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# UNDERSTANDING *GROOTBOOM* — A RESPONSE TO CASS R. SUNSTEIN

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## INTRODUCTION

In a typically thought-provoking essay on the significance of the recent judgment of the South African Constitutional Court in *Grootboom*,[1] Cass R. Sunstein welcomes the contribution of this "extraordinary decision" to the international debate over the justiciability of socio-economic rights.[2] In particular, he argues that the decision provides a partial answer to the objection that the judicial enforcement of such rights inevitably requires courts to assume "an unacceptable managerial role."[3] On Professor Sunstein's reading, the Court in *Grootboom* successfully steers a middle course between the Scylla of complete enforceability and the Charybdis of non-justiciability. It does so by adopting what is in effect an "administrative law model of socio-economic rights," one which reads such rights as giving courts the power to order government to "devote more resources than it otherwise would" to the regulatory problem at issue.[4]

The further significance of the *Grootboom* decision, according to Professor Sunstein, is that the outcome required the South African government to pay

> close attention to the human interests at stake and sensible priority-setting, without mandating protection for each person whose socio-economic needs are at risk. The distinctive virtue of [this approach] is that it is respectful of democratic prerogatives and of the limited nature of public resources, while also requiring special deliberative attention to those whose minimal needs are not being met.[5]

It is always gratifying to have jurisprudential developments in one's own country put into a broader perspective in this way.[6] South African commentators, preoccupied as they are with their sectoral concerns, often find it difficult to stand back from a decision like *Grootboom* in order to assess its true significance. By the same token, however, local commentators — precisely because of their concern for the practical impact of such cases — are more alert to, or at least more inclined to see, their possible weaknesses.[7] There is thus much to be gained from international dialogue of the kind that Professor Sunstein's essay invites.

In this co-operative spirit, I would like to engage ("take issue" is too strong a phrase) with certain aspects of Professor Sunstein's reading of *Grootboom*. The next section attempts to refine his bipartite classification of constitutions into those that are "preservative" and those, like the *South African Constitution*,[8] which are best described as "transformative." Although this typology is helpful, the terms "preservative" and "transformative" are perhaps better conceptualized as opposite ends of a continuum of possible constitutions, with some more obviously transformative or preservative than others.

After briefly reiterating the factual background to *Grootboom* and the reasons given by the court *a quo* and the Constitutional Court for their decisions, the main part of this response interrogates Professor

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1 *Government of the Republic of South Africa* v. *Grootboom* 2000 (11) BCLR 1169 (CC), 2001 (1) SA 46 (CC) [hereinafter *Grootboom*].

2 C.R. Sunstein, "Social and Economic Rights? Lessons from South Africa" (2001) 11:4 Const. For. 123.

3 *Ibid.* at 123.

4 *Ibid.*

5 *Ibid.*

6 Compare C. Scott & P. Alston, "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney*'s Legacy and *Grootboom*'s Promise" (2000) 16 S. Afr. J. Hum. Rts. 206; and H. Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (Cambridge: Cambridge University Press, 2000).

7 See *e.g.* the special issue of the *South African Journal on Human Rights* on the *Grootboom* decision (v. 17, no. 2, 2001).

8 *The Constitution of the Republic of South Africa 1996*, Act No. 108 of 1996 [hereinafter *South African Constitution*].

Sunstein's reading of the Constitutional Court's decision as engaging in "priority-setting." Although it undoubtedly pushes out the boundaries of socio-economic rights adjudication, the interpretation advanced here is that the decision falls short of obliging the South African government to *order* its spending priorities in any particular way. Rather, the decision is authority for the more limited proposition that socio-economic rights of the kind contained in the *South African Constitution* may require the diversification of social and economic policies so as to cater to vulnerable groups. Although the judicially enforced diversification of a policy will inevitably impact on budgetary allocations, the legislature and the executive retain, on this narrower reading of *Grootboom*, the power to decide on the temporal order in which social needs are met.

The importance of this narrower reading, which may seem slight at the abstract level, is illustrated through a case study of the South African government's land redistribution policy. That policy has recently shifted away from its original focus on providing land for the rural poor in favour of assisting aspirant commercial farmers. In extrapolating the ratio of the *Grootboom* decision to test the constitutionality of the new policy, the weakness of the judgment becomes clear. It simply does not go far enough in constraining the state from expending scarce resources on relatively privileged groups for whom such assistance is an added benefit rather than a pressing need.

In conclusion, I return to *Grootboom* to argue that the flaw in the decision is to be found not so much in the Court's substantive reasoning, but rather in the form of the order made. In failing to back up its declaration of constitutional invalidity with a proper enforcement mechanism, the Court did not do justice to the remedies available under the *South African Constitution*. To this extent, the decision, though correctly described as "extraordinary," was not extraordinary enough.

## A CAUTIONARY NOTE ON THE "TRANSFORMATIVE" CONSTITUTION

In summarising the debate that preceded the inclusion of socio-economic rights in the *South African Constitution*, Professor Sunstein draws a distinction between "preservative" constitutions, which "seek to maintain existing practices," and "transformative" constitutions which "set out certain aspirations that are emphatically understood as a challenge to longstanding practices."[9] He continues that, "if it is apt to describe the *South African Constitution* [as the leading example of a transformative constitution], this is because [it] is designed to ensure that future governments do not fall prey to anything like the evils of the apartheid era."[10] Earlier in this section, the "overriding goal" of the *South African Constitution* is said to be "a commitment to overcome the legacy of apartheid."[11] This is probably the better wording, for reasons given below.

The bifurcation of constitutions into those that are "preservative" and those that are "transformative," though useful, is perhaps a little too neat.[12] Arguably, a constitution that extended civil and political rights (including the right to own property) to all South Africans, but which contained no justiciable socio-economic rights, would also have had a transformative effect. Yet, such a constitution would not have been "emphatically understood as a challenge to longstanding practices" and would therefore not have been transformative in the absolute sense used by Professor Sunstein. Similarly, a preservative constitution in the South African context could have taken a number of more or less absolute forms. The 1983 *South African Constitution*, for example, whilst establishing a Tricameral Parliament that for the first time extended political rights to members of the so-called "coloured" and "Indian" groups, nevertheless maintained the white group's effective stranglehold on political power.[13] A more politically daring constitution at the time might have been one that extended the franchise to all South Africans whilst protecting property rights much more strongly than is the case in the current Constitution, thereby barring the democratic government from pursuing meaningful social reforms. But would such a constitution have been preservative or transformative?

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9 Sunstein, *supra* note 2 at 125. Compare the distinction drawn between "confirmatory" and "amendatory" bills of rights by Justice Antonin Scalia of the United States Supreme Court, writing extra-judicially, in "The Bill of Rights: Confirmation of Extant Freedoms or Invitation to Judicial Creation" in G. Huscroft & P. Rishworth, eds., *Litigating Rights: Perspectives from Domestic and International Law* (Oxford: Hart Publishing, 2002) 19 at 20–21.

10 Sunstein, *supra* note 2 at 125.

11 *Ibid*.

12 Compare K.E. Klare, "Legal Culture and Transformative Constitutionalism" (1998) 14 S. Afr. J. Hum. Rts. 146 at 151–56.

13 See *The Republic of South Africa Constitution Act* 110 of 1983, s. 52, as discussed by L.J. Boulle, "Race and the Franchise" in A.J. Rycroft, *et al.*, eds., *Race and the Law in South Africa* (Cape Town: Juta & Co., 1987) 11 at 16–17.

These examples illustrate that it may be better to conceptualize the terms "preservative" and "transformative" as opposite ends of a continuum of types of constitutions, with some constitutions being more obviously preservative or transformative than others. Perhaps Professor Sunstein means to imply as much when describing the American Constitution as being made up of "a mixture of preservative and transformative features."[14] A mixed constitution in this sense, however, is not necessarily the same thing as a constitution that occupies a point along a continuum. The American Constitution is mixed because of the practical difficulty of adding to the amendments, meaning that it is a patchwork of different generations' constitutional aspirations, with some missing generations in between. In the result, there is no express commitment either to preserving or to transforming the *status quo*. Given the chance to start afresh, the American people would probably choose a constitution that was less patchy, and more committed to a coherent set of ideals representing the political centre. Once again, however, such a constitution would neither be preservative nor transformative in any absolute sense.

It is important to get these nuances right. As noted above, in describing the *South African Constitution* as "the world's leading example of a transformative constitution,"[15] Professor Sunstein alternately depicts it as a constitution that aims to prevent the recurrence of apartheid-like evils and one that aims to overcome the legacy of apartheid. There is in fact a crucial difference between these two depictions, with the second more apposite than the first. As the product of time-bound social and economic forces, the policy of apartheid will self-evidently never recur in precisely the same form, with or without a constitutional pre-commitment that forbids future governments from heading in that direction. Perhaps more plausibly it could be said that the current *South African Constitution* is designed to prevent the recurrence of totalitarianism — for that is, generically, what apartheid was. But why then the need to be so specific? Most constitutions based on the liberal model attempt to do something like this. The better view is surely that the *South African Constitution* was designed to address the *legacy* of apartheid, and that justiciable socio-economic rights were seen as integral to that enterprise.

An example of the paradoxical results that may flow from depicting the *South African Constitution* as being primarily about pre-empting a return to the past rather than addressing a historical legacy is provided by the decision in *Betta Eiendomme (Pty) Ltd* v. *Ekple-Epoh*.[16] In this case, the Witwatersrand Local Division of the High Court was asked to rule on whether section 26(3) of the *South African Constitution* had altered the common-law pleading requirements in an action for ejectment. Before the coming into force of the *South African Constitution* in February 1996, the common law required that the plaintiff in an action for ejectment allege and prove ownership of the land and lawful termination of the defendant's right of occupation.[17] Section 26(3), which forms part of the housing right, but which was not at issue in *Grootboom*, provides:[18]

> No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

In an earlier case, the Cape of Good Hope High Court had held that this provision had indeed altered the common law. Where it is conceded that the land is occupied as the defendant's home, that Court reasoned, the protection afforded by section 26(3) is triggered. In such circumstances, the plaintiff in an action for ejectment must, in addition to the common-law requirements, allege and prove relevant circumstances justifying the granting of an eviction order.[19]

In *Betta Eiendomme*, the Witwatersrand Local Division, describing section 26(3) as a "never again" provision, declined to follow this ruling.[20] Instead, it restricted the constitutional requirement that relevant circumstances be considered in situations where the defendant was facing eviction under discriminatory legislation *like that applicable in the apartheid era*. In this Court's view, section 26(3) had not altered the law applicable to "cases of ordinary trespass, whether in the

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[14] Sunstein, *supra* note 2 at 125.

[15] *Ibid.*

[16] *Betta Eiendomme (Pty) Ltd* v. *Ekple-Epoh* 2000 (4) SA 468 (W) [hereinafter *Betta Eiendomme*].

[17] See *Graham* v. *Ridley* 1931 T.P.D. 476 and *Chetty* v. *Naidoo* 1974 (3) SA 13 (A).

[18] The origins of this provision may be traced to the decision by Goldstone J. in *S.* v. *Govender* 1986 (3) SA 969 (T) at 971H-J that magistrates, when exercising their discretion under section 46(2) of the *Group Areas Act* 1966, Act. No. 36 of 1966 to grant an order for eviction against a person who had been convicted of an offence under section 26(1) of that *Act*, should take into account "circumstances" such as "the personal hardship which such an order may cause and the availability of alternative accommodation."

[19] *Ross* v. *South Peninsula Municipality* 2000 (1) SA 589 (C) at 599C.

[20] High Court judges in South Africa are not bound to follow decisions of judges in other provincial divisions of the High Court, although such decisions (especially Full Bench decisions) are regarded as highly persuasive. See H.R. Hahlo & E. Kahn, *The South African Legal System and its Background* (Cape Town: Juta & Co., 1968) at 251.

form of squatting or holding over or otherwise."[21] Since no future South African government is ever likely to re-enact discriminatory legislation providing for forced removals, this reading of section 26(3) renders its impact on the common law nugatory.

The point of this example is simply to note the way in which a politically conservative judge can deploy the language of transformation to read down constitutional rights, even where the general thrust of a constitution is "emphatically" transformative. This is trite legal realism, but the point is worth repeating nevertheless. Amongst other things, it reminds us that the transformative potential of a constitution is a function both of the constitutional text and the nature of its community of interpreters.[22] One of the paradoxes of the South African transition is that the task of realizing the transformative potential of the *South African Constitution* was given to an overwhelmingly conservative judiciary whose class and race interests are not served by the kind of transformation the *South African Constitution* envisages. Although the Constitutional Court was created precisely to overcome this problem, its record to date has generally reflected the prevailing ethos of the legal culture in which its members were socialized.[23] Thus the Court in *Grootboom*, even as it went further than any other court in the world has gone in giving effect to socio-economic rights, did not in the end embrace the full extent of the *South African Constitution*'s transformative vision. The argument in support of this claim is the subject of the remainder of this response.

## THE DECISION IN *GROOTBOOM*

The *Grootboom* case concerned a group of homeless people, consisting of 390 adults and 510 children, who had been evicted from land earmarked for a low-cost housing project. After their eviction, the community's legal representative wrote to the local municipality demanding temporary accommodation.[24] When this demand was not met, the group launched an application in the Cape of Good Hope High Court[25] for an order compelling the municipality and/or other responsible tiers of government to comply with their obligations under sections 26 and 28 of the *Constitution*.

Section 26 provides:

> 26. (1) Everyone has the right to have access to adequate housing.
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

Section 28 provides:

> 28. (1) Every child has the right –
> (a) …
> (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
> (c) to basic nutrition, shelter, basic health care services and social services.

The Cape of Good Hope High Court held that section 28(1)(c) conferred on the applicant children an unqualified right to shelter.[26] In addition, section 28(1)(b) justified the inclusion of these children's parents in an order compelling "the appropriate organ or department of state" to provide shelter to the applicant children and their accompanying parents until such time as the parents were able to provide shelter to the children themselves.[27] The claim based on section 26 was dismissed, meaning that those members of the community who did not have children received no relief.

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[21] *Betta Eiendomme*, *supra* note 16 at para. 7.2.

[22] And other factors, too. See *e.g.* C.R. Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998) (emphasizing the role of "support structures for legal mobilization" in the rights revolutions in India, the United States, Britain and Canada).

[23] On the origins of this tradition, and its interaction with the new constitutional order, see M. Chanock, *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice* (Cambridge: Cambridge University Press, 2001) at 511–38. For a discussion of the Constitutional Court's record to date, emphasizing its preference for formalistic legal reasoning rather than the value-based, moral reasoning seemingly required by the Bill of Rights, see A. Cockrell, "Rainbow Jurisprudence" (1996) 12 S. Afr. J. Hum. Rts. 1, and I. Currie, "Judicious Avoidance" (1999) 15 S. Afr. J. Hum. Rts. 138.

[24] *Grootboom*, *supra* note 1 at para. 11.

[25] Proceedings based on Chapter 2 of the *South African Constitution*, *supra* note 8, (the Bill of Rights) are typically launched in the High Court, with the appeal lying directly to the Constitutional Court, the highest authority on constitutional matters. In exceptional cases, parties may approach the Constitutional Court directly. See sections 167, 169 and 172(2) of the *South African Constitution*, *ibid.*

[26] *Grootboom* v. *Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C) at 290G-291C.

[27] *Ibid.* at 293J.

On appeal to the Constitutional Court, the South African Human Rights Commission[28] and the Community Law Centre at the University of the Western Cape were admitted to the case as *amici curiae*. Although the appeal was initially restricted to the lower court's finding with regard to section 28, arguments on behalf of the *amici* successfully re-opened the claim based on section 26.

In a lengthy and densely reasoned decision, the Constitutional Court set aside the lower court's order and substituted for it an order declaring the housing program in the area concerned unconstitutional, in light of section 26(2) of the *Constitution*. The essence of the Court's decision is that this subsection, together with section 26(1), requires the state to devise and implement a comprehensive program aimed at realizing the right of access to adequate housing. The existing program fell short of meeting this obligation "to the extent that it fail[ed] to recognise that the State must provide for relief for those in desperate need."[29]

In so finding, the Court rejected an argument on behalf of the *amici* that General Comment 3 of 1990 issued by the United Nations Committee on Economic, Social and Cultural Rights[30] was directly applicable to the case. Paragraph 10 of this Comment interprets articles 2.1 and 11.1 of the *International Covenant on Economic, Social and Cultural Rights*[31] as meaning that state Parties have to devote *all* the resources at their disposal *first* to satisfy the "minimum core content" of the right to adequate housing.[32] Article 2.1 provides:

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

Article 11.1 of the Covenant in turn provides:

> The States parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

The basis for the Court's refusal to apply these provisions was twofold. First, the Court held that the textual differences between section 26(1) and (2) of the *South African Constitution* and articles 2.1 and 11.1 of the Covenant, particularly the qualification of the right to adequate housing in the former instance by the word "access" and the difference between "appropriate steps" and "reasonable measures,"[33] suggested that "the real question in terms of [the South African] Constitution is whether the measures taken by the State to realise the right afforded by section 26 are reasonable."[34] The minimum core content of the right to adequate housing was just one indicator in respect of this overarching inquiry. In any event, the Court held, there was insufficient evidence before it to allow it to determine

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[28] The South African Human Rights Commission is a "state institution supporting constitutional democracy" under Chapter 9 of the *South African Constitution, supra* note 8. It was established in terms of the *Human Rights Commission Act* 54 of 1994. Under section 7(1)(e) of that Act, it has the power to "bring proceedings in a competent court or tribunal in its own name, or on behalf of a person or group or class of persons." In the few instances in which the Human Rights Commission has exercised this power to date, it has relied on the generous provision for the admission of *amici curiae* in the rules of the High Court and the Constitutional Court. See rule 16A of the Uniform Rules of Court (High Court Rules) and rule 9 of the Constitutional Court's Rules (available at www.concourt.gov.za/rules.html). In the most controversial case, the Commission applied to be admitted as an *amicus curiae* at the High Court stage of a constitutional claim involving the distribution of anti-retroviral drugs to pregnant mothers living with HIV/AIDS (*Treatment Action Campaign and Others* v. *Minister of Health and Others* (unreported) Transvaal Provincial Division Case 21182/2001 (judgment of Botha J. delivered on 14 December 2001). The Commission subsequently withdrew its application under a cloud of accusations that it had been influenced to do so by the executive. On the monitoring of socio-economic rights by the Commission in terms of section 184(3) of the *South African Constitution, supra* note 8, see the Commission's annual Economic and Social Rights Reports (available at www.sahrc.org.za) and the regular updates on the Commission's work in this area published in *ESR Review: Economic and Social Rights in South Africa* [hereinafter *ESR Review*].

[29] *Grootboom, supra* note 1 at para. 66.

[30] *Committee On Economic, Social and Cultural Rights*, UN ESCOR, 5th Sess., Annex III, General Comment No. 3 (1990). The Nature of States Parties' Obligations (Art. 2, Para. 1, of The Covenant), UN Doc. E/1991/23.

[31] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3.

[32] South Africa has signed, but not ratified the Covenant. See *Grootboom supra* note 1 at para. 27 n. 29. However, according to section 39(1) of the *South African Constitution, supra* note 8, "[w]hen interpreting the Bill of Rights, a court, tribunal or forum — ... (b) must consider international law."

[33] *Grootboom, supra* note 1 at para. 28.

[34] *Ibid.* at para. 33.

the minimum core content of the right of access to adequate housing, given regional variations in housing requirements and the rural/urban divide.[35]

After analysing the state's housing program under the three headings suggested by the text of sections 26(1) and (2), the Court concluded that the absence of any measures specifically aimed at assisting "people in desperate need," such as the applicants, was unreasonable.[36] The housing program was accordingly unconstitutional against section 26(2) to this extent.[37]

Interestingly, the appeal in respect of the lower court's section 28(1)(c) finding was upheld. The essence of the Court's reasoning in this respect is contained in the following passage:[38]

> Through legislation and the common law, the obligation to provide shelter in ss. (1)*(c)* is imposed primarily on the parents or family and only alternatively on the State. The State thus incurs the obligation to provide shelter to those children, for example, who are removed from their families. It follows that s. 28(1)*(c)* does not create any primary State obligation to provide shelter on demand to parents and their children if children are being cared for by their parents or families.

The intervention by the *amici* was thus crucial to the outcome of the *Grootboom* case. Had the argument in relation to section 26 not been re-opened, the case may well have been decided in favour of the state, on the basis of section 28 alone. By re-opening the argument under section 26, the *amici* gave the Court the opportunity to rule on the import of this section, and hence to make the order of constitutional invalidity described above.[39]

## DID THE *GROOTBOOM* COURT ENGAGE IN PRIORITY-SETTING?

In his summary of the decision in *Grootboom*, Professor Sunstein writes:[40]

> In short, the Court held that the *Constitution* required not only a long-term plan to provide low-income shelter, but also a system to ensure short-term help for people who had no place to live. ... What is most striking about this ruling is the distinctive and novel approach to socio-economic rights, requiring not shelter for everyone, but sensible priority-setting, with particular attention to the plight of those with the greatest need.

The crucial term in this passage is "priority-setting." It is not expressly defined, but seems to mean something like *the relative importance that the state accords to competing social needs*. For example, in his discussion of the section 28 challenge, Professor Sunstein attributes the Court's reluctance to interpret this provision as creating absolute rights to the fear that such an approach "would trump even reasonable priority-setting, thus keeping the state from deciding that in view of sharply limited resources, certain needs were even more pressing."[41] The addition of the qualifier "reasonable" in this passage is significant, since it suggests that the state may act unreasonably by according the wrong degree of importance to competing social needs. It also suggests that it is legitimate, from the point of view of democratic theory, that a court should be able to review and set aside such a policy choice.

This understanding of the term "priority-setting" is sufficient to justify Professor Sunstein's claim that the decision in *Grootboom* pushes out the boundaries of socio-economic rights adjudication beyond a point that many commentators believed possible. However, there is another sense of the term "priority-setting" that is worth highlighting for what it reveals about the terrain that the Court was not prepared to chart. In its strict sense, I want to suggest that "priority-setting" means *the temporal order in which government chooses to meet competing social needs*.[42] The difference between this sense of the term and the sense used by Professor Sunstein was central to the *Grootboom* case — not because the Court's decision on the constitutionality of the government's housing program would have been any different (the program was unreasonable in both senses), but because the Court's reluctance to engage in priority-setting in the strict sense affected the nature of the order made.

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35 *Ibid.* at paras. 32–33.

36 *Ibid.* at para. 66.

37 *Ibid.* at para. 69.

38 *Ibid.* at para. 77.

39 The precise nature of the order is discussed in greater detail below.

40 Sunstein, *supra* note 2 at 127.

41 *Ibid.* at 130.

42 *The Concise Oxford Dictionary of Current English*, 7th ed., *s.v.* "prior" as meaning "earlier; coming before in time, order, or importance," and "priority" as "being earlier or antecedent; precedence in rank etc.; an interest having prior claim to consideration."

I shall return to the nature of the order in conclusion. For the moment, it is sufficient to note that the Court, in declaring the housing program unconstitutional because it did not cater for people in desperate need, did not intrude onto the terrain of "priority-setting" in the strict sense. To be sure, the Court found that it was unreasonable to have a long-term housing strategy in the absence of a short-term relief strategy,[43] but the reference to temporal sequencing in this part of the decision is deceptive. The Court crucially did not hold, as the legal representative for the *amici curiae* asked it to, that the state's short-term relief strategy should take precedence *in time* over the long-term housing strategy. Rather, the ruling was that the two strategies should be pursued in tandem, with the short-term relief strategy catering for the needs of those without access to shelter, however rudimentary, pending the staged delivery of adequate housing for all.

As Professor Sunstein notes,[44] the *Grootboom* decision also stops short of telling the state what *proportion* of its housing budget should be spent on addressing the plight of people in desperate need. The relevant passage in *Grootboom* reads: "It is essential that a reasonable part of the national housing budget be devoted to this, but the precise allocation is for the national government to decide in the first instance."[45] In this respect, too, rather than setting priorities, the Court in *Grootboom* simply expressed a view on what could not reasonably be left out of the housing program.

Assuming the South African government takes the decision in *Grootboom* seriously, it will have inevitable budgetary implications. But it will not impact on the temporal order in which competing needs are met. Only the wholesale adoption of paragraph 10 of the U.N. Committee on Economic, Social and Cultural Rights' General Comment 3[46] would have done that, since this would have required the State *first* to devote *all* available resources to meeting the needs of those without any kind of shelter, *before* moving on to improving the living conditions of everyone. However, as noted above, the Constitutional Court carefully distinguishes the text of section 26 of the *Constitution* from articles 11.1 and 2.1 of the *International Covenant on Economic, Social and Cultural Rights*, precisely so as to avoid this result.

## THE EXAMPLE FROM LAND REFORM

The significance of this narrower reading of *Grootboom* may be illustrated by a hypothetical case testing the constitutionality of a recent shift in the South African government's land redistribution policy. In its initial form, as part of the African National Congress's 1994 election manifesto, the policy recognized the need to provide "residential and productive land to the poorest section of the rural population *and* aspirant farmers."[47] In the subsequent *White Paper on South African Land Policy*,[48] however, a clear choice was made in favour of the role of land redistribution in poverty alleviation. This emphasis was confirmed in the implementation of the policy, where the focus fell on the award of Settlement Land Acquisition Grants of R15,000 (later increased to R16,000) to people falling below a threshold income of R1,500 per month.

In June 2000, a year after the appointment of a new Minister of Agriculture and Land Affairs, land redistribution policy in South Africa took a decisive turn with the publication of an "Integrated Programme of Land Redistribution and Agricultural Development."[49] One of the express aims of the new policy is to assist people from historically disadvantaged groups to become commercial farmers. This objective is pursued through a sliding-scale system of grants, from a minimum of R20,000 (accessed via a self-contribution in cash, materials or labour of R5,000) up to R100,000 (accessed via a self-contribution of R400,000).

The total budget for land reform has not, however, significantly increased. An inevitable consequence of the new policy is thus that resources will be diverted away from funding grants to the rural poor towards funding grants to the relatively well off. The main non-governmental organization representing the rural poor, the National Land Committee (NLC), has criticized the new policy on precisely these grounds.[50] As a simple matter of arithmetic, each grant made at the upper end of the scale is equivalent to five grants made at the entry-level. The new policy therefore presumptively prejudices poor people in the absence of a significant increase in the total overall budget for land redistribution.

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43 *Grootboom*, *supra* note 1 at paras. 65–66.

44 Sunstein, *supra* note 2 at 131.

45 *Grootboom*, *supra* note 1 at para. 66.

46 *Supra* note 30.

47 African National Congress, *The Reconstruction and Development Programme: A Policy Framework* (Johannesburg: Umanyano Publications, 1994) at para. 2.4.3 [emphasis added].

48 Department of Land Affairs (April 1997).

49 Ministry of Agriculture and Land Affairs (June 2000).

50 National Land Committee, "Workshop Briefing Paper" delivered at the *Civil Society Forum on Land & Agrarian Reform*, Johannesburg (22–23 August 2000) at 11.

The NLC has expressed the view that the new policy is "at variance with government's constitutional obligation to implement a wide-ranging land redistribution programme,"[51] but has not formally announced that it intends to mount a legal challenge to this effect. Depending on the success of its attempts to lobby government to amend the policy, such a challenge may become the only option available to it.

Like the housing policy, land redistribution policy in South Africa is subject to a justiciable socio-economic right. Section 25(5) of the *Constitution* provides:[52]

> The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

Because of the textual similarity between this provision and section 26, land reform activists, along with their colleagues in the health and welfare sectors, eagerly awaited the outcome of the constitutional challenge to the housing program in *Grootboom*. A far-reaching judgment in this case would, it was thought, open the door to litigation in other sectors similarly subject to justiciable socio-economic rights. When the initial euphoria over the decision subsided, however, a mood of disappointment set in. Although welcoming the declaration of constitutional invalidity, many realized that the Court had stopped short of making the robust order that had widely been anticipated.[53]

From the point of view of activists working in the land reform sector, the reasons for this disappointment are readily apparent from an examination of the new land redistribution policy against section 25(5), interpreted according to the standard of review laid down in *Grootboom*. The major difference between the right of access to adequate housing and the right of access to land is that the state's primary duty in the latter case is simply "to foster conditions which enable citizens to gain access to land." This difference aside, however, the structure of the two provisions is essentially the same. Thus the standard of review in section 25(5), like that in section 26(2), is the "reasonableness" of the "legislative and other measures" taken by the state to fulfill its constitutional obligation, qualified by the availability of resources.

Suppose that the NLC were to challenge the new land redistribution policy on the grounds that it will inevitably divert resources away from the rural poor to the relatively well off. In order to succeed, the NLC would have to convince the Court that the state had unreasonably failed, taking into account its available resources, to adopt legislative and other measures to foster conditions that enabled citizens to gain access to land on an equitable basis. The NLC could try to do this by arguing that it is not reasonable for the State to award grants of R100,000 to people who are able to raise R400,000 of their own capital. In relation to such people, the NLC might plausibly argue, the state's duty is to ensure that ordinary commercial loans are available. To this end, the NLC might rely on the *dictum* in *Grootboom* that the housing policy should take account of "different economic levels":[54]

> For those who can afford to pay for adequate housing, the State's primary obligation lies in unlocking the system, providing access to housing stock and a legislative framework to facilitate self-built houses through planning laws and access to finance. Issues of development and social welfare are raised in respect of those who cannot afford to provide themselves with housing.

This *dictum*, one might think, becomes all the more forceful in relation to a right that expressly obliges the state to "foster conditions" facilitating "access to" the economic good in question. Moreover, the reference to equity in section 25(5) seems to imply that land redistribution policy, in addition to being reasonable, must also be fair.

On the evidence of *Grootboom*, the Court would probably approach these issues by carefully distinguishing the text of section 25(5) from section 26(2). The three constituent elements of section 26(2) are considered separately in *Grootboom* at paragraphs 39 to 46. The duty to adopt "reasonable legislative and other measures" is said to involve primarily the allocation of responsibilities to different spheres of

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[51] *Ibid*. at 2.

[52] The "right of access to land" in section 25(5) was included among the list of justiciable socio-economic rights given by the Court in *Grootboom*, *supra* note 1 at para. 19, n. 15.

[53] On 18 May 2000, one week after the *Grootboom* case was heard in the Constitutional Court, the President of the Court, Arthur Chaskalson, delivered a public lecture in which he said that South Africans had "temporarily . . . lost [their] way" in realizing the constitutional vision of "[a] society in which there will be social justice and respect for human rights, a society in which the basic needs of all . . . people will be met" A. Chaskalson, "Human Dignity as a Foundational Value of Our Constitutional Order" (2000) 16 S. Afr. J. Hum. Rts. 193 at 205. This remark was widely interpreted at the time as a sign that the Court would use the *Grootboom* case to hold the executive to account on the slow pace of social service delivery.

[54] *Grootboom*, *supra* note 1 at para. 36.

government.[55] It also means, however, that the policy must be theoretically capable of realizing the right in question, though not the only way,[56] and that the implementation strategy itself must be reasonable.[57] In a particularly interesting passage under this heading, the Court remarks that "[a] program that excludes a significant segment of society cannot be said to be reasonable."[58] The next paragraph, however, appears to restrict this statement to vulnerable segments of society: "Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right."[59]

In the NLC's hypothetical constitutional challenge, these *dicta* invite an analysis of the institutional mechanisms used to implement the new land redistribution policy, and of their impact in practice. At this level of generality, and at this point in time, the NLC would not succeed in challenging the policy on these grounds. As in the housing sector, a fairly sophisticated legal framework for land redistribution is now in place.[60] The new land redistribution policy does not envisage any change to this framework, although a more significant devolution of responsibilities to provincial level is contemplated, together with greater co-operation between different government agencies. It is also too early to question the implementation of the new policy. Initial indications are, however, that there has been a tremendous slow-down in the number of land redistribution projects approved since the change to a sliding-scale system of grants.[61]

Can the new land redistribution policy be challenged on the ground that it does not cater to a "significant segment of society"? This question reveals a crucial ambiguity in the *Grootboom* decision that is worth exploring in more detail. As noted above, the Court at first appears to say that a program that excludes any "significant segment of society" will be unreasonable.[62] In the next paragraph, however, the Court qualifies this remark by stressing that special attention should be paid to "[t]hose whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril." And, of course, the Court's eventual declaration of constitutional invalidity is directed at the housing program's failure to cater "for those in desperate need."[63]

In the result, the question whether a particular segment of society is constitutionally "significant" appears to depend on its degree of vulnerability, *i.e*. on how pressing its needs are. It is for this reason that Professor Sunstein is correct to argue that the Court engages in priority-setting in a weak sense. But the required standard is merely *inclusion* — a government program that is subject to socio-economic rights will be unreasonable if it fails to *cater to* a significant segment of society. Nothing is said about how the state ought to apportion its efforts between competing significant segments or, more importantly, between significant and not-so-significant segments of society.

It follows that the NLC would find very little purchase for an argument that, in diverting resources away from the rural poor, the new land redistribution policy violated the "reasonable legislative and other measures" requirement of section 25(5). Provided that the rural poor are catered to in some way, as they are at the bottom end of the sliding scale, such a change in policy is, it would seem, constitutionally permissible.

The second element of the Court's compartmentalized analysis of section 26(2) in *Grootboom*, the state's duty progressively to realize the right, would be irrelevant to a challenge based on section 25(5) since this element does not appear in that provision. This difference is particularly unfortunate for the NLC because it was here that the Court in *Grootboom* was most sympathetic to the principles enunciated in General Comment 3. Noting that the phrase "progressive realisation" is "taken from international law and art 2.1 of the Covenant in particular," the Court held that "there is no reason not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived."[64] By this device, the Court was able to hold that the principles laid down in paragraph 9 of General Comment 3 were directly applicable to section 26(2), including the important principle that

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55 *Ibid*. at paras. 39–40.

56 *Ibid*. at para. 41.

57 *Ibid*. at para. 42.

58 *Ibid*. at para. 43.

59 *Ibid*. at para. 44.

60 The main statutory vehicle for land redistribution is the *Provision of Land and Assistance Act* 126 of 1993, which was enacted (under a different title) when the apartheid government was still in power, and subsequently amended in line with the *White Paper on South Africa Land Policy*, *supra* note 48.

61 See S. Sibanda, "Land Reform and Poverty Alleviation in South Africa" (paper presented at the SARPN conference on *Land Reform and Poverty Alleviation in Southern Africa*, Pretoria, June 2001). Table 1 of this paper, relying on official government statistics, states that the number of completed redistribution projects declined from 1065 in the year 1999 to 89 in the year 2000.

62 *Grootboom*, *supra* note 1 at para. 43.

63 *Ibid*. at para. 66.

64 *Ibid*. at para. 45.

"deliberately retrogressive measures" are impermissible.[65]

Had section 25(5) imposed a duty on the state to realize progressively the right of access to land, this part of the *Grootboom* decision may have provided a basis on which to challenge the new land redistribution policy. At first blush, the move from a flat-rate, income-related system of grants to a sliding-scale, income-independent system is a deliberately retrogressive measure, certainly from the point of view of the rural poor. This conclusion depends, however, on the assumption that emerging commercial farmers are not a "significant segment of society" equally deserving of respect and concern. On the narrower reading of *Grootboom* proposed above, it is not self-evident that a decision to diversify a social program so as to cater to a more affluent segment of society is a "deliberately retrogressive" step. Indeed, it may be a constitutionally necessary step in order to include a segment of society that was previously not catered to.

The reference to "available resources" in section 25(5), which is repeated in section 26(2), also does not assist the NLC. The Court's specific treatment of this element in *Grootboom* is limited to one paragraph, half of which is devoted to repeating the position adopted in a previous case, *i.e*. that the reference to "available resources" must be understood as an internal limitation qualifying the state's duty to realize the right in question.[66] Given its refusal earlier on in the judgment to apply the U.N. Committee on Economic, Social and Cultural Rights' concept of minimum core obligations, the Court's cursory treatment of the "available resources" element is not surprising. Yet, in a country with scarce resources, the temporal order in which resources are deployed by the State is the key question. By declining to intrude onto this terrain, the Court in *Grootboom* left the most important policy issues for decision by the legislature and the executive. In the hypothetical test case, the consequence of this judicial self-restraint is that the NLC will almost certainly fail were it to challenge the decision to divert land redistribution resources away from the rural poor. Provided that some resources are still being made available to the rural poor — a "reasonable" proportion (whatever that may mean) — the policy will pass constitutional muster.

## CONCLUSION

The example from land reform illustrates why activists working in areas related to the housing sector were more than a little disappointed with the *Grootboom* decision. It simply does not provide the sort of legal ammunition that many of them had hoped for. The most positive aspect of the decision is the ruling that, in order to survive constitutional impugnment, a social program must not only be reasonably designed, but also reasonably implemented. The direct application of paragraph 9 of General Comment 3[67] is also significant for people working in sectors where the state is under a duty progressively to realize the right in question.

Even these aspects of the decision, however, are ultimately dependent on the strength of the mechanisms used to enforce socio-economic rights. It is in this respect that the decision was most disappointing. The Court's final order is worth quoting in full for what it reveals about the Court's preparedness to hold the legislative and executive arms of government to account for their constitutional obligations:

> 1. The appeal is allowed in part.
> 2. The order of the Cape of Good Hope High Court is set aside and the following order is substituted for it:
>
> 'It is declared that:
>
> *(a)* Section 26(2) of the Constitution requires the State to devise and implement within its available resources a comprehensive and co-ordinated program progressively to realise the right of access to adequate housing.
>
> *(b)* The program must include reasonable measures ... to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.
>
> *(c)* As at the date of the launch of this application, the State housing program in the area of the Cape Metropolitan Council fell short of compliance with the requirements in para *(b)*, in that it failed to make reasonable provision within its available resources for people in the Cape Metropolitan area with no access to land, no roof over their

[65] *Ibid*.
[66] *Ibid*. at para. 46.
[67] *Supra* note 30.

heads, and who were living in intolerable conditions or crisis situations.

3. There is no order as to costs.[68]

The substituted order is entirely declaratory.[69] Paragraph *(a)* merely restates the provisions of section 26(2). Paragraph *(b)* confirms that the state's constitutional duty is to "include" a particularly vulnerable segment of society in its housing program, without necessarily prioritizing its efforts to meet this group's needs. Finally, paragraph *(c)* restricts the declaration of invalidity to the particular geographic area at issue in the *Grootboom* case, as though what is said in the decision about the deficiencies of the national housing program had no bearing on the lack of an effective program at the local level.

No doubt political scientists interested in the Court's quest for legitimacy will have much to say about this studied exercise in judicial deference,[70] but the message for public-impact litigators is clear: don't get your hopes up. The closest the Court came to giving its order teeth was the observation that the South African Human Rights Commission was under a constitutional duty to monitor the promotion of socio-economic rights, and would thus, "if necessary ... report on the efforts made by the State to comply with its section 26 obligations in accordance with this judgment."[71] In short, the Court appears to take the view that an adequate mechanism for the enforcement of socio-economic rights already exists, and that its role is simply to give guidance to the Human Rights Commission on the proper interpretation of the *Constitution*.

An indication of how far this position was from meeting the expectations of other members of the *South African Constitution*'s community of interpreters may be gleaned from the range of remedies considered by a leading constitutional litigator in a paper delivered two years before the decision in *Grootboom* was handed down. Noting that section 172(1)(b) of the *Constitution* gives the courts "sweeping powers ... to develop and build their own arsenal of remedies," Wim Trengove suggests that an order consequent on a finding that a socio-economic right has been violated might include a direction to the relevant state agency that it present the Court "with a plan of reform which would put an end to the violation."[72] After approving the means–end rationality of the plan, the Court might then order the agency to implement it according to predetermined deadlines.[73] Trengove even goes so far as to suggest that the Court should write the plan for the agency if it unreasonably fails to do so itself, and that it should hold individual state officials in contempt of court if they fail to perform.[74]

One does not have to accept that all of these remedies are justifiable from the point of view of democratic theory to appreciate the extent of the road not travelled by the Court in *Grootboom*. At the very least, it should have ordered the appellants to return at a later date with a plan detailing how they intended to cater to people with "no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations."[75] In the absence of such an enforcement mechanism, the Court's declaration of constitutional invalidity has embarrassment value only. Assuming it is correct to describe this remedy as one emanating from administrative law, it is a remedy without a sanction, and therefore without any practical relevance for people whose socio-economic rights constitute their sole claim to citizenship.[76]❑

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[68] *Grootboom*, *supra* note 1 at para. 99.

[69] Compare the very detailed order granted in the lower court decision, *supra* note 26 at 293H–294C.

[70] For an analysis of the Constitutional Court's record before *Grootboom* from this perspective, see S. Gloppen, *South African Constitutionalism 1994–2000: The difficult balancing act of the Constitutional Court* (Doctoral Dissertation, Department of Comparative Politics, University of Bergen 2000) [unpublished].

[71] *Grootboom*, *supra* note 1 at para. 97.

[72] W. Trengove, "Judicial Remedies for Violations of Socio-Economic Rights" (1999) 1 E.S.R. Rev. 8 at 10.

[73] *Ibid*.

[74] *Ibid*.

[75] *Grootboom*, *supra* note 1 at para. 99.

[76] On 2–3 May 2002 the Constitutional Court will consider an appeal from the decision of the Transvaal High Court in the *Treatment Action Campaign* case, *supra* note 28. The order in this case comes much closer to the type of order suggested by Trengove. Paragraph 4 of the order, for example, enjoins the respondents "forthwith to plan an effective comprehensive national programme to prevent or reduce the mother-to-child transmission of HIV, including the provision of voluntary counselling and testing, and where appropriate, Nevirapine or other appropriate medicine, and formula milk for feeding, which programme must provide for its progressive implementation to the whole of the Republic, and to implement it in a reasonable manner." Paragraph 5 enjoins each of the respondents to deliver a report within three months on "what he or she has done to implement the order in paragraph 4" and detailing "what further steps he or she will take to implement the order in paragraph 4, and when he or she will take each such step." Clearly, the Constitutional Court's judgment on appeal in this matter will reveal a great deal about its preparedness to move beyond the limits of the declaratory order granted in *Grootboom* to the range of supervisory orders suggested by Trengove.

# STRENGTHENING THE ECONOMIC UNION: THE *CHARTER* AND THE *AGREEMENT ON INTERNAL TRADE*

Sujit Choudhry

## INTRODUCTION

The standard story in public policy and constitutional circles on the relationship between the Constitution and the Canadian Economic Union is a story of constitutional failure: that the Constitution has proven to be ineffective at furthering the integration of the Canadian economy.[1] As a consequence, securing this goal requires either constitutional amendment or, in the face of the impossibility of large-scale constitutional change, the use of non-constitutional policy instruments such as the *Agreement on Internal Trade*, an intergovernmental agreement designed to remove barriers to interprovincial economic mobility.[2] In this paper, I challenge this view. My argument is that constitutional litigation under the *Charter*'s[3] mobility rights provisions can serve as an effective alternative to the various mechanisms (adjudication and negotiation) established under the *AIT* to further the integration of the Canadian economy. Moreover, I suggest how constitutional litigation can actually *strengthen* the *AIT*, rather than simply serve as an alternative to it.

The suggestion that the Constitution as it currently stands can help to strengthen the Economic Union will strike most readers as counter-intuitive because the whole impetus to strengthen the Economic Union, whether through constitutional or non-constitutional means such as the *AIT*, assumes the failure of the existing Constitution to achieve that goal. The narrative of constitutional failure has three components.

The first is the *text* of the *Constitution Act, 1867*,[4] which reflects a nineteenth century understanding of barriers to interprovincial economic mobility. Section 121 of the *Constitution Act, 1867* appears to only prohibit the imposition of tariffs on goods moving between provinces,[5] and says nothing about non-tariff barriers.[6] Nor does it say anything about the mobility of services, capital or labour. Granted, the narrow wording of section 121 need not have been fatal. Section 91(2), the federal trade and commerce power, could have done much of the same work and more with respect to provincially created barriers to economic mobility.[7] Unfortunately, section 91(2) did not live up to its potential because of the second source of constitutional failure — the *interpretation* given to the *Constitution Act, 1867* by the Judicial Committee of the Privy Council. Based on a desire to protect provincial autonomy, the Privy Council adopted a rather expansive interpretation of section 92(13), which confers on the provinces jurisdiction over property and civil rights, and a correspondingly narrow interpretation of section 91(2). Although the case law does not allow the provinces to enact discriminatory barriers to trade,[8] it imposes no discipline whatsoever on provincial policies that inhibit either the inflow of factors of production from other provinces, or the outflow of factors of production to other provinces. The contrast with both the case law under the so-called dormant commerce

1 The clearest statement of this view is found in J. Chrétien, *Securing the Canadian Economic Union in the Constitution* (Ottawa: Supply and Services Canada, 1980).

2 Canada, *Agreement on Internal Trade* (Ottawa: Industry Canada, 1994) [hereinafter *AIT*].

3 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

4 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [hereinafter *Constitution Act, 1867*].

5 *Constitution Act, 1867*, *ibid.* at s. 121 provides, "All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces."

6 Although some judges have said that it could be interpreted to prohibit measures that are protectionist either on their face, or in intent: see *e.g. Murphy* v. *Canadian Pacific Railway Co.*, [1958] S.C.R. 626 at 642 (per Rand J.); *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198 at 1268 (per Laskin C.J.C.).

7 *Constitution Act, 1867*, *supra* note 4 at s. 91(2) confers on the federal government jurisdiction over "The Regulation of Trade and Commerce."

8 *Manitoba (A.G.)* v. *Manitoba Egg & Poultry Assoc.*, [1971] S.C.R. 689.

clause[9] of the American Constitution, as well as the European Court of Justice's case law interpreting the Treaty of Rome,[10] is striking.[11]

This sense of failure — a sense of thwarted ambition, a sense that the Constitution has been ineffective in creating a Canada that could be more economically integrated, more prosperous and hence better equipped to pursue important national projects — put the Economic Union at the centre of the constitutional agenda in both the Patriation and Canada Rounds.[12] Strengthening the Economic Union, albeit through non-constitutional means, was the focus of many of the recommendations of the MacDonald Commission.[13] However, both the Patriation package and the Charlottetown Accord contained few of the federal government's initial proposals to strengthen the Economic Union. As a consequence, even if the Charlottetown Accord had been passed, it would have added nothing in the way of new constitutional restraints on the ability of provincial and federal governments to inhibit interprovincial economic mobility. Thus, alongside the inadequacies resulting from the text of the *Constitution Act, 1867* and the interpretation thereof, we should add a third: the failure of *constitutional amendment*.

In large part, I agree with this story. However, there is a silver lining to this otherwise grim picture, which I think has been largely ignored in the vast literature on the Economic Union. The exception to the narrative of constitutional failure is the entrenchment of section 6 of the *Charter* in 1982. Section 6 contains a number of mobility rights. Of central importance for our purposes is section 6(2)(b), which enshrines the right of any citizen or permanent resident to pursue the gaining of a livelihood in any province.[14] Section 6(2)(b) has been given a rather expansive interpretation that has taken it far beyond the realm of labour to encompass the mobility of goods. What I want to do next is to outline the evolution of the Supreme Court of Canada's understanding of section 6(2)(b), before I contrast constitutional litigation with the mechanisms established under the *AIT* as alternative means to promote the Economic Union.

## MOBILITY RIGHTS AND THE *CHARTER*

The best place to start is with the text of section 6(2)(b), which guarantees "the right … to pursue the gaining of a livelihood in any province." In its first *Charter* case, *Skapinker* v. *Law Society of Upper Canada*,[15] the Supreme Court of Canada clarified that section 6(2)(b) was not, despite appearances to the contrary, a right to work unencumbered by regulations, such as professional licensing requirements. Rather, as La Forest J. explained in a later decision, *Black* v. *Law Society of Alberta*,[16] section 6(2)(b) enshrines a right to gain a livelihood in a province on terms that do not discriminate on the basis of residency, either between residents and non-residents of that province, or among residents on the basis of length of residence. Although the Court did not refer to the international trade literature, the idea of non-discrimination is clearly equivalent to the principle of national treatment, a hallmark of negative integration. By negative integration I mean the elimination of discriminatory treatment of out-of-jurisdiction factors of production. And *Black* added another element to section 6(2)(b) — namely, that there be some kind of interprovincial aspect to the gaining of a livelihood, the so-called *mobility element* of section 6(2)(b). The central idea here is that a citizen or permanent resident should be

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9 U.S. Const. art. I, §8.

10 *Treaty establishing the European Economic Community*, 25 March 1957, 298 U.N.T.S. 11.

11 The American and European Union jurisprudence, in addition to imposing severe constraints on discriminatory trade barriers, has subjected facially neutral laws that might operate to impede trade flows between trading partners (states, or member states) to probing scrutiny. In the American context see *e.g. Hunt* v. *Washington State Apple Advertising*, 452 U.S. 333 (1977). For a recent discussion of the American position see D.H. Regan, "Judicial Review of Member-State Regulation of Trade Within a Federal or Quasi-federal System: Protectionism and Balancing, Da Capo" (2001) 99 U. Mich. L. Rev. 185. In the European context, the first decisions to advance and apply the theory of indirect discrimination arising from regulatory diversity were *Procureur du Roi* v. *Dassonville* (No. 8/74), [1974] E.C.R. 837 (goods); *Rewe-Zentral AG* v. *Bundesmonopolverwaltung fur Branntwein* (No. 120/78), [1979] E.C.R. 649 [hereinafter *Cassis de Dijon*] (goods); and *Van Bisbergen* v. *Bestuur van de Bedrijfsverniging voor de Metaalnijverheid* (No. 33/74), [1974] E.C.R. 1299 (services). The subsequent case law has modified these cases, and is quite complex. For a good overview, see C. Barnard, "Fitting The Remaining Pieces Into The Goods And Persons Jigsaw" (2001) 26 Eur. L. Rev. 35.

12 For an overview of this history, see M.J. Trebilcock & R. Behboodi, "The Canadian Agreement on Internal Trade: Retrospects and Prospects" in M.J. Trebilcock & D. Schwanen, eds., *Getting There: An Assessment of the Agreement on Internal Trade* (Toronto: C.D. Howe Institute, 1995) 20 at 20–33.

13 Royal Commission on the Economic Union and Development Prospects for Canada, *Report of the Royal Commission on the Economic Union and Development Prospects for Canada*, vol. 3 (Ottawa: Supply and Services Canada, 1985).

14 *Charter, supra* note 3, s. 6(2)(b) states, "Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right … (b) to pursue the gaining of a livelihood in any province."

15 *Skapinker* v. *Law Society of Upper Canada*, [1984] 1 S.C.R. 357 [hereinafter *Skapinker*].

16 *Black* v. *Law Society of Alberta*, [1989] 1 S.C.R. 591 [hereinafter *Black*].

able to earn a livelihood without regard to provincial borders, that is, as if those borders did not exist.

As with any constitutional provision, there are easy cases and hard cases for section 6(2)(b). In the central case, an individual would shift her province of residence in search of better employment prospects, and what section 6(2)(b) would protect would be her right to be treated equally under the law of her new province of residence with respect to her ability to gain a livelihood. For example, section 6(2)(b) presumptively prohibits governments from discriminating in employment on the basis of length of residence, which is tantamount to prohibiting discrimination on the basis of province of *prior* residence. Another example of an easy case, which was provided by the Court in *Skapinker*, is that of a trans-border commuter, living in one province but working in another, who faces restrictions on her ability to work solely because she does not reside in her province of employment. There, the discrimination would be on the basis of province of *present* residence. In both of these cases, *physical* movement between provinces in connection with employment would satisfy the mobility element. The implicit image here is one of workers (*i.e.* wage labour) spreading out over the vast Canadian expanse, in search of economic opportunity.

But there are harder cases as well. Consider *Black*. The background to *Black* was the decision by McCarthy & McCarthy, now McCarthy Tétrault, to become Canada's first national law firm with offices from coast to coast. McCarthy & McCarthy wanted to open an office in Calgary. Fearful of out-of-province competition, the Law Society of Alberta responded by enacting a series of by-laws designed to discourage out-of-province firms from establishing offices in Alberta (and competing with Alberta-based firms). Two of these by-laws ended up before the Supreme Court. One of the by-laws (R154) prohibited resident members of the Alberta bar from entering into partnerships with non-resident members. The other by-law (R75B) prohibited members of the Alberta bar from being partners in more than one firm.

To be sure, in some ways *Black* was an easy case. The first of these by-laws openly discriminated between resident and non-resident members of the Alberta bar; the former were able to form partnerships with resident members, whereas the latter were not. This was clearly a facially discriminatory distinction on the basis of residence. Moreover, the by-law disadvantaged non-residents in their ability to gain a livelihood in Alberta because partnerships are the most common way of practicing law, and the inability of non-residents to enter into partnerships with residents put them at an economic disadvantage.

But there were other aspects of *Black* that were more difficult. First, there was the mobility element itself. The challenge to the by-laws was brought by members of the Alberta Bar who were resident in Ontario, not in Alberta. Most of these lawyers made very infrequent trips to Alberta, and, in fact, probably offered legal advice to Alberta clients on matters of Alberta law out of their Toronto offices. These were not trans-border commuters who physically crossed provincial boundaries to work every day, but they nonetheless did participate in the economic life of a province other than their province of residence. Faced with these facts, the Court responded by loosening up the mobility requirement, stating that it would be met if an individual pursued a living in a province, even without being physically present there. In a later case, *Canadian Egg Marketing Agency* v. *Richardson*,[17] the Court affirmed this position, stating that in light of modern technology, what really counts is whether someone is attempting to create wealth in another province. This is a decidedly twentieth century conception of economic mobility. To be sure, the *Charter* is a twentieth century constitutional document, but *Black* nonetheless had to contend with paradigmatic, if somewhat dated examples of inter-provincial mobility centred on physical movement.

Another difficult point in *Black* was the rule against partnership in more than one firm. The rule applied equally to all members of the Alberta bar, both resident and non-resident, and accordingly would appear to not discriminate on the basis of residence. However, the Court reasoned that although the rule was facially neutral, it had a disparate impact on non-residents, and therefore indirectly discriminated against them. The reason why the law disproportionately burdened non-residents was that very few residents would have the need to enter into more than one partnership, whereas for non-residents, the ability to enter into multiple partnerships — one in Alberta, one in their province of residence — would be essential to being able to practice in Alberta.

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[17] *Canadian Egg Marketing Agency* v. *Richardson*, [1998] 3 S.C.R. 157 [hereinafter *Richardson*]. Note: I disclose that I served as law clerk to Chief Justice Antonio Lamer during the 1996–97 term, when *Canadian Egg Marketing Agency* v. *Richardson* was heard. Nothing in this paper reveals any confidential information acquired during that time.

Faced with these breaches of section 6(2)(b), the Court then turned to section 6(3)(a).[18] As drafted, section 6(3)(a) looks like a savings clause, and allows for the limitation of mobility rights by laws of general application other than those that discriminate primarily on the basis of province of present or prior residence. The Court held that both by-laws could not be upheld under section 6(3)(a) because they were both discriminatory.[19] This way of approaching justifiable limits created a bit of a problem. The problem was that laws that contravened section 6(2)(b) would fail the test of justification for the *very same reason* that they contravened section 6(2)(b), *i.e.* because they were discriminatory. To be fair, that was not the end of the matter; all *Charter* rights, including mobility rights, are subject to a general limitation clause, section 1.[20] To defenders of *Charter* mobility rights, section 1 serves as a safety valve, allowing governments to justify mobility-restricting measures. To critics of mobility rights, the need to resort to section 1 is extremely dangerous. The reason for concern is that the simple existence of regulatory diversity between provinces can itself give rise to claims of indirect discrimination. To these critics, *Black* meant that all manner of provincial public policies that create indirect barriers to economic mobility would be subject to constitutional justification under section 1, putting courts in the position of second-guessing provincial public policy.

To be sure, this is not a concern confined to mobility rights cases, and arises whenever government policies are found to contravene *Charter* rights. However, given that section 6(2)(b) is an economic right, and that *Black* implies that simple regulatory diversity contravenes that provision, section 6(2)(b) would subject a far broader range of socio-economic policies to section 1 analysis than would violations of other *Charter* rights. In this connection, it is worth noting that opponents of the Economic Union aspect of the federal government's proposals in the Canada Round feared that those amendments would launch a Canadian version of the *Lochner* era, a period of American constitutional history in which the U.S. Supreme Court struck down all manner of socio-economic legislation in furtherance of what we would now call a neo-liberal economic agenda.[21] Given that the drafting history of the *Charter* evinces a clear intention to avoid the libertarian legacy of *Lochner*,[22] *Black* set off alarm bells.

These concerns were raised and addressed by *Richardson*, a case that at once expanded and contracted the scope of section 6(2)(b). *Richardson* involved a challenge to the national egg-marketing scheme, centred on the Canadian Egg Marketing Agency. Under the scheme, global production limits are set for each province, and within each province federal and provincial egg marketing boards allocate that global limit to individual producers in the form of production quotas. Only producers with quotas are entitled to market eggs interprovincially. The feature of the scheme that gave rise to the constitutional challenge is that no quota was allocated to producers in the Northwest Territories (NWT), because it was not a party to the scheme. The NWT was not a party because when the scheme was set up in 1972 there was no egg production in the NWT. At the time of the appeal, production quotas were allocated on the basis of historical levels of production. To an important extent then, the exclusion of the NWT can be regarded as a historical accident. Two parties, Richardson and Pineview Poultry, who owned and operated chicken farms in the NWT and who wished to market their eggs interprovincially, brought the constitutional challenge.

The claim in *Richardson* pushed the limits of section 6(2)(b) for three reasons. First, the claim seemed to have little to do with labour mobility rights. In *Richardson*, the only things moving across provincial borders were eggs, and even the most ardent *Charter*-phile would not assert that eggs possess constitutional rights. As a consequence, government lawyers strenuously argued that the plaintiffs were attempting, through the vehicle of section 6(2)(b), a provision that grants rights to *people*, to craft a right to interprovincial trade in *goods* — an internal free trade provision that our Constitution currently lacks, a sort of revised section 121. Second, the previous mobility rights cases (*Skapinker*, *Black*) involved claims brought by natural persons. But one of the plaintiffs in this case was a corporation, an artificial legal person. In most areas of

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[18] *Charter, supra* note 3 at s. 6(3)(a) states, "The rights specified in subsection (2) are subject to (a) any laws and practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence."

[19] It is worth noting, though, that the Court shifted its analysis regarding R75B, suggesting that although facially neutral, it was discriminatory, not simply because of its unequal impact on non-residents but because it had been enacted for a colourable motive, *i.e.* for the purpose of putting non-residents at a competitive disadvantage, at para. 74.

[20] *Charter, supra* note 3 at s. 1 states, "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[21] For a good discussion see D. Schneiderman, "The Constitutional Politics of Poverty" in J. Bakan & D. Schneiderman, eds., *Social Justice and the Constitution*: *Perspectives on a Social Union for Canada* (Ottawa: Carleton University Press, 1992) 125.

[22] See S. Choudhry, "The *Lochner* Era and Comparative Constitutionalism" [unpublished manuscript].

law nothing really turns on this difference because artificial legal persons have many, if not most of the rights that natural legal persons do. But the *Charter* is fundamentally different because it is a human rights document whose *raison d'être* is the protection of the interests of human beings. It was thus argued that corporations should not be able to invoke the mobility rights provision out of a concern that corporations were attempting to convert section 6(2)(b) into a new and improved section 121. Third, the egg-marketing scheme seemed to distinguish among egg producers not on the basis of province of residence, but province of production. This distinction, it was argued, mattered a great deal in the particular case because Richardson was a resident of Alberta, although his business was located in the NWT. Accordingly, since he was a resident of a province in which quota was available, it was argued that he was not discriminated against on the basis of province of residence.

*Richardson* is a very important decision because notwithstanding these challenges, the Court sided with the plaintiffs on all three of these points. It held that producing and shipping goods was just another way of gaining a livelihood, which stood alongside selling one's labour or providing services, and hence that interprovincial economic activity of any kind is protected by the *Charter*. Presumably, the next step will be to seek to protect capital mobility under the *Charter* by challenging the constitutionality, for example, of provincial laws that limit land ownership by non-residents.[23] On the issue of corporations and the *Charter*, the Court sidestepped the difficult questions raised by the case, and held that the claimants had standing to challenge the constitutionality of the egg-marketing scheme, because they launched the challenge in defence of an application by the Canadian Egg Marketing Agency for a civil injunction against its attempt to market goods interprovincially.[24] This amounted to an extension of the pre-existing case law, which had permitted corporations defending against *criminal* proceedings to raise *Charter* arguments that they could not assert as of right.[25] Finally, with respect to residency, the Court simply stated that "it would be an egregious formalism"[26] to force apart residency and production, presumably because the two are most often closely intertwined. Taken together, the various holdings in *Richardson* show us how far we have traveled from the personal mobility right for wage labour that section 6(2)(b) was originally conceived as being limited to. The Court was really on the verge of converting that provision into a revised section 121.

However, perhaps precisely because it was staring this prospect in the face, the Court in *Richardson* did take this final step by making it much easier for governments to justify limits on mobility rights than had previously been the case. Reinterpreting the relationship between sections 6(2)(b) and 6(3)(a), the Court determined that only laws that *primarily* discriminated on the basis of present or prior province of residence would violate section 6(2)(b). What does this mean? It means that unless the dominant purpose or effect of the challenged public policy is discriminatory — be the policy facially neutral or facially discriminatory — there is no violation of the *Charter*. In *Richardson*, for example, a majority of the Court held that the motives behind the use of the historical production patterns system were entirely valid because the system was "an equitable means of distributing quotas for the orderly and fair marketing of commodities,"[27] and that in terms of discriminatory effects, the claimants had not proved that they were any worse off than producers in the ten participating provinces but who lacked quota and were therefore precluded from marketing eggs interprovincially as well. The dissent disagreed on both counts. First, it correctly noted that the exclusion of the NWT arose largely as a result of historical accident, not a reasoned decision as to what was the most equitable way to regulate the marketing of eggs, and suggested that the on-going exclusion of the NWT was "in the interests of the provincial producers and exporters who control the scheme" centred on the Canadian Egg Marketing Agency.[28] Second, the dissent also noted that producers in the NWT were definitely worse off than those in provinces without quota, because they were legally precluded from obtaining quota at all.

In conclusion, the picture under section 6(2)(b) is mixed, with the Court adopting an expansive interpretation of the provision, while at the same time contracting it. In the next section, I compare and contrast section 6(2)(b) and the *AIT* to discuss which is more effective in securing the Economic Union. My focus will be on those provisions of the *AIT* that further the project of negative integration, because these could potentially serve as partial functional substitutes for constitutional litigation under section 6(2)(b).

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[23] Interestingly, though, Prince Edward Island's restrictions on land ownership by non-residents have withstood constitutional challenge under s. 6(2)(b). See *McCarten* v. *Prince Edward Island* (1994), 112 D.L.R. (4th) 711 (P.E.I. S.C. (A.D.)).

[24] *Canada (Egg Marketing Agency)* v. *Richardson* (1995), 129 D.L.R. (4th) 195 (N.W.T. S.C.).

[25] This is the so-called *Big M* exception, so termed because it was first applied in *R.* v. *Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295.

[26] *Richardson*, *supra* note 17 at para. 97.

[27] *Ibid.* at para. 96.

[28] *Ibid.* at para. 118.

## *CHARTER* MOBILITY RIGHTS VS. THE *AIT*

The *AIT* is an intergovernmental agreement entered into by the federal government and all ten provinces in 1994 and which came into force in 1995. The *AIT* has as its goal the elimination of barriers to economic mobility within Canada.[29] Although motivated by economic considerations — *i.e.* the economic benefits that would result from increased interprovincial economic activity — the *AIT*, along with the *Social Union Framework Agreement*,[30] should be seen as an attempt to renew the federation through non-constitutional means. The *AIT* is comprehensive in scope, covering the mobility of goods, services, capital and persons in all areas of economic activity, although there are sectoral chapters dealing with government procurement, investment, *etc*. The *AIT* is modeled on international trade agreements in two respects. First, its primary focus is negative integration. However, the *AIT* also creates the framework for intergovernmental negotiations to eliminate barriers to mobility arising from interprovincial regulatory diversity (known as positive integration).[31] The sense among commentators is that the positive integration agenda of the *AIT* has not been particularly successful.[32] Second, the *AIT* contains a dispute settlement machinery to deal with alleged violations of the *AIT*. In the wake of the *CAP Reference*,[33] it is widely accepted that neither the *AIT* nor the decisions of *AIT* panels are justiciable in the ordinary courts,[34] and that the *AIT* does not operate to fetter legislative sovereignty.

So how do the *AIT* and section 6(2)(b) compare? If we compare the *AIT* and section 6(2)(b) as instruments of negative integration, there are two significant respects in which section 6(2)(b) is more effective. First, section 6(2)(b) is a constitutional provision, which binds both the legislative and executive branches of government. Indeed, it is not subject to the legislative override created by section 33 of the *Charter*. The *AIT*, by contrast, is an intergovernmental agreement which is legally unenforceable. In light of the *CAP Reference*, and the express language of Article 300,[35] the *AIT* does not operate to fetter legislative sovereignty. Moreover, even though one reading of the *CAP Reference* keeps this possibility open,[36] Article 300 makes it clear that the *AIT* does not bind either the federal or provincial executives. Because of the non-legal character of the *AIT* its effectiveness will always depend on the willingness of governments to comply with it. Governments will always be free to ignore an inconvenient ruling, or to refuse to cooperate with the dispute settlement procedure, paying at most a political price for non-performance. Second, under Article 101(3)(a), the *AIT* only applies to new barriers to internal trade created after the coming-into-force of the agreement on 1 July 1995.[37] This leaves existing barriers beyond the reach of the complaints procedure, and, ultimately, beyond adjudication. This severely limits the effectiveness of the *AIT*. By comparison, no such limitation applies to the *Charter*. In *Richardson*, for example, the relevant system was created in the 1970s.

But when we turn to the substantive principles of negative integration, neither the *AIT* nor section 6(2)(b) seems to enjoy a clear advantage over the other. First, the *AIT* applies to the mobility of all factors of production — *i.e.* goods, service, capital and labour. It is fair to say that when section 6(2)(b) was enacted, it was viewed as being limited in scope to labour mobility, and as having no direct relevance to the mobility of other factors of production. Moreover, section 6(2)(b) was understood as a right exercisable by natural legal persons. Now, through judicial interpretation, those initial expectations have been displaced. Not only persons, but also goods and

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29 D. Schwanen, "Canadian Regardless of Origin: 'Negative Integration' and the Agreement on Internal Trade" in H. Lazar, ed., *Non-Constitutional Renewal* (Kingston: Institute of Intergovernmental Relations, 1998) 169.

30 *A Framework to Improve the Social Union for Canadians — An Agreement between the Government of Canada and the Governments of the Provinces and Territories* (4 February 1999).

31 For a discussion and comparison of negative and positive integration, see Trebilcock & Behboodi, *supra* note 12 at 33–39.

32 See *e.g.* D. Schwanen, "Happy Birthday, AIT!" (2000) 21:6 Policy Options 51.

33 *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525 [hereinafter *CAP Reference*].

34 With the exception of non-discrimination in procurement by the federal government, which falls within the jurisdiction of the Canadian International Trade Tribunal (CITT) pursuant to s. 3(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, S.O.R./93–602. Decisions of the CITT are subject to judicial review by the Federal Court of Canada.

35 Article 300 of the *AIT*, *supra* note 2 states, "Nothing in this Agreement alters the legislative or other authority of Parliament or of the provincial legislatures or of the Government of Canada or of the provincial governments or the rights of any of them with respect to the exercise of their legislative or other authorities under the Constitution of Canada."

36 S. Choudhry, "The Enforcement of the *Canada Health Act*" (1996) 41 McGill L.J. 461 at 504.

37 Article 101(3)(a) of the *AIT*, *supra* note 2 states, "In the application of this Agreement, the Parties shall be guided by the following principles: … Parties will not establish new barriers to internal trade and will facilitate the cross-boundary movement of persons, goods, service and investments within Canada." Under Article 1814, the *AIT* came into force on 1 July 1995.

services, and likely capital as well, are covered by the provision. Moreover, corporations can now take advantage of section 6(2)(b), at least in some circumstances.[38] Second, if we compare section 6(2)(b) and Article 401,[39] both proscribe facially discriminatory measures. Moreover, section 6(2)(b) and Article 402[40] proscribe measures that are neutral on their face, but which have been enacted for a protectionist or colourable purpose; an example of the latter sort of barrier to trade was the provincial regulation at issue in the *PEI Dairy* case.[41] Third, *Richardson* affirmed that section 6(2)(b) still regulates indirect discrimination arising from regulatory diversity; the *AIT*, at least on the face of Article 402, might as well. However, to be fair, the relative youth of the *AIT* means that this important question remains unanswered. Moreover, the Court's comments in *Richardson* suggest that it will be very reluctant to find that indirect discrimination arising from regulatory diversity *per se* breaches section 6(2)(b), for such a holding, in its view, would allow the *Charter* to undo what the Court sees as another basic objective of the Constitution: to allow provincial communities to make their own choices as to the public policies they will live by, an objective which is bound to create regulatory diversity.

By comparison, with respect to limitation analysis, the *AIT* clearly comes out ahead. Under Article 404,[42] a trade-limiting measure must meet a multi-part test, as explained by the panel in the *MMT* case:[43] the measure must pursue a legitimate objective, it must not unduly impair the access of factors of production, it must be no more trade restrictive than necessary to achieve the legitimate objective, and it must not be a disguised restriction on trade. I would actually collapse these into a two-part test: that the measure be motivated by legitimate, and not protectionist reasons, and that the measure minimally impair trade. Framed in these terms, Article 404 sounds a great deal like the *Oakes* test under the *Charter*'s limitation clause, section 1.[44] What *Richardson* has done, though, is to prevent the courts from addressing the issue of minimal impairment. However, I very much doubt that *Richardson* is the last word on this subject. It is worth noting, in particular, that the current Chief Justice was in dissent in that case.

## CONCLUSION: HOW CONSTITUTIONAL LITIGATION CAN MAKE THE *AIT* MORE EFFECTIVE

Thus far I have been viewing the mechanisms centred on the *AIT* and constitutional litigation as alternatives to furthering the Canadian Economic Union. By way of conclusion, I want to suggest one way in which constitutional litigation can make the *AIT*

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[38] See the discussion, *supra* note 23 and accompanying text.

[39] Article 401 of the *AIT*, *supra* note 2, states in full:

1. Subject to Article 404, each Party shall accord to goods of any other Party treatment no less favourable than the best treatment it accords to:
   (a) its own like, directly competitive or substitutable goods; and
   (b) like, directly competitive or substitutable goods of any other Party or non-Party.
2. Subject to Article 404, each Party shall accord to persons, services and investments of any other Party treatment no less favourable than the best treatment it accords, in like circumstances, to:
   (a) its own persons, services and investments; and
   (b) persons, services and investments of any other Party or non-Party.
3. With respect to the Federal Government, paragraphs 1 and 2 mean that, subject to Article 404, it shall accord to:
   (a) the goods of a Province treatment no less favourable than the best treatment it accords to like, directly competitive or substitutable goods of any other Province or non-Party; and
   (b) the persons, services and investments of a Province treatment no less favourable than the best treatment it accords, in like circumstances, to persons, services and investments of any other Province or non-Party.
4. The Parties agree that according identical treatment may not necessarily result in compliance with paragraph 1, 2 or 3.

[40] Article 402, *supra* note 2, states, "Subject to Article 404, no Party shall adopt or maintain any measure that restricts or prevents the movement of persons, goods, services or investments across provincial boundaries."

[41] *Re Amendments to Dairy Industry Act Regulations*, File No. 98/99 (18 January 2000). One of the issues in this complaint was the compliance with the *AIT* of a provincial regulation that governed the granting of licences of dairy processors and distributors in P.E.I. Although the regulation was facially neutral, the dispute settlement panel found that the purpose behind the regulation was to protect local milk producers from out-of-province competition, and for that reason the regulation contravened Article 402. Oddly enough, the panel did not attempt to uphold the regulation under Article 404, notwithstanding the express terms of Article 402, perhaps because the regulation had not been enacted for "a legitimate objective."

[42] Article 404 of the *AIT*, *supra* note 2, states in full:

Where it is established that a measure is inconsistent with Article 401, 402 or 403, that measure is still permissible under this Agreement where it can be demonstrated that:
   (a) the purpose of the measure is to achieve a legitimate objective;
   (b) the measure does not operate to impair unduly the access of persons, goods, services or investments of a Party that meet that legitimate objective;
   (c) the measure is not more trade restrictive than necessary to achieve that legitimate objective; and
   (d) the measure does not create a disguised restriction on trade.

[43] *Re Manganese-Based Fuel Additives Act*, File No. 97/99 (12 June 1998).

[44] *R.* v. *Oakes*, [1986] 1 S.C.R. 103.

*more* effective. The key here is to build upon an important insight in *Black*: that the simple existence of regulatory diversity can give rise to a constitutional challenge under section 6(2)(b). Although *Richardson* has tried to shut down this line of argument, as I suggested earlier the logic of *Black* could resurface again.

Why would this doctrinal move with respect to the interpretation of section 6(2)(b) make the *AIT* more effective? The difficulty with litigating indirect discrimination, as the European case of *Cassis de Dijon*[45] indicates, is that it creates the danger that the province with the lowest standards will set the norm for the federation as a whole, through a series of trade challenges launched by economic entities resident in that province against the laws of other provinces. As Robert Howse has suggested, the prospect of a litigated race to the bottom might provide an extremely strong incentive to the provinces and federal government to further the project of positive integration, through the negotiation of mutual recognition and/or harmonization.[46] And this kind of litigation strategy would have the additional attraction of relying on an appropriate institutional division of labour between courts and political institutions, with the former undertaking the task of negative integration, but the latter having the final say on the substance of the public policies.

If I am right, then those entities which have an interest in ensuring the success of the *AIT* would ironically help it most if they shifted their attention to the courts. And in this connection, it is worth noting that those economic interests most committed to promoting economic mobility have not intervened in Supreme Court cases in which section 6(2)(b) has been at issue. Perhaps this should change.❑

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[45] *Supra* note 11. This case involved a challenge to a German product standard (minimum alcohol content for fruit liqueur). Although the rule was not facially discriminatory, it had the effect of impeding access to the German market for similar products from other jurisdictions with a lower alcohol content. The judgment established the rule that simple inter-jurisdictional regulatory diversity would amount to a trade barrier, and would be illegal unless the trade-restricting rule met a test of justification.

[46] R. Howse, *Securing the Canadian Economic Union: Legal and Constitutional Options for the Federal Government* (Toronto: C.D. Howe Institute, 1996).

# RIGHTS, RECOGNITION, AND RECTIFICATION: CONSTITUTIONAL REMEDIES IN *JOHNSON* V. *SAND*

Barbara Billingsley

## INTRODUCTION

Not long ago, the Supreme Court of Canada warned against narrowly interpreting section 15 of the *Canadian Charter of Rights and Freedoms*[1] so as to bespeak a "thin and impoverished vision" of equality rights.[2] Following this admonition, Canadian courts have rendered several decisions which arguably offer a large and liberal interpretation of section 15 and which give new life to the *Charter*'s equality protection.[3] In some recent cases, however, the courts have paired a liberal interpretation of the *Charter*'s equality protection with a restrictive application of the *Charter*'s remedy provisions, thereby issuing decisions which effectively return to a thin and impoverished view of the *Charter*'s protective value when it comes to breaches of equality rights.[4] Unfortunately, the Alberta Surrogate Court's ruling in *Johnson* v. *Sand*[5] is one such decision, a circumstance which is particularly unfortunate given the fact that the appeal of the case was discontinued in favour of settlement, so the Alberta Surrogate Court's ruling retains precedential value in Alberta's *Charter* jurisprudence.

## THE *SAND* CASE

The facts of *Sand* are uncomplicated and were not in dispute before the Court. Larry Sand died in April, 2000 due to injuries sustained when he was hit by a motor vehicle in March, 2000. Mr. Sand had been divorced from his wife since 1991. During their marriage, the Sands had two children and Mr. Sand was paying maintenance for both of these children at the time of his death. From May, 1994 until his death, Mr. Sand had been living with Brent Johnson in a same-sex relationship such that the two men "were an interdependent social and economic unit."[6] At the time of his death, Mr. Sand did not have a will and, accordingly, the distribution of his estate fell under Alberta's *Intestate Succession Act*.[7]

The *ISA* provides a scheme for distributing a deceased's estate where no valid will exists: "In essence, the law creates a default will."[8] Generally, where the intestate leaves a surviving spouse and children, the *ISA* provides the first $40,000.00 of the estate to the spouse and divides the remaining portion between the surviving spouse and the children.[9] In the absence of a surviving spouse, the estate is distributed equally among the children.[10] The *ISA* does not define "spouse," but the "historical meaning of 'spouse' in the *ISA* is a husband or wife, *i.e.*, a legally married person."[11] This historical definition did not apply to

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1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. [hereinafter *Charter*]. Section 15(1) reads as follows:

> 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 *Eldridge* v. *B.C.*, [1997] 3 S.C.R. 624 at para. 73.

3 Prominent examples include the Supreme Court of Canada's rulings in *M.* v. *H.*, [1999] 2 S.C.R. 3; *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493; and *Corbiere* v. *Canada*, [1999] 2 S.C.R. 203. Arguably, the Supreme Court has recently narrowed its approach to equality rights again in decisions such as *Lovelace* v. *Ontario*, [2000] 1 S.C.R. 950.

4 See *e.g. Walsh* v. *Bona*, [2000] N.S.J. No. 173 (N.S.C.A.), online: QL (NSJ). In this case the Nova Scotia Court of Appeal found that the province's *Matrimonial Property Act*, R.S.N.S. 1989, c. 275 violated the appellant's equality rights by discriminating against common law spouses. The Court issued a suspended declaration of invalidity, a remedy which did not personally benefit the appellant.

5 *Johnson* v. *Sand*, [2001] A.J. No. 390 (Alta. Q.B.), online: QL (AJ) [hereinafter *Sand* case or *Sand*]; supplementary reasons, [2001] A.J. No. 478 (Alta. Q.B.), online: QL (AJ) [hereinafter *Sand* supplement]. An appeal of both the main judgment and the supplementary reasons was filed, but the case was ultimately settled and the appeal did not proceed.

6 *Sand, ibid.* at para. 4.

7 *Intestate Succession Act*, R.S.A. 2000, c. I-10 [hereinafter *ISA*].

8 *Sand*, *supra* note 5 at para. 24.

9 *ISA*, *supra* note 7 at s. 3(1) and 3(3).

10 *Ibid.* at s. 4.

11 *Sand*, *supra* note 5 at para. 25. See *infra* note 15, however, for a discussion of the decision in *Bodnar* v. *Blacklock Estate*, and its implications for the meaning of "spouse" in the *ISA*, *supra* note 7.

Brent Johnson because he was never legally married to Mr. Sand.[12] Accordingly, Mr. Johnson brought an application for a declaration that the *ISA* violated his section 15 *Charter* right to equality by discriminating against him as a same-sex common-law spouse. Mr. Johnson also sought a corrective remedy which would entitle him to share as a spouse in the *ISA*'s division of Mr. Sand's estate. Thus, the issues before the Alberta Surrogate Court were: (1) whether the *ISA*'s failure to include a same-sex common-law spouse in its distribution scheme unjustifiably infringed Mr. Johnson's equality rights under the *Charter* and (2) if so, what remedy should be provided for this infringement.

Mr. Johnson's application was heard by Justice Perras of the Surrogate Court of Alberta on 28 February 2001. In written reasons filed 2 April 2001, Perras J. concluded that the *ISA* did violate Mr. Johnson's equality rights by failing to include same-sex common-law spouses in the intestate distribution scheme and that this violation of section 15 could not be saved under section 1 of the *Charter*.[13] As a remedy for this unjustifiable *Charter* breach, Perras J. issued a suspended declaration of invalidity. He found the impugned provisions of the *ISA* to be invalid but suspended the effect of this declaration for nine months in order to give the Alberta legislature time to amend the law to remedy the constitutional defect.[14] In addition, this ruling left the *ISA* provisions unchanged for nine months, thereby denying any specific relief to Mr. Johnson. Justice Perras expressly refused to rectify the *ISA*'s invalidity by interpreting the statute in a way which would encompass same-sex common-law spouses within the *ISA*'s distribution scheme and which would thereby have allowed Mr. Johnson to share in the Sand estate. Justice Perras could have achieved this result either by simply interpreting the word "spouse" to include same-sex common-law spouses or by expressly reading words into the statute to clearly cover same-sex common-law spouses.[15]

In considering whether to rectify the constitutional defect by reading words into the *ISA*, Perras J. acknowledged that the Supreme Court of Canada's ruling in *Schachter* v. *Canada*[16] confirmed reading in as a valid remedy for a *Charter* breach. Nevertheless, Perras J. concluded that reading in the words "including a same-sex" before the word "spouse" in the *ISA* was not an appropriate remedy in the *Sand* case because this remedy would not satisfy the element of precision which *Schachter* established as one of the prerequisites for reading in:[17]

> To simply read in the words pressed for does not solve the problem with precision, which the Supreme Court of Canada in Schachter (*supra*) indicated was one of the hallmarks of reading in. Simply reading in the words

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12 Under Alberta law, Mr. Johnson and Mr. Sand could not legally be married. In fact, in order to eliminate any doubt regarding the ability of same-sex spouses to marry in Alberta, in March 2000 the province's *Marriage Act*, R.S.A. 2000, c. M-5 was amended to expressly define marriage as "a marriage between a man and a woman" and to include a provision stating that the *Act*, including the newly incorporated definition, operates notwithstanding sections 2, 7 and 15 of the *Charter, supra* note 1. See *Marriage Act*, R.S.A. 2000, c. M-5, s. 2, as am. by *Marriage Amendment Act*, S.A. 2000, c. 3. Query whether this amendment is constitutional from a division of powers standpoint, given that the federal government retains power over marriage under s. 91(26) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 and the provincial governments only have power to legislate regarding the solemnization of marriage under s. 92(12) of the same document. To date, this question has not been addressed by the courts and is beyond the purview of this paper.

13 See *supra* note 1 for the full text of s. 15(1) of the *Charter*. The entirety of s. 1 reads as follows:

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

14 *Sand*, *supra* note 5 at para. 68.

15 Technically, these remedies are different in that the first remedy simply involves interpreting the statute in a manner consistent with the *Charter* while the second remedy involves putting words into the statute. On this technical basis, the first remedy is arguably more palatable because it does not involve the court in expressly drafting legislation. The effect of these remedies, however, is the same, and Perras J. certainly does not distinguish between the two. Any distinction between these remedies is not critical to my analysis of Perras J.'s comments. In any event, the remedy urged upon the court by Mr. Johnson's counsel was to read in the words "including a same-sex" before the word "spouse" in the impugned sections of the *ISA, supra* note 7. See *Sand*, *supra* note 5 at para. 55. Mr. Johnson's counsel relied on the finding of the Alberta Court of Queen's Bench in *Bodnar* v. *Blacklock Estate*, [2000] A.J. No. 1248 (Alta. Q.B.), online: QL (AJ) [hereinafter *Bodnar*] to conclude that common-law relationships had already been read in as part of the *ISA* reference to "spouse." In *Bodnar*, *ibid.* at para. 1, Belzil J. considered an application by an opposite-sex common-law spouse for an order entitling her to share in the deceased's estate under the *ISA*. Belzil J. found that the applicant and the deceased met all reasonable requirements for a common-law relationship because of the length of their conjugal co-habitation. He also held that no specific definition of the term "common law relationship" was necessary in order to read these words into the statute. Accordingly, Belzil J. ordered that the words "including a common law relationship, which is continuous up to the date of death of the intestate" should be read in wherever the word "spouse" was used in the *Intestate Succession Act*. The appellant in *Bodnar* was therefore deemed to be the surviving spouse of the intestate for the purposes of the statutory distribution.

16 *Schachter* v. *Canada*, [1992] 2 S.C.R. 679 [hereinafter *Schachter*].

17 *Sand*, *supra* note 5 at paras. 57–58.

> contended for before the word spouse where it appears in the *ISA* assumes that the court would then go on to define spouse beyond its historical legal meaning of husband and wife, to include common-law unions of either sex. In short, to simply read in the words contended for solves no problem and is of little or no effect in correcting the inconsistency.
>
> The aspect of defining spouse to include, in essence, common-law unions no matter the sex is a daunting task.

Justice Perras then went on to note that the question of what qualifies as a common-law union for intestacy involves "pressing social policy issues"[18] more suitable for the legislature to resolve. Justice Perras distinguished *Miron* v. *Trudel*[19] and *Grigg* v. *Berg Estate,*[20] two cases in which the courts read common-law spouses into challenged legislation, on the grounds that the courts in these cases read in definitions of common-law spouse which had already been adopted by the legislatures. Finally, noting that different definitions of "spouse" and "common-law spouse" exist under a variety of Alberta statutes, Perras J. concluded that: "In Alberta there is, to date, no consistency in defining spouse or a common-law spouse."[21] Thus, it appears that Perras J. refused to read the required terms into the impugned legislation largely because he could not comfortably predict how the legislature might define these terms for the purposes of the *ISA*'s distribution scheme.

Initially, Perras J. did not address the possibility of providing individual relief to Mr. Johnson pursuant to section 24(1) of the *Charter,* which provides that a court may provide any appropriate and just remedy to an individual whose *Charter* rights have been violated. In supplementary reasons issued at the request of counsel, however, Perras J. considered and summarily dismissed this option:[22]

> Having regard for the direction that there will be a temporary suspension of a declaration of invalidity for a period of nine months in so far as the impugned provisions of the Intestate Succession Act are concerned, it is not possible to fashion an individual remedy pursuant to s. 24 of the *Charter* and I decline to attempt to do so, vide *Miron* v. *Trudel*, [1995] 2 S.C.R. 419; *Schachter* v. *Canada,* [1992] 2 S.C.R. 679.

Thus, Perras J.'s ruling did not entitle Mr. Johnson to share in the Sand estate.

## ANALYSIS

Obviously, Perras J.'s decision provided Mr. Johnson with a hollow victory: Mr. Johnson won the court's acknowledgement that his equality rights were unjustifiably infringed by the *ISA* but still lost the right to share in the division of Mr. Sand's estate. My purpose in this commentary is to analyse Perras J.'s choice of constitutional remedy in light of his finding of a *Charter* breach. First, I argue that Perras J. erred in refusing to apply the remedy of reading in. Second, I argue that, having issued a suspended declaration of invalidity of the impugned provisions of the *ISA*, Perras J. erred in refusing to grant an individual remedy to Mr. Johnson. Finally, I submit that the unjust outcome of this case illustrates the need for courts to dispense with narrow and restrictive approaches to *Charter* remedies in favour of constructions which reflect a large and liberal approach to *Charter* rights.

Justice Perras correctly identified the *Schachter* case as Canada's leading decision on constitutional law remedies in general and on the reading in remedy in particular. In *Schachter*, the Supreme Court considered the appropriate remedy to be granted to a natural parent whose equality rights under section 15 of the *Charter* were breached by the provisions of the *Unemployment Insurance Act, 1971*.[23] The Supreme Court found the challenged provisions of the *Act* to be unconstitutional because they failed to provide natural parents with the same economic benefits as adoptive parents. While the Supreme Court concluded that the appropriate remedy in *Schachter* was to issue a suspended declaration of invalidity, the Court expressly recognized that, in appropriate circumstances, reading in is a legitimate remedy under section 52 of the *Constitution Act, 1982*.[24]

The Supreme Court in *Schachter* held that the first step in choosing a remedy for a *Charter* breach is to determine the extent of the inconsistency between the impugned statute and the *Charter*: if the entirety of the statute or if the statute's purpose violates the *Charter*,

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18 *Ibid.* at para. 61.
19 *Miron* v. *Trudel*, [1995] 2 S.C.R. 418 [hereinafter *Miron*].
20 *Grigg* v. *Berg Estate* (2000), 31 E.T.R. (2d) 214 (B.C. S.C.) [hereinafter *Grigg*].
21 *Sand*, *supra* note 5 at para. 64.
22 *Sand* supplement, *supra* note 5 at para. 2.
23 S.C. 1970–71–72, c. 48.
24 *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

then the whole law must be struck down. On the other hand, if the constitutional defect is limited to an identifiable portion of the statute which does not significantly impact on the whole of the legislation, other remedial options, such as reading in, may be appropriate. The Supreme Court recognized that reading in is only the flip side of the severance remedy: severance allows a court to strike out words or phrases which make an otherwise valid law unconstitutional and reading in allows a court to add words or phrases to a statute necessary to make an otherwise invalid law constitutional. The Supreme Court noted, however, that when applying the reading in remedy, courts must be cautious to give due consideration to both the purposes of the *Charter* and the purposes of the legislature:[25]

> Reading in should therefore be recognized as a legitimate remedy akin to severance and should be available under s. 52 in cases where it is an appropriate technique to fulfil the purposes of the *Charter* and at the same time minimize the interference of the court with the parts of legislation that do not themselves violate the *Charter*.

In light of these dual considerations, the Supreme Court concluded that reading in is an appropriate remedy only in the "clearest of cases."[26]

According to the Supreme Court in *Schachter*, the "clearest of cases" are those in which the following criteria exist: (1) reading in can be done with sufficient precision; (2) reading in the excluded class is consistent with the legislative objective and is less intrusive to this objective than striking down the whole law; (3) reading in will not impose a substantial budgetary burden on the government; and (4) reading in will not significantly alter the non-offending portions of the legislation.[27] In explaining the precision requirement, the Supreme Court stressed the importance of the relationship between severance and reading in, emphasizing that reading in is only appropriate where this remedy can be employed with the same degree of certainty typically associated with the remedy of severance:[28]

> While reading in is the logical counterpart of severance, and serves the same purposes, there is one important distinction between the two practices which must be kept in mind. In the case of severance, the inconsistent part of the statutory provision can be defined with some precision on the basis of the requirements of the Constitution. This will not always be so in the case of reading in. In some cases, the question of how the statute ought to be extended in order to comply with the Constitution cannot be answered with a sufficient degree of precision on the basis of constitutional analysis. In such a case, it is the legislature's role to fill in the gaps, not the court's.

Applying the Supreme Court's comments in *Schachter* to the *Sand* case, it appears that Perras J. erred in rejecting the reading in remedy on the basis that this remedy could not be employed with the requisite precision. With respect, Perras J. interpreted the precision requirement in an unduly restrictive manner, essentially suggesting that remedial precision requires absolute certainty as to how the legislature would define the read in term. In fact, the *Schachter* requirement for remedial precision calls for only two things: first, that the terms to be read in and the place for their inclusion in the legislation are easily identifiable and second, that the terms to be read in have commonly understood meanings. The test really is whether the substance of the required read in is obvious: whether the court has "little choice as to how to cure the constitutional defect"[29] and whether the court can identify a "distinct provision" to rectify the constitutional problem.[30]

As previously noted, Perras J. relied on the *Miron*[31] and *Grigg*[32] cases to illustrate his understanding of the remedial precision requirement. In each of these cases, the court was able to identify *and* define the terms to be read in with absolute certainty because the court simply adopted terms which had already been approved by the legislature. In those cases, the legislatures amended the challenged statutes after the respective cases had been commenced but before the courts had issued their judgments. Accordingly, the courts had considerable comfort in reading the amended definitions into the old statutes so as to benefit the parties before them. Obviously, these cases depict ideal circumstances for employing the remedy of reading in. I suggest, however, that Canadian jurisprudence does not limit the reading in remedy to such circumstances. First, no such

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25 *Schachter*, *supra* note 16 at 702.
26 *Ibid.* at 718.
27 For further discussion, description and explanation of these criteria, see *R.* v. *Sharpe*, [2001] 1 S.C.R. 45 at 113 [hereinafter *Sharpe*]; R. Khullar, "*Vriend*: Remedial Issues for Unremedied Discrimination" (1996) 7 N.J.C.L. 221 at 232–33 and P.W. Hogg, *Constitutional Law of Canada*, looseleaf (Scarborough: Carswell, 1997) at s. 37–12.
28 *Schachter*, *supra* note 16 at 705.
29 Hogg, *supra* note 27.
30 *Sharpe*, *supra* note 27 at 111.
31 *Supra* note 19.
32 *Supra* note 20.

limitation is expressly stated in the *Schachter* decision. Second, since *Schachter*, Canadian courts have employed the reading in remedy on several occasions without the benefit of a preceding legislative amendment and, indeed, even in direct opposition to stated legislative intentions.[33] Finally, restricting the use of the reading in remedy to circumstances where the court can simply mirror a legislative amendment would prevent the court from effectively and immediately protecting the *Charter* rights of individuals where the legislature refuses to act.

In *Schachter*, the Supreme Court referred to its rulings in *Hunter* v. *Southam Inc.*[34] and in *Rocket* v. *Royal College of Dental Surgeons of Ontario*.[35] In both of these cases the Supreme Court had found the relevant statutory schemes to be in breach of the *Charter*. Nevertheless, in both cases the Supreme Court also refused to apply the remedy of reading in because this remedy would have required the Court to essentially establish entirely new systems or regulations dealing with the matters in question. According to the Supreme Court in *Schachter*:[36]

> In such cases, to read in would amount to making *ad hoc* choices from a variety of options, none of which was pointed to with sufficient precision by the interaction between the statute in question and the requirements of the Constitution. This is the task of the legislature, not the courts.

The *Hunter* and *Rocket* cases referred to by the Supreme Court in *Schachter* are much more helpful in defining the parameters of the precision requirement. These cases demonstrate that reading in should not be used where that remedy involves the court in essentially drafting a new regulatory system involving complicated policy choices. In such a circumstance, the court does not have a clear choice with respect to what words to read in — the court has many options to choose from and the choice made will impact the whole statutory scheme.[37] This situation did not present itself, however, with respect to the constitutional breach identified in the *Sand* case.

The only viable option available to rectify the *Charter* problem in *Sand* was to redefine "spouse" either by judicial interpretation or by an express read in, so as to include same-sex common-law couples. This option would not have involved the court in rewriting complicated aspects of the distribution scheme recognized by the *ISA*. The court would simply have recognized that, in modern terms and for the purposes of Alberta's intestacy plan, "spouse" must include more than just an individual involved in a traditional marriage.[38] Of course, in order to arrive at this conclusion, the court has to understand the *ISA* scheme in a liberal, rather than a formalistic fashion.

On the liberal side, Perras J. characterized the *ISA* as a statute which creates a "default will."[39] More formalistically, however, Perras J. also opined early in his judgment that "the primary goal of the *ISA* is to distribute a deceased's property in keeping with values considered basic in 1670"[40] which included distribution based "primarily on marriage bloodlines and generational concepts."[41] With respect, this description of the statute's purpose undermines Perras J.'s own characterization of the statute's function of creating a default will. If the statute does operate as a default will, then we can assume that the distribution scheme in the *ISA* attempts to reflect the distribution that a deceased would likely have chosen if the deceased had made a will. A reasonable assumption is that the deceased

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33 For example, see *Vriend* v. *Alberta*, *supra* note 3, where the Supreme Court of Canada read the words "sexual orientation" into Alberta's *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14 (formerly *Individual's Rights Protection Act*, R.S.A. 1980, c. I-2) notwithstanding the fact that the Alberta legislature had expressly decided not to include this term in the statute. See also *infra* note 46.

34 *Hunter* v. *Southam Inc.*, [1984] 2 S.C.R. 145 [hereinafter *Hunter*].

35 *Rocket* v. *Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232 [hereinafter *Rocket*].

36 *Schachter*, *supra* note 16 at 707.

37 *Taylor* v. *Rossu* (1998), 216 A.R. 348 (Alta. C.A.)[hereinafter *Rossu*], relied on by Perras J., is distinguishable on this same basis. In *Rossu*, the Alberta Court of Appeal considered a common-law spouse's application for spousal support. While agreeing that the legislation in question unjustifiably discriminated against common-law spouses, the Court of Appeal refused to read common-law spouses into the statute and instead issued a suspended declaration of invalidity. The court refused to employ the remedy of reading in because reading the necessary words into the impugned section would have had extensive repercussions for the entire statutory scheme and would have impacted on unrelated and unchallenged statutory provisions.

38 In this respect, the remedial precision criterion is closely linked to another of *Schachter*'s criteria for reading in: namely, the significance of the remaining portion of the legislation. The test employed in *Schachter* regarding the latter criterion is whether the legislature, knowing that the statute would otherwise be held unconstitutional, would have passed the law including the read in provision. See *Schachter*, *supra* note 16 at 712–13. I suggest that the Alberta legislature would have chosen to have an *ISA* including same-sex common-law spouses over no *ISA* at all.

39 *Sand*, *supra* note 5 at para. 24.

40 *Ibid.*

41 *Ibid.*

would have wanted his or her property to be provided to the individuals having the greatest degree of long-term economic and emotional dependence on the deceased: a mate, then children, then other relatives. The concept of a "default will" does not necessarily link the distribution of an estate with marriage, particularly in the present day when many couples, regardless of gender considerations, reside in common-law relationships with their mates.

Section 15 of the *ISA* further demonstrates that emotional and economic dependence, and not marriage itself, is the cornerstone of the statute's distribution scheme. Section 15 expressly recognizes that a spouse who left the intestate and is living with someone else at the time of the intestate's death is not entitled to share in the deceased's estate. This provision prevents even an individual who was legally married to the deceased at the time of death from benefiting from the deceased's estate where that individual has transferred his or her emotional and economic dependence to someone else. Thus, marriage itself clearly is not the determining factor in the *ISA*'s distribution scheme.

Although the remedy sought by Mr. Johnson's counsel was for the court to read in the words "including same-sex" before the word "spouse" in the *ISA*, Perras J. rested much of his decision on his concerns regarding a court-imposed expansion of the term "spouse" to include common-law spouses. In this regard, Perras J. was apparently unwilling to accept counsel's contention that the Alberta courts had already interpreted "spouse" in the *ISA* as including common-law spouses.[42] Arguably, Perras J. erred in dismissing counsel's contention that "spouse" had already been reinterpreted by the court to include common-law spouse. In any event, his points about whether the courts should reinterpret "spouse" in this fashion are troublesome. With respect to the definition of "common-law spouse," Perras J. correctly noted that Alberta legislation *as a whole* does not consistently define this term. Various statutes require different lengths of cohabitation before the cohabitants are recognized as common-law spouses. Once again, however, the fact that "common-law spouse" is defined in different ways for varying legislative purposes does not necessarily mean that this term fails to meet the *Schachter* requirement for remedial precision. Canadian jurisprudence does not require a term to have a single definition before it can be read into a statute. Further, the fact that a given statute may expressly restrict or expand the common definition of a word for the purpose of that statute does not necessarily make the word more difficult to understand in other contexts. Thus, while "common-law spouse" may be defined by the Alberta legislature in differing ways in order to meet the purposes of various statutes, the term retains a generally understood meaning which is sufficiently clear to allow the courts to determine whether an individual claiming to be a common-law spouse should be entitled to benefit as such under the *ISA*. Justice Perras inadvertently recognized this fact when he noted that at least two Alberta statutes, the *Mental Health Act*[43] and the *Municipal Government Act*[44] included common-law spouses without any reference to the length of cohabitation.[45] Obviously the colloquial understanding of a common-law spouse being an unmarried but conjugal-like cohabitant is sufficiently clear for these statutes without the necessity of a statutorily defined length of cohabitation. The term "common-law spouse" certainly constitutes "a commonly used term with an easily discernible common sense meaning."[46]

Finally, the legislature is not powerless to respond to any *Charter* decision or remedy laid down by the courts. Thus, if the Alberta legislature wants to limit the commonly understood definition of a common-law spouse for the purposes of the *ISA*, such action would not be thwarted by the court reading this term into the statute in the *Sand* case. Subject to the requirements of the *Charter*, the legislature is free to amend the distribution scheme in the *ISA* in any manner it chooses at any time.

Overall, then, on the basis of the criteria set down in *Schachter*, the court in *Sand* should have read the required words into the *ISA* to make the statute comply with section 15 of the *Charter*. The words to be read into the statute were ascertainable with sufficient precision. These words, "same-sex common-law spouse," are commonly understood and no intricate rewriting of the statute beyond the addition of these words was necessary. Reading in the excluded group or

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42 See the discussion of *Bodnar*, *supra* note 15.

43 *Mental Health Act*, R.S.A. 2000, c. M-13.

44 *Municipal Government Act*, R.S.A. 2000, c. M-26.

45 *Supra* note 5 at para. 66.

46 This was the characterization of the precision test applied by a majority of the Supreme Court of Canada when electing to read the term "sexual orientation" into Alberta's *Individual's Rights Protection Act* in *Vriend* v. *Alberta*, *supra* note 3 at 571. See also *Ferguson* v. *Armbrust*, [2000] S.J. No. 312 (Sask. Q.B.), online: QL (SJ) and *Re Nova Scotia (Birth Registration No. 1999–02–004200)*, [2001] N.S.J. No. 261 (N.S. S.C.), online: QL (NSJ), both recent decisions in which the courts interpreted the undefined statutory term "spouse" as including individuals in a common-law relationship or applied the remedy of reading in common-law spouses where the statute was found not to include same within its reference to "spouse." Neither court required any specialized definition of "common-law spouse" other than the general understanding that the term refers to someone in an unmarried conjugal relationship.

adopting a definition of spouse to include this group would have been consistent with the legislative objective of creating a default will for intestacy situations. The remedy did not have any budgetary implications for the government because no public expenditure was required. Finally, the remedy would not have had a significant impact on the remaining portion of the legislation because, accepting the statutory purpose described above, the statute's overall distribution scheme would not have been altered.

## Granting an Individual Remedy in Conjunction with a Suspended Declaration of Invalidity

If Perras J. had employed the remedy of reading in, Mr. Johnson would have been included within the *ISA*'s court-imposed expanded definition of "spouse." Having decided instead to issue a suspended declaration of invalidity, however, Perras J. was then called upon to determine whether Mr. Johnson could still be brought within the statute's distribution scheme by virtue of the Court's power to grant an individual remedy under section 24(1) of the *Charter*. The appropriate individual remedy would have been an order entitling Mr. Johnson to be treated as a "spouse" under the *ISA* for the purpose of the distribution of Mr. Sand's estate notwithstanding the suspended declaration of invalidity.

As previously noted, Perras J. ultimately refused to provide Mr. Johnson with such an individual remedy, relying on the Supreme Court of Canada's rulings in *Schachter* and in *Miron* to summarily conclude that "it is not possible to fashion an individual remedy pursuant to s. 24 of the *Charter*"[47] where a suspended declaration of invalidity has been issued. With respect, I submit that this is not the case. First, nothing in the express wording of section 52 or section 24 prohibits their conjunctive use. Second, neither *Schachter* nor *Miron* support this principle. Although an individual remedy was denied in each of these cases, this denial was based on the court's finding that such a remedy was inappropriate in the circumstances. Neither decision went so far as to expressly prohibit, in principle, the granting of an individual remedy in conjunction with a suspended declaration of invalidity where it is just to do so. In fact, Lamer C.J.C.'s statements in *Schachter* that a section 24 remedy will only "rarely" be available in conjunction with a section 52 remedy[48] imply that, in some limited circumstances, such a combined remedy can be appropriately rendered.

In *Miron*, a majority of the Supreme Court applied the remedy of reading in and therefore did not have to expressly rule on whether an individual remedy could be granted where a suspended declaration of invalidity had been issued.[49] Nevertheless, in choosing between the reading in remedy and a suspended declaration of invalidity, McLachlin J. (as she then was) made the following comments regarding the possibility of using the latter remedy in conjunction with an individual remedy for the applicants:[50]

> It is suggested that the Court could fashion a remedy for the appellants under s. 24(1) of the *Charter* ... Assuming the Court were inclined to grant the appellants an exemption from the 1980 legislation and insurance policy provisions, the question remains of how it could do so without creating further inequities between the appellants and others in their situation who have been denied benefits. To avoid this, any constitutional exemption would have to be extended to all similar families. This in turn would require formulation of general criteria of eligibility, thus involving the court in the very activity which would have led it to eschew "reading up" the 1980 statute in conformity with the terms legislated in 1990. Yet to deny such persons a remedy would be to perpetuate the effects of a discrimination which the Court has found to violate the *Charter* when the obvious remedy — the payment of the benefits that should have been paid — remains available.

It is clear that McLachlin J.'s comments do not bar the conjunctive use of a personal remedy and a suspended declaration of invalidity in all cases. Her comments simply reflect her view that, in the case before her, the simplest solution was to read the necessary words into the statute. Evidently her concern in the case before her was that a suspended declaration of invalidity coupled with an individual remedy for the applicant would necessarily open the floodgates for individual remedies being sought by other persons affected by the legislation before the term of suspension was up. Thus, it appears that the only relevant principle established by Canadian jurisprudence is that a personal remedy should only be used in conjunction with a suspended declaration of invalidity in appropriate

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47 *Sand* supplement, *supra* note 5 at para. 2.

48 *Schachter*, *supra* note 16 at 720.

49 The dissenting judges, having found no *Charter* breach, did not comment on appropriate or available remedial options.

50 *Miron*, *supra* note 19 at 509–10.

circumstances.[51] I suggest that Mr. Johnson's situation in *Sand* fulfilled this requirement.

Moreover, apart from meeting the requirements established by the case law, combining an individual remedy with a suspended declaration of invalidity meets objective standards of justice and the overall purposes of the *Charter*. Justice demands that individuals who are wrongly treated by the state and who prove this mistreatment in a court of law be entitled to compensation or a rectification of that wrong. The *Charter* guarantees individuals' fundamental freedoms and rights, including the right to equal treatment and benefit of the law. Justice is not achieved and rights are not effectively guaranteed if individuals who successfully establish that their *Charter* rights have been denied are not given any personal, tangible benefit of such findings.

As noted by Perras J., Mr. Johnson cohabited with Mr. Sand in an economically and emotionally dependent relationship for approximately six years prior to Mr. Sand's death. Surely this relationship would qualify as a common-law union even under the most conservative definition. One can reasonably assume that Mr. Johnson would fall within any definition constructed by the legislature to remedy the constitutional breach. Mr. Johnson was not in a position to wait out the nine month period to see how the legislature would rectify the *Charter* breach because the legislative amendment almost certainly would not operate retroactively and the Sand estate would probably be dispensed by that time. Further, the floodgates concern which apparently influenced McLachlin J.'s comments in *Miron* simply did not arise in Mr. Johnson's case because statistically few people would be expected to be in a position to seek benefits as a same-sex common-law spouse under the *ISA* during the nine month period of suspension. Thus, having decided in favour of a suspended declaration of invalidity, the Court could have and should have ensured a satisfactory personal remedy for Mr. Johnson. As noted by one reputable constitutional law commentator:[52]

> When delaying declarations of invalidity, courts should take steps to prevent irreparable harm to individuals whose rights are violated while also giving governments a realistic time to devise new, constitutionally adequate structures.

## The Need for a "Constitutional Inclusion" Remedy

To this point, my comments have focussed on the legal aspects of Perras J.'s choice of remedy in the *Sand* case. These legal issues are born, however, from a more fundamental problem with the *Sand* case: namely, that the result of the case is unjust. The notion that the *ISA*'s discriminatory effect on Mr. Johnson should be recognized but not rectified is unfair and inconsistent with the spirit and intent of the *Charter*. In this case, the court was not justified in deferring to the legislature to rectify the constitutional wrong because a legislative amendment is unlikely to benefit Mr. Johnson even if it benefits other same-sex common-law spouses in the future.

Early in his judgment, Perras J. noted that the *Charter* "paved the way for the courts ... to grapple from time to time with vexing societal issues as guardians or trustees of new constitutional rights for individual citizens."[53] This description of the court's role under the *Charter* should be applied not only to the court's duty to interpret the *Charter*'s substantive rights but also to the court's obligation to construct appropriate remedies for *Charter* breaches. The *Charter* does indeed mandate the courts to be the guardians of constitutional rights for individual citizens. It is a poor guardian, however, who points to and recognizes existing danger, takes steps to prevent future harm from ensuing, but does nothing to forestall harm that is already occurring.

The Supreme Court of Canada's decision in *Schachter* is nearly a decade old. As illustrated by Perras J.'s ruling in *Sand*, the *Schachter* criteria for reading in are easily subject to misinterpretation and misapplication as the courts struggle to give life to *Charter* rights in the face of new and challenging social issues. Accordingly, Canadian courts need to clarify and expand the remedial options available for *Charter* breaches. Most obviously, there is a need for the Supreme Court of Canada, in a binding judgment, to revisit and clarify its comments in *Schachter* with respect to the criteria of remedial precision. In particular, the Supreme Court must restate the relationship between this element and the need for some degree of legislative deference. To avoid future

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[51] In fact, some commentators argue that Canadian courts have established, and certainly should establish a practice of ensuring that a litigant who is successful in bringing a constitutional challenge receives personal relief from the unconstitutional law where a suspended declaration of invalidity is issued. See *e.g.* K. Roach, *Constitutional Remedies in Canada*, looseleaf (Aurora, Ontario: Canada Law Book., 1994) at paras. 14.1810–14.1859 and the cases referred to therein.

[52] *Ibid.* at para. 14.1768.

[53] *Sand*, *supra* note 5 at para. 10.

misunderstandings, it is also important that the Supreme Court expressly state that *Schachter* should not be interpreted as prohibiting the conjunctive use of section 52 and section 24 remedies. Finally, if section 15 is to be applied in a manner which does not bespeak a "thin and impoverished" view of equality rights, Canadian courts must correspondingly expand the selection of remedies available under sections 52 and 24 for equality breaches, particularly where the breaches take the form of under-inclusive legislation. One option would be for the courts to formally recognize a remedy of "constitutional inclusion": essentially allowing applicants to personally benefit where the court suspends a declaration of invalidity for under-inclusive legislation. Alternatively, the courts could establish the remedy of a "temporary read in," where words would be read into a statute or included as part of statutory interpretation only for the duration of a suspended declaration of invalidity. This temporary read in would not unduly tread on the legislature's role because the read in would not operate on a permanent basis. Nevertheless, this option would still provide relief to individuals whose rights would otherwise remain violated during the suspension period.[54]

## Conclusion

The decision in *Sand* illustrates the ongoing challenge faced by Canadian courts in attempting to fashion appropriate remedies for legislative breaches of the *Charter*'s equality protections. The courts have been encouraged to give a liberal interpretation and application of the *Charter*'s equality provision. At the same time, however, the Courts have been increasingly criticized for becoming too activist in applying the *Charter* and thereby usurping the role of elected legislators. The latter criticisms may be responsible for the tentative approach which some courts, such as the Alberta Surrogate Court in *Sand*, now appear to be taking to *Charter* remedies. However, Canadian jurisprudence cannot be allowed to develop with broadly interpreted *Charter* equality rights alongside constrained *Charter* remedies. Permitting the law to develop along these lines reduces the practical effect of *Charter* rights. This approach prevents individuals, such as Mr. Johnson, from obtaining justice and, in the end, results in a thin and impoverished *application* of the *Charter*'s equality rights.❑

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[54] Another option would be for the legislatures to give retroactive effect to any statutory changes made in response to a temporary declaration of invalidity. While the courts could recommend such action, the courts have no power to mandate this retroactive response, so this remedial option would be entirely up to the legislatures to grant. Further, this remedy would not offer a very practical solution to an individual whose rights have been violated since that individual might have to wait months for the legislative response to take effect. In a case such as *Sand* for example, by the time the legislative response occurs the estate in question might well have been dissipated.