Canada's New Hierarchy of Rights

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I. INTRODUCTION

It is trite law that when it comes to the rights and freedoms expressed in the *Canadian Charter of Rights and Freedoms*,[1] there is no hierarchy of rights. As Lamer C.J.C. noted in *Dagenais v. Canadian Broadcasting Corp.*: "A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the Charter and when developing the common law. When the protected rights of two individuals come into conflict ... Charter principles require a balance to be achieved that fully respects the importance of both sets of rights."[2] This principle has been repeated so often that it has become something of a creedal statement, in which all and sundry profess a willingness to treat each and every Charter right with exquisite equanimity. Indeed, the "no hierarchy of rights" doctrine requires its adherents to regard any suggestion that certain rights might be more equal than others as anathema.

This article challenges the received wisdom and advances the almost heretical view that, in recent years, Canadian jurisprudence has revealed an increasing tendency toward the creation of a hierarchy of rights. Moreover, it suggests that we have arrived at an era in which the "no hierarchy" doctrine will be tested in a variety of ways, but most especially in the context of religious and equality rights. In the religion context, Canada's diverse religious landscape will continue to provide an ever-growing range of challenges from minority religious practices seeking accommodation in the public sphere. In addition, the interplay

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

2 [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835, at 878 (S.C.C.). See also *Trinity Western University v. Nova Scotia Barristers' Society*, [2015] N.S.J. No. 32, 2015 NSSC 25, at para. 187 (N.S.S.C.).

between religious and equality rights has become a new battleground as adherents of both majority and minority religions resist engagement with same-sex marriage and transgender rights.

II. HIERARCHIES OF RIGHTS IN THE CANADIAN CONSTITUTIONAL SCHEME

At the outset, it is important to note that, despite repeated assertions to the contrary, there are, in fact, several hierarchies of rights in the Canadian constitutional scheme. The first is a structural hierarchy that is contained within the provisions of the Constitution Acts themselves. The second is a structural hierarchy within the Charter created by section 33's Notwithstanding Clause. The third is a hierarchy existing within the "common rights" of the Charter, the lines of which have been sketched out in more complete detail by both the judiciary and various human rights tribunals over the past decade. It is this third hierarchy that is the primary concern of this article, but it is helpful to first briefly consider the first two hierarchies.

1. The Constitution's Structural Hierarchy

The various Constitution Acts contain a hierarchy of competing rights within their very structure. This structural hierarchy came about as a result of the series of compromises along linguistic and religious lines that were thought necessary to bring about Confederation. Other parts of the hierarchy appear to be the result of political considerations resulting from changes in views of the status of Aboriginal peoples or the relationship between the sexes. Thus, the educational rights of religious minorities contained in section 93(1) of the *Constitution Act, 1867*,[3] as well as the Aboriginal rights guaranteed by section 35 of the *Constitution*

[3] See *Reference re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] S.C.J. No. 44, [1987] 1 S.C.R. 1148, at para. 60 (S.C.C.) (holding that the Charter cannot be used to invalidate the denominational schools created existing under s. 93(1) on the grounds that "[t]he Charter cannot be applied so as to abrogate or derogate from rights or privileges guaranteed by or under the Constitution" (at para. 61)). Section 93 "maintains or 'freezes' the immediate pre-confederation situation in relation to denominational school rights. A primary practical effect of s. 93(1) in the contemporary context is that it ensures funding for Protestant or Catholic schools in certain provincial contexts": Mark Carter, "An Analysis of the 'No Hierarchy of Constitutional Rights Doctrine'" (2006) 12 Rev. Const. Stud. 19, at 23.

Act, 1982, cannot be limited through the use of section 1 or section 33 of the Charter.[4] The privileged status of section 93's education rights was made necessary by the need to obtain consensus for what Wilson J. has called "a fundamental part of the Confederation compromise",[5] whilst a rethinking of the political situation of the place of the First Nations in the constitutional scheme provided the impetus for section 35.[6]

As a result, the denominational schools provisions of section 93 are immune from challenge under section 2(a) (freedom of religion) or section 15(1) (equality) of the Charter.[7] For their part, pre-existing Aboriginal rights, while not subject to limitation under the Charter, are subject to limitation by Parliament. However, the Supreme Court of Canada has made clear that federal legislation affecting Aboriginal rights is subject to strict scrutiny, and the Crown will be held to "a high standard of honourable dealing" consistent with the fact that the "relationship

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[4] The reason for this is that s. 35, guaranteeing Aboriginal rights, is outside the Charter and thus not subject to s. 1 or 33 of the Charter. However, as Peter Hogg notes, this exclusion may not be entirely beneficial because enshrining Aboriginal rights outside the Charter prevents First Nations peoples from obtaining remedies under s. 24: Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2011), at 36.8(e).

[5] *Reference re Bill 30, An Act to Amend the Education Act (Ontario)*, [1987] S.C.J. No. 44, at para. 63, [1987] 1 S.C.R. 1148 (S.C.C.). See also *Reference re Ontario Bill 30*, [1986] O.J. No. 2355, 53 O.R. (2d) 513, at 575-76 (Ont. C.A.):

> These educational rights, granted specifically to the Protestants in Quebec and the Roman Catholics in Ontario, make it impossible to treat all Canadians equally. The country was founded upon the recognition of special or unequal educational rights for specific religious groups in Ontario and Quebec. The incorporation of the Charter into the Constitution Act, 1982, does not change the original Confederation bargain. A specific constitutional amendment would be required to accomplish that.

[6] This seems to have been especially the case after the Supreme Court's decision in *Calder v. British Columbia (Attorney General)*, [1973] S.C.J. No. 56, [1973] S.C.R. 313 (S.C.C.) [hereinafter "*Calder*"], which held that Aboriginal peoples' historic occupation of the land gave rise to legal rights that survived European settlement, thus recognizing the possibility of present-day Aboriginal rights to land and resources. *Calder* was to become an important factor in prompting the federal government to develop policies for addressing unsettled Aboriginal land claims. See Senate of Canada, Final Report of the Standing Senate Committee on Legal and Constitutional Affairs, *Taking Section 35 Rights Seriously: Non-derogation Clauses Relating to Aboriginal and Treaty Rights* (Ottawa: Queen's Printer for Canada, 2007). See also *R. v. Sparrow*, [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075, at 1105 (S.C.C.):

> [Section 35(1)] represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. The strong representations of native associations and other groups concerned with the welfare of Canada's aboriginal peoples made the adoption of s. 35(1) possible .... Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place. It also affords aboriginal peoples constitutional protection against provincial legislative power.

[7] *Adler v. Ontario*, [1996] S.C.J. No. 110, [1996] 3 S.C.R. 609 (S.C.C.).

between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship".[8]

2. Section 33's Charter Hierarchy

It is also clear that the Charter has its own hierarchy of rights based on the applicability of section 33's override provision. Thus, fundamental freedoms (religion, expression, association), legal rights (due process and privacy) and equality rights are subject to override by both Parliament and the provincial legislatures through the use of the Notwithstanding Clause.[9] At the same time, however, democratic rights (sections 3-5), mobility rights (section 6), minority language rights (sections 16-23) and the right to equality between the sexes (section 28) are not. The result is that section 33 "creates two tiers of rights: the 'common rights' that are subject to override, and the 'privileged rights' that are not".[10]

Moreover, within the category of "privileged rights" there appears to be no question that language rights are paramount. Like minority education rights, linguistic protections in the Charter are a function of "our peculiar Canadian heritage and the evolution of our social and political history".[11] Consequently, as Wilson J. noted in *Société des Acadiens*, "double entrenchment of language rights in the Charter and the commitment to linguistic duality in s. 16 would seem to support the view ... that in terms of importance linguistic rights now stand 'at the highest level

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[8] *R. v. Sparrow*, [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075, at 1108-1109 (S.C.C.). This is not to say that Aboriginal rights may never be abridged. On the contrary, the Supreme Court recognizes that s. 35 rights may be limited by Parliament provided there has been a proportionality analysis akin to that envisioned by s. 1 of the Charter. *Tsilhqot'in Nation v. British Columbia*, [2014] S.C.J. No. 44, , [2014] 2 S.C.R. 257, at para. 13 (S.C.C.):

> [L]egislation can infringe rights protected by s. 35 only if it passes a two-step justification analysis: the legislation must further a "compelling and substantial purpose" and account for the "priority" of the infringed Aboriginal interest under the fiduciary obligation imposed on the Crown ….

[9] *Canadian Charter of Rights and Freedoms*, s. 33, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[10] Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2011), at 36.8(e). Professor Hogg also suggests that s. 28 is at the top of the hierarchy as the use of the phrase "Notwithstanding anything in this Charter" might also imply that s. 28 cannot be overridden by legislation under s. 1. *Id.*, at 55.17(c).

[11] *Société des Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] S.C.J. No. 26, [1986] 1 S.C.R. 549, at para. 186 (S.C.C.), *per* Wilson J.

of the constitutional hierarchy'".[12] This idea was reinforced in *Mahe v. Alberta*, wherein the Supreme Court held that the language guarantee set forth in section 23 of the Charter is an exception to the equality provisions of section 15 in that it accords the English and the French "special status in comparison to all other linguistic groups in Canada".[13] The result is that the special status of the language provisions, and especially section 23, creates something of "a Charter within a Charter".[14]

The more frequent issue to appear before courts and tribunals, however, is a purported conflict among or between Charter rights and other legal rights. The processes that legal decision-makers have employed in resolving those conflicts, and the hierarchy of rights that has emerged as a result, is the focus of this paper.

III. THE PROCESS OF RESOLVING CONFLICTS OF RIGHTS

Resolving conflicts of rights between individuals or groups has become increasingly more important in Canadian jurisprudence, both because of growing awareness of the significance of individual rights and the proliferation of legislation and other instruments expanding or codifying those rights. These include the Charter, various provincial human rights codes, individual statutes providing for legislative rights, and certain international treaties and conventions. As a result, situations in which rights conflicts arise depend on the source of the right being asserted. These conflicts include a clash of Charter rights, clashes of code rights, conflicts between a Charter right and a code right, or between a code right and a legislative right, or between a code right and a common law right.[15] The increasing number and sources of rights leads to a corresponding increase in clashes of rights.

1. Balancing or Reconciling?

Much has been written about the Supreme Court's approach to the problem of how to resolve collisions of rights between private

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[12] *Id.*, at para. 186, quoting André Tremblay, "The Language Rights (ss. 16 to 23)" in W.S. Tarnopolsky & G.A. Beaudoin, eds., *The Charter of Rights and Freedoms: Commentary* (Toronto: Carswell, 1982), at 445-46.

[13] [1990] S.C.J. No. 19, [1990] 1 S.C.R. 342, at 369 (S.C.C.).

[14] Mark Carter, "An Analysis of the 'No Hierarchy of Constitutional Rights Doctrine'" (2006) 12 Rev. Const. Stud. 19, at 28.

[15] Ontario Human Rights Commission, *Policy on Competing Human Rights* (2012), at 14-17.

individuals.[16] Writing extrajudicially, Justice Frank Iacobucci has argued that the proper approach to such conflicts is through a "reconciliation", rather than a "balancing", process.[17] In his view, a balancing approach such as that contemplated in *R. v. Oakes*[18] should be confined to claims against a state actor, and involves "assigning primacy to one right over another right or interest after having weighed the relevant considerations".[19] Reconciliation, on the other hand, is an exercise wherein courts attempt to define the content and scope of rights in relation to one another:

> The most obvious difference between "balancing" under section 1 and "reconciling" Charter rights stems from the nature of the actors involved. Under section 1, the state must justify a violation of an individual's Charter rights. When reconciling competing Charter rights, on the other hand, a court seeks to reconcile the constitutionally guaranteed rights of one individual with those of another.[20]

Admittedly, the terms "reconciliation" and "balancing" have often been used interchangeably,[21] sowing some confusion in both the cases and commentary. There is, however, a fundamental distinction between the two approaches that is dependent on the onus of proof. Under a section 1 analysis, the state must justify a violation of an individual's rights, with the result that the courts are charged with balancing the injury to the claimant's Charter right with the collective public interest in the Charter infringement. In making this assessment, courts are expected

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[16] See, *e.g.*, Jena McGill, "'Now It's My Rights Versus Yours': Equality in Tension with Religious Freedoms" (2016) 53 Alta. L. Rev. 583; Cara Faith Zwibel, "Reconciling Rights: The *Whatcott* Case as Missed Opportunity" (2013) 63 S.C.L.R. (2d) 313; Patricia Hughes, "Resiling from Reconciling?: Musing on *R. v. Kapp*" (2009) 47 S.C.L.R. (2d) 255; Christina Szurlej, "Reconciling Competing Human Rights in Canada" (2015) 47 Peace Research 179.

[17] The Honourable Justice Frank Iacobucci, "'Reconciling Rights': The Supreme Court of Canada's Approach to Competing Charter Rights" (2003) 20 S.C.L.R. (2d) 137, at 140-43. Over the years, the Supreme Court appears to have used the terms, "balancing" and "reconciliation" interchangeably when referring to cases of competing Charter rights: Christina Szurlej, "Reconciling Competing Human Rights in Canada" (2015) 47 Peace Research 179, at 182.

[18] [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103, at paras. 69-71 (S.C.C.).

[19] The Honourable Justice Frank Iacobucci, "'Reconciling Rights': The Supreme Court of Canada's Approach to Competing Charter Rights" (2003) 20 S.C.L.R. (2d) 137, at 141.

[20] The Honourable Justice Frank Iacobucci, "'Reconciling Rights': The Supreme Court of Canada's Approach to Competing Charter Rights" (2003) 20 S.C.L.R. (2d) 137, at 141. See also *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1994] S.C.J. No. 24, [1995] 1 S.C.R. 315, at 438-39 (S.C.C.).

[21] Jena McGill, "'Now It's My Rights Versus Yours': Equality in Tension with Religious Freedoms" (2016) 53 Alta. L. Rev. 583, at 587.

to take into account a wide variety of societal factors. The challenge is to decide "whether the enacting legislative body has made the appropriate compromise between the civil libertarian value guaranteed by the Charter and the competing social or economic objectives pursued by the law".[22]

In the reconciliation context, on the other hand, there is "no rule about onus *per se*".[23] Instead, the claims of both parties must be considered equally, and each must be construed in such a way as to give the asserted right the fullest possible expression. This is a function of two principles that are said to underlie the interpretation of Charter rights. The first is the rule that no Charter right is absolute.[24] Application of Charter values must, therefore, "take into account other interests and in particular other Charter values which may conflict with their unrestricted and literal enforcement".[25] The second principle said to support the reconciliation framework is the assertion that there is no hierarchy of rights.[26] Together, these two principles lead to the conclusion that resolving conflicts between two or more competing rights requires that some compromise be reached wherein both rights are given expression, so that no right in particular may be said to trump another.

Although proponents of the reconciliation approach assert its superiority over the balancing process of the section 1 *Oakes* test jurisprudence, in reality, there is little difference between the two.[27] This is because, in the end, courts are still required to engage in a balancing process regardless of which method judges propose to use. To be sure, Iacobucci J.'s reconciliation approach is more circumscribed than that required in a traditional section 1 analysis, in that it takes into account fewer factors than are taken into consideration in the *Oakes* test

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[22] Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2011), at 33-10. See also *R. v. Mills*, [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668, at para. 67 (S.C.C.).

[23] The Honourable Justice Frank Iacobucci, "'Reconciling Rights': The Supreme Court of Canada's Approach to Competing Charter Rights" (2003) 20 S.C.L.R. (2d) 137, at 142.

[24] *R. v. Crawford; R. v. Creighton*, [1995] S.C.J. No. 30, [1995] 1 S.C.R. 858, at para. 34 (S.C.C.) (Charter rights "are not absolute in the sense that they cannot be applied to their full extent regardless of the context"). See also *R. v. Mills*, [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668, at para. 61 (S.C.C.).

[25] *R. v. Crawford; R. v. Creighton*, *id*.

[26] *Dagenais v. Canadian Broadcasting Corp.*, [1994] S.C.J. No. 104, [1994] 3 S.C.R. 825, at 877 (S.C.C.).

[27] See, *e.g.*, Patricia Hughes, "Resiling from Reconciling? Musing on *R. v. Kapp*" (2009) 47 S.C.L.R. 255 (noting at 255 that "the rhetoric of reconciliation and balancing has often been stronger than its achievement").

balancing exercise, but both section 1 balancing and reconciliation still require that courts eventually give preference to one right over another. Where there is a true clash of rights, one of them must ultimately yield, and it is left to judges to decide which that will be. In making that decision, judges are called upon to balance which right is more deserving of protection or priority than the other. The means by which they do so is by considering the two rights in comparison and ultimately making a value judgment between them. Thus, it is obvious that "it is not realistic that in all cases the rights can be shaped in a way that everyone's interests are protected to some degree".[28] On the contrary, "depending on the way a right is defined, the practical effect of reconciliation may be that one right is subordinated to another".[29]

The balancing test inherent in the reconciliation approach is a result of the Supreme Court's repeated assertion that reconciling conflicts of rights cannot be undertaken in a vacuum, but must instead be based upon an analysis of the entire factual and legal context.[30] It is only after considering the exercise of both rights in the particular factual situation that courts can be justified in undertaking the process of determining the extent to which the competing rights may be exercised. Put more simply, the court must consider the factual context to determine which right must be given priority. In so doing, the court essentially weighs the benefits of allowing the exercise of one right against the burdens such exercise would impose on the other.[31] Consequently, slight variations in the facts might result in a different conclusion to the reconciliation exercise. As Abella J. noted in her dissent in *Bou Malhab v. Diffusion Métromédia CMR, inc.*, "[T]here is a difference between yelling 'fire' in a crowded theatre and yelling 'theatre' in a crowded fire station."[32]

It is important to note, however, that the Supreme Court itself has never officially adopted Justice Iacobucci's reconciliation approach. Indeed, other justices have criticized reconciliation on the grounds that

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[28] *Id.*, at 259.

[29] *Id.*

[30] See, *e.g.*, *R. v. Mills*, [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668, at para. 21 (S.C.C.). See also *R. v. S. (N.)*, [2010] O.J. No. 4306, 95 O.R. (3d) 735, at para. 97 (Ont. C.A.) ("Reconciling competing *Charter* values is necessarily fact-specific. Context is vital and context is variable").

[31] Christina Szurlej, "Reconciling Competing Human Rights in Canada" (2015) 47 Peace Research 179, at 185.

[32] [2011] S.C.J. No. 9, [2011] 1 S.C.R. 214, at para. 96 (S.C.C.).

the "Charter makes no provision for directly balancing constitutional rights against one another".[33] On the contrary, in the view of some of the justices, section 1 is "the only balancing mechanism provided under the Charter".[34] This is because the reconciliation approach is effectively an attempt "to limit a right by another, with no stated mechanism for judicially determining just when, on the facts, the first right is overridden".[35] Moreover Justice Iacobucci himself has admitted that the reconciliation framework "clearly reflects the substance of the *Oakes* test when assessing legislation under s. 1 of the Charter".[36] Thus, "[t]he analyses involved in reconciling rights often involve a consideration of the deleterious effects of the measures which limit the right in question and the objective sought to be achieved by the limitation of the right, as well as a consideration of the deleterious and salutary effects of the measures themselves."[37] In his view, this "directly reflects the approach taken in part 3 of the [*Oakes*] proportionality analysis".[38]

Consequently, it appears that the only real difference between the section 1 balancing and the purported reconciliation approach remains the range of factors to be considered in the analysis. An *Oakes*-type balancing test requires the reviewing court to consider a wider array of socio-economic facts than would be necessary in a clash of rights between private individuals. In effect, section 1 balancing requires that a court consider "whether the enacting legislative body has made the appropriate compromise between the civil libertarian value guaranteed by the Charter and the competing social or economic objectives pursued by the law".[39] Reconciling rights, on the other hand, requires merely that

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[33] *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1994] S.C.J. No. 24, [1995] 1 S.C.R. 315, at para. 118 (S.C.C.), *per* La Forest J.

[34] *Id*. See also *Trinity Western University v. British Columbia College of Teachers*, [2001] S.C.J. No. 32, [2001] 1 S.C.R. 772, at para. 94 (S.C.C.), *per* L'Heureux-Dubé J. (dissenting); *Law Society of British Columbia v. Trinity Western University*, [2018] S.C.J. No. 32, 2018 SCC 32, at para. 304 (S.C.C.), *per* Brown J. (dissenting) ("[T]he *Oakes* test — must apply to justify state infringements of *Charter* rights, regardless of the context in which they occur").

[35] *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1994] S.C.J. No. 24, [1995] 1 S.C.R. 315, at para. 119 (S.C.C.), *per* La Forest J.

[36] The Honourable Frank Iacobucci, "'Reconciling Rights': The Supreme Court of Canada's Approach to Competing Charter Rights" (2003) 20 S.C.L.R. (2d) 137, at 145, citing *Dagenais v. Canadian Broadcasting Corp*., [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835, at 877 (S.C.C.).

[37] *Id.*, at 157.

[38] *Id*.

[39] Peter W. Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 2011), at 33-10.

the court establish the extent to which existing Charter rights might be exercised in a discrete situation. Thus, "the exercise of reconciling rights does not necessarily mean a full exploration of a Charter infringement, as one would expect with a direct Charter challenge".[40]

How, then, does this balancing of salutary and deleterious effects work in practise? A review of the cases indicates that it is a rather rough and ready sort of justice, for one very obvious reason: There are no set standards. Nor could there be.[41] The insistence on a contextual approach necessarily means that every case is different and that "a different [factual] relationship may be struck between various Charter rights in one case from that in another".[42] Moreover, the Ontario Human Rights Commission insists that one important part of the balancing process requires a consideration of the underlying values of Canadian society as reflected in both statute and case law, along with a consideration of both individual and group rights.[43] Thus, whilst courts might establish a general principle, the application of the principle in any given case is entirely dependent on the particular facts.

Finally, it should be noted that Justice Iacobucci's reconciliation process was developed prior to the Supreme Court's decision in *Doré v. Barreau du Québec*,[44] which created a new framework for the review of administrative decisions that impact Charter rights. Under this new framework, administrative agencies are entitled to deference when their decisions adversely impact the exercise of an individual's Charter rights. This deference is justified on the basis of the administrative decision-maker's expertise in the interpretation and implementation of its own statutory mandate as well as its "proximity to the facts of the case".[45]

Under *Doré*, in considering a claim that a particular action would violate a Charter right, an administrative agency should, first, consider the statutory objectives that lie behind the decision. Thereafter, it "should ask how the *Charter* value at issue will best be protected in view of the

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[40] The Honourable Frank Iacobucci, "'Reconciling Rights': The Supreme Court of Canada's Approach to Competing Charter Rights" (2003) 20 S.C.L.R. (2d) 137, at 143.

[41] Christina Szurlej, "Reconciling Competing Human Rights in Canada" (2015) 47 Peace Research 179, at 183.

[42] The Honourable Frank Iacobucci, "'Reconciling Rights': The Supreme Court of Canada's Approach to Competing Charter Rights" (2003) 20 S.C.L.R. (2d) 137, at 156.

[43] Ontario Human Rights Commission, *Policy on Competing Human Rights* (2012), at 23.

[44] [2012] S.C.J. No. 12, [2012] 1 S.C.R. 395 (S.C.C.).

[45] *Id.*, at para. 54.

statutory objectives".[46] There is, in other words, a "proportionate balancing" in which the administrative agency must ensure that decision it proposes to take "interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives. If the decision is disproportionately impairing of the guarantee, it is unreasonable. If, on the other hand, it reflects a proper balance of the mandate with *Charter* protection, it is a reasonable one."[47]

Proportionate balancing might, therefore, be seen to be a truncated version of the traditional section 1 balancing approach. Although the Supreme Court notes in *Doré* that the traditional *Oakes* test is not appropriate to administrative decision-making,[48] the *Doré* framework is intended to find "analytical harmony" with the minimal impairment and balancing stages of the *Oakes* test.[49]

The *Doré* framework, which was further developed in *Loyola*,[50] may, therefore, be regarded as a subset of the traditional balancing approach for two reasons. First, it is applicable to claims that a decision by a state actor infringes Charter rights, and, thus, is effectively a claim that a right has been impaired "by law". Second, although the full *Oakes* test might not be applicable, the *Doré/Loyola* proportionate balancing test "works the same justificatory muscles", the intent of which is to balance a claim of private party against the state, rather than resolve claims between two private parties.[51]

In the end, both section 1 balancing (whether undertaken in full in accordance with *Oakes* or in the more truncated version provided for in the *Doré/Loyola* framework), as well as Justice Iacobucci's reconciliation approach, require that at some point courts weigh benefits and burdens on some imaginary scale to give priority to one interest over another. In the case of *Oakes* and *Doré*, the task is to determine whether the statute or administrative action justifiably infringes a claimed Charter right. In reconciliation, the task is to determine whether one Charter

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[46] *Id.*, at para. 56.

[47] *Id.*, at para. 7; *Loyola High School v. Quebec (Attorney General)*, [2015] S.C.J. No. 12, [2015] 1 S.C.R. 613, at para. 32 (S.C.C.).

[48] *Doré v. Barreau du Québec*, [2012] S.C.J. No. 12, [2012] 1 S.C.R. 395, at para. 37 (S.C.C.).

[49] *Law Society of British Columbia v. Trinity Western University*, [2018] S.C.J. No. 32, 2018 SCC 32 (S.C.C.).

[50] *Loyola High School v. Quebec (Attorney General)*, [2015] S.C.J. No. 12, [2015] 1 S.C.R. 613, at paras. 3-4, 35-42 (S.C.C.).

[51] *Doré v. Barreau du Québec*, [2012] S.C.J. No. 12, [2012] 1 S.C.R. 395, at para. 5 (S.C.C.).

claim ought to take priority over another. Resolving both types of cases requires a proportional balancing of interests.

2. Resolving Conflicts of Rights

In actuality, however, it appears that when confronting cases involving a clash of rights, courts utilize a two-step process of delineation (or definition) and balancing. They begin by delineating the scope of the right at issue to ascertain whether there is, in fact, an actual conflict between two competing Charter rights. In some cases, it is possible to define the conflict out of existence through a narrow definition of rights.[52] Where definition does not eliminate the conflict, then the two rights must be balanced against each other. Once properly defined, the corresponding salutary and deleterious effects of the rights can then be weighed against each other with a view toward determining which right will ultimately be given priority.

(a) Definition

The first step in resolving a conflict of rights is through the process of definition. In a number of cases, courts have been able to eliminate conflicts between rights by defining the scope of an asserted right narrowly and in such a way as to make the conflict disappear. For example, in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*,[53] the Supreme Court considered the extent to which parents might refuse life-saving medical treatment to their minor child on the grounds that their religious beliefs prohibited administering the treatment proposed by the child's doctors. Confronted with a life-threatening situation, the Children's Aid Society brought an action seeking to take wardship of the child and thereby provide the requisite consent to the treatment. On the face of it, the case presented a conflict between the parents' right "to rear their children according to their religious beliefs, including that of choosing medical and other treatments"[54] and the child's section 7 right to life, liberty and security.

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[52] See, *e.g.*, *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1994] S.C.J. No. 24, [1995] 1 S.C.R. 315 (S.C.C.); *Trinity Western University v. British Columbia College of Teachers*, [2001] S.C.J. No. 32, [2001] 1 S.C.R. 772, at para. 29 (S.C.C.).

[53] [1994] S.C.J. No. 24, [1995] 1 S.C.R. 315 (S.C.C.).

[54] *Id.*, at para. 105.

Although the Court was unanimous in limiting the parents' right to refuse the proposed treatment, the justices were divided over the proper approach to the problem. The majority, led by La Forest J., considered that the right to consent to medical treatment on behalf of a minor child was a fundamental aspect of the parents' liberty[55] and religious[56] rights under the Charter. The Court then engaged in a section 1 balancing and concluded that the state had a "pressing and substantial" interest in overriding the parents' Charter rights. The parents' liberty and religious rights had to give way where unfettered exercise of their freedoms would result in a denial of potentially life-saving treatment to their minor child.[57]

Writing separately, three justices undertook to resolve the clash of rights through a process of definition. With regard to the section 7 claim, they defined the liberty interest as not including a parent's right to deny a child medical treatment that has been adjudged necessary by a medical professional.[58] Similarly, in considering the religious freedom claim, the minority defined the scope of the section 2(a) guarantee narrowly to include "the right to educate and rear their child in the tenets of their faith".[59] On the other hand, they said, "a parent's freedom of religion does not include the imposition upon the child of religious practices which threaten the safety, health or life of the child".[60] In their view, no conflict of rights existed because the rights the parents were seeking to exercise were not themselves within the scope of any constitutional guarantee. By narrowly construing the parents' section 7 liberty interest,

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[55] *Id.*, at para. 83 ("… I would have thought it plain that the right to nurture a child, to care for its development, and to make decisions for it in fundamental matters such as medical care, are part of the liberty interest of a parent").

[56] *Id.*, at para. 105 ("It seems to me that the right of parents to rear their children according to their religious beliefs, including that of choosing medical and other treatments, is an equally fundamental aspect of freedom of religion").

[57] With regard to the s. 7 claim, the parents ultimately agreed that the state might intervene in order to protect children. The complaint thus resolved itself into a question of whether the process used by the state was commensurate with principles of fundamental justice. The Court concluded it did: *id.*, at paras. 89, 101. On the question of the s. 2(a) claim, the Court concluded that if the process used complied with the principles of fundamental justice, it largely met the burden required under s. 1: *id.*, at paras. 111-113.

[58] *Id.*, at para. 212 (Corey, Iacobucci and Major JJ.). Writing separately, Lamer C.J.C. drew a similar conclusion, holding that the liberty interest protected by s. 7 is limited to "the physical dimension of the word 'liberty,' which can be lost through the operation of the legal system": *id.*, at para. 22.

[59] *Id.*, at para. 223.

[60] *Id.*, at para. 225.

as well as the right to freedom of religion, the minority was effectively able to make the conflict go away.

Another example of using the definitional process to resolve an apparent conflict of rights is found in *Trinity Western University v. British Columbia College of Teachers*.[61] The British Columbia College of Teachers ("BCCT") denied accreditation to the education program of Trinity Western University ("TWU") on the grounds that the school's "community standards", which prohibited homosexual behaviour by members of the TWU community, constituted a discriminatory practice based on sexual orientation. TWU claimed that the BCCT's decision violated the university's right to religious freedom, as well as the equality rights of both prospective students and students in the schools in which TWU's graduates might eventually teach.

As in *B. (R.)*, the Court concluded that this was a case "where any potential conflict should be resolved through the proper delineation of the rights and values involved".[62] It then defined the rights involved thusly:

> [T]he proper place to draw the line in cases like the one at bar is generally between belief and conduct. The freedom to hold beliefs is broader than the freedom to act on them. Absent concrete evidence that training teachers at TWU fosters discrimination in the public schools of B.C., the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected. The BCCT, rightfully, does not require public universities with teacher education programs to screen out applicants who hold sexist, racist or homophobic beliefs. For better or for worse, tolerance of divergent beliefs is a hallmark of a democratic society.[63]

The definition process allowed the Court to eliminate the conflict by effectively limiting the definition of freedom of religion to belief and not conduct. In so doing, the Court was able to make a distinction between the situation of TWU students from that of the teacher in *Ross v. New Brunswick School District No. 15*.[64] Unlike the teacher in *Ross*, whose out-of-school conduct had "poisoned the atmosphere of the school",[65] there was no evidence that TWU graduates had, or would, engage in

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61 [2001] S.C.J. No. 32, [2001] 1 S.C.R. 772 (S.C.C.).

62 *Id.*, at para. 29.

63 *Id.*, at para. 36.

64 [1996] S.C.J. No. 40, [1996] 1 S.C.R. 825 (S.C.C.).

65 *Trinity Western University v. British Columbia College of Teachers*, [2001] S.C.J. No. 32, [2001] 1 S.C.R. 772, at para. 19 (S.C.C.).

discriminatory conduct toward students in their care.[66] In the event that any TWU graduates engaged in misconduct, they would be subject to discipline by the regulator. However, until then, they were free to hold whatever beliefs they chose and TWU was free to establish whatever conduct policy it believed was consistent with its religious mission for those who wanted to be part of its community.[67]

This tactic of essentially "reading down" rights has been used by courts as a means of prioritizing certain rights over others, mainly in the religion context, but in other contexts as well. When confronted with a conflict of Charter rights, the definition exercise allows a decision-maker to effectively eliminate a conflict by narrowly construing the scope of a claimed right. In many cases, the apparent conflict will simply disappear.

Nonetheless, it should be noted that the process of definition is itself largely an arbitrary one. It effectively permits courts and tribunals to determine the core elements of a particular right in ways that are unconnected with any objective standard. *B. (R.)* is, again, a good example of this problem. As noted above, the justices were deeply divided on the scope of the section 7 liberty right. Thus, Lamer C.J.C. asserted that the liberty interest was limited to the criminal context and did not include either the right to bring up children or the right to choose medical treatment for them.[68] Justices La Forest, Gonthier and McLachlin, on the other hand, came to the opposite conclusion and held that the liberty interest included parents' right to make medical decisions for their children.[69] Meanwhile, Iacobucci, Major and Cory JJ. held that section 7 did include the right of parents to make medical decisions for their children, but that this right did not include the power "to deny a child medical treatment that has been adjudged necessary by a medical professional".[70] In the end, all of the justices agreed in the result, but the definitional process was largely arbitrary. As will be seen below in *Hall (Litigation guardian of) v. Powers*[71] and *Law Society of British Columbia v. Trinity Western University*,[72] the definition process can become an integral tool in advancing the policy choices of judges.

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66 *Id.*, at para. 35.

67 *Id.*, at para. 3.

68 *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1994] S.C.J. No. 24, [1995] 1 S.C.R. 315, at paras. 1, 36 (S.C.C.), *per* Lamer C.J.C.

69 *Id.*, at para. 85, *per* La Forest J.

70 *Id.*, at para. 212, *per* Iacobucci J.

71 [2002] O.J. No. 1803, 59 O.R. (3d) 423 (Ont. S.C.J.).

72 [2018] S.C.J. No. 32, 2018 SCC 32 (S.C.C.).

(b) Balancing

Assuming that a conflict of rights between two private parties cannot be eliminated through the process of definition, there must be a consideration of whether the proposed infringement or interference is minor or trivial. If it is, then the claimed right is not likely to receive protection.[73] If there is a substantial interference, then it will be necessary to move on to a balancing process. Courts will then be required to balance the two conflicting rights, using a benefits and burdens analysis. The salutary and deleterious effects of the exercise of the conflicting rights are weighed in an effort to establish which should be given priority.

In some cases, the balance is rather easily struck, as for example, in the case of speech that incites imminent violence against a minority group. The definition process can make the conflict disappear by simply defining the conduct at issue as not being speech at all, but rather violence in and of itself.[74] Where that process fails to resolve the conflict, a balancing approach would allow the speech to be limited because the deleterious effects on the equality rights of the targeted group clearly outweigh the salutary benefits that might come from permitting the speech to continue.[75]

(c) Policy Preference and Instrumentalism

It is important to note that the contextual approach to both delineation and balancing means that judges and other decision-makers are able to interpret the content of various Charter rights in an *ad hoc* fashion, divorced from any consistent principle. For example, when it comes to the process of definition, there is no precise standard for determining the boundaries of the definitional exercise. While judges frequently resort to maxims such as, "no right is absolute",[76] or that all rights must be "defined in light of competing claims",[77] in the end, they are largely free to define a right in individual cases as seems best to them under the

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[73] Reema Khawja, *The Shadow of the Law: Surveying the Case Law Dealing with Competing Rights Claims* (Ontario Human Rights Commission, 2012), at 6.

[74] *R. v. Khawaja*, [2012] S.C.J. No. 69, [2012] 3 S.C.R. 555 (S.C.C.).

[75] *Ross v. New Brunswick School District No. 15*, [1996] S.C.J. No. 40, [1996] 1 S.C.R. 825 (S.C.C.).

[76] *R. v. Crawford; R. v. Creighton*, [1995] S.C.J. No. 30, [1995] 1 S.C.R. 858, at para. 34 (S.C.C.).

[77] *R. v. Mills*, [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668, at para. 61 (S.C.C.).

circumstances. Indeed, the fact that nine justices produced three different definitions of the liberty interest contained in section 7, as was the case in *B. (R.)*, should indicate that there is a great deal of arbitrariness in the process.[78] Similarly, the balancing process which follows the definitional exercise is equally untethered from principle. There are no set standards for determining what factors ought to be placed on the scale in any particular case.

In short, while many judges today describe the definitional and balancing processes in a way that gives the impression of neutral law-making, the reality is that the entire exercise is rather instrumentalist in nature and gives judges free rein to advance their own policy preferences. No doubt, many would disagree with this characterization as unduly tendentious. However, Chief Justice Beverley McLachlin herself long ago admitted:

> [With the advent of the Charter, a] whole range of questions touching everyday life which were formerly matters exclusively for the legislators are now fodder for the courts .... The result has been that judges, particularly at the appellate level, find themselves facing questions which are new and unfamiliar. Many involve social and moral values, foreign territory to a judge raised on the arid objectivity of contracts and bills of lading. It is not enough to demand, as one writer recently did, that our judges "stop trying to be our moral mentors and get back to deciding cases". As I have already suggested, the proposed distinction between "deciding cases" and engaging in evaluative moral questions is a false dichotomy. *There is no way to interpret the Charter without making value judgments*.[79]

It will also be argued that what the judges are, in fact, doing is merely reading the zeitgeist, interpreting the Charter in the context of Canadian values. Thus, it is said that judges "examine the values on which the conflict arises and decide which is most in keeping with the purposes of the Charter guarantee in question".[80] This reference to "external values will ensure that the judge does not decide on the basis of his or her prejudices".[81] Again, this sounds like a neutral principle, but ultimately, leaving judges to decide what is "most in keeping" with Charter values still requires them to make a personal choice as to what each thinks those

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[78] See text accompanying notes 53-54, *supra*.

[79] Madame Justice B.M. McLachlin, "The Charter: A New Role for the Judiciary?" (1991) 29 Alta. L. Rev. 540, at 542-43 (emphasis added; references omitted).

[80] *Id.*, at 547.

[81] *Id*.

values might be. How else to explain the great differences in the various courts' view of the same case? For example, how is it that the Quebec Court of Appeal unanimously upheld the injunction against the succah in *Amselem*,[82] whilst the Supreme Court rejected it? Or, how is it that the British Columbia Court of Appeal unanimously rejected the Law Society of British Columbia's decision to refuse accreditation to Trinity Western University's law school,[83] while the Supreme Court came to precisely the opposite conclusion? The answer, of course, is clear: All of the judges involved were making personal determinations as to what they believed was "most in keeping" with Charter values, with the result that decisions turn on the preferences of those who ultimately get the final say. Value judgments are, therefore, "inherent in defining the scope of the rights and freedoms guaranteed by the Charter".[84]

This is especially true in cases that arise in administrative tribunals and decided under the *Doré/Loyola* framework.[85] Given that the Supreme Court has adopted a standard of reasonableness when reviewing the decisions of administrative tribunals,[86] the discretion afforded these agencies is arguably far broader than that given to lower courts. This is because, as currently constructed, the *Doré/Loyola* framework does not necessarily require an administrative decision-maker to state with specificity the precise factors that went into its analysis. Indeed, after the decision in *Law Society of British Columbia v. Trinity Western University*, it does not appear that an administrative tribunal need provide any detailed explanation as to precisely what factors it took into consideration in its proportional balancing.[87]

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[82] *Amselem v. Syndicat Northcrest*, [2002] Q.J. No. 705, [2002] R.J.Q. 906 (Que. C.A.).

[83] *Trinity Western University v. Law Society of British Columbia*, [2016] B.C.J. No. 2252, 2016 BCCA 423 (B.C.C.A.).

[84] Madame Justice B.M. McLachlin, "The Charter: A New Role for the Judiciary?" (1991) 29 Alta. L. Rev. 540, at 545. See also *R. v. J. (K.R.)*, [2016] S.C.J. No. 31, [2016] 1 S.C.R. 906, at para. 79 (S.C.C.), wherein the majority observed that the proportionality step of the *Oakes* test "allows courts to stand back to determine on a normative basis whether a rights infringement is justified in a free and democratic society. Although this examination entails difficult value judgments, it is preferable to make these judgments explicit, as doing so enhances the transparency and intelligibility of the ultimate decision."

[85] *Doré v. Barreau du Québec*, [2012] S.C.J. No. 12, [2012] 1 S.C.R. 395 (S.C.C.); *Loyola High School v. Quebec (Attorney General)*, [2015] S.C.J. No. 12, [2015] 1 S.C.R. 613 (S.C.C.).

[86] *Doré v. Barreau du Québec*, *id.*, at paras. 56-57. See also *Law Society of British Columbia v. Trinity Western University*, [2018] S.C.J. No. 31, 2018 SCC 32, at paras. 79-82 (S.C.C.).

[87] See, *e.g.*, Côté and Brown JJ.'s discussion of the decision-making process in *Law Society of British Columbia v. Trinity Western University*, [2018] S.C.J. No. 32, 2018 SCC 32, at paras. 294-300 (S.C.C.).

Finally, there is the question of "Charter values". The use of these unwritten principles to inform the definition and balancing process is problematic in the extreme. As Côté and Brown JJ. noted in their dissent in the *Law Society of British Columbia v. Trinity Western University*, "resorting to *Charter* values as a counterweight to constitutionalized and judicially defined *Charter* rights is a highly questionable practice".[88] This is again because the use of Charter values opens the door to unfettered judicial or administrative discretion:

> … *Charter* "values" — unlike *Charter* rights, which are the product of constitutional settlement — are unsourced. They are, therefore, entirely the product of the idiosyncrasies of the judicial mind that pronounces them to be so. And, perhaps one judge's understanding of "equality" might indeed represent a "shared value" with all Canadians, but perhaps another judge's might not. This in and of itself should call into question the legitimacy of judges or other state actors pronouncing certain "values" to be "shared". Canadians are permitted to hold different sets of values. One person's values may be another person's anathema. We see nothing troubling in this, so long as each person agrees to the other's right to hold and act upon those values in a manner consistent with the limits of core minimal civil commitments which are necessary to secure civic order — none of which are implicated here. What *is* troubling, however, is the imposition of judicially preferred "values" to limit constitutionally protected rights, including the right to hold other values.[89]

All this means, of course, that the resolution of conflicts of rights depends on the choices being made by judges in each case. Depending then on a judge's inclinations, the definitional exercise that often takes place at the outset of a rights reconciliation case will, in many cases, determine the ultimate result. In the event that the conflict is not eliminated through the definitional exercise, the balancing process may also be used to achieve a particular result depending on what judges decide to put on the scales. Thus, "[a]lthough Canadian courts consistently use 'the language of balancing and accommodation, there is rarely any consideration of how this balancing would actually be

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[88] *Law Society of British Columbia v. Trinity Western University*, *id.*, at para. 307 (S.C.C.). See also para. 166 (Rowe J., concurring) ("While *Doré* was intended to clarify the relationship between the *Charter* and administrative action, its reliance on values rather than rights has muddled the adjudication of *Charter* claims in the administrative context").

[89] *Id.*, at para. 308 (emphasis in original).

undertaken in hard cases'".[90] Judges are thus left free with respect to what items, precisely, are put on the balance in any given case.

(d) A Spectrum Analysis

In most cases, the actual balancing process takes place within the context of a "spectrum analysis". Where there is an infringement or interference with an activity that is closely connected to the "core" of a protected Charter right, the infringement will be deemed unjustified. On the other hand, the further an activity is from the core of a protected right, the more likely it is to be subordinated to a competing right.

For example, where property rights conflict with equality rights, property claims almost invariably lose out to equality or religious rights, unless the property claim being asserted is very near the core of another right, usually the exercise of religion. Thus, property or economic rights will lose out to equality unless the property right is being asserted by a religious organization related to a religious practice, or a person exercising a religious right that is directly connected to a property or economic claim. Similarly, speech rights, including speech motivated by religious belief, are subordinated to equality, unless the speech is closely related to religious practice or may be considered comment on matters of public policy or administration. However, even the exercise of religion itself has been made subordinate to equality claims where the exercise of a religious right in the public sphere would interfere with another person's or group's demand for equal treatment. A number of examples of these "spectrum analysis" outcomes are discussed below.

IV. THE HIERARCHY OF "COMMON RIGHTS"

At present, it seems clear that Canadian jurisprudence has already established the outlines of a hierarchy of rights where the "common rights" of the Charter are concerned. These rights include the fundamental freedoms of section 2, the legal rights of sections 7 to 14 and the equality right in section 15. The common rights might also be considered to include traditional freedoms recognized at common law,

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[90] Jena McGill, "'Now It's My Rights Versus Yours': Equality in Tension with Religious Freedoms" (2016) 53 Alta. L. Rev. 583, at 589, quoting Carl F. Stychin, "Faith in the Future: Sexuality, Religion and the Public Sphere" (2009) 29 Oxford J. Leg. Stud. 729, at 749 (footnote omitted; emphasis in original).

such as the freedom of contract or the right to own and dispose of property.[91] Although not specifically recognized in the Charter, these economic rights are an integral part of the Anglo-Canadian legal and constitutional heritage.[92] This is because section 26 provides that the Charter "shall not be construed as denying the existence of any other rights or freedoms that exist in Canada". Consequently, economic rights, including property and contract rights, remain protected under the common law, the *Canadian Bill of Rights*[93] and provincial statutes.[94]

A review of the cases, especially within the past decade, indicates that courts and human rights tribunals do, on balance, privilege certain rights above others. Among those at the top of the hierarchy are what might be referred to as "dignity" rights, which is to say rights that implicate an individual's concept of identity or self-worth. These include freedom of religion, of conscience, and equality rights. In the middle are rights related to participation in society, such as rights of speech or association. At the bottom are property and economic rights. Moreover, it can be seen that when it comes to the "dignity" rights themselves, equality has, and

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[91] See, *e.g.*, *Canadian Bill of Rights*, S.C. 1960, c. 44, s. 1(a):

> It is hereby recognized and declared that in Canada there have existed and shall continue to exist ... the following human rights and fundamental freedoms, namely ...
>
> (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

[92] See, *e.g.*, *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927, at 1003-1004 (S.C.C.):

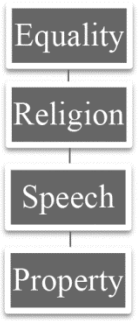
> The intentional exclusion of property from s. 7, and the substitution therefor of "security of the person" has, in our estimation, a dual effect. First, it leads to a general inference that economic rights as generally encompassed by the term "property" are not within the perimeters of the s. 7 guarantee. This is not to declare, however, that no right with an economic component can fall within "security of the person". Lower courts have found that the rubric of "economic rights" embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property — contract rights. To exclude all of these at this early moment in the history of Charter interpretation seems to us to be precipitous. We do not, at this moment, choose to pronounce upon whether those economic rights fundamental to human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights.

[93] S.C. 1960, c. 44.

[94] See, *e.g.*, *Singh v. Canada (Minister of Employment and Immigration)*, [1985] S.C.J. No. 11, [1985] 1 S.C.R. 177, at para. 85 (S.C.C.), *per* Beetz J.:

> [T]he *Canadian Bill of Rights* retains all its force and effect, together with the various provincial charters of rights. Because these constitutional or quasi-constitutional instruments are drafted differently, they are susceptible of producing cumulative effects for the better protection of rights and freedoms. But this beneficial result will be lost if these instruments fall into neglect. It is particularly so where they contain provisions not to be found in the *Canadian Charter of Rights and Freedoms* ….

apparently will continue to have, precedence over religion and conscience, except in very limited circumstances. As a result, one might discern the current hierarchy of rights is as follows:



In advancing this claim, this article will examine cases from the Supreme Court, the provincial courts and the various human rights tribunals. Focusing only on Supreme Court cases tends to give a limited perspective due to the infrequent nature of Supreme Court appeals. Moreover, while it is true that in most cases, provincial human rights tribunals do not interpret the Charter *per se*, they do explore the boundaries of rights analogous to those in the Charter. And, while it is also true that most human rights codes apply far more broadly than the Charter, as for example including private actors as well as government, the substantive content of many of the rights contained in the codes is similar to those in the Charter. Thus, human rights tribunals interpreting speech or religious rights do so in a manner akin to those of the courts, and indeed, frequently rely on judicial development of the Charter to inform their interpretation. Consequently, fundamental rights in Canada are evolving across a broad range of activity and by a wide range of judicial and quasi-judicial bodies. Therefore, a proper understanding of rights cannot be had without considering this wider universe of opinion.

1. Property Rights versus Dignity Rights

At the bottom of the hierarchy are property rights. Indeed, it seems clear that property and economic rights will lose out to religious, speech and equality rights in almost every case. One reason for this, of course, is that property rights are not explicitly found in the Charter

and, therefore, conflicts between economic rights and religious or equality rights present a conflict between Charter and common law rights. Given the constitutional status of the Charter, one would expect that economic rights would yield. Nonetheless, as noted above, economic rights are worthy of some protection by virtue of both the *Canadian Bill of Rights* (at least with respect to federal legislation) and, perhaps even section 7 of the Charter, with the result that they cannot simply be ignored. As a result, many commentators insist that section 7 must be interpreted as "not including property, as not including freedom of contract, and, in short, as not including *economic* liberty".[95] For its part, however, the Supreme Court has been less definitive on the point.[96] The Court has thus far interpreted section 7 as implicated only where the state has acted to deprive a person of life, liberty or security by means of the criminal law or some significant adverse administrative action.[97] While there have been calls to interpret section 7 to create a positive right to economic security, the Court has declined the invitation to do so.[98] However, several justices have suggested that section 7 might be invoked in circumstances unrelated to the justice system and some have expressed the opinion that the traditional rule "unduly circumscribes the scope of the section, in a manner contrary to the cautious, but open, approach" adopted by the Court in other cases.[99]

Yet, notwithstanding the view that economic rights do not receive Charter protection, Canadian courts have considered the interplay between dignity rights and contract/property rights on several occasions. In cases where they have done so, courts have recognized that economic rights deserve protection when they are themselves manifestations of religious activity or protected speech. Thus, a religious group might have the right to refuse to rent out a church building for a same-sex wedding where doing so would be contrary to

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[95] Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2011), at 47.7(b) (emphasis in original).

[96] See, *e.g.*, *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927, at 1003-1004 (S.C.C.), *per* Dickson C.J.C.

[97] See *Gosselin v. Quebec (Attorney General)*, [2002] S.C.J. No. 85, [2002] 4 S.C.R. 429, at para. 77 (S.C.C.).

[98] *Id.*, at paras. 307-358, *per* Arbour J. (dissenting).

[99] *Id.*, at para. 414, *per* LeBel J. (dissenting). An interesting discussion of the importance of negative/positive rights distinction in s. 7 may be found in Emmett Macfarlane, "Dialogue, Remedies, and Positive Rights: *Carter v. Canada* as Microcosm for Past and Future Issues under the Charter of Rights and Freedoms" (2017) 49 Ottawa L. Rev. 107.

the tenets of the faith, but an individual operating a B&B would not be able to discriminate against a same-sex couple in the renting of a room, even if such a rental would offend his sincerely held religious beliefs. The former falls clearly within an area of activity that is at the heart of religious practice, while the latter is more attenuated. Similarly, a newspaper might be able to refuse to print material advocating for or against racial preferences in hiring on the grounds that doing so would conflict with its own editorial position, but it would not be entitled to reject advertising simply based on the prospective client's race. The former case involves the potential for forced speech violating a publisher's right to free expression, while the latter has little, if anything, to do with legitimate debate. Put more simply, where traditional common law property and contract rights conflict with dignity rights, courts have almost uniformly subordinated these economic interests unless the exercise of the economic right is itself an expression of a Charter right. Consequently, property rights trump other rights only where they are themselves closely connected to the core of a dignity right. In that case, the economic activity becomes a proxy for the underlying dignity right. Where, however, the property or contract right is largely divorced from the exercise of any protected Charter right, it is almost always subordinated to the conflicting dignity right. As a result, it is only where there is a clash between dignity rights that the courts must engage in a true balancing test.

One end of the spectrum is represented by a series of cases involving property owned by religious organizations. Thus, in *Dallaire v. Les Chevaliers de Colomb – Conseil 6452*,[100] a church had a monument on its lawn expressing the view that abortion is morally wrong. The plaintiff objected to the memorial and sought redress, arguing that the inscription was "discriminatory because it denounces, victimizes, and excludes women".[101] The tribunal rejected the claim on the grounds that the monument was itself on church property and the inscription was "clearly an expression of religious belief".[102] The

[100] [2011] O.H.R.T.D. No. 650, 2011 HRTO 639 (Ont. H.R.T.). The inscription on the monument read as follows: "Let us pray that all life rests in the hands of God from conception until natural death" [translation].

[101] *Id.*, at para. 3.

[102] *Id.*, at para. 36. In the end, the tribunal avoided the conflict entirely by holding that "the manifestation of religious belief in an inscription displayed on church property is not a 'service' or 'facility'" covered by s. 1 of the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19.

church was entitled to use its property to advance its religious agenda. In effect, the property claim was a proxy for the religion claim with the result that the property right was superior because it was closely related to the core mission of the religious organization.[103] Similarly, in *Reference re Same-Sex Marriage*, the Supreme Court addressed the question of "compulsory use of sacred places" for the celebration of same-sex marriages and concluded that the property rights of the religious institution would trump equality concerns.[104] This particular balancing makes sense because, after all, it is hard to imagine an activity closer to the core of religious belief than the celebration of religious rites in a religious building.[105]

The other end of the spectrum is represented by cases in which private parties engage in commercial activity that has a more attenuated connection with religious activity. Thus in *Robertson v. Goertzen*, a human rights tribunal in the Northwest Territories sanctioned a landlord who refused to rent an apartment to two gay men.[106] The landlord claimed that his religious beliefs prevented him from condoning homosexuality by renting to a same-sex couple, and asserted that being forced to rent to the complainants would impose an undue hardship on him because he feared "[God's] judgment at death".[107] The tribunal accepted the sincerity of the landlord's religious belief, but balanced those beliefs against the legislature's intention "to ensure certain protected individuals and groups, including those who have a sexual orientation different than some other people, are not to

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[103] To be sure, although the plaintiff attempted to state a discrimination claim, she could not establish a denial of a service or facility within the terms of the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19. The crux of her claim was that she was offended by the message.

[104] [2004] S.C.J. No. 75, [2004] 3 S.C.R. 698, at para. 59 (S.C.C.). To be sure, the primary issue before the Court was whether religious officials might be required to perform same-sex marriages. However, the Court also dealt with the property question (also at para. 59):

> The question we are asked to answer is confined to the performance of same-sex marriages by religious officials. However, *concerns were raised about the compulsory use of sacred places for the celebration of such marriages* and about being compelled to otherwise assist in the celebration of same-sex marriages. The reasoning that leads us to conclude that the guarantee of freedom of religion protects against the compulsory celebration of same-sex marriages, suggests that the same would hold for these concerns (emphasis added).

[105] See, *e.g.*, *Halpern v. Canada (Attorney General)*, [2002] O.J. No. 2714, 60 O.R. (3d) 321 (Ont. Div. Ct.), affd *Halpern v. Canada (Attorney General)*, [2003] O.J. No. 2268, 65 O.R. (3d) 161 (Ont. C.A.).

[106] [2012] A.W.L.D. 375 (N.W.T. Human Rights Adjudication Panel).

[107] *Id.*, at para. 24.

be harmed by the exercise of religious freedom".[108] The fact that the property in question was residential real estate offered to the public without any connection to a core religious function convinced the tribunal that the landlord's property claim had to be subordinated to the plaintiff's equality right.

A similar situation arose in *Eadie v. Riverbend Bed and Breakfast*, wherein the owners of a B&B refused to rent a room to a same-sex couple.[109] The owners were devout Christians who wanted to use the guest house as a "ministry" and often sought to discuss their religious values with guests if any were open to such a discussion.[110] They also argued that their business was different from a hotel in that it was operated inside their home. As a result, requiring them to rent to a same-sex couple would force them to violate their sincerely held religious beliefs by "permitting behaviour in their home which they believe on religious grounds to be prohibited".[111]

The British Columbia Human Rights Tribunal rejected this defence, holding that the activity in question fell closer to the commercial end of the religion/property spectrum. It laid great emphasis on the fact that the B&B was not operated by a church or religious organization. While it recognized that "the business was operated by individuals with sincere religious beliefs respecting same-sex couples, and out of a portion of their personal residence, it was still a commercial activity. It was the [owners'] personal and voluntary choice to start up a business in their personal residence" and, thus, they were not compelled by the state to act in a manner inconsistent with their religious views.[112] Following the Supreme Court's decision in *Hutterian Brethren*,[113] the tribunal noted that this was one occasion "when the exercise of personal religious beliefs in the public sphere may be limited or carry a cost".[114] Having entered into the commercial sphere, the B&B's owners were engaged in a purely commercial activity, unconnected with any religious organization and offered to the public at large, and

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[108] *Id.*, at para. 45.

[109] [2012] B.C.H.R.T.D. No. 247, 2012 BCHRT 247 (B.C.H.R.T.).

[110] *Id.*, at para. 20.

[111] *Id.*, at para. 94.

[112] *Id.*, at para. 165.

[113] *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] S.C.J. No. 37, [2009] 2 S.C.R. 567 (S.C.C.).

[114] *Eadie v. Riverbend Bed and Breakfast*, [2012] B.C.H.R.T.D. No. 247, 2012 BCHRT 247, at para. 168 (B.C.H.R.T.).

thus had the obligation to provide services to the public regardless of their personal religious beliefs.

Cases in the middle of the spectrum have proven rather more difficult to resolve, as these often involve a combination of economic activity and the assertion of a dignity (usually religion) right. Frequently, they involve a claim by one party seeking to use its property in a manner that is not purely commercial but which is closely connected to a religious practice or belief.

Without doubt, the most well-known of these is *Syndicat Northcrest v. Amselem*,[115] wherein the Supreme Court held that a Jewish resident of a condominium building could erect a "sukkah" on his balcony in spite of the fact that the contract between him and the other condominium owners prohibited such a structure.[116] The Court rejected the condominium's contract claim on the grounds that interference with the other owners' property rights would be "minimal" or "trivial".[117]

Amselem is most often cited for the manner in which it refined the concept of freedom of religion under the Charter. Yet, at bottom, the case really involved a clash between the property rights of two private parties.[118] On the one side was a property owner (Amselem) who sought to use his property to exercise his religious beliefs, while on the other was a group of competing owners (Syndicat Northcrest) who wanted to enforce the terms of the contract between them and Amselem. In resolving the case, the Court adopted a rather simplistic balancing test, weighing the benefits and burdens that would be imposed on either party in the event of a decree in favour of the other. It placed on the one side

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[115] [2004] S.C.J. No. 46, at para. 54, [2004] 2 S.C.R. 551 (S.C.C.).

[116] A "sukkah" is a temporary dwelling built by Jewish people as part of the celebration of the festival of Sukkot. The structure is meant to remind the believers of the shelter that God provided for them during their time in the desert. It is usually built of material that allows the roof to be open to the sky. Most of a family's daily activities, such as eating or sleeping, take place in the sukkah during the festival period. Abraham P. Bloch, *The Biblical and Historical Background of Jewish Customs and Ceremonies* (Ktav, 1980), at 186-91.

[117] *Syndicat Northcrest v. Amselem*, [2004] S.C.J. No. 46, [2004] 2 S.C.R. 551, at paras. 85-86 (S.C.C.).

[118] It is important to note at the outset that *Amselem* does not itself involve a claim brought under the Charter. Instead, the case was brought under the Quebec *Charter of Human Rights and Freedoms*, CQLR, c. C-12 ("Quebec Charter") because there was no state action. Unlike its federal counterpart, the Quebec Charter applies to both public and private action: *Syndicat Northcrest v. Amselem*, [2004] S.C.J. No. 467, [2004] 2 S.C.R. 551, at para. 38 (S.C.C.).

Amselem's right to use his property to exercise his religious beliefs.[119] On the other side was the condominium's interest in protecting the aesthetics of the property as well as the safety and security of other residents. With respect to the latter, Syndicat Northcrest asserted that the balconies of the building served as emergency escape routes, and thus the building of structures on them had the potential to create a safety hazard in the event of fire.

The majority rejected the safety argument on the grounds that Amselem had promised that any structure he erected would not block the exits.[120] This was the case even though the condominium presented a letter from its insurer in which the company declared that it would not cover any loss arising from the construction of structures on balconies.[121] With the safety argument discarded, it seems clear that the majority regarded the case as merely requiring a balance between the religious right and the preservation of the building's aesthetic features. Framing the interests in this way allowed the Court to diminish the negative impact of Amselem's sukkah on the other owners' property interest. To be sure, although the Court recognized that "[c]onduct which would potentially cause harm to or interference with the rights of others would not automatically be protected",[122] it minimized the condominium's concerns about aesthetics on the grounds that "the alleged intrusions or deleterious effects" were "at best, minimal" or "quite trivial".[123] With that assessment of the interests, the Court easily concluded that the condominium's property right must yield:

> In a multiethnic and multicultural country such as ours, which accentuates and advertises its modern record of respecting cultural diversity and human rights and of promoting tolerance of religious and ethnic minorities — and is in many ways an example thereof for other

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[119] In considering the spectrum, it should be noted that Amselem's claim is not akin to that of the church in *Dallaire v. Les Chevaliers de Colomb – Conseil 6452*, [2011] O.H.R.T.D. No. 650, 2011 HRTO 639 (Ont. H.R.T.), for the obvious reason that his is secular property. On the other hand, he is not similar to the B&B in *Eadie v. Riverbend Bed and Breakfast*, [2012] B.C.H.R.T.D. No. 247, 2012 BCHRT 247 (B.C.H.R.T.) because he was not using the property for commercial purposes.

[120] *Syndicat Northcrest v. Amselem*, [2004] S.C.J. No. 46, [2004] 2 S.C.R. 551, at para. 89 (S.C.C.).

[121] *Id.*, at para. 171.

[122] *Id.*, at para. 62.

[123] *Id.*, at paras. 84 and 86.

> societies —, the argument of the respondent that nominal, minimally intruded-upon aesthetic interests should outweigh the exercise of the appellants' religious freedom is unacceptable.[124]

Writing in dissent, Bastarache J. criticized the majority and asserted that it used the wrong balancing test. In his view, simply considering the balance of convenience between the parties, as was done by the majority, violates both the letter and spirit of the Quebec Charter, which requires not only a consideration of the individual interests involved, but the common interest of all citizens of Quebec as well.[125] In Amselem's case, that meant that the Court should account for the fact that not only the co-owners, but also the citizens of Quebec, have "the right to expect contracts will be respected".[126]

In considering these expanded interests, Bastarache J. noted that the insurers' withdrawal of coverage for any loss attributable to a structure on a balcony was, in fact, a significant infringement on the condominium's property rights. As for the aesthetic claim, Bastarache J. asserted that the co-owners' right to preserve the value of their investment in the property was entitled to as much protection under the Quebec Charter as Amselem's religious right.[127] With that in mind, Amselem's right to freedom of religion could not be exercised in harmony with the rights and freedoms of other owners of Syndicat Northcrest or the Quebec public.

Justice Binnie made the same point even more directly in his dissent:

> There is a vast difference, it seems to me, between using freedom of religion as a shield against interference with religious freedom by the State and as a sword against co-contractors in a private building. It was for the appellants, not the other co-owners, to determine in advance of their unit purchase what the appellants' particular religious beliefs required. They had a choice of buildings in which to invest. They

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[124] *Id.*, at para. 87.

[125] *Id.*, at para. 154, *per* Bastarache J. (dissenting), quoting *Aubry v. Éditions Vice-Versa Inc.*, [1998] S.C.J. No. 30, [1998] 1 S.C.R. 591, at para. 56 (S.C.C.). Section 9.1 of the Quebec *Charter of Human Rights and Freedoms*, CQLR, c. C-12 provides as follows:

> In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec.
>
> In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law.

[126] *Syndicat Northcrest v. Amselem*, [2004] S.C.J. No. 46, [2004] 2 S.C.R. 551, at para. 172 (S.C.C.).

[127] *Id.*, at paras. 165-167.

> undertook by contract to the owners of *this* building to abide by the rules of *this* building even (as is apparently the case) they accepted the rules without reading them.[128]

Nevertheless, although the *Amselem* majority purported to use a balancing test, it is not clear what factors went into the balance. The Court simply declared that the burden on the property claim arising from the building of a sukkah on Amselem's balcony would be trivial, without explaining how it came to that conclusion. This lack of detail demonstrates the arbitrariness of the balancing process. The majority's curt dismissal of the safety concern in the face of the insurers' objection implies the use of a results-driven approach. The fact that the Court preferred to accept Amselem's bare promise not to block the exits over the condominium's legitimate concerns that it would essentially be uninsured for the entire period during which Amselem's sukkah was on the balcony is simply inexplicable.

Thus, although the Court might be seen to have solved the particular case before it, it did not set forth any test or standard by which conflicts between property and dignity rights might be resolved more generally. Instead, it limited itself to resolving the dispute between the particular parties then before it. One might conclude from this that the test is simply one of balancing "salutary" and "deleterious" effects, with the result that if the burden on property rights exceeded that placed on the religious right, the conclusion might have been different. Moreover, as noted by Bastarache J., the end result of the balancing test simply depends on what factors a court decides to throw into the mix. According to Bastarache J., failing to consider the security concerns allowed the majority to conclude that the burden on the other owners' property rights was "trivial". Had the majority taken the insurers' letter more seriously, then the balance could quite easily be struck differently. In short, the balancing test utilized in *Amselem* was largely instrumentalist in both approach and effect.

Other cases involve more direct clashes between a property right that serves as a proxy for religion and the equality rights of third parties. An example is found in *Brockie v. Ontario (Human Rights Commission)*, wherein an Ontario court held that a printer's right to freedom of contract did not extend to refusing to print business cards for the director of an LGBTQ advocacy group.[129] The printer, a devout Christian who believed

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[128] *Id.*, at para. 185, *per* Binnie J. (dissenting) (emphasis in original).

[129] [2002] O.J. No. 2375, 222 D.L.R. (4th) 174 (Ont. S.C.J.).

that homosexuality was a sin, claimed that providing the service would infringe on his religious beliefs. The Ontario Board of Inquiry (the precursor to the Ontario Human Rights Tribunal) held that Brockie "remains free to hold his religious beliefs and to practice them in his home, and in his Christian community".[130] However, "[w]hat he is not free to do, when he enters the public marketplace and offers services to the public in Ontario, is to practice those beliefs in a manner that discriminates against lesbians and gays by denying them a service available to everyone else."[131] The Board then ordered Brockie to provide services to lesbians and gays to the same extent they are provided to others.

On appeal, the Superior Court modified the tribunal's blanket order in an effort to balance the religious and equality rights at issue. The court recognized the existence of a "conflict of dignities" requiring a balance between individual religious rights and the right to be free of discrimination in the marketplace.[132] Thus, in weighing the benefits and burdens, the court held that the "further the activity is from the core elements of the freedom, the more likely the activity is to impact on others and the less deserving the activity is of protection".[133] Consequently, "[s]ervice of the public in a commercial service must be considered at the periphery of activities protected by freedom of religion."[134] The court ultimately rejected the idea that the printer's religious rights were implicated to any great extent in the wider commercial marketplace, concluding instead that the printer's claim of a right to freedom of religion was "at best, at the fringes of that right".[135] Accordingly, limiting Brockie's freedom to act on his religious beliefs was appropriate in order to prevent widespread discrimination in obtaining commercial services based on sexual orientation. With that said, however, the court modified the tribunal's broad order in a way designed to protect Brockie's religious rights when a printing job came closer to the core of his religious belief, decreeing that Brockie might, in fact, have the right to reject a printing job when it was designed to

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130 *Brillinger v. Brockie*, [2000] O.H.R.B.I.D. No. 3, at para. 47 (O.B.I.).

131 *Id.*, at para. 48.

132 *Brockie v. Ontario (Human Rights Commission)*, [2002] O.J. No. 2375, at para. 20, 222 D.L.R. (4th) 174 (Ont. S.C.J.).

133 *Id.*, at para. 51.

134 *Id*.

135 *Id.*, at para. 54.

promote the "gay and lesbian lifestyle". The court used a hypothetical to explain its reasoning:

> If any particular printing project ordered by Mr. Brockie (or any gay or lesbian person, or organization/entity comprising gay or lesbian persons) contained material that conveyed a message proselytizing and promoting the gay and lesbian lifestyle or ridiculed his religious beliefs, such material might reasonably be held to be in direct conflict with the core elements of Mr. Brockie's religious beliefs. On the other hand, if the particular printing object contained a directory of goods and services that might be of interest to the gay and lesbian community, that material might reasonably be held not to be in direct conflict with the core elements of Mr. Brockie's religious beliefs.[136]

The balancing test employed in *Brockie* is problematic for two reasons. First, it implies that religious people can compartmentalize their lives into neat categories, one involving their private life and the other involving their activities in public. The decision requires that Brockie and others who enter into the "public marketplace" subordinate whatever private religious scruples they have when those principles conflict with larger public policy goals, which in this case include the need to prevent discrimination based on sexual orientation. Some might argue that this injunction violates the spirit, if not the letter, of Dickson C.J.C.'s famous statement in *Big M* that every individual must be free "to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own".[137] Of course, the Ontario court concluded that, on balance, allowing Brockie to refuse to print the requested material worked an injury to the parallel rights of the plaintiff.

The other, and perhaps more troubling, issue is the court's willingness to determine what activities are at the core of a person's religious beliefs. To be sure, *Brockie* pre-dates *Amselem* by two years and, therefore, the Ontario court could be excused for not having had the benefit of considering the Supreme Court's later admonition that "courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious

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[136] *Id.*, at para. 56.

[137] *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at para. 123 (S.C.C.).

requirement, 'obligation', precept, 'commandment', custom or ritual".[138] Nonetheless, if taken seriously, *Brockie* opens the door to a balancing exercise every bit as instrumentalist as that in *Amselem*. After all, in determining that Brockie's economic activity was not inextricably connected to his Christian faith, the Ontario court was able to conclude that the equality right prevails. In *Amselem*, on the other hand, the Supreme Court came to the opposite conclusion with respect to the importance of Amselem's use of his property. In that case, the Supreme Court determined that the use of the balcony as contemplated by its owner was an essential aspect of his religious practice. Seen together, therefore, the cases demonstrate that how a court determines the core of religious belief ultimately determines the outcome.

This can be seen even more clearly in *Smith v. Knights of Columbus*,[139] wherein the B.C. Human Rights Tribunal considered the case of a same-sex couple denied the right to use a hall owned by a group affiliated with the Catholic Church for a wedding. The owner asserted that its refusal was motivated by deeply held religious beliefs and thus its actions were justified under both the Charter and the B.C. *Human Rights Code*.[140] Following *Brockie*, the tribunal began its analysis with the assertion that "the further the act at issue is from the core religious belief of the person denying the service, the less likely the act will be found to be justified".[141] The tribunal then engaged in a spectrum analysis wherein it noted that had the couple in question sought to rent the parish church for the wedding, the church would have been entitled to reject the request. On the other hand, the situation would have been different if the couple had sought to rent "commercial space, which was available for rent to the public and which had no religious affiliation".[142] In this latter case, the owners of the hall would not have been permitted to refuse.[143]

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[138] *Syndicat Northcrest v. Amselem*, [2004] S.C.J. No. 46, [2004] 2 S.C.R. 551, at para. 50 (S.C.C.). But see *Chamberlain v. Surrey School District No. 36*, [2002] S.C.J. No. 87, [2002] 4 S.C.R. 710, at para. 19 (S.C.C.):

> Religion is an integral aspect of people's lives, and cannot be left at the boardroom door. What secularism does rule out, however, is any attempt to use the religious views of one part of the community to exclude from consideration the values of other members of the community. ... Religious views that deny equal recognition and respect to the members of a minority group cannot be used to exclude the concerns of the minority group.

[139] [2005] B.C.H.R.T.D. No. 544, 2005 BCHRT 544 (B.C.H.R.T.).

[140] R.S.B.C. 1996, c. 210.

[141] *Smith v. Knights of Columbus*, [2005] B.C.H.R.T.D. No. 544, 2005 BCHRT 544, at para. 106 (B.C.H.R.T.).

[142] *Id.*, at para. 110.

[143] *Id.*, at paras. 108-110.

The Knights of Columbus presented a case that lay "at neither end of the spectrum, but somewhere along the continuum, [and thereby] requiring a delicate balance".[144] The hall in question was on church land, but the Knights had made it available to the public without regard to religious affiliation. When first approached by the complainants, the Knights appeared not to realize that the reception was for a same-sex wedding.[145]

The tribunal was thus forced to consider whether the hall, as operated by the Knights, was a public accommodation within the meaning of the *Human Rights Code*.[146] If so, then arguably the Knights' decision to refuse its use for a same-sex reception constituted discrimination on the basis of sexual orientation. In considering the question, the tribunal examined the policies and practices of the Knights with respect to rentals. It concluded that while the hall was used for a variety of both religious and secular activities, the Knights' policy (although unwritten) was that the hall could not have been used for a purpose contrary to the tenets of the Catholic faith.[147] Under these circumstances, the tribunal eventually agreed that the Knights did not have to rent the hall for activities that would be contrary to their core religious beliefs, thus upholding the Knights' claim in theory at least. The panel found that although the Knights were not being asked to participate in the solemnization of the marriage, renting the hall for the wedding reception would have required them to "indirectly condone the celebration of a same-sex marriage, an act that is contrary to their core religious beliefs".[148]

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[144] *Id.*, at para. 112.

[145] *Id.*, at paras. 24-26, 33.

[146] R.S.B.C. 1996, c. 210, s. 8.

[147] *Smith v. Knights of Columbus*, [2005] B.C.H.R.T.D. No. 544, 2005 BCHRT 544, at para. 112 (B.C.H.R.T.). The tribunal noted that the Knights' policy of not renting to same-sex couples was not firmly established or written down at the time of the incident. However, it allowed the Knights to rely on the policy *ex ante* and conceded that "[i]t is not unusual for a standard not to be articulated until the issue presents itself": *id.*, at para. 57.

[148] *Id.*, at para. 113. It is important to note, however, that the tribunal ultimately ordered the Knights to pay damages to the plaintiffs. The tribunal concluded that while the owners could not have been forced to rent the hall, they still had an obligation to take steps to accommodate the renters, where that could be done without violating their religious convictions. In this case, the tribunal concluded that the manner and timing of the cancellation was inconsistent with that duty. *Id.*, at para. 120. Using an accommodation analysis, the tribunal noted, *id.*, at para. 122, that the Knights originally agreed to rent the hall, but then cancelled shortly before the wedding. Although the plaintiffs were able to secure an alternate venue, the tribunal found that the manner of cancellation imposed a hardship on the couple:

> Although, in this case, the Knights could not offer the complainants access to the Hall, and the Panel does not find that they were required to find another Hall for the complainants, they were required to consider the effect on the complainants and any

When it comes to property, therefore, the cases indicate that dignity rights, such as religious or equality rights, are almost always given priority over pure common law contract and property rights. The exception is where the activity or service in question is itself closely associated with a dignity right. The question in these cases, then, is always one of where on the point of the spectrum of economic activity the particular transaction lies. Economic activity closer to the core of religious belief brings greater protection, while the exercise of garden-variety property or economic rights with only a tangential connection to a dignity right will yield. In the end, therefore, "the further the activity is from the core religious belief of the individual, the less deserving it will be of constitutional protection".[149]

2. Speech versus Religion and Equity Rights

Freedom of expression occupies a higher plane than property rights but it too can be limited by religion or equality claims. Indeed, it seems clear that religion and equality rights generally take precedence over speech except where the speech at issue is (1) closely connected to the core values of "political speech"; or (2) expressive speech closely related to another core Charter value.

Political speech has long been thought to be "a necessary feature of modern democracy",[150] and the Supreme Court has declared that the "right of free expression of opinion and of criticism, upon matters of public policy and public administration, and the right to discuss and debate such matters, whether they be social, economic or political, are essential to the working of a parliamentary democracy".[151] As a result, when it comes to "pure speech" on matters of politics and public policy, expressive rights are nigh absolute.

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possible steps they could have taken before calling the complainants and advising them that the Hall was no longer available, given they had entered into a contract to this effect.

But see *Dallaire v. Les Chevaliers de Colomb - Conseil 6452*, [2011] O.H.R.T.D. No. 650, 2011 HRTO 639, at para. 38 (Ont. H.R.T.) (asserting that the BCHRT rejected the Knights' claimed right to refuse to rent).

[149] *Smith v. Knights of Columbus*, [2005] B.C.H.R.T.D. No. 544, 2005 BCHRT 544, at para. 117 (B.C.H.R.T.).

[150] *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] S.C.J. No. 75, [1986] 2 S.C.R. 573, at 583 (S.C.C.).

[151] *Switzman v. Elbling*, [1957] S.C.J. No. 13, [1957] S.C.R. 285, at 326 (S.C.C.).

The same holds true where the speech is "expressive" in nature and is connected with another Charter value. Expressive speech, such as religious practice, artistic endeavour[152] or even union picketing,[153] receives protection because it is the means by which other Charter rights are exercised. Thus, the performance of religious rites, preaching or teaching receive protection because these activities are the means by which the right to hold religious opinions are expressed. As the Court noted in *Big M*, "[t]he essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination."[154] Religious practice is protected under the speech guarantee for the simple reason that the right to hold religious opinions would be a nullity if it did not include the right to express them.[155] Similarly, artistic performances are protected because art is a form of language and "is in many ways an expression of cultural identity", as well as "one's identity with a particular set of thoughts, beliefs, opinions and emotions".[156] For its part, peaceful picketing is expressive of associational rights because it is a "crucial form" of collective action in the arena of labour relations, designed "to publicize the labour dispute in which the striking workers are embroiled and to mount a show of solidarity of the workers to their goal".[157] Courts and

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[152] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927, at para. 42 (S.C.C.) ("The content of expression can be conveyed through an infinite variety of forms of expression: for example, the written or spoken word, the arts, and even physical gestures or acts").

[153] See, *e.g.*, *British Columbia Government Employees' Union v. British Columbia (Attorney General)*, [1988] S.C.J. No. 76, [1988] 2 S.C.R. 214, at 244 (S.C.C.); *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] S.C.J. No. 75, [1986] 2 S.C.R. 573, at 586 (S.C.C.).

[154] *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at para. 94 (S.C.C.).

[155] But see *Trinity Western University v. British Columbia College of Teachers*, [2001] S.C.J. No. 32, [2001] 1 S.C.R. 772, at para. 36 (S.C.C.) ("The freedom to hold [religious] beliefs is broader than the freedom to act on them").

[156] *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] S.C.J. No. 52, [1990] 1 S.C.R. 1123, at 1182 (S.C.C.). See also *Ismail v. British Columbia (Human Rights Tribunal)*, [2013] B.C.J. No. 1308, 2013 BCSC 1079 (B.C.S.C.).

[157] *British Columbia Government Employees' Union v. British Columbia (Attorney General)*, [1988] S.C.J. No. 76, [1988] 2 S.C.R. 214, at para. 27 (S.C.C.). See also *Harrison v. Carswell*, [1975] S.C.J. No. 73, [1976] 2 S.C.R. 200, at 219 (S.C.C.):

> Society has long since acknowledged that a public interest is served by permitting union members to bring economic pressure to bear upon their respective employers through peaceful picketing, but the right has been exercisable in some locations and not in others ….

tribunals thus place a high value on protecting expressive activity as it relates to other Charter values.[158]

Nevertheless, speech rights can be curtailed where they conflict with religion and equality values. *Canada (Human Rights Commission) v. Taylor*[159] and *R. v. Keegstra*[160] establish the principle that speech might be restricted where it tends to arouse racial or religious hatred against others. Both these cases are really equality cases, and they stand for the proposition that limits on speech may be necessary to protect minority groups from oppression or discrimination. As with economic activity, however, the closer expression comes to religious practice, restricting expression becomes more problematic. Using a spectrum analysis, therefore, courts and tribunals have been able to distinguish between speech that is protected, even though it offends the dignity of others, from unprotected or hateful speech that is subject to suppression.

The spectrum in speech cases is rather broad. At one end are the cases where speech is protected notwithstanding its impact on the dignity of others because it is closely connected to the essence of a Charter value. Thus, "pure" political speech or religious activity are protected even though the speech is upsetting or insulting to minority groups.[161] The other end of the spectrum is represented by cases in which speech is curtailed because its purpose is to incite violence or stir up hatred toward others. These cases generally involve some form of "hate speech" and, indeed, implicate a form of expression that may not necessarily be considered speech at all.

The former is represented by *Tesseris v. Greek Orthodox Church of Canada*.[162] Here, a priest was accused of making disparaging comments about homosexual conduct. The tribunal rejected the claim on the grounds that "[t]eaching, dissemination and religious practice by clergy is clearly at the heart" of freedom of religion. The complainant "approached the priest, in the course of performing a religious rite ... to

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[158] *Grant v. Torstar Corp*., [2009] S.C.J. No. 61, [2009] 3 S.C.R. 640, at paras. 47-50 (S.C.C.). See also *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, [2013] S.C.J. No. 62, [2013] 3 S.C.R. 733, at para. 32 (S.C.C.) ("It is through their expressive activities that unions are able to articulate and promote their common interests, and, in the event of a labour dispute, to attempt to persuade the employer").

[159] [1990] S.C.J. No. 129, [1990] 3 S.C.R. 892 (S.C.C.).

[160] [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 (S.C.C.).

[161] *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] S.C.J. No. 11, [2013] 1 S.C.R. 467 (S.C.C.). See also *Owens v. Saskatchewan (Human Rights Commission)*, [2006] S.J. No. 221, 2006 SKCA 41, at para. 53 (Sask. C.A.).

[162] [2011] O.H.R.T.D. No. 780, 2011 HRTO 775 (Ont. H.R.T.).

seek his assistance as a member of the Greek Orthodox clergy. In giving a response in accordance with his faith, the priest was exercising his rights at the core of his right to freedom of religion and that were purely connected with his religious role."[163]

The protection afforded purely political speech is represented by the cases involving newspapers. Courts and tribunals have generally found the content of newspapers, both in the selection of the news articles and editorial opinion, to be at the heart of the right to free expression. The law has thus "recognized the freedom of the press to propagate its views and ideas on any issue and to select the material which it publishes".[164] The press also has the right to refuse to publish material that runs contrary to the views it expresses.[165] Put simply, editorial opinion is "at the very core" of the right to free expression, with the result, that, short of the kind of hate speech discussed below, equality claims are generally subordinated to the expressive rights of newspapers.[166]

The other end of the spectrum is represented by the hate speech cases. Violent expression and expression that threatens violence do not fall within the protected sphere even if they are designed to advance a religious or political agenda.[167] Thus, statutes outlawing speech advocating support for terrorism are valid.[168] This is because threats of violence "take away free choice and undermine freedom of action" and "undermine the very values and social conditions that are necessary for the continued existence of freedom of expression".[169] Similarly, speech

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[163] *Id.*, at para. 9.

[164] *Gay Alliance Toward Equality v. Vancouver Sun*, [1979] S.C.J. No. 55, [1979] 2 S.C.R. 435, at 455 (S.C.C.). It should be noted that this case was decided under the *Canadian Bill of Rights*, S.C. 1960, c. 44, rather than the Charter.

[165] *Gay Alliance Toward Equality v. Vancouver Sun*, [1979] S.C.J. No. 55, [1979] 2 S.C.R. 435, at 455 (S.C.C.).

[166] *Owens v. Post Media Network Inc. (c.o.b. The Leader-Post)*, [2016] S.J. No. 509, 2016 SKQB 289 (Sask. Q.B.); *Whiteley v. Osprey Media Publishing Inc.*, [2010] O.H.R.T.D. No. 2154, 2010 HRTO 2152 (Ont. H.R.T.). Most cases dealing with discrimination claims against newspapers have resulted in the tribunal finding that newspapers are not "services" or "facilities" for purposes of human rights codes. See, *e.g.*, *Gay Alliance Toward Equality v. Vancouver Sun*, [1979] S.C.J. No. 55, [1979] 2 S.C.R. 435, at 455 (S.C.C.); *Whiteley v. Osprey Media Publishing Inc.*, [2010] O.H.R.T.D. No. 2154, 2010 HRTO 2152 (Ont. H.R.T.); *Engineering Students' Society, University of Saskatchewan v. Saskatchewan (Human Rights Commission)*, [1989] S.J. No. 35, 10 C.H.R.R. D/5636 (Sask. C.A.); *Warren v. Chapman*, [1985] M.J. No. 117, 6 C.H.R.R. D/2777 (Man. C.A.).

[167] *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] S.C.J. No. 11, [2013] 1 S.C.R. 467, at para. 112 (S.C.C.).

[168] *R. v. Khawaja*, [2012] S.C.J. No. 69, [2012] 3 S.C.R. 555, at para. 70 (S.C.C.).

[169] *Id*. See also *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, [2009] S.C.J. No. 31, [2009] 2 S.C.R. 295 (S.C.C.); *Suresh v. Canada (Minister of Immigration and Citizenship)*, [2002] S.C.J. No. 3, [2002] 1 S.C.R. 3

designed to incite hatred against minority groups has also been limited on the grounds that "wilful promotion of hatred is an activity the form and consequences of which are analogous to those associated with violence or threats of violence".[170] In both situations — speech promoting violence and hate speech — courts limit such speech on the grounds that it has no redeeming social value.[171]

The middle of the spectrum is represented by cases such as *Ross* and *Whatcott*. Here one finds that courts have been willing to restrict even religious expression on grounds similar to those in *Taylor* and *Keegstra*. Thus, in *Ross v. New Brunswick School District No. 15*,[172] the Supreme Court upheld the removal of a school teacher who disseminated anti-semitic beliefs in various publications outside of school time.[173] The Court agreed that the speech in question was a manifestation of the teacher's rather unique religious beliefs, but upheld his removal from the classroom on the grounds that the comments unduly interfered with his students' right to be free from a hostile educational environment.

In deciding the question of whether Ross' speech might be limited, the Supreme Court noted that the "core values" of the right to free expression were threefold. These include "the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process".[174] Set against this template, the Court concluded that Ross' speech did not fall within any of the core values underlying the Charter's speech guarantee. When read in context, Ross' claims could not be considered a search for political truth since its purpose was to silence the views of those in the targeted minority.[175] With respect to the protection of individual autonomy and self-development, Ross' unsupported assertion of the existence of an international Jewish conspiracy was actually designed to

(S.C.C.); *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] S.C.J. No. 75, [1986] 2 S.C.R. 573, at 583 (S.C.C.).

[170] *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697, at 731 (S.C.C.).

[171] *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] S.C.J. No. 75, [1986] 2 S.C.R. 573, at 583 (S.C.C.).

[172] [1996] S.C.J. No. 40, [1996] 1 S.C.R. 825 (S.C.C.).

[173] "The gist of the respondent's message [was] that Jews are heading a 'conspiracy' or a 'great Satanic movement' against Christians with a view to destroying the Christian faith and civilization": *Ross v. New Brunswick School District No. 15*, [1996] S.C.J. No. 40, [1996] 1 S.C.R. 825, at para. 58 (S.C.C.).

[174] *Id.*, at para. 89, quoting *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] S.C.J. No. 68, [1995] 3 S.C.R. 199, at 280 (S.C.C.).

[175] *Ross v. New Brunswick School District No. 15*, [1996] S.C.J. No. 40, [1996] 1 S.C.R. 825, at para. 91 (S.C.C.).

hinder the ability of Jewish people to develop a sense of self-identity and belonging.[176] Finally, Ross' goal was decidedly not to encourage participation in the democratic process. On the contrary, its purpose and effect was to impede meaningful participation in social and political decision-making by Jews, "an end wholly antithetical to the democratic process".[177]

As for the religion claim, the Court recognized that freedom of religion is not without limits such that "any religious belief that denigrates and defames the religious beliefs of others erodes the very basis of the guarantee in s. 2 (a) — a basis that guarantees that every individual is free to hold and to manifest the beliefs dictated by one's conscience".[178] While Ross certainly had a right to express his sincerely held religious beliefs, that right did not extend to denying others equal respect and dignity.

Whatcott seems to be the apotheosis of this view.[179] The speech in question was clearly motivated by religious belief, but the Court nonetheless held that it could be limited in order to reduce "the harmful effects and social costs of discrimination by tacking certain causes of discriminatory activity".[180] Again, the principle here seems to be that religious expression that denigrates other groups or treats members of vulnerable minority groups as somehow less worthy of dignity or respect than others is not entitled to the same degree of Charter protection as other exercises of expressive freedom. Where speech is concerned, therefore, limits on both political and religious speech are possible when necessary to protect equality values. Moreover, the cases decided thus far indicate that limits on speech may be imposed even when the speech goes very far down the spectrum towards sincere religious expression consistent with the theory, expressed by the Supreme Court in *Big M Drug Mart*, that protection is available only to such manifestations that do not injure one's neighbours.

Courts have taken a similar position where artistic expression is concerned. In two recent cases, tribunals have held that speech which offends someone's dignity interest may be suppressed, at least where the speech prevents access to public accommodations. Thus, in *Ismail v.*

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[176] *Id.*, at para. 92.

[177] *Id.*, at para. 93.

[178] *Id.*, at para. 94.

[179] *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] S.C.J. No. 11, [2013] 1 S.C.R. 467 (S.C.C.).

[180] *Id.*, at para. 71.

British Columbia (Human Rights Tribunal),[181] a comedian at a comedy club was ordered to pay damages to a member of the audience whom he had insulted on the basis of her sexual orientation.[182] The language used by the comedian was offensive in the extreme and would likely have been considered beyond the pale in any other context. The claimant made an equality claim, alleging that the abuse constituted adverse treatment in the provision of a service customarily available to the public.[183] For his part, the comedian argued that the restaurant at which the events took place was "an adult comedy club catering to a predominantly gay clientele".[184] He, therefore, asserted that derogatory jokes about homosexuals were well within the norm of a gay comedy club.

The court noted that while comments made by comedians, artists and emcees are entitled to protection under section 2(b) of the Charter, there is no absolute protection for comments that might otherwise amount to discrimination under human rights legislation. It agreed that "comedy clubs are places where performers push boundaries and sometimes try to generate outrage", but it does not necessarily follow that comedy clubs are "zones of absolute immunity from human rights legislation".[185] In the court's view, the comments directed at the claimant were not part of the act, but were, in fact, designed to drive her from the premises. The speech in question could, therefore, be restricted since its purpose was to deny equal access to a service that was otherwise available to the general public.[186]

A far more aggressive example of limiting speech where it offends dignity is found in *Commission des droits de la personne et des droits de la jeunesse (Gabriel et autres) v. Ward*.[187] Although brought under the Quebec Charter of Rights,[188] the case presents a similar factual situation to *Ismail*. Here, Ward, a local comedian, was ordered to pay damages to the plaintiff, whom he had ridiculed during his comedy act. The plaintiff,

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[181] [2013] B.C.J. No. 1308, 2013 BCSC 1079 (B.C.S.C.).

[182] The comments in question can be found in *Ismail v. British Columbia (Human Rights Tribunal)*, [2013] B.C.J. No. 1308, 2013 BCSC 1079, at paras. 66, 71 (B.C.S.C.).

[183] *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 8.

[184] *Ismail v. British Columbia (Human Rights Tribunal)*, [2013] B.C.J. No. 1308, 2013 BCSC 1079, at para. 312 (B.C.S.C.).

[185] *Id.*, at para. 337.

[186] But see *Redmond v. Hollywood Boutique*, [2018] B.C.H.R.T.D. No. 121, 2018 BCHRT 121 (B.C.H.R.T.) (rejecting claim brought by a black woman against store playing rap music using racial slurs).

[187] [2016] Q.H.R.T.J. no 18, 2016 QCTDP 18 (Que. H.R.T.).

[188] *Charter of Human Rights and Freedoms*, CQLR, c. C-12, ss. 4, 10 (the "Quebec Charter").

a young man with a physical disability, had achieved a certain fame as a singer in Quebec, appearing on television and even presenting the national anthem at a Montréal Canadiens game. Relying on sections 4 and 10 of the Quebec Charter,[189] the plaintiff contended that the comedian's jokes infringed his right to dignity and reputation. The comedian, of course, argued that his comments were protected speech.

The court admitted that both parties were "public personalities"[190] and that the plaintiff suffered no actual damage to his career or any other financial or property interest. Nonetheless, the court rejected the free expression claim on the grounds that the comments injured the plaintiff's "honour, reputation, and dignity":

> Comments that are unacceptable in private do not automatically become lawful when uttered by a comedian in public. What is more, having a platform imposes certain responsibilities. Comedians may not base their actions solely on the laughter of their audience; they must also take into account the fundamental rights of the victims of their jokes.
>
> The fact that Ward's comments have an artistic aspect is no more able to shield Ward from legal actions than the fact that they are comedy. Freedom of expression includes freedom of artistic expression, but the latter does not enjoy a status superior than general freedom of expression. Freedom of artistic expression is also circumscribed by the other rights protected by the [Quebec] *Charter*.[191]

To be sure, the case turns on Quebec's rather idiosyncratic definition of "discrimination", which is far broader than the concept at common law and in human rights statutes elsewhere. One of the fundamental guarantees of the Quebec Charter is that "[e]very person has a right to the safeguard of his dignity, honour and reputation".[192] It also provides

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[189] See, *id.*:

> 4. Every person has a right to the safeguard of his dignity, honour and reputation.
>
> .....
>
> 10. Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, gender identity or expression, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.
>
> Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.

[190] *Commission des droits de la personne et des droits de la jeunesse (Gabriel et autres) v. Ward*, [2016] Q.H.R.T.J. no 18, 2016 QCTDP 18, at para. 131 (Que. H.R.T.).

[191] *Id.*, at paras. 134-135.

[192] *Charter of Human Rights and Freedoms*, CQLR, c. C-12, s. 4.

that a person has a right to "full and equal recognition and exercise of his human rights" without distinction, exclusion or preference based on a prohibited ground of discrimination, one of which is "a handicap or the use of any means to palliate a handicap".[193] Discrimination under the Quebec Charter thus exists where a private party or government body uses a distinction, exclusion or preference in such a way as to nullify or impair the rights guaranteed in the Charter, which in this case, was the right to dignity, honour and reputation.[194] The Quebec Human Rights Tribunal found that by exposing the plaintiff to mockery because of his physical appearance caused by his disability, Ward infringed on the plaintiff's right to respect for his reputation in a manner that was discriminatory as defined by the Quebec Charter.[195]

The result in *Ward* appears to conflict with the Supreme Court's approach to this issue since the latter has consistently rejected the idea that mere insults can rise to the level of speech that must be curtailed. Indeed, the Court has made it clear that "[e]xpression criticizing or creating humour at the expense of others can be derogatory to the extent of being repugnant", and that "[r]epresentations belittling a minority group or attacking its dignity through jokes, ridicule or insults may be hurtful and offensive".[196] However, "offensive ideas are not sufficient to ground a justification for infringing on freedom of expression".[197] Notwithstanding this admonition, we see in *Ward* a greater willingness to subordinate speech rights to dignity claims, even where there is no measurable injury.

It is also important to note that the Supreme Court's approval of restrictions on hate speech distinguishes "between the expression of repugnant ideas" and "expression which exposes groups to hatred".[198] The latter form of speech is subject to limitation, while the former is not. This distinction "filters out expression which, while repugnant and

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[193] *Id.*, s. 10.

[194] *Id*.

[195] The case is currently on appeal before the Quebec Court of Appeal: *Ward c. Commission des droits de la personne et des droits de la jeunesse*, No. 500-09-026283-168 (May 17, 2017).

[196] *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] S.C.J. No. 11, [2013] 1 S.C.R. 467, at para. 90 (S.C.C.). See also *Owens v. Saskatchewan (Human Rights Commission)*, [2006] S.J. No. 221, 2006 SKCA 41, at para. 53 (Sask. C.A.).

[197] *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] S.C.J. No. 11, [2013] 1 S.C.R. 467, at para. 90 (S.C.C.). See also *Owens v. Saskatchewan (Human Rights Commission)*, [2006] S.J. No. 221, 2006 SKCA 41, at para. 53 (Sask. C.A.).

[198] *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] S.C.J. No. 11, [2013] 1 S.C.R. 467, at para. 51 (S.C.C.).

offensive, does not incite the level of abhorrence, delegitimization and rejection that risks causing discrimination or other harmful effects".[199]

In the end, it would appear that speech may be limited where it rises to the level of hate speech in that it is calculated to incite imminent harm or expose a group to hatred or contempt. Quebec, however, adds an additional dimension to limitations on speech with its insistence on protecting an individual's right to dignity.

3. Religion and Equality Rights

The Supreme Court continues to assert that "there is no hierarchy amongst constitutional provisions, and equality guarantees cannot therefore be used to invalidate other rights expressly conferred by the Constitution".[200] More specifically, the Court has declared that any "attempt to give equality guarantees a superior status in a 'hierarchy' of rights must be rejected".[201]

In spite of these assertions, however, it is quite clear that a new hierarchy of rights has emerged and that "equality" is, in fact, at the top of the pyramid. A significant demonstration of this hierarchy is found in *Bruker v. Marcovitz*.[202] Here, the Supreme Court was faced with a settlement agreement in a divorce between an orthodox Jewish couple. The agreement provided that the husband would obtain a "ghet", or religious divorce, upon the conclusion of the civil proceedings. Without a religious divorce, the wife would not be able to remarry in the faith and any children subsequently born to her would be considered illegitimate.[203] Moreover, under Jewish law, she was prevented from obtaining a ghet on her own. Only the husband of the marriage may seek a divorce from the rabbinical court. For nearly 15 years, Mr. Marcovitz refused to appear before the rabbinical court to obtain the ghet. Consequently, Ms. Bruker sued for breach of contract. In awarding damages against the husband, the trial court expressed its concern that the husband's refusal deprived the wife of

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[199] *Id.*, at para. 57.

[200] *Gosselin (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 15, [2005] 1 S.C.R. 238, at para. 2 (S.C.C.).

[201] *Id.*, at para. 26.

[202] [2007] S.C.J. No. 54, [2007] 3 S.C.R. 607 (S.C.C.).

[203] Richard Moon, "*Bruker v. Marcovitz*: Divorce and the Marriage of Law and Religion" (2008) 42 S.C.L.R. (2d) 37.

an equal right to remarry because, as a woman, she could not obtain the religious divorce on her own.[204]

The case eventually made its way to the Supreme Court of Canada, which had to consider (1) whether the agreement to obtain a religious divorce was an obligation cognizable under Quebec law and (2) if so, whether enforcement of such an agreement would violate Mr. Marcovitz's freedom of religion. The Court answered the first question in the affirmative, asserting that "[t]he fact that a dispute has a religious aspect does not by itself make it non-justiciable".[205] Thus, "while the courts may not intervene in strictly doctrinal or spiritual matters, they will when civil or property rights are engaged".[206] Writing for the majority, Abella J. held that the fact that a contractual agreement has religious elements does not immunize it from judicial scrutiny. In her view, the plaintiff's claim did not require the court to adjudicate doctrinal religious principles, such as whether a particular ghet was, in fact, valid. On the contrary, Mr. Marcovitz's promise was simply to remove religious barriers to remarriage by going to the rabbinical court and obtaining a decree of divorce. The contract was valid because it was negotiated between two consenting adults, each of whom was represented by counsel, as part of a voluntary exchange of commitments intended to have legally enforceable consequences. Under those circumstances, the obligation was justiciable in the civil courts.[207] Justice Abella also noted that although the civil law will not recognize the enforceability of moral obligations, "there is nothing in the *Civil Code* preventing someone from transforming his or her moral obligations into legally valid and binding ones".[208]

It is important to note, however, that Abella J.'s reasons for enforcing Marcovitz's obligation to go to the rabbinical court and obtain a ghet was not merely based on the contract made between him and his ex-wife. For Abella J., the husband was obligated to grant his wife a religious divorce on public policy grounds. Justice Abella noted that the refusal of Jewish husbands to freely give their wives a ghet was, "a long-standing source

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[204] *Bruker v. Marcovitz*, [2007] S.C.J. No. 54, [2007] 3 S.C.R. 607, at para. 25 (S.C.C.).

[205] *Id.*, at para. 41.

[206] *Id.*, at para. 45.

[207] *Id.*, at para. 47.

[208] *Id.*, at para. 51. In support of this assertion, Abella J. gave the example of a donation to charity. As is well known, a bare promise to make a gift is unenforceable; however, "if an individual enters into a contract with a particular charity agreeing to make a donation, the obligation may well become a valid and binding one if it complies with the requirements of a contract" under the *Civil Code of Québec*, S.Q. 1991, c. 64.

of concern and frustration in Jewish communities".[209] This concern led to amendments to the *Divorce Act* giving a court discretionary authority to prevent a spouse from obtaining relief under that Act if that spouse refused to remove a barrier to religious marriage.[210] In Abella J.'s view, these amendments are "a clear indication that it is public policy in this country that such barriers are to be discouraged".[211] Moreover, because the amendments "received overwhelming support from the Jewish community, including its more religious elements",[212] the state was justified in stepping in to ensure that marriage and divorce are available equally to men and women:

> The refusal of a husband to provide a *get*, therefore, arbitrarily denies his wife access to a remedy she independently has under Canadian law and denies her the ability to remarry and get on with her life in accordance with her religious beliefs.[213]

When it came time to consider the husband's religious freedom claim under the Quebec Charter, the majority employed the same section 9.1 balancing test used in *Amselem*.[214] This test requires that when balancing a claim of religious freedom, courts must have due regard for "democratic values, public order and the general well-being of the citizens of Québec".[215] In balancing the interests, Abella J. began by stating that Mr. Marcovitz had very "little to put on the scales".[216] She placed great emphasis on the fact that he "freely entered into a valid and binding contractual obligation and now seeks to have it set aside based on *ex post facto* religious compunctions".[217] She then asserted that the husband's objections to obtaining the religious divorce were not the result of a sincerely held religious belief. On the contrary, she declared that "his refusal to provide the *get* was based less on religious conviction than on the fact that he was angry".[218] She then considered the public policy implications and concluded that "[t]he public interest in protecting equality rights, the dignity of Jewish women in their independent ability

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209 *Id.*, at para. 6.

210 *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), Bill C-61. Marcovitz originally contested the constitutionality of these amendments but abandoned that part of his defence on appeal.

211 *Bruker v. Marcovitz*, [2007] S.C.J. No. 54, [2007] 3 S.C.R. 607, at para. 81 (S.C.C.).

212 *Id*.

213 *Id.*, at para. 82.

214 *Syndicat Northcrest v. Amselem*, [2004] S.C.J. No. 46, [2004] 2 S.C.R. 551 (S.C.C.).

215 *Charter of Human Rights and Freedoms*, CQLR, c. C-12, s. 9.1.

216 *Bruker v. Marcovitz*, [2007] S.C.J. No. 54, at para. 79, [2007] 3 S.C.R. 607 (S.C.C.).

217 *Id.*, at para. 79.

218 *Id.*, at para. 69.

to divorce and remarry, as well as the public benefit in enforcing valid and binding contractual obligations, are among the interests and values that outweigh Mr. Marcovitz's claim".[219]

Marcovitz's religious interest had to yield for two reasons. First, there was the "policy benefit of preventing individuals from avoiding the usual legal consequences of their contractual breaches".[220] Second, there was a "constitutionally and statutorily articulated commitment[] to equality, religious freedom and autonomous choice in marriage and divorce" that would flow from the breach of his legal obligation.[221] The defendant's continued refusal to grant his wife a religious divorce "represented an unjustified and severe impairment of her ability to live her life in accordance with this country's values and her Jewish beliefs".[222] Consequently, any infringement of Mr. Marcovitz's freedom of religion was "inconsequential compared to the disproportionate disadvantaging effect on Ms. Bruker's ability to live her life fully as a Jewish woman in Canada".[223]

The decision in *Bruker* seems to clearly contradict *Amselem* on a number of points. First, there is the question of the contract. In both cases, there is a secular agreement (in *Amselem* dealing with property, and in *Bruker* dealing with a divorce) set against a claim of religious rights. In *Amselem*, the Court held that enforcing the property contract would force the party to violate his religious beliefs. In *Bruker*, however, the contract required the husband to actually perform a religious act against his will. As the Quebec Court of Appeal noted, obtaining a ghet "is not simply a matter of 'showing up' and going through a meaningless ritual, especially for someone who is an Orthodox Jew. A religious intention is required. Indeed, divorcing by a formal written document is considered amongst the 613 mitzvot or commandments from the Torah."[224] As a result, in penalizing the husband for not obtaining the ghet, the Supreme Court actually punished a private citizen for not performing a religious rite.

The Supreme Court minimized the issue of consent, regarding it as a mere formality. In actuality, however, an order requiring him to comply with his obligations under the contract would essentially have been an

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219 *Id.*, at para. 92.
220 *Id.*, at para. 80.
221 *Id*.
222 *Id.*, at para. 93.
223 *Id*.
224 *Marcovitz v. Bruker*, [2005] Q.J. No. 13563, 2005 QCCA 835, at para. 46 (Que. C.A.).

order insisting that he lie to the rabbinical authorities. After all, if he had appeared before the rabbinical court, he would have been asked if he freely consented to the divorce. If he answered in the negative and said, "No, I'm only here because a judge made me come", then arguably the rabbinical court would have refused the divorce and he would have been sanctioned for failing to do what he promised to do. As a result, the only way to have avoided being penalized was to lie to the rabbis.

More importantly, the assertion that a Jewish husband's refusal to grant a divorce interferes with his wife's right to remarry under Canadian law is simply incorrect.[225] As Deschamps J. noted in her dissent, the acts of rabbinical courts with regard to marriage have no effect in civil law.[226] The regulation of marriage and divorce is established by statute, and the decisions of religious authorities in these matters are of no consequence. Thus, the failure to obtain a religious divorce imposed no *legal* impediment to Bruker's remarriage in Canada. Contrary to Abella J.'s assertions, therefore, women whose husbands refuse to obtain a ghet are not denied any right under Canadian law. What they are denied is a right to remarry in their faith, but arguably that is not a problem that is susceptible to judicial remedy.[227]

Yet, the most surprising aspect of the decision in *Bruker* is the ease with which the Court takes upon itself the ability to determine the underlying doctrinal issues. Justice Abella's assertion that Marcovitz did not offer sufficient religious reasons to support his objection seems to conflict with *Amselem*'s admonition that "it is inappropriate for courts rigorously to study and focus on the past practices of claimants in order to determine whether their current beliefs are sincerely held".[228] Far more troubling, however, is Abella J.'s willingness to interpret the tenets of Judaism on the question of consent in the process of obtaining a ghet.[229] Indeed, it is the majority's assumptions about the theological issues that underlay the obligation that provided the basis for insisting that the

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[225] *Bruker v. Marcovitz*, [2007] S.C.J. No. 54, [2007] 3 S.C.R. 607, at para. 82 (S.C.C.).

[226] *Id.*, at para. 174, *per* Deschamps J. (dissenting).

[227] See, *e.g.*, *id.*, at paras. 131-133, *per* Deschamps J. (dissenting).

[228] *Syndicat Northcrest v. Amselem*, [2004] S.C.J. No. 46, [2004] 2 S.C.R. 551, at para. 53 (S.C.C.).

[229] See, *e.g.*, *Bruker v. Marcovitz*, [2007] S.C.J. No. 54, [2007] 3 S.C.R. 607, at para. 69 (S.C.C.):

> His religion does not require him to refuse to give Ms. Bruker a *get*. The contrary is true. There is no doubt that at Jewish law he *could* refuse to give one, but that is very different from Mr. Marcovitz being prevented by a tenet of his religious beliefs from complying with a legal obligation he voluntarily entered into and of which he took the negotiated benefits (emphasis in original).

object of the contract was determinable by a civil court.[230] This was one of Deschamps J.'s most significant objections. In her view, the contract to obtain a religious divorce was not a proper object of a contract because it was not an act capable of having legal consequence. In other words, for a contract to be valid under Quebec law, a civil court must have the ability to determine whether the requirements necessary to make the underlying obligation effective have been fulfilled.[231] Put another way, for the contract between Bruker and Marcovitz to be justiciable, the Court must have been able to determine whether the underlying act was valid. The only way to determine that would be to resolve the theological issues concerning consent. Seen in this light, the majority's reliance on contract as a means of enforcing the obligation seems wildly inappropriate. Yet, it was the majority's certainty about its ability to determine the validity of a contract to perform a religious act that weighed in the balance against Mr. Marcovitz's religious freedom claim.

At all events, however, what the majority in *Bruker* does not explain is why the public interest in the certainty of contract in *Bruker* was more significant than that in *Amselem*. Recall that the majority in *Amselem* largely ignored the public policy concerns about certainty of contract, limiting its enquiry to balancing the corresponding benefits and burdens that would be imposed on Amselem or the condominium. In *Bruker*, however, Abella J. effectively adopted Bastarache J.'s dissent in *Amselem* in which he asserted that the citizens of Quebec "have the right to expect that contracts will be respected".[232] This use of public policy demonstrates the instrumentalist approach to balancing: In *Amselem*, certainty of contract is not at all weighed by the majority, whilst in *Bruker* it forms an important part of the majority's reasons for overriding the defendant's religious freedom claim. This contradiction shows that what judges decide to put on the scale often drives the outcome.

In truth, however, the primary factor explaining the difference between *Amselem* and *Bruker* seems to be that *Bruker* is about equality. As noted above, although the public policy in ensuring that contracts are performed was one factor taken into consideration, it seems that Abella J. would still have denied the religion claim based on the "public interest in protecting equality rights [and] the dignity of Jewish women in their

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230 *Id.*, at paras. 54-58.

231 *Id.*, at paras. 173-174, *per* Deschamps J. (dissenting).

232 *Syndicat Northcrest v. Amselem*, [2004] S.C.J. No. 46, [2004] 2 S.C.R. 551, at paras. 79-80 (S.C.C.).

independent ability to divorce and remarry".[233] Enforcing the promise to get a religious divorce was not, therefore, merely a matter of contract, but was motivated by the Court's desire to remove religious barriers to marriage.[234] *Bruker* is about putting marriage in one religious community on an equal footing. Indeed, as Abella J. put it in a rather unusual statement, it is about ensuring "that members of the Canadian public are not arbitrarily disadvantaged by their religion".[235]

The willingness to interpret religious doctrine in order to advance equality is one means by which courts place equality at the top of the hierarchy. Without doubt, one of the most troubling examples of this phenomenon is found in *Hall (Litigation guardian of) v. Powers*,[236] wherein the Ontario Superior Court granted an injunction against a Catholic school requiring it to permit a male student to attend the school prom with his same-sex partner. Here, the court made a distinction between activities going to the core of the school's religious mission and those which had a "social or celebratory" function. The prom clearly fell into the latter category and thus a refusal to permit the student to attend with his chosen guest violated his equality rights. The court noted that the school existed to provide education "in a manner consistent with the teaching of the Roman Catholic Church", but then proceeded to determine for itself what functions were and what were not integral to the Catholic educational mission.[237] It justified its intervention on the grounds that there appears to be "a substantial diversity of opinion within the Catholic community regarding the appropriate pastoral care and the practical application of [the] Church's teachings on homosexuality".[238] Yet, putting aside the question of what *all* Catholics might believe on the subject, it was clear that this particular Catholic school believed that allowing a same-sex couple to attend a school dance would be contrary to the church's teaching. The end result, therefore, was a judicial order requiring a religious institution to violate its own sincerely held religious beliefs on the basis that not every single member of the faith held the same position.

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233 *Id.*, at para. 92.

234 Richard Moon, "*Bruker v. Marcovitz*: Divorce and the Marriage of Law and Religion" (2008) 42 S.C.L.R. (2d) 37, at 50.

235 *Bruker v. Marcovitz*, [2007] S.C.J. No. 54, [2007] 3 S.C.R. 607, at para. 19 (S.C.C.).

236 [2002] O.J. No. 1803, 59 O.R. (3d) 423 (Ont. S.C.J.).

237 *Id.*, at para. 5.

238 *Id.*, at para. 23.

On the face of it, *Hall* violates the basic principle of *Amselem*,[239] which held that "freedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials".[240]

To be sure, *Hall* was decided two years before *Amselem*, but earlier Supreme Court precedent had already made clear that "it is not the role of [the courts] to decide what any particular religion believes".[241] As a result, the fact that the court in *Hall* took it upon itself to determine the significance of a particular ethical belief was thus inappropriate. Nonetheless, the court ploughed ahead, and ultimately concluded that the objections to allowing same-sex couples at school events were not all that important to Catholics in general and so should not be of concern to this particular religious claimant. Bear in mind the Supreme Court's assertion in *Amselem* that not all members of a religious group must subscribe to a particular tenet in order for that belief to be entitled to protection. What is important, at least according to *Amselem*, is that the particular claimant sincerely hold to the belief in question. *Hall* explicitly contradicts that principle, holding that, because not every Catholic is in agreement on how to apply the Church's teachings on homosexuality, the school's sincerely held belief is unworthy of protection.

The tactic adopted in *Hall* forms the basis of the Supreme Court's treatment of Trinity Western University's claims against the law societies. Here, the Court effectively "read down" TWU's religious objection to conclude that, because the Community Covenant was not an integral part of the Christian faith, it could not form the basis of a claim of religious right. The British Columbia Law Society's decision not to accredit TWU "did not limit religious freedom to a significant extent", because the mandatory covenant at issue was "not absolutely required for the religious practice at issue: namely, to study law in a Christian

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[239] It should be noted that *Hall*, *id.*, was decided two years before *Syndicat Northcrest v. Amselem*, [2004] S.C.J. No. 46, [2004] 2 S.C.R. 551 (S.C.C.), and so the Ontario court did not have the latter decision's guidance on this question at the time.

[240] *Syndicat Northcrest v. Amselem*, [2004] S.C.J. No. 46, [2004] 2 S.C.R. 551, at para. 46 (S.C.C.).

[241] *Ross v. New Brunswick School District No. 15*, [1996] S.C.J. No. 40, [1996] 1 S.C.R. 825, at para. 70 (S.C.C.).

learning environment".[242] The Court eliminated the religious element of TWU's claim simply by determining that the covenant was a means to create an "*optimal*" learning environment for those involved, rather than a required element of a Christian law school.[243] In support of this position, the majority insisted that denying prospective students the ability to attend a school with a mandatory Community Covenant did not rise to the level of "forced apostasy" and, therefore, there was no injury to a cognizable religious interest.[244]

It is important to note, however, that the evidence for the majority's assertion came from affidavits submitted by prospective students, not from the university itself. The Court, in other words, was judging the sincerity of TWU's belief on what other people might have said about it.[245] Thus, the *TWU* Court (as did the courts in *Bruker* and *Hall*) ignored *Amselem*'s admonition that the sincerity of a claimant's belief is not measured by what his co-religionists might think or do:

> Since the focus of the inquiry is not on what others view the claimant's religious obligations as being, but rather what the claimant views these personal religious "obligations" to be, it is inappropriate to require expert opinions to show sincerity of belief. An "expert" or an authority on religious law is not the surrogate for an individual's affirmation of what his or her religious beliefs are. Religious belief is intensely personal and can easily vary from one individual to another. Requiring proof of the established practices of a religion to gauge the sincerity of belief diminishes the very freedom we seek to protect.[246]

The focus in *TWU*, therefore, should not have been what prospective students might understand as being important to TWU's mission, but rather on what TWU itself understood its mission and religious principles required. The question after *Amselem* should then have been whether TWU's belief in the importance of the Community Covenant was sincerely held.[247] The majority seems to have completely ignored that principle. In sum, it should not have mattered if TWU was the only institution in the entire world that thought a Community Covenant was

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[242] *Law Society of British Columbia v. Trinity Western University*, [2018] S.C.J. No. 32, 2018 SCC 32, at paras. 85, 87 (S.C.C.).

[243] *Id.*, at para. 87 (emphasis in original).

[244] *Id.*, at para. 90.

[245] *Id.*, at paras. 89-90.

[246] *Syndicat Northcrest v. Anselem*, [2004] S.C.J. No. 46, [2004] 2 S.C.R. 551, at para. 54 (S.C.C.).

[247] *Id.*, at para. 56.

required for a Christian university. Under *Amselem*, that belief, if sincerely held, was entitled to respect and deference for purposes of the Charter analysis.

This refusal to engage with TWU's own vision of its religious principles then allowed the majority to conclude that there was no significant interference with TWU's religious freedom. In the Court's view, the denial of approval was not a "serious limitation" on the rights of the TWU community because "no evangelical Christian is denied the right to practise his or her religion as and where they choose".[248] Again, this misses the mark by a mile: The primary claim at issue was not brought by evangelical Christians in general. It was brought by Trinity Western University, which made a specific claim about what it believed its religious faith required.[249] The Court ignored that claim. This allowed the majority to balance what it characterized as a trivial impairment on a non-essential religious preference against the weightier equality rights of LGBTQ people.

TWU is, therefore, the most recent example of the Supreme Court using the definitional and balancing process to manipulate outcomes in cases where rights collide. By defining TWU's Community Covenant as non-essential to its faith or mission, the Court was able to largely eliminate any conflict between the religious freedom and equality claims. In the end, it was able to balance an optional religious "preference" against a significant equality interest. The definitional aspect of the case was, thus, paramount. Had the *TWU* Court taken TWU's claims seriously, then the balancing test might have produced a different result.

V. CONCLUSION

It seems clear that, notwithstanding assertions to the contrary, Canadian courts have developed a hierarchy of rights. This hierarchy places equality at the top of the pyramid, with other rights falling lower

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[248] *Law Society of British Columbia v. Trinity Western University*, [2018] S.C.J. No. 32, 2018 SCC 32, at para. 102 (S.C.C.).

[249] To be sure, the individual plaintiff, Brayden Volkenant, made a claim as well. The Court rejected his claim on the grounds that Volkenant only expressed a "preference" or would like to have had the "option" of attending TWU. Volkenant's claim was separate from that of TWU. He could not have made any representation as to what TWU's religious beliefs were. It was thus the university's beliefs that were primarily at issue and largely ignored by the Court. See *Law Society of British Columbia v. Trinity Western University*, [2018] S.C.J. No. 32, 2018 SCC 32, at para. 89 (S.C.C.).

on the scale. This allocation of priority has been achieved through a process of definition and balancing where rights collide. The extent to which a court defines the contours of a right narrowly or broadly may, in many cases, be determinative of the outcome. A narrow definition might make a conflict disappear, whilst a broader one requires that the claim be balanced against another competing right. Moreover, in balancing rights, courts are relatively free to include whatever factors seems most appropriate to them. The result is that, on its face at least, the definition and balancing process is highly idiosyncratic and unpredictable. In reality, however, the case law indicates that, in many instances, courts have used the process to achieve particular aims, one of which is to establish the current hierarchy.