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“RECONCILING RIGHTS”
THE SUPREME COURT OF CANADA’S APPROACH TO COMPETING CHARTER RIGHTS

The Honourable Justice Frank Iacobucci

I. INTRODUCTION

The Charter of Rights and Freedoms became part of Canada’s constitution by virtue of the Constitution Act, 1982, assuming the role of pre-eminent textual guardian of our fundamental freedoms. Over the last 20 years, Canadian courts, particularly the Supreme Court, have defined the contours of individual Charter rights, and sought to establish a framework for when state action could legitimately encroach upon constitutionally protected rights. One area of Charter jurisprudence which remains relatively undeveloped, however, is that which concerns competing Charter rights. While much has been written on the limits of an individual’s Charter rights vis-à-vis the state, the same cannot be said about the parameters of one individual’s Charter rights vis-à-vis those of another. In other words, how should we deal with the situation where Charter rights conflict? The answer, in my view, is to be found in the concept of reconciling Charter rights, a topic that is the subject of this paper.

It is important to recognize that the techniques required for reconciling Charter rights are analogous to those used in various other areas of constitutional analysis, and indeed, legal analysis more generally. To illustrate, in Reference re Secession of Quebec, the Supreme Court considered the relationship among

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* Justice, Supreme Court of Canada. I should like to recognize the invaluable assistance of my law clerk, Tanya Monestier, in the research and preparation of these comments.
four foundational constitutional principles: federalism, democracy, constitutionalism/rule of law and respect for minority rights. The Court stated:

These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other.

Our Constitution has an internal architecture, or what the majority of this Court ... [has] called a ‘basic constitutional structure.’ The individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole.³ (emphasis added).

Similarly, in federalism or division of powers analyses, courts employ a variety of interpretive techniques such as “mutual modification” in order to reconcile seemingly conflicting heads of legislative power under sections 91 and 92 of the Constitution Act. For example, “the federal Parliament’s exclusive power to legislate in relation to ‘trade and commerce’ (s. 91(2)) has been held to exclude intraprovincial trade so as to not conflict with the provincial Legislatures’ exclusive power to legislate in relation to ‘property and civil rights in the province’ (s. 92(13)).”⁴ As well, when confronted with French and English versions of constitutional language, courts are called upon to reconcile the versions in a manner that ensures that full effect is given to the meaning of each.⁵

This technique of “reconciliation,” however, is not unique to constitutional analysis. Judges on a daily basis use a host of interpretive tools to harmonize provisions of a statute or a contract which appear contradictory or incompatible. Reconciling rights under the Charter is a similar exercise to those described above, but takes on heightened significance owing to the nature of what is being reconciled: fundamental human rights enshrined in Canada’s Constitution.

In its Charter jurisprudence, the Supreme Court of Canada has articulated several fundamental principles of Charter interpretation. First, it has consistently asserted that no Charter right is absolute. A particular Charter right must be defined in relation to other rights and with a view to the underlying context in which the apparent conflict arises. In the case of R. v. Crawford; R. v. Creighton,⁶ the Supreme Court expressed this principle in the following way:

³ Id., at paras. 49-50.
... Charter rights are not absolute in the sense that they cannot be applied to their full extent regardless of the context. Application of Charter values must take into account other interests and in particular other Charter values which may conflict with their unrestricted and literal enforcement. 7

In R. v. Mills, 8 this same concept was phrased in these terms:

At play in this appeal are three principles, which find their support in specific provisions of the Charter ... No single principle is absolute and capable of trumping the others; all must be defined in light of competing claims. 9

Closely related to this principle of Charter interpretation is the idea that there is no hierarchy of rights in the Charter, nor should one be inferred from Charter jurisprudence. 10 This seminal statement of law was made by Lamer C.J. in Dagenais v. Canadian Broadcasting Corporation: 11

A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the Charter and when developing the common law. When the protected rights of two individuals come into conflict, as can occur in the case of publication bans, Charter principles require a balance to be achieved that fully respects the importance of both sets of rights. 12

Finally, just as the Constitution — written and unwritten — must be viewed as a coherent set of values, 13 so too must the Charter be regarded and

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7 Id., at para. 34.
8 [1999] 3 S.C.R. 668 [hereinafter “Mills”]
9 Id., at para. 61.
10 In one sense, the Charter does prescribe a hierarchy of rights in that some sections are subject to parliamentary override while others are not. The rights that can be overridden through the s. 33 notwithstanding clause include: s. 2 (freedom of religion, expression, assembly, association); ss. 7-14 (legal rights); s. 15 (equality). Professor Hogg argues that “Section 33 thus creates two tiers of rights: the ‘common rights’ that are subject to override, and the ‘privileged rights’ that are not.” He further explains, however, that “[t]he hierarchy of rights that I have described reflects the differences in the vulnerability of the right to legislative abridgement. It does not imply that the ‘privileged rights’ must take priority over the ‘common rights’ when they come into conflict.” Hogg, supra, note 4, at 33-24 — 33-25.

This is analogous to saying that no section of the Constitution trumps another in cases that are not strictly Charter based. For instance, s. 2(b) or s. 15 of the Charter cannot be said to eclipse s. 93’s guarantee for funding of Roman Catholic separate schools in Ontario. See, for instance, Adler v. Ontario, [1996] 3 S.C.R. 609.
13 See generally Reference re Secession of Quebec, supra, note 2.
interpreted as a unified whole. The Supreme Court of Canada has reaffirmed this cardinal principle of Charter interpretation on many occasions. Most recently, in *Trinity Western University v. British Columbia College of Teachers*, the Court repeated that “... the Charter must be read as a whole, so that one right is not privileged at the expense of another.” Many would argue that it is not the role of courts to make normative judgments about which rights should be prioritized at the expense of others. However, it is proper for courts to give the fullest possible expression to all relevant Charter rights, having regard to the broader factual context and to the other constitutional values at stake.

With this as the conceptual backdrop, I turn now to the issue of rights reconciliation. To quote the famous words of John Stuart Mill: “The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it.” The principle is easy to state, but difficult to apply. Where does one draw the line when Charter rights appear to come into conflict? How does one define where one right begins and one right ends? At what point does one person’s freedom begin to impinge upon another’s? Concrete answers to these weighty questions are elusive. The methodology that should be employed in answering them — that is, rights reconciliation — is not.

The key to rights reconciliation, in my view, lies in a fundamental appreciation for context. Charter rights are not defined in abstraction, but rather in the particular factual matrix in which they arise. When understood in this way, the exercise of reconciling competing Charter rights becomes a less onerous and daunting task. My discussion will be divided into comparing reconciling rights and justification balancing under section 1 of the Charter, followed by an overview of the Supreme Court’s jurisprudence on rights reconciliation. I then will briefly deal with the basic principles to be gleaned from the jurisprudence and the overall significance of rights reconciliation.

II. HOW DOES “RECONCILING” DIFFER FROM “BALANCING” UNDER SECTION 1 OF THE CHARTER?

Courts, including the Supreme Court of Canada, often label the exercise of giving content to two seemingly competing Charter rights “balancing.” In fact, the two terms have been used interchangeably in Charter jurisprudence over the

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14 [2001] 1 S.C.R. 772 [hereinafter “Trinity Western”].
15 *Id.*, at para. 31.
years. For example, courts speak of “balancing” the right of an accused to full answer and defence with the right of a complainant to a reasonable expectation of privacy in cases dealing with publication bans, or of “balancing” the right to free speech against the right to be free from discrimination in hate propaganda cases.

The Oxford English Dictionary\textsuperscript{17} defines “balance” as:

\textbf{Balance}: 1. To weigh (a matter); to estimate the two aspects or sides of anything; to ponder. 2. To weigh two things, considerations, etc., against each other, so as to ascertain which preponderates. 3. To counterbalance or counterpoise one thing by, with, or against another. 4. To bring to or keep in equilibrium. (emphasis added).

The more correct term, however, may be “reconcile,” which implies harmonizing seemingly contradictory things so as to render them compatible. The term is defined by the Oxford Dictionary as:

\textbf{Reconcile}: 10. a. To make (discordant facts, statements, etc.) consistent, accordant, or compatible with each other. 11. a. To make (an action, condition, quality, etc.) compatible or consistent in fact or in one’s mind with another; to regard as consistent with. b. To make (a theory, statement, author, etc.) agree with another or with a fact; to show to be in agreement.\textsuperscript{18} (emphasis added).

The exercise in which courts engage when they define the content and scope of rights in relation to one another, more closely approximates rights “reconciliation” than rights “balancing.” The latter term, which connotes assigning primacy to one right over another right or interest after having weighed the relevant considerations, is customarily used in section 1 \textit{Oakes} test jurisprudence and is perhaps better suited to that sort of analysis.

The most obvious difference between “balancing” under section 1 and “reconciliation” Charter rights stems from the nature of the actors involved. Under section 1, the state must justify a violation of an individual’s Charter rights. When reconciling competing Charter rights, on the other hand, a court seeks to reconcile the constitutionally guaranteed rights of one individual with those of another.\textsuperscript{19} Consequently, the onus of proof in each of these cases plays out somewhat differently. Under section 1, the party challenging the impugned law must establish a \textit{prima facie} encroachment of a Charter right. The state then bears the serious onus of defending or justifying the violation with reference to the overall collective state interest in the Charter infringement.

\textsuperscript{17} Oxford English Dictionary, 2003 (online edition).
\textsuperscript{18} \textit{Id.}
\textsuperscript{19} This is the classic dichotomy of “state v. individual” as opposed to “individua v. individual.”
In the reconciling context, there is no rule about onus per se. If, for instance, the common law is challenged as not striking the appropriate relationship between competing Charter rights, the party alleging this bears the burden of demonstrating that the common law should be modified accordingly. The judiciary is then assigned the task of reconciling the competing rights. In *Hill v. Church of Scientology of Toronto*, the Supreme Court described these differences in terms of onus in the following terms:

> Finally, the division of onus which normally operates in a Charter challenge to government action should not be applicable in a private litigation Charter “challenge” to the common law. This is not a situation in which one party must prove a *prima facie* violation of a right while the other bears the onus of defending it. Rather, the party who is alleging that the common law is inconsistent with the Charter should bear the onus of proving both that the common law fails to comply with Charter values and that, when these values are balanced, the common law should be modified. In the ordinary situation, where government action is said to violate a Charter right, it is appropriate that the government undertake the justification for the impugned statute or common law rule. However, the situation is very different where two private parties are involved in a civil suit. One party will have brought the action on the basis of the prevailing common law which may have a long history of acceptance in the community. That party should be able to rely upon that law and should not be placed in the position of having to defend it. It is up to the party challenging the common law to bear the burden of proving not only that the common law is inconsistent with Charter values but also that its provisions cannot be justified.

Furthermore, justification under section 1 is arguably more broad-based than rights reconciliation, in that it takes into account various societal factors, rather than just a countervailing Charter right. In his book, *Constitutional Law of Canada*, Professor Peter Hogg states that “Section 1 of the Charter ... implicitly authorizes the courts to balance the guaranteed rights [of individuals] against competing societal values.” In other words, under section 1, “the Court must decide whether the enacting legislative body has made the appropriate compromise between the civil libertarian value guaranteed by the Charter and the competing social or economic objectives pursued by the law.” This idea was also articulated by the Supreme Court in *Mills*:

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21 *Id.*, at para. 98.
23 Hogg, *supra*, note 4, at 33-10.
In contrast, s. 1 is concerned with the values underlying a free and democratic society, which are broader in nature. In *R. v. Oakes*, … Dickson C.J. stated that these values and principles “embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.” In *R. v. Keegstra* …, Dickson C.J. described such values and principles as “numerous, covering the guarantees enumerated in the *Charter* and more.”

In *R. v. Keegstra*, the Supreme Court noted that the balancing exercise under section 1 was not restricted to values explicitly set out in the Charter. In that case, the Supreme Court did not specifically pit freedom of expression against freedom from discrimination in the section 1 justification exercise. Rather, the Court considered a series of factors in the overall justification analysis including: the fact that sections 15 and 27 represented a strong commitment to equality and multiculturalism; the harmful effect of hate propaganda on society at large; the contribution of hate propaganda to racial and religious tension in Canada, and the international human rights obligations undertaken by Canada aimed at eradicating discrimination. *Keegstra* is therefore illustrative of the broad-based balancing that takes place under section 1, an exercise which, as indicated above, differs in notable respects from that of rights reconciliation.

One final comment: with rights reconciliation, courts are not dealing with a Charter violation. Consequently, it is important 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. Thus, the exercise of reconciling rights does not necessarily mean a full exploration of a Charter infringement, as one would expect with a direct Charter challenge.

### III. RECONCILING CHARTER RIGHTS: SUPREME COURT OF CANADA JURISPRUDENCE

Recent Supreme Court jurisprudence in the area of rights reconciliation reveals the Court’s approach to seemingly conflicting Charter rights and speaks considerably about how courts should tackle this challenging task. My analysis herein is not intended to be a comprehensive review of the case law on rights reconciliation. Rather, it serves both to provide concrete illustrations of situations where the Charter rights of one individual have seemingly come into

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24 *Mills, supra*, note 8, at para. 67 (citations omitted).

conflict with those of another, and to describe how the Supreme Court has addressed this conflict so as to give the most generous possible expression to both sets of rights. For purposes of discussion only, I have grouped the Supreme Court cases under specific contextual headings.

1. Publication Ban and Confidentiality Order Cases

Cases involving publication bans or confidentiality orders usually engage the right to freedom of expression and the right to full answer and defence. *Dagenais*, the leading case in this regard, established the theoretical framework for rights reconciliation not only as it pertains to publication bans, but in various other contexts as well. At issue in *Dagenais* was a publication ban prohibiting the Canadian Broadcasting Corporation from televising the special, “The Boys of St. Vincent”26 during the trial of the accused, members of a religious order who had been charged with sexual and physical abuse of boys in their care. The question facing the Court was whether the common law rule governing publication bans — that those seeking a ban must demonstrate that there is a real and substantial risk of interference with the right to a fair trial — provided sufficient protection for freedom of expression in a post-Charter society. The Court concluded that the common law rule relating to publication bans prioritized the right to a fair trial over the free expression interests of those affected by the ban. The Court noted that “the balance this rule strikes is inconsistent with the principles of the Charter, and in particular, the equal status given by the Charter to ss. 2(b) and 11(d).”27 Chief Justice Lamer reasoned that it would be inappropriate to continue to apply a common law rule that automatically favoured the rights protected by section 11(d) over those protected by 2(b), as a hierarchical approach to rights had to be avoided. He thus found it essential to alter the common law rule governing publication bans so as to reflect Charter values. He stated:

I am, therefore, of the view that it is necessary to reformulate the common law rule governing the issuance of publication bans in a manner that reflects the principles of the Charter. Given that publication bans, by their very definition, curtail the freedom of expression of third parties, I believe that the common law rule must be adapted so as to require a consideration both of the objectives of a publication ban, and the proportionality of the ban to its effect on protected Charter rights. The modified rule may be stated as follows:

A publication ban should only be ordered when:

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26 The four-hour mini-series, “The Boys of St. Vincent” was a fictional account of sexual and physical abuse of children in a religious institution.
27 *Dagenais*, supra, note 11, at 877.
a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and

b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.  

(emphasis in original).

The Supreme Court explicitly acknowledged that this framework “clearly reflects the substance of the Oakes test when assessing legislation under s. 1 of the Charter,”[29] and in particular, the third part of the proportionality analysis under Oakes. In applying the analysis to the facts of Dagenais, the Supreme Court concluded that the publication ban could not be upheld. While the ban was clearly directed toward preventing a real and substantial risk to the fairness of the trial of the accused, it was not necessary on the facts of the case. The ban was far too broad, since it prohibited broadcast throughout Canada as well as reporting on the ban itself. Furthermore, reasonable alternative measures were available to achieve the objective of trial fairness without circumscribing the expressive rights of third parties (for example, adjourning trials, changing venues, sequestering jurors, etc.).

A publication ban was also in issue in R. v. Mentuck.[30] In that case, the accused was charged with second degree murder. At his first trial, a stay of proceedings was entered after certain evidence was ruled inadmissible. Following this trial, the accused was targeted by the RCMP in an undercover investigation, and the indictment was ultimately reinstated as a result of the evidence obtained in the investigation. During the trial, the Crown moved for a publication ban to protect from disclosure the identity of the officers and the operational methods employed by the RCMP in the investigation. The accused and two newspapers opposed the motion. The trial judge granted a one-year ban

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28 Id., at 878.
29 Id.

After the Supreme Court rendered its decision in Dagenais (and prior to Mentuck), the Supreme Court heard the case of Canadian Broadcasting Corporation v. New Brunswick (Attorney General), [1996] 3 S.C.R. 480 [hereinafter “New Brunswick”]. Although New Brunswick was a s. 1 case, it nonetheless informed the analysis in Mentuck. In New Brunswick, the Court considered the issue of the power of the court to exclude media and the public from a portion of a sentencing proceeding for sexual assault and sexual interference under s. 486(1) of the Criminal Code, R.S.C. 1985, c. C-46. Justice LaForest, writing for a unanimous Court, found that the exclusion was a violation of the freedom of the press under s. 2(b), but that it was demonstrably justified under s. 1 of the Charter. He then found, building upon the Supreme Court’s decision in Dagenais, that the trial judge must conduct a similar exercise in applying s. 286(1) as in applying the common law rule.
relating to the identity of the police officers involved, but refused a ban with respect to the RCMP’s operational methods. The accused was ultimately acquitted of the murder.

While in Dagenais, there was an apparent conflict between freedom of expression and the right to a fair trial, in Mentuck, both of these militated against imposing a publication ban. In this regard, the Court noted:

... the facts of [Mentuck] invoke a different purpose and different interests from those raised by the facts of Dagenais. While the Court in Dagenais was required to reconcile the accused’s interest in a fair trial with society’s interest in freedom of expression, the accused’s right to a fair trial [in Mentuck] is not ... in issue. Indeed, the accused wishes to have the information disclosed, and views the publication of certain of the details of his arrest and trial as essential to the fulfilment of his fair trial interest. Instead, it is the Crown that seeks a publication ban in order to protect the safety of police officers and preserve the efficacy of undercover police operations. Thus, a literal application of the test as set out in Dagenais will not properly account for the interests to be balanced. 31

The competing consideration in Mentuck was not a Charter right per se, but broader concerns for the administration of justice. The Supreme Court therefore concluded that the test established in Dagenais — premised on part 3 of the proportionality analysis in Oakes — had to be “reconfigured” to account for the different purpose for which the order was sought in Mentuck and for the different effects it would have. The Court pointed out:

Were we to simply weigh, as in Dagenais, the accused’s right to a fair trial and the public interest in freedom of expression, this would be an open and shut inquiry, since both of the competing interests recognized in the factual context of Dagenais are aligned in opposition to granting the ban.

However, the common law rule under which the trial judge considered the publication ban in this case is broader than its specific application in Dagenais. The rule can accommodate orders that must occasionally be made in the interests of the administration of justice, which encompass more than fair trial rights. As the test is intended to “reflec[t] the substance of the Oakes test”, we cannot require that Charter rights be the only legitimate objective of such orders any more than we require that government action or legislation in violation of the Charter be justified exclusively by the pursuit of another Charter right ... Dagenais envisioned situations where the right to a fair trial and the right to free expression directly conflicted, and the specific terms Lamer C.J. used in that case were tailored to apply in that situation. Accordingly, the test we must apply in order to determine whether the common law rule allowing trial judges to issue publication bans in the interest of the

31 Mentuck, id., at para. 28.
proper administration of justice will differ in specific content from the test used in Dagenais, though not in basic principle.\(^{32}\)

The Supreme Court in Mentuck thus modified the second part of the Dagenais framework, such that a publication ban should only be ordered when:

… the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.\(^{33}\)

(emphasis added).

The Court acknowledged that this tailoring of the Dagenais framework was not designed to “disturb the essence of the test, but to restate it in terms that more plainly recognize ... that publication bans may invoke more interests and rights than the rights to trial fairness and freedom of expression.”\(^{34}\)

In Sierra Club of Canada v. Canada (Minister of Finance),\(^{35}\) the Supreme Court considered the proper analytical approach to be applied to the exercise of judicial discretion where a litigant seeks a confidentiality order under Rule 151 of the Federal Court Rules. In that case, Sierra Club, an environmental organization, sought judicial review of the federal government’s decision to provide financial assistance to Atomic Energy of Canada for the construction and sale of two CANDU nuclear reactors to China. Atomic Energy filed an affidavit in the proceedings which summarized confidential documents containing technical information regarding the ongoing environmental assessment. Sierra Club sought production of these confidential documents, while Atomic Energy resisted production. Chinese authorities authorized disclosure of the documents on the condition that they be protected by a confidentiality order, such that the contents would only be made available to the parties and the court. The Federal Court rejected the application for a confidentiality order, a decision which was upheld by the Federal Court of Appeal.

The Supreme Court acknowledged the strong similarities between publication bans and confidentiality orders in the context of judicial proceedings: in both cases, a restriction on freedom of expression is sought in order to preserve or promote an interest engaged by those proceedings. In Sierra Club, the Supreme Court recognized that there was a conflict between the defendant’s right to a fair trial and the principle of open and accessible

\(^{32}\) Id., at paras. 30-31 (citations omitted).

\(^{33}\) Id., at para. 32.

\(^{34}\) Id., at para. 33.

court proceedings, which it found was inextricably linked to freedom of expression. The Supreme Court once again drew upon the Dagenais analysis, this time applying it to confidentiality orders. The Court concluded that a confidentiality order under Rule 151 should only be granted when:

a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.36

The Court found that while the confidentiality order would have a significant salutary effect on the defendant’s right to a fair trial and would assist in the search for truth, it would also result in the public being denied access to the contents of the documents in question. Given, however, the highly technical nature of the documents and the minimal impact that the order would have on the core values underlying freedom of expression, the Supreme Court concluded that the salutary effects of a confidentiality order outweighed its deleterious consequences.

2. Medical Records Cases

In R. v. O’Connor,37 the Supreme Court considered the process that should govern production of a complainant’s medical and therapeutic records held in the hands of third parties in a sexual assault case. Chief Justice Lamer and Sopinka J. for the majority on this issue noted that the rights in issue were the right to privacy and the right to full answer and defence:

In recognizing that all individuals have a right to privacy which should be protected as much as is reasonably possible, we should not lose sight of the possibility of occasioning a miscarriage of justice by establishing a procedure which unduly restricts an accused’s ability to access information which may be necessary for meaningful full answer and defence.38

36 Id., at para. 53.
38 Id., O’Connor, at para. 18.
They emphasized that when the defence seeks information in the hands of a third party (as opposed to the state) two considerations operate so as to justify shifting the onus of proof and establishing a higher threshold of relevance:

1. the information is not part of the state’s “case to meet” nor has the state been granted access to the information in preparing its case; and

2. third parties have no obligation to assist the defence.\(^39\)

In light of these factors, Lamer C.J. and Sopinka J. concluded that “at the first stage in the production procedure, the onus should be on the accused to satisfy a judge that the information is likely to be relevant.”\(^40\) This stage, in their view, should be confined to the issue of “whether the right to make full answer and defence is implicated by information contained in the records.”\(^41\) The second stage of the inquiry requires a judge to examine the records in question to determine whether they should be produced. This entails a weighing of the salutary and deleterious effects of a production order to assess “whether a non-production order would constitute a reasonable limit on the ability of the accused to make full answer and defence.”\(^42\) In this weighing exercise, courts should consider the following factors:

1. the extent to which the record is necessary for the accused to make full answer and defence;
2. the probative value of the record in question;
3. the nature and extent of the reasonable expectation of privacy vested in that record;
4. whether production of the record would be premised upon any discriminatory belief or bias;
5. the potential prejudice to the complainant’s dignity, privacy or security of the person that would be occasioned by production of the record in question.\(^43\)

\(^39\) Id., at para. 19.
\(^40\) Id., (emphasis in original). Chief Justice Lamer and Sopinka J. stated at para. 22 that the test of “relevance” in the context of production should be higher than that in the disclosure context: “the presiding judge must be satisfied that there is a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify,” but that this “should not be interpreted as an onerous burden upon the accused.” (emphasis in original), at para. 24.

\(^41\) Id., at para. 21.
\(^42\) Id., at para. 30.
\(^43\) Id., at para. 31.
In response to *O’Connor*, Parliament drafted Bill C-46, which was proclaimed into force on May 12, 1997. The Bill amended the *Criminal Code* to include sections 278.1 to 278.91, which now govern the production of records in sexual offence proceedings. The accused in *Mills*, who had been charged with one count of sexual assault and one count of unlawful sexual touching, brought a constitutional challenge attacking the validity of these provisions on the basis that they violated sections 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*.

In *Mills*, the Supreme Court observed:

The resolution of this appeal requires understanding how to define competing rights, avoiding the hierarchical approach rejected by this Court in *Dagenais*… On the one hand stands the accused’s right to make full answer and defence. On the other hand stands the complainant’s and witness’s right to privacy. Neither right may be defined in such a way as to negate the other and both sets of rights are informed by the equality rights at play in this context. Underlying this question is the relationship between the courts and Parliament when Parliament alters a judicially created common law procedure that already embodies Charter standards.\(^{44}\)

On the proper approach to the competing Charter rights in *Mills*, the Court stated:

As this Court’s decision in *Dagenais*, supra, makes clear, Charter rights must be examined in a contextual manner to resolve conflicts between them. Therefore, unlike s. 1 balancing, where societal interests are sometimes allowed to override Charter rights, under s. 7 rights must be defined so that they do not conflict with each other. The rights of full answer and defence, and privacy, must be defined in light of each other, and both must be defined in light of the equality provisions of s. 15.\(^{45}\)

The Court noted that Bill C-46 differed in salient respects from the regime contemplated in *O’Connor*.\(^{46}\) Though the respondent and several interveners

\(^{44}\) [1999] 3 S.C.R. 668, at para. 17 (citations omitted).

\(^{45}\) Id., at para. 21.

\(^{46}\) The Court described these differences at paras. 53-54 of *Mills*:

This brings us to the heart of the Bill — the process established to govern the production of private records to an accused person in sexual offence proceedings. Like *O’Connor*, Parliament has set up a two-stage process: (1) disclosure to the judge; and (2) production to the accused. At the first stage, the accused must establish that the record sought is “likely relevant to an issue at trial or to the competence of a witness to testify” and that “the production of the record is necessary in the interests of justice” (s. 278.5(1)). Bill C-46 diverges from *O’Connor* by directing the trial judge to consider the salutary and deleterious effects of production to the court on the accused’s right to full answer and defence and the complainant’s or witness’s right to privacy and equality. A series of factors is listed that the
argued that Bill C-46 was unconstitutional to the extent that it created a process for production that diverged from or was inconsistent with that established in O’Connor, the Court opined that “it does not follow from the fact that a law passed by Parliament differs from a regime envisaged by the Court in the absence of a statutory scheme, that Parliament’s law is unconstitutional. Parliament may build on the Court’s decision, and develop a different scheme as long as it remains constitutional.”

The Court observed that the three relevant principles at play in Mills were full answer and defence, privacy, and equality. Justice McLachlin (as she then was) and I stated in this regard:

As Lamer C.J. stated in Dagenais, … “When the protected rights of two individuals come into conflict ... Charter principles require a balance to be achieved that fully respects the importance of both sets of rights.” This illustrates the importance of interpreting rights in a contextual manner — not because they are of intermittent importance but because they often inform, and are informed by, other similarly deserving rights or values at play in particular circumstances.

After reviewing these three principles in detail, the majority concluded that the Criminal Code provisions in issue in Mills passed constitutional scrutiny. While it was undisputed that Bill C-46 diverged notably from what the Supreme Court had envisioned in O’Connor, “these differences [were] not fatal because Bill C-46 provide[d] sufficient protection for all relevant Charter rights.”

M. (A.) v. Ryan was essentially the civil equivalent of O’Connor. Justice McLachlin (as she then was) characterized the issue in Ryan as: “Should a defendant’s right to relevant material to the end of testing the plaintiff’s case outweigh the plaintiff’s expectation that communications between her and her trial judge is directed to take into account in deciding whether the document should be produced to the court (s. 278.5(2)) …” If the requirements of this first stage are met, the record will be ordered produced to the trial judge. At the second stage, the judge looks at the record in the absence of the parties (s. 278.6(1)), holds a hearing if necessary (s. 278.6(2)), and determines whether the record should be produced on the basis that it is “likely relevant to an issue at trial or to the competence of a witness to testify” and that its production is “necessary in the interests of justice” (s. 278.7). Again at this stage, the judge must consider the salutary and deleterious effects on the accused’s right to make full answer and defence and on the right to privacy and equality of the complainant or witness, and is directed to “take into account” the factors set out at s. 278.5(2); s. 278.7(2). When ordering production, the judge may impose conditions on production: s. 278.7(3).

psychiatrist will be kept in confidence?"51 The Supreme Court then examined
the relevant competing Charter rights (privacy, fair trial, equality) under the
fourth Wigmore criterion for privilege: that the interests served by protecting
the communication from disclosure outweigh the interest of pursuing the truth
and disposing correctly of the litigation.52 The Court considered its decision in
O’Connor and noted:

Just as justice requires that the accused in a criminal case be permitted to answer
the Crown’s case, so justice requires that a defendant in a civil suit be permitted to
answer the plaintiff’s case. In deciding whether he or she is entitled to production
of confidential documents, this requirement must be balanced against the privacy
interest of the complainant.53

Justice McLachlin was careful to point out that the interest in disclosure of a
defendant in a civil suit may be less compelling than the parallel interest of an
accused charged with a crime. In a civil case, the defendant stands to lose
money and repute; the accused in a criminal proceeding, on the other hand,
stands to forfeit his or her liberty. The balance, therefore, between the interest
in disclosure and the complainant’s interest in privacy may be struck at a
different level in civil and criminal cases. Justice McLachlin ultimately held
that it is open to a judge to conclude that psychiatrist-patient records are
privileged in appropriate circumstances. Once the first three Wigmore
requirements for privilege are satisfied and a compelling prima facie case for
protection is established, the focus will be on balancing under the fourth
Wigmore criterion. Justice McLachlin emphasized:

\[ \text{The result depends on the balance of the competing interests of disclosure and privacy in each case. It must be borne in mind that in most cases, the majority of the communications between a psychiatrist and her patient will have little or no bearing on the case at bar and can safely be excluded from production. Fishing expeditions are not appropriate where there is a compelling privacy interest at} \]

51 Id., at para. 1.
52 It should be recalled that the Wigmore criteria are designed to guide a court’s determination of whether privilege should attach to a particular relationship. The four Wigmore criteria are:
1. The communications must originate in a confidence that they will not be disclosed.
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
3. The relation must be one which in the opinion of the community ought to be sedulously fostered.
4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

53 Ryan, supra, note 50, at para. 36.
stake, even at the discovery stage. Finally, where justice requires that communications be disclosed, the court should consider qualifying the disclosure by imposing limits aimed at permitting the opponent to have the access justice requires while preserving the confidential nature of the documents to the greatest degree possible.54

(emphasis added).

3. Religious Freedoms Cases

Trinity Western University, a private institution associated with the Evangelical Free Church of Canada, established “Community Standards” which were applicable to all staff and students. These included a list of “Biblically Condemned” practices, one of which was homosexual behaviour. Trinity Western applied to the British Columbia College of Teachers to assume full responsibility for its teaching programme, which had previously been conducted partially under the aegis of another university. The B.C. College of Teachers refused to approve the application on the grounds that it was contrary to the public interest for it to approve a programme offered by an institution which appeared to follow discriminatory practices. The Court characterized the issue at the heart of the appeal as how to reconcile the religious freedoms of individuals wishing to attend Trinity Western with the concerns of students in the B.C. school system (concerns that may be shared by society generally). The Court held that any potential conflict between religious freedoms and equality rights should be resolved through a proper demarcation of the rights and values involved. The proper place to draw the line in this case, according to the Supreme Court, was between belief (that is, freedom to hold religious convictions) and conduct (that is, acting on discriminatory beliefs). The Court stated:

The freedom to hold beliefs is much broader than the freedom to act on them. Absent concrete evidence that training teachers at TWU fosters discrimination in the public schools of B.C., the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected. The BCCT, rightfully, does not require public universities with teacher education programs to screen out applicants who hold sexist, racist or homophobic beliefs. For better or worse, tolerance of divergent beliefs is a hallmark of a democratic society.

Acting on those beliefs, however, is a different matter. If a teacher in a school system engages in discriminatory conduct, that teacher can be subject to disciplinary hearings before the BCCT ... In this way, the scope of the freedom of religion

54 Id., at para. 37.
and equality rights that have come into conflict in this appeal can be circumscribed and thereby reconciled.\textsuperscript{55}

In \textit{B. (R.) v. Children’s Aid Society of Metropolitan Toronto},\textsuperscript{56} the Supreme Court considered the case where parents’ religious freedom was said to be in conflict with the section 7 right to life, liberty and security of person of their child. The majority of the Court found that the relevant provisions of the \textit{Child Welfare Act},\textsuperscript{57} infringed the appellants’ freedom of religion under section 2(a) of the Charter. Justice LaForest for the majority on this issue found that section 2(a), which commanded a liberal interpretation, extended to “the right of parents to rear their children according to their religious beliefs, including that of choosing medical and other treatments ...”\textsuperscript{58} He then held that since the Supreme Court has “consistently refrained from formulating internal limits to the scope of freedom of religion in cases where the constitutionality of a legislative scheme [is] raised,” it would be more appropriate to “leave to the state the burden of justifying the restrictions it has chosen [under s. 1].”\textsuperscript{59} Justice LaForest ultimately concluded that the restrictions that the Act placed on parental rights under section 2(a) were amply justified under the \textit{Oakes} test.

The analytical approach that Major J. and I adopted in \textit{B. (R.)} differed from that of the majority. We categorized the relevant issue as: “to what extent can an infant’s right to life, liberty and health be subordinated to conduct emanating from a parent’s religious convictions?”\textsuperscript{60} We then concluded that the appellant parents “[did] not benefit from the protection of s. 2(a) of the Charter since freedom of religion does not include the imposition upon a child of religious practices which threaten the safety, health or life of the child.”\textsuperscript{61} In other words, we defined freedom of religion as \textit{not} extending to the right of a parent to make religious choices that would jeopardize the section 7 Charter rights of a child. By defining freedom of religion in this way, a conflict between rights was avoided. We stated:

\textsuperscript{55} [2001] 1 S.C.R. 772, at paras. 36-37.
\textsuperscript{56} [1995] 1 S.C.R. 315 [hereinafter “\textit{B. (R.)}”].
\textsuperscript{57} R.S.O. 1980, c. 66. The pleadings primarily focused on the constitutionality of s. 19(1)(b)(ix) of the Act, which defined “child in need of protection” as “a child where the person in whose charge the child is neglects or refuses to provide or obtain proper medical, surgical or other recognized remedial care or treatment necessary for the child’s health or well-being, or refuses to permit such care or treatment to be supplied to the child when it is recommended by a legally qualified medical practitioner, or otherwise fails to protect the child adequately.”
\textsuperscript{58} \textit{Id.}, at para. 105.
\textsuperscript{59} \textit{B. (R.)}, supra, note 56, at paras. 109-110.
\textsuperscript{60} \textit{Id.}, at para. 225.
\textsuperscript{61} \textit{Id.}
Just as there are limits to the ambit of freedom of expression (e.g. s. 2(b) does not protect violent acts...) so are there limits to the scope of s. 2(a), especially so when this provision is called upon to protect activity that threatens the physical or psychological well-being of others. In other words, although the freedom of belief may be broad, the freedom to act upon those beliefs is considerably narrower, and it is the latter freedom at issue in this case.62

Justice LaForest for the majority was of the view that the balancing required between freedom of religion, on the one hand, and life, liberty and security of person, on the other, must take place under section 1, as the Charter "makes no provision for directly balancing constitutional rights against one another."63 While I note the relevance of this reasoning, it seems to me that rights reconciliation — quite apart from the balancing required under the section 1 analysis — has an important and unique role in Charter jurisprudence and was appropriate to use in this case. Justice Major and I addressed this critique of our approach in B. (R.).

Although many of the competing rights discussed in this appeal could perhaps be integrated into a s. 1 analysis as was done by La Forest J. ...., we believe this is inappropriate in the present case. Such an approach elevates choosing to refuse one’s child necessary medical care on account of one’s personal convictions to the level of constitutionally protected activity. Moreover, this approach obliges s. 1 almost single-handedly to play the role of balancing diverse interests. Although s. 1 may be the appropriate forum for balancing the interests of the state against the rights violation of the aggrieved individual, such a balance is not required in the case at bar. The nexus of the balancing operates between Sheena’s right to life and security of the person and her parents’ right to freedom of religion. We are not convinced that s. 1 should be the exclusive balancing agent between two individuals’ positive and negative liberties.64

IV. OVERARCHING PRINCIPLES TO BE GLEANED FROM CASES ON RIGHTS RECONCILIATION

Despite the differing factual backdrops, the cases described above reveal certain overarching principles about the concept of rights reconciliation. First, and perhaps most importantly, rights reconciliation cannot take place in a vacuum. As is true with a section 1 analysis, courts engaging in rights reconciliation must be acutely sensitive to context. Second, in most instances, rights reconciliation requires a court to conduct an analysis such as the one

62 Id., at para. 226 (citations omitted).
63 Id., at paras. 117-118.
64 Id., at para. 233.
contemplated in the third branch of the proportionality test under *Oakes*. Third, the exercise of rights reconciliation is a flexible one, such that a given framework for reconciling Charter rights may be modified to take into consideration other factors if necessary. Finally, in most cases, it is inappropriate to conceive of Charter rights as “clashing” or “colliding,” as this is fundamentally incongruous with the notion of “reconciling” rights. Each of these broad principles is examined in more detail below.

1. Rights Reconciliation is Guided by Context

The Supreme Court has consistently emphasized the importance of context in Charter jurisprudence, particularly in the section 1 analysis. In *Thomson Newspapers v. Canada (Attorney General)*, for instance, Bastarache J. wrote for a majority of the Court:

> The analysis under s. 1 of the Charter must be undertaken with a close attention to context. This is inevitable as the test devised in *R. v. Oakes* requires a court to establish the objective of the impugned provision, which can only be accomplished by canvassing the nature of the social problem which it addresses. Similarly, the proportionality of the means used to fulfil the pressing and substantial objective can only be evaluated through a close attention to detail and factual setting. In essence, context is the indispensable handmaiden to the proper characterization of the objective of the impugned provision, to determining whether that objective is justified, and to weighing whether the means used are sufficiently closely related to the valid objective so as to justify an infringement of a Charter right.

Context is an equally crucial consideration when courts seek to reconcile the Charter rights of one individual with those of another. The Supreme Court’s jurisprudence on rights reconciliation demonstrates that a different relationship may be struck between various Charter rights in one case from that in another. Rights reconciliation is therefore highly contextually sensitive. For instance, McLachlin J. (as she then was) noted in *Ryan* that the right to privacy, the right to a fair trial and the right to equality from discrimination may align differently in cases involving production of medical records depending on whether the proceeding is civil or criminal in nature. She ultimately concluded that “documents produced in a criminal case may not always be producible in a civil case, where the privacy interest of the complainant may more easily outweigh the defendant’s interest in production.”

66 *Id.*, at para. 87 (citation omitted).
67 *Ryan*, supra, note 50, at para. 36.
interests will be aligned differently in different cases, and the purposes and effects invoked by the parties must be taken into account in a case-specific manner. 68

Context, then, determines where the line should be drawn between the competing Charter rights in a given case. In the words of the Supreme Court in Mills:

Considered in the abstract, these principles of fundamental justice may seem to conflict. The conflict is resolved by considering conflicting rights in the factual context of each particular case. Therefore, we do not say that a complainant’s right to be free from an unreasonable search and seizure may be justifiably infringed by the accused’s right to make full answer and defence or vice versa. Rather, part of what defines both a reasonable search or seizure and full answer and defence is a full appreciation of these principles of fundamental justice as they operate within a particular context. 69

(emphasis added).

2. Rights Reconciliation Usually Involves a Proportionality-Type Analysis Such as the One Contemplated Under Oakes

The analyses involved in reconciling rights often involve a consideration of the deleterious effects of the measures which limit the right in question and the objective sought to be achieved by the limitation of the right, as well as a consideration of the deleterious and salutary effects of the measures themselves. This directly reflects the approach taken in part 3 of the proportionality analysis. At this point, it is worth noting that this third branch of the proportionality analysis under Oakes — which some have argued is redundant in the section 1 analysis 70 — is criticized in the rights reconciliation context as being too sub-

70 See for instance, Hogg, Constitutional Law of Canada, 4th ed. (Toronto: Carswell, 1997), at 35-39, where he states:

Obedient to Oakes, when the Court engages in s. 1 analysis, it always goes through the motion of this fourth step. So far as I can tell, however, this step has never had any influence on the outcome of any case. And I think that the reason for this is that it is redundant. It is really a restatement of the first step, the requirement that a limiting law pursue an objective that is sufficiently important to justify overriding a Charter right. If a law is sufficiently important to justify overriding a Charter right (first step), and if the law is rationally connected to the objective (second step), and if the law impairs the Charter right no more than is necessary to accomplish the objective (third step), how could its effects then be judged to be too severe? (emphasis added).

jective. In short, the critics assert that part 3 of the proportionality test leaves too much interpretive room for courts to decide these Charter cases appropriately and consistently. In my view, the third branch of the proportionality test provides an analytically coherent framework to guide judicial discretion, so that it is not arbitrary and unfettered. There can be no rigid rule for courts to apply when confronted with seemingly conflicting rights, as this would run afoul of the Supreme Court’s pivotal statement in Dagenais eschewing a hierarchical approach to Charter rights. Part 3 of the proportionality test, on the other hand, equips the judiciary with a workable framework to delineate between competing Charter rights in a principled and case-specific manner. Or, in the words of the Supreme Court in Mentuck, “This test exists to ground the exercise of discretion in a constitutionally sound manner, not to command the same result in every case.”

In Dagenais, the Supreme Court explicitly recognized the overlap between part 3 of the proportionality analysis and the reconciliation of sections 2(b) and 11(d) of the Charter:

The analysis that is required at this stage of the application of the common law rule is very similar to the third part of the second branch of the analysis required under s. 1 of the Charter, as set out by this Court in R. v. Oakes. As noted in the discussion on Supreme Court jurisprudence, the Dagenais framework was reconfigured and then used in subsequent cases such as Mentuck, O’Connor, and Sierra Club. In Sierra Club, the Court stated:

Although in each case freedom of expression will be engaged in a different context, the Dagenais framework utilizes overarching Canadian Charter of Rights and Freedoms principles in order to balance freedom of expression with other rights and interests, and thus can be adapted and applied to various circumstances. As a result, the analytical approach to the exercise of discretion under Rule 151 should

Until recently, this final balancing step has not been decisive and was thought by many to be redundant. It appeared unlikely that the Court would ever find that the objective was of sufficient importance to justify overriding a protected freedom, and that the least intrusive means had been employed, but nevertheless conclude that on balance the effects on the right were disproportionate ... More recently, however, this final stage has taken on more importance ... If the fourth part of the proportionality review continues to assume increasing importance, governments will bear a greater obligation to demonstrate that the impugned legislation is not only rationally connected to its objectives, but effective in achieving the objectives. This stage will also require the courts to balance the effectiveness of the violation in achieving the government’s objective against the harms of denying the Charter right. (emphasis added).

71 Mentuck, supra, note 68, at para. 37.
echo the underlying principles laid out in Dagenais, supra, although it must be tai-
lored to the specific rights and interests engaged in this case.73

The appeal of a Dagenais-type framework in the rights reconciliation context is that it allows courts to make case-specific determinations without sacrificing legal precedent or principle.

3. “Clash” Imagery May be Inapposite

In Dagenais, Lamer C.J. emphasized that it was important to recognize that “publication bans should not always be seen as a clash between two titans — freedom of expression for the media versus the right to a fair trial for the ac-
cUSED.”74 He provides three reasons for rejecting what he terms the “clash model”:

First, it is more suited to American than to Canadian jurisprudence, since the American Constitution has no equivalent of s. 1 of our Charter, which, as I discussed earlier, is also a source of the fundamental principles informing the development of the common law in Canada.

Second, it is not the case that freedom of expression and the accused’s right to a fair trial are always in conflict. Sometimes publicity serves important interests in the fair trial process. For example, in the context of publication bans connected to criminal proceedings, these interests include the accused’s interest in public scrutiny of the court process, and all of the participants in the court process.

Third, the analysis of publication bans should be much richer than the clash model suggests. Rather than simply focusing on the fact that bans always limit freedom of expression and usually aim to protect the right to a fair trial of the ac-
cUSED, it should be recognized that ordering bans may ... 75

Chief Justice Lamer went on to provide a comprehensive review of the advantages and disadvantages associated with publication bans.

That courts should approach seemingly clashing rights with a view to how both can be given proper recognition appears as a theme in the Supreme Court case law dealing with rights reconciliation. In O’Connor, for instance, L’Heureux-Dubé J. (dissenting) stated:

I would emphasize that the imagery of conflicting rights which it conjures up may not always be appropriate. One such example is the interrelation between the equality rights of complainants in sexual assault trials and the rights of the accused to a fair trial. The eradication of discriminatory beliefs and practices in the conduct

74 Dagenais, supra, note 72, at 881.
75 Id., at 882.
of such trials will enhance rather than detract from the fairness of such trials. Conversely, sexual assault trials that are fair will promote the equality of women and children, who are most often the victims.  

It is especially inappropriate to conceive of rights as conflicting when engaging in “definitional” balancing or reconciliation. The approach of Major J. and myself in B. (R.) is a classic example of definitional reconciliation. Where a parent’s right to religion is defined as not extending to the right to allow for religious medical choices which can harm a child, there really is no conflict between freedom of religion and life, liberty, and security of the person. This sentiment was echoed in Trinity Western where the Supreme Court noted that “this is a case where any potential conflict should be resolved through the proper delineation of the rights and values involved. In essence, properly defining the scope of the rights avoids a conflict in this case.”

4. The Exercise of Reconciling Rights is Flexible

An overview of Supreme Court case law in the area of rights reconciliation reveals the flexibility of the Dagenais (or a Dagenais-type) approach to reconciling Charter rights. As Mentuck and Sierra Club illustrate, the Dagenais framework can be modified and applied to new factual scenarios where Charter rights seemingly conflict. In Sierra Club, the Court said:

Although in each case freedom of expression will be engaged in a different context, the Dagenais framework utilizes overarching Canadian Charter of Rights and Freedoms principles in order to balance freedom of expression with other rights and interests, and thus can be adapted and applied to various circumstances.

Therefore, in Mentuck, the Supreme Court broadened the approach to publication bans in recognition of the fact that there may be situations where other interests — apart from the competing Charter rights — may need to be considered. In Mentuck, this “other interest” was an interest in the overall administration of justice. In this regard, the Court stated:

As the test [in Dagenais] is intended to “reflect[t] the substance of the Oakes test”, we cannot require that Charter rights be the only legitimate objective of such orders any more than we require that government action or legislation in violation of the Charter be justified exclusively by the pursuit of another Charter right ...

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77 Hogg, supra, note 70, at 22-26-27.
79 Sierra Club, supra, note 73, at para. 38.
... For cases where concerns about the proper administration of justice other than those two [competing] Charter rights are raised, the ... broader approach will allow those concerns to be weighed as well. There may also be other cases which raise interests other than the administration of justice, for which a similar approach would be used, depending of course on the particular danger at issue and rights and interests at stake.80

(emphasis added).

In situations where the Dagenais framework is indeed modified to take into account other interests (such as in Mentuck), the analysis required is more holistic and approximates a section 1 analysis to some extent. This is because a court is not simply striving to reconcile one individual’s Charter right with that of another. Rather, it is seeking to reconcile the Charter rights in a manner that adequately addresses other, and oftentimes broader, social purposes.

V. WHY IS IT SIGNIFICANT FOR COURTS TO ENGAGE IN THE PROCESS OF RIGHTS RECONCILIATION?

1. To Facilitate Dialogue Between the Legislature and the Courts

In O’Connor, the Supreme Court addressed the issue of when accused persons should have access to the private records of complainants and witnesses. Approximately 17 months after this decision, Parliament proclaimed into force Bill C-46, which amended the Criminal Code in response to O’Connor. As noted, elements of the Bill diverged considerably from the regime that was set out by the Supreme Court in O’Connor. In Mills, the Supreme Court upheld the constitutionality of Bill C-46 notwithstanding these differences. The Court in Mills emphasized:

... it is important to keep in mind that the decision in O’Connor is not necessarily the last word on the subject. The law develops through dialogue between courts and legislatures. Against the backdrop of O’Connor, Parliament was free to craft its own solution to the problem consistent with the Charter.81

This dialogue was discussed by the Supreme Court in Vriend v. Alberta:82

To my mind, a great value of judicial review and this dialogue among the branches is that each of the branches is made somewhat accountable to the other. The work of the legislature is reviewed by the courts and the work of the court in

80 Mentuck, supra, note 71, at paras. 31-33.
81 Mills, supra, note 69, at para. 20 (citation omitted).
its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under s. 33 of the Charter). This dialogue between and accountability of each of the branches have the effect of enhancing the democratic process, not denying it.83

The O’Connor and the Mills cases provide the paradigm example of the “dialogue” between the legislature and the judiciary:

Parliament has enacted this legislation after a long consultation process that included a consideration of the constitutional standards outlined by this Court in O’Connor… While it is the role of the courts to specify such standards, there may be a range of permissible regimes that can meet these standards. It goes without saying that this range is not confined to the specific rule adopted by the Court pursuant to its competence in the common law. In the present case, Parliament decided that legislation was necessary in order to address the issue of third party records more comprehensively. As is evident from the language of the preamble to Bill C-46, Parliament also sought to recognize the prevalence of sexual violence against women and children and its disadvantageous impact on their rights, to encourage the reporting of incidents of sexual violence, to recognize the impact of the production of personal information on the efficacy of treatment, and to reconcile fairness to complainants with the rights of the accused ... It is perfectly reasonable that these many concerns may lead to a procedure that is different from the common law position but that nonetheless meets the required constitutional standards.84

Rights reconciliation, therefore, is a vital exercise since it both invites and facilitates dialogue between the legislative and judicial branches of government.

2. To Ensure that the Common Law Accords with Charter Values

In R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd.,85 the Supreme Court drew a distinction between actually applying the Charter to the common law and ensuring that the common law reflects Charter values. It underscored the fact that care must be taken not to expand the application of the Charter beyond the ambit established by section 32(1).86 Therefore, in the context of civil litigation involving private parties, the Charter will “apply” to the common law only

83 Id., at para. 139.
84 Mills, supra, note 69, at para. 59.
86 Section 32(1) of the Charter reads:

This Charter applies (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.
to the extent that it is found inconsistent with Charter values. In *Dolphin Deli-

er*, McIntyre J. stated:

Where such exercise of, or reliance upon, governmental action is present and where

one private party invokes or relies upon it to produce an infringement of the

Charter rights of another, the Charter will be applicable. Where, however, private

party “A” sues private party “B” relying on the common law and where no act of

government is relied upon to support the action, the Charter will not apply. I

should make it clear, however, that this is a distinct issue from the question whether

the judiciary ought to apply and develop the principles of the common law in a

manner consistent with the fundamental values enshrined in the Constitution. The

answer to this question must be in the affirmative. In this sense, then, the Charter is

far from irrelevant to private litigants whose disputes fall to be decided at common

law. But this is different from the proposition that one private party owes a

constitutional duty to another, which proposition underlies the purported assertion

of Charter causes of action or Charter defences between individuals. 87

Rights reconciliation is crucial to ensuring that the common law evolves in

accordance with, and is interpreted in light of, the Charter. In *Ryan*, the Su-

preme Court remarked:

In view of the purely private nature of the litigation at bar, the Charter does not

“apply” per se. Nevertheless, ensuring that the common law of privilege develops in

accordance with “Charter values” requires that the existing rules be scrutinized to

ensure that they reflect the values the Charter enshrines. This does not mean that

the rules of privilege can be abrogated entirely and replaced with a new form of

discretion governing disclosure. Rather, it means that the basic structure of the

common law privilege analysis must remain intact, even if particular rules which

are applied within that structure must be modified and updated to reflect emerging

social realities. 88

(emphasis added).

In some cases, the common law will provide sufficient protection for all the

Charter rights in question. In *Hill*, 89 for instance, the Supreme Court concluded

that the common law of defamation represented an adequate compromise be-

tween the twin values of freedom of expression and reputation (which are

closely linked with the right to privacy).

In other cases, however, the common law will not have struck the appropriate relationship between competing Charter rights and courts will be required to

modify the common law accordingly. Thus, in *Dagenais*, the Supreme Court found it necessary to “reformulate the common law rule governing the issuance

87 *Dolphin Delivery*, supra, note 85, at 602-603.


of publication bans in a manner that reflect[ed] the principles of the Charter.**90 Whatever the ultimate conclusion, the exercise of reviewing and scrutinizing the common law with reference to the Charter is an important and valuable one.

VI. CONCLUSION

It is possible to envisage a series of situations where Charter rights seemingly overlap or conflict. Several such scenarios have already been addressed by the Supreme Court; others will work their way through the court system over time. The idea of “rights reconciliation” is thus emerging as a relatively new and developing area of Charter interpretation. Many of the cases involving rights reconciliation will be challenging, requiring courts to reconcile individual freedoms perceived as central to how we define ourselves as a society — freedom of expression; freedom of religion; life, liberty and security of person, and so on. There is no mechanistic rule that can be applied to yield a definitive answer to the pressing question: What should courts do when Charter rights conflict? Rather, courts must be acutely sensitive to context and approach the Charter analysis flexibly, and with a view to giving fullest possible expression to all the rights involved. Put another way, like many other important issues of Charter interpretation, the last word has not been written, but I believe a helpful beginning has been established.

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90 Dagenais, supra, note 72, at 878.
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