1995

Developments in Constitutional Law: The 1993-94 Term

Joel Bakan
Allard School of Law at the University of British Columbia, bakan@allard.ubc.ca

Bruce Ryder

David Schneiderman

Margot Young
Allard School of Law at the University of British Columbia, myoung@allard.ubc.ca

Citation Details

Joel Bakan, Bruce Ryder, David Schneiderman & Margot Young, "Developments in Constitutional Law: The 1993-94 Term" (1995) 6 Sup Ct L Rev (2d) 67.

DEVELOPMENTS IN CONSTITUTIONAL LAW: THE 1993-94 TERM

Joel Bakan, Bruce Ryder, David Schneiderman and Margot Young*

[The principles of fundamental justice are those] upon which there is some consensus that they are vital or fundamental to our societal notion of justice....

. . . . .

[They] cannot be created for the occasion to reflect the court's dislike or distaste of a particular statute.... [R]eference must be made to principles which are "fundamental" in the sense that they would have general acceptance among reasonable people.

Sopinka J.[1]

The best solution [to interpretive problems under the Charter] lies in seeking the dominant views being expressed in society at large on the question in issue.

McLachlin J.[2]

I. INTRODUCTION

The legitimacy of constitutional judicial review has been of constant concern to the Supreme Court of Canada and those who analyze its work. Judges are neither democratically accountable nor representative. Yet they possess the authority to deny force and effect to the laws, policies and actions of elected officials; and the only explicit constraints on their decisions are the often indeterminate and vague provisions of the constitutional text. Sometimes judges of the Court openly express anxiety about this, noting, for example, that they must not question the wisdom of legislation in reaching their decisions, while at other times they seek implicitly to

---

* Joel Bakan is Associate Professor, Faculty of Law, University of British Columbia. Bruce Ryder is Associate Professor, Osgoode Hall Law School, York University. David Schneiderman is Executive Director, Centre for Constitutional Studies, University of Alberta. Margot Young is Assistant Professor, Faculty of Law, University of Victoria. Many thanks to Annie Bunting, Marlee Kline, Hester Lessard and Pratima Rao for their helpful comments and support, and to Patrick Macklem for his contribution to the organizing ideas.

[1] *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at 590 and 607.

[2] McLachlin, "The *Charter*: A New Role for the Judiciary" (1991), 29 Alta. L. Rev. 540 at 546-47.

assuage concerns about legitimacy by creating interpretive formulae — like the *Oakes*[3] test, double aspect doctrine, or purposive reasoning — that appear to constrain their discretion. A theme underlying all of their efforts, however, is a desire not to step outside the boundaries of what they perceive to be the "social consensus" or "dominant views" in Canadian society. That is the point of the above passages from Sopinka and McLachlin JJ. The Court as a whole "labors under the obligation to succeed", to borrow a phrase from Alexander Bickel,[4] and that means not moving too far ahead, or lagging too far behind, what it perceives to be the social consensus. One of the difficulties with such an approach is that there likely exists no social consensus on most controversial issues, only different interpretations of what it might be.[5]

The following analyses will draw out of this Term's cases four different, and often conflicting, themes that inform the Court's constitutional decisionmaking. Each theme expresses a conception of the Canadian state, and taken together they represent, arguably, the current range of dominant views regarding the appropriate role of the state in Canada. Explicit and implicit reliance upon these conceptions of the state can be understood as reflecting the Court's concern to stay in step with its perception of contemporary social consensus on the large political issue lurking behind every constitutional question it addresses: How should the state exercise its power and what sorts of constraints ought the Constitution impose upon such state power?[6] The fact that four different and potentially conflicting themes are developed in answer to this question suggests that the members of the Court have not been able to identify what the social consensus is; or, far more likely, a social consensus does not exist on the desirable scope and content of state power, only competing ideals. In mapping out reflections of the four themes in this Term's decisions, we hope to illustrate that constitutional adjudication is an inevitably political process, one shot through with controversial presumptions about the state and contradictory approaches to what results those presumptions require in particular cases. The

[3] *R. v. Oakes*, [1986] 1 S.C.R. 103.

[4] *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd ed. 1986), at 239.

[5] "There is no consensus to be discovered," according to John Hart Ely, "and to the extent that one may seem to exist, that is likely to reflect only the domination of some groups by others." See *Democracy and Distrust: A Theory of Judicial Review* (1980), at 63.

[6] A similar kind of analysis can be found in Macklem, "Constitutional Ideologies" (1988), 20 Ottawa L. Rev. 117.

four themes we will look at are classical liberalism, federalism, social democracy and neo-liberalism. Before turning to the cases, a quick synopsis of each of these themes may be useful.

The classical liberal state is constructed as fundamentally antagonistic to individual interests. As representative of the all-powerful collectivity, the state always operates in potentially hostile opposition to individual interests. This coercive capacity of the state must be kept in check — one checking mechanism being judicial review. Moreover, since the state rather than private power is conceived as the major threat to individual liberty, state powers of economic regulation should be limited to establishing the preconditions of a competitive marketplace. State interference in the outcome of private market ordering is presumptively illegitimate. The antagonism between individual and state, representative of classical liberalism, is reinforced by other structural oppositions, such as those between freedom and restraint, and the public and private spheres.

The federal conception of the state assumes a tension between the national and the sub-national; between local communities of loyalty organized along provincial lines and a national community premised upon the notion of a single citizenship and a single national market. Here the state's jurisdiction is divided between two levels of government, although power is considered to be complete: as between these levels, there is nothing beyond jurisdictional competence. Under the federal conception of the state, judicial review is usually considered to be essentially neutral as to the proper role of the state within the constraints of the federal form. The purpose of judicial review is to maintain a balance of provincial and federal powers when allocating particular legislative functions to either, or both, levels of the state.

The social democratic conception concedes that the state has a proper role to play, both as facilitator of, and as corrective to, the private marketplace. The social democratic approach comprehends that the state is implicated extensively in the operation of the private sphere so revered by the classical liberal conception. The role of the social democratic state is to intervene self-consciously on behalf of "vulnerable groups" and to redress the inequalities of power that predominate in society.

The neo-liberal conception of the state may be considered the more recent of the conceptions of the state. In the neo-liberal frame, the state (particularly its social-democratic variant) is considered obsolete. Due to the organization of production across state borders, the state is no longer relevant to the economic life of its citizenry. To be sure, there are still some functions the state is needed to fulfill —

crime control and national defence, to name only a couple — but, for the most part, the state is best removed from economic life in the name of productivity and global competitiveness.

II. The Classical Liberal State

The first of the conceptions of the state one can draw out of the constitutional cases of the 1993-94 Supreme Court Term is perhaps the most obvious one. Given the ideological heritage of rights protection, its roots in a Lockean preoccupation with the unbridled exercise of state power and the alleged danger such central authority poses for individual freedom and autonomy, one would expect a classical liberal picture of the state to figure in any discussion of rights within liberal democracies.[7] Equally, the picture of state authority implicit in such a perspective — one that relies on notions of formal equality, the respect for consent as justification for coercion, and the enshrinement of a sphere of private or local autonomy — is a strong part of the political history of Canadian federalism and is thus an expected undercurrent in most discussions of federal and provincial jurisdiction. In both areas one finds judges implicitly relying on an image of the state whose actions are best understood as negative and repressive of individual freedom and whose entry into classically private spheres — the economy, the family — is either illegitimate or must be justified. Such a conception of state power flows from the assumption of a relationship of antagonism but necessary connection between individual freedom and collective power.[8] State power, representative as it is of collective power, necessarily involves coercive restructuring of at least some expressions of individual choice. Cast in opposition are individual freedom and state authority, the former to be revered and the latter tolerated but limited.

1. The Public/Private Distinction

Various methods for mediating and understanding the tension between the individual and the state exist within classical liberal theory. One old standard, long the flogging horse of the left, is the assertion of a distinction between private and public spheres of life.

[7] Waldron, "Natural Rights in the Seventeenth and Eighteenth Centuries" in Waldron (ed.), *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (1991).

[8] Schwartz, "Individuals, Groups and Canadian Statecraft" in Devlin (ed.), *Canadian Perspectives on Legal Theory* (1991), at 39.

As Hester Lessard writes, the public sphere consists of the formal apparatus of the state, cloaked in its full regulatory and punitive power. The private sphere is the realm of the family, the market, the personal, and the customary. It is "the sphere of activity that facilitates individual and social well-being."[9] Social ordering as it appears in the private sphere is the product of the free pursuit of individual interests, the mix of individual talents and choices. The state figures in the evolution of such relations only narrowly as mediator of disputes.[10] To the extent that the state does more than this, it loses authority. Thus, the public and private spheres are distinguished in terms of the legitimacy or illegitimacy of particular types of state intervention in each.[11] The public sphere marks out those areas of collective and individual life in which state ordering is legitimate, while the private sphere identifies a realm of protected individual action too intimate and essential to individual personality to permit state or collective structuring. In only such a manner, it is argued, is the moral primacy of individual freedom respected, the pursuit of important individual preference preserved, and the necessity of some collective ordering acknowledged and legitimated.

Imagery of public and private spheres of human activity is involved most obviously in decisions involving the issue of the application of the Charter.[12] Judicial review on constitutional grounds stands in complicated relationship to liberalism's emphasis on individual freedom. Judicial assertion of rights as a means of preventing state interference with individual choice is, from a classical liberal perspective, a positive event. However, when relied upon to re-order the private sphere, rights, as statements of public norms and values, threaten the very individual freedom mandating their constitutional protection in the first place, no less than government intrusion into the same sphere. Thus, the theoretical baggage of rights necessitates some sort of public/private divide ensuring that "there is a private realm in which people are not obliged to subscribe to 'state' virtues and into which constitutional norms ought not to intrude."[13] So, it is no surprise that the Charter, from its earliest days on, has been held to constitute a check on

[9] Lessard, "The Construction of Health Care and the Ideology of the Private in Canadian Constitutional Law" (1993), 2 Annals of Health L. 121 at 132.

[10] *Id.*, at 132.

[11] Mahoney, "The Limits of Liberalism" in Devlin (ed.), *supra*, note 7, at 61.

[12] *Canadian Charter of Rights and Freedoms* (*Constitution Act, 1982*, Pt. I).

[13] Hogg, "The Dolphin Delivery Case: The Application of the Canadian Charter of Rights and Freedoms" (1987), 51 Sask. L. Rev. 273 at 274.

state action alone. A broader reach for the Charter would have meant re-thinking fundamental liberal conceptions of social and political ordering.[14]

What initial confinement of the scope of Charter review did not mean, however, was that subsequent application issues were rendered simple. The incoherence of any imagined line between state and non-state activity in a modern administrative society has ensured that the Court has been unable to provide clear, predictive guidance as to what sorts of activities lie within the purview of the Charter.[15] Most notable among the Court's founderings on this issue is its early assertion in *Retail, Wholesale & Department Store Union, Local 580 v. Dolphin Delivery Ltd.*[16] that the Charter does not apply to the judiciary, *per se*. It is not surprising, on reflection, that this is where the Court drew the line. Courts are, after all, one obvious spot where private disputes meet state power and thus dwell along the boundary between public and private. The concern that judicial involvement alone not trigger Charter review is juxtaposed to the potential threat to fundamental individual freedoms judicial power might represent.

The developing saga of the judiciary and the Charter arose in an unexpected way this Term in the case of *Young v. Young*.[17] We say unexpected because the conundrum after *Dolphin Delivery* appeared to be the Charter's relevance to judicial reliance on common law, not on legislation. In this case, challenge was made to the *Divorce Act*'s requirement that judicial custody and access orders be made "in the best interests of the child",[18] a test adopted from traditional common law rules on custody and access issues. The claim was that this requirement infringed sections 2(*a*), 2(*b*), 2(*d*), and 15 of the Charter. The dispute, occasioned by the breakdown of a couple's marriage, focused on an initial order at trial granting access to the children by the non-custodial parent on the conditions that he not discuss the Jehovah's Witness religion with the children, take the children to religious services or meetings, nor expose the children to religious discussion without the custodial parent's permission. The order was

[14] See Hutchinson and Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter" (1988), 38 U.T. L.J. 278.

[15] For a lengthier discussion of this point, see Bakan, "Constitutional Interpretation and Social Change: You Can't Always Get What You Want (Nor What You Need)" (1991), 70 Can. Bar Rev. 307.

[16] [1986] 2 S.C.R. 573.

[17] [1993] 4 S.C.R. 3.

[18] R.S.C. 1985, c. 3 (2nd Supp.), ss. 16(8), 17(5). Also at issue were the trial judge's orders for distribution of property, payment of support and expenses, and for costs. The orders were varied by the Supreme Court.

modified upon first appeal, with limitations on religious discussion and attendance set aside. In its turn, the Supreme Court allowed the appeal in part. Aside from the question of applicability, the best interests test was found not to violate the Charter. However, the Court of Appeal's rejection of the trial judge's order imposing conditions on the non-custodial parent's access was upheld. The Supreme Court held that imposition of these conditions was not supported by proper application of the best interests of the child test.

Young presented a tough case for the Court. It brought together a number of tricky elements for the classical liberal perspective underlying the Court's stance on application issues: a familial and therefore prototypically private dispute, state codification of a traditional and discretionary common law test, and the judicial application of this test in ways that at least *prima facie* raised issues of protected individual freedoms. Together, these factors signalled difficulty for a court reluctant to grant wide applicability to the Charter but desirous of constructing a vigorous network of constitutional protection. Holding the judicial order in *Young* subject to the Charter would mean injecting a set of external values in that most sacred of private areas: the parent-child relationship. But to find the Charter inapplicable would be to distance oddly the resolution of the dispute by the court from the mandatory statutory (state) framework. Thus, *Young* forces the Court to confront directly the soundness of the distinctions it drew in *Dolphin Delivery* as they apply to the modern administrative state, a state deeply implicated in the most intimate and private aspects of its citizens' lives. In *Young*, this involvement, more invisible in other contexts, is conspicuous, crystallized as it is in the legislative provisions.

Of those who wrote opinions, L'Heureux-Dubé J. alone took up the challenge of dealing with the application issue. She did so in a way that bodes badly for the future coherence of application doctrine, but that is perhaps more acceptable when viewed from the substantive perspective of family law principles. We will come to this last contention later, dealing first with the judgment's implications for Charter application issues. Justice L'Heureux-Dubé split the constitutional issue into two questions: first, the constitutional status of the statutory test and, second, the constitutionality of the judicial order under such a test. This is a puzzling distinction, at least until one realizes that such a split enabled respect for *Dolphin Delivery*'s spirit of restrained Charter review in the "private" realm while also dealing with the obvious legislative context underlying the dispute. Unfortunately, this juggling act is achieved at the high price of inserting into

the doctrine the specious distinction between a legislative test and the judicial order based on that test, something clearly out of line with early jurisprudence.[19]

The first of L'Heureux-Dubé J.'s questions — the legislative test — raises no difficult application issue; legislative action clearly falls within section 32 of the Charter.[20] It is the second part of the constitutional challenge — the character of the judicial order under this legislative test — that raises the thornier application issue. Justice L'Heureux-Dubé began her discussion by purposively characterizing religious and expressive rights as "public". What are we to understand L'Heureux-Dubé J. to mean by this? Justice L'Heureux-Dubé provides some direct insight into her characterization of these rights as "public" when she writes that such rights guard against state coercion of the individual; they speak only to the relationship between the individual and state. They are therefore inappropriately applied in custody and access disputes, since those disputes involve relationships between family members and values other than those of individualism and autonomy. According to L'Heureux-Dubé J., these rights do not enable an individual to "claim the protection of the state either to say or refrain from saying something to a spouse or child",[21] for custody and access matters are of a different character than those matters that lie between the individual and the state and that rights mediate. This is a difference that remains unaltered despite the *Divorce Act*'s involvement: "[t]he mere fact that the state plays a role in custody and access decisions in formalizing the circumstances of parent-child interaction does not transform the essentially private character of such interchanges into activity which should be subject to Charter scrutiny."[22] Thus, the involvement of the *Divorce Act* clearly did not, for L'Heureux-Dubé J., change the dispute into a public one, despite the parties' reliance on a statutory provision. It becomes apparent that what

[19] See the discussion of *Blainey* (approved in *Dolphin*) in text at note 24, *infra*. See also *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (exercise of discretion pursuant to statutory powers must comply with the Charter).

[20] Justice L'Heureux-Dubé quickly dismissed challenges to the best interests legislative standard itself. As to the content of the test, she stated that it was "self-evident that the best interests test is value neutral, and cannot be seen on its face to violate any right protected by the *Charter*" (*supra*, note 17, at 71). She also found that the test was not unduly vague nor did it grant overly broad discretion to the judiciary (*id.*, at 72). This resolution of these issues was mirrored by the Court's response in *P.(D.) v. S.(C.)*, [1993] 4 S.C.R. 141, to a similar challenge to the child's best interests test of art. 30 of the *Civil Code of Lower Canada*, [ad. 1980, c. 39, s. 3].

[21] *Supra*, note 17, at 89-90. This, of course, adds the further dimension that such rights are negative, not positive (although the relevance of this observation remains unclear given that the protest is against state restriction of religious speech).

[22] *Id.*, at 90.

L'Heureux-Dubé J. means by "public" rights here are precisely those rights that conform with classical liberal rights: rights that adhere to the individual and that preserve individual freedom in the private sphere. And family disputes — at least those involving the custody of and access to children — are not appropriately structured by such private individual freedoms. So, L'Heureux-Dubé J. concluded, the constitutional concerns such rights might raise are to be dealt with only in relation to the legislative test and not to the judicial custody and access order made pursuant to it. The judicial order is rendered immune from review on Charter grounds, in line, L'Heureux-Dubé J. asserted, with the *ratio* of *Dolphin Delivery*.[23]

What is interesting about this discussion is that L'Heureux-Dubé J. employs one sense of the distinction between public and private to justify the further doctrinal entrenchment of another, different use of the public/private split. The first set opposes the family as a private sphere structured by its own norms (one suspects such things as altruism and communal values) to the public sphere, a realm of individualism, competition, and selfishness (values arguably linked with the assertion of classical rights). This first public/private split accounts for why freedom of religion and expression become "public" rights, even though such freedoms, belonging as they do to individuals and guaranteeing as they do private liberty, are more coherently seen as "private" rights from the other sense of public and private where the divide lies between the individual and the state. It is this slippage between the two different senses of the public/private that enables L'Heureux-Dubé J. to keep the Charter at bay.

From the perspective of doctrinal clarity, this decision is unfortunate. As already mentioned, one is struck by the arbitrary nature of distinguishing for constitutional review purposes a legislative test and the judicial order relying on such a test. Equally puzzling is the conclusion that legislative involvement in custody and access decisions does not introduce an element of public regulation. Despite L'Heureux-Dubé J.'s obvious relief that she has been able to preserve *Dolphin Delivery*'s *ratio* as it pertains to constitutional review of the judiciary, her decision runs counter to important aspects of that decision. One might reasonably have assumed that the situation in *Young* closely mimicked the circumstances in *Blainey v. Ontario Hockey Association*,[24] a case cited with approval by the Court in *Dol-*

[23] In a very similar case, released the same day, *P.(D.) v. S.(C.)*, *supra*, note 20, at 181, L'Heureux-Dubé J. reached the same conclusion: "The *Charter*...will not apply here to the order of a court in a family matter."

[24] (1986), 54 O.R. (2d) 513, 26 D.L.R. (4th) 728 (C.A.); leave to appeal to S.C.C. refused (1986), 58 O.R. (2d) 274*n*.

phin Delivery for its application of the Charter to a dispute between two private parties. In *Blainey*, the fact that one of the parties relied upon a legislative provision was sufficient to provide the required element of government intervention, thus removing the case from the private sphere despite the fact that the legislation in question merely encoded a pre-existing common law tolerance for certain forms of discrimination. But this was clearly not how L'Heureux-Dubé J. dealt with similar legislative involvement in *Young*. Instead, because L'Heureux-Dubé J. was able to find that there exists apart from the statutory provisions an inherent judicial jurisdiction to resolve custody and access disputes in favour of the best interests of the child, the judicial order in *Young* was rendered immune from Charter review.

However, from a broader political perspective, L'Heureux-Dubé J.'s decision in *Young* takes on both a more coherent and, arguably, a more favourable aspect. A return to the discussion of the classical liberal image of the state with which we began this section lends the coherence. The insulation of parent-child interaction from Charter review and the underlying refusal to see disputes in this area as anything but private resonate soundly with liberal insistence that family life lies at the core of the private. The reluctance to admit that the state is meaningfully present, even here, reinforces that rigid picture of the state as registering only a coercive presence and not, alternatively, positively and intimately involved in most, if not all, aspects of individual life. Certainly, L'Heureux-Dubé J.'s judgment is not simplistic in its invocation of these themes, but such reminders of the classical liberalism which fuels the concern that there be a line drawn between public and private actions seem rather apposite here. It is also worth noting that rulings L'Heureux-Dubé J. classifies as exceptions to the rule in *Dolphin Delivery — BCGEU, Slaight*[25] — in fact fit in nicely with the notion that it is underlying ideological perspectives on what is public and private that determine the reach of the Charter.

A more favourable view of L'Heureux-Dubé J.'s insulation of this area of family law from Charter review proceeds from a perspective on Charter litigation generally suspicious of attempts to open up family relations to the norms and values encoded within Charter rights. Despite classical liberalism's insistence upon the neutrality of rights protections — that rights, by constraining the state, facilitate

[25] *British Columbia Government Employees' Union v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214; and *Slaight Communications Inc. v. Davidson*, *supra*, note 19.

equally all individual life plans — one has only to recall the danger that imposition of these same rights in the private sphere can represent for individual autonomy to appreciate that such rights are neither neutral nor apolitical. One sees clearly, from this reversed perspective, that rights are "claims about the appropriate allocation of state powers and social resources":[26] that they always already embody a particular substantive vision of justice. In effect, what L'Heureux-Dubé J. is saying is that this vision of justice ill fits the area of family law under review: a point, it bears stating, that numerous feminist family law commentators have already made.[27] So, L'Heureux-Dubé J. does use the rhetoric of classical liberalism, of the private sphere necessitated by the repressive state of the classical liberal, but one suspects that what she is in fact achieving by way of this rhetorical deployment is an insulation of important aspects of communal life from the very individualism which justifies that rhetoric in the first place.

2. The Minimalist State

The Court's federalism jurisprudence also reflects a classical liberal concern with state regulation of certain areas of social life. In the classical liberal vision, for example, the state assumes a minimalist role in economic regulation, limited to establishing the preconditions of a market economy and then interfering as little as possible with the market's presumptively fair outcomes. This vision tends to be enhanced by constitutional doctrines, such as the interjurisdictional immunity doctrine, that limit state powers of regulation to the exclusive jurisdiction of one level of government. Conversely, doctrines that promote *de facto* concurrency of legislative power, like the double aspect doctrine, expand the opportunities for state intervention and are, for this reason, inimical to the classical liberal vision. The position the Court takes between exclusivity and concurrency is thus a good indication of its attitude to state regulation in a particular context.[28]

Largely, although not exclusively, the Court's federalism decisions

[26] Hutchinson and Petter, *supra*, note 14, at 289.

[27] See, for example, Boyd, "Women, Men and Relationships With Children: Is Equality Possible?" in Busby, Fainstein, and Penner (eds.), *Equality Issues in Family Law: Considerations for Test Case Litigation* (1990); and Smart, *Feminism and the Power of Law* (1989).

[28] See Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991), 36 McGill L.J. 308.

in the 1993-94 Term evoke this classical liberal vision of the state. In only two cases (concerning provincial taxation powers)[29] was the Court willing to promote a limited measure of concurrency. Otherwise, the Court insisted upon a clear separation of federal and provincial powers. The *Ontario Hydro*[30] case, for example, continues a long Supreme Court tradition of ensuring that the regulation of the relationship between any group of workers and an employer is competent to only one level of government. Similarly, the *Morgentaler*[31] and *Colarusso*[32] cases rely on federal criminal law jurisdiction to limit the use of the coercive power of the state for punitive purposes to one level of government.

As mentioned, in *Allard* and *Reference re QST* the Court did countenance a measure of concurrent provincial power in relation to indirect taxation. Given the fiscal problems currently faced by all levels of government, it is perhaps predictable that the Court was unwilling to construe narrowly provincial powers to raise revenue. One implication of federal cost cutting (and the fact that the Court has given its seal of approval to unilateral reductions in federal spending in areas of provincial jurisdiction)[33] is that the provinces will be increasingly dependent on their own sources of revenue in the years ahead. Narrow interpretations of provincial taxation powers would open the Court to the charge that it is contributing to a situation that places the provinces in a fiscal straitjacket.

More typical of this Term was the Court's approach to the regulation of labour relations, an approach that closes the door completely on any possibility of concurrent federal and provincial powers in relation to the same employees. In *Ontario Hydro*, the Court was asked to review the refusal of the Ontario Labour Relations Board to certify a proposed union of employees at Ontario Hydro on the grounds that

[29] *Reference re Quebec Sales Tax*, [1994] 2 S.C.R. 715 (transformation of Quebec Sales Tax to a value-added tax to harmonize it with the federal goods and services tax upheld; general tendency of tax would be direct, and indirect elements created by small supplier exemption found to be incidental to the efficient administration of the tax); and *Allard Contractors Ltd. v. Coquitlam (District)*, [1993] 4 S.C.R. 371 (municipal by-laws imposing volumetric fees as part of a licensing scheme dealing with removal of gravel upheld; s. 92(9) of the *Constitution Act, 1867* empowers provinces to impose an element of indirect taxation through a licensing scheme provided revenue is used to defray the costs of the regulatory scheme).

[30] *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327.

[31] *R. v. Morgentaler*, [1993] 3 S.C.R. 463.

[32] *R. v. Colarusso*, [1994] 1 S.C.R. 20.

[33] *Reference re Canada Assistance Plan (British Columbia)*, [1991] 2 S.C.R. 525; *British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] 2 S.C.R. 41, discussed *infra*, note 56 *et seq.* and accompanying text.

some of the employees worked at nuclear generating facilities that fell within federal legislative jurisdiction. Following the traditional "either/or" approach of its labour relations jurisprudence, the Court framed the issue as whether the Ontario *Labour Relations Act*[34] or the *Canada Labour Code*[35] applied to the labour relations of the disputed employees.

The possibility that both pieces of legislation could be applicable, allowing workers to choose to seek certification under whichever statute appeared to them to be the most favourable, was not raised. This was so notwithstanding the presence of strong claims to jurisdiction by both the federal and provincial governments. The province, for instance, had a strong textual basis to support its claim to jurisdiction: section 92A(1)(c) of the *Constitution Act, 1867*[36] confers on the provinces exclusive jurisdiction to pass laws in relation to the "management of sites and facilities in the province for the generation and production of electrical energy."

The majority judgments of La Forest J. (Gonthier and L'Heureux-Dubé JJ. concurring) and Lamer C.J. found that jurisdiction in relation to labour relations is "integral" to Parliament's declaratory power in section 92(10)(c) and the national dimensions branch of the peace, order, and good government power.[37] As a result, the *Canada Labour Code* could apply to Ontario Hydro's employees at nuclear generating facilities. Moreover, it followed, in the majority's view, that the Ontario *Labour Relations Act* could not apply to the same employees since, in La Forest J.'s words, "[l]aws of general application in the province...cannot touch an integral part of Parliament's jurisdiction over the work."[38] The majority thus invoked the interjurisdictional immunity doctrine to "read down" the provincial statute.

The interjurisdictional immunity doctrine has a deregulatory thrust, one that has been embraced warmly by the Supreme Court in recent years. The effect of the doctrine is to remove the possibility of any concurrent provincial jurisdiction in relation to matters that are found to be "integral" to federal jurisdiction. From its modest roots in the "federal companies cases", the doctrine has expanded to prevent otherwise valid provincial laws from touching

[34] R.S.O. 1990, c. L.2.

[35] R.S.C. 1985, c. L-2.

[36] Enacted as the *British North America Act, 1867* (U.K.), c. 3 [see R.S.C. 1985, App. II, No. 5].

[37] *Supra*, note 30, at 351, *per* Lamer C.J., and 367, 380, *per* La Forest J.

[38] *Id.*, at 363.

matters that are determined to be integral to a wide array of federal powers.[39] The imperialistic spread of the interjurisdictional immunity doctrine has had its greatest impact in restricting the scope for state intervention in the employment relationship. Labour relations, apparently, is always "integral" to federal jurisdiction over a work or undertaking and thus provincial labour laws are always ousted by invoking the doctrine.

The dissenting judgment of Iacobucci J. (Sopinka and Cory JJ. concurring) departed from the view that labour relations is necessarily integral to federal jurisdiction over an undertaking. His judgment, however, still is consistent with the Court's tradition of viewing labour relations jurisdiction as an "either/or" proposition. In Iacobucci J.'s view, jurisdiction over the labour relations of employees at nuclear electrical generating facilities is "integral" to provincial jurisdiction over the management of those facilities pursuant to section 92A(1)(c), but is not "integral" to federal jurisdiction pursuant to its declaratory or pogg powers. It followed, therefore, that "it is the Ontario *Labour Relations Act* which constitutionally applies" to those employees.[40] Neither the dissenters nor the majority judges were willing to contemplate the obvious possibility that the regulation of the labour relations of employees at nuclear generating stations is equally important to *both* federal and provincial powers and thus ought to be a "double aspect" matter subject to concurrent jurisdiction. In this way, the *Ontario Hydro* decision continues a long Supreme Court tradition of limiting the opportunities for the state to engage in regulation of the employment relationship.

The Court's decision in *R. v. Morgentaler*[41] endorsed a related aspect of the classical liberal conception of the state, namely the view that the state is a potentially powerful antagonist of the individual. In *Morgentaler*, as in the recent *Starr v. Houlden*[42] decision, the Court used the federal criminal law power to restrict interference

[39] See Beetz J.'s review of the cases and strong defence of the doctrine in *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749 (health and safety laws inapplicable to federal undertaking). See also *Commission de transport de la Communauté urbaine de Québec v. Canada (National Battlefields Commission)*, [1990] 2 S.C.R. 838 (provincial licensing law inapplicable to bus service in federal park); *Shulman v. McCallum* (1993), 79 B.C.L.R. (2d) 393 (C.A.); leave to appeal to S.C.C. refused, B.S.C.C., May 20, 1994, at 853 (provincial tort law inapplicable to maritime accidents).

[40] *Supra*, note 30, at 421-22, 428.

[41] *Supra*, note 31.

[42] [1990] 1 S.C.R. 1366.

with a sphere of individual autonomy or privacy by the provincial arm of the state.[43] At issue in *Morgentaler* was the constitutional validity of the Nova Scotia *Medical Services Act*[44] and accompanying regulations.[45] The Act prohibited the performance of a "designated medical service" outside of an approved hospital. Penalties ranged from $10,000 to $50,000 for each offence. The regulations passed pursuant to the Act designated nine medical procedures subject to the prohibition, one of which was abortion. The stated purpose of the Act was "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."

In passing the Act, it was clear that the Nova Scotia legislature was responding to two events: first, the Supreme Court's 1988 decision in *R. v. Morgentaler*[46] striking down the therapeutic abortion provision of the *Criminal Code*[47] as a violation of women's Charter rights; and, second, to Dr. Morgentaler's stated intention to take advantage of the absence of a criminal prohibition on abortion by opening a clinic in Halifax. The governments of Nova Scotia and several other provinces sought to implement policies that would maintain the restricted access to abortion services that had been produced by the defunct *Criminal Code* provision.[48]

Dr. Morgentaler successfully argued that the Act and its regulations were *ultra vires* the Nova Scotia legislature as an invasion of the federal criminal law power. The judgment of Sopinka J. for a unanimous Court is a clearly written, textbook example of how to determine the pith and substance of a statute for the purposes of the division of powers. The decision is notable in conducting a broad inquiry that goes far beyond the "four corners of the legislation"[49] to examine extrinsic evidence, legal context, and legislative history (including Hansard) in determining the purpose and effect of the challenged law. By reference to this range of evidence, Sopinka J., like the lower courts, was able to make a convincing case that the

[43] See also *R. v. Colarusso*, *supra*, note 32, at 71-73 (La Forest J.'s majority judgment suggests that, in a future case, sections of Ontario's *Coroners Act* may be found to be invalid as an invasion of the federal criminal law power since they allow the police to rely on evidence obtained through a coroner's investigation).

[44] R.S.N.S. 1989, c. 281.

[45] *Medical Services Designation Regulation*, N.S. Reg. 152/89.

[46] [1988] 1 S.C.R. 30.

[47] R.S.C. 1970, c. C-34, s. 251, as it then was. Now R.S.C. 1985, c. C-46, s. 287.

[48] See Gavigan, "Morgentaler and Beyond: Abortion, Reproduction, and the Courts" in Brodie, Gavigan, and Jenson, *The Politics of Abortion* (1992), at 140-45 for a review of these developments.

[49] *R. v. Morgentaler*, [1993] 3 S.C.R. 463 at 483.

true purpose of this legislation was "the prohibition of abortions outside hospitals as socially undesirable conduct subject to punishment."[50] The Act therefore was *ultra vires* because "the prohibition of abortion with penal consequences has long been considered a subject for the criminal law"[51] and the provinces cannot prohibit "traditionally criminal conduct".[52]

This case has thus confirmed the "interesting paradox", noted by Shelley Gavigan several years ago, that "the criminal denotation of abortion [has] inhibited some forms of provincial restrictions".[53] Ironically, historical stigma is invoked to serve contemporary access to abortion. Nevertheless, the zone of autonomy opened up by the liberal structure of constitutional doctrine in this case is fragile and limited. If the lack of consensus among federal politicians on whether to pass a new federal criminal law turns out to be temporary, the criminal construction of abortion could return in the future to restrict women's moral agency and reproductive autonomy.

Moreover, the affirmation of the criminal cast of abortion regulation does not call into question all provincial regulation of abortion services. It does mean that provincial laws that have both a criminal law form (prohibition coupled with a penalty) and a traditional criminal law purpose (punishing the provision of abortions on moral grounds) will be *ultra vires* the provinces. Otherwise, in Sopinka J.'s words, provincial regulation of abortion may be valid if it is "solidly anchored in one of the provincial heads of power which give the provinces jurisdiction to legislate in relation to such matters as health, hospitals, the practice of medicine and health care policy."[54]

Provinces may continue to be tempted to pursue a variety of administrative and regulatory strategies that lack a punitive, criminal law form, yet may be equally effective in restricting access to abortion. Thus, for example, the 1993 *Morgentaler* decision, like its 1988 predecessor, is not likely to prevent the provinces from refusing to fund abortions. Charter and federalism jurisprudence have worked together to create a perhaps temporary realm of private autonomy free from punitive state intervention, but they do not appear capable of placing positive obligations on the state to ensure access to fully-funded abortion services.[55]

[50] *Id.*, at 513-14.
[51] *Id.*, at 491.
[52] *Id.*, at 495.
[53] *Supra*, note 48, at 141.
[54] *Supra*, note 49, at 493-94.
[55] For a thoughtful discussion of this point, see Brodie, "Health Versus Rights: Comparative Perspectives on Abortion Policy in Canada and the United States" in Sen and Snow (eds.), *Power and Decision: The Social Control of Reproduction* (1994).

3. The State as Economic Actor

From a constitutional point of view, if the state is implicated in economic life, then economic life *ipso facto* is subject to constitutional overview. This is a conclusion resisted most strenuously by courts in the era of the Charter. Rather than collapse the classical illusion of a separate, private economic sphere, courts have preferred to recast state economic activity so as to free it from constitutional relevance. The next two cases we discuss can be understood as examples of this judicial desire, not to erase the state from economic activities, but to subsume those activities into non-constitutional spheres. In *British Columbia (Attorney General) v. Canada (Attorney General)*,[56] the Court relocates a commitment to maintain the Vancouver Island Railway from the private to the non-constitutional public, while, in *R. v. Howard*,[57] the Court equates treaty negotiations with aboriginal peoples as equivalent to contractual arrangements in the private sphere. The latter equation has the effect of relieving the state of its constitutional obligations toward the First Nations articulated in the Court's earlier jurisprudence.

The Court was asked in *Vancouver Island Railway* to characterize the federal state's promise to construct and maintain an intercolonial railway, a promise made expressly in Term 11 of the *Terms of Union*[58] upon which British Columbia entered the Canadian federation. The particular issue raised by the case was whether the Government of Canada had a continuing obligation to maintain a railway on the southeastern coast of Vancouver Island. The sole reference to a continuing obligation to operate the railway could be found in the 1883 settlement that put into place the specific mechanics of the railway construction.[59] The British Columbia Court of Appeal, and the Supreme Court below, concluded unanimously that such a continuing

[56] [1994] 2 S.C.R. 41 ("*Vancouver Island Railway*").
[57] [1994] 2 S.C.R. 299.
[58] *British Columbia Terms of Union*, enacted as *Order of Her Majesty in Council admitting British Columbia into the Union* [see R.S.C. 1985, App. II, No. 10]. Term 11 provided that the Dominion would "undertake to secure the commencement...of the construction of a railway...to connect the seaboard of British Columbia with the railway system of Canada" within two years of the date of union.
[59] In consideration of the payment of $750,000 together with almost two million acres of land in southwestern Vancouver Island, and the further payment of $250,000 to complete the construction of a dry dock at Esquimault, the Dunsmuir Syndicate agreed to "construct, equip, maintain and work continuously" the railway line and to "continuously and in good faith operate the same." See *An Act respecting the Vancouver Island Railway, the Esquimault Graving Dock, and certain Railway Lands of the Province of British Columbia, granted to the Dominion*, S.C. 1884, c. 6, s. 3, Sch., clauses 3 and 9, quoted in the Court's decision, *supra*, note 56, at 61.

obligation had been incorporated into the *Terms of Union* in 1871. The Court disagreed, justifying its decision on a close and narrow reading of the constitutional text. Justice Iacobucci, writing for a unanimous Court, focused on the term "Constitution of Canada" in section 52(2) of the *Constitution Act, 1982*. According to Iacobucci J., the *British Columbia Terms of Union* were incorporated into the Constitution by being included in the schedule to the *Constitution Act, 1982*, placing the "constitutional status of Term 11 beyond doubt."[60] The same could not be said of the subsequent arrangements in 1883 that accelerated construction of the railway. Those arrangements were not itemized in the schedule and were not, therefore, elevated to the status of "Constitution". Thus, there existed only a constitutional "obligation of construction...not an obligation of operation."[61]

Of greater interest, for our purposes, is the way the Court characterized the 1883 settlement. While resembling a move away from classical liberal discourse, the Court resisted the implication of its portrayal of the settlement as an exercise in nation-building. Instead, it settled for a depiction of the state disconnected from its constitutional setting, looking more like the myopic image of state economic activity consistent with classical liberalism. Having rejected the B.C. Supreme Court's characterization of the settlement as imposing upon the federal government an obligation to operate the railway, the only other judicial characterization available was that of the Judicial Committee of the Privy Council in the *Precious Metals* case.[62] That case raised the question of who had title to gold lying beneath the railway line belt. Lord Watson held in favour of the province, and in so doing characterized Term 11 as "merely embod[ying] the terms of a commercial transaction".[63] Here the state is likened to a purely economic actor in the private sphere of commerce — the same classical liberal construction we see in operation in the *Howard* case, which we discuss below.

The Court, in finding that the 1883 agreements did not form part

[60] *Supra*, note 56, at 82.

[61] *Id.*, at 90. This textual approach poses the interesting question of what exactly is included within the scope of the term "Constitution of Canada". Justice Iacobucci left this issue open, although he did quote an argument by Peter Hogg suggesting that the phrase may not include a number of important pre-1867 Acts, such as the *Royal Proclamation of 1763* [see R.S.C. 1985, App. II, No. 1]. On the significance of the *Royal Proclamation* as a *constitutional* document, see Borrows, "Constitutional Law From a First Nation Perspective: Self-Government and the Royal Proclamation" (1994), 1 U.B.C. L. Rev. 1.

[62] *British Columbia (Attorney General) v. Canada (Attorney General)* (1889), 14 App. Cas. 295 (P.C.); revg (1887), 14 S.C.R. 345.

[63] *Id.*, at 304 (App. Cas.).

of the Constitution, found itself in agreement with Lord Watson in result, but preferred to disassociate itself from his characterization of the state in this context as a private actor. For the Court, the settlement represented a "nation-building" arrangement of a political (public), not an economic (private), character. In support of this view, the Court suggested that Lord Watson did not mean what he said. According to Iacobucci J., Lord Watson wished merely to refute the characterization of the *Terms of Union* in the Supreme Court of Canada below. There, Ritchie C.J. had described the completion of the railway line as "giving effect to, and carrying out, the constitutional compact" between British Columbia and Canada,[64] while Gwynne J. portrayed these transactions as "being of the nature of a treaty between these two independent bodies".[65] According to Iacobucci J., Lord Watson did not believe that Term 11 was merely economic in nature; rather, he wished to make clear in his ruling that Term 11 did not permit any negotiations outside the terms permitted by section 146 of the *Constitution Act, 1867*,[66] such as those that may occur between the sovereign parties to a treaty. There is a great deal inferred in Iacobucci J.'s reconstruction of *Precious Metals*, and its plausibility depends upon reading Lord Watson out of the intellectual context in which he was writing — in late nineteenth century constitutional discourse, the state easily could be likened to a for-profit venture and its activities subsumed within the private sphere. The Court's strained attempt to distance itself from Lord Watson's explicit views can be understood as signalling a re-drawing of the public/private boundary, and an assertion that the public state should not be viewed as a private economic actor. At the same time, however, the Court denies the state is required to act, thus construing the state's economic role, while admittedly a "public" one, as unhampered by constitutional obligation.

Obviously consistent with the classical liberal image of the state, however, is the image of the state implicit in *R. v. Howard*.[67] Here, in dealing with the question of whether an aboriginal claimant's right to fish had been extinguished by treaty, the Court depicts the state as bargaining in a presumptively equal relationship with Aboriginal peoples in treaty negotiations. No corrective is provided to an image

[64] *Id.*, at 358 (S.C.R.).

[65] *Id.*, at 372.

[66] Enacted as the *British North America Act, 1867* (U.K.), c. 3 [see R.S.C. 1985, App. II, No. 5]. Section 146 provided for the admission of Newfoundland, Prince Edward Island, and British Columbia into the federation.

[67] *Supra*, note 57.

of the state that is benevolent yet competitive, eager to bargain contractually with other partners in conditions of formal equality — the contrived conditions of equality usually associated with the private sphere.

Howard, a member of the Hiawatha Band, was charged with fishing out of season contrary to regulations passed pursuant to the federal *Fisheries Act*.[68] The question was whether he had an "existing" Aboriginal or treaty right recognized and affirmed by section 35 of the *Constitution Act, 1982*. The *Fisheries Act* and regulations could not have extinguished the appellant's rights; the *R. v. Sparrow* decision made clear that extensive regulation of Aboriginal rights did not amount to extinguishment.[69] An 1818 treaty signed by Howard's ancestors had surrendered Aboriginal title over 1.95 million acres of land in return for annual payments and oral assurances that fishing and hunting rights would be respected over unoccupied Crown land.[70] However, in the 1923 Williams treaty, the Crown indicated it was "desirous of obtaining a surrender" of "Indian title of the said tribe to fishing, hunting and trapping rights" over all but reserve lands. To this end, the 1923 treaty, signed by representatives of the Hiawatha Band, contained a provision by which the "said Indians" surrendered "all the right, title, interest, claim, demand and privileges whatsoever" in "all other lands situate in the Province of Ontario to which they ever had, now have, or now claim to have any right, title, interest, claim, demand or privileges, except such reserves as have heretofore been set apart for them by His Majesty the King."[71] The question was whether this provision evinced a "clear and plain" intention to extinguish the appellant's Aboriginal right to fish preserved by the earlier (1818) treaty.

The Supreme Court, in a brief unanimous judgment written by Gonthier J., found in favour of extinguishment and upheld the appellant's conviction. The cursory attention given to the issue of extinguishment by adhesion to a treaty is reminiscent of the Court's 1991 decision in *Ontario (Attorney General) v. Bear Island Foundation*.[72] In both cases the Court found the issues to be "essentially factual in nature and the subject of concurrent findings in the courts below."[73] The importance of both decisions "lies not so much in what was said

[68] R.S.C. 1970, c. F-14, as it then was.
[69] [1990] 1 S.C.R. 1075 at 1097-99.
[70] This treaty is discussed and the rights flowing from the oral assurances confirmed in *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360 (C.A.).
[71] Quoted, *supra*, note 57, at 302.
[72] [1991] 2 S.C.R. 570.
[73] *Supra*, note 57, at 307.

as what was left unsaid, particularly the unarticulated assumptions lurking behind the court's words."[74]

The *Howard* case is a stark example of the methodological limitations to the Court's stated commitment to interpreting section 35 of the *Constitution Act, 1982* in a manner that achieves "a just settlement for aboriginal peoples".[75] In *Guerin v. R.*, Dickson C.J. noted that one purpose of the treaty process is "to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited."[76] The Crown is thus subject to a fiduciary duty to act in Aboriginal peoples' interests when exercising its discretion in relation to surrendered land. Similarly, in *Sparrow*, the Court held that any interference with existing aboriginal or treaty rights must be consistent with the Crown's fiduciary obligations to Aboriginal peoples.[77] These principles would seem to require that the Crown also act in Aboriginal peoples' interests at the earlier stage of negotiating the terms of a surrender; exploitation in the name of protection from exploitation remains exploitation. Yet, in *Howard*, the legitimacy of a Crown policy of pursuing blanket extinguishment of rights outside reserve land is not questioned,[78] nor is the fairness of the treaty exchange considered.

Instead, the Court approached the treaty as if it were an ordinary contract. Finding no ambiguity and no convincing evidence of misunderstanding on the part of the Aboriginal signatories, it could only give effect to the "clear terms"[79] of the 1923 surrender. Justice Gonthier found that the basket surrender clause, precisely because of its "broad nature" and "wide sweeping effect", left no room for ambiguity. It "was a conveyance in the broadest terms" that "clearly identified" the territory covered by the surrender (all of Ontario save the reserve land).[80]

The very breadth of the surrender clause, in other words, assured its effectiveness in extinguishing Aboriginal rights. While this rea-

[74] McNeil, "The High Cost of Accepting the Benefits from the Crown: A Comment on the Temagami Indian Land Case", [1992] 1 C.N.L.R. 40 at 41.
[75] *Supra*, note 69, at 1106, *per* Dickson C.J. and La Forest J., quoting Professor Noel Lyon.
[76] [1984] 2 S.C.R. 335 at 383.
[77] *Supra*, note 69, at 1114.
[78] For a detailed discussion of the argument that a federal policy of blanket extinguishment is inconsistent with the spirit of the *Royal Proclamation of 1763* and the Crown's fiduciary obligations to Aboriginal peoples, see the Royal Commission on Aboriginal Peoples, *Treaty Making in the Spirit of Co-existence* (1995), at 45-58.
[79] *R. v. Howard*, [1994] 2 S.C.R. 299 at 307.
[80] *Id.*, at 306.

soning may be persuasive as a literal interpretation of the sweeping words of the treaty, it is troubling to the extent that it may be enlisting the substantive unfairness of the bargain as a reason for enforcing its literal terms.

Justice Gonthier did not find it necessary to mention directly the principles that Aboriginal treaties should be liberally construed and doubtful expressions resolved in favour of Aboriginal understandings.[81] He made clear in the following passage why he considered such an approach inapplicable:

> The 1923 Treaty does not raise the same concerns as treaties signed in the more distant past or in more remote territories where one can legitimately question the understanding of the Indian parties (compare *R. v. Sioui*...and *Eastmain Band v. Canada*...). The 1923 Treaty concerned lands in close proximity to the urbanized Ontario of the day. The Hiawatha signatories were businessmen, a civil servant and all were literate. In short, they were active participants of the economy and society of their province. The terms of the Treaty and specifically the basket clause are entirely clear and would have been understood by the seven signatories.[82]

The implication is that principles of liberal interpretation applied to treaties in the distant past, such as the 1760 treaty at issue in *Sioui*, have limited relevance to more modern treaties, such as the 1975 *James Bay and Northern Quebec Agreement* at issue in *Eastmain* or the 1923 Williams Treaty at issue in *Howard*. The passage from *Eastmain* relied upon by Gonthier J. makes this clear:

> The principle that ambiguities must be construed in favour of the Aboriginals rests, in the case of historic treaties, on the unique vulnerability of the Aboriginal parties, who were not educated and were compelled to negotiate with parties who had a superior bargaining position, in languages and with legal concepts which were foreign to them and without adequate representation.
>
> In this case, there was simply no such vulnerability.[83]

The approach of the Federal Court of Appeal, adopted by Gonthier J., accords liberal treaty interpretation principles a purely formal rather than substantive purpose. Unless there is evidence of divergent understandings or an absence of independent legal knowledge or advice, treaties apparently will be interpreted like ordinary contracts or real estate transactions. In short, the Court's stated commitment to liberal interpretation of Aboriginal treaties apparently has nothing to do with redressing an inherent inequality of bargaining power or inhibiting judicial confirmation of one-sided bargains.

[81] See, *e.g.*, *Simon v. R.*, [1985] 2 S.C.R. 387; *Nowegijick v. R.*, [1983] 1 S.C.R. 29; and *R. v. Sioui*, [1990] 1 S.C.R. 1025.

[82] *Supra*, note 79, at 306-7.

[83] *Eastmain Band v. Canada*, [1993] 1 F.C. 501 at 515.

The position that the formal equality of the parties to treaty negotiations banishes concerns about exploitation of the Aboriginal signatories is consistent with classical liberal thinking about commercial transactions. However, it represses the fact that the Canadian state has a great deal more economic, political and coercive power at its disposal than do Aboriginal peoples. Moreover, before 1982, Canadian law held that the federal Crown could extinguish Aboriginal rights unilaterally by executive or legislative action. Seeking a "voluntary" surrender through treaty negotiations was an option that the Crown could choose to pursue or abandon at its pleasure. Obviously, the Crown's claim to sovereignty and the accompanying threat of unilateral extinguishment that hung over treaty negotiations placed Aboriginal peoples in a decidedly unenviable bargaining position. To presume that Aboriginal peoples were not vulnerable to exploitation in these circumstances is to ignore the power dynamics in the colonial relationship between First Nations and the Canadian state.

III. THE FEDERAL STATE

Unlike the other conceptions of the state we discuss, the Constitution is explicit in creating our second conception, namely a federal state with jurisdiction divided between two levels of government. The federal and provincial levels of the state are, in Wheare's classic definition of federalism,[84] coordinate and autonomous when acting within their exclusive sphere of jurisdiction established by the constitutional division of powers. The judiciary has taken on the task of preserving the federal form of the state by defining and policing the boundaries of federal and provincial powers. In doing so, judges inevitably attempt to give effect to their sense of the appropriate balance between federal and provincial interests. Less obviously, perhaps, but no less inevitably, how judges define the scope of federal and provincial powers also is influenced by their support for (or antipathy to) the other three conceptions of legitimate state activity we discuss.

The federal form of the Canadian state is, of course, a constant presence in the Court's constitutional jurisprudence, whether the

[84] Wheare, *Federal Government* (4th ed. 1963), at 10.

Court is engaged in its traditional role as arbiter of the legislative division of powers or its more recent role in defining Charter rights and freedoms. There are several striking features of the Court's attitude to the federal form of the state. One is the absence of a normative appreciation of federalism in much of the Court's jurisprudence. Another is the Court's determination to avoid appearing to be entangled in the politics of federalism. In fact, the Court has proven itself to be a crafty political actor over the years, and its manipulation of the contingent and shifting law/politics divide is a key component of its political art.

These features of the Court's attitude toward federalism ensure that much of its federalism jurisprudence is characterized by a dry legalism. One would have no way of knowing from a reading of the Court's decisions that Canadian federalism is undergoing profound changes and challenges provoked by Quebec nationalism, the struggle for political and constitutional recognition of aboriginal self-government, the fiscal crisis of the state, and the perception of powerful *de facto* limits placed on state sovereignty by globalization and the growing power of international capital.

In contrast to the Charter, where, as we will argue, the protection of the interests of vulnerable groups is a major rhetorical device employed by the Court to legitimize the exercise of judicial power, the interests of groups or individuals are buried in the federalism cases. For example, the interests of workers seeking to form a union or women's interest in reproductive autonomy are not addressed in the *Ontario Hydro* and *Morgentaler* cases, respectively. Rather, what is presented as vulnerable or fragile in the Court's federalism jurisprudence is the "balance" of federal and provincial powers. In *Ontario Hydro*, for example, a majority of the Court discusses the need to limit the scope of the federal declaratory and pogg powers to ensure such powers do not threaten an abstractly conceived federal "balance". In addition, the Court sees federalism itself as something of a nuisance: the multiple opportunities it creates for state intervention and resulting regulatory complexity pose a potential threat to administrative efficiency and to classical liberal or neo-liberal conceptions of the role of the state. Thus, in *Hunt v. T&N PLC*, the federal state is seen as a potential threat to "comity". The Court presents the ideals of "balance" and "comity" as threatened by political forces, thus legitimizing the exercise of judicial power through constitutional law.

Yet, the Court has not been able to follow through on its commitment to "balance".[85] Commentators in recent editions of this review

[85] Just as it has failed to follow through, we will show below, in its stated goal of protecting vulnerable groups in a number of Charter cases.

have remarked that the Court's activism has taken a marked centralist turn.[86] This trend continued in the 1993-94 Term: none of the federalism cases hindered, and most of them promoted, federal policies and federal powers. Provincial claims to jurisdiction, on the other hand, met with little success.

One example of the ease with which the Court dismissed a provincial claim to jurisdiction is the case of *Téléphone Guèvremont Inc. v. Québec (Régie des télécommunications)*.[87] The issue in the case was whether Téléphone Guèvremont, a private company providing telephone services in two small municipalities in Quebec, was a local undertaking subject to provincial regulatory authority or an interprovincial undertaking within federal jurisdiction. Central to the argument in the case was whether the Supreme Court's decision in *Alberta Government Telephones v. Canada (Canadian Radio-Television and Telecommunications Commission)*[88] could be distinguished. In that case, the Court held that AGT fell within federal jurisdiction even though it did not operate beyond the boundaries of a province. The Court reached this conclusion by relying on AGT's ability to provide interprovincial and international service to its subscribers, its physical connections at the province's border, and its membership in Telecom Canada. The practical result of the decision was that all of the major telephone companies in Canada now fell within federal jurisdiction. Companies operating at the municipal level like TG continued to be regulated provincially, presumably "on the assumption that the absence of direct interprovincial connections makes the *AGT* case inapplicable."[89]

In a one paragraph judgment, the Court found that TG, like AGT, was an interprovincial undertaking. Chief Justice Lamer's brief reasons indicated that the Court found the nature of the service provided to subscribers to be determinative of the issue. Federal jurisdiction, he said, follows:

> ...by reason of the nature of the services provided and the mode of operation of the undertaking, which provides a telecommunication signal carrier service whereby its subscribers send and receive interprovincial and international communications...[90]

[86] For example, Robin Elliot remarked that "[o]ne of the striking features of these decisions [in the 1989-90 Term] is that, in all but one of them, the claim on behalf of provincial jurisdiction was rejected." See Elliot, "Developments in Constitutional Law: The 1989-90 Term" (1991), 2 S.C.L.R. (2d) 83 at 93.

[87] [1994] 1 S.C.R. 878.

[88] [1989] 2 S.C.R. 225.

[89] Hogg, *Constitutional Law of Canada* (3rd ed. 1992), at 599.

[90] *Supra*, note 87, at 879.

The consolidation of federal jurisdiction over telecommunications and the "information highway", largely accomplished in *AGT*, was thus rendered complete. The minimal room left for balancing local and national interests in telecommunications through a division of provincial and federal competence has now been completely closed. National and international integration of communications was held to extinguish local interests. That this conclusion was reached with no discussion appears to belie the Court's oft-stated concern with preserving the balance of federal and provincial powers.

A similar disregard of a provincial claim to jurisdiction is evident in *Ontario Hydro v. Ontario (Labour Relations Board)*.[91] As discussed above, the issue in the case was whether the labour relations of employees at Hydro's nuclear electrical generating facilities fell within the federal declaratory or pogg powers, or within provincial jurisdiction over the "management" of hydroelectric facilities pursuant to section 92A(1)(*c*). The Court was invited to read the declaratory power narrowly to reflect the fact that Canadian constitutional practices have moved toward a fuller embrace of federalism and a rejection of the unitary elements of the Constitution. Like the disallowance and reservation powers in the 1867 Act, the declaratory power is fundamentally at odds with the notion that, in a federal state, governments are equal in status and autonomous when acting within their respective spheres of exclusive jurisdiction. As La Forest J. put it: "the declaratory power is an unusual one that fits uncomfortably in an ideal conceptual view of federalism."[92]

Yet, La Forest J. (L'Heureux-Dubé and Gonthier JJ. concurring) rejected this suggestion in no uncertain terms: "the Constitution", he said, "must be read as it is, and not in accordance with abstract notions of theorists." He noted that there was "no authority supporting the view that the declaratory power should be narrowly construed" and no constitutional provision which empowered the courts to express an opinion about its exercise. As for the argument that confining the declaratory power was necessary to avoid endangering "the structure of Canadian federalism", he suggested that it evinced "a misunderstanding of the respective roles of law and politics in the specifically Canadian form of federalism established by the Constitution":[93]

> The courts have not engaged in the task of defining the manner in which these broad political bases of Canadian federalism should be protected. The Constitution has not accorded them that mandate. These are matters for the people.[94]

[91] [1993] 3 S.C.R. 327.
[92] *Id.*, at 370.
[93] *Id.*, at 370-71.

The line drawn here between law and politics is a familiar one. It would be unremarkable were it not for the fact that neither La Forest J. nor the Court as a whole has consistently eschewed interpretation based on non-textual, structural argumentation. The Court has been willing to place limits on legislative powers where it believes that constitutional structure or norms dictate such a result. Indeed, La Forest J.'s judgment in *Hunt v. T&N PLC*,[95] released several months after the *Ontario Hydro* decision, has been described in a recent commentary as a "tour de force" of exactly this kind of "constitutional alchemy".[96] In *Hunt*, which is discussed in more detail below, La Forest J. embarked on a search for a "workable balance between diversity and uniformity,"[97] and, following the approach he developed in the earlier *Morguard*[98]decision, ended up finding that a "full faith and credit" clause was "inherent in the structure of the Canadian federation".[99] Given the lack of "authority" for this result, and the lack of a textual mandate, it would be fanciful to describe the *Hunt* decision as one that gave effect to the "constitution as it is" rather than the "abstract notions of theorists". Rather, it appears that La Forest J. is only selectively hesitant to engage in creative, structural forms of reasoning.

In *Ontario Hydro*, a 4:3 majority of the Court was willing to place minimal restrictions on the declaratory power in an attempt to bolster the federal principle. In his judgment for three members of the Court,[100] Iacobucci J.'s respect for "the primacy of the balance between federal and provincial powers"[101] led him to conclude that the declaratory power is "not plenary, but extends only to those aspects of the work which make the work specifically of federal jurisdiction."[102] He concluded that "[c]ontrol of labour relations is not integral to the federal interest in the nuclear plants."[103] Chief Justice Lamer agreed with the balancing principles espoused by Iacobucci

[94] *Id.*, at 372-73.
[95] [1993] 4 S.C.R. 289.
[96] Black and MacKay, "Constitutional Alchemy in the Supreme Court: *Hunt v. T & N plc*" (1994), 5 N.J.C.L. 79 at 79-80.
[97] *Supra*, note 95, at 296.
[98] *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077.
[99] *Supra*, note 95, at 324.
[100] Justices Sopinka and Cory concurring (dissenting in result).
[101] *Supra*, note 91, at 404.
[102] *Id.*, at 405.
[103] *Id.*, at 422.

J., but came to a different result in this case. Like La Forest J., he concluded that the regulation of labour relations at nuclear energy facilities was integral to Parliament's declaratory jurisdiction.[104]

The judges' reasoning with respect to the pogg power was similar. The Court was unanimous in finding that the regulation of nuclear power was a subject matter that met the national dimensions test set out by Le Dain J. in *R. v. Crown Zellerbach Canada Ltd.*[105] Justices La Forest and Lamer went on to conclude in their majority judgments that jurisdiction over labour relations is "integral" to Parliament's pogg jurisdiction. Their judgments suggest that the pogg analysis has the same effect on provincial jurisdiction as the declaratory power analysis: that is, provincial jurisdiction in relation to labour relations is ousted.

It is hard to understand why the majority finding that labour relations is an "integral part" of federal jurisdiction is sufficient reason, let alone to find in favour of federal jurisdiction but also to oust the provincial claim to jurisdiction. Labour relations can be no less "integral" to provincial jurisdiction under section 92A(1)(*c*) than to federal jurisdiction. According to the Court's jurisprudence, provincial laws must be read down to prevent their application to vital parts of the management of undertakings within federal jurisdiction. However, the Court has never suggested that federal laws have to be read down to prevent their application to vital parts of the management of undertakings within provincial jurisdiction. No explanation has ever been offered for this lack of reciprocity in the application of the interjurisdictional immunity doctrine. Yet the Court departs fundamentally from the notion of equal status inherent in the federal principle when it treats federal powers as more exclusive than provincial powers.

Moving on from the division of powers analysis, it is important to note that federalism themes also appear in Charter discourse. This should not be surprising. The Charter arguably has a centralizing effect on Canadian federalism because it binds all of the provinces to a national rights regime. Quebec rejected the Charter largely for this reason; it imposed the federal agenda, including strengthened official bilingualism, upon Quebec. The tension between centralist and provincialist approaches to Canadian federalism is reflected in the different positions staked out by members of the Court in the area of language rights.[106]And importantly, for our purposes, it may also

[104] *Id.*, at 340.
[105] [1988] 1 S.C.R. 401.
[106] See, *e.g.*, *Quebec (Attorney General) v. Blaikie*, [1979] 2 S.C.R. 1016; *Macdonald v. Montreal (City)*, [1986] 1 S.C.R. 460; and *Société des acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] 1 S.C.R. 549.

help to explain some of the differences between the majority and minority judgments in *Haig v. Canada*.[107] The issues in *Haig* arose in the context of the Charlottetown Accord referendum. Due to a combination of residency requirements and a recent move from Ontario to Quebec, Graham Haig "fell between the legislative cracks"[108] and was unable to vote in either the Quebec or the federal referendum held on proposed amendments to the Canadian Constitution contained in the Charlottetown Accord. Residents in every province outside Quebec were entitled to vote in the federal referendum, and those in Quebec (who met the six-month residency requirement, which Mr. Haig did not) were entitled to vote in a parallel referendum, on the same question and held on the same day, initiated and administered by the Quebec government. Haig argued, *inter alia*, that the exclusion of Quebeckers from the federal referendum violated section 15 because it discriminated on the basis of Quebec residency.

Justice L'Heureux-Dubé, writing for the majority, rejected this claim, arguing that differential treatment of provinces by the federal government and Parliament did not constitute discrimination. For her, Parliament is under no obligation to treat all provinces equally, whether in holding a referendum or in any other way. Moreover, "[d]ifferences between provinces are a rational part of the political reality in the federal process", and thus differential treatment of provinces by Parliament is "a legitimate means of promoting and advancing the values of a federal system."[109] Thus, the majority can be understood as antagonistic to the pan-Canadian ideal that tends to emphasize the formal equality of provinces and therefore would not tolerate one province being left out of a federal referendum. The latter approach can be found in Iacobucci J.'s dissenting judgment. For him, the federal referendum was a *national* one whose aim "was to include all Canadian citizens",[110] and it was therefore constitutionally impermissible under section 2(*b*) for the federal government to deny the residents of Quebec, or any other province, the opportunity to vote. The majority, however, agreed with L'Heureux-Dubé J. and thus, wittingly or not, supported the conception of federalism underlying it. This result contrasts sharply with the centralist tendencies evident, as noted earlier, in the Court's approach to division of powers cases. The contrast may be explained, in part, by the fact

[107] [1993] 2 S.C.R. 995.
[108] *Id.*, at 1065, *per* Iacobucci J.
[109] *Id.*, at 1047.
[110] *Id.*, at 1065.

Haig raised directly the question of Quebec's political autonomy within Canadian federalism. One might speculate that the majority's approach was driven by a sense, widely shared in the wake of the Charlottetown Accord's failure, that the survival of Canada as a nation largely depends upon there being sufficient flexibility within Canadian federalism to accommodate Quebec's demands for political autonomy.

IV. The Social Democratic State and Vulnerable Groups

A third conception of the state that plays an important role in Charter jurisprudence is what we have referred to as the social democratic state. Here, in contrast to the classical liberal approach, the state, whether in its federal or provincial form, is understood in positive terms, not as an instrument of coercion that must be constrained to protect individual freedom but as an active force promoting the equality and welfare of citizens. The social democratic approach recognizes that social and economic relations in the "private" sphere are structured by substantial inequalities of power among groups, and that, because of this, some groups are able systematically to exploit, oppress, and deny opportunities and resources to others. Whether in the context of class, race, gender or other dimensions of social relations, systemic inequalities are acknowledged, and the state is understood as being responsible for redressing them proactively, either through social spending or regulation. This idea of the state is articulated in the following passage from L'Heureux-Dubé J.'s judgment in *Comité paritaire de l'industrie de la chemise v. Potash*:

> Canadians recognize that government has traditionally had and continues to have an important role to play in the creation and preservation of a just Canadian society....It is, in my view, untenable to suggest that freedom is co-extensive with the absence of government. Experience shows the contrary, that freedom has often required the intervention and protection of government against private action.[111]

Consistent with this, the Court has recognized in numerous Charter cases that a central and legitimate role for the state, and the Charter itself, is to protect "vulnerable groups". This concern operates in the Court's jurisprudence both to shape the interpretation of particular rights and freedoms (as we shall see in *Haig*,[112] *Peterborough (City) v. Ramsden*,[113] and *Symes v. Canada*[114]); and to engender a deferential posture by the Court to legislation it considers necessary to prevent groups with social and economic power from exploiting and oppressing those without it (as we shall see in *Comité paritaire*[115] and *Rodriguez v. British Columbia (Attorney General)*[116]). The Court's approach to "vulnerable groups" in each context provides insight into the politics of Charter litigation. This is a point we will draw out in analyzing the above-mentioned cases and *Hy & Zel's Inc. v. Ontario (Attorney General)*[117] and *International Longshoreman's and Warehouseman's Union, Canada Area Local 500 v. Canada*.[118] We contend that, despite the Court's formal and constant invocation of the importance of shaping a constitutional jurisprudence consistent with state protection of vulnerable groups, the resulting judgments are often far from clear applications of this larger judicial self-conception.

[111] [1994] 2 S.C.R. 406 at 447. The passage is cited from Cory J.'s judgment in *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 which, in turn, is citing the passage from Wilson J. in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229.

1. Class

The social democratic and "vulnerable groups" themes are most pronounced in this Term's cases in relation to the social inequalities created by economic class. We are using "class" here primarily to describe two groups: those who own productive property, and those who do not.[119] Throughout several of the cases decided this Term, the Court recognized that the latter group requires the protection (of the Charter and, more generally, of the state) from the power of the former. In *Haig* and *Peterborough*, the Court recognized the relationship among property ownership, social power, and the capacity of individuals to express themselves effectively; in *Comité paritaire*, it recognized employers' power to exploit their employees, though, as *ILWU* confirms, such recognition did not lead the Court to providing Charter protection to unions; and finally, in tension with its stated reluctance to extend rights protection to corpora-

[112] *Supra*, note 107.
[113] [1993] 2 S.C.R. 1084.
[114] [1993] 4 S.C.R. 695.
[115] *Supra*, note 111.
[116] [1993] 3 S.C.R. 519.
[117] [1993] 3 S.C.R. 675.
[118] [1994] 1 S.C.R. 150.
[119] Productive property, in contrast to personal property, is property that can be used commercially.

tions, the Court in *Hy & Zel's* found that a for-profit corporation may be granted public interest standing. Economic class is the explicit or implicit issue in all of these cases. Consistent with our earlier assertion, we will argue that while recognizing the social inequalities generated by capitalist class relations, the Court (not surprisingly) neither criticized that system nor seriously redressed its outcomes; indeed, some of the decisions can be understood as potentially exacerbating those inequalities.

(a) Communications

The inequalities generated by the political economy of communications have been regularly noted by activists and scholars.[120] Concerns about public broadcasting, regulation of the media, the dependence of media enterprises on advertising revenue, and concentration of media ownership are all referable to a more general problem: those who own media enterprises have inordinate power to shape the discursive and ideological environment in which citizens live and, by corollary, those who do not own such resources have little access, if any, to effective public communication. Traditionally, this kind of critique has been developed by people on the left. It is therefore of some interest that the Court picked up on the critique in *Haig* and in *Peterborough*. In *Haig*, L'Heureux-Dubé J., writing for the majority, cited authors like Owen Fiss and Allan Hutchinson who argue that factors such as concentration of media ownership, together with most people's lack of access to and resources for effective communication, mean there are substantial impediments to the realization of freedom of expression.[121] In *Peterborough*, Iacobucci J., writing for the majority, cited favourably an earlier statement of L'Heureux-Dubé J. that, within the private domain, "[o]nly those with enough wealth to own land, or mass media facilities (whose ownership is largely concentrated), [are] able to engage in free expression" and "only the favoured few have any avenue to communicate with the public."[122] There is, then, a recognition that the market-organization of communication media denies the capacity of most people to exercise their freedom of expression.

There is not, however, much the Court can do directly to remedy the

[120] See, for example, Schiller, *Culture Inc.* (1989); Keane, *The Media and Democracy* (1991); and Curran and Seaton, *Power Without Responsibility* (1991).

[121] *Supra*, note 107, at 1037-38.

[122] *Supra*, note 113, at 1097, quoting *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139 at 198.

problem it recognized. Without overruling its several decisions on the question of who has obligations under the Charter — beginning with *Dolphin Delivery*[123] — it cannot impose obligations on private actors, like the *Globe and Mail* or CTV, to respect individuals' rights of freedom of expression by, say, providing public access to their facilities. Nor, more generally, can it deploy the Charter to regulate markets or redistribute income and wealth so as to ensure a more even distribution of resources to engage in communicative activity. Though not suggesting such radical solutions, the Court did consider in *Haig* and *Peterborough* two routes through which peoples' capacity to exercise their right to freedom of expression might be improved: first, section 2(*b*) might be interpreted as imposing a positive obligation on government to promote this capacity (*Haig*); and, second, public property (government owned as opposed to privately owned) could be made available under section 2(*b*) to members of the public for expression (*Peterborough*). We will look at each of these options in turn.

"Does freedom of expression include a positive right to be provided with specific means of expression?"[124] That was the central question raised in relation to section 2(*b*) according to the majority in *Haig v. Canada*. Graham Haig challenged his exclusion from the federal referendum not only under section 15 (as discussed above) but also as a violation of section 2(*b*). The federal government, he argued, had a positive obligation (corresponding to his section 2(*b*) rights) to provide him with an opportunity to vote in the referendum. The majority rejected Haig's claim, but agreed with him that freedom of expression might have a positive element. Though the tradition in both Canadian and American freedom of expression jurisprudence is to "conceptualize freedom of expression in terms of negative rather than positive entitlements"[125] — to "prohibit gags, but...not compel the distribution of megaphones"[126] — such a strictly negative approach, according to the majority, "may not in all circumstances guarantee the optimal functioning of the marketplace of ideas."[127] Positive state action might be needed to remedy such factors as lack of resources and opportunities for speech, and concentration of media ownership,[128] that block the realization of freedom of expres-

[123] *Retail, Wholesale & Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573.

[124] *Supra*, note 107, at 1034.

[125] *Id.*

[126] *Id.*, at 1035.

[127] *Id.*, at 1037.

[128] *Id.*, at 1038.

sion for most people.[129] According to the majority:

> ...a situation might arise in which, in order to make a fundamental freedom meaningful, a posture of restraint would not be enough, and positive governmental action might be required. This might, for example, take the form of legislative intervention aimed at preventing certain conditions which muzzle expression, or ensuring public access to certain kinds of information.
>
> In the proper context, these may perhaps be relevant considerations leading a court to conclude that positive governmental action is required.[130]

The majority provided little sense of what would constitute a "proper context", but if its reasons for rejecting Mr. Haig's claim are any indication, it is difficult to imagine any circumstances that would lead the Court to impose positive obligations under section 2(*b*). Here, the Court was unwilling to find a positive obligation on government either to solicit citizens' opinions by holding a referendum, or to solicit *all* citizens' opinions in the event a referendum was held. The principle underlying this conclusion appears to be that a legislature has no obligation under the Charter to create a positive remedy where that remedy would normally be a matter of legislative policy. Drawing an analogy with the rights to strike and bargain collectively, the majority held that the right to participate in a referendum is "a creation of legislation",[131] "a matter of legislative policy and not of constitutional law", and a "statutorily created platform for expression."[132] "A government is under no constitutional obligation to extend this platform of expression to *anyone*, let alone to *everyone*."[133] On this reasoning, it is hard to imagine a "proper context" for a court requiring the government to take positive action. The circularity of the reasoning — because a matter (referendum, strikes, collective bargaining) is dealt with by the legislature, it is a matter of legislative policy and therefore not one of constitutional obligation — likely would lead to the failure of most claims that the Charter requires a legislature to take positive action by creating conditions conducive to the exercise of rights.

Peterborough (City) v. Ramsden[134] develops a second approach to broadening the scope of freedom of expression rights. It follows a previous decision, *Committee for the Commonwealth of Canada v. Canada*,[135] in finding that government, as property owner is, unlike its private counterparts, subject to section 2(*b*) of the Charter. Kenneth Ramsden, who had advertised an upcoming performance of his band by affixing posters to utility poles, was charged with having contravened a Peterborough by-law that prohibited postering on all public property, including utility poles. Ramsden alleged the by-law violated his section 2(*b*) rights. The first question the Court had to answer was whether the government as property owner (the City in this case) has an absolute right (as would a private owner) to restrict the freedom of expression of those using its property. The Court said not: government property owners are *prima facie* bound by section 2(*b*) in exercising their property rights. In justifying this result the Court referred, as in *Haig*, to the fact that people without property or resources have limited capacities to exercise their freedom of expression. The availability of public property to them as a forum for expression is presented by the Court as compensation for this. Postering, the Court noted, is used by minority groups as an economical way to publicize new ideas and causes. It is a "medium of communication of revolutionary and unpopular ideas" that effectively creates "circulating libraries of the poor."[136] The Court concluded that government property owners, in contrast to private ones, must respect freedom of expression rights, though not in all circumstances.

Unfortunately, the Court was not very clear in defining the circumstances in which government does and does not have obligations in relation to freedom of expression. In the earlier *Commonwealth* decision, three judgments established three quite dissimilar sets of criteria for determining when governments can and cannot prohibit the use of their property for communication. Justice L'Heureux-Dubé held that all such restrictions limit section 2(*b*) and must be justified under section 1; Lamer C.J. found there would not be a limit on section 2(*b*) if the expressive activity was inconsistent with the function of the property involved; and, for McLachlin J., expression on public property would not be protected under section 2(*b*) unless the expression served one of the underlying values of freedom of expression. *Peterborough* does not resolve the doctrinal issue of which approach should be taken in public property cases. "[I]t is not necessary", according to Iacobucci J., "to determine which of the three approaches should be adopted"[137] because, in his view, the applica-

[129] The majority (*id.*, at 1038) refers to Dickson C.J.'s dissenting opinion in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, where he states (at 361) that the "absence of government intervention may in effect substantially impede the enjoyment of fundamental freedoms".

[130] *Id.*, at 1039.

[131] *Id.*, at 1040.

[132] *Id.*, at 1041.

[133] *Id.* (emphasis in original).

[134] [1993] 2 S.C.R. 1084.

[135] *Supra*, note 122.

[136] *Supra*, note 134, at 1102 (quoting an expert on the history of postering).

[137] *Id.*, at 1100.

tion of each of them leads to the conclusion that postering on utility poles falls within the scope of section 2(*b*)'s protection.[138]

Despite the Court's failure to commit to one set of criteria for determining when government property owners are bound by section 2(*b*), the decision in *Peterborough* has some positive elements. It does acknowledge that, without freedom of expression rights on public property, only those who own property would have the capacity to exercise their Charter rights. Those who do not own property would literally have no space to use their freedom of expression rights meaningfully. On both privately- and publicly-owned property (like streets, parks, utility poles, and so on) they would be subject to the same power of property owners to prohibit their speech. At the same time, however, it is important to note that *Peterborough* will add little if anything to the very limited opportunities of most people to engage in effective expression in their day-to-day lives. It will not change the fact they have few resources to communicate beyond their immediate environments; nor that they are subject, as employees, tenants, or family members, to the unconstrained authority of those who own the spaces they inhabit to silence them; nor that the corporate cultural industries have a disproportionate influence on their discursive environments. Utility poles as circulating libraries of the poor is a nice idea, but most people would probably rather own a television station. Public property as a forum of expression cannot compensate for the radically unequal distribution of communicative capacity in Canada. To suggest that it can (as the Court implies) is to downplay — even legitimate — that inequality.

(b) Labour Relations

Central to the rise of the social welfare state in Canada was the development of collective bargaining and employment standards legislative regimes. The usual justification for such regimes is that they protect workers from undue exploitation where they are vulnerable because of the inequality of bargaining power between them and their employers. To this end, these regimes provide workers with rights in the workplace and facilitate collective action. The Court in its Charter jurisprudence has tended to accept such social democratic explanations of the need for labour legislation, while at the same time maintaining a classical liberal suspicion of unions. In holding that employment standards[139] and labour legislation[140] should be upheld

[138] *Id.*, at 1100-04.
[139] *R. v. Edwards Books & Art Ltd.*, [1986] 2 S.C.R. 713.
[140] *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211.

under the Charter, the Court has noted the need for such measures to protect workers' interests in light of the inequalities of bargaining power that exist *vis-à-vis* their employers. These social democratic sentiments are hard to find, however, in the seven majority decisions of the Court in previous terms where unions have unsuccessfully sought to have collective bargaining, strikes and picketing protected by the Charter.[141] The pattern is sustained in this Term's decisions.

The first case, *Comité paritaire de l'industrie de la chemise v. Potash*,[142] concerned Quebec's *Act Respecting Collective Agreement Decrees* (ACAD).[143] The Act allows the terms of a collective agreement negotiated by a union in a particular sector of the economy to be extended by legislative decree to all employees in the sector, including non-union ones. Parity committees are set up for each sector to ensure the decree is implemented, with the power to conduct investigations and inspect workplaces. In the present case, inspectors from a parity committee for the shirt industry sought to exercise their investigative powers in response to a complaint that an alleged sub-contractor of Selection Milton, a shirt manufacturer, was not paying its employees. The respondents claimed that the ACAD violated section 8 of the Charter (and parallel provisions of the Quebec Charter[144]). The Court unanimously held that the searches and seizures authorized by section 22(*e*) of the ACAD were "reasonable" for the purpose of section 8 of the Charter and therefore did not infringe that section.[145] Each of the two judgments, one by La Forest J., and the other by L'Heureux-Dubé J., reached this conclusion on the basis of remarkably similar reasons. At the core of each judgment is a social democratic conception of the state. The ACAD is characterized as regulatory legislation designed to protect a vulnerable group[146] —

[141] *Retail, Wholesale & Department Store Union, Local 500 v. Dolphin Delivery Ltd.*, *supra*, note 123; *British Columbia Government Employees' Union v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214; *Reference Re Public Service Employee Relations Act (Alta.)*, *supra*, note 129; *Public Service Alliance of Canada v. Canada*, [1987] 1 S.C.R. 424; *Retail, Wholesale & Department Store Union, Locals 544, 496, 635 & 955 v. Saskatchewan*, [1987] 1 S.C.R. 460; *Newfoundland (Attorney General) v. Newfoundland Assn. of Public Employees*, [1988] 2 S.C.R. 204; and *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367.
[142] [1994] 2 S.C.R. 406.
[143] R.S.Q. 1977, c. D-2.
[144] *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12.
[145] *Supra*, note 142, at 418-25 and 441-53.
[146] The Court's deferential posture to regulatory legislation also provides a basis for its refusal to follow *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145. Because, in the present case, the industry is heavily regulated there is a relatively low expectation of privacy on the part of employers (*per* La Forest J., *supra*, note 142, at 420-22; *per* L'Heureux-Dubé J., *id.*, at 444-45); and the "stigmas normally associated with criminal investigations and their consequences are less draconian" (*per* La Forest J., *id.*, at 424).

employees who, due to being in small businesses with low levels of unionization, "are among the most vulnerable."[147]

Importantly, the judgments in *Comité paritaire* do not say workers are vulnerable *as a class* to the exploitation of employers, only that particular sub-groups of workers, especially those who are not unionized, are vulnerable. The implication is that others are not. The contrary view, that workers are exploited by employers as a class, has made only one appearance in the Court's Charter decisions, and that in a dissenting judgment. Chief Justice Dickson's partial dissent in *Alberta Reference* noted the "inherent inequalit[y] of bargaining power in the employment relationship".[148] "Throughout history", it continued, "workers have associated to overcome their vulnerability as individuals to the strength of their employers."[149] Without the capacity to do so (which would include the right to strike), they would be "vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict."[150] In other words, workers, as a class, are a "vulnerable group" in the absence of the capacity to act collectively. The majority in the *Alberta Reference* saw things differently. Justice McIntyre, one of the majority judges, characterized the relationship between labour and capital as one of equality. The role of labour law, according to him, is to strike a "political and economic compromise between organized labour — a very powerful socio-economic force — on the one hand, and the employers of labour — an equally powerful socio-economic force — on the other."[151] For both McIntyre and Le Dain JJ. (writing for the plurality), labour unions do not raise any special concerns and cannot be differentiated, for constitutional purposes, from "a wide range of associations [and] organizations"[152] including, according to McIntyre J., associations of property owners, commercial actors and gun clubs.[153]

The *Alberta Reference* majority's approach is implicitly adopted by the Court in this Term's decision in *International Longshoreman's and Warehouseman's Union, Canada Area Local 500 v. Canada*.[154] Justice La Forest, writing for a unanimous Court, held that on the basis of the

[147] *Id.*, at 419, 424 and 442.
[148] *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at 334.
[149] *Id.*, at 368.
[150] *Id.*, at 366.
[151] *Id.*, at 414.
[152] *Id.*, at 390, *per* Le Dain J.
[153] *Id.*, at 404-5.
[154] [1994] 1 S.C.R. 150.

"thrust of the reasoning applicable to s. 2(*d*)...adopted in earlier decisions of this Court", the right to strike is not protected by section 7's right to liberty.[155] Thus, the Court held (in a half-page decision) that back-to-work legislation does not limit section 7 of the Charter.[156] *ILWU* brings the record of unions seeking to protect the rights to strike, bargain collectively and picket under the Charter to zero victories and eight losses. Many commentators have argued this is not at all surprising given the traditional antipathy of courts to unions.[157] Even those who initially held out some hope for a union-friendly Charter jurisprudence seem chastened by the Court's remarkable consistency in rejecting unions' claims.[158]

(c) Corporations

From its earliest decisions under the Charter, the Court has found vexing the question of whether, and to what extent, corporations should be protected by the Charter's rights. The case law simultaneously reflects the classical liberal theme of formal equality — with substantive distinctions between real and artificial persons being glossed over when rights protection is extended to corporations — and the social democratic understanding that the Charter is designed to protect "vulnerable groups" — a category that does not include business corporations. The tension between these two themes becomes most apparent when corporations seek to use the Charter to attempt to deregulate their activities.

In *Hy and Zel's Inc. v. Ontario (Attorney General)*,[159] the Court was confronted with just such a situation. A business corporation sought declaratory standing to challenge Ontario's *Retail Business Holidays Act*[160] on the ground that Sunday-closing legislation violated the Charter's guarantee of freedom of religion and the right to equality. The corporation had applied for a declaration of unconstitutionality, and was joined in its application by its employees.[161] Consistent with its

[155] *Id.*, at 151.
[156] The union argued that the prohibition on strikes in the *Maintenance of Ports Operations Act, 1986*, S.C. 1986, c. 46, violated workers' rights to liberty by forcing them to work under terms and conditions they did not freely choose, and by penalizing them for withdrawing their labour at the termination of a contract.
[157] For discussion, see Bakan, "Constitutional Interpretation and Social Change: You Can't Always Get What You Want (Nor What You Need)" (1991), 70 Can. Bar Rev. 307 and authorities cited therein.
[158] See Beatty, "Labouring Outside the Charter" (1991), 29 Osgoode Hall L.J. 839.
[159] [1993] 3 S.C.R. 675.
[160] R.S.O. 1980, c. 453 [as am. S.O. 1989, c. 3] as it then was.
[161] The civil action had been commenced only after the Attorney General of Ontario had instituted proceedings, under s. 8 of the Act, seeking an order requiring that Hy and Zels, Paul Magder Furs and several other retailers remain closed for business over the Christmas holidays.

earlier decisions in *Irwin Toy Ltd. v. Quebec (Attorney General)*[162] and *R. v. Wholesale Travel Group Inc.*,[163] the Court did not grant private standing to Hy and Zel's to challenge the legislation under section 2(*a*). Yet, all the members of the Court were prepared to grant public interest standing to Hy and Zel's (a for-profit corporation) if its claim was found to meet the criteria for public interest standing established in *Canada (Minister of Justice) v. Borowski*.[164] Though the majority judges held that the criteria were not met in the case, they were apparently unaware that they were doing anything new or controversial in suggesting a for-profit corporation *could* get public interest standing.[165] Absent from the majority decision is any hint of reservation or reflection about granting public interest standing to a for-profit corporation to challenge legislation under the Charter.

Surely, it would not be unreasonable to expect somebody on the Court to express some concern about this. Instead, in the dissenting judgment of L'Heureux-Dubé J. (McLachlin J. concurring), the majority are criticized for not going far enough in protecting corporations under the Charter. The dissenters would have granted Hy and Zel's private standing. In doing so, they would have exceeded the majority in clearing the way for corporate access to the Charter. First, L'Heureux-Dubé J. argued for removal of the limitations on corporate access established by *Irwin Toy* and *Wholesale Travel*, holding that a corporation could raise the constitutionality of a law whether as subject of a prosecution or as applicant in a civil action.[166] Second, L'Heureux-Dubé J. asserted that corporations *could* have rights under sections 2(*a*) and 15 of the Charter, thus rejecting the significance of the difference between artificial and natural persons for the purpose of these sections.[167] The dissenters would have

[162] [1989] 1 S.C.R. 927.

[163] [1991] 3 S.C.R. 154.

[164] [1981] 2 S.C.R. 575.

[165] This may be, in part, the result of the Court's ruling last Term in *Conseil du Patronat du Québec Inc. v. Quebec (Attorney General)*, [1991] 3 S.C.R. 685; revg (1988), 55 D.L.R. (4th) 523 (Que. C.A.). In this case, the Court granted standing in a cursory, one paragraph judgment to an employer's association seeking to challenge Quebec's prohibition on the hiring of replacement workers during a strike or lock-out. By adopting the reasoning of Chouinard J.A. in the Quebec Court of Appeal, the Court unhesitatingly affirmed the right of employers to invoke the Charter to challenge a law designed to maintain the integrity of the collective bargaining process during labour disputes.

[166] *Supra*, note 159, at 714.

[167] This was not inconsistent, according to L'Heureux-Dubé J., with the Court's decision in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, as that case had merely decided that a corporation was entitled to raise the religious rights of others as a defence to a criminal or quasi-criminal charge; it left open the question of "whether corporations may have rights under s. 2(*a*) of the *Charter*" (*Hy and Zel's*, *id.*, at 700).

thrown the doors of the Charter wide open to corporations, in contrast to the more cautious approach of the majority. What is remarkable about both judgments is the absence of any apparent concern on the part of the judges about the issues raised by corporate access to judicial review under the Charter. This is perhaps all the more surprising given the expression of such concerns in earlier Charter cases,[168] and the Court's continuous refrain, as we hear again in this Term's *Comité paritaire* decision, that it should be wary of attempts by parties to use the Charter to attack regulatory legislation, especially that which protects vulnerable groups.[169] All members of the Court seemed unwilling to go behind the legally constructed formal equivalence of for-profit corporations and individual actors to address the substantive differences that exist among social actors seeking public interest standing.[170] By failing to do this, the group to whom public interest standing is available becomes, we would argue, overinclusively cast.

The Court's blindness to the issue of *who* is seeking public interest standing has another distressing consequence. By indirectly doing what it should have done directly — denying public interest standing explicitly to for-profit corporations — the Court potentially restricts the availability of such standing to public interest organizations. This occurs because the majority's decision confirms, and perhaps further circumscribes, the Court's strict approach to applying the public interest standing rule developed in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*.[171] Kent Roach has noted that the Court's approach to the third

[168] See, *e.g.*, *Irwin Toy*, *supra*, note 162.

[169] An earlier version of the legislation at issue in this case had already been upheld by the Court on this ground. See *R. v. Edwards Books & Art Ltd.*, [1986] 2 S.C.R. 713.

[170] The minority decision exhibits a further penchant for formal equality in presuming equality in principle between litigants in federalism cases and those in Charter cases. Justice L'Heureux-Dubé adopts Peter Hogg's argument that by distinguishing between Charter and federalism litigants the Court has established "artificial barriers" to constitutional challenges, offending the principle of constitutionalism that a "plaintiff ought to be able to obtain a declaration...on the basis of any part of the Constitution" (*supra*, note 159, at 714, quoting Hogg). The simplicity of the stated principle is beguiling, for we see a fundamental distinction between Charter and federalism litigation that merits limiting the availability of standing in Charter cases. The distinction is this: in federalism cases, only one level of government is precluded from legislating on a particular subject; the other level of government, by definition, is not. In Charter cases, both levels of government are disabled from legislating in ways that unreasonably limit Charter rights and freedoms. Given the more significant consequences that flow from a declaration of invalidity under the Charter, standing ought to be more carefully circumscribed.

[171] [1992] 1 S.C.R. 236.

criterion for public interest standing — that there is no other reasonable and effective way to bring the issue before the court — is more strictly applied in *Hy and Zel's* than it was in *Canadian Council of Churches* because of its requirement that "a party seeking to challenge the Act *must show* there is no other reasonable and effective means of bringing the matter before the court."[172] Not only is this burden extremely difficult to meet, but, arguably, it restricts public interest standing only to those applicants who seek to challenge laws and regulations (like those in *Thorson v. Canada (Attorney General))*[173] that have no direct effect on anybody. True, these strictures will serve to keep many private corporations from using the Charter, but they will have the same effect on organizations seeking Charter protection for vulnerable groups. A jurisprudence of public interest standing that truly reflected the Court's concern that the Charter operate to protect vulnerable groups would be sensitive to actual distinctions between different kinds of individuals, groups and organizations seeking Charter protection. By failing to recognize this important distinction, the Court credits both an overinclusive standard — allowing for-profit corporate access — and an underinclusive application of that standard — potentially denying access to organizations representing public interests.

Peterborough (City) v. Ramsden,[174] too, is an example of the overinclusiveness problem. Arguably, *Peterborough* enhances the capacity of those with few resources to exercise their freedom of expression rights, but, we will suggest, it does the same for those with many resources. The Court has made it clear in a series of cases that corporations have freedom of expression interests and can rely directly on section 2(*b*) to challenge legislation. Nothing in *Peterborough* suggests that corporations would not be able to avail themselves of freedom of expression rights on public property. More than that, however, the Court in *Peterborough* put a gloss on its decision in *Irwin Toy* that may serve to expand corporate freedom of expression rights under the Charter. In *Irwin Toy*, the Court held that a content-neutral law (one whose *purpose* is not to restrict a particular meaning) that has the *effect* of limiting expression, does not constitute a limit on section 2(*b*) unless the particular content of the expression being limited "promotes at least one of [the] principles [underlying

[172] *Supra*, note 159, at 693 (emphasis added). See Roach, *Constitutional Remedies in Canada* (1994), at 5-13. See also the discussion in Ross, "Further Restrictions on Access to Charter Review: A Comment on *Hy and Zels Inc. v. Ontario (AG)*" (1994), 5 Constitutional Forum 22 at 24.

[173] [1975] 1 S.C.R. 138.

[174] [1993] 2 S.C.R. 1084.

freedom of expression]."[175] If we combine this with the Court's several indications that the content of purely commercial advertising may not promote or serve these principles,[176] then it might follow that purely commercial advertising would only with difficulty receive section 2(*b*) protection from content-neutral laws.[177] That was the logic, at least until *Peterborough*.

Peterborough effectively puts a gloss on *Irwin Toy* in a way that may serve to provide commercial advertisers wide section 2(*b*) protection from content-neutral laws. The gloss is as follows. *Irwin Toy* suggests that the correct question for the Court to have asked in *Peterborough* was: Does the *content* of Mr. Ramsden's expression — advertising an upcoming performance of his band — promote any of the three values underlying freedom of expression? The Court in *Peterborough*, however, asked a very different question: Does the *form* of Mr. Ramsden's expression — *postering* — promote any of those values? Based on the Court's earlier decisions, the answer to the first question might have been "no". The second question, however, frees the Court from its earlier analyses of commercial advertising by shifting the inquiry from content (commercial advertising) to form (postering), thus making it easier for the Court to draw a link between Mr. Ramsden's activities and the values underlying

[175] The Court adopts (*id.*, at 1104) the following example and passage from *Irwin Toy, supra*, note 162, at 976-77: if an individual is charged for shouting under a city by-law that prohibits excessive noise-making, she would not be able to claim her section 2(*b*) rights had been limited unless she could "show that her aim [in shouting] was to convey a meaning reflective of the principles underlying freedom of expression."

[176] Referring to dentists who wished to advertise their services, for example, the Court states in *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232 at 247: "Their motive for doing so is, in most cases, primarily economic. Conversely, their loss, if prevented from doing so, 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 spiritual or artistic self-fulfillment". In *Reference re Criminal Code, Sections 193 and 195.1(1)(c)*, [1990] 1 S.C.R. 1123 at 1136, Dickson C.J. suggests that expression with an economic purpose does not "lie at, or even near, the core of the guarantee of freedom of expression." In *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 760, he pointed out that it can be "destructive of free expression values...to treat all expression as equally crucial to those principles at the core of s. 2(*b*)." In that decision he finds (at 766) that hate propaganda "contributes little" to the promotion of these values and "strays some distance from the spirit of s. 2(*b*)". For an earlier, and somewhat contrary view, see *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712.

[177] Such a result would be perfectly consistent with the *Irwin Toy* and *Rocket* cases, where the legislation in issue was not content-neutral, but was aimed at regulating commercial advertising with a particular content. The Court has insisted in these and other cases that where legislation in its purpose restricts a particular kind of expression it will limit section 2(*b*) even where the expression does not serve any of the values underlying freedom of expression. See also *R. v. Keegstra*, *id.*

section 2(*b*). Postering, as a *form* of communication, the Court pointed out, has historically served at least one of those values — the communication of information that "fosters social and political decision-making"[178] — and Mr. Ramsden's section 2(*b*) rights were therefore limited by the postering ban. Contrary to the Court's approach in *Irwin Toy*, the *content* of his expression is simply not a relevant issue. This shift from analysis of specific content to analysis of general form represents a potential expansion of the scope of section 2(*b*) protection for commercial advertisers.[179] Under the *Peterborough* approach they need only establish that the form of expression prohibited by a content-neutral law *could* convey a message whose content advances freedom of expression values and that law will be found to limit section 2(*b*) and be struck down, as was the law in *Peterborough* itself, if it does not meet the section 1 criteria.

2. Identifying Vulnerable Groups

(a) Gender and Class

Treatment of vulnerable groups is not always as straightforward as our discussion to this point implies. In particular, determination of what the vulnerable group at issue is or whether, in fact, there is indeed a vulnerable group involved is often a tricky question with highly variable answers. This is in part due to the interplay of privilege and disadvantage that characterizes our social and economic world, granting individuals cross-cutting, shifting, and multiple group identities. The result of such interactive and various group affiliation means that the selection of an operative group identity for individuals who figure before the court in constitutional actions (either as claimants or parties otherwise affected by the state action in question) is a difficult, necessarily simplistic, and artificial exercise.[180] The consequences that flow from the identification of the relevant presence of a vulnerable group in any one case are thus dependent upon a somewhat arbitrary and certainly political process. The result of this analytical fact is that, while the Court expresses on numerous occasions great sensitivity to the existence of social, economic, and political vulnerability, its recognition of the

[178] *Supra*, note 174, at 1101, 1105.

[179] And others, like hate mongers, whose speech has been found by the Court not to serve the purposes underlying section 2(*b*). See *R. v. Keegstra*, *supra*, note 176.

[180] For a lengthier discussion of this claim, see Philipps and Young, "Sex, Tax, and the Charter: A Review of *Thibaudeau v. The Queen*" (1995), 2 Rev. of Constitutional Studies 221.

group interests that implicate these concerns in any one case is far from uncontestable and unimportant.

Nowhere is this more apparent than in cases involving the protections offered by section 15 of the Charter. Here, of course, the Supreme Court[181] has established that vulnerability of the group affected by the state action in question, in terms of which the claimant is categorizable, is a prerequisite to a finding of discrimination. This results simply from the fact that vulnerability will always be true of a group that meets the requirement of being historically disadvantaged and stigmatized, the last stage of the *Andrews* test.[182] Through such a requirement, the Court has built into section 15 a selective problematization of state action. And underlying such a restriction on the potential use of section 15 is the image of an often benevolent, and therefore not immediately suspect, state. The concern is, however, that in its zeal to so focus the impact of section 15, the Court has given insufficient explicit consideration to the inevitable shortcomings of the categorization process such an analysis invokes. Instead, the move away from the earlier "similarly situated test" has been falsely celebrated in cases like *Andrews* as an end to the "categorization game".[183] What the Court fails to acknowledge is that the problem of categorization is still with us and that this problem has specific consequences for the issue of vulnerable groups and the Charter.

A strong illustration of the general points made above arises in *Symes v. Canada*, a decision involving a challenge to provisions of the *Income Tax Act*.[184] In this case, the appellant, a full-time partner in a law firm, argued that the wages she paid to a child-care giver were deductible as business expenses under sections 9 and 18 of the *Income Tax Act*. She relied on two specific claims to make her argument. First, she claimed that child care expenses constituted legitimate business expenses: the employment of a nanny enabled Symes to engage in an income-producing business. If this interpretation of business expenses were denied, her second claim was that such a limited understanding of business expenses had a disparate negative impact on women and thus infringed the gender equality guarantee of section 15 of the Charter.

[181] See *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; and *R. v. Turpin*, [1989] 1 S.C.R. 1296.

[182] Justice Iacobucci summarizes this test in *Symes v. Canada*, [1993] 4 S.C.R. 695.

[183] *Per* MacIntyre J. in *Andrews v. Law Society of British Columbia*, *supra*, note 181 at 168, quoting Kerans J.A. in *Mahe v. Alberta* (1987), 54 Alta. L.R. (2d) 212 at 244.

[184] R.S.C. 1952, c. 148 [as am. S.C. 1970-71-72, c. 63], as it then was.

The Court did not accept Symes' initial claim. Instead, it found that section 63, by establishing a separate system for deductions of child care expenses (up to a maximum of $2,000 per child in 1985) effectively precluded any other deductibility.[185] Thus the Court moved on to consider Symes' constitutional challenge to the limitation imposed on her ability to deduct the full amount of expenses she had incurred for the care of her two children (over $13,000 in 1985). In dealing with this second question, Iacobucci J. (writing for the majority of the Court) began with the problem the facial neutrality of section 63 raised for Symes' claim. The provision distinguished explicitly only between persons who incur child care expenses with respect to an eligible child and those who do not, thus forcing Symes to establish that section 63, in its effects, draws a distinction on the basis of sex. Symes was unable to do this. Thus, it was in relation to the first step of the *Andrews* test — the necessity of showing differential treatment on the ground claimed — that Symes' constitutional claim failed. It failed because Iacobucci J., while easily recognizing that women disproportionately bear the *social* costs of child care, refused to carry the analysis one step further and conclude that women disproportionately bear the *economic* costs of child care. And since the only possible effect of section 63 is to limit the tax deduction available with respect to financial expenses, this section can only affect women disproportionately at all if women are those who pay the economic costs: "social costs, although very real, exist outside of the Act."[186]

Unwilling to extrapolate from the disproportionate social burden child care imposes on women, Iacobucci J. denied the very interlinkage of social, economic, and political consequences that adverse effect discrimination acknowledges and targets. After all, what adverse effect discrimination recognizes is that certain social characteristics are, when looked at in context, so closely associated with other characteristics that treatment with respect to the one set of characteristics has to be understood as treatment in terms of the other. It acknowledges that group characteristics have a variety of social and economic consequences. For example, clustered with gender is a wide range of associated behaviours and circumstances, such as pregnancy, child care responsibilities and vulnerability to harassment.

[185] Justice L'Heureux-Dubé, in dissent, recognized the bias in favour of a traditionally male practice of business found in the deduction provisions of the Act. As a result, she held (*supra*, note 182, at 808) that section 63 does not limit deductibility of child care expenses under other relevant sections.

[186] *Id.*, at 765.

Revealing new linkages and thus problematizing seemingly neutral distinctions is what equality theory at its best does. Thus, Iacobucci J.'s refusal to make the leap from social burden to economic burden restricts the necessary flexible range adverse effect doctrine tells us we must import into any equality analysis. Contrast this with L'Heureux-Dubé J.'s statement that the inference from social burden to economic costs was "inescapable".[187]

Justice Iacobucci's refusal to find such economic consequences for women is closely dependant upon his categorization of the groups he sees as involved in Symes' claim. In the case before him, the parents did not equally share the costs of child care: Symes bore the economic costs. Yet, Iacobucci J. gave more relevance to the observation that, formally, parents have joint legal responsibility for child care expenses.[188] The consequence of this selective privileging of the formal legal picture over Symes' actual circumstances is that, for this portion of Iacobucci J.'s argument, Symes is implicitly yet effectively denied any representative status in relation to the more general category of women: her circumstances remain individual and discrete, ungeneralizable beyond the particulars of her own situation. Thus Iacobucci J. wrote:

> [T]he "family decision" made by the appellant and her husband is not mandated by law and public policy....In most households involving more than one supporting person, therefore, regardless of "family decisions", the law will impose the legal duty to share the burden of child care *expenses*....[189]

When Iacobucci J. did deal explicitly with the question of representation, Symes was allowed only a limited representative status. She was confined to a subgroup of women: married women who are entrepreneurs. She could not speak for women generally but only for this more limited and relatively privileged subgroup. And the inequality her claim then addresses is circumvented by Iacobucci J.'s refusal to infer economic burden from social burden for the group of women she represents. Justice L'Heureux-Dubé in her dissent condemned such a confinement of Symes' equality claim, arguing that: "The fact that Ms. Symes may be a member of a more privileged economic class does not by itself invalidate her claim under s. 15 of the Charter...we cannot 'hold every woman to the position of the most disadvantaged women, apparently in the name of sex equality'."[190]

[187] *Id.*, at 821.

[188] *Id.*, at 764.

[189] *Id.*, at 764 (emphasis in original).

[190] *Id.*, at 825-26.

Frustratingly, Iacobucci J. recognized to some extent the validity of Symes' complaints about section 63. Had Symes led evidence as to the effect of the tax provisions on single mothers, Iacobucci J. allowed that she might have been able to establish the constitutional claim: "In my view, if it were possible in another case to prove that s. 63 of the Act caused an adverse effect for some subgroup of women, s. 63 would be discriminatory on the basis of sex..."[191] In support of such a proposition, Iacobucci J. reiterated the conclusion from *Brooks v. Canada Safeway Ltd.*[192] and *Janzen v. Platy Enterprises Ltd.*[193] that an adverse effect felt only by a subgroup of women can still constitute sex-based discrimination.[194] Justice Iacobucci accepted that women from this latter category may be more likely than men to head single-parent households, thus leaving open the possibility that child care expenses could be shown to disproportionately fall upon these women. But, again, Symes has been categorized out of the "equality loop" and thus this other equality angle is not before the Court.

The effect of these conclusions about Symes' group membership is that Symes became unable to cast herself as a member of a disadvantaged group. This is not necessarily a distressing result. Section 15, as given flesh by Wilson J. particularly in *Andrews* and *Turpin*, does not have as its purpose the redress of all forms of unequal treatment. But, this assessment is less appealing when the group whose equality claim is at stake has important elements of disadvantage present in its identity.

What happens in *Symes* illustrates an important aspect of equality analysis and group membership. The categorization chosen to represent the claimant's group membership is critical to the ultimate success of the claimant's challenge. Because equality is a comparative concept, categorization — identification of the groups between whom comparison will take place — is an inevitable component of any analysis. And because of the great variety of possible group identities for any one individual, this exercise is, as already mentioned, inevitably political. The result of such variable categorization possibilities means that for equality claims, where the social dimension at issue occurs associated with a number of other social relations, the Court will have some choice as to how to characterize the claimant's concern. Symes' case is such an instance as her claim of gender distinction clearly maps onto, in relation to section 63, concerns that

[191] *Id.*, at 770.
[192] [1987] 1 S.C.R. 1219.
[193] [1989] 1 S.C.R. 1252.
[194] *Supra*, note 182, at 769.

also implicate family status and class. Justice Iacobucci noted this[195] and went on to isolate Symes' claim to one involving businesswomen only, thus emphasizing Symes' class membership at the expense of her gender representativeness.

Commentators have picked up on the implications of this interaction between gender and class in Symes' situation, arguing that Symes' class gives her a perspective on child care issues that is, in the long run, damaging to general equity struggles in this area.[196] Justice Iacobucci was not unaware of these larger politics. He mentioned that, had a section 1 analysis been necessary, section 63 would have had to be considered in relation to the government's overall response to child care needs.[197] But, by narrowing Symes' claim to one representative of only businesswomen, Iacobucci J. preempted the fuller equality analysis — a stage necessarily prior to the kind of balancing section 1 dictates.

Symes highlights the limited remedial scope of constitutional equality rights. Forced to remedy inequalities between identifiable subgroups, considered in the abstract from the larger injustices framing the situation, constitutional equality analysis allows only for tinkering with, and not a re-working of, existing patterns of income distribution. Had Symes been successful, as L'Heureux-Dubé J. noted, an important inequality existing between businesswomen and businessmen would have been acknowledged. Yet, the elements of class inequality, gendered division of labour, devaluation of child care work — all of which function to construct a much larger and more disturbing general picture — would lie unaddressed and possibly exacerbated.

Justice Iacobucci ended his section 15 discussion with the important observation that an adverse effect gender discrimination claim is not defeated by establishing that both men and women are negatively affected by the action in question. It is important, Iacobucci J. asserted, to realize "that there is a difference between being able to point to *individuals negatively affected* by a provision, and being able to prove that a *group or subgroup* is suffering an *adverse effect* in law by virtue of an impugned provision."[198] That is, the different background conditions that pertain for each gender will mean that similar treatment of men and of women will be viewed differently by equality law. The result is that despite any overlap, "disadvantage

[195] *Id.*, at 767-68.
[196] See Macklin, "*Symes v. M.N.R.*: Where Sex Meets Class" (1992), 5 C.J.W.L. 498; and Young, "Case Comment on *Symes v. The Queen*", [1991] Brit. Tax Rev. 105.
[197] *Supra*, note 182, at 773.
[198] *Id.*, at 770-71 (emphasis in original).

[cannot] be located for both men and women at the same time."[199]

One can impute to this aside a recognition of the indeterminacy of all group distinctions. Even gender, a distinction culturally imbued with strong claims to natural determinacy, cannot be captured by a determinate set of characteristics that clearly situates and describes all individuals. Thus gender-based distinctions ought not to be denied merely because they affect some individuals who are not members of the targeted gender. To fail to recognize this, given the nature of group identification, would be to undermine the possibility of any meaningful doctrine of adverse effect discrimination.

(b) Disability

Rodriguez v. British Columbia (Attorney General)[200] provides further illustration of some of the difficulties in the Court's approach to issues of social power and vulnerability. The facts of the case are well known. Sue Rodriguez suffered from amyotrophic lateral sclerosis (AMS), a disease that causes rapid physical deterioration followed by death. Rodriguez planned to end her life when the symptoms became so unbearable that it was no longer worth living. She knew she would require assistance to do so since, by that time, she would be severely disabled. The only obstacle to this plan was the *Criminal Code*'s prohibition of one person assisting another to commit suicide.[201] Rodriguez challenged this provision under sections 7, 12 and 15 of the Charter. A majority of the Court, in a rather curious judgment by Sopinka J., held that none of these provisions was violated.[202] We will focus here on how Sopinka J. characterized the plight of Sue Rodriguez, as this is the key to his reasons for holding that the ban on assisted suicide offends neither section 7's principles of fundamental justice nor section 1's minimal impairment test.[203]

[199] *Id.*, at 771.

[200] [1993] 3 S.C.R. 519.

[201] R.S.C. 1985, c. C-46, s. 241(*b*).

[202] We say "curious" for several reasons. One of which – the reliance on "social consensus" – is mentioned above. Two others are, first, the majority's running together of the "basic tenets of the legal system" and the "manifest unfairness" tests for defining the principles of fundamental justice under s. 7. The former is developed in *R. v. Jones*, [1986] 2 S.C.R. 284 and applied by Beetz J. and Dickson C.J. in *R. v. Morgentaler*, [1988] 1 S.C.R. 30; the latter is developed in *Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1979, c. 288*, [1985] 2 S.C.R. 486 and also applied by Dickson C.J. in *R v. Morgentaler, supra*. A second example is Sopinka J.'s unwillingness to consider whether s. 15(1) is limited by the ban on assisted suicide on the ground that even if it is the ban can be upheld under s. 1.

[203] The latter is engaged by the majority's assuming *in arguendo* that the ban on assisted suicide limits s. 15(1).

Justice Sopinka defined the purpose of the ban on assisted suicide as "the protection of the vulnerable who might be induced in moments of weakness to commit suicide."[204] And, the question posed in each of the section 7 and section 1 analyses was essentially the same: Is a blanket ban on assisted suicide necessary for achieving this purpose? The dissenting judges said no. For them, the vulnerable group contemplated by the purpose of the ban could not include Rodriguez — a terminally ill, mentally competent person with two to 14 months to live, whose future was inevitably one of unbearable suffering and incapacity to end her own life. Given her circumstances, according to the dissenting judges, it was difficult to conceive of her choice to end her life as the product of inducement in a moment of weakness.[205] Unfortunately, the majority judgment never met this point head on. Instead, it slid back and forth between re-characterizing the vulnerable group that needs legislative protection as *all* people who are terminally ill,[206] thus including Rodriguez as a terminally ill person; and re-characterizing the purpose of the legislation in terms of the general principle of "sanctity of human life", a principle that requires people be forbidden from intentionally ending the lives of others and that therefore proscribes assisted suicide.[207] Each characterization enabled the majority to argue that the blanket ban on assisted suicide is necessary to achieve the legislative objective; neither came close to capturing the reality of Sue Rodriguez's plight.

The majority's judgment was a remarkable example of the abstraction and unreality that often characterize judicial reasoning under the Charter. The majority's analysis effectively made Sue Rodriguez invisible. Either she was lumped together with all terminally people, including those, unlike herself, who may be mentally incompetent, not suffering unbearably, or not disabled from taking their own lives; or she was defined as a member of the general population who must be protected by legal prohibition from others who would

[204] *Supra*, note 200, at 595 (s. 7 analysis), adopted at 613 for s. 1 analysis.

[205] The minority judges would have held that s. 241(*b*) was overbroad and should not apply to Rodriguez and others in similar situations. The dissenting judges were: Lamer C.J. (who found a violation of s. 15), L'Heureux-Dubé and McLachlin JJ. (who found a violation of s. 7), and Cory J. (who agreed with all of his dissenting colleagues).

[206] *Supra*, note 200, at, *e.g.*, 586 and 614.

[207] The majority draws a distinction between the active ending of a life (of which it views assisted suicide as an example) and passively allowing for life to end, as is the case in palliative care. For a critique of this and other aspects of the majority's decision, see Jackman, "Solutions in Science Outside the Law? *Rodriguez v. British Columbia (A.G.)*" (1994), 17 Dal. L.J. 206.

end her life.[208] Yet, her real vulnerability, contrary to the majority's construction, was not to those who might take her life, but to those who would force her to live; her fear was not that she would be induced to end her life in a moment of weakness, but that she would be forced to face the horrors of life because the law prohibits people from helping her end her life when she is too weak to do it herself. The majority's failure to grasp this point is all the more curious given its acknowledgement of the uniquely horrendous circumstances of Rodriguez's life, and its conclusion that the ban on assisted suicide "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".[209] The majority's inability to respond to Sue Rodriguez's reality illustrates just how abstract and unreal constitutional discourse can be.

One further interesting point arises in regard to a theme we developed earlier. An unintended result of the majority's decision in *Rodriguez* may be to confirm fears about an expanded role for corporations in Charter review. Rather than engaging in the more specific inquiry of whether the provisions of the *Criminal Code* prohibiting assisted suicide are overbroad by implicating the mentally competent but terminally ill patient, such as Sue Rodriguez, the majority inquired into the larger question, asking whether the principles of fundamental justice have "evolved" such that they conflict with the balancing of interests by Parliament. This latter question was answered by ascertaining whether a "new consensus has emerged in society" supporting a substantive right to assisted suicide. Rather than confining itself to the narrower question of procedural arbitrariness posed by McLachlin J. in dissent — the same question also posed by a majority of the Court in *Morgentaler* — the majority tested the law against a substantive standard of review, premised upon the view that the principles of fundamental justice are those "upon which there is some consensus that they are vital or fundamental to our societal notion of justice".[210] We can think of no better example for which a court likely would find evidence of societal consensus (given the ideological bent of the judiciary) than the principles of freedom of contract and private property. When combined with the decision in *R. v. Wholesale Travel Group Inc.*,[211] where a corporation was entitled to avail itself of section 7 in a criminal prosecution, and the minority decision in *Hy and Zel's Inc. v. Ontario (Attorney General)*,[212] which supported the expansion of corporate standing in civil cases, we can discern an inertia developing in favour of the substantive protection of corporate economic interests. Whether this indeed will occur remains to be seen, but the doctrinal elements for such a move appear to be almost in place.

[208] In discussing the sanctity of human life as an underlying legislative purpose, the Court refers to protection from violence and the policy against capital punishment as examples of laws with that purpose. The implication of subsuming s. 241(*b*) to this purpose is those who assist in suicide are, at least for the purpose of that principle, in the same class as murderers or executioners.

[209] *Supra*, note 200, at 589.

[210] *Id.*, at 590.

V. The Neo-Liberal State

We turn now to the fourth and last conception of the state which we see represented in the Court's constitutional discourse. This conception can be characterized as "neo-liberal", a term that captures the radical shift in the functions of the state associated with the rise of global capital. This shift is exemplified by the state's retreat from its social welfare function. Founded primarily upon Keynesian notions, welfarism recognized the state's legitimate role in tempering the effects of the marketplace by redistributing wealth, facilitating collective bargaining, and encouraging and managing economic development.[213] The social welfare function now is seen as inconsistent with a transnational economy no longer tied to local labour markets. With the assistance of new technologies, economic actors are able to generate profits by internationalizing production. Businesses simply identify the most cost-efficient location for the production of any particular component in an organizational enterprise.[214] This suggests that economic regulation by the nation state is obsolete — capital simply flees or evades jurisdictions that inhibit the accumulation of maximum profits. With its supervisory role in the economy hindered, the nation state is viewed as no longer able to influence its own economic development.[215]

The social democratic ideals and arrangements that characterized post-World War II political economy are increasingly portrayed in dominant discourse as outdated, unrealistic and inflexible. "Newness" and "change" are the buzzwords justifying the movement of

[211] [1991] 3 S.C.R. 154.

[212] [1993] 3 S.C.R. 675.

[213] See the discussion in Marchuk, *The Integrated Circus: The New Right and the Restructuring of Global Markets* (1991), at 3-4.

[214] What Reich calls "organizational webs". See Reich, *The Work of Nations: Preparing Ourselves for 21st-Century Capitalism* (1991), at 112.

[215] Miyoshi, "A Borderless World? From Colonialism to Transnationalism and the Decline of the Nation-State" (Summer 1993), 19 Critical Inquiry 726.

economic policy in a rightward direction, and those who have reservations about the effect of these shifts on social justice issues are dismissed as out of touch. It should not be surprising that the Court has picked up on this neo-liberal enthusiasm for newness and change, despite the tension between these views and its social democratic ones. In *Alberta Reference*, for example (referentially incorporated into this Term's *ILWU*[216] case), McIntyre J. noted that "[g]reat changes — economic, social and industrial — are afoot....[there is] great pressure to reassess the traditional approaches to economic and industrial questions, including questions of labour law and policy."[217] Accordingly, in his view, it would have been wrong to constitutionalize strikes and collective bargaining.

A most persistent neo-liberal theme has been that of "free trade". States are being pressured to remove impediments to trade, internally and externally, in the name of productivity and competition. Regional trading agreements, such as the North American Free Trade Agreement, are designed to "harmonize" trading rules and facilitate freer trade. The constraints that NAFTA, and its underlying ideology, places on state parties leads to a corresponding phenomenon of deregulation. In Canadian federalism these themes are manifest in the movement towards freer trade within Canada — one that is deregulatory in the sense that it necessarily imposes restrictions on the power of provinces to regulate. In 1991, for example, the federal government proposed amendments to section 121 of the Constitution that would have guaranteed the free movement of goods, services, persons and capital and barred constitutionally a myriad of provincial non-tarriff barriers to trade. These proposals were made, the Government of Canada argued, "in light of continuing trade liberalization and accelerating globalization of markets."[218] Though these proposals were not successful, their terms are manifest in recently negotiated agreements among the federal and provincial governments.

The Court's decision this Term in *Hunt v. T&N PLC*[219] provides an interesting example of the Court's readiness to adopt neo-liberal

[216] *International Longshoreman's and Warehouseman's Union, Canada Area Local 500 v. Canada*, [1994] 1 S.C.R. 150.

[217] *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at 414.

[218] Government of Canada, *Canadian Federalism and Economic Union: Partnership for Prosperity* (1991), at 20. These proposals are discussed in Schneiderman, "The Market and the Constitution" in Cameron and Smith (eds.), *Constitutional Politics* (1992).

[219] [1993] 4 S.C.R. 289.

themes in justifying its constitutional decisions. At issue was a Quebec statute — what is called typically a "blocking statute" — that prohibited, *inter alia*, the removal of documents of business entities in Quebec that are required to be produced in judicial proceedings outside of the province. Such statutes are common to both Quebec and Ontario and were originally intended as a shield against anti-trust prosecutions in the U.S. The Quebec-based companies are alleged to have conspired to cover up negligently manufactured products that exposed the appellant, George Hunt, and other workers to asbestos fibres. The companies at first resisted the litigation by attempting to strike out the claim, then shareholders sought successfully an order under section 4 of the *Business Concerns Records Act*[220] preventing the production of documents from the Quebec headquarters.

The appellant argued that either the law was *ultra vires* the province or, in the alternative, was constitutionally inapplicable as it applied to other provinces "under the principles set forth by this Court in *Morguard*".[221] In *Morguard Investments Ltd. v. De Savoye*,[222] La Forest J. for the Court held that a British Columbia court was required to enforce a default judgment obtained in Alberta. In reaching that decision he adopted neo-liberal themes, noting that the rules of private international law were "grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner."[223] According to La Forest J: "the business community operates in a world economy and we correctly speak of a world community even in the face of decentralized political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative."[224]

Morguard, La Forest J. noted, was not argued on constitutional grounds. But the constitutional status of the rule, requiring the recognition of default judgments where there is a real and substantial connection to the jurisdiction where judgment was obtained, continued to be debated.[225] This puzzlement seemed reasonable, given that

[220] R.S.Q. 1977, c. D-12, s. 4 [am. 1988, c. 21, s. 66].

[221] *Supra*, note 219, at 307.

[222] [1990] 3 S.C.R. 1077.

[223] *Id.*, at 1096.

[224] *Id.*, at 1098.

[225] See, for example, Black, "The Other Side of *Morguard*: New Limits on Judicial Jurisdiction" (1993), 22 Can. Bus. L.J. 4; Edinger, "*Morguard v. De Savoye*: Subsequent Developments" (1993), 22 Can. Bus. L.J. 29; and Hogg, *Constitutional Law of Canada* (3rd ed. 1992), at 335.

the ruling in *Morguard* referred to constitutional principles[226] and read into Canadian law what other jurisdictions, such as the United States, have expressly provided for.[227] In *Hunt*, there is no longer any doubt — La Forest J. described the considerations in *Morguard* as "constitutional imperatives". The "'integrating character of our constitutional arrangements as they apply to interprovincial mobility' calls for the courts in each province to give 'full faith and credit' to the judgments of the courts of sister provinces." This, writes La Forest J., "is inherent in the structure of the Canadian federation, and, as such, *is beyond the power* of provincial legislatures to override."[228]

The Court relied upon neo-liberal themes in finding the blocking statute was "constitutionally inapplicable" to the B.C. proceedings. Justice La Forest acknowledged the law likely was made in relation to property and civil rights; but this constitutional foundation had to be balanced with the law's extraterritorial effect and examined in light of the regime of legal interdependence found in the *Constitution Act, 1867*. Weighing into the equation some of the same considerations he identified in *Morguard* — the intentions of the framers as evinced by the fact of common citizenship, interprovincial mobility rights, the common market, and the unitary structure of the court system — La Forest J. found the Quebec law should not be available to shield Quebec defendants and impede litigation elsewhere. Although the province is entitled to legislate to protect property within the province, it would run counter to the principle of the comity of nations, and "it discourages international commerce and...conduct of litigation."[229] Taking into account that the statute did not allow for any exceptions and that Ontario (having a similar blocking statute) and Quebec are the home to many of Canada's largest corporations, application of the law would force litigants to commence suits in only Ontario or Quebec, or in multiple fora.[230] This would result in "higher transactional costs for interprovincial transactions [and] constitute an infringement on the unity and efficiency of the Canadian marketplace...as well as unfairness to the citizen."[231]

[226] See *supra*, note 222, at 1101, where La Forest J. wrote: "In short, the rules of comity or private international law as they apply between the provinces must be shaped to conform to the federal structure of the Constitution."

[227] See the "full faith and credit clause" in Art. IV, s. 1 of the U.S. Constitution.

[228] *Supra*, note 219, at 324 (emphasis added). This is no small matter for provincial jurisdiction. As Joost Blom argues, this would "at one stroke invalidate a good part of the common law provinces' current jurisdictional practice" as well as negate the narrower rule applicable in the province of Quebec. See Blom, "Case Comment: *Morguard Investments Ltd. v. De Savoye*" (1991), Can. Bar Rev. 733 at 745.

[229] *Id.*, at 327.

[230] *Id.*, at 330.

[231] *Id.*

What is striking is the weight that the Court places on constitutional structure, without grounding its analysis within the actual text of the Constitution, particularly in the division of powers. If blocking statutes — which target foreign legal proceedings — are constitutionally inapplicable, then they are drained, at least within Canada, of all force and effect. Should rules for the recognition of extraprovincial legal proceedings, then, be an exclusive matter for Parliament? If it is "beyond the power of the provincial legislatures" to depart from the standards for recognition of judgments outlined in *Morguard*, presumably the same result follows in *Hunt*. The exceptional nature of the Court's ruling is made plain by its departure from the traditional model of federalism adjudication — policing jurisdictional boundaries with reference to sections 91 and 92.[232] The Court fashions a standard out of its understanding of constitutional structure and context (but without any apparent textual bases in sections 91 and 92 of the *Constitution Act 1867*) against which provincial laws are to be tested and which "is beyond the power of the provincial legislatures to override."[233] The standard operates in much the same way as a revived or revised section 121 may operate; it could disable government from legislating in ways that inhibit the flow of persons, services and capital across provincial borders. If this is the case, it may be that the federal government also is prevented from inhibiting market flows, as has been suggested in regard to section 121.[234]

Although the decision applies expressly only as between the Canadian provinces, the Court intimated that it may have application beyond interprovincial disputes.[235] In an era in which "numerous transactions...spill over the borders defining legal communities in our decentralized world legal order, there must also be a workable method of coordinating this diversity"[236] without discouraging "inter-

[232] The remedy in this case also is exceptional. Constitutional inapplicability, a version of "reading down", has emerged as a remedy where the interjurisdictional immunity doctrine is invoked to protect core areas of federal jurisdiction from even incidental provincial encroachment. In such cases, provincial laws yield to matters at the heart of federal jurisdiction to promote the exclusivity of s. 91 powers. While La Forest J. does hint briefly at the existence of a hitherto unrecognized federal power in relation to the enforcement of judgments (*id.*, at 326), he does not base the holding of inapplicability explicitly on the need to preserve the exclusivity of any such power. Instead, the remedy appears to be dictated by principles of fairness and the structure of Canadian federalism.

[233] *Id.*, at 324.

[234] See Laskin C.J. in *Re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198.

[235] *Supra*, note 219, at 296.

[236] *Id.*, at 295.

national commerce",[237] wrote La Forest J. In *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, decided last Term, Sopinka J. similarly found support for his ruling in the "increase of free trade and the rapid growth of multinational corporations".[238] Coupled with the realization that the ruling in *Morguard* has been of significant benefit to mostly U.S. judgment creditors,[239] it is apparent that the Court is willing to nudge Canadian federalism in a neo-liberal direction, consistent with, and surely influenced by, the political and economic restructuring resulting from NAFTA.

The victim of that restructuring will be provincial regulatory capacity. The more the Court sees provincial economic laws and regulations as obstacles to domestic and foreign business activity, the less likely the Court will continue to vindicate provincial areas of jurisdiction and police the limits of federal jurisdiction. It may be that domestic and international pressures, including the constraining effects of NAFTA, will make less likely the enactment of laws that impede transnational market activity and lead to fewer challenges such as that in *Hunt*. But for those provincial governments who have indicated a willingness to resist constitutionally the levelling effects of NAFTA, the Court's ruling does not bode well for their success. It suggests that the Constitution, as understood through the neo-liberal gaze, may be part of the problem, not the solution.

Hunt demonstrates how neo-liberal ideology structures the Court's justificatory discourse about what it is doing in relation to economic regulation. Neo-liberalism also describes the perceived politico-economic reality of contemporary Canada, and therefore the context in which the Court's decisions operate. "Privatization" is a major part of neo-liberal ideology and practice, along with free trade and deregulation. As the state continues to pull out of the provision of services, privatizing its operations, it is worth asking how this will affect the operation of remedies for rights violations that the Court provides under the Charter. Again, we will return to *Peterborough (City) v. Ramsden*[240] to illustrate our point. As discussed above, the Court in *Peterborough* affirmed its earlier decision in *Committee for the Commonwealth of Canada v. Canada*[241] that governments, unlike private actors, have obligations under section 2(*b*) in relation to the property they own. The real effect of that decision will, of course, depend upon

[237] *Id.*, at 327.
[238] [1993] 1 S.C.R. 897 at 911.
[239] See Glenn, "The Supreme Court, Judicial Comity and Anti-Suit Injunctions" (1994), 28 U.B.C. L. Rev. 193 at 193.
[240] [1993] 2 S.C.R. 1084.
[241] [1991] 1 S.C.R. 139.

the availability of public property to individuals who wish to engage in expressive activity. Yet public space increasingly is being privatized, meaning there are fewer and fewer sites where section 2(*b*) places obligations on property owners. To take one example, many airports in Canada have been privatized and, according to the 1995 federal budget, privatization is the fate of all airports. After privatization, leafletting in an airport, the activity protected in *Commonwealth*, may no longer be protected under section 2(*b*) from restrictions by the airport's owner since that owner will no longer be government. The privatization of space is a trend that goes far beyond airports. Public streets and town centres are giving way to privately owned malls as primary sites of social interaction in suburban and ex-urban population centres. In urban centres, enclosed skyways, tunnel systems and sidewalks, often privately owned, are the analogue of suburban malls. Moreover, many of the open spaces in the urban core — "public" squares, parks and gardens — are under the democratically unaccountable control of private owners. Needless to say, the right to freedom of expression on public property is dependent upon there *being* public property, and the rights created by *Peterborough* likely will disappear, along with public property itself, if the privatization trends of neo-liberalism continue.

VI. CONCLUSION

We have argued that four distinct visions of the Canadian state run through the Court's constitutional discourse this Term. To return to the point we made in our introduction, we want to emphasize the relationship between these conceptions of the state and the Court's attempts to legitimate its decisions. Given the precarious position in which courts in liberal democracies are put by the institution of judicial review, it would be astonishing if judicial assumptions about the nature of the state did not figure as important analytical themes in these judgments. By invoking any one of these images of the state, the members of the Court can be seen as attempting to ground their decisions in what they perceive to be the social consensus on any particular issue. These images can all potentially serve this legitimation function by representing distinct, yet coexisting, elements of the political and legal traditions from which our dominant political culture is constituted. The imagery of a state restricted from public reordering of the private sphere, a state whose purpose is the alleviation of disadvantage, a state rapidly rendered obsolete by the internationalization of capital, or a state whose jurisdiction is divided

between different levels of domestic government, all ring true at different levels of this culture, despite the contradictions between them. The Court, by invoking any one of these images when making a particular decision, calls on an aspect of the dominant discourse that gives its decision a general and accepted grounding, thus helping to dull any contentious edges the decision might have. The existing mix of dominant views of the state will therefore shape the range of images available to the judiciary for its justificatory discourse and, thus, the decisions it reaches. If the last few years have seen dominant views shifting toward the right of the political spectrum in Canada and elsewhere — as the state gives in more and more to the ideological pressures of capital and individualism, and as the legitimacy of the welfare state diminishes — one might expect that future decisions of the Court will reflect this trend.