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DEVELOPMENTS IN CONSTITUTIONAL LAW: THE 1988-89 TERM*

A. Wayne MacKay** and Dianne Pothier***

I. INTRODUCTION

If a constitutional law teacher were compelled to select only one term of the Supreme Court of Canada as the basis for a constitutional law course, the 1988-89 Term of the Court would be an apt choice. We say this because of the range and importance of the issues decided during the term. As in last year's essay,¹ we make a point of dealing with issues related to both the *Canadian Charter of Rights and Freedoms*² and the *Constitution Act, 1867*.³ Charter cases are admittedly higher in volume, even when one excludes consideration of the criminal Charter issues, which we leave to other contributors to this volume for comment. However, although Charter cases tend to attract more attention, the reality is that the Court continues to deal with major division of powers questions as well. After an initial few years of preoccupation with Charter issues, the Court has reverted to a more balanced constitutional agenda. This was already starting to happen during the 1987-88 Term, but it is particularly obvious in relation to the 1988-89 Term.

On the Charter front, the 1988-89 Term features major developments concerning equality rights, mobility rights, freedom of expression, and section 7. Given that section 15 of the Charter only came into force in 1985, we are still at the beginnings of the Supreme Court's elaboration of

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¹ Pothier, "Developments in Constitutional Law: The 1987-88 Term" (1989), 11 *Supreme Court L. Rev.* 41.

² Part I of Schedule B to an Act of the British Parliament, the *Canada Act*, R.S.C. 1985, Appendix II, Doc. 44.

³ R.S.C. 1985, Appendix II, Doc. 5.

equality rights. In relation to mobility rights, freedom of expression, and section 7, the groundwork had previously been laid, but there is significant fleshing out left for the Court in the 1988-89 Term: elaboration on the extent of interprovincial mobility required by section 6, articulation of the place of commercial expression and choice of language within freedom of expression, the impact of section 2(b) on labour relations, and consideration of the position of corporations under section 7. These issues also raise further contexts for the Court to engage in the balancing of interests under section 1. The choice of language issue and freedom of expression, in the context of Quebec's sign laws, also involve consideration of the section 33 override. There are few Charter issues that are not at least touched on during the 1988-89 Term.

In connection with the *Constitution Act, 1867*, the 1988-89 Term features important developments in the federal trade and commerce power as well as broad hints as to the Supreme Court's leanings in relation to the federal spending power. There is clarification on how both federal and provincial laws affect federal undertakings, and re-affirmation of the ancillary nature of powers in relation to language. The Court reassesses the tests of when a provincial inferior tribunal oversteps the bounds created by section 96, and has an opportunity to consider again the jurisdiction of section 101 courts. The Court also is called upon to specify the extent of autonomy for denominational schools afforded by section 93. Thus the 1988-89 Term is particularly comprehensive in relation to the *Constitution Act, 1867*, extending beyond the standard sections 91/92 issues.

If the Court had so desired, it could have tackled the question of whether the foetus has constitutional rights in Canada. Instead, that issue is converted into a discussion of mootness and standing. Perhaps the Court felt it had already achieved enough of a public profile during the 1988-89 Term by plunging into the assessment of Quebec's language laws and of equality rights. The high public profile cases during the term are certainly important, but that should not detract from the significance of the other cases, in relation to both the Charter and the *Constitution Act, 1867*.

This article proceeds by examining, in Part II, the Court's analysis of equality issues under section 15 of the Charter. Part III of the article delves into the Court's treatment of the Constitution's impact on economic regulation, covering Charter and division of powers limits on provincial regulation, the impact of federalism on federal economic regulation, and the effect of the Charter on labour law. Part IV deals with issues related to court jurisdiction, and Part V concerns cultural issues affecting Quebec's autonomy (language rights and denominational schools). Part VI covers general constitutional issues and themes: the

override clause, mootness and standing, and an overview of the Court's approach to section 1. Part VII offers a few concluding remarks.

Some general patterns emerge during the 1988-89 Term. In relation to division of powers, the Court gives latitude to both the federal and provincial governments to exercise their powers to the outer limits. As for the Charter, there seems to be a kind of "vision" starting to take shape. Although some exceptions are discussed below, there is a tendency for the Court to approach the Charter with an eye to the protection of the disadvantaged and powerless, and to pay some attention to group as well as individual rights. These trends are particularly apparent in relation to the Court's consideration of equality rights, to which we now turn.

II. THE APPROACH TO SECTION 15: ARTICULATING EQUALITY

In the annals of legal history, *Andrews v. Law Society of British Columbia*⁴ (*Andrews*) is likely to be recorded as the most significant decision rendered by the Supreme Court of Canada in the 1988-89 Term. This importance arises not from the facts or legal issues in the case, but from its timing. *Andrews* provided the Court with its first opportunity to articulate its approach to equality in section 15 of the Charter.⁵ Recognizing the importance of section 15 in the Charter and the Court's approach to it, ten parties intervened in the case, presenting the justices with a wide range of options in interpreting equality.⁶ This broad, almost legislative, process by which the decision was reached may explain why *Andrews* in some respects presents a "coat of many colours."

The basic facts in *Andrews* are simple. Under British Columbia's *Barristers and Solicitors Act*,⁷ one of the requirements for becoming a lawyer was Canadian citizenship. Mr. Andrews, a British subject perma-

⁴ [1989] 1 SCR 143.

⁵ Some of the justices in *Reference re Bill 30, An Act to Amend the Education Act (Ont.)* [1987] 1 SCR 1148 (the "Separate Schools Reference") did make some passing comments on the application of s. 15 in the context of denominational schools, but there was no real suggestion about how the Court would approach equality in the Charter. Thus *Andrews* is the genesis of the Court's equality jurisprudence.

⁶ Black & Smith, "Canadian Citizenship and the Right to Practice Law: *Andrews v. Law Society of British Columbia*" (1989), 68 Can. Bar. Rev. 591 at 592 *et seq.* suggest that the open process by which the decision was reached enhanced the quality of the judgment. In particular, they argue that the Court was influenced by the public interest interveners such as Women's Legal Education and Action Fund (L.E.A.F.) in its analysis of s. 15. It is interesting that some of the interveners only addressed the issue of how s. 15 should be interpreted, and took no position on how the merits of the case should be resolved.

⁷ R.S.B.C. 1979, c. 26, s. 42.

nently resident in Canada, met all the requirements for admission to the Bar, except Canadian citizenship. When his application for admission was denied, he challenged the relevant provisions under section 15 of the Charter as a denial of equality. He lost at trial, and succeeded on appeal, before having his case heard in the Supreme Court of Canada as the cause célèbre on the meaning of equality in the Charter.⁸

Many courts struggled with the concept of equality in the years between 1985 and the Supreme Court ruling in *Andrews*, and many different approaches were upheld. In the *Andrews* case itself, McLachlin J.A. (as she then was) had concluded that Mr. Andrews' rights to equality had been denied,⁹ but by a mode of analysis that the Court rejects. Although section 15 spawned much academic commentary, there was little consensus on how the courts should approach the difficult concept of equality.¹⁰ Since the Supreme Court has shown its hand (or at least part of it) in *Andrews* and the companion cases, the issues and academic commentary have acquired a sharper focus.¹¹ There have also been some commentaries on the *Andrews* decision, making our task an easier one.¹²

It is with some trepidation that we embark upon this analysis, because a proper job would require a book rather than a few pages of case comment.¹³ We shall attempt to analyze the *Andrews* and related cases by exploring the aspects of analysis presented by the Court. As Marc

⁸ By the time of the hearing in the Supreme Court of Canada, Mr. Andrews had been admitted to the British Columbia Bar and had become a Canadian citizen. The other respondent, Gorel Elizabeth Kinersly, became eligible for Canadian citizenship during the period of which judgment was reserved in the Supreme Court of Canada. *Supra* note 4 at 159-60. The Court does not raise any mootness issue. See discussion, *infra*, in Section VI.2 of this article.

⁹ *Andrews v. Law Society of BC* (1986), 27 DLR (4th) 600 (BCCA).

¹⁰ There are at least a half dozen books on equality to date, and they propose a wide range of views and perspectives. Some examples include: Bayefsky & Eberts, *Equality Rights and the Canadian Charter of Rights and Freedoms*, (1985); Smith *et al* (eds.) *Righting the Balance: Canada's New Equality Rights*, Saskatoon: Can. Human Rts. Reporter, 1986; Boyle, MacKay, McBride & Yogis (eds.), *Charterwatch: Reflections on Equality*, (1986); Fogarty, *Equality Rights and Their Limitations in the Charter* (1987). The periodical literature on equality under the Charter is voluminous, and will not be cited because of the restrictions of time and space.

¹¹ Gibson, *The Law of the Charter: Equality Rights*, (1990) is a thorough and thoughtful analysis of equality in light of the Supreme Court rulings. Black & Smith "Equality Rights," in Beaudoin & Ratushny (eds.), *The Canadian Charter of Rights and Freedoms* (2nd ed. 1989), at 557 produce a systematic analysis of how to approach s. 15 of the Charter, and include an addendum on the impact that *Andrews* has for their analysis.

¹² Gold, "Comment: *Andrews v. Law Society of B.C.*" (1989), 34 McGill L.J. 1063, and Black and Smith, *supra*, note 6 provide valuable insights which we acknowledge.

¹³ Indeed, Gibson's *The Law of the Charter: Equality Rights*, *supra*, note 11, provides a depth of analysis that we can hardly approximate.

Gold has stated, separating the aspects of the equality analysis and making sense of them is no small task.

The equality provisions in the *Charter* are like the three-dimensional image in a holographic plate. Although one may break the plate into a thousand pieces, shining a laser beam through any one of the shards will reproduce the image in its entirety. So too is it with the concepts of “equality”, “discrimination”, “reasonableness” and “justification”. Out of any one of these concepts can be generated all of the principles that we distribute amongst the various clauses of sections 15 and 1. At the risk of overstating the case, to criticize the Court for some of its shortcomings of analysis in *Andrews* is to ignore the very nature of equality itself.¹⁴

Three justices write in *Andrews* — McIntyre, Wilson and La Forest. On the critical question of the approach to section 15 of the Charter, McIntyre J. writes for a majority of the Court, with Dickson C.J., Lamer, Wilson and L’Heureux-Dubé JJ. concurring.¹⁵ Justice La Forest writes a concurring in the result opinion on the proper approach to section 15 of the Charter.¹⁶ All the justices agree that section 15 was violated on the facts of the case, and the majority concludes that the violation cannot be saved by section 1 of the Charter. Justices McIntyre and Lamer would apply section 1 to save the legislative provision, and thus dissent in the result of the appeal — that citizenship as a prerequisite to Bar admission is a denial of equality under the Charter.

1. Preliminary Equality Issues

Some preliminary issues about the meaning of equality in the Charter are clearly addressed, and in that respect *Andrews* offers more guidance than we might reasonably have expected in the first case.¹⁷ In regard to sources, the Court makes it clear that it is willing to give serious consideration to the jurisprudence about equality and discrimination arising from human rights statutes, and will distance itself from the narrow

¹⁴ *Supra* note 12 at 1079.

¹⁵ While Wilson J. concurs with the McIntyre opinion in *Andrews*, her separate reasons there and her judgment in *R v Turpin* [1989] 1 SCR 1296, suggest some important differences of emphasis.

¹⁶ In light of his oral decision for the Court in *Reference re Workers' Compensation Act 1983 (Nfld)* [1989] 1 SCR 922, it appears that he is now willing to adopt the majority view in *Andrews*.

¹⁷ Black & Smith, *supra*, note 6, at 614-15. They indicate that the guidance from the Supreme Court is all the more noteworthy because *Andrews* marks a significant departure from lower court rulings.

rulings under the *Canadian Bill of Rights*.¹⁸ The Court also serves notice that it will not be easily persuaded of the relevance of American equality jurisprudence, which has developed in quite a different context. If the Court continues to shape equality in relation to communitarian as well as individualistic values, the discounting of American authority will become even more important.

Speaking through McIntyre J., the Court also indicates that it will take the same broad and purposive approach to the meaning of equality in section 15 of the Charter as they have with respect to other rights.

Both the enumerated grounds themselves and other possible grounds of discrimination recognized under s. 15(1) must be interpreted in a broad and generous manner, reflecting the fact that they are constitutional provisions not easily repealed or amended but intended to provide a “continuing framework for the legitimate exercise of governmental power” and, at the same time, for “the unremitting protection” of equality rights: see *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 155.¹⁹

The breadth of this assertion is limited by the articulation by McIntyre J. of a more limited purpose for section 15 than that advanced by some lower courts and academics. Recognizing that governments must constantly make distinctions in the everyday administration of public affairs, he concludes that the purpose was not to have the courts review all legislative distinctions.

If the *Charter* was intended to eliminate all distinctions, then there would be no place for sections such as 27 (multicultural heritage); 2(a) (freedom of conscience and religion); 25 (aboriginal rights and freedoms); and other such provisions designed to safeguard certain distinctions. Moreover, the fact that identical treatment may frequently produce serious inequality is recognized in s. 15(2), which states that the equality rights in s. 15(1) do “not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups . . .”²⁰

We agree that section 15 of the Charter was never intended to eliminate all governmental distinctions — indeed such an approach would be unworkable. Furthermore, we agree that specific Charter guarantees such as equality must be read in conjunction with the other rights and freedoms guaranteed in the Charter. In some respects this is a doctrine of

¹⁸ R.S.C. 1985, Appendix III. Black & Smith, *id.*, hail this departure from the sterile *Bill of Rights* analysis as a significant advance for equality. In general, the evolution of equality under human rights commissions has been more progressive than its treatment in the courts.

¹⁹ *Supra* note 4 at 175.

²⁰ *Id.* at 171.

“mutual modification” similar to that articulated with respect to the division of powers pursuant to sections 91 and 92 of the *Constitution Act, 1867*.²¹ In some cases the result will be the limitation of equality to accommodate other Charter rights, and in other cases individualistic rights such as freedom of the press may have to be limited to give equality its proper scope.²² The Court does not carry its analysis this far, as it was not necessary to do so on the facts of *Andrews*.

One of the most controversial issues that divided the lower courts in their struggles to give shape to equality was the interplay of section 15(1) and section 1 of the Charter. An early view espoused by Peter Hogg is that every legal distinction produces a discrimination, and any balancing of interests must take place in the context of section 1.²³ At the other end of the spectrum, many courts held that a person claiming a violation of section 15(1) of the Charter must demonstrate that the distinction was unreasonable before shifting the burden to the government under section 1. Justice McLachlin (while a member of the British Columbia Court of Appeal) articulated this view in *Andrews*.

The ultimate question is whether a fair-minded person, weighing the purposes of legislation against its effects on the individuals adversely affected, and giving due weight to the right of the Legislature to pass laws for the good of all, would conclude that the legislative means adopted are unreasonable or unfair.²⁴

The Supreme Court in *Andrews* rejects both of the above extremes in favour of a third means of restricting the scope of section 15(1) — “enumerated or analogous grounds.”²⁵ We shall turn to the meaning of this middle option shortly, and explore some of its ambiguities. On the need to separate clearly the section 15 and section 1 analysis, the Court,

²¹ *Citizens Insurance Co of Canada v Parsons* (1881) 7 App Cas 96 (PC). This approach is also reflected in the *Separate Schools Reference*, *supra* note 5.

²² *Canadian Newspaper Co v Canada* [1988] 2 SCR 122 is a case where s. 2(b) rights under the Charter were limited to give women victims equality, in the broad sense, during sexual assault trials. While the Court did not expressly allude to s. 15 in its reasonable limits balancing, it was essentially an equality value which motivated them. Shielding the identity of the sexual assault victim in a criminal trial justifies a limitation on freedom of the press in s. 2(b) of the Charter.

²³ *Constitutional Law of Canada* (2nd ed. 1985), at 800. Black and Smith, *supra* note 6, question whether this is the view Professor Hogg currently holds, as it was expressed in 1985.

²⁴ *Supra* note 9 at 610.

²⁵ Gold, *supra* note 12 at 1070-71 questions whether you can really maintain a middle position between the extremes of doing all the interest balancing in s. 1 of the Charter and doing a reasonable limits balance within s. 15(1).

through McIntyre J., speaks clearly, while recognizing the difficulties of practical application.

It must be admitted at once that the relationship between these two sections may well be difficult to determine on a wholly satisfactory basis. It is, however, important to keep them analytically distinct if for no other reason than the different attribution of the burden of proof. It is for the citizen to establish that his or her *Charter* right has been infringed and for the state to justify the infringement.²⁶

Another welcome conclusion that emerges from all three opinions in *Andrews* is that systemic as well as intentional discrimination falls within the ambit of section 15 of the Charter.²⁷ Justice McIntyre also emphasizes that the impact of the challenged law on the affected individual or group is the vital consideration in determining whether there has been an equality violation. Speaking about the concept of equality he states:

To approach the ideal of full equality before and under the law — and in human affairs an approach is all that can be expected — the main consideration must be the impact of the law on the individual or the group concerned.

.

In other words, the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another.²⁸

2. The Equality Concept

As we move from some of the preliminary matters to the core concepts embedded in section 15(1), the Court's guidance becomes less definitive. Before espousing the more idealized form of equality quoted above, McIntyre J. sounds a cautionary note about the limits of equality in the real world of the Charter.

This is not a general guarantee of equality; it does not provide for equality between individuals or groups within society in a general or abstract sense, nor does it impose on individuals or groups an obligation to accord equal treatment to others. It is concerned with the application of the law. No problem regarding the scope of the word "law", as employed in s. 15(1), can

²⁶ *Supra* note 4 at 178.

²⁷ The Americans have restricted constitutional protection against discrimination under the Fourteenth Amendment to intentional discrimination. Their human rights legislation goes further than this.

²⁸ *Supra* note 4 at 165.

arise in this case because it is an Act of the Legislature which is under attack. Whether other governmental or *quasi-governmental* regulations, rules, or requirements may be termed laws under s. 15(1) should be left for cases in which the issue arises.²⁹

It appears that McIntyre J. does not attach very much significance to the detailed expression of the four equalities in section 15(1), and that for him “without discrimination” is the crucial phrase.

Justice La Forest envisions a more expansive role for the opening words of section 15(1).

I am not prepared to accept at this point that the only significance to be attached to the opening words that refer more generally to equality is that the protection afforded by the section is restricted to discrimination through the application of law. It is possible to read s. 15 in this way and I have no doubt that on any view redress against that kind of discrimination will constitute the bulk of the courts' work under the provision. Moreover, from the manner in which it was drafted, I also have no doubt that it was so intended. However, it can reasonably be argued that the opening words, which take up half the section, seem somewhat excessive to accomplish the modest role attributed to them, particularly having regard to the fact that s. 32 already limits the application of the *Charter* to legislation and governmental activity. It may also be thought to be out of keeping with the broad and generous approach given to other *Charter* rights, not the least of which is s. 7, which like s. 15 is of a generalized character. In the case of s. 7, it will be remembered, the Court has been at pains to give real meaning to each word of the section so as to ensure that the rights of life, liberty and security of the person are separate, if closely related rights.³⁰

In the next breath La Forest J. reverts to a more cautious deference to legislative choices, which, based on his abrupt dismissal of the equality claim in *Reference Re Workers' Compensation Act*,³¹ is likely more reflective of his general approach to section 15. He states:

That having been said, I am convinced that it was never intended in enacting s. 15 that it become a tool for the wholesale subjection to judicial scrutiny of variegated legislative choices in no way infringing on values fundamental to a free and democratic society. Like my colleague, I am not prepared to accept that *all* legislative classifications must be rationally supportable before the

²⁹ *Id.* at 163-64.

³⁰ *Id.* at 193. This broad formulation of s. 15 is intriguing because it would allow an extension of the section beyond “enumerated and analogous grounds.” It appears to leave open s. 15 protection for distinctions which result in a denial of fundamental values — an analysis that has been accepted in the United States and is implicitly referred to by La Forest J., at 194 in his *Andrews* opinion.

³¹ *Supra* note 16.

courts. Much economic and social policy-making is simply beyond the institutional competence of the courts: their role is to protect against incursions on fundamental values, not to second guess policy decisions.³²

In *Andrews* itself, Wilson J. concurs with the concept of equality in section 15 of the Charter as stated by McIntyre J. The approach that she takes to the definition of discrimination in section 15 of the Charter in both *Andrews* and later in *R. v. Turpin*,³³ suggests that she has a view different from that of La Forest J. on the scope of equality in section 15 of the Charter.³⁴ On the facts of *Turpin*, the alleged discrimination was based on province of residence. In Alberta a person charged with murder could elect to be tried by judge alone, as well as by judge and jury, while residents of all other provinces could only be tried by judge and jury.³⁵ Justice Wilson has no difficulty in concluding that there is a violation of one of the four equalities, although she concludes that there is at the end of the day no discrimination and thus no section 15 violation. In spite of the fact that during the evolution of section 15 the heading for the section was changed from “non-discrimination rights” to “equality rights,” the primary focus of the Court in *Andrews* is the former and not the latter concept.

3. Discrimination

Justice McIntyre in *Andrews* could not be much clearer in rejecting the “similarly situated” analysis of discrimination adopted by a host of lower courts. Under this mode of analysis, a court had to decide whether individuals or groups were similarly situated before determining whether different treatment was appropriate. The Court speaks forcefully in dismissing this analysis.

³² [1989] 1 SCR 143 at 194.

³³ [1989] 1 SCR 1296.

³⁴ Gibson, *supra* note 11 at 152-56, suggests that Wilson J. links discrimination in s. 15(1) to group disadvantage and powerlessness in a way that unnecessarily restricts the scope of equality. In large measure he seems to be objecting to Wilson J.'s communitarian approach to interpreting s. 15 which he feels would exclude deserving individual cases.

³⁵ The challenged provisions in the *Criminal Code* has since been removed and all provinces are now subject to the same rules. At 1334-35 in *Turpin*, *supra* note 33, Wilson J. makes the tantalizing suggestion that such equal treatment might be mandated by s. 7 of the Charter.

As section 7 of the *Charter* was not pleaded in this case I make no comment to whether equal application of the criminal law to all persons in Canada constitutes a principle of fundamental justice within the meaning of that section.

The test as stated, however, is seriously deficient in that it excludes any consideration of the nature of the law. If it were to be applied literally, it could be used to justify the Nuremberg laws of Adolf Hitler. Similar treatment was contemplated for all Jews.³⁶

Dale Gibson argues that McIntyre J. could not have intended to totally dismiss the “similarly situated” analysis, but only to condemn its mechanical application to produce perverse effects.

While these words could be construed, if read in a vacuum, as a complete rejection of a similarly situated idea, it would be a mistake to do so. What was rejected was employment of the notion “as a fixed rule or formula”. It seems clear from his preceding remarks that Mr. Justice McIntyre intended this to mean applications of the test which would permit unequal treatment to be excused by *any* differences between persons or groups, without regard to whether the differences were relevant to the activity in question. Such blind or mischievous uses of the formula stand condemned.³⁷

We agree in part with Gibson’s comments, as a problem only really arises where irrelevant differences rather than crucial and relevant ones are used to distinguish groups or individuals. The test is similarity, not identity. It is our view, nonetheless, that the Court did intend a more general rejection of the “similarly situated” test as a way of reducing the scope of section 15 to more manageable limits.³⁸ Mark Gold also argues that the Court could not have intended to totally banish the “similarly situated” test.

Finally, even if the similarly situated test has been rejected as a test in all cases, it would be wrong to assume that the essence of it disappears from equality analysis under the *Charter*. Wherever a legislative distinction burdens one group at the expense of another such that section 15 is violated, the section 1 analysis will have to confront the question of whether there are differences between these two groups that would justify the different treatment. Indeed, it is precisely because the principle of formal equality is so question-begging that it cannot be banished from the analysis altogether. It is like pushing in a bump on a balloon. It may be flattened, but the bump will reappear at some other place on the balloon.³⁹

³⁶ *Supra* note 32 at 166.

³⁷ *Supra* note 11 at 73.

³⁸ Justices McIntyre and La Forest would likely see this as a way of limiting judicial discretion in the shaping of equality, while Wilson J. would see it as a way of focusing s. 15 on disadvantaged groups in society rather than *any* “similar” groups receiving different treatment. This analysis of Wilson J.’s views would explain why Black and Smith, *supra* note 6, who favour a communitarian approach to s. 15, applaud the rejection of the test and Gold, *supra* note 12, and Gibson, *supra* note 11 lament the narrowing of the Charter’s scope for both group and individual claims.

³⁹ *Supra* note 12 at 34.

We agree that this is the fate of the test after *Andrews*.

In what has already become a much quoted definition of discrimination, McIntyre J. states:

I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.⁴⁰

The focus on personal characteristics, which reinforces the exclusion of corporations from the ambit of section 15,⁴¹ also limits the reach of the Charter by limiting the unenumerated grounds of discrimination. This is the genesis of the enumerated and analogous grounds approach. The gist of this analysis is to look to the listed grounds for common characteristics and then define the analogous grounds in relation to these characteristics. One such characteristic is that all the listed grounds represent aspects of personhood and are in that respect personal. In *Andrews* citizenship is held to be a personal characteristic analogous to the listed grounds, while province of residence in *Turpin* is not so construed.

Another possible common characteristic is a degree of immutability — not in the sense the characteristic cannot be changed, but that it would be difficult to do so. This provides one of the bases upon which *La Forest J.* categorizes citizenship as a ground analogous to those listed in section 15 of the Charter.

The characteristic of citizenship is one typically not within the control of the individual and, in this sense, is immutable. Citizenship is, at least temporarily, a characteristic of personhood not alterable by conscious action and in some cases not alterable except on the basis of unacceptable costs.

Moreover, non-citizens are an example without parallel of a group of persons who are relatively powerless politically, and whose interests are likely to be compromised by legislative decisions.⁴²

⁴⁰ *Supra* note 32 at 174-75.

⁴¹ In March 1990 the Supreme Court dismissed s. 15 claims on the part of corporations in *R v Zutphen Brothers and Wolf and Noranda Inc v The Queen* (the former on appeal from *Dywidag Systems International Canada Ltd v Zutphen Bros Construction Ltd* (1987) 76 NSR (2d) 398 (SC AD) and the latter from *Rudolph Wolff & Co v Canada* (1987) 26 CPC (2d) 166 (Ont SC), appeal dismissed by Ont. C.A., March 7, 1988).

⁴² *Supra* note 32 at 195.

The reference to powerlessness shifts the analysis from individual characteristics to group identifications. Both McIntyre J. and Wilson J. use the term “discrete and insular minorities”⁴³ in *Andrews* as one way of describing the necessary characteristic of the disadvantaged group. Justice Wilson returns to this phraseology in *Turpin*, although she does not expand on its meaning in the Canadian context. It would be difficult to argue that all the groups listed in section 15 are “discrete and insular minorities” and we are inclined to agree with Dale Gibson that the phrase is not a particularly helpful one.⁴⁴

Unlike Gibson, however, we are attracted to the idea of using section 15 of the Charter to advance powerless and disadvantaged groups rather than a wider range of groups and individuals.⁴⁵ To make section 15 broadly available to all groups and individuals would dilute its impact. We also applaud Justice Wilson’s emphasis on the group or communitarian aspects of section 15 of the Charter in contrast to the more individualistic interpretations of many of the other sections of the Charter.⁴⁶ The need to look at the broader group context is emphasized by Wilson J. in *Andrews*.

I would conclude therefore that non-citizens fall into an analogous category to those specifically enumerated in s. 15. I emphasize, moreover, that this is a determination which is not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society. While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others.⁴⁷

She returns to this theme again in *Turpin*, and asserts that a failure to look to the larger context in defining discrimination would reduce the “analogous grounds” approach to the same mechanical and sterile approach as characterized the similarly situated test, rejected in *Andrews*.⁴⁸ Lest there be any doubt she states:

⁴³ The term is an American one coined in *US v Carolene Prod Co* 304 US 144 (1938) at 152-53 n 4.

⁴⁴ *Supra* note 11 at 150-52.

⁴⁵ Of course Gibson does not object to s. 15 being used to advance the rights of powerless groups in society, but he does suggest that restricting it to those purposes is faulty: *id.* at 152-56. Black & Smith, *supra* note 6, applaud the Wilson analysis as a way of making the equality guarantee more meaningful for those who need it.

⁴⁶ This is a good example of the legal and political philosophies of the judges colouring their approach to equality, or any other Charter guarantee. See MacKay, “Judging and Equality: For Whom Does the Charter Toll?” in Boyle, MacKay, McBride & Yogis (eds.), *Charterwatch: Reflections on Equality* (1986) at 35.

⁴⁷ *Supra* note 32 at 152.

⁴⁸ [1989] 1 SCR 1296 at 1332.

A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged.⁴⁹

Heeding its own cautions in both *Andrews* and *Turpin*, the Court does not go too far in defining the difficult concepts enshrined in section 15 of the Charter. It does, however, make an impressive beginning.

4. The Section 1 Analysis

On the question of applying the section 1 reasonable limits clause to save the discrimination in *Andrews*, the justices disagree on both the approach and the result. Chief Justice Dickson and Justices Wilson and L'Heureux-Dubé apply the *Oakes* test with full vigour and conclude that the citizenship requirement cannot be saved.⁵⁰ Justice La Forest reaches the same conclusion as the majority by applying the *Oakes* test in a more flexible way.

If I have any qualifications to make, it is that I prefer to think in terms of a single test for s. 1, but one that is to be applied to vastly differing situations with the flexibility and realism inherent in the word "reasonable" mandated by the Constitution.

The degree to which a free and democratic society such as Canada should tolerate differentiation based on personal characteristics cannot be ascertained by an easy calculus.⁵¹

Justice McIntyre, Lamer J. concurring, adopts a more relaxed section 1 analysis than that mandated in *Oakes*, and concludes that the citizenship requirement can be saved as a reasonable limit on equality.

Public policy, of which the citizenship requirement in the *Barristers and Solicitors Act* is an element, is for the Legislature to establish. The role of the Charter, as applied by the courts, is to ensure that in applying public policy the Legislature does not adopt measures which are not sustainable under the Charter. It is not, however, for the courts to legislate or to substitute their views on public policy for those of the Legislature.⁵²

⁴⁹ *Id.* at 1332. Wilson J. also emphasizes the importance of interpreting equality in its specific factual context.

⁵⁰ *R v Oakes* [1986] 1 SCR 103. Black & Smith, *supra* note 6 at 613, argue for rigorous application of s. 1 in the equality context. They suggest that the test should be even more strictly applied where the ground of discrimination is more closely linked to human dignity. Wilson J. in *Andrews*, *supra* note 32 at 154 indicates that there might have to be some relaxation of the *Oakes* standard if every distinction necessitated a s. 1 analysis. That is not the case, so there is no need to lower the standard.

⁵¹ *Supra* note 32 at 198.

⁵² *Id.* at 190.

While La Forest J. claims to be applying the *Oakes* standard, he indicates in other passages sympathy with the approach enunciated by McIntyre J. above.

Much economic and social policy-making is simply beyond the institutional competence of the courts: their role is to protect against incursions on fundamental values, not to second guess policy decisions.⁵³

On this approach to section 1 of the Charter, the justices reflect divisions within the Court to which we will return at the end of this article. Suffice it to say that the differences are indicative of conflicting views about the proper role of the courts in restricting legislative action. With respect to the merits of the case, there are interesting discussions about whether being a Canadian citizen is vital to the practice of law. While the majority finds no rational and proportional link between citizenship and lawyering, Justices McIntyre and Lamer dissent, based on a more exalted view of the role of the lawyer in public life. We agree with the majority of the Court that citizenship is not rationally linked to lawyering, and should not be saved as a reasonable limit on the denial of equality to non-citizens. The merits of the case, however, merely provide a back drop for the larger issues of giving shape to equality.

III. ECONOMIC RIGHTS AND THE CONSTITUTION

One of the aspects of constitutional law which has become more apparent in recent years is the impact of constitutional decisions on Canada's economic life. The economic impact of Supreme Court rulings is not new, but there is greater public awareness that there is such an impact. Even before the arrival of the Charter in 1982, decisions about the scope of the trade and commerce power, the constitutional validity of anti-inflation legislation, and the control of natural resources provided examples of the Court's economic impact. Determinations about the scope of the federal spending power, the control of federal undertakings, and the proper constitutional framework for labour relations are equally illustrative. As with many other aspects of the Court's role, it is its Charter interpretations which have raised the Court's profile as a significant economic actor.⁵⁴ The equality guarantees in section 15 of the

⁵³ *Id.* at 194. We question why McIntyre and La Forest JJ. do not express a similar concern about judicial review in the social and economic domain in *Black v Law Society of Alberta* [1989] 1 SCR 591.

⁵⁴ The emergence of the Supreme Court of Canada as a significant player in the Canadian economy was recognized in the Royal Commission on the Canadian Economic Union and Development Prospects (the Macdonald Commission — 1985). See MacKay & Bauman, "The Supreme Court of Canada: Reform Implications for an Emerging National Institution," in Beckton and MacKay, *The Courts and the Charter* (1985), vol. 58 of the research reports under the Macdonald Commission, at 37-131.

Charter have the potential for wide-spread economic consequences, and it may be this recognition that partly explains the Court's cautious approach to equality. The cases in the 1988-89 Term also offer some guidance to other Charter guarantees of economic significance — sections 2, 6 and 7, where the Court does not always exhibit the deference on social and economic matters signaled in *Andrews*⁵⁵ and its companion cases.

1. Provincial Economic Regulation

(a) *Charter Limitations on Economic Policy-Making*

The Supreme Court has taken a more interventionist approach to the Charter than many observers predicted it would do. One exception to this generalization is in the area of social and economic policy-making. Even though some of its earliest cases, such as *R. v. Big M Drug Mart Ltd.*⁵⁶ and *R. v. Edwards Books & Art Ltd.*,⁵⁷ had a direct and important economic impact, the Court was cautious about second guessing the legislators on matters of economic policy. This signal of caution and deference was clearly delivered by both McIntyre and La Forest JJ. in *Andrews*,⁵⁸ as discussed in the preceding section. It would appear that the Court will also be reluctant to use section 7 of the Charter to rearrange economic affairs, and this is consistent with the reluctance of lower courts to use section 7 to give effect to economic claims.⁵⁹ In respect to claims of commercial expression under section 2(b) and mobility claims under section 6 of the Charter, the Court appears more willing to enter the economic fray.

(i) Economic Intervention: *Black*

Section 6 of the Charter is about as close as the Canadian Constitution comes to expressly entrenching an economic right. While the Supreme Court, in *Law Society of Upper Canada v. Skapinker*,⁶⁰ was quick to put

⁵⁵ *Supra* note 32.

⁵⁶ [1985] 1 SCR 295.

⁵⁷ [1986] 2 SCR 713.

⁵⁸ *Supra* note 32 at 190, 194.

⁵⁹ One exception to this pattern is *Wilson v British Columbia (Medical Services Commission)* (1988) 53 DLR (4th) 171 (BCCA). Leave to appeal to the Supreme Court was sought, but denied. The case involved a challenge to British Columbia's allocation of doctors' billing numbers designed to increase the number of doctors in rural areas. It is possible the case may be explained by the characterization of the right to practise a profession as a matter of dignity rather than pure economics.

⁶⁰ [1984] 1 SCR 357.

to rest the idea that section 6 contains a free standing right to a livelihood, an economic component is clear from the wording of the section.

Mobility Rights

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

- (a) to move to and take up residence in any province; and
- (b) to pursue the gaining of a livelihood in any province.

(3) The rights specified in subsection (2) are subject to

- (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
- (b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

A majority of the Supreme Court decides to take a second look at section 6 in *Black v. Law Society of Alberta (Black)*,⁶¹ even though the issues could have been disposed of based on section 2(d) of the Charter — the guarantee of freedom of association. Indeed, the dissenters in *Black* deal with the issues primarily on the basis of section 2(d). In our view, this is the less expansive way to invalidate the challenged statutory provisions, and it is rather surprising that the majority deals with the case pursuant to section 6. It appears that La Forest J., who writes for the majority, wanted to explore the ambit of mobility rights in section 6, while McIntyre J., who writes the dissent, believes that section 2(d) is the least intrusive way to dispose of the case.⁶²

The litigation in *Black* was precipitated by efforts on the part of the large Toronto law firm of McCarthy and McCarthy to form an interprovincial law firm by setting up a branch office in Calgary, Alberta. Originally the branch in Calgary was going to operate under the McCarthy name, but they eventually named it Black and Co. Although neither of the Supreme Court judgments, nor those of the lower courts, admit this point, we suggest that the crux of the problem, at a political level, was the invasion of the western legal market by a large “central Canadian” law firm. Notwithstanding the lofty claims of the Alberta Law Society that their concerns were for the consumer of legal services in

⁶¹ *Supra* note 53.

⁶² Dickson C.J. and Wilson J. concur in the majority judgment of La Forest J., while L'Heureux-Dubé J. concurs in McIntyre J.'s dissenting opinion.

Alberta, we propose that the crucial concern was an economic one — outside competition.⁶³

Whatever its real concerns, the Alberta Law Society enacted two rules in response to the McCarthy “invasion,” and it is these rules which were the subject of the constitutional challenge. These rules read as follows:

154. An active member who ordinarily resides in and carries on the practice of law within Alberta shall not enter into or continue any partnership, association or other arrangement for the joint practice of law in Alberta with anyone who is not an active member ordinarily resident in Alberta.

75B. No member shall be a partner in or associated for the practice of law with more than one law firm.

Black was successful in getting an interlocutory injunction to prevent the Alberta Bar from enforcing these rules against him while the issue was before the courts.⁶⁴ The interlocutory injunction preventing the enforcement of Rule 75B was set aside on appeal.⁶⁵ When the matter came up for determination at the main trial, Mr. Black lost at first instance, but won on appeal, before his case reached the Supreme Court of Canada.⁶⁶

One of the first things to note about La Forest J.’s majority analysis of the section 6 issue is his broad purposive and contextual analysis, which draws on a wide range of sources. No doubt drawing upon his days as a Professor of constitutional law, he asserts that national economic union was one of the central purposes of Confederation.

The concept of Canada as a single country comprising what one would now call a common market was basic to the Confederation arrangements and the drafters of the *British North America Act* attempted to pull down the existing internal barriers that restricted movement within the country.

⁶³ It is interesting to note that Quebec’s Attorney General was the only one to intervene in this case, and he intervened on behalf of the Law Society of Alberta. Presumably Quebec would be just as resistant to Toronto law firms attempting to set up shop in Quebec.

⁶⁴ *Black v Law Society of Alberta* (1983) 144 DLR (3d) 439 (Alta QB).

⁶⁵ *Law Society of Alberta v Black* (1983) 8 DLR (4th) 346 (Alta CA).

⁶⁶ At trial ((1984) 33 Alta LR (2d) 214 (QB)), Dea J. dismissed the challenge on the basis that s. 2(d) did not extend to “commercial” associations, but only ones in pursuit of subsections 2(a), (b), and (c). He found a s. 6 violation, but saved Rule 75B under s. 6(3), and Rule 154 under s. 1 of the Charter.

On appeal ((1986) 44 Alta LR (2d) 1 (CA)), both Kerans and Stevenson JJ.A. reject the trial judge’s narrow view of s. 2(d), and conclude that both rules violate this section and cannot be saved. They also find Rule 154 violated s. 6 and cannot be saved. Both judges apply s. 6(3)(a) to save Rule 75B in respect to the s. 6 challenge. It is noteworthy that all three judges who wrote below saved Rule 75B by using s. 6(3), since the Supreme Court rejects this analysis.

Section 121 of the *Constitution Act, 1867*, was one of the pillars of the Confederation scheme for achieving the economic union sought by the Fathers of Confederation. It provides:

121. All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other provinces.⁶⁷

Justice La Forest also cites, with approval, earlier judgments of Justices Rand and Laskin (as he then was) interpreting sections 91 and 92 of the *Constitution Act, 1867* in light of the importance to Confederation of a national economic union.⁶⁸ Referring again to the work of Justice Ivan Rand in *Winner v. S.M.T. (Eastern) Ltd.*,⁶⁹ he cites, with approval, his link between mobility across provincial borders and the status of Canadian citizenship.

What this implies is that a province cannot, by depriving a Canadian of the means of working, force him to leave it: it cannot divest him of his right or capacity to remain and to engage in work there: that capacity inhering as a constituent element of his citizenship status is beyond nullification by provincial action.

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It follows, *a fortiori*, that a province cannot prevent a Canadian from entering it except, conceivably, in temporary circumstances, for some local reason as, for example, health. With such a prohibitory power, the country could be converted into a number of enclaves and the "union" which the original provinces sought and obtained disrupted.⁷⁰

The use of pre-Charter jurisprudence to elucidate the meaning of section 6 of the Charter is laudable, and underscores the interconnection of all parts of the Canadian Constitution. Building upon Rand J.'s links between citizenship, mobility and the economy, La Forest J. makes the following statement about section 6 of the Charter.

Citizenship and nationhood are correlatives. Inhering in citizenship is the right to reside wherever one wishes in the country and to pursue the gaining of a livelihood without regard for provincial boundaries. Under *Charter* disposition, that right is expressly made applicable to citizens and permanent residents alike. Like other individual rights guaranteed by the *Charter*, it must be interpreted generously to achieve its purpose to secure to all Canadians and

⁶⁷ *Supra* note 53 at 609.

⁶⁸ *Murphy v Canadian Pacific Railway Co* [1958] SCR 626 at 638 *per* Rand J. and *AG Manitoba v Manitoba Egg and Poultry Assn* [1971] SCR 689 at 717 *per* Laskin J.; cited with approval, *id.* at 609-10.

⁶⁹ [1951] SCR 887.

⁷⁰ *Id.* at 919-20; cited with approval in *Black*, *supra* note 53 at 611.

permanent residents the rights that flow from membership or permanent residency in a united country.⁷¹

On the merits of the case, La Forest J. has no difficulty in concluding that both Rule 154 and Rule 75B violate section 6 of the Charter. While Mr. Black and his associates are not denied a livelihood, their pursuit of one in the province of Alberta is seriously impaired.⁷² Looking closely at the effects rather than the declared purposes of the challenged Bar Society Rules, La Forest J. notes that a non-resident lawyer can practise law in Alberta, but not associate with a resident lawyer for that purpose. From this he concludes that the only economically feasible way to practise in Alberta is to take up residence there. One does not have to move to another province in order to trigger section 6. Justice La Forest correctly concludes that the operation of an interprovincial law firm would necessitate movement between provinces sufficient to meet the mobility requirement of section 6(2)(b).⁷³

The majority in *Black* also concludes that the challenged Rules cannot be saved. Justice La Forest rules that section 6(3)(a) cannot be used to save these Rules because they do discriminate “primarily on the basis of province of present or previous residence.”⁷⁴ He surmises that the courts below reached a different conclusion in respect to Rule 75B and section 6(3)(a) by focusing too much on the declared purposes and not enough on the effects of the Rule. The appellant’s arguments under section 1 of the Charter about the practice of non-members, local competence, insurance problems, discipline, and lack of access to support programs do not convince the majority of the Court. The tone of the Court’s rejection is revealed in the following passage from La Forest J.’s opinion.

There is no evidence that non-resident members are less competent to deal with local matters and there is no reason to believe that this is in fact the case. As the United States Supreme Court has noted in *Supreme Court of New Hampshire v. Piper*, *supra*, at p. 285, a non-resident lawyer is likely to have a substantial incentive, as a practical matter, to familiarize himself or herself

⁷¹ *Supra* note 53 at 612. La Forest J. also buttresses his position on mobility as an aspect of citizenship by referring to the relevant American jurisprudence under Article IV, s. 2(1) of the United States Constitution. In particular he refers to *Supreme Court of New Hampshire v. Piper* 470 US 274 (1985).

⁷² *Supra* note 53 at 618-19, citing *Re Mia and Medical Services Commission of British Columbia* (1985) 17 DLR (4th) 385 (BCSC) and *Wilson v British Columbia (Medical Services Commission)* *supra* note 59 La Forest J. concludes that “disadvantage” short of denial of livelihood still can violate the Charter.

⁷³ In *Skapinker*, *supra* note 60 at 382, Estey J. insists that there must be an interprovincial element to trigger s. 6 of the Charter.

⁷⁴ Based on this conclusion, he does not consider whether the Rules are “law of general application” within the meaning of s. 6(3).

with local rules if he or she intends to sustain any kind of local practice or reputation.⁷⁵

Even if La Forest J. were convinced by the Alberta Bar's objectives, he concludes that there were clearly less intrusive means to deal with problems of confidentiality and conflicts of interest.⁷⁶ The fatal element in the Alberta Bar's response was the blanket nature of the rules.

The fact that the appellant did not even consider anything less than a blanket prohibition is in my view revealing. There are many reasonable alternatives for obtaining the legislative purpose aimed at without so drastically affecting these mobility rights. The rule is not reasonably justified as required by s. 1, and it is therefore of no force or effect.⁷⁷

Justice McIntyre, in partial dissent, does not regard this as a section 6 Charter case at all. Instead he concludes, without much analysis, that there is a violation of freedom of association under section 2(d) of the Charter. In respect to Rule 154 he states:

Nobody is forbidden entry into Alberta and nobody is prohibited from practising law or forming a partnership in Alberta. The sole restriction imposed by the rule is upon the ability of resident members to form associations or partnerships with non-resident members. While this restriction no doubt offends the provisions of s. 2(d) of the *Charter*, which guarantee freedom of association, I cannot see where s. 6 or any of its subsections is in any way violated. In my view, therefore the proper constitutional provision engaged is s. 2(d) and not s. 6.⁷⁸

His conclusion is the same with respect to Rule 75B.

Nobody is denied entry into the province of Alberta, nor is anyone barred from the practice of law. Again, however, the guarantee in s. 2(d) is infringed.⁷⁹

Justice McIntyre is engaging in a technical reading of the rules, whereas Justice La Forest is considering their practical effects. The latter approach is more consistent with a purposive interpretation of the Charter.

Justice McIntyre is in agreement with the majority that Rule 154 is not saved by section 1 of the Charter. He does, however, conclude that Rule 75B is a reasonable limit on freedom of association. Stressing the importance of avoiding conflicts of interests in the practice of law,

⁷⁵ *Supra* note 53 at 629.

⁷⁶ *Id.* at 609. La Forest J. cites Kerans J.A.'s list of four less intrusive ways to pursue the declared objectives.

⁷⁷ *Supra* note 53 at 633.

⁷⁸ *Id.* at 636.

⁷⁹ *Id.*

McIntyre J. concludes that the interference with the right is minimal in relation to the purposes to be achieved. As was the case in *Andrews*,⁸⁰ McIntyre J. appears to be willing to relax the application of the *Oakes* test in deference to the needs of the legal profession, as defined by the Bar. We prefer the position taken by La Forest J., speaking for the majority of the Court.⁸¹ It is more consistent with the broad and purposive interpretation of the Charter that the Court repeatedly has urged. It is interesting to see that McIntyre J. is much more vigilant in the application of the *Oakes* test in the context of commercial expression.

(ii) Further Intervention for Commercial Expression: *Ford* and *Irwin Toy*

The issue of commercial expression provided the Supreme Court with a dilemma. On the one hand it was eager to give section 2(b) of the Charter a broad and expansive reading, but on the other hand it had been reluctant to read economic rights into general Charter guarantees. Commercial expression could not be explained as easily as mobility rights in section 6 of the Charter, because neither the wording of section 2(b) nor its historical context indicated that the section embraced economic rights. The Attorney General of Quebec argued against the inclusion of commercial expression within section 2(b) because of its economic character, but to no avail. In both *Ford v. Quebec (Attorney General)*⁸² (*Ford*) and *Irwin Toy Ltd. v. Quebec (Attorney General)*⁸³ (*Irwin Toy*) the Court comes down clearly on the side of an expansive approach to section 2(b), which includes commercial expression.

In *RWDSU v. Dolphin Delivery Ltd.*⁸⁴ (*Dolphin Delivery*) the Court kept open the concept of freedom of expression, and did not limit it to political speech. Lower courts had divided on whether to include or exclude commercial expression within the Charter, and the Court exam-

⁸⁰ [1989] 1 SCR 143.

⁸¹ In many circumstances, serious conflicts of interest would be caused by someone being a partner in two law firms (such that firms would likely not accept such an arrangement). However, in the circumstances of *Black*, although there are two separate firms for some purposes, it is clear that Black and Co. and McCarthy and McCarthy would have to be treated as a single firm for conflict of interest purposes, thereby taking care of the problem.

⁸² [1988] 2 SCR 712.

⁸³ [1989] 1 SCR 927.

⁸⁴ [1986] 2 SCR 573. McIntyre J., speaking for the Court, relied heavily upon the importance of political expression in a democratic society but did not limit s. 2(b) to the pursuit of such interests. It should also be noted that the picketing at issue in the case has a clear economic component as well.

ines both lines of authority⁸⁵ in *Ford*, which reached the Court before *Irwin Toy*.⁸⁶ Concluding that this is a section of the Charter where American jurisprudence is relevant,⁸⁷ the Court notes that commercial speech is protected under the First Amendment to the United States Constitution, but that offending legislation is subjected to a lower level of scrutiny.

In *Ford* the issue was whether sections 58 and 69 of the *Charter of the French Language*,⁸⁸ dealing with commercial advertising and firm names, violated freedom of expression. These provisions required that advertising be done only in the French language. The challenge was based on both section 2(b) of the Charter and section 3 of the Quebec *Charter of Human Rights and Freedoms*.⁸⁹ The controversial language and human rights aspects of this case are explored later in this article. In respect to the issue of commercial expression, the Court asks why it should be excluded rather than why it should be included.

The issue in the appeal is not whether the guarantee of freedom of expression in s. 2(b) of the Canadian *Charter* and s. 3 of the Quebec *Charter* should be construed as extending to particular categories of expression, giving rise to difficult definitional problems, but whether there is any reason why the guarantee should not extend to a particular kind of expression, in this case the expression contemplated by ss. 58 and 69 of the *Charter of the French Language*.⁹⁰

In order to answer the question, the Court turns to the theories of free speech that have emerged in the United States, and cites Robert Sharpe's reformulation of these rationales.

The first is that freedom of expression is essential to intelligent and democratic self-government . . . The second theory is that freedom of expression protects an open exchange of views, thereby creating a competitive marketplace of ideas which will enhance the search for the truth. . . .

⁸⁵ *Re Klein and Law Society of Upper Canada* (1985) 50 OR (2d) 118 (Div Ct) excluded commercial expression. *Re Grier and Alberta Optometric Association* (1987) 42 DLR (4th) 327 (Alta CA), and *Irwin Toy Ltd v Quebec (Attorney General)* [1986] RJQ 2441 (CA) embrace commercial expression.

⁸⁶ *Supra* note 82 at 759-64.

⁸⁷ *Id.* at 756-59. Particular reference was made to *Virginia Pharmacy v Virginia Consumer Council* 425 US 748 (1976).

⁸⁸ R.S.Q. 1977, c. C-11.

⁸⁹ R.S.Q. 1977, c. C-12.

⁹⁰ *Supra* note 82 at 755-56.

The third theory values expression for its own sake. On this view, expression is seen as an aspect of individual autonomy. Expression is to be protected because it is essential to personal growth and self-realization.⁹¹

In accepting the commercial expression argument and finding that the challenged statutory provisions are in violation of it, the Court states:

Over and above its intrinsic value as expression, commercial expression which, as has been pointed out, protects listeners as well as speakers plays a significant role in enabling individuals to make informed economic choices, an important aspect of individual self-fulfillment and personal autonomy.⁹²

This is a rather broad formulation for a Court which has been reluctant to protect economic rights. Courts, in defining "individual self-fulfillment" and "personal autonomy," could bring almost any economic activity within section 2(b) of the Charter.⁹³ While some commentators are happy with the Court's balancing of competing theories of expression, we feel that the Court went further than necessary in *Ford* in opening section 2(b) to economic claims.⁹⁴

Our concerns about the Court's expansive approach to section 2(b) are alleviated by the fact that the Charter involves a two-stage analysis. The Court clearly states that the proper place for the balancing of competing interests in particular factual contexts is in section 1 of the Charter.

First, consideration will be given to the interests and purposes that are meant to be protected by the particular right or freedom in order to determine whether the right or freedom has been infringed in the context presented to the court. If the particular right or freedom is found to have been infringed, the second step is to determine whether the infringement can be justified by the state within the constraints of s. 1. It is within the perimeters of s. 1 that courts will in most instances weigh competing values in order to determine which should prevail.⁹⁵

We agree with the Court in this approach, which settles conflicting lines of authority about whether interests should be balanced in the definition of the right itself.

⁹¹ Sharpe, "Commercial Expression and the Charter" (1987), 37 U. of T.L.J. 229 at 232; cited with approval in *Ford*, *supra* note 82 at 765.

⁹² *Supra* note 82 at 767.

⁹³ This is particularly true in the materialistic world in which we live, where individual self-fulfillment is often defined in economic terms.

⁹⁴ McAlpine & Donovan, "*Ford v. Quebec (Attorney General)*, *Irwin Toy v. Quebec (Attorney General)* (1989), 23 U.B.C. Law Rev. 615, are pleased with the Court's broad definition of commercial expression. We have concerns about who will really be protected by s. 2(b) if it relies too heavily on liberal and individualistic theories developed in the United States. See MacKay, "Freedom of Expression: Is It All Just Talk?" (1989), 68 Can. Bar Rev. 713 at 714-24 and 763-64, in particular.

⁹⁵ *Supra* note 82 at 766.

The treatment of the section 1 issue in *Ford* is really about balancing the language rights of Quebec's francophone majority and its anglophone minority, and it is discussed under "language rights" later in this article. In its approach to the section 1 issue, the Court establishes that the American courts have applied a test equivalent to Canada's *Oakes* test,⁹⁶ and can be used as a point of reference for the necessary interest balancing.

The *Central Hudson* test has been described as "an uneasy compromise" between competing strains of commercial speech theory. It is an attempt to balance the legitimacy of government regulations intended to protect consumers from harmful commercial speech with the belief that a free market in ideas and information is necessary to an informed and autonomous consumer.⁹⁷

This strain between the theory of a "free marketplace of ideas" and the demonstrated need for consumer protection is the essence of the situation in *Irwin Toy*.⁹⁸ In November 1980 the respondent, Irwin Toy Ltd., sought a declaration that sections 248 and 249 of the *Consumer Protection Act*⁹⁹ were unconstitutional. At trial it based its claim solely on the Quebec *Charter of Human Rights and Freedoms*¹⁰⁰ and lost its application.¹⁰¹ By the time the appeal was heard in *Irwin Toy*, the Charter was enacted and a claim based on section 2(b) of the Charter was added to those made at trial.¹⁰² Irwin Toy Ltd. won in the Quebec Court of Appeal,¹⁰³ but lost in the Supreme Court of Canada.

The challenged provisions of the *Consumer Protection Act* read as follows:

248. Subject to what is provided in the regulations, no person may make use of commercial advertising directed at persons under thirteen years of age.

⁹⁶ *R v Oakes* [1986] 1 SCR 103.

⁹⁷ *Supra* note 82 at 758. The case referred to is *Hudson Gas & Electric Co v Public Service Commission of New York* 447 US 557 (1980).

⁹⁸ *Supra* note 83. Stripped of the complexities of the politics of language in Quebec, it is in this case that the Court more fully articulates its views on commercial expression.

⁹⁹ R.S.Q. 1977, c. P-40.1.

¹⁰⁰ R.S.Q. 1977, c. C-12, s. 3. The equivalent treatment of this section and s. 2(b) of the Charter is discussed later in this article.

¹⁰¹ [1982] CS 96.

¹⁰² The Charter issue was heard on the merits in the Supreme Court of Canada, because the override provision in s. 364 of the *Consumer Protection Act* (validly enacted pursuant to s. 33 of the Charter) expired on June 23, 1987. The issue about whether this and related override provisions were constitutionally valid is explored in the later "general themes" section of this article.

¹⁰³ [1986] RJQ 2441 (CA).

249. To determine whether or not an advertisement is directed at persons under thirteen years of age, account must be taken of the context of its presentation, and in particular of

- (a) the nature and intended purpose of the goods advertised;
- (b) the manner of presenting such advertisement;
- (c) the time and place it is shown.

The fact that such advertisement may be contained in printed matter intended for persons thirteen years of age and over or intended both for persons under thirteen years of age and for persons thirteen years of age and over, or that it may be broadcast during air time intended for persons thirteen years of age and over or intended both for persons under thirteen years of age and for persons thirteen years of age and over does not create a presumption that it is not directed at persons under thirteen years of age.

The essence of the provisions is to restrict commercial advertising aimed at people under the age of 13. For the purposes of this analysis we will not delve into the complexities of the exemptions under the statute and related regulations. We need only note that the exemptions were extensive, leaving the main prohibition as advertising on television.¹⁰⁴

Writing for the majority in the Supreme Court is a triumvirate composed of Dickson C.J., Lamer and Wilson J.J.¹⁰⁵ Asserting that not all activity falls within the ambit of section 2(b), the Court questions whether advertising aimed at children is within reach of the section.¹⁰⁶ After a revealing discussion about the diverse range of human conduct covered by the concept of expression, the majority concludes that the facts of *Irwin Toy* are within the realm of section 2(b) of the Charter. The comments of the majority nourish seeds planted by McIntyre in *Dolphin Delivery*¹⁰⁷ that there is no clear line between speech and conduct.

¹⁰⁴ This raised a division of powers issue, to be discussed below.

¹⁰⁵ This is an unusual situation where a judgment is written collectively by three judges. The normal pattern is for one judge to write and the others to concur. Other than this, the Court writes anonymously for the whole Court, usually in politically sensitive cases, as it did in *Ford*, *supra* note 82. Perhaps *Irwin Toy* is the beginning of a new trend, or perhaps it was at some stage expected that *Irwin Toy* would be released simultaneously with *Ford*, favouring a parallel form of judgment.

¹⁰⁶ The Court uses for analogy the process by which it determined that a strike was not included within the conduct protected by s. 2(d): *Reference re Public Service Employees Relations Act (Alta)* [1987] 1 SCR 313. This decision ("the *Alberta Reference*") was much criticized by Petter & Monahan, "Developments in Constitutional Law: The 1986-87 Term" (1988), 10 *Supreme Court L. Rev.* 61 at 96. While we prefer the dissent of Chief Justice Dickson (Wilson J. concurring) in the *Alberta Reference*, we are disappointed that McIntyre J. and the majority of the Court were not as willing to read economic rights into s. 2(d) as he, and the whole Court, are willing to do in the context of commercial speech. The collective nature of the s. 2(d) right is seemingly the stumbling block.

¹⁰⁷ *Supra* note 84 at 588.

Conduct that conveys meaning is generally protected. Also as in *Dolphin Delivery*¹⁰⁸ the majority excludes violent conduct from the definition of protected expression in *Irwin Toy*.

The content of expression can be conveyed through an infinite variety of forms of expression: for example, the written or spoken word, the arts, and even physical gestures or acts. While the guarantee of free expression protects all content of expression, certainly violence as a form of expression receives no such protection.¹⁰⁹

Using the example of parking a car in protest over the allocation of parking spots, the majority in *Irwin Toy* is willing to define broadly the scope of protected expression. Moreover, the dissenters depart from their colleagues on the application of section 1 to limit expression rather than on the definition of the right. The words of the majority are eloquent in their breadth.

“Expression” has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That meaning is its content. Freedom of expression was entrenched in our Constitution and is guaranteed in the Quebec *Charter* so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec *Charter*, “fundamental” because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual.¹¹⁰

Although we generally applaud this expansive approach,¹¹¹ we fear that this definition may be so broad as to invite abusive applications, at least at lower court levels.

Shifting to an analysis of the purposes and effects of the challenged legislation, the majority concludes that it is acceptable to attempt to control the harmful physical consequences of expression, but not its content, or form that is clearly linked to content. If an anti-littering law is disguised as aiming at the harmful accumulation of litter, but is in fact aimed at preventing people from distributing pamphlets in the street, it is restricting the form of expression in such a way as to suppress content. Such a purpose would render the anti-litter law in violation of the

¹⁰⁸ *Id.* at 588.

¹⁰⁹ *Supra* note 83 at 969-70. This passage may provide a hint about how the Court will respond to the issues of hate propaganda currently before them.

¹¹⁰ *Id.* at 968.

¹¹¹ There is a delicious irony in this concerning the right to strike. Although the right to strike was excluded from freedom of association in the *Alberta Reference*, *supra* note 106, certain kinds of strikes with expressive purpose (*e.g.*, strikes like the 1976 National Day of Protest against wage controls) would seem to be *prima facie* protected under s. 2(b).

Charter, and is analogous to colourable attempt to circumvent sections 91 and 92 of the *Constitution Act, 1867*.¹¹²

In demonstrating that the purpose or effect of government action is a suppression of freedom of expression, the person claiming the right must show that her activity promotes at least one of the following purposes.

We have already discussed the nature of the principles and values underlying the vigilant protection of free expression in a society such as ours. They were also discussed by the Court in *Ford* (at pp. 765-067), and can be summarized as follows: (1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed.¹¹³

In respect to sections 248 and 249 of the *Consumer Protection Act*, the government fails the purposes analysis. Even though the restrictions at first appear to be “time, place and manner” restrictions, they are aimed at both form linked to content and the content of the message itself.¹¹⁴ The effects also interfere with freedom of expression. The discussion then shifts to the analysis of reasonable limits under section 1 of the Charter, and it is here that the majority and minority of the Court part company.

There was an argument that section 249 of the *Consumer Protection Act* was too vaguely worded to meet the test of “prescribed by law” in section 1 of the Charter. Putting the matter another way, it was suggested that the challenged sections left too much to judicial discretion. These contentions are rejected.

Absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies. On the other hand, where there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances, there is no “limit prescribed by law”.

Sections 248 and 249 do provide an intelligible standard to be applied in determining whether an advertisement is subject to restriction.¹¹⁵

¹¹² E.g. *Saumur v City of Quebec* [1953] 2 SCR 299.

¹¹³ [1989] 1 SCR 927.

¹¹⁴ *Id.* at 977-78.

¹¹⁵ *Id.* at 983.

Another preliminary issue was whether the Court should consider studies and evidence not available at the time the challenged sections were enacted. The Court is willing to consider this evidence. We agree with this conclusion.

Where the basis for its legislation is not obvious, the government must bring forward cogent and persuasive evidence demonstrating that the provisions in issue are justified having regard to the constituent elements of the s. 1 or s. 9.1 inquiry (see *R. v. Oakes*, *supra*, at p. 138). In showing that the legislation pursues a pressing and substantial objective, it is not open to the government to assert *post facto* a purpose which did not animate the legislation in the first place (see *Big M Drug Mart*, *supra*, at p. 335). However, in proving that the original objective remains pressing and substantial, the government surely can and should draw upon the best evidence currently available. The same is true as regards proof that the measure is proportional to its objective (see *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 769). It is equally possible that a purpose which was not demonstrably pressing and substantial at the time of the legislative enactment becomes demonstrably pressing and substantial with the passing of time and the changing of circumstances.¹¹⁶

In applying the section 1 *Oakes* test, the majority of the Court is mindful that the Quebec legislation is aimed at protecting a vulnerable group in society — children under 13 — against powerful ones — corporate advertisers.

Broadly speaking, the concerns which have motivated both legislative and voluntary regulation in this area are the particular susceptibility of young children to media manipulation, their inability to differentiate between reality and fiction and to grasp the persuasive intention behind the message, and the secondary effects of exterior influences on the family and parental authority. Responses to the perceived problems are as varied as the agencies and governments which have promulgated them. However the consensus of concern is high.¹¹⁷

This approach of protecting vulnerable groups is consistent with the vision, espoused in *Andrews*,¹¹⁸ of the Charter as a document aimed at protecting the disadvantaged and powerless in Canadian society. We agree with the majority in *Irwin Toy* that this vision entails a broad reading of Charter rights designed to enhance the disadvantaged, and a relaxed section 1 scrutiny of legislation directed to the same ends.

This relaxed approach was evidenced by the majority in *Irwin Toy* by its willingness to give the Quebec government the benefit of the doubt in

¹¹⁶ *Id.* at 984.

¹¹⁷ *Id.* at 987.

¹¹⁸ [1989] 1 SCR 143.

relation to the evidence about the harmful effects of advertising on children.

Where the legislature mediates between the competing claims of different groups in the community, it will inevitably be called upon to draw a line marking where one set of claims legitimately begins and the other fades away without access to complete knowledge as to its precise location. If the legislature has made a reasonable assessment as to where the line is most properly drawn, especially if that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the court to second guess.¹¹⁹

Not only is the majority willing to give the legislators a margin of appreciation in respect to its “pressing and substantial” objective, it also holds that the measures in issue were rationally connected, proportional, and not outweighed by the protected right. At this stage of the analysis, the majority in *Irwin Toy* recognizes that what the respondents were raising as a countervailing interest was increased corporate profits. It gives little weight to this economic value at the second (section 1) stage of Charter analysis, and does not return to the first stage discussion about the inherent value to the consumer of commercial speech in a “free marketplace of ideas.” We think that the section 1 analysis of the real beneficiaries of commercial expression is more accurate than that at the first stage.¹²⁰ At the end of the day, we are content that the majority in *Irwin Toy* puts the protection of vulnerable children above abstract values of commercial advertising.

Justice McIntyre, who writes the dissenting opinion for himself and Beetz J., agrees with the majority about the broad scope to freedom of expression, but disagrees that the challenged sections can be saved by section 1 of the Charter. Having argued for a relaxed application of the *Oakes* test in *Andrews*,¹²¹ he insists on its strict application in the

¹¹⁹ *Supra* note 113 at 990.

¹²⁰ MacKay, “Freedom of Expression: Is It All Just Talk,” *supra* note 94 at 741, states:

An important question is whether we can really trust companies or the media to fairly inform consumers. To raise the question is to answer it. In my view the Charter, as a remedial document, should be aimed at protecting those who are not well served by the political process.

Beckton, “Freedom of Expression (Section 2(b)),” in Beaudoin & Ratushny (eds.), *The Canadian Charter of Rights and Freedoms* (1989) at 195, states at 206 a more optimistic view of the value of commercial advertising:

Advertising serves the function of making individuals fully aware of the range of products and services that are available to them and therefore does have value.

¹²¹ *Supra* note 118 at 190.

context of commercial expression. Based upon this analysis, he is not convinced that the government has shown that children are harmed by commercial advertising.

Children live in a world of fiction, imagination and make believe. Children's literature is based upon these concepts. As they mature, they make adjustments and can be expected to pass beyond the range of any ill which might be caused by advertising. In my view, no case has been made that children are at risk. Furthermore, even if I could reach another conclusion, I would be of the view that the restriction fails on the issue of proportionality. A total prohibition of advertising aimed at children below an arbitrarily fixed age makes no attempt at the achievement of proportionality.¹²²

Relying on worst case scenarios, McIntyre J. demonstrates his liberal and individualistic values by insisting on the highest protection for freedom of expression.

In conclusion, I would say that freedom of expression is too important to be lightly cast aside or limited. It is ironic that most attempts to limit freedom of expression and hence freedom of knowledge and information are justified on the basis that the limitation is for the benefit of those whose rights will be limited. It was this proposition that motivated the early church in restricting access to information, even to prohibiting the promulgation and reading of the scriptures in a language understood by the people. The argument that freedom of expression was dangerous was used to oppose and restrict public education in earlier times. The education of women was greatly retarded on the basis that wider knowledge would only make them dissatisfied with their role in society.

Our concern should be to recognize that in this century we have seen whole societies utterly corrupted by the suppression of free expression. We should not lightly take a step in that direction, even a small one.¹²³

We would be more sympathetic to McIntyre J.'s analysis if he had shown a similar concern for the erosion of equality values in *Andrews*. Entering the slippery slope of legislative deference is as dangerous in the context of equality rights as in the context of fundamental freedoms. Our disagreement with McIntyre J. is one of values. He appears to be more attracted to the individual values of section 2, while we would consider group values under section 15 as at least as important.

(iii) Putting on the Brakes: Section 7 and *Irwin Toy*

The section 7 challenge in *Irwin Toy* was based on the doctrine of vagueness, but the Court does not find it necessary to address that issue,

¹²² *Supra* note 113 at 1007-08.

¹²³ *Id.* at 1008.

because it rules that corporations, such as *Irwin Toy Ltd.*, cannot claim the protection of section 7 of the Charter. While the Court is not deterred by the corporate status of the respondent in bringing its claim within section 2(b) of the Charter, it is more stingy with respect to section 7. Although the term "Everyone" in section 7 is broad enough to include corporations, this term is read down in light of the nature of the interests protected.

In our opinion, a corporation cannot avail itself of the protection offered by s. 7 of the Charter. First, we would have to conceive of a manner in which a corporation could be deprived of its "life, liberty or security of the person". We have already noted that it is nonsensical to speak of a corporation being put in jail. To say that bankruptcy and winding up proceedings engage s. 7 would stretch the meaning of the right to life beyond recognition. The only remaining argument is that corporations are protected against deprivations of some sort of "economic liberty".¹²⁴

On the facts of *Irwin Toy*, the corporate status of the respondent was clearly a difficulty. The argument about vagueness had to do with the principles of fundamental justice, of knowing what conduct is prohibited. But a violation of the principles of fundamental justice contravenes section 7 only if associated with a deprivation of life, liberty or security of the person. Only liberty was argued in *Irwin Toy*. The liberty argument related to the penal consequences of the possibility of jail. But since a corporation cannot be sent to jail, *Irwin Toy* could not itself benefit from the section 7 argument. It is one thing to say that a corporation could not invoke section 7 in the specific context of *Irwin Toy*; it is going much further to say that it cannot avail itself of the protection of section 7 at all.

Whatever the wisdom of excluding corporations from the benefits of section 7, the holding in *Irwin Toy* does produce some inconsistencies.¹²⁵ In *Reference re B.C. Motor Vehicle Act*,¹²⁶ the Court held that section 7 is the umbrella provision for legal rights, such that sections 8 to 14 are

¹²⁴ *Id.* at 1002-03. This conclusion with respect to corporations was reaffirmed by the Supreme Court in March 1990 in its brief judgment reversing *Dywidag Systems International Canada Ltd v Zutphen Bros Construction Ltd* (1987) 76 NSR (2d) 398 (SC AD). The lower court had also denied the s. 7 claim but granted the relief sought under s. 15 of the Charter. The Supreme Court denied the litigants access to both sections of the Charter.

¹²⁵ MacKay, Sopinka, Gibson & Greenspan, "The Charter of Rights and the Corporation: Beyond the Pale of the Corporate Veil," in McArdle (ed.), *The Cambridge Lectures 1989* (1990). The heart of the debate was between Justice Sopinka defending the Court's position in *Irwin Toy* and Eddie Greenspan arguing dramatically in favour of the inclusion of corporate interests in the Charter. The appropriateness of excluding corporations from crucial Charter sections sparked lively arguments.

¹²⁶ [1985] 2 SCR 486.

examples of section 7. Furthermore, the Court in *Southam Inc. v. Hunter*¹²⁷ extended to corporations the privacy guarantees of section 8 of the Charter. If section 7 includes the guarantees in section 8 (and other legal rights) to which a corporation is entitled, how can corporations be totally excluded from section 7 of the Charter?¹²⁸ Even if one has doubts about the privacy rights of corporations under section 8,¹²⁹ it would be hard to deny the applicability of section 11 rights to corporations.

Before concluding that extending “life, liberty and security of the person” interests to corporations was nonsensical, the Court in *Irwin Toy* brings the corporation within freedom of expression in section 2(b). Is the idea of a corporation engaging in the “pursuit of truth” or “human flourishing” any more sensible than recognizing section 7 interests for a corporation? We think not, and would prefer to have the Court take account of corporate status in the section 1 balancing of interests.

Given the numerous political avenues open to many corporations to pursue their interests, we are not overly troubled by their exclusion from section 7 of the Charter. Their exclusion is consistent with the general vision of the Charter as designed to benefit the disadvantaged and the powerless.¹³⁰ Of course some small corporations might fall into this protected category, and that is why the total exclusion from section 7 produces some discomfort. The Court does leave open the possibility of a corporation using section 7 in the context of a criminal defence, but gives no real guidance on this point.

One of the reasons for the Court’s rejection of the section 7 claim in

¹²⁷ [1984] 2 SCR 145.

¹²⁸ A possible response is that s. 7 might be available to a corporation facing a criminal charge. In *R v Big M Drug Mart Ltd* [1985] 1 SCR 295, a corporation was allowed to make a s. 2(a) freedom of religion claim in spite of its corporate status, on the basis that no one (including corporations) can be convicted of a violation of an unconstitutional law. This precedent is held not to apply to *Irwin Toy* because it is facing no prosecution: *Irwin Toy*, *supra* note 113 at 1005. Technically, this is true, since *Irwin Toy* was seeking a declaration. But since the purpose of seeking the declaration was presumably to pre-empt a quasi-criminal charge, the difference with *Big M* on this point is very minor. We think *Big M* can more properly be distinguished on the basis that *Irwin Toy*’s s. 7 argument was directed, not at the provision as a whole as in *Big M*, but at the penal consequences which entailed the possibility of jail, something not relevant to corporations. Even if there were a s. 7 violation in this respect, those portions of the law could be severed, still leaving intact the parts of the law affecting *Irwin Toy* as a corporation. Especially since *Irwin Toy* was not purporting to be suing on behalf of its directors, *Irwin Toy* should have no standing to make a s. 7 argument, even using the rules for public interest standing in *Minister of Justice of Canada v Borowski* [1981] 2 SCR 575.

¹²⁹ Petter, “The Politics of the Charter” (1986), 8 Supreme Court L. Rev. 473.

¹³⁰ This s. 7 ruling in *Irwin Toy* also reinforces the Charter as a document concerned with dignity and other “human” values.

Irwin Toy is its traditional concern about giving effect to economic claims through the Charter. It decides that it is time to put on the brakes.

What is immediately striking about this section is the inclusion of “security of the person” as opposed to “property”. This stands in contrast to the classic liberal formulation, adopted, for example, in the Fifth and Fourteenth Amendments in the American Bill of Rights, which provide that no person shall be deprived “of life, liberty or property, without due process of law”. The intentional exclusion of property from s. 7, and the substitution therefor of “security of the person” has, in our estimation, a dual effect. First, it leads to a general inference that economic rights as generally encompassed by the term “property” are not within the perimeters of the s. 7 guarantee.¹³¹

We agree with the Court’s approach here, and think this is the better way to deal with corporate claims generally under section 7. Corporate claims should ordinarily be denied under section 7, not because of the status of corporations, but because corporate claims usually do not relate to the interests protected by section 7. Most economic rights claims should be excluded from section 7, whether made by corporations or human beings. But such an exclusion need not be absolute. In an intriguing passage, the Court does leave the door ajar in respect to certain individual claims for economic rights.

This is not to declare, however, that no right with an economic component can fall within “security of the person”. Lower courts have found that the rubric of “economic rights” embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property — contract rights. To exclude all of these at this early moment in the history of Charter interpretation seems to us to be precipitous.¹³²

¹³¹ *Supra* note 113 at 1003.

¹³² *Id.* The scope of this exception will have to be considered in future cases. It is presumably to this interpretation of s. 7 that La Forest J. in *Andrews*, [1989] 1 SCR 143 at 201, looks for a livelihood interest.

It is still an open question whether the right to earn a livelihood is a value constitutionally protected under the *Charter*, perhaps under s. 6. But whether or not such constitutional protection exists, no one would dispute that the “right” to earn a livelihood is an interest of fundamental importance to the individuals affected, and as such should not lightly be overridden.

Note that by some typographical error (or over-enthusiastic editing) the reference to s. 7, which is what had appeared in the original unreported judgment released by the Court, has been changed to s. 6 in the SCR official report. (The DLR version, 56 DLR (4th) 1 at 43, and the NR version, 91 NR 255 at 278, both have s. 7 in this paragraph.) *Law Society of British Columbia v Skapinker* [1984] 1 SCR 357 at 382, makes it clear there is no freestanding right to livelihood in s. 6 of the Charter, thus a reference to s. 6 does not fit in this paragraph.

Such claims would be consistent with the Court's approach to the Charter, and in our view deserving of serious consideration.

(b) *Distribution of Powers Limitations on Economic Policy-Making*

While decisions on the proper distribution of powers pursuant to the *Constitution Act, 1867* do not command the same public attention as rulings on the Charter of Rights, they too have an important impact on everyday commercial activity. Since 1982 the Charter has dominated the Supreme Court's agenda, and it continues to do so in the 1988-89 Term. There is, however, a wider range of constitutional issues addressed in this term, including more traditional questions about the scope of sections 91 and 92 of the *Constitution Act, 1867*. In *Devine v. Quebec (Attorney General)*¹³³ (*Devine*) and *Irwin Toy*, more traditional jurisdictional questions are considered in tandem with Charter challenges to provincial legislation.

(i) *Language of Commerce: Devine*

One of the most important aspects of the form of commercial expression is the language in which the message is delivered. That is precisely the matter that the Quebec government sought to regulate by the provisions of the *Charter of the French Language*¹³⁴ challenged in the *Ford*¹³⁵ and *Devine*¹³⁶ cases. The question is whether the challenged provisions requiring the joint use of French and another language, and the ones requiring French only, are *ultra vires* the powers of the province in section 92 of the *Constitution Act, 1867*. In its ruling on this issue, the Court re-affirms that language itself is not a separate constitutional matter. For a provincial law to be valid it must be in relation to an institution or activity that is otherwise within the list of section 92 provincial powers.¹³⁷ It is clear to the Court that both the provisions requiring the joint use of French and its sole use were in relation to intraprovincial trade and commerce — a matter falling within property and civil rights in section 92(13) of the *Constitution Act, 1867*. Mr. Singer in *Devine* also argued that section 58 was an invasion of the

¹³³ [1988] 2 SCR 790.

¹³⁴ R.S.Q. (1977), c. C-11.

¹³⁵ [1988] 2 SCR 712.

¹³⁶ *Supra* note 133.

¹³⁷ *Jones v AG New Brunswick* [1975] 2 SCR 182; cited with approval, *id.* at 807-08.

federal criminal law power. The Court gives this argument short shift, which we feel it deserves.¹³⁸

In another somewhat unusual challenge, it was argued that the provisions requiring the joint use of French and another language imposed an unconstitutional burden on anglophones contrary to the guarantees of mobility in section 121 of the *Constitution Act, 1867* and section 6 of the Charter. This contention is dismissed as without merit. Any additional burden on anglophones is simply the cost of doing business in Quebec. The challenged provisions were not intended to prevent people from entering the province. In conclusion, the Quebec government was acting within its section 92 jurisdiction in establishing the language of commerce in the province.

(ii) Communications and Consumer Protection: *Irwin Toy*

The distribution of powers issues in *Irwin Toy* are more substantial. In characterizing sections 248 and 249 of the *Consumer Protection Act* for purposes of constitutional analysis, the first question is whether there was anything in this case to distinguish it from *A.G. Quebec v. Kellogg's Co.*¹³⁹ (*Kellogg's*). In the *Kellogg's* case, the issue was the validity of the prohibition against cartoon advertising, including on television, aimed at children. Justice Martland (as he then was), speaking for the majority, held that the provincial law was in relation to property and civil rights, and only incidentally affected the federal broadcasting undertaking. Chief Justice Laskin (as he then was) dissented, and would have invalidated the law as being in relation to the federal broadcasting undertaking.

Irwin Toy Ltd. argued that the relevant provisions in its case were more clearly directed at television advertising, and thus were distinguishable from the general ban on media advertising in *Kellogg's*. It was conceded that the ban was media wide in form, but considering the range of exceptions for other than television, and the importance of television as a means of reaching children, the law was really a colourable regulation of the broadcast undertaking. The Court rejects this claim.

¹³⁸ The Court concludes in *Devine* that s. 58 is part of the overall regulatory scheme set out by the province in the *Charter of the French Language* and is not a separate penalizing section concerned with morality or public order. We are unable to identify even a plausible basis for this criminal law submission in *Devine*.

¹³⁹ [1978] 2 SCR 211. In this case Martland J., writing for the majority, concluded that the challenged sections of the *Consumer Protection Act* were within the province's s. 92 jurisdiction.

There is no suggestion that the legislative or regulatory concern with these other forms of children's advertising is a mere pretense or façade for a primary, if not exclusive, purpose of regulating television advertising. It is not the relative importance of these other forms of advertising but the *bona fide* nature of the legislative concern with them that is in issue on the question of colourability.¹⁴⁰

Pathonic, a broadcaster, intervened in *Irwin Toy* to argue that the effect of the challenged sections of the *Consumer Protection Act* is to seriously impair the operation of federal broadcasting undertakings. While the Court readily concludes that television advertising is a vital part of the federal control, it disagrees that, on the evidence, there was a serious impairment. There might well be some loss of profits as an incidental effect of the consumer legislation, but it would not sterilize the undertaking as an on-going concern. What is really being regulated is advertisers, and not broadcasters.

Irwin Toy re-affirms the notion that the regulation of the content of broadcasting is a matter of exclusive federal jurisdiction over broadcasting, but effectively acknowledges a substantial element of double aspect. Provinces can deal with advertising on television, not as television law, but as advertising law. By analogy, this would seem to give the provinces considerable scope concerning educational television, not as television law, but as education law. The result is that broadcasting content is made responsive to both national and local concerns. That is a sensible approach to the cultural dynamics of Canada.

Irwin Toy Ltd. also contended that sections 248 and 249 of the *Consumer Protection Act* conflict with section 3(c) of the *Broadcasting Act*,¹⁴¹ and thus should be rendered inoperative by the doctrine of paramountcy. The relevant federal provision states:

3. It is hereby declared that . . .
- (c) all persons licensed to carry on broadcasting undertakings have a responsibility for programs they broadcast but the right to freedom of expression and the right of persons to receive programs, subject only to generally applicable statutes and regulations, is unquestioned;

The Court refuses to read section 3(c) as preventing provincial laws of general application from having an incidental effect on broadcasting undertakings, so that no issue of conflict with section 3(c) arises.¹⁴²

Pathonic, the intervenor, raised the licence requirement that broad-

¹⁴⁰ [1989] 1 SCR 927 at 954.

¹⁴¹ R.S.C. 1970, c. B-11 (now R.S.C. 1985, c. B-9).

¹⁴² *Supra* note 140 at 960.

casters adhere to the *Broadcast Code*, which it argued was incompatible with the challenged provincial scheme. The Court concludes that there is no conflict in constitutional terms, because it is possible to comply with both federal and Quebec law by complying with the more stringent Quebec law.¹⁴³

Finally, the argument that the penalty provisions of the *Consumer Protection Act* were an intrusion into the criminal law domain is quickly dismissed in *Irwin Toy*. This situation clearly falls within section 92(15) of the *Constitution Act, 1867*, which states:

15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

As in *Devine*,¹⁴⁴ the distribution of powers arguments appear somewhat tortured, and we agree with the Court's rejection of them. The crucial arguments in *Irwin Toy* were the Charter ones explored earlier in the article, and not provincial limitations on federal broadcast undertakings. It is worth mentioning, however, that the Court makes a point of disposing of the division of powers arguments first.¹⁴⁵

2. Federal Economic Regulation

(a) *Federal Undertakings: Clark*

*Irwin Toy*¹⁴⁶ reiterates the point made in last year's essay that federal undertakings are not immune from provincial law.¹⁴⁷ That point is made even more directly in *Clark v. Canadian National Railway Co. (CN)*.¹⁴⁸ *CN* involves a personal injury claim on behalf of an infant who, when he was two years old, had been struck by a train operated by CN. The statement of claim was filed more than three years after the accident. In its defence, in addition to denying the allegations of negligence, CN invoked section 342(1) of the *Railway Act*¹⁴⁹ to say that the suit was time barred.

342. (1) All actions or suits for indemnity for any damages or injury sustained by reason of the construction or operation of the railway shall, and

¹⁴³ *Ross v Registrar of Motor Vehicles* (1973) 42 DLR (3d) 68 (SCC).

¹⁴⁴ *Supra* note 133.

¹⁴⁵ *Supra* note 140 at 949.

¹⁴⁶ *Id.*

¹⁴⁷ Pothier, *supra* note 1 at 89.

¹⁴⁸ [1988] 2 SCR 680.

¹⁴⁹ R.S.C. 1970, c. R-2.

notwithstanding anything in any Special Act may, be commenced within two years after the time when such supposed damage is sustained, or if there is continuation of damage, within two years next after the doing or committing of such damage ceases, and not afterwards.

Counsel on behalf of the plaintiff contended, on the basis of provincial legislation, that the claim was not time barred. New Brunswick's *Limitations of Actions Act* sets the limitation period for infants at the later of six years or two years after the attainment of full age.¹⁵⁰ The limitation point was argued as a pre-trial determination of law. At all levels the courts agreed that the claim was not time barred, but differed as to the basis of reaching that conclusion.

The Supreme Court of Canada¹⁵¹ rejects the arguments that section 342(1) does not bar this claim as a matter of statutory interpretation. The Court concludes that, assuming the section to be constitutionally valid, it bars the claim, and is paramount to the provincial legislation because there is a direct conflict between the two.¹⁵² Thus the claim could only proceed if section 342(1) were *ultra vires* the federal Parliament, which is what the Court finds.

The constitutional question in *CN* concerns the dividing line between provincial jurisdiction over property and civil rights in the province and federal jurisdiction over interprovincial railways. The starting premise is that provincial laws of general application apply to railways and other federal undertakings.¹⁵³ A further basic principle is that federal jurisdiction over federal undertakings extends to matters integral to the jurisdiction over the federal undertaking.¹⁵⁴ In elaborating on this principle, the Court reviews the cases on labour jurisdiction, including the occupational health and safety trilogy discussed extensively in last year's essay.¹⁵⁵

¹⁵⁰ R.S.N.B. 1973, c. L-8, s. 18. Section 24 of the Act makes s. 18 subject to other statutory limitations.

¹⁵¹ *Per* Dickson C.J. and Beetz, McIntyre, Lamer, Wilson and L'Heureux-Dubé JJ. (No author is identified.) Le Dain J. heard the appeal, but took no part in the judgment.

¹⁵² *Supra* note 148 at 689-95. While the provincial Act gives a longer limitation period, the federal Act says the claim *shall* be filed within two years. There is a direct conflict in that the federal Act bars a claim that is permitted under the provincial Act. This case is consistent with the Court's stringent test of conflict in *Ross v Registrar of Motor Vehicles*, *supra* note 143.

¹⁵³ *Supra* note 148 at 704-05.

¹⁵⁴ *Id.* at 705-09.

¹⁵⁵ *Supra* note 1 at 79-107. It is interesting to note that the *CN* discussion of the labour cases sounds like a discussion of a federal ancillary power. In the occupational health and safety trilogy, Beetz J. had rejected the argument that federal labour jurisdiction was ancillary, a stance criticized in last year's essay, at 100-02.

In applying these principles in the *CN* case, the Court reaches the following conclusion:

While section 342(1) of the *Railway Act* is plainly legislation in relation to railways, a limitation provision relating to an action for personal injury caused by a railway cannot be said to be an integral part of federal jurisdiction. The core federal responsibility regarding railways is to plan, establish, supervise and maintain the construction and operation of rail lines, railroad companies and related operations. The establishment of general limitation periods which affect those injured by the negligence of the railway is not, to our mind, part of that core federal responsibility or of any penumbra sufficiently proximate to satisfy the test articulated in the cases just referred to. Such limitation periods are not an integral part of jurisdiction over railways. . . .¹⁵⁶

The Court finds section 342(1) to be *ultra vires* to the extent that it applies to common law causes of action. It reads down section 342(1) so that it only covers statutory causes of action under the *Railway Act*.¹⁵⁷

The Court seems able to reach this conclusion partly because it so narrowly characterizes the jurisdiction at issue. It is much easier to say that jurisdiction over limitation periods is not integral to jurisdiction over railways than to say that jurisdiction over the civil liability of railways is not integral to jurisdiction over railways. In the labour cases upon which the Court relies, however, the characterization has been broad rather than narrow.

An analogy could be made between the *CN* case and workers' compensation jurisdiction, something not mentioned in *CN*. Workers' compensation, even in respect of federal undertakings and other federal businesses, falls under provincial jurisdiction. Since workers' compensation legislation is essentially an overhaul of the civil liability of employers, there are clear parallels to the issues in *CN*. In last year's essay, the assumption that workers' compensation jurisdiction does not fall within federal jurisdiction over federal undertakings was criticized.¹⁵⁸ Similar comments would equally apply to the *CN* decision. Although no single instance of civil suit is likely to be particularly important, the general parameters of civil liability of federal undertakings should be integral to federal jurisdiction over those undertakings.

One suspects that the Court's decision in *CN* is heavily influenced by its dislike of section 342(1). As interpreted, section 342(1) creates a very short limitation period with none of the usual exceptions, such as in

¹⁵⁶ *Supra* note 148 at 708.

¹⁵⁷ *Id.* at 709-10.

¹⁵⁸ *Supra* note 1 at 103-07.

relation to minors. That runs counter to the judicial predisposition to assure court access.¹⁵⁹ If it had been the federal limitation period that was more generous and the provincial legislation severely restricted, our guess is that the *CN* decision would have gone the other way. While we have no difficulty with the *CN* result of allowing more leeway for suits, particularly on behalf of minors, we think it would have been preferable to reach this conclusion by stretching on the statutory interpretation side¹⁶⁰ rather than stretching on the constitutional front.

The *CN* case is, however, a useful illustration to make the point unequivocally that federal undertakings are not immune from provincial legislation, and reiterate that the ordinary rules of a pith and substance analysis apply to federal undertakings.¹⁶¹

(b) *General Trade and Commerce: General Motors*

During the 1988-89 Term, the federal power over "general trade and commerce," the second branch of the *Parsons*¹⁶² test, was finally, and unequivocally, rescued from obscurity. By the late 1970s, in the wake of *Labatt's*¹⁶³ and *Dominion Stores*,¹⁶⁴ it had seemed that there was not much life left in the second branch of *Parsons*.¹⁶⁵ In *Attorney General of Canada v. Canadian National Transportation Ltd.*,¹⁶⁶ general trade and commerce had started a comeback, but only three members of the Court had addressed the trade and commerce issues; the rest of the Court ignored trade and commerce in order to concentrate on the issue of the federal power to prosecute criminal law. In *General Motors of Canada Ltd. v. City National Leasing*¹⁶⁷ (*General Motors*) there is no issue about the authority to prosecute to cloud the trade and commerce issues. With the Court's full attention directed to the trade and commerce power,

¹⁵⁹ The importance attributed to court access is particularly emphasized in the *BCGEU* case, discussed *infra*.

¹⁶⁰ As the trial judge had done.

¹⁶¹ See Pothier, *supra* note 1 at 89-94.

¹⁶² (1881) 7 App Cas 96 (PC).

¹⁶³ *Labatt Breweries of Canada Ltd v AG Canada* (1979) 30 NR 496 (SCC).

¹⁶⁴ *Dominion Stores Ltd v R* [1980] 1 SCR 844.

¹⁶⁵ MacPherson, "Economic Regulation and the British North America Act" (1981), 5 Can. Bus. L.J. 172.

¹⁶⁶ [1983] 2 SCR 206.

¹⁶⁷ [1989] 1 SCR 641. See a comment on this case by Finkelstein, (1989), 68 Can. Bar Rev. 802.

Chief Justice Dickson is able to get unanimous support¹⁶⁸ for the views he had expressed in *Canadian National Transportation*.

General Motors involves a challenge to section 31.1 of the *Combines Investigation Act*.¹⁶⁹

31.1. (1) Any person who has suffered loss or damage as a result of

- (a) conduct that is contrary to any provision of Part V, or
- (b) the failure of any person to comply with an order of the Commission or a court under this Act,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

The challenge to the constitutional validity of section 31.1 was raised by *General Motors* as a defence to *City National Leasing's* claim under that section.

Since section 31.1 creates an independent civil cause of action, it appears, at first glance, to be a matter of property and civil rights, *i.e.*, a matter of provincial jurisdiction. If section 31.1 were to be sustained as being within federal powers, it would have to be by virtue of its relationship to the rest of the *Combines Investigation Act*.

The *Combines Investigation Act*, and predecessor legislation, had previously been held to be within federal jurisdiction by virtue of the criminal law power under section 91(27) of the *Constitution Act, 1867*.¹⁷⁰ However, section 31.1 could not be sustained as federal under the criminal law power, since a civil remedy under section 31.1 does not need to be associated in any way with prosecutions under the Act. Section 31.1 is not part of a criminal remedy; it is an independent civil remedy. As such, if section 31.1 were to be sustained as valid federal law, it would have to be by virtue of the trade and commerce power under section 91(2). In other words, the Act as a whole would have to meet the tests of general trade and commerce, and section 31.1 would have to be sufficiently integrated with the rest of the Act to also qualify as trade and commerce.

In *Canadian National Transportation*,¹⁷¹ Dickson J. (as he then was)

¹⁶⁸ The Chief Justice's judgment was concurred in by Beetz, McIntyre, Lamer, La Forest and L'Heureux-Dubé JJ. Le Dain J. heard the appeal, but took no part in the judgment.

¹⁶⁹ R.S.C. 1970, c. C-23, as am. by S.C. 1974-75-76, c. 76, s. 12.

¹⁷⁰ *Canadian National Transportation*, *supra* note 166.

¹⁷¹ *Id.*

had articulated a five-part test for general trade and commerce, a test re-affirmed in *General Motors*. The first three elements are taken from the judgment of Chief Justice Laskin in *MacDonald v. Vapour Canada Ltd.*;¹⁷² the final two are added.

- (1) The impugned legislation must be part of a general regulatory scheme.
- (2) The regulatory scheme must be monitored by the continuing oversight of a regulatory agency.
- (3) The legislation must be concerned with trade as a whole rather than a particular industry.
- (4) The legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting.
- (5) The failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country.¹⁷³

The list is not meant to be exhaustive, nor is the presence or absence of one of the indicia necessarily determinative.¹⁷⁴

On any occasion where the general trade and commerce power is advanced as a ground of constitutional validity, a careful case by case analysis remains appropriate. The five factors articulated in *Canadian National Transportation* merely represent a principled way to begin the difficult task of distinguishing between matters relating to trade and commerce and those of a more local nature.¹⁷⁵

Although the Court is being careful not to box itself in, the five-part test does seem to be developing into a relatively structured test.

What is the rationale for the test? The Court is trying to find a balance between provincial powers under section 92(13) and federal powers under section 91(2).

The true balance between property and civil rights and the regulation of trade and commerce must lie somewhere between an all pervasive interpretation of s. 91(2) and an interpretation that renders the general trade and commerce power to all intents void and meaningless.¹⁷⁶

The requirement that the regulation be of trade in general rather than concerned with a particular industry re-affirms the starting premise of *Parsons* that the regulation of a particular industry is a matter of provincial jurisdiction under property and civil rights in the province. It has long been assumed that to take away the exclusive rights of the

¹⁷² (1976) 66 DLR (3d) 1 (SCC).

¹⁷³ *General Motors*, *supra* note 167 at 661-62.

¹⁷⁴ *Id.* at 662-63.

¹⁷⁵ *Id.* at 663.

¹⁷⁶ *Id.* at 660.

provinces to regulate particular industries would unduly undercut section 92(13). The requirements of a regulatory scheme and the oversight of a regulatory agency seem to be a way of identifying complex areas of economic regulation. That is at least some indication that local (*i.e.*, provincial) regulation may be inadequate. The final two indicia make more explicit the notion of invoking the federal general trade and commerce power only where there is no real provincial capacity to regulate effectively.¹⁷⁷ The Court is saying that national economic regulation will be sanctioned under the general trade and commerce power when necessary, but only when necessary. General provincial powers under section 92(13) remain protected.

The Court in *General Motors* has little difficulty sustaining the *Combines Investigation Act* as a whole under the general trade and commerce power.¹⁷⁸ The Act involves an extensive regulatory scheme under the watchful eye of the Director of Investigation and Research, and, to a lesser extent, the Restrictive Trade Practices Commission, meeting the first two criteria for the general trade and commerce power. As for the third criteria, the Act aims at general anti-competitive practices rather than at particular industries.¹⁷⁹ The most critical factor, however, in upholding the *Combines Investigation Act* under general trade and commerce is the assumption, related to the last two criteria, that provincial regulation would be inadequate.

The Court is heeding the warning of Hogg and Gower:

If there is no federal power to enact competition policy, then Canada cannot have a competition policy. The consequence of a denial of federal constitu-

¹⁷⁷ There seems to be a close affinity between the general trade and commerce power and the national concern branch of peace, order and good government. See, in particular, the discussion of provincial inability as an indication of national concern in *R v Crown Zellerbach Canada Ltd* [1988] 1 SCR 401 at 434. Finkelstein, *supra*, note 167 at 810, aptly labels the general trade and commerce power and the national concern branch of peace, order and good government as first cousins.

¹⁷⁸ *Supra* note 167 at 674-83.

¹⁷⁹ In *General Motors*, *id.* at 678, Chief Justice Dickson distinguishes *Labatt*, *supra* note 163, on the basis that *Labatt* involved the regulation of a particular industry, *i.e.*, the beer industry. Finkelstein, *supra* note 167, at 809-10, criticizes the Chief Justice for approving *Labatt*. Since Dickson C.J. was one of the majority judges in *Labatt*, it is not surprising that he continues to approve it. However, we do agree with Finkelstein that *Labatt* is not properly viewed as the regulation of a particular industry. It is impossible to have commodity standards without making specific reference to the products, but that does not mean that commodity standards are aimed at regulating particular industries. Commodity standards aim at consistency for the sake of consistency, not for the sake of regulating particular industries.

tional power is therefore, in practical effect, a gap in the distribution of legislative powers.¹⁸⁰

If, as suggested by the Attorney General of Quebec in *General Motors*, an attempt were made to allocate intraprovincial dimensions of competition to the provinces and extraprovincial dimensions of competition to the federal Parliament, neither could be fully effective. The mobility of goods and services, and of the people seeking goods and services, makes local regulation at best partial.¹⁸¹ Even if a province could control all transactions completed in the province whatever the origin, its competition policy could be completely undermined by a more lax policy in a neighbouring province. Similarly, if federal competition policy could only extend to interprovincial transactions, it would be undermined by a more lax provincial policy toward intraprovincial transactions. In designing a competition policy, the question of whether provincial borders are being crossed is really irrelevant. Competition policy is not easy to enforce under the best of circumstances; it becomes impossible if placed in a constitutional straightjacket. Accordingly, the Court finds both intraprovincial and extraprovincial aspects of competition to be within the general trade and commerce power of the federal Parliament. Thus the *Combines Investigation Act* as a whole is valid under section 91(2).

In order for section 31.1 to also be valid, under the trade and commerce power, it must be sufficiently integrated with the rest of the *Combines Investigation Act*. The Court applies an analysis of ancillary powers to decide this point. The Chief Justice refers to a variety of tests of ancillary powers, the most commonly used formulations being "necessarily incidental" and "rationally and functionally connected." However, Dickson C.J. makes a point of not identifying any single test for ancillary powers, contending instead that the test can vary with the context.¹⁸²

In assessing the degree of integration of section 31.1 into the rest of the *Combines Investigation Act*, Chief Justice Dickson takes into account the extent of encroachment on provincial powers. He concludes that the encroachment is limited, because section 31.1 is only a remedial provision and it is directly linked to the rest of the Act rather than creating a general cause of action. Furthermore, there is precedent for federal

¹⁸⁰ Hogg & Gower, "The Constitutionality of the Competition Bill" (1977), 1 Can. Bus. L. J. 197 at 200; cited with approval in *General Motors*, *id.* at 683. The reference to "gap" in this quote has its usual meaning; it is not a reference to a "gap" test of the federal peace, order and good government power.

¹⁸¹ The Court does recognize, however, that the provinces can continue to exercise jurisdiction over intraprovincial aspects of competition, *i.e.*, it recognizes a *de facto* concurrent jurisdiction, *id.* at 681-82.

¹⁸² *Id.* at 670-71.

authority to create civil causes of action. Thus it would not unduly encroach on provincial powers for section 31.1 to be upheld as valid federal legislation.¹⁸³

Given the conclusion of limited encroachment, the Chief Justice rejects a strict test of ancillary powers.

In this light, I do not think that a strict test, such as “truly necessary” or “integral”, is appropriate. On the other hand, it is not enough that the section be merely “tacked on” to admittedly valid legislation. The correct approach in this case is to ask whether the provision is functionally related to the general objective of the legislation, and to the structure and the content of the scheme.¹⁸⁴

In applying this approach, the Chief Justice finds section 31.1 to be sufficiently integrated into the rest of the Act.

Section 31.1 is one of the arsenal of remedies created by the Act to discourage anti-competitive practices. Section 31.1 simply serves to reinforce other sanctions of the Act. . . . Like the other remedies, s. 31.1 is intimately linked to the *Combines Investigation Act*. It takes on meaning only by reference to other provisions of the Act and has no independent content. As a result, the section is carefully bounded by the parameters of the *Combines Investigation Act*. It provides a private remedy only for particular violations of the Act and does not create a private right of action at large.

Section 31.1 of the *Combines Investigation Act* is also fundamentally integrated into the purpose and underlying philosophy of the *Combines Investigation Act*. There is a close congruence between the goal of enhancing healthy competition in the economy and s. 31.1 which creates a private remedy dependent for its effectiveness on individual initiative. . . . Together or apart, the civil, administrative, and criminal actions provide a deterrent against the breach of the competitive policies set out in the Act.¹⁸⁵

While the Chief Justice applies the somewhat less strict test of rationally and functionally connected, he also claims that section 31.1 would meet the necessarily incidental test as well.¹⁸⁶ Neil Finkelstein disagrees with this latter point on the basis that section 31.1 is clearly severable from the rest of the Act, *i.e.*, that the Act can stand alone and operate quite well without section 31.1¹⁸⁷ We do not share Finkelstein’s

¹⁸³ *Id.* at 671-74.

¹⁸⁴ *Id.* at 683. The Chief Justice is thus using the formulation first applied by Laskin J.A. (as he then was) in *Papp v Papp* [1970] 1 OR 331 (CA). The Chief Justice had himself previously used this formulation in *Multiple Access Ltd v McCutcheon* (1982) 138 DLR (3d) 1 (SCC).

¹⁸⁵ *Id.* at 684-85.

¹⁸⁶ *Id.* at 685.

¹⁸⁷ Finkelstein, *supra*, note 167 at 814.

assessment. The necessarily incidental test cannot mean that it must be impossible to operate without the impugned provision. That would imply that jurisdiction would be lost if not exercised, since failure to exercise the jurisdiction would be proof that it was not necessary. Failure to exercise constitutional jurisdiction has never been a basis for losing it. We take the necessarily incidental test, as well as any other formulation of ancillary powers, as addressing the question of who is entitled to exercise the jurisdiction, assuming it is going to be exercised. In this case, assuming there are to be independent civil remedies for breaches of the *Combines Investigation Act*, is that something that is part and parcel of the power to enact the *Combines Investigation Act*? We agree with the Chief Justice that, whatever the test, civil remedies for breaches of the *Combines Investigation Act* are inextricably bound up with the Act. To its credit, the Court's analysis is a practical and functional one, rather than a technical and legalistic dissection.

Finkelstein also criticizes the Chief Justice's discussion of ancillary powers because it takes into account the extent of intrusion on provincial powers. Finkelstein claims this is irrelevant because:

... there is no federal "encroachment" on provincial subject matters where a matter is within the federal catalogue of powers in section 91.¹⁸⁸

We think Finkelstein is being too formalistic. In reality, the determination of whether a matter is within the federal catalogue of powers cannot be made without some attention to the degree of intrusion on provincial powers. The development of jurisprudence about section 91(2), in relation to both the first and second branches of *Parsons*, has been a continuing struggle to give content to section 91(2) without completely dwarfing section 92(13). That is an ever present consideration in cases involving the trade and commerce power, whether or not ancillary powers are at issue.¹⁸⁹

General Motors is undoubtedly a landmark case. For the first time, more than a minority of the Supreme Court of Canada has validated the *Combines Investigation Act* under the trade and commerce power. Sustaining the Act under the trade and commerce power gives the federal Parliament considerably more leeway than does a ruling based on the criminal law power. Although the exact scope of the general trade and commerce power will have to await future cases for further elaboration, the Court has now unequivocally embraced a substantial role for the

¹⁸⁸ *Id.* at 815.

¹⁸⁹ The scale of impact on provincial jurisdiction is also expressly considered as a factor in determining whether the national concern branch of peace, order and good government applies. See *Crown Zellerbach*, *supra* note 177 at 431-32.

federal Parliament in economic regulation. As with its approach to mobility rights in section 6 of the Charter in the *Black*¹⁹⁰ case, the Court is interpreting the Constitution so as to facilitate and foster a national economic market.

(c) *The Federal Spending Power: YMHA*

A further vehicle for federal economic regulation is the federal spending power, which is implicated in *YMHA Jewish Community Centre of Winnipeg Inc. v. Brown (YMHA)*.¹⁹¹ The case involves a federal job creation programme under section 38 of the *Unemployment Insurance Act, 1971*.¹⁹² Section 38 effectively allows unemployment insurance benefits to be paid as a wage subsidy, while the person working on the job creation project is deemed to still be unemployed for the purposes of the *Unemployment Insurance Act* and certain other federal Acts. Brown and others had participated in a job creation programme involving renovations to the YMHA premises. They had been classified as labourers, and paid accordingly. However, they filed a complaint with the Manitoba Labour Relations Board claiming their work was actually general construction work, which would entitle them to a higher minimum wage under provincial legislation, *i.e.*, a higher wage than they had actually been paid. The Board upheld their complaint, and ordered the YMHA to pay the wage difference. The Supreme Court of Canada¹⁹³ concludes that Brown and the others were indeed employees of YMHA within the meaning of the provincial legislation, and were entitled to the back wages unless there were some constitutional impediment to the application of the provincial labour legislation. This constitutional analysis leads to an inquiry into the nature of federal authority over the job creation project.

The Court quickly rejects the contention that federal authority over unemployment insurance under section 91(2A) is involved. Although section 38 of the *Unemployment Insurance Act* makes provision for how the project would be dealt with in terms of the unemployment insurance legislation, the basis for the job creation programme is neither the *Unemployment Insurance Act* nor federal power over unemployment insurance.¹⁹⁴

¹⁹⁰ [1989] 1 SCR 591.

¹⁹¹ [1989] 1 SCR 1533.

¹⁹² S.C. 1970-71-72, c. 48, ss. 38(1) to (6), rep. & subs. 1976-77, c. 54, s. 41.

¹⁹³ *Per* L'Heureux-Dubé J., Dickson C.J. and Lamer, Wilson, La Forest, Sopinka and Gonthier JJ., concurring.

¹⁹⁴ *Supra* note 191 at 1547-48.

The Court finds that the basis of federal jurisdiction is in fact the federal spending power. This means the federal jurisdiction is limited, and does not extend to jurisdiction over the business as such, which means further that federal labour jurisdiction does not apply.¹⁹⁵ Accordingly, there is nothing to displace provincial labour jurisdiction.

There is nothing particularly noteworthy about the *YMHA* case in terms of constitutional jurisdiction over labour matters. What is more interesting is the Court's discussion of the federal spending power. Its comments bear extensive quotation.

In my view, the power to establish a job creation scheme is derived from the federal spending power. The scope and extent of this power has been the subject of some speculation. Professor Peter Hogg describes the constitutional basis for this power in *Constitutional Law of Canada* (2nd ed. 1985), at p. 124:

What is the constitutional basis for federal grants to the provinces, and for federal involvement in shared-cost programmes which are outside federal legislative competence? The only possible basis is the "spending power" of the federal Parliament, a power which is nowhere explicit in the Constitution Act, 1867, but which must be inferred from the powers to levy taxes (s. 91(3)), to legislate in relation to "public property" (s. 91(1A)), and to appropriate federal funds (s. 106). Plainly the Parliament must have the power to spend the money which its taxes yield, and to dispose of its own property. But of course the issue is whether this spending power authorizes payments for objects which are outside federal legislative competence.

There has been some debate over the extent to which the exercise of the federal spending power can justify federal incursions into what would otherwise be areas of provincial legislative jurisdiction. In *The Allocation of Taxing Power Under the Canadian Constitution* (2nd ed. 1981), at p. 45, Dr. G.V. La Forest, now a Justice of this Court, expressed the view that the federal spending power can be exercised so long as it is not in substance legislation on a provincial matter. Thus, the federal government could spend money to create jobs in the private sector, or in areas not directly under its competence. However, while Parliament may be free to offer grants subject to whatever restrictions it sees fit, the decision to make a grant of money in any particular area should not be construed as an intention to regulate all related aspects of that area. . . . I find it difficult to believe that simply by providing federal money to promote employment in a region or sector, the federal government can obtain jurisdiction over the workers employed by virtue of the grant. It is worth noting that the Attorney General of Canada, who intervened in this matter, did not support this position, and argued against federal competence in the matter.¹⁹⁶

¹⁹⁵ *Id.* at 1549-51. See the discussion of federal labour jurisdiction in last year's essay, Pothier, *supra*, note 1 at 79-107, esp. 85-89.

¹⁹⁶ *Supra* note 191 at 1548-49, 1550.

Although the *YMHA* case does not involve the more contentious application of the spending power to shared cost programs that impact upon the exercise of jurisdiction by the provinces,¹⁹⁷ these comments are the strongest judicial endorsement yet accorded to the federal spending power.¹⁹⁸ Whether out of conviction or pragmatism, the Court shows little inclination to restrict the federal spending power in the absence of a constitutional amendment.

It is simply beyond the capacity of the courts to undo forty years of political developments.¹⁹⁹

If there are to be restrictions on the spending power, the impetus will be political rather than judicial. At the time of writing, the fate of the Meech Lake attempts at restriction remain uncertain.²⁰⁰ In any event, it would be beyond the scope of this essay to comment in detail.

¹⁹⁷ For a critique of the federal spending power, particularly as it relates to shared cost programs, see Petter, "Federalism and the Myth of the Federal Spending Power" (1989), 68 *Can. Bar Rev.* 448. The federal spending power's relationship to shared cost programs is too tangentially related to the *YMHA* case to warrant any extensive discussion in this essay.

¹⁹⁸ The federal spending power has not been much litigated, presumably because there is usually not much to be gained by litigation. Any objection to the federal spending power usually involves an objection to the strings attached. However, any attack on the validity of the federal spending power would not only remove the strings, it would also effectively dry up the source of the money, which is not a remedy potential litigants want.

¹⁹⁹ Petter, *supra*, note 197 at 473. In a post-script, at 478-79, Petter cites *YMHA* as evidence of this assertion. Where the effect is modest, the Court is capable of rendering a constitutional decision that goes against longstanding conventional wisdom. (For example, in *Alberta Government Telephones v Canada (CRTC)* [1989] 2 SCR 225 the Court ruled that AGT was subject to federal jurisdiction despite *de facto* provincial regulation since 1906.) In contrast, the impact of a denial of the federal spending power would be anything but modest.

²⁰⁰ Section 7 of the Meech Lake Accord, which would add a new s. 106A to the *Constitution Act, 1867*, is the current political attempt to deal with the federal spending power.

106A. (1) The Government of Canada shall provide reasonable compensation to the government of a province that chooses not to participate in a national shared-cost program that is established by the Government of Canada after the coming into force of this section in an area of exclusive provincial jurisdiction, if the province carries on a program or initiative that is compatible with the national objectives.

(2) Nothing in this section extends the legislative powers of the Parliament of Canada or of the legislatures of the provinces.

While subsection (1) purports to limit the federal spending power in future, some have argued, in spite of subsection (2), that the real effect of s. 106A is to entrench a previously non-existent federal spending power. The *YMHA* decision makes it clear that the Supreme Court of Canada already recognizes a federal spending power; it would not be enhanced by the passage of s. 106A.

What is worth noting in the context of this essay is that, in both the *General Motors* and *YMHA* cases, the Supreme Court of Canada is receptive to national economic regulation, as long as it is kept within manageable bounds.

3. The Charter and Labour Law

There are three cases during the 1988-89 Term related, in one way or another, to the Charter and labour law, especially section 2(b). In all three cases the Charter challenge fails. In two cases the rejection of the Charter argument favours the rights of workers; in the other case the rights of workers are overshadowed. This latter case is *B.C.G.E.U. v. British Columbia (Attorney General) (BCGEU)*,²⁰¹ which involves, at least from one perspective, the free expression rights of striking court workers to picket in front of courthouses; however, the Supreme Court of Canada de-emphasizes that aspect of the case. The Court is more responsive to the interests of workers in *Slaight Communications Inc. v. Davidson (Slaight Communications)*²⁰² in upholding restrictions on the free expression rights of employers in order to protect employees. The third case only tangentially involves the Charter and labour law; *Moysa v. Alberta (Labour Relations Board) (Moysa)*²⁰³ concerns a claim by a reporter not to have to answer questions from union counsel at a labour board hearing into an unfair labour practice complaint.

(a) *The Pre-eminence of the Right of Access to Courts: BCGEU*

The first paragraph of the *BCGEU* judgment makes it clear that the Supreme Court of Canada considers any free expression rights of court employees to be secondary to higher principles.

This case involves the fundamental right of every Canadian citizen to have unimpeded access to the courts and the authority of the courts to protect and defend that constitutional right.²⁰⁴

The case arose out of a legal strike by, among other government employees, court workers. There is no questioning of the right of the court workers to strike; the issue involves only the right of court workers to set up picket lines outside courthouses. On the first day of the strike called

²⁰¹ [1988] 2 SCR 214.

²⁰² [1989] 1 SCR 1038.

²⁰³ [1989] 1 SCR 1572.

²⁰⁴ *Supra* note 201 at 219; *per* Dickson C.J., Lamer, Wilson, La Forest and L'Heureux-Dubé JJ. concurring.

by the BCGEU, picket lines had been set up by the union outside courthouses throughout British Columbia. As with the usual labour picket, the purpose of the picketing was to ask people to support the strikers by respecting the picket line. The line could be respected either by not crossing, or by crossing only with a pass obtained from the picket captain. There is scant evidence about when the union was prepared to grant such a pass, but one example is given of approval of passes for duty counsel so they could defend people in custody.²⁰⁵

After crossing the picket line to enter his courthouse, McEachern C.J.S.C., on his own motion, issued an *ex parte* injunction to restrain the picketing of courthouses throughout British Columbia. The basis for the injunction was that the picketing constituted criminal contempt of court. When given notice of the injunction, the picketers obeyed, but the union immediately moved to set aside the injunction (as the injunction itself had expressly contemplated). That motion to set aside was heard and dismissed by McEachern C.J.S.C., and an appeal to the British Columbia Court of Appeal was also dismissed. The constitutional arguments were framed primarily in terms of the constitutional right of access to the courts and the free expression rights of the strikers.²⁰⁶

The BCGEU's Charter arguments about freedom of expression were used to challenge the constitutionality of the court-issued injunction; this raised an issue of whether the Charter applied. In *Dolphin Delivery*²⁰⁷ the Court had said that court orders do not constitute government action for the purposes of invoking the Charter through section 32. In *BCGEU*, the Court recognizes an exception to that proposition with respect to criminal contempt of court.

The court is acting on its own motion and not at the instance of any private party. The motivation for the court's action is entirely "public" in nature, rather than "private". The criminal law is being applied to vindicate the rule of law and the fundamental freedoms protected by the *Charter*. At the same time, however, this branch of the criminal law, like any other, must comply with the fundamental standards established by the *Charter*.²⁰⁸

²⁰⁵ *Id.* at 220-21.

²⁰⁶ The BCGEU also made arguments based on ss. 11 and 7 of the Charter, which the Court disposes of quite quickly. There could be no breach of s. 11 because no one was charged with an offence; *id.* at 246-47. (This is consistent with the Court's decision in *R v Wigglesworth* [1987] 2 SCR 541, referred to, with approval, in last year's essay, *supra*, note 1 at 81, n. 221.) There could be no breach of s. 7, and particularly the principles of fundamental justice, because the *ex parte* injunction protected the legal and constitutional rights of access to court of all citizens of British Columbia: *id.* at 245-46. These are the same arguments used in relation to the s. 1 justification for a violation of s. 2(b) rights, and will be dealt with below.

²⁰⁷ [1986] 2 SCR 573.

²⁰⁸ *Supra* note 201 at 244.

This is not the place to review the Court's general approach to Charter application,²⁰⁹ but it is at least heartening to see that the Court is showing some flexibility in the wake of its *Dolphin Delivery* pronouncements severely limiting Charter application. In the context of this case, it would be very uneven justice to rely on the Charter as a primary basis for granting the injunction, while denying those subject to the injunction the opportunity to raise Charter arguments to challenge the injunction.

The majority of the Supreme Court of Canada has no difficulty in recognizing that the injunction against picketing outside courthouses is a *prima facie* interference with freedom of expression under section 2(b).²¹⁰ This is fully consistent with the broad approach to freedom of expression previously articulated in *Dolphin Delivery*,²¹¹ as well as in *Ford*²¹² and *Irwin Toy*,²¹³ discussed above. The more contentious issue concerns the section 1 analysis.

We have no difficulty accepting the Court's assumption that assuring the right of access to the courts is a pressing and substantial objective within the meaning of the section 1 jurisprudence, especially given significant constitutional guarantees of access to courts. Indeed the BCGEU itself, to some extent at least, recognized the importance of access to the courts by being prepared to issue passes to cross its picket line. The Supreme Court of Canada, however, is not prepared to countenance selective access, nor that the union should have any role in determining access. It is because the Court takes such a blanket approach to access that the Court finds the proportionality test of section 1 to be met. We are not so easily convinced.

It is obvious that a picket line will deter some people from entering court, so that enjoining of a picket line is rationally connected to the objective of preserving access to court. But it is with respect to the question of minimum impairment and degree of interference with freedom of expression that we part company with the Court.

²⁰⁹ There are numerous critiques of the *Dolphin Delivery* approach to Charter application. See, for example, Petter & Monahan, "Developments in Constitutional Law: The 1986-87 Term", *supra*, note 106; Hutchinson & Petter, "Private Rights and Public Wrongs: The Liberal Lie of the Charter" (1988), 38 U. of T.L.J. 278; Elliot & Grant, "The Charter's Application in Private Litigation" (1989), 23 U.B.C.L. Rev. 459.

²¹⁰ Justice McIntyre dissents on this point, (*supra* note 201 at 251-52) on the ground that the union is claiming a Charter right to deprive others of Charter rights; he concludes such a claim cannot be entertained even on a *prima facie* basis. As discussed below, we think there is a more complex interaction between the general rights of access to courts and the free expression rights of court workers. There is, in our view, a genuine balancing of conflicting rights which can best be resolved in a s. 1 analysis.

²¹¹ *Supra* note 207.

²¹² [1988] 2 SCR 712.

²¹³ [1989] 1 SCR 927.

In its analysis, the Court draws no distinction between those who have some sort of legal obligation or responsibility to be in court, in relation to their own or others' legal interests, and those for whom access to court on that particular day is a matter of discretion. We think that is an important distinction.

Consider first those for whom access to court on that particular day is a matter of discretion. For them there is nothing at stake beyond the general principle of the right of access to courts. The picket line does not deprive them of their constitutional right of access to the courts. It only asks them to make a choice of which is more important to them, exercising their constitutional rights of access to the courts, or supporting the strikers. The Court's analysis falls into the trap of thinking that only constitutional rights are important, or that they must be the most important. People do not lose their constitutional rights just because on some particular occasion they choose not to exercise them, on the ground that they consider something else more important.

Moreover, removal of the picket line does not essentially change the equation for many of the people who would have refused to cross the picket line. Even if there were no picket line, people who knew of the strike from news reports could still decline to attend court for the same reason that they would have refused to cross a picket line. For example, a union that had been planning to file an application for judicial review of an arbitrator's decision would presumably not do so while the court workers were on strike, whether or not the filing would actually involve crossing a picket line. Refusal to cross a picket line is, as the Court recognizes, a symbolic act. That kind of symbolic act can equally apply to a figurative picket line. If people want to give a higher priority to supporting strikers than to the general principle of access to the courts, there is no way to compel people to go to court who have no obligation to be there.

The presence of an actual picket line simply ensures that people know of the choice to be made, and have to publicly acknowledge that choice if they elect to cross a picket line. The Court's blanket approach to access to courts does not so much emphasize the importance of access to courts as it simplifies the choice of those who do not want to support the strikers. We see no reason why the Constitution should be used to deny court workers freedom of expression simply to make it easy for people to decide not to support the strikers.

The stakes do change somewhat where access to court on that particular day is not discretionary. An innocent third party might suffer significant legal disadvantage, or the costs of supporting the strikers might be particularly high, if someone refuses to cross a picket line in spite of a legal obligation or responsibility to attend court. It was in

recognition of such considerations that the BCGEU was prepared to issue passes to cross the line. We do not know how far the union was prepared to go in issuing passes, but since the onus under section 1 is on the side of those seeking to uphold a constitutional limitation,²¹⁴ there should have been some effort to show that the union was too restrictive in issuing passes. We do not think the strikers' freedom of expression is impaired as little as possible, or that the objective of access to court is sufficient to prevail, unless some specific prejudice is shown.

As for the objection to the union's giving permission to enter court,²¹⁵ we think that misperceives the situation. The union is not actually giving permission by giving a pass; it is signifying that it will not be offended. No one is forced to seek a pass, unless they consider it important not to offend the union. McEachern C.J.S.C. was not precluded by the picket line from entering his court; it only meant that he had to give affront to the union in order to enter his court.

The Court considers the section 1 analysis easy in this case because access to the courts is seen as the *sine qua non* of individual rights such as freedom of expression.²¹⁶ Yet the Court implicitly accepts some disruption of access to courts by accepting the right of court workers to go on strike. One can accept the importance of access to the courts without insisting on blanket access. Is it too much to expect that a court could be detached enough to recognize that other values, such as support of striking workers, can in certain circumstances be considered more important by some people? At the very least a democracy should be able to recognize the rights of citizens to decide what priority they want to give their own constitutional rights.

(b) *Limits on Employer Free Speech: Slight Communications*

In *Slight Communications*²¹⁷ the Court faces a more usual sort of Charter challenge. The case involves an adjudication of a claim of unjust dismissal under the then section 61.5 of the *Canada Labour Code*.²¹⁸ The adjudicator decided that Davidson had been unjustly dismissed, but that reinstatement was inappropriate in the circumstances. The adjudicator ordered some monetary compensation, an order conceded to be within his authority. The adjudicator also made an order (labelled the positive order) that the employer draw up a letter of recommendation stating

²¹⁴ *Supra* note 50.

²¹⁵ *Supra* note 201 at 230.

²¹⁶ *Id.* at 247-48.

²¹⁷ *Supra* note 202.

²¹⁸ R.S.C. 1970, c. L-1, as am. by S.C. 1977-78, c. 27, s. 21.

Davidson's sales records (these had not been contested) and indicating that his dismissal had been found to be unjust. There was a further order (labelled the negative order) that the employer respond to inquiries about Davidson only by sending the letter of reference referred to above, *i.e.*, that the employer make no further comment about Davidson.

The positive and the negative order were challenged on both administrative and Charter grounds. On the issues of statutory interpretation, the Court has no difficulty concluding that these sorts of orders are within the adjudicator's authority, and the majority holds that the specific orders are not unreasonable from the standpoint of administrative law review.²¹⁹ With respect to the Charter, the majority sustains both the positive and the negative order.

The Court has no difficulty in concluding that the Charter applies, since the adjudicator was a creature of statute and derived all his authority from statute.²²⁰ The Court also indicates that the Charter involves a stricter kind of review than administrative law review.²²¹ Although the precise limits are left for future development, the Charter, as a constitutional document, leaves less room for deference to administrative decision-makers.²²²

The Court has no doubt that both the negative and positive orders are a *prima facie* interference with the employer's freedom of expression. The negative order prohibits expression²²³ while the positive order compels it. On the latter issue, Lamer J. (with whom his colleagues agree on this point) comments as follows:

There is no denying that freedom of expression necessarily entails the right to say nothing or the right not to say certain things. Silence is in itself a form of expression which in some circumstances can express something more clearly than words could do.²²⁴

We do not disagree with the Court, but it should be noted that this has clear implications for freedom of association under section 2(d) of the Charter, where the issue of freedom of non-association has been more

²¹⁹ Dickson C.J., Wilson, La Forest and L'Heureux-Dubé JJ., concurring. Lamer J. dissents with respect to the negative order, finding it to be beyond the adjudicator's authority on administrative law grounds. Beetz J. dissents with respect to both the positive and negative order, but discusses them only in connection with the Charter.

²²⁰ *Supra* note 202 at 1077-78, 1048, 1058.

²²¹ *Id.* at 1049.

²²² The same principle applies in relation to administrative tribunal decisions about division of powers constitutional jurisdiction: *Northern Telecom Ltd v Communications Workers of Canada* (1979), 98 DLR (3d) 1 (SCC).

²²³ *Supra* note 202 at 1050.

²²⁴ *Id.* at 1080.

contentious.²²⁵ Discussion of that issue is, however, beyond the scope of this essay.

The more serious Charter issues in *Slaight Communications* concern section 1. The majority concludes that both the positive and the negative orders are saved by section 1. The pressing and substantial objective is identified as

counteracting the effects of the unjust dismissal by enhancing the ability of the employee to seek new employment without being lied about by the previous employer.²²⁶

Chief Justice Dickson elaborates on the importance of the objective.

It cannot be overemphasized that the adjudicator's remedy in this case was a legislatively-sanctioned attempt to remedy the unequal balance of power that normally exists between an employer and employee. Thus, in a general sense, this case falls within a class of cases in which the governmental objective is that of protection of a particularly vulnerable group, or members thereof. . . . On the facts of this case, constitutionally protecting freedom of expression would be tantamount to condoning the continuation of an abuse of an already unequal relationship.²²⁷

The majority finds the proportionality test to be met with respect to both the positive and negative order. Given the circumstances of this case, the employer could not be relied upon to give a fair assessment of Davidson to prospective employers. The positive order only required the employer to pass on information about objective facts not in dispute.²²⁸ The negative order prevented the positive order from being undermined. The majority finds these orders to be the only effective way to achieve the objective, *i.e.*, the only way of giving Davidson a reasonable opportunity to find a new job. The Chief Justice also manages to get a majority of the Court to agree with the point he had made in dissent in the *Alberta Reference*,²²⁹ that jobs represent more than an economic interest on the

²²⁵ Freedom of non-association is an issue in a case currently before the Court, *Lavigne v OPSEU* (1989) 67 OR (2d) 536 (CA), leave to appeal granted, Sup. Ct. Bulletin 1572(89).

²²⁶ *Supra* note 202 at 1051.

²²⁷ *Id.* 1051-52. Justice Beetz, in dissent, at 1064, does not think bargaining power has anything to do with the availability of Charter protection. He does not explain why it is not relevant to reasonable limits.

²²⁸ Justice Beetz, in dissent, thinks his colleagues are creating a false dichotomy between objective fact and opinion. He says, *id.* at 1061, that an affirmation of facts apart from belief in their veracity is "totalitarian in nature and can never be justified under s. 1." However, the positive order would be all right according to Beetz J. (*id.* at 1062) if the letter said these were the facts found by the adjudicator. Given that the facts were uncontested, we think Beetz J. is unnecessarily splitting hairs.

²²⁹ *Reference re Public Service Employees Relations Act (Alta)* [1987] 1 SCR 313.

part of employees.²³⁰ As in *Irwin Toy*,²³¹ the majority in *Slaight Communications* is prepared to allow considerable latitude under section 1 where the governmental objective is to protect vulnerable groups.

A further question about section 1, dealt with only implicitly in *Slaight Communications*, concerns the relationship between a legislative grant of discretion and the “prescribed by law” criteria of section 1. This is not a situation like *Irwin Toy*²³² where there is a claim that it is unclear what the legislation proscribes; here clarity is provided in a specific remedial order. The point is rather that the legislation provides no structuring of the exercise of discretion by the adjudicator in deciding the terms of the order. The legislation sets no specific standards for limiting the free expression rights of employers; it makes no specific reference to the free expression rights of employers at all. It simply authorizes the adjudicator to order the employer to “do any like thing that is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.”²³³ With such an imprecise grant of discretion, the Court assumes that the legislation does not authorize any Charter breach, and that the *order* must be assessed against section 1 of the Charter to see if it is valid in terms of both the legislation and the Constitution. What is important to note is that the exercise of discretion is accepted as being “prescribed by law” even though the legislation sets no specific standards. All that is necessary for the limitation on Charter rights to be “prescribed by law” is that there be some legislative grant of power.²³⁴

This sets a low threshold for “prescribed by law” under section 1. We think this is a proper approach outside the criminal or penal context. Where administrative decision-makers are put in place to protect the interests of vulnerable groups, there must often be, as in this case, the flexibility to meet the demands of particular circumstances. In particular situations where the discretion is considered overbroad, that issue can be dealt with in relation to the minimum impairment aspect of the section 1 test. However, different considerations should apply in the criminal and penal context where there is a greater premium on specific legislative

²³⁰ [1989] 1 SCR 1038 at 1054-55.

²³¹ [1989] 1 SCR 927.

²³² *Id.* at 983.

²³³ Section 61.5(9)(c) of the *Canada Labour Code*, R.S.C. 1970, c. L-1, as am. by S.C. 1977-78, c. 27, s. 21.

²³⁴ It is clear from the *BCGEU* case, ([1988] 2 SCR 214) that common law rules (e.g., the common law of criminal contempt of court) can also be “prescribed by law” under s. 1.

standards. In those circumstances, a completely unstructured discretion could be said not to meet the requirement of being "prescribed by law."²³⁵

Slaight Communications, in both its sensitivity to the protection of vulnerable groups under section 1, and its flexible approach to legislative discretion, shows an appreciation of the functioning of administrative tribunals, such as labour boards.

(c) *Compelling Testimony from Reporters before Labour Boards:*
Moysa

An appreciation of the functioning of administrative tribunals is also evident in *Moysa v. Alberta (Labour Relations Board)*.²³⁶ Moysa is a reporter who was called by a union to testify at a labour board hearing into its complaint of unfair labour practice against the Hudson Bay Company. Moysa had written an article about the union's organizing activities, and the union wanted to ask about any conversations Moysa had had with Hudson's Bay officials. The union seemed to be more interested in what Moysa had said to Hudson's Bay than in what Hudson's Bay had said to Moysa. Moysa claimed before the Alberta Labour Relations Board and in the courts that compelling her to testify would interfere with her section 2(b) freedom of the press. The Board had concluded that Moysa was required to testify, and the Court agrees.

The Supreme Court of Canada does not find even a *prima facie* interference with section 2(b) rights, and declines to make any general pronouncements about whether journalists enjoy a qualified privilege with respect to their sources. The Court is content to conclude that even if there were such a constitutional right, it could not be claimed on the facts of this case. There was no evidence to establish the proposition that sources would dry up if journalists testified before bodies such as labour relations boards, nor was there a relationship of confidence in this case. The Board had also held that the evidence was crucial and not available

²³⁵ See, e.g., *Re Ontario Film & Video Appreciation Society and Ontario Board of Censors* (1984) 45 OR (2d) 80 (CA). That case involved the Ontario censor board's authority to ban films. The statute set no standards for the censor board to apply, with the result that the Court of Appeal found the limits on free expression not to be prescribed by law. There were standards set out in policy guidelines, but they had no legal force, and were therefore held to be of no relevance.

²³⁶ [1989] 1 SCR 1572. The judgment is written by Sopinka J., with Dickson C.J., and Lamer, Wilson, L'Heureux-Dubé, Gonthier and Cory JJ., concurring.

from other sources. In finding no violation of section 2(b),²³⁷ the Court is going out of its way not to unduly interfere with the way in which administrative tribunals carry out their mandates. Since the mandate in this case involves the protection of the rights of workers to unionize, this is a further illustration of the Court not allowing the interests of the economically more powerful, in this case the media, to prevail.²³⁸

The Court in *Moysa* is also insisting on a demonstrated and significant interference with freedom of the press, comparable to its approach to freedom of religion in section 2(a).²³⁹ The Court seems to have a more expansive interpretation of freedom of expression generally, than of freedom of the press, religion, or association.²⁴⁰ Perhaps that is because expression is considered less obviously a threat to competing interests, demanding a demonstration of those competing interests under section 1.

Although the labour law issues are overshadowed in the *BCGEU* case, in both *Slaight Communications* and *Moysa* the Court is sensitive to the dynamics of labour law. That sensitivity is also reflected, at least in part, in the Court's treatment of a section 96 challenge to a labour standards tribunal in *Sobeys Stores Ltd. v. Yeomans*²⁴¹ (*Yeomans*). That case will be discussed in the next section, concerning the Court's handling of issues of court jurisdiction.

IV. COURT JURISDICTION

During the 1988-89 Term the Court decided four cases which raised issues of court jurisdiction: *Yeomans*²⁴² (involving a claim that the Nova Scotia Director of Labour Standards and the Labour Standards Tribunal were improperly exercising the jurisdiction of a section 96 court); *Ontario (Attorney General) v. Pembina Exploration Canada Ltd.* (*Pem-*

²³⁷ The Court's approach in *Moysa* is similar to its approach in *Canadian Newspaper v Canada* [1988] 2 SCR 122, although that case is decided on the basis of s. 1. In both cases, claims of freedom of the press had to give way to other interests. In *Canadian Newspaper*, that other interest is the right of sexual assault victims not to have their identity revealed, as a way of encouraging the reporting of sexual assaults. The Court considers issues of press freedom more comprehensively in the 1989-90 Term in *Edmonton Journal v Alberta (Attorney-General)* (1989) 64 DLR (4th) 577 (SCC).

²³⁸ See MacKay, "Freedom of Expression: Is It All Just Talk?", *supra*, note 94 for a discussion of the dangers of protecting freedom of the press without being careful to take account of the economic power of the mass media.

²³⁹ *R v Jones* [1986] 2 SCR 284; *Edwards Books and Art Ltd v R* [1986] 2 SCR 713.

²⁴⁰ *Alberta Reference*, *supra* note 229.

²⁴¹ [1989] 1 SCR 238.

²⁴² *Id.*

bina)²⁴³ (concerning an allegation that the Ontario Small Claims Court was improperly exercising a jurisdiction in admiralty matters); *Roberts v. Canada (Roberts)*²⁴⁴ (respecting the jurisdiction of the Federal Court to hear a dispute between two Indian bands in which the federal Crown was also implicated); and *Québec Ready Mix Inc. v. Rocois Construction Inc. (Quebec Ready Mix)*²⁴⁵ (also involving the jurisdiction of the Federal Court, though that question was very much secondary to the main question of the substantive validity of section 31.1 of the federal *Combines Investigation Act*,²⁴⁶ as discussed above in connection with the *General Motors*²⁴⁷ case. The *Yeomans* case, in holding that section 96 had not been transgressed, allows leeway for provincial administrative tribunals (this time in the labour context), but still assumes a clear constraining influence of section 96.²⁴⁸ The other three cases all involve consideration of the role of section 101 courts,²⁴⁹ with the Supreme Court of Canada reaffirming its conception of such courts as anomalous.

1. Re-examining Section 96 Court Jurisdiction: *Yeomans*

The *Yeomans* case, concerning section 96 courts, is the most significant court jurisdiction decision, because it most clearly breaks new ground. The Court is unanimous in the result, but not in its reasoning. Justice Wilson, writing for a majority consisting of herself, Chief Justice Dickson, and McIntyre and Lamer JJ., concludes that section 96 is not transgressed because of the institutional context of the particular administrative tribunal. In reaching this conclusion, Justice Wilson con-

²⁴³ [1989] 1 SCR 206. See a comment on this case by Tetley, (1989), 34 McGill L.J. 1099.

²⁴⁴ [1989] 1 SCR 322. See a comment on this case by Evans & Slattery, (1989), 68 Can. Bar Rev. 817.

²⁴⁵ [1989] 1 SCR 695.

²⁴⁶ R.S.C. 1970, c. C-23, as am. by S.C. 1974-75-76, c. 76, s. 12.

²⁴⁷ [1989] 1 SCR 641.

²⁴⁸ Section 96 of the *Constitution Act, 1867* provides:

The Governor General shall appoint the Judges of the Superior, District and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

²⁴⁹ Section 101 of the *Constitution Act, 1867* provides:

The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better administration of the Laws of Canada.

Only the latter part of s. 101 was relevant to these cases.

siders several important analytical questions about the application of section 96. In a separate concurring decision, Justice La Forest, writing for a minority of himself and Beetz and L'Heureux-Dubé JJ.,²⁵⁰ concludes that section 96 jurisdiction is simply not engaged at all, and does not find it necessary to comment on many of the points addressed by Wilson J. Although there is some common ground between Wilson and La Forest JJ., there are quite a few significant differences. In our assessment, the minority judgment generally offers a preferable approach as far as it goes. The majority decision, while moving in some directions we consider desirable, is also disturbing in some respects.

The context in which the section 96 issue arose in *Yeomans* concerns section 67A of the Nova Scotia *Labour Standards Code*.²⁵¹ That section prohibits the dismissal, without just cause, of an employee who has been working for the employer for at least ten years. Moreover, the Code contemplates a remedy of reinstatement in such circumstances. There was no challenge to the right of the province to pass such legislation; it is clearly a matter of property and civil rights in the province. The constitutional challenge arises because the forum for dealing with a complaint about a violation of section 67A is, in the first instance, the Director of Labour Standards, and then, (failing satisfaction), the Labour Standards Tribunal. In this case the Labour Standards Tribunal had ordered that Yeomans be reinstated, with backpay. The employer, Sobeys, challenged this decision on several grounds, including the claim that the legislation violated section 96, an argument which was accepted (unanimously) by the Nova Scotia Supreme Court, Appeal Division.

In deciding whether section 96 is being transgressed, all start from the premise that the three-stage test set out in *Reference Re Residential Tenancies Act, 1979*²⁵² applied:

- 1) whether the power or jurisdiction broadly conforms to the power or jurisdiction exercised by superior, district, or county courts at the time of Confederation;
- 2) whether the function of the tribunal is judicial; and,
- 3) whether, in the entire institutional context, the judicial powers are subsidiary or ancillary to general administrative functions, or necessarily incidental to the broader policy goal of the legislature.²⁵³

²⁵⁰ *Estey and Le Dain JJ.* heard the appeal, but took no part in the judgment.

²⁵¹ S.N.S. 1972, c. 10 as am. by S.N.S. 1975, c. 50, s. 4, S.N.S. 1976, c. 41, s. 15.

²⁵² [1981] 1 SCR 714.

²⁵³ *Id.* at 734-36. For critical assessments of this approach see, e.g., MacKay & MacLauchlan, "Section 96 and Its Amendment: A Report to the Attorney-General of Nova Scotia," September 1984; Bouchard, "Constitutional Challenges Related to Administrative Agencies — Division of Powers," in Finkelstein & Rogers, *Recent Developments in Administrative Law* (1987).

Whereas the Appeal Division had found that section 67A failed all three tests, Justice Wilson, for the majority of the Supreme Court of Canada, finds section 67A to be saved by the third stage of the test, and Justice La Forest, for the minority, concludes that section 67A passes the first stage of the test, making resort to the latter two stages unnecessary.

Justice Wilson treats the first stage of the test as establishing whether, *prima facie*, there has been trenching on section 96, and the second and third stages as determining whether such trenching is justified.²⁵⁴ That is a useful way to conceptualize the test, because it acknowledges the need for flexibility by recognizing that section 96 court jurisdiction is not frozen as it was in 1867.²⁵⁵

In treating the first stage of the test as a threshold to determine whether there has been any infringement on the traditional jurisdiction of section 96 courts, Justice Wilson poses several questions as to how the analysis should be approached. The first question is how broadly or narrowly the jurisdiction at issue ought to be characterized. Should the characterization be cast widely, such as labour standards or employer/employee relations, or narrowly, such as reinstatement or unjust dismissal?

Justice Wilson rejects too broad a characterization, because that would generally provide too easy a way around the section 96 constraint. If one creates a broad enough category, one is bound to get beyond the scope of section 96 courts.²⁵⁶ We do not disagree with Justice Wilson on this point, but it is important to note that another aspect of the inquiry gets buried in Wilson J.'s analysis. She gets so involved in asking how broad or narrow the characterization ought to be that she loses sight of the essence of what is being characterized. The argument that section 96 was transgressed in this case depends upon section 96 court jurisdiction over *contracts* of employment. The most compelling counterargument, and the one adopted by La Forest J., is that section 67A is *not* about contractual rights and obligations. In the words of La Forest J.:

The underlying social and economic philosophy of this legislation could not be in sharper contrast to that which existed at Confederation. At that time, the philosophy of laissez-faire was at its zenith. This was reflected in a legal environment that promoted strict individual equality and freedom of contract. Legislative control of economic activity was minimal. In the field of labour relations, then, what the courts enforced were individual contracts (governing what was then appropriately called a "master-servant" rela-

²⁵⁴ *Supra* note 241 at 254.

²⁵⁵ See MacKay & MacLauchlan, *supra*, note 253; Bouchard, *supra*, note 253 esp. at 185.

²⁵⁶ *Supra* note 241 at 252-56.

tionship). . . . In enacting the Code, the Legislature was not concerned with rules of contracts, but with establishing minimum standards. . . . The provision regarding dismissal, like the other standards in the Code, applies independently of any contractual arrangement that may exist. Essentially it is a new obligation imposed by law. It transcends the relationship between private parties.²⁵⁷

In rejecting the categorization “labour standards” because it is too broad, Justice Wilson misses the real point. The more significant aspect of the “labour standards” label is to divorce the legislation from the contractual locus of section 96 courts. Justice Wilson does, in effect, take this factor into account at the third stage of the test, but we think Justice La Forest has the preferable approach in considering this at the first stage. Section 96 court jurisdiction is simply not engaged in *Yeomans* because section 96 court jurisdiction has to do with something qualitatively quite different.

We agree with Justice La Forest that the inquiry could have, and should have, ended here. However, Justice Wilson’s approach takes her into further questions.²⁵⁸ Of particular interest is whether the section 96 court had to exercise *exclusive* jurisdiction in order for the inferior tribunal to run afoul of the historical part of the inquiry. In other words, if the jurisdiction was shared between superior and inferior courts at Confederation, is there any section 96 constraint at all? Justice Wilson answers in the negative, as long as the extent of shared jurisdiction was significant. If inferior tribunals exercised the jurisdiction to a considerable extent at Confederation, even if only concurrently, provinces are free to continue to allocate that jurisdiction to administrative tribunals or other inferior courts. Although this point had not been directly addressed by the Court before, this seemed to be the implicit assumption of previous cases.²⁵⁹ Indeed, it would be hard to justify any other approach. Section 96 courts were not under threat at the time of Confederation, and there is no sense that section 96 was meant to enhance their powers. Section 96 simply gives the appointment power to the federal government. The point of the section 96 jurisprudence is to preserve the integrity of section 96 courts by preventing their jurisdiction from being

²⁵⁷ *Id.* at 283-84.

²⁵⁸ Justice La Forest, in what constitutes *obiter* in his analysis, makes only brief comment on some of these points.

²⁵⁹ *Supra* note 241 at 256-61. Justice La Forest does not address this point.

unduly eroded. Their integrity cannot be undermined by continuing to recognize a concurrency that already existed at Confederation.²⁶⁰

Having determined that only exclusive section 96 court jurisdiction would cause a problem with respect to the historical inquiry, Wilson J. next considers the extent of the historical inquiry. What time frame and which provinces are relevant? Does Confederation refer to 1867 or to the date of entry of the particular province? And is the history of only one province or a “global” history relevant?

Justice Wilson concludes that 1867 is the relevant temporal reference, on the basis that section 96 was part of the 1867 Confederation bargain about the division of powers. New provinces accepted that part of the bargain as it already existed; they did not enter with a new or different bargain over section 96. This conclusion is consistent with the earlier section 96 cases, although the point had not been specifically analyzed.²⁶¹ Justice La Forest also tentatively agrees with the use of 1867, although warning against applying too technical an approach.²⁶²

The more contentious historical inquiry issue is whose history, *i.e.*, which province or provinces, is relevant. Earlier cases had tended to suggest that the inquiry was province specific, so that similar schemes could face different fates in different provinces.²⁶³ This is where *Yeomans* clearly breaks new ground. Both Wilson and La Forest JJ. reject this kind of checkerboard approach to section 96.²⁶⁴ They want the

²⁶⁰ An aspect of this question that is not addressed by Wilson J. (because it was not relevant in *Yeomans*) is whether a province could grant *exclusive* jurisdiction to an inferior tribunal over an area that was a matter of *concurrent* jurisdiction at the time of Confederation. This would not be giving an inferior tribunal a jurisdiction that it did not already have, but would be taking away jurisdiction previously exercised by a s. 96 court. We would suggest, nonetheless, that this should not run afoul of s. 96 because it would not attack the core of s. 96 court jurisdiction. Something that was only of concurrent jurisdiction does not constitute the essence of s. 96 court jurisdiction. However, it is doubtful that the Supreme Court of Canada would accept this argument, given their approach in *Crevier v AG Quebec* [1981] 2 SCR 220. That case indicates that s. 96 not only limits the conferring of powers on inferior tribunals, but is also a control against diminishing s. 96 court powers.

²⁶¹ *Supra* note 241 at 262-65.

²⁶² *Id.* at 288-89.

²⁶³ For example, the Ontario landlord/tenant legislation struck down in *Re Residential Tenancies Act*, *supra* note 252, was very similar to the Quebec legislation upheld in *AG Quebec v Grondin* [1983] 2 SCR 364. The different results reflected the different pre-Confederation history in Ontario and Quebec. This element of *Grondin* has been much criticized, *e.g.*, MacKay & MacLauchlan, *supra*, note 253 at 75; Bouchard, *supra*, note 253 at 174.

²⁶⁴ *Supra* note 241 at 265-67 (Wilson J.); 288-89 (La Forest J.).

Constitution to mean the same thing in different parts of the country.²⁶⁵ They approach the Constitution from a national perspective.²⁶⁶ Even for those more inclined to have the constitutional division of powers reflect differences, section 96 seems to be a very odd place to do this. It would be hard to suggest that historical differences related to section 96 court jurisdiction are anything other than historical accidents. For example, in the context of the Meech Lake Accord, we are not aware of any discussion of Quebec as a “distinct society” which relies on section 96 court jurisdiction. The historical inquiry is used in section 96 jurisprudence more or less by default, failing any other conceptual basis for defining section 96 court jurisdiction. In that light, every effort should be made to ignore historical anomalies. The acceptance of this proposition in *Yeomans* is welcome, as is the frank acknowledgement of the change in direction from previous cases.

Justice Wilson assumes that this “global” historical inquiry should relate only to the four original provinces of Nova Scotia, New Brunswick, Quebec and Ontario, since the objective is to discover the nature of the Confederation bargain in 1867.²⁶⁷ Justice La Forest is inclined to be more flexible, including some consideration of colonies initially involved in the Confederation negotiations or which, as had been contemplated, entered Confederation soon after the original four (*i.e.*, Newfoundland, Prince Edward Island and British Columbia).²⁶⁸ We think Justice La Forest’s more flexible approach is preferable. Since, as noted above, the historical inquiry is a default option method of giving substantive content to section 96 court jurisdiction, it is artificial to limit the historical inquiry. The 1867 bargain was struck with the expectation that other provinces would soon join, such that their histories at that time have at least some relevance.

Justice Wilson considers only the four original provinces, and faces the question of what happens if their history yields a two-two tie. That is in fact what the historical analysis produces in *Yeomans*. Justice Wilson breaks the tie by looking to the situation in the United Kingdom in

²⁶⁵ There obviously have to be exceptions to this where there are constitutional provisions that are expressly limited to particular jurisdictions, such as s. 133 of the *Constitution Act, 1867*, which applies only at the federal level and in Quebec (extended to Manitoba by s. 23 of the *Manitoba Act* and to New Brunswick by ss. 16 to 22 of the Charter).

²⁶⁶ The general reluctance to find differential application of the Constitution was perhaps most apparent in *Reference re Newfoundland Continental Shelf* [1984] 1 SCR 86, in which the Court systematically rejected Newfoundland’s claims to a unique constitutional position in relation to the offshore.

²⁶⁷ [1989] 1 SCR 238 at 265.

²⁶⁸ *Id.* at 289.

1867,²⁶⁹ which in *Yeomans* has the result that section 67A fails the historical part of the test. Although there is precedent for considering the situation in the United Kingdom,²⁷⁰ we find that puzzling. It is true that we inherited our judicial institutions from the United Kingdom, but the colonies did have internal self-government prior to Confederation, allowing changes to court jurisdiction. It seems quite strange to suggest that the United Kingdom practice should be incorporated at such a level of detail as to adopt the specific jurisdiction of United Kingdom inferior courts.

Moreover, and more significantly, we think Justice Wilson becomes entirely too technical in seeking to look anywhere to break a tie. If the historical evidence from this side of the Atlantic is so evenly balanced, that should be taken to mean there is no section 96 problem worth any worry. As long as there is significant history to support inferior court jurisdiction, *i.e.*, more than isolated examples, that should make it clear that the core of section 96 court jurisdiction is not in jeopardy. In that circumstance, the provinces should be at liberty to choose the judicial or administrative apparatus they consider best, free of constitutional limitation. We agree with Justice La Forest that it is preferable to “avoid too much precision in a matter that is inevitably imprecise.”²⁷¹

As regards the second and third stages of the *Residential Tenancies* test, we have no quarrel with Justice Wilson’s analysis except for the fact that her inquiry ever had to reach those stages. Regarding the second stage, it is quite obvious, as Justice Wilson concludes, that the Director of Labour Standards does not perform a judicial function, being more of an investigator and conciliator, but that the Labour Standards Tribunal does perform a judicial function in its adjudication of disputes.²⁷² With respect to the third stage of the test, Justice Wilson does acknowledge the policy importance of having labour standards handled through an administrative structure to provide expeditious results. She recognizes that the *Labour Standards Code* provides both substantive and procedural rights as part of the policy of protecting workers against economically stronger employers.²⁷³

Although in the result in *Yeomans*, Justice Wilson, for the majority of the Supreme Court of Canada, does provide scope for dealing with issues in a modern context differently from how they were dealt with in 1867, there is still plenty of room to run afoul of section 96. She forces the nub

²⁶⁹ *Id.* at 266-67, 271-72. Justice La Forest also considers it proper to examine the situation in the United Kingdom, at 289.

²⁷⁰ Cited in *id.* at 267.

²⁷¹ *Id.* at 289.

²⁷² *Id.* at 272-77.

²⁷³ *Id.* at 277-83.

of the inquiry to the third stage of the test, which is vague enough that it gives little guarantee of room to manoeuvre in different contexts.²⁷⁴ In setting the historical inquiry as the threshold of whether there has been any *prima facie* interference with section 96 jurisdiction, we think her net is cast too widely. Section 96 should be recognized as a limited restriction, only invoked when there is a serious and genuine threat that section 96 courts will be undermined.

The majority reasons in *Yeomans* seem to represent, to some extent, the attribution of a certain mystique to section 96 courts. That is not new, and has, in the past, been reflected as well in a cautious approach to section 101 courts.²⁷⁵ This attitude continues to prevail during the 1988-89 Term in the *Pembina*²⁷⁶ and *Roberts*²⁷⁷ cases.

2. Reaffirming the Limited Jurisdiction of Section 101 Courts: *Pembina* and *Roberts*²⁷⁸

The *Pembina* case actually concerns the jurisdiction of a small claims court, but since the subject matter is admiralty jurisdiction, the inter-relationship between provincial and federal courts comes up for consideration. The case involves a suit for \$442.80 in connection with damage to a trawling net which had become entangled in an unmarked gas well owned by the defendant. The plaintiff brought an action in small claims court, under section 55a of the Ontario *Small Claims Court Act*,²⁷⁹ which covers "any action where the amount claimed does not exceed \$1,000 exclusive of interest." The defendant contended there was no jurisdiction in the small claims court because this was an admiralty claim. Section 22 of the *Federal Court Act*²⁸⁰ gives concurrent, not exclusive,

²⁷⁴ See MacKay & MacLauchlan, *supra* note 253 at 36, 154-58; Bouchard, *supra* note 253 at 180.

²⁷⁵ *Jabour v Law Society of British Columbia* (1982), 137 DLR (3d) 1 (SCC); *Canada Labour Relations Board v. Paul L'Anglais Inc* (1983) 146 DLR (3d) 202 (SCC).

²⁷⁶ [1989] 1 SCR 206.

²⁷⁷ [1989] 1 SCR 322.

²⁷⁸ The *Quebec Ready Mix* case ([1989] 1 SCR 695) does not really shed much light on s. 101 court jurisdiction. Once it was decided s. 31.1 of the *Combines Investigation Act* was *intra vires* the federal Parliament, it was clear the Federal Court, as a s. 101 court, could hear an application pursuant to it. The alternate claim under s. 1053 of the *Civil Code of Lower Canada* could not, in itself, be characterized as falling within the "better administration of the laws of Canada" within s. 101. Nor could there be any serious contention that the alternate claim was intertwined with a s. 101 claim, even if it could be argued that this would be sufficient to invoke s. 101 jurisdiction. Federal Court jurisdiction over the alternate claim was not even argued before the Supreme Court of Canada.

²⁷⁹ R.S.O. 1980, c. 476.

²⁸⁰ R.S.C. 1970 (2nd Supp.), c. 10.

jurisdiction to the Federal Court, Trial Division over such admiralty law claims, but the defendant argued the concurrency was shared only with provincial superior courts. The small claims court judge rejected the challenge to jurisdiction, but the Ontario Divisional Court felt bound to agree with the objection to the small claims court jurisdiction because of the decision of the Ontario Court of Appeal in *Heath v. Kane*.²⁸¹ The Ontario Court of Appeal denied leave to appeal to itself, but the Supreme Court of Canada granted leave to appeal.²⁸²

Justice La Forest, writing for the Supreme Court of Canada,²⁸³ overrules the Ontario Court of Appeal's decision in *Heath v. Kane*, and reverses the decision of the Ontario Divisional Court denying jurisdiction to the small claims court. In recognizing that the small claims court had jurisdiction, the Supreme Court of Canada recognizes the right of provinces, under section 92(14), (subject to sections 96 and 101) to confer jurisdiction over federal matters to any provincially constituted court, whether superior or inferior. Furthermore, it concludes that very general

²⁸¹ (1975) 10 O.R. (2d) 716 (C.A.).

²⁸² Although the Supreme Court of Canada makes no comment on the point, there is an interesting question about the jurisdiction of the Supreme Court of Canada itself in this case, arising out of the fact that the Ontario Court of Appeal had denied leave to appeal to itself. In *Ernewein v Minister of Employment and Immigration* [1980] 1 SCR 639 the majority of the Court had said that where a Court of Appeal had denied leave to itself, the Supreme Court of Canada could hear neither an appeal of the decision to deny leave, nor a direct appeal of the lower court decision. The Court changed its mind on this point in *MacDonald v City of Montreal* [1986] 1 SCR 460, concluding that, although it normally would not, it could hear an appeal of a decision of a Court of Appeal to deny leave. Such a case would be heard in circumstances (as in *Pembina*) where the Court of Appeal had denied leave on the basis of a previous decision of its own on an important constitutional question which the Supreme Court of Canada had not itself considered. In the event that the Supreme Court of Canada thought the appeal meritorious, the Court would reverse both the decision of the Court of Appeal denying leave and the lower court decision. (The majority in *MacDonald* did not disagree with the lower court decision, and so simply dismissed the appeal, but agreed with Wilson J. (dissenting) that this would have been the proper way to resolve the case if they had thought the appeal meritorious.) In *Pembina*, however, the Supreme Court of Canada seems to have granted leave directly from the decision of the Ontario Divisional Court, completely bypassing and ignoring the Ontario Court of Appeal's denial of leave. If so, this reverses the other element of *Ernewein*, and assumes that "the highest court of final resort in a province" within s. 41 of the *Supreme Court Act*, R.S.C. 1970, c. S-19 (currently R.S.C. 1985, c. S-26, s. 40) is case specific, and includes the court below the Court of Appeal when the Court of Appeal has chosen not to be the court of final resort by denying leave to itself. This seems to be an important jurisdictional and procedural point, warranting some explanation or comment from the Supreme Court of Canada, even though the ultimate effect is the same as the approach approved in *MacDonald*.

²⁸³ Dickson C.J., and McIntyre and L'Heureux-Dubé JJ., concurring. Le Dain J. heard the appeal, but took no part in the judgment.

language, such as in section 55a of the Ontario *Small Claims Court Act*, is sufficient to accomplish this. We agree with the comments of William Tetley²⁸⁴ that the Supreme Court of Canada's decision in *Pembina* is sound. It is clear that section 101 is merely permissive, allowing the federal Parliament to create courts for the administration of federal law only if it so chooses. In this instance there was no federal legislative claim to exclusive jurisdiction in a federally constituted court. The Constitution contemplates provincially constituted courts dealing with federal subject matters, and there is nothing in section 92(14) which impliedly excludes provincial inferior courts from this. La Forest J.'s judgment in *Pembina*, like his judgment in *Yeomans*,²⁸⁵ properly refuses to artificially restrict the jurisdiction of provincial inferior tribunals.²⁸⁶

It is, however, the Court's attitude to section 101 courts that gives broader implications in *Pembina*. Section 101 court jurisdiction was not actually at issue, since there was no legislative claim to exclusive Federal Court jurisdiction. The Supreme Court of Canada acknowledges in *Pembina* that the federal Parliament, under section 101, could take away jurisdiction over admiralty from provincially constituted courts. Yet one is left with the impression that the Court would consider this a highly undesirable step. La Forest J. refers throughout *Pembina* to the "essentially unitary nature of the court system established by the Constitution."²⁸⁷ Although the Court is forced to acknowledge section 101, it is clearly with some reluctance. La Forest expressly links his decision in *Pembina* to the "stringent requirements" for federal resort to section 101.²⁸⁸ The Court seems to us to be somewhat over zealous on this point, something also reflected in the *Roberts*²⁸⁹ case.

Roberts involves a trespass action by the Wewayakum Indian Band (also know as the Campbell River Indian Band) against the Wewayakai Indian Band (also know as the Cape Mudge Indian Band) in a dispute about which Band has the right to exclusive use and occupation of the Quinsam Indian Reserve. The federal Crown, which was impleaded in the action, has for some time acted on the basis that the reserve in question is set aside for the Wewayakai Band. The only issue before the Supreme Court of Canada was whether the Federal Court, Trial Division

²⁸⁴ *Supra* note 243.

²⁸⁵ *Supra* note 267.

²⁸⁶ There was some argument that the admiralty jurisdiction in *Pembina* belonged to a s. 96 court, according to the usual tests, but this contention is quickly rejected by the Supreme Court of Canada: *supra* note 276 at 227-28.

²⁸⁷ *Id.* at 226, for example.

²⁸⁸ *Id.* at 226.

²⁸⁹ *Supra* note 277.

had jurisdiction to hear the case. The Court, speaking through Wilson J.,²⁹⁰ applies the standard test for section 101 court jurisdiction:

- 1) There must be a statutory grant of jurisdiction by the federal Parliament.
- 2) There must be an existing body of federal law which is essential to the disposition of the case. . . .
- 3) The law on which the case is based must be "a law of Canada" as the phrase is used in s. 101 of the *Constitution Act, 1867*.²⁹¹

The possible bases for statutory jurisdiction are section 17(1) or (3)(c) of the *Federal Court Act*.²⁹² The statutory interpretation issue is whether either subsection covers a case where the federal Crown is not the only defendant. The Court gives broad hints that section 17(1) could be used where the claim against the non-Crown defendant is intertwined with the claim against the Crown,²⁹³ but in the end decides that the conditions of section 17(3)(c) are satisfied.²⁹⁴ In other words, the Court relies on the section which they find completely covers the case in express terms. They do not rely on the section under which the statutory jurisdiction would be partly implied, while suggesting this is possible. Although this

²⁹⁰ Dickson C.J. and Beetz and Lamer JJ., concurring. Le Dain J. heard the appeal, but took no part in the judgment.

²⁹¹ *Supra* note 277 at 330. In their comment on *Roberts*, *supra* note 244, Evans and Slattery claim there is no meaningful distinction between the second and third parts of the test (at 823-25). We think there is a subtle, but important, difference. The second part of the test assumes reliance on what purports to be federal law. The third part of the test assesses whether it is validly federal law. The distinction can become quite apparent in a case such as *Quebec Ready Mix* ([1989] 1 SCR 695) where there is a substantive federal statutory provision on which the case depends, (easily meeting the second part of the test) but it is alleged that provision is *ultra vires* (raising an issue under the third part of the test). Thus we would paraphrase the three part test as requiring a statutory grant of jurisdiction, over a case that turns on what purports to be federal law, which is in fact a valid "law of Canada" under s. 101.

²⁹² R.S.C. 1970 (2nd Supp.), c. 10.

17. (1) The Trial Division has original jurisdiction in all cases where relief is claimed against the Crown and, except where otherwise provided, the Trial Division has exclusive original jurisdiction in all such cases.

.

(3) The Trial Division has exclusive original jurisdiction to hear and determine the following matters:

.

(c) proceedings to determine disputes where the Crown is or may be under an obligation, in respect of which there are or may be conflicting claims.

²⁹³ *Supra* note 277 at 333.

²⁹⁴ *Id.* at 334-37.

possibility has the potential to open up Federal Court jurisdiction slightly, the ultimate impact of such an approach is muted by the conclusion, on the second and third elements of the test, that the case must turn *exclusively* on federal law which qualifies as a “law of Canada” under section 101.²⁹⁵

The Court does find that *Roberts* turns exclusively on federal law, *i.e.*, executive Acts by the federal Crown, various provisions of the *Indian Act*,²⁹⁶ and the common law of aboriginal title. The common law of aboriginal title qualifies as a “law of Canada” under section 101, but not simply because it falls within federal constitutional authority allowing the federal Parliament to legislate about it. Justice Wilson affirms previous case law that this is necessary, but insufficient. The common law of aboriginal title qualifies as a “law of Canada” under section 101 because it is an already developed area of common law.²⁹⁷

Thus *Roberts* does clearly recognize that common law can qualify as a “law of Canada” within section 101, and can cover some areas of federal jurisdiction which the federal Parliament has not yet occupied. Yet the Court is still careful not to make section 101 jurisdiction co-extensive with the federal Parliament’s constitutional authority. Even if given statutory jurisdiction over the subject matter, a section 101 court cannot start developing federal common law “from scratch” in the way that a provincial superior court could. The Federal Court is clearly a second class court.

The continuing commitment to the requirement that federal law be the *exclusive* basis for federal court jurisdiction also severely limits the jurisdiction of the Federal Court. As Evans and Slattery have said in commenting on the problems faced by the Federal Court:

The fundamental reason for the court’s difficulties is that its existence challenges the pre-eminent position long enjoyed by the superior courts in the essentially unitary judicial system established by the Constitution Act, 1867.²⁹⁸

In *Roberts* Justice Wilson comments on the American approach to federal court jurisdiction, called “pendant and ancillary jurisdiction,” under which claims intertwining both federal and state law can be heard in the federal courts, assuming the federal law issues are substantial.

²⁹⁵ *Id.* at 534. It seems to us that Evans & Slattery, *supra*, note 244 at 825-29, are reading a bit too much into the implications of a broader approach to the statutory grant of jurisdiction.

²⁹⁶ R.S.C. 1970, c. I-6.

²⁹⁷ *Supra* note 277 at 340. See also Evans & Slattery, *supra* note 244 at 831-32.

²⁹⁸ *Supra* note 244 at 817-18.

In some ways this is an attractive concept. However, it does not appear to find support in the existing jurisprudence of this Court nor indeed in the wording of s. 101 of the *Constitution Act, 1867*. . . .²⁹⁹

If one were predisposed to recognize a pendant and ancillary jurisdiction, we do not see why it would be hard to find authority in section 101. Section 101 simply refers to “courts for the better administration of the laws of Canada.” If a federally constituted court contributes to the better administration of federal law, presumably because a single court provides more consistency and/or expertise than ten provincially constituted courts, why could not that rationale equally apply where federal law is intertwined with provincial law in the resolution of a case? The arguments in favour of federally constituted courts interpreting federal law do not essentially change just because provincial law happens to be implicated in a particular case. Section 101 does not expressly say that the courts can deal only with federal law, and the section does contain a “notwithstanding anything in this Act.”³⁰⁰ Federal ancillary jurisdiction has been recognized elsewhere; it could be recognized in section 101. The fact that it has not been reflects the strong commitment of the Supreme Court of Canada to the “essentially unitary nature” of the Canadian court system. The kinds of practical problems created by the restrictive interpretation of section 101 are well documented in the comment on *Roberts* by Evans and Slattery.³⁰¹

The Supreme Court of Canada does show some flexibility in the interpretation of both section 96 and 101 (and also section 92(14)) during the 1988-89 Term. They are not as technical in their approach to court jurisdiction questions as they have been at times in the past. Yet there is, in our assessment, still a tendency to be overly protective of section 96 courts and overly suspicious of section 101 courts.

V. LANGUAGE RIGHTS, DENOMINATIONAL SCHOOLS, AND QUEBEC'S CULTURAL AUTONOMY

At a time when the distinctiveness of Quebec is a major political issue in the context of efforts to ratify the 1987 Meech Lake Accord, the Supreme Court made some important rulings on the cultural autonomy of Quebec. In *Ford*³⁰² and *Devine*³⁰³ the Court addresses the linguistic

²⁹⁹ *Supra* note 277 at 334.

³⁰⁰ The limited impact of this phrase in the s. 101 jurisprudence has been noted, with some lament, by Strayer J. in *Re Brink's Canada and Canada Labour Relations Board* (1985) 17 DLR (4th) 331 (FC TD).

³⁰¹ *Supra* note 244.

³⁰² [1988] 2 SCR 712.

³⁰³ [1988] 2 SCR 790.

rights of Quebec's anglophone minority, not in the more traditional context of language rights *vis-à-vis* the government, but in the guise of commercial expression pursuant to section 2(b) of the Charter. These rulings precipitated a controversial legislative override by the Quebec National Assembly, which added further turbulence to the troubled waters of Meech Lake. In a lower profile case, *Greater Montreal Protestant School Board v. Quebec (Attorney General)*,³⁰⁴ the Court also addresses the cultural autonomy of Quebec in the field of education. In this case the relevant minority is the dissentient Protestant School Boards asserting their constitutional rights pursuant to section 93 of the *Constitution Act, 1867*. We shall begin with the high profile language cases.

1. Language and Expression: The Medium is the Message

While the issue of Quebec's cultural autonomy is slightly below the surface in the court's analysis of denominational school rights, it is front and center in the high profile cases dealing with the language of commercial signs in Quebec. With the possible exception of the abortion cases discussed later in this article, *Ford v. Quebec (Attorney General)*³⁰⁵ and *Devine v. Quebec (Attorney General)*³⁰⁶ have stirred more political controversy and generated more public interest than any other cases decided by the Court since the advent of the Charter. The explosive combination of language rights, freedom of expression, and Quebec politics ensured that these cases would test the judicial and political skills of Canada's top judges. In our view the members of the Court rose to the challenge; nonetheless, the Quebec National Assembly had a different view, and enacted legislation with an override provision which circumvented the Supreme Court's conclusion.³⁰⁷

The central issue in both *Ford* and *Devine* is the validity of the provisions of the *Charter of the French Language*³⁰⁸ restricting the use of languages other than French in commercial advertising. In the first section of this statute French is declared to be the official language of Quebec, and this objective is pursued in sections such as 58 and 69, which were the focus of the judicial challenge.

58. Public signs and posters and commercial advertising shall be solely in the official language.

Notwithstanding the foregoing, in the cases and under the conditions or

³⁰⁴ [1989] 1 SCR 377.

³⁰⁵ *Supra* note 302.

³⁰⁶ *Supra* note 303.

³⁰⁷ *An Act To Amend the Charter of the French Language*, S.Q. 1988, c. 54.

³⁰⁸ R.S.Q. 1977, c. C-11.

circumstances prescribed by regulation of the Office de la langue française, public signs and posters and commercial advertising may be both in French and in another language or solely in another language.

69. Subject to section 68, only the French version of a firm name may be used in Québec.

In her challenge to these sections, and the related statutory sections and regulations, Valerie Ford raised both section 2(b) of the *Canadian Charter of Rights and Freedoms* and the equivalent provision of the *Quebec Charter of Human Rights and Freedoms*.³⁰⁹ This section reads as follows:

3. Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.

Balancing the expression rights of the linguistic minorities in Quebec, and the powers of the Quebec government to limit these rights in the pursuit of cultural autonomy, is the central task facing the Court in both *Ford* and *Devine*. In *Ford*, where the Court most fully expresses its view on this balancing of rights, the litigants sought to invalidate both sections 58 and 69, as well as the related provisions, by arguing in favour of the right to use bilingual signs and names. In *Devine* the argument was pushed further, arguing in favour of the right to use English only. Recognizing the need for the Quebec government to take measures to preserve the French language and culture in an anglophone North American milieu, the Court is willing to accept that advertising must be done in French, in addition to any other language. Thus the Court rejects the claim of the litigants in *Devine* to advertise in English only.³¹⁰ However, in the Court's view, the requirement that commercial advertising be in French only is going too far.

For purposes of its freedom of expression analysis, the Court assumes that the freedom should be accorded the same meaning in both section 2(b) of the Charter and section 3 of the *Quebec Charter of Human Rights and Freedoms*. This is consistent with its rulings in *Andrews*³¹¹ that the

³⁰⁹ R.S.Q. 1977, c. C-12. Basing the challenge on this statute as well as the Charter was an important strategic move, because s. 58 of the *Charter of the French Language* was held to be immunized from Charter challenge by a valid and subsisting override provision pursuant to s. 33 of the Charter. Section 69, the other challenged provision, was subject to both the Canadian and Quebec Charters.

³¹⁰ In *Devine* the relevant provisions of the *Charter of the French Language* are also challenged on the basis of the division of powers pursuant to ss. 91 and 92 of the *Constitution Act, 1867*; this aspect of the case is explored earlier in the article.

³¹¹ [1989] 1 SCR 143.

concept of discrimination developed under human rights legislation is a valid reference point for the meaning of discrimination in section 15 of the Charter.³¹² It is also a further example of the Supreme Court's tendency to accord human rights legislation a "quasi-constitutional" status.³¹³ In the past the Court has made its comments about the special status of human rights legislation in cases involving questions of equality and discrimination.³¹⁴

There is no doubt in either the lower courts or the Supreme Court in *Ford* that freedom of expression includes the freedom to express oneself in the language of one's choice. Both the Quebec Court of Appeal and the Supreme Court cite with approval the following passage from *Reference re Minority Language Rights*.

The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society.³¹⁵

From this point of departure, the Supreme Court continues in an eloquent passage to stress that language is not just the medium of expression, but is also vital to the content of the message.

Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice. Language is not merely a means or medium of expression; it colours the content and meaning of expression. It is, as the preamble of the *Charter of the French Language* itself indicates, a means by which a people may express its cultural identity. It is also the means by which the individual expresses his or her personal identity and sense of individuality. That the concept of "expression" in s. 2(b) of the *Canadian Charter* and s. 3 of the *Quebec Charter* goes beyond mere content is indicated by the specific protection accorded to "freedom of thought, belief [and] opinion" in s. 2 and to "freedom of conscience" and "freedom of opinion" in s. 3. That suggests that "freedom of expression" is intended to extend to more than the content of expression in its narrow sense.³¹⁶

³¹² This is more noteworthy because the American constitutional experience with equality and the earlier Canadian experience with the *Canadian Bill of Rights*, R.S.C. 1985, Appendix III, was discounted in *Andrews, id.*

³¹³ The Quebec situation may be somewhat unique because the *Quebec Charter of Human Rights and Freedoms* is more like a provincial bill of rights than a regular human rights statute.

³¹⁴ *Winnipeg School Div No 1 v Cranton* [1985] 2 SCR 150; *Bhinder v CNR* [1985] 2 SCR 561; and *Ontario Human Rights Commission v Simpsons-Sears Ltd* [1985] 2 SCR 536, are examples.

³¹⁵ [1985] 1 SCR 721 at 744; cited with approval in *Ford, supra* note 302 at 748.

³¹⁶ *Supra* note 302 at 748-49.

The Court emphatically rejects the distinction between the medium and the message. In the context of language, we agree that there is no workable distinction between the medium and the message.³¹⁷ In Quebec's political climate, the choice of one's language of expression is in itself a significant political statement. In response to the expert commentary on the vital link between language and culture, the Court states:

As has been noted this quality or characteristic of language is acknowledged by the *Charter of the French Language* itself where, in the first paragraph of its preamble, it states: "Whereas the French language, the distinctive language of a people that is in the majority French-speaking, is the instrument by which that people has articulated its identity."³¹⁸

In this context, the Attorney General of Quebec was in an awkward legal position in trying to argue that language was not integral to expression.

Another submission by the Attorney General of Quebec was that section 2(b) should not be interpreted to embrace language of expression because of the express language rights guaranteed in section 133 of the *Constitution Act, 1867* and sections 16-23 of the Charter. The Court finds no inconsistency in recognizing language rights *vis à vis* the government in express constitutional provisions, and also recognizing language rights for commercial expression in the private domain, under the umbrella of the broader concept of freedom of expression.³¹⁹ Using the distinction between the private and governmental spheres, the Court also distinguishes decisions from the European Commission of Human Rights and the European Court of Human Rights that denied choice of language as an aspect of freedom of expression. We agree that is a distinction between what the government is required to do, and what the citizen is prohibited/required to do, with respect to language. In *Ford* the Court makes an eloquent and convincing case for including language of choice within the guarantees of freedom of expression.

Accepting that the challenged provisions violated freedom of expression, the Court turns to whether they are saved by the relevant limitation clauses in the two Charters. The language of section 1 of the Charter differs from that of the Quebec *Charter of Human Rights and Freedoms*, which reads as follows:

9.1. In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec.

³¹⁷ This distinction was adopted by Dugas J. in *Devine v Quebec (AG)* [1982] CS 355.

³¹⁸ *Supra* note 302 at 750.

³¹⁹ This kind of restrictive interpretation of the express language guarantees in the Constitution has already been explored in *MacDonald v City of Montreal* [1986] 1 SCR 460 and *Société des Acadiens du NB v Assn of Parents for Fairness in Education* [1986] 1 SCR 549.

In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law.

In spite of the different language in the two sections, the Court concludes that both should be treated the same, and that the *R. v. Oakes*³²⁰ analysis is appropriate.

The Court also concludes that *Ford*, *Devine* and *Irwin Toy* are cases involving the limitation of rights, and not the total denial or negation of rights, as the respondents argued. Chief Justice Deschenes in the Quebec Superior Court and a majority of the Court of Appeal in *Quebec Assn. of Protestant School Boards v. Quebec (A.G.)*³²¹ held that section of the Charter has no application where the right in issue is denied rather than limited. This issue was not addressed at the Supreme Court level in *Quebec Assn. of Protestant School Boards*,³²² but in its *Ford* analysis the Court indicates that it agrees that there was a denial of rights with respect to that particular section 23 Charter issue. It distinguishes the situations in *Ford*, *Devine* and *Irwin Toy* as examples of specific limitations on more generalized Charter rights.³²³

There is an interesting issue in *Ford* and *Devine* about the admissibility of factual evidence of a sociological, demographic and statistical nature. Most of the contested studies were introduced at the appeal level, but there was no formal ruling on whether they were admitted as part of the court record. To further complicate matters, the Attorney General of Quebec attached more linguistic studies and what it termed "legislative facts" to its Supreme Court factum. While there were some objections to its consideration as evidence properly before the Court,³²⁴ the parties were not taken by surprise and came prepared to argue, on the

³²⁰ [1986] 1 SCR 103.

³²¹ [1982] CS 673 at 689-93; affd [1983] CA 77 at 78.

³²² [1984] 2 SCR 66.

³²³ In this regard the Court also distinguishes the comments of Wilson J. in *R v Morgentaler* [1988] 1 SCR 30 at 183 where she states:

Section 251 of the *Criminal Code* takes the decision away from the woman at all stages of her pregnancy. It is a complete denial of the woman's constitutionally protected right under s. 7, not merely a limitation on it. It cannot, in my opinion, meet the proportionality test in *Oakes*. It is not sufficiently tailored to the legislative objective and does not impair the woman's right "as little as possible". It cannot be saved under s. 1.

Cited in *Ford*, *supra* note 302 at 774.

³²⁴ The most strenuous objections came from Mr. Singer in *Devine*, *supra* note 303. He disagreed with some of the statistical evidence on the anglophone and francophone minorities in Quebec. Because the normal rules for admitting evidence were not followed, the materials were not subjected to the usual scrutiny of the adversarial process. The Court was willing to treat much of the materials in the same way that it treats scholarly articles -- which are not subjected to strict cross examination.

basis that the evidence might be admitted. The Court notes the objections, but accepts the evidence for purposes of the section 1 Charter analysis and the equivalent Quebec Charter considerations.³²⁵

On considering the evidence and the arguments of the parties, the Court has no difficulty in concluding that the preservation of the French language in Quebec is a pressing and substantial objective, and that the challenged provisions are in pursuit of that objective. It is convinced that there is a need for Quebec to present a "visage linguistique" which reflects the dominance of the French language in the province. Thus requiring the use of French is justified, and is an answer to the claim in *Devine* to the right to use English only. However, the challenged provisions, in mandating *only* French, fail the *Oakes* test on the proportionality branch. While it would be proportional to require that French have a predominance, even a marked predominance, compared to the other language, the requirement that only French be used is too serious an invasion of freedom of expression to be justified under sections 1 and 9.1 respectively. Thus both sections 58 and 69 of the *Charter of the French Language* are rendered invalid.³²⁶

The Court's discussion on the proportionality test is somewhat sparse. The Court does go out of its way to acknowledge that Quebec is a province "pas comme les autres" in this context. It is clear that the Court would not have the same degree of receptiveness to comparable legislation in a predominantly English province, since there is no arguable threat to English in North America. In effect, the distinctness of Quebec's society is acknowledged without reliance on the Meech Lake Accord. While the Court is prepared to accept the need for some extraordinary measures for the promotion of French in Quebec, it looks in vain for proof that the subordinate use of English is a threat. The impression that we are left with is that the Court was open to be convinced, but was

³²⁵ In light of the Court's persistent plea for this kind of "social fact" and "legislative fact" evidence for purposes of the s.1 Charter analysis, it is not surprising that it was willing to bend the rules. The Court appears genuinely committed to grounding its decisions in solid factual evidence. See MacKay, "Interpreting the Charter of Rights: Law, Politics and Poetry," in Beaudoin (ed.), *Charter Cases 1986-87* (1987).

³²⁶ As a result of the challenge in *Devine*, other sections of the statute and related regulations were invalidated as part of the tainted package. The Court in *Devine*, *supra* note 303 at 816, states:

Although in the present case several sections are in issue, and not a single one as in *Morgentaler*, the same principle applies. A single scheme is being dealt with, and once the parent section which institutes that scheme has been found unconstitutional, the Court must proceed to strike down those exceptions which are necessarily connected to the general rule. In that way, distortions and inconsistencies of legislative intention do not result from finding the major component of a comprehensive legislative regime contrary to the Constitution.

forced to conclude that the section 1 burden had not been met. Indeed, the Court notes that “the Attorney General of Quebec did not attempt to justify the requirement of the exclusive use of French.”³²⁷ On that basis, the Court can hardly be faulted for failing to be convinced.

Even though the above reasoning disposed of the challenges in *Ford*, the Court does address whether sections 58 and 69 also violate section 10 of the Quebec *Charter of Human Rights and Freedoms*, which reads:

10. Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.

In *Ford* the Court finds that sections 58 and 69 are also in violation of section 10 of the Quebec Charter to which the saving section 9.1 clause does not apply. It rejects the position taken below that all Quebecers are subject to the same law and that any extra burden imposed on anglophones is not a discrimination. Foreshadowing its equality analysis in *Andrews*,³²⁸ the Court focuses not on a “similarly situated” analysis, but rather the real discriminatory impact of the challenged provisions on anglophones in Quebec. Although section 15 of the Canadian Charter was raised in *Devine*, the Court does not address the section 15 issue.³²⁹ In light of the many layers of controversy in *Ford* and *Devine*, the Court was wise not to articulate its approach to equality in this context.

2. Dissident Protestant Schools in Quebec

Debates about the powers of denominational schools in Canada are as old and sometimes as controversial as those about language rights. Indeed, language rights in section 133 and denominational school rights in section 93 were a mini bill of rights in the *Constitution Act, 1867*. Problems with section 93 interpretation have arisen as the exercise of education control shifts from largely local authorities to central provincial ones, and as political and social needs in relation to education change from what they were at the time of Confederation. In Ontario the

³²⁷ *Supra* note 302 at 779.

³²⁸ [1989] 1 SCR 143. This equality analysis is explored earlier in the article.

³²⁹ The decision to not address s. 15 of the Charter was an easy one, because ss. 52 and 57, challenged on the basis of s. 10 in *Devine*, were held not to be discriminatory in their impact.

provincial response has been to enhance the role of the denominational schools. Amendments to Ontario's *Education Act* provide increased funding for Roman Catholic high schools, and there are also indications of provincial willingness to accommodate school board-directed curricula. These measures were affirmed as constitutionally sound in the 1987 *Separate Schools Reference*.³³⁰ The situation is different in Quebec, where increased provincial involvement has been seen by the Protestant minority as a threat to their educational autonomy. This "threat" has been seen as not only denominational in character, but also cultural and linguistic.

In Quebec, the last two decades have seen the delegation of many traditional school board powers to the Ministry of Education, including tax collection, labour negotiations, and curriculum control. Coupled with this power shift, there has been a dramatic decrease in enrolment in Protestant schools. This has produced school closures and the shrinking of the Protestant school system to approximately 60% of its 1976 size. As a part of the opposition to what anglophone Quebecers see as a restriction of their traditional political and cultural authority, court battles, based on section 93 of the *Constitution Act, 1867*, have been launched to protect the status quo of the Protestant schools.³³¹ Since most of the schools involved are actually secular in style, the underlying issue is not really their denominational character.

Funding disputes have been brought before the Court but the Court has been able to evade the definition of the exact scope of section 93 rights in Quebec. In 1979, Bill 57 was passed which gave the provincial government more powers in distributing school board grants. It restricted school boards' powers to levy taxes in order to meet expenses beyond these grants. This was challenged by the anglophone minority and reached the Supreme Court level in *A.G. Quebec v. Greater Hull School Board (Greater Hull)*.³³² There, the 1979 law was indeed found to violate rights protected by section 93 of the *Constitution Act, 1867*. The challenged legislation did not include a requirement that government grants be awarded based on pupil enrolments, and it made fundraising too onerous for local boards. The court's ruling in *Greater Hull* represents a careful middle ground on section 93 rights in Quebec. While ruling section 93 rights and privileges exist beyond the bare denominational character of the schools, the Court, by only answering the very

³³⁰ [1987] 1 SCR 1148.

³³¹ Although the Protestant schools are largely English, they are not exclusively so. Accordingly, s. 93 schools in a position to claim constitutional rights as religious minorities are not synonymous with Charter minority language s. 23 schools.

³³² [1984] 2 SCR 575.

specific questions raised by Bill 57, sent no message of overall constitutional constraint to the province.

While funding is obviously vital to the autonomy of denominational school boards in Canada, another area of vital concern is the control of the school curriculum. This is particularly true in the province of Quebec, where questions of language and culture can be just as divisive as denominational issues. Indeed, any examination of recent controversies about denominational schools in Quebec should be undertaken in the context of frustrated desires on the part of successive Quebec governments to reorganize schools on the basis of language rather than religion. The control of curriculum content is crucial to the linguistic and cultural character of Quebec schools, as well as their denominational character.

Dissatisfaction with uniform curriculum regulations introduced by the Quebec Government in 1981 resulted in their examination by the Court in the 1988-89 Term, in *Greater Montreal Protestant School Board v. Quebec (Attorney General) (Greater Montreal Protestant School Board)*.³³³ The Court comes down strongly on the side of provincial power, allowing a substantial shift in the local/provincial balance of power. Its ruling is based on the letter of the law in force at Confederation, and not actual power structures in force at the time. The Court refuses to consider political and linguistic concerns in deciding the denominational issue. The case will likely discourage groups trying to control education through section 93 challenges to provincial educational regulation. Powers granted by law to local denominational authorities at the time of Confederation may be read narrowly in the presence of provisions granting provinces broad regulatory power. The direct denominational aspects of the curriculum obviously will be constitutionally protected. Beyond that, non-denominational aspects of the curriculum are only protected to the extent necessary to give effect to these denominational aspects, construed in a limited fashion. This appears to be the message that the Court is sending in *Greater Montreal Protestant School Board*.

The Greater Montreal Protestant School Board attempted two lines of attack against the challenged uniform curriculum regulation. The appellants argued that the trustees' rights in 1867 to regulate the course of study in dissentient schools could not co-exist with the provincially prescribed curricula, and so the challenged regulations were in violation of the section 93(1) constitutional protections. Alternatively, they argued that the regulations were constitutionally invalid under section 93(2). They argued that the extension to Quebec dissentient schools of

³³³ [1989] 1 SCR 377.

rights over curricula enjoyed by Roman Catholics in Ontario conflicted with the challenged regulations. The Court rejects both lines of attack and thereby affirms the Quebec government's power to consolidate and centralize their authority over education. The Court's discomfort in using section 93 to settle political or pedagogical disputes is obvious in its admonishment of the appellants:

There is plainly an honest difference of opinion between the educational experts of the appellant school boards and those of the Minister of Education as to what kind of pedagogical regime is best. . . . Whatever the merits of the approaches to education espoused by the appellant school boards and the Minister respectively, s. 93(1) of the *Constitution Act, 1867* is not the appropriate device to settle their differences. . . . In an effort to attack the principle of a uniform curriculum for all schools, the appellants have framed what may well be a legitimate pedagogical argument in constitutional terms which, I believe, is inappropriate.³³⁴

The Court is unanimous in its opinion, as expressed by Beetz J., regarding the application of section 93(1) to the matter. Tellingly, Justice Beetz begins his section 93 analysis by quoting the 1928 *Hirsch*³³⁵ case, to the effect that section 93, while protecting rights, "does not purport to stereotype the educational system in the Province as then existing" and "it is difficult to see how the Legislature can effectively exercise the power entrusted to it unless it is to have a large measure of freedom to meet new circumstances as they arise." Justice Beetz rejects the view of McCarthy J.A. at the Court of Appeal level in *Greater Montreal Protestant School Board*. Under McCarthy J.A.'s approach, if a large and liberal interpretation is given to the exclusive power of the provinces to make laws in relation to education, such an interpretation must also be given to the rights and privileges held at Confederation with respect to denominational schools.³³⁶ Instead, Justice Beetz states:

While it may be rooted in notions of tolerance and diversity, the exception in s. 93 is not a blanket affirmation of freedom of religion or freedom of conscience. The entrenched right of specified classes of persons . . . to enjoy

³³⁴ *Id.* at 416-17.

³³⁵ *Hirsch v Protestant Board of School Commissioners of Montreal* [1928] AC 200. The Privy Council here decided that the treatment of Jewish children in the same way as Protestants, for school purposes, would violate the Protestants' s. 93(1) protections in that Jews might be elected to their school boards, thereby prejudicially affecting the rights and privileges of denominational school supporters. It was held, however, that Jewish children had the right to attend Protestant schools in Montreal and could be admitted as a matter of grace to rural schools.

³³⁶ *Greater Montreal Protestant School Board v Quebec*, [1987] RJQ 1028 (CA) at 1033.

publicly-sponsored denominational schools based on a fixed statutory benchmark should not be construed as a *Charter* human right or freedom. . . .³³⁷

First, declaring that section 93 rights are not “stereotyped,” Beetz J. explains that section 93(1) protections, by the section’s own text, are limited to those rights and privileges protected “by Law” and “at the Union,” which cannot accommodate Charter-like large and liberal interpretations. To understand how encouraged provincial regulators should be after this decision, one must examine the sweeping nature of the Quebec curriculum regulations. Then, one must examine the seemingly expansive powers of dissentient school trustees and commissioners at the time of Confederation, to understand the import of their subjection to such provincial regulation.

Under Quebec’s 1981 regulations³³⁸ the Minister prescribes or approves curricula and indicates which textbooks and teaching materials are to be used; any others supplemental to them must be approved. The Minister also prescribes “educational and motivational activities,” *i.e.*, compulsory “Social and Personal Development,” “Career Guidance” and “Home Economics.” The regulations do provide, however, that moral and religious instruction is to be regulated by the appropriate Catholic or Protestant Committee of the Conseil de l’éducation, and not the Minister.

The appellants claimed that control over certain non-denominational aspects of the curriculum was necessarily exercised by local school boards in order to give effect to “Protestant educational philosophy.” Since the regulations effectively give the province complete control over the non-denominational aspects of the curriculum, the appellants argued that this part of the school boards’ protected denominational rights had been violated. The appellants gave examples relating to English second language instruction and the teaching of a less Quebec-centred version of Canadian history. Their complaints also focused on the degree of inflexibility in the prescribed curriculum and the virtual impossibility of scheduling additional electives.

The Protestant school boards felt that these regulations gutted their right to manage and control their schools, in accordance with 1861

³³⁷ *Supra* note 333 at 401.

³³⁸ *Regulation respecting the basis of elementary and preschool organization*, O.G. 551-81, Feb. 25, 1981, (1981), 115 O.G. 11 1213, and *Regulation respecting the basis for secondary school organization*, O.C. 552-81, Feb. 25, 1981, (1981) 115 O.G. 11 1223, under *Education Act*, R.S.Q. 1977, c. I-14, s. 16(7).

legislation. The Court does not see it that way.³³⁹ It differs in its view of which non-denominational aspects of curricula are necessary to give effect to denominational guarantees (and are thus protected). It also differs in its interpretation of the deal made at Confederation and the meaning of dissentient school officials' rights to regulate courses of study in Quebec.

In answer to the school board's complaints described above, Justice Beetz simply declares that the challenged regulations address the non-denominational aspects of the curriculum which are not necessary to give effect to the denominational guarantees. The Court does not accept the appellants' assertions about a "Protestant educational philosophy." It dismisses the language and cultural objections to the required curricula with little explanation as to why they fall outside denominational concerns. As to the complaints about inflexibility effectively removing the Protestant school board's powers to regulate the curricula, the Court believes that the provisions in the regulations, empowering school boards to adapt prescribed curricula to local needs and to create additional curricula, subject to Ministerial approval, are enough to allow the challenged regulations to meet constitutional requirements.

The Court gives the term "denominational" a narrow meaning, based necessarily on a limited definition of religion and religious concerns. Given the high hourly requirements of the prescribed curricula and the subjection to Ministerial approval of all supplementary teaching materials, it is doubtful that there is time for "additional curricula" or that local authorities really have the ability to "adapt" the prescribed curricula to local needs. The Court decides that this will not interfere with denominational rights. It is assumed that religion and morals are to be taught in a course of study separate from all others. There is a strong impetus for the Court to compartmentalize religious instruction in this way in order to deal in an orderly fashion with the required section 93 examination.

Whenever one attempts to draw a line between the denominational and non-denominational aspects of a school curriculum, there are bound to be conceptual disagreements about where the line should be. Indeed, supporters of denominational schools, such as the appellants, would argue that no line can be drawn. Any problems in the Court's attempt to

³³⁹ To the frustration of the appellants, whose motion for a rehearing was denied: [1989] 2 SCR 167. The fact that this rehearing application was made suggests that the appellants and the Court have fundamentally different views about the rights of dissentient schools in Quebec. The Court was polite but firm in its response to the rehearing.

confront this problem have less to do with the quality of its analysis than with the anomalous nature of the section 93 provision in the Canadian Constitution. In the province of Quebec, where the provincial government must be concerned with preserving its cultural fabric in a predominantly anglophone North America, it makes good sense to give provincial authorities effective control of the school curricula. This value must be balanced against the constitutionally guaranteed rights of the dissentient school boards in Quebec and the broader rights of the anglophone minority in that province. Faced with this difficult balancing act, the Supreme Court has reached a reasonable compromise solution.

The limited definition of denominational guarantees is based on an analysis of laws prevailing at Confederation. What were the rights “by Law” of dissentient school authorities at that time? Under the statute then in force,³⁴⁰ authority over schools was divided between the government-appointed Council of Public Instruction and the school commissioners and trustees at the local level. The powers of the Council included the making of regulations for “organization, government, and discipline” and selecting books and materials “to be used to the exclusion of others.” The school commissioners and trustees had the duty to “regulate the course of study” in each school, and to establish general rules for management. Book selection for courses in “religion and morals” was to be locally determined. The Court assessed the 1867 situation in this way: book control equalled curricular control, and the commissioners’ and trustees’ power to regulate the course of study was not in conflict with the Council’s curricular authority. The local authority was complementary to the provincial in the area of non-denominational curriculum, being a power to implement and monitor.

This analysis makes the dissentient school authorities appear weak at the time of Confederation by focusing on the *de jure* rather than *de facto* powers of provincial authorities. Historically, the dissentient local authorities had and exercised more power than appears from this analysis. There were few regulations passed under provincial education statutes of that time. The Court is willing, because of the legal depiction of local authority in 1867, to now constitutionally affirm a very different practical balance of power over education.

This decision appears to narrow any potential increase in the scope of protections for non-denominational aspects of denominational schools indicated by the *Separate Schools Reference*.³⁴¹ There, it was held that

³⁴⁰ *An Act respecting Provincial Aid for Superior Education — and Normal and Common Schools*, C.S.L.C. 1861, c. 15.

³⁴¹ *Supra* note 330. In light of the rather unique role that the Quebec government must play in education and the difficulty of balancing denominational and linguistic rights in Quebec, it may be dangerous to directly apply the ruling in the *Greater Montreal Protestant School Board* to other provinces.

separate school supporters had at Confederation a right, by law, to have their children receive an "appropriate" education. For that to be meaningful, the Court held, an adequate level of funding was required and indeed protected by section 93(1). This raised the possibility of other non-denominational aspects necessary for an appropriate education being recognized as protected in the future, although they were not at issue or enumerated in the case.³⁴² In *Greater Montreal Protestant School Board*, the only protected non-denominational aspect of education mentioned specifically is funding. This was already known to be protected in Quebec after the decision in *Greater Hull*.³⁴³ In *Greater Montreal Protestant School Board*, the Court finds that the somewhat limited powers to "adapt" and "add" curricula are enough to protect the non-denominational aspects of denominational schools essential to the denominational character of these schools. It would appear that outside of compartmentalized religious and moral instruction, and funding, very little is insulated from provincial control in provinces where Ministers of Education had broad regulatory powers at Confederation, whether or not regulation then existed. If the Court was intending to limit its ruling to the province of Quebec and the position of dissentient schools there, it fails to expressly declare this intention.

In *Mahe v. Alberta*³⁴⁴ the Court held that section 23 of the Canadian Charter confers upon minority language parents a right to management and control over the educational facilities in which their children are taught. How does this affect denominational rights guaranteed under the Constitution? Chief Justice Dickson states that:

The answer to this question is provided by the recent case of *Greater Montreal Protestant School Board v. Quebec (Attorney General)*, [1989] 1 S.C.R. 377. In that case, Beetz J., writing for the majority, held that the phrase "Right for Privilege with respect to Denominational Schools" in s. 93(1) of the *Constitution Act, 1867*, means that the section protects powers over *denominational* aspects of education and those non-denominational aspects which are related to denominational concerns which were enjoyed at the time of Confederation. . . . On this view of s. 93(1) of the *Constitution Act, 1867* . . . the powers of management and control which s. 23 would accord to minority language groups [will] not affect any rights in respect of the denominational aspects of education or related non-denominational aspects. The minority language trustees on a denominational school board who are to be given powers over management and control will be, at the same time, denominational trustees: in such instances, the denominational board is not required to cede powers to

³⁴² This possibility was important to Protestant school boards because of the extension to them of Ontario rights by s. 93(2), the treatment of which is discussed below.

³⁴³ *Supra* note 332.

³⁴⁴ [1990] 1 SCR 342.

a non-denominational group of persons, it is only required to give certain of its members authority over minority language education.³⁴⁵

Chief Justice Dickson countenances the possibility of minority language students being partly denominational and non-denominational. On the premise that denominational school boards will not be forced to take in non-denominational students, this raises the possibility of a "quadripartite" school system. More likely, the limited scope of denominational rights, as decided in *Greater Montreal Protestant School Board*, means denominational rights and section 23 language control can be combined in a single school board, with section 23 trustees exercising language and cultural control for a section 23 school, and the full board exercising denominational control for all schools. Chief Justice Dickson admits that the denominational school guarantees could split up an eligible group of minority language students in such a way as to preclude the creation of a minority language school which would otherwise be required. He feels this problem would be rare.

If section 23 provides control over minority language instruction for the minority language group, and section 93 provides denominational group control over denominational aspects of education, other issues such as the Greater Montreal Protestant School Board's objection to Quebec-centered Canadian history may be left outside minority or denominational groups' control. It is possible that the control of the curriculum would fall within the language and culture mandate of the section 23 minority language trustees, even though important aspects of the curriculum appear outside denominational control. The resolution of these general issues is left to majoritarian politics, since the Court is willing to separate the denominational "aspects," and to a lesser extent minority language "aspects," of instruction from the general school curriculum.

The Protestant school boards were also unsuccessful in their use of section 93(2), again because of the subjection of separate school boards in Ontario to broad provincial regulation. That is, because regimes in both provinces gave similar powers to central provincial authority, Quebec's dissentient school boards' rights were no greater by the extension to them of Ontario separate school boards' powers. Although there are express constitutional parallels between the situations of separate schools in Ontario and dissentient schools in Quebec, the pattern of denominational schools in other provinces is quite varied.³⁴⁶ This raises

³⁴⁵ *Id.* at 381-82.

³⁴⁶ Dickinson & MacKay, *Rights, Freedoms and the Educational System in Canada* (1989) at 48-70.

the question of what impact the Court's decision in *Greater Montreal Protestant School Board* will have in other provinces.³⁴⁷ No clear answer emerges from the case itself but the Court does re-affirm the significance of the historical situation at the time the province joined Confederation. It also attaches greater weight to the situation as defined by law than to that worked out by practical administrative arrangements. Other provinces will undoubtedly be testing the limits of the section 93 denominational rights in the future.

While agreeing in the result with respect to section 93(2), Beetz J.'s majority approach differs significantly from that of Justice Wilson (Chief Justice Dickson concurring). Justice Beetz explains that section 93(2) rights are not constitutionally entrenched. The extension of Ontario's separate school boards' rights to Quebec's dissentient school boards simply provides extra material to subject to the section 93(1) analysis. One must ask, according to the Beetz analysis, if the rights so extended are in relation to the denominational character of denominational schools. Only then are they protected by section 93(1). Wilson J. takes issue with this approach:

My colleague interprets the words "with respect to Denominational Schools" in s. 93(1) as if they read "with respect to the denominational aspects of Denominational Schools". In other words, he reads "with respect to Denominational Schools" as limiting s. 93(1) protection to the powers, privileges and duties extended to dissentient schools in Quebec by s. 93(2) which relate specifically to the denominational aspects of such schools.

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The difficulty raised by this interpretation of s. 93(1) is that it requires us to decide which powers, privileges and duties of separate schools in Ontario at the Union were related to the denominational aspects of such schools and which were not.

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It would be my view that *all* powers, privileges and duties conferred or imposed on separate schools in Ontario at the time of Union other than those specifically made subject by law to the overriding control of the province (as was the curriculum) are extended by s. 93(2) to dissentient schools in Quebec and have the constitutional protection of s. 93(1). This is so because, in my view, the words "with respect to Denominational Schools" in s. 93(1) do not contain the internal limitation imported into those words by my colleague."³⁴⁸

³⁴⁷ This question is one of practical significance in Newfoundland where the present government is attempting to rewrite their *Education Act* in an effort to make their denominational structure more effective, efficient and fair. The power of the provincial government to subtract from traditional powers held by the denominational school boards is the central legal and political question in this modernizing process.

³⁴⁸ *Supra* note 333 at 385-87.

Justice Wilson's use of section 93(2) is more straightforward than that of her colleague. Beetz's two-step formula requires another instance of analysis of what is denominational and what is not. In *Mahe*,³⁴⁹ Chief Justice Dickson uses the Beetz approach to separate and split denominational and section 23 rights. This enables these rights to co-exist in the same school board when only some trustees are exercising section 23 rights. Justice Wilson's approach, however, allows for greater consistency between the Court's recent rulings in the *Separate Schools Reference* and *Greater Montreal Protestant School Board*. Even on the Wilson analysis, in the Quebec case there is an indication that the Court is cognizant of the differing political forces at work in Ontario and Quebec with respect to the protection of denominational school rights. In this regard, there may be an implicit recognition that Ontario and Quebec are quite "distinct societies."

VI. GENERAL CONSTITUTIONAL ISSUES AND THEMES

1. The Charter Override: Section 33

It is ironical that the Supreme Court's elucidation of the section 33 override provision of the Charter occurs in the cases concerning the language of commercial expression, which in turn produce the most contentious use of the override provision to set aside the Court's rulings on the merits of the dispute. The ruling on the scope and limitations of section 33 of the Charter in *Ford*³⁵⁰ is relatively clear, once one cuts through the tangle of statutory provisions relevant to this issue. A preliminary complication is the existence of two override provisions invoking section 33 of the Charter. First, section 214 of the *Charter of the French Language*³⁵¹ was enacted by section 1 of *An Act Respecting the Constitution Act, 1982*,³⁵² an omnibus bill which inserted an override provision in every then existing Quebec statute. Second, section 52 of *An Act to Amend the Charter of the French Language*³⁵³ was passed in 1983, pursuant to a practice of adding an override provision to every new piece of legislation passed. The two legislative override provisions are identical and read as follows:

This Act shall operate notwithstanding the provisions of sections 2 and 7 to 15 of the Constitution Act, 1982 (Schedule B of the Canada Act, chapter 11 in the 1982 volume of Acts of Parliament of the United Kingdom).

³⁴⁹ *Supra* note 344.

³⁵⁰ [1988] 2 SCR 712.

³⁵¹ R.S.Q. 1977, c. C-11.

³⁵² S.Q. 1982, c. 21.

³⁵³ S.Q. 1983, c. 56.

The extent to which the relevant override provisions in Quebec conform with the dictates of section 33 of the Charter was an issue in *Devine*³⁵⁴ and *Irwin Toy*,³⁵⁵ as well as *Ford*, but the Court chooses to address the issue in the latter case. In the earlier rulings of the Quebec Superior and Appeal Courts in *Alliance des professeurs de Montréal v. Québec (A.G.)*,³⁵⁶ conflicting opinions had been expressed as to whether the challenged override provision was effective. Although this case was not before the Court, it has to deal with the argument raised in *Alliance des professeurs* in order to resolve the section 33 issue in *Ford*.³⁵⁷ In both cases the essential contention against the validity of the section 52 Quebec override provision was that there was not a sufficiently specific reference to the Charter sections intended to be overridden to meet the requirements of section 33 of the Charter. More particularly, the argument is that the right or freedom must be referred to in the words of the Charter, and not merely by section number. There was also an argument that all the relevant Charter provisions could not be overridden at one time.

The Court considers that the question before it was whether section 33 of the Charter is a substantive limitation to the power of legislatures to override Charter rights, or only a limitation in form. The Court answers in clear terms.

Section 33 lays down requirements of form only, and there is no warrant for importing into it grounds for substantive review of the legislative policy in exercising the override authority in a particular case. The requirement of an apparent link or relationship between the overriding Act and the guaranteed rights or freedoms to be overridden seems to be a substantive ground of review. It appears to require that the legislature identify the provisions of the Act in question which might otherwise infringe specified guaranteed rights or freedoms. That would seem to require a *prima facie* justification of the decision to exercise the override authority rather than merely a certain formal

³⁵⁴ [1988] 2 SCR 790. The Court even addresses an argument raised by the appellant Singer in *Devine* that the s. 52 override applied only to the enacting words of the statute amending the *Charter of the French Language*, and not the amended provisions of the *Charter of the French Language*. This argument is dismissed as "without merit" in *Ford*, *supra* note 350 at 735.

³⁵⁵ [1989] 1 SCR 927.

³⁵⁶ [1985] CS 1272; *revd* [1985] CA 376. Although leave to appeal this case to the Supreme Court of Canada was granted on September 30, 1985, the appeal was not inscribed and the Quebec Attorney General indicated that the case was on hold until the resolution of the more pressing issues in *Ford*, *Devine* and *Irwin Toy*.

³⁵⁷ Indeed, the differing conclusions on the s. 33 issue in *Ford* at trial and appeal were the result of following the conflicting rulings at the trial and appeal levels in *Alliance des professeurs*, *id.*

expression of it. There is, however, no warrant in the terms of s. 33 for such a requirement. A legislature may not be in a position to judge with any degree of certainty what provisions of the *Canadian Charter of Rights and Freedoms* might be successfully invoked against various aspects of the Act in question. For this reason it must be permitted in a particular case to override more than one provision of the *Charter* and indeed all of the provisions which it is permitted to override by the terms of s. 33.³⁵⁸

Based upon this reasoning, the Court concludes that section 52 is a valid and subsisting override provision which protects section 58 of the *Charter of the French Language* from Charter review. This conclusion does not affect the result in this case, as section 58 was subject to the equivalent provisions of the *Quebec Charter of Human Rights and Freedoms*, and section 69 was subject to both Charters. While we do not object to the result in this case, it is not clear why the Court felt compelled to give such a broad scope to legislative action under section 33 of the Charter.³⁵⁹ It does not appear to be consistent with the Court's frequently declared liberal approach to enhance the rights and freedoms in the Charter.³⁶⁰ If the language of section 33 of the Charter does not expressly call for substantive restrictions, it could equally be said it is not expressly limited to form.

We think that the Court could have reached the result it did even if it had acknowledged some substantive element to the review. The argument against the validity of the section 52 override is that it is not specific enough to show a conscious and considered invocation of section 33. Although the lack of specificity in section 52 certainly reflected a general policy rather than a particularized decision, it is not a fair inference to say that the use of the override during the tenure of the Parti Québécois government was not conscious or considered. It was a blanket protest against the entrenchment of the Charter that represented the

³⁵⁸ *Supra* note 350 at 740-41.

³⁵⁹ If the Court is saying that s. 33 can never be used to impose substantive limits on the legislative override, it is going beyond what it needed to decide in the case. Slattery, "A Theory of the Charter" (1987), 25 *Osgoode Hall L.J.* 701 at 745, states:

Instances in which a court would be justified in nullifying a notwithstanding clause on substantive grounds will likely be few and confined to cases where the legislative measures are so extreme that they cannot be reconciled on any reasonable view with the basic democratic values animating the Charter as a whole.

While the cases before the Court did not present such an exceptional case, one may arise in the future, where substantive limits on the exercise of s. 33 would be appropriate.

³⁶⁰ The analysis was also not particularly purposive as the main point of reference was rules of statutory interpretation, rather than the intent of the drafters to preserve a significant degree of legislative supremacy in Canada.

most conscious of political choices. The argument against the validity of the section 52 override was itself excessively focused on form.

As is so often the case, the Court has made a significant value choice — one which reasserts the importance of legislative supremacy even in the context of the Charter. Ironically, this very power soon would be used to reverse the Court's ruling on the merits in *Ford*. One assumes the Court anticipated this possibility. The Court seems to be going out of its way to emphasize that the Quebec National Assembly can, by invoking section 33, insist on French-only signs if it wishes, with the proviso that this decision is one for which the politicians, not the judges, will have to accept the full responsibility.

Section 214 of the *Charter of the French Language* ceased to have any effect because more than five years had passed since its enactment (section 33(3)), and it had not been re-enacted pursuant to section 33(4). Thus whether this override provision conforms with the dictates of section 33 of the Charter is a moot point.³⁶¹ Nonetheless, the Court does rule upon the validity of this section, because it was of significance to other decisions pending before courts and tribunals. The “omnibus” nature of the 1982 override legislation passed during then Premier René Levesque's Parti Québécois government, and its retrospective application, were issues not applicable in respect to the section 52 override provision.

Reaffirming its view expressed in respect to section 52, the Court concludes that the passage of section 214 as part of an omnibus override statute did not detract from its constitutional validity pursuant to section 33 of the Charter. The omnibus nature of the *Act Respecting the Constitution Act, 1982* is held to be a matter of legislative policy rather than constitutional form, and thus beyond the scope of judicial challenge. The Court does not accept counsel's arguments that this sweeping override exceeded the permissible constitutional limits of section 33.

Counsel referred to this form of enactment as reflecting an impermissibly “routine” exercise of the override authority or even a “perversion” of it. It was even suggested that it amounted to an attempted amendment of the *Charter*. These are once again essentially submissions concerning permissible legislative policy in the exercise of the override authority rather than what constitutes a sufficiently express declaration of override. As has been stated, there is no warrant in s. 33 for such considerations as a basis of judicial review of a particular exercise of an authority conferred by s. 33.³⁶²

³⁶¹ This conclusion is reached by the Court on the assumption that the Court should declare the law as of the time that the judgment is rendered and by this time s. 214 of the *Charter of the French Language* had ceased to have any legal effect.

³⁶² *Supra* note 350 at 743.

On the question of the retrospective application of the override provision, the Court takes a more restrictive approach. Applying doctrines of statutory interpretation, particularly the rules against retroactive operation of the law, it holds that section 33 of the Charter permits prospective derogations of Charter rights, but not retroactive ones. Thus section 214 came into effect on June 23, 1982 and did not have retroactive effect to April 17, 1982 as claimed in the omnibus override legislation. On the facts of *Ford*, *Devine* and *Irwin Toy* this aspect of the ruling made no difference, as section 214 had expired by the time these judgments were rendered.³⁶³

We are struck by the fact that there is no soul searching analysis of the doctrines of mootness in *Ford* as there was in *Borowski v. Canada (Attorney General) (Borowski)*,³⁶⁴ which we discuss in the next section of this article. In both cases the litigants urged the Court to decide a formally moot issue in order to clarify questions of law with continuing practical significance. In *Ford*, without hesitation or even serious discussion, the Court accepted the challenge; in *Borowski* they did not. We can only speculate that the Court felt more comfortable in engaging in complex statutory and constitutional interpretation (even in the absence of a live controversy) than it did in entering the emotionally charged and highly politicized debates about the legal and constitutional rights of the foetus.

2. Mootness and Standing: *Borowski*

One of Canada's most controversial public law issues in recent years has been abortion. It is difficult to untangle the emotional and rational strands of the abortion debate. In spite of their declared intentions to the contrary, judges cannot separate the legal issues from the abortion question. In this regard it may be unfortunate that the Court chooses to articulate its views on mootness and standing in this highly charged context. In our view, the Court's desire to forestall confronting the complexities of the "right to life" debate influences its approach to the

³⁶³ More complex questions of timing arose in *Ford*, as to when the *Quebec Charter of Human Rights and Freedoms* took precedence over the challenged sections of the *Charter of the French Language*. After this date the guarantees of the Quebec Charter could only be set aside by an express derogation similar to the situation under the Canadian Charter. Once again this issue was resolved by resort to doctrines of statutory interpretation and the relevant date determined. As with s. 214, the Court ruled on these issues of statutory interpretation because of their future importance, in spite of their mootness on the facts of *Ford*.

³⁶⁴ [1989] 1 SCR 342.

legal questions of mootness and standing. We do not criticize the linking of the legal and larger social questions, but rather the Court's failure to recognize or admit the connection.³⁶⁵

The judgment in *Borowski*,³⁶⁶ written by Justice Sopinka,³⁶⁷ is unanimous. Mr. Borowski's challenge to the abortion provisions of the *Criminal Code* is held to be moot and not worthy of a decision on the merits. The appellant, Borowski, is also held to have lost his standing to bring the case. These conclusions are reached because the challenged legislation no longer exists, after the decision in *Morgentaler*.³⁶⁸

Borowski deals at great length with the general issue of mootness. It provides a thorough review of authorities useful in determining when an appeal is moot. Mootness is based on the absence of a "live controversy." Such controversies may "die" in a variety of ways: disappearance of the challenged laws prior to hearing (as here), the promise of an appellant to pay damages and costs regardless of the disposition of an appeal, short duration of the controversy (e.g., strike injunction appeals), and the death of parties challenging legislation. More important, *Borowski* provides a detailed framework for the exercise of the Court's discretion to decide a case on the merits in spite of mootness.

Justice Sopinka, writing for the Court, lists three main criteria relevant to the exercise of this discretion. The first of these is the existence of the necessary adversarial context, despite the absence of a live controversy. Second, the Court must exercise concern for judicial economy in allocating scarce resources to moot cases. Third, the Court must "demonstrate a measure of awareness of its proper law-making function."³⁶⁹ The selection and elaboration of those factors is conventional. The tone is one of formality and caution.

In light of such developments as the Marshall Inquiry in Nova Scotia,³⁷⁰ the general debacle of our family courts, and the spiralling costs of litigation, it must be heartening for some lawyers to hear a Supreme Court Justice sing the praises of adversarialism:

The first rationale for the policy and practice referred to above [the exercise of discretion to hear moot cases] is that a court's competence to resolve legal

³⁶⁵ One wonders whether the decision to resolve *Borowski* on mootness was the compromise conclusion that avoided a split in the Court on the merits.

³⁶⁶ *Supra* note 364.

³⁶⁷ Chief Justice Dickson and Wilson, McIntyre, Lamer, La Forest and L'Heureux-Dubé JJ., concurring.

³⁶⁸ [1988] 1 SCR 30.

³⁶⁹ *Supra* note 364 at 362.

³⁷⁰ *The Royal Commission on the Donald Marshall, Jr. Prosecution: Digest of Findings and Recommendations* (December 1989).

disputes is rooted in the adversary system. The requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome.³⁷¹

Historically, one cannot say that the competence of all courts has been rooted in adversarialism. This is a particularly common law tradition. Outside the Anglo-American world, judicial investigation, mediation, and the cooperation between parties are basic to justice.³⁷²

The second criterion mentioned is concern for judicial economy. The analysis is outlined with regard to three basic factors: collateral consequences; the nature of the dispute (a brief but recurring nature); and the public interest. Justice Sopinka adds that a genuine adversarial context is still preferable.³⁷³ Regarding the third factor he goes on to explain that:

There also exists a rather ill-defined basis for justifying the deployment of judicial resources in cases which raise an issue of public importance of which a resolution is in the public interest. The economics of judicial involvement are weighed against the social cost of continued uncertainty in the law.³⁷⁴

National importance is not enough as this is a requirement for all cases before the Court; there must be some social cost in leaving the matter undecided. In *Borowski* none of the factors justifying the expenditure of judicial resources is held to be applicable. It is especially emphasized that it is not in the public interest to address the merits in order to settle the state of the law:

The appellant is asking for an interpretation of ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms* at large. In a legislative context any rights of the foetus could be considered or at least balanced against the rights of women guaranteed by s. 7. . . . A pronouncement in favour of the appellant's position that a foetus is protected by s. 7 from the date of conception would decide the issue out of its proper context. Doctors and hospitals would be left to speculate as to how to apply such a ruling consistently with a woman's rights under s. 7. During argument the question was posed to counsel for R.E.A.L. Women as to what a hospital would do with a pregnant woman who required an abortion to save her life in the face of a ruling in favour of the appellant's position. The answer was that doctors and legislators would have to stay up at night to decide how to deal with the situation. This state of uncertainty would clearly not be in the public interest.³⁷⁵

³⁷¹ *Supra* note 364 at 358-59.

³⁷² One of the problems of placing too high a priority on adversarialism is that being a litigant requires substantial financial resources. Those who can afford to fight abortion issues all the way to the Supreme Court of Canada may not be those who are most intimately involved in the issue. Those who are in the most obviously adversarial stance may not be those who can afford to litigate.

³⁷³ *Supra* note 364 at 361.

³⁷⁴ *Id.*

³⁷⁵ *Id.* at 364-65.

This approach does not acknowledge the social cost of leaving women in a state of uncertainty as to their rights until a "live controversy" arises. Ignoring this social cost backfired on the Court this year in *Daigle*.³⁷⁶ A finding for the respondent in *Borowski*, i.e., a denial of any constitutional rights of the foetus, might have prevented the anguish caused Ms. Daigle by her boyfriend's resort to the legal system.³⁷⁷ Women paid a heavy social cost in being subject to lower court injunctions against having an abortion at the behest of any potential father. This might have been avoided if the Court had not remained silent on the merits in *Borowski*.

Such a decision in *Borowski*, in the Court's view, would have also failed the third criterion listed in determining whether or not to hear a moot appeal: remaining within the judicial sphere of law-making. *Borowski* places a heavy emphasis on this third rationale. The Court considers it inappropriate to comment in the absence of a law. This assumes there can be no Charter challenge based on government inaction, something which is also a factor in the Court's decision on standing, to be discussed shortly.

In terms of the third criteria on whether a moot appeal should be heard, the Court relies on the practice of dealing with as little as possible to decide a case. This has been the general theme of the Court's approach to abortion matters. A more complete decision in *Morgentaler*, with no pretence of deciding women's rights under section 7 as apart from a determination of foetal rights, could have obviated the need for *Daigle*.³⁷⁸ This could have happened if *Morgentaler* and *Borowski* had been de-

³⁷⁶ *Tremblay v Daigle* [1989] 2 SCR 530. Interestingly, the issue in *Daigle* as well was no longer a live controversy, since Ms. Daigle proceeded with an abortion in the face of a prohibitory injunction. This was announced in the midst of the Court's hearing. The Court decided to exercise its discretion and proceed because (at 550):

[I]f this question is not addressed then, assuming one of the appellant's other two arguments is accepted, it will remain unclear whether another woman in the position of Ms. Daigle could be placed in a similar predicament through the use of a different legal procedure. In order to try to ensure that another woman is not put through an ordeal such as that experienced by Ms. Daigle it is important for this Court to give the guidance it can.

³⁷⁷ Although he still could have argued that a foetus was a human being under the Quebec *Charter of Human Rights and Freedoms*.

³⁷⁸ In *Daigle*, the Court specifically reserved ruling on ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms*, and restricted itself to an analysis of very similarly worded Quebec legislation. The best one can hope for is that, given the Court's reticence, this issue will be decided in a reference rather than the urgent circumstances of a case like *Daigle*.

cided simultaneously, in which case there would have been no mootness issue in *Borowski*. The Court had sufficient control over the timing to have chosen this route.

In addition to failing to meet the relevant criteria to have a moot appeal heard, Mr. Borowski is held to have lost his standing to bring the matter before the Court. Mr. Borowski was originally given standing in 1981, before the advent of the Charter.³⁷⁹ It was granted on the basis that he had a genuine interest in the validity of the legislation, and that there was no other reasonable and effective way in which the issue could have been brought before the Court.³⁸⁰ With the availability of the Charter, Mr. Borowski premised his claim against sections 251(4), (5) and (6) of the *Criminal Code* on the right of the foetus to equality, and the right not to be deprived of life except in accordance with the principles of fundamental justice, under sections 15 and 7 respectively. Mr. Borowski's standing, before the striking down of section 251 in *Morgentaler*, was presumably based on section 52(1) of the *Constitution Act, 1982*. With the disappearance of the impugned legislation, his standing disappeared. Justice Sopinka explains:

[A] challenge based on s. 52(1) of the *Constitution Act, 1982* is restricted to litigants who challenge a law or governmental action pursuant to power

³⁷⁹ *Minister of Justice of Canada v Borowski* [1981] 2 SCR 575.

³⁸⁰ Issues of public interest standing to challenge abortion legislation from the pro-choice side have recently arisen in Nova Scotia. In *C.A.R.A.L. v AG Nova Scotia*, an unreported decision, October 13, 1989 (NSSC TD), Nunn J. denied standing to the well-known pro-choice group, C.A.R.A.L., on the basis that they lacked a genuine interest in the abortion issue and that the issues would be raised by a more directly affected party — Dr. Henry Morgentaler, who has been charged under the legislation at issue. A majority of the Appeal Division in a March 27, 1990 decision, reversed his ruling on genuine interest and would have granted standing on that basis but exercised their discretion to deny standing in light of the similar constitutional challenges being raised by Dr. Morgentaler in the Nova Scotia courts. Chief Justice Clarke dissents and would have allowed C.A.R.A.L. to proceed in spite of the parallel Morgentaler challenges.

A woman seeking a medically insured abortion has no other reasonable and effective means by which to bring the matter forward unless she is granted an expedited hearing. A woman is not subject to a penalty if she has an abortion. She is affected by the legislation though not directly regulated by it. This, coupled with the practical problem that pregnancy will not await the outcome of court proceedings, means that in the end result those most directly affected by the legislation have not challenged it and are not likely to do so. I liken C.A.R.A.L. to Mr. Borowski in this respect.

Even in the case of Dr. Morgentaler, one must question the appropriateness of the issue being brought before the Court by a doctor. Courts are essentially deciding a woman's control over her body in the context of the rights and privileges of the male-dominated medical profession.

granted by law. The appellant in this appeal challenges neither “a law” nor any governmental action so as to engage the provisions of the *Charter*. What the appellant now seeks is a naked interpretation of two provisions of the *Charter*. This would require the Court to answer a purely abstract question which would in effect sanction a private reference. In my opinion, the original basis for the appellant’s standing is gone and the appellant lacks standing to pursue this appeal.³⁸¹

This again seems to dismiss the possibility that government inaction warrants *Charter* review, but without any discussion or elaboration. Also, as Moira McConnell points out,³⁸² funding of abortions is evidently not a “government activity” sufficient to bring it within the *Charter*. Further, the case assumes the correctness of McIntyre J.’s decision in *Dolphin Delivery*³⁸³ in exempting court or judicial action from *Charter* review. The Court does not consider itself as the potentially infringing actor in striking down section 251.

The Court’s approach to omission is something of a bombshell to slip in at the end of the *Borowski* judgment, not unlike the sweeping exclusion of corporations included at the end of *Irwin Toy*.³⁸⁴ *Borowski* would seem to put an end to the idea of *Charter* arguments based on government omission. More of an explanation is warranted.³⁸⁵

3. The Supreme Court’s Approach to Section 1 of the *Charter*

Section 1 of the *Charter* has become the major point of controversy in recent cases, and is the point where the Supreme Court justices are most likely to divide. Since the careful articulation of the test for balancing interests in *R. v. Oakes*,³⁸⁶ there has been relaxation of the standards in particular cases and variations in others.³⁸⁷ There have been many

³⁸¹ *Supra* note 364 at 367.

³⁸² McConnell, “Even By Commonsense Morality: *Morgentaler*, *Borowski*, and the Constitution of Canada” (1989), 68 Can. Bar Rev. 765.

³⁸³ [1986] 2 SCR 573.

³⁸⁴ [1989] 1 SCR 927.

³⁸⁵ For instance, how does this relate to the possibility of economic survival rights being guaranteed under s. 7 of the *Charter*, as per *Irwin Toy*, *id.* Is it all right for the government to let one starve as opposed to taking away one’s food? It may be that the Court’s ruling is restricted to s. 52 of the *Constitution Act, 1982* and would not apply to remedies sought pursuant to s. 24 of the *Charter*.

³⁸⁶ [1986] 1 SCR 103.

³⁸⁷ Even before the 1988-89 Term, there was some evidence of a retreat from the strict standards of the *Oakes* test. *Edwards Books and Art Ltd v R* [1986] 2 SCR 713, is a good example with respect to religion and Sunday shopping.

articles attempting to identify a pattern in the Supreme Court's treatment of section 1 of the Charter,³⁸⁸ and we will make a similar attempt.

It has become almost cliché to observe that important differences exist among the judges of the Supreme Court with respect to the proper use of section 1 of the Charter. Marc Gold surmises that these differences are really reflective of different views about the proper relationship between the Court and the other branches of the state.

In summary, it is sufficient to note that significant differences exist between the members of the Court on the application of s. 1, at the heart of which are differences on the nature and value of constitutional rights and on the role of the courts *vis à vis* the legislative process.³⁸⁹

Brian Slattery takes this observation a step further, and espouses a "co-ordinate" as opposed to "judicial" model of Charter analysis, which applies to section 1 as well as other sections of the Charter.³⁹⁰ Under the co-ordinate model, all three branches of government — legislative, executive and judicial — are responsible for complying with the standards of the Charter. This is in contrast to the judicial model whereby the other two branches accept no responsibility for Charter compliance, leaving that task exclusively to the courts. Slattery advocates the co-ordinate model, and we agree that is the most effective way to pursue the values entrenched in the Charter. One advantage of this approach is that Charter rights can be vindicated without the expense of court litigation.

The relevance of the co-ordinate model to the Supreme Court treatment of section 1 of the Charter is that it would encourage flexibility in the application of the section 1 standard to take account of the comparative institutional competence of the affected bodies.

In some instances governments and legislatures may be better-equipped than courts to determine and weigh the factors germane to a finding of reasonableness under section 1 or indeed to the interpretation and application of the substantive Charter section.³⁹¹

This view is supported by the Supreme Court of Canada³⁹² as well as academic authority.

³⁸⁸ Elliot, "The Supreme Court of Canada and Section 1 — The Erosion of the Common Front" (1987), 12 Queen's L.J. 277; Weinrib, "The Supreme Court of Canada and Section One of the Charter" (1988), 10 Supreme Court L. Rev. 469; Chapman, "The Politics of Judging: Section 1 of the Charter of Rights and Freedoms" (1986), 24 Osgoode Hall L.J. 867, are only a few examples.

³⁸⁹ Gold, "Of Rights and Roles: The Supreme Court and the Charter" (1989), 23 U.B.C. Law Rev. 507 at 527.

³⁹⁰ Slattery, "A Theory of the Charter", *supra* note 359.

³⁹¹ *Id.* at 733.

³⁹² *PSAC v Canada* [1987] 1 SCR 424 at 432, *per* Dickson C.J.; *Canada v Schmidt* [1987] 1 SCR 500 at 523 *per* La Forest J.

This kind of philosophy could explain much of the approach to section 1 during the 1988-89 Term. For example, in *Black*³⁹³ and *Andrews*³⁹⁴ McIntyre J. is willing to defer to the comparative competence of the relevant Bar Societies to decide what reasonable limits should be applied to the practice of law. Chief Justice Dickson and Justice Wilson in *Slight Communications*³⁹⁵ and *Irwin Toy*³⁹⁶ are more deferential to the legislators in respect to section 1 in these cases, because the challenged legislation was designed to enhance the status of a disadvantaged group in society. In *Ford*,³⁹⁷ the Court is receptive to the arguments about the need for Quebec to protect the French language and culture, but can simply find no basis for a justification of Quebec having gone as far as it had.

In other cases, however, the same judges seem to adopt the judicial model and insist on a strict application of the *Oakes* test, showing little deference to the front line state actors. This is the approach of Dickson C.J. and Wilson J. in *Andrews*, where they insist on carefully scrutinizing violations of equality. The difference may be that in the *Andrews* case the disadvantaged group was the victim of legislation, while in *Slight Communications* and *Irwin Toy*, it was the beneficiary. Similarly McIntyre J., who is deferential in *Andrews* and *Black*, appears to adopt the judicial model in *Irwin Toy* and demand close scrutiny of violations of commercial expression under section 1 of the Charter.

While theories or models may provide a framework and some guidance about how the judges will use section 1, the cases in the 1988-89 Term suggest that the approach to section 1 on the part of the Supreme Court judges is sometimes subjective, and usually context specific. Justice La Forest is fairly consistently in favour of a flexible approach to section 1 which will give ample scope to judicial scrutiny but leave policy makers some room to make decisions.³⁹⁸ This is his approach in *Andrews*, and it has less to do with adopting a particular model than with his belief about how society should operate. Justice Lamer seems more prone to saving legislation under section 1, siding with Justice McIntyre in *Andrews*, and with the Chief Justice and Justice Wilson in *Irwin Toy*.

There is no substitute for finding out about the values and preferences of the individual judges as a way to predict their response to section 1

³⁹³ [1989] 1 SCR 591.

³⁹⁴ [1989] 1 SCR 143.

³⁹⁵ [1989] 1 SCR 1038.

³⁹⁶ [1989] 1 SCR 927.

³⁹⁷ [1988] 2 SCR 712.

³⁹⁸ This was especially true in his decisions in *Edwards Books*, *supra* note 387 and *R v Jones* [1986] 2 SCR 284.

issues. Justice McIntyre has consistently displayed a conservative and individualistic approach to the Charter. This could explain why he was unwilling to read the right to strike into section 2(d)³⁹⁹ and inclined to save the section 2(d) violation in *Black* under the *Oakes* test. More particularly, it explains his passionate defence of commercial expression even at the section 1 level in *Irwin Toy*, and his reluctance to apply too strict a standard to violations of equality claimed by various groups in society.

On the other hand, Justice Wilson appears comfortable with group claims under section 15 of the Charter in *Andrews* and is loathe to save its violation under section 1 when powerless or disadvantaged groups are the victims. In an exposition of both her general values and her views about the role of the Courts, Wilson J. writes as follows:

The anti-majoritarian nature of rights provides valuable guidance to the courts in interpreting the Constitution. Judges should consider which groups are most likely to be ignored in the making of legislation. The poor, the oppressed, the powerless, racial minorities, accused criminals — even in healthy democracies these groups are typically shut out of the political process. The true test of rights is how well they serve the less privileged and least popular segments of society.⁴⁰⁰

Whatever differences there are within the Court, they all come to the interpretive exercise from the perspective of being judges. This may explain the Court's approach to the balancing of interests in *BCGEU*.⁴⁰¹ Because of the Court's firm belief in the courts and their role in society, it seems to have been blinded to the competing claims of the picketers to have their interests respected. This departure is particularly marked for the Chief Justice, the author of *BCGEU*, because the disadvantaged group in this case is surely the picketers who are the victims of the injunction. The decision also is out of line with the Chief Justice's generally expansive approach to Charter rights.

Apart from the values of the individual judges, the approach to section 1 may change significantly depending upon the Charter right in issue. Justice McIntyre takes a stricter approach to the section 1 analysis in relation to the fundamental freedoms than in respect to equality. Justice La Forest, who advocates a flexible approach to section 1 in the context of equality, is quite strict in applying the *Oakes* test with respect to mobility rights in *Black*. The approach may also be affected by the nature of the protected interest within a particular right. Chief Justice

³⁹⁹ *Reference re Public Service Employees Relations Act (Alta)* [1987] 1 SCR 313.

⁴⁰⁰ Wilson, "The Making of a Constitution" (1988), 71 *Judicature* 334 at 338.

⁴⁰¹ [1988] 2 SCR 214.

Dickson and Justice Wilson, who would be reluctant to apply section 1 to save a violation of political expression, are willing to apply it to limit commercial expression in *Irwin Toy*.

There appears to be no escaping a close analysis of the facts of a particular case and tracking the performance of the individual Supreme Court justices. This latter task is made more difficult by the rapid changes in Court personnel over the last few years. Justices Le Dain, Beetz, Estey and McIntyre have left the Court in the last couple of years and Chief Justice Dickson has retired. Their replacements have less clearly defined views and little Supreme Court track record.

Lest one despairs of finding any pattern, it should be noted that some section 1 issues have been resolved. The Court has now made it quite clear that the balancing of interests is to take place at the section 1 stage rather than in the definition of the right at the first stage. Moreover, the Court has consistently taken a flexible approach to the admission of evidence for the purposes of the section 1 analysis and is willing to bend the rules to allow this.

Finally there does appear to be a trend, if not a conclusive pattern, in the Court's approach not only to section 1 of the Charter but the document as a whole. That trend⁴⁰² is to interpret the Charter so as to benefit those who are disadvantaged and dispossessed in Canadian society. Errol Mendes argues that the Court has progressed beyond the more mechanical application of the *Oakes* test to a more visionary articulation of a theory of social justice.⁴⁰³ Like a sculpture in progress, its final form and shape is not yet known. The outline of this vision of social justice is encouraging, if not yet clear.

VII. CONCLUSION

Constitutional decisions during the 1988-89 Term of the Court cover a wide range of issues, but do show some general patterns. In both the Charter and division of powers contexts, there is a tendency among some Supreme Court justices to interpret the Constitution in such a way as to give legislators considerable latitude in shaping public policy. On the other hand, some judges continue to assert what many would regard as an activist or even *quasi*-legislative role. The critical element is the point of

⁴⁰² *BCGEU, id.*, is the notable exception.

⁴⁰³ Mendes, "In Search of a Theory of Social Justice: The Supreme Court Reconceives the *Oakes* Test" (1990), 24 *Rev. Juridique Thèmes*, forthcoming. In a presentation of this paper he argued that *Oakes* provided the tools for making the Charter sculpture but the Court is now getting closer to a vision of what the ultimate product should be. *Department of Justice Second Annual Conference on Human Rights and the Charter*, February 1990 in Ottawa.

reference. Compared to earlier Supreme Courts, the present one is quite interventionist, but compared to this Court's recent track record, it is showing more restraint.

It is becoming increasingly apparent that section 1 of the Charter is the key to understanding how extensive is the impact of the Charter. The approach to section 1 varies significantly among the judges, and is particularly affected by the context. Outside the criminal context, there is considerable deference to legislative choices.⁴⁰⁴ For some members of the Court, there is particular attention to using section 1 to protect vulnerable groups, either by invoking section 1 when the state is trying to protect vulnerable groups, or by refusing to resort to section 1 when the state action disadvantages vulnerable groups. This view carries the day in *Andrews*,⁴⁰⁵ *Irwin Toy*⁴⁰⁶ and *Slaight Communications*.⁴⁰⁷ If that trend continues, we will be greatly encouraged.

For the most part, the Charter's guaranteed rights and freedoms are being broadly interpreted, so that most of the balancing of interests takes place under section 1. This is especially true in relation to freedom of expression, which is given a very expansive interpretation in *Ford*,⁴⁰⁸ *Devine*,⁴⁰⁹ *Irwin Toy*, and *Slaight Communications*. In relation to equality rights, mobility rights and section 7, the ambit of the protected rights has been confined somewhat, while still leaving significant issues for resolution under section 1.⁴¹⁰

The 1988-89 Term, with the decisions in *Andrews*, *Turpin*,⁴¹¹ and *Reference re Workers' Compensation Act*,⁴¹² marks the beginning of the Court's equality jurisprudence. The Court's approach to section 15 is quite broad in some respects, and carefully restrained in others. The Court's approach to section 15 is broad in the sense of covering both purpose and effect (thus encompassing unintentional and systemic discrimination), and shifting the burden of justification to section 1. However, the Court's consideration of the grounds included in section 15, and of the meaning of discrimination, gives a very specific focus to section 15. By confining section 15 to analogous grounds, the Court gives section 15 a focus on disadvantaged groups, rather than leaving section

⁴⁰⁴ There is complete deference to judicial law-making in the context of contempt of court: *BCGEU*, *supra* note 401.

⁴⁰⁵ [1989] 1 SCR 143.

⁴⁰⁶ [1989] 1 SCR 927.

⁴⁰⁷ [1989] 1 SCR 1038.

⁴⁰⁸ [1988] 2 SCR 712.

⁴⁰⁹ [1988] 2 SCR 790.

⁴¹⁰ The scope of fundamental justice under s. 7 remains somewhat ill-defined, and was not further developed during the 1988-89 Term, so that the relationship between ss. 7 and 1 awaits further clarification.

⁴¹¹ [1989] 1 SCR 1296.

⁴¹² [1989] 1 SCR 922.

15 as a vehicle for generalized attacks against a wide range of governmental policy-making. This reflects, as does much of the section 1 analysis, deliberate choices as to institutional competence. The Court does not want to second guess all legislative policy decisions. The focus on disadvantaged groups gives section 15 a purpose closely connected to the rationale for entrenching rights, protecting those likely to be hurt by the majoritarian approach of legislators. Thus the Court gives a vital, but carefully tailored, task to section 15.

Concern about usurping the role of the legislative branch is also an important factor in the Court's approach to section 7 in *Irwin Toy*. Both the exclusion of corporations from section 7, and the cautious approach to economic rights under that section, reflect an assumption that the courts are not the most appropriate forum for economic policy-making. Sections 7 and 15, of all the Charter provisions, give the greatest potential scope for judicial intervention on a wide scale; the Court's caution is a welcome acknowledgement of institutional limits.

Deference to the economic policy choices of legislatures and governments is also apparent in the division of powers cases in the 1988-89 Term. The Court's re-invigoration of the federal general trade and commerce power in *General Motors*,⁴¹³ and its sympathetic reference to the federal spending power in *YMHA*,⁴¹⁴ give the federal government considerable leeway to shape national economic policy. These two cases, as well as *Black*⁴¹⁵ in connection with section 6 of the Charter, indicate the Court's view of Canada as a national economic market. Yet there is still plenty of room for provincial economic regulation. *Irwin Toy* characterizes quite significant effects on federally regulated broadcasting undertakings as amounting only to "incidental effects" in the constitutional sense, thus sustaining the validity of provincial controls largely directed at television advertising. The discussion of the ancillary nature of powers over language in *Devine* reaffirms the plenary nature of provincial power over intraprovincial commerce. Furthermore, although we prefer the more open approach of the minority, even the majority judgment in *Yeomans*⁴¹⁶ gives considerable latitude to the provinces to deal with economic policy on an administrative basis despite the constraints of section 96.

These cases emphasize the importance of the economic impact of constitutional decisions. As but one indication, Part III of the article, labelled "Economic Rights and the Constitution," is by far the longest Part. Moreover, cases discussed elsewhere in the article also have an

⁴¹³ [1989] 1 SCR 641.

⁴¹⁴ [1989] 1 SCR 1533.

⁴¹⁵ [1989] 1 SCR 591.

⁴¹⁶ [1989] 1 SCR 1533.

economic component. Whether through the Charter or division of powers analysis, Canada's economic directions are very much affected by its constitutional structure.

Economic issues are intertwined with cultural ones in *Ford* and *Devine*. In these two cases, as well as in *Greater Montreal Protestant School Board*,⁴¹⁷ the Court demonstrates good social and political awareness of contentious issues in Quebec. As regards language policy, the Court is fully cognizant of the importance of Quebec's role in the promotion of the French language and culture. The Court is also fully conscious of the trade-offs between the autonomy of dissentient schools and the cultural autonomy of the province of Quebec. The Court gives protection to the rights of linguistic and religious minorities, but in a way that is limited by the realities of a francophone minority in an overwhelmingly anglophone North America.

These cases are examples of something that is generally true of the 1988-89 Term. For the most part, the Court is aware of, and responsive to, the social, economic and political contexts of its decisions. By and large, it avoids a narrow, mechanical and legalistic analysis. But there are exceptions. Although the Court is quite comfortable in dealing with technically moot issues in *Andrews*, *Ford* and *Devine*, the approach in *Borowski*⁴¹⁸ is quite different. In other cases the Court ignores the mootness point because of the importance of the issues involved, but in *Borowski* the Court relies on the technicality of mootness to avoid dealing with the thorny issue of foetal rights. The contrast between the cases has less to do with the legal doctrines of mootness than with what, politically, the Court feels comfortable in addressing.

The other contexts in which the Court becomes overly mechanical and legalistic involve the actual workings of courts. The discussion of issues of court jurisdiction becomes somewhat mired in detail and in the mystique of section 96 courts. More dramatically, in our view, the Court loses all sense of objectivity in *BCGEU*,⁴¹⁹ in not being able to recognize anything that could compete with the right of access to court.

Fortunately, *BCGEU* is very much an anomaly in the 1988-89 Term. On the whole, the Court does a commendable job of dealing with a wide variety of constitutional issues while paying close attention to context. In relation to both the Charter and division of powers issues, the Court shows a balanced understanding of the impact of its decisions. In both the Charter and division of powers contexts, the Court is acutely aware of its political role in shaping Canada's constitutional development.

⁴¹⁷ [1989] 1 SCR 377.

⁴¹⁸ [1989] 1 SCR 342.

⁴¹⁹ [1988] 2 SCR 214.