THE IMPACT OF THE MOBILITY RIGHTS: THE CANADIAN ECONOMIC UNION — A BOOM OR A BUST?

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I. INTRODUCTION

The right of mobility has probably, over the centuries, been the last refuge of the oppressed. The exodus through the Red Sea, the flight of the Irish to the New World, the search for a new home by African, Asian and Caribbean refugees, and the occasional breaches of the Berlin Wall by the East German *Fluechtlinge*, while disparate in time, place and causes, are the conclusions of escapes from oppression: political, economic, religious, racial or otherwise. Interference with mobility rights ranges from the dramatic harshness of exclusion, confinement and expulsion to the more subtle forms of disadvantageous barriers to opportunities, privileges or rights.

The right of mobility does not raise simply an issue; it raises a cluster of issues under the new Canadian Charter of Rights and Freedoms.[1] The infringement of other personal rights and freedoms, such as rights and privileges of citizenship, equality rights and democratic rights, is almost always inextricably involved. As a right to move, the right of mobility involves the legal right to *liberty* encompassed within

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[1] Constitution Act, 1982, Part I, *enacted by* Canada Act, 1982, U.K. 1982, c. 11. The mobility rights provision, s. 6, reads as follows:

> 6.(1) Every citizen of Canada has the right to enter, remain in and leave Canada.
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> (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
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> (*a*) to move to and take up residence in any province; and
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> (*b*) to pursue the gaining of a livelihood in any province.
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> (3) The rights specified in subsection (2) are subject to
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> (*a*) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
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> (*b*) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.
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> (4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

section 7 of the Charter.[2] As a right to pursue the gaining of a livelihood in any province, as provided in paragraph 6(2)(*b*), it is a specific instance of the legal right to life guaranteed by section 7 of the Charter. As a right that condemns discrimination on the basis of residence, it is a specific instance of the right of an individual to general *equality* guaranteed by section 15 of the Charter.[3] In substance, there is not very much point to pursuing the gaining of a livelihood unless there is a right to enjoy the things that one has gained. Since the only way to pursue life in the material sense involves the *acquisition* and *use* of goods, services and capital, paragraph 6(2)(*b*) establishes the most fundamental of all property rights. In short, mobility rights mean the liberty to acquire and use services and capital anywhere in Canada and to enjoy life anywhere in Canada. A citizen has, in addition to the right to acquire goods and services anywhere in Canada, the right to leave Canada. To what extent and how a person acquires these economic goods, to what extent and how he is permitted to use them (in other words the question of the standard of living a person is entitled to enjoy, whether that of an indigent, on or above the poverty line, middle income or upper income levels); these are issues that arise from section 15. For this reason, any discussion of mobility rights cuts across the grain of other rights and freedoms found in the new Canadian Charter of Rights and Freedoms.

II. Some Historical and General Considerations

The Fathers of Confederation had a lofty and grand design in writing the British North America Act (*now* Constitution Act, 1867): the creation of Confederation as a new integrated "political nationality"[4] and integrated national economy. The political structure of Confederation, the levels of government, the scheme in the distribution of legislative powers, the functional allocation of executive power, the unified judiciary and the care with which they crafted the Constitution Act, 1867

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[2] S. 7 reads:

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

[3] S. 15 reads:

15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[4] D. Creighton, British North America at Confederation: A Study Prepared for the Royal Commission on Dominion-Provincial Relations 40 (1939).

as a whole, evidence their resolve to achieve the political integration of the constituent colonies. Unfortunately, the same assessment cannot be made of their attempt to enshrine economic integration. It is true that to the Fathers "the creation of the new national economy occupied a place of central importance. It was an enterprise which was consciously adopted and deliberately put into execution."[5] But they were unclear as to what the organic law should provide in order to establish or encourage the economic union. They seem to have assumed that economic integration would naturally follow from the creation of the political union:

> The Fathers of Confederation expected great things of the new economy; and they evidently believed that its *inherent strength* made artificial support unnecessary. The establishment of a free trade area of nearly four million people and its integration by means of improved canals and new railways were, in the minds of the Fathers, the sufficient means for the realization of their ideal. Apart from Isaac Buchanan and a few others, who definitely linked Confederation with a national policy of protection, there were few people who wished to bind the new economy together with a tariff. The almost entire absence of any demand for a new fiscal policy was due as well to the tariff apprehensions which agitated the Maritimes.[6]

They believed that with the installation of a strong central government, having wide power to regulate "Trade and Commerce" and to legislate in relation to the monetary system and any form of taxation, pursuant to the Constitution Act, 1867, the central government would assume the task of forging the country into an integrated economic union.[7] They had no reason to foresee the competition for capital and industry that has tortured Canada in the recent past. Rather, it was thought that the various regions of Canada harboured no points of potential competition; their resources and industries were "diversified and complementary".[8] To paraphrase one of the Fathers, the East would send its fish, coal and other produce to the West in return for the West's flour, grain and meat which the East used to buy from Boston and New York.[9]

The Constitution Act, 1867, as interpreted by the Privy Council, integrated and unified Canada's geography but it failed miserably in its pursuit of the ideal of political integration envisioned by the Fathers. Since political integration was the mechanism adopted to realize economic integration, economic integration failed as well. For this

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[5] *Id.*

[6] *Id.* at 42-43 (emphasis added).

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> What one thing has contributed so much to the wondrous material progress of the United States as the free passage of their products from one State to another? Sir, I confess to you that in my mind this one view of the union — this addition of nearly a million of people to our home consumers — sweeps aside all the petty objections that are averred against the scheme.

Id. at 45, *citing* CANADIAN CONFERENCE DEBATES 99.

[8] D. CREIGHTON, *supra* note 4, at 40.

[9] *Id.* at 45, *citing* E. WHELAN, UNION OF THE BRITISH PROVINCES 37 (1865).

reason, the weaknesses in Canada's economic regime reveal the more endemic weaknesses in Canada's political fabric. The promise of the trade and commerce power of Parliament under head 2 of section 91 of the Constitution Act, 1867 proved greater than its performance. The less extensive interstate commerce clause in the United States Constitution built the American colonies into a nation;[10] the Canadian trade and commerce clause, though broader in language, fell victim to judge-made strictures. The destiny of head 2 of section 91 is an irony of Hegelian dialectic; today, its ambit is far narrower than that of the American interstate commerce clause. The recent judgments of the Supreme Court of Canada, such as *MacDonald v. Vapor Canada Ltd.*[11] and *Labatt Breweries of Canada Ltd. v. A.G. Can.*[12] show that the confinement of the trade and commerce clause, imposed by a distant and isolated Privy Council, and the enhancement of the property and civil rights competence of the provinces, are now permanent fixtures in our constitutional edifice. Although the Supreme Court of Canada has recently struck down the attempts of a province to regulate international and inter-provincial trade of its products in *Canadian Industrial Gas & Oil Ltd. v. Saskatchewan*,[13] this decision is far from reviving the full scope of the commerce power. On the contrary, the decision could very well eliminate the regulatory presence of any government. The logic of *CIGOL* could easily consign natural resource regulation to the same fate as that of the regulation of agricultural products, such as wheat and apples, an area which for a time was, in the words of Frank Scott, "a no man's land in the constitution".[14] In any event, the decision of the Supreme Court of Canada in the *CIGOL* case will no longer be applicable, due to section 92A of the Constitution Act, 1867, as introduced by section 50 of the Constitution Act, 1982.

The federal power of disallowance and reservation, the *ultima ratio* in the Constitution Act, 1867 to institutionalize national integration, has also fallen into disuse by default and mistaken wisdom. This writer would quarrel with those who seek to draw from the federal restraint on its use an "unimpeachable" case that it now has no room for application.[15] One would wonder how disuse could annihilate a law, let alone a constitutional norm. The universal rule of all civilized legal systems is that "neither contrary practice nor disuse can repeal the

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[10] U.S. CONST. art. I, §8, cl. 3.

[11] [1977] 2 S.C.R. 134, 66 D.L.R. (3d) 1 (1976).

[12] [1980] 1 S.C.R. 914, 110 D.L.R. (3d) 594 (1979).

[13] [1979] 1 S.C.R. 37, 80 D.L.R. (3d) 449 (1978) [hereafter CIGOL]

[14] *The Privy Council and Mr. Bennett's "New Deal" Legislation*, 3 CAN. J ECON. & POL. SCI. 234, at 240 (1937).

[15] P. HOGG, CONSTITUTIONAL LAW OF CANADA 39 (1977).

positive enactment of a statute."[16] Furthermore, this position is both spurious and dangerous, for it confers upon the courts the power to read away the existence of an express constitutional rule. Even the judgment of the Supreme Court of Canada in *Reference re Amendment of the Constitution of Canada*[17] cannot quiet concern against judicially ordered repeal. The creation of a convention by practice can at least be supported by continuous, unequivocal consensus; repeal of a constitutional rule by disuse, on the other hand, has to rely largely on speculation.[18] The point, however, is that the judicious and courageous use of the disallowance vehicle to dismantle any measure of destructive economic regionalism, which it otherwise lies within the legislative competence of a province to enact, was foregone.

The romantic scenario of a "diversified and complementary" economy painted by the Fathers was more a landscape of hope than reality. The economic base of each province was neither necessarily diversified nor deliberately complementary; it was destined to shift as politicians responded to their perception of factors of national and international dimension. Whereas on one day, Province A was begging to peddle its produce to other provinces, on the following day the other provinces were begging to buy whatever Province A was willing to peddle. Alberta's energy saga is not an isolated story; it is a story that has been replayed several times since Confederation. The provinces have found themselves, through various devices of coercion or seduction, competing against each other to bring capital investment, establishment of enterprises, and scarce manpower resources into their borders. This mad scramble has created distortions in the allocation of economic resources, the establishment of uneconomic white elephants within regions, the imposition of a heavier tax burden on the residents of the

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[16] The Privy Council in Hebbert v. Purchas, [1871] L.R. 3 P.C. 605, at 650. It is, of course, different in international law since international law arises largely from the practices of states rather than by a superior legislative authority standing above the states.

[17] [1981] 1 S.C.R. 753, 125 D.L.R. (3d) 1.

[18] As Kerwin J. stated in Reference *re* the Power of the Governor Gen. in Council to Disallow Provincial Legislation and the Power of Reservation of a Lieutenant Governor of a Province, [1938] S.C.R. 71, at 95, [1938] 2 D.L.R. 8, at 27:

> The circumstances under which the powers referred to may be exercised are matters upon which this Court is not constitutionally empowered to express an opinion since the power of disallowance is granted by the Act to the Governor General in Council and the power of reservation is to be exercised by the Lieutenant-Governor 'according to his Discretion, but subject to the Provisions of this Act and to the Governor General's Instructions.'

The Court in this case was unanimous that an implied alteration of constitutional powers cannot occur. Duff C.J. was emphatic that the Court "is not concerned with constitutional usage", but "with questions of law which, we repeat, must be determined by reference to the enactments of the *British North America Acts* of 1867 to 1930, the *Statute of Westminster*, and, it might be, to relevant statutes of the Parliament of Canada if there were any": *id.* at 78, [1938] 2 D.L.R. at 13.

province and, ultimately, a sacrifice on the quality and scope of necessary government services to the people.

The Fathers of Confederation also exaggerated the significance of the relatively small Canadian market and the viability of such market independent of the United States. In the view of the Fathers, the creation of the "free-trade area of four million people would provide a compensation for the abrogation of the Reciprocity Treaty; and security against the caprices of foreign commercial policy would come with the development of inter-regional trade in naturally interchangeable goods."[19] In their fervent nationalism, they blithely ignored the dependence of the Canadian economy upon the access of Canadian goods to the large American market, and the fact that Canada is less able than other countries to implement an economic policy independently of the United States.

The consequence of the judicial rewriting of the Constitution Act, 1867 upon the growth of the provinces as separate economic units has sealed the doom of the economic union. With increasing tax power, greater responsibility and substantial spending power, any one or two major provinces has the power to undermine the implementation of any desirable national economic policy. The poorer provinces, denied substantial financial staying power, must rely on federal assistance to survive economic downturns and to deliver the minimum standard of government services to the people.

To the people of Canada, the economic regime of the Constitution Act, 1867 is unsatisfactory:

> To mention just one harmful consequence, Canadians in different parts of the country do not share equally the price of fighting inflation. . . . More serious, the growth we have achieved is grossly unfair: it is so alarmingly pregnant with regional disparities that we seem to be moving to the future along Darwin's doctrine of natural selection. Central Canada, favoured by a number of factors, has achieved prosperity that can only be considered a dream in other regions. Necessarily, provincial standards of essential services to the people differ vastly from region to region. If this is bad enough to some Canadians, it is disastrous to Canadian Eskimos and Indians. In fine, therefore, Canadians do not share equally in the costs and gains of economic growth under the B.N.A. Act.[20]

Mobility rights were included in the Charter to create the economic union that Parliament and the legislatures of the provinces have failed to create within the scope of their powers in the Constitution Act, 1867. On both sides of the House, repeated condemnation was voiced towards preferential treatment of provincial residents or goods and outright exclusion of out-of-province residents or goods in government purchases or contracts, employment and other enterprises. Provincial government campaigning to prevent out-of-province residents taking away jobs in

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[19] D. CREIGHTON, *supra* note 4, at 45.

[20] Binavince, *Economic Growth Through Constitutional Safeguards The Canadian Experience*, 17 MCGILL L.J. 189, at 215 (1971).

large projects such as the James Bay project in Quebec,[21] Newfoundland's reservation of jobs on oil rigs offshore of Newfoundland for residents,[22] the fear of retaliatory legislation by other provinces,[23] the high rate of migration of residents from one province to another,[24] the exclusion of Hull, Quebec, painters from work in the national capital,[25] the exclusion of Ontario construction firms from Quebec construction projects,[26] the practice of the postal workers' union and the electrical workers' union to prevent movement of workers from one locality to another without the prior consent of their local[27] and the dubious practice of distorting purchase order specifications of furniture so that only provincial manufacturers could satisfy the tender conditions: all these were arguments offered to support the entrenchment of mobility rights. There were objections to the mobility rights provision in that it was not broad enough; and one British Columbia M.P. read the provision as an exploitation of the West by Central Canada:

> Mobility of labour is attractive in a province such as Ontario where 10,000 people recently applied for 1,000 jobs. But in Vancouver mobility of labour means the migration of 4,000 people a month to British Columbia. Mobility of labour means that every $85,000 house is selling for a quarter of a million dollars. It means that British Columbians are being priced out of a chance to own their own homes in their own cities. Mobility of labour means that native Canadians who need the time to learn the skills to participate in job opportunities which are opening to them will be denied that right. The freedom to move should at least be matched by their freedom to stay.[28]

The mobility of labour was a dominant concern. In this regard, a Minister stated:

> The only way we can supply our human resource need and ensure that there is effective productivity is to ensure the easy movement of people to where the jobs are. So long as we tolerate or allow barriers to exist, we will not be able to employ a national employment strategy. To those who sometimes condemn the constitutional debate as being somewhat abstract or academic in this area, I would say that certainly in this area, it is a very real and vital necessity to make our economy grow.[29]

The dilemma of labour mobility today illustrates the most damning shortcoming of the economic union under the regime of the Constitution Act, 1867. In response to a fear of being accused of doing nothing for the unemployed, the federal government introduced a program providing relocation assistance to the unemployed within a province. However, the

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[21] H.C. DEB., 32nd Parl., 1st sess., at 5316 (4 Dec. 1980).
[22] H.C. DEB., 32nd Parl., 1st sess., at 3570 (9 Oct. 1980).
[23] H.C. DEB., 32nd Parl., 1st sess., at 3396 (8 Oct. 1980).
[24] H.C. DEB , 32nd Parl., 1st sess., at 7844 (3 Mar. 1981).
[25] H.C. DEB., 32nd Parl., 1st sess., at 3851 (20 Oct. 1980).
[26] H.C. DEB., 32nd Parl., 1st sess., at 4024 (23 Oct. 1980); H.C. DEB., 32nd Parl., 1st sess., at 2799 (11 Jul. 1980).
[27] H.C. DEB., 32nd Parl., 1st sess., at 3609 (10 Oct. 1980).
[28] H.C. DEB., 32nd Parl., 1st sess., at 4010 (23 Oct. 1980).
[29] H.C. DEB., 32nd Parl., 1st sess., at 5418 (5 Dec. 1980).

program is not aggressively implemented for fear of displeasing the provincial governments whose transfer payments would substantially decrease as their population declined or whose alleged pool of skilled labour would be drained, creating a shortage when their economy moves into high gear. Other provinces reject the financial or social burdens of the indigent from other provinces. There is a figurative "Berlin Wall" in these dubious machinations that condemns the people as a burden in one region, yet prevents them from becoming productive resources in another region.

III. The Ideological Premise of Mobility Rights Protection

The mobility rights guarantee in section 6 of the Charter of Rights and Freedoms is not an institutional provision; it does not depend upon the mandate of the federal or provincial governments for its protection. The rights are not, therefore, "matters" of legislative power and are not derived from the quantitative allocation of the competence to make laws. On the contrary, the Charter makes the fundamental assumption that governments are potential infringers, rather than protectors, of the mobility rights. Accordingly, the mobility rights provisions, like all provisions of the Charter, seek to create a relatively secure sphere of moral minimum for human dignity from which the powers of government are banned. This does not mean that the division of powers under sections 91 and 92 of the Constitution Act, 1867 is not available to shield a person from a statute that a level of government has no competence to enact, or that a government is prohibited, if otherwise competent, from enacting statutes that would strengthen the shield of protection of section 6. It means that even in the event of federal-provincial cooperation, through the mechanism of inter-delegation or mirror enactments, a person has the ultimate weapon to challenge the qualitative character of a suspect governmental measure. Under the renewed Constitution of Canada, therefore, the onus of implementing the strengthened economic union is conferred upon the people in pursuit of their individual interest in a free market economy. Section 6 insulates private initiative in the pursuit of human values from government interference. Concurrently, the legislative powers of Parliament may be exercised, within the area defined by the courts, to achieve the same objective.

The mobility rights in the Charter do not draw their philosophical inspiration from the high ground of the privileges and immunities of citizenship. The domestic mobility right is the right not only of Canadian citizens, but also of persons who have the status of permanent resident of Canada as this term is understood in immigration statutes. Further, as stated earlier, the primary reason for the mobility rights protection in the Charter is largely economic. There were references in Parliament during the constitutional debates to the protection of the "basic citizenship

right'' from being ''embargoed by the unilateral action of a province''.[30] But even that speaker concluded: ''Mobility rights are principally the cement that holds our economic union together.''[31]

Related to this point is another significant feature of section 6: the distinction between domestic mobility and international mobility. International mobility is protected for Canadian citizens; domestic mobility is enjoyed by both the Canadian citizen and the permanent resident of Canada. The original proposal of both Prime Minister Trudeau and Mr. Jean Chrétien, then Minister of Justice, did not extend the protection to permanent residents. In proposing his original scheme, Mr. Trudeau stressed that one of the objectives of the new Canadian Federation is to strengthen the solidarity of ''citizens of all regions and communities''.[32] The Constitutional Amendment Bill of June 1978 provided in section 8 protection for citizens of Canada, and in his speech in the House of Commons on 6 October 1980, Mr. Chrétien described the mobility of citizens as ''a matter of right'' and stated that ''[t]his right which is inherent in Canadian citizenship will be enshrined in the Charter and will be binding on all governments . . . there will be one Canadian citizenship not ten provincial citizenships.''[33]

The approach of the Charter to mobility rights is fundamentally different, though in some respects similar, to the approach of the United States Constitution. The United States Constitution contains no explicit protection of mobility rights. Nonetheless, the Supreme Court of the United States has been able to support mobility rights on three different grounds: first, on the general purposes of the union; second, on some other expressly protected rights; and third, on the allocation of powers between the central government and the states. As a matter of allocation of power, personal mobility has been found in the United States to be protected by the commerce clause of the Constitution. In *Edwards v. California*[34] the United States Supreme Court invalidated a law penalizing as a misdemeanour the bringing into California of ''any indigent person who is not a resident of the state, knowing him to be indigent''.[35] The majority opinion of Mr. Justice Byrnes, disregarding an earlier decision of the Court, *City of New York v. Miln*,[36] found the state law to be an unconstitutional burden on interstate commerce. He argued that although the huge influx of migrants into California in recent years had resulted in problems of health, morals and especially finance in staggering proportions, the Constitution was framed upon ''the theory

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[30] H.C. DEB., 32nd Parl., 1st sess., at 8288 (16 Mar. 1981).

[31] *Id.*

[32] P. TRUDEAU, A TIME FOR ACTION: HIGHLIGHTS OF THE FEDERAL GOVERNMENT'S PROPOSALS FOR THE RENEWAL OF THE CANADIAN FEDERATION 3 (1978).

[33] H.C. DEB., 32nd Parl., 1st sess., at 3286.

[34] 314 U.S. 160 (1941).

[35] 1937 Cal. Stats., §2615.

[36] 36 U.S. 648 (1837).

that the peoples of the several states must sink or swim together''.[37] Accordingly, California could not isolate itself from the difficulties common to all states by restraining the transportation of persons and property across its borders. In this case, one justice found support in the privileges and immunities of citizenship, while another found it in the equal protection clause.[38] Mr. Justice Stewart's majority opinion in *United States v. Guest*[39] relied on the implicit character of the union:

> Although the Articles of Confederation provided that 'the people of each State shall have free ingress and regress to and from any other State,' that right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.[40]

The scheme adopted by the European Economic Community (EEC) is analogous to the mechanism embodied in section 6 of the Canadian Charter. The EEC relies mainly on private initiative in economic integration and the Treaty of Rome contains a series of duties of member states to abolish existing barriers and prohibitions to the creation of new barriers. The powers conferred on the Council are simply powers to clarify the scope of these treaty provisions.

The mobility rights have a ''preferred'' position in the Charter. Along with democratic rights in section 3, and minority language educational rights in section 23, mobility rights are not subject to the override power of Parliament or the provincial legislatures in section 33 of the Charter. This is, of course, not to say that the mobility rights cannot be qualified; the general limitation provided in section 1 of the Charter applies. The limitations, however, must be (a) reasonable, (b) prescribed by law and (c) demonstrably justified in a free and democratic

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[37] *Supra* note 34, at 174 (Byrnes J. quoting Cardozo J. in Baldwin v. Seelig, 294 U.S. 511, at 523 (1935)).

[38] Douglas J.'s concurring opinion preferred reliance on broader principles than the commerce clause. To him, the privileges and immunities clause of the fourteenth amendment applied. The right to move freely from state to state was an incident of national citizenship, and this principle may not be lawfully breached even if those who seek to migrate are poor or destitute. To allow such an exception to the rights of national citizenship, he argued, would contravene any conception of national unity. Jackson J. was more emphatic in his reluctance to rely on the commerce clause, preferring instead the equality right. ''To hold that the measure of his [mobility] rights is the commerce clause is likely to result eventually either in distorting the commercial law or in denaturing human rights.'' *Supra* note 34, at 182.

[39] 383 U.S. 745 (1966).

[40] *Id.* at 758. *See also* Shapiro v. Thompson, 394 U.S. 618 (1969), where the Court refused to specify the basis for this ''fundamental right'', noting, however, that it had been founded on the privileges and immunities clause of the fourteenth amendment and the commerce clause, while Harlan J., in dissent, supported it on the due process clause of the fifth amendment.

society.[41] This stricture (which the government of Canada had indicated in December 1980 it would delete but did not as a result of representation from the provinces) appears to involve a myriad of qualifications of uncertain scope. Although it does not include the vague wording of earlier drafts that "the accepted rule of parliamentary sovereignty"[42] would be justification, the concepts "reasonableness" of the limitations, "demonstrable justification" and "free and democratic society" are open ended, admitting historical analysis and pragmatic judgment on the effect of such rights upon traditional, current, popular and strongly held political, economic and cultural conflicts in Canadian society. If the courts handle this limitation unimaginatively, section 1 might spell the doom of the Charter's usefulness. Another question emerges from the word "law" which would prescribe the limitations. It is submitted that only the Parliament of Canada and the provincial legislatures can establish "reasonable" limits; the limitations at common law established by the courts cannot be shielded from attack, and delegated or subordinate authorities cannot create such limits. The reason is that the scheme of the Charter is to expose the creation of limitations to fundamental rights to the test of the political arena, and only Parliament and the legislatures have the political accountability to yield to such tests.

IV. Brief Review of the Impact of the Mobility Rights Provision

A. *In General*

The main question, of course, is the significance of the mobility rights provision. Will it dismantle the regional inequities, economic distortions and conflicting government measures that have been so roundly condemned by all parties in Parliament? It is contended that section 6 of the Charter will go far in giving Canadians the means to force

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[41] S. 1 reads as follows:

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

[42] The 1980 Draft of the Charter provided:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits as are generally accepted in a free and democratic society with a Parliamentary system of government.

The June 1978 Draft was even broader. S. 25 provided:

Nothing in this Charter shall be held to prevent such limitations on the exercise or enjoyment of any of the individual rights and freedoms declared by this Charter as are justifiable in a free and democratic society in the interests of the peace and security of the public, or the interests of the rights and freedoms of others, whether such limitations are imposed by law or by virtue of the construction or application of any law.

governments to test the validity of their measures on the merits and in giving courts the ability to strike down any infringing measures. On the strict wording of section 6, however, it cannot be predicted with confidence that the balkanizing barriers in Canada will be wholly dismantled. To achieve this, the courts will have to have more courage to assert the worth of human dignity against the intrusion of governments than they have shown to date. They must, in addition, re-interpret and strengthen the protective reach of section 121 of the Constitution Act, 1867. Short of this — although it is a very big order for the courts — the barriers to full economic union that exist today will remain, and the mobility of goods, services, capital and people will not be wholly unimpeded.

The mobility rights enshrined in section 6 of the Charter relate simply to mobility of persons: the mobility of goods, capital and services is not enshrined expressly in section 6. The question whether the mobility of goods, services and capital is protected by the Charter depends upon the extent to which the dichotomy between personal rights and property rights can be sustained in Canadian constitutional law and, if so, whether property rights are in fact protected by the other provisions of the Charter. The participants in the constitution-making process were intensely aware that the success of an economic union depends partly, if not largely, upon the free mobility of goods, services and capital, and that the evils they have so eloquently condemned stem from the barriers to that free movement. For this reason, it is difficult to believe that section 6 of the Charter relates only to personal mobility. If it does, the authors of the Charter repeated the error of the Fathers of Confederation; they, like the Fathers of Confederation, again relied on the distribution of legislative powers and section 121 of the Constitution Act, 1867. Since section 31 of the Charter expressly states that "[n]othing in this Charter extends the legislative powers of any body or authority", it is clear that reliance on the powers of a "supranational" institution to implement economic union is a delusion. The question, therefore, is whether section 121 guarantees the mobility of goods, capital and services from federal and provincial government encroachment? If not, is their movement simply an aspect of personal mobility?

B. *The Free Movement of Goods, Services and Capital in Canada*

The economic union established by the Constitution Act, 1867 was thought to be adequately provided for by natural circumstances and it was believed that all that was needed was section 121 of the Act: "All articles of growth, produce, or manufacture of any one of the provinces shall, from and after the union, be admitted free into each of the other provinces." An economic union is based on a generally accepted market economy, and the free movement of articles established by section 121 relates to the distribution or disposition of the goods. Such activities as the utilization of resources (capital and labour) and their free movement

require equally meaningful protection if the economic union is to be functional. The free movement of goods, taken alone, provides no firm foundation for a functioning and viable economic union. The movement of goods relates only to the availability of the goods to all provincial consumers, but the movement of capital and labour relates to the search for lower cost, based on efficient production. Thus, whereas goods move to where they are wanted most, the factors of production move to where they can be most efficiently used to produce goods of the best quality at the lowest possible cost. The allocation of resources of production in Canada, if governed by market forces, will, therefore, defy the provincial boundaries.

There are numerous difficulties hindering section 121 from establishing such an economic union. First, the provision applied only to "articles", and the cases, especially those construing the Combines Investigation Act,[43] have held that "articles" do not include "services".[44] Second, the courts have understood section 121 to prohibit only the imposition of a custom duty.[45] Taken in this sense, the word "free" in section 121 only means an interdiction against the establishment of tariff-like barriers. In the words of Mignault J. in *Gold Seal Ltd. v. Dominion Express Co.*:

> I think that, like the enactment I have just quoted, the object of section 121 was not to decree that all articles of the growth, produce or manufactures of any of the provinces should be admitted into the others, but merely to secure that they should be admitted 'free', that is to say without any tax or duty imposed as a condition of their admission. The essential word here is 'free' and what is prohibited is the levying of customs duties or other charges of a like nature in matters of interprovincial trade.[46]

Mr. Justice Rand, in *Murphy v. C.P.R.*,[47] made some statements which could form the basis for a more creative approach to section 121 to enable it to establish a broader free movement principle, that would condemn non-tariff restrictions such as quantitative or equivalent effect

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[43] R.S.C. 1970, c. C-23, *as amended*.

[44] *See* R. v. J.J. Beamish Constr. Co., [1968] 1 O.R. 5, 65 D.L.R. (2d) 260 (C.A. 1967); R. v. B.C. Professional Pharmacists' Soc'y, [1971] 1 W.W.R. 705, 17 D.L.R. (3d) 285 (B.C.S.C. 1970).

[45] *See* Atlantic Smoke Shops Ltd. v. Conlon, [1941] S.C.R. 670, [1941] 4 D.L.R. 129; *aff'd* [1943] A.C. 550, [1943] 3 W.W.R. 113 (P.C.).

[46] 62 S.C.R. 424, at 470, [1921] 3 W.W.R. 710, at 740, 62 D.L.R. 62, at 89.

[47] [1958] S.C.R. 626, 15 D.L.R. (2d) 145.

restrictions prohibited in the European Economic Community.[48] In this case, the challenge was mounted against a prohibition by a federal statute on the interprovincial movement of grain outside the scheme established by the Act. Although Rand J. sustained the statute on the commerce power, he took an expansive view of section 121:

> Viewing it in isolation, as a hindrance to interprovincial trade detached from all other aspects, the demand bears the appearance of a violation. Apart from matters of purely local and private concern, this country is one economic unit; in freedom of movement its business interests are in an extra-provincial dimension, and, among other things, are deeply involved in trade and commerce between and beyond provinces.
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> . . . .
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> 'Free', in s. 121, means without impediment related to the traversing of a provincial boundary. If, for example, Parliament attempted to equalize the competitive position of a local grower of grain in British Columbia with that of one in Saskatchewan by imposing a charge on the shipment from the latter representing the difference in production costs, its validity would call for critical examination. That result would seem also to follow if Parliament, for the same purpose, purported to fix the price at which grain grown in Saskatchewan could be sold in or for delivery in British Columbia. But burdens for equalizing competition in that manner differ basically from charges for services rendered in an administration of commodity distribution. The latter are items in selling costs and can be challenged only if the scheme itself is challengeable.[49]

This trend could also be noted in *A.G. Man. v. Manitoba Egg and Poultry Ass'n*,[50] where the Supreme Court of Canada had to consider the restraint imposed on out-of-province eggs by the marketing scheme established by Manitoba. Although the case was decided on the federal commerce power, Mr. Justice Laskin, as he then was, supported the non-tariff scope of section 121. He found that the limitation upon the provincial authority to exercise its powers within the province precluded

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[48] The Treaty establishing the European Economic Community (Rome, 25 Mar. 1957) (hereafter Treaty of Rome), in arts. 30 to 37, deals with quantitative restrictions and measures having equivalent effect. As to import, art. 30 states:

> Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States.

As to export, art. 34 states:

> 1. Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.
>
> 2. Member States shall, by the end of the first stage at the latest, abolish all quantitative restrictions on exports and any measures having equivalent effect which are in existence when this Treaty enters into force.

See also art. 2(2) of directive 70/50, J.O. 1970, L13/29, which construed what constitutes a measure having equivalent effect as including those which "make imports or the disposal, at any marketing stage, of imported products subject to a condition — other than a formality — which is required in respect of imported products only, or a condition differing from that required for domestic products and more difficult to satisfy".

[49] *Murphy*, *supra* note 47, at 638-39, 15 D.L.R. (2d) at 149.

[50] [1971] S.C.R. 689, [1971] 4 W.W.R. 705, 19 D.L.R. (3d) 169.

it from intercepting either goods moving into the province or goods moving out, subject to possible exceptions, as in the case of danger to life or health. He argued that the Manitoba scheme could not be considered in isolation from similar schemes in other provinces. To him, to permit each province to seek its own advantage through figurative sealing of its borders to entry of goods from other provinces would be to deny one of the objects of Confederation, that of forming an economic unit of the whole of Canada. In his view, the existence of egg marketing schemes similar to the Manitoba scheme supports the finding that the interprovincial trade in eggs was being struck at by the provincial barriers to this movement in the various provincial markets.[51]

The third aspect of section 121 that has to be overcome is that the word "admission" yields to a literal reading. The courts may not be able to "trace back" the reason for a discriminatory treatment of goods at provincial distribution or sale to the point of "admission". If it is recognized, however, that the objective of any onerous treatment of out-of-province goods is to create exclusionary barriers for these goods, by direct measures, imposition of regulatory conditions, or requirements that add to distribution cost, then the word "admission" can be construed more realistically.

The fourth hurdle relates to the movement of capital. It is probably difficult to construe the word "article" to include capital, thus permitting enactments prohibiting the transfer of establishments from one province to another.

The shortcomings of an economic union based only on section 121 of the Constitution Act, 1867 and the trade and commerce clause can be observed by examining practices that may not be in breach of the provision. For comparison, some solutions found for problems in the European Economic Community will also be considered.

A quantitative restriction within a licensing scheme implemented at the retail level, where certain products of domestic industries face competition from out-of-province producers, may well escape the charge of invalidity under the Constitution Act, 1867, despite its recognition today as more damaging to trade at the international level. The EEC expressly forbids this form of restriction between goods from member states.[52]

Another form of restriction is that which has an "equivalent effect" restriction on out-of-province goods. For instance, the subjection of out-of-province products to conditions not required of domestic industries may survive the challenge. In the EEC, articles 30 and 34(1) of the Treaty of Rome prohibit this form of restriction, and article 2(2) of directive 70/50 has been issued accordingly.[53] In *Rewe-Zentralfinanz v. Direcktor der Landwirtschaftskammer*,[54] legislation requiring health

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[51] *Id.* at 717, [1971] 4 W.W.R. at 727, 19 D.L.R. (3d) at 190.
[52] *Supra* note 48.
[53] J.O. 1970, L13/29.
[54] [1977] 1 C.M.L.R. 599.

inspection of plant producers, not required for similar domestic products, was condemned as a measure having equivalent effect as quantitative restriction. In *Commission v. Germany*,[55] a measure which reserved to domestically produced wines appellations well-known to consumers, and required unknown or unattractive appellations for imported wine, was held invalid.

A marketing practice like Saskatchewan's prohibition on advertising or offering for sale telephone attachment equipment, is not condemned by section 121.[56] Neither is the punitive taxation of expatriation of capital or earnings from a province or the movement of a head office or the closing of operations, much feared when the *Parti Québecois* took power in Quebec, bad under section 121. This form of mobility stands unprotected before the dominant legislative powers of either Parliament or a province.

Another broadly used but less known practice, just as harmful in its effect on full mobility, is that of provincial subsidies. If it is noted that the objective of an illegal exclusion or restriction of out-of-province goods is to confer a competitive advantage for a domestic product in relation to a similar competing out-of-province product, then any measure that artificially reduces the cost of production of the domestic producer impairs free mobility of goods. The payment of government subsidies, by way of direct grant, low-cost loans, forgivable or lower tax, to name but a few, creates an artificial advantage not only in the provincial but also in the out-of-province markets. A more blatant form of subsidy, subtle but nonetheless artificial, is established by government directives to purchase local products, directed at business firms dealing with governments, typified by Newfoundland's Petroleum Regulations.[57] This is a creation of a captive market, and if the buying power of the firm is overwhelming, it could completely seal the provincial borders except to the select few, who are not necessarily the most efficient and innovative, nor the most able to provide high quality goods or services at the lowest possible cost. The same applies to government purchasing policies for the public service. Lastly, Crown corporations, which have direct engagement in business as statutory monopolies or otherwise, distort competitive situations within a province and have the tendency of creating a higher barrier to entry for out-of-province goods and possibly capital.

The question is: are these forms of restriction on full movement of goods and capital now prohibited by the mobility rights in section 6 of the Charter? It is submitted that the personal mobility provisions are available to protect the mobility of goods, capital and services in the

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[55] [1975] 1 C.M.L.R. 340, [1975 Transfer Binder] COMMON MARK. REP. (CCH) ¶8293.

[56] The Saskatchewan Telecommunications Act, R.S.S. 1978, c. S-34, s. 44.3

[57] *See* The Petroleum and Natural Gas Act, R.S.N. 1970, c. 294, and The Newfoundland and Labrador Petroleum Regulations, 1977, Nfld Reg. 139/78, which form the statutory basis for governmental out-of-province exclusions

above instances. This writer shares the view of Mr. Justice Stewart, who stated in *Lynch v. Household Finance Corp.*:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.[58]

It is contended that paragraph 6(2)(*b*) includes the free movement of capital and goods, since they are employed by a person "to pursue the gaining of a livelihood in any province". There is no valid reason to limit the "gaining of a livelihood" to employment or personal service; it includes the use of capital, the establishing of business and so on. There is not much point in utilizing capital and labour in order to produce goods and services which one cannot sell in pursuit of gaining a livelihood. Neither is there any point in attempting to gain a livelihood in a place which is uneconomic. Furthermore, the right to expatriate capital and make out-of-province payment comes within section 6. The availability of earnings to the investor or worker outside the province is necessary if the right to gain a livelihood is not to be rendered illusory. For this reason, the question that really arises is whether or not the right to pursue the gaining of a livelihood in any province requires the province or the government of Canada to be absolutely neutral so that the market forces will determine the allocation of resources in the country.

It is the writer's view that the combined effect of the mobility rights and the general provision on equality rights and legal rights mandates such neutrality, and that they condemn artificial interference by the state. There is no difference in quality between one's right to life and the right "to equal benefit of the law free from discrimination", on the one hand, and the right to move to a province to pursue one's right to life in any province without discrimination, on the other. By enshrining the right to pursue the gaining of a livelihood anywhere in Canada, the Charter does not require the physical presence of the person, nor the actual use of labour as the exclusive method of gaining a livelihood. The Charter is just as much a Charter for those who employ their sheer physical labour

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[58] 405 U.S. 538, at 552 (1972). While this paper was in galley proofs, the Toronto Globe and Mail reported on the dispute between Alberta, on the one hand, and the federal government and the other provinces, on the other. It appears that Alberta's $20.4 million subsidy of provincial canola crushers distorts the market and has placed the industry in Manitoba and Saskatchewan at a competitive disadvantage. Senator Argue condemned the subsidy, saying: "[t]he distortions created by a rich province subsidizing its crushers simply balkanizes the industry with unforeseen consequences. This action puts province against province, cooperative against cooperative and farmer against farmer, and for that reason is unacceptable to the federal government." *Id.*, 27 Nov. 1982, at B3, cols. 4-8.

and mental abilities, as for those who utilize their minds and property to gain a livelihood. The livelihood, the gaining of which is guaranteed, is not merely a life of bare physical existence; it is life in the broad sense that makes man more than a beast. It is "life" as understood in section 7 of the Charter: a physical, cultural, social, political and spiritual life. It is realized that Parliament, in deference to the New Democratic Party, deleted the specific language that protected economic rights. The writer's view is that the deletion was without significance; it did not succeed in eliminating the *basic* economic right implicit in the right to "life" from the Charter: the right to gain a livelihood. What was removed from the Charter was merely the gloss, or elaboration of this fundamental economic right.

C. *The Mobility of Persons*

1. *General Considerations*

Since section 6 of the Charter speaks of a "citizen" of Canada and of a "person who has the status of a permanent resident of Canada", it is clear that section 6 does not apply to corporations separately from their personal beneficial owners. A corporation is, for some specific purposes, a "citizen": for instance, for the application of war time measures, and for corporate, tax and business licence purposes. The term "citizen" in section 6, however, carries the designation of political membership in Canada as a state. For this reason, it is also used specifically in section 3 which protects the democratic right to vote.[59] Also, only individuals can have the status of "permanent resident", since such status is determined by the Immigration Act.[60] Accordingly, a corporation cannot qualify to invoke the benefits of subsection 6(2) of the Charter.

Labour is a factor of production, like capital, but it is supplied by "persons" who do come within the express terms of section 6. Service is, like goods or articles, a product. If it is provided by persons, for instance by professionals, then it comes within the express terms of section 6. In this regard, its protection is similar to that of labour. On the other hand, service may be supplied by corporations as, for instance, in the provision of telephone, transportation and television services. In this case, the issue involved is similar to that of the mobility of goods, discussed earlier.

As previously noted, the mobility right of a Canadian citizen is broader than that of a permanent resident. The Canadian citizen has international and domestic mobility rights; the permanent resident has only domestic mobility rights.

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[59] S. 3 reads as follows:

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

[60] R.S.C. 1970, c. I-2, *as amended*.

2. *The International Mobility of Citizens*

Subsection 6(1) confers upon a citizen "the right to enter, remain in and leave Canada". A narrow construction of this provision would establish that only the right of *physical* movement is protected. Such a view would permit the imposition of any requirement that discourages physical movement from or to Canada. Such a literal reading of the Charter, though open, does violence to its objective and scheme as a whole. The deliberate broadness of language of the Charter and its objective to "constitutionalize" fundamental rights and freedoms dictate that it should be interpreted with dynamism and the courts must have the courage and willingness to venture into the outer limits of the rationale behind it.

A clear infringement of the right to leave Canada arises from a broadly drafted discretion conferred upon officials who may impose any restrictions, such as that in the Canadian Passport Order.[61] The restriction is made by way of subordinate legislation, and hence is not a "law" within the meaning of section 1 so as to override the protection of section 6. This Order confers power on the Passport Office to refuse the issuance of a passport for various reasons, among which is the failure to provide any information and material that the office requests or requires.[62] It may also revoke a passport for the same reason, and may revoke the passport of a person who, "being outside Canada, stands charge in a foreign country or state with the commission of *any offence* that would constitute an indictable offence if committed in Canada".[63] A passport is a travel document; without it, a person may not be able to leave Canada freely, or leave a foreign country to return to Canada. It is contended that the grounds provided in the Order are unreasonable, and too broadly and indiscriminately restrictive of the right to mobility. It is not the writer's position that the federal government has no authority to regulate the travel of Canadians abroad; it is argued simply that the restrictions must satisfy the requirements of section 1.

The United States Supreme Court has relied on the basic "liberty" protected by the fifth amendment to hold such restriction invalid:

> The right to travel is a part the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment. . . . Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values. . . . Freedom to travel is, indeed, an important aspect of the citizen's 'liberty'.[64]

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[61] Canadian Passport Order, P.C. 1981-1472, S.I./81-86 (4 Jun. 1981) (115 CAN. GAZETTE PT. II, 1852).

[62] S. 9.

[63] S. 10 (emphasis added).

[64] Kent v. Dulles, 357 U.S. 116, at 125-27 (1958); *see also* Califano v. Aznavorian, 439 U.S. 170 (1978).

Another example of suspect legislation is provided by the Foreign Investment Review Act[65] which defines "non-eligible person" to include "a Canadian citizen who is not ordinarily resident in Canada and who is a member of a class of persons prescribed by regulation for the purpose of this definition".[66] This provision has a Berlin Wall effect; it threatens a Canadian citizen with the deprivation of the right to gain a livelihood by Canadian investments, or participation in Canadian investments, if he leaves the country and decides to stay abroad for a time that would make him "not ordinarily resident in Canada". The use of this restriction has become disturbingly widespread, even though it affects a large number of retired Canadian citizens who cannot, due to infirmity or age, live in Canada's severe climate. For instance, the Energy Security Act, 1982, Bill C-94, tabled before the House of Commons for First Reading on 26 February 1982, adopts, in the proposed Canadian Ownership and Control Determination Act (for purposes of the grants under the Petroleum Incentives Act and qualification for production licences under the Canada Oil and Gas Act) this disability. It is submitted that this measure infringes the mobility right of a citizen and his equality rights provided under section 15.

The power of the Governor General in Council under the War Measures Act,[67] exercised in deportation orders in council P.C. 7355, 7356 and 7357, of 15 December 1945 and sustained in *Co-operative Committee on Japanese Canadians v. A.G. Can.*[68] now collides with the right of citizens to "remain" in Canada. It will be remembered that in the above orders in council, Canadian citizens of Japanese ancestry were among the 10,000 persons who were "deported" or "exiled". In spite of the express exemption in the War Measures Act[69] of the powers of the Governor General in Council from the limitations created by the Canadian Bill of Rights,[70] the exile of Canadian citizens can no longer be supported due to subsection 6(1) of the Charter.

3. *The Domestic Mobility of Citizens and Permanent Residents*

Paragraph 6(2)(*a*) guarantees the right of a citizen and permanent resident "to move to and take up residence in any province". This provision is broader than the corresponding provisions that operate within the EEC where, under article 48 of the Treaty of Rome only the "freedom of movement of workers" is secured. It must be noted,

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[65] S.C. 1973-74, c. 46, *as amended*.

[66] Subs. 3(1), *as amended by* S.C. 1976-77, c. 52, subs. 128(2).

[67] R.S.C. 1970, c. W-2.

[68] [1947] A.C. 87, [1947] 1 D.L.R. 577 (P.C. 1946) (Can.).

[69] R.S.C. 1970, c. W-2, subs. 6(5).

[70] R.S.C. 1970, App. III. *But see* Republic of Germany v. Rauca, a judgment of Evans C.J. of the Supreme Court of Ontario (not yet reported, 4 Nov. 1982), in which the extradition of an alleged war criminal to Germany was sustained against an objection founded on subs. 6(1) of the Charter.

however, that the Court of Justice has read the word "worker" broadly. In *Hessische Knappschaft v. Maison Singer*,[71] the Court of Justice read the article and the regulation made by Council to apply to a German holidaymaker who died in an accident in France. It argued that "[i]t would not be in keeping with such concept [of freedom of movement of labour] to limit the idea of 'worker' to migrant workers strictly speaking or to travel connected with their employment."[72]

Paragraph 6(2)(*a*) must be read to create two rights: (a) the right to move to a province and (b) the right to take up residence in a province. Read in this manner, paragraph 6(2)(*a*) extends to every person travelling to a province, whether worker, unemployable or holidaymaker. A question that could arise is whether a province in the exercise of its legislative powers could erect discriminatory barriers that would discourage out-of-province residents from entering the province, or would encourage residents to remain in the province. The forms of preferential discriminatory measures to discourage the movement to or taking up residence within a province or region are, in the writer's view, presumptively bad, unless they satisfy the requirements of section 1. The same applies to inducement not to leave a province.

The experience in the United States in this regard is instructive. As early as 1868, the United States Supreme Court invalidated a Nevada statute imposing a one dollar tax upon passengers leaving the state. It stated that a citizen has:

> the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. He has a right of free access to its sea-ports, through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several States, and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it.[73]

The case of *Edwards*,[74] discussed earlier, condemned the exclusion of indigents from the state. The discriminatory availability of medical care, of automobile insurance schemes and other social welfare benefits, such as sick leave, maternity leave and pension payments could be condemned, not only on mobility rights grounds but also on the presence of unreasonable classification, a breach of the equality provisions.[75]

It is contended that paragraph 6(2)(*a*) guarantees not only interprovincial mobility, but also intra-provincial mobility, except that in respect to intra-provincial mobility, the province has a broader mandate to impose limitations. The words "to move *to* and take up residence *in any*

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[71] [1966] C.M.L.R. 82.

[72] *Id.* at 94.

[73] Crandall v. Nevada, 73 U.S. 745 (1868).

[74] *Supra* note 34.

[75] *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); *but see* Califano v. Torres, 435 U.S. 1 (1978).

province", read literally, would not protect mobility *within* the province. This literal reading, however, is precluded since it is only the discriminatory treatment based on residence *within* the province founded on laws or practices of general application to which the exception in paragraph 6(3)(*a*) applies. This exception would have been unnecessary if intra-provincial mobility were not protected in paragraph 6(2)(*a*). In addition, the special exception for "reasonable residency requirements for the receipt of publicly provided social services" contained in paragraph 6(3)(*b*) shows the wider ambit of the Charter than the American protection founded on the constitutional right to travel based on the commerce clause and the privileges and immunities clause of the United States Constitution. For instance, whereas a municipality's residence requirement for civil servants (firemen) was sustained by the United States Supreme Court in *McCarthy v. Philadelphia Civil Service Commission*,[76] such a requirement, unless coming within section 1, is invalid in Canada. An example of such a statutory provision is contained in the Supreme Court Act which makes an unreasonable local residence requirement.[77] It must be noted that section 6 does not contain an exception similar to that found in the Treaty of Rome: "The provisions of this Article shall not apply to employment in the public service."[78]

The more significant statutes that now require reconsideration are too numerous to review here in detail. Some are discussed simply by way of illustration. Direct preferential treatment of provincial residents for employment in the private or public sector infringes section 6. In employment, advertisement for positions must be residence-neutral. Some worker compensation statutes infringe the section; for example, Ontario's, where compensation is not payable if the accident occurred where the employee was employed in any other province,[79] and entitlement to receive compensation depends upon the worker's continuing residence in Ontario.[80] The broad power to make regulations relating to defining residence for the purposes of establishing eligibility for assistance and fixing of eligibility generally may be subject to challenge if the residential requirement is not "reasonable" as provided in paragraph 6(3)(*a*) of the Charter.[81] Quebec's automobile insurance statute is another example, for it differentiates recovery for damages for a victim who is not a resident of Quebec and a resident of Quebec, subject to agreement between the statutory authority and the other jurisdiction.[82]

In relation to education, also an area of provincial responsibility, it must be noted that the availability of education to a person or to members

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[76] 424 U.S. 645 (1976).

[77] R.S.C. 1970, c. S-19, s. 8, *as amended by* S.C. 1976-77, c. 25, s. 19.

[78] Art. 48(4).

[79] *See* Workmen's Compensation Act, R.S.O. 1980, c. 539, s. 6

[80] S. 13.

[81] *See, e.g.*, General Welfare Assistance Act, R.S.O. 1980, c. 188, s. 14 and the Regulations issued thereunder.

[82] Loi sur l'assurance automobile, R.S.Q. 1977, c. A-25.

of his family influences his decision to move to another province. This is the main issue in the problems relating to the English language rights in Quebec and French language rights in other provinces. Aside from the protection of section 23 of the Charter, the mobility rights may be infringed by deliberate discriminatory exclusion of educational opportunity in a province. The House of Commons, during the constitutional debates, was conscious of this issue. One Member stated:

> On the question of language rights, the charter uses wording very similar to that agreed on by the provincial premiers in Montreal in 1978. The charter will give Canadians the right to have their children educated in whichever official language is used by the parents where there are sufficient numbers of the minority language group to justify a school.
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> This, of course, is a very important right when viewed in connection with mobility of workers. If we really want to make it easier for Québecois to live and work for a few years in other parts of Canada and for Anglophone Canadians to live and work in Quebec from time to time, we must make it easier for people to move their families. Undoubtedly English-speaking Canadians who move to Quebec will want to improve their French and will want their children to learn French in order to take part fully in the social and cultural life of that province. But if the long-term future of the children is in English-speaking Canada, they will also want to ensure that the children maintain and build on their knowledge of English.
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> Obviously one can make comparable statements about the Quebecker who moves to another province in Canada for a few years as part of his or her career line progression and who wants his or her children to maintain their proficiency in French. Parents may make different choices depending on the ages of their children, their facility in the second official language and so forth, but they should have the right of choice and the educational facilities to make the choice a reality.[83]

Finally, some provincial post-secondary student financial assistance statutes must be examined.[84] The residence qualifications that are exclusionary and unreasonable in that they do not have justifiable screening functions are liable to be struck down.

With respect to professions, the scope of powers given to the self-governing bodies and the regulations and decisions they make require substantial re-examination. Two issues are likely to become major fields of controversy in the immediate future. The first is the recognition of formal qualifications acquired outside the province. Any unreasonable exclusion of such formal qualifications by a province would deprive a person of the right to pursue a livelihood "in any province" pursuant to paragraph 6(2)(*b*). It is the writer's view that any provision which is not supportable as determining questions of competence, skill and integrity to exercise a profession is a suspect classification that has the effect of excluding out-of-province persons from pursuing a livelihood. It is interesting to note that under the EEC Treaty, article 57(1) and (2) confers upon the Council the power to

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[83] H.C. DEB., 32nd Parl., 1st sess., at 3762 (16 Oct. 1980).

[84] *See, e.g.*, R.R.O. 1980, Reg. 644, issued pursuant to the Ministry of Colleges and Universities Act, R.S.O. 1980, c. 272.

"issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications" and to issue directives "for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking up and pursuit of activities as self-employed persons". It is contended that there is an affirmative duty on the part of the provinces to coordinate statutes, regulations and administrative actions in this regard to ensure that no residential requirements, based on alleged formal education, are established as barriers. The Court of Justice has held in *Thieffry v. Paris Bar Council*[85] that a Belgian national cannot be prohibited from undergoing practical training in law in France, though he possesses no French law degree, since such prohibition would amount to an *indirect* discrimination on the basis of nationality. The same rule was applied in *Patrick v. Minister for Cultural Affairs*,[86] where a British architect sought to practice his profession in France.

The second likely area of controversy will be in the exclusion from practice of out-of-province professional practitioners. The exclusion can be a direct prohibition through the use of a licensing scheme, or the prohibition of licenced provincial practitioners from creating an establishment in association with an outside professional. This controversy is typified by the Alberta Law Society rule that applied to a Toronto law firm.[87] There are grounds to argue that this rule infringes the legal right of the Alberta professional under section 7 and the mobility rights of both professionals to pursue the gaining of livelihood.

Another example is the refusal of law societies to allow occasional representation by out-of-province lawyers of their clients before the courts and administrative agencies of the province.[88] In these cases the

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[85] [1977] 2 C.M.L.R. 373, [1977-1978 Transfer Binder] COMMON MARK. REP (CCH) ¶8396.

[86] [1977] 2 C.M.L.R. 523, [1977-1978 Transfer Binder] COMMON MARK. REP (CCH) ¶8412.

[87] On 25 Feb. 1982 W.B. Kelly, Secretary of the Law Society of Alberta circulated a notice of the new Rule 154 of the Rules of The Law Society of Alberta. Rule 154 states:

> An active member who ordinarily resides in and carries on the practice of law within Alberta shall not enter into or continue any partnership, association or other arrangement for the joint practice of law in Alberta with anyone who is not an active member ordinarily resident in Alberta.

[88] An application by a leading counsel in Canada, practising in Ontario, for an occasional call in Saskatchewan for the counsel to represent a client before a court in Saskatchewan received the following typical reply:

> Your application was considered by the Benchers in Convocation on May 31, 1982. The Benchers passed the following resolution, namely, that your application for admission be approved subject to further compliance with the rules and that there be no special dispensation granted allowing you an occasional call. You will, accordingly, be required to pass the bar examination on Saskatchewan Statutes and Practice and Procedures, the next date for such examination being October 19, 1982.

It should be noted that the Law Society in Ontario allows occasional call under R.R.O. 1980, Reg. 573, s. 6:

out-of-province professional does not seek an establishment of practice, but only a continuation of his service to a client. It is submitted that these measures are not laws, regulations or practices of "general application", but discriminatory exclusions based on residence.

D. *The Scope of Limitations to Mobility Rights Under Subsections 6(3) and (4)*

Subsection 6(3) states that the domestic mobility rights are "subject to" (a) "laws or practices" of general application that are not discriminatory on provincial residence grounds and (b) "laws" providing reasonable residence requirements in publicly provided services. Since the full scope of the domestic mobility right includes provincial residence, the first limitation only confirms the scope of subsection 6(2). Intra-provincial residence discrimination of general application, such as residence in one county or city, rather than another county or city, in the same province is not prohibited. In other words, the authorization to impose restriction on intra-provincial mobility pursuant to subsection 3 confirms that there is an intra-provincial mobility right in subsection 6(2). The stipulation that "practices of general application" are exempt as provided in paragraph 6(3)(*a*) also confirms that the *form* of differential treatment condemned by subsection 6(2) is not limited to "laws". The paragraph 6(3)(*b*) exemption is a true exemption. It must be noted that the "law" must provide for the residence requirement, and it only applies to "qualification" to receive publicly provided *social* services. The concept of "reasonableness" in paragraph 6(3)(*b*) appears to be identical to the concept of "reasonableness" in section 1.

The exception of affirmative action measures in subsection 6(4) shows that equal treatment of unequals, not only unequal treatment of equals, is condemned by the Charter. There is a presumptive equality, and accordingly affirmative action becomes forbidden if the rate of employment in the province reaches the national average. It also shows that present provincial subsidies for business are within the scope of subsection 6(2), since the special exception for the "amelioration of . . . conditions of individuals . . . who are socially or economically disadvantaged" implies exclusion of other forms of assistance. Business assistance can only be sustained if it is an integral part of the amelioration measure, such as, for instance, in a depressed industry where individual

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6.(1) Any person who is a member of the legal profession from outside Ontario may, in the discretion of Convocation, be admitted to membership in the Society and called to the bar and admitted as a solicitor for the purpose of appearing as counsel in a specific proceeding under rule 56.

(2) The applicant shall undertake to Convocation that he will not otherwise engage in the practice of law in Ontario.

(3) Upon the completion of such proceeding he shall be deemed to have applied to the Society for permission to resign.

hardships are evident and significant. In other words, business cannot be the ultimate beneficiary of the amelioration measure, only *individuals* can. Although this exemption creates possibilities for covert subsidy to business, it should not be difficult for the courts to unmask such subsidy.

V. CONCLUSION

Section 6 of the Charter may very well be the "sleeper" provision. The reason is that the full scope of the "right to pursue the gaining of a livelihood", popularly read in a naïvely literal manner, appears to be confined to making a livelihood by the utilization of labour or provision of services. It must be realized, however, that section 6 is the centrepiece of the economic union envisioned by the Charter and is designed to dismantle Canada's ten "Berlin Walls". Compared to the other rights, the mobility right is relatively novel. Whereas most of the other rights are now recognized, in one form or another, in the Constitution Act, 1867 and other statutes of the provinces and Canada, making the Charter simply a "formal" entrenching instrument, the mobility right is a new right, conceptually created by the Charter, adopted as a vehicle to achieve the missed opportunities of economic union under the Constitution Act, 1867.

The answer to the question raised by the topic of this paper is obvious: the people's vigilance to challenge mobility infringing measures, allied with the courts' courage to use section 6 imaginatively, will determine whether the Canadian economic union is "a boom or a bust". Section 6, if properly invoked by private litigants in significant and crucial cases in the first few years of the Charter, should provide the push for federal and provincial government initiative to dismantle the ten "Berlin Walls" of Canada. Invoked flippantly in its early years, section 6 will project a fearsome threat to government power that will probably invite defensive attitudes and evasive action. The means to implement the economic union intended by the Fathers is now in the Constitution. Hopefully, the people's willingness and the courts' creativity will match the breadth of the means.