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THEY'RE ALL INTERPRETATIVE: TOWARDS A CONSISTENT APPROACH TO SS 25–31 OF THE *CHARTER*

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INTRODUCTION

As the *Canadian Charter of Rights and Freedoms*[1] passes its 40th anniversary, it is difficult to overstate its influence not only on Canadian law, but also on Canadian identity more generally: largely as a source of pride,[2] though frequently as a source of controversy.[3] Most analysis of the *Charter* has concentrated on the meaning of the substantive rights guaranteed therein, or how it has affected the relationship between courts and the democratic branches of government in Canada's constitutional order.[4] Recent years, however, have seen increased interest in the

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1 Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

2 See e.g. Sean Fine, "Canada's Charter Turned 40 on Sunday – and It's Still as Radical and Enigmatic as it was in 1982", *The Globe and Mail* (17 April 2022), online: <theglobeandmail.com/canada/article-canada-charter-turns-40-supreme-court/>.

3 Discussed in e.g. Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001).

4 See e.g. Emmett Macfarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role* (Vancouver: UBC Press, 2012); Mark S

provisions of the *Charter* appearing under the title "General" in sections 25 through 31. Scholars and commentators[5] who have very different views on how the *Charter* should be interpreted have sought to breathe life into these provisions, suggesting that they can be the basis for substantive *Charter* claims. But what have the courts in general, and the Supreme Court in particular, said about their meaning to date? And is it relevant that they all reside together in the *Charter* under the same heading? This article seeks to answer these questions at a time when the provisions are increasingly the subject of litigation, and when other sections appearing under the same heading in the *Charter*—whether it be fundamental freedoms[6] or democratic rights—[7]have been subject to comprehensive analysis seeking reconciliation of their meanings.

This analysis accordingly has two overarching goals: the first, descriptive and doctrinal; the second, normative. The descriptive and doctrinal goals are pursued in Part I, which looks at the text of sections 25–31 and how courts, and particularly the Supreme Court, have interpreted these provisions to date. Part I concludes by doctrinally analyzing how the provisions come together to form a coherent whole of interpretative provisions that do not grant rights in themselves, but can affect, usually by restricting, the scope of *Charter* review in certain circumstances. In this sense, all provisions are interpretative, and none are capable of being "violated" in and of themselves. Rather, they guide the

Harding, *Judicializing Everything: The Clash of Constitutionalisms in Canada, New Zealand, and the United Kingdom* (Toronto: University of Toronto Press, 2022).

5 See e.g. André Schutten & Tabitha Ewert, "Section 31 and the Charter's Unexplored Constraints on State Power" 105 SCLR (2d) 323; Kerri Anne Froc, *The Untapped Power of Section 28 of the Canadian Charter of Rights and Freedoms* (PhD Dissertation, Queen's University, 2016) [unpublished] [Froc, "Dissertation"].

6 See e.g. Dwight Newman, Derek Ross, Brian Bird, eds, *The Forgotten Fundamental Freedoms of the Charter* (Toronto: LexisNexis, 2020).

7 See e.g. Ian A McIsaac, *Democratic Legitimacy of Executive Government under the Charter of Rights and Freedoms: Reassessing Crown Prerogatives and Political Constitutionalism under Sections 3 to 5 of the Charter* (LLM Thesis, University of Manitoba, 2022) [unpublished].

interpretation of other provisions in the *Charter*; however, some may fairly be called purely "interpretative guides" while others—section 29 and, less certainly, sections 25, 28, and 31—could be described as "interpretative trumps"[8] that dictate how potential conflicts among constitutional provisions are to be resolved. Moreover, none of these provisions can conflict with clear language found elsewhere in the *Charter*. Part I is meant to be purely doctrinal so that lawyers, judges, students, and scholars seeking to determine what the courts, particularly the Supreme Court, have held regarding the meaning of the individual sections, and the "General" provisions as a whole, can easily find this in this article.

Parts II and III are more normative. Part II posits that the status quo is satisfying and should be disturbed only with the most extreme caution. The doctrinal implications from Part I accord with several canons of constitutional interpretation, specifically regarding the constitution's text, structure, purpose, and original meaning. Moreover, such interpretations are predictable, in accordance with *stare decisis* and judicial minimalism. Part III engages with commentators who have argued for different interpretations of the provisions and responds to concerns that these interpretations render the provisions meaningless. A way forward for each provision is suggested consistent with Canada's constitutional past and principles. After the Conclusion, a short Addendum acknowledges very recent and consequential case law that supports this article's thesis.

I. JUDICIAL INTERPRETATIONS TO DATE

In the summer of 2021, extensive CanLII, QuickLaw, and Westlaw searches were conducted to read all Supreme Court of Canada

[8] I am using this as a metaphor to euchre, where the playing of certain "trump" cards resolves who wins a trick, regardless of what is "led". This does not necessarily align with Ronald Dworkin, *Taking Rights Seriously*, 2nd ed (London: Duckworth, 1977), though it probably has some overlap, with this terminology being adopted even by those who disagree with Dworkin.

decisions that had considered sections 25–31 of the *Charter*.[9] The Court's decisions in this regard were subsequently monitored through May of 2023.[10] In January through June of 2022, these databases were searched for significant lower court decisions considering these provisions. Though there are limitations to such methodology for finding cases, quantitative analysis of case law still proceeds on their use given that they are preferable to alternative possible ways of gleaning this data.[11] This section explains, from a doctrinal perspective, what these searches illustrated. For each of these provisions, all Supreme Court holdings are explained, as are significant lower court holdings. A synthesis of the judicial interpretation for each provision concludes each subsection. Those doctrinal details should prove valuable for judges and lawyers considering the provisions. Those who are less interested in the doctrinal details of the particular sections may wish to "read ahead" to subsection I.H, wherein three conclusions are drawn about the jurisprudential interpretation of the provisions as a whole, namely that they: a) are not rights-granting in themselves and are incapable of being "violated"; b) are all interpretative provisions that aid in the interpretation of other *Charter* provisions, although some purely as "guides", while others could be "trumps" that direct how to resolve potential constitutional conflicts; and c) cannot be interpreted in such a way so as to conflict with other specific provisions in the *Charter*.

A. SECTION 25: ABORIGINAL RIGHTS UNAFFECTED

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9 In part for new chapters I wrote for Gerard J Kennedy, *The Charter of Rights in Litigation: Direction from the Supreme Court of Canada* (Toronto: Thomson Reuters, 2022) (loose-leaf updated 2023, release 5) [Kennedy, *Charter*]. Part I of this article is significantly based on those chapters.

10 As a result of which, *R v Sullivan*, 2022 SCC 19 [*Sullivan*] and *R v Brown*, 2022 SCC 18 [*Brown*] were added to the analysis.

11 See e.g. Craig E Jones & Micah B Rankin, "Justice as a Rounding Error? Evidence of Subconscious Bias in Second-Degree Murder Sentences in Canada" (2014) 52:1 Osgoode Hall LJ 109 at 121, n 58; Gerard J Kennedy, "Jurisdiction Motions and Access to Justice: An Ontario Tale" (2018) 55:1 Osgoode Hall LJ 79 [Kennedy, "Jurisdiction"].

1. LANGUAGE

Section 25 reads:

> The guarantee in this Charter of certain rights and freedoms shall not be construed as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
>
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
>
> (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.[12]

2. SUPREME COURT CASE LAW

As of September 2021, only nine Supreme Court of Canada decisions have considered section 25 of the *Charter*. Seven of these have done so in passing. Four of these did so in recognizing the principle that an element of differential treatment between groups is constitutionally permissible, usually to protect minorities.[13] A fifth decision held that one's membership in a group can affect how one is treated as an individual, demonstrating a pressing and substantial governmental objective for section 1 analysis.[14] A sixth decision[15] cited section 25 to determine the meaning of "aboriginal persons" in the context of the *Criminal Code* while a seventh[16] did the same to determine who are rights-holders under section 35(1) of the *Constitution Act, 1982*.[17]

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12 *Charter*, *supra* note 1, s 25.

13 *Reference Re Public Service Employee Relations Act (Alta)*, 1987 CanLII 88 (SCC) [*Alberta Labour Reference*]; *Andrews v Law Society of British Columbia*, 1989 CanLII 2 (SCC) [Andrews]; *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC) [*Quebec Secession Reference*]; *Gosselin (Tutor of) v Quebec (Attorney General)*, 2005 SCC 15 [*Gosselin Tutor*].

14 *R v Keegstra*, 1990 CanLII 24 (SCC) [*Keegstra*].

15 *R v Gladue*, 1999 CanLII 679 (SCC).

16 *R v Desautel*, 2021 SCC 17.

17 being Schedule B of *Canada Act 1982* (UK), 1982, c 11.

Only two judgments addressed section 25 in any detail, and neither judgment attracted a majority of judges. First, in *Corbiere v Canada* (*Minister of Indian and Northern Affairs*),[18] the Court unanimously held that section 15 of the *Charter* was unjustifiably limited by prohibiting Aboriginal persons who do not live on reserves from voting in band elections. The majority declined to decide how section 25 could affect a section 15 claim. Even though some parties and intervenors suggested that Aboriginal rights could be at play by permitting non-resident band members to vote, the majority held that this could not affect the outcome of this case.[19] In concurring reasons, L'Heureux-Dubé J (with whom Gonthier, Iacobucci, and Binnie JJ agreed) did hold that "other rights or freedoms" protected by section 25 are broader than those guaranteed by section 35(1) of the *Constitution Act, 1982*. In her view, section 25 protects rights and freedoms guaranteed by section 35(1), as well as "other rights or freedoms that pertain to the aboriginal peoples of Canada" and this could include statutory voting rights. However, in this case, she held there was no evidence that any relevant right or freedom protected by section 25 was at issue. She accordingly declined to articulate a general approach to section 25.[20] She did add, however, that if a litigant could make out an Aboriginal or treaty right to restrict non-residents from voting, section 25 would need to be analyzed.[21]

Second, in *R v Kapp*,[22] a unanimous Supreme Court dismissed a claim brought by a group of mostly non-Aboriginal fishers who asserted that section 15 rights had been limited by the granting of a licence to members of three Aboriginal bands to exclusively fish for salmon for a 24-hour period. For the majority of eight judges, McLachlin CJ and Abella J held that section 15(2) protected the granting of the licence from section 15(1) scrutiny.

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18 1999 CanLII 687 (SCC).

19 *Ibid* at para 20.

20 *Ibid* at paras 51–53.

21 *Ibid* at para 112.

22 2008 SCC 41 [*Kapp*].

In concurring reasons, Bastarache J gave the most substantive Supreme Court interpretation of section 25 to date. Specifically, he held that section 25 is a "shield" (in the language of this article, a "trump") that protects differential treatment between Aboriginal and non-Aboriginal Canadians from being attacked as inconsistent with the *Charter* in certain circumstances.[23] He further proposed a detailed framework for determining how to analyze section 25 in the future. Responding to Bastarache J, McLachlin CJ and Abella J declined to definitively pronounce upon section 25's meaning. However, they expressed doubt that a fishing licence constituted a right or freedom within the meaning of section 25, rather suggesting that only rights of a constitutional character fall within section 25's ambit.[24] They also did not view it is as clear that section 25 could bar a section 15 claim, rather than being viewed as an interpretive guide.[25]

3. Lower Courts

Lower court treatment of section 25 has been more significant than for some of the other "General" provisions. Mostly, however, this has been in the context of recognizing that Aboriginal rights exist alongside *Charter* rights without specifying precisely how. Kirkpatrick JA, writing only for herself in the highly divided British Columbia Court of Appeal in *Kapp*, agreed that section 25 "shielded" the policy at issue from section 15 scrutiny.[26] The Yukon Court of Appeal, in *Dickson v Vuntut Gwitchin First Nation*, did consider the effects of section 25 on a residency requirement to stand for election to a First Nations self-governmental body.[27] Newbury JA, for a majority of the Court, held that section 25 indeed "shielded" the residency requirement from being found to be inconsistent with the *Charter*. In her view, section 25 is meant to "obviate" the need to balance Aboriginal rights against *Charter*

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23 *Ibid* at para 96.

24 *Ibid* at para 63.

25 *Ibid* at para 64.

26 2006 BCCA 277, aff'd for other reasons, *Kapp*, *supra* note 22.

27 2021 YKCA 5 [*Dickson* CA], aff'g, 2020 YKSC 22 [*Dickson* YKSC]; leave to appeal granted, 2022 CanLII 32895 (SCC).

rights.[28] She shared Veale CJ's view that interpreting section 25 merely as an interpretative "lens" (or "guide" to use this article's terminology) would result in Indigenous self-government and the concomitant goal of reconciliation ringing "hollow".[29] Moreover, even if one accepted the majority *obiter* from *Kapp* that rights protected by section 25 needed to be of a "constitutional" character, she held that the residency requirement at issue could be construed as "constitutional".[30] She declined to decide whether section 25 should always be considered before or after a prima facie limit of a *Charter* right or section 1 justification; she implied, however, that section 25 is probably best addressed prior to section 1 given that section 25 is meant to avoid section 1 analysis.[31]

On the other hand, in the additional post-*Kapp* case of *Cunningham v Alberta (Minister of Aboriginal Affairs and Northern Development)*,[32] Ritter JA held that section 25 did not protect a policy that mandated individuals who register as Indians under the *Indian Act*[33] have their membership in a Métis settlement terminated. He "very much doubt[ed] that protection applies to any enactment which purports to set out or enhance existing constitutional practices and rights" and agreed with Bastarache J that "s 25 was not intended to be used as between aboriginal groups."[34]

A somewhat narrower interpretation of section 25 did receive notable appellate approval prior to *Kapp*. Though the Supreme Court ended up not addressing the issue, the Federal Court of Appeal in *Corbiere* held that section 25 indeed acts a "shield" that prevents Aboriginal rights protected by section 35(1) of the *Constitution Act, 1982* from being found to be inconsistent with the *Charter*. However, it found that the voting rights at issue in

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28 *Ibid* at para 146.

29 *Ibid* at para 148; the reasons in *Dickson* YKSC, *supra* note 27 at para 195.

30 *Dickson* CA, *supra* note 27 at para 147.

31 *Ibid* at paras 151–53.

32 2009 ABCA 239 [*Cunningham*], rev'd on other grounds, 2011 SCC 37.

33 RSC 1985, c I-5.

34 *Cunningham*, *supra* note 32 at para 73.

Corbiere were not protected by section 35(1). And insofar as other rights and freedoms may be protected by section 25 despite not being protected by section 35(1) (a matter the Court did not decide), it held that the voting rights at issue in *Corbiere* were not such rights. Rather, the *per curiam* Court held that "[t]he purpose of section 25 is to protect those rights which belong to Aboriginal peoples *as Aboriginal peoples*." Restricting voting rights to those living on the reserve were not such rights.[35]

4. Synthesis of Judicial Interpretation

The jurisprudential meaning of section 25 will likely come to a head in *Dickson*, as the Supreme Court has reserved judgment after oral argument, having granted leave to appeal. To date, however, it is notable that it has been approached with caution. With the exception of Bastarache J's concurrence in *Kapp* and the British Columbia Court of Appeal in *Dickson*, almost every use of the provision has been to interpret other statutory or constitutional provisions, either to define who constitutes the "aboriginal peoples of Canada" or to recognize that the constitutional guarantee of equality does not mandate that every individual be treated the same irrespective of their characteristics. This accords with McLachlin CJ and Abella J's *obiter dicta* in *Kapp* that section 25 may be "interpretative."[36]

However, even if section 25 is ultimately interpreted in accordance with Bastarache J's views in *Kapp* (this appears to be the dominant academic view of how it should be interpreted[37]),

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[35] *Batchewana Indian Band (Non-resident members) v Batchewana Indian Band* (1996), 142 DLR (4th) 122 at 136, 1996 CanLII 3885 (FCA) [emphasis in original].

[36] *Kapp*, *supra* note 22 at para 64.

[37] See *ibid* at para 94 [citations edited to comply with *McGill Guide*]:

> Practically all authors agree with the fact that s 25 operates as a shield: see Bruce H Wildsmith, *Aboriginal Peoples & Section 25 of the Canadian Charter of Rights and Freedoms* (Saskatoon: University of Saskatchewan Native Law Centre, 1988) at 23; Brian Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1982-1983) 8 Queen's LJ 232 at 239; Norman K Zlotkin, *Unfinished Business: Aboriginal Peoples and the 1983 Constitutional Conference* (Kingston: Queen's University, Institute of Intergovernmental Relations, 1983) at 46; Kent McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982) 4 SCLR 255 at

section 25 would remain an interpretative provision: it merely ensures that the *Charter* cannot be interpreted to limit rights pertaining to Aboriginal peoples and/or Aboriginal persons, whether or not those rights are constitutionalized. In this sense, it is not merely a "guide" that recognizes that differential treatment between groups is occasionally constitutionally permissible but would also be a "trump." This would accord with the interpretation of section 29, as discussed below.

B. Section 26: Pre-Existing Rights Unaffected

1. Language

Section 26 reads:

> The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.[38]

2. Supreme Court

As of May 2023, only three Supreme Court of Canada decisions have provided any substantive analysis of section 26 of the *Charter*. These have done so in passing, and no judge has held that section 26 itself constitutionalizes rights. Rather, to date, these rights have been held to continue to exist in other forms, such as the right to a hearing guaranteed in the *Canadian Bill of*

262; Peter W Hogg, *Constitutional Law of Canada* (5th ed Supp 2007), vol 1 (Scarborough: Thomson Carswell, 2007) at 28-56 and 28-57; Douglas Sanders, "The Rights of the Aboriginal Peoples of Canada" (1983) 61 Can Bar Rev 314 at 321; Peter Cumming, "Canada's North and Native Rights", in Bradford W Morse, ed, *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada* (Ottawa: Carleton University Press, 1985) 695 at 732 ["Morse"]; Noel Lyon, "Constitutional Issues in Native Law" in Morse, 408 at 423; Kenneth M Lysyk, "The Rights and Freedoms of the Aboriginal Peoples of Canada", in Walter S Tarnopolsky and Gérald-A Beaudoin, eds, *The Canadian Charter of Rights and Freedoms: Commentary* (Toronto: Carswell, 1982) 467 at 471–72; *contra*: Richard H Bartlett, "Survey of Canadian Law: Indian and Native Law" (1983) 15 Ottawa L Rev 431; Bryan Schwartz, *First Principles: Constitutional Reform with Respect to the Aboriginal Peoples of Canada, 1982–1984* (Kingston: Queen's University, Institute of Intergovernmental Relations, 1985).

38 *Charter*, *supra* note 1, s 26.

Rights,[39] at issue in *Singh v Minister of Employment and Immigration*,[40] or the common law rights to the prerogative writs, discussed in *Mills v The Queen*,[41] and compensation following a constructive taking, discussed in *Annapolis Group Inc v Halifax Regional Municipality*.[42]

3. Lower Courts

Section 26 has been considered by lower courts rarely, and usually for the same purposes as noted by the Supreme Court. These include the need to be cognizant that rights exist outside of the *Charter*. For instance, *R v Bissonnette*[43] and *Canadian Union of Public Employees (Airline Division) v Canadian Airlines International Ltd*[44] noted that, due to section 26, the *Canadian Bill of Rights* retains its full force and effect. In *Simpson v R*, Stober JSC also held that relief can be granted for rights violations pursuant to the Superior Court's inherent jurisdiction alongside the *Charter*.[45]

However, courts have also been clear that section 26 neither creates nor expands rights. For instance, in *Vanguard Coatings and Chemicals Ltd v Minister of National Revenue (MNR)*,[46] Muldoon J held that, though section 26 makes it clear that the *Charter* has no monopoly on rights in Canada, it cannot be a basis of substantive rights; there was accordingly no basis to grant the plaintiff a right of appeal (as opposed to judicial review) of

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39 RSC 1960, c 44 [*Bill of Rights* or *Canadian Bill of Rights*].

40 1985 CanLII 65 (SCC) [*Singh*].

41 1986 CanLII 17 (SCC) [*Mills* 1986].

42 2022 SCC 36.

43 2019 QCCS 354 at paras 776–77, Huot JSC, var'd on other grounds, 2020 QCCA 1585, with the Court of Appeal's decision being affirmed in 2022 SCC 23.

44 [1998] CHRD No 8, 1998 CarswellNat 3088, rev'd on other grounds, 2004 FCA 113, per Rothstein JA (as he then was), with the Federal Court of Appeal's decision being affirmed, 2006 SCC 1, per LeBel and Abella JJ.

45 2014 QCCS 6699.

46 1986 CanLII 6788 (FC).

certain ministerial actions taken under the *Excise Tax Act*[47] when it is up to Parliament to grant such a right of appeal. In *Waterloo (Regional Municipality) v Hampton*,[48] Justice of the Peace Rojek also noted that section 26 cannot make the *Canadian Bill of Rights* binding on provincial laws. The notion that the *Canadian Bill of Rights* remains in force, but is not expanded, was underscored in *R v Williams*. Morden ACJO, in his dissenting reasons, emphasized that the *Charter* has not "supplanted" the *Bill of Rights*. The majority did not address this issue.[49]

That section 26 does not constitutionalize non-*Charter* rights was underscored in *Hudson v Canada (Attorney General)*,[50] where Gabrielson J dismissed an application alleging that the applicant had a right to possess firearms. He held that the *Bill of Rights, 1689*, the alleged source of this right, is not part of the constitution of Canada and, in any event, did not become part of the *Charter* due to section 26. In *Mistusinne (Resort Village) v Board of Education of Outlook School Division No 32*, Gerein J similarly did not give effect to the submission that the principle "no taxation without representation" had been constitutionalized pursuant to section 26.[51] Moreover, anything that could colloquially be called a "right" may not be captured by section 26. For instance, in *Re Klein and Law Society of Upper Canada*, Henry J expressed doubt as to whether the powers of the Law Society of Upper Canada to regulate advertising by, and

47 RSC 1970, c E-13.

48 2012 ONCJ 838.

49 1992 CanLII 7657 (ONCA), Morden ACJO, dissenting, but Osborne JA (as he then was), writing for the majority, agreed on this point, going on to hold that *Charter* analysis should take precedence given broader remedial powers.

50 2007 SKQB 455 at paras 29–30, aff'd, 2009 SKCA 108, leave to appeal to SCC refused, 33406 (28 January 2010).

51 1989 CanLII 4672 (SKKB). Though it arguably has some constitutional status due to s 53 of the *Constitution Act, 1867*, which reads, "Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons." The membership in the House of Commons is, to a large extent, determined by representation-by-population: see e.g. *Reference re Prov Electoral Boundaries (Sask)*, 1991 CanLII 61 (SCC).

discipline actions of, its members, were rights within the meaning of section 26.[52] Muldoon J also suggested that section 26 is compatible with non-*Charter* rights being subject to "their natural or inherent limitation of scope" in *Canada (Human Rights Commission) v Canadian Liberty Net (TD)*.[53] Jones Prov Ct J, in an additional case, held that there would be occasional instances where *Charter* rights would need to be considered "in relation to and perhaps sometimes against, other rights and freedoms."[54] This saga eventually arrived in the Supreme Court as *Big M Drug Mart*, but section 26 was not considered.[55]

Ultimately, the notion that other rights continue to exist in Canada, but are not constitutionalized by section 26, was summarized succinctly in the *obiter dicta* of Mitchell J in *R v MacAusland*:

> That section of the *Charter* acknowledges that rights guaranteed in the *Charter* are not [in] lieu of any other rights that exist in Canada. Therefore, all Canadians continue to enjoy the protection provided for in the *Canadian Bill of Rights* which they had before the *Charter* as well as the rights and freedoms as guaranteed in the *Charter*. However, while the rights and freedoms as recognized and declared in the *Candian* [*sic*] *Bill of Rights* continue to exist, they are not guaranteed by the *Charter*. Section 26 would have been unnecessary and the words "as guaranteed by this Charter" would have been used in section 24(1) of the *Charter* if section 24 applied to all rights whatever their source. Section 26 only indicates that the *Charter* is not limiting or interfering with any additional rights which already existed, but that is quite a different matter from saying the *Charter* guarantees those rights.[56]

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[52] 1985 CanLII 3086 (ONSCDC), Henry J, dissenting.

[53] 1992 CanLII 14305 at 188 (FC) [*Canadian Liberty Net*].

[54] *R v WH Smith et al*, [1983] 5 WWR 235 at 258, 1983 CanLII 3652 (ABCJ) [*WH Smith*].

[55] *R v Big M Drug Mart Ltd*, 1985 CanLII 69 (SCC) [*Big M Drug Mart*].

[56] 1985 CanLII 5175 at para 26 (PESCTD).

4. Synthesis of Judicial Interpretation

Section 26's language is plain and has been reflected in its judicial interpretation: it does not affect the applicability of other rights, such as those guaranteed by other parts of the constitution, the *Bill of Rights*, legislation, and/or the common law. However, those other rights are not given constitutional status by the *Charter*. Rather, they continue to have the force that they had prior to the *Charter*'s enactment. This meaning has been questioned[57] and its critiques will be addressed later. But from a purely doctrinal perspective, there is no question that this "interpretative guide" approach—noting that, for instance, section 7 did not qualify section 1 of the *Bill of Rights*, which continues to operate in full force—is the approach that the courts have adopted to date.

C. Section 27: Multicultural Heritage

1. Language

Section 27 reads:

> This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.[58]

2. Supreme Court

Section 27 has been considered, albeit always in passing, twenty times by the Supreme Court. Examples of its use include being considered as a guide for conceptualizing rights guaranteed elsewhere in the *Charter*, such as freedom of religion,[59] the right

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[57] Matthew P Harrington, "'The Rights Retained by the People': The Implications of the Ninth Amendment for the Interpretation of Section 26 of the Charter" (2022) 105 SCLR (2d) 247 responds to these concerns, ultimately supporting the orthodox interpretation of s 26.

[58] *Charter*, *supra* note 1, s 27.

[59] See e.g. *Big M Drug Mart*, *supra* note 55; *R v Edwards Books and Art Ltd*, 1986 CanLII 12 (SCC) [*Edwards Books*]; *R v Gruenke*, 1991 CanLII 40 (SCC); *Adler v Ontario*, 1996 CanLII 148 (SCC) [*Adler*], L'Heureux-Dubé J, dissenting; *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16.

to an interpreter,[60] and the right to equality.[61] It has also been relied upon in upholding limits on freedom of expression as reasonable under section 1 of the *Charter*.[62] It has definitively been held to not be a "right" in and of itself.[63]

Section 27's status as being an important interpretive guide, but no more, is the most established of all the "General" provisions in the *Charter*, as Bastarache J noted in *Kapp*.[64] Examples of its consideration in this vein also include:

- recognizing the special role of collectivities in Canada's constitutional order (noted in Dickson CJ's dissent in the *Alberta Labour Reference*[65]);
- declining to use it to strike down criminal prohibitions on abortion (by the dissent of McIntyre J in *R v Morgentaler*,[66] with the majority not needing to address this issue);
- recognizing the need for judges to be perceived as fair to all members of society, irrespective of demographic status, in criminal cases (*R v S(RD)*[67]); and
- holding that its generality means that it cannot be used to limit the scope of specific rights protection, such as:
    - section 19 of the *Charter* (as Wilson J held in her concurring reasons in *Société des Acadiens v Association of Parents*[68]);
    - section 23 of the Charter (as noted in three cases: *Mahe v Alberta*;[69] *Reference re Public*

60 See e.g. *R v Tran*, 1994 CanLII 56 (SCC) [*Tran*].

61 See e.g. *Andrews*, *supra* note 13; *Adler*, *supra* note 59, L'Heureux-Dubé J, dissenting.

62 See e.g. *Keegstra*, *supra* note 14; *Canada (Human Rights Commission) v Taylor*, 1990 CanLII 26 (SCC); *R v Zundel*, 1992 CanLII 75 (SCC), Iacobucci J, dissenting; *Baier v Alberta*, 2007 SCC 31, LeBel J, concurring, with the majority not needing to address this issue.

63 *Kapp*, *supra* note 22 at para 88, Bastarache J, concurring.

64 *Supra* note 22 at para 88.

65 *Supra* note 13 at para 85.

66 1988 CanLII 90 (SCC) [*Morgentaler*].

67 1997 CanLII 324 (SCC).

68 1999 CanLII 684 (SCC) [*Société des Acadiens*].

69 1990 CanLII 133 (SCC) [*Mahe*].

Schools Act (Man), s 79(3), (4) and (7);[70] and *Solski (Tutor of) v Quebec (Attorney General)*[71]); or

- fair trial rights (as noted in LeBel J's concurrence in *R v NS*[72]).

In no Supreme Court of Canada decision has the use of section 27 been a source of controversy or extensive analysis.

3. Lower Courts

Lower courts have followed the Supreme Court's lead and used section 27 as a guide for interpreting the other provisions of the *Charter*. For instance, in *R v Videoflicks Ltd et al*,[73] Tarnopolsky JA held that section 27 supported an interpretation of section 2(a) that would hold religious freedom rights to be limited when religious minorities could comply with a law only at greater expense than members of dominant groups. Jones Prov Ct J reached a similar conclusion in *WH Smith*,[74] which eventually came to the Supreme Court in *Big M Drug Mart*.[75] In *R v Sidhu*,[76] Hill J used section 27 in giving a strong interpretation to section 14's right to an interpreter.

Many cases, in the vein of *Keegstra*, have used section 27 as a reason to justify limits on expression that expresses hateful views of minority groups.[77] In *Canadian Liberty Net*, Muldoon J implied that freedom of expression was "inherently" limited by sections "7, 12, 15, 27 and perhaps 28" given that freedom of

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70 1993 CanLII 119 (SCC).

71 2005 SCC 14.

72 2012 SCC 72.

73 1984 CanLII 44 (ONCA) [*Videoflicks*], rev'd *Edwards Books*, *supra* note 59, but only on the ability of s 1 to justify the law.

74 *Supra* note 54.

75 *Supra* note 55.

76 2005 CanLII 42491 (ONSC) at para 278 [*Sidhu*].

77 See e.g. *Peel Board of Education v Ontario Secondary School Teachers' Federation (Fromm Grievance)*, 1998 CanLII 18118 (ONLA); *R v Andrews*, 1988 CanLII 200 (ONCA), Cory JA (as he then was), aff'd 1990 CanLII 25 (SCC).

expression should not protect humiliation.[78] It seems better to construe this, however, as indicating that limits on freedom of expression can be justified under section 1 if having such a goal is the aim of expression-restricting legislation, as occurred in *Keegstra*.

At the same time, lower courts have been consistent that section 27 is an interpretative provision and is incapable of being "violated". For instance, in *Tall v The Queen*,[79] a constitutional challenge to a provision in the *Income Tax Act*,[80] Miller J held that section 27 was not "violated" as it was an "interpretative aid",[81] Similarly, in *Roach v Canada (Minister of State for Multiculturalism and Citizenship)*, a challenge to the constitutionality of the oath of citizenship to the Queen, Linden JA held that section 27 is not capable of being violated and a claim that it has been could be dismissed on a motion to strike:

> [Section 27 is not] a substantive provision that can be violated. Since section 27 does not protect a particular right or freedom, it being relevant only as an aid to interpretation, it should not be pleaded in the way it has been. [The] claim under section 27 should, therefore, be struck out.[82]

Similarly, in dismissing a challenge to the refusal to designate the "Church of Atheism of Central Canada" as a charity under the *Income Tax Act*, Rivoalen JA (as she then was) cited *Roach* in concluding that "Section 27 of the Charter is not a substantive provision that can be violated".[83] Even so, the Minister of National Revenue conceded that section 27 is related to the state's duty of religious neutrality under section 2(a) of the *Charter*.[84] This limited scope of section 27 extends beyond the tax context. For

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78 *Canadian Liberty Net*, *supra* note 53 at para 61.

79 2008 TCC 677, 2009 DTC 1036 [*Tall*].

80 RSC 1985, c 1 (5th Supp).

81 *Tall*, *supra* note 79 at paras 22(4) and 55.

82 *Roach v Canada (Minister of State for Multiculturalism and Citizenship) (CA)*, 1994 CanLII 3453 (FCA) at 443–44 [*Roach*].

83 *Church of Atheism of Central Canada v Canada (Minister of National Revenu—MNR)*, 2019 FCA 296 at para 15.

84 *Ibid*.

example, the Manitoba Court of Appeal has held that the provision cannot be used to guarantee an accused person a jury made up of members of his racial community.[85]

4. SYNTHESIS OF JUDICIAL INTERPRETATION

More than any other provision of the *Charter*, section 27 has clearly been held to be an interpretative guide, whose presence informs the interpretation of other provisions in the *Charter*. It has been understandably used to identify "pressing and substantial objectives" that can justify limits on *Charter* rights.[86] Specifically, it has been interpreted to reflect the fact that, though the *Charter* guarantees individual rights, individuals' membership in groups can affect how they are treated, and this must inform both our conceptualization of *Charter* rights and why they can reasonably be limited.[87] However, section 27 clearly does not grant rights in itself. Moreover, it cannot be used to interpret other provisions in such a way—either broadly or narrowly—to unreasonably interpret those rights.[88]

D. SECTION 28: EQUALITY OF MALE AND FEMALE PERSONS

1. LANGUAGE

Section 28 of the *Charter* reads:

> Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.[89]

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85 See e.g. *R v Kent*, 1986 CanLII 4855 at para 50 (MBCA), Matas JA; *R v Fiddler*, 1994 CanLII 7396 (ONSC).

86 *Supra* note 62.

87 *Ibid*.

88 Notably, the majority rejected an attempt to use s 27 to hold that it was unconstitutional to not fund non-Catholic schools in *Adler*, *supra* note 59.

89 *Charter*, *supra* note 1, s 28.

2. SUPREME COURT

Section 28 has been considered 13 times by the Supreme Court to date. It has only been interpreted as a guide to interpret other provisions in the *Charter*, such as:

- recognizing that an accused person cannot receive lesser criminal procedure protections from section 7 because he is a man;[90]
- holding that the section 7 right of an accused person to full answer and defence on a sexual assault charge must bear in mind the complainant's equality interests;[91] and
- limits on section 2(b) freedom of expression rights can be justified under section 1 to further the equality interests of women.[92]

Section 28 has not to date been used as a basis of substantive rights in and of itself. The Court did consider a submission that section 28, taken together with section 2(b), should be the basis of substantive rights in *Native Women's Assn of Canada v Canada*.[93] The Court dismissed this submission as misconceived, suggesting that section 15 would have been a sounder basis for the claim. Similarly, McIntyre J dismissed a claim that criminal prohibitions on abortion violated section 28 in *Morgentaler*.[94] McIntyre J dissented in the result in this case, but the majority of the Court did not need to address this issue, resolving the case on other grounds.

The section has also been invoked in dissenting and concurring reasons of L'Heureux-Dubé J in the criminal law,[95]

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90 *R v Hess*, 1990 CanLII 89 (SCC) [*Hess*].

91 *R v Osolin*, 1993 CanLII 54 (SCC); *R v Mills*, 1999 CanLII 637 (SCC) [*Mills* 1999].

92 See e.g. *Keegstra*, *supra* note 14.

93 1994 CanLII 27 (SCC) [*NWAC*].

94 *Supra* note 66.

95 See e.g. *R v Seaboyer*, 1991 CanLII 76 (SCC); *R v Park*, 1995 CanLII 104 (SCC); *R v Esau*, 1997 CanLII 312 (SCC); *Sullivan*, *supra* note 10; *Brown*, *supra* note 10.

taxation,[96] and child protection[97] contexts. However, even these uses were to interpret legislation, the common law, and/or other provisions of the *Charter*. She never held that section 28 was a source of rights in itself.

The closest a judge has come to holding that section 28 could grant rights in itself was Bastarache J's concurrence in *Kapp*, where he held that section 28 limits the ambit of protection provided by section 25.[98] However, he was writing only for himself in that case and he acknowledged that details of his framework for the application of section 25 would need to be resolved in the future.[99] This discrete use of section 28 to limit the ambit of section 25 is also consistent with the original understanding of Barry Strayer (later Strayer JA of the Federal Court of Appeal), the Assistant Deputy Minister of Justice who drafted much of the *Charter*.[100]

3. Lower Courts

Section 28 has been sporadically interpreted by lower courts, and consistently for the most part. For example, in *McIvor v Canada (Registrar of Indian and Northern Affairs)*,[101] the plaintiffs alleged that an individual's inability to transmit Indian status to his children offended section 28 of the *Charter*, despite the fact that his wife was non-Indian and his father was non-Indian. The plaintiffs asserted that laws preventing this offended section 28 and, in any event, section 28 "buttresses" their section 15 claim. Groberman JA disagreed, adopting the orthodox interpretation of section 28 as a non-rights-granting interpretative provision:

> I am unable [to] accept either argument. Section 28 is a provision dealing with the interpretation of the *Charter*. It does

[96] *Symes v Canada*, 1993 CanLII 55 (SCC).

[97] *New Brunswick (Minister of Health and Community Services) v G(J)*, 1999 CanLII 653 (SCC).

[98] *Supra* note 22 at para 97.

[99] *Ibid* at para 100.

[100] Barry L Strayer, "In the Beginning ... The Origins of Section 15 of the *Charter*" (2006) 5:1 JL & Equality 13 [Strayer, "Origins"].

[101] 2009 BCCA 153.

> not, by itself, purport to confer any rights, and therefore cannot be "contravened". Further, the equality rights set out in s 15 explicitly encompass discrimination on the basis of sex; they are incapable of being interpreted in any manner which would be contrary to s 28. In my opinion, s 28 of the *Charter* is of no particular importance to this case.[102]

This was consistent with *Shewchuk v Ricard*, wherein Macfarlane JA rejected an argument that section 28 prohibited a regime that imposed obligations on fathers, but not mothers, vis-à-vis child support.[103]

More recently, in *Hak c Procureur général du Québec*,[104] Blanchard J adopted Groberman JA's views of section 28. Despite obviously being disquieted by the law at issue, he largely dismissed various challenges to Quebec's infamous Bill 21, which, *inter alia*, prohibits most civil servants from wearing many religious symbols. Quebec invoked section 33 and thus mostly succeeded in insulating the legislation from *Charter* review. Blanchard J rejected a submission that the law discriminated against women (on the basis that they disproportionately wear visible religious symbols, such as niqabs, hijabs, and burkas) and that the "notwithstanding" wording in section 28 means that sex-based equality rights cannot be overridden by section 33. He agreed that there was "un certain mérite"[105] to the notion that section 28 imposes an intersectional lens on the *Charter*, mandating that each right in the *Charter* be guaranteed equally to female and male persons, with this requiring analysis. He nonetheless ultimately held that the provision was an interpretative guide in that vein. He noted the primordial place of text in constitutional interpretation,[106]

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[102] *Ibid* at para 64.

[103] *Shewchuk v Ricard*, 2 BCLR (2d) 324 at 339–40, 1986 CanLII 174 (BCCA). See also the discussion in Kerri Anne Froc, "How Québec's Bill 21 could be vanquished by a rarely used Charter provision" *The Conversation* (23 August 2022), online: <theconversation.com/how-quebecs-bill-21-could-be-vanquished-by-a-rarely-used-charter-provision-188261>.

[104] 2021 QCCS 1466 [*Hak*].

[105] *Ibid* at para 859.

[106] *Ibid* at para 867.

and the fact that the provision explicitly refers to rights and freedoms "qui y sont mentionnés"[107] with "y" referring to the *Charter*. As such, given that the legislature suspended the sex-based equality rights guaranteed by section 15 through invoking section 33, there were no *Charter* rights to be guaranteed equally to male and female persons. He thus concluded: "en utilisant l'article 33 de manière très large, le législateur fait en sorte qu'il n'existe juridiquement plus de droits et libertés qui se trouvent visés par l'article 28 de la *Charte*."[108]

There is, to be sure, authority to the contrary. In *Re Boudreau and Lynch*, Hart JA implied that section 28 would prevent legislatures from perpetuating sexual discrimination by invoking section 33:

> [Section 28] was simply intended to prevent any continuation of sexual discrimination by affirmative legislative action once the full *Charter* had come into force. By doing so the legislators have treated sexual discrimination as the most odious form of discrimination and taken away from legislative bodies the right to perpetrate it in the future. Other types of discrimination may without reasons being given be carried on under the legislative override provisions of s 33.[109]

However, it should be emphasized that this was *obiter dicta*, as the fundamental question in that case was whether section 28 circumvented the three-year delay of the coming into force of section 15 if discrimination was on the basis of sex. After concluding that it did not, the discussion of the relationship between sections 28 and 33 was not necessary to decide the case.

4. Synthesis of Judicial Interpretation

Section 28's judicial interpretation to date has emphasized that male-female equality (it assumes a gender binary) should infuse the interpretation of other provisions of the *Charter*. This has most notably occurred in interpreting how fair trial rights should be conceptualized for sexual assault cases. This seems both

[107] *Ibid* at para 866.

[108] *Ibid* at para 874.

[109] *Re Boudreau and Lynch*, 1984 CanLII 3055 (NSSC) at para 12.

unsurprising and appropriate, given the highly gendered nature of sexual assault.[110] But while this often occurs in conceptualizing criminal *procedure*, it seems much less likely to affect underlying substantive criminal law principles. This is notably apparent in the recent *Brown* and *Sullivan* decisions, where Kasirer J, for a unanimous Court, held that the equality "interests" of women and children could constitute "pressing and substantial objectives" to justify limits of the accused's rights under sections 7 and 11 of the *Charter*.[111] However, on the facts of that case, he emphasized that it was inappropriate to consider sections 28 in conceptualizing the accused's section 7 rights. Moreover, he held that the law at issue in *Brown* and *Sullivan* prohibiting a defence of extreme intoxication akin to automatism was not justified as a reasonable limit on *Charter* rights due to its disproportionality.[112]

The spirit of section 28 has also been applied to interpreting the common law and legislation, notably in the sexual assault context.[113] Though significant analysis has not been given to *how* it should infuse the common law and/or legislation, presumably the "spirit" of section 28 cannot be used to interpret legislation that clearly conflicts with a statute, in the same way that the "spirit" of any constitutional provision cannot contradict clear statutory language. As Kasirer J noted in *Brown*, while courts attempt to read legislation in harmony with the constitution, they cannot do so if it would stretch the legislation's meaning "beyond what the text can plausibly bear."[114] Similarly, the "spirit" of constitutional provisions can help inform the interpretation of the common law but cannot, in itself, overrule the common law.[115]

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110 *R v Goldfinch*, 2019 SCC 38 at para 34.

111 *Brown*, *supra* note 10 at para 24.

112 *Ibid*.

113 See e.g. *R v Seaboyer*, *supra* note 95; *R v Park*, *supra* note 95; *R v Esau*, *supra* note 95; *Sullivan*, *supra* note 10; *Brown*, *supra* note 10.

114 *Brown*, *supra* note 10 at para 88.

115 See e.g. *Hill v Church of Scientology of Toronto*, 1995 CanLII 59 (SCC); Harding, *supra* note 4.

This "interpretative guide" approach to section 28 has been challenged in the commentary, notably by Kerri Froc.[116] Moreover, the relationship between sections 28 and 33 has been subject to disagreement and will presumably be clarified as *Hak* makes its way through the courts. But Froc acknowledges that the courts have taken a narrow interpretation to section 28.[117] Given that this section of this article is meant to be doctrinal rather than normative, it will simply be observed for now that this interpretation is defensible. The language that "the rights and freedoms referred to in [the *Charter*] are guaranteed equally to male and female persons" implies that section 28 indicates how ***other*** provisions in the *Charter* are to be interpreted. As Blanchard J concluded in *Hak*, this is the most plausible reading of the provision, given the primordial place of text in constitutional interpretation.[118]

E. SECTION 29: SEPARATE SCHOOL RIGHTS UNAFFECTED

1. LANGUAGE

Section 29 reads

> Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.[119]

2. SUPREME COURT

The Supreme Court has considered section 29 nine times to date. It received its most comprehensive consideration in *Reference re Bill 30, An Act to Amend the Education Act (Ont)*.[120] Wilson J held

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[116] Froc, "Dissertation", *supra* note 5; Kerri Froc, "A Prayer for Original Meaning: A History of Section 15 and What It Should Mean for Equality" (2018) 38:1 NJCL 35 at 84 [Froc, "Original Meaning"].

[117] See e.g. Froc, "Dissertation", *supra* note 5 at 342.

[118] *Quebec (Attorney General) v 9147-0732 Québec inc*, 2020 SCC 32 [*Québec inc*].

[119] *Charter*, *supra* note 1, s 29.

[120] 1987 CanLII 65 at para 62 (SCC) [*Ontario Reference*].

that it was included "for greater certainty" to ensure that governmental actions under section 93 of the *Constitution Act, 1867* could not be held to violate the *Charter* despite the funding of certain but not all religious schools sitting uncomfortably with modern conceptions of equality. However, she also held that its inclusion in the *Charter* was not necessary to achieve that result. Two subsequent decisions have concentrated on the breadth of protection that section 29 gives to governmental decisions regarding school funding.[121] Iacobucci J further emphasized that section 29 "preserve[s]" rights granted by section 93 of the *Constitution Act, 1867* in *Ontario English Catholic Teachers' Assn v Ontario (Attorney General)*.[122] To date, the Court has never found that funding, or lack thereof, of section 93 schools has been contrary to the *Charter*, essentially holding that section 29 results in denominational school rights "trumping" *Charter* provisions that would otherwise be difficult to square with public funding of certain religious schools.

The notion that section 29 was included "for greater certainty" was underscored in *Gosselin (Tutor of) v Quebec (Attorney General)*, where a unanimous Supreme Court held that it cannot be contrary to section 15 to allow only those with section 23 rights to have their children attend minority language schools, in the same way that funding separate schools pursuant to section 93 of the *Constitution Act, 1867* cannot limit section 15 rights.[123] Bastarache J also relied upon section 29 in *R v Kapp*, and in particular its linguistic similarity to section 25, to hold that section 25 creates an area of government action that cannot be held to limit *Charter* rights.[124]

Other Supreme Court recognition of section 29 has been in the context of recognizing the interests of collectivities,[125] that individuals' treatment can be affected by their membership in a

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[121] *Adler*, *supra* note 59; *Ontario Home Builders' Association v York Region Board of Education*, 1996 CanLII 164 (SCC).

[122] *Ontario English Catholic Teachers' Assn v Ontario (Attorney General)*, 2001 SCC 15 [*Ontario English Catholic Teachers' Assn*].

[123] *Gosselin Tutor*, *supra* note 13.

[124] *Kapp*, *supra* note 22 at paras 85, 87.

[125] *Alberta Labour Reference*, *supra* note 13.

group,[126] and recognizing that section 23 rights must be realized in a way that guarantees denominational education rights.[127]

3. Lower Courts

Lower court consideration of section 29 has, in the main, very much accorded with the Supreme Court's interpretation. In fact, some of the most detailed consideration of the provision has occurred in cases that eventually made their way to the Supreme Court, such as the Court of Appeal for Ontario's decision in *Adler v Ontario (Minister of Education)*.[128] Otherwise, courts have used section 29 as an interpretative guide in various matters. For instance, the British Columbia Court of Appeal described it as an "exception" to the state's general duty to be neutral in matters of religion in *Trinity Western University v Law Society of British Columbia*.[129] Jones Prov Ct J noted in *WH Smith* that section 29 implies a limited acceptable constitutional connection between church and state.[130] The Court of Appeal for Saskatchewan also held that a trial judge erred by failing to consider the impact of section 29 in deciding whether the funding of non-Catholic students to attend Catholic schools offended the *Charter* in *Saskatchewan v Good Spirit School Division No 204*.[131]

4. Synthesis of Judicial Interpretation

Taken together, cases interpreting section 29 give it a clear jurisprudential meaning: to create a zone where the *Charter* cannot be interpreted to limit provincial government action taken pursuant to section 93 of the *Constitution Act, 1867*. Though section 93 may sit awkwardly with modern notions of pluralism, something judges have acknowledged,[132] it remains

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[126] *Keegstra*, *supra* note 14.

[127] *Mahe*, *supra* note 68.

[128] 1994 CanLII 1451 (ONCA).

[129] 2016 BCCA 423 at para 100 [*TWU* BCCA], rev'd on other grounds, 2018 SCC 32.

[130] *WH Smith*, *supra* note 54 at 265.

[131] 2020 SKCA 34 [*Good Spirit*].

[132] *Ontario Reference*, *supra* note 120; *TWU* BCCA, *supra* note 129 at para 100.

part of Canada's constitutional architecture that "trumps" *Charter* equality and religious freedom rights. If the public considers this undesirable, the remedy is to amend the constitution, and not come to the structurally untenable situation of using one part of the constitution (the *Charter*) to undermine another (section 93 of the *Constitution Act, 1867*). While section 29's inclusion in the *Charter* may well have been only "for greater certainty"[133] given that sections 2(a) and 15 of the *Charter* and section 93 of the *Constitution Act, 1867* should be interpreted harmoniously if possible,[134] that certainty can be desirable[135] and section 29 cements that certainty. And the interpretation to insulate from review all actions *permitted* by section 93, rather than merely those *required* by section 93, creates predictability and stability by limiting litigation over what section 93 purportedly "requires".

F. Section 30: References to Territories

1. Language

Section 30 reads

> A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include

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133 *Reference re Bill 30, An Act to Amend the Education Act (Ont)*, 1987 CanLII 65 at para 62 (SCC).

134 See e.g. *The Citizens Insurance Company of Canada and The Queen Insurance Company v Parsons*, [1881] UKPC 49 [*Parsons*]; Asher Honickman, "Watertight Compartments: Getting Back to the Constitutional Division of Powers" (2017) 55:1 Alta L Rev 225 at Part I [Honickman, "Watertight"].

135 The legitimacy of such "for greater certainty" provisions is discussed (admittedly in the context of statutory interpretation) in Carissima Mathen & Michael Plaxton, *The Tenth Justice: Judicial Appointments, Marc Nadon, and the* Supreme Court Act *Reference* (Vancouver: UBC Press, 2020) at 71–72. The virtues of "rules" that aim to develop legal certainty is noted in, *inter alia*, Mathen & Plaxton at 118–23; Douglas G Baird & et al, "Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207" (1982) 68:6 Va L Rev 1217 at 1229–30; Cass R Sunstein, "Problems with Rules" (1995) 83:4 Cal L Rev 953 at 969. These illustrate that the division of powers and the *Charter* should be interpreted harmoniously, even if not on the subject of s 93.

> a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.[136]

2. SUPREME COURT

Section 30 has only ever been considered once by the Supreme Court of Canada, in the dissenting reasons of McLachlin J (as she then was) in *Canadian Egg Marketing Agency v Richardson*.[137] She observed that the rights protected by sections 6(2)(a) and 6(2)(b) of the *Charter*, to "take up residence in any province" and "pursue the gaining of a livelihood in any province," include the right to reside and pursue a livelihood in the Northwest Territories in light of section 30 of the *Charter*.[138] Though McLachlin J dissented in the result in the case, the majority did not take issue with this observation.[139]

3. LOWER COURTS

Her decision is buttressed by the only appellate decision to explicitly consider section 30: *Fédération Franco-Ténoise v R*,[140] wherein Décary JA noted that even though section 30 means that the territorial governments are as bound to the *Charter* as provincial governments, section 31 means that the territories had not become the constitutional "equals" of the provinces due to the *Charter*'s enactment.[141] De Weerdt J of the Supreme Court of the Northwest Territories (as he then was) reached the same conclusion as Décary JA when he was the trial judge in *Richardson*.[142] The Supreme Courts of the Northwest Territories and Yukon have also relied upon section 30 to hold that the rights

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136 *Charter*, *supra* note 1, s 30.

137 1997 CanLII 17020 (SCC) [*Richardson*].

138 *Ibid*.

139 *Ibid*.

140 2001 FCA 220 [*Ténoise*].

141 *Ibid* at para 33, later cited by Muldoon J in *Mazhero v Yukon Teachers' Staff Relations Board*, 2001 FCT 901 at para 8 [*Mazhero*].

142 *Canadian Egg Marketing Agency v Richardson*, 1995 CanLII 6235 at para 61 (NWTSC).

to vote and run for public office guaranteed by section 3 apply to territorial elections.[143] The same has been held with respect to the right to be presumed innocent guaranteed by section 11(d).[144] Though he did not explicitly invoke section 30, Slatter JA implicitly referred to it in *Assn des Parents ayants droit de Yellowknife c Territories du Nord-Ouest (Procureur général)*,[145] wherein he noted that section 23 imposes minority language education obligations on territories as well as provinces.[146] Having said that, the Supreme Court of the Yukon has also noted that section 30 only extends the *Charter*'s scope to territories insofar as the *Charter* binds all provinces; thus, the language rights guaranteed by sections 16, 18, and 19 do not bind the Yukon in the way that they bind the federal and New Brunswick governments/legislative assemblies.[147]

4. Synthesis of Judicial Interpretation

Synthesizing section 30's meaning is not challenging: it means that, insofar as provisions of the *Charter* bind all (as opposed to specific) provincial governments and legislative assemblies, they also bind territorial governments and legislative assemblies. How this affects Nunavut will be considered in Part III.F. It is worth noting that section 30 may be the only general provision to truly be *essential* to expanding *Charter* protection, as otherwise certain of the democratic and mobility rights that specifically refer to provinces/provincial legislative assemblies would not apply to the territories.

G. Section 31: Legislative Powers Not Extended

[143] *Morin v Crawford*, 1999 CanLII 6802 (NWTSC); *Friends of Democracy v Northwest Territories (Commissioner)*, 1999 CanLII 4256 (NWTSC); *Penikett v R*, 1987 CanLII 145 (YKCA); *Re Frobisher Bay Municipal Elections*, 1986 CanLII 6563 (NWTSC); *Allman v Northwest Territories (Commissioner)*, 1983 CanLII 4766 (NWTSC).

[144] *Walton v Hebb*, 1984 CanLII 3669 (NWTSC).

[145] 2015 NWTCA 2.

[146] *Ibid*.

[147] *St Jean v R*, 1986 CanLII 6576 (YKSC).

1. LANGUAGE

Section 31 reads:

> Nothing in this Charter extends the legislative powers of any body or authority.[148]

2. SUPREME COURT

Section 31 has never been considered by the Supreme Court of Canada.

3. LOWER COURTS

The only instances of section 31 being considered by any court, based on January 2022 searches, all indicate that it did not affect the division of powers. Indeed, its first judicial consideration was in *WH Smith*,[149] where Jones Prov Ct J held that nothing in section 31 could be interpreted to ***restrict*** governmental authority under the division of powers, even though the section's text only explicitly refers to ***extending***. This decision eventually made its way to the Supreme Court in *Big M Drug Mart*, with this aspect of the decision not being disputed.[150]

Four other decisions have also considered the section. In a 2009 Quebec Superior Court decision, Hallée J held that section 31 prevented an interpretation of the *Charter* that would extend federal power over marriage.[151] In *Quebec (Attorney General) v Canada (Attorney General)*, the Quebec Court of Appeal also used section 31 to indicate the limited role of *Charter* case law in adjudicating a federalism-based challenge to a statute.[152] In *Ténoise*, Décary JA noted that section 31 means that the territories, though bound by the *Charter* to the same extent as the provinces, had not become the constitutional "equals" of the

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148 *Charter*, *supra* note 1, s 31.

149 *WH Smith*, *supra* note 54.

150 *Big M Drug Mart*, *supra* note 55.

151 *Droit de la Famille - 091768*, 2009 QCCS 3210.

152 2004 CanLII 28398 at para 80 (QCCA).

provinces.[153] In *Canada Packers Inc v Canada (Attorney General)*,[154] McClung JA held that it was not possible for an accused to terminate a criminal trial brought by the Attorney General of Canada by issuing civil proceedings under provincial Alberta law.

4. Synthesis of Judicial Interpretation

This case law comes to the inescapable conclusion that section 31's meaning is obvious: the *Charter* did not affect the division of powers. This was possibly a superfluous provision. But including additional clarity in legal documents is understandable,[155] especially given controversial American case law holding that the Fourteenth Amendment bound state governments to the *Bill of Rights*.[156] Provinces may well have sought to ensure that nothing similar occurred with respect to the Canadian division of powers due to the *Charter*'s enactment. This would include extending Parliament's powers to "enforce" the *Charter*.[157] André Schutten and Tabitha Ewart have suggested that section 31 has broader implications[158] and that will be revisited in Section III.G. But the jurisprudential interpretation to date is not in doubt.

H. A Coherent Whole

The above sections have analyzed each "General" provision in the *Charter* to indicate how they have been interpreted to date by both the Supreme Court and lower courts, before summarizing

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153 *Ténoise*, *supra* note 140 at para 33, later cited by Muldoon J in *Mazhero*, *supra* note 141 at para 8.

154 1985 ABCA 287.

155 See the discussion, *supra* note 135.

156 Mike Maharrey, "The Incorporation Doctrine Broke the Constitutional System", *Mises Institute* (8 June 2020), online: <mises.org/wire/incorporation-doctrine-broke-constitutional-system>.

157 Katherine Swinton, "Application of the Canadian Charter of Rights and Freedoms (ss 30, 31, 32)" in Walter Tarnopolsky & Gérald Beaudoin, eds, *The Canadian Charter of Rights and Freedoms: Commentary* (Toronto: Carswell, 1982) at 42–43.

158 Schutten & Ewart, *supra* note 5.

the present jurisprudential understanding of their meaning. In sum:

- **Section 25** indicates how courts are to approach *Charter* claims that potentially affect Aboriginal rights;
- **Section 26** reminds us that non-*Charter* rights continue to exist in Canada;
- **Section 27** is a general interpretative guide to interpret the *Charter* in accordance with multiculturalism;
- **Section 28** emphasizes that male-female equality should infuse the interpretation of other provisions of the *Charter*;
- **Section 29** insulates funding of denominational schools from being found to be inconsistent with the *Charter*;
- **Section 30** means that, insofar as provisions of the *Charter* bind all (as opposed to specific) provincial governments and legislative assemblies, they also bind territorial governments and legislative assemblies; and
- **Section 31** underscores that the *Charter* does not affect the division of powers**.**

Analyzing them together leads to three conclusions. First, and undoubtedly, none of these provisions are rights-granting in themselves and they cannot be violated in and of themselves. Sections 25, 26, and 29 protect rights guaranteed elsewhere in the *Constitution Acts, 1867 to 1982*, legislation, or the common law. Sections 27, 28, and 30 indicate how the rights guaranteed by sections 1–23 or the application provisions in sections 32–33 should be interpreted. And section 31 (as well as sections 25 and 29 for that matter) ensure consistency between all parts of the *Constitution Act, 1867* and the *Constitution Act, 1982*. In no cases, however, do these provisions "grant rights" in and of themselves. Accordingly, a submission that government action "violates", "infringes", "contravenes", or "limits" any of these provisions can be summarily dismissed: the provisions are not capable of being

"violated", "infringed", "contravened", or "limited" in and of themselves.[159]

Second, in the same vein, all of these provisions are interpretative. However, their interpretative nature may be that of a "guide" or, less frequently, a "trump". Their role as "guides" can affect the interpretation of other provisions in the *Charter*. Indeed, these provisions all bear a remarkable similarity in their jurisprudential interpretation to date: they are understood to be interpretative guides that help inform the substantive provisions of the *Charter*, as well as section 1 analysis. In fact, all provisions can be and have been used in this regard. In certain circumstances, however, some of the provisions could be "interpretative trumps" by precluding *Charter* review through indicating that there are areas where governments can act without the risk of having their actions reviewed for *Charter* compliance: this is clearly the case for section 29. The presence of section 29 means that one must acknowledge that the provisions are not necessarily "only" guides; as such, it is more than plausible that this is also the case with respect to section 25. This "interpretative trump" approach has also been suggested by Froc, insofar as she has argued that section 28 restricts the applicability of sections 1 and 33 in certain circumstances,[160] and Ewart and Schutten, who suggest that section 31 restricts powers of administrative bodies.[161] These will all be revisited in more detail in Part III. Whether they are construed as guides or trumps, however, they remain interpretative. The jurisprudential interpretation of these provisions in the same manner accords with another principle of *Charter* interpretation: that the headings found in the *Charter* are valuable indicia that the provisions thereunder should be interpreted as coherent

[159] See Gerard Kennedy & Mary Angela Rowe, "Tanudjaja v Canada (Attorney General): Distinguishing Injusticiability and Deference on Motions to Strike" (2015) 44 Adv Q 391, discussing the ability to summarily dismiss matters that are nonetheless justiciable.

[160] Froc, "Dissertation", *supra* note 5; Kerri A Froc, "A Law in Rupture: Section 28, Equal Rights, and the Constitutionality of Québec's Bill 21 Religious Symbols Ban" (24 July 2022) online: <ssrn.com/abstract=4171256> [Froc, "Bill 21"].

[161] Schutten & Ewart, *supra* note 5.

wholes.[162] That these provisions should have similar meanings is therefore unsurprising. Whether placing such weight on headings is desirable from a normative perspective will be discussed in Part II.B.

Third, it should be noted that all of the provisions, even when used as interpretative guides or trumps, cannot be used to abrogate clear language elsewhere in the *Charter*: notably, the specific rights guaranteed by sections 19[163] and 23,[164] and protected by section 29.[165] This is notwithstanding the fact that these provisions can be seen to be in tension with section 27 in particular. This accords with the principle that specific language generally prevails over more general language.[166]

Ultimately, a review of the case law to date indicates that sections 25–31 of the *Charter*: a) are not rights-granting in and of themselves; b) are interpretative provisions regarding how other provisions of the *Charter* should be interpreted or restricted in their scope—usually as guides, rarely as trumps; and c) cannot abrogate clear language elsewhere in the *Charter*. Should this *status quo* continue? That is the subject of the rest of this article.

II. CONSISTENT WITH PRINCIPLES OF CONSTITUTIONAL INTERPRETATION

This section of this article observes that six principles of constitutional interpretation support the conclusion that sections 25–31 are all interpretative provisions, with none of them being rights-granting. None of these constitutional principles supporting this interpretation are determinative in and of themselves. But taken together, and notwithstanding one principle that could lead one to a contrary conclusion, they form a compelling argument for this consistent interpretation. As

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[162] See Section II.B.

[163] *Société des Acadiens*, *supra* note 68.

[164] *Mahe*, *supra* note 69.

[165] *Ontario Reference*, *supra* note 120; *Adler*, *supra* note 59.

[166] *Parsons*, *supra* note 134; Honickman "Watertight", *supra* note 134 at 231; *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at paras 126–27.

such, irrespective of which principles of constitutional interpretation one emphasizes, they all point to these sections having similar characteristics. Recognizing these characteristics creates unity among pluralistic approaches to constitutional interpretation,[167] even if there will remain marginal arguments about details of interpretation of each individual section, as will be revisited in Part III. Given that these principles are normatively satisfying, this is not a case of inconsistent doctrine requiring charting a new path,[168] as has occurred in the past in areas such as equality rights and administrative law's standard of review.[169] On the contrary, it is entirely appropriate to keep on this present path.

A. TEXTUALLY SOUND

Text is the starting point of constitutional analysis. In *Québec (procureure générale) v 9147-0732 Québec inc*,[170] Brown and Rowe JJ, for a majority of the Supreme Court, emphasized that constitutional interpretation must begin with and be constrained by the text of constitutional provisions. In their view, giving text a primordial place in constitutional interpretation prevents overshooting or undershooting the purpose of a *Charter* provision. It is thus complementary to, and not in tension with, a purposive approach to constitutional interpretation.[171]

To be sure, *Québec inc* has been criticized by both academics[172] and, even more notably, Abella J's concurrence,

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[167] As noted in Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986) at 58, it is desirable to reach rule-like conclusions when parties can agree on the content of the rule, despite profound disagreements over its ultimate source.

[168] Recognized in the shifting majorities between *Fraser v Canada (Attorney General)*, 2020 SCC 28 and *R v Sharma*, 2022 SCC 39.

[169] This led to massive reform in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

[170] *Québec inc*, *supra* note 118.

[171] *Ibid* at para 13 (in particular).

[172] See e.g. Vanessa MacDonnell, "The Enduring Wisdom of the Purposive Approach to Charter Interpretation" in Kerri Froc, Howard Kislowicz &

wherein she expressed concern that the majority was elevating the importance of constitutional text and that purpose remains the "central" consideration in *Charter* interpretation.[173] But regardless of how much weight one gives to text in constitutional interpretation, it is clearly entitled to a great deal of weight,[174] and its relationship to purpose will be addressed below.

So how does the text of sections 25 to 31 indicate that they should be interpreted? It would appear as though none suggest that rights are granted by the provisions themselves, but they are rather interpretative:

- section 25 explains that "the guarantee in this Charter of certain rights and freedoms shall not be construed as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including …,"[175] implying that the rights that section 25 speaks to are not found in section 25. As noted above, it is uncertain whether this is a directive of a particular way to interpret *Charter* provisions that could be interpreted as being in tension with the rights of Aboriginal peoples, or a stand-alone directive that such a right should "trump" if it is in tension with a *Charter*

Richard Moon, eds, *The Surprising Constitution* (Vancouver: UBC Press, 2024) 369. See also the discussion in Sean Fine, "Canada's Supreme Court is off-balance as 'large and liberal' consensus on the Charter falls apart", *The Globe and Mail* (15 January 2022), online: <theglobeandmail.com/canada/article-canadas-supreme-court-is-off-balance-as-large-and-liberal-consensus-on/>. The extent of these trends can be queried, however. See, *e.g.*, Gerard Kennedy, "Why 'Liberal' and 'Conservative' are unhelpful terms in Canadian courts", *The Hub* (21 January 2022), online: <thehub.ca/2022-01-21/liberal-conservative-are-unhelpful-terms-in-the-canadian-judicial-context/>; Gerard Kennedy & Mark Mancini, "Canadian courts are not politicized in the American way", *Policy Options* (23 January 2023), online: <policyoptions.irpp.org/magazines/january-2023/politicized-courts-us-canada/>.

[173] *Québec inc*, *supra* note 118 at para 80, citing *R v Poulin*, 2019 SCC 47 at para 85.

[174] In an additional concurrence, Kasirer J declined to address this controversy, holding that doing so was unnecessary.

[175] *Charter*, *supra* note 1, s 25.

provision. But it is clearly some sort of interpretative provision.

- section 26 explicitly refers to not abrogating or denying the existence of "other rights,"[176] indicating that section 26 itself does not guarantee rights and that the *Charter* shall not be interpreted in such a way as to imply that the "other rights" cease to exist.
- section 27 clearly refers to how the *Charter* "shall be interpreted"[177]—again, not a source of rights in itself but a guide to interpretation, as the courts have held.[178]
- section 28 states that rights and freedoms "referred to in [the *Charter* are] guaranteed equally to male and female persons",[179] implying that section 28 refers to rights and freedoms guaranteed elsewhere, not in section 28 itself. Perhaps the most contested of these provisions in terms of being a source of rights, this will be revisited in Part III, but the text more than plausibly points to it being an interpretative provision.
- section 29 states that "[n]othing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools",[180] indicating that the rights referred to in section 29 are guaranteed elsewhere and that the *Charter* shall not be interpreted to affect those rights.
- section 30 states that, in certain circumstances, references to provinces "shall be deemed to include a reference to the Yukon Territory and the Northwest Territories,"[181] a clear interpretative provision and not a source of rights.
- section 31 reads that "[n]othing in this Charter extends

[176] *Ibid*, s 26.

[177] *Ibid*, s 27.

[178] As Bastarache J noted in *Kapp*, *supra* note 22 at para 88: "s 25 is very different from s 27, which is the only general provision in the *Charter* that has been clearly identified as a simple interpretative clause."

[179] *Charter*, *supra* note 1, s 28.

[180] *Ibid*, s 29.

[181] *Ibid*, s 30.

> the legislative powers of any body or authority"[182] and it is difficult to read that in any way other than limiting the *Charter*'s effects, guiding the interpretation of other provisions. I recognize that Schutten and Ewart have questioned this,[183] and I return to this below.

Ultimately, irrespective of how much weight one places on text in constitutional interpretation, it is more than plausible to read each of sections 25–31 as interpretative provisions that are not rights-granting, even if some of them do indicate how to reconcile potential conflict with other parts of the *Constitution Acts, 1867 to 1982.* Moreover, the meaning of ambiguous provisions should be informed by surrounding unambiguous provisions.[184] So the fact that some of the provisions are clearly interpretative (notably sections 27 and 30) bears on the interpretation of the potentially ambiguous provisions (notably sections 28 and 31). This approach is further supported by the use of headings, which will now be discussed.

B. Consistent with Structure and Headings

Since the earliest days of *Charter* interpretation, the headings within the *Charter* have been valuable indicia that the provisions thereunder are related and bear important similarities.[185] As Estey J held in *Law Society of Upper Canada v Skapinker*,[186] this is because, unlike some statutory headings and marginal notes in statutes, the headings themselves are the product of the *Charter*'s framers, and were chosen subsequent to careful negotiation.[187] The importance of such negotiation to constitutional interpretation has been underscored in recent years, particularly

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182 *Ibid*, s 31.

183 Schutten & Ewart, *supra* note 5.

184 This is known as the "whole text canon". See e.g. Justice Antonin Scalia & Bryan A Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul, MN: Thomson/West, 2021) at 168–69.

185 Kennedy, *Charter*, *supra* note 8 at §5:33.

186 1984 CanLII 3 (SCC) [*Skapinker*].

187 *Ibid*.

in *Québec inc*.[188] In *Skapinker*, Estey J noted that headings will seldom be "controlling" as to a provision's meaning, but will almost always be relevant, particularly in cases of ambiguous provisions.[189] Though recognizing that unambiguous provisions must be given their meaning irrespective of headings, he held that courts should seek a "reconciliation" of the provisions under a particular heading when possible.[190]

Specifically, this approach has been used to seek reconciliation of the subsections within section 6, under the heading "Mobility Rights"[191] and to recognize that sections 7–14, under the heading "Legal Rights," address instances where government action jeopardizes an individual's rights to life, liberty, or security of the person (as opposed to this being a free-standing positive entitlement).[192] Similarly, the Language Rights have been given a consistent interpretation: originally, narrowly, and expressly contrasted to legal rights[193]—subsequently, more generously.[194] Though courts have perhaps been less explicit in terms of the use of the heading, it is also worth observing that the "Fundamental Freedoms" protected by section 2 have all been given very broad interpretations, with most of the practical onus being on the government to justify limitations under section 1.[195] Dwight Newman, Derek Ross, and Brian Bird have recently brought together a group of authors to consider the implications of the "forgotten" freedoms in section 2—conscience, thought, belief, opinion, peaceful assembly, and (to a lesser extent)

188 See e.g. *Québec inc*, *supra* note 118 at para 41.

189 *Skapinker*, *supra* note 186 at 377.

190 *Ibid*.

191 *Ibid*; *United States of America v Cotroni*, 1989 CanLII 106 (SCC).

192 *Gosselin v Québec (Attorney General)*, 2002 SCC 84 [*Gosselin* 2002].

193 *Société des Acadiens*, *supra* note 68, Beetz J.

194 *R v Beaulac*, 1999 CanLII 684 (SCC).

195 *Ross v New Brunswick School District No 15*, 1996 CanLII 237 at para 73 (SCC). See also Peter W Hogg, *Constitutional Law of Canada: 2017 Student Edition* (Toronto: Thomson Reuters, Canada Ltd, 2017) at 43-7, *contra* the discussion in Newman, Ross & Bird, *supra* note 6.

association.[196] Ian McIsaac has similarly considered how the "Democratic Rights" in sections 3–5 can and should be interpreted as a coherent whole.[197]

Turning to the "General" provisions, having all sections construed as interpretative provisions is indeed a consistent approach, recognizing that they are not rights-granting in themselves and indicate how the rest of the *Charter* is to be interpreted. As such, the case for viewing sections 25–31 as interpretative is particularly strong. Much of the analysis in this article could also apply to, notably, sections 15(2), 21, and 22 of the *Charter*: all three of these provisions could also be described as non-rights-granting interpretative guides. But not being under the same heading does distinguish them from sections 25–31. The implications of this analysis on these provisions are thus best left for another day.

This approach of using the headings to come to consistent meanings of *Charter* rights has been challenged, notably by Arbour J in *Gosselin*, as inconsistent with another view of *Charter* interpretation: that *Charter* provisions should be given "generous" interpretations.[198] Even so, this is limited by the need to not overshoot the purpose of a *Charter* provision, as the next subsection discusses.[199]

C. PURPOSIVE

Since *Big M Drug Mart*, the Supreme Court has emphasized that *Charter* provisions are to be interpreted in accordance with their purpose. Judges such as Justice Rothstein[200] and Justice Abella,[201]

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196 Newman, Ross & Bird, *supra* note 6.

197 *Supra* note 7.

198 *Gosselin* 2002, *supra* note 192 at para 316.

199 *Québec inc*, *supra* note 118 at para 10.

200 Stated extrajudicially in The Hon. Marshall Rothstein, "The Judicial Role in Constitutional Law and Administrative Law" (Keynote Address to the Runnymede Society, 29 February 2020) at 14m:20s–15m:38s, online: <youtube.com/watch?v=8xC5AMgzDSM>.

201 See her concurrence in *Québec inc*, *supra* note 118.

despite often heated disagreements on other cases,[202] have emphasized this. Vanessa MacDonnell has recently argued that a purposive approach to interpretation has served Canada "well".[203] Of course, in the recent *Québec inc* case, Brown and Rowe JJ emphasized the "primordial" place of text in constitutional interpretation and noted that purpose is grounded in text.[204] For instance, section 8 of the *Charter* has the purpose of protecting privacy but only in the context of state searches and seizures. It does not protect every privacy interest imaginable.

So, what is the purpose of sections 25–31? Collectively, the purpose appears to be assisting courts to interpret the constitution as a coherent whole.[205] Individually, the purposes appear to be:

- Section 25: protecting rights of Aboriginal peoples from being negatively impacted by the *Charter*, whether the provision is conceived as a "trump" for Aboriginal rights, or as a purely interpretative provision;[206]
- Section 26: protecting other rights from being negatively impacted by the *Charter*;[207]
- Section 27: ensuring that multiculturalism permeates an understanding of the *Charter*'s meaning, in terms of interpreting substantive provisions and justifications for limits on *Charter* rights;[208]
- Section 28: ensuring male and female persons benefit

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202 See e.g. *Fraser v Ontario*, 2011 SCC 20; *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4.

203 MacDonnell, *supra* note 172 at 2.

204 *Québec inc*, *supra* note 118 at para 11.

205 See the comments of Roger Tassé, noted in Canada, Parliament, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 32nd Parl, 1st Sess, No 49 (30 January 1981) at 93, cited in Schutten & Ewart, *supra* note 5 at 323, describing the General Provisions as "a number of interpretation clauses, mainly that apply to the *Charter*, that either are necessary to integrate, help in the construction of the provisions of the *Charter*".

206 The dispute in *Kapp*, *supra* note 22.

207 The judgment of Beetz J in *Singh*, *supra* note 40.

208 See the discussion in Section II.C, *above*.

equally from each *Charter* right[209] (Froc's broader conceptualization of purpose[210] will be addressed below);
- Section 29: protecting separate school rights from being negatively impacted by the *Charter*; [211]
- Section 30: extending *Charter* protection to matters in the purview of the territories when appropriate;[212] and
- Section 31: protecting the division of powers from being negatively impacted by the *Charter*.

Taken together, several purposes are evident, including that sections 25, 29, and 31 in particular seek to limit *Charter* review by reducing its applicability vis-à-vis Aboriginal rights, denominational school rights, and federalism. Section 26 ensures that the *Charter* does not take up the entirety of rights discourse. Section 27 has also decreased the extent that *Charter* litigation has been successful given that numerous cases cite the need to preserve multiculturalism as a pressing and substantial objective justifying rights-limiting government action under section 1 of the *Charter*.[213] There have even been uses of section 28 in this regard, or otherwise in noting that the accused's section 7 rights need to be conceptualized to accord with women's rights in the highly gendered context that is sexual assault.[214] Section 28 may increase court scrutiny of government action in particular circumstances, given that Blanchard J in *Hak* held that the provision has the purpose of ensuring that each right, insofar as the right is in effect (unlike in *Hak* itself, where rights were suspended), applies equally to male and female persons.[215] Even so, in the main (and despite exceptions, such as section 27 giving broader interpretations to section 2(a)[216] and section 14[217]),

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209 *Hess*, *supra* note 90; *NWAC*, *supra* note 93.

210 *Supra* note 116.

211 *Ontario Reference*, *supra* note 120.

212 See the discussion in Section II.F, *below*.

213 *Supra* note 62.

214 *Mills* 1999, *supra* note 91, as discussed in *Brown*, *supra* note 10 at para 70.

215 *Hak*, *supra* note 104 at para 874.

216 *Videoflicks*, *supra* note 73.

217 *Sidhu*, *supra* note 76.

these provisions *decrease* rather than increase the ability to use the *Charter* to challenge state action. This will be discussed in more detail in the next two subsections.

D. ORIGINALISM

Original public meaning of a constitution is not determinative of how it should be interpreted in the present, as the Supreme Court had held that Canada's constitution is a "living tree".[218] Even so, original public meaning is clearly relevant to constitutional interpretation and framers' intent assists in understanding original public meaning.[219] Original public meaning and framers' intent have been frequently invoked by the Supreme Court, even when the judges insist that they are not practising "originalism", as Benjamin Oliphant and Léonid Sirota have noted.[220] As one example, Bastarache J in *Kapp* relied extensively on the statements of two Ministers of Justice (Jean Chrétien and Mark MacGuigan, the latter of whom became MacGuigan JA of the Federal Court of Appeal) and one Deputy Minister of Justice (Roger Tassé) from the early 1980s to buttress his conclusion regarding the proper interpretation of section 25.[221] Zuber, Cory, and Tarnopolsky JJA (as Zuber and Cory JJA then were), for a

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[218] See e.g. *Gosselin* 2002, *supra* note 192 at para 82, citing *Edwards v Attorney-General for Canada*, 1929 CanLII 438 (UKJCPC) [*Persons Case*]. But also see Bradley W Miller, "Origin Myth: The Persons Case, the Living Tree, and the New Originalism" in Grant Huscroft & Bradley W Miller, eds, *The Challenge of Originalism: Theories of Constitutional Interpretation* (Cambridge University Press, 2011), noting how this metaphor has generally been misunderstood and misapplied, but the notion that the Dominion of Canada is a living tree is nonetheless an apt metaphor, if properly understood.

[219] Benjamin Oliphant & Léonid Sirota, "Has the Supreme Court of Canada Rejected 'Originalism'?" (2016) 42:1 Queen's LJ 107 at 126 [Oliphant & Sirota, "Originalism"], citing Kerri A Froc, "Is Originalism Bad for Women? The Curious Case of Canada's Equal Rights Amendment" (2014) 19:2 Rev Const Stud 237 at 271.

[220] Oliphant & Sirota, "Originalism", *supra* note 219; Benjamin Oliphant & Léonid Sirota, "Originalist Reasoning in Canadian Constitutional Jurisprudence" (2017) 50:2 UBC L Rev 505. See also Kennedy, *Charter*, *supra* note 9 at §5:34.

[221] *Kapp*, *supra* note 22 at paras 81, 93.

majority of the Court of Appeal for Ontario, similarly relied upon the framers' intentions in concluding that legislation increasing funding for denominational schools could not conflict with the *Charter* in *Reference re an Act to amend the Education Act*.[222] Roger Tassé also stated that the provisions under the heading "General" were "a number of interpretation clauses, mainly that apply to the *Charter*, that either are necessary to integrate, help in the construction of the provisions of the *Charter*."[223] As such, the original public meaning of these provisions supports the view that sections 25–31 are interpretative.

The major challenge to this view comes from Kerri Froc's analysis of section 28. She notes that many feminist advocates sought to include section 28 in the *Charter* during a time period when women were marginalized.[224] Froc posits that the original meaning of section 28 was to ensure a "gender equality lens" for *Charter* interpretation, which is consistent with the view that section 28, along with the other "General" provisions, was meant to be an interpretive guide.[225] This is the first of two principles that she puts forth as making up the original meaning of section 28. The second principle, the challenge to the view of sections 25–31 as interpretative in nature only, is that section 28's "guarantee" of rights and freedoms to male and female persons was meant to be a transformative and substantive right. She uses this interpretation of section 28 to provide a framework in which section 28 could be the basis for substantive *Charter* rights.[226] Based on the time period, Froc suggests that those who framed section 28 wanted to ensure that the *Charter* and its guarantees would not be rooted in 1982 understandings of gender equality and would make women's rights accessible in practice.[227]

Froc, to be sure, acknowledges that Strayer disagrees with this interpretation (as did Tassé), but she observes, accurately, that

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222 1986 CanLII 2863 (ONCA), aff'd *Ontario Reference*, *supra* note 120.

223 *Supra* note 205.

224 Froc, "Dissertation", *supra* note 5 at 11.

225 *Ibid* at 19.

226 *Ibid*.

227 *Ibid* at 393–94.

subjective intentions of framers are of limited utility in constitutional interpretation, with the original public meaning of the words being most important.[228] Even so, Strayer and Tassé's understanding cuts against the understanding of the feminist advocates regarding the provision's original public meaning. Froc has pushed back on this, observing that Tassé made his comments prior to section 28 being grouped with the other interpretative provisions under the heading "General".[229] The fact is, however, that section 28 ultimately was placed in that area of the *Charter* rather than under the heading "Equality Rights". It is strongly disputed, therefore, that it is an "error" (Froc's accusation) to rely on Tassé's understanding of the purpose of "General" provisions as a whole, even as an understanding prior to section 28 being added. Such an understanding surely affected the decision to put section 28 among those provisions. From a textual perspective, Froc's parsing of the English-language words of section 28 will be revisited below. For the time being, it will simply be observed that the original meaning of section 28 may be more complicated than for the other General provisions; nor is it clear that section 28's original meaning is inconsistent with viewing the provision as a non-rights-granting interpretative provision, which is how Chrétien, MacGuigan, Strayer, and Tassé all conceptualized (at least many of) these sections.

E. *STARE DECISIS* AND JUDICIAL RESTRAINT

As noted above, courts in Canada have mainly interpreted sections 25–31 as interpretative provisions that do not grant rights and freedoms in themselves. This accords with *stare decisis*, a fundamental basis of our legal and constitutional

[228] Barry L Strayer, *Canada's Constitutional Revolution* (Edmonton: University of Alberta Press, 2013) at 261–62, cited in Froc, "Original Meaning", *supra* note 116 at n 68.

[229] Kerri Froc, "Are You Serious? Litigating Section 28 to Defeat the Notwithstanding Clause" (Paper delivered at the 'Litigating Equality Conference' at the University of Toronto, 22 May 2023) (2023) 114 SCLR (2d) 267.

order.[230] Of course, *stare decisis* is not an absolute straightjacket. There are a variety of reasons to depart from it, such as if a decision is clearly wrong in expanding criminal liability[231] or if it is causing significant negative real-world or jurisprudential consequences.[232] However, as the rest of this article demonstrates, the current understanding of these sections is eminently defensible, and definitely not egregiously wrong. Nor does it appear to be causing significant negative real-world or jurisprudential consequences.

Judicial restraint further supports this continued approach to section 25–31. Judicial restraint can admittedly mean different things in different contexts, but it typically includes both a minimal judicial role in reviewing the other branches of government and adhering to precedent through *stare decisis*.[233] No serious observer believes that judges should never depart from *stare decisis*. Moreover, judicial restraint can have a complicated relationship with *stare decisis* when the precedent at issue is itself an arguable example of judicial overreach.[234] Here, however, the consistent and circumscribed role of section 25–31 in constitutional interpretation itself accords with a

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230 See e.g. Dwight Newman, "The State of *Stare Decisis* and the Rule of Law" (2019) 92 SCLR (2d) 107.

231 *R v Chaulk*, 1990 CanLII 34 at 1352–53 (SCC).

232 *R v Robinson*, 1996 CanLII 233 at paras 16–42 (SCC). See also the decision of Justice Kavanaugh in *Ramos v Louisiana*, 140 SCt 1390 (2020) [*Ramos*], and my commentary thereon: Gerard Kennedy, "Food for Thought on Stare Decisis: SCOTUS's Decision in Ramos v Louisiana" (28 April 2020), online: *Advocates for the Rule of Law* <ruleoflaw.ca/food-for-thought-on-stare-decisis-scotuss-decision-in-ramos-v-louisiana/>.

233 See e.g. Thomas W Merrill, "Originalism, *Stare Decisis* and the Promotion of Judicial Restraint" (2005) 22:2 Const Commentary 271; Lewis F Powell, Jr, "Stare Decisis and Judicial Restraint" (1990) 47 Wash & Lee L Rev 281.

234 See e.g. the decision of Justice Kavanaugh in *Ramos*, *supra* note 232. See also Powell, *supra* note 233 at 284. This was an issue with Justice Anthony Kennedy and his ambivalent relationship to *Roe v Wade*, 410 US 113—see e.g. Ilya Shapiro, "A Faint-Hearted Libertarian at Best: The Sweet Mystery of Justice Anthony Kennedy" (2009) 33:1 Harvard J L & Publ Pol 333 at 348–51.

humble and limited[235] judicial role. As noted above, it tends to give the legislature more room to achieve its policy ends without judicial interference.[236] As such, departing from *stare decisis* to give the General provisions a rights-granting role would not only depart from precedent, but also expand judicial power in questionable circumstances. As such, it is particularly in keeping with judicial restraint and being mindful of the courts' proper role to continue with the relatively circumscribed conceptualization of these provisions.

F. Predictability and the Rule of Law

There is something to be said for simplicity and predictability in law. Indeed, excessively complicated law can prevent parties from being able to order their affairs and can be a significant access to justice obstacle.[237] This is yet another reason to view sections 25–31 as interpretative provisions that are not rights-granting. Admittedly, simplicity can be taken to such a level that it offends other values underlying the legal system, such as the rule of law and constitutional supremacy. It would be a mistake, for instance, to ignore clear constitutional language such as New Brunswick being obliged to provide government services in French[238] because doing so departs from simplicity. But the "General" provisions appear, more-than-plausibly, to be non-rights granting interpretative sections. This is accordingly an area where a predictable approach to constitutional interpretation is appropriate. In fact, clear law is generally

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[235] As argued by The Honourable Peter Lauwers, "Reflections on Charter Values: A Call for Judicial Humility" (12 January 2018), online: <ruleoflaw.ca/reflections-on-charter-values-a-call-for-judicial-humility/>, but also by Jeremy Waldron, "The Core of the Case Against Judicial Review" (2006) 115:6 Yale LJ 1346. Of course, this cannot lead to abrogation of the judicial role: see e.g. Benjamin L Berger, "What Humility Isn't: Responsibility and the Judicial Role" (2018) 87 SCLR (2d) 277.

[236] *Ibid*. See also Mark V Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton, NJ: Princeton University Press, 2007).

[237] See e.g. Kennedy, "Jurisdiction", *supra* note 11 at 110.

[238] As guaranteed by ss 16–20 of the *Charter*.

consistent with the rule of law,[239] yet another cornerstone of Canada's constitutional order.[240]

G. THE COUNTERPOINT: IS THIS A "GENEROUS" INTERPRETATION?

Now it is time to address a prospective counterargument: the long-standing principle that the *Charter* is to be given a "large and liberal"[241] or "generous" interpretation rather than a legalistic one.[242] It could fairly be argued that conceptualizing these provisions as non-rights-granting interpretative provisions does not accord with this principle. This is, to some extent, a fair critique, but three responses are in order. First, the "generosity" that courts can give to *Charter* interpretation is constrained by language and purpose, as noted in *R v Stillman*[243] and *Québec inc*.[244] Generosity cannot extend beyond what language and purpose, with purpose being constrained by language, can plausibly bear. Second, and related to this, we need to be careful not to use the principle of "generosity" to turn the *Charter* into an "empty vessel to be filled with whatever meaning we might wish from time to time."[245] Essentially, though there may be provisions in the *Charter* that are delegations to the judiciary to fulfill those

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[239] See e.g. Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) at 210–29, discussed in Hamish Stewart, "The Role of Reasonableness in Self-Defence" (2003) 16 Can JL & Jur 317 at 333–34. See also Friedrich A Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1944) [16th impression, 1962], discussed in Malcolm Lavoie & Dwight Newman, "Mining and Aboriginal Rights in Yukon: How Certainty Affects Investor Confidence" (2015) at 16, online (pdf): <fraserinstitute.org/sites/default/files/mining-and-aboriginal-rights-in-yukon-how-certainty-affects-investor-confidence.pdf>.

[240] See e.g. *Quebec Secession Reference*, *supra* note 13.

[241] *Ford v Quebec (Attorney General)*, 1988 CanLII 19 at 766–67 (SCC) [*Ford*].

[242] See the decision of McIntrye J in *Alberta Labour Reference*, *supra* note 13 at 394. See also *Gosselin* 2002, *supra* note 192 at para 316.

[243] 2019 SCC 40 at para 21.

[244] *Supra* note 170 at para 10.

[245] See e.g. the dispute between the majority and concurrence in *Québec inc*, *supra* note 118, and the discussion thereof in MacDonnell, *supra* note 172.

provisions' purposes,[246] given the need for the constitution to be applicable in a variety of new circumstances, this does not mean that anything goes. Third, this is only one principle of constitutional interpretation. As noted above, many others point in a different direction with respect to sections 25–31.

III. THE PROVISIONS ARE STILL MEANINGFUL: HOW TO INTERPRET THEM GOING FORWARD

Part I of this article sought to demonstrate how sections 25–31 have been jurisprudentially interpreted to date, synthesizing their meaning as non-rights-granting interpretative provisions. Part II then demonstrated that this is, in the main, normatively satisfying, according with several different principles of constitutional interpretation. There is no need to depart from this. This section indicates how these provisions will still importantly affect constitutional interpretation in the future. While the consistent interpretive approach proposed by this article may constrain the interpretation and power that can be given to these provisions, the provisions are still very meaningful, particularly when they can be used as "trumps." While a similar limitation applies to them all, they all have important and different roles. And many (though probably not all) of those who have argued for broader interpretations of the provisions may still find the ability to use the provisions to achieve many of their preferred legal outcomes.

This section is not intended to be exhaustive as to how these provisions should be interpreted. An entire article could be written about many of these provisions. In fact, Froc has written an entire dissertation on section 28. Specifically, this article does not take a firm position on whether sections 25, 28, or 31 can ever be used as "trumps" in the way that section 29 has been. But this is intended to indicate how each of sections 25–31 would be affected by a consistent approach to interpretation, recognizing that all provisions are interpretative and non-rights-granting, even if some could be used as "trumps".

[246] *Ibid*.

A. Section 25: Strong and Narrow Interpretations Still Possible

Jurisprudentially, section 25 has, in the main, only been used to support peripheral points in the case law. However, it clearly has the potential to act akin to section 29 in insulating certain government action, whether constitutionally required or not, from *Charter* review. This is the dominant academic view,[247] shared by Bastarache J in *Kapp*[248] and the Yukon Court of Appeal in *Dickson*.[249] There is strong textual basis (extremely important, as per *Québec inc*[250]) for this interpretation, as well as considerable basis grounded in original public meaning.[251] Moreover, it is buttressed by the identical French wording of sections 25 and 29 ("la présente charte . . . ne porte . . . pas atteinte aux droits ou [libertés/privileges]"). The French and English versions are, of course, equally authoritative. According to the law of bilingual interpretation, a shared meaning between English and French should be sought.[252] And according to basic principles of statutory[253] and constitutional[254] interpretation, similar wording should result in similar legal meanings.

To be clear, this article is agnostic on whether section 25 should be understood as an interpretative trump in accordance with Bastarache J's opinion in *Kapp*. But this article's conclusion—that sections 25–31 should be interpreted consistently as non-rights-granting interpretative provisions—is not in tension with this approach. Rather, this stronger approach

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247 *Supra* note 37.

248 *Supra* note 22.

249 *Supra* note 27.

250 *Supra* note 170 at para 11 (in particular).

251 *Kapp*, *supra* note 22 at paras 81, 93.

252 See *R v Daoust*, 2004 SCC 6; The Honourable Mr Justice Michel Bastarache *et al*, *The Law of Bilingual Interpretation* (Markham, ON: LexisNexis Canada, 2008). But for criticism of this, see Ruth Sullivan, "Some Problems with the Shared Meaning Rule as Formulated in *R v Daoust* and the *Law of Bilingual Interpretation*" (2010) 42:1 Ottawa L Rev 71.

253 Ruth Sullivan, *The Construction of Statutes*, 7th ed (Markham, ON: LexisNexis Canada Inc, 2022) at 5.02.

254 *Ibid*.

to section 25 would simply make it, like section 29, an interpretative trump rather than a "mere" interpretative guide.

B. Section 26: Discrete but Important Purpose

Enormous controversy has ensued in the United States over the meaning of the Ninth Amendment, which reads that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Much ink has been spilt over whether this provision, particularly given its admonition that other rights are not to be "disparaged," itself constitutionalizes rights that are not found in the American *Bill of Rights*.[255]

But despite the superficial similarities between the Ninth Amendment and section 26, they are very different. As Matthew P Harrington has noted, section 26 is much less contentious, not just in its jurisprudential treatment, but in its history: section 26 was clearly intended to be declaratory.[256] The scant attention paid to it during patriation confirms as much. Other rights may be found in statutes,[257] the common law,[258] or even other parts of the constitution itself,[259] such as Aboriginal rights and denominational school rights. However, section 26 was never intended to elevate their status to constitutional: they continue in their pre-existing form.[260] This interpretation accords with this article's proposition that sections 25–31 are all non-rights-granting interpretative provisions.

C. Section 27: A Role in Rights Interpretation and Section 1

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[255] Harrington, *supra* note 57 summarizes the literature in this area at 259–60. See in particular Randy E Barnett, "Reconceiving the Ninth Amendment" (1988) 74:1 Cornell L Rev 1 and Kurt T Lash, *The Lost History of the Ninth Amendment* (Oxford: Oxford University Press, 2009).

[256] Harrington, *supra* note 57 at Part III (in particular).

[257] See *Singh*, *supra* note 40, summarizing the *Bill of Rights*, *supra* note 39.

[258] See e.g. *Mills* 1986, *supra* note 41.

[259] Discussed in Harrington, *supra* note 57 at 270.

[260] See e.g. the discussion of property rights in Harrington, *ibid* at 280–82.

As Bastarache J noted in *Kapp*,[261] section 27 has clearly, more than any other provision in the *Charter*, been conceived as an interpretative guide: whether in conceptualizing equality,[262] freedom of religion,[263] fair trial rights,[264] or what can justify reasonable limits on *Charter* rights.[265] Though certain academics have suggested courts have been insufficiently robust in using section 27, [266] its core meaning never seems to have been jurisprudentially in doubt. It very much fits into the conclusion that sections 25–31 are non-rights-granting interpretative provisions and section 27 should continue to be interpreted as it has been.

D. Section 28: An Interpretative Provision (Whether it can "Trump" Section 33 is Uncertain)

On first blush, section 28 may appear to be the most difficult to square with the argument for consistent interpretation, given Froc's argument that the original understanding of section 28 was that it could be used as a basis for substantive rights. However, assuming that she is correct about this (for contrary views, see Barry Strayer,[267] Asher Honickman,[268] and Geoffrey Sigalet[269]), the tension between her conceptualization of section

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261 *Kapp*, *supra* note 22 at para 88.

262 *Andrews*, *supra* note 61.

263 *Big M Drug Mart*, *supra* note 59.

264 *Tran*, *supra* note 60, specifically addressing the right to an interpreter.

265 *Supra* note 62.

266 See e.g. Natasha Bakht, "Reinvigorating Section 27: An Intersectional Approach" (2009) 6:2 J L & Equality 135 at 142.

267 See e.g. Strayer, "Origins", *supra* note 100 at 22.

268 Asher Honickman, "Deconstructing Section 28", *Advocates for the Rule of Law* (29 June 2019), online: *Advocates for the Rule of Law* <ruleoflaw.ca/deconstructing-section-28/#:~:text=Section%2028%20states%3A%20Notwithstanding%20anything,other%20sections%20in%20the%20Charter> [Honickman, "Section 28"].

269 Geoffrey T Sigalet, "The Truck and the Brakes: Understanding the Charter's Limitations and Notwithstanding Clauses Symmetrically" (2022) 105 SCLR (2d) 189 at 218–19.

28 and this article's conclusion may be less than one may think. Many of Froc's proposed views on section 28 are clearly consistent with the consistent approach to sections 25–31 that this article proposes. Other proposed uses could also potentially be reconciled with this consistent approach. Only some proposed uses are truly irreconcilable with the article's proposed consistent approach to the provisions. Notably, any argument that a law "violates" section 28 can be dismissed, but many laws about which such arguments could be made could still potentially be invalidated, even conceptualizing section 28 as an interpretative provision.

Froc's first principle for interpreting section 28 is that it is a "gender equality lens" to ensure that all *Charter* provisions be interpreted as gender equal.[270] Nothing in this article is inconsistent with this interpretation. In fact, as noted in Section I.D, this is consistent with precedent and, as noted in Section II.E, should continue as it has, for instance, in the criminal procedure context.[271] Of course, it is still important analytically to distinguish the difference between the equal guarantee of *Charter* rights and using gender equality as a justification for limits on *Charter* rights under section 1.[272] Kasirer J helpfully emphasized this distinction in *Brown*.[273] But this remains entirely consistent with this article's thesis.

Froc, however, goes beyond this. In determining two underlying principles that make up the original meaning of section 28, she outlines the original semantic meaning of section 28 in its historical context. In her view, "[n]otwithstanding anything in this Charter" was meant to ensure that women were fully entitled to their *Charter* rights without the potential limitations of other *Charter* provisions such as sections 1 and 33.[274] "[R]ights and freedoms referred to in it" provides the basis

[270] Froc, "Dissertation", *supra* note 5 at 390.

[271] See e.g. *Hess*, *supra* note 90.

[272] See e.g. Kennedy, *Charter*, *supra* note 9 at §5:10, citing, *inter alia*, *Operation Dismantle Inc v The Queen*, 1985 CanLII 74 at 489 (SCC), Wilson J, concurring.

[273] *Brown*, *supra* note 10 at para 70.

[274] Froc, "Dissertation", *supra* note 5 at 378.

for section 28 as an interpretive clause, as Froc notes that the gender-equality component of section 28 was meant to be "infused" throughout the entirety of the *Charter* instead of being an add-on to section 15.[275] Importantly, Froc suggests that sections 25 and 26 of the *Charter* create a distinction between "guarantee" and "construe" in that a guarantee of certain rights and freedoms can be interpreted to be a substantive right, while directions to "construe" said rights and freedoms are a clear indication that a provision is meant to be interpretative in nature only.[276] As such, the inclusion of "guaranteed" in section 28 could be the basis for substantive rights under the *Charter*.[277] Finally, "equally to male and female persons," while fairly self-explanatory in semantic meaning, is important in historical context. Froc notes that the choice to include the phrase "persons" could have been attributed to the Privy Council's prior historical recognition of women as persons in the *Persons Case*.[278] Furthermore, the choice to include gender in "male and female persons" further separated section 28 from the broad grounds of section 15 and was meant to ensure that the guaranteed *Charter* rights were connected to "the enjoyment and exercise of rights by actual persons."[279]

Some of this is consistent with viewing section 28 as a non-rights-granting interpretative provision. For instance, the proposition that section 33 cannot be used to override gender equality depends on several factors, but none are inconsistent with section 28 being a non-rights-granting interpretative provision. In such a situation, section 28 trumps the application of section 33 to rights guaranteed *elsewhere in the Charter* vis-à-vis sexual equality due to its "notwithstanding" clause being broader than section 33's. There remains significant difficulties with this proposed use of section 28 to restrict the

[275] *Ibid* at 387–88.

[276] *Ibid* at 388.

[277] *Ibid*.

[278] *Ibid* at 386, citing *Persons Case*, *supra* note 218.

[279] Froc, "Dissertation", *supra* note 5 at 387.

ambit of section 33.[280] But the power of section 33, admittedly a matter of reasonable debate,[281] does not require the

[280] Partially, the notion that sexual equality rights cannot be "overridden" by s 33 is dependent on whether one views s 33 as a true "override", which appears to be most consistent with:

- Supreme Court of Canada precedent (see e.g. *Ford*, *supra* note 241. The *per curiam* Court also used the language of "override" in *Devine v Québec (Attorney General)*, 1988 CanLII 20 at 812 (SCC);
- Blanchard J's conceptualization in in *Hak*, *supra* note 104 at para 874; and
- work of scholars such as Maxime St-Hilaire and Xavier Foccroulle Ménard (see Maxime St-Hilaire & Xavier Foccroulle Menard, "Nothing to Declare: A Response to Grégoire Webber, Eric Mendelsohn, Robert Leckey, and Léonid Sirota on the Effects of the Notwithstanding Clause" (2020) 29:1 Constitutional Forum 38).

Under this conceptualization, rights are overridden by s 33 and, as such, there is no operable right that s 28 can guarantee equally to male and female persons. Another conceptualization of s 33, put forward by Grégoire Webber, Robert Leckey, and Eric Mendelsohn, is that s 33 merely protects the *operation* of laws, and courts can, at least, issue declarations of inconsistency with the *Charter*. See Robert Leckey & Eric Mendelsohn, "The Notwithstanding Clause: Legislatures, Courts, and the Electorate" (2022) 72:2 UTLJ 189; Grégoire Webber, "Notwithstanding Rights, Review, or Remedy? On the Notwithstanding Clause and the Operation of Legislation" (2021) 71:4 UTLJ 510. Geoffrey Sigalet takes the view, in response to this, that s 33 ousts judicial review in "Notwithstanding Judicial Review: Legal and Political Reasons Why Courts Cannot Review Laws Invoking Section 33" in Peter Biro, ed, *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies* (Montreal & Kingston: McGill-Queen's University Press, 2024) 168, assuming the procedural antecedents for invoking the provision are met. In the interpretation proposed by Leckey, Mendelsohn, and Webber, rights remain, even if an invalidation remedy cannot follow. But even in this situation, it is debatable that the guarantee of gender equality requires a particular remedy of invalidation (see e.g., Leckey & Mendelsohn, *supra* note 280 at 207, 209), as that invalidation power itself may be excluded by s 33 if s 28 does not guarantee rights in itself. In other words, any attempt to view s 28 as limiting the ambit of s 33's invalidation power is based on the debatable assumption that a right is no longer guaranteed in the absence of the particular remedy of invalidating legislation for its breach (see e.g., Kent Roach, "Enforcement of the Charter—Subsections 24(1) and 52(1)" (2013) 62 SCLR (2d) 473 at 477–87). By this logic, the United Kingdom, Australia, and New Zealand do not guarantee rights.

interpretation of section 28 as anything other than an interpretative non-rights-granting provision, just as section 29 and possibly section 25 can be quite powerful even if construed as non-rights-granting interpretative provisions. As such, it may be a stretch, albeit not a completely implausible one, to conclude that section 28's "notwithstanding clause" requires an invalidation remedy for sex-based discrimination. But such an interpretation is still not rights-granting. Rather, this conceptualization of section 28 affects the relationship between, in particular, sections 15, 24, 33, and 52(1) of the *Constitution Act, 1982*.[282]

Froc further proposes that limits on gender equality rights cannot be subject to section 1's reasonable limits provision because of section 28. Contested history aside, this interpretation appears textually implausible and potentially even betrays the distinction she draws between the uses of "construe" and "guarantee" in sections 25, 26, and 28. All rights

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In particular, on Webber's view, given that s 33 allows an unconstitutional law to "operate", it is unlikely that s 28 overrides s 33 given the specificity of s 33 in ousting an invalidation remedy compared to s 28's general "guarantee". And on Sigalet's subjunctive view, courts must read the law invoking s 33 as though the *Charter* rights it references do not exist. As such, courts cannot consider the interpretative question that would allow s 28 to interpret s 28 rights as trumping s 33. This accords with Blanchard J's judgment in *Hak*.

Finally, and in the particular context of Bill 21, the Quebec legislature asserts that the legislation merely enacts a particular conception of gender equality and thus accords with s 28. The preamble states that the law's purported purpose of addressing sexual equality: "CONSIDÉRANT l'importance que la nation québécoise accorde à l'égalité entre les femmes et les hommes". This accords with Quebec-centred theories of uses of s 33, as noted by Guillaume Rousseau & François Côté in "A Distinctive Quebec Theory and Practice of the Notwithstanding Clause: When Collective Interests Outweigh Individual Rights" (2017) 47:2 RGD 343.

Ultimately, though this article's ultimate conclusion that s 28 is not-rights-granting is not incompatible with the use of 28 to "invalidate" uses of s 33 that affect sexual equality, there are still many other impediments to doing so, both in the context of *Hak* and more generally.

281 See Webber, *supra* note 280; Leckey & Mendelsohn, *supra* note 280; Sigalet, *supra* note 280.

282 See discussion in Webber, *supra* note 280.

guaranteed in the *Charter* are, *ipso facto*, "guaranteed" subject to section 1 by the wording "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." In other words, Froc is asking for the first (before "subject"), but not the latter, part of section 1 to apply to section 28. As such, an interpretation of section 28 that excludes the possibility of justification appears to disregard the very structure of the *Charter*. However, this interpretation's implausibility is apparent for purely textual and structural reasons, not because an interpretative provision could not have this result. For instance, if section 28 read "limits on section 15 rights on the basis of sex can never be justified as reasonable under s 1," it would indeed have Froc's proposed meaning despite being a non-rights-granting interpretative provision. In any event, this may be a largely academic debate given that, as a practical matter, it is difficult to justify limits on section 15 rights under section 1.[283]

It is more challenging to reconcile Froc's second proposed principle animating section 28 with the view that sections 25–31 are all purely interpretative. Notably, largely based on section 28's using the language of "guarantee" (as opposed to "construe") and the intentions of the activists who sought to include section 28 in the *Charter*, she challenges the proposition that section 28 is interpretative in nature only. Recently, she has argued that Bill 21 "violates" section 28 and can be invalidated for that reason.[284] With greatest respect to her meticulous historical account, this article *does* take issue with this interpretation: even if it is an interpretative trump, section 28 is in itself incapable of being "violated". Again, with respect, Froc's interpretation appears to selectively use text, downplaying the fact that section 28 refers to rights "guaranteed in the *Charter*", implying they are not found in section 28. Similarly, section 1 uses the word "guarantee" even

[283] Kasirer J acknowledged this despite upholding a limit on s 15 rights as justified under s 1 in *R v CP*, 2021 SCC 19 at para 174. See also Honickman, "Section 28", *supra* note 268.

[284] Froc, "Bill 21", *supra* note 160.

though section 1 clearly does not guarantee rights in itself. On the other hand, Froc overemphasizes the contrast between the use of the word "guarantee", which clearly is not the basis of rights in section 1 (and, it is proposed, section 28), instead of "construe", the language used in sections 25 and 26. The use of "construe" in these two provisions is more plausibly meant to underscore that sections 25 and 26 relate to rights guaranteed *outside* the *Charter*, so the *Charter* must be "construed" to respect those rights. The distinction, which Froc puts great emphasis on, is also not as clear in the equally authoritative French version of the *Charter*. In French, section 25 is, as noted above, worded similarly to section 29 while section 26 indicates that the *Charter*'s guarantee of rights "ne constitue pas une négation" ("does not constitute a 'negation'") of other rights. Meanwhile, in both languages, sections 1 and 28 refer only to rights guaranteed *in* the *Charter*, made clear by section 1's use of the word "following" and section 28's referring to rights "referred to in [the *Charter*]" or, in French, "qui *y* sont mentionnés".[285] Thus, the difference in language is important, but only because the difference in language directs the reader to look either elsewhere in (sections 1 and 28) or external to (sections 25 and 26) the *Charter* as a source of the rights referred to in the provisions.

Moreover, Froc's conceptualization of section 28 as rights-granting is debatable based on the historical record, as civil servants and politicians who "held the pen" in drafting the *Charter* understood section 28 differently than the feminist advocates who fought for its inclusion. Strayer, for example, noted that there was concern that sections 25 and 27 would be used to downplay women's equality interests and section 28 was included to ensure gender equality "notwithstanding" these provisions.[286] Froc acknowledges this was *an* impetus for section 28.[287] As noted above, the use of framers' subjective intentions in constitutional interpretation is limited. But here, those intentions point to original public meaning cutting in different

[285] *Charter*, *supra* note 1, ss 1, 28 [emphasis added].

[286] Strayer, "Origins", *supra* note 100 at 21–22.

[287] See e.g. Froc, "Dissertation", *supra* note 5 at 143, 148, 150.

directions. From a precedential perspective, moreover, Bastarache J held that section 25 must be interpreted in accordance with Strayer's understanding in *Kapp*.[288]

But most importantly for the purposes of this article, Froc's interpretation would make section 28 unique among sections 25–31 as being rights-granting, which is inconsistent with many principles of constitutional interpretation, as demonstrated throughout this article. It is also flatly contrary to *Skapinker*'s instruction to seek a reconciliation of the meaning of ambiguous provisions under the same heading.[289] Of course, if this substantive interpretation of section 28 was unambiguous, *Skapinker* would mandate such an interpretation, subject to *stare decisis* concerns (described above in Section II.E). But, with respect, Froc's proposed substantive interpretation is quite far from unambiguous given the many other principles of constitutional interpretation that point in an opposite direction. It also, unlike the "stronger" proposed interpretation of sections 25 and 29, expands the judicial role while the other provisions appear to confine the judicial role. (This is another reason to query broad interpretations of section 31, a matter that will be addressed below.)

None of this downplays the importance of section 28 as a possibly under-utilized provision of the *Charter* that should indeed ensure that the rights-granting provisions of sections 2–23 are guaranteed equally to male and female persons. It can and should also be used as a reason to accept achieving gender equality as a pressing and substantial objective for section 1 purposes. Nor is its potential to affect the scope of section 33 completely implausible. But it remains a non-rights-granting interpretive provision. As Asher Honickman has noted before, "Section 28 is flanked by various interpretive provisions for the simple reason that it is one as well."[290]

E. SECTIONS 29: KEEPING THE COURSE

[288] *Kapp*, *supra* note 22 at para 97.

[289] *Skapinker*, *supra* note 186 at 377.

[290] Honickman, *supra* note 268.

Section 29 has been interpreted to insulate funding of certain denominational schools from *Charter* scrutiny, giving a zone where provinces may fulfill constitutional obligations alongside collateral policy choices without the fear of *Charter* litigation. The funding of certain but not all denominational schools certainly sits questionably alongside modern conceptions of equality,[291] despite the importance of Catholic education as a matter of Canadian history.[292] It has also drawn the condemnation of the United Nation Human Rights Committee for violating the *International Covenant on Civil and Political Rights*.[293] Even so, given the primacy of Canadian as opposed to international law in Canada's constitutional order, we have this legacy of the constitutional compromise from 1867.[294] Without this compromise,[295] Canada may not have come into existence.[296] Section 29 may have been included only for certainty to ensure the compromise continues to work practically, but work it does. A Saskatchewan Court of Queen's Bench (as it then was) decision that arguably did not give sufficient weight to section 29 was not only overturned on appeal,[297] but resulted in the Saskatchewan government invoking the notwithstanding clause to promote legal certainty. Given the practical chaos that followed the trial

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291 *Ontario Reference*, *supra* note 120 at 1197.

292 Kevin P Feehan, "How Catholic Education Rights Have Shaped the History of Canada" (Paper delivered at Theory and Praxis in Catholic School Administration, CSA 573, Newman Theological College, 9 October 2009) [unpublished].

293 International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171, art 14(5) (entered into force 23 March 1976, accession by Canada 19 May 1976), as interpreted in *Waldman v Canada* (1999), UN Doc CCPR/C/67/D/694/1996.

294 *Ontario Reference*, *supra* note 120 at 1197–98.

295 *Ontario English Catholic Teachers' Assn*, *supra* note 122 at para 3.

296 ArchEdmonton, "A History of the Right to Catholic Education w/Justice Kevin Feehan" (2 November 2022, speech delivered at Newman Theological Seminary, Edmonton, Alberta, 22 October 2022, online (video): <youtube.com/watch?v=LQj6yc3PCzU>; Feehan, *supra* note 292.

297 *Good Spirit*, *supra* note 131, rev'g, *Good Spirit School Division No 204 v Christ the Teacher Roman Catholic Separate School Division No 212*, 2017 SKQB 109.

decision, and the need for certainty, this has been viewed as a relatively uncontroversial use of the notwithstanding clause.[298] There is no reason to depart from the orthodox interpretation of section 29 as a non-rights-granting interpretative provision. If anything, its text, particularly in French, may be most helpful for understanding section 25, as noted above.

F. Section 30: The Simplest Provision (But for Nunavut)

Section 30 has been interpreted so that generic references to provinces and provincial legislative assemblies include territories and territorial legislative assemblies. There is no reason that this should be interpreted in any other way even if, pursuant to section 31, the territories have not become the "equals" of the provinces for purposes of the division of powers.[299]

The specific language of section 30 does lead to an interesting question as to whether it includes Nunavut, which did not exist in 1982. This has not been litigated to date. The spirit of the section would certainly seem to encompass Nunavut, as does the marginal note "[a]pplication to territories and territorial authorities".[300] Moreover, the section also was not amended to reflect the change of the name of the Yukon Territory to simply Yukon. This may be an academic question as: most actions of Nunavut/its legislative assembly are delegated to it by Parliament, making the *Charter* clearly applicable;[301] the

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[298] Dwight Newman, "Canada's Notwithstanding Clause, Dialogue, and Constitutional Identities" in Geoffrey Sigalet, Grégoire Webber & Rosalind Dixon, ed, *Constitutional Dialogue*, (Cambridge: Cambridge University Press, 2019) 209 at 228–29; Joanna Baron & Geoffrey Sigalet, "Saskatchewan's Brad Wall and the rehabilitation of the *Charter*", (19 May 2017), online: <policyoptions.irpp.org/fr/magazines/mai-2017/saskatchewans-brad-wall-rehabilitation-charter/>.

[299] *Ténoise*, *supra* note 140 at para 33.

[300] *Charter*, *supra* note 1, s 30.

[301] Department of Justice Canada, "Federal Legislation and the Private Law of the Canadian Territories: An Argument for Complementarity" (last modified 25 August 2022), online: <justice.gc.ca/eng/rp-pr/csj-sjc/harmonization/gaudr/territories/p1.html>. All matters relating to

possibility that Nunavut would not challenge any argument that the *Charter* applies to it; or, most likely, that the legislative authority of the Northwest Territories from 1982 has been reorganized by Parliament such that it now has constituent parts in Nunavut and Northwest Territories (and their legislative authorities).[302] Even so, the specific obligations imposed on provinces by sections 3–5 are positive obligations[303] on provinces that are distinguishable from most other "delegated" authority. Section 30 appears necessary to ensure these democratic rights are applicable to territorial elections/legislative assemblies in a way that they are not to municipalities.[304] Indeed, in this vein, as noted above, section 30 may be the only provision in sections 25–31 that was truly "necessary" to include, with the others perhaps being better construed as (understandable) "for greater certainty" provisions. As such, a constitutional amendment to include Nunavut may be prudent given the specificity of section 30.

G. SECTION 31: KEEPING IT SIMPLE?

Much like section 29, section 31's purpose seems self-evident: to not affect the division of powers. However, Schutten and Ewart observe, accurately, that this could have been more precisely achieved had the provision kept the wording in a previously

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Nunavut are "matters within the authority of Parliament" under s 4 of the Constitution Act, 1871 (and POGG, etc.), such that s 32(1)(a) provides that the Charter is generally applicable to the Nunavut legislature and government in the exercise of the authority delegated to them by Parliament.

302 Thanks to Malcolm Lavoie, Dennis Buchanan, and Emmett Macfarlane for making this observation. See also Tony Penikett & Adam Goldenberg, "Closing the Citizenship Gap in Canada's North: Indigenous Rights, Arctic Sovereignty, and Devolution in Nunavut" (2013) 22:1 Michigan State Intl L Rev 23 at 29.

303 As noted by Côté and Brown JJ in *Frank v Canada (Attorney General)*, 2019 SCC 1 at paras 113, 124, 142 (dissenting in the result, but this observation seems undeniable).

304 As noted in *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34, the omission of municipalities from s 3 was "a deliberate omission" at paras 81–82.

proposed version of a bill of rights that Pierre Trudeau had helped develop. That previous version clearly indicated that it did not expand the powers of Parliament and the provincial legislatures, rather than "any body." As such, they propose that section 31 should be used to constrain rights-limiting actions of administrative bodies that would not have been permitted prior to 1982.[305] Like certain more expansive readings of section 28, this is not implausible on its face, and there were indeed submissions from the *Charter*'s drafting that would suggest that the provision could have this meaning. Insofar as anyone argues that the *Charter*'s enactment gives administrative bodies more power, Schutten and Ewart's understanding appears unimpeachable. Indeed, Léonid Sirota accused the majority of the Supreme Court of using the *Charter* to expand powers of law societies, contrary to section 31, in *Law Society of British Columbia v Trinity Western University*.[306] However, insofar as Schutten and Ewart suggest that section 31 precludes administrative agencies from being given rights-limiting powers, whether they had them in 1982 or were given them subsequently by legislation, this "trump-like" interpretation is more questionable. It appears in contradiction to Tassé's understanding (remembering that Tassé did/oversaw much of the drafting and had the ear of Trudeau and Chrétien).[307] Section 31 may well have used the broader language of "any body" as opposed to "legislature" to ensure municipalities and territorial governments are captured within its meaning, as well as to ensure that the *Charter* does not expand administrative bodies' statutory powers. Even so, it appears as though *legislation* could expand those statutory powers, even if the *Charter* does not.

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[305] Schutten & Ewart, *supra* note 5 at 5, 13–14.

[306] 2018 SCC 32, criticized by Professor Sirota in "The Supreme Court v the Rule of Law", *Double Aspect* (18 June 2022), online: <doubleaspect.blog/2018/06/18/the-supreme-court-v-the-rule-of-law/>.

[307] Eric Andrew-Gee & Tu Thanh Ha, "Roger Tassé, architect of Canada's Charter of Rights and Freedoms, dead at 85", *The Globe and Mail* (26 May 2017), online: <theglobeandmail.com/news/politics/roger-tasse-was-an-architect-of-canadas-charter-of-rights/article35136541/>.

As such, and in line with the spirit of Schutten and Ewart's thesis, it is probably fair to conclude that the adoption of the *Charter* cannot in itself be used to expand the powers of administrative, territorial,[308] or municipal bodies. It is probably particularly important to emphasize this in an era where "*Charter* values" are often used to justify administrators' rights-limiting actions. There is much to be said for the proposition that courts have become too sanguine about the administrative state limiting *Charter* rights:[309] indeed, I have done some of the saying.[310] Nonetheless, insofar as they argue that section 31 precludes legislatures from expanding administrative powers, Schutten and Ewart have proposed an interpretation of section 31 that expands the judicial role vis-à-vis invalidating government action, and is inconsistent with precedent. In this vein, it is distinguishable from the "stronger" interpretation of section 25.

Moreover, Schutten and Ewart accept that section 31 does not grant rights. Rather, it constrains bodies.[311] As such, it remains an interpretative provision, albeit one that constrains administrative bodies as well as federal and provincial legislatures. Accordingly, their proposed interpretation of the provision is not necessarily in conflict with this article's conclusion. Rather, they propose that it be used as a "trump" to restrict expansion of the administrative state.

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[308] *Ténoise*, *supra* note 140 at para 33.

[309] See criticisms of the Supreme Court of Canada's decision in *Doré v Barreau du Québec*, 2012 SCC 12, both judicially (see e.g. the opinions of McLachlin CJ, Rowe J, and Coté and Brown JJ in *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at paras 166, 176, 206, 266, 302–305, 312), and extrajudicially (see e.g. The Honourable Justice Peter Lauwers, "What Could Go Wrong with *Charter* Values?" (2019) 91 SCLR (2d) 1 at paras 6, 12, 191–202, 244, 265–276; Audrey Macklin, "Charter Right or Charter-Lite? Administrative Discretion and the Charter" (2014) 67 SCLR (2d) 561; Christopher D Bredt & Ewa Krajewska, "*Doré*: All That Glitters Is Not Gold" (2014) 67 SCLR (2d) 339).

[310] Leonid Sirota, "Day Five: Gerard Kennedy", (29 December 2018), online: <doubleaspect.blog/2018/12/29/day-five-gerard-kennedy/>.

[311] Schutten & Ewart, *supra* note 5 at 30–31.

IV. CONCLUSION

This article has had both doctrinal and normative goals. Doctrinally, it is hoped that Part I becomes a single place where judges, lawyers, law students, and legal scholars can consult to understand how courts have to date interpreted, individually and collectively, the "General" provisions in the *Charter*. Normatively, it is posited that courts have generally done a good job at interpreting these provisions and they should all continue to be interpreted as non-rights-granting interpretative provisions. This is not an instance where case law is internally incoherent or indefensible. Rather, the doctrine to be applied accords with many different principles of constitutional interpretation. This does not render the provisions meaningless: far from it. Nor does it entirely solve how they are to be interpreted. Further details will need to be resolved in future cases, particularly for sections 25 and 28, and the latter's relationship with section 33. This article does give a framework for their interpretation, but the details will need to follow.

Of course, one *could* query whether most of the "General" provisions were necessary to include in the *Charter*, and whether a jurisdiction such as Australia would be wise to include such provisions. Section 30 is the only one whose inclusion was necessary, and its necessity could have been avoided had sections 3–6 been worded differently. The provisions have tended only to be helpful around the margins. But the ultimate wisdom of including them can be a question left for another day.

Recent years have seen more division on the Supreme Court on matters of constitutional interpretation, often focussed on the primacy of text and how broadly the *Charter* should be interpreted.[312] But there are clearly constraints. As McIntyre J observed in the *Alberta Labour Reference*:

> [W]hile a liberal and not overly legalistic approach should be taken to constitutional interpretation, the *Charter* should not be regarded as an empty vessel to be filled with whatever meaning we might wish from time to time. The interpretation of

[312] See the dispute between the majority and concurrence in *Québec inc*, *supra* note 118, and the discussion thereof in MacDonnell, *supra* note 172.

> the *Charter*, as of all constitutional documents, is constrained by the language, structure, and history of the constitutional text, by constitutional tradition, and by the history, traditions, and underlying philosophies of our society.[313]

This article, in part, seeks to ensure that McIntyre J's wisdom is not forgotten.

ADDENDUM

After this article was accepted for publication and posted to SSRN, and while the galleys were being set, two highly consequential decisions were released: the Supreme Court of Canada's decision in *Dickson*[314] and the Quebec Court of Appeal's decision in *Hak*.[315] As noted above in the methodology section, this article sought to accurately state the law as of mid-2023. The cases accordingly do not fall within the article's methodology. Moreover, integrating the cases was not practical given timing considerations. Most importantly, Rowe J cited the SSRN version of this article in his separate non-majority reasons in *Dickson*. It thus seemed inappropriate to substantively change the article after this.

At the same time, the cases are of such importance that this brief addendum is appropriate to underscore that neither affect this article's thesis and to direct readers to where they can learn more regarding the cases' doctrinal implications. *Dickson* held that section 25 is indeed an interpretative provision, albeit a "trump" (at least in certain circumstances) that directs courts to prioritize Aboriginal rights over *Charter* rights in the event of a prospective conflict. Writing for the majority, Kasirer and Jamal JJ underscored that section 25 does not guarantee rights in itself but protects other Aboriginal rights from being found to be inconsistent with the *Charter*. They provided a framework that is now determinative regarding section 25's applicability and powers. Interestingly, they also held that section 28 may "limit"

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313 *Alberta Labour Reference*, *supra* note 13 at para 151.

314 *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 [*Dickson* SCC].

315 *Organisation mondiale sikhe du Canada c Procureur général du Québec*, 2024 QCCA 254 [*Hak* QCCA].

section 25's protections, though they never suggested that section 28 grants rights in itself.[316] For more information regarding the framework prescribed by the majority in *Dickson*, see *The Charter of Rights in Litigation*.[317]

In *Hak* QCCA, on the other hand, the Court adopted the orthodox interpretation of section 28, holding that the provision is a guide, not a trump, and has no bearing on section 33 of the *Charter*. Andrew Bernstein, Yael Bienenstock, Jeremy Opolosky, Marie-Ève Gingras, Alex Bogach, and Jon Silver have succinctly summarized the case.[318]

316 *Dickson* SCC, *supra* note 314 (describing s 25 as "subject to the equality guarantee" at para 110; noting that s 25 is subject to "limitations" of s 28 at para 173; referring to "limits imposed by s 28" at para 182; referencing "limits[…]imposed in relation to s 28" at para 227).

317 Kennedy, *Charter*, *supra* note 9 at §§48:2–48:3.

318 Andrew Bernstein et al, "Court of Appeal upholds Québec's *Act respecting the laicity of the State*" (4 March 2024), online: <torys.com/our-latest-thinking/publications/2024/03/la-cour-dappel-du-qc-valide-la-loi-sur-la-laicite-de-letat>.