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Freedom to Conduct a Business, a Comparative Law Perspective

Canada

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FREEDOM TO CONDUCT A BUSINESS, A COMPARATIVE-LAW PERSPECTIVE

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Abstract

This document is part of a series of Comparative Law studies that analyze the freedom to conduct a business in different legal orders around the world. After a brief historic introduction and a presentation of applicable legislation and case law, the content, limits and possible evolution of this freedom are examined.

The subject of this study is Canada's federal legal system.

While the freedom to conduct a business is a common law right, it does not possess supralegislative status. Nevertheless, various constitutional rules — including those arising from Canada's federal structure and from the *Charter of Rights* — afford a degree of protection to businesses and to business activities.

The study notes the pervasive influence of federalism on business regulation in Canada. The rules allocating responsibility between the Parliament and the provinces do not affect only the level of government at which regulatory laws are enacted, but also affect the form and content of those laws.

AUTHOR

This study has been written by **Professor Ian B. LEE**, Professor of Law, Faculty of Law, University of Toronto, at the request of the "Comparative Law Library" Unit, Directorate-General for Parliamentary Research Services (DG EPRS), General Secretariat of the European Parliament.

The structure of this study was established by the European Parliament's Comparative Law Library to enable a comparison between the different studies in the series. For practical reasons, there is a certain amount of repetition between the content of Chapters I, II and III of the study, which are essentially descriptive in nature, and Chapter IV, which is more of a critical commentary, in order to make the study easier to use.

EDITOR

Prof. Dr. Ignacio DÍEZ PARRA, Head of the "Comparative Law Library Unit".
To contact the Unit, please send an email to: EPRS-ComparativeLaw@europarl.europa.eu

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List of Abbreviations

§	section *("§§" is an abbreviation for "sections")*
ABCA	Alberta Court of Appeal
AC	Appeal Cases
Aff'd	affirmed
amend.	amendment
art.	article
BCCA	British Columbia Court of Appeal
BCJ	British Columbia Judgments
BCLR	British Columbia Law Reports
BCSC	British Columbia Supreme Court
CA	Court of Appeal
CanLII	Canadian Legal Information Institute
CCQ	Civil Code of Quebec
CCSM	Continuing Consolidation of the Statutes of Manitoba
cl.	Clause
CFREU	Charter of Fundamental Rights of the European Union
CQLR	Compilation of Quebec Laws and Regulations
CSNu	Consolidated Statutes of Nunavut
DLR	Dominion Law Reports
ed./eds.	Editor/editors
EdN	Editor's note
EUCFR	Charter of Fundamental Rights of the European Union
FC	Canada Federal Court Reports
FCA	Federal Court of Appeal
HCJ	High Court of Justice
JCPC	Judicial Committee of the Privy Council
LCBO	Liquor Control Board of Ontario
NWT	Northwest Territories
NWTSC	Northwest Territories Supreme Court
OAR	Ontario Appeal Reports
OJ	Ontario Judgments
ONCA	Ontario Court of Appeal
ONCJ	Ontario Court of Justice
ONSC	Ontario Superior Court of Justice
OR	Ontario Reports
p./pp.	page / pages
par.	paragraph

PESCAD	Prince Edward Island Court of Appeal
QCCA	Court of Appeal of Quebec
QCCS	Quebec Superior Court
rev'd	reversed
rev. ed.	revised edition
RJQ	Recueils de jurisprudence du Québec
RSA	Revised Statutes of Alberta
RSBC	Revised Statutes of British Columbia
RSC	Revised Statutes of Canada
RSNB	Revised Statutes of New Brunswick
RSNL	Revised Statutes of Newfoundland and Labrador
RSNS	Revised Statutes of Nova Scotia
RSNWT	Revised Statutes of the Northwest Territories
RSO	Revised Statutes of Ontario
RSPEI	Revised Statutes of Prince Edward Island
RSY	Revised Statutes of Yukon
s./ss.	Section/sections
SC	Statutes of Canada
SCC	Supreme Court of Canada
SCR	Supreme Court Reports
SNL	Statutes of Newfoundland and Labrador
SNWT	Statutes of the Northwest Territories
SO	Statutes of Ontario
SQ	Statutes of Quebec
SS	Statutes of Saskatchewan
TFEU	Treaty on the Functioning of the European Union
UKPC	Judicial Committee of the Privy Council
US	United States Reports
vol.	volume

Summary

This Study of the manner in which the freedom to conduct a business* is recognized, and limited, in the Canadian legal system develops three main themes.

The first theme concerns the status of the freedom to conduct a business as a legal norm. In Canada, the formal constitution is silent as to a freedom to conduct a business. Commercial economic rights are, in general, conspicuously absent from the *Canadian Charter of Rights and Freedoms*, reflecting a conscious choice of the Framers. The freedom to conduct a business is instead a common law right; like all common law rights, commercial freedom can be limited, modified or even taken away by legislation.

A second theme is that, despite the absence of a freedom to conduct a business from the formal constitution, various constitutional rules — including those arising from Canada's federal structure and from the *Charter of Rights* — afford a degree of protection to businesses and to business activities. The freedom of expression, in particular, has received an interpretation sufficiently broad to encompass a range of activities in connection with the conduct of business.

The pervasive influence of federalism on business regulation in Canada constitutes a third theme. The rules allocating responsibility between the Parliament and the provincial legislatures do not affect only the level of government at which regulatory laws are enacted; they also affect the form and content of those laws. This is especially true of federal legislation, the features of which are often driven by the significant constitutional constraints on Parliament's jurisdiction.

* EdN.: to compare with other legal systems, see other studies in the "***Freedom to conduct a business***" series:

- **European Union**: ZILLER, J.: *La liberté d'entreprise, une perspective de droit comparé : Union européenne,* Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), janvier 2024, XII et 135 pp., référence PE 757.620;
- **France**: PONTHOREAU, M.-C.: *La liberté d'entreprise, une perspective de droit comparé : France,* Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), avril 2024, XII et 124 pp., référence PE 762.291;
- **Germany** : REIMER, F.: *Die unternehmerische Freiheit, eine rechtsvergleichende Perspektive: Deutschland*, Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), April 2024, XV und 140 S., Referenz PE 760.415;
- **Mexico**: FERRER MAC-GREGOR POISOT, E.: *La libertad de empresa, una perspectiva de Derecho Comparado: México*, Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), mayo 2024, XIV y 194 pp., referencia PE 762.318;
- **Spain**: GONZÁLEZ-TREVIJANO SÁNCHEZ, P.: *La libertad de empresa, una perspectiva de Derecho Comparado - España*, Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), marzo 2024, XVI y 160 pp., referencia PE 760.373;
- **Switzerland**: MARTENET, V.: *La liberté d'entreprise, une perspective de droit comparé – Suisse*, Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), juin 2024, XII et 136 pp., référence PE 762.343.

I. Historical Evolution of the Recognition of the Freedom to Conduct a Business in the Canadian Legal System

I.1. General overview

As the Supreme Court of Canada observed in *Annapolis Group v Halifax*,[1] the *Canadian Charter of Rights and Freedoms* "*is not, and never has been, the sole source of Canadians' rights against the state*."[2] Prior to the enactment of the *Charter* in 1982, Canadians' rights were recognized by the common law, by legislation or by earlier constitutional instruments, including the *Constitution Act 1867*.

A "freedom to conduct a business" is among the rights understood to be enjoyed by Canadians under the common law. Such rights do not depend on the operation of legislation for their existence. They can be regulated, modified or even taken away by appropriate legislation, but they are rights nevertheless. Explicit references to a common law freedom to conduct a business in the case law are not frequent; nevertheless, various judicial decisions (to be discussed in Part III.1 below) recognize or rely upon the existence of such a right.

Although the *Constitution Act 1867* does not refer to a freedom to conduct a business, the case law under this foundational document is relevant to our subject in at least two respects. First, during the tenure of the Judicial Committee of the Privy Council (JCPC) as final arbiter of legal disputes between the federal government and the provinces, that body repeatedly invalidated attempts by the federal Parliament to regulate local businesses, on the ground that the power to enact such regulations belonged exclusively to the provinces. Obviously, such rulings conferred at best, only qualified protection for a freedom to conduct a business, for the JCPC did not hold that business could not be regulated, but only that it was for the provinces, rather than the federal government, to do so.

Second, the JCPC's reasoning in the relevant cases was such as to encourage the understanding of business or contractual freedom as a "right" of Canadians. Federal regulatory legislation was characterized as "*interference with particular trades in which Canadians would [otherwise] be free to engage in*," and as thus invading the field of "civil rights," which had been entrusted exclusively to the provinces by the Constitution.[3]

Prior to the advent of the *Charter*, constitutional judicial review focused almost exclusively on the division of powers between the federal and provincial legislatures. The *Charter* considerably expanded the scope of review by entrenching a catalogue of rights that can be infringed by either level of government only (1) if the government satisfies a court that the infringement is a "reasonable limit" on the right;[4] or (2) in accordance with an override provision that is available for certain of the rights, by providing explicitly within the legislation that the latter shall operate notwithstanding the specified rights.[5]

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1 *Annapolis Group Inc. v Halifax Regional Municipality*, 2022 SCC 36.

2 *Ibid.* at par. 24.

3 See Part III.2.1 below.

4 *Canadian Charter of Rights and Freedoms* ("*Charter*"), s 1.

5 *Charter*, s. 33. See Part III.1.2.1.1 below.

For purposes of the present study, what is most significant about the *Charter* is that economic rights in general, including the right to property, freedom of contract, and freedom to conduct a business, are absent from the text of that instrument. Private economic actors have attempted to argue that certain provisions of the *Charter*, especially the right to "liberty," should be interpreted as including economic liberty. These attempts have been almost entirely unsuccessful,[6] but it should be noted that the judicial interpretation of a different provision, the "freedom of expression," has been sufficiently broad that a range of activities in connection with the conduct of business could, in principle, fall within its scope.[7]

I.2. Appearance of the concept at a constitutional level and factors leading to its subsequent evolution

The various country studies carried out at the request of the European Parliamentary Research Service divide the historical overview into periods "before" and "after" the appearance of the concept in the constitutional system under examination. In the case of Canada, there is no pivotal moment: the "freedom to conduct a business" does not appear in the formal constitution; nor has such a "freedom" ever been used by a court as a basis for invalidating legislation.

As a common law right, the freedom to conduct a business is of ancient origin. BLACKSTONE referred to the value attached by "the English" to "three great advantages, religion, liberty and commerce";[8] and the *Royal Proclamation 1763*, providing for the government of the North American territories newly acquired by Great Britain from France, described as one of its aims "*that all of Our loving Subjects [...] may avail themselves [...] of the great Benefits and Advantages which must accrue [...] to their Commerce, Manufactures, and Navigation*."[9] There is not, however, a unique constitutional or legislative instrument, or judicial decision, which can usefully be identified as introducing the concept of a freedom to conduct a business into Canadian law.

* * *

In general, it may be said that the enduring values underlying the Canadian legal system include both a baseline "freedom" to engage in various activities, including those of a commercial nature, and a recognition that it is a legitimate and even important activity of government to regulate business in the public interest. It will be the task of the remainder of this Study to expand on these ideas by elucidating the manner in which the freedom to conduct a business is recognized, and limited, in the Canadian legal system.

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6 See Part III.3.2 below.

7 See Part III.3.3 below.

8 BLACKSTONE, W.: *Commentaries on the Laws of England*, Book 1, Oxford, Clarendon, 1765, p. 253 (quoting MONTESQUIEU).

9 *Royal Proclamation, 1763* (GB), reprinted in RSC 1985, App II, No 1.

II. Constitutional and Legislative Provisions

II.1. Constitutional provisions

Canada's constitution is partly written[10] and partly unwritten.[11] The two most significant written instruments are the *Constitution Act 1867* and the *Constitution Act 1982*.

The "right to carry on a business" does not appear in the instruments that make up the written component of Canada's constitution. Indeed, economic rights in general are noticeably absent from the text of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").[12] Nevertheless, features of Canada's federal structure, as established primarily by the *Constitution Act 1867*, have the effect of circumscribing the power of governments to regulate the conduct of business; and certain provisions of the *Constitution Act 1982* provide a measure of protection to aspects of the conduct of business.

II.1.1. *Constitution Act 1867*

The *Constitution Act 1867* establishes a federal and parliamentary system of government. Within the *Constitution Act 1867,* sections 91 through 95 exhaustively distribute legislative authority between the federal Parliament and the legislatures of the provinces. Most relevant to the subject of this Study is the allocation to the federal Parliament of authority to make laws in relation to "*the regulation of trade and commerce*" (s. 91(2)); and to the provincial legislatures of authority to make laws in relation to "*property and civil rights in the Province*" (s. 92(13)).

FRAME 1

***Constitution Act 1867*, sections 91(2) and 92(13)**

91 [T]he exclusive legislative authority of the Parliament of Canada extends to [...]

2. The Regulation of Trade and Commerce.

92 In each Province the Legislature may exclusively make Laws in relation to [...]

13. Property and Civil Rights in the Province.

Although ss. 91 and 92 are framed as grants of legislative authority, the attributions of authority are "exclusive." It follows from this that each level of government is deprived of the power to legislate with respect to subject-matters that have been assigned exclusively to the other level. In particular, as will be seen when the relevant case law is examined in Part III of the present study, the concept of "civil rights" has been interpreted as encompassing transactions as well as manufacturing and processing activities taking place within a province. Thus, the exclusive allocation of "civil rights" to the provinces has had the effect of significantly

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10 The written instruments include those listed in the Schedule to the *Constitution Act 1982*.

11 The preamble of the *Constitution Act 1867* states that Canada shall have a constitution "*similar in principle to that of the United Kingdom*." The distinguishing feature of the U.K. constitution is, of course, that it rests upon unwritten conventions. Like the conventions of the U.K. constitution, the unwritten component of the Canadian constitution is recognized as binding by those to whom its norms apply. As a generalization, the conventions are not judicially enforced. See ROWE, M. and DÉPLANCHE, N.: "Canada's Unwritten Constitutional Order: Conventions and Structural Analysis", *The Canadian Bar Review*, Vol. 98 n°3, 2020, p. 431 at p. 433.

12 The Charter is Part I of the *Constitution Act 1982*.

limiting the authority of the federal Parliament to enact laws regulating those activities and, more generally, to enact laws regulating the conduct of business.

The division of legislative powers also limits, to a lesser degree, the provincial power to regulate business, in particular, insofar as a province seeks to restrict cross-border transactions or to legislate with respect to core aspects of certain lines of business the regulation of which is placed within exclusive federal jurisdiction by other provisions within s. 91 — for example, banking, telecommunications, aviation and interprovincial transportation.[13] Again, the most relevant judicial decisions in this respect are described more fully in Part III below.

II.1.2. *Constitution Act 1982*

The enactment of the *Constitution Act 1982* modified the Canadian constitution in several important respects. For purposes of the present study, the two most important changes were the addition of a catalogue of fundamental rights — the *Canadian Charter of Rights and Freedoms* — and the recognition and affirmation of the rights of the First Nations, Inuit and Métis peoples of Canada.

II.1.2.1. Canadian Charter of Rights and Freedoms

II.1.2.1.1. Structure of the Charter

The *Canadian Charter of Rights and Freedoms* guarantees a catalogue of fundamental freedoms and other basic rights against infringement by the Parliament or government of Canada, or by the legislature or government of a province. The rights and freedoms contained in the *Charter* fall into the following general categories:

- Fundamental freedoms — for example, the freedoms of religion and conscience; of thought, expression and the press; of assembly; and of association (s. 2)
- Democratic rights — including the right to vote and to stand for election to Parliament or a legislature) (ss. 3-5)
- Mobility rights — in general terms, the right of citizens and permanent residents to enter, exit and move interprovincially within Canada (s. 6)
- Legal rights — including notably the right to "*life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice*" (s. 7) and otherwise consisting of a list of procedural and substantive rights associated with the administration of justice (ss. 8-14);
- The right to equality without discrimination (s. 15); and
- Rights concerning the use of English or French, as the official languages of Canada (ss. 16-20);[14] and the educational rights of members of minority official language communities (ss. 21-23).

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[13] Some of these sectors are explicitly mentioned in ss. 91 and 92, or obviously included in a listed class of subject (for example, s. 91(15) ("banking"), s. 92(10)(a) (interprovincial transportation and communications), Others have been determined by case law not to come within any class of subject listed in s. 92, which has the effect of placing them under the residual authority of Parliament under s. 91 to make laws for the "peace, order and good government" of Canada. For example, *Johannesson v Municipality of West St Paul*, [1952] 1 SCR 292 (aeronautics).

[14] The *Charter* also includes rights relating to the status and official use of English and French in New Brunswick: ss. 16.1, 17(2), 18(2), 19(2) and 20(2).

The guarantee of rights and freedoms under the *Charter* is qualified in two main ways. First, s. 1 of the *Charter* provides that the rights and freedoms it contains are subject to "*such reasonable limits prescribed by law as are demonstrably justified in a free and democratic society*." Second, s. 33 empowers Parliament or a provincial legislature to derogate from certain of the rights and freedoms in the *Charter* by including in an Act of Parliament or of a provincial legislature an express declaration that the legislation is to operate "notwithstanding" the right or freedom in question, for a (renewable) period of up to five years.[15]

II.1.2.1.2. Absence of a "freedom to carry on a business"

To what extent does the *Charter* protect a "freedom to carry on a business"? In answer to this question, an obvious starting point is the observation that the *Charter* does not contain a "freedom to carry on a business," or even a "right to the enjoyment of property." In general, economic rights are absent from the text of the *Charter*.

II.1.2.1.3. Right to pursue the "gaining of a livelihood' in connection with interprovincial mobility

The provision that comes closest to a freedom to conduct a business, at least at first glance, is s. 6(2)(b), which refers to the "*gaining of a livelihood*". However, despite what it might seem if s. 6(2)(b) is read in isolation, s. 6 of the *Charter* does not confer a general guarantee of the right to "*pursue the gaining of a livelihood*." The surrounding provisions make clear that the guarantee is of a more limited nature.

For one thing, the right conferred by s. 6(2) is immediately qualified by s. 6(3). From this it is clear that any right not to be subject to laws that impede the gaining of a livelihood is conferred only to the extent that those laws either are not of general application or discriminate on the basis of province of residence. For another thing, s. 6 appears under the heading "Mobility Rights" and adjacent to a provision (s. 6(2)(a)) dealing explicitly with the right to move interprovincially. As will be explained in Part III, the courts have accordingly declined to interpret s. 6(2)(b) as conferring a freestanding right to pursue a gainful occupation.

FRAME 2

***Canadian Charter of Rights and Freedoms*, sections 6(2) and 6(3)**

Mobility rights

6 (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(a) to move to and take up residence in any province; and

(b) to pursue the gaining of a livelihood in any province.

(3) The rights specified in subsection (2) are subject to

(a) any laws or 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[...]

[15] Legislation employing the s. 33 mechanism is valid without regard to whether it is a "reasonable limit" within the meaning of s. 1. The power to derogate from Charter rights or freedoms under s. 33 has never been used by the Parliament of Canada. As for its use by provinces, s. 33 was used systematically by the province of Québec until 1985, was used on rare occasions by a few provinces between that date and the late 2010s, and has been used with somewhat increasing frequency since 2018. See HOGG, P. W. and WRIGHT, W.: *Constitutional Law of Canada*, 5th ed, Toronto, Thomson Reuters, 2019 (loose-leaf updated July 2023), s 39:2.

II.1.2.1.4. "Liberty"

The wording of certain provisions of the *Charter* is such that they could, in theory, have been interpreted as embracing something akin to a freedom to carry on a business. An obvious example is s. 7, which guarantees the right not to be deprived of (among other things) "*liberty [...]. except in accordance with the principles of fundamental justice*."

However, Canadian courts have consistently declined to adopt such a broad interpretation of s. 7. As is explained in Part III, the judiciary has understood the omission of economic rights, such as the right to property, to be the result of a conscious choice by the Framers,[16] and has not wished to interpret other rights in such a manner as to circumvent the Framers' deliberate omission.

FRAME 3

***Canadian Charter of Rights and Freedoms*, section 7**

7 *Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.*

II.1.2.1.5. "Freedom of expression"

The freedom of expression is another guarantee the wording of which is sufficiently broad that it could, at least in theory, embrace a wide range of activities connected with the carrying on of business. As is explained in Part III, this provision has in fact received a generous interpretation by the courts, and confers a measure of protection for certain aspects of the conduct of business, including but not limited to advertising.

FRAME 4

***Canadian Charter of Rights and Freedoms*, section 2(b)**

2 Everyone has the following fundamental freedoms: [...]

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; [...].

II.1.2.1.6. Other provisions of the Charter

Many other provisions of the *Charter* that do not refer to concepts directly related to the conduct of business have been invoked by business organizations, with varying degrees of success. Provisions successfully claimed by business corporations (in addition to the freedom of expression, already discussed above) include:

- The right to be secure against unreasonable search or seizure;[17] and
- The right to be tried within a reasonable time.[18]

Rights that the courts have held are not enjoyed by business corporations include (in addition to the right to "liberty," already discussed above):

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16 See Part III.3.2 below.

17 *Charter*, s. 8; see *Hunter v Southam Inc*, [1984] 2 SCR 145, *Thomson Newspapers Ltd v Canada*, [1990] 1 SCR 425.

18 *Charter*, s. 11(b); see *R v CIP Inc*, [1992] 1 SCR 843.

- Mobility rights;[19]
- The right not to be subjected to cruel and unusual treatment or punishment;[20]
- The right not to be compelled as a witness against oneself;[21]
- The right to trial by jury;[22]
- The right to an interpreter;[23] and
- The right to equality without discrimination.[24]

In addition, business corporations have successfully relied on the freedom of religion to challenge the validity of legislation under which they were being prosecuted.[25]

These provisions, and the case law interpreting them, will not be specifically discussed in this study, as there is no suggestion in any of the cases, even when the provisions were invoked by business enterprises, that the rights encompass a general freedom to conduct a business. Rather, the question was whether the specific constitutional rights in question are, and should be, available to corporations as legal persons. This question is an important one, but one that lies beyond the scope of the present study.

II.1.2.2. Rights of the Indigenous peoples of Canada

The Canadian legal system also accords normative force to Indigenous rights, understood as legal rights of Indigenous peoples arising by virtue of the latter's longstanding occupation of the land before the arrival of Europeans, as well as the rights acquired by the Indigenous party to treaties with the Crown. Such rights were recognized, albeit inconsistently, prior to 1982. A significant step was taken in s. 35 of the *Constitution Act 1982*, which explicitly "recognizes and affirms" those rights and has been interpreted by the Supreme Court as protecting Indigenous rights from unjustified governmental infringement.

According to the prevailing interpretation of s. 35, the rights protected by that provision may, depending on the particular historical practices of the Indigenous community in question or the terms of any treaty between that group and the Crown, include the right of the members of the group to undertake certain activities on a commercial basis. The relevant case law under s. 35 will be discussed further in Part III below.

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19 *Charter,* s. 6; see Part IV.8.6 below.

20 *Charter*, s. 12; see *Québec v 9147-0732 Québec inc*, [2020] 3 SCR 426, discussed in note 397 below.

21 *Charter*, s. 11(c); see *R v Amway Corp*, [1989] 1 SCR 21.

22 *Charter*, s. 11(f); see *PPG Industries Canada Ltd v Canada*, [1982] BCJ No. 1799, 40 BCLR 299 (SC), aff'd [1983] BCJ No 2260 (CA).

23 *Charter*, s. 14; see *116845 Canada Inc c Québec (Régie des permis d'alcool)*, [1991] RJQ 1655 (CS).

24 *Charter*, s. 15; this provision appears explicitly to exclude corporations from the benefit of the guarantee, as it uses the term "individual" to designate those on whom the right is conferred. See *Re Aluminum Co of Canada Ltd and the Queen in right of Ontario*, [1986] OJ No 697 (HCJ); *Homemade Winecrafts (Canada) Ltd v British Columbia (Attorney General)*, [1986] BCJ No 2404, 26 DLR (4th) 468 (SC); *Surrey Credit Union v Mendonca*, [1985] BCJ No 2838 (SC). See also *Church of Atheism of Central Canada v Canada*, 2019 FCA 296, par. 13; *Humanics Institute v Canada*, 2014 FCA 265, par. 12.

25 *Charter*, s. 2(a); see *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295; *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713. The Court avoided the need to address the question whether corporations, as artificial entities, are capable of holding and manifesting religious beliefs, on the basis that, as criminal accused, they were entitled to invoke the unconstitutionality of the statute under which they were being prosecuted, regardless of whether it was the corporations' own religious freedom that was infringed. See *Big M, par.* 39-40; *R v Wholesale Travel Group Inc*, [1991] 3 SCR 154, at par. 179.

FRAME 5

***Constitution Act 1982*, section 35(1)**

35 *(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.*

II.2. Legislation

The system for the legal protection of fundamental rights in Canada includes, in addition to constitutional instruments, subconstitutional legislation enacted variously by the federal Parliament and the provincial legislatures. Of particular significance are two categories of such legislation:

- legislation, such as the *Canadian Bill of Rights*,[26] concerned with fundamental rights in general; and
- legislation that is commonly referred to in Canada as "human rights legislation" but is more specifically directed at discrimination.

The freedom to conduct a business is also a value that informs much ordinary legislation, including that in relation to competition law.

II.2.1. *Canadian Bill of Rights*

The *Canadian Bill of Rights* ("*Bill of Rights*"), a predecessor to the *Charter*, was enacted by the federal Parliament in 1960. The statute recognizes and affirms a catalogue of rights similar to that contained in the *Charter*, and remains in force today. Like the *Charter*, the *Bill of Rights* is silent as to a freedom to conduct a business. However, unlike the *Charter*, the *Bill of Rights* recognizes a right to the enjoyment of property.[27]

As a federal statute, the *Bill of Rights* applies to the federal government and to the interpretation of federal legislation. It does not constrain the provinces, although Alberta and Québec have since enacted analogous legislation[28] and another province — Saskatchewan — has had its own bill of rights since 1947.[29] In part because of its subconstitutional status and in part because of the wording of its operative provisions, the judiciary has tended to interpret and apply the *Bill of Rights* cautiously.[30] In practice, the document plays only a very minor role, especially as compared with the *Charter* and the human rights legislation to be described in the next section, in Canada's system of fundamental rights protection.

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[26] *Canadian Bill of Rights*, SC 1960, c 44.

[27] Section 1(a).

[28] *Alberta Bill of Rights*, RSA 2000, c A-14; *Charter of Human Rights and Freedoms*, CQLR c C-12. In relation to the right to enjoyment of one's property, see s 1(a) of the *Alberta Bill of Rights* and s 6 of the Québec *Charter of Human Rights and Freedoms*.

[29] *Saskatchewan Bill of Rights Act, 1947*, SS 1947, c 35; now see *The Saskatchewan Human Rights Code, 2018*, SS 2018, c. S-24.2, ss. 4-8.

[30] See *R v Therens*, [1985] 1 SCR 613 at par. 48 ("an evident fact of Canadian judicial history [is] that on the whole, with some notable exceptions, the courts have felt some uncertainty or ambivalence in the application of the *Canadian Bill of Rights* because it did not reflect a clear constitutional mandate to make judicial decisions having the effect of limiting or qualifying the traditional sovereignty of Parliament.")

FRAME 6

***Canadian Bill of Rights*, section 1(a)**

SC 1960, c 44

1 *It is hereby recognized and declared that [...] there have existed and shall continue to exist [...]*

(a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

II.2.2. Federal and provincial human rights legislation

The "human rights legislation" in force in each province and at the federal level is of varying scope, depending on the jurisdiction.[31] As a generalization, these laws provide protection from discrimination by government or by private sector behaviour in certain settings, especially employment, housing and the provision of goods and services.

As these laws are principally concerned with discrimination rather than with the protection of fundamental rights in general, most of them do not mention a freedom to conduct a business. An exception is the legislation of Saskatchewan, which has, since 1947,[32] recognized a "*right to carry on any [...] business or enterprise under the law without discrimination.*" In addition, provincial and territorial human rights legislation includes, as one of the settings in which discrimination is prohibited, membership in professional, business, trade, occupational or similar associations.[33]

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[31] *Canadian Human Rights Act*, RSC 1985, c H-6; *Alberta Human Rights Act*, RSA 2000, c A-25.5; *Human Rights Code*, RSBC 1996, c 210 (British Columbia); *The Human Rights Code*, CCSM c H175 (Manitoba); *Human Rights Act*, RSNB 2011, c 171 (New Brunswick); *Human Rights Act, 2010,* SNL 2010, c H-13.1 (Newfoundland and Labrador); *Human Rights Act*, SNWT 2002, c 18 (Northwest Territories); *Human Rights Act*, RSNS 1989, c 214 (Nova Scotia); *Human Rights Act*, CSNu, c H-70 (Nunavut); *Human Rights Code*, RSO 1990, c H.19 (Ontario); *Human Rights Act*, RSPEI 1988, c H-12 (Prince Edward Island); *Charter of Human Rights and Freedoms*, CQLR c C-12 (Québec); *The Saskatchewan Human Rights Code, 2018,* SS 2018, c. S-24.2; *Human Rights Act*, RSY 2002, c 116 (Yukon).

[32] *Saskatchewan Bill of Rights Act, 1947*, SS 1947, c 35, s 9; now see Saskatchewan Human Rights Code, note 31 above, s 9.

[33] Alberta *Human Rights Act,* note 31 above, s 9 ("employers' organization or occupational association"); B.C. *Human Rights Code*, note 31 above, s 14 ("employers' association or occupational association"); Manitoba *Human Rights Code,* note 31 above, s. 14(6) ("employers' organization, occupational association, professional association or trade association"); New Brunswick *Human Rights Act,* note 31 above, s 4(3) ("employers' organization"); NWT *Human Rights Act,* note 31 above, s 10(1) ("employers' organizations organization or occupational association"); Nova Scotia *Human Rights Act*, note 31 above, s. 5(1)(g) ("membership in a professional association, business or trade association, employers' organization or employees' organization"); Ontario *Human Rights Code,* note 31 above, s. 6 ("membership in any trade union, trade or occupational association or self-governing profession"); Nunavut *Human Rights Act,* note 31 above, s. 11(1) ("trade association, occupational or professional association or society, employers' organization"); PEI *Human Rights Act*, note 31 above, s 9 ("business, professional or trade association"); Québec *Charter of Human Rights and Freedoms,* note 31 above, s. 17 ("association d'employeurs ou de salariés ou de tout ordre professionnel ou association de personnes exerçant une même occupation"); *Saskatchewan Human Rights Code*, note 31 above, s 17 ("professional society or other occupational association"); Yukon *Human Rights Act,* note 31 above, s 9(c) ("trade association, occupational association, or professional association").

FRAME 7

***Saskatchewan Human Rights Code, 2018*, section 9**

SS 2018, c S-24.2

9 *Every person and every class of persons has the right to engage in and carry on any occupation, business or enterprise under the law without discrimination on the basis of a prohibited ground.*

II.2.3. Other legislation

Despite its absence from formal constitutional instruments and its relative absence even from subconstitutional human rights legislation, the freedom to conduct a business remains a value having an undeniable influence on the content of the law.

Examples abound of legislation that may be viewed as connected with the implementation of that value or, alternatively, with the reconciliation of commercial freedom with other values. One obvious example is antitrust legislation,[34] which limits the freedom of some economic actors in order to protect consumers, but also (in the words of the Canadian legislation) "*to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy*"[35] (i.e., to protect the equal commercial freedom of smaller businesses).

A similar influence can be observed in the law regarding municipalities. For example, Ontario's *Municipal Act*, which grants to municipalities the power to license and regulate businesses, has since the early 20th century withheld from them the power to create monopolies (absent specific authorization by the legislature).[36]

FRAME 8

***Municipal Act, 2001* (Ontario), section 18**

SO 2001, c 25

18 *A municipality shall not confer on any person the exclusive right of carrying on any business, trade or occupation unless specifically authorized to do so under any Act.*

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[34] See Part IV.1.3.2 below.

[35] *Competition Act*, RSC 1985, c C-34, s 1.1; this legislation is discussed further in Part IV.8.3.1 below.

[36] *Municipal Act*, RSO 1927, c. 233, s. 263(1). Now see *Municipal Act, 2001*, SO 2001, c 25. See further Part IV.7.2 below.

III. Most Relevant Case Law

In this Part of the study, we review the case law most relevant for an understanding of the status of a "freedom to conduct a business" in the Canadian legal system.

We have already seen that an unavoidable fact about the Canadian constitution is that is that the written instruments — notably the *Constitution Act 1867* and the *Constitution Act 1982*, including the *Charter of Rights* — are essentially silent as to a freedom to conduct a business. It is undeniable that the freedom to conduct a business is not a formal constitutional norm in Canada, and the case law under these instruments does not support any contrary understanding.

Nevertheless, an analysis of the relevant case law permits us to qualify this conclusion in two respects.

First, the freedom to conduct a business as a value — and even as a right — has informed judicial reasoning in some of the most important rulings in Canadian public law.

Second, in some respects, the judicial interpretation of various components of the formal constitution has had effects comparable, albeit to a limited degree, to the recognition of commercial freedom — this is true both of the division of legislative powers between the two levels of government, and of the *Charter of Rights*, especially the freedom of expression.

III.1. The freedom to conduct a business: a legal right?

III.1.1. *Roncarelli v Duplessis*

A prime example of the recognition by the Canadian judiciary of a baseline freedom of the individual to conduct a business is the decision of the Supreme Court of Canada in *Roncarelli v Duplessis*, [37] celebrated today as a "*spectacular affirmation of the rule of law [...] as well as the protection of minorities*."[38]

The litigation, a suit for damages brought by a restaurant owner against the Premier of Québec, arose in the context of a general campaign of repression by the provincial government against the Jehovah's Witness denomination. In the specific case, the restaurant owner — a member of the denomination who had provided bail to other members who had been arrested for their activities — incurred the wrath of the Premier, who then directed the provincial Liquor Licensing Commission to revoke the plaintiff's licence.

The Supreme Court upheld the restaurant owner's action in damages against the Premier. The latter, in "*wrongfully caus[ing] the cancellation of the appellant's permit [, had] intentionally inflicted damage upon the appellant [without] lawful justification*," thus incurring liability for the commission of fault under the Québec Civil Code.[39]

From an administrative law perspective, the lesson of the decision is that even where a statute confers discretionary powers on the executive, those powers are not absolute and must not

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[37] *Roncarelli v Duplessis*, [1959] SCR 121.

[38] MULLAN, D.: "*Roncarelli v Duplessis* and Damages for Abuse of Power: For What Did It Stand in 1959 and For What Does It Stand in 2009?", *McGill Law Journal* 55, 2010, p. 587.

[39] *Roncarelli,* note 37 above, at p. 159.

be exercised arbitrarily.[40] Less often mentioned, but more significant for the purposes of the present study, is the Court's rejection of the Premier's attempt to characterize a liquor licence as a mere "privilege."[41] Instead, Justice Rand emphasized that the plaintiff was being denied the opportunity "*to enter or continue a calling which, in the absence of regulation, would be free and legitimate*."[42]

FRAME 9

Roncarelli v Duplessis
[1959] SCR 121

Supreme Court of Canada
(Rand J)

In these circumstances, when the [...] power of the Executive [...] is exercised deliberately and intentionally to destroy the vital business interests of a citizen, is there legal redress by him against the person so acting? [...] It is a matter of vital importance that a public administration that can refuse to allow a person to enter or continue a calling which, in the absence of regulation, would be free and legitimate, should be conducted with complete impartiality and integrity [...].

III.1.2. *Manitoba Fisheries v R*

A second example illustrates the relationship between property — a right considered fundamental within the legal system — and the freedom to conduct a business. As we have seen, in the Canadian legal system, property is not constitutionally protected; yet, property enjoys special protection by virtue of a judicially-developed presumption that legislation shall not be understood to authorize expropriation without compensation, in the absence of clear language.[43] In *Manitoba Fisheries v R.*,[44] this principle was applied for the benefit of a corporation whose business consisted of the processing and export sale of fish, after a statute granted to a Crown corporation a commercial monopoly on fish exports.

The decision of the Court makes no reference to a right to carry on a business; the plaintiff's goodwill was characterized as property that had been taken by the Crown. Yet, the effect of the decision seems to be that the ability to continue to operate one's business enjoys a measure of protection from confiscation by the State.[45]

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40 *Ibid,* at p. 140.

41 See, e.g., p. 148 (referring to the Premier's argument: "the permit did not give any right, but constituted a privilege available only during the pleasure of the Commission")

42 Page 140.

43 *London and North Western Railway Company v Evans* (1893) 1 Ch 16 at 28 (Bowen LJ); *British Columbia Power Corporation v British Columbia*, 34 DLR (2d) 25 at 44 (BC CA); *Manitoba Fisheries v R*, [1979] 1 SCR 101; *Annapolis Group Inc. v Halifax Regional Municipality*, 2022 SCC 36 ("*Annapolis*").

44 Note 43 above.

45 Although the assimilation of business goodwill to property is significant, it is important not to overstate the extent of the protection afforded by the presumption against uncompensated takings. For one thing, of course, a presumption is capable of being displaced by sufficiently clear legislation. For another, legislation regulating the use of property does not thereby effect an expropriation, except in extreme cases where "*all reasonable uses have been removed*" such that "*a regulation may be, in effect, confiscation*": *Annapolis*, note 43 above, at par. 43. The Court in *Annapolis* noted that, in *Manitoba Fisheries,* the legislation had "*completely extinguished*" the plaintiff's goodwill and rendered its assets "*virtually useless*" (par 30-31).

FRAME 10

Manitoba Fisheries v R
[1979] 1 SCR 101

Supreme Court of Canada
(Ritchie J)

The basic contention of the appellant is that this legislation has resulted in depriving it of its business and indeed it is conceded both in the judgments at trial and on appeal that the implementation of the legislation had the effect of putting the appellant out of business. This loss has been sustained without any compensation from the federal authority which undoubtedly brought it about.

[...]

In my opinion, [...] goodwill, although intangible in character is a part of the property of a business just as much as the premises, machinery and equipment employed in the production of the product whose quality engenders that goodwill. [...] Once it is accepted that the loss of the goodwill of the appellant's business which was brought about by the [legislation] was a loss of property and that the same goodwill was by statutory compulsion acquired by the federal authority, it seems to me to follow that the appellant was deprived of property which was acquired by the Crown.

III.1.3. *Harrison v Carswell*

A third example, *Harrison v Carswell*,[46] also illustrates the interaction between property rights and commercial freedom. This 1976 decision concerned a prosecution for trespass, initiated by the owner of a shopping centre, against an individual engaged in peaceful picketing on the premises of the centre. In upholding the prosecution, the majority noted that the provincial trespass legislation was in line with the traditional recognition, in the Canadian legal system, of the "*right of the individual to the enjoyment of property*" as a "*fundamental freedom*."[47]

While the majority's decision refers to a "right of the individual," and to "*property*," rather than the freedom to conduct a business, the owner of the property in *Harrison* was a business corporation and the property was, of course, being used in the operation of a commercial enterprise. As such, the circumstances and outcome of *Harrison* seem to illustrate (as does *Manitoba Fisheries*) that the legal protection afforded to property rights often amounts, when the owner of the property is a business enterprise, to protection of the freedom to conduct that enterprise.[48]

FRAME 11

Harrison v Carswell
[1976] 2 SCR 200

Supreme Court of Canada
(Dickson J)

It is urged on behalf of Mrs. Carswell that the right of a person to picket peacefully in support of a lawful strike is of greater social significance than the proprietary rights of an owner of a shopping centre and that the rights of the owner must yield to those of the picketer. [...] The submission that this Court should weigh and determine the respective values to society of the right to property and the right to picket raises important and

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[46] *Harrison v Carswell*, [1976] 2 SCR 200.

[47] Page 219.

[48] The Court's decision has attracted criticism; much commentary is sympathetic to Chief Justice Laskin's dissenting opinion holding that an "*ancient legal concept*" (trespass) should not be applied in an unchanged form to "*areas of [a commercial] shopping centre which have been opened [...] to public use.*" (Page 206)

difficult political and socio-economic issues, the resolution of which must, by their very nature, be arbitrary and embody personal economic and social beliefs. It raises also fundamental questions as to the role of this Court under the Canadian constitution.

[...]

Anglo-Canadian jurisprudence has traditionally recognized, as a fundamental freedom, the right of the individual to the enjoyment of property and the right not to be deprived thereof, or any interest therein, save by due process of law. The Legislature of Manitoba has declared in The Petty Trespasses Act that any person who trespasses upon land, the property of another, upon or through which he has been requested by the owner not to enter, is guilty of an offence. If there is to be any change in this statute law, if A is to be given the right to enter and remain on the land of B against the will of B, it would seem to me that such a change must be made by the enacting institution, the Legislature, which is representative of the people and designed to manifest the political will, and not by the Court.

III.1.4. *City of Prince George v Payne*

In the three decisions just discussed, it is possible to discern the notion of a baseline freedom to conduct a business. It must be acknowledged, however, that explicit judicial references to such a freedom are few. The most frequent references are in the area of municipal law:[49] an example is *City of Prince George v Payne*,[50] involving the refusal by a municipal council of a business licence. The case, which is excerpted in the frame below, invites a comparison to *Roncarelli*, in that the Court regarded as inappropriate the council's exercise of its discretion on the basis of officeholders' moral disapproval of the nature of the business.[51]

FRAME 12

Prince George (City of) v Payne
[1978] 1 SCR 458

Supreme Court of Canada
(Dickson J)

The issue in this appeal is whether a municipal council is empowered to refuse a business licence on the basis that it seeks to protect the community's moral welfare.

[…]

The common law right of the individual freely to carry on his business and use his property can be taken away only by statute in plain language or by necessary implication.

[...]

Council was empowered by s. 455 to refuse a licence "in any particular case" but those words do not mean and cannot be so construed to extend to any particular type of business. They do not suggest a blanket right to prohibit generally so-called "adult boutiques" which are not ex hypothesi illegal. The words "particular case" mean peculiar to the applicant and not to the type of business which he wishes to conduct.

[...]

Municipal officers are not given a discretion whether, as a matter of policy, one type of lawful business can be carried on within a municipality while another cannot.

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[49] See Part IV.7.2 below.

[50] *Prince George (City of) v Payne*, [1978] 1 SCR 458.

[51] It would be an error to interpret the decision as standing for the proposition that municipal powers should be interpreted narrowly where the common law right to pursue a trade is sought to be limited. See *United Taxi Drivers' Fellowship v Calgary (City)*, 2004 SCC 19, [2004] 1 SCR 485, at par. 6-8, reversing *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City of)*, 2002 ABCA 131.

III.2. The freedom to conduct a business and the law of federalism

As mentioned in Part II, the *Constitution Act 1867* exhaustively distributes legislative authority between the federal Parliament and the provincial legislatures. With few exceptions, authority is allocated to one or the other level of government on an exclusive basis.

Strictly speaking, such a distribution should not give rise to a "freedom to conduct a business," given that any law restrictive of such freedom should be within the powers of one or the other level of government. Nevertheless, the interpretation of the division of powers remains relevant to the subject of this study, in large part because of the choice by the Judicial Committee of the Privy Council[52] to characterize the regulation of particular industries, professions and occupations as an interference with "civil rights," a class of subjects within provincial jurisdiction. The effects of this choice have been moderated somewhat as a result of Supreme Court of Canada decisions since 1949, but federal business regulatory power remains heavily circumscribed.

III.2.1. Restrictions on federal legislative authority

It is a firmly established rule that the federal Parliament lacks authority to enact laws the main thrust of which is to regulate particular lines of business, occupations and professions or, more generally, to regulate transactions and business activities taking place within a province.[53] This is so despite what might otherwise be assumed by a reader of the *Constitution Act 1867*, which allocates to the federal Parliament the exclusive authority to make laws for the "regulation of trade and commerce."[54] In a series of early cases,[55] the Judicial Committee of the Privy Council essentially decided that the regulation of contracts and business activities taking place within a province comes instead within the concept of "civil rights," a head of authority conferred exclusively on the provinces[56] — a proposition that today still describes the state of the law.

III.2.1.1. Re Board of Commerce

While decisions about the division of legislative powers may seem to be about which government can regulate rather than about recognizing a freedom from regulation, the Judicial Committee's reasoning seems on occasion to have been influenced by *laissez-faire* economic ideas. A conspicuous example is found in *Re Board of Commerce*,[57] involving a challenge to federal legislation that attempted to regulate retail commerce in consumer goods. In justifying its invalidation of the legislation, the Judicial Committee described the legislation as "restricti[ve]" of "liberty" and rejected an interpretation of "the regulation of

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52 This body was the final court of appeal for Canada until 1949, when it was replaced in that role by the Supreme Court of Canada.

53 See, for example: *Canada v Alberta (Insurance Reference)*, [1916] 1 AC 588 (business of insurance); *The King v Eastern Terminal Elevator Co*, [1925] SCR 434 (grain elevator; local processing of grain); *Global Securities Corp. v British Columbia (Securities Commission)*, [2000] 1 SCR 494 (securities dealers); *Krieger v Law Society of Alberta*, [2002] 3 SCR 372 (legal profession); *Reference re Assisted Human Reproduction Act*, [2010] 3 SCR 457, at par. 265-66 (per LeBel and Deschamps JJ.; medical profession). See also HOGG & WRIGHT, note 15 above, §§21:8, 21:9.

54 Section 91(2). See Part II.1.1 above.

55 See, for example: *Citizens Insurance Co. v Parsons*, [1881] UKPC 49, (1881), 7 AC 96; *Insurance Reference,* above note 53; *Reference Re Board of Commerce* (1921), [1922] 1 AC 191, 60 DLR 513; *Toronto Electric Commissioners v Snider*, [1925] AC 396.

56 Section 92(13). See Part II.1.1 above.

57 Cited above, note 55.

trade and commerce" that would permit the federal government to *"interfer[e] with particular trades in which Canadians would [otherwise] be free to engage in*."[58]

FRAME 13

Canada (AG) v Alberta (AG)
***[Reference Re Board of Commerce],* [1921] 1 AC 191**

Judicial Committee of the Privy Council
(VC Haldane)

[G]eneral Canadian policy [cannot] justify interference, on such a scale as the statutes in controversy involve, with the property and civil rights of the inhabitants of the Provinces. It is to the Legislatures of the Provinces that the regulation and restriction of their civil rights have in general been exclusively confided [...]

It can, therefore, be only under necessity in highly exceptional circumstances, such as cannot be assumed to exist in the present case, that the liberty of the inhabitants of the Provinces may be restricted by the Parliament of Canada [...]. Nor do the words in sec. 91, the Regulation of Trade and Commerce, if taken by themselves, assist the present Dominion contention. [Rather it has been held] that the authority of the Dominion Parliament to legislate for the regulation of trade and commerce did not, by itself, enable interference with particular trades in which Canadians would, apart from any right of interference conferred by these words above, be free to engage in the Provinces.

[There is] no justification for interpreting the words of sec. 91 (2) in a fashion which would make them confer capacity to regulate particular trades and businesses.

III.2.1.2. Margarine Reference

Similarly, in the *Margarine Reference*, an attempt by the federal Parliament to use the criminal law to confer an economic advantage on one industry, by suppressing its competitor, was ruled invalid as an invasion of the "*civil rights of individuals in relation to particular trade within the province*."[59]

FRAME 14

Reference re Validity of s. 5(a) of the Dairy Industry Act
***[The Margarine Reference],* [1949] SCR 1**

Supreme Court of Canada
(Rand J)

Under a unitary legislature, all prohibitions may be viewed indifferently as of criminal law; but as the cases cited demonstrate, such a classification is inappropriate to the distribution of legislative power in Canada.

Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law, but they do not appear to be the object of the parliamentary action here. That object, as I must find it, is economic and the legislative purpose, to give trade protection to the dairy industry in the production and sale of butter; to benefit one group of persons as against competitors in business in which, in the absence of the legislation, the latter would be free to engage in the provinces. To forbid manufacture and sale for such an end is prima facie to deal directly with the civil rights of individuals in relation to particular trade within the provinces [...].

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[58] Page 517.

[59] *Reference re Validity of s. 5(a) of the Dairy Industry Act (The Margarine Reference)*, [1949] SCR 1, at p. 50.

III.2.1.3. Case law after the abolition of appeals to the Judicial Committee of the Privy Council

Since 1949, the interpretation of ss. 91 and 92 of the *Constitution Act 1867* has developed in a direction more accommodating of federal regulatory authority. For example, the Supreme Court has interpreted the authority to make laws in relation to "*the regulation of trade and commerce*" as including the power to enact general regulatory schemes concerned with "*trade as a whole*," as opposed to the regulation of particular industries.[60]

An illustration of the dividing line between what is and is not permissible is in the area of securities regulation. An attempt by the federal government to develop a general securities regulatory law was ruled invalid by the Supreme Court in 2011 on the basis that, among other things, it regulated transactions in securities and the particular professions associated with the securities industry, both of which instead came within "civil rights."[61] Several years later, a revised proposed federal securities law more narrowly focused on the management of risks to the stability of the Canadian financial system as a whole was upheld as a measure "*address[ing] economic matters of national scope which transcend the concerns of any one province*," and therefore relating to "*trade as a whole*."[62]

In addition, prohibitory laws having a "*public purpose*," within the meaning of the *Margarine Reference*, can be enacted under the criminal law power even if they contain features that are, in a sense, regulatory.[63] A law may prohibit the carrying out of an (otherwise lawful) activity in a given manner, such as where Parliament criminalizes the advertising of a product (e.g., tobacco) even though the sale of the product remains legal.[64] The prohibited forms of the activity may be even be defined in subordinate legislation ("regulations").[65] It remains settled law, nevertheless, that the regulation of individual industries, occupations, and professions; and of transactions and other business activities taking place within a province, is in principle within the exclusive jurisdiction of each province.

III.2.2. Restrictions on provincial legislative authority

As we have already seen, each province possesses broad authority to regulate the conduct of business on its territory. This authority is the result of the interpretation given by the courts to the provincial jurisdiction over "*property and civil rights*" (as well as to the restrictive scope given by the courts to the federal jurisdiction over "*the regulation of trade and commerce*").

Despite the breadth of this authority, it is worth noting two limitations on its scope that are relevant, from the standpoint of a "freedom to conduct a business."

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60 *General Motors of Canada Ltd. v City National Leasing*, [1989] 1 SCR 641. In this decision, the Court developed a set of indicia for determining whether a law could be enacted on this basis. The overall thrust of the indicia was to differentiate between legislation regulating individual industries or dealing with local concerns, on the one hand, and a "scheme of regulation [that is] national and scope and [where] local regulation would be inadequate," (p. 678) on the other hand.

61 *Reference re Securities Act*, 2011 SCC 66, [2011] 3 SCR 837.

62 *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 (CanLII), [2018] 3 SCR 189, at par. 111-12.

63 See Part IV.8.5.1.1.ii below.

64 *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199. This is subject, however, to the requirements of the Charter, about which see Part III.3 below.

65 *R v Hydro-Québec*, [1997] 3 SCR 213.

First, the regulation of international and interprovincial transactions has been held to come within federal, rather than provincial jurisdiction. As a result, for example, a provincial law may not restrictively regulate the importation of goods from outside the province.[66]

Second, certain activities and business sectors are placed under federal legislative jurisdiction by specific provisions of the *Constitution Act 1867*, for example:

- Banking (s. 91(15))
- Navigation and shipping (s. 91(10))
- Interprovincial transportation and telecommunications undertakings (s. 92(10)(a))

In light of the exclusive nature of legislative authority under the Canadian division of powers, it might be expected that the above allocations would have an impact on the ability of a province to regulate the activities of businesses operating in those sectors.

The rule is, however, that general provincial laws, if otherwise valid, apply to entities even if they are engaged in a line of business within federal jurisdiction. Thus, for example, while a province cannot enact a law specifically about banking regulation, its general consumer protection law applies even to the activities of banks.[67] An exception to this rule arises where the law would impair a "*vital or essential part*" of the undertaking.[68] It is, however, a rather narrow exception and the threshold for meeting it is high; the law reports are full of examples of unsuccessful attempts, by business entities operating in federally-regulated sectors, to invoke the exception to avoid the application of provincial regulatory laws.[69]

III.3. Commercial freedom and the *Charter*

III.3.1. The "right to pursue the gaining of a livelihood" is a right connected with interprovincial mobility, not a free-standing right to pursue an occupation

As previously observed, the *Charter* guarantee that (textually speaking) comes closest to a freedom to conduct a business is that contained in s. 6(2)(b), which refers to the "gaining of a livelihood."[70]

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66 *Lawson v Interior Tree Fruit & Vegetable Committee of Direction*, [1931] SCR 357; *Manitoba v Manitoba Egg and Poultry Association*, [1971] SCR 689. The principle, as understood in Canada, refers to direct restrictions on imports. Canadian jurisprudence in this area does not reflect the notion of "measures having equivalent effect" contained in Article 34 of the *Treaty on the Functioning of the European Union*. A similar limitation arises because of s. 121 of the *Constitution Act 1867,* which provides for the free movement of goods between provinces but, again, has not been interpreted as broadly as the corresponding European Union provisions. See *R v Comeau*, [2018] 1 SCR 342, and Part IV.1.3.3 below.

67 *Bank of Montreal v Marcotte*, [2014] 2 SCR 725.

68 See, for example, *Vancouver International Airport Authority v British Columbia (Attorney General)*, 2011 BCCA 89 at par. 40-45.

69 For example: *Air Canada v Ontario*, [1997] 2 SCR 581 (provincial liquor licensing laws apply to the provision of inflight alcohol by an airline, despite federal jurisdiction over aeronautics); *Irwin Toy v Québec*, [1989] 1 SCR 927 (provincial consumer protection law applies to broadcast advertising, despite federal jurisdiction over broadcasting); *Canadian Western Bank v Alberta*, [2007] 2 SCR 3 (provincial insurance law applies to credit insurance products marketed by banks, despite federal jurisdiction over banking). An example of the application of the exception is in the area of workplace relations: see note 345 below.

70 See Part II.1.2.1.3 above.

In *Skapinker,*[71] an individual challenged the requirement the individuals seeking admission practice as a lawyer in Ontario be Canadian citizens, on the basis that the requirement violated his right to *"pursue the gaining of a livelihood"* in Ontario. The Court, after analyzing the provisions surrounding s. 6(2)(b), concluded that the right conferred by the section is not a standalone right to pursue an occupation. Instead, it is a right, in connection with movement between provinces, not to be subjected to laws that, in impeding the gaining of a livelihood, also discriminate on the basis of provincial residence. In light of *Skapinker*, subsequent attempts by individuals and corporations[72] to challenge legislation restricting access to a profession or a line of business, or regulating the conduct of a business or a profession, have been uniformly (and often summarily) dismissed.[73]

FRAME 15

Law Society of Upper Canada v Skapinker
[1984] 1 SCR 357

Supreme Court of Canada
(Estey J)

It is reasonable to conclude, therefore, that s. 6(2)(b) should not be read in isolation from the nature and character of the rights granted in subs. (1) and subs. (2)(a). [...] Nor should s. 6(2) be construed as a discrete section entirely separate from s. 6(3). [...] In my opinion, s. 6(3)(a) further evinces the intention to guarantee the opportunity to move freely within Canada unimpeded by laws that "discriminate...primarily on the basis of province of present or previous residence". The concluding words of s. 6(3)(a), just cited, buttress the conclusion that s. 6(2)(b) is directed towards "mobility rights", and was not intended to establish a free standing right to work. [...] Paragraph (b), therefore, does not avail [the intervener] of an independent constitutional right to work as a lawyer in the province of residence [...].

III.3.2. "Liberty" does not include a freedom to conduct a business or, more generally, corporate-commercial economic rights

Section 7 of the *Charter* guarantees the "*right to life, liberty and security of the person*" and provides that no one may deprived of that right "*except in accordance with the principles of fundamental justice*."

The word "liberty" could, of course, if taken in isolation, be read broadly enough to include the freedom to conduct a business (an aspect of economic "liberty"). However, constitutional words are not and should not be interpreted without regard to the context in which the words appear. In this connection, two features of s. 7 of the *Charter* stand out. First, and most obviously, "property" is not mentioned in s. 7, even though a right to property is included in the analogous provisions of some other rights instruments in existence at the time when the

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71 *Law Society of Upper Canada v Skapinker*, [1984] 1 SCR 357.

72 An additional obstacle to challenges brought by corporations is that the prevailing judicial interpretation of s. 6 is that its scope is limited to natural persons. *Parkdale Hotel Limited v AG Canada et al* [1986] 2 FC 514 at 534-35; *Corporation (City of Brampton) v Mister Twister Inc et al*, 2011 ONCJ 271 at par. 58-65.

73 *Walker v Prince Edward Island*, [1995] 2 SCR 407 (requirement of membership in provincial institute in order to engage in practice of accountancy); *Chartered Professional Accountants of Ontario v Gujral*, 2019 ONCJ 859 (same); *Willow v Chong*, 2013 BCSC 1083, at par. 79-80 (restriction against conferral by unauthorized private educational institution of degrees purporting to entitle holder to use "doctor" as a professional title); *Brampton v Mister Twister*, above, note 72 at par. 102 (refusal of municipality to allow ice cream trucks); *Deep v Ontario*, 2004 CanLII 14527 at par. 144-45 (ON SC) (allegation by medical doctor of violation of s 6 by regulatory body).

Charter was drafted, such as the *Canadian Bill of Rights*,[74] and the Fifth and Fourteenth Amendments to the *U.S. Constitution*.

Second, s. 7 does not appear in the part of the *Charter* that guarantees "fundamental freedoms" (such as the freedoms of conscience and religion, expression, assembly and association[75]) but instead appears under the heading "legal rights," and at the head of a collection of rights associated with the administration of justice and law enforcement:

- Section 8: right not to be subjected to unreasonable search and seizure
- Section 9: right not to be subjected to arbitrary detention
- Section 10: rights upon arrest or detention
- Section 11: rights of persons charged with an offence
- Section 12: right not to be subjected to cruel and unusual treatment or punishment
- Section 13: right against self-incrimination
- Section 14: right to an interpreter in a court proceeding

In light of the placement of s. 7 within the *Charter*, one might wonder to what extent the provision applies in matters not connected with the administration of justice. Despite initial equivocation,[76] the Supreme Court appears to have decided that s. 7's placement does not limit its scope to matters concerned with the administration of justice.[77] On the other hand, it remains an open question, given s. 7's wording, whether the provision includes any "economic rights" (particularly those that might be closely linked to "human life or survival").[78]

The above uncertainties do not, however, extend to the more specific question whether s. 7 includes a right to conduct a business. The courts have been quite clear that it does not. The position is clearest when what is claimed is a right to conduct one's business in a particular manner. For example, in *R. v Edwards Books and Art Ltd.*,[79] an attempt to challenge Sunday-closing legislation as an unconstitutional deprivation of "liberty" was summarily rejected by the Court, on the ground that "liberty" does not "exten[d] to an unconstrained right to transact business whenever one wishes."[80]

Similarly, in *Siemens v Manitoba*,[81] the appellants argued that a law preventing them from operating video lottery terminals at their place of business deprived them of "liberty." The Court's response to the argument was categorical and negative: "*The ability to generate business revenue by one's chosen means is not a right that is protected under s. 7 of the Charter.*"[82]

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74 See Part II.2.1 above.

75 Sections 2(a), (b), (c) and (d) of the Charter.

76 See, e.g., *Gosselin v Québec*, [2002] 4 SCR 429, at par. 80 (challenge to social assistance legislation) ("Can s. 7 apply to protect rights or interests wholly unconnected to the administration of justice? The question remains unanswered.").

77 For example, *Chaoulli v Québec*, [2005] 1 SCR 791 (challenge to provincial ban on private health insurance; both McLachlin and Major JJ, and Binnie and LeBel JJ, although disagreeing on the result, agreed that s. 7 was applicable and that the legislation engaged "security of the person").

78 *Irwin Toy*, note 69 above, at p. 1003; *Gosselin*, note 76 above, at par. 80.

79 *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713.

80 Par. 155.

81 *Siemens v Manitoba*, [2003] 1 SCR 6.

82 Par. 46.

FRAME 16

R v Edwards Books and Art Ltd
[1986] 2 SCR 713

Supreme Court of Canada
(Dickson J)

Counsel for [one of the accused] argued that the statutory obligation to close his business on Sundays deprived him of "liberty". In my opinion "liberty" in s. 7 of the Charter is not synonymous with unconstrained freedom. [...]

Whatever the precise contours of "liberty" in s. 7, I cannot accept that it extends to an unconstrained right to transact business whenever one wishes.

FRAME 17

Siemens v Manitoba
[2003] 1 SCR 6

Supreme Court of Canada
(Major J)

The appellants also submitted that s. 16 of the VLT Act violates their right under s. 7 of the Charter to pursue a lawful occupation. [...] However, as a brief review of this Court's Charter jurisprudence makes clear, the rights asserted by the appellants do not fall within the meaning of s. 7. The right to life, liberty and security of the person encompasses fundamental life choices, not pure economic interests [...]. The ability to generate business revenue by one's chosen means is not a right that is protected under s. 7 of the Charter.

It is also clear that corporations do not possess rights under s. 7. In *Irwin Toy v Québec,* the Court considered a toy manufacturing firm's argument that a prohibition against advertising directed at children deprived the manufacturer of "liberty" within the meaning of s. 7. Noting the "*intentional exclusion of property from s. 7*," the Court concluded that "*a corporation's economic rights find no constitutional protection in that section*," which "*was intended to confer protection on a singularly human level*."

FRAME 18

Irwin Toy Ltd v Québec
[1989] 1 SCR 927

Supreme Court of Canada
(Dickson CJ)

In our opinion, a corporation cannot avail itself of the protection offered by s. 7 of the Charter. First, we would have to conceive of a manner in which a corporation could be deprived of its "life, liberty or security of the person". We have already noted that it is nonsensical to speak of a corporation being put in jail. To say that bankruptcy and winding up proceedings engage s. 7 would stretch the meaning of the right to life beyond recognition. The only remaining argument is that corporations are protected against deprivations of some sort of "economic liberty".

What is immediately striking about this section is the inclusion of "security of the person" as opposed to "property". This stands in contrast to the classic liberal formulation, adopted, for example, in the Fifth and Fourteenth Amendments in the American Bill of Rights, which provide that no person shall be deprived "of life, liberty or property, without due process of law". The intentional exclusion of property from s. 7, and the substitution therefor of "security of the person" has, in our estimation, a dual effect. First, it leads to a general inference that economic rights as generally encompassed by the term "property" are not within the perimeters of the s. 7 guarantee. This is not to declare, however, that no right with an economic component can fall within "security of the person". Lower courts have found that the rubric of "economic rights" embraces a broad spectrum

of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property -- contract rights. To exclude all of these at this early moment in the history of Charter interpretation seems to us to be precipitous. We do not, at this moment, choose to pronounce upon whether those economic rights fundamental to human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights. In so stating, we find the second effect of the inclusion of "security of the person" to be that a corporation's economic rights find no constitutional protection in that section.

That is, read as a whole, it appears to us that this section was intended to confer protection on a singularly human level. A plain, common sense reading of the phrase "Everyone has the right to life, liberty and security of the person" serves to underline the human element involved; only human beings can enjoy these rights. "Everyone" then, must be read in light of the rest of the section and defined to exclude corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and include only human beings.

It has sometimes been suggested by litigants that, even if "liberty" does not include a right to carry on business by whatever means one chooses, it at least extends to the choice by an individual of an occupation or profession. This line of argument was raised, in particular, in connection with constitutional challenges to the legislation that restricts sex work. Although this argument has not yet been considered in a majority decision of the Supreme Court, it was rejected by the Ontario Court of Appeal in *Bedford*[83] and by Justice Lamer (concurring) in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*.[84] A version of the argument appears also to have been rejected, in the different context of the private practice of medicine, by Justices Binnie and LeBel in *Chaoulli*.[85]

FRAME 19

Canada v Bedford
2012 ONCA 186

Ontario Court of Appeal
(Doherty, Rosenberg and Feldman JJA)

Some of the intervenors, however, advance a broader liberty claim. They submit that a person's decision to engage in prostitution involves personal life choices that are also protected under the right to liberty. We do not accept this submission.

The case law recognizes that the right to liberty extends beyond physical liberty to the right to make individual choices that go to the core of personal autonomy. [...]

To this stage in the development of the jurisprudence, the right to liberty as manifested in the right to make personal decisions free from state interference has been limited to decisions that "go to the heart of an individual's private existence" [...]. The decision to engage in a particular commercial activity is not akin to the kinds of decisions that have been characterized as so fundamentally and inherently personal and private as to fall under the right to liberty. To accept the intervenors' submission would be to read into s. 7 a constitutional protection for what are economic or commercial decisions. That reading would be inconsistent with the deliberate decision to exclude property-related rights from the ambit of s. 7 [...]. As stated by Major J. in Siemens v Manitoba *(Attorney General): "The ability to generate business revenue by one's chosen means is not a right that is protected under s. 7 of the Charter."*

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83 *Bedford v Canada*, 2012 ONCA 186. An appeal to the Supreme Court of Canada was dismissed. The latter court agreed with the Court of Appeal that the impugned legislation deprived sex workers of "security of the person" by endangering their safety; the Supreme Court did not comment on the arguments invoking "liberty." *Bedford v Canada*, [2013] 3 SCR 1101.

84 *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 SCR 1123.

85 *Chaoulli v Québec*, [2005] 1 SCR 791. Justices Binnie and Lebel were dissenting, and the point was not addressed by the majority Justices.

FRAME 20

Reference re ss. 193 and 195.1(1)(c) of the Criminal Code
[1990] 1 SCR 1123 (Lamer J, concurring)

Supreme Court of Canada

I [...] reject the application of the American line of cases that suggest that liberty under the Fourteenth Amendment includes liberty of contract. As I stated earlier these cases have a specific historical context, a context that incorporated into the American jurisprudence certain laissez-faire principles that may not have a corresponding application to the interpretation of the Charter in the present day. There is also a significant difference in the wording of s. 7 and the Fourteenth Amendment. The American provision speaks specifically of a protection of property interests while our framers did not choose to similarly protect property rights [...]

[...]

[T]he appellants' arguments [...] must fail. The rights under s. 7 do not extend to the right to exercise their chosen profession.

FRAME 21

Chaoulli v Québec
[2005] 1 SCR 791

Supreme Court of Canada
(Binnie and LeBel JJ, dissenting)

Nor do we accept that s. 7 of the Canadian Charter guarantees Dr. Chaoulli the "liberty" to deliver health care in a private context. [...] The fact that state action constrains an individual's freedom by eliminating career choices that would otherwise be available does not in itself attract the protection of the liberty interest under s. 7.

In short, the position is as summarized by the Ontario Court of Appeal, in *A&L Investments Ltd.:* "*the economic right to carry on a business [...] fall[s] outside the s. 7 guarantee*."[86]

FRAME 22

A and L Investments Ltd. v Ontario
1997 CanLII 3115

Ontario Court of Appeal
(Goudge JA)

[T]he jurisprudence that has developed under the Charter has made clear that economic rights as generally encompassed by the term 'property' and the economic right to carry on a business, to earn a particular livelihood, or to engage in a particular professional activity all fall outside the s. 7 guarantee.

III.3.3. The "freedom of expression" confers protection on various aspects of the conduct of business, including but not limited to advertising

The freedom of expression has been interpreted as encompassing any activity that "*conveys a meaning*" — independently of the type of meaning being conveyed, and subject only to the proviso that the activity must not take the form of an act of violence.[87]

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[86] *A&L Investments Ltd v Ontario* (1997), 36 OR (3d) 127 (CA).

[87] *Irwin Toy v Québec*, [1989] 1 SCR 927 at 969-70. The Court has equivocated over whether "threats of violence" are also excluded. The current position is that they are: *R v Khawaja*, [2012] 3 SCR 555 at par. 70,

Obviously, given such a definition, commercial advertising is included within the scope of the freedom of expression.[88] For example, in *Irwin Toy*,[89] despite rejecting the corporation's attempt to invoke "liberty," the Court held that the prohibition against advertising directed at children infringed the freedom of expression.

Although the prohibition in *Irwin Toy* was ultimately found to be justified as a "*reasonable limit*" on that freedom, a later challenge against an advertising prohibition, brought by *RJR-Macdonald*,[90] succeeded on the basis that the government had not shown that something less than a near-total ban on tobacco advertising would be less effective at achieving the public health goals of the legislation.

Beyond advertising, other activities related to the conduct of business may also be described as "*conveying a meaning*." For example, in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*,[91] the Court held that "communicating with [a] vendor" in the course of "negotiating for the purpose of" a service (in that case, the services of a sex worker) comes within the freedom of expression (see Frame immediately below). Another case, *Slaight Communications Inc. v Davidson*, involved communication by an employer with third parties about a dismissed employee.[92]

FRAME 23

Reference re ss. 193 and 195.1(1)(c) of the Criminal Code
[1990] 1 SCR 1123

Supreme Court of Canada (Wilson J)

The provision prohibits persons from engaging in expression that has an economic purpose. But economic choices are, in my view, for the citizen to make (provided that they are legally open to him or her) and, whether the citizen is negotiating for the purchase of a Van Gogh or a sexual encounter, s. 2(b) of the Charter protects that person's freedom to communicate with his or her vendor. Where the state is concerned about the harmful consequences that flow from communicative activity with an economic purpose and where, rather than address those consequences directly, the content of communicative activity is proscribed, then the provision must, in my view, be justified as a reasonable limit under s. 1 of the Charter if it is to be upheld.

In theory, the concepts of "negotiating" and "communicating" with external parties are sufficiently broad to encompass much of what is involved in carrying on a business. Given, however, the position taken by the Court on the meaning of "liberty," there are strong reasons to doubt that the Court would ultimately adopt an interpretation of "expression" that would amount to that which the Court rejected in *Edwards Books*, namely an "*unconstrained right to transact business whenever [and in whatever manner] one wishes.*"[93]

Moreover, the generous interpretation given to the freedom of expression has engendered what the Court refers to as a context-sensitive approach to assessing whether limits on that

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88 *Irwin Toy* at 971; *Rocket v Royal College of Dental Surgeons of Ontario*, [1990] 2 SCR 232 at 241; *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199.

89 *Irwin Toy*, note 87.

90 *RJR-Macdonald*, note 88.

91 *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 SCR 1123.

92 *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038. The Court held that a labour adjudicator's order to an employer that it provide a letter of reference with specified content infringed the employer's freedom of expression (but was a reasonable limit).

93 See note 79 above. An analogy can also be made to the Court's interpretation of s. 2(d) (freedom of association), discussed in Part IV.1.3.4 below.

freedom are justified under s. 1 of the *Charter*.[94] The framework developed by the Supreme Court involves determining whether the legislation is aimed at objectives that are both legitimate and sufficiently important; and whether the infringement of rights is proportionate to the importance of the objective and to what the legislation achieves for its objective.[95] In some cases, where the restricted activities are commercial in character, the Supreme Court has considered them remote from the underlying purposes of the freedom of expression guarantee, leading to a more relaxed application of the requirement of proportionality.

The decisions in the four cases mentioned earlier in this section of the Study — *Irwin Toy, Slaight, RJR-Macdonald,* and *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code* — illustrate the point. In only one of these cases (*RJR-Macdonald*) was the infringement of s. 2(b) held to be unreasonable.[96] Even in this case, Justices La Forest and Iacobucci, together writing on behalf of a majority of the Justices, agreed that the proportionality standard analysis should not be excessively demanding, given the nature of the expressive activity involved.[97]

FRAME 24

RJR-Macdonald Inc. v Canada,
[1995] 3 SCR 199

Supreme Court of Canada (La Forest J., dissenting)

In my view, the harm engendered by tobacco, and the profit motive underlying its promotion, place this form of expression as far from the "core" of freedom of expression values as prostitution, hate mongering, or pornography, and thus entitle it to a very low degree of protection under s. 1. [...] The main, if not sole, motivation for [tobacco] advertising is, of course, profit. The sale of tobacco products in Canada generates enormous profits for the three companies who dominate the market [...]

FRAME 25

Reference re ss. 193 and 195.1(1)(c) of the Criminal Code,
[1990] 1 SCR 1123

Supreme Court of Canada (Dickson CJ)

Yet, the expressive activity, as with any infringed Charter right, should also be analyzed in the particular context of the case. Here, the activity to which the impugned legislation is directed is expression with an economic purpose. It can hardly be said that communications regarding an economic transaction of sex for money lie at, or even near, the core of the guarantee of freedom of expression.

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94 See, for example, *Thomson Newspapers Co v Canada*, [1998] 1 SCR 877 at par. 87; *RJR-MacDonald*, note 88 above, at par. 63.

95 *R v Oakes*, [1986] 1 SCR 103; *Dagenais v Canadian Broadcasting Corporation*, [1994] 3 SCR 835. The "proportionality" test asks, more specifically, whether the means employed by the legislation are rationally connected with its objective; whether the objective could not be achieved as effectively while impairing the right less; and whether what the legislation achieves for its objective is not outweighed by the extent and gravity of the infringement.

96 Restrictions on commercial expression were also been held to be invalid by the Supreme Court in *Ford v Québec*, [1988] 2 SCR 712 (ban on English-language signage); *Rocket v Royal College of Dental Surgeons of Ontario*, [1990] 2 SCR 232 (prohibition against advertising by dentists); *R v Guignard*, [2002] 1 SCR 472 (prohibition against advertising signs except in areas zoned for industrial use).

97 This point is discussed further in Part IV.8.1.2, text accompanying note 293.

III.4. Indigenous rights and the right to engage in commercial activities

Section 35 of the *Constitution Act 1982*, which "*recognizes and affirms*" the "*existing aboriginal and treaty rights*" of the First Nations, Inuit and Métis peoples of Canada, protects in some circumstances rights that are of a commercial nature.[98]

It will be observed that s. 35 refers to two categories of right: "aboriginal rights" (in French, "*droits ancestraux*") and "treaty rights" (in French, "*droits issus de traités*").[99] Current Supreme Court of Canada jurisprudence recognizes, in turn, two types of "aboriginal right":

- the right to engage in activities that, at the moment of European contact,[100] were integral to the distinctive culture of the group, including the modern forms of those activities[101] ("activity-based rights"), and
- the right to exclusive use and occupation of land, where the group occupied the land exclusively prior to the assertion of European sovereignty over the relevant area ("aboriginal title").[102]

It follows that, under current doctrine, a right to engage in a particular activity of a commercial nature is recognized and affirmed under s. 35 if any of the following are true:

- the activity was engaged in by the group and was integral to the distinctive culture of the group at the moment of European contact;[103]
- the group is engaging in the activity on land over which the group possesses aboriginal title; or
- the right to engage in the activity is contained in a treaty between the group and the Crown.[104]

Further, the Court has interpreted the "recognition and affirmation" of Indigenous rights as implying that legislation that infringes those rights is valid only if:

- the aim of the legislation is compelling and substantial; and
- the means by which the legislation sought to achieve its aims was consistent with the Crown's duty of honourable dealing vis-à-vis Indigenous peoples.[105]

In practical terms, the latter requirement entails, among other things, a proportionality assessment similar to that used in connection with s. 1 of the *Charter*.[106]

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98 Section 35 refers to "existing" rights. The Supreme Court has interpreted this to mean that rights that were extinguished prior to 1982 are not revived by s. 35, and are not included in the rights that that provision "recognizes and affirms." *R v Sparrow*, [1990] 1 SCR 1075.

99 See Part II.1.2.2.

100 For Métis peoples, the relevant time is the moment when Europeans gained control in the area (rather than the moment of contact). *R v Powley*, [2003] 2 SCR 207.

101 *R v Van der Peet*, [1996] 2 SCR 507.

102 *Tsilhqot'in Nation v British Columbia*, [2014] 2 SCR 257.

103 For example, *R v Gladstone*, [1996] 2 SCR 723 (commercial trading of a particular fisheries resource).

104 For example, *R v Marshall*, [1999] 3 SCR 456 at par. 7, 59, 61 (gathering certain resources and trading them in support of a "moderate livelihood").

105 *Sparrow* note 98 above.

106 *Tsilhqot'in Nation* above, par. 87. In addition, the requirement of honourable dealing entails an obligation of the Crown to consult with Indigenous peoples, where its actions may have an adverse impact on their rights. *Haida Nation v British Columbia*, [2004] 3 SCR 511; *Tsilhqot'in*, above.

The interpretation of s. 35 is still evolving and, in particular, some lower courts have called into question the narrowness of the "*activity-based rights*" component of the framework described above. For example, in *R. v Montour*, a 2023 decision, the Québec Superior Court adopted a broader approach, and determined that the importation of bulk tobacco and manufacturing of cigarettes by the Mohawks of Kahnawà:ke comes within a "*right to freely pursue economic development*" possessed by all Indigenous peoples.[107] If the approach adopted by the Superior Court in *Montour*, or a similar approach, came to be established, it would considerably expand the potential circumstances in which a freedom to engage in commercial activities would be found to be possessed by a given Indigenous community under s. 35.

FRAME 26

R. c. Montour
2023 QCCS 4154

Superior Court of Québec
(Bourque J)

The Court is convinced that the right to freely pursue economic development is one of the generic rights shared by all Indigenous peoples. It is intimately tied to the survival and dignity of any nations. Without it, Indigenous societies are not only deprived of the opportunity to flourish, but they could also be threatened with the inability to meet their basic needs. Moreover, [...] a myriad of other rights essential to the continuity of Indigenous societies depends on the right to pursue economic development.

[...]

There is [...] very little evidence presented by the parties to contradict the submission that the tobacco trade in Kahnawà:ke is part of a collective attempt to pursue economic development. [...] [Moreover, there] is enough undisputed evidence on the records to link the Applicants' actions with the right to economic development of their community [...].

[...]

The Court thus concludes that the [Applicants'] participation in the Mohawks' of Kahnawà:ke tobacco trade industry is protected by their Aboriginal right to freely pursue economic development.

[107] *R c Montour*, 2023 QCCS 4154, at par. 1409, 1410. As of the date of this study, an appeal brought by the Government of Québec before the Québec Court of Appeal has not yet been heard.

IV. Freedom to Conduct a Business and Its Challenges

Whereas Parts I-III of the present Study endeavoured to describe the state of the positive law in Canada, this Part IV approaches the "freedom to conduct a business" from a broader perspective. With examples from the Canadian legal system, this Part:

- Discusses the "freedom to conduct a business" as a concept, and distinguishes this concept from other similar concepts, such as the freedom of contract and the right to enjoyment of property;
- Considers the relationship between the "freedom to conduct a business" and the rule of law, among other matters; and
- Surveys the nature of the limits on the freedom to conduct a business.

In its structure and coverage, this Part follows the template established by the European Parliamentary Research Service to facilitate comparative analysis across country studies.

IV.1. The concept of "freedom to conduct a business"

IV.1.1. Normative underpinnings of the freedom to conduct a business

In seeking to identify the normative rationale for a freedom to conduct a business, we may adopt one of two different perspectives. On the one hand, some scholars have associated commercial freedom with the intrinsic value of individual autonomy, and even sought to situate it among the inherent rights of the individual "*which are beyond the power of government to abridge.*"[108] On the other hand, the freedom to carry on a business may understood as serving the functional values associated with the market economy as a form of economic organization.[109]

There is, of course, overlap between these perspectives, given that a normative commitment to the market economy can itself be based not only on its advantages as a means to the maximization of aggregate social welfare, but also on the respect that it shows for individual choices.[110]

IV.1.2. Different names for the same concept?

In connection with Article 16 EUCFR,[111] it has been observed that the freedom to conduct a business includes both the freedom to undertake a business and the freedom to carry on that business.[112] In other words, one may speak of a freedom to enter into (and against compelled exit from) a line of business, as well as a freedom from interference in the manner in which the business is carried out.

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[108] WHITE, T.R.: "Constitutional Protection of Liberty of Contract: Does It Still Exist?", *University of Pennsylvania Law Review*, Vol. 83:4, 1935 (p. 426).

[109] See generally USAI, A.: "The Freedom to Conduct a Business in the EU, Its Limitations and Its Role in the European Legal Order: A New Engine for Deeper and Stronger Economic, Social, and Political Integration", *German Law Journal,* Vol. 14:9, 2013, 1867 at 1868 (discussing the freedom to conduct a business as "*stemming from the concept of personal freedom*" as well as serving a "*social function*").

[110] See LEE, I. B.: "Fairness and Insider Trading", 2002, *Columbia Business Law Review* 119 (pp.142-145).

[111] Charter of Fundamental Rights of the European Union, 2010 O.J. (C83) 389, 30 March 2010, art. 16.

[112] ZILLER, J.: *La liberté d'entreprise, une perspective de droit comparé : Union européenne,* Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), janvier 2024, XII et 135 pp., référence PE 757.620 (p 58).

Both of these aspects of the freedom to conduct a business find echoes in the manner in which the concept is used in Canadian discourse. For example, in *Roncarelli*,[113] *Manitoba Fisheries*[114] and *Prince George*,[115] the impugned legislative or administrative decisions effectively deprived the affected individual or business entity of the possibility of carrying on their business. On the other hand, in *Board of Commerce*,[116] *Edwards Books*,[117] *Irwin Toy*,[118] and *Siemens*,[119] what was argued for was a freedom from interference in the manner in which business was carried out.

It must be emphasized that the conceptual understanding of a freedom is a distinct question from the extent to which, and the manner in which, the freedom enjoys legal protection. For example, it can be seen from the outcomes of the first three cases listed above and the reasoning offered by the relevant courts in support of those outcomes, that — despite the absence of a formal constitutional right to conduct a business — general principles of the Canadian legal system afford a measure of protection, in some circumstances, against arbitrary exclusion or expulsion from a line of business.[120] Similarly, it was seen in Part II that the prohibition under human rights legislation against discrimination in connection with membership in trade and professional associations provides protection from certain types of discriminatory barrier to access to a trade or profession.[121] Thus, the first aspect of freedom to conduct a business — freedom of entry and freedom from compelled exit — enjoys some legal protection in Canadian legislation and jurisprudence.

However, it can equally be seen from the other cases mentioned above that, with the exception of *Board of Commerce*, attempts to invoke commercial liberty to attack restrictions on the manner in which business is carried out have been almost entirely unsuccessful.[122] Even in *Board of Commerce*,[123] the Judicial Committee's rhetorical invocation of "liberty" is belied by the Court's holding, which was not that businesses could not be regulated in the manner proposed by the federal government, but only that such legislation must instead be enacted by the provinces.

IV.1.3. Differences between freedom to conduct a business and other freedoms

The freedom to conduct a business is often associated with other concepts, such as:

- Freedom of contract
- Free competition
- Freedoms related to internal trade
- Freedom of association
- Industrial freedom
- Freedom of economic initiative.

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113 *Roncarelli v Duplessis*, note 37 above.

114 *Manitoba Fisheries v R*, note 43 above.

115 *Prince George (City) v Payne*, note 50 above.

116 *Re Board of Commerce*, note 55 above.

117 *R v Edwards Books and Art Ltd*, note 79 above.

118 *Irwin Toy Ltd v Québec*, note 87 above.

119 *Siemens v Manitoba*, note 81 above.

120 See Part III.1 above.

121 See Part II.2.2 above.

122 See Part III.3.2 above.

123 Discussed above in the text accompanying note 58.

In the sections that follow, we consider the relationship between these concepts and the freedom to conduct a business.[124]

IV.1.3.1. Freedom of contract

Conceptually speaking, much commercial activity takes the form of concluding and performing obligations under contracts — whether with the owners of factors of production, or with the purchasers of the output of the business.

The close association between contracting and the conduct of business can be seen in *Citizens Insurance v Parsons*,[125] the decision widely understood as the origin of the proposition that, in general, business regulation with each province comes within provincial jurisdiction. The proposition flows from the Judicial Committee's determination that "contracts," and, more particularly, "*rights arising from contract*" come within the concept of "*civil rights*";[126] and from the Judicial Committee's choice to exclude from the scope of the federal power to regulate trade and commerce the "*power to regulate [...] contracts of a particular business*."[127]

FRAME 27

Citizens Insurance Co. v Parsons
[1881] UKPC 49, (1881) 7 AC 96

Judicial Committee of the Privy Council

[Regarding "civil rights", a class of subjects under provincial jurisdiction:]

The Act deals with policies of insurance [...] and prescribes certain conditions which are to form part of such contracts. These contracts, and the rights arising from them, it was argued, came legitimately within the class of subject, "Property and civil rights." The appellants, on the other hand, contended that civil rights meant only such rights as flowed from the law, and gave as an instance the status of persons. Their Lordships cannot think that the latter construction is the correct one. They find no sufficient reason [...] for giving so narrow an interpretation to the words "civil rights." The words are sufficiently large to embrace, in their fair and ordinary meaning, rights arising from contract [...].

[Regarding "regulation of trade and commerce," a class of subjects under federal jurisdiction:]

It is enough for the decision of the present case to say that, in their [Lordships'] view, [Parliament's] authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade [...].

In private law, freedom of contract is a recognized (but far from unqualified) value, both in the common law provinces and in Québec.[128] However, it is not among the freedoms guaranteed in the *Charter*.

Arguments might be made regarding the inclusion of contracting activity in such concepts as "liberty" (s. 7) and "freedom of expression" (s. 2(b)), as can be seen from the judgments of

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[124] The relationship between another concept — the right to property — and the freedom to conduct a business is considered in Part IV.3, below.

[125] *Citizens Insurance Co v Parsons*, [1881] UKPC 49, (1881) 7 AC 96.

[126] Page 8.

[127] Page 12.

[128] See *Tercon Contractors Ltd. v British Columbia (Transportation and Highways)*, [2010] 1 SCR 69 at par. 117 (Binnie J., dissenting, but not on this point: "*freedom of contract will often, but not always, trump other societal values*"); PICOTTE, M.-A.: "Adhérer ou adhérer : proposition sur la notion de contrat (par adhésion)", *Revue générale de droit*, Vol. 51 n°2, 2021, p. 519 (p. 534) ("La liberté contractuelle est un principe phare du droit des contrats").

Justices Lamer and Wilson, respectively, in *Reference re ss. 193 and 195.1(1)(c) of the Crimnial Code*,[129] involving a challenge to the offence of communicating in public for the purpose of prostitution. These judgments illustrate, on the one hand, the Supreme Court's lack of receptiveness to the suggestion that "liberty" includes economic rights of a commercial nature[130] and, on the other hand, the fact that the Court's definition of "expression" is certainly broad enough to embrace, in theory, the activities involved in contracting.[131] Regarding the latter point, however, as mentioned in Part III, it is doubtful that the Court would ultimately endorse an interpretation of s. 2(b) so broad as to constitutionalize, in effect, the freedom of contract.[132]

IV.1.3.2. Free competition

During an earlier era, measures taken by the State to ensure free competition were sometimes judged to be in tension with the freedom to conduct a business [...] of those possessing market power. For example, it was seen in Part III that, in invaliding the federal legislation directed against anti-competitive practices in *Board of Commerce*, the Judicial Committee characterized the legislation as effecting an interference with "liberty," and thus encroaching on provincial jurisdiction over civil rights.[133]

As mentioned in Part III, the Supreme Court has subsequently interpreted the division powers in a manner more accommodating of federal legislative authority; it has, in particular, upheld federal competition legislation under the power of Parliament to make laws regulating trade and commerce. This legislation has, as one of its stated purposes, "*to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy*"[134] — that is, the legislation recognizes that some market behaviours must be constrained in order to preserve the equal commercial freedom of smaller businesses.

FRAME 28

***Competition Act*, s 1.1**

RSC 1985, c. C-34

Purpose of Act

1.1 *The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.*

[emphasis added]

Similarly, there is a longstanding rule in Ontario that, without specific legislative authority, municipalities lack the power to create monopolies — in the language of the statute, municipalities may not "*confer on any person the exclusive right of carrying on any business, trade*

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[129] *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 SCR 1123.

[130] See Part III.3.2 (case law interpreting "liberty"), and in particular note 84.

[131] See Part III.3.3 (case law interpreting "expression"), and in particular note 91.

[132] Id. An analogy can be made to the Court's rejection of an interpretation of the "freedom of association" that would be so broad as to "constitutionalize all commercial relationships." See Part IV.1.3.4.

[133] Part III.2.1, above.

[134] *Competition Act*, RSC 1985, c C-34, s. 1.1. The *Competition Act* is discussed further in Part IV.8.3 below.

or occupation [...]."[135] Such a rule also appears to be fundamentally concerned with preserving the freedom to conduct a business.

IV.1.3.3. Freedoms related to interprovincial trade and mobility

In the European Union, there is a close link between the freedom to conduct a business and the freedoms of movement that form the pillars of the common market.[136] In Canada, the relevant constitutional framework includes ss. 91(2), 92(13) and 121 of the *Constitution Act 1867* and s. 6 of the *Charter of Rights*.

IV.1.3.3.1. Section 121 of the Constitution Act 1867

Section 121 of the *Constitution Act 1867* provides:

FRAME 29

***Constitution Act 1867*, s 121**

121 *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.*

For nearly a century, the prevailing understanding of s. 121 was that it precluded only direct tariff barriers between provinces. This understanding was the result of the Supreme Court's 1921 decision in *Gold Seal*,[137] upholding the validity of a federal law prohibiting the importation of alcohol into those provinces where its sale was prohibited by provincial law. According to the majority Justices, because this law did not implement a tariff, it did not contravene s. 121.

FRAME 30

Gold Seal v Alberta
(1921) 62 SCR 424

Supreme Court of Canada

Duff J: —

[T]he phraseology adopted, when the context is considered in which this section is found, shews, I think, that the real object of [s. 121] is to prohibit the establishment of customs duties affecting inter-provincial trade in the products of any province of the Union.

Anglin CJC: —

Neither is the legislation under consideration in my opinion obnoxious to s. 121 of the B.N.A. Act. The purpose of that section is to ensure that articles of the growth, produce or manufacture of any province shall not be subjected to any customs duty when carried into any other province. Prohibition of import in aid of temperance legislation is not within the purview of the section.

Mignault J: —

[The] object of section 121 was not to decree that all articles of the growth, produce or manufacture of any of the provinces should be admitted into the others, but merely to secure that they should be admitted "free," that is to say without any tax or duty imposed as a condition of their admission. The essential word here is

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[135] *Municipal Act, 2001*, SO 2001, c 25, s 18. See note 36 above.

[136] See ZILLER, J.: *La liberté d'entreprise, une perspective de droit comparé : Union européenne,* Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), janvier 2024, XII et 135 pp., référence PE 757.620, Part IV.1.2.3 (p 67).

[137] *Gold Seal Ltd v Alberta* (1921), 62 SCR 424.

"free" and what is prohibited is the levying of custom duties or other charges of a like nature in matters of interprovincial trade.

In 2018, however, the Supreme Court changed course and adopted a less parsimonious interpretation of the requirement that goods originating in one province be "*admitted free*" in the others. Under the revised interpretation, s. 121 is violated by measures that are "*tariff-like*," in the sense that "*in essence and purpose [they] burden the passage of goods across a provincial border*."[138]

FRAME 31

R v Comeau
[2018] 1 SCR 342

Supreme Court of Canada

Section 121 does not impose absolute free trade across Canada. [The provision] prohibits governments from levying tariffs or tariff-like measures (measures that in essence and purpose burden the passage of goods across a provincial border); but, s. 121 does not prohibit governments from adopting laws and regulatory schemes directed to other goals that have incidental effects on the passage of goods across provincial borders.

An illustration of what is and is not permitted under s. 121 can be found in a comparison of the outcome in the *Comeau* case itself with that in *Steam Whistle Brewing Inc v Alberta Gaming and Liquor Commission*,[139] a subsequent decision of the Alberta Court of Appeal.

In *Comeau,* the impugned legislation established a provincial Crown corporation as the entity responsible for purchasing, importing, distributing and selling liquor in the province of New Brunswick. The legislation prohibited the possession of liquor (exceeding a prescribed threshold) if the liquor did not originate from the provincial liquor corporation. This legislation "*imposes a burden on bringing liquor across a provincial boundary [...] [and] in essence, functions like a tariff*" (par. 121); yet, its purpose "*is not to specifically target out-of-province liquor*" but instead is a component of a broader, permissible scheme "*to enable public supervision of the production, movement, sale, and use of alcohol within New Brunswick*" (par. 124). Because the purpose of the legislation was not to restrict imports, it did not offend against s. 121 and was valid.

By contrast, in *Steam Whistle*, the provincial liquor distribution agency in Alberta instituted a pricing policy that discriminated against beer produced outside the province. This pricing policy ran afoul of s. 121 because its "*primary purpose [was] to protect local industry, a purpose traditionally served by tariffs, [...] [and because it] achieved this purpose by imposing a greater cost on the sale of craft beer produced extra-provincially than is imposed on the sale of craft beer produced in Alberta*." (par. 110).

IV.1.3.3.2. Sections 91(2) and 92(13) of the Constitution Act 1867

Sections 91(2) and 92(13) provide as follows.

FRAME 32

***Constitution Act 1867*, sections 91(2) and 92(13)**

91 [T]he exclusive legislative authority of the Parliament of Canada extends to [...]
2. The Regulation of Trade and Commerce.

[138] *R v Comeau*, [2018] 1 SCR 342, at par. 53.

[139] *Steam Whistle Brewing Inc v Alberta Gaming and Liquor Commission*, 2019 ABCA 468.

92 In each Province the Legislature may exclusively make Laws in relation to [...]

13. Property and Civil Rights in the Province.

The combined effect of the conferral on the federal Parliament by s. 91(2) of "exclusive" authority to make laws in relation to the regulation of trade and commerce, and the territorial limitation on provincial authority under s. 92(13) ("in the province"), is to restrict the power of provinces to regulate interprovincial transactions. As a generalization, a provincial law is ultra vires if its purpose is to restrict or regulate imports. On the other hand, a provincial law is valid if its dominant characteristic is the regulation of transactions or activities taking place within the province, even if the law has an incidental impact on imports.

Again, it is useful for an understanding of what is and is not permissible to consider the contrasting outcomes in two cases: *Carnation Co. Ltd. v Québec Agricultural Marketing Board*[140] and *The Manitoba Egg Reference*.[141] In *Carnation*, a provincial law regulated transactions between producers and purchasers of agricultural products within the province of Québec. The law was challenged by a business that purchased raw milk from producers, processed the milk, and sold the output in other provinces. In dictating the price paid by the milk processing company for its inputs, the law had an undeniable impact on interprovincial trade; yet, the legislation was found to come within provincial authority because the transactions that it regulated took place within Québec.

In *Manitoba Egg*, a provincial law similarly regulated transactions taking place in a particular agricultural product within the province; however, the Court determined in this case that the purpose of the law was to place domestic producers at an advantage over out-of-province producers. As a result, the Court concluded that the legislation "*not only affects interprovincial trade in eggs; it aims at the regulation of such trade. [...] It is designed to restrict or limit the free flow of trade between Provinces as such*"[142] and invades federal authority under s. 91(2).

IV.1.3.3.3. Section 6 of the Charter of Rights

The relevant portion of s. 6 of the *Charter* provides:

FRAME 33

***Canadian Charter of Rights and Freedoms*, sections 6(2)-(4)**

Mobility rights

6 (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(a) to move to and take up residence in any province; and

(b) to pursue the gaining of a livelihood in any province.

(3) The rights specified in subsection (2) are subject to

(a) any laws or 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; and

(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

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[140] *Carnation Company Limited v Québec Agricultural Marketing Board et al*, [1968] SCR 23.

[141] *Attorney-General for Manitoba v Manitoba Egg and Poultry Association et al (The Manitoba Egg Reference)*, [1971] SCR 689.

[142] *Manitoba Egg*, at p. 703.

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

The Supreme Court discussed the purpose and scope of s. 6 in *CEMA v Richardson*,[143] characterizing the provision as giving effect to a "*basic human right*" grounded in the "*dignity of the individual*" (par. 60), rather than as an instrument of "*the economic unity of the country*" (par. 66).

FRAME 34

Canadian Egg Marketing Agency v Richardson
[1998] 3 SCR 157

Supreme Court of Canada

58. [Section] 6 may be understood as giving effect to the fundamental human right of mobility, which is defined according to the obligation that individuals be treated without discrimination based on their residence [...]

60. The freedom guaranteed in s. 6 embodies a concern for the dignity of the individual. Sections 6(2)(b) and 6(3)(a) advance this purpose by guaranteeing a measure of autonomy in terms of personal mobility, and by forbidding the state from undermining this mobility and autonomy through discriminatory treatment based on place of residence, past or present. The freedom to pursue a livelihood is essential to self-fulfilment as well as survival. Section 6 is meant to give effect to the basic human right, closely related to equality, that individuals should be able to participate in the economy without being subject to legislation which discriminates primarily on the basis of attributes related to mobility in pursuit of their livelihood.

61. The terms of s. 6 suggest that this right is not violated by legislation regulating any particular type of economic activity, but rather by the effect of such legislation on the fundamental right to pursue a livelihood on an equal basis with others. Indeed, the provinces and federal government are authorized by virtue of ss. 91 and 92 of the Constitution Act, 1867 to regulate all manner of economic activity, as defined by type of activity. For example, s. 92(13) authorizes provincial legislation with respect to property and civil rights, s. 92(9) authorizes the imposition of retail licences, and s. 91(12) authorizes legislation over the sea coast and inland fisheries. As a result of the federal design of our Constitution, and the grant of property and civil rights to the jurisdiction of the provinces, a vast array of legislation in force in the provinces affecting the terms of commercial activity applies only within the province in which it is enacted. The federal structure of our Constitution authorizes the growth of distinct systems of commercial regulation whose application is inevitably defined "in terms of provincial boundaries". Provincial legislation validly enacted under s. 92 of the Constitution is applicable only within a single province and may have an effect on the conditions according to which a livelihood may be pursued. Federal legislation, or cooperative federal-provincial legislative schemes, may also apply only in some provinces and, thus, create variable conditions for the pursuit of a livelihood in different provinces [...]. This type of economic legislation, and the growth of divergent regulatory regimes in the provinces, is undoubtedly authorized by the Constitution.

66. The objective of s. 6 should not be interpreted in terms of a right to engage in any specific type of economic activity. Entrenching mobility with regard to specified factors of economic production was proposed and roundly rejected. By contrast, the inclusion of s. 6 in the Charter reflects a human rights objective: to ensure mobility of persons, and to that end, the pursuit of a livelihood on an equal footing with others regardless of residence. It guarantees the mobility of persons, not as a feature of the economic unity of the country, but in order to further a human rights purpose. It is centred on the individual. Section 6 neither categorically guarantees nor excludes the right of an individual to move goods, services, or capital into a province without regulation operating to interfere with that movement. Rather, s. 6 relates to an essential attribute of personhood, and guarantees that mobility in the pursuit of a livelihood will not be prevented by means of unequal treatment based on residence by the laws in force in the jurisdiction in which that livelihood is pursued.

[143] *Canadian Egg Marketing Agency v Richardson*, [1998] 3 SCR 157.

Nevertheless, the Court recognized that s. 6 undeniably includes rights of an economic nature:

FRAME 35

Canadian Egg Marketing Agency v Richardson
[1998] 3 SCR 157

Supreme Court of Canada

68. In the context of an economy characterized by modern communications and forms of goods and services which are easily transported across great distances, it must be recognized that the hallmark of mobility required by s. 6 is not physical movement to another province, but rather any attempt to create wealth in another province.

The application of these principles is illustrated by the analysis and outcome in *Richardson* itself. The efforts of an egg producer located in the Northwest Territories (NWT) to sell eggs outside the territory, while not involving "*physical movement*" of the producer, were an "*attempt to create wealth in another province*" and, thus, amounted to the "*gaining of a livelihood in another province*" within the meaning of s. 6(2)(b).

At the same time, the complainant producer had not shown that the legislation preventing that producer from marketing its eggs outside the NWT had discriminated against that producer on the basis of its province of origin, because the producer had not shown that similarly situated producers located in the destination provinces would have received more favourable treatment.[144] Thus, the affront to equality and dignity with which s. 6 is chiefly concerned, according to the Court, was not established.

IV.1.3.4. Freedom of association

Section 2(d) of the *Charter* guarantees the "freedom of association":

FRAME 36

***Canadian Charter of Rights and Freedoms*, section 2(d)**

2 Everyone has the following fundamental freedoms: [...]
(d) freedom of association.

In *Richardson,*[145] the complainants' alternative argument was that the impugned legislation, in preventing them from marketing their eggs outside NWT, restricted their freedom of association by preventing them from "associating" with potential purchasers of their eggs. This argument met with success at the trial level:

FRAME 37

Canadian Egg Marketing Agency v Richardson
(1995) 129 DLR (4th) 195

Supreme Court of the Northwest Territories (de Weerdt J)

Association is of the very essence of trade, for one cannot trade merely with oneself. The commercial production of eggs implies their eventual consumption, which must involve associations between individual producers, processors, vendors, purchasers and ultimately consumers, not to mention regulators and others in the ordinary course of the trade.

144 *Richardson*, at par. 100-101.

145 See above, note 143.

The Supreme Court of Canada, however, rejected the argument. The egg producers' interpretation of the freedom of association was unacceptable, the Court held, because it was so broad that it would "*constitutionalize all commercial relationships*."

FRAME 38

Canadian Egg Marketing Agency v Richardson
[1998] 3 SCR 157

Supreme Court of Canada

It cannot be said that freedom of contract and trade is a modern notion. [...] Yet the effect of the respondents' submissions would be to constitutionalize all commercial relationships under the rubric of freedom of association. There is no trade or profession that can be exercised entirely by oneself. Following the reasoning of the Court of Appeal, all forms of government regulation of the economy that affect the ability of individuals to trade would, at least prima facie, infringe s. 2(d) and require justification under s. 1. As William Shores noted in a comment on the Court of Appeal's decision in the case at bar:

> *An interpretation of the freedom of association that protects trade expands the role of the Charter in protecting commercial activity far beyond anything recognized by the courts to date. Such an interpretation will provide a sharp weapon for attack on a wide range of regulatory systems.*

("Walking Onto an Unfamiliar Playing Field -- Expanding the Freedom of Association to Cover Trade" (1996), 6 Reid's Administrative Law 1.)

IV.1.3.5. Industrial freedom

The term "industrial freedom" is not in common use in Canadian legal discourse.

In some other countries, the term "industrial freedom" is used in conjunction with the term "commercial freedom" (e.g., *liberté du commerce et de l'industrie*), implying a possible conceptual distinction between "commercial" and "industrial" activities — between exchanging goods and services, on the one hand, and producing goods and services, on the other hand.

One might suppose that the question whether this conceptual distinction is capable of giving rise, in Canada, to a legal difference in the status of any given business activity depends on the particular rules being applied.

For instance, provincial authority to regulate business under the "property and civil rights" power does not depend on whether the specific activities being related are in the nature of exchange, as opposed to production, but on whether the activities take place within the province. Similarly, federal jurisdiction to prohibit an activity under the "criminal law" power does not depend on whether the activity is "commercial" or "industrial," but whether the form and purpose of the federal legislation comply with the requirements for use of that power.[146]

On the other hand, the distinction could potentially be more significant if the question is whether a particular restriction on a business activity violates the freedom of expression, for it may well be the case that negotiating with a potential purchaser (commerce) comes within the constitutional guarantee,[147] while manufacturing a product (industry) does not.

On balance, however, it would probably be unwise to attach undue significance to the distinction in the Canadian context. To the extent that Canadians enjoy the freedom to

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[146] See Part IV.5.1.1.

[147] See Part III.3.3, in particular regarding the *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 SCR 1123.

conduct a business — for example, as a baseline freedom recognized by the common law — there is no reason to suppose that it does not embrace both "commerce" and "industry."

IV.1.3.6. Freedom of economic initiative

The term "freedom of economic initiative" is not in widespread use in Canadian legal discourse.

It appears that, in some countries, the term is associated with a principle that the State should not engage in commercial activities — especially in competition with or to the exclusion of private actors.[148] Such a principle is absent from the Canadian legal landscape: Crown corporations have, for long, engaged in activities of a commercial nature,[149] including in competition with private providers.

The normative concern about an "*uneven playing field*" between market participants that are public sector entities and their private competitors has not gone unnoticed. An example is the decision of the trial judge in *Fenton v North York Hydro Electric Commission*,[150] in which the defendant, a municipal hydroelectric utility, claimed the benefit of a shortened limitation period for lawsuits against a "public utility." The trial judge, noting the "modern predilection of public institutions to delve into private enterprise," interpreted the limitation period as inapplicable to the municipal entity's commercial activities.

FRAME 39

Fenton v North York Hydro Electric Commission
(1993) 12 OR (3d) 590 (Gen Div)

Ontario Court (General Division)

The limitation period of the type at issue here, emerged at a time in which the role of public corporations was minimal. However, given the modern predilection of public institutions to delve into private enterprise, limitation periods may represent an unfair "competitive advantage" and a potential pitfall to consumers and to innocent third parties who, with increasing frequency, fall victim to an emerging checkerboard of limitation periods. Interpretation of the Public Utilities Act, particularly s. 32, must give effect to the distinction between public and private enterprise. This view captures the evolving legal distinction [...] made between the primary duties of public authorities exercised in the public interest, and those which, although within the legal powers of the public authority, are not absolutely required.

[148] See PONTHOREAU, M.-C.: *La liberté d'entreprise, une perspective de droit comparé : France,* Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), avril 2024, XII et 124 pp., référence PE 762.291, Part IV.1.2.2.

[149] See generally GARANT, P.: "Crown Corporations: Instruments of Economic Intervention — Legal Aspects" in BERNIER, I. and LAJOIE, A. (eds.): *Regulations, Crown Corporations and Administrative Tribunals*, University of Toronto Press, 1985; LUCAS, A. R.: "Judicial Review of Crown Corporations", *Alberta Law Review* Vol. 25:3, 1987, 363 at 364.

[150] *Fenton v North York Hydro Electric Commission*, (1993) 12 OR (3d) 590 (SC), aff'd (1996) 29 OR (3d) 481 (CA), leave ref'd SCC (Feb 20, 1997).

IV.2. Is the "freedom to conduct a business" a fundamental right in Canada?

An initial response to the question whether the "freedom to conduct a business" is a fundamental right in Canada can be provided in the form of a synthesis of the material in Parts I, II and III of this Study:

- The "freedom to conduct a business" is absent from the written text of the Constitution Acts 1867 and 1982;[151]
- The courts have consistently declined to interpret constitutional notions such as "liberty" in such a manner as to embrace a freedom to conduct a business.[152]
- The *Charter* is not the only source of protection for rights. Even prior to the advent of the *Charter*, the common law recognized certain rights and freedoms of the individual against the State;[153] the freedom to conduct a business is among those rights and freedoms.[154] Like other common law rights and freedoms, the freedom to conduct a business can be regulated, modified or even taken away by appropriate legislation.[155]

It may be tempting to summarize the foregoing in a simple negative answer to the question posed in the heading — i.e., to conclude that the freedom to conduct a business is not a fundamental right in Canada. Such a conclusion would not be incorrect if by "fundamental" one means "constitutionally entrenched," but one risks being misled if one takes "fundamental" to be a synonym for "important" or "highly valued."

To put the point another way, the societal choice to entrench (or not) a given right within the constitutional order does not reduce to a judgment about the value society attaches to that right. What constitutionalization does is assign to the judiciary, which is to say to an organ rather than the representative institutions of government, an important (and sometimes decisive) role in determining when and how the right should be balanced against other values and interests.[156] Examples of reasons for assigning such a role to an unelected judiciary are: (a) to protect minorities from oppression or systematic disregard for their interests; (b) to correct foreseeable shortcomings in majoritarian political processes (e.g., myopia); or (c) to ensure the electoral accountability of the government (e.g., by preventing the government from suppressing discussion of its performance and policies).[157]

These reasons can help to explain much of the content of the *Charter of Rights*, for example the freedoms of religion and expression,[158] the right to vote and be a candidate for elected

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[151] Part II.1.

[152] Part III.3.2.

[153] Part I.

[154] Part III.1.

[155] Part I.

[156] The role is decisive in the absence of an override clause, such as s. 33 of the Charter; and nearly so if, as has until recently been the case, there are strong political norms against the use of the clause. See note 15 above.

[157] See LEE, I. B.: "Can Economics Justify the Constitutional Guarantee of Freedom of Expression?", 2008, 21:2 *Canadian Journal of Law & Jurisprudence* 355 at p. 372.

[158] *Charter*, s. 2(a) and (b).

office,[159] English and French minority language rights,[160] anti-discrimination rights,[161] and criminal justice rights.[162] From our country's historical experience, Canadians have drawn the lesson that political majorities had sometimes had insufficient regard for the rights just described. There is a widespread consensus, for example, that majorities (or their representatives) have sometimes attempted to suppress dissenting political views, or unpopular religious minorities; that laws have too often discriminated on the basis of identifiable personal characteristics or membership in a group defined by such characteristics; and that popular demands for retribution have sometimes produced miscarriages of justice in criminal cases.[163]

Is the "freedom to conduct a business" subject to concerns about political process failure or majoritarian disregard for minority interests? Have Canadians had reason to believe that the legal system, including our institutions of representative decision-making and judges exercising their role as guardians of the common law, have inadequately valued commercial freedom when it has been in competition with other values and interests? An affirmative response to these questions would not attract a consensus among Canadians. In this regard, commercial freedom seems to differ from the other rights and freedoms previously described.

On this understanding of the moral and political judgments that lead to the constitutional entrenchment of rights, the non-constitutionalization of business freedom does not signify its lesser value, but only the general preference, in a democracy, for trade-offs between important values to be decided by representative institutions, unless there are pathologies of representative decision-making that may foreseeably produce decisions that later generations recognize as misguided or unfair.

IV.3. Relationship to the right to property

IV.3.1. The concept of property rights

It was earlier observed that the normative basis for the freedom to carry on a business can be understood in either intrinsic or instrumental terms.[164] The same is true of the right to the enjoyment of one's property, which some theories regard as a condition for the legitimate exercise of governmental power, while others emphasize its contribution to the maximization of societal welfare.[165]

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159 *Charter*, s. 3.

160 *Charter*, ss. 16-23.

161 *Charter*, s. 15.

162 Charter, ss. 7-14. Some of these rights, which include the right to life, liberty and security of the person (s. 7); the right to be secure against unreasonable searches and seizures (s. 8); and the right to be secure against cruel and unusual treatment or punishment (s. 12); are not limited to the criminal justice setting.

163 In *Roncarelli,* for example, which was discussed in Part III.1 in connection with the common law freedom to carry on a business, the Premier's decision to revoke the restaurant owner's liquor licence was attributable to the Premier's animosity towards a minority religious movement; it was not uncommon, at the time of the Supreme Court's ruling, to frame the case in terms of the protection of a persecuted religious minority. See ADAMS, E. M.: "Building a Law of Human Rights: *Roncarelli v Duplessis* in Canadian Constitutional Culture", 2010, 55:3 *McGill Law Journal* 437 at 440.

164 See Part IV.1.1 above.

165 Compare RAWLS, note 167 below, and EPSTEIN, R.: *The Classical Liberal Constitution,* Harvard University Press, 2013, at p. 4 (associating the protection of property with freedom from government tyranny), with DEMSETZ, H.: "Toward a Theory of Property Rights", 1967, 57 *American Economic Review* 347 at pp. 350 (describing "*allocative function of property rights in the internalization of beneficial and harmful effects*").

As the *Manitoba Fisheries* and *Harrison v Carswell* cases discussed in Part III.1 illustrate, the legal protection of property rights often has, in practice, the effect of protecting the freedom to carry on a business, when the owner of the property is a business enterprise.[166] Nevertheless, not every theoretical understanding of property as a fundamental right treats all kinds of property indifferently. For example, in RAWLS' *Theory of Justice*, the "*right to hold (personal) property*" was included among the "*basic liberties of citizens*"[167]; however, RAWLS later clarified that he did not consider this concept to include the right to own "*means of production*"[168]

IV.3.2. Absence of property rights from the *Charter of Rights*

Like the freedom to carry on business, the right to the enjoyment of property is absent from the text of the *Charter of Rights*.

At the time of the adoption of the *Charter*, the right to property was recognized in several fundamental rights instruments, including the *Canadian Bill of Rights*,[169] the U.S. *Bill of Rights*,[170] the *Universal Declaration of Human Rights*,[171] and the *European Convention*.[172]

FRAME 40

Canadian Bill of Rights, section 1(a)

SC 1960, c 44

1 *It is hereby recognized and declared that [...] there have existed and shall continue to exist [...]*

(a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

Accordingly, one might have anticipated that property rights would also be included in the *Charter*. Indeed, the federal government's proposals for a constitutional charter of rights included a right to the enjoyment of property among its provisions: see, for example, Frame 41 below.[173]

FRAME 41

Bill C-60

An Act to amend the Constitution of Canada with respect to matters coming within the legislative authority of the Parliament of Canada, and to approve and authorize the taking of measures necessary for the amendment of the Constitution with respect to certain other matters

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166 See the text accompanying notes 44 to 48, above.

167 RAWLS, J.: *A Theory of Justice*, Harvard University Press, 1971 (p. 61), quoted in NEWMAN, D.G. and BINNION, L.: "The Exclusion of Property Rights from the Charter: Correcting the Historical Record", *Alberta Law Review*, Vol. 52 n°3, 2015, p. 543 (p. 549).

168 RAWLS, J.: *A Theory of Justice*, rev. ed., Harvard University Press, 1999 (p. 54), quoted in NEWMAN and BINNION, *loc cit*.

169 *Canadian Bill of Rights*, SC 1960, c 44, s 1(a).

170 United States Constitution, Am. V, IV(1).

171 Art. 17 of the Universal Declaration of Human Rights, GA Res. 217(111), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948).

172 Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, ETS 9, art. 1.

173 For additional examples and discussion, see JOHANSEN, D.: "Property Rights and the Constitution", Library of Parliament, 1991.

3rd Sess, 30th Parl, SC, 1978

6. *it is accordingly declared that, in Canada, every individual shall enjoy and continue to enjoy the following fundamental rights and freedoms: [...]*

   — the right of the individual to the use and enjoyment of property, and the right not to be deprived thereof except in accordance with law; [...]

[Note to reader: this Bill was not enacted.]

Two factors go a long way towards explaining the ultimate decision of the Framers to omit property rights.

First, the governments of several provinces feared that the entrenchment of property rights would negatively affect provincial jurisdiction.[174] In order to understand this concern, one must recall that the provinces' authority to make laws in relation to "*property and civil rights*" is a vital component (arguably, the cornerstone) of their autonomy. The provinces' fear of the consequences for this authority of entrenching property rights would have been compounded by the fact that the judges of superior and appellate courts in Canada, including the Supreme Court of Canada, are all appointed by the federal government.[175] In an attempt to obtain the support of provincial governments for the *Charter of Rights* project,[176] the federal government eventually dropped property rights from its draft. [177]

A second factor may have been the fear of replicating the U.S. experience with the right, under the Fifth and Fourteenth Amendments, not to be deprived of property without due process. This experience included, notoriously, a period when an interventionist U.S. Supreme Court relied on the due process clause to invalidate regulatory laws that much late 20th century Canadian opinion regarded as enlightened and progressive.[178] Although many believed that the risk could be mitigated with careful drafting,[179] the "fear of *Lochner*"[180] was nevertheless prominent in the minds of the drafters of the *Charter* and other political actors at the time.[181]

IV.3.3. Property and aboriginal title

It was mentioned in Part III.4 that one of the constitutional rights of the First Nations, Inuit and Métis peoples of Canada is "Aboriginal title." As a right "*to the exclusive use and occupation of*

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[174] Newman & Binnion, note 167 above, at p. 552; ALVARO, A.: "Why Property Rights Were Excluded from the Canadian Charter of Rights and Freedoms", 1991, 24 *Canadian Journal of Political Science* 309, p. 321.

[175] *Constitution Act 1867*, s 96.

[176] Eventually, the governments of nine provinces (all except Québec) endorsed the *Constitution Act 1982*.

[177] Newman & Binnion, note 167 above, at p. 556. The addition of the legislative override clause, s. 33, was another concession.

[178] See, e.g., AUGUSTINE, P. W.: "Protection of the Right to Property under the Canadian Charter of Rights and Freedoms", 1986, 18:1 *Ottawa Law Review* 55, at pp. 63-64; ALVARO, note 174 above, at p. 325; BAUMAN, R. W.: "Property Rights in the Canadian Constitutional Context", *South African Journal on Human Rights,* Vol. 8 n°3, 1992, p. 344 (pp. 354-55).

[179] For example, both the *Canadian Bill of Rights* and *Bill C-60* designated property rights as a "*right of the individual*." See Frames 41 and 42 above. By contrast, in the U.S. Fourteenth Amendment, the term "person" is used, and has been interpreted as enabling business corporations to claim the protection of the Amendment: see *Santa Clara County v Southern Pacific Railroad Company* 118 US 394 at 396 (1886). See also CHOUDHRY, S.: "The Lochner Era and Comparative Constitutionalism", *International Journal of Constitutional Law* 2:1, 2004, p. 1 (p. 19); ALVARO, note 174 above (p. 325).

[180] *Lochner v New York*, 198 US 45 (1905), invalidating under the due process clause a state law that imposed a maximum number of weekly hours of work for bakery employees.

[181] CHOUDHRY, note 179 above, at pp. 17-18; NEWMAN & BINNION, note 167 above (pp. 548-59).

[...] land,"[182] Aboriginal title has been analogized by scholars and courts to a property right;[183] however, courts have also warned that the anology is not exact,[184] and it may be more precise to describe Aboriginal title as a *sui generis* legal right[185] grounded in inter-societal law.[186]

IV.3.4. Recognition of the right to the enjoyment of property under provincial legislation

The right to the enjoyment of property is included in the human rights legislation of Alberta, Québec and the Yukon Territory.

FRAME 42

***Alberta Bill of Rights*, s. 1(a)**

RSA 2000, c A-14

1 *It is hereby recognized and declared that [...] there exist [...]*

(a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

FRAME 43

***Charter of Human Rights and Freedoms*, art. 6 (Québec)**

CQLR c C-12, art 6

6. *Every person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law.*

FRAME 44

***Human Rights Act*, s. 6 (Yukon)**

RSY 2002, c 116

6. *Every individual has a right to the peaceful enjoyment and free disposition of their property, except to the extent provided by law, and no one shall be deprived of that right except with just compensation.*

In addition, Alberta has legislation specifically restricting the acquisition, without compensation, of privately owned "*personal property*" by the Crown: the *Alberta Personal Property Bill of rights*.[187] This legislation, unlike the *Alberta Bill of Rights*:

- Applies to only to tangible non-real property, and therefore excludes such property as choses in action (e.g., securities) and real property; and
- Protects property even if its owner is not an "individual" (i.e., a natural person).

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[182] *Tsilhqot'in Nation v British Columbia*, [2014] 2 SCR 257 at par. 121.

[183] See, for example, SLATTERY, B.: "Understanding Aboriginal Rights", *The Canadian Bar Review* Vol.66 n°4, 1987, p. 727 (p. 748).

[184] For example, *Tsilhqot'in*, at par. 72.

[185] For example, *Tsilhqot'in*, at par. 12-14.

[186] See BORROWS, J.: "Aboriginal Title and Private Property", 2015, 71 *Supreme Court Law Review* 91 at p. 104 ("Aboriginal rights are formed through inter-societal law")

[187] *Alberta Personal Property Bill of Rights*, RSA 2000, c A-31.

FRAME 45

Alberta Personal Property Bill of Rights

RSA 2000, c A-31

1 *In this Act ,[...]*

(b) "personal property" means only tangible personal property that is capable of being physically touched, seen or moved or that can be physically possessed and does not include

(i) intangible personal property,

(ii) an incorporeal right, or

(iii) any interest in land;

[...]

2 *Subject to section 3, where*

(a) personal property is owned by a person other than the Crown, and

(b) a provincial enactment contains provisions that authorize the acquiring of permanent title to that personal property by the Crown,

those provisions are of no force or effect unless a process is in place for the determination and payment of compensation for the acquiring of that title.

3 *Section 2 does not apply in respect of the following:*

(a) any taxes, levies or royalties that are payable to the Crown under a provincial enactment;

(b) where personal property is acquired or retained by the Crown following a conviction or contravention of a provincial enactment, if

(i) the acquiring of that personal property is in whole or in part the penalty or an addition to a penalty provided for under that enactment,

(ii) the possession of that personal property by its owner constitutes the contravention of that enactment, or

(iii) the acquiring of that personal property was by reason of the forfeiture of that property to the Crown on account of the conviction;

(c) where the title to personal property is acquired under or pursuant to

(i) any proceedings taken under a provincial enactment respecting the payment of taxes, levies, royalties, fines or penalties;

(ii) the Civil Enforcement Act;

(iii) the Personal Property Security Act;

(iii.1) the International Interests in Mobile Aircraft Equipment Act;

(iv) any regulation made under the Civil Enforcement Act, the Personal Property Security Act or the International Interests in Mobile Aircraft Equipment Act;

(v) any distress, receivership, trusteeship or similar proceedings;

(vi) any liens;

(vii) any agreement or arrangement between the owner of the personal property and the Crown;

(d) any matter, provincial enactment or provision of a provincial enactment exempted from the application of section 2 by a regulation made under section 5.

4 *Subject to section 3, every provincial enactment, whether enacted before or after the coming into force of this Act, shall be construed and applied so as not to abrogate, abridge or infringe on, and so as not to authorize the abrogation or abridgment of or infringement on, any of the rights or benefits provided for under this Act unless an Act of the Legislature expressly declares that that enactment operates notwithstanding the Alberta Personal Property Bill of Rights.*

5 *The Lieutenant Governor in Council may make regulations exempting any matter, provincial enactment or provision of a provincial enactment from the application of section 2.*

6 *This Act binds the Crown.*

IV.4. Freedom to conduct a business and the rule of law

The rule of law* is a foundational principle of the Canadian constitutional order. Recognized explicitly in the preamble to the *Charter of Rights*, the rule of law principle has also been understood to flow implicitly from the preamble to the *Constitution Act 1867*. In the words of the Supreme Court, in *Re Manitoba Language Rights*, "*the constitutional status of the rule of law is beyond question.*"[188]

* EdN: For a comparison of the ***rule of law*** in different legal systems, see:

- **Argentina**: Díaz Ricci, S.: *El Estado de Derecho, una perspectiva de Derecho Comparado: Argentina*, Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), junio 2023, XVI y 199 pp., referencia PE 745.675;
- **Belgium**: Behrendt, C.: Behrendt, C.: *L'État de droit, une perspective de droit comparé : Belgique*, Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), juin 2023, XII et 116 pp., référence PE 745.680 ;
- **Canada**: Zhou, H.-R.: *L'État de droit, une perspective de droit comparé : Canada*, Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), mai 2023, X et 113 pp., référence PE 745.678;
- **Council of Europe**: Ziller, J.: *L'État de droit, une perspective de droit comparé : Conseil de l'Europe*, Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), mars 2023, X et 138 pp., référence PE 745.673;
- **European Union**: Salvatore, V.: *Lo Stato di diritto, una prospettiva di diritto comparato - Unione europea*, Unità Biblioteca di diritto comparato, Servizio Ricerca del Parlamento europeo (EPRS), luglio 2023, X e 105 pp., referenza PE 745.685;
- **France**: Ponthoreau, M.-C.: *L'État de droit, une perspective de droit comparé : France*, Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), avril 2023, X et 119 pp., référence PE 745.676;
- **Germany**: Reimer, F.: *Der Rechtsstaat, eine rechtsvergleichende Perspektive: Deutschland*, Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), März 2023, XVI und 149 S., Referenz PE 745.674;
- **Italy**: Luciani, M.: *Lo Stato di diritto, una prospettiva di diritto comparato - Italia*, Unità Biblioteca di diritto comparato, Servizio Ricerca del Parlamento europeo (EPRS), luglio 2023, XVI e 127 pp., referenza PE 745.682;
- **Mexico**: Ferrer Mac-Gregor Poisot, E.: *El Estado de Derecho, una perspectiva de Derecho Comparado: México*, Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), junio 2023, XIV y 161 pp., referencia PE 745.683;
- **Spain**: González-Trevijano Sánchez, P.: *El Estado de Derecho, una perspectiva de Derecho Comparado: España*, Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), abril de 2023, XIV y 157 pp., referencia PE 745.677;
- **Switzerland**: Hertig Randall, M.: *L'État de droit, une perspective de droit comparé : Suisse*, Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), mai 2023, XII et 183 pp., référence PE 745.684;
- **United States**: Price, A. L.: *The rule of law, a comparative law perspective - United States of America*, Comparative Law Library Unit, European Parliamentary Research Service (EPRS), July 2023, X and 121 pp., reference PE 745.681.

[188] *Re Manitoba Language Rights*, [1985] 1 SCR 721

FRAME 46

Re Manitoba Language Rights
[1985] 1 SCR 721

Supreme Court of Canada

The constitutional status of the rule of law is beyond question. The preamble to the Constitution Act, 1982 states:

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law.

[Emphasis added.]

This is explicit recognition that "the rule of law [is] a fundamental postulate of our constitutional structure" (per Rand J., Roncarelli v Duplessis, 1959 CanLII 50 (SCC), [1959] S.C.R. 121, at p. 142). The rule of law has always been understood as the very basis of the English Constitution characterising the political institutions of England from the time of the Norman Conquest (A.V. Dicey, The Law of the Constitution (10th ed. 1959), at p. 183). It becomes a postulate of our own constitutional order by way of the preamble to the Constitution Act, 1982, and its implicit inclusion in the preamble to the Constitution Act, 1867 by virtue of the words "with a Constitution similar in principle to that of the United Kingdom".

Additional to the inclusion of the rule of law in the preambles of the Constitution Acts of 1867 and 1982, the principle is clearly implicit in the very nature of a Constitution. The Constitution, as the Supreme Law, must be understood as a purposive ordering of social relations providing a basis upon which an actual order of positive laws can be brought into existence. The founders of this nation must have intended, as one of the basic principles of nation building, that Canada be a society of legal order and normative structure: one governed by rule of law. While this is not set out in a specific provision, the principle of the rule of law is clearly a principle of our Constitution.

In analyzing the connection between the rule of law and the freedom to conduct a business, it is useful to consider two aspects of the rule of law: (1) the principle that all (including officials) are subject to the law; and (2) the notion that the law should possess certain characteristics that enable it to fulfil its distinctive role in society.

IV.4.1. Rule of law as the subjection of public power to law

The first aspect of the rule of law implies, in particular, that public officials and citizens alike must obey the law. It is commonly associated with rules that preclude the arbitrary exercise of power by those officials.

In Canada, the *Roncarelli* decision is widely regarded as a paradigmatic application of this cornerstone principle.[189] It will be recalled from Part III.1 that, in that case, the Supreme Court upheld an award of civil damages against a provincial Premier who had arbitrarily ordered the revocation of the plaintiff's liquor licence. The decision demonstrates that no one is exempt from the obligation to follow the law and that there must be legal recourse when officials fail to meet this obligation. It also shows that the citizen's interest in pursuing otherwise lawful business activities is among the interests that enjoy protection as a result of these principles.

[189] *Roncarelli v Duplessis*, [1959] SCR 121.

FRAME 47

Roncarelli v Duplessis
[1959] SCR 121

Supreme Court of Canada (Rand J)

The field of licensed occupations and businesses of this nature is steadily becoming of greater concern to citizens generally.

In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute.

[...]

That, in the presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure.

IV.4.2. Rule of law: the demands of legality[190]

A second aspect of the rule of law is the notion that a legal system must possess certain characteristics if it is to be worthy of that label. There are several distinct perspectives from which the adequacy of a legal system can be assessed. WALDRON, in particular, distinguishes between "formal," "procedural" and "substantive" requirements.[191]

IV.4.2.1. Formal requirements

With respect to the formal qualities that law must possess, FULLER's account of the "inner morality" of law remains canonical.[192]

Among the requirements enumerated by FULLER are that laws should be general; that they should operate prospectively rather than retroactively; that they should be intelligible; that they should not be internally contradictory; and that they should not require the impossible.[193] Each of these requirements has, on occasion, been discussed in the Canadian context, in circumstances involving the regulation of business.

IV.4.2.1.1. Possibility of compliance, absence of internal contradiction

A core principle of legality is that a legal system must not subject its citizens to contradictory legal requirements; more generally, it must not require the impossible.[194]

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[190] The phrase "demands of legality" is from FULLER, L.L.: *The Morality of Law*, Yale University Press, 1964, at p. 43.

[191] WALDRON, J.: "The Rule of Law", in ZALTA, E. N. and NODELMAN, U. (eds.): *The Stanford Encyclopedia of Philosophy,* Fall 2023 Edition: https://plato.stanford.edu/archives/fall2023/entries/rule-of-law/

[192] FULLER, note 190 above, at p. 42.

[193] FULLER, *op cit*, at p. 39.

[194] FULLER, *op cit*, at pp. 65-70.

In Canadian constitutional law, one reflection of this principle is in the doctrine of paramountcy, a rule for resolving conflicts between valid federal and provincial laws.[195] In early statements of the doctrine, the Supreme Court explained that a provincial law is treated as inoperative if federal and provincial laws impose contradictory requirements, such that it is impossible to comply with both at the same time.[196]

It should be noted that, litigants in some of these cases had argued for a broader definition of conflict, one that would result in provincial legislation being treated as inoperative if it was "duplicative" of federal law. The Court's choice to adopt a narrower, rule-of-law focused definition reflected its view that a degree of overlap and duplication between federal and provincial laws, and the resulting inefficiencies, are a necessary evil in a federal system.

FRAME 48

Multiple Access Ltd v McCutcheon
[1982] 2 SCR 161

Supreme Court of Canada

The resulting "untidiness" or "diseconomy" of duplication is the price we pay for a federal system in which economy "often has to be subordinated to [[...]] provincial autonomy" (Hogg, at p. 110). Mere duplication without actual conflict or contradiction is not sufficient to invoke the doctrine of paramountcy and render otherwise valid provincial legislation inoperative. [...]

In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other.

In later case law, the Court has exhibited a willingness to intervene in the case of a different kind of "untidiness" or "diseconomy," namely where a provincial law has the effect of frustrating the purpose of a federal law — even if compliance with both laws is not impossible.[197] For example, in *Rothmans v Saskatchewan*,[198] the Supreme Court considered a challenge brought by a tobacco manufacturer against a provincial law that prohibited the retail display of tobacco products in premises open to persons under 18 years old. According to the company, this prohibition "conflicted" with a federal law that prohibited tobacco promotion and advertising, but included an exception for the retail display of a tobacco product (which exception contained no age-related restriction). To state the obvious, it was not impossible for a retailer to comply with both provisions; for example, a retailer would violate neither law if it simply chose not to display tobacco products. However, the Court also considered whether the purpose of the federal legislation was frustrated by the provincial legislation — the Court determined that it was not — before concluding that there was no conflict between the two laws.

IV.4.2.1.2. Intelligibility

The notion that the law should be accessible to the citizen and contain intelligible standards finds reflection in the interpretation and application of the requirement, under s. 1 of the

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[195] See generally LEE, I. B.: "Preemption" in GROTE, R., LACHENMANN, F. and WOLFRUM, R. (eds.): *Max Planck Encyclopedia of Comparative Constitutional Law*, January 2022. Available at: https://oxcon.ouplaw.com/display/10.1093/law-mpeccol/law-mpeccol-e429.

[196] *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161 at p. 191.

[197] *Bank of Montreal v Hall*, [1990] 1 SCR 121.

[198] *Rothmans, Benson & Hedges Inc v Saskatchewan*, [2005] 1 SCR 188.

Charter, that limitations of guaranteed rights and freedoms be "*prescribed by law*", as well as in the "*principles of fundamental justice*" under s. 7 of the *Charter*.

IV.4.2.1.2.i. Section 7 of the Charter

Where a law exposes individuals to sanctions entailing a deprivation of liberty (i.e., imprisonment), s. 7 of the *Charter* is infringed if such deprivation is not in accordance with the "*principles of fundamental justice*."[199] One of the principles of fundamental justice recognized by the courts is that a law must not be unacceptably vague.[200]

The decision of the Supreme Court in *R. v Nova Scotia Pharmaceutical Society* illustrates the application of the principle, in a context involving the conduct of business. In that case, the accused were charged with the criminal offence of engaging in an anti-competitive conspiracy, and argued that the provisions were excessively vague, rendering the offence unconstitutional. The Court rejected the argument, on the ground that the terms of the legislation were adequate to give "*fair notice to the citizen*" as to the "*boundaries of permissible and non-permissible conduct*" and to provide a basis for the determination of meaning through "*legal debate*."[201]

IV.4.2.1.2.ii. Section 1 of the Charter

Under s. 1 of the *Charter*, limits to guaranteed rights and freedoms must be both "reasonable" and "prescribed by law."[202]

The Supreme Court has indicated that the "*prescribed by law*" requirement is "*chiefly concerned with the distinction between a limit imposed by law and one that is arbitrary*."[203] Accordingly, concerns such as those that arose in *Roncarelli* would be germane to an analysis under this requirement.[204]

An additional aspect of the requirement of legality under s. 1 concerns the intelligibility of the relevant legal standards. For example, in *Irwin Toy*, a toy company argued that legislation prohibiting advertising directed at children under the age of 13 was "*insufficiently precise to constitute a limit [on the freedom of expression] prescribed by law*."[205] According to the company, "*it [was] all but impossible for the manufacturer of a children's product to know whether an advertisement of that product will run afoul*" of the prohibition.[206]

The Court rejected the argument, not because the principle relied on was wrong, but because the Court disagreed that there was anything "*inherently confusing or contradictory*" in the statutory wording.[207] In the process, the Court articulated what, today, remains the received judicial

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199 *Reference Re BC Motor Vehicle Act*, [1985] 2 SCR 486.

200 *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606. It is worth mentioning that, although at least some of the accused were corporations, and only individuals possess rights under s. 7, any criminal accused is entitled to raise as a defence that the legislation under which it is being prosecuted is unconstitutional. In particular, corporate accused have, on numerous occasions, successfully challenged legislation that infringed *Charter* rights, without needing to show that the rights infringed were those of the corporation itself. See note 25 above.

201 Pages 633, 638, 639

202 See Part II.1.2.1.1 above.

203 *R v Therens*, [1985] 1 SCR 613, at par. 60.

204 See Part IV.4.1 above.

205 *Irwin Toy v Québec*, [1989] 1 SCR 927, at p. 980.

206 Page 981.

207 Page 982.

understanding of the requirement that laws limiting *Charter* rights be intelligible, if those limits are to be considered to be "*prescribed by law*":[208]

FRAME 49

Irwin Toy Ltd v Québec (Attorney General)
[1989] 1 SCR 927

Supreme Court of Canada

Absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies. On the other hand, where there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances, there is no "limit prescribed by law".

IV.4.2.1.3. Non-retroactivity

The principle that the law should operate prospectively finds reflection in s. 11(g) of the *Charter* provides that a person shall not be convicted of an offence unless the relevant act or omission constituted an offence, or was criminal according to general, internationally-recognized principles, "*at the time of its commission*."[209] In addition, the norms of statutory interpretation include a presumption against retroactivity — but, like all such presumptions, it is rebuttable "*if the retroactive effect is clearly expressed*."[210]

However, there is no general prohibition under Canadian law against retroactive legislation, and attempts to challenge the validity of retroactive legislation, in circumstances to which s. 11(g) of the *Charter* does not apply, have not succeeded. For example, in *Imperial Tobacco v B.C.*, the Supreme Court addressed a challenge to the validity of provincial legislation that authorized an action by the Crown against tobacco products manufacturers for health care costs associated with the treatment of tobacco-related illnesses. The legislation explicitly provided that it had "*retroactive effect*" and "*allow[ed] an action to be brought [for a wrong as defined by the legislation,] whenever the tobacco related wrong occurred*."[211] The applicants argued that the legislation was violated a rule of law principle requiring legislation to be prospective rather than retroactive.[212] The Court ruled otherwise, disagreeing both with the general premise of the challenge, namely that the "rule of law" can be invoked as a ground for

[208] Page 983.

[209] *Charter,* s 11(g).

[210] *British Columbia v Imperial Tobacco Canada Ltd*, [2005] 2 SCR 473, at par. 69.

[211] *Tobacco Damages and Health Care Costs Recovery Act*, SBC 2000, c 30, s. 10.

[212] Par. 63.

invalidating legislation, and with the more specific suggestion that there is a constitutional requirement of legislative prospectivity.[213]

FRAME 50

British Columbia v Imperial Tobacco Canada Ltd
[2005] 2 SCR 473

Supreme Court of Canada

The rule of law is not an invitation to trivialize or supplant the Constitution's written terms. Nor is it a tool by which to avoid legislative initiatives of which one is not in favour. On the contrary, it requires that courts give effect to the Constitution's text, and apply, by whatever its terms, legislation that conforms to that text. [...]

Except for criminal law, the retrospectivity and retroactivity of which is limited by s. 11(g) of the Charter, there is no requirement of legislative prospectivity embodied in the rule of law or in any provision of our Constitution. Professor P. W. Hogg sets out the state of the law accurately (in Constitutional Law of Canada (loose-leaf ed.), vol. 2, at p. 48-29):

> *Apart from s. 11(g), Canadian constitutional law contains no prohibition of retroactive (or ex post facto) laws. There is a presumption of statutory interpretation that a statute should not be given retroactive effect, but, if the retroactive effect is clearly expressed, then there is no room for interpretation and the statute is effective according to its terms. Retroactive statutes are in fact common.*

IV.4.2.1.4. Generality

In *Imperial Tobacco*, the tobacco companies also argued that the provincial legislation violated a *"requirement of generality in the laws."*[214] The argument was unsuccessful in the British Columbia Court of Appeal, which was of the view that the law did not offend against the requirement of generality;[215] it was received no more favourably in the Supreme Court, which disagreed at a more fundamental level with the proposition that "*the Constitution, through the rule of law, requires that legislation be general in character.*"[216]

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[213] Every province, as well as the Northwest Territories and Nunavut, has enacted tobacco costs recovery legislation having retroactive effect: see *Crown's Right of Recovery Act*, SA 2009, c C-35, s 42 (Alberta); *The Tobacco Damages and Health Care Costs Recovery Act*, CCSM c T70 (Manitoba); *Tobacco Damages and Health Care Costs Recovery Act*, SNB 2006, c T-7.5 (New Brunswick); *Tobacco Health Care Costs Recovery Act*, SNL 2001, c T-4.2 (Newfoundland and Labrador); *Tobacco Damages and Health Care Costs Recovery Act*, SNWT 2011 (Northwest Territories); *Tobacco Damages and Health-care Costs Recovery Act*, SNS 2005 (Nova Scotia), c 46; *Tobacco Damages and Health Care Costs Recovery Act*, SNu 2010, c 31 (Nunavut; not yet in force); *Tobacco Damages and Health Care Costs Recovery Act, 2009*, SO 2009, c 13 (Ontario); *Tobacco Damages and Health Care Costs Recovery Act*, RSPEI 1988, c T-3.002 (Prince Edward Island); *Tobacco-related Damages and Health Care Costs Recovery Act*, CQLR c R-2.2.0.0.1 (Québec); *The Tobacco Damages and Health Care Costs Recovery Act*, SS 2007, c T-14.2 (Saskatchewan). British Columbia has also enacted legislation with similarly retroactive effect in relation to "opioid-related wrongs": *Opioid Damages and Health Care Costs Recovery Act*, SBC 2018, c 35, s. 10.

[214] *British Columbia v Imperial Tobacco Canada Ltd*, 2004 BCCA 269 at par. 106; *Imperial Tobacco* (SCC), note 210 above, at par. 63.

[215] *Imperial Tobacco* (BCCA), note 214 above, at par. 114.

[216] *Imperial Tobacco* (SCC), note 210 above, at par. 73-75.

IV.4.2.2. Procedural requirements

IV.4.2.2.1. Natural justice

From a procedural perspective, the rule of law is often associated with the requirements of "natural justice,"[217] which include such ideas as the right to a hearing by an impartial tribunal, judicial independence, and *audi alteram partem*.

While both the *Canadian Bill of Rights* and the *Charter* contain provisions relevant to the procedural aspect of the rule of law, the "due process" protections of the Bill of Rights protect a much broader range of interests than does their counterpart provision in the *Charter* (s. 7). Whereas s. 7 refers to life, liberty and security of the person, the corresponding provision of the Bill of Rights also refers to deprivations of the right to enjoyment of property;[218] and an additional provision of the Bill separately confers a right to a fair hearing "*for the determination of a person's rights and obligations.*"[219]

FRAME 51

***Canadian Bill of Rights*, sections 1(a) and 2(e)**

SC 1960, c 44

1 *It is hereby recognized and declared that [...] there have existed and shall continue to exist [...]*

(a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

2 *[N]o law of Canada shall be construed or applied so as to*

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;[...]

It has already been mentioned that the rule-of-law-based challenge to provincial health care costs recovery legislation in B.C. was unsuccessful, because of the absence of explicit constitutional prohibitions against legislative retroactivity and non-generality.[220] When similar legislation was later enacted by the province of Québec,[221] the tobacco companies mounted a different challenge based on the rule of law: they characterized the legislation as an interference in pending litigation against them. The legislation modified the rules of evidence and limitation periods in order to facilitate lawsuits against the tobacco companies;[222] the latter argued that the legislation deprived the companies of the "*full and equal, public and fair hearing by an independent and impartial tribunal, for the determination of [their] rights and obligations*," to which they were entitled under s. 23 of the Québec *Charter*.[223]

This argument met with no greater success than had the arguments in the British Columbia litigation. Section 23, according to the Québec Court of Appeal, was concerned with "*equal procedural treatment, that is, the right of both parties to a fair judicial or quasi-judicial proceeding,*

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217 E.g., WALDRON, J.: "The Rule of Law and the Importance of Procedure", 50 *Nomos* 3, 2011 (WALDRON, *Procedure*) at p. 6.

218 *Canadian Bill of Rights*, SC 1960, c 44, s 1(a). The *Alberta Bill of Rights*, RSA 2000, c A-14, s 1(a), is to the same effect.

219 *Canadian Bill of Rights*, s. 2(e). See similarly the Québec *Charter of Human Rights and Freedoms*, CQLR c C-12, s 23.

220 Part IV.4.2.1.3 and Part IV.4.2.1.4.

221 See note 211 above.

222 *Imperial Tobacco Canada Ltd c Québec (Procureure générale)*, 2015 QCCA 1554, at par. 5.

223 Québec *Charter*, s 23.

or in other words, a public hearing, an independent and impartial decision-maker, a judgment based on the facts and the law, and the possibility of being apprised of the evidence or the nature of the faults or wrongs alleged against them and to answer to the same." Although the legislation had "*considerably lighten[ed] the onus on the government and the other [beneficiaries] of the Act,*"[224] the legislature was entitled to amend the rules of civil liability,[225] and these amendments did not have the effect of depriving the tobacco companies of "*equal procedural treatment*."[226]

FRAME 52

Imperial Tobacco Canada Ltd c Québec (Procureure générale)
2015 QCCA 1554

Québec Court of Appeal

[49] The appellants claim that section 23 of the Québec Charter guarantees a fair trial, the terms of which go beyond the right to be heard by an impartial and independent tribunal....

[67] The appellants find it shocking that the onus on the government and the other recipients is retroactively modified by the Act, even as regards pending proceedings. They also find it unacceptable that the Act allows the applicants to prove causation solely on the basis of statistical information or information derived from epidemiological, sociological or any other studies.

[68] In my view, they are not completely wrong. Indeed, the Act is particularly strict in their regard and considerably lightens the onus on the government and the other recipients of the Act. The legislator chose to target the tobacco products industry and to adopt what might be described as [translation] "tough" civil liability measures against it. Despite this observation, the fact remains that it is not the role of this Court to question the legislator's choices or the appropriateness of a statute.

[69] In such circumstances, I am unable to conclude that the amendment of the traditional rules of civil liability in terms of both evidence and prescription contravenes section 23 of the Québec Charter, or prevents the appellants from presenting a full defence within the meaning of this provision, although I must admit that the Act as enacted facilitates the proof that the government or other recipients are required to adduce against the appellants and deprives them of certain defences that were previously available to them.

[70] The Act does not, however, compromise the independence and impartiality of the court that will eventually hear the action or prevent that court's judgment from being based on the facts and the law established by the legislator. Moreover, it does not limit the right of the appellants to obtain access to the evidence brought against them [...] and to respond to same. [...]

[86] In short, Parliamentary supremacy allows the legislator to amend the law as it sees fit, so long as such amendments fall within constitutional limits. Here, the appellants have not shown how the elimination of prescription or the other changes to the rules of evidence and civil procedure would infringe their right to a fair trial, even if it actually does deprive them of some of their defences.

IV.4.2.2.2. Rule of law and arbitration

Can rule-of-law principles sometimes be in tension with commercial freedom — for example, when parties to a commercial relationship agree to resolve their disputes by way of arbitration, rather than through the courts?

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[224] *Imperial Tobacco* (QCCA), note 222 above, par. 68.

[225] *Imperial Tobacco* (QCCA), par. 66.

[226] *Imperial Tobacco* (QCCA), par. 69-70.

IV.4.2.2.2.iii. General framework

As has been observed in a number of recent cases, Canadian courts do not consider that there is a necessary conflict between arbitration clauses and the rule of law. At an earlier time, the judiciary had taken a dim view of agreements to arbitrate, viewing arbitration as incapable of "*yield[ing] dispute resolution according to law*."[227] However, judicial attitudes evolved as arbitration statutes also evolved.[228] Modern arbitration legislation (i) incorporates requirements of fairness and impartiality,[229] (ii) permits court intervention in order to uphold the same,[230] and (iii) expresses a public policy of enabling parties to choose an expeditious and cost-effective dispute settlement alternative to court proceedings.[231]

In Ontario, relevant legislation includes:

- The *International Commercial Arbitration Act,*[232] which incorporates into Ontario law the *UNCITRAL Model Law on International Commercial Arbitration*.[233]
- The *Arbitration Act, 1991,*[234] which applies to arbitrations that are not covered by the *International Commercial Arbitration Act* (i.e., to domestic commercial arbitration, and to non-commercial arbitration).

Courts have taken a "hands-off" approach to arbitration, where these Acts apply. The following example is from a consumer dispute that the Court determined was governed by the *Arbitration Act, 1991*:

FRAME 53

TELUS Communications Inc v Wellman
[2019] 2 SCR 144

Supreme Court of Canada

[54] [I]n the years since the Arbitration Act was passed, the jurisprudence ... has consistently reaffirmed that courts must show due respect for arbitration agreements and arbitration more broadly, particularly in the commercial setting. ...

[55] The policy that parties to a valid arbitration agreement should abide by their agreement goes hand in hand with the principle of limited court intervention in arbitration matters. ... This principle is embedded most

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227 *Uber Technologies Inc. v Heller*, [2020] 2 SCR 118, at par. 116 (Brown J, concurring).

228 *Uber, loc cit.* See also *TELUS Communications Inc v Wellman*, [2019] 2 SCR 144, at par. 48, 54.

229 For example, *Arbitration Act*, RSA 2000, c A-43 (Alberta), s 19; *Arbitration Act*, SBC 2020, c 2 (British Columbia), s 21; *The Arbitration Act*, CCSM c A120 (Manitoba), s 19; *Arbitration Act, 1991*, SO 1991, c 17 (Ontario), s 19; *The Arbitration Act*, 1992, SS 1992, c A-24.1 (Saskatchewan), s 20.

230 For example, *Arbitration Act* (Alberta), s 6(c); *Arbitration Act* (British Columbia), s 58(1)(g)-(h); *The Arbitration Act* (Manitoba), s 6(c); *Arbitration Act, 1991* (Ontario), s 6(3); *The Arbitration Act* (Saskatchewan), s 7(c).

231 *TELUS,* above note 228, at par. 48-56, 76.

232 *International Commercial Arbitration Act, 2017*, SO 2017, c 2, Sch 5 (Ontario); compare *International Commercial Arbitration Act*, RSA 2000, c I-5 (Alberta); *International Commercial Arbitration Act*, RSBC 1996, c 233 (British Columbia); *The International Commercial Arbitration Act*, CCSM c C151 (Manitoba); *International Commercial Arbitration Act*, RSNB 2011, c 176 (New Brunswick); *International Commercial Arbitration Act*, RSNL 1990, c I-15 (Newfoundland and Labrador); *International Commercial Arbitration Act*, RSNWT 1988, c I-6 (Northwest Territories); *International Commercial Arbitration Act*, RSNS 1989, c 234 (Nova Scotia); *International Commercial Arbitration Act*, RSNWT (Nu) 1988, c I-6 (Nunavut); *International Commercial Arbitration Act*, RSPEI 1988, c I-5 (Prince Edward Island); *The International Commercial Arbitration Act*, SS 1988-89, c I-10.2 (Saskatchewan); *International Commercial Arbitration Act*, RSY 2002, c 123. For Québec, see art 649-651 of the Code of Civil Procedure, CQLR c C-25.01 (Québec).

233 UNCITRAL Model Law on International Commercial Arbitration, UNCITRAL, Annex 1, UN Doc A/40/17 (1985), with amendments as adopted in 2006 (7 July 2006)

234 Note 229 above.

visibly in ss. 6 and 7 of the Arbitration Act, which are both contained in the part of the Act labelled "Court Intervention". Section 6 reads:

> *Court intervention limited*
>
> *6 No court shall intervene in matters governed by this Act, except for the following purposes, in accordance with this Act:*
>
> *1. To assist the conducting of arbitrations.*
>
> *2. To ensure that arbitrations are conducted in accordance with arbitration agreements.*
>
> *3. To prevent unequal or unfair treatment of parties to arbitration agreements.*
>
> *4. To enforce awards.*

[56] Stated succinctly, s. 6 signals that courts are generally to take a "hands off" approach to matters governed by the Arbitration Act. This is "in keeping with the modern approach that sees arbitration as an autonomous, self-contained, self-sufficient process pursuant to which the parties agree to have their disputes resolved by an arbitrator, not by the courts" (Inforica Inc. v CGI Information Systems and Management Consultants Inc., 2009 ONCA 642, 97 O.R. (3d) 161, at para. 14).

Where legislation incorporating the UNCITRAL Model Law applies,[235] courts are more circumspect still. Even where a complaint is based on a claim that the arbitral proceeding failed to respect natural justice, a court will intervene only where the arbitral tribunal's "conduct is so serious that it cannot be condoned under the law of the enforcing State."[236] As illustrated by the recent Ontario Superior Court decision in *Costco Wholesale v TicketOps*,[237] this standard will not be met simply because more extensive procedural protections would have been afforded in a judicial proceeding in this country:

FRAME 54

Costco Wholesale Corporation v TicketOps Corporation
2023 ONSC 573

Ontario Superior Court of Justice
(Vermette J)

[45] The grounds for refusing recognition or enforcement set out in the Convention and the Model Law are to be construed narrowly.

[46] [...] Courts have held that to justify setting aside an arbitral award under the Model Law for reasons of fairness or natural justice, the conduct of the arbitral tribunal must be sufficiently serious to offend our most basic notions of morality and justice. Judicial intervention for alleged violations of the due process requirements of the Model Law will be warranted only when the tribunal's conduct is so serious that it cannot be condoned under Ontario law. [...]

[82] [...] Had the matter been a court proceeding in Ontario, the hearing would likely have been significantly longer than two days. However, it would be ill-advised for an Ontario court to find that: (a) a hearing in an international arbitration proceeding that does not sufficiently resemble a trial in an Ontario court proceeding is contrary to Canadian notions of fundamental justice; and (b) a party to such an international arbitration proceeding is unable to present its case. International arbitration awards usually involve parties from different States. The States in question may have different legal traditions (e.g. civil law vs. common law) and different approaches to the resolution of disputes.

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[235] Note 232 above.

[236] *All Communications Network of Canada v Planet Energy Corp*, 2023 ONCA 319, at par. 42.

[237] *Costco Wholesale Corporation v TicketOps Corporation*, 2023 ONSC 573, at par. 46. See also

IV.4.2.2.2.iv. Cost of arbitration

Some commentators have sounded a cautionary note regarding the compatibility of arbitration clauses with the rule of law.[238] For example, it has been suggested that arbitration's promise of lower-cost access to justice may be illusory, given, on the one hand, the high fees associated with arbitration and, on the other hand, the small claims court and class action cost-pooling mechanisms available within the regular litigation system.[239] If the cost of arbitration serves as a barrier to the assertion, for example by consumers, of their contractual and mandatory statutory rights, can it be still be said that clauses restricting access to the ordinary courts remain consistent with acesss to justice and the rule of law?

Consider the situation in *Uber Technologies Inc. v Heller*,[240] in which the plaintiff, a food delivery driver, initiated a class action proceeding against the developer and provider of the well-known transportation and food delivery apps, claiming violations of Ontario's employment standards legislation. Under the terms of the standard-form contract between Uber and drivers using the platform, the latter were required to resolve disputes through mediation and arbitration in the Netherlands and follow a process requiring the payment of upfront administrative fees of USD 14,500 (not including the fees associated with participating in the mediation and arbitration themselves). In reliance on the agreement to arbitrate, a trial judge granted a motion by Uber to stay the class action proceedings.

A majority of the Supreme Court reversed the stay, holding that the arbitration agreement was invalid: the hurdles to arbitration imposed by the agreement were so high that "*arbitration [was] realistically unattainable, [...] amount[ing] to no dispute resolution mechanism at all*."[241] (The majority Justices observed that the upfront administrative fees alone represented most of the plaintiff's annual income.[242])

In a concurring judgment, Justice Brown wrote that the clause "*undermine[d] the rule of law by denying access to justice, and [was] therefore [void as] contrary to public policy*."[243]

FRAME 55

Uber Technologies Inc v Heller
[2020] 2 SCR 118

Supreme Court of Canada
(Brown J, concurring)

[110] [...] A provision that penalizes or prohibits one party from enforcing the terms of their agreement directly undermines the administration of justice. There is nothing novel about the proposition that contracting parties, as a matter of public policy, cannot oust the court's supervisory jurisdiction to resolve contractual disputes [...] Indeed, irrespective of the value placed on freedom of contract, courts have consistently held that a contracting party's right to legal recourse is "a right inalienable even by the concurrent will of the parties" [citation omitted].

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238 For example, MENON, S.: "Arbitration's Blade: International Arbitration and the Rule of Law", *Journal of International Arbitration,* Vol. 38 n°1, 2021, p. 1.

239 WATSON HAMILTON, J.: "Pre-Dispute Consumer Arbitration Clauses: Denying Access to Justice?" (2006) 51:4 *McGill Law Journal* 693 (p. 722).

240 *Uber Technologies Inc v Heller*, [2020] 2 SCR 118.

241 *Uber,* at par. 97 (Abella and Rowe JJ). The inadequacy of the arbitration agreement, together with the inequality of bargaining power between the parties, led the majority to set it aside under the contract law doctrine of unconscionability. (Par. 93-98.)

242 *Uber,* at par. 2.

243 *Uber,* at par. 101 (Brown J, concurring).

[111] This head of public policy serves to uphold the rule of law, which, at a minimum, guarantees Canadian citizens and residents "a stable, predictable and ordered society in which to conduct their affairs" (Reference re Secession of Québec, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217, at para. 70). Such a guarantee is meaningless without access to an independent judiciary that can vindicate legal rights. The rule of law, accordingly, requires that citizens have access to a venue where they can hold one another to account (Jonsson v Lymer, 2020 ABCA 167, at para. 10 (CanLII)). Indeed, "[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice" (B.C.G.E.U. v British Columbia (Attorney General), 1988 CanLII 3 (SCC), [1988] 2 S.C.R. 214, at p. 230). Unless private parties can enforce their legal rights and publicly adjudicate their disputes, "the rule of law is threatened and the development of the common law undermined" (Hryniak v Mauldin, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 26). Access to civil justice is paramount to the public legitimacy of the law and the legitimacy of the judiciary as the institution of the state that expounds and applies the law.

[112] Access to civil justice is a precondition not only to a functioning democracy but also to a vibrant economy, in part because access to justice allows contracting parties to enforce their agreements. A contract that denies one party the right to enforce its terms undermines both the rule of law and commercial certainty. That such an agreement is contrary to public policy is not a manifestation of judicial idiosyncrasies, but rather an instance of the self-evident proposition that there is no value in a contract that cannot be enforced. Thus, the harm to the public that would result from holding contracting parties to a bargain they cannot enforce is "substantially incontestable" (Millar Estate, at p. 7, quoting Fender, at p. 12). It really is this simple: unless everyone has reasonable access to the law and its processes where necessary to vindicate legal rights, we will live in a society where the strong and well-resourced will always prevail over the weak. ....

[115] None of this is to say that public policy requires access to a court of law in all circumstances. As this Court has recognized, "new models of adjudication can be fair and just" (Hryniak, at para. 2). But public policy does require access to justice, and access to justice is not merely access to a resolution. After all, many resolutions are unjust. Where a party seeks a rights-based resolution to a dispute, such resolution is just only when it is determined according to law, as discerned and applied by an independent arbiter.

IV.4.2.3. Substantive requirements

It is suggested by some commentators that the rule of law also has what WALDRON terms a "*substantive dimension*,"[244] including (for example) respect for human rights, or the protection of property rights.

These suggestions appear to be grounded in the notion of inherent limits on legitimate State action. As such, they may be best understood as normative arguments for the existence of inherent rights enforceable against the State, and the reader is referred to the earlier discussion of such arguments in Parts IV.1 and IV.3.1.[245]

IV.5. Freedom to conduct a business and the State's economic model

The formal constitution is silent as to any particular "economic model of the State." Written constitutions, drafted at a moment in time, reflect the preoccupations of the Framers' generation, as well as that generation's perspective on future challenges. In that regard:

- The economic provisions of the *Constitution Act 1867* suggest that the principal concern of the Framers was not with defining the extent of the government's role in

[244] WALDRON, *Procedure,* note 217 above (p. 7).

[245] Text accompanying notes 108 and 165.

the economy but, rather, with whether that role should be exercised by the central government or the provinces.

- The primary focuses of the 1982 constitutional reforms were the termination of the role of the U.K. in amending the Canadian constitution;[246] the elaboration of a catalogue of fundamental rights;[247] and the recognition of the rights of the Indigenous peoples.[248]
- Since 1982, discussions of potential further constitutional reforms concerning the economy have focused on the economic and social union, rather than on defining the role of the State in the economy.

IV.5.1. *Constitution Act 1867*

It is hazardous to attempt to summarize the intentions of the Framers of the 1867 arrangements in a few sentences. The historical record is sparse, and the evidence that does exist suggests that the Framers held divergent views as to the nature and, critically, the degree of centralization or decentralization of the federal union that they were designing.[249] With that disclaimer, it may nonetheless be ventured that, from an economic perspective, the provisions enacted in 1867 aim at the establishment of a domestic market unhindered by internal tariffs;[250] and assign to the federal government broad powers to develop and manage the national economy,[251] while allocating to the provinces, to a considerable extent, the power to regulate local commercial dealings.[252]

To state the obvious, it appears to have been assumed by the Framers that private enterprise would play a major role in an economy that would nevertheless be managed, in a significant way, by the State.

In the first half of the 20th century, federal attempts to enact laws regulating business were repeatedly struck down by the Judicial Committee on federalism grounds. Examples include legislation:

- to regulate the business of insurance;[253]
- authorizing a federal agency to establish fair prices and profit margins in particular retail sectors;[254]

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[246] See *Canada Act*, s. 2 (UK); regarding the requirements for amending the Constitution, see now *Constitution Act 1982*, Part V.

[247] *The Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act 1982*.

[248] *Constitution Act 1982*, Part II.

[249] See HOGG, P. and WRIGHT, W.: "Canadian Federalism, the Privy Council and the Supreme Court: Reflections on the Debate About Canadian Federalism", 2005, 38 *Univeristy of British Columbia Law Review* 329, at pp. 330-31.

[250] See, for example, s. 121 of the *Constitution Act 1867*; as well as the allocation to the federal Parliament of exclusive authority to legislation in relation to "the regulation of trade and commerce": Parts IV.1.3.3.1 and IV.1.3.3.2 above.

[251] In addition to the power to regulate "trade and commerce" (s. 91(2)), relevant federal economic powers include those in relation to "currency" (s. 91(14)), "banking" (s. 91(15)), "weights and measures" (s. 91(17)), negotiable instruments (s. 91(18)), "interest" (s. 91(19)), "legal tender" (s. 91(20)) and "bankruptcy" (s. 91)).

[252] This aim is reflected in, among other things, the provincial power to make laws about "property and civil rights" (s. 92(13)), "the incorporation of companies with provincial objects," (s. 92(11)), and "local works and undertakings" (s. 92(10)).

[253] *Canada v Alberta (Insurance Reference)*, [1916] 1 AC 588.

[254] *Reference Re Board of Commerce* (1921), [1922] 1 AC 191, 60 DLR 513.

- establishing a framework for industrial workplace dispute settlement;[255]
- implementing an unemployment insurance scheme.[256]
- implementing obligations under an international treaty, with regard to hours of work and a minimum wage.[257]

As mentioned in Part III.2.1 it appears in at least one case that the Judicial Committee was influenced by *laissez-faire* economic ideas.[258] Nevertheless, the principle of these decisions was not that the regulation of economic activity was illegitimate *per se*, but rather that, at least in the form enacted, such regulation was within provincial, rather than federal authority, and the main concern of the JCPC appears to have been the protection not of economic liberty, but of provincial autonomy.[259]

In the second half of the 20th century, the judicial interpretation of division of powers has reflected a greater openness to economc interventions by the federal Parliament. Examples of federal economic legislation upheld by the Supreme Court, under more expansive readings of the heads of power in s. 91, include:

- A law establishing wage and price controls during a "crisis" period when high inflation was combined with high unemployment;[260]
- A law to regulate anti-competitive business practices;[261]
- Laws regulating local economic activities as an incident to regulatory schemes aimed predominantly at international trade;[262] and
- A law establishing a minimum national standard for the pricing of greenhouse gas emitting activities.[263]

Some federal interventions were nevertheless found by the Court to go too far. Notable examples included:

- A law establishing product standards for a broad range of food products;[264] and
- A law establishing a national securities regulator.[265]

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255 *Toronto Electric Commissioners v Snider*, [1925] AC 396

256 *Canada (Attorney General) v Ontario (Attorney General) (Re Employment and Social Insurance Act)*, [1937] AC 355. This decision was overcome through a formal constitutional amendment. See now *Constitution Act 1867*, s 91(2A).

257 *Canada (AG) v Ontario (AG) (Labour Conventions)*, [1937] AC 326, [1937] 1 DLR 673 (PC).

258 *Re Board of Commerce*, note 254 above; and Part III.2.1.

259 On occasion, it was a provincial law that trod on federal authority, rather than the other way around. For example, a B.C. law that purported to prevent federally incorporated companies from doing business without a provincial licence was invalidated (as encroaching on federal authority to regulate "trade and commerce"): *John Deere Plow Co v Wharton*, [1915] AC 330, 18 DLR 353. Another law, whereby the province of Alberta sought to remedy the local effects of the Great Depression by creating a form of provincial money, was invalidated as encroaching on federal authority over some or all of "currency," "banking" and "trade and commerce": *Reference re Alberta Statutes*, [1938] SCR 100.

260 *Re: Anti-Inflation Act*, 1976 CanLII 16 (SCC), [1976] 2 SCR 373.

261 *General Motors of Canada Ltd. v City National Leasing*, [1989] 1 SCR 641

262 *R v Klassen* (1959), 20 DLR (2d) 406 (Man CA); *Caloil Inc v Attorney General of Canada*, [1971] SCR 543.

263 *References re Greenhouse Gas Pollution Pricing Act*, [2021] 1 SCR 175.

264 *Labatt Breweries of Canada Ltd v Attorney General of Canada*, [1980] 1 SCR 914.

265 *Reference re Securities Act*, 2011 SCC 66, [2011] 3 SCR 837.

Again, however, when laws were invalidated, it was not on the basis that the relevant intervention was an intrinsically unacceptable activity of the State, but rather on the basis that the responsibility to undertake such an intervention rests with the provinces, rather than the federal government.

IV.5.2. *Constitution Act 1982* (and Canada Act 1982)

From the standpoint of the freedom to conduct a business, and of the economic model of the State, the *Constitution Act 1982* is more significant for what it does not include, than for what it does include. The economic provisions of the Act consist of:

- The mobility rights under s. 6, which include the right to move between provinces and pursue the "gaining of a livelihood";[266]
- An amendment to the *Constitution Act 1867*, to confer jurisdiction over "non-renewable natural resources" to the provinces.[267]
- A provision expressing a political commitment to regional economic development, with a view to promoting equality of opportunities and comparable public services across regions (including by way of direct financial transfers — "equalization payments" — from the federal government to provincial governments).[268]

As has already been mentioned, a proposal to entrench property rights was withdrawn in order to overcome the reticence of some provincial governments to the *Charter of Rights* project as a whole. A federal proposal to reduce barriers to internal trade by strengthening ss. 91(2) and 121 was similarly abandoned.[269]

IV.5.3. Post-1982 attempts at constitutional reform

During the decade following the adoption of the *Constitution Act 1982*, political actors attempted to resolve matters left "unfinished" by that document,[270] among them the strengthening of the Canadian economic union.

A lengthy process of consultation and negotiation produced, in 1992, the "Charlottetown Accord" — a package of proposed amendments to the *Constitution Act 1867* and *Constitution Act 1982*. These amendments included the articulation of aspirational commitments regarding the "social and economic union."

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[266] See Parts II.1.2.1.3, III.3.1.

[267] See *Constitution Act 1867*, s 92A, added by *Constitution Act 1982*, s 50.

[268] *Constitution Act 1982*, s 36.

[269] COURCHENE, T. J.: "The Political Economy of Canadian Constitution-Making: The Canadian Economic-Union Issue", 1984, 44:1 *Public Choice* 201, at pp. 217, 221, 233-36. See further Part IV.7.1.2.

[270] The "unfinished business" included, most significantly: repairing the damage to unity that resulted from the adoption of the Constitution Act 1982 over the objections of the government and legislature of Québec; unresolved demands, principally by the western provinces, for reforms to the Senate; and Indigenous peoples' demands for stronger legal protection for their inherent rights, including recognition of their inherent right to self-government. For discussion, see the various contributions to BANTING, K. and SIMEON, R. (eds.): *And No One Cheered: Federalism, Democracy, and the Constitution Act*, Toronto, Methuen, 1983.

FRAME 56

Draft Legal Text of the Charlottetown Accord

October 9, 1992

PART III.1

THE SOCIAL AND ECONOMIC UNION

Commitment respecting social and econimic union

36.1 (1) Without altering the authority of Parliament, the provincial legislatures or the territorial legislative authorities, or of the government of Canada or the governments of the provinces or territories, or the rights of any of them with respect to the exercise of their authority, Parliament, the provincial legislatures and the territorial legislative authorities, together with the government of Canada and the provincial and territorial governments, are committed to the principle of the preservation and development of the Canadian social and economic union.

Social union

(2) The preservation and development of the social union includes, but is not limited to, the following policy objectives:

(a) providing throughout Canada a health care system that is comprehensive, universal, portable, publicly administered, and accessible;

(b) providing adequate social services and benefits to ensure that all individuals resident in Canada have reasonable access to housing, food and other basic necessities;

(c) providing high quality primary and secondary education to all individuals resident in Canada and ensuring reasonable access to post-secondary education;

(d) protecting the rights of workers to organize and bargain collectively; and

(e) protecting, preserving and sustaining the integrity of the environment for present and future generations.

Economic union

(3) The preservation and development of the economic union includes, but is not limited to, the following policy objectives:

(a) working together to strengthen the Canadian economic union;

(b) the free movement of persons, goods, services and capital;

(c) the goal of full employment;

(d) ensuring that all Canadians have a reasonable standard of living; and

(e) ensuring sustainable and equitable development

[...]

Monitoring

36.2 The Prime Minister of Canada and the first ministers of the provinces shall, at a conference convened pursuant to section 37.1, establish a mechanism to monitor the progress made in relation to the objectives stated in subsections 36.1(2) and (3).

The Charlottetown Accord was rejected in a national referendum,[271] and its provisions form no part of the positive law. They are mentioned here because it is instructive that, even as the proposed measures relating to the "social and economic union" express a commitment to ensuring the "free movement of persons, goods, services and capital," they implicitly take for granted the role of governments in promoting the achievement of broader social and economic objectives.

Ultimately, the Canadian position regarding the role of the State in the economy is a matter of tradition and assumption, rather than of formal declaration. Regarding that tradition, a Royal Commission tasked in the early 1980s with studying the role of the State in the economy concluded as follows: "*the 'positive state' tradition in our history, which has supported an influential role for governments in the economy, has nevertheless always assumed that most economic decision making will be in private hands*."[272]

IV.6. Freedom to conduct a business and "national practices"

Art. 16 CFREU makes reference to "*national laws and practices*" in connection with the "*freedom to conduct a business*." It appears that the reference to "*national laws and practices*" signifies that the freedom to conduct a business may be limited, not only by Union laws, but also by the Member States; and that the reference to "practices" was intended to allow the limits to include those arising within a Member State's economic system otherwise than through statutory law.[273] As such, Art. 16 specifically contemplates diversity, from one Member State to another, as to the manner in which business is regulated and, therefore, as to the extent of the residual freedom to conduct business.

We have already seen that, in Canada, the "freedom to conduct a business" is not a norm possessing a supralegislative quality.[274] It is more aptly described as a value that may be reflected, to a greater or lesser extent, in the positive law; and as a baseline freedom that may be limited, modified or even taken away by appropriately enacted legislation. The provinces have extensive authority, and arguably a predominant role,[275] in the sphere of business regulation; as a result, there is enormous scope for diversity in "*provincial laws and practices*."

Even in areas where the Parliament possesses and exercises legislative authority, federal legislation sometimes accommodates provincial regulatory diversity through mechanisms that allow provincial requirements to apply in lieu of the federal requirements. For example:

- The federal private sector privacy legislation provides that organizations or activities can be exempted from federal requirements if the federal government is "*satisfied that legislation of a province that is substantially similar to [the federal legislation] applies*" to the organizations or activities[276]

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[271] See McRoberts, K. and Monahan, P.: *The Charlottetown Accord, the Referendum and the Future of Canada*, University of Toronto Press, 1993.

[272] Royal Commission on the Economic Union and Development Prospects for Canada: Report, Vol 1, Ottawa, Privy Council Office, 1985 (p. 47).

[273] Ziller, J.: *La liberté d'entreprise, une perspective de droit comparé : Union européenne,* Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), janvier 2024, XII et 135 pp., référence PE 757.620 (p. 77).

[274] See, in particular, Parts II.1 and IV.2.

[275] See Parts III.2, IV.5.1.

[276] *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5, s 26(2).

- The federal greenhouse gas pricing legislation applies only in those provinces that have been determined by the federal government not to have a "*sufficiently stringent GHG pricing system*" of their own.[277] The intention is to give provinces "the flexibility to design their own policies to meet emissions reductions targets, including carbon pricing, adapted to each province['s] specific circumstances [...] [and to] "*recognize carbon pricing policies already implemented or in development by provinces[...].*"[278]

IV.7. Freedom to conduct a business and the non-centralized State

IV.7.1. Provincial autonomy

It will be apparent to a reader of the preceding sections of this Study that Canada's federal structure has a considerable impact on the legal framework for the conduct of business, including in the following respects:

(1) The division of legislative authority, as interpreted by the judiciary, circumscribes the power of governments, especially that of the federal government, to regulate business; and
(2) Proposed modifications to the formal constitution that would enlarge the freedom to conduct a business (for example by entrenching property rights, or strengthening the economic union) have often met with resistance from provincial governments, in part because of the implications of the proposals for provincial autonomy.

IV.7.1.1. The division of legislative powers

As we have seen, the provincial power over "*property and civil rights*" has been interpreted as including the power to enact laws regulating particular professions, industries and lines of business and, more generally, to regulate transactions and activities taking place within each province. This is an exclusive power and, during the tenure of the Judicial Committee of the Privy Council as Canada's final court of appeal, federal laws attempting to regulate particular business sectors or commercial transactions were repeatedly struck down as beyond the authority of the federal Parliament.[279]

The decisions rested in part on a narrow interpretation of federal powers such as the authority to make laws in relation to "*the regulation of trade and commerce*" (s. 91(2)). The interpretation of this and other federal powers has evolved since 1949, under the Supreme Court of Canada, to become more accommodating of federal regulatory authority. Still, as outlined elsewhere in this Study, federal legislative authority to regulate business remains heavily circumscribed.

These restrictions have not necessarily meant that the federal government has been unable to achieve its policy objectives, but rather that it has had to pursue its objectives through the means at its disposal — when Parliament has not been able to rely on a general regulatory power, it has instead sought to influence the conduct of business through tax or subsidy

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[277] As described in *References re Greenhouse Gas Pollution Pricing Act ("GHGPPA Reference")*, [2021] 1 SCR 175, at par. 72.

[278] *GHGPPA Reference*, par. 72 (quoting a Canadian government document). Although this description might be interpreted as suggesting that the design of the federal legislation was a policy choice, the fact that the legislation operated only as a "backstop," rather than purporting to impose a uniform national scheme, was in fact crucial to its constitutional validity. See text accompanying note 483 below.

[279] See Part III.2 above.

incentives; by enacting criminal prohibitions;[280] or by applying requirements to goods or services in interprovincial or international movement[281] (which, in a country such as Canada, is a large proportion of goods and services).

IV.7.1.2. Rights and the economic union viewed through the lens of federal-provincial balance

As was explained in Part IV.5, during the process that led to the 1982 constitutional reforms, the federal government's proposals included provisions directed at entrenching property rights in the formal constitution and at strengthening the economic union; these components of the federal proposals were ultimately abandoned because of opposition by the governments of several provinces.

It would be an error to interpret the provinces' reticence as reflecting opposition in principle to economic freedoms. The bills of rights of several provinces, after all, expressly recognize property rights.[282] Instead, the provinces were concerned about the impact of the proposals on provincial autonomy. Recall that the entrenchment of rights in *Charter* has the effect of diminishing the role of the representative institutions of government in determining the balance between those rights and other interests, and increasing the role of the judiciary — which, in Canada, is appointed by the federal government.[283] Even the federal government's proposals to strengthen the economic union entailed expanding the scope of s. 91(2), the federal power to regulate "trade and commerce."[284]

In Canada, provincial autonomy and identity manifest themselves in part through interventions in the economy.[285] In these circumstances, it is to be foreseen that proposals — especially by the federal government — to limit such interventions may be viewed with suspicion.

IV.7.2. The evolution of municipal powers

Municipal institutions are not entrenched in the Constitution. Rather, municipal governments are "*creatures of the provincial government*,"[286] and their structure and powers are determined by legislation enacted by each province pursuant to its authority under s. 92(8) of the *Constitution Act 1867*.

FRAME 57

***Constitution Act 1867*, section 92(8)**

92 In each Province the Legislature may exclusively make Laws in relation to [...]

8. Municipal Institutions in the Province; [...]

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[280] See Part IV.8.5.1.1 below.

[281] See the examples in notes 310 (alcohol) and 462 (energy efficiency standards) below.

[282] See Part IV.3.4 above.

[283] See Part IV.3.2 above.

[284] COURCHENE, note 269 above (pp. 221-22).

[285] For example, the nationalization of the hydroelectric industry by the government of Québec was a landmark event of the Quiet Revolution: see BERNIER, L. and LATOUCHE, D.: "Il y a bien eu une Révolution tranquille : histoire de l'État québécois" in RIOUX, X. H. and PAQUIN, S. (eds.): *La Révolution Tranquille 60 Ans Après: Rétrospective et Avenir,* Presses de l'Université de Montréal, 2022 (p. 53); PRÉMONT, M-C.: "L'hydroélectricité du Québec sous tension" in RIOUX and PAQUIN (p. 173).

[286] *Ontario English Catholic Teachers' Assn v Ontario (Attorney General)*, [2001] 1 SCR 470 at paras. 57-58, quoting *Ontario Public School Boards' Assn. v Ontario (Attorney General)* (1997), 151 DLR (4th) 346 (Ont Ct (Gen Div)) at p. 361.

The case law reveals an evolution in the approach to the interpretation of municipal business licensing powers. Historically, those powers were interpreted restrictively, in light of their potential to interfere with the common law freedom to engage in a lawful business.

FRAME 58

Merritt v City of Toronto
(1895), 22 OAR 205

Ontario Court of Appeal

Municipal corporations, in the exercise of the statutory powers conferred upon them to make by-laws should be confined strictly within the limits of their authority, and all attempts on their part to exceed it should be firmly repelled by the Courts. A fortiori should this be so where their bylaws are directed against the common law right, and the liberty and freedom, of every subject to employ himself in any lawful trade or calling he pleases.

However, the courts no longer endorse a restrictive interpretive approach, in part because the drafting of modern municipal governance legislation typically suggests a legislative intention to grant broad powers to municipalities.

This development is well illustrated by the respective decisions of the Alberta Court of Appeal and the Supreme Court of Canada in *United Taxi v Calgary*. The Court of Appeal applied what had, until then, been the usual rule that clear statutory authority is required in order for a municipality to be able to interfere with the conduct of a lawful business.[287] Not finding clear authority in the relevant statute, the Court of Appeal ruled that a municipal bylaw setting a cap on the number of taxi licences that could be issued was *ultra vires* the municipality.

In its decision reversing the Court of Appeal, the Supreme Court of Canada made no mention of the longstanding rule relied on by the Court of Appeal, but instead endorsed a "*broad and purposive*" approach to the interpretation of municipal powers — including powers of business licensing and regulation.[288]

FRAME 59

United Taxi v Calgary
2002 ABCA 131

Alberta Court of Appeal

[72] The exercise of a common law right to pursue a trade may only be limited by express legislative authority, therefore, any limitation on the number of licences to be issued must be expressly authorized by the governing statute: Merritt v Toronto, at 208-209; Prince George (City) v Payne (1978)

[77] In this appeal, the Bylaw clearly authorizes limiting numbers and limits the number of TPLs issued. [...] [However, the] new MGA [Municipal Government Act] does not expressly confer a power to limit the number of licences issued.

[90] For the foregoing reasons, I find those portions of the Bylaw enacted by the City to regulate the taxi industry by freezing and limiting the number of TPLs creates a scheme that was not within its jurisdiction as authorized by the MGA. As such, those provisions in the Bylaw are ultra vires the City's power and invalid.

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[287] *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City of)*, 2002 ABCA 131. The principle was also mentioned by the Supreme Court of Canada in *Prince George (City of) v Payne*, [1978] 1 SCR 458, discussed in Part III.1 above.

[288] *United Taxi Drivers' Fellowship v Calgary (City)*, 2004 SCC 19, [2004] 1 SCR 485.

FRAME 60

United Taxi v Calgary
[2004] 1 SCR 485

Supreme Court of Canada

[6] The evolution of the modern municipality has produced a shift in the proper approach to the interpretation of statutes empowering municipalities. [A] broad and purposive approach to the interpretation of municipal powers has been embraced.... This interpretive approach has evolved concomitantly with the modern method of drafting municipal legislation. Several provinces have moved away from the practice of granting municipalities specific powers in particular subject areas, choosing instead to confer them broad authority over generally defined matters.... This shift in legislative drafting reflects the true nature of modern municipalities which require greater flexibility in fulfilling their statutory purposes....

[7] Alberta's Municipal Government Act follows the modern method of drafting municipal legislation. The legislature's intention to enhance the powers of its municipalities by drafting the bylaw passing provisions of the Act in broad and general terms is expressly stated in s. 9. Accordingly, to determine whether a municipality is authorized to exercise a certain power, such as limiting the issuance of taxi plate licences, the provisions of the Act must be construed in a broad and purposive manner.

[13] Applying a broad and purposive interpretation, ss. 7 and 8 grant the City the power to pass bylaws limiting the number of taxi plate licences.

IV.8. Limits to the freedom to conduct a business

It is a truism that rights are not absolute. This is all the more so in the case of the freedom to conduct a business, which does not possess supralegislative status in Canada, and is circumscribed by all manner of ordinary federal and provincial legislation. This Part surveys selected elements of the vast landscape of legal constraints on the conduct of business, following the structure specified by the European Parliamentary Research Service.

IV.8.1. Principle of proportionality

IV.8.1.1. General principles

Section 1 of the *Charter* provides that the rights and freedoms guaranteed by the *Charter* are subject to "reasonable limits prescribed by law as are demonstrably justified in a free and democratic society."[289] The "prescribed by law" requirement has been discussed earlier in this Study (Part IV.4.2.1.2). The remainder of the inquiry mandated by s. 1 concerns whether the limitation of rights is "reasonable and demonstrably justified in a free and democratic society," which has been interpreted as requiring that any limitation of guaranteed rights or freedoms:

- be motivated by a "pressing and substantial objective"; and
- pursue that objective by means that are "proportionate" to the infringement of rights.

[289] The Québec *Charter of Human Rights and Freedoms*, CQLR c C-12, also contains a limitations clause (s 9.1) that has also been interpreted as embodying a requirement of proportionality.

Proportionality of means is, in turn, established by showing that there is a rational connection between the infringement and the objective; that a less infringing measure would not achieve the objective as well; and that the negative impact of the infringement not be disproportionate to the objective and to what the measure accomplishes for its objective.[290]

IV.8.1.2. Proportionality in the context of the conduct of business

Because the "freedom to conduct a business" is not among the freedoms guaranteed by the *Charter*, a law cannot be challenged on the ground that it limits said freedom. Restrictions on the freedom to conduct a business do not, therefore, need to meet the requirements of legality, validity of objective, and proportionality of means under s. 1 of the *Charter*.

However, as has previously been mentioned, some of the rights and freedoms that are guaranteed by the *Charter* do confer a measure of protection on aspects of the conduct of business. For instance, commercial advertising is included within the freedom of expression. Laws restricting advertising limit s. 2(b) of the *Charter* and, if they are to be valid, must meet the standard of justification under s. 1.

It will be recalled from Part III.3.3 that, in *RJR-Macdonald v Canada,*[291] an absolute prohibition against tobacco advertising was invalidated on the grounds that the government had not shown that the legislation's public health objectives could not be achieved with something less than an absolute prohibition. On the other hand, a ban on advertising directed at children was upheld in *Irwin Toy v Québec*, [292] because the Court was willing to defer to the legislature's judgment that alternatives such as self-regulation or a more targeted prohibition would be as effective.

Two additional observations about the proportionality analysis may be made. First, the Supreme Court regards "*commercial expression*" as being somewhat remote from the values underlying the freedom of expression, with the result that it is somewhat easier for a law restricting advertising to be justified under s. 1 than, say, a law restricting political expression. For example, a majority of the judges in *RJR-Macdonald* held that the "*degree of required fit between means and ends*" was more relaxed in the case of commercial advertising — i.e., there would be greater tolerance of overbreadth — than in the case of restrictions of expression lying closer to the core of the constitutional guarantee.[293]

The second observation is that laws limiting commercial freedom normally do so in order to protect some other interest (for example, the interests of consumers or workers). The Supreme Court has recognized that in cases where the legislature is "*mediating between competing groups*,"[294] the legislative provisions often involve a line-drawing exercise. For example, in *Edwards Books,*[295] the legislation's aim was to provide a uniform day of rest to retail workers by requiring businesses to close on Sunday, but it provided an exemption allowing businesses of up to 7 employees and 5,000 square feet to remain open if they had closed on the preceding Saturday. Although the law limited the freedom of religion of retailers whose religious observance required them to close on Saturday but who, by reason of size, were not eligible

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290 The onus of proof under s 1 is on the party (usually the government) seeking to justify a limitation of rights: *R v Oakes*, [1986] 1 SCR 103.

291 *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199.

292 *Irwin Toy v Québec*, [1989] 1 SCR 927.

293 *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199 (La Forest J, at par. 96-97; Iacobucci J., at par. 189).

294 *Irwin Toy v Québec*, [1989] 1 SCR 927 at p. 993.

295 *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713.

for the exemption, the Court concluded that the limit was reasonable, and that the law was justified under s. 1: in fixing a maximum number of employees and a maximum square footage, the legislature was engaged in a permissible line-drawing exercise.

FRAME 61

R v Edwards Books and Art Ltd
[1986] 2 SCR 713

Supreme Court of Canada
(Dickson CJ)

[147] [...] I do not believe there is any magic in the number seven as distinct from, say, five, ten, or fifteen employees as the cut off point for eligibility for the exemption. In balancing the interests of retail employees to a holiday in common with their family and friends against the s. 2(a) interests of those affected the Legislature engaged in the process envisaged by s. 1 of the Charter. A "reasonable limit" is one which, having regard to the principles enunciated in Oakes, it was reasonable for the legislature to impose. The courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line.

IV.8.2. Sectors reserved for the State

The Canadian Constitution does not reserve any specific areas of economic activity to the State.[296] Nor, however, does it preclude the enactment of legislation establishing a State monopoly over a particular activity — provided, of course, that the legislation is enacted at the correct level of government and otherwise complies with constitutional requirements.

A few examples serve to illustrate the range of circumstances in which, to varying degrees and in different manners, particular sectors have been reserved to the State.

IV.8.2.1. Alcohol

Depending on the province, there are varying degrees of private involvement in the retail distribution of alcohol; in most provinces, with the exception of Alberta, government-operated liquor stores remain predominant.[297] In all provinces, wholesale distribution is reserved to a government agency.[298]

For example:

- In Alberta, retail liquor distribution is fully privatized; however, the Alberta Gaming, Liquor and Cannabis Commission maintains a monopoly on wholesale liquor distribution. All liquor manufactured in or imported into Alberta may be sold (subject to exceptions) only to the AGLC,[299] which applies a markup to the liquor before reselling it to licensed private retail sellers.[300]

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[296] The respective Terms of Union of British Columbia, Prince Edward Island and Newfoundland form part of the Constitution and contain provisions that contemplate or specify federal or provincial government ownership of certain defined undertakings, such as ferry services and railways. However, the purpose of these provisions is either to assign ownership of existing infrastructure or to commit the federal government to provide certain services; the provisions do not impose a State monopoly. (*British Columbia Terms of Union*, RSC 1985, App II, No 10; *Prince Edward Island Terms of Union*, RSC 1985, App II, No 12; *Newfoundland Act*, RSC 1985, App II, No 32.)

[297] See BOURGEOIS, D.J.: *Liquor Laws of Canada*, LexisNexis, 2018, at pp. 99-111.

[298] See BOURGEOIS, *op cit,* at pp. 151-52.

[299] *Gaming, Liquor and Cannabis Act*, RSA 2000, c G-1 (Alberta), ss 77, 79.

[300] *Gaming, Liquor and Cannabis Act* (Alberta), s 80.

- In British Columbia, the provincial government automatically becomes the owner of any liquor manufactured in or imported into British Columbia;[301] the government operates retail stores, and also licenses private retailers who may (subject to exceptions) sell or serve liquor only if it has been purchased from the government.[302]
- In New Brunswick, the retail sale of liquor is an authorized activity only for the provincial government liquor corporation.[303] Despite the government's monopoly, there is private involvement in retail distribution, as the provincial liquor corporation is permitted to appoint private entities to sell liquor on its behalf, as agents of the corporation.[304]
- In Ontario, the relevant provincial legislation requires a licence or permit to engage in most liquor transactions, other than those conducted by the Liquor Control Board of Ontario.[305] The LCBO operates retail stores and legislation also establishes a system for the licensing of certain categories of private retail outlet, such as grocery stores and convenience stores.[306] However, the government maintains a monopoly on wholesale distribution.[307]

As explained in Part IV.1.3.3.1, the New Brunswick legislation survived a challenge to its constitutionality in *R v Comeau*.[308] Although the legislation has the effect of burdening the interprovincial movement of goods, the Supreme Court of Canada nevertheless upheld its validity because its purpose is to manage the manufacture, distribution and sale of alcohol within the province, rather than to restrict imports. By contrast, a subsequent challenge directed against Alberta's mark-up policy, in *Steam Whistle*,[309] succeeded because that policy was intended to favour in-province over out-of-province brewers, and thus to restrict interprovincial trade.

The structure of the liquor distribution system in Canada is a holdover from the era of alcohol prohibition. In particular, the provincial government monopoly on wholesaling results from a prohibition under federal law against transporting liquor into a province — not only from outside Canada, but also from any other part of Canada — unless the liquor was sold or consigned to a provincial liquor authority.[310] (The federal legislation was amended in 2019 so that the prohibition no longer applies to the transportation of liquor within Canada.[311])

Today, the policies underlying government control over the liquor industry include public safety concerns associated with liquor consumption, the generation of government revenue from the sale of liquor, and the promotion of local liquor manufacturing.[312]

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301 *Liquor Distribution Act*, RSBC 1996, c 268 (British Columbia), s 6.

302 *Liquor Control and Licensing Act*, SBC 2015, c 19 (British Columbia), s 8.

303 *Liquor Control Act*, RSNB 1973, c L-10 (New Brunswick), ss 38(1), 132-134.

304 *Liquor Control Act* (New Brunswick), s 40.1.

305 *Liquor Licence and Control Act, 2019*, SO 2019, c 15, Sched 22 (Ontario), s 2.

306 *Liquor Licence and Control Act, 2019* (Ontario), s 3(1); *Licensing*, O Reg 746/21 (Ontario), s 69 (categories of private retail outlet).

307 *Licensing*, O Reg 746/21 (Ontario), s 108.

308 *R v Comeau*, [2018] 1 SCR 342.

309 *Steam Whistle Brewing Inc v Alberta Gaming and Liquor Commission*, 2019 ABCA 468.

310 *Importation of Intoxicating Liquors Act*, RSC 1985, c I-3, s 3(1). (Link to past version of Act.)

311 *Budget Implementation Act, 2019, No. 1*, SC 2019, c 29, s 186.

312 See BOURGEOIS, p. 3.

IV.8.2.2. Lotteries and gaming

Since its enactment in 1892, the *Criminal Code* has prohibited a range of activities in connection with gambling and lotteries;[313] a significant liberalization occurred in 1969, when Parliament introduced an exemption for, among other things, gambling and lottery schemes that are "*conduct[ed] and manage[d]*" by the government of a province (s. 207(1)(a)).[314]

The language of the exemption is sufficiently general to accommodate private involvement in the provision of gambling and lottery schemes. For example, in Ontario, the provincial legislation whereby the government "*conducts and manages*" gambling and lottery schemes contemplates the registration of private entities to supply "*services*," including the "*operation of a gaming site*" (whether physical or online).[315]

Nevertheless, in order to comply with s 207(1)(a), the government must retain "*management and control*" of the operation. In *Great Canadian Casino*,[316] the B.C. Supreme Court examined an arrangement between the provincial government and a private company whereby the latter operated casino-based slot machines, in exchange for a significant share of the profits. The Court described the arrangement as "*dangerously close to a delegation of the provincial government's power to control and manage gaming*," but found that, in view of the government's retention of "*manage[ment] and contro[l]*" over the slot machine scheme, the arrangement nonetheless complied with s. 207(1)(a).

A recent case, *Mohawk Council v iGaming Ontario*,[317] concerns the framework implemented by the province of Ontario for internet gaming. The applicant argued that the framework was "*in effect, a disguised licensing scheme that impermissibly outsources the conduct and management of internet gaming to private sector enterprises*."[318] In rejecting the challenge, the Ontario Superior Court distinguished between the permissible "*engagement of private entities in an operational capacity*," and the impermissible delegation by the province of the "*conduct and management*" of the scheme.[319] What is required is that the government retain a "*sufficient level of control to maintain its position as the 'operating mind' of the lottery [...]. [so as to] protec[t] public safety and foste[r] responsible gaming*."[320] The province of Ontario, the trial judge determined, had satisfied this requirement here.

FRAME 62

Mohawk Council of Kahnawà:ke v iGaming Ontario
2024 ONSC 2726

Ontario Superior Court of Justice
(Brownstone J)

[95] I find that the legislative purpose for the Code provisions was to decriminalise gaming in instances where the provincial legislature exerted a sufficient degree of management and control to maintain public safety, fairness, and integrity in gaming. [...] Parliament intended to provide the provinces with substantial

313 *Criminal Code*, RSC 1985, c C-46, ss 202 and 206.

314 For a description of the history of the *Criminal Code* provisions relating to gambling, see MONAHAN, P. J. and GOLDLIST, G. A.: "Roll Again: New Developments concerning Gaming", *Criminal Law Quarterly* 42, 1999, p.182 (p.185-89).

315 *Gaming Control Act*, 1992, SO 1992, c 24, s 4(2); *General*, O Reg 78/12, s 3.

316 *Great Canadian Casino Company Ltd v Surrey (City of)* (1998), 1998 CanLII 2894 (BC SC), 53 B.C.L.R. (3d) 379 (S.C.), rev'd but not on this point 1999 BCCA 619.

317 *Mohawk Council of Kahnawà:ke v iGaming Ontario*, 2024 ONSC 2726.

318 Par 2.

319 Par 98.

320 Id.

room to conduct and operate provincially-run lotteries as they saw fit, in accordance with local attitudes [...]. It trusted the provinces to do so in a responsible manner with overriding concern for public safety. Purely private gaming schemes were to continue to be subject to the Code provisions; public schemes under sufficient provincial control were not.

[98] In implementing its lottery scheme in accordance with s. 207(1)(a), the province is permitted to engage private entities in an operational capacity. The province must not, however, delegate to such entities the conduct and management of the scheme. In order to be conducting and managing a lottery scheme itself, the province must exert a sufficient level of control to maintain its position as the "operating mind" of the lottery. It must do so in a manner that protects public safety and fosters responsible gaming. It must do more than distantly oversee or regulate the scheme; the province must exert direction and control over it. It need not be involved in granular operations, but it needs to be far more than a "hands-off" licensor.

IV.8.2.3. Postal service

The Canada Post Corporation enjoys "*the sole and exclusive privilege of collecting, transmitting and delivering letters to the addressee thereof within Canada*."[321] In reality, the postal service does have competition, in the form of courier services and electronic means of communication — both of which are deemed not to infringe the Canada Post Corporation's "*exclusive privilege*."[322]

IV.8.3. Competition law, in particular State aids

IV.8.3.1. Competition law

IV.8.3.1.1. Historical development

Historically, the structure of Canadian competition law was profoundly influenced by federalism constraints on the powers of the federal Parliament. In *Board of Commerce*,[323] discussed in Part III.2.1, the Judicial Committee had decided that the federal authority to regulate "trade and commerce" could not support legislation that interfered with the conduct of business in the provinces; a decade later, in *PATA*,[324] discussed in Part IV.8.5 below, it upheld, under the "criminal law" power, a prohibition against participation in a combine.

As a result, out of constitutional necessity, federal competition law took the form of criminal prohibitions against particular anti-competitive practices, such as price-fixing conspiracy, predatory pricing, price discrimination and pyramid selling.[325]

In 1989, the Supreme Court's decision in *General Motors*[326] opened the door to a regulatory, rather than criminal, approach to competition law, when it ruled that the *Combines Investigation Act* could also be upheld under the "*trade and commerce*" power. To reach this result, the Court developed an interpretation of that power as authorizing federal legislation that went beyond regulating individual industries, but that was instead sweeping regulation of "*trade as a whole*." Such legislation, the Court reasoned, was of a kind that it would be beyond the capacity of any or even all of the provinces to enact under their own authority, and therefore must be within Parliament's authority to enact.

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321 *Canada Post Corporation Act*, RSC 1985, c C-10, s 14(1).

322 See sections 15(1)(e) ("urgent" delivery for a fee not less than three times the regular postage rate); 15(1)(h) ("electronic or optical transmission").

323 *Reference Re Board of Commerce* (1921), [1922] 1 AC 191, 60 DLR 513.

324 *Proprietary Articles Trade Association v Canada (AG)*, [1931] AC 310, [1931] 2 DLR 1 (PC).

325 See John S. Tyhurst, *Canadian Competition Law and Policy* (Irwin, 2021), pp. 29-30.

326 *General Motors of Canada Ltd. v City National Leasing*, [1989] 1 SCR 641.

FRAME 63

General Motors of Canada Ltd v City National Leasing
[1989] 1 SCR 641

Supreme Court of Canada
(Dickson CJ)

It is evident from this discussion that competition cannot be effectively regulated unless it is regulated nationally. As I have said, in my view combines legislation fulfills the three indicia of national scope as described in [AG (Can) v Can Nat Transportation, Ltd, [1983] 2 SCR 206]: it is legislation "aimed at the economy as a single integrated national unit rather than as a collection of separate local enterprises", it is legislation "that the provinces jointly or severally would be constitutionally incapable of passing" and "failure to include one or more provinces or localities would jeopardize successful operation" of the legislation "in other parts of the country".

IV.8.3.1.2. Current approach

The current federal legislation, the *Competition Act,*[327] provides for review by the Competition Tribunal, on application by the Commissioner of Competition,[328] of merger transactions and agreements between competitors, to determine whether a transaction or agreement would "*preven[t] or lesse[n], or is] likely to prevent or lessen, competition substantially*" (ss 90.1, 92). Other provisions of the *Act* authorize the Tribunal, on application by the Commissioner or by an affected person, to order remedies in the event of conduct amounting to abuse of a dominant position (s. 79).

The *Act* retains a collection of criminal offences "in relation to competition," including:[329]

- Price- (or wage-) fixing conspiracy (s. 45)
- Bid rigging (s. 47)
- Knowingly or recklessly making materially false or misleading representations (s. 52)
- Deceptive telemarketing (s. 52.1)
- Pyramid selling (s. 55.1)

The making of false or misleading representations, unless "*knowin[g] or reckles[s],*" is not an offence but is instead "*reviewable conduct*" that, upon application by the Commission, can give rise to an order of the Federal Court to discontinue the conduct and/or to pay an "*administrative monetary penalty*."[330]

In addition to proceedings initiated by the Commissioner of Competition, and criminal prosecution for competition offences, the *Act* provides a civil damages remedy to any person who suffers damage as a result of any of the offences relating to competition, or as a result of another person's non-compliance with an order of the Tribunal.[331]

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[327] *Competition Act*, RSC 1985, c C-34.

[328] The Competition Tribunal is a quasi-judicial body established by *Competition Tribunal Act*, RSC 1985, c 19, 2nd Supp; the Commissioner of Competition is an officer who is appointed by the federal government under s 7 of the *Competition Act* and is responsible for the administration and enforcement of the *Act*.

[329] *Competition Act*, Part VI ("Offences in relation to competition").

[330] *Competition Act*, s. 74.1.

[331] *Competition Act*, s. 36. The civil remedy, although an encroachment on the provincial jurisdiction over "property and civil rights," was upheld by the Supreme Court of Canada in *General Motors*, note 326 above, as a provision incidental to the remainder of the Act, which was itself valid under the trade and commerce power.

IV.8.3.2. State aids

The Canadian constitutional order contains no provision analogous to Art. 107 TFEU, which prohibits, with certain exceptions, any State aid "*which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods*." On the contrary, even if it is not uncontroversial,[332] targeted financial support to business is a familiar industrial policy lever of Canadian federal and provincial governments.[333]

Sometimes, the provision of a competitive advantage to a particular industry has taken the form, not of direct financial support, but of a prohibitory or regulatory law. On occasion, such legislation has run afoul of constitutional limits. Most notably, in the *Margarine Reference,* discussed in Part IV.8.5.1.1.ii below, the Supreme Court invalidated a federal statute that prohibited the manufacture and sale of margarine. The Court held that Parliament's aim — "*to give trade protection to the dairy industry in the production and sale of butter [...] as against competitors in business*" — was not one that could support the legislation's characterization as a "criminal law."[334]

Another example can be found in the dissenting opinion of Justice Brown in *Re Greenhouse Gas Pollution Pricing Act.*[335] Justice Brown described a portion of the federal carbon pricing scheme as effecting a "*deep foray into industrial policy*" (par. 346), insofar as it confers discretion on the federal Cabinet to establish industry-by-industry carbon output pricing standards, and to exempt industries from pricing altogether, so as to preserve their international competitiveness (par. 339).[336] Such matters, Justice Brown concluded, come within provincial jurisdiction over "*local works and undertakings*" (s. 92(10) of the *Constitution Act 1867*).

As usual in federalism cases, the upshot of the objections to the impugned legislation in these cases was not that the legislation could not be enacted at all, but only that it had been enacted by the wrong level of government.

IV.8.4. Labour and employment law

The conventional account of the legal framework of employment describes it as consisting of three intertwined regimes:

- In the common law provinces, the common law of employment, grounded in the values of contract; or, in Québec, the "contract of employment," governed by the Civil Code;
- collective bargaining; and

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[332] For analysis and criticism of the expenditure of government resources on business subsides, see HILL, T. and EMES, J.: "The Cost of Business Subsidies in Canada", 2023, at https://www.fraserinstitute.org/studies/cost-of-business-subsidies-in-canada; LESTER, J.: *Business Subsidies in Canada: Comprehensive Estimates for the Government of Canada and the Four Largest Provinces*, SPP Research Papers 11:1, 2018, University of Calgary, School of Public Policy.

[333] In Canada, most support takes the form of financial instruments, such as loans and loan guarantees: see ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT: *Quantifying Industrial Strategies Across Nine OECD Countries*, OECD Science, Technology and Industry Policy Papers No 150, June 2023, p. 39.

[334] *Reference re Validity of s. 5(a) of the Dairy Industry Act (The Margarine Reference)*, [1949] 1 SCR (p. 50).

[335] *References re Greenhouse Gas Pollution Pricing Act*, [2021] 1 SCR, p. 175 (Brown J, dissenting).

[336] Similar concerns were expressed by Justice Rowe, dissenting, at par. 599. The majority Justices rejected Justice Brown's characterization and instead described the main thrust of the legislation as the "*creat[ion of] minimum national standards of greenhouse gas price stringency.*" The majority situated the authority to create such standards within Parliament's authority, under the "*peace, order and good government*" clause of s. 91, to make laws on matters of national concern.

- direct statutory regulation of employment terms and working conditions.[337]

IV.8.4.1. The employment contract

It is in the first part of the framework — the common law of employment, in the common law provinces; and the Civil Code provisions concerning the "*contract of employment,"* in Québec — that values akin to a "*freedom to conduct a business*" and its close relative, the freedom of contract, are most perceptible.

IV.8.4.1.1. Common law

The common law recognizes the employer's freedom to enter (or not) into a contract for an employee's service; and presumes that the terms of such contract include a "*managerial prerogative*" to direct the employee's work.[338] Obviously, the managerial prerogative is subject to the contract's express terms, and the freedom of contract is itself subject to statutory restrictions, including those relating to collective bargaining and employment standards.

FRAME 64

Voice Construction Ltd. v Construction & General Workers' Union, Local 92
[2004] 1 SCR 609

Supreme Court of Canada

32 Generally management has a residual right to do as it sees fit in the conduct of its business. This right is subject to any express term of a collective agreement or human rights and other employment-related statutes providing otherwise.

Legislators have seen fit to override the freedom of contract in a number of respects in the employment context, because of a recognition that an assumption underlying that freedom — that the parties are autonomous and capable of looking out for their own interests[339] — may be unjustified in light of inequalities of bargaining power between employers and employees and the overall vulnerability of the latter. This recognition has also influenced judicial development of the common law and, in particular, the interpretation of contracts of employment:

FRAME 65

Wood v Fred Deeley Imports Ltd
2017 ONCA 158

Ontario Court of Appeal
(Laskin JA)

[26] In general, courts interpret employment agreements differently from other commercial agreements. They do so mainly because of the importance of employment in a person's life. As Dickson C.J.C. said in an oft-quoted passage from his judgment in Reference re Public Service Employee Relations Act (Alberta), 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313, [1987] S.C.J. No. 10, at p. 368 S.C.R.:

> *Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.....*

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[337] LABOUR LAW CASEBOOK GROUP: *Labour and Employment Law Cases and Materials*, 9th ed., Irwin, 2018, §1:200 (pp. 2-3).

[338] *Op. cit.,* §3:100 (p. 220).

[339] *Op. cit.,* §3:100 (p. 219).

[28] When employment agreements are made, usually employees have less bargaining power than employers. Employees rarely have enough information or leverage to bargain with employers on an equal footing....

IV.8.4.1.2. Civil law

In Québec, the Civil Code defines an employment contract as "a contract by which a person, the employee, undertakes, for a limited time and for remuneration, to do work under the direction or control of another person, the employer."[340]

The provisions of the Code specifically concerning employment contracts[341] are relatively sparse and, in many instances, permissive, in line with the observation that "*[le] droit civil repose sur le principe de la liberté contractuelle. En effet, la volonté des parties et le contrat sont considérés, en droit civil, comme la loi des parties.*"[342]

However, as in the common law provinces, contractual freedom in the employment context in Québec is overridden by mandatory legislative regimes such as those in relation to collective bargaining and minimum employment standards.[343]

IV.8.4.2. Collective bargaining

Legislation in each province[344] (as well as legislation at the federal level, applicable to federally-regulated workplaces[345]) establishes a framework whereby private sector employees[346] can engage in collective bargaining with their employer, by means of a union. This legislation limits the freedom of action of employers in variety of ways, including by prohibiting unilateral changes to the terms of employment during the process of negotiation of a collective agreement;[347] and by imposing a duty to bargain in good faith in an effort to enter into a collective agreement.[348]

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340 Art 2085 CCQ.

341 Art 2085-2097 CCQ.

342 OTIS, L. : "L'ordre public dans les relations de travail", *Les Cahiers de droit*, Vol. 40 n°2, p. 381, 1999 (p. 382).

343 See, generally, OTIS, *op. cit.*

344 *Labour Relations Code*, RSA 2000, c L-1 (Alberta); *Labour Relations Code*, RSBC 1996, c 244 (British Columbia); *The Labour Relations Act*, CCSM c L10 (Manitoba); *Industrial Relations Act*, RSNB 1973, c I-4 (New Brunswick); *Labour Relations Act*, RSNL 1990, c L-1 (Newfoundland and Labrador); *Trade Union Act*, RSNS 1989, c 475 (Nova Scotia); *Labour Relations Act, 1995*, SO 1995, c 1, Sch A (Ontario); *Labour Act*, RSPEI 1988, c L-1 (Prince Edward Island); *Labour Code*, CQLR c C-27 (Québec); *The Saskatchewan Employment Act*, SS 2013, c S-15.1, Part VI (Saskatchewan).

345 *Canada Labour Code*, RSC 1985, c L-2, Part I. In general, the regulation of the employment relationship comes within provincial jurisdiction over "property and civil rights" (s. 92(13) of the *Constitution Act 1867*). See *Toronto Electric Commissioners v Snider*, [1925] AC 396. However, for employers that are federal "undertakings," within the meaning of ss. 92(10)(a)-(c) of the *Constitution Act 1867*, or in industry sectors the regulation of which is within exclusive federal jurisdiction (such as banks and airlines), the regulation of workplace relations comes within federal jurisdiction. See, for example, *Bell Canada v Québec (Commission de la Santé et de la Sécurité du Travail)*, [1988] 1 SCR 749. See HOGG & WRIGHT, note 15 above, §§21:10, 21:11.

346 The legislation concerning collective bargaining in the public sector is beyond the scope of this Study.

347 For example, *Canada Labour Code*, RSC 1985, c L-2, s 50(b). See generally Labour Law Casebook Group, note 337 above, §5:300.

348 For example, *Canada Labour Code,* s 50(a). See Labour Law Casebook Group, note 337 above, §7:400.

After initially deciding that the freedom of association guaranteed by s. 2(d) of the *Charter* did not include a right to collective bargaining,[349] the Supreme Court reversed course in the 2000s. In *Health Services and Support v British Columbia,*[350] the Court overruled its earlier decisions and held that s. 2(d) does include "the right of employees to join together in a union to negotiate with employers on workplace issues or terms of employment — a process described broadly as collective bargaining."[351]

The *Charter of Rights* does not, however, have direct horizontal application.[352] As a result, the constitutional right to collective bargaining is, in general, relevant to employees whose employer is the government (i.e., public sector employees). An example of the application of s. 2(d) for the benefit of private sector employees is *Dunmore,* in which it was successfully argued that s. 2(d) was violated by a legislative provision that excluded a category of employees (agricultural workers) from the general labour relations regime.[353]

IV.8.4.3. Statutory regulation of the employment relationship

A third component of the legal framework of employment is a collection of laws that regulate the terms of employment and working conditions. As with collective bargaining legislation, laws regulating employment standards exist in every province and at the federal level.[354]

Examples of such laws include:

- Laws establishing minimum employment standards;
- Laws concerning occupational health and safety, and workplace accident insurance;
- Anti-discrimination legislation, including legislation regarding disability accessibility;
- In Québec, legislation regarding the language of work.

IV.8.4.3.1. Minimum employment standards

The Ontario *Employment Standards Act*,[355] and similar legislation in every other province and territory and at the federal level,[356] contains provisions that are deemed to be part of any employment contract. The *Act* establishes minimum standards: any attempt to contract out of the provisions is void, unless it is to provide a "greater benefit to an employee" than is provided by the *Act*:

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349 *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313.

350 *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia*, [2007] 2 SCR 391.

351 Par. 38.

352 Section 32(1) of the Charter provides that it applies to the "Parliament and government of Canada" and to the "legislature and government of each province."

353 *Dunmore v Ontario (Attorney General)*, 2001 SCC 94 (CanLII), [2001] 3 SCR 1016

354 See note 345 above.

355 *Employment Standards Act, 2000*, SO 2000, c 41 (Ontario).

356 *Employment Standards Code*, RSA 2000, c E-9 (Alberta); *Employment Standards Act*, RSBC 1996, c 113 (British Columbia); *The Employment Standards Code*, CCSM c E110 (Manitoba); *Employment Standards Act*, SNB 1982, c E-7.2 (New Brunswick); *Labour Standards Act*, RSNL 1990, c L-2 (Newfoundland and Labrador); *Employment Standards Act*, SNWT 2007, c 13 (Northwest Territories); *Labour Standards Code*, RSNS 1989, c 246 (Nova Scotia); *Labour Standards Act*, RSNWT (Nu) 1988, c L-1 (Nunavut); *Employment Standards Act*, RSPEI 1988, c E-6.2 (Prince Edward Island); *Act respecting labour standards*, CQLR c N-1.1 (Québec); *The Saskatchewan Employment Act*, SS 2013, c S-15.1 (Saskatchewan), Part II; *Employment Standards Act*, RSY 2002, c 72 (Yukon). For federally-regulated workplaces, the provisions of the *Canada Labour Code*, RSC 1985, c L-2, Part III, apply.

FRAME 66

***Employment Standards Act, 2000* (Ontario), section 5**

SO 2000, c 41

5 *(1) Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void.*

(2) If one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract or Act apply and the employment standard does not apply.

When enacted in 1969, the *Act* included provisions concerning hours of work, overtime pay, the minimum wage, equal pay for equal work (performed by male and female employees), and paid vacation.[357] Today, the *Act* deals with the foregoing matters and also includes provisions concerning disconnecting from work,[358] electronic monitoring,[359] and non-compete agreements,[360] among other matters.

IV.8.4.3.2. Occupational health and safety; workplace accident insurance

Provincial and federal legislation[361] imposes duties on employers, supervisors, workers and others in order to protect workers' health and safety. The Ontario legislation,[362] for example, contains:

- general requirements concerning, among other things, the provision of protective equipment, instruction and supervision, and warnings concerning workplace hazards;[363]
- a requirement to prepare and maintain policies regarding workplace violence and harassment;[364]
- the right of workers to refuse work if the equipment or condition of the workplace are such as to expose the worker to danger;[365] and
- a prohibition against reprisals by employers against workers for complying with the legislation, or for seeking enforcement of the legislation.[366]

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357 *The Employment Standards Act, 1968*, SO 1968, c 35.

358 Section 21.1.2 requires an employer having more than 25 employees to have a policy on disconnecting from work, but does not mandate the content of the policy.

359 Section 41.1.1 requires an employer having more than 25 employees to have a policy regarding electronic monitoring.

360 Section 67.2 prohibits non-compete agreements except (i) for employees who are not executives, or (ii) where the seller of a business subsequently becomes an employee of the business, and the seller's agreement not to compete with the business was a term of the sale.

361 See note 345 above.

362 *Occupational Health and Safety Act*, RSO 1990, c O.1.

363 Sections 25 and 26.

364 Sections 32.0.1 and 32.0.2

365 Section 43(3)

366 Section 50

In addition, employers in a wide range of industries are required to participate in a provincial insurance plan to compensate workers who incur injuries by reason of occupational accidents.[367] The insurance legislation also imposes a duty on employers to facilitate the injured worker's return to work.[368]

IV.8.4.3.3. Anti-discrimination, accommodation and accessibility

The human rights legislation described above in Part II.2.2 provides protection from discrimination in certain settings, including employment.[369] *

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[367] *Workplace Safety and Insurance Act, 1997*, SO 1997, c 16, Sch A. The covered industries include: agriculture; mining; utilities; manufacturing; transportation; construction; wholesale; retail; information and culture; professional, scientific and technical industries; leisure and hospitality; and other services. *General*, O Reg 175/98, Schedule 1.

[368] *Workplace Safety and Insurance Act, 1997*, s 40(1).

[369] Note 31 above.

* EdN: For a comparison of the ***principles of equality and non-discrimination*** in other legal systems, see:

- **Austria**: VAŠEK, M.: *Die Grundsätze der Gleichheit und der Nichtdiskriminierung, eine rechtsvergleichende Perspektive – Österreich*, Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), Oktober 2020, VIII und 44 S., Referenz PE 659.277 (original German version); *Les principes d'égalité et non-discrimination, une perspective de droit comparé - Autriche*, Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), octobre 2020, VIII et 49 pp., référence PE 659.277 (French version with added comments);
- **Belgium**: BEHRENDT, CH.: *Les principes d'égalité et non-discrimination, une perspective de droit comparé - Belgique*, Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), février 2021, VIII et 44 pp., référence PE 679.087 (original French version); *Los principios de igualdad y no discriminación, una perspectiva de Derecho Comparado - Bélgica*, Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), julio 2022, X y 82 pp., referencia PE 733.602 (Spanish version with added comments and update); *Die Grundsätze der Gleichheit und der Nichtdiskriminierung, eine rechtsvergleichende Perspektive – Belgien*, Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), Dezember 2022, VIII und 106 S., Referenz PE 739.262 (German version with added comments and update);
- **Canada**: SHEPPARD, C.: *The principles of equality and non-discrimination, a comparative law perspective - Canada*, Comparative Law Library Unit, European Parliamentary Research Service (EPRS), November 2020, VIII and 64 pp., reference PE 659.362 (original English version); *Les principes d'égalité et de non-discrimination, une perspective de droit comparé - Canada*, Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), février 2022, X et 92 pp., référence PE 698.937 (French version with added comments and update);
- **Chile**: GARCÍA PINO, G.: *Los principios de igualdad y no discriminación, una perspectiva de Derecho Comparado - Chile*, Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), marzo 2021, VIII y 120 pp., referencia PE 690.533 (original Spanish version); *Los principios de igualdad y no discriminación, una perspectiva de Derecho Comparado - Chile*, Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), febrero 2023, X y 178 pp., referencia PE 739.352 (updated second edition with added comments); *Die Grundsätze der Gleichheit und der Nichtdiskriminierung, eine rechtsvergleichende Perspektive - Chile*, Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), Februar 2023, XII und 210 S., Referenz PE 739.353 (German version with added comments and update) ;
- **Council of Europe**: ZILLER, J.: *Les principes d'égalité et de non-discrimination, une perspective de droit comparé - Conseil de l'Europe*, Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), octobre 2020, VIII et 72 pp., référence PE 659.276 (original French version); *Principios de igualdad y no discriminación, una perspectiva de Derecho Comparado – Consejo de Europa*, Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), octubre 2022, X y 122 pp., referencia PE 738.179 (Spanish version with added comments and update); *Die Grundsätze der Gleichheit und der Nichtdiskriminierung, eine rechtsvergleichende Perspektive – Europarat*, Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), November 2022, X und 136 S., Referenz PE

An example from the Ontario *Human Rights Code*[370] appears in the Frame immediately below.

739.217 (German version with added comments and update) ;

- **European Union**: SALVATORE, V.: *I principi di uguaglianza e non discriminazione, una prospettiva di diritto comparato - Unione europea*, Unità Biblioteca di diritto comparato, Servizio Ricerca del Parlamento europeo (EPRS), gennaio 2021, VIII e 61 pp., referenza PE 679.060 (original Italian version); *Die Grundsätze der Gleichheit und der Nichtdiskriminierung, eine rechtsvergleichende Perspektive – Europäische Union*, Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), Mai 2023, X und 121 S., Referenz PE 747.894 (updated German version with comments).
- **France**: PONTHOREAU, M.-C.: *Les principes d'égalité et non-discrimination, une perspective de droit comparé - France*, Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), janvier 2021, VIII et 44 pp., référence PE 679.061 (original French version); *Los principios de igualdad y no discriminación, una perspectiva de Derecho Comparado - Francia*, Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), abril 2022, XI y 82 pp., referencia PE 729.378 (Spanish version with added comments and update);
- **Germany**: REIMER, F.: *Die Grundsätze der Gleichheit und der Nichtdiskriminierung, eine rechtsvergleichende Perspektive - Deutschland*, Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), Oktober 2020, XIV und 77 S., Referenz PE 659.305 (original German version); *Les principes d'égalité et de non-discrimination, une perspective de droit comparé - Allemagne*, Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), mars 2022, XIV et 111 pp., référence PE E 729.295 (French version with added comments and update);
- **Italy**: LUCIANI, M.: *I princìpi di eguaglianza e di non discriminazione, una prospettiva di diritto comparato - Italia*, Unità Biblioteca di diritto comparato, Servizio Ricerca del Parlamento europeo (EPRS), ottobre 2020, X e 71 pp., referenza PE 659.298; *Die Grundsätze der Gleichheit und der Nichtdiskriminierung, eine rechtsvergleichende Perspektive - Italien*, Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), September 2023, X und 137 S., Referenz PE 747.895 (updated German version with comments); DÍEZ PARRA (Coord.): *I princìpi di eguaglianza e di non discriminazione, una prospettiva di diritto comparato - Italia*, Unità Biblioteca di diritto comparato, Servizio Ricerca del Parlamento europeo (EPRS), febbraio 2024, XVI e 172 pp., referenza PE 659.298 (updated second edition with comments) ;
- **Peru**: ESPINOSA-SALDAÑA BARRERA, E.: *Los principios de igualdad y no discriminación, una perspectiva de Derecho Comparado - Perú*, Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), diciembre 2020, VIII y 64 pp., referencia PE 659.380;
- **Spain**: GONZÁLEZ-TREVIJANO SÁNCHEZ, P.: *Los principios de igualdad y no discriminación, una perspectiva de Derecho Comparado - España*, Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), octubre 2020, VIII y 104 pp., referencia PE 659.297 (original Spanish version); *Les principes d'égalité et non-discrimination, une perspective de droit comparé - Espagne*, Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), juin 2022, X et 167 pp., référence PE 733.554 (French version with added comments and update); *Die Grundsätze der Gleichheit und der Nichtdiskriminierung, eine rechtsvergleichende Perspektive – Spanien*, Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), Januar 2023, X und 194 S., Referenz PE 739.207 (German version with added comments and update);
- **Switzerland**: FREI, N.: *Die Grundsätze der Gleichheit und der Nichtdiskriminierung, eine rechtsvergleichende Perspektive - Schweiz*, Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), Oktober 2020, X und 70 S., Referenz PE 659.292 (original German version); *Les principes d'égalité et de non-discrimination, une perspective de droit comparé - Suisse*, Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), mars 2022, X et 95 pp., référence PE 729.316 (French version with added comments);
- **United States**: OSBORNE, E.L.: *The principles of equality and non-discrimination, a comparative law perspective - United States of America*, Comparative Law Library Unit, European Parliamentary Research Service (EPRS), March 2021, XII and 83 pp., reference PE 689.375 (original English version); *Les principes d'égalité et de non-discrimination, une perspective de droit comparé - États-Unis d'Amérique*, Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), février 2022, XIII et 111 pp., référence PE 698.938 (French version with added comments and update).

[370] *Human Rights Code*, RSO 1990, c H.19.

FRAME 67

***Human Rights Code* (Ontario), section 5**

RSO 1990, c H.19

***5** (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.*

(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

The general structure of the employer's obligations in connection with non-discrimination may be summarized in two propositions.[371]

First, discrimination is prohibited regardless of whether it is

- direct*

[371] See, further, SHEPPARD, C.: *The principles of equality and non-discrimination, a comparative law perspective - Canada*, Comparative Law Library Unit, European Parliamentary Research Service (EPRS), November 2020, VIII and 64 pp., reference PE 659.362 (pp. 18, 41-42).

* EdN.: For a comparison of the ***concept of "direct discrimination"*** in other jurisdictions, see:

- **Austria**: § 5 para. 1 of the Equal Treatment Act states: *"Direct discrimination exists if a person is treated less favorably than another person is, has been or would be treated in a comparable situation on the basis of his or her sex"*. See also the provisions of §§ 4a para. 1 and 13a para. 1 of the Federal Equal Treatment Act, which are identical in content, as well as § 7c para. 1 of the Federal Disability Employment Act and § 5 para. 1 of the Federal Disability Equality Act. See sections II.2.2. to II.2.5. of the study VAŠEK, M.: *op. cit.* (pp.22-25), and sections II.2.2.2. to II.2.5. of the updated French version of the study: VAŠEK, M.: *op. cit.* (pp. 23-26);
- **Belgium**: direct discrimination is a direct distinction on the basis of one of the characteristics protected by the Racism Act (art. 4(7)), the General Act (art. 4(7)) or the Equality Act (art. 5(6)) that does not fulfil one of the conditions set out in these laws under which the distinction would be justified. See section II.3.1.2.b) of the study BEHRENDT,Ch.: *op. cit.* (p. 14). See also section II.3.1.2.b) of the updated German version of the study: BEHRENDT, Ch.: *op. cit.* (pp. 30-34) and of the updated Spanish version: BEHRENDT, Ch.: *op. cit.* (pp. 20-22);
- **Chile**: The difference between direct and indirect discrimination is based on the intention of the discriminator. In this sense, direct discrimination occurs when the discriminator takes an intrinsically discriminatory measure with the clear intention of harming the target group. See section IV.2.5. of the study GARCÍA PINO, G.: *op. cit.* (p. 91). See also section IV.2.5. of the updated 2nd edition of the original Spanish version of the study: GARCÍA PINO, G.: *op. cit* . (pp. 118-120) and of its German version: GARCÍA PINO, G.: *op. cit.* (pp. 142-144);
- **Council of Europe**: The concept of discrimination has the same meaning in Art. 14 ECHR and Art. 1 of Protocol No. 12 and is defined in the Explanatory Report on Protocol No. 12 as follows: *"A difference of treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is no reasonable proportionality between the means employed and the aim pursued."* See section II.2.1.3 of the study ZILLER, J., *op. cit.* (p. 16). See also section II.2.1.3 of the updated Spanish version of the study: ZILLER, J., *op. cit.* (pp. 17-18). See also SectionII.2.1.3 of the updated German version of the study ZILLER, J., *op. cit.* (pp. 21-22);
- **European Union**: Article 2(2) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation defines the concept of direct discrimination in its point (a) as follows: "(a) *direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1*". Discrimination therefore refers to one of the prohibited grounds of discrimination listed in Art. 1 of the Directive. Article 1d(5) of the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of the European Communities also refers to direct discrimination. In its *Defrenne judgment*(C-43/75) of April 8, 1976, the ECJ distinguished between direct and indirect discrimination with regard to Art. 119 of the EEC Treaty (the content of which largely corresponds to today's Art. 157 (1) and (2) TFEU). Direct discrimination is defined as discrimination arising from legal provisions or collective agreements

- indirect*,

and, in any case, the case of unequal pay for male and female employees for the same work in one and the same public or private service or company. In the *Otero Ramos judgment* C-531/15 of 19 October 2017, the Court qualified "*any less favourable treatment of a woman related to pregnancy or maternity leave*" as direct discrimination on grounds of sex. See frames 10 and 11 and sections II.3, II.4, III.2 and III.4.6 of the study SALVATORE, V.*: op. cit*. (pp. 13-14, pp. 17-18, pp. 23-25 and pp. 37-38), and of its updated version in German SALVATORE, V.: *op. cit*. (pp. 34-37, pp. 41-43, pp. 50-53 and pp. 69-70).

– **Germany**: Any difference in treatment based on one of the grounds of discrimination prohibited in Article 3 (2) and (3) of the Basic Law constitutes direct discrimination. See section II.2.2. of the study REIMER, F.*: op. cit.* (pp. 24-26) and of the updated version in French of the study: REIMER, F.: *op . cit.* (pp. 33-34);

– **Peru:** In judgment 01423-2013-PA/TC (*Andrea Álvarez Villanueva* case), the Peruvian Constitutional Court held that the fact that a female officer candidate was excluded from the Peruvian Armed Forces Officers' School because she was pregnant constituted direct discrimination on grounds of sex. See section III.5.6. of the study ESPINOSA-SALDAÑA Barrera, E.: *op. cit.* (p. 44-47);

– **Spain**: Direct discrimination occurs when a person is treated less favorably than another person in a comparable situation because of their gender, race, etc. Organic Law 3/2007 of 22 March 2007 on de facto equality between women and men speaks of direct discrimination in art. 6.1 when it is a situation *"in which a person is, has been or could be treated less favorably than another person in a comparable situation because of their sex."* See Section IV.1.4. of the study GONZÁLEZ-TREVIJANO SÁNCHEZ, P.*: op. cit.* (pp. 74-75), of the updated version in French of the study: GONZÁLEZ-TREVIJANO SÁNCHEZ, P. : *op. cit.* (pp. 98-101) and of the updated version in German: GONZÁLEZ-TREVIJANO SÁNCHEZ, P.: *op. cit.* (pp. 121-125). Law 15/2022 of July 12, 2022 on equal treatment and non-discrimination defines direct discrimination. According to its Article 6(1)(a), a specific form of direct discrimination is the *"denial of reasonable accommodation to persons with disabilities"*. This practice consists of refusing to make necessary and reasonable modifications and adjustments to the physical, social and behavioral environment that do not impose an undue and disproportionate burden and that are necessary to facilitate the accessibility and participation of persons with disabilities and to ensure the enjoyment or exercise of all their rights on an equal basis with others.

* EdN.: For a comparison of the ***concept of "indirect discrimination"*** in other jurisdictions, see:

– **Austria**: Section 5(2) of the Equal Treatment Act states: *"Indirect discrimination occurs when apparently neutral provisions, criteria or procedures may put persons of one sex at a particular disadvantage compared to persons of the other sex* [...]*"*. Cf. also the provisions of §§ 4a para. 3 and 13a para. 2 of the Federal Equal Treatment Act, which are identical in content, as well as § 7c para. 2 and para. 4 of the Federal Disability Employment Act and § 5 para. 2 and § 6 of the Federal Disability Equality Act. See sections II.2.2. to II.2.5. of the study VAŠEK, M.*: op. cit.* (pp.22-25) and of its updated version in French: VAŠEK, M.: *op. cit.* (pp. 23-26);

– **Belgium**: According to the three main laws adopted in the field of equality and non-discrimination (art. 4(9) of the Racism Act, art. 5(8) of the Equality Act and art. 4(9) of the General Act), indirect discrimination is a situation in which an apparently neutral provision, criterion or practice may lead to a concrete disadvantage, without justification, for persons with one of the criteria protected by these laws. See section II.3.1.2.b) of the study BEHRENDT, Ch.: *op. cit.* (p. 14), of its updated version in Spanish BEHRENDT, Ch.: *op. cit.* (pp. 21-22) and of the updated version in German of the study BEHRENDT, Ch.*: op. cit.* (pp. 31-32);

– **Chile**: The difference between direct and indirect discrimination is based on the intention of the discriminator. In the case of indirect discrimination, the discriminator does not intend to discriminate, but their action results in the members of a group being disadvantaged. This is the case with measures that aim to benefit certain disadvantaged groups, whether for economic or social reasons, but which ultimately lead to their stigmatization or exclusion, for example, when social benefits are granted that create state dependency to the detriment of the group (reduction of individual freedoms) or place them outside the economic system (social segregation). See sections IV.2.5. and IV.2.8. of the study GARCÍA PINO, G.: *op. cit*. (p. 91 and p. 102), of its updated 2nd edition: GARCÍA PINO, G.: *op . cit.* (pp. 118-120 and 132-133) and of the German version of the 2nd edition: GARCÍA PINO, G.: *op. cit*. (pp. 142-144 and 159-160);

– **Council of Europe**: Discrimination does not have to be intentional for it to constitute a violation of Art. 14 ECHR. The European Court of Human Rights also condemns indirect discrimination. See Section II.2.1.3 of the study ZILLER, J.: *op. cit.* (pp. 16-17), of its updated version in Spanish: ZILLER, J.: *op . cit.* (pp. 18-19) and of its updated version in German ZILLER, J.: *op. cit.* (pp. 22-23);

– **European Union**: The concept of "indirect discrimination" can also be found in the case law of the Court of Justice of the European Union (ECJ). In the *Sotgiu judgment*(C-152/73) of February 12, 1974, the ECJ implicitly refers to this type of discrimination when it states that Regulation No 1612/69 prohibits *"not only overt*

- intentional or
- unintentional.

FRAME 68

Ontario Human Rights Commission v Simpsons-Sears Ltd (O'Malley)
[1985] 2 SCR 536

Supreme Court of Canada
(McIntyre J)

Direct discrimination occurs in this connection where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, "No Catholics or no women or no blacks employed here." [...] the concept of adverse effect discrimination[...] arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees[...]

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discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result " (Recital 11). The ECJ also used the term "indirect discrimination" in the *Bilka ruling*(C-170/84) of May 13, 1986. Upon referral by the Federal Labor Court in the context of preliminary ruling proceedings, the ECJ took the view that the principle of equal pay for men and women could be violated by indirect discrimination under Art. 119 of the EEC Treaty (which largely corresponds to today's Art. 157 (1) and (2) TFEU). According to the ECJ, the exclusion of part-time employees from a company pension scheme may constitute indirect discrimination against women in breach of Article 119 of the EC Treaty if this exclusion affects a significantly larger number of women than men and is not objectively justified by factors independent of discrimination on grounds of sex. The concept of "indirect discrimination" is now regarded as a classic concept of EU law, which has gradually been incorporated into the national law of Member States under the influence of the EU, both at legislative level and in case law. See section III.3. of the study SALVATORE,V.: *op. cit.* (p. 26), and of its updated version in German: SALVATORE, V.: *op . cit.* (pp. 53-54). See also the information brochure published by the ECJ: *The Court of Justice and Equal Treatment*, Directorate for Communication, Publications and Electronic Media Unit, June 2020, 30 pp., ISBN 978-92-829-3547-7 (p. 11).

– **France**: The term "indirect discrimination" can be found in legislation and is identified as a specific type of discrimination. For example, the Labor Code *(Code du travail)* states in Article L.1132-1: *"No one may be excluded from a recruitment or appointment procedure or from access to an internship or training in a company; no employee may be penalized, dismissed or subjected to a directly or indirectly discriminatory measure,* [...] *in particular with regard to salary,* [...] *participation measures or share distribution, training* [...] *on the basis of his origin, gender, customs, sexual orientation,* [...]". See frame 7 of the study PONTHOREAU, M.-C.: *op. cit.* (p. 11) and of its updated version in Spanish: PONTHOREAU, M.-C.: *op . cit.* (pp. 19-21);

– **Germany**: The specific principles of equality also prohibit indirect discrimination. The term "indirect discrimination" refers to two situations. On the one hand, it can be used to refer to situations in which the state applies a differentiation criterion that is not provided for in the list of prohibited grounds of discrimination (art. 3(2) and (3) of the Basic Law), but is closely related to them. On the other hand, the term can also be used to refer to situations in which a criterion is applied which, although apparently neutral, specifically affects one of the groups protected by Article 3(2) and (3) of the Basic Law. See section II.2.4. of the study REIMER, F.: *op. cit.* (pp. 26-27) and of its updated version in French: REIMER, F.: *op. cit.* (pp. 35-36);

– **Spain**: Law 15/2022 of July 12 on Equal Treatment and Non-Discrimination defines "indirect discrimination" as discrimination that occurs when an apparently neutral provision, criterion or practice puts or is likely to put one or more persons at a particular disadvantage compared to other persons on any of the grounds referred to in art. 2(1) of the Law (art. 6(1)(b)). According to the sanctions established in Law 15/2022, indirect discrimination constitutes a serious criminal offense (art. 47(3)), punishable by a fine determined according to the standards and criteria established in arts. 48 and 49 of the Law. Organic Law 3/2007, of March 22, on de facto equality between women and men, also explicitly refers to indirect discrimination, in particular indirect discrimination based on sex, in art. 6(2). In Spain, indirect discrimination is also referred to as "impact *discrimination*" (as opposed to direct discrimination, which is "treatment *discrimination*"), as it is a comparison of the different effects that a basically neutral legal difference in treatment has on the members of the group to be protected (ethnic minorities, women, etc.) compared to those of the majority. See section IV.1.4. of the study GONZÁLEZ-TREVIJANO SÁNCHEZ, P.: *op. cit.* (pp. 74-75), of its updated version in French: GONZÁLEZ-TREVIJANO SÁNCHEZ, P.: *op. cit.* (pp. 98-101) and of the updated version in German of the study: GONZÁLEZ-TREVIJANO SÁNCHEZ, P.: *op. cit*. (pp. 121-125).

Second, if it is found that a workplace rule or policy amounts, prima facie, to discrimination on a prohibited ground, the rule or policy will nevertheless not be found to be contrary to the Code if it is shown to be a "*bona fide occupational requirement*" (BFOR):

FRAME 69

Ontario Human Rights Com'n et al v Borough of Etobicoke
[1982] 1 SCR 202

Supreme Court of Canada
(McIntyre J)

To be a bona fide occupational qualification and requirement a limitation, [...] must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition, it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.

In order for a workplace standard to be a BFOR, an employer must show that it was not possible to accommodate the affected employees without incurring undue hardship:

FRAME 70

British Columbia (Public Service Employee Relations Commission) v BCGSEU (Meiorin)
[1999] 3 SCR 3

Supreme Court of Canada
(McLachlin J)

An employer may justify [a] standard [that has been found, prima facie, to be discriminatory] by establishing, on the balance of probabilities:

(1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;

(2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and

(3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

In Ontario, additional requirements arise under the *Accessibility for Ontarians with Disabilities Act*.[372] The employment-related standards developed under the *Act* include requirements pertaining to recruitment, communication with employees, return to work following disability-related absence, performance evaluation, advancement and redeployment.[373]

IV.8.4.3.4. Language of work in Québec

Québec's *Charter of the French Language*[374] includes provisions in respect of the right of workers in that province to "*carry on [their] activities in French*" (s. 41). This entails, in particular, an obligation of employers to "use French in written communications" (s. 41(3)), unless the

[372] *Accessibility for Ontarians With Disabilities Act, 2005*, SO 2005, c 11.

[373] *Integrated Accessibility Standards*, O Reg 191/11, Part III ("Employment Standards").

[374] *Charter of the French Language*, CQLR c C-11.

employee otherwise requests (s. 41(4)). The *Charter of the French Language* also prohibits employers from requiring employees to have a "*specific level of knowledge*" of a language other than French, unless "*the nature of the duties*" make such knowledge necessary and the employer has first taken "*all reasonable means to avoid imposing such a requirement*." (s. 46).

Pursuant to federal legislation that has received Royal Assent but has not yet been proclaimed in force, rules similarly conferring upon workers the right to work in French will apply to organizations whose workplace relations are governed by federal law[375] in respect of their workplaces situated in Québec.[376] *

IV.8.5. Criminal law

IV.8.5.1. Federal criminal law

The criminal law, a sphere of exclusive federal legislative competence under s. 91(27) of the *Constitution Act 1867*, is relevant to an understanding of the limits to the freedom to conduct a business in at least two respects. First, given the significant limits to federal jurisdiction in matters of business regulation, the criminal law takes on greater importance as a lever by which the federal legislator can shape the behaviour of commercial actors. Second, the general criminal law applies to business entities, by virtue of the rules concerning organizational liability contained within the *Criminal Code*.

FRAME 71

***Constitution Act 1867*, section 91(27)**

91 *[T]he exclusive legislative authority of the Parliament of Canada extends to [...]*
27. The Criminal Law[...].

IV.8.5.1.1. Criminal law as a regulatory modality

In general, the power to enact laws regulating business activities taking place within a province comes within provincial legislative authority, because the courts consider the subject of such laws to come within the concept of "*property and civil rights*" (a provincial power), rather than "*the regulation of trade and commerce*" (a federal power).[377]

As a result, Parliament has regularly relied on other heads of authority as alternative means to pursue regulatory aims. One of the most important powers in this respect is the power to make criminal law, which has been frequently employed to achieve objectives that, were it not for the restrictive reading given to its powers in relation to "*the regulation of trade and commerce,*" might otherwise have been advanced by way of regulatory, as opposed to prohibitory, legislation.

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375 See note 345 above.

376 *Use of French in Federally Regulated Private Businesses Act*, SC 2023, c 15, ss 9-11.

* EdN : For a comparison with the principle of non-discrimination on the grounds of language in Italy, see section II.2.4. in DÍEZ PARRA, I. (Coord.): *I princìpi di eguaglianza e di non discriminazione, una prospettiva di diritto comparato - Italia*, Unità Biblioteca di diritto comparato, Servizio Ricerca del Parlamento europeo (EPRS), febbraio 2024, XVI e 172 pp., referenza PE 659.298 (updated second edition with comments) (pp. 61-71).

377 See Part III.2.1.

IV.8.5.1.1.i. Historical development

Parliament's earliest efforts to use the criminal law in this manner met with failure, essentially because the Judicial Committee viewed them as illegitimate attempts by the federal legislator to circumvent the limits on its regulatory power. To take one example, after the Judicial Committee invalidated a federal law regulating the business of insurance, Parliament re-enacted the same law in the form of a scheme whereby individuals could voluntarily subject themselves to licensing, and added provisions to the *Criminal Code* making it an offence to conduct the business of insurance without such a licence.[378] The Judicial Committee had no hesitation in holding the *Criminal Code* provisions to be invalid.

In another case, *Re Board of Commerce*,[379] which has already been discussed elsewhere in this study, Parliament enacted a law authorizing a federal board to determine the prices at which various goods could be sold, and made it a criminal offence not to comply with the decisions of the board. Again, the Judicial Committee's view was that, given that Parliament did not have the power to regulate the selling price of goods, it not could evade this limit on its power merely by attaching criminal penalties to the violation of the law's provisions.

FRAME 72

Canada (AG) v Alberta (AG)
***[Reference Re Board of Commerce],* [1921] 1 AC 191**

Judicial Committee of the Privy Council
(VC Haldane)

It is one thing to construe the words "the Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the 'Procedure in criminal matters," as enabling the Dominion Parliament to exercise exclusive legislative power where the subject matter is one- by which its very nature belongs to the domain of criminal jurisprudence. A general law, to take an example, making incest a crime, belongs to, this class. It is quite another thing, first to attempt to interfere with a class of subject committed exclusively to the Provincial Legislature, and then to justify this by enacting ancillary provisions, designated as new phases of Dominion Criminal law which require a title to so interfere as basis of their application.

Although the Judicial Committee's reasons might be read as implying that the federal criminal law power is limited to the matters which "*by [their] very nature belong to the domain of criminal jurisprudence*" (i.e., *mala in se*), that is not, in fact, the case, as a subsequent decision of the Judicial Committee, upholding the validity of a law criminalizing participation in a combine, makes clear:

FRAME 73

Proprietary Articles Trade Association v Canada (AG)
[1931] AC 310

Judicial Committee of the Privy Council

The substance of the Act is [...] to define [...] to make criminal combines which the Legislature in the public interest intends to prohibit. The definition is wide, and may cover activities which have not hitherto been considered to be criminal. But only those combines are affected "which have operated or are likely to operate to the detriment or against the interest of the public, whether consumers, producers, or others;" and if Parliament genuinely determines that commercial activities which can be so described are to be suppressed in the public interest, their Lordships see no reason why Parliament should not make them crimes. [...]. It

[378] *Re Reciprocal Insurance Legislation*, [1924] AC 328, [1924] 1 DLR 789.

[379] *Reference Re Board of Commerce* (1921), [1922] 1 AC 191, 60 DLR 513.

appears to their Lordships to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of "criminal jurisprudence;" for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they' are prohibited by the State and that those who commit them are punished.

IV.8.5.1.1.ii. Current doctrine

Current constitutional doctrine regards a federal law as validly enacted under the criminal law if it is directed at a "*valid criminal law purpose*" and is prohibitory in form.

The first requirement — that the law have a valid purpose — is associated with the decision of the Supreme Court in the *Margarine Reference,*[380] in which a federal law prohibiting the manufacture and sale of margarine was ruled invalid. The Court held that, to come within s. 91(27), a law must be directed at a "*public purpose which can support it as being in relation to criminal law [...] [such as p]ublic peace, order, security, health, [or] morality[...].",*[381] and that the purpose of the impugned prohibition could not be so described. Rather, the legislature's aim in prohibiting the sale of margarine was to give a commercial advantage to dairy producers over their competitors.

FRAME 74

***Reference re Validity of s. 5(a) of the Dairy Industry Act [The Margarine Reference],* [1949] SCR 1**

Supreme Court of Canada (Rand J)

Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law, but they do not appear to be the object of the parliamentary action here. That object, as I must find it, is economic and the legislative purpose, to give trade protection to the dairy industry in the production and sale of butter; to benefit one group of persons as against competitors in business in which, in the absence of the legislation, the latter would be free to engage in the provinces. To forbid manufacture and sale for such an end is prima facie to deal directly with the civil rights of individuals in relation to particular trade within the provinces

The second requirement — that the law be prohibitory in form — may seem straightforward; yet, issues have arisen because the manner in which the federal legislation has pursued its valid objectives has sometimes tested the boundary between prohibitory and regulatory law.

An example is the federal *Tobacco Products Control Act*, which did not prohibit the sale of tobacco products, but only its advertising. The tobacco companies argued in *RJR-Macdonald*[382] that such a law should be characterized as an attempt to regulate the marketing of a lawful product, rather than as a law prohibiting an intrinsically harmful activity. (The argument was unsuccessful.)

A still more ambitious use of the criminal law power was upheld by the Supreme Court in *Hydro-Québec*,[383] a challenge to the *Canadian Environmental Protection Act*. The impugned

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380 *Reference re Validity of s. 5(a) of the Dairy Industry Act (The Margarine Reference)*, [1949] SCR 1

381 Par 50.

382 *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199

383 *R. v Hydro-Québec*, [1997] 3 SCR 213.

legislation authorized the federal executive branch to designate substances as "toxic," and to make regulations prescribing the quantity or concentration of such substances that could be released into the environment; the prohibition consisted of a provision within the Act making it an offence to "*contravene[e] [...] a provision of this Act or the regulations*."[384] Despite the similarity between the structure of this legislation and that of the law invalidated in *Board of Commerce,* the Supreme Court ruled that this law satisfied the requirement of a prohibitory form, and — having also decided that the prevention of harm to the environment was an acceptable criminal law purpose — concluded that the legislation was valid as federal criminal law.

FRAME 75

R. v Hydro-Québec
[1997] 3 SCR 213

Supreme Court of Canada

119 What appears from the analysis [of the case law is that] the power conferred on Parliament by s. 91(27) is "the criminal law in its widest sense" (emphasis added). Consistently with this approach, the Privy Council in Proprietary Articles Trade Association v Attorney-General for Canada [...] defined the criminal law power as including any prohibited act with penal consequences. As it put it [...]"The criminal quality of an act cannot be discerned . . . by reference to any standard but one: Is the act prohibited with penal consequences?"

[...]

121 The Charter apart, only one qualification has been attached to Parliament's plenary power over criminal law. The power cannot be employed colourably. Like other legislative powers, it cannot, as Estey J. put it in Scowby v Glendinning, [1986] 2 S.C.R. 226, at p. 237, "permit Parliament, simply by legislating in the proper form, to colourably invade areas of exclusively provincial legislative competence". To determine whether such an attempt is being made, it is, of course, appropriate to enquire into Parliament's purpose in enacting the legislation.

[...]

127 The purpose of the criminal law is to underline and protect our fundamental values. [...] [T]he stewardship of the environment is a fundamental value of our society and [...] Parliament may use its criminal law power to underline that value.

[...]

146 [A]s I see it, the broad purpose and effect of [the legislation] is to provide a procedure for assessing whether out of the many substances that may conceivably fall within the ambit of s. 11, some should be added to the List of Toxic Substances in Schedule I and, when an order to this effect is made, whether to prohibit the use of the substance so added in the manner provided in the regulations made under s. 34(1) subject to a penalty. These listed substances, toxic in the ordinary sense, are those whose use in a manner contrary to the regulations the Act ultimately prohibits. This is a limited prohibition applicable to a restricted number of substances. The prohibition is enforced by a penal sanction and is undergirded by a valid criminal objective, and so is valid criminal legislation.

The reasoning and outcome in *Hydro-Québec* suggest that there is considerable scope for legislation under the criminal law power that blurs the line between prohibitory and regulatory law.[385]

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[384] See now *Canadian Environmental Protection Act, 1999*, SC 1999, c 33, s 272.

[385] See, for example, Re AHRA ("[I]t is open to Parliament to create regulatory schemes under the criminal law power, provided they further the law's criminal law purpose," par. 36, McLachlin CJ, dissenting; "a regulatory scheme, even one that takes the form of exemptions from a prohibitory scheme, falls within the field of criminal law" (par 234)).

Nevertheless, a subsequent case also involving the *Canadian Environmental Protection Act* demonstrates that the the flexibility afforded by *Hydro-Québec* is not unlimited. In *Responsible Plastic Use Coalition,*[386] an industry group chellenged the federal government's decision to add the term "*plastic manufactured items*" to the list of toxic substances under the *Act*. (The government also promulgated regulations prohibiting six categories of "*plastic manufactured item*", including single-use plastic straws, cutlery and checkout bags.[387]). Declining to interpret *Hydro-Québec* as tolerating this use of the criminal law power, the Federal Court agreed with the industry group that the delegated measures were invalid. Justice Furlanetto held that only "*substances that are toxic in 'the real sense'*" could be designated as toxic under the Act,[388] and that the evidence "*did not support a finding [by the federal government] that all [plastic manufactured items] are toxic.*"[389] Without a requirement of actual toxicity, the federal government's power to add non-dangerous items to the list, and then determine the manner of their permissible use by regulation, would transform the Act into a "*general regulatory power*" inconsistent with the characterization of the Act as criminal law.

FRAME 76

Responsible Plastic Use Coalition v Canada (Environment and Climate Change)
2023 FC 1511

Federal Court
(Furlanetto J)

To employ criminal law, what is being restricted has to actually be dangerous i.e.*, there needs to be a harm. Otherwise, the restriction amounts to nothing more than economic regulation, which does not satisfy the [constitutional requirements for the use of the federal criminal law power].*

Without the requirement for toxicity, [...] any substance could be listed on Schedule 1 of any breadth as long as [the government] limited the substance by regulation. This would [...] have the effect of turning the statute into a general regulatory power which defines all aspects of the [criminal law power] by regulation.

As set out earlier, not every [plastic manufactured item] has the potential to create a reasonable apprehension of harm. This is different from examples such as lead and carbon dioxide [...], which are substances that may not be inherently toxic but which may have aspects or uses that are toxic. In this case, the substance [i.e., plastic manufactured item] is a broad category of items that include items with no reasonable apprehension of environmental harm. The broad and all-encompassing nature of the category [...] poses a threat to the balance of federalism as it does not restrict regulation to only those [items] that truly have the potential to cause harm to the environment.

IV.8.5.1.2. Principles of corporate criminal liability

Business corporations and other organizations can incur criminal liability pursuant to specific provisions of the *Criminal Code* enacted in 2003.[390]

Prior to these amendments, corporate criminal liability was governed by the common law "*identification doctrine*," whereby a crime committed by a natural person could be attributed

386 *Responsible Plastic Use Coalition v Canada (Environment and Climate Change)*, 2023 FC 1511.

387 *Single-use Plastics Prohibition Regulations*, SOR/2022-138.

388 *Responsible Plastic Use Coalition,* at par. 107, 181.

389 *Responsible Plastic Use Coalition*, at par. 118.

390 *Criminal Code*, RSC 1985, c C-46, ss 22.1, 22.2, discussed below. By virtue of s. 34(2) of the *Interpretation Act*, RSC 1985, c I-21, these liability rules also apply to offences contained within federal statutes other than the *Criminal Code*.

to the corporation if that person's status within the corporation was such that the person could be considered to be the corporation's "*directing mind*."

FRAME 77

R v Canadian Dredge and Dock
[1985] 1 SCR 662

Supreme Court of Canada

[The] `identification' theory [...] produces the element of mens rea in the corporate entity, otherwise absent from the legal entity but present in the natural person, the directing mind. This establishes the identity" between the directing mind and the corporation which results in the corporation being found guilty for the act of the natural person, the employee. [...] In order to trigger its operation and through it corporate criminal liability for the actions of the employee (who must generally be liable himself), the actor-employee who physically committed the offence must be the ego", the centre" of the corporate personality, the vital organ" of the body corporate, the alter ego" of the employer corporation or its directing mind".

One of the perceived shortcomings of the identification doctrine was that corporate liability required fault on the part of an identifiable individual occupying a relatively senior role within the corporation, such that that person could be described as the directing mind — or at least *a* directing mind — of the corporation. In the 1990s, dissatisfaction with the doctrine became widespread when, after a mining disaster claimed 26 lives and despite the subsequent revelation of numerous lapses in safety, inspection and training,[391] no one was successfully prosecuted. The episode prompted a reconsideration of the principles of corporate criminal liability that led, ultimately, to the enactment of the 2003 amendments to the *Criminal Code*.[392]

These amendments to the *Criminal Code*:

- Replace the directing mind doctrine with corporate liability for the acts, negligence or other mental culpability of "representatives" and "senior officers," depending on the type of criminal offence (ss. 22.1 and 22.2); and
- Expand liability to include organizations that are not corporations, including many that traditionally have not had legal personality, such as partnerships and trade unions (s. 2).

The category of "senior officer" is broader than the category of "directing mind." Moreover, the corporation's liability is no longer dependent on showing that a particular very senior individual committed the same offence; the acts, omissions and knowledge of different individuals, some of whom need not be senior at all, can be cumulated to engage the corporation's responsibility.

FRAME 78

***Criminal Code*, sections 2, 22.1, 22.2**

RSC 1985, c C-46

2 In this Act, [...] organization *means*

(a) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or

(b) an association of persons that

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391 GOVERNMENT OF NOVA SCOTIA: *The Westray Story* (Report of the Westray Mine Public Inquiry, Justice K. Peter Richard, Commissioner), 1997, https://novascotia.ca/lae/pubs/westray/

392 GOETZ, D.: *Legislative Summary of Bill C-45: An Act to Amend the Criminal Code,* Library of Parliament, 3 July 2003, pp. 7-8.

(i) is created for a common purpose,

(ii) has an operational structure, and

(iii) holds itself out to the public as an association of persons;[...]

22.1 In respect of an offence that requires the prosecution to prove negligence, an organization is a party to the offence if

(a) acting within the scope of their authority

(i) one of its representatives is a party to the offence, or

(ii) two or more of its representatives engage in conduct, whether by act or omission, such that, if it had been the conduct of only one representative, that representative would have been a party to the offence; and

(b) the senior officer who is responsible for the aspect of the organization's activities that is relevant to the offence departs — or the senior officers, collectively, depart — markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative of the organization from being a party to the offence.

22.2 In respect of an offence that requires the prosecution to prove fault — other than negligence — an organization is a party to the offence if, with the intent at least in part to benefit the organization, one of its senior officers

(a) acting within the scope of their authority, is a party to the offence;

(b) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence; or

(c) knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.

The 2003 amendments also add provisions specifying the factors to be taken into account by a court when sentencing an organization:

FRAME 79

***Criminal Code*, section 718.21**

RSC 1985, c C-46

718.21 A court that imposes a sentence on an organization shall also take into consideration the following factors:

(a) any advantage realized by the organization as a result of the offence;

(b) the degree of planning involved in carrying out the offence and the duration and complexity of the offence;

(c) whether the organization has attempted to conceal its assets, or convert them, in order to show that it is not able to pay a fine or make restitution;

(d) the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees;

(e) the cost to public authorities of the investigation and prosecution of the offence;

(f) any regulatory penalty imposed on the organization or one of its representatives in respect of the conduct that formed the basis of the offence;

(g) whether the organization was — or any of its representatives who were involved in the commission of the offence were — convicted of a similar offence or sanctioned by a regulatory body for similar conduct;

(h) any penalty imposed by the organization on a representative for their role in the commission of the offence;

(i) any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence; and

(j) any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence.

IV.8.5.2. Provincial offences

Although the federal Parliament has exclusive constitutional jurisdiction over "criminal law,"[393] the *Constitution Act 1867* nevertheless also makes penal sanctions, such as fines and imprisonment, available to the provincial legislator as a means of enforcing its laws.[394] There are many examples of provincial laws containing such sanctions, including in spheres relevant to the conduct of business, such as environmental protection,[395] occupational health and safety,[396] and the regulation of various specific trades and professions.[397]

IV.8.6. Right of establishment

IV.8.6.1. Charter of Rights

The relevant provision of the *Canadian Charter of Rights and Freedoms* is s. 6, which guarantees the right of citizens and permanent residents of Canada to interprovincial mobility and "*pursue the gaining of a livelihood in any province*."

As explained earlier in this Study,[398] s. 6 of the *Charter* is not tantamount to a freedom to conduct a business. For one thing, the right to pursue the gaining of a livelihood is tied to interprovincial mobility, rather than a freestanding right to earn a living; for another, when the section is read as a whole, it is clear that the right confers protection only against laws that either are not of general application or discriminate on the basis of province of residence.

The sphere of application of s. 6, in fact, more closely resembles that of a "*right of establishment*." Three examples illustrate its application and limits in characteristic situations.

In *Black v Law Society of Alberta*,[399] the plaintiffs challenged provincial rules that prevented members of the legal profession from entering into partnership with non-residents of the province. The Supreme Court held that the rules violated s. 6 of the *Charter*. In preventing non-resident lawyers from forming partnerships with residents of the province, the rules deprived the former of "*the most common form of law office organization*" and "*seriously restricted [them] in their ability to gain a livelihood*" in the province; in singling out non-residents, the rules also discriminated on the basis of province of residence.

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393 *Constitution Act 1867*, s 91(27).

394 Section 92(15) of the *Constitution Act 1867* authorizes "The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section."

395 For example, *Environmental Protection Act*, RSO 1990, c E.19, s 186 (Ontario).

396 For example, *Occupational Health and Safety Act*, RSO 1990, c O.1, s 66 (Ontario).

397 For example, in *Québec v 9147-0732 Québec inc*, [2020] 3 SCR 426, a corporation was convicted of carrying on construction work as a contractor without a permit, in violation of the provincial *Building Act*, CQLR, c B-1.1, s 46. The legislation provided, in s 197, for the imposition of a mandatory minimum fine, which the corporation challenged as a violation of its constitutional right not to be subjected to "cruel and unusual treatment or punishment" (s 12 of the *Charter*). The Supreme Court of Canada rejected the challenge on the ground that s. 12 applies only to human beings.

398 Part IV.1.3.3.3 above.

399 *Black v Law Society of Alberta*, [1989] 1 SCR 591.

FRAME 80

Black v Law Society of Alberta
[1989] 1 SCR 591

Supreme Court of Canada

... What section 6(2) was intended to do was to protect the right of a citizen (and by extension a permanent resident) to move about the country, to reside where he or she wishes and to pursue his or her livelihood without regard to provincial boundaries. The provinces may, of course, regulate these rights[...]. But, subject to the exceptions in ss. 1 and 6 of the Charter, they cannot do so in terms of provincial boundaries.

I am of the view that both [rules] violate s. 6(2)(b) of the Charter. The combined effect of the rules seriously impairs the ability of the respondents to maintain a viable association for the purpose of obtaining a livelihood, and makes such a business arrangement completely unfeasible.

I need not enter into an extensive discussion of the meaning of "a law of general application" because even if the rules can be said to fall within that rubric, they are not covered by s. 6(3)(a) because, in my view, they "discriminate among persons primarily on the basis of the province of present or previous residence." That is surely obvious in the case of [a rule that] makes direct reference to a lawyer's province of residence. The Law Society determined who could practise with whom by reference to residence. I am hard pressed to think of a clearer example of a provision that discriminates primarily on the basis of residence.

The applicants in a second case, *Walker*,[400] challenged the rules that reserved the practice of public accountancy to those who hold the professional designation of "Chartered Accountant." The Appellate Division of the Supreme Court of Prince Edward Island held that the fact that the challenged rules applied irrespective of province of residence was fatal to the applicants' claim that the rules violated s. 6 of the *Charter*:

FRAME 81

PEI (Government of) v Walker
1993 CanLII 1816 (PE SCAD)

Prince Edward Island Supreme Court
(Appellate Division)

Subsection 6(2)(b) does not guarantee a free-standing right to work. Law Society of Upper Canada v Skapinker, 1984 CanLII 3 (SCC), [1984] 1 S.C.R. 357 at pp. 382-3. It simply guarantees all Canadian citizens and permanent residents the right to pursue a livelihood of choice in any province on the same terms and conditions as the residents of that province. Black v Law Society of Alberta, 1989 CanLII 132 (SCC), [1989] 1 S.C.R. 591 at pp. 617-8. The restriction in s-s. 14(1) has nothing to do with residency. It subjects all non-members of the Institute to the same restrictions and conditions whether they reside in the Province or not. The decisions of the Supreme Court of Canada in Skapinker and Black have established that s. 6 of the Charter does not prevent a province from regulating a profession so long as it does so without discriminating on the basis of place of residence. There is nothing in s-s. 14(1) of the Public Accounting and Auditing Act which prevents anyone meeting the specified professional qualifications from practicing in this province. Accordingly, s-s. 14(1) does not violate s-s. 6(2)(b) of the Charter.

Finally, in *Devine*,[401] the Supreme Court of Canada ruled on a challenge to rules that mandated the use of the French language in commercial activities carried out in Québec. The Court rejected out of hand an argument that the rules infringed s. 6 of the *Charter*. That provision is not infringed by legislation that merely "*imposes additional burdens on persons considering doing business in the province [and is] not designed to prevent people from entering the province.*"[402]

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400 *PEI (Government of) v Walker*, 1993 CanLII 1816 (PE SCAD), aff'd [1995] 2 SCR 407.

401 *Devine v Québec (Attorney General)*, [1988] 2 SCR 790.

402 *Devine*, at par. 19.

FRAME 82

Devine v Québec (Attorney General)
[1988] 2 SCR 790

Supreme Court of Canada

[T]he challenged provisions do not impose conditions which present an unacceptable obstacle to mobility. They are conditions with which anyone may comply, with the necessary professional assistance. They may impose additional burdens on persons considering doing business in the province, which may in some cases discourage such an initiative, but that may be true of other conditions imposed by valid legislation in a province. The challenged provisions are not designed to prevent people from entering the province. They are simply conditions of doing business in the province with which anyone may comply.

IV.8.6.2. Interprovincial mobility of corporations

Regarding the interprovincial "mobility" of corporations, it may first be observed that, unlike the provisions of the TFEU pertaining to the right of establishment,[403] the benefit of the mobility guarantee under s. 6 probably does not extend to corporations.[404]

The question of corporate mobility is, in fact, more usefully analyzed from the perspective of the division of powers. In this regard, a distinction exists between corporations that are incorporated under federal law and those that are provincially incorporated.

A federally-incorporated company has the power to carry on business throughout Canada, and the Judicial Committee has held that it is not within the power of a provincial government to "*deprive a [federally-incorporated] company of its status and powers*," for example, by requiring it to obtain a provincial licence in order to exercise its legal capacity in the province.[405]

FRAME 83

John Deere Plow Co v Wharton
[1915] AC 330

Judicial Committee of the Privy Council

It is enough for present purposes to say that the province cannot legislate so as to deprive a Dominion company of its status and powers. This does not mean that these powers can be exercised in contravention of the laws of the province restricting the rights of the public in the province generally. What it does mean is that the status and powers of a Dominion company as such cannot be destroyed by provincial legislation.

It follows from these premises that these provisions of the Companies Act of British Columbia which are relied on in the present case as compelling the appellant company to obtain a provincial license of the kind about which the controversy has arisen, or to be registered in the province as a condition of exercising its powers or of suing in the Courts, are inoperative for these purposes. The question is not one of enactment of laws affecting the general public in the province and relating to civil rights, or taxation, or the administration of justice. It is in reality whether the province can interfere with the status and corporate capacity of a Dominion company in so far as that status and capacity carries with it powers conferred by the Parliament of Canada to carry on business in every part of the Dominion. Their Lordships are of opinion that this question must be answered in the negative.

In contrast to federal incorporated companies, which possess the inherent power to operate throughout Canada, a provincially-incorporated company may carry on business in another

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403 Art. 49-53 TFEU.

404 *Parkdale Hotel Limited v AG Canada et al.* [1986] 2 FC 514.

405 *John Deere Plow Co v Wharton*, [1915] AC 330, 18 DLR 353, at pp. 360-61 (DLR). Federal authority to incorporate companies resides in the "peace, order and good government" clause of s 91 of the *Constitution Act 1867*.

province, if the legislation of the host province so permits. In fact, legislation in each province makes provision for the registration of Canadian or non-Canadian extraprovincial corporations.[406] Ontario exempts corporations incorporated under the laws of another province of Canada from even the requirement of registration:

FRAME 84

***Extra-Provincial Corporations Act* (Ontario), sections 2(1), 4(1), 21(1), 22**

RSO 1990, c E.27

2 (1) Extra-provincial corporations shall be classified into the following classes:

Class 1. Corporations incorporated or continued by or under the authority of an Act of a legislature of a province of Canada.

Class 2. Corporations incorporated or continued by or under the authority of an Act of the Parliament of Canada or of the legislature of a territory of Canada.

Class 3. Corporations incorporated or continued under the laws of a jurisdiction outside of Canada.

4 (1) Subject to this Act, the Corporations Information Act and any other Act, an extra-provincial corporation within class 1 or 2 may carry on any of its business in Ontario without obtaining a licence under this Act.

21 (1) An extra-provincial corporation within class 3 that ... has not obtained a licence when required by this Act, is not capable of maintaining any action or any other proceeding in any court or tribunal in Ontario in respect of any contract made by it.

22 Every corporation,

(a) within class 1 or 2;

(b) within class 3 that has a licence under this Act; or

(c) that is exempt from the licensing requirement under this Act,

has power to acquire, hold and convey any land or interest therein in Ontario necessary for its actual use and occupation or for carrying on its undertaking.

The reader will notice that the Ontario Act also exempts federally-incorporated companies (Class 2) from the requirement to obtain a licence. In light of the limits on provincial power enunciated in *John Deere*, the legislative exemption is arguably unnecessary but would arise, in any event, by operation of the *Constitution Act 1867*.

In practice, whether by virtue of the constitutional division of powers or by complying with extraprovincial corporations registration requirements, a corporation formed in any Canadian jurisdiction can operate throughout Canada. In other words, an individual wishing to incorporate a business in Canada enjoys jurisdictional choice.

There is considerable convergence among the general incorporation statutes in the various jurisdictions; after the enactment of the *Canada Business Corporations Act*[407] by the federal Parliament in 1975, many provinces reformed their own corporations legislation to align its content with the federal statute.[408] However, there is also some provincial (and territorial)

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406 For example: *Business Corporations Act*, RSA 2000, c B-9, Part 21 (Alberta); *Business Corporations Act*, SBC 2002, c 57 (British Columbia), Part XI; *Extra-Provincial Corporations Registration Act*, RSPEI 1988, c E-14 (Prince Edward Island); *The Business Corporations Act, 2021*, SS 2021, c 6, Part XX (Saskatchewan).

407 *Canada Business Corporations Act*, RSC 1985, c C-44.

408 DANIELS, R. J.: "Should Provinces Compete? The Case for a Competitive Corporate Law Market", 1991, 36 *McGill Law Journal* 130 at pp. 152-54.

diversity; individual jurisdictions have introduced variations in an effort to meet "market demand" for certain corporate law characteristics. Examples include provisions:

- Departing from the requirement under the federal statute of a minimum number of Canadian resident directors;[409]
- Allowing a member of the board of directors to be an incorporated entity;[410]
- Allowing for the formation of corporations with unlimited liability;[411] and
- Allowing for the designation of a corporation as a "benefit corporation," with resulting modifications to the duties of directors and officers.[412]

IV.8.7. Circulation of services

IV.8.7.1. Charter of Rights

The circumstances in *Black*, discussed in Part IV.8.6.1, illustrate that s. 6 of the *Charter* is not limited to permanent or semi-permanent relocation to another province, but also applies to temporary mobility to provide services in a province where one does not reside. The plaintiffs in *Black* were not seeking to take up residence in Alberta and practice law in that province, but rather to practice law in Alberta as non-residents, in partnership with local lawyers.

FRAME 85

Black v Law Society of Alberta
[1989] 1 SCR 591

Supreme Court of Canada

The mobility element inherent in [s. 6] does not go so far as to require a person to move to another province and become a resident of that province before he or she has a right to gain a livelihood in that province. [In LSUC v Skapinker,] Estey J. stated: "The [rights in s. 6] relate to movement into another province, either for the taking up of residence, or to work without establishing residence."

Estey J. specifically addressed the situation of the transprovincial border commuter. Such a commuter, he held, need not establish residence in the province of employment in order to have a guaranteed right to work under [s. 6(2)(b)].

As previously mentioned, the freedom conferred by s. 6(2)(b) to pursue the gaining of a livelihood in another province is not absolute, but rather is subject to rules of general application, that do not discriminate on the basis of province of residence (s. 6(3)). In addition, of course, any infringement of s. 6 is also subject to being shown to be justified as a reasonable limit under s. 1 of the *Charter*.

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409 *Business Corporations Act*, RSA 2000, c B-9 (Alberta); *Business Corporations Act*, SBC 2002, c 57 (British Columbia); *Business Corporations Act*, CQLR c S-31.1 (Québec); *Business Corporations Act*, RSO 1990, c B.16 (Ontario). (Compare *Canada Business Corporations Act*, s 105(3).)

410 *Business Corporations Act*, RSY 2002, c 20 (Yukon), s 106(1.1).

411 *Business Corporations Act* (British Columbia), Part 2.1; *Business Corporations Act*, RSPEI 1988, c B-6.01 (Prince Edward Island), Part III; *Business Corporations Act* (Alberta), Part 2.1; *Companies Act*, RSNS 1989, c 81 (Nova Scotia), s 12; *Business Corporations Act*, SNB 1981, c B-9.1, as amended by SNB 2023, c 2 (New Brunswick), Part XXII.2.

412 *Business Corporations Act* (British Columbia), Part 2.3.

IV.8.7.2. Canadian Free Trade Agreement

The *Canadian Free Trade Agreement*, an intergovernmental agreement entered into by the federal government and all thirteen provinces and territories in 2017, contains provisions regarding the free movement of services. Under the Agreement, the parties agree not to limit the number of service providers in the provincial/territorial market. However, Art. 307(2) of the Agreement specifically preserves the parties' freedom to make residence or a commercial presence in the province or territory a requirement for providing a service.[413] It is not clear that Art. 307(2), at least as applied to natural persons who are citizens or permanent residents of Canada, is compatible with s. 6 of the *Charter*.[414]

IV.8.8. Capital movement

IV.8.8.1. Movement of capital within the national economy

The regulation of the movement of capital within the national economy includes securities regulation and the regulation of financial institutions.

In Canada, securities regulation, generally speaking, comes within the authority of the provinces under their "*property and civil rights*" power.[415] As discussed in Part III.2.1, the Supreme Court has determined that the federal Parliament's legislative authority under its "*trade and commerce*" power allows it only to enact more focused securities legislation dealing with the management of systemic risks, rather than a general securities regulatory law.

The authority to regulate financial institutions is also divided between Parliament and the provinces. Parliament has exclusive legislative authority in relation to "*banks and banking*."[416] On the other hand, other financial institutions, such as insurance companies, trust companies and credit unions/*caisses populaires* are provincially regulated.[417]

IV.8.8.2. International capital movement

IV.8.8.2.1. Foreign investment review

The *Investment Canada Act*[418] contemplates two different types of review of significant investments in Canada by non-Canadians:

- "Net benefit review": for investments exceeding a certain dollar threshold, the federal government conducts a review to determine whether the investment will be of "net benefit to Canada."[419] Even if the investment falls below the threshold, the

[413] Article 307(2).

[414] See Part IV.8.6.1 above.

[415] *Lymburn v Mayland*, [1932] AC 318 (PC); *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161; *Reference re Securities Act*, 2011 SCC 66 (CanLII), [2011] 3 SCR 837.

[416] *Constitution Act 1867*, s 91(15).

[417] Regarding insurance, see note 378 above.

[418] *Investment Canada Act*, RSC 1985, c 28 (1st Supp) ("*ICA*").

[419] *ICA*, s 16.

government may initiate a "net benefit" review if the investment is in a culturally sensitive sector (the production or sale of books, music, films or print periodicals).[420]

- "National security review": the government may also initiate a review of an investment, regardless of the dollar value of the investment, where it considers that the investment "could be injurious to national security."[421]

In addition, the filing of an investment notification is required whenever a non-Canadian commences a new business activity in Canada or acquires control of an existing Canadian business (regardless of dollar value).[422]

IV.8.8.2.2. Sectoral restrictions on foreign ownership

Certain laws place restrictions on foreign ownership of businesses in specific sectors. For example:

- Non-Canadians (including a corporation in which non-Canadians hold shares representing more than a specified percentage of the voting power) are ineligible to hold a broadcasting licence under the *Broadcasting Act*.[423]
- A telecommunications common carrier having more than a 10% market share must not have more than a specified percentage of its voting shares held by non-Canadians.[424]

IV.8.9. Advertising

In Canada, the general rule is that commercial activities taking place within a province come within the regulatory authority of the province in which they occur. As advertising regulation is, in general, a modality of business regulation, it follows that much advertising regulation in Canada is provincial.

Some aspects of advertising, however, come within federal authority, for example where the advertising medium or the advertiser's line of business are within federal jurisdiction; or Parliament has chosen to criminalize a particular advertising activity; or as part of a broader regulatory scheme within Parliament's authority.

Because commercial advertising is "expression" within the meaning of the *Charter of Rights*, restrictions on commercial advertising are considered to be limitations of the "freedom of expression" guaranteed by s. 2(b) of the *Charter* and must, in order to be valid, be shown to be reasonable limits under s. 1.

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[420] *ICA*, s 15; *Investment Canada Regulations*, SOR/85-611, Schedule IV. Published federal government policies indicate that acquisitions by a non-Canadian of existing Canadian-owned or controlled businesses in the film distribution and book publishing sectors will not be allowed, although there are indications of some flexibility in practice in the application of these policies: see FACEY, B.A. and MACDONALD, K.: *Investment Canada Act: Commentary and Annotation*, LexisNexis, 2022 (pp. 113-117).

[421] *ICA*, ss 25.2-25.3.

[422] *ICA*, ss 11.

[423] *Direction to the CRTC (Ineligibility of Non-Canadians)*, SOR/97-192. These restrictions affect traditional television and radio broadcasting; services "*delivered and accessed over the Internet*," or "*using point-to-point technology and received on mobile devices*," are exempted from licensing under the *Broadcasting Act*. *Amendments to the Exemption order for new media broadcasting undertakings (now known as the Exemption order for digital media broadcasting undertakings)*, CRTC 2012-409, Appendix, s 2.

[424] *Telecommunications Act*, SC 1993, c 38, ss 16(2)-(3).

IV.8.9.1. Provincial legislation

Provincial rules regulating advertising can be found in general legislation, as well as the legislation that specifically governs many individual professions, trades and industries.

For example, provincial consumer protection legislation typically prohibits "*false or misleading representation*."[425] Québec's *Consumer Protection Act*, in addition, prohibits all advertising directed at children under the age of thirteen.[426] In Québec, the *Charter of the French Language* requires all "*public signs, posters and commercial advertising*" to be in French. If another language also appears, French must be "*markedly predominant*."[427]

With respect to regulated professions, delegated legislation often imposes advertising restrictions directed at maintaining the integrity of professional titles and certifications, as well as ethical norms of the profession.[428]

Rules regulating the advertising of specific products and services often require the communication of specified information, in a standardized form, in order to facilitate consumer choice.[429]

IV.8.9.2. Federal legislation

Although advertising regulation — as an instance of business regulation — generally comes within provincial responsibility, certain types of legislative intervention with respect to advertising remain open to the federal Parliament. Some relevant examples are as follows:

- Parliament has chosen to prohibit certain advertising activities, pursuant to its legislative authority in relation to the "criminal law." Notable examples include the prohibition of certain forms of advertising of tobacco and vaping products;[430] and numerous advertising prohibitions associated with pharmaceutical drugs and medical devices.[431]
- The regulation of certain industries comes within federal legislative authority by virtue of specific attributions under s. 91 of the Constitution Act, or because of the judicial interpretation of Parliament's general authority to legislate with respect to the "peace, order and good government" of Canada. For these industries, which notably include

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[425] E.g., *Consumer Protection Act, 2002*, SO 2002, c 30, Sch A (Ontario), *s* 14; to be replaced by *Consumer Protection Act, 2023*, SO 2023, c 23, Sch 1, *s.* 8 (not yet in force); *Consumer Protection Act*, CQLR, c P-40.1 (Québec), ss 219-222.

[426] *Consumer Protection Act* (Québec), ss 248-249. A constitutional challenge to the validity of these provisions on various federalism- and rights-based grounds was rejected by the Supreme Court of Canada in *Irwin Toy v Québec*, [1989] 1 SCR 927, discussed in Parts III.2.2, III.3.2 and III.3.3.

[427] *Charter of the French Language*, CQLR c C-11, s 58. A previous version of the law required French to be the only language used in commercial advertising (with limited exceptions). A challenge to this earlier version was brought under the freedom of expression guarantees of the Canadian and Québec *Charters*, and is discussed in Part IV.8.9.3 below.

[428] E.g., *General*, O Reg 219/94 [Regulation under the *Opticianry Act, 1991*, SO 1991, c 34], s 6; *General*, O Reg 264/16 [Regulation under the *Drug and Pharmacies Regulation Act*, RSO 1990, c H.4], s 29(1).

[429] *Eggs and Processed Egg*, O Reg 171/10 [Regulation under the *Food Safety and Quality Act, 2001*, SO 2001, c 20], s 10(1); *General*, O Reg 98/09 [Regulation under the *Payday Loans Act, 2008*, SO 2008, c 9], s 15.

[430] *Tobacco and Vaping Products Act*, SC 1997, c 13, ss 19-22 (promotion and advertising of tobacco products), 30.1-30.48 (promotion and advertising of vaping products)

[431] Among the many examples are *Food and Drugs Act*, RSC 1985, c F-27, s 3(1) (advertising a drug as a treatment for a listed condition); *Food and Drug Regulations*, CRC, c 870, s C.08.002(1) (advertising a new unapproved drug).

banking and aeronautics, federal regulatory law can and often does include restrictions on advertising.[432]

- Advertising by way of media that come within Parliament's legislative authority, such as the postal service and telecommunications, is also subject to federal regulatory laws.[433]
- Federal authority in relation to "weights and measures" provides a basis for regulating the use of particular units (e.g., the metric system) in commerce, including in advertising.[434]
- The *Competition Act* regulates or prohibits various activities in connection with advertising.[435]

IV.8.9.3. Advertising and the freedom of expression

The Supreme Court has interpreted "expression," as the term is used in s. 2(b) of the *Charter of Rights*, as including any non-violent activity that conveys a meaning. As a result, there is no doubt that commercial advertising comes within the scope of the freedom of expression guarantee.[436]

Restrictions on advertising have been upheld as reasonable limits on the freedom of expression in several cases, especially where:

- the restriction was targeted or partial, as opposed to an absolute ban;[437] or
- the restriction sought to protect a group vulnerable to manipulation (e.g., children).[438]

By comparison, where the Supreme Court has invalidated an advertising restriction, it has often been because the Court assessed the restriction to be unnecessarily broad. Examples include:

- a nearly-absolute prohibition against the use of languages other than French in commercial advertising in Québec;[439]
- a near-absolute ban on tobacco advertising;[440]
- a prohibition against price advertising by dentists;[441]
- a municipal prohibition against advertising signs except in areas zoned for industrial use.[442]

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[432] E.g., *Bank Act*, SC 1991, c 46, ss 627.85-627.87; *Air Passenger Protection Regulations*, SOR/2019-150, ss. 25-31.

[433] For example, *Television Broadcasting Regulations, 1987*, SOR/87-49, s 6 (advertising of alcoholic beverages); *Radio Regulations, 1986*, SOR/86-982, s 4 (id.); *Solicitations by Mail Regulations*, CRC, c 1295 (mailing of solicitations having the appearance of an invoice).

[434] See, for example, *Weights and Measures Regulations*, CRC, c 1605, including s 336 (advertising of gasoline), 338 (advertising of individually measured foods for retail trade).

[435] Examples include false or misleading representation (*Competition Act*, RSC 1985, c C-34, ss 52, 74.01); and bait-and-switch selling (s 74.04).

[436] See Parts III.3.3 and IV.8.1.2, above.

[437] For example, *Canada (Attorney General) v JTI-Macdonald Corp*, [2007] 2 SCR 610 (ban on lifestyle advertising and advertising directed at youth, for tobacco products)

[438] *Irwin Toy v Québec*, [1989] 1 SCR 927 (prohibition against advertising directed at persons under 13 years old).

[439] *Ford v Québec*, [1988] 2 SCR 712.

[440] *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199.

[441] *Rocket v Royal College of Dental Surgeons of Ontario*, [1990] 2 SCR 232.

[442] *R v Guignard*, [2002] 1 SCR 472.

IV.8.10. Consumer protection

IV.8.10.1. Provincial legislation

In general, laws for the protection of consumers come within provincial authority under s. 92(13) of the *Constitution Act 1867* ("property and civil rights"). Every province and territory has, in fact, enacted consumer protection legislation.[443] The scope and details of the legislation vary by jurisdiction, but typical coverage includes provisions relating to:

- Unfair business practices (e.g., false representations)[444]
- Implied conditions and warranties;[445]
- Unsolicited goods (e.g., no obligation to pay);[446]
- Direct selling (e.g., right to cancel during cooling-off period);[447]
- Credit agreements (e.g., disclosure of fees and terms).[448]

In addition, provincial and territorial anti-discrimination laws and, in Ontario, the *Accessibility for Ontarians with Disabilities Act*, apply to the provision of goods and services to the public.[449] In certain provinces, consumers also enjoy protection under provincial private-sector privacy legislation.[450]

IV.8.10.2. Federal legislation

Despite the constitutional limits on federal jurisdiction in the field of business regulation, the federal government possesses several avenues for protecting consumer interests through legislation, for example:

- Regulation of contractual terms and business practices in federally regulated industries (e.g., telecommunications[451] and air transportation[452]);

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[443] *Consumer Protection Act*, RSA 2000, c C-26.3 (Alberta); *Business Practices and Consumer Protection Act*, SBC 2004, c 2 (British Columbia); *Consumer Protection Act*, CCSM c C200 (Manitoba); *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1 (Newfoundland and Labrador); *Consumer Protection Act*, RSNS 1989, c 92 (Nova Scotia); *Consumer Protection Act*, RSNWT 1988, c C-17 (Northwest Territories); *Consumer Protection Act*, RSNWT (Nu) 1988, c C-17 (Nunavut); *Consumer Protection Act, 2002*, SO 2002, c 30, Sch A (Ontario); *Consumer Protection Act*, RSPEI 1988, c C-19 (Prince Edward Island); *Consumer Protection Act*, CQLR c P-40.1 (Québec); *The Consumer Protection and Business Practices Act*, SS 2013, c C-30.2 (Saskatchewan); *Consumers Protection Act*, RSY 2002, c 40 (Yukon). New Brunswick is in the process of consolidating its consumer protection legislation: see *Bill 16, Consumer Protection Act*, 3rd Sess, 60th Leg, New Brunswick, 2023-24 (awaiting Royal Assent).

[444] E.g., *Consumer Protection Act, 2002* (Ontario), ss 14-19.

[445] E.g., *Consumer Protection Act, 2002* (Ontario), 9.

[446] E.g., *Consumer Protection Act, 2002* (Ontario), s 13.

[447] E.g., *Consumer Protection Act, 2002* (Ontario), ss 41-43.1.

[448] E.g., *Consumer Protection Act, 2002* (Ontario), ss 66-85.

[449] See Part IV.8.4.3.3 above.

[450] *Personal Information Protection Act*, SA 2003, c P-6.5 (Alberta); *Personal Information Protection Act*, SBC 2003, c 63 (British Columbia); *Act respecting the protection of personal information in the private sector*, CQLR c P-39.1 (Québec).

[451] E.g., *Telecom Regulatory Policy CRTC 2017-200*, App 1 (mandatory code of conduct for wireless service providers).

[452] E.g., *Air Passenger Protection Regulations*, SOR/2019-150.

- Product safety and labelling legislation — these often take the form of prohibitions enacted on the basis of the criminal law power;[453] and
- Regulatory legislation capable of being classified as relating to the regulation of "trade as a whole," within the meaning of the case law interpreting s. 91(2) of the *Constitution Act 1867*.[454]

We have already seen that the third category includes the *Competition Act*,[455] which contains a number of provisions that overlap with the general subject-matter of consumer protection.[456] In addition, the federal power under s. 91(2) appears to be the constitutional basis for the application of the federal private-sector privacy legislation to any organization that "*collects, uses or discloses [personal information] in connection with commercial activities*."[457]

IV.8.11. Environmental protection

Environmental protection as a policy goal underpins a wide range of legal constraints on the conduct of business. The multiplicity of policy interventions that serve environmental goals is such that identifying "*the exact composition of a country's environmental regime*" is "*not a simple matter.*"[458] This section begins by discussing the constitutional allocation of responsibilities between the federal and provincial levels of government in the field of environmental protection, before briefly canvassing four specific topics:

- The regulation of activities that may cause environmental harm;
- Remediation and restoration;
- Toxic substances; and
- Climate change.

IV.8.11.1. Constitutional allocation of responsibilities

The courts have often repeated that "*environmental protection*" is not a class of subjects attributed exclusively to either level of government under ss 91 and 92 of the *Constitution Act 1867*. Instead, it is an example of a "*diffuse subject*" that both Parliament and the provincial legislatures have constitutional capacity to address using the levers at their disposal.[459]

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[453] E.g., *Canada Consumer Product Safety Act*, SC 2010, c 21; *Consumer Packaging and Labelling Act*, RSC 1985, c C-38; *R v Wetmore*, [1983] 2 SCR 284, at pp. 288-89 ("*it has been well understood over many years that protection of food and other products against adulteration [is] properly assigned to the criminal law*"); *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199, at par. 39 ("*Parliament may validly employ the criminal law power to prohibit or control the manufacture, sale and distribution of products that present a danger to public health, and that Parliament may also validly impose labelling and packaging requirements on dangerous products with a view to protecting public health*," La Forest J, dissenting but not on this point).

[454] See text accompanying note 60 above.

[455] *Competition Act*, RSC 1985, c C-34.

[456] See Part IV.8.3.1.2 above.

[457] *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("PIPEDA"), s 4(1)(a). The legislation was enacted prior to the Supreme Court's refinement of the requirements under s 91(2), in the *Securities Reference* and *Reference re Pan-Canadian Securities Regulation* (notes 61 and 62 above), and courts have not had occasion to rule on the legislation's validity. A bill currently before Parliament would overhaul PIPEDA: *Bill C-27, Digital Charter Implementation Act*, 1st Sess, 44th Parl, 2022.

[458] BENIDICKSON, J.: *Environmental Law*, 5th ed., Irwin, 2019, p. 6. In general terms, the organization of this section follows that of BENIDICKSON's exposition of the legislative and regulatory frameworks.

[459] *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3, par. 63-64; *R v Hydro-Québec*, [1997] 3 SCR 213, par. 112.

Parliament might, for example, enact a criminal law,[460] a tax,[461] or a law regulating the movement of goods across provincial or international borders,[462] in each case with a view to advancing an environmental goal. Environmental policies might similarly guide federal legislative action in the exercise of its regulatory authority over the fisheries[463] or over waters outside the boundaries of any province (e.g., the territorial sea).[464]

The provinces, for their part, have broad authority to regulate local activities by virtue of the "*property and civil rights*" power and the power to legislate with respect to "*local works and undertakings*" and "*matters of a [...] local and private nature*."[465] Provinces have legislative authority over the management of non-renewable natural resources on their territory, and are also the owners of the Crown land situated within their borders.[466] Each of these provincial legislative and ownership powers provides a constitutional basis for regulating local activities with a view to controlling their adverse environmental impact.

FRAME 86

R. v Hydro-Québec
[1997] 3 SCR 213

Supreme Court of Canada

[T]his Court in Oldman River, supra, made it clear that the environment is not, as such, a subject matter of legislation under the Constitution Act, 1867. As it was put there, "the Constitution Act, 1867 has not assigned the matter of 'environment' sui generis to either the provinces or Parliament" (p. 63). Rather, it is a diffuse subject that cuts across many different areas of constitutional responsibility, some federal, some provincial (pp. 63-64).

FRAME 87

Reference re Impact Assessment Act
2023 SCC 23

Supreme Court of Canada
(Wagner CJ)

[123] The "constitutionally abstruse" nature of the environment means that legislative jurisdiction over the environment must be rooted in specific heads of power ... Since the heads of power differ in their nature and scope, the extent to which a level of government may address environmental concerns may vary from one head of power to another....

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460 *Canadian Environmental Protection Act, 1999*, SC 1999, c 33, s 272, discussed in text accompanying note 384 above. The criminal law power is contained in s 91(27) of the *Constitution Act 1867*.

461 For example, *Excise Tax Act*, RSC 1985, c E-15, Sch 1, s 6(1) (tax on vehicles based on fuel efficiency). The federal taxation power is contained in s 91(3) of the *Constitution Act 1867*.

462 *Energy Efficiency Act*, SC 1992, c 36, s 4(1) (energy-using products imported or transported interprovincially must comply with federal energy efficiency standard). The constitutional basis for such legislation is *Constitution Act 1867*, s 91(2) ("regulation of trade and commerce").

463 *Constitution Act 1867*, s 91(12).

464 E.g., *Ocean Dumping Control Act*, SC 1974-75-76, c 55, upheld in *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401.

465 *Constitution Act 1867*, ss 92(10)(a), (13), (16).

466 With respect to Ontario, Québec, Nova Scotia and New Brunswick, see *Constitution Act 1867*, s 109. The other provinces were placed in the same position by subsequent instruments, including the *Constitution Act, 1930*, 20-21 Geo V, c 26 (UK), and/or individual provinces' respective terms of union.

[124] Some heads of power relate to activities — for example, Parliament can legislate in respect of pollution from ships pursuant to its jurisdiction over the activity of navigation and shipping (s. 91(10)...). It can similarly legislate in respect of environmental issues arising from interprovincial works and undertakings, such as interprovincial railways or pipelines (ss. 91(29) and 92(10)(a)...). Provinces can legislate in respect of local works and undertakings, property and civil rights in the province, and matters of a local nature (s. 92(10), (13) and (16)).

[125] Other heads of power relate to what has been described as "management of a resource" — for example, in Oldman River, Justice La Forest viewed the fisheries power under s. 91(12) in this light (pp. 67-68). As another example, provinces can exclusively make laws in respect of non-renewable natural resources, forestry resources and electrical energy pursuant to s. 92A [...].

IV.8.11.2. Regulation of activities that may cause environmental harm

BENIDICKSON describes pollution standards, expressed for example in regulations imposing "*emission standards or limits for specified substances*,"[467] as a staple environmental regulatory mechanism in the Canadian context. A common approach is to require a permit as a precondition for engaging in an activity that may result in the discharge of a specified contaminant.[468] For example, the *Environmental Protection Act* (Ontario) provides:

FRAME 88

***Environmental Protection Act* (Ontario), section 9(1)**

RSO 1990, c E.19

***9** (1) No person shall, except under and in accordance with an environmental compliance approval,*

(a) use, operate, construct, alter, extend or replace any plant, structure, equipment, apparatus, mechanism or thing that may discharge or from which may be discharged a contaminant into any part of the natural environment other than water; or

(b) alter a process or rate of production with the result that a contaminant may be discharged into any part of the natural environment other than water or the rate or manner of discharge of a contaminant into any part of the natural environment other than water may be altered.

An example of this approach in the federal context is the regulation of the disposal of substances at sea under the *Canadian Environmental Protection Act,* which provides:[469]

FRAME 89

***Canadian Environmental Protection Act, 1999*, section 125(1)**

SC 1999, c 33

125 (1) No person or ship shall dispose of a substance in an area of the sea referred to in any of paragraphs 122(2)(a) to (e) [e.g., Canada's territorial sea and internal marine waters] unless

(a) the substance is waste or other matter; and

(b) the disposal is done in accordance with a Canadian permit.

A recent dispute concerning a provincial attempt to regulate an interprovincial oil pipeline illustrates the application, in the environmental protection context, of general principles of

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[467] BENIDICKSON, note 458 above, at p. 130.

[468] BENIDICKSON at pp. 135-39.

[469] See also *Crown Zellerbach,* note 464 above (upholding the constitutionality of a predecessor provision).

federalism.[470] In *Re Environmental Management Act*,[471] the province of British Columbia proposed to amend its general environmental protection legislation to add a provincial licensing requirement for possessing, "*in the course of operating an industry, trade or business*," more than a specified quantity of *"heavy oil*." In general, of course, it is within a province's authority to regulate the conduct of a business activity within its borders. However, the B.C. Court of Appeal took the view that, in light of the intended and actual effect of the proposed amendment, what the province was attempting to do was regulate an interprovincial pipeline — something that only the federal Parliament can do:

FRAME 90

Reference re Environmental Management Act (British Columbia)
2019 BCCA 181

British Columbia Court of Appeal

[93] [B]oth levels of government have jurisdiction over aspects of the environment, and both levels have adopted complex and far-ranging legislation dealing with the prevention and mitigation of environmental harm and the remediation of and compensation for such harm, usually incorporating the principle of 'polluter pays.' ... Environmental protection is indeed "too important" — and too diffuse — to belong to one level exclusively or absolutely.

[94] [A]lthough Part 2.1 is framed as a law of general application, it is intended, and (more importantly) its sole effect is, to set conditions for, and if necessary prohibit, the possession and control of increased volumes of heavy oil in the Province. Heavy oil will enter the Province only via Trans Mountain's interprovincial pipeline and railcars destined for export.

[98] At what point is the line crossed between valid provincial environmental legislation and the impermissible regulation of a federal undertaking?

[101] In my view, Part 2.1 does cross the line between environmental laws of general application and the regulation of federal undertakings. Even if it were not intended to 'single out' the TMX pipeline, it has the potential to affect (and indeed 'stop in its tracks') the entire operation of Trans Mountain as an interprovincial carrier and exporter of oil. It is legislation that in pith and substance relates to, and relates only to, what makes the pipeline "specifically of federal jurisdiction." By definition, an interprovincial pipeline is a continuous carrier of liquid across provincial borders. Indeed, in Canada the pipeline owner is subject to conditions of common carriage across those borders: see s. 71(1) of the National Energy Board Act. Unless the pipeline is contained entirely within a province, federal jurisdiction is the only way in which it may be regulated. [I]t is simply not practical — or appropriate in terms of constitutional law — for different laws and regulations to apply to an interprovincial pipeline (or railway or communications infrastructure) every time it crosses a border. Paraphrasing the majority in Consolidated Fastfrate (2009), the operation of an interprovincial pipeline would be "stymied" by the necessity to comply with different conditions governing its route, construction, cargo, safety measures, spill prevention, and the aftermath of any accidental release of oil. Jurisdiction over interprovincial undertakings was allocated exclusively to Parliament by the Constitution Act to deal with just this type of situation, allowing a single regulator to consider interests and concerns beyond those of the individual province(s).

[104] At the end of the day, the NEB is the body entrusted with regulating the flow of energy resources across Canada to export markets. Although the principle of subsidiarity has understandable appeal, the TMX project is not only a 'British Columbia project'. The project affects the country as a whole, and falls to be regulated taking into account the interests of the country as a whole.

[470] The relevant principles are discussed in Part IV.1.3.3.2 above.

[471] *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181, aff'd [2020] 1 SCR 3.

IV.8.11.3. Remediation and restoration

A legal obligation to restore contaminated lands to an acceptable standard can be imposed in various ways.[472] For example, in Alberta, the provincial regulator will not grant a licence to exploit an oil and gas resource unless the licensee undertakes "abandonment" and "reclamation" responsibilities that include sealing drill holes; removing surface structures; and decontaminating and reconstructing the land.[473]

In *Orphan Well Association*, an issue arose as to the compatibility of these responsibilities, in the case of an insolvent oil and gas company, with the priority scheme and powers of trustees under federal bankruptcy legislation. In this case, the bankruptcy trustee challenged the provincial regulator's insistence that abandonment and reclamation obligations be satisfied as a condition of the regulator's approval of the transfer of the company's licenses.[474] The Supreme Court rejected the challenge:

FRAME 91

Orphan Well Association v Grant Thornton Ltd
[2019] 1 SCR 150

Supreme Court of Canada

[29] Alberta has chosen is a licensing regime which makes such costs an inherent part of the value of the licensed assets. This regime has the advantage of aligning with the polluter-pays principle, a well-recognized tenet of Canadian environmental law. This principle assigns polluters the responsibility for remedying environmental damage for which they are responsible, thereby incentivizing companies to pay attention to the environment in the course of their economic activities...

[30] Ultimately, it is not the role of this Court to decide the best regulatory approach to the oil and gas industry. What is not in dispute is that, in adopting its current regulatory regime, Alberta has acted within its constitutional authority over property and civil rights in the province and over the "development, conservation and management of non-renewable natural resources . . . in the province" (Constitution Act, 1867, ss. 92(13) and 92A(1)(c)). ... Alberta intended that apparatus to continue to operate when an oil and gas company is subject to insolvency proceedings....

[160] Bankruptcy is not a licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy. They must, for example, comply with non-monetary obligations that are binding on the bankrupt estate, that cannot be reduced to provable claims, and the effects of which do not conflict with the Bankruptcy and Insolvency Act*, notwithstanding the consequences this may have for the bankrupt's secured creditors. The Abandonment Orders and the LMR requirements are based on valid provincial laws of general application — exactly the kind of valid provincial laws upon which the BIA is built..... End-of-life obligations are imposed by valid provincial laws which define the contours of the bankrupt estate available for distribution.*

IV.8.11.4. Environmental assessment

Environmental assessment is a process for subjecting "*proposed activities [to] scrutin[y] in advance from the perspective of their possible environmental consequences*."[475] The Supreme

[472] BENIDICKSON, pp. 238-239, mentions that such obligations can be found in, for example, general legislation, approval conditions, administrative orders and judicially-granted remedies.

[473] As described in *Orphan Well Association v Grant Thornton Ltd*, 2019, 1 SCR 150 at par. 16.

[474] The challenge was based on the doctrine of federal paramountcy, according to which requirement under provincial legislation are inoperative to the extent that they conflict with valid federal legislation. See Part IV.2.1.1 above.

[475] BENIDICKSON, p. 257, quoted in *Reference re Impact Assessment Act*, 2023 SCC 23 ("*Re Impact Assessment*") par. 10.

Court of Canada has described environmental assessment as "a*n integral component of sound decision-making*."[476]

In general, it is for each province to determine whether a given activity within its borders will be subject to an environmental assessment process. There is considerable variation from one province to another, both in the range of projects and industries to which assessment applies and in the exhaustiveness of the assessment process.[477]

The imposition of environmental assessment at the federal level requires a basis for federal jurisdiction. For example, the operation of the federal assessment regime under the *Canadian Environmental Assessment Act 1992,* was triggered by the exercise of a "*federal decision-making responsibility*," such as federal financial assistance for the project or the granting of a federal permit.[478] A different triggering process applied under a successor statute, the *Canadian Environmental Assessment Act 2012;* this statute was in turn replaced in 2019 by the *Impact Assessment Act*. The 2019 *Act* established a multi-stage assessment process that included the screening of projects for assessment based on their potential to cause problematic effects; an assessment stage; and, finally, a decision-making stage at which the government determines whether, and on what conditions, a project can proceed.

The *Impact Assessment Act* was ruled invalid, in part, by the Supreme Court, on two main grounds. First, the "*federal trigger*" was too loose. Although the statute specified, as one of the factors to be taken account in screening, "*the possibility that the carrying out of the designated project may cause adverse effects within federal jurisdiction*,"[479] the Court objected both to the statutory definition of "adverse effects within federal jurisdiction" and to the open-ended role of that factor in the screening process. These resulted, in the Court's view, in the screening net being cast too wide. Second, the ultimate decision whether to allow a project to proceed following assessment was, in the Court's view, insufficiently connected with the impact of the project on matters within federal jurisdiction, or even to environmental impacts in general. Instead, that decision appeared to the Court to entail an all-things-considered assessment as to whether the project was "*in the public interest*."

IV.8.11.5. Toxic substances

The *Canadian Environmental Protection Act* includes a framework for managing toxic substances. As was explained above in Part IV.8.5.1.1.ii, the *CEPA* authorizes the federal government to designate a substance as "toxic"; such designation enables the federal government to make rules prescribing the quantity or concentration in which the substance can be released into the environment. The violation of those rules is prohibited under the legislation, under pain of criminal sanctions.

IV.8.11.6. Climate change

Canada's federal system provides room for provinces to make different regulatory choices in response to the climate change threat. For example, both British Columbia and Québec implemented carbon pricing several years before the federal Parliament enacted carbon

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476 *Oldman River,* note 459 above, at p. 71; *Re Impact Assessment*, at par. 10.

477 BENEDICKSON, pp. 272-74.

478 As described in *Re Impact Assessment*, par. 19.

479 *Impact Assessment Act*, SC 2019, c 28, s 1, s 16(2)(b).

pricing legislation,[480] and some, but not all, provinces have adopted renewable energy standards for public electricity utilities.[481]

The federal *Greenhouse Gas Pollution Pricing Act*,[482] enacted in 2018, implements a regulatory charge on carbon-based fuels as well as an output-based pricing system for industrial greenhouse gas emissions. The scheme is a "backstop"; the legislation establishes a minimum national standard of greenhouse gas price stringency, and the federal fuel charge and pricing system apply only in provinces and territories that the federal government has determined do not have their own carbon pricing systems meeting or exceeding the national standard.

The validity of the federal legislation was upheld by the Supreme Court in a 2020 decision that emphasized both the national importance of carbon pricing and the fact that the federal legislation did not purport to displace provincial authority to regulate emissions, but was targeted only at the "*grave extraprovincial harm*" that would result from the failure of a province to enact a sufficiently stringent scheme.[483]

FRAME 92

References re Greenhouse Gas Pollution Pricing Act
[2021] 1 SCR 175

Supreme Court of Canada
(Wagner CJ)

[171] T]he evidence clearly shows that establishing minimum national standards of GHG price stringency to reduce GHG emissions is of concern to Canada as a whole. This matter is critical to our response to an existential threat to human life in Canada and around the world. As a result, it readily passes the threshold test and warrants consideration as a possible matter of national concern.

[195 [T]here is uncontested evidence of grave extraprovincial harm as a result of one province's failure to cooperate. In other words, this is a true interprovincial pollution problem of the highest order. This Court's decisions have consistently reflected the view that interprovincial pollution is constitutionally different from local pollution and that it may fall within federal jurisdiction on the basis of the national concern doctrine. [In addition,] the proposed federal matter in the instant case relates only to the risk of non-cooperation that gives rise to this threat of grievous extraprovincial harm. In other words, this matter would empower the federal government to do only what the provinces cannot do to protect themselves from this grave harm, and nothing more.

[206] On the whole, I am of the view that the scale of impact of this matter of national concern on provincial jurisdiction is reconcilable with the fundamental distribution of legislative power under the Constitution. The GGPPA puts a Canada-wide price on carbon pollution. Emitting provinces retain the ability to legislate, without any federal supervision, in relation to all methods of regulating GHG emissions that do not involve pricing. They are free to design any GHG pricing system they choose as long as they meet the federal government's outcome-based targets. The result of the GGPPA is therefore not to limit the provinces' freedom to legislate, but to partially limit their ability to refrain from legislating pricing mechanisms or to legislate mechanisms that are less stringent than would be needed in order to meet the national targets. Although this restriction may interfere with a province's preferred balance between economic and environmental considerations, it is necessary to consider the interests that would be harmed — owing to irreversible consequences for the environment, for human health and safety and for the economy — if Parliament were

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480 *Carbon Tax Act*, SBC 2008, c 40 (British Columbia); *An Act to amend the Environment Quality Act and other legislative provisions in relation to climate change*, SQ 2009, c 33 (Québec).

481 For example, see *Renewable Electricity Act*, SA 2016, c R-16.5 (Alberta); *Electricity from Renewable Resources Regulation*, NB Reg 2015-60 (New Brunswick); *Renewable Electricity Regulations*, NS Reg 155/2010 (Nova Scotia).

482 *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186.

483 *References re Greenhouse Gas Pollution Pricing Act*, [2021] 1 SCR 175, par. 195.

unable to constitutionally address the matter at a national level. This irreversible harm would be felt across the country and would be borne disproportionately by vulnerable communities and regions, with profound effects on Indigenous peoples, on the Canadian Arctic and on Canada's coastal regions. In my view, the impact on those interests justifies the limited constitutional impact on provincial jurisdiction.

IV.8.12. Other limits

IV.8.12.1. Indigenous consultation

As has previously been mentioned, the *Constitution Act 1982* recognizes and affirms the rights of the First Nations, Métis and Inuit.[484] The constitutional obligations of the Crown in connection with Indigenous rights include a requirement to consult with an Indigenous community before undertaking an action that could adversely affect the rights of that group.[485]

The approval or licensing of a business activity is an example of a government activity that, depending on the circumstances, has the potential to affect Indigenous rights. For example, a Crown obligation to consult was found to arise in connection with the granting of a forestry licence on land that was the subject of an Indigenous land claim;[486] and in connection with the approval of a pipeline modification that might increase the risk of spills on land on which an Indigenous group asserted Aboriginal and treaty rights.[487]

The Supreme Court has indicated, in cases such as these, that the "*duty to consult*" is owed by the government, not by the private licensee or project proponent.[488] Nevertheless, in practice, in discharging its duty to consult, the government expects proponents to engage with potentially affected groups.[489] In at least one case, the inadequacy of a project proponent's responses to the concerns raised by an Indigenous community during the regulatory approval process was a significant factor in the Supreme Court's determination that the Crown's consultation had been deficient and that the project approval should be quashed.[490]

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484 Part II.1.2.2.

485 *Haida Nation v British Columbia*, [2004] 3 SCR 511. See note 106 above.

486 In *Haida*, above, the Court held that the granting of a forestry licence to a large private company was invalid because of the Crown's non-compliance with the its duty of prior consultation.

487 *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, [2017] 1 SCR 1099.

488 *Haida*, above, at par. 52-56.

489 Crown-Indigenous Relations and Northern Affairs Canada, *Consultation and Accommodation Advice for Proponents (draft)*, last modified on 22 June 2022, available at https://www.rcaanc-cirnac.gc.ca/eng/1430509727738/1609421963809.

490 *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, [2017] 1 SCR 1069 at par. 49.

V. Conclusions

V.1. State of play

This has been a study of the freedom to conduct a business as a legal norm and, somewhat more generally, of the various dimensions along which the conduct of business is regulated in Canada. From this predominantly legal perspective, the "state of play" may be summarized simply: the freedom to conduct a business is not a constitutionally entrenched right, and the conduct of business is regulated by a wide variety of federal and provincial (or territorial) laws.

Another useful perspective is offered by cross-country rankings of the regulatory environment of business and of indicia of economic freedom. Relevant examples include: the *Doing Business* program of the World Bank Group,[491] the *Economic Freedom of the World* project of the Fraser Institute,[492] and the *Index of Economic Freedom* compiled by the Heritage Foundation.[493]

Index	**Canada's rank**		
	(global)	(within group: EU 27+Canada)	(within group: G7)
World Bank (Doing Business) 2020	23rd	8th	4th
Fraser Institute (Economic Freedom of the World) 2023	10th	3rd	3rd
Heritage Foundation (Index of Economic Freedom) 2024	16th	9th	1st

One must be wary of drawing strong conclusions from such rankings, at least in the absence of a detailed and critical analysis which it is beyond the scope of this Study to offer.[494] Even on their own terms, each of the reports describes areas where the relevant organization assessed Canada's business environment to be more or less liberal or its performance to be "stronger" or "weaker."[495] Nevertheless, it does not seem unreasonable to interpret these rankings as

[491] World Bank Group, *Doing Business 2020: Comparing Business Regulation in 190 Economies* (2019), available at https://openknowledge.worldbank.org/bitstream/handle/10986/32436/9781464814402.pdf, at p. 4.

[492] GWARTNEY, J., LAWSON, R. and MURPHY, R.: *Economic Freedom of the World: Annual Report*, Fraser Institute, 2023, p. 8. Available at https://www.fraserinstitute.org/sites/default/files/economic-freedom-of-the-world-2023.pdf

[493] HERITAGE FOUNDATION: *Index of Economic Freedom* (2024), available at: https://static.heritage.org/index/pdf/2024/2024_indexofeconomicfreedom_execsummary.pdf

[494] A careful analysis of the *Doing Business* rankings is offered by SHARPE, A.: *The World Bank Doing Business Index for Canada: An Assessment,* Centre for the Study of Living Standards, 1 April 2021, available at https://www.csls.ca/reports/csls2021-02.pdf.

[495] For example, Canada ranked 3rd in the world on "ease of starting a business" (*Doing Business* 2020); 11th on "regulation" (*Economic Freedom of the World* (2023)); and 18th on "business freedom" (*Index of Economic Freedom* (2024)). However, it ranked 100th on the time and expense associated with "contract enforcement" (*Doing Business* 2020) and 99th on "size of government" (*Economic Freedom of the World* (2023)).

generally supportive of an assessment of the Canadian business environment as relatively liberal overall.[496]

V.2. Possible future developments

On virtually all of the matters described in the parts of this Study dealing with the regulatory environment of business,[497] the positive law is a moving target: legislative initiatives in response to new and existing challenges are continually shifting the boundaries of the freedom to conduct a business.

Constitutions establish the institutional framework within which these legal changes occur. In Canada's case, a significant role is played by the features of this framework that establish:

- a division of responsibilities between legislatures responsible to national and provincial electorates; and
- entrenched rights, which is to say, rules authorizing judicial review of legislation where certain interests systematically vulnerable to being overlooked by local or national majorities are at stake (i.e., the rights enumerated in the *Charter of Rights,* and the rights of the First Nations, Inuit and Métis peoples).

We have seen that commercial activities enjoy a significant degree of protection as a result of the requirement that federal and provincial legislatures and governments abide by the constraints on their authority, even though these constraints do not specifically include a freedom to conduct a business.

The absence of an entrenched feedom to conduct a business — and, more generally, of entrenched commercial rights — reflects the absence of a consensus that public decision-making would be improved, on balance, by their inclusion. Specifically, it has not been clear that it would be preferable if the role of the federal judiciary were expanded, relative to that of the representative branches of the provincial and federal governments, in determining the balance to be struck between commercial and other societal interests.

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[496] Not all observers would concur in this assessment: see CD HOWE INSTITUTE: *Part I: Reforms to the Competition Act Must Be Evidence-Based and Homegrown, But They Are Only a Start to Promoting Competitiveness,* 30 March 2023, available at https://www.cdhowe.org/sites/default/files/2023-04/Communique_2023_0330_CPC%20v2.pdf, at pp. 4-6 (describing, among other things, poor performance by Canada on OECD measures of distortion of competition by government policies).

[497] Principally, Part IV.8 of the Study.

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VI. Right to health

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VII. Rule of Law

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VIII. Freedom to conduct a business

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This series will be completed in the course of 2024.

IX. Emergency law (legal bases for anti-COVID-19 measures)

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X. Ratification of international treaties

- **Belgium**: BEHRENDT, CH.: *La ratification des traités internationaux, une perspective de droit comparé - Belgique*, Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), mars 2020, VI et 44 pp., référence PE 646.197;
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- **Portugal**: SALVAÇÃO BARRETO, P.: *A ratificação de tratados internacionais, uma perspectiva de direito comparado - Portugal*, Unidade Biblioteca de Direito Comparado, Serviços de Estudos do Parlamento Europeu (EPRS), novembro 2018, VIII e 33 pp., referência PE 630.294;
- **Spain**: FERNÁNDEZ DE CASADEVANTE ROMANI, C.: *La ratificación de los tratados internacionales, una perspectiva de Derecho Comparado - España*, Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), septiembre 2021, VIII y 80 pp., referencia PE 698.044;
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XI. Other topics

- **Copyright Law**: AA. VV.: *Copyright Law in the EU: Salient features of copyright law across the EU Member States*, Comparative Law Library Unit, European Parliamentary Research Service (EPRS), June 2018, VIII and 409 pp., reference PE 625.126;
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This document is part of a series of Comparative Law studies that analyze the freedom to conduct a business in different legal orders around the world. After a brief historic introduction and a presentation of applicable legislation and case law, the content, limits and possible evolution of this freedom are examined.

The subject of this study is Canada's federal legal system.

While the freedom to conduct a business is a common law right, it does not possess supralegislative status. Nevertheless, various constitutional rules — including those arising from Canada's federal structure and from the Charter of Rights — afford a degree of protection to businesses and to business activities.

The study notes the pervasive influence of federalism on business regulation in Canada. The rules allocating responsibility between the Parliament and the provinces do not affect only the level of government at which regulatory laws are enacted, but also affect the form and content of those laws.

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