
Mobility Rights in the European Union and Canada

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The authors use mobility rights within Canada and the European Union to illustrate the idea that a federation is always a work in progress. Both Canada and the EU have been concerned with personal mobility since inception. In Canada mobility rights have been traditionally understood as a function of the law governing provincial legislative competence over business, professions, and services, and the interrelationship between these powers and federal jurisdiction. Since 1982, however, the *Canadian Charter of Rights and Freedoms* has enshrined a right to mobility in its section 6, which the authors examine to identify the provision's underlying objectives. Within the EU, in contrast, mobility is principally a right exercised by employees and employers to seek and give work, paralleled by the right of establishment of professional workers and the broader theme of the free movement of services. Through treaty amendment, legislation, jurisprudential change, and most recently, the *Charter of Fundamental Rights of the European Union*, EC law has expanded the meaning of mobility, resulting in a paradigm shift from the rights of workers to the rights, more generally, of persons, and latterly, of citizens. The Canadian experience suggests that while a constitutionalized right of mobility may become a central element of constitutional discourse, it does not signal a break from the past trend of incremental change. This lesson is relevant to the EU, where the process of constitutionalization is currently, if controversially, underway.

Les auteurs, à travers un examen de la liberté de circulation au Canada et dans l'Union européenne, remarquent qu'une fédération reste toujours un projet en évolution. Ainsi, les deux fédérations ont fait de la libre circulation des personnes une question importante depuis leur création. En droit constitutionnel canadien, la libre circulation était traditionnellement fonction du droit gouvernant la compétence provinciale en matière commerciale, professionnelle et de services, et de la relation entre ces pouvoirs et les champs de compétence fédéraux. Toutefois, depuis 1982, l'article 6 de la *Charte canadienne des droits et libertés* garantit la liberté de circulation et d'établissement, et les auteurs font état des objectifs sous-jacents à l'adoption de cette disposition. Dans l'Union européenne, par contre, la liberté de circulation est principalement un droit exercé par les travailleurs et les employeurs pour rechercher et offrir des emplois, qui s'inscrit en parallèle avec le droit d'établissement des professionnels et la question plus large de la libre circulation des services. Néanmoins, à travers des amendements aux traités, l'adoption de mesures législatives, l'évolution de la jurisprudence et la récente *Charte des droits fondamentaux de l'Union européenne*, le droit communautaire a élargi le champ d'application de la liberté de circulation, avec pour résultat un changement d'orientation pour celle-ci, des droits des travailleurs aux droits de la personne et du citoyen. L'expérience canadienne suggère que l'enchéassement du droit à la libre circulation, bien qu'elle tende à en faire un élément central du discours constitutionnel, ne signifie pas une rupture avec son évolution graduelle. Selon les auteurs, cette conclusion est pertinente au processus similaire en cours en Europe.

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Introduction

Comparison serves to reveal similarities and differences. Similarities emerge when two apparently different systems are revealed to have the same deep structure and to promote similar goals. Differences appear when it can be shown that two apparently similar systems have, in fact, quite different objectives and are actually designed to promote different values. Above all, comparison serves to reveal the true nature of a system to those trying to understand it. In light of such positive assumptions regarding the value of comparison, we posit that comparing the *Treaty on European Union*¹ and its companion *European Community Treaty*² with the Constitution of Canada is a worthwhile endeavour.

Comparisons have frequently been made between the U.S. Constitution, particularly its “commerce clause”,³ and certain aspects of the *TEU/EC Treaty*.⁴ Since the two units are of roughly the same size, and given their economic rivalry, the comparison seems natural. It is well-known that equals like to be compared, if only to display their respective superiority to others. As we hope to show in this article, however, a more telling comparison is possible between the *TEU/EC Treaty* and the Constitution of Canada.

¹ *Consolidated Version of the Treaty on European Union*, [1997] O.J. C. 340/2, 37 I.L.M. 67 [hereinafter *TEU*].

² *Consolidated Version of the Treaty establishing the European Community*, 10 November 1997, [1997] O.J. C. 340/3, 37 I.L.M. 79 [hereinafter *EC Treaty*].

³ U.S. Const. art. I, § 8, cl. 3.

⁴ See e.g. T. Sandalow & E. Stein, eds., *Courts and Free Markets: Perspectives from the United States and Europe*, 2 vols. (Oxford: Clarendon Press, 1982); M. Cappelletti, M. Seccombe & J. Weiler, eds., *Integration through Law: Europe and the American Federal Experience*, 5 vols. (Berlin: Walter de Gruyter, 1986); K. Lenaerts, ed., *Two Hundred Years of U.S. Constitution and Thirty Years of EEC Treaty* (Brussels: Kluwer, 1988); “Symposium: The European Union and the Treaty of Amsterdam” (1999) 22 *Fordham Int’l L.J.*; M. Zuleeg, “What Holds a Nation Together? Cohesion and Democracy in the United States of America and in the European Union” (1997) 45 *Am. J. Comp. L.* 505; J.C. Cohen, “The European Preliminary Reference and U.S. Supreme Court Review of State Court Judgments: A Study in Comparative Judicial Federalism” (1996) 44 *Am. J. Comp. L.* 421; M.J. Dundas, B.C. George & J.E. Hallas, “The Transposal Processes of the EC Directives and the U.S. Uniform Codes: A Comparative Analysis” (1998) 21 *B.C. Int’l & Comp. L. Rev.* 43; G.A. Bermann, “Taking Subsidiarity Seriously: Federalism in the European Community and the United States” (1994) 94 *Colum. L. Rev.* 331; J. Fitzpatrick, “The Lugano Convention and Western European Integration: A Comparative Analysis of Jurisdiction and Judgments in Europe and the United States” (1993) 8 *Conn. J. Int’l L.* 695; P.R. Hugg, “Transnational Convergence: European Union and American Federalism” (1998) 32 *Cornell Int’l L.J.* 43; T.C. Fischer, “‘Federalism’ in the European Community and the United States: A Rose by Any Other Name. . .” (1994) 17 *Fordham Int’l L.J.* 389.

One of the principal difficulties in comparing anything with the *TEU/EC Treaty* is that the European "Union", "Community", "Single Market" is not a finished concept. It is already much more than a customs union and it is unlikely to remain static as an economic union. It is a work in progress, and what may be said of it at any one time may cease to be true at a later time. Regardless of the manner in which one defines the rules and structures created by the *TEU/EC Treaty*, we believe that the EU is more properly compared with a federation, that is, a political entity, than with a free trade association. The presence of supranational law-making institutions and supreme law having direct effect on the citizens of each Member State, combined with the broad jurisdiction conferred upon the EC, have created a quantum difference between the EU and the many free trade associations that exist throughout the world today.

Comparing a newly emerging Europe with a well-established federal union that dates back to 1867 may, at first blush, appear to prejudice the question so many commentators are asking as to whether the European experiment has already metamorphosed into a federation of its own. We make no such claim; rather, one central conclusion of our comparative analysis is that, while existence in the form of a constitutionally established federation does entail certain consequences with respect to stability and longevity, a federation can also be described as a work in progress. However complex and tightly drafted the federal constitution may be, it is no assurance against the forces of change, which are in fact central to a healthy federation. If comparative constitutional law reveals anything, it is that change is inevitable and generally desirable.

Multiple points of comparison might be pursued, but we have chosen personal mobility to illustrate this article's thesis. Both Canada and the EU have been vitally concerned with the promotion and maintenance of personal mobility since inception. For a unitary state, mobility is virtually axiomatic, except under totalitarian conditions, but for a federation the matter is much more complex and will depend greatly upon the division of legislative powers. In Canada personal mobility has been seen as an incident of citizenship, but provincial jurisdiction over business and professional activities has often posed problems for citizens wishing to move physically from one province to another and to pursue economic activities. Within the EEC, then the EC, and now the EU, it has always been necessary to promote and define the exercise of the mobility rights of workers, persons, and services, as well as the rights of establishment. The process of definition has been long and complex and is certainly not yet complete. There is thus a common concern for mobility at different levels, including physical mobility, mobility as an economic value, mobility as an incident of citizenship, and finally, mobility as a human right. This article is therefore devoted to a single theme, but one that we believe illustrates a broader truth.

This article follows the internal logic of Canadian constitutional law and the different aspects of EC law designed to promote mobility. Thus in Part I mobility rights in the Canadian constitutional setting are understood initially as a function of the law governing provincial jurisdiction over business, professions, and services, including social and medical services, and the interrelationship between these heads of jurisdiction and federal jurisdiction over such matters as citizenship, criminal law, and inter-

provincial trade. After 1982 the dominant theme has become the exploration of mobility as a fundamental freedom, either seen as a right of personal mobility or an aspect of the complex right to equality. In Part II, while mobility in the EU is primarily a right exercised by employees and employers to seek and give work, it is paralleled by the right of establishment enjoyed by professional workers and the broader theme of the free movement of services. Through treaty amendment, legislation, and incremental change resulting from interpretation by the European Court of Justice ("ECJ"), EC law has expanded the meaning of mobility in many ways, including a paradigm shift from the rights of workers to the rights of persons, and lately, to the rights of citizens. The human rights dimension of mobility is gradually asserting itself through the same process.

I. Mobility Rights under the Constitution of Canada

The right to personal mobility has not been the subject of much attention by Canadian courts since its entrenchment.⁵ As Canadians are slowly struggling with its

⁵ The *Canadian Charter of Rights and Freedoms*, s. 6, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Canadian Charter*], reads as follows:

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

This article does not discuss issues related to the international mobility of Canadian citizens. See e.g. *United States v. Burns*, [2001] 1 S.C.R. 283, 175 D.L.R. (4th) 1; *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, 90 D.L.R. (4th) 289; *United States v. Cotroni*, [1989] 1 S.C.R. 1469, 96 N.R. 321; A.J. Arkelian, "Freedom of Movement of Persons between States and Entitlement to Passports" (1985) 49 Sask. L. Rev. 15; P. Blache, "Les libertés de circulation et d'établissement" in G.-A. Beaudoin & E. Mendes, eds., *The Canadian Charter of Rights and Free-*

meaning, extent, and application, they are at the same time trying to define its justifications and purposes. Lee and Professor Trebilcock, in an interesting article, suggest three rationales for the protection of personal mobility: (a) mobility enhances economic efficiency; (b) mobility is linked to privacy and personhood, and is therefore a personal right in the sense of a human right; and (c) mobility is a characteristic of citizenship.⁶ Identifying the rationale behind such a right is useful for determining the scope of mobility rights in Canadian constitutional law. We will therefore examine each of these justifications in light of the text of the *Canadian Charter*, the interpretation given to it by courts, and the situation as it was before the *Canadian Charter* was enacted.

A. An Economic Scheme?

The first of the three rationales often invoked for the adoption of section 6 of the *Canadian Charter* is the will to increase the economic integration of the country; the provision is meant to be a response to a perceived balkanization of the Canadian economy caused by the development of the provinces as separate and competitive economic units.

The drafters of the *Constitution Act, 1867*,⁷ while designing the new confederation, seem to have sought to create both a new integrated political unit and an integrated national economy.⁸ Although much effort had been made to secure the political integration of the constituent colonies, it was assumed that economic integration would flow naturally from the political integration. A strong central government having powers to legislate on matters related to "The Regulation of Trade and Commerce",⁹ "Currency and Coinage",¹⁰ "Banking, Incorporation of Banks, and the Issue

doms, 3d ed. (Toronto: Carswell, 1996) 8-1; H. Brun & C. Brunelle, "Les statuts respectifs de citoyen, résident et étranger, à la lumière des chartes des droits" (1988) 29 C. de D. 689; J.-G. Castel & S.A. Williams, "The Extradition of Canadian Citizens and Sections 1 and 6(1) of the Canadian Charter of Rights and Freedoms" (1987) 25 Can. Y.B. Int'l L. 263; R.P. Cohen, "Fundamental (In)justice: The Deportation of Long-Term Residents from Canada" (1994) 32 Osgoode Hall L.J. 457; S. Slosar, "La citoyenneté canadienne et ses effets juridiques" (1979) 10 R.D.U.S. 157.

⁶ See T. Lee & M.J. Trebilcock, "Economic Mobility and Constitutional Reform" (1987) 37 U.T.L.J. 268 at 281.

⁷ (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

⁸ See *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591, 58 D.L.R. (4th) 317 [hereinafter *Black* cited to S.C.R.]; *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357 at 373, [1931] 2 D.L.R. 193; E.S. Binavince, "The Impact of the Mobility Rights: The Canadian Economic Union—A Boom or a Bust?" (1982) 14 Ottawa L. Rev. 340 at 341-42; P. Bernhardt, "Mobility Rights: Section 6 of the Charter and the Canadian Economic Union" (1987) 12 Queen's L.J. 199 at 199-200.

⁹ *Constitution Act, 1867*, *supra* note 7, s. 91(2).

¹⁰ *Ibid.*, s. 91(14).

of Paper Money”,¹¹ “Savings Banks”,¹² “Bills of Exchange and Promissory Notes”,¹³ “Interest”,¹⁴ and “Bankruptcy and Insolvency”,¹⁵ and to raise “Money by any Mode or System of Taxation”,¹⁶ was thought to be the main way in which to achieve economic integration among the polity, the federal government bearing the responsibility for forging the Canadian economic union. Complementary to this scheme, a “partial free trade” was established amongst the provinces by virtue of the act, which states that “All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Uniou, be admitted free into each of the other Provinces,”¹⁷ and the building of a transcontinental railway.

The drafters’ vision of the Canadian economy and its development was proven to be grossly mistaken: the value of the Canadian market was overestimated, as was its ability to function independently from the American market, and the simplistic perception of the Canadian regions’ industries and resources as “diversified and complementary”¹⁸ precluded the drafters from foreseeing the fierce competition that would take place amongst provinces. The development of the provinces as separate and competitive economic units was even more accentuated by the judicial interpretation of the *Constitution Act, 1867*. First, the federal power to regulate trade and commerce, notwithstanding its broad language, was read as having a much more restricted effect than its American counterpart (the interstate commerce clause), thus leaving to the provinces a wide range of issues as coming within their legislative power over “Property and Civil Rights”.¹⁹ Second, although section 121 precludes the imposition of customs duties between the provinces, it has not yet been said to preclude non-tariff barriers to trade.²⁰

¹¹ *Ibid.*, s. 91(15).

¹² *Ibid.*, s. 91(16).

¹³ *Ibid.*, s. 91(18).

¹⁴ *Ibid.*, s. 91(19).

¹⁵ *Ibid.*, s. 91(21).

¹⁶ *Ibid.*, s. 91(3).

¹⁷ *Ibid.*, s. 121.

¹⁸ See Binavince, *supra* note 8 at 342.

¹⁹ *Constitution Act, 1867*, *supra* note 7, s. 92(13). See e.g. *Citizens Insurance Co. v. Parsons* (1881), 7 A.C. 96 (P.C.); *Canada (A.G.) v. Alberta (A.G.)*, [1916] 1 A.C. 588, 10 W.W.R. 405 (P.C.); *Re the Board of Commerce Act, 1919, and the Combines and Fair Prices Act, 1919* (1921), [1922] 1 A.C. 191, 60 D.L.R. 513 (P.C.); *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396, [1925] 1 W.W.R. 785 (P.C.); *British Columbia (A.G.) v. Canada (A.G.)*, [1937] A.C. 377, [1937] 1 D.L.R. 691 (P.C.); *Canadian Federation of Agriculture v. Quebec (A.G.)* (1950), [1951] A.C. 179, [1950] 4 D.L.R. 689 (P.C.).

²⁰ On the interpretation of this provision, see Binavince, *supra* note 8 at 351ff.; *Atlantic Smoke Shops v. Conlon*, [1941] S.C.R. 670, [1941] 4 D.L.R. 129, *aff'd*, [1943] A.C. 550, [1943] 2 All E.R. 393 (P.C.); *Gold Seal v. Dominion Express Co.* (1921), 62 S.C.R. 424, 62 D.L.R. 62; *R. v. J.J. Beamish*

In the context of mobility of labour, the existence of barriers having a distorting effect on the national economy had been amply analyzed prior to the adoption of the *Canadian Charter*.²¹ Examples such as the prevention of out-of-province workers from employment on large projects and the exclusion of out-of-province construction firms from provincial construction projects were invoked in the House of Commons to support the entrenchment of mobility rights.²²

If the enhancement of Canada's economic efficiency were the main goal of the mobility right, that is, promoting rapid movements of the labour force so as to adjust to the changing needs of the market, one would not have found a provision such as subsection 6(4) of the *Canadian Charter* or a clause providing for "equalization payments" between provinces.²³ By creating incentives for the labour force to stay where it is, even if it does not correspond with the best allocation of resources, those clauses run counter to the economic objective that a mobility clause attempts to reach.

Finally, it is relevant to note that corporations cannot benefit from section 6 rights²⁴ and also that subsection 6(2) applies only to restrictions related to interprovincial mobility barriers, which seems to indicate that it is therefore possible to discrimi-

Construction Co., [1968] 1 O.R. 5, 65 D.L.R. (2d) 260 (C.A.), aff'd, [1968] 1 O.R. 31 (note), 65 D.L.R. (2d) 286 (note) (S.C.C.); *Murphy v. Canadian Pacific Railway Co.*, [1958] S.C.R. 626, 15 D.L.R. (2d) 145; *Manitoba (A.G.) v. Manitoba Egg & Poultry Association*, [1971] S.C.R. 689 at 717, 19 D.L.R. (3d) 169; *Reference Re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198 at 1267-68, 84 D.L.R. (3d) 257.

²¹ See *Lee & Trebilcock*, *supra* note 6 at 273.

²² See Binavince, *supra* note 8 at 346, for a list of situations invoked as arguments for the entrenchment of a mobility right and relevant references.

²³ See *Constitution Act, 1982*, *supra* note 5, s. 36.

²⁴ See *Parkdale Hotel v. Canada (A.G.)*, [1986] 2 F.C. 514, 27 D.L.R. (4th) 19 (T.D.); *Groupe des éleveurs de volailles de l'est de l'Ontario v. Canadian Chicken Marketing Agency*, [1985] 1 F.C. 280, 14 D.L.R. (4th) 151 (T.D.) [hereinafter *Canadian Chicken*]; Binavince, *supra* note 8 at 357; Blache, *supra* note 5 at 8-5, 8-11; J.-P. Gervais, "Les personnes morales et la Charte canadienne des droits et libertés" (1993) 38 McGill L.J. 263 at 306, 308, 309; B. Godbout, "Le droit au travail: une garantie constitutionnelle à définir. Est-ce que les Chartes reconnaissent le droit au travail? L'étendue de ce droit et ses limites" in Barreau du Québec, Formation Permanente, *Développements récents en droit administratif* (1992) (Cowansville, Qc.: Yvon Blais, 1992) 121 at 127; C. Jacquier, "La liberté de circulation des étudiants au Canada: une liberté garantie et quasi absolue" (1985) 16 R.G.D. 511 at 532; J.B. Laskin, "Mobility Rights under the Charter" (1982) 4 Supreme Court L.R. 89 at 90; *Lee & Trebilcock*, *supra* note 6 at 284; D.A. Schmeiser & K.J. Young, "Mobility Rights in Canada" (1983) 13 Man. L.J. 615 at 627; Slosar, *supra* note 5 at 176; P.W. Hogg, *Constitutional Law of Canada*, looseleaf (Toronto: Carswell, 1997) at 43-10.

nate on the basis of region.²⁵ Such a scheme could hardly be qualified as having for its primary goal to ensure the economic integration of the country.

Nevertheless, one should not understand what has been said as denying any impact to subsection 6(2) in the increased economic integration of the country. On the contrary, paragraph 6(2)(b) has been used to strike down a provincial regulation that had the effect of impairing the ability to form interprovincial law firms.²⁶ It is implicit in this decision that the Supreme Court considers economic integration worthy of some protection. Indeed, the majority in *Black* went so far as to say that there should be no doubt that the “right ‘to pursue the gaining of a livelihood in any province’” guaranteed by paragraph 6(2)(b) meant that “a person can pursue a living in a province without being there personally,”²⁷ making reference to the possibility of income earned in a province even though that person is there only through the instrument of an agent. That being said, it remains that the primary nature of subsection 6(2) is not economic.

B. Human Rights?

Lee and Professor Trebilcock suggest that personhood and privacy might be a rationale for mobility rights in Canada, and in so doing they refer to an argument made by Professor Tribe regarding the American “right to travel”.²⁸ We believe that even though subsection 6(2) offers protection that might be assimilated to human rights protections, the way it is framed and its subsequent judicial interpretation suggest that it is not primarily a human rights clause.

Paragraph 6(2)(b) has been held by the Supreme Court to guarantee “not simply the right to pursue a livelihood, but more specifically, the right to pursue the livelihood of choice to the extent and subject to the same conditions as residents.”²⁹ In an

²⁵ *Demaere v. R.*, [1983] 2 F.C. 755, 11 D.L.R. (4th) 193 (C.A.). We must qualify this assertion by noting that discrimination based on the region of residence may sometimes amount to discrimination based on province of residence, e.g. if preference for a job is given to residents of the northern part of a province, one could be tempted to argue that it is not discrimination based on the province of residence, since both southerners of that province and residents of other provinces (i.e. residents and non-residents) are denied benefit. But the logic of this case would deny that while some residents would be eligible for the job, all non-residents would not. Therefore, it seems that if interregional barriers to mobility are valid, they must not be totally intraprovincial.

²⁶ *Black*, *supra* note 8.

²⁷ *Ibid.* at 621.

²⁸ See Lee & Trebilcock, *supra* note 6 at 281, citing L.H. Tribe, *American Constitutional Law* (New York: Foundation Press, 1978) at 953. Prof. Tribe relies on *Shapiro v. Thompson*, 394 U.S. 618 at 642-43, 89 S. Ct. 1322 (1969), where Stewart J. describes the right to travel as “not a mere conditional liberty subject to regulation and control under conventional due process or equal protection standards” but “a virtually unconditional personal right”.

²⁹ *Black*, *supra* note 8 at 617-18.

other case a provincial medical services commission refused to issue a billing number to a qualified medical doctor to practice as a general practitioner in her chosen location.³⁰ She was disadvantaged because preference was given to other members for billing numbers, based on residence and previous practice. The court rejected the argument that she was not disadvantaged because she could require her patients to pay her directly; it was unrealistic to expect patients with access to public medical insurance to obtain the services of a doctor whose services were not covered by the medical plan. The court went on to state that the right to pursue the gaining of a livelihood "can only mean the right to practise on a viable economic basis."³¹

But this right is not a "free-standing" right. The Supreme Court concluded unanimously in *Law Society of Upper Canada v. Skapinker* that paragraph 6(2)(b) does not establish a separate and distinct right to work divorced from the mobility provisions in which it is found.³² In that case a South African citizen resident in Canada met all the requirements for membership in the Ontario bar except the citizenship requirements imposed by the *Law Society Act*.³³ The plaintiff thus sought a declaration that the citizenship requirement was inoperative and of no force to the extent that it discriminated between Canadian citizens and permanent residents of Canada, and in particular, that it was inconsistent with paragraph 6(2)(b). The Supreme Court concluded that, in the absence of the interprovincial aspect of the mobility right, paragraph (b) did not avail a permanent resident of an independent constitutional right to work as a lawyer in the province of residence so as to override the provincial legislation.

This decision implicitly expresses the strong reluctance to entrench social and economic rights in the Canadian constitution, particularly a general right to work,³⁴ and the uselessness of subsection 6(2) to combat preferences for citizens over perma-

³⁰ See *Mia v. British Columbia (Medical Service Commission)* (1985), 17 D.L.R. (4th) 385, 61 B.C.L.R. 273 (S.C.) [hereinafter *Mia* cited to D.L.R.].

³¹ *Ibid.* at 408. See also *Wilson v. British Columbia (Medical Services Commission)* (1987), 36 D.L.R. (4th) 31, 9 B.C.L.R. (2d) 350 (S.C.), rev'd on other grounds (1988), 53 D.L.R. (4th) 171, 30 B.C.L.R. (2d) 1 (C.A.), leave to appeal to S.C.C. refused, [1988] 2 S.C.R. viii, 92 N.R. 400 (note).

³² [1984] 1 S.C.R. 357 at 382, 9 D.L.R. (4th) 161 [hereinafter *Skapinker* cited to S.C.R.].

³³ R.S.O. 1980, c. 233, s. 28(c).

³⁴ See e.g. *Godbout v. Longueuil (City of)*, [1995] R.J.Q. 2561, 31 M.P.L.R. (2d) 130 (C.A.), aff'd, [1997] 3 S.C.R. 844, 152 D.L.R. (4th) 577 [hereinafter *Godbout*]; *Masse v. Ontario (Ministry of Community and Social Services)* (1996), 134 D.L.R. (4th) 20, 35 C.R.R. (2d) 44 (Ont. Div. Ct.); *Béliveau v. Comité de discipline du Barreau du Québec*, [1992] R.J.Q. 1822 (C.A.), leave to appeal to S.C.C. refused, [1993] 1 S.C.R. v, 148 N.R. 240 (note); *Gosselin v. Quebec (P.G.)*, [1992] R.J.Q. 1647 (Sup. Ct.), aff'd (23 April 1999), Montreal 500-09-001092-923 (C.A.), leave to appeal to S.C.C. granted (1 June 2000), 27418 (S.C.C.); *Benoit v. Gestion Tex-Di*, [1987] R.J.Q. 1401, 50 D.L.R. (4th) 627 (Sup. Ct.); *Lutwick v. Nackawic (Town of)* (1987), 82 N.B.R. (2d) 401, 43 D.L.R. (4th) 746 (Q.B.).

ment residents in a job setting. It must be noted, however, that the citizenship requirement for admittance to the bar was subsequently struck down by the Supreme Court as violating *another* right, the equality right guaranteed by the *Canadian Charter*.³⁵

Moreover, that only interprovincial—as opposed to intraprovincial—mobility rights are guaranteed by subsection 6(2) can hardly be explained on the basis of a human rights theory of personal freedom. It would be difficult to argue that intraprovincial barriers affect human dignity to a lesser degree than interprovincial ones. In fact, such a theory of personal freedom was more likely to be developed, as was the case, under section 7 of the *Canadian Charter*, the terms of which are broader;³⁶ and provincial human rights laws, such as the *Quebec Charter of Human Rights and Freedoms*.³⁷ These sections were invoked in *Godbout*³⁸ to invalidate a resolution adopted by a city requiring all new permanent employees to reside within its boundaries. This resolution was invalidated because it was held to violate the personal autonomy of the employees: “[C]hoosing where to establish one’s home is ... a quintessentially private decision going to the very heart of personal or individual autonomy.”³⁹ It is to be noted that subsection 6(2) was not invoked in that case, and that a paragraph 6(2)(b) argument had been dismissed in a similar case dealing with a residence requirement in a municipal bylaw.⁴⁰

Furthermore, subsection 6(2) has been inefficient in protecting property rights linked to mobility. The provision does not expressly confer the right to acquire or hold property in a province; such rights were deleted from the drafts of subsection 6(2) at the request of the government of Prince Edward Island.⁴¹ An example of the reluc-

³⁵ *Supra* note 5, s. 15(1). See *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1.

³⁶ Section 7 of the *Canadian Charter*, *ibid.*, provides that:

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

See *e.g. Godbout*, *supra* note 34.

³⁷ R.S.Q. c. C-12. Article 5 provides:

5. Every person has a right to respect for his private life.

³⁸ *Supra* note 34.

³⁹ *Ibid.* at para. 66.

⁴⁰ See *McDermott v. Nackawic (Town of)* (1989), 89 N.B.R. (2d) 333, 53 D.L.R. (4th) 150 (C.A.). One might argue that this case was wrongly decided, because any municipal residence requirement automatically involves a provincial residence requirement and such requirement should be invalid under s. 6(2) as discriminating against out-of-province workers, but s. 6(2) is really not seen as a measure of personal autonomy protection.

⁴¹ See *Morgan v. Prince Edward Island (A.G.)*, [1976] 2 S.C.R. 349, 55 D.L.R. (3d) 527, where a provision limiting the rights of non-residents to own land in the province had been unsuccessfully challenged prior to the enactment of the *Canadian Charter*.

tance of courts to strike down laws related to non-resident ownership of land is *McCarten v. Prince Edward Island*.⁴² It was held there that a section of the *Real Property Tax Act*⁴³ that does not give a tax credit to landowners who do not reside within the province for an uninterrupted period of at least six months per year does not violate subsection 6(2).

Also, the mobility right per se did not have much effect on the residence requirement for voting. A twelve-month residence requirement was held not to violate paragraph 6(2)(a),⁴⁴ and it was even said that residence restrictions imposed on voting rights had nothing to do with subsection 6(2) rights.⁴⁵ Instead, residence requirements for voting rights have generally been examined under section 3 of the *Canadian Charter*, which guarantees that “[e]very citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.”⁴⁶

Finally, the narrow scope of subsection 6(2) is further evidenced by the definition of its beneficiaries. The term “citizen of Canada” used to define who benefits from section 6 rights is used in only two other sections of the *Canadian Charter*: (a) the right to vote in provincial or federal elections;⁴⁷ and (b) minority language educational rights.⁴⁸ The first is not so much a human right as an attribute coming with the fact of being a member of the Canadian polity. The second protects only French and English linguistic minorities and was not entrenched to protect basic human rights, but rather to protect a certain vision, or an identity of the Canadian polity. As for the expression “permanent resident”, it is not found anywhere in the *Canadian Charter* other than subsection 6(2). Therefore it cannot be said that the drafters intended to exclude only corporations from section 6 by opting for expressions like “citizen” and “permanent resident”. If that was their goal, they could have used expressions such as “every individual” found at the equality clause⁴⁹ and interpreted as meaning that only “individuals” could benefit from this right and that corporations are excluded.⁵⁰ But instead they

⁴² (1994), 112 D.L.R. (4th) 711, 117 Nfld. & P.E.I.R. 1 (P.E.I. C.A.), leave to appeal to S.C.C. refused, [1994] 2 S.C.R. viii, 115 D.L.R. (4th) viii.

⁴³ R.S.P.E.I. 1988, c. R-5, s. 5.

⁴⁴ *Hedstrom v. Commissioner of Yukon Territory*, [1985] 6 W.W.R. 690, 16 C.R.R. 37 (Y.T. S.C.).

⁴⁵ See *Storey v. Zazelchuk* (1984), 21 Sask. R. 158, 5 C.R.R. 99 (Q.B.), aff'd (1984), 36 Sask. R. 103, 12 C.R.R. 261 (C.A.). See also *Re Allman and Commissioner of the Northwest Territories*, [1984] N.W.T.R. 65, 8 D.L.R. (4th) 230 (C.A.), leave to appeal to S.C.C. refused, [1984] N.W.T.R. xxxix, 55 N.R. 394 (note) (S.C.C.).

⁴⁶ *Supra* note 5, s. 3.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, s. 23.

⁴⁹ *Ibid.*, s. 15.

⁵⁰ See e.g. *Edmonton Journal v. Alberta (A.G.)*, [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577.

chose “citizens” and “permanent resident”. It seems, therefore, that the limitation on who is to benefit from mobility rights is not grounded in a human rights theory, but in other concerns. We suggest that these other concerns may be more readily affiliated with the will to create a national unity through a common citizenship.

C. “Nation-Building” Rights?

In *Malartic Hygrade Gold Mines v. R.*,⁵¹ Chief Justice Deschênes of the Quebec Superior Court had to decide whether paragraph 6(2)(b) guaranteed the right of a member of the bar of Ontario to participate in a judicial proceeding in Quebec without a licence or permit from the Barreau du Québec. The chief justice held, “Cette disposition vise sans doute à donner à la citoyenneté canadienne son sens véritable et à prévenir l’érection de murailles artificielles entre les provinces.”⁵² This statement has since been quoted with approval in both Supreme Court judgments dealing with subsection 6(2) rights.⁵³

The legal links between mobility, work, and citizenship had been established long before in Canadian case law. Courts have been prepared to characterize certain attributes as fundamental rights flowing from a person’s citizenship. In 1899 the Judicial Committee of the Privy Council dealt with the validity of a British Columbia statute prohibiting people of Chinese descent from being employed in mines.⁵⁴ The Privy Council found the provision to be invalid as being *ultra vires* the provincial legislature. The *Constitution Act, 1867* gave exclusive authority over “naturalisation and aliens” to the federal Parliament,⁵⁵ and “naturalisation” was held to include “the power of enacting ... what shall be the rights and privileges pertaining to residents in Canada after they have been naturalized.”⁵⁶ Provincial interference with a resident’s rights to live and work in the province was thus prohibited.

In *Winner v. S.M.T. (Eastern)*,⁵⁷ Rand J. made clear that Canadian citizenship carried with it certain rights. He held:

What this implies is that a province cannot, by depriving a Canadian of the means of working, force him to leave it: it cannot divest him of his right or capacity to remain and to engage in work there: that capacity inhering as a con-

⁵¹ [1982] C.S. 1146, 142 D.L.R. (3d) 512 [hereinafter cited to C.S.].

⁵² *Ibid.* at 1150.

⁵³ See *Skapinker*, *supra* note 32 at 381; *Black*, *supra* note 8 at 615.

⁵⁴ *Union Colliery Co. v. Bryden*, [1899] A.C. 580 (P.C.) [hereinafter *Bryden*].

⁵⁵ *Supra* note 7, s. 91(25).

⁵⁶ *Supra* note 54 at 586. See also *Cunningham v. Toney Homma*, [1903] A.C. 151 (P.C.), where the disenfranchisement of naturalized Canadians by a provincial government was upheld, as the right to vote was considered as merely an “incident of status”.

⁵⁷ [1951] S.C.R. 887, [1951] 4 D.L.R. 529 [hereinafter *Winner* cited to S.C.R.].

stituent element of his citizenship status is beyond nullification by provincial action. ...

It follows, *a fortiori*, that a province cannot prevent a Canadian from entering its territory except, conceivably, in temporary circumstances, for some local reasons as, for example, health. *With such a prohibitory power, the country could be converted into a number of enclaves and the "union" which the original provinces sought and obtained disrupted.* In a like position is a subject of a friendly foreign country; for practical purposes he enjoys all the rights of the citizens.

Such, then, is the national status embodying certain inherent or constitutive characteristics, of members of the Canadian public, and it can be modified, defeated or destroyed, as for instance by outlawry, only by Parliament.⁵⁸

Four elements of pre-*Canadian Charter* law flowing from this excerpt merit our attention in light of post-*Canadian Charter* law:

1. All Canadian citizens—naturalized or native-born—cannot be deprived by provinces of the benefit of the right to remain and to engage in work in any province. This seems wider in scope than subsection 6(2) rights, since it does not require any interprovincial element.
2. Under pre-*Canadian Charter* law, the federal Parliament retained the capacity to alter or even “destroy” such citizenship rights. Subsection 6(2) had the effect of limiting both the provincial and federal powers to do so.⁵⁹
3. One could wonder what practical purposes militate in favour of the fact that a “subject of a friendly foreign country ... enjoys all the rights of the citizens.” In public international law, however, the federal government is responsible for its federated states’ acts. Therefore, such a position could be understood as the will to face the world as one single entity capable of respecting the rules imposed by international comity.
4. The major policy reason behind such citizenship rights, as we emphasized in the quotation from *Winner*, is national unity, the fear of disintegration of the state and of political balkanization. The *Constitution Act, 1982* (which includes the *Canadian Charter*) was a response to those fears; it was adopted following the defeat of Quebec sovereigntists at the 1980 referendum. The *Canadian Charter* was intended to be the “people’s package”, and national unity was surely one of its main goals.

⁵⁸ *Ibid.* at 919-20 [emphasis added].

⁵⁹ See e.g. *Pineview Poultry Products v. Canada*, [1994] 2 F.C. 475, 73 F.T.R. 50 (T.D.).

The latter comment is the key that enables one to understand the scope and function of subsection 6(2) in the Canadian constitutional setting. This is evidenced even further by La Forest J.'s comments in *Black*, that even if economic concerns undoubtedly played a part in the constitutional entrenchment, the purpose of section 6 was to "secure to all Canadians and permanent residents the rights that flow from membership or permanent residency in a united country."⁶⁰ Even if, technically, subsection 6(2) rights did not add much protection to what Canadian citizens already had, the mere fact that they were expressly entrenched in the constitution gave an explicit signal to the population that its country was *one* country and that it should not be limited in its aspirations by "artificial provincial walls" created by governments. The call seems to have been heard mostly in the legal community, since a large part of the most important case law on subsection 6(2) originates from challenges to bar regulations.⁶¹ The provision has also been used, however, to challenge regulations dealing with accountants,⁶² medical doctors,⁶³ taxi drivers,⁶⁴ university tuition fees,⁶⁵ interprovincial marketing schemes set up by the Canadian government,⁶⁶ and direct sellers.⁶⁷

⁶⁰ *Supra* note 8 at 612.

⁶¹ See e.g. *Tapper v. Law Society of Upper Canada* (1998), 113 O.A.C. 370 (C.A.); *Skapinker, supra* note 32; *Black, ibid.*; *Richards v. Barreau du Québec*, [1992] R.J.Q. 2847 (Sup. Ct.); *O'Neill v. Law Society of New Brunswick* (1993), 141 N.B.R. (2d) 1, 115 D.L.R. (4th) 423 (Q.B.).

⁶² *Walker v. Prince Edward Island*, [1995] 2 S.C.R. 407, 124 D.L.R. (4th) 127; *Taylor v. Institute of Chartered Accountants of Saskatchewan* (1989), 75 Sask. R. 153, 59 D.L.R. (4th) 656 (C.A.).

⁶³ *Rombaut v. New Brunswick (Minister of Health)* (2000), 95 A.C.W.S. (3d) 1159 (N.B. C.A.); *Waldman v. British Columbia (Medical Services Commission)* (1999), 177 D.L.R. (4th) 321, [1999] 12 W.W.R. 542 (B.C. C.A.); *Mia, supra* note 30.

⁶⁴ *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City of)* (1998), 217 A.R. 1, 45 M.P.L.R. (2d) 16 (Q.B.).

⁶⁵ See *Ruel v. Québec (Ministre de l'Éducation)* (11 February 1998), Montreal 500-05-032573-972, J.E. 98-565 (Sup. Ct.) [hereinafter *Ruel*], where the Students' Society of McGill University challenged a decision by the minister of education to raise tuition fees for out-of-province Canadian students. One of the arguments invoked by the plaintiff was that differential fees were incompatible with s. 6 mobility rights because they created an obstacle for students wishing to study in Quebec. The Superior Court dismissed this argument by pointing to the relatively low fees charged and the non-abusive nature of the amounts in question. It remains to be seen whether the Court of Appeal will uphold this reasoning.

⁶⁶ *Archibald v. Canada*, [2000] 4 F.C. 479, 188 D.L.R. (4th) 538 (C.A.); *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157, 166 D.L.R. (4th) 1; *British Columbia (Milk Marketing Board) v. Aquilini* (1998), 165 D.L.R. (4th) 626, 59 B.C.L.R. (3d) 143 (C.A.); *Canadian Chicken, supra* note 24.

⁶⁷ *Basile v. Nova Scotia (A.G.)* (1984), 62 N.S.R. (2d) 410, 11 D.L.R. (4th) 219 (C.A.).

D. Limitations on Subsection 6(2) Rights

Before concluding this section, we would like briefly to outline limitations to the application of subsection 6(2) rights. First, section 33 of the *Canadian Charter*, which gives Parliament and the legislatures the power expressly to declare that an act or a provision thereof shall operate notwithstanding a provision of the *Canadian Charter*, does not apply to section 6 rights.⁶⁸ Second, subsection 6(3), La Forest J. said in *Black*, “acts as more or less a footnote to s. 6(2). It merely qualifies s. 6(2).”⁶⁹ In addition, paragraph 6(3)(b), which stipulates that the rights specified in subsection 6(2) are subject to any laws providing for *reasonable* residency requirements as a qualification for receiving public social services, has not been subject to judicial interpretation. One reason is that under a federal statute provinces are prohibited from requiring a period of residence within the province for welfare benefits funded on a shared-cost basis with the federal government.⁷⁰ Such programs amount to a large portion of social services available in Canada. Subsection 6(4)—the affirmative action section—has also not been subject to any known judicial interpretation. This is probably because of the importance that section 15—the equality clause—has assumed in constitutional litigation. Third, once an infringement of a *Canadian Charter* right has been recognized, courts must examine whether that right was “subject ... to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”⁷¹ If the legal norm fails that test, it must be invalidated.⁷² Finally, the biggest limitation to mobility rights is the absence of a real political consensus as to what should be seen as the primary political and economic unit in Canada: should it be the provinces or the federal state itself? As we have seen, Canada is still struggling with its “new” mobility rights provision. At the bottom of such struggle and of the difficulty to reach a better economic integration is the never-ending obstacle to Canadian unity: the ill-defined concept of a Canadian nationhood. Canadian people are still torn apart by the interplay of multiple identities, by multiple allegiances. Those conflicting identities are particularly evident in the Province of Quebec, where humorist Yvon Deschamps has neatly coined the will of the Quebec population, having “an independent Quebec within a strong, united Canada”.

⁶⁸ *Supra* note 5, s. 33(1).

⁶⁹ *Supra* note 8 at 624. The French version says that s. 6(3) “sert plus ou moins à expliquer le par. 6(2). Il ne fait que nuancer le par. 6(2)” (*ibid.*).

⁷⁰ See *Federal-Provincial Fiscal Arrangements Act*, R.S.C. 1985, c. F-8, s. 13(1)(c). This prohibition was formerly in the *Canada Assistance Plan Act*, R.S.C. 1985, c. C-1, s. 6(2)(d), as rep. by *Budget Implementation Act, 1995*, S.C. 1995, c. 17, s. 32.

⁷¹ *Canadian Charter*, *supra* note 5, s. 1.

⁷² *Constitution Act, 1982*, *supra* note 5, s. 52.

II. Freedom of Movement of Persons and Residence in the European Union

A. The Provisions on Free Movement and Residence

The objectives of the provisions on free movement and residence in the *TEU* and the *EC Treaty* have always been much debated. In essence, they do not appear very different from those underlying the mobility rights entrenched in the Canadian constitution. On the one hand, the primary goal pursued by the authors of the *EC Treaty* was enhancing economic rationality. A fully integrated area would not only require the abolition of restrictions on the free movement of goods, but also the elimination of obstacles to the free movement of persons. Common markets are thought to produce a more efficient allocation of resources and to generate more substantial welfare effects than less far-reaching forms of economic co-operation such as free trade zones and customs unions.⁷³ On the other hand, the human dimension of free movement raises certain social justice concerns. The right attaches to persons who, when they move to another state to take up residence with a view to working and improving their standard of living and economic prospects, are entitled to be treated in accordance with a common code of fundamental values. The tensions between the purely economic and the social aspects of the free movement provisions are reflected in the case law of the ECJ.⁷⁴ As early as 1974 the Court confirmed that free movement rules are instruments not only of economic interpenetration, but also of social interpenetration.⁷⁵ The Court has frequently refused to interpret the relevant treaty provisions in a manner reducing free movement to a mere instrument of economic integration.⁷⁶

⁷³ See e.g. A.J. Mackenzie Stuart, "Problems of the European Community—Transatlantic Parallels" (1987) 36 I.C.L.Q. 183 at 191; W. Molle & A. van Mourik, "International Movements of Labour under Conditions of Economic Integration: The Case of Western Europe" (1988) 26 J. Common Market Stud. 317.

⁷⁴ For a discussion of the case law, see P. Craig & G. de Búrca, *EU Law: Texts, Cases, and Materials*, 2d ed. (Oxford: Oxford University Press, 1998) c. 16, 17.

⁷⁵ *Reyners v. Belgium*, C-2/74, [1974] E.C.R. 631 at 651, [1974] 2 C.M.L.R. 305 [hereinafter *Reyners*].

⁷⁶ This approach is quite clearly expressed by Advocate General Jacob's opinion in *Konstantinidis* (*Reference for a preliminary ruling from the Amtsgericht Tübingen*):

[A] Community national who goes to another Member State as a worker or self-employed person ... is entitled not just to pursue his trade or profession and to enjoy the same living and working conditions as nationals of the host state; he is in addition entitled to assume that, wherever he goes to earn his living in the European Community, he will be treated in accordance with a common code of fundamental values, in particular those laid down in the European Convention on Human Rights. In other words, he is entitled to say "civis europeus sum" and to invoke that status in order to oppose any

As appears to be the case in Canada, freedom of movement in Europe is seen as an important element of an embryonic European citizenship and a catalyst for further political integration. The *TEU* has introduced new provisions in this respect, but it would appear that the rules on free movement of persons remain the backbone of the concept of Union citizenship. Finally, the *Charter of Fundamental Rights of the European Union* also proclaims the rights of free movement to be among the basic rights to be safeguarded in the EU.⁷⁷

The *EC Treaty* distinguishes between “wage earners” (workers) and non-wage earners, *i.e.* self-employed professional people and tradespeople wishing to take up and pursue economic activities in another Member State of the Community. Articles 39 to 42 govern the free movement of workers. The free movement of the self-employed (both natural and legal persons) is to be secured within the framework of the rules on the freedom of establishment⁷⁸ and the rules on the freedom to provide services.⁷⁹ Whereas establishment implies the setting up of a more or less permanent residence in another Member State, the rules on the freedom to provide services apply where a person wishing to provide services across national borders requires only occasional and temporary entry into another Member State.

The ECJ has emphasized time and again that the free movement of persons represents one of the fundamental freedoms of the *EC Treaty* and that, as such, the provisions in this area may be relied on by private individuals through the doctrine of direct effect and shall not be interpreted restrictively. The Court has played a decisive role here, by extending the personal and substantive scope of application of free movement rights for workers and self-employed persons as much as possible.

It should nonetheless be remembered that securing the free movement of economically active persons is insufficient to create a *general right* of residence for all Community citizens. Since the entry into force of the *TEU* in 1993, a right “to move and reside freely within the territory of the Member States”⁸⁰ is vested in every citizen of the Union, *i.e.* every person holding the nationality of a Member State,⁸¹ but this

violation of his fundamental rights (C-168/91, [1993] E.C.R. I-1191 at I-1211 to I-1212, (*sub nom. Konstantinidis v. Altensteigstandesamt*) [1993] 3 C.M.L.R. 401).

⁷⁷ 18 December 2000, [2000] O.J. C. 364/1, art. 45 [hereinafter *EU Charter*]. It remains to be seen whether the proclamation of this document, which has not been given formal legal binding force, will have an impact on the scope of the rights already accruing to Community nationals by virtue of the EC rules on free movement of workers, the self-employed, providers and recipients of services, and various categories of persons who are not economically active or not fully economically active.

⁷⁸ *EC Treaty*, *supra* note 2, arts. 43-48.

⁷⁹ *Ibid.*, arts. 49-55.

⁸⁰ *Ibid.*, art. 18(1).

⁸¹ *Ibid.*, art. 17(1).

right is subject to the limitations and conditions laid down in the treaty.⁸² So, in principle, it is up to the Council of Ministers to adopt measures to secure the same rights of free movement for non-economically active citizens of the Union.

In practice, however, there has been an absence of legislative activity surrounding this question, and it is the Court that has shown a particular interest in bridging the gap between the rights of the economically active and the non-economically active categories of Community citizens. It has done so by extracting maximum effect from the treaty provisions and the various Regulations and Directives adopted to flesh out the rights of economically active Community citizens and their dependants, and then extending, where possible, the reach of these provisions for the benefit of non-economically active persons.

While there are indications that the Court is prepared to use the concept of Union citizenship as a basis for extending equal treatment rights,⁸³ it is not to be expected that judicial activism will go so far as to ignore social, economic, and political realities. Indeed, it is impossible at the present stage of the development of the EU to presume that solidarity between the Member States has progressed to the point where, as a matter of law, all Community nationals must be given access to public services and publicly financed benefits available in other Member States on equal footing with the state's own nationals.

B. Jurisprudential Developments

1. Economically Active Persons

The following points will serve to highlight the ECJ's essential contributions in the area. First, despite (or perhaps because) there is an extensive body of secondary legislation governing the conditions of entry, residence, and treatment of EC workers, their families, the self-employed, retired workers, etc., the Court of Justice has been frequently called upon to determine the precise scope of the free movement provisions.⁸⁴ The case law is particularly abundant in respect of the definition of the term

⁸² *Ibid.*, art. 18(1).

⁸³ See *Sala v. Freistaat Bayern*, C-85/96, [1998] E.C.R. I-2691 [hereinafter *Sala*].

⁸⁴ See e.g. EEC, Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, [1968] O.J. L. 257/13; EEC, Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, [1973] O.J. L. 172/14; EEC, Council Regulation 1612/68 on the free movement of workers within the Community, [1968] O.J. L. 257/2 [hereinafter Regulation 1612/68]; EEC, Council Regulation 1408/71 of 14 June 1971 on the application of social

“worker”. Some of the cases reveal the tension between the economic and the human rights aspects of the rules on intra-Community free movement.⁸⁵

The standard criterion used by the Court for finding that a worker comes under Community protection is that the person concerned performs services under the direction of another person for remuneration and that the employment involves “effective and genuine activities”.⁸⁶ The reasons for taking up employment are immaterial and so is the amount earned. Community law does not apply, however, where the activities are on such a small scale as to be regarded as purely marginal and ancillary. The Court’s judgments have been similarly generous on the status of EU citizens who have been previously in employment or who are job seekers.

Second, services within the meaning of Articles 49 and 50 are those activities that are “normally provided for remuneration”.⁸⁷ According to Article 50, the beneficiaries of the provisions on free movement of services are the persons who wish temporarily to pursue activities in the state where the service is to be provided. Such persons are entitled to equal treatment with nationals. While these provisions do not mention the rights of the recipients of services, the secondary legislation protects the position of such recipients who travel to another Member State for the purpose of receiving a particular service.⁸⁸

security schemes to employed persons and their families moving within the Community, [1971] O.J. L. 149/2 [hereinafter Regulation 1408/71]; EEC, *Council Regulation 1251/70 on the right of workers to remain in the territory of a Member State after having been employed in that State*, [1970] O.J. L. 142/24; EEC, *Council Directive 75/35/EEC of 17 December 1974 extending the scope of Directive No 64/221/EEC on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health to include nationals of a Member State who exercise the right to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity*, [1975] O.J. L. 14/14.

⁸⁵ See e.g. *Levin v. Staatssecretaris van Justitie*, C-53/81, [1982] E.C.R. 1035, [1982] 2 C.M.L.R. 454; *Kempf v. Staatssecretaris van Justitie*, C-139/85, [1986] E.C.R. 1741, [1987] 1 C.M.L.R. 764.

⁸⁶ For an application of the test, see *Lawrie-Blum v. Land Baden-Württemberg*, C-66/85, [1986] E.C.R. 2121, [1987] 3 C.M.L.R. 389, where the Court found that a trainee teacher qualified as a worker although the amount of remuneration received was modest.

⁸⁷ *EC Treaty*, *supra* note 2, art. 50. In the ever-expanding telecommunications and media sectors, the providers of services often do not receive payment from the service users because their income is largely generated by advertising. In response to such cases the Court has accepted that art. 49 does not require that the services be paid for by their direct beneficiaries. See *Procureur du Roi v. Debauve*, C-52/79, [1980] E.C.R. 833, [1981] 2 C.M.L.R. 362; *Bond van Adverteerders v. Netherlands*, C-352/85, [1988] E.C.R. 2085, [1989] 3 C.M.L.R. 113.

⁸⁸ See *Luisi & Carbone v. Ministero del Tesoro*, C-286/82 & C-26/83, [1984] E.C.R. 377, [1985] 3 C.M.L.R. 52. See also *Cowan v. Trésor public*, C-186/87, [1989] E.C.R. 195, [1990] 2 C.M.L.R. 613 [hereinafter *Cowan*].

Third, the removal of obstacles to free movement and residence is based primarily on the principle of equal treatment. As such, Articles 39, 43, and 49 represent a specific application of the general prohibition of discrimination on grounds of nationality in Article 12 of the *EC Treaty*. This prohibition covers, in the first place, situations where a national measure explicitly differentiates on nationality grounds. This is called “direct” or “overt” discrimination. The principle of non-discrimination also applies to cases of “indirect” or “covert” discrimination, such as the situation where measures draw no distinction on the basis of nationality, but by the application of other criteria of differentiation, achieve in practical effect the same result, because persons from other Member States are placed at a disadvantage.⁸⁷

Free movement is also thought to postulate the absence of restrictions on free movement that flow from national measures that do not discriminate against non-nationals in law or in practical effect. Measures that are “indistinctly applicable” to nationals and non-nationals alike may be caught by the treaty prohibitions if they hinder or impede the pursuit by Community citizens of occupational activities beyond the territory of their home state.⁸⁸

With respect to freedom of establishment, compliance with indistinctly applicable measures laying down, for example, conditions for access to certain professions, or the use of professional titles such as “avvocato”, may be just as burdensome for nationals as for non-nationals. But given that without such measures intra-Community movement of self-employed persons would be easier, the said measures may qualify as restrictions on the freedom of establishment.⁸⁹ Similarly, in relation to the freedom to supply services,⁹⁰ a restriction does not escape from the scope of Article 49 merely because it is genuinely non-discriminatory. If the measure affects the possibility for

⁸⁷ See e.g. *Württembergische Milchverwertung-Südmilch-AG v. Ugliola*, C-15/69, [1969] E.C.R. 363, [1970] C.M.L.R. 194; *Sotgiù v. Deutsche Bundespost*, C-152/73, [1974] E.C.R. 153.

⁸⁸ See e.g. *Union Royale Belge des Sociétés de Football Association ASBL v. Bosman*, C-415/93, [1995] E.C.R. I-4921, [1996] 1 C.M.L.R. 645; *Graf v. Filzmoser Maschinenbau GmbH*, C-190/98, [2000] E.C.R. I-493, [2000] I C.M.L.R. 741.

⁸⁹ See *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, C-55/94, [1995] E.C.R. I-4165 at I-4194, [1996] 1 C.M.L.R. 603 [hereinafter *Gebhard* cited to E.C.R.]. For a similar case involving indistinctly applicable French rules (requirement that all practising lawyers be registered at the bar) and which were held to be in breach of the rules on freedom of establishment, unless objectively justified, see *Gullung v. Conseil de l'ordre des avocats du barreau de Colmar et de Saverny*, C-292/86, [1988] E.C.R. 111, [1988] 2 C.M.L.R. 57.

⁹⁰ See e.g. *Säger v. Dennemeyer & Co.*, C-76/90, [1991] E.C.R. I-4221, [1993] 3 C.M.L.R. 639 (German legislation reserving certain activities in the field of maintenance of industrial property rights to patent agents); *Alpine Investments BV v. Minister van Financiën*, C-384/93, [1995] E.C.R. I-1141, [1995] 2 C.M.L.R. 209 (Dutch prohibition on the making of unsolicited phone calls to offer financial services (cold calling)).

service providers to gain access to markets in another Member State, it constitutes a restriction that is forbidden unless it can be justified by the regulating state.⁹¹

Finally, mobility rights granted by the *EC Treaty* are not without exception. First, freedom to take up employment or to pursue self-employed activities abroad is subject to exceptions and derogations in the context of employment in the public service⁹⁴ and of activities that in any given state are connected, even occasionally, with the exercise of official authority.⁹⁵ Second, workers and their families, job seekers, and all other beneficiaries of the freedom of movement of workers are entitled to admission to and residence in the territory of a host Member State, but subject to limitations justified on grounds of public policy, public security, or public health.⁹⁶ Similarly, Member States may invoke these same grounds when they wish to refuse entry or residence to foreign nationals seeking to benefit from the free movement rules on establishment and services, or to justify expulsion of such persons from the national territory.⁹⁷ Third, if Member States enact restrictive measures that are not discriminatory but nevertheless hinder free movement, such measures may be compatible with the treaty if they can be objectively justified by the need to satisfy imperative requirements linked to the general interest and proven not to be an unsuitable or disproportionate instrument for attaining an acceptable goal.⁹⁸

The removal of obstacles to the free movement of workers, self-employed persons, and providers and recipients of services implies that entry visas and similar restrictions are outlawed and that residence rights are automatically granted. In addition, the beneficiaries of these rights are to be placed on an equal footing with a state's own nationals as regards remuneration, working conditions, training, diplomas and other evidence of formal qualifications, and generally the conditions for taking up and pur-

⁹³ This position was clearly explained by the Court in *Gebhard*:

It follows, however, from the Court's case-law that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it (*supra* note 91 at I-4197 to I-4198 [reference omitted]).

⁹⁴ *EC Treaty*, *supra* note 2, art. 39(4). For an interesting case concerning the scope of the exception, see *Commission v. Belgium*, C-149/79, [1980] E.C.R. 3881, (*sub nom. Re Public Employees: E.C. Commission v. Belgium*) [1981] 2 C.M.L.R. 413.

⁹⁵ *EC Treaty*, *ibid.*, arts. 45, 55. Such exceptions are given a narrow scope. See *e.g. Reyners*, *supra* note 75.

⁹⁶ *EC Treaty*, *ibid.*, art. 39(3).

⁹⁷ *Ibid.*, arts. 46, 55.

⁹⁸ See *supra* note 93.

suing economic activities. Whenever a person comes within the personal scope of the free movement provisions, he or she is entitled to full social and economic equality as set forth in the secondary legislation, namely, Regulation 1612/68⁹⁹ and Regulation 1408/71.¹⁰⁰ In the case of persons invoking the freedom to supply services, however, the secondary legislation is silent.

2. Non-economically Active Persons

Obviously, persons who do not participate in, or perform, some sort of economic activity within the meaning of Articles 39, 43, or 49 cannot rely on the treaty provisions on the freedom of movement to claim a right of entry and residence in another Member State. Yet since the seventies there has been a growing awareness that measures are needed for strengthening the Community's identity and for developing Community citizenship. This would imply granting free movement rights to "residual" categories of persons, such as students and pensioners. The main problem encountered here was, of course, that Member States were—and still are—not prepared to permit or encourage "benefits tourism" and other forms of "free riding". It has been generally thought to be unproblematic to allow nationals from other Member States free entry rights so long as this does not mean that the principle of non-discrimination would demand recognition of equal treatment rights concerning access of such persons to public benefits and publicly financed services. It would indeed be difficult to allow persons having no genuine link with the wealth-generating processes in a foreign country the same financial advantages as nationals of the host state.

This state of affairs is precisely why *Cowan*¹⁰¹ must be considered an important yet controversial step forward. The case concerned a British holidaymaker in France who fell victim to a violent crime and who was denied publicly financed compensation by the government because he was not a French national. When the French policy was challenged before the ECJ, it was found to be discriminatory under Article 12.¹⁰² Given the tenuous connection between a recipient of tourist services and the economic life of the host Member State, as well as the weak link between the freedom to receive services and a compensation scheme for victims of crime, we find the potential impact of the *Cowan* ruling to be tremendous.

Practically speaking, every benefit that a state reserves for its own nationals and for those lawfully residing in the national territory may have an impact on the free movement of anybody moving across state borders, because it is not easy to visit an-

⁹⁹ *Supra* note 84.

¹⁰⁰ *Supra* note 84.

¹⁰¹ *Supra* note 88.

¹⁰² *EC Treaty*, *supra* note 2. This provision prohibits any discrimination on grounds of nationality.

other Member State without being at the receiving end of the service industry of that state. Therefore, even though the ECJ has accepted that non-nationals may invoke Article 12 to claim equality of treatment in respect of access to public museums¹⁰³ and the right to use minority languages in court proceedings,¹⁰⁴ it is unsurprising that the Court does not appear to be prepared to generalize the *Cowan* ratio any further.

Moreover, the ECJ's cautious approach to claims made by students seeking access to higher education in a host state shows an unwillingness to widen the scope of the equality principle enshrined in Article 12 so as to present a risk for Member States' capacity to provide their residents with proper public services and benefits, or to jeopardize budgetary and financial stability. In fact, the Court has clearly declined to read a right of access to public institutions of higher education into the treaty provisions on the freedom to provide services.¹⁰⁵

Whether a student is to be considered a recipient of services could of course be sidestepped by basing a student's claim on Article 12, which prohibits any discrimination on grounds of nationality "within the scope of application of this Treaty". This is precisely what happened in the famous *Gravier* case.¹⁰⁶ There the Court found that the conditions of access to vocational training¹⁰⁷ fell within the scope of application of the treaty. The imposition on students from other Member States of higher enrolment or tuition fees than those charged to students who were nationals of the host state constituted a case of discrimination incompatible with Article 12.¹⁰⁸ It is to be noted, however, that the Court, while prohibiting discriminatory fees, has ruled that the principle of non-discrimination does not require equal treatment with regard to financial aid designed to cover the general living costs of students.¹⁰⁹

A few years after these judgments the Council finally adopted a set of measures to extend residence rights to a wider group of persons than the beneficiaries of the "eco-

¹⁰³ See e.g. *Commission v. Spain*, C-45/93, [1994] E.C.R. I-911.

¹⁰⁴ See e.g. *Bickel and Franz, Criminal proceedings against* (1998), C-274/96, [1998] E.C.R. I-7637, [1999] 1 C.M.L.R. 348.

¹⁰⁵ See *Belgium v. Humbel*, C-263/86, [1988] E.C.R. 5365, [1989] 1 C.M.L.R. 393, aff'd by *Wirth v. Landeshauptstadt Hannover*, C-109/92, [1993] E.C.R. I-6447, where educational facilities funded by the state were held not to be services within the meaning of the *EC Treaty*, *supra* note 2, art. 50, because they could not be said to be "normally provided for remuneration".

¹⁰⁶ *Gravier v. Liège (City of)*, C-293/83, [1985] E.C.R. 593, [1985] 3 C.M.L.R. 1 [hereinafter *Gravier*].

¹⁰⁷ *Blaizot v. University of Liège* (1988), C-24/86, [1988] E.C.R. 379, [1989] 1 C.M.L.R. 57, expands the scope of the *Gravier* ruling to most forms of higher education.

¹⁰⁸ Compare the holding of the Quebec court in *Ruel*, *supra* note 65.

¹⁰⁹ *Lair v. Universität Hannover* (1988), C-39/86, [1988] E.C.R. 3161 at paras. 15, 16, [1989] 3 C.M.L.R. 545; *Brown v. Secretary of State for Scotland*, C-197/86, [1988] E.C.R. 3205, [1988] 3 C.M.L.R. 403.

nomical” free movement rights. The Council adopted three Directives¹¹⁰ granting residence rights to categories of persons other than workers or the self-employed and their dependants, on condition that the beneficiaries have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State. When the *TEU* came into force in 1993, these conditions and limitations were constitutionalized in Article 18,¹¹¹ which recognized every citizen’s right to move and reside freely within the EU, subject to limitations and conditions laid down in the treaty and by the measures adopted to give it effect. It would thus be misleading to suggest that the citizens of the European Union enjoy a general right of residence throughout the Union’s territory comparable to that granted to citizens of Canada or the United States across provinces or states.¹¹²

The question that must now be examined is whether, despite the limiting clause in Article 18 of the *EC Treaty*, citizenship of the Union may entail a lifting of the limitations inherent in the non-discrimination clause and a more generous entitlement for nationals from other Member States to social benefits available in a country in which they are not performing or have not performed occupational activities.

C. Freedom of Movement and Citizenship

The *TEU* has introduced the concept of citizenship of the Union.¹¹³ Since mobility rights are an important ingredient of citizenship,¹¹⁴ and since, for the time being, Euro-

¹¹⁰ EC, Council Directive 90/364/EEC of 28 June 1990 on the right of residence, [1990] O.J. L. 180/26 (“playboy” Directive); EC, Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity, [1990] O.J. L. 180/28; EC, Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students, [1990] O.J. L. 180/30.

¹¹¹ *EC Treaty*, *supra* note 2.

¹¹² In *Micheletti v. Delegación del Gobierno en Cantabria*, C-369/90, [1992] E.C.R. I-4239, the Court confirmed that determination of nationality falls within the exclusive competence of the Member States and went on to add that this competence must be exercised with due regard to the requirements of Community law.

¹¹³ *EC Treaty*, *supra* note 2, arts. 17-22.

¹¹⁴ For discussions regarding the notion of European citizenship, see e.g. S. O’Leary, *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship* (The Hague: Kluwer Law International, 1996); S. O’Leary, “The Free Movement of Persons and Services” in P. Craig & G. de Búrca, eds., *The Evolution of EU Law* (Oxford: Oxford University Press, 1999) 377; U.K. Preuß, “Problems of a Concept of European Citizenship” (1995) 1 Eur. L.J. 267; P. Neussl, “European Citizenship and Human Rights: An Interactive European Concept” (1997) 24:2 Legal Issues Eur. Integration 47; C. Closa, “The Concept of Citizenship in the Treaty on European Union” (1992) 29 C.M.L. Rev. 1137; P.H. Schuck, “Citizenship in Federal Systems” (2000) 48 Am. J. Comp. L. 195; Zuleeg, *supra* note 4.

pean citizenship does not involve the recognition of substantial political rights and obligations for the nationals of the Member States,¹¹⁵ one might have thought that the introduction of European citizenship could at least herald a broadening of rights to free movement and attendant rights to equal treatment. The conditions and limitations pertaining, in particular, to the free movement rights of the non-economically active, however, have not become less prominent since the implementation of the *TEU* than they were before. If anything, these conditions and limitations have become more firmly entrenched in Article 18.

It is fairly obvious that the drafters of these provisions were careful not to formulate citizens' rights in a manner conducive to the idea that every national of a Member State is entitled to complete freedom of movement and to the social and economic benefits that the host state makes available to its own nationals, merely because he or she is a citizen of the Union. Nevertheless, in 1998 the ECJ made creative use of Article 17 and the concept of citizenship, showing itself prepared to extend the scope of the provision on equal treatment¹¹⁶ in a manner recalling the best traditions of judicial activism. In *Sala*¹¹⁷ the Court was confronted with whether a national of a Member State who was not a worker, former worker, or person otherwise enjoying rights under secondary legislation, but who was just a citizen of the European Union, could benefit from the non-discrimination provision of Article 12. The case concerned a Spanish national who had lived in Germany for thirty years and who, having held jobs at various intervals, had received social assistance for the previous ten years. Since she was lawfully residing in a contracting state of the *European Convention on Social and Medical Assistance*, the German authorities could not deport her, even though her residence permit was no longer valid.¹¹⁸ When Mrs. Sala claimed a child-raising benefit from the Bavarian government, her application was rejected on the ground that she did not have German nationality, a residence entitlement, or a residence permit. As a result, the question that was referred to the Court was whether requiring nationals of other Member States to produce a formal residence permit to receive a child-raising allowance constituted discrimination within the scope of Article 12.

¹¹⁵ *EC Treaty*, *supra* note 2, grants every citizen the right to vote and to stand as a candidate at municipal elections (art. 19(1)), as well as in elections to the European Parliament (art. 19(2)) in the Member State in which he resides, under the same conditions as nationals of that state; art. 20 guarantees diplomatic and consular protection to every citizen in the territory of a third country, even though the Member State of which the citizen is a national is not represented; art. 21 grants every citizen the right to petition the European Parliament (art. 21(1)), to apply to the Ombudsman (art. 21(2)), and to write to any of the EU Institutions in any of the languages recognized at art. 314.

¹¹⁶ *Ibid.*, art. 12.

¹¹⁷ *Supra* note 83.

¹¹⁸ 11 December 1953, 218 U.N.T.S. 255, art. 6.

Because the plaintiff was neither a worker nor a person who could otherwise invoke the Community provisions on free movement, and because it was decided that Article 18 does not create an independent right of free movement for all citizens of the Union,¹¹⁹ the Court had to find a gateway to the non-discrimination clause, which it did in Article 17:

As a national of a Member State lawfully residing in the territory of another Member State, the appellant in the main proceedings comes within the scope *ratione personae* of the provisions of the Treaty on European citizenship.

Article 8(2) of the Treaty attaches to the status of citizen of the Union the rights and duties laid down by the Treaty, including the right laid down in Article 6 of the Treaty, not to suffer discrimination on grounds of nationality within the scope of application *ratione materiae* of the Treaty.¹²³

In this manner, the Court stated that Article 12 is more than an instrument designed to strengthen the legal position of those nationals of a Member State who, *by virtue of free movement rights granted by the EC Treaty*, may lawfully reside in another Member State. Indeed, the duty of non-discrimination applies equally to situations where Union citizens reside lawfully in a Member State in circumstances where there is no obligation under Community law for the host state to grant free movement and residence rights to such persons.

The message of *Sala* is far-reaching. EU citizens no longer enjoying rights as economically active persons in a wide sense within the meaning of the various free movement provisions, and citizens deriving a right of residence under the secondary legislation¹²¹ who no longer satisfy the requirement concerning the possession of adequate financial resources, will remain entitled to equal treatment as long as their continued residence on the national territory of the host state has not been declared unlawful. Clearly this poses risks for Member States. They may have to pay social assistance to foreign nationals who are not wanted on the national territory but who, for one reason or another, cannot be repatriated.¹²² This may result in a tendency to in-

¹¹⁹ *Sala*, *supra* note 83 at para. 60. In light of the judgment of the Court of First Instance in *Kuchlenz-Winter v. Commission*, T-66/95, [1997] E.C.R. II-637 at para. 47 (rendered the day after the oral hearing on 15 July 1997 in *Sala*), it now seems certain that *EC Treaty*, *supra* note 2, art. 18, does not of itself create free movement and residence rights, independently from the specific treaty provisions such as arts. 39, 43, 49. For a critical comment, particularly in regard of the Court's having side-stepped whether art. 18 should be seen as the gate to art. 12, see C. Tomuschat, "Case C-85/96, *María Martínez Sala v. Freistaat Bayern*, Judgment of 12 May 1998, Full Court. [1998] ECR I-2691" Case Comment (2000) 37 C.M.L. Rev. 449.

¹²⁰ *Sala*, *ibid.* at paras. 61, 62.

¹²¹ See *supra* note 84.

¹²² According to the *European Convention on Social and Medical Assistance*, *supra* note 118, art. 11, which has been ratified by the vast majority of the EU Member States, residence becomes unlaw-

crease controls on immigrants so as to enable the authorities to terminate a person's status of lawful resident (e.g. by revoking a residence permit) before that person can apply for social benefits.

On 7 December 2000 the presidents of the European Parliament, the Commission, and the Council, in the presence of the heads of state and government assembled in Nice, proclaimed with much solemnity the *EU Charter*.¹²³ As the *EU Charter* contains essentially new descriptions of existing fundamental rights that belong potentially to the *acquis communautaire*, it is not easy to determine the value added that it brings to fundamental rights protection in the EU.¹²⁴ In particular, most of the rules on citizens' rights¹²⁵ appear to be little more than paraphrased versions of the provisions on Union citizenship laid down in Articles 18 to 21 of the *EC Treaty*. Thus, Article 45(1) provides: "Every citizen of the Union has the right to move and reside freely within the territory of the Member States." At first sight this article appears broader than the corresponding Article 18(1) of the *EC Treaty* because the latter provision provides that the right of citizens to move and reside freely shall be subject "to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect." The right of free movement and residence guaranteed by the *EU Charter* under Article 45(1), however, is no wider than that granted under Article 18(1) of the *EC Treaty*. Indeed, Article 52(2) of the *EU Charter* states: "Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties."

So *EU Charter* rights that correspond to rights expressly mentioned in the treaties are co-extensive with the equivalent treaty rights, and the same is true for the conditions governing their exercise. Likewise, rights contained in the *EU Charter* that correspond with rights guaranteed by the *Convention for the Protection of Human Rights and Fundamental Freedoms*¹²⁶ are stated to have the same meaning and scope as those laid down in that convention.¹²⁷

It may be concluded that the provisions on citizens' rights set forth in the *EU Charter* are not *as such* a step forward on the road to extending to all citizens of the

ful after a person has been ordered to leave the country, but art. 6 ensures that such an order cannot be issued in respect of a person lawfully residing in a contracting state on the sole ground that that person is in need of assistance.

¹²³ *Supra* note 77.

¹²⁴ See E. de Smijter & K. Lenaerts, "A 'Bill of Rights' for the European Union" (2001) 38 C.M.L. Rev. 273.

¹²⁵ *EU Charter*, *supra* note 77, arts. 39-46.

¹²⁶ 4 November 1950, 213 U.N.T.S. 221, Eur. T.S. 5.

¹²⁷ *EU Charter*, *supra* note 77, art. 52(3). But according to the last sentence of this provision, it shall not prevent Union law from providing more extensive protection.

EU a general right of movement and residence under conditions of full social equality. It should be noted, however, that the document does not remain silent on equal rights of access to public services and benefits. Under the heading “Solidarity” the *EU Charter* lists rights relating to social security and social assistance¹²⁸ and health care.¹²⁹ Admittedly, the inclusion of such provisions appears to be a confirmation that we are in the presence of important principles, rather than the mere definition of enforceable rights.¹³⁰ Nevertheless, even though the *EU Charter* only amounts to soft law for the time being, the principles it defends may be used as stepping stones for administrators and judges wishing to combat unjust and unnecessary restrictions on the rights of movement and residence of Union citizens.

Conclusion

Canada began in 1867 as a political union; the EU, in contrast, began in 1957, essentially as a project for an economic union. One important consequence of this distinction on mobility rights is that, in Canada, it is the federal government that decides for the whole country who will be a citizen and hence who can exercise mobility rights, while in the EU, Member States alone determine who will be counted among their citizens and hence who will be able to exercise the mobility rights guaranteed by the treaties. For this reason, the law in Canada has developed around the need to fill in the economic gaps revealed over time, while in the EU, the law’s development process has involved movement from an economic institution towards one having more overtly political goals.

Analysis of the Constitution of Canada and the body of treaties governing the EU and the EC reveals that they are both “works in progress”. The experience of Canadian federalism suggests that those in Europe who consider that their political or legal difficulties will be fundamentally changed upon the adoption of a genuine European “constitution”, clearly defining Community and Member States’ powers, may well be disappointed. In fact, analysis of the evolution of mobility rights under the Constitution of Canada suggests that constitutional development does not end with the creation of a formal political unit governed by a formal constitution. Rather, the constitution continues to be shaped by changing social, economic, and political forces.

¹²⁸ *Ibid.*, art. 34(2), states that every person residing and moving legally within the EU is entitled to social security benefits and social advantages in accordance with Community law and national laws and practices.

¹²⁹ *Ibid.*, art. 35, states that everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices.

¹³⁰ See P. Pescatore, “Nice—Aftermath” (2001) 38 C.M.L. Rev. 265 at 267-68.

As an economic construct, it would seem, on the one hand, that the EU protects mobility rights against infringement more effectively than is the case under the Constitution of Canada. In the EU the Community has authority to harmonize national laws with a view to promoting greater mobility. Furthermore, even indistinctly applicable laws may well be held to violate mobility rights, and traditional public policy justifications for such systemic barriers to the movement of goods and services have not stood up to challenges by persons seeking to enlarge the ambit of their freedom of movement. On the other hand, in Canada, the fact of citizenship protects those who move from one province to another against many barriers to free physical movement and the right to participate in the political process or to invoke the benefit of fundamental civil rights. Several civil and economic rights long taken for granted by Canadians have yet to be seen as incidents of EU law. This is particularly true with respect to mobility rights and rights to public benefits enjoyed by non-economically active citizens. It is for this reason, among others, that developments such as the *Schengen Agreement*¹³¹ and its subsequent incorporation into the *Treaty of Amsterdam*¹³² constitute such a significant step in EU law. It can therefore be concluded that a federal constitution is the more solid and durable construct of the two systems.

The manner in which the *Canadian Charter of Rights and Freedoms* has been invoked to fill the economic gaps in the Canadian constitution in respect of mobility is instructive. The *Canadian Charter* has in a few short years become a central element of Canadian constitutional discourse, including that relating to mobility. It can be confidently asserted that the same process is already under way in Community law and that the *Charter of Fundamental Rights of the European Union* is bound eventually to play the same role even as a declaratory text, and even more so when it will come to enjoy treaty status.

In both Canada and the EU, mobility rights, especially as incidents of more fundamental civil rights, are invoked as a justification for a political community. Indeed, politicians often refer to mobility rights and other fundamental freedoms as evidence of a strong and definable political community that serves the interests of its citizens.

In Canada it has been interesting to note the incremental growth of mobility rights. When the *Canadian Charter* was adopted there may have been considerable political fanfare, but it did not, in fact, constitute a total break with the past; rather, it

¹³¹ *Schengen Agreement Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of controls at the common frontiers*, 14 June 1985, 30 I.L.M. 68 [hereinafter *Schengen Agreement*]. The *Schengen Agreement* has been subsequently amended several times, notably to include all the Member States except the United Kingdom and Ireland.

¹³² *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts*, 2 October 1997, [1997] O.J. C. 340/1.

was added on to rights already existing in the constitution. A similar process of development can be identified in the EU and is likely to continue as the *EU Charter* comes to assume even greater significance in the legal system.

Finally, analysis of the development and protection of mobility rights under the Constitution of Canada shows clearly that the Canadian constitutional debate is about devolution from the centre, or ensuring a proper balance of rights between the central government—already enjoying broad jurisdiction over citizenship—and the social, cultural, linguistic, and regional interests that the provinces were established to protect. While in the EU the debate concerns limitation on the sovereignty of Member States with a view to gradually strengthening mobility rights and citizenship, sovereignty is limited each time it is decided that the Community power is better able to protect mobility rights and values than are the Member States.
