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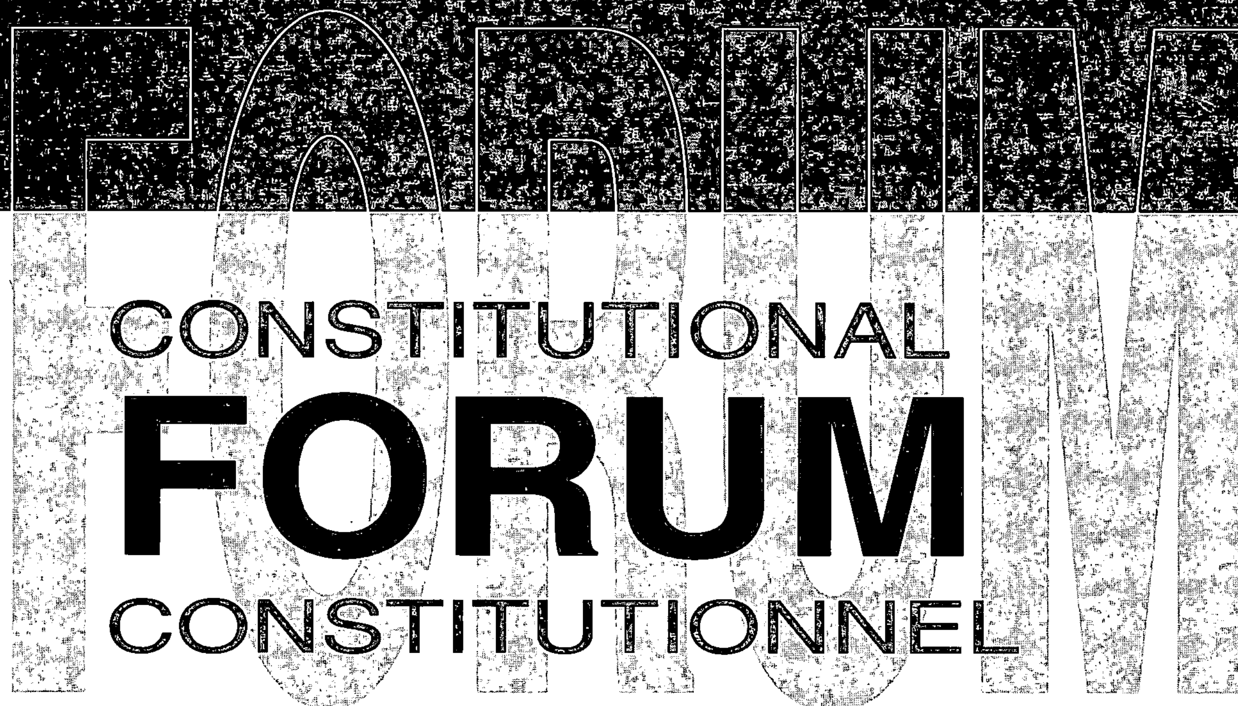

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The Demise of Positive Liberty? *Native Women's Association of Canada v. Canada*

Leon E. Trakman

Introduction

Canadian courts ordinarily conceive of liberty negatively. Applied to the *Charter*, they protect liberty by prohibiting the state from interfering with the fundamental rights and freedoms of the individual, notably, those under section 2. However, courts could also conceive of liberty positively. They could adopt a strong conception of positive liberty by requiring the state to perform some positive act towards an individual or group. For example, they could oblige the state to guarantee to everyone a minimum level of education, conditions of employment, or income. They could also adopt a weaker conception by requiring the state to perform a positive act towards a party only if the state has already chosen to act. For example, should the state decide to provide minimal levels of education, employment, or income, courts could insist that it do so in a particular manner.

Positive liberty is sometimes protected under section 15 of the *Charter*. In *Haig v. Canada*[1] in particular, the Supreme Court left open the possibility that a weak conception of positive liberty might apply under section 2 as well.

The case of *Native Women's Association of Canada v. R.*[2] is important, not because it imposes a positive obligation upon the state to fund the Native Women's Association of Canada — indeed, the Supreme Court does exactly the opposite. It is significant because it undermines positive conceptions of liberty in general, but notably under section 2 of the *Charter*, notwithstanding *Haig*.[3] The case might also be taken as a departure from previous decisions of the Supreme Court of Canada on the interpretation of the *Charter*.

This case study has three aims: first, to evaluate positive conceptions of liberty as conceived by Canadian courts prior to the *NWAC* case, notably in *Haig*; second, to analyze the impact of the *NWAC* case upon the judicial interpretation of sections 2 and 15 of the *Charter*; and third, to conclude in light of the first two aims.

Haig v. *Canada*

Haig dealt with two referenda on the Charlottetown Accord held on October 26, 1992: one held in Quebec, and the other in the rest of Canada. Due to the different enumeration requirements of the two referenda, Haig was unable, after moving from Ontario to Quebec in August 1992, to vote in either referendum. He appealed to the Federal Court on grounds that, being disentitled to vote in either referendum, the state had violated his rights under sections 2(b), 3[4] and 15(1).[5] He applied for a declaration that he, and anyone else in his position, be considered resident in their respective province of origin, and be entitled to vote in the federal referendum. Speaking for the majority, L'Heureux-Dubé J. held that the *Referendum Act* did not require that the federal referendum be conducted in all provinces and territories. She observed, explicitly, that:[6]

> ... the appellants were unable to cast their ballots simply because, on the enumeration date, they were not ordinarily resident in a province where the federal referendum was held, a limitation which does not infringe the appellant's right of expression as guaranteed in the Charter.

More importantly from the perspective of this case study, L'Heureux-Dubé J. recognized circumstances in which individuals have positive liberties which the state has a positive obligation to preserve. This is most apparent in her statement:[7]

> [W]hile section 2(b) of the Charter does not include the right to any particular means of expression, where a government chooses to provide one ... it may not do so in a discriminatory fashion, and particularly not on ground [sic] prohibited under section 15 of the Charter.

Several inferences follow from this statement. First, the individual does not have unlimited options in expressing her opinion in a referendum. Second, the state is entitled to choose among competing options. Third, the state may not do so in a discriminatory fashion.

This third requirement is important in two respects. First, it is consistent with the principle, enunciated in *Andrews* v. *Law Society of British Columbia*,[8] that everyone has the right to equal benefit of the law.[9] It also is important as it seems to establish a link between the positive obligations assumed by the state under section 2 and section 15 of the *Charter*, respectively.

L'Heureux-Dubé J. used an illustration to depict everyone's right to equal benefit of the law. She stated: "in colloquial terms, ... the freedom of expression contained in section 2(b) prohibits gags, but does not compel the distribution of megaphones."[10] At the same time, L'Heureux-Dubé J. insisted that the state, in being free to distribute megaphones, still cannot do so in a "discriminatory fashion."[11] The inference arising from her illustration is that, in preserving the right of all Canadians to vote, the federal government is obliged to ensure that it does not accord the right to vote to some only by discriminating against others. This does not imply that the state is obliged to devise multifaceted ways of voting in order to satisfy the whim or convenience of each and every Canadian. But, it *does* imply that the state contemplate the possible unequal effect of a referendum upon discrete segments of society. Using an extreme example, it would be unconstitutional for a government to require voters to satisfy a complex literacy or property-ownership test that prevents significant segments of the population from voting. In contrast, the government would *not* violate section 3 of the *Charter* were it to set up polling stations for a referendum only in generally accessible areas of the Yukon, despite the inconvenience caused to citizens living in remote parts who could vote only by trekking to one or another of them.

Regarding the link between the state's positive obligations under sections 2 and 15 of the *Charter*, L'Heureux-Dubé J. is unclear as to whether the state assumes a positive obligation to provide equal benefit under section 15 *only*, or also under section 2(b) dealing with freedom of expression. She is also unclear, in light of *Andrews*,[12] whether she intends to limit discriminatory treatment to enumerated and analogous grounds to section 15, or whether she envisages new grounds as well. If L'Heureux-Dubé J.'s reasoning requires the state "to take positive steps to ensure the equality of people or groups ... within the scope of section 15" *only*,[13] it is apparent that the state has *no* further obligation to promote freedom of expression under section 2(b). If she reasons that issues of expression are "strongly linked" to equality, as she appears to do,[14] it is likely that the state has at least *some* positive obligations under section 2 as well.

NATIVE WOMEN'S ASSOCIATION OF CANADA v. CANADA

The facts of the *NWAC* are best drawn from the report of the case itself:[15]

> During the constitutional reform discussions which eventually led to the Charlottetown Accord, a parallel process of consultation took place with the Aboriginal community of Canada. The federal government provided $10 million to fund participation of four national Aboriginal organizations: the Assembly of First Nations (AFN), the Native Council of Canada (NCC), the Metis National Council (MNC) and the Inuit Tapirisat of Canada (ITC). The Native Women's Association of Canada (NWAC) was specifically not included in the funding,

> but a portion of the funds advanced was earmarked for women's issues. As a result, AFN and NCC each paid $130,000 to NWAC and a further $300,000 was later received directly from the federal government. NWAC was concerned that their exclusion from direct funding for constitutional matters and from direct participation in the discussions threatened the equality of Aboriginal women .... They alleged that by funding male-dominated groups and failing to provide equal funding to NWAC, the federal government violated their freedom of expression and right to equality. The application was dismissed by the Federal Court, Trial Division. The Federal Court of Appeal also refused to issue an order of prohibition. It made a declaration, however, that the federal government had restricted the freedom of expression of Aboriginal women in a manner that violated ss.2(b) and 28 of the *Charter*.

In writing the majority opinion in the *NWAC* case, Sopinka J. affirmed L'Heureux-Dubé J.'s contention in *Haig* that, "in certain circumstances," a government might be required to engage in positive action "in order to make the freedom of expression more meaningful."[16] He stated:

> *Haig* establishes the principle that generally the government is under no obligation to fund or provide a specific platform of expression to an individual or a group. However, the decision in *Haig* leaves open the possibility that, in certain circumstances, positive governmental action may be required in order to make the freedom of expression more meaningful. Furthermore, in some circumstances where the government does provide such a platform, it must not do so in a discriminatory manner.

However, following this statement and using artful rhetoric, Sopinka J. emphasized the inefficiency and cost that would arise were government to assume positive obligations under section 2 of the *Charter*. This is apparent when he declares:[17]

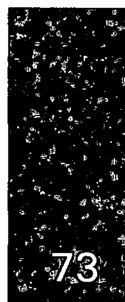
> ... it cannot be said that every time the Government of Canada chooses to fund or consult a certain group, thereby providing a platform upon which to convey certain views, that the Government is also required to fund a group purporting to represent the opposite point of view ... if this was the intended scope of section 2(b) of the Charter, the ramifications on government spending would be far reaching indeed.

The result of Sopinka's rhetoric is less an evaluation of the merits of the assertions of the Native Women's Association of Canada than a blanket disapproval of court-imposed obligations upon government under section 2(b) of the *Charter*. Sopinka J.'s argument is familiar: requiring government to act positively is inefficient because it likely would give rise to a flood of inefficient impositions upon the state. Then, there is Sopinka J.'s further argument that governments ought to be free to decide when and how to act positively towards the populace. For example, he insisted that the state "must be free to consult or not whomever it pleases."[18] He added that, because government "chooses to fund or consult a certain group" does not mean that it also is required to "fund a group purporting to represent the opposite point of view."[19]

In advancing these arguments, Sopinka J. dismantles a straw man — the possibility left open by L'Heureux-Dubé J. in *Haig* that government might embrace a positive conception of liberty. Indeed, nothing in L'Heureux-Dubé J.'s *ratio* in *Haig* infers that courts should assume the mantle of government by default. Nor does Sopinka J. identify any judicial argument in *Haig*, or any other case for that matter, in which a positive right to freedom of expression is viewed as trammelling the democratic function of government.

Nevertheless, Sopinka J.'s majority decision in *NWAC* appears to negate the claim that the state might have any weak positive obligation to promote freedom of expression under section 2 of the *Charter*. By insisting that "it will be rare indeed that the provision of a platform or funding to one or several organizations will have the effect of suppressing another's freedom of speech,"[20] Sopinka J. retreats from the door partially opened by *Haig*.[21] While he makes it more difficult to advance a claim to positive liberty under section 2 of the *Charter*, he does not altogether exclude that possibility.

L'Heureux-Dubé J., in her minority decision in *NWAC*, understandably disagreed with this retreat



from *Haig*. She "cannot agree with [her] colleague [Sopinka J.] when he states that *Haig* 'establishes the principle that generally the government is under no obligation to fund or provide a specific platform of expression to an individual or a group.'"[22] She added: "*Haig* ... stands for the proposition that the government *in that particular case* was under no constitutional obligation to provide for a right to a referendum under section 2(b)."[23] It follows from L'Heureux-Dubé J.'s reasoning that a positive liberty might be enforced *in some other case*. Sopinka J. clearly rejected this line of reasoning.

Sopinka J.'s final argument was to collapse the positive obligation of government under section 2(b) into a section 15 inquiry into equality. Again citing L'Heureux-Dubé J. in *Haig*, Sopinka J. noted that "the allegations that a platform of expression has been provided on a discriminatory basis are preferably dealt with under section 15."[24] Sopinka J. hereby resolved the ambiguity in *Haig* as to whether an independent positive speech right arises under section 2(b) that forbids the government from acting in a "discriminatory fashion." Treating positive speech rights, at most, as equality rights, he recognized a positive speech right only as a subset of section 15(1).[25]

Sopinka's apparent disapproval of courts imposing *any* positive obligations upon the state goes well beyond the scope of the case. In appearing to disapprove of courts requiring the state to protect both strong *and* weak conceptions of positive liberty, he appears to disassemble the analyses of prior courts. He also varies from Wilson J.'s contention, in *Edmonton Journal*,[26] that one value "at large" ought not to be balanced against a conflicting value "in context."[27] In rendering efficiency "at large" overriding, Sopinka J. seems *not* to evaluate the values of expression and equality "in context."

Sopinka J. varies from existing *Charter* jurisprudence in another respect as well. He associates positive liberty with section 15 of the *Charter*, but not section 2. This defies the unity of values that courts ordinarily impute to the guarantees provided for in the *Charter*. If courts are to preserve that unity, then, absent agreement to the contrary, they ought to ensure that freedom of expression under section 2 and equality under section 15 are mutually reinforcing.[28] The roots of this proposition, in the complex and interacting values of the *Charter*, is apparent in LaForest J.'s assertion in *Lyons*:[29]

> [T]he rights and freedoms protected by the Charter are not insular and discrete ... Rather, the Charter protects a complex of interacting values, each more or less fundamental to the free and democratic society that is Canada ... and the particularization of rights and freedoms contained in the Charter thus represents a somewhat artificial, if necessary and intrinsically worthwhile attempt to structure and focus the judicial exposition of such rights and freedoms. The necessity of structuring the discussion should not, however, lead us to overlook the importance of appreciating the manner in which the amplification of the content of each enunciated right and freedom imbues and informs our understanding of the value structure sought to be protected by the Charter as a whole and, in particular, of the content of the other specific rights and freedoms it embodies.

Courts have a further reason to invoke section 2 to preserve a weak conception of positive liberty. Section 2 provides guarantees of freedom to "everyone." "Everyone" has a wide meaning. Encompassed within its meaning is the realization that, for the state to deny one person's section 2 freedom while granting that freedom to another is to violate section 2, not only section 15. To avoid this consequence and to preserve the unity of *Charter* values, a court ought to deny the state the right to discriminate under *both* sections, not under one section only.[30]

This contention introduces Sopinka J.'s likely response: a state that gives a megaphone to one group does not necessarily infringe the freedom of another group to express an opposite view. That other group remains free to voice its perspective. However, this response is insufficient because it ignores the unequal effect that state action might have upon different groups. By amplifying the right of expression of one group, but not another, the state not only treats them unequally: it potentially infracts upon the right of the ignored group to express itself. That infraction is most apparent in cases like *Big M*[31] where the guarantee of freedom includes the absence of coercion or constraint.[32] The guarantee of freedom, in turn, includes the protection from indirect forms of control that the state exerts in favour of some groups. That indirect control is most apparent — and most questionable — when the state assists some groups to

express their particular beliefs and practices, but not others.[33]

Given the limits in Sopinka J.'s analytical premises, it is to be hoped that at least a weak conception of positive liberty still might prevail under section 2 of the *Charter*. This weak conception might be premised upon three related considerations: the social conditions preceding the state's grant of a benefit to a disadvantaged group, the social effect of the grant upon *that* group, and its effect upon other groups, including other disadvantaged groups. Applied to Native women, the state is entitled to benefit native organizations claiming to represent native peoples in general. However, it is not entitled to do so when the effect is to exacerbate the disadvantage of native women *vis-à-vis* others, including native men. While the precise impact of state action upon disadvantaged status is a question of fact, that question arises under *both* sections 2 and 15(1). Freedom of expression under section 2(b) is every bit as fundamental as equality in a democratic society. If an individual or group cannot invoke an enumerated or analogous ground under section 15(1), section 2 is surely a justifiable alternative.

Despite these observations, legal counsel are advised to orient future *Charter* challenges based on positive liberty around section 15(1), not section 2. Whatever the deficiencies in Sopinka J.'s reasoning in the *NWAC* case, he clearly suggests that future *Charter* challenges based on positive liberty be brought within the enumerated or analogous grounds of section 15.

SECTION 15

Despite his insistence that positive liberty claims be grounded in section 15, Sopinka J. barely touched on that section. This is regretable for several reasons. First, by insisting that a positive speech right is likely to arise only as a subset of section 15(1), not section 2(b), Sopinka J. opens the door to speculation on the application of section 15(1), while avoiding entering it himself. Second and following therefrom, Sopinka J. passes up the opportunity to evaluate new analogous grounds recognised by superior courts in several provinces, notably, in Nova Scotia[34] and Saskatchewan.[35] In particular, he does not explore the possibility that discrete groups might invoke a new analogous ground under section 15.

Given that the interests of native women arguably are distinguishable from those of both native men and women in general, it is conceivable that their disadvantaged status gives rise to a new and analogous ground under section 15. This approach is reinforced by the realization that courts sometimes are willing to fill in the cracks between disadvantaged groups. This is especially apparent when they transform economic and social disadvantage into new and analogous grounds under section 15 on the basis of the harsh social effects of that disadvantage.[36]

SECTION 1

In rejecting the claim of the Native Women's Association, the Supreme Court in the *NWAC* case did not find it necessary to consider section 1 of the *Charter*. It has been suggested above that the proper stage at which to balance the values of efficiency, expression and equality is the section 1 stage of analysis. Sopinka J. found that the evidentiary foundation was insufficient to warrant proceeding to such a balancing. However, as section 1 is significant in determining when a positive liberty has been violated, it is appropriate to consider it here.

The prevailing analysis of section 1, following the *Oakes* test,[37] is phrased in the language of negative liberty. The intent is to evaluate whether the state has a compelling reason in a free and democratic to override the right of an individual. A section 1 inquiry based on a positive conception of liberty, in contrast, is likely to give rise to an inquiry into whether the state has a compelling reason not to promote that positive liberty. In effect, courts will be required to determine whether the state is justified in failing to act positively, rather than in acting negatively.

A section 1 inquiry into restrictions on positive liberty also is likely to lead to a second order of rights based on economic considerations. This varies from the traditional construction of section 1 in which courts disallow economically-based intrusions upon negative liberty: "Administrative flexibility in itself is generally regarded as insufficient reason to warrant overriding a [negative] Charter right."[38] Given that the state is most likely to decline to act positively on the grounds of social cost, administrative inefficiency is likely to be central to a section 1 inquiry into the denial of positive liberty. This is apparent in the Nova Scotia case of *Sparks*[39] where Hallett J.A. indicated that a "degree of administrative flexibility

is needed to effectively manage a public housing scheme ....”[40] While the remainder of the *Oakes* test would remain largely intact in relation to section 1,[41] the addition of a positive liberty that is economically constrained to a negative liberty that is not, is likely to lead to a modified perception of *Charter* rights.[42] However much one might distrust a hierarchy of constitutional rights, it is arguable that, with the protection accorded “life, liberty and security ...” under section 7, the apex of such a hierarchy already exists.

CONCLUSION

The *NWAC* case has seriously undermined the prospect of an independent claim to weak positive liberty under section 2(b) of the *Charter*. The fact that L'Heureux-Dubé J., who raised the possibility of such an action in *Haig*,[43] did not convince the majority to leave that possibility open in the *NWAC* case, reinforces the implication that a positive claim to liberty under section 2 is not likely to be successful.

At the same time, the majority in the *NWAC* case preserved the right to assert a positive claim based on discrimination under section 15(1) of the *Charter*. This is in keeping with *Andrews*[44] and *Schacter*.[45] It also complies with the principle that, if the state is to provide equal benefit under the law, it is expected to do so by both positive and negative means.

Although it is not explicitly dealt with in the *NWAC* case, it is conceivable that a section 15(1) claim of positive liberty may be sustained *only* if it is founded upon an enumerated or analogous ground. Recent decisions in Nova Scotia and Saskatchewan take a wider view of 15(1). In particular, they treat “composite grounds” as analogous.[46] Given that the *NWAC* case does not deal with this issue, it is hoped that this trend in Nova Scotia and Saskatchewan will prevail.

The *NWAC* case also did not deal explicitly with section 1. Had the Court determined that the state had violated a positive liberty under section 15, a section 1 inquiry would have become necessary. It is suggested that this is where Sopinka J.'s efficiency concerns should have been voiced. As indicated above, such an inquiry is likely to lead to a modified application of section 1, notably, by forcing consideration of the efficiency of state action.

In summary, the *NWAC* case is remarkable only in the fact that it draws a firm line: positive liberty henceforth has a very restrictive place under the *Charter*. In particular, positive liberty is permitted as an equalitarian claim under section 15(1), but not as a fundamental right under section 2, unless one of the arguments proposed here receives judicial support. The *NWAC* case might also mark a departure from liberal principles of interpretation accorded the *Charter* during its first decade of evolution.

The majority in the *NWAC* case is crystal clear: courts should not require the state to embark upon inefficient action. The assumption is that government is better able to decide when its actions are efficient, or for that matter, inefficient. This assumption is overstated. In evaluating selective state funding, judges would pronounce on the fairness of state action, not displace its conception of efficiency. Evaluating the fair allocation of public funds *is* within the judicial purview — and ought to be. Nor does the fair allocation of funding mean equal funding. It is quite conceivable that a court could fairly award an organization like the NWAC *some*, as distinct from *equal*, funding.

What is a fair allocation of state funding, ultimately, is a question of fact, not judicial jurisdiction. What is reasonable to consider is whether organizations like the NWAC represent a voice of difference that, absent state funding granted other organizations, is subject to discrimination. What is evenhanded is for judges to balance positive liberty against administrative efficiency in weighing the rights of the state against its responsibilities within a disparate society.

None of these criticisms of the majority in the *NWAC* case is intended to suggest that the Supreme Court *necessarily* should have held that the state infringed the positive liberty of the *NWAC* case. What is suggested, however, is that, just as the *Haig* Court restricted its *ratio* to the facts,[47] the Supreme Court could have done so here as well. Founding good law upon questionable reasoning, ultimately, fosters questionable law.❑

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Endnotes

1. [1993] 2 S.C.R. 995 [hereinafter *Haig*].

2. [1994] 3 S.C.R. 627, F.C.A. dec'n 95 D.L.R. (4th) 106 [hereinafter *NWAC*].

3. *Haig, supra* note 1.

4. No violation of section 3 was found as section 3 does not guarantee a right to vote in a referendum (at 1030-33).

5. No section 15(1) violation was found. Persons who move to Quebec less than six months before a referendum do not comprise an analogous ground. They do not suffer historical disadvantage or prejudice and therefore are not a discrete and insular minority.

6. *NWAC, supra* note 2 at 1042.

7. *Supra* note 1 at 1041 (emphasis added). L'Heureux-Dubé J. found no section 2(b) violation.

8. [1989] 1 S.C.R. 143 [hereinafter *Andrews*].

9. In *Andrews, ibid*, McIntyre J., defines equality under section 15 as having four elements: (1) the right to equality before the law; (2) the right to equality under the law; (3) the right to equal protection of the law; and (4) he right to equal benefit of the law.

10. *NWAC, supra* note 2 at 1035.

11. *Ibid.* at 1041.

12. This lack of clarity is evident in Justice L'Heureux-Dubé's stipulation in *Haig* that the government not act "in a discriminatory fashion, and particularly not on ground prohibited by section 15." *Haig*, supra note 1 at 1041. On *Andrews*, see *supra* note 8.

13. Citing the Supreme Court of Canada decision in *Schacter*, L'Heureux-Dubé J. states:

    > ... the Court said that section 15 of the Charter is indeed a hybrid of positive and negative protection, and that a government may be required to take positive steps to ensure the equality of people or groups who come within the scope of section 15. It may well be that, in the context of a particular equality claim, those positive steps may involve the provision of means of expression to certain groups or individuals ... I believe that, should such situations arise, it would be preferable to address them within the boundaries of section 15, without unduly blurring the distinctions between different Charter guarantees (*infra* note 42 at 1041-42).

14. *Haig, supra* note 1 at 1041.

15. *NWAC, supra* note 2 at 628-629.

16. *Ibid.* at 655.

17. *Ibid.* at 656.

18. *Ibid.* at 656-57. Sopinka J. reinforces this proposition by referring to American jurisprudence, notably, *Minnesota State Board for Community Colleges* v. *Knight*, 465 U.S. 271 (1984). For example, he cited with approval, the statement there: "[W]hen government makes policy, it is under no greater constitutional obligation to listen to any specifically affected class than it is to the public at large ... [and that] a person's right to speak is not infringed when government simply ignores that person while listening to others."

19. *Ibid.* at 656.

20. *Ibid.* at 657.

21. See *Haig, supra* note 1.

22. *NWAC, supra* note 2 at 666-67.

23. *Ibid.* at 667 (emphasis in the original).

24. *Ibid.* at 664. Sopinka J. then goes on to dismiss the case on lack of evidence: "In either case, regardless of how the arguments are framed, it will be seen that the evidence does not support the conclusions urged by the respondents" (at 657).

25. McLachlin J. was not willing to go even this far. In a terse separate opinion, she states: "I would allow the appeal on the ground that the freedom of governments to choose and fund their advisors on matters of policy is not constrained by the Charter of Rights and Freedoms ... I would distinguish the policy consultations at issue in this case from a formal electoral vote of the type at issue in *Haig* ... I find it unnecessary to determine whether the evidence was capable of demonstrating a violation of the Native Women's Association of Canada's rights under section 2(b) of the Charter" (*ibid.* at 668).

26. *Edmonton Journal* v. *Alberta (Attorney General),* [1989] 2 S.C.R. 1326.

27. *Ibid.* at 1351ff.

28. See *Southam Inc.* v. *Hunter*, [1984] 2 S.C.R. 145 at 156, and *R.* v. *Oakes*, [1986] 2 S.C.R. 103 at 136.

29. *R.* v. *Lyons*, [1987] 2 S.C.R. 309 at 326.

30. For a comparable resort to section 2(a) in the absence of section 15 which was not yet in force, see *R. v. Edwards Books & Arts Ltd.*, [1986] 2 S.C.R. 713.

31. *R.* v. *Big M Drug Mart*, [1985] 2 S.C.R. 295.

32. *Ibid.* at 336.

33. *Ibid.* L'Heureux-Dubé J.'s used an illustration in response. If the state amplifies the expression of whites but not persons of colour, for example, does this not constitute an indirect form of control? Does it not interfere with the manifestation of beliefs and practices held by persons of colour?

34. In 1993 the Nova Scotia Court of Appeal in *Dartmouth/Halifax County Regional Housing Authority* v. *Sparks* (1993), 101 D.L.R.(4th) 224 [hereinafter *Sparks*] found that public housing tenants were encompassed within an analogous ground. The appeal concerned a provision of the *Residential Tenancies Act* which denied public housing tenants any security of tenure (private housing tenants gain security of tenure after 5 years, and may only be removed under exceptional circumstances), and allowed any public housing tenant, regardless of the length of their tenancy, to be evicted on one month's notice.

    The Nova Scotia Court of Appeal found that public housing tenants form what might be described as a composite ground (this was the first composite finding in *Charter* history). Hallett J.A., speaking for a unanimous court, held that public housing tenants were disproportionately composed of the elderly and single mothers, a disproportionate number of whom were black, and all of whom were (as a criteria of eligibility for public housing) economically disadvantaged. The fact that the tenants were not a uniform group was not deemed to be a barrier to a section 15(1) claim. Thus, while tenancy is not, in and of itself, an immutable ground, the Court held that persons who are tenants possess sufficient immutable characteristics to merit *Charter* protection under section 15(1). As Hallett J.A. stated:

    > ... the phrase 'based on grounds relating to personal characteristics' as used in *Andrews* cannot be taken to mean that the personal characteristics must be explicit on the face of the legislation, nor that the legislation must be manifestly directed at such characteristics. Such an interpretation would fly in the face of the effects-based approach to the *Charter* espoused by the Supreme Court of Canada (at 233).

    Sparks was followed in the recent N.S.S.C.T.D. case of *R.* v. *Rehberg* (1993) 127 N.S.R.(2d) 331. That court, found that the status of single mothers on social assistance constituted, in and of itself, an analogous ground. The case involved a provision of the N.S. *Family Benefits Act* which forbade single mother recipients from cohabiting with men. Kelly J. followed the Court of Appeal in *Sparks* by finding that "single mothers are a 'group' in society most likely to experience poverty in the extreme, and that poverty is likely of to be a personal characteristic of a single mother" (at 351). Further, he found that "in this instance, poverty is analogous to the grounds listed in section 15" (at 351).

35. In *Panko* v. *Vandesype* (1993), 101 D.L.R. (4th) 726 (Sask. Q.B.), illegitimacy was found to be an analogous ground. The *Children of Unmarried Persons Act* did not allow for a voluntary support order to be varied unless the father was delinquent. The *Act* also prohibited the mother from making an application to the Court. The judge addressed this by finding that the position of unmarried parents is also an analogous group under section 15.

36. As the Nova Scotia Court of Appeal found in *Sparks*, *supra* note 34, an effects-based approach does not require that "the personal characteristics must be explicit on the face of the legislation, nor that the legislation must be manifested at such characteristics" (at 233). But see *contra*, *Egan* v. *Canada* (1993), 103 D.L.R. (4th) 336, aff'd [1995] S.C.J. No. 43, where the Court denied pension benefits to gay and lesbian partners of pension recipients. The majority accepted the government's concession that sexual orientation was a ground analogous to those listed in section 15(1). However, it thereafter chose to characterize the distinction in the legislation as being between spousal and non spousal relationships. This line of reasoning is reminiscent of the Supreme Court of Canada's resort to formal equality in *Attorney-General of Canada* v. *Bliss*, [1979] 1 S.C.R. 183. There, the court held that unequal treatment of pregnant women did not discriminate against women as the disadvantaged group was defined by pregnancy not sex.

37. *Supra* note 28.

38. *Sparks*, *supra* note 34 *per* Hallett J.A. at 235, citing *Singh* v. *Minister of Employment and Immigration*, [1985] 1 S.C.R. 177.

39. *Ibid.*

40. *Ibid.* at 235. Hallett J.A. added: "However, neither the authority nor the Attorney-General has proven that the means chosen to achieve the objective are ... properly tailored to meet the legitimate objectives" (at 235).

41. See *supra* note 28.

42. On the underinclusiveness of governmental action, see esp. *Schacter* v. *Canada*, [1992] 2 S.C.R. 679. In that case the Supreme Court evaluated whether the *Unemployment Insurance Act* violated section 15(1). In particular, it considered whether that *Act* created an unequal benefit by distinguishing between the benefits available to natural and adoptive parents.

43. *Supra* note 1.

44. *Supra* note 8.

45. *Supra* note 42.

46. See, for example, *supra* notes 34-35.

47. See L'Heureux-Dubé J. in *NWAC*, *supra* note 2 at 666-7. L'Heureux-Dubé J. contends that *Haig* does not stand for the proposition that the government is generally under no obligation to fund or provide a specific platform of expression to an individual or a group. It rests on the proposition that, *in that particular case* the government was under no constitutional obligation to provide for a referendum under section 2(b). It rests on the further proposition that, if and when the government decides to provide such a platform for expression, it ought to do so in a manner that is consistent with the *Charter*.

Covenant Constitutionalism and The Canada Assistance Plan[1]

Craig M. Scott

A leading United Nations human rights body took an unprecedented step recently which Canadian society should know about. What follows is a commentary on the significance of that step for the passage of Bill C-76,[2] which will end the application of the law governing the Canada Assistance Plan (CAP)[3] as of April 1996 and replace it with something called the Canada Health and Social Transfer (CHST).[4] The message I wish to convey is that this is neither a fair trade nor a legal one from an international human rights law perspective.

Most Canadians almost certainly will not be aware that Bill C-76 will remove legal protection for national standards that we have associated with social assistance programmes for several decades (with the exception of standards related to residence requirements for entitlement to social assistance). Most will also not have realized that Bill C-76 will place Canada in a position of breaching international human rights law. The enactment of Bill C-76 will almost certainly result in a finding to that effect in 1996 by a U.N. human rights body of experts that has responsibility for monitoring the human rights in question.

On May 4, that body, the U.N. Committee on Economic, Social and Cultural Rights, sent a letter to Canada which strongly hints that this federal Government legislation, if enacted without necessary amendments, will breach an international human rights treaty to which Canada has been party since 1976.[5] That treaty, the International Covenant on Economic, Social and Cultural Rights (the Covenant),[6] is one of two treaties considered the pillars of the U.N. human rights system (the other being the International Covenant on Civil and Political Rights).[7]

The decision to send the letter was not taken lightly by the 18-member Committee, made up of independent experts from around the world.[8] It had been presented with a detailed legal brief and oral arguments by representatives of three leading Canadian organisations, the National Anti-Poverty Organisation (NAPO), the Charter Committee on Poverty Issues (CCPI), and the National Action Committee on the Status of Women (NAC).[9] The Committee carefully considered whether to set such a precedent before unanimously deciding that it had a responsibility to signal its concerns to Canada about what some members termed "potentially dangerous" legislation.[10]

What international human rights protections does the U.N. Committee fear will be lost if Bill C-76 is not modified? This question can be answered by examining those protections currently mandated by the *Canada Assistance Plan Act* which no longer will be part of federal law under the CHST. By virtue of CAP, the federal government enters into agreements with each province to transfer payments in order to share in the costs of providing social assistance benefits to persons in need.[11] But, the transfer of federal funds is conditional on national standards that take the form of certain rights which must be explicitly guaranteed in each province.[12]

These guaranteed rights include: the right to financial assistance for persons in need;[13] the right to have the level of financial assistance take into account each individual's budgetary requirements;[14] the right

to legal appeal procedures to challenge denials of financial assistance;[15] and the right not to be forced to work as a condition for receiving financial assistance (what some call "workfare").[16] By virtue of the 1986 decision of the Supreme Court of Canada in *Finlay*,[17] any social assistance recipient has the right to go to court to challenge federal funding of a provincial social assistance programme which fails to respect these rights. All of these rights will disappear as of April 1, 1996, in terms of their status as nationally-mandated legal protections.

The need for these soon-to-be-lost rights is apparent as soon as one understands the harsh pressures the poor will be under as a result of the nature of the CHST which is to replace CAP. Unlike CAP, the CHST will not involve federal-provincial cost-sharing on a proportionate basis with levels of funding tied to the actual need for social assistance in each province, which goes up in recessions and down in better economic times. Rather, the amount of the CHST will be fixed in advance and therefore will not be sensitive to actual need. Not only will the level of federal funding be a set amount but also it appears that it will decrease by 15% of current levels over a three year period (about $7 billion in total).[18]

The CHST will be a block funding mechanism. Not just social assistance, but also health, post-secondary education and other social services will be covered in one lump sum.[19] This means that no longer will there be earmarked funding for financial assistance to those in need. When one looks to current policies in Alberta or to the campaign promises of both opposition leaders in Ontario, it is not hard to imagine how poverty — and thus the poor — will get lost in the shuffle in favour of health and education.

Most voters see health and education in more 'universal' terms than they see social assistance. Despite new-found awareness of the arbitrariness of unemployment and blamelessness of the unemployed in the current economic order, the majority of 'us' still do not imagine ourselves as being in (or even potentially in) the same boat as the poor.

That such marginalisation (if not vilification) of the poor is likely to occur is made clear by Bill C-76 itself. In contrast to the repeal of CAP national standards, Bill C-76 maintains the national standards that have to date existed in the *Canada Health Act*. So, the current political agenda of deficit and debt reduction has not been invoked as a reason for a frontal assault on the rights embedded in national health care standards which middle- and upper-class Canadians associate more closely with their own interests. This is plainly and simply discrimination against one of the most vulnerable groups in society — the poor.[20]

In manifold ways, Bill C-76 decrees that an unequal burden is to be placed on the poor as a result of the collective imperative to get our fiscal house in order. As laudable and necessary as fiscal responsibility is, austerity measures constitute discrimination, in law and not just morality, if those measures are either aimed at or clearly affect persons faced with poverty more severely than they affect better-off sectors of society. If Bill C-76 were to pass without modification in order to retain the equivalent of the current CAP protections, we would be witnessing a classic situation of the rights of a vulnerable minority being treated not as priorities but as dispensable privileges. It is worth recalling that it is when times are tough — and the majority's sense of threats to their values or material interests most acute — that respect for rights is most required.

An appreciation of the context within which the U.N. Committee sent its May 4 letter is important. Two years before the Committee's decision to demonstrate its concern, the Committee had issued, in May 1993, what it calls "Concluding Observations" in relation to a state report that had been presented to it by the Government of Prime Minister Mulroney.[21] The 1993 conclusions judged Canada to have fallen short of its international legal obligations under the Covenant due to our failure to achieve any "measurable progress in alleviating poverty over the last decade," particularly severe poverty among especially vulnerable groups.[22] The Committee at that time expressed its view on a number of specific practices that were contrary to Canada's legal promise to uphold the right to an adequate standard of living found in Article 11 of the Covenant.[23] The Committee urged "concerted action" to remedy two illegal situations: the reliance on food banks due to poverty-related hunger and discrimination in housing against both social assistance recipients and the working poor.[24]

In view of the fact that the occurrence of both of these situations is directly related to the inadequacy of social assistance, it was significant that the Committee's 1993 Concluding Observations also recorded its "particular concern ... that the Federal Government appears to have reduced the ratio of its

contributions to cost-sharing agreements for social assistance."[25] This was a clear reference to CAP and can be understood as an implicit reference to the Committee's existing jurisprudence that governments are under a general obligation not to take "deliberately retrogressive measures" with respect to existing protections of Covenant rights.[26] This obligation is the corollary of the obligation of governments to achieve "progressive realisation" of rights in the Covenant (including, apart from the right to an adequate standard of living, those to health, education, and opportunities to work), an obligation set out in Article 2(1) of the Covenant.[27]

The Committee ended these 1993 Concluding Observations by asking to be kept informed of "any developments or measures taken with regard to the issues raised and recommendations made" by the Committee.[28] To my knowledge, it does not appear that the government has done this, in general or with respect to Bill C-76 (a clear "development"). Two years later, the letter to the Liberal government carefully notes that the Committee was acting in the context of "its responsibility to keep under continuous review the various 'concluding observations' that it has adopted."

In the discussions leading to the decision to send the letter, the Chairperson of the Committee made clear that even the action of sending a letter to Canada about Bill C-76 was not to be taken lightly. In the Chairperson's words, a "threshold of concern" must be crossed "to warrant the Committee's taking action" before the next report of a state is due for evaluation.[29]

The letter to Canada is judiciously worded. After the Committee outlines two options it had considered, namely requesting a special report from Canada and recommending the government refer the matter to the Supreme Court of Canada for its opinion on the compatibility of Bill C-76 with the Covenant, the Committee states in the letter that it is only because Bill C-76 is not yet law that "it would not be appropriate to make any specific recommendations to the Government on the issues raised." In view of its constrained role vis-à-vis draft legislation, the Committee limited itself to "welcom[ing]" any observations by Canada in its next periodic report (due at the end of 1995, to be reviewed by the Committee in 1996) on the conformity of Bill C-76 with the Covenant, if it becomes law. The Committee's cautious approach results from the precedent-setting nature of having decided both that it had jurisdiction to signal concern about draft legislation and that it could do so between its scheduled consideration of reports.[30]

However, what is clear to those familiar with U.N. diplomatic language is that there *would* be recommendations to be made if the bill were law. Significant is the way in which the Committee draws the government's attention to the 1993 Concluding Observations and then "underline[s] the importance that it attaches to the pursuit of policies and programs which comply fully with Canada's obligations as a party to the Covenant."

A final piece of context is required in order to interpret the signals being sent in the Committee's letter of May 4. In 1993, the government of Prime Minister Mulroney reacted very negatively to the Committee's critical Concluding Observations. The Conservative government weathered a brief firestorm of criticism in the Commons from both the Liberal and the New Democratic opposition and then proceeded to all but ignore the Committee's conclusions.

Some observers based in Geneva who are familiar with the Committee take the view that the Committee's very measured language can also be interpreted as an attempt to re-fashion a meaningful dialogue with a state that has behaved recalcitrantly in relation to the Committee. The hand of cooperation as opposed to antagonism is held out in the letter's careful reference to the Committee's appreciation of the "importance which the Canadian Government has consistently attached to the Covenant and of the Government's strong support for the work of the Committee."

Canadians and Parliamentarians should be under no illusions about the significance of the May 4 letter from the U.N. to Canada. Especially when viewed in the context of the Committee having commented in forceful terms in 1993 on the lack of progress in relief of poverty from 1983 to 1993, it is highly likely that the Committee will unambiguously judge the retrogressive measures contained in Bill C-76 to be in violation of the Covenant when Canada appears before the Committee in 1996 to present — and defend — its next report.[31]

At what point will the Committee understand the retrogressive measures in question to have taken

place in law? There are, it would seem, two main possibilities. The first possibility is that the Committee will understand the basic fact of removing legally existing federal legal protections as a retrogressive measure because this repeal of legal guarantees creates a significant risk that one or more provinces will not meet previous CAP standards. On this possibility, even if all provinces continue for the time being to respect the former CAP standards, the retrogressive measure in question is the creation of a legal vulnerability (a precarious and constantly contingent legal protection) that did not exist before.[32]

The second possibility is one that would require proof that the repeal of CAP has in fact resulted in less protection in (some) provincial law or practice than had been the case under CAP. Thus, on this second possibility, the duty not to take retrogressive measures will, at minimum, be determined to have been violated by the Committee if, at the time of the Committee's review of Canada at the end of 1996, there exists in any province of Canada any less protection for the above-indicated rights than found in CAP. My own interpretation of the duty not to take "deliberately retrogressive measures" is that such measures will have occurred no later than April 1, 1996, when Bill C-76 enters into force. I say "no later than" because there is a good argument that the violation will occur as soon as the legal vulnerability is assured (i.e. on the date Bill C-76 is passed).

Whichever interpretation the Committee adopts, it is absolutely crucial that Members of Parliament realise that Canada will not be able to plead a kind of legal devolution to the provinces as a defence; international treaty law does not allow domestic legal arrangements to justify what would otherwise be a breach of the treaty.[33] In specific respect to the second possibility, if any province begins to act in a way inconsistent with current CAP standards, it will be Canada, as represented by the federal Government, that will be accountable in international law. Federal Parliamentarians must realise that the repeal of CAP is in a certain sense a delegation of authority to the provinces to place Canada as a whole in breach of international law.

The international legal ratchet effect (about which I have been speaking in the preceding paragraphs) undoubtedly will be enhanced in the eyes of the Committee by the fact that Canada has consistently over the last 15 years invoked the CAP as an important plank in the legal protections accorded by Canadian law to Covenant rights.[34] Thus, even without the obligation not to adopt retrogressive measures as a self-standing aspect of the Covenant obligation of progressive realisation, there would be a separate and strong legal argument that Canada has bound itself in good faith not to modify CAP in a way that lowers the protections it affords.

Furthermore, quite apart from this duty not to go back on achievements to date, it is important to be aware that the Committee would likely interpret some or even all of the rights protections currently in CAP agreements to be independently required by the Covenant whether or not they had previously existed in domestic law.

In particular, the Committee would be hard-pressed not to interpret the right to work in Article 6 of the Covenant as prohibiting being forced to work (what other treaties, including the International Covenant on Civil and Political Rights, call "forced labour").[35] Article 6 expressly states that the right to work is in relation to work which a person "freely chooses or accepts."

As well, comparative case law under the European Social Charter (applicable to some 25 European states) and the evolving views of the Committee make it likely that the Committee will interpret Articles 9 and 11 (social security and adequate standard of living) in tandem as generating a right to appeal (in a judicial or quasi-judicial forum) social assistance denials or reductions in terms of their adequacy in meeting needs.[36] Finally, Article 2(2) of the Covenant precludes discrimination which, as outlined earlier, Bill C-76 can be viewed as creating.[37]

Through its May 4 letter, the Committee has done the Government a service by acting in a spirit of cooperative dialogue. The message was very diplomatic but nonetheless loud and clear. Why place ourselves in the position of having to justify the legally unjustifiable on the world stage? The current Liberal Government's foreign policy on human rights, especially economic and social rights, does not have to be cut from the same cloth as that of the former Conservative Government.

Surely the measure of Canada's professed commitment to its international human rights obligations and to the rule of law generally is the willingness of our legislators to avoid passing legislation which fails to respect human rights. The

Canadian Charter of Rights and Freedoms is used consistently by governments across Canada as a measuring-stick for proposed legislation in a spirit of prevention of rights violations, not to mention avoidance of litigation. Canada's international human rights commitments should be taken no less seriously, especially since international human rights are one source of *Canadian Charter* (and, I would add, Québec *Charter*) rights.[38]

Bill C-76 has to be amended in a way that ensures that Canadians do not lose the human rights protections we — *all* of us — currently enjoy.❑

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Endnotes

1. The following is the text of Craig Scott, "The Implications of U.N. Human Rights Body Signalling Concern vis-à-vis Repeal of Rights in Bill C-76: Letter to Canada Suggests that Bill C-76's Repeal of National Standards in the *Canada Assistance Plan Act* Will Breach International Treaty if Not Amended," Submission to the Standing Committee on Finance, House of Commons (March 8, 1995). The accompanying oral presentation to the Standing Committee was made on May 16, 1995. The text has been modified slightly in two respects. Firstly, minor corrections have been made to the May 8 written submission in order to remove inaccurate references with respect to dates on which legislative changes are to take effect. Secondly, references to Parliamentarians and Members of the Standing Committee on Finance as the intended readership have been removed in order to make the audience for these remarks Canadian society as a whole. In addition, endnotes have been added, some of which contain commentary that was added to the written submission of May 8 during the oral presentation of May 16.

2. Bill C-76 (First Session, Thirty-fifth Parliament, 42-43-44 Elizabeth II, 1994-95), *An Act to implement certain provisions of the budget tabled in Parliament on February 27, 1995* (First Reading, March 20, 1995) [hereinafter Bill C-76].

3. *Canada Assistance Plan Act*, R.S., c.C-1 [hereinafter *CAP*].

4. Bill C-76 adds section 4.1 to *CAP* which reads:

   4.1. Notwithstanding any agreement made under this Act,

   (a) no payment shall be made to a province under this Act in respect of any fiscal year commencing on or after April 1, 1996; and

   (b) no payment shall be made to a province under this Act on or after April 1, 2000.

   Section 32 of Bill C-76 goes on to repeal *CAP* on March 31, 2000. It can thus be seen that CAP ceases to have an effective existence as of April 1, 1996, in spite of the actual repeal of the law occurring some four years later.

   The CHST is created by Bill C-76 as an amendment to the *Federal-Provincial Fiscal Arrangements Act*: Bill C-76, section 48. Part V of the *Federal-Provincial Fiscal Arrangements Act* is now devoted to the Canada Health and Social Transfer, with the lead section, section 13, now reading:

   13. (1) Subject to this Part, a Canada Health and Social Transfer may be provided to a province for a fiscal year for the purposes of

   (a) establishing interim arrangements to finance social programs in a manner that will increase provincial flexibility;

   (b) maintaining the national criteria and conditions in the *Canada Health Act*, including those respecting public administration, comprehensiveness, universality, portability, accessibility, extra-billing and user charges; and

   (c) maintaining national standards, where appropriate, in the operation of other social programs.

   (2) The Canada Health and Social Transfer shall consist of

   (a) a federal income tax reduction in favour of the provinces that would enable the provinces to impose their own tax measures without a net increase in taxation; and

   (b) a cash contribution not exceeding the amount computed in accordance with section 14.

   (3) The Minister of Human Resources Development shall invite representatives of all the provinces to consult and work together to develop, through mutual consent, a set of shared principles and objectives for the other social programs referred to in paragraph (1)(c) that could underlie the Canada Health and Social Transfer.

   Section 14, referred to in section 13(2)(b), reads:

   14. The cash contribution in respect of the Canada Health and Social Transfer that may be provided to a province for a fiscal year is an amount equal to the amount, if any, by which the total entitlement in respect of the Canada Health and Social Transfer applicable to the province exceeds the total equalized tax transfer applicable to the province for that fiscal year.

   It should be noted that the CHST takes the form of a unilateral transfer of funds, unlike CAP which has taken the form of a federal-provincial agreement.

5. Letter from Philip Alston, Chairperson, Committee on Economic Social and Cultural Rights to His Excellency Ambassador Gerald Shannon, Permanent Representative, Permanent Mission of Canada to the United Nations Office in Geneva, dated 4 May 1995, Palais des Nations, Geneva (reproduced as Appendix I).

6. *International Covenant on Economic, Social and Cultural Rights*, 19 December 1966, Can. T.S. 1976 No. 46, 993 U.N.T.S. 3.

7. *International Covenant on Civil and Political Rights*, 19 December 1966, Can. T.S. 1976 No. 47, 999 U.N.T.S. 171

8. For an overview of the Committee, see Philip Alston, "The Committee on Economic, Social and Cultural Rights" in Philip Alston, ed., *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Clarendon Press, 1992) 473.

9. *Re: The International Covenant on Economic, Social and Cultural Rights and Proposed Legislation by Canada (Bill C-76) to eliminate the Canada Assistance Plan (CAP)*, Presentation to the Committee on Economic, Social and Cultural Rights by Non-Governmental Organisations from Canada, May 1, 1995, Palais des Nations, Geneva. The May 4 letter from the Committee to Canada included, as an attachment, a copy of this written brief.

   The oral presentations on behalf of NAC, CCPI and NAPO were made by Sarah Walsh, a low-income activist and Chairperson of CCPI, and Vincent Calderhead, a staff lawyer with the Public Interest Advocacy Centre in Vancouver. While the Covenant does not have a procedure for individual petitions (or communications) as exists under its sibling Covenant (the International Covenant on Civil and Political Rights and its Optional Protocol), the Committee has created some space for states' reports to the Committee to be evaluated in light of concrete situations and accompanying evidence of Covenant breaches. At its Eighth Session, the Committee adopted a decision changing its rules of procedure to provide for enhanced Non-Governmental Organisation (NGO) participation in the work of the Committee, including allowing the Committee to receive oral presentations from NGOs on the first afternoon of each of its sessions: Decision on NGO participation in the activities of the Committee, Committee on Economic, Social and Cultural Rights, *Report on the Eighth and Ninth Sessions*, UN ESCOR, 1994, Supp. No. 3, UN Doc. E/1994/23, E/C.12/1993/19 at 69. On the extent to which an unofficial petition procedure is evolving through written and oral submissions by NGOs, see Matthew Craven, "Towards an Unofficial Petition Procedure: A Review of the Role of the UN Committee on Economic, Social and Cultural Rights" in Krzysztof Drzewicki, Catarina Krause & Allan Rosas, eds., *Social Rights as Human Rights: A European Challenge* (Turku/Abo, Finland: Institute for Human Rights/Abo Akademi University, 1994) 91.

10. See "U.N. Rights Body Decides to Act Regarding 'Potentially Dangerous' Federal Budget Legislation," Press Release of NAC, CCPI and NAPO, May 2, 1995.

    The reaction reported in the NGO news release refers to the initial response by Committee measures after the oral presentation by the Canadian NGOs. The sessions during which NGO oral presentations are heard are not transcribed in the official records of the Committee. However, the provisional transcript, known in the United Nations as a Summary Record, of the Committee's subsequent official discussion (on May 3, 1995) of what action to take vis-à-vis Bill C-76 is found in U.N. Doc. E/C.12/1995/SR.5 at 1-6 (8 mai 1995) [French version].

11. *CAP*, sections 4, 11, and 15.

12. *CAP*, sections 6(2) and 15(3) for the standards, and sections 7 and 16 for the express statement that "payments are subject to the conditions specified in this Part and in the regulations and to the observance of the agreements and the undertakings in an agreement."

13. *CAP*, section 6(2)(a).

14. *CAP*, section 6(2)(b).

15. *CAP*, section 6(2)(e).

16. *CAP*, section 15(3)(a).

17. *Finlay* v. *Canada (Minister of Finance)*, [1988] 2 S.C.R. 607.

18. This is the interpretation placed on the Bill C-76 provisions dealing with the fiscal aspects of the CHST by the NGO presenters to the Committee in *Re: The International Covenant on Economic, Social and Cultural Rights*, *supra* note 10 at 6.

19. Bill C-76, section 25.

20. Article 2 of the International Covenant on Economic, Social and Cultural Rights, *supra* note 6, protects against discrimination and serves as one basis on which the Committee has interpreted the Covenant as requiring a priority of attention in policy-making and legislation to the most vulnerable and disadvantaged groups in any society. See Scott and Macklem, *infra* note 26 at 95.

21. Concluding Observations with respect to Canada, Committee on Economic, Social and Cultural Rights, *Report on the Eighth and Ninth Sessions*, UN ESCOR, 1994, Supp. No. 3, UN Doc. E/1994/23, E/C.12/1993 19 at 28. For easier access, it should also be noted that the Concluding Observations are also reproduced at 20 C.H.R.R. C/1.

22. *Ibid.* at 30.

23. Article 11(1) provides in part:

    > The State's Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food,

> clothing and housing, and to the continuous improvement of living conditions ....

24. Concluding Observations with respect to Canada, *supra* note 21 at 30 and 31.

25. *Ibid.* at 30.

26. See General Comment No. 3, Committee on Economic, Social and Cultural Rights, *Report on the Fifth Session*, UN ESCOR, 1990, Supp. No. 3, UN Doc. E/1991/23, E/C.12/1990/8 at 83, 85. See also Craig Scott and Patrick Macklem, "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution" (1992) 141 U.Pa.L.Rev. 1 at 80-81. Two Finnish scholars have discussed a similar normative ratchet in terms of a constitutional prohibition against "going back": Heikki Karapuu and Allan Rosas, "Economic, Social and Cultural Rights in Finland" in Allan Rosas, ed., *International Human Rights Norms in Domestic Law: Finnish and Polish Perspectives* (Dordrecht: Martinus Nijhoff Publishers, 1995) 195, 208-209.

27. Article 2(1) provides:

    > Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

    A set of interpretive principles for the Covenant drafted by a group of international legal experts meeting in Maastricht, the Netherlands, in June 1986, refers in Principle 72 to a violation of the Covenant being produced if, *inter alia*, the state "deliberately retards or halts the progressive realisation of a right, unless it is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or *force majeure*": see "The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights" (1987) 9 Hum. Rts. Q 122 at 131.

28. Concluding Observations with respect to Canada, *supra* note 21 at 32.

29. Press Release, *supra* note 10. Again, these were the words of the Chairperson as reported from the day of the NGO presentations. During the formal consideration of the Canadian situation, on May 3, the Chairperson led off the Committee's discussion by noting:

    > It is necessary that the difficulty signalled [to the Committee about state compliance with Covenant obligations] be sufficiently worrying to justify the Committee returning, as an exceptional matter, to a specific aspect of a report that it has already examined. The Committee must therefore establish very clearly that taking steps is justified in the case at hand.

    E/C.12/1995/SR.5, *supra* at 1 [author's translation of the French].

30. Except for one, all Committee members who spoke during the Committee debate on Bill C-76 affirmed the power of the Committee to follow up on state reports at Committee sessions after the state in question has presented its report and received the Committee's concluding observations and when that state is not otherwise due to appear before the Committee. M. Texier, the Member from France and a sitting judge in that country, went even further by indicating that the Committee can follow the "situation" in a country throughout the year and not simply during the period in which the Committee is in session. He cited the precedents for this:

    > In effect, the Committee had moved over the past few years towards following the situation in States parties between sessions, for example concerning the right to housing in the Dominican Republic and in Panama (where the Committee had even conducted a visit), and, to a lesser extent, in the Philippines. It is therefore true that the Committee must strive to follow the situation in States parties throughout the year and not only at the time it is in session (*ibid.* at 3).

    Thus, it is probably true to say that the precedent being set by the Committee related mostly to the question of drawing the attention of states to concerns about draft legislation. That being said, the sense of going somewhat beyond and building on the precedents listed by M. Texier (on the question of 'follow-up' jurisdiction,) was evident in the Chairperson taking note of the idea of adding an item to the Committee's standard agenda in order to formalise the follow-up of Committee observations (*ibid.* at 6).

    It should finally be noted that the prudence of the letter is also tied to the fact that the Committee, treating the matter as one of some urgency, had not had the opportunity to receive representations from Canada on its view of the matter, although a lawyer-diplomat from the Canadian Mission to the U.N. in Geneva did observe the Committee sessions.

31. Such a finding would be an application of the Committee's view set out in General Comment No. 3 that the Covenant prohibits what the Committee calls "deliberately retrogressive measures," especially those that result in particularly vulnerable and disadvantaged groups being at greater risk than had been the case. See General Comment No. 3 and other citations, *supra* note 26.

32. This legal vulnerability consists not simply in the possibility that a province may modify current provincial laws and regulations or adopt harsher polices and practices. It is also due to the fact that there would no longer be any clear basis for challenging provincial failures by bringing suit against the federal government on the basis of the CAP agreement in question, as in the *Finlay* case (interacting with sections 7 and 16 of CAP). It is not simply that the CHST is not based on a federal-provincial agreement. It is also that the actions now specified in sections 20-24 of the *Federal-Provincial Fiscal Arrangements Act* for the Minister of Human Resources Development in response to provincial failure to meet the one national standard retained as part of the CHST in respect of social assistance (inter-provincial residential mobility in section 19 of the *Federal-Provincial Fiscal Arrangements Act*, as amended by Bill C-76, section 50) is so full of wide discretion that there would appear to be no real statutory duty on which to sue.

    The so-called 'legal' vulnerability cannot be divorced from the particular race-to-the-bottom pressure placed on the adequacy of social assistance by the fact that only residential mobility rights are retained as national social assistance standards. It is not difficult to envisage scenarios according to which one province lowers its levels of social assistance in a way which causes some people to move to neighbouring provinces in the hope of being able adequately to attend to their needs. As section 19 prohibits the receiving province from treating newcomers differently, the result will be pressure on that province to lower its levels of assistance in order to match or come close to that of the emigrant-producing province and, thereby, stem the flow of new residents. Without an enforceable common national standard of social assistance adequacy, there is nothing to stop some provinces from exploiting and other provinces from having to conform to the pressures toward the lowest common denominator.

33. The *Vienna Convention on the Law of Treaties* provides: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty ...": *Vienna Convention on the Law of Treaties*, 23 May 1969, Can. T.S. 1980 No. 37, 8 I.L.M. 679, art. 27.

34. See the instances cited in the May 1, 1995, NGO presentation to the Committee, *Re: The Covenant on Economic, Social and Cultural Rights*, *supra* note 9 at 2-4.

35. Article 6(1) provides:

    > The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

    Article 8(3)(a) of the International Covenant on Civil and Political Rights, *supra* note 7, provides:

    > No one shall be required to perform forced or compulsory labour.

    On the right to work, especially in relation to freedom from forced and compulsory labour, see Krzystof Drzewicki, "The Right to Work and Rights in Work" in Asbjorn Eide, Catarina Krause and Allan Rosas, eds., *Economic, Social and Cultural Rights: A Textbook* (Dordrecht, the Netherlands: Martinus Nijhoff, 1995) 169, 175-178. For relevant International Labour Organisation (ILO) norms, see International Labour Conference, *Abolition of Forced Labour: General Survey by the Committee of Experts on the Application of Conventions and Recommendations* (Geneva: International Labour Office, 1979).

36. Articles 9 provides:

    > The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

    Article 11(1) is reproduced *supra* note 23.

    For an account of the obligations in each of these two articles, see Asbjorn Eide, "The Right to an Adequate Standard of Living Including the Right to Food" and Martin Scheinin, "The Right to Social Security" in Eide, Krause, and Rosas, *ibid.* at 89 and 159. For a description with citations of relevant European Social Charter jurisprudence, see Scott and Macklem, *supra* note 26 at 102-104.

37. Article 2(2) provides:

    > The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

38. See especially *Slaight Communications Inc.* v *Davidson*, [1989] 1 S.C.R. 1038.

APPENDIX 1

OFFICE DES NATIONS UNIES A GENÈVE — UNITED NATIONS OFFICE AT GENEVA

CENTRE POUR LES DROITS DE L'HOMME — CENTRE FOR HUMAN RIGHTS

Palais des Nations
CH-1211 Genève 10

4 May 1995

Dear Ambassador Shannon,

I am writing to you on behalf of the Committee on Economic, Social and Cultural Rights, which is currently meeting in Geneva for its twelfth session.

The Committee has been presented with information relating to current developments in Canada by representatives of the National Anti-Poverty Organization, the Charter Committee on Poverty Issues and the National Action Committee on the Status of Women. A copy of the report presented to the Committee is attached. It alleges, inter alia, that draft legislation currently before the Canadian Parliament in Bill C-76 will, if enacted, result in serious contraventions of the International Covenant on Economic, Social and Cultural Rights, to which Canada is a party. The Committee has been requested to take various measures including requesting a special report from the Government and recommending that the Bill be referred to the Supreme Court for an opinion as to its compatibility with the Covenant.

The Committee has given careful consideration to this matter in light of its responsibility to keep under continuing review the various "concluding observations" that it has adopted. It notes in this regard the various provisions of its concluding observations relating to the second periodic report of Canada relating to articles 10 to 15 (E/1994/23, paras. 90-121). In view of the fact that the draft legislation has not yet been enacted, the Committee considers that it would not be appropriate for it to make any specific recommendations to the Government on the issues raised.

It wishes, however, in view of the importance which the Canadian Government has consistently attached to the Covenant and of the Government's strong support for the work of the Committee, to underline the importance that it attaches to the pursuit of policies and programs which comply fully with Canada's obligations as a party to the Covenant. In this regard, if the legislation in question is enacted, the Committee would welcome observations by the Government on the issue of its conformity with the Covenant in the context of Canada's next periodic report, due later this year.

Yours sincerely,

[SIGNED]

Philip Alston
Chairperson
Committee on Economic, Social
and Cultural Rights

H.E. Ambassador Gerald Shannon
Permanent Representative
Permanent Mission of Canada to the
United Nations Office in Geneva

R. v. *HEYWOOD*: OVERBREADTH IN THE LAW OR IN THE JUDGMENT?

June Ross

Last November the Supreme Court of Canada overturned the loitering conviction of a previously convicted paedophile. He had been loitering near a playground, taking revealing photographs of young girls. The court released him, despite its acceptance of evidence that such conduct by such a person increased the risk of reoffending, and despite its opinion that such conduct can therefore be prohibited for the protection of children. The court released him because the law under which he had been convicted was not carefully drafted and could be used to imprison other persons in other circumstances in which imprisonment would be fundamentally unjust.

The decision in *R.* v. *Heywood*[1] is of interest in a number of ways. In terms of assessing the impact of the *Canadian Charter of Rights and Freedoms* on our criminal justice system, it may be considered as one in a series of cases in which the court has been narrowly divided (the appeal was allowed by five to four); and in which the majority and minority views can be characterized in terms of their focus on the rights of the accused or on the community interests served by the law.[2]

But the decision also made a significant addition to *Charter* section 7 doctrine. With this case, the concept of fundamental justice has come to include a consideration of a law's potential for overbreadth. With this addition, fundamental justice is now essentially the equivalent of reasonableness as determined under section 1 of the *Charter*. In effect, it is as though section 7 contained a protection of life, liberty and security of the person, subject only to the same qualification of reasonable limits to which all *Charter* rights are subject. What are the implications of broadening fundamental justice, to the point that it has lost any qualifying impact on section 7 rights?

Heywood's approaches to *Charter* application and to the assessment of an appropriate remedy are also interesting. The majority reviewed the statute in an abstract way and invalidated it due to potential concerns that would only arise in circumstances other than those of the accused. This stance, while not uncommon in the criminal law context,[3] stands in stark contrast to the Court's approach to *Charter* challenges in the civil context.[4] A more flexible approach to the appropriate remedy would alleviate an excessive response to hypothetical concerns.

INTERPRETATION OF THE CRIMINAL CODE PROHIBITION

Robert Heywood had been convicted in 1987 of two counts of sexual assault involving children. This made him subject to section 179(1)(b) of the *Criminal Code*, which prohibited persons convicted of specified sexual offenses from "loitering in or near a school ground, playground, public park or bathing area." Heywood was charged under the section after being observed on two occasions near a children's playground, carrying a camera with a telephoto lens. His camera and film were seized. A picture developed on the film showed young girls playing in the park, their clothing disarranged by play, so that their crotch areas, covered by underwear, were visible.[5]

In the Supreme Court of Canada, both Cory J. for the majority and Gonthier J. for the dissent agreed that Heywood's liberty had been restricted. He

was prevented from attending at places "where the rest of the public is free to roam," and a breach of the prohibition could result in imprisonment.[6] Both also agreed that the restriction of an individual's liberty "for the purpose of protecting the public does not *per se* infringe the principles of fundamental justice."[7] Thus, the constitutionality of the *Criminal Code* prohibition turned upon the relationship between the *Code's* restriction of liberty and its objective of protecting the public. This in turn depended on the scope of the restriction, a matter of statutory interpretation.

The majority interpreted loitering in accordance with the ordinary meaning of the word, to "stand idly around, hang around, linger, tarry, saunter, delay, dawdle," without any requirement of malevolent intent.[8] Applying this definition, the majority held that the prohibition would restrict liberty in circumstances in which the law's objective of protecting children would not be advanced. The prohibition was overbroad in its geographical ambit, as it applied to places other than those where children would be present; in the persons to whom it applied, as not all would constitute a danger to children (previous convictions did not necessarily relate to children); and in the time for which it applied, as it amounted to a lifetime prohibition without review and thus would apply even if a person ceased to be a danger to children.[9]

The dissent looked to other aids to interpretation of the provision and, aided by its consideration of the purpose and legislative history of section 179(1)(b), concluded that the prohibition was intended to apply only to persons who were "lingering or hanging about the enumerated areas for a malevolent or ulterior purpose related to any of the predicate offenses."[10] Employing this interpretation, and relying on evidence that the risk of reoffending by sexual offenders is substantial and that disassociation helps to reduce this risk,[11] the dissent concluded that the law was a reasonable restriction of liberty.

I do not propose to assess the process of statutory interpretation employed by either the majority or the dissent. Suffice it to say that the court was narrowly divided on the point and that the process can be indeterminate, with the court electing to consider or to refuse to consider various "aids" to interpretation.[12] It seems unfortunate to add this element of indeterminacy to a *Charter* case, particularly where there is relative agreement about the scope of the constitutional right or freedom. I will first deal with the court's s.7 discussion, in the course of which I hope to demonstrate that there was indeed a significant degree of agreement about the scope and application of that provision. I will then address the question of remedy, and suggest that the court should have utilized a more flexible approach in determining the appropriate remedy.

SECTION 7

As noted above, both the majority and the dissent agreed that liberty was restricted by the loitering law, and that restrictions of liberty may be imposed for the purpose of protecting the public. Constitutional difficulties arise only if the restrictions apply where there is no danger to the public sufficient to justify them.

While the court did not attempt to describe in any general way what might be a sufficient danger to the public to justify a particular restriction of liberty, it seems that the restriction of Heywood's liberty as imposed in the case was justifiable. Heywood had been recently convicted of sexual offenses involving children and he was loitering near a children's playground. None of the forms of overbreadth identified by the majority applied to him.[13]

The majority found a violation of the principles of fundamental justice by considering the scope of the *Criminal Code* provision "on its face," as it might be applied in other hypothetical cases. The majority further identified and applied a new principle of fundamental justice — overbreadth:[14]

> If the state, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's right will have been limited for no reason. The effect of overbreadth is that *in some applications the law is arbitrary or disproportionate* (emphasis added).

The dissent implicitly agreed with the majority's position regarding section 7. Referring to the broad definition of loitering applied by the majority, the dissent held:[15]

> As Cory J. convincingly demonstrates, however, for such a broad prohibition to be

constitutional, it would probably have to be accompanied by the same kind of guarantees present in the new section 161.

The addition of overbreadth to the list of principles of fundamental justice was thus apparently uncontroversial. In some ways, this is not surprising, as overbreadth seems to be a natural next step following upon the determinations that vagueness[16] and arbitrariness[17] violate fundamental justice. Vagueness and overbreadth may be related, in that vagueness may give rise to overbreadth.[18] Arbitrariness and overbreadth also are related concepts. Laws that are arbitrary are objectionable because they apply where no legitimate purpose will be forwarded. Determining arbitrariness involves balancing state and individual interests:[19]

> Where the deprivation of the right in question does little or nothing to enhance the state's interest (whatever it may be), it seems to me that a breach of fundamental justice will be made out, as the individual's rights will have been deprived for no valid purpose.

Overbreadth analysis simply continues this process, finding a violation of fundamental justice where laws are "unnecessarily broad, going beyond what is needed to accomplish the governmental objective."[20]

Yet the determination that overbreadth is a principle of fundamental justice is surprising in other ways, and also is a very significant extension of section 7. The significance of the extension can be seen by comparing these principles to those involved in a section 1 analysis. The analogy is clear, and was expressly recognized by the court: where laws were found to violate fundamental justice due to arbitrariness or overbreadth, balancing of the public interest takes place under section 7 rather than section 1.[21]

Arbitrariness, which exists where a law "does little or nothing to enhance the state's interest"[22] parallels the first branch of the *Oakes* proportionality test, which requires that the means be rationally connected to the state objective.[23] Overbreadth, which occurs where the means are "too sweeping" or "broader than necessary" in relation to the objective,[24] parallels the second branch, the requirement that the means impair "as little as possible" the *Charter* right or freedom.[25] Determining overbreadth in the context of section 7 involves a degree of deference to legislative decision-making,[26] but this also applies to the minimal impairment test.[27]

The second branch of the *Oakes* test is clearly the most demanding part of the test, and the one which is most often invoked when the test is failed.[28] Equally, one can expect that overbreadth as a principle of fundamental justice will be more often violated than either of its predecessors, vagueness or arbitrariness.[29]

One surprising aspect of the inclusion of overbreadth within the principles of fundamental justice is that as recently as 1992, in *R.* v. *Nova Scotia Pharmaceutical Society*, the Supreme Court of Canada held that overbreadth was "subsumed under the 'minimal impairment branch' of the *Oakes* test," was "no more than an analytical tool to establish a violation of a Charter right" and had "no autonomous value" or "independent existence" under the Charter.[30] *Nova Scotia Pharmaceutical* was extensively cited by the majority in *Heywood* (including in a number of the quotations set out here), but the inconsistency was not discussed.[31]

The most surprising aspect of the addition of overbreadth to the list of principles of fundamental justice can be seen by returning to the seminal case of *Reference re section 94(2) of the Motor Vehicle Act*.[32] That, of course, is the case in which the Supreme Court of Canada, rejected a substantive/procedural dichotomy and held that principles of fundamental justice might involve substance as well as procedure. But the principles of substantive fundamental justice were assumed to be different than a review of the reasonableness of a law under section 1. This follows from the court's description of the principles of fundamental justice as a qualifier to the right to life, liberty and security of the person.[33] A "qualifier" implies a limitation or restriction of the right. If a failure to meet the requirements of section 1, which qualifies all *Charter* rights and freedoms, would constitute a violation of fundamental justice, then the latter "qualifier" ceases to have any limiting effect.[34]

In addition, the court's efforts at defining the principles of fundamental justice in the *Reference* demonstrated a desire to circumscribe them and to identify "judicial" principles, as opposed to the assessment of the need for or reasonableness of a law:[35]

> ... the principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system.

The court did not attempt to define what aspects of substantive fundamental justice were within the "basic tenets of our legal system" but there is no reason to think they would include a review of the objective and proportionality of a law as assessed under section 1.[36] Overbreadth analysis finds its source in the *Charter* and its entrenchment of rights and freedoms subject to reasonable state limitations under section 1. To describe overbreadth analysis as being within the inherent domain of the judiciary is ironic, because it is the separation between traditional judicial functions and the assessment of least restrictive means that has led to the court's sometimes reluctance to apply this branch of the *Oakes* test, and its incorporation of "flexibility" or deference to the legislature within the test. One could argue, perhaps, that a deferential review, a search for obvious overbreadth, is within the judicial realm, but this would ignore the difficulty involved in identifying even obvious overbreadth; in drawing a line between the provision of effective judicial review and undue intrusion into the legislative domain.[37]

The result of *Heywood* is that the principles of fundamental justice now include the basic parts of section 1 analysis. There is not yet a fundamental justice equivalent to the third branch of the *Oakes* proportionality test, the requirement of proportionality between the harmful effects of the law on *Charter* rights and its beneficial effects in terms of the state objective.[38] However, in view of the very limited effect of this part of the test, this is a minor difference.[39]

In one sense the inclusion within section 7 of a full-scale review of the substantive fairness of laws may be seen as a desirable development from the perspective of those desirous of fully protecting *Charter* rights and freedoms. However, there may be a price to pay for this. The court is likely to remain concerned with the problem initially addressed in the *Reference re section 94(2) of the Motor Vehicle Act*, of placing sufficient limits on section 7 to avoid a perceived over-intrusion by the courts upon legislative goals and actions. If the scope of section 7 is not to be limited through the definition of fundamental justice, it is likely that it will have to be through the definition of the protected interests in life, liberty and security of the person.[40] While it may be acceptable to have the courts reviewing criminal laws for overbreadth, a similar review of economic legislation could give rise to a Canadian version of the feared American "Lochner era," in which economic reforms were struck down by the courts as unduly interfering with freedom of contract and similar interests.[41] The Supreme Court of Canada has not yet clarified its position with regard to section 7 and economic interests,[42] but the broader the scope of fundamental justice, the more unlikely is its application to any form of economic interest.

I would agree that review of the substantive fairness of economic legislation is an inappropriate task for the courts, and this would be the case whether the court is assessing the rationality *or* the overbreadth of a law. On the other hand, review of procedural fairness, in the sense of the right to be heard, to know the case one must meet, and to have one's rights (including economic rights) determined by an impartial decision-maker, has been a part of the court's traditional role at common law. To permit such review under section 7 would give constitutional weight to the norms of natural justice and procedural fairness developed by the courts. It seems clear that these norms do reflect "basic tenets of our legal system."[43] Requiring legislatures to adhere to these principles, or to justify any departure from them, would promote justice much as the common law principles seek to do.[44] Had fundamental justice been restricted to procedural justice, or to substantive justice as reflected in the "basic tenets of our legal system," the court would have had less concern with a broad approach to the protected interests, and a broadly applicable constitutional stature for natural justice might have been achieved. But with every step down the road of substantive review, there is a greater impetus for the court to restrict the scope of that review by restricting the scope of the protected interests.[45] Even prior to *Heywood*, a significant step had been taken in this regard in the provision for rationality review, so there was already reason to restrict the scope of life, liberty and security of the person. The extension of substantive review to include overbreadth review strengthens this reason. Whether this gives rise to a good or bad result depends on one's assessments of the positive value of constitutionalizing natural justice as against the risk of allowing any form of judicial review of economic legislation.

THE REMEDY

Where the court is in agreement as to the requirements of the *Charter*, and differs only on statutory interpretation, the *Charter* remedy of reading down might operate to bring the two sides together. Reading down is a remedy that involves narrowing the application of the law to make it comply with the *Charter*. The court's jurisdiction to read down in *Charter* cases was confirmed, albeit in *dicta*, in *Schachter* v. *Canada*.[46] The decision dealt primarily with reading in, or extending the application of a law, but the discussion was broadly formulated and referred to reading down as well. Nonetheless, the use of reading down as a *Charter* remedy is still quite limited in application and perhaps in principle. One matter that remains unclear is the extent to which, if at all, reading down can override legislative intent.

The majority in *Schachter* offered a number of guidelines with respect to choice of remedy. Two of these were referred to in *Heywood*: whether reading in or down would constitute a lesser intrusion on the legislative objective than striking down the law, and whether the choice of means used by the legislature was so unequivocal that reading in or down would constitute an unacceptable intrusion into the legislative sphere.[47] While the court must be concerned with legislative intention in selecting an appropriate remedy, the concern should be with fundamental aspects of legislative intention, not the ordinary indications of legislative intention as revealed through the process of statutory interpretation. This is clear in *Schachter*, in which the legislature's intention to unconstitutionally limit the availability of a benefit was presumed. In discussing the appropriate remedy the court went behind ordinary legislative intention and looked to the legislature's underlying objectives. If reading in or reading down would result in a substantial interference with those underlying objectives, the remedy should not be employed.[48] Similarly, if the means selected by the legislature is fundamentally related to its objectives, and reading down would substantially change the means, then the remedy would be inappropriate.[49]

In addition to reading in or down as a remedy where legislation has been found to violate the *Charter*, *Charter* principles can also inform the court in the interpretation of ambiguous statutory provisions. This may occur implicitly, as seemed to be the case in the dissenting judgment in *Heywood*, or it may be explicit.[50] Thus there are arguably two forms of reading down: a "mild" form involving the incorporation of *Charter* values in statutory interpretation, and a "strong" form under section 52, which can override legislative intent.[51] But while *Schachter* confirmed the court's jurisdiction to grant a "strong" form of reading down, the court has nonetheless been remarkably reluctant to exercise this jurisdiction.

One reason for the court's reluctance may be that expressed by LaForest J. in his concurring judgment in *Schachter*. He drew a distinction between reading in to extend social assistance schemes and reading down to narrow laws that conflict with the *Charter* due to overbreadth. He held that where the liberty of the subject is at stake, the judicial stance should be one that does not encourage the legislature to overreach, and the courts should be slow to provide a corrective remedy. While the majority of the court has not expressly adopted this distinction, they may have done so implicitly. Reading in has now been applied by a majority of the court, permitting the extension of legislation in circumstances in which the legislature had unambiguously declined to extend it.[52] Reading down in similar circumstances has not yet been adopted.[53]

Reading down could have united the divided court in *Heywood*. Had the majority been prepared to override legislative intent and read down as a *Charter* remedy in a manner similar to the interpretation suggested by the minority, the forked paths would have rejoined. However, reading down was raised and quickly rejected by the majority. Reading down, they held, would not be appropriate because it would create a new scheme in conflict with Parliament's unequivocal approach. This amounts to relegating reading down to its "mild" form only — it was rejected for the same reason that the interpretation was rejected. There was no suggestion that reading down would have interfered with Parliament's underlying objectives. The minority judgment interpreting the section narrowly in view of its purpose, and even the Crown's position, seeking such an interpretation, would contradict any such suggestion.

The court's treatment of reading down in *Heywood* raises questions as to the court's real commitment to this remedy in anything other than a mild form. Perhaps this may be explained on the policy ground referred to in the concurring judgment of LaForest J. in *Schachter*, that where the liberty of

the subject is involved, the courts should not adopt an approach that would permit or could even encourage overbroad legislation. But the result of an inflexible insistence on striking down overbroad laws is that the *Charter* is converted into a requirement for precise law-making, even where less precise laws are not demonstrably being applied in such a way as to interfere with rights and freedoms. I would argue that legislative precision is not a *Charter* value, unless an impact or chill upon rights or freedoms is demonstrated. Where there is only an abstract discussion of "reasonable hypotheticals," the *Charter* is reaching further than it needs to. This may be justified in certain circumstances, where there are significant problems with a law.[54] But mere potential overbreadth for a law that addresses a serious and legitimate problem does not require such extreme action. In such cases there is no reason why persons like Heywood, who lack any *Charter* stake in the case, should acquire incidental benefits or "*Charter* windfalls" as a result of the process. This is a much more significant and unnecessary intrusion upon legitimate legislative objectives than reading down would create.❑

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Endnotes

1. (1994) 120 D.L.R. (4th) 348 (S.C.C.). The majority judgment was written by Cory J. and concurred in by Lamer C.J. and Sopinka, Iacobucci and Major JJ. The dissenting judgment was written by Gonthier J. and concurred in by La Forest, L'Heureux-Dubé and McLachlin JJ.

2. See for example the commentary in S. Fine, "Ban on Loitering Struck Down — Sex Offenders' Rights Violated," Globe and Mail (25 Nov., 1994); S. Fine, "Middle Kingdom — Why He's Allowed to Watch," Globe and Mail (30 Nov., 1994).

3. An accused's standing to rely on the *Charter* rights of others has been established since *R.* v. *Big M Drug Mart Ltd.* (1985), 18 D.L.R. (4th) 321 (S.C.C.). There are many examples of cases in which an accused has benefitted from the invalidation of a law without a showing that the application of the law would have violated his or her own *Charter* rights. For example, in *R.* v. *Oakes* (1986), 26 D.L.R. (4th) 200 (S.C.C.) the court invalidated the reverse onus clause in section 8 of the *Narcotic Control Act*, R.S.C. 1970, c. N-1, because it was irrational to presume that an accused in possession of only a small amount of a narcotic, was in possession for the purpose of trafficking. Oakes, however, was in possession of a significant amount.

4. See for example the court's approach to the "civil" declaratory application brought in *Hy and Zel's Inc.* v. *Ontario (A.G.)* (1993), 107 D.L.R. (4th) 634 (S.C.C.).

5. Other photos seized in his residence and at the drugstore where he developed pictures contained similar scenes.

6. *Supra* note 1 at 382 per Cory J., noting that the Crown had not argued otherwise. Gonthier J. for the dissent did not discuss the violation of liberty as such, but did identify the primary *Charter* concerns as overbreadth and vagueness, issues pertaining to the section 7 requirement of fundamental justice. Further, Gonthier J. characterized Cory J.'s section 7 argument as "convincing," but found it to be inapplicable due to his narrower interpretation of the *Criminal Code* provision (*ibid.* at 364).

7. *Ibid.* at 382 per Cory J. See also p. 365 per Gonthier J.

8. *Ibid.* at 381.

9. The majority pointed in contrast to the subsequently enacted section 161 of the *Criminal Code*, which permits a court to make an order prohibiting a person who has committed an offence against a child under age 14 from attending at areas where children under 14 are likely to be present. The majority also expressed a concern that Heywood had not been formally notified of the prohibition, as would occur under section 161 (*ibid.* at 389-391).

10. *Ibid.* at 364. This was the interpretation advanced by the Crown.

11. *Ibid.* at 355-356. The minority also rejected challenges based on sections 9, 11(d), 11(h) and 12 of the *Charter*, which were not reached by the majority.

12. For example, the majority indicated that legislative debates should not be examined for proof of legislative intent, but only for the more general purpose of showing the mischief sought to be addressed (*ibid.* at 380).

13. Apart from the issue of retroactivity, Heywood would appear to be subject to a prohibition order under the new section 161 of the *Criminal Code*, described *supra* note 9. As further noted *supra* note 9, the majority expressed a concern that Heywood was not formally notified, as he would be under section 161. However, it was not clear that this factor alone would have made the restriction fundamentally unjust.

    The dissent supported the restriction as applied to Heywood. Having indicated that malevolent intent must be proved, the dissent went on to hold that it was clear that Heywood "had a malevolent purpose related to the predicate offenses" (*ibid.* at 368). The

dissent also expressly disavowed the provision of formal notice as a principle of fundamental justice: *ibid.* at 366.

14. *Ibid.* at 384 per Cory J.

15. *Ibid.* at 366 per Gonthier J.

16. *R.* v. *Nova Scotia Pharmaceutical Society* (1992), 93 D.L.R. (4th) 36 (S.C.C.).

17. *Rodriguez* v. *British Columbia (A.G.)* (1993), 107 D.L.R. (4th) 342 (S.C.C.).

18. *R.* v. *Nova Scotia Pharmaceutical Society, supra* note 16 at 51-52.

19. *Rodriguez* v. *British Columbia (A.G.), supra* note 17 at 396.

20. *R.* v. *Heywood, supra* note 1 at 385.

21. *Ibid.* at 384, 391.

22. *Supra* note 17 at 396.

23. *R.* v. *Oakes, supra* note 3 at 227 (S.C.C.). In defining the rational connection test, Dickson C.J.C. indicated that the measures adopted must not be "arbitrary, unfair or based on irrational considerations."

24. *R.* v. *Heywood, supra* note 1 at 384.

25. *R.* v. *Oakes, supra* note 3 at 227. The court states expressly that an overbroad law would fail the minimal impairment branch of the section 1 test in *R.* v. *Heywood, ibid.* at 391.

26. *R.* v. *Heywood, ibid.* at 384-385.

27. *Irwin Toy Ltd.* v. *Quebec (A.G.)* (1989), 58 D.L.R. (4th) 765 (S.C.C.).

28. For a review and assessment of the case law to this effect, see P. Hogg, *Constitutional Law of Canada*, 3rd ed., (Toronto: Carswell, 1992) at 35-27 — 35-28.

29. In an annotation of *R.* v. *Heywood,* D. Stuart suggests that the case has "breathed new life into the doctrine of void for vagueness, under what the majority describes as a separate but related aspect of overbreadth": (1995) 34 C.R. (4th) 135.

30. *Supra* note 16 at 50, 52.

31. See also D. Stuart, *supra* note 29.

32. (1985) 24 D.L.R. (4th) 536 (S.C.C.).

33. *Supra* note 31 at 548.

34. It may still have an impact on the right. There are principles of fundamental justice that are more specific than those similar to s.1 analysis, such as the requirement of a "guilty mind" and various procedural rules. These may provide additional focus to section 7 analysis where they are implicated.

35. *Supra* note 31 at 550.

36. E. Colvin, "Section Seven of the Canadian Charter of Rights and Freedoms," (1989) 68 Can. Bar Rev. 560 argued that section 7 should be concerned with "legal means rather than social ends" (at 561), and that although the concept of legal means could not be confined to narrowly procedural matters, it should not extend to a "full power of substantive review, including the power to measure the substantive objectives of legal rules against the standards of fundamental justice" (at 573).

37. For example, see the different views in *McKinney* v. *University of Guelph* (1990), 76 D.L.R. (4th) 545 (S.C.C.).

    An argument may also be made that a determination of arbitrariness is not included in the "basic tenets of the legal system:" see Hogg, *supra* note 28 at 44-16, 44-17, taking this position and Colvin, *supra* note 36 at 581-83, arguing to the contrary.

38. *R.* v. *Oakes, supra* note 3, as modified in *Dagenais* v. *Canadian Broadcasting Corp.* (1994), 120 D.L.R. (4th) 12 (S.C.C.).

39. For a review and assessment of the case law to this effect, see P. Hogg, *supra* note 28 at 35-32 — 35-33.

40. As was done by Lamer J. (as he then was) in a concurring judgment in *Reference re ss. 193 and 195.1 of the Criminal Code*, [1990] 4 W.W.R. 481 (S.C.C.).

41. See P. Hogg, *supra* note 28 at 44-8 for a brief description and further references.

42. Corporate economic interests are not included in section 7: *Irwin Toy, supra* note 27. However, the majority of the court left open in *Reference re ss. 193 and 195.1 of the Criminal Code, supra* note 40 and in *Pearlman* v. *Manitoba Law Society Judicial Committee* (1991), 84 D.L.R. (4th) 105 (S.C.C.) whether individual economic or professional interests might be included.

43. J.M. Evans, "The Principles of Fundamental Justice: The Constitution and the Common Law" (1991) 29 Osgoode Hall L.J. 51 develops this thesis. Accord, see Hogg, *supra* note 28 at 44-36 and cases cited therein.

44. Evans, *ibid.*, although he does not take a position as to the appropriate scope of the protected interests under section 7.

45. Colvin, *supra* note 36 argues in favour of a limited and largely procedural version of fundamental justice and and notes that this would be compatible with a broad scope for the protected interests of life, liberty and security of the person, although he does not discuss economic interests. Evans, *ibid.* also notes that the greater the scope of interests protected under section

7, the greater will be the call for judicial restraint with regard to the principles of fundamental justice, referring however to restraint in the development and application of principles of procedural justice.

46. (1992) 93 D.L.R. (4th) 1 (S.C.C.).

47. Other factors included the extent of the conflict between the law and the *Charter*, whether adequate remedial precision could be achieved, the social significance of the law, and the impact on budgetary decisions.

48. An example referred to was *Osborne* v. *Canada (Treasury Board)* (1991), 82 D.L.R. (4th) 321 (S.C.C.). Sopinka J. held that reading down, while available in principle, should not be applied in the case. The court should "refrain from intruding into the legislative sphere beyond what is necessary to give full effect to the provisions of the Charter." "Reading down may in some cases be the remedy that achieves [these] objectives." But the law in issue, banning political activity by public servants, would be invalid in many of its applications and would, "as a result of wholesale reading down, bear little resemblance to the law that Parliament passed...In these circumstances it [was] preferable to strike out the section."

49. For example in *R.* v. *Seaboyer* (1991), 83 D.L.R. (4th) 193 (S.C.C.), the majority referred to reading down and the constitutional exemption as techniques to declare "valid in part" legislation, and held that the doctrine of constitutional exemption should not be applied because the result would not substantially uphold the law as enacted. "It would import into the provision an element which the legislature specifically chose to exclude — the discretion of the trial judge. Add to this the host of judge-made procedures which have been proposed to effect this judicial amendment to the legislation, and the will of the legislature becomes increasingly obscured. The exemption, while perhaps saving the law in one sense, dramatically alters it in another."

50. The dissent did not directly refer to *Charter* values, but did refer to a policy or presumed legislative intention avoiding "excessive intrusiveness" of the provision, so it seems fair to conclude that *Charter* concerns affected the interpretation of the statute: *ibid.* at 362.

    Cases in which the Supreme Court of Canada has explicitly taken into account *Charter* principles in interpreting ambiguous statutory provisions include *Slaight Communications Inc.* v. *Davidson* (1989), 59 D.L.R. (4th) 416 (S.C.C.) and *Hills* v. *Canada (A.G.)* (1988), 48 D.L.R. (4th) 193 (S.C.C.). In *Canada (A.G.)* v. *Mossop* (1993), 100 D.L.R. (4th) 658 (S.C.C.) the court restricted this principle of interpretation to circumstances of ambiguity, holding that where statutes are unambiguous, the *Charter's* role is a more powerful one, to ensure compliance with it. *R.* v. *Butler* (1992), 89 D.L.R. (4th) 449 (S.C.C.), like the dissent in *Heywood*, is another example of a decision in which the court did not expressly refer to the *Charter* in interpreting an apparently sufficiently ambiguous statute, but in which it seems undeniable that *Charter* concerns shaped the process of statutory interpretation.

51. K. Roach, *Constitutional Remedies* (Aurora, Ont.: Canada Law Book, 1994) at 14-22 and 14-23.

52. *Miron* v. *Trudel,* [1995] S.C.J. No. 44.

53. In *R.* v. *Grant*, [1993] 3 S.C.R. 323, section 10 of the *Narcotics Control Act*, authorizing warrantless searches of places other than dwelling-houses, was read down to permit such searches only in exigent circumstances. While this does seem to be a strong form of reading down, there were special circumstances in the case. The Crown had conceded that the statute should be read down to this extent, and had also conceded that so read down the statute did not authorize a particular search of concern in the case. Thus the accused had no interest in advocating otherwise.

    In *R.* v. *Laba* (1994), 34 C.R. (4th) 360 (S.C.C.) the court read down, but whether this was a strong or mild form of reading down was not clarified. Sopinka J. for the court found that a reverse onus provision under section 394 of the Criminal Code, requiring persons selling precious metals to establish that they are the owner or agent of the owner, unconstitutionally infringed the presumption of innocence, but that an evidentiary burden could constitutionally be imposed in this context. Rather than strike down the section, he chose to read it down, so that an evidentiary burden would be imposed. However, he noted that the same result could have been reached as a matter of statutory interpretation.

54. *Schachter* v. *The Queen, supra* note 46 suggests that where a law has an improper purpose or where it is irrational, the law as a whole should be struck down.

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THE BURDEN OF PROOF, THE *CHARTER*, AND A HIERARCHY OF LEGAL NORMS

Paul Carr-Rollitt

INTRODUCTION

In the recent Supreme Court of Canada decision *Dagenais* v. *Canadian Broadcasting Corporation*,[1] the majority canvassed the issues surrounding a situation where two fundamental legal rights come into conflict with one another. In that case, the CBC had been restrained from broadcasting the mini-series *The Boys of St. Vincent* until after the trials of several members of a Catholic religious order charged with physical and sexual abuse of young boys. The common law judicial discretion to impose a publication ban was held to have emphasized the right to a fair trial over the free expression rights of the media.

The Court was particularly concerned with the tension between these two rights since both are now protected under sections 11(d) and 2 (b) of the *Canadian Charter of Rights and Freedoms*,[2] respectively. Writing for the majority, the learned Chief Justice said:[3]

> It would be inappropriate for the courts to continue to apply a common law rule that automatically favoured the rights protected by section 11(d) over those protected by section 2(b). *A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the Charter and when developing the common law.* When the protected rights of two individuals come into conflict, as can occur in the case of publication bans, *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights.

Acting on this concern, the Court reformulated the common law rule dealing with publication bans and modified the third step in the second stage of the *Oakes*[4] test such that a proportionality must exist between the salutary and deleterious effects of the measure used to achieve the government objective. In other words, if protecting an accused's right to a fair trial through a publication ban unduly restricts the media's freedom of expression, the ban may be held to be an unreasonable limit under section 1 of the Charter even though it is aimed at achieving a sufficiently important objective.

Despite the Court's clear direction on the importance of affording equal status to all fundamental rights and freedoms, it is respectfully submitted that this view does not reflect the current state of the law and may be a goal which is unattainable. This will be illustrated through an approach which focuses on the burden of proof placed on the respective parties in cases involving *Charter* challenges under three of the protected fundamental freedoms.

THE BURDEN OF PROOF AND THE *CHARTER*

The particular analytical framework constructed in a *Charter* case can be more restrictive or more flexible depending on which right or freedom is in question. One way to analyze these frameworks is in terms of the relative weight of the burden of proof placed on applicants in attacking government action and on the Crown in defending the government action as a reasonable limit.

It is through the burden of proof that law, in part, expresses social policy and determines the pattern of decisions that will be made. Burden of proof evinces an attitude the law takes toward things.[5] By examining the burdens of proof that have been imposed by the Supreme Court of Canada it will be demonstrated that three of the fundamental freedoms protected under section 2 of the *Charter*, namely, religion, expression and association, fall into a judicially-created hierarchy which tells us something about their relative significance in our society.

In cases involving a *Charter* challenge, the basic analytical framework applied by the courts places the initial burden of proof on the plaintiff to establish a *prima facie* breach of his or her constitutional rights. If successful, the burden then shifts to the Crown to justify the infringement under section 1.[6] In both cases each party bears the ultimate burden of proof. The standard of proof is the same for the applicant and the Crown, that is, proof on a balance of probabilities, but the burden may be lighter or heavier at each stage and also from case to case; sometimes the challenger will have to prove a great deal in order to establish a breach, while at others the burden may be heaviest on the Crown.

Where the burden of proof is the lightest on the applicant (i.e., easiest to establish a *prima facie* breach), and heaviest on the Crown under section 1 (i.e., hardest to justify an infringement), it could be said that that particular right or freedom enjoys the highest status under the *Charter*. This is so because the courts will be least tolerant of abridgements of that right or freedom as compared to others. Analyzing *Charter* cases in terms of burden of proof alerts us to this phenomenon which otherwise might remain hidden if we simply took for granted that all 'fundamental' rights and freedoms are equally important.

Freedom of Religion

In the leading cases on freedom of religion, one of the few restrictions on a person's freedom to hold, profess and manifest his or her religious beliefs imposed by the Supreme Court of Canada is that no one can, in exercising this freedom, interfere with the rights of others to do the same.[7] Little time has been spent defining what "religion" actually is and an understanding of this concept is almost taken for granted by the Court.

The more important first issue entails a look at the purpose and effects of the impugned legislation or government action to determine whether a *prima facie* breach has occurred. If the purpose is found to be clearly aimed at restraining freedom of religion, that is the end of the inquiry; there is an irrebuttable presumption of unconstitutionality irrespective of whether the government could show that no adverse effect actually resulted. So, for example, in *Big M Drug Mart*,[8] the federal *Lord's Day Act* was held to violate section 2(a) because of its religious purpose and the Court dismissed the Crown's assertion that its only effect was to force people to take a day of rest from work. The Chief Justice held that: "If the legislation fails the purpose test, there is no need to consider further its effects, since it has already been demonstrated to be invalid."[9]

Another aspect of the purpose test that decreases the weight of the burden of proof on the applicant is that the Court will not allow the Crown to advance arguments which attribute a contemporary, secular purpose to legislation that originally was religiously based.[10]

Furthermore, even if the government's purpose is found not to be directed at interfering with freedom of religion, an applicant can still show that the effect is such that his or her rights have been infringed. By adding this second option the Court has made it relatively easy to establish a *prima facie* breach once the initial hurdle of showing that some aspect of one's religion is involved has been overcome. Applicants are given two avenues to pursue and the cards are stacked in their favour at both the purpose and the effects stages.

The only real limitation occurs in situations, such as in the *Jones* case,[11] where a "trivial infringement" has occurred. In that case, a pastor who wanted to educate his children at home because of his religious beliefs claimed that the government requirement that he apply for an exemption from the school system was a violation of his freedom of religion. He argued that the requirement involved his acknowledging that government had final authority over his children's education instead of God. The Court emphasized that it was in no position to question the validity of a religious belief, even though few people may share it, but held, nevertheless, that the requirement did not infringe his section 2(a) rights because it constituted only a "minimal" or "peripheral" intrusion. The fact that the possibility for an exemption did exist for

those with strong religious convictions against state controlled education was important to this finding.

Once an applicant has established an abridgement of his or her freedom of religion the burden then shifts to the Crown to prove justification. In cases where the legislation's purpose has been shown to be directly aimed at restricting freedom of religion the Crown will face an insurmountable burden. The Supreme Court has placed such high importance on the sanctity of religious freedom (perhaps in the interests of separating Church and State), that such governmental action will not be justified under virtually any circumstances.[12] It is only where the government's purpose was purely secular that the Crown will have a chance to meet the burden of showing that the restriction was a reasonable limit.

The analytical framework in freedom of religion cases thus favours applicants over the Crown and the relative burdens placed on each party evidence the stringent protection religious freedom is afforded. The next two sections will compare this framework to those applicable to freedom of expression and freedom of association challenges.

FREEDOM OF EXPRESSION

As was stated above, there is usually not much debate over whether some aspect of religion is involved when a section 2(a) challenge is brought. The situation is different, however, in freedom of expression cases. A broader inquiry takes place into whether the activity alleged to have been affected can be considered "expression." The two questions that have to be answered in this regard are whether the activity has expressive content and whether its form is protected. It is only after this initial stage, during which the applicant bears the burden of proof, that an examination of the purpose and effects of the government action begins.[13] So, even where an applicant has little difficulty with this step, his or her burden of proof is quantitatively heavier.

This fact illustrates an important point: that the weight of the burden of proof is affected by how equivocal a legal concept is. Here, "expression" is a more nebulous legal concept than "religion" and, as a result, the plaintiff in a freedom of expression case must prove *more* than the plaintiff in a freedom of religion case and, thus, has a heavier burden to bear.

Furthermore, though the purpose test applies in roughly the same way in expression cases as it does in religion cases, the effects test is more onerous in the former. Assuming an applicant can establish that the activity in question counts as expression, he or she must then bring the claim of interference within the ambit of one of the three values underlying section 2(b). Specifically, it must be shown that the government action adversely affected the applicant's freedom to seek or attain truth, participate in social and political decision-making, or realize individual self-fulfilment.[14]

Instead of only ruling out "trivial infringements" as is the case when religion is involved, here the Court specifies the circumstances where an interference with expression will constitute a *prima facie* breach. The values which underlie religion seem to be taken for granted and protected for their own sake whereas only expressive conduct aimed at the enunciated values will be defended.

The Court's decision to narrow the range of protected expressive activities to a greater degree than religious ones points toward a higher status for religious freedom. This conclusion is supported on the other side of the analysis where the burden is on the Crown to justify the infringement.

Under the first stage of the section 1 analysis, the emphasis is on the legislative or governmental objective. This perhaps is because the potential harm that could ensue from a person exercising his or her freedom of expression is perceived to be greater than the range of possible deleterious effects resulting from the free exercise of religion. The leading Supreme Court of Canada case *R.* v. *Keegstra*[15] is a good example of this. In *Keegstra*, free expression led to the propagation of hatred against an identifiable group. The Court was clearly concerned about the potential harm associated with such a use of expressive conduct.

It follows that the greater the weight that is given to the objective, the easier it will be for the Crown to justify an infringement. When the Court is assessing whether the abrogated right has been impaired as little as is reasonably possible, the Crown will benefit from a weighty objective, for the more important it is, the more serious an abridgement will be tolerated to fully achieve the objective. Thus by emphasizing the importance of the first stage of the section 1 inquiry, the Court has effectively lightened the Crown's burden. For example, in *Irwin Toy*,[16] a provincial statute that prohibited advertising specifically directed at persons under the age of

thirteen was upheld under section 1. The Court held that the legislation's objective was to protect a group that is most vulnerable to commercial manipulation. Phrased in those terms, it is not surprising that the objective was found to be important enough to warrant overriding a corporation's expressive freedom.

Another interesting addition to the section 1 analysis that the Court has incorporated into freedom of expression cases provides that where the applicant's conduct is only "tenuously" linked to the values underlying this freedom, it will be easier to justify an infringement.[17] Consequently, the same obstacle that the applicant had to overcome during the first stage resurfaces and is used to lighten the burden on the Crown.

In sum, freedom of expression challenges require the applicant to prove a *prima facie* breach within narrower parameters, and thus also to prove more than is the case in freedom of religion challenges. The opposite is true for the Crown. Under section 2(a) the Crown will not be able to meet the burden of justification if the government's very purpose was to abrogate religious freedom. It will also have difficulty establishing an important enough objective to warrant overriding this constitutional right. Under section 2(b) it will be easier for the Crown to show good reasons for limiting freedom of expression which, in turn, will enhance its ability to justify a *Charter* breach. It is also aided at this stage by the narrow parameters already faced by the applicant during stage one.

Based on this analysis, then, freedom of religion enjoys a higher status in the hierarchy of legal norms under the *Charter* than freedom of expression. It remains for us to examine where freedom of association fits in to this scheme.

FREEDOM OF ASSOCIATION

Courts have taken a fairly restrictive view of what is essential to a person's freedom to associate. It is clear that any restraint on membership in or formation of associations will offend the *Charter*. However, the activities pursued by a particular association will not be covered *per se*. Only those pursuits which involve other constitutionally protected rights or freedoms or other lawful rights of individuals will be protected when carried out in association with others. Even the fact that an activity is fundamental to an association's existence will not ensure it protection under section 2(d).[18]

Additionally, the phrase "other lawful rights of individuals" has been interpreted narrowly to mean lawful *in the particular context*. So, for example, in the *Professional Institute of the Public Service of Canada* v. *N.W.T.* case,[19] the Court held that where a collective bargaining regime is in place it is not lawful for an individual to bargain with his or her employer. This reasoning contributed to a finding that collective bargaining itself was not an activity covered by freedom of association.

The scope of freedom of association thus is even narrower than that of freedom of expression. As a result, the burden of proof is heavier on applicants than in both the other frameworks discussed, but here the cause is somewhat different.

It has been shown that the difficulty in delineating the legal concept of expression led to an increase in the weight of the burden of proof. The concept of association, however, poses even fewer problems than religion at that initial stage; an individual is either associating with other people in some way or they are not. The courts, in freedom of association cases, will almost always skip right to an assessment of whether that freedom has been abridged based on the considerations outlined above. At this stage the extremely narrow construction of what will be protected is not a function of any difficulty in defining the concept. Rather, it would appear to be connected to the fact that most freedom of association challenges have arisen in the context of labour and employment law. It has been suggested that the judicial restraint evident in these decisions is a result of the belief that the legislative and administrative branches of government are better equipped to deal with the policy issues within this field.[20] Unlike criminal or other matters which are administered on a day-to-day basis by the judiciary itself, the labour and employment field is dealt with by legislatures and administrative boards and tribunals. Consequently, the Court has narrowly and restrictively construed freedom of association, at least in part, to avoid too extensive a role in the collective bargaining arena.

These stringent definitional limits would lead to the expectation that the Crown would have great difficulty in justifying infringements under section 1 when an applicant successfully establishes a breach.

Since a very limited range of activities is protected, the ones that do qualify should be protected forcefully. However, in the few judgments in which section 1 has been considered, the analysis has not led to the imposition of an unusually heavy burden on the Crown. If anything, government objectives which have been held to be sufficiently important to warrant overriding section 2(d) indicate that the Crown may have an easier time justifying an infringement under this sub-section as compared to the other two.[21]

The strong focus on the applicant in freedom of association cases combined with the narrow definition of what will be protected are evidence of the lower status the judiciary has assigned to this freedom as compared to the other two. Freedom of association would thus appear to rank third in the hierarchy of constitutional norms.

Burdens of proof determine how difficult it is to make or defend legal claims. The Supreme Court of Canada has placed a very light burden of proof on a party challenging legislation or other government action as a violation of freedom of religion, a heavier burden of proof on challengers under freedom of expression, and an almost impossibly heavy burden of proof on the applicant in a freedom of association case.

Under section 1, the Crown bears a heavy burden when attempting to justify an interference with freedom of religion (particularly where the legislative purpose was religious) and a somewhat lighter burden of proof in freedom of expression cases. When freedom of association is involved, while the Crown might be expected to face a very heavy burden, the indications so far are that the opposite may in fact be true. The Court could allow a great deal of latitude in the formulation of the government objective thus making the Crown's task easier.

Therefore, the hierarchy among these fundamental freedoms is revealed through the burdens of proof placed on the parties: religion is guarded more forcefully than expression which, in turn, takes precedence over association. And, the definitional, conceptual and other differences among the rights and freedoms enshrined in the *Charter*, through their impact on the burden of proof, make unequal treatment of these rights and freedoms seem inevitable.

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Endnotes

1. [1994] 3 S.C.R. 835.
2. Part I of the *Constitution Act*, 1982 being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11
3. *Supra* note 1 at 877 [emphasis added].
4. *R.* v. *Oakes* (1986), 24 C.C.C. (3d) 321.
5. S.M. Wexler, *Burden of Proof: The Essence of Law* (forthcoming, McGill Queen's University Press) *passim*.
6. See *R.* v. *Oakes, supra* note 4.
7. *R.* v. *Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295.
8. *Ibid.*
9. *Ibid.* at 334.
10. This is known as the "shifting purpose" doctrine and has been rejected by the Supreme Court.
11. *R.* v. *Jones*, [1986] 2 S.C.R. 284.
12. See *Big M Drug Mart, supra* nopte 7 and *Zylberberg* v. *Sudbury Board of Education* (1988), 65 O.R. (2d) 641 (C.A.)
13. *Irwin Toy Ltd.* v. *A.-G. of Quebec*, [1989] 1 S.C.R. 927
14. *Ibid.*
15. [1990] 3 S.C.R. 697
16. *Supra* note 13.
17. For a discussion of this analysis see *Rocket* v. *Royal College of Dental Surgeons*, [1990] 2 S.C.R. 232
18. This framework was set out in the so-called "Labour Trilogy" cases. The approach was outlined in *Reference re: Public Service Employee Relations Act*, [1987] 1 S.C.R. 313
19. [1990] 2 S.C.R. 367.
20. See Paul C. Weiler, "The Charter at Work: Reflections on the Constitutionalizing of Labour and Employment Law" (1990) 40 U.T.L.J. 117.
21. See Dickson, C.J.C.'s judgments in the Labour Trilogy generally, *supra* note 18. In two of the cases, government objectives arising out of purely economic concerns, such as combating inflation and the economic interests of dairy farmers, were held to be sufficiently pressing and substantial to warrant overriding section 2(d). Note, however, that these judgments did not represent the views of the majority in any of the *Labour Trilogy* cases. Also see *Lavigne* v. *Ontario Public Service Employee's Union*, [1991] 2 S.C.R. 211.

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