

Canadian Constitutionalism, the Rule of Law, and Economic Globalization

David SCHNEIDERMAN*

* Professor, Faculty of Law, University of Toronto (david.schneiderman@utoronto.ca).

We are in the midst of a new rights revolution, it is claimed.¹ After the fall of the wall in Berlin, and the collapse of the Soviet empire, new and old nation states are emerging out of the yoke of totalitarianism, apartheid, or state socialism and rearranging their constitutional systems to embrace human rights and freedoms. The Canadian legal system is viewed as an example for many of these countries, having adopted a model of rights less steeped in tradition and in the rigidities of categorical thinking associated with the United States Constitution.²

At the very same time, there has emerged a corresponding push for the free movement of goods, services, and capital across national frontiers. The World Trade Organization helps to oversee the operation of non-discriminatory markets. International financial institutions, such as the World Bank and IMF, use their economic influence to advocate the downsizing of government and deficit reduction through tax concessions and the selling off of public enterprise. Democratic self-government is viewed as untrustworthy in this new environment. Limitations on government action through legally-enforceable mechanisms, such as NAFTA's investor rights,³ are viewed as a preferable means of safeguarding the gains made towards global free markets in the post-communist era.

¹ See, for instance, M. Ignatieff, *The Rights Revolution* (Toronto: Anansi, 2000) and C.R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998).

² See L. Weinrib, "Constitutional Conceptions and Constitutional Comparativism" in V.C. Jackson & M. Tushnet, eds., *Defining the Field of Comparative Constitutional Law* (Westport, Conn.: Praeger, 2002) 3.

³ See D. Schneiderman, "NAFTA's Takings Rule: American Constitutionalism Comes to Canada" (1996) 46 UTLJ 499.

We then are compelled to ask: is the correspondence between a nascent global human rights regime and a strengthening of the rules and institutions of economic globalization mere coincidence? In my view, there is a connection between the general tendency towards open markets and limited government. In a world where the market rules, where structural adjustment programs mandate legal reform that privilege economic interests, states increasingly are under pressure to adopt constitutional regimes that replicate the model upon which economic success is more likely to be secured.

This relationship between individual rights and markets was noticed in earlier times. James Madison famously admitted that US constitutional design was intended to safeguard the interests of the propertied from dispossessed factions.⁴ Even constitutionalism in the United Kingdom has been portrayed as a vehicle for preserving vested interests and as prophylactic to class rule,⁵ a view that has been associated with Oxford Vinerian Professor of Law, Albert Venn Dicey.⁶ Dicey's idea of the 'rule of law' has taken on a life of its own, being conscripted by proponents of both human rights and market freedoms.⁷

A Canadian version of this tendency is represented in the recent work of Patrick Monahan. Monahan argues that the *Canadian Charter of Rights and Freedoms* guarantees the "rule of law"—expressly mentioned only in the Preamble to the *Charter*, together with a reference to the "supremacy of God"—and that this functions as a limitation on governmental power similar to other Charter rights and freedoms.⁸ The rule of law, Monahan insists, specifically prohibits the arbitrary treatment of citizens by

⁴ A. Hamilton, J. Madison & J. Jay, *The Federalist Papers*, ed. by C. Rossiter (New York: Mentor Books, 1961) at 78-79.

⁵ See references *infra* note 27.

⁶ See A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (N.Y.: St.Martin's Press, 1960) [hereinafter "*Law of the Constitution*"] and A.V. Dicey, *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century* (London: Macmillan, 1920).

⁷ I explore this phenomenon in D. Schneiderman, "Investment Rules and the Rule of Law" (2001) 8 *Constellations* 521.

⁸ P.J. Monahan, "Is the Pearson Airport Legislation Unconstitutional?: The Rule of Law as a Limit on Contract Repudiation by Government" (1995) 33 *Osgoode Hall Law Journal* 411 and P.J. Monahan, *Constitutional Law* (Concord: Irwin Law, 1997) at 84-85, 128-130.

“expropriating contractual rights”, though there is no prohibition on impairing contractual obligations as in the US Constitution.⁹ His argument was precipitated by the Government of Canada’s decision to cancel contracts to privatize Terminal 2 at Toronto’s Pearson Airport. A decision to privatize was finalized during the brief tenure of Prime Minister Kim Campbell and the reversal of this decision was one of the first acts of the new Liberal government under Prime Minister Jean Chretien in 1992. The Government limited recourse to the courts and capped damages arising from the cancellation of the contracts. Monahan, along with several other leading constitutional lawyers appearing before a Senate Committee, maintained that the federal government offended limiting principles they associated with the rule of law: a limitation on government implied by the Constitution of Canada. A version of this rule of law principle appears to have been adopted by the Supreme Court of Canada in the *Quebec Secession Reference*. In one passage, the Court indicated that the unwritten constitutional principles it had identified—including those of “constitutionalism and the rule of law”—could “in certain circumstances give rise to substantive legal obligations... which constitute substantive limitations upon government action.”¹⁰

This penchant for expanding constitutional limitations beyond what is fairly implied by constitutional text is, in my view, a dangerous trend¹¹ which complements well the global movement towards limited state action in regard to market matters. The rules and institutions we associate with economic globalization have precisely the objective of isolating markets from politics by limiting, through legal means, the capacity of self-governing communities to take measures for the common weal. I argue in this paper that this does not sit well with an understanding of Canadian constitutionalism that is premised on the idea of “pluralism”. Much work on legal pluralism concerns the multiplicity of legal orders at work in any single legal system, though they may not be recognized as such by the “official” legal system.¹² I draw here on certain normative suppositions of

⁹ Monahan (1995), *ibid.* at 415.

¹⁰ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 54.

¹¹ See also J. Leclair, “Canada’s Unfathomable Unwritten Constitutional Principles” (2002) 27 *Queen’s L.J.* 389.

¹² See M.-M. Kleinmans & R.A. Macdonald, “What is *Critical Legal Pluralism*” (1997) 12 *Canadian Journal of Law and Society* 25; J. Griffiths, “What is Legal Pluralism” (1986) 24 *Journal of Legal Pluralism* 1; H.W. Arthurs, *Without the Law: Administrative*

legal pluralist thought, namely, that self-governing communities should have the capacity to construct their own legal orders and that any theory of constitutionalism should accommodate these differing expressions of self-government. I want to suggest that Canada's constitutional order gives expression to this version of pluralism, not just as regards linguistic or cultural differences, but as regards the relationship between states and markets. Canada's constitutional order traditionally has tolerated a range of ideological approaches to this relationship so that, rather than foreclosing options to state-market problems, Canadian constitutionalism has enabled the imagination of what Taylor calls "alternative futures".¹³

In the first part of the paper, I examine some of the text, structure, and jurisprudence of the Constitution in order to suggest that Canadian constitutional law traditionally has been one that enables rather than disables government action in the realm of the economy. In this way, the constitution facilitates pluralism in state-market relations. It does so despite pressures from economic actors abroad, as I show in an early twentieth-century dispute over the capacity of the Ontario legislature to make laws that took public control of hydro-electricity development in the province. This tendency should not have been thwarted by the arrival of the *Charter* in 1982. Rather, this pluralistic view, I argue, complements the Charter reasonably well. In the second half of the paper, I turn to some contemporary Supreme Court of Canada decisions that signal a worrisome departure from the premises of pluralism. In my view, the Court has, on occasion, gone too far in tilting constitutional interpretation in ways consonant with the values of economic globalization by limiting unreasonably legislative power over economic subjects.

I want to argue that the contemporary promotion of individual rights through constitutional means working in conjunction with the values associated with economic globalization may combine to threaten important Canadian constitutional values. In my view, we are at a critical juncture in the history of Canadian constitutional law. The Canadian judiciary is being drawn into this struggle over the future of rights, economy, and democracy

Justice and Legal Pluralism in Nineteenth-Century England (Toronto: University of Toronto Press, 1985).

¹³ C. Taylor, "Alternative Futures: Legitimacy, Identity and Alienation in Late Twentieth Century Canada" in A. Cairns & C. Williams, eds., *Constitutionalism, Citizenship and Society in Canada* (Toronto: University of Toronto Press, 1985) 183.

in Canada. I suggest here a judicial path both that resists this connection and that remains faithful to the Canadian constitutional value of pluralism.

I. ENERGETIC CANADIAN CONSTITUTIONALISM

Viscount James Bryce, a colleague of Dicey's at Oxford, subtitled his little book on Canada: "an actual democracy."¹⁴ Written in the early twentieth century, Bryce described Canada's constitutional regime as more democratic than in the United States. This was because legislative power in Canada was "legally boundless". "Were there any revolutionary spirit," Bryce wrote, changes could swiftly be brought about by Parliamentary legislation.¹⁵ Bryce grossly exaggerated federal power, but the observation captures an important aspect of Canada's constitutional design in 1867. Though divided, legislative power is complete as between the two levels of government.¹⁶ In contrast to the style of constitutional limitation in the US—limits which disable legislative action over a variety of economic subjects (by guaranteeing property and contract rights, for instance)—Canada's constitutional regime of federalism largely is unbounded. It would have been apparent to Bryce that Canadian legislative authority was "absolutely sovereign"—that, in Dicey's famous words, it virtually "could make or unmake any law whatever."¹⁷

There were, to be sure, sources of limitations exercised early on in Canada's post-confederation history. W.P.M. Kennedy shows us that federal authority to disallow provincial legislation was exercised in ways that replicated protections found in the US Bill of Rights.¹⁸ John Willis similarly describes the common law presumptions of statutory interpretation as performing constitution-like functions. These presumptions, such as the requirement, absent clear and plain language, of compensation in the event of an expropriation, acted as an "ideal constitution" for England and

¹⁴ J. Bryce, *Canada: An Actual Democracy* (Toronto: Macmillan, 1921). This appears to be a reprint of the chapter on Canada originally published in J. Bryce, *Modern Democracies* (New York: The Macmillan Company, 1921) at 455.

¹⁵ Bryce, *Canada*, *ibid.* at 17, 41.

¹⁶ A.H.F. Lefroy, *Canada's Federal System* (Toronto: Carswell, 1913) at 64-67.

¹⁷ Dicey, *Law of the Constitution*, *supra* note 6 at 39-40.

¹⁸ W.P.M. Kennedy, "The Nature of Canadian Federalism" in Kennedy, *Essays in Constitutional Law* (London: Oxford University Press) 27 at 49.

Canada.¹⁹ These kinds of impediments either fell into disuse (in the case of the power of disallowance) or proved only to delay, and not to prevent, legislative interventions in the marketplace.

The point was proven by Dicey himself in a little known episode in early twentieth-century Ontario history.²⁰ The Ontario government, led by Minister without portfolio Adam Beck, was proceeding with a program for public hydro-electric power in Ontario. Beck's Hydro-Electric Power Commission entered into a series of contracts with southern Ontario municipalities for the provision of electric power drawn primarily from the Niagara River. As required by provincial municipal law, municipalities in the province secured the approval of ratepayers to by-laws stipulating the contractual terms under which the municipality would pay the Commission for electric power.²¹ The financial terms of these contracts, however, varied from those which had been approved by local electorates and therefore Beck rushed into passage legislation in 1908 empowering mayors to approve the contracts though different from the terms approved by ratepayers.²² After suits were launched challenging the validity of these contracts²³ and fearing yet another year of delay, Beck pushed through a second statute in 1909 validating the contracts, staying all pending litigation, and declaring that municipal contracts should "not be open to question and shall not be called into question on any ground whatever in any court but shall be held and adjudged to be valid and binding."²⁴

¹⁹ J. Willis, "Statute Interpretation in a Nutshell" (1938) 16 Canadian Bar Review 1 at 21.

²⁰ Much of this history is drawn from C. Armstrong, *The Politics of Federalism: Ontario's Relations with the Federal Government 1867-1942* (Toronto: University of Toronto Press, 1981) at 55-64.

²¹ *Beardmore v. Toronto*, (1909) O.W.R. 1262 at 1263 [hereinafter *Beardmore*].

²² *An Act to validate certain By-laws Passed and Contracts made pursuant to "An Act to Provide for the Transmission of Electrical Power to Municipalities"* S.O., 8 Edw. VII., c. 22.

²³ See *In Re By-Law No. 904 of the Town of Galt; Scott v. Patterson* (1908), 17 O.L.R. 270 (Sup. Ct.); *Horrigan v. Port Arthur* (1909), 14 O.W.R. 973, aff'd (1909). 14 O.W.R. 1087 (Div. Ct.); *Abbott v. Trenton* (1909). 14 O.W.R. 1101 (Ex.D.).

²⁴ *An Act to Amend an Act Passed in the 7th year of His Majesty's Reign, Chapter 19, intituled "An Act to Provide for the Transmission of Electrical Power to Municipalities," to validate certain contracts entered into with the Hydro-Electric Power Commission of Ontario, and for other purposes*, S.O., 9 Edw. VII., c. 19, ss. 4, 8; Armstrong, *supra* note 20 at 57-58; "Sir James Whitney's Invasion of the Rights of Municipalities" (1909) 45 Canada Law Journal 258.

According to W.E. O'Brien, the legislation interfered with "vested rights in order to carry out some object of supposed public utility."²⁵ O'Brien and others insisted that such measures were beyond the constitutional capacity of the provincial legislatures and, in any event, should be disallowed by the federal Minister of Justice. It appears to have been the editor of the *Toronto Sun* who secured the opinion of Professor Dicey.²⁶ Subsequently published in the *Canada Law Journal*, Dicey called the provincial measures "unjust and impolitic." However, there was nothing in the BNA Act, Dicey wrote, "which provides that a law passed by a provincial legislature shall not be palpably unjust," for the "obvious unfairness of a law can hardly affect its validity if the law falls within the terms of the BNA Act."²⁷ The only remedy available, opined Dicey, was to petition the Governor General for disallowance (he could hardly "conceive a stronger case") or seek an amendment to the BNA Act from the Imperial Parliament "limiting the power of legislatures to interfere with acquired rights and with the validity of contracts" (though such an amendment would "hardly be obtained ... unless it were obviously desirable by the people of Canada").²⁸ Despite concerns expressed by British financial opinion (Finance Minister Fielding was warned that failure to intervene would make it difficult to borrow from London financial houses²⁹) and the sympathy of Prime Minister Laurier to their pleadings (Laurier described the provincial measures as "highly improper and prejudicial"³⁰), the power of disallowance would not be exercised in these circumstances. The Ontario government could proceed with its plan for public power.

²⁵ W.E. O'Brien, "What Are the Functions of a Provincial Legislature?—The Distinction Between Public and Private Purposes" (1909) 45 *Canada Law Journal* 137 at 137. See also C.B. Labatt, "The Scope of the Power of the Dominion Government to Disallow Provincial Statutes" (1909) 45 *Canada Law Journal* 296.

²⁶ Professor Dicey, "Unjust and Impolitic Provincial Legislation and its Disallowance by the Governor-General" (1909) 45 *Canada Law Journal* 457 at 458.

²⁷ *Ibid.* at 459, 461.

²⁸ *Ibid.* at 462.

²⁹ Armstrong, *supra* note 20 at 58.

³⁰ *Ibid.* at 61.

Dicey's opinion seems correct in light of his understanding of federalism and the rule of law, in addition to contemporaneous understandings of Canadian constitutional law.³¹ Federalism, for Dicey, acted as a prophylactic to rash legislative action. "Federalism, as it defines, and therefore limits, the powers of each department of the administration," Dicey wrote, "is unfavourable to the interference or the activity of government." Federalism meant "weak government" and "conservatism".³² Under a federal regime, each level of government was no more than a subordinate law-making body and excesses of legislative authority would result in findings of *ultra vires*, just as would any railway authority or municipality that exceeded its jurisdiction. Where, however, a subordinate legislative body acted within its assigned jurisdiction, no question of *ultra vires* could arise.

The rule of law, for Dicey, performed similar limiting functions. Though Parliament could make or unmake any law, this dogma was "not worth the stress here laid upon it",³³ for courts always could supervise legislative activity in the exercise of their judicial review functions. It was at this stage that his "kindred conceptions" of the rule of law—that governments operate through regular law; that no one is above the law and all are amenable to the jurisdiction of courts; and that the general rights of the Constitution arise out of particular cases³⁴—would have their intended effect. Judicial review, under Dicey's conception of the rule of law, could help stem the majoritarian excesses that so worried Dicey and others of his generation.³⁵ Dicey's legal opinion confirmed that provincial measures

³¹ See my discussion of Dicey on the subject of federalism in D. Schneiderman, "A.V. Dicey, Lord Watson, and the Law of the Canadian Constitution in the Late Nineteenth Century" (1998) 16 *Law and History Review* 495 at 501-510 [hereinafter "A.V. Dicey..."]. For contemporaneous understandings, see *Smith v. City of London* (1909), 14 O.W.R. 1248 (Div. Ct.) [hereinafter *Smith*]; *Beardmore*, *supra* note 21 and Lefroy, *supra* note 16 at 38-39, 82-85. On the question of whether a municipality could compete with private industry, Justice Boyd in *Beardmore* referred approvingly to *Thompson Houston Electric Co. v. City of Newton* 42 F. 723 (1890).

³² See Dicey, *Law of the Constitution*, *supra* note 6 at 173, 171.

³³ *Ibid.* at 71.

³⁴ *Ibid.* at 188-203.

³⁵ See Schneiderman, "A.V. Dicey..." *supra* note 31; B.J. Hibbits, "The Politics of Principle' Albert Venn Dicey and the Rule of Law" (1994) 23 *Anglo-American Law Review* 18; D. Sugarman, "The Legal Boundaries of Liberty: Dicey, Liberalism and Legal Science" (1983) 46 *Modern Law Review* 102.

within the boundaries of their legislative authority, denying access to courts by clear and plain language, could not be preempted by the “rule of law.”³⁶ The province of Ontario would be free, then, to experiment with a provincially-owned and operated hydro-electric utility.

The constitutional limitations associated with divided jurisdiction, so valued by Dicey, have made social and economic legal change “difficult,”³⁷ but not impossible. According to contemporary accounts, divided authority does not so much bar governments from acting, as much as it delays the taking of swift government action.³⁸ In their study of intergovernmental cooperation, Fletcher and Wallace conclude that “governments have found ways and means to accomplish many, perhaps most, of their objectives.” Rather than barring social policy development, the experience under Canadian federalism “has been more one of delay and frustration than of paralysis... the system rarely frustrates the popular will.”³⁹ Indeed, the almost unanimous response of governments in Canada to the challenges posed by economic globalization—spending reductions, retreat from national standards, privatization, and the withdrawal of the state from welfare state functions—suggests that federalism is not an impediment to coordinated action. The problem of divided authority does not seem to have posed so much of a problem, once a consensus around a set of national goals is identified. The pluralism undergirding Canadian constitutional law, in other words, can be overcome through the coordinated action of national and subnational units. It is the potential competitive normativism of federalism, giving rise to the exigency of cooperation, which remains a dominant feature of Canada’s constitutional order.⁴⁰

³⁶ This was the essential finding of Boyd, C. of the Divisional Court in *Smith*, *supra* note 31.

³⁷ J.A. Corry, “The Difficulties of Divided Jurisdiction” (A Study prepared for the Royal Commission on Dominion-Provincial Relations) (Ottawa: King’s Printer, 1939).

³⁸ K. Banting, *The Welfare State and Canadian Federalism* (Montreal: McGill-Queen’s University Press, 1982) at 68.

³⁹ F.J. Fletcher & D.C. Wallace. “Federal-Provincial Relations and the making of Public Policy in Canada: A Review of Case Studies” in R. Simeon, ed., *Division of Powers and Public Policy* (Toronto: University of Toronto Press, 1985) at 132.

⁴⁰ I rely here on R.A. Macdonald, “Metaphors of Multiplicity: Civil Society, Regimes, and Legal Pluralism” (1998) 15 *Arizona Journal of International and Comparative Law* 68 at 80, though Macdonald is more disparaging of the normative opportunities offered by territorial federalism than that of non-state normative legal orders. But see A.

One reasonably might think that this pluralist view of the constitution—as enabling rather than disabling of public authority—will have altered with the arrival on the scene of the Charter. Things, however, should not have changed all that dramatically. An examination of the structure and text of the *Charter* reveals that there remains a significant degree of legislative room to maneuver, particularly as regards socio-economic subjects. Property rights, of course, were left out of the *Charter* at the behest of the provincial premiers.⁴¹ Other, so-called, “pure” economic rights, such as an inability to interfere with the obligation of contracts, also are absent from the *Charter*. What remains is a residue of what may be called “indirect” economic rights, such as freedom of expression and mobility rights, and both of these are discussed in subsequent parts of the paper. Even in those cases where indirect rights are implicated, governments can supercede rights guarantees in those cases where they can demonstrate that a limitation is reasonable and demonstrably justifiable. In more drastic cases, governments may override certain Charter rights and freedoms under the notwithstanding clause (section 33), though it may now be that its invocation is considered illegitimate.⁴²

Taken together, it is not unreasonable to suggest that the *Charter* fits well the logic of the pluralist constitutional design I have described. My concern is that the Supreme Court of Canada has not been faithful to this logic. By way of illustration, I turn first to a discussion of the guarantee of freedom of expression and then to the mobility rights guarantee.

Breton, “The Theory of Competitive Federalism” in G. Stevenson, ed., *Federalism in Canada* (Toronto: McClelland and Stewart 1989) 457 at 460.

⁴¹ A. Alvaro, “Why Property Rights Were Excluded From the Canadian Charter of Rights and Freedoms” (1991) 24 *Canadian Journal of Political Science* 309 at 319-321; S. Choudhry, “The Lochner Era and Comparative Constitutionalism” (2004) 2 *International Journal of Constitutional Law* 1 at 16-27.

⁴² Cf. K. Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001).

II. FREE SPEECH RIGHTS⁴³

Certainly, not only economic interests have been well served by the *Charter*. That they have benefited from the *Charter*, however, is indisputable. This is a conclusion the Supreme Court of Canada appears to want to resist. In the *Pepsi-Cola* case,⁴⁴ Chief Justice McLachlin and Justice LeBel, writing for the Court, distinguished between “fundamental Canadian value[s]”, like freedom of expression, and those diverse interests served by the common law and “not engaged by the *Charter*. Salient among these are the life of the economy and individual economic interests.”⁴⁵ Note the distinction the Court purports to make, which fits well Canada’s constitutional design I outlined above. The Court, however, has not always been faithful to these presuppositions.

The record of success for business interests has been mixed, but there is little doubt that gains continue to be secured in the guise of making constitutional law. As Gregory Hein shows, “corporate interests” are actively engaging in *Charter* litigation.⁴⁶ Business firms have had some success in conscripting the *Charter* in order to resist government regulation. According to Richard Bauman, constitutional challenges “have become an important strategic device for businesses.”⁴⁷

⁴³ This section draws on D. Schneiderman “Exchanging Constitutions: Constitutional Bricolage in Canada” (2002) 40 *Osgoode Hall Law Journal* 401 [hereinafter “Exchanging Constitutions”]. In my presentation at the Banff conference, I also made reference to some of the Court’s federalism cases. Though I have omitted that discussion from this paper, the cases are discussed in “Exchanging Constitutions”.

⁴⁴ *RWDSU, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] SCC 8 [hereinafter *Pepsi-Cola*].

⁴⁵ *Ibid.* at para. 21.

⁴⁶ G. Hein, “Interest Group Litigation and Canadian Democracy” in P. Howe & P.H. Russell, eds., *Judicial Power and Canadian Democracy* (Montreal: McGill-Queen’s University Press, 2001) 214.

⁴⁷ R.W. Bauman, “Business, Economic Rights, and the Charter” in D. Schneiderman & K. Sutherland, eds., *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics* (Toronto: University of Toronto Press, 1997) 58. This is a phenomenon which, curiously, escapes the attention of F.L. Morton & R. Knopff, *The Charter Revolution and the Court Party* (Peterborough, Ont.: Broadview Press, 2000). See D. Schneidierman, “The Old and New Constitutionalism” in J. Brodie & L. Trimble, eds., *Reinventing Canada: Politics of the 21st Century* (Toronto: Prentice Hall, 2003) 243-258 at 248-250.

Nowhere is this success more apparent than in the field of commercial speech. From its modest doctrinal beginnings in *Ford*⁴⁸ to its robust articulation in *RJR-MacDonald*,⁴⁹ commercial expression under the *Charter* has proven to be a valuable resource for promoting the economic interests of corporate actors. Once it is accepted that “all expressions of the heart and mind” together with all “human activity” which “conveys or attempts to convey a meaning” fall within the scope of constitutionally protected expression,⁵⁰ then it comes as little surprise to find that the promotion of commercial products will find safe harbour in the *Charter*.

In so doing, the Court has appeared to be agnostic about the capacity of states to regulate markets. The constitutionalization of commercial speech rights, after all, need not lead necessarily to the constitutionalization of “free enterprise.” Instead, the Canadian Supreme Court appears to have been more attracted to protecting the consumer’s interest in receiving commercial information.⁵¹ For the Court, constitutionalizing commercial speech has the advantage of enabling individuals to make informed economic choices, which is “an important aspect of individual self-fulfillment and personal autonomy.”⁵² In the interests of informing consumers, the Court even has been prepared to enter the realm of labour relations—a domain which the Court mostly has shielded from *Charter* review. The Court has identified a public interest in receiving important messages about labour disputes, either through consumer pamphleting at retail outlets⁵³ or via secondary picketing.⁵⁴ The juridical thrust of these cases is to value consumer interests, and this is equated with a public interest in the free flow of commercial information.⁵⁵ By constitutionalizing

⁴⁸ *Ford v. Quebec (A.G.)*, [1988] 2 S.C.R. 712 [hereinafter *Ford*].

⁴⁹ *RJR-MacDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199 [hereinafter *RJR-MacDonald*].

⁵⁰ *Attorney General of Quebec v. Irwin Toy*, [1989] 1 S.C.R. 927 at 968-969.

⁵¹ *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232 at 247; *RJR-MacDonald*, *supra* note 49 at 347.

⁵² *Ford*, *supra* note 48 at 767.

⁵³ *United Food and Commercial Workers, Local 1518 (U.F.C.W.) v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083 at 1105.

⁵⁴ *Pepsi-Cola*, *supra* note 44 at paras. 34-35.

⁵⁵ By endowing commercial speech with constitutional protection, the Court has helped to promote what Leslie Sklair calls the “culture-ideology of consumerism”: a “set of

the interests of consumers, the Court also enhances the constitutional position of producers, though this relationship often is obscured.

The Court was more frank about this relationship in *R. v. Guignard*.⁵⁶ There, the Court invalidated a Saint-Hyacinthe municipal bylaw prohibiting advertising outside designated “industrial areas.” Mr. Guignard erected a sign on one of his commercial properties complaining about his insurance company’s delay in indemnifying him for repairs done several months earlier.⁵⁷ Justice LeBel, for the Court, embarked on his section 2(b) discussion by acknowledging the great value placed on commercial speech by the Court in previous decisions:⁵⁸

“The need for such expression derives from the very nature of our economic system, which is based on the existence of a free market. The orderly operation of that market depends on businesses and consumers having access to abundant and diverse information... The decisions of this Court accordingly recognize that commercial enterprises have a constitutional right to engage in activities to inform and promote, by advertising.”

The interests of commercial enterprise now are considered equivalent to those of consumers. Perhaps this represents only a slight shift in direction. Yet it goes some distance in revealing the direction the Court has taken: that commercial speech doctrine is predicated upon the constitutional rights of producers to bring products to market through advertising.⁵⁹

practices, attitudes and values, based on advertising... that encourages ever-expanding consumption of consumer goods.” See L. Sklair, “The Culture-Ideology of Consumerism in Urban China: Some Findings From a Survey in Shanghai” in C.J. Schultz, II, R.W. Belk & G. Ger, eds., *Research in Consumer Behavior*, vol. 7: *Consumption and Marketizing Economies* (Greenwich: Jai Press, 1994) 260.

⁵⁶ *R. v. Guignard*, [2002] SCC 14.

⁵⁷ *Ibid.* at para. 3.

⁵⁸ *Ibid.* at paras. 21, 23.

⁵⁹ This conclusion was embraced readily by the Ontario Court of Appeal in *Vann Niagara Ltd. v. Oakville (Town of)* (2002), 60 O.R. (3d) 1 (C.A.). The case concerned a by-law of the municipality of Oakville which prohibited commercial billboard signs in certain designated areas. According to Justice Borins, for the majority of the Court of Appeal, commercial expression is “a key component to our economic system and therefore merits Charter protection” (at para. 17). The majority held the by-law was not a reasonable limitation on commercial speech rights. The Supreme Court of Canada reversed the finding under s.1 of the *Charter* but agreed that the billboard restriction

Though the Court rightly struck down this by-law, recognizing that consumers will have constitutional rights to engage in “counter-advertising”, it is disquieting to see how far the Court has gone down the path of constitutionalizing the social relations of the market. This precisely is the objective being promoted by the rules and structures of economic globalization.

III. MOBILITY RIGHTS

Individual mobility rights have, of course, a more direct relation to economic freedom. Though the Trudeau project of a *Canadian Charter of Rights and Freedoms* was not primarily one about economic rights,⁶⁰ the mobility rights come closest to embracing the idea that attached to Canadian citizenship is the idea of limited government in the realm of markets. The *Charter*’s section 6 guarantees to citizens and permanent residents the right, subject to certain limitations, to move and take up residence in any province and to pursue the gaining of a livelihood in any province (the latter right is of most concern here). The significance of the mobility guarantees is underscored by the fact that these rights are not subject to the override clause in section 33. Complementing the *Charter*’s mobility rights is a joint federal-provincial commitment in section 36(1) to “promote equal opportunity for the well-being of Canadians”. These constitutional provisions are supplemented by instruments of intergovernmental cooperation, like the *Agreement on Internal Trade (AIT)* and measures to enhance mobility rights in the *Social Union Framework Agreement (SUFA)*.⁶¹ The Constitution and its related instruments thus give voice to a conception of citizenship that has come to be understood as the primary vehicle for the attainment of wealth and happiness in the modern world, premised upon the idea of equality of economic opportunity.

infringed s. 2(b). See *Corporation of the Town of Oakville v. Vann Niagara Ltd.*, [2003] S.C.J. No. 71, online: QL (SCJ) 2003 SCC 65.

⁶⁰ On Trudeau’s constitutional project see S. Clarkson & C. McCall, *Trudeau and Our Times, Volume 1: The Magnificent Obsession* (Toronto: McClelland and Stewart, 1990).

⁶¹ “A Framework to Improve the Social Union for Canadians” (February 4, 1999), section 2, reproduced with commentaries in (1999) 10:4 Constitutional Forum 133.

The cases indicate that economic discrimination based upon provincial boundaries will be scrutinized closely by the courts. The threshold for review under the right to “pursue a livelihood in any province”, for instance, is not high. Though the section does not guarantee a “right to work”, according to Justice Estey in the *Skapinker* case, there need only be some potential mobility aspect that is circumscribed to trigger *Charter* review.⁶² There need not even be an element of physical movement or the taking up of a residence in another province. All there need be is a simple desire to carry on economic activity in some other province than in the province of residence. This helps to explain the result in *Black v. the Law Society of Alberta*.⁶³ In *Black*, the law society benchers sought to prohibit the establishment of national law firms. Justice LaForest, for the majority of the Court, traced the importance of interprovincial economic mobility to the original confederation project. While economic concerns, LaForest J. acknowledged, “undoubtedly” played a part in the constitutional entrenchment of mobility rights, section 6 also “defines the relationship of citizens to their country.” This is reflected in the language of section 6 itself, which addresses not the structural elements of federalism but the rights of permanent residents and citizens.⁶⁴

Viewed in this light, the rule prohibiting interprovincial law firms clearly violated *Charter* mobility rights in section 6(2)(b), even if there was no physical “movement” being frustrated. According to the Court, “the mobility element need not be a regular or prominent component”, rather, there need only be some “contact” with the discriminating province.⁶⁵ It only remained for the Court to consider whether the limitation on national partnerships was justifiable in a free and democratic society. Here we might have expected a measure of deference accorded to the legislature. After all, only three years earlier in *Edwards Books* the Court indicated that in matters of socio-economic policy “a Legislature must be given reasonable room to manoeuvre.”⁶⁶ The Law Society’s objectives admittedly were important: they were concerned about practice by non-members, the need for local competence and expertise in matters pertaining to Alberta law,

⁶² *Law Society of Upper Canada v. Skapinker* (1984), 9 D.L.R. (4th) 161 at 181 (S.C.C.).

⁶³ *Black v. Law Society of Alberta* (1989), 58 D.L.R. (4th) 317 (S.C.C.).

⁶⁴ *Ibid.* at 336.

⁶⁵ *Ibid.* at 338, 340.

⁶⁶ *Edwards Books and Art Ltd. v. The Queen* (1986) 35 D.L.R. (4th) 1 at 67.

increased liability and concerns about discipline. But these were disproportionate to the objectives sought and therefore unjustifiable.⁶⁷ According to this construction of the *Charter's* mobility rights, the *Charter* gives expression to the objectives of the Canadian economic union and a conception of Canadian citizenship in which persons are free not only to move physically, but to contract and invest, in order to pursue economic gain.

There are a number of interesting connections between the reasoning in *Black* and the phenomenon of economic globalization. First, as Katherine Swinton has observed, since the claim concerned a right to equal treatment for out-of-province residents to invest in provincial law firms, the right to economic mobility in section 6 is analogous to the international investment rule of “national treatment” (requiring that non-residents be treated the same as residents).⁶⁸ Second, by removing the protective barriers that barred national law firms, the Court facilitated the generation of large regional and supra-national professional law firms determined to reach beyond local markets in order to keep pace with international business trends.⁶⁹

The majority of the Court parted ways with Justice La Forest's legacy in *Canadian Egg Marketing v. Richardson*.⁷⁰ The Court recharacterized the mobility rights guarantee as serving human rights objectives rather than promoting economic citizenship. The case concerned Canada's national marketing scheme for the production and distribution of eggs. Quotas are allotted to egg producers in each of the provinces across Canada. Historically, egg production did not originate from Canada's Northwest Territories (NWT); consequently, no permits were ever allotted to NWT producers. Richardson, who wished to break into the egg market but was not permitted to do so under the current scheme, challenged the authority of the federal Canadian Egg Marketing Agency to bar his entry into the

⁶⁷ P. Blache, “Mobility Rights” in G.-A. Beaudoin & E. Mendes, *The Canadian Charter of Rights and Freedoms*, 3rd ed. (Toronto: Carswell, 1996) 352.

⁶⁸ K.E. Swinton, “Courting Our Way to Economic Integration” (1995) 25 *Canadian Business Law Journal* 280.

⁶⁹ H.W. Arthurs & R. Kreklewich, “Law, Legal Institutions, and the Legal Profession in the New Economy” (1996) 34 *Osgoode Hall Law Journal* 1 at 51.

⁷⁰ *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157 [hereinafter *Richardson*].

market. As the Court had held in *Black*, the Court in *Richardson* declared that the right to “pursue the gaining of a livelihood” in any province did not require any “physical movement” whatever. All that was required was that there be “any attempt to create wealth.”⁷¹ Though mobility rights appeared to have been infringed, the majority of the Court proceeded to read down the scope of section 6, limiting the purpose of these provisions to furthering the “human rights objective” of non-discrimination.⁷² A denial of “human dignity,” which has emerged as the touchstone for judicial findings of discrimination under the *Charter*’s equality rights provisions, now was prerequisite to a finding that mobility rights also had been infringed.⁷³

Though egg producers in the NWT were barred permanently from participating in the interprovincial marketing scheme, the egg quota system was not primarily one that discriminated on the basis of residence. Rather, this was a scheme constructed around historical patterns of egg production. The purpose of the scheme, then, was not to denigrate the human dignity of egg producers because of their residency—it really was nothing personal. Nor was the scheme discriminatory in its effect, the Court concluded. Weighing in with a very formalistic equality analysis, the majority compared producers in the NWT with egg producers without quotas in other provinces (rather than as compared to egg producers with quotas) and concluded that they were in no worse a position.

Justice McLachlin (as she then was) in dissent was more faithful to the La Forest legacy, characterizing section 6 as promoting both the Canadian economic union and a fundamental incident of citizenship, namely, equality of opportunity without discrimination based on province of residence.⁷⁴ She would have found the scheme discriminatory and unjustifiably so: an absolute bar on new entrants from the NWT based on historical patterns of production did not further any justifiable pressing and substantial objective.⁷⁵

⁷¹ *Ibid.* at paras. 71, 72.

⁷² *Ibid.* at para. 66.

⁷³ On this, see the opinions of Justices Iacobucci and L’Heureux-Dubé in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

⁷⁴ *Richardson*, *supra* note 70 at para. 161.

⁷⁵ *Ibid.* at paras. 157, 178.

The majority justices, perhaps, were more faithful to the Constitution's overall objectives of enabling legislative activity than was the dissenting opinion. But in applying a formalistic equality rights analysis with an inappropriate comparator group, they probably were not faithful to the constitutional tenor of the mobility rights clause. It is interesting, however, that both the majority and minority justices agreed that non-tariff barriers to the mobility of capital, goods, and services that unreasonably discriminate against persons and business associations, primarily upon provincial lines⁷⁶ are constitutionally prohibited. This is a startling result in light of the fact that reform of section 121 of the Canadian Constitution along just these lines was expressly rejected in the 1980s and 1990s.

CONCLUSION

One of the defining characteristics of Canadian constitutional law has been its pluralism. The Constitution has enabled governments to give expression to a wide variety of legislative initiatives. This in turn, has enabled a diversity of ideological commitments to be given expression through social and economic legislation. In this sense, Viscount Bryce was correct. Canadian constitutional design is more democratic than its American counterpart as it accommodates political protest and keeps open a range of achievable political goals. Openness to political possibility, as political scientist Adam Przeworski argues, makes electoral competition meaningful for all interests: though losers today, we could be winners tomorrow.⁷⁷ This is precisely not the idea of democracy promoted by the rules and institutions of economic globalization. Democracy is considered untrustworthy, politics merely about self-interestedness. Constitutionalism is about shielding the market from political authority. To the extent that the current trends which I have identified continue, it will have the effect of foreclosing political alternatives, checking further our capacity for self-government.

⁷⁶ This right is subject to laws that provide "reasonable residency requirements as a qualification for the receipt of publicly provided social services" (s. 6(3)(b)).

⁷⁷ A. Przeworski, *Democracy and Market: Political and Economic Reforms in Eastern Europe and Latin America* (Cambridge: Cambridge University Press, 1991) at 33. Also see S.N. Eistentadt, *Paradoxes of Democracy: Fragility, Continuity, and Change* (Washington and Baltimore: The Woodrow Wilson Center Press and The Johns Hopkins University Press, 1999).

Our pluralism is under threat. Perhaps it is unreasonable to expect the judiciary to be the vanguard in resisting or even reversing these tendencies. Perhaps the most we can expect is that the judiciary remain faithful to the constitutional values of the past that will have contemporary resonance as governments move to counteract the deleterious effects of economic globalization on Canada's most vulnerable populations.