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The Constitutional Protection of Freedom of Religion, Expression, and Association in Canada and the United States: A Comparative Analysis

Robert A. Sedler*

I. INTRODUCTION

Following the promulgation of the Charter of Rights in 1982,¹ freedom of religion, expression, and association, along with a number of other individual rights, became *entrenched* in Canada. Given this constitutional protection, these rights could not be infringed upon by governmental action. This Article will compare the constitutional protection of freedom of religion, expression, and association in Canada with the constitutional protection of those rights in the United States. Like any comparative analysis, the focus will be on the differences and similarities between the protection of these rights under the constitutional systems of both nations. The analysis is to a degree tentative, since it is based on the results reached by the Canadian courts in the relatively few years that the Charter has been in effect. Nonetheless, by looking to these results, it is possible to arrive at some conclusions. Taking into account the textual and structural differences between the constitutional protection of freedom of religion, expression, and association under the Canadian Charter of Rights and the protection of those rights under the U.S. Constitution, the degree of protection afforded those rights in Canada appears highly similar, although not identical, to the degree of protection afforded those rights in the United States. To put it another way, in determining the degree of protection to be afforded to these rights under the Charter, the Canadian courts have resolved the value questions in much the same way as they have been resolved by the courts in the United States. Results reached by Canadian courts differ in practice from results reached by U.S. courts due primarily to the textual and structural differences between the Canadian Charter of Rights and the U.S. Constitution. There is also a different line of growth of freedom of expression doctrine in the United States, reflecting both the context in which much of that doctrine developed and subsidiary doctrines that have emerged from this process of development.

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¹ Canadian Charter of Rights and Freedoms, Constitution Act, 1982, pt. I (ss. 1-34) [hereinafter Charter].

This Article discusses the textual and structural differences between the constitutional protection of freedom of religion, expression, and association under the Canadian Charter of Rights and the protection of those rights under the U.S. Constitution. There is then a review of the Canadian cases concerning freedom of religion, freedom of expression, and freedom of association, and a comparison of the results reached by the Canadian courts in these cases with those reached by the U.S. Supreme Court in similar cases. The Article concludes with a retrospective, setting forth a submission designed to explain why these rights have received substantially the same degree of constitutional protection in Canada as they have in the United States.

II. THE STRUCTURAL PROTECTION OF FREEDOM OF RELIGION, EXPRESSION, AND ASSOCIATION UNDER THE CANADIAN CHARTER OF RIGHTS

A. *Entrenchment*

The Canadian Charter of Rights entrenches specific individual rights, including freedom of religion, expression, and association, in the Canadian constitutional system. The concept of entrenchment is very important in Canadian legal theory, for it alters the principle of parliamentary supremacy and empowers the judiciary to protect individual rights against what it finds to be improper governmental interference.²

² See Sedler, *Constitutional Protection of Individual Rights in Canada: The Impact of the New Charter of Rights and Freedoms*, 59 NOTRE DAME L. REV. 1191, 1202 (1984).

Canada's Constitution consists of two documents, the Constitution Act of 1867 (formerly the British North American Act, 1867, 30 & 31 Vict., ch. 3) and the Constitution Act of 1982. The Constitution Act of 1867 essentially established the Canadian federal system, allocating powers exclusively between the federal government and the provinces, but also providing for certain entitlements, such as denominational schools. The Constitution Act of 1982, is contained in the Canada Act of 1982, enacted by the U.K. Parliament. That Act also removed all of the U.K. Parliament's authority over Canada and patriated the Canadian Constitution. The Constitution Act of 1867 and the Constitution Act of 1982, now form the "fundamental law" of Canada. Constitution Act of 1982, ss. 52, 60. For a brief discussion of the structure of constitutional governance in Canada, see Sedler, *supra* this note, at 1195-1203. For a more detailed discussion, see P. HOGG, CONSTITUTIONAL LAW OF CANADA, at 79-188 (chs. 5-8) (2d ed. 1985).

Section 52, the supremacy clause, provides that "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." According to Hogg, section 52 textually provides the basis for judicial review of all legislation in Canada. *Id.* at 693. Section 24(1) specifically authorizes the courts to provide remedies for violations of rights guaranteed by the Charter.

In Canada, there is basically a unitary court system, in contrast to the U.S. dual system of federal and state courts. The Supreme Court of Canada is the highest court of appeal for all of Canada and has the authority to decide all questions of provincial law, just as an American state court decides all questions of state law. Each province in Canada has a court of appeals, which, for purposes of comparison to the United States, is a combined state supreme court and a federal court of appeals. The system of lower courts varies somewhat among the provinces, but in general consists

Freedom of religion, freedom of expression, and freedom of association are entrenched as "fundamental freedoms" in section 2 of the Charter, which reads as follows:

"Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association."³

Section 2 is textually similar to the first amendment in the sense that its provisions are broadly-phrased and open-ended.⁴ However, section 2(a) does not have the equivalent of the first amendment's non-establishment clause; thus it does not prohibit "non-coercive" governmental action favoring religion. Additionally, while the language of section 2(b)-(d) is more comprehensive than the comparable language of the first amendment,⁵ and while section 2(d) expressly recognizes freedom of association as a protected right, the textual differences between section 2(b)-(d) and the first amendment seem to be insignificant in influencing the results in the freedom of expression and association cases decided by the Canadian courts.

The text and structure of the Charter also prescribe the *mode of analysis* for questions involving constitutional protection of individual rights. Sections 2-23 of the Charter set forth the individual rights that are entrenched and thus constitutionally protected against governmental action.⁶ Under section 1 of the Charter, these rights are "guaranteed," and are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."⁷ In light of

of a trial court of general jurisdiction, variously referred to as Queen's Bench, the High Court, or the Supreme Court, and lower provincial courts. There is also a Federal Court of Canada, consisting of a trial and appellate division, which has jurisdiction over certain federal matters, such as federal revenue, citizenship, and patents, and jurisdiction to review the decisions of federal agencies. See generally *id.* at 133-188 (chs. 7-8).

³ Charter, s. 2.

⁴ This similarity contrasts with a number of the "legal rights" provisions, dealing essentially with the rights of persons accused of crime, which are much more specific than their counterparts in the U.S. Constitution. See Sedler, *supra* note 2, at 1215-18.

⁵ "Congress shall pass no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

⁶ Section 2 sets forth the "fundamental freedoms" of religion, expression, assembly and association; sections 3-5 set forth political rights; section 6 sets forth mobility rights; sections 7-14 set forth "legal rights, which, except for section 7 (the closest equivalent to a "due process" clause) deals with the right of persons accused of a crime; section 15 sets forth equality rights; and section 16-23 provide for minority language and minority language educational rights.

⁷ Charter, s. 1.

this text and structure, the Canadian courts must employ a two-part mode of analysis in determining whether a particular law or governmental action affecting individual rights violates the Charter.

The first step is to determine whether the individual right implicated by the challenged law or governmental action comes within the Charter's protection; that is, the asserted individual right must be found to be one that is guaranteed by the text of sections 2-23. This step in the constitutional analysis under the Charter resembles the process of defining the meaning of constitutional guarantees, such as "free exercise of religion" and "freedom of speech," as applied to particular forms of activity under the U.S. Constitution.⁸ For example, just as the U.S. Supreme Court has held that laws "burdening" the practice of one's religion come within the protection of the first amendment's free exercise clause,⁹ the Supreme Court of Canada has likewise held that "coercive burdens on the exercise of religious beliefs" implicate section 2(a)'s guarantee of freedom of conscience and religion.¹⁰ Under this step of the analysis, if the Canadian court would conclude that the asserted right does not come within the protection of the rights guaranteed by sections 2-23, then that right is not entrenched, and the constitutional inquiry proceeds no further.¹¹

Once the court concludes that the asserted right does come within the protection of the Charter, the second step in the analysis is to apply the section 1 criteria to determine whether the challenged restriction on that right is justifiable.¹² The burden is on the government to establish

⁸ For example, the U.S. Supreme Court has held that "obscenity" and "fighting words" are not "speech" within the meaning of the first amendment. *Roth v. United States*, 354 U.S. 476 (1957); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). On the other hand, it has held that peaceful demonstrations constitute "speech," *Edwards v. South Carolina*, 372 U.S. 229 (1963), and likewise that "commercial speech" is "speech" for first amendment purposes. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). As we shall see, the lower courts in Canada are divided over the question of whether "commercial speech" constitutes "expression" within the meaning of section 2(b) of the Charter.

⁹ See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963).

¹⁰ See *Regina v. Edwards Books and Art, Ltd.*, [1986] 2 S.C.R. 713; *Regina v. Big M Drug Mart*, [1985] 1 S.C.R. 295.

¹¹ See, e.g., *Law Society of Upper Can. v. Skapinker*, [1984] 1 S.C.R. 357. This was the first Charter case decided by the Supreme Court of Canada, in which the Court concluded that the right to "pursue the gaining of a livelihood in any province," guaranteed by section 6(2)(b), was not a "free standing right to work." *Id.* at 380. Rather, it was related to the right to "move to and take up residence in any province," guaranteed by section 6(2)(a). That provision could not be relied upon to challenge an Ontario law requiring that all persons seeking to practice law in Ontario be a Canadian citizen or other British subject. At that time, the equality rights provisions of section 15 were not yet in force, so the discrimination against resident aliens effected by that law could not be challenged as violative of section 15.

¹² Section 1's requirement of "reasonable limits prescribed by law," as applied to governmental regulation affecting expression, has been interpreted by the Canadian courts to demand a high degree of specificity in such regulation, very similar to the first amendment's "void for vagueness" and "overbreadth" doctrines. See *Re Ontario Film & Video Appreciation Soc'y and Ontario Bd. of*

justification. It must do so both with reference to "ends" and to "means." First, the government must show that "the legislative objective which the limitation is designed to promote [is] of sufficient importance to warrant overriding a constitutional right."¹³ The objective must bear on a "pressing and substantial concern"¹⁴ in order to satisfy the "ends" requirement. Second, "the means chosen to attain these objectives must be appropriate or proportional to the ends."¹⁵ The proportionality requirement normally has three aspects: the limiting measures "must be carefully designed or rationally connected to the objective";¹⁶ they must "impair the right as little as possible";¹⁷ and their effects "must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgement of rights."¹⁸

This two step mode of analysis prescribed by the text and structure of the Charter is very similar to the "balancing approach" that the U.S. Supreme Court has developed for dealing with first amendment questions.¹⁹ As pointed out previously, the first step in the Charter analysis is similar to the process of defining whether particular activity constitutes "free exercise of religion" or "freedom of speech" under the first amendment. Once it is found that the particular activity comes within the protection of the first amendment, the American court must then balance the asserted governmental interest against the protected individual inter-

Censors, [1984] 45 O.R.2d 80 (Ont. C.A.) (provincial film censorship law containing no standards to determine when a license to show a film could be refused); *Re Luscher and Deputy Minister of Nat'l Revenue, Customs and Excise*, [1985] 17 D.L.R.4th 503 (Fed. C.A.) (custom tariff prohibition of "immoral and indecent matter"); *Re Information Retailers Ass'n of Metro. Toronto & Municipality of Metro. Toronto*, [1985] 52 O.R.2d 449 (Ont. C.A.) (municipal "adult book" regulation prohibiting display of nude photographs "designed to appeal to erotic or sexual appetites or inclinations"). As the Court stated in the latter case: "It is to be remembered that this by-law affects a fundamental freedom protected by the Canadian Charter of Rights and Freedoms, and as such must be subject to more stringent scrutiny than by-laws which do not affect constitutional rights." *Id.* at 467-68.

¹³ *Edwards Books*, [1986] 2 S.C.R. at 768.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* (Dickson, C.J.). The Chief Justice also noted that the nature of the proportionality test would vary depending on the circumstances, and that "[b]oth in articulating the standard of proof and in describing the criteria compromising the proportionality requirement the Court has been careful to avoid rigid and inflexible standards." *Id.* at 768-69. See also Gibson, *Reasonable Limits Under the Canadian Charter of Rights and Freedoms*, 15 MANITOBA L.J. 27 (1985).

¹⁹ This similarity was noted by Chief Justice Dickson in *Edwards Books*, when discussing the U.S. Supreme Court decisions in the *Sunday Closing Cases* (*McGowan v. Maryland*, 366 U.S. 420 (1961) and *Braunfeld v. Brown*, 366 U.S. 599 (1961)). He observed that, "I agree with Douglas, J.'s assessment that the majority was engaged in a balancing process which, under a Constitution like Canada's, would properly be dealt with under a justificatory provision such as [section] 1." *Edwards Books*, [1986] 2 S.C.R. at 757.

est in the circumstances presented. The balancing takes place under various formulations, depending on the nature of the first amendment interest implicated by the particular restriction, such as the "compelling governmental interest" test,²⁰ the "commercial speech" doctrine,²¹ the "clear and present danger" test,²² the "symbolic speech doctrine,"²³ and other formulations. The difference between the "balancing approach" developed by the U.S. Supreme Court and that prescribed by the text and structure of the Charter appears to be one of formulations and context. Under the first amendment, the balancing approach operates differently in different contexts. Different "subsidiary doctrines," reflecting the various formulations of the balancing approach, have been developed for evaluating the constitutional permissibility of regulations affecting different kinds of first amendment interests.²⁴ The different "subsidiary doctrines" may affect how the "balance" will be struck in particular circumstances. For example, the individual interest in expression is given comparatively less weight when commercial rather than non-commercial expression is involved.²⁵ Whereas, under section 1 of the Charter, there appears to be no "subsidiary doctrine" applicable in different contexts. In all cases where an infringement of a protected interest is involved, the "ends" and the "means" analysis would appear to be the same. Nonetheless, balancing is at the heart of the constitutional analysis under both systems, and it should not be surprising that the balancing frequently leads to the same constitutional result in particular cases.

B. The Protection of Freedom of Religion

The most significant feature of section 2(a) of the Charter, in comparison with the first amendment, is the omission of a non-establishment

²⁰ See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (stating that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.").

²¹ See, e.g., *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) (four-part analysis to determine whether a particular regulation of commercial speech is constitutionally permissible).

²² See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (state may prohibit advocacy of unlawful action only where such advocacy "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

²³ See, e.g., *United States v. O'Brien*, 391 U.S. 367 (1968) (governmental regulation of "symbolic speech" subject to four-part analysis).

²⁴ The U.S. Supreme Court has also developed a number of specific doctrines, such as "void on its face," prior restraint, and content neutrality, that operate independently of the general balancing approach, to determine the validity of particular kinds of restrictions on expression. These specific doctrines have not, as yet, been considered by the Canadian courts in expression cases; but if they should be adopted, it will be in the context of applying Section 1. See Sedler, *supra* note 2, at 1226-27 n.125.

²⁵ See, e.g., *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981) (upholding constitutionality of billboard regulation as applied to commercial speech, but not as applied to non-commercial speech).

component from section 2(a). Section 2(a) is thus the analogue of the first amendment's free exercise clause, and the omission of a non-establishment clause component from section 2(a) reflects a fundamentally different approach to the protection of freedom of religion in the constitutional systems of the two nations.

1. Prohibition of Official Endorsement

In the United States, there is reference to the "religion clauses" of the first amendment, and the text of the first amendment embodies a two-fold method of protecting freedom of religion. The establishment component prohibits the government from aiding religion and from preferring religion over non-religion. It requires that the government maintain a course of "complete official neutrality toward religion."²⁶ Thus, the establishment clause does not depend upon any showing of direct governmental compulsion against individuals, and is violated by governmental action that aids religion, regardless of whether that action operates to coerce non-observing individuals.²⁷ The free exercise clause provides an additional measure of protection to freedom of religion by invalidating religiously neutral governmental action that has the effect of improperly interfering with, or burdening an individual's religious beliefs and practices.

2. A Traditional Involvement with Religion

In Canada, the constitutional approach to the protection of freedom of religion focuses entirely on governmental interference with, or placing burdens on an individual's religious freedom. One reason for the omission of a non-establishment component in section 2(a) was doubtless to insulate from possible constitutional challenge the long-standing Canadian practice of governmental assistance to denominational schools.²⁸ More significantly, there has been a long history of governmental involvement with religion in Canada, and a non-establishment component would have been inconsistent with this aspect of the Canadian tradi-

²⁶ *Wallace v. Jaffree*, 472 U.S. 38 (1985).

²⁷ See *Engel v. Vitale*, 370 U.S. 421, 430-31 (1962).

²⁸ This practice was first constitutionalized in section 93 of the Constitution Act of 1867. It was again constitutionalized in section 29 of the Charter, which provides that "[n]othing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools." Charter, s. 29. For a discussion of the history of governmental financial assistance to denominational schools in Canada and the operation of section 93 of the Constitution Act of 1867, and section 29 of the Charter, see Reference *Re an Act to Amend the Education Act*, [1986] 53 O.R.2d 513 (Ont. C.A.). The decision of the Ontario Court of Appeals in that case was affirmed by the Supreme Court of Canada, which held specifically that the guarantees of freedom of religion in section 15 did not abrogate from the rights and privileges granted in section 93. Reference *Re Roman Catholic Separate High Schools Funding*, [1987] 77 N.R. 241 (S.C.C.).

tion.²⁹ In any event, because of the absence of a non-establishment component in section 2(a), the government is not required to be neutral toward religion. Governmental practices that favor religion over non-religion or that favor one religion over another religion, are not as such violative of section 2(a). It is only where the governmental action has the effect of imposing "coercive burdens on the exercise of religious beliefs" that it may be found violative of section 2(a).³⁰

The significance of the absence of a non-establishment component in section 2(a) is illustrated by a consideration of prayer and other religious exercises in the public schools. In the United States, officially-sponsored school prayer, Bible reading and the like are violative of the establishment clause because they constitute an official endorsement of religion.³¹ It does not matter that objecting students may be excused from these exercises. Here the basis of the constitutional violation is not the interference with the students' free exercise of religion, but the government's official sponsorship of religion and the resultant breach of the requirement of complete official neutrality toward religion.³² In Canada, however, the challenge to such practices must be on the ground that they impose "coercive burdens on the exercise of religious beliefs." If such "coercive burden" cannot be shown, there is no violation of section 2(a).

In *Re Zylberberg and Director of Education*³³ there was a section 2(a) challenge to a requirement that the schoolday begin with the reading of the Bible and the recitation of the Lord's Prayer. The regulation specifically provided that objecting pupils could be excused from the exer-

²⁹ The Charter begins with the declaration "[w]hereas Canada is founded upon principles that recognize the supremacy of God and the rule of law". Charter, Preamble. In *Re Zylberberg & Director of Education*, Judge O'Leary, in holding that prayer and Bible reading in the public schools did not violate section 2(a), observed: "Where a country is founded on the principle of the supremacy of God there is no obligation on the schools to spend the same effort reinforcing the belief of non-believers that God does not exist as in teaching believers about the nature of God." *Re Zylberberg & Director of Educ.*, [1986] 55 O.R. 2d 749, 763 (Ont. H.C.).

³⁰ See *Regina v. Edwards Books and Art, Ltd.*, [1986] 2 S.C.R. 713; *Regina v. Big M Drug Mart*, [1985] 1 S.C.R. 295.

³¹ See, e.g., *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Stone v. Graham*, 449 U.S. 39 (1980); *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962). See also *Edwards v. Aguillard*, 107 S. Ct. 2573 (1987) (law prohibiting the teaching of evolution in the public schools unless it was accompanied by the teaching of "creation science" violative of the establishment clause).

³² For a discussion of this point, see *Schempp*, 374 U.S. at 222-23:

[t]o withstand the strictures of the [e]stablishment [c]lause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion (citations omitted). . . . [I]t is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. The distinction between the two clauses is apparent—a violation of the [f]ree [e]xercise [c]lause (sic) is predicated on coercion while the [e]stablishment [c]lause (sic) violation need not be so attended."

³³ [1986] 55 O.R.2d 749 (Ont. S.C.).

cises.³⁴ A majority of the Ontario Divisional Court relied on the provision for excusing an objecting student to find that there was no violation of section 2(a).³⁵ It rejected the contention that a claimed "pressure to conform" constituted "coercion" for purposes of section 2(a).³⁶ The dissenting judge found that the exemption did not provide any real choice for non-Christian students and that the result was an unjustifiable interference with their freedom of conscience and religion.³⁷ In any event, because of the absence of a non-establishment component in section 2(a), officially-sponsored religious practices in the public schools, which are constitutionally impermissible in the United States, may be able to withstand attack in Canada under section 2(a).³⁸ If they cannot withstand constitutional attack, it will be because the courts will find that they are "inherently coercive." Also immune from constitutional challenge in Canada are other governmental actions that benefit religion, but that cannot be shown to place a "coercive burden" on anyone's religious freedom.³⁹

On the other hand, the Supreme Court of Canada has held that the federal Lord's Day Act⁴⁰ violated section 2(a), because its purpose compelled the observance of the Christian sabbath, thus advancing Christianity at the expense of other religions.⁴¹ The federal Lord's Day Act must be distinguished from the more typical Sunday closing law, which has been upheld against a section 2(a) challenge in the same manner as Sunday closing laws have been upheld against free exercise challenges in the United States. The federal Lord's Day Act, generally prohibiting work or commercial activity "on the Lord's Day," was enacted by Parliament in 1903 pursuant to its criminal law power. It has only a religious purpose. Unlike U.S. state Sunday closing laws, this law could not be found to have the contemporary secular purpose of providing a uniform day of rest.⁴² The reason for this relates to the allocation of federal and provincial power under the Constitution Act of 1867. The federal government's

³⁴ *Id.* at 752.

³⁵ *Id.* at 749-50.

³⁶ *Id.* at 757-60.

³⁷ *Id.* at 768-69.

³⁸ *Id.* at 780-82 (Judge Anderson pointedly emphasized that the American cases involving religious practices in the public schools were decided on establishment clause grounds, and so were not helpful in determining the validity of such practices under section 2(a).).

³⁹ See, e.g., *Larkin v. Grendel's Den, Inc.* 459 U.S. 116 (1982) (church veto of liquor license law); *ACLU v. City of Birmingham*, 791 F.2d 1561 (6th Cir.), *cert. denied*, 107 S. Ct. 421 (1986) (display of purely religious symbols, such as a nativity scene, on public property); cf. *Lynch v. Donnelly*, 465 U.S. 668 (1984) (no establishment clause violation by inclusion of nativity scene in extensive holiday season display, consisting otherwise entirely of secular symbols).

⁴⁰ Lord's Day Act, R.S.C. ch. L-13 (1970).

⁴¹ *Regina v. Big M Drug Mart*, [1985] 1 S.C.R. 295.

⁴² See *McGowan v. Maryland*, 366 U.S. 420 (1961) (finding that this was the contemporary purpose of Sunday closing laws and upholding those laws against establishment clause challenge).

criminal law power relates to the promotion of "public peace, order, security, health [and] morality,"⁴³ and the Lord's Day Act could be sustained in the absence of section 2(a) as being *intra vires* Parliament on the ground that it was designed to promote public morality by requiring observance of the sabbath.⁴⁴ The Act could not have the secular purpose of providing a uniform day of rest, because this would involve "property and civil rights within the province" under section 92(13) of the Constitution Act of 1867, and so would be *ultra vires* Parliament.⁴⁵

Since the federal Lord's Day Act had the religious purpose of compelling observance of the Christian sabbath, it interfered with freedom of conscience and religion under section 2(a), because it required persons to refrain from working in a governmental effort to advance Christian beliefs.⁴⁶ In this regard, the Supreme Court of Canada gave an expansive meaning to freedom of conscience and religion under section 2(a). Freedom of religion, the Court held, means more than the right to hold religious beliefs and to act in accordance with those beliefs.⁴⁷ The Court further stated:

Freedom can primarily be characterized by the absence of coercion or restraint. . . . Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience. . . . To the extent that it binds all to a sectarian Christian ideal, the *Lord's Day Act* works a form of coercion inimical to the spirit of the *Charter* and the dignity of all non-Christians. . . .

If I am a Jew or a Sabbatarian or a Muslim, the practice of my religion at least implies my right to work on a Sunday if I wish. It seems to me that any law purely religious in purpose, which denies me that right, must surely infringe my religious freedom.⁴⁸

The expansive meaning given to freedom of conscience and religion, reflected in *Regina v. Big M Drug Mart, Ltd.*⁴⁹ indicates that government

⁴³ P. HOGG, *supra* note 2, at 400 (quoting Justice Rand's opinion from *Re Reference as to the Validity of Section 5(A) of the Dairy Industry Act*, [1949] S.C.R. 1, 50).

⁴⁴ See *In re Legislation Respecting Abstinence from Labour on Sunday*, [1905] 35 S.C.R. 581.

⁴⁵ As stated in *Big M Drug Mart*: "A finding that the *Lord's Day Act* has a secular purpose is, on the authorities, simply not possible. Its religious purpose, in compelling sabbatical observance, has been long-established and consistently maintained by the courts of this country." *Big M Drug Mart*, [1985] 1 S.C.R. at 331 (Dickson, C.J.). It was also noted that "[w]ere its purpose not religious but rather the secular goal of enforcing a uniform day of rest from labour, the Act would come under section 92(13), property and civil rights in the province and hence, fall under provincial rather than federal competence." *Id.* at 355.

⁴⁶ *Id.* at 350-51.

⁴⁷ *Id.* at 349-51.

⁴⁸ *Id.* at 336-38.

⁴⁹ *Id.* at 295.

neutrality toward religion is required in Canada, to the extent that the government cannot interfere with an individual's freedom of action in order to advance a religious purpose.⁵⁰

However, when the law advances a secular purpose, the section 2(a) claim, like a free exercise claim under the first amendment, is subject to a balancing analysis. In *Regina v. Edwards Books and Art, Ltd.*,⁵¹ the Supreme Court of Canada upheld against section 2(a) challenge a provincial Sunday closing law, thereby reaching the same result as the U.S. Supreme Court reached under the free exercise clause.⁵² There the law was found to have the secular purpose of providing for a uniform day of rest for retail workers. Note that if the law were found to have a religious purpose, it would be *ultra vires* the province, so it was not necessary for the Court to find a "contemporary secular purpose," as was the case with state Sunday closing laws in the United States.⁵³ And just as the U.S. Supreme Court found no establishment clause violation resulting from the fact that the uniform day of rest chosen coincided with the Christian sabbath, the secular purpose of the provincial law at issue here was not obviated by the fact that the legislature chose Sunday as the uniform day of rest.⁵⁴

This law, unlike the Sunday closing laws sustained by the U.S. Supreme Court, did provide a limited Saturday exemption: retailers having no more than seven employees or 5000 square feet of store space could stay open on Sunday if they closed their stores for a twenty-four hour period Friday to Saturday evening. The exemption was available to all retailers without regard to their religion. The section 2(a) challenge was based on the failure to include a complete exemption for all Sabbatarians. The Court in *Edwards Books* concluded that the law did abridge the freedom of conscience and religion of some Sabbatarians, but that it was a demonstrably justifiable reasonable limit under section 1. The decision addressed the kind of concerns addressed by the U.S. Supreme Court in holding that a Sabbatarian objection was not constitu-

⁵⁰ See also *id.* at 339-341 (Dickson, C.J.'s discussion about the overlap of the establishment and free exercise clauses of the U.S. Constitution).

For other cases invalidating Sunday restrictions, see *Regina v. Quinlan*, 60 N.S.R.2d 224 (Cy. Ct. 1983) (ban on setting of lobster traps in certain areas on Sunday); *Regina v. Peddle & Rice*, [1986] 61 Nfld. & P.E.I.R. 57 (S.C., Trial Div.) (ban on Sunday hunting).

In *Big M Drug Mart*, the government argued that a corporation could not assert a section 2(a) challenge. The Court rejected the argument on the ground that any party charged with a criminal offense could challenge the law as being violative of the Charter. *Big M Drug Mart*, [1985] 1 S.C.R. at 314-16.

⁵¹ [1986] 2 S.C.R. 713.

⁵² *Braunfeld v. Brown*, 366 U.S. 599 (1961).

⁵³ In light of *Big M Drug Mart*, if the law had a religious purpose, it would also be violative of section 2(a). For a discussion of these points, see *Edwards Books*, [1986] 2 S.C.R. at 737.

⁵⁴ *Edwards Books*, [1986] 2 S.C.R. at 744-47.

tionally required under the first amendment's free exercise clause. These concerns related to impairment of the uniform day of rest objective and to the undesirability of official inquiry into religious beliefs. As Chief Justice Dickson concluded: "The infringement is not disproportionate to the legislative objectives. A serious effort has been made to accommodate the freedom of religion of Saturday observers, insofar as that is possible without undue damage to the scope and quality of the pause day objective. It follows that I would uphold the Act under s. 1."⁵⁵ Justice LaForest took the position that there would be no constitutional violation even if the limited exemption were not included, and emphasized the impracticality of a religious-based exemption.⁵⁶

3. Balancing Competing Interests

What is significant is the similarity of approach and the similarity of result reached by the Supreme Court of Canada and the U.S. Supreme Court in dealing with the same issue, a quarter of a century apart. Both courts made the same *value judgment* with respect to the competing individual and societal interests. The government's interest in providing a uniform day of rest for all employees was found to be of sufficient importance and validity to outweigh the burden that was imposed on the religious freedom of Sabbatarians. Both courts recognized that a strong justification was required for the resulting burden on religious freedom, but both found that this justification was demonstrated and upheld the Sunday closing laws.⁵⁷

The results reached in the other freedom of conscience and religion cases decided by the Canadian courts closely track those reached by the U.S. courts in comparable cases. The Canadian courts, for example, have upheld against section 2(a) challenges, governmental regulation and certification of religious schools,⁵⁸ court-ordered medical treatment of

⁵⁵ *Id.* at 783.

⁵⁶ *Id.* at 794-805. Two justices took the position that the law did not infringe on freedom of conscience and religion within the meaning of section 2(a). One justice dissented, contending that the limited exemption did not go far enough, and that the government was required to exempt all persons who closed their stores on another day for religious reasons.

⁵⁷ On the other hand, a law allowing an employee to be relieved from work on the day of the employee's Sabbath, which the U.S. Supreme Court invalidated on establishment clause grounds in *Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), would be constitutionally permissible in Canada.

⁵⁸ See *Regina v. Jones*, [1986] 2 S.C.R. 284. In that case, the provincial law was very liberal in authorizing home schooling and certification of private schools. A pastor of a fundamentalist church who was educating his and other children in a church basement claimed that a requirement that he apply for certification of his school was violative of section 2(a). The Court unanimously rejected this contention. Four justices were of the view that the requirement did not infringe on freedom of conscience and religion within the meaning of section 2(a), and three were of the view that the requirement was a demonstrably justifiable reasonable limit under section 1. An unbroken line of American state court decisions has upheld regulation and certification requirements against

children contrary to the parents' religious beliefs,⁵⁹ and bans on use of illegal drugs as applied to purported use for religious purposes.⁶⁰

Religious freedom has received the same type of protection in Canada under section 2(a) as it has received in the United States under the first amendment's free exercise clause. Moreover, because of the expansive meaning given to freedom of conscience and religion in *Big M Drug Mart*, governmental action designed to advance religion will be invalidated whenever it has a coercive effect on individual freedom. The only difference between the situation in Canada and the situation in the United States is that in Canada, the absence of a non-establishment component in section 2(a) suggests that governmental aid to religion and governmentally-sponsored religious practices may be constitutionally permissible so long as they do not have the effect of imposing coercive burdens on the exercise of religious beliefs.⁶¹

C. *The Protection of Freedom of Expression*

The language of section 2(b) is more specific than the comparable language of the first amendment, but the textual differences between section 2(b) and the first amendment do not appear to be significant in influencing the results in the cases decided by the Canadian courts. Therefore, it is convenient to refer to "freedom of expression" as the interest protected under section 2(b), noting this "freedom of expression" interest comprises "freedom of thought, belief and expression, including freedom of the press and other media of communication."⁶² Section 2(b), like the first amendment, is broadly phrased and open-ended, and

free exercise challenge. See, e.g., *State v. Rivinius*, 328 N.W.2d 220 (N.D. 1982), *cert. denied*, 460 U.S. 1070 (1983). *Sheridan Church v. Department of Ed.*, 132 Mich. App. 1, 348 N.W. 2d 263 (1984).

⁵⁹ See *Re S.E.M., R.D.M. & E.M. v. Director of Child Welfare*, [1987] 1 W.W.R. 327 (Alta. Q.B. 1986). See also *Regina v. Tutton*, [1985] 44 C.R.3d 193 (Ont. C.A.) (prosecution against parent for failure to provide child with necessities of life). For comparable American cases, see *Jehovah's Witnesses v. King County Hosp.*, 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968); *In re Sampson*, 29 N.Y.2d 900, 278 N.E.2d 918 (1972).

⁶⁰ See *Regina v. Kerr*, [1986] 75 N.S.R.2d 305 (S.C.). For illustrative American cases, see *Leary v. United States*, 383 F.2d 851 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969); *Lewellyn v. State*, 489 P.2d 511 (Okla. 1971) (criminal case).

See also *Baxter v. Baxter*, [1983] 45 O.R.2d 348 (Ont. H. C.) (grant of divorce under the Divorce Act is not violative of section 2(a)). For a comparable U.S. case, see *Reynolds v. United States*, 98 U.S. 145 (1879). There is no doubt that the Canadian courts would hold that section 2(a) does not protect a claim of religious entitlement to enter into plural marriages.

⁶¹ See *Big M Drug Mart*, [1985] 1 S.C.R. 295. Chief Justice Dickson's opinion suggests that while "the applicability of the *Charter* guarantee of freedom of conscience and religion does not depend on the presence or absence of an (anti-establishment principle) in the Canadian Constitution," there may be a tolerance of certain governmental aid to religion or religious activities. The acceptability of such legislation "will have to be determined on a case by case basis." *Id.* at 341.

⁶² Section 2(c), unlike the first amendment, specifically guarantees freedom of association.

requires substantial interpretation by the courts, as applied to a variety of governmental actions impacting on freedom of expression.⁶³

1. Balance: A Congruence of Approach

This is where section 1 comes into play. Section 1 of the Charter textually embodies the same kind of balancing approach that the U.S. Supreme Court has developed over the years in resolving first amendment questions.⁶⁴ As pointed out previously, there are some differences in the balancing process, relating to formulations and context, but balancing is at the heart of the constitutional analysis under both systems, and the approach that the Canadian courts are required to take to the resolution of freedom of expression issues under section 1 is very similar to the approach that the U.S. Supreme Court has developed to deal with the resolution of freedom of expression issues under the first amendment. From this approach, it should not be surprising that the balancing will often lead to the same constitutional result in particular cases.

However, the constitutional protection of freedom of expression in the United States has evolved over a long period of time. Constitutional doctrine in this area has developed in a *line of growth*, largely in response to conditions existing at different times in U.S. society. That is, the content of first amendment doctrine has been strongly influenced by the context in which it first developed. That context was the governmental repression of dissent and the expression of unpopular ideas.⁶⁵ The "chilling effect" concept gained prominence as a result of this course of development, giving rise to particular doctrines, such as the "void on its face doctrine,"⁶⁶ and providing a possible analytical basis for invalidating any law regulating expression.⁶⁷ In addition, as first amendment doctrine has evolved over a period of time, it has come to incorporate certain principles, such as the requirement of content neutrality,⁶⁸ and the presump-

⁶³ For general discussions of freedom of expression by Canadian commentators, see THE MEDIA, THE COURTS AND THE CHARTER (P. Anisman & A. Linden eds. 1986); Beckton, *Freedom of Expression*, in CANADIAN CHARTER OF RIGHTS AND FREEDOMS 75 (W. Tarnopolsky & G. Beaudoin eds. 1982); McKay, *Freedom of Thought, Belief, Opinion and Expression, Including Freedom of the Press and Other Media of Communications and Freedom of Peaceful Assembly: Whose Interests Are Protected* (paper presented at Canadian Bar Association Program, Oct. 23-24, 1987); Moon, *The Scope of Freedom of Expression*, 23 OSGOODE HALL L.J. 331 (1985).

⁶⁴ See *supra* notes 18-24 and accompanying text.

⁶⁵ This development is reflected in the evolution of the "clear and present danger" test from *Schenk v. United States*, 249 U.S. 47 (1919), through *Dennis v. United States*, 341 U.S. 494 (1951), to *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

⁶⁶ See *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973) (discussion of the relationship between the concept of "chilling effect" and the "void on its face" doctrine).

⁶⁷ See, e.g., *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

⁶⁸ See, e.g., *Carey v. Brown*, 447 U.S. 455 (1980).

tive invalidity of "prior restraints."⁶⁹ Finally, the U.S. Supreme Court has developed different formulations for the application of the balancing approach in particular contexts, which have given rise to a number of "subsidiary doctrines."⁷⁰ At present, this means there is an extensive body of constitutional doctrine applicable in the United States to the protection of freedom of expression. Particular freedom of expression claims will be resolved within the analytical framework of that doctrine.

In Canada, by contrast, the constitutional doctrine applicable to the protection of freedom of expression is just beginning to develop. Its growth differs from that in which the development of first amendment doctrine occurred in the United States. It is not developing in the context of governmental repression of dissent and social change effort, but rather in the context of a "general climate of freedom" that currently prevails both in Canada and in the United States. In the United States today, the first amendment cases that are arising generally involve questions such as the protection afforded to "commercial speech," pornography and "adult entertainment," and access and publication rights of the media. *These are the same kind of questions that are arising in Canada today under section 2(b) of the Charter.* Thus, the context in which freedom of expression doctrine will be developing in Canada is quite different from the context in which freedom of expression doctrine has developed in the United States. Accordingly, one should not expect to see the same kind of line of growth of freedom of expression doctrine in Canada as in the United States. Also, particular concepts, such as "chilling effect," that have turned out to be so significant in the United States, may not become a part of freedom of expression doctrine in Canada.

In addition, as discussed previously, the "subsidiary doctrines," such as the "commercial speech" doctrine, and the "symbolic speech" doctrine that have been developed under the balancing approach applied in freedom of expression cases by the U.S. Supreme Court, would not seem to be appropriate for the balancing required under section 1 of the Charter. Finally, there is a difference between the meaning of "state action" under the Charter and its meaning under provisions of the U.S. Constitution, such as the first amendment. Under the U.S. Constitution, "state action" includes not only legislation, but common law rules applied by state courts in litigation between private persons.⁷¹ In Canada, the Charter has been held not to be applicable to common law rules applied by the courts in litigation between private persons. Thus, a court

⁶⁹ See, e.g., *New York Times Co. v. United States*, 403 U.S. 713 (1971) (the Pentagon Papers case).

⁷⁰ See *supra* notes 19-24 and accompanying text.

⁷¹ See, e.g., *Shelley v. Kraemer*, 334 U.S. 1 (1948) (state common law rules enforcing racially restrictive covenants); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (state common law of defamation).

injunction against secondary picketing, based on enforcement of a common law rule which rendered such picketing tortious, could not be challenged under section 2(b) of the Charter.⁷² Under this view of "state action," insofar as the defamation law of a Canadian province is based on common law rather than legislation, the "New York Times rule"⁷³ could not be structurally applicable, and the imposition of liability for defamation would not be subject to constitutional restraint.⁷⁴

The above discussion is designed to provide the point of departure for a comparison between the protection of freedom of expression under section 2(b) of the Charter and under the first amendment. The following similarities may be noted: (1) the provisions of both section 2(b) and the first amendment are broadly phrased and open-ended and thus require substantial interpretation by the courts; (2) under both constitutional systems the basic approach to constitutional protection of freedom of expression involves a balancing of the expression interest against competing societal interests; and (3) at the present time the same kinds of cases involving a claimed interference with freedom of expression are arising in Canada and in the United States. At the same time, the following differences may be noted: (1) the context in which freedom of expression doctrine will be developing in Canada is quite different from the context in which freedom of expression doctrine has developed in the United States, so that particular concepts which have turned out to be

⁷² Retail, Wholesale & Department Store Union, Local 580 v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573. The Charter applies to common law rules only insofar as the common law rule is the basis of governmental action. It also applies in actions between private litigants where one party relies on legislation. The Charter does not apply in actions between private litigants where only common law rules, and not legislation, are involved. The Court based its decision in *Dolphin Delivery* on section 32(1), which provides as follows:

(1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and the Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Charter, s. 32(1). As McIntyre, writing for the Court, stated:

In the case at bar, however, we have no offending statute. We have a rule of the common law which renders secondary picketing tortious and subject to injunctive restraint, on the basis that it induces a breach of contract. While, as we have found, the *Charter* applies to the common law, we do not have in this litigation between purely private parties any exercise of or reliance upon governmental action which would invoke the *Charter*.

Dolphin Delivery, [1986] 2 S.C.R. at 603-04.

⁷³ The rule is often described as "Times malice." *New York Times v. Sullivan*, 379 U.S. 254 (1964).

⁷⁴ Nor could a Canadian court hold that the issuance of an injunction sought by a realtor whose home was being picketed to protest his racially discriminatory business practices would amount to an unconstitutional "prior restraint." See *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971).

significant in freedom of expression doctrine in the United States might not become a part of freedom of expression doctrine in Canada; (2) subsidiary doctrines which have been developed by the U.S. Supreme Court as part of the balancing process in freedom of expression cases would not seem to be appropriate for balancing under section 1 of the Charter; (3) because of differences in the meaning of "state action" under both the Charter and the first amendment, certain first amendment doctrines, such as the "New York Times rule," may be structurally inapplicable in Canada.

In light of the above similarities and differences, one would expect to find different and similar *results* reached by the Canadian and U.S. courts in freedom of expression cases. What emerges from a comparison of the cases that have arisen thus far, however, is a much higher degree of similarity than of difference. This will not change, even as more freedom of expression issues are resolved by the Supreme Court of Canada. In practice, the same kinds of considerations that have influenced the results in the U.S. cases appear to be influencing the results in the cases decided by the Canadian courts. Again, the Canadian courts appear to be resolving the *value choices* in these cases in much the same way as these choices have been resolved by the U.S. courts.

2. The Balancing Approach Applied

A review of the Canadian cases will focus on the following areas:

- (1) pornography and "adult entertainment"; (2) commercial expression;
- (3) the media and the courts; and (4) "anti-hate" legislation.

(a) Pornography and "Adult Entertainment"

Pornography, as used here, refers generically to the description or depiction of sexual activity. The constitutional questions appear in the context of what restrictions on the dissemination of pornography are permissible. The U.S. Supreme Court has dealt with these constitutional questions in a *definitional* way by drawing a distinction between "pornography" and "obscenity," and holding that material defined as "obscenity" is not entitled to constitutional protection.⁷⁵ Under this definitional approach, all pornography that is not "obscene" is constitutionally protected. Moreover, certain procedural safeguards have been

⁷⁵ See *Miller v. California*, 413 U.S. 15 (1973); *Roth v. United States*, 354 U.S. 476 (1957). Under the current standard set forth in *Miller*, a work is "obscene" for constitutional purposes if the following can be shown: (1) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to a prurient interest; (2) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) the work, taken as a whole, lacks serious literary, artistic, political or scientific value. *Miller*, 413 U.S. at 24-25. The relevant "contemporary community standards" are those of the local community in which the work is distributed.

imposed, as a constitutional matter, to insure that the government, in its efforts to prevent the dissemination of "obscenity," does not interfere with or inhibit the dissemination of constitutionally protected pornography.

Canada's approach to the constitutional validity of criminal prohibitions against the dissemination of pornography has turned out to be definitional, too. "Obscenity," defined slightly differently in Canada than in the United States, is subject to criminal prosecution, while pornography that does not reach the level of "obscenity" is not. While the Supreme Court of Canada has not yet passed on the question, there can be little doubt that the ban on the dissemination of "obscenity" under this definitional approach will constitute a "demonstrably justifiable reasonable limit" on freedom of expression under section 1 and thus not be violative of section 2(b).

In Canada, criminal prohibitions against the dissemination of pornography and the display of sexually-oriented activity come within federal power, while all other forms of regulation of pornography and sexually-oriented activity come within provincial power.⁷⁶ The criminal prohibition is contained in section 159(8) of the Criminal Code, which defines "obscenity," as "any publication a dominant character of which is the undue exploitation of sex, or of sex, and any one or more of the following subjects, namely crime, horror, cruelty and violence." Since the prohibition is contained in a federal law, the standard for determining "obscenity" is a national one: it is the objective standard of the tolerance in accordance with the contemporary standards of the Canadian community, and not merely to project one's own personal ideas of what is tolerable."⁷⁷ In defining the meaning of "undue exploitation of sex" for purposes of section 159(8), the emphasis is not upon sexual explicitness as such, but upon the degradation or dehumanization of the persons

⁷⁶ Provincial regulation of pornography and "adult entertainment" has been generally sustained against the challenge that such regulation is *ultra vires* the province, as "being in relation to the criminal law." See *Nova Scotia Bd. of Censors v. McNeil*, [1978] 2 S.C.R. 602 (motion picture censorship); *Rio Hotel Ltd. v. Liquor Licensing Bd.*, [1987] 77 N.R. 104 (S.C.C.) (prohibition of nude dancing in licensed liquor establishments). But see *Re Koumoudouros & Metropolitan Toronto*, [1985] 52 O.R.2d 442 (Ont. C.A.) (municipal by-law requiring that performers in liquor-licensed establishments cover their pubic areas *ultra vires* the province as constituting the regulation of public morals, and so "being in relation to the criminal law"). In *Rio Hotel*, Justice Estey indicated that *Koumoudouros* was wrongly decided. 77 N.R. at 125.

⁷⁷ *Towne Cinema Theatres v. Regina*, [1985] 45 C.R.3d 1, 17. As Chief Justice Dickson stated, "[w]hat matters is not what Canadians think is right for themselves to see. What matters is what Canadians would not abide other Canadians seeing because it would be beyond the contemporary Canadian standard of tolerance to allow them to see it." *Id.* The degree of explicitness tolerated, however, could vary, depending upon the audience and the circumstances. See also *Regina v. Sudbury News Serv.*, [1978] 18 O.R.2d 428 (Ont. C.A.).

portrayed.⁷⁸ The obscenity prosecutions coming before the Canadian courts have typically involved home-viewing video cassettes that feature sexual violence and other forms of sexual degradation of women. The courts that have dealt with these cases have held that these films are "obscene" within the meaning of section 159(8). They have also held that the definition of "obscenity" under that section constitutes a "demonstrably justifiable reasonable limit" under section 1 and so does not violate section 2(b).⁷⁹

It is interesting to note that the questions as to the constitutional protection of pornography under section 2(b) are arising in Canada at a time when the tolerable limits of pornography, both in Canada and in the United States, have gone far beyond what they were thirty years ago when the question of the constitutional protection of pornography was first decided by the U.S. Supreme Court.⁸⁰ This is due to the fact that much pornography was held to be constitutionally protected under the first amendment, giving rise to a pornography and "adult entertainment" industry in the United States, which "exports its wares" to Canada.⁸¹ Moreover, citizens on both sides of the border constitute a much more "sexually open society." There is much greater tolerance of sex and nudity in films and magazines, and of nude dancing and other forms of "adult entertainment." There is also a thriving "commercial sex" industry in both countries.

The concern today is with an entirely different genre of pornography than was prevalent thirty years ago. Today's pornography features sexual violence and the degradation of women,⁸² and even uses children as

⁷⁸ One concurring judge distinguished such dehumanization, stating:

It seems to me that the undue exploitation of sex at which [section] 159(8) is aimed is the treatment of sex which in some fundamental way dehumanizes the persons portrayed and, as a consequence, the viewers themselves It is this line between the mere portrayal of human sexual acts and the dehumanization of people that must be reflected in the definition of "undueness."

Towne Cinema Theatres, 45 C.R.3d at 29 (Wilson, J., concurring).

⁷⁹ See, e.g., *Regina v. Red Hot Video, Ltd.*, [1985] 45 C.R.3d 36 (B.C. C.A.); *Regina v. Wagner*, [1985] 36 Alta. L.R. 301 (Alta. C.A.); *Regina v. Ramsingh*, [1984] 29 Man. R.2d 110 (Man. C.A.). But cf. *Regina v. Metro News Ltd.*, [1986] 56 O.R.2d 321, 329 (Ont. C.A.) (jury could find that photographs contained in an issue of *Penthouse* magazine, which "depict[ed] young women bound by ropes with the genitalia displayed" could be found to be "obscene" under section 159(8)). For cases where particular works were found not "obscene," see *Regina v. Video World Ltd.*, [1985] 36 Man. R.2d 68 (Man. C.A.); *Re Ontario Film & Video Appreciation Soc'y & Ontario Film Bd.*, [1986] 57 O.R.2d 339 (Ont. H.C.).

⁸⁰ *Roth v. United States*, 354 U.S. 476 (1957).

⁸¹ Apparently most pornography disseminated in Canada has been produced in the United States or otherwise outside of Canada.

⁸² See REPORT OF THE ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY 323-28 (1986).

participants.⁸³ The harmful effects of this new genre of pornography have been emphasized by feminist writers. They have contended that sexually violent and degrading and dehumanizing pornography should be proscribed, and that for constitutional purposes, this kind of pornography must be distinguished from constitutionally protected "erotica."⁸⁴

It is precisely this distinction that has been drawn by the Canadian courts in their interpretation of section 159(8).⁸⁵ In so doing, they have expressed a concern over the harmful effects of this new genre of pornography.⁸⁶ Should the Supreme Court of Canada be called on to pass on this question, it will hold, as have the lower courts, that the definition of "obscenity" under section 159(8) constitutes a demonstrably justifiable reasonable limit on expression. In this sense, it can be contended that the "feminist perspective" on pornography will have prevailed in Canada.⁸⁷

In the United States, the constitutional approach to the protection of pornography developed at a time when the focus was on the sexual explicitness of "erotica," and when sexually violent and degrading and dehumanizing pornography did not appear to be prevalent. The resulting constitutional doctrine was shaped with reference to sexual explicitness, and under the *Miller*⁸⁸ test, it is possible that some sexually explicit "erotica" would be held to be "obscene" for constitutional purposes. *However, of much greater significance is that all the sexually violent and degrading and dehumanizing pornography that in Canada has been held*

⁸³ The government can prohibit the dissemination of any pornography involving children as participants, regardless of whether the work is "obscene" under the *Miller* standard. *New York v. Ferber*, 458 U.S. 747 (1982).

⁸⁴ See, e.g., Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L.J. 1 (1985); MacKinnon, *Pornography, Civil Rights and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985); Noonan, *Pornography: Preferring the Feminist Approach of the British Columbia Court of Appeal to That of the Fraser Committee*, 45 C.R.3d 61 (1985). Compare Lahey, *The Charter and Pornography: Toward a Restricted Theory of Constitutionality Protected Expression*, in LITIGATING THE VALUES OF A NATION: THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS 265 (Weiler & Elliot eds. 1986) [hereinafter LITIGATING THE VALUES OF A NATION] with Arbour, *The Politics of Pornography: Towards an Expansive Theory of Constitutionally Protected Expression*, in LITIGATING THE VALUES OF A NATION, *supra* this note, at 294 (view of obscenity from a feminist perspective).

⁸⁵ See *Wagner*, 36 Alta.L.R. at 331.

⁸⁶ In this regard, the British Columbia Court of Appeal has stated that

[j]udges are not so insulated from observing community standards that they have failed to notice the growing concern expressed by the Canadian community at large that the undue sexual exploitation of women and children depicted in certain publications and films can, in certain circumstances, lead to abject and servile victimization. To protect these classes of our society, Parliament has enacted [section] 159, a precise and understandable standard for the guidance of those who would contravene contemporary Canadian community standards.

Red Hot Video, Ltd., 45 C.R.3d at 43-44.

⁸⁷ See Noonan, *supra* note 84, at 65-67.

⁸⁸ *Miller v. California*, 413 U.S. 15 (1973).

to be "obscene" under section 159(8) would be held to be "obscene" under the *Miller* test as well. Such material would be found to "appeal to a prurient interest in sex," to "depict sexual conduct in a patently offensive way," and to "lack serious literary, artistic, political or scientific value."⁸⁹

In other words, although the constitutional protection of pornography in the United States has developed in a different context and time frame than the constitutional protection of pornography in Canada, the nature and degree of constitutional protection appears to be substantially the same in both nations. Pornography that features sexual violence and sexual degradation and dehumanization is not protected in either nation. It is not protected in Canada because it is prohibited by section 159(8). The prohibition of such pornography has been held to constitute a "demonstrably justifiable reasonable limit" under section 1 and so is not violative of section 2(b). Such degradation and dehumanization is not constitutionally protected in the United States—and so can be prohibited by both the federal government and the states—because it is likely to be found "obscene" under the *Miller* test. Insofar as there is any difference between the protection of pornography in Canada and the United States, the difference is marginal. Some sexually explicit "erotica" that does not come within the definition of "obscenity" under section 159(8) of the Criminal Code might be found to be "obscene" under the *Miller* test. But that is all. In effect, the courts in both nations have made the same value choice as to the nature and degree of constitutional protection that will be extended to the dissemination of pornography.⁹⁰

Provincial regulation of pornography and "adult entertainment" in Canada has given rise to Charter challenges primarily on the ground that the particular regulation does not constitute a "reasonable limit prescribed by law" within the meaning of section 1. The results reached by the Canadian courts are similar to those reached by the courts in the United States, under the "void on its face" doctrine. For example, Ontario's film censorship law⁹¹ was held violative of the Charter, because it contained no standards to govern the discretion of the censorship board. Under the law no film could be shown in Ontario unless it had been

⁸⁹ See *supra* note 75. However, the "bondage photographs" in Penthouse magazine would be constitutionally protected, because under the *Miller* test, they could not be considered in isolation from the work as a whole. The result in the *Regina v. Metro News, Ltd.*, [1986] 56 O.R.2d 321 (Ont. C.A.), seems to be questionable, both as a matter of interpretation of section 159(8), and as a constitutional matter under section 2(b).

⁹⁰ The author does not believe in this value choice. The author's view, based on the Black-Douglas dissents in *Roth*, is that *all* pornography, no matter how violent, degrading or dehumanizing or howsoever linked to male domination or capable of causing tangible harm to women, should be protected. *Roth*, 354 U.S. at 508. Pornography is "pure speech" and the expression of an idea, no matter how odious that idea may be to most of us. But that is another matter.

⁹¹ Theatres Act, R.S.O. 1980, c. 498, s. 3(2)(a),(b).

licensed by the censorship board, and the board had the power to censor any film and to cut from the film any portion of which it did not approve. As the Ontario Court of Appeals has noted: "The subsection allows for the complete denial or prohibition of the freedom of expression in this particular area and sets no limits on the Ontario Board of Censors. It clearly sets no limit, reasonable or otherwise, on which an argument can be mounted that it falls within the saving words . . . of the Charter, 'subject only to such reasonable limits prescribed by law.'" ⁹²

In the same vein, a federal ban on the importation of books of an immoral or indecent character was held to be too vague to constitute a reasonable limit prescribed by law. ⁹³ A municipal regulation of bookstores selling books and magazines which appeal to, or are designed to appeal to, "erotic or sexual appetites," was likewise held to be too vague to constitute a "reasonable limit prescribed by law." ⁹⁴ The same was true of a regulation prohibiting the display of erotic goods, defined as goods appealing to or designed to appeal to erotic or sexual appetites or inclinations. ⁹⁵ In the United States, any such regulation would be found to be "void on its face" because of its vagueness and overbreadth. ⁹⁶

A number of questions dealing with pornography and "adult entertainment" regulation that have been resolved in the United States are unresolved in Canada, but may arise in the future. These would include questions of whether there are constitutionally required procedures that must be a part of any provincial film censorship scheme or other restriction on the dissemination of pornography; ⁹⁷ whether it is permissible for a municipality to impose zoning restrictions on the location of "adult entertainment" establishments; ⁹⁸ and whether there may be regulation or

⁹² *Re Ontario Film & Video Appreciation Soc'y and Ontario Bd. of Censors*, [1984] 45 O.R.2d 80, 82 (Ont. C.A.).

⁹³ *Re Luscher & Deputy Minister of Revenue Canada, Customs & Excise*, [1985] 17 D.L.R.4th 503, 508-10 (Fed. C.A.).

⁹⁴ *Re Information Retailers Assoc. of Metro. Toronto, Inc. & Metropolitan Toronto*, [1985] 52 O.R.2d 449, 465 (Ont. C.A.).

⁹⁵ *Re Hamilton Independent Variety & Confectionary Stores, Inc., and Hamilton*, [1983] 143 D.L.R.3d 498, 502-03 (Ont. C.A.).

⁹⁶ *See, e.g., Erznoznik v. Jacksonville*, 422 U.S. 205 (1975). *Cf. Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985).

⁹⁷ *E.g., Freedman v. Maryland*, 380 U.S. 51 (1965) (ban on the exhibition of a film as "obscene" is permissible only after a prior judicial determination of obscenity. The burden must be put on the censor to initiate the proceeding after viewing the film and refusing to license it, and the proceeding must be expeditious.). In the wake of *Freedman*, procedures apply to all governmental efforts to prevent the dissemination of material as "obscene". *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971) (customs seizures of obscene materials); *Blount v. Rizzi*, 400 U.S. 410, 416-22 (1971) (postal stop orders of obscene materials).

⁹⁸ These restrictions have been held not to violate the first amendment if such establishments could be operated somewhere within the municipality. *See Young v. American Mini Theatres*, 427 U.S. 50 (1976); *Renton v. Playtime Theatres*, 475 U.S. 41 (1986). In *Re Red Hot Video Ltd. &*

prohibition of nude dancing in public places.⁹⁹ As these questions arise in Canada, they generally will be resolved in the context of determining whether the regulation at issue constitutes a "demonstrably justifiable reasonable regulation prescribed by law" within the meaning of section 1.¹⁰⁰ While the rulings of the Canadian courts on particular issues might differ somewhat from the rulings of the courts in the United States, we would in general expect to see those issues approached the same way in Canada as in the United States. An overriding concern in the United States has been that the government, in its efforts to regulate constitutionally unprotected "obscenity," does not create a "chilling effect" on the dissemination of constitutionally protected pornography.¹⁰¹ This same concern has been expressed by the Canadian courts.¹⁰² For this reason, it may be assumed that the Canadian courts will impose significant "process-type" limitations on governmental efforts to regulate pornography and "adult entertainment."

There will be the recognition in Canada, as there has been in the United States, that the expression component of the "commercial sex" industry cannot be fully separated from the other components of that industry, and that there is a valid governmental interest in preventing certain kinds of harms that are caused by the operation of the "commercial sex" industry. The U.S. Supreme Court has recognized this interest analysis in sustaining the constitutionality of zoning restrictions on the

Vancouver, [1983] 5 D.L.R.4th 61 (B.C. S.C.), a lower court rejected a Charter challenge to a municipal zoning regulation prohibiting the sale of specified "sex-oriented" products in certain areas.

⁹⁹ Governmental efforts to regulate or prohibit nude dancing in the United States have run into first amendment problems. See, e.g., *Doran v. Salem Inn*, 422 U.S. 922 (1975) (municipal "bare breasts law unconstitutionally overbroad); *Schad v. Mount Ephraim*, 452 U.S. 61 (1981) (municipal ban on "live entertainment," which was directed against nude dancing in a commercial district, unconstitutionally overbroad). However, because of the twenty-first amendment, the states may constitutionally prohibit nude dancing in establishments that serve alcoholic beverages. *California v. LaRue*, 409 U.S. 109 (1972). In *Rio Hotel, Ltd. v. Liquor Licensing Bd.*, [1987] 77 N.R. 104 (S.C.C.), the Supreme Court of Canada holding that the prohibition of nude dancing in licensed liquor establishments was *intra vires* the province, the Court refused to consider the claim that such a prohibition violated section 2(b) on the ground that "the record before the courts on this issue is woefully inadequate and cannot serve as a base upon which to build an argument that this law violates the above provision of the Charter." *Rio Hotel*, 77 N.R. at 129-30.

¹⁰⁰ The nude dancing question, however, might require a determination of whether nude dancing is a form of protected expression under section 2(b).

¹⁰¹ See *Freedman*, 380 U.S. at 56-61.

¹⁰² In *Re Luscher*, 17 D.L.R. 4th 503, the Court held that

[i]f a citizen cannot know with tolerable certainty the extent to which the exercise of a guaranteed freedom may be restrained, he is likely to be deterred from conduct which is, in fact, lawful and not prohibited. Uncertainty and vagueness are constitutional vices when they are used to restrain constitutionally-protected rights and freedoms. While there can never be absolute certainty, a limitation of a guaranteed right must be such as to allow a very high degree of predictability of the legal consequences.

Id. at 506.

location of "adult entertainment" establishments.¹⁰³ It may be assumed that such zoning restrictions in Canada would be found to be "demonstrably justifiable reasonable limits" under section 1.¹⁰⁴

There is also a concern with protecting children and unconsenting adults from unwanted exposure to pornography. The U.S. Supreme Court has recognized the concept of "variable obscenity," enabling the state to prohibit the dissemination of certain forms of otherwise protected pornography to children,¹⁰⁵ and has upheld a provision of the postal laws prohibiting the mailing of "sexually-oriented" materials to persons who have indicated an unwillingness to receive such materials.¹⁰⁶ It is certainly reasonable to believe that similar restrictions would be upheld as constitutional by the Canadian courts.

It is suggested that in pornography and "adult entertainment" the constitutional balance between the individual interest in "sexual expression" and the societal interest in regulating such expression will be struck substantially the same in Canada as in the United States. This conclusion certainly appears to be a reasonable one, given the results reached thus far in the pornography and "adult entertainment" cases coming before the Canadian courts.

(b) Commercial Speech

The U.S. Supreme Court has been ambivalent toward the nature of the protection afforded by the first amendment to commercial speech. This speech involves the exchange of goods and services for profit, as opposed to speech involving the production and exchange of ideas. For many years, the Court indicated that the first amendment provided little or no protection for commercial speech.¹⁰⁷ Then, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,¹⁰⁸ the Court held that commercial speech was "speech" within the meaning of the first amendment. In that case and others to follow, the Court invalidated restrictions on price advertising and on the dissemination of other forms of commercial information.¹⁰⁹ At the same time, the Court has made it

¹⁰³ See *Young v. American Mini Theatres*, 427 U.S. at 54-55 (discussion of the city's justification for the zoning law). The Court concluded that "the city's interest in the present and future character of its neighborhoods adequately supports its classification of motion pictures." *Id.* at 72.

¹⁰⁴ See *Re Red Hot Video*, 5 D.L.R.4th 61.

¹⁰⁵ See *Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding a conviction for selling a non-obscene "girlie" magazine to a minor).

¹⁰⁶ See *Rowan v. United States*, 397 U.S. 728 (1970).

¹⁰⁷ See, e.g., *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

¹⁰⁸ 425 U.S. 748 (1976).

¹⁰⁹ See, e.g., *Bates v. State Bar of Arizona*, 443 U.S. 350 (1977) (ban on lawyer advertising of prices for routine legal services); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) (ban on promotional advertising by regulated public utility); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) (ban on advertising of contraceptives by mail).

clear that commercial speech is not entitled to the same degree of first amendment protection as non-commercial speech. It has developed a subsidiary doctrine of "commercial speech."¹¹⁰ Under that doctrine, the Court has held that the government may constitutionally restrict commercial speech in circumstances in which it could not restrict non-commercial speech,¹¹¹ and that the government may constitutionally prohibit the advertising of commercial activity, such as gambling, that is not itself constitutionally protected.¹¹² While commercial speech is protected under the first amendment, the degree of constitutional protection afforded to commercial speech is somewhat uncertain.

The same ambivalence toward the constitutional protection of commercial speech appears in the cases decided by the lower courts in Canada. One view is that commercial speech does not involve "freedom of expression" within the meaning of section 2(b), so that any restriction on advertising and the like is constitutionally permissible; there is no requirement for justification under section 1.¹¹³ The predominant view, however, is that commercial speech does involve "freedom of expression" within the meaning of section 2(b), so that the constitutionality of the particular regulation depends upon whether it can be sustained as a "demonstrably justifiable reasonable limit" under section 1. Using this analysis, one appellate court has upheld rules regulating lawyer advertising, including those that prohibited a lawyer from advertising areas of practice.¹¹⁴ Another court, however, has held that a ban on the circulation of a price list for optometric services is violative of section 2(b).¹¹⁵ Also there are conflicting appellate court decisions on whether a prohibition on solicitation for prostitution contained in the Criminal Code violates section 2(b).¹¹⁶

¹¹⁰ The "commercial speech doctrine" consists of a four-part analysis, which determines whether a particular regulation of commercial speech is constitutionally permissible. (1) The commercial speech must concern lawful activity and not be misleading. (2) The asserted governmental interest relied upon to justify the regulation of commercial speech must be "substantial." (3) The regulation must advance the governmental interest asserted. (4) The regulation must not be "more extensive than necessary" to serve that interest. If the commercial speech is "lawful and not misleading," the governmental regulation, in order to be sustained, must satisfy all the remaining criteria. *Central Hudson Gas & Elec. Corp.*, 447 U.S. 557.

¹¹¹ See *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981) (billboard regulation valid as to billboards containing commercial messages, but invalid as to billboards containing noncommercial messages).

¹¹² See *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986).

¹¹³ See *Re Klein & Law Soc'y of Upper Canada*, [1985] 50 O.R.2d 118 (Ont. D.C.) (Law Society's ban on free advertising).

¹¹⁴ *Re Law Soc'y of Manitoba and Savino*, [1983] 1 D.L.R.4th 285 (Man. C.A.). The U.S. Supreme Court has invalidated much regulation of lawyer advertising, including a ban on advertising areas of practice. See *In re R.M.J.*, 455 U.S. 191 (1982).

¹¹⁵ *Grier v. Alberta Optometric Ass'n*, [1987] 5 W.W.R. 539 (Alta. C.A.).

¹¹⁶ See Reference *Re Sections 193 and 195.1(1)(c) of the Criminal Code*, [1987] 6 W.W.R. 289

The Quebec Court of Appeals has been most vigorous in its protection of commercial speech, and two of the cases decided by that court are now before the Supreme Court of Canada. In one, the court of appeals held that a provincial ban on advertising directed toward persons under the age of thirteen violated section 2(b).¹¹⁷ In the other, it held violative of section 2(b) a provincial law requiring signs, posters, and commercial advertising to be displayed in French.¹¹⁸

While it is not possible to predict with certainty how the Supreme Court of Canada will deal with the matter of the protection of commercial speech under the Charter, it is likely to follow the predominant view of the lower courts and hold that commercial speech involves "freedom of expression" within the meaning of section 2(b).¹¹⁹ The mode of analysis prescribed by the text and structure of the Charter ensures that extending constitutional protection to commercial speech will not deprive the government of the authority to appropriately regulate commercial speech. The vitality of this analysis is especially significant in the regulation of commercial speech context. In the United States, under the "commercial speech" doctrine, regulation of commercial speech may be appropriate in circumstances where regulation of non-commercial speech is not. The government may be able to assert certain interests with respect to commercial speech that it is not able to assert with respect to non-commercial speech, such as the need to prevent fraud and deception.

(Man. C.A.) (held constitutional); *Regina v. Jahelka*, [1987] 58 C.R.3d 164 (Alta. C.A.) (held unconstitutional); *Skinner v. Regina*, [1987] 79 N.S.R.2d 8 (S.C.) (held unconstitutional). It should be noted that prostitution itself is not prohibited by the Criminal Code. If it were, then solicitation for prostitution would not constitute "freedom of expression" within the meaning of section 2(b), since the solicitation itself would relate to the commission of illegal activity. This is the situation dealt with under the "concern lawful activity" part of the first element of the *Central Hudson* test. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). See also *Pittsburgh Press v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) (ban on newspaper's carrying sex-designated "help-wanted" ads constitutional).

¹¹⁷ *Irwin Toy Ltd. v. Attorney-Gen. of Quebec*, [1986] 32 D.L.R.4th 641 (Que. C.A.) (leave to appeal granted Nov. 6, 1986).

¹¹⁸ *Attorney-Gen. of Quebec v. La Chaussure Brown's Inc.*, [1986] 36 D.L.R. 4th 374 (Que. C.A.) (leave to appeal granted Apr. 6, 1987). The court of appeals rejected on "proportionality" grounds the contention that the restriction was a "demonstrably justifiable reasonable limit" under section 1. The province argued that the restriction was justified as a means to make French the language of commerce and business in the province, but the court concluded that there was no "reasonable proportionality between the objective sought and the means employed." See also *Re Canadian Newspaper Co. and Director of Pub. Rd. & Traffic Servs. of the City of Quebec*, [1986] 36 D.L.R.4th 641 (Que. S.C.) (municipal law prohibiting the placing of newspaper vending machines on public property was violative of section 2(b)). The U.S. Supreme Court has reached a similar result in *City of Lakewood v. Plain Dealer Publishing Co.*, 108 S. Ct. 2138 (1988).

¹¹⁹ For the expression of this view by Canadian commentators, see Sharpe, *Commercial Expression and the Charter*, 37 U. TORONTO L.J. 229 (1987); Braun, *Should Commercial Speech Be Accorded Prima Facie Constitutional Recognition Under the Canadian Charter of Rights and Freedoms?*, 18 OTTAWA L. REV. 37 (1986).

As the U.S. Supreme Court emphasized in *Virginia Pharmacy*, deceptive and misleading commercial speech may be prohibited, and the truth of commercial speech is often more easily verifiable than the truth of non-commercial speech.¹²⁰ Similarly, the Supreme Court of Canada may conclude, as has the U.S. Supreme Court, that the government has less of a burden of justification to sustain restrictions on commercial speech than it has to sustain restrictions on non-commercial speech.

The balancing process expressly mandated by section 1 of the Charter insures that legitimate governmental interests in the regulation of commercial speech will be adequately recognized if commercial speech is held to come within the protection of section 2(b). It may well be that the Supreme Court of Canada, if it holds that commercial speech is "freedom of expression" within the meaning of section 2(b), will uphold restrictions such as the ban on solicitation for prostitution, which some appellate courts have found unconstitutional. But in every case, the particular restriction will have to be justified, and the access of the Canadian people to commercial information will be protected. Assuming that the Supreme Court of Canada holds that commercial speech is protected under section 2(b), we would expect that Court's approach to what constitutes a "demonstrably justifiable reasonable limit" under section 1 to be similar to the approach taken by the U.S. Supreme Court to restrictions on commercial speech under the "commercial speech doctrine."¹²¹ Again, particular questions may be resolved differently by the Supreme Court of Canada than they have been resolved by the U.S. Supreme Court. But commercial speech can expect to have substantially the same degree of constitutional protection in Canada as it has received in the United States. For all of the above reasons, that protection will be somewhat less than the degree of constitutional protection afforded to non-commercial speech.

(c) The Media and the Courts

In Canada today, as in the United States, a number of cases are arising that involve the media and the courts. On the one hand, the media is seeking unrestricted access to judicial proceedings.¹²² On the other

¹²⁰ *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771-72 (1976). See also *id.* at 777-78 (Stewart, J. concurring, noting that the commercial advertiser is usually in the position to verify the accuracy of factual information prior to dissemination, so that there is no danger that the prohibition of false and misleading advertising will chill accurate and nondeceptive commercial expression).

¹²¹ See Sharpe, *supra* note 119, at 255-59.

¹²² For Canadian commentary on the matter of access to courts, see Beckton, *Freedom of Expression - Access to Courts*, 61 CAN. BAR REV. 101 (1983); Linden, *Limitations on Media Coverage of Legal Proceedings: A Critique and Some Proposals for Reform*, in *THE MEDIA, THE COURTS AND THE CHARTER*, *supra* note 63, at 301; Cameron, *Comment: the Constitutional Domestication of our*

hand, the media seek to avoid judicially-imposed restrictions on publication.¹²³ While no cases involving the media and the courts have yet reached the Supreme Court of Canada, there have been a sufficient number of lower court decisions to indicate the direction of the development of constitutional doctrine in this area.

The leading case involving the matter of access to the courts is *Re Southam, Inc. and the Queen (No.1)*,¹²⁴ decided by the Ontario Court of Appeals in 1983. At issue was the constitutionality under section 2(b) of a statutory provision requiring that all trials of juveniles be held *in camera*.¹²⁵ The newspaper challenging the ban did not assert a "freedom of the press" claim on the basis of the media's entitlement to "special access" to judicial proceedings, but the general public's "freedom of expression" right to attend such proceedings.¹²⁶ This is the approach that the U.S. Supreme Court has taken under the first amendment: the media has no right of "special access" to governmentally-controlled information,¹²⁷ but the general public has a right of access to judicial proceedings, which the media may assert.¹²⁸

In *Southam (No.1)*, the Ontario Court of Appeals agreed with this position and held that the public's right of access to judicial proceedings is part of the "freedom of expression" protected by section 2(b).¹²⁹ The absolute ban on access to juvenile trials was held to not constitute a "demonstrably justifiable reasonable limit" on that right precisely because of its absolute nature.¹³⁰ However, in the later case of *Re Southam, Inc. and the Queen (No.2)*,¹³¹ the same court upheld as a "demonstrably justifiable reasonable limit" a statutory provision giving the trial judge discretion to close all or part of the proceedings where the evidence presented would be "seriously injurious or seriously prejudicial" to a youthful defendant, victim, or witness.¹³² The court concluded that, "the interests of society in the protection and rehabilitation of young people involved in

Courts - Openness and Publicity in Judicial Proceedings under the Charter, in *THE MEDIA, THE COURTS AND THE CHARTER*, *supra* note 63, at 331.

¹²³ For Canadian commentary on bans on publication, see Beckton, *Freedom of the Press in Canada*, in *THE MEDIA, THE COURTS AND THE CHARTER*, *supra* note 63, at 119, 135-42.

¹²⁴ [1983] 41 O.R.2d 113 (Ont. C.A.).

¹²⁵ *Id.* at 117.

¹²⁶ *Id.* at 116.

¹²⁷ See, e.g., *Pell v. Procunier*, 417 U.S. 817 (1974); *Houchins v. KQED*, 438 U.S. 1 (1978).

¹²⁸ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

¹²⁹ The court relied on the review of Anglo-American history of criminal trials by the U.S. Supreme Court in *Richmond Newspapers*. This review emphasized that, "from time immemorial, judicial trials have been held in open court, to which the public have free access." *Southam (No. 1)*, 41 O.R.2d at 122-23.

¹³⁰ *Id.* at 134.

¹³¹ [1986] 53 O.R.2d 663 (Ont. C.A.), *aff'g*, [1984] 48 O.R.2d 678 (Ont. H.C.).

¹³² *Id.* at 679.

youth court proceedings is a value of such superordinate importance that it justifies the discretion given to a youth court judge."¹³³

The distinction between absolute and discretionary bans on public access to judicial proceedings is similar to that drawn by the U.S. Supreme Court. That Court has recognized a broad right of access to all stages of criminal proceedings,¹³⁴ and has stated that "[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."¹³⁵ It has invalidated absolute or routine bans on access to particular proceedings, emphasizing that closure is permissible only when strong justification can be shown in a particular case.¹³⁶ It is reasonable to assume that the broad right of access recognized in the United States under the first amendment will be recognized in Canada under section 2(b) as well,¹³⁷ and that under section 1, the Canadian courts will require a strong showing that a particular ban on access is justifiable.

A number of cases, including one that is now before the Supreme Court of Canada, have involved bans on the publication of information by the media. The case now before the Supreme Court involves a provision in the Criminal Code absolutely prohibiting the publication of the name of a victim of a sexual offense or any information that could disclose her identity. The Ontario Court of Appeals held that the absolute ban on publication was violative of section 2(b), while another provision of the Code, giving the trial judge the discretion to make a prohibitory order in an appropriate case was a "demonstrably justifiable reasonable limit."¹³⁸

The other cases coming before the lower courts have led to mixed results. The courts have upheld as constitutional an order of an extradi-

¹³³ *Id.* at 699.

¹³⁴ The Court recognized a right of access to the preliminary hearing in *Press-Enterprise Co. v. Superior Ct. of Cal.*, 478 U.S. 1 (1986) (criminal case).

¹³⁵ *Press-Enterprise v. Superior Ct. of Cal.*, 464 U.S. 501, 510 (1984). The Court also stated that the asserted governmental interest justifying closure had to be "articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.*

¹³⁶ See, e.g., *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596 (1987), where the Court held that the routine exclusion of the press and public during the testimony of a minor victim of a sex offense was unconstitutional, emphasizing that the trial judge could determine on a case-by-case basis whether closure was necessary to protect the welfare of the particular minor victim.

¹³⁷ In the pre-Charter case of *Attorney-Gen. of Nova Scotia and MacIntyre*, [1982] 1 S.C.R. 175, the Supreme Court of Canada held that members of the public had the right to inspect search warrants and the information on which they were based, after the warrants had been executed. In that case, Justice Dickson referred to a "strong public policy in favor of openness" in respect of judicial acts." *Id.* at 183.

¹³⁸ *Canadian Newspapers Co. & Attorney Gen. of Canada*, [1985] 49 O.R.2d 557 (Ont. C.A.), *aff'd*, [1986] 560 R.2d 240.

tion judge in a highly-publicized case barring the publication of the evidence taken at a bail hearing until the completion of the accused's trial in the United States;¹³⁹ a statutory ban on the publication of the identity of a young person involved in juvenile proceedings;¹⁴⁰ a statutory ban on the publication of certain material presented at a divorce hearing;¹⁴¹ and restrictions on revealing the identity of victims.¹⁴² They have held unconstitutional a permanent ban on the publication of proceedings of a juvenile transfer hearing, where the juvenile was ordered tried as an adult,¹⁴³ and a provision of the Criminal Code, prohibiting the publication of information with respect to search warrants.¹⁴⁴

The constitutionality of the issuance of restrictions on publication under section 2(b) will be determined in a different analytical framework than that prevailing in the United States. In the United States, the issuance of restrictions on publication brings into play the prior restraint doctrine, under which the restriction on publication is presumptively unconstitutional and can be sustained only by a very heavy burden of justification. The prior restraint doctrine operates notwithstanding that the restriction is designed to protect the accused's sixth amendment right to a fair trial. In practice, it is highly unlikely that a restriction on publication for this purpose will be sustained.¹⁴⁵ The U.S. Supreme Court,

¹³⁹ *Re Global Communications, Ltd. & Attorney Gen. of Canada*, [1984] 44 O.R.2d 609 (Ont. C.A.). The accused was being held for extradition to California on a murder charge, arising out of her having allegedly administered drugs to the prominent actor, John Belushi, resulting in his death.

¹⁴⁰ *Re Southam, Inc. & Regina (No. 2)*, [1986] 53 O.R.2d 663 (Ont. C.A.), *aff'g* [1984] 48 O.R.2d 678 (Ont. H.C.).

¹⁴¹ *Edmonton Journal v. Attorney Gen. of Alberta*, [1987] 5 W.W.R. 385 (Alta. C.A.).

¹⁴² *Re Hirt & College of Physicians & Surgeons of Brit. Columbia*, [1985] 17 D.L.R.4TH 472 (B.C. C.A.) (identity of patients with whom physician had sexual relations); *Toronto Sun Publishing Corp. v. Attorney Gen. for Alberta*, [1985] 6 W.W.R. 36 (Alta. C.A.) (identity of victims of blackmail).

¹⁴³ *Re Canadian Newspapers Co. & Regina*, [1984] 16 C.C.C.3d 495 (Man. C.A.). However, the court held that publication could be banned until thirty days after the trial was completed.

¹⁴⁴ *Canadian Newspapers Co. v. Attorney Gen. of Canada*, [1986] 55 O.R.2d 737 (Ont. H.C.). See also *Regina v. Sophonow*, [1983] 21 Man.2d 110 (C.A.) (the court refused to restrict the publication of extra-judicial commentary concerning the accused's guilt or innocence until his appeal had been decided).

¹⁴⁵ See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). In that case, the Court noted that a prior restraint on publication was "one of the most extraordinary remedies known to our jurisprudence," and that this was no less true when the restraint was designed to protect the accused's right to a fair trial. As the Court stated:

If the authors of [the first and sixth amendments], fully aware of the potential conflict between them, were unwilling or unable to resolve the issue by assigning to one priority over the other, it is not for us to rewrite the Constitution by undertaking what they declined. Yet it is nonetheless clear that the barriers to prior restraint remain high unless we are to abandon what the Court has said for nearly a quarter of our national existence and imply throughout all of it.

Id. at 561. In evaluating the constitutional permissibility of a prior restraint designed to protect the accused's right to a fair trial, the court must consider: (1) the nature and extent of pretrial news

under the prior restraint doctrine, has also held unconstitutional bans on the publication of the names of juveniles obtained at a court hearing or from public records,¹⁴⁶ and on information obtained about confidential judicial tenure proceedings.¹⁴⁷

In Canada, however, there is no prior restraint doctrine as such, and any bans on publication will be evaluated in terms of whether they constitute a "demonstrably justifiable reasonable limit" under section 1. As appears thus far from the lower court decisions, some bans on publication would expectedly be sustained in Canada that would be held unconstitutional in the United States under the prior restraint doctrine. Nonetheless, it may be assumed, as the cases thus far indicate, that a strong burden of justification will be required for any restriction on publication, although even with this burden some restrictions will be sustained.

Other questions involving the media and the courts will likely arise in Canada, as they have in the United States, and it will be interesting to see the results that are reached in these cases. For example, the U.S. Supreme Court has held that members of the "working press" are subject to the same requirements of giving testimony as other persons and cannot claim a first amendment right to refuse to disclose confidential sources.¹⁴⁸ The lower courts in Canada have thus far reached the same result.¹⁴⁹ On the other hand, the U.S. Supreme Court has invoked the "clear and present danger" doctrine to deal with the matter of contempt of court by publication. The doctrine invalidates all efforts to impose contempt of court sanctions against the press for extra-judicial commentary on pending cases or intemperate criticism of the courts.¹⁵⁰

coverage; (2) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; (3) how effectively a restraining order would operate to prevent the threatened danger. *Id.* at 562. Applying these criteria to the facts of that case, the Court concluded that the issuance of a ban on pretrial publicity was unconstitutional under the prior restraint doctrine, and the practical effect of the decision will preclude the issuance of bans in all but the most extraordinary circumstances.

¹⁴⁶ *Oklahoma Publishing Co. v. District Ct.*, 430 U.S. 308 (1977); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979).

¹⁴⁷ *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978). Compare *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (upholding a protective order restricting the publication of information obtained by a newspaper litigant through pretrial discovery when order was based on a finding of "good cause" and did not restrict the dissemination of information derived through sources other than pretrial discovery) with *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (holding violative of the first amendment, a state law imposing liability for publication of the name of a rape victim derived from public court documents).

¹⁴⁸ See *Branzburg v. Hayes*, 408 U.S. 665 (1972).

¹⁴⁹ See *Re Moysa and Labour Relations Bd.*, [1986] 28 D.L.R.4th 140 (Alta. Q.B.), *aff'd*, [1987] 52 Alta.L.R.2d 193 (Alta. C.A.); *Coates v. The Citizen and Southam, Inc.*, [1986] 72 N.S.R.2d 116 (S.C.).

¹⁵⁰ See, e.g., *Wood v. Georgia*, 370 U.S. 375 (1962); *Bridges v. California*, 314 U.S. 252 (1941).

A recent decision by the Manitoba Court of Appeals, in contrast, has held that, consistent with section 2(b), a newspaper could be punished for contempt of court for publishing the criminal records of persons charged with murder before proceedings had been instituted against them.¹⁵¹

In the area of the media and the courts, the results are similar in Canada and the United States. Because of doctrinal differences, namely the applicability of the prior restraint doctrine in the United States, but not apparently in Canada, restrictions on publication are more likely to be upheld in Canada than they are in the United States. The Canadian courts may even be willing to impose sanctions for contempt by publication that would be unconstitutional in the United States. Nonetheless, the media in Canada has thus far managed to obtain a substantial degree of constitutional protection in their involvement with the courts. This is somewhat similar to that which is enjoyed by the media in the United States.

(d) "Anti-Hate" Legislation

One clear difference between the degree of protection afforded freedom of expression in Canada and the United States appears in the area of "anti-hate" legislation. This difference is due primarily to the context in which freedom of expression doctrine has developed in the United States and to the resulting principles and subsidiary doctrines that have emerged from such development. The constitutional protection of freedom of expression in the United States developed in the context of governmental repression of dissent and the expression of unpopular ideas. In response to such repression, the resulting doctrine has emphasized that all unpopular ideas are entitled to constitutional protection, no matter how offensive or odious. This emphasis exists without regard to the negative attitudes toward people or groups caused by these ideas. An important first amendment principle is that of *content neutrality*. Under that principle, the government cannot proscribe the expression of a particular idea because of disagreement with the content of that idea.¹⁵² In addition, the first amendment recognizes the right to advocate unlawful

¹⁵¹ Attorney Gen. for Manitoba v. Groupe Quebecor, Inc., [1987] 5 W.W.R. 270 (Man. C.A.). For the view that "[o]n the basis of existing evidence it would be mistaken to imagine that the courts will encourage the use of the Charter as a means of reforming the law of contempt of court." See Martin, *Contempt of Court: The Effect of the Charter*, in *THE MEDIA, THE COURTS AND THE CHARTER*, *supra* note 63, at 207, 219.

¹⁵² [A]bove all else, the [f]irst [a]mendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity would completely undercut the "profound national com-

action, such as murder, genocide or violent overthrow of the government, so long as such advocacy does not reach the point of "likely to incite or produce imminent lawless action."¹⁵³ In light of these principles, expression that promotes racial and religious hatred comes within the protection of the first amendment. The government could not, for instance, prohibit a march by self-proclaimed "Nazis," with Nazi uniforms and swastikas, in a predominantly Jewish city that counted numerous Holocaust survivors among its residents.¹⁵⁴

In Canada, by contrast, there would seem to be no constitutional principle precluding the government from regulating or prohibiting expression because of its *content*, or from proscribing the advocacy of unlawful action, such as genocide (provided only that the particular regulation or prohibition constitutes a "demonstrably justifiable reasonable limit" under section 1). In the cases decided by the Canadian courts thus far, the courts have upheld against section 2(b) challenges various laws designed to prevent the expression of "hatred" against identifiable religious and racial groups. These have included a provision of the Criminal Code prohibiting the "spreading of false news," as applied to the publication of an article "likely to cause mischief to the public interest in social and racial tolerance,"¹⁵⁵ and a provision of the federal Human Rights Act prohibiting the telephonic communication of racial or reli-

mitment to the principle that debate on public issues should be uninhibited, robust and wide-open".

Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972) (citations omitted).

¹⁵³ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

¹⁵⁴ *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978). In that case, the court struck down provisions of local ordinances prohibiting among other things, "the dissemination of materials which promotes and incites hatred against persons by reason of their race, national origin or religion," and marching in "military style" uniforms. *Id.* at 1199-1200. These ordinances were directed against a proposed march by the National Socialist Party of America in the Village of Skokie, a predominantly Jewish suburb of Chicago, in which several thousand Holocaust survivors resided. As the court stated: "The asserted falseness of Nazi dogma, and indeed, its general repudiation, simply do not justify its suppression." *Id.* at 1203.

The older case of *Beauharnais v. Illinois*, 343 U.S. 250 (1952), upholding the constitutionality of a "race libel" law against a first amendment challenge, must be considered superseded by subsequent developments, particularly the principle of content neutrality. See *Collin*, 578 F.2d at 1204.

¹⁵⁵ *Regina v. Zundel*, [1987] 58 O.R.2d 129 (Ont. C.A.). The essential thrust of the publication, that the defendant was charged with circulating, was that the Holocaust did not happen and that the number of Jews killed during World War II was only in the "thousands". The court held that the prohibition against "spreading false news" did not infringe upon the freedom of expression within the meaning of section 2(b), but that if it did, it was a "demonstrably justifiable reasonable limit" under section 1. As the court stated:

Section 177 would appear to be a reasonable means of achieving the objective of prohibiting the spread of false news which a person knows to be false, and which causes or is likely to cause injury or mischief to a public interest. It impairs freedom of expression as little as possible, and any impairment is proportionate to the objective to be achieved.

Id. at 157. In order to sustain the conviction of the defendant in the instant case, the jury was required to find that the defendant knew that the statements about the non-existence of the Holo-

gious hate messages.¹⁵⁶ However, a very recent decision of the Alberta Court of Appeals has held violative of section 2(b) a provision of the Criminal Code prohibiting the "wilful promotion of hatred against an identifiable group."¹⁵⁷ While the degree of protection afforded "hateful speech" in Canada will ultimately have to be resolved by the Supreme Court of Canada, it is possible that this kind of expression will receive less constitutional protection in Canada than it has in the United States.

To the extent that this is so, it points up the significance of the analysis required by the text and structure of the Charter. Under this mode of analysis, there is a careful balancing in all cases between the individual interest in freedom of expression and the asserted governmental interest in imposing particular restrictions on expression. This balancing is unhampered by subsidiary doctrines or constitutional principles, such as that of content neutrality, which have been developed in the United States as the Supreme Court has tried to apply a less structured balancing approach under the first amendment. The courts in the United States have been compelled to extend protection to "hateful speech" under established first amendment doctrine and principles.¹⁵⁸ They may envy their Canadian counterparts who are able to uphold bans on "hateful speech" as constituting a "demonstrable justifiable reasonable limit" under section 1 of the Charter.

In any event, as the contrasting results in the area of "anti-hate"

caust were false when he published them. The conviction was reversed on the ground that the trial judge failed to charge the jury properly on this point and for other trial errors.

¹⁵⁶ *Taylor v. Canadian Human Rights Comm'n*, [1987] 78 N.R. 180 (Fed. C.A.). The case involved recorded "hate" messages directed against Jews and particular Jewish individuals. The court held that the prohibition on the dissemination of "hate messages" constituted a "demonstrably justifiable reasonable limit" under section 1.

¹⁵⁷ *Regina v. Keegstra*, [1988] Alta. J. No. 501 (Alta. C.A.). The Court of Appeals reversed a decision of the Alberta High Court, which upheld the constitutionality of the law on its face. [1984] 19 C.C.C.3d 254 (Alta. Q.B.). A number of conditions were necessary to establish a violation of the Code provision: (1) the statement had to be made in a public place; (2) it had to be made with reference to an identifiable group, distinguished by color, race, religion or ethnic origin; (3) the promotion of hatred had to be "wilful"; (4) the statement had to be true; and (5) if the statement was made for the "public benefit," it was a defense that the statement was made "in the reasonable belief of its veracity." 19 C.C.C.3d at 274 (there are three conditions not mentioned).

The trial court held that the provision did not infringe freedom of expression within the meaning of section 2(b), but that if it did, it was a "demonstrably justifiable reasonable limit" under section 1. In the course of its opinion, the court referred to section 27 of the Charter, which provides that "[t]his Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians," and found that the willful promotion of racial or religious hatred was inconsistent with that provision. *Id.* at 268. The court of appeals held that the provision did infringe freedom of expression and that it could not be sustained as a "demonstrably justifiable reasonable limit."

¹⁵⁸ As Judge Sprecher observed in *Collin*, 578 F.2d at 1211: "My wariness [in approaching this case] is enhanced by the fact that each court dealing with these precise problems (the Illinois Supreme Court, the [d]istrict [c]ourt and this Court) feels the need to apologize its result."

legislation indicate, there will be certain differences in the protection of freedom of expression in Canada and the United States, due to structural differences between the Charter and the U.S. Constitution and the different line of growth of constitutional doctrine in both nations.

A review of the Canadian cases in the areas of pornography and "adult entertainment," commercial expression, the media and the courts, and "anti-hate" legislation, clearly demonstrates that there has been a high degree of similarity in the results reached by both the Canadian and U.S. courts. Despite some differences, as in the area of "anti-hate" legislation, substantially the same degree of protection has been extended to freedom of expression by the Canadian courts under section 2(b) as has been extended by the U.S. courts under the first amendment.¹⁵⁹

D. The Protection of Freedom of Association

The first amendment of the U.S. Constitution, unlike section 2(d) of the Charter, does not specifically mention freedom of association. Nonetheless, its guarantees of "freedom of speech" and "freedom of assembly" implicitly encompass the freedom of association.¹⁶⁰ A substantial body

¹⁵⁹ The same similarity of result appears in some of the other freedom of expression cases thus far decided by lower courts in Canada. For example, a ban on leafletting at Dorval Montreal Airport has been held violative of section 2(b). *Levine, Deland & Comm. for the Commonwealth of Canada v. Canada*, [1987] 76 N.R. 338 (Fed. C.A.). Cf. *Board of Airport Comm'rs v. Jews for Jesus*, 107 S. Ct. 2568 (1987) (holding violative of the first amendment, a ban on "first amendment activities" at Los Angeles International Airport). Likewise, the provisions of the Canada Election Act prohibiting election expenditures by persons other than political parties have been held violative of section 2(b). *E.g.*, *National Citizens Coalition v. Attorney-Gen. for Canada*, [1984] 11 D.L.R.4th 481 (Alta. Q.B.). Thus they have reached the same result as in *Buckley v. Valeo*, 424 U.S. 1 (1976), where the Supreme Court held violative of the first amendment a limitation of expenditures that an individual could make in support of a candidate. In a pre-Charter case, *Gay Alliance Toward Equality v. Vancouver Sun*, [1979] 2 S.C.R. 435, the Supreme Court of Canada interpreted provincial human rights legislation as not applying to the refusal of a newspaper to publish an advertisement submitted by a homosexual organization. Justice Martland, writing for the Court, emphasized the importance of protecting the newspaper's editorial discretion from governmental interference, and discussed at length the decision of the U.S. Supreme Court in *Miami Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), which invalidated on first amendment grounds, a state statute requiring newspapers to give political candidates space in the newspaper to reply to the newspaper's criticism of them.

¹⁶⁰ The early cases involved efforts by the states to prohibit organizing activities of the Communist Party under "sedition" and "criminal syndicalism" laws, which the U.S. Supreme Court found to be unconstitutional. *De Jonge v. Oregon*, 299 U.S. 353 (1937); *Herndon v. Lowry*, 301 U.S. 242 (1937). As the Court stated in *DeJonge*: "The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental." 229 U.S. at 364.

Similarly, the Court has stated:

An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not guaranteed. According protection to the collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from

of constitutional doctrine dealing with the various aspects of freedom of association has emerged in the United States.¹⁶¹ A comparison of the constitutional protection of freedom of association in Canada and in the United States begins with a consideration of the constitutional protection accorded to the various aspects of freedom of association under the first amendment.

One aspect of freedom of association is the right to belong to organizations and to be free of sanction because of membership in such organizations. Under this aspect of freedom of association, the government cannot sanction membership even in an illegal "subversive" organization, unless it is active membership with knowledge of the illegal purpose and specific intent to further that illegal purpose.¹⁶² Nor can it discharge non-policy-making employees from governmental service because they are not members of the political party that is in power.¹⁶³ Another aspect of freedom of association is the right of an organization to engage in concerted activity, both for the benefit of its members and to advance its organizational objectives. Under this aspect of freedom of association, the government cannot prohibit an organization from "engaging in the practice of law;" soliciting clients for cases related to advancing the organization's objectives;¹⁶⁴ or providing group legal services for its members.¹⁶⁵ Likewise, an organization is constitutionally entitled to engage in economic boycotts in order to advance the organization's political objectives.¹⁶⁶ It is also entitled to "identify the people who constitute the organization."¹⁶⁷

Still another aspect of freedom of association involves associational

suppression by the majority. Consequently, we have long understood as implicit in the right to engage in activities protected by the [f]irst [a]mendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural end.

Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984) (citations omitted).

¹⁶¹ As the Court noted in *Roberts*: "Government actions that may unconstitutionally infringe upon this freedom can take a number of forms." *Id.*

¹⁶² *E.g.*, *Scales v. United States*, 367 U.S. 203 (1961); *United States v. Robel*, 389 U.S. 258 (1967).

¹⁶³ *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980). The other side of the coin, so to speak, is that the government may constitutionally prohibit partisan political activity on the part of civil service employees. *United States Civil Service Commission v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973).

¹⁶⁴ *NAACP v. Button*, 371 U.S. 415 (1963); *In re Primus*, 436 U.S. 412 (1978).

¹⁶⁵ *Brotherhood of Trainmen v. Virginia*, 377 U.S. 1 (1964).

¹⁶⁶ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

¹⁶⁷ *Tashjian v. Republican Party of Conn.*, 107 S. Ct. 544 (1986). In that case the Connecticut Republican Party adopted a rule permitting registered independent voters to vote in Republican primaries for federal and statewide offices. A state statute prohibited party non-members from voting in primary elections. The Supreme Court held that the statute violated the freedom of Association Rights of the Republican Party and its members.

privacy. The government cannot compel an organization to disclose the names of its members,¹⁶⁸ nor can it compel individuals to reveal their organizational memberships.¹⁶⁹ Finally, freedom of association includes the "right to not associate." Thus, when employees are required to pay fees to a labor union under an "agency shop" collective bargaining agreement, the union may not use the fees to support political candidates or to express political views unrelated to the union's duties as collective bargaining representative.¹⁷⁰

The Supreme Court has upheld governmental interference with freedom of association in only very limited circumstances. One of these circumstances has involved the applicability of state anti-discrimination laws to "private organizations" such as the Jaycees and the Rotary Club, which have excluded women from membership.¹⁷¹ In holding that the state may prohibit such organizations from discriminating on impermissible grounds, such as gender, the Court emphasized both the compelling governmental interest in eradicating discrimination and the minimal interference with the organization's ability to carry on its expressive activities by compliance with the non-discrimination requirement.¹⁷²

In the United States, it has never been contended that government regulation of union activity in labor disputes violates the union's freedom of association under the first amendment. Regulation of picketing in connection with labor disputes, such as prohibitions of secondary boy-

¹⁶⁸ See, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Brown v. Socialist Workers*, 459 U.S. 87 (1982).

¹⁶⁹ See, e.g., *Shelton v. Tucker*, 364 U.S. 479 (1960); *Gibson v. Florida Legislative Investigating Comm.*, 372 U.S. 539 (1963); *Baird v. State Bar of Ariz.*, 401 U.S. 1 (1971).

¹⁷⁰ *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).

¹⁷¹ *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Board of Directors of Rotary Int'l v. Rotary Club of Durate*, 107 S. Ct. 1940 (1987).

¹⁷² As the Court stated in *Roberts*: "We are persuaded that Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms." *Roberts*, 468 U.S. at 623. It noted "the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women," and that a requirement that the organization admit women to membership would not "impede the organization's ability to engage in these protected activities or to disseminate its preferred views." *Id.* at 626-27.

The applicability of a non-discrimination requirement to membership in a private organization would be unconstitutional only where the requirement would destroy the integrity of a particular kind of organization, such as a prohibition against religious or ethnic discrimination applied to an avowedly religious or ethnic organization such as the Knights of Columbus or the Ancient Order of Hibernians. Here, religious and ethnic exclusivity are essential to the existence of the organization, so a prohibition against religious or ethnic discrimination by the organization is tantamount to a prohibition against the existence of the organization itself. See also *New York State Club Ass'n, Inc. v. City of New York*, 108 S. Ct. 2225 (1988) (city law prohibiting discrimination by "private business clubs" that provide benefits to business entities and persons other than their own members upheld).

cotts or picketing in furtherance of an illegal strike, has been held to be a permissible restriction on freedom of expression,¹⁷³ nor is there any first amendment requirement that the government bargain collectively with an employee's union.¹⁷⁴

Freedom of association in Canada is expressly guaranteed under section 2(d) of the Charter. Thus, whenever a challenge is made under that provision, the first question for the Canadian court is whether the challenged governmental action infringes upon freedom of association. In a trilogy of cases decided in 1987 involving restrictions on collective bargaining and strikes by public employees, the Supreme Court of Canada dealt with the matter of "infringement." In so doing, the Court defined "freedom of association" in a manner quite similar to the definition of freedom of association under the first amendment.

The primary case of the trilogy, *Re Public Service Employee Relations Act*,¹⁷⁵ involved a provincial law which prohibited strikes by public employees and imposed compulsory arbitration to resolve impasses in collective bargaining. Some Canadian commentators had contended that governmental prohibition of strikes and interference with collective bargaining intruded upon the freedom of association rights of labor unions and their members under section 2(d). This interference would then be subject to justification under section 1.¹⁷⁶ The Supreme Court of Canada, by a vote of 4-2, rejected this proposition. The majority¹⁷⁷ took the position that section 2(d) protected interests such as the freedom to work for the establishment of an association, to belong to an association, to maintain it and to participate in its lawful activity without sanction. But it did not include the right to engage in a particular activity on the

¹⁷³ See, e.g., *International Longshoremen's, AFL-CIO v. Allied Int'l*, 456 U.S. 212 (1982); *International Brotherhood of Teamsters Local 695 v. Vogt, Inc.*, 354 U.S. 284 (1957). Thus, while peaceful picketing comes within the protection of the first amendment, *Thornhill v. Alabama*, 310 U.S. 88 (1940), picketing receives relatively little constitutional protection in the context of labor regulation. In *Retail, Wholesale and Department Store Union v. Dolphin Delivery Ltd.*, the Supreme Court of Canada indicated that while peaceful picketing comes within the protection of section 2(b), an injunction against picketing in pursuance of a secondary boycott would be a "demonstrably justifiable reasonable limit." [1986] 2 S.C.R. 573.

¹⁷⁴ *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463 (1979). By the same token, if the government does recognize a union as the collective bargaining representative, it is not required by the first amendment to confer with its employees who are not represented by the union. *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271 (1984).

¹⁷⁵ [1987] 1 S.C.R. 313.

¹⁷⁶ See, e.g., Cavalluzzo, *Freedom of Association and the Right to Bargain Collectively*, in *LITIGATING THE VALUES OF A NATION*, *supra* note 84 at 189. For a contrary view, see Weiler, *The Regulation of Strikes and Picketing Under the Charter*, in *LITIGATING THE VALUES OF A NATION*, *supra* note 84, at 211.

¹⁷⁷ The principal opinion was written by Justice LeDain and was joined by Justices Beetz and LaForest. Justice McIntyre concurred separately. Chief Justice Dickson and Justice Wilson dissented; Justice Chouinard did not participate.

ground that the activity was "essential to give an association meaningful existence." For this reason, the right of membership in a labor organization could not be said to include the right to strike or to engage in collective bargaining. A governmental interference with these rights did not constitute an "infringement" of freedom of association under section 2(d).¹⁷⁸

The separate opinion of Justice McIntyre discussed at length various approaches to defining the meaning of freedom of association under section 2(d). He concluded that the preferred approach was one that would recognize that whatever rights have charter protection when exercised by an individual are protected under section 2(d) when exercised by an association. He also stated that freedom of association means the freedom to associate for the purpose of activities which are lawful when performed alone. But the fact of association did not confer *additional rights* on individuals. Thus an organization could not acquire a constitutionally guaranteed right to do what an individual, acting alone, did not have a constitutional right to do. Since the right to strike was not independently protected under the Charter and was not a part of freedom of association, a labor union did not have a constitutionally protected right to strike.¹⁷⁹ The three other Justices in the majority agreed with Justice McIntyre's approach to defining the meaning of freedom of association under section 2(d).¹⁸⁰

In the other cases comprising the trilogy, the Court upheld two laws against section 2(d) challenge. In one, a federal law fixed the wage increases of federal employees for a two year period, thus limiting collective bargaining activity during that time.¹⁸¹ A third case involved

¹⁷⁸ *Id.* at 390-91.

¹⁷⁹ *Id.* at 409-10 (McIntyre, J. concurring).

¹⁸⁰ The dissenting Justices gave a more expansive meaning to freedom of association under section 2(d), focusing on group action to achieve common objectives. As Chief Justice Dickson stated: "What freedom of association seeks to protect is not associational particular activities, but the freedom of individuals to interact with, support, and be supported by, their fellow humans in the varied activities in which they choose to engage." *Id.* at 366. He also noted that "[t]he role of association has always been vital as a means of protecting the essential needs and interests of working people." *Id.* at 368. He concluded that the right to bargain collectively and the right to strike were part of the freedom of association protected under section 2(d). *Id.* at 371. He also found that the particular legislation was not a demonstrably justifiable reasonable limit under section 1, because it was not limited to employees providing essential services and because the arbitration system was not an adequate replacement for the employees right to strike. *Id.* at 385-86.

¹⁸¹ *Public Serv. Alliance of Can. v. Canada*, [1987] 1 S.C.R. 424. The Court lined up the same way in this case as it did in the primary case. See *supra* note 173 and accompanying text. Justice McIntyre, however, noted that while section 2(d) of the Charter did not recognize a constitutional right to strike, there was the possibility that other aspects of collective bargaining could receive protection under Section 2(d). Here, however, he concluded that the legislation did not "interfere with collective bargaining so as to infringe the Charter guarantee of freedom of association." *Id.* at 453-54.

provincial law prohibiting dairy workers from striking and imposing compulsory arbitration.¹⁸²

The Supreme Court of Canada thus has made it clear in these cases that it will not use section 2(d) to interfere with governmental regulation of labor relations in Canada, just as the U.S. Supreme Court has not used the first amendment for similar interference. In retrospect it is not surprising that the Supreme Court of Canada has made this value judgment. The core values of freedom of association are not implicated by governmental regulation of labor relations. No matter what the regulation, the labor unions can still engage in collective activity for a common purpose. Moreover, labor unions in Canada, as in the United States, are not a "discrete and insular minority," needing protection from the majoritarian process.¹⁸³ As Justice McIntyre emphasized in the *Public Service Employees Relations Act* case, labor law today is "based upon a political and economic compromise between organized labor . . . and the employers of labor."¹⁸⁴ Where a labor union loses a battle in the political process, the courts would not be likely to reverse the political decision and provide constitutional protection for the interest that the labor union was not able to advance in the political process.¹⁸⁵

As a result of Canada's approach to the meaning of freedom of association under section 2(d) in the 1987 trilogy, it is reasonable to conclude that the protection of freedom of association under section 2(d) will develop along substantially the same lines as in the United States under the first amendment. The interests recognized in the majority opinions in the *Public Service Employees Relations Act* case appear to correspond to the various aspects of freedom of association that have been recognized under the first amendment. In particular cases, of course, the Canadian courts may reach different results than those reached by their American

¹⁸² *Retail, Wholesale & Dept. Store Union v. Saskatchewan*, [1987] 1 S.C.R. 460. In this case, Chief Justice Dickson took the position that the particular restriction was a demonstrably justifiable reasonable limit under section 1. *Id.*

¹⁸³ This phrase is borrowed from the famous footnote four of Justice Stone's opinion in *Carolene Products*. *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4. (1938).

¹⁸⁴ *Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313, 414.

¹⁸⁵ Again, to quote Justice McIntyre:

The balance between the two forces is delicate and the public-at-large depends for its security and welfare upon the maintenance of the balance The whole process is inherently dynamic and unstable. Care must be taken in considering whether constitutional protection should be given to one aspect of this dynamic and evolving process while leaving the others subject to the social pressures of the day To intervene in that dynamic process at this early stage of *Charter* development by implying constitutional protection for a right to strike would, in my view, give to one of the contending forces an economic weapon removed from and made immune, subject to s.1, to legislative control which could go far towards freezing the development of labour relations and curtailing that process of evolution necessary to meet the changing circumstances of a modern society in a modern world.

Id. at 414-15.

counterparts, but the analysis will be fairly similar. For example, the Canadian courts would invalidate any effort to compel disclosure of organizational membership. By the same token, it is doubtless that they would hold that a ban on gender discrimination by private organizations, such as the Jaycees or the Rotary Club, constitutes a "demonstrably justifiable reasonable limit" under section 1, is not violative of section 2(d).

Thus far, there have not been many freedom of association cases coming before the lower and appellate courts in Canada. A lower court in Ontario has held that a crown agency's collective bargaining agreement with the union providing for compulsory payment of dues by non-members, a portion of which was used by the union for non-collective bargaining purposes, violated the freedom of association rights of objecting non-members.¹⁸⁶ The federal trial court has held that a condition imposed on a parolee prohibiting him from associating or communicating with persons having criminal records was a "demonstrably justifiable reasonable limit" on freedom of association.¹⁸⁷ One court of appeals, which held that a rule prohibiting partnerships between resident and non-resident lawyers, violates the mobility rights guaranteed by section 6(2), also held that the rule violated freedom of association guaranteed by section 2(d).¹⁸⁸ In view of the paucity of cases at present, the contours of the protection afforded to freedom of association under section 2(d) remain to be fully developed.¹⁸⁹ However, in light of the approach taken to the meaning of freedom of association by the Supreme Court in the 1987 trilogy, it is reasonable to conclude that freedom of association will be afforded substantially the same degree of protection in Canada as in the United States.

E. Our Comparative Constitutional Analysis: A Retrospective

This Article has compared the constitutional protection of freedom of religion, expression, and association in Canada and in the United States. Taking into account the textual and structural differences be-

¹⁸⁶ *Re Lavigne & Ontario Pub. Serv. Employees Union*, [1986] 55 O.R.2d 449 (Ont. H.C.). This accords with the result under the first amendment. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). A contrary result was reached in *Baldwin v. British Columbia Gov't Employees' Union*, [1986] 4 W.W.R. 679 (B.C. S.C.), on the ground that the use of the dues by the union was not "state action" under section 32, so the Charter was inapplicable. For discussion of this issue, see Gall, *Freedom of Association and Trade Unions: A Double-Edged Constitutional Sword*, in *LITIGATING THE VALUES OF A NATION*, *supra* note 84, at 245.

¹⁸⁷ *Re Bryntwick and National Parole Bd.*, [1986] 55 C.R.3d 332 (Fed. T.C.).

¹⁸⁸ *Black v. Law Soc'y of Alta.*, [1986] 27 D.L.R.4th 527 (Alta. C.A.), *aff'd*, [1987] Alta. J. No. 201.

¹⁸⁹ For example, there are conflicting lower court decisions on whether a ban on partisan political activity by civil servants violates section 2(d). Compare *Fraser v. Nova Scotia Civil Serv. Comm'n.* 74 N.S.R.2d 91 (S.C. 1986) (unconstitutional) with *Osborne v. Regina*, [1986] 30 D.L.R.4th 662 (Fed. T.C.) (constitutional).

tween the constitutional protection of freedom of religion, expression, and association under both the Canadian Charter of Rights and the U.S. Constitution, the degree of protection afforded those rights in Canada appears highly similar, although not identical, to the degree of protection afforded those rights in the United States. In determining the degree of protection to be afforded these rights under the Charter, the Canadian courts have resolved the *value questions* in much the same way as they have been resolved by the courts in the United States.

Consideration will now be given to the reasons behind these similarities. Why are these freedoms afforded substantially the same degree of protection under the Canadian Charter of Rights and under the U.S. Constitution? Why have the Canadian courts resolved the value questions inherent in constitutional interpretation in much the same way as they have been resolved by the courts in the United States?

One plausible explanation might be the influence of the U.S. experience of constitutional interpretation on constitutional interpretation in Canada. In the years preceding the Charter, the advocates of entrenchment of individual rights in Canada would naturally look to the American constitutional experience. There is no doubt that this experience was considered in the drafting of the Charter's provisions.¹⁹⁰ The Supreme Court of Canada has specifically recognized the relevance of the American constitutional experience in interpretation of the Charter.¹⁹¹ However, while the Canadian courts regularly cite and discuss U.S. constitutional cases, there is no evidence that these cases are treated as "authoritative" or especially "persuasive." Where appropriate, the Canadian courts have distinguished U.S. cases on the basis of textual and structural differences between the Charter and the U.S. Constitution, and they have not hesitated to disagree with the analysis and conclusions of their U.S. counterparts in particular cases. Rather, in all of the cases considered so far, the Canadian courts have faithfully applied the mode of analysis prescribed by the text and structure of the Charter; they have done so in a distinctly Canadian context. The influence of U.S. experience of constitutional interpretation on the Canadian courts, while not insignificant in practice, does not go very far toward explaining the similarity of results reached by the courts of both nations.

The similarity in the degree of protection afforded freedoms of religion, expression and association in Canada and the United States is best

¹⁹⁰ For a discussion of this point, see Sedler, *supra* note 2, at 1213-23.

¹⁹¹ As the Court stated in the first case decided under the Charter:

[t]he courts in the United States have had almost two hundred years experience at this task [of interpretation of the individuals rights provisions of a constitution] and it is of more than passing interest to those concerned with these new developments in Canada to study the experience of the United States courts.

Law Soc'y of Upper Can. v. Skapinker, [1984] 1 S.C.R. 357, 367.

understood with reference to the concept of "demonstrably justifiable reasonable limits" embodied in section 1 of the Charter. Section 1 refers to "such reasonable limits prescribed by law as can be demonstrably justified in a *free and democratic society*."¹⁹² The courts of *any* "free and democratic society," sharing the same legal tradition,¹⁹³ are likely to be in substantial agreement on the question of what is a "demonstrably justifiable reasonable limit" on freedoms of religion, expression, and association. These freedoms are paramount in any free and democratic society,¹⁹⁴ and they will be given substantial constitutional protection.

The crucial question in regard to the extent of the protection that they will be given revolves around *limitation* and *justification*. As Thomas Emerson has stated with regard to freedom of expression:

A system of freedom of expression, operating in a modern democratic society, is a complex mechanism. At its core is a group of rights assured to individual members of the society. . . .

At the same time, the rights of all in freedom of expression must be reconciled with other individual and social interests. It is this process of reconciliation that has given rise to most of the controversial issues in the past and continues to be the major focus of attention today.¹⁹⁵

And, as Emerson goes on to say:

In constructing and maintaining a system of freedom of expression the major controversies have arisen not over acceptance of the basic theory, but in attempting to fit its values and functions into a more comprehensive scheme of social goals. These issues have resolved around the question of what limitations, if any, ought to be imposed upon freedom of expression in order to reconcile that interest with other individual and social interests sought by the good society.¹⁹⁶

Section 1 of the Charter textually provides the answer to the question of what limitations should be imposed upon freedoms of religion, expression, and association in Canada. The only limitations are those that can be "demonstrably justified in a free and democratic society." The use of this concept works extremely well with respect to the rights of

¹⁹² Charter, s. 1.

¹⁹³ I am referring here to nations such as the United States and Canada that share what may be called the Anglo-American legal tradition. I express no opinion on constitutional interpretation by the courts of the Western European democracies or on the interpretation of international human rights documents by international tribunals, because I have no familiarity with these matters.

¹⁹⁴ Reflected by the fact that they are embodied in the first amendment to the U.S. Constitution and are embodied in section 2, the *first* substantive provision of the Charter, where they are referred to as "fundamental freedoms".

¹⁹⁵ T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 1 (1970).

¹⁹⁶ *Id.* at 9.

religion, expression, and association¹⁹⁷ because it focuses attention on the justification for the particular limitation and relates that justification to the particular interest that is infringed by the limitation.

The concept of "demonstrably justifiable reasonable limit," as applied to infringements on these freedoms in Canada, embodies in textual form the balancing approach to the constitutional protection of these rights that the U.S. Supreme Court has been trying to effectuate over time. While the balancing approach that has been developed by the U.S. Supreme Court takes place under various formulations and has given rise to a number of subsidiary doctrines, the result is that the Court requires a substantial justification for any interference with first amendment rights. Given the fact that the United States is a "free and democratic society," it is fair to say that the courts in the United States will sustain restrictions on only those rights that can be shown to be "demonstrably justifiable in a free and democratic society."

In the area of freedoms of religion, expression, and association, the balancing approach prescribed by the text and structure of the Charter embodies in a more precise form, as befits a contemporary constitutional document, the balancing approach that in fact has been developed by the U.S. Supreme Court in its efforts to reach a proper accommodation between the protection of these interests and the recognition of other societal interests. Given this similarity in approach and the fact that both nations are "free and democratic societies," it should not be surprising that the courts of both nations have resolved value questions in much the same way and have frequently arrived at the same constitutional result in particular cases. This is the primary reason why freedom of religion, expression, and association has received substantially the same degree of constitutional protection in Canada as in the United States.

I would also submit that we would expect to see a similarity of result with *any* free and democratic society, sharing the same legal tradition, in which these individual rights have been given constitutional protection. That is, we would expect to see substantial agreement among the courts of those societies as to what infringements on freedom of religion, expression, and association constitute a "demonstrably justifiable reasonable limit." Under this view, the proximity of Canada to the United States, and the fact that the Canadian courts can draw on the constitutional experience of the courts in the United States turn out to be rather unimportant. If the United Kingdom, Australia or New Zealand, for example, were to adopt a constitution protecting the individual rights of freedom of religion, expression, and association, we would expect to see substantially the same degree of constitutional protection afforded these

¹⁹⁷ I am not at the present expressing any view as to how this concept works with respect to the protection of other rights guaranteed under the Charter.

rights in those countries as is presently afforded in Canada and in the United States.

III. CONCLUSION

In the final analysis, the entrenchment of individual rights in Canada has put that nation on a parallel constitutional course with the United States. This Article has compared the protection of freedom of religion, expression, and association in Canada and in the United States. The conclusion that has been reached as a result of this comparison may have broader significance and may say something about the nature of constitutional protection of individual rights in any free and democratic society. It may well be that in any free and democratic society, sharing the same legal tradition, the courts, within the textual and structural constraints of their particular constitutions, will extend substantially the same degree of protection to the individual rights recognized by the constitution. To this extent, the constitutional protection of individual rights will be "universal" in free and democratic societies.