

CONSTITUTIONAL LAW—CHARTER OF RIGHTS AND FREEDOMS—SECTION  
15—AN ERRONEOUS APPROACH TO THE CHARTER'S EQUALITY GUARANTEE:  
*R. v. Ertel*.

M. David Lepofsky\*  
and Hart Schwartz\*

*Introduction*

In a string of decisions,<sup>1</sup> culminating in *R. v. Ertel*,<sup>2</sup> the Ontario Court of Appeal has attempted the difficult task of formulating a test for the application of section 15 of the Charter of Rights and Freedoms,<sup>3</sup> the equality rights guarantee. Viewed superficially, the *Ertel* interpretation of equality may seem clear, sensible, workable; and supported by good authority. Yet, after careful examination, *Ertel's* equality definition appears seriously flawed. It misses the point of the equality guarantee, and is unworkable in practice. Meritless claims will proliferate, leaving unprotected section 15's prime intended beneficiaries. It is the product of reasoning

---

\*Both of the Ontario Bar, Toronto, Ontario. The authors are counsel with the Ministry of the Attorney General for Ontario. This article is written in their personal capacity and does not purport to express the views of the Attorney General of Ontario or his Ministry.

<sup>1</sup> *Re McDonald and The Queen* (1985), 21 D.L.R. (4th) 397, 51 O.R. (2d) 745, 21 C.C.C. (3d) 330 (Ont. C.A.), leave to appeal to S.C.C. refused, [1985] 2 S.C.R. ix, (1985), 52 O.R. (2d) 688n, 64 N.R. 400n; *R. v. R.L.* (1986), 26 C.C.C. (3d) 417, 52 C.R. (3d) 209 (Ont. C.A.); *Reference re Act to Amend Education Act* (1986), 25 D.L.R. (4th) 1, 53 O.R. (2d) 513, 23 C.R.R. 193 (Ont. C.A.), per Howland C.J.O. and Robins J.A. (dissenting), aff'd on other grounds (1987), 77 N.R. 241 (S.C.C.); *Bregman v. Attorney General for Canada* (1986), 33 D.L.R. (4th) 477, 57 O.R. (2d) 409 (Ont. C.A.); *R. v. Century 21 Ramos Realty Inc. and Ramos* (1987), 58 O.R. (2d) 737, 19 O.A.C. 25, 32 C.C.C. (3d) 353 (Ont. C.A.).

<sup>2</sup> (1987), 20 O.A.C. 257 (Ont. C.A.), leave to appeal to the Supreme Court of Canada denied, December 3, 1987, Estey, Wilson and Le Dain JJ.

<sup>3</sup> Constitution Act, 1982, Part I, Section 15(1) provides:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

which does not apply the fundamental principles of Charter construction, which have been enunciated by the Supreme Court of Canada.

This comment first describes the *Ertel* test for equality rights, and then critically examines it. In this critique, the Ontario Court's identification of section 15's purposes is scrutinized. Then the three parts of the *Ertel* test are analyzed. Finally, the broader implications of the *Ertel* approach are considered.

Appealing his drug conviction, Ertel urged the Ontario Court of Appeal to find that his section 15 rights were contravened. Pursuant to section 507 of the Criminal Code,<sup>4</sup> the Attorney General had preferred an indictment against him. This preferring of an indictment deprived him of certain procedural rights, for example the right to a preliminary hearing and the right to elect trial without a jury. He assertedly suffered discrimination, in contrast to those charged with the same offence through the ordinary criminal process, because they, and not he, had the benefit of these procedural safeguards.

The court's approach to equality, leading it to dismiss Ertel's claim, is the case's crucial feature. Previously, the court had held that "the purpose of s. 15 is to require that those who are similarly situated be treated similarly".<sup>5</sup> Based on this the court ruled that those claiming a contravention of their section 15 rights must show three things. They must establish the following:

- (1) equality—that the impugned law treats them differently from persons who are similarly situated to them. Parties are similarly situated despite differences between them, if those differences are irrelevant to the law's purpose;
- (2) disadvantage—that in being differently treated they are subject to an inherent disadvantage;
- (3) discrimination—that "a fair minded person, weighing the purposes of the legislation against its effects on the individual adversely affected and giving due weight to the right of the Legislature to pass laws for the good of all, would conclude that the legislative means adopted are unreasonable or unfair".<sup>6</sup>

---

<sup>4</sup> R.S.C. 1970. c. C-34.

<sup>5</sup> *Re McDonald and The Queen*, *supra*, footnote 1, at pp. 417 (D.L.R.), 765 (O.R.), 349 (C.C.C.).

<sup>6</sup> *R. v. Century 21 Ramos Realty Inc. and Ramos*, *supra*, footnote 1, at pp. 762 (O.R.), 42 (O.A.C.), 377 (C.C.C.), citing with approval the test prescribed by McLachlin J.A., in *Re Andrews and Law Society of British Columbia* (1986), 27 D.L.R. (4th) 600, at p. 610, [1986] 4 W.W.R. 242, at p. 253 (B.C.C.A.). This is the test applied by the court in *R. v. Ertel*, *supra*, footnote 2, at p. 272; see further footnote 37, *infra*.

If the Charter plaintiff meets these tests, then the onus shifts to the defendant to justify the law under section 1.<sup>7</sup>

### *Purpose of Section 15*

By building its section 15 test on the finding that the goal of equality is to ensure that similarly situated persons are treated similarly, the Ontario Court of Appeal may have failed to implement the approach to the Charter demanded by the Supreme Court of Canada. The Supreme Court has repeatedly insisted that the Charter is a purposive document. Its guarantees must be construed with careful attention to the purposes served by such rights in a free and democratic society.<sup>8</sup> A Charter right's purposes are ascertained by examining the provision's text, its legislative history, its role in a free and democratic society and its relationship to the other Charter rights.<sup>9</sup> While the Ontario Court of Appeal attempted the difficult task of identifying section 15's purposes, its endeavour was flawed<sup>10</sup> both because of the reasoning employed and the result reached.

<sup>7</sup> Section 1 of the Charter provides:

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

In *Ertel* the court, in *obiter*, appears to provide that there may be some instances when the onus might shift earlier, that is where the Crown is "better equipped" to lead evidence of reasonableness, purpose or effect (the elements of Step 3). Yet, the court provides no standards or guidelines for the triggering of such premature onus shifts. This step's confusion is discussed below.

<sup>8</sup> *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 155-156, (1984), 11 D.L.R. (4th) 641, at pp. 649-650, 14 C.C.C. (3d) 97, at pp. 105-106; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344, (1985), 18 D.L.R. (4th) 321, at pp. 359-360, 18 C.C.C. (3d) 385, at pp. 423-424; *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 119, (1986), 26 D.L.R. (4th) 200, at p. 212, 24 C.C.C. (3d) 321, at p. 333; *Reference re s. 94(2) of Motor Vehicle Act*, [1985] 2 S.C.R. 482, at pp. 499-500, (1985), 24 D.L.R. (4th) 536, at p. 547, 23 C.C.C. (3d) 289, at p. 299; *Edwards Books and Art Ltd. v. The Queen*, [1986] 2 S.C.R. 713, at p. 752, (1986), 35 D.L.R. (4th) 1, at p. 29, 30 C.C.C. (3d) 385, at p. 413; *Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313, at pp. 393-394, (1987), 38 D.L.R. (4th) 161, at p. 217.

<sup>9</sup> *R. v. Big M Drug Mart Ltd.*, *ibid.*, at pp. 344 (S.C.R.), 359-360 (D.L.R.), 423-424 (C.C.C.); *Reference re s. 94(2) of Motor Vehicle Act*, *ibid.*, at pp. 499-500 (S.C.R.), 547 (D.L.R.), 299 (C.C.C.); *Re Public Service Employee Relations Act*, *ibid.*, at pp. 394 (S.C.R.), 217 (D.L.R.); *Attorney General for Quebec v. Quebec Protestant School Boards*, [1984] 2 S.C.R. 66, at pp. 79-80, (1984), 10 D.L.R. (4th) 321, at pp. 331-332; *Reference Re Roman Catholic Separate High Schools Funding* (1987), 77 N.R. 241, at pp. 267-268 (S.C.C.); and see, *Retail, Wholesale and Department Store Union v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at pp. 604-650, (1986), 33 D.L.R. (4th) 174, at pp. 199-200, per Wilson J., concurring.

<sup>10</sup> Several other courts across Canada, struggling with the approach to section 15, have made no effort whatsoever to identify the section's purpose. See for example, *Re Andrews and Law Society of British Columbia*, *supra*, footnote 6; *Re Wilson and Medical Services Commission of British Columbia* (1987), 36 D.L.R. (4th) 31 (B.C.S.C.); *Re Rebic and The Queen* (1986), 28 C.C.C. (3d) 154, [1986] 4 W.W.R. 401 (B.C.C.A.); *Re Headley and Public Service Commission Appeal Board* (1987), 35 D.L.R. (4th) 568 (Fed. C.A.). As a striking exception to this national trend see, *Kask v. Shimizu* (1985), 28 D.L.R. (4th) 64 (Alta. Q.B.).

The first flaw with the Ontario court's identification of section 15's purposes is that it flatly contradicts a core component of equality rights, recognized by the Supreme Court of Canada. By declaring that section 15's goal is simply to ensure similarity of treatment, the Ontario court suggests that government has met its constitutional obligations when it treats people the same. Yet similarity of treatment can itself offend the principle of equality. The Supreme Court has recognized both in the Charter context<sup>11</sup> and in the context of anti-discrimination legislation<sup>12</sup> that differential treatment can be required to ensure equality.<sup>13</sup>

Second, the purpose which the Ontario Court of Appeal ascribes to section 15 is ill-suited to the very people whom that provision describes as its prime beneficiaries—those specifically enumerated by section 15(2)<sup>14</sup> as being “disadvantaged” and as meriting anti-discrimination protection “in particular” in order to achieve equality.<sup>15</sup> For example, as studies have documented, groups such as women<sup>16</sup> and the handicapped<sup>17</sup> are *not* similarly situated to men and the able-bodied in Canadian society. If women and the disabled had to establish that they are similarly situated to others to gain the protection of section 15, then that provision would

---

<sup>11</sup> *R. v. Big M Drug Mart Ltd.*, *supra*, footnote 8, at pp. 347 (S.C.R.), 363 (D.L.R.), 426 (C.C.C.).

<sup>12</sup> *Re Ontario Human Rights Commission and Simpson Sears Ltd.*, [1985] 2 S.C.R. 536, (1985), 23 D.L.R. (4th) 321; *Action Travail des Femmes v. C.N.R. Co.* (1987), 76 N.R. 161 (S.C.C.), citing with approval at pp. 186-187 the case of *Canadian Odeon Theatres v. Saskatchewan Human Rights Commission*, [1985] 3 W.W.R. 717 (Sask. C.A.). See also, *Robichaud v. The Queen*, [1987] 2 S.C.R. 84. The comparable American approach, cited with approval by Wilson J. in *R. v. Big M Drug Mart*, *supra*, footnote 8, is found in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1970).

<sup>13</sup> See Human Rights Code, S.O. 1981, c. 53, s. 10, which statutorily prescribes this position.

<sup>14</sup> S. 15(2) provides:

Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

<sup>15</sup> See s. 15(1), *supra*, footnote 4, setting out specific enumerated grounds “in particular”.

<sup>16</sup> See, e.g., Report of the Royal Commission on Equality in Employment, Judge Rosalie Silberman Abella, Commissioner (October 1984, Ministry of Supply and Services, Canada).

<sup>17</sup> See, e.g., *Obstacles: Report of the Special Committee on the Disabled and the Handicapped*, House of Commons, Ottawa, Queen's Printer (February 1981); Ontario Human Rights Commission, *Life Together: A Report on Human Rights in Ontario*, Toronto, Queen's Printer (July 1977); see also M.D. Lepofsky, *Equality Rights for Handicapped Persons in the Charter: Putting the Accent on Individual Ability*, in *The Cambridge Lectures, 1985* (Canadian Institute for Advanced Legal Studies, 1987).

not assist them in securing equality of opportunity—an eventuality which would contradict the legislative history of section 15.<sup>18</sup>

As a second example, racially segregated schools would comply with the *Ertel* court's purely formalistic conception of equality. Black children are treated similarly to white children in such an arrangement. Black and white are forced to go to school exclusively with children of their own race. Yet overt racial segregation is a prime example of the evil which section 15 seeks to prevent.<sup>19</sup>

Third, while the Aristotelian maxim that like cases should be treated alike<sup>20</sup> is an appropriate goal for courts deciding individual cases through common law adjudication, it is ill-suited to the legislative process. Courts deal with individual common law cases one at a time, apply comparable legal principles to all cases, attempting to ensure that similar results are reached in cases where the relevant facts are similar.

In contrast, legislatures, unlike courts, do not make laws and policy on an individual, case by case basis. Legislating essentially involves identifying a social problem, deciding whether it warrants government action, weighing competing measures for addressing the problem, and then choosing the most desirable and politically marketable course of action. Legislative solutions to social problems are often experimental and piecemeal, taking reform one step at a time.<sup>21</sup> Painted with a broad brush, they do not solve all aspects of a social problem at once, or draw perfect lines when demarcating who should benefit from a new initiative.

Additionally, if section 15's goal was to require governments to treat similarly all who are similarly situated, then the section would have the bizarre effect of *prima facie* obliging governments to enact

---

<sup>18</sup> See, e.g., Special Joint Committee of the House of Commons and of the Senate (The Hays-Joyal Committee), Minutes and Proceedings of Evidence, 1st sess., 32nd Parl., 1980-81. See also, *Attorney General for Quebec v. Quebec Protestant School Boards*, *supra*, footnote 9, at pp. 79-80 (S.C.R.), 332 (D.L.R.). In *Reference re s. 94(2) of Motor Vehicle Act*, *supra*, footnote 8, at pp. 504-509 (S.C.R.), 550-555 (D.L.R.), 303-307 (C.C.C.), Lamer J. ruled that when the court seeks to attribute a particular legal meaning to the phrase "principles of fundamental justice", only minimal weight should be attached to the legal opinions of senior Crown law officers whose role was to advise parliamentary committees on legal interpretations. This ruling does not, however, preclude a court from taking judicial notice of evidence placed before Parliament during proceedings leading up to the enactment of the Charter.

<sup>19</sup> Compare *Brown v. Board of Education*, 347 U.S. 483 (1954), reargument on the question of relief, 349 U.S. 294 (1955); *Cooper v. Aaron*, 348 U.S. 1 (1958); see D.J. Hutchinson, *Unanimity and Desegregation: Decision Making in the Supreme Court, 1948-1958* (1979-80), 68 *Georgetown L.J.* 1.

<sup>20</sup> *The Politics of Aristotle* (Oxford University Press; trans. E. Barker, 1946), Book III, xii, 1280a-1281a.

<sup>21</sup> This reality of government has obtained constitutional recognition in the United States in *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), cited with approval in *Edwards Books and Art Ltd. v. The Queen*, *supra*, footnote 8, at pp. 772 (S.C.R.), 44 (D.L.R.), 428 (C.C.C.).

perfectly drawn legislation. A legislature, responding to a social problem (for example, pollution, poverty, or consumer protection) would be obliged constitutionally either to solve the entire problem with one fell swoop, or face the prospect of an equality rights challenge, brought by an aggrieved individual who could have, but did not, benefit under the initiative. This "all or nothing" requirement for legislative action is a practical impossibility for governments, and as such could not be the intended objective of the Charter's equality guarantee.

The declaration of section 15's purpose, on which *Ertel* is predicated, is further flawed because the court did not consider highly relevant sources for discovering the section's purposes. Located in one short paragraph in the pre-*Ertel* decision of *Re McDonald and The Queen*<sup>22</sup> the court's deliberations include no reference to section 15's important legislative history,<sup>23</sup> its wording (including the emphasis on the enumerated grounds, as relating to disadvantaged status in Canadian society), or the wealth of jurisprudence expounding the goals and content of analogous equality guarantees found in human rights legislation.<sup>24</sup> The sole authority cited by the court is a California Law Review article commenting on the equal protection clause of the United States Constitution, written by Tussman and tenBroek.<sup>25</sup>

This reliance on the Tussman and tenBroek article is problematic. It was taken out of its jurisprudential context. Published in 1949, the article was written prior to the modern era in United States equal protection doctrine, at a time when overt, governmentally instigated racial segregation was still constitutionally permissible under the now infamous "separate but equal" doctrine.<sup>26</sup> Since the article's publication, the emphasis in United States equal protection doctrine has shifted away from the sterile concept of similar treatment for those similarly situated. Most forceful constitutional protection is now given in instances of dis-

---

<sup>22</sup> *Supra*, footnote 1.

<sup>23</sup> See footnote 18, *supra*, and see A.F. Bayefesky and M. Eberts (eds.), *Equality Rights and the Canadian Charter of Rights and Freedoms* (1985), esp. A.F. Bayefsky, *Defining Equality Rights*, pp. 8-14; M.D. Lepofsky and J.E. Bickenbach, *Equality Rights and the Physically Handicapped*, pp. 333-340. And see W.S. Tarnopolsky, *Equality and Discrimination*, in R.S. Abella and M.L. Rothman (eds.), *Justice Beyond Orwell* (1985).

<sup>24</sup> Regarding the goals of the guarantee of equality in human rights legislation, see *Re Ontario Human Rights Commission and Simpson Sears*, *supra*, footnote 12; *Action Travail des Femmes v. C.N.R. Co.*, *supra*, footnote 12; *Cameron v. Nel-Gor Castle Nursing Home* (1984), 5 C.H.R.R. D/2170, *aff'd* unreported decision of the Ontario Supreme Court (Divisional Court), September 17, 1985, leave to appeal to the Ontario Court of Appeal refused November 25, 1985.

<sup>25</sup> J. Tussman and J. tenBroek, *The Equal Protection of the Laws* (1949), 37 Calif. L. Rev. 341.

<sup>26</sup> The "separate but equal" doctrine was enunciated by the United States Supreme Court in *Plessi v. Ferguson*, 163 U.S. 637 (1896), and was not reversed until *Brown v. Board of Education*, *supra*, footnote 19, six years after publication of the Tussman and tenBroek article.

crimination based on invidious, inherently suspect grounds such as race or national origin.<sup>27</sup> Though not exclusively so, a central focus of United States equal protection jurisprudence is now on protection against oppressive treatment of discrete and insular minorities.<sup>28</sup>

An attempt to rationalize the abstruse United States equal protection caselaw of its day, the Tussman and tenBroek article did not advance the "similarly situated" maxim as a magic formula for deciding equality claims. Yet that is what it has become under the *Ertel* approach to section 15. Indeed, Tussman and tenBroek themselves recognize a number of substantial exceptions to this maxim—exceptions which are not built into the *Ertel* equality test.<sup>29</sup>

### *The Three-Step Test—(1) Equality*

Turning from section 15's purposes to the first of the three steps in the *Ertel* test, serious practical problems plague the requirement that parties show themselves to be similarly situated to persons differently treated by the impugned law. First, the court has not clarified who must be similarly situated to whom. Can a plaintiff succeed simply by showing that he or she is individually similarly situated to those benefitting under the law? Alternatively, must they show that they are members of an entire class of differently treated persons, *all* of whom are similarly situated to the benefitted class? Must the impugned law itself identify the two classes who are to be compared on this similarly situated test, or may parties themselves delineate two classes in their factum, and show how the law treats them each differently? The answers to these hitherto unanswered questions will affect profoundly the outcome in individual section 15 cases.

Second, the "similarly situated" test allows for challenges to *any* legislative distinctions, regardless of whether they involve the nine grounds enumerated in section 15 or other unenumerated grounds which are analogous to them (for example, marital status, sexual orientation, political belief). The court flatly rejected, without explanation, the suggestion that section 15 is an egalitarian provision aimed only at distinctions based on the enumerated grounds, or any additional grounds that are analogous to them, in the sense of involving personal characteristics and

<sup>27</sup> See, generally, *Brown v. Board of Education*, *ibid.*, (school segregation); *McLaughlin v. Florida*, 379 U.S. 184 (1964) (inter-racial cohabitation); *Loving v. Virginia*, 388 U.S. 1 (1967) (antimiscegenation); *Carter v. Jury Commission of Greene County*, 396 U.S. 320 (1970) (jury exclusion); *Hunter v. Erickson*, 393 U.S. 385 (1969) (housing discrimination); *White v. Regester*, 412 U.S. 755 (1973) (gerrymandering); *Palmore v. Sidoti*, 466 U.S. 429 (1984) (child custody determinations).

<sup>28</sup> *United States v. Carolene Product Co.*, 304 U.S. 144, 152 n.4 (1938). See generally J.H. Ely, *Democracy and Distrust, A Theory of Judicial Review* (1980), pp. 75-77, 151 *et seq.*; B.A. Ackerman, *Beyond Carolene Products* (1985), 98 Harv. L. Rev. 713.

<sup>29</sup> For example, Tussman and tenBroek, *loc. cit.*, footnote 25, at pp. 367 *et seq.*, recognize that "under-inclusive" legislative classifications are constitutionally justified, *i.e.*, those classifications which extend a benefit to some, but not all, potential beneficiaries.

attributes.<sup>30</sup> Under *Ertel*, the Charter's enumeration of nine prohibited grounds of discrimination must be completely random, and has no role to play in the section's construction.<sup>31</sup> Section 15's scope may be limited ultimately only by the reach of a litigant's imagination.

Third, when the "similarly situated" test is applied to claims involving the enumerated grounds, an unfair and unwarranted evidentiary burden is cast on the disadvantaged in our society who seek equality, such as blacks, women and the disabled. For example, a physically disabled plaintiff, alleging that he was denied a governmental benefit because of disability (for example, equal educational opportunities)<sup>32</sup> must prove that he is as capable of profiting from the desired educational opportunity as is the non-disabled child to whom he claims to be similarly situated. By virtue of *Ertel*'s first step, the onus is on the handicapped person to show that his disability does not impose a barrier to participation in the activity involved. The onus is *not* on government to prove that the disability impairs participation in the educational opportunity. There is thus a constitutional presumption of his incapacity. This runs contrary to the whole thrust of section 15, which was aimed at eradicating, not perpetuating, stereotypes about the abilities of the disabled. It also runs contrary to the long-established approach to the analogous equality rights guaranteed in human rights legislation. Under human rights statutes, the onus lies on a defendant, defending a distinction based on a prohibited characteristic (for example, sex or disability), to prove that the complainant's sex or disability renders him or her incapable of fulfilling the duties of the employment or other opportunity denied.<sup>33</sup>

The ultimate flaw with *Ertel*'s first step is that the "similarly situated" requirement is at bottom an empty concept.<sup>34</sup> This test's applica-

<sup>30</sup> See *R. v. Ertel*, *supra*, footnote 2, at p. 271, where the court cites with approval its own decision in *R. v. Century 21 Ramos Realty Inc. and Ramos*, *supra*, footnote 1, at pp. 758-759 (O.R.), 40 (O.A.C.), 374 (C.C.C.), rejecting without reasons the "analogy" or "akin to" test, that had been adopted by Ontario's Divisional Court in *Re Aluminium Co. of Canada Ltd. and The Queen in Right of Ontario* (1986), 55 O.R. (2d) 522, at p. 531.

<sup>31</sup> For a contrary view, see *Kask v. Shimizu*, *supra*, footnote 10; *Smith, Kline and French Laboratories Ltd. v. Attorney General of Canada* (1986), 34 D.L.R. (4th) 584 (Fed. C.A.).

<sup>32</sup> This example is discussed further in Lepofsky and Bickenbach, *Equality Rights and the Physically Handicapped* in Bayefsky and Eberts, *op. cit.*, footnote 23, p. 323.

<sup>33</sup> See: Human Rights Code, *supra*, footnote 13, ss. 16 and 23; *Ontario Human Rights Commission v. Borough of Etobicoke*, [1982] 1 S.C.R. 202, (1983), 132 D.L.R. (3d) 14.

<sup>34</sup> See, generally, P. Westen, *The Empty Idea of Equality* (1981-82), 95 Harv. L. Rev. 537; S.J. Burton, *Comment on "Empty Ideas": Logical Positivist Analysis of Equality and Rules* (1981-82), 91 Yale L.J. 1136; P. Westen, *On "Confusing Ideas": Reply* (1981-82), 91 Yale L.J. 1153; K. Greenawalt, *How Empty is the Idea of Equality* (1983), 83 Columbia L. Rev. 1167; P. Westen, *To Lure the Tarantula From its Hole: A Response* (1983), 83 Columbia L. Rev. 1186; R.E. Charney, R.L.: *Bootstrap Equality* (1986), 52 C.R. (3d) 232; see the criticism of this "empty concept" for section 15 in *Mahe v. The Queen*, unreported decision of the Alberta Court of Appeal, August 26, 1987, at pp. 50-51.



tion to any particular statute will not lead to any single, predictable and "correct" result. The court asks if any differences between the two "classes" are relevant to the impugned legislation's purpose. If they are irrelevant, the two groups are said to be "similarly situated". Otherwise, the groups are deemed "differently situated", and no section 15 violation is found. The outcome at this stage thus depends entirely upon the court's definition of the law's purpose.

For example, a law's purpose can be defined judicially so that it closely matches the terms of the statute's classification scheme. Impugned pension legislation may create two classes of war veterans, those who have resided in Canada for ten years and those who have not. The first group receives veterans' benefits. The second does not. If the court defines the law's purpose as the rewarding of those who fought in the allied forces and who have resided in Canada for ten years, then it will achieve a perfect matching. Those veterans who are Canadian citizens but have resided in Canada for only nine and a half years would be found to be situated differently *vis à vis* the law's purpose. The opposite result would occur, with the two groups being deemed "similarly situated" if, instead, the law's purpose was more broadly defined as simply the rewarding of allied veterans who fought overseas.<sup>35</sup>

Accordingly, the "similarly situated" test turns section 15 litigation into an arcane game, with parties tediously debating about the appropriate definition of classes and the proper description of the legislation's purpose. A court, wishing to uphold the law, can define the law's purpose tautologically to fit closely the classes delineated in it. A court wishing to strike down the law can define the law's purpose to justify a finding of similar situation among differently treated classes. Because the identification of a law's purpose is a highly discretionary, open-ended process, this entire exercise can become nothing more than a disguise for judicial review of the wisdom of legislation, pure and simple, albeit one which was apparently unintended by the *Ertel* court.

### *The Three-Step Test—(2) Disadvantage*

The second of the *Ertel* tests requires a court to examine whether the impugned dissimilar treatment amounts to an "inherent disadvantage". Yet *Ertel* offers no criteria for deciding whether someone is subjected to an inherent disadvantage. What may constitute an inherent disadvantage to one litigant may be trivial or unsubstantial to another.<sup>36</sup>

If a "reasonable person" yardstick is employed to ascertain what constitutes inherent disadvantage, the court must sever from its consideration unique personal traits amongst Charter litigants, thus stripping section 15 of much of its intended punch. After all, native women,

<sup>35</sup> See *Bregman v. Attorney General of Canada*, *supra*, footnote 1.

<sup>36</sup> In this regard, see the interesting approach adopted by MacGuigan J. in *Re Headley and Public Service Commission Appeal Board*, *supra*, footnote 10, at p. 576.

obscure religious minorities and the disabled rarely resemble the man on the Clapham Omnibus. If instead a subjective test is used, the "inherent disadvantage" test will be rendered meaningless, since parties ordinarily do not go to the extraordinary expense of presenting Charter claims unless they feel themselves to have been genuinely and seriously disadvantaged. *Ertel* sets out no criteria to indicate when dissimilar treatment amounts to an inherent disadvantage, perhaps because it is impossible to do so.

### *The Three-Step Test: (3) Discrimination*

The third stage of the *Ertel* test is perhaps the most problematic.<sup>37</sup> Under *Ertel*, even if the court finds inherent disadvantage, this will only constitute "discrimination" contrary to section 15 if the mythical "fair minded person", weighing the legislative purpose against its effects, would conclude that the means adopted are unreasonable or unfair. There are four major flaws with this definition of discrimination.

First, by importing into section 15 a consideration of the legislation's reasonableness and fairness, the court injects into the section matters which the Supreme Court of Canada had already reserved exclusively for the analytically distinct deliberation under section 1 of the Charter.<sup>38</sup> In *R. v. Oakes*,<sup>39</sup> the Supreme Court acknowledged the crucial distinction between those Charter provisions which specifically enumerate constitutional rights on the one hand, and section 1 which imposes limitations on those rights on the other. Section 1 is to be considered only *after* a Charter right is found to have been infringed.<sup>40</sup> This unique

<sup>37</sup> The court borrowed this "fair/reasonable requirement" from the British Columbia Court of Appeal's decision in *Re Andrews and the Law Society of British Columbia*, *supra*, footnote 6, but without taking into account the fact that the British Columbia Court has taken a very different analytical approach to s. 15. In *Andrews*, the court found as a first step that the impugned ground of discrimination (there, citizenship) was one which is analogous to the grounds of discrimination enumerated in s. 15. In *Ertel*, the Ontario Court of Appeal explicitly rejected this approach, yet adopted out of context the fair/reasonable requirement, which the *Andrews* court has developed in specific response to its view of the nature of discrimination based on citizenship.

In the post-*Ertel* decision of *McKinney et al. v. Board of Governors of the University of Guelph et al.* (unreported, December 10, 1987), another panel of the Ontario Court of Appeal suggested that the court had never fully adopted the *Andrews* reasonableness requirement as part of the section 15 test. The *McKinney* court held that under section 15, the court is now to determine if the distinctions created by the legislation are invidious, unfair or irrational but not whether they are unreasonable. The *McKinney* decision does not alter our critique of *Ertel's* reasonableness requirement. These same difficulties with the court's approach to section 15 apply whether the terms used for the third step are "unreasonable", "irrational", "unfair", "unjustified" or some combination thereof.

<sup>38</sup> See footnote 7, *supra*. For a judicial critique of this usurpation by section 15 of section 1's power to review legislation, see the decision of Hugessen J. in *Smith, Kline and French Laboratories v. Attorney-General of Canada*, *supra*, footnote 31.

<sup>39</sup> *Supra*, footnote 8.

<sup>40</sup> *Ibid.*, at pp. 135-135 (S.C.R.), 224-225 (D.L.R.), 345-346 (C.C.C.).

role for section 1 is mandated by its text, which specifically refers to "reasonable limits" and "demonstrable justifications", rendering it the appropriate section for determining whether legislation is unreasonable or unfair.

In redirecting the exceptional power to review judicially the reasonableness of legislation from section 1 to section 15 *Ertel* left Charter claimants twice short-changed. First, *Ertel* thrusts the overwhelming burden onto the Charter claimant to prove affirmatively that the impugned law is unreasonable, whereas under section 1 the onus lies on the government to prove the reverse. *Ertel*'s shifted onus calls on the Charter claimant to play the impossible role of the government's mind reader. Without access to resources easily available to the government lawyer (who is better placed to explain the state's justification for the impugned legislation) the Charter claimant's burden appears potentially insurmountable. *Ertel*'s section 15 reasonableness test is also substantially diluted, as compared to *Oakes*' section 1 reasonableness test. *Ertel* upholds a law as reasonable if its purpose simply outweighs its effects, no matter how unimportant those purposes may be. In contrast, according to the Supreme Court of Canada, a law's purpose is upheld under section 1 only if it is pressing and substantial or in furtherance of collective goals of fundamental importance. Moreover, according to *Oakes*, the means employed to achieve the fundamental purpose are reasonable only if they meet the court's strict proportionality criteria. They must be clearly connected to the important goals to be achieved, constitute the least restrictive method to attain those goals and must not trench overly upon a Charter right. The *Ertel* test for reasonableness lacks any such definiteness, and thus is completely unstructured.<sup>41</sup>

The second major flaw with *Ertel*'s definition of discrimination is that it again requires a consideration of whether the means employed in the impugned law are rationally related to their legislative ends. The problem that arose with the "similarly situated" requirement recurs here. A court's appraisal of a law's reasonableness under section 15 again wholly depends on how the court chooses to characterize the law's purpose. As shown above, it is always open to a court to define a statute's purpose so that it closely matches the effects of the statute's application.<sup>42</sup>

<sup>41</sup> We do not here propose that it would be at all appropriate for the court to read into s. 15 the entirety of the section 1 reasonableness test prescribed in *Oakes*. We simply seek to show how the result of *Ertel* is that the protection for Charter claimants, mandated by *Oakes*, has been eviscerated for all practical purposes by *Ertel*'s insertion of a completely open ended reasonableness or rationality requirement in s. 15, with the burden placed on the Charter claimant.

<sup>42</sup> The court in *Ertel* appeared to pay lip service to the dangers of "circular reasoning" at step 1, the "similarly situated" aspect, of their analysis (although they set down no principled directions for its avoidance). Yet, the court employed just such reasoning at step 3, the unfair/unreasonable test, as the example, *infra*, demonstrates.

Alternatively, the court can characterize the law's purpose in a way which leads inescapably to the conclusion that its means are not rationally related to its purpose.<sup>43</sup>

For example, the *Ertel* court decided that the purpose of the Criminal Code provision permitting preferred indictments is to ensure flexibility in the Attorney General's administration of criminal justice. The court could just as well have defined the purpose as simply the preventing of unconscionable delay in commencing trial proceedings. But had it done so, preferred indictments would have been struck down as an overbroad method for achieving that objective. After all, an indictment can be preferred months, or even years, after the fact. By proceeding as it did, the court ensured a perfect fit of the statute's means (unfettered prosecutorial discretion vested in the Attorney General) with its judicially derived purpose of "ensuring flexibility". By declaring a tautologically formulated purpose the court guaranteed a finding that the means employed were reasonable and fair.<sup>44</sup>

The third defect with *Ertel*'s definition of discrimination is that it is so amorphous and open-ended as to be incapable of objective application. Under it, section 15 cases will tend to degenerate into an evidentiary fight over the wisdom of the impugned law and nothing more.

This problem becomes manifest when the very terms of *Ertel*'s definition of discrimination are explored. How does a court ascertain whether a law's purpose outweighs its effect on the individual? How much does a particular purpose or effect weigh? In determining a law's reasonableness, the court requires that "due weight" be given to the right of the legislature to pass laws for the good of all. How much weight is "due" under this criterion? Does this mean that a court should defer readily to a legislature's judgment calls (leading to the likely upholding of impugned laws), or does it require careful judicial scrutiny of laws brought under attack (leading to their more frequent invalidation)? When is a democratically enacted law fair, unfair, reasonable or unreasonable? Ultimately, this "test" is not a yardstick for discrimination; it is a prescription for constitutional rulings based on judicial preference, and nothing more.

To do battle over whether a law is fair, reasonable, rational, invidious, unjustified or unduly prejudicial, parties will be driven to file evidentiary records and conduct cross-examinations focusing in the end on

---

<sup>43</sup> One of the most powerful discussions of such a contentless approach can be found in Note, Legislative Purpose, Rationality and Equal Protection (1972-73), 82 Yale L.J. 123.

<sup>44</sup> *Ibid.*, at pp. 132 *et seq.* Under the *Oakes* s. 1 reasonableness test a court is dissuaded from relying on a statute's own terms to define its purpose because it must first determine the "fundamental importance" or "pressing and substantial" nature of the provision. The *Ertel* approach provides no similar standards for labelling some purposes permissible; it only requires a rational relation between any purpose and the means employed to achieve it.

one central question—is this a good law or a bad law? Courts will be forced to wade through such materials in order to reach conclusions on the wisdom of the challenged enactment. Principled reasoning will be replaced by the personal predilection of judges, not because of any judicial impropriety, but because of the very nature of the task which *Ertel* imposes on them.

*Ertel*'s unbridled section 15 inquiry into legislative "reasonableness" differs markedly from the court's very limited role when it evaluates a law's reasonableness under section 1. If the deliberation reaches the section 1 stage, there has already been a finding that the government has wronged the individual, by interfering with his or her fundamental human rights. Under *Ertel*, however, the scope of the "reasonableness" deliberation is broadened substantially and supplants any consideration of whether fundamental human rights have been infringed.

*Ertel*'s potential for open-ended judicial review of legislation parallels the widely discredited *Lochner*<sup>45</sup> era in United States constitutional legal history. Between 1904 and 1937, American courts ruled on the constitutionality of socio-economic legislation largely by ascertaining whether judges felt the impugned measures were unreasonable, arbitrary, or capricious. Because of the serious risk of judicial caprice and regressive rulings during that period, the *Lochner* approach to constitutional adjudication has been reversed and thoroughly condemned in the United States.<sup>46</sup> Under *Ertel*, there is a serious risk of its recurrence in Canada under section 15.

The fourth flaw with *Ertel*'s definition of discrimination is that it bears no resemblance to the conceptions of discrimination which have evolved in Canadian jurisprudence to date. The court attempted to define separately the word "discrimination" in section 15, first by removing this single word from its textual and historical context, and then by fashioning its definition in the air. The forty years of Canadian experience interpreting a similar concept in provincial anti-discrimination statutes, was never considered.<sup>47</sup> In the result, under *Ertel*'s definition of discrimination, no inquiry need be conducted as to whether the treatment complained of relates to any question having to do with the particular traits of the person, the historical treatment meted out to members of his or her group, evidence of animus by government officials in the enforcement of the law, or even the disproportionately negative impact

<sup>45</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>46</sup> *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, at p. 391 (1937); *Williamson v. Lee Optical Co.*, 348 U.S. 483, at p. 488 (1955); and see A. Cox, *The Court and the Constitution* (1987), pp. 117-155; P. Murphy, *The Constitution in Crisis Times* (1972), pp. 70-110; T.R. Powell, *The Judiciality of Minimum Wage Legislation (1923-24)*, 37 *Harv. L. Rev.* 45; G.E. White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Twentieth century American Law* (1972), 58 *Va. L. Rev.* 999.

<sup>47</sup> See W. S. Tarnopolsky, *Discrimination and the Law* (1985), esp. Chapter 16.

(albeit unintentional) that the law has on this person or his or her group—all of which are traditional indicia of discrimination. What is considered, according to *Ertel*, is simply whether the impugned measure is fair and reasonable.

### Conclusion

In conclusion, under *Ertel*, the outcome in virtually any section 15 case is now wholly unpredictable. On the one hand, before one judge, the government may have a much easier task and need only have to show that there is at the very least a rational basis for the law, to prove that there is no violation of section 15. The court need never get to section 1 at all and the government may never be required to justify the law under the strict test set out for it in *Oakes*. On the other hand, before another judge, the government's task could be much more difficult under *Ertel*. In the absence of safeguards for its section 15 test, any court attempting to apply properly *Ertel* could strike down legislation it honestly believes to be unfair to someone or somehow unreasonable, no matter how much justificatory evidence is led by the government. The *Ertel* court has thus laid the groundwork for judicial declarations of open season on unpopular legislation, or for virtually blanket judicial deference to Legislatures, all under the rubric of one section 15 test—a test which had seemed at the outset to be clear, workable, and doctrinally defensible.

\* \* \*

DROIT CONSTITUTIONNEL—ARTICLE 16 DE LA CHARTE DES DROITS ET LIBERTÉS  
—ÉGALITÉ DE STATUT DES LANGUES OFFICIELLES—UNE INTENTION OU UNE  
OBLIGATION?: *Société des Acadiens c. Association of Parents*.

Luc Huppé\*

### Introduction

La reconnaissance officielle de l'égalité de statut des langues française et anglaise au Canada procède d'un mouvement relativement récent de l'histoire nationale. L'article 133 de la Loi constitutionnelle de 1867<sup>1</sup> consacrait bien cette égalité dans les procédures parlementaires, judiciaire et législative aux niveaux fédéral et québécois, mais la garantie avait une étendue restreinte. La double survenance d'une part du dépôt du rapport de la Commission Laurendeau-Dunton recommandant, entre autres, la proclamation officielle de cette égalité de statut<sup>2</sup> et l'adoption

\*Luc Huppé, membre du Barreau du Québec, Montréal, Québec.

<sup>1</sup> 30-31 Vict., c. 3 (R.U.); Canada: S.R.C. 1970, appendice no 5.

<sup>2</sup> Rapport de la Commission royale d'enquête sur le bilinguisme et le biculturalisme, vol. 1, Imprimeur de la Reine, Ottawa, 1967, pp. 93-96.

d'une loi sur les langues officielles amorçant un processus d'égalisation dans la structure fédérale,<sup>3</sup> et d'autre part, de l'élection d'un premier ministre canadien professant cette même foi égalitaire<sup>4</sup> allait cependant enclencher un mécanisme qui devait aboutir, en 1969, à cette consécration dualiste de la société canadienne par la Loi sur les langues officielles.<sup>5</sup>

Cette loi assurait l'implantation, à l'intérieur de l'administration fédérale, du français et de l'anglais comme langues de fonctionnement, édictait des règles d'interprétation établissant l'autorité des versions d'un même texte législatif, anticipait la création de districts bilingues fédéraux et introduisait la fonction de commissaire aux langues officielles. Elle débute, à l'article 2, sur une déclaration d'égalité de statut des langues:

2. L'anglais et le français sont les langues officielles du Canada pour tout ce qui relève du Parlement et du gouvernement du Canada; elles ont un statut, des droits et des privilèges égaux quant à leur emploi dans toutes les institutions du Parlement et du gouvernement du Canada.

La Loi constitutionnelle de 1982<sup>6</sup> allait enchâsser une garantie identique dans la Constitution du pays. L'article 16 retient ce statut officiel des langues:

16.(1) Le français et l'anglais sont les langues officielles du Canada; ils ont un statut et des droits et privilèges égaux quant à leur usage dans les institutions du Parlement et du gouvernement du Canada. . .

(3) La présente charte ne limite pas le pouvoir du Parlement et des législatures de favoriser la progression vers l'égalité de statut ou d'usage du français et de l'anglais.

La jurisprudence relative à la Loi sur les langues officielles montrait avant la réforme constitutionnelle des hésitations quant à la portée de l'égalité linguistique qui y est proclamée. La Cour supérieure du Québec affirmait dans *Joyal c. Air Canada*<sup>7</sup> que l'article 2 de cette loi intègre bien plus qu'une simple déclaration de principes et forme la base d'un recours civil visant à en faire respecter l'esprit dans les institutions du gouvernement du Canada, permettant d'annuler la réglementation incompatible et d'enjoindre les autorités administratives à poser les actes nécessaires à l'avènement de cette égalité de statut. Dans la cause de l'*Association des gens de l'air du Québec c. Otto Lang*,<sup>8</sup> la Cour fédérale adoptait une interprétation différente et concluait que l'article 2 ne suffisait pas seul à rendre invalide une ordonnance incompatible adoptée en

<sup>3</sup> *Ibid.*, pp. 144-148.

<sup>4</sup> P.E. Trudeau, *Le fédéralisme et la société canadienne française*, Collection Constantes, ed. HMH, Montréal, pp. 56-58.

<sup>5</sup> S.C. 1968-69, c. 54, S.R.C. 1970, c. 0-2: la Cour suprême a reconnu la validité de cette loi dans *Jones c. Procureur Général du Nouveau-Brunswick*, [1975] 2 R.C.S. 182.

<sup>6</sup> Voir Loi de 1982 sur le Canada, 1982, c.11 (R.U.); Canada: S.C., 1980-81-82-83, p. ii.

<sup>7</sup> [1976] C.S. 1211.

<sup>8</sup> [1977] 2 C.F. 22 (Div. p. inst.).

vertu d'une autre loi fédérale. La Cour d'appel fédérale confirmait ce jugement.<sup>9</sup> Par la suite, la Cour d'appel du Québec adoptait les vues de la Cour d'appel fédérale et renversait le jugement de première instance dans la cause *Joyal*.<sup>10</sup>

L'égalité de statut des langues officielles prend alors un aspect de principe d'inspiration et d'interprétation plutôt que d'obligation véritable; on lui donne une portée déclaratoire plutôt qu'exécutoire.

L'enchâssement d'une disposition identique dans la Charte canadienne des droits et libertés pouvait laisser espérer que cette jurisprudence serait mise de côté, et qu'on attacherait au statut constitutionnel du principe des conséquences plus impérieuses.

Malheureusement, la première interprétation que la Cour suprême du Canada a eu à donner de l'article 16 de la Charte confirme que si l'égalité de statut des langues officielles a gagné quelque chose lors du rapatriement, c'est bien la certitude de ne devoir demeurer désormais que cet absolu qu'on enchâsse par idéalisme mais qui s'évanouit lorsqu'on légifère. Cependant, cet arrêt *Société des Acadiens c. Association of Parents*<sup>11</sup> ne répond pas aux attentes que laissait entrevoir la constitutionnalisation de l'égalité des langues officielles, et il faut voir dans quelle mesure l'on peut être en accord avec ce jugement.

#### *La décision de la Cour suprême dans Société des Acadiens*

Dans cette décision, la Cour suprême avait, entre autres, à décider si l'article 19(2) de la Charte, qui donne à chacun le droit d'employer l'anglais ou le français dans toutes les affaires dont sont saisis les tribunaux et dans tous les actes de procédure qui en découlent, donne aussi le droit à cette personne d'être comprise par le tribunal devant lequel elle s'exprime. La cour a décidé que l'article 19 n'incluait pas le droit d'être compris par le tribunal devant lequel on s'exprimait, et elle en a profité pour faire quelques remarques concernant l'égalité du statut des langues officielles établie par l'article 16 de la Charte.

Au nom de la majorité, le juge Beetz exprime l'opinion que les droits linguistiques enchâssés dans la Charte sont fondés sur un compromis politique<sup>12</sup> et que les tribunaux doivent hésiter à servir d'instrument de changement dans ce domaine.<sup>13</sup> Le juge Beetz ajoute que l'article 16 contient un principe d'avancement ou de progression vers l'égalité du statut ou d'usage des langues officielles:<sup>14</sup>

Je crois qu'il est exact d'affirmer que l'art. 16 de la Charte contient un principe d'avancement ou de progression vers l'égalité de statut ou d'usage des deux lan-

<sup>9</sup> *Association des gens de l'air du Québec c. Otto Lang*, [1978] 2 C.F. 371 (C.A.).

<sup>10</sup> *Air Canada c. Joyal*, [1982] C.A. 39.

<sup>11</sup> [1986] 1 R.C.S. 549.

<sup>12</sup> *Ibid.*, à la p. 578.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*, à la p. 579.



gues officielles. Je considère toutefois qu'il est très significatif que ce principe de progression soit lié au processus législatif mentionné au par. 16(3) où se trouve consacrée la règle énoncée dans l'arrêt *Jones c. Procureur général du Nouveau-Brunswick*, 1975 2 R.C.S. 182. Comme le processus législatif est, à la différence du processus judiciaire, un processus politique, il se prête particulièrement bien à l'avancement des droits fondés sur un compromis politique.

Il ajoute:<sup>15</sup>

Si toutefois on disait aux provinces que le régime créé par les art. 16 à 22 de la Charte est dynamique et progressif en soi, indépendamment de toute législation et de toute modification de la constitution, et qu'il appartient surtout aux tribunaux de régler le rythme d'évolution de ce régime, elles se trouveraient donc dans l'impossibilité de savoir avec une exactitude relative ce à quoi elles adhèrent. Pareille situation les rendrait assurément plus réticentes à adhérer et irait à l'encontre du principe de progression énoncé au par. 16(3).

Selon moi, l'art. 16 de la Charte confirme la règle selon laquelle les tribunaux doivent faire preuve de retenue dans leur interprétation des dispositions relatives aux droits linguistiques.

Après avoir révisé la jurisprudence rendue en vertu de l'article 2 de la Loi sur les langues officielles, le juge Wilson déclare pour sa part:<sup>16</sup>

A mon avis, la difficulté qu'on éprouve à caractériser l'art. 16 de la Charte découle en grande partie des problèmes d'interprétation inhérents au par. 16(1). J'estime que la disposition introductive portant que "Le français et l'anglais sont les langues officielles du Canada" est déclaratoire et que le reste du paragraphe énonce les conséquences principales de cette déclaration dans le contexte fédéral, savoir que les deux langues ont un statut égal et sont assorties des mêmes droits et privilèges quant à leur usage dans les institutions du Parlement et du gouvernement du Canada. Toutefois, il ressort clairement du par. 16(3) que ces conséquences représentent le but visé plutôt que la réalité actuelle; il s'agit de quelque chose dont le Parlement et les législatures doivent "favoriser la progression"... J'estime toutefois qu'aucun droit à un redressement ne découle inévitablement du fait que le but n'ait pas encore été atteint à un moment donné. J'abonde dans le sens de ceux qui voient dans l'article 16 un principe de croissance ou de développement, une progression vers un objectif ultime. La question, selon moi, sera donc toujours de savoir où nous en sommes présentement dans notre acheminement vers le bilinguisme et si la conduite attaquée peut être considérée comme appropriée à ce stade de l'évolution. Dans l'affirmative, même si la conduite en question ne reflète pas la pleine égalité de statut et l'égalité quant aux droits à l'usage des langues officielles, elle ne sera pas contraire à l'esprit de l'art. 16.

La Cour suprême a donc donné à l'article 16 de la Charte une portée très voisine de celle que les tribunaux avaient donné à l'article 2 de la Loi sur les langues officielles, à savoir que l'égalité de statut des langues officielles qui y est proclamée n'a pas, en soi, une valeur juridique indépendante, et qu'on doit plutôt trouver ses véritables conséquences dans d'autres dispositions législatives. En somme, la cour a conclu que l'égalité linguistique prévue à l'article 16 reflétait l'expression d'une

<sup>15</sup> *Ibid.*, aux pp. 579-580.

<sup>16</sup> *Ibid.*, aux pp. 618-619.

intention plutôt qu'une obligation véritable pesant sur les législateurs et les gouvernements concernés.

À la lumière de ce jugement, il paraîtrait extrêmement difficile de fonder un recours sur l'article 16 en prétendant que l'usage ou l'emploi des langues officielles au Canada ne s'effectue pas sur un pied d'égalité. Cependant, cette conclusion mérite d'être critiquée, car le rapprochement entre l'article 16 de la Charte et l'article 2 de la Loi sur les langues officielles n'est pas aussi évident qu'on pourrait le penser.

### *Le statut de la Charte*

Avant la proclamation de la Charte, l'égalité des langues officielles était assurée par la Loi sur les langues officielles, une simple loi fédérale. Le juge Deschênes, dans la cause *Joyal*,<sup>17</sup> reconnaissait cependant déjà à cette loi un aspect quasi constitutionnel. Inversement, le juge Marceau dans l'affaire de l'*Association des Gens de l'Air du Québec*<sup>18</sup> appliquait les règles générales d'interprétation et, notant le caractère général de cette loi, lui préférait les dispositions incompatibles d'une loi spéciale, même antérieure. La Cour d'appel du Québec, dans l'affaire *Joyal*<sup>19</sup> entérinait ces propos. Cette position empêchait la réalisation effective de l'égalité des langues, et réduisait d'autant l'autorité de l'article 2, puisque toute loi spéciale pouvait en écarter l'application dans le secteur qu'elle réglemente. L'article 16 de la Charte aurait donc dû régler la question et bénéficier d'une interprétation différente puisqu'il édicte une norme constitutionnelle, et non simplement législative.

La suprématie de la Constitution est indubitable. D'un point de vue légal, celle de la Charte se fonde sur l'article 52 de la Loi constitutionnelle de 1982, qui remplace à cet égard la sanction d'invalidité élaborée sous le Colonial Laws Validity Act.<sup>20</sup>

Ainsi, l'article 52 pose les bornes de la suprématie de l'article 16: il lui donne le caractère de loi suprême du pays, ce qui en soi suffirait à établir sa prépondérance sur les autres lois, et rend inopérantes les dispositions incompatibles de toute autre règle de droit. La maxime *generalia specialibus derogant*, invoquée par la Cour d'appel dans l'affaire *Joyal*,<sup>21</sup> ne peut donc plus recevoir application à l'égard d'une Constitution considérée comme représentation suprême de la nation, et intégrant les valeurs qu'elle retient comme fondamentales et inaltérables.

Ayant établi la supériorité du texte contenant la déclaration d'égalité des langues, il reste à se demander si une constitution peut édicter,

<sup>17</sup> *Supra*, note 7, à la p. 1222.

<sup>18</sup> *Supra*, note 8, à la p. 37.

<sup>19</sup> *Supra*, note 10, à la p. 52.

<sup>20</sup> 28 & 29 Vict., c. 63 (R.U.). Voir *Operation Dismantle c. La Reine*, [1985] 1 R.C.S. 441, à la p. 482; *Renvoi sur les droits linguistiques au Manitoba*, [1985] 1 R.C.S. 721, à la p. 746.

<sup>21</sup> *Supra*, note 10, à la p. 52.

comme le déclare la Cour suprême, un "principe de progression et d'avancement", autrement dit, si une norme constitutionnelle peut n'avoir l'effet que d'une déclaration de principe, toute suprême qu'elle soit. Il semble que non.

Il est intéressant à cet égard de faire un rapprochement entre ce que la Cour suprême du Canada a dit dans *Société des Acadiens* et ce qu'elle avait dit dans le *Renvoi des droits linguistiques au Manitoba*,<sup>22</sup> où la Cour avait déclaré:

Nulle jurisprudence canadienne ne permet d'appliquer à des dispositions constitutionnelles la théorie de la distinction entre ce qui est impératif ou directif. Nous sommes d'avis que cette théorie ne doit pas être appliquée lorsque la constitutionnalité d'une loi est en jeu. . .

Cependant, ce qui est plus important que l'absence de jurisprudence justifiant l'application de la distinction entre ce qui est impératif ou directif aux dispositions constitutionnelles, c'est le tort qui serait causé à la suprématie de la Constitution canadienne si un principe aussi vague était utilisé comme expédient pour l'interpréter. Ce serait une entorse grave à la Constitution que de conclure qu'une disposition en apparence impérative doit être qualifiée de directive pour le motif qu'une conclusion en sens contraire entraînerait des inconvénients ou même le chaos. Lorsqu'il n'y a aucune indication textuelle qu'une disposition constitutionnelle est directive et lorsqu'il ressort clairement de ses termes qu'elle est impérative, il n'y a pas lieu d'interpréter cette disposition comme étant directive.

Il est intéressant de rappeler que la Cour dans le *Renvoi sur les droits linguistiques au Manitoba* avait prononcé ces paroles à l'égard de droits linguistiques semblables à ceux protégés par l'article 133 de la Loi constitutionnelle de 1867, dispositions qui ont été reproduites dans les articles 17 et suivants de la Charte canadienne des droits et libertés.

Ainsi, la comparaison de ces deux jugements montre que la Cour établit sans justification une distinction entre les divers droits linguistiques protégés par la Charte, considérant certains comme impératifs, au risque même de créer une situation de chaos comme celle qui aurait pu prévaloir au Manitoba, et par ailleurs interprétant d'autres droits linguistiques comme contenant simplement l'expression d'une intention, sans leur donner d'autre force exécutoire que celle que les législateurs voudront bien leur reconnaître. À cet égard, les termes utilisés à l'article 16 semblent tout aussi impératifs que ceux utilisés à l'article 133 et reproduits aux articles 17 à 20 de la Charte.

Le rôle d'une constitution d'organiser l'État, de le rendre conforme aux aspirations de ses bâtisseurs, de poser des limites à l'étendue de son activité, s'avère inconciliable avec l'énoncé de simples vœux, de purs souhaits. Si par un texte solennel on entend régir le fonctionnement de l'État, chacune des dispositions qui ne limite pas elle-même sa force exécutoire doit s'interpréter comme posant des exigences impératives, comme définissant la souveraineté réelle des institutions, comme établis-

<sup>22</sup> *Supra*, note 20, aux pp. 741, 742-743.

sant les normes obligatoires de l'exercice de l'autorité conférée par ce texte. Lorsqu'une charte des droits établit des limites aux activités législatives ou gouvernementales concernant le peuple, elle ne peut simplement véhiculer des attentes, mais doit alors nécessairement imposer des obligations.

### *Le contexte de la Charte*

Dans l'interprétation d'une loi il est permis de prendre en considération toute situation extérieure ou historique nécessaire à la compréhension du sujet traité par la loi.<sup>23</sup> Ainsi, le recours aux rapports de commissions gouvernementales demeure possible afin d'établir les faits et situations formant le contexte de la loi.<sup>24</sup> La Loi sur les langues officielles faisait suite au rapport Laurendeau-Dunton, qui révélait l'inégalité de statut des langues dans la réalité canadienne et, conformément à son mandat,<sup>25</sup> proposait des mesures aptes à rééquilibrer le statut respectif du français et de l'anglais.<sup>26</sup> La Loi sur les langues officielles représentait l'une de ces suggestions, et entendait engager le processus devant mener à l'égalisation dans les faits du statut des langues: elle visait à modifier une situation existante d'inégalité pour en arriver à une situation idéale d'égalité. La plupart de ses dispositions s'expliquent ainsi, et leur modération provient de ce que les obligations qu'elles édictent ne peuvent recevoir qu'une application progressive,<sup>27</sup> ne peuvent atteindre leur parfait accomplissement qu'au terme d'une période indéfinie. Lorsque l'article 2 proclame l'égalité de statut des langues dans les institutions fédérales, il ne pouvait déclarer qu'un but et non une situation de fait, puisque la réalité ne lui était pas conforme:

Le Parlement ne prétendait pas introduire, en pratique et immédiatement, un bilinguisme intégral, évidemment parce que les faits à partir desquels il légiférerait ne le permettaient pas. Le statut est déclaré, le but irrévocable est défini, l'obligation de prendre les moyens pour accéder au but est imposée, mais le rythme d'accession à ce but. . . est assuré par les possibilités.<sup>28</sup>

Donc, on peut tirer du contexte entourant l'adoption de cette loi la conclusion que son objectif se définissait comme étant de remédier à une situation de fait inégalitaire par l'imposition d'obligations spécifiques, et l'établissement de structures de contrôle.

Le contexte de la Loi constitutionnelle de 1982, qu'on est aussi autorisé à prendre en considération pour l'interpréter,<sup>29</sup> montre un but

<sup>23</sup> P.B. Maxwell, *The Interpretation of Statutes*, 12<sup>ème</sup> ed., Sweet and Maxwell, Londres, 1969, pp. 47-48.

<sup>24</sup> *Ibid.*, p. 54.

<sup>25</sup> *Op. cit.*, note 2, pp. 179-180.

<sup>26</sup> *Ibid.*, pp. 73-74, 93-94, 144-148.

<sup>27</sup> Par exemple, art. 5(2), 5(4), 6, 7, 9(2), 11(2), 39.

<sup>28</sup> *Association des Gens de l'Air du Québec c. Lang*, *supra.*, note 8, à la p. 35.

<sup>29</sup> *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, à la p. 155; *La Reine c. Big M Drug Mart*, [1985] 1 R.C.S. 295, à la p. 344; *Renvoi sur le Motor Vehicle Act*, [1985] 2 R.C.S. 486, aux pp. 506-507.

différent. Elle ne suit pas la publication d'un rapport percutant sur la situation linguistique au Canada, mais survient plutôt au terme d'une longue période de discussions sur la révision constitutionnelle et de tentatives infructueuses de rapatriement. Elle provient du désir de "compléter une constitution incomplète et inachevée"<sup>30</sup> plutôt que de pallier à une inégalité ou une injustice. On aurait tort de ne voir dans la Charte qu'une procédure réparatrice visant à contrecarrer un déni actuel des droits qu'elle garantit. La Loi constitutionnelle de 1982 procède plutôt à un réaménagement des institutions canadiennes. Elle établit une formule d'amendement de la Constitution, et énonce des limites supplémentaires à l'activité législative ainsi que des bornes à l'activité gouvernementale: les législateurs doivent en plus du partage des conséquences respecter certains droits et libertés énumérés. Le fait que la Charte ne s'applique qu'au Parlement et au gouvernement<sup>31</sup> ajoute à cette certitude qu'elle entendait établir des droits et des principes institutionnels plutôt que de corriger une situation par des mesures réparatrices dont l'une d'elles énoncerait l'objectif visé (comme le rôle que l'on fait jouer à l'article 2 de la Loi sur les langues officielles). L'article 16 apparaît ainsi non comme l'objectif d'une série de mesures plus concrètes visant son implantation dans la réalité, mais comme partie d'un réaménagement structurel plus global.

#### *Le contexte de l'article 16*

La signification d'un article dérive de l'ensemble de la loi où il se trouve, plutôt que de l'interprétation étroite de l'article seul.<sup>32</sup> La Loi sur les langues officielles doit se lire dans son ensemble<sup>33</sup> et la signification de son article 2 doit être précisée par l'intention découlant du reste de la loi. Ainsi, cet article ne constituerait qu'une déclaration de statut qui demeurerait introductive et les conséquences à en tirer résideraient dans les dispositions qui suivent.<sup>34</sup> On s'aperçoit, par la diversité des dispositions de la Loi sur les langues officielles qu'il est effectivement raisonnablement possible de lire la loi comme formulant à l'article 2 un principe qu'elle explicite et met en oeuvre dans le reste de ses dispositions.

L'article 16 se situe dans la Charte de façon différente au début de deux sections consacrées aux droits linguistiques. L'article 17 de la Charte permet l'emploi de l'une ou l'autre langue dans les travaux parlementaires. L'article 18 donne la même valeur aux deux versions des textes du Parlement et oblige leur publication et impression dans les deux langues. L'article 19 accorde le droit d'employer le français ou l'anglais comme langue judiciaire. L'article 20 permet aux citoyens de communi-

<sup>30</sup> Renvoi sur le rapatriement de la Constitution, [1981] 1 R.C.S. 753, à la p. 799.

<sup>31</sup> *Syndicat des détaillants, grossistes et magasins à rayons, section locale 580 c. Dolphin Delivery Ltd.*, [1986] 2 R.C.S. 573.

<sup>32</sup> Maxwell, *op. cit.*, note 23, p. 62.

<sup>33</sup> *Joyal c. Air Canada*, *supra*, note 10, aux pp. 42, 49.

<sup>34</sup> *Association des Gens de l'Air du Québec c. Lang*, *supra*, note 8, à la p. 34.

quer avec le gouvernement fédéral ou d'en recevoir des services dans la langue officielle de leur choix. Les articles 21 et 22 qui ne contiennent pas de dispositions substantives préservent les droits existants de ces deux langues et de toutes les autres. Enfin, l'article 23 se situe sous un titre différent et traite du droit à l'éducation dans la langue de la minorité.

Les articles 17 à 19 ne font que reprendre, en les précisant et en les élargissant quelque peu, les dispositions de l'article 133 de la Loi constitutionnelle de 1867 (voir particulièrement le libellé de la version anglaise<sup>35</sup>), sans doute dans le but de les faire bénéficier des recours prévus aux articles 24 et 52 de la Loi constitutionnelle de 1982. Si ces dispositions reprennent le contenu de l'article 133, elles ne servent donc pas à expliciter, à mettre en oeuvre le principe de l'article 16: elles ne sont utiles qu'à l'intégration d'anciennes obligations dans un nouvel environnement juridique, celui de la Charte. La répétition des normes déjà existantes de l'article 133 ne peut évidemment servir à expliciter un article nouveau et postérieur à l'article 133. Si l'effet de l'article 16 se borne à servir d'écho à ce que proclame l'article 133, il devient inutile, puisque cette dernière disposition jouissait déjà du statut protégé de norme constitutionnelle. Le législateur, et à plus forte raison le constituant, ne parle pas pour rien dire: si l'article devient inutile selon cette interprétation, elle ne doit pas être retenue.

Reste l'article 20 qui ne peut certes pas, seul, contenir toutes ces mesures concrètes qui devraient expliciter l'article 16, dans l'hypothèse retenue par la Cour suprême<sup>36</sup> où l'article 16 n'édicte qu'une introduction en la matière.

Cette hypothèse à l'effet que l'article 16 a le caractère d'une introduction des articles qui le suivent, plutôt que le caractère d'une disposition substantive, ne résiste pas non plus à l'analyse.

L'article 16(1) couvre un éventail d'activités beaucoup plus larges que celles qu'énumèrent les articles subséquents, et il incorpore une règle suffisamment précise et définie en elle-même pour valoir comme prohibition ou obligation distincte et autonome. Ainsi, les institutions parlementaires comprennent bien plus que les débats et travaux du Parlement (article 17) ou que les lois, archives, comptes rendus et procès-verbaux (article 18): elles se composent de multiples services rendus aux députés ou au public en général, éléments d'un corps administratif comportant un certain nombre d'employés. Les députés ne participent pas qu'aux débats et travaux du Parlement, ils poursuivent d'autres activités où l'égalité des langues peut être protégée par l'article 16, soit à l'égard des documents qui leur sont communiqués ou des services qui leur sont rendus (étant membres de l'institution, ils ne font probablement pas par-

<sup>35</sup> *Société des Acadiens c. Association of Parents*, *supra*, note 11, aux pp. 573, 623.

<sup>36</sup> *Ibid.*, à la p. 578.

tie du public au sens de l'article 20). Les lois et procès-verbaux ne font pas seulement l'objet d'impression et de publication, mais aussi de distribution, de conservation, où l'égalité des langues doit être préservée. Les employés des institutions du Parlement travaillent nécessairement dans une langue quelconque: aucune discrimination ne doit alors exister entre les langues officielles. Dans la mesure où l'on peut caractériser les tribunaux comme institutions gouvernementales,<sup>37</sup> la langue y tient une place plus large que celle utilisée devant le tribunal (article 19): elle s'étend à la langue des magistrats, de leurs jugements, à la traduction des décisions, à l'expression des employés entourant ce tribunal. L'article 20 s'applique à toute l'activité gouvernementale, mais seulement à l'égard des relations de l'administration avec l'extérieur, sans s'attacher au déroulement de ses activités internes, où la langue tient une place aussi importante et dont l'exemple le plus concret se matérialise dans la langue de travail des employés de l'État, mais aussi dans les relations avec les supérieurs, dans les services offerts non au public mais aux employés mêmes. L'égalité de statut des langues que nous laisse entrevoir l'article 16, le bilinguisme qu'il proclame possède une substance beaucoup plus riche que les simples exemples qu'en offrent les articles 17 à 20. Cet article a vraisemblablement le même rôle à l'égard des droits linguistiques que celui de l'article 7 à l'égard des garanties juridiques énumérées aux articles 8 à 14: un principe général dont les articles suivants viennent préciser certaines dimensions, mais contenant en lui-même des obligations substantives indépendantes des exemples qu'on en donne.<sup>38</sup>

### *Le rôle de l'article 16(3) comme moteur des obligations de 16(1)*

L'article 16(3) prévoit que la Charte ne limite pas le pouvoir du Parlement et des législatures de favoriser la progression vers l'égalité de statut ou d'usage du français et de l'anglais. La Cour, dans *Société des Acadiens*, en tire la conclusion que l'égalité de statut proclamée par l'article 16(1) doit être réglée et mise en oeuvre par les mesures permises par l'article 16(3). Or, il s'agit là d'un détournement inexplicable de la véritable utilité de l'article 16(3), qu'il faut évidemment rapprocher de l'article 15(2).

On retrouve la même relation à l'article 15. Cette disposition proclame d'abord l'égalité devant la loi (article 15(1)) et ajoute que cette déclaration n'a pas pour effet d'interdire les programmes, même discriminatoires et brisant cette égalité, destinés à améliorer la condition d'in-

<sup>37</sup> *Société des Acadiens c. Association of Parents*, *ibid.*, aux pp. 565-566. Voir cependant *La Reine c. Beauregard*, [1986] 2 R.C.S. 56, à la p. 83, où la cour déclare que les juges des cours supérieures ne sont en aucune façon des employés du gouvernement fédéral, ainsi que *Dolphin Delivery Ltd.*, *supra*, note 31, à la p. 597, ss. où, aux fins de l'article 32, la cour déclare que les tribunaux ne font pas partie du gouvernement.

<sup>38</sup> Voir, entre autres, *Renvoi sur le Motor Vehicle Act*, *supra*, note 29, aux pp. 502-503; *La Reine c. Oakes*, [1986] 1 R.C.S. 103, à la p. 119.

dividus ou de groupes défavorisés (article 15(2)): le second paragraphe apparaît ainsi comme une exception au premier. On constate à l'article 16 la même structure de raisonnement: les paragraphes (1) (au niveau fédéral) et (2) (pour le Nouveau-Brunswick) proclament l'égalité de statut des langues et l'égalité quant à leur usage, prohibant implicitement la discrimination entre elles; le paragraphe (3) édicte cependant que la Charte ne limite pas le pouvoir de favoriser la progression vers l'égalité, le fait de favoriser une langue constituant nécessairement une inégalité à l'égard de l'autre langue officielle. Il faut donc comprendre que les paragraphes (1) et (2) limiteraient autrement ce pouvoir si le paragraphe (3) n'existait pas.

Le but de l'article 16(3) n'est donc pas d'indiquer par quel moyen l'article 16(1) sera mis en oeuvre, mais bien au contraire d'indiquer que lorsque le Parlement ou le gouvernement voudront pratiquer ce qu'on a appelé de la "discrimination positive", leur action sera valide malgré le fait qu'une langue reçoive un statut plus favorable que celui réservé à l'autre.

De plus, le rapprochement du mécanisme de l'article 16(3) avec l'arrêt *Jones c. Procureur Général du Nouveau-Brunswick*<sup>39</sup> est aussi curieux. L'arrêt *Jones* a décidé que les droits linguistiques contenus dans la Constitution étaient un minimum auquel les législateurs concernés étaient libres d'ajouter. Or, l'article 16(3) ne permet pas d'ajouter à un droit constitutionnel, il permet plutôt de forcer la concrétisation de ce droit. Et même si l'on retient le rôle que la Cour suprême veut faire jouer à l'article 16(3), cet article ne sert pas à ajouter à un droit constitutionnel, il sert à le définir.<sup>40</sup>

### *La sanction de l'article 16*

En définitive, le caractère impératif ou non d'une norme légale provient en grande partie, plus que de son contenu intrinsèque, de la sanction qui s'attache à une contravention aux obligations qu'elle édicte. L'existence d'un recours devient ainsi une condition essentielle à la force exécutoire d'une disposition. La Loi sur les langues officielles prévoyait un recours explicite en cas de non-respect de l'article 2: l'article 26 habilitait toute personne à déposer une plainte auprès du Commissaire aux langues officielles lorsque le statut d'une langue officielle n'était pas respecté. L'article 2 proclamant l'égalité de statut des langues et, selon une interprétation minimale, dévoilant l'esprit de la loi, trouvait un exutoire dans cette procédure, qui menait à la formulation de recommandations (article 31) et, finalement, au dépôt d'un rapport au Parlement (article 33). L'existence d'une sanction autre que celle prévue par la loi posait des problèmes à la jurisprudence. La Cour d'appel fédérale

<sup>39</sup> *Supra*, note 5.

<sup>40</sup> Il est intéressant de constater que la Cour suprême avait déjà établi qu'il ne revient pas aux législateurs de définir les droits et libertés contenus dans la Charte, dans *La Reine c. Big M Drug Mart Ltd.*, *supra*, note 29, à la p. 349.



dans la cause *Association des Gens de l'Air du Québec*<sup>41</sup> concluait que la mise en application pratique de l'égalité de statut relevait de la seule compétence du Commissaire aux langues officielles. La Cour supérieure dans l'affaire *Joyal*<sup>42</sup> appliquait plutôt les règles générales du droit et faisait découler un recours civil valable du texte de l'article 2 de la loi.

À l'opposé, la Loi constitutionnelle de 1982 prévoit deux sanctions expresses à la violation de l'une de ses dispositions: l'une qui rend inopérantes les dispositions incompatibles de toute règle de droit (article 52), l'autre qui prévoit un recours en réparation pour la violation des droits garantis par la Charte (article 24). Il semble clair que le constituant n'a pas voulu faire sanctionner la violation de l'égalité de statut des langues par la voie d'un processus politique, comme l'est la plainte auprès du Commissaire ou l'adoption de mesures législatives ou gouvernementales remédiatrices, mais par voie judiciaire. C'est pourquoi on ne peut s'expliquer la position de la Cour suprême dans *Société des Acadiens* à l'effet qu'il revient à chaque législateur concerné, par la voie d'un processus politique, de mettre en oeuvre l'égalité de statut des langues officielles et non aux tribunaux d'établir leurs obligations constitutionnelles.

Comment peut-on alors rattacher des recours de nature fondamentalement légale avec le contenu présumément de nature purement politique d'un article auquel s'appliquent ces sanctions? Le caractère intrinsèquement légal de la sanction n'implique-t-il pas nécessairement le caractèrement foncièrement légal des garanties protégées par cette sanction? Si l'obligation est politique, que signifie alors une sanction légale comme celle des articles 24 et 52 de la Charte, et si ces sanctions s'appliquent, le droit conféré à l'article 16 ne peut avoir un caractère purement politique.

### Conclusion

L'article 16(1) est impératif. Cette conclusion ressort de la comparaison avec la Loi sur les langues officielles et de l'examen de la Charte elle-même. Il se situe dans une Constitution, document qui entend poser les cadres intangibles du fonctionnement de l'État: il est lui-même l'un de ces cadres qui fixent la marge de manoeuvre de l'État. Il édicte des obligations qui proviennent d'un désir d'achever une Constitution incomplète plutôt que de corriger une situation inégalitaire, et qui ne précèdent pas d'autres dispositions suffisamment élaborées pour lui donner un simple caractère de principe d'inspiration. Il arbore d'ailleurs de par son libellé une norme suffisamment précise pour générer des obligations véritables, et est suffisamment large pour qu'on puisse, sans le dénaturer, le restreindre aux règles sectorielles qui le suivent. Il a été précédé par une loi qui a enclenché le mécanisme d'égalisation de langues, qui a supervisé

<sup>41</sup> *Supra*, note 9, à la p. 380.

<sup>42</sup> *Supra*, note 7, aux pp. 1217-1222.

la période préliminaire nécessaire de mise en application progressive, et qui permet maintenant de constitutionnaliser le principe, de rendre son observation obligatoire. Il édicte des cadres institutionnels, mais formule aussi un droit, dont la mise en oeuvre est protégée par des recours qui permettent tous les correctifs justes et convenables, et l'annulation des normes incompatibles. Ce sont certainement là les attributs d'une disposition qui proclame plus qu'un simple principe de progression et d'avancement.

À cet égard, la qualification de l'article 16 par la Cour suprême comme ne contenant que l'énoncé d'un principe de progression vers l'égalité semble fort discutable. La théorie du "compromis politique" qui caractériserait les droits linguistiques paraît aussi artificielle. Si la Cour a raison de caractériser ainsi les droits linguistiques, il faut reconnaître que cette théorie n'a pas pesé d'un poids très lourd lorsqu'elle a confronté l'article 23 de la Charte aux dispositions québécoises concernant la langue de l'éducation.<sup>43</sup>

Il apparaîtra curieux qu'on utilise l'idée d'un "compromis" politique à l'égard des droits linguistiques lorsque la seule province majoritairement francophone n'a politiquement pas participé au processus du rapatriement et qu'elle s'y est même fermement opposée.<sup>44</sup>

Il apparaîtra également curieux qu'on considère comme fondées sur un compromis des obligations auxquelles les législateurs ne peuvent même pas déroger par le biais de l'article 33, et à l'égard desquelles la Cour suprême a exprimé des doutes quant à la possibilité de les limiter par l'article 1.<sup>45</sup>

Il apparaîtra tout aussi curieux qu'on permette que des compromis politiques puissent légalement diminuer les obligations claires imposées par la Constitution au gouvernement fédéral, et qu'on refuse tout effet légal à d'autres compromis politiques, appelés alors conventions constitutionnelles, lorsqu'il s'agit de limiter le pouvoir du gouvernement fédéral de rapatrier seul la Constitution.<sup>46</sup>

S'il devait subsister quelques doutes sur le caractère impératif de l'article 16(1), il faudrait se référer au canon d'interprétation fourni par la Charte à l'article 27:

Toute interprétation de la présente charte doit concorder avec l'objectif de promouvoir le maintien et la valorisation du patrimoine multiculturel des Canadiens.

---

<sup>43</sup> *Procureur Général du Québec c. Quebec Association of Protestant School Board*, [1984] 2 R.C.S. 66.

<sup>44</sup> Par exemple, le *Renvoi sur le droit de veto*, [1982] 2 R.C.S. 793, et la Loi concernant la loi constitutionnelle de 1982, L.Q. 1982, c. 21.

<sup>45</sup> *Procureur Général du Québec c. Quebec Association of Protestant School Board*, [1984] 2 R.C.S. 66, aux pp. 78, 85.

<sup>46</sup> *Renvoi sur le rapatriement de la Constitution*, *supra* note 30.

Cette disposition indique que l'un des objectifs de la Charte était la valorisation des cultures existantes au Canada. La langue constitue certainement un élément essentiel de toute culture et la Cour suprême a même reconnu qu'elle jouait un rôle essentiel dans la dignité de l'être humain et l'organisation sociale.<sup>47</sup> Le français et l'anglais font indubitablement partie de ce patrimoine multiculturel canadien, puisqu'ils accompagnent l'évolution historique du pays depuis ses origines. En tant que principales langues parlées au Canada, en tant que langues officielles, en tant que langues historiques, elles sont fondées à occuper une place de choix dans les institutions fédérales. La promotion de la valorisation du patrimoine culturel passe par l'intégration de ces deux langues dans ces institutions. À la lumière de l'article 27, l'article 16(1) prend l'allure de l'une de ces mesures destinées à hausser le statut de la moins répandue de ces deux langues, le français, et ainsi à promouvoir l'expression culturelle qu'elle véhicule.

Il serait contraire à cet objectif avoué de ne voir dans l'article 16(1) qu'une déclaration de principe dont on doit laisser la mise en oeuvre au bon vouloir des législateurs concernés.

De plus, on peut inférer des ressemblances d'une disposition de la Charte avec un texte de loi, la volonté qu'avait le constituant de réformer ce texte de loi.<sup>48</sup> Dès lors, ne peut-on pas prétendre qu'en enchâssant dans la Constitution des principes contenus dans la Loi sur les langues officielles, le constituant avait nécessairement l'intention de leur donner un statut plus vigoureux que celui que cette simple loi leur reconnaissait alors?

Il serait vain de vouloir nier la nature extrêmement importante de la reconnaissance de l'égalité des langues dans les structures fédérales. Elle provient de la lutte politique de la communauté francophone pour assurer sa présence, sa survivance et son respect au coeur de ce pays. Cette lutte a inspiré toute la démarche historique des canadiens français pour l'affirmation de leur culture, pour la reconnaissance de leur rôle primordial dans l'évolution du pays, et pour l'établissement officiel de l'égalité politique entre les deux principales communautés linguistiques nationales. Cette consécration constitutionnelle provient beaucoup trop de la présence francophone à Ottawa lors du rapatriement pour que l'on puisse nier ces faits. L'article 16(1) est une mesure nécessaire pour assumer cet héritage dont la Cour suprême vient de nous dire, dans *Société des Acaadiens*, qu'elle n'est pas le légataire.

\* \* \*

<sup>47</sup> Renvoi sur les droits linguistiques au Manitoba, *supra*, note 20, à la p. 744.

<sup>48</sup> *Procureur Général du Québec c. Quebec Association of Protestant School Board*, *supra*, note 45, à la p. 82.

CONSTITUTIONAL LAW—PUBLIC FUNDING FOR DENOMINATIONAL SECONDARY SCHOOLS—CONSTITUTIONAL RIGHTS IMMUNE FROM CHARTER—THE CONFEDERATION COMPROMISE—ARE SOME SUPREME LAWS MORE SUPREME THAN OTHERS?: *Reference re Bill 30, An Act to amend the Education Act*.

Dale Gibson\*

### *Introduction*

The decision of the Supreme Court of Canada in *Reference re Bill 30, An Act to amend the Education Act*<sup>1</sup> (the *Ontario Separate High School Reference*) has overturned a Privy Council ruling of almost eighty years' standing that denied Roman Catholic secondary schools the right to public support under section 93(1) of the Constitution Act, 1867, and has confirmed the power of provincial legislatures, under section 93(3) of the Constitution Act, to extend to Roman Catholic and Protestant minorities denominational school rights beyond those guaranteed by section 93(1). It has also established the important constitutional principle that the enactment of the Canadian Charter of Rights and Freedoms in 1982 did not repeal any pre-existing constitutional rights that might be regarded as inconsistent with Charter rights. It is good to have all that settled.

The decision also has some unsettling aspects. It raises the possibility, for example, that the notorious "Manitoba school question" might be reopened. More disturbing (or at least perplexing) are certain remarks by Wilson J., on behalf of the majority of her colleagues, that could be construed to suggest a special constitutional status for rights related to "a fundamental part of the Confederation compromise". Section 29 of the Charter, which exempts "guaranteed" denominational school benefits from Charter scrutiny, also came in for some rather confusing treatment from the court.

### *The Dispute*

Section 93 of the Constitution Act, 1867, grants exclusive jurisdiction over education to the provincial legislatures, subject to important guarantees of the right of Roman Catholic and Protestant minorities to operate publicly funded denominational schools in each province where such a right existed at Confederation. As Sir Charles Tupper, one of the Fathers of Confederation, was to say later: "[W]ithout this guarantee for the rights of minorities being embodied in that new constitution, we should have been unable to obtain any confederation whatever."<sup>2</sup>

Ontario has always respected this guarantee to the extent of providing public support for Roman Catholic schools at the primary level.

\* Dale Gibson, of the Faculty of Law, University of Manitoba, Winnipeg, Manitoba.

<sup>1</sup> [1987] 1 S.C.R. 1148, (1987), 77 N.R. 241.

<sup>2</sup> *Ibid.*, at pp. 1174 (S.C.R.), 265 (N.R.).

Secondary denominational schools have been excluded from public support, however. The reason, confirmed by the Judicial Committee of the Privy Council in a 1928 case, *Tiny Separate School Trustees v. The King*,<sup>3</sup> was that the rights of separate school adherents in Upper Canada in 1867 were thought to have been restricted to what are now referred to as primary schools.

In 1985, the Government of Ontario proposed extending public funding and other public support to the secondary level of denominational schools. Opponents of the move contended that section 93 provided no constitutional authority for such an extension and that even if it did, the Charter's guarantees of equality and religious freedom would now render unconstitutional any legislation that singled out the members of a particular religious faith for special favourable treatment.

The Ontario Government referred these constitutional questions to the provincial court of appeal, which ruled in favour of the proposed legislation by a majority of three to two.<sup>4</sup> The Supreme Court of Canada, on appeal, unanimously upheld the majority ruling.

Wilson J., who wrote for four of the seven Supreme Court judges who sat on the case, addressed three distinct issues in her reasons for judgment:

- (1) Is the proposed extension of rights "a valid exercise of the provincial power in relation to education under the opening words of s. 93 and s. 93(3) of the *Constitution Act, 1867*?"<sup>5</sup>
- (2) Alternatively, is the measure "a valid exercise of provincial power because it returns to Roman Catholic separate schools supporters rights which were constitutionally guaranteed to them by s. 93(1) of the *Constitution Act, 1867*?"<sup>6</sup>
- (3) "[I]f an affirmative answer is given to either or both of the above questions, is . . . the *Canadian Charter of Rights and Freedoms* . . . applicable to [the measure] and if so, to what extent, and with what effect?"<sup>7</sup>

She answered the first two questions affirmatively, and the third in the negative. The remaining three judges agreed with the majority's conclusions on question 1 and 3, but declined to answer question 2.

- (1) *Does Section 93 authorize an extension of denominational school rights?*

All seven Supreme Court judges agreed that a provincial legislature may, if it chooses, grant to Roman Catholic or Protestant minorities

<sup>3</sup> [1928] A.C. 363 (P.C.).

<sup>4</sup> (1986), 25 D.L.R. (4th) 1 (Ont. C.A.).

<sup>5</sup> *Supra*, footnote 1, at pp. 1168 (S.C.R.), 258 (N.R.).

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*, at pp. 1168 (S.C.R.), 258-259 (N.R.).

rights or privileges in relation to denominational schools that go beyond those guaranteed by section 93(1) of the Constitution Act, 1867. The authority to enact such additional measures is to be found, according to Wilson J., in "the combined effect of the opening words of section 93 and section 93(3)".<sup>8</sup>

Section 93 begins by ordaining that: "In and for each Province the Legislature may exclusively make Laws in relation to Education . . .". This plenary provincial power over education is then made subject to several provisos designed to protect certain rights and privileges of denominational school supporters.

While a literal reading of the opening words would clearly support the power to bestow additional rights and privileges on denominational schools, opponents of the proposed Ontario extension contended that the provisos should be interpreted as an exhaustive catalogue of such protections, intended to restrict the power of the provinces to favour denominational schools in other ways.

The court rejected that restrictive interpretation. Wilson J. commented that:<sup>9</sup>

Given the importance of denominational educational rights at the time of Confederation, it seems unbelievable that the draftsmen of the section would not have made provision for future legislation conferring rights and privileges on religious minorities in response to new conditions.

She and her colleagues found a basis for such future legislation in the words of section 93(3):<sup>10</sup>

Where in any Province a System of Separate or Dissident Schools exists by law at the Union *or is thereafter established by the Legislature of the Province*, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education.

The emphasized words unmistakably contemplate that the plenary educational power bestowed on the provinces by the opening words of the section includes the authority to grant denominational school benefits that did not exist at the time of union. The court was unanimous in holding that this includes not just the power to create a system of separate schools in provinces where none existed at Confederation, but also the authority to extend systems that did exist in provinces like Ontario.

(2) *Did section 93(1) guarantee rights and privileges in relation to secondary schools in Ontario?*

The Attorney-General of Ontario and other supporters of publicly funded denominational secondary schools took the position that the pro-

<sup>8</sup> *Ibid.*, at pp. 1176 (S.C.R.), 269 (N.R.).

<sup>9</sup> *Ibid.*, at pp. 1173 (S.C.R.), 264-265 (N.R.).

<sup>10</sup> (Emphasis added).

posed measure would not in fact add anything to the rights and privileges possessed by Ontario Roman Catholics in 1867; it would, on the contrary, they claimed, *restore* a benefit they had at that time. To succeed in this contention it was necessary to persuade the Supreme Court of Canada to overrule or disregard *Tiny Separate School Trustees v. The King*,<sup>11</sup> which had denied that the denominational school rights and privileges of Roman Catholics in Ontario in 1867 extended to separate secondary schools.

Wilson J. and the three other judges for whom she spoke found that the Judicial Committee of the Privy Council had taken a wrong approach in the *Tiny* case. Because the pre-Confederation legislation had vested in the Council of Public Instruction an unrestricted regulatory power over denominational schools, the Privy Council had concluded that the law failed to grant separate school authorities an unfettered discretion to conduct secondary level education. Wilson J. held that this approach gave undue significance to the regulatory power:<sup>12</sup>

A power to regulate is not a power to prohibit. It cannot be used to frustrate the very legislative scheme under which the power is conferred. . . . The power of the Council of Public Instruction was to make regulations for explicitly stated purposes—“for the organization, government and discipline of common schools, for the classification of schools and teachers, and for school libraries throughout Upper Canada”. Its power did not extend to prohibiting a secondary level of instruction. . .

Since apart from this regulatory power of the Council the education legislation in force at the time of union did permit denominational “common schools” to offer secondary level education (a point which even most judges in the *Tiny* case had conceded), Wilson J. concluded that:<sup>13</sup>

. . . Roman Catholic separate school supporters had at Confederation a right or privilege, by law, to have their children receive an appropriate education which could include instruction at the secondary school level and that such right or privilege is therefore constitutionally guaranteed under s. 93(1). . .

Three of the seven Supreme Court judges declined to consider this issue. Having agreed with Wilson J. that ample authority to enact the contemplated measures could be found in the opening words of section 93 together with section 93(3), they thought it unnecessary to re-examine section 93(1) or the *Tiny* case. Estey J. explained his refusal to do so as follows:<sup>14</sup>

It would be most inappropriate and indeed dangerous for this Court over half a century later to review and then reverse or revise findings of fact. . . . Where it is not necessary for the disposition of the issue here, it would be imprudent for an appellate court sitting almost sixty years distant from the scene to reassess a factual decision peculiarly within the experience of the members of the lower courts who were called upon to make their judgment of then recent history.

<sup>11</sup> *Supra*, footnote 3.

<sup>12</sup> *Supra*, footnote 1, at pp. 1191-1192 (S.C.R.), 287-288 (N.R.).

<sup>13</sup> *Ibid.*, at pp. 1195 (S.C.R.), 291-292 (N.R.).

<sup>14</sup> *Ibid.*, at pp. 1200 (S.C.R.), 298 (N.R.).

It was unfair to characterize the majority's treatment of *Tiny* as a reversal or revision of "findings of fact". Their decision about the guarantees included in section 93(1) was one of law; it was based on an examination and interpretation of pre-Confederation statutes, not of fact. Estey J. was correct, however, in saying that it was unnecessary to determine the point in order to decide the case before the court.

Were the majority judges justified in dealing with the issue? Supporters of the proposed legislation had at least three distinct reasons for wanting the Supreme Court to re-examine section 93(1) and the *Tiny* case. First, it provided an alternative source of authority for the legislation if the court concluded that the provinces had no power to give denominational schools rights or privileges additional to those guaranteed by section 93(1). The court's unanimous decision that additional rights and privileges may be granted disposed of that reason. Second, it was possible that rights and privileges guaranteed by section 93(1) enjoyed greater immunity from attack on Charter grounds than additional rights or privileges that a legislature might subsequently create. As we shall see, however, the court was again unanimous in holding that the Charter does not restrict the power to add to the rights and privileges of denominational schools, so this reason for considering section 93(1) also lost its force.

A third reason for proceeding with the alternative argument was described as follows by Wilson J.:<sup>15</sup>

We are urged to decide this question. . . in order to obviate any further controversy concerning the rights and privileges of Roman Catholic separate school supporters in the Province of Ontario.

Precisely what such "further controversy" might involve was not explained at that point in the reasons for judgment, but one important possibility emerged from a later passage. There Wilson J. pointed out that rights guaranteed by section 93(1) cannot be repealed if a future Ontario Legislature should change its mind about separate secondary schools, whereas legislation which merely extends the original Confederation guarantees can be altered at will by the Legislature, subject only to a political "appeal" to the federal government under section 93(4).<sup>16</sup> Another possibility is that the ruling will influence future *political* controversies, if based on section 93(1), since future measures favouring denominational schools might fare better politically if seen as a further restoration of constitutionally guaranteed entitlements, rather than as the conferring of new benefits. Moreover, it may be a boon to the future simply to set the historical record straight.

Another possible consequence of the majority's decision to address the question of guaranteed rights under section 93(1), and of its willingness

---

<sup>15</sup> *Ibid.*, at pp. 1168 (S.C.R.), 258 (N.R.).

<sup>16</sup> *Ibid.*, at pp. 1198 (S.C.R.), 295-296 (N.R.).



to reconsider a long-standing authority on the subject, is that it might encourage the challenging of *other* controversial precedents concerning denominational schools. One such precedent could be *City of Winnipeg v. Barrett*,<sup>17</sup> in which the Judicial Committee of the Privy Council upheld the Manitoba Public Schools Act, 1890, which ended public financial assistance for separate schools in that province and required all taxpayers, including separate school supporters, to support non-sectarian public schools. The reasoning of that decision, which overturned a unanimous ruling of the Supreme Court of Canada, has been the target of considerable criticism (as well as much support) over the years. While the Supreme Court's determination of the *Ontario Separate High School Reference* has no direct relevance outside Ontario, its demonstration of the Supreme Court's readiness to re-examine established precedents, and to set history right if necessary, could induce critics of the *Barrett* decision to take up the cudgels again.

(3) *Does the Canadian Charter of Rights and Freedoms restrict rights and privileges respecting denominational schools?*

This was the most portentous issue addressed in the *Ontario Separate High School Reference*. The Supreme Court was unanimous as to some aspects of the question, and divided as to others. Again the majority went much further than they had to.

(a) *Unanimous Reasons*

Opponents of the proposed Ontario legislation contended that it would contravene two rights guaranteed by the Canadian Charter of Rights and Freedoms: freedom of conscience and religion (section 2(a)) and the right to equality (section 15(1)). The Supreme Court was unanimous in rejecting this contention.

The simplest answer to the Charter argument was provided by Estey J. (with whom Beetz J. concurred):<sup>18</sup>

The role of the *Charter* is not envisaged in our jurisprudence as providing for the automatic repeal of any provisions of the Constitution of Canada. . . . Action taken under the *Constitution Act, 1867* is of course subject to *Charter* review. That is a far different thing from saying that a specific power to legislate as existing prior to April 1982 has been entirely removed by the simple advent of the *Charter* . . . [Section 93(3)] expressly contemplates that the province may legislate with respect to a religiously-based school system funded from the public treasury. . . .

. . . This legislative power in the province is not subject to regulation by other parts of the Constitution in any way which would be tantamount to its repeal.

Wilson J. appeared to agree with this view of the Charter's relation to other constitutional rights. She expressed it more succinctly: "It was never intended. . . that the *Charter* could be used to invalidate other provisions of the Constitution. . . ." <sup>19</sup>

<sup>17</sup> [1892] A.C. 445 (P.C.).

<sup>18</sup> *Supra*, footnote 1, at pp. 1206-1207 (S.C.R.), 306-307 (N.R.).

<sup>19</sup> *Ibid.*, at pp. 1197 (S.C.R.), 295 (N.R.).

(b) *Confederation Compromise*

If she had ended the sentence at that point, there would have been little doubt that Wilson J. was in agreement with Estey J. as to the reason that legislation granting rights and privileges to separate schools is not open to Charter attack. She went on, however, to add the following words: "... particularly a provision such as s. 93 which represented a fundamental part of the Confederation compromise".<sup>20</sup> This seems to suggest that "fundamental" parts of the "Confederation compromise" may have a higher level of immunity from Charter requirements than other parts of the constitution. This puzzling suggestion was repeated in the next paragraph, in which Wilson J. explained that Charter immunity applies to extensions of separate school benefits, as well as to those guaranteed by section 93(1), because "[t]he Confederation compromise in relation to education is found in the whole of s. 93, not in its individual parts".<sup>21</sup> Both categories of separate school benefits were stated to be:<sup>22</sup>

... insulated from *Charter* attack as legislation enacted pursuant to the plenary power in relation to education granted to the provincial legislatures as part of the Confederation compromise. Their protection from *Charter* review lies not in the guaranteed nature of the rights and privileges conferred by the legislation but in the guaranteed nature of the province's plenary power to enact that legislation.

Did Wilson J. and her colleagues really intend to suggest that some provisions of the Canadian constitution are more deeply entrenched or have a higher priority than others? The possibility that this was their intention cannot be rejected out of hand, startling though the possibility may be. The words quoted above appear to point in that direction. Moreover, the Supreme Court has shown a willingness in the past to assign priority status to one category of regular legislation: that which relates to human rights.<sup>23</sup> A priority ranking of constitutional stipulations would therefore involve a certain consistency of form. But not of substance; there are fundamental differences of substance between ordinary legislation and constitutional legislation. These differences are such that the reasons for distinguishing between and prioritizing categories of statute law have no application at all to the constitutional situation. Indeed, any attempt to give some constitutional provisions paramountcy over others would raise serious problems of several types.

In the first place, there is the logical difficulty. Section 52 of the Constitution Act, 1982 assigns the status of "supreme law" to the *entire* constitution of Canada. To designate certain provisions of the constitution as "more supreme than supreme" would be as impossible logically

<sup>20</sup> *Ibid.*, at pp. 1197-1198 (S.C.R.), 295 (N.R.).

<sup>21</sup> *Ibid.*, at pp. 1198 (S.C.R.), 295 (N.R.).

<sup>22</sup> *Ibid.*

<sup>23</sup> *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150, (1985), 21 D.L.R. (4th) 1.

as designing a ball that is "rounder than round". The only way to give some parts of the constitution priority over others would be by ruling that section 52 does not mean what it says, and that in reality only *part* of the constitution of Canada constitutes "supreme law".

Next would be the problem of determining the legal basis for distinguishing between paramount and run-of-the-mill constitutional provisions. Wilson J. did not suggest any legal rationale for such a distinction, and the only one that might be drawn from orthodox principles of legislative interpretation—that later enactments impliedly repeal inconsistent earlier ones—would give the Charter priority over section 93, rather than vice versa. The only rationale to be found in the reasons of Wilson J. is not legal, but political/historical: the fact that the "Confederation compromise" would not have been possible without agreement on certain fundamental matters, of which preservation of the rights and privileges of separate schools was one. If she and the judges who concurred with her intended that certain constitutional stipulations should be regarded as more supreme than others, they must therefore have been willing to extend this superior status to all provisions that were as pivotal to the Confederation negotiations as the separate school question, which brings us to the next difficulty.

The third problem involved in distinguishing among constitutional provisions on the basis of their importance to the "Confederation compromise" would be the difficulties of proof. The record of negotiations at the Charlottetown, Quebec and London conferences that led to enactment of the 1867 Constitution is very sparse. As Dr. G.P. Browne noted in his introduction to *Documents on the Confederation of British North America*:<sup>24</sup>

Historians. . . lack both the amount and type of primary material that is available to historians of the American federation movement; for the preliminary discussions among the Imperial and colonial founders were largely conducted within the confines and conventions of the governmental process. The passage of the British North America Act was preceded by the holding of three "constitutional conferences" . . . But all these meetings took place behind closed doors, and there is scant evidence as to what happened at them, much less before, between, and after.

Even if evidence existed that some participant in the negotiations regarded a given provision as essential (or as surplusage), how could it be proved that removal of the provision would (or would not) have wrecked Confederation? This would require reliable evidence as to such matters as: (a) What did *other* participants think about the question?; (b) How influential were these participants?; (c) Is it possible that these participants' comments about the importance of the matter in question were merely made for effect, or as a bargaining stance?; (d) Is it certain, in any event, that these other participants would not, in the crunch, have been willing to compromise their positions in order to achieve agree-

<sup>24</sup> G.P. Browne (ed.), *Documents on the Confederation of British North America* (1969), p. xi.

ment, or could not have been "bought off" in some manner? It is often difficult to establish historical facts; it is next to impossible to establish historical "might have beens".

Given these many difficulties, it seems likely that a court called upon to determine which provisions were key parts of the "Confederation compromise" would be inclined to include almost every significant feature of the Constitution Act, 1867, as well as all subsequent constitutional amendments made over the years to incorporate new provinces. After all, it is unlikely that anything that found its way into the final legislation was not regarded as pivotal by *someone*. Unless there is evidence of a consensus by key negotiators that a particular item was a "throw-away" (which is highly improbable), courts would have little alternative to treating every feature of the final bargain as *prima facie* essential.

This would mean that about the only constitutional provisions not accorded complete supremacy would be those which resulted from post-Confederation amendments. An example would be section 99(2) of the Constitution Act, 1867, requiring that superior court judges cease to hold office at age seventy-five, which was the product of a 1960 amendment.<sup>25</sup> If this provision were more vulnerable to Charter attack than elements of the "Confederation compromise", it might be possible for judges to claim that it involves age discrimination, contrary to section 15 of the Charter. Other examples of post-Confederation provisions, which the Confederation paramountcy principle would condemn to second-class status, would include those relating to old age pensions<sup>26</sup> and aboriginal rights.<sup>27</sup>

What purpose would be served by granting greater constitutional significance to matters regarded as important in 1867 than to amendments designed to keep the constitution relevant to changing conditions? One of the most important and contentious issues involved in the "Confederation compromise" was the role of the Senate. We are told that of the total fourteen days spent discussing the details of the Confederation proposal at the crucial Quebec Conference in 1864, fully six days were devoted to the Senate.<sup>28</sup> Nowadays the Senate is regarded as a minor, if not anachronistic, appendage to Canada's vital organs of government. By what common sense standard could one justify granting higher constitutional priority to provisions concerning the Senate than to those concerning aboriginal rights, old-age pensions, or even the retirement age of judges? If constitutional provisions arising from the "Confederation

---

<sup>25</sup> Constitution Act, 1960, 9 Eliz. II, c. 2 (U.K.). The original s. 99 granted life tenure during good behaviour.

<sup>26</sup> Constitution Act, 1867, s. 94A, enacted by British North America Act, 1951, 14-15 Geo. VI, c. 32 (U.K.), and Constitution Act, 1964, 12-13 Eliz. II, c. 73 (U.K.).

<sup>27</sup> Constitution Act, 1982, s. 35.

<sup>28</sup> R.A. MacKay, *The Unreformed Senate of Canada* (Rev. ed., 1963), p. 37.

compromise" were given preference over those which relate to more currently topical matters, the capacity of the constitution to grow with the times would be seriously impaired.

The most disturbing aspect of Wilson J.'s remarks about the "Confederation compromise" is the inference (one hopes unintended) that *any* laws enacted pursuant to a law-making power granted as part of the compromise are immune from the Charter. After noting that the legislative provisions under review by the court were "enacted pursuant to the plenary power in relation to education granted to the provincial legislature as part of the Confederation compromise", she continued:<sup>29</sup>

Their protection from *Charter* review lies not in the guaranteed nature of the rights and privileges conferred by the legislation but in the guaranteed nature of the province's plenary power to enact that legislation.

The "Confederation compromise" guaranteed the provincial legislatures the "plenary power to enact . . . legislation" on many more topics than education. Plenary jurisdiction over "Property and Civil Rights",<sup>30</sup> "Administration of Justice",<sup>31</sup> "Matters of a merely local or private Nature",<sup>32</sup> "Direct Taxation",<sup>33</sup> and numerous other topics, was also conferred. The Parliament of Canada was given equally "plenary" legislative powers in matters under its jurisdiction.<sup>34</sup> If all laws enacted pursuant to these legislative powers were immune from Charter attack, section 52 of the Constitution Act, 1982, which subjects all laws to Charter review, would become meaningless. That so nonsensical a conclusion could not have been intended by Wilson J. and her colleagues is evident from the number of laws that have already been struck down by the court on Charter grounds.<sup>35</sup> What Wilson J. must have meant by her comment about the "guaranteed" plenary power to make laws relating to education, is simply that because section 93 guarantees a power to discriminate in favour of certain religious minorities, the Charter protections of equality and religious freedom have no application to legislation on that subject.

It is submitted that her other puzzling comments about the "Confederation compromise" should be given a similarly innocuous interpretation. In view of the formidable problems that would be raised by any attempt to treat Confederation provisions differently from other parts of the Constitution, and the absence of any discernible benefit to be gained from doing so, Wilson J.'s remarks about the "Confederation compro-

<sup>29</sup> *Supra*, footnote 1, at pp. 1198 (S.C.R.), 295 (N.R.).

<sup>30</sup> Constitution Act, 1867, s. 92(13).

<sup>31</sup> *Ibid.*, s. 92(14).

<sup>32</sup> *Ibid.*, s. 92(16).

<sup>33</sup> *Ibid.*, s. 92(2).

<sup>34</sup> *Ibid.*, s. 91.

<sup>35</sup> *E.g.*: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, (1985), 18 D.L.R. (4th) 321.

mise" should be treated as intended to do no more than to emphasize the importance of continuing to honour historic commitments concerning denominational education. It is not that some constitutional provisions are more supreme than others; it is only that since constitutional amendment cannot be achieved by implied repeal, new constitutional stipulations like those contained in the Charter are subject to all existing constitutional provisions not explicitly repealed or amended. It is not that elements of the "Confederation compromise" are more deeply entrenched than other parts of the constitution *in a legal sense*; it is only that failure to accord them the legal supremacy they share with every part of the existing constitution would violate an understanding that is unusually important to Canadians *in a political/historical sense*.

(c) *Section 29*

The final matter calling for comment is the role played in the outcome of the case by section 29 of the Charter. It stipulates:

Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

To the extent that the proposed Ontario legislation constituted a restoration of rights *guaranteed* by section 93(1) of the Constitution Act, 1867, this proviso was a complete answer to those who claimed that the legislation would violate the Charter.<sup>36</sup> With respect, however, to the possibility that it was an *extension* of rights and privileges, as contemplated by section 93(3), section 29 was not relevant. As Estey J. stated:<sup>37</sup>

[T]he dominant word in s. 29 is "guaranteed". Statutes cannot by their very nature guarantee anything, susceptible as they are to legislative appeal. As the rights granted by Bill 30 are not "guaranteed"... s. 29 cannot operate so as to protect these rights.

The approach of Wilson J. was more complicated. Indeed, it is rather difficult to understand. One thing is crystal clear, however: section 29 is not essential to the protection of rights and privileges based on either section 93(1) or section 93(3). Both Wilson J. and Estey J. agreed that both types of denominational school benefits were insulated from Charter review by their recognition in the constitution independently of section 29.

Notwithstanding that conclusion Wilson J. proceeded to ask, in the alternative: "[D]oes s. 29 protect rights or privileges conferred by legislation passed under the province's plenary power in relation to education. . .?";<sup>38</sup> and to answer: "In my view, it does . . ."<sup>39</sup> This response,

<sup>36</sup> *Supra*, footnote 1, at pp. 1196 (S.C.R.), 293 (N.R.).

<sup>37</sup> *Ibid.*, at pp. 1209 (S.C.R.), 309 (N.R.). It will be remembered that Estey J. refused to follow the majority in finding the Bill to be a restoration of rights guaranteed under s. 93(1).

<sup>38</sup> *Ibid.*, at pp. 1198 (S.C.R.), 295 (N.R.).

<sup>39</sup> *Ibid.*

which seems on the surface to contradict the Estey interpretation of section 29, is difficult to reconcile with her earlier statement, in apparent agreement with Estey J., that: "[R]ights or privileges conferred by post-Confederation legislation under s. 93(3) are [not] 'guaranteed' within the meaning of s. 29 *in the same way as* rights or privileges under 93(1)."<sup>40</sup>

The explanation of this apparent inconsistency must lie in the emphasized concluding words. Wilson J. seems to regard the extended separate school benefits to which section 93(3) refers as being "guaranteed" for the purpose of section 29, but guaranteed to a lesser extent than section 93(1) benefits. They are guaranteed against Charter review, but they are not guaranteed from legislative repeal.<sup>41</sup> If, however, the preceding analysis is correct in attributing that guaranteed immunity to the general constitutional status of the benefits in question, rather than to any special quality of section 93, section 29 loses its significance, a. merge.<sup>42</sup>

\* \* \*

FAMILY LAW—JUDICIAL VARIATION OF FINAL GLOBAL SETTLEMENTS: *Pelech v. Pelech*, *Caron v. Caron*, *Richardson v. Richardson*.

Alastair Bissett-Johnson\*

### *Introduction*

It has become common for spouses who are involved in broken marriages to enter into final, global settlement agreements. These "once and for all" agreements usually cover custody and access, child and spousal support, and matrimonial property division. Such agreements create a policy problem for the courts: should the courts vary such agreements, despite their apparent finality, in order to secure a fair response to changed circumstances? Would such a response, even in a limited way, undermine the value of negotiating such agreements and run the risk of substantially increasing the workload of the courts?

<sup>40</sup> *Ibid.*, at pp. 1197 (S.C.R.), 295 (N.R.). (Emphasis added).

<sup>41</sup> *Ibid.*, at pp. 1198 (S.C.R.), 295-296 (N.R.).

<sup>42</sup> A final observation. It would be interesting to know whether other readers of the decision had as much difficulty making sense of Madame Justice Wilson's treatment of the "Confederation compromise" and s. 29 issues as this reviewer did. If so, the difficulty may illustrate a need the reviewer has sensed for some time. The Supreme Court of Canada, under the pressure of an expanding caseload, has less and less time to devote to expression and style. Yet lucid expression is vital to the Court's task of elaborating the basic principles of Canadian law. Is it perhaps time for the Court to employ an editor?

\* Alastair Bissett-Johnson, of the Faculty of Law, Dalhousie University, Halifax, Nova Scotia. The assistance of Donald Moir, of the Bar of British Columbia, Vancouver, British Columbia, is gratefully acknowledged.

Generally husbands<sup>1</sup> will favour the finality of the agreement; if a wife can reopen the support question in a global separation agreement without the property question being susceptible to similar treatment, injustice can result. The expectations of the payer spouse may thus be undermined, and the whole basis of the agreement, which may have involved a "front-end loading" of a lump sum support payment in return for freedom from future periodic support, could be destroyed. Why bother to make such agreements if they are easily overturned? On the other hand, wives do not have the same economic resources with which to absorb changed circumstances such as illness, and it is no surprise that *Pelech v. Pelech*,<sup>2</sup> *Caron v. Caron*,<sup>3</sup> and *Richardson v. Richardson*<sup>4</sup> each involved applications by wives to vary allegedly final agreements.

Resolving the tensions between "finality" and "flexibility" produced a considerable body of case law<sup>5</sup> and these three decisions in the Supreme Court of Canada can be seen to represent the tip of one of the most important icebergs facing family law practice.

### *Facts of Pelech, Caron and Richardson*

In *Pelech*, the spouses were married in 1954 and divorced in 1969. After receiving independent legal advice the wife agreed to accept a sum of \$28,750, paid in part as a lump sum and in part by installments over thirteen months, as a full and final settlement of all present and future support claims. The agreement was incorporated in the divorce decree and duly honoured by the husband. Subsequently the wife became ill, was unable to work and was eventually forced to resort to social assistance. Meanwhile the husband prospered and, by the time of the wife's variation application pursuant to section 11(2) of the Divorce Act<sup>6</sup> (the former Act), had an income of \$95,000 a year and assets of \$1,800,000. The trial judge allowed the wife's application to reopen the agreement order to claim spousal support, but the court of appeal dismissed the application.

In *Caron*, the parties separated, the wife receiving clear title to the marital home, a lump sum payment of \$10,000 and further assistance of \$5,000 if she elected to leave the Yukon. Maintenance for the children was agreed upon and paid. The agreement provided that periodic main-

---

<sup>1</sup> It is ironic, however, that one of the recent leading cases, *Webb v. Webb* (1984), 10 D.L.R. (4th) 74, 39 R.F.L. (2d) 113 (Ont. C.A.), involved the successful variation application based on the husband's catastrophic business losses.

<sup>2</sup> [1987] 1 S.C.R. 801, (1987), 38 D.L.R. (4th) 641.

<sup>3</sup> [1987] 1 S.C.R. 892, (1987), 38 D.L.R. (4th) 735.

<sup>4</sup> [1987] 1 S.C.R. 857, (1987), 38 D.L.R. (4th) 699.

<sup>5</sup> For an analysis of the case law prior to the Supreme Court of Canada's decisions, see A. Bissett-Johnson and D.C. Day, *Lowering the Curtain: Finality of Financial Support Provisions of Global Domestic Settlements upon Divorce* (1986-76), 1 Can. Fam. L. Q. 279.

<sup>6</sup> R.S.C. 1970, c. D-8.



tenance was payable but (pursuant to a modern variant of a *dum casta* clause) was to terminate if the wife "should cohabit as man and wife with any person for a continuous period in excess of ninety days". The wife breached the provision and, although the husband paid the support for a time thereafter, he eventually terminated the periodic payments. The person with whom the wife cohabited did not support her, and she was forced to seek social assistance. Other evidence of the wife's circumstances was meagre, save that she was in need even after selling the marital home. In the face of this, the appeal court was unwilling to overrule the trial judge's decision not to allow variation of the maintenance provisions in the agreement pursuant to section 11(2) of the former Act; the wife had been independently legally represented and advised on the agreement's contents before signing it.

Finally, in *Richardson* the parties separated in 1979 after eighteen years of marriage. There were two children of the marriage, neither of whom had attained majority. The husband was a policeman who at the time of the divorce proceedings was a police sergeant. Until the birth of the second child the wife had been a clerk-typist but, apart from two short periods of work between 1974 and 1976, had not worked since 1974. After the breakdown of the marriage the wife moved to North Bay to live with her parents. She was forty-six at the time of the proceedings.

By the terms of a settlement the wife agreed to accept child support for the child in her custody, and spousal maintenance of \$175 a month for a year.<sup>7</sup> At the time of signing the wife was unemployed and in receipt of social assistance. At the end of the one-year period the wife's position had not changed and so she sought spousal support, contrary to the minutes of settlement, and increased child support. The trial judge did not increase the child support but did award spousal support and a cost of living increase in proceedings pursuant to section 11(1) of the former Act. The court of appeal increased the child support, but struck down the award of spousal support and the cost of living clause.

### *Analysis*

Although these cases reached court under the former Act the shadow of the Divorce Act, 1985<sup>8</sup> (the new Act) looms large in the decisions. Of particular significance in variation proceedings in the new legislation are section 15(5)(c), requiring the court to take into consideration "any order, agreement or arrangement relating to the support of the spouse or child", and section 17(10)(a) which makes "economic hardship arising

---

<sup>7</sup> The wife was legally represented but did not allege her legal representation was defective in any respect. The settlement was made pursuant to provincial law. There is no evidence of a property division between the spouses.

<sup>8</sup> Divorce Act, 1985, S.C. 1986, c. 4.

from a change in circumstances that is related to the marriage" part<sup>9</sup> of the threshold test. Section 17(7)(c) talks in similar terms of relieving economic hardship "arising from the breakdown of marriage" as an objective for the court dealing with variation proceedings. However, section 15(5) lists three factors to be considered (of which an agreement is only one) and section 15(7) lists four objectives. In the case of a variation, "fitness and justness", relevant under section 11(2) of the former Act, are not factors under section 17(4), and the objectives to be realized under section 17(7) arguably preclude consideration of an agreement. A decision which does not take into account each of the factors and objectives listed in section 15 and gives undue weight to one of them may be open to challenge.<sup>10</sup>

### (1) Appellate Review

Family law decisions are almost invariably fact specific and it is perhaps no surprise that the Supreme Court was unanimous<sup>11</sup> in holding that an appellate court should only interfere with a lower court decision where there has been a material error in law or a significant misapprehension of the evidence, resulting in the trial court having gone wrong in principle or its final award being otherwise clearly wrong.<sup>12</sup> If a trial judge has acted within a discretion conferred on him or her, and if no error of law can be demonstrated an appellate court should defer to his or her opinion. In arriving at this conclusion, Wilson J. rejected<sup>13</sup> the broad approach to the appeal provisions of section 17(1)(b)(1) of the former Act taken in *Carmichael v. Carmichael*<sup>14</sup> and *Guberman v. Guberman*.<sup>15</sup> Instead Wilson J. quoted from, and seemed to have adopted the more restricted approach of the Ontario Court of Appeal in *Harrington v. Harrington*<sup>16</sup> that some material error in the trial decision had to be shown if one was to avoid an appellant having a fairly arguable appeal in just about every case.

<sup>9</sup> The other cumulative part of the test, resulting from the use of the conjunction "and" in s. 17(10)(b), requires that "the changed circumstances, had they existed at the time of the making of the support order, . . . would likely have resulted in a different order".

<sup>10</sup> See the comments of Williams Fam. Ct. J. in *Publicover v. Publicover* (1987), 9 R.F.L. (3d) 308 (N.S. Fam. Ct.).

<sup>11</sup> La Forest J., who dissented on the merits of the decision in *Richardson*, nevertheless associated himself with the majority's views on appellate review.

<sup>12</sup> *Pelech v. Pelech*, *supra*, footnote 2, at pp. 824 (S.C.R.), 657 (D.L.R.).

<sup>13</sup> *Ibid.*, at pp. 815-817 (S.C.R.), 651-652 (D.L.R.).

<sup>14</sup> (1976), 69 D.L.R. (3d) 297, 27 R.F.L. 325 (B.C.C.A.).

<sup>15</sup> [1977] 2 W.W.R. 1 (Man. C.A.).

<sup>16</sup> (1981), 123 D.L.R. (3d) 689, 33 O.R. (2d) 150 (Ont. C.A.). In reaching this conclusion Wilson J. drew a distinction between the narrow wording of s. 17(2) of the former Divorce Act and s. 30(1) of the Judicature Act of Ontario, R.S.O. 1970, c. 228, and the more broadly worded Saskatchewan legislation, Court of Appeal Act, R.S.S. 1978 c. C-42, s. 8, which gave the appeal court the clear mandate to "act upon its own view of what the evidence in its judgment proves" and permitted the court to draw inferences of fact.

### (2) *The Effect of an Agreement on standing to seek variation*

Wilson J. accepted the assertion in *Hyman v. Hyman*<sup>17</sup> that a spouse could not by covenant preclude herself from invoking the jurisdiction of the court (or the court from exercising its jurisdiction) to make an order for support. She did not however discuss the historical reasons for the rule. One of the reasons was very much fault based, a factor the court regards as of diminishing weight—to prevent a guilty husband transferring to the taxpayer, under the guise of social assistance payments, a support obligation that was properly his.<sup>18</sup> This doctrine was very much a part of a social history in which applicants for spousal support had to be “innocent of a matrimonial offence”.<sup>19</sup> To deny an innocent wife support would be to reward further a husband who, in addition to not supporting his wife, as well as possibly having committed adultery, cruelty or desertion, was also seeking to transfer the burden of supporting his wife to the state. However, quite apart from overtones of “fault”, the *Hyman* principle can also be seen in terms of protecting the economically weaker partner. Although judicial paternalism is no longer fashionable, until financial equality between the ex-spouses is nearer realization, both reasons for the *Hyman* principle deserve further judicial elaboration.

Wilson J. did discuss the changing attitudes to support, but in the context of when it was appropriate for a court to exercise its power to vary agreements. Instead the existence of a power was used to justify the comment of Chouinard J. in *Messier v. Delage*<sup>20</sup> that orders for support under section 11(1) of the former Act could never be truly final.

### (3) *The Effect of an Agreement on the exercise of discretion*

In the context of the willingness of the courts to override a final global agreement between the parties, Wilson J. noted: (a) the shift in

<sup>17</sup> *Hyman v. Hyman*, [1929] A.C. 601 (H.L.). This applied whether or not common law bases obtain which vitiate the agreement or certain of its terms. As Lord Hailsham L.C. stated in *Hyman*, at p. 614:

[T]he power of the court to make provision for a wife on the dissolution of her marriage is . . . conferred not merely in the interests of the wife, but of the public. . . . [T]he wife cannot by her own covenant preclude herself from invoking the jurisdiction of the Court or preclude the Court from the exercise of that jurisdiction.

<sup>18</sup> *Ibid.*

<sup>19</sup> As late as 1976, P.M. Bromley, *Family Law* (5th Ed., 1976), pp. 512, 527, was complaining that if an English wife (the usual complainant) had been guilty of adultery no order could be made in respect of the husband's wilful neglect to maintain his wife. The wife might be forced thus to petition for divorce or judicial separation. The Domestic Proceedings and Magistrates Courts Act, 1978, changed the law in the Magistrates Court and in the High Court. The position was similar under the Canadian Deserted Wives and Children's Maintenance legislation. See further, D.J. MacDougall, *Alimony and Maintenance*, in D. Mendes da Costa (ed.), 2 *Canadian Studies on Family Law* (1972), p. 283. For a discussion of the more modern legislation, see C. Davies, *Family Law in Canada* (4th ed., 1984), chapters 10 to 12.

<sup>20</sup> [1983] 2 S.C.R. 401, at pp. 411-412.

attitude towards support from fault to the financial relationship of the parties during the marriage;<sup>21</sup> (b) the reference to a "fit and just" order in section 11 of the former Act which required courts to meet a uniform standard of fairness and reasonableness, based on the needs and means of the parties;<sup>22</sup> and (c) the fact that spouses had themselves agreed on maintenance and the extent to which this was an important factor for the courts in the exercise of their discretion.<sup>23</sup>

### (a) *Shift in Attitude towards Support*

Since 1968 the right to support has increasingly become independent of fault.<sup>24</sup> First families are not always first priorities for husbands who remarry.<sup>25</sup> There is a desire, where possible, for a "clean break" to enable the parties to go their separate ways,<sup>26</sup> backed by the division of resources under recent provincial matrimonial property reforms. Spouses are encouraged, where practicable, to become self-sufficient,<sup>27</sup> and increasingly parties are entering into a final, global, settlement agreement of a once and for all character intended to cover custody, spousal and child support and matrimonial property division. The effect of these changes is to produce transitional problems for wives who married at a time when society's attitudes to marriage were different. As Judge Williams has perceptively commented:<sup>28</sup>

With respect to maintenance we have seen a change in the way the family and roles within it are perceived. There are obligations on each spouse to attempt to become self-sufficient. Marriage is not necessarily seen as a life-long commitment. Nor is maintenance. Some, in my experience, most often middle-aged or older women, are left after a divorce with expectations of self-sufficiency that are totally foreign to their own values and expectations—i.e. that marriage and/or right to support was a life-long thing. These people are trapped—by a value system that was totally legitimate in their formative years and a society that has "changed the rules".

<sup>21</sup> *Pelech v. Pelech*, *supra*, footnote 2, at pp. 828-829 (S.C.R.), 660-661 (D.L.R.).

<sup>22</sup> *Ibid.*, at pp. 829-830 (S.C.R.), 661-662 (D.L.R.).

<sup>23</sup> *Ibid.*, at pp. 831-832 (S.C.R.), 662-663 (D.L.R.).

<sup>24</sup> See the comments of McKeigan C.J. in *Connelly v. Connelly* (1974), 47 D.L.R. (3d) 535, 16 R.F.L. 171 (N.S.C.A.). Conduct is completely irrelevant under the Divorce Act 1985, *supra*, footnote 8, s. 15(6).

<sup>25</sup> Contrast the old laws as exemplified in *Kinghorn v. Kinghorn* (1960), 34 W.W.R. 123 (Sask. Q.B.), with *Turner v. Turner* (1972), 8 R.F.L. 15 (Man. Q.B.) and *Grini v. Grini* (1979), 5 D.L.R. (3d) 640, 10 R.F.L. (2d) 275 (Man. Q.B.).

<sup>26</sup> *Minton v. Minton*, [1979] A.C. 598, at p. 608 (H.L.). The English Law Commission suggested that for most families recourse to a "clean break" would be rare, Law Com. No. 112, *Family Law: The Financial Consequences of Divorce* (1981), p. 11, a fact confirmed by the Court of Appeal decision in *Suter v. Suter*, [1987] 2 All E.R. 236, at p. 240.

<sup>27</sup> For a discussion, see *Gray v. Gray* (1986), 3 R.F.L. (3d) 457 (Man. Q.B.), though the facts of that case (a 66 year old wife) were such that the case hardly made for an ideal test case.

<sup>28</sup> Unpublished paper prepared for American Psychiatric Association, Developmental Approaches to Divorce and the Matrimonial Lawyer.

What is fair maintenance—what should be done with/for the spouse who is marginally employed, whose spouse is a middle or upper income earner? Should there be a “topping up” of maintenance based on life style? How long should maintenance last? Should education or upgrading be paid for by maintenance? Who should evaluate whether it is a legitimate or prudent course of study? How long should maintenance last? Should maintenance be paid rather than have an unmotivated, emotionally paralyzed or disabled spouse go on welfare? What is the relationship between first and second families—how can the law balance or give priority to one or the other? What consideration should be given to the impact of a new relationship (for either spouse) and income of that new person on assessing maintenance? What role, if any, does conduct during or after the marriage have in maintenance?

It may be that in due course some of the problems of the present generation of older women adverted to by Judge Williams will disappear as more women prepare for financial independence through a full time continuous career rather than follow the traditional pattern of interrupting their career in order to nurture children. However, while female wages are on average only fifty-five per cent<sup>29</sup> of those of males, while child care is not always readily available and while unemployment rates are not evenly distributed among the regions of Canada, it may well be that the transition period to female self-sufficiency will be a lengthy one. In the meantime it is no surprise to learn that “no-fault” divorce, equal division of property and a system in which women predominantly are the custodians of children after marital breakdown, produce a situation in which women “bounce back” financially after divorce less quickly than men.<sup>30</sup> In these circumstances, the application of rules reflecting changed societal values have undoubtedly had an adverse effect on many women and some children.<sup>31</sup> Although Matas J.A. in *Ross v. Ross*<sup>32</sup> talked of the need to compensate for gender based inequality, most courts, including the Supreme Court of Canada in the present cases, have been less open to this view, and instead have favoured upholding agreements.

(b) *The fit and just requirement of section 11(2)*

Wilson J. discussed the complexity of balancing the individual financial interdependence of particular relationships with a uniform standard

<sup>29</sup> Statistics Canada, *Women in the Workplace: Selected Data* (Ottawa: Supply & Services, 1987), p. 74.

<sup>30</sup> Lenore Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (1985). For reviews of this book, see M.J. Mossman (1986), 5 Can. J. Fam. Law 341, and the Review Symposium in [1986] Am. B. Foundation Research J. 759. The unequal effect of divorce on men and women is also due to the fact that much of people's capital is in the form of the “new property” such as income, professional qualifications and, to a lesser extent, occupational pensions, often falling outside traditional matrimonial property legislation. See M.A. Glendon, *The New Family and the New Property* (1981).

<sup>31</sup> See J.S. Wallerstein and J.B. Kelly, *Surviving the Breakup: How Children and Parents Cope with Divorce* (1980). The evidence is not clear cut, however. See English Law Commission, Working Paper No. 96, *Family Law: Review of Child Law, Custody* (1986), pp. 80 *et seq.*

<sup>32</sup> (1984), 6 D.L.R. (4th) 385, 39 R.F.L. (2d) 51 (Man. C.A.).

of fairness and reasonableness. The “fit and just” criteria, of the former legislation, required a court to assess reasonable needs in the light of:<sup>33</sup>

- (a) the division of function in the marriage,
- (b) the express or tacit understanding of the spouses that one will make financial provision for the other,
- (c) custodial arrangements made with respect to the children of the marriage at the time of dissolution,
- (d) the physical or mental disability of either spouse that affects his or her ability to provide for counsel for himself or herself, or
- (e) the inability of a spouse to obtain gainful employment.

A right to support “should continue for so long as the reasonable needs exist and no longer” and might be permanent or temporary.

### (c) *The Relevance of the Agreement*

Wilson J. recognized that the agreement, though not binding on the court, was nevertheless an important factor in the exercise of the court’s discretion. The case law fell into three categories. One group of cases emphasized: (i) individual responsibility and freedom of contract,<sup>34</sup> and (ii) an oft repeated statement of Anderson J.:<sup>35</sup>

It is of great importance not only to the parties but to the community as a whole that contracts of this kind should not be lightly disturbed. Lawyers must be able to advise their clients in respect of their future rights and obligations with some degree of certainty. Clients must be able to rely on these agreements and know with some degree of assurance that once a separation agreement is executed their affairs have been settled on a permanent basis. The courts must encourage parties to settle their differences without recourse to litigation. The modern approach in family law is to mediate and conciliate so as to enable the parties to make a fresh start in life on a secure basis. If separation agreements can be varied at will, it will become much more difficult to persuade the parties to enter into such agreements.

At the other end of the spectrum were cases emphasizing a judicial standard of reasonableness.<sup>36</sup> In the middle were cases trying to achieve a compromise by holding the parties to their agreement, but sanctioning a variation when a change in circumstances of considerable magnitude negated a fundamental assumption on which the agreement was premised.<sup>37</sup>

Here lies the core of the decision. Is a court to adopt a basically “private ordering approach”, giving supremacy to the contract, and

<sup>33</sup> *Pelech v. Pelech*, *supra*, footnote 2, at pp. 830 (S.C.R.), 661 (D.L.R.), setting out a passage taken from the Law Reform Commission of Canada, Report on Family Law (1976), pp. 42-43.

<sup>34</sup> *Farquar v. Farquar* (1983), 1 D.L.R. (4th) 244, 35 R.F.L. (2d) 287 (Ont. C.A.).

<sup>35</sup> *Dal Santo v. Dal Santo* (1975), 21 R.F.L. 117, at p. 120 (B.C.S.C.).

<sup>36</sup> *E.g., Newman v. Newman* (1980), 114 D.L.R. (3d) 517, 4 Man. R. (2d) 50 (Man. C.A.).

<sup>37</sup> *E.g., Webb v. Webb*, *supra*, footnote 1.

only intervene in a narrow range of cases?<sup>38</sup> Or is the court to impose on the parties a judicial standard of reasonableness notwithstanding their agreement to the contrary?<sup>39</sup> Was it possible to clarify the basis for judicial intervention either by reference to the size of the change in circumstances, "the gross or catastrophic change" referred to in *Webb v. Webb*,<sup>40</sup> or by reference to specific categories of change? Wilson J. felt that, although the *Webb* size of change in circumstances ("dramatic", "radical" or "gross") had merit in trying to uphold the parties' final and conclusive negotiated settlement, it had the flaw of failing to relate the change in circumstances to a dependency flowing from marriage.<sup>41</sup>

McLeod suggests<sup>42</sup> that the test is now comprised of three stages:

- (1) Has there been a (radical<sup>43</sup>) change in circumstances?
- (2) Was the change unforeseen<sup>44</sup> at the time of the agreement (order)?

<sup>38</sup> See *Farquar v. Farquar*, *supra*, footnote 34.

<sup>39</sup> *Newman v. Newman*, *supra*, footnote 36.

<sup>40</sup> *Supra*, footnote 1.

<sup>41</sup> *Pelech v. Pelech*, *supra*, footnote 2, at pp. 850 (S.C.R.), 676 (D.L.R.). The most likely proof will be that a wife has interrupted or lost seniority in her career to assume child care responsibilities. Other proof might include the foregoing of educational upgrading for family reasons or periods of part-time work.

<sup>42</sup> J. McLeod, Annotation to *Pelech* (1987), 7 R.F.L. (3d) 226, at p. 229.

<sup>43</sup> A gloss on J. McLeod's commentary. In *Pelech v. Pelech*, *supra*, footnote 2, at pp. 850 (S.C.R.), 676 (D.L.R.), Wilson J. stated that though radical change was an important factor in a court's decision, by itself it was too imprecise a standard. La Forest J. is less impressed with the size of the change (*ibid.*, at pp. 856 (S.C.R.), 680 (D.L.R.)) and, as unforeseen here is used in the sense of negating a fundamental assumption upon which the original agreement was premised (*ibid.*, at pp. 838-839 (S.C.R.), 668 (D.L.R.)). William Fam. Ct. J. points out in *Publicover*, *supra*, footnote 10, that it does not appear expressly in s. 17(10) of the Divorce Act 1985, *supra*, footnote 8.

<sup>44</sup> It may be vital that agreement indicates that the agreement is final in the sense of each of the parties accepting the risk of failed employment prospects or of future dramatic change in circumstances. In *Publicover v. Publicover*, *ibid.*, Williams Fam. Ct. J. held that the decision in *Pelech* only applied "when the parties or the court have in the original or previous order made a clear attempt to achieve a 'clean break', a termination of any further monetary relationship between the parties or an attempt to terminate any future role for the court (by, for example, a provision that the quantum of maintenance will not be varied or will be varied only in accordance with a fixed identifiable formula or will terminate upon the happening of a specific event)". (Emphasis in the original). The most important issue is *not* the mere existence of a settlement agreement but what the agreement says and contemplates, and how it is interpreted with respect to the issue of finality. Time limited agreements and orders should then set out relevant expectations—are they final or assuming some event taking place? *Ivanovitch v. Ivanovitch* (1985), 45 R.F.L. (2d) 409 (Ont. H.C.) illustrates that if the expectation is clearly stated, and with time is proven wrong or in error, a time limited order is reviewable. In *Ivanovitch* the expectations that the wife would become self-sufficient on completing her engineering program were later proved to be excessively optimistic. If then the recipient spouses can establish that they have fulfilled their obligation to try to become self-sufficient, the failed expectation may constitute a change in circumstance. See also *Slone v. Slone* (1987), 7 R.F.L. (3d) 197 (Ont. Prov. Ct.), and McLeod's annotation thereto.

- (3) Is the change *causally*<sup>45</sup> connected to the marriage and the roles adopted during marriage?

Additionally, one might add that according to the majority<sup>46</sup> the main<sup>47</sup> difference between varying agreements under section 11(1), application *de novo*, and under section 11(2), variation proceedings, is that in the former case the change will have occurred between the signing of the agreement and the application for *decree nisi*, whereas in the latter the change will have occurred between the granting of the *decree nisi* and the application for variation.<sup>48</sup>

The risk of focusing on the agreement and on the need to uphold the broad range of freely negotiated settlements may be to fetter unduly a court's discretion to determine when a variation was fit and just in the individual case.

#### (d) *Exceptions*

The Supreme Court rejected the argument that the fact that the applicant in variation proceedings was a recipient of social assistance was a sufficient basis for departing from the basic test. They did, however, note two exceptions.

##### (i) *Children*

The courts have traditionally intervened to protect children from parents bargaining away their support rights. They, after all, are not parties to the agreement<sup>49</sup> and the courts have been willing to vary child support when they would not have varied spousal support in the face of a final agreement.

The problem of final settlement agreements is compounded by the impossibility of separating the weft of spousal support from the warp of

---

<sup>45</sup> The application of this test in practice is not easy as the dissenting judgment in *Richardson v. Richardson*, *supra*, footnote 4, shows. See, *infra*, pp. 165-166.

<sup>46</sup> In *Richardson v. Richardson*, *supra*, footnote 4, La Forest J. was of the view that the court's discretion was wider under s. 11(1) than s. 11(2); see, *infra*, pp. 165-166.

<sup>47</sup> One difference which attracted much comment was whether it was more appropriate to invoke s. 11(1) or s. 11(2) where no support had been sought at the time when the *decree nisi* was made. The complex case law culminating in *Cotter v. Cotter* (1986), 25 D.L.R. (4th) 221, 53 O.R. (2d) 449 (Ont. C.A.) has been made redundant by the working of s. 4 of the new Act, which allows corollary relief to be invoked by former spouses and is not subject to the words "upon granting a decree nisi of divorce" found in s. 11(1) of the former Act.

<sup>48</sup> *Richardson v. Richardson*, *supra*, footnote 4, at pp. 867 (S.C.R.), 705 (D.L.R.).

<sup>49</sup> Though note J. McLeod's comment in his annotation to *Silverman v. Silverman* (1987), 7 R.F.L. (3d) 292 (N.S.C.A.), that the same argument may not be true on a spouse's application for child support since the contract is binding on the spouse.



child support.<sup>50</sup> Husbands will often make generous short term spousal support available in the expectation of wives becoming self-sufficient or entering into a new marriage. However, such agreements run the risk that, if these expectations are not realized, the court may vary these allegedly final agreements, under the guise of directly or indirectly benefitting the children. The first possibility is to vary child support. Procedurally such an application is made by the custodial parent, who is often the indirect beneficiary of any increase in child support, since living expenses are not capable of being precisely attributed as between spousal and child support. The other possibility is to recognize that the courts must acknowledge that the reality is that the nurture of children is inextricably intertwined with the well being of the nurturing parent and to accept that sometimes a denial of spousal support would result in the indirect deprivation of the children of the marriage.<sup>51</sup> In an appropriate case the only way to protect children might be to grant or increase spousal support to their custodian even though, in the absence of children, no spousal support would be payable.<sup>52</sup> Of the two solutions, both of which seem to have been adopted by the Supreme Court, the preferred solution is to increase child support rather than spousal support to cover increased costs. This can be done by dividing the support obligation in accordance with the parents' incomes and ability to pay.<sup>53</sup>

However, the fact that the children have entered the "expensive years"<sup>54</sup> bites less keenly when the children are in the care of a parent who has received a final settlement worth in excess of \$900,000 of matrimonial property division and child and spousal support. In *Silverman v. Silverman*,<sup>55</sup> a case decided a week before the *Pelech* decision, the Nova Scotia Court of Appeal suggested that, though a court would more readily reopen a final agreement where variation was sought for child support rather than spousal support, there were nevertheless limits. Jones J.A. held that the agreement was not to be disregarded totally simply because there were children. The applicant had to demonstrate a need for an increase in child support, and the items sought had to relate to the needs of the children. In less affluent families the basics of food and housing are not susceptible of neat division between the needs of spouses and children. In wealthier families they may be.

<sup>50</sup> See J. McLeod's analysis of *Friesen v. Friesen* (1985), 48 R.F.L. (2d) 137 (B.C.C.A.).

<sup>51</sup> *Pelech v. Pelech*, *supra*, footnote 2, at pp. 845 (S.C.R.), 672 (D.L.R.).

<sup>52</sup> See *Jull v. Jull*, [1985] 1 W.W.R. 385 (Alta. C.A.); *Binns v. Binns* (1985), 69 N.S.R. (2d) 205 (N.S. Fam. Ct.).

<sup>53</sup> See Wilson J.'s approval of *Paras v. Paras* (1970), 14 D.L.R. (3d) 546, at p. 551, [1971] 1 O.R. 130, at p. 135 (Ont. C.A.), in *Richardson v. Richardson*, *supra*, footnote 4, at pp. 869 (S.C.R.), 706 (D.L.R.). On this analysis the fact that the child support will indirectly benefit the spouse, cannot decrease the quantum awarded to the child.

<sup>54</sup> A phrase encountered in *Friesen v. Friesen*, *supra*, footnote 50.

<sup>55</sup> *Supra*, footnote 49.

## (ii) *Common Law and Equitable Defences*

An agreement subject to vitiating elements, which is incorporated in the minutes of settlement and approved by court order, is binding by virtue of being part of the court order despite its vulnerability as a contract. However, as Wilson J. points out,<sup>56</sup> a court would then legitimately feel less constrained in exercising its power to vary.

In addition to well understood contractual defences, such as duress, fraud,<sup>57</sup> lack of capacity, lack of consent and *non est factum*,<sup>58</sup> there are likely to be increased numbers of cases involving other vitiating factors. However, some of the existing case law is unclear as to what other vitiating or unconscionable elements may affect the enforceability of a contract, or how to distinguish between them.<sup>59</sup> Although there is probably no general broad equitable power to set aside agreements as unfair,<sup>60</sup> there is still scope for inventive advocacy.<sup>61</sup> It is doubtful, however, if husbands and wives are fiduciaries one to the other in concluding settlement agreements.<sup>62</sup>

## *Outcome of the Cases*

The court held in *Pelech* that, though Mrs. Pelech's hardship was great, to burden her former husband, fifteen years after the termination

<sup>56</sup> *Pelech v. Pelech*, *supra*, footnote 2, at pp. 848 (S.C.R.), 674-675 (D.L.R.).

<sup>57</sup> G.W. Keeton and L.A. Sheridan, *Equity* (2nd ed., 1976), pp. 224 *et seq.*

<sup>58</sup> *Mason v. Mason* (1981), 47 N.S.R. (2d) 435 (N.S.C.A.).

<sup>59</sup> In the Nova Scotia case of *Currie v. Currie* (1985), 5 R.F.L. (3d) 192 (N.S.C.A.) a wife, despite legal advice to the contrary, signed a purportedly final settlement agreement by which she waived her right to support or property division. The Nova Scotia Court of Appeal held that the agreement was not binding but did not explain whether this was because of (1) common law vitiating factors, (2) an exception to the *Webb* line of cases, or (3) under the special variation power of the courts under s. 29 of the Matrimonial Property Act, S.N.S. 1980, c. 9, to review agreements which were "unconscionable, unduly harsh or fraudulent".

<sup>60</sup> See the majority in *Tutiah v. Tutiah* (1985), 48 R.F.L. (2d) 337 (Man. C.A.). The limits of unconscionability as a defence have been recently set by the House of Lords in *National Provincial Bank Plc. v. Morgan*, [1985] A.C. 686 which restricts Lord Denning's decision in *Lloyds Bank v. Bundy*, [1975] Q.B. 326 (C.A.).

<sup>61</sup> For instance in *Kristoff v. Kristoff* (1987), 7 R.F.L. (3d) 284 (Ont. D.C.). Mossop D.C.J. appeared to find a settlement agreement a contract *uberrimae fidei*. The utmost good faith precluded a wife from failing to disclose that her husband was not the father of one of the children, and thus entitled the husband to sever that obligation. See further J. McLeod's annotation to this case.

<sup>62</sup> *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, (1978), 83 D.L.R. (3d) 289. The remedial constructive trust cases are an exception to the historic link between constructive trusts and a fiduciary duty. In *H.L. Misener & Son Ltd. v. Misener* (1977), 2 B.L.R. 106 (N.S.C.A.) a wife learned of the lowest price at which her husband was prepared to sell certain property. After becoming intimate with the manager of her husband's competitor she was alleged to have leaked this information to the competitor. The husband's claim to damages for a breach of fiduciary duty failed. Among the reasons was the lack of profit made by the wife. Although a fiduciary position was said to exist, it arose more from the wife's position as director and employee in her husband's company than as a spouse.

of their marriage, for no other reason than they were once husband and wife, would be to over-emphasize marital responsibility at the expense of individual responsibility. The courts should not undermine the agreement of people who, instead of resorting to litigation, had settled their financial affairs in a responsible fashion. This does not fully answer the problem adverted to earlier of older wives who have been caught by a change in society's attitude to marriage and its financial responsibilities and consequences.

In *Caron* the court held that there was no evidence of the wife's work pattern prior to or during marriage, what marketable job skills she had, what her state of health was, what the availability of jobs was; thus there was an insufficient basis for varying the agreement. The stringent test in *Pelech* required proof of a radical change in circumstances. In the absence of such proof it was not appropriate for the court to exercise its power to vary.<sup>63</sup>

*Richardson* proved to be the most difficult of the cases and the dissenting judgment of La Forest J. is most persuasive. The majority held that the wife's contention, that the limited duration of spousal support was based on the spouses' expectation that she would become employed within that period, was not supported by the evidence. Where the expectations were unclear a valid enforceable agreement had to be upheld under the general test enunciated in *Pelech*. Nor was it proper to insert by court order a cost of living escalator clause in a settlement agreement not providing for such a clause, in the absence of circumstances justifying variation. The appropriateness of the insertion of a cost of living clause where judicial variation of a final settlement agreement was justified was left for another occasion.<sup>64</sup>

However it is difficult not to agree with La Forest J. that the fact that the wife had not worked for any substantial period after the birth of the second child in 1974 had resulted in her job skills atrophying.<sup>65</sup> La Forest J. thought that the wife's application for support was an application *de novo* coming within section 11(1) rather than section 11(2) of the former Act, and that the discretion of the judge was broader on an original application for support than a variation application, where the judge's

---

<sup>63</sup> One point of difficulty was whether the agreement in *Caron* could be regarded as final, thus attracting the *Pelech* principle, because paragraph 7 of the agreement contemplated variation of the terms by a court of competent jurisdiction. The court interpreted this paragraph as creating a power to vary quantum, assuming the existence of a continued right to support, rather than a power of reinstatement of a right to support which had been forfeited by cohabitation. See *supra*, footnote 3, at pp. 902-903 (S.C.R.), 742-743 (D.L.R.).

<sup>64</sup> *Supra*, footnote 4, at pp. 873 (S.C.R.), 709-710 (D.L.R.).

<sup>65</sup> *Supra*, footnote 4, at pp. 886-887 (S.C.R.), 719-720 (D.L.R.), a view rejected by Wilson J. on the basis that the wife worked more often than not during the marriage, even if she did not work substantially from the birth of her second child until the parties separated; *ibid.*, at pp. 868 (S.C.R.), 705-706 (D.L.R.).

authority is confined to considering circumstances subsequent to the original order. Moreover, the settlement agreement made pursuant to provincial family law while a marriage subsists did not have the same quality of finality as a separation agreement sanctioned in a divorce proceeding.<sup>66</sup> Given that the *Pelech* test applied to both subsections, the wife had suffered a radical change in circumstances attributable to a pattern of economic dependency generated by the marriage. She was in her mid-forties, had to have time and energy for child care, factors that were significant in assessing her competitive position against younger people.<sup>67</sup> Her dependency flowed from the marriage. The trial judge, having determined that the provision under the agreement for an indebted and destitute spouse was inadequate, awarded spousal support notwithstanding the settlement agreement. No sufficient reason had been advanced to disturb the trial judge's decision and it should have stood.<sup>68</sup>

La Forest J. was more enthusiastic<sup>69</sup> about the use of cost of living escalator clauses than the majority of the court.<sup>70</sup> He approved a number of authorities,<sup>71</sup> despite the decisions to the contrary,<sup>72</sup> and despite his own recognition that an increasing amount might not be a periodic payment within the meaning of the former Divorce Act and that a variation procedure is provided within the same legislation. Even if it is possible to express the escalator clause in terms of the supporting spouse's actual wage rather than the Consumer Price Index, thus providing for the case where the husband's wage increases more slowly than the Consumer Price Index, other problems remain, including the uncertain future impact of income tax.<sup>73</sup>

<sup>66</sup> This view was rejected by Wilson J.; see *supra*, footnote 48, and accompanying text.

<sup>67</sup> See La Forest J.'s remarks about *Richardson* in *Pelech*, *supra*, footnote 2, at pp. 855-856 (S.C.R.), 680 (D.L.R.); and in *Richardson* itself, *supra*, footnote 4, at pp. 886-887 (S.C.R.), 720 (D.F.L.).

<sup>68</sup> *Richardson*, *ibid.*, at pp. 887 (S.C.R.), 720 (D.L.R.).

<sup>69</sup> He cited, *ibid.*, at pp. 890-891 (S.C.R.), 723 (D.L.R.), the following authorities in R. Abella and C. L'Heureux-Dubé, *Family Law: Dimensions of Justice* (1983): J. Payne, *Approaches to Economic Consequences of Marriage Breakdown*, p. 30; G. Cook, *Economic Issues in Marriage Breakdown*, p. 20; T. Berger, *Forms of Support Order Under the Divorce act*, p. 75.

<sup>70</sup> Compare the majority view, *supra*, footnote 64 and accompanying text.

<sup>71</sup> *Lardner v. Lardner* (1980), 20 R.F.L. (2d) 234, at pp. 235-236 (B.C.C.A.); *Moosa v. Moosa* (unreported) (Ont. Prov. Ct., June 17, 1981); *Laflamme v. Levallée*, [1981] C.A. 396; *Jarvis v. Jarvis* (1984), 45 R.F.L. (2d) 223 (Ont. C.A.).

<sup>72</sup> *Yeates v. Yeates* (1982), 31 R.F.L. (2d) 71, at p. 77 (N.S.T.D.); *Unsimi v. Unsimi* (1975), 24 R.F.L. 261, at p. 263 (Ont. C.A.).

<sup>73</sup> For example, under the current tax reform proposals, the tax brackets will be reduced in number and the rate of tax generally lowered. This will increase notionally the husband's after tax income but also reduce the income splitting potential by reducing the value of the tax deductions due in respect of his spousal and child support. Under the proposed Part II tax changes there seems to be a move to value added or consumption taxes. These will hit both the payer and recipient spouse. Unless the tax credits to the recipient spouses are adequate the impact on wives and children in terms of their needs may be considerable.

### Conclusions

- (1) Although the Supreme Court has retained the *Hyman*<sup>74</sup> principle of not being bound by final settlement agreements of the parties it has nevertheless adopted a policy of considerable deference to such agreements, save in cases of radical changes of circumstances causally connected to the marriage.
- (2) The drafting of such agreements will require even more care in future. For example, if the parties have expectations or assumptions which result in the incorporation of time limited orders in the agreement, these expectations or assumptions should be clearly set out; or if the agreement is to be a final global settlement agreement this, too, should be clearly stated. The identification of expectations may be difficult in practice and may even inhibit settlements being reached.
- (3) When presenting cases in court care will have to be taken to establish the foundation for a possible later argument (in variation proceedings) that a wife's economic dependency can be causally related to the marriage.<sup>75</sup> A case like *usband's* catastrophic change of circumstances in *Webb v. Webb*<sup>76</sup> will be more difficult to deal with.
- (4) Although some wives' lawyers will be asking for escalator clauses or even lifetime maintenance, it seems less likely that husbands' lawyers will be willing to agree to them.<sup>77</sup> In some cases logic and legal prudence may mean that the better course is not to settle. Whether this will "spill over" and adversely affect mediation must be open to question.
- (5) There will be probably an increase in case law on vitiating factors under the existing law of equity and contracts. The law on vitiating factors may be "manipulated" to help "deserving cases".
- (6) New jurisprudence on "causal connections", "expectations" and what is (or is not) a "radical change in circumstances" may be expected.
- (7) The potential indirect benefit to the custodial parent is normally not a relevant factor in variation proceedings relating to child support, but an indirect deprivation of a child may be relevant in variation proceedings for spousal support brought by a custodial parent.

<sup>74</sup> *Supra*, footnote 17.

<sup>75</sup> See comments of D.C. Day, reported in *The National*, Vol. 14, p. 8 (July/August 1987 issue).

<sup>76</sup> *Supra*, footnote 1.

<sup>77</sup> See comments of S. Hall in *The National*, Vol. 14, p. 8:

In every instance where I am acting for the wife I intend to obtain maintenance with a cost-of-living clause built in that goes on forever, particularly with a woman who will have a difficult time entering the job market.

Hall also noted that because of the usual finality of contracts, he recommends getting the financial planners and actuaries involved in any negotiations. "All contingencies are going to have to be thought through."