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A Work in Progress: The Supreme Court and the Charter's Equation of Rights and Limits

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A WORK IN PROGRESS: THE SUPREME COURT AND THE *CHARTER*'S EQUATION OF RIGHTS AND LIMITS

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Abstract

The text of the *Charter* separates the rights conferred from reasonable limits which may justifiably be placed on their enjoyment. Though the concepts of breach and justification serve different functions, the Supreme Court of Canada has not been faithful to the *Charter*'s structural logic. "A Work in Progess" examines the relationship between the rights and their limits in the jurisprudence. It shows that the boundary between breach and justification has been blurred, and that the Court's methodology is complex and unworkable. The final section suggests a methodology which will enable these concepts to serve their respective functions without upsetting the balance in the *Charter*'s equation of rights and limits.

A work in progress

In the early flush of *Charter*[1] interpretation the Supreme Court of Canada's jurisprudence was influenced by two assumptions. First, the judges considered section 1 an innovation which marked Canada's text for the protection of constitutional rights an improvement over the U.S. model. Second, the Court believed that a structured methodology would advance the enjoyment of rights. A structured approach could help fulfill the *Charter*'s promise and assist in maintaining the vital distinction between matters of law and matters of politics.

The fallibility of these assumptions has become evident over the years. Section 1, which, along with section 33, is often touted as a distinguishing feature of the *Charter*, has been a mixed blessing. By separating the concepts of breach and justification, the text set up an equation with two sides rather than one. In place of any presumption in favour of the entitlement, Canada's model sought equilibrium between individual rights and the demands of democratic governance. If section 1's mandate of reasonable limits allayed fears of absolute rights and the *Charter*'s implications for parliamentary tradition, it has confounded the Court nonetheless.

To this day the Supreme Court remains baffled by the textual equation of rights and limits. Under some guarantees, such as section 2(b)'s freedom of expression, the threshold for breach is low, and limits are imposed almost exclusively under section 1. Meanwhile, though the Court's definition of entitlement imposes significant constraints on the scope of section 15, the judges cannot agree on the analytical division of labour between breach and justification. Finally, freedom of association has been given a narrow and defensive interpretation quite unlike that accorded section 2(b).

Text and context confirm that the plan was for limits on the *Charter*'s rights and freedoms to be rationalized and imposed under section 1. That is the functional logic of reasonable limits, and yet it is a logic the Court has resisted. Due to differing views about how such limits qualify the guarantees and affect the scope of the entitlement, section 1 has never played its intended role. The Court has rejected its logic but failed to explain why the relationship between rights and their limits varies so much from one guarantee to another.

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[1] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), c. 11 [hereinafter *Charter*].

Divergent methodologies are one source of confusion in the Court's *Charter* interpretation, but there is another. Initially, and largely under the stewardship of the late Chief Justice Dickson, the Court sought refuge from the unfamiliar task of enforcing constitutional rights in structured doctrines. The *Oakes*[2] test, which promulgated a series of tests to evaluate the question of reasonable limits, is a case in point. There are others too, including *Irwin Toy*'s[3] abortive two-step-test under section 2(b), the section 15's *Law*[4] methodology, and even *Professional Institute*'s[5] four part definition of associational freedom.

Under the burden of layered and overlapping criteria, *Charter* analysis has become less accessible, to the point at times of impenetrable. For instance, the question of breach under section 15 is answered by a multi-step test, which incorporates subdivisions and further guidelines. That side of the equation is then followed by the several parts of the *Oakes* test, which is applied to determine whether limits are justifiable. Yet with prolix, cumulative doctrines the probability that the boundaries between breach and justification will blur can only increase. In addition, to escape the needless convolution of such doctrines, the Court has inserted subjective criteria into the mix. Co-existing alongside abstract doctrines in the jurisprudence are perceptive concepts like context, vulnerability, and human dignity. More often than not, those considerations, and not the evenhanded application of a structured methodology, determine the outcome. To summarize, the Court claims adherence to a structured methodology and then employs result-oriented criteria to decide cases. *Charter* adjudication does not take place under a methodology but rather, under the cover of methodology.

This paper's goals are to explain the evolution of *Charter* methodology in more detail, and then to propose an alternative which respects the functions of breach and justification, as well as the principle of equilibrium between the two. The proposal rests on two premises. The first is that limits on the *Charter*'s rights and freedoms should not enter the definition of entitlement and should be reserved to the question of justification under section 1. Second, and with a few exceptions, the *Charter*'s methodology should not be individualized to particular guarantees, but generalized to section 1 and its mandate of identifying reasonable limits.

Like the Court's *Charter* methodology, this paper is, at the time of publication, a work in progress. The polished version will develop the arguments introduced here and provide the support for its proposal that is not included here. In the circumstances, comments are particularly welcome.

The structural dilemma

At the outset, the Court's aspirations for the *Charter* outstripped its grasp of the equation's implications. Having been castigated for its uninspired interpretation of the *Canadian Bill of Rights*,[6] the judges were motivated to make amends and demonstrate diligence in undertaking responsibility for the enforcement of constitutional rights. As a result, rights were initially favoured on both sides of the equation. Thus in *R.* v. *Big M Drug Mart*,[7] the Court declared that the *Charter*'s guarantees should receive a generous and purposive interpretation. Despite the reference to "purposive", which later served to qualify the meaning of "generous", Dickson J.'s opinion in *Big M* confirmed that the Court would secure for individuals the full benefit of the *Charter*'s protection. He did add an admonition, in suggesting an approach to entitlement, against overshooting the mark.

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[2] *R.* v. *Oakes*, [1986] 1 S.C.R. 103.

[3] *Irwin Toy* v. *Quebec (A.G.)*, [1989] 1 S.C.R. 927.

[4] *Law* v. *Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

[5] *Professional Institute of the Public Service of Canada* v. *Northern Territories (Commissioner)*, [1990] 2 S.C.R. 367.

[6] *Canadian Bill of Rights*, S.C. 1960, c.44.

[7] [1985] 1 S.C.R. 295.

In the spirit of the day, the Supreme Court also announced, under section 1, that rights are the rule and limits the exception. That principle was formalized in the *Oakes* test, which promulgated a structured and rights-protective standard of justification.[8] It is in the nature of equations, though, that each side affects the other. That is why slanting both sides of the *Charter*'s equation in a rights-protective direction placed its equilibrium at risk. Not letting up on the *Oakes* test under section 1, in combination with *Big M*'s generous approach to the definition of rights, made it difficult for limits to prevail. By the same token, unless the entitlements themselves were limited, the burden of balancing the equation would fall entirely on section 1.

Together, *Big M* and *Oakes* could radically alter the relationship between individuals and the state, as well as compromise friendly relations between courts and legislatures. If re-jigging the concepts of breach and justification was unavoidable, still the Court had choices in deciding how to find the *Charter*'s point of equilibrium. For instance, either or both sides of the equation could be modified. Yet in choosing to alter both, the Court all but abandoned the functional distinction between the entitlement and its permissible limits.

Skewing the equation

Joining *Big M* and *Oakes* differed little in effect from a model of absolute rights. In such circumstances, including section 1's general principle of reasonable limits, modifying the *Oakes* test would have been the easiest way to correct the imbalance. That solution had the advantage of respecting the text's separation of breach and justification. It was unacceptable just the same, because the *Charter*'s structural logic contained a contradiction. Setting limits exclusively under section 1 would not avoid the awkwardness of absolute rights, because it suggested that the entitlements were unlimited. Against a tradition of parliamentary democracy, it was asking too much for courts to grant individual rights an unbounded interpretation, even if only temporarily and on one side of the equation.

Moreover, by setting one part of the analysis off from the other, the *Charter*'s structure promoted analytical imbalance. A low threshold on the question of breach, which then shifted attention to section 1, placed a disproportionate burden on the justification exercise. Though there is no logical reason why a "balance" between rights and limits cannot be achieved under that model, the concepts of individual entitlement and democratic limits would appear distorted. Finally, a methodology that sent every limit to section 1 would disadvantage the government, and make the rights holder a favorite of the law. Rather than adjust the justification side of the equation, the Court tinkered with both.

Definitional limits on the entitlement

This paper maintains that definitional restrictions on the scope of a right are a form of justifiable limits in disguise. To the contrary, though, *Charter* analysis assumes that an entitlement must be defined before violations can be debated as permissible or impermissible. In other words, the government can only be asked to explain a limit on a right that has content or meaning. If it appears that disagreement on this point is simply a debate about the definition of a definition, an example from American jurisprudence can explain why categorical limits are unworkable. Years ago, the U.S. Supreme Court held that lewd, obscene and libelous speech was excluded from the First Amendment[9]. As each is in fact a form of speech, the Court was trapped in a contradiction. These categories were removed from the *Constitution* in any event, because the expressive activities were not speech in a different sense. At the time, each was viewed as being so valueless, having regard to the First Amendment's underlying rationales, that it was permissible to eliminate it from constitutional consideration.

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[8] *Supra* note 2.

[9] *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942).

The subsequent jurisprudence would show, however, that definitional exclusion was an exercise in futility, for the U.S. Supreme Court could not avoid drawing the line between the obscene and non-obscene, and so on. Though abstracted in the form of a definition, there was a line that distinguished between speech which was included and speech which was excluded. For purposes of this paper, the point is that the U.S. *Bill of Rights* has no equivalent of section 1, and the American Court is without a textual mandate to limit individual rights. Under the *Charter*, Canada's courts could avoid the contradiction that obscenity is not expression, or that different treatment is not unequal treatment, because reasonable explanations could be advanced and limits accepted under section 1.

By upholding statutory limits on obscenity and other categories of offensive expression, the Supreme Court of Canada achieved a similar result under section 1. Elsewhere, however, it obviated the need for a justification analysis by interpreting the entitlement restrictively. Under section 15, for example, the Court fretted that a generous definition of equality would upset the balance of breach and justification. As a result, *Andrews* v. *Law Society of British Columbia*[10] confined the guarantee to its named grounds of discrimination, and to others which qualified as analogous. Building flexibility into section 15's interpretation by adding analogous grounds avoided "freezing" the *Charter*'s concept of equality. Even so, the text was clear that the guarantee was intended, by its comprehensive terms, to protect the equality of all individuals.

As noted above, the Court's approach in *Andrews* sought analytical balance between the concepts of breach and justification. From that perspective, while too generous an interpretation of section 15 would overtax section 1, an uncharitable definition would shortchange the concept of equality. If a midway point between two extremes appeared sensible it nonetheless blurred the distinction between the *Charter*'s two functions. To explain, the prohibited grounds methodology treats certain characteristics as a proxy for the discrimination that has been practiced on individuals, not as a matter of their merit, but because they bear certain characteristics in common with others. By the same token, this methodology has a negative aspect, which discounts different treatment, unless it is accompanied by one of the prohibited grounds. In that setting, individuals who are not treated equally suffer a discrimination in one sense but not in the sense of the entitlement. The reasoning of *Andrews* is longhand for the conclusion that an inequality that does not fall within the categories which have constitutional status is one that is justifiable. Without being put to the test under section 1, such inequalities are by definition reasonable, permissible and justifiable. In this, the negative definition of section 15 is no different than the U.S. Supreme Court's conclusion that fighting words, obscenity and libel are not speech under the First Amendment.

Through the prohibited grounds methodology, justificatory criteria entered the Court's interpretation of equality. Nor could the Court resist the temptation, subsequently, to expand on section 15's definitional limits. *Andrews* left unresolved whether a classification based on prohibited grounds would establish a breach, or whether section 15 required proof, in addition, that the classification was discriminatory. The possibility that the prohibited grounds might not suffice created new opportunities for section 1's function to invade section 15. The most transparent example will be found in the La Forest-Gonthier methodology of *Egan* v. *Canada*[11] and *Miron* v. *Trudel*.[12] There, in separate opinions, the judges claimed, respectively, that classifications based on a prohibited ground are only discriminatory when based on an irrelevant personal characteristic. In other words, a characteristic which is irrelevant is unreasonable as a basis for classification and therefore in breach of section 15, but one that is relevant is not. Different treatment grounded in a relevant personal characteristic would not violate section 15, under this analysis, because it is, by definition, reasonable and justifiable.

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[10] [1989] 1 S.C.R. 143.

[11] [1995] 2 S.C.R. 513.

[12] [1995] 2 S.C.R. 418.

Though other members of the Court rejected that approach, their reliance on stereotyping as the test of discrimination was more subtle but little different. That view equated treatment which stereotyped individuals with discrimination but again, it is in effect a section 1 conclusion reformulated to fit the entitlement analysis. If the presence of stereotyping is *prima facie* discriminatory, or impermissible, its absence simply means that an equality based on a prohibited ground is justifiable after all.

Between *Andrews* and the decision in *Law* v. *Canada*,[13] the Supreme Court judges attempted to plot a course for the equality jurisprudence. What emerged in that ten year period, however, was an inchoate mass of principles, tests, and methodologies. Its members finally agreed on a definition for section 15 when Iacobucci J. cobbled a synthesis of the Court's ruminations on equality which is now known as the *Law* test. Its aim, which was to state a comprehensive definition of equality, reveals a misconception of the entitlement side of the equation. Enumerating a cumulative and encyclopedic list of all that equality can or might mean is a distraction from the task of the analysis, which is to determine whether there is a *prima facie* breach that requires justification under section 1.

In terms of this paper's interest in the relationship between rights and their limits, the *Law* methodology is flawed for two reasons. First, its criteria are long-winded, intertwined, abstract and yet, as the Court cautioned, not exhaustive at that. In the circumstances, the excesses of the breach analysis have prompted judges to simplify the exercise. *Law* offers a shortcut, which is to ask, fundamentally, whether the different treatment at issue violates an individual's "essential human dignity". Unfortunately, human dignity is a concept that is perceptive rather than concrete and, by subdividing it into subjective and objective components, *Law* magnified its fluidity and indeterminacy. As well, *Law* has confirmed that adding layers upon layers of doctrinal criteria does not lend precision to the decision making process. The debate between Justices Bastarache and Arbour in *Lavoie* v. *Canada*[14] shows that the *Law* methodology, with its plethora of elements leading to the human dignity shortcut, results in the opposite.

Second, by resorting to human dignity as the standard of discrimination, the Court relied again on justificatory thinking to define the entitlement. In *Lavoie* for example, Arbour J. maintained that a citizenship preference in employment was not discriminatory because a reasonable person's human dignity would not be offended in such circumstances. Such reasoning, however, is a version of justification analysis, abstracted to a definition of human dignity. Any test of discrimination which asks whether the different treatment is reasonable or unreasonable, permissible or impermissible, is another way of inquiring whether it is justifiable or not. This is true of Arbour J.'s analysis in *Lavoie*, but also of Mr. Justice Bastarache's conclusion that a citizenship preference for employment *is* discriminatory and subject to section 1. The difference between the two is that while he found the classification justifiable under section 1, she found it justifiable under section 15, through a negative or exclusionary interpretation of human dignity. Justices Arbour and Bastarache were less divided on the question of entitlement and whether section 15 is engaged, as on the question whether the preference was suspect and therefore *prima facie* unjustifiable, or unsuspicious and accordingly permissible.

It would be difficult for a test of breach as complicated as *Law*'s to avoid overlap with section 1's function of justification. And, as the opinions in *Lavoie* illustrate, the relationship between sections 15 and 1 is far from settled. Thus the equality jurisprudence remains a protracted exercise in confusion. It is dysfunctional, in large part, because the Court has refused to respect the functional purposes of breach and justification. Until it does, little in section 15's interpretation is likely to change.

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[13] *Supra* note 4.

[14] (2002), 210 D.L.R. (4th) 193 (S.C.C.).

Justification and the other side of the equation

The Court's decision in *Andrews* preceded *Irwin Toy* v. *Quebec (A.G.)*[15] by a few months. At the time, Justice La Forest was the only one who was uncomfortable with the decision to give section 15 a narrowing interpretation. The underlying assumption of McIntyre J.'s prohibited grounds methodology was that the analytical functions of breach and justification should be more or less in balance. Subsequently, and in proposing a definition of freedom of expression, *Irwin Toy* is a counterpart of *Andrews*. It is interesting to note, in comparing the two guarantees, that the Court agreed to limit the scope of section 15, but was unable to agree on a methodology until *Law*, ten years later. Meanwhile, *Irwin Toy* advanced a two part test of expressive freedom. Paradoxically, section 2(b) began under the constraints of a structured test of breach but than was granted an open-ended interpretation. On the entitlement side, the Court was not at all concerned about the balance between the right and its limits.

Skewing the *Charter*'s equation on the entitlement side did not produce a sound methodology or results especially protective of equality. In principle, an approach that accepts the logic of section 1 and reserves the question of limits to that part of the analysis is more protective of rights. But that has not been section 2(b)'s experience. After adopting a generous interpretation of the right, the Court compensated by easing the standard of justification. Its concerns about keeping the equation in equilibrium resulted in corrections on the section 1 side: as seen above, the worry was that overextending the *Charter*'s rights and applying a strict section 1 test was too dangerous a combination.

Even so, it can be forgotten, in light of later developments, that *Irwin Toy*'s definition of expressive freedom is ambivalent. There, a majority of three set up a two-part test to decide the question of breach. Step one, which requires an attempt to convey meaning, simply asks whether an activity is expressive in nature. The second step trades on *Big M*'s[16] purpose-effects distinction, and is more obscure. Its two-prong analysis asks first whether the purpose of the restriction is to interfere with the content of the expression, in which case a *prima facie* breach is established and the analysis moves to section 1. Alternatively, when the restriction merely affects expressive freedom, its second part requires the rights claimant to show that the activity in question serves the guarantee's underlying values. Only then is a section 1 analysis required.

How the two-step test might widen or narrow the scope of the guarantee was initially unknown. On one hand, the majority openly endorsed section 2(b)'s values and declared that the freedom embraced all expressive activity, regardless of its content. That, in combination with the first step of the test, which in effect asks a question of fact, suggested few constraints on the entitlement. In this, the Court's definition was unaffected by concerns about the relationship between sections 2(b) and 1. On the other, though, the first step included a violent forms exception, and the second required a purpose-effects analysis which not only created a double standard but allowed the Court to screen claims. The degree to which screening would occur depended on the application of those criteria.

Irwin Toy also suggested a two-tiered approach to the question of justification. There, the majority opinion experimented with a dichotomous conception of *Charter* rights. When the state acted as the singular antagonist of the individual, it stated, a strict standard of justification should apply. But when the state served in its capacity to protect the vulnerable or make policy decisions about the allocation of resources, the standard should be less exacting. The awkwardness of *Irwin Toy*, in part, was that the Court had extended the *Charter*'s protection to pure commercial expression. Invalidating a law against children's advertising, which had been enacted in the province of Quebec, would expose the Court to

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[15] *Supra* note 3.

[16] *Supra* note 7.

criticism. In the circumstances, the purpose of *Irwin Toy*'s dichotomy was to rationalize limits on expressive freedom which otherwise would not have survived the *Oakes* test.

In the wake of *Irwin Toy*, section 2(b)'s evolution could be expected to follow two patterns. First, the cumulative effect of section 2(b)'s two-step test and the two branches of *Oakes* would subject expressive freedom to an abstract and heavily structured methodology. Second, it appeared that the *Oakes* test, which was complex enough in its own right, might be subdivided into standards that were more or less strict, depending on the nature of the state's intervention.

It was not long before the Court buckled under the analytical strain of that methodology. In the event, critical developments occurred on each side of the equation. First, it clarified its conception of the right. Not only was the violent forms exception read down, the principle of content neutrality was granted near-absolute status. In addition, the purpose-effects branch of the test effectively withered. Those developments left in place a presumption that expression is *prima facie* valuable, and that violations of the freedom must be justified under section 1.

The second development led to conflict between a near-absolute conception of the rights, and an easy standard of justification under section 1. Rather than endorse *Irwin Toy*'s two-tiered approach, the Court preserved equilibrium between rights and their limits through the "contextual approach". At the outset, context provided a way to balance competing considerations under section 1 and offset a methodology which was relentlessly abstract. In addition, and owing to the textual divide, breach and justification were disconnected from each other: the nature of the right belonged on one side of the equation, and the requirements of a democratic society, on the other. True to the functional and structural logic of the *Charter*, the *Oakes* test was designed to determine the reasonableness of a *Charter* violation, and not to "balance" rights against democratic prerogatives. By not juxtaposing the competing considerations at stake, abstract, compartmentalized conceptions of the right and its limits slanted the analysis in favour of the right.

Contextualizing the contest between the competing interests addressed a perceived gap in the *Oakes* test which could lend an air of reality to the analysis. An objective which made sense nonetheless distorted the methodology in section 2(b) cases, because it provided the means by which the guarantee's values were turned against the freedom under section 1. Doctrinally, context did not fit either branch of the *Oakes* test. Without a place in the analysis, the concept had nowhere to go and would surely languish. Accordingly, in a series of decisions commencing with *R.* v. *Keegstra*,[17] the Court held that context is an aspect of the proportionality analysis. In that setting, context served as a proxy for content that allowed the Court to test the value of *particular* expressive activity against section 2(b)'s *abstract* values. In that way, the contextual approach achieved the opposite of content neutrality: instead of enhancing the guarantee, section 2(b)'s values explained why a lower standard of justification applied to objectionable expressive activity.

In the section 2(b) jurisprudence, the separation of rights and their limits became an artifice that allowed the Court to claim a magnanimous interpretation of section 2(b) and then achieve inconsistent results under section 1. By disconnecting the principle of content neutrality from section 1, this methodology manipulated the separation of breach and justification. With the textual divide in place, the two parts of the equation did not have to be consistent.

All that said, the section 2(b) jurisprudence is more faithful to the *Charter*'s conceptual scheme than its section 15 counterpart. And, though the results have been uneven over the years, the contextual approach

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[17] [1990] 3 S.C.R. 697.

has been less focal in recent case law. At present, then, the section 2(b) methodology is more wanting in refinement than in need of a make over.

Comparisons and an anomaly

Neither *Law*'s approach, which has burdened section 15 with a structured and constraining test of breach, nor the contextual approach, which has emasculated the principle of expressive freedom under section 1, offers a workable methodology. The Court's top heavy definition of equality compromises both sides of the equation. On one side, the entitlement is subject to complex, subjective criteria which diminish the guarantee and apply justificatory criteria to determine whether equality has been violated. On the other, the section 1 analysis is eliminated, to the claimant's disadvantage, when different treatment is not "discriminatory" because it does not offend human dignity. Though that allows the government to succeed without explaining why it is permissible to treat individuals differently, when a claim does reach section 1, the combination of *Law* and the section 1 analysis creates tremendous odds against its success. Meanwhile, under section 2(b), the principle of content neutrality was subverted by the methodology of the contextual approach. If the problem with the section 15 jurisprudence is that section 1 criteria entered the definition of entitlement, section 2(b) was undercut by the misuse of the guarantee's values under section 1.

Whether the *Charter*'s methodology of rights and limits should be the same for different guarantees is a question infrequently broached. Though the textual location and function of section 1 support that view, the Court's divergent methodologies are not unexplained. For instance, its fear that section 15 might be trivialized, and section 1 too heavily taxed led to a methodology that privileges the entitlement side of the equation. Meanwhile, the Court's awareness that invalidating criminal sanctions against unpopular expression would be controversial led it to subvert expressive freedom's values under section 1.

A final example illustrates how anomalous this methodology can be. Despite its conceptual and geographical proximity to section 2(b), freedom of association has been given one of the narrowest interpretations of all the *Charter*'s guarantees. Thus it is more difficult to establish a breach of section 2(d) than to satisfy *Law*'s multidimensional test of discrimination. This state of affairs arises from the *Labour Trilogy*'s[18] distinction between the freedom to form an association and the freedom to engage in collective activities. That distinction was motivated by the fear that labour relations might otherwise be constitutionalized by the *Charter*, as well as by a general concern that groups and organizations, simply by virtue of associating, might be granted greater rights than individuals. The Court's resistance to associational freedom was embedded in the entitlement to prevent claims from reaching section 1. In the result, section 2(d) was confined to the formal right to associate, and to associational activities which were independently protected by other *Charter* guarantees.

Until the decision in *Dunmore* v. *Ontario (A.G.)*,[19] section 2(d) was a dead letter. The equation was so distorted on the entitlement side that claims crossed the definitional barrier to section 1 on the rarest of occasions only. It bears noting here, too, that the decision to exclude associational activity, generally, from the *Charter* substitutes definitional criteria for the conclusion that limits on collective activity are justifiable. As the late Chief Justice Dickson's dissenting opinion in the *Trilogy* attests, that conclusion rests less on any sound conception of association than on the raw fear that section 1 would be swamped and any number of laws rendered vulnerable to invalidity. So much activity is collective in nature that, without definitional limits, section 2(d) might grant all human endeavour status under the *Charter*.

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[18] The *Labour Trilogy* comprises *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *P.S.A.C.* v. *Canada*, [1987] 1 S.C.R. 424; and *R.W.D.S.U.* v. *Saskatchewan*, [1987] 1 S.C.R. 460.

[19] (2002), 207 D.L.R. (4th) 193 (S.C.C.).

In *Professional Institute* v. *Northwest Territories*,[20] the late Sopinka J. structured the section 2(d) methodology in a series of four points which described the relationship between an association and its activities. Though his framework arose from the *Labour Trilogy*, it stated yet too generous a scope for the guarantee and was not endorsed by a majority of the Court for several more years[21]. More recently, though, in supplementing *Professional Institute* with an inquiry explicitly directed at interferences with collective activity, *Dunmore* v. *Ontario* (*A.G.*) diminished the importance of the distinction between a bare right to associate and the freedom to engage in collective activities. It is too early to tell how the jurisprudence will evolve under *Dunmore*. At the moment, however, it appears that section 2(d) has taken a step away from the entitlement side, and moved toward the justification part of the equation.

A consistent methodology of breach and justification has never been a priority for the Court. The section 2(b) and section 15 jurisprudence is not remotely consistent, and section 2(d)'s entitlement analysis may be more akin to section 15's, but that places it in sharp contrast to the low threshold applied under section 2(b). This refreshes the question whether divergence is undesirable, and the short answer is that any methodology which overextends the entitlement analysis at the expense of section 1's function is undesirable. By blurring breach and justification that approach renders the Court's decisions conceptually unsound. As shown throughout the discussion, it has produced a doctrinal structure which is complex and impenetrable. To cope, the Court has introduced subjective concepts which simplify the process of decision making but compromise the goal of a principled methodology. Last but not least, how the functions of rights and limits are formulated can affect the outcome in cases where a claim fails on breach but might have succeeded had it reached section 1.

It is time to rethink the methodology of the *Charter*'s equation. Due to the press of time, the proposal below is rough and preliminary, a form of thinking in progress.

A question of balance

Balance is a central *Charter* concept, and one that has different meanings. For instance, there must be a balance between the rights of individuals and the requirements of democratic governance. In addition, there must be a balance, or dialogue, between the courts and legislatures. As well, there is an expectation that *Charter* interpretation should balance the roles breach and justification play, to prevent one side of the equation assuming inordinate importance in the analysis. By the same token, it is assumed that each side should shoulder an appropriate burden; in other words, the *Charter* should not unfairly advantage the claimant or the state in contests between the two.

Any or all of the relationships above can be in or out of balance. That is a matter of perception on which views will vary, depending on whichever vision of rights is favoured. In turn, whether explicitly or implicitly, every vision of rights includes substantive, institutional and doctrinal elements. One of the shortfalls in the *Charter* jurisprudence to this point is its lack of a vision or conception of rights. In its absence, the Court has balanced rights and their limits in a more *ad hoc* fashion. The *Charter*'s equilibrium is adjusted by manipulating both sides of the equation, on an as needed basis, to achieve an acceptable balance between rights and limits. To the extent this can be considered a vision, it is not a desirable one.

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[20] *Supra* note 5.

[21] See *Professional Institute, ibid.*; *Canadian Egg Marketing Agency* v. *Richardson*, [1998] 3 S.C.R. 157; and *Delisle* v. *Canada (Deputy A.G.)*, [1999] 2 S.C.R. 989.

This part of the paper does not offer a vision of rights. Instead, it proposes a methodology that can apply, whatever the Court's vision of rights may be. It is a methodology that addresses the equation and is indifferent to results. As noted in the Introduction, it rests on two premises: first, that limits should be imposed under section 1; and, second, that a consistent methodology should apply to all guarantees, with only those exceptions that are directed by the text.

There are at least three reasons why limits should be reserved to section 1. To begin, that is section 1's structural and analytical function. Second, as the discussion has shown, building limits into the definition of entitlement has not worked. Not only are the resulting doctrines confusing and constraining, they overlap the question of justification. Third, an equation that reserves the question of limits to one side need not be out of equilibrium. All it means is that limits are decided there and not elsewhere. In methodological terms, that side is indifferent whether limits under section 1 are easy or difficult to justify. Under this concept of the *Charter*'s functioning the reasoning of *Andrews*, that definitional limits on the entitlement are necessary to preserve the balance, is unsound.

Second, the divergent methodologies in place at present detract from the *Charter*'s cohesion. As well, these methodologies have duplicated, repeated and complicated the analysis. All too often the result is a wearying series of exercises in obfuscation. A consistent methodology of rights and limits would simplify the *Charter*'s interpretation and contribute to greater transparency in decision making. At the same time, it need not rob the guarantees of their context and subject difficult questions about competing considerations to a mechanistic formula under section 1.

The structural logic of the *Charter* can and does work. Suggested below, in preliminary form, is a way of reconfiguring the existing guarantee-specific methodologies to restore section 1's function and lend coherence to the equation of rights and limits. The proposal will be elaborated in the full article this conference paper introduces.

It offers two alternatives, the first of which is preferred and is therefore explained in more detail; the second is merely mentioned. To begin, although a low threshold for breach would diminish the entitlement side of the equation, the Court need not worry about disequilibrium between rights and their limits; under the proposal, section 1's function would be divided into two parts and enriched by the addition of a contextualization analysis. Accordingly, the first part contemplates a contextualization, which would characterize the nature of the infringement and, in doing so, inform the requirements of justification, which would be addressed, doctrinally, at the second stage of the analysis. This exercise would both rationalize and adjust the requirements of the *Oakes* test, which would remain in place as the foundation for testing reasonable limits. Examples from each of the three guarantees discussed above provide an illustration.

Under section 15, for example, the complexities of the *Law* test would be eliminated in favour of a simple question which would ask whether an individual was treated differently and therefore unequally. Adopting a low threshold of breach would not eliminate the *Law* test, but would shift most of its criteria to section 1's initial, contextualization analysis. The objective there would be to develop principles which explain why some inequalities are more or less justifiable than others. The use of a prohibited ground, for instance, invites a demanding standard of justification, because the classification singles individuals out on that basis and raises a suspicion, for that reason, that it might be based on stereotyping. At the same time, some of the prohibited grounds are more likely to offend human dignity than others; some arise from a stronger history of discrimination than others. Whether and how that ought to affect the application of *Oakes* should be part of the section 1 analysis, and not a screening mechanism to prevent violations of equality from requiring an explanation. Meanwhile, there would be a presumption that different treatment not based on a prohibited ground is justifiable. Only where the government cannot satisfy a relatively low standard of rationality or proportionality would that presumption be rebutted.

The analysis in section 2(b) cases has already gravitated to section 1, and so the challenge there is one of formalizing the principles which should inform justification. Once again, the Court could develop principles under the contextual analysis, to explain why the standard of justification is not the same in every case. Content regulation, absolute bans and prior restraints pose the most serious threats to expressive freedom, and the standard of justification that applies in such instances should accordingly be strict. In addition, section 2(b)'s underlying values can inform the question of justification, but rather than test the content of *particular* expression against *general* values, the Court can identify which categories of expression are located closer to the core of the guarantee. That political expression is highly prized is hardly controversial, and should be reflected in the form the *Oakes* test takes. Finally, the Court should be more explicit that it is the harm of an activity, not its perceived lack of value, that is the measure of a justifiable limit.

A parallel can be drawn with claims under section 2(d). Once again, singling an organization out because of its objectives, as well as absolutely banning either its activities or its operations, should invite rigorous scrutiny. As well, it is not inappropriate to apply a different standard of justification to a political organization than to one formed for criminal purposes. Finally, the contextualization of section 2(d) claims should include a presumption against measures which are based on guilt by association.

The point of commencing the section 1 analysis with a contextualization of the infringement is to rationalize and regulate the *Oakes* standard of justification. Adding this exercise to section 1 will allow the Court to contextualize the justification to the individual guarantees. Also, it will identify the criteria which explain adjustments to the *Oakes* test. Not only can it lead to a more evenhanded application of the test, under identified criteria, it is flexible enough to maintain equilibrium between the rights and their limits, wherever the Court decides that point may be.

A second alternative, mentioned briefly here, is this. Another way of addressing the divide between rights and their limits is to merge the concepts. That could be done by reading section 1, notionally, into the guarantees, and conducting an integrated analysis. Doing so would encourage a simplification of the entitlement analysis and thereby demonstrate that the present jurisprudence attaches far too much importance to that question. Being atextual, this approach is less desirable. Still, it has the advantage of bringing the entitlement directly into contact with its limits. As argued throughout this paper, the disconnection of these concepts has been a stumbling block in the *Charter*'s interpretation thus far. At the same time, attaching section 1 to every guarantee, on even a notional basis, might detract from its status as the *Charter*'s organizing principle. As well, though it is not unavoidable, conducting an integrated analysis could cause confusion on the burden of proof.

Conclusion

Charter interpretation requires a methodology which makes some sense of the text's separation of rights and their limits. Section 1's innovation, which was conceptually sound in the sense of putting any notion of absolute rights to rest and seeking continuity with a tradition of parliamentary democracy, has generated a difficult jurisprudence. Paradoxically, the functions of breach and justification have been disconnected from each other, and yet the two overlap in the case law. The result, as repeated far too often throughout this paper, is needless confusion, complication and incoherence in the Court's management of these concepts.

In defining the relationship between the rights and their limits at the outset, the Supreme Court of Canada could not have been expected to foresee and predict how the two concepts would interact. Initial choices favouring the protection of rights on both sides of the equation led to further choices aimed at its re-calibration. Still uncertain today, the two sides of the equation have each become dysfunctional.

The object of this article has been to propose a methodology which will redefine the equation's functions of rights and limits. In doing so, it connects the *Charter*'s two central functions in a way that has been missing from the beginning. Because it is based on the principle that a low threshold for breach should reserve the question of reasonable limits to section 1, it is likely to encounter resistance. Two quick points in its favour can be made. The first is that adjusting the roles on both sides of the equation need not upset the *Charter*'s equilibrium. The justification analysis does not presume that rights should prevail over limits, or that limits should prevail over rights. The basis of the proposal, instead, is that the introduction of a contextualization exercise can refine and enrich the section 1 analysis. Only then can section 1 fulfill its intended role, without generating undue fears that rights are too adequately or inadequately protected, or that the courts are too powerful or not powerful enough.

Second, the changes proposed here do not require the Court to abandon its own jurisprudence. As suggested above, it is more a question of shifting existing criteria into a contextualization exercise under section 1, re-shaping those criteria and perhaps adding others, and specifying a set of principled guidelines for the justification analysis under *Oakes*.

The structural and functional logic of the *Charter*'s equation can and does work. But it requires a methodology which respects that logic to make it work.