AN ANALYSIS OF THE "NO HIERARCHY OF CONSTITUTIONAL RIGHTS" DOCTRINE

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In Gosselin (Tutor of) v. Quebec (Attorney General) (2005) the Supreme Court of Canada provided its most recent and most extensive statement of the "no hierarchy of rights" doctrine. The doctrine holds that one part of the Constitution can not be used to prevent, restrict, or expand the implementation of another part of the Constitution. The author's analysis of the no hierarchy of rights doctrine emphasizes the extent to which the doctrine is more correctly understood as a recognition of certain hierarchies among constitutional provisions, rather than a rejection of all hierarchies. The author also identifies several other respects in which the sweeping language that the Supreme Court has used to describe the no hierarchy of rights doctrine is at odds with the relatively few situations where the doctrine may be expected to be invoked. Finally, the author characterizes the no hierarchy of rights doctrine as an example of a "strategic positivist' approach to judicial review which may be gaining favour on the Supreme Court.

Dans Gosselin (Tuteur de) c. Québec (Procureur général) (2005), la Cour suprême du Canada a donné sa plus récente et plus vaste déclaration sur la doctrine « pas de hiérarchie de droits ». Selon cette doctrine, on ne peut pas utiliser une partie de la Constitution pour prévenir, restreindre ou élargir l'implantation d'une autre partie de la Constitution. Dans son analyse, l'auteur souligne la mesure dans laquelle la doctrine est mieux comprise en tant que reconnaissance de certaines hiérarchies parmi les dispositions constitutionnelles plutôt qu'un rejet de toutes les hiérarchies. L'auteur identifie aussi plusieurs autres cas où le langage profond que la Cour suprême a utilisé pour décrire cette doctrine est en désaccord avec les quelques situations où elle pourrait être invoquée. Enfin, l'auteur caractérise cette doctrine d'exemple d'une approche de « positiviste stratégique » à l'égard d'une révision judicaire qui pourrait gagner la faveur de la Cour suprême.

I. INTRODUCTION

The need to resolve conflicts between constitutionally grounded claims of right or privilege has been one of the challenges for Canada's courts since the reconfiguration of our constitutional order in 1982 and the entrenchment of the *Canadian Charter of Rights and Freedoms*.[1] The Supreme Court of Canada

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1 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11

has addressed some of these conflicts by developing a doctrine that has received its most recent statement in *Gosselin (Tutor of) v. Quebec (Attorney General)*.[2] Drawing from the wording of the *Gosselin* decision itself, this doctrine may be termed "no hierarchy of constitutional rights." It holds that guarantees of rights or freedoms that are contained in one part of the Constitution can not be used to prevent, restrict, or expand the implementation of rights or privileges that are contained in another part of the Constitution. [3]

This article reviews the development of the no hierarchy of rights doctrine and analyzes the doctrine itself. I argue that the doctrine probably has much narrower applicability than is suggested by the very general terms in which the Supreme Court has sometimes framed it. In fact, the no hierarchy of rights doctrine emerges as something of a misnomer. Rather than rejecting all hierarchies among constitutional provisions that guarantee freedoms, rights, or privileges, the doctrine essentially protects certain hierarchies. In particular, the rights and freedoms in the *Charter* that are universally applicable — which does not include all of them — are

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[*Charter*].

2 [2005] 1 S.C.R. 238, 2005 SCC 15 [*Gosselin*].

3 In developing the no hierarchy of rights doctrine the Supreme Court has referred almost interchangeably to such concepts as "rights," "freedoms," "constitutional provisions," "constitutional guarantees," and "privileges." Although very little turns on these distinctions for the purposes of the case law under review, it should be noted that from a more strictly philosophical perspective differences between these standards are important. For example, some of the conflicts addressed by the case law under review deals with would be characterized as "external rights conflicts." External rights conflicts involve conflict between rights and other kinds of claims. For example, the denominational schools provisions in s. 93 of the *Constitution Act, 1867* (*infra* note 4) may be the basis for claims that are more appropriately characterized as privileges than as rights. Insofar as s. 93 is in conflict with the equality guarantees in s. 15 of the *Charter*, this may be an example of external rights conflict. Internal rights conflicts, on the other hand, concern rights conflicting with each other. Conflict between the minority language provisions in the *Charter* under s. 23 and, again, the equality provisions under s. 15 could be characterized as internal conflict. Joel Feinberg, *Rights, Justice, and the Bounds of Liberty* (Princeton: Princeton University Press, 1980).

On the issue of internal conflict, legal scholars will be most familiar with Ronald Dworkin's argument about the "weight" of rights in situations where they conflict. In Dworkin's theory, an ability to weigh rights claims allows judges to resolve disputes without declaring the unsuccessful rights claim to be invalid. *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978). For a critical assessment of the potential of weighing rights claims objectively and without reference to social considerations in the Canadian constitutional context, see Andrew Petter & Allan C. Hutchinson, "Rights in Conflict: The Dilemma of Charter Legitimacy" (1989) 23 Univ. of British Columbia Law Rev. 531.

As it relates to this discussion, the weighing of conflicting rights claims is essentially what is involved in analysis under s. 1 of the *Charter*. However, as I discuss (see below, "Contingent Hierarchies of Rights: Section 1 of the *Charter*"), the no hierarchy of rights doctrine is characterized in part by the suggestion that in certain circumstances it is inappropriate to weigh conflicting constitutional claims.

always subordinate to the (relatively few) special rights and privileges that are contained in other parts of the *Charter* or in the *Constitution Act, 1867*.[4] For example, in the *Gosselin* decision the no hierarchy of constitutional rights doctrine was invoked to prevent the universally applicable equality provisions in section 15 of the *Charter* from applying to the more exclusive minority language provisions in section 23. Earlier case law insulated the special guarantee of funding for denominational schools in section 93 of the *Constitution Act, 1867* from challenges based on section 15 of the *Charter*.

After providing an overview of the major decisions that have developed the no hierarchy of rights doctrine, leading up to and including *Gosselin*, I begin the analysis of the doctrine by addressing some important preliminary issues. The Supreme Court has indicated that the no hierarchy of constitutional rights doctrine will be invoked in extraordinary cases where constitutional provisions that protect rights and freedoms — and those contained in the *Charter* in particular — are being used to challenge other provisions in the Constitution that guarantee rights or privileges. In fact, the case law under review involves the relatively unremarkable phenomenon of *Charter* provisions being used to challenge, not constitutional provisions themselves, but legislation that was passed pursuant to those constitutional provisions. Since all valid legislation is passed pursuant to the authority of constitutional provisions, and not every *Charter* challenge of legislation engages the no hierarchy of rights doctrine, the doctrine must therefore depend upon a *special relationship between the legislation in question and the Constitution*. I consider the characteristics that make the legislation at issue in the cases under review so "linked" to the Constitution that a challenge of the legislation amounts to a challenge of the Constitution itself. I conclude that this linkage is achieved either when legislation specifically reflects the terms of constitutional provisions that protect "special" rights or privileges or when the legislation implements such rights or privileges.

Leaving the nature of the legislation aside, the discussion then concentrates upon the constitutional provisions that are the source of the no hierarchy of rights doctrine. As an initial matter, I point out that the Constitution is, in fact, structured to create effective hierarchies of rights; in addition, the courts recognize contingent hierarchies of rights in the context of analysis under

4 U.K., 30 & 31 Victoria, c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

section 1 of the *Charter*. I suggest, therefore, that once again the no hierarchy of rights doctrine emerges as a more modest concept than may be suggested by the sweeping language that the Supreme Court has used to describe it. In fact, the no hierarchy of rights doctrine applies only to a subset of all of the provisions in the Constitution that guarantee freedoms, rights, and privileges. To date, this subset includes the Constitution's provisions for denominational schools and minority language education rights. In considering the common characteristics of this subset, I identify and discuss two dominant rationales that support the doctrine: the "confederation," or "political compromise," rationale and the "remedial" rationale. I then briefly consider the potential for the application of the no hierarchy of rights doctrine to legislation passed pursuant to the federal government's jurisdiction over "Indians and Lands Reserved for Indians" under section 91(24) of the *Constitution Act, 1867* and government activity that protects or implements aboriginal rights under section 35 of the *Constitution Act, 1982*.[5]

Finally, this article places the no hierarchy of rights doctrine within a more general climate of interest on the Supreme Court in what I call "strategic positivism." Strategic positivism involves the Court's engagement of a limited positivist interpretation strategy that rejects arguments based on normative principles, such as *Charter* values of freedom of religion or equality, when those norms are in tension with the wording of specific parts of the Constitution.

My analysis ends on a note of guarded optimism. The no hierarchy of rights doctrine, in particular, and the strategic positivist interpretation style, more generally, reflect a sensitive response on the part of the Court to concern over the political dimensions of adjudication. Sometimes, if it is difficult to bring constitutional provisions into line with a particular normative perspective, then the courts should not try. The no hierarchy of rights doctrine compels the non-judicial branches of government to confront, and engage in the hard work that attends, the fact that our Constitution reflects alternative and sometimes opposing normative, historical, and political themes.

5 *Constitution Act, 1982*, s. 35, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11.

II. THE EMERGENCE OF THE NO HIERARCHY OF CONSTITUTIONAL RIGHTS DOCTRINE

Reference re Bill 30

The no hierarchy of rights doctrine has been forged in the context of litigation concerning constitutionally protected denominational and linguistic education rights or privileges. The Supreme Court's most significant initial consideration of this kind of conflict among constitutional rights – and the Court's first articulation of the no hierarchy of rights doctrine – was in *Reference re Bill 30*.[6] The opening words of section 93 of the *Constitution Act, 1867* [7] give the provinces plenary power over education. Section 93(1) limits the province's jurisdiction, however, by guaranteeing that no provincial law in relation to education "shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of persons have by law in the Province at the Union."[8] Section 93(1), therefore, maintains or "freezes" the immediate pre-confederation situation in relation to denominational school rights. A primary practical effect of section 93(1) in the contemporary context is that it ensures funding for Protestant or Roman Catholic schools in certain provincial contexts, including Roman Catholic schools in Ontario.[9]

Through their plenary power over education, the provinces retain the ability to create new denominational school rights for Protestant or Roman Catholic minorities. New denominational school rights are not protected from repeal or amendment under section 93(1). However, should post-confederation denominational school rights be amended or repealed by

6 *Reference re Bill 30, An Act to amend the Education Act (Ont.)*, [1987] 2 S.C.R. 1148, Wilson J. [*Reference re Bill 30*].

7 *Supra* note 4.

8 *Ibid.*, s. 93(1).

9 Similar privilege is extended to Roman Catholic schools in Alberta, Saskatchewan, and Manitoba by provisions which, *mutatis mutandis*, mirror s. 93 of the *Constitution Act, 1867* and which are part of the acts creating these provinces. For example, the beginning of s. 17 of the *Saskatchewan Act*, 4-5 Edward VII, c. 42 (Can.), reads: "Section 93 of the *Constitution Act, 1867* shall apply to the said province, with the substitution for Paragraph (i) of the said s. 93, of the following paragraph:

> (1) Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the Ordinances of the North-west Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said ordinances.

provincial legislation, section 93(3) provides a right of appeal by affected parties to the federal cabinet and section 93(4) provides that the federal Parliament can pass remedial legislation.

The legislation at issue in *Reference re Bill 30* provided for the extension of government funding to Roman Catholic schools in Ontario to the end of high school. The parties challenging the validity of the legislation for the purposes of the reference case argued that Bill 30 violated the *Charter*'s equality guarantee in section 15(1)[10] by providing Roman Catholics and Roman Catholic schools with financial benefits that were not equally available to other taxpayers and other religious schools. It was also argued that Bill 30 violated the guarantee of freedom of religion in section 2(a)[11] of the *Charter*. Bill 30 was upheld by a majority of the Ontario Court of Appeal and by all members of the Supreme Court of Canada.

An obstacle for the parties attempting to use *Charter* provisions to oppose Bill 30 was section 29 of the *Charter*. Section 29 indicates that "[n]othing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools." It was argued by Bill 30's opponents, however, that the Privy Council's decision in *Tiny Separate School Trustees v. The King*[12] made section 29 irrelevant to the case. In *Tiny*, the Privy Council held that Roman Catholic schools in Ontario had no pre-confederation constitutional right to high school funding. Accordingly, section 29 of did not protect the legislation from a challenge under other sections of the *Charter*.

Justice Wilson's decision for the majority rejected the holding in *Tiny*[13] and accepted that the extended funding to Ontario Roman Catholic schools under *Reference re Bill 30* represented the return of a confederation-era right recognized by section 93(1). Justices Beetz, Estey, and Lamer did not feel that it was necessary to consider section 93(1), holding instead that the express

10 Section 15(1) of the *Charter* reads: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

11 Section 2(a) of the *Charter* reads: "Everyone has the following fundamental freedoms: (a) freedom of conscience and religion."

12 [1928] A.C. 363 [*Tiny*].

13 *Supra* note 6 at pp. 1195-96. Dickson C.J., McIntyre, and La Forest JJ. concurred with Wilson J.'s decision. Estey and Beetz JJ. reached the same conclusion in the case without having to "reopen" the *Tiny* decision. See Estey J.'s reasons at 1199-200. Lamer J. also concurred in Wilson J.'s disposition of the case, but felt that he could do so without addressing the overturning the *Tiny* decision. See Lamer J.'s reasons at 1209-10.

power to create new denominational school systems that is recognized by section 93(3) necessarily implies an ability on the part of the provinces to augment such systems as already existed at confederation.[14]

Regarding the relationship between intersecting and conflicting constitutional provisions, Justice Wilson's decision relied on the principle that "[i]t was never intended . . . that the *Charter* could be used to invalidate other provisions of the Constitution."[15] She also strengthened this early articulation of the no hierarchy of rights doctrine by indicating that her decision did not depend upon section 29 of the *Charter*:

> [Section 29] was put there simply to emphasize that the special treatment guaranteed by the constitution to denominational, separate or dissentient schools, even if it sits uncomfortably with the concept of equality embodied in the *Charter* because not available to other schools, is nevertheless not impaired by the *Charter*. [16]

Although section 29 does protect rights or privileges "conferred by legislation passed under . . . s. 93," what is most determinative is the fact that one set of constitutional guarantees are being asserted against another set.

Madam Justice Wilson's recognition of the tension that exists between equality principles and the entrenchment of "special treatment" in the constitution is significant. Her candidness in this regard reflects the pragmatism that underlies the no hierarchy of rights doctrine. At least insofar as the Canadian Constitution is concerned, Justice Wilson suggests that concessions to human rights principles are the price of having a country. Section 93 enshrines a "confederation compromise"[17] that can be modified only by amending the constitution, and not indirectly by the application of normative principles that inform other parts of the Constitution.[18]

Justice Estey, in his concurring reasons, also addressed the tension between

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14 *Ibid.* at 1174-75.

15 *Ibid.* at 1198.

16 *Ibid.*

17 *Ibid.* at 1197-98.

18 In this regard, Wilson J. quotes with approval the Ontario Court of Appeal's decision in the case (*ibid.* at 1198-99):

> These educational rights, granted specifically to the Protestants in Quebec and the Roman Catholics in Ontario, make it impossible to treat all Canadians equally. The country was founded upon the recognition of special or unequal educational rights for specific religious groups in Ontario and Quebec. The incorporation of the *Charter* into the *Constitution Act, 1982*, does not change the original confederation bargain. A specific constitutional amendment would be required to accomplish that.

the human rights principles that animate the *Charter* and guaranteed funding for particular denominational schools. He stated that "[i]t is axiomatic . . . that if the *Charter* has any application to Bill 30, this Bill would be found discriminatory and in violation of s. 2(a) and s. 15 of the *Charter of Rights*." But for Mr. Justice Estey, the "real contest" in the appeal was that which existed "between the operation of the *Charter* in its entirety and the integrity of s. 93." [19] In addressing this issue, he provided a clear articulation of the no hierarchy of rights doctrine, at least as it involves attempts to use the *Charter* against other parts of the Constitution:

> The role of the *Charter* is not envisaged in our jurisprudence as providing for the automatic repeal of any provisions of the Constitution of Canada which includes all of the documents enumerated in s. 52 of the *Constitution Act, 1982*. . . . Although the *Charter* is intended to constrain the exercise of legislative power conferred under the *Constitution Act, 1867* where the delineated rights of individual members of the community are adversely affected, it cannot be interpreted as rendering unconstitutional distinctions that are expressly permitted by the *Constitution Act, 1867*. [20]

Mahe v. Alberta

The Supreme Court of Canada's decision in *Mahe v. Alberta*[21] was the most significant early application of the no hierarchy of rights doctrine to the language provisions of the *Charter* that were at issue in *Gosselin*. The *Mahe* decision also represents the application of the doctrine to an intersection of rights within the *Charter* itself. This contrasts with the *Reference re Bill 30* example, which attempted to use provisions of the *Charter* against rights or privileges created by other parts of the Constitution.

Section 23 of the *Charter* provides limited guarantees of publicly funded primary and secondary education in French or English for children in provinces where speakers of one of those languages represent a linguistic minority population. Rather than conferring rights directly on the children who may receive minority language education, section 23 rights are exercisable by the parents of those children. In general terms, the section ensures that "wherever . . . the number of citizens who have such a right is sufficient to warrant,"[22] primary and secondary school instruction in either English or French will be

19 *Ibid.* at 1206.
20 *Ibid.* 1206-207
21 [1990] 1 S.C.R. 342 [*Mahe*].
22 *Supra* note 1, s. 23(3)(a).

available to the children of parents who are Canadian citizens[23] and who fall within one of three categories.

The first category of parents who enjoy section 23 rights are those whose first language "learned and still understood is that of the English or French minority population of the province in which they reside."[24] The second category of parents who enjoy section 23 rights are those who themselves received primary school instruction in one of those languages "and reside in a province where the language in which they received that instruction . . . is the language of the English or French linguistic minority population."[25] Finally, notwithstanding the first language of parents or the language in which they received education, parents have the right to have a child receive publicly funded school instruction in the same language, either French or English, as has been received by any of their other children.[26] Furthermore, "where the number of those children so warrants," the minority language education rights under section 23 of the *Charter* go beyond minority language instruction to include "educational facilities provided out of public funds."[27] The reference to minority language educational facilities in section 23(3)(b) includes, at least, schools. An issue in *Mahe*, however, was the extent to which this language right extends beyond physical facilities to include guaranteed Francophone representation on school boards or separate Francophone school boards to manage and control of French-language education where numbers warrant.

In Mahe, parents living in Edmonton who qualified for French-language education for their children under section 23 argued, among other points, that section 15(1) of the *Charter* augmented the proper application of that section. In light of section 15's equality guarantees, the parents argued that their rights under section 23 of the *Charter* required the establishment of a publicly funded Francophone school run by a Francophone school board. A unanimous Court held that, given the numbers of eligible Francophone students in Edmonton, section 23 mandated the existence of the Francophone school that had already been established by the separate school board. In addition, the court held that section 23 required that the minority-language parents should have representation on the separate school board. Furthermore,

23 *Ibid.*, s. 23.

24 *Ibid.*, s. 23(1)(a). The effect of s. 59 of the *Constitution Act, 1982* is to make this subsection inapplicable in Québec until such time as it is adopted by the legislative assembly or government of Québec.

25 *Ibid.*, s. 23(1)(b).

26 *Ibid.*, s. 23(2).

27 *Ibid.*, s. 23(3)(b).

the number of minority-language parents and eligible students in Edmonton were sufficient to warrant a significant degree of management and control of the school. On the facts, however, the Court did not find that the numbers warranted a separate Francophone school board.

As it relates to the intersection of sections 15 and 23 of the *Charter*, Chief Justice Dickson reasoned that section 23 was insulated from the impact of other *Charter* provisions because of the "comprehensive code" that the section establishes. Section 23 is something of a *Charter* within a *Charter*, which responds to factors that occupy a different theoretical territory than the rights framework that surrounds it. He stated:

> [Section 23] has its own internal qualifications and its own method of internal balancing. A notion of equality between Canada's official language groups is obviously present in s. 23. Beyond this, however, the section is, if anything, an exception to the provisions of ss. 15 and 27 [the multicultural interpretive provision of the *Charter*] in that it accords these groups, the English and the French, special status in comparison to all other linguistic groups in Canada. As the Attorney General for Ontario observes, it would be totally incongruous to invoke in aid of the interpretation of a provision which grants special rights to a select group of individuals, the principle of equality intended to be universally applicable to "every individual"[28]

The Chief Justice's identification of section 23 as an exception to a broader notion of equality that otherwise informs the *Charter* echoes Justice Wilson's recognition that section 93 of the *Constitution Act, 1867* "sits uncomfortably" with the *Charter's* concept of equality. A factor that may distinguish section 23 of the *Charter* from section 93 of the *Constitution Act, 1867*, however, is that section 23's exceptionalism *vis-à-vis* section 15 is tempered by Chief Justice Dickson's recognition of "a notion of equality" that the section serves. It is worth noting as well that he acknowledges some "remedial" characteristics of section 23.[29] As will be discussed below, section 15 jurisprudence recognizes that legislation that draws formal distinctions between groups for remedial purposes may be consistent with the equality guarantees of the *Charter*.[30]

In *Mahe*, Chief Justice Dickson was careful to avoid the suggestion that because section 23 is the product of a "political compromise" it should be interpreted more restrictively than other *Charter* guarantees. The source of the idea that language guarantees are a different species of rights from others that are recognized in the *Charter*, and therefore require more restrictive

28 *Supra* note 21 at 369.

29 *Ibid.* at 364.

30 See below "Section 23 of the *Charter* and the 'Remedial Rationale'" for more on this topic.

interpretation, is Justice Beetz's decision in *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education.*[31] Specifically, *Société des Acadiens* concerned section 19(2) of the *Charter*, which guarantees that either English or French may be used in the New Brunswick courts. Justice Beetz's decision, however, went beyond the specific language right at issue. He discussed the way in which *all* of the Constitution's language rights have a political compromise nature, thus contrasting with legal rights, which "tend to be seminal in nature because they are rooted in principle." Thus, Justice Beetz stated:

> This essential difference between the two types of rights dictates a distinct judicial approach with respect to each. More particularly, the courts should pause before they decide to act as instruments of change with respect to language rights. This is not to say that language rights provisions are cast in stone and should remain immune altogether from judicial interpretation. But, in my opinion, the courts should approach them with more restraint than they would in construing legal rights.[32]

In deference to Justice Beetz's admonition, Chief Justice Dickson in *Mahe* allowed that section 23 provides "a perfect example of why . . . caution is advisable" in the interpretation of section 23, given its character as a "novel form of legal right, quite different from the type of legal rights which courts have traditionally dealt with." However, referencing with approval Justice Wilson's response in *Reference re Bill 30* to Justice Beetz's cautious advice about political compromise rights, Chief Justice Dickson maintained that "this does not mean that courts should not 'breathe life' into the expressed purpose of the section."[33]

While the *Mahe* decision supports the reasoning in the earlier *Reference re Bill 30* case, another aspect of Madam Justice Wilson's *dicta* in *Reference re Bill 30* requires some reconsideration. As mentioned in the overview of *Reference re Bill 30*, she provided in her opinion that "[i]t was never intended . . . that the *Charter* could be used to invalidate other provisions of the Constitution."[34] *Mahe* adds complexity to this observation — after *Mahe* we must accept that it was never intended that some parts of the *Charter* itself would be used to invalidate[35] the application of other parts of the *Charter.* Accordingly, the no

31 [1986] 1 S.C.R. 549 [*Société des Acadiens*].

32 *Ibid.* at 578.

33 *Supra* note 21 at 365.

34 *Supra* note 6 at para. 62.

35 "Invalidate" may seem extreme in the context of the ways in which the parents groups sought to use the s. 15 of the *Charter* to modify the application of s. 23 of the *Charter* in the *Mahe* and *Gosselin* decisions. In an extraordinary passage in *Gosselin*, however, the Court indicated that not only did the Constitution not require the government of Québec to provide English-language

hierarchy of rights doctrine is not merely an "intergenerational" phenomenon allowing older parts of the Constitution to retain their viability in the face of new constitutional norms. The doctrine is animated by deeper ideas about how the positive law framework of the Constitution places blunt limits on the scope of judicial review based on human rights principles. However, at least insofar as section 23 is concerned, the *Mahe* decision goes some way toward dampening some concerns about the extent to which the invocation of the no hierarchy of rights doctrine involves abandonment of principle. The emphasis that Chief Justice Dickson places on the remedial and alternative-equality characteristics of section 23 make its ability to trump the equality themes of section 15 more palatable from an equality perspective.

Adler v. Ontario

In *Adler v. Ontario*,[36] the Supreme Court of Canada returned to the theme of the immunity of section 93 from the *Charter*. *Reference re Bill 30* was concerned with the implications of funding denominational schools in Ontario; in *Adler*, the parent groups who were seeking support for their non-Roman Catholic denominational schools focused their equality and religious freedom arguments on the funding of non-denominational public schools in Ontario, pursuant to section 93 of the *Constitution Act, 1867*.

Justice Iacobucci's decision for the majority,[37] rejecting the arguments of the parent groups, relied heavily not only upon Justice Wilson's decision in *Reference re Bill 30*, but also upon *Mahe*. In Justice Iacobucci's opinion, "the reasoning used in *Mahe* is equally applicable to the appellants' attempt to use s. 2(*a*) in combination with s. 15(1) [of the *Charter*] to expand on s. 93's religious education guarantees."[38] Drawing directly from Chief Justice Dickson's wording in *Mahe*, Justice Iacobucci held that section 93 of the *Constitution Act, 1867* represented a "comprehensive code" for constitutionally

education to all students in the province, but to do so — as the parents groups argued s. 15 required — would actually *contravene* s. 23 of the *Charter*. Building upon its decision in *Arsenault-Cameron v. Prince Edward Island*, [2000] 1 S.C.R. 3 at para. 26, the Court stated (at para. 32): "A provincial government that provided equal access to all citizens to minority language schools would not be 'do[ing] whatever is practically possible to preserve and promote minority language education'" as s. 23 requires. The suggestion is that the province's plenary power over education in s. 93 of the *Constitution Act, 1867* is restricted by s. 23 of the *Charter* so that the provinces are barred from providing more access to primary and secondary education the minority language than is required to serve the needs of that minority population.

36 [1996] 3 S.C.R. 609 [*Adler*].

37 Lamer C.J., La Forest, Gonthier, and Cory JJ. concurring.

38 *Ibid.* at para. 35.

required funding of education[39] and that "the funding of Roman Catholic separate schools and public schools is within the contemplation of the terms of s. 93 and therefore is immune from *Charter* scrutiny."[40] In relation to the "confederation compromise" theory of section 93 used to defend the doctrine in earlier cases, he characterized the section as "the product of an historical compromise which was a crucial step along the road leading to confederation,"[41] a "solemn pact,"[42] a "cardinal term of union,"[43] and a "child born of historical exigency."[44]

Mr. Justice Iacobucci provided a very expansive version of the extent to which provincial legislative activity based upon section 93 of the *Constitution Act, 1867* is insulated from review under the *Charter.* Justices Sopinka, Major, McLachlin, and L'Heureux-Dubé identified a greater degree of *Charter* applicability in this area. Justice Sopinka, writing for himself and Justice Major, drew a distinction between the opening words of section 93. which give the provinces legislative jurisdiction over education, and subsections (1) and (2) of section 93 which limit that plenary power by ensuring funding for denominational schools in certain circumstances. As for the power-conferring opening words of section 93, Justice Sopinka held that legislation passed pursuant to "[t]his power is no different from the heads of power contained in s. 92 of the *Constitution Act, 1867.* Like the latter, it is subject to the *Charter.*"[45] In the result, however, Justices Sopinka and Major did not find that the appellants' section 2(a) or section 15(1) interests under the *Charter* had been infringed by the denial of funding to independent religious schools. Justice McLachlin found an infringement of section 15(1) but would have upheld the legislation under section 1. Justice L'Heureux-Dubé agreed with Justice McLachlin on the section 15(1) issue but would not have saved the legislative scheme under section 1, suggesting instead that some limited funding of independent religious schools should be provided by the province.

Gosselin (Tutor of) v. Quebec (Attorney General)

Gosselin is one of several unanimous decisions handed down by the Supreme Court of Canada in March 2005, all of which involved parents seeking access

39 *Ibid.* at para. 35.
40 *Ibid.* at para. 27.
41 *Ibid.* at para. 29.
42 *Ibid.* at para. 29.
43 *Ibid.* at para. 29.
44 *Ibid.* at para. 30.
45 *Ibid.* at para. 123.

for their children to publicly funded English language education in Québec.[46] The parents in the *Gosselin* appeal challenged section 73 of the *Charter of the French Language*.[47] In general terms, the Québec legislation requires that French be the language of instruction for children in the province's publicly funded elementary and secondary schools.[48] An exception to the French-only education requirement is provided for under section 73 of the *French Language Charter*. Section 73 implements the minority language education rights that are enjoyed by some English-speaking parents in Québec under section 23 of the *Canadian Charter*.

The parents in *Gosselin* did not qualify under section 73 of the *French Language Charter* or section 23 of the *Canadian Charter* (after which section 73 is modeled). The parents argued that their exclusion from the category of parents whose children received English education in Québec represents discrimination under the provincial *Charter of Human Rights and Freedoms*,[49] which opposes "distinction, exclusion or preference" based, among other grounds, on language. The parents' arguments were dismissed by both the Québec Superior Court[50] and the Court of Appeal.[51]

For the purposes of their appeal to the Supreme Court of Canada, the parents in *Gosselin* did not base their arguments upon linkages between section 73 of the *French Language Charter* and the *Canadian Charter*. The Supreme Court, however, insisted on the connection, stating that a linkage between section 73 of Québec's *French Language Charter* and section 23 of the *Canadian Charter* is "fundamental to an understanding of the constitutional issue."[52] From the Supreme Court's perspective, the importance of the parents' argument in *Gosselin* was not merely the unremarkable question of whether ordinary provincial legislation offends provincial human rights guarantees. The *Gosselin* case raised the more significant question of whether, within the *Canadian Charter*, section 23 infringes section 15. Language is not one of the enumerated grounds of discrimination that offend section 15; however, in *Gosselin*, the Supreme Court affirmed the reasoning of the Saskatchewan Court of Appeal in *Reference re French Language Rights of*

46 The other cases were *Okwuobi v. Lester B. Pearson School Board*; *Casimir v. Quebec (Attorney General)*; *Zorrilla v. Quebec (Attorney General)*, [2005] 1 S.C.R. 257, 2005 SCC 16; and *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] 1 S.C.R. 201, 2005 SCC 14.

47 R.S.Q. c. C-11 [*French Language Charter*].

48 *Ibid.*, s. 72.

49 R.S.Q. c. C-12, s. 10 [*Quebec Charter*].

50 [2000] R.J.Q. 2973.

51 [2002] R.J.Q. 1298.

52 *Supra* note 2 at para. 14.

Accused in Saskatchewan Criminal Proceedings,[53] which held language to be an analogous ground under section 15.

The holding of the Court in *Gosselin* is succinctly captured by a statement early in the decision:

> [T]here is no hierarchy amongst constitutional provisions, and equality guarantees cannot therefore be used to invalidate other rights expressly conferred by the Constitution. . . . It cannot be said, therefore, that in implementing s. 23 [of the *Canadian Charter of Rights and Freedoms*] the Quebec legislature has violated either s. 15(1) of the *Charter* or [the *Quebec Charter of Human Rights and Freedoms*].[54]

Relying upon the case law reviewed above, the Court characterized the appellant's argument as an attempt "to accomplish precisely that which *Mahe* said was prohibited . . . . The attempt was rejected in *Mahe,* albeit in different circumstances, and should be rejected again in this appeal."[55] The Court also references with approval the connection that Justice Iacobucci drew in *Adler* between section 93 of the *Constitution Act, 1867* and the *Charter* minority language education rights that were at issue in *Mahe* and *Gosselin* itself. Relying upon Justice Wilson's decision in *Reference re Bill 30*, the Court admonished that any attempt "to give equality guarantees a superior status in a 'hierarchy' of rights must be rejected."[56]

The Court's insistence in *Gosselin* on the existence of a no hierarchy of constitutional rights doctrine reaches an almost feverish pitch. Not only is the "no hierarchy amongst constitutional provisions" principle mentioned repeatedly, it is elevated to the status of the title of Part D of the decision: "*There is No Hierarchy of Constitutional Rights.*"[57] Part D supports and explains the immediately preceding Part C, titled in honour of a more precise corollary of the doctrine: "*The Right to Equality is Not Opposable to Section 23 of the Charter.*"[58] The *Gosselin* decision also brings together all of the major themes and issues arising in the jurisprudence on the no hierarchy of rights doctrine as it has evolved since the *Reference re Bill 30.* These themes will be analyzed below.

53 (1987), 36 C.C.C. (3d) 353.
54 *Supra* note 2 at para. 2.
55 *Ibid.* at para. 22.
56 *Ibid.* at para. 29.
57 *Ibid.* at paras. 22-23.
58 *Ibid.* at paras. 20-21.

III. ANALYSIS OF THE NO HIERARCHY OF RIGHTS DOCTRINE

Conflict with Legislation Rather Than Constitutional Provisions

In developing the no hierarchy of rights doctrine the Supreme Court of Canada has said that "constitutional provisions" are immune from each other. In fact, the no hierarchy of rights doctrine must be more complex than this, since, on it own, the idea that constitutional provisions are immune from each other is either trivially obvious or simply wrong. On the "obvious" side of the spectrum, the immunity of particular constitutional provisions from other constitutional provisions is never really an issue. In the cases where the no hierarchy of rights doctrine was invoked, provisions of the *Charter* were not being used to challenge other constitutional provisions directly. Rather, in the case law under review, *Charter* provisions were being used to challenge legislative initiatives (*Reference re Bill 30, Adler*), existing legislative frameworks (*Mahe*), or particular parts of legislation (*Gosselin*). Accordingly, in these cases, constitutional provisions were being used to challenge other constitutional provisions only to the extent that these latter provisions were made manifest by the ordinary legislation. If this is the case, then it is simply wrong to suggest that the passage of legislation pursuant to constitutional provisions is the *sine qua non* for the invocation of the no hierarchy of rights doctrine. The complex nature of the no hierarchy of rights doctrine must be connected to the special character of the legislation that is being challenged, or the special nature of the constitutional provision that supports the legislation, or a combination of these factors.

The "Linkage" Between Legislation and Constitutional Provisions

Taking the legislation issue first, under Canada's federal Constitution all legislation flows from a constitutional grant to either Parliament or provincial legislatures.[59] Although the Supreme Court has suggested that it has broader application, all of the case law concerning the no hierarchy of right doctrine

59 The exhaustive distribution of legislative powers, a principle of federalism as applied to Canada, holds that "the totality of legislative power is distributed between the federal Parliament and the provincial Legislatures." Peter Hogg, *Constitutional Law of Canada, Loose-Leaf Edition* (Toronto: Carswell, 2004) at s. 15.9(e), 15-42.

to date has involved the invocation of the *Charter* to challenge legislation or to try to compel legislative activity.[60] Sections 32 (a) and (b) of the *Charter* make its protections applicable to "all matters within the authority" of the Parliament and Government of Canada and the legislature and government of each province, respectively. Section 32 does not formally exclude from the *Charter*'s applicability any forms of legislation or other kinds of government activity, regardless of the constitutional provisions that may sanction them. Therefore, at least insofar as the no hierarchy of rights doctrine applies to the *Charter* — and to date all of the leading case law has been confronted with this situation — the Supreme Court has created something like an implied exception to section 32 of the *Charter.*

There may be, in fact, an express exception for legislation implementing section 93 of the *Constitution Act, 1867.* It will be recalled, however, that in *Reference re Bill 30,* Justice Wilson emphasized that the no hierarchy of rights doctrine is fundamental enough that section 29 of the *Charter* is essentially incidental to its existence. As anomalous — or redundant — as this "implied and textual" basis for the no hierarchy of rights doctrine may be in relation to the denominational school provisions, the "necessarily implied" character of the doctrine could be important for its extension into contexts that do not involve express exemptions from the application of the *Charter.*

The case law invoking the no hierarchy of rights doctrine does not state specifically what makes the legislation under review in those cases possess what the Court in *Gosselin* identifies as the "linkage" to the constitution that allows it to take advantage of the doctrine.[61] An obvious assumption — which begs further questions — is that some legislation engages the no hierarchy of rights doctrine because it has been passed pursuant to certain "special" constitutional provisions that are capable of giving rise to the doctrine. The facts of *Gosselin* take the connection between legislation and constitutional provisions to the extreme. The provision of Québec's *French Language Charter* at issue in the case directly reflected section 23 of the *Constitution Act,* making a challenge of the legislation seem to be a direct test of the Constitution. *Gosselin* may stand for the proposition, therefore, that legislative provisions that are passed by a government with the jurisdiction to do so, and that reflect the precise terms of a constitutional provision, will engage the no hierarchy of rights doctrine.

60 *Mahe* involved a challenge to a *lack* of government activity or legislation.

61 *Supra* note 2 at paras. 13-16.

It will be rare that legislation that reflects the kind of unity with a constitutional provision that was evinced by the *French Language Charter* in *Gosselin*.[62] Furthermore, unity with the precise terms of the Constitution does not explain why the Court invoked the no hierarchy of rights doctrine in *Reference re Bill 30*, *Mahe*, and *Adler*. In fact, in *Adler*, differences of opinion over what makes legislation closely enough linked to constitutional provisions to engage the doctrine emerged as a fault-line among the Supreme Court justices. Justice Iacobucci's decision for the majority held that the legislative framework for public schools that did not include funding to private religious schools was linked to the "comprehensive code" of constitutionally guaranteed funding for education contained in section 93 of the *Constitution Act, 1867*. To allow the public school legislative framework to be challenged under the *Charter* amounted to using one part of the Constitution to challenge section 93 itself.

For their part, Justices Sopinka, Major, McLachlin, and L'Heureux-Dubé felt that the legislative framework in *Adler* that denied funding to private religious schools was not linked to the Constitution in a way that brought it within the no hierarchy of rights doctrine. Justice Sopinka held that, rather than reflecting the framework of rights and privileges that are contained in section 93(1) and that the *Reference re Bill 30* decision insulated from the *Charter*, public school funding is merely an exercise of the broad plenary power over education that the opening words of section 93 give to the provinces. To this extent, section 93 is "on the same footing as the provincial powers granted to the provinces in s. 92 of the *Constitution Act, 1867*."[63]

Existing Hierarchies Among Constitutional Provisions

Structural Hierarchies

In the context of the *Charter*, Professor Hogg has identified a "hierarchy of rights" that is created by section 33, the override provision. Section 33 allows Parliament or the legislature of a province to declare that legislation "shall operate notwithstanding a provision included in s. 2 or ss. 7 to 15 of this *Charter*."[64] Legislation overriding these sections of the *Charter* is limited

62 An anonymous reviewer of this article pointed out that another example might be the way ss. 16-20 of the *Charter* (*supra* note 1), relating to use of French and English in federal institutions, are reflected in provisions of the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.).

63 *Supra* note 36 at para. 130.

64 *Supra* note 1, s. 33(1)

to five years,[65] but overriding legislation can be re-enacted indefinitely[66] in five-year cycles.[67] Thus, the effect of section 33 is to make fundamental freedoms under section 2, legal rights under sections 7-14, and equality rights under section 15 more susceptible to limitation than the *Charter* rights that cannot be overridden. The *Charter* rights and freedoms that cannot be overridden are the democratic rights in sections 3-5, mobility rights in section 6, and language rights in sections 16-23. In Hogg's analysis, section 33 "thus creates two tiers of rights: the 'common rights' that are subject to override, and the 'privileged rights' that are not."[68]

The hierarchy of rights that Hogg identifies as an implication of section 33 is somewhat distinguishable from the hierarchy that the Supreme Court addresses in the no hierarchy of rights doctrine. No hierarchy of rights refers to the principle that parts of the Constitution that guarantee rights, freedoms, and privileges cannot operate to limit other constitutional guarantees. Section 33, on the other hand, does not *directly* allow the *Charter* sections that fall within its scope to be overridden in the interests of other constitutional provisions. What amounts to the same thing, however, would be achieved by legislation that is declared to operate notwithstanding the relevant sections of the *Charter*, when that legislation is designed to advance rights that are otherwise recognized by the *Charter*. In this way, the legislation in question would be "implementing" constitutional provisions enjoying a superior position over the rights that have been overridden. The broadest version of the no hierarchy of constitutional rights doctrine is, therefore, undermined by section 33 of the *Charter*.

Finally, Justice Wilson's *dicta* in *Société des Acadiens*[69] threatens to relegate the "no hierarchy of rights" label to misnomer status with her acceptance of the theory that the language rights in the *Charter* enjoy a superior place in a structural hierarchy within the *Charter* itself. She stated: "[D]ouble entrenchment of language rights in the *Charter* and the commitment to linguistic duality in s. 16 would seem to support the view expressed by Professor Tremblay that in terms of importance linguistic rights now stand 'at the highest level of the constitutional hierarchy.'"[70] Put in this context,

65 *Ibid.*, s. 33(3).

66 *Ibid.*, s. 33(4).

67 *Ibid.*, s. 33(5).

68 Hogg, *supra* note 59 at s. 33.7(e).

69 *Supra* note 31.

70 *Ibid.* at para. 178, citing Andre Tremblay, "The Language Rights (ss. 16 to 23)" in W.S. Tarnopolsky & G.A. Beaudoin eds., *The Charter of Rights and Freedoms: Commentary* (Toronto: Carswells, 1982) at 445-46.

therefore, rather than there being no hierarchy of rights there is, instead, a particular institutionalized hierarchy.

Contingent Hierarchies of Rights: Section 1 of the Charter

The Supreme Court's indication that there is no hierarchy of constitutional provisions is also undermined by the fact that, at least for particular purposes, the courts regularly recognize that certain rights claims have priority over others to resolve disputes under the *Charter*. This occurs when government activity that advances some individuals' or groups' rights or freedoms as guaranteed under the *Charter* infringes the *Charter* rights or freedoms of other individuals or groups.[71] The hate speech provisions of the *Criminal Code*,[72] for example, enhance the personal security and equality interests of people who are the targets of hate speech. These interests are recognized under sections 7 and 15, respectively, of the *Charter*. The hate speech provisions also infringe the freedom of expression of people who engage in this form of speech. Freedom of expression is guaranteed under section 2(*b*) of the *Charter*. In such circumstances, rather than invoking the no hierarchy of rights doctrine to insulate from challenge the government activity in question, the courts engage in a balancing exercise under section 1.[73] The object of section 1 analysis is to determine whether the government activity is a reasonable infringement of the challengers' rights or freedoms. In the hate speech example, the Supreme Court of Canada held in *R. v. Keegstra*[74] that the *Criminal Code* provisions represent reasonable limitations upon the freedom of expression of people who are charged under these provisions.

Characteristics of Constitutional Provisions That Engage the No Hierarchy of Rights Doctrine

This article has emphasized the fact that the Supreme Court's occasional sweeping denial of the existence of "a hierarchy amongst [any] constitutional provisions"[75] cannot be sustained. The Constitution establishes some formal hierarchies and the courts themselves recognize hierarchies among rights claims on a case-by-case basis in the context of the review of government

71 Of course, government activity does not always advance interests that are recognized under the *Charter*, but such legislation is not uncommon.

72 R.S.C. 1985, c. C-46, s. 319.

73 Section 1 reads: "The *Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

74 [1990] 3 SCR 697.

75 *Supra* note 2 at para. 2.

activity under the *Charter*. At this stage in the development of the no hierarchy of rights doctrine, therefore, it seems safest to conclude that the constitutional provisions that have the potential to engage the doctrine will be similar in kind to those that the Supreme Court has already identified.

The jurisprudence concerning the no hierarchy of rights doctrine has dealt almost exclusively with questions about the interaction between *Charter* provisions — sections 2(*a*) and 15(1) in particular — and both section 93 of the *Constitution Act, 1867* and section 23 of the *Charter* itself. The Court in *Gosselin* also alludes to the probability that some legislation, at least that which is enacted pursuant to section 91(24) of the *Constitution Act, 1867*, will fall under the no hierarchy of rights doctrine. In the process of emphasizing the significance of the linkage between the legislative provisions at issue in the case and section 23 of the *Charter* the Court stated:

> The linkage is fundamental to an understanding of the constitutional issue. Otherwise, for example, any legislation under s. 91(24) of the *Constitution Act, 1867* ("Indians, and Lands reserved for the Indians") would be vulnerable to attack as race-based inequality. . . . Such an approach would, in effect, nullify any exercise of the constitutional power.[76]

A characteristic that is shared by these provisions is that they guarantee certain rights and privileges to specific groups of people. Subtle differences exist, however, between the rationales that have been provided for the invocation of the no hierarchy of rights doctrine in relation to section 93 of the *Constitution Act, 1867* and section 23 of the *Charter*. It may be assumed, therefore, that the extension of the doctrine to other constitutional provisions will rest, to some degree, on the relationship between those provisions and these rationales.

Section 93 of the Constitution Act, 1867, and the Confederation Compromise Rationale

The idea that section 93(1) of the *Constitution Act, 1867* reflects a "confederation compromise" was a leitmotif in the Supreme Court's defence of the no hierarchy of rights doctrine in the *Reference re Bill 30* and the *Adler* cases. The confederation compromise argument emerges as a variation of the "compact theory" of Canada's constitution.[77] According to the compact theory, the Constitution is an agreement among the parties to confederation.

76 *Ibid.*, at para. 14.

77 Ramsay Cook, *Provincial Autonomy, Minority Rights and the Compact Theory, 1867-1921* (Ottawa: Queen's Printer, 1969).

Jeremy Webber defines the compact theory in the following terms:

> Canada was created by the agreement — by the compact — of the pre-existing colonies, and that this feature of Canada's origin should be used to interpret the resulting constitutional order. The theory has many variations, all springing from that common foundation. Its proponents tend to share a commitment to the moral significance, if not the moral primacy, of the provinces as fundamental constituents of confederation, and to use the theory as a way of resisting constitutional developments that would erode the autonomy of the provinces ostensibly guaranteed in the initial accord.[78]

Leaving aside the many difficulties associated with the compact theory,[79] a variation of it explains the suggestions in *Reference re Bill 30* and *Adler* that the Constitution is a somewhat fragile amalgam of responses to political and historical contingencies and various normative mandates. It is no surprise, therefore, that parts of the Constitution that guarantee rights and privileges in a manner that reflects various historic exigencies — *e.g.*, denominational school guarantees of the confederation period, language education rights of the patriation period – may not measure up to the particular rational demands of the universal human rights values that are contained in the *Charter*. In a sense, this lack of a single rational framework in the Constitution must be accepted and perhaps even celebrated to the extent that it manifests Canada's uniqueness.

For its part, the Supreme Court has recognized that section 93, for example, "sits uncomfortably with the concept of equality embodied in the *Charter*"[80] and that section 23 of the *Charter* "is, if anything, an exception to the provisions of ss. 15 and 27" of the *Charter*.[81] However, in *Reference re Secession of Quebec*,[82] the Court pointed to a framework of Canadian constitutional principles — an "internal architecture"[83] of complementary values — that exists at a high level of abstraction[84] and within which all of

78 Jeremy Webber, "The Legality of a Unilateral Declaration of Independence Under Canadian Law" (1997) 42 McGill Law J. 281 at 304.

79 See Gregory Marchildon & Edward Maxwell, "Quebec's Right of Secession Under Canadian and International Law" 32 Virginia J. of International Law 583 at 594. Although the authors outline the debates surrounding the compact theory, they argue that a version of it is substantial enough to support Québec's secession.

80 *Supra* note 6 at 1198, Wilson J.

81 *Supra* note 21 at 369, Dickson C.J.

82 [1998] 2 S.C.R. 217.

83 *Ibid.* at para. 50.

84 See Cass R. Sunstein, "Incompletely Theorized Agreements" (1995) 108 Harvard Law Rev. 1733, discussing the various levels of abstraction that are involved in legal reasoning, and indicating that at the highest level of abstraction are general constitutional theories that are proffered as

the disparate constitutional provisions "fit."[85] In concluding its discussion of "The Significance of Confederation" in *Reference re Secession of Quebec*, the Court stated:

> We think it apparent . . . that the evolution of our constitutional arrangements has been characterized by adherence to the rule of law, respect for democratic institutions, the accommodation of minorities, insistence that governments adhere to constitutional conduct and a desire for continuity and stability.[86]

The accommodation of minorities emerges as a particularly significant principle for our understanding of the constitutional provisions that give rise to the no hierarchy of rights doctrine. Rather than existing merely as the products of pragmatic political necessity within a constitutional order that is otherwise defined by principles, the religious education and minority language guarantees simply reflect their own alternative principle. The Court states:

> [T]hough those [minority language and religious education] provisions were the product of negotiation and political compromise, that does not render them unprincipled. Rather, such a concern reflects a broader principle related to the protection of minority rights.... We emphasize that the protection of minority rights is itself an independent principle underlying our constitutional order. The principle is clearly reflected in the *Charter*'s provisions for the protection of minority rights.[87]

Section 23 of the Charter and the "Remedial" Rationale

In *Gosselin*, the Court warns that the appellants' attempt to use section 15 of the *Charter* to expand English-language education would undermine the "carefully crafted compromise" in relation to minority language education contained in section 23. The Court's comments in this regard come very close to the language of "confederation compromise" from *Reference re Bill 30* and *Adler*. The Court in *Gosselin* also drew heavily from the reasoning in those earlier cases in which the "confederation compromise" characterization of section 93 of the *Constitution Act, 1867* was central to explaining why legislation passed pursuant to section 93 was insulated from *Charter* scrutiny.

Notwithstanding the *Gosselin* decision's close association of section 93 of the *Constitution Act, 1867* and section 23 of the *Charter*, following Chief

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explanations for the entire constitutional order.

85 Ronald Dworkin discusses the extent to which a general theory about the nature of the law in an area or the Constitution accounts for the network of rules. This is the "dimension of fit." Ronald Dworkin, *Law's Empire* (Cambridge, MA: Belknap Press, 1986).

86 *Supra* note 82 at para. 48.

87 *Ibid.* at para 80.

Justice Dickson's lead in *Mahe*, the Court in *Gosselin* may have been careful to avoid the precise language of "confederation compromise" or "political compromise." Although the "confederation"/"political" compromise characterization operated in the interests of section 93 legislation in the *Reference re Bill 30* and *Adler* decisions, as mentioned earlier, the Supreme Court has recognized that a similar characterization of some constitutional language rights provisions led to an unnecessarily restrictive interpretation of the protections and benefits that they provide.[88]

Leaving aside, therefore, the "confederation"/"political" compromise characterization that assisted section 93 of the *Constitution Act, 1867* in fending off attacks from the *Charter*, the question remains what other characteristics of section 23 of the *Charter* may explain the section's ability to engage the no hierarchy of rights doctrine. Some indication of the special nature of section 23 may be contained in the *Mahe* decision and the unqualified acceptance of Chief Justice Dickson's reasoning in that case by the Court in *Gosselin*. *Mahe* suggests that section 23 of the *Charter* manifests more than a mere response to "the pressures of interest groups and other practical exigencies" that Peter Hogg alludes to in considering why section 23 is among the "privileged rights" that are excluded from the section 33 override provisions.[89] In *Mahe*, Chief Justice Dickson for the Court identifies the "remedial" aspect of section 23. Quoting with approval from the appellants' factum, the Chief Justice found that they were "fully justified in submitting that 'history reveals that s. 23 was designed to correct, on a national scale, the progressive erosion of minority official language groups and to give effect to the concept of the 'equal partnership' of the two official language groups in the context of education.'"[90]

In analyzing section 23 of the *Charter* to support the invocation of the no hierarchy of rights doctrine, the Court in *Gosselin* drew heavily from the *Mahe* decision. *Gosselin* does, however, put some careful conditions on Chief Justice Dickson's indication in *Mahe* that section 23 "is, if anything, an exception" to section 15."[91] While the Court in *Gosselin* indicated that the reasons of Chief Justice Dickson applied "with equal force" to the case at hand,[92] it went on to

88 This was the suggestion in the reasons of Bastarache J. for the majority in *R. v. Beaulac*, [1999] 1 S.C.R. 768. Bastarache J. stated (at para. 24) that "the existence of a political compromise is without consequence with regard to the scope of language rights." See Denise Réaume, "The Demise of the Political Compromise Doctrine: Have Official Language Use Rights Been Revived?" (2002) 47 McGill Law J. 593.

89 *Hogg, supra* note 59 at 33-35.

90 *Supra* note 21 at 364.

91 *Ibid* at 369.

92 *Supra* note 2 at para. 21.

indicate that section 23 could "also be viewed *not* as an 'exception' to equality guarantees but as their fulfillment in the case of linguistic minorities to make available an education according to their particular circumstances and needs equivalent to education provided to the majority."[93] In this respect the Court supports its indication earlier in the decision that "equality in substance may *require* different treatment."[94]

The Court's indication in *Gosselin* that section 23 is both "an exception and not an exception" to section 15 of the *Charter* may not be as illogical as it sounds. Presumably the Court's point is that, although section 15 of the *Charter* has no application to the Québec legislation that implements section 23 because of the no hierarchy of rights doctrine, the legislation would not offend section 15 even it it did apply. Chief Justice Dickson's identification of the "exceptional" nature of section 23 in *Mahe* is itself prefaced by his earlier allusion in that decision to the remedial nature of the section. Supreme Court decisions concerning section 15 have emphasized the "strong remedial purpose" of the section.[95] Furthermore, the Supreme Court has held that legislation that, in the course of pursuing "ameliorative purposes," provides benefits to targeted classes of individuals will not necessarily amount to discrimination against persons who do not fall within the legislative scheme.[96]

The Potential Application of the No Hierarchy of Rights Doctrine to the s. 91(24) and Aboriginal Rights Contexts

In the cases that have developed the no hierarchy of rights doctrine, the rationales that have supported its development, along with *dicta* by some justices, suggest that the doctrine will be engaged by certain pieces of legislation passed pursuant to section 91(24) of the *Constitution Act, 1867*, which gives the federal Parliament legislative jurisdiction over "Indians, and lands reserved for Indians." It also seems likely that the no hierarchy of rights doctrine will be invoked to protect from constitutional challenge legislation and other forms of government activity that implement or otherwise respect aboriginal rights as recognized by section 35(1) of the *Constitution Act, 1982*. Section 35(1) provides that that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

93 *Ibid.* [emphasis added].

94 *Ibid.* at para. 15 [emphasis in original].

95 Iacobucci J. for the Court in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para. 3.

96 *Ibid.* at para. 72.

Constitution Act, 1867, section 91(24)

Earlier, I considered the "linkage" that must exist between legislation and a constitutional provision in order to engage the no hierarchy of rights doctrine. Section 91(24) raises some interesting questions about when legislation passed pursuant to this section will be immune from *Charter* challenges. In *Gosselin*, the Court refers to section 91(24) in the context of its insistence that section 73 of Québec's *French Language Charter* is "linked" to section 23 of the *Canadian Charter of Rights and Freedoms*, stating: "The linkage is fundamental to an understanding of the constitutional issue. Otherwise, for example, any legislation under s. 91(24) of the *Constitution Act, 1867* . . . would be vulnerable to attack as race-based inequality. . . ."[97]

It may be beyond argument that the constitutional order can not allow the *Charter* to prevent Parliament from passing "any" legislation relating to Indian people. Clearly, however, the *Charter* has some application to section 91(24) legislation. *Corbiere v. Canada (Minister of Indian and Northern Affairs)*[98] concerned a constitutional challenge of section 77(1) of the *Indian Act*[99] that prevented band members who were not "ordinarily resident" on reserves from voting in band elections. The *Indian Act* is federal legislation passed pursuant to s. 91(24) of the *Constitution Act, 1867*. Section 77(1) was held to be an unreasonable infringement of section 15(1) of the *Canadian Charter*. The ground of discrimination was the analogous one of "aboriginality residence."

Section 25 of the *Canadian Charter* had potential significance to the *Corbiere* decision. Section 25 provides, in part, that "[t]he guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal people of Canada." In the opinion of all of the Justices participating in the *Corbiere* decision, however, section 25 of the *Charter* had not been fully enough argued to allow the Court to establish general principles as to the meaning of its terms and its application. Justice L'Heureux-Dubé did state, however, that "the fact that legislation relates to Aboriginal people cannot alone bring it within the scope of the 'other rights or freedoms' included in s. 25."[100]

Corbiere reminds us of the fact that the history of judicial review of the

97 *Supra* note 2 para. 14.
98 [1999] 2 S.C.R. 203 [Corbiere].
99 R.S.C. 1985, c. I-5.
100 *Supra* note 97 at para. 52.

Indian Act[101] actually provided significant impetus for the entrenchment of the *Charter*. Furthermore, the unsuccessful attempt to challenge particularly discriminatory provisions of the *Indian Act* under the equality provisions of the *Canadian Bill of Rights*[102] in the *Attorney General of Canada v. Lavell*[103] decision directly influenced the wording of section 15(1) of the *Charter*.[104] Accordingly, whatever the Court in *Gosselin* meant by its suggestion that the *Charter* must not be allowed to attack "any" legislation that is passed pursuant to section 91(24), we must assume — and *Corbiere* demonstrates — that the Court did not exclude the possibility that *some* section 91(24) legislation must respect some aspects of the *Charter*.

In the *Reference re Bill 30* decision, Justice Estey's comments about section 91(24) of the *Constitution Act, 1867* provide some clues to the nature of legislation that engages the no hierarchy of rights doctrine. In supporting the decision that legislation passed pursuant to section 93 is not subject to review under the *Charter*, he stated: "In this sense, s. 93 is a provincial counterpart of s. 91(24) . . . which authorizes the Parliament of Canada to legislate for the benefit of the Indian population in a preferential, discriminatory, or distinctive fashion *vis-à-vis* others."[105] The section 91(24) legislation that Justice Estey alludes to here, and which, he implies, engages the no hierarchy of rights doctrine, is characterized as "beneficial" to Indian people as a group. This beneficial section 91(24) legislation would be discriminatory only in relation to the fact that non-Indian people do not receive the same benefits.

This implies, therefore, that there may be room for *Charter* scrutiny of section 91(24) legislation that discriminates among Indian people themselves or otherwise infringes the *Charter* rights of this population. The idea that the no hierarchy of rights doctrine is not engaged by legislation that that infringes the *Charter* rights of the people who are supposed to benefit from special

101 *Supra* note 98.

102 S.C. 1960, c. 44, s. 2 reprinted in R.S.C. 1985, App. III.

103 [1974] S.C.R. 1349 [*Lavell*].

104 See Walter Tarnopolsky, "The Equality Rights in the Charter of Rights and Freedoms" (1983),61 *Canadian Bar Review* 242. Tarnopolsky reviews the Supreme Court of Canada's decision under the *Canadian Bill of Rights* including *Lavell* (*ibid.*). In *Lavell,* Ritchie J. for the majority upheld s.12(1)(b) of *Indian Act,* which caused Indian women to lose their status under the *Indian Act* when they married non-Indian men. Indian men marrying non-Indian women did not lose their status. Ritchie J. held that these provisions did not contravene the guarantee of "equality before the law" under s. 1 of the *Bill of Rights.* Tarnopolsky argues that the limitations that the Supreme Court of Canada placed upon the concept of equality in *Lavell* are directly responsible for the reference to "equal protection of the law" in s. 15 of the *Charter* (at 249).

105 *Supra* note 6 at para. 79.

constitutional protections would reconcile precedents such as *Corbiere*.[106]

Constitution Act, 1982, s. 35

Section 35's references to the "recognition" and "affirmation" of aboriginal rights are on a different plane of significance from the other constitutional provisions that have involved the no hierarchy of rights doctrine. Section 35 is a recognition of constitutional status that extends to rights of sovereignty and self-governance for aboriginal people.[107] As significant as denominational school and minority language education rights may be, to place the guarantees provided by section 35 of the *Constitution Act, 1982* in the same category threatens to minimize the significance of aboriginal and treaty rights. That being said, insofar as the no hierarchy of rights doctrine is concerned, the pre-eminence of the section 35 guarantees would only strengthen the argument for the application of the doctrine in this context.

To date, the no hierarchy of rights doctrine has been exclusively concerned with the immunity from *Charter* challenges of pieces of legislation that implement special constitutional rights and privileges. Section 35 protections could be drawn into this kind of scenario where *Charter* rights are used to challenge federal or provincial government activity that respects or implements section 35 rights.[108]

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106 While not referring to the no hierarchy of rights doctrine in particular, Thomas Isaac's comments are apposite. Isaac states in "Charter of Rights and Freedoms: The Challenge of the Individual and Collective Rights of Aboriginal People" (2002) 21 Windsor Yearbook of Access to Justice 431 at 437:

> While the lack of *Charter* application to legislation such as the *Indian Act* probably makes sense in light of subsection 15(1) of the Charter, it is difficult to understand, in light of Canada's constitutional framework since 1982, a statutory framework that applies to aboriginal people that could escape adhering to fundamental *Charter* rights and freedoms such as those relating to freedom of association (section 2(d)), the right to vote (section 3) and the right to life, liberty and security of the person (section 7). Nothing in section 25 or elsewhere in the *Charter* states or suggests that aboriginal people are not entitled to the full benefit of the *individual* rights and freedoms set out in the *Charter*. Whatever the impact of section 25, it appears that it must balance the protection of the collective rights of aboriginal people, as a distinct group, with the rights and freedoms held individually by aboriginal people and other Canadians. [emphasis in original].

107 In *R. v. Pamajewon*, [1996] 2 S.C.R. 821, Lamer C.J. opinion for the plurality at para. 24 "assume[ed] without deciding that s. 35(1) includes self-government claims." See Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001).

108 A possible scenario is provided by the facts of *Re R.T. et al.* (2005), 248 D.L.R. (4th) 303 (Sask. Q.B.). In this case, Ryan-Froslie J. had to decide upon the appropriate placement for five children who had been found to be in need of protection under Saskatchewan's *Child and Family Services*

The non-derogation clause contained in section 25 of the *Charter* might seem to make the invocation of the judge-made no hierarchy of rights doctrine unnecessary. Section 25 does, however, mirror the protection from "abrogation" and "derogation" that the constitutionally guaranteed rights or privileges of denominational, separate, or dissentient schools receive under section 29 of the *Charter*. It may be assumed, therefore, that Madam Justice Wilson's analysis of the relationship between section 29 of the *Charter* and section 93(1) of the *Constitution Act, 1982* applies equally to the relationship between sections 25 and 35 of the *Constitution Act, 1982*. She held that the no hierarchy of rights doctrine existed and operated to protect constitutionally guaranteed rights and privileges, such as those found in section 93(1) of the *Constitution Act, 1867*, from abrogation or derogation by the *Charter* regardless of non-derogation clauses. To adapt the words of Justice Wilson in *Reference re Bill 30* to the issue at hand, section 25 of the *Charter* merely emphasizes "that the special treatment guaranteed by the constitution" to aboriginal and treaty rights "even if it sits uncomfortably with the [other provisions of the *Charter*] is nevertheless not impaired by the *Charter*."[109] This is a constitutional reality that would exist independently of section 25 of the *Charter*.

In relation to the rationales that have been offered for invoking the no hierarchy of rights doctrine, their application to section 35 of the *Constitution Act, 1982* might, again, threaten to diminish the significance of this section. Clearly, it would not be difficult to associate section 35 with the remedial and substantive equality themes that explained the invocation of the no hierarchy of rights doctrine in support of legislation implementing minority language education rights in *Mahe* and *Gosselin*. However, the rights of sovereignty and self-governance contained in section 35 point to

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Act, S.S. 1989-90, c. C-7.2. All of the children were members of a First Nation community. Adoption was one option for children in this situation, however, the Department of Community Resources and Employment for Saskatchewan employed a policy whereby First Nations children would not be placed for adoption without the consent of the relevant First Nation. Counsel for the children argued that this policy, which is government activity for the purposes of s. 32 of the *Charter*, infringed the children's right to security of the person under s. 7 of the *Charter* and their equality rights under s. 15(1). The First Nation argued that this policy was effectively the implementation of an aboriginal right under s. 35(1) and that the *Charter* did not, therefore, have any application to the matter. In the result, Ryan-Froslie J. held that there was insufficient evidence to support a finding that an ability to determine the placement of children in need of protection was an incident of the right of aboriginal self-governance under s. 35(1) of the *Constitution Act, 1982*. Madam Justice Ryan-Froslie held that the policy represented an unreasonable infringement of the children's rights under the *Charter*. The test for the no hierarchy of rights doctrine relates to the question as to what the outcome would be had the court accepted that there is sufficient evidence to support the aboriginal right argument.

109 *Supra* note 6 at 1198.

rationales for the engagement of the no hierarchy of rights doctrine that are more closely related to the respect for national sovereignty that one state owes to another. While it is beyond the scope of the present discussion to explore the point, it must be noted that the application of the no hierarchy of rights doctrine to government activity that implements section 35 rights has to take into account the Supreme Court of Canada's decision in *R. v. Sparrow*.[110] *Sparrow* established that rights protected by section 35 may be limited by federal laws that pursue "compelling and substantial"[111] objectives.[112]

IV. THEORETICAL CONSIDERATIONS: "STRATEGIC POSITIVISM"

The Supreme Court of Canada's development of the no hierarchy of rights doctrine reflects a recent tendency on the part of the Court to establish formal boundaries against substantive review of government activity in very specific contexts. The Court has suggested that there are important dimensions of judicial review under the Constitution requiring a positivist interpretive style. The positivist character of this judicial approach is related to its rejection — in the interests of protecting special rights and privileges — of normative arguments based on principles and rights that, in the words of the Court in *Mahe*, are "universally applicable to 'every individual.'"[113] Choudhry and Howse describe the positivist interpretive style in the following terms:

> Legal interpretation is delimited by the text of the Constitution, so that the beginning and ending points of constitutional interpretation are the express terms of individual constitutional provisions. . . . Setting to one side the inherent limitations of legal language to address factual situations that were unanticipated when that language was framed (the problem of open-texturedness), some provisions are relatively specific and precise, and admit of a narrower range of interpretive choices. The interpretive frames surrounding such terms is [*sic*] narrow enough to create a strong presumption against the recourse to normative reasoning.[114]

In the *Reference re Bill 30*, *Mahe*, *Adler*, and *Gosselin* decisions, the Supreme

110 [1990] 1 S.C.R. 1075 [*Sparrow*].

111 *Ibid.* at 1113.

112 Felix Hoehn, "Not Too Good to Be True: A Home for Children in a Theory of Aboriginal Rights" (Paper presented to the Canadian Association of Law Teachers Annual Meeting, Saskatoon, May 2007).

113 *Supra* note 21 at 369.

114 Sujit Choudhry & Robert Howse, "Constitutional Theory and the *Quebec Secession Reference*" (2000) 13 Canadian J. of Law and Jurisprudence 143 at at 153.

Court seizes on the extent to which section 93 of the *Constitution Act, 1867* and section 23 of the *Charter* are, in the words of Choudhry and Howse, "relatively specific and precise." The specificity and precision of sections 93 and 23 absolve the Court of the need to respond to the parents' demands that they have recourse to the brand of normative reasoning that sections 2(a) and 15(1) of the *Charter* otherwise mandate. I suggest that the Court's approach is "strategic" in that it does not suggest that the positivist interpretive style is generally applicable. The Court does not deny the validity of normative argument based on principles with universal application in other parts of the Constitution. Indeed, in *Gosselin*, section 23 of the *Charter* is cast as an island of "careful compromise" within the very part of the Constitution that is most dedicated to universalist normative discourse.

A similar kind of strategic positivism is reflected in the Supreme Court of Canada's recent decision in *British Columbia v. Imperial Tobacco Canada Ltd.*[115] In *Imperial Tobacco*, tobacco companies challenged the constitutionality of provincial legislation that created a specific cause of action aimed solely at tobacco-products manufacturers. The legislation was designed to allow the provincial government to recover the costs of medical care that it had provided to smokers in British Columbia. It provides for potential retroactive liability of the tobacco companies, and special rules of procedure that are favourable to the government, including a reversal of the onus of proof in relation to harm caused by tobacco products.

Several of the constitutional arguments raised by the companies were based on the unwritten rule of law principle that the Supreme Court has recognized and applied in earlier cases.[116] The tobacco companies relied upon a version of the rule of law principle that embraces substantive normative standards that, in the companies' submissions, are offended by the legislation's lack of generality — applying as it does only to tobacco product manufacturers — and the legislation's retroactive effect. The companies also argued that the rule of law principle guaranteeing a fair trial process is infringed by the special procedure that the legislation established for the pursuit of the cause of action against tobacco products manufacturers.

Justice Major, writing for a unanimous Court, rejected all of the tobacco companies' submissions. The Court's reasoning in relation to the rule of law arguments in the *Imperial Tobacco* case strongly reflects the positivist interpretive style that the Court employed in developing the no hierarchy

115 [2005] 2 S.C.R. 473, 2005 SCC 49 [*Imperial Tobacco*].

116 *Reference re Manitoba Language Rights* [1985] 1 S.C.R. 721.

of rights doctrine. His rejection of the fair trial argument demonstrates a particularly striking example of the embrace of an interpretive frame that Choudhry and Howse say, "is narrow enough to create a strong presumption against the recourse to normative reasoning."[117] Essentially, the Court engages the "expression of one thing is the exclusion of another" canon of interpretation to hold that since the Constitution specifically provides for a fair trial in the criminal law context under section 11(d)[118] of the *Charter* there is no constitutional right to a fair civil trial.[119]

The limited form of positivism demonstrated by the Supreme Court in *Imperial Tobacco* and in the cases that have developed the no hierarchy of rights doctrine suggests that the Supreme Court is taking an interesting position in the context of debates over the scope of judicial review. In the *Charter* era, the Court is mandated to give meaning to Constitutional provisions by referring to normative principles and to also review the extent to which legislation is consistent with those principles. The case law considered in this article suggests a sophisticated appreciation on the part of the Court of an alternative interpretive mandate that courts share with the other branches of government, and more specifically with the elected representatives who were responsible for drafting the Constitution and have the authority to amend it. Given interpretive frames that are "narrow enough . . . to create a strong presumption against the recourse to normative reasoning," the Supreme Court demonstrates a willingness in these cases to defer to the legislative branch. The Court's deference does not resolve important normative issues such as whether equality, fairness, and values of religious freedom are compromised by government activity undertaken pursuant to the constitutional provisions that engage the no hierarchy of rights provision. The obligation to answer these moral issues remains alive, but it is appropriately

117 *Supra* note 113 at 153.

118 Section 11(d) of the *Charter* states: Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

119 Major J. states, *supra* note 1114 at para. 65:

> [T]he appellants' proposed fair trial requirement is essentially a broader version of s. 11(*d*) of the *Charter*, which provides that "[a]ny person charged with an offence has the right . . . to . . . a fair and public hearing." But the framers of the *Charter* enshrined that fair trial right only for those "charged with an offence". If the rule of law constitutionally required that all legislation provide for a fair trial, s. 11(*d*) and its relatively limited scope (not to mention its qualification by s. 1) would be largely irrelevant because *everyone* would have the unwritten, but constitutional, right to a "fair . . . hearing". . . . Thus, the appellants' conception of the unwritten constitutional principle of the rule of law would render many of our written constitutional rights redundant and, in doing so, undermine the delimitation of those rights chosen by our constitutional framers [emphasis in original].

shifted to elected representatives, where it perhaps should rest more often.

V. CONCLUSION

I have identified a number of qualifications that must be placed upon the most expansive articulation of the no hierarchy of rights doctrine by the Supreme Court of Canada. The Court has indicated that there is no hierarchy among constitutional rights or other provisions. In fact, however, the doctrine does not involve the direct clash of constitutional provisions any more than is always the case when the courts review legislation under the Constitution. Therefore, at this stage in the no hierarchy of rights doctrine's development, it appears to provide immunity from attack under the *Charter* for legislation that precisely reflects or implements "special" rights and privileges that are recognized by the Constitution.

The broadest understanding of the no hierarchy of constitutional rights doctrine is also undermined by the fact that the Constitution contains structural hierarchies of rights and the courts regularly recognize contingent hierarchies of constitutional rights. As it applies to the sections of the Constitution that have resulted in the development of the no hierarchy of rights doctrine, rather than rejecting hierarchies it must be concluded that the Constitution actually *guaranteed* several of them. To date, the rights and privileges of Roman Catholic schools under section 93(1) of the *Constitution Act, 1867* and the French and English minority-language education rights of parents under section 23 of the *Charter* seem to enjoy a permanent position of superior status in relation to universally available *Charter* guarantees. This superior status will likely also extend to some legislation passed pursuant to section 91(24) of the *Constitution Act, 1867* and government activity that respects and implements aboriginal rights under section 35 of the *Constitution Act, 1982.*

Finally, the no hierarchy of rights doctrine may be seen within a broader theoretical development involving the Supreme Court's openness to a positivist interpretive style. This positivism allows the Court to defer to legislative and other forms of government activity that are in some tension with normative principles that inform judicial interpretation of other parts of the Constitution such as the rule of law principle and the universally applicably provisions of the *Charter.* The Supreme Court's positivist style of interpretation is sophisticated, however, in the extent to which the Court is careful not to reject the importance and validity of alternative principle-embracing interpretative styles in other contexts.