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Renewing Freedom of Expression, Part Two: From the Contextual Approach to Proportionality Balancing

Jamie Cameron

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I. INTRODUCTION

Interpreting the *Canadian Charter of Rights and Freedoms* in the early years placed heavy demands on the Supreme Court of Canada, which was tasked to develop doctrines for a range of guarantees, establish standards of breach and justification, and decide key issues that included the *Charter*'s application and how remedies would work.[1] There was little time to reflect or defer decision making to a more incremental process of developing a *Charter* jurisprudence. Bertha Wilson was one member of the Court who candidly processed the anxiety associated with deciding complex *Charter* issues in quick succession and a short span of years.[2] Nor is it a secret that the Dickson Court's institutional problems and instability in the late 1980s were at least partly a function of the strain arising from *Charter* adjudication.[3]

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[1] *Canadian 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.

[2] In 1987, Justice Wilson said that the *Charter* dealt a "blow to one's self-confidence" and described the experience as "somewhat demoralizing". After noting that the road "may be a little rocky to start" and stating that "there is now, a period of panic", she predicted that "ultimately the bumps will get straightened out and an integrity [will] develop around the whole". J. Cameron, "Justice in her own Right: Bertha Wilson and the Canadian Charter of Rights and Freedoms", in J. Cameron, ed., *Reflections on the Legacy of Justice Bertha Wilson* (Canada: LexisNexis Canada, 2008) at 373 (quoting from *Speeches Delivered by the Honourable Bertha Wilson;* unpublished volume, Supreme Court of Canada Library).

[3] The Court's internal problems in the late 1980s are detailed in Robert Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press, 2003). See Chapter 17, "Cracks in the Foundation", at 350-76 (discussing the internal processes of deciding *Charter* landmarks and the tensions that arose from a significant backlog in decision making), and Chapter 18, "Feeling the Strain", at 377-96 (stating, at 377, that *Charter* cases were "unusually difficult to decide, especially in the early going when so much was riding on the Court's pronouncements").

Though some landmarks were inspired, and the *Charter* jurisprudence has stood up relatively well over time, it should not be surprising that the Court has modified some of its initial doctrinal choices. The *Charter*'s vitality may depend on renewal – including a reconsideration of precedent – but that does not make change easy and, without an incentive to do so, it can be difficult for courts to re-visit the foundations of doctrine. At this point, and with forty years of insight into the *Charter*, the Court is well-advised to amend rather than leave flawed doctrines in place. The Court has shown the will to remake its jurisprudence under other guarantees, including ss.2(d) and 7 of the *Charter*, and must also do so for s.2(b).[4]

This project advances the goal of renewing the *Charter*'s methodology of expressive freedom in two parts. Part One, titled "Resetting the Foundations: Renewing Freedom of Expression under Section 2(b) of the *Charter*" ("Part One"), explained that the Court's approach to s.2(b) decision making is skewed against expressive freedom and must be addressed holistically, under ss.2(b) and s.1.[5] Part One provided a critique of the current methodology, addressed the meaning of freedom under s.2(b), and proposed a revised standard of breach. It also sketched a plan for renewal under s.1 that was not finished and is developed in more detail in this article, titled "Part Two: From the Contextual Approach to Proportionality Balancing".

In combination, the consolidated renewal of ss.2(b) and 1 doctrine has the following elements. First, a revised framework for breach removes the purpose-effects step of the *Irwin Toy* test, replacing it

[4] For instance, the Court overruled s.2(d)'s landmark decisions in the "Labour Trilogy", granting constitutional protection to collective bargaining and the right to strike. *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007], 2 S.C.R. 391 (S.C.C.); *Mounted Police Ass'n of Ontario v. Canada (AG)*, [2015] 1 SCR 3 (S.C.C.); and *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] 1 SCR 245 (S.C.C.). Under s.7, the Court rejected the *MVR* theory that restricted this guarantee to matters arising in the administration of justice, and developed a framework for the principles of fundamental justice. *Blencoe v. British Columbia (Human Rights Commission*, [2000] 2 S.C.R. 307 (S.C.C.); *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101 (S.C.C.).

[5] J. Cameron, "Resetting the Foundations: Renewing Freedom of Expression under Section 2(b) of the Charter", in B. Bird and D. Ross, eds., *Forgotten Foundations of the Canadian Constitution*. (LexisNexis Canada, 2022) at 120-51.

with a standard of violation drawn from *Syndicat Northcrest v. Amselem*.[6] As Part One explains, importing that standard from s.2(a)'s guarantee of conscientious and religious freedom addresses the deficiencies of the current approach under s.2(b). At present, what proceeds to s.1 and the question of justification is, in most instances, little more than a bare conclusion that the state violated s.2(b)'s guarantee of expressive freedom. A test that combines step one of *Irwin Toy* and the *Amselem* test for infringement – to create the *Irwin Toy/Amselem* test – addresses that problem and, in doing so, enlists a discussion of the nature and gravity of the violation.

Doctrinal changes must also be made under s.1. There, the contextual approach has been dominant for years and must be eliminated from the methodology of justification.[7] Under that approach, the value of *freedom* was overlooked in an analysis that concentrated instead on the value of expressive *content*. Problematic at many levels, the contextual approach undermined and even pre-empted the final step of *Oakes* and its consideration of the deleterious consequences of a violation. As a result, those consequences were hardly discussed and rarely influenced the outcome. Part Two addresses these issues by removing the contextual approach from s.1 and enhancing the role of proportionality balancing under the final step of *Oakes*.[8] As explained below, empowering this element of the analysis draws the gravity of the infringement directly into s.1's discussion of deleterious consequences.

After a brief recap of Part One's model for s.2(b) the discussion turns to s.1, explaining how a principled approach to limits on expression can be achieved by elevating the role of proportionality balancing. In combination, the doctrinal modifications to the concepts of breach and justification replace elements of the current methodology that are ill-conceived and work against s.2(b)'s guarantee of expressive freedom. Though it entails more than a tweak, the renewal of ss.2(b) and (1) does not require

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[6] *Irwin Toy v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 (S.C.C.); *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 (S.C.C.).
[7] See *infra*, The Contextual Approach.
[8] *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.).

a wholesale or radical transformation of precedent, and can be implemented without too much disruption of current doctrine. The key challenge may be to persuade courts that these modifications align with principles of *Charter* interpretation and are necessary to safeguard the conceptual integrity of s.2(b)'s guarantee of expressive freedom.

II. CONNECTING BREACH AND JUSTIFICATION: THE *IRWIN TOY/AMSELEM* TEST

From the outset, the Supreme Court was clear that the roles of ss.2(b) and 1 are a function of the *Charter*'s structured division of breach and justification. In *Ford v. Quebec*, the Court stated that the scope of entitlement under s.2(b) is broad because limits on expressive freedom should be determined by s.1.[9] Its landmark decision in *Irwin Toy* adopted that view, granting the guarantee a generous interpretation that requires most restrictions on expressive freedom to be justified under s.1.[10] *Irwin Toy* established a two-step test that defines expression as "any attempt to convey meaning" and addresses the question of infringement through a purpose-effects test.[11] Though it reflects a generous conception of entitlement, *Irwin Toy* had negative consequences for expressive freedom because, in practice, the test reduced the analysis essentially to a factual question whether the government had interfered with expression.[12] An affirmative answer was sufficient to establish a *prima facie* entitlement, complete the analysis, and proceed to s.1 and the question of reasonable limits.

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[9] *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at 766 (S.C.C.) (rejecting definitional restrictions under s.2(b) because it is "within the perimeters of s.1 that courts will in most instances weigh competing values" to determine which should prevail).

[10] *Irwin Toy* added a proviso that excluded "violent forms of expression" from s. the scope of s.2(b). *Irwin Toy v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 970 (S.C.C.).

[11] *Irwin Toy v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at 967-71 (outlining the first step of the test) and 971-77 (explaining the purpose-effects test).

[12] The question of breach is more complex on issues of access to government property or government information. *City of Montréal v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141 (S.C.C.) (applying an issue-specific standard to issues of s.2(b) access to government property); *Ontario (Public Safety and Services v. Criminal Lawyers' Association*, [2010] 1 S.C.R. 815, at para. 31 (S.C.C.) (setting a standard for access to documents under s.2(b) that are "necessary to permit meaningful discussion on a matter of public importance").

The heart of the problem under s.2(b) is the purpose-effects test. This branch of *Irwin Toy* entered the jurisprudence early in the *Charter*'s interpretation when the Court was mulling a variety of concepts. The purpose-effects doctrine migrated to s.2(b) from *Big M*'s watershed decision under s.2(a) of the *Charter,* which guarantees freedom of conscience and religion. This doctrine has not influenced the s.2(a) jurisprudence and is dysfunctional under s.2(b), where it remains formally in place.[13] There are three fundamental problems with this doctrine. First, the purpose-effects test rests on a double standard that asks whether the government's interference with expressive freedom is purposeful in nature, or arises from state action with adverse effects on expressive freedom. While purposeful infringements proceed directly to s.1, effects-based interferences do not infringe s.2(b) unless the claimant demonstrates that their expressive activity advances the guarantee's underlying values.[14] Not only is it conceptually confusing, the purpose-effects dichotomy disadvantages one class of claimants vis-à-vis others, and is difficult to apply.

Second, the purpose-effects test is ineffective as well as clumsy, and is more often skipped than applied.[15] In most cases, the infringement is self-evident and does not require a purpose-effects analysis, with the result that s.2(b) typically exports a bare finding of breach to s.1. [16] Third, the *pro forma* discussion of breach under *Irwin Toy* does not require or invite analysis of the nature and severity of the violation. Despite being incorporated into the guarantee from the outset, s.2(b)'s underlying values play little or no

[13] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989], 1 S.C.R. 927, at 972 (stating that the importance of focusing on the purpose and effects of the legislation is nowhere more clearly stated than in *R. v. Big M Drug Mart*).
[14] *Irwin Toy v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 976-77 (stating that the claim must relate to "the principles and values underlying the freedom", and that the claimant must identify the meaning being conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing").
[15] But see *R. v. Khawaja*, [2012] 3 S.C.R. 555 (S.C.C.) (applying the purpose-effect test in the setting of anti-terrorism legislation).
[16] *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569 at para. 31 (S.C.C.) (confirming that unless it is a violent form of expression, all activity that conveys or attempts to convey meaning is covered by s.2(b)).

role in informing the breach and its consequences for expressive freedom.[17] For these reasons, this decision making methodology places expressive freedom at a disadvantage on arrival at s.1, because the analysis of breach can be superficial, to the point of being meaningless.[18] This analysis is clearly deficient and must be rebuilt. In particular, s.2(b)'s conception of breach must include a standard of violation that assesses the infringement and prepares a "case to meet" under s.1. In doing so, the gravity of the violation must be brought to the forefront of s.2(b) and then inform the question of reasonable limits.

The purpose-effects test is a doctrinal failure and would not be missed, but eliminating it leaves s.2(b) without any standard of violation. In its place, Part One proposed that s.2(b) import the *Amselem* test for s.2(a)'s guarantee of conscientious and religious freedom. Much in parallel with s.2(b), the first step of *Amselem* defines religion, for purposes of s.2(a)'s scope of entitlement, and then addresses the question of violation through a standard that asks whether the state's interference with religious freedom is more than trivial or insubstantial in nature.[19] That test would support a generous interpretation of s.2(b) and work well for s.2(b)'s guarantee of expressive freedom. A revised doctrine of breach – the *Irwin Toy/Amselem* test – retains the first step of *Irwin Toy* and then applies the *Amselem* standard to determine the violation.

Though the meaning of "trivial" and "insubstantial" is somewhat subjective and can vary in interpretation, these words signal that, except where it is essentially *de minimis*, interferences with expressive freedom violate s.2(b) and must be tested under s.1. This is consistent with a concept of entitlement that has been embedded in the jurisprudence from the outset, and from that perspective the

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[17] Those values, which were adopted in *Ford* and the subsequent s.2(b) jurisprudence, are truth seeking, social and political decision making, and human flourishing. *Ford v. Quebec (Attorney General)*, [1988) 2 S.C.R. 712, at 765-67; *Irwin Toy v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at 976.

[18] The question of breach is often conceded, which further deters discussion of the infringement under s.2(b).

[19] *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 (S.C.C.) at para. 59 (stating that it suffices under s.2(a) for a claimant to show that government action interfered with religious beliefs "in a manner that is more than trivial or insubstantial"; underlining in original).

Irwin Toy/Amselem standard would not narrow the scope of entitlement. In this, it is significant that s.2's guarantees of religious and expressive freedom are related, but not identical. To explain, s.2(a) guarantees protection for religious beliefs *and practices*, including conduct, and the analysis looks at harm to others in determining the question of breach.[20] By contrast, s.2(b) protects expression, not conduct, and the impact of expressive activity on others is not considered in determining the infringement. Apart from *Irwin Toy*'s exception for violent forms of expression, harm to others arising from expressive activity must be addressed under s.1's concept of reasonable limits.

Under this proposal, the analysis of breach explicitly addresses the nature and severity of the violation, including the scope of the infringement, its impact on the claimant(s), its consequences for the s.2(b) rights of others and for expressive freedom – including any chilling effects – and the degree to which it undermines s.2(b)'s guarantee of freedom and expression's underlying values. That discussion informs the violation under s.2(b), as well as the s.1 analysis, because the justifiability of limits cannot be fairly decided without considering the severity of the infringement. At present, that issue is not considered under s.2(b).

These modifications, which (i) eliminate the purpose-effects test, (ii) import the *Amselem* standard of violation, and (iii) upgrade the discussion of the infringement, provide an approach to breach that completes the s.2(b) analysis and sets the groundwork for the discussion of reasonable limits under s.1. Sections s.2(b) and 1 are seamless and connected under a conception that draws the analysis of breach into the question of justification under s.1.

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[20] *R. v. Big M Drug Mart*, [1985] 1 S.C.r. 295 at 344-47 (adopting an inclusive conception of s.2(a) that extends the guarantee to beliefs and practices, subject to the proviso that "such manifestations" must not injure their neighbours and their parallel rights). In *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, the Court stated, at para. 62, that the impact on others must be considered, and that *conduct* that potentially causes harm to others would not "automatically be protected" by s.2(a)(emphasis added).

III. SECTION 1: FROM THE CONTEXTUAL APPROACH TO PROPORTIONALITY BALANCING

1. From *Irwin Toy* to the contextual approach

Once the Court adopted a generous interpretation of s.2(b), the s.1 analysis took a turn of its own in *Irwin Toy*. There, the Court varied the *Oakes* test, introducing a double standard to modulate the threshold of justification. Specifically, the majority opinion prescribed that when the state acts as the singular antagonist of an individual, as in the criminal justice system, it is subject to a strict *Oakes*-ian standard of review.[21] On other occasions, when the state is mediating competing claims or protecting the vulnerable, as with the restrictions on children's advertising at issue in *Irwin Toy*, the s.1 review will be more deferential.[22] There, the introduction of a bifurcated model of justification enabled the Court to uphold the restrictions on advertising.[23] Though it never became dominant and was quickly eclipsed by the contextual approach, *Irwin Toy*'s tiering of s.1 scrutiny introduced and normalized the idea that lower standards of justification are permissible in s.2(b) decision making.[24]

Soon after *Irwin Toy*, the Supreme Court decisions in *Edmonton Journal v. Alberta* and *R v. Keegstra* developed a contextual approach to s.2(b) decision making.[25] Rather than a double standard, that approach rests on an assumption that the *Charter* status of expressive activity depends on how well

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[21] *Irwin Toy v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 994.
[22] *Irwin Toy v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 990, 993.
[23] *Irwin Toy v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 994 (explaining that because of competing social science evidence on how to protect children from advertising it was sufficient, under minimal impairment, for the government to show that it had a reasonable basis for concluding that its ban satisfied that requirement).

[24] Note, on this issue, that *Irwin Toy* also created a tiered approach to expressive freedom under s.2(b)'s purpose-effects test. Meanwile, the underlying concept of *Irwin Toy*'s two-tier doctrinal modification to *Oakes* (*i.e.,* whether the state is a singular antagonist or not) is occasionally discussed but has had mixed success in the jurisprudence.
[25] *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.); *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.). *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232 (S.C.C.) was decided between these two decisions and also played a vital role in the emergence of the contextual approach.

its content aligns with s.2(b)'s abstract, aspirational values.[26] Where the *Criminal Code* prohibits expressive activity, or where objectionable expression like defamation or tobacco advertising was at stake, there was no contest and the Court did not hesitate to declare that limits on low-value content could be readily upheld.[27] This approach has been dominant in the jurisprudence since 1990, and has even supported limits on expression that, without argument, define the core of s.2(b).[28]

In brief, the problems with the contextual approach are at least four-fold. First, this approach engages s.2(b)'s underlying values to test and in most instances discount the value of expressive content.[29] Second, the stated purpose of the contextual approach is to adjust the standard of justification under s.1, lowering the evidentiary threshold to make restrictions on expressive freedom easier to uphold.[30] Third, it conflates evidentiary questions of harm with a subjective assessment of expressive content's value, with

[26] Those values, which were adopted in *Ford* and the subsequent s.2(b) jurisprudence, are truth seeking, participation in social and political decision making, and human flourishing. *Ford v. Quebec (Attorney General)*, [1988) 2 S.C.R. 712, at 765-67; *Irwin Toy v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at 976.

[27] Examples include *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.)(hate propaganda); *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 (S.C.C.) (federal human rights legislation); *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 (S.C.C.) (extracurricular expressive activity of a schoolteacher); *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 (S.C.C.) (tobacco advertising) (*per* La Forest J., dissenting); *Hill v. Scientology of Toronto*, [1995] 3 S.C.R. 1130 (S.C.C.) (common law defamation); and *R. v. Lucas*, [1998] 1 S.C.R. 439 (S.C.C.) (defamatory libel).

[28] See, e.g., *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827 (S.C.C.) (applying a deferential standard of justification to restrictions on political expression); *R. v. Bryan*, [2007] 1 S.C.R. 527 (S.C.C.) (upholding a temporary ban on publication of federal election results; see discussion *infra*).

[29] For example, in *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at 282-83 (S.C.C.) La Forest J.'s dissenting opinion declared that tobacco advertising was as far from s. 2(b)'s core as prostitution, hate mongering and pornography, and should only receive "a very low degree of protection" under s. 1. In *R. v. Lucas*, [1998] 1 S.C.R. 439 at para.s 93-94 (S.C.C.), Cory J. described defamatory statements as "inimical" to s. 2(b)'s core values, adding that it would "trivialize the magnificent panoply" of rights guaranteed by the Charter to attach significant value to such content; in his view, defamatory libel should receive no more than "scant protection" under s. 1.

[30] In *Keegstra*, for instance, Dickson C.J. stated that the question is whether expressive activity is "tenuously connected to the values underlying s.2(b)" and makes these restrictions "easier to justify than other infringements". He found that the *Criminal Code* prohibition was easier to uphold because hate propaganda "strays some distance from the spirit of s.2(b)". *R. v. Keegstra*, [1990] 3 S.C.R. 697, at 761 & 766 (S.C.C.).

the result that outcomes are based more on perceptions of expressive value than evidence of harm.[31] Fourth, the contextual approach's analysis of values all but pre-empts the final step of *Oakes*, effectively rendering the infringement's deleterious consequences for s.2(b) a moot question. In all these ways, the contextual approach skews the s.1 analysis, tipping the balance decidedly against expressive freedom.

The defects of the contextual approach are systemic and cannot be addressed by modifying the doctrine, because its central premise – that the *Charter*'s protection of expression depends on perceptions of its merit – is wrong in principle.[32] As such, it undermines the *Oakes* test and especially its inquiry into the deleterious consequences of a violation. These concerns are fundamental but can be addressed in two steps: while the first abandons the contextual approach, removing it from the s.1 analysis, the second builds the analytical capacity of proportionality balancing under the final step of *Oakes*.

2. From the contextual approach to proportionality balancing

Dropping the contextual approach from s.1 eliminates an unprincipled way of lowering the standard of justification, but does so without unduly disrupting s.2(b) decision making. At the same time, the s.1 analysis is re-calibrated to balance the interests at stake fairly by enhancing the role and authority of proportionality balancing. Under the final step of *Oakes*, the Court conducts a form of proportionality

[31] It cannot be assumed that expression that is valueless is also harmful. Though expressive activity that is merely valueless is entitled to the *Charter*'s protection, it may be harmful in some instances and innocuous in others. J.Cameron, "The Past, Present, and Future of Expressive Freedom", (1997) 35 *O.H.L.J.* 2, at 18-19.

[32] Some critiques include J.Cameron, "The Past, Present, and Future of Expressive Freedom", (1997) 35 *O.H.L.J.* 2; J. Cameron, "A Reflection on Section 2(b)'s Quixotic Journey, 1982-2012", (2012), 58 S.C.L.R. (2d) 163; J. Cameron, "*Big M*'s Forgotten Legacy of Freedom", in B. Bird, D. Newman & D. Ross, eds., *The Forgotten Fundamental Freedoms of the Charter* (Toronto: LexisNexis Canada, 2020) at 25-29; and J. Cameron, "Resetting the Foundations: Renewing Freedom of Expression under Section 2(b) of the Charter", in B. Bird and D. Ross, eds., *Forgotten Foundations of the Canadian Constitution*. (LexisNexis Canada, 2022) at 145-50.

balancing that measures the deleterious consequences of a *Charter* violation against its salutary benefits for the democratic community.[33]

In the early years of *Charter* interpretation, this step was dismissed as an ineffective or irrelevant part of the s.1 analysis and was overlooked in most cases.[34] A key insight into the evolution of s.2(b) methodology is that s.1 balancing was at best underdeveloped – and more dormant in nature – at this time. In its absence and, as Wilson J. explained in *Edmonton Journal*, a concept of context could address the problems inherent in abstracting *Charter* rights from their circumstances and enable the Court to set competing interests "in sharp relief".[35] While it engaged with the expressive activity under s.1, the contextual approach did so in a misguided way that set expressive content up against s.2(b)'s abstract values in an analysis that was awkwardly grafted onto the *Oakes* test.[36] Rather than eliminate their use, this concept re-purposed abstract values in the guise of an approach that diminished the expressive activity at stake and did not engage in any balancing of values. Instead, this approach focused on whether expressive content was valuable enough to protect under s.1.

The contextual approach has had a profound effect on s.1 balancing. Noting that assigning expressive activity low value is used to "inform the s.1 analysis at various steps", McLachlin J. cautioned in *R. v. Lucas* that "we must be careful not to allow the discussion of context to pre-empt the analysis itself".[37] That is nonetheless what has occurred. In *R. v. Keegstra*, for example, Dickson C.J. – the author

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[33] This formulation of the test was developed in *Dagenais v. C.B.C.*, [1994] 3 S.C.R. 835 at 889 (S.C.C.) (stating that there must be a proportionality between the deleterious effects of the measures and their objective, and "there must be a proportionality between the deleterious and the salutary effects of the measures").

[34] In 1997, a few years after the contextual approach was established under s.2(b), Peter Hogg wrote that the Court "goes through the motion" on the final step of *Oakes*, though it has "never had any influence on the outcome of a case" and can "safely be ignored". P. Hogg, *Constitutional Law*, 4th ed. (Toronto: Thomson Canada Ltd., 1997) at 898.

[35] *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.) at 1355.

[36] *Keegstra* added the contextual approach and its assessment of values to the discussion of the proportionality branches of the *Oakes* test.

[37] *R. v. Lucas*, [1998] 1 S.C.R. 439, at paras. 114 & 115 (S.C.C.) (dissenting in part).

of the *Oakes* test – addressed that step in three paragraphs, stating that the infringement was not "of a most serious nature" and admitting that the deleterious effects of the violation were of little concern for expression that is "largely removed from the heart of free expression values".[38] Years later, in the Court's second leading decision on hateful expression, *Saskatchewan (Human Rights Commission) v. Whatcott* dedicated no more than four of its 88 paragraphs on s.1 to the balancing analysis. In doing so, the Court made no mention of the infringement's deleterious consequences for expressive freedom, and did not balance the salutary benefits of the regulation against its deleterious consequences for expressive freedom.[39] There, as well, the Court's conclusion that the expressive content had little redeeming value obviated the need to balance the benefits and negative consequences of the violation.[40]

A methodology that by necessary operation negates analysis of the deleterious consequences is incapable of protecting the guarantee. Proportionality balancing cannot be conditional on or governed by an *a priori* conclusion that the deleterious consequences are insignificant because the expressive activity at stake is considered low in value. For these reasons, the contextual approach is misguided and must be discontinued.

At the same time, the final step of *Oakes* must be vitalized to serve its function of determining whether the consequences of violating s.2(b) are justifiable. Proportionality balancing is the mechanism, within the structure of *Oakes*, that squarely confronts the impact of the violation. After noting that Hogg dismissed it as "redundant", Chief Justice McLachlin stated, in *Alberta v. Hutterian Brethren of Wilson Colony*, that "[o]nly the fourth branch [of *Oakes*] takes full account of the 'severity of the deleterious effects of a measure on individuals or groups'".[41] Because it only applies after a violation is justifiable

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[38] *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 787 (S.C.C.).
[39] *Saskatchewan (Human Rights Commission v. Whatcott*, [2013] 1 S.C.R. 467, at paras. 147-50.
[40] *Saskatchewan (Human Rights Commission v. Whatcott*, [2013] 1 S.C.R. 467, at paras. 112-20 (stating, among other things, that the expression at stake contributes little to the values underlying freedom of expression and that restrictions are easier to justify).
[41] *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567, at para. 75, 76. (S.C.C.).

under the other parts of *Oakes*, this step is explicitly concerned with rights protection. Pursuant to *Oakes*, the final step directs an inquiry into the effects of a violation that goes beyond its "general effect," and considers the nature of the right or freedom violated, the extent of the violation, and the degree to which it trenches on the integral principles of a free and democratic society.[42] In outlining this analysis, Chief Justice Dickson added that the more deleterious the effects, the more important the objective must be to warrant the infringement.[43] In other words, this part of the s.1 analysis raises the bar on justification where the deleterious consequences of the infringement are serious.

Under a model that focuses on the final step of *Oakes,* the assumptions of the contextual approach no longer determine the outcome. Instead, the proportionality test imports s.2(b)'s analysis of infringement into s.1, and the state bears the onus to demonstrate that the salutary benefits for the democratic community outweigh those consequences. Context remains important, but plays a different role under the auspices of a balancing test that requires pointed consideration of the deleterious consequences of a violation.[44] Whether expressive content has value does not lower the standard or determine the outcome, as it did under the contextual approach.

Re-directing the proportionality balancing in s.2(b) cases creates a principled framework for the s.1 analysis, and in doing so tracks the Court's attention to this step under in other *Charter* decisions, including *R. v. K.R.J*.[45]

3. Models of proportionality balancing

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[42] *R. v. Oakes*, [1986] 1 S.C.R. 104, at 139 (S.C.C.).
[43] *R. v. Oakes*, [1986] 1 S.C.R. 104, at 140 (S.C.C.).
[44] In *R. v. Lucas*, [1998] 1 S.C.R. 439 at para. 119 (S.C.C.) (*per* McLachlin J., dissenting in part, and stating that the analysis under this step remains "flexible and contextual", taking account of different legislative and expressive contexts, while "at the same time ensuring an adequate level of protection for all forms of expression", and noting that limits on low value expression are not justifiable because the threshold is lower, but because the beneficial effects of regulation more easily outweigh any negative effects of infringing the entitlement).
[45] *R. v. K.R.J.*, [2016] 1 S.C.R. 906 (S.C.C.)

Thomson Newspapers v. Canada (Attorney General) provides one of the most compelling discussions of s.1 balancing under s.2(b), and is a precursor to two other decisions that are discussed in more detail.[46] In *Thomson Newspapers*, Justice Bastarache invalidated a ban on public opinion polls in the final 72 hours of a federal election campaign. In doing so, he provided a thoughtful discussion of the proportionality analysis, explaining that it performs a "fundamentally distinct role".[47] Agreeing that it is "the only part of the current analysis to acknowledge the harm or cost of justifiable limits", he went on to describe this step – which determines whether the *Charter* right is impaired as little as possible "given the validity of the legislative purpose" – as the "ultimate standard".[48] On that part of the analysis, Justice Bastarache concluded that the "very serious invasion of the freedom of expression of all Canadians" was not outweighed by the "speculative and marginal benefits postulated by the government".[49]

A few years later, Justice Abella observed that "[p]roportionality, after all, is what s.1 is about".[50] Then in *R. v. K.R.J.*, the Court re-inforced the "fundamentally distinct role" of a step that allows – or *requires* – courts to determine the justifiability of an infringement "on a normative basis".[51] After explaining that the limits must be demonstrably justified, the Court held that while the deleterious consequences of infringing s.11(d) were "significant and tangible", the benefits were "marginal and speculative". [52]

Two of the Court's s.2(b) opinions demonstrate how proportionality balancing should proceed when expressive freedom is at stake. In *R. v. Bryan*, Abella J.'s dissent carefully addressed the salutary

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[46] [1998] 1 S.C.R. 877 (S.C.C.).
[47] *Thomson Newspapers v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 at para. 125 (S.C.C.).
[48] *Thomson Newspapers v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 at para. 125 (underlining in original) (S.C.C.) (citing J.Cameron, "The Past, Present, and Future of Expressive Freedom", (1997) 35 *O.H.L.J.* 2).
[49] *Thomson Newspapers v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 at para. 131.
[50] *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567 at para. 149 (S.C.C.).
[51] *R. v. K.R.J.*, [2016] 1 S.C.R. 906 at paras. 77-80.(S.C.C.).
[52] *R. v. K.R.J.*, [2016] 1 S.C.R. 906 at paras. 91-92, and (S.C.C.). In the result, one of the *Criminal Code*'s pornography provisions failed the proportionality test but the other, under different evidence, did not.

benefits and deleterious consequences of an infringement that she concluded was not justifiable.[53] In *Alberta (Information & Privacy Commissioner) v. UFCW, Local 401*, a joint majority opinion by Justices Abella and Cromwell gave close attention to the deleterious consequences and impact of privacy legislation on expressive activities related to a labour union strike.[54] In both instances, the opinion presented a rigorous analysis under the final stage of the *Oakes* test.[55]

In *R v. Bryan,* the Court upheld s.329 of the *Canada Elections Act* ("CEA"), which prohibited the communication of federal election results from eastern Canada while voting was still underway in the west.[56] To reduce the risk that early election results from the east could influence voting in the west, the *CEA* adopted a model of staggered voting hours across time zones. Apart from its potential impact on the outcome, the early release of some election results raised issues about information equality and the perceived fairness of an election.[57] Specifically, the process might be perceived as unfair if some, but not all Canadians, had access to this information while voting continued. The question in *Bryan* was whether s.329's prohibition on communicating timely election results violated s.2(b)'s guarantee of expressive freedom.

In the absence of direct evidence that unequal access to these results undermines public confidence in elections, Bastarache J.'s majority opinion found that informational equality is a "logically direct result of the requirement that elections be fair".[58] He relied on the contextual approach to uphold

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[53] *R. v. Bryan*, [2007] 1 S.C.R. 527 (S.C.C.).
[54] *Alberta (Information & Privacy Commissioner) v. UFCW, Local 401*, [2013] 3 S.C.R. 733 (S.C.C.)
[55] This analysis draws on an earlier discussion of these decisions in "Her Fundamentals: Justice Abella and Section 2(b) of the *Charter*" (in *A Life of Firsts: A Celebration of a Remarkable Career and Legacy*, conference publication forthcoming, 2023).
[56] *Canada Elections Act*, S.C. 2000, c.9, s.329. Bastarache J. wrote the majority opinion upholding s.329, and Fish J. added a concurrence in a 5-4 vote in which Abella J. wrote the minority opinion for four members of the Court.
[57] *R. v. Bryan*, [2007] 1 S.C.R. 527 (S.C.C.) at para. 14 (*per* the majority opinion, explaining that the "true objective" of the provisions was to ensure informational equality by measures that address the perception of unfairness when some voters have access to information that is denied to others).
[58] *R. v. Bryan*, [2007] 1 S.C.R. 527 (S.C.C.) at para. 22.

s.329, concluding that the early communication of election results "is at the periphery of the s.2(b) guarantee".[59]

The majority opinion and concurrence by Justice Fish also addressed the final step of *Oakes*. For the majority, Justice Bastarache held that the state had no higher burden to meet on salutary benefits and found no evidence that the harm to s.2(b) was "of a quality or character manifestly superior" to the salutary goal of electoral fairness.[60] In addition, he found that the magnitude of a ban temporarily delaying the release of election results for 2-3 hours was "extremely small".[61] Justice Fish concurred, stating that a minor delay in transmitting election results "at least" had the merit of "addressing the perception of unfairness caused by the information balance alone."[62] The harm to informational equality was "resistant to precise measurement," but the prohibition was justifiable because the deleterious effects of delaying the release of results was minimal.[63]

Meanwhile, Abella J.'s dissenting opinion placed a sharp focus on proportionality balancing and the issue of harm, studying it from both sides.[64] She maintained that the salutary benefits of a prohibition must meet a standard of "clear and convincing evidence," and found that the mere fact of informational equality was not sufficient to warrant the infringement.[65] In her view, the CEA's staggered-hours model ameliorated the risk that voters might know the outcome of the election before casting their ballot.[66] On the other side of the balance, Abella J. held that the harm of suppressing "core political speech", even for

[59] In this, it is instructive that his opinion provided no discussion of s.2(b) and dedicated more than 20 paragraphs to the contextual approach under s.1. *R. v. Bryan*, [2007] 1 S.C.R. 527 (S.C.C.) at paras.9-30.
[60] *R. v. Bryan*, [2007] 1 S.C.R. 527 (S.C.C.) at para. 51.
[61] *R. v. Bryan*, [2007] 1 S.C.R. 527 (S.C.C.) at paras. 48, 51.
[62] *R. v. Bryan*, [2007] 1 S.C.R. 527 (S.C.C.) at para. 66.
[63] *R. v. Bryan*, [2007] 1 S.C.R. 527 (S.C.C.) at paras. 66, 80.
[64] It is striking that Abella J. identified and emphasized the question of harm more than 25 times in her reasons.
[65] *R. v. Bryan*, [2007] 1 S.C.R. 527 (S.C.C.) at para. 110.
[66] *R. v. Bryan*, [2007] 1 S.C.R. 527 (S.C.C.) at para. 89.

a short time, was profound.[67] As she explained, the speculative, hypothetical, and unsubstantiated harm to electoral fairness was far outweighed by the deleterious consequences for a core democratic right.

The balance in *Bryan* was between the relative benefits and consequences of a 2-3 hour delay in their transmission, and the early release of voting results from 32 of 308 House of Commons seats. Under Justice Abella's analysis, the evidence on harm balanced in favour of expressive freedom on both sides of the proportionality equation. First, the government failed to substantiate the harm arising from unequal but temporary access to some election results, and could not establish the salutary benefits of the restriction. Second, the violation of s.2(b) was not trivial or minor in nature, but constituted a serious interference with expressive activity at its apex, during a democratic election.[68] Under that view of the evidence, the balance between the benefits and consequences of the s.2(b) violation was not close.

Of prime interest in *Bryan* is the significance Justice Abella attached to the final step of *Oakes* and the details of proportionality balancing.[69] As noted, she affirmed the burden on the state, explaining that, in the absence of "clear and convincing evidence" to justify limits on the transmission of election results, the salutary benefits of the regulation could not outweigh the deleterious consequences of violating s.2(b).[70] The *Bryan* dissent also focused on the deleterious consequences of the prohibition, according that element prominence in the analysis. Justice Abella's conclusion that the impact on expressive freedom was grave, and that the salutary benefits were hypothetical or speculative, was evidence based. On that point, her dissent echoed Chief Justice Dickson's instruction in *Oakes* that the threshold of justification is higher where the deleterious consequences of an infringement are serious. As such, the

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[67] *R. v. Bryan*, [2007] 1 S.C.R. 527 (S.C.C.) at para. 107.
[68] "News is news precisely because of its immediacy, especially during an election". *R. v. Bryan*, [2007] 1 S.C.R. 527 (S.C.C.) at para. 128.
[69] While Bastarache J.'s discussion of proportionality balancing was four paragraphs and Fish J.'s was fourteen, Justice Abella's extended over twenty-six paragraphs.
[70] *R. v. Bryan*, [2007] 1 S.C.R. 527 (S.C.C.) at para. 116.

Bryan dissent provides a compelling illustration of the way proportionality balancing should proceed in s.2(b) cases.[71]

UFCW is equally important on this issue.[72] There, Justices Abella and Cromwell wrote a joint unanimous decision invalidating Alberta's *Privacy Information Protection Act* ("*PIPA*") in its entirety. The question was whether *UFCW*'s decision to photograph those who crossed the picket line, including members of the public, was in violation of the privacy legislation.[73] Though the statute was overbroad in several respects, the Court invalidated the statute because it failed the demands of proportionality balancing.[74]

Starting with the analysis of breach, *UFCW* focused on *PIPA*'s impact on the expressive activities of the union. Though the breach was conceded, the Court reviewed *PIPA* to explain that the broad scope of the legislation was mitigated by exemptions that did not apply to *UFCW*'s picketing activities.[75] Under s.1, the Court held that the privacy legislation served "self-evidently significant social values" but was disproportionate to the scope of the violation, because it contained no mechanism for balancing the labour union's expressive activities against the interests of the legislation.[76] In effect, *PIPA* protected virtually all personal information, without regard to the context.[77]

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[71] At the same time, it bears noting that none of the Court's opinion took more than one paragraph to discussion the issue of breach.
[72] *Alberta (Information & Privacy Commissioner) v. UFCW, Local 401*, [2013] 3 S.C.R. 733 (S.C.C.).
[73] Signs posted in the area warned that images of those who crossed the line could be posted on a website. *Alberta (Information & Privacy Commissioner) v. UFCW, Local 401*, [2013] 3 S.C.R. 733 (S.C.C.) at para. 4.

[74] *Alberta (Information & Privacy Commissioner) v. UFCW, Local 401*, [2013] 3 S.C.R. 733 (S.C.C.). This discussion is the centrepiece of the decision, extending from paras. 20-38, of a 42-paragraph opinion.
[75] *Alberta (Information & Privacy Commissioner) v. UFCW, Local 401*, [2013] 3 S.C.R. 733 (S.C.C.) at paras. 12-17.
[76] *Alberta (Information & Privacy Commissioner) v. UFCW, Local 401*, [2013] 3 S.C.R. 733 (S.C.C.) at para. 24.
[77] *Alberta (Information & Privacy Commissioner) v. UFCW, Local 401*, [2013] 3 S.C.R. 733 (S.C.C.) at para. 25.

In conducting the balancing analysis, the Court stated that photographing those who crossed a union picket line did not significantly compromise privacy interests.[78] Against that conclusion, the judges declared that *PIPA*'s deleterious effects would "weigh heavily" in the balance.[79] That element of the analysis was comprehensive, reviewing the *Charter*'s labour jurisprudence and explaining that *UFCW*'s labour picketing was a "particularly crucial form of expression" that has "strong historical roots" and serves objectives that are "at the core of protected expressive activity under s.2(b)"[80]. The proportionality analysis in *UFCW* grounded a conclusion that the deleterious consequences of *PIPA*'s overbroad legislation were disproportionate to the benefits of the privacy legislation.[81]

UFCW's s.2(b) methodology has many positive elements. The Court paused initially on the issue of breach and explained the extent of the infringement. The s.1 analysis discussed *PIPA*'s flaws in protecting virtually all personal information and failing to accommodate contexts such as labour strikes, or to balance the interests at stake. The deleterious consequences for expressive freedom were serious because *PIPA*'s protection of privacy was acontextual and unjustifiably failed to accommodate UFCW's high-value expressive activity.

To sum up, the contextual approach and proportionality balancing represent two different models of s.2(b) decision making. Juxtaposing *Keegstra* and *Whatcott* with *Bryan* and *UFCW* highlights how the contextual approach and its assessment of expressive content can pre-determine the final step of *Oakes*. And while the contextual approach is outcome-oriented and effectively forecloses analysis of the deleterious consequences of violating s.2(b), the *Bryan* dissent and *UFCW* shifted the focus to an

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[78] *Alberta (Information & Privacy Commissioner) v. UFCW, Local 401*, [2013] 3 S.C.R. 733 (S.C.C.) at para. 26 (noting that the images were taken at an open political demonstration and did not include intimate biographical details).
[79] *Alberta (Information & Privacy Commissioner) v. UFCW, Local 401*, [2013] 3 S.C.R. 733 (S.C.C.) at para. 28.
[80] *Alberta (Information & Privacy Commissioner) v. UFCW, Local 401*, [2013] 3 S.C.R. 733 (S.C.C.) at paras. 28-35.
[81] Notably, *UFCW* is one of only two decisions after 2000 Court that invalidated statutory provisions under s.2(b) of the *Charter*. The other was *Greater Vancouver Transportation Authority v. Canadian Federation of Students*, [2009], 2 S.C.R. 295.

evidence-based concept of proportionality balancing. As such, these opinions stand out in a s.1 jurisprudence that generally gives scant consideration to the freedom interests at stake, opening up a heightened role for s.2(b)'s freedom-affirming values in the s.1 analysis.

Though proportionality balancing can ground a principled approach to reasonable limits, there are caveats to note. First, the criteria of salutary benefits and deleterious consequences are open-ended and, as *Hutterian Brethren of Wilson Colony* shows, can be subjective in application.[82] There, the majority opinion and dissent each provided a comprehensive discussion of balancing, but selectively focused on the benefits and adverse impacts of Alberta's mandatory photo requirement for drivers' licences. While the majority opinion spoke in laudatory terms of the regulation's benefits and discounted the negative implications for Wilson Colony, the dissent went in the opposite direction, focusing on the gravity of the impact on religious freedom and all but dismissing the salutary benefits of the ID requirement.[83]

If the two opinions simply represent different interpretations of the same evidence, the point is that the balancing analysis must fairly address the question of harm. The function of the final step is to test the deleterious consequences of a violation and not to repeat the benefits of regulation discussed under other parts of *Oakes*. As Bastarache J. advised in *Thomson Newspapers*, a "weighing exercise" that "necessarily admits of some subjectivity" is nonetheless "lessened by the analysis of the purposes, rationality, and efficiency of the legislation *under other elements of the test*".[84] To return to *Oakes*, Chief Justice Dickson prescribed an inquiry that raises the threshold of justification for deleterious consequences that are serious in nature. This is the conception of balancing – as a high-threshold and evidence-based inquiry – that frames and directs the analysis under this step.

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[82] *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567 (S.C.C.).
[83] In each opinion the discussion of balancing was about 25 paragraphs long. See also *R. v. K.R.J.*, [2016] 1 S.C.R. 906 at para. 153 (S.C.C.) (*per* Brown J., dissenting in part, and claiming that the majority opinion overstated the deleterious consequences of the provision's retrospective effect and understated its salutary effects).
[84] *Thomson Newspapers v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 at para. 126 (emphasis added).

Finally, vestiges of the contextual approach must not be permitted to creep into proportionality balancing. In the past, the Court dismissed the deleterious consequences of a violation when expressive content was deemed to be low in value. As this discussion has emphasized, the final step of *Oakes* cannot be glossed because the consequences of prohibiting low-value expression are not considered serious.[85] The assessment of those consequences can and must be contextual, in the sense of identifying the impact of the violation on expressive activity that serves s.2(b)'s values, but cannot be a mechanism for reverting to the contextual approach and its practice of elevating value preferences to divert the question of harm.

Abandoning the contextual approach and enhancing the final step of *Oakes* offer a principled model of s.2(b) decision making. The proposal in Parts One and Two of this project connect the analysis of breach to proportionality balancing under s.1, where it informs the consideration of an infringement's deleterious consequences for expressive freedom. At that stage, it is incumbent on courts to address the rights-negating impact of an infringement in a principled way. Holistically, this doctrinal scheme for ss.2(b) and 1 serves the dual interests of protecting s.2(b)'s guarantee of expressive freedom and allowing reasonable limits to be justified under s.1.

IV. CONCLUSION

In combination, Parts One and Two of this project to renew s.2(b) methodology explain how the doctrinal edifice that arose around *Irwin Toy* is skewed against s.2(b)'s guarantee of expressive freedom. Its central goal is to develop a model that shows how the concepts of breach and justification can be modified to resolve these problems. The more embedded the doctrine, the more difficult it is to dislodge, and that is an obstacle for s.2(b). In the face of that challenge, the objective of these articles has been to return to principle and demonstrate how doctrinal modifications that are not unduly disruptive can lead

[85] Though there are others, two examples discussed in this article are *R. v. Keegstra*, [1990] 3 S.C.R. 697 and *R. v. Lucas*, [1998] 1 S.C.R. 439.

to significant – and even transformative – reform of the s.2(b) jurisprudence. Though they might alter the outcome in some instances, the more important goal is to set s.2(b) decision making in a framework of principle that is clear and robust in its protection of expressive freedom.