The Demise of Mandatory Minimums and the Rise of the Federal Notwithstanding Clause

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I. Introduction

On February 29, 2024, the Court of Appeal for Ontario handed down its reasons in *R. v. Basso*,[1] a decision that has passed without much comment despite its significance. In its brief and almost casual reasons for decision, the court struck down the one-year mandatory minimum sentence for sexual abuse of a minor under 16 years old. It did this despite finding that sentence fit and appropriate in the circumstances, owing to the fact it might constitute cruel and unusual punishment when applied to another hypothetical offender. In due course, this unheralded decision could soon prove to be one of the most momentous to the course of Canadian jurisprudence, as it may — and indeed, should — serve as the catalyst for Parliament's first use of the notwithstanding clause.

As the Supreme Court of Canada's jurisprudence on minimum sentences is suffused with activism and unreflective subjective assessments, recourse to section 33 would not be a surprising development, nor would it be unwarranted. This problematic jurisprudence did not begin with *Basso*, nor did it begin two years ago in *R. v. Bissonnette*, in which the Chief Justice of Canada opined that denying multiple murderers access to parole for longer than 25 years was not merely unconstitutional, but "contrary to the fundamental values of Canadian society".[2] Rather, it began in 2015 in *R. v. Nur*,[3] which "presents itself as a clear case of the Court's repudiation of a recently-enacted core policy of the government".[4]

From *Nur* onward, Canada's courts have been empowered to strike down mandatory minimum sentences for an ever-widening range of offences, including those involving firearms and sexual assaults. As this article will demonstrate, the only way that any minimum sentences will remain, including for first degree murder, is if Parliament breaks the glass on the federal notwithstanding clause. Furthermore, the article concludes that the programmatic deployment of the notwithstanding

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1 [2024] O.J. No. 951, 2024 ONCA 168 (Ont. C.A.) [hereinafter "*Basso*"].

2 [2022] S.C.J. No. 23, 2022 SCC 23 at para. 95 (S.C.C.) [hereinafter "*Bissonnette*"].

3 [2015] S.C.J. No. 15, [2015] 1 S.C.R. 773 (S.C.C.) [hereinafter "*Nur*"].

4 Christopher Manfredi, "Conservatives, the Supreme Court of Canada, and the Constitution: Judicial-Government Relations, 2006-2015" (2016) 52:3 Osgoode Hall L.J. 951 at 963.

clause to reinstate mandatory minimum sentences by Parliament would be both justifiable and salutary.

II. *R. v. Basso:* A One-Year Mandatory Minimum for Sexual Abuse of a Minor under 16 is now Cruel and Unusual Punishment

In *R. v. Basso*, Trevor Basso appealed his conviction and the sentence he had received for sexual assault of a minor under 16 years of age. At the conclusion of the hearing, the Court of Appeal for Ontario dismissed his appeal. Less than a week later, the panel released its reasons, which provided far more than just a reasoned justification for that decision. Despite the court's judgment being issued in the form known as "reasons for decision" (which as the court notes, is how it "classifies shorter decisions that do not require extensive analysis of the facts or law [formerly known as 'endorsements']"),[5] it contained a declaration of constitutional invalidity that struck down the mandatory minimum sentence for sexual assault of a minor.

The facts at issue in the appeal were not complicated. The complainant had been 14 years old at the time of the offence, and was a runaway from a youth justice facility who had come to Basso's residence looking for a friend of her own age. Her account of the sexual assault was that Basso "pulled down her pants and had vaginal intercourse with her, during which she told him to stop". Basso disputed these facts, but on his own account the trial judge had found he was guilty of the offence of sexual abuse of a minor, as "even if I accept the accused's evidence it does not lead to a finding of not guilty".[6]

The Court of Appeal's discussion of the relevant precedents about whether a sentence is cruel and unusual was brisk. Its remarkable conclusion followed a 12-paragraph analysis and application of the two-step test first elaborated by the Supreme Court in 1987[7] (although it was to lie dormant in the Court's jurisprudence for almost 30 years). This test allows courts to consider whether "a provision's reasonably foreseeable applications will impose grossly disproportionate sentences" not merely on the accused, but "on others".[8] This is known as the reasonable hypothetical approach to determining whether a sentencing provision constitutes unconstitutional cruel and unusual punishment. On this basis, the court issued a declaration of constitutional invalidity against section 271(a) of the *Criminal Code*,[9] as it concluded that the "one-year minimum sentence at issue in this case offends s. 12 of the Charter".[10]

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[5] Court of Appeal for Ontario, "About Decisions", online: https://www.ontariocourts.ca/coa/decisions_main/about-decisions/.

[6] *R. v. Basso*, [2024] O.J. No. 951, 2024 ONCA 168 at paras. 4-14 (Ont. C.A.).

[7] *R. v. Smith*, [1987] S.C.J. No. 36, [1987] 1 S.C.R. 1045 (S.C.C.).

[8] *R. v. Nur*, [2015] S.C.J. No. 15, [2015] 1 S.C.R. 773 at para. 77 (S.C.C.).

[9] *Criminal Code*, R.S.C. 1985, c. C-46.

[10] *R. v. Basso*, [2024] O.J. No. 951, 2024 ONCA 168 at para. 61 (Ont. C.A.). *Canadian*

The specific hypothetical example upon which *Basso* was decided was first elaborated in *R. v. Scofield*.[11] In this scenario, a 21-year-old man engages in sexual activity with a 16-year-old girl willingly and knowing her age; his culpability is, purportedly, diminished by the use of alcohol and drugs that lower inhibitions. *Scofield* concluded that, in these circumstances and where this was a first offence (as paraphrased in *Basso*), "a one-year sentence for that conduct would be grossly disproportionate to a proportionate sentence which would not necessarily involve imprisonment or even a conditional sentence".[12] Citing this, *Basso* noted:

> the hypotheticals cited . . . could also have been prosecuted as sexual assault of a minor. On that approach, those hypotheticals would also attract a minimum sentence of one year under the provision impugned in this case . . . This conclusion compels a holding that the one-year minimum sentence at issue in this case offends s. 12 of the *Charter*.[13]

Stripped of all legal euphemisms, *Basso* stands for the following. A 14-year-old runaway alleged that a man had raped her. His own words established that he had committed the crime, so he was convicted but sentenced to the minimum term of imprisonment the statute allowed. The Court of Appeal concluded that this was an appropriate punishment, but since Basso had received the minimum sentence established by Parliament, he was entitled to challenge its constitutionality. While Basso could not demonstrate that it would constitute cruel and unusual punishment in his case, the judges concluded that it might in some other case in the future. Since the judges who decided *Basso* could imagine a hypothetical 21-year-old first offender whose inhibitions were lowered by drugs and alcohol, they concluded that this sentencing provision was unconstitutional in all cases.

Accordingly, the mandatory minimum sentence for sexual assault of a minor under 16 years old was struck down as an unconstitutional infringement of the right not to be subjected to cruel and unusual punishment, which the court concluded could not be justified as a reasonable limitation that is demonstrably justifiable in a free and democratic society. Almost as an afterthought, the court relieved Basso of the remainder of his custodial sentence for unspecified reasons, despite having previously concluded that 12 months of incarceration had been fit and appropriate in his circumstances. Thus, he was released.

III. THE SUPREME COURT'S POLITICAL ACTIVISM ON MINIMUM SENTENCES

The first and most important question one might ask when encountering *Basso* stems from the sense of demoralization it conveys: How did it ever come to this? That is, how is it possible that the Court of Appeal for Ontario could dispense with

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

[11] *R. v. Scofield*, [2019] B.C.J. No. 22, 2019 BCCA 3 (B.C.C.A.).

[12] *R. v. T. (B.J.)*, [2019] O.J. No. 4503, 2019 ONCA 694 at para. 73 (Ont. C.A.).

[13] *R. v. Basso*, [2024] O.J. No. 951, 2024 ONCA 168 at para. 60 (Ont. C.A.).

a one-year minimum sentence for sexual abuse of a minor under 16 years of age in such a casual manner? The path to the answer requires us to follow a decade of caselaw that began with *R. v. Nur*, in which the courts — in particular the Supreme Court — resorted to what Moldaver J. called "loose conjecture" to strike down minimum sentences for drug crimes, firearms offences, sex crimes (including against minors), and even murder. The resurgence of the formerly moribund reasonable hypothetical approach unleashed a wave of judicial activism which has yet to crest. *Nur*'s reasons demonstrate that this was precisely the Court's intention.[14]

Initially, there was considerable resistance. When *Nur* was before the Supreme Court in 2015, it was not merely the Crown but "several Attorneys General [who took] this opportunity to argue that the reasonable hypothetical test . . . should be swept away altogether".[15] The Attorney General of British Columbia argued in his submissions that this approach was "incompatible with judicial restraint".[16] To say the Court rejected this submission would be quite the understatement, as *Nur* both reaffirmed and broadened the reasonable hypothetical approach, setting the judiciary on a collision course with the government. In dissent, Moldaver J. noted that "it is not for this court to frustrate the policy goals of our elected representatives based on questionable assumptions . . . As LeBel J. observed in *R. v. Nasogaluak*, mandatory minimums are 'a forceful expression of governmental policy in the area of criminal law.'"[17] These warnings were swept aside with imperious flourishes.

By the end of the same year, it was clear that a majority at the Supreme Court was now squarely targeting mandatory minimums *tout court*. The language McLachlin C.J.C. used in *R. v. Lloyd* (which struck down minimum sentences for drug offences committed in areas children frequented) made it clear that the Court had "taken an approach that suggests mandatory minimum periods of incarceration will be consistently declared to be unconstitutional in Canada".[18] Namely, McLachlin C.J.C. opined that future challenges will "almost inevitably include an acceptable reasonable hypothetical for which the mandatory minimum will be found unconstitutional".[19]

This statement galvanized judicial activism at all levels of the judiciary, as "*Nur* sent a strong signal to lower courts that unjustified constraints on their ability to

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[14] *R. v. Nur*, [2015] S.C.J. No. 15, [2015] 1 S.C.R. 773 at para. 77 (S.C.C.).

[15] Michael Plaxton, "The Future of Mandatory Minimums: *R. v. Nur* (part 1)" *Policy Options*, April 13, 2015, online: https://policyoptions.irpp.org/2015/04/the-future-of-mandatory-minimums-r-v-nur-part-1/ [hereinafter "'Plaxton, The Future of Mandatory Minimums'"].

[16] Plaxton, "The Future of Mandatory Minimums".

[17] *R. v. Nur*, [2015] S.C.J. No. 15, [2015] 1 S.C.R. 773 at para. 132 (S.C.C.).

[18] Wayne Gorman, "The Death of Mandatory Minimum Periods of Imprisonment in Canada" (2016) 52 Court Review: The Journal of the American Judges Association 96 at 101.

[19] *R. v. Lloyd*, [2016] S.C.J. No. 13, 2016 SCC 13 at para. 35 (S.C.C.).

impose proportionate sentences [as the courts saw them] would no longer be tolerated".[20] In her quantitative analysis of "the post-*Nur* revolution", Stacey M. Purser presents graphs that chart both the number of challenges to mandatory minimums by year and the success rate of those challenges: the first chart resembles a ski jump, while the second resembles the ascent of a summit. In 2019 alone, a mere four years after *Nur* and *Lloyd* were decided, there were 74 constitutional challenges to mandatory minimums; over 85 per cent of them were successful.

In 2020, the Court of Appeal of Alberta heard the appeal of a judgment striking down a four-year mandatory minimum for a serious violent offence, the first time a court had done so to date.[21] The Supreme Court heard a further appeal in 2022, and the majority reaffirmed the use of the reasonable hypothetical approach in section 12 challenges. As in *Nur*, its decision drew a pointed dissent, this time from Côté J. She noted that "intentionally shooting a life-threatening firearm into a building or other place, knowing of or being reckless as to its occupants is highly culpable and blameworthy conduct".[22] In her view, the majority ignored that "it is within Parliament's mandate to regulate firearms-related offences as it sees fit. This includes balancing objectives of deterrence and denunciation with those of rehabilitation, proportionality, and judicial discretion in sentencing."[23] Eight justices disagreed with this opinion.

That same year, when deciding *Bissonnette* (the Quebec City mosque shooting case), the Supreme Court also considered whether it is constitutional to sentence a multiple murderer to life imprisonment without a reasonable chance of parole.[24] The Court, in a decision penned by Wagner C.J.C., concluded that regardless of the nature of the offences (namely, the premeditated murder of congregants at prayer), such a sentence was unconstitutional. The Chief Justice found that life without parole is cruel and unusual punishment because it is "intrinsically incompatible with human dignity".[25]

The Court appeared to constitutionalize the priority of rehabilitation over all other relevant principles of sentencing. This is not a coherent approach, as Leonid Sirota noted, citing a recent judgment of the New Zealand High Court. In *R. v. Tarrant*[26] (the Christchurch mosque shooting case), Mander J. noted that it was possible that no punishment might be adequate to satisfy the legitimate need to hold offenders to

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[20] Stacey M. Purser, "Reconsidering *Luxton* in the post-*Nur* Revolution" (2021) 44:5 Man. L.J. 124 [hereinafter "Purser"].

[21] *R. v. Hills*, [2020] A.J. No. 740, 2020 ABCA 263 (Alta. C.A.).

[22] *R. v. Hills*, [2023] S.C.J. No. 2, 2023 SCC 2 at para. 184 (S.C.C.) [hereinafter "*Hills*"].

[23] *R. v. Hills*, [2023] S.C.J. No. 2, 2023 SCC 2 at para. 225 (S.C.C.).

[24] Leonid Sirota, "Undignifed" (2022) *Double Aspect*, online: https://doubleaspect.blog/2022/06/08/undignified/.

[25] *R. v. Bissonnette*, [2022] S.C.J. No. 23, 2022 SCC 23 at para. 60 (S.C.C.).

[26] [2020] NZHC 2192.

account for the harm they caused to the community. It follows, in his view, that for the most abhorrent crimes, denunciation and deterrence might rightly be deemed the only practical objectives, as the reintegration of such an offender into the community is simply impossible. If we accept this commonsensical argument, a constitutionally mandated preference for rehabilitation is paradoxical, unless we adopt the Chief Justice of Canada's faith that multiple murderers can be rehabilitated, despite all the evidence being to the contrary.

Chief Justice Wagner's profession of belief in universal rehabilitation is said to follow from his conclusion that Canadians' commitment to the value of human dignity requires it. However, as Sirota and Maxime St-Hilaire observed, by 2022 one dared to hope that the Supreme Court had finally grasped an essential truth: dignity is an ineffable notion, the philosophical equivalent of the shifting sands; it is unsuitable for the foundation of any jurisprudential edifice. Unfortunately, as Sirota noted, this did not prevent the Chief Justice from pulling "dignity" out of the sleeve of his robe in *Bissonnette*, and it came up trumps. The human dignity of the offender clearly has priority within the value system that Wagner C.J.C. embraced without reservation in *Bissonnette*, but any worldview that considers only the offender's dignity to the exclusion of everyone else in the community is merely an "abstract, and ultimately soulless, humanitarianism".[27] Why its empty pieties are intoned with such reverence in our legal institutions requires further inquiry.

IV. THE TRANSMUTATION OF VALUES INTO RIGHTS MUST BE STOPPED

There are very few dissenters from this creed in legal academia. The same is true within the highest echelons of the legal profession, including at the board level of provincial law societies and bar associations. The post-*Nur* revolution, even as it approaches its own Thermidor, is the subject of rapturous and near-unanimous praise in these institutions. *Bissonette* is a signal — in other words, another *Nur* — which beckons numerous constitutional challengers forward. In her article about the stunning success of challenges to mandatory minimums, Purser suggests that since *Bissonnette* "demonstrates a willingness to interfere with mandatory minimum type provisions . . . trends in judicial thinking suggest that the sociological climate has finally reached a place where striking down the mandatory minimum for first-degree murder may actually be possible".[28]

While Purser points to a "sociological climate" that is warming to the idea that premeditated murder should have no minimum sentence, it is evident that this is not a naturally occurring phenomenon, but one that is driven by human activity. In the 21st century, and especially since 2016, the political climate has been increasingly heated. While it remains to be seen whether we have reached a tipping point, it is nevertheless important to take stock of how the sociopolitical climate that

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[27] Leonid Sirota & Maxime St-Hiliaire, "Still Wrong, Just a Little Less So" (2020) *Double Aspect*, online: https://doubleaspect.blog/2020/12/03/still-wrong-just-a-little-less-so/.

[28] Purser at 147.

hot-housed judicial activism over minimum sentences was created.

Political scientists have noted that the platform of the Conservative Party of Canada in 2006 was markedly different from that of the Progressive Conservative Party (its predecessor) in elections past: before that time, the criminal law policies of the Liberals and Conservatives had been "indistinguishable".[29] After that, criminal justice reform became a clear point of differentiation from the other parties. This led to a marked increase in the number of offences with a mandatory minimum sentence.

This, in itself, does not explain the *Nur* revolution and the legislative agenda codifying it after 2015; prior to 2006 there had been virtually no concern outside of academia about the constitutionality of minimum sentences, which the *Criminal Code* contained from its inception in 1892. Since *Nur*, the courts have done more than roll back the statutory minimums created by the *Safe Streets and Communities Act*,[30] the *Protection of Communities and Exploited Persons Act*[31] and the *Tougher Penalties for Child Predators Act*,[32] as *Bissonnette* exemplifies. The courts have created a jurisprudence that appears designed to pre-empt "attempts by the lawmakers to enforce blanket approaches to punishment".[33]

The rulings that strike down mandatory minimums sound as harmonious to the Trudeau government as they had been dissonant to its predecessor. In 2016 it remained unclear whether the new Liberal government would "dismantle legislatively what the Supreme Court does not or cannot" with its criminal justice policy. It is by now pellucid that the government concurs with the Court that human dignity — and therefore, in its view, the Charter — requires rehabilitation to be the dominant, if not the only, consideration in sentencing. In 2021, David Lametti (then Attorney General and Minister of Justice) opined that the government was "turning the page on a failed Conservative criminal justice policy" when introducing a bill that abolished mandatory minimums for 20 drugs and firearms offences. Speaking in favour of the bill, Lisa Kerr commented that this "would make our system of sentencing law much more coherent and humane".[34]

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[29] Anthony Doob, quoted in Ian MacLeod "How the Supreme Court is dismantling one of the key parts of Stephen Harper's legacy" *Toronto Sun*, April 22, 2016, online: https://torontosun.com/news/politics/how-the-supreme-court-is-dismantling-one-of-the-key-parts-of-stephen-harpers-legacy.

[30] *Safe Streets and Communities Act*, S.C. 2012, c. 1.

[31] *Protection of Communities and Exploited Persons Act*, S.C. 2014, c. 25.

[32] *Tougher Penalties for Child Predators Act*, S.C. 2015, c. 25.

[33] Ben Andrews, "Courts, Government Bills Are Unravelling Harper-era Crime Laws", *CBC News,* November 2, 2022, online: https://www.cbc.ca/news/politics/stephen-harper-mandatory-minimum-sentences-criminal-code-1.6637154.

[34] Lisa Kerr, quoted in Aaron Wherry, "Why the Liberals Took the Long Road to Sentencing Reform", *CBC News,* February 19, 2021, online: https://www.cbc.ca/news/politics/

The rhetorical flourishes of those arrayed against minimum sentences in all these fora are quite consistent. Whether orating in the courts, the halls of government or the groves of academe, their homilies all assume the argument's conclusion: prioritizing rehabilitation is morally praiseworthy, while any policy that emphasizes denunciation, incapacitation and deterrence is anathematized. As noted above, the Chief Justice of Canada is no exception, as *Bissonnette* noted that "while such a punishment could well be popular, it is contrary to the fundamental values of Canadian society".[35]

It is unlikely that Wagner C.J.C. considered himself to be extending constitutional excommunication to those who believe spree killers like Alexandre Bissonnette should die in prison. Rather, he simply appears to believe that there is no legitimate debate on the moral preeminence of empathy, which is relabelled for jurisprudential purposes as respect for the dignity of the human person. Within the worldview upon which this conclusion is predicated, one can only conceive of life without parole as creating "devastating effects". That said, there is another perspective, namely, that a sufficiently harsh sentence for murdering six people at prayer is both salutary and compatible with human dignity, since it treats the offender as a responsible moral subject capable of both good and evil, whose punishment and atonement are necessary and meaningful. Regardless of whether this would be a "popular" punishment, it cannot be characterized as outside of the pale of fundamental Canadian values, at least not without entrenching ideological tenets within the Constitution. This is evident when we consider the contemporary significance of the vice that corresponds to the virtue of empathy within liberalism's political theology.

John Kekes observed that liberalism was increasingly defined by the opinion that of all the vices, cruelty was the worst. Judith Shklar wrote that "liberal and humane people, of whom there are many among us, would, if they were asked to rank the vices, put cruelty first. Intuitively they would choose cruelty as the worst thing we do", such that "liberalism is the possibility of making the evil of cruelty the basic norm of its political practices and proscriptions".[36] Richard Rorty endorsed Shklar's position, labelling it the "criterion of a liberal".[37]

As Kekes argued, making the proscription on cruelty the essential criterion of a liberal "encourages the thought that liberals are right-minded and their opponents are morally insensitive. It helps to create a climate of opinion in which it is difficult

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[35] *R. v. Bissonnette*, [2022] S.C.J. No. 23, 2022 SCC 23 at para. 95 (S.C.C.).

[36] Judith Shklar, *Ordinary Vices* (Cambridge, MA: Harvard University Press, 1984) at 44; Shklar "The Liberalism of Fear" in Nancy L. Rosenbaum, ed., *Liberalism and the Moral Life* (Cambridge, MA: Harvard University Press, 1989).

[37] Richard Rorty, *Contingency, Irony, and Solidarity* (Cambridge, UK: Cambridge University Press, 1989) at 146.

to criticize liberalism."[38] In that environment, it is inevitable that those who wish to be seen as the most right-minded will demonstrate how rigorously they abide by the criterion by scrupulously avoiding the appearance of cruelty — even if it means abandoning any possibility of deterrence. This accounts for the fact that within Canadian legal academia, there are advocates for "prison abolition", while no scholars of criminal law advocate openly for the return of mandatory minimum sentences. It is likely also the reason why the Supreme Court extended in *Nur* and *Bissonnette* special protections for section 12 against the application of the *Oakes* test, such that the justification of a limitation of that right can hardly be fathomed: "it is hard to imagine how a punishment that is cruel and unusual by nature could be justified in a free and democratic society".[39]

This judicial pronouncement about the limitless and unfathomable nature of the right not to be subjected to cruel and unusual punishment is unique and anomalous. Notably, the text of section 7 of the Charter does not seem to suggest that a deprivation of liberty that is not in accordance with the principles of fundamental justice could be subject to reasonable limitations. It is not clear how such an infringement contrary to the principles of fundamental justice — such as prolonged and indefinite arbitrary detention without access to *habeas corpus* — could ever be justified in a free and democratic society, but McLachlin C.J.C. herself penned a number of opinions applying the *Oakes* test after a determination that section 7 had been infringed.

While Wagner C.J.C. remarked in *Bissonnette* that a limitation of the section 12 right would be "hard to imagine", on the subject of section 7, McLachlin C.J.C. noted more modestly in *Carter* that "it is hard to justify a law that runs afoul of the principles of fundamental justice and is thus inherently flawed . . . [but] a restriction on s. 7 rights may in the end be found to be proportional to its objective".[40] The disparity can be explained most parsimoniously by noting that the deprivation of liberty is far less significant to contemporary liberals than the infliction of cruelty. For this reason, the protection of liberty is bound to contract in proportion to the expansion of initiatives to prevent harm caused by cruelty.

As a result, the Supreme Court's section 12 jurisprudence has undergone hypertrophy, to the point of becoming an immovable object that would block all legislation that would restore mandatory minimums within the *Criminal Code*. Nevertheless, it will soon be met by an irresistible force, in a collision that even the critics of mandatory minimum sentences had thought to be inevitable. Writing in 2012, Debra Parkes predicted that: "An 'activist' decision that strikes down a mandatory minimum sentence may be just the issue that would persuade the federal

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[38] John Kekes, "Cruelty and Liberalism" (1996) 106:4 Ethics 834 at 835.

[39] *R. v. Bissonnette*, [2022] S.C.J. No. 23, 2022 SCC 23 at para. 121 (S.C.C.).

[40] *Carter v. Canada*, [2015] S.C.J. No. 5, 2015 SCC 5 at para. 95 (S.C.C.).

government to invoke the section 33 legislative override."[41] *Bissonnette* certainly fits this prediction. Additionally, four years earlier Kent Roach had anticipated that "Parliament is likely to make its first use of s. 33 in a case involving popular punishment and unpopular criminals."[42] This criterion is satisfied by *Bissonnette*; since the Supreme Court made its ruling retroactive, other mass killers received its benefits. This group includes Justin Bourque, who had initially been sentenced to life with no parole eligibility for 75 years after murdering three police officers.

More particularly, the *Basso* decision corresponds closely to both of these predictions, as it protects the most despicable offenders — sexual predators targeting children — from the application of a remarkably modest mandatory minimum: one year of imprisonment. It could also set the stage for legislation that overrides *Bissonnette*, which would establish a pattern for parliamentary invocation of the notwithstanding clause in service of the restoration of a comprehensive regime of minimum sentencing in Canadian criminal law. Accordingly, scholars working in the areas of constitutional and criminal law should be prepared to address questions about the legitimacy and propriety of these developments.

V. CONCLUSION: THE UNCHARTED WAY FORWARD TO DIALOGUE

Parliament's use of section 33 to override *Bissonnette* and *Basso* and the further extension of that response to the line of cases going back to *Nur* should not be controversial. A strong argument can be made for its legal and political propriety, as this would not involve the pre-emptive use of the notwithstanding clause, nor would it be made where there are nonfrivolous arguments that unwritten constitutional principles are at issue. Finally, these invocations need not create a blanket exemption from all of the constitutional provisions specified in section 33, but could be framed as a specific response to the Court's section 12 jurisprudence, which is both erroneous and politicized.

Despite these advantages, it is likely that those very few members of the legal academy and the profession who defend the constitutionality of such measures will need to rearticulate some basic truths about the *Constitution Act, 1982* and the separation of powers in Canada. Needless to say, these invocations would not override the Constitution; the legislation would conform explicitly with what the constitution text specifies. As Dwight Newman notes:

> The very authority of any such declaration enacted by a parliament or a legislative assembly stems from the constitution itself, so it is not an override of the constitution but a constitutionally supported decision to enact a statute regardless of views that judges might hold as to the conformity of that statute with certain

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[41] Debra Parkes, "From *Smith* to *Smickle:* The Charter's Minimal Impact on Mandatory Minimum Sentences" (2012) 57 S.C.L.R. (2d) 149 at 171.

[42] Kent Roach, "The Future of Mandatory Minimums after the Death of Constitutional Exemptions" (2008) 44 Crim. L.Q. 1 at 3.

> sections of the Charter. This use of the notwithstanding clause is exactly what its framers intended.[43]

Section 33, in Peter Lougheed's words, was intended to allow Parliament to "curb an errant court".[44] This claim about the clause's intended meaning deserves considerable respect, as Lougheed, then Premier of Alberta, was one of the most influential figures in the negotiations that led to the final bargain that produced the Charter,[45] namely, entrenched rights were accepted in exchange for means to override judicial decisions that stray from their proper bounds.

Should the next government employ the notwithstanding clause to reinstate — *seriatim* — every provision establishing a mandatory minimum that had been declared to infringe section 12 from *Nur* onward, this would correspond with Lougheed's description of its proper purpose. *Nur* was wrongly decided, containing several problematic errors. The reasonable hypothetical doctrine allowed for an exponential expansion of the courts' power to strike down legislation. Numerous decisions extending its *ratio* followed; all of these invaded the legislatures' ability to instantiate Canadians' policy preferences about how the purposes of criminal sentencing should be re-balanced in favour of denunciation and deterrence. The Supreme Court even went so far as to invalidate the use of the Charter's limitations clause in this area so as to fortify its position on mandatory minimum sentences. By using the notwithstanding clause to assert its power to decide policy matters in accordance with its political mandate, Parliament would, as Geoffrey Sigalet notes, be vindicating the "historical reasons why [Premiers] Blakeney and Lougheed insisted on including the clause in the Charter: it ensures the legislatures have a turn to *disagree* with courts about Charter rights".[46] It was the Supreme Court that initiated the argument in *Nur* over whether the minimum sentences present in the *Criminal Code* from its inception constitute cruel and unusual punishment. There is no cause for complaint if Parliament chooses to have its say in 2025.

This constructive disagreement is especially necessary now, as the Supreme Court has camouflaged its invasion of the legislative sphere of policy-making in

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[43] Dwight Newman, "Canada's Notwithstanding Clause, Dialogue, and Constitutional Identities" in Geoffrey Sigalet, Gregoire Webber & Rosalind Dixon, eds., *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge, UK: Cambridge University Press, 2019) 209 at 221.

[44] Peter Lougheed, "Why A Notwithstanding Clause?", (1998) *Points of View* No. 6 at 13, online: https:// https://www.constitutionalstudies.ca/wp-content/uploads/2020/08/Lougheed.pdf.

[45] Howard Leeson, *The Patriation Minutes* (Edmonton: Centre for Constitutional Studies, 2011) 85-99.

[46] Geoff Sigalet, "Notwithstanding judicial benediction: Why we need to dispel the myths around section 33 of the Charter", Macdonald-Laurier Institute, December 5, 2022, online: https://macdonaldlaurier.ca/notwithstanding-judicial-benediction-why-we-need-to-dispel-the-myths-around-section-33-of-the-charter/.

sentencing reform in the guise of "fundamental Canadian values". The Court's willingness to pose as the oracle of those values — arrogating the rights of the politically accountable branches of government in doing so — invites and indeed requires forceful disagreement. Not all Canadians profess belief in the worldview that considers cruelty in any of its forms to be the worst of all evils. Some believe that murder and sexual assault of minors are considerably more iniquitous, and strive to elect governments that will enact laws that would deter and denounce those crimes — whether or not punishments that achieve those objectives might hypothetically impair the rehabilitation of the most depraved offenders. Their views are deserving of respect in a free and democratic society, and should not be placed beyond the pale of acceptable Canadian values by the judiciary: that is not its constitutionally defined role.

While many issues will remain to be resolved after Parliament's first uses of the notwithstanding clause, including questions about the precise legal effects of its invocation and political questions about the boundaries of its legitimate and illegitimate purposes, robust federal use of section 33 to set aside *Nur* and its progeny can only assist in clarifying the meaning of the constitutional settlement that was agreed upon at patriation. The alternative is to accept ever more casual disregard from the courts about the importance of denouncing the most heinous crimes, as evidenced by *Basso*. Vigorous and full-throated disagreement about the role of the courts and legislatures within our constitutional order can only serve to clarify the points of disagreement, and drive home the stakes of these disputes about the separation of powers to the Canadian public.

Conflicting Rights? Balancing Equality and Fundamental Freedoms

Kristopher E.G. Kinsinger*

I. Introduction

Since the adoption of the *Canadian Charter of Rights and Freedoms* in 1982, the Supreme Court of Canada (the "Court") has issued multiple rulings on the intersection of constitutional rights and freedoms.[1] These decisions often concern alleged conflicts between fundamental freedoms (specifically, the freedoms of religion and expression) and the right to equality before and under the law without discrimination, which are respectively guaranteed by sections 2 and 15 of the Charter.[2] Yet as an increasing number of such cases appear before the Court, so too have the attitudes toward fundamental freedoms been treated with a growing and palpable suspicion — if not outright hostility.[3]

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

[2] Section 2 guarantees "freedom of conscience and religion; freedom of freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; freedom of peaceful assembly; and freedom of association." Section 15 guarantees the right to "[equality] before and under the law and . . . the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".

[3] Office of International Religious Freedom, *2020 Report on International Religious Freedom Report: Canada* (Washington, DC: United States Department of State, 2020) at 17; Cardus, "An Institutional History of Religious Freedom in Canada", 2d ed., 2020, online: https://www.cardus.ca/research/faith-communities/reports/an-institutional-history-of-religious freedom-in-canada/; University of Saskatchewan, "One in Five Prairie Residents Thinks Free Speech Limited or Non-existent", see online: https://news.usask.ca/articles/research/2022/one-in-five-prairie-residents-thinks-free-speech-limited-or-non-existent.php.

Two of the central truisms of Canadian constitutional law are that a hierarchical approach to Charter rights and freedoms ought to be avoided,[4] and that one part of the Constitution cannot be abrogated by another part of the Constitution.[5] The first of these maxims has, at best, been followed inconsistently by Canadian courts, including the Supreme Court. As Matthew Harrington concludes, "A review of the cases . . . indicates that courts and human rights tribunals do, on balance, privilege certain rights above others".[6] Specifically, Harrington suggests that Court decisions privilege "dignity" rights (that is, "rights that implicate an individual's concept of identity or self-worth") over rights of public participation, such as freedom of expression or freedom of association.[7] However, even as dignity rights are broadly favoured within this "new hierarchy of rights", Harrington observes that "[the right to] equality has, and will continue to have, precedence over religion and conscience [rights], except in very limited circumstances".[8]

This article considers how apparent conflicts between fundamental freedoms and equality rights have been addressed in Charter jurisprudence. The first part surveys post-Charter jurisprudence from the Court on apparent conflicts between fundamental freedoms and equality rights. The second part critically engages the core themes that have emerged in Canadian legal scholarship on such purported conflicts. The article concludes by arguing that the widely received wisdom on how to resolve apparent conflicts between Charter entitlements — namely, that such conflicts are a zero-sum calculus — is wrong. Rather, I contend that any meaningful reconciliation of fundamental freedoms and equality rights must recognize that the Charter's guarantees are conceptually reinforcing, not mutually circumscribing. Equality rights must thus be reinforced by a robust commitment to the fundamental freedoms: section 15 of the Charter guarantees an equality of citizenship, a right that can be exercised only in conjunction with the freedom to fully participate in public discourse and acts of truth-seeking.

II. THE CHARTER JURISPRUDENCE

A survey of how Court jurisprudence has addressed the relationship between the fundamental freedoms and the right to equality would be incomplete without an initial comment on *R v. Big M Drug Mart*, the Court's first ruling on section 2 of the Charter. The case concerned a retailer charged with selling goods on Sunday

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[4] *Dagenais v. Canadian Broadcasting Corp.*, [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835 at 877 (S.C.C.).

[5] *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] S.C.J. No. 2, [1993] 1 S.C.R. 319 at para 144 (S.C.C.). See also *Adler v. Ontario*, [1996] S.C.J. No. 110, [1996] 3 S.C.R. 609 at paras. 38, 137 (S.C.C.).

[6] Matthew P. Harrington, "Canada's New Hierarchy of Rights" (2019) 91 S.C.L.R. (2d) 297 [hereinafter "Harrington, 'Canada's New Hierarchy of Rights'"] at 317.

[7] Harrington, "Canada's New Hierarchy of Rights" at 317.

[8] Harrington, "Canada's New Hierarchy of Rights" at 317-318.

contrary to the federal *Lord's Day Act*. The retailer argued that this explicitly religious law infringed the Charter's religious freedom guarantee. At the Court, a six-judge panel held that the *Lord's Day Act*[9] unjustifiably limited freedom of religion as guaranteed by section 2(a). The majority reasons, written by Dickson J. (as he then was), have become a largely forgotten treatise on the role of freedom in Canada's constitutional order. As Jamie Cameron aptly concludes, "*Big M* remains freedom's first and most important legacy under the Charter", even as the Court's "simple and formative definition of freedom failed to infuse or substantially influence the section 2 jurisprudence" in the decades after *Big M* was handed down.[10]

"[F]reedom", according to Dickson J. in *Big M*, "means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience".[11] This is especially crucial for members of minority communities, lest majoritarian religious groups impose their values on them.[12] On this point, Dickson J. noted that "a free society is one which aims at equality with respect to the enjoyment of the fundamental freedoms and I say this without any reliance upon [section] 15 of the Charter".[13] *Big M*, taken at face value, thus suggests that freedom and equality — having both been guaranteed by the Charter — are mutually reinforcing concepts. Indeed, although the claimant in *Big M* relied only on section 2(a), the case could have just as easily been framed as a religious-equality claim under section 15, a point further addressed in the fourth section of this article.[14]

In the nearly four decades since *Big M* was handed down, there have been relatively few Court cases that involve head-on conflicts between a fundamental freedom and the right to equality, in the sense that a state actor is faced with an irreconcilable choice between violating or upholding one of these guarantees at the expense of the other. More commonly, state actors seek to limit the exercise of a fundamental freedom in the name of promoting values given effect by other sections of the Charter, such as equality. In such cases, affirming the exercise of a

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[9] *Lord's Day Act*, R.S.C. 1970, c. L-13.

[10] Jamie Cameron, "*Big M*'s Forgotten Legacy of Freedom" (2020) 98 S.C.L.R. (2d) 15 [hereinafter "Cameron, '*Big M*'s Forgotten Legacy'"] at 15-16.

[11] *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 at para. 95 (S.C.C.) [hereinafter "*Big M*"].

[12] *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 at para. 96 (S.C.C.).

[13] *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.).

[14] See Kristopher E.G. Kinsinger, "Inclusive Religious Neutrality: Rearticulating the Relationship Between Sections 2(a) and 15 of the Charter" (2019) 91 S.C.L.R. (2d) 219 [hereinafter "Kinsinger, 'Inclusive Religious Neutrality'"] at 224-225.

fundamental freedom would not violate the constitutional right to equality *per se*. Private individuals — even those whose actions are perceived to undermine equality — cannot violate the Charter, since the Charter constrains only state actors.[15] These scenarios often arise when the state limits expression that it deems to be hateful. Indeed, such prohibitions have been held to be justified (at least partially) by the values that inform section 15 of the Charter.[16]

The Court addressed the issue of hateful expression in its 1990 ruling in *R. v. Keegstra*, one of the first major Charter decisions concerning prohibitions on hateful expression.[17] The accused, James Keegstra, was a high school teacher alleged to have made anti-Semitic statements in his class (specifically, denying the Holocaust) and was subsequently charged under the *Criminal Code* for wilfully promoting hatred against an identifiable group. Mr. Keegstra argued that this provision unjustifiably limited his freedom of expression as guaranteed by section 2(b) of the Charter.[18] The Court unanimously held that the promotion of hatred against identifiable groups is activity protected by section 2(b) of the Charter — in other words, that criminalizing this activity limited freedom of expression. However, the Court divided over whether such limitations could be upheld under section 1 of the Charter, which permits "reasonable limits" on Charter guarantees so long as these limits are "demonstrably justified in a free and democratic society".[19] Chief Justice

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[15] Section 32(1) of the Charter stipulates that the Charter applies only to Parliament and the Government of Canada, the provincial legislatures and their governments, and to all matters falling within their respective authorities.

[16] *Criminal Code*, R.S.C. 1985, c. C-46, s. 318.

[17] *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 (S.C.C.) [hereinafter "*Keegstra*"].

[18] Mr. Keegstra's case was heard concurrently by the Court with *R. v. Andrews*, [1990] S.C.J. No. 130, [1990] 3 S.C.R. 870 (S.C.C.), in which the accused also argued that s. 319(2) violated the Charter, as well as *Canada (Human Rights Commission) v. Taylor*, [1990] S.C.J. No. 129, [1990] 3 S.C.R. 892 (S.C.C.), which concerned a similar s. 2(b) challenge of s. 13(1) of the *Canadian Human Rights Act*, S.C. 1976-77, c. 33.

[19] The legal analysis of whether a right or freedom has been infringed upon takes place in two parts: in the first part, the court must determine whether the Charter right or freedom in question has been limited; in the second part, the court assesses whether this limitation is justified by s. 1 of the Charter. The test from *R. v. Oakes* stipulates how such limits are to be assessed under s. 1: limits must be "prescribed by law", pursue a "pressing and substantial" objective, and achieve proportionality between this objective and the limiting measure in question. Proportionality arises where a limiting measure is: (1) rationally connected to its objective; (2) minimally impairing of the right or freedom in question; and (3) proportionate between its positive and negative effects. See *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 at paras. 69-71 (S.C.C.) [hereinafter "*Oakes*"]. Thus, a Charter guarantee can properly be said to be "infringed" only when such a limit is held to be unjustified: see the discussion of Côté and Brown JJ. on this important distinction in their dissent in *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1, 2019 SCC 1 at paras. 122-125 (S.C.C.). See

Dickson, writing for the majority, upheld section 319(2) of the *Criminal Code* as constitutional, while the dissent, led by McLachlin J. (as she then was), would have struck down the impugned provision for giving rise to a constitutionally unjustified "chilling effect" on legitimate expression. Although the Court diverged over the constitutionality of section 319(2), the seven-judge panel agreed that the scope of section 2(b) should not be constrained by other sections of the Charter.

The arguments in favour of upholding the prohibition on hate propaganda in *Keegstra* invoked the values of equality and multiculturalism (respectively affirmed by sections 15 and 27 of the Charter). "The general tenor of this argument", Dickson C.J.C. summarized, is that section 2(b) itself "must be curtailed so as not to extend to communications which seriously undermine the equality, security and dignity of others".[20] The Chief Justice preferred to consider such "various contextual values and factors" in a justification analysis under section 1.[21] Justice McLachlin, on the other hand, cautioned against reading down (*i.e.*, limiting the scope of) section 2(b) "to exclude from protected expression statements whose content promotes such inequality".[22] The values of equality and multiculturalism, she held, cannot limit the scope of freedom of expression "on the basis that the exercise of the freedom may run counter to the philosophy behind another section of the Charter".[23] Indeed, if the state itself has not actually limited the right to equality, then "the value to be weighed on that side of the balance cannot be placed in a factual context", thus "render[ing] the exercise of balancing the conflicting values extremely difficult".[24]

It is beyond the scope of this article (which is concerned, first and foremost, with the relationship between fundamental freedoms and the right to equality) to assess the merits of this so-called contextual approach preferred by Dickson C.J.C. in *Keegstra*. It is worth briefly noting, however, that this methodology has been criticized by Jamie Cameron, who argues that this approach allows courts to more easily designate content which they deem to be objectionable as "low value", thus "relaxing the standard of justification" under section 1.[25] For present purposes, the main takeaway is that both the majority and the minority in *Keegstra* rejected the idea that freedom of expression can be circumscribed by relying on values of equality and multiculturalism. This conclusion is consistent with the approach adopted by the Court in *Big M*: far from limiting the scope of religious freedom, Dickson J. demonstrated how a robust guarantee of freedom, properly understood,

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also *R. v. Brown*, [2022] S.C.J. No. 18, 2022 SCC 18 at para. 126 (S.C.C.).

[20] *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 at para. 39 (S.C.C.).

[21] *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 at para. 40 (S.C.C.).

[22] *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 at para. 243 (S.C.C.).

[23] *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 at para. 248 (S.C.C.).

[24] *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 at para. 248 (S.C.C.).

[25] Jamie Cameron, "Resetting the Foundations: Renewing Freedom of Expression Under Section 2(b) of the Charter" (2022) 105 S.C.L.R. (2d) 121 at 146.

will further the objectives of equality by protecting minority groups from assimilation by cultural majorities. The fourth section of this article further elaborates this point.

Despite unanimously holding in *Keegstra* that equality rights cannot circumscribe the scope of freedom of expression, the Court's 2001 decision in *Trinity Western University v. British Columbia College of Teachers* marks a subtle yet significant departure from this conclusion.[26] From the outset, the case was framed as a conflict between freedom of religion and the right to equality. Trinity Western, a private Christian university in British Columbia, sought accreditation for a proposed school of education. The province's College of Teachers (which regulates teachers in British Columbia) refused to approve the university's application, on the grounds that Trinity Western's Community Standards (which, among other things, prohibited "homosexual behaviour") would foster discrimination in the schools where prospective graduates would teach. Trinity Western argued that this decision fell outside of the College's mandate and infringed the religious freedom of its students.

A majority of the Court (with L'Heureux-Dubé J. dissenting) held that the College of Teachers had acted unreasonably by refusing to accredit Trinity Western. In their reasons for the majority, Iacobucci and Bastarache JJ. concluded that there was no evidence that approving Trinity Western's proposed school of education would foster "a risk of discrimination" in British Columbia's public school system, cautioning that "human rights values . . . encompasses consideration of the place of private institutions in our society and the reconciling of competing rights and values".[27] Trinity Western, as one such institution, was not bound by the Charter. Although the British Columbia *Human Rights Code* broadly prohibits discrimination by private actors, special-interest organizations (including religious institutions) are partially exempted from these provisions when serving members of their respective communities.[28] Moreover, based on the evidence, there was no reason to conclude that "graduates of [Trinity Western] will not treat homosexuals fairly and respectfully".[29]

Nevertheless, the majority in *Trinity Western I* concluded that the College of Teachers was not wrong to consider equality values when making its decision regarding Trinity Western; rather, its error was that it had failed to also consider countervailing values of religious freedom. Where conflicts between the right to equality and religious freedom arise, the majority held, they "should be resolved through the proper delineation of the rights and values involved".[30] Their emphasis

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[26] *Trinity Western University v. British Columbia College of Teachers*, [2001] S.C.J. No. 32, 2001 SCC 31 (S.C.C.) [hereinafter "*Trinity Western I*"].

[27] *Trinity Western I* at para. 34.

[28] *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 41.

[29] *Trinity Western I* at para. 35.

[30] *Trinity Western I* at para. 29.

was not just on the restriction of a right or freedom but on defining the scope of Charter guarantees in a way that avoids potential conflict between them. "In essence", the majority explained, "properly defining the scope of the rights avoids a conflict in this case. Neither freedom of religion nor the guarantee against discrimination based on sexual orientation is absolute."[31]

The majority's reasoning in *Trinity Western I* departs (perhaps unintentionally) from the Court's unanimous conclusion in *Keegstra* that Charter entitlements do not limit the scope of one other.[32] The majority concluded that "the scope of the freedom of religion and equality rights that have come into conflict in this appeal can be circumscribed and thereby reconciled".[33] This rationale assumes that purported conflicts between rights and freedoms are a zero-sum calculus, such that giving effect to one entitlement must necessarily come at the expense of the other. The final section of this article addresses the problems with this methodology.

In the year following its decision in *Trinity Western I*, the Court once again addressed the relationship between freedom and equality in its ruling in *Chamberlain v. Surrey School District No. 36*.[34] The case arose following a school board dispute over the question of whether books portraying same-sex families ought to be included as supplementary material in a kindergarten–grade one curriculum. The teacher who had made the request to include the material in his curriculum brought his case before the courts after the school board — in part due to the objections of religious parents — voted against authorizing the books. The board's resolution was challenged on the grounds that it had acted outside of its mandate and that the resolution itself violated the Charter.

The majority in *Chamberlain*, led by McLachlin C.J.C., resolved the case on administrative law grounds. The board, she concluded, had breached its mandate under the provincial *School Act*[35] by favouring the views of religious parents over those in same-sex relationships. On this basis, the majority declined to address the applicants' arguments that the school board decision had itself infringed the Charter.[36] Justice Gonthier, writing in dissent with the support of Bastarache J., would have upheld the school board's decision, finding that it had properly applied both the provisions of the *School Act* and the values and protections afforded by the Charter.

Chamberlain is one of the few cases decided by the Court that seemingly

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[31] *Trinity Western I* at para. 29.

[32] Even though other Charter values may be relevant under section 1.

[33] *Trinity Western I* at para. 37.

[34] [2002] S.C.J. No. 87, 2002 SCC 86 (S.C.C.) [hereinafter "*Chamberlain*"].

[35] *School Act*, R.S.B.C. 1996, c. 412.

[36] *Chamberlain v. Surrey School District No. 36*, [2002] S.C.J. No. 87, 2002 SCC 86 [hereinafter "*Chamberlain*"] at para. 73 (S.C.C.).

concerns a *bona fide* claim of competing Charter entitlements. Those challenging the school board's decision argued that refusing to authorize books that depicted same-sex couples with children discriminated against same-sex-parented families, while the school board maintained that it had protected the religious freedom of objecting families. The majority resolved the dispute through the principles of secularism and tolerance mandated by the *School Act* — which, in their view, precluded the school board from favouring the views of religious parents over same-sex parents — rather than through a Charter analysis.[37] The dissent, however, would have applied the framework adopted by the majority in *Trinity Western I*, emphasizing that no Charter guarantee is absolute and holding that "where belief claims seem to conflict, there will be a need to strike a balance, either by defining the rights so as to avoid a conflict or within a [section] 1 justification".[38] As noted, this approach suggests that apparent conflicts between Charter entitlements should be resolved by either reading down one guarantee at the expense of the other or by placing limits on those protections under section 1. The final section of this article explains why such thinking fails to account for how Charter guarantees conceptually reinforce one another.

Shortly after its ruling in *Chamberlain*, the Court released an advisory opinion on what would eventually become the *Civil Marriage Act*.[39] Though the *Reference re Same-Sex Marriage* did not actually concern a Charter claim by a private party, the Court nevertheless considered the potential religious freedom and equality implications of the proposed legislation.[40] The Court unanimously held that "the potential for a collision of rights does not necessarily imply unconstitutionality".[41] In cases where rights and freedoms appear to be in conflict, the Court adopted a two-step framework. At the first step, courts must assess whether conflicting rights can be reconciled through delineation (*i.e.*, mutual circumscription), as held in *Trinity Western I*: a "true conflict of rights" exists only where "rights cannot be reconciled", in which case courts proceed to the second step and assess whether limits on a given right are justified by "balanc[ing] the interests at stake under [section] 1 of the Charter".[42]

Strangely, the Court in the *Marriage Reference* did not cite *Chamberlain* in its

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[37] *Chamberlain v. Surrey School District No. 36*, [2002] S.C.J. No. 87, 2002 SCC 86 at paras. 57-59 (S.C.C.).

[38] *Chamberlain v. Surrey School District No. 36*, [2002] S.C.J. No. 87, 2002 SCC 86 at para. 130 (S.C.C.).

[39] *Civil Marriage Act*, S.C. 2005, c. 33.

[40] *Reference re Same-Sex Marriage*, [2004] S.C.J. No. 75, 2004 SCC 79 (S.C.C.) [hereinafter "*Marriage Reference*"].

[41] *Reference re Same-Sex Marriage*, [2004] S.C.J. No. 75, 2004 SCC 79 at para. 50 (S.C.C.).

[42] *Reference re Same-Sex Marriage*, [2004] S.C.J. No. 75, 2004 SCC 79 at para. 50 (S.C.C.).

reasons. Nevertheless, its framework for resolving so-called Charter conflicts mirrors the dichotomy that the minority proposed in *Chamberlain*: between reconciliation by delineation, on the one hand, and limitation by justification, on the other. The Court clearly favoured the former approach, concluding that "many if not all such conflicts" are capable of resolution "within the ambit of the Charter itself by way of internal balancing and delineation".[43]

Almost a decade after its advisory opinion in the *Marriage Reference*, the Court's 2013 decision in *Saskatchewan (Human Rights Commission) v. Whatcott* returned to several of the issues that it had explored in the wake of *Keegstra*.[44] The claimant, William Whatcott, was ordered by the province's Human Rights Commission to pay compensation pursuant to the *Saskatchewan Human Rights Code*[45] for distributing flyers that allegedly promoted hatred against persons based on their sexual orientation and not to distribute any similar materials. Mr. Whatcott argued that the provisions under which these orders were made unjustifiably limited his freedoms of religion and of expression under section 2(a) and (b) of the Charter. In a unanimous decision, the Court largely upheld the impugned provisions of the *Saskatchewan Human Rights Code*, deciding to strike down only the sections that prohibited the distribution of material that "ridicules, belittles or otherwise affronts the dignity of" protected classes of persons.

As with many of the cases considered in this article, *Whatcott* did not concern an equality rights claim, *per se*. However, the Court's unanimous reasons, delivered by Rothstein J., invoked the values of equality rights to assess whether the limitations imposed on Mr. Whatcott's section 2 freedoms by the *Saskatchewan Human Rights Code* were reasonable. As in *Keegstra*, the Court concluded that the impugned provisions of the *Saskatchewan Human Rights Code* prohibited expressive content that fell within the scope of section 2(b). The Court likewise held that these provisions substantially interfered with Mr. Whatcott's ability to act in accordance with a sincere religious belief.[46] The primary question was whether these limitations on section 2 were reasonable under section 1. Justice Rothstein presented the issue starkly:

> We are . . . required to balance the fundamental values underlying freedom of expression (and . . . freedom of religion) in the context in which they are invoked, with competing Charter rights and other values essential to a free and democratic society, in this case, a commitment to equality and respect for group identity and the

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[43] *Reference re Same-Sex Marriage*, [2004] S.C.J. No. 75, 2004 SCC 79 at para. 52 (S.C.C.).

[44] *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] S.C.J. No. 11, 2013 SCC 11 (S.C.C.) [hereinafter "*Whatcott*"].

[45] *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1.

[46] *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] S.C.J. No. 11, 2013 SCC 11 at paras. 64, 155 (S.C.C.).

inherent dignity owed to all human beings.[47]

Notably, while treating Mr. Whatcott's case as one of "competing Charter rights and other [essential] values", the Court's reasons did not cite the framework for reconciling rights and freedoms developed in *Trinity Western I* and the *Marriage Reference*. Instead, Rothstein J.'s analysis closely followed the section 1 test adopted in *R. v. Oakes*.[48] Specifically, the Court held that the prohibition of material that "ridicules, belittles or otherwise affronts the dignity of" protected classes of persons was not rationally connected to its objective of eliminating discrimination.[49] In doing so, Rothstein J. sidestepped the apparent tension between the Court's conclusion from *Keegstra* — namely, that the scope of section 2(b) cannot be limited by other sections of the Charter — and its subsequent framework for reconciling apparent conflicts between Charter entitlements.

In many respects, the twin 2018 decisions in *Law Society of British Columbia v. Trinity Western University* and *Trinity Western University v. Law Society of Upper Canada* mark a turning point in the Court's jurisprudence on purported conflicts between rights and freedoms.[50] The facts were remarkably similar to those that had arisen in *Trinity Western I*. Trinity Western University had received approval from the British Columbia Ministry of Advanced Education and the Federation of Law Societies of Canada to open a law school, which would have been the first private and faith-based law faculty in Canada. The proposed law school proved controversial, once again due to the prohibition in Trinity Western's Community Covenant (the successor to its prior Community Standards document) on sex outside of heterosexual marriage. The law societies of British Columbia, Ontario and Nova Scotia refused in protest to license law graduates of Trinity Western in their respective provinces. The university brought Charter challenges against the decisions of all three law societies, winning in the superior courts and Courts of Appeal in British Columbia and Nova Scotia, but losing at both levels of court in Ontario. The rulings from British Columbia and Ontario were appealed to the Supreme Court; however, the Nova Scotia Barristers Society opted not to appeal.

From the outset, the narrative in *Trinity Western II* was framed as a conflict

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[47] *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] S.C.J. No. 11, 2013 SCC 11 at para. 66 (S.C.C.).

[48] *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 at paras. 69-71 (S.C.C.). See also Dwight Newman, "Reasonable Limits: How Far Does Religious Freedom Go in Canada?" *Cardus*, online: https://www.cardus.ca/research/faith-communities/reports/reasonable-limits/.

[49] *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] S.C.J. No. 11, 2013 SCC 11 at paras. 79-85 (S.C.C.). See also *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, s. 3.

[50] *Law Society of British Columbia v. Trinity Western University*, [2018] S.C.J. No. 32, 2018 SCC 32 (S.C.C.); *Trinity Western University v. Law Society of Upper Canada*, [2018] S.C.J. No. 33, 2018 SCC 33 (S.C.C.) [hereinafter, collectively, "*Trinity Western II*"; citations are to 2018 SCC 32].

between the religious freedom of the university's faith-based community and the equality rights of prospective LGBTQ law students. In its reasons, the Court of Appeal for Ontario described the dispute as "a collision between the broad interpretation of two rights or freedoms" and as "a clash between religious freedom and equality".[51] The Supreme Court of Canada ultimately ruled in a 7-2 split in favour of the law societies, though with separate concurring reasons by McLachlin C.J.C and Rowe J. For their part, the majority did not rely on the framework from *Trinity Western I* and the *Marriage Reference* for resolving conflicts between Charter entitlements, nor did they explicitly describe the case as a rights conflict. Instead, the majority held that the law societies had proportionately balanced their statutory objections with relevant Charter protections (not just Charter rights, but also Charter values).[52] In doing so, the majority effectively (if by implication) treated the claim as a conflict between Charter guarantees, concluding that the law societies had acted reasonably by favouring the equality rights of LGBTQ students in their respective decisions to not license graduates of Trinity Western's proposed law school.[53]

Only Rowe J.'s concurring reasons in *Trinity Western II* relied on the framework from *Trinity Western I* and the *Marriage Reference* for resolving apparent conflicts between Charter guarantees.[54] Indeed, as the only member of the Court to hold that Trinity Western's religious freedom had *not* been limited, Justice Rowe was primarily concerned with the scope of religious freedom itself. Rejecting the majority's reliance on so-called Charter values, he emphasized that it is necessary to define the scope of a Charter right or freedom on its own terms before proceeding to a section 1 analysis.

Equality rights thus played almost no role in Rowe J.'s reasons in *Trinity Western II*. Relying on Dickson J.'s reasons from *Big M*, he instead emphasized that the first stage of the Charter analysis "requires [the] courts to ascertain the purpose of the Charter right or freedom so as to protect activity that comes within that purpose and exclude activity that does not".[55] Multiple "indicators" guide this analysis, including the text, context, and overall purpose of the Charter, as well as "the historical and philosophical roots of the right or freedom" being claimed.[56] Even though religious

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[51] *Trinity Western University v. Law Society of Upper Canada*, [2016] O.J. No. 3472, 2016 ONCA 518 at para. 4 (Ont. C.A.).

[52] Applying the revised section 1 framework adopted in *Doré v. Barreau du Québec*, [2012] S.C.J. No. 12, 2012 SCC 12 [hereinafter "*Doré*"] (S.C.C.) and refined in *Loyola High School v. Quebec (Attorney General)*, [2015] S.C.J. No. 12, 2015 SCC 12 (S.C.C.) for assessing administrative (that is, non-legislative) limits on Charter rights and freedoms.

[53] *Trinity Western II* at paras. 92, 96.

[54] *Trinity Western II* at paras. 176–94.

[55] *Trinity Western II* at para. 184.

[56] *Trinity Western II* at para. 184.

freedom has communal aspects, Rowe J. ultimately held that religious universities such as Trinity Western are incapable of exercising freedoms under section 2(a) beyond those already held by their individual members.[57] As such, he concluded that Trinity Western had sought to "impose adherence to their religious beliefs or practices on others who do not share their underlying faith" in a manner contrary to the underlying purpose of section 2(a).[58]

Justices Côté and Brown did not directly address whether Charter guarantees can limit each other in their dissenting reasons. Their concern had more to do with using amorphous Charter "values" to justify limits on Charter guarantees than it did with using one section of the Charter to limit the scope of another. Nevertheless, their reasons speak directly to this article's core analysis. Rejecting the majority's reliance on the Charter "value" of equality to justify limits on Trinity Western's religious freedom, Brown and Côté JJ. concluded that "without further definition, [equality] is too vague a notion on which to ground a claim to equal treatment in any and all concrete situations, such as admission to a law school".[59] Indeed, "equality in an absolute sense is also perfectly compatible with a totalitarian state, being easier to impose where freedom is limited".[60] For this reason, Côté and Brown JJ. concluded that "the liberal state must foster pluralism by striving to accommodate difference in the public life of civil society".[61]

In summary, the proposition that conflicts between Charter entitlements ought to be resolved through mutual limitation was first proposed by the minority in *Chamberlain*, contrary to the Court's prior conclusion in *Keegstra* that Charter rights and freedoms do not limit the scope of one another. The minority's reasons from *Chamberlain*, while not explicitly cited, appear to have influenced the framework adopted in *Trinity Western I* and refined in the *Marriage Reference*. Though applied inconsistently across the later jurisprudence, this framework assumes that conflicts between Charter guarantees must be resolved either by "reconciling" (*i.e.*, internally limiting) their respective scope or by imposing external "reasonable limits" on their exercise under section 1. Justice Iacobucci (as further discussed in the next section of this article) presents this framework as a choice between "reconciling" or "balancing", terminology that was subsequently adopted in the *Marriage Reference*.

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[57] *Trinity Western II* at para. 219.

[58] *Trinity Western II* at para. 251. While I ultimately disagree with Rowe J.'s conclusion on this point, I admire his framework for defining the purpose of a given Charter guarantee *on its own terms*, rather than in the name of promoting other Charter rights or values. I discuss this further in the fourth section of this article.

[59] *Trinity Western II* at para. 310.

[60] *Trinity Western II* at para. 310.

[61] *Trinity Western II* at para. 260.

III. THEMES IN THE SCHOLARLY LITERATURE

While conflicts between constitutional rights and freedoms have been discussed perennially in Canadian legal scholarship, the actual methodology the Court employed for resolving such cases remains a niche area of academic interest. This section does not exhaustively survey this literature but rather highlights several of the core themes that have emerged from it. Justice Iacobucci has loomed large within this discussion, following up his joint reasons with Bastarache J. from *Trinity Western I* with a 2003 article on the Court's methodology for reconciling conflicting Charter rights and freedoms. His analysis in the latter reiterates the maxim that "there is no hierarchy of rights in the Charter".[62] To give Charter rights and freedoms their "fullest possible expression", Justice Iacobucci explains that they must be defined "in the particular factual matrix in which they arise".[63] Within such a framework, "balancing" must be seen as an exercise distinct from "reconciling"; the former seeks to achieve equilibrium between two things, while the latter attempts to "[harmonize] seemingly contradictory things so as to render them compatible".[64] In Iacobucci J.'s view, balancing indicates that primacy must be given to one right or freedom over another and thus engages the broader social considerations faced by state actors under a section 1 analysis.[65]

Justice Iacobucci's article restates the framework adopted during his tenure at the Court in *Trinity Western I* (and as it would later be refined following his retirement, in the *Marriage Reference*), in which "reconciling" takes the place of "delineation", while "balancing" stands in for "limitation". Based on these comments, he seems largely unconcerned by the tensions highlighted in the second section of this article between *Trinity Western I* and the Court's prior decision in *Keegstra*. Indeed, Iacobucci J. takes the view that the Court's reasons in *Keegstra* represent a balancing exercise rather than one of rights reconciliation. He further suggests that exercises in rights reconciliation do not concern Charter violations. In such cases, the judicial task is "to focus on the values of the different Charter rights in dealing with the problem before the Court, which means that there will be an examination of the underlying interests at stake as reflected in the Charter provisions at play".[66]

With respect to Iacobucci J., his distinction between balancing and reconciling (or, alternatively, between delineation and limitation, to use the language of *Trinity Western I*) lacks methodological clarity. While arguing that reconciliation between constitutional entitlements requires conceptual limitation, he also suggests that such

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[62] Frank Iacobucci, "'Reconciling Rights': The Supreme Court of Canada's Approach to Competing Charter Rights" (2003) 20 S.C.L.R. (2d) 137 at 139 [hereinafter "Iacobucci, 'Reconciling Rights'"].

[63] Iacobucci, "Reconciling Rights" at 140.

[64] Iacobucci, "Reconciling Rights" at 141.

[65] Iacobucci, "Reconciling Rights" at 141-142.

[66] Iacobucci, "Reconciling Rights" at 143.

reconciliation is conceptually narrower than under section 1. Responding to this distinction, Harrington aptly notes that "the terms 'balancing' and 'reconciling' have often been used interchangeably, sowing some confusion in both the cases and commentary".[67] "In the end", he explains, "courts are still required to engage in a balancing process regardless of which method judges propose to use."[68] Both approaches "require that courts eventually give preference to one right over another", even if Iacobucci J.'s methodology for reconciliation is somewhat more constrained than a full section 1 analysis.[69]

Errol Mendes, like Harrington, claims that Justice Iacobucci's distinction between reconciling and balancing is an illusory one.[70] Jena McGill cites this critique by Mendes (along with others) in her observation that "there is no exact formula to guide the process of reconciling in cases where rights are in tension".[71] Nevertheless, McGill identifies four core principles that have emerged regarding conflicts between Charter rights and freedoms. First, she accepts the maxim (which she refers to as the "golden rule") that there is no hierarchy of Charter rights. Second, no Charter right or freedom is absolute, and every such guarantee is limited by the parallel rights of others. Third, she asserts that where rights and freedoms appear to be in tension, the analysis must be a contextual one and not resolved in the abstract. And finally, when faced with seemingly conflicting rights and/or freedoms, courts must consider "the extent or severity of the interference with each right".[72]

McGill contends that recent cases pitting religious freedom against the right to equality have undergone a shift as courts engage more thoroughly with equality interests even as the right to equality remains a more "amorphous" concept that is "susceptible to a range of possible framings and definitions".[73] However, she concurs with then-Professor and now-Justice Carissima Mathen that it has been easier for courts to understand religious freedom claims than claims to equality, given the wider availability of case law that gives religious freedom a large and liberal interpretation.[74] This trend alarms McGill, who calls for a more "purposive

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[67] Harrington, "Canada's New Hierarchy of Rights" at 302.

[68] Harrington, "Canada's New Hierarchy of Rights" at 303-304.

[69] Harrington, "Canada's New Hierarchy of Rights" at 304.

[70] E.P. Mendes, "Reaching Equilibrium between Conflicting Rights" in S. Azmi, L. Foster & L.A. Jacobs, eds., *Balancing Competing Human Rights Claims in a Diverse Society: Institutions, Policy, Principles* (Toronto: Irwin Law, 2012) at 244, quoted in J. McGill, "'Now It's My Rights Versus Yours': Equality in Tension with Religious Freedoms" (2016) 53:3 Alta. L. Rev. 588 [hereinafter "McGill, 'Now It's My Rights Versus Yours'"].

[71] McGill, "Now It's My Rights Versus Yours" at 589.

[72] McGill, "Now It's My Rights Versus Yours" at 590-591.

[73] McGill, "Now It's My Rights Versus Yours" at 603.

[74] McGill, "Now It's My Rights Versus Yours" at 603, citing C. Mathen, "What Religious Freedom Jurisprudence Reveals About Equality" (2009) 6:2 J.L. & Equality at 163-164.

conceptualization of equality", lest equality interests be "minimized, marginalized, or sidelined in the reconciliation exercise when it comes into conflict with a relatively better-defined fundamental freedom like religion".[75]

Other lawyers and scholars have similarly bemoaned the opportunities that the Court has missed to provide a more satisfying framework for resolving apparent tensions between Charter guarantees. In a comment on the *Whatcott* ruling, Cara Zwibel criticizes how the case was resolved under section 1, in which the Court held that hateful expression is contrary to the values of section 2(b).[76] "As a result of this lowered status", Zwibel explains, "there is hardly a need to reconcile freedom of expression with the right to equality and the rigorous standards that should be applied to constitutional violations are eroded."[77] In essence, the "Court evaded the issue by labelling hate speech a form of expression that is less valuable and thus less worthy of protection", and in doing so "deprived us of a thoughtful discussion on how to approach the problem of hate speech and the goal of achieving equality". This problem, Zwibel argues, is often seen in cases in which (allegedly) hateful or discriminatory expression arises from sincerely held religious beliefs.[78]

Derek Ross echoes these themes in his comment on the Court's ruling in *Trinity Western II*, which, in his view, failed to reconcile freedom of religion and the right to equality. The majority, Ross argues, misapprehends both guarantees: "The conflict in [*Trinity Western II*] was not the result of religious freedom infringing on equality rights, but rather a 'sweeping abstraction' of equality being invoked to infringe on religious freedom."[79] In doing so, Ross concludes, the majority "ultimately undermines, not promotes, equality and diversity", since "equality and diversity are not achieved by forcing private associations to alter their defining characteristics (religious or otherwise) to ensure that all people will want to join".[80] Ross affirms the core idea addressed in the fourth section of this article, namely, that freedom and equality — even if understood in a broad and abstract sense — are not the antagonists they are too often made out to be. To guarantee one without the other is to undermine both.

On this point, I ultimately disagree with how Rowe J. would have resolved *Trinity Western II* (specifically, his conclusion that a religiously informed code of conduct

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[75] McGill, "Now It's My Rights Versus Yours" at 603.

[76] Cara F. Zwibel, "Reconciling Rights: The *Whatcott* Case as Missed Opportunity" (2013) 63 S.C.L.R. (2d) 313 at 333 [hereinafter "Zwibel, 'Reconciling Rights'"].

[77] Zwibel, "Reconciling Rights" at 333.

[78] Zwibel, "Reconciling Rights" at 334.

[79] Derek B.M. Ross, "'Intolerant and Illiberal'? *Trinity Western University* and its Implications for *Charter* Jurisprudence" (2019) 89 S.C.L.R. (2d) 127 at 164 [hereinafter "Ross, 'Intolerant and Illiberal'"], citing *Trinity Western II* at para. 311, Côté and Brown JJ, dissenting.

[80] Ross, "Intolerant and Illiberal" at 168.

at a private university coercively imposes religious conformity on those who choose to enrol at that institution). Nevertheless, the Court would do well in future cases to emulate his framework for defining Charter guarantees based on their own underlying purposes, rather than whether they "conflict" with other constitutional entitlements.

To Rowe J.'s above framework, I add a further clarification: while one section of the Charter cannot circumscribe another (just as, more broadly, one section of the Constitution cannot abrogate another), the guarantees of the Charter are properly understood where they are interpreted as reinforcing each other. In other words, to the extent that one Charter guarantee is invoked to define the scope of another, this ought to be done only with the aim of *augmenting* rather than *limiting* the scope of the latter guarantee. In the next section of this article, I explain how the fundamental freedoms reinforce (and are reinforced by) such other guarantees as equality rights.

IV. BEYOND A ZERO-SUM APPROACH

The tension highlighted in the second section of this article between *Keegstra* (which holds that Charter rights and freedoms cannot limit one another) and the framework adopted in *Trinity Western I* and the *Marriage Reference* (in which apparent conflicts between Charter rights and freedoms are resolved through mutual limitation) has gone largely ignored in subsequent jurisprudence and scholarship. Furthermore, as an increasing number of cases have been resolved largely under section 1 of the Charter, the case law has shifted toward the language of Charter values and away from analyses that seek to understand constitutional entitlements on their own terms.[81]

The majority's reasons in *Trinity Western II* demonstrate how reliance on Charter "values" increases the risk that Charter rights and freedoms will be needlessly pitted against one another.[82] It is in these "hard cases" (which, as the saying goes, are prone to result in "bad law") that judges are more likely to invoke Charter values to arrive at preferred outcomes, unconsciously or otherwise.[83] Writing extra-judicially, Justice Peter Lauwers warns that Charter values are "especially susceptible to manipulation" and therefore to undermining the rule of law and constrained judicial decision-making.[84] "Leaving judges to decide what is 'most in keeping' with Charter values", as Harrington similarly argues, "still requires them to make a personal choice as to what each thinks those values might be."[85] Harrington contends that these judicial choices demonstrably favour "dignity" rights over

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[81] A trend that began in *Doré* and arguably reached its apex in *Trinity Western II*.

[82] Ross, 'Intolerant and Illiberal' at 168.

[83] See Peter Lauwers, "What Could Go Wrong with Charter Values?" (2019) 91 S.C.L.R. (2d) 1 at 14 [hereinafter "Lauwers, 'What Could Go Wrong with Charter Values?'"].

[84] Lauwers, "What Could Go Wrong with Charter Values" at 6.

[85] Lauwers, "What Could Go Wrong with Charter Values" at 313-314.

unpopular exercises of the fundamental freedoms.[86] Invoking Charter values to resolve apparent conflicts between Charter entitlements — as Justice Iacobucci urges — risks further obfuscating the purported distinction between rights reconciliation and rights balancing.[87]

Indeed, as mentioned above, Mendes and Harrington each argue that there is no meaningful distinction between Justice Iacobucci's concepts of reconciliation and of balancing. I would take these arguments further and contend that this preferred methodology is premised on a false dichotomy. The general concept of "rights conflicts" incorrectly assumes that many of the Charter's guarantees — specifically the fundamental freedoms and the right to equality — exist in tension with one another. McGill, for example, implicitly contends that the resolution of conflicts between fundamental freedoms and the right to equality is a zero-sum calculus. With a more "purposive conceptualization of equality", she argues, equality rights claimants will be better equipped to defend their interests against religious freedom claims.[88] To be fair, McGill made this argument before the Court's decision in *Trinity Western II*. Yet in the wake of this decision and other similar rulings, there are increasingly few grounds on which to argue that courts are prone to unduly favour fundamental freedoms over equality rights.[89]

More fundamentally, McGill's narrative neglects to provide a satisfying account of why the Charter guarantees *both* freedom and equality. Cases such as *Trinity Western II* have reinforced the idea that equality is protected when ostensibly harmful exercises of fundamental freedoms are curtailed. In this regard, I contend that the received wisdom for resolving conflicts between Charter rights and freedoms is wrong. Far from opposing one another, neither freedom nor equality can exist without a meaningful guarantee of the other. The Charter is more than a mere assortment of disparate rights and freedoms. Its guarantees, taken together, are intended to preserve Canada's status as a "free and democratic society", as section 1 unambiguously states. To the extent that these interests play any role in limiting other Charter rights and freedoms, it is against this constitutional backdrop. As the dissent in *Trinity Western II* held, violations of the Charter do not arise out of disputes between private parties, but only where the state has failed to demonstrate that such limitations are demonstrably justified. Accordingly, to suggest that a robust guarantee of fundamental freedoms somehow undermines or threatens equality rights misapprehends the very purpose of both entitlements.

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[86] Harrington, "Canada's New Hierarchy of Rights" at 317.

[87] Iacobucci, "Reconciling Rights" at 143.

[88] McGill, "Now It's My Rights Versus Yours" at 603.

[89] See *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, [2019] O.J. No. 2515, 2019 ONCA 393 (Ont. C.A.). See also *Servatius v. Alberni School District No. 70*, [2022] B.C.J. No. 2390, 2022 BCCA 421 (B.C.C.A.).

On this point, we forget the Court's ruling in *Big M* at our peril.[90] The case remains an apt study of the interdependent relationship between freedom and equality. As recounted in the second section of this article, *Big M* concerned the constitutionality of the federal *Lord's Day Act*. The late Peter Hogg noted that such explicitly religious laws place an unequal burden on anyone who does not assent to the state's preferred religious worldview. From this perspective, state support of religion undermines both freedom of religion and the right to equality.[91] "These cases were not decided under [section] 15", Hogg remarked, "but they could easily be viewed as equality cases in which benefits are conferred on Christians that are denied to the adherents of other religions."[92] Hogg made this point more forcefully in a 2003 article: while the *Big M* challenge to the federal *Lord's Day Act* was framed as a religious freedom question, "the objection to Sunday closing laws is really an equality claim".[93]

Big M demonstrates how the fundamental freedoms enumerated by section 2, perhaps more than any other right or freedom guarantee in the Charter, cultivate the constitutional soil in which a free and democratic society can flourish. Section 2's fundamental freedoms are not a mere preamble to the other rights guaranteed by the Charter; to the contrary, their centrality to the scheme of Canadian constitutional governance is precisely why they have been designated as "fundamental". As Dickson J. demonstrated, the fundamental freedoms enjoy a similar "primacy" or "first-ness", as does the First Amendment to the American *Bill of Rights*: "They are", he explained, "the *sine qua non* of the political tradition underlying the Charter".[94] To be clear, this does not mean that section 2 enjoys preference in a "hierarchy of rights" — a concept that the Court has rightly rejected, in my view. Rather, *Big M* confirms that the fundamental freedoms lay the conceptual foundation for the exercise of the other rights that have been guaranteed by the Charter.

Section 2's freedoms must thus be understood "by reference to the character and the larger objects of the Charter itself . . . [and] to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter", as Dickson J. held in *Big M*.[95] In other words, the demands of freedom are inexorably tied to creating a civil polity within which diverse communities can

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[90] See Cameron, "*Big M*'s Forgotten Legacy".

[91] See Kinsinger, "Inclusive Religious Neutrality" at 224-225.

[92] Peter Hogg, *Constitutional Law of Canada*, student ed. (Toronto: Thomson Reuters, 2016) at 55–60.2.

[93] Peter Hogg, "Equality as a Charter Value in Constitutional Interpretation" (2003) 20 S.C.L.R. (2d) 113 at 117.

[94] *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 at para. 122 (S.C.C.).

[95] *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 at paras. 117, 122 (S.C.C.).

participate equally. Regarding this "forgotten legacy of freedom", Jamie Cameron remarks that:

> Freedom places a demand on tolerance, asking a democratic community to forgo its instinct to suppress what is objectionable, discordant, disruptive. Though those who defend the courage of their convictions may be valorized, pilloried — or more likely — ignored, a principled conception of freedom is uninterested in preferring some voices and silencing others. Prizing freedom in turn demands reciprocal courage because tolerating profound difference — granting space to all views and voices — challenges a community to permit what is widely held and believed to be unsettled, and even placed at risk.[96]

These are the "larger objects" to which the fundamental freedoms are oriented. Such objects manifestly encompass a meaningful right to equality. Theologian and ethicist Andrew T. Walker makes a similar observation regarding the broader relationship between fundamental freedoms:

> Societies that allow for free speech, free association, and free assembly are the types of societies that understand that citizens have beliefs and obligations that precede the demands and obligations of the state and civil society. This is why religious liberty is so central to building societies that not only are free but also understand that with freedom comes the corresponding reciprocities of pluralism, respect, civility, kindness, and a commitment to diversity that allows freedom's continued existence.[97]

Accordingly, an individual cannot truly enjoy the "equal protection and equal benefit of the law without discrimination", as section 15 guarantees, if they are unable to participate in society as free citizens. "The ability of each citizen to make free and informed decision is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government", as Dickson J. so aptly explained in *Big M*.[98] The fundamental freedoms, Ross thus argues, collectively "protect the free development, exchange, conveyance and manifestation of ideas (particularly unpopular, dissenting and/or minority viewpoints)".[99] The exercise of these freedoms — unencumbered by the constraints so readily imposed by majorities — is precisely what allows social-minority groups to participate as equal citizens in public life and in the democratic institutions that govern our civil polity.[100]

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[96] Cameron, "*Big M*'s Forgotten Legacy" at 39.

[97] A.T. Walker, *Liberty for All: Defending Everyone's Religious Freedom in a Pluralistic Age* (Grand Rapids: Brazos Press, 2021) at 190.

[98] *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 at para. 122 (S.C.C.).

[99] Derek B.M. Ross, "Truth-Seeking and the Unity of the Charter's Fundamental Freedoms" (2020) 98 S.C.L.R. (2d) 63 at 69.

[100] See Bruce B. Ryder's excellent article on this point, "The Canadian Concept of Equal Religious Citizenship" in R. Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: University of British Columbia Press, 2008) at 87.

And yet there remains a more cardinal explanation for why the freedoms guaranteed by the Charter are described as fundamental: namely, that these freedoms precede the adoption of positive law itself. Though such a conclusion may seem better suited to the study of political philosophy or even theology, it retains a compelling jurisprudential basis. In *Saumur v. Quebec (City)* — a landmark Court ruling on religious freedom that was decided decades before the enactment of the Charter — Rand J. explained how such freedoms exist prior to the enactment of a positive legal order:

> Strictly speaking, civil rights arise from positive law; but freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order. It is in the circumscription of these liberties by the creation of civil rights in persons who may be injured by their exercise, and by the sanctions of public law, that the positive law operates.[101]

Fundamental freedoms, on this view, do not arise out of any political tradition; they are, rather, inalienable freedoms that every person bears by virtue of their inherent humanity. In other words, these freedoms are not bestowed by any external authority such as the state — or any such constitutional system governing it — but exist first and foremost by virtue of the fundamental human equality to which we are all bound. Conceptions of law that pit fundamental freedoms and equality rights against one another — including those examined in this article — forget this truth at their peril.

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[101] *Saumur v. Quebec (City)*, [1953] S.C.J. No. 49, [1953] 2 S.C.R. 299 at 329 (S.C.C.).