

THE PAST, PRESENT, AND FUTURE OF EXPRESSIVE FREEDOM UNDER THE *CHARTER*[®]

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More than ten years have passed since the Supreme Court of Canada's first interpretation of the *Charter's* guarantee of expressive freedom in *RWDSU v. Dolphin Delivery*. This review of the past, present, and future of expressive freedom under the *Charter* is in three parts. The first—dealing with the past—traces the evolution of a methodology of expressive freedom in the “first generation” of s. 2(b) jurisprudence. It is followed by an examination of the status of expressive freedom at present, through comments on recent Supreme Court landmarks in *Dagenais v. Canadian Broadcasting Corp.*, *Hill v. Church of Scientology of Toronto* and *RJR MacDonald Inc. v. Canada (A.G.)*. The third part proposes a methodology for the future, which would enhance the *Charter's* protection of expressive freedom by grounding the s. 1 analysis in a framework of principle.

Plus d'une dizaine d'années se sont écoulées depuis l'arrêt *SGDMR c. Dolphin Delivery* dans lequel la Cour suprême du Canada a interprété pour la première fois la garantie de la liberté expressive accordée par la *Charte*. Cette revue du passé, du présent, et de l'avenir de la liberté expressive garantie par la *Charte*, est examinée en trois parties. La première, en rapport avec le passé, retrace l'évolution d'une méthode d'analyse de la liberté d'expressive selon la jurisprudence de la « première génération » de l'al 2(b). Cette partie est suivie par un examen du statut actuel de la liberté expressive, à travers les commentaires de repères récents établis par la Cour suprême dans *Dagenais c. Société Radio-Canada* *Hill c. Église de scientologie de Toronto* ainsi que *RJR MacDonald Inc. c. Canada (P.G.)*. La dernière partie visant l'avenir, propose une méthodologie qui pourrait améliorer la protection de la liberté expressive garantie par la *Charte* tout en basant l'analyse premier sur des règles de principe.

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I. INTRODUCTION

A jurisprudence on expressive freedom evolved quickly following the Supreme Court of Canada's first interpretation of section 2(b) of the *Canadian Charter of Rights and Freedoms* in *RWDSUV, Dolphin Delivery*². Since 1986, the Court has considered limits on offensive communications, including hate propaganda,³ obscenity,⁴ and the

¹ Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), c. 11 [hereinafter *Charter*]. The section provides as follows: "Everyone has the following fundamental freedoms: ... (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication ..."

² [1986] 2 S.C.R. 573 [hereinafter *Dolphin Delivery*] (protecting labour picketing under s. 2(b) of the *Charter*).

³ *R. v. Keegstra* [1990] 3 S.C.R. 697 [hereinafter *Keegstra*]; and *R. v. Andrews* [1990] 3 S.C.R. 870 (upholding s. 319(2) of the *Criminal Code*, R.S.C. 1985, c. C-46).

⁴ *R. v. Butler*, [1992] 1 S.C.R. 452 [hereinafter *Butler*] (upholding the definition of obscenity under s. 163(8) of the *Criminal Code*).

solicitation of sex,⁵ and addressed the constitutionality of restrictions on false,⁶ libellous⁷ and discriminatory⁸ expression. The emerging case law has discussed the status of commercial⁹ and political expression,¹⁰ including compelled messages,¹¹ examined the principle of openness in judicial and other public proceedings,¹² set limits on the

⁵ *Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code* [1990] 1 S.C.R. 1123 [hereinafter *Prostitution Reference*]; *R. v. Stagnitta*, [1990] 1 S.C.R. 1226; and *R. v. Skinner*, [1990] 1 S.C.R. 1235 (upholding the *Criminal Code's* solicitation provisions).

⁶ *R. v. Zundel*, [1992] 2 S.C.R. 731 [hereinafter *Zundel*] (invalidating s. 183 of the *Criminal Code* prohibiting the wilful spreading of false news); *Hill v. Church of Scientology of Toronto* [1995] 2 S.C.R. 1130 [hereinafter *Scientology*] (holding that s. 2(b) of the *Charter* does not alter the common law of defamation); and *Botiuk v. Toronto Free Press Publications Ltd.* [1995] 3 S.C.R. 3 [hereinafter *Botiuk*] (upholding a verdict and award for damages for libel).

⁷ *Scientology*, *supra* note 6; and *Botiuk*, *supra* note 6.

⁸ *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 (upholding a human rights complaint about hateful telephone messages); and *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 [hereinafter *Ross*] (upholding a discrimination complaint arising from a schoolteacher's off-duty anti-Semitic expressive activity).

⁹ *Ford v. Quebec (A.G.)* [1988] 2 S.C.R. 712 [hereinafter *Ford*], and *Devine v. Quebec (A.G.)* [1988] 2 S.C.R. 790 (invalidating English language advertising restrictions); *Irwin Toy v. Quebec (A.G.)*, [1989] 1 S.C.R. 927 [hereinafter *Irwin Toy*] (upholding restrictions on advertising aimed at children); *Rocket v. Royal College of Dental Surgeons of Ontario* [1990] 2 S.C.R. 232 [hereinafter *Rocket*] (invalidating restrictions on professional advertising); and *RJR-MacDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199 [hereinafter *RJR-MacDonald*] (invalidating restrictions on tobacco advertising and mandatory cigarette package warnings).

¹⁰ *Osborne v. Canada (Treasury Board)* [1991] 2 S.C.R. 69 (invalidating restrictions on partisan activities by public servants); *Lavigne v. OPSEU*, [1991] 2 S.C.R. 211 [hereinafter *Lavigne*] (upholding the use of compelled union dues for political and ideological purposes); *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)* [1993] 1 S.C.R. 319 [hereinafter *Nova Scotia*] (dismissing a claim of access to a provincial legislative assembly by a television station); and *Haig v. Canada (Chief Electoral Officer)* [1993] 2 S.C.R. 995 (dismissing the right of a citizen to vote in a referendum as an element of expressive freedom under s. 2(b)).

¹¹ *Slaight Communications v. Davidson*, [1989] 1 S.C.R. 1038 [hereinafter *Slaight*] (upholding limits on an employer's expressive freedom and compelling an employer to provide a reference letter of specified contents to a former employee); *Lavigne*, *supra* note 10; and *RJR-MacDonald*, *supra* note 9.

¹² *Canadian Newspapers v. Canada (A.G.)*, [1988] 2 S.C.R. 122 (upholding a ban on publication of complainants' identities in sexual assault cases); *Edmonton Journal v. Alberta (A.G.)* [1989] 2 S.C.R. 1326 [hereinafter *Edmonton Journal*] (invalidating a statutory ban on the publication of certain civil proceedings); *Vickery v. Nova Scotia Supreme Court (Prothonotary)* [1991] 1 S.C.R. 671 [hereinafter *Vickery*] (denying press access, at common law, to a taped confession); *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 [hereinafter *Dagenais*] (invalidating a publication ban); *Nova Scotia*, *supra* note 10; *Native Women's Association of Canada v. Canada*, [1994] 3 S.C.R. 627 [hereinafter *NWAC*] (dismissing a claim of access to constitutional negotiations); and *R. v. Adams*, [1995] 4 S.C.R. 707 (establishing conditions for the revocation of publication orders with respect to the identity of sexual assault complainants).

availability of publication bans,¹³ pondered the role of the press,¹⁴ and explored the scope of access to government property under section 2(b).¹⁵ In such circumstances, it should be of little surprise that the jurisprudence thus far has been mixed: though expressive freedom has prevailed in important cases, the infringements saved still outnumber, by some margin, those that have been struck down.¹⁶ Issues that raised questions of first impression also challenged the Court to develop a conception of expressive freedom under the *Charter*. If it is premature to expect a theory of expression, it is surely not too soon to reflect on the first generation of section 2(b) jurisprudence and to look to the future.

Like other *Charter* guarantees, section 2(b) can claim an auspicious beginning. The holding in *Dolphin Delivery* that labour picketing is a protected form of expression under the *Charter* was followed by *Irwin Toy v. Quebec (A.G.)* and a definition of expression as all activity that attempts to convey meaning.¹⁷ Ironically, however, a generous reading of section 2(b) expanded the role of section 1's concept of justification and set a certain dynamic in motion.¹⁸ After defining the right broadly, the Court in *Irwin Toy* immediately relaxed the requirements of the section 1 test first set out in *R. v. Oakes*.¹⁹

¹³ *Edmonton Journal*, *supra* note 12; and *Dagenais*, *supra* note 12.

¹⁴ *Edmonton Journal*, *supra* note 12; *Dagenais*, *supra* note 12; *Canadian Broadcasting Corp. v. Lessard*, [1991] 3 S.C.R. 421 [hereinafter *Lessard*], and *Canadian Broadcasting Corp. v. New Brunswick (A.G.)*, [1991] 3 S.C.R. 459 [hereinafter *New Brunswick*] (rejecting the claim that s. 2(b) protects the press from search warrants); and *Canadian Broadcasting Corp. v. New Brunswick (A.G.)* (Re: *R. v. Carson*), [1996] 3 S.C.R. 480 [hereinafter *Carson*] (upholding s. 486(1) of the *Criminal Code* but invalidating the exclusion order as an unjustifiable infringement of s. 2(b) in the circumstances).

¹⁵ *Canada v. Committee for the Commonwealth of Canada* [1991] 1 S.C.R. 139 [hereinafter *Commonwealth*] (invalidating restrictions on access to a public airport); *Nova Scotia*, *supra* note 10; *Peterborough (City) v. Ramsden*, [1993] 2 S.C.R. 1084 [hereinafter *Ramsden*] (invalidating restrictions on access to public property); and *NWAC*, *supra* note 12.

¹⁶ Important s. 2(b) decisions include *Ford*, *supra* note 9; *Rocket*, *supra* note 9; *RJR MacDonald*, *supra* note 9; *Zundel*, *supra* note 6; *Edmonton Journal*, *supra* note 12; and *Dagenais*, *supra* note 12. Limits have been upheld in cases that include *Irwin Toy*, *supra* note 9; *Keegstra*, *supra* note 3; *Butler*, *supra* note 4; *Lavigne*, *supra* note 10; *Slaight*, *supra* note 11; *Scientology*, *supra* note 6; *Lessard*, *supra* note 14; and *New Brunswick*, *supra* note 14.

¹⁷ See text accompanying note 38, *infra*.

¹⁸ Section 1 of the *Charter*, known as the "limitation clause," provides as follows: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

¹⁹ [1986] 1 S.C.R. 103 at 138-40 [hereinafter *Oakes*]. In order to justify a limit on a *Charter* right, the state must first point to an objective that is sufficiently pressing and substantial. The limitation must then pass a three-step proportionality test: the limit must be rationally connected to

Shortly thereafter, Wilson J. proposed in *Edmonton Journal v. Alberta (A.G.)* that the Court adopt a “contextual approach” to the balancing of values under section 1.²⁰ A simple principle of interpretation that was introduced in concurring reasons quickly became the mainstay of a methodology which is now firmly entrenched in precedent.

Leaving the results of particular cases aside, the methodology of section 2(b) adjudication is troubling and problematic. The foundation of that methodology is the contextual approach, which has emasculated *Irwin Toy’s* inclusive definition of the right and transformed section 1 review into an *ad hoc* exercise that exalts flexibility at the expense of principle. In the years since *Dolphin Delivery*, section 2(b)’s values have increasingly been compromised by a lack of structure, principle, and consistency in the analysis. Today, *Irwin Toy’s* principle of expressive freedom is little more than an empty gesture. The jurisprudence reached that point by marginalizing expressive freedom through a methodology that itself reflects a limited conception of the right and its values.

Exploring that relationship, or symbiosis, between section 2(b)’s values and the Court’s methodology is the central purpose of this article. Part II discusses the early jurisprudence and its struggle to reconcile the Court’s definition of the right with a conception of reasonable limits under section 1. After considering the impact of *Irwin Toy* and tracing the development of the contextual approach, the article explains how the methodology that crystallized in *Keegstra*²¹ skewed the *Charter’s* equation of rights and limits. Part III of the article traces the progress of that methodology in three key decisions, each of which invited the Supreme Court to consider the *Charter’s* guarantee of expressive freedom in a distinctive context.²² Although the claim prevailed twice, these cases demonstrate that the right cannot be protected by a flawed methodology, and likewise that a sound methodology cannot emerge from a flawed conception of the right. The Court’s fundamental ambivalence toward expressive freedom is confirmed in a brief review of two more recent decisions which also mark Mr. Justice La Forest’s emergence as the Court’s leader on these issues.²³

the objective; the limit must be the least rights-impairing method of achieving the objective; and the deleterious effects of the limit on the right must not be disproportionate to the beneficial effects of achieving the objective.

²⁰ See *infra* notes 51-57 and accompanying text.

²¹ *Supra* note 3.

²² *Dagenais*, *supra* note 12 (publication bans); *Scientology*, *supra* note 6 (defamation); and *RJR MacDonald*, *supra* note 9 (tobacco advertising).

²³ *Ross*, *supra* note 8; and *Carson*, *supra* note 14.

The Court has spoken of a “delicate balance”²⁴ and a “synergetic relation” under section 1.²⁵ In that regard, it is important to note that the *Charter’s* dynamic of rights and limits is structural as well as substantive. Structurally, the two sides of the equation are set apart and then reconciled, as a matter of substantive law, through a balancing of values that establishes equilibrium under section 1. The first three parts of the article conclude that the search for equilibrium in the first generation of jurisprudence was compromised by a methodology that is structurally and substantively unsound. Although the discussion is critical, it identifies the building blocks that can provide a foundation for section 2(b)’s evolution in the next generation of jurisprudence. Drawing on those building blocks, Part IV explains how the Court’s methodology could be modified, both to achieve stronger protection for expressive freedom and to promote principled decisionmaking under section 1 in the future.

Before proceeding, it should be acknowledged that consensus on difficult questions about expressive freedom cannot realistically be achieved. Although this article defends a balance that prefers freedom over regulation in most cases, its purposes are as focused on the methodology of *Charter* interpretation as on the way in which values are balanced in particular cases. As is suggested below, a “methodology for the future” would incorporate the following changes: first, the introduction of two presumptions in favour of expressive freedom under section 1; second, adjustments to the *Oakes* test; and third, a reconceptualization of the role that the contextual approach plays in the section 1 analysis.

It is inevitable that perceptions of the *Charter’s* equilibrium will vary from case to case and issue to issue. In such circumstances, the first and foremost goal of the article is to propose a framework of principle to guide the jurisprudence in the next generation and, in doing so, to ground shifting perceptions of equilibrium in a structure of analysis.

²⁴ *RJR MacDonald*, *supra* note 9 at 270.

²⁵ *Keegstra* *supra* note 3 at 737.

II. THE FIRST GENERATION

A. *Evolution of a Methodology*

Textually, the *Charter's* integrity rests on a principle of equilibrium between its rights and freedoms, and those limits that are “demonstrably justified in a free and democratic society.”²⁶ The source of that equilibrium is section 1 and its mandate to set “reasonable limits” on constitutional rights. The concept of reasonable limits is regarded as a stroke of genius because it acknowledges, in explicit terms, that rights cannot be absolutely protected. Through an equation that attained balance between the *Charter's* guarantees and its democratic values, Canada hoped to avoid the contradictions of American doctrine. In the United States, certain categories of speech were excluded from the First Amendment because limitations were impossible to reconcile with the text’s absolute prohibition on abridgments of free speech.²⁷ Hence the fiction that obscenity, libel, and fighting words—each of which is undeniably expressive—do not constitute “speech” under the First Amendment.²⁸ Restricting the right would not be necessary in Canada because reasonable limits on expressive freedom can be saved under section 1.²⁹

Yet, in balancing the equation so evenly, the *Charter* failed to indicate how the tension between its rights and limits should be resolved. Unlike the United States Constitution, which unequivocally favours expressive rights, the *Charter* shows no preference for either side of the equation; nor does it address the relationship between the two. As a result, one of the most difficult questions the Supreme Court of Canada considered in the early years of *Charter* interpretation was whether the

²⁶ *Supra* note 18.

²⁷ U.S. Const. amend. I [hereinafter First Amendment]. The text of the First Amendment states, in part: “Congress shall make no law ... abridging the freedom of speech”

²⁸ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (excluding the lewd, the obscene, the profane, the libellous, and the insulting or “fighting words” from the First Amendment) has been modified by *New York Times v. Sullivan*, 376 U.S. 254 (1964) [hereinafter *Sullivan*] and the principle of content neutrality. See generally B.J. Cameron, “The First Amendment and Section 1 of the *Charter*” (1990) 1 M.C.L.R. 59 [hereinafter “First Amendment and Section 1”] (analyzing the evolution of First Amendment doctrine and relating it to the *Charter's* concepts of breach and justification).

²⁹ See J. Cameron, “The Original Conception of Section 1 and its Demise: A Comment on *Irwin Toy v. Attorney-General of Québec*” (1989) 35 McGill L.J. 253 at 257-60 (explaining the theory of s. 1 and its implications for the scope of the *Charter's* rights and freedoms).

guarantees could be restricted or whether limits could only be imposed under section 1. Despite the existence of section 1, the latter view was problematic; as a matter of instinct it seemed unavoidable that shifting too much analysis onto one side would upset the balance of the equation. In that regard, section 15 appeared symptomatic. The suggestion that every distinction between individuals is *prima facie* in breach of the *Charter's* guarantee of equality³⁰ not only threatened to dwarf the *Charter's* other rights and freedoms but meant, in addition, that virtually all legislation would have to be saved under section 1.³¹ At the time, the Court was committed to a strict standard of review under *Oakes*.³² The perception that a generous conception of equality could not coexist with a rigorous section 1 test prompted the Court to restrict the scope of section 15 in *Andrews*.³³

One of the early debates under section 2(b) was whether the *Charter's* guarantee of expressive freedom should be confined to political expression.³⁴ The Court's decision in *Dolphin Delivery* rejected the suggestion that labour picketing is conduct rather than expression and, in doing so, protected activity which was unquestionably more economic than political.³⁵ In addition, McIntyre J. stated that section 2(b) would not include threats or acts of violence, property destruction, assault, or "other clearly unlawful conduct."³⁶ The Court's conclusion under section 32, that the *Charter* did not apply to a dispute between purely private parties, rendered *Dolphin Delivery's* comments about the scope of expressive freedom gratuitous. A "methodology" for section 2(b) issues evolved in four "turning point" decisions: *Irwin Toy*, *Edmonton Journal*, *Rocket*, and *Keegstra*

³⁰ See, for example, P.W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 800 (arguing that s. 15 should be interpreted as providing for the universal application of every law and that s. 1 provides the only standard of justification).

³¹ *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143 at 179-83 [hereinafter *Andrews*], McIntyre J., quoting McLachlin J.A. (as she then was) in the same case at the British Columbia Court of Appeal: (1986), 2 B.C.L.R. (2d) 305 at 312-13.

³² *Supra* note 19.

³³ *Supra* note 31 (rejecting the same treatment test and defining inequality more narrowly as discrimination on the enumerated or on analogous grounds).

³⁴ See, for example, *Re Klein and Law Society of Upper Canada*; *Re Dvorak and Law Society of Upper Canada* (1985), 50 O.R. (2d) 118 (Div. Ct.) [hereinafter *Re Klein*] (holding that political expression is the principal, if not exclusive, function of s. 2(b)).

³⁵ See *Ford*, *supra* note 9 at 764 (citing *Dolphin Delivery* *supra* note 2 for the proposition that s. 2(b) is not confined to political expression and can be extended to expression having an economic purpose).

³⁶ *Dolphin Delivery* *supra* note 2 at 588.

B. Step One: *Irwin Toy's Principle of Freedom*

Despite its *dicta* about the scope of section 2(b), the Supreme Court of Canada in *Dolphin Delivery* did not consider whether it would devalue the *Charter's* aspirations and ideals to protect obscenity, hate propaganda, commercial expression, and other forms of “valueless” expression. Only a few months after *Andrews* limited the scope of section 15, the Court gave section 2(b) a generous interpretation. To some extent, the foundation had been laid in *Ford*, which confirmed the Court’s commitment to a large and liberal conception of the *Charter* and added English language advertising to section 2(b)’s embryonic list of protected activity.³⁷ In *Irwin Toy* the Court held in broad, abstract terms that activity which intends to convey a meaning is *prima facie* protected by section 2(b) and proposed an unqualified principle of freedom, that “everyone can manifest their thoughts, opinions, beliefs, indeed *all* expressions of the heart and mind, *however unpopular, distasteful or contrary to the mainstream*”³⁸ By declaring that “we prize a diversity of ideas ... for their inherent value,” the Court effectively rejected the distinction between valuable and valueless expression.³⁹

Curiously, *Irwin Toy* never explained why section 2(b) should be interpreted more generously than section 15, or discussed the concerns that affected the Court’s decision to restrict the scope of equality. Although it failed to consider how an unlimited definition of expressive freedom might affect the relationship between section 2(b) and section 1, the Court quickly discovered that an expansive definition of the right had unavoidable consequences for section 1. The facts of *Irwin Toy* confirmed that a broad interpretation of the guarantee could not coexist with a literal application of *Oakes*, at least not unless the Court was prepared to invalidate virtually all restrictions on expressive freedom. In the circumstances, Quebec’s prohibition on children’s advertising could not easily be sustained without adjusting the standard of review under section 1. To keep the equation in balance, the majority opinion relaxed the *Oakes* test.

³⁷ *Supra* note 9.

³⁸ *Supra* note 9 at 986 [emphasis added]. The Court’s definition of expressive freedom was subject to an exception for violent forms of expression and the addition of a second, “purpose-effects” test. Its two-step test is summarized *ibid.* at 971-73.

³⁹ *Ibid.* at 968. At issue was the validity of a Quebec law that banned all commercial advertising aimed at children under thirteen years of age. See *Consumer Protection Act* R.S.Q. 1977, c. P-40.1, ss. 248, 249 and regulations thereunder.

By establishing a low threshold of breach, *Irwin Toy* placed pressure on section 1 and the *Oakes* test, thereby threatening the kind of disequilibrium *Andrews* had foreseen, and countered by reading section 15 down. *Irwin Toy* chose a different route: instead of narrowing the scope of section 2(b), the Court proposed strict and deferential branches of the *Oakes* test. By that route, a rigorous approach is appropriate, as *per Oakes* when the state acts as the singular antagonist of an individual, as it does in criminal proceedings.⁴⁰ Otherwise, a more deferential conception of justification, based on a standard of reasonableness, is indicated when the legislature seeks to protect the vulnerable or make difficult decisions about the allocation of scarce resources.⁴¹ Although Quebec's advertising law was saved under the latter approach, McIntyre J. complained in dissent that "[no] case has been shown that" children suffer harm from advertising, and declared that a total prohibition aimed at those below an "arbitrarily fixed age makes no attempt at the achievement of proportionality."⁴² The majority opinion replied that the courts should not second guess any "reasonable assessment as to where the line [between permissible and impermissible children's advertising] is most properly drawn."⁴³

Irwin Toy's definition of expression also had significant but unforeseen consequences for section 2(b) and its role in the analysis. Ironically, and perhaps by accident, the Court's generous interpretation of the guarantee rendered its underlying values irrelevant. In building a foundation for section 2(b), *Dolphin Delivery*, *Ford* and *Irwin Toy* explained that expressive freedom is prized because it promotes values of democratic government, truth-seeking, and self-realization. Against decisions like *Re Klein*⁴⁴ the rhetoric of those cases signalled the Supreme Court's intention to grant expressive freedom strong protection under the *Charter*. By including all attempts to convey meaning, however, *Irwin Toy* truncated the entitlement side of the equation and inadvertently excluded the right's underlying values from the analysis. Despite uncertainty about its violent forms exception and purpose-effect distinction, *Irwin Toy* effectively reduced breach to a question of fact

⁴⁰ *Ibid.* at 993-94.

⁴¹ *Ibid.* at 986-91 (applying a standard of reasonableness to the requirement of a pressing and substantial objective), and at 992-99 (substituting reasonableness for the *Oakes* requirement of minimal impairment).

⁴² *Ibid.* at 1007-08.

⁴³ *Ibid.* at 990.

⁴⁴ *Supra* note 34.

which simply asks whether activity is sufficiently communicative to be considered expression under section 2(b).

Rationales which were not determinative on the issue of breach could still play a role in the analysis under section 1. Earlier, *Ford* had noted that expressive freedom's values are formulated in a philosophical context that "fuses" questions of entitlement and limits, which, under the *Charter's* structure of rights and limits, are "two distinct questions and call for two distinct analytical processes."⁴⁵ *Ford* resolved that structural problem by declaring that it is "within the perimeters of s. 1 that courts will in most instances weigh competing values"⁴⁶ Given that the *Oakes* test was designed to test the justifiability of the violation—not to balance values—whether and how section 2(b)'s rationales could be incorporated into section 1 was a mystery. Although *Irwin Toy* followed *Ford's* lead in interpreting the right generously as a matter of substantive law, it failed to fit its values into the *Charter's* structure of analysis.

Irwin Toy and *Oakes* resulted in the creation of abstract standards that provided little or no guidance for resolving concrete questions about the scope of expressive freedom. In addition, *Ford* separated the two sides of the equation and then neglected to indicate how they might be brought together. Finally, *Irwin Toy's* unqualified definition of the right created a further complication: the suggestion that all expressive activity is inherently valuable conferred a kind of absoluteness on section 2(b) that made weighing other values against it potentially awkward. Rather than solve those problems, the majority upheld the prohibition on children's advertising by lowering the standard of review under section 1. In the circumstances, McIntyre J.'s remark that the Court's decision represented a "small abandonment of a principle," but one of vital importance, would be prescient.⁴⁷ Despite reading section 2(b) more generously than section 15, the Supreme Court of Canada was profoundly ambivalent about expressive freedom. That ambivalence set the pattern for the subsequent jurisprudence.

⁴⁵ *Supra* note 9 at 765-66.

⁴⁶ *Ibid.* at 766.

⁴⁷ *Irwin Toy*, *supra* note 9 at 1008. He also declared that the principle that freedom of expression should not be suppressed, "except in cases where urgent and compelling reasons exist, and then only to the extent and for the time necessary for the protection of the community": *ibid.* at 1009.

C. *Step Two: Context and the Balancing of Values*

Irwin Toy volunteered a definition of expression and modified the *Oakes* test without providing a blueprint for section 2(b) adjudication. Although all expressive activity was *prima facie* protected, the scope of *Irwin Toy's* exclusionary criteria remained unclear, and with only Dickson C.J., Wilson and Lamer JJ. signing the opinion, it was speculative whether a majority of the Court would endorse *Irwin Toy's* methodology.⁴⁸ Only a few months later, in *Edmonton Journal*,⁴⁹ Wilson J. offered an alternative to *Irwin Toy's* section 1 analysis, which was subsequently endorsed by the Court in *Rocket*.⁵⁰

The issue in *Edmonton Journal* was whether a statutory ban on the publication of information relating to matrimonial proceedings was justifiable. The legislation created a conflict between open justice, a principle of strong pedigree at common law, and family privacy, the value protected by the ban. Although Cory J. wrote the Court's opinion invalidating the legislation, Wilson J. concurred separately to propose a compromise between the majority's abstract analysis and the focus on context that she found attractive in La Forest J.'s dissent. She reconciled the two in a "contextual approach,"⁵¹ which supported Cory J.'s result by balancing values under section 1.

Madam Justice Wilson objected that Cory J. had "prejudge[d] the issue" by "placing more weight on [expressive freedom] at large than is appropriate in the context of the case."⁵² In other words, an abstract conception of the right was too blunt an instrument for balancing values, because its failure to preserve a role for the facts and circumstances of particular cases weighted the equation in favour of the guarantee. Noting that section 1 contemplated a balancing of interests, not uncritical enforcement of the entitlement, Wilson J. suggested a contextual approach, which would "bring into sharp relief" the aspect of section 2(b) "truly at stake," as well as the relevant aspects of any values in competition with it.⁵³ On the assumption that "a particular right or

⁴⁸ A five member panel decided the case; a majority of three issued a "By the Court" opinion, and McIntyre and Beetz JJ. dissented.

⁴⁹ *Supra* note 12. A majority of four, Dickson, C.J., (Lamer, Cory, and Wilson JJ. concurring) invalidated the ban. L'Heureux-Dubé and Sopinka JJ. joined La Forest J.'s dissenting opinion.

⁵⁰ *Supra* note 9.

⁵¹ *Edmonton Journal supra* note 12 at 1353.

⁵² *Ibid.* at 1353-54.

⁵³ *Ibid.* at 1355-56.

freedom may have a different value depending on the context,” her principle would be conducive to “a fair and just compromise” under section 1.⁵⁴ Wilson J. predicted that the contextual approach would produce a “generous interpretation aimed at fulfilling [the guarantee’s] purpose and securing for the individual the full benefit of the guarantee.”⁵⁵

Although the Court had indicated in *Oakes* and other cases that the section 1 analysis would vary with the circumstances, a term of art was not coined until *Edmonton Journal*⁵⁶ Far more accessible and intuitive than the abstract criteria of *Irwin Toy* and *Oakes*, the contextual approach simply suggested that values be balanced under section 1. Wilson J. offered a principle of interpretation which could ground *Irwin Toy*’s intangible concepts of meaning, purpose, and effect in the facts and facilitate practical decisionmaking under section 1. In effect, she integrated the rudiments of common law methodology—which is situational and evidence-based—into the *Charter*’s unfamiliar equation of rights and limits. By doing so, she moved the constitutional analysis away from the abstract terrain of *Oakes* and *Irwin Toy*, and onto the more comfortable ground of common law decisionmaking. For all those reasons, *Edmonton Journal* had tremendous intuitive appeal for courts and judges experiencing difficulty with *Oakes* and the relationship between the *Charter*’s rights and reasonable limits under section 1.

Edmonton Journals principle of interpretation also had implications for section 2(b). Shifting the guarantee’s values from section 2(b) into section 1 was not a problem, because it was inevitable both that the *Charter* would balance values and that the facts and circumstances of expressive activity would matter under section 1. In the aftermath of *Irwin Toy*, Wilson J. responded to the perception that the *Charter* should not privilege the guarantee’s “abstract” principles against other values which were seen only in “context” under section 1. At the same time, her response introduced a dichotomy between principle and context, and in doing so suggested that distinctions between different kinds of expressive activity could be drawn under section 1. As she explained, expression may have *greater* value in a political context than in *Edmonton Journals* setting of a matrimonial dispute between private parties. That comparison, in combination with the statement that “the

⁵⁴ *Ibid.*

⁵⁵ *Ibid.* at 1356.

⁵⁶ See *Oakes*, *supra* note 19; and *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 (both indicating, in general terms, that the s. 1 test could vary with the circumstances).

importance of *the right or freedom* must be assessed in context” under section 1, placed Wilson J.’s approach potentially in conflict with *Irwin Toy’s* principle that the content or value of expressive activity is irrelevant under the *Charter*.⁵⁷ At that stage in the evolution of a methodology, the conflict was latent. If *Ford* was correct that breach and justification represent distinctive analytical concepts, the inconsistency between section 2(b)’s definition of the right and section 1’s approach to justification did not have to be resolved. Even so, in attempting to bridge the divide between principle and context, Wilson J.’s approach created an embryonic contradiction between *Irwin Toy* and the emerging section 1 methodology.

That contradiction deepened in *Rocket*, which invalidated a near-total prohibition on professional advertising by dentists.⁵⁸ Although *Irwin Toy’s* two-tiered approach to section 1 was directly on point, McLachlin J. rejected that model of review in favour of Wilson J.’s contextual approach. Thus, she suggested a “sensitive, case-oriented approach” that would permit the courts to consider “the special features of the expression in question.”⁵⁹ Once again, Wilson J.’s proposal offered a concrete alternative to the abstract structures and doctrines of *Irwin Toy* and *Oakes*, and enabled judges to ground their conclusions in the facts and evidence of particular cases. *Rocket’s* contextualized balancing of values weighed consumer choice and access to information about dental services against competing interests in professionalism and consumer protection. Ultimately, McLachlin J. held that the regulatory scheme was unjustifiable and that the appropriate remedy, in the circumstances, was to invalidate the legislation.⁶⁰

She vindicated the right of dentists to advertise but in doing so set the Court’s methodology in a certain direction. In unequivocal terms McLachlin J. stated that “*not all expression is equally worthy of protection. Nor are all infringements equally serious*”⁶¹ It followed that restrictions on certain activities, such as advertising, might be easier to justify. Once again, the difficulty is that both propositions undercut *Irwin Toy’s* inclusive and egalitarian conception of expressive freedom. Like *Ford*

⁵⁷ *Edmonton Journal*, *supra* note 12 at 1356 [emphasis added].

⁵⁸ *Supra* note 9. See the regulations under Ontario’s *Health Disciplines Act*, R.S.O. 1980, c. 196, which made advertising by dentists, with few restricted exceptions, “professional misconduct”: R.R.O. 1980, Reg. 447, ss. 37(39), (41).

⁵⁹ *Rocket*, *supra* note 9 at 246-47.

⁶⁰ *Ibid.* at 251-53 (concluding that judicial revision of the regulations would be inappropriate).

⁶¹ *Ibid.* at 247 [emphasis added].

and *Edmonton Journal Rocket* may also have assumed that different principles apply to different sides of the equation. Even so, as a result of *Rocket* the content or value of expressive activity, which *Irwin Toy* deemed irrelevant under section 2(b), had become a key factor in the section 1 analysis.

Still, it was not self-evident how Wilson J.'s principle of interpretation could be incorporated into the *Oakes* test. In *Keegstra* the contextual approach provided a vehicle for grafting additional criteria onto an analytical framework that was strict and abstract but too entrenched to be easily changed or abandoned. In blunt terms, context enabled the Court to introduce flexibility into a section 1 test that it regarded as being too uncompromising. At this point, an important difference between *Irwin Toy* and the contextual approach should be noted. Under *Irwin Toy*, the standard of review depended on the government's rationale and in particular, whether the state had acted as the singular antagonist of the individual or in a capacity that advanced the traditional values of democratic governance. While those adjustments to *Oakes* retained section 1's focus on the question of justification, the contextual approach suggested, to the contrary, that the value of the expressive activity should determine the stringency of review. It is an important difference, and although their implications for *Oakes* remained unclear, *Edmonton Journal* and *Rocket* had shifted some of the attention under section 1 from the government and its burden of justification to the entitlement and the value of the claim.

D. Step Three: Keegstra's Doctrine of Justification

The contextual approach was not assigned a concrete role in the section 1 analysis until Chief Justice Dickson's majority opinion in *Keegstra*⁶². There, the *Criminal Code's* prohibition against hate propaganda⁶³ raised two questions about *Irwin Toy* which, as yet, had only been endorsed by three members of the Court. The first was whether hate propaganda could be excluded from the *Charter* under the judicially created exception to section 2(b) for violent forms of

⁶² *Supra* note 3. The chief justice's opinion was joined by Wilson, L'Heureux-Dubé, and Gonthier JJ.; McLachlin J. dissented (La Forest and Sopinka JJ. concurring).

⁶³ Section 319(2) of the *Criminal Code* provides as follows: "Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of ... (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or (b) an offence punishable on summary conviction."

expression.⁶⁴ Hence the dilemma of *Keegstra* although any decision to protect anti-Semitic teachings would ignore a strong instinct that offensive expressive activity should not be covered by the *Charter*, *Irwin Toy* had clearly stated that all expression is protected, no matter how repugnant. Rather than concede the instinct to exclude invidious views from the *Charter*, Dickson C.J. chose to honour *Irwin Toy*'s promise that section 2(b) protects all expression. Stating that it was "beside the point"⁶⁵ that hate propaganda is obnoxious, he held that "the content of expression is irrelevant in determining the scope of [the guarantee]."⁶⁶ All members of the panel supported that interpretation of section 2(b).

Keegstra raised a second question about *Irwin Toy* and its two levels of review under section 1.⁶⁷ *Irwin Toy* diluted *Oakes* by reading a reasonableness requirement into key parts of the test. In doing so, it maintained that section 1's standard of justification could be relaxed in cases that pose difficult questions about social and economic policies or involve legislation that seeks to protect the vulnerable. However, where the state acts as the singular antagonist of an accused, as in criminal proceedings, *Irwin Toy* held that section 1's requirements of justification should be more scrupulously observed. Despite the *Criminal Code* setting of *Keegstra* which should have engaged *Irwin Toy*'s singular antagonist model of review, Dickson C.J.'s majority opinion relied on McLachlin J.'s interpretation of the contextual approach in *Rocket*

The section 1 methodology that emerged is important for several reasons. At the outset of the analysis, Dickson C.J. announced that it is "dangerously misleading to conceive of s. 1 as a rigid and technical provision,"⁶⁸ and repeated the warning that a "rigid or formalistic approach" must be avoided.⁶⁹ Although the function of section 1 is justification, he held that the Court should consider "*the right or freedom at stake and the limit proposed by the state.*"⁷⁰ Thus, a "proper judicial perspective" on the synergetic relation between the values underlying the *Charter* and the facts of a case could be attained by treating section 1

⁶⁴ *Keegstra supra* note 3 at 730-33 (stating that while s. 2(b) protects all content of expression, "certainly violence as a form of expression receives no such protection," citing *Irwin Toy, supra* note 9 at 970).

⁶⁵ *Keegstra supra* note 3 at 730.

⁶⁶ *Ibid.* at 732.

⁶⁷ See text accompanying notes 39-41, *supra*.

⁶⁸ *Keegstra supra* note 3 at 735.

⁶⁹ *Ibid.* at 737.

⁷⁰ *Ibid.* [emphasis added].

as a “gauge which is sensitive to the values and circumstances particular to an appeal”⁷¹ Through this link between the facts and values at stake in particular cases and the contextual approach, the content of expressive activity entered the section 1 analysis in *Keegstra*

From there, the majority opinion’s “gauging” of values proceeded in a particular way. For reasons that are not explained, the chief justice postponed his discussion of section 2(b)’s values to the proportionality test. Meanwhile, under the first branch of *Oakes*, he found that equality and multiculturalism are sufficiently important objectives to justify limits on expressive freedom. Only after reaching that conclusion did the chief justice turn to section 2(b). By then, however, an asymmetric and hierarchical analysis had privileged sections 15 and 27 at the expense of expressive freedom.⁷² At that stage, Dickson C.J. went on to consider section 2(b)’s values under the second branch of *Oakes*, the “proportionality” test. There, *Keegstra* employed the rationales which are intended to protect expressive freedom in order to dilute the requirements of proportionality and thereby justify the limit.

On commencing that analysis, the chief justice conceded that he had “commented at length upon the way in which the suppression of hate propaganda furthers values basic to a free and democratic society,” but said little about whether “these same values ... are furthered by *permitting* hate propaganda.”⁷³ Once having made that observation, he echoed Wilson J.’s concerns in *Edmonton Journal* about placing a premium on abstract principle and stated that context was necessary under section 1 to offset the “high value” section 2(b) places on “freedom of expression in the abstract.”⁷⁴ Contextualizing abstract principle meant examining “the expression *at stake in a particular case*”⁷⁵ to determine whether its content is at the “core” of section 2(b)’s values or is only “tenuously connected” to them.⁷⁶ After creating a “core-values” analysis, Dickson C.J. found that hate propaganda was of “limited importance when measured against free expression values,”⁷⁷ because it “contributes little to the aspirations of Canadians or Canada” and fails to promote the guarantee’s values of truth-seeking, self-

⁷¹ *Ibid.*

⁷² *Ibid.* at 755-58.

⁷³ *Ibid.* at 759-60 [emphasis in original].

⁷⁴ *Ibid.* at 760.

⁷⁵ *Ibid.* [emphasis in original].

⁷⁶ *Ibid.* at 761.

⁷⁷ *Ibid.* at 762.

realization, or democratic debate.⁷⁸ Citing *Rocket*, he concluded that limits on expressive activity that “strays some distance from the spirit of s. 2(b)” might be easier to justify.⁷⁹

Although Dickson C.J. rejected a rigid and technical interpretation of section 1, that explanation of his analysis in *Keegstra* is unconvincing. Setting section 2(b)’s abstract values as the standard of evaluation for particular expressive activity, and grafting that comparison onto the minimal impairment branch of the proportionality test hardly simplified the section 1 analysis. Instead, *Keegstra*’s hierarchy of values under the first branch of *Oakes* and its core-values gloss on the proportionality test created a justificatory bias under section 1. Ironically, Wilson J.’s principle of interpretation responded to the asymmetry that might arise by placing section 2(b)’s values on a grand and abstract scale, and then balancing them against competing interests which were presented merely or exclusively “in context.” Rather than “balance one value at large and the conflicting value in its context,” her approach placed the two sets of competing interests on equivalent or similar grounds.⁸⁰ To the extent that *Irwin Toy* may have privileged or overvalued section 2(b), the contextual approach provided a corrective.

If the goal of *Charter* analysis is equilibrium between the right and its limits, then *Keegstra* overcorrected the equation to uphold limits on controversial expressive activity. After declaring that the Court should reject the premium section 2(b) places on abstract principle, the chief justice cited those very same principles to lower the standard of review under section 1. In this way, a definition of freedom which deemed the content of expression irrelevant under section 2(b) supported the converse proposition under section 1, *i.e.*, that valueless expressive activity is entitled to little or no protection under the *Charter*. That contradiction prompted McLachlin J. to declare, in dissent, that “[i]f one starts from the premise that the speech covered by section 319(2) [of the *Criminal Code*] is dangerous and without value, then it is simple to conclude that none of the commonly-offered justifications for protecting freedom of expression are served by it.”⁸¹

The majority opinion also collapsed the distinction between value and harm. It is trite that valueless expressive activity is harmful in some cases and innocuous in others. The distinction is fundamental,

⁷⁸ *Ibid.* at 766.

⁷⁹ *Ibid.*

⁸⁰ *Edmonton Journal*, *supra* note 12 at 1353-54.

⁸¹ *Keegstra*, *supra* note 3 at 841.

though, because expression that is merely valueless is entitled to the *Charter's* protection. The Court in *Keegstra* blurred that line by altering the requirements of proportionality, including the government's burden to demonstrate that its prohibition is rationally connected to the prevention or punishment of a demonstrable harm.⁸² In doing so, the majority effectively assumed that expressive activity that is valueless must also be harmful. Although hate propaganda unquestionably strays from democratic values, value and harm are not synonymous. In the absence of a demonstrable harm, relaxing the standard of constitutionality to validate criminal sanctions against offensive expression unquestionably violates *Irwin Toy's* principle of freedom.

Precisely because of its content, the Court's response to expression that is offensive or controversial must be beyond reproach. Although it is evident that Dickson C.J. wrestled with the issues in *Keegstra* his analysis compromised section 2(b). After endorsing *Irwin Toy's* principle of freedom for *all* expression under section 2(b), he engaged in an overt assessment of the value of *particular* expression under section 1. The gulf between an inclusive conception of the guarantee and the proposition that section 1 review is determined by the value accorded particular thoughts and ideas widened as a result. *Keegstra's* justificatory bias was also reinforced by the chief justice's decision to exclude section 2(b)'s values from the first branch of *Oakes*.

It is unfortunate that the *Keegstra* dissent has not been more influential because several features of McLachlin J.'s opinion are important. First, although she and the chief justice agreed that section 2(b) protects hate propaganda, they reached that conclusion by different routes. Dickson C.J.'s interpretation of the guarantee rested on a particular conception of the *Charter's* structure and its separation of the rights and their limits. Citing *Ford*, he noted in *Keegstra* that "[i]t is the presence of s. 1 which makes necessary [a] bifurcated approach to Canadian freedom of expression cases" and also "permit[s] the Court to give a large and liberal interpretation to s. 2(b)."⁸³ In terms of hate propaganda, he found that it is "[b]ecause *Irwin Toy* stresses that the type of meaning conveyed is irrelevant" under section 2(b) that "[i]t is enough that those who publicly and wilfully promote hatred convey or attempt to convey a meaning"⁸⁴ Then, he held that "*it must therefore*

⁸² *Ibid.* at 767-71, Dickson C.J. (explaining how the government met the standard), and at 851-54, McLachlin J. (dissenting).

⁸³ *Ibid.* at 728.

⁸⁴ *Ibid.* at 730.

be concluded that expressive activity which is invidious and obnoxious is covered by section 2(b).⁸⁵ The chief justice's interpretation of section 2(b) was based more on a view of the *Charter's* structure than on an inclusive or egalitarian conception of expressive freedom.

Meanwhile, McLachlin J. confronted the distinction between valuable and valueless expression under section 2(b) and in doing so, advanced principled grounds for including hate propaganda in the *Charter*. Not only did she acknowledge the difficulty of determining which speech has redeeming value, she added that such "[a]ttempts to confine [section 2(b)] only to content which is judged to possess redeeming value or to accord with accepted values *strike at the very essence of the value of the freedom..*"⁸⁶ For section 2(b) to be meaningful, she concluded, it must protect expression which "challenges even the very basic conceptions about our society."⁸⁷ It followed that a "true commitment" to freedom of expression "demands nothing less."⁸⁸ Although she, unlike the chief justice, would have excluded threats of violence from section 2(b), hate propaganda did not in her view fall within that exception.⁸⁹

It is not surprising that two such distinctive conceptions of section 2(b) would be reflected in the section 1 analysis. The chief justice viewed sections 2(b) and 1 as separate structural concepts and therefore did not address the contradiction between his content-neutral definition of the right and his content-based analysis of reasonable limits. In dissent, McLachlin J. did attempt to integrate her conception of the entitlement into the section 1 analysis. Under section 2(b), she rejected the suggestion that equality and multiculturalism could take precedence over expressive freedom. Although she agreed with Dickson C.J. that section 319(2) of the *Criminal Code* satisfied the first branch of the *Oakes* test, she did so on narrower grounds. Rather than choose between values or indicate a preference for sections 15 and 27, she held that it was permissible for Parliament to limit expressive activity which is symptomatic of ongoing racial and religious prejudice.⁹⁰

⁸⁵ *Ibid.* [emphasis added]. The second step, requiring a purposeful infringement of s. 2(b) before proceeding to s. 1, was easily met.

⁸⁶ *Ibid.* at 842 [emphasis added].

⁸⁷ *Ibid.*

⁸⁸ *Ibid.* [emphasis added].

⁸⁹ *Ibid.* at 829-32 (concluding that statements promoting hatred are not akin to violence or threats of violence).

⁹⁰ *Ibid.* at 846-48.

McLachlin J. also stressed the importance of focusing on the question of justification under section 1. Any suggestion that the value of particular expressive activity should determine the standard of review deflects attention from section 1's requirement that the government demonstrate the reasonableness of its infringement. As a result, she urged the Court not to be distracted from the question of justification by the offensiveness of anti-Semitic views. In her view, once expression is protected by the *Charter*, the focus under section 1 must be on the justification of the limit and not on the content of the expression.

Unlike the chief justice, McLachlin J. emphasized the importance of considering characteristics which relate "peculiarly to the nature of freedom of expression" in section 1's balancing of values.⁹¹ Despite acknowledging that the suppression of hate propaganda "undeniably muzzles the participation of a few individuals in the democratic process," the chief justice concluded that "the degree of this limitation is not substantial."⁹² By contrast, McLachlin J. warned at the outset of her proportionality analysis, of the "dangers inherent in state censorship" and of the need to give "particularly close consideration" to restrictions which "touch the critical core of social and political debate."⁹³ She stated that it is particularly important to be aware of those dangers under section 1, because the text of the *Charter* "expressly requires the court to have regard to whether the limits are *reasonable and justified in a free and democratic society*"⁹⁴ She also indicated that the "chilling effect"⁹⁵ that a legal prohibition may have on legitimate expressive activity must be taken into account under section 1.

After outlining those concerns, McLachlin J. considered section 319(2)'s implications for expressive freedom under each branch of the proportionality test. In addressing the rational connection she expressed skepticism that section 319(2) would curb hate-mongers and speculated that, by conferring the "joy of martyrdom" on such individuals, it could be counter-productive.⁹⁶ Her analysis of section 319(2)'s flaws under minimal impairment is compelling, in large part because she scrutinized the legislation from a critical perspective that required Parliament to demonstrate that the infringement *was* minimal. She also gave the

⁹¹ *Ibid.* at 849.

⁹² *Ibid.* at 764.

⁹³ *Ibid.* at 849.

⁹⁴ *Ibid.* at 849-50 [emphasis in original].

⁹⁵ *Ibid.* at 850.

⁹⁶ *Ibid.* at 853.

“significance of the impairment” serious consideration under the final branch of the proportionality test. There, her conclusion that section 319(2) failed to satisfy that aspect of *Oakes* rested on the claim that the *Criminal Code* “invokes *all* of the values upon which s. 2(b) ... rests” and thereby affects the preservation of “democratic government and our fundamental rights and freedoms.”⁹⁷

Madam Justice McLachlin’s dissenting opinion introduced several principles that are vital to the protection of expressive freedom. Under the first branch of *Oakes*, she declined to endorse any hierarchy of values which would grant equality and multiculturalism paramouncy over expressive freedom. In addition, she stressed the importance of bringing the values underlying section 2(b)’s guarantee of freedom into the section 1 analysis. Thus, she acknowledged that a “true commitment” to section 2(b) requires breathing space for views that challenge basic conceptions about our society. Realizing that the commitment would be meaningless if they did not affect the section 1 analysis, she incorporated the guarantee’s values into her discussion of the proportionality test. Even so, McLachlin J. declined to challenge the chief justice’s methodology. In the circumstances, she may have felt estopped from doing so by her own declaration in *Rocket* that not all expression is equal and not all infringements are equally serious.⁹⁸ Her opinion in *Keegstra* nonetheless provided a foundation in principle for protecting expressive freedom under section 1. She quite rightly complained that the majority opinion failed to disentangle its distaste for the expressive activity in question from the broader issues of principle and methodology at stake. That simple but perceptive observation pinpointed the flaws of a methodology that crystallized in *Keegstra* and would soon be more firmly entrenched in the jurisprudence.

E. *An Ambivalent Conception of Section 2(b)*

Certain elements of the first generation of jurisprudence, including the Supreme Court’s decisions on access to government property⁹⁹ and the status of the press,¹⁰⁰ have not been discussed in this article. Just the same, it should be noted that there too, the Court’s

⁹⁷ *Ibid.* at 863 [emphasis added].

⁹⁸ *Supra* note 61.

⁹⁹ *Supra* note 15.

¹⁰⁰ *Supra* notes 12 and 14.

responses confirmed its ambivalence towards section 2(b). On access, for example, a seven-member panel agreed that an absolute prohibition on the distribution of literature at a public airport could not be justified.¹⁰¹ In reaching that conclusion, *Commonwealth* proposed three different methodologies, each of which relied on *Irwin Toy*. As a matter of principle, the threshold question in that case was whether access to government property should be treated differently from other section 2(b) issues. While Lamer C.J. and McLachlin J. proposed criteria to restrict the scope of access under the guarantee, L'Heureux-Dubé J. held that limits should be justified under section 1.¹⁰² Although no view commanded a majority, the Court subsequently refused to choose between *Commonwealth's* competing approaches when it decided *Ramsden*.¹⁰³ To this day, a framework of principle for addressing those claims does not exist.

The status of the press also raised questions about the importance of democratic values such as debate, access to information, participation, and accountability. Uncertainty and confusion prevails there as well. After receiving strong support in *Edmonton Journal*, freedom of the press was unceremoniously dismissed in *Lessard*,¹⁰⁴ *New Brunswick*,¹⁰⁵ and *Nova Scotia*.¹⁰⁶ More generally, although the Court's rhetoric acknowledges the role that a free press plays in the democratic process, it is reluctant to confer any "special status" under the *Charter* or develop doctrines which recognize that role.¹⁰⁷ Questions of principle and methodology were once again avoided by a jurisprudence that provided *ad hoc* answers to particular questions.

Meanwhile, in the years following *Keegstra* Dickson C.J.'s methodology became more entrenched. Its two main elements, a

¹⁰¹ *Commonwealth*, *supra* note 15.

¹⁰² See generally J. Cameron, "A Bumpy Landing: The Supreme Court of Canada and Access to Public Airports Under Section 2(b) of the *Charter*" (1992) 2 M.C.L.R. 91; and R. Moon, "'Out of Place': Comment on *Committee for the Commonwealth of Canada v. Canada*" (1993) 38 McGill L.J. 204.

¹⁰³ *Supra* note 15 (invalidating a municipal by-law that prohibited all postering on public property).

¹⁰⁴ *Supra* note 14.

¹⁰⁵ *Supra* note 14.

¹⁰⁶ *Supra* note 10.

¹⁰⁷ See, for example, *New Brunswick*, *supra* note 14 at 475-80, Cory J. (stating, enigmatically, that warrants against the press raise special concerns, without importing any new or additional requirements for the issuance of search warrants). But see *Carson*, *supra* note 14 and text accompanying notes 259-261, *infra*.

hierarchy of values under the first branch of *Oakes* and a core-values approach to proportionality, were solidified in *Butler*.¹⁰⁸ The result was a sharper and more pronounced dilution of review under section 1. There, in upholding the *Criminal Code*'s definition of obscenity,¹⁰⁹ Sopinka J. claimed that the objective was avoidance of harm, not moral disapproval.¹¹⁰ His definition of harm was based on a conception of obscenity and pornography as low value expressive activities that undercut gender equality. He held, for example, that the first branch of *Oakes* was satisfied because sexually explicit materials "seriously offend the values fundamental to our society," such as "true equality between male and female persons."¹¹¹ Like the chief justice in *Keegstra* Sopinka J. found that pornography could be limited under that part of the test without balancing expressive freedom against gender equality.

Likewise, *Butler*'s proportionality analysis both followed and extended the example set by *Keegstra*. Sopinka J. began by stating that the prohibition was easier to justify because "the kind of expression which is sought to be advanced does not stand on equal footing with other kinds of expression" ¹¹² That proposition led to a deferential application of the proportionality test. Despite the absence of evidence linking sexual expression with a concrete harm, he found a rational connection because "it is reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs."¹¹³ It was sufficient, in his view, that Parliament had a *reasonable basis* for its action or had responded to a "reasoned apprehension of harm."¹¹⁴ Under minimal impairment, Sopinka J. stated that the legislative scheme need not be "perfect": as long as it was "appropriately tailored *in the context of the infringed right* it would satisfy the *Charter*."¹¹⁵ Finally, his comments on the third proportionality test of *Oakes* left little doubt that his constitutional analysis was grounded in disapproval of sexually explicit expression. Given that "this kind of expression lies far from the

¹⁰⁸ *Supra* note 4.

¹⁰⁹ Section 163(8) of the *Criminal Code* states: "For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene."

¹¹⁰ *Butler*, *supra* note 4 at 492.

¹¹¹ *Ibid.* at 496-97 [emphasis added].

¹¹² *Ibid.* at 500.

¹¹³ *Ibid.* at 502.

¹¹⁴ *Ibid.* at 504.

¹¹⁵ *Ibid.* at 504-05 [emphasis in original].

core of the guarantee of freedom of expression,” “appeals only to the most base aspect of individual fulfilment” and is “primarily economically motivated,” he found that the objective of promoting equality among members of society readily outweighed the interest in protecting expressive freedom.¹¹⁶

Butler is important and surprising, in the first instance, because *Keegstra*'s methodology was effectively adopted by all members of the Court. Unlike *Keegstra* which was decided by a 4-3 vote, *Butler* failed to provoke a dissent.¹¹⁷ Moreover, in adopting that approach, its core-values contextual approach and reasoned apprehension of harm standard further eroded the *Oakes* test. No member of the Court considered the principles outlined in McLachlin J.'s *Keegstra* dissent worth defending.¹¹⁸ Once again the Court failed to separate its subjective perception of pornography from broader questions of principle and methodology.

Although the methodology of *Keegstra* and *Butler* undercut expressive freedom, its subsequent decision in *Zundel* revealed how equivocal the Court can be on these issues. In that case, a majority decision which could not easily be squared with *Keegstra* invalidated the false news provision of the *Criminal Code*¹¹⁹ and reversed Ernst Zundel's conviction for holocaust denial. Through a careful analysis that was evidence- and context-based, McLachlin J. distinguished section 181's false news prohibition from section 319(2)'s ban on hate propaganda¹²⁰ and secured majority support for her opinion. She defended expressive freedom in difficult circumstances a second time but did so without questioning the methodology of *Keegstra*. Justices Cory and Iacobucci

¹¹⁶ *Ibid.* at 509.

¹¹⁷ Gonthier J. wrote separate concurring reasons at 511ff, which L'Heureux-Dubé J. joined.

¹¹⁸ *Ibid.* at 504. Sopinka J., who had joined McLachlin J.'s dissent, mentioned *Keegstra* in passing to suggest that a rational connection was established in *Butler*, but not *Keegstra* because, in contrast to the hate-monger who may gain an audience, the “prohibition of obscene materials does nothing to promote the pornographer's cause.”

¹¹⁹ *Supra* note 3, s. 181. The provision stated as follows: “Every one who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.”

¹²⁰ *Supra* note 63.

wrote a passionate joint dissent that was based on the chief justice's approach in *Keegstra*¹²¹

The trilogy of *Keegstra*, *Butler*, and *Zundel* exemplifies the confusion and uncertainty of the section 2(b) jurisprudence. On any view of the results in particular cases, the Court's methodology lacked principle and consistency. Although the relationship between sections 2(b) and 1 was resolved, in part, by bringing the guarantee's values into section 1, their role in the analysis was distorted. Instead of forming part of the conceptual framework for balancing values under section 1, section 2(b)'s principles were restricted to the proportionality analysis. Isolating expressive freedom in that part of the test meant that other values, such as equality and multiculturalism, could be preferred under the first branch of *Oakes*. Moreover, as part of the "context" of proportionality under the second branch of *Oakes*, section 2(b)'s principles played a significant but selective role. Instead of explaining why the right should be protected, as might be expected, expressive freedom's rationales enabled the Court to designate offensive activity as "low value." Pursuant to that designation, the Court attenuated the standard of review and diluted proportionality's requirements of harm, rational connection, and minimal impairment.

The early cases set an unhealthy dynamic in motion, which had its roots in *Ford*'s assumption that the right and its limits are separate concepts which call for two distinct analytical processes. That assumption led to the following contradiction. *Irwin Toy*'s principle of freedom for all expressions of the heart and mind deemed the content or value of expressive activity to be irrelevant under section 2(b). By the time *Butler* was decided, however, the Court's section 1 methodology espoused the opposite proposition: that the status of expressive activity is contingent on its value and that thoughts or ideas which "stray some distance" from section 2(b)'s core should receive little or no protection under the *Charter*. That separation of concepts, the contradictions it has spawned, and the resulting contortions of analysis are the hallmarks of the first generation of jurisprudence.¹²²

As the next part demonstrates, the Supreme Court of Canada is as ambivalent as ever toward expressive freedom. Despite the

¹²¹ *Zundel*, *supra* note 6 at 778ff. The Court split 4-3 again, with McLachlin J. writing for the majority (La Forest, L'Heureux-Dubé, and Sopinka JJ. concurring), and Gonthier J. joining the "joint dissent."

¹²² For a thoughtful discussion of the s. 2(b) jurisprudence, especially the relationship between ss. 2(b) and 1, see R. Moon, "The Supreme Court of Canada on the Structure of Freedom of Expression Adjudication" (1995) 45 U.T.L.J. 419.

contradictions and the methodological bias in favour of justification, section 2(b) prevailed in two of the three cases examined. Even so, they show once again that it is the Court's methodology, not the results in particular cases, that holds the key to section 2(b)'s future.

III. TEN YEARS LATER

A. Introduction

Almost a decade after *Dolphin Delivery* the Supreme Court of Canada decided three cases, each of which posed an untested question about the scope of expressive freedom under the *Charter*. Two of the three, *Dagenais*¹²³ and *Scientology*¹²⁴ considered whether common law doctrine complies with section 2(b) of the *Charter*, and the third, *RJR-MacDonald*, questioned the permissibility of strong legislative sanctions against tobacco promotion.¹²⁵ In its first decision on fair trial versus expressive freedom, the Supreme Court in *Dagenais* recalibrated the common law's equation to strengthen section 2(b)'s weight in the balance. Due to the constraints of methodology, it was difficult for Lamer C.J. to incorporate the guarantee's values into the section 1 analysis, and he was only partly successful in doing so.

Shortly after *Dagenais*, it was held in *Scientology* that section 2(b) has not altered the common law of defamation. Given the jury's verdict that the Church of Scientology acted maliciously, the plaintiff's claim to damages need not have been jeopardized by a re-balancing of values under the *Charter*. The Court applied a core-values analysis just the same and entrenched the common law's preference for the protection of reputation in the *Charter* jurisprudence. Finally, *RJR-MacDonald* invalidated Parliament's tobacco control measures by the narrowest of margins, against a strong dissent by La Forest J. That dissent proposed a disturbing approach to section 1 which was followed in *Ross*.¹²⁶ This part of the article analyzes the Supreme Court of Canada's commitment to expressive freedom in these cases and concludes with a brief review of the status of section 2(b) today.

¹²³ *Supra* note 12.

¹²⁴ *Supra* note 6.

¹²⁵ *Supra* note 9.

¹²⁶ *Supra* note 8.

B. *Dagenais v. Canadian Broadcasting Corp.: Accommodating Values*

Dagenais invalidated a controversial publication ban and modified common law doctrine to comply with the *Charter*. In doing so, the Supreme Court of Canada legitimized third-party status in criminal proceedings and constitutionalized the common law of publication bans.¹²⁷ The question under section 2(b) was whether a broadcast of *The Boys of St. Vincent* a fictional drama, would prejudice the fair trials of several accused who, as members of a religious order, were charged with committing acts of sexual assault in circumstances strongly resembling those of the “drama.” The criminal charges and proposed broadcast arose against a backdrop of heightened public awareness and concern about abuses of authority, including physical and sexual assault, which occurred many years ago at various training and educational institutions around the country. Not only did *The Boys of St. Vincent* portray the institutions and individual priests who committed such acts unsympathetically, the pre-broadcast advertising claimed a direct parallel between the fictional program and the unsettling revelations and prosecutions of recent years.¹²⁸

Paradoxically, the decision in *Dagenais* was both easy and difficult. On the one hand, the publication ban was “far too broad,” and despite the parallel, the threat to a fair trial arose from a fictional program and fictional characters, not pre-trial publicity about the individuals being tried.¹²⁹ On the other hand, it was unclear why third parties such as the CBC should have access to an appeal in criminal proceedings between the Crown and the accused.¹³⁰ Moreover, the lower court jurisprudence was virtually unanimous that the *Charter* had

¹²⁷ *Supra* note 12. Lamer C.J. wrote the majority opinion on both issues (Sopinka, Cory, Iacobucci and Major JJ. concurring); McLachlin J. wrote concurring reasons; Gonthier J. concurred on the third party issue but dissented under s. 2(b); La Forest J. concurred on s. 2(b) and dissented on the third party issue; and L’Heureux-Dubé J. dissented both on the third party and the s. 2(b) question.

¹²⁸ (1993), 12 O.R. (3d) 239 at 242-43 (C.A.).

¹²⁹ *Dagenais*, *supra* note 12 at 881. Not only did the trial judge impose a *national* ban to protect fair trial interests at stake in *Ontario*, she banned the publication of any information about the broadcast schedule or the application for the order; the Ontario Court of Appeal upheld the ban but restricted it to the geographic location of the trials and reversed the bans on publication of the broadcast schedule and court proceedings.

¹³⁰ Third party issues are not discussed in this paper. See generally J. Cameron, “Tradition and Change Under the *Charter*: The Adversary System, Third Party Interests and the Legitimacy of Criminal Justice in Canada” in J. Cameron, ed., *The Charter’s Impact on the Criminal Justice System* (Toronto: Carswell, 1996) 217.

not altered the common law and its preference for fair trial values.¹³¹ In such circumstances, the Ontario Court of Appeal's conclusion that those interests ought to prevail over any "inconvenience" the CBC might suffer in rescheduling its program was predictable.¹³² To many, it was far from apparent that the *Charter* had changed the common law's balancing of values.

The Supreme Court of Canada's decision to accept jurisdiction, invalidate the order, and modify the common law represented a major victory for third-party and section 2(b) rights, which provoked dissents on both issues. As to section 2(b), Gonthier J. Objected in dissent that the *Charter* does not require the Court to depart from the common law "in any substantive respect" and rejected the suggestion that "we emulate American society" or otherwise "discard the unique balancing of fundamental values" that existed prior to 1982.¹³³ In his view, the *Charter* should have minimal impact in areas such as publication bans, where the common law reinforces, rather than derogates from, fundamental values. L'Heureux-Dubé J. agreed that the *Charter* does not render the common law invalid, especially where its balancing of values is "an expression of the very rights protected by the *Charter*."¹³⁴

In all the circumstances, including the lower court jurisprudence, the appellate decision and the dissenting opinions, the majority opinion in *Dagenais* was obliged to explain why the common law's balancing of values was inappropriate under the *Charter*. Chief Justice Lamer's reading of the constitutional text, which treats expressive freedom and a fair trial as equivalent values, led him to conclude that the common law rule which "automatically favoured" fair trial should be reformulated.¹³⁵ In doing so, he added that a hierarchical approach to rights must be avoided "both when interpreting the *Charter* and when developing the common law."¹³⁶ *Dagenais* ameliorated that common law hierarchy by grafting elements of the section 1 analysis onto the pre-*Charter* doctrine.

¹³¹ See, for example, *Re Southam Inc. and the Queen*(No. 2) (1985), 141 D.L.R. (3d) 349 at 354 (Ont. H.C.J.), Smith J. (declaring that "[i]t could not have been in the contemplation of the new Fathers of Confederation that the rights of an accused person should be whittled down in the name of a general concept of [freedom of expression].")

¹³² *Dagenais*, *supra* note 12 at 855.

¹³³ *Ibid.* at 928-29.

¹³⁴ *Ibid.* at 916.

¹³⁵ *Ibid.* at 877-78.

¹³⁶ *Ibid.* at 877.

For example, the chief justice specified that a publication ban can only be granted when it is *necessary* to permit a real and substantial risk to the fairness of a trial.¹³⁷ He warned that bans are not available to prevent “remote and speculative dangers” and affirmed the Court’s faith in the jury’s ability to ignore extraneous considerations and follow the judge’s instructions.¹³⁸ At the same time, he endorsed the common law’s threshold test of a real and substantial risk, and found that requirement satisfied in *Dagenais* because the ban was “clearly directed” towards the prevention of that risk.¹³⁹ Under the view that a risk of prejudice, not prejudice in fact, is sufficient, the chief justice’s modified rule would permit a ban aimed at “the diminution of the risk that the trial ... *might* be rendered unfair.”¹⁴⁰ A low threshold of risk enabled him to accommodate both values through the requirement that alternative measures be employed in such cases, but only where “reasonably available.” Despite restricting access to bans, Lamer C.J.’s doctrine would prohibit publication where the prejudice is either unknown or indeterminate but measures such as sequestration of the jury are considered unreasonable. In principle, however, questions of accommodation and alternative measures should not arise until it is demonstrated, by some measure of certainty, that the fairness of the trial truly is at risk. By setting a higher standard of prejudice under the rational connection test, McLachlin J.’s concurring opinion proposed a stronger safeguard against “the facile assumption that if there is any risk of prejudice to a fair trial, ... the ban should be ordered.”¹⁴¹

The chief justice’s requirement that reasonably available alternative measures be adopted to accommodate both constitutional values is nonetheless highly innovative. In the circumstances of *The Boys of St. Vincent*, such measures were available and it was unnecessary for him to expand on that concept. He also proposed a modification to the final branch of the proportionality analysis, which would test a ban’s deleterious effects on section 2(b) against its salutary benefits for the fairness of the trial and the integrity of the criminal justice system.¹⁴²

¹³⁷ *Ibid.* at 878 [emphasis in original].

¹³⁸ *Ibid.* at 880 and 885.

¹³⁹ *Ibid.* at 880.

¹⁴⁰ *Ibid.* at 879 [emphasis added].

¹⁴¹ *Ibid.* at 950 (stating that it is necessary to show that many eligible jurors would see the broadcast, that the broadcast might confuse or predispose potential jurors, and that the confusion may not be dispelled by other measures).

¹⁴² *Ibid.* at 878 and 887-88.

Dagenais unquestionably adjusted common law doctrine in favour of expressive freedom. The chief justice's opinion achieved that result, in part, by conceding that the *Charter* cannot take "all conceivable steps" to remove "even the most speculative risks," and acknowledging that a ban which "trenches" on expressive freedom must be carefully reviewed.¹⁴³ By grafting a modified concept of proportionality onto common law doctrine, he set a higher threshold for bans which compromise the openness and accountability of the justice system. It is also significant that Lamer C.J. demonstrated how the *Oakes* test can be adapted to accommodate pre-*Charter* contexts and doctrines. In doing so, *Dagenais* integrated the basic elements of *Oakes* into common law doctrine without compromising the integrity of either.

Even so, *Dagenais* was lacking in its commitment to section 2(b) values. To declare, for example, that sections 2(b) and 11(d) have equal status is simply to make an observation about the text. In addition, that observation created an unresolved tension with *Keegstra* and *Butler*, where section 2(b)'s equal status did not prevent it from being subordinated to section 15 under the first branch of *Oakes*. More importantly, although *Dagenais* rejected a hierarchical approach to rights, it failed to explain how the competing values should be balanced under the Court's modified rule. In discussing that issue, the chief justice supplied a list of reasons "for and against bans,"¹⁴⁴ both to contextualize the issues and discredit the conflictual assumptions of the "clash model," and then declared that those factors were "simply intended to illustrate the breadth of issues that deserve a place but are not often found in the analysis of ... particular publication bans."¹⁴⁵ That comment was perceptive: with the exception of McLachlin J.'s *Keegstra* dissent, the values which support the protection of expressive freedom—rather than its dilution—are not found in the section 1 analysis.

As noted above, the Court's modified rule would preclude bans when reasonably available measures could prevent the risk to a fair trial. Unfortunately, the chief justice failed to elaborate what reasonableness means or to explain how alternatives which impose a burden on the trial process, like jury sequestration, should be weighed. As Gonthier J.'s comments demonstrate, however, the interests at stake cannot fairly be balanced unless section 2(b)'s principles are factored into the Court's

¹⁴³ *Ibid.* at 880.

¹⁴⁴ *Ibid.* at 882-83.

¹⁴⁵ *Ibid.* at 883.

conception of what “reasonably available” requires. In dissent, he claimed that any restriction on expressive freedom that flowed from the ban on *The Boys of St. Vincent* would be “minor.”¹⁴⁶ While his conclusion was specific to docudramas, to dismiss a ban as a minor restriction in any circumstances, but especially amidst the debate of recent years, shows how little weight section 2(b) carried in his accommodation of values.¹⁴⁷ It is disappointing that Lamer C.J. failed to respond or otherwise indicate any disagreement with Gonthier J.’s interpretation of his rule. In leaving those remarks unanswered, the majority opinion missed an important opportunity to substitute a foundation of principle for *ad hoc* perceptions of what reasonableness requires under section 1.

Finally, the chief justice’s gloss on the final branch of the proportionality test should be noted. There, he proposed a salutary-deleterious effects comparison, which would weigh the harmful consequences of compromising section 2(b) against the benefits gained by preserving a fair trial. Specifically, he stated that “when a ban has a serious deleterious effect on freedom of expression and has few salutary effects on the fairness of a trial, the ban will not be authorized at common law.”¹⁴⁸ That gloss acknowledges that constitutional violations are *per se* harmful and requires that harm to be weighed in determining the justifiability of the infringement. Like his earlier observation about issues that deserve a place in the analysis, the chief justice’s comments about the final stage of the proportionality test underscore the poverty of the Court’s methodology: it is the only part of the *Oakes* test that explicitly incorporates the cost of the infringement into the analysis. As such, it contemplates the prospect that an infringement which is otherwise justifiable might fail because the violation is more harmful than beneficial. Yet, as experience has shown, limits which satisfy all other parts of the test are unlikely to falter at that stage of the analysis.¹⁴⁹ Chief Justice Lamer’s attempt to bolster that requirement highlights how badly the section 1 test is skewed. Section 2(b)’s underlying values should be at the forefront of the analysis and not an

¹⁴⁶ *Ibid.* at 929.

¹⁴⁷ *Ibid.* at 929-31.

¹⁴⁸ *Ibid.* at 889.

¹⁴⁹ *Zundel*, *supra* note 6 held that s. 181 of the *Criminal Code* failed final proportionality after it had already been struck under other parts of the test. See P.W. Hogg, *Constitutional Law of Canada*, 4th student ed. (Toronto: Carswell, 1996) at 699-700 [hereinafter *Hogg student ed.*] (stating that “this step has never had any influence on the outcome of any case.”)

afterthought which only enters the equation after the justifiability of the limit has been established.¹⁵⁰

The chief justice's majority opinion ameliorated the balance between fair trial and expressive freedom, but was constrained in doing so by the biases of the common law and the Court's methodology. By endorsing the common law's standard of risk, Lamer C.J. failed to make it clear that a sufficient threat must be established before expressive freedom can be limited to protect fair trial interests. Under proportionality he rejected the clash model but failed to indicate how the values at stake should influence the accommodation of interests. Not doing so places expressive freedom at risk of being outweighed by a vague and unfettered conception of what alternative measures are reasonable. *Dagenais* was a limited victory because expressive freedom prevailed but did so without incorporating fully section 2(b)'s underlying values into the section 1 analysis.

C. *Hill v. Church of Scientology of Toronto: The Clash Model*

Only a few months after *Dagenais* rejected a hierarchy that preferred fair trial over expressive freedom, *Scientology* pitted section 2(b) against the law of defamation. There, the Court adopted a different approach to the resolution of conflicting values at common law. Unlike *Dagenais*, which sought an accommodation of interests, *Scientology* embraced the clash model and its hierarchy of values. Speaking for the Court, Cory J. applied the *Keegstra* methodology and reputation, which is a non-*Charter* value, emerged paramount over expressive freedom, which is explicitly guaranteed by section 2(b).¹⁵¹

The defamation action had its genesis in proceedings involving a Crown attorney who had prosecuted criminal charges against the Church of Scientology. The prosecutor, Mr. Hill, was the subject of a courthouse-steps press conference at which the Church and its lawyer wrongfully accused him of contempt, charging the prosecutor with violating a judicial sealing order that had been part of the earlier

¹⁵⁰ See Part IV(A), below.

¹⁵¹ *Scientology*, *supra* note 6. Lamer C.J., who wrote the majority opinion in *Dagenais*, *supra* note 12, and Sopinka J., who joined that opinion, did not participate in *Scientology*. In fact, at a much earlier phase of the litigation, John Sopinka (as he then was) argued as counsel for one of the defendants to the libel action that Canadian courts ought to adopt the American *Sullivan* doctrine: see *Hill v. Church of Scientology of Toronto* (1985), 35 C.C.L.T. 72 (Ont. H.C.J.). L'Heureux-Dubé J. concurred separately to add certain comments about "*Charter* values" and to dissent from Cory J.'s view of qualified privilege.

proceedings. That accusation prompted a civil action by the Crown officer, and an award of \$1.6 million in damages against the Church of Scientology and its counsel.¹⁵² The case reached the Supreme Court of Canada on the *Charter* question whether common law principles of libel and slander are modified by section 2(b)'s guarantee of expressive freedom.

Like *Dagenais*, *Scientology* was also an easy and a difficult case. From one perspective, it presented a difficult challenge. Ten years after *Dolphin Delivery* the *Charter's* impact on the law of defamation remained unclear. In the meantime, the lower court jurisprudence had uniformly resisted the pressure to adopt the American *Sullivan* rule, which confers constitutional protection, absent malice,¹⁵³ on false and defamatory statements about public officers.¹⁵⁴ While *Sullivan* was a "press case"¹⁵⁵ and *Scientology* was not, the plaintiff was a public officer and that should have been enough to implicate the First Amendment jurisprudence and its status under the *Charter*. Still, the case could have been easy because unreviewable jury verdicts against both defendants virtually guaranteed that the claim would survive any constitutionalization of the common law imaginable.¹⁵⁶ Although the constitutional issue did not place the plaintiff's entitlement at risk, the Court held conclusively against section 2(b) on all points but one.

Cory J.'s opinion began by considering whether the *Charter* applies to a civil suit between a Crown officer and a non-governmental actor. Unlike *Dolphin Delivery* which concerned a dispute between two purely private parties, *Scientology* involved a *prosecutor's* civil action against criminal defendants who had accused him of misconduct as an officer of the Crown.¹⁵⁷ In such circumstances, any suggestion that the

¹⁵² The complicated facts are set out in *Scientology supra* note 6 at 1141-58.

¹⁵³ *Sullivan, supra* note 28 at 280 (equating malice "with knowledge that [a statement] was false or with reckless disregard of whether it was false or not").

¹⁵⁴ *Hill v. Church of Scientology of Toronto* (1994), 18 O.R. (3d) 385 (C.A.); *Derrickson v. Tomat* (1992), 63 B.C.L.R. (2d) 273 (C.A.) [hereinafter *Derrickson*]; and *Coates v. The Citizen* (1988), 85 N.S.R. (2d) 146 (S.C.T.D.) all rejected the *Sullivan* rule, *supra* note 28, under s. 2(b) of the *Charter*.

¹⁵⁵ *Supra* note 28 at 257. The case involved a Montgomery Alabama police commissioner who sued *The New York Times* for publishing an advocacy advertisement by civil rights workers that accused "Southern violators" and "police" of harassing civil rights protesters during the early 1960s with trumped-up criminal charges. Neither the plaintiff nor anyone else was named directly.

¹⁵⁶ See text accompanying note 199, *infra*.

¹⁵⁷ In *Dolphin Delivery supra* note 2, the dispute arose in contract and tort between a private labour union and a private corporation that was the proposed target of secondary picketing.

plaintiff had either been defamed or had sued in his capacity as a private citizen was problematic. To the contrary, the lawsuit arose from proceedings and a judicial sealing order that were directly under his authority as Crown prosecutor. Moreover, the government's generosity in financing Mr. Hill's action hinted that there might be more at stake than a private contest between private parties.¹⁵⁸ Although the purpose of the lawsuit was to vindicate the Crown attorney's reputation, Cory J. held that section 32's requirement of government action was not satisfied.

He reacted strongly to the suggestion that a different regime might apply to public officers. Because reputation "exists for everyone quite apart from employment," "identical" defamatory comments could not be subject to "two different laws," one for governmental officers and another for private citizens.¹⁵⁹ To avoid that dichotomy, Cory J. found that the plaintiff's libel action was "independent of and distinct from [the Crown officer's] status as an agent for the government."¹⁶⁰ Although the events that had prompted the contempt action were directly related to his responsibilities as a prosecutor,¹⁶¹ the plaintiff's lawsuit was deemed to fall outside the scope of his duties as a Crown attorney and was not subject to the *Charter*.

The Court's section 32 analysis reveals a limited understanding of the relationship between the *Charter's* constraints on government and section 2(b)'s underlying values. The test is not whether the civil action fell within the statutory definition of a Crown officer's powers, but whether his legal action infringed the defendants' rights under the *Charter*. On that question, it is difficult to understand how the plaintiff's status as a public officer and conduct as a Crown prosecutor could be detached from his reputation as a lawyer. Precisely because constitutional rights are meant to protect citizens from the government and its agents, the law draws distinctions between governmental and non-governmental actors. Sections 7 and 8 to 14 of the *Charter* impose duties on Crown attorneys and fetter their discretion in the criminal justice system; there should be no doubt that the same officers are

¹⁵⁸ The attorney general had a particular interest in vindicating the integrity of an individual who was responsible for a controversial and well-publicized investigation, and a more general interest in discouraging criticisms of the office.

¹⁵⁹ *Scientology*, *supra* note 6 at 1161.

¹⁶⁰ *Ibid.* at 1162.

¹⁶¹ Under Ontario's *Crown Attorney's Act*, R.S.O. 1990, c. C.49, ss. 10, 11, prosecutors such as Mr. Hill are described as "agent[s] for the Attorney General" who exercise powers to "aid in the administration of justice."

likewise bound not to violate section 2(b)'s guarantee of expressive freedom.¹⁶² In rejecting that logic, the Court in *Scientology* created a libel exception to the rule that the *Charter* binds governments and their employees.

Once having found that section 32 was not engaged, Cory J. considered whether the law of defamation should be modified under *Dolphin Delivery's* direction that the common law develop "in a manner consistent with the fundamental values enshrined in the Constitution."¹⁶³ Stressing the distinction between *Charter* rights and *Charter* values, Cory J. emphasized that "[c]ourts must be taken not to expand the application of the *Charter* beyond that established by s. 32(1)."¹⁶⁴ After noting that courts have been cautious in amending the common law, he stated that the courts "must not go further than is necessary when taking *Charter* values into account."¹⁶⁵ Against the weight of decisions including *Dagenais*, *BCGEU v. British Columbia (A.G.)*,¹⁶⁶ *R. v. Salituro*,¹⁶⁷ and *R. v. Swain*,¹⁶⁸ Cory J. insisted in *Scientology* that "[f]ar-reaching changes to the common law must be left to the legislature."¹⁶⁹

Whether under section 32 or section 52(1) of the *Constitution Act, 1982*, the law of defamation violates expressive freedom and a section 1 analysis is necessary. There, *Scientology's* response confirmed the depth of the Court's resistance to the claim in this case. Stating that a "traditional s. 1 framework is not appropriate," Cory J. held that the balancing must be "more flexible" when section 32 is not engaged because values, not rights, are at stake.¹⁷⁰ More specifically, flexibility meant that the party claiming the *Charter's* benefit must establish both that the common law is inconsistent with constitutional values and that it

¹⁶² One of the best examples is *R. v. Stinchcombe*, [1995] 1 S.C.R. 754 (imposing a wide duty of disclosure on Crown officers under s. 7 of the *Charter*).

¹⁶³ *Scientology*, *supra* note 6 at 1165 [emphasis in original].

¹⁶⁴ *Ibid.* at 1170 [emphasis added].

¹⁶⁵ *Ibid.* at 1171.

¹⁶⁶ [1988] 2 S.C.R. 214 (holding that court orders can be subject to *Charter* review and that the picketing of courts is protected under s. 2(b) but may be proscribed under s. 1).

¹⁶⁷ [1991] 1 S.C.R. 654 (altering a common law rule about spousal testimonial incompetency in criminal trials, based on "*Charter* values").

¹⁶⁸ [1991] 1 S.C.R. 933 (invalidating a common law procedure that permitted the Crown to raise the issue of an accused's insanity, even over the accused's objection).

¹⁶⁹ *Scientology*, *supra* note 6 at 1171.

¹⁷⁰ *Ibid.*

is unjustifiable. In other words, *Scientology* declared the common law presumptively justifiable despite the infringement of section 2(b).

Only a few months earlier, *Dagenais* had addressed a similar question about the constitutional status of common law doctrine. On its face, the common law's inconsistency with *Charter* values was more glaring in *Scientology* because reputation is not the textual equivalent of expressive freedom and can only be "read in" to the *Charter* by inference.¹⁷¹ Cory J. dodged the chief justice's admonition in *Dagenais* against a hierarchy of rights by undertaking a core-values analysis. Citing *Keegstra* and *Butler*, he declared that defamatory statements are "very tenuously related to the core values which underlie s. 2(b)" because such statements are inimical to the truth, cannot enhance self-development, and will not lead to "healthy" participation in the affairs of the community.¹⁷² In reaching that conclusion, he neglected to consider or mention the Court's decision in *Zundel*, which explained why the distinction between truth and falsehood can be a dangerous basis for limiting expressive freedom.¹⁷³ Instead, Cory J. invoked *Globe & Mail Ltd. v. Boland*,¹⁷⁴ decided long before the *Charter*, and its declaration that defamatory statements about election candidates would be "harmful to that 'common convenience and welfare of society,'" because "sensitive and honourable men" would otherwise be deterred from seeking positions of trust and responsibility.¹⁷⁵ In light of the conclusion that the plaintiff's lawsuit was purely personal, the Court's solicitude for the sensibilities of public officers is puzzling.

On the other side of the ledger Cory J. held, despite the lack of textual equivalence, that reputation implicates democratic values and is entitled to "just as much" protection as freedom of expression.¹⁷⁶ Unlike the Church of Scientology's criticism of a Crown officer, which he characterized as being tenuously related to section 2(b)'s values, the good reputation of individuals is fundamentally important to our "democratic society"¹⁷⁷ He noted that defamation law is "the product of

¹⁷¹ Although he recognized that "it is not specifically mentioned," Cory J. found that "the good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the *Charter* rights": *ibid.* at 1179.

¹⁷² *Ibid.* at 1174.

¹⁷³ *Supra* note 6 at 753-59, McLachlin J.

¹⁷⁴ [1960] S.C.R. 203 at 208.

¹⁷⁵ *Scientology*, *supra* note 6 at 1174.

¹⁷⁶ *Ibid.* at 1175.

¹⁷⁷ *Ibid.* at 1179 [emphasis added].

its historical development up to the 17th century,” and though “subject to a few refinements,” remains “of vital importance” today.¹⁷⁸ Without acknowledging that the *Charter*, like the emergence of defences such as qualified privilege and fair comment, might be regarded as one such refinement, Cory J. held that “the law of defamation is [not] unduly restricting or inhibiting.”¹⁷⁹

Scientology's failure to provide any section 1 analysis is unique in the section 2(b) jurisprudence. Although civil liability for defamatory statements unquestionably infringes expressive freedom, so paramount was the protection of reputation that Cory J. did not consider the question of justification. Hence the contrast: unlike *Dagenais*, where the Court grafted elements of the proportionality test onto common law doctrine to protect equivalent *Charter* values, *Scientology* conceded the paramountcy of reputation, a nontextual value, and eliminated the section 1 test. In a jurisprudence that is self-conscious about the *Charter*'s structure and section 1's mandate to balance values, the decision to ignore the justification side of the equation is baffling. Yet, as Cory J. explained, “[s]urely it is not requiring too much of individuals that they ascertain the truth of the allegations they publish,” because those who publish statements should “assume a reasonable level of responsibility.”¹⁸⁰ Yet the common law's conception of responsibility imposes strict liability and limits the defences available to those who cannot prove the truth of their statements.

Although the *Charter* did not apply and the Court held that “there is no need to amend or alter” the common law, three issues remained.¹⁸¹ First was the status of the *Sullivan* rule, which extended constitutional protection to defamatory statements about public officers that are made without malice.¹⁸² In 1964, at the threshold of a First Amendment renaissance, *Sullivan* was proclaimed as perhaps “the best and most important [decision] ... ever produced in the realm of freedom

¹⁷⁸ *Ibid.* at 1177-78.

¹⁷⁹ *Ibid.* at 1187.

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.* at 1188.

¹⁸² The significance of *Sullivan* is discussed in “First Amendment and Section 1,” *supra* note 28 at 95-100.

of speech.”¹⁸³ Despite recurring doubts about its viability as doctrine,¹⁸⁴ *Sullivan* could have influenced section 2(b), if not by providing a ready-made rule of constitutional law, then at least by offering a rationale for granting expressive freedom some protection under the *Charter*. However, the Court in *Scientology* dismissed *Sullivan’s* rule without considering whether its *rationale* could enrich the *Charter’s* conception of expressive freedom. As *Sullivan* explained, however, debate which is “uninhibited, robust, and wide-open” may well include vehement, caustic, and sometimes unpleasantly sharp attacks on public officials.¹⁸⁵ Whatever its flaws as doctrine may be, the enduring lesson of *Sullivan* is that free discussion of public issues *is* intimately connected with principles of accountability and responsible government. Having earlier concluded that defamatory statements are only tenuously related to section 2(b)’s values, the Court discounted *Sullivan* as a social and political artifact, an exceptional response to “dramatic facts.”¹⁸⁶

While the Court is right to be skeptical of American doctrine, *Sullivan* was not put forward as an all or nothing proposition.¹⁸⁷ Although *Scientology* gave the Court a valuable opportunity to harmonize the common law and section 2(b) of the *Charter*, Cory J. foreclosed any possibility of a compromise between the *Charter’s* guarantee of expressive freedom and the law of defamation. His refusal to acknowledge the link between expressive freedom and democratic accountability in this case is particularly surprising.¹⁸⁸

Second, Cory J. reviewed the defence of qualified privilege. At common law the privilege applied only to reports on proceedings and

¹⁸³ H. Kalven Jr., “The New York Times Case: A Note on ‘the Central Meaning of the First Amendment’” [1964] Sup. Ct. Rev. 191 at 194.

¹⁸⁴ See, for example, R.A. Epstein, “Was *New York Times v. Sullivan* Wrong? (1986) 53 U. Chi. L. Rev. 782.

¹⁸⁵ *Sullivan*, *supra* note 28 at 270.

¹⁸⁶ *Scientology*, *supra* note 6 at 1182.

¹⁸⁷ The Court could have modified common law doctrine any number of ways without adopting the actual malice test: see, for example, *Factum of the Appellant, Church of Scientology of Toronto*, Supreme Court of Canada, Court File No. 24216, paras. 60-77 [unpublished] (reviewing models for reform in English, Australian, and American jurisdictions); *Factum of the Appellant, Morris Manning* Supreme Court of Canada, Court File No. 24216, paras. 29-42 [unpublished] (proposing a Canadian constitutional rule based on qualified privilege); and *Factum of the Intervenor, Canadian Civil Liberties Association* Supreme Court of Canada, Court File No. 24216, paras. 27-34 [unpublished] (proposing a reasonable belief standard).

¹⁸⁸ Previously, Cory J. had acknowledged that link in *Edmonton Journal* *supra* note 12 at 1336; in his dissenting opinions in *Vickery* *supra* note 12 at 709; in *New Brunswick*, *supra* note 14 at 475; and in *R. v. Kopyto* (1987), 62 O.R. (2d) 449 at 462-63 (C.A.), Cory J.A. (as he then was).

documents which were either filed with the court or on record in open court. The question in *Scientology* was whether the defendants' press conference was privileged, although the contempt action had not been filed and was not a court document at the time. Because the failure to comply with that requirement was the result of misadventure, Cory J. held that the defence could not be defeated "by the kind of technicality which arose in this case."¹⁸⁹ After expanding the privilege in that direction, he promptly narrowed its scope in another. Although qualified privilege is subject at common law to malice and the jury found that the Church's lawyer had not acted with malice, he withheld the defence because the lawyer failed to take reasonable steps to confirm the allegations of contempt.¹⁹⁰ In doing so, *Scientology* appears to import a negligence standard into a defence that was previously based on actual or express malice, knowing or reckless disregard, or dishonesty.¹⁹¹ At present, it remains unclear whether this aspect of *Scientology* should be considered fact- and evidence-based or read, instead, as a modification that redefines the defence of qualified privilege.¹⁹²

Finally, the defendants and intervenors sought review of the jury's award for damages, which totalled \$1.6 million. Under general principles of tort law the question was whether the damages were reasonable, and whether awards for defamation, like personal injury, should be capped.¹⁹³ In addition, counsel raised questions about the constitutionality of punitive or non-compensatory damages, the proportionality of the awards, the burden they impose on expressive freedom, and the availability of less intrusive alternatives.¹⁹⁴ After stating that its assessment should not be varied on appeal "unless it

¹⁸⁹ *Scientology*, *supra* note 6 at 1192.

¹⁹⁰ *Ibid.* at 1193 (explaining that the lawyer was duty-bound to take reasonable steps before making such serious allegations).

¹⁹¹ *Ibid.* at 1189.

¹⁹² See M. Doody, "New Common Law Libel Privilege to Report on Court Documents: Hill v. Church of Scientology of Toronto" (1996), 18 *Advocates' Q.* 251 at 256 (suggesting that *Scientology* might be limited by its unique facts).

¹⁹³ The Supreme Court of Canada imposed a "rough upper limit" of \$100,000 in 1978 dollars for non-pecuniary damages in the personal injury "trilogy" of *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Thornton v. Board of School Trustees of School District No. 57 (Prince George)* [1978] 2 S.C.R. 267; and *Arnold v. Teno*, [1978] 2 S.C.R. 287.

¹⁹⁴ See *supra* note 187; see also *Factum of the Intervenor, Media Coalition* Supreme Court of Canada, Court File No. 24216 [unpublished]; and *Factum of the Intervenor, the Writers' Union of Canada, PEN Canada, Canadian Association of Journalists, Periodical Writers Association of Canada and Book and Periodical Council* Supreme Court of Canada, Court File No. 24216 [unpublished].

shocks the conscience of the court,” Cory J. upheld the jury’s unprecedented award of general, aggravated, and punitive damages.¹⁹⁵

Despite limits on damages in personal injury cases, he refused to impose a similar cap in *Scientology* because defamation is “entirely different.”¹⁹⁶ The most important distinction between the two is that libel damages infringe and burden a constitutionally protected right. Without mentioning the *Charter* arguments raised by counsel, Cory J. rejected the cap because it would “change the whole character and function of the law of defamation.”¹⁹⁷ By making it more compatible with section 2(b), limits on the size and availability of such damages would unquestionably change the law of defamation. In *Derrickson*, the British Columbia Court of Appeal recognized that “we can no longer apply common law rules relating to damages for defamation which belong to an earlier and very different era.”¹⁹⁸ Unfortunately, the Supreme Court of Canada’s analysis in *Scientology* was too one-sided to acknowledge that damages burden constitutional values.

Scientology is a regrettable landmark in the section 2(b) jurisprudence. Although the decision could have upheld the plaintiff’s claim and modified the common law, the Court chose instead to issue definitive pronouncements about the paramountcy of reputation.¹⁹⁹ In doing so, Cory J. expressed unmistakable resistance to section 2(b) at virtually every stage of the analysis: in rejecting the claim under section 32, applying the *Charter*’s values under section 52(1) of the *Constitution Act, 1982*, balancing expressive freedom and reputation, failing to provide any section 1 analysis, dismissing *Sullivan*, restricting the defence of qualified privilege, and ratifying unprecedented damages. Instead of accommodating the values at stake, the Court applied a clash model and reputation, a non-*Charter* value, prevailed over section 2(b)’s explicit guarantee of expressive freedom. Cory J. added a single qualification,

¹⁹⁵ *Scientology supra* note 6 at 1195-96. As a matter of tort law, the focus in making such awards should be on compensating the plaintiff for damage to his or her reputation and, in rare cases, on the need for additional sanctions against outrageous conduct. Even under a traditional conception of damages Cory J.’s sympathy for the plaintiff and solicitude for his feelings was disproportionate: *ibid.* at 1200-03.

¹⁹⁶ *Ibid.* at 1197.

¹⁹⁷ *Ibid.* at 1198.

¹⁹⁸ *Supra* note 154 at 297.

¹⁹⁹ While the jury’s verdict against the Church could have easily withstood the *Sullivan* standard, it found that the lawyer, Morris Manning, had not acted with malice at common law; whether his conduct displayed reckless disregard as to the truth or falsity of the allegation is therefore less certain. Other options were also put before the Court: see *supra* note 187.

that “this appeal does not involve the media or political commentary about government policies.”²⁰⁰ That qualification could enable the Court to “read down” *Scientology* in the future and restrict it to its distinctive elements—an “unreviewable” jury verdict which awarded “reasonable” damages in a contest between two “purely private” parties.

Of greater concern are *Scientology*'s broader implications for section 2(b). So visceral was the Court's reaction to the merits that it only saw one side of the equation. To some extent, *Scientology* is reminiscent of the dissenting opinions in *Dagenais*, which effectively argued that it would be impossible for the common law to be unconstitutional because the pre-*Charter* balancing “was an expression of the very rights protected by the *Charter*.”²⁰¹ Following the majority opinion's warning against a hierarchy of rights in *Dagenais*, however, it is difficult to understand how reputation could attain such uncritical paramouncy over expressive freedom in *Scientology*. For its treatment of section 32 and its balancing of values, as well as for its failure to apply section 1 to or consider the constitutionality of damages, this decision represents section 2(b)'s lowest point in the first generation of section 2(b) jurisprudence.

D. *RJR-MacDonald Inc. v. Canada (A.G.): Evidence and the Concept of Justification*

RJR-MacDonald tested the constitutionality of provisions in the *Tobacco Products Control Act*²⁰² which, among other things, prohibited tobacco advertising and compelled tobacco companies to place unattributed warnings on packages. Despite rising concerns about smoking and growing disapproval of the tobacco companies, the courts were closely divided throughout: the legislation was struck down by the trial judge,²⁰³ upheld on a 2-1 vote by the Quebec Court of Appeal,²⁰⁴ and then invalidated at the Supreme Court of Canada by a 5-4

²⁰⁰ *Scientology*, *supra* note 6 at 1188.

²⁰¹ *Supra* note 134, L'Heureux-Dubé J.

²⁰² S.C. 1988, c. 20, ss. 4, 5 (prohibiting advertising), ss. 6, 8, (prohibiting promotion and restricting trademark use); and s. 9 (compelling unattributed health warnings); reprinted in R.S.C. 1985 (4th Supp.), c. 14, as rep. by S.C. 1997, c. 13, s. 64 [hereinafter *TPCA*].

²⁰³ [1991] R.J.Q. 2260 (Sup. Ct.).

²⁰⁴ [1993] R.J.Q. 375.

margin.²⁰⁵ In such circumstances, it was predictable that the Court's decision would be controversial.²⁰⁶ At the same time, though *RJR-MacDonald* counts as a victory for expressive freedom, the Court's opinions add little to the development of section 2(b)'s values. Although McLachlin J.'s result prevailed, La Forest J.'s dissent was powerful. In order to uphold the legislation, he proposed further modifications to the Court's methodology.

His abhorrence of smoking is a relentless theme in the dissent. Even so, the *TPCA* could not be easily saved under section 1. First, the ban on advertising was compromised by a lack of evidence to establish a causal link between tobacco promotion and consumption. In the face of an adverse finding of fact at trial, it was doubtful that the government could show a sufficient connection between the two.²⁰⁷ In addition, the ban drew no distinction between informational messages and "lifestyle" ads. The difficulty there was that an absolute prohibition could not satisfy minimal impairment unless the government demonstrated the necessity of banning all advertising, including messages that are purely informational. To make matters worse, the government withheld its own evidence on minimal impairment.²⁰⁸ Finally, the statute failed to attribute its mandatory package warnings to the government. Once again, the infringement could not pass minimal impairment unless the government explained why the message could not be attributed to its author.

Mr. Justice La Forest's approach to those flaws in the government's case was to alter the standard of review. He began this task by complaining that the trial judge in *RJR-MacDonald* treated *Oakes* as a "test" that is "uniformly applicable in all circumstances" and, in doing so, exchanged formalistic doctrine for the *Charter's* concept of

²⁰⁵ *Supra* note 9. All members of the Supreme Court of Canada held that the legislation was *intra vires* under the division of powers; McLachlin J. (Sopinka and Major JJ. concurring) and Iacobucci J. (Lamer C.J. concurring) invalidated its key provisions under s. 2(b) of the *Charter*; L'Heureux-Dubé, Gonthier, and Cory JJ. concurred in La Forest J.'s dissent.

²⁰⁶ See D. Beatty, "Order in the Supreme Court! Ad-hockery is running wild" *The [Toronto] Globe and Mail* (9 October 1995) A11; A. Coyne, "The Supreme Court's Motto: Give me liberty, or give me a good excuse" *The [Toronto] Globe and Mail* (25 September 1995) A14; A. Hutchinson, "Tobacco decision is a windfall for corporations" *The [Toronto] Globe and Mail* (25 September 1995) A15; and D. Schneiderman, "A Comment on *RJR-MacDonald v. Canada (A.G.)*" (1996) 30 *U.B.C. L. Rev.* 165.

²⁰⁷ *RJR-MacDonald*, *supra* note 9 at 285 (summarizing the trial judge's findings of fact on the evidence).

²⁰⁸ *Ibid.* at 309-11.

reasonable limits.²⁰⁹ He added that *Oakes* promotes abstract formalism at the expense of section 1's mandate to strike "a delicate balance," and declared that balancing entails an "unavoidably normative inquiry."²¹⁰ In his view, the guidelines of *Oakes* should be applied flexibly, according to the "factual and social context of each case."²¹¹ Ultimately, he stated that section 1's evidentiary requirements would "vary substantially" from case to case with the nature of the legislation and the right infringed.²¹² Under that standard the *Charter's* delicate balance is a matter of *ad hoc* perception.

Like Cory J. in *Scientology*, La Forest J. only saw one side of the equation in *RJR-MacDonald*. His analysis under *Oakes* began by diverting attention from the legislation's ban on *advertising* to the problems associated with *consumption*. He claimed that evidence about tobacco consumption should play a role in determining "the appropriate standard of justification and in weighing the relevant evidence."²¹³ Consumption was an important part of his analysis because the detrimental effects of smoking filled a "significant gap" in the evidence.²¹⁴ To justify a restriction on advertising, the government must ordinarily show that the infringement is linked to a valid objective of consumer health and safety. In *RJRMacDonald*, La Forest J. argued that it is not necessary to show that a prohibition on advertising will advance the government's objective of reducing tobacco consumption; it is enough that the harmful effects of tobacco are known. Proving a link between consumption and advertising would place an "impossible onus" on Parliament.²¹⁵ To eliminate that onus, he characterized the gap in the government's evidence as an "institutional constraint" that called for deference by the courts and an attenuation of the *Oakes* test.²¹⁶

His discussion of advertising provided a further rationale for relaxing the standard of review. Following the methodology of *Keegstra*, *Butler*, and *Scientology*, La Forest J. conducted a core-values analysis to test the content of tobacco promotion against "a set of even more

²⁰⁹ *Ibid.* at 269-70.

²¹⁰ *Ibid.* at 270.

²¹¹ *Ibid.*

²¹² *Ibid.* at 272.

²¹³ *Ibid.* at 273.

²¹⁴ *Ibid.* at 275.

²¹⁵ *Ibid.*

²¹⁶ *Ibid.* at 276.

fundamental values.”²¹⁷ Under that analysis, he concluded that tobacco advertising is entitled to “a very low degree of protection under s.1,” because it is profit-seeking, serves no political, scientific, or artistic ends and does not promote participation in the political process.²¹⁸ In doing so, La Forest J. found closer parallels in *Keegstra Butler*, and the *Prostitution Reference*²¹⁹ which deal with *Criminal Code* provisions, than in decisions such as *Rocket*, which balance goals of consumer protection against access to information about lawful products and services.²²⁰ He repeated that an attenuated section 1 test was appropriate because tobacco advertising is “as far” from the core of section 2(b)’s values as prostitution, hate mongering, or pornography.²²¹ To summarize, before even addressing proportionality, La Forest J. discounted the *Oakes* test in favour of a flexible approach that would permit the Court to alter section 1’s evidentiary requirements. Under the first branch of the test he emphasized the harms associated with the product’s consumption to support a ban on advertising. Then, to further dilute the review he compared ads which promote a legal product to expressive activity that is prohibited by the *Criminal Code*. It is difficult to imagine how any legislation could fail this standard of justification.

Mr. Justice La Forest’s attenuation of review continued under the proportionality test. There, he equated the rational connection requirement with “common sense” to fill a gap in the evidence.²²² Lacking evidence of a demonstrable link between advertising and consumption, La Forest J. held that the power of common sense would suffice: advertising must be connected to consumption, he reasoned, because it would otherwise make no sense for the companies to advertise.²²³ He buttressed that line of analysis with *Butler* and its “common sense ... connection” between pornography and harm.²²⁴ There, the Court held that pornographic material can be limited because it is antithetical to equality values. Although it is doubtful whether the analogy is apt, it is painfully obvious that a common sense

²¹⁷ *Ibid.* at 280.

²¹⁸ *Ibid.* at 282-83.

²¹⁹ *Supra* note 5.

²²⁰ *RJR-MacDonald*, *supra* note 9 at 282.

²²¹ *Ibid.*

²²² *Ibid.* at 290-94 and 304.

²²³ *Ibid.* at 291.

²²⁴ *Ibid.* at 292-93.

standard of constitutionality can only have one purpose, and that is to save infringements that cannot satisfy any higher standard of proof.²²⁵

The minimal impairment test posed a second evidentiary hurdle for *La Forest J.* There, the difficulty was that the government introduced no evidence to explain why an absolute ban was necessary to achieve its objective. It is clear, on the wording of section 1 and under all the Court's jurisprudence, that the burden of justification is on the government. To solve that evidentiary problem, *La Forest J.* turned the burden on its head and upheld the legislation because there was no evidence that the ban did *not* satisfy minimal impairment. In the absence of evidence to demonstrate a minimal impairment he stated that "it would be highly artificial for the Court to decide, *on a purely abstract basis*, that a partial prohibition *would be* as effective."²²⁶ In his view, the legislation would only fail "*if it had been clear to Parliament* that some forms of advertising do not stimulate consumption."²²⁷ That analysis essentially reversed the burden of proof: instead of requiring the government to offer affirmative evidence of minimal impairment it assumed, in the absence of clear proof to the contrary, that the infringement satisfied that requirement. Although he refused to speculate that a partial prohibition might have been as effective *La Forest J.* found it "reasonable to conclude" that all advertising stimulates consumption.²²⁸ In effect, he invented a presumption of minimal impairment and then upheld the infringement when it was not rebutted. How it could have been rebutted and by whom, given the government's refusal to present evidence, is a mystery.

La Forest J.'s contortions of analysis have dark implications for section 2(b). His approach is capable of saving any legislation, whatever its flaws, and his aversion to values of consistency and proportionality is alarming. The theory of *Oakes* is that structured criteria are necessary to minimize the risk that arbitrary, subjective and *ad hoc* perceptions may compromise the section 1 analysis. The *RJR-MacDonald* dissent

²²⁵ Limits on pornography and tobacco advertising are based on different theories of harm. Pornography was held to be harmful in *Butler*, *supra* note 4, because it violates the equality of women generally, regardless of whether individuals suffer direct harm. By contrast, tobacco advertising is only harmful if it increases consumption, and individuals are harmed by having fallen prey to its persuasion. The evidence in *RJR-MacDonald* did not support that link. Assuming the correctness of *Butler's* conclusion that women are harmed generally by pornography, it is difficult to see how tobacco advertising is harmful unless it does increase consumption.

²²⁶ *RJR-MacDonald*, *supra* note 9 at 312 [emphasis added].

²²⁷ *Ibid.* at 311 [emphasis added].

²²⁸ *Ibid.*

illustrates that eliminating the *Oakes* test's constraints in favour of flexibility can only undercut the *Charter's* commitment to expressive freedom and undermine the integrity of section 1 review.

It cannot have been easy for McLachlin J. to write in defence of tobacco companies and their promotional activities. In the circumstances, however, some response to a dissent that would have emasculated section 2(b) was imperative if expressive freedom is to have any meaning under the *Charter*. Her opinion invalidating the legislation was at once strong and ambivalent: it was strong because she defended a principled conception of section 1, but ambivalent because section 2(b)'s values played a limited role in her analysis. She made a persuasive argument on the evidence but failed, in doing so, to affirm or enrich the Court's commitment to expressive freedom.

McLachlin J. took issue with the dissenting opinion on several points. First, she proposed an alternative to La Forest J.'s methodology that is "evidence-based." Her reasons make clear that she regards the contextual approach as a factual and evidentiary concept, and the section 1 analysis as a "fact-specific inquiry" which requires the courts to "take[] into account the context in which the particular law is situate."²²⁹ As McLachlin J. explained, review under section 1 examines the "*actual* objective" of the law, and determines the "*actual* connection" between that objective and what the law achieves, the "*actual* degree" to which it impairs the right, and whether the "*actual* benefit" of the law outweighs the "*actual* seriousness" of the violation.²³⁰ Her approach is aimed at resolving tensions or incompatibilities between the situational focus of pre-*Charter* common law methodology and the structured framework of constitutional analysis. When juxtaposed, the majority and minority approaches expose a significant divergence of views: whereas McLachlin J. treats context as a mechanism for relating constitutional principles to the facts and circumstances of particular cases, La Forest J. regards it as a rationale for lowering section 1's standard of review. Under her section 1 analysis the relevant variable is the evidence; under his it is the standard itself.

McLachlin J. also claimed that the dissent had attenuated the government's burden under section 1 to an extreme that diminished the role of the courts and weakened the structure of rights under the *Charter*. She insisted, instead, that the analysis be based on reason, reasoned demonstration, and rational inference, because to relax those

²²⁹ *RJR MacDonald, supra* note 9 at 330.

²³⁰ *Ibid.* at 331 [emphasis added]

requirements would effectively grant Parliament the right to determine the limits of its intrusion on *Charter* rights.²³¹ Unlike La Forest J., she regarded the government's refusal to disclose evidence in its possession or to present any other evidence on minimal impairment as an affront, both to the Court and to the *Charter*. For her, *RJR-MacDonald* was less about transcending issues of expressive freedom than the “bottom line” under section 1: that the government has the burden to provide a reasoned demonstration that its violation of a constitutional right is justifiable.²³² That bottom line was at stake in *RJR-MacDonald* because the *Charter*'s rights would have no force and meaning unless that standard is enforced by the judiciary.²³³

Not only did she question the dissent's framework for section 1 review, McLachlin J. challenged its characterization of the legislative objective and analysis of minimal impairment. Although she concluded that “[e]ven a small reduction in tobacco use” is sufficiently important to warrant limits on advertising,²³⁴ she cautioned that “[c]are must be taken not to overstate the objective.”²³⁵ By conflating the known harm inherent in consumption with the impact of advertising, which was speculative at best, that is exactly what La Forest J. did. Then, under minimal impairment, he juxtaposed advertising's “low value” with the transcending importance of reducing tobacco consumption. As McLachlin J. observed, however, the minimal impairment test does not contemplate a balancing of values; its purpose instead is to determine whether the *impairment* is greater than necessary in the circumstances. Noting that La Forest J. had re-balanced the values to rationalize yet another attenuation of review she cautioned that “care must be taken not to devalue the need for a demonstration of minimum impairment by arguing that the legislation is important and the infringement of no great moment.”²³⁶ In any case, McLachlin J. stated that the Court's analysis should neither overvalue the legislative objective nor undervalue the expressive activity in question. In effect, the dissenting opinion imposed a burden on the tobacco companies to establish “the true benefits” of their advertising.²³⁷ That was inappropriate, in her view, because the

²³¹ *Ibid.* at 328-29.

²³² *Ibid.* at 329.

²³³ *Ibid.*

²³⁴ *Ibid.* at 336.

²³⁵ *Ibid.* at 335.

²³⁶ *Ibid.* at 347.

²³⁷ *Ibid.* at 347-48.

onus under section 1 is on the government, not the party claiming the entitlement. Finally, she rejected the suggestion that expressive freedom can be compromised by the profit motive. In an attempt to retain the focus on justification, she stated that the motive behind protected activity is “irrelevant to the determination of whether the government has established that the law is reasonable or justified”²³⁸

Although she confronted the dissent’s conception of section 1, McLachlin J.’s commitment to expressive freedom should itself not be overstated. She invalidated the legislation on narrow evidentiary grounds, under minimal impairment, and deferred to Parliament at important stages of the analysis. Her conclusion that a small reduction in tobacco use could justify the violation of constitutional rights set a low threshold under the first branch of *Oakes*.²³⁹ In addition, after emphasizing the importance of reason, logic, and reasoned demonstration, she adopted a common sense standard under the rational connection test. There, she cited *Butler*²⁴⁰ and its reliance on the American Meese Commission on Pornography, which proposed the following the test of connection: “would [it] be surprising ... to find otherwise?”²⁴¹ In other words, it would be such a surprise or so counter-intuitive to discover that tobacco advertising does not promote smoking that a rational connection between the ban and a reduction in consumption can be assumed. Once again, it is difficult to imagine how legislation could fail a standard that can so easily explain the violation of a constitutional right.

RJR-MacDonald was a victory for section 2(b), but a pyrrhic one at that. McLachlin J. advocated an evidence-based concept of section 1 review and confirmed, as a matter of institutional policy, that the Court will require the government to demonstrate the justifiability of laws that violate section 2(b). She disputed the dissent’s conception of section 1 but diverged in her application of the test only on the question of minimal impairment. The claim prevailed on a point of evidence and broader principles of expressive freedom were not engaged.

²³⁸ *Ibid.* at 348.

²³⁹ *Supra* note 19.

²⁴⁰ *Supra* note 4.

²⁴¹ *RJR-MacDonald*, *supra* note 9 at 341, citing United States, Department of Justice, *Attorney General’s Commission on Pornography: Final Report* vol. 1 (Washington D.C.: U.S. Department of Justice, 1986) at 326.

E. *Ross and Carson: The Emergence of La Forest J.*

RJR-MacDonald was decided nearly two years ago. Since then, the most significant development under section 2(b) is the emergence of La Forest J. as the Court's spokesperson on these issues. Twice since *RJR-MacDonald* he has written in important cases and both times he spoke for the full Court. First, his decision in *Ross* upheld a teacher's removal from the classroom for views he expressed outside the school, as a member of the public.²⁴² More recently, his judgment in *Carson* saved the *Criminal Code*'s provision that permits judges to exclude the public from all or part of criminal proceedings, but reversed the trial judge's order closing part of a hearing on sentence.²⁴³

Ross arose from a complaint and proceedings under human rights legislation which concerned a schoolteacher's off-duty anti-Semitic expressive activity and its impact on the school environment. In reviewing the board of inquiry's orders, the Court considered whether the school board's failure to take action constituted discrimination, and what sanctions, if any, should be imposed on the teacher. It upheld the board's order removing him from the classroom but invalidated the condition that his employment in a non-teaching position be terminated should he revive his extra-curricular activities.²⁴⁴

The Court's methodology was a central factor in the outcome. Though section 2(b) was not discussed, the board of inquiry's finding of discrimination vitally affected the section 1 analysis. In the circumstances, La Forest J.'s decision to adopt that finding before the *Charter* was engaged pre-empted the rational connection test. On the question of discrimination, there was no evidence that Ross had engaged in anti-Semitic activity while on duty, and no direct evidence that his extra-curricular activities had any impact on the school environment.²⁴⁵

²⁴² *Ross*, supra note 8.

²⁴³ *Supra* note 14, upholding the constitutionality of s. 486(1) of the *Criminal Code*. The provision grants a discretion to a trial judge to exclude the public from criminal proceedings if the judge "is of the opinion that it is in the interest of public morals, the maintenance of order or the proper administration to [do so]."

²⁴⁴ The board of inquiry ordered the school board to place Ross on an eighteen-month leave of absence without pay; to appoint him to a non-teaching position in that period if one became available; to terminate his employment if he had not been offered and had not accepted such a position in that period; and to terminate his employment immediately upon the revival of any of the activities complained of, during the leave of absence or in a non-teaching position: *Ross*, supra note 8 at 838-39.

²⁴⁵ *Ibid.* at 856.

The board of inquiry found discrimination nonetheless, because it “*would be reasonable to anticipate*” that the teacher’s outside activities were a factor in influencing the discriminatory conduct of some students.²⁴⁶ Mr. Justice La Forest upheld that finding because a “reasonable inference” was sufficient to support the conclusion that the teacher’s activity “impaired the educational environment generally.”²⁴⁷ Unfortunately, that conclusion answered the rational connection test before the *Charter* analysis even began.²⁴⁸ As a result, La Forest J. Simply recited that finding under section 1: the removal order was rationally connected to the objective of preventing discrimination because it was reasonable to presume or anticipate the causal relationship; in such circumstances, the removal order would deny Ross the opportunity to influence students, whether he had in the past or not. Not only was a key part of the section 1 analysis resolved in advance against expressive freedom, in the absence of proof that the teacher’s views did have consequences, the distinction between value and harm was once again collapsed.

Under section 2(b) of the *Charter*, the Court continues to insist, as did La Forest J. in *Ross*, that the scope of protection of expression is “very broad” and that “freedom of expression serves to protect the right of the minority to express its views, however unpopular such views may be.”²⁴⁹ Despite its professed disdain for formalism and abstraction in *Charter* interpretation, such statements about expressive freedom are valid only at the highest level of abstract formalism. As *Keegstra Butler*, the *RJR-MacDonald* dissent, and *Ross* confirm, the Court pays little or no price for protecting unpopular views under section 2(b) because limits on such expressive activity can be easily justified under its section 1 methodology.

La Forest J.’s constitutional analysis in *Ross* carefully drew parallels between his approach and that of McLachlin J. Under section 2(b) he cited her majority opinion in *Zundel*²⁵⁰ and claimed that both the “majority and minority agreed” in *RJRMacDonald* that a uniform section 1 test must be eschewed in favour of flexibility.²⁵¹ Soon thereafter he

²⁴⁶ *Ibid.* [emphasis added].

²⁴⁷ *Ibid.* at 860, citing *Fraser v. Canada (Public Service Staff Relations Board)* [1985] 2 S.C.R. 455, which was not decided under the *Charter*.

²⁴⁸ *Ibid.* at 880-82.

²⁴⁹ *Ibid.* at 864.

²⁵⁰ *Ibid.* at 864-65.

²⁵¹ *Ibid.* at 871-72.

reasserted the central point of his *RJR-MacDonald* dissent, that section 1's evidentiary requirements "will vary substantially depending upon both the nature of the legislation and the nature of the right infringed."²⁵² He strengthened the impression of solidarity among members of the Court by citing McLachlin J. in the next two sentences. As a result, the Court unanimously agreed that the standard of review under section 1 is contingent on *ad hoc* perceptions of the relative value of regulation and freedom in any given case.

In establishing a framework for balancing values under section 1, the Court explored the three contexts considered relevant by the New Brunswick Human Rights Commission: the educational, the employment, and the anti-Semitism contexts.²⁵³ Excluded from that framework of analysis was any consideration of expressive freedom and the consequences of violating a constitutionally protected right. Once again, La Forest J. held that the board of inquiry's approach to discrimination reflected an appropriate "balancing of values" before section 2(b) was considered.²⁵⁴ Only after reaching that conclusion did he turn to expressive freedom. There, he twice inferred that the board's orders against Ross did not violate the *Charter*, stating first that "[t]he nature of the right *allegedly* infringed in this case is of equal significance," and then adding that, when the form of expression "*allegedly* infringed lies further from the 'core' values of freedom of expression," a lower standard of justification is appropriate.²⁵⁵ In the circumstances, he quickly found that anti-Semitic expressive activity is tenuously connected to section 2(b)'s values. The standard of review was lowered and proportionality satisfied, with the exception of the final order imposing a permanent ban on the teacher's expressive activity, which failed minimal impairment.²⁵⁶

Nowhere in the section 1 analysis were the orders' consequences for expressive freedom discussed. Under the final stage of the proportionality test, where a deleterious effects-salutary benefits analysis is now required, La Forest J. simply stated that the teacher's expressive

²⁵² *Ibid.* at 876.

²⁵³ *Ibid.* at 872-76.

²⁵⁴ *Ibid.* at 876. In reaching that conclusion he noted that the board "carefully considered the effect on the respondent" Ross, but otherwise did not mention or discuss s. 2(b)'s values.

²⁵⁵ *Ibid.* at 876-77 [emphasis added].

²⁵⁶ *Ibid.* at 884. There, the Court held that the evidence did not support the conclusion that the "residual poisoned effect" would last once Ross was placed in a non-teaching role.

freedom was unrestricted.²⁵⁷ Not only did that conclusion gloss over the price Ross paid for holding offensive views, it overlooked a key element of the deleterious effects analysis. It is not only the consequences for one individual, but also for the principle of expressive freedom, that should be considered in this analysis. In *Keegstra* McLachlin J. urged the majority to consider the chilling effects of limits on offensive expression under section 1: in *Ross*, however, the Court did not see it as a factor, despite the risk of self-censorship, and the decision's potential to silence teachers both in and out of school.

In spite of the Court's section 2(b) rhetoric and with the exception of the result in *Zundel*, controversial views have virtually no protection under the *Charter*. As a result of *Ross*, the Court's aversion to unpopular and offensive expression is entrenched in a methodology that treats context as a proxy for content under section 1, equates subjective perceptions of value with constitutional principles, and dilutes section 1's requirements of harm and proportionality to the vanishing point. The fear of formalism that has been voiced by members of the Court in rejecting the constraints of *Oakes* is entirely misplaced: formalism is the defining feature of section 2(b), not of section 1.²⁵⁸

Meanwhile, the jurisprudence that followed *Dagenais*, namely *Scientology*, *RJR-MacDonald*, and *Ross*, made little effort to enrich or develop section 2(b)'s values. Although it upheld section 486(1) of the *Criminal Code*, *Carson* broke the pattern of those cases.²⁵⁹ In doing so La Forest J. articulated a concept of access under section 2(b) that is based on principles of openness and democratic accountability, as well as on a strong recognition that newsgathering is vital to freedom of the press. He vindicated the statutory provision that authorizes judges to close the courtroom but fettered the trial judge's discretion to exclude the public by reading a *Dagenais*-like test into the "proper administration of justice" under section 486(1) of the *Code*.

That provision does not limit expression and cannot infringe the *Charter* unless section 2(b) guarantees a right of access to judicial proceedings. As noted in Part II, above, the Court was unable to establish any approach to access in *Commonwealth*.²⁶⁰ In *Carson*,

²⁵⁷ *Ibid.* at 885 (concluding that he was only prevented from expressing certain views and holding a teaching position at the same time).

²⁵⁸ See, for example, *Keegstra* *supra* note 3 and text accompanying notes 68-71, *supra*; and *RJR-MacDonald*, *supra* note 9.

²⁵⁹ *Supra* note 14.

²⁶⁰ *Supra* note 15.

however, the strong pedigree of openness and publicity at common law may have placed the claim on a higher plane. Not only did he invoke access and democratic accountability under section 2(b), La Forest J. linked both values to the newsgathering function of the press.²⁶¹ For the first time since McLachlin J.'s dissent in *Keegstra* principles of expressive freedom played a valuable role in the *Charter* analysis. Moreover, unlike *Commonwealth*, where six of seven judges restricted the scope of section 2(b), the Court in *Carson* rejected the suggestion that section 486(1) represents an accommodation of values that do not violate section 2(b) and held, instead, that competing interests must be balanced under section 1.²⁶²

After explaining why section 486(1) is justifiable, La Forest J. added to the foundation of *Dagenais* by showing how the chief justice's publication ban rule could apply to the exercise of the discretion to exclude.²⁶³ On that point, his reasons were reminiscent of McLachlin J.'s opinion in *RJR-MacDonald* because of his emphasis on the need for a sufficient evidentiary basis to support any limit on the right.²⁶⁴ Significantly, La Forest J. also integrated the values at stake into his application of the *Dagenais* test. As he explained, the order closing part of the sentencing hearing implicated the interests of the victims and even the accused, as well as the values served by access, including deterrence and public denunciation. On balance, he concluded that "permitting the public to determine what punishment fits a given crime, and whether sentences reflect *consistency and proportionality*" should prevail.²⁶⁵ The order was not necessary and its deleterious consequences were not outweighed by its salutary effects.²⁶⁶

Carson highlighted values of consistency and proportionality which apply, *a fortiori*, to the section 1 analysis. In doing so it reinforced

²⁶¹ *Carson*, *supra* note 14 at 493-99.

²⁶² *Ibid.* at 499-502.

²⁶³ In the context of s. 486(1), the judge must consider the available options and consider whether there are any other reasonable and effective alternatives available, and whether the order is limited as much as possible; in addition, the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate: *ibid.* at 515-16.

²⁶⁴ *Ibid.* at 516-18.

²⁶⁵ *Ibid.* at 523 [emphasis added].

²⁶⁶ *Ibid.* Compare La Forest J.'s conclusion in *Carson*—that there was insufficient evidence to support a concern for undue hardship, that the order was not necessary, and that its deleterious effects were not outweighed by its salutary benefits—with his s. 1 analysis in *Ross*, *supra* note 8.

the Court's commitment to those values and demonstrated its willingness to protect section 2(b)'s principles. La Forest J. also confirmed that the exercise of a discretion, whether at common law or under statute, is subject to the *Charter*. His opinion demonstrated once again how the basic concepts of the *Oakes* test can be adapted to bring pre-existing doctrine or statutory standards into compliance with the *Charter*. Most importantly, by discussing the competing values at stake, he added the step that was missing in *Dagenais*.

Still, *Carson* must be read alongside *Ross* and other decisions which have abandoned section 2(b)'s principles to an *ad hoc* concept of context under section 1. Not only does that jurisprudence lack in consistency, its attenuation of review under section 1, including proof of a demonstrable harm and minimal impairment, represents a rejection of proportionality. The difference between *Ross* and *Carson*, and the different lines of jurisprudence each represents, can be summed up in two words: subjective perception. Section 2(b) tends to prevail when the Court perceives the expressive activity at stake to be valuable, and fails when the content of the entitlement is considered valueless. If formalism is the fatal flaw of section 2(b), subjective perception is the fundamental assumption, and also the fatal flaw, of the Court's conception of section 1.

IV. THE NEXT GENERATION

A. *A Methodology for the Future*

The first generation of jurisprudence and its methodological flaws have been discussed at length. Primary among those flaws is *Ford's* assumption that the right and its limits are separate analytical concepts. Despite the *Charter's* textual structure, that interpretation of the relationship between the two is fundamentally unsound. Just as restrictions on the scope of the right would have to be based on a conclusion that it is justifiable to exclude certain expression from the *Charter*, reasonable limits under section 1 must likewise rest on a balancing of values which incorporates some evaluation of the expressive activity at stake. In addition, *Irwin Toy's* unlimited definition of the right was abstract, and failed, as such, to offer any criteria for distinguishing between claims. Wilson J.'s contextual approach attempted to close the gap between sections 2(b) and 1, and to ground the analysis of expressive freedom in the facts and circumstances of particular cases. Although it succeeded in relating section 2(b)'s guarantee to section 1's mandate of

reasonable limits, her approach did so at the expense of *Irwin Toy's* principle of freedom. Together, these developments produced a methodology that marginalized section 2(b)'s rationales for protecting expressive freedom and substituted *ad hoc* decisionmaking for a principled balancing of values. *Carson's* principles of consistency and proportionality for sentencing should *a fortiori* be the hallmarks of justification under section 1. Unfortunately, the Supreme Court of Canada does not observe those principles in its section 2(b) jurisprudence.

The Ontario Court of Appeal's decision in *Thomson Newspapers Co. v. Canada (A.G.)*²⁶⁷ illustrates how stunted the *Charter's* conception of expressive freedom has become. Soon to be heard by the Supreme Court of Canada, *Thomson Newspapers* is instructive as an example of what is wrong with the section 2(b) jurisprudence. There, the court upheld an absolute publication ban on opinion surveys during the final seventy-two hours of a federal election campaign, in full awareness that there was no empirical evidence that such polls affect the outcome of elections.²⁶⁸

Nowhere in its reasons did the Ontario Court of Appeal discuss section 2(b)'s values or acknowledge the central role information plays in an election process. To make matters worse, the Court expanded the scope of section 322.1 of the *CEA*, thereby maximizing the constitutional violation, before even reaching the *Charter*.²⁶⁹ Then, without exploring whether opinion surveys in an election campaign lie at the core of section 2(b), as they surely must, the court applied a relaxed standard of section 1 review. In the absence of any concrete evidence of harm, it held that "[i]t is surely a substantial and pressing objective to respond to widespread perceptions that opinion surveys *can be distorting*... ." ²⁷⁰

²⁶⁷ (1996), 30 O.R. (3d) 350 [hereinafter *Thomson Newspapers*]; leave to appeal to Supreme Court of Canada granted 3 March 1997: [1996] S.C.C.A. No. 510 (QL).

²⁶⁸ Section 322.1 of the *Canada Elections Act*, R.S.C. 1985, c. E-2, as am. by S.C. 1993, c. 19, s. 125, [hereinafter *CEA*] imposes a three-day blackout period on the publication of opinion surveys during a federal election campaign. The court conceded in *Thomson Newspapers* *supra* note 267 at 353, that there is "no empirical evidence as to the extent or nature of the influence of opinion polls upon the voter"

²⁶⁹ *Thomson Newspapers* *supra* note 267 at 357. After interpreting the section to include hamburger and other non-scientific polls, the court concluded that it should also apply to the re-publication of pre-blackout polls. It supported that view by observing that "[w]hile it may be that Parliament intended to restrict the scope of the prohibition to new, previously undisclosed survey results, we are not convinced, in the absence of any words in the legislation to that effect, that such was necessarily the intention."

²⁷⁰ *Ibid.* at 359 [emphasis added].

Under proportionality it applied *Butler's* reasoned apprehension of harm test, and found a rational connection on the strength of the observation that “[t]here was serious controversy on a social scientific subject ..., combined with the manifest fact that the publication of bare results does not tell the whole story and thus may well be misleading.”²⁷¹ After reading section 322.1 up, to expand its regulatory scope, it was unlikely that the court would strike the provision for failing to satisfy *minimal* impairment.²⁷² Finally, although the Court of Appeal failed to apply a deleterious effects-salutary benefits analysis, it claimed that the effect of the ban was “nominal” because “[i]t is the newspaper industry, urging its own interests *and those of the public* in these proceedings.”²⁷³ For the court to describe the violation as nominal, in light of the press function and public interest in access to information during elections, is short-sighted at best.

If section 2(b) has a core, then expressive activity located at that core is entitled to strong protection under the *Charter*. While the Supreme Court of Canada has decided that pornography, defamation, and hate propaganda stray from that core, other activity, such as election campaign surveys, are unquestionably closer to its centre. The result in *Thomson Newspapers*, whereby expressive activity having a direct bearing on the democratic process did not prevail, highlights the imbalance of the current methodology. Section 2(b)'s values never work in favour of the guarantee, and experience has shown that when expressive freedom is not valued, evidence of harm is not required. The status of public opinion polls aside, *Thomson Newspapers* challenges the Supreme Court of Canada to recalibrate a methodology of expressive freedom that has strayed a long way from section 2(b)'s principles.

The next sections sketch out the broad outlines of a methodology which would reduce the inconsistency and unpredictability of the section 2(b) jurisprudence. It proceeds in three steps. The first explains why expressive freedom's values should be an equal partner in the analysis, and proposes two presumptions or principles that would equalize the balancing of values under section 1. Without further modifications, that step would significantly alter the Court's methodology, because it is based on the assumption that the rationales for *protecting* the right must be balanced fairly against the government's justifications for limiting it.

²⁷¹ *Ibid.* at 360.

²⁷² *Ibid.* (concluding that any prohibition which was not absolute would be arbitrary and uncertain).

²⁷³ *Ibid.* [emphasis added].

The two framework principles or presumptions do not stand alone, however. Because they affect the analysis, the second step explains how those principles interact with *Oakes*. Finally, the proposed framework principles, especially *Irwin Toy's* commitment to freedom for all expressions of the heart and mind, are inconsistent with what has been referred to throughout this article as a “core-values analysis”: a methodology that treats context as a proxy for content and cites section 2(b)'s abstract goals to diminish the *Charter's* protection for particular expressive activity. The final step resolves that conflict by suggesting a variation on the contextual approach, which is based on the proposition that the section 1 analysis can neither be monolithic nor purely *ad hoc*—the contextual approach taken to an extreme. The goal is an analysis that is at once principled and contextual. Put another way, the Court needs to develop rules of justification that establish principles for balancing the values at stake in diverse contexts. The discussion in the next section explains how these three steps can work together to protect section 2(b)'s values under section 1, preserve the discipline of *Oakes* and accommodate the need for flexibility.

B. *Framework Principles: Bridging the Conceptual Gap*

Madam Justice McLachlin's dissent in *Keegstra* claimed that section 1's balancing of values must incorporate the characteristics that relate “peculiarly to the nature of expressive freedom.”²⁷⁴ What that means, in the terminology of this article, is that the *Charter's* equilibrium cannot be preserved unless section 2(b)'s rationales are factored into the balancing of rights and limits under section 1. Indirectly, Lamer C.J. answered McLachlin J.'s plea in *Dagenais* by proposing a deleterious effects-salutary benefits analysis in the last stage of the proportionality test.

Despite those endeavours, the right's values do not play an equivalent role in the section 1 analysis. While the Court does not strictly adhere to it, *Oakes* is dominant; unfortunately, though, with the exception of the final step of the proportionality analysis, the test was not designed to balance values. In an effort to introduce a concept of balancing, expressive freedom's values were incorporated into the contextual approach and then relegated to the proportionality analysis. Subsequently, the Court began considering general principles at the outset of section 1, though in doing so equated context with flexibility.

²⁷⁴ *Supra* note 3.

As a result, it substantially abandoned *Oakes* in favour of an open-ended standard of justification.²⁷⁵ To the extent that section 2(b)'s values influence justification, they do so selectively to rationalize limits: the Court's core-values analysis is a one-way street that validates limits without granting section 2(b) sufficient protection under section 1.

The enduring lesson of the first generation jurisprudence is that a broad definition of section 2(b) is an empty gesture unless the principles and rationales for protecting expressive freedom influence the section 1 analysis. Although the text of the *Charter* promoted an interpretation that separated the scope of the entitlement from the justifiability of limits, experience has shown that the two parts of the equation are neither conceptually nor analytically distinct. When the Court in *Irwin Toy* adopted an unlimited definition of expressive freedom, values could only be balanced and compared in one place, under section 1. Instead of harmonizing the two, however, the jurisprudence created a dichotomy between the Court's conception of expressive freedom and its core-values analysis under section 1. The Court's definition of the right is based on an assumption of content neutrality and its section 1 review, on the converse proposition that the content or value of the expression should determine the degree of constitutional protection it receives. If *Charter* methodology is to have any coherence, that dichotomy must be resolved. *Irwin Toy*'s definition of freedom is more than an abstract principle under section 2(b); it is, in addition, a vital part of the balancing of values.

Irwin Toy's declaration of freedom for all expressions of the heart and mind—or content neutrality as it is described in American doctrine—is not an indigenous concept. In the United States it represents the culmination of a First Amendment renaissance that began in the Cold War climate of the 1950s with *NAACP v. Button*²⁷⁶ and gained momentum throughout the 1960s era of civil unrest and widespread protest.²⁷⁷ The “felt necessities” of those times required a constitutional principle to check acts of censorship against messages that were perceived as hostile, offensive or unpatriotic. Curiously, though a dissident tradition is strongly rooted in American experience, content neutrality did not crystallize as a commandment of the First Amendment until 1972, when the United States Supreme Court declared, as a matter

²⁷⁵ See, for example, *Ross*, *supra* note 8; and *RJR-MacDonald*, *supra* note 9 (dissenting opinion).

²⁷⁶ 371 U.S. 415 (1963) (invalidating attempts by a state legislature to prevent the civil rights organization from operating within Virginia).

²⁷⁷ See generally “First Amendment and Section 1,” *supra* note 28 at 93-113 (analyzing the evolution of the principle of content neutrality).

of doctrine, that the state cannot prohibit speech because of its content. The principle is based on an assumption that there must be neutrality—or equality—in the field of ideas, because any other rule of constitutional interpretation would concede an impermissible degree of power to the state to regulate the content of speech.²⁷⁸

Years later, under section 2(b) of the *Charter*, content neutrality lacked a concrete foundation in historical experience, legal doctrine, or a tradition of dissent. Even so, the Supreme Court of Canada recognized that not being censored or punished for expressing unpopular views is the essence of the guarantee. From the beginning, however, the difficulty was that *Irwin Toy's* principle of freedom is abstract and unavoidably acontextual, because objectionable expressive activity can only be protected by disregarding its content. As such, it runs up against a strong instinct that valueless or offensive expression should be excluded from the *Charter*. The dilemma of expressive freedom is that it pulls in opposite directions: by promoting its highest ideals and challenging its most cherished values, expressive freedom offers the best and threatens the worst of democratic society. While instinct demands that offensive expression be excluded from the Constitution, history confirms over and over again how harmful it is to suppress unpopular ideas. In principle, the *Charter* should resist instinct and summon the courage to protect the thoughts and ideas that are valued the least and feared the most. At the same time, it is easy to disapprove of censorship but far more difficult to run the risk of harm, which so often lurks in the shadow of speculation but is an unavoidable cost of expressive freedom.

Before turning to harm and its role in the *Oakes* test the principle of expressive freedom must be brought into the section 1 analysis. Doing so can connect the two sides of an equation which are currently in conflict, and provide a stronger safeguard against limits on expression that is unpopular or offensive. Those objectives can be accomplished through the introduction of a presumption that any content-based infringement of section 2(b) is *prima facie* unjustifiable. Although a section 1 analysis is not undertaken unless a constitutional violation has been established, a presumption against content-based violations is necessary to honour *Irwin Toy's* principle of freedom for all expressions of the heart and mind.

McLachlin J. has noted that it is inappropriate to focus on the value of the entitlement under section 1.²⁷⁹ A presumption that it is

²⁷⁸ *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92 (1972).

²⁷⁹ *Keegstra* *supra* note 3; and *RJR MacDonald*, *supra* note 9.

prima facie unjustifiable for the government to target particular expressive activity would redirect the Court's attention to section 1's mandate of justification. To rebut that presumption, the government would have to demonstrate that its breach of section 2(b) serves a legitimate, non-censorial objective. In other words, its burden would be to establish a harm *independent* of the perception that the content of the expressive activity is offensive or valueless. By demanding careful scrutiny of any violation of section 2(b)'s principle of freedom, this presumption acknowledges the risk that the government may have committed an impermissible act of censorship. Incorporating that presumption into the balancing of values recognizes that risk and honours the government's burden of justification under section 1.²⁸⁰

Before turning to the *Oakes* test, a second presumption or framework principle should be mentioned. Legislation which targets particular expressive activity because of its content is problematic because of the risk that certain views may have been selectively punished. Absolute prohibitions on expression are problematic for a different reason: without targeting particular views, total bans impose a blanket prohibition on a constitutionally protected right. Although the Court has held that such measures are difficult to justify under minimal impairment, a similar presumption against total bans on expression should also form part of the general framework of principle for section 1 review.²⁸¹ Treating an absolute prohibition as a question of minimal impairment is not adequate because it denies that violation the threshold importance it should have in the section 1 analysis. There too, the presumption would impose a strict burden on the government to establish the need for such an uncompromising violation of the right.

Together, these presumptions create framework principles which recognize the entitlement side of the equation and confirm the government's burden of justification under section 1. By addressing the imbalance of the current methodology, these modifications set the right and its limits on an even plane. In addition, by incorporating section 2(b)'s principle of freedom into the structure of section 1, these presumptions bridge the conceptual gap between sections 2(b) and 1. How they might affect the *Oakes* test remains to be determined. As well,

²⁸⁰ Step two of *Irwin Toy's* s. 2(b) test, *supra* note 38, which stated that purposeful violations of s. 2(b) should proceed directly to s. 1, has never played an important role in the analysis. As a result, little or no doctrinal significance attaches to content-based infringements of expressive freedom. The suspicion or skepticism that is appropriate in such circumstances is reflected in a presumption, under s. 1, against content-based violations of s. 2(b).

²⁸¹ *Ramsden*, *supra* note 15; and *RJR-MacDonald*, *supra* note 9.

a presumption against content-based limits is incompatible with the Court's core-values approach, which assumes, to the contrary, that an attenuated standard of justification applies to expressive activity which is designated "low-value." How the proposal relates to the *Oakes* test and how the contextual approach fits into the scheme are discussed in the next two sections.

C. *The Oakes Test: Structure and Principle*

1. Branch 1: the objective

The first branch of the *Oakes* test requires the government to establish a substantial and pressing objective for infringing expressive freedom. Early in section 2(b)'s evolution the stringency suggested by that language was alleviated by *Irwin Toy's* standard of reasonableness.²⁸² Since then, the legitimacy of the government's objective has only been rejected once under section 2(b).²⁸³ A presumption against content-based limits would change this element of the *Oakes* test by requiring the government to establish a non-censorial objective that is unrelated to disapproval of the activity's content or to a perception that it lacks redeeming value. Put another way, prohibiting expressive activity simply because of its content would be patently unjustifiable under this branch of *Oakes*. In the absence of a harm or a regulatory objective that is separate from an activity's content, expression which is merely objectionable should be protected.

On the question of valid objectives, one issue is whether other *Charter* values, such as equality, multiculturalism and privacy, can override section 2(b). An affirmative answer suggests that expressive activity can be limited because other values are considered inherently more important. As seen above, the Court preferred equality and multiculturalism in *Keegstra* and *Butler* without weighing expressive freedom or considering the consequences for section 2(b). Subsequently, *Dagenais* warned against any hierarchy of values under the *Charter*, and admonished that expressive freedom cannot be prohibited

²⁸² *Supra* note 9 at 986 and 990 (stating that a high standard of justification should apply under this branch and then concluding that the legislature's objective was reasonable).

²⁸³ *Zundel*, *supra* note 6 at 764-65, McLachlin J. (holding that s. 181 of the *Criminal Code* did not relate to a substantial and pressing objective under s. 1).

because other interests are automatically or reflexively preferred.²⁸⁴ As a matter of text, there is no basis for the preferences that are entrenched in *Keegstra*, *Butler*, *Scientology*, and *Ross*. Moreover, as a matter of methodology, the Court should not have privileged those values without weighing the competing interest in expressive freedom against them. For that reason, the section 1 analysis should require the government to establish a legitimate regulatory objective that is unrelated to mere disapproval of the activity or to any automatic preference for competing values. The relationship between branch one of *Oakes*, and the requirement of a rational connection which forms part of the proportionality analysis, is discussed below.

2. Branch 2: proportionality

Harm is the key to section 2(b)'s principle of freedom as well as to section 1's concept of justifiable limits: where harm is present, limits are justifiable, and where it is absent, the principle of freedom must prevail. Two of the biggest problems with the current approach are first, that its core-values analysis equates the Court's subjective perception of expression with its constitutionality; and second, that as a result section 1's threshold of harm is low. The Court's perception of value and its conception of harm interact in the following way: the value of the expression at stake determines the government's burden to show a connection between its violation of section 2(b) and the prevention or punishment of a demonstrable harm. At present, the risk of harm can be established by direct or indirect proof, and can be inferred as a matter of common sense.²⁸⁵ In addition, the harm need not be tangible: it is sufficient that some risk of harm can be articulated, whether it has a substantial probability of materializing, and whether it is concrete or diffuse.²⁸⁶ The more pervasive, intangible, or speculative the harm, however, the greater the risk that the government may have prohibited

²⁸⁴ *Supra* note 12.

²⁸⁵ See, for example, the discussion of the rational connection test in *RJR MacDonald*, in text accompanying notes 238-241 *supra*; and *Carson*, *supra* note 14 at 506-07 (stating that the relationship under the rational connection test need not be "scientifically measurable," and can be established, in the absence of direct proof, by reason, logic, and common sense).

²⁸⁶ See, for example, *Butler*, *supra* note 4 at 504 (holding that a sufficiently rational connection is demonstrated by the "community's disapproval" of sexually explicit materials which "potentially victimize women," and a prohibition which "restricts the negative influence which such materials have on changes in attitudes and behaviour").

the activity simply because of its content. To reduce that risk it is necessary to require proof of a demonstrable harm.

Harm can arise under *Oakes* in one of two ways. Whether expressive activity has undesirable consequences which invite regulation is a factor in determining the sufficiency of the government's objective under the first branch of the test. Perhaps in part because that analysis is more abstract than empirical, the question of harm has resurfaced, as a matter of evidence and proof, under the rational connection test. There, two aspects of the test are frequently collapsed: the first, which is exemplified by *Butler* and *RJRMacDonald*, is whether the expressive activity is linked to a demonstrable harm; and the second, which McLachlin J. raised in her *Keegstradissent*, is whether the government's limit will advance its goal of preventing that harm. The problem of overlap in the *Oakes* test could be addressed in the following way. The first branch should focus on the legitimacy of the government's goal; while health, safety, or consumer protection are examples of valid objectives, limits on expression *per se*, because of its content or because of a preference for other values, are not. The rational connection test is distinct because it is evidentiary, situational, and fact-based. There, the government must show both that the expressive activity at stake is linked to a demonstrable harm, and also that its limit on expressive freedom will advance its legitimate interest in preventing or punishing that harm.²⁸⁷

The Court's recent decisions on openness provide a good illustration. In *Carson*, the Court's emphasis on the need for a sufficient evidentiary base for any exclusion under section 486(1) of the *Criminal Code* reinforced the presumption that courts should be open unless access would cause a harm that threatens the administration of justice. La Forest J. found that protecting the administration of justice is a legitimate objective under branch one of *Oakes* and then held, on the facts, that excluding the public from a sentencing hearing was unnecessary because the harm to the victims' privacy interests had been accommodated by alternative means. Meanwhile, although the Court should have required a stronger threshold of risk, *Dagenais* held that a publication ban cannot be imposed in the absence of a demonstrable link between publicity and prejudice to the fairness of a trial. Together, these decisions acknowledge that harm is a precondition for limits on principles of open justice.

²⁸⁷ See, for example, *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996) [hereinafter *44 Liquormart*] (invalidating a blanket prohibition on price advertising for liquor because the state failed to show that a ban would advance its interest in promoting temperance).

By way of contrast, all members of the Court agreed in *RJR-MacDonald* that an absolute prohibition on tobacco advertising satisfied the rational connection test, because common sense confirms that the goal of advertising is to promote sales and thereby increase or sustain tobacco consumption.²⁸⁸ A common sense standard is inherently problematic because the purpose of the *Charter's* guarantees is to protect certain rights and freedoms from unfounded perceptions of good and bad, value and harm, or cause and effect. Simply believing that expression is harmful or has a bad influence is not sufficient to justify limits under section 1 of the *Charter*.

In relaxing the standard of review to justify limits on low value expression, *Keegstra Butler*, and *Ross* may have prohibited expressive activity in the absence of harm. Offensive expression is undoubtedly harmful in broad, pervasive terms; by definition it violates widely accepted and highly cherished views about the nature of social, political and individual relationships. The question under the *Charter*, however, is whether expressive activity that challenges those orthodoxies can be restricted without evidence of a harm that transcends the general offence to social values. If section 2(b) has any meaning, the answer to that question must be no. Enforcing *Irwin Toy's* principle of freedom does not foreclose reasonable limits on expression, but it does mean that declaring offensive expression repugnant to other values is not a sufficient ground for overriding section 2(b). In *Ross*, La Forest J. stated that "freedom of expression serves to protect the right of the minority to express its views, however unpopular such views may be."²⁸⁹ For that principle to resonate under section 1 the Court must incorporate *Carson's* requirement of a sufficient evidentiary base into the rational connection test's analysis of harm. Although a full consideration of the meaning of harm under section 1 must be deferred to another time and place, suffice to say, for the time being, that section 2(b) cannot be compromised by a concept of harm that is diffuse, pervasive, indeterminate or speculative.

The Court's concept of minimal impairment should also be adjusted. As McLachlin J. indicated in *RJR-MacDonald*, the value of the *Charter* activity is irrelevant at that stage of the analysis.²⁹⁰ Structurally, values should be identified at the beginning of the analysis to establish a

²⁸⁸ *Supra* note 9. The evidence did not establish that connection, or show that advertising is sufficiently related to consumption to warrant an absolute ban.

²⁸⁹ *Supra* note 8.

²⁹⁰ *Supra* note 9 at 348.

framework for section 1 review. Once that framework has been developed, it is unnecessary and inappropriate to repeat the exercise; under the second branch of proportionality the only question is whether the government impaired the freedom as minimally as was necessary in the circumstances. In addition, though the standard of review can vary under that test, as the next section explains, the requirement of minimal impairment should be rigorously enforced when either of section 1's presumptions have been triggered. When expression is limited because of its content, a lack of vigilance on minimal impairment would uphold restrictions that are broader or more intrusive than necessary; banning all tobacco ads, when those which are purely informational may not promote consumption, is one example. A stricter standard should also apply to absolute prohibitions because a total ban on expressive activity is only necessary in exceptional circumstances; as *Ford, Ramsden, Dagenais, RJR-MacDonald*, and *Carson* all show, alternative means of achieving the government's objective with fewer or no consequences for section 2(b) are almost always available.²⁹¹

The final branch of the proportionality test has never featured prominently in the section 1 analysis. It is the last step in a complex test of justification pursuant to *Oakes*, which in many cases is undertaken following a lengthy analysis to determine the initial question of breach.²⁹² Although it is not difficult to see why this test might be considered redundant, final proportionality should not be so easily discounted.²⁹³ Especially as articulated by Lamer C.J. in *Dagenais*, this branch of the section 1 analysis asks an important question. By assessing the proportionality of its deleterious effects and salutary benefits it considers, in direct and explicit terms, whether the consequences of the violation are too great when measured against the benefits that may be achieved.²⁹⁴ As such, it is the only part of the current analysis to acknowledge the harm or cost of justifiable limits: that a constitutional right has been violated.

²⁹¹ *Supra* notes 9, 15, 12, 9, and 14.

²⁹² Although the Supreme Court has abandoned *Irwin Toy's* two-step test under s. 2(b) in favour of the threshold that the activity simply attempts to convey meaning, it continues to employ and conduct a complex analysis under s. 15; see, for example, *Miron v. Trudel*, [1995] 2 S.C.R. 418; and *Egan v. Canada*, [1995] 2 S.C.R. 513.

²⁹³ *Hogg student ed, supra* note 149 at 699-700 (stating that it is a restatement of the first step because a judgment that the effects are too severe would surely mean that the objective was *not* sufficiently important to justify the limit).

²⁹⁴ *Dagenais, supra* note 12.

Throughout, this article has complained that the fundamental assumption of *Oakes*—that the infringement of a right must be taken seriously under section 1—has been displaced by an undue focus on the relative value of expressive activity. In such circumstances, a test that assesses the cost of suppressing expressive freedom should be an imperative part of the analysis.

With bolstering, Lamer C.J.'s deleterious effects-salutary benefits concept can serve that function. Much like Wilson J.'s principle of interpretation for balancing values contextually under section 1, his proposal lacked criteria. That gap can be filled, however, by drawing on McLachlin J.'s dissent in *Keegstra*. There, she stated that certain characteristics which relate peculiarly to the nature of expressive freedom should be included in the section 1 analysis. Her list emphasized the underlying rationales of section 2(b)'s principle of freedom and the potential for the infringement to have chilling effects on constitutionally protected activity. The severity of the infringement, and whether it imposes an absolute prohibition or a prior restraint, could be added to that list. Basically, the purpose of the inquiry would be to determine whether the consequences for expressive freedom are too great, taking into account the values that would be compromised, as well as the severity of a violation which might impose a total ban or silence voices through its chilling effect on expressive freedom.

Ross provides an example.²⁹⁵ There, the Court removed a teacher from the classroom for voicing offensive opinions outside the school. Assuming that the order satisfied the other elements of *Oakes*, the Supreme Court of Canada should have given the order's consequences careful consideration under final proportionality. Doing so would have exposed the chilling effects of imposing such a strong sanction for views which, though highly offensive, were only tenuously linked to incidents within the school environment. The chilling effects on other teachers and individuals in similar positions of trust or custodial responsibility are an imperative part of the constitutional analysis. Had the Court undertaken that analysis, it might have found the impact on expressive freedom to be disproportionate, and the limit unjustifiable for that reason.

The proposal has introduced two presumptions or framework principles for section 1 review and indicated how La Forest J.'s concept of a "sufficient evidentiary base" can be incorporated into the *Oakes* test. Left in limbo thus far is the status of the contextual approach.

²⁹⁵ *Supra* note 8.

D. *A Proposal to Harmonize Context and Principle*

Despite the critique that this article has presented, it is unrealistic, at this stage in section 2(b)'s evolution, to expect the contextual approach to be abandoned. In any case, Wilson J.'s instinct that context should be the basis for balancing values under section 1 is sound. Still, it was not easy to incorporate a concept of balancing into the structure of a test which was not designed to serve that purpose. Instead of balance, the result was a doctrine of justification. This section explains how the contextual approach can be adapted to address those difficulties, to coexist with *Oakes* and to continue anchoring the analysis.

At present, the relationship between *Oakes* and the contextual approach remains unresolved: the Court is unwilling to depart from *Oakes* and its two-branch objective-proportionality test, and equally unwilling to demand consistency in the application of that test. The contextual approach enabled the Court to avoid and apply *Oakes* at the same time, with unfortunate results both for principles of constitutional interpretation and for the protection of expressive freedom. In light of those results, the Court should reconsider its resistance to variable standards of review under section 1. Some issues, such as access and the role of the press, present context-specific questions. In other cases, including obscenity and libel, the first generation of jurisprudence has shown that pre-existing judge-made doctrines cannot easily be bent into the framework of *Oakes*. A further problem is that the Court's early interpretations of sections 2(b) and 1 proposed absolutes which have not been practicable. Distinctions that were not permissible under section 2(b) could only be made under section 1. There, in the face of a monolithic section 1 test, the contextual approach created a mechanism for drawing distinctions but assumed, in doing so, that section 2(b) can be adequately protected by an *ad hoc* assessment of particular expressive activity. The protection of constitutional rights and differentiation of claims instead require a framework of principle.

Access and publicity, two pillars of the common law's principle of openness, illustrate how context and principle can be harmonized with *Oakes* under section 1. *Dagenais* and *Carson* are sound models for the future because each harmonized context and principle by adapting the basic concepts of *Oakes* to issue-specific settings. In *Dagenais*, Chief Justice Lamer retooled the *Oakes* test to reconcile the common law doctrine of publication bans with the *Charter's* guarantees of expressive freedom and a fair trial. Moulding *Oakes* to the particular values at stake produced an innovative standard of justification that is principled

as well as contextual. By explicitly acknowledging values of openness and accountability, and linking them to the press, *Carson* took that integration of context and principle one step further. There, La Forest J. adopted the *Dagenais* test, applied it to access and, in doing so, explained how a free press advances the underlying values of section 2(b). While *Carson* proposed a doctrine to deal with the interface of access and open justice, other questions, such as access to government property or to broadcasting venues during federal election campaigns, may require alternative solutions. For example, expressive activity on public property was traditionally a matter of government regulation. Although it remains unclear how such claims should be resolved under the *Charter*, it is apparent that access to government property invites a tailor-made standard of justification under section 1.²⁹⁶

On other questions, such as obscenity and libel law, pre-existing doctrine does not fit neatly into the framework of *Oakes*. While it is preferable, from the perspective of continuity, that existing doctrine be preserved as much as possible, the Court cannot shirk its responsibility to adopt the modifications that are required to protect section 2(b)'s guarantee of expressive freedom. In doing so, the key is to develop a standard that focuses on the *values* at stake, rather than on the *content* of particular expressive activity. For example, instead of deciding whether particular sexually explicit materials or defamatory statements are valuable, the Court should ask why a constitutional guarantee protects expressive freedom *in that context* and adopt a standard of justification which reflects an appropriate balancing of the values at stake. To illustrate: short of a harm that is grounded in a "sufficient evidentiary base," sexually explicit material should be free because the risk of punishing artists and individuals for holding unconventional views about sexuality is otherwise too great. Rather than acknowledge that diversity of views is inherently valuable, *Butler* stated that materials which do not promote true equality between male and female persons can be limited. The Court's failure to acknowledge a section 2(b) rationale resulted in a low threshold of harm under the rational connection test. Moreover, while the Court upheld the *Criminal Code's* definition of obscenity, it failed to see that its judge-made definition of pornography should also be subject to constitutional scrutiny. Later, in the context of defamation, the decision in *Scientology* rejected the link between criticism of public officers and values of accountability and democratic governance. Those

²⁹⁶ See *Commonwealth*, *supra* note 15 at 203-04, L'Heureux-Dubé J. (proposing issue-specific criteria under s. 1 to determine whether government property should be regarded as a "public arena").

values cannot be protected, however, without modifying the common law's principles of liability and damages. To harmonize principle and context it would be necessary for the Court to develop a doctrine that achieves a proportionality between expressive freedom and the protection of reputation that is consistent with section 2(b) of the *Charter*.

Context and principle can be harmonized under section 1 in the following way. The elements of justification—including a framework of analysis, criteria of proportionality, such as a rational connection, minimal impairment and alternative means, and the concept of a sufficient evidentiary base—can serve as the guideposts of review. As long as those elements can be adjusted for context, the analysis need not be formalistic or monolithic. For instance, although a different test may apply in obscenity, defamation, access, and other cases, each can incorporate the principles of justification identified above into a standard that balances the values at stake in a particular context. The difference between that approach and the current methodology of section 2(b) adjudication is this: reasonable limits will not turn on subjective perceptions of the relative value of particular expressive activity, as they do now, but will instead be determined by a balancing of values and principles. It is the difference between a discretion and a rule, between an approach that essentially dismissed defamatory statements under the *Charter* in *Scientology* and one that moulded the principles of justification into a section 1 doctrine that responded to the context of openness in *Dagenais* and *Carson*. Put yet another way, it is the contrast between the content-based assumptions of the clash model and a methodology that seeks to balance values fairly and, in doing so, to limit expressive freedom only when section 1's principles of justification have been proved.

Although some section 2(b) issues by their nature or legal pedigree require distinctive standards under section 1, others, including virtually all of those which arise under statutory provisions, are governed by *Oakes*. There, the question for the future is whether that standard should be monolithic, as originally contemplated, flexible, as proposed by La Forest J.'s interpretation of the contextual approach, or defined by levels or hierarchies of review, as in American doctrine.²⁹⁷

²⁹⁷ Compare *Meyer v. Grant*, 486 U.S. 414 (1988) (reserving the strictest scrutiny for abridgments of political expression); with *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* 447 U.S. 557 (1980) (articulating a more relaxed standard of review in commercial expression cases).

For many reasons, a monolithic conception of *Oakes*, which would apply the test the same way in different circumstances, has proven unworkable. The opposite extreme, of adjusting section 1 review on an *ad hoc* basis in response to perceptions about the relative worth of expressive activity, is inconsistent with *Irwin Toy's* principle of freedom. Thus far, despite the attempt in *Irwin Toy* to create two tiers of review, the Supreme Court has been reluctant to entertain the third option, which would draw distinctions between *categories* of expressive activity. That approach also presents problems: any suggestion that political expression is more important than art or advertising is hierarchical and therefore inconsistent both with *Irwin Toy's* conception of section 2(b) and the warning in *Dagenais* against preferring some values over others. In addition, stratification would introduce a certain amount of rigidity into the section 1 review. *Rocket* rejected a "levels" approach because McLachlin J. feared it might constrain the judiciary's freedom to assess the facts and circumstances of particular cases.²⁹⁸

As a practical reality, some hierarchy or preference between claims is unavoidable under the *Charter*. Moreover, a differentiation of claims is not necessarily inconsistent with an inclusive definition of expressive freedom or an organic conception of justification under section 1. For example, it is beyond peradventure that tradition and principle support a stronger attachment to political expression than other forms or categories of expressive activity.²⁹⁹ In such circumstances, limits that infringe political expression should be subject to a strict standard of justification under section 1. Chief Justice Dickson's instinct that the guarantee's "core" should affect the section 1 analysis is sound. Once again, however, there is a fundamental difference between the Court's core-values analysis and what is proposed here: instead of declaring tobacco advertising, sexually explicit material, or hate propaganda to be of low value, as members of the Court have done, it would determine the status of expressive activity under a standard that reflects an appropriate balancing of values. For instance, although political expression might receive greater protection under section 1 than other activities, all commercial expression would be treated the same way; the same test would apply to professional advertising and tobacco promotion.³⁰⁰ Although it cannot eliminate the

²⁹⁸ *Rocket*, *supra* note 9 at 246-47.

²⁹⁹ *Dolphin Delivery*, *supra* note 2 at 583-88.

³⁰⁰ But see *44 Liquormart*, *supra* note 287 (suggesting a distinction between regulations which protect consumers from misleading, deceptive, or aggressive sales practices or require the disclosure of information, and blanket bans on the dissemination of truthful, non-misleading commercial

risk, treating expressive activities in the same category the same way can reduce the role that subjective perception plays in the constitutional analysis. Distinctions between claims are permissible when grounded in a rationale that is based on principle.

As for the concern that levels or hierarchies would constrain the judiciary's assessment or introduce rigidity under section 1, constraints on the discretion of judges and the flexibility of standards are imperative to the enforcement of the *Charter's* guarantees. As a result, a levels approach would make it more difficult to justify limits on expressive activity. As *Thomson Newspapers* demonstrates, the dilution of review in cases like *Keegstra*, *Butler*, and *Ross* has led to the dilution of review in *all* cases. Despite its flaws, a levels approach would revive the theory of *Oakes*—that constitutional violations should be taken seriously. How many levels the Court should adopt and how much differentiation is appropriate unfortunately cannot be addressed in the latter stages of what is already a lengthy article. At its simplest, a levels approach might single out political expression and make plain that limits which strike at the core of section 2(b) require the strictest scrutiny under section 1. A more structured approach might create nuances in the *Oakes* test based on the Court's assessment of the competing values, institutional as well as substantive, that are at stake. The important point is that, under this proposal the analysis would take place within a framework of principle that explains and rationalizes the underlying assumptions of section 1 review. Not only would expressive freedom be less at risk of subjective perception, a principled basis for drawing distinctions between section 2(b) claims would promote La Forest J.'s requirement of a sufficient evidentiary base, as well as his values of consistency and proportionality.

E. *Conclusion*

This part of the article has proposed the basic outline of a methodology for the future. While it draws on the building blocks of the first generation of jurisprudence, it unquestionably suggests significant changes in the Supreme Court of Canada's approach to expressive freedom under the *Charter*.

To summarize, its key components include the following. First is the addition of two presumptions against content-based limits and absolute bans on expression under section 1. By attaching consequences to the violation of section 2(b), these presumptions of "unjustifiability" draw the entitlement of the *Charter's* equation into the section 1 analysis

messages).

and confirm, in unequivocal terms, that the burden to prove the constitutionality of a violation rests with the government. Second are adjustments to *Oakes*, which set a higher threshold under the elements of the test than the standard of reasonableness that is found in much of the current jurisprudence. Third and finally is a proposal to reconstruct the role of context in the analysis. At present, the contextual approach in effect licenses the courts to exercise complete discretion under section 1. As explained above, though context is a fundamental concept of section 1 analysis, the *Charter's* rights and freedoms require a framework of principle for their protection. In the circumstances, a methodology that contextualizes section 1's principles of justification can respond to the need for issue-specific solutions without compromising the requirement that limits on the *Charter's* rights and freedoms be demonstrably justified.

Sketchy and incomplete, the proposal may well raise as many questions as it attempts to answer. To repeat, the project has two objectives. The first is to create a sounder structure, framework, or foundation of principle for the section 1 analysis. Grounding the analysis in a structure of principle can avoid, or at least minimize, the unpredictability and inconsistency of the first generation case law. The second is to enhance the role that section 2(b)'s values play under section 1: to restore the equilibrium in the *Charter's* equation and, in doing so, to secure a stronger place for those values in the jurisprudence. In some instances, the methodology that is proposed here would alter the result under section 1. Whether and to what extent it should do so may be a matter of some debate. At the least, and far more importantly, it will bring section 2(b)'s principle of freedom directly into the balancing of values under section 1, as an equal partner in the *Charter's* equation. Whatever the result in particular cases, that would represent a huge step forward in the evolution of the section 2(b) jurisprudence.

V. LOOKING AHEAD

The introduction of a written charter of constitutional rights created an extraordinary opportunity for the enrichment of Canadian legal, social and political culture. Whatever one's views about the wisdom of legalizing questions of rights and limits, there can be little doubt that the *Charter* has challenged Canadians to articulate, debate, and grapple with fundamental assumptions about democratic governance. In that process, section 2(b) has been a lightning rod for divisions about the meaning of a "free and democratic society" under a

regime of constitutional rights. Mandated to resolve those divisions, the Supreme Court of Canada has been intermittently bold and tentative, granting section 2(b)'s guarantee of expressive freedom strong and even surprising protection in some cases, only to retreat in others to a posture of deference to the legislature. As a new generation of jurisprudence succeeds the first, the challenge, now as much as ever, is upon us to rethink and reconceptualize the fundamental assumptions of the section 2(b) methodology. The primary objective of this article has been to provoke our thinking in undertaking that task.