THE UNIVERSITY OF CALGARY

Litigating Pan-Canadianism: The Constitutional Litigation Strategy of the Canadian Federal Government in Charter Cases, 1982-1993

by

Matthew A. Hennigar

A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES

IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE

DEGREE OF MASTER OF ARTS

DEPARTMENT OF POLITICAL SCIENCE

CALGARY, ALBERTA

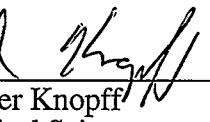
APRIL, 1996

THE UNIVERSITY OF CALGARY

FACULTY OF GRADUATE STUDIES

The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies for acceptance, a thesis entitled "The Constitutional Litigation Strategy of the Canadian Federal Government in Charter Cases, 1982-1993" submitted by Matthew A. Hennigar in partial fulfilment of the requirements for the degree of Master of Arts.

Supervisor, F.L. Morton
Political Science



Rainer Knopff
Political Science

David Taras
General Studies

May 8, 1996

Date

Litigating Pan-Canadianism: The Constitutional Litigation Strategy of the Canadian Federal Government in Charter Cases, 1982-1993

Abstract

This is a study of the Federal government's attempts to influence the policy effects of the 1982 *Charter of Rights and Freedoms* through its legal arguments before the Supreme Court of Canada. Canadian governments may be understood as "repeat players" who strategically intervene to elicit judicial rulings that protect their constitutional interests. Ho's 1995 study found that provincial governments pursued *Charter* litigation strategies that complemented their support (opposition) to the *Charter* in formal constitutional negotiations. This analysis of the Attorney General of Canada's factums in twenty-nine cases between 1982 and 1993 demonstrates that Ottawa encouraged judicial activism in language rights cases, but urged judicial self-restraint in other areas. The Mulroney government's support in court for expanding the power of the courts over provincial language policy contradicted its Meech Lake and Charlottetown strategies. The Trudeau government's weak support for the other sections of the *Charter* contradicts his reputation as a libertarian and partisan of judicial power.

Acknowledgements

I would like to thank a number of people whose support has been essential to seeing this thesis to its conclusion.

For the second time in print, I thank my parents and brothers for their moral support and humour, all the more appreciated this time around because it came long-distance. Special thanks to Kathleen Batstone for her love and support during our time in Calgary, despite my undoubtedly tiresome thesis-related ramblings. Thanks too to Ernie, whose unique brand of canine contentment and comfort helped keep me sane while giving me company on long weekends in the office.

I also wish to extend my gratitude to the secretaries who make the department "trains run on time", Ella Wensel, Valerie Snowdon, Judi Powell and Carolyn Andres. Their friendly concern and help with gremlins of the technical and administrative varieties are greatly appreciated. Thanks also to Denise Jackson at Court Records in Ottawa, who provided the required documents for the study speedily despite the distance and often short notice; she was also kind enough to give me a tour of the Supreme Court on my research trip.

That trip, as well as my food, shelter and mentally-necessary trips home were made possible by scholarships from the Province of Alberta and Pan-Canadian Petroleum Ltd. Special thanks for their generosity.

I am also grateful for the insights provided by my thesis examiners, Professors Rainer Knopff and David Taras, and fellow students Ian Brodie, Shawn Ho and Brenda Long. Finally, extra-special thanks to my advisor Dr. F.L. Morton, who has provided me not only with intellectual guidance but research funding, teaching experience and a steady supply of wild game. His perspectives on the study of law and politics have left me with a far richer understanding of that which I study, as I hope this thesis reflects.

Table of Contents

CHAPTER ONE

Introduction

Litigation is one of the ways by which a government can pursue constitutional change. Manfredi identifies such litigation as "micro-constitutional politics," and contrasts it to the traditional process of formal constitutional amendment, which he terms "macro-constitutional politics."[1] In Canada, macro-constitutional politics has taken the form of elite accommodation, most recently executive federalism. Governments' presence in the courts on constitutional issues pre-dates 1982,[2] but the *Charter* has raised the profile, frequency, and stakes of such government litigation.

Central to Manfredi's distinction is his identification of first- and second-order rules. First-order rules are those provisions enumerated in Canada's constitutional documents, such as the federal division of powers in the *Constitution Act, 1867* (formerly the *B.N.A. Act, 1867*), and the specific rights and freedoms guaranteed in the *Charter*. Thus, altering first-order rule requires formal amendment. Second-order rules, on the other hand, are those interpretive rules used by the Court that give life to the first-order rules, or laws.[3] Micro-constitutional politics occur primarily when litigation is used to influence second-order rules.

---

[1]Christopher P. Manfredi, "Litigation and Institutional Design: The *Charter of Rights and Freedoms* and Micro-Constitutional Politics," 1-2. Paper presented at the 1993 Annual Meeting of the Canadian Political Science Association, Ottawa, Ontario; June 6, 1993. See Peter Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 2nd ed. (Toronto: U of Toronto P, 1993) for a thorough chronicling of the evolution of executive federalism.

[2]For example, the *Patriation Reference* case which was crucial to the 1982 amendment process itself.

[3]*Ibid.* 4. Manfredi's distinction in this regard is especially useful as it recognizes that constitutional provisions are not self-enforcing, but require the active participation of legal actors, most importantly judges, to acquire socio-political relevance.

Micro-constitutional politics also usually involves a "repeat player" employing systematic litigation, often incrementally over several cases. This description of micro-constitutional politics is usually associated with interest groups, which have the professional and financial resources to engage in repeated, protracted litigation. The paradigmatic example of this phenomenon is the series of anti-segregation cases in the U.S. Supreme Court litigated or supported by the NAACP, culminating in the decision in *Brown v. Board of Education* [1954]. The Women's Legal Education and Action Fund (LEAF) has attempted a similar strategy with respect to advancing feminist policy goals in Canada via sections 15 and 28 of the *Charter*. However, by this account, *governments* are potentially the ultimate repeat players and systematic litigants, because of their superior financial and professional resources. Consistent with this hypothesis, Brodie found that between 1984 and 1990 government interventions in Supreme Court of Canada cases outnumbered non-government interveners 268 to 100.[4]

That said, not all government litigation relating to the *Charter* qualifies as micro-constitutional politics. Unlike interest groups, governments can be drawn into cases involuntarily as respondents, or appeal a decision to try to protect their policies. In such cases, governments typically place their short-term policy interests - that is, defending their legislation - ahead of their long-term constitutional objectives. As Knopff warns, one should expect inconsistent legal reasoning when litigation is subservient to political strategy, even to the point where legal arguments are "theoretically incompatible with the very end the strategy is designed to secure."[5] For these reasons, third-party interventions are most relevant to a study of a government's micro-constitutional strategy.

---

[4]Ian Brodie, "Interest Groups and the *Charter of Rights and Freedoms*: Interveners at the Supreme Court of Canada" (M.A. Thesis, The University of Calgary, 1994).

[5]Rainer Knopff, "Legal Theory and the 'Patriation' Debate," *Queen's Law Journal* 7 (1981): 42.

However, unlike the provinces, the federal government can intervene as a third party when its own legislation is at stake. This is made possible by provincial enforcement of the federal *Criminal Code*. Thus, the provincial government is the defendant (or respondent/appellant on appeal) when *Charter*-based challenges are brought against the *Criminal Code*, while Ottawa enjoys an automatic right to intervene. In such cases, Ottawa's interests are effectively analogous to when it is a party. Nonetheless, some party and *Criminal Code*-related cases are included in this study, for several reasons. First, it is necessary to test the theory that Ottawa's short-term interest of protecting its policies eclipses its long-term micro-constitutional goals. The theory would be supported if, in practice, Ottawa promoted different interpretive choices when its legislation was at stake and when the federal government was truly a third party intervener. Second, including these cases may provide evidence that Ottawa participates in certain types of *Charter* litigation only when its policies are at stake. This would indicate an absence of federal strategic litigation in that area. Finally, whether Ottawa attempts to defend its legislation in these cases is relevant, as a failure to do so may indicate tacit support for judicial intervention via the *Charter*.

In Canada's federal system the opportunity exists for one government to intervene in litigation involving other governments, in order to influence second-order rule-making that may affect the intervening government's long-term constitutional position. The hierarchical structure of the Canadian court system means that the Supreme Court of Canada has the "last word" on constitutional interpretation. This elevates the stakes of micro-constitutional politics, creating a powerful incentive for governments with interests at stake to intervene. Nonetheless, Canadian scholarship in this field is relatively underdeveloped. Work on micro-constitutional politics is recent, and focuses almost

exclusively on non-governmental interest groups. Authors in this area include Manfredi,[6] Brodie,[7] Morton,[8] Knopff,[9] Hausegger,[10] and Riddell.[11]

However, a recent study by Ho examined the micro-constitutional strategies of the Ontario, Alberta and Saskatchewan provincial governments vis-à-vis the *Charter* and judicial power.[12] He found that over the ten year period studied (1982-1992), all three governments followed a consistent micro-constitutional strategies over time, despite changes of government. Ontario emerged as the most "pro-*Charter*," that is, the strongest supporter of broad *Charter* interpretations that expanded judicial supervision of legislative and administrative policy choices. Conversely, Alberta and Saskatchewan were consistent in their resistance to the erosion of provincial legislative authority, urging judicial deference and narrow interpretations of *Charter* rights and freedoms.

Equally significant was Ho's finding that each province's macro-constitutional agenda was consistent over time and across different governments. More importantly, each province's micro-constitutional strategy paralleled its macro-constitutional agenda. This co-ordination suggests either the presence of a pervasive political culture towards the *Charter* and judicial power in each region, or strict direction of constitutional litigation by

---

[6]Manfredi, "Litigation and Institutional Design."

[7]Brodie, "Interest Groups and the *Charter of Rights and Freedoms*."

[8]F.L. Morton, *Morgentaler v. Borowski: Abortion, the Charter and the Courts* (Toronto: McClelland and Stewart, 1992); "The Political Impact of the Canadian *Charter of Rights and Freedoms*," *Canadian Journal of Political Science* (March 1987).

[9]Rainer Knopff and F.L. Morton, *Charter Politics* (Scarborough: Nelson Canada, 1992).

[10]Lori Hausegger, "The Effectiveness of Interest Group Litigation: An Assessment of LEAF's Participation in Supreme Court Cases" (M.A. Thesis, The University of Calgary, 1994).

[11]Troy Riddell, "The Development of Section 1 of the *Charter of Rights*: A Study in Constitutional Politics" (M.A. Thesis, The University of Calgary, 1994).

[12]Shawn Ho, "The Micro-Constitutional Strategy of Provincial Governments in Charter Cases: A Study of Alberta, Saskatchewan and Ontario, 1982-1992" (M.A. Thesis, The University of Calgary, 1995).

provincial executives. Whichever the case, Ho concludes that provincial constitutional agendas are determined primarily by regionalism.

While Ho's work begins to remedy the absence of research on governmental strategies in micro-constitutional politics, a gap persists with respect to the national government's micro-constitutional activities. This study investigates this lacunae by investigating the following questions:

1. Has the federal government manifested a discernible and consistent position toward judicial power at the macro-constitutional level?

2. Has the federal government manifested a discernible and consistent position toward judicial power at the micro-constitutional level?

3. Has the federal government exhibited consistency in pursuing the same or complementary objectives at both levels?

The research adopts Ho's methodology, and focuses on governmental attitudes toward the most fundamental issue in micro-constitutional politics: judicial power itself. For purposes here, judicial power is used in an institutional sense, with greater power implying greater judicial *intervention* in legislative policy choices. The de facto policy-making authority entailed by judicial remedial power via the *Charter* was a major issue for the federal government at the macro-constitutional level during the 1980-81 negotiations. At the micro-constitutional level, this study follows Ho's method of addressing this basic issue through an analysis of federal government factums in cases involving leading interpretive *Charter* issues. Ho selected those matters of particular interest to the provinces, whereas this study focuses on those issues of special concern to Ottawa. For the most part, these interests coincide, such as with freedom of religion (section 2(a)), freedom of expression (section 2(b)), equality rights (section 15), minority language rights (section 23) and judicial remedial power (section 24(1)).

There are several advantages to modeling the study after Ho's. First, comparison with his findings is possible, especially since many of the legal cases examined are the same. Thus, findings regarding federal strategies can be placed in context, at both the micro- and macro-levels, along the "judicial activism–judicial self-restraint" spectrum represented at one pole by Ontario and at the other by Alberta and Saskatchewan. Moreover, alliance patterns between Ottawa and particular provinces may be discerned, with implications for a centre-periphery analysis of *Charter* politics. Finally, this study functions as a test on the "exportability" of Ho's conclusions. That is, if Ottawa's macro- and micro-constitutional strategies are consistent, this would be further evidence of regionalism as a decisive factor in governments' constitutional agendas.

By the same token, the limitations inherent in Ho's approach are shared by this study. Certain constitutional topics are ignored due to the limited scope of the thesis, such as aboriginal, democratic and mobility rights. Legal rights (or criminal process) cases are also excluded, for two reasons. First, a government's micro-constitutional planning in these cases is limited by the state's primary interest in prosecuting criminal litigation. The second is economy: the majority of *Charter* cases participated in by the federal government relate to criminal process, which, if examined in the same thesis as the non-criminal process cases, would exceed the limits on the study's size and of the author's financial resources. Lastly, the thesis is limited to cases argued before the Supreme Court of Canada for the purposes of comparison with Ho's study.

Chapter Two analyzes the federal government's macro-constitutional strategy between 1980 and 1993. After defining the indices used to measure micro-constitutional orientations in Chapter Three, Chapters Four and Five analyze the federal factums from the same time period regarding fundamental freedoms (religion and expression) and equality rights, respectively. Chapter Six examines the federal government's litigation pertaining to

bilingualism, including freedom of expression and education rights cases. Federal attitudes toward judicial remedial powers are examined in this section as well, in part because of the small case sample in this area, but mostly to compare the federal position on judicial remedy in "bilingualism" cases to Ottawa's approach to the same issues in other *Charter* areas. As well, Ottawa's treatment of the section 33 legislative override ("notwithstanding") clause is discussed in Chapter Six, since this treatment occurs only in the context of language rights. In Chapters Four through Six, the Supreme Court's decisions are discussed only when they establish or develop a second-order rule, and are thereby relevant to subsequent litigation.

The final chapter addresses the three central questions posed above. In summary, the federal government's macro-constitutional agenda was more consistent across the Liberal and Conservative governments than expected. However, while both governments exhibited weak support for non-language rights, the Trudeau government's support for language rights was markedly stronger than that of the Mulroney government. At the micro-constitutional level, by contrast, the Mulroney government more closely mirrored the Trudeau government: both governments exhibited greater federal support for judicial power via language rights throughout the entire period. As such, there was a disjuncture between the Mulroney government's macro- and micro-constitutional strategy with respect to language rights, at least within Quebec. In contrast, the Trudeau government witnessed relative harmony between its formal and litigated constitutional agendas, although micro-constitutional support for non-language rights was weaker than hypothesized.

The chapter also explores possible explanations for the particular differences between the micro-constitutional strategies of the federal government and those of the provinces studied by Ho, as well as what might explain the disjunctures between Ottawa's macro- and micro-constitutional approaches. Analysis indicates that regionalism,

manifested through electoral coalitions and Cabinet appointments, helped shape the macro-constitutional strategy of both the Trudeau and Mulroney governments. However, these disjunctures suggest that, contrary to Ho's conclusions regarding the provinces, regionalism does not determine Ottawa's micro-constitutional political strategy. Rather, the internal attributes of the Attorney-General's office (the federal Justice Department) and the relationship between the department and the political executive are the primary influences.

CHAPTER TWO

Federal Macro-Constitutional Politics

Managing the coexistence of French and English in a united Canada has been an ongoing (and often all-consuming) project for our governing bodies since 1763.[1] It is a project that became more difficult and urgent with the advent of Quebec nationalism during the Quiet Revolution. The most recent responses to Quebec nationalism have been three attempts at constitutional change - the Patriation Debate (1980-81), the Meech Lake Accord (1987-90) and the Charlottetown Accord (1990-92). This chapter analyzes the macro-constitutional strategies of the federal government in these three rounds of constitutional change.

The 1982 entrenchment of bilingualism and language rights in the *Charter* effected then-Prime Minister Trudeau's strategy to counter Quebec nationalists by subjecting Quebec's language laws to judicial review by the federally-appointed Supreme Court of Canada. However, through the same mechanism of entrenchment, the *Charter* represented the advent of a legal regime in which judges and courts acquired the potential to displace elected representatives and legislatures in other policy fields as well. Ultimately, judges chose the path of judicial aggrandizement, thereby diminishing the policy autonomy of all the provinces, but especially Quebec. In response, provincial governments, led by Quebec, strove in vain to reverse this development through constitutional negotiation with

---

[1]This is evident in the *Quebec Act, 1774*, which granted French Canadians religious freedom and use of their traditional civil law; the establishment of Upper and Lower Canada in the *Constitutional Act, 1791*; Canada East and West in the 1840 *Act of Union*; and Confederation in 1867 (Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People*, 2nd ed., (Toronto: U of Toronto P, 1993): 13-33). The tensions involved in this project have reached a flash-point on several occasions since 1867, most notably in the Manitoba Schools Crisis of the 1890s, and the Conscription Crises in both World Wars this century.

the newly-elected Conservative government in Ottawa, which was more amenable to legislative empowerment.

Trudeau and Pan-Canadianism, 1967-1982

Ottawa's macro-constitutional strategy during the 1980-81 period cannot be divorced from the personal vision of Pierre Elliott Trudeau. To understand this vision, one must harken back to 1967, when he emerged on the national political stage as Lester Pearson's Minister of Justice. Trudeau's advocacy of an enhanced French presence nationally, through bilingualism, reflected the agenda of one of three post-Duplessis Quebec elites that emerged during the Quiet Revolution.[2] Diametrically opposed to this vision, radical Quebec nationalists preferred political independence, or "sovereignty," and were led by René Lévesque under the banner of the Parti Québécois. The third, "moderate nationalist" elite operated within Quebec, and preferred to remain in Canada, but only with formal recognition of Quebec's special status as the primary homeland of French language and culture, and augmented provincial powers to preserve and promote that status.[3] This middle position was based on the "compact theory" or "two nations" vision, and was represented by Robert Bourassa and the Quebec provincial Liberal government of the early 1970s, and again after 1984.

Following Ontario's 1967 Confederation of Tomorrow Conference, Trudeau pursued a "homeland Canada" strategy, which sought to absorb Quebec nationalism into a less exclusive (that is, less British) Canadian nationalism, or "Pan-Canadian identity."[4]

---

[2]David Milne, *The Canadian Constitution* (Toronto: James Lorimer & Company, Publishers, 1991): 55.

[3]*Ibid.*, 56.

[4]Garth Stevenson, *Unfulfilled Union: Canadian Federalism and National Unity* (3rd ed.) (Toronto: Gage Educational Publishing Company, 1989): 245.

Prior to 1982, the strategy consisted of three fundamental tenets: the constitutional entrenchment of bilingualism, a charter of universally-held liberal rights, and patriation.[5]

Trudeau believed that enhancing the presence of French language and culture throughout Canada would convince francophone Quebecers that separation was not necessary for the survival of French in Canada. The first stage of this project was the passage of the *Official Languages Act* in 1969. The OLA enhanced the presence of French in the federal bureaucracy while establishing a symbol of Canada's linguistic duality. However, the symbolic and substantive impact of these measures was limited, since, as a federal statute, the OLA did not apply to provincial institutions or jurisdiction. Thus, the OLA also attempted to promote bilingualism at the grassroots level, by providing organizational grants for official language minority advocacy groups (OLMGs). Subsequently, these groups were aided in their lobbying efforts for greater French-language services and education though massive infusions of financial support from the Secretary of State, which also expanded to fund women's and multicultural advocacy organizations.[6]

Ottawa's next step was to encourage OLMGs to challenge provincial unilingualism legislation - particularly Quebec's Bill 101, or *la Charte de la langue française* - through the courts. OLMGs were granted funding to initiate litigation through the Court Challenges Program (CCP) in 1977. Trudeau recognized the potential for litigation to achieve federal goals in language policy where Parliamentary jurisdiction did not apply. The legal basis for litigation within Quebec was section 133 of the then-*British North America Act, 1867*, which required bilingual legislative and judicial record-keeping by Ottawa and Quebec.

---

[5]Milne, 57. Of these, only the entrenchment of rights is directly relevant to micro-constitutional politics.

[6]See Leslie A. Pal, *Interests of State: The Politics of Language, Multiculturalism and Feminism in Canada* (Montreal-Kingston: McGill-Queen's UP, 1993): chapter 7.

Claims outside of Quebec were on various grounds, such as section 23 of the *Manitoba Act, 1970*, which parallels section 133. These cases, *Blaikie* and *Forest*, are discussed in Chapter Six.

Entrenchment of language rights was the next logical step in this "end-run" around the provinces, as it would provide a broader constitutional basis for legal claims by OLMGs. Since provincial legislation and regulations would be subordinate to constitutionally entrenched language rights, they would be vulnerable to judicial review, ultimately by the federally-appointed judges of the Supreme Court of Canada. This would give Ottawa a much-desired "veto" over provincial language legislation, albeit by judicial proxy.[7] Furthermore, provisions applying bilingualism to the "English" provinces implied a satisfying measure of reciprocity to Quebecers for their province's forced special treatment of the anglophone minority.

Trudeau's first attempt at entrenchment occurred at the 1971 First Ministers' Conference in Victoria. The federal agenda was to entrench minority language education rights, bilingual services in the provinces, a weak charter of equality and democratic rights, and a patriated amending formula requiring the consent of Ontario, Quebec, Ottawa and a majority of the Atlantic and Western provinces respectively. However, Ottawa gave way during negotiations to stiff provincial opposition to entrenchment, in return for commitments to enhance bilingualism in provincial legislatures, courts and civil services.[8]

---

[7]Trudeau's understanding of the central role played by judges in this strategy is suggested to some degree by his appointment of judges openly hostile to separatism to the Quebec Trial and Appeal Courts. In particular, Mandel notes the appointment of Jules Deschênes to those lower courts that heard the language rights cases *Blaikie* and *Quebec Protestant School Boards* discussed in Chapter 5 (Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, (revised, updated and expanded edition) (Toronto: Thompson Educational Publishing, 1994): 134-5).

[8]Milne, 59.

This concession was ultimately in vain, as the Victoria Charter was scuttled by Quebec premier Robert Bourassa's last-minute withdrawal of support.

During the 1980-81 negotiations, the entrenchment of bilingualism was central to the federal agenda. This is apparent in the unusually technical wording of the *Charter*'s language rights, most notably section 23's minority language education rights.[9] This wording directly contradicted section 73 of Bill 101, which required French-language schooling for all children except those whose parents were educated in English *in Quebec*.[10] As stated most bluntly by Joseph Magnet, "section 23...is a direct attack on Quebec's Bill 101."[11] Moreover, the precision of section 23 was designed to ensure that judges would interpret the section precisely as its federal framers intended.

---

[9]Section 23 reads: (1) Citizens of Canada

(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom any child had received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children received primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(a) wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction.

(b) includes, where the number of these children so warrants, the right to have them received that instruction in minority language educational facilities provided out of public funds.

[10]Because section 59(1) of the *Constitution Act, 1982* exempts Quebec from section 23(1)(a), Quebec parents who received English-language instruction outside of Canada (most, notably, immigrants who became Canadian citizens) do not enjoy the right to have their children taught in English.

[11]Joseph E. Magnet, "A New Deal in Minority Language Education," *Courts in the Classroom: Education and the Charter of Rights and Freedoms*, eds. Michael E. Manley-Casimir and Terri A. Sussel (Calgary: Detselig Enterprises Ltd., 1986): 109. For a more legalistic (but less forthright) discussion of this point, see Peter W. Hogg, *Constitutional Law of Canada* (3rd Edition) (Scarborough: Thompson Canada Ltd., 1992): 1221-4; Michel Bastarache, "Education Rights of Provincial Official Language Minorities," *The Canadian Charter of Rights and Freedoms* (2nd Edition), eds. Gerard-A. Beaudoin and Ed Rastushny, (Toronto: Carswell, 1989): chpt. 16; and Pierre Foucher, "Language Rights and Education," *Language Rights in Canada*, ed. Bastarache (Montreal: Les Éditions Yvon Blais Inc., 1987): 255-311.

The centrality of bilingualism to the federal agenda was also evinced by the refusal of Trudeau and his negotiators to allow the provinces to apply the section 33 legislative override to the language rights provisions.[12] Just days prior to reaching an agreement with all of the provinces except Quebec, Trudeau argued that if his minority language rights were not incorporated in the *Charter*, it would give the PQ "a first class tool to fight for independence."[13] For Trudeau, allowing Quebec to override sections 16-23 would be no different from leaving the rights out of the *Charter* altogether.

The contrast between the federal government's willingness to bargain the entrenchment of bilingualism, especially minority language rights, in 1971 but not 1980-81 deserves some explanation. The change primarily reflects Trudeau's adversarial strategy of strengthening his centralizing/nationalizing demands in the face of greater centrifugal pressures on the nation by the late 1970s. The separatist threat posed by the PQ government in Quebec was joined by the ardent forces of regionalism from the resource-rich West, and even the impoverished Atlantic provinces, as visions of offshore oil development danced in the heads of Nova Scotia and Newfoundland's leaders. However, Trudeau's new strategy was only possible because he enjoyed a far stronger bargaining position in 1980-81 than in 1971. In his victorious return to Parliament in 1980, he received overwhelming support in Quebec, which was bolstered further by his successful leadership of the NO forces shortly thereafter in the Quebec referendum. With Lévesque's

---

[12]Roy Romanow, John Whyte and Howard Leeson, *Canada...Notwithstanding: the Making of the Constitution 1976-1982*, (Toronto: Carswell/Methuen, 1984): 210. As noted above, the parties to the final agreement exempted Quebec from the contentious section 23(1)(a), with the option to "opt-in" later. However, this did not relieve Quebec from the general effect of minority language rights, as discussed in Chapter 5.

[13]*Ibid.*, 206.

position as "Quebec's representative" thus weakened, Trudeau's ability to press his language rights agenda was greatly enhanced.[14]

With respect to the central issue of this study, Ottawa was unequivocal in its support of expanding judicial power vis-à-vis language rights. This is evident in the relatively explicit directives to the judiciary contained in section 23. As well, the exemption of sections 16 to 23 from the "notwithstanding" clause meant that the judiciary would have the final word on the application of language rights. Although these rights were still vulnerable to section 1 analysis of whether legislative restrictions were "reasonable limits," this too would be determined by the judiciary.[15]

In light of Ottawa's support for judicial power in this field, and the earlier indication from the Deschênes[16] and Laskin[17] appointments that Trudeau recognized the importance of which judge hears a case, it is perplexing that Trudeau was willing to surrender Ottawa's monopoly on the appointment process for Supreme Court of Canada judges. At both Victoria and during negotiations between 1978 and 1982, Trudeau offered to allow

---

[14] The alternative argument that Ottawa did not appreciate the value of entrenching language rights and the potential of the courts at Victoria is unlikely, or the language rights would not have been proposed. It is also unlikely that Ottawa did not perceive the threat of assimilation to minority francophone communities until after 1971, since this was identified by the report of the Royal Commission on Bilingualism and Biculturalism as early as 1967 (see Chapter II, Volume 1 and Chapter IV, volume 1, to which Trudeau himself was a consultant). However, the cost of losing these communities had risen in the intervening period.The election of the PQ government in 1976 and the impending referendum on separation increased Trudeau's need to demonstrate the validity of his "national bilingualism" vision to Quebecers, which would be undermined by the continued assimilation of minority francophone communities. More tangibly, federal funding to OLMGs had created a powerful constituency who demanded recognition, and whose assimilation would mean the loss of an important political actor for the federal interest (Pal, ch. 7).

[15] As we will see in Chapter 5, Ottawa intervened strenuously to encourage findings of unreasonableness in section 1 analysis in language rights cases.

[16] see note 7, *supra.*

[17] As Morton notes, Trudeau's 1973 appointment of Laskin - the Supreme Court of Canada's leading civil libertarian and judicial activist - as Chief Justice broke the custom of appointing the most senior judge in terms of service (while alternating between a francophone and an anglophone); *Law, Politics and the Judicial Process in Canada* (2nd Edition), ed. F.L. Morton (Calgary: U of Calgary P, 1992): 51; 78.

provinces to nominate Supreme Court candidates, with final appointments made by a reformed and more regionally-representative Senate.[18] Equally startling is Romanow's admission that the provinces rejected this "regionalization" of the Court in 1978, in part due to their emphasis on division-of-powers issues.[19] This suggests that *we* must not over-emphasize the degree of understanding of micro-constitutional politics held by elected political elites. That said, when the federal government presented its package for unilateral patriation in October 1980, reform of the appointment procedure was dropped from the agenda, and did not find its way into the final agreement.[20]

Ironically, the many parts of the *Charter* that do not relate to language rights were designed in part to make the entrenchment of language rights more palatable. It was clear that the anglophone provinces would not accept constitutional reforms which only bilingualized their institutions and educational systems. However, language rights might be acceptable if presented as part of a broader bill of democratic, legal and equality rights which would enjoy public support. As Milne observes, by positioning language rights within the context of more familiar civil liberties, Trudeau sought "to defuse anglophone backlash against French such as bedeviled the 1969 *Official Languages Act*."[21] Similarly, Smiley notes that "[e]ncapsulating language rights in a broader Charter made the protection

---

[18]Romanow *et al.*, 36.

[19]*Ibid.*, 37.

[20]However, this says less about Ottawa's understanding of judicial power than their desire to patriate the package by narrowing the proposals to exclude any reforms of central institutions. Presumably, this omission was hoped to improve the chance of Westminster's acceptance of the package, since the Supreme Court of Canada had just ruled in the *Senate Reference* [1980] (1 S.C.R. 54) that Ottawa could not reform another central institution - the Senate - unilaterally. As well, limiting the number of items on the constitutional agenda would lessen the possible sources of disagreement should negotiations with the provinces resume.

[21]Milne, 57.

of English and French more palatable to English-speaking Canadians and fended off the charge that constitutional reform was an exercise of 'French power'."[22]

This is not to deny the existence of independent purposes for a bill of rights. Trudeau's desire to forge a new Pan-Canadian identity was itself a reason to pursue the entrenchment of universally-held "citizens' rights." At the biographical level, Trudeau's affinity for individual liberal rights was evident during his time as a writer for *Cité libre*, when he railed against the egregious transgressions of human rights by the Duplessis regime.[23] Whatever the reasons, Trudeau saw in a bill of rights a strong symbol of national unity, a "great equalizer" with the potential, like the patriation exercise, to foster a new and stronger sense of Canadian citizenship. As Trudeau himself wrote recently of the *Charter*:

> [I]t implicitly established the primacy of the individual over the state and all government institutions, and in doing so, recognized that all sovereignty resides in the people. In this respect, the Canadian Charter was a new beginning for the Canadian nation: it sought to strengthen the country's unity by basing the

---

[22]Donald Smiley, "A Dangerous Deed: The Constitution Act, 1982," *And No One Cheered: Federalism, Democracy & The Constitution Act*, eds. Keith Banting and Richard Simeon (Toronto: Methuen, 1983): 82.

[23]Ramsay Cook, "'I Never Thought I Could Be as Proud...': The Trudeau-Lévesque Debate," *Towards a Just Society: The Trudeau Years*, eds. Thomas Axworthy and Pierre Elliott Trudeau (Toronto: Penguin Books, 1992): 395. There were a variety of additional factors driving Canada toward the constitutional recognition of individual rights. Alan Cairns contends that Canada's pursuit of entrenched liberal or human rights can be traced to international influences, such as the United Nations Declaration of Human Rights and Conventions on Civil Rights (*Federalism Versus the Charter* (Montreal and Kingston: McGill-Queen's UP, 1992): 12). Moreover, the "prestige" and suggestion of modernity provided by a bill of rights were arguably influential factors. Additionally, the erosion of Canada's demographic "Britishness" by greater ethnic diversity in immigration is cited as a sociological impetus for entrenchment, recognized much earlier by Diefenbaker (Cairns, "The Constitutional World We Have Lost," paper presented at the 1992 Annual meeting of the Canadian Political Science Association, Charlottetown, PEI (June 1, 1992): 22). Knopff has written of the contribution of pre-*Charter* human rights commissions and legislation to entrenchment, through encouraging the development of a human rights bureaucratic and social clientele (Rainer Knopff, with Tom Flanagan, *Human Rights and Social Technology: The New War on Discrimination* (Ottawa: Carleton UP, 1989): 86-7). Many of these nascent members of the "Court Party", to use Morton's phrase (or "Charter Canadians", to use Cairns's) later became pro-*Charter* activists, during 1980-81 and in subsequent litigation.

> sovereignty of the Canadian people on a set of values common to all, and in particular on the notion of equality among all Canadians.[24]

In spite of these factors, the secondary status of the non-language rights in Ottawa's eyes is demonstrated by both the negotiation process and the final result. In stark contrast to the precision of the language rights, the wording of the legal and civil liberties was vague throughout the entire process. Unlike the language rights, which delineated rights to specific levels of service, the latter class of rights and freedoms were open to disagreement at the most fundamental level. For example, what does "expression" encompass in section 2(b)? Political speech, or commercial and personal expression as well? Just the spoken and written word, or visual imagery? Does "freedom of religion" protect one's freedom to believe, or freedom to act on such beliefs? The lack of precision suggests that there was an equally imprecise purpose underlying these rights, again in clear contrast to the language rights.

Trudeau's lack of commitment to non-language rights was also evident in his willingness to weaken or strengthen their wording depending on what potential supporters he was courting. At the September 1980 First Ministers Conference, Trudeau proposed a narrowly-worded charter in an attempt to appease the provinces.[25] Most of the non-language rights contained provisions that they could be limited by "grounds established by law." Moreover, the October 1980 version of section 1 adopted the provincial proposal that the *Charter*'s rights and freedoms be subject to "such reasonable limits as are generally accepted in a free and democratic society *with a parliamentary system of government*" [emphasis added]. Romanow submits that this "particular formulation of limitation was

---

[24]Pierre Elliott Trudeau, "The Values of a Just Society," *Towards a Just Society*, 407.

[25]Riddell, 9; see also Rainer Knopff and F.L. Morton, "Nation-Building and the Charter," *Constitutionalism, Citizenship and Society in Canada*, eds. Alan C. Cairns and Cynthia Williams (Toronto: U of Toronto P, 1985).

designed to produce even greater judicial deference....The idea behind the provincial text was that, if Parliament or a legislative assembly enacted a provision which was thought to infringe rights, it would in most instances, simply by virtue of being enacted, be considered to be generally accepted in a free society living under a parliamentary democracy."[26] These phrases would have directed the Court to grant considerable deference to legislative policy priorities, and to limit the scope and impact of rights litigation.[27]

Similarly, the original charter would have limited the judiciary's ability to exclude illegally-obtained evidence to very narrow grounds.[28] Furthermore, this draft did not even possess an equivalent to the final version's section 24(1) judicial remedy power.[29] Accordingly, Ottawa's original charter would have augmented judicial power in these areas very little. The judiciary would have been more constrained in its ability to craft remedies for rights violations other than simple nullification.

When the September conference ended in failure, Trudeau initiated his bid for unilateral patriation. Part of this strategy was to "popularize" the charter so as to enhance the democratic legitimacy of his package, and to gain negotiating leverage on the provinces. What premier would want to be seen as opposing civil liberties and the popular will? This move was foreshadowed at the September conference, when Trudeau addressed his

---

[26]Romanow, *et al.*, 244.

[27]Although section 1 would also apply to the language rights, it is likely that Trudeau hoped their specificity would protect them from a narrow judicial interpretation. Indeed, this was Ottawa's argument in the *Protestant Schools* case.

[28]Section 26 (later section 24(2)) read: "No provision of this Charter, other than section 13 (privilege against self-incrimination), affects the laws respecting the admissibility of evidence in any proceedings or the authority of Parliament or a legislature to make laws in relation thereto."

[29]Section 24(1) reads: "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."

opening remarks "not to the assembled politicians and officials, but to the people of Canada," never turning away from the television camera pointed at him.[30]

Trudeau's bid for support from pro-*Charter* constituencies was bolstered by the Joint Parliamentary Commission (JPC) public hearings on the 1980 draft of the charter.[31] In response to the presentations from six governments, ninety-three groups and five individuals, Ottawa broadened the wording of selected *Charter* rights, thereby strengthening judicial power.[32] Section 15's equality rights were broadened to include persons with mental or physical disabilities The wording of the section was also changed, from a guarantee of "equality before the law and to the equal protection of the law" to one in which "[e]very individual is equal before and under the law and has the right to equal protection and *equal benefit* of the law" [emphasis added]. This suggests a right to *substantive* as well as *procedural* equality.

The appeal to pro-*Charter* groups also saw the deletion of the "established by law" caveats, and their replacement by a single limitations clause (section 1). As Riddell details, the 1980 version of section 1 was reworded precisely as these constituencies had recommended.[33] The "parliamentary system of government" criterion was dropped, and the requirement that reasonable limits be "generally acceptable" was replaced by the more demanding directive that they be "prescribed by law" and "demonstrably justified." Overall, as Riddell argues, these changes "tended to narrow the limitations clause, and by indirection to broaden the guarantees."[34] Institutionally, these changes diminished the

---

[30]Romanow *et al.*, 216.

[31]Ironically, the JPC was not Trudeau's idea, but a concession demanded by Opposition Leader Joe Clark in order for him to cease the Conservatives' filibuster during debate of the proposed unilateral amendment.

[32]Romanow *et al.*, 247.

[33]Riddell, 14.

[34]*Ibid.*, 15.

status of legislatures vis-à-vis the judiciary and rights-claimants. The insertion of sections 24(1) and 24(2) explicitly enhanced judicial power with respect to non-language rights. Section 24(1) granted judges the power to issue remedies for rights violations, including, potentially, "positive" remedies such as "reading in" rather than simple nullification of an unconstitutional statute. Section 24(2) allowed considerable judicial power to exclude illegally-obtained evidence in criminal law cases, thereby possibly strengthening legal rights claims.[35] In sum, the changes acknowledged the recommendations of pro-*Charter* /judicial power constituencies, while increasing the threat that legislative authority would be eroded by judicial review.

When the Supreme Court of Canada's decision in the *Patriation Reference*[36] scuttled Trudeau's plans to patriate unilaterally, he was then equally willing to weaken the *Charter* to gain needed provincial support. As Romanow, *et al.* recount, Trudeau and his negotiators conceded to the addition of a *non obstante* clause, which would allow governments to suspend judicial invalidations of their policies under the *Charter.* In return, Trudeau demanded - and the provinces rejected - that the fundamental freedoms of section 2 and language rights be exempted from the clause, which became section 33.[37] In a telling demonstration of Trudeau's priorities, he broke the impasse by subjecting fundamental freedoms to the notwithstanding clause in return for exempting minority language education rights.[38] Milne accurately assessed the federal government's tactics:

---

[35]Section 24(2) reads: "Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

[36]*A.G. Manitoba et al. v. A.G. Canada et al* (Patriation Reference), [1981] 1 S.C.R. 753.

[37]Romanow, *et al.*, 210.

[38]*Ibid.*, 210.

> [a]lthough...the federal Liberals were ready to compromise on almost all the general human rights and freedoms in the package until left with a weak charter of rights that made a mockery of legal protection of civil liberties they were not willing to give up the linguistic core of their strategy.[39]

Not surprisingly, this concession angered Ottawa's pro-*Charter* constituents. To placate the particularly effective lobby of women's groups (who also opposed the diminution of their status by the expansion of enumerated groups in section 15), Ottawa added section 28's exemption of sexual equality from section 33. By so doing, this segment of Ottawa's supporters had some assurance that the operation of "their" section of the *Charter* would be ultimately determined by the judiciary rather than by governments.

In summary, Trudeau's inconsistent level of support for non-language rights, and therefore inconsistent support for expanding judicial power in these areas, suggests that these issues did not enjoy the highest priority on the federal government's agenda. Pride of place clearly belonged to the language rights, as the rest of the *Charter* project became a bargaining tool in the drive to implement Trudeau's linguistic strategy. The implication for the micro-constitutional study to follow is that we should expect Ottawa's support for judicial aggrandizement to be considerably stronger in the field of language rights litigation than in any other area.

The Meech Lake Accord, 1987-1990

In early 1982 all of the governments except Quebec formally agreed to the patriation package and the *Charter*, which received Royal assent in April that year. Despite the absence of its government's assent, Quebec was legally bound by the agreement, although

---

[39]Milne, 70.

the PQ government registered its opposition by invoking an omnibus bill applying section 33 to all of Quebec's eligible legislation. Although Trudeau publicly announced his disappointment that Quebec was not party to the final accord, the personal acrimony between himself and Lévesque and economic turmoil precluded any further discussion of the constitution, beyond some limited discussions pertaining to aboriginal issues. However, the election of Brian Mulroney's Conservative government in 1984 replaced Trudeau, and the crushing defeat of the PQ by Robert Bourassa's Liberals in 1985 saw the exit of Lévesque. Although Mulroney had made noises about "righting the wrong" of 1982 and accommodating Quebec during his campaign, it appears that he did not have a clear vision of how this was to be accomplished. Indeed, the speech in which he made this promise was written by nationalist Lucien Bouchard.[40]

The agenda for macro-constitutional politics for the rest of the decade was set by Quebec, in Premier Bourassa's "five demands." The crux of Quebec's agenda was an "attempt to get back some of the constitutional powers and status it lost in the preceding five years."[41] The Supreme Court of Canada had rejected the existence of a constitutional veto for Quebec in the 1982 *Quebec Veto Reference*[42], and then used section 23 of the *Charter* to invalidate restrictions on English language education, sections which lay at the heart of *la Charte de la langue française*.[43] Worse still for Quebec, the legislative override which had been added to every Quebec law since 1982 as a symbolic protest could not be

---

[40]Andrew Cohen, *A Deal Undone: The Making and Breaking of the Meech Lake Accord* (Vancouver: Douglas & McIntyre, 1990): 68.

[41]F.L. Morton, "Judicial Politics Canadian-Style: The Supreme Court's Contribution to the Constitutional Crisis of 1992," *Constitutional Predicament: Canada after the Referendum of 1992*, ed. Curtis Cook (Montreal-Kingston: McGill-Queen's UP, 1993): 140.

[42][1982] 2 S.C.R. 793.

[43]*A.G. Quebec v. Quebec Protestant School Boards*, [1984] 2 S.C.R. 66.

applied to section 23. In short, the Court was interpreting the *Charter*'s language provisions exactly as Trudeau had hoped.

In addition to granting Quebec a constitutional veto and the right to opt out (with compensation) of any federal spending plans in provincial jurisdiction, an acceptable constitutional package for Bourassa would have to contain three items aimed directly at shielding Quebec from the *Charter* and judicial power. The first was a constitutional guarantee that at least three Supreme Court Justices would be from Quebec, an amendment that would have simply entrenched the existing practice. More important was the second item: that Quebec must be able to nominate candidates to fill those three seats. The provinces' oversight in 1980-81 of the crucial role of the judiciary and the courts in the *Charter* project was not a mistake to be repeated. For the provinces, the decision in the *Patriation Reference* was proof enough of the cost of insufficient provincial participation in the Supreme Court appointment process.[44] The third demand, the recognition of Quebec as a distinct society, was intended as an interpretive clause to encourage a judicial finding of "reasonableness" under section 1 analysis.[45] In this way, the clause could "trump" the *Charter*'s language rights provisions, so as to prevent any further erosion of Quebec's "French-first" linguistic regime. As Manfredi observed, the rules of micro-constitutional politics had become the focus of macro-constitutional politics.[46]

The Meech Lake Accord, struck in 1987, delivered on all five demands, without Ottawa exacting a *quid pro quo* augmentation of federal power or influence in any area. In both the initial meetings, and the marathon session in the Langevin Block opposite

---

[44]For a more in-depth and comparative analysis of the centralizing effect of national government appointment of federal high courts, see André Bzdera, "Comparative Analysis of Federal High Courts: A Political Theory of Judicial Review," *Canadian Journal of Political Science* (March 1993): 3-30.

[45]Morton, "Judicial Politics Canadian-Style," 142.

[46]Manfredi, "Litigation and Institutional Design," 26.

Parliament several weeks later, Mulroney played the role of mediator, as if he had no specific interests at stake. Ironically, this was noted with concern on several occasions at Meech Lake by the premiers of Manitoba and Ontario, Pawley and Peterson.[47] However, Mulroney was not operating without an agenda, just a very lean one: to bring Quebec back into the constitutional fold. Whereas Trudeau had responded to centrifugal pressures by adversarially increasing his demands for greater centralization, Mulroney's experience as a labour mediator led him to a strategy of appeasement, no doubt encouraged by the sovereigntist Québécois members of his Cabinet and caucus. This strategy, as much as his lack of a coherent constitutional vision, explains the shift of constitutional agenda-setting from Ottawa to Quebec.[48]

Mulroney's strategy makes assessing the macro-constitutional position of his Conservative government more difficult than with Trudeau. Trudeau was guided by a fairly clear personal vision of the nation, informed by philosophical considerations, and accessible through his published works. Trudeau also possessed a clear understanding of the instrumental value of judicial review, and the strategic potential of judicial appointments, as demonstrated by his early appointments of Deschênes and Laskin. Mulroney's strategy of appeasement resulted in positions on specific issues which were inconsistent, often haphazard, and punctuated with embarrassing gaffes. To generalize about the federal macro-constitutional agenda during this period, one must (1) examine government documents (not necessarily linked to Mulroney) from the period, (2) infer from what Ottawa agreed to in the final product of the Meech Lake Accord and the process employed, and (3) Ottawa's legislation from the period.

---

[47]Cohen, 111.

[48]See page 50-1 below for further discussion of the composition of the Mulroney government.

Of particular note among the first category are a series of federal Justice Department discussion papers regarding the equality principles of section 15 of the *Charter*. When the *Charter* was adopted in 1982, the implementation of section 15's equality rights was delayed for three years to allow governments either to amend their policies so as to avoid *Charter* challenges, or to prepare defenses for such challenges.[49] The federal Justice Department undertook such a "*Charter* conformity review" in areas including unemployment insurance, the armed forces, taxation, immigration and mandatory retirement, and reported its findings in in the 1985 discussion paper *Equality Issues in Federal Law*.[50] Although the micro-constitutional implications of the discussion are limited, two issues are noteworthy. The first is the suggestion that section 15 could be applied to "systemic discrimination," or discrimination that results from a neutrally-worded law.[51] As will be discussed in greater detail in the section on equality rights (Chapter Five), this approach rejects the narrow, intent-based "procedural" interpretation of equality rights developed under the 1960 *Bill of Rights*. Accordingly, this broader understanding allows for an expansion of judicial power/intervention.

Second, the Department adopted an interpretation of section 15 in its review that gave greater emphasis to enumerated grounds (race, nationality, sex, age, disability, religion), but allowed for "successful complaints of denial of equality based on other grounds."[52] Furthermore, they concluded that "it may be easier to find distinctions made

---

[49]See section 32(2) of the *Charter*.

[50]Canada (Minister of Justice and Attorney General of Canada), *Equality Issues in Federal Law: A Discussion Paper* (Ottawa: Minister of Supply and Services, 1985). It should be noted that this document was published on January 31, 1985, only five months after the Mulroney government took office. The short length of this interval makes it possible that the views expressed apply to the Trudeau government. Although section 15 did not become active until the Liberals had left power, the general attitude toward judicial power is relevant to litigation in other *Charter* areas.

[51]*Ibid.*, 9.

[52]*Ibid.*, 10.

on the basis of some grounds such as age than on those of race or sex," and that it was "hard to conceive of a situation where it would be permissible to distinguish in a way that is detrimental to a racial group."[53]

In 1985, the Parliamentary Subcommittee on Equality Rights reported its recommendations. *Equality for All*[54] was the result of 550 written submissions and testimony from 250 individuals and groups in twelve cities.[55] More importantly, the Justice Department published its response to the Subcommittee's report, in *Toward Equality*.[56] In it, the Department re-states its position that section 15 protects against systemic discrimination, but displays a preference for legislative over judicially-crafted remedies for inequality. Early in *Toward Equality*, it is stated that "[m]aking choices that are both sensitive and responsible is largely a policy [i.e., legislative] rather than a legal [judicial] question."[57] This echoes the testimony of then-Justice Minister John Crosbie before the Subcommittee, that "[i]t is the role of Parliament, which represents the people of Canada, to make policy choices among the various means of complying with the *Charter*."[58] Furthermore, as Hiebert notes, the Department perceived a major role for section 1 in limiting section 15 entitlements.[59] As it was phrased in *Toward Equality*,

---

[53]*Ibid.*, 11-12.

[54]Patrick Boyer, Chairperson, *Equality For All: Report of the Parliamentary Committee on Equality Rights* (Ottawa: Minister of Supply and Services, 1985).

[55]Janet Hiebert, "Debating Policy: The Effects of Rights Talk," *Equity and Community: The Charter, Interest Advocacy and Representation*, ed. F. Leslie Seidle (Montreal: Institute for Research on Public Policy, 1993): 34.

[56]Canada (Department of Justice), *Toward Equality: The Response to the Report of the Parliamentary Committee on Equality Rights* (Ottawa: Minister of Supply and Services, 1986).

[57]*Ibid.*, 2.

[58]in Hiebert, 35.

[59]*Ibid.*, 34.

> [p]olicies aimed at ensuring equality and social justice must be based on respect for the other important values in Canadian society – the freedom of the individual, *federalism, Parliamentary democracy*, and the rights and interests of other individuals and society as a whole. *The importance of the other values is, indeed, reflected in section 1 of the Charter....*[60]

In summary, the documents suggest an attempt by the Department (and, by extension, the government) to appear supportive of equality rights, while preferring to defend legislative authority against judicial intervention, and to defend decentralization by protecting regional variation in policies from equality rights claims.

The decentralist, anti-judicial power orientation of the Conservative government is further suggested by Ottawa's support and handling of the Meech Lake Accord. As noted, the Accord's fundamental character was shaped by Bourassa's demands. The statist conception of dualism underlying these demands was markedly different from Trudeau's individualistic bilingualism, drawing instead on the third post-Duplessis vision, of *Québec* as "*une province pas comme les autres*": a distinct society, the principle home of French culture and language in Canada.[61] This is evident in the opening sections of the Accord, which read as follows:

> **2.** (1) The Constitution of Canada [including the *Charter*] shall be interpreted in a manner consistent with
>
> (a) the recognition that the existence of French-speaking Canadians, *centred in Quebec* but also present elsewhere in Canada, and English-speaking Canadians, *concentrated outside Quebec* but also present in Quebec, constitutes a fundamental characteristic of Canada; and

---

[60]*Ibid.*, 4.

[61]Milne, 216.

(b) the recognition that Quebec constitutes within Canada a distinct society. [emphasis added]

Moreover, while Parliament and the provincial legislatures were charged with *preserving* official language minorities, Quebec was authorized to *preserve and promote* the nebulous distinct identity of Quebec. The distinction was intended to provide an element of protection to Quebec language policies aimed at promoting French at the expense of English. In the parlance of micro-constitutional politics, the difference would signal to judges the higher priority of promoting Quebec's French language and culture over the maintenance of bilingualism, and in case of conflict between the two, to rule in favour of the former. Not only was this a palpable demotion of national bilingualism's constitutional status; it was also an attempt to enhance the constitutional authority of elected governments relative to the judiciary, and thereby erode judicial power with respect to the constitution.

The Accord was similarly cool towards the *Charter*'s non-linguistic rights. As Milne notes, section 2.4 of the Accord protected other governments' powers from the distinct society clause - an admission that the clause was likely to enjoy tangible effects - but without making similar guarantees to citizens' rights.[62] Thus, the distinct society clause could blunt the effect of judicial review of Quebec's legislation under *any* part of the *Charter*. This is not to suggest that a post-Meech government in Quebec was likely to be oppressive, but simply that entrenched rights were secondary to legislative authority. Nonetheless, it lends credence to the assessment by Trudeau himself that the Accord was a "victory for those who never wanted a Charter of Rights entrenched in the Constitution," and, more to the point, those who opposed judicial aggrandizement.[63]

---

[62]*Ibid.*, 219.

[63]Pierre E. Trudeau, "Say Goodbye to the Dream of One Canada," *Meech Lake and Canada: Perspectives from the West*, eds. Roger Gibbins *et al.* (Edmonton: Academic Printing and Publishing, 1988): 66-7.

The process by which the Accord was produced is also indicative, albeit indirectly, of Ottawa's reduced support for the *Charter* and judicial power. Pro-*Charter* constituencies were excluded from the negotiation process, particularly advocacy groups for women, official language minorities and multicultural communities. When public consultations were finally held, Ottawa discounted the submissions of these groups by declaring that the Accord would not be altered because of their concerns. Ultimately, the cost of this strategy was high, as these groups played a key role in scuttling the deal by focusing the general public's resentment at political elites' tampering with "the people's constitution."[64]

It is possible that Ottawa excluded pro-*Charter* groups not because of opposition to the values they represented, but in the practical interests of making a deal, which was easier with fewer players at the table. As well, it is possible that Mulroney was not fully cognizant of the stake these groups had in the *Charter*, or their central role in influencing the interpretation and impact of the *Charter* through litigation. As noted earlier, Trudeau's willingness to surrender federal control over Supreme Court of Canada appointments cautions us not to overestimate the acumen of political elites with respect to the realities of micro-constitutional politics. At the very least, however, Ottawa's willingness to subordinate the *Charter* and judicial power to the legislative authority of Quebec, and to a lesser degree, all provinces, illustrates a lack of support for the interests and goals of pro-*Charter* constituents.

The most notable legislative initiative during this period was the Conservative government's amendments to the *Official Languages Act* in 1988. The amendments, contained in Bill C-72, re-asserted Ottawa's commitment to national bilingualism, in stark

---

[64]See Cairns, *Disruptions: Constitutional Struggles from the Charter to Meech Lake*, ed. Douglas E. Williams (Toronto: McClelland & Stewart Inc., 1991) for a discussion of public reaction to Meech Lake. However, Cairns underemphasizes the interest group-mechanism by which this reaction was effected.

contrast to the contents of the Meech Lake Accord. Bill C-72 allowed more public servants to work in their official language of choice, and guaranteed the right to trial in either French or English.[65] However, the apparent contradiction between Bill C-72 and the Meech Lake Accord may be explained by the timing of the former. The amendments to the *OLA* were introduced shortly before Mulroney called the 1988 federal election, and may have been intended to appease OLMGs concerned by the Accord's apparent diminution of bilingualism's constitutional status. As well, Bill C-72 may represent a demonstration of the Mulroney government's continued support for minority francophones outside Quebec.

In summary, although the new Mulroney government did not appear to have an entirely coherent constitutional vision, their basic acceptance of Quebec's five demands, as modified in the Meech Lake Accord, suggests a reduced commitment to judicial enforcement of *Charter* rights, but especially the language rights within Quebec. This interpretation is supported by the Mulroney government's early approach in the Justice Department discussion papers to equality rights and the role of section 1. In effect, the Conservative government's approach represented at least a partial reversal of the macro-constitutional strategy of the Trudeau government.[66]

Significantly, Mulroney's macro-constitutional position contrasted sharply with the interests of the Ontario government. This ended the Ottawa-Ontario coalition from the prior period, as Ontario joined with Manitoba to defend the *Charter* and national standards. As Ho recounts, Premier Peterson of Ontario opposed the distinct society clause's probable limitation of minority rights, and pushed for a clause which would assert the *Charter*'s legal

---

[65]Darrel E. Reid and Dwight Herpinger, "Chronology of Events 1988-89," *Canada: State of the Federation, 1989*, eds. Ronald L. Watts and Douglas M. Brown (Kingston: Institute of Intergovernmental Relations, Queens University, 1989): 256.

[66]See footnote 51 *supra*, for an explanation of the qualified nature of this conclusion.

supremacy.[67] In short, Ontario tried to maintain the pre-eminence of judicial power in the face of Ottawa-Quebec's attempt to undermine it.

The governments of Alberta and Saskatchewan were not as concerned with the issues surrounding judicial interpretation of rights, beyond a desire to have greater input in the appointment of Supreme Court judges. However, this had as much to do with the West's historic distrust of central institutions as with micro-constitutional politics. That said, Ho notes that the attitude of these provinces toward the *Charter* ranged from indifference to hostility, which is a fair description of Ottawa's approach under Mulroney.[68]

The Charlottetown Accord, 1990-1992

Bourassa's response to the failure of the Meech Lake Accord was to announce a referendum in his province on either independence or a federalist option by the end of 1992, following the recommendation of the Bélanger-Campeau Commission. With this ultimatum to the rest of Canada, once again it was Bourassa, and not the Prime Minister, who set the macro-constitutional agenda for the nation. To the demands from Meech Lake, which were reiterated, was added a call for greater decentralization of legislative powers.

Like Bourassa, Mulroney had learned the hard way the cost of ignoring the people in constitutional politics, and established in 1990 a federal travelling constitutional commission, the "Citizens' Forum," under the leadership of Keith Spicer. Partially on the basis of Spicer's report, the federal government unveiled in September 1991 their working constitutional proposals, under the title "Shaping Canada's Future Together." These

---

[67]Ho, 30.

[68]*Ibid.*, 28-9.

proposals were then sent to the Beaudoin-Dobbie Committee, which in turn held five regional public conferences on the constitution. The result of all of these initiatives, reflected in the 1992 federal report, "A Renewed Federalism," was that the federal government "lacked its own agenda."[69] Again, as in Meech, it is more accurate to say that the federal government had *one* aspiration, to strike a deal. That said, the federal government's positions on the sundry aspects of the Charlottetown Accord are murky at best. The confusion was enhanced to no small degree by the fact that Prime Minister distanced himself from the entire project by assigning responsibility for constitutional negotiations to Joe Clark, and it soon became apparent that their desires and strategies were not co-ordinated.

While many aspects of the federal strategy remain ambiguous, one thing is fairly certain: the openness of the process from 1990-92 should not be equated with a greater enthusiasm for the *Charter* or judicial power. Although pro-*Charter* groups played a greater role in the consultation and negotiation process, the Conservative government made a number of policy choices - under the banner of budgetary restraint - that undermined the strength of these groups. In 1990, Secretary of State funding to these groups was slashed, and CCP funding was not extended to equality rights challenges to provincial laws. Two years later, the CCP was abruptly cancelled.[70]

As with Meech Lake, Mulroney's appeasement strategy requires analysis of the text of the Accord to glean the federal government's constitutional priorities. The final text of the Accord retained Quebec's fundamental demands, albeit buried under a cornucopia of institutional reforms and Aboriginal self-government provisions. However, amid the often

---

[69]Russell, *Constitutional Odyssey*, 196.

[70]Brodie, "The Court Challenges Program," *Law, Politics and the Judicial Process in Canada* (2nd Edition), 254-5.

discordant proposals, three sections were of particular relevance to the *Charter* and judicial power: Aboriginal self-government, the "Canada clause" and the "Social Charter."

Sections 41 and 42 of the Accord provided that a justiciable, inherent right to Aboriginal self-government be entrenched in the constitution.[71] On one hand, this suggests support for the expansion of judicial power in this area. As well, the clause is reminiscent of Ottawa's bilingualism strategy of using entrenchment and judicial review (or the threat thereof) to pursue Ottawa's goals where federal jurisdiction was limited. For although Aboriginal affairs fall within Ottawa's authority, self-government had the potential to conflict with provincial laws that apply to (status) natives living in a given province. On the other hand, section 43 of the Accord extended section 33 of the *Charter* to the "legislative bodies of Aboriginal peoples," thereby undermining judicial power in this field.[72]

The Canada clause could have eroded judicial power and the constitutional status of the *Charter* in several ways. The first is evident in the requirement of section 2(1) that "the Constitution of Canada, including the Canadian Charter of Rights and Freedoms, shall be interpreted in a manner consistent with "a variety of "fundamental characteristics."[73] The first of these is a "parliamentary and federal system of government," language that suggests an attempt to reclaim parliamentary supremacy and to prevent further centralization via the judicial application of the *Charter.* The distinct society clause is replicated here, as is the empowerment of the Quebec government to "preserve and promote" this distinctiveness. Similarly, legal scholar and *Charter* enthusiast Lorraine Weinrib argues that the most important feature of the Canada clause was contained in sections 2(3) and (4)'s directives to

---

[71] *Consensus Report on the Constitution: Final Text* (Charlottetown, August 28, 1992): 14.

[72] *Ibid.*, 15.

[73] *Ibid.*, 1.

the judiciary that the clause would not diminish government power.[74] This would also have applied to the *Charter* in light of section 2(1) of the clause, and since, as Weinrib writes, *Charter* rights are guaranteed to individuals against government," the clause "must create the possibility of enlarged government power."[75]

Weinrib also notes the possible effect of the hierarchy within the fundamental characteristics on judicial interpretation.[76] The strongest language refers to the assertions of government power noted above, which could have retrenched judicial authority over constitutional law relative to the legislative branch(es). Following Weinrib's analysis, the next-highest priority appears to be bilingualism. The provision regarding official language minority communities is similar to that in the Meech Lake Accord, but arguably strengthened, as the directive "to preserve" was replaced by the phrase, "Canadians and their governments are committed to the vitality *and development* of official language minority communities throughout Canada" (emphasis added).[77] However, this enhancement may be illusory, in light of the distinct society clause and the provisions shielding government power. Finally, sexual and ethnic equality are recognized, but less so than bilingualism, as these provisions recognize only that "Canadians," but not their governments, "are committed" to these principles. In the language of micro-constitutional

---

[74]Lorraine Weinrib, "Charlottetown Accord Constitutional Proposals: Legal Analysis of Draft Text of October 12, 1992," (University of Toronto, unpublished, 1992): 9-10. Sections 2(2) and 2(3) read as follows:

(2) Nothing in this section derogates from the powers, rights or privileges of the Parliament or the Government of Canada, or of the legislatures or governments of the provinces, or of the legislative bodies or governments of the Aboriginal peoples of Canada, including any powers, rights or privileges relating to language.

(3) For greater certainty, nothing in this section derogates from the aboriginal and treaty rights of the Aboriginal peoples of Canada.

[75]*Ibid.*, 10.

[76]*Ibid.*, 10-1.

[77]*Consensus Report on the Constitution: Final Text*, 1.

politics, this difference is similar to the "preserve/promote" distinction in its possible influence on judicial interpretation. Moreover, Weinrib argues that the use of the term "commitment" with respect to language and equality rights actually diminishes their constitutional status.[78] Elsewhere in the constitution, a "commitment" to a principle does not entail a requirement on governments to comply, and more importantly for this study, is not enforceable through the courts and cannot be used to interpret *Charter* rights.[79]

The issue of judicial power was explicitly addressed in newly-elected Ontario NDP premier Bob Rae's recommendation for a "Social Charter," which would recognize those shared social programs, such as medicare, public education and social welfare. Continuing Ontario's support for entrenched rights and enhanced judicial influence, Rae initially proposed a Social Charter with limited justiciability. This proposition was flatly rejected by the new NDP government of Saskatchewan, by Conservative Don Getty in Alberta, and in the published final text of the Charlottetown Accord.[80] Indeed, neither Western province gave support to any form of a social charter.[81] As of this writing, the attitude of the federal government toward the social charter provision cannot be formally documented. However, it seems unlikely that Mulroney and his Quebec cabinet ministers would support expanding judicial review to government economic and social policy at the very time they were contemplating budget cuts in these policy fields. As well, the Mulroney government was

---

[78]Weinrib, 13.

[79]*Ibid.*, 13.

[80]Joel Bakan and David Schneiderman, eds., *Social Justice and the Constitution: Perspectives on a Social Union for Canada* (Ottawa: Carleton UP, 1992) in Ho, 34-7. Rae's February 1992 draft did not propose judicial review of specific socio-economic programs. However, section I(4) advocated the insertion of a clause ensuring "harmony with the *Charter*," (including, presumably, section 15) and that inter-governmental agreements in "areas covered by the social charter should be made constitutionally binding" (in Bakan and Schneiderman, 163). Ultimately, Rae relented on this enforcement dimension and agreed to the non-justiciable version in the Charlottetown Accord.

[81]Ho, 36-7.

averse to offending Quebec's sensibilities, which the Social Charter's erosion of legislative authority would have achieved.

Ultimately, the Accord was rejected in the referendum by a majority of voters in every province except Ontario, Newfoundland, New Brunswick and Prince Edward Island. Nonetheless, the federal government's constitutional preferences, insofar as they can be determined from the text of the Accord, were as restrictive towards the *Charter* and judicial power as in 1987-1990. Indeed, the Charlottetown Accord's elevation of community rights (that is provincial and aboriginal governments) over individual rights was more marked than in Meech Lake. With respect to language, this represents a rejection of Trudeau's vision of French and English as rooted in the individual, protected through individually-held language rights. In its place, Ottawa adopted Bourassa's *deux nations*, territorially-based conception of linguistic duality. Moreover, the Accord would have shifted the guardianship role for language away from the judiciary toward (provincial) legislatures, at least within Quebec.

Conclusion

The federal government's macro-constitutional strategy vis-à-vis the *Charter* and judicial power was not consistent during the 1982-92 period. This is due in part to the very different leadership strategies and political objectives of Pierre Trudeau and Brian Mulroney, as displayed by their public disputes during the Meech Lake and Charlottetown Accords. However, while the two leaders brought significantly different backgrounds and objectives to the negotiation process, the tangible differences in their *Charter* agendas are not as marked as one might expect. For example, while it is true that Trudeau approached constitutional issues from a philosophically liberal standpoint, we have seen that his

willingness to protect civil liberties at the bargaining table was clearly secondary to his goal of entrenching language rights. Thus, his support for non-language rights was not as strong as expected. Under Mulroney the mediator, the federal government was willing to weaken the *Charter* by curtailing judicial policy-making in order to satisfy Quebec and national unity. However, after Bourassa's use of the "notwithstanding" clause following the Supreme Court's nullification of Quebec's French-only sign law in *Ford*,[82] Mulroney made his Trudeau-esque comment that, because of section 33, the *Charter* "isn't worth the paper it's written on."[83] Although Mulroney moderated his remarks about section 33 when in Quebec due to pressure from his Quebec ministers, particularly Bouchard, the outburst suggests that the Prime Minister's support for *Charter* rights was not as *weak* as expected. Thus, Trudeau's and Mulroney's approaches to judicial power in the context of non-linguistic *Charter* rights are quite similar. The chief differences between their macro-constitutional strategies are two: their approaches (i.e., Trudeau had a clear strategic agenda while Mulroney did not), and, more importantly, with respect to enforcing language rights in Quebec through judicial empowerment. To phrase it in theoretical terms, the agenda of the Mulroney period (albeit determined by Bourassa and Quebec federal cabinet ministers) was an attempt to replace Trudeau's "Pan-Canadian/national bilingualism" vision of the country with the "compact theory" in order to appease Quebec nationalists and so maintain national unity. This is not to say that Mulroney abandoned bilingualism. Even the Meech Lake Accord gave greater constitutional recognition to bilingual language rights than to other *Charter* rights. However, the relative status accorded to language rights and the judiciary by the Conservative government is clearly less than that accorded by their Liberal predecessors, particularly within Quebec.

---

[82][1988] 2 S.C.R. 712.

[83]Cohen, 65.

There are a number of possible explanations for the difference between the 1982-84 and 1985-93 federal macro-constitutional strategies. The first is simply a difference in the leadership strategies of the two leaders. While this is certainly a factor, and possibly the most important one, it is unlikely that a single actor could determine the government's agenda unilaterally. The leader must have the support of his or her cabinet and caucus. This, in turn, raises the question of which constituencies the government represents. Accordingly, party is not likely to be an independent determining factor, because partisan differences may reflect regional biases.

The regional patterns of support for the two parties is telling, particularly in light of Ho's findings. The core of the Mulroney caucus and Cabinet was drawn from the three provinces with strong records of anti-*Charter*, anti-judicial power, and anti-centralist sentiments: Alberta, Quebec and Saskatchewan. In contrast, Trudeau's government in 1982 was not represented west of Manitoba. Both governments drew their greatest support from Quebec, but the internal divisions in that province on the issue of separation make regional generalization difficult. Rather, it is likely that while Trudeau's Quebec MPs were largely committed federalists, like the Prime Minister, the Conservatives drew on soft-federalists and nationalists, such as Lucien Bouchard. After all, the party of the federal government in Quebec had been the Liberals for most of the century, so it follows that the committed federalists in the 1984 and 1988 elections would *not* have been the Conservative candidates. Thus, some combination of these two factors - leadership and regionalism (via electoral coalitions and Cabinet membership) - is likely responsible for the differences in the federal strategy during the period.

What are the implications of these findings for our micro-constitutional study? On the assumption that a government's constitutional litigation parallels its formal

constitutional agenda, we can make the following four hypotheses regarding Ottawa's micro-constitutional strategies:

> H_1: Support for judicial power in language rights under the Trudeau government will be strong.
>
> H_2: Support for judicial power in non-language rights under the Trudeau government will be moderate.
>
> H_3: Support for judicial power in language rights under the Mulroney government will be moderate overall, with weaker support for minority anglophones in Quebec than minority francophones outside Quebec.
>
> H_4: Support for judicial power in non-language rights under the Mulroney government will be weak.

For purposes here, "strong" support for judicial power is indicated by consistent support for interpretive choices associated with judicial intervention. "Weak" support entails a consistent preference for judicial self-restraint. Support for both judicial intervention and judicial deference on a given issue is coded as "moderate". The following chapter defines a number of these interpretive choices that arise in Chapters Four, Five and Six. Interpretive choices specific to a given right are introduced in the relevant chapters.

CHAPTER THREE

Interpretive Issues in Micro-Constitutional Charter Politics

As Peter Russell has observed, the *Charter* "guarantees...a particular way of making decisions about rights, in which the judicial branch of government has a much more systematic and authoritative role."[1] However, measuring attitudes toward judicial power in micro-constitutional *Charter* politics is more difficult than in macro-constitutional politics. This is because the issue of institutional power is obscured in litigation by legalistic discourse. Fortunately, attitudes toward interpretive choices (second-order rule-making) in *Charter* litigation may serve as proxy measures of support for judicial power, as these choices increase or decrease the scope and opportunity for judicial review under the *Charter.*

Judicial interpretation of *Charter* rights is not self-evident, due to the ambiguous wording of many rights, and a corollary multitude of interpretive choices. How the Court resolved these issues would determine how "activist" or deferential[2] the judiciary would be with regard to legislative policy choices. Generally speaking, "judicial self-restraint" is characterized by a high degree of judicial deference to the policy choices of the legislative branch, while "judicial activism" entails greater judicial scrutiny of and intervention in the policy process. In terms of judicial power, the resolution of these interpretive issues would

---

[1]Peter H. Russell, "The Effect of the Charter of Rights on the Policy-Making Role of the Canadian Courts," *Canadian Public Administration* 25 (1982): 1.

[2]These terms are preferred to "conservatism" and "liberalism" as the latter are imprecise and refer more to interpretive outcomes than to the process, which is the concern here. For example, a judge may give a broad "activist" reading to equality rights in order to nullify a "liberal" affirmative action legislation.

determine whether the judiciary or the legislature/executive would enjoy institutional pre-eminence in the definition of *Charter* rights.[3]

This chapter operationalizes the concepts of "judicial self-restraint" and "judicial activism" with respect to eight interpretive choices that can arise in all types of *Charter* right-litigation. These eight issues are: adherence to the *1960 Canadian Bill of Rights* precedents; policy continuity (or "frozen concepts"); adherence to "framers' intent"; internal versus external limits on rights; evidentiary onus; intent- versus effects-based analysis; negative versus positive remedies; and judicial allocation of public resources. These "general" interpretive issues are distinguished from those specific to a particular right, which are introduced and defined in the chapters that follow.

1. Adherence to *1960 Canadian Bill of Rights* Precedents

One of the first important interpretive issues confronting the Court under the *Charter* was the weight to be assigned to precedents from the *1960 Canadian Bill of Rights* ("*CBR*") era. The contents of the two rights documents were very similar, and with one exception,[4] the legacy of the *CBR* was one of significant judicial self-restraint and narrow interpretations of contested rights. If *CBR* precedents were treated as binding for analogous rights under the *Charter*, the scope of the "new" rights would be as narrow as the "old" rights. *CBR* precedents would also carry with them the "spirit" of judicial self-restraint, further undermining the reformist potential of the *Charter*. This issue would have

---

[3]Although judicial review of legislation implies, as Russell notes, a certain degree of judicial paramountcy in the interpretation of the constitution, the legislature will enjoy de facto power to define the limits of rights if the judiciary consistently defers to legislative interest by upholding legislation.

[4]The Supreme Court's only nullification of a federal statute under the *1960 C.B.R.* occurred in *R. v. Drybones*, [1970] 2 S.C.R. 282.

to be resolved in the first round of *Charter* decisions. Thus, we could expect supporters of judicial power under the *Charter* to urge the Court to reject *CBR* precedents as binding, while opponents of judicial activism would urge their acceptance.

2. Policy Continuity (or "Frozen Concepts" vs. "Living Tree")

Related but distinct from the issue of *CBR* precedents was the interpretive doctrine of "frozen concepts." Under the *CBR*, the Court sometimes used past policy practices to define the content of a right. In one of the Supreme Court of Canada's earliest *CBR* decisions, it ruled that there was no conflict between the *Lord's Day Act* and the *CBR*'s freedom of religion provisions, because the two had peacefully coexisted prior to 1960.[5] In practice, this logic seemed to insulate all pre-1960 statutes from challenge under the *CBR*, thereby severely limiting the potential to use *CBR* litigation to force policy reform.

The detractors of this approach labelled it the "frozen concepts" doctrine, and criticized it as contrary to the "correct" doctrine of Canadian constitutional interpretation - the "living tree approach." The "living tree" doctrine, adopted from Canadian federalism jurisprudence,[6] stressed the desirability of a "large and liberal" interpretation - that is, "judicial updating" - of constitutional meaning to keep pace with (and thus relevance to) the ever-changing socio-economic character of Canadian society. Despite a certain illogic,[7]

---

[5]*Robertson and Rosetanni v. The Queen*, [1963] S.C.R. 652. Justice Ritchie wrote that the *CBR* "is not concerned with 'human rights and fundamental freedoms' in any abstract sense, but rather with such 'rights and freedoms' as they existed in Canada immediately before the statute was enacted."

[6]Lord Sankey in *The "Persons" Case*, JCPC (1928) wrote: "...The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits....Their Lordships do not conceive it to be the duty of this Board...to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation...."

[7]The illogic is that in the context of federalism, the "living tree" doctrine is a prescription for judicial self-restraint - deferring to legislative decisions - while in the context of rights, the doctrine encourages judicial activism - the review and revision of legislative policy choices. See F.L.Morton and Rainer Knopff,

"progressive" commentators soon transformed the "living tree" doctrine into a formulaic prescription for judicial activism in rights adjudication. This issue would also have to be resolved in the first round of *Charter* decisions. Thus, we could expect supporters of judicial power under the *Charter* to urge the Court to adopt the "living tree" approach to rights interpretation, while predicting that opponents of the *Charter* project would urge the Court to be guided by prior policy practice.

3. Adherence to "Framers' Intent"

Central to the interpretation of any constitutional provision is the authority to be attached to the meaning that those who framed it intended it to have. Is a judge obliged to be faithful to the "framers' intent" or is a judge free to the add new, unintended meaning? In American constitutional discourse, this issue is typically designated as the "interpretivist" versus "non-interpretivist" debate, with "interpretivism" stressing "judicial fidelity to the original understanding of the text as illuminated by the framers' intent."[8] The newness of the Canadian *Charter* gives a certain force to the "interpretivist" position. Nonetheless, since "fidelity to framers' intent" restricts (in theory) judicial discretion and innovation, proponents of judicial activism have not favoured it, preferring instead an approach that focuses on the *Charter*'s broader "underlying purposes." This "purposive" approach to rights interpretation is similar to the "living tree" doctrine in that both are "forward-looking." In practice, both are used interchangeably with the prescription for a "large and liberal" interpretation of a right. However, they are analytically distinct in that one is

---

"Permanence and Change in a Written Constitution: The 'Living Tree' Doctrine and the Charter of Rights," *Supreme Court Law Review* 2 (1990): 533-546.

[8]F.L. Morton, ed., *Law, Politics and the Judicial Process in Canada* (2nd Edition) (Calgary: U of Calgary P, 1992): 405.

intended to counter fidelity to framers' intent while the other is used to negate appeals to past policy practice.

The orthodox understanding that adherence to framers' intent is associated with judicial self-restraint does not necessarily apply to the *Charter*'s language rights. The orthodox view, stated above, is that fidelity to framers' intent reduces judicial discretion, thereby limiting the opportunity for judicial intervention. This is accurate insofar as it applies to broadly-worded or ambiguous rights, such as "freedom of expression." However, the opposite may be true when the text is explicit, and the right guarantees a positive entitlement (or level of service), as with the language rights. In that case, one can argue that the framers made the language specific to minimize judicial choice, in order to force the Court to strike down non-complying provincial minority language education policies. Thus, adherence to framers' intent can *encourage* judicial intervention in the context of language rights. This last issue is considered in Chapter Six.

4. Internal (Definitional) versus External (Section 1) Limits on Rights

Section 1 of the *Charter* declares that the subsequently enumerated rights are subject to such "reasonable limitations prescribed by law as can be demonstrably justified in a free and democratic society." This wording posed a raft of interpretive issues that were addressed in a voluminous academic commentary before the Supreme Court of Canada even dealt with section 1.[9] One of the central issues was whether section 1 prescribed an "internal" or an "external" approach to defining these "reasonable limitations." The internal limits approach regards section 1 as simply a common sense preface that judges should not

---

[9]See Riddell, 1994.

interpret rights in an "absolute" or abstract manner, but to define rights in a way that limits their meaning in a reasonable fashion. For example, section 2(b) "freedom of expression" would have to be defined as either including or excluding "commercial speech." This approach also draws on past practice and precedent as a guide to what is reasonable. To take our example, if "commercial speech" was not considered protected free speech in the past, it would be "reasonable" not to include it as protected under section 2(b) of the *Charter*. The exclusion of "commercial speech" from "freedom fo expression" would thus be an example of an "internal" or "definitional" limitation. This implicit reliance on past practice as a guide to the present thus limits the policy reform potential of *Charter* litigation

However, as Knopff and Morton argue, "[t]he very presence of section 1 makes it plausible to argue that the substantive rights should be read broadly - the required limits, after all, can be justified under section 1 and need not be imposed through definitional restriction."[10] This alternative "external limits" approach views section 1 as prescribing a new and separate stage in rights interpretation: that is, that judges should initially give a right a very broad, literal, even absolute interpretation, and then address the reasonableness of any limitation at a second stage, where it must be "demonstrably justified." To take our example again, under this approach, section 2(b) would be understood to protect all forms of expression regardless of content. "Commercial speech," like all speech, is protected. Whether restrictions on "commercial speech" are permitted would then be considered in a second and separate analysis. This approach clearly has more potential for supporting judicial reform of legislation, since it simultaneously devalues past practice as a guide and gives an initial imprimatur of legitimacy to almost any rights claim. Thus, we can predict that proponents of judicial activism will favour the new external limits approach, while

---

[10]Rainer Knopff and F.L. Morton, *Charter Politics* (Scarborough: Nelson Canada, 1992): 46.

opponents will urge the Court to adopt the traditional "internal" or "definitional" limit approach to articulate the scope of a right.

5. Evidentiary Onus

Closely related to the internal-external limits choice is the issue of evidentiary onus, or burden of proof. Historically, challenged statutes enjoyed the presumption of constitutional validity. This tradition is premised on the dual assumptions that governments do not knowingly violate the constitution and that judges should show appropriate deference to elected governments by proceeding on this assumption. In both Canada and the United States, this presumption places the burden of proof on the party challenging the constitutional validity of a government policy. However, if the external limits approach is used, the burden of proof borne by the rights claimant at the first stage of analysis is relatively light, since rights are defined so broadly. Moreover, it was virtually a foregone conclusion that the evidentiary onus for the demonstration of "reasonableness" under section 1 would fall on the government. The external limits approach thus had the effect of shifting the burden of proof from claimants to governments, and the presumption of constitutionality to one of unconstitutionality or unreasonableness, with the implication that successful challenges (i.e., judicial intervention) would be more likely. Accordingly, we should expect the opponents of judicial activism to urge the courts to place significant burden of proof on claimants, typically through the adoption of internal limits on rights.

6. Intent versus Effect

Some laws purposely or intentionally violate rights, while others do so only indirectly by their "effects." An election law that explicitly disenfranchises Jews is an

example of the former. By contrast, a Sunday-closing law applies equally to all citizens, but has an "unequal effect" on Saturday sabbatarians such as Jews. Laws of universal application with an otherwise neutral and valid purpose may still have unequal effects on certain groups or individuals. In the context of equality rights, this is known as "systemic discrimination." In contemporary liberal democracies, laws that intentionally violate rights on the kinds of grounds enumerated in section 15 of the *Charter* are rare. However, in a pluralistic society such as Canada, many laws of general application have unequal impact. If the *Charter* is interpreted as prohibiting only intentional violations of rights, then there are far fewer policies vulnerable to *Charter*-based judicial intervention. Conversely, if the *Charter* is interpreted as also prohibiting systemic discrimination, there are few statutes that are not vulnerable. Thus, we can expect the proponents of judicial activism to advocate an "effects-based" analysis of *Charter* rights, while supporters of judicial self-restraint will oppose such an interpretation.

7. Negative versus Positive Remedies

There is a range of possible judicial remedies available under the *Charter*, ranging from most to least interventionist. A government's policy toward judicial power may be measured according to what kinds of remedies it argues are appropriate under the *Charter*.

Section 52(1) of the *Constitution Act, 1982* makes it clear that if a law contravenes a provision of the *Charter*, it is, "to the extent of the inconsistency, of no force or effect." This is universally understood to authorize judges to nullify - to declare invalid and refuse to enforce - such laws. Nullification is considered a "negative" remedy, in that the courts do not create policy in the process of issuing remedy. To comply, a government must

simply stop or desist from whatever is proscribed. By contrast, a "positive remedy" forces a government to do something in order to comply with the court-order.

Nullification is considered a less intrusive remedy, since it leaves to the government the decision of how to remedy or respond to a *Charter* violation. Typically, there may several constitutionally permissable alternatives. A positive remedy specifies what remedial action a government *must* take to comply with the *Charter*. It thus "forces" new government action requiring the allocation of money or other resources, decisions traditionally the prerogative of the "responsible" government. Positive remedies are more activist in a second sense: by creating a new policy status quo, they further restrict a government's policy discretion. The new "policy amendments" prescribed by the positive judicial remedy immediately enjoy a privileged position vis-à-vis alternatives, given a government's already overcrowded agenda and the difficulty of assembling a majority coalition to support an alternative remedy.[11]

The most common kinds of positive judicial remedy are "judicial extension" and the "structural injunction." Judicial extension, or "reading in," typically occurs when a court finds that the coverage or scope of a government policy is "under-inclusive" because it excludes individuals or groups that have a constitutional right to be included. To remedy this violation, the court "reads" the excluded group into the statute, thereby expanding the eligibility requirements for the government program. While its proponents defend "reading in" as less disruptive than nullification, it still amounts to de facto judicial law-making. If minimizing disruption were the main objective, it could be obtained with the less intrusive remedy of "nullification with temporary validity," discussed below.

---

[11] See Thomas Flanagan, "The Staying Power of the Status Quo: Collective Choice After *Morgentaler*," manuscript (1996).

A structural injunction denotes a judicial order that specifies the provision of a new level of service or facilities. It is the corollary to "positive rights" or entitlements to specified government services. It is associated primarily with section 23 of the *Charter* and the provision of educational services or facilities for official minority language communities. At its extreme, ensuring compliance with structural injunctions can lead to the ongoing involvement of judges in the administrative decision-making of public institutions such as schools or prisons.

There are several variations on negative remedies, among them "constitutional exemption" and "nullification with temporary validity." In theory, both are less intrusive than simple nullification.[12] A constitutional exemption upholds the law "in general" but rules it invalid "as applied" to the particular circumstances of the rights claimant. It is thus a sort of "mini-nullification," since it leaves the challenged policy intact and still enforceable in other circumstances.

The remedy of "nullification with temporary validity" means that the challenged law is declared invalid, but the law will be allowed to continue to have effect for a specified period of time, or until the government amends it, whichever comes first. The rationale behind the "suspension" of nullification is to allow a government time to consider and to craft an alternative policy while minimizing disruption to those operating under the (now invalid) rules of the old policy regime. The judicial deference to and respect for the elected government manifest in this approach qualifies it as marginally less activist than simple nullification.

To summarize, there is a spectrum of possible judicial remedies under the *Charter*. Proceeding from the least to the most intrusive, these remedies include: narrow

---

[12]However, if a constitutional exemption is extended to an entire class of "similarly situated persons," it becomes more like the remedy of "reading in," and would have to be considered more (not less) interventionist than nullification.

constitutional exemption; nullification with temporary validity; nullification; reading in; and structural injunction. Opponents of expanded judicial power under the *Charter* can be expected to oppose reading in and structural injunctions, while supporters of judicial activism will support such remedies.

To conclude, we can construct an index that measures support for judicial power from these eight general interpretive issues. Proponents of judicial activism would exhibit support for the following micro-constitutional positions: a rejection of adherence to *CBR* precedents, policy continuity, and framers' intent; a preference for external limits on rights, that places the evidentiary onus on the government to justify these limits; an acceptance of claims brought on the grounds of systemic discrimination; and support for positive remedies. In contrast, support for judicial self-restraint would be marked by: urging adherence to *CBR* precedents, past policies, and framers' intent; encouraging the adoption of internal limits and the placement of evidentiary onus on the rights claimant; resisting claims not brought on the basis of intentional violations; and supporting only negative remedies. By applying this index, along with rights-specific interpretive issues, to the federal government's interventions in fundamental freedoms, equality rights and language rights cases, we can determine in a systematic fashion Ottawa's support for judicial power in these areas.

CHAPTER FOUR

Fundamental Freedoms

A series of cases relating to the *Charter*'s "fundamental freedoms" (section 2(a)'s freedom of religious belief and section 2(b)'s freedom of expression) provided the earliest opportunities for the Supreme Court of Canada to address the issue of judicial power through the seven general interpretative choices.[1] Not surprisingly, the participants in constitutional politics - the federal and provincial governments, and the newer non-governmental interest groups from the 1980-81 period - recognized their respective stakes in how these issues were resolved, and sought to influence the decisions through litigation and interventions.

Freedom of Religion

In addition to the general issues of *Charter* interpretation, the Court had to address whether section 2(a)'s "freedom of conscience and religion" only implied one's freedom to hold beliefs, or also to *act* on those beliefs. The first Supreme Court of Canada case pertaining to freedom of religion arose in *Big M Drug Mart v. The Queen* [1985].[2] At

---

[1]Examining these cases follows the framework of Ho's study of the *Charter* litigation strategies of Ontario, Alberta and Saskatchewan. The case selection criteria for my study were: (1) freedom of religion and freedom of expression cases (2) heard by the Supreme Court of Canada (3) between 1982 and 1993 and (4) participated in by the Attorney General of Canada and (5) the Attorneys General of Ontario, Alberta or Saskatchewan, preferably more than one. This allowed direct comparison with Ho's findings, and a positioning of the federal government along the pro-judicial power/activism–judicial self-restraint/deference spectrum of judicial interpretive approaches, represented by Ontario and Alberta/Saskatchewan respectively. Of a total of five freedom of religion cases heard by the Supreme Court of Canada between 1982-93, four were relevant to Ho's study and three to mine. Of 24 freedom of expression cases, Ho examined 11, the same number (though not same cases) which met this study's criteria. Notably, some cases when only the AG Canada participated are included as needed, to illuminate the federal position on specific interpretive issues where this information was not available from cases also in the Ho study.

[2][1985] 1 S.C.R. 295.

issue was the constitutionality of the *Lord's Day Act*'s Sunday closing requirement. The owner of Big M Drug Mart in Calgary argued this mandatory closing violated his freedom of religion. The case raised most of the interpretive issues discussed above. In particular, the same Act had been challenged in the Supreme Court in 1963 under the freedom of religion provisions of the *Bill of Rights*. In that case, *Robertson and Rosetanni v. The Queen*,[3] the court upheld the Act, on the argument that the meaning of the right should be consistent with Canadian law before 1960. Thus, the 1985 Court had to decide whether to accept *Robertson and Rosetanni* as binding precedent, and, in so doing, adopt a "frozen concepts" or policy continuity approach.

In his intervention, the AG for Canada argued that the religious freedom accorded by the *Charter* "has the same meaning that it had in Canada before the *Charter* came into force"; that is, action based on belief was not protected.[4] He continued, citing a minority argument in *R. v. Potma*,[5] a 1983 Ontario Court of Appeal *Charter* decision:

> The *Charter* does not purport to change the meaning of words and in particular the meaning of "freedom of conscience and religion" as traditionally and universally understood and earlier defined as the birthright of every human being. The "freedom of religion" declared and secured by the *Canadian Bill of Rights* in 1960 and considered by the Supreme Court of Canada in *Robertson and Rosetanni* has the same meaning as the "freedom of conscience and religion" guaranteed by the *Charter of Rights* in 1981.[6]

Like Alberta (the appellant in the case), Ottawa contended that the *Charter* did not even apply in this case, since Big M Drug Mart was an "artificial entity" that did not enjoy

---

[3][1963] S.C.R. 651.

[4]Virginia Davies and Julius Isaac, Attorney General of Canada Factum in *The Queen v. Big M Drug Mart*, 16. Supreme Court of Canada File No. 18125.

[5][1983] 41 O.R. (2d) 43.

[6]AG Canada Factum, *The Queen v. Big M Drug Mart*, 16.

Charter rights. Moreover, by rejecting the lower court's "effects-based" approach, Ottawa argued no violation would exist anyway, since the law's purpose was secular. However, the federal factum qualified its endorsement of judicial self-restraint by conceding that "the concept [religious freedom] is not immutable," and that the court "might well enlarge its meaning."[7]

The federal government's advocacy of judicial deference is further illustrated by its submission regarding the section 1 test. Preferring to limit section 2(a) internally, Ottawa argued that the evidentiary onus should fall on the rights claimant, with emphasis on the framers' intent rather than the effect of the legislation when determining the reasonableness of a limitation.[8] Since the intent did not violate the *Charter*, the AG Canada argued that there should be a low threshold for reasonableness, which was met in this case.[9] Furthermore, the AG Canada explicitly opposed judicial activism in the context of section 1 analysis, warning that "the Court must not give in lightly to the temptation to substitute their opinion for that of the legislature."[10]

Writing for the majority of the Court, Chief Justice Dickson rejected the federal government's arguments on *Charter* applicability, *Bill of Rights* precedents and section 1 analysis. He explicitly rejected the notion that *Robertson and Rosetanni* constituted a binding precedent, asserting that the *Charter* "does not simply 'recognize and declare' existing rights."[11] Rather, he employed a "purposive approach" which based definitions of

---

[7]*Ibid.* 16.

[8]*Ibid.* 27-8.

[9]This approach represents an attempt by the AG Canada to influence the form of section 1 analysis, an issue not settled by the Court until *R. v. Oakes* [1986] 1 S.C.R. 103.

[10]AG Canada Factum, *The Queen v. Big M Drug Mart*, 32.

[11]Peter H. Russell, Rainer Knopff and Ted Morton, "The Queen v. Big M Drug Mart, *1985*," *Federalism and the Charter: Leading Constitutional Decisions* (Ottawa: Carleton UP, 1990): 410.

Charter rights on their broader purposes. He argued that the *Charter*'s recognition of multiculturalism in section 27 serves as a guide, reflecting the *Charter*'s greater purpose of promoting Canada's social diversity. Furthermore, he reasoned that, "if I am [a Saturday Sabbatarian], the practice of my religion at least implies my right to work on a Sunday if I wish."[12] He also implicitly rejected Ottawa's argument that artificial entities cannot make *Charter* claims. Since Dickson disagreed that the Act's purpose of "compelling sabbatical observance" could be secular, he concluded that "any law...which denies me that right must surely infringe my religious freedom."[13] Thus, he joined with Justice Wilson to reject reviewing legislation according to its framers' intent, contending that "the *Charter* is first and foremost an effects-oriented document."[14] Given the intent and effect of the *Lord's Day Act*, he concluded that the government could not justify that the violation was a reasonable limit under section 1. With these interpretive precedents established, the Court laid the groundwork for future judicial activism, contrary to the interpretive choices advocated by the federal government.

The AG Canada intervened a year later in the next Sunday closing case, *Edwards Books and Art v. The Queen*,[15] a challenge to Ontario's *Retail Business Holidays Act*. Ottawa restricted its argument to the matter of *Charter* applicability and judicial remedial power. Although the factum is not particularly telling with respect to religious freedom, it does reveal the federal government's attitude toward judicial power.

While Ottawa supported the *Charter* claimant, it recommended a narrow judicial remedy. This position was achieved through support for a "constitutional exemption" for

---

[12]*Ibid.* 409.

[13]*Ibid.* 409.

[14][1985] 1 S.C.R. 301.

[15][1986] 2 S.C.R. 713.

the claimant, a remedy previously suggested by Ontario in *Jones v. The Queen.*[16] The federal government conceded that although the legislation's purpose was secular and therefore valid, its effect violated religious freedom. Rather than nullify the entire Act, however, Ottawa argued that the owner of Edwards Books should be awarded a remedy under the *Charter*'s section 24 (1) "enforcement" clause, in the form of an exemption from the law.[17] In addition, the AG Canada opposed the judiciary "reading in" words to the Act "in order to render an unconstitutional enactment constitutional," calling this an exercise "of a legislative, not an adjudicative, nature."[18]

Ottawa's approach, while more supportive of rights claims than in *Big M Drug Mart*, indicated a preference for judicial self-restraint, since a narrow constitutional exemption in this case was a less-activist remedy than nullification or "reading in," the other possibilities Ottawa considered.[19] On the other hand, Ottawa's position was more "activist" than those of Alberta, Saskatchewan and Ontario. The two Western provinces reiterated the narrow, traditional interpretation of religious freedom. Ontario also opposed the rights claim and the exercise of judicial power. As Ho notes, this stance was out of character for Ontario, and is probably explained by the fact that the province had "little leeway for strategic maneuvering" as it was drawn into the case involuntarily as a respondent with a *prima facie* responsibility to defend the legislation.[20] Since six of the

---

[16][1986] 2 S.C.R. 284; Ho, 45.

[17]Graham Garton, Attorney General of Canada Factum in *Edwards Books and Art v. The Queen*, 8. Supreme Court of Canada File No. 19046.

[18]*Ibid.* 6.

[19]Ottawa proposed an exemption only for the claimant, or for others who came before the Court with a similar claim. The scope of the proposed exemption in this case was therefore extremely narrow, representing, in effect, a limited nullification.

[20]Ho, 47.

seven Supreme Court Justices who heard the case upheld the Act, the remedy issue was moot.[21]

In the final freedom of religion case examined for this study, *Young v. Young*,[22] Ottawa intervened to support the *Divorce Act* provision that child custody regulations be based on "the best interests of the child." The father, a Jehovah's Witness, claimed his freedom of religion was violated by this provision, which authorized a court order under the Act- at the children's request - that he not discuss his religion with his children, take them to services or canvassing, or expose them to religious discussions with others without the primary caregiver's (mother's) consent.

Ottawa's "first line" argument was that the *Charter* did not apply in this case, since the order did not impede the father's right to practice his religion, only his ability to expose it to his children. This interpretation of freedom of religion represented a narrow internal limit on the father's section 2(a) rights. The "second line" argument, echoing that of Ontario, was that the Court must intervene to protect the children's freedom of religion where, as here, they had declared their desire not to engage in their father's religion.[23] Despite this acknowledgment of the Court's need to protect the rights of children, the federal factum did not extrapolate this to "the protection of disadvantaged and disempowered groups," in contrast to Ontario.[24] The federal government's factum thus

---

[21]Justices Beetz and McIntyre read section 2(a) narrowly, contending that the economic disadvantages suffered by Saturday Sabbatarians resulted from their religion, not the law, which was secular in nature. The other four judges employed section 1 analysis to uphold the law, after concluding a violation had occurred. Only Justice Wilson concluded that the violation could not be saved as a reasonable limit.

[22][1993] 4 S.C.R. 3.

[23]Brian Evernden, Attorney General of Canada Factum in *Young v. Young*, 12. Supreme Court of Canada File No. 22227.

[24]Attorney General of Ontario Factum in *Young v. Young*, in Ho, 48. Supreme Court of Canada File No. 22227.

not only reflected a continuation of Ottawa's weak support for freedom of religion claims, but Ottawa's resistance to judicial intervention in these policy areas. As demonstrated in the next chapter, this stance is consonant with Ottawa's position in equality rights cases.

The Court's decision in *Young v. Young* was consistent with the arguments presented by Ontario. Although freedom of religion was recognized as a fundamental *Charter* right, the Court concluded that this freedom was not absolute. Justices L'Heureux-Dube, La Forest and Gonthier argued that the father's religious beliefs and practices were not threatened, and that the *Divorce Act*'s objective of protecting a vulnerable segment of society "is completely consonant with the *Charter*'s values."[25] Justices McLachlin, Cory and Iacobucci, employing J.S. Mill's harm principle, ruled that although the *Charter* applies, there was no violation since freedom of religion ceases when its exercise intrudes on the rights of others, in this case the children. Justice Sopinka held that the *Charter* applied, but that if exposing children to their parent's (or parents') religious beliefs creates a "substantial risk that the child's physical, psychological or moral well-being will be adversely affected" - as in this case - a violation of religious freedom is justified.[26]

In summary, the federal government's approach to freedom of religion claims was generally consistent with judicial self-restraint, although there was some concession made toward greater judicial intervention over the ten-year span studied. Specifically, early demands for adherence to *Bill of Rights* jurisprudence which rejected an "effects-based" analysis of impugned legislation gave way to a preference for a constitutional exemption when the effect of the legislation violated an individual's religious freedom. With respect to section 1, after its initial objection, Ottawa was forced to accept the Court's ruling that

---

[25][1993] 4 S.C.R. 9.

[26]*Ibid.* 16.

the evidentiary onus falls on governments. Notwithstanding this burden of proof, the AG Canada contended the violations were justifiable limits in all of the cases examined. Finally, Ottawa's preference for judicial self-restraint was manifest in its consistent attempts to limit the scope of freedom of religion by excluding behaviour based on belief from *Charter* protection.

Freedom of Expression

Similar to freedom of religion, the meaning of the *Charter*'s "freedom of expression" in section 2(b) is ambiguous. Did "expression" constitute speech and text, or a broader range of behaviour? To phrase this as an interpretive choice, should the Court adopt a "content-free" approach to expression? In effect, this is a specific example of the general issue of internal versus external limits on rights. An answer in the affirmative would create a broadly-defined right with the potential to allow significant judicial intervention in legislative policies. Proponents of judicial activism would thus support such an approach, while opponents of judicial power, for the same reason they support the internal limits approach, would resist it.

The Supreme Court of Canada's first opportunity to address interpretive issues surrounding the *Charter*'s section 2(b) freedom of expression provision arose in *Retail, Wholesale & Department Store Union, Local 580 et al. v. Dolphin Delivery.*[27] The striking Purolator Courier Union wanted to picket Purolator's sub-contractor in the Vancouver area, Dolphin Delivery. This "secondary picketing" was blocked by a court injunction at the request of Dolphin Delivery. The court that issued the injunction

---

[27][1986] 2 S.C.R. 573.

concluded that secondary picketing constituted a breach of contract under common law tort. In turn, the union initiated *Charter* litigation, contending the injunction violated the picketers' freedom of expression. In addition to the issue of expression, then, the Supreme Court had to determine first whether the *Charter* applied to the common law and private litigation.

The Attorney General of Canada intervened in the case, along with Alberta, to encourage judicial self-restraint and a narrow reading of section 2(b). Drawing on *Bill of Rights* jurisprudence, Ottawa contended that as an action - especially a collective and not individual action - picketing was "not an exercise of freedom of expression."[28] Rather, expression was interpreted as "speech." This view was supported by citing Justice Beetz in *AG Canada v. Dupond*,[29] to the effect that, "[d]emonstrations are not a form of speech but of collective action...their inarticulateness prevents them from reaching the level of discourse."[30] Moreover, Ottawa promoted the common law definition of "speech" as *political* speech, which would limit freedom of expression to a political civil liberty. That is, freedom of expression would guarantee the level of political expression necessary for the operation of the rest of the Constitution, most importantly, those parts relating to parlimentary democracy. Ottawa's preference for an "internal limits" approach to freedom of expression was further illustrated by the AG Canada's claim that "the appropriate ways in which the exercise of the guaranteed rights can be regulated, *without resort to section 1*, is by reasonably regulating the time and place of its exercise" [emphasis added].[31]

---

[28]Peter Doody and James Mabbutt, Attorney General of Canada Factum in *RWDSU v. Dolphin Delivery*, 4. Supreme Court of Canada File No. 18720.

[29][1978] 2 S.C.R. 770.

[30]AG Canada Factum, *RWDSU v. Dolphin Delivery*, 5.

[31]*Ibid.* 7.

Second, Ottawa sought to limit the *Charter*'s scope by exempting common law. This was necessary, according to the AG Canada, because the *Charter*'s applicability is determined "exhaustively" by section 32(1), which identifies only the legislatures and Parliament and matters within their respective authority - in short, "state activity." Therefore, he concluded, "the *Charter* does not apply to the conduct of private parties unless such parties are acting for the state."[32] Thus, Ottawa argued that the court that issued the injunction was not part of the government.[33] Moreover, the section 52(1) "supremacy clause" was subordinated to section 32(1), "being limited to situations where there is an act of the government."[34] In all these respects, the federal government submission was identical to the restrictive approach of Alberta noted by Ho.

Justice McIntyre, writing for the majority of the Court, rejected Ottawa's arguments on the scope of freedom of expression. An "internal limit" on section 2(b) was rejected with the conclusion that picketing made a public statement constituting expression. However, like Ottawa, McIntyre found "governments" to mean only the executive branch, and not the judiciary. Moreover, section 52(1) was read as subject to section 32(1), in that the *Charter* only applies to the common law when it authorizes "executive action," but not "private action." In this case, the Court ruled that the *Charter* did not apply.

Two years later, in *R. v. Canadian Newspapers Company Ltd*,[35] Ottawa displayed a more conciliatory attitude toward section 1 analysis. As appellant, the AG Canada conceded that section 442(3) of the *Criminal Code*, which banned publication of the identity of a complainant in sexual abuse cases, violated the newspapers' freedom of

---

[32]*Ibid.* 11.

[33]*Ibid.* 12.

[34]*Ibid.* 12.

[35][1988] 2 S.C.R. 122.

expression.[36] Attention was focused on section 1 analysis, and on the intent of the ban to remedy the underreporting of "highly damaging" and common sexual abuse by shielding victims who come forward. The AG Canada submitted that "this provision designed to safeguard and protect the innocent is a social value of superordinate importance."[37] Furthermore, he argued that section 2(b) "is not an absolute freedom," but that "its scope and meaning are shaped by and must yield to other [undefined] competing interests in a democratic society."[38] In light of these factors, the ban was argued to be a reasonable limit on section 2(b).

Ottawa's use of section 1 in this case, however, must be put in its proper context. As party to the case, Ottawa had a vested interest in arguing the case in the manner most likely to elicit judicial agreement, and the Court had demonstrated previously its preference for an "external limits" approach. Thus, the micro-constitutional implications of the case are limited. However, a comparison with the intervener factum of the AG Ontario is revealing. While the two factums are similar, Ontario - unlike Ottawa - explicitly endorsed the use of section 15 (equality rights) as an interpretive guide to section 1 analysis. As the AG Ontario argued, "[a] core guarantee of the *Charter* is equality before the law and the equal protection of the law without discrimination based on gender. Government initiatives aimed at achieving equality for women and children are recognized by *Charter* section 15(2) as being of fundamental importance."[39] The AG Canada's decision not to endorse the

---

[36]Notably, the parallel argument in *Big M Drug Mart* that businesses do not enjoy *Charter* protection as "artificial entities" was not reiterated here, though this is not surprising since the Court rejected this argument in that case.

[37]Frank Iacobucci, Attorney General of Canada Factum in *R. v. Canadian Newspapers Company Ltd.*, 13. Supreme Court of Canada File No. 19298.

[38]*Ibid.* 14.

[39]Brian Trafford and David Lepofsky, Attorney General of Ontario Factum in *R. v. Canadian Newspapers Company Ltd.*, 20. Supreme Court of Canada File No. 19298.

extension of section 15 to the rest of the *Charter* indicates the limits of Ottawa's support for the egalitarian "underlying purposes" of the *Charter*. Ottawa's position in this case foreshadowed its antipathy to subsequent equality rights claims.[40]

The next freedom of expression case participated in by the federal government, *R. v. Committee for the Commonwealth of Canada*,[41] pertained to the constitutionality of the *Government Airport Concessions Operations Regulations*, which barred commercial advertising and solicitation at airports without government authorization. The respondents argued this limit on their political solicitation activities at Dorval airport in Quebec infringed their section 2(b) rights. In its appellant factum, the federal government argued that freedom of expression does not entail access to government property, which is a "public forum" only for those who have legitimate business on the premises.[42] Thus, drawing on U.S. jurisprudence, Ottawa construed government as analogous to a private owner. On the basis of this internal limit, the AG Canada argued that no violation existed and therefore there was "no occasion or need to resort to section 1."[43] This approach differed somewhat from Ontario's intervention, which focused on whether the regulation was "content-neutral," and finding it so, argued that there was no violation.

The Court's ruling, employing a variety of arguments, rejected both Ottawa and Ontario's submissions. Chief Justice Lamer, writing for Justices Sopinka and Cory, disagreed that government ownership justified the limitation, but conceded that the

---

[40]The Court unanimously allowed the federal government's appeal. Justice Lamer, the author of the decision, agreed that remedying the underreporting of rape and sexual abuse was a "pressing and substantial" concern, and the ban was a "minimal impairment" of the respondent's freedom of expression.

[41][1991] 1 S.C.R. 139. Although the Court's decision was not rendered until 1991, argumentation took place early in 1990, before the cases reported in 1990 which follow.

[42]Gaspard Côté and Marie Nichols, Attorney General of Canada Factum in *R. v. Committee for the Commonwealth of Canada*, 29-30. Supreme Court of Canada File No. 20334.

[43]*Ibid.* 30.

complainant must show that the form of expression was compatible with the function of the forum.[44] If this "internal limit" or condition is satisfied, section 1 analysis must be undertaken. They argued that the condition was satisfied in this case, but since *political* solicitation and advertising were not explicitly prohibited the limit was not "prescribed by law," and therefore Ottawa could not invoke section 1. Justice La Forest also dismissed Ottawa's appeal, but held that the limit was prescribed by law, though not saved by section 1. Justice McLachlin employed Ontario's "content-neutral" framework, but argued that the claimant must demonstrate a link between the use of the forum and acceptable purpose(s) underlying freedom of expression, such as seeking truth, individual self-fulfilment or participation in social and political decision-making. Since this condition was met, section 1 analysis was required, and the blanket prohibit found to be disproportionately overbroad, and not a reasonable limit. Finally , Justice L'Heureux-Dube gave a broad definition of freedom of expression and found the effect of the regulation a *prima facie* violation of section 2(b), with the onus on the government to demonstrate reasonableness under section 1. However, she found the limit too vague to be "prescribed by law," as well as overbroad, and dismissed the appeal.

The federal government participated in a very similar case two years later, but this time as a third party intervener. In *Ramsden v. Peterborough*,[45] the issue was concerned commercial advertisement on public utility poles. The claimant, Kenneth Ramsden, argued that his freedom of expression was violated by Peterborough's municipal by-law banning postering on public property. Because the primary interest of this study is to determine Ottawa's constitutional litigation strategy, this case may be more useful than *R. v.*

---

[44][1991] 1 S.C.R. 141.

[45][1993] 2 S.C.R. 1084.

Committee for the Commonwealth of Canada, since Ottawa was party to that case. As noted earlier, a government's priority when party may be the short-term goal of protecting its impugned policy - or in that case, to protect its ability to manage its own property.

In *Ramsden*, Ottawa explicitly weighed the internal versus external limits approaches to section 2(b), and adopted the "mixed" approach of Chief Justice Lamer in *Committee for the Commonwealth of Canada* cited above. In particular, the AG Canada criticized Justice L'Heureux-Dube's reliance on section 1, and the onus on the state this would entail. As the federal factum phrased it, "[o]n this view, section 2(b) would serve as a barely policed port of entry into section 1, thus placing the onus on government to justify virtually any legal restriction on freedom of expression and requiring constitutionality to be determined on a case-by-case basis."[46] Here, then, was an explicit rejection of judicial activism.

In contrast, the AG Ontario intervened to support the external limits approach when considering freedom of expression on public property claims. Showing that it was interested solely in shaping the relevant second-order rules, Ontario took "no position with respect to the facts or the outcome of this appeal."[47] It then endorsed a modified form of McLachlin's test in *Committee for the Commonwealth of Canada.* McLachlin had required the claimant to demonstrate within the ambit of section 2(b) a link between one of the three underlying purposes of freedom of expression and the function of the forum. The AG Ontario recommended shifting this analysis to section 1, and thereby "placing the onus on the party with the best knowledge of use of government property" - the government.[48]

---

[46]Yvonne Milosevic, Attorney General Factum in *Ramsden v. Peterborough*, 5. Supreme Court of Canada File No. 22787.

[47]Lori Sterling, Attorney General of Ontario Factum in *Ramsden v. Peterborough*, 1. Supreme Court of Canada File No. 22787.

[48]*Ibid.*, 3.

Writing for a unanimous nine-member Court, Justice Iacobucci employed both the "Lamer" and "McLachlin" approaches to rule the by-law unconstitutional. After reading section 2(b) broadly to encompass advertising a rock concert, the Court ruled that although the by-law was content-neutral, the posters were compatible with the "function of the forum" and with the values underlying the freedom - that is, "political, cultural and artistic messages."[49] Although the limit was prescribed by law and rationally connected to a pressing and substantial concern (preventing litter), the blanket prohibition, as in *Committee for the Commonwealth of Canada*, did not meet the "minimal impairment" and "proportionality" requirements of section 1.

Interestingly, the federal government displayed a more generous interpretation of freedom of expression in a series of cases in 1990 dealing with solicitation for prostitution and hate-mongering. The AG Canada submitted a single factum for three cases heard concurrently concerning the constitutionality of ss. 193 and 195 of the *Criminal Code*, which prohibited public solicitation for the purposes of prostitution. In *Reference re ss. 193 and 195 of the Criminal Code* (Prostitution Reference),[50] *R. v. Stagnitta*,[51] and *R. v. Skinner*,[52] Ottawa reversed its narrow casting in *Dolphin Delivery* of freedom of expression as a political civil liberty. In rejecting this common law understanding favoured by Alberta and Saskatchewan, the AG Canada argued that the *Charter* "provides a broader protection to the freedom than is called for by the structural demands of the Constitution" [i.e., for parliamentary democracy].[53] In other words, expression should include a

---

[49][1993] 2 S.C.R. 1086.

[50][1990] 1 S.C.R. 1123.

[51][1990] 1 S.C.R. 1226.

[52][1990] 1 S.C.R. 1235.

[53]David Frayer and Graham Garton, Attorney General of Canada Factum in *Reference re ss. 193 and 195 of the Criminal Code*, 17. Supreme Court of Canada File No. 20581.

broader range of activities than political speech. As well, both the method and the content of expression were said to be constitutionally protected, so as to promote democracy and "human worth and dignity."[54] Thus, as Ontario argued in its intervention, freedom of expression is "not merely a means to an end but an end in itself."[55] The AG Canada then proceeded to reject content-based internal limitations on section 2(b) - with the exception of threats or acts of violence - as this "process of elimination" would lead to unacceptable "value judgements about the relative merits of thoughts, beliefs or opinions."[56]

However, Ottawa's subsequent legal arguments in these cases did not employ either the concepts of "violence" or "human worth and dignity." The AG Canada ignored the putative underlying issues of sexism and exploitation of the weak, focusing instead on the technical wording of section 195.1(1)(c), which prohibits solicitation not for the message passed between prostitute and client but for the "secondary effects" of solicitation, such as increased crime and lowered property values and community standard of living.[57] Since, Ottawa reasoned, section 195 imposes only a content-neutral, "trivial" regulation of "time, place and manner," no violation of section 2(b) exists.[58] Furthermore, if section 1 analysis was necessary, Ottawa argued that the objective of combatting a "public nuisance" was pressing enough, and the means sufficiently reasonable and proportional, to save any violation.

These arguments differed significantly from those of Ontario, which made the "equity argument" that solicitation (read prostitution) fuels the exploitation of the young and

---

[54]*Ibid.* 18.

[55]*Ibid.* 18.

[56]*Ibid.* 18-9.

[57]*Ibid.* 26-7.

[58]*Ibid.* 24.

vulnerable, and is therefore inconsistent with the underlying values of the *Charter*. Although paying lip service to its "content-neutral" framework, Ontario contended that the expression in question did not promote "self-fulfilment" as it involved no exchange of ideas or opinions. Notably (and inconsistently), however, Ontario maintained that other forms of commercial expression should still enjoy *Charter* protection, an issue Ottawa did not address.

In a creative analysis, Chief Justice Dickson, writing for Justices La Forest and Sopinka, imposed a hierarchy of values on section 2(b). In a single decision for the three cases, he argued that it "can hardly be said that communications regarding an economic transaction of sex for money lie at, or even near, the core of the guarantee of freedom of expression."[59] However, a *prima facie* violation was found, but this "peripheral" status was taken into account in section 1 analysis to rule the limit reasonable.[60]

In *R. v. Keegstra*,[61] the AG Canada intervened to support the constitutionality of section 319(2) of the *Criminal Code*, which prohibits promoting "hatred against an identifiable group." As a teacher and principal in a rural Alberta high school, Keegstra had disseminated anti-Semitic literature to his students. After being arrested and charged under section 319(2), Keegstra challenged the law as a violation of his freedom of expression. The case gave Ottawa, Ontario and Alberta the opportunity to develop the position that

---

[59][1990] 1 S.C.R. 1125.

[60]Contrary to these three judges, Justice Lamer contended that section 195 was intended to remedy the exploitation and degradation of women and children, but his ultimate ruling concurred with Dickson ([1990] 1 S.C.R. 1125). In dissent, Justices Wilson and L'Heureux-Dube argued that the law constituted a violation of section 2(b) that could not be saved by section 1 as section 195 was not tailored to the narrow legislative objective of preventing a social nuisance (1129). Overall, the decision was fairly consistent with Ottawa's, and to a lesser degree Ontario's submissions. All judges employed the "content-neutral" framework, and all but Lamer focused on the technical objective of section 195 to remedy the secondary effects of solicitation. However, contrary to Ottawa's suggestion, all judges employed section 1 analysis to some degree.

[61][1990] 3 S.C.R. 697.

section 2(b) did not protect "violent" expression. All three Attorneys-General claimed that the willful promotion of hatred was linked to violence against the identified group. Citing the Court's decision in *AG Quebec v. Ford* (which reflected Ontario's approach),[62] Ottawa argued that section 2(b) protects three categories of expression: (i) "political" expression essential to democracy; (ii) expression which exchanges views in search of Truth, and (iii) expression which advances individual autonomy and therefore promotes personal growth and self-realization, or "self-fulfilment." The AG Canada argued that hate-mongering failed to convey any meaning within these categories. Moreover, and contrary to its position in *Canadian Newspapers* and the prostitution-related cases, Ottawa invoked the *Charter*'s egalitarian "underlying purpose." Specifically, the AG Canada argued that hate-mongering was antithetical to the *Charter*'s underlying values of respect for dignity, social justice and equality as represented by sections 15 and 27.[63] While preferring an internal limit in this instance, Ottawa also argued that any infringement was justified under section 1, since the *Criminal Code* provisions were "a measured response to the willful promotion of hatred."[64]

The Court rejected the most fundamental claim of the Ottawa, Ontario and Alberta factums, that Keegstra's expression was "violent." Therefore, section 319(2) represented a restriction on content, but one justifiable under section 1 since, as Chief Justice Dickson argued, hate-mongering "is of limited importance when measured against free expression values."[65] Echoing his reasoning in the prostitution cases, he considered a limitation

---

[62][1988] 2 S.C.R. 712.

[63]D. Martin Low, Stephen Sharzer and Irit Weiser, Attorney General of Canada Factum in *R. v. Keegstra*, 9. Supreme Court of Canada File No. 21118.

[64]*Ibid.* 18.

[65]in Knopff and Morton, *Charter Politics*, 49.

relatively easy to justify under section 1 because the expression "strays some distance from the spirit of section 2(b)."[66]

In its intervention in *R. v. Zundel*,[67] Ottawa addressed a similar issue as in *Keegstra*. After AG Roy McMurtry of Ontario refused to charge Neo-Nazi activist and publisher Ernst Zundel under section 319(2) of the *Criminal Code* for fear of violating the *Charter*, a Toronto Jewish advocacy organization prosecuted Zundel under section 181 of the *Criminal Code*. Section 181 makes it an offense to publish a statement that one knows is false and or is likely to cause injury or mischief to a public interest. This was applied to Zundel's pamphlet, *Did Six Million Really Die?*, which claimed the Holocaust was a myth perpetuated by a worldwide Jewish conspiracy. In response, Zundel claimed section 181 violated his freedom of expression.

After almost a decade of working its way through the legal system, the case was heard by the Supreme Court of Canada in late 1991. In its submission, Ottawa reiterated its three-point criteria for freedom of expression, and concluded that deliberate falsehoods did not qualify since they did not possess meaning: they had no intrinsic value worth protecting. Moreover, like Ontario, Ottawa argued that lies constitute a form of verbal abuse analogous to physical violence.[68] As well, citing Richard Delgado, the AG Canada argued that falsehoods "divide rather than unite....Indeed, by demoralizing their victim they actually reduce speech, dialogue and participation in political life."[69] Furthermore, "*making* racist remarks impairs, rather than promotes the growth of the person who makes

---

[66]*Ibid.* 49

[67][1992] 2 S.C.R. 731.

[68]Graham Garton and James Hendry, Attorney General of Canada Factum in *R. v. Zundel*, 4-5. Supreme Court of Canada File No. 21811.

[69]*Ibid.* 5.

them, by encouraging rigid, dichotomous thinking and impeding moral development."[70] Thus, falsehoods were held not only to work against those *Charter* values enshrined in sections 15 and 27, but to counter self-fulfilment for the prevaricator.

Thus, Ottawa's first-line argument was that internal limits on section 2(b) precluded the protection of falsehoods, and so no violation had occurred. By this time, the AG Canada must have been aware of the Court's preference for section 1 analysis, and he also provided a detailed argument defending section 181 as a reasonable limit. Citing Dickson's decision in the prostitution cases and *Keegstra*, Ottawa contended that falsehoods do not promote democracy, and are therefore "peripheral to the core rights protected."[71]

Again, the Court disagreed that the expression in question was violent, finding in section 181 a content-based limitation. The Court unanimously gave a broad reading to section 2(b), ruling that "[a]ll communications which convey or attempt to convey meaning are protected by section 2(b), unless the physical form by which the communication is made (for example, a violent act) excludes protection."[72] It seems fairly clear that the Court sought to send a message to litigants that the creative interpretations of "violence" offered by Ottawa and Ontario would not be entertained. However, the Court split over section 1, with a majority finding section 181 too broad and "draconian" for its limited stated intentions.[73] Justices Gonthier, Cory and Iacobucci dissented, echoing the arguments of Ottawa and Ontario that suppressing damaging falsehoods would promote

---

[70]*Ibid.* 5.

[71]*Ibid.* 10.

[72][1992] 2 S.C.R. 732.

[73]*Ibid.* 734.

social tolerance, equality and multiculturalism, in keeping with the *Charter*'s broader purposes.[74]

In the final case examined here, *R. v. Butler*,[75] the AG Canada's intervention waded into the controversial issue of pornography. Winnipeg video store owner Donald Butler had been convicted under section 163 of the *Criminal Code* on 77 counts of possessing, selling and exposing "obscene" material to the public. In Canada, pornography is not specifically prohibited, but falls under the broad rubric of obscenity, which section 163 defines as "any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any more of...crime, horror, cruelty and violence." In his appeal to the Supreme Court of Canada, Butler argued that obscene expression enjoyed section 2(b) protection, and therefore section 163 infringed his rights.

The interventions by Ottawa, Ontario and Alberta all conceded Butler's charge of a *prima facie* violation, but contended the law could be saved under section 1. All three governments submitted that the suppressed materials did not lie at or near the core of free expression, with Ottawa suggesting further that there was "little meaning" in obscene materials. In addition, a number of arguments were made in the context of section 1 regarding pornography's detrimental effect on the "inherent dignity of the human person,"[76] and the "degradation and dehumanization" of women in particular.

Implicitly, *Butler* represented the classic dilemma of liberty versus equality, and, given the centrality of the Court's "community standard of tolerance" test for obscenity, of individual versus collective interest. While conceding the violation, Ottawa believed these

---

[74]*Ibid.* 736-7.

[75][1992] 1 S.C.R. 452.

[76]Bernard Laprade, Attorney General of Canada Factum in *R. v. Butler*, 20. Supreme Court of Canada File No. 22191.

competing interests could be balanced through section 1,[77] and more specifically, by exempting materials where explicit sexuality was "internally necessary" so as to protect works of "genuine literary, artistic or scientific value."[78] Notably, however, the AG Canada did not *explicitly* construe the case as a liberty-equality issue, nor encourage the use of section 15's equality rights as an interpretive clause within section 1 analysis. Finally, Ottawa drew an analogy between pornography and hate literature (in this case, against women), and repeated its argument from *Keegstra* that the harmful effect of such material justifies its limitation. The Court concurred with Ottawa (as well as Ontario and Alberta), finding the violation justifiable while establishing the first "harm-based" definition of pornography in the world.[79]

The previous chapter explained how broader interpretations of rights are typically associated with greater judicial intervention. In the context of fundamental freedoms, Ottawa joined with Alberta and Saskatchewan to encourage narrow, pre-*Charter* interpretations of freedom of religion and freedom of expression. While continuing to advocate a narrow definition of the former, Ottawa's subsequent arguments in the freedom of expression cases followed the Court in promoting a progressively broader understanding of expression, until its focus on expression as "self-fulfilment" was consistent with Ontario's stance. However, also like Ontario, this "large and liberal" reading of freedom of expression did not translate into actual support for rights claimants or judicial intervention in any of the cases examined. Rather, Ottawa preferred to limit the specific *Charter* right

---

[77]See discussion of proportionality in *ibid.*, 20-3.

[78]*Ibid.* 21; 14.

[79]Notably, the Court did *not* define harm through Ottawa's analogy to hate literature, but focused on pornography's harm to society's and the viewer's moral fabric. See M.A. Hennigar, "A Critical Analysis of *R. v. Butler* [1992]," Honours Thesis, Acadia University, 1994.

under the rubric of excluding "violent" expression, through the "content-neutral" framework, or in the name of the *Charter*'s egalitarian "underlying purpose."[80] Ottawa's antipathy toward judicial power via the *Charter*'s fundamental freedoms is further evidenced by the AG Canada's aversion to section 1 analysis. Ottawa conceded to section 1 analysis as the preferred course only in *Canadian Newspapers Company Ltd.* and *Butler*, in the face of explicit violations of section 2(b). As late as 1993, when the Court's commitment to the external limits approach was well-established, the federal government was still advocating a mixed approach of content-neutral internal limits, followed by section 1 analysis only if necessary, and with the evidentiary onus on the claimant. This case, *Ramsden*, was one of only two in which the federal government was not party to the case or when a provision of the *Criminal Code* was not at stake; the other was *Dolphin Delivery*. The fact that the AG Canada's most forceful resistance to freedom of expression claims occurred in its only truly third-party interventions is the strongest evidence of Ottawa's preference for judicial self-restraint in this area. Further evidence is provided by Ottawa's consistent defense of its legislation against judicial intervention in the remaining cases. In sum, Ottawa exhibited a marked preference for legislative schemes over judicial remedies.

---

[80]Notably, Ottawa's use of this last argument was inconsistent. When the impugned legislation could be construed as protecting or promoting an ethnic minority - as in *Keegstra* and *Zundel* - Ottawa invoked section 15 as an interpretive guide to the *Charter*'s underlying purpose. However, when women were the disadvantaged group - in *Canadian Newspapers*, the prostitution-related cases, and *Butler* - Ottawa did not, but countered the rights claim on technical legal grounds. This apparent double-standard when dealing with racism on one hand and sexism on the other reflects the absence of an alliance between Ottawa and feminist litigants such as LEAF on women's issues, in contrast to Ontario. This ambiguity toward judicial enforcement of equality mirrors Ottawa's indifference to judicial power in section 15 litigation, as discussed in the following chapter.

CHAPTER FIVE

Equality Rights[1]

Section 15 was potentially "the most intrusive provision of the *Charter*."[2] More to the point, section 15 provided potentially the most potent vehicle for subjecting legislation to judicial scrutiny, and thereby to augment judicial power. The degree to which this possibility was realized depended on how the Court resolved a number of important interpretive issues specific to section 15. These included: (1) the time period to which section 15 applies; (2) who enjoys equality rights; (3) what constitutes discrimination for the purposes of section 15; and (4) whether section 15 protects individuals against "systemic" as well as intentional discrimination.

One of the issues relating to the enforcement of the entire *Charter* was whether its rights and freedoms could be used to challenge legislation passed prior to 1982. Hogg notes that the *Charter* "operates only prospectively" from the day it was adopted, on April 17, 1982.[3] In general, this means this that pre-1982 laws are subject to the *Charter*, but

---

[1]Of a total of 21 non-criminal-process cases heard before the Supreme Court of Canada involving section 15, 6 witnessed interventions by the Attorney General of Canada and either Ontario, Alberta or Saskatchewan. Four more cases were included in which the AG Canada was a party (and the only government participant) in order to clarify specific aspects of Ottawa's micro-constitutional agenda for section 15, for a total of 10. Two other cases where Ottawa appeared as a party - *R. v. Dywidag* and *Rudolf Wolff v. R*[1990] 1 S.C.R. 695 (heard concurrently on the same issue) - are not included because they do not reveal anything about the federal government's section 15 micro-constitutional position. Ho included 9 cases (though not the same ones), but only 3 were discussed in detail.

[2]Peter W. Hogg, *Constitutional Law of Canada* (2nd Edition) (Toronto: Carswell, 1985): 797. Section 15 is composed of two sub-sections:
15. (1) 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.

(2) 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.

[3]Peter W. Hogg, *Constitutional Law of Canada* (3rd Edition) (Toronto: Carswell, 1992): 33-33.

there can be remedy only for claimants affected after 1982.[4] However, section 15 was unique as the activation of this section alone was delayed, according to section 32(2). In particular, the phrase "shall not have effect" could be construed to preclude section 15's "retrospectivity" before 1985. Support for this interpretation by an intervener would signal a desire to limit the impact of section 15 and so restrict judicial review of legislation.

The second and third issues of who can lay claim to equality rights and what constitutes discrimination are effectively the same issues. The eligible grounds for discrimination claims tells us who is entitled to claim section 15 protection. Ho reproduced the summary of approaches considered by the Attorney General of Ontario in *Law Society of British Columbia v. Andrews and Kinersly*,[5] the first Supreme Court of Canada case to address section 15 explicitly. The first approach, associated with Peter Hogg, is that anyone could employ section 15. Hogg suggests that any legislative distinction should be considered a *prima facie* violation of section 15.[6] This approach would seem to make section 15, to use the AG Canada's phrase in *Ramsden*, "a barely policed port of entry to section 1." However, the American equal protection jurisprudence suggests otherwise. In the absence of explicit internal limits, the U.S. Supreme Court has adopted different levels of scrutiny for the various grounds of legislative distinctions. Distinctions based on skin color and ethnicity are subject to "maximum scrutiny" and are rarely justifiable, while those based on sex receive "intermediate scrutiny." The result of this approach is three-fold. First, the majority of legislative distinctions (such as on age) are allowed under "minimal scrutiny," thereby sparing legislative policies from wholesale judicial review. The second effect is that anticipated reaction prevents almost all claims on grounds *other* than race,

---

[4]*Ibid.*, 33-33. Hogg further notes that some legal rights do not apply beyond 1982 at all, such as those against unreasonable search and seizure and exclusion of illegally-obtained evidence.

[5][1989] 1 S.C.R. 143.

[6]in Ho, 76.

religion or sex from ever being made before the Court. Conversely, legislators strive to avoid "maximum scrutiny" distinctions when making laws since successful court challenges are extremely likely. By this dynamic, the court exercises judicial power indirectly in such a way as to promote legislative compliance with the Constitution. In summary, Hogg's approach would most likely have resulted in U.S.-style jurisprudence rather than extensive judicial intervention in legislative policies.

The BC Court of Appeal developed a second approach in *R. v. LeGallant.*[7] In contrast to Hogg, the court emphasized that the claimant must demonstrate that distinctions are "unfair" or "unreasonable" in purpose and effect in order to constitute discrimination under section 15. A third and closely related approach formulated by the Ontario Court of Appeal required "treating the similarly situated similarly."[8] In a series of cases,[9] the court established that "a law is inconsistent with s. 15(1) if it treats persons differently, where they are similarly situated vis-à-vis the purpose of the law, and where this different treatment is unfair, unreasonable, or unduly prejudicial."[10] These latter two approaches would entail a substantial degree of judicial review of legislation since any legislative distinction could be challenged. However, the requirement that claimants must demonstrate "unreasonableness" and "prejudicial treatment" (and the "intent-based" interpretation in the third approach) would potentially limit judicial intervention. Ho suggests that this is why Alberta and Saskatchewan initially adopted these approaches.[11]

---

[7][1986] 6 B.C.L.R. (2d) 105 (C.A.).

[8]Attorney General of Ontario Factum in *Law Society of British Columbia v. Andrews and Kinersly*, 22. Supreme Court of Canada File No. 19955.

[9]*Re MacDonald and The Queen* [1985] 51 O.R. (2d) 745; *R. v. R.L.* [1986] 14 O.A.C. 318; *Century 21 Ramos Realty Inc. and Ramos v. The Queen* [1987] 58 O.R. (2d) 737.

[10]AG Ontario Factum, *Andrews*, 22.

[11]Ho, 94.

The American "levels-of-scrunity" or equal protection jurisprudence cited above provided the fourth approach. This is also the approach suggested in the 1985-86 federal Justice Department discussion papers, reviewed in Chapter Two. It was precisely this rank ordering of types of discrimination that the Women's Legal Education and Action Fund (LEAF) (and Ontario) feared would result from Hogg's expansive approach, with the associated diminution of women's constitutional status.[12]

A fifth approach would limit discrimination claims to those groups explicitly enshrined in section 15(1) and "analogous" groups, using historical disadvantage related to immutable individual characteristics as the grounds of analogy.[13] This approach was adopted by LEAF and Ontario, as it would maximize the opportunities for judicial scrutiny of legislative choices touching upon sexual equality issues and other enumerated and analogous grounds. LEAF and Ontario's paradoxical desire to limit section 15 internally is explained by Knopff and Morton's post-materialist analysis that "[c]onstitutional status gives a group official public status of the highest order, and groups who enjoy it have an advantage (i.e., a heightened burden of proof on governments) in pressing their claims against government over other groups who do not."[14] Like any other resource, the value of constitutional status is a function of its relative scarcity, such that those that enjoy it have a vested interest in preventing its dispersion to other groups.[15]

Underlying all of the approaches to the second and third interpretive issues was the fourth issue, which held important implications for judicial power: whether section 15

---

[12]Hausegger, 61.

[13]*Ibid.*, 61.

[14]Knopff and Morton, *Charter Politics*, 82.

[15]*Ibid.*, 82; see also Brodie's discussion employing a rational choice framework, "The Market for Political Status," forthcoming in *Journal of Comparative Politics*.

protected individuals against only "intentional" discrimination or also systemic discrimination. In essence, this is the same "intent- vs. effects-based approach" debate discussed in the previous chapter. As with the fundamental freedoms, equality rights violations based only on legislative intent would be rare relative to those based on effects, and so would limit judicial review of legislation. Thus, advocacy of an intent-based approach to section 15 claims reflects a choice to minimize judicial power.[16]

Andrews offered the Supreme Court the first opportunity to establish its approach to interpreting section 15. At issue was the constitutionality of section 42(a) of British Columbia's *Barristers and Solicitors Act*, which stipulated Canadian citizenship as a requirement for admission to that province's bar. Andrews, a landed immigrant from Britain, argued that this requirement discriminated against him and thus violated his rights under section 15(1) of the *Charter*. Although numerous parties intervened to attempt to influence the Court's decision, including LEAF and the Attorneys-General of Alberta and Ontario, the AG Canada did not. Given the obvious micro-constitutional importance of the case, and the Justice Department's consideration of section 15 in 1985-86, this absence is perplexing, and deserves some consideration.

---

[16]In truth, there is another underlying issue: whether section 15 entitled individuals to procedural/formal equality, or to broader substantive equality (ie., equality of result). The 1960 *Canadian Bill of Rights* had guaranteed "equality before the law," which had been narrowly interpreted in *Lavell and Bédard v. A.G. Canada* [1974] S.C.R. 1349 as "equality of treatment in the enforcement and application of the laws" (in Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (Toronto: McClelland & Stewart, 1993): 33). This interpretation upheld laws discriminatory in substance but which were applied equally. However, as noted in Chapter Two, the lobbying efforts in 1980-81 of women's groups dissatisfied with this interpretation resulted in, as Hogg notes, a four-fold definition of equality: equality before the law and under the law, equal protection of the law and equal benefit of the law (*Constitutional Law of Canada*, (3rd Edition)(Toronto: Carswell, 1992): 52-9). The last of these was a fairly explicit attempt to entrench a guarantee of substantive equality. With the deck stacked so heavily (both legally and politically) against a strictly procedural reading of section 15, governmental support in litigation for substantive equality–as all three governments in Ho's study displayed–is not an accurate reflection of support for expanded judicial power. (Of course, if a government *did* advocate only procedural equality, it would represent a challenge to judicial power and equality rights claims).

There are two possible explanations for this non-intervention. The first is that the AG Canada was faced with competing external pressures to advocate a restrictive reading of equality rights on one hand, and to support section 15 claims and judicial intervention on the other. The *Charter* - and especially section 15 - has fostered and legitimated conceptions of citizenship and identity separate from regionalism. These "non-territorial pluralities," as Cairns terms them, are a direct threat to both the traditional, federal conception of Canadian identity and to Quebec nationalism. In particular, the *Charter* symbolizes (and helps effect) a rejection of Quebec nationalists' *deux nations*/compact theory of Canadian federalism. In light of this, Ottawa's support of a broad interventionist interpretation of section 15 in 1988 might have threatened its alliance with Quebec during the Meech Lake Accord negotiations. Presumably, such support would also have been opposed by the Quebec and Western members of the Tory cabinet and caucus. Mulroney's desire to prevent section 15 from souring federal-provincial relations was foreshadowed by his decision when reforming the Court Challenges Program in 1985 to restrict new funding for equality rights cases to only those that challenged federal laws. On the other side of the equation, Secretary of State and CCP funding - and the patriation process itself - had bought Ottawa a constellation of constituencies among women's and multicultural groups. Whatever the Conservative government's attitude toward these constituencies from the Liberal era, outright resistance to "their" section of the *Charter* would be seen as a betrayal, with heavy political costs. Caught between Scylla and Charibdes, Ottawa may have chosen to do the safest thing - nothing.

A second explanation may lay in the internal politics of the federal Justice Department. While it is likely that some members of the Department's Human Rights division supported a generous interpretation of section 15, other members (including the Minister and those responsible for the 1985-86 discussion papers) did not. The result of

this division may have been internal wrangling which resulted in inaction. Unfortunately, the conventions of Cabinet secrecy and lawyer-client privilege prevent the researcher from obtaining any evidence for either hypothesis.

When the Court rendered its decision in *Andrews*, it addressed many of the interpretive issues noted above. Whether section 15 was "retrospective" did not arise in the case, but on the questions of who enjoys equality rights and on what grounds, the Court adopted the LEAF/Ontario "enumerated and analogous" approach. Writing for the Court, Justice McIntyre imposed the further restriction on equality rights claims that the claimant must show "that the legislative impact of [a] law is discriminatory," that is, harmful and prejudicial.[17] Drawing on American jurisprudence, McIntyre found that non-citizen permanent residents were a "discrete and insular" minority suffering historical disadvantage, and so were analogous to those groups enumerated in section 15(1). Further, McIntyre contended that section 15 "constitutes a compendious expression of a positive right to equality in both the substance and the administration of the law."[18] That the *Charter* was thus a rejection of *Bill of Rights* equality rights jurisprudence was asserted explicitly by the Court: "it is readily apparent that the language of s. 15 was deliberately chosen in order to remedy some of the perceived defects under the *Canadian Bill of Rights*."[19] With respect to section 1, the Court, not surprisingly, followed jurisprudence from the fundamental freedoms cases and *Oakes* to lay the evidentiary onus for proving "reasonableness" on the government responsible for the impugned legislation. In this case, all but McIntyre found the limit unjustifiable.

---

[17][1989] 1 S.C.R. 183.

[18]*Ibid.*, 594.

[19]*Ibid.*, 593.

The adoption of the enumerated and analogous approach poses two problems for the study of Ottawa's factums in cases heard subsequent to *Andrews*. First, a factum that did not embrace this approach would be considered "bad law," and would be discounted if not ignored by judges. This explains why Alberta and Saskatchewan, which initially opposed Ontario's strict enumerated and analogous approach in *Andrews*, adopted the Court's decision in subsequent cases.[20] Second, the enumerated and analogous approach can be used to promote diametrically opposed orientations to equality rights and judicial power. For Ontario and LEAF, the approach served to preserve the constitutional status of the named and other "historically disadvantaged" groups. For Alberta and Saskatchewan, the approach allowed them to advocate an internal limit on section 15 in hopes of restricting the impact of equality rights and judicial intervention. In light of these factors, Ottawa's use of the enumerated and analogous approach after *Andrews* reveals little about the federal government's support or opposition to judicial power under section 15. Instead, arguments on other interpretive issues must be examined, such as retrospectivity, section 1 analysis, and systemic discrimination. The last of these is of particular interest, as linking strict adherence to the enumerated and analogous approach with a rejection of systemic discrimination would severely limit the scope of possible section 15 claims. This would clearly indicate an intervener's desire to limit judicial intervention under section 15.

Ottawa's first intervention and factum in a section 15 case was in the *Reference re Workers' Compensation Act, 1983*.[21] Sections 32 and 34 of the Act guaranteed compensation for workers injured through employer or co-worker negligence in lieu of "all

---

[20]Ho, 90.

[21][1989] 1 S.C.R. 922.

rights and rights of action" (i.e., litigation). The Act thus drew a distinction between such workers and all other "victims of tort," and the reference sought to determine whether this distinction constituted discrimination under section 15(1) of the *Charter*.[22] Unlike Alberta, Ontario and Saskatchewan, Ottawa's first-line argument was that "s. 15(1) of the *Charter* should not be applied retrospectively so as to confer a right of action and a corresponding liability where none existed prior to the coming into force of the section."[23] However, Ottawa did not advocate insulating all pre-1985 legislation from section 15, but preferred a case-by-case approach to determine whether the legislation resulted in "a case of continuing discriminatory practice."[24] Finding this not to be so in this case, the AG Canada contended the *Charter* did not apply.

Should the Court disagree, Ottawa offered a second argument: that the distinction did not correspond to an enumerated or analogous ground. Making reference to the "historical origins" of section 15(1) and the *Charter*,[25] the AG Canada argued, like Ontario, that the section "was intended to proscribe discriminatory distinctions based on...personal characteristics of an individual or group...that have been involuntarily acquired and are immutable [and] historically the subject of stigmatization or the target of prejudice."[26] Ottawa argued the ground of the claim in this case - employment status - was not encompassed by the framers' intent.

---

[22]Eric Bowie and Yvonne Milosevic, Attorney General of Canada Factum in *Reference re Workers' Compensation Act, 1983*, 8. Supreme Court of Canada File No. 20697.

[23]*Ibid.*, 3.

[24]*Ibid.*, 4.

[25]*Ibid.*, 9.

[26]*Ibid.*, 9.

Following McIntyre's decision in *Andrews*, the AG Canada argued that if the distinction was found to be on an analogous ground, "it will then be necessary to determine whether the effect of the distinction...is so burdensome, prejudicial or disadvantageous as to be discriminatory."[27] Should the Court undertake such analysis, Ottawa conceded that the Act was discriminatory, but that "the negative impact of any inequality...must be weighed against the benefits conferred by the Act as a whole."[28] More importantly, the AG Canada argued that this weighing "is a function that has traditionally and properly been ascribed to the legislature."[29] He continued, "[i]t was never the intention of the framers of the *Charter* to transfer from the legislature to the court responsibility for striking the appropriate balance between individual and collective interests as affected by social programs."[30]

This explicit challenge to judicial power echoes almost word-for-word the opinions expressed in the Justice Department's 1985-86 discussion papers, with one exception. Whereas in 1985-86 the Department considered urging judicial deference in the context of section 1, in 1989 the AG Canada suggested the Court defer to the legislature's balancing act *within* section 15, prior to section 1 analysis. Under this latter approach, the burden of proof would rest with the claimant rather than the government. The resistance to judicial intervention this implies is underscored by Ottawa's decision not to produce its own section 1 analysis.[31]

---

[27]*Ibid.*, 10.

[28]*Ibid.*, 10.

[29]*Ibid.*, 12.

[30]*Ibid.*, 12.

[31]Ottawa's factum simply affirmed the federal government's support for the respondent's (Newfoundland) section 1 analysis.

When its strong support of legislative authority is added to its qualified opposition to retrospectivity, Ottawa emerges as an opponent of judicial power via section 15. As discussed above, use of the enumerated and analogous approach may also reflect a preference for judicial restraint. Ottawa's anti-judicial power position was a more emphatic version of Alberta's and Saskatchewan's arguments, and differed from Ontario's continued support for a strict reading of the *Andrews* standard supported by an interventionist section 1 analysis. The Court's brief decision concurred with Ottawa on the issue of retrospectivity, but still employed the enumerated and analogous framework from *Andrews*. The Court ruled, as Alberta, Ontario, Ottawa and Saskatchewan had argued, that the situation of the workers was not analogous to those listed in section 15(1).

The federal government's next involvement with section 15 occurred in a series of cases that addressed whether provincial variations in the enforcement of federal policies violated section 15(1). In essence, these cases tested how compatible federalism is with equality rights. In *R. v. Gregory S.*,[32] heard concurrently with several similar cases, the Court considered whether Ontario's strict admission criteria for the *Alternative Measures Program* - a component of the federal *Young Offenders Act* - violated section 15(1). The claimant, a young offender who did not meet Ontario's standards, argued that his section 15 rights were violated by virtue of the fact that Ontario's criteria were stricter than those of other provinces. Like Ontario, which was party to the case, the AG Canada's factum contended that "regional variation is not offensive to the equality principles protected by section 15(1)."[33] Specifically, Ottawa suggested that the difference was not related to any "personal characteristic or from association with a group."[34] Notably, Ottawa's argument

---

[32][1990] 2 S.C.R. 294.

[33]D.J. Avison and Douglas Rutherford, Attorney General of Canada Factum in *R. v. Gregory S.*, 5. Supreme Court of Canada File No. 21336.

[34]*Ibid.*, 4.

in this case was consistent with the Justice Department's support in their discussion papers for federalism in the context of section 15.

The Court dealt with a similar issue in *R. v. Sheldon S.*.[35] Ontario's administration of the *Young Offenders Act* was again in question, but this time the issue was whether Ontario's failure to establish *any* program of alternative sentencing violated the claimant's section 15(1) guarantee of equal benefit of the law. Although the federal government intervened as a third party, Ottawa had a direct interest in the case as the enforcement of federal law was at stake. Contrary to their defense of federalism in *Gregory S.*, Ottawa argued that:

> where, as here, a valid federal law is frustrated by the failure of provincial officials to respond to a positive duty [to implement alternative sentencing] and that failure deprives the class of persons affected of the beneficial impact of the federal law, then s. 15 may be invoked to remedy the resulting unreasonable and significantly unequal application of the federal law.[36]

Notably, for Ottawa to employ section 15 in this case, the strict reading of "enumerated and analogous" recommended in *Gregory S.* (and by Saskatchewan and Ontario in this case) had to be abandoned. In addition to enumerated and analogous grounds, the AG Canada submitted that "section 15 should also operate to protect the interests of individuals who may be denied entitlement to or enjoyment of the values and principles essential to a free and democratic society."[37] This broader interpretation of section 15 is notable for two reasons. First, it is consonant with the interpretation

---

[35][1990] 2 S.C.R. 254.

[36]D.J. Avison and Douglas Rutherford, Attorney General of Canada Factum in *R. v. Sheldon S.*, 14. Supreme Court of Canada File No. 20845.

[37]*Ibid.*, 13.

considered by the Justice Department in *Toward Equality*.[38] Second, Ottawa's willingness to deviate from the enumerated and analogous standard suggests that the federal government was not as concerned as Ontario and LEAF with preserving the exclusive constitutional status of the "historically disadvantaged" groups listed in section 15.

The Court rejected Ottawa's arguments in its decision in *Sheldon S.*. A unanimous court found that "[i]n a federal system of government, the values underlying section 15 cannot be given unlimited scope. The division of powers not only permits differential treatment based on province of residence, it mandates and encourages geographical distinction."[39] The Court re-affirmed the strict enumerated and analogous approach used in *Andrews* to conclude that geographic distinctions "do not amount to a distinction based upon a 'personal characteristic' and therefore are not discriminatory."[40] Thus, the Court ruled that federal enabling legislation (the *Y.O.A.*) did not oblige provinces to implement the alternative measures program. As a result, the Court ruled that the issue of the program's admission criteria raised in *Gregory S.* "has become moot."[41]

In 1993, the federal government appeared as respondent in another case involving provincial variations and section 15, *Graham Haig, et al. v. The Chief Electoral Officer and A.G. Canada*.[42] Under Ottawa's *Referendum Act, 1992*, Parliament established that two referenda would be held on the Charlottetown Accord on October 26, 1992, one in Quebec and another in the rest of the Canada. Haig had moved to Quebec close to the referendum

---

[38] As well, the Department's early resistance to judicial intervention is echoed by the AG Canada's brief dismissal of section 1 analysis, saying simply that the violation did not meet the criteria of the *Oakes* test (*ibid.*, 15).

[39] [1990] 2 S.C.R. 257.

[40] *Ibid.*, 257.

[41] [1990] 2 S.C.R. 299.

[42] [1993] 2 S.C.R. 995.

date, and so was unable to vote in that province's referendum as he failed to meet the six-month residency requirement. He challenged the Act, even though the referendum had passed, on the grounds that the residency requirement violated his freedom of expression, voting rights and equality rights. In response to the section 15(1) challenge, the AG Canada countered that Haig's exclusion stemmed from the time he chose to move to Quebec, and "timing of moving is not a distinction which section 15 of the *Charter* aims at protecting and promoting."[43] Adopting the *Andrews* decision, Ottawa urged the Court to reserve section 15 for the protection of "discrete and insular" groups which are discriminated against on the basis of an immutable personal characteristic which shares the similarities of historical, legal or political disadvantage as those enumerated in section 15.[44] The Court concurred unanimously with this argument, finding that "new residents of a province do not constitute a disadvantaged group" nor are they a "discrete and insular" group suffering from stereotyping or social prejudice."[45] However, Ottawa's arguments in these three cases underscore the point made earlier that arguments made when party to a case reveal little about a government's long-term micro-constitutional agenda. Ottawa's employment of the Ontario/LEAF approach in *Haig* served to defend federal legislation from a constitutional challenge, whereas in *Sheldon S.* section 15 was given a more flexible reading to support a challenge which, if successful, would have forced provincial implementation of federal criminal law.

---

[43]Jean-Marc Aubry and Richard Morneau, Attorney General of Canada Factum in *Graham Haig, John Doe and Jane Doe v. The Chief Electoral Officer and A.G. Canada*, 19. Supreme Court of Canada File No. 23223.

[44]*Ibid.*, 18.

[45][1993] 2 S.C.R. 999.

In 1990, the AG Canada intervened in three cases which addressed whether section 15 applied to the mandatory retirement policies of post-secondary educational facilities. In *McKinney v. University of Guelph*,[46] *University of British Columbia v. Harrison (and Connell)*,[47] and *Douglas College v. Douglas/Kwantlen Faculty Association*,[48] the Court had to consider first whether the *Charter* even applied to "private" universities. If not, the Court had to determine whether provincial human rights legislation - which *did* apply to universities - had to be consistent with the *Charter*.

Ottawa's factums in these cases were pure exercises in micro-constitutional politics, as the AG Canada stated that Ottawa was not concerned with the outcome of the cases. Ottawa's interest in these cases was limited to the second-order rules to be articulated by the Court in determining whether the *Charter* applies to a particular institution. The AG Canada's submission in *UBC v. Harrison* (which is referred to in the other two factums), cites the decision in *Dolphin Delivery* affirming section 32(1) as the operative section in matters of *Charter* applicability.[49] Since section 32(1) stipulates that the *Charter* only applies to governmental actions, Ottawa urged the Court to examine whether there is "a *direct* and *precisely defined* connection between government action" and the universities' retirement policies [emphasis added].[50] Specifically, the AG Canada asked, are the universities "acting on behalf of the executive branch of government" in enforcing the retirement provisions?[51] Although the AG Canada did not make a submission as to

---

[46][1990] 3 S.C.R. 229.

[47][1990] 3 S.C.R. 451.

[48][1990] 3 S.C.R. 570.

[49]Duff Friesen, Attorney General of Canada Factum in *University of British Columbia v. Harrison (and Connell)*, 4. Supreme Court of Canada File No. 20785.

[50]*Ibid.*, 4.

[51]*Ibid.*, 5.

whether the lower courts' conclusions from such a test were correct, such analysis would generally lead to a narrow reading of "government action."[52] The corollary is a narrowing of the potential range of claims against "government action" that violates section 15, or any other *Charter* right. As such, the federal factum implicitly advocates judicial self-restraint.

These cases also provide useful information on the section 15 orientations of Ontario and Saskatchewan. Saskatchewan intervened in *McKinney* to argue that universities are not governmental bodies for the purpose of the *Charter*, but that provincial human rights codes must be consistent with section 15. In this case, Saskatchewan contended that Ontario's legislation was inconsistent as it allowed age discrimination past the age of sixty-five. However, Saskatchewan argued that if the Court applied the *Charter* to universities, any violation was saved by section 1 as "courts should show deference to legislative assessments of the extent to which such [*Charter*] values should be imposed on private conduct."[53] Saskatchewan's resistance to judicial power under section 15 is thus consistent with its approach to fundamental freedoms. As co-respondent in *McKinney*, the AG Ontario made the uncharacteristic argument that its human rights legislation, which allowed age discrimination over the age of 65, did not violate the *Charter*. More interesting was Ontario's second-line argument that any violation was saved by section 1 as the age distinction "is not based on hostility."[54] While this demotion of an enumerated ground may simply reflect Ontario's desire to win the case, it is also consistent with the desire of some enumerated groups to diminish the constitutional status of age and so enhance their

---

[52]Notably, Ottawa's test would preclude Justices Wilson and Cory's conclusion, noted shortly, that the university's ability to enforce the retirement provisions through the courts implied government action. By stipulating a precise linkage with the *executive*, court activity would be excluded, as in *Dolphin Delivery*.

[53]Attorney General of Saskatchewan Factum in *McKinney v. University of Guelph*, 12. Supreme Court of Canada File No. 20747.

[54]Attorney General of Ontario Factum in *McKinney v. University of Guelph*, page number unavailable. Supreme Court of Canada File No. 20747.

own. Since belonging to an age cohort is not usually associated with historical prejudice - especially since most of us pass through a number of life stages, and so age is not "immutable" - its inclusion in section 15 undermines LEAF and Ontario's argument that section 15 was designed to protect the historically disadvantaged segments of society. Therefore, the inclusion of age renders the enumerated grounds suspect, weakening all of their constitutional status. Indeed, it was for this very reason that the Canadian Advisory Council on the Status of Women argued for the deletion of age from section 15 in 1980-81.[55] As noted, Ottawa did not address this issue here.

The Court was fractured in its decision on all three cases. In *McKinney* and *UBC v. Harrison*, Justices Dickson, La Forest and Gonthier concurred with Ottawa that the *Charter*'s applicability was restricted to government action under section 32(1). In these two cases, they found universities were not governmental in nature.[56] Only L'Heureux-Dube, in dissent, considered whether the *Charter* applied to universities via provincial human rights codes. She ruled that the *Charter* did not apply to universities directly, but human rights legislation which allowed age discrimination past age 65 violates the *Charter*,

---

[55]Romanow, *et al.*, 254.

[56][1990] 3 S.C.R. 233. Sopinka explicitly endorsed Ottawa's preferred test for determining "governmental action," and otherwise concurred with Dickson, *et al.* (238). In dissent, Justices Wilson and Cory found universities to be governmental for the purposes of section 32(1) given their ability to enforce the retirement policy, which they found to be in violation of section 15 (238). However, Cory argued that the violation was saved by section 1, while Wilson found it unreasonable given current life expectancy. The Court's decision in *Douglas College* differed from the other two cases because, as a community college, Douglas College was not as independent from the government in terms of finances and curriculum. Writing for Dickson and Gonthier, La Forest pointed out that the college was an agent of the Crown by law; its board was appointed by the Lieutenant-Governor at pleasure; it had to submit its annual budget to the Minister for approval; and there was Ministerial authority over college policies, funding and by-laws ([1990] 3 S.C.R. 570-1). Since the college was thus "subject to direct and substantial control by the Minister of Education," La Forest characterized the institution "in form and in fact an apparatus of government" and thus subject to the *Charter* (571). However, since the appellant had not actually raised a section 15 argument in the case, La Forest declined to address the issue further. Wilson, Cory and L'Heureux-Dube decided section 15 did apply, but like La Forest, considered the issue no further.

and cannot be saved by section 1.[57] In none of the decisions did any of the Justices consider Ontario's attempt to undermine the constitutional status of age.

However, a year later the Court considered a section 15 claim specifically on the basis of age discrimination, in *Tétreault-Gadoury v. Employment and Immigration Commission and A.G. Canada.*[58] The claimant challenged provisions of the *Unemployment Insurance Act, 1971* that disqualified her from drawing U.I. benefits after she lost her job upon turning 65 in 1986. As the respondent, it is not surprising that the AG Canada opposed the constitutional challenge, with a variety of arguments. First, Ottawa argued that since so many governmental policies make distinctions based on age, striking down such legislation would have the effect, citing Justice Wilson in *Andrews*, "of denying the community at large the benefits associated with sound, desirable social and economic legislation."[59] Second, the sheer volume of potential challenges on the basis of age would allow the wholesale judicial review of legislative policies. Citing La Forest in *Andrews*, the AG Canada resisted such judicial empowerment, arguing that

> it was never intended in enacting s. 15 that it become a tool for the wholesale subjection to judicial scrutiny of variegated legislative choices.... I am not prepared to accept that all legislative classifications must be rationally supportable before the courts. [The court's] role is to protect against incursions on fundamental values, not to second-guess policy decisions.[60]

Ottawa's third argument, which echoed that of Ontario in *McKinney* and CACSW in 1980-1, was that «l'âge constitue une caractéristique personnelle incontournable et qui

---

[57]*Ibid.*, 239-40.

[58][1991] 2 S.C.R. 22.

[59]Carole Bureau and Gaspard Côté, Attorney General of Canada Factum in *Tétreault-Gadoury v. EIC and AG Canada*, 29. Supreme Court of Canada File No. 21222.

[60]*Ibid.*, 29.

est fondamentalement differente des autres caractéristiques personnelles énumérée à l'article 15(1).»[61] Because «l'âge est une caractéristique biologique à laquelle personne n'échappe», distinctions made on the basis of advanced age are not discriminatory. Furthermore, Ottawa employed the logic of the Ontario/LEAF/*Andrews* approach - that "s. 15 is aimed at the protection of disadvantaged groups susceptible to prejudice and stereotyping" - to devalue claims made on the "non-disadvantaged" basis of age.[62] Although these arguments are of limited value for an analysis of Ottawa's micro-constitutional agenda, *where* they are made is relevant. The point is made by comparing Ottawa's third argument in *Tétreault-Gadoury* with Ontario's argument against age claims in *McKinney*. Although the arguments are virtually identical substantively, their form differs importantly. While Ontario preferred to downgrade the constitutional status of age in the context of section 1, Ottawa preferred to do so within the context of section 15 itself, thereby leaving the evidentiary onus on the claimant, rather than the government. Although this is a predictable strategy for a government trying to defend its legislation, it is also consistent with Ottawa's preference in the cases discussed above to limit section 15 internally and so to restrict judicial power.[63]

---

[61] *Ibid.*, 30.

[62] *Ibid.*, 31.

[63] Writing for the Court, La Forest found that the impugned provisions of the *U.I. Act, 1971* violated section 15(1). Notably, the issue of section 15's retrospectivity, which the Court decided to address on a case-by-case basis in the *Workers' Compensation Act, 1983* reference, was ignored here by both Ottawa and the Court. In a stinging criticism, the Court argued that the Act "permanently deprived the respondent of the status of a socially insured person by making her a pensioner of the state. It stigmatized her, regardless of her personal skills and situation, as belonging to the group of persons no longer considered part of the active population." ([1991] 2 S.C.R. 32) Nonetheless, La Forest supported the Act's objectives but not their implementation, which were not rationally connected and did not constitute a minimal impairment under section 1.

Ottawa's only factum in a case concerning sex discrimination appeared in *Symes v. Canada.*[64] Elizabeth Symes, a lawyer, claimed as business expenses her child care costs *in excess* of those allowed as deductions on her personal income tax pursuant under section 63 of the federal *Income Tax Act, 1972* . When the Federal Court of Appeal disallowed this deduction, Symes claimed that the *Income Tax Act* violated her section 15 rights. She argued that women disproportionately bear the cost of child care, and that the personal/business expense distinction drawn by section 63 resulted in systemic discrimination against working women.

As respondent, Ottawa offered a multi-tiered defense of its legislation. First, the retrospectivity argument from the *Workers' Compensation Act* reference was reiterated. Since "the effective date for the application of section 15 was, by virtue of section 32(2) of the *Charter*, April 17, 1985," the AG Canada asserted that "section 15 can only apply to that portion of the Appellant's child care expenses incurred after that date."[65] This would have narrowed the basis of Symes's claim (and possible remedy) to two-thirds of the 1985 tax year. Thus, the section 15 issue could not be resolved on retrospectivity alone.

Ottawa invoked "framers' intent" for its second-line defense, contending that Symes's claim "overshoots the purpose of the *Charter.*"[66] Citing Justice Dickson in *Big M Drug Mart*, the AG Canada urged that the Court not "overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must...be placed in its proper linguistic, philosophic and historical context."[67] Binding the Court to "original" or "framers' intent" is typically (but not always) associated with a

---

[64][1993] 4 S.C.R. 695.

[65]John R. Power and Sandra E. Phillips, Attorney General of Canada Factum in *Symes v. Canada*, 27. Supreme Court of Canada File No. 22659.

[66]*Ibid.*, 28.

[67]Cited in *ibid.*, 28.

preference for judicial restraint. In this case, however, one must remember that the AG Canada's primary interest in defending its legislation renders conclusions about Ottawa's micro-constitutional agenda suspect. This is especially true of section 15 challenges to the *Income Tax Act*, which, if successful, would represent a major policy loss for Ottawa.

Ottawa's third argument employed the Court's decision in *Andrews*. Following Justice McIntyre, the AG Canada argued that section 15 claimants must demonstrate not only that a legislative distinction has an unequal effect, but that "the legislative impact of the law is *discriminatory*" [emphasis added]; that is, the claimant suffers "harm and prejudice" as a result of the distinction.[68] Ottawa asserted that section 63's differential treatment of personal and business expenses "does not constitute discrimination...on any of the grounds enumerated in section 15 or analogous thereto."[69] In short, by focusing on the letter of the law, the federal government simply denied that women suffered systemically from the distinction. Ottawa's linkage of the enumerated and analogous standard with a rejection of claims based on systemic discrimination suggests a preference for limiting section 15 claims, and so to limit judicial power on this basis. However, the micro-constitutional implications of this argument are limited, as Ottawa was clearly pre-occupied with defending its legislation.

Finally, if the Court found a violation of section 15, Ottawa argued that the limit was reasonable under section 1. Notably, the AG Canada encouraged the Court to lower the threshold for "reasonableness" when socio-economic policy is at stake, or at least the *Income Tax Act*. Dickson's advocacy in *Irwin Toy Ltd. v. Quebec*[70] of judicial deference in such matters was cited approvingly:

---

[68][1989] 1 S.C.R. 183, cited in *ibid.*, 30-31.

[69]*Ibid.*, 31.

[70][1989] 1 S.C.R. 927.

> [w]here the legislature mediates between the competing claims of different groups in the community, it will inevitably be called upon to draw a line marking where one set of claims legitimately begins and the other fades away, without access to complete knowledge as to its precise location. If the legislature has made a reasonable assessment as to where the line is most properly drawn...it is not for the court to second guess. That would only be to substitute one estimate for another.[71]

In the Court's decision, the Justices divided according to gender. The male judges dismissed Symes's appeal, arguing that Symes "has not demonstrated a violation of section 15(1) of the *Charter* with respect to section 63 as she has not proved that s. 63 draws a distinction based on sex."[72] For Justice Iacobucci, the key issue was that although women disproportionately bear the burden of child care, it was not established that women disproportionately bear the *financial costs* of child care.[73] In dissent, Justices L'Heureux-Dube and McLachlin rejected this somewhat superficial analysis. For them, "child care is vital to women's ability to earn an income," and therefore the Act's distinction between business and personal expenses is specious.[74] In light of this, the female members of the Court found that section 63 perpetuated systemic discrimination against women, and thereby unreasonably violated Symes's equality rights.

The last section 15 case considered in this study, *Weatherall (Conway) v. The Queen*,[75] addressed the relationship between section 15(1) and the affirmative action provisions of section 15(2). At issue was the constitutionality of frisk searching and

---

[71]Cited in AG Canada Factum in *Symes*, 35.

[72][1993] 4 S.C.R. 698.

[73]*Ibid.*, 701.

[74]*Ibid.*, 702.

[75][1993] 2 S.C.R. 872.

patrolling of cells by female guards in men's prisons. The appellant argued that his equality rights were violated by the fact that the cross-gender touching and viewing of nude inmates occurred in male but not female prisons. As respondent in the case, the AG Canada (soon-to-be Supreme Court Justice Frank Iacobucci) argued that the situation imposed "no more than a trivial burden" on the appellant's rights, and therefore "does not merit *Charter* scrutiny."[76] Failing this, Ottawa asserted that, as a branch of the state, the penitentiary was subject to the affirmative action program adopted by the Government of Canada "to enable women to have adequate opportunities for employment in federal penal institutions."[77] In short, "s. 15(2) precludes a complaint under s. 15(1)."[78] If section 1 analysis was required, Ottawa contended that "the underlying values of the *Charter* rights involved must be sensitively weighed in a particular context against the other values of a free and democratic society sought to be promoted by the legislature."[79] In this case, "equality of treatment in the government's work-force...is a limit under s. 1 on the rights of inmates."[80] Ottawa's argument in *Weatherall* was identical to that in Ontario's intervener factum. Clearly, Ottawa's approach was inconsistent with its earlier arguments, but whether this was due to their respondent status, the author of the factum, or some combination of the two is unclear. Whatever the case, Ottawa was successful in persuading the Court to dismiss the claim. La Forest, writing for the Court, agreed with

---

[76]Brian Saunders, Attorney General of Canada Factum in *Weatherall (Conway) v. The Queen*, 17. Supreme Court of Canada File No. 22633.

[77]*Ibid.*, 28.

[78]*Ibid.*, 29.

[79]*Ibid.*, 29-30.

[80]*Ibid.*, 30.

Ottawa and Ontario that substantive equality may require differential treatment, as indicated by the existence of section 15(2).

To conclude, the federal government's litigation does not reveal a consistent or coherent approach to judicial power via equality rights. In stark contrast to Ontario's methodical and systematic attempts to protect the constitutional status of enumerated and analogous "historically disadvantaged" groups, Ottawa's participation in section 15 cases was sporadic and inconsistent. Failing to participate in *Andrews* is only the most telling example. In most cases, Ottawa's presence was involuntary or when they had a direct stake in the decision. Of the nine cases examined, Ottawa was a party in four (*Haig*, *Tétreault-Gadoury*, *Symes*, and *Weatherall*),[81] and in *Gregory S.* and *Sheldon S.* the implementation of federal criminal law was in jeopardy. This leaves only Ottawa's submission in the *Workers' Compensation Act, 1983* reference and the limited factums in the three university-related cases as positive, substantive examples of the federal government's micro-constitutional agenda for equality rights.[82]

Nonetheless, Ottawa's apprehension of judicial power in this area can be inferred from a number of sources. The first is the very fact that Ottawa, unlike Ontario, did not regularly intervene as a third party to support rights claims, the constitutional status of enumerated groups, or judicial aggrandizement through section 15. Indeed, Ottawa's most substantive intervention, in *Reference re Workers' Compensation Act. 1983*, explicitly opposes any expansion of judicial scrutiny under section 15. Similarly, Ottawa attempted to limit section 15's retrospectivity in the same case, and supported a test for "government

---

[81] As well as in *Dywidag* (appellant) and *Rudolf Wolff* (respondent).

[82] As a result, there is no reliable evidence of whether Ottawa linked the enumerated and analogous approach with support for claims made on the basis of systemic discrimination, since the this issue was discussed only in *Symes*.

action" in the university cases that would have limited the possible scope of section 15 claims.

As noted above, the micro-constitutional implications of arguments made when Ottawa is a party are limited. However, the fact that the federal government always fought to protect their legislation rather than concede a violation is notable. What this suggests is that Ottawa (unlike Ontario) puts its policy interests ahead of any long-term micro-constitutional agenda, and its own legislation ahead of the *Charter* and beyond judicial intervention. Finally, Ottawa's aversion to section 1 analysis was manifest throughout all nine factums. The preference for internal limits was consistent with Ottawa's approach in the fundamental freedoms cases, though not with the Justice Department's intent evinced in the 1985-86 discussion papers to use section 1 to urge judicial deference to legislative interests. The discrepancy probably lay in the fact that the discussion papers pre-dated the *Oakes* decision, in which the Court shifted the burden of proof to governments, making it clear that it would not allow section 1 to be a simple vehicle for protecting legislative policy choices. Moreover, as constitutional legitimacy has become more and more associated with the *Charter*, it has become more costly politically to be seen as "the violator of rights." Avoiding the task of justifying a violation has thus become a greater imperative politically (and legally, since the *Oakes* decision placed the evidentiary onus under section 1 on the government). When the *Andrews* decision allowed critics of judicial power and equality rights to advocate internal limits on section 15 under the guise of supporting the "enumerated and analogous" approach, resorting to section 1 became a secondary strategy. As for *why* Ottawa was a non-participant in section 15 cases, and why they resisted judicial power via equality rights, the explanation is likely the same one that explains Ottawa's absence in *Andrews*.

CHAPTER SIX

Language Rights and Judicial Remedy Power[1]

The language rights entrenched in sections 16 to 23 of the *Charter* represent the centerpiece of the Trudeau constitutional agenda. Ottawa's push for entrenchment of these rights, and especially section 23, was a direct response to the threat posed by Quebec's Bill 101 to Trudeau's vision of national bilingualism. That the *Charter* project coincided with massive increases in federal funding of OLMGs was no accident. The result was the fostering of potential litigants - anglophones within and francophones outside Quebec - who would challenge restrictive language regimes with their newly-entrenched rights.

This strategy had two advantages for Ottawa. First, Bill 101 could be systematically dismantled through litigation without heavy-handed and high-profile action by Ottawa, such as a reference or disallowance. The Trudeau Cabinet considered a constitutional reference of Bill 101 in 1977, but "rejected such a direct attack as too risky politically within Quebec," in light of the impending referendum on sovereignty-association.[2] By allowing its agenda to be mediated through OLMGs, Ottawa and the rest of the country witnessed the media portray the attack on Bill 101 [and English-only legislation in other provinces] as "beleaguered minorities struggling to obtain 'their rights' against hostile provincial governments."[3] The second advantage, shared by reference but

---

[1]For this chapter's section on language rights, the study included all cases involving claims under the sections 16 to 23 of the *Charter*, and section 2(b) in *Ford* and *Devine*, where the federal government intervened. There were five such cases, although Ottawa submitted *Charter*-related arguments in only four. There are no cases in which Ottawa appears as a party. A similar study was not undertaken by Ho, though he discussed *Mahé* in the context of judicial power. The section on judicial remedy power includes the two cases where Ottawa explicitly considered section 24(1). In one case, *Schacter*, Ottawa is party (appellant), which Ho also included.

[2]F.L. Morton, "The Effect of the Charter of Rights on Canadian Federalism," *Publius* 25 (Summer 1995): 181.

[3]*Ibid.*, 181.

not by disallowance, was that the battle over language rights would be settled by the federally-appointed Supreme Court of Canada, which has historically exhibited a sub-culture of bilingualism and receptivity "to the policy preferences of national elites."[4] As the cases discussed below suggest, the Court's centralist bias in language policy was evident prior to the adoption of the *Charter*.

Despite the advantages of entrenchment, the federal strategy had at least one major drawback: the "first-order rules" could do little by themselves to realize Trudeau's vision of national bilingualism. It follows that one should expect vigorous intervention and litigation by the federal government to encourage judicially activist second-order rule-making in language rights litigation. In addition to activist positions on the general interpretive issues delineated in Chapter Three, we should expect Ottawa to support "management and control" of educational facililties by OLMGs under section 23, with the associated positive remedy of structural injunction. As well, when the legislative override was used to protect Bill 101 from *Charter*-based challenges, we should expect Ottawa to encourage judicial review of section 33's use. In short, language rights should witness Ottawa's strongest advocacy of judicial power.

The hypothesis can be refined, first, by recalling Ottawa's dual strategies of protecting the anglophone minority of Quebec while promoting the use of French outside of Quebec. Second, given the different macro-constitutional agendas of the Trudeau and Mulroney governments, we should expect weaker support for these dual strategies after 1984, under the Conservative government. The chapter closes by contrasting Ottawa's

---

[4]*Ibid.*, 173. See André Bzdera, "Comparative Analysis of Federal High Courts: A Political Theory of Judicial Review," *Canadian Journal of Political Science* 26 (March 1993): 1-29, and Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: U of Chicago Press, 1981) for further discussions of the centralizing role of high courts and judicial review.

support for judicial remedial powers in the area of language rights with that when non-language rights are violated.

The "Quebec Anglophone" Arm

The primary threat to anglophones in Quebec, and so to Trudeau's constitutional vision, was the Parti Québécois's *Charte de la langue française*, better known as Bill 101. Passed originally in 1977, Bill 101 sought to establish French as the "working language of the state" by limiting or banning the use of other languages in the legislature, courts, civil service, commercial activity, and education. Even before the adoption of the *Charter*, Ottawa contested Bill 101 through the courts, in *A.G. Quebec v. Blaikie*.[5] A number of Quebec lawyers challenged Bill 101's provisions requiring the exclusive use of French in official legislative and judicial record-keeping as *ultra vires*, and the AG Canada intervened to support the challenge. According to section 133 of the (then) *British North America Act, 1867*, the federal and Quebec legislatures must keep bilingual records. Contrary to Quebec, Ottawa argued that section 92 of the *B.N.A. Act, 1867* provides the exhaustive list of exclusive provincial jurisdictions. Thus, Ottawa concluded that section 133 is a shared jurisdiction rather than part of Quebec's provincial constitution. As such, Quebec could not unilaterally nullify or amend section 133.[6] The Supreme Court of Canada unanimously agreed with Ottawa, and struck down these sections of Bill 101.

However, Bill 101's restrictions on English-language elementary and secondary education were both more threatening and less vulnerable than the provisions dealt with in

---

[5][1979] 2 S.C.R. 1016.

[6]Raynold Langlois, Attorney General of Canada Factum in *A.G. Quebec v. Blaikie*, 23. Supreme Court of Canada File No. 15495.

Blaikie. The educational provisions were well within Quebec's jurisdiction, and so required Trudeau to pursue the entrenchment of educational language rights as constitutional law. The AG Canada's first opportunity to encourage the Supreme Court of Canada's enforcement of these rights arose in *A.G. Quebec v. Association of Quebec Protestant School Boards*.[7] Section 73 of the *Charte de la langue française* decreed that school instruction "must be given in French" for all children, except those whose parents were educated in English in Quebec, or in another province and had moved to Quebec before 1977. In other words, children (or children of parents) who immigrated to Quebec from another country had to be educated in French. The same was true for Canadian children who moved to Quebec from another province after 1977, even if both parents were anglophones.

At issue in *Protestant Schools* was whether section 73 violated sections 23(1)(b) and 23(2) of the *Charter*, which entitles children of anglophones to be educated in English (and francophones in French) when living in a province where they belong to a linguistic minority. In truth, the existence of a violation was a foregone conclusion, since section 23 of the *Charter* had been drafted specifically to counter section 73. The case "represented nothing less than the final clash between the two old rivals, Trudeau and Lévesque, and their different visions of the future of the French in Canada."[8] Nonetheless, Ottawa elaborated extensively on the purposes of section 23. In contrast to Ottawa's desire to limit section 2(a) and (b) in contemporary cases, the AG Canada stressed that the *Charter* is a higher order of law and therefore "must receive a large and liberal interpretation."[9] In a

---

[7][1984] 2 S.C.R. 66.

[8]Russell, Knopff and Morton, eds., *Federalism and the Charter*, 619.

[9]Claude Joli-Cœur, Raynold Langlois and Louis Reynolds, Attorney General of Canada Factum in *A.G. Quebec v. Association of Quebec Protestant School Boards*, 5. Supreme Court of Canada File No. 17821.

statement that could have been drawn from a speech by the Prime Minister himself, the AG Canada contended that the "broad objective" of section 23

> is to promote the principle of equality of francophone and anglophone Canadians Section 23 represents a fundamental contribution to the constitutional recognition of the bilingual character of Canada and Canadian duality in favouring the maintenance and propagation of French and English cultures throughout the country.[10]

What was less certain was how the Court would apply the section 1 "reasonable limits" clause to violations of language rights, especially since the basic form of section 1 analysis had not yet been determined. Ottawa devoted the bulk of its factum to arguing strenuously against allowing the violation under section 1. The AG Canada proposed a two-tiered section 1 criteria, which distinguished between laws that attempt to modify or abrogate the content of rights "permanently," and those that attempt to undermine the exercise of a right "temporarily."[11] Legislation of the first type could not be saved, while legislation in the latter category could, provided the government could demonstrate that the restriction was "reasonable" and "proportional to the objectives."[12] This test is in marked contrast to Quebec's argument that, in light of Parliamentary supremacy, only "fantastic and arbitrary" measures would not be justified by section 1.[13] In this case, Ottawa asserted section 73 could not be saved as it "has the effect of depriving in a permanent manner an entire category of citizens of the right conferred upon them by section 23."[14] Furthermore, Ottawa stressed the remedial nature of section 23 viz. Bill 101. In light of the fundamental

---

[10]*Ibid.*, 7.

[11]*Ibid.*, 13.

[12]*Ibid.*, 21.

[13]As cited in *ibid.*, 21.

[14]*Ibid.*, 14.

incompatibility of the two provisions, Ottawa insisted that Bill 101 "cannot constitute a reasonable limit," since it would "neutralize" rather than limit the rights protected by section 23.[15]

Although Ottawa's proposed section 1 analysis would effectively protect language rights, it is notable that the same test could justify substantial violations of the other *Charter* rights. Since Ottawa's approach would allow limitation on the exercise of rights, "time, manner and place" restrictions would be relatively easy to justify.[16] A more provocative example is that cited by the AG Canada, of restrictions on the voting rights of judges. Ottawa construed this as an allowable "temporary" limitation, because employment as a judge is not "permanent" (or more accurately, "intrinsic"). Extensive restrictions on the voting rights, equality rights, and freedoms of religion, association and expression of other public servants (such as teachers, nurses, and municipal employees) could also be justified.

In a *per curiam* decision, the Court concurred with the AG Canada that section 73 denied rather than limited language rights and therefore could not be saved by section 1. However, the Court did not embrace Ottawa's "permanent/temporary limitation" test, nor any other systematic section 1 analysis. Another significant difference was the Court's use of "framers' intent" to justify their interventionist application of section 23, whereas Ottawa had invoked the nebulous "broad purposes" of the *Charter*. While adherence to framers' intent usually entails judicial restraint, the Court argued that the drafters (i.e., Trudeau) clearly intended section 23 to nullify section 73.[17] Since the Court has rejected adherence to framers' intent elsewhere, its employment here is notable, as it denotes special treatment

---

[15]*Ibid.*, 25.

[16]Indeed, the AG Canada defended precisely these types of limits in the fundamental freedoms cases, but as internal limits rather than via section 1.

[17][1984] 2 S.C.R. 76-77.

of language rights. Why Ottawa did not employ the same interpretation is unclear. It is possible that the federal government considered "framers' intent" a risky argument, since they knew the *provincial* framers had not supported a broad reading of section 23. Moreover, the federal government had testified before the Special Joint Committee on the Constitution in 1981 that it did not intend by section 23 to meddle "in the administration of education which is and should remain the responsibility of the provincial government."[18] These discrepancies aside, in its first opportunity the Court played the hand Trudeau had dealt as he had hoped.

The Mulroney government did not have the opportunity to intervene in any section 23 challenges to Quebec legislation. However, in two 1988 cases - *A.G. of Quebec v. Ford, et al.*[19] and *Devine* (Singer)*v. A.G. of Quebec*[20] - Ottawa intervened to support the challenge to the Quebec government's attempts to force the use of French for firm names and outdoor commercial signs. Bill 101 was again at issue, specifically sections 58 (the sign law) and 69 (regarding firm names), on the grounds that these provisions violated retailers' freedom of expression under section 2(b) of the *Charter*. The constitutional waters were muddied by Lévesque's omnibus application of the section 33 "notwithstanding clause" immediately following patriation in 1982. Unlike section 23 language rights, section 2(b) is subject to the legislative override. Lévesque's 1982 override expired in 1987, and was not renewed by the Liberal Bourassa government, but the issue was clouded further still by the PQ's second application of section 33 specifically to the sign law (section 58) in 1983. This "extra" use of the override, if valid, had not yet expired at the time of *Ford* and *Devine*.

---

[18]Cited in Ho, 103.

[19][1988] 2 S.C.R. 712.

[20][1988] 2 S.C.R. 790.

The Supreme Court thus faced a byzantine array of constitutional questions in the two cases. First and foremost, did sections 58 and 69 violate section 2(b), or was this "commercial expression" outside the *Charter*'s protection? If commercial expression was protected, could the violations be saved by section 1? If not, section 69 would be "of no force or effect," as the override had already expired. With respect to section 58, however, the Court had to decide whether the "extra" use of section 33 was valid, and to what extent (if any) the use of the override was subject to judicial review for consistency with the *Charter*. Moreover, the Supreme Court had to rule on the constitutionality of the omnibus use of section 33, since the Quebec Appeal Court had concluded that such use was invalid. Finally, in addition to the many *Charter* issues, ss. 58 and 69 were challenged under Quebec's *Charter of Human Rights and Freedoms*, which recognizes freedom of expression and prohibits discrimination on the basis of language.

The federal government's forays into *Ford* and *Devine* were markedly different, despite being argued on the same dates by the same lawyers.[21] The federal factum in *Ford* ignored section 69, focussing instead on the section 58 sign law's constitutionality vis-à-vis sections 2(b), 1 and 33 of the *Charter*. On the freedom of expression question, the AG Canada initially side-stepped the commercial aspect of the expression being regulated, by arguing that "s. 58 does not aim at regulating commercial messages, but prohibiting the use of languages other than French."[22] Giving an uncharacteristically broad reading to section 2(b), Ottawa contended that «la liberté d'expression présume l'existence non seulement d'un message mais aussi une possibilité de transmettre ce message.»[23] Later in the factum,

---

[21]The factums were heard by the Court on November 16-19, 1987; the authors were Georges Emery and André Bluteau of the A.G. Canada's office.

[22]André Bluteau and Georges Emery, Attorney General of Canada Factum in *A.G. Quebec v. Ford, et al.*, 6. Supreme Court of Canada File No. 20306.

[23]*Ibid.*, 11.

the AG Canada submits that «même si l'article 58 de *la Charte de la langue française* ne visait que l'expression commerçiale, l'art. 2(b) de la *Charte canadienne* devraient néanmois recevoir application.»[24]

Next, Ottawa's factum responded to Quebec's claim that the *Charter*'s language rights precluded Canadians' freedom to express in the language of their choice in areas others than education and legislative/judicial proceedings.[25] The AG Canada countered that freedom of teaching in a given language is subsumed by freedom of expression, and section 23 (echoing Ottawa's argument in *Protestant Schools*) is only a new constitutional development in that it bars the courts from applying section 1 to language rights.[26] Thus, Ottawa concluded, "the existence of the fundamental freedom of expression in other areas is not denied by section 23."[27] Finally, Ottawa deployed section 27 of the *Charter* as an interpretive clause to argue that the French-only provisions of Bill 101 conflicted with the *Charter*'s "objective of promoting the maintenance and development of Canadians' multicultural heritage."[28] The AG Canada spent comparatively little space on its section 1 argument. Ignoring the criteria established in *Oakes*, Ottawa reiterated the crux of its argument in *Protestant Schools* that the effect of the legislation was a negation of individual liberty rather than a reasonable limit.[29] Quebec's motive for section 58, that the French

---

[24]*Ibid.*, 15.

[25]*Ibid.*, 12.

[26]*Ibid.*, 20. In the original French, the passage reads: «Si la liberté d'enseignement dans une langue donné relevait de la liberté d'expression au sens de l'art. 2(b), l'art. 23 de la *Charte canadienne* ne constituerait en fait qu'un aménagement constitutionel de la liberté d'expression qui dispenserait simplement le tribual d'examiner la question sous l'angle de l'article 1.»

[27]*Ibid.*, 14.

[28]*Ibid.*, 14-15.

[29]*Ibid.*, 18. Notably, however, the "temporary/permanent limitation" model was abandoned, presumably because of the Court's rejection of this approach in *Oakes* two years earlier.

language and "face" of the province was in peril, was rejected out of hand by the federal government.

The remainder of the federal factum dealt with the various issues surrounding Quebec's use of the notwithstanding clause. First, Ottawa objected (without explanation) to the omnibus use of section 33 in 1982. More importantly, Ottawa disputed the validity of the second use of section 33 with respect to section 58, which was argued to have expired in 1987 with the original omnibus application of the override. Section 33(3) states that any legislative override "shall cease to have effect five years after it comes into force," while section 33(4) allows for the re-enactment of the declaration. Ottawa argued that section 33(4) allowed re-enactment *only* when the override expired or was explicitly removed before five years had passed; neither condition applied to the 1983 use of section 33.[30] On this rather flimsy and uncompelling basis, Ottawa asserted that the formal conditions required by section 33 were not respected in the second use of section 33, and so the override was inoperable.

But Ottawa did not limit itself to a discussion of expiry dates and formalities. Like Ontario, Ottawa characterized Quebec's use of the override as "indirect amendments" to the *Charter*, and called for judicial review of section 33's use.[31] The AG Canada encouraged judges to assess the constitutional "validity" of the legislature's use of section 33, arguing «it faut examiner l'essence et la substance (pith and substance) d'un loi afin d'en décider le but véritable.»[32] In this case, Ottawa contended that "l'objectif visé par le législateur québécois - i.e., préserver les droits et les pouvoirs législatifs de l'Assemblée nationale du Québec, malgré l'adoption de la *Loi constitutionnelle de 1982* - n'a aucun lien avec le

---

[30]*Ibid.*, 29.

[31]*Ibid.*, 33.

[32]*Ibid.*, 33.

contenu de la *Charte canadienne*."[33] By this reasoning, any government use of section 33 could be challenged as unconstitutional, since it temporarily suspends one or more constitutional rights. Since section 33 is a province's last line of defense against *Charter*-based judicial review, subjecting its exercise to judicial scrutiny would represent a major loss of power for the provinces and a corresponding increase in judicial power. Such emphatic support for augmenting judicial power is surprising to say the least, given Ottawa's restrictive approach in other *Charter* areas and the Mulroney government's pro-legislative authority macro-constitutional agenda. The factum is even more remarkable in that it makes no attempt to accommodate Quebec's legislation, thereby displaying no reluctance to threaten the Mulroney-Bourassa Meech Lake Accord alliance. Indeed, the AG Canada's attitude toward section 33 bears considerable resemblance to Trudeau's disdain for the notwithstanding clause.

In another *per curiam* decision, the Supreme Court read section 2(b) expansively to include commercial expression, but construed the issue as one of restricting language usage, as had the AG Canada. Also as Ottawa had encouraged, the Court found section 58's sign law (and section 69) to be unjustifiable under section 1. However, the Justices preferred self-restraint when it came to section 33, finding both the omnibus and the subsequent uses of the override valid. Thus, section 58 was protected from nullification (but not section 69). As well, the Court curtly rejected scrutinizing the use of the override. However, the override shielding section 58 had expired by the time the Court handed down its decision in December 1988, prompting Bourassa's re-passage of the sign law in Bill 178 with the explosive override provision.

---

[33]*Ibid.*, 34.

The federal factum in *Devine*, on the other hand, conforms with the hypothesis that the Conservative government would follow a micro-constitutional strategy that did not offend Quebec during the Meech Lake period. Eschewing *Charter*-related issues altogether, Ottawa pursued only the traditional federalism argument that section 58 and related sections were *ultra vires* Quebec's legislative jurisdiction. In a brief argument, the AG Canada cited Justice Montgomery's decision at the appellate court level that "[t]he prohibition of the use of a particular language, or any language but one, is not one of the classes of subjects so enumerated [in the jurisdiction of the provincial legislatures in the *Constitution Act, 1867*], and this might be said to end the matter."[34]

It is possible that the federal factum's avoidance of all *Charter* issues reflects a strategy to diminish judicial scrutiny and thus avoid alienating the Bourassa government. However, the more plausible explanation for this factum's difference from that in *Ford* is Ottawa's desire not to repeat itself, since the two cases dealt with the same issues, at precisely the same time before the Court, and were argued by the same federal counsel. Not surprisingly, the Court's ruling in *Devine* simply cited that in *Ford.*

The "Minority Francophone" Arm

The second arm of Trudeau's national bilingualism strategy - promoting French outside of Quebec - was also pursued through the courts. Similar to its support for Quebec's anglophones, Ottawa intervened in support of non-Quebec francophones prior to the adoption of the *Charter*. In *A.G. Manitoba v. Georges Forest*,[35] decided at the same

---

[34]André Bluteau and Georges Emery, Attorney General of Canada Factum in *Devine v. A.G. Quebec*, 5. Supreme Court of Canada File No. 20297.

[35][1979] 2 S.C.R. 1032.

time as *Blaikie*, the AG Canada encouraged the Court to reverse Manitoba's denial of francophone minority language rights.

In 1890, the Manitoba legislature responded to the rapidly shrinking francophone proportion of the population by passing the *Official Languages Act* making English the province's official language. A more extreme analog of Quebec's Bill 101, Manitoba's Act banned the use of French altogether in legislative record-keeping, court proceedings, and the publication of laws. The source of the dispute in *Forest* was that section 23 of the *Manitoba Act, 1870* - the document that legally recognized the province of Manitoba - created an officially bilingual province in terms identical those those in section 133 of the *B.N.A. Act, 1867* applying to Quebec. At issue was whether the 1870 Act was part of the province's constitution, in which case Manitoba could amend it unilaterally. Ottawa argued against this interpretation, casting section 23 as analogous to section 133. The AG Canada's rationale was that the *Manitoba Act, 1870* had been confirmed in the Canadian constitution through an Imperial statute, the *British North America Act, 1871*.

The Court's decision concurred with Ottawa, employing what Mandel accurately characterizes as "some rather half-hearted and completely unconvincing technical arguments" to achieve linguistic reciprocity between Quebec and "English" Canada in the treatment of their respective official language minorities.[36] Mandel's observation is supported by the Court's closing statement that "[i]t is enough to note that on any view it certainly cannot result in Manitoba's legislature having towards section 23 of the *Manitoba Act, 1870* an amending power which Quebec does not have towards section 133."[37]

---

[36]Mandel, 139.

[37][1979] 2 S.C.R. 1040.

Despite the Court's decision in *Forest*, the Justices did not pursue the constitutional implications for all of Manitoba's post-1890 legislation which had only been published in English. That question was addressed in the 1985 *Reference re Manitoba Language Rights*.[38] Following *Forest*, Manitoba francophone Roger Bilodeau contested a traffic offense by challenging the validity of the province's unilingual *Highway Traffic Act* and *Summary Convictions Act*. The provincial appeal court enforced the laws while finding them unconstitutional in a 1981 decision. The Supreme Court of Canada delayed hearing Bilodeau's appeal while Manitoba, Ottawa and francophone groups negotiated a translation schedule. When electoral resistance prompted the Manitoba government to scuttle the deal, Ottawa referred the constitutionality of all of Manitoba's post-1890 legislation to the Court.

Ottawa used the opportunity to encourage the Court's imposition of bilingualism on Manitoba where negotiation had failed. The federal intervention promoted a broad reading of *Forest*'s constitutional implications, and argued that Manitoba's unilingual laws were invalid and should be nullified.[39] The factum presented the issue as a matter of reciprocity in the treatment of minority francophones and anglophones. The AG Canada referred to the "striking similarity" between section 23 of the *Manitoba Act, 1870* and section 133 of the *B.N.A. Act, 1867*, and drew heavily on the pro-bilingualism decision in *Blaikie*.[40] Ottawa compromised, however, by proposing a two-year period of "temporary validity" to allow for translation.[41] Faced with either undermining the *Forest* decision or catapulting Manitoba into a state of anarchy, the Court adopted Ottawa's compromise. In addition to

---

[38][1985] 2 S.C.R. 347.

[39]Pierre Genest, Peter Hogg and Edward Sojonky, Attorney General of Canada Factum in *Reference re Manitoba Language Rights*, 22. Supreme Court of Canada File No. 18606.

[40]*Ibid.*, 15-16.

[41]*Ibid.*, 8-9.

ruling that all new laws must be passed and published in French and English, the Court gave existing laws "temporary validity" until the end of 1990. As Russell, Knopff and Morton note, the Court's ruling that "the Constitution will not suffer a province without laws," is "the most important contribution it has made to a universal theory of constitutionalism."[42] Once again, both Ottawa and the Supreme Court of Canada sought to balance the treatment of francophones outside Quebec with that of anglophones in Quebec.[43]

The federal government's first opportunity to protect and promote minority francophones via the *Charter* arose in *la Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education, Grand Falls District 50 Branch.*[44] The case raised the question of whether section 19(2) of the *Charter* entailed the right to be understood in court in either official language. Section 19(2) entrenches the right that "either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick." Ottawa argued that "while the wording of section 19(2) does not expressly mention the right to be understood, it must be borne in mind that this is a constitutional provision, and so must be interpreted differently from an ordinary piece of legislation."[45] Specifically, Ottawa construed section 19(2) as a remedial provision like section 23, requiring "a wide and liberal interpretation."[46] On this basis, the

---

[42]Russell, Knopff and Morton, eds, 628.

[43]Bilodeau's appeal, as well as the companion case *Macdonald v. City of Montreal* [1986] 27 D.L.R. (4th) 321 which dealt with an anglophone being ticketed in French only, were subsequently dismissed by the Court, since the laws challenged were now (temporarily) valid.

[44][1986] 1 S.C.R. 549.

[45]Alban Garon and Roger Roy, Attorney General of Canada Factum in *la Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, 3. Supreme Court of Canada file No. 18781.

[46]*Ibid.*, 6.

AG Canada asserted "it is beyond doubt that the corollary of the right to use French in all cases in the New Brunswick courts is the right to be understood by the court."[47] Where either trial or appeal court judges do not understand French, Ottawa insisted on competent simultaneous oral translation.[48] Notably, this proposed structural injunction represented a level of service which compromised between the status quo - post-trial translation of court transcripts[49] - and the francophones' demand for bilingual judges.[50]

The Court divided along linguistic lines in its decision in *Acadiens*. Writing for the francophone members of the Court, Justice Beetz argued that "understanding" was not required by section 19(2), but by section 11(d)'s right to fair hearing. Beetz based his restrictive reading of section 19(2) on the grounds that language rights resulted in "political compromise," and were thus better advanced by the legislature.[51] Dickson C.J. disagreed, finding that the two rights overlap, and since language rights pertain to communication, understanding is implied.[52] However, all but Justice Wilson argued that the specific "techniques or mechanisms which might aid in such understanding...are not before us in this appeal."[53] In contrast, Wilson provided the most expansive reading of language rights

---

[47]*Ibid.*, 3.

[48]*Ibid.*, 11.

[49]The specific challenge in *Acadiens* pertained to a particular judge's comprehension of French without the aid of translation or an interpreter. More generally, under the status quo a judge *could* request simultaneous oral translation, but was only *required* to have translations of written submissions, and then only if the judge decided that his or her own level of French comprehension was inadequate.

[50][1986] 1 S.C.R. 550.

[51]Russell, Knopff and Morton, eds., 645. However, by invoking section 11(d), Beetz actually promoted bilingualism more than either of his collegues. While section 19(2) only applies to New Brunswick, the right to fair hearing in section 11(d) applies to *all* provinces. The result is effective judicial extension of the right to be understood in either official language in court proceedings to provinces that did not opt in to these provisions in 1982.

[52]*Ibid.*, 645.

[53]*Ibid.*, 649.

by implying that appeal courts require bilingual judges. This went beyond what Ottawa supported, as did her suggestion that the aim of *promoting* bilingualism entailed an increasing "minimum standard" subject to "continuous" judicial scrutiny.[54] The federal government declined supporting such a blatant increase of judicial intervention and power.

When the Supreme Court of Canada heard *Mahé v The Queen*,[55] it provided the first (and to date, only) opportunity for Ottawa to support before the Supreme Court the linguistic educational rights of minority francophones as the AG Canada had done for anglophones in *Protestant Schools*. The appellants in *Mahé* claimed that Edmonton's educational system did not satisfy section 23(3)(a) and (b)'s requirement for the provision of minority language education. Although the school board had made some provisions for francophone students, the parents of these students sought "management and control" of the instruction and educational facilities, through a separate French language school board. The court was thus being asked to issue the more activist positive remedy of a structural injunction, in contrast to traditional negative remedies such as nullification.

Mahé was the first such case to be heard by the Supreme Court, but on two previous occasions (excluding the Alberta appeal court's decision in *Mahé*) provincial appeal courts had dealt with the interpretation of section 23(3)(b).[56] In *Marchand v. Simcoe Board of Education*,[57] the Ontario Court of Appeal found qualitative differences in the educational services enjoyed by francophone and anglophone secondary school students to violate the francophones' section 23 rights. Rather than let the violation stand, the Court issued pursuant to section 24(1) a remedial decree ordering the board of

---

[54]*Ibid.*, 646.

[55][1990] 1 S.C.R. 342.

[56]In neither case did the AG Canada intervene.

[57][1986] 29 D.L.R. (4th) 596.

education to correct the disparity. In *Lavoie v. Nova Scotia*,[58] the Nova Scotia Supreme Court found, contrary to the trial judge, that 50 students met section 23(3)(a)'s criterion of "where numbers warrant," and ordered that French language education was required at the Cape Breton school in question.

Since the demands in *Mahé* went well beyond those in *Marchand* and *Lavoie*, the case attracted numerous interveners interested in the scope of minority language rights and judicial remedial powers. The AG Canada intervened to support the francophone claimants and a broad reading of section 23. Characterizing minority language education rights as "a fundamental aspect of Canadian life" and "of cardinal importance to the bilingual character of Canada," Ottawa urged that section 23(3)(b) "be construed liberally in furtherance of the broad objective sought to be achieved [i.e., national bilingualism]."[59] In particular, Ottawa encouraged the Court to read section 23(3)(b) literally, as the Ontario Court of Appeal had in *Marchand*, that the facilities be "of" the linguistic minority rather than "for" them.[60] The subtle difference, Ottawa and the claimants maintained, implied a degree of "management and control." In response to Alberta and Saskatchewan's claim that management and control were not intended by the framers of section 23 as this would have limited provincial power over education, Ottawa stated simply that "section 23 limits this power in respect to minority language education."[61] As to what "management and control" entailed in this case, the AG Canada made no submission, but argued that generally a "variety of methods depending on the local circumstances and the particular character of the educational system"

---

[58][1989] 58 D.L.R. (4th) 293.

[59]K.M. Eidsvik, T.-L. Fornier and E.D.D. Tavender, Attorney General of Canada Factum in *Mahé v. The Queen*, 6; 4. Supreme Court of Canada File No. 20590.

[60]*Ibid.*, 14.

[61]*Ibid.*, 14.

could satisfy section 23.[62] However, the AG Canada asserted that the minimum requirement of section 23 is "the right of representatives of the minority to appropriate arrangements for the management and control of [educational] facilities."[63]

Although periodic judicial review and judicial appropriation of public funds are necessarily implied by Ottawa's arguments, these factors are not explicitly addressed in the federal government's factum. In contrast, Ontario endorsed both in *Mahé*, while urging the Court to allow considerable variation and provincial experimentation in the implementation of section 23.[64] Thus, although Ottawa supported judicial activism with respect to language rights in *Mahé*, it did so with less intensity than Ontario.

Dickson's ruling for a unanimous Court concurred with the submissions of Ottawa, Ontario and the claimants, and rejected Alberta and Saskatchewan's insistence on adherence to the restrictive "framers' intent." He interpreted section 23(3)(b) broadly to include "management and control," on the grounds that community involvement is essential to section 23's broader purpose of "preserving and promoting the two official languages of Canada, and their respective cultures, by ensuring each language flourishes...in provinces where it is not spoken by the majority of the population."[65] Dickson adopted the lower court's conclusion that the court had an obligation to "breathe life" into section 23 and to formulate remedies to that effect, without employing a fixed standard. Instead, he proposed a "sliding scale," ranging from separate school boards with revenue-raising capacity at the greatest extreme to mere instruction at the lowest. Thus, the Court did not adopt as demanding an interpretation as the AG Canada. Finally, Dickson argued the task

---

[62]*Ibid.*, 15.

[63]*Ibid.*, 13.

[64]Attorney General of Ontario Factum in *Mahé*, 8, in Ho, 109. Supreme Court of Canada File No. 20590.

[65][1990] 1 S.C.R. 362.

of applying the "sliding scale" in each case fell to the courts, thereby firmly establishing judicial remedial power in the realm of language rights.

In summary, Ottawa exhibited strong support for judicial power in language rights, in marked contrast to its position in the fundamental freedoms and equality rights cases. The AG Canada consistently advocated judicial intervention through "large and liberal" interpretations of language rights, both under the *Charter* and the *Constitution Act, 1867.* This support was extended to both minority anglophones and francophones, in keeping with the Trudeau government's policy of linguistic reciprocity. However, this policy, and strong support for judicial power in language rights, persisted under the Conservative Mulroney government despite the shift of Ottawa's macro-constitutional agenda to accord with Bourassa's *deux nations* vision. Thus, the hypothesis that federal support for judicial activism under language rights within Quebec would decline after Trudeau was not confirmed.

Judicial Remedial Power

Ottawa's attitude toward judicial remedy power also deserves examination, as remedy is one of the strongest manifestations of judicial power under the *Charter.* Ottawa's arguments in the language rights cases above reveal federal support for positive judicial remedies of violations of these rights. But what of other rights? The preceding chapters have dealt with this issue only indirectly. Here, the issue is addressed directly: has Ottawa manifested a consistent litigation strategy toward judicial remedy power? To this end, the federal government's arguments in the language rights cases are compared to

those in two non-language cases, *Edwards Books and Art et al. v. The Queen*, and *R. v. Schacter*.[66]

At issue in *Mahé* was the Court's remedial capacity to enforce constitutional entitlements in the absence of legislative action. In *Acadiens*, Ottawa encouraged a judicial requirement for simultaneous oral translation of court proceedings. However, in neither *Mahé* nor *Acadiens* did these positive judicial remedies flow (at least explicitly) from the judicial remedy power entrenched in section 24(1) of the *Charter*. In both cases, remedy followed from interpretation of the right. In contrast, judicial remedy with respect to non-language rights, such as the finding of a "constitutional exemption" in *Edwards Books*, is typically based on section 24(1).

The chief reason for the discrepancy lay in the different forms of the violated rights. The wording of the language rights is more prescriptive and more technical than the non-language rights. Language rights are "positive" rights, or entitlements to particular services, whereas the freedoms of expression and religion are traditional "negative" liberties which protect the individual from certain types of state interference. As a general rule, a violation of a negative rights will be remedied through negative activism, such as nullification. This is the function of the Constitution's "supremacy clause" in section 52(1), which states that "any law that is inconsistent with the provisions of the Constitution [including the *Charter*] is, to the extent of the inconsistency, of no force or effect." On the other hand, remedying violations of positive rights with nullification would do little to implement the required level of service. Where proponents of judicial self-restraint would prefer the court to nullify and allow the legislature to fashion new legislation, supporters of

---

[66][1992] 2 S.C.R. 679.

judicial activism would support positive activism, in the form of "structural injunctions" or "reading in."

Violations of negative rights can raise remedial issues beyond nullification. In *Edwards Books*, the AG Canada considered the appropriate remedy for the violation of non-Sunday Sabbatarians' freedom of religion by Ontario's Sunday closing legislation.[67] Specifically, was the Court obliged by section 52(1) to nullify the law, or could some other remedy be issued under section 24(1)? In addition to nullification, the AG Canada considered two other options: judicial "reading in " of clauses to the statute to render it constitutional, and the less-interventionist and preferred alternative of granting the individual claimants a "constitutional exemption" from the law via section 24(1). As noted in Chapter Three, Ottawa's preferred approach may allow greater judicial "creativity" in crafting remedies, but the result is less interventionist than a general nullification. Moreover, the narrow exemption - unlike "reading in" - is still a form of negative activism.

Although most non-language *Charter* rights are negative liberties, some entrench positive entitlements. Section 15(1)'s guarantee of "equal benefit of the law" raises remedial issues similar to those raised in *Mahé* by section 23(3)(b). In *R. v. Schacter*, the Supreme Court of Canada specifically considered the judiciary's positive remedial powers under section 24(1), as the federal government conceded the *Unemployment Insurance Act*'s violation of section 15(1). In 1985, Shalom Schacter filed for "maternity" benefits under the *U.I. Act* so he could stay home to care for his new-born child. At that time, the Act provided 15 weeks of maternity benefits to the natural mother, but not the natural father, except in the case of the mother's death or disability. Neither situation applied to Mr. Schacter. However, the Act allowed adoptive parents of either sex 15 weeks of

---

[67]As discussed in Chapter Three, the Court did not address the issue of remedy as no violation was found.

benefits, to be divided as the parents wished. Schacter argued the Act violated his section 15(1) equality rights by drawing a discriminatory distinction between natural and adoptive parents on one had, and between natural mothers and fathers on the other.

By the time the case reached the Court, Ottawa had amended the Act to grant natural parents the same option as adoptive parents. With the violation admitted and already remedied by Parliament, the case was in fact moot, but the Court and a number of parties wanted to clarify the Court's remedial options under section 24(1). The Court considered three options: nullification; a finding of "temporary validity" to allow legislators time to enact a constitutionally appropriate law; or granting an extension of benefits to natural fathers (or to an analogous individuals in other cases) via "reading in " and mandatory injunctions. As in *Edwards Books*, "reading in" entails the most active judicial role as it is the only option that compels legislative expenditure or extension of benefits.

Ottawa's appellant factum concurred with those of Alberta and Saskatchewan in opposing "reading in." Ottawa asserted that "legislation which infringes the rights guaranteed by subsection 15(1) of the *Charter* is necessarily inconsistent with the provisions of the Constitution and is therefore rendered of no force or effect by section 52(1)....[I]f it infringes the *Charter*, it is invalid."[68] In response to the criticism that nullification would deprive others of beneficial services, Ottawa replied simply that section 15(1) "guarantees equality...[but] imposes no obligation on Parliament to provide child care benefits to anyone."[69] Therefore, nullification would resolve the issue, "and there would be no remaining infringement to be remedied by resort to section 24(1)."[70]

---

[68]Roslyn Levine and David Sgayis, Attorney General of Canada Factum in *R. .v Schacter*, 19. Supreme Court of Canada File No. 21889.

[69]*Ibid.*, 19-20.

[70]*Ibid.*, 20.

Ottawa's resistance to positive judicial activism is explicit in its submission that "[i]t is for the Court to determine whether legislation infringes the *Charter* and to declare infringing legislation of no force or effect. It then falls to Parliament to consider what, if any, replacement legislation ought to be enacted."[71] The choice between "eliminating, extending or refashioning benefits...is one of social and economic policy" which Ottawa asserted "is best made by the elected legislature."[72] Similarly, "section 24(1) does not stand above the other provisions of the Constitution, " or "permit the court to exercise the legislative powers which are expressly assigned to Parliament and the legislatures by sections 91 and 92 of the *Constitution Act, 1867*."[73]

A corollary to Ottawa's forceful rejection of judicial law-making is the AG Canada's opposition to the appropriation of public funds by unaccountable judges. Ottawa argued that section 24(1) has not displaced Parliament's constitutional authority over the public purse. In contrast to their position in *Mahé*, Ottawa asserted that the Court could not issue remedies which entail public spending. Instead, the federal government preferred a finding of "temporary validity" to allow Parliament time to craft new legislation (as it had already done). In short, Ottawa saw very little purpose or function for section 24(1), beyond issuing limited negative remedies which left law-making firmly in the grip of the legislative branch. The Court rejected Ottawa's approach, preferring Ontario's more activist reading of section 24(1)'s remedial powers. "Reading in" was warranted, the Justices concluded, but only in "the clearest of cases."[74]

---

[71] *Ibid.*, 22.

[72] *Ibid.*, 25.

[73] *Ibid.*, 26.

[74] in Ho, 120. Both Ontario and the Court ignored the positive/negative activism distinction and the issue of judicial appropriation of funds in arguing that nullification was "equally intrusive" as judicial extension

To conclude, Ottawa's support for judicial remedy power was inconsistent overall, but the inconsistency followed a pattern. For violations of non-language rights, Ottawa endorsed only limited forms of negative activism which tended to emphasize legislative authority. This finding is consistent with Ottawa's weak support for fundamental freedoms and equality rights, and opposition to section 1 analysis. In contrast, the federal government's encouragement of large and liberal "purposive" interpretations of language rights was matched by strong support for judicial nullification when appropriate and positive activism when possible. The factum in *Schacter* suggests that Ottawa does not simply support positive activism when a positive right is violated; language is the crucial ingredient.[75] Thus, the hypothesis that Ottawa's support for judicial remedy power is greatest under language rights is confirmed, although, as noted, this support is more implicit than explicit.

[75]Admittedly, the conclusions drawn from *Schacter* must take into account that Ottawa was the appellant; that it was *Parliament*'s jurisdiction and money facing appropriation likely colored the AG Canada's arguments. However, the factum is consistent with the two others examined, as well as with Ottawa's general resistance to judicial intervention through non-language rights.

CHAPTER SEVEN

Conclusion

The federal government's complex set of macro- and micro-constitutional positions toward judicial power conform to only some of the hypotheses stated in Chapter Two. These hypotheses are restated and their outcomes summarized below. Again, "strong" support for judicial power is indicated by consistent support for interpretive choices associated with judicial intervention. "Weak" support entails a consistent preference for interpretive choices associated with judicial self-restraint, while support for both judicial intervention and judicial deference to legislative policy choices in a given area is coded as "moderate."

> H_1: Support for judicial power in language rights under the Trudeau government will be strong: *confirmed.*

The entrenchment of language rights was the centrepiece of the Trudeau government's macro-constitutional agenda, and this was reflected in that government's micro-constitutional strategy in *Protestant Schools*, the only language rights case of that period. Judicially activist choices were advocated on every interpretive issue raised in this early *Charter* case. These included a "large and liberal" interpretation of section 23 through appeals to the *Charter*'s broad underlying purpose (in this case, promoting national bilingualism), support for the external limits and "effects-based" approaches, and the placement of evidentiary onus for proving the limit "reasonable" on the (Quebec) government.

> H_2: Support for judicial power in non-language rights under the Trudeau government will be moderate: *not confirmed.*

Despite the Trudeau government's entrenchment of a bill of rights that transcended language issues, Ottawa's support for judicial power in this early period was limited almost exclusively to language rights. Contrary to Trudeau's popular image as the great civil libertarian and father of the "Just Society," federal interventions under Trudeau in the fundamental freedoms cases resembled the highly restrictive positions taken by Alberta. In *Big M Drug Mart* and *Dolphin Delivery*, Ottawa consistently encouraged interpretive choices that would minimize judicial power. The AG Canada urged adherence to *CBR* precedents, the "frozen concepts" approach, and restrictive framers' intent. Narrow internal limits on freedom of religion and freedom of expression were preferred, along with placing the burden of proof on the rights claimant. Thus, Ottawa's level of support for judicial power on non-language rights during this period was *weak* rather than moderate, representing a disjuncture between the Trudeau-era macro- and micro-constitutional strategies.

> H_3: Support for judicial power in language rights under the Mulroney government will be moderate overall, with weaker support for minority anglophones in Quebec than minority francophones outside Quebec.: *not confirmed.*

Ottawa's support for judicial activism in language rights within Quebec did *not* diminish under Mulroney as hypothesized. Forceful federal support in *Ford* for Quebec anglophones' freedom of linguistic expression was not consistent with the Mulroney government's macro-constitutional agenda of the time. This case witnessed Ottawa's rejection of *CBR* precedents and the adoption of an expansive definition of freedom of expression, support for a "purposive" approach to *Charter* interpretation, and federal advocacy for judicial review of government use of section 33. Ottawa was similarly supportive of judicial activism in language rights claims by minority francophones outside Quebec. In *Acadiens* and *Mahé*, the AG Canada proposed positive remedies for rights

violations, and in the latter case, supported "management and control" of educational facilities by OLMGs under section 23(3)(b). The *Mahé* and *Ford* factums also suggest that the factors that helped shaped the Conservative strategy during the Meech Lake Accord - regionalism via the Tory's Quebec–West electoral coalition - did not exert a significant influence on Ottawa's constitutional litigation.

> H_4: Support for judicial power in non-language rights under the Mulroney government will be weak: *confirmed.*

The Mulroney government's macro-constitutional agenda during the Meech Lake and Charlottetown Accords suggested a willingness to diminish judicial power in policy areas affected by non-language rights. Ottawa's micro-constitutional strategy mirrored this willingness. Ottawa attempted to limit retrospectivity and urged adherence to framers' intent in the context of section 15, while explicitly opposing positive judicial remedies in *Edwards Books* and *Schacter*. In *Young v. Young*, the AG Canada reiterated the previous government's preference for excluding action motivated by religious beliefs from protection under section 2(a). *Ramsden* witnessed Ottawa's explicit opposition to judicial activism through the external limits approach. These arguments indicate a continuation of the Trudeau government's weak support for judicial power in non-language rights.

A clearer sense of Ottawa's support for judicial power is gained by situating the federal government's micro-constitutional orientations in the context of Ho's findings for the provinces. Ottawa's overall support for judicial activism, summarized in Table 1, lies roughly mid-way between Ontario's consistent support for judicial activism and Alberta's and Saskatchewan's consistent preference for judicial self-restraint. The table aggregates and standardizes the federal (and provincial) positions on the general and right-specific interpretive choices discussed in the previous four chapters. The interpretive issues are

phrased in propositions which support judicial activism (see Appendix B), and each participant's third-party intervener position with respect to a particular proposition is coded as "support for" (value=1), "opposition to" (value=0), or "conflicting" (value=.5). Cases where a government's legislation was at stake are excluded, since the Attorney General's concern for second-order rule-making in such cases is typically secondary to defending the legislation. A more accurate measure of micro-constitutional strategies is thus achieved by ignoring cases when an AG is party, and in the case of the federal government, interventions when Ottawa's legislation (the *Criminal Code*) was challenged.

However, Ottawa's overall "middle-of-the-road" appearance is misleading, as demonstrated when the cases involving language are factored out. The result is perfectly consistent advocacy of judicial activism in the realm of language rights, but almost no support (.06) for activism in non-language rights. The only non-language interpretive issue that did not witness Ottawa's consistent preference for judicial self-restraint (value=0) - a "content-free" reading of freedom of expression - saw inconsistencies in the federal approach (value=.5). As discussed in Chapter Four, Ottawa's support after 1986 for a large and liberal reading of section 2(b), like that of Ontario, never translated into support for judicial intervention in non-language cases. In light of this, Ottawa's position on the section 2(b) interpretive issue might be more properly coded as a "0".

The preceding analysis is based, as noted, solely on truly third-party interventions. However, a large number of "party" cases were examined to test the theory that Ottawa's legal arguments in these cases were qualitatively distinct from those offered in interventions. The theory was confirmed. In cases such as *Big M Drug Mart* and *Protestant Schools*, Ottawa's micro-constitutional arguments were consistent, and supported each other. By contrast, Ottawa's typical approach in the "party" cases was to offer a multitude of micro-constitutionally inconsistent legal arguments with the hope of

TABLE 1

Positions of Selected Interveners on Key Interpretive Issues in Supreme Court of Canada Cases Reviewed[1]

Interpretive Issues	Alberta	Sask.	Ontario	Canada overall	Canada lang. cases	Canada non-lang.
C.B.R. Precedents	0	0	1	0	n/a	0
"Living Tree"	0	0	1	0	n/a	0
Purposive Approach	0	0	1	.5	1	0
External Limits	0	0	1	.5	1	0
Onus on Gov't.	0	0	1	.5	1	0
Effects-Based Appr.	0	0	1	.5	1	0
Positive Remedies	0	0	1	.5	1	0
Freedom to Act under S. 2(a)	0	0	.5	0	n/a	0
Content-Free S. 2(b)	0	0	1	.5	1	.5
S. 15 Retrospective	n/a	n/a	n/a	0	n/a	0
Enum. & Analog. Plus Systemic Discr. in S. 15(1)	n/a	n/a	1	n/a	n/a	n/a
"Management and Control" by OLMGs	n/a	0	1	1	1	n/a
Scrutinize S. 33 Use	n/a	0	1	1	1	n/a
Average[2]	0	0	.96	.42	1	.05

[1]Information regarding Alberta, Saskatchewan and Ontario is from Ho, 140. Some of the interpretive propositions upon which Table 1 is based (see Appendix B) have been altered in accordance with the arguments presented earlier. The values for the provinces have been changed accordingly. Similarly, some values have been amended by the exemption of cases, which Ho included, where the province was party to the case. The result is a clearer picture of the micro-constitutional orientation of the intervener.

[2]Average=Σcolumn $\div$ (13-n/a)

protecting its impugned policy. Ottawa also made uncharacteristic arguments to protect its policy interests. For example, in at least one case (*Gregory S.*), Ottawa encouraged judicial intervention to force provincial implementation of federal policy. As well, in several cases - including *Keegstra*, *Zundel* and *Weatherall* - the AG Canada employed the egalitarian "underlying purpose" of the *Charter* to encourage judicial deference to legislation, yet Ottawa demonstrated little support for judicial power in section 15 cases.

The party cases were also included in the study to determine the extent of Ottawa's strategic litigation in a given area, and whether the federal government always tried to defend its legislation against judicial intervention. On the first issue, federal interventions were virtually absent in equality rights, and there were only two (*Dolphin Delivery* and *Ramsden*) under freedom of expression. This indicates that Ottawa was not a particularly strategic litigant in these non-language rights areas. On the second issue, the federal government *always* tried to protect its legislation, whether Ottawa was the intervener in *Criminal Code*-related cases, the respondent, or the appellant. Thus, although the "party" cases are not accurate indicators of specific micro-constitutional arguments, they reflect Ottawa's general antipathy toward judicial power in non-language rights.

With the four hypotheses addressed, we can come full circle and answer the study's three original questions: Has the federal government manifested a consistent position toward judicial power at the macro-constitutional level? Has the federal government manifested a consistent position toward judicial power at the micro-constitutional level? Has Ottawa exhibited consistency in pursuing the same or complementary objectives at both levels? Macro-constitutionally, Ottawa's support for judicial power on language rights was consistently stronger than on non-language rights, but the Trudeau government was a stronger advocate of judicial power generally than the Mulroney government. Thus,

Ottawa's macro-constitutional agenda was inconsistent across policy areas and over time. The federal government's micro-constitutional strategy was also inconsistent across policy areas, but consistent over time. Strong support for judicial activism in language rights existed under both Trudeau and Mulroney, while non-language rights witnessed calls for judicial self-restraint. Thus, Ottawa's macro- and micro-constitutional strategies were inconsistent, in two ways. The first is the unanticipated strong support for language rights in Quebec under Mulroney. The second is the strength of the opposition to non-language rights under Trudeau, a surprise to even the most cynical observer of macro-constitutional politics.

These disjunctures raise the question of what factors (if not the executive's macro-constitutional agenda) determined Ottawa's micro-constitutional positions. In the context of the *Andrews* non-intervention, two possibilities were considered: the macro-constitutional agenda of the executive, and the internal politics of the Justice Department. To these possibilities should be added partisanship, centre-periphery dynamics, and the political executive's intentional pursuit of inconsistent macro- and micro-constitutional strategies. Partisanship is relevant because Canada's electoral system encourages single-party majority government, such that a party's platform forms the basis of the *government*'s agenda. This is further reinforced by the practice of party discipline. In this study, partisanship is of particular interest since the party in power changed during the period examined. Centre-periphery dynamics refers to the possibility that Ottawa's agenda reflected what best served the interests of Canada's economic and demographic centre. Alliance patterns between Ottawa and the provinces are the primary measures of this possibility. The possibility of intentionally inconsistent strategies is discussed below.

Ottawa's de facto alliance with Alberta (and likely Quebec) on the desirability of judicial self-restraint on the non-language rights is consistent with the first explanation.

However, as noted above, outright opposition to Alberta in *Mahé* and Quebec in *Ford* on language rights augurs against an explanation based purely on electoral coalitions or alliances between First Ministers. Party affiliation offers little hope, since the federal positions hold across the Liberal/Conservative divide. If some sort of "centre-periphery" dynamic was at work, there should have been a high degree of interagreement between the federal government and Ontario. There was not.[3]

Intentional inconsistency refers to the possibility that the federal government knowingly pursued a different public strategy (in negotiations) than its private litigation strategy. Students of constitutional law notwithstanding, the majority of voters do not realize the degree of judicial discretion in - and therefore possible government influence on - *Charter* decisions. In addition, people generally believe that the *Charter* alone can "demand" a particular government policy or action. As a result of these simplistic assumptions, a government can adopt popular strategies publicly, and eschew responsibility when its preferred policy is legitimated by the Court. Examples of this form of executive "issue avoidance" include the governments of Ontario and New Brunswick's handling of the contentious issue of OLMG funding.[4]

This strategy is plausible with respect to Trudeau and non-language rights. The popular mythology of Trudeau as the "great civil libertarian" is testimony to the value of his public pro-rights/-judicial power agenda. However, this approach fails to explain why the Mulroney government would appear to appease Quebec publicly but encourage strict

---

[3]Of course, it may be that the issues in question simply are not of the sort which might trigger such an "alliance". During relatively recent economic crises - such as inflation in the 1970s - and serious threats to national unity - the 1980 Quebec referendum and the ensuing patriation round, for example - Ontario has played the role of "national lynchpin" and supported the federal government, even when the result was Ottawa's encroachment on provincial jurisdiction. See Richard Simeon, "Ontario in Confederation," *The Government and Politics of Ontario*, Donald C. MacDonald, ed. (Scarborough: Nelson Canada, 1985) for a fuller discussion of this relationship.

[4]Manfredi, "Constitutional Rights and Interest Advocacy," 111.

judicial enforcement of bilingualism in that province. Although the public strategy may have appealed to many Quebeckers, it was not popular in the rest of the country. Rather, the electoral incentive should have been to adopt a hard-line stance with Quebec publicly, while appeasing Quebec by encouraging judicial deference to the National Assembly's language policies. Moreover, it is counter-intuitive that the Quebec-dominated Mulroney Cabinet secretly desired greater judicial intervention in Quebec language law. That leaves an explanation rooted in the Attorney General of Canada's department itself as the most plausible alternative.

There are two categories of factors that shape the Justice Department's impact on constitutional litigation: the nature of the relationship between the department and the political executive, and the internal attributes of the department. The existence of disjunctures between the federal micro- and macro-constitutional agendas necessarily imply that the executive does not exercise strict control over the department's litigation. But why does this measure of independence exist?

One possibility is that independence results from the Cabinet's ignorance or naïvety regarding the discretion exercised by government lawyers in *Charter* litigation. The comments of some prominent ex-Cabinet members suggests that the erroneous opinion that government lawyers are "neutral players" persists. Lowell Murray, Mulroney's Minister of Inter-Governmental Relations during the Meech Lake Accord period, proved a case in point in a recent interview. Speaking of the crucial "*Charter*-vetting" process in drafting new legislation, Murray stated "we had not gone too far wrong in following the always cautious advice of the Justice Department."[5] If Murray is representative of his Cabinet colleagues and predecessors, de facto departmental independence is highly likely.

---

[5]Lowell Murray, letter to Peter H. Russell, April 7, 1995.

An alternative explanation is offered by J.L.J. Edwards and former Ontario Attorney General Ian Scott. They both argue that departmental independence has its roots in the AG's discretion to litigate in criminal law, which is well established in the British legal tradition.[6] Although he does not make the link explicitly, Scott's conception of an AG with the discretion whether and how to litigate *Charter* cases resembles the American Solicitor General. Created in 1870, the Solicitor General's office was put in charge of the national government's litigation, at arm's length from the partisan politics of the executive of the day. Appointed by the President via the Attorney General subject to the approval of the Senate for three year terms, the SG enjoys the discretion of whether and how to litigate on behalf of the government in almost all areas. The SG's independence is also manifest in his or her unique ability to intervene as a third party (*amicus curiæ*, or "friend of the court") without the permission of the parties, both at the United States Supreme Court's docket-setting stage (the granting of writs of *certiorari*) and during the actual case.[7] Perhaps most importantly, the SG's selective litigation and tendency to file balanced factums of high quality result in a remarkable success rate (70-87%) as *amicus* and in influencing the Court's docket.[8] In light of these factors, it is little wonder that the Solicitor General is an attractive model to its Canadian counterparts.

---

[6]J.Ll.J. Edwards, "The Attorney General and the Charter of Rights," *Charter Litigation*, Robert Sharpe, ed. (Toronto: Butterworths, 1987): 52-53; Ian Scott, "Law, Policy, and the Role of the Attorney General: Constancy and Change in the 1980s," *The University of Toronto Law Journal* 39 (1989): 120.

[7]Karen O'Connor, "The *Amicus Curiæ* Role of the U.S. Solicitor General in Supreme Court Litigation," *Judicial Politics: Readings from Judicature*, Elliot E. Slotnick, ed. (Chicago: American Judicature Society, 1992): 210-211.

[8]Of particular note is the Solicitor General's 87% success rate as an *amicus curiæ* since 1930; that is, the Court finds in favour of the party supported by the SG 87% of the time; Lincoln Caplan, "The Annals of Law–The Tenth Justice," *The New Yorker* (17 Aug. 1987): 35; O'Connor, 210; Robert Scigliano, *The Supreme Court and the Presidency* (New York: The Free Press, 1971): 180.

However, Scott's desire to graft the Solicitor General model onto the Canadian system overlooks two important attributes which do not apply to the Attorney General: the SG's *institutional* independence, and the American separation of powers. As an appointee of the President/Attorney General, the SG's discretion to refuse to support Congress in court can be justified as an extension of the executive veto power. The same cannot be said of the Canadian Attorney General, who is a member of both the legislature and the executive by virtue of our imbedded Cabinet.[9] Furthermore, the Canadian conventions of Cabinet solidarity (and party discipline) provide strong arguments against Scott and Edwards's theory of AG independence Attractive as the American model might be to government lawyers, it is not analogous to the Canadian political or legal environment. Moreover, as the U.S. Supreme Court has become highly politicized over such issues as abortion, the executive has exercised greater supervision over the SG's office, especially under Reagan-Meese.[10] Thus, as the Canadian Supreme Court undergoes the same process, the SG model actually argues *against* greater AG independence.

Scott and Edwards's extrapolation of AG independence in criminal law to *Charter* litigation is also questionable theoretically. A more appropriate basis of comparison is pre-*Charter* constitutional litigation in traditional division of powers cases. Where criminal law is entirely within the authority of the AG, judicial review on federalism grounds involves socio-economic policy issues and jurisdictions outside the purview of the Justice Department. Moreover, litigation on the basis of entrenched constitutional rights - be it the

---

[9]This criticism of Edwards-Scott relates more to practice than their theory. In Britain, the Attorney General (who sits outside the Cabinet) and the Home Secretary (their equivalent of our Minister of Justice) are separate offices held by two different people. The Canadian offices are also separate in theory, following the British model, but are in fact occupied by the same individual (Edwards, *Ministerial Responsibility for National Security*, MacDonald Commission (Ottawa: Minister of Supply and Services, 1980): 35).

[10]See Lincoln Caplan, "The Annals of Law–The Tenth Justice (I)," *The New Yorker* (10 Aug. 1987): 29-58 and Caplan, "The Annals of Law–The Tenth Justice (II)," *The New Yorker* (17 Aug. 1987): 30-62.

Charter or the federal division of powers - is entirely outside the experience of the British AG, which further weakens the Edwards-Scott argument.

A cursory review of the AG's arguments in major federalism reference cases suggests that the AG has frequently promoted the macro-constitutional agenda of the political executive. In the *Patriation Reference* case, for example, the AG encouraged the Court's use of interpretive rules that would lead to a decision supporting unilateralism. Russell's anatomy of the *Anti-Inflation Reference* on the constitutionality of Trudeau's wage and price controls program reveals another example of close AG co-operation with Cabinet. The AG promoted an interpretation of section 91's "peace, order and good government" clause that permitted federal legislation in the "national interest." By contrast, Ottawa's provincial allies in the case only supported the more restrictive "emergency powers" doctrine.[11]

During the Depression, Ottawa referred the constitutionality of the Alberta Social Credit government's attempts to legislate relief through monetary policy and to force "accurate" press coverage of the government's policies.[12] The *Reference re Alberta Statutes*[13] culminated a tug-of-war between Alberta and the federal government, which had seen Ottawa exercise disallowance and later reservation to stymie Social Credit's legislation.[14] Baar notes that the press worried that a reference would only deal with "the narrow jurisdictional grounds" of the monetary policy issue "without any enunciation of

---

[11]Russell, "The *Anti-Inflation* Case: The Anatomy of a Constitutional Decision," *Law, Politics and the Judicial Process in Canada*, 372-373.

[12]The "Press Bill" empowered the Alberta government to order newspapers to publish "government statements of policy," and to prohibit publication of any non-complying papers; Carl Baar, "Using Process Theory to Explain Judicial Decision Making," *Canadian Journal of Law and Society* 1 (1986): 72.

[13][1938] 2 S.C.R. 100.

[14]Manfredi, *Judicial Power and the Charter*, 49-50.

fundamental values of a free press."[15] Prime Minister King and Western members of Cabinet held the same concerns, in addition to the fear that another use of disallowance would be seen as "an attack on the region."[16] As in the other reference cases, the AG Canada represented the executive's political interests. Not only did the AG Canada insist that Alberta's legislation was *ultra vires* in light of federal authority over monetary policy in section 91, he responded to the press's lobbying of Cabinet by linking the free press arguments explicitly to the *B.N.A. Act*..[17]

Perhaps most importantly, the historical pattern of AG-executive coordination in federalism litigation has continued into the *Charter* era. For example, the AG Canada offered contorted legal arguments to encourage "balancing" the treatment of minority francophones and anglophones in the 1985 *Reference re Manitoba Language Rights*. As in *Blaikie* and *Forest*, the AG Canada thus served the Trudeau government's constitutional agenda of promoting national bilingualism. Even this limited review of non-*Charter* reference cases reveals that the AG's office has used the "law" to serve the political interests of the executive in constitutional litigation, a practice that is entirely consistent with Cabinet government and ministerial responsibility.

Theoretical objections to Edwards and Scott notwithstanding, the practical reality seems to be that the AG's independence in *Charter* litigation has in fact followed from its independence in criminal law. This "policy inertia" has undoubtedly been aided by the political executive's naïvety regarding the complexities of *Charter* litigation and the discretion exercised by government lawyers. This said, it is necessary to consider the internal characteristics of the department.

---

[15]Baar, 73.

[16]*Ibid.*, 73.

[17]*Ibid.*, 73.

The internal attributes of the AG Canada's office would be irrelevant to the nature of its litigation if government lawyers dutifully served their political masters. However, given that the office enjoys a measure of independence from the executive, intra-departmental factors are pertinent to the kinds of interpretive choices that the AG recommends in its factums to the Court. There are two categories of salient departmental attributes: those relating to personnel and those relating to the institution. These categories correspond to what Mohr terms "variance" and "process" theories respectively.

"Variance theory" refers to the traditional behaviourist explanation of phenomena through "the attitudes and values and objectives" of individuals.[18] By this account, the personal attributes of individual lawyers in the AG's office that might influence their orientations to the *Charter* determine the character of the department's litigation. Of particular interest are age, years of experience in the department, legal background, and partisan affiliation. Age is salient on the assumption that older lawyers have developed their legal attitudes before the advent of the *Charter*, and so would be less receptive to entrenched rights than younger lawyers. Age also serves as a proxy measure of a lawyer's legal background. Lawyers who received their degree before 1982 would have been trained in the British common law or Quebec civil law tradition.[19] In both traditions, there is a strong bias against judicial law-making in the realm of social policy. Partisan affiliation may entail general attitudes toward the *Charter*, judicial power and decentralization (or provincial power). For example, federal Liberals (especially in Quebec) are more likely to

---

[18]*Ibid.*, 58.

[19]A notable exception to this rule might be lawyers trained at some point in the United States, who would be much more likely to support judicial intervention through entrench rights. Morton and Ho are currently conducting a survey of past departmental authors of the factums discussed in this and Ho's study to test the hypotheses offered herein. Their data will also be used to determine the effect of an American legal education on *Charter* orientations among Canadian lawyers.

support national bilingualism and judicial intervention in provincial education legislation through language rights than Conservatives.

These personal attributes are relevant for both recruits to the department and their appointers. It is to be expected that an appointer will attempt to hire or appoint people (and successors) who share his or her legal and political values. If appointments could be made with perfect knowledge of these factors, continuity of departmental *Charter* orientations could be maintained despite attrition and changes in government. However, such perfection is an improbability, especially given human changeability.

Mohr's "process theory" stresses explanations based on organizational context.[20] Baar notes that this neo-institutional approach has characterized the study of American criminal trial court decisions, which focuses on institutional factors such as case load, socialization processes within the court, courtroom workgroup, and the local legal culture.[21] The notable institutional attributes of the AG's office include assignment of cases by seniority, departmental harmonization of factums, and civil service bilingualism. Interviews with Justice Department officials suggests that responsibility for factum-writing in the AG Canada's office is assigned according to seniority. Thus, *Charter* cases are more likely to have been authored by older, anti-*Charter*/judicial power lawyers than junior pro-*Charter* counsel. This could explain Ottawa's initial antipathy to activist interpretations of the *Charter* under the Trudeau government. A seniority-based system would also create a lag in the time between appointments by a new government and these appointments exerting an effect on factum content. Thus, pro-language rights recruits during the Trudeau period would have enjoyed seniority during the Mulroney government's tenure.

---

[20]Baar, 60.

[21]*Ibid.*, 58.

Furthermore, the policy of civil service bilingualism contributes to an institutional sub-culture that supports national bilingualism and entrenched language rights.[22] These factors help explain the AG's deviation in *Ford* from the Mulroney government's macro-constitutional agenda.

Another key feature of the Justice Department's structure is the absence of a central review process for factums to ensure consistency of their micro-constitutional arguments. This is in apparent contrast to Ontario and Alberta, judging from their factums across several *Charter* areas.[23] As well, the greater the proportion of factums penned by lawyers outside the department (unknown at this time), the more likely it is for Ottawa's micro-constitutional approaches to be discordant. The authorship of federal factums (listed in the bibliography of this thesis) and interviews with department lawyers suggest that there is a departmental division of labour according to the *Charter* section involved. For example, Graham Garton usually argued the freedom of expression cases, while Duff Friesen or D.J. Avison and Douglas Rutherford handled equality rights cases. This combination of seniority and authors primarily determining factum content makes the personal attributes of individual lawyers all the more relevant.

The observations about the Justice Department can be only speculative, as biographical and employment information about department personnel is not a matter of public record. The survey of past government lawyers by Morton and Ho may be able to verify or disprove the hypotheses suggested above. At this stage of inquiry, more definitive explanations are not available.

---

[22]Morton and Ho's preliminary data indicates that 100% of the Federal Crown attorneys are bilingual.

[23]In the case of Alberta's small Attorney General office relative to Ontario and Ottawa, this consistency may simply be the result of a small number of factum authors. Morton and Ho's preliminary survey findings revealed this to be the case in Saskatchewan, where one department lawyer accounted for over half of that province's *Charter*-related factums.

In closing, this study has revealed that the federal government is an active player in Canadian judicial politics, but a strategic litigant only in language rights, and with inconsistent strategies and levels of success.[24] There is evidence of some coordination of litigation strategies with macro-constitutional strategies, but less than that observed in the provinces. This suggests that the political forces shaping the Attorney General of Canada's constitutional litigation are more complex than those driving the provinces in Ho's study. Where regionalism guides the provinces along a more consistent agenda, Ottawa's positions are probably determined by the often competing agendas and loyalties of the executive and Justice Department lawyers. Why this dynamic is not manifest in the provinces is a matter for further study, but may be the result of regionalism influencing both the lawyers and the politicians, stronger executive control of its lawyers, or a concerted effort within provincial Justice Departments to harmonize litigation. The relationship between the federal executive and the Justice Department, as well as the Department's internal political structure, are topics that, while difficult to study, are crucial to a more complete understanding of Ottawa's role in Canadian micro-constitutional politics.

[24]The information presented in this thesis can be used to calculate the AG's rate of success in influencing Supreme Court of Canada decisions. Since this topic is not the focus of this thesis, the discussion of success rate is presented in Appendix C.

BIBLIOGRAPHY

Government Documents

Boyer, Patrick, Chairperson. *Equality for All: Report of the Parliamentary Committee on Equality Rights*. Ottawa: Minister of Supply and Services, 1985.

Canada (Minister of Justice and Attorney General of Canada). *Equality Issues in Federal Law: A Discussion Paper*. Ottawa: Minister of Supply and Services, 1985.

Canada (Department of Justice). *Toward Equality: The Response to the Report of the Parliamentary Committee on Equality Rights*. Ottawa: Minister of Supply and Services, 1986.

Consensus Report on the Constitution: Final Text. Charlottetown, August 28, 1992.

Edwards, J.Ll.J. *Ministerial Responsibility for National Security, as it Relates to the Offices of the Prime Minister, Attorney General and Solicitor General of Canada*. The Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police (MacDonald Commission). Ottawa: Minister of Supply and Services, 1980.

Articles and Books

Allen, Avril. "Feminist Issues in the Courts since the Adoption of the Charter of Rights and Freedoms." Honours Thesis. Calgary: The University of Calgary, 1995.

Baar, Carl. "Using Process Theory to Explain Judicial Decision Making." *Canadian Journal of Law and Society* 1 (1986): 57-79.

Bakan, Joel and David Schneiderman, eds. *Social Justice and the Constitution: Perspectives on a Social Union for Canada*. Ottawa: Carleton University Press, 1992.

Brodie, Ian. "The Court Challenges Program." *Law, Politics and the Judicial Process in Canada*. Second Edition. Ed. F.L. Morton. Calgary: University of Calgary Press, 1992.

——. "Interest Groups and the *Charter of Rights and Freedoms*: Interveners at the Supreme Court of Canada." M.A. Thesis. Calgary: The University of Calgary, 1994.

Brodsky, Gwen. "Social Charter Issues." *Social Justice and the Constitution: Perspectives on a Social Union for Canada*. Eds. Joel Bakan and David Schneiderman. Ottawa: Carleton UP, 1992.

Bzdera, André. "Comparative Analysis of Federal High Courts: A Political Theory of Judicial Review." *Canadian Journal of Political Science* 26 (March 1993): 3-30.

Cairns, Alan C. *Disruptions: Constitutional Struggles, from the Charter to Meech Lake.* Ed. Douglas E. Williams. Toronto: McClelland & Stewart Inc., 1991.

——. *Federalism Versus the Charter.* Montreal-Kingston: McGill-Queen's University Press, 1992.

——. "The Constitutional World We Have Lost." Paper presented at the 1992 Annual meeting of the Canadian Political Science Association. Charlottetown, PEI: June 1, 1992.

Caplan, Lincoln. "The Annals of the Law-The Tenth Justice (I)." *The New Yorker* (10 Aug. 1987): 29-58.

——. "The Annals of the Law-The Tenth Justice (II)." *The New Yorker* (17 Aug. 1987): 30-62.

Cohen, Andrew. *The Making and Breaking of the Meech Lake Accord.* Vancouver: Douglas & McIntyre, 1990.

Cook, Ramsay. "'I Never Thought I Could Be as Proud...': The Trudeau-Lévesque Debate." *Towards a Just Society: The Trudeau Years.* Eds. Thomas Axworthy and Pierre Elliott Trudeau. Toronto: Penguin Books, 1992.

Edwards, J.Ll.J. "The Attorney General and the Charter of Rights." *Charter Litigation.* Ed. Robert J. Sharpe. Toronto: Butterworths, 1987.

Hausegger, Lori. "The Effectiveness of Interest Group Litigation: An Assessment of LEAF's Participation in Supreme Court Cases." M.A. Thesis. Calgary: The University of Calgary, 1994.

Hiebert, Janet. "Debating Policy: The Effects of Rights Talk." *Equity and Community: The Charter, Interest Advocacy and Representation.* Ed. F. Leslie Seidle. Montreal: Institute for Research on Public Policy, 1993.

Ho, Shawn W. "The Micro-Constitutional Strategy of Provincial Governments in Charter Cases: A Study of Alberta, Saskatchewan and Ontario, 1982-1992." M.A. Thesis. Calgary: The University of Calgary, 1994.

Hogg, Peter W. *Constitutional Law of Canada.* Second Edition. Toronto: Carswell, 1985.

——. *Constitutional Law of Canada.* Third Edition. Toronto: Carswell, 1992.

Knopff, Rainer. "Legal Theory and the 'Patriation' Debate." *Queen's Law Journal* 7 (Fall, 1981): 41-65.

Knopff, Rainer, with Tom Flanagan. *Human Rights and Social Technology: The New War on Discrimination.* Ottawa: Carleton University Press, 1989.

Knopff, Rainer and F.L. Morton. *Charter Politics.* Scarborough: Nelson Canada, 1992.

——. "Nation-Building and the Charter." *Constitutionalism, Citizenship and Society in Canada.* Eds. Alan C. Cairns and Cynthia Williams. Toronto: University of Toronto Press, 1985.

Mandel, Michael. *The Charter of Rights and Freedoms and the Legalization of Politics in Canada.* Revised, Updated and Expanded Edition. Toronto: Thompson Educational Publishing, Inc, 1994.

Manfredi, Christopher P. "Constitutional Rights and Interest Advocacy: Litigating Educational Reform in Canada and the United States." *Equity and Community: The Charter, Interest Advocacy and Representation.* Ed. F. Leslie Seidle. Montreal: Institute for Research on Public Policy, 1993.

——. *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism.* Toronto: McClelland & Stewart, Inc., 1993.

——. "Litigation and Institutional Design: The Charter of Rights and Freedoms and Micro-Constitutional Politics." Paper presented at the 1993 Annual Meeting of the Canadian Political Science Association, Ottawa, Ontario; June 6, 1993.

Milne, David. *The Canadian Constitution: The Players and the Issues in the Process that has led from Patriation to Meech Lake to an Uncertain Future.* Toronto: James Lorimer & Company, Publishers, 1991.

Morris, Thomas R. "States Before the U.S. Supreme Court: State Attorneys General as Amicus Curiæ." *Judicial Politics: Readings from Judicature.* Ed. Elliot E. Slotnick. Chicago: American Judicature Society, 1992 (561-570, orig. 1987).

Morton, F.L. "The Effect of the Charter of Rights on Canadian Federalism." *Publius* 25 (Summer 1995): 173-188.

——. "Judicial Politics Canadian-Style: The Supreme Court's Contribution to the Constitutional Crisis of 1992." *Constitutional Predicament: Canada after the Referendum of 1992.* Ed. Curtis Cook. Montreal-Kingston: McGill-Queen's University Press, 1993.

——. *Morgentaler v. Borowski: Abortion, the Charter and the Courts.* Toronto: McClelland and Stewart, 1992.

——. "The Political Impact of the Canadian *Charter of Rights and Freedoms.*" *Canadian Journal of Political Science* 20 (1987): 31-55.

——, ed. *Law, Politics and the Judicial Process in Canada.* Second Edition. Calgary: University of Calgary Press, 1992.

O'Connor, Karen. "The Amicus Curiæ Role of the U.S. Solicitor-General in Supreme Court Litigation." *Judicial Politics: Readings from Judicature.* Ed. Elliot E. Slotnick. Chicago: American Judicature Society, 1992 (209-15, orig. 1983).

Pal, Leslie A. *Interests of State: The Politics of Language, Multiculturalism and Feminism in Canada.* Montreal-Kingston: McGill-Queen's University Press, 1993.

Riddell, Troy. "The Development of Section 1 of the *Charter of Rights and Freedoms*: A Study in Constitutional Politics." M.A. Thesis. Calgary: The University of Calgary, 1994.

Romanow, Roy, John Whyte and Howard Leeson. *Canada...Notwithstanding: The Making of the Constitution 1976-1982.* Toronto: Carswell/Methuen, 1984.

Russell, Peter H. *Constitutional Odyssey: Can Canadians Become a Sovereign People?* Second Edition. Toronto: University of Toronto Press, 1993.

Russell, Peter H., Rainer Knopff and Ted Morton, eds. *Federalism and the Charter: Leading Constitutional Decisions.* A New Edition. Ottawa: Carleton University Press, 1990.

Scigliano, Robert. *The Supreme Court and the Presidency. The Supreme Court in American Life.* General Editor, Samuel Krislov. New York: The Free Press, 1971.

Scott, Ian. "Law, Policy, and the Role of the Attorney General: Constancy and Change in the 1980s." *The University of Toronto Law Journal* 39 (1989): 109-126.

Simeon, Richard. "Ontario in Confederation." *The Government and Politics of Ontario.* Ed. Donald C. MacDonald. Scarborough: Nelson Canada, 1985.

Smiley, Donald. "A Dangerous Deed: The Constitution Act, 1982." *And No One Cheered: Federalism, Democracy and the Constitution.* Eds. Banting, Keith and Richard Simeon. Toronto: Methuen Publications, 1983.

Stevenson, Garth. *Unfulfilled Union: Canadian Federalism and National Unity.* Third Edition. Toronto: Gage Educational Publishing Company, 1989.

Swan, Kenneth P. "Intervention and Amicus Curiæ Status in Charter Litigation." *Charter Litigation.* Ed. Robert J. Sharpe. Toronto: Butterworths, 1987.

Trudeau, Pierre Elliott. "The Values of a Just Society," *Towards a Just Society: The Trudeau Years.* Eds. Thomas Axworthy and Pierre Elliott Trudeau. Toronto: Penguin Books, 1992.

——. "Say Goodbye to the Dream of One Canada." *Meech Lake and Canada: Perspectives from the West.* Eds. Roger Gibbins *et al.* Edmonton: Academic Printing and Publishing, 1988.

Watts, Ronald L. and Douglas M. Brown, eds. *Canada: State of the Federation, 1989.* Kingston: Institute of Intergovernmental Relations, Queens University, 1989.

Cases and Factums

A.G. Manitoba et al. v. A.G. Canada et al (Patriation Reference), [1981] 1 S.C.R 753.
Factums of AG of Alberta, Ontario and Saskatchewan (interveners). Michel Robert, John J. Robinette and Clyde Wells, Factum of AG of Canada (respondent). Supreme Court of Canada File No. N/A.

A.G. Manitoba v. Georges Forest, [1979] 2 S.C.R. 1032.
Laurent J. Roy and J.A. Scollin, Factum of AG of Canada (intervener). Supreme Court File No. N/A.

A.G. Quebec v. Association of Quebec Protestant School Boards, [1984] 2 S.C.R. 66.
Claude Joli-Cœur, Raynold Langlois, and Louis Reynolds, Factum of AG of Canada (intervener). Supreme Court File No. 17821.

A.G. Quebec v. Blaikie et al., [1979] 2 S.C.R. 1016.
Raynold Langlois, Factum of AG of Canada (intervener). Supreme Court File No. 15495.

A.G. Quebec v. Ford et al., (La Chaussure Brown's Inc. et al.), [1988] 2 S.C.R. 712.
André Bluteau and Georges Emery, Factum of AG of Canada (intervener). Supreme Court File No. 20306.

Big M Drug Mart v. The Queen, [1985] 2 S.C.R. 295.
Virginia Davies and Julius Isaac, Factum of AG of Canada (intervener). Supreme Court File No. 18125.

Butler v. R., [1992] 1 S.C.R. 452.
Bernard Laprade, Factum of AG of Canada (intervener). Supreme Court File No. 22191.

Devine (Singer) v. A.G. Quebec, [1988] 2 S.C.R. 790.
André Bluteau and Georges Emery, Factum of AG of Canada (intervener). Supreme Court File No. 20306.

Douglas College v. Douglas/Kwantlen Faculty Association, [1990] 3 S.C.R. 570.
Duff Friesen, Factum of AG of Canada (intervener). Supreme Court File No. 20800.

Edwards Books and Art et al. v. The Queen, [1986] 2 S.C.R. 713.
Graham Garton, Factum of AG of Canada (intervener). Supreme Court File No. 19046.

Employment and Immigration Commission of Canada and A.G. Canada v. Tétreault-Gadoury, [1991] 2 S.C.R. 22.
Carole Bureau and Gaspard Côté, Factum of AG of Canada (appellant). Supreme Court File No. 21222.

Graham Haig, John Doe and Jane Doe v. The Chief Electoral Officer and A.G. Canada, [1993] 2 S.C.R. 995.

Jean-Marc Aubry and Richard Morneau, Factum of AG of Canada (respondent). Supreme Court File No. 23223.

La Société des Acadiens du Noveau-Brunswick Inc. et al. v. Association of Parents for Fairness in Education, [1986] 1 S.C.R. 549.
Alban Garon and Roger Roy, Factum of AG of Canada (intervener). Supreme Court File No. 18781.

Law Society of British Columbia v. Andrews and Kinersly, [1989] 1 S.C.R. 143.
Factum of AG of Ontario (intervener). Supreme Court File No. 19955.

Mahé v. The Queen, [1990] 1 S.C.R. 342.
K.M. Eidsvik, T.-L. Fortin and E.D.D. Tavender, Factum of AG of Canada (intervener). Supreme Court File No. 20590.

McKinney v. University of Guelph, [1990] 3 S.C.R. 229.
Duff Friesen, Factum of AG of Canada (intervener). Supreme Court File No. 20747.

Peterborough (City) v. Ramsden, [1993] 2 S.C.R. 1084.
Yvonne Milosevic, Factum of AG of Canada; Factum of AG of Ontario (interveners). Supreme Court File No. 22787.

R. v. Canadian Newspapers Company Ltd., [1988] 2 S.C.R. 122.
Frank Iacobucci, Factum of AG of Canada (appellant). Factum of AG of Ontario (intervener). Supreme Court File No. 19298.

R. v. Committee for the Commonwealth of Canada, et al., [1991] 1 S.C.R. 139.
Gaspard Côté and Marie Nichols, Factum of AG of Canada (appellant). Supreme Court File No. 20334.

R. v. Gregory S., et al., [1990] 2 S.C.R. 294.
D.J. Avison and Douglas J.A. Rutherford, Factum of AG of Canada (intervener). Supreme Court File No. 21336.

R. v. Keegstra, [1990] 3 S.C.R. 697.
D. Martin Low, Stephen Sharzer and Irit Weiser, Factum of AG of Canada (intervener). Supreme Court File No. 21118.

R. v. Schacter, [1992] 2 S.C.R. 679.
Roslyn Levine and David Sgayis, Factum of AG of Canada (appellant). Supreme Court File No. 21889.

R. v. Sheldon S., [1990] 2 S.C.R. 254.
D.J. Avison and Douglas J.A. Rutherford, Factum of AG of Canada (intervener). Supreme Court File No. 20845.

R. v. Skinner, [1990] 1 S.C.R. 1235.
David Frayer and Graham Garton, Factum of AG of Canada (intervener). Supreme Court File No. 20428.

R. v. Stagnitta, [1990] 1 S.C.R. 1226.
David Frayer and Graham Garton, Factum of AG of Canada (intervener). Supreme Court File No. 20497.

Reference re Manitoba Language Rights, [1985] 2 S.C.R. 347.
Pierre Genest, Peter Hogg and Edward Sojonky, Factum of AG of Canada (intervener). Supreme Court File No. 18606.

Reference re ss. 193 and 195 of the Criminal Code (Prostitution Reference), [1990] 1 S.C.R. 1123.
David Frayer and Graham Garton, Factum of AG of Canada (intervener). Supreme Court File No. 20581.

Reference re Workers' Compensation Act, 1983, [1989] 1 S.C.R. 922.
Eric A. Bowie and Yvonne Milosevic, Factum of AG of Canada (intervener). Supreme Court File No. 20697.

Retail, Wholesale & Department Store Union, Local 580 et al. v. Dolphin Delivery, [1986] 2 S.C.R. 573.
Peter K. Doody and James M. Mabbutt, Factum of AG of Canada (intervener). Supreme Court File No. 18720.

Symes v. Canada, [1993] 4 S.C.R. 695.
John R. Power and Sandra E. Phillips, Factum of AG of Canada (respondent). Supreme Court File No. 22659.

University of British Columbia v. Harrison (and Connell), [1990] 3 S.C.R. 451.
Duff Friesen, Factum of AG of Canada (intervener). Supreme Court File No. 20785.

Weatherall (Conway) v. The Queen, [1993] 2 S.C.R. 872.
Brian J. Saunders, Factum of AG of Canada (respondent). Supreme Court File No. 22633.

Young v. Young, [1993] 4 S.C.R. 3.
Brian Evernden, Factum of AG of Canada (intervener). Supreme Court File No. 22227.

Zundel v. R., [1992] 2 S.C.R. 731.
Graham Garton and James Hendry, Factum of AG of Canada (intervener). Supreme Court File No. 21811.

APPENDIX A

Government Participation in Appeals Involving Selected Charter Sections, 1982-1993

Canada	Alberta	Saskatchewan	Ontario
Freedom of Religion	**Freedom of Religion**	**Freedom of Religion**	**Freedom of Religion**
-*Big M Drug Mart v. R.* (1985) Intervener -*Edwards Books and Art v. R.* (1986) Intervener -*Young v. Young* (1993) Intervener	-*Big M Drug Mart v. R.* (1985) Respondent -*Edwards Books and Art v. R.* (1986) Intervener -*Jones v. R.* (1986) Respondent	-*Big M Drug Mart v. R.* (1985) Intervener -*Edwards Books and Art v. R.* (1986) Intervener	-*Edwards Books and Art v. R.* (1986) Respondent -*Jones v. R.* (1986) Intervener -*Young v. Young* (1993) Intervener
Freedom of Expression	**Freedom of Expression**	**Freedom of Expression**	**Freedom of Expression**
-*R.W.D.S.U. v. Dolphin Delivery* (1986) Intervener -*R. v. Canadian Newspapers* (1988) Appellant -*Prostitution Reference* (1990) Intervener -*R. v. Stagnitta* (1990) Intervener -*R. v. Skinner* (1990) Intervener -*R. v. Keegstra* (1990) Intervener -*R. v. Committee for the Commonwealth of Canada* (1991) Appellant -*Butler v. R.* (1992) Intervener -*Zundel v. R.* (1992) Intervener -*Peterborough v. Ramsden* (1993) Intervener	-*R.W.D.S.U. v. Dolphin Delivery* (1986) Intervener -*Prostitution Reference* (1990) Intervener -*R. v. Stagnitta* (1990) Respondent -*R. v. Skinner* (1990) Intervener -*R. v. Keegstra* (1990) Appellant -*Butler v. R.* (1992) Intervener	-*Prostitution Reference* (1990) Intervener -*R. v. Stagnitta* (1990) Intervener -*R. v. Skinner* (1990) Intervener -*Public Service Commission v. Millar* (1991) Intervener	-*R. v. Canadian Newspapers* (1988) Intervener -*Prostitution Reference* (1990) Intervener -*R. v. Stagnitta* (1990) Intervener -*R. v. Skinner* (1990) Intervener -*R. v. Keegstra* (1990) Intervener -*R. v. Committee for the Commonwealth of Canada* (1991) Intervener -*Butler v. R.* (1992) Intervener -*Zundel v. R.* (1992) Respondent -*Peterborough v. Ramsden* (1993) Intervener

APPENDIX A (cont'd.)

Government Participation in Appeals Involving Selected Charter Sections, 1982-1993

Canada	Alberta	Saskatchewan	Ontario
Equality Rights	**Equality Rights**	**Equality Rights**	**Equality Rights**
-*Ref. re Workers' Compensation Act, 1983* (1989) Intervener -*R. v. Sheldon S.* (1990) Intervener -*R. v. Gregory S.* (1990) Intervener -*McKinney v. U of Guelph* (1990) Intervener -*UBC v. Harrison* (1990) Intervener -*Douglas College v. D/K Faculty* (1990) Intervener -*EIC v. Tétreault-Gadoury* (1991) Appellant -*Haig v. AG Canada* (1993) Respondent -*Symes v. Can.* (1993) Respondent -*Weatherall v. R.* (1993) Respondent	-*Law Society of BC v. Andrews and Kinersly* (1989) Intervener -*Reference re Workers' Compensation Act, 1983* (1989) Intervener -*Edmonton Journal v. R.* (1989) Respondent -*Dywidag Systems v. R.* (1990) Intervener -*R. v. Sheldon S.* (1990) Intervener	-*Law Society of BC v. Andrews and Kinersly* (1989) Intervener -*Reference re Workers' Compensation Act, 1983* (1989) Intervener -*McKinney v. University of Guelph* (1990) Intervener	-*Law Society of BC v. Andrews and Kinersly* (1989) Intervener -*Reference re Workers' Compensation Act, 1983* (1989) Intervener -*Dywidag Systems v. R.* (1990) Intervener -*R. v. Sheldon S.* (1990) Appellant -*R. v. Gregory S. et al.* (1990) Appellant -*McKinney v. University of Guelph* (1990) Respondent -*Weatherall v. R.* (1993) Intervener
Language Rights	**Language Rights**	**Language Rights**	**Language Rights**
-*AG Quebec v. Protestant Schools* (1984) Intervener -*Société des Acadiens* (1986) Intervener -*Mahé v. R.* (1990) Intervener	-*Mahé v. R.* (1990) Respondent	-*Mahé v. R.* (1990) Intervener	-*Mahé v. R.* (1990) Intervener

APPENDIX A (cont'd.)

Government Participation in Appeals Involving Selected Charter Sections, 1982-1993

Canada	Alberta	Saskatchewan	Ontario
Judicial Remedy	**Judicial Remedy**	**Judicial Remedy**	**Judicial Remedy**
-*Edwards Books and Art v. R.* (1986) Intervener -*R. v. Schacter* (1992) Respondent	-*Edwards Books and Art v. R.* (1986) Intervener -*R. v. Schacter* (1992) Intervener	-*Edwards Books and Art v. R.* (1986) Intervener -*R. v. Schacter* (1992) Intervener	-*Edwards Books and Art v. R.* (1986) Respondent -*R. v. Schacter* (1992) Intervener
Legislative Override	**Legislative Override**	**Legislative Override**	**Legislative Override**
-*AG Quebec v. Ford* (1988) Intervener -*Devine v. AG Quebec* (1988) Intervener	-none	-*AG Quebec v. Irwin Toy Ltd.* (1989) Intervener	-*AG Quebec v. Ford* (1988) Intervener -*Devine v. AG Quebec* (1988) Intervener -*AG Quebec v. Irwin Toy Ltd.* (1989) Intervener

APPENDIX B

Appearance of Interpretive Propositions by Case

Interpretive Proposition	Cases
The Supreme Court should disregard its *1960 Canadian Bill of Rights* precedents.	*Big M Drug Mart v. R.*; *Edwards Books and Art v. R.*; *RWDSU v. Dolphin Delivery*; *AG Quebec v. Ford*; *Devine v. AG Quebec*
The Supreme Court should disregard the practice of policy continuity or the "frozen concepts" approach.	*Big M Drug Mart v. R.*; *Edwards Books and Art v. R.*; *RWDSU v. Dolphin Delivery*
The Supreme Court should not be bound by "framers' intent."	*Big M Drug Mart v. R.*; *AG Quebec v. Protestant Schools*; *Société des Acadiens*; *Mahé v. R.*; *Reference re Workers' Compensation Act, 1983*; *Symes v. Canada*
The Supreme Court should adopt the "external" rather than the "internal" approach to limiting the scope of *Charter* rights ("violent" expression and section 15 excepted).	*Big M Drug Mart v. R.*; *Edwards Books and Art v. R.*; *RWDSU v. Dolphin Delivery*; *AG Quebec v. Ford*; *Devine v. AG Quebec*; *Prostitution Reference*; *R. v. Stagnitta*; *R. v. Skinner*; *R. v. Keegstra*; *R. v. Committee for the Commonwealth of Canada*; *Butler v. R.*; *Zundel v. R.*; *Peterborough v. Ramsden*
The Supreme Court should place the evidentiary onus for proving the "reasonableness" of limitations on *Charter* rights on governments.	*Big M Drug Mart v. R.*; *AG Quebec v. Protestant Schools*
The Supreme Court should employ an "effects-based" approach when adjudicating *Charter* claims.	*Big M Drug Mart v. R.*; *AG Quebec v. Protestant Schools*
The Supreme Court should issue positive remedies.	*Edwards Books and Art v. R.*; *Société des Acadiens*; *Mahé v. R.*; *R. v. Schacter*
The Court should protect action based on belief under section 2(a).	*Big M Drug Mart v. R.*; *Edwards Books and Art v. R.*; *Young v. Young*
The Supreme Court should employ a content-free interpretation of freedom of expression (except for "violent" expression).	*RWDSU v. Dolphin Delivery*; *AG Quebec v. Ford*; *Devine v. AG Quebec*; *Prostitution Reference*; *R. v. Stagnitta*; *R. v. Skinner*; *R. v. Keegstra*; *R. v. Committee for the Commonwealth of Canada*; *Butler v. R.*; *Zundel v. R.*; *Peterborough v. Ramsden*
The Supreme Court should apply section 15(1) retrospectively beyond 1985.	*Reference re Workers' Compensation Act, 1983* *Symes v. Canada*
The Supreme Court should interpret section 15(1) using both the "enumerated and analogous" and "systemic discrimination" approaches	*Andrews and Kinersley v. Law Society of British Columbia*; *Symes v. Canada*
The Supreme Court should interpret section 23 to include a right to "management and control" by official minority languages groups.	*Mahé v. R.*
The Supreme Court should subject the use of section 33 to more than just "manner-and-form" requirements.	*AG Quebec v. Ford* *Devine v. AG Quebec*

APPENDIX C

Success Rates of the AG Canada in Charter Cases, 1982-1993

Avril Allen has operationalized the concept of success in litigation in three ways: in dispute, in law, and in policy.[1] Success in dispute refers to whether the outcome of the appeal (allowed or denied) was what Ottawa desired. Success in law measures Ottawa's success in influencing the Court to employ particular interpretive or "second-order" rules. For this micro-constitutional study, Ottawa's ability to obtain jurisprudence containing favourable precedent is more relevant than Ottawa's success in dispute. The third dimension of success, success in policy, refers to whether the long-term effect on the public policy challenged is favourable to a litigant's interests. This may include future court decisions in related cases, or subsequent legislation. However, only success in dispute and law are calculated here, because of the difficulty associated with tracking long-term policy developments in the thirty cases examined.[2]

Table 2 summarizes the federal government's success rate on each case according to the two measures and overall. A score of "1" represents a decision that was consistent with the outcome or jurisprudence encouraged by Ottawa, "0" when inconsistent, and mixed results are represented by scores between 0 and 1. The calculation of success in law is detailed in Appendix D. As the average scores along the bottom row reveal, Ottawa was significantly more likely to get the outcome they wanted (72%) than to influence the Court's jurisprudence (49%).

---

[1]Avril Allen, "Feminist Success in the Courts since the Adoption of the Charter of Rights and Freedoms," (Honours Thesis, The University of Calgary, 1995): 6-10.

[2]Calculating policy success is also complicated by the ambiguity of Ottawa's true interest in any given case. In contrast, Allen's model was based on LEAF, whose feminist agenda makes easy to determine whether a policy outcome is or is not consistent with LEAF's interests.

TABLE 2

ATTORNEY GENERAL of CANADA SUCCESS in COURT

	Measures of Success		
Case *	Dispute	Law	Average
Big M Drug Mart (1985) (D-)	0	0	0.00
Butler v. R.(1992)† (D+)	1	1	1.00
Douglas College (1990)	n/a	1	1.00
Edwards Books (1986)	n/a	n/a	n/a
Ford (1988) (O+)	** 0.5	0.5	0.50
Haig (1993)† (D+)	1	1	1.00
Mahé (1990) (O+)	1	1	1.00
McKinney v. U. of Guelph (1990)	n/a	1	1.00
Peterborough v. Ramsden (1993)	n/a	1	1.00
Protestant Schools (1984) (O+)	1	0.5	0.75
Prostitution Reference (1990)† (D+)	1	0	0.50
R. v. Cdn. Newspapers (1988)† (D+)	1	1	1.00
R. v. C.C. of Can (1991)† (D-)	0	0	0.00
R. v. Gregory S. (1990)† (D+)	1	1	1.00
R. v. Keegstra (1990)† (D+)	1	0	0.50
R. v. Schacter (1990)† (D-)	0	0	0.00
R. v. Sheldon S. (1990)† (O-)	0	0	0.00
R. v. Skinner (1990)† (D+)	1	0	0.50
R. v. Stagnitta (1990)† (D+)	1	0	0.50
Ref re Workers' Comp. Act (1989) (D+)	1	.67	0.83
RWDSU v. Dolphin Delivery (1986) (D+)	1	.5	0.75
Société des Acadiens (1986) (O+)	1	0	0.50
Symes v. Canada (1993)† (D+)	1	.5	0.75
Tétreault-Gadoury (1991)† (D-)	0	0	0.00
UBC v. Harrison (1990)	n/a	1	1.00
Weatherall (1993)† (D+)	1	1	1.00
Young v. Young (1993) (D+)	1	.5	0.75
Zundel v. R. (1992)† (D-)	0	0	0.00
Average Score	**0.72**	**0.49**	**0.57**

* Cases in bold face are those in which the decision's impact is a change relative to the status quo.
A (O) or (D) after the case name indicates whether Ottawa's litigation was "offensive" (challenged status quo) or "defensive" (defended status quo). The (+) or (-) following refers to whether Ottawa was successful in its position or not.

† Cases so marked indicate when Ottawa's legislation was directly at stake.

**This curious result reflects Ottawa's "win" on invalidating the sign law, but losing on its attempt to counter s. 33. Thus, the unconstitutional provision could have continued to operate, but the override had expired when the decision was handed down.

TABLE 3.1

AG Canada Challenges to the Law (Offensive Cases)*

	Measures of Success		
Case	**Dispute**	**Law**	**Average**
Ford (1988) (O+)	0.5	0.5	0.50
Mahé (1990) (O+)	1	1	1.00
Protestant Schools (1984) (O+)	1	0.5	0.75
R. v. Sheldon S. (1990)† (O-)	0	0	0.00
Société des Acadiens (1986) (O+)	1	0	0.50
Average Score	**0.70**	**0.40**	**0.55**

TABLE 3.2

AG Canada Defenses of the Law (Defensive Cases)

	Measures of Success		
Case	**Dispute**	**Law**	**Average**
Big M Drug Mart (1985) (D-)	0	0	0.00
Butler v. R.(1992)† (D+)	1	1	1.00
Haig (1993)† (D+)	1	1	1.00
Prostitution Reference (1990)† (D+)	1	0	0.50
R. v. Cdn. Newspapers (1988)† (D+)	1	1	1.00
R. v. C.C. of Can (1991)† (D-)	0	0	0.00
R. v. Gregory S. (1990)† (D+)	1	1	1.00
R. v. Keegstra (1990)† (D+)	1	0	0.50
R. v. Schacter (1990)† (D-)	0	0	0.00
R. v. Skinner (1990)† (D+)	1	0	0.50
R. v. Stagnitta (1990)† (D+)	1	0	0.50
Ref re Workers' Comp. Act (1989) (D+)	1	.67	0.83
RWDSU v. Dolphin Delivery (1986) (D+)	1	.5	0.75
Symes v. Canada (1993)† (D+)	1	.5	0.75
Tétreault-Gadoury (1991)† (D-)	0	0	0.00
Weatherall (1993)† (D+)	1	1	1.00
Young v. Young (1993) (D+)	1	.5	0.75
Zundel v. R. (1992)† (D-)	0	0	0.00
Average Score	**0.68**	**0.38**	**0.53**

* *Douglas College*, *Edwards Books*, *McKinney v. U. of Guelph*, *Ramsden*, and *UBC v. Harrison* are not included in either table since Ottawa's policy preference could not be ascertained, as the AG Canada intervened only to influence jurisprudence.

Table 2 masks an important feature of micro-constitutional politics: whether litigation attempts to change or defend the policy status quo. Flanagan argues that "offensive" litigation which challenges existing policies is considerably less successful because of the "staying power of the status quo."[3] Thus, an "offensive win" represents a more profound gain by a litigant than a "defensive win," or successful defense of legislation. Tables 3.1 and 3.2 account for this factor by separating offensive from defensive cases.

What is immediately evident is Ottawa's marked tendency toward defensive litigation. Of 23 cases where the AG Canada stated a preference on dispute outcome, 18 were defensive. In light of Flanagan's analysis, one might expect a significantly higher success rate in these cases. However, Ottawa's success rates were virtually identical across the type of litigation, on both dispute (roughly 70%) and law (40%).

Table 4 re-arranges the information in Tables 2, 3.1 and 3.2 to determine the federal government's success rate according to the issue at stake and Ottawa's role in the case. The top part of the table distinguishes between federal litigation when their legislation is at stake and when it is not, by the type of case. The results are telling, particularly the respective number of cases in each category. Of the 18 defensive cases, all but four saw Ottawa attempting to defend its own litigation, either as intervener when *Criminal Code* provisions were challenged, respondent, or appellant. Contrary to expectations, Ottawa was marginally less successful when defending its own policies than when appearing as a third party, in both dispute and law; however, this outcome probably results from the small number of defensive third-party interventions. This was also the case overall, due to Ottawa's relatively greater success in its offensive cases, which almost entirely third-party

---

[3]Flanagan, "The Staying Power of the Status Quo."

interventions. The pattern of greater success in dispute than in law observed previously persisted across both offensive and defensive cases, and overall.

TABLE 4

Summary of AG Canada Success Rate by Type of Participation

	Offensive Cases		Defensive Cases		All Cases	
Status of AG Can	**Dispute**	**Law**	**Dispute**	**Law**	**Dispute**	**Law****
Federal Law at Stake *	0% (0/1)	0% (0/1)	71.0% (10/14)	39.3% (5.5/14)	**66.7% (10/15)**	**36.7% (5.5/15)**
Federal Law Not at Stake	87.5 (3.5/4)	50.0 (2/4)	75.0 (3/4)	42.5 (1.7/4)	**81.2 (6.5/8)**	**64.2 (7.7/12)**
Party	n/a	n/a	57.1 (4/7)	50.0 (3.5/7)	**57.1 (4/7)**	**50.0 (3.5/7)**
Intervener (criminal law cases)	0 (0/1)	0 (0/1)	85.7 (6/7)	28.6 (2/7)	**75.0 (6/8)**	**25.0 (2/8)**
Intervener (language cases)	87.5 (3.5/4)	50.0 (2/4)	n/a	n/a	**87.5 (3.5/4)**	**50.0 (2/4)**
Intervener (remaining cases)	n/a	n/a	75.0 (3/4)	42.5 (1.7/4)	**75.0 (3/4)**	**71.2 (5.7/8)**
Overall	**70.0 (3.5/5)**	**40.0 (2/5)**	**72.2 (13/18)**	**40.0 (7.2/18)**	**71.7 (16.5/23)**	**48.9 (13.2/27)**

* Included in this category are cases where Ottawa is an intervener when criminal law is at stake, an appellant, or a respondent, marked with a "†" in Table 2.

**The totals in this column for "Federal Law Not at Stake," "Intervener (remaining cases)" and "Overall" do not equal the sum of the offensive and defensive cases due to the presence of four interventions from Table 2 which ignored the dispute.

The two general row categories on the top of Table 4 are broken down below by Ottawa's role and the type of legislation impugned. Some of the results simply verify the foregoing qualitative analysis. For example, all of Ottawa's litigation in the language rights cases were offensive, third-party interventions. The only surprise in this category is the discrepancy between Ottawa's success in dispute (87.5%) and in law (50%). However, the statistics are misleading. In *Acadiens* and *Protestant Schools*, Ottawa's "losses" on interpretive issues were the result of the Supreme Court using more activist rules than even the AG Canada dared promote. With the small number of cases, such factors produce disproportionately large changes on the summary statistics.

Other results are rather surprising. In particular, the "Federal Law at Stake" category masks remarkable differences between Ottawa's success when party and when intervening in criminal cases; 57% and 50% in dispute and law as party, compared to 86% and 29% in criminal cases. When the criminal cases are factored out, Ottawa's success on jurisprudential issues when party (50%) is comparable to that as a third party in defensive (i.e., non-language) cases (43%). The discrepancy on success in dispute narrowed to 57% when party and 75% for non-language interventions. The difference between Ottawa's success as party and in criminal case interventions probably reflects qualitative differences in the writing of each type of factum. Interventions often occur only at the level of the Supreme Court of Canada, so Ottawa's familiarity with the issues in such cases may be less than where federal lawyers have argued a case as party from the trial level. The greater amount of time spent with a case when party may also generate a stronger commitment to win than in an intervention.

In summary, the federal government's lack of influence on jurisprudence is not surprising, given Ottawa's frequent opposition to judicial power and the well-documented activism of the Court. Neither is Ottawa's greater influence in language rights cases, in

light of federal support for judicial intervention in the cases examined in Chapter Five. Finally, the figures verify what the preceding chapters have implied: with the exception of language rights, Ottawa is not a particularly strategic litigant in *Charter* cases. As Appendix C reveals, Ottawa's attempts to influence second-order rules occurred primarily in the first two years of *Charter* litigation (and soon after the Supreme Court's first section 15 decision in 1989). After these attempts met with failure, Ottawa fades from the micro-constitutional arena on non-language issues.

APPENDIX D

Success in Law by Case

Case	Interpretive Issues and Outcome for Ottawa	Average
Big M Drug Mart	*CBR* precedent=0; *Charter* not apply to corporations=0; intent-based analysis of legislation=0; s. 1 onus on claimant=0	* 0
Butler v. R.†	"degradation and dehumanization" test under s. 1=1	1
Cdn. Newspapers †	purposive approach under s. 1=1	1
C.C. of Can. †	internal limit on s. 2(b) for expression on public property=0	0
Dolphin Delivery	s. 2(b) only protects political speech=0; s. 32 (*Charter* not apply)=1	.5
Douglas College	narrow reading of s. 32 (*Charter* applicability)=1	1
Edwards Books	constitutional exemption remedy for violation of s. 2(a)=n/a	n/a
Ford	s. 2(b) covers commercial exp=1; s. 2(b)protects language of exp=1;extra use of s. 33 invalid=0; omnibus use of s. 33 invalid=0.	.5
Haig †	provincial variation not violate s. 15(1) (strict en. & an.)=1	1
Mahé	purposive approach to s. 23(3)(b)=1; s. 23 entails "mgt & control"=1	1
McKinney	narrow reading of s. 32 (*Charter* applicability)=1	1
Protestant Schools	purposive approach to s. 23=1; permanent/temporary s. 1 standard=0	.5
Prostitution Ref. †	s. 195 content-neutral (no s. 2(b) violation)=0	0
Ramsden	mix of internal & external limits on s. 2(b) for public property=1	1
R. v. Gregory S. †	provincial variation not violate s. 15(1) (strict en. & an.)=1	1
R. v. Keegstra †	hateful speech equals violence, not covered by s. 2(b)=0	0
R. v. Schacter †	no judicial "reading in" under s. 24(1)=0	0
R. v. Sheldon S. †	provincial variation violates s. 15(1)=0	0
R. v. Skinner †	s. 195 content-neutral (no s. 2(b) violation)=0	0
R. v. Stagnitta †	s. 195 content-neutral (no s. 2(b) violation)=0	0
Ref re WC Act	s. 15(1) not retrospective=1; internal limit on s. 15=0; en. & an.=1	.67
Société des Acadiens	s. 19(2) entails judicial understanding of official languages=0	0
Symes v. Canada †	framers' intent binding=0; use en. & an.=1	.5
Tétreault-Gadoury †	not enforce age discrimination under s. 15(1)=0	0
UBC v. Harrison	narrow reading of s. 32 (*Charter* applicability)=1	1
Weatherall †	s. 15(2) trumps s. 15(1) claims=1	1
Young v. Young	*Charter* not apply=0; Court must protect children's s. 2(a) rights=1	.5
Zundel v. R. †	hateful speech equals violence, not covered by s. 2(b)=0	0

* Where there is more than one interpretive issue in a case, the codes ("1" for Court agreement and "0" for disagreement) are averaged to generate a single measure of success in law for each case.