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Résumé de l'article

La *Charte canadienne des droits et libertés* offre une certaine protection constitutionnelle aux corporations aux titres des libertés fondamentales et des garanties juridiques. L'ambiguïté du libellé des dispositions relatives à la liberté de circulation et d'établissement et aux droits à l'égalité rendent incertaines leur application aux corporations. Le raisonnement de l'arrêt *Big M* pourrait indirectement assurer une protection constitutionnelle aux corporations. Si la définition de la portée de la Charte constitutionnelle, et partant, la détermination de son impact sur les plans social et politique doit demeurer essentiellement l'oeuvre du judiciaire, une autre solution, celle-là liée à un processus général de révision constitutionnelle, pourrait marquer la définition des objets de la *Charte des droits et libertés de la personne* du Québec.

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Corporations and constitutional guarantees

Elizabeth FOSTER*

La Charte canadienne des droits et libertés *offre une certaine protection constitutionnelle aux corporations aux titres des libertés fondamentales et des garanties juridiques. L'ambiguïté du libellé des dispositions relatives à la liberté de circulation et d'établissement et aux droits à l'égalité rendent incertaines leur application aux corporations. Le raisonnement de l'arrêt* Big M *pourrait indirectement assurer une protection constitutionnelle aux corporations. Si la définition de la portée de la Charte constitutionnelle, et partant, la détermination de son impact sur les plan social et politique doit demeurer essentiellement l'œuvre du judiciaire, une autre solution, celle-là liée à un processus général de révision constitutionnelle, pourrait marquer la définition des objets de la* Charte des droits et libertés de la personne *du Québec.*

Certain constitutional guarantees are now clearly available to corporations, under the Canadian Charter of Human Rights and Freedoms, *in the areas of Fundamental Freedoms and Legal Rights. Ambiguous terminology in the provisions dealing with Mobility and Equality Rights leaves the status of corporate applicants uncertain. The rationale of* Big M *may guarantee constitutional protection to corporations as indirect beneficiaries of rights to which they have no direct access. Whereas in the case of the Canadian Charter, responsability for the clarification of the scope and thereby of the political and social impact of the guarantees is likely to remain with the courts, an alternative solution may be available in Quebec. Clarification and/or reconsideration of the objectives of the Quebec* Charter of Human Rights and Freedoms, *as they are defined through the identification of its beneficiaries, could take place in the context of general constitutional review.*

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Whatever may have been the original purpose of a Charter of Rights it is clear, in the case of the *Canadian Charter of Rights and Freedoms*, that the constitutional guarantees contained therein can no longer be characterized as providing a shield to protect the rights of the individual citizen — with exceptional protection afforded by certain provisions dealing with rights to which he becomes entitled as a member of a particular group. It is clear from the case law that corporations share with citizens the benefits of many of these constitutional guarantees.

The first and major part of this paper consists of an overview of the case law to date and a summary of the types of guarantees afforded by the courts to corporate applicants under the Canadian Charter.

Discussion focusses on those sections of the Charter which have been interpreted in such a manner as to offer protection to corporations, and on those provisions in which the use of ambiguous terminology raises

1. Part I of Schedule B to the *Constitution Act, 1982*, c. 11(U.K.), in R.S.C. 1985, App. II, No. 44.
2. *Quebec Charter of Human Rights and Freedoms*, R.S.Q., c. C-12.

doubts as to the scope of the guarantees and the nature of the beneficiaries. Some apparent inconsistencies in Charter interpretation are considered and the possibility of an extension of the range of Charter guarantees available to corporations is discussed in the context of the various sections.

No reference is made to those rights and freedoms which are clearly not applicable or concerning which no serious question has been raised as to their availability to corporate beneficiaries.

In a second and minor part of the paper the author notes that the present state of Canadian Charter jurisprudence can satisfy neither those who view a Charter of Rights as a shield primarily designed to protect the rights and freedoms of human beings, nor on the other hand the advocates of adequate constitutional guarantees for corporate interests. In the absence of political direction, ambiguous terminology concerning Charter beneficiaries has placed an unjustifiable burden upon judges, who are understandably reluctant to shoulder the full responsability for societal choices with far-reaching political and economic consequences.

The point is made that, whereas in the case of the Canadian Charter responsability for the clarification of the scope and thereby of the political and social impact of the guarantees must continue to be the unhappy lot of superior court judges, an alternative solution may be available in Quebec. The evolutionary drift of Canadian Charter interpretation, as it identifies the beneficiaries and thereby defines the social impact of constitutional rights, could provide valuable lessons in an eventual review of the constitutional status and objectives of another Charter of Rights — one to which the case law discussed below may or may not be considered totally relevant.

In the context of eventual constitutional review, the case is made for a clarification and/or reconsideration of the objectives of the *Quebec Charter of Human Rights and Freedoms* as they are defined through the identification of the beneficiaries of its guarantees.

1. Corporations and the *Canadian Charter of Rights and Freedoms*

Constitutional protection is now available to corporations with regard to a number of the rights and freedoms guaranteed by the *Canadian Charter of Rights and Freedoms*. Section 24(1) sets out a remedy for "individuals", whether real persons or artificial ones such as corporations, whose rights under the Charter have been infringed[3].

3. *R.* v. *Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, p. 313.

In general, Charter interpretation has resulted in the inclusion of corporations under the terms "everyone", "anyone" and "any person", except where the right by its nature is considered not to be applicable to corporate beneficiaries[4].

Constitutional guarantees are clearly available in the areas of Fundamental Freedoms and Legal Rights. The exclusion of corporations from the benefits offered under the Equality Rights and Mobility Rights provisions of the Charter is examined and the possibility of the extension of certain guarantees to cover corporations is considered in the context of the various sections.

1.1. Fundamental freedoms

1.1.1. Section 2(a) — Freedom of religion

In the case of *R.* v. *Big M Drug Mart Ltd.*[5] the question of whether a corporation can enjoy or exercise freedom of religion was found to be irrelevant by the Supreme Court of Canada. A law which itself infringes religious freedom is, for that reason alone, inconsistent with s. 2(a) of the Charter and it matters not whether the accused is a Christian, Jew, Muslim, Hindu, Buddhist, atheist, agnostic or whether an individual or a corporation. It is the nature of the law, not the status of the accused that is in issue[6]. Any accused, whether corporate or individual, may defend a criminal charge by arguing the constitutional invalidity of the law under which the charge is brought[7].

1.1.2. Section 2(b) — Freedom of expression

Corporations may enjoy the freedom of expression guaranteed by section 2(b) of the Charter. After a prolonged debate which saw the appeal courts divided on the issue, the Supreme Court of Canada, in the case of *Ford* v. *Quebec (A.G.)*[8], decided in favour of the inclusion of commercial expression within the ambit of the protection afforded by this provision. Freedom of commercial expression while avalaible to both the individual and the corporate beneficiary is, of course, of primary interest to the latter.

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4. See P.W. Hogg, *Constitutional Law of Canada*, 2d. ed., Toronto, Carswell, 1985, p. 667.
5. *R.* v. *Big M Drug Mart Ltd.*, *supra*, note 3.
6. *Id.*, p. 314.
7. *Id.*, p. 316.
8. *Ford* v. *Quebec (A.G.)*, [1988] 2 S.C.R. 712.

According to the reasoning of the Supreme Court, to know what is protected by the freedom of expression, one should ask whether there is a reason why the guarantee should not extend to a particular kind of expression, rather than ask whether the guarantee should be construed as extending to particular categories of expression[9]. Commercial expression which protects listeners as well as speakers, plays a significant role in the development of the individual and of personal autonomy. In accordance with the principle that the rights and freedoms guaranteed in the Charter should be given a large and liberal interpretation, there was, in the opinion ot the Supreme Court, no sound basis on which commercial expression could be excluded from the protection of s. 2(b) of the Charter[10]. It was, however, noted with regard to other juridictions that commercial expression does not always enjoy the same degree of protection as other forms of constitutionally protected expression.

Similarly, in the case of *Irwin Toy Ltd.* v. *Quebec (A.G.)*[11] the Supreme Court favoured a broad interpretation of the freedom of expression guaranteed by s. 2(b), so as to protect the right to undertake commercial advertising. In this case, however, statutory limitations were justified according to the criteria established by section 1 of the Canadian Charter and by section 9.1 of the Quebec Charter.

The inclusion of corporate activities within the ambit of the protection offered by section 2(b) has given rise to interpretations of the meaning of freedom of expression which sometimes display a suprising degree of broadness and liberality. For example, in the case of *Institute of Edible Oil Foods et al* v. *R.*[12], the court was of the view that the colour in which margarine is presented to the public constitutes a form of expression protected by s. 2(b). However, provincial legislation aimed at controlling the colour of this product was found to meet the criteria of section 1 of the Charter.

That the freedom of the press and other media of communication specifically included in the freedom of expression guaranteed by s. 2(b) is not restricted in its application to individual members of the media is clear from the case law. This guarantee has been successfully invoked by business entities including corporations[13].

9. *Id.*, p. 756.
10. *Id.*, p. 766-767.
11. *Irwin Toy Ltd.* v. *Quebec (A.G.)*, [1989] 1 S.C.R. 927.
12. *Institute of Edible Oil Foods et al.* v. *R.*, (1987) 47 D.L.R. (4th) 368 (Ont. H.C.); conf. Dec. 1989 (C.A.); leave to appeal refused, S.C.C. Sept. 1990.
13. See for example : *Edmonton Journal* v. *Alberta (A.G.)*, [1989] 2 S.C.R. 1326 ; *Toronto Sun Publishing Corp.* v. *A.G. Alberta*, (1985) 6 W.W.R. 36 (Alta C.A.).

1.1.3. Section 2(d) — Freedom of association

It has been argued[14] that the guarantee of freedom of association could be relevant in an economic context. It could include, for instance, the freedom to join trade associations or other business groupings, or the freedom "not" to join groupings of this kind that are made mandatory by legislation. (For example, compulsory industry-wide labour negotiations, or compulsory producer participation in marketing boards or similar schemes.) However, the possibility that s. 2(d) might guarantee the freedom "not" to associate, in whatever context, appears to have been ruled out, at least for the time being[15].

The fundamental question of whether the guarantee of s. 2(d) is available to corporations whose interests are economic in nature has so far received no direct response. However, the Supreme Court of Canada in *Re Public Service Employee Relations Act*[16] noted that the Charter, with the possible exception of s. 6, does not concern itself with economic rights, while Chief Justice Dickson described the purpose of the s. 2(d) guarantee as protecting individuals from the vulnerability resulting from isolation and assuring effective participation in society[17]. On the other hand, an "individual's" right to form an association in order to earn a living did receive constitutional protection under s. 2(d) in *Black* v. *Law Society of Alberta*[18].

Thus it appears that s. 2(d) may, in certain circumstances, protect rights which have a very significant, if not predominant, economic aspect but that such guarantees are only available to individuals. The interpretative problem presented by such a reading of s. 2(d) is that, in order to restrict this guarantee to individuals, the term "everyone" used in s. 2 must be interpteted differently for the various paragraphs of the section[19].

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14. W.D. Moull, "Business Law Implications of the Canadian Charter of Rights and Freedoms", (1984) 8 *C.B.L.J.* 449, p. 471.
15. *MacPhee* v. *Nova Scotia (Pulpwood Marketing Board)*, (1989) 56 D.L.R. (4th) 582 (N.S.C.A), leave to appeal refused : [1989] 2 S.C.R. viii; *Lavigne* v. *OPSEU* (1989) 56 D.L.R. (4th) 474 (Ont. C.A.), leave to appeal granted : [1989] 1 S.C.R.X.
16. *Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313, p. 412 (McIntyre, J.).
17. *Id.*, p. 334 (Dickson, C.J.).
18. *Black* v. *Law Society of Alberta*, (1986) 27 D.L.R. (4th) 527 (Alta. C.A.); appeal dismissed for other reasons : [1989] 1 S.C.R. 591.
19. See *infra*, discussion re notes 39, 40.

1.2. Legal rights

1.2.1. Section 7 — Life, liberty and security of the person

A corporation may not invoke section 7. In the opinion of the Supreme Court, "everyone" must be read in light of the rest of the section and defined to exclude corporations and other artificial entities incapable of enjoying life, liberty or security of the person[20].

This denial to corporations of the protection afforded by s. 7 is hard to reconcile with the observations of the Supreme Court in *Re B.C. Motor Vehicle Act*[21], concerning the relationship between s. 7 and ss. 8 to 14. In the opinion of Mr. Justice Lamer (as he then was) who delivered the majority judgment in this case, ss. 8 to 14 illustrate some of the parameters of the right to life, liberty and security of the person. They address specific deprivations of these rights in breach of the principles of fundamental justice, and as such are concerned with violations of s. 7. Among these illustrations of specific infringements of s. 7 there are cases where the beneficiaries of the guarantees are corporations (see below), as for example in the case of s. 8[22]. From this, it would seem to follow that the protection afforded by section 7 is not necessarily limited to natural persons.

In order to reconcile these seemingly contradictory conclusions concerning the beneficiaries of s. 7 and of ss. 8-14, one would have to assume that, whereas one of the purposes served by ss. 8 to 14 is to provide examples of instances in which a s. 7 right would be infringed, this is not the only purpose. In other words, where the victim is a natural person, an infringement of one of these guarantees could imply a breach of s. 7, but in a case where the beneficiary of one of the rights guaranteed by ss. 8 to 14 is not a natural person, for example a corporation, this intimate connection between s. 7 and the sections which follow does not exist. This argument, which would serve to remove any ambiguity with regard to the exclusion of corporations from the protection of s. 7[23], is not however supported by the subsequent observation of Lamer J. in *Re B.C. Motor Vehicle Act*. In the context of the discussion of the relationship between s. 7 and ss. 8 to 14 he notes that ss. 7 to 14 could have been fused into one section, with inserted between the words of s. 7 and the rest of

20. *Irwin Toy* v. *Quebec (A.G.)*, *supra*, note 11, p. 1004 ; *Zutphen Bros. Construction Ltd.* v. *Dywidag Systems International Canada Ltd.*, [1990] 1 S.C.R. 705, p. 709.
21. *Re B.C. Motor Vehicule Act*, [1985] 2 S.C.R. 486, p. 502.
22. *Hunter* v. *Southam Inc.*, [1984] 2 S.C.R. 145.
23. Now decreed by the Supreme Court in *Irwin Toy*, *supra* note 11.

those sections the provision "and, without limiting the generality of the foregoing (s. 7) the following shall be deemed to be in violation of a person's rights under this section"[24]. Such phrasing, within the ambit of s. 7 itself, would have excluded the possibility of any additional purpose for the guarantees now provided by s. 8 to 14—a purpose such as the protection of non-human beneficiaries, including corporations.

The conclusion of the Supreme Court in *Irwin Toy* and in *Zutphen Bros.* would seem to remove any lingering doubts concerning the nature of s. 7 beneficiaries and to suggest that the Chief Justice's fusion hypothesis must be set aside in the interest of a clear understanding of the relationship between s. 7 and ss. 8 to 14. However, in both *Irwin Toy* and *Zutphen Bros.*, the Supreme Court does in fact allow for an exception to the general principle that a corporation, which cannot be deprived of life, liberty and security of the person, cannot avail itself of the protection offered by s. 7. In noting in each case[25] that the principle articulated in *Big M* is not applicable since there are no penal proceedings pending, the Supreme Court appears to be allowing for the possibility that, under certain circumstances, a corporation might benefit, indirectly, from the guarantees afforded to individuals under s. 7. Such circumstances might arise, for example, in the case of a corporation charged with an absolute liability offence, if it could be shown that an individual, who "could" be deprived of life, liberty and security of the person, might be charged under the same legislative provision[26].

Thus the implications of the reasoning of the Supreme Court in *Irwin Toy* and *Zutphen Bros.*, combined with the logical difficulties arising from the various observations of the Court on the matter of the relationship between s. 7 and ss. 8 to 14 would seem to suggest a less than absolute bar on corporations, at least as "indirect" beneficiaries of the guarantees provided by s. 7.

It would seem necessary to admit of the possibility that a corporation might in certain circumstances rely upon s. 7, in order to avoid an anomaly which might otherwise result from the contrasting effects of ss. 7 and 11(d). Section 11(d) which guarantees the presumption of innocence and therefore affords protection against reverse onus clauses, is available to corporate defendants, according to the limited authority to date[27]. If it is the case that the s. 7 guarantee is not available to corporations, whereas

24. *Re B.C. Motor Vehicule Act.*, *supra*, note 21, p. 502.
25. *Irwin Toy Ltd.* v. *Quebec (A.G.)*, *supra*, note 11, p. 1004 ; *Zutphen Bros. Construction Ltd* v. *Dywidag Systems International Canada Ltd.*, *supra*, note 20. p. 709.
26. See discussion below, re s. 15.
27. See *infra*, note 33.

s. 11(d) which is more limited in scope does afford protection to corporate beneficiaries, we could be faced with an anomalous situation with regard to absolute liability offences and reverse onus clauses. Thus, in the case of a corporation, a legislative provision which afforded an opportunity for defence would be more likely, through the operation of s. 11(d), to be considered violative of corporate constitutional rights than would an absolute liability provision which admitted of no defence.

1.2.2. Section 8 — Search of seizure

Although the purpose of the section 8 guarantee is to "protect *individuals* from unjustified state intrusions upon their privacy" (my emphasis)[28], protection against unreasonable search was afforded to a corporation by the Supreme Court in *Hunter* v. *Southam Inc.*[29] According to the trial judge in this matter, the scope of s. 8 "should include all human beings and all entities that are capable of enjoying the benefit of security against unreasonable search"[30].

1.2.3. Section 11 — Proceedings in criminal and penal matters

According to the limited case law in the lower courts, "any person" within the meaning of s. 11 applies in principle to corporations[31].

However, not all the rights guaranteed under section 11 have been found applicable to corporate beneficiaries.

Under s. 11(b), a corporation charged with an offence has the right to be tried within a reasonable time[32].

Section 11(d) which guarantees to any person charged with an offence the right to be presumed innocent until proven guilty affords protection to corpoprate beneficiaries against "reverse onus" clauses frequently found in business-related statutes[33].

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28. *Hunter* v. *Southam Inc.*, *supra*, note 22, p. 160.
29. *Id.*
30. *Southam Inc.* v. *Hunter*, (1982), 136 D.L.R. (3d) 133 at p. 141, (Alta Q.B.) per Cavanagh J.; appeal allowed on other grounds, 147 D.L.R. (3d) 420 (Alta. C.A.); conf., *supra* note 22.
31. See e.g. *R.* v. *Unity Auto Body Ltd.*, (1988) 68 Sask. R. 3 (Q.B.); *Re Panarctic Oils Ltd. and The Queen*, (1983) 141 D.L.R. (3d) 138 (N.W.T.S.C.).
32. See e.g. *R.* v. *Grandma Lee's Inc.*, (1987) 24 C.R.R. 153 (D.C. Ont.); *R.* c. *Habitations Périgord*, (1989) R.J.Q. 439 (C.Q.); *Re Panarctic Oils Ltd. and The Queen*, *supra*, note 31.
33. *R.* v. *Ireco Canada II Inc.*, (1989) 43 C.C.C. (3d) 482 (C.A. Ont.); *R.* v. *Wholesale Travel Group*, L.W. 22.12.89 (C.A. Ont.); *Ascenseurs Leclerc* c. *Commission de la santé et de la sécurité du travail*, (1988) R.J.Q. 1858 (C.S.)

Certains paragraphs of s. 11 have been found not to apply to corporations. Since a corporation cannot be said to be a witness within the meaning of s. 11(c), it is not entitled to invoke this guarantee when an officer of the corporation is compelled to testify against it[34]. According to the Supreme Court, it would strain the interpretation of s. 11(c) if an artificial entity were held to be a witness[35].

The British Columbia Court of Appeal, in *P.P.G. Industries Canada and Attorney General of Canada*[36], found that s. 11(e) which guarantees that a person charged with an offence shall not be denied reasonable bail without just cause, does not apply to corporations. Likewise, the court found that s. 11(f) did not apply to a corporation. The majority of the court held that in the context of this paragraph the word "person" was not intended to include a corporation, but only natural persons who could in fact suffer the punishment of imprisonment for five years or more.

The general consensus, as evidenced by the available case law, is therefore to the effect that although certain paragraphs of s. 11 are not applicable, this provision may in principle apply to corporations. On the other hand, the distinction drawn by Nemetz, C.J.B.C. between the expression "everyone" as used in other sections and "any person" as employed in s. 11 would seem to lead to the opposite conclusion that s. 11 as a whole does not apply to corporations[37]. The Supreme Court, in holding that s. 11(c) did not apply to corporations, found that it was neither necessary nor desirable in the case under consideration[38] to decide that under no circumstances may a corporation avail itself of the provisions of s. 11. Thus the question remains open.

Mr. Justice La Forest, on behalf of the majority of the Court in *Canada* v. *Schmidt*[39] and in *R.* v. *Lyons*[40] opined that the expression "any person charged with an offence" in the opening words of s. 11 must have a constant meaning that harmonizes with the various paragraphs of the section. If in all cases a person charged with an offence must be capable of enjoying all the rights enumerated in s. 11 then a corporation, in so far as it clearly may not benefit from certain of the provisions contained therein, is not covered by the expression "any person charged with an offence"

34. *R.* v. *Amway Corp. Inc.*, [1989] 1 S.C.R. 21, p. 37.
35. *Id.*, p. 39.
36. *P.P.G. Industries Canada and Attorney General of Canada*, (1983) 146 D.L.R. (3d) 261, leave to appeal granted, [1983] 1 S.C.R. XI.
37. *Id.*, p. 267-68.
38. *R.* v. *Amway Corp. Inc.*, *supra*, note 34.
39. *Canada* v. *Schmidt*, [1987] 1 S.C.R. 500, p. 519.
40. *R.* v. *Lyons*, [1987] 2 S.C.R. 309, p. 353.

and must therefore be excluded from the protection afforded by the section as a whole. It is to be noted that Mr. Justice Lamer (as he then was) dissenting in part in *R.* v. *Lyons*[41], did not favour this "all-or-nothing" approach which would restrict the application of s. 11 to circumstances in which all of the rights set out therein were applicable.

Seaton J.A. in *Re PPG Industries Canada Ltd.*[42], addressing this issue in his dissenting opinion, attempted to reconcile the need, as he saw it, for a uniform interpretation of the expression "any person" with the fact that certain rights are obviously not applicable to corporations. In his view, it was simply a case of a corporation not "requiring" rights such as those guaranteed by paragraphs (c) and (e). The fact that a provision might not be useful to a particular accused or a particular type of accused does not indicate that the words "any person" do not describe him.

The question of the necessity of ascribing a constant meaning to the expression "any person" in s. 11 might perhaps be considered in light of the interpretation of s. 2 and the meaning ascribed to "everyone" in that provision. Freedom of peaceful assembly, freedom of thought and freedom of religion are clearly not relevant concepts when dealing with corporate activities. (The fact that a corporation may be said to "benefit" from the guarantee of freedom of religion[43], does not mean that it is, itself, a beneficiary of such a guarantee in the sense that the Charter guarantees that a corporation may exercise the freedom of religion[44].) On the other hand, freedom of expression including freedom of the press and other media of communication have been interpreted to apply to corporate beneficiaries, thus indicating that the term employed to designate the beneficiaries of s. 2—"everyone"—does not have a constant meaning. For the purposes of guaranteeing certain of the rights contained in s. 2, "everyone" is restricted to physical persons ; for others it may extend to include bodies corporate. It could be argued, therefore, in the context of s. 11, that the case for a constant meaning not being established as a matter of principle in Charter interpretation, the exclusion of corporations from the protection afforded by s. 11 will have to be grounded on some other principle.

1.3. Mobility rights—Section 6

Section 6(1) guarantees to every citizen of Canada the right to enter, remain in and leave Canada. Section 6(2) guarantees to every citizen of

41. *Id.*, p. 376.
42. *P.P.G. Industries Canada and Attorney General of Canada*, *Supra*, note 36, p. 108.
43. *R.* v. *Big M Drug Mart Ltd.*, *supra*, note 3.
44. See discussion below, in re. s. 15.

Canada and every person who has the status of a permanent resident of Canada the right to move to and take up residence in any province, and to pursue the gaining of a livelihood in any province.

Case law is scanty on the question of whether the use in s. 6(2) of the expression "every person" *(toute personne)*, which normally includes legal as well as natural persons, implies that corporations may avail themselves of this guarantee. According to the Federal Court (Trial Division), the protection provided by section 6(2) is limited to natural persons and does not extend to corporations[45].

Most legal commentators are in agreement that section 6 does not apply to corporations[46]. The primary objection to the inclusion of corporations within the scope of the protection offered by section 6 centres on the definition of the terms "citizen" and "permanent resident" under federal legislation. The *Citizenship Act*[47] and the *Immigration Act*[48] define these terms so as to include only natural persons.

It would be possible of course for the courts to give the terms some significance independent of federal statute law. For example, a corporation could be held to be a Canadian citizen, based on either incorporation within Canada or control by Canadian citizens. Moull[49] has argued that corporations have a "residence" for various purposes—for determining income tax liabilities, for example—and that the tests for determining corporate residence for income tax purposes import a large degree of permanence and may thus accord with the phrase "permanent resident" in section 6(2). According to this viewpoint, there is no reason why the definition of the term "permanent resident" as used in the *Immigration Act*, where it clearly applies to individuals only, should necessarily control the interpretation of a constitutional instrument.

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45. *Parkdale Hotel Ltd.* v. *A.G. of Canada et al.*, [1986] 2 F.C. 514 (T.D.).
46. See *e.g.* P. Blache, "Liberté de circulation" in G.A. Beaudoin and E. Ratushny, *Charte canadienne des droits et libertés*, Montréal, Wilson & Lafleur, 1989, p. 359; P. Bernhardt, "Mobility Rights: Section 6 of the Charter and the Canadian Economic Union", (1987) 12 *Queen's L.J.* 199; P.W. Hogg, *supra*, note 4, p. 668; C. Jacquier, "La liberté de circulation des étudiants au Canada: une liberté garantie et quasi absolue", (1985) 16 *R.G.D.* 511, p. 532; D.A. Schmeiser and K.J. Young, "Mobility rights in Canada", (1983) 13 *Man. L.J.*, 615, p. 627, J.B. Laskin, "Mobility Rights Under the Charter", (1982), 4 *Supreme Court L.R.*, 89, p. 90-91; *contra*: *W.D. Moull*, "Business Law Implications of the Canadian Charter of Rights and Freedoms", (1984) 8 *Can. Bus. L.J.* 449, p. 472.
47. *Citizenship Act*, R.S.C., 1985, c. C-29.
48. *Immigration Act*, R.S.C., 1985 c. 1-2.
49. W.D. Moull, *supra*, note 46.

Lee and Trebilcock are of the view that interpretation of the supreme law of the land should not be dependent upon the statutory act of a single level of government. The court must arrive at a constitutional definition of the terms "citizen" and "permanent resident". In so doing, the court may rely on various sources of meaning, including international law, and corporate law[50].

That the legislator, in framing this Charter provision, doubtless had in mind the current statutory definition is, of course, not a deciding factor (as is clear from the decision in *Re B.C. Motor Vehicle Act*[51] where the Supreme Court interpreted the expression "principles of fundamental justice" in section 7 in a manner which was, on the evidence, clearly contrary to the meaning as understood by the legislator at the time of the adoption of the Charter). However, the use of the term "citizen" in sections 3 and 23 of the Charter—Democratic Rights and Minority Language Education Rights—where the restrictive nature of the term is clear, lends further support to the argument that the meaning which accords with common usage and the current statutory definition is to be preferred. Similarly, the use of the expression "permanent resident" in close connection with the word "citizen" would imply that the term is to be defined here according to normal usage, as referring to the status of an individual as defined by one or other of the two acts mentioned above.

On the other hand, the nature of the rights accorded under s. 6 would not seem necessarily to militate against the inclusion of corporations as potential beneficiaries. The fact that the rights guaranteed by s. 6(1) (which on the plain meaning of the terms appear to relate to the physical mobility of natural persons) might not be relevant in the case of a corporation would not seem, of itself, to exclude the latter from the ambit of protection afforded by section 6(2), the beneficiaries of the two guarantees being clearly not identical. The fact that a corporation may not be considered to be a "citizen" for the purposes of section 6, and may not be the kind of entity that could benefit from the rights conferred by subsection (1) does not mean that it may not benefit from the rights guaranteed to "permanent residents" under subsection (2).

Within the context of section 6(2) it has been argued that corporations are excluded from the scope of the protection guaranteed because they are unable to benefit from one of the rights contained therein—the "right to pursue the gaining of a livelihood in any province". "Livelihood" could signify, in the corporate context, the carrying on of business,

50. T. Lee and M.J. Trebilcock, "Economic mobility and constitutional reform", (1987) 37 *U. of T. L.J.* 268, p. 284.

51. *Re B.C. Motor Vehicule Act*, *supra*, note 21.

and this without putting any greater strain upon the English language than is already evident in other areas of Charter interpretation. However, an even greater degree of literary licence is probably required in order to interpret the French version *(gagner leur vie)* in this manner. In the face of ambiguous terminology, the principe of a broad and liberal approach to Charter rights might be applied, should the courts, for social and political reasons, favour a wider interpretation which would include corporate beneficiaries.

A judicial interpretation which would deny the protection of s. 6(2)(b) to corporate beneficiaries would not necessarily exclude corporations from the benefits provided by other guaranties under this section. Should the position of the now Chief Justice prevail in the context of s. 11, rejecting the "all-or-nothing" approach, and thereby permitting a beneficiary to enjoy certain rights guaranteed by a provision, even though others contained in the same section may be unavailable to him, this principle of "selective benefit" could militate in favour of corporations in the context also of section 6(2). According to this approach, even if it were decided that the right contained in subsection 6(2)(b)—the gaining of a livelihood—could not be enjoyed by a corporate body, the right guaranteed in subsection (a) might still be available to corporations.

Finally, as Professor Hogg points out[52], such an extension of mobility rights to include corporations would represent a radical change in Canada's constitutional law, which has hitherto always denied full legal status to a corporation outside its jurisdiction of incorporation.

1.4. Equality rights—Section 15

Despite the ambiguous wording of s. 15 which, depending upon the choice of interpretative rule, could be understood to include corporations within the ambit of its protection, other factors taken together lead to a more restrictive interpretation of the scope of the guarantee. The legislative history of the provision, the objectives which the guarantee is designed to achieve, as evidenced by the indicia of discrimination established in *R.* v. *Andrews*[53], all point to the exclusion of corporations as direct beneficiaries of the guarantees provided by s. 15.

Such a conclusion as to the identity of the immediate beneficiaries, even if confirmed by the Supreme Court, would not provide an answer to the question of who may benefit "indirectly" from the protection afforded to natural persons. Decisions to date which have permitted

52. P.W. Hogg, *supra*, note 4.
53. *R.* v. *Andrews*, [1989] 1 S.C.R. 143.

corporations to benefit indirectly from the s. 15 guarantee, in accordance with the rationale of *Big M.*, have made the granting of such protection conditional upon the existence of criminal or penal proceedings. However, recent decisions by the Supreme Court would seem to suggest that the outcome of the debate will not turn on this single criterion. The issue would appear to involve some fundamental considerations concerning the matter of standing and the general effects of a declaration of constitutional invalidity.

1.4.1. Terminology

The beneficiaries of s. 15 are designated by the terms "individual" in the English version and *personne* and *tous* in the French version. The term *personne* can refer to either a natural person or a corporate body and *tous* is equally indefinite. Although the term "individual" has been used by Dickson J. to mean either real persons or artificial ones such as corporations[54], it is normally understood to exclude the latter[55].

An attempt to harmonize the French and English texts by finding a "common meaning" would suggest that the French text be "read down" so as to confine it to natural persons. However, the search for a common meaning, as an interpretative aid, is to be employed with caution. According to Beaupré, "even though as an initial step in the interpretation of an ambiguous provision, a construction is found that is common to both the English and French versions, that construction must be related back to and tested against the entire context of the provision before being settled upon."[56].

In the context of the Charter, the principle of a broad and liberal construction must be taken into consideration. According to this rule, the expression of the rights and freedoms enumerated must receive a generous interpretation aimed at fulfilling the purpose of the guarantee[57]. A broad and liberal construction of the language used in s. 15 could favour the wider meaning permitted by the phrasing of the French version, thus calling for the inclusion of corporations within the ambit of the protection afforded by this provision. But would such a generous interpretation fulfil the purpose of the guarantee ?

54. *R.* v. *Big M. Drug Mart*, *supra*, note 3, p. 313.
55. See e.g. P.W. Hogg, *supra*, note 4, p. 667.
56. R.M. Beaupré, *Construing Bilingual Legislation in Canada*, Toronto, Butterworths, 1981, p. 125.
57. R.M. Beaupré, *Interpreting Bilingual Legislation*, 2d ed., Toronto, Carwsell, 1986, p. 202 ; H. Brun, "Quelques notes sur les articles 1, 2, 7 et 15 de la *Charte canadienne des droits et libertés*", (1982) 23 *C. de D.* 781, p. 793 ; *R.* v. *Big M Drug Mart Ltd.*, *supra*, note 3, p. 344 ; *Hunter* v. *Southam Inc.*, *supra*, note 22, p. 156-7.

1.4.2. Legislative history and original intent

In examining the "entire context of the provision" one must look not only at the language employed but also at the general purpose of the guarantee. According to the documented legislative history of the section[58], the term "every individual" was substituted for the word "everyone" in order to make it clear that the right would apply to natural persons only. However, such legislative history in general, as an indicator of intent, is to be given "minimal weight" in the view of the Supreme Court[59]. The reliability of the historical evidence as to parliamentary intent in the case of s. 15 is further called into question by the ambiguous nature of the French version of the provision. Although it must have been apparent to any legal draftsman or legislator from Quebec that the term *personne* could be given a wider meaning, the necessary change was not made in the French version in order to make the restricted meaning clear.

Finally, even in circumstances where the original intent of the legislator appears to be well established, it is clear from the decision in *Re B.C. Motor Vehicle Act*[60] that such evidence is not determinative of the present scope of a constitutional guarantee.

1.4.3. The purpose of the s. 15 guarantee: the immediate beneficiaries

Except where a corporation invokes section 15(1) as a defence to criminal or penal liability, decisions to date in the lower courts limit the scope of this guarantee to the protection of human beings[61]. Justification for this restriction is founded not only upon the wording of s. 15(1), but also upon the enumerated heads of discrimination. The Supreme Court has not yet had occasion to consider in principle the matter of the standing of a corporation to invoke s. 15[62].

According to the Court of Appeal of British Columbia[63], a corporation does not qualify for the protection of section 15(1) not only because it

58. *Consolidation of Proposed Resolution and Possible Amendments as Placed before the Special Joint Committee by the Minister of Justice*, Jan. 1981, p. 7, together with explanatory notes.
59. *Re B.C. Motor Vehicule Act*, *supra*, note 21, p. 509.
60. *Id.*
61. *Smith, Kline & French Laboratories Ltd.* v. *A.G. Canada*, [1986] 1 F.C. 274, conf. at [1987] 2 F.C. 359 (C.A.); *R.* v. *Paul Madger Furs*, L.W. 12.5.89 (C.A. Ont.); *Milk Board* v. *Clearview Dairy Farm Inc.*, [1987] 3 W.W.R. 279 (B.C.C.A.); *Garderie Blanche-Neige Inc.* c. *Office des services de garde à l'enfance*, (1987) D.L.Q. 17 (C.S.); *Association des détaillants en alimentation du Québec* c. *Ferme Carnaval Inc.*, (1986) R.J.Q. 2513 (C.S.).
62. *Wolff & Co.* v. *Canada*, [1990], 1 S.C.R. 695, p. 703.
63. *Milk Board* v. *Clearview Dairy Farm Inc.*, *supra*, note 61.

is not an individual, but also because it has no race, national or ethnic origin, colour, religion, sex, age, mental or physical disability or any other comparable quality. However, as is now established by the decision of the Supreme Court in *Andrews* v. *Law Society of British Columbia*[64], the grounds of discrimination enumerated in s. 15(1) are not exhaustive. The section aims to protect against the enumerated and also against analagous grounds[65]. Both the enumerated grounds themselves and other possible grounds of discrimination must be interpreted in a broad and generous manner, reflecting the fact that they are constitutional provisions[66]. Citizenship was found by the Supreme Court in this same decision to be one such analagous ground.

The point has been made that "citizenship" and "residence" (which might arguably constitute another analagous ground) form a common basis of "discrimination" in a variety of pieces of corporate and regulatory legislation, and that corporations might thereby be granted access to the benefits of s. 15[67]. However, a determination as to whether the claimant belongs to an analogous category to those enumerated in s. 15 is to be made in the context of the place of the group in the entire social, political and legal fabric of our society[68]. Such an examination must determine if the group which is discriminated against by law constitutes a "discrete and insular minority" or displays indicia of discrimination such as stereotyping, historical disadvantage or vulnerability to political and social prejudice[69]. It is unlikely that a corporation, even if admitted to the category of "individual", would be able to show that it belonged to any such grouping[70].

1.4.4. Indirect beneficiaries

Although section 15(1) is not considered to include corporations as immediate beneficiaries, case law to date, in the lower courts, holds that a corporation may nevertheless invoke this guarantee in order to contest the constitutional validity of a law under which it is charged[71].

64. *R.* v. *Andrews*, *supra*, note 53, p. 175.
65. *Id.*, p. 182.
66. *Id.*, p. 175.
67. W.D. Moull, *supra*, note 46, p. 482-3.
68. *R.* v. *Andrews*, *supra*, note 53, p. 152.
69. *R.* v. *Turpin*, [1989] 1 R.C.S. 1296, p. 1333.
70. *Wolff & Co.* v. *Canada*, *supra*, note 62, p. 700.
71. *Cabre Exploration Ltd.* v. *Arndt*, (1986) 22 C.R.R. 319 (C.A. Alta); *Energy Probe and A.G. Can.*, (1988) 61 O.R. (2d) 65 (H.C.), rev. for other reasons at (1989) 58 D.L.R. (4th) 513 (Ont. C.A.).

The decision in *R.* v. *Big M Drug Mart Ltd.*[72] would seem to suggest, by necessary implication, that there exist two kinds of beneficiaries of Charter guarantees. There is the immediate beneficiary (human or otherwise, depending upon the right involved) who may apply to a court, under section 24(1), for enforcement of rights and freedoms which are guaranteed directly to him by the Charter. For example, in the circumstances of *Big M* a non-Christian individual obliged to "observe" the Christian sabbath and therefore unable for practical, economic reasons to observe his own sabbath would be the direct beneficiary of the freedom of religion guaranteed by s. 2(a). The corporation was the indirect beneficiary, benefiting in this case not from the guarantee of freedom of religion which it was obviously incapable of exercising, but from the effect produced upon the legislative provision in question by its infringement of this freedom as guaranteed to an individual. A law which itself infringes religious freedom is, by that reason alone, inconsistent with s. 2(a) of the Charter and it matters not whether the accused is an individual or a corporation. It is the nature of the law, not the status of the accused that is in issue[73].

Any accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid. In *Big M* the corporation argued successfully that the law under which it had been charged was inconsistent with s. 2(a) of the Charter and by reason of s. 52 of the *Constitution Act, 1982*, it was of no force or effect. Whether a corporation could enjoy or exercise freedom of religion was therefore irrelevant[74].

The rationale of the Supreme Court in *Big M* should apply in principle to any guarantee which is not directly available to a corporate litigant. As noted above, the argument has been used successfully in the context of s. 15 in cases where a corporation has relied upon the unconstitutionnality of a legislative provision to defend itself against a criminal or penal charge. However, the soundness of this argument in the context of s. 15 is yet to be tested by the Supreme Court.

In *Edmonton Journal* v. *Alberta (A.G.)*[75] La Forest, L'Heureux-Dubé and Sopinka J.J., who were dissident in part, opined that section 15 did not apply to corporations. However, in the view of the majority of the Court, consideration of the applicability of s. 15 was not necessary in the

72. *R.* v. *Big M Drug Mart Ltd.*, *supra*, note 3.
73. *Id.*, p. 314.
74. *Id.*
75. *Edmonton Journal* v. *Alberta (A.G.)* [1989] 2 S.C.R. 1326.

circumstances. Similarly, in the case of *Wolff & Co.* v. *Canada*[76], the Supreme Court found it "neither necessary nor advisable" to deal with the question of whether a corporation has standing to invoke section 15. In deferring consideration of this matter, the Court could be leaving open not only the question of whether a corporation may benefit indirectly from the guarantee of s. 15, but also the fundamental question of whether a corporation has standing to invoke s. 15 as a "direct" beneficiary. However, for the reasons discussed above and in light of the *obiter* comment in *Wolff* to the effect that the Crown is not a physical person with whom a comparison may be made[77], it seems likely that physical persons alone will be accorded the direct benefit of the guarantee and that future consideration of the potential standing of a corporation will focus on the question of its ability to raise, as an "indirect" beneficiary, the invalidity of a legislation provision as it effects a human being.

In allowing the appeal in *Zutphen Bros.*[78], the Supreme Court found that the impugned provisions did not constitute discrimination for the reason, as expressed in *Wolff*[79], that the legislation did not discriminate on enumerated or analogous grounds. The Court expressly left for future consideration the issue of whether a corporation has standing to invoke s. 15. In this same decision[80] but in the context of the denial of standing to a corporation to invoke s. 7, the Court did comment on the principle established by *Big M*, finding it not applicable because no penal proceedings were pending. The fact that it was unwilling to dispose in like manner of the issue of corporate standing under s. 15 would suggest that, in the context of this latter provision, the criterion of the presence or absence of penal proceedings might not suffice in the determination of the applicability of the *Big M* principle and of the standing of a corporation to rely upon the invalidity of a law violating the equality rights of an individual. In other words, even in circumstances where the criminal/penal condition is met, a corporation may yet be unable, in the case of s. 15, to rely upon the unconstitutional nature of a law vis-à-vis an individual. A corporation wishing to invoke s. 15 in its defence, may have to meet additional requirements in order to be granted standing.

76. *Wolff & Co.* v. *Canada*, *supra*, note 62, p. 703.
77. *Id.*, p. 700.
78. *Zutphen Bros. Construction Ltd.* v. *Dywidag Systems International Canada Ltd.*, *supra*, note 20.
79. *Wolff & Co.* v. *Canada*, *supra*, note 62, p. 703.
80. *Zutphen Bros. Construction Ltd.* v. *Dywidag Systems International Canada Ltd.*, *supra*, note 20, p. 709.

1.4.5. Further considerations

Certain elements and implications of the *Big M* decision call for clarification by the courts.

The result in *Big M* and the principle which it establishes raise certain issues concerning the effects of a declaration of invalidity and the related matter of standing to raise constitutional questions under the Charter. A discussion of such fundamental matters is beyond the scope of this paper[81], but it is perhaps useful to point to certain elements of the decision in *Big M* where judicial elaboration could be particularly helpful in the context of corporations and the s. 15 guarantee.

We are dealing with a decision of the Supreme Court of Canada and therefore, through the operation of the rule of authoritative precedent, the effects of the declaration of invalidity are far wider than those resulting from the simple authority of *res judicata* among the parties to the dispute. This does not imply, however, that such a declaration has authority *erga omnes*, although the phrasing of the decision in *Big M* might seem to suggest the latter interpretation. To say that "it is the nature of the law, not the status of the accused, that is in issue"[82] might suggest that, in the context of Charter rights, if a law is invalid, it is invalid for all purposes and for all parties.

But if the "nature" of the law remains constant, as appears to be the inference, then not only the "status" of the accused but also the judicial circumstances of the accused and indeed the circumstances of any party to the dispute must be irrelevant to the question of the applicability of that law. Once a legislative provision has been found to be unconstitutional it could be argued, given the apparent rationale of *Big M*, that it is unconstitutional *erga omnes* and that a corporate applicant should not be denied the right to rely upon a previous finding of unconstitutionality, regardless of whether the dispute involves an issue of criminal/penal liability.

Yet the fact that conditions are now clearly being imposed upon the ability of a corporate litigant to raise the matter of the invalidity of a law as it affects a natural person[83] would seem to imply, on the contrary, that such invalidity is not necessarily absolute. To assume otherwise could lead to the unfortunate inference that the courts, in restricting the

81. See for example, P.W. Hogg, *supra*, note 4, p. 344 f; B.L. Strayer, *The Canadian Constitution and the Courts: the function and scope of judicial review*; 3d ed., Toronto, Butterworths, 1988; S. Létourneau, "L'autorité d'un jugement prononçant l'inconstitutionnalité d'une loi", (1989) 23 *R.J.T.* 173.

82. *R.* v. *Big M Drug Mart Ltd.*, *supra*, note 3, p. 314.

83. See *supra*, note 79.

standing of parties to invoke such invalidity, were in effect imposing certain conditions upon the principle of the supremacy of the Constitution itself.

If one assumes that there is no implication in *Big M* of absolute invalidity and that the "nature of the law" in issue was in fact varying as to its invalidity, then the possibility that a statute could infringe upon the constitutional rights of some people and yet remain valid against others is not ruled out. (It has been argued[84] that the wording of s. 52(1) of the *Constitution Act 1982* — "to the extent of the inconsistency" — allows for this interpretation.) The issue then becomes one of standing to invoke the invalidity of a provision as it applies to an individual. The standing of a corporation to invoke such relative invalidity has been established with regard to s. 2(a)[85] and, by necessary implication, with regard to s. 7[86].

The question of the standing of a corporation to invoke s. 15(1) and the unconstitutional nature of a law which infringes upon the equality rights of an individual can be viewed from two different perspectives. First of all, there is the question of whether a corporation is to be granted standing to present evidence in an attempt to "convince" the court of the unconstitutional nature of a law vis-à-vis an individual. Secondly, there is the question of when a corporation may "rely upon" a finding of invalidity which has already been made, pursuant to an application by an individual who does have standing to invoke s. 15(1). This latter question raises again the issue of the scope of a declaration of invalidity under the Charter.

If we are to assume, as seems likely, that in the case of s. 15(1) the criminal/penal proceedings criterion will not suffice, what additional criteria might apply to a decision on the standing of a corporation to present evidence with regard to the alleged infringement of the rights of an individual? In the context of freedom of religion, the approach adopted by the Supreme Court of the United States has been proposed as a model. Thus a litigant charged with a breach of a statute would have to argue that the duty imposed on him by the statute would prevent either him, "or a citizen with whom he had a special connection", from asserting his or their rights[87]. According to this approach, although a corporation itself does not have the right to freedom of religion, it should have the standing

84. See W. Rozéfort, "Are Corporations Entitled to Freedom of Religion under the Canadian Charter of Rights and Freedoms?", (1986) 15 *Man L.J.* 199, p. 216-218.
85. *R.* v. *Big M Drug Mart Ltd.*, *supra*, note 3.
86. *Zutphen Bros. Construction Ltd.* v. *Dywidag Systems International Canada Ltd.*, *supra*, note 20.
87. W. Rozéfort, *supra*, note 84, p. 217.

to assert the rights of its officers or employees to such freedom. The corporation that has no employees or officers having to observe a day other than a Sunday, would have no standing to challenge the validity of a Sunday observance statute. Such a selective approach might be adopted with regard to the standing of a corporation to challenge the validity of legislation under s. 15(1).

The Supreme Court may eventually rule that a corporation may only be granted standing to challenge legislation, as it affects the equality rights of an individual, in the circumstances of a defence against criminal or penal charges with or without additional preconditions, or in circumstances where the corporation is engaged in "public interest litigation" and has fulfilled the status requirements laid down by the Supreme Court in the trilogy of "standing" cases[88]. If this is indeed the decision with regard to s. 15(1), then it is to be expected that, short of a clear statement on the part of the Supreme Court with regard to the limited scope of a declaration of invalidity, prospective corporate litigants will resort more and more to the device of "pre-determining" the law by funding test cases designed to meet their future evidentiary requirements. Where the circumstances of a case do not permit the joining of an individual plaintiff[89] whose circumstances allow for a decision on the constitutional issue under s. 15(1), corporate interests may yet set the constitutional stage by funding individuals in their private litigation or, where the issue is of a stricly commercial nature, by establishing sole proprietorships for the purpose of establishing the invalidity of a law which they themselves are unable to challenge directly.

Thus by restricting access to s. 15(1) guarantees in the case of corporations, we can expect to see an increase in the demands upon court time required to deal with cases which have been artificially scinded, and in which issues of vital social concern are dealt with in an inadequate fashion because the real players are disguised behind the masks of human litigants.

1.5. Economic rights

The question arises as to whether the Charter protects economic rights as such, as distinct from the indirect protection of economic interests which results from the granting to corporations of the protection

88. *Thorson* v. *A.G. of Canada*, [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors* v. *McNeil*, [1976] 2 S.C.R. 265; *Minister of Justice of Canada* v. *Borowski*, [1981] 2 S.C.R. 575.

89. *E.g. Smith, Kline & French Laboratories Ltd.* v. *A.G. Canada*, *supra*, note 61; *Parkdale Hotel Ltd.* v. *A.G. Canada*, (1986) 2 F.C. 514.

of rights such as the freedom of (commercial) expression. To what extent does the constitutional protection of economic rights, if it exists, redound to the favour of corporations ?

The question of whether the Charter is in any way concerned with economic rights was addressed in *Re Public Service Employee Relations Act*[90] and the answer appeared to be clearly negative — in the context of the debate over the right to strike. Thus McIntyre J. observes that, "with the possible exception of s. 6(2)b) (the right to earn a livelihood in any province) and par. 6(4) (affirmative action programs) the Charter does not concern itself with economic rights"[91].

In *Black* v. *Law Society of Alberta*, the Alberta Court of Appeal, in a judgment confirmed by the Supreme Court found that s. 2(d) protects the formation of an association for the earning of a living. The Supreme Court, in confirming this decision, noted that economic concerns undoubtedly played a part in the constitutional entrenchment of inter-provincial mobility rights, under s. 6(2) of the Charter[92].

In *Irwin Toy Ltd.* v. *Quebec (A.G.)*[93], the Supreme Court expressly did not rule out the possibility that rights with economic components might fall within the ambit of "security of the person" in section 7. However, the Court concluded that a corporation could not avail itself of the protection offered by s. 7[94].

2. Corporations and constitutional choices

2.1. Clarification and reconsideration of objectives

The present state of Canadian jurisprudence concerning the objectives of the Charter as reflected in the identification of its beneficiaries, can satisfy neither those who view a Charter of Rights as a shield primarily designed to protect the rights and freedoms of human beings, nor the advocates of adequate constitutional protection for corporate interests. On the one hand, through the extension of rights to corporations, the scope of these constitutional guarantees goes way beyond what was originally considered to be the field of operation of a Charter of "Human" Rights. On the other hand, if one accepts the rationale for the extension of such guarantees to legal persons, then it is hard to find a

90. *Re Public Service Employee Relations Act*, *supra*, note 16.
91. *Id.*, p. 412.
92. *Black* v. *Law Society of Alberta*, *supra*, note 18, p. 612.
93. *Irwin Toy* v. *Quebec (A.G.)*, *supra*, note 11, p. 1003.
94. *Id.*, p. 1002.

logical and philosophical justification for the many chinks in the panoply of corporate constitutional armour.

In the absence of political direction, judges are left to wrestle with the inconsistencies arising out of the interpretation of ambiguous terminology concerning Charter beneficiaries. In the context of the Canadian Charter, it seems that they must continue to shoulder the burden of responsability for what should be clearly recognized as political decisions with far-reaching social and economic consequences. In Quebec, however, the opportunity for clarification and reconsideration of the objectives of Charter guarantees could soon be afforded in the overall context of constitutional review.

In the present climate of consititutional uncertainty which may well give rise in Quebec to a reconsideration of, among other things, the status of the *Charter of Human Rights and Freedoms*, it is perhaps not too early to begin some re-thinking about the primary purposes of this document which, depending upon the outcome of the major constitutional debate, might no longer be subject to interpretative rules derived from Canadian Charter decisions[95].

Corporate beneficiaries may be well suited with the evolutionary drift of the Canadian Charter and, in its tow, of Quebec Charter jurisprudence. However, if they wish to preserve their current status, arguments must be prepared in advance of constitutional review, in order to meet the very significant case which can be made against an automatic acceptance of the *status quo* with regard to the beneficiaries of constitutional guarantees[96].

2.2. Constitutionally guaranteed human rights — the case against corporate beneficiaries

The proper approach to the interpretation of Charter guarantees is, according to the Supreme Court, the "purposive approach"[97]. If such guarantees are to be available to legal and natural persons alike, the identification of the purpose of a particular provision becomes extremely difficult, since the guarantee will serve different purposes for these different categories of beneficiaries. For example, as Professor Petter points out[98], in the case of the individual, the section 8 right to be free

95. For example, certain instances of judicial "transplants" such as the transfer from the Canadian Charter of the s. 1 *Oakes* tests for use in the application of s. 9.1 of the Quebec Charter may warrant closer scrutiny.
96. See for example, A. Petter, "The Politics of the Charter", (1986) 8 *Supreme Court L.R.* 473, p. 490 f.
97. *Hunter* v. *Southam Inc.*, *supra*, note 22, p. 156.
98. A. Petter, supra, note 96, p. 490-91.

from unreasonable search or seizure is a privacy right rather than a property right. While the privacy interests of human beings relate to their needs for psychological and bodily security, in addition to economic security, the privacy interests of corporations do not. To grant a corporation a privacy right is to grant it a property right pure and simple. Thus the search for the purpose of a guarantee becomes extremely difficult if the right in question is seen to serve the widely differing interests of both corporate and human beneficiaries.

Among the more telling arguments against the protection of corporate interests by means of a charter of human rights is one which can be derived from the reasoning of Mr. Justice McIntyre in *Re Public Service Employee Relations Act*: the overwhelming preoccupation of the Charter is with individual, political and democratic rights with conspicuous inattention to economic and property rights[99]. Any rights sought by a corporation are required for the purpose of enabling it the more successfully to fulfill the purpose for which it was established, which is essentially an economic purpose. To this extent, rights and freedoms guaranteed to corporations are in essence property and economic rights.

The other concern addressed by McIntyre J.[100] involves the nature of decisional processes in areas which are crucial to the maintenance of the balance between major and competing sectors or interest groups in our society. In the context of labour law, this concern was used as a criterion for deciding whether a court of law was the appropriate forum for deciding a major social issue.

Extensive statutory provisions already in place in the area of corporate law might suggest, as in the labour-law field, that we are dealing with a matter that is crucial to the continuing smooth working of our social institutions and that it is therefore an area best left to the judgement of democratically elected members of the parliament and legislatures, with all the technical and research tools at their disposal, and with all their variety and depth of knowledge and experience.

Finally, the purpose of a Charter of Rights is not to protect or guarantee a particular right or freedom as an abstract value but to ensure that power relationships in our society do not become "unbalanced" to the point where the liberty of the individual is restricted to a greater extent than democratic society generally considers to be reasonable and justifiable. If this is indeed the raison d'être of a document such as the Charter, what justification can we offer for extending such protection to

99. *Re Public Service Employee Relations Act*, *supra*, note 16, p. 413.
100. *Id.*, p. 412-418.

those institutions in our society which as a general rule do not suffer from the imbalance which affects the relationship between the individual and the state ?

2.3. The Quebec Charter of Human Rights and Freedoms

It is not evident from the wording of the *Quebec Charter of Human Rights and Freedoms* that corporations should necessarily benefit from the rights and freedoms guaranteed therein, to the extent and in a manner comparable to that established by Canadian Charter decisions[101]. Despite an apparent emphasis on the rights of human beings, however, it became clear from the beginning that the guarantees provided by the Quebec Charter would not be restricted to natural persons[102]. With the advent of the Canadian Charter, the debate on this issue shifted to another forum.

It is clear that in the present constitutional context there would be little practical point in interpreting the Quebec Charter in a more restrictive manner than the Canadian Charter, since the latter would prevail anyway. In the case of *Ford* v. *Quebec (A.G.)*[103], for example, not only was the guarantee of freedom of expression of s. 3 of the Quebec Charter interpreted in the same manner as the guarantee contained in s. 2 of the Canadian Charter, so as to protect commercial expression but, more significantly yet, the criteria to be applied in the assessment of the justification of "limits" to guaranteed rights under the former document were, in the view of the Supreme Court, identical to those employed in Canadian Charter decisions. Thus, despite the wording of s. 9.1 of the Quebec Charter which might suggest a primary concern for human and communal values not evident in the equivalent provision (s. 1) of the Canadian Charter, limits imposed on freedom of expression and on other rights and freedoms are to be judged under the two documents by identical criteria. As a result, any possibility that limits on corporate rights under the Quebec Charter might prove for practical purposes,

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101. The wording of the *Quebec Charter of Human Rights and Freedoms*, might, on the contrary, have led one to expect an exclusive concern for the protection of human beings. Although the French title contains the indefinite term *personne*, the English version is unambiguous in its reference to "human" rights and freedoms. The word *personne* is employed in one paragraph of the Preamble, the other four *considérant* clauses thereof containing the expressions *être humain*, or *personne humaine*. Again, in the English version there would appear to be no misunderstanding. The expressions are throughout "human being", "human person", "human rights".

102. See H. Brun, "La Charte des droits et libertés de la personne : domaine d'application", (1977) 37 *R. du B.* 179, p. 187.

103. *Ford* v. *Quebec (A.G.)*, *supra*, note 8.

through the use of different justificatory criteria, to be of a different order from those permitted by the Canadian Charter now seems to be ruled out.

Conclusion

Opportunity for the clarification and/or reconsideration of objectives, as reflected in the identification of the beneficiaries of Charter guarantees, may yet be afforded in Quebec through the medium of general constitutional review. If, at such time, a decision were reached that corporations should indeed benefit from the protection offered by a constitutionally enshrined Quebec Charter, this intent ought to be made clear in the wording of the appropriate guarantees. Corporate rights should not be left to emerge piecemeal from judicial interpretation.

If, on the contrary, constitutional protection for corporations were thought to be unnecessary or, alternatively, not appropriately provided through guarantees framed to protect human beings, then thought would have to be given to the question of whether corporations, or indeed any other would-be beneficiaries not covered directly by the Charter, should be able to use the Quebec equivalent of s. 52(1) (which would presumably be required in a constitutionally enshrined document) in order to benefit "indirectly" from the rights guaranteed to individuals.

There are ways of protecting corporate and other non-human rights without expecting a Charter of Rights and Freedoms to become the constitutional factotum, able to right all the wrongs of our society. Many would suggest that the damage being done to the environment and the need for protective guarantees in this area require immediate attention. We may indeed have to consider the constitutional entrenchment of certain principles of environmental protection. But surely such guarantees would not be included in a Charter of (human) Rights ? To give trees rights under a Charter and to try to decide upon appropriate measures for their protection in terms of human values could only confuse the issues and render logical, rational solutions — for humans or trees — impossible to achieve. Fortunately, however, the distinction between a human being and a tree is easy to grasp. Not so the distinction between people and corporations. As a result of a legal fiction (useful in the context of corporation law) the distinction between a natural person and a legal person has been blurred, with the result that the needs of human beings are confused with those of corporate entities — which in many cases are themselves as responsible as governments for the limitations imposed upon human rights and freedoms.

If we are to devise effective constitutional solutions to the fundamental problems of our society, we must start from the simple premise that

human beings, corporations and trees (which may all require, to varying degrees, protection of their "rights") face problems which are fundamentally different in nature, the solutions to which call for the consideration of vastly different principles and values—which are not to be found in a single constitutional "grab-bag" of rights and freedoms.