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I. INTRODUCTION

Among the varied documents forming part of the Canadian Constitution is the Canadian Charter of Rights and Freedoms, adopted in 1982.[1] The Charter contains contemporary Canada's first written, constitutional guarantees of individual fundamental freedoms.[2] The written form of the document diverges from the past, but will the scope of protection afforded religious freedom under the document differ from that previously afforded?

Pre-Charter courts were hesitant to protect religious freedom. They developed four doctrines, or modes of analysis, that evidenced their reluctance to actively safeguard religious freedom in pre-Charter Canada. This Comment will explore these doctrines of reluctance, tracing their development and use in pre-Charter religious freedom cases and evaluating their status under the Charter and in post-Charter jurisprudence. First, the Comment will briefly outline the history of religious freedom in Canada up to the advent of the British North America Act ("B.N.A. Act"),[3] now known as the Constitution Act, 1867.[4] Next, the Comment will describe the four doctrines of reluctance as they developed under the B.N.A. Act and the Canadian Bill of Rights.[5] The Comment will then assess the degree to which the Canadian Charter of Rights and Freedoms eliminated or accommodated these judicial doctrines. Next, the Comment will survey Canada's post-Charter religious freedom cases. Finally, the Comment will analyze these cases to determine the extent to which the Canadian Supreme Court has continued to adhere to the doc-

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1. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms).

2. *See, e.g., id.* § 2 (guaranteeing such fundamental freedoms as freedom of religion, association, and expression).

3. British North America Act, 1867, 30 & 31 Vict., ch. 3 (Eng.).

4. *See* CAN. CONST. (Constitution Act, 1982) pt. VII, § 53(1); *id.* sched.

5. Canadian Bill of Rights, ch. 44, 1960 S.C., *reprinted in* PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 895 (2d ed. 1985).

trines of reluctance in the wake of the Charter of Rights and Freedoms, concluding that the court has been willing to shed or alter its doctrines of reluctance and assume a stance more protective of religious freedoms.

II. HISTORY OF RELIGIOUS FREEDOM IN CANADA

Canada was discovered by the Old World and claimed for the French in 1534.[6] Throughout French occupation, the Catholic Church enjoyed a privileged status as the official church;[7] Protestants were persecuted and excluded after 1627.[8] When French rule yielded to British dominion in 1760,[9] however, the Church of England assumed the position of privileged church.[10] French Catholics were nonetheless permitted to practice their religion to the extent allowed by British law.[11]

Rather than oppress French Catholics, early British rulers sought to assimilate them into British religion and culture.[12] Assimilation of the French Québécois was unsuccessful, however, and in 1774, in an attempt to garner the loyalty of French Canadians for the pending struggle between Britain and the American colonies, Britain passed the Quebec Act.[13] "By this Act, the free exercise of the Catholic religion was granted and the payment of tithes to the Catholic Church was made enforceable by civil law."[14] In addition, the Act forbade the imposition of civil disabilities on Catholics and authorized appointment of a Catholic bishop.[15] At the same time, the Church of England was intended to, but did not actually, become the established church.[16]

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6. Denise J. Doyle, *Religious Freedom in Canada*, 26 J. CHURCH & ST. 413, 414 (1984).

7. *Id.*

8. M.H. Ogilvie, *What Is a Church by Law Established?*, 28 OSGOODE HALL L.J. 179, 219-23 (1990).

9. Doyle, *supra* note 6, at 414.

10. *Id.* at 415. For a discussion of Church of England establishment in Nova Scotia, New Brunswick, and Prince Edward Island, see Ogilvie, *supra* note 8, at 219-23.

11. Doyle, *supra* note 6, at 415; Ogilvie, *supra* note 8, at 224.

12. Doyle, *supra* note 6, at 416; *see also* Ogilvie, *supra* note 8, at 225 (describing the toleration both shown by Quebec's early British governors and legislated in the Quebec Act, 1774).

13. Doyle, *supra* note 6, at 415.

14. *Id.*

15. *Id.*

16. *Id.*; *see also* Ogilvie, *supra* note 8, at 225, 226 (explaining that "the precise legal status of the Church of England" remained ambiguous after the Quebec Act was

With the advent of the American Revolution, British loyalists migrated to Canada, altering Quebec's religious composition and creating new tensions.[17] In response to these tensions, the Constitutional Act of 1791 divided Quebec into Upper Canada, comprised largely of Protestant loyalists, and Lower Canada, embracing a majority of French Catholics.[18] Although the Constitutional Act did not establish the Anglican Church in either colony,[19] it "did set aside one-seventh of all the lands granted by the crown to support and maintain a Protestant clergy."[20] In addition, "the crown authorized the governor or lieutenant governor to erect and endow rectories of the Church of England within every township. The Catholic Church, meanwhile, maintained the right to collect tithes from its own membership in Lower Canada."[21]

Disputes soon arose over the clergy reserves set aside by the Constitutional Act.[22] The Act indicated that these reserves were to support "a 'Protestant clergy.'"[23] Beginning with the Church of

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passed, although the Act intended that the Church of England alone enjoy the privilege of establishment).

17. Doyle, *supra* note 6, at 415-16; *see also* Ogilvie, *supra* note 8, at 226 ("The influx of Protestant Loyalists into the western regions of Quebec . . . necessitated a further constitutional revision in the *Constitutional Act, 1791* which contained clauses purporting to provide a religious settlement for Upper and Lower Canada." (footnote omitted)).

18. Doyle, *supra* note 6, at 416.

19. *See* Ogilvie, *supra* note 8, at 228 ("[W]hile Bishop Strachan and some members of the colonial government considered the Church of England to be established [in Upper Canada], many contemporaries did not, nor do most Canadian historians of the period who are agreed that either it was not established at all or at best, it was quasi-established." (footnote omitted)). *But cf. id.* at 227 ("The Church of England asserted claims to establishment and conducted itself like the established church of Upper Canada until the late 1840's when it became apparent . . . that the tide of establishmentarianism had run out."); *id.* at 228-29 (enumerating the privileges enjoyed by the Church of England in Upper Canada); Irwin Cotler, *Freedom of Assembly, Association, Conscience and Religion, in* THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS 186 (Walter S. Tarnopolsky & Gérald-A. Beaudoin eds., 1982) ("[T]he Church of England was, if not the established church, at least for a while the privileged church in Upper Canada from 1791 until the Freedom of Worship Act of 1851 . . . .").

20. Doyle, *supra* note 6, at 416; *see also* Ogilvie, *supra* note 8, at 226.

21. Doyle, *supra* note 6, at 416 (footnote omitted); *see also* Ogilvie, *supra* note 8, at 226 ("[T]here was . . . no derogation from the privileges granted by the *Quebec Act* to Roman Catholic[s] . . . .").

22. Doyle, *supra* note 6, at 416.

23. *Id.*; *see also* Ogilvie, *supra* note 8, at 230 ("Although said to be for a 'Protestant clergy' in sections 37 and 38 of the *Constitutional Act*, it was initially assumed that the clergy reserves were created for the maintenance of the Church of

Scotland, Protestant churches besides the Church of England successfully claimed a stake in the clergy reserves.[24] The clergy reserves continued to incite controversy, however, as voluntarists—advocates of separation between church and state and of voluntary support of churches—opposed, and the Church of England sought, establishment.[25] The feasibility of establishment eventually faded as an early nineteenth-century religious revival saw the growth of new religions in Canada.[26] Eventually, clergy reserve monies were converted into loan funds for municipalities and the four churches that had earlier gained rights in the monies "were given lump sum settlements."[27]

Further, in 1851, the reunited Canadian legislature "repealed those sections of the Constitutional Act that dealt with endowed parsonages" and enacted the first statute declaring religious freedom in the Province of Canada.[28] The statute provided:

> [T]he free exercise and enjoyment of Religious Profession and Worship, without discrimination or preference, so [long] as the

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England in place of tithes.").

24. Doyle, *supra* note 6, at 416.

25. *Id.* at 416-17.

26. *Id.* at 417. *But cf.* Ogilvie, *supra* note 8, at 185-87 (noting that while the preponderance of evidence indicates that no church is established under the common law in Canada today, the Church of England may still be established under unrepealed legislation in New Brunswick, Nova Scotia, and Prince Edward Island).

Although the Charter of Rights and Freedoms does not in plain terms prohibit establishment of a religion, the Canadian Supreme Court has indicated that "[a]n Act of Parliament or of a legislature which . . . purported to impose the beliefs of a State religion would be in direct conflict with s. 2(a) of the *Charter*, which guarantees freedom of conscience and religion, and would have to be ruled of no force or effect without the necessity of even considering whether such legislation could be legitimized by s. 1." Attorney Gen. v. Quebec Ass'n of Protestant Sch. Bds., [1984] 2 S.C.R. 66, 88 (Can.), *quoted in* The Queen v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, 333 (Can.) *and in* Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038, 1062 (Can.) (Beetz, J., dissenting); *see also* Lavigne v. Ontario Pub. Serv. Employees Union, [1991] 2 S.C.R. 211, 324 (Can.) (La Forest, J.) ("[I]t was eventually recognized that being forced to financially support another's faith, especially one antagonistic to the existence of one's own, was a violation of one's conscience."). Yet the court has also deferred deciding "the extent to which the *Charter* allows for state financial support for, or preferential treatment of, particular religions or religious institutions." *Big M*, [1985] 1 S.C.R. at 340-41. The degree of establishment permitted by the Charter of Rights and Freedoms thus appears undecided.

27. Doyle, *supra* note 6, at 417; *see also* Ogilvie, *supra* note 8, at 231-32 (describing the two acts that incrementally dismantled the clergy reserve system).

28. Doyle, *supra* note 6, at 417-18; *see also* Ogilvie, *supra* note 8, at 232 (deacribing the scope and ultimate sale of the Anglican rectories created under the authority of the Constitutional Act).

> same be not made an excuse for acts of licentiousness, or justification of practices inconsistent with the peace and safety of the Province, is by the constitution and law of this Province allowed to all Her Majesty's subjects within the same.[29]

Less than two decades later, the British Parliament enacted the British North America Act.[30] The Act contains "no express statements on the subject of religion or religious freedom,"[31] but under that Act three of the four doctrines of reluctance developed.

III. DOCTRINES OF RELUCTANCE

A. Doctrines Discernible Under the B.N.A. Act, 1867

The British North America Act of 1867 was Canada's first constitutional document.[32] The Act sought to carry out the desire of "the Provinces of Canada, Nova Scotia, and New Brunswick . . . to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom."[33] The Act accomplished two goals: it "established the rules of federalism," allocating power between the federal Parliament and the provincial legislatures,[34] and it gave Canada a constitution like that of England. The limited scope of the B.N.A. Act fostered development of three doctrines of judicial reluctance: parliamentary supremacy, legal federalism, and essential purpose.

1. Parliamentary supremacy

By prescribing for Canada "a Constitution similar in Principle to that of the United Kingdom,"[35] the B.N.A. Act imported

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29. Doyle, *supra* note 6, at 418 (quoting DOUGLAS A. SCHMEISER, CIVIL LIBERTIES IN CANADA 66 (1964)). This statute "still applies in the provinces of Quebec and Ontario by virtue of s. 129 of the B.N.A. Act." Cotler, *supra* note 19, at 195.

30. *See* CAN. CONST. (Constitution Act, 1867) pmbl.; HOGG, *supra* note 5, at 895 n.1.

31. Doyle, *supra* note 6, at 419.

32. *See* HOGG, *supra* note 5, at 2.

33. CAN. CONST. (Constitution Act, 1867) pmbl.

34. HOGG, *supra* note 5, at 2; *see* CAN. CONST. (Constitution Act, 1867) pt. VI (enumerating the powers of the federal Parliament and the provincial legislatures).

35. CAN. CONST. (Constitution Act, 1867) pmbl.

into Canada the English theory of parliamentary sovereignty, which meant that parliament was empowered to enact whatever laws it deemed necessary.[36] Under the framework of parliamentary supremacy, the courts were largely bound to defer to legislative judgments even if legislation infringed on fundamental freedoms, such as freedom of religion.[37]

In *Walter v. Attorney General*,[38] for example, the court sustained the Alberta legislature's Communal Property Act, which obstructed the acquisition of land to be owned or inhabited communally.[39] The Act "was prompted by the fact that Hutterites had acquired and were acquiring large areas of land in Alberta, held as communal property."[40] The Hutterites acquired the land as part of their religious practice of communal living and land ownership.[41] Notwithstanding the obvious impact of the Act on Hutterite religious exercise, the court upheld the Act, reasoning in part that:

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36. *See* Cotler, *supra* note 19, at 127, 129. In adopting "[a] 'constitution similar in principle' [Canada] imported [another] principle from the United Kingdom—the rule of law." *Id.* at 129. Through the double override, this principle was diverted from its intended result—"that an individual should be able to do *everything* except that which is prohibited by law, and governments *nothing* except that which is expressly authorized by law"—and impressed to achieve the opposite result—that "individuals could seemingly do nothing except that which was authorized by law, [and] governments could do everything except that which was prohibited by law." *Id.* This converted rule-of-law principle appears more an expression of legal federalism and parliamentary sovereignty, however, than an independent doctrine of reluctance. *See id.* at 130 ("[T]he notion of the rule of law . . . has been converted through the prism of the 'double override' to a legitimation of the exercise of power as long as the power has originated in lawful legislative authority."). This Comment will therefore not address the rule of law principle independently.

37. *See* Patrick Macklem, *Freedom of Conscience and Religion in Canada*, 42 U. TORONTO FAC. L. REV. 50, 61 (1986) (recognizing that activism was not to be expected from courts applying the Canadian Bill of Rights, *see infra* part III.B, because of "the deferential role of the courts entailed by the concept of parliamentary supremacy"); Guy Tremblay, *The Supreme Court of Canada: Final Arbiter of Political Disputes*, *in* THE SUPREME COURT OF CANADA AS AN INSTRUMENT OF POLITICAL CHANGE 179, 184 (Ivan Bernier & Andrée Lajoie eds., 1986) ("[T]he Supreme Court's conservatism . . . has . . . perpetuated in Canada the British principle of legislative supremacy to the extent that it is compatible with the Constitution. This principle, the court's reluctance to substitute its opinion for that of the political authorities, and a tendency to articulate its decisions on technical grounds have not encouraged the emergence of new kinds of constitutional protection for rights and freedoms in Canada." (footnotes omitted)).

38. 1969 S.C.R. 383 (Can.).

39. *See id.* at 386-88.

40. *Id.* at 392.

41. *See id.* at 385, 392.

> It is a function of a provincial legislature to enact those laws which govern the holding of land within the boundaries of that province. [The *legislature*] determines the manner in which land is held. *It* regulates the acquisition and disposition of such land, and, if it is considered desirable in the interests of the residents in that province, *it* controls the extent of the land holdings of a person or group of persons.[42]

Thus deferring to the legislative function and will, the court countenanced restrictions on Hutterite religious practice.

2. *Legal federalism*

In addition to providing Canada a constitution similar to England's, the B.N.A. Act established the federalist structure of Canadian government. Yet, while the Act wed the four original provinces in a federal dominion, the Act did not attempt to create a constitutional system of fundamental, individual freedoms.[43] Not only did the Act lack guarantees of the type that might be found in a bill of rights, but under the Act's federalist allocations, neither the federal nor the provincial legislatures "were . . . intended to serve as instruments for the protection of fundamental rights."[44] As a result, when claims involving fundamental rights were brought before Canadian courts under the Act, the courts had no obvious constitutional basis for protecting those rights.[45] The courts could, however, look to the Act's federalist allocations for guidance in deciding the claims.[46] Fundamental rights claims were therefore often decided under the rubric of what has been called legal federalism.[47]

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42. *Id.* at 392 (emphasis added); *see also* Ann Hayward, R. v. Jack and Charlie *and the Constitution Act, 1982: Religious Freedom and Aboriginal Rights in Canada*, 10 QUEEN'S L.J. 165, 168 (1984) (describing Justice Taggart's opinion in The Queen v. Jack & Charlie, 139 D.L.R.3d 25 (Can. 1983), wherein Justice Taggart concluded that "[v]alidly enacted legislation provide[s] inviolate boundaries within which freedom of religion . . . [is] allowed to operate").

43. HOGG, *supra* note 5, at 2.

44. Cotler, *supra* note 19, at 126.

45. *Id.*

46. *See id.* at 127. According to Cotler, "[l]egal federalism . . . became the most appropriate—if not the only—means of reconciling parliamentary sovereignty with judicial invalidation of legislation denying fundamental freedoms." *Id.* Some would argue that the courts deliberately used legal federalism in order to provide some protection for fundamental rights. *Id.* at 126 (citing CANADIAN CONSTITUTIONAL LAW IN A MODERN PERSPECTIVE 375 (J.N. Lyon & R.G. Atkey eds., 1970)).

47. *Id.* at 124; *see also id.* at 195 ("Legal federalism became the organizing frame

Legal federalism focused the courts not on "limitations on the exercise of [legislative] power," but on "the division of powers between the federal and provincial governments."[48] When "federal or provincial law appeared to offend . . . civil liberties, the central question . . . became [whether] the alleged denial of civil liberties [was] within the legislative power of the offending government."[49] If the denial fit within the enacting government's power, the denial was upheld.[50] Only if the denial fell outside the legislature's authority was the denial declared unconstitutional—not because it limited an individual's fundamental rights but because the legislation violated the federalist division of authority.[51]

In *Attorney-General for Ontario v. Hamilton Street Railway Co.*,[52] for example, the Privy Council faced a challenge to Ontario's Lord's Day Act.[53] While this Sunday closing law potentially infringed the religious freedom of non-Sunday observers, the Council did not address whether the law was an invalid in-

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of reference for freedom of religion . . . ."); *id.* ("The dominant motif . . . for the determination and disposition of freedom of religion . . . was the 'double override'—the interaction of parliamentary sovereignty with the division of powers."). *See generally id.* at 124-29, 194-97 (explaining and documenting legal federalism analysis); Macklem, *supra* note 37, at 51-57 (discussing the federalism focus of fundamental freedom cases under the B.N.A. Act, 1867).

48. Cotler, *supra* note 19, at 124; *see also* Macklem, *supra* note 37, at 57 (explaining that while individual freedom did arise as a separate concern in some cases, freedom was defined in the federalism context and protected only incidentally as courts sought to maintain the Dominion's federalist division of power). *See generally* Cotler, *supra* note 19, at 195-96 (identifying the heads of power to which religion might be assigned and noting that religion has generally been allocated to the national Parliament's power over criminal law).

49. Cotler, *supra* note 19, at 124.

50. *Id.*; *see* Walter v. Attorney Gen., 1969 S.C.R. 383, 389 (Can.) (addressing a law that effectively limited the communal religious practices of the Hutterites and explaining that "a provincial legislature can enact laws governing the ownership of land within the province and that [the] legislation enacted in relation to that subject must fall within s. 92(13), and must be valid unless it can be said to be in relation to a class of subject specifically enumerated in s. 91 of the *British North America Act* or otherwise within [the] exclusive Federal jurisdiction").

51. *See* Cotler, *supra* note 19, at 125; *see also* Macklem, *supra* note 37, at 53 (noting that "although the legislation in question in each [of three Sunday closing law] case[s] affect[ed] religious freedom . . . the Court's primary concern [was] that of the constitutional division of power between the [provincial and federal] government[s]").

52. Attorney-General for Ont. v. Hamilton St. Ry. Co., 13 App. Cas. 201 (P.C. 1903) (appeal taken from Ontario).

53. *See id.* at 201-02 ("An Act to prevent the Profanation of the Lord's Day").

fringement on that freedom.[54] The Council held the Act invalid because it dealt with criminal law, which falls within the exclusive competence of the national, not provincial, Parliament.[55]

While federalism analysis could produce incidental protection for fundamental freedoms, as it did in *Hamilton Street Railway* for non-Sunday observers, the courts' federalist focus failed to accord significant, independent weight to individual rights, preventing Canadian courts from directly protecting religious freedom within the federalism framework.[56]

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54. *See id.* at 207-09.

55. *See id.* at 207-08. Because courts under the B.N.A. Act focused on federalism in cases presenting issues of fundamental freedom, any protection afforded these freedoms was largely illusory. *See* Macklem, *supra* note 37, at 53, 57. Thus, while the Privy Council struck down the Lord's Day Act in *Hamilton Street Railway*, the Council's holding did not prevent the federal legislature from enacting a similar law on a national level. *See id.* at 52.

The Canadian Supreme Court adopted the reasoning of *Hamilton Street Railway* in *In re* the Jurisdiction of a Province to Legislate Respecting Abstention from Labour on Sunday, 35 S.C.R. 581, 592 (Can. 1905).

56. *See* Cotler, *supra* note 19, at 128 (The result of "[t]he preoccupation with the division of powers analysis . . . has been [the relegation of] civil liberties, however compelling, to a secondary status in Canadian constitutional law—a constitutional 'after thought.'"); *id.* at 205 ("[T]he division of powers technique may . . . be a protection where the legislation is held to be *ultra vires*, but a prohibition where it is *intra vires*; and . . . the characterization process can cut both ways. The matter at issue may be characterized as 'religion', but it may also not . . . be characterized as a fundamental freedom at all."); *id.* at 129 ("[E]ven where the courts have appeared to limit the powers of Parliament respecting fundamental freedoms, they may be said to have done so to respect legal federalism and, by inference, the sovereignty of parliament, rather than to protect fundamental freedoms. And yet, . . . the . . . test of legal federalism emerged to protect the very civil liberties that parliamentary sovereignty might otherwise offend."); Macklem, *supra* note 37, at 53 ("[A]ny protection accorded to the exercise of religious duty in [pre-Charter Sunday closing] cases can be seen as arbitrary protection, coincidental to the constitutional issues before the Court."); *id.* at 57 ("[T]he fundamental issues raised by concepts of individual rights and freedoms were never addressed squarely by the courts, and any protection of religious freedom under the *British North America Act* was thus arbitrary protection, dependent upon doctrines developed for another purpose."); Tremblay, *supra* note 37, at 184 ("From 1945 to 1960, in most of the cases where fundamental freedoms were at issue, the supreme court handed down decisions that favoured such freedoms, but did so for legalistic reasons without explicitly discussing the underlying values.").

In addition, "the division of powers analysis has . . . led . . . to a 'double-standard' in the judicial invalidation of legislation offending civil liberties. For while the court was striking down offensive provincial legislation for trespassing on federal authority, it was upholding offensive federal legislation as being within the 'competence' of federal powers." Cotler, *supra* note 19, at 128.

3. Essential purpose

Legal federalism not only diverted courts from fundamental freedom questions to division of powers concerns, but also gave rise to a third doctrine of reluctance: essential purpose. "[T]he analytic starting point in a division of powers [legal federalism] case is the determination of the 'pith and substance' [or essential purpose] of the challenged enactment."[57] "[I]dentification of the purpose of an impugned piece of legislation is a way of assessing whether . . . the enacting government has pursued a function within the class of subject matters in relation to which it can validly legislate" under the B.N.A. Act.[58] In identifying an act's purpose, the courts distinguish "the central thrust of the enactment from its merely incidental effects."[59] "Only when the effects of the legislation so directly impinge on some other subject matter as to reflect some alternative or ulterior purpose do the effects themselves take on analytic significance."[60] By focusing the courts on an act's purpose to the general neglect of the act's effects, the essential purpose doctrine allows courts to more easily ignore claims that legislation improperly infringes on religious freedom.

The potential impact of the essential purpose doctrine is most apparent in the context of the judicially created implied bill of rights.[61] While never adopted by a majority of the Canadian Supreme Court, the implied bill of rights provided a narrow check on provincial infringements.[62] The theory operated within

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57. The Queen v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, 357 (Can.) (Wilson, J., dissenting).

58. *Id.* This is not to suggest that the pre-Charter court did not ever consider legislation's effects. The effect of legislation was scrutinized in the pre-Charter case of *Robertson & Rosetanni*, for example, wherein the court explained that "the *effect* of the *Lord's Day Act* rather than its *purpose* must be looked to in order to determine whether its application involves the abrogation, abridgment or infringement of religious freedom." Robertson & Rosetanni v. The Queen, 1963 S.C.R. 651, 657 (Can.). According to the court in *Big M*, the *Robertson & Rosetanni* majority held that "the effect rather than the purpose of [the] legislation fell to be assessed, because [the court] was testing not the *vires* of the legislation, but whether its 'application' offended religious freedom." *Big M*, [1985] 1 S.C.R. at 333.

59. *Big M*, [1985] 1 S.C.R. at 357 (Wilson, J., dissenting).

60. *Id.* at 358.

61. *See* Macklem, *supra* note 37, at 55. For a fuller discussion of the implied bill of rights doctrine under the B.N.A. Act, see *id.* at 54-55.

62. *See* Macklem, *supra* note 37, at 54, 56; Tremblay, *supra* note 37, at 184-85; *see also* Andrée Lajoie et al., *Political Ideas in Quebec and the Evolution of Canadian Constitutional Law, 1945 to 1985*, *in* THE SUPREME COURT OF CANADA AS AN INSTRUMENT

the framework of legal federalism and, in essence, recognized that certain freedoms were outside the legislative competence of provincial legislatures, such that provincial acts seeking to limit those freedoms were void as *ultra vires*.[63] For the doctrine to apply, however, the court had to characterize the legislation's essential purpose as infringement of a protected freedom.[64] Due to the essential purpose doctrine, "if an effect, but not the purpose, of legislation was to infringe upon religious freedom, the legislation would remain valid,"[65] and courts enjoyed substantial leeway in characterizing legislation's purpose.[66] As a result, any protection available under the implied bill of rights doctrine could easily be dismissed by an application of the essential purpose doctrine, characterizing an act's purpose as within a provincial legislature's competence in spite of the act's negative effects on religious freedom.

The *Walter* opinion—in which the court upheld Alberta's Communal Property Act, restricting Hutterite practice of com-

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OF POLITICAL CHANGE, *supra* note 37, at 1, 19 ("[A]lthough the judges of the Supreme Court occasionally relied on the distribution of powers as the basis for their decisions, the Court often also based its decisions on the doctrine of implied rights under the preamble to the *Constitution Act, 1867* and the parliamentary form of government adopted in Canada." (footnote omitted)); Tremblay, *supra* note 37, at 185 (noting that the implied bill of rights theory was abandoned after the Canadian Bill of Rights was enacted in 1960).

The B.N.A. Act's adoption of a constitution like that of England provided a foundation for arguing that Canada enjoyed an implied bill of rights. *See* Cotler, *supra* note 19, at 131-32 (citing Professor "F. R. Scott's Supreme Court factum in *Switzman v. Elbling*," 1957 S.C.R. 285 (Can.), which advanced this argument). According to Professor Cotler, however, the majority opinion in Attorney General v. Dupond, [1978] 2 S.C.R. 770 (Can.), "rejected the implied bill of rights theory outright." Cotler, *supra* note 19, at 133.

63. *See* Macklem, *supra* note 37, at 55. The implied bill of rights doctrine was invoked in freedom of speech cases. *See id.* at 54-55. In Sunday closing cases, by contrast, federalism concerns dominated any fundamental freedom interests arising out of the implied bill of rights doctrine. *See id.* at 55. The implied bill of rights doctrine was, however, applied in the religious speech context in *Saumur v. City of Quebec*. *See* Saumur v. City of Quebec, [1953] 2 S.C.R. 299, 351-56 (Can.) (Kellock, J.); *id.* at 371-76 (Locke, J.); Macklem, *supra* note 37, at 54. The original and best expositions of the implied bill of rights doctrine were provided in *In re* an Act to Ensure the Publication of Accurate News & Information, 1938 S.C.R. 100, 133-44 (Can.) (Duff, C.J.); *id.* at 144 (Cannon, J.).

64. *See* Macklem, *supra* note 37, at 55.

65. *Id.*

66. *See id.* at 55-56; *cf.* Tremblay, *supra* note 37, at 185-86 (explaining that the court's "'valid federal objective'" focus in cases under the 1960 Bill of Rights gave Canadian legislatures "an almost uncontrollable margin within which to manoeuvre").

munal living and land holding—is again illustrative.[67] The appellants in *Walter* argued that "the Act [was] legislation in respect of religion and, in consequence, . . . beyond the legislative powers of a provincial legislature."[68] Although the court recognized that the Act "was prompted by" Hutterite acquisition of lands[69] and that the Act "undoubtedly affect[ed] the future expansion and creation of Hutterite colonies in Alberta,"[70] the court reasoned that:

> The Act is not directed at Hutterite religious belief or worship, or at the profession of such belief. It is directed at the practice of holding large areas of Alberta land as communal property, whether such practice stems from religious belief or not. . . . The fact that a religious group upholds tenets which lead to economic views in relation to land holding does not mean that a provincial legislature, enacting land legislation which may run counter to such views, can be said, in consequence, to be legislating in respect of religion and not in respect to property.[71]

Under the essential purpose doctrine, then, the court was able to characterize the Act as legislation "in relation to the right to acquire land in Alberta" and not "in relation to . . . religion."[72] The doctrine provided the court a way to analytically minimize the legislation's effect on religious practice and to uphold the Act as legislation essentially intended to accomplish an objective within the legislature's competence.[73]

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67. *See supra* text accompanying notes 38-41.

68. *Walter*, 1969 S.C.R. at 388.

69. *Id.* at 392.

70. *Id.* at 393.

71. *Id.* at 392; *see also id.* at 394 ("The Act does not interfere with the profession of the Hutterite faith or with religious worship in that faith. It controls the land holdings of colonies of people of that faith.").

72. *Id.* at 393; Macklem, *supra* note 37, at 56.

73. *See Walter*, 1969 S.C.R. at 393; Macklem, *supra* note 37, at 55-56.

Finkelstein asserts that under the Charter the "*Walter* [case] must be decided differently . . . . The public purpose underlying modes of land ownership is not compelling enough to justify its effect on the Hutterite religion." Neil Finkelstein, *The Relevance of Pre-Charter Case Law for Post-Charter Adjudication*, 4 SUP. CT. L. REV. 267, 279 (1982).

B. Doctrine Discernible Under the Canadian Bill of Rights

The Canadian Bill of Rights was enacted in 1960.[74] The Bill "affirm[s] that the Canadian Nation is founded upon principles that acknowledge the supremacy of God" and "that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values."[75] The Bill of Rights also provides protection for religious freedom by "recogniz[ing] and declar[ing] that in Canada there have existed and shall continue to exist without discrimination by reason of . . . religion . . . [several enumerated] human rights and fundamental freedoms."[76] Among these fundamental freedoms is freedom of religion.[77]

While the Bill of Rights thus affords explicit protection to religious freedom, the scope of that protection is limited. The Bill of Rights is not a constitutional document, but a federal statute applying "only to federal law[]."[78] Consequently, the Bill places no constraints on provincial legislatures.[79] Moreover, the constraints placed on the national Parliament can be avoided; Parliament simply has to declare that an act will "operate notwithstanding the . . . Bill of Rights."[80]

The effectiveness of the Bill of Rights was further undermined by the way in which it was applied.[81] "[N]ot until 1970

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74. HOGG, *supra* note 5, at 639.

75. Canadian Bill of Rights, ch. 44, 1960 S.C. pmbl., *reprinted in* HOGG, *supra* note 5, at 895.

76. *Id.* § 1.

77. *Id.* § 1(c). Provincial bills of rights similarly proclaimed religious freedom. Cotler, *supra* note 19, at 194 (citing § 3 of the Saskatchewan Bill of Rights, 1947 (currently codified as § 4 of the Saskatchewan Human Rights Code), § 1(c) of the Alberta Bill of Rights, and § 3 of the Quebec Charter of Human Rights and Freedoms).

78. HOGG, *supra* note 5, at 639; *see* Canadian Bill of Rights, ch. 44, 1960 S.C. § 5(2), (3), *reprinted in* HOGG, *supra* note 5, at 896.

79. *See* HOGG, *supra* note 5, at 640.

80. Canadian Bill of Rights, ch. 44, 1960 S.C. § 2, *reprinted in* HOGG, *supra* note 5, at 895.

81. *See* Cotler, *supra* note 19, at 130 ("Only one case since the enactment of the Canadian Bill of Rights [The Queen v. Drybones, 1970 S.C.R. 282 (Can.)] has ever held a federal provision of law inoperative by reason of the fact that it offended the Bill."); Tremblay, *supra* note 37, at 185-86 ("[T]he rights that were protected [by the *Bill of Rights*] were often limited by rules and conceptions current before the *Bill of Rights*, to the point that it was held that the *Bill of Rights* guarantees only those rights that existed at the time of its enactment and was not intended to create new rights; a general statute like the *Bill of Rights*, unless its terms are very clear, does not take precedence over a specific act, nor does it deprive the federal government of its jurisdiction with respect to Indians as such; in the absence of objective and easily applicable standards, the Court was very reluctant to substitute its opinion for that of

[did] the Supreme Court of Canada . . . rule[] that the Bill enabled courts to declare inoperative provisions of federal statutes that could not be construed as not conflicting with the provisions of the Bill."[82] In addition, the supreme court limited the content of the Bill of Rights by adopting the doctrine of the status quo in *Robertson & Rosetanni v. The Queen*.[83]

In *Robertson*, operators of a bowling alley had been convicted under the federal Lord's Day Act for running their business on Sunday.[84] The operators claimed that the Act was inconsistent with the religious freedom enshrined in the Bill of Rights.[85] The court denied the claim,[86] however, reasoning that the religious freedom protected by the Bill is the freedom that "existed in Canada immediately before the statute was enacted."[87] By thus limiting the Bill's content to the status quo at the time the Bill was passed, the court precluded progressive protection of religious freedom.[88]

In the doctrine of status quo, as in the other doctrines of reluctance, a unifying theme is visible: reluctance to actively protect religious freedom from legislative encroachment.[89] The Charter of Rights and Freedoms, enacted in 1982, changed Canada's legal landscape. Whether the Charter itself precluded or accommodated the judiciary's doctrines of reluctance will now be assessed.

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democratic institutions, and it developed the concept of 'valid federal objective,' giving these institutions an almost uncontrollable margin within which to manoeuvre." (footnotes omitted)).

82. Macklem, *supra* note 37, at 58 (footnote omitted).

83. 1963 S.C.R. 651 (Can.).

84. *Id.* at 653; Macklem, *supra* note 37, at 59.

85. *Robertson*, 1968 S.C.R. at 654; Macklem, *supra* note 37, at 59.

86. *Robertson*, 1963 S.C.R. at 658.

87. *Id.* at 654; *see* Cotler, *supra* note 19, at 135; Macklem, *supra* note 37, at 59.

88. W.S. Tarnopolsky has argued that the status quo doctrine is inconsistent with Canadian precedent as well as with the Bill's own terms. Cotler, *supra* note 19, at 135 (citing W.S. Tarnopolsky, *Civil Liberties During the Post-Centennial Decade*, *in* DECADE OF ADJUSTMENT 36-56 (J. Menzies ed., 1980)).

89. *But cf.* Tremblay, *supra* note 37, at 186 (suggesting that since the middle of the twentieth century the supreme court has made itself more available to resolve political problems "by broadening the standing or interest required of those who want[] to institute constitutional proceedings").

IV. THE CHARTER AND DOCTRINES OF RELUCTANCE

The Canadian Charter of Rights and Freedoms accords constitutional status to religious freedom. Specifically, section 2 recognizes that "freedom of conscience and religion" is a fundamental freedom belonging to all.[90] Section 15 proclaims that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination . . . based . . . on religion."[91] Section 29 preserves the rights and privileges "of denominational, separate or dissentient schools"[92] and section 27 mandates that the Charter "be inter-

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90. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 2(a). Both freedom of religion and conscience may have been mentioned in the Charter "to ensure that both thought and practice" are protected. Hayward, *supra* note 42, at 167.

Unlike their American counterparts, few Canadian cases have attempted to define *religion*. *See* Cotler, *supra* note 19, at 190-94. If *religion* is defined expansively, *conscience* may not need to be given independent content and weight, for freedom of religion could encompass that of conscience. *See id.* at 200.

91. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 15(1). Canada's equal protection jurisprudence, though important to religious freedom, is beyond the scope of this Comment. For a prescription of how equal protection claims ought to be analyzed under the Charter as well as a discussion of how they were handled under the Canadian Bill of Rights, see Finkelstein, *supra* note 73, at 280-84.

92. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 29; *see also id.* (Constitution Act, 1867), § 93 (protecting the rights of denominational schools against provincial encroachments). Sections 29 and 93 seem to allow establishment to some degree. Cotler, *supra* note 19, at 190 ("[T]he protections for denominational rights and privileges afforded by s. 93 may be said to amount to a breach of the 'establishment principle,' and thereby [freedom of religion], albeit in limited form. At the same time, however, the guarantees of s. 93 may also be regarded as protecting certain denominational rights, and hence religious freedom, as recognized by their incorporation into s. 29 of the Charter itself."); *see id.* at 201 ("[S]eparation of church and state has never been an avowed policy of Canadian legislators, and indeed, the incorporation of s. 93 into the Charter, together with the reference in the Preamble to the Supreme Deity, would seem to evince a contrary legislative intention . . . . Also, what are we to make of the Proclamation of the Constitution Act, 1982 which begins with the words 'In the year of our Lord?'" (footnote omitted)). In fact, §§ 29 and 93 were cited in *Big M* "as proof of the non-existence of an anti-establishment principle because they guarantee existing rights to financial support from the state for denominational schools." *Big M*, [1985] 1 S.C.R. at 340. The *Big M* court, however, did not "decide the extent to which the *Charter* allows for state financial support for, or preferential treatment of, particular religions or religious institutions." *Id.* at 340-41; *see supra* note 26. "[T]wo academic commentators[, however,] have suggested tentatively that section 93 *may* constitute an establishment of religion." Ogilvie, *supra* note 8, at 188 (referring to Irwin Cotler and William W. Black). At the least, "the advent of the Charter with its entrenchment of both a free exercise of religion clause

preted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."[93] Finally, section 24 empowers "[a]nyone whose rights or freedoms, as guaranteed by [the] Charter, have been infringed or denied [to] apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."[94]

These Charter guarantees seem to entrench religious freedom in such a way as to abolish the doctrines of reluctance. Yet, other Charter provisions suggest that the doctrines may remain viable under the Charter.

A. Parliamentary Supremacy

The Charter constricts, but also constitutionalizes, the theory of parliamentary sovereignty.[95] Unlike the Bill of Rights, the

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and a limited 'establishment' clause will require an imaginative, as well as indigenous, jurisprudence." Cotler, *supra* note 19, at 206.

For a brief overview of Canadian denominational school rights up to 1867, see Ogilvie, *supra* note 8, at 232-34. For a survey of the rights and privileges guaranteed by § 29, see Cotler, *supra* note 19, at 188-90. For a post-Charter case discussing § 29, see *In re* an Act to Amend the Education Act, [1987] 1 S.C.R. 1148, 1196-99 (Can.) (Dickson, C.J.); *id.* at 1207-09 (Beetz, J.).

For a comparison of U.S. and Canadian religious freedom jurisprudence exploring the effect of Canada's lack of an estsblishment clause, see Robert A. Sedler, *The Constitutional Protection of Religion, Expression, and Association in Canada and the United States: A Comparative Analysis*, 20 CASE W. RES. J. INT'L L. 577, 583-89 (1988). Professor Sedler concludes:

> 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.

Id. at 589. Sedler explores the reasons behind the similarity in U.S. and Canadian jurisprudence in *id.* at 618-20.

93. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 27.

94. *Id.* § 24(1). For a brief summary of the "two prevailing views as to the meaning of 'court of competent jurisdiction' in s. 24(1) of the *Charter*," see *Big M*, [1985] 1 S.C.R. at 315.

For an overview of the mode of analysis mandated by the Charter for religious freedom claims, see Sedler, *supra* nota 92, at 579-81.

For a perspective on the potential role of Canada's international obligations in fundamental freedom jurisprudence—in spite of the Charter's failure to reference those commitments—see Cotler, *supra* nota 19, at 136-38.

95. *See* Cotler, *supra* note 19, at 128-29 ("[T]he Charter . . . purports to

"Charter applies . . . to [both] the Parliament and government of Canada . . . and . . . the legislature and government of each province."[96] Moreover, the Charter forms part of the Canadian Constitution.[97] As such, the Charter is part of "the supreme law of Canada."[98] It trumps "any law that is inconsistent with [its] provisions"[99] and may not be amended by ordinary legislation.[100] Ostensibly, then, the Charter strictly limits legislative authority to infringe on religious freedom.[101]

Nonetheless, the Charter simultaneously recognizes parliamentary supremacy, even the ability of Canadian legislatures to encroach on religious freedom.[102] Section 1 concedes that the Charter's individual freedom guarantees are "subject . . . to such reasonable limits as can be demonstrably justified in a free and democratic society."[103] While section 1 assigns the burden of justifying limitations to the government, thus weakening the doctrine of parliamentary supremacy,[104] the section clearly antici-

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guarantee, for the first time, fundamental freedoms unfettered by the historic 'double override'" of parliamentary supremacy interacting with legal federalism); *id.* at 129 (The double override "will still be relevant under the Charter.").

96. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 32(1).

97. *Id.* at pt. VII, § 52.

98. *Id.*

99. *Id.*

100. *See id.* at pt. V.

101. *Cf.* Sedler, *supra* note 92, at 578 ("The Canadian Charter . . . entrenches . . . freedom of religion . . . . 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.").

102. Cotler, *supra* note 19, at 124. In Cotler's words:

> The inclusion in s. 33 of the Charter of an 'override' provision . . . institutionalizes, albeit in residual and qualified manner and form, the notion of Parliamentary sovereignty, thereby undercutting the otherwise 'overriding' character of the Charter itself. When s. 33 is collocated together with the 'limitations' clause in s. 1, the potential for a 'double override'—and one, ironically enough, rooted in the 'historic override' of parliamentary sovereignty—begins to emerge.

Id.

103. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1. Herbert Marx suggests that the § 1 reasonable limits standard is essentially the standard used in delineating appropriate limits to the Canadian Bill of Rights and "would inevitably have [been] found . . . implicit in the Charter" in its essential form had the Charter not expressly adopted it. Herbert Marx, *Entrenchment, Limitations and Non-Obstante*, *in* THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS, *supra* note 19, at 61, 68.

104. *See* Finkelstein, *supra* note 73, at 267 ("[T]he onus provision in section 1 puts

pates and accommodates limitations.[105] Further, in section 33, the Charter authorizes Canadian legislatures to override the Constitution's religious freedom guarantee as long as the legislature makes an express declaration "that [an] Act or a provision thereof shall operate notwithstanding [the Charter's religious freedom] provision[s]."[106] An exemptive declaration expires after five years but may be renewed by the legislature for additional five-year periods.[107] While, due to political constraints, the Canadian legislatures may not employ section 33's override,[108] the

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the burden on governments to 'demonstrably justify' their restrictive laws, thereby requiring the courts to apply much stricter scrutiny."); Marx, *supra* note 103, at 73 ("The outstanding feature of s. 1 is that it will place the burden of proof regarding justification of limitations on those who would rely upon them, and thus place the litigant in a better position to invoke his [or her] rights and liberties under the Charter than under other constitutional provisions or under the Canadian Bill of Rights.").

105. *See* Finkelstein, *supra* note 73, at 273. Finkelstein describes the analysis mandated by § 1:

> The Charter directs the courts to characterize legislation . . . . [T]he mere fact that legislation is in relation to or affects a constitutionally guaranteed liberty does not mean that it is *per se* invalid. It simply means that the person attacking the legislation . . . has satisfied his burden under the initial part of section 1 of the Charter by showing that a guaranteed right is implicated. The burden then shifts to the government to "demonstrably justify" its actions.

Id. If the government carries its burden, the legislation may stand.

106. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 33(1). For an overview of the override power, see Peter W. Hogg, *A Comparison of the Canadian Charter of Rights and Freedoms with the Canadian Bill of Rights*, *in* THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS, *supra* note 19, at 1, 10-11. Professor Cotler predicts that "the new override of s. 33 coupled with the s. 1 limitations clause may yet create a new 'double override.'" Cotler, *supra* note 19, at 199.

107. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 33(3), (4).

108. Cotler, *supra* note 19, at 124; *see also* Hogg, *supra* note 106, at 11 ("Presumably, the exercise of the power would normally attract such political opposition that it would rarely be invoked . . . ."). *But see* Marx, *supra* note 103, at 73. In Marx's words:

> The inclusion of an express notwithstanding clause in the Canadian Charter is an invitation to its use. Parliament and the legislatures might be prone to accept this invitation, as the experience with the exception clause in the Canadian Bill of Rights and in the Quebec Charter would seem to indicate.

Id. "The notwithstanding clause in the Canadian Bill of Rights has been used only once by Parliament since 1960" and then in an act that remained "in force for only five months." *Id.* at 72. By contrast, the "exception clause [in the Quebec Charter of Rights and Freedoms] was used on nine occasions" from 1975 to 1982. *Id.* Moreover, the

mere incorporation of the override into the Charter accommodates and even validates the judiciary's parliamentary sovereignty paradigm.[109]

B. Legal Federalism

The Charter similarly accommodates, or at least does not preclude, the doctrine of legal federalism.[110] Indeed, the Constitution Act, 1982, of which the Charter forms part, elevates the B.N.A. Act, with its federalist allocations of authority, to express constitutional status.[111] Thus, courts under the Charter may continue to employ legal federalism in fundamental freedom cases.[112] Yet, courts need not use legal federalism to safeguard fundamental rights, for the Charter provides direct protection for such rights.[113] Moreover, courts upholding an infringement on fundamental freedoms likely may not use the doctrine in isolation; they should justify the infringement under the Charter as well.

Quebec legislature, "primarily . . . to register . . . objection to the procedure surrounding the adoption of the Constitution Act, 1982," excludes all pre-Charter and post-Charter legislation from application of Charter "sections 2 and 7 to 15." *Id.* at 73. In view of these divergent experiences, it is difficult to predict the extent to which § 33 will be employed to limit Charter guarantees.

109. *See* HOGG, *supra* note 5, at 260 ("The override provision thus preserves parliamentary supremacy over much of the Charter."); Marx, *supra* note 103, at 71 (Due to the § 33 exception, "Parliament and the legislatures are . . . supreme with respect to ss. 2, 7-14, and 15." With respect to other sections, "[t]he Court should now be free from the restraint imposed by [parliamentary supremacy], since the Charter is a constitutional instrument even though Parliament and the legislatures have retained the last word as to the application of certain sections.").

110. *See* Cotler, *supra* note 19, at 199 ("[T]he 'double override' of the past, while now contained, has not been removed [under the Charter]."). *But see id.* at 128-29 ("[T]he Charter itself . . . purports to guarantee, for the first time, the fundamental freedoms unfettered by the historic 'double override.'"); Finkelstein, *supra* note 73, at 267 (The Charter directs the courts "to decide civil liberties cases on their own terms rather than in the artificial 'division of powers' framework.").

111. *See* CAN. CONST. (Constitution Act, 1982) pt. VII, § 52(2).

112. *See* Finkelstein, *supra* note 73, at 268 (noting that if legislation falls outside the authority of the enacting legislature the legislation "will be invalid without reference to the Charter").

113. Cotler, *supra* note 19, at 129. In Professor Cotler's words: "The courts no longer need to look darkly through the looking glass of legal federalism. A rights theory is at hand." *Id.*; *see also* Finkelstein, *supra* note 73, at 270-71 (explaining that while pre-Charter civil rights cases were largely decided within the federalism framework, post-Charter fundamental rights cases "can be dealt with forthrightly . . . without having to engage in logical and linguistic contortions.").

C. Essential Purpose

The essential purpose doctrine remains valid in legal federalism analysis; courts may still focus on the purpose of legislation to the neglect of effects in order to determine whether an enactment falls within the legislature's authority. As noted above, however, laws that survive legal federalism analysis should be independently scrutinized under the Charter. It is less clear whether the essential purpose doctrine applies under the Charter. The Charter does not, on its face, preclude application of the doctrine, though some might argue it should.[114] Even if the Charter does not accommodate the essential purpose doctrine's analysis, the Charter does accommodate the doctrine's effect. Section 1 of the Charter authorizes such "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[115] As a result, incidental limits on religious freedom which result from enactments essentially directed at matters within legislative competence may be sustained under the Charter as under the essential purpose doctrine.

D. Status Quo

The doctrine of the status quo may similarly survive the Charter's enactment. Section 2 of the Charter recognizes "freedom of conscience and religion" as a fundamental freedom,[116] but does not define the content of that freedom.[117] As a result, the section 2 guarantee may be interpreted as constitutionalizing the status quo.[118] Section 15(2), by contrast, suggests that the

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114. Finkelstein, for example, maintains that "an inquiry into the effect of legislation, independent and apart from the legitimacy of the purpose, is now necessary." Finkelstein, *supra* note 78, at 284; *see also id.* at 285 (noting in the equal protection context that "[t]he ever-popular 'aspect doctrine,' . . . long used to review legislative validity on the basis of purpose alone, is no longer determinative because, under the Charter, the *effect* of a particular piece of legislation will be just as important as its *purpose*"). Under "the adjudication process suggested by section 1 . . . [t]he courts must first characterize the . . . primary thrust, of the impugned law" and then, "[i]f they find that [the law] is directed at *or affects* a guaranteed right," determine whether the law is justified. *Id.* at 268-69 (emphasis added); *see also id.* at 273. According to Finkelstein, then, the pre-Charter essential purpose analysis gives way to an essential purpose-*and*-effect analysis under the Charter.

115. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1.

116. *Id.* § 2(a).

117. Hayward, *supra* note 42, at 165.

118. *See* Noel Lyon, *The Teleological Mandate of the Fundamental Freedoms*

Charter does not freeze protection as it existed when the Charter was enacted. That section sanctions laws intended to improve "conditions of disadvantaged individuals or groups including those that are disadvantaged because of . . . religion."[119] Thus, the Charter foresees the amelioration of past discrimination. Such improvement would be hampered without the support of the judiciary, so section 15 may be viewed as a directive to the courts to go beyond the status quo to the ideal established by the Charter. Of course, section 15 could also be interpreted simply as authorizing, but not mandating, progressive legislation, leaving the constitutional scope of religious freedom as it existed at the time the Charter was adopted.

In short, the Charter by its terms does not irrefutably preclude any of the judicial doctrines of reluctance.[120] The question therefore arises whether the Canadian Supreme Court has continued to adhere to these doctrines, thus limiting the protection afforded religious freedom, or whether the court has discarded the doctrines and assumed a more active role in protecting religious freedom in response to the Charter. The court has provided an initial answer to this question in its limited post-Charter religious freedom jurisprudence. The next two sections will survey that jurisprudence and then assess whether the doctrines of reluctance have survived the Charter's enactment.

V. POST-CHARTER RELIGIOUS FREEDOM CASES

A. Sunday Closing Laws

The first case to apply the Charter's religious freedom guarantee, *The Queen v. Big M Drug Mart Ltd.*,[121] assessed the validity of federal Sunday closing legislation. The defendant, Big M,

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Guarantee: What To Do with Vague but Meaningful Generalities, 4 SUP. CT. L. REV. 57, 57 (1982) ("Experience with the *Canadian Bill of Rights* suggests . . . that judges will take the position that the Charter simply entrenches the rights and freedoms that have been perfected by the common law." (footnote omitted)).

119. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 15(2).

120. *See* Cotler, *supra* note 19, at 210 ("[W]hile the law has been changed, the legal culture in which it is reposed remains the same, with Parliamentary Sovereignty an organizing idiom of that legal culture. The ghosts of the past have not been slain, they have been joined. Constitutional law now has its own 'condominium theory'—powers and rights . . . .").

121. [1985] 1 S.C.R. 295 (Can.).

was accused of violating the federal Lord's Day Act by selling goods on Sunday.[122] The Lord's Day Act made it unlawful "for any person on the Lord's Day . . . to sell or offer for sale or purchase any goods . . . or to carry on or transact any business of his ordinary calling."[123] Big M contested the Act's constitutionality on both federalism and Charter grounds.[124]

In response to the federalism challenge, the court found that the Lord's Day Act related "to a criminal law matter because, at risk of penalty, it compel[led] the observance of a religious obligation, specifically the preservation of the sanctity of the Christian Sabbath."[125] Criminal law is "reserved to the exclusive authority of Parliament" under the Constitution Act, 1867.[126] Consequently, according to a unanimous court, enactment of the Lord's Day Act properly lay within the competence of the national Parliament.[127]

In addressing the Charter-based challenge, the court discussed the analyses to be used for identifying the scope of freedom of religion as well as for assessing the constitutionality of legislation suspected of violating religious freedom. The court affirmed that "[t]he meaning of a right or freedom guaranteed by the *Charter* [is] to be ascertained by an analysis of the *purpose* of such a guarantee; . . . in other words, in . . . light of the interests it was meant to protect."[128] Freedom of religion, the court found,

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122. *Id.*

123. *Id.* at 301 (quoting Lord's Day Act, R.S.C., ch. L-13, § 4 (1970) (Can.)).

124. *Id.* at 300.

125. *Id.* at 354.

126. *See id.*; *see* CAN. CONST. (Constitution Act, 1867), § 91(27).

127. *Big M*, [1985] 1 S.C.R. at 354-55; *id.* at 362 (Wilson, J.). Had the Act's purpose been "the secular goal of enforcing a uniform day of rest from labour, the Act would [have] come under s. 92(13), property and civil rights in the province, and, hence, [would have] fall[en] under provincial rather than federal competence." *Id.* at 355.

128. *Id.* at 344. This purposive approach had been suggested by the court in Hunter v. Southam Inc., [1984] 2 S.C.R. 145 (Can.).

> In identifying a guarantee's purpose under this approach, courts are to look to:
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> the character and the larger aspects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which [the guarantee] is associated within the text of the *Charter*.

Big M, [1985] 1 S.C.R. at 344. The characterization of the guarantee:

> should be . . . a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the

"is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination."[129] In addition, "[f]reedom 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 [or her] beliefs or . . . conscience."[130] The court concluded, in defining the scope of the Charter's religious freedom guarantee for this appeal, that the religious freedom guarantee "at the very least means [that] . . . government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose."[131]

Not only did the court comment on the content of the Charter's religious freedom guarantee, but the court, in a nearly

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Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore . . . be placed in its proper linguistic, philosophic and historical contexts.

Id.

129. *Big M*, [1985] 1 S.C.R. at 336.

Justice Wilson advanced a more expansive view of freedom of religion and conscience in Morgentaler v. The Queen, [1988] 1 S.C.R. 30 (Can.). In determining whether an abortion regulation which was deemed to deprive women "of the s. 7 right" also "infring[ed] a right guaranteed elsewhere in the *Charter*" and therefore did not conform "with the principles of fundamental justice," Justice Wilson argued "that in a free and democratic society 'freedom of conscience and religion' should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or in a secular morality." *Id.* at 175, 179 (Wilson, J.). Justice Wilson concluded that the abortion legislation in question offended § 2(a)'s freedom of conscience guarantee and so could not be said to comport "with the principles of fundamental justice within the meaning of s. 7." *See id.* at 175, 180.

130. *Big M*, [1985] 1 S.C.R. at 337.

131. *Id.* at 347. Chief Justice Dickson further developed this description of the scope of religious freedom when, in *Edwards*, he stated that religious freedom "is not necessarily impaired by legislation which requires conduct consistent with the religious beliefs of another," as the criminal laws against theft or murder demonstrate. Edwards Books & Art Ltd., [1986] 2 S.C.R. 713, 760 (Can.) (Dickson, C.J.). When such legislation is religiously motivated, however, it may infringe "the freedom from conformity to religious dogma," as indicated in *Big M*. *Id.* at 761. Likewise, "legislation with a secular inspiration . . . [that has] provisions [that] coincide with the tenets of a religion" may improperly "limit the freedom of conscience and religion of persons whose conduct is governed by an intention to express or manifest his or her non-conformity with religious doctrine." *Id.*

unanimous opinion,[132] also set out the analysis to be used in testing the constitutionality of laws allegedly violating that guarantee. The court explained:

> [T]he legislation's purpose is the initial test of constitutional validity and its effects are to be considered when the law under review has passed or, at least, has purportedly passed the purpose test. If the legislation fails the purpose test, there is no need to consider further its effects . . . . [But] if a law [has] . . . a valid purpose . . . a litigant could still argue the effects of the legislation as a means to defeat its applicability and possibly its validity.[133]

That is, "either an unconstitutional purpose or an unconstitutional effect can invalidate legislation."[134]

However, even if an enactment suffers from an unconstitutional purpose or effect and thus violates a Charter guarantee, the act may still be valid if it "can be demonstrably justified in a free and democratic society."[135] The *Big M* court suggested that, in determining whether a law is justified, the court must decide whether the objectives behind the act "are of sufficient importance to warrant overriding a constitutionally protected right or freedom."[136] If "a sufficiently significant government interest [exists] then it must be decided if the means chosen to achieve [that] interest are reasonable."[137] If the government objective is sufficiently compelling and the means chosen proportional, then the act may be upheld.

Applying this constitutional analysis to the Lord's Day Act, the court concluded—after reviewing the historical development of,[138] and the Canadian[139] and American [140]case law on, Sunday closing legislation—that "[a] finding that the *Lord's Day Act* has a secular purpose is, on the authorities, simply not possible."[141]

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132. Justice Wilson wrote separately to advocate a mode of analysis different than that of the majority. *See infra* notes 147-150 and accompanying text.

133. *Big M*, [1985] 1 S.C.R. at 334.

134. *Id.* at 331.

135. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1; *see Big M*, [1985] 1 S.C.R. at 351-52.

136. *Big M*, [1985] 1 S.C.R. at 352.

137. *Id.*

138. *See id.* at 317-19.

139. *See id.* at 319-29.

140. *See id.* at 329-31.

141. *Id.* at 331.

The Act's true purpose was clearly "to compel the observance of the Christian Sabbath."[142] As a result, the Act was found to infringe on the freedom of religion and conscience guaranteed in the Charter.[143] The Act could not be justified under section 1 of the Charter, for an objective that causes an act to violate a Charter guarantee in the first place cannot subsequently be used to justify the act.[144] The majority consequently voided the Lord's Day Act as an unjustifiable violation of the religious freedom guaranteed by the Charter.[145]

While Justice Wilson accepted the majority's conclusion,[146] she wrote separately to describe what she believed to be the proper mode of constitutional analysis in fundamental freedom cases.[147] Rather than look to an act's purpose initially and thus "confus[e] the traditional approach to division of powers [legal federalism] cases with the approach demanded by the *Charter*,"[148] Justice Wilson argued that Charter analysis should first "inquire whether legislation in pursuit of what may well be an *intra vires* purpose has the effect of violating an entrenched right

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142. *Id.* at 351.

143. *Id.*

144. *See id.* at 353. As Justice Wilson summarized, "legislation cannot be regarded as embodying legitimate limits within the meaning of s. 1 where the legislative purpose is precisely the purpose at which the *Charter* right is aimed." *Id.* at 362 (Wilson, J.). Otherwise, Parliament would be able "to do indirectly [under § 1] what it could not do directly" because of the guarantees in § 2. *Id.* at 353 (majority opinion).

145. *Id.* at 351, 353, 355-56. The court also held that "to accept that Parliament retains the right to compel universal observance of the day of rest preferred by one religion is not consistent with the preservation and enhancement of the multicultural heritage of Canadians" and therefore is not consistent with Charter § 27. *Id.* at 337-38. The court thus recognized that § 27 may be relevant to religious freedom issues. Section 27 reads: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 27.

146. *Big M*, [1985] 1 S.C.R. at 356 (Wilson, J.).

147. *Id.* It appears that Justice Wilson misunderstood the majority's mode of analysis. She suggested that the majority's evaluation of an act's purpose merely seeks to do what legal federalism analysis does, that is, determine "whether the legislature has acted for a purpose that is within the scope of the authority of that tier of government." *Id.* at 360. Yet, the majority's purpose inquiry "focuses scrutiny upon the aims and objectives of the legislature and ensures they are consonant with the *guarantees* enshrined in the *Charter*," *id.* at 331 (majority opinion) (first emphasis added), not with the allocation of power in the B.N.A. Act, 1867.

148. *Id.* at 360; *see id.* at 357, 359-60 (explaining that division of powers analysis properly begins by looking at an act's purpose, but arguing that the *Charter* "is . . . an effects-oriented document"); *infra* note 330.

or freedom."[149] Then, "under s. 1" the court may evaluate "the purpose underlying the impugned legislation."[150] Irrespective of the mode of analysis used, however, the conclusion is the same: the Lord's Day Act unjustifiably infringed on Charter-guaranteed freedom of religion.[151]

Having held the federal Lord's Day Act to be unconstitutional, the supreme court was subsequently called upon to decide the constitutionality of a provincial Sunday closing law in *Edwards Books & Art Ltd. v. The Queen*.[152] In *Edwards*, four Ontario retailers had been charged with violating Ontario's Retail Business Holidays Act.[153] "Section[] 2 . . . [of that Act made] it an offence to carry on a retail business on a holiday," defined "to include Sundays and various other days" such as Christmas Day, Good Friday, Dominion Day, and Victoria Day.[154] The Act exempted such businesses as "[p]harmacies, gas stations, . . . [and] educational, recreational or amusement services" and authorized municipalities "to create [their] own scheme of exemptions where necessary for the promotion of the tourist industry."[155] In addition, the Act exempted any "business[] which, on Sundays, [had] seven or fewer employees engaged in the service of the public and less than 5,000 square feet used for such service," provided that the business had been closed the previous Saturday.[156] None of the retailers charged with violating the Act, however, qualified for an exemption.[157] Three of the retailers were convicted and appealed, challenging the constitutionality of the Act.[158] The other retailer was acquitted, but in response to an appeal brought by the Crown asserted that the application of the Act was unconstitutional.[159] The aggregate appeal attacked the con-

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149. *Id.* at 360-61.
150. *Id.* at 361.
151. *See id.* at 355 (majority opinion); *id.* at 362 (Wilson, J.).
152. [1986] 2 S.C.R. 713 (Can.).
153. *Id.* at 724.
154. *Id.* at 726.
155. *Id.* at 727.
156. *Id.*
157. *See id.* at 728-31 (Edwards Books, Longo Brothers Fruit Markets, and Paul Madger had all conducted business the Saturday before the Sunday on which they violated the Act. Paul Madger's business was not exempted by municipal by-law. And Nortown Foods had greater than seven employees serving customers on the Sunday on which it contravened the Act.).
158. *Id.* at 724.
159. *Id.*

stitutionality of the Act under "[s]ections 2(a), 7 and 15 of the *Canadian Charter of Rights and Freedoms*" as well as under the B.N.A. Act's allocation of power.[160]

In responding to the allocation of power claim, all seven justices agreed that the Act lay within Ontario's legislative competence.[161] Because the Act sought "to establish a common pause day for those employed in retail business,"[162] it was legislation "relating to property and civil rights within the province"[163]—matters which fall within the provinces' exclusive domain under section 92 of the Constitution Act, 1867.[164] The Act thus survived legal federalism analysis and the court was forced to determine whether the Act was consistent with the religious freedom guarantee of Charter section 2(a).[165]

Although Chief Justice Dickson and Justices Chouinard and Le Dain found that "[t]he Act [had] a secular purpose" which did not offend section 2(a),[166] these same justices, as well as Justices La Forest and Wilson, concluded that the Act violated the free-

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160. *Id.* at 725.

Although Justices Beetz, McIntyre, and La Forest suggested that the Act or its exemption might be challenged under § 15, *see id.* at 790 (Beetz, J.); *id.* at 804 (La Forest, J.), neither these justices nor Chief Justice Dickson and Justices Chouinard and Le Dain answered the § 15 claim raised in this appeal, because "[s]ection 15 . . . was not in force at the time the offences charged here took place." *Id.* at 805; *see id.* at 786, 787 (Dickson, C.J.); *id.* at 788, 791, 792 (Beetz, J.); *id.* at 805, 806 (La Forest, J.).

The court did address, but quickly dismissed, the § 7 liberty claim. *See id.* at 786 (Dickson, C.J.) ("Whatever the precise contours of 'liberty' in s. 7, I cannot accept that it extends to an unconstrained right to transact business whenever one wishes."); *id.* at 788 (Beetz, J.) (simply "agree[ing] with the Chief Justice that the impugned legislation does not contravene s. 7").

161. *See id.* at 752 (Dickson, C.J.); *id.* at 788, 791-92 (Beetz, J.); *id.* at 806 (La Forest, J.); *id.* at 807, 813 (Wilson, J., dissenting in part).

162. *Id.* at 807 (Wilson, J., dissenting in part).

163. *Id.* at 741 (Dickson, C.J.).

164. CAN. CONST. (Constitution Act, 1867), § 92(12).

165. Section 2(a) recognizes "freedom of conscience and religion" as a fundamental freedom belonging to everyone. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 2(a).

166. *Edwards*, [1986] 2 S.C.R. at 752 (Dickson, C.J.). Citing "[t]he title and text of the Act, the legislative debates and [a report of] the Ontario Law Reform Commission[]" for support, *id.* at 744, these justices concluded that the "object of the legislation [was] to benefit retail employees by making available to them o weekly holiday which coincides with that enjoyed by most of the community." *Id.* at 778; *see also id.* at 744, 770. Although the same justices admitted that the Sabbatarian exemption had a religious purpose, *see id.* at 749, they reasoned that the exemption was saved by "its [unseverable] context in valid provincial legislation in relation to property and civil rights," *id.* at 751.

dom of Saturday observers, because its effect was to increase the burden of Saturday observance.[167] Nevertheless, six justices—Chief Justice Dickson and Justices Chouinard, Le Dain, La Forest, Beetz, and McIntyre—upheld the Act as written: four because the Act was reasonably justifiable under section 1 of the Charter[168] and two—Justices Beetz and McIntyre—because they believed the Act did not violate religious freedom in the first place.[169] The seventh justice, Justice Wilson, was willing to uphold the Act as justified under section 1 if the limitations[170] on the Saturday observance exemption were severed, leaving an unqualified Sabbatarian exemption.[171]

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167. *See id.* at 766, 787 (Dickson, C.J.) (reasoning that the Act fosters "competitive pressure on non-exempt retailers to abandon the observance of a Saturday Sabbath" and circumscribes "the ability of [Saturday-observing consumers] . . . to go shopping or seek professional services . . . on Sundays"); *id.* at 793, 806 (La Forest, J.) (assuming that the Act imposes direct economic burdens on some non-Sunday-observing retailers and indirect economic disadvantages on others, and holding that the Act infringes "the freedom of religion of Saturday observing retailers," but not ruling on the Act's effect on others); *id.* at 807, 813 (Wilson, J., dissenting in part) (holding that § 2 of the Act "infringes the freedom of religion protected by s. 2(a) of the *Charter* of those retailers who close . . . on Saturdays for religious reasons and who cannot qualify for exemption" because "it attaches an economic penalty to their religious observance").

Because the evidence of Hindu and Muslim religious practices was insufficient "to assess the effects of the Act on members of those religious groups," *id.* at 767 (Dickson, C.J.), Chief Justice Dickson and Justices Chouinard, Le Dain, and Wilson declined to address "[w]hether the Act infringe[d] the freedom of religion of" these groups, *id.* at 767-68.

168. *See id.* at 768-83 (Dickson, C.J.) (finding that "the Act is aimed at a pressing and substantial concern" and bears a "rational connection" to its objective of protecting a uniform pause day such that the Act may be upheld under § 1 of the Charter); *id.* at 793-94 (La Forest, J.) (arguing that even if the Act adversely affected "the freedom of religion of those who worship on a day other than Sunday," and "even if [the Act] did not contain [a Sabbatarian] exemption, . . . it [could] nonetheless be held valid under s. 1 of the *Charter*," because, as Chief Justice Wilson demonstrated, the Act is aimed at the justified and compelling concern of "preserving a uniform weekly day of rest and recreation, and other holidays").

169. Justices Beetz and McIntyre found that "the impugned legislation [did] not violate the freedom of conscience and religion guaranteed by s. 2(a) of the *Charter*." *Id.* at 788; *see also id.* at 792. They reasoned that "[t]he economic harm suffered by a Saturday observer who closes shop on Saturdays is not caused by the *Retail Business Holidays Act*. . . . It results from the deliberate choice of a tradesman who gives priority to the tenets of his religion over his financial benefit." *Id.* at 789. The challengers of the legislation could thus "not plead the unconstitutionality of the impugned statute on the basis of a coercion or constraint . . . derived from their religion." *Id.* at 790.

170. *See supra* text accompanying note 156.

171. *See Edwards*, [1986] 2 S.C.R. at 810-11 (Wilson, J., dissenting in part). Justice Wilson observed that the limitations on the Act's Sabbatarian exemption resulted in different treatment for large and small Saturday-observing retailers. *Id.* at 807. "[A]

In contrast to *Big M*, then, *Edwards* upheld the Sunday closing legislation at issue.[172] The critical difference producing the opposing outcomes in *Big M* and *Edwards* appears to be that Ontario's Retail Business Act boasted an objective—the protection of a uniform pause day—that was arguably secular and that could justify the burdens it imposed on religious freedom,[173] while the Lord's Day Act could not elude its religious objective—compelling observance of the Christian Sabbath—in order to justify its infringement on religious freedom.[174]

B. Pastor-Penitent Privilege

In addition to evaluating the constitutionality of Sunday closing legislation, the court has had the opportunity to assess the Charter's impact on the existence and scope of a pastor-penitent privilege.[175] In *Gruenke v. The Queen*, the appellant had been

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limit on freedom of religion which recognizes the freedom of some members of the group but not of other members of the same group can [not] be reasonable and justified in a free and democratic society." *Id.* at 808. Alternatively, she reached the same conclusion by holding "that the Crown failed totally to discharge its burden under s. 1 of the *Charter*." *Id.* at 810.

By contrast, Chief Justice Dickson and Justices Chouinard and Le Dain found:

> [T]he balancing of the interests of more than seven employees to a common pause day against the freedom of religion of those affected constitutes justification for the exemption scheme selected by the Province of Ontario, at least in a context wherein any satisfactory alternative scheme involves an inquiry into religious beliefs.

Id. at 781 (Dickson, C.J.). Justice La Forest was satisfied "that the choice of having or not having an exemption for those who observe a day other than Sunday must remain, in essence, a legislative choice. That, barring equality considerations, is true as well of the compromises that must be made in creating religious exemptions." *Id.* at 796 (La Forest, J.).

172. The Canadian Supreme Court addressed two subsequent applications challenging Ontario's Retail Business Holiday Act in Hy & Zel's Inc. v. Attorney Gen., [1993] 3 S.C.R. 675 (Can.). While the majority in *Hy & Zel's* assumed "that the numerous amendments [to the Act had] sufficiently altered the Act in the seven years since *Edwards Books* so that the Act's validity [was] no longer a foregone conclusion," *id.* at 690, the majority dismissed the appeals for lack of standing, *id.* at 694. As a result, the court did not assess the constitutionality of the amended Act.

173. *See supra* notes 166, 168 and accompanying text.

174. *See supra* notes 141-145 and accompanying text; *Edwards*, [1986] 2 S.C.R. at 725 (Dickson, C.J.) ("The majority of the Court in . . . *Big M* . . . , while acknowledging the importance of the *effects* of legislation, relied on the predominantly religious *purpose* of the *Lord's Day Act* in finding that Act to be inconsistent with freedom of conscience and religion guaranteed by s. 2(a) of the *Charter*." (citation omitted)).

175. Gruenke v. The Queen, [1991] 3 S.C.R. 263, 273 (Can.).

convicted of first degree murder.[176] She appealed alleging that "the testimony of a pastor and lay counsellor of the Victorious Faith Centre Church regarding communications made to them by the appellant [about] her involvement in the murder" was inadmissible, because "the communications were privileged."[177] In finding "no common law, *prima facie* privilege for religious communications,"[178] the majority[179] reasoned that:

> While the value of freedom of religion, embodied in [Charter] s. 2(a), will become significant in particular cases, . . . this value [need not] . . . be recognized in the form of a *prima facie* privilege in order to give full effect to the Charter guarantee. [Instead, t]he extent (if any) to which disclosure of communications will infringe on an individual's freedom of religion will depend on the particular circumstances involved, for example: the nature of the communication, the purpose for which it was made, the manner in which it was made, and the parties to the communication.[180]

In assessing the appellant's claim for privilege, the court found that the appellant's communication with the pastor and counsellor did not "originate with an expectation of confidentiality" and therefore could not be privileged.[181] In addition, the court found that the "communications [were] . . . made more to relieve [appellant's] emotional stress than for a religious or spiritual pur-

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176. *Id.* at 272.

177. *Id.*

178. *Id.* at 289.

179. The minority cited the Charter's religious freedom guarantee as support for a pastor-penitent privilege, *id.* at 301-02 (L'Heureux-Dubé, J.), and concluded that Canada should "recognize a pastor-penitent category of privilege," rather than determine the existence of the privilege ad hoc, *id.* at 311. Recognition of "a pastor-penitent category of privilego," *id.*, would "not mean that every communication between pastor and penitent [would] be protected. The creation of the category [would] simply acknowledge[] that [Canadian] . . . society recognizes that the relationship should bo fostered, and that disclosure of communications will generally do more harm [than] . . . good," *id.* at 312. For an explanation of how the minority would determine whether a claim of privilege should be upheld, see *id.* at 312-14.

The minority and majority agreed that in order to preserve Canada's multicultural heritage, as directed by Charter § 27, the success of a claim for privilege cannot hinge on whether the claimant's religion requires or provides for some formal communication with a religious leader, *id.* at 313-14, or on whether the communications were made during such a formal procedure, *id.* at 291.

180. *Id.* at 289.

181. *Id.* at 292; *see id.* at 316 (L'Heureux-Dubé, J.).

pose."[182] "In fact, [the counsellor] initiated the meeting and [the appellant] testified that she saw no harm in speaking to [the counsellor] because she had already made up her mind to turn herself into the police and 'take the blame.'"[183] Having thus characterized [the appellant's] communications, the court abruptly concluded that the communications' "admission into evidence [did] not infringe [appellant's] freedom of religion."[184]

C. Parental Rights

The court once again faced religious freedom challenges in *Jones v. The Queen*[185]—challenges to Alberta's compulsory education statute: the School Act.[186] The Act required children of certain ages to attend public school unless they were attending an approved private school or receiving instruction certified as efficient by the Superintendent of Schools or an inspector from the Department of Education.[187] Appellant "educate[d] his . . . children in a schooling program . . . which [he] operate[d] in the basement of a fundamentalist church of which he [was] the pastor."[188] Appellant believed:

> that his right and duty to bring up and educate his children [came] from God and it would offend his conscience and his religious convictions to acknowledge the School Board, a secular institution, as the source of this right and obligation. To accept that the Board [could] grant him permission to carry out his God-given duty would be, he submit[ted], to accept the converse, i.e. that it [could] also refuse him such permission. He [could not] in conscience recognize the Board's authority in this regard.[189]

Consequently, appellant "refused to send his children to public school"[190] and likewise "refuse[d] to apply for approval of his academy by the Department of Education as a private school" or to seek a certificate indicating that his children were "receiving

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182. *Id.* at 292.
183. *Id.*
184. *Id.* at 292-93.
185. [1986] 2 S.C.R. 284 (Can.).
186. *Id.* at 290 (La Forest, J.).
187. *Id.* at 290-91.
188. *Id.* at 290.
189. *Id.* at 310 (Wilson, J., dissenting).
190. *Id.* at 290 (La Forest, J.).

efficient instruction."[191] Appellant was therefore accused of violating the School Act, but was acquitted based not on his religious freedom defenses but on a section 7 defense.[192] The Court of Appeals of Alberta "reversed . . . and entered convictions against the accused."[193] The supreme court then addressed the question of whether the relevant provisions of the School Act were consistent with the Charter's religious freedom guarantee.[194]

The minority—composed of Justice La Forest and Chief Justice Dickson, joined in a separate opinion by Justice Lamer[195]—found the Act's purpose to be the "purely secular" one of "regulat[ing] the education of young people in the schools of the province."[196] Yet, after assuming that appellant sincerely[197] believed that seeking registration or certification of his school would, contrary to his convictions, acknowledge that "the government, rather than God, has the final authority over the education of his children," the minority "agree[d] that the effect of the *School Act* [would] . . . constitute some interference with the appellant's freedom of religion."[198] Nonetheless, these justices found that the province's interest "in the education of the young

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191. *Id.* at 291. However, appellant had "no objection to the school authorities inspecting his academy and testing his pupils to ascertain their level of achievement, but he assert[ed] that his religious convictions prevent[ed] him from making such a request of the school authorities." *Id.* Thus, there arose "what the trial judge . . . described as a standoff between 'a stiff-necked parson and a stiff-necked education establishment, both demanding that the other make the first move in the inquiry to determine whether the children [were] receiving efficient instruction outside the public or separate school system.'" *Id.*

192. *Id.* at 292-94. Section 7 provides that "[e]veryone 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." CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 7. In accepting the pastor's § 7 claim, the trial judge reasoned that "[s]ince proof of efficient instruction under [the Act] was solely by means of a certificate issued by an employee of the school board or the Minister of Education or his designate, this would prevent the accused [in violation of notions of fundamental justice] from making a full answer and defence by bringing all evidence relevant to the issue before the court." *Jones*, [1986] 2 S.C.R. at 293-94.

193. *Jones*, [1986] 2 S.C.R. at 294.

194. *Id.*

195. *See id.* at 308 (Lamer, J.).

196. *Id.* at 294 (La Forest, J.).

197. Justice La Forest and Chief Justice Dickson acknowledged that "a court is in no position to question the *validity* of a religious belief" but may, and in fact has the duty to, examine "the sincerity of a religious belief when a person claims exemption from the operation of a valid law on that basis." *Id.* at 295.

198. *Id.*

[was] . . . compelling,"[199] that the requirement that home schoolers apply for certification of their instruction was "a minimal, or . . . peripheral intrusion on religion," and that the requirement was "demonstrably justified in a free and democratic society."[200] Having thus found the Act's certification requirement to be justifiable under Charter section 1, Justices Dickson, La Forest, and Lamer dismissed appellant's religious freedom claim.[201]

The majority, composed of Justice Wilson and the three justices who joined in Justice Wilson's dissenting opinion, likewise rejected appellant's religious freedom claim, though on different grounds.[202] Justice Wilson observed that the only provision of the Act appellant believed violated his religious freedom was the certification requirement.[203] However, not only did appellant fail to prove that applying for certification would in fact violate his religious beliefs,[204] but appellant did not persuade Justice Wilson that the *purpose* of the Act was "to give the School Board absolute control over the education of children."[205] Thus, appellant's claim was reduced to the assertion that "the *effect* of the statutory machinery for certification [infringed] on his religious be-

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199. *Id.* at 297.

200. *Id.* at 299.

201. *See id.* at 310 (La Forest, J.); *id.* at 308-09 (Lamer, J.). Justice La Forest and Chief Justice Dickson also dismissed appellant's § 7 claim, reasoning that the compulsory education act did "not *per se* violate the claimed [§ 7] liberty," but would do so "only if those charged with its administration use it as a device for unduly infringing on such liberty," which did not occur here. *Id.* at 307-08 (La Forest, J.). Justices Beetz, McIntyre, and Le Dain generally agreed with the reasoning of Justices La Forest and Dickson and agreed with their "disposition of the [§ 7] issue." *Id.* at 308 (Beetz, J.). Similarly, Justice Lamer, with one reservation, concurred in Justice La Forest's handling of the § 7 claim. *Id.* at 309 (Lamer, J.). Only Justice Wilson held that the Act violated § 7 of the Charter and could not be saved by § 1. *Id.* at 309 (Wilson, J., dissenting).

202. *See id.* at 308 (Beetz, J.); *id.* at 315, 324 (Wilson, J., dissenting).

203. *Id.* at 312 (Wilson, J., dissenting).

204. *Id.* at 313. Nor did Justice Wilson find a reason why making the application would violate appellant's beliefs. In Justice Wilson's words:

> No-one is asking the appellant to replace God with the School Board as the source of his right and his duty to educate his children. They are merely asking him to have the quality of his instruction approved by the secular authorities so that minimum standards may be maintained in all educational establishments in the Province.

Id.

205. *Id.* Instead, Justice Wilson found that the "[t]he purpose of the legislation . . . [was] to ensure that children receive[d] an adequate education." *Id.*

liefs."[206] While Justice Wilson acknowledged "that legislation may be invalidated if its effect is to violate a constitutional guarantee," she maintained that "not every effect of legislation on religious beliefs or practices is offensive to the constitutional guarantee of freedom of religion."[207] In her view, "[s]ection 2(a) [of the Charter] does not require the legislature to refrain from imposing any burdens on the practice of religion. Legislative or administrative action whose effect on religion is trivial or insubstantial is not . . . a breach of freedom of religion."[208] Because the certification requirement's impact, if there was in fact an impact (which Justice Wilson doubted), "on the appellant's freedom of conscience and religion . . . [was] an extremely formalistic and technical one," Justice Wilson concluded that it did not "give[] rise to a violation of . . . the *Charter*."[209] Consequently, she did not need to discuss whether the limit on appellant's freedom was justifiable under section 1.[210] In sum, all justices agreed that appellant's religious freedom claim should be dismissed—the majority because the Act did not violate the appellant's religious freedom[211] and the minority because the Act, though violative of appellant's religious freedom in its effects, was justifiable under section 1 of the Charter.[212]

In *Richard B. v. Children's Aid Society*,[213] the supreme court again assessed parental religious freedom claims, this time in response to a challenge to the Ontario Child Welfare Act.[214] Appellants were Jehovah's Witnesses who, for religious reasons, did not believe in using blood transfusions.[215] Appellants' daughter, Sheena, was born prematurely, on June 25, 1983.[216] By July 30, Sheena's "haemoglobin level had dropped to such an extent that the attending physicians believed . . . that she might require a

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206. *Id.* (emphasis added).
207. *Id.*
208. *Id.* at 313-14.
209. *Id.* at 315.
210. *Id.* If her reasoning was wrong and the Act did violate appellant's religious freedom, Justice Wilson indicated that the Act would not be saved by § 1, because the government had failed to prove that the Act "impair[ed] as little as possible the . . . freedom in issue." *Id.*
211. *See id.* at 308 (Beetz, J.); *id.* at 315, 324 (Wilson, J., dissenting).
212. *See id.* at 295, 297-301 (La Forest, J.); *id.* at 308 (Lamer, J.).
213. [1995] 1 S.C.R. 315 (Can.).
214. *Id.* at 351 (La Forest, J.).
215. *Id.*
216. *Id.*

blood transfusion to treat potentially life-threatening congestive heart failure."[217] The following day, a hearing was held in which the judge granted Children's Aid Society "a 72-hour wardship," based on evidence that "a transfusion might be necessary."[218] At a subsequent hearing, the wardship was extended twenty-one days, in part because the "head of ophthalmology at the Hospital for Sick Children [where Sheena was staying[219]] . . . suspected Sheena had infantile glaucoma and needed to undergo exploratory surgery," which would have "to be performed under general anaesthetic" and which would, and in fact did, require transfusion.[220] Both wardships were awarded under the Child Welfare Act,[221] which provided that "a court may order a child to be committed to or subject to the care and custody of the Children's Aid Society for a period of time not exceeding 12 months" if the child is deemed to be "in need of protection."[222]

Appellants claimed that the Act "infring[ed] their right, [protected by sections 2(a) and 7 of the Charter,] to choose medical treatment for their infant in accordance with the tenets of their faith."[223] The supreme court was thus called upon to decide whether the Child Welfare Act violated appellant's section 2(a) freedom and whether any violation was nonetheless justified under section 1.[224]

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217. *Id.* at 352.

218. *Id.*

219. *See id.* at 351.

220. *Id.* at 352.

221. *See id.* at 393 (L'Heureux-Dubé, J., dissenting in part).

222. *Id.* at 429 (Iacobucci, J.). According to the Act:

> (b) "child in need of protection" means [among other things],
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> . . . .
>
> (ix) a child where the person in whose charge the child is neglects or refuses to provide or obtain proper medical, surgical or other recognized remedial care or treatment necessary for the child's health or well-being, or refuses to permit such care or treatment to be supplied to the child when it is recommended by a legally qualified medical practitioner, or otherwise fails to protect the child adequately.

Id. at 429 (quoting Child Welfare Act, R.S.O., ch. 66, § 19(1)(b)(ix) (1980) (Ont.)).

223. *Id.* at 351 (La Forest, J.).

224. *See id.* at 360-61. The court was also asked to determine whether the Act violated § 7 of the Charter and whether any violation of § 7 was justified. *See id.* at 360. While the members of the court agreed that appellant's § 7 claim should be dismissed, differing reasons were offered. *See id.* at 351 (Lamer, C.J.); *id.* at 391 (La Forest, J.); *id.* at 392 (L'Heureux-Dubé, J., dissenting in part); *id.* at 428 (Sopinka, J.); *id.* at 439 (Iacobucci, J.).

Justices La Forest, Gonthier, and McLachlin, joined by Justice L'Heureux-Dubé,

The majority, consisting of Justices La Forest, Gonthier, and McLachlin,[225] joined by Justices L'Heureux-Dubé[226] and Sopinka,[227] argued that "s. 2(a) must be given a liberal interpretation with a view to satisfying its purpose."[228] These justices found that "the right of parents to rear their children according to their religious beliefs, including that of choosing medical and other treatments, is [a] . . . fundamental aspect of freedom of religion."[229] The majority then determined that the Act did not intend to violate appellant's religious freedom; rather, the Act's purpose was "nothing more or less than the protection of children."[230] Nevertheless, the Act's effects, "culminat[ing] in a wardship order depriving the parents of the custody of their child," did deprive the appellants of religious freedom.[231] Consequently,

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held that "the Act . . . infringed upon the parental 'liberty' protected in s. 7 of the *Charter*," *id.* at 374 (La Forest, J.), but that "the legislative scheme . . . [was] in accordance with the principles of fundamental justice," *id.* at 380, so the Act did not violate § 7. *See id.* at 391; *id.* at 392 (L'Heureux-Dubé, J., dissenting in part, but concurring with Justice La Forest's reasoning as to the § 7 claim).

Justices Iacobucci and Major, in contrast, held that "the right to liberty embedded in s. 7 does not include a parent['s] right to deny a child medical treatment that has been adjudged necessary by a medical professional," *id.* at 430 (Iacobucci, J.), so the Act did "not occasion any rights infringements in the first place," *id.* at 439.

Chief Justice Lamer similarly found that "the liberty interest protected by s. 7 [had] not been infringed because it includes neither the right of parents to choose (or refuse) medical treatment for their children nor, more generally, the right to bring up or educate their children without undue interference by the state." *Id.* at 330 (Lamer, C.J.).

Finally, Justice Sopinka reasoned that "it was unnecessary to determine whether a liberty interest was engaged because the threshold requirement of a breach of the principles of fundamental justice was not met." *Id.* at 428 (Sopinka, J.).

225. Justice La Forest authored the opinion of these three justices. *See id.* at 351.

226. *See id.* at 392 (L'Heureux-Dubé, J., dissenting in part).

227. *See id.* at 428 (Sopinka, J.).

228. *Id.* at 382 (La Forest, J.). However, Justice La Forest, the author of the majority opinion, conceded that "freedom of religion is not absolute. While it is difficult to conceive of any limitations on religious beliefs, the same cannot be said of religious practices . . . ." *Id.* at 383. Yet, he added that "[a]ny ambiguity or hesitation should be resolved in favour of individual rights." *Id.* at 384. In explaining why Charter rights should be broadly construed, he stated:

> Apart from the fact that [broad construction] brings in the full contextual picture in balancing [Charter rights] with other rights under s. 1, a narrower interpretation has the effect of forever narrowing the ambit of judicial review, and so limiting the scope of judicial intervention for the protection of the individual rights guaranteed under the *Charter*.

Id. at 389.

229. *Id.* at 382.

230. *Id.*

231. *Id.*

the majority turned to section 1 to determine whether the denial was justified.[232]

In pursuing their section 1 analysis, the majority counterpoised "the parents' rights . . . [and the State's interests or] the interests of others in a free and democratic society."[233] The majority found "that the state interest in protecting children at risk [was] a pressing and substantial objective" and that "the process contemplated by the Act [was] carefully crafted, [was] adaptable to a myriad of different situations, . . . [was] far from arbitrary,"[234] and afforded parent procedural protections.[235] Consequently, the majority held that "[t]he restrictions the Act impose[d] on parental rights [were] amply justified."[236]

By contrast, the minority—Justices Iacobucci and Major, joined by Chief Justice Lamer[237]—approached the issue as a conflict between parental and children's rights.[238] The minority justices rejected the majority's "reliance on s. 1 . . . to establish the constitutionality of the . . . *Child Welfare Act*."[239] They reasoned that turning to section 1 inappropriately "elevate[d] choosing to refuse one's child necessary medical care on account of one's personal convictions to the level of constitutionally protected activ-

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232. *Id.* at 385. While Justice La Forest recognized that "internal limits to the scope of freedom of religion," *id.* at 383-84, could be formulated under § 2, he "opted to balance the competing rights [of the state and the appellants] under s. 1" which he believed to be "a much more flexible tool with which to balance competing rights," *id.* at 384.

233. *Id.* at 387. In response to the charge that such a balancing reduced the "child's right to life or security . . . to a limitation of the parent's constitutionally protected right," Justice La Forest maintained that the majority's "approach [was] dictated by the nature of the case":

> The sole issue before us was that raised by the parents, i.e. that *their* constitutional rights were infringed in the circumstances in which medical treatment was given to the child. In such a case, the parent[s'] rights must, under s. 1, be balanced against the interests of others in a free and democratic society—in this particular case the right of their child.

Id. By defining "the interests of others in a free and democratic society," to include the child's interests, *id.*, the majority, like the minority, *see infra* notes 237-244 and accompanying text, took into account the child's rights, suggesting, as Justice La Forest stated, that "the issue raised governs the form, but not the substance of the analysis." *Id.* at 387-88.

234. *Id.* at 385.

235. *Id.*

236. *Id.* at 386.

237. *See id.* at 330 (Lamer, C.J.).

238. *Cf. supra* note 233 and accompanying text.

239. *Id.* at 429 (Iacobucci, J.).

ity."[240] Rather than turn to section 1, the minority resolved the conflict between Sheena's "right to life and health" and her parents' religious freedom under section 2(a)—the religious freedom guarantee.[241] To support its approach, the minority reasoned that "the freedom of religion is not absolute" and that while the majority believed "that limitations on [religious freedom] are best considered under a s. 1 analysis, . . . the right itself must have a definition, and even if a broad and flexible definition is appropriate, there must be an outer boundary."[242] That boundary, the minority found is defined in part by others' rights.[243] The minority considered Sheena's rights in defining her parents' rights, noting that "denying an infant necessary medical care could preclude that child from exercising any of her constitutional rights, as the child, due to parental beliefs, [might] not live long enough to make choices about the ideas she should like to express, the religion she should like to profess, or the association she should like to join."[244] In light of Sheena's competing rights, the minority held that Sheena's parents "[did] not benefit from the protection of s. 2(a) of the *Charter* since a parent's freedom of religion does not include imposition upon the child of religious practices which threaten the safety, health or life of the child."[245] Consequently, the Child Welfare Act did "not occasion

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240. *Id.* at 438. In addition, they argued that "[a]lthough s. 1 may be the appropriate forum for balancing the interests of the *state* against the rights violation of the aggrieved individual . . . s. 1 [is not necessarily] the exclusive balancing agent between two individuals' positive and negative liberties." *Id.* at 438.

Justice La Forest, by contrast, suggested that individual rights are balanced in the § 1 analysis. *See id.* at 387 (La Forest, J.) (Even though the appeal only asserted the parents' constitutional rights, those "rights must, under s. 1, be balanced against the interests of others in a free and democratic society—in this particular case the right of their child."). Justice La Forest's view that balancing should occur under § 1, not § 2, appears to be the traditional and the contemporary position of a majority of the court. *See id.* at 383-84 ("This Court has consistently refrained from formulating internal limits to the scope of freedom of religion in cases where the constitutionality of a legislative scheme was raised; it rather opted to balance the competing rights under s. 1 . . . ."); *id.* at 384-86 (illustrating that Justice La Forest's opinion—which was adopted as to the religious freedom claim by five of the nine justices, *see supra* notes 225-227 and accompanying text—balances state interests and individual rights under § 1).

241. *Id.* at 435 (Iacobucci, J.).

242. *Id.*

243. *See id.* at 435 (citing The Queen v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, 337 (Can.) (Dickson, J.)).

244. *Id.* at 437.

245. *Id.* at 435.

any rights infringements in the first place."[246] The majority and minority reached the unanimous conclusion—though based on different reasoning—that appellant's religious freedom claim should be dismissed.

The supreme court assessed the religious freedom of parents in relation to their children in the context of a custody and access dispute in *Young v. Young*.[247] Mr. and Mrs. Young, who had three daughters, were involved in a protracted separation battle.[248] Mr. Young had converted to the Jehovah's Witness faith two years before separating from Mrs. Young and wished to share his religion with his daughters, of whom Mrs. Young had custody.[249] The couple disagreed over "which religious activities Mr. Young might appropriately undertake with his daughters."[250] In her divorce suit, Mrs. Young sought "interim and permanent custody of the children and an order enjoining [Mr. Young] from inculcating the children in the Jehovah's Witness faith or involving them in church activities."[251] Mr. Young in return sought "a declaration that the restrictions sought by his wife violated his and the children's rights under the *Charter*."[252]

In handling these petitions, the trial court was bound by the federal Divorce Act, which directs courts to consider only the children's best interest in custody and access matters.[253]

> The trial judge granted custody of the children to Mrs. Young and access to Mr. Young. . . . The order[, however,] provided that Mr. Young not discuss the Jehovah's Witness religion with the children, not take them to any religious services, canvassing or meetings, and not expose the children to religious discussions with third parties without the prior consent of Mrs. Young . . . . Mr. Young was also enjoined from preventing blood transfusions for the children, should the need arise.[254]

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246. *Id.* at 439.
247. [1993] 4 S.C.R. 3 (Can.).
248. *Id.* at 111 (McLachlin, J.).
249. *Id.*
250. *Id.*
251. *Id.* at 27 (L'Heureux-Dubé, J., dissenting in the result).
252. *Id.*
253. *Id.* at 113 (McLachlin, J.).
254. *Id.* at 112.

On Mr. Young's appeal, "[t]he Court of Appeal . . . set aside the limitations on religious discussion and attendance"[255] reasoning that it was in the children's best interest to "come to know their non-custodial parent fully."[256] The majority found that restrictions should not be placed on the freedom of an access parent to discuss religion with his or her child, or to involve the child in religious activities, unless [potential or actual real harm] . . . to the child [is] established on the evidence, or the evidence establishe[s] that the child [does] not consent to being subject to the access parent's views or practices.[257] Mrs. Young appealed.[258]

Her appeal presented the supreme court with the following constitutional questions: whether the best-interests-of-the-child test, mandated by the Divorce Act, violated the religious freedom and equality guarantees of Charter sections 2(a) and 15(1), respectively, and whether any such violations were nonetheless justified.[259] Freedom of expression and association issues were also raised under Charter sections 2(b) and 2(d).[260] The court's reasoning on the section 2(a) religious freedom claim was highly fractured.

Justice McLachlin, whose disposition of the appeal was accepted by the majority,[261] began by assuming, though not deciding, that "the *Charter* applie[d] to an action for access under the *Divorce Act*."[262] Mr. Young's claim, he summarized, was that legislative imposition of the best-interests-of-the-child test under the Divorce Act violated constitutional "religious and expressive freedom," because the test in some cases would "require a judge to make an order limiting expressive or religious freedom."[263] Justice McLachlin found that "this argument [could not] stand."[264] Citing *Big M*, Justice McLachlin explained that "[i]t is

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255. *Id.* (citation omitted).
256. *Id.* at 113.
257. *Id.*
258. *Id.*
259. *Id.* at 5.
260. *Id.*
261. *See id.* at 109 (Sopinka, J.); *id.* at 110 (Cory, J.).
262. *Id.* at 120 (McLachlin, J.).
263. *Id.* at 121. Justice McLachlin dismissed the association and equality claims, explaining that "[t]he guarantees of freedom of association and equality appl[ied] only tangentially, if at all, and were not emphasized in [the] argument." *Id.* at 120-21.
264. *Id.* at 121.

established that the guarantee of freedom of religion does not extend to religious activity which harms other people."[265] "To deprive a child of what a court has found to be in his or her best interests is to [harm] . . . the child."[266] Thus, according to Justice McLachlin, "the *Charter* guarantee of freedom of religion does not . . . protect conduct which is not in the best interests of the child under the *Divorce Act*."[267] As a result, the Act cannot be said to proscribe constitutionally protected conduct.

While agreeing with Justice McLachlin's disposition of the appeal and reasoning,[268] Justice Sopinka added reasons of his own. He went "a step further than . . . [Justice] McLachlin . . . and conclude[d] that what is in the best interests of the child is the generally applicable test, but in its application to restrict religious expression, risk of substantial harm is not only an important [but also a necessary] factor."[269] Interpreting the best interests test in this way, Justice Sopinka found that the test did "not constitute a limitation on freedom of religious expression," for "this freedom does not extend to protect conduct which is harmful to others."[270]

Advocating the minority disposition was Justice L'Heureux-Dubé, whose reasoning on the constitutional questions was accepted by Justices La Forest and Gonthier.[271] According to Justice L'Heureux-Dubé, Mr. Young's main argument was that "his freedom of religion under s. 2(a) of the *Charter* [was infringed] due to the trial judge's access order."[272] Justice L'Heureux-Dubé responded to this argument by finding that the Charter did not apply to the order itself.[273] Under the rule of *Retail, Wholesale &*

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265. *Id.*

266. *Id.* at 122.

267. *Id.* In resolving the freedom of expression claim, Justice McLachlin appears to have held that because "the teaching of religious beliefs and practices to one's children," while partly expressive, "is predominantly religious," the limits found on religious freedom must govern in this case. *Id.* at 124.

Justice McLachlin's statement that "the limits of the guarantee of freedom of *expression* should govern in the context of religious instruction of children," *id.* (emphasis added), appears to be in error. It seems the word *religion* should be substituted for the word *expression*; otherwise the statement does not seem to comport with Justice McLachlin's argument. *See id.* at 123-24.

268. *Id.* at 107 (Sopinka, J.).

269. *Id.* at 108.

270. *Id.* at 109.

271. *Id.* at 25 (La Forest, J.).

272. *Id.* at 89 (L'Heureux-Dubé, J., dissenting in the result).

273. *Id.* at 90. Nor does the Charter apply "to private disputes between parents

Department Store Union, Local 580 v. Dolphin Delivery Ltd.,[274] which Justice L'Heureux-Dubé believed to be dispositive,[275] "the *Charter* applies to the legislative, executive and administrative branches of government but does not apply to judicial orders made in the resolution of private disputes."[276] Custody and access disputes are private.[277] "The mere fact that the state plays a role in custody and access decisions in formalizing the circumstances of parent-child interaction does not transform the essentially private character of such interchanges into activity which should be subject to *Charter* scrutiny."[278] Mr. Young's claim thus lacked a Charter foundation.

"[E]ven if the *Charter* were to apply to custody and access orders, no infringement of religious freedoms would [have] occur[red]" since the order was based on "the best interests of the child."[279] "[F]reedom of religion is inherently limited by . . . the rights and freedoms of others"—as the court in *Big M* recognized.[280] Thus, if the access parent's religious practices "interfere with the best interests of the child," the parent's religious freedom cannot extend to those practices.[281]

Although arguing that the Charter does not apply to custody and access orders, Justice L'Heureux-Dubé nonetheless maintained that "*Charter* values . . . remain an important consideration in judicial decision-making" so that had the court based its order on Mr. Young's religion, the order would not have been

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in the family context." *Id.* at 100. As Justice L'Heureux-Dubé explained, the court:

> will consider both the purpose and the context of a right when determining whether there has been an infringement of the *Charter*. . . . [T]he purposes underlying the protection of religious and expressive freedoms have little if anything to do with regulating activities between family members. Such rights are public in nature and have typically referred to and encompassed freedom of the individual from state compulsion or restraints.

Id. at 89.

274. [1986] 2 S.C.R. 573 (Can.).

275. *Young*, [1993] 4 S.C.R. at 91 (L'Heureux-Dubé, J., dissenting in the result).

276. *Id.* at 90-91. For two so-called exceptions to that rule, see *id.* at 91.

277. *Id.* at 91.

278. *Id.* at 90.

279. *Id.* at 93.

280. *Id.* at 94 (drawing this conclusion from the court's discussion of the scope of religious freedom in The Queen v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, 336-37 (Can.)).

281. *Id.* Justices McLachlin and L'Heureux-Dubé seem to agree on this point—that *Big M* places conduct that harms others outside the scope of the religious freedom guarantee. *See supra* notes 265-267 and accompanying text.

legitimate.[282] Yet, the court could properly consider "the religion of the parties . . . as one of the circumstances to be assessed along with all the others in the determination of the best interests of the child."[283] In so doing, the court would not be "engaged in adjudicating a 'war of religion'" nor in trying "the religious beliefs of the parties," but in resolving an irreconcilable difference in favor of "the best interests of the child."[284]

As the above discussion illustrates, the reasoning of the justices in *Young* was splintered.[285] Yet, a majority of the justices agreed on the disposition of the appeal. Justices McLachlin, Iacobucci, Cory, and Sopinka agreed to uphold the court of appeals' removal of the access restrictions.[286]

A contrary result was reached in the case of *D.P. v. C.S.*,[287] which was "heard at the same time" as *Young*, raised similar issues, and was disposed of concurrently.[288] In *D.P. v. C.S.*, the respondent mother, who had separated from the appellant father,[289] obtained an order which allowed the father to teach their daughter the Jehovah's Witness faith but prohibited him from indoctrinating her or from involving her in activities of the Jehovah's Witness religion.[290] The access order was governed by "[a]rticle 30 of the *Civil Code of Lower Canada*."[291] Article 30 di-

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282. *Young*, [1993] 4 S.C.R. at 92.

283. *Id.*

284. *Id.* at 93.

285. Justices Cory and Iacobucci added little to the milieu of opinion on the religious freedom claim. Instead, they substantially agreed with the reasons and agreed with the conclusion of both Justices McLachlin and L'Heureux-Dubé that "the best interests of the child standard provided in . . . the *Divorce Act* does not violate [the religious freedom or equality guarantees] . . . of the *Canadian Charter of Rights and Freedoms*." *Id.* at 109 (Cory, J.) (citation omitted). Justices Cory and Iacobucci refrained, however, from addressing other issues raised by Justices McLachlin and L'Heureux-Dubé; namely, "whether, if an infringement of the *Charter* were found, such an infringement would be so trivial as not to warrant *Charter* protection" and "whether or not the *Charter* applies to judicial orders made in custody or access proceedings." *Id.*

286. *Id.* at 138 (McLachlin, J.); *see id.* at 107, 109 (Sopinka, J.); *id.* at 110 (Cory, J.).

287. [1993] 4 S.C.R. 141 (Can.).

288. *Id.* at 148 (La Forest, J.).

289. *Id.* at 149.

290. *Id.* at 151, 152.

291. *Id.* at 148; *see id.* at 189-90 ("[A]rticle 30 *C.C.L.C.* . . . governs this dispute between unmarried parties who are parents of a young child."). Had the mother and father been married, the order would have been governed by the Divorce Act, as was the case in *Young*. *Id.* at 155.

rects that "[i]n every decision concerning a child, the child's interests and the respect of his [or her] rights must be the determining factors."[292] The court of appeal upheld the order.[293]

On appeal to the supreme court, the constitutionality of the child's interests test—on which the order was based[294]—was challenged.[295] The father argued, among other things, that "the order infringe[d] his freedom of religion and that of his daughter, that is, his right to propagate his religion and that of his daughter to be exposed to it, . . . contrary to s. 2(a) . . . of the *Charter*."[296] The father also claimed that "Jehovah's Witnesses [were] victims of systematic discrimination in Quebec, contrary s. 15(1) of the *Charter*."[297]

In dismissing the father's religious freedom claim under section 2(a), Justice L'Heureux-Dubé reiterated the reasons he offered in *Young*: that the Charter did not apply to judicial resolution of private disputes; that consideration of the parent's religious practices in determining the best interests of the child was consistent with Charter values; and that there could be no infringement of the father's religious freedom, because that freedom is bounded by the best interests of the child.[298] Justices Sopinka and McLachlin likewise relied on their arguments in

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The constitutionality of two articles of the Civil Code of Quebec—articles 653 and 654, which also adopt the child's interests standard—was also contested but was explicitly addressed only by Justice McLachlin. *Id.* at 192, 193 (McLachlin, J., dissenting); *see id.* at 195.

292. *Id.* at 148 (quoting Civil Code of Lower Canada, art. 30).

293. *Id.* at 153 (La Forest, J.).

294. *See id.* at 187. The trial judge identified "the child's best interest" as the appropriate test but applied a stricter version of the test than Justice L'Heureux-Dubé advocates. *Id.*; *see id.* at 188.

295. *See id.* at 197 (McLachlin, J., dissenting).

296. *Id.* at 154 (La Forest, J.).

297. *Id.*

298. *Id.* at 181-82; *see supra* notes 273-281 and accompanying text. The father also alleged a violation of "his freedom of expression." *D.P.*, [1993] 4 S.C.R. at 154. Justice L'Heureux-Dubé responded to this claim, explaining that even if the Charter's free expression guarantee applied—which it did not—freedom of expression is not absolute and may be limited in the best interests of the child. In this case, freedom of expression would not be infringed since "[t]he disputed order [did] not prohibit any communication by the appellant with [his daughter]; it only prohibit[ed] him from indoctrinating" her, "both by his words and by his activities." *Id.* at 182. Justice L'Heureux-Dubé dismissed the father's religious equality and freedom of association claims even more peremptorily, simply finding that the father had made no showing that his association or equality rights had been infringed. *Id.* at 182-83.

Young.[299] In the end, five of the seven justices who were present clearly agreed that the challenged legislative provisions, which "affirm[ed] the 'best interests of the child' standard,"[300] did not violate the Charter.[301] Justices Cory and Iacobucci did not address the constitutional questions but apparently agreed that the constitutional challenges failed.[302] As in *Young*, therefore, the constitutionality of the child's interests test was upheld. In contrast, however, Justices Cory and Iocobucci, who had voted to affirm removal of access restrictions in *Young*,[303] concluded that the restrictions in *D.P. v. C.S.* were "not so unreasonable as to require amendment" and joined with the *Young* minority to uphold the trial court's restrictive access order.[304]

VI. DOCTRINES OF RELUCTANCE IN POST-CHARTER JURISPRUDENCE

In the post-Charter religious freedom opinions outlined above, the Canadian Supreme Court has shown itself willing to alter its fundamental freedom analysis, including its doctrines of reluctance. This section will assess the degree to which the court has discarded the doctrines of reluctance in post-Charter cases.

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299. *Id.* at 190 (Sopinka, J., dissenting); *id.* at 195 (McLachlin, J., dissenting).

300. *Id.* at 195.

301. *Id.* at 197 (McLachlin, J., dissenting); *see id.* at 190 (La Forest, J.); *id.* (Sopinka, J.).

302. *See id.* at 191 (Justices Cory and Iacobucci applied the child's best interest test without question.); *id.* at 192 (Justices Cory and Iacobucci agreed with Justice L'Heureux-Dubé's dismissal of the appeal.).

303. *See supra* note 286 and accompanying text.

304. *D.P.*, [1993] 4 S.C.R. at 192 (Cory, J.); *see id.* at 190 (La Forest, J.). Two justices dissented from this holding. *See id.* at 198; *id.* at 197 (McLachlin, J., dissenting) ("In the absence of evidence capable of outweighing the benefit of full and free access, the court should not have interfered with the access parent's activities . . . ."); *id.* at 190 (Sopinka, J.).

A freedom of religion and conscience claim was also raised in the abortion case of Morgentaler v. The Queen, [1988] 1 S.C.R. 30 (Can.), but the claim was given almost no attention. *See id.* at 156 (McIntyre, J., dissenting) (finding no "abridgement of freedom of conscience and religion" and adopting the appeals court's reasoning on this point). Instead, the court focused on the § 7 liberty, life, and security issue. *See id.* at 45 (Dickson, C.J.); *id.* at 80 (Beetz, J.); *id.* at 132 (McIntyre, J., dissenting); *id.* at 162 (Wilson, J.).

A. Parliamentary Supremacy

The court's analytical approach to post-Charter religious freedom claims indicates that the court has interpreted the Charter as a mandate to discontinue its historically wide deference to Canadian legislatures.[305] "[B]efore the passage of the *Canadian Bill of Rights* and the entrenchment of the *Charter*, human rights and freedoms, no matter how fundamental, were constitutionally vulnerable to government encroachment."[306] "With the entrenchment of the *Charter*[, however,] the definition of freedom of conscience and religion is no longer vulnerable to legislative incursion."[307] Instead, the legislature must generally respect the guarantees of freedom enshrined in the Charter.[308] And the court must ensure this respect; the court is not simply to "defer to legislative judgments when those judgments trench upon rights considered fundamental in a free and democratic society."[309]

To ensure that a legislative enactment conforms to the Charter guarantees, the post-Charter court scrutinizes the enactment's purpose and effect.[310] In addition, if either the purpose or

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305. *See* Gordon Fairweather, *The Rights of Religious Minorities*, 27 LES CAHIERS DE DROIT UNIVERSITE LAVAL 89, 93 (1986) ("The 'double override' of parliamentary supremacy and legal federalism has been relegated to a secondary role in constitutional interpretation."); Tremblay, *supra* note 37, at 187 (predicting that the supreme court would have to "challenge the traditional supremacy of legislative authorities in order to give effect to the constitutionalization of fundamental rights").

306. The Queen v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, 348 (Can.).

307. *Id.* at 349.

308. A legislature may, of course, make a § 33 declaration that an act is exempt from the Charter's fundamental freedom guarantees. *See* CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 33(1).

309. Edwards Books & Art Ltd. v. The Queen, [1986] 2 S.C.R. 713, 795 (Can.) (La Forest, J.).

310. *See* Richard B. v. Children's Aid Soc'y, [1995] 1 S.C.R. 315, 381 (Can.) (La Forest, J.) (majority opinion) (finding that the effects, though not the purpose, of the Children's Protection Act infringe religious freedom); Jones v. The Queen, [1986] 2 S.C.R. 284, 294 (Can.) (Dickson, C.J.) (Although an act has a secular purpose, "if its effect is to interfere with . . . religious activities or convictions, it raises an issue under s. 2(a) of the *Charter*."); *id.* at 313 (Wilson, J., dissenting) (assessing attacks on both the purpose and the effect of the School Act); *Edwards*, [1986] 2 S.C.R. at 725 (Dickson, C.J.) ("The present cases require a consideration of the effects of the *Retail Business Holidays Act* as well as its purpose or purposes."); *Big M*, [1985] 1 S.C.R. at 331 ("[B]oth purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation."); *see also* Hayward, *supra* note 42, at 171 ("Post-Charter decisions have shown a willingness on the part of judges to consider both the purpose and the effect of challenged

the effect of an act infringes on a Charter-guaranteed freedom and the court proceeds to determine whether that infringement is justified under section 1, the court may assess the weight of the legislature's objective and the proportionality of the objective and means.[311] The objective "must be of sufficient importance to warrant overriding a constitutional right."[312] And "the means chosen to attain th[e] objective[] must be proportional or appropriate to the ends."[313] In sum, in post-Charter Canada, legislatures' purposes and legislation's means and effects must conform to Charter standards.

Certain justices have recognized that legislatures must be given some flexibility in framing statutes[314] and that the court is

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legislation."); *id.* at 172 ("Indeed it can be seen as absolutely necessary in order to comply with the spirit of the constitution that judges be willing to look beyond the stated purposes of legislation.").

On the importance of scrutinizing legislative purpose, the *Big M* court stated:

> [C]onsideration of the object of legislation is vital if rights are to be fully protected. The assessment by the courts of legislative purpose focuses scrutiny upon the aims and objectives of the legislature and ensures they are consonant with the guarantees enshrined in the *Charter*. The declaration that certain objects lie outside the legislature's power checks governmental action at the first stage of unconstitutional conduct.

Big M, [1985] 1 S.C.R. at 331-32.

311. *See Edwards*, [1986] 2 S.C.R. at 768 (Dickson, C.J.). Justice La Forest may agree with this reasoning as well. *See id.* at 792 (La Forest, J.).

312. *Id.* at 768 (Dickson, C.J.). The objective must be directed at a substantial and pressing concern. *Id.*

313. *Id.*

> The proportionality requirement, in turn, normally has three aspects: the limiting measures must be carefully designed, or rationally connected, to the objective; they must impair the right as little as possible; 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.

Id.

314. *Jones*, [1986] 2 S.C.R. at 314 (Wilson, J., dissenting) ("To state that any legislation which has an effect on religion, no matter how minimal, violates the religious guarantee 'would radically restrict the operating latitude of the legislature.'" (quoting Braunfeld v. Brown, 366 U.S. 599, 606 (1961))); *Edwards*, [1986] 2 S.C.R. at 794-95 (La Forest, J.) (Under the proportionality requirement, if the legislative "objective is of pressing and substantial concern, the Legislature must be allowed adequate scope to achieve that objective."); *see id.* at 795-96 (Due to the conflicting interests involved in fashioning an exemption to a Sunday closing law and because the Sunday closing law in question sought "to achieve a goal that is demonstrably justified in a free and democratic society . . . the choice of having or not having an exemption for those who observe a day other than Sunday must remain, in essence, a legislative choice. That, barring equality considerations, is true as well of the compromises that

not to simply substitute its judgment for that of the legislature.[315] Indeed, the court has voided only one law—the Lord's Day Act—as an unjustified infringement on Charter-guaranteed religious freedom.[316] Nonetheless, the court's post-Charter analysis recognizes that Canadian legislatures are subject to an external standard to be enforced by the courts. The court has thus discarded, at least analytically, its doctrine of parliamentary supremacy and assumed a more scrutinizing role in the fundamental freedoms arena.

B. Legal Federalism

Similarly, the court has taken advantage of the Charter's guarantees to escape the constraints of legal federalism. Because the parties in *Big M* and *Edwards* lodged both federalism and Charter challenges to legislation,[317] *Big M* and *Edwards* afforded the supreme court the opportunity to comment on the role of legal federalism in post-Charter jurisprudence. The court seized the opportunity. In *Big M*, the court noted that "[t]he constitutional validity of Sunday observance legislation [had] in the past been tested largely through the division of powers provided in . . . the *Constitution Act, 1867*."[318] The court recognized, however, that "following the advent of the *Constitution Act, 1982*," the court would not only have to resolve federalism questions, but would also have to "address squarely the fundamental issues raised by individual rights and freedoms enshrined in the *Charter*."[319] The court thus has not abandoned legal federalism, for

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must be made in creating religious exemptions.").

315. *Edwards*, [1986] 2 S.C.R. at 781-82 (Dickson, C.J.) (In deciding whether a legislative limit on freedom is reasonable, "[t]he courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line."); *id.* at 812 (Wilson, J., dissenting) (It "is not the Court's business" to comment on whether the legislature's provision of a uniform pause day only for certain retail workers "is a good thing or a bad thing."); *cf.* Morgentaler v. The Queen, [1988] 1 S.C.R. 30, 136 (Can.) (McIntyre, J., dissenting) (With the advent of the Charter, "[t]he power of judicial review of legislation acquired greater scope but, in my view, that scope is not unlimited and should be carefully confined to that which is ordained by the *Charter*. . . . [T]he courts must not, in the guise of interpretation, postulate rights and freedoms which do not have a firm and a reasonably identifiable base in the *Charter*.").

316. *See supra* note 145 and accompanying text.

317. *See supra* notes 124, 160 and accompanying text.

318. *Big M*, [1985] 1 S.C.R. at 301.

319. *Id.* The court accepted this new dual duty in deciding both the federalism and

the court continues to police the division of powers between the national and provincial parliaments.[320]

Yet the court has not analyzed religious freedom issues solely under legal federalism. Instead, the court has recognized that the Charter provides independent protection for religious freedom.[321] Indeed, the court indicated in *Big M* that the Lord's Day Act could be struck under the Charter without ever addressing federalism concerns.[322] The court has thus retained legal federalism analysis as legitimate and necessary, but as an independent inquiry in fundamental freedom cases,[323] an inquiry which might serve to invalidate offensive legislation on division of powers grounds, but which cannot exempt legislation that survives legal federalism analysis from Charter scrutiny. The court may have thereby transformed legal federalism from a doctrine of reluctance into an alternate doctrine of protection.

C. Essential Purpose

The essential purpose doctrine, though potentially still viable in legal federalism analysis,[324] has been largely abandoned in the

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Charter claims presented in *Big M* and *Edwards*. *See id.* at 356; *supra* notes 161-171 and accompanying text.

320. *See* The Queen v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401, 407 (Can.) (considering "whether federal legislative jurisdiction to regulate the dumping of substances at sea, as a measure for the prevention of marine pollution, extends to the regulation of dumping in provincial marine waters").

321. Thus, the *Big M* court found that the Lord's Day Act unjustifiably violated the Charter even though the Act lay within Parliament's power to enact. *See supra* notes 127, 145 and accompanying text. And the majority in *Edwards* found that Ontario's Sunday closing law violated, albeit justifiably, the freedom of religion guaranteed by the Charter although enactment of the law was properly within the province's competence. *See supra* notes 161, 167, 168 and accompanying text.

322. *See Big M*, [1985] 1 S.C.R. at 322 ("It is perhaps needless . . . to say that if the *Lord's Day Act*, as presently drafted, falls because it is in conflict with the freedom of religion guaranteed by the *Charter* it does not ineluctably follow that the whole subject of a day of rest and recreation for Canadians is exclusively committed to the provincial legislatures.").

323. The legal federalism and Charter analyses are not entirely unrelated, however. Characterization of an act's purpose under legal federalism is relevant to characterization of the act's purpose under the Charter. *See Edwards*, [1986] 2 S.C.R. at 752 (Dickson, C.J.).

324. *See id.* at 359-60 (Wilson, J., dissenting) ("[I]t remains perfectly valid to evaluate the purpose underlying a particular enactment in order to determine whether the legislature has acted within its constitutional authority in division of powers terms . . . ."); Macklem, *supra* note 37, at 56-57 (The essential purpose doctrine "may be of relevance where the competing interests at stake entail a determination of the proper balance of state power between the federal and provincial governments, but

application of the Charter. The evaluation of an act's purpose, even if performed under legal federalism analysis, will be relevant in assessing the act's conformity with the Charter,[325] but the Charter demands more than a valid purpose; it requires constitutional effects.[326] Not all effects may be held to violate the Charter,[327] but the court has made it clear that effects, like purposes, must conform to Charter standards.[328]

In ensuring the conformity of purposes and effects, purpose should be scrutinized first, according to the court in *Big M*:

> [T]he legislation's purpose is the *initial* test of constitutional validity and its effects are to be considered when the law under review has passed or, at least, has purportedly passed the purpose test. If the legislation fails the purpose test, there is no need to consider further its effects, since it has already been demonstrated to be invalid. . . . [E]ffects can never be relied upon to save legislation with an invalid purpose.[329]

By employing a purpose-first analysis, the court, in Justice Wilson's view, has adopted a type of essential purpose doctrine.[330]

[it] . . . loses legitimacy when applied to the tension between religious freedom and the exercise of state power.").

325. *See Edwards*, [1986] 2 S.C.R. at 752 (Dickson, C.J.).

326. *See supra* note 310 and accompanying text.

327. Jones v. The Queen, [1986] 2 S.C.R. 284, 313-14 (Can.) (Wilson, J., dissenting) ("[N]ot every effect of legislation on religious beliefs or practices is offensive to the constitutional guarantee of freedom of religion. . . . Legislative or administrative action whose effect on religion is trivial or insubstantial is not . . . a breach of freedom of religion."); *Edwards*, [1986] 2 S.C.R. at 759 (Dickson, C.J.) ("[L]egislative or administrative action which increases the cost of practising or otherwise manifesting religious beliefs is not prohibited if the burden is trivial or insubstantial."). *But cf. id.* at 759 ("[W]hether a coercive burden is direct or indirect, intentional or unintentional, foreseeable or unforeseeable[, a]ll coercive burdens on the exercise of religious beliefs are potentially within the ambit of s. 2(a)."); *id.* at 792 (La Forest, J.) ("I fully agree with the Chief Justice that the freedom of religion guaranteed by s. 2(a) not only serves to protect the individual against direct legislative coercion but against indirect legislative coercion as well.").

328. *See supra* note 310 and accompanying text.

329. The Queen v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, 334 (Can.) (emphasis added).

330. *See id.* at 356-62 (Wilson, J.). Justice Wilson argued that the approach taken by the majority in *Big M* improperly incorporated division of powers analysis, with its purpose-focused essential purpose inquiry, into post-Charter fundamental freedom jurisprudence. *But see supra* note 148.

Justice Wilson explained that "[f]or the sake both of consistency and analytical clarity it would seem preferable to avoid confusing the traditional approach to division of powers cases with the approach demanded by the *Charter*." *Id.* at 360. In her view, "[the Charter] asks not whether the legislature has acted for a purpose that is within

Yet the court's analysis differs sharply from the essential purpose test because of its consideration of legislative effects. As explained above, under the essential purpose doctrine "[o]nly when the effects of the legislation so directly impinge on some other subject matter as to reflect some alternative or ulterior purpose do the effects themselves take on analytic significance," and then only to indicate intent.[331] By contrast, under the court's Charter approach the effects of the legislation may be considered even if the purpose of the legislation is consistent with the Charter, for effects under that approach must independently conform to the Charter.[332]

In spite of this difference, the outcomes under both the essential purpose and purpose-first Charter analyses may be similar. Under the Charter test, if the legislation's purpose is consistent with the Charter, the act may be upheld as a "reasonable limit[] . . . demonstrably justified in a free and democratic society," even if the legislation's effect is inconsistent with the Charter.[333] The governmental purpose behind the act must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom" and the means employed to accomplish that purpose must be reasonable.[334] But if these two conditions are met, the act may be upheld, in spite of its effects—just as legislation may be sustained under the essential purpose test if its purpose is within the enacting legislature's authority, even if the legislation incidentally produces effects that are *ultra vires* the legislature.

Although the court's Charter and essential purpose analyses may thus produce similar outcomes, the two analyses remain

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the scope of authority of that tier of government, but rather whether in so acting it has had the effect of violating an entrenched individual right. It is, in other words, first and foremost an effects-oriented document." *Id.* Consequently, Justice Wilson asserted that "[t]he first stage of any *Charter* analysis . . . is to inquire whether legislation in pursuit of what may well be an *intra vires* purpose has the effect of violating an entrenched right or freedom." *Id.* at 360-61.

331. *Big M*, [1985] 1 S.C.R. at 358 (Wilson, J.); *see supra* notes 59-60 and accompanying text.

332. *See Big M*, [1985] 1 S.C.R. at 331 (majority opinion) ("[I]f a law with a valid purpose interferes by its impact, with rights or freedoms, a litigant could still argue the effects of the legislation as a means to defeat its applicability and possibly its validity.").

333. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1.

334. *Big M*, [1985] 1 S.C.R. at 352.

distinguishable due to the difference discussed above: the essential purpose test focuses on purpose to the neglect of effect, while the Charter analysis assesses the constitutionality of both purpose and effect. At least analytically, then, the essential purpose doctrine has not been imported into application of the Charter.

D. Status Quo

Of the four doctrines of reluctance, the status quo doctrine has suffered the most definitive blow in post-Charter jurisprudence. In *Big M*, the appellant argued that the religious freedom guaranteed by the Charter was equivalent to that protected by the Bill of Rights, which had merely enshrined the protection afforded at the Bill's enactment.[335] The court responded:

> It is not necessary to reopen the issue of the meaning of freedom of religion under the *Canadian Bill of Rights*, because whatever the situation under that document, it is certain that the *Canadian Charter of Rights and Freedoms* does not simply "recognize and declare" existing rights as they were circumscribed by legislation current at the time of the Charter's entrenchment.[336]

Instead:

> [T]he Charter is intended to set a standard upon which *present as well as future* legislation is to be tested. Therefore the meaning of the concept of freedom of conscience and religion is not to be determined solely by the degree to which that right was enjoyed by Canadians prior to the proclamation of the *Charter*.[337]

With these words, the court made clear that the doctrine of the status quo lacked relevance under the Charter. Chief Justice Dickson explicitly relied on this holding in *Edwards* when he "declin[ed] to be bound by jurisprudence interpreting an instrument which purported only to reaffirm pre-existing rights and freedoms."[338] In thus rejecting the status quo doctrine, the court accepted the Charter as a directive to provide increased protection for religious freedom.

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335. *Id.* at 342; *see supra* note 87 and accompanying text.

336. *Big M*, [1985] 1 S.C.R. at 343.

337. *Id.* at 343-44.

338. Edwards Books & Art Ltd. v. The Queen, [1986] 2 S.C.R. 713, 759 (Can.) (Dickson, C.J.).

VII. CONCLUSION

Prior to the adoption of the Canadian Charter of Rights and Freedoms, the Canadian Supreme Court was reluctant to protect or even address fundamental freedoms threatened by legislative encroachment. Using the doctrines of legal federalism, parliamentary supremacy, essential purpose, and status quo, the court deferred to legislation that essentially fell within the scope of legislative authority and, subsequent to the passage of the Bill of Rights, that did not violate rights recognized in Canada at the time of the Bill's passage. With the entrenchment of fundamental rights in the Canadian Charter of Rights and Freedoms, the court has proven itself willing and able to shed these doctrines of reluctance.[339] While the court has voided only one law as an unjustifiable infringement on Charter-guaranteed religious freedom,[340] the court has, at least analytically, assumed a more prominent role as a legislative overseer and as an adjudicator of individual rights, subjecting legislation's objectives, means, and effects to Charter scrutiny. The Charter thus appears to have worked a significant change in the direction of Canada's religious freedom jurisprudence.

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339. The court may, however, be developing new doctrines of reluctance. One such doctrine might be the doctrine of the rights of others, which excludes from the scope of religious freedom practices that interfere with others' rights. *See, e.g.*, Young v. Young, [1993] 4 S.C.R. 3, 94 (Can.) (L'Heureux-Dubé, J., dissenting in the result) ("[F]reedom of religion is inherently limited by a number of considerations, including the rights and freedoms of others."). While this doctrine appears to provide a reasonable delineation of the boundary of religious freedom, the doctrine provides the court with opportunities to circumscribe that freedom. For example, under this doctrine the court might decide that interference with another's interests, rather than another's rights, is sufficient to justify limitations on an individual's freedoms. *Compare id.* (In fashioning limits on noncustodial parents' rights, the "standard is not one of harm but must at all times be the best interests of the child.") *with id.* at 119, 126 (McLachlin, J.) ("Risk of harm to the child is not a condition precedent for limitations on access. The ultimate determinant in every case must be the best interests of the child." Yet, "where the issue is whether entirely lawful discussions and activities between the access parent and the child should be curtailed, it behooves the judge to enquire whether the conduct poses a risk of harming the child.") *and with id.* at 108 (Sopinka, J.) ("[W]hat is in the best interests of the child is the generally applicable test, but in its application to restrict religious expression, risk of substantial harm is not only an important factor but also must be shown.").

340. *See supra* note 145 and accompanying text.