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RESETTING THE FOUNDATIONS: RENEWING FREEDOM OF EXPRESSION UNDER SECTION 2(B) OF THE CHARTER

Jamie Cameron*

I. INTRODUCTION

The 40th anniversary of the *Canadian Charter of Rights and Freedoms* on April 17, 2022 is a time for reckoning, and an opportunity to ready s. 2's fundamental freedoms for the future.¹ Today, as ever, freedom is under perennial challenge from the collective instinct to suppress voices and views that threaten to upset the status quo. The fundamental freedoms of religion, expression, peaceful assembly, and association are subject to the benevolence of the dominant will, and to any constraints the Charter's system of constitutional rights might place on that will.² Whether and to what degree a democratic community accepts freedom of difference, including differences that may be volatile and even destabilizing, is an age-old question. That much is familiar.

This discussion on the freedom to differ and dissent focuses on s. 2(b)'s guarantee of expressive freedom. If s. 2(b)'s fortunes in the Charter's formative period were mixed, two catalysts propel a re-set of the guarantee's foundations at this time. First is a backdrop of rising concern and pushback against the perceived excesses of expressive freedom, and a sensibility, in some discourse, that free expression is a

* Professor Emerita, Osgoode Hall Law School, York University. I thank the co-chairs of the Forgotten Foundations Workshop, Brian Bird and Derek Ross, for inviting me to participate in the Workshop, and also for providing valuable comments and editorial assistance on earlier drafts of my paper. I also thank Hoi Kong for commenting on the Workshop draft and engaging with me in discussion at the symposium. Finally, I am grateful to Matthew Traister (J.D. 2023) for his valuable research, especially on the "legacy" jurisprudence, discussed below at II, 1. "*Ford, Irwin Toy*, and a conception of breach under s. 2(b)"

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

² Note that s. 33 of the Charter grants legislatures the power to override certain Charter rights and freedoms, namely ss. 2 and 7 to 15 for a period of five years. In recent years the override has been invoked in controversial circumstances in Quebec, Saskatchewan, and Ontario. See, e.g., Bill 21, *An Act respecting the laicity of the State*, 1st Sess., 42nd Leg., Quebec, 2019 (S.Q. 2019, c. 12) and *An Act respecting French, the official and common language of Quebec*, 1st Sess., 42nd Leg., Quebec, 2021 (Quebec); *The School Protection Act*, S.S. 2018, c. 39 (Saskatchewan); and Bill 307, *The Protecting Elections and Defending Democracy Act, 2021*, S.O. 2021, c. 31 (Ontario).

throwback value, laissez-faire and regressive in nature.³ To some extent, that views finds expression in a regulatory impetus that aims primarily, though not exclusively, at online communications.⁴

Technology has shifted and escalated debate about the boundaries of expressive freedom, and while the regulatory thrust varies in its details, controlling a flood of unfathomable online content is the overarching goal. Regulating technology adds a layer of complication, but does not alter the unrelenting goal of eliminating objectionable content. While the abuse of freedom must be countered, expressive content is too often restricted through clumsy and overbroad measures that rest on an expansive and amorphous concept of harm. In conceptual terms, it is troubling that limits on expression may not be presented as exceptions to a presumption in freedom's favour. Too often, suppression is grounded in righteous conviction that prohibiting content that offends and even hurts is unarguable.

A second imperative arising from this synergy concerns s. 2(b)'s doctrinal edifice and its lack of fortitude to withstand the pressures of the day. To be fair, some branches of s. 2(b) jurisprudence, such as the open court doctrine, are for the most part exemplary.⁵ Moreover, and despite refusing to grant it constitutional recogni-

³ In the United States, see, e.g., G. Lakier, "The Non-First Amendment Law of Freedom of Speech" (2021) 134 Harv. L. Rev. 2299 (explaining how the "non First-Amendment" system of speech laws exemplify a majoritarian free speech tradition and modify the "laissez faire" constitutionalism of the First Amendment); T. Wu, "Is the First Amendment Obsolete?" (2018) 117 Mich. L. Rev. 547 (explaining that many of the core assumptions of the First Amendment no longer hold true); P.E. Moskowitz, *The Case Against Free Speech: The First Amendment, Fascism and the Future of Dissent* (New York: Hachette Book Group, 2019) (maintaining that freedom of speech has never existed and is empty, hollow, and meaningless). In Canada, see, e.g., R. Moon, "Does Freedom of Expression Have a Future?" in E. Macfarlane, ed., *Dilemmas of Free Expression* (Toronto: University of Toronto Press, 2021), at 15-34.

⁴ See, e.g., Report of the Standing Committee on Justice and Human Rights, House of Commons, *Taking Action to End Online Hate* (June 2019, 42nd Parl.), online: <<https://www.ourcommons.ca/Content/Committee/421/JUST/Reports/RP10581008/justrp29/justrp29-e.pdf>>; Final Report, Canadian Commission on Democratic Expression, "Harms Reduction: A Six-Step Program to Protect Democratic Expression Online (January 2021) ("A Six-Step Program"), online: <<https://ppforum.ca/articles/harms-reduction-a-six-step-program-to-protect-democratic-expression-online/>>; Bill C-36, *An Act to amend the Criminal Code and the Canadian Human Rights Act* (hate propaganda, hate crimes and hate speech), (1st Reading, June 23, 2021), online: <<https://parl.ca/DocumentViewer/en/43-2/bill/C-36/first-reading>>

⁵ See *Edmonton Journal v. Alberta (Attorney General)*, [1989] S.C.J. No. 124, [1989] 2 S.C.R. 1326 (S.C.C.) (statutory publication ban); *Dagenais v. Canadian Broadcasting Corp.*, [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835 (S.C.C.) (judicial publication ban); *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] S.C.J. No. 38, [1996] 3 S.C.R. 480 (S.C.C.) (closed courtrooms); *R. v. Mentuck*, [2001] S.C.J. No. 73, [2001] 3 S.C.R. 442 (S.C.C.); and *R. v. O.N.E.*, [2001] S.C.J. No. 74, [2001] 3 S.C.R. 478 (S.C.C.)

tion, the Court’s jurisprudence acknowledges the distinctive role the press and media play in a functioning democracy.⁶ But when content is at issue, s. 2(b) is notably less resilient.

As explained elsewhere in more detail, the current framework of s. 2(b) methodology is unsound and unprincipled.⁷ Fault lines that are embedded in the jurisprudence register at both stages of the analysis, under the guarantee’s standard of breach, as well as under the justification of limits under s. 1. These fault lines arise principally from the Court’s landmark decisions in *Ford v. Quebec* and *Irwin Toy v. Quebec*, and from adoption of the contextual approach under s. 1.⁸ The consequences for the Charter’s guarantee of expressive freedom are profound, and appear under each branch of the analysis.

(judicial publication bans); *Re Vancouver Sun*, [2004] S.C.J. No. 41, [2004] 2 S.C.R. 332 (S.C.C.) (closed hearing); *Toronto Star Newspapers Ltd. v. Ontario (Attorney General)*, [2005] S.C.J. No. 41, [2005] 2 S.C.R. 188 (S.C.C.) (access to search warrants). See J. Cameron, “A Reflection on Section 2(b)’s Quixotic Journey, 1982-2012” (2012) 58 S.C.L.R. (2d) 163, at 184-90 (praising the open justice jurisprudence as a “section 2(b) template”).

⁶ See *R. v. Vice Media Canada Inc.*, [2018] S.C.J. No. 53, [2018] 3 S.C.R. 374 (S.C.C.) (concluding that it was neither desirable nor necessary to address the constitutional status of the press under s. 2(b)). But see *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] S.C.J. No. 38, [1996] 3 S.C.R. 480 (S.C.C.); *R. v. Mentuck*, [2001] S.C.J. No. 73, [2001] 3 S.C.R. 442 (S.C.C.); *R. v. O.N.E.*, [2001] 3 S.C.R. 478 [2001] 3 S.C.R. 478 (S.C.C.); *Re Vancouver Sun*, [2004] S.C.J. No. 41, [2004] 2 S.C.R. 332 (S.C.C.); *Toronto Star Newspapers Ltd. v. Ontario (Attorney General)*, [2005] S.C.J. No. 41, [2005] 2 S.C.R. 188 (S.C.C.) (providing exemplary analysis of the vital links between a free press, the open court principle, democratic self government, and the accountability of the courts and justice system); see also *R. v. Vice Media Canada Inc.*, [2018] S.C.J. No. 53, [2018] 3 S.C.R. 374 (S.C.C.) (*per* Abella J., concurring and endorsing an independent guarantee for the press and media). See, generally, J. Cameron, “Section 2(b)’s Other Fundamental Freedom: The Press Guarantee, 1982-2012”, in L. Taylor and C-M. O’Hagan, eds., *The Unfulfilled Promise of Press Freedom in Canada* (Toronto: University of Toronto Press, 2017); B. Oliphant, “Does Independent Protection for Freedom of the Press Make a Difference?: The Case of *Vice Media v. Canada (Attorney General)*”, in B. Bird, D. Newman & D. Ross, eds., *The Forgotten Fundamental Freedoms of the Charter*, (Toronto: LexisNexis Canada, 2020).

⁷ 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 17-62 (critiquing the s. 2(b) jurisprudence); J. Cameron, “A Reflection on Section 2(b)’s Quixotic Journey, 1982-2012” (2012) 58 S.C.L.R. (2d) 163, at 167-73 (criticizing s. 2(b) methodology).

⁸ *Ford v. Quebec (Attorney General)*, [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712 (S.C.C.); *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927 (S.C.C.). The contextual approach was derived from Wilson J.’s concurring opinion in *Edmonton Journal v. Alberta (Attorney General)*, [1989] S.C.J. No. 124, [1989] 2 S.C.R. 1326 (S.C.C.), 5; see discussion below at III “Resetting the Foundations, Part 2: Section 1, The Contextual Approach, and a Conception of Justification”.

Critically, the current methodology marginalizes the concept of breach in significant ways. First, s. 2(b) lacks a conception of freedom to ground the entitlement and inform the analysis of breach. Forty years on, the jurisprudence has yet to offer a theory of freedom that safeguards the voices of difference and dissent. This is a serious deficiency that must be corrected to meet s. 2(b)'s unerring challenge – of explaining why the Charter protects all views, including the ideologically and morally offensive. Precisely because it engages our strongest emotions and challenges deep-seated instincts, it is no small feat to show why expressive content that flouts or unsettles conventional values should be protected by the Charter.

Second, an abstract theory or conception cannot protect freedom on its own, and must be accompanied by a framework of principle to address transgressions of s. 2(b). Before any question of justification arises under s. 1, the analysis of breach requires a deep examination of the Charter violation and its consequences for expressive freedom. Regrettably, that is not how current doctrine operates. In most instances, the s. 2(b) analysis is perfunctory and discussion of the infringement is thin at best, and often non-existent. Meanwhile, the analysis of reasonable limits under s. 1 of the Charter is detailed and thorough. The lack of balance in this doctrinal scheme necessarily privileges limits at the expense of s. 2(b)'s guarantee of freedom.⁹

The deficits on the s. 2(b) side of the Charter's equation of rights and limits are mirrored under s. 1. There, the central problem is the contextual approach and its unrequited use of s. 2(b)'s underlying values to discount expressive content and relax the standard of justification.¹⁰ Under that approach, limits do not rest on sufficient evidence of harm but rather, on pronouncements about the relative value of expressive content. In principle, it is critical to reject the view that expression can be limited simply because it lacks value. As explained below, protection for s. 2(b)'s guarantee of expressive freedom requires a retreat from the contextual approach and return to a more disciplined standard of justification under *Oakes*.¹¹

In spite of the criticisms it attracted, s. 2(b)'s analytical framework has been relatively static since *Irwin Toy* was decided more than thirty years ago.¹² While other guarantees have been re-worked and even re-invented, expressive freedom has

⁹ See discussion below at II, 1. “*Ford, Irwin Toy*, and a conception of breach under s. 2(b)”.

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¹¹ See discussion below at II, 1. “*Ford, Irwin Toy*, and a conception of breach under s. 2(b)”.

¹² See, e.g., R. Elliott, “Back to Basics: A Critical Look at the *Irwin Toy* Framework for Freedom of Expression”, (2011), 15 *Rev. of Const. Studies* 205; C. Sethi, “Beyond *Irwin Toy*: A New Approach to Freedom of Expression under the *Charter*”, (2012), 17 *Appeal: Current Law and Law Reform* 21 (proposing alternative approaches to s. 2(b)).

experienced little conceptual growth.¹³ The Charter’s 40th anniversary offers a moment to pause and invest in s. 2(b)’s renewal.

A process of renewal can place s. 2(b) on principled foundations and constrain the power of regulators and legislators to infringe the Charter’s guarantee of expressive freedom. This proposal addresses s. 2(b) and s. 1, engaging the concepts of breach and justification in a process of holistic reform. Under s. 2(b), it offers a theory of freedom and suggests how to reform the current standard of breach before turning to s. 1. There, the methodology requires the elimination of the contextual approach and a re-invigoration of the *Oakes* test.

This ambitious task begins with a review of the deficiencies of s. 2(b)’s current foundations, before introducing and explaining the building blocks of the proposal. What emerges from a remake of s. 2(b) doctrine is a richer conception of entitlement that deepens the analysis of breach and treats violations of expressive freedom with the gravitas that is required by the Charter’s guarantee of fundamental freedoms. Under s. 1, the methodology in s. 2(b) cases abandons the contextual approach, restores the mandate of evidence-based decision-making, and boosts the role of proportionality balancing to ensure that the interests at stake are fairly weighed before limits on expressive freedom are justified.

A process of renewal that is complex in its re-ordering of current doctrine rests on fundamental principles of rights protection. These principles support a proposal to reshape s. 2(b)’s foundations and outline a robust methodology for the future. Protecting freedom of expression depends on a culture of respect for rights and a constitutional system of rights protection. Ideally, these dynamics can work in tandem to bolster the Charter’s guarantee of expressive freedom. At this moment, neither is especially reliable. Resetting s. 2(b)’s foundations can strengthen the Charter’s role in protecting expressive freedom and inspire respect for freedom in the broader democratic culture.

II. RESETTING THE FOUNDATIONS, PART 1: THE PRINCIPLE OF FREEDOM AND CONCEPT OF BREACH

1. *Ford, Irwin Toy*, and a conception of breach under s. 2(b)

Neither of the Supreme Court’s s. 2(b)’s landmarks inspired a culture of respect for expressive freedom: while *Irwin Toy* upheld restrictions on advertising aimed at children, *Ford*’s invalidation of Quebec’s outdoor signage law marked a pyrrhic victory for expressive freedom when the province re-enacted the legislation and relied on the override.¹⁴ Comparisons to other branches of s. 2 jurisprudence are

¹³ See below at II, 1. “*Ford, Irwin Toy*, and a conception of breach under s. 2(b)” (noting the renewal and re-invention of s. 2(d) and its guarantee of associational freedom).

¹⁴ *Ford v. Quebec; Irwin Toy v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927 (S.C.C.). In provoking the Government of Quebec to use the override, *Ford* had spillover consequences for national unity and the Meech Lake Accord. J. Cameron, “To the

revealing. Prior to *Ford* and *Irwin Toy*, *R. v. Big M Drug Mart* spoke powerfully of freedom from religious persecution and of freedom as the absence of coercion or constraint.¹⁵ And though defeatist at first, the s. 2(d) jurisprudence provided extensive discussion of associational freedom in the *Alberta Reference*, in McIntyre J.'s concurrence and in Dickson C.J.C.'s much revered dissent.¹⁶ That dissent provided the foundation for s. 2(d)'s renewal many years later.¹⁷

In many ways, *Ford's* invalidation of Quebec's language law was monumental. Quebec's immediate turn to the override confirmed the risks the Court took in applying a rigorous standard of justification and invalidating legislation of utmost sensitivity to Quebecers. Section 2(b)'s interpretation was also at stake. At the time, it was an open question whether the guarantee should be restricted in scope to "political" expression. The Court rejected that approach, declaring that a "great range of expression" is deserving of constitutional protection and concluding that there is "no sound basis" for excluding commercial expression from the Charter.¹⁸ *Ford* held that s. 2(b) extends to more than the content of expression, includes choice of language in outdoor commercial advertising, and protects the rights of listeners as well as speakers.¹⁹ On compelled expression and the requirement to advertise only in French, the Court cited *Big M*, stating that one of the Charter's

Rescue: Antonio Lamer and the Section 2(b) Cases from Quebec" in Adam Dodek & Daniel Jutras, eds., *The Sacred Fire: The Legacy of Antonio Lamer* (Toronto: LexisNexis Canada, 2009) 237, at 243-48 (explaining the link between Quebec's "visage linguistique", the override, and the Meech Lake Accord).

¹⁵ *R. v. Big M Drug Mart*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at 336 (S.C.C.) (stating that freedom can "primarily be characterized by the absence of coercion or constraint"); see 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 Inc., 2020).

¹⁶ *Reference re Public Service Employee Relations Act*, [1987] S.C.J. No. 10, [1987] 1 S.C.R. 313 (S.C.C.).

¹⁷ Freedom of association's renewal began in 2001, when *Dunmore v. Ontario* endorsed Dickson C.J.C.'s conception of association, [2001] S.C.J. No. 87, [2001] 3 S.C.R. 1016 (S.C.C.). Section 2(d)'s progress continued with the overruling of s. 2(d)'s landmark precedents – the "Labour Trilogy" – in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, [2007] 2 S.C.R. 391 (S.C.C.); *Mounted Police Ass'n of Ontario v. Canada (Attorney General)*, [2015] S.C.J. No. 1, [2015] 1 S.C.R. 3 (S.C.C.); and *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] S.C.J. No. 4, [2015] 1 S.C.R. 245 (S.C.C.).

¹⁸ *Ford v. Quebec (Attorney General)*, [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712, at 764 and 767 (S.C.C.).

¹⁹ *Ford v. Quebec (Attorney General)*, [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712, at 748-52 (S.C.C.), and stating, at 748, that there cannot be "true" freedom of expression by means of language if one is prohibited from using the language of one's choice.

major purposes is to protect individuals from coercion or restraint by the state.²⁰

Following the pattern of early decisions to ground the Charter's rights and freedoms in a foundation of principle, *Ford* introduced s. 2(b)'s underlying values and since then, the "*Ford* values" have infused the jurisprudence.²¹ In *Ford*'s iteration, those values encompass the truth-seeking and -attaining functions of expression, its role in social and political decision making, and its connection to diverse forms of individual self-fulfilment and human flourishing.²²

Ford's articulation of abstract values signalled an inclusive and undifferentiated scope of protection that embraced virtually all human endeavour. Little, if anything, is excluded from a conception based, essentially, on the view that expression in any of the *Ford* categories is valuable, at least in the abstract. Quite understandably, the Court might have thought there was no need to theorize rationales that supported broad and potentially unlimited protection for expressive freedom. But as one commentator observed, *Ford* accepted "at face value the 'generally' held view that these are the appropriate values to protect", and then "stayed the course", doing little to deepen its conception of the values, or relate these values to a conception or theory of freedom.²³

That lack of reflection and development exposes a telling gap in insight – that the *Ford* values do not present a theory or principle of freedom. Decision making, truth seeking, and self-fulfilment accept or presume the value of those categories of content, but make no mention of freedom. That gap in insight is critical because, essentially without pause, the *Ford* values mapped onto assumptions about expressive content that have defined the s. 2(b) jurisprudence. Absent in those assumptions is a recognition that making expressive freedom contingent on the value of content negates s. 2(b)'s guarantee of *freedom*. While s. 2(b) has a conception of expressive content that is guided by *Ford*'s abstract values, it lacks a theory of expressive freedom. Still missing from s. 2(b) is an adequate account of freedom and why expressive *freedom* should be rigorously protected by the Charter.

²⁰ *Ford v. Quebec (Attorney General)*, [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712, at 751 and stating, at 748, that if a person is compelled by the state to a course of action or inaction that otherwise would not be undertaken, that person is "not acting of his own volition and cannot be said to be truly free".

²¹ Albeit in *obiter*, the Court first canvassed the role of expressive freedom in Canada's political and constitutional tradition in *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] S.C.J. No. 75, [1986] 2 S.C.R. 573 (S.C.C.).

²² *Ford v. Quebec (Attorney General)*, [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712, at 765-67 (S.C.C.); *Irwin Toy v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927, at 976 (S.C.C.).

²³ R. Elliot, "The Supreme Court's Understanding of the Democratic Self-Government, Advancement of Truth, and Knowledge and Individual Self-Realization Rationales for Protecting Freedom of Expression: Part I – Taking Stock" (2012) 59 S.C.L.R.(2d) 436, at 445.

Part of the problem is methodological and stems from *Irwin Toy*'s two-step test of breach, which adopted a *prima facie* concept of breach that diluted and blurred the role of *Ford* values under s. 2(b). Step one, which governs in the majority of cases, grants *prima facie* protection to "every attempt to convey meaning".²⁴ Nothing further, including a discussion of *Ford* values or the severity of the breach, is required; that threshold rests on an assumption of content neutrality and the principle that content cannot be excluded without risking the disapproval and even censorship of unpopular points of view.²⁵ In this way and, perhaps inadvertently, *Irwin Toy* diminished the *Ford* values because it enabled courts to make a summary finding of breach and shift the analysis to s. 1.²⁶ That approach lowered the claimant's burden under s. 2(b) but dispensed with the guarantee's values, effectively relegating them to irrelevance at that stage of the analysis. Paradoxically, then, *Irwin Toy*'s generous interpretation of expression undermined s. 2(b), because its *prima facie* standard of breach rendered analysis of the nature and severity of the violation unnecessary.

Section 2(b)'s analytical framework is complicated by *Irwin Toy*'s second step, the purpose-effects test, which asks whether the government action purposely violates expressive freedom or adversely affects it.²⁷ Though most interferences are purposeful – in the sense of placing "direct or facial" limits on expressive activity – the claimant bears a more onerous standard of proving a s. 2(b) breach for those that are not. Under *Irwin Toy*, effects-based interferences with expressive freedom do not violate s. 2(b) unless the claimant establishes that the activity adversely affected by state action advances the guarantee's underlying values, namely, the *Ford* values.²⁸ This test is confusing because it is inconsistent with step one's

²⁴ *Irwin Toy v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927, at 969 (S.C.C.) (stating that if an activity conveys or attempts to convey meaning it has expressive content and *prima facie* falls within the scope of s. 2(b)). Elliot noted with surprise that the *Ford* values did not play a role or influence *Irwin Toy*'s definition of expression. R. Elliot, "The Supreme Court's Understanding of the Democratic Self-Government, Advancement of Truth, and Knowledge and Individual Self-Realization Rationales for Protecting Freedom of Expression: Part I – Taking Stock" (2012) 59 S.C.L.R.(2d) 436, at 445.

²⁵ The Court stated that freedom of expression was entrenched so that "everyone can manifest their thoughts, opinion, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream". *Irwin Toy v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927, at 969 (S.C.C.).

²⁶ Subject to the purpose-effects test, which does not apply in every case, there is a *prima facie* breach of s. 2(b) whenever the government interferes with "any attempt to convey meaning". The caveat to the attempt-to-convey meaning test is the Court's exclusion, under step one, for "violent forms of expression" from s. 2(b) (at 970).

²⁷ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927 at 978-79 (S.C.C.) (summarizing the test).

²⁸ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927 at 976 (S.C.C.) (stating that to establish a breach, the plaintiff must state her claim "with

principle of content neutrality.²⁹ Moreover, and though it plays a muted role in the jurisprudence, *Irwin Toy*'s overlay of purpose-effects analysis is problematic.³⁰ By undermining a concept of freedom based on content neutrality, the effects-based analysis demonstrated how the *Ford* values could be used to exclude content from s. 2(b). As explained below, under the guise of a contextual approach, a very similar analysis quickly surfaced in the s.1 analysis.

In combination, *Ford* and *Irwin Toy* present a perplexing and anomalous concept of expressive freedom. The *Ford* values do not advance a theory of freedom, and in any case were sidelined by *Irwin Toy*, except when used to impose a content-related burden on effects-based violations of s. 2(b). The *prima facie* scope of entitlement and *pro forma* presence of *Ford* values are the hallmarks of a methodology that fails to engage with the infringement and its implications for expressive freedom. In joining a thin concept of entitlement with an extensive analysis of limits under s. 1, *Saskatchewan (Human Rights Commission) v. Whatcott* provides a compelling illustration of the consequences. There, the Court's discussion of s. 2(b) was completed in a single paragraph and was followed by a s. 1 analysis that was 88 paragraphs long.³¹ Regrettably, *Whatcott* is not atypical, but indicative of the lack of balance – or proportionality, to invoke a revered *Charter* concept – between the Court's treatment of breach and justification in s. 2(b) cases.³²

reference to the principles and values underlying the freedom”) and 977 (adding that she 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”).

²⁹ Despite identifying it as the underlying assumption of s. 2(b), *Irwin Toy* did little more to develop the principle of content neutrality, or treat it as an imperative and requirement for the protection of expressive freedom. The tension between step one's content neutrality and the content-based inquiry of step two's effects-based violations remains intact in s. 2(b). As explained, the contextual approach would facilitate a content-based approach to the justification of limits under s. 1.

³⁰ The *Ford* values also play a role on questions of s. 2(b) access to government property and information. See *Montreal (City) v. 2952-1366 Quebec Inc.*, [2005] S.C.J. No. 63, [2005] 3 S.C.R. 141, at para. 73 (S.C.C.) (stating that s. 2(b) protects access to public property where expressive content is not in conflict with the guarantee's three central purposes); *Ontario v. Criminal Lawyers' Association of Ontario*, [2013] S.C.J. No. 43, [2013] 3 S.C.R. 3 (S.C.C.) (addressing s. 2(b) access to information).

³¹ *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] S.C.J. No. 11, [2013] 1 S.C.R. 467 (S.C.C.). Compare para. 62 (agreeing with the Commission's concession that the statutory provision violated s. 2(b)), and paras. 63-151 (discussing the justifiability of the violation under s. 1 of the Charter).

³² But see *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697, at 725-34 (S.C.C.) (*per* Dickson C.J.C.) and 802-43 (*per* McLachlin J., in dissent) (providing an elaborate discussion of s. 2(b) and its scope of protection); *R. v. Zundel*, [1992] S.C.J. No. 70, [1992] 2 S.C.R. 731 (S.C.C.) (*per* McLachlin J., at 751-60) discussing the scope of s. 2(b) and the guarantee's reasons for protecting beliefs the majority regards as wrong or false. By the time

Toward a conception of freedom

After 40 years, s. 2(b) lacks an iconic statement of free expression's inherent and transcending value. Part of the problem is that, unlike other guarantees, s. 2(b)'s freedom of expression has not had a champion – a jurist willing to theorize and defend freedom in principle and across issues.³³ Nor is the genesis of the *Ford* values rooted in Canada's constitutional jurisprudence; rather, s. 2(b)'s foundations trace to and essentially re-state the underpinnings of the First Amendment's free speech clause. In the United States, the jurisprudence grants free speech powerful and at times inspired protection that is complemented by a rich scholarly literature on free speech.³⁴ In Canada, the s. 2(b) jurisprudence surprisingly makes scarce reference to a pre-Charter jurisprudence that displayed a forceful, compelling, and unexpected defence of freedom.³⁵ Rather than consult that pre-Charter legacy and learn from its response to government repression, *Ford* borrowed abstract values

of *Whatcott*, the general analysis under s. 2(b) was abbreviated and the question of breach was often conceded.

³³ Some of its most significant s. 2(b) decisions protecting expressive freedom are authored by different members of the Court. See, e.g., *Nova Scotia (Attorney General) v. MacIntyre*, [1982] S.C.J. No. 1, [1982] 1 S.C.R. 175 (S.C.C.) (Dickson J., pre-Charter); *Canadian Broadcasting Corp. v. Lessard*, [1991] S.C.J. No. 88, [1991] 3 S.C.R. 459 (S.C.C.) (McLachlin J., dissenting); *Dagenais v. Canadian Broadcasting Corp.*, [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835 (S.C.C.) (Lamer C.J.C.); *Thomson Newspapers Ltd. v. Canada (Attorney General)*, [1998] S.C.J. No. 44, [1998] 1 S.C.R. 877 (S.C.C.) (Bastarache J.); *Re Vancouver Sun*, [2004] S.C.J. No. 41, [2004] 2 S.C.R. 332 (S.C.C.) (Iacobucci and Arbour JJ.); *Montreal (City) c. 2951-1366 Quebec Inc.*, [2005] S.C.J. No. 63, [2005] 3 S.C.R. 141 (S.C.C.) (Binnie J., dissenting); and *R. v. Vice Media Ltd.*, [2018] S.C.J. No. 53, [2018] 3 S.C.R. 374 (S.C.C.) (Abella J., concurring).

³⁴ See, e.g., *Abrams v. United States*, 250 U.S. 616 (1919); *Whitney v. California*, 274 U.S. 357 (1927); *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), *New York Times v. Sullivan*, 376 U.S. 254 (1964); *New York Times Co. v. the United States (The Pentagon Papers)*, 403 U.S. 713 (1971); and *Cohen v. California*, 403 U.S. 15 (1971), among others. In addition, a vibrant First Amendment literature continues the search for a single organizing principle to ground the free speech clause. Each of the *Ford* values has analogues and advocates in this exercise, though characteristically there is little agreement on whether a sole principle can or should be found, much less what it might be. See, e.g., A. Tsesis, "Free Speech Constitutionalism", 2015 U. Ill. L. Rev. 1015 (explaining why none of the accepted rationales is sufficient on its own and proposing "unified statement of free speech theory").

³⁵ Reference re: *Alberta Legislation*, [1938] S.C.J. No. 2, [1938] S.C.R. 100 (S.C.C.) ("*Alberta Press*", or *The Alberta Press Case*"); *R. v. Boucher*, [1950] S.C.J. No. 41, [1951] S.C.R. 265 (S.C.C.); *Saumur v. Québec (City)*, [1953] S.C.J. No. 49, [1953] 2 S.C.R. 299 (S.C.C.); *Switzman v. Elbling*, [1957] S.C.J. No. 13, [1957] S.C.R. 285 (S.C.C.). These decisions are cited from time to time in the jurisprudence, on their own and in combination, but not to ground or create a foundation for s. 2(b)'s guarantee of expressive freedom.

from the First Amendment.³⁶

On the principal issue of freedom and its meaning under s. 2(b), this proposal draws inspiration from, and is anchored in, four pre-Charter decisions on expressive freedom, the “legacy” jurisprudence. Hidden in plain sight, this jurisprudence comprises *The Alberta Press Case*, *R. v. Boucher*, *Saumur v. City of Quebec*, and *Switzman v. Elbling*.³⁷ As timely as ever, these decisions offers a foundation that can enrich s. 2(b)’s conception of freedom and inform the analysis of breach.

A dynamic episode in Canadian constitutionalism that began with *The Alberta Press Case* continued with a prosecution for seditious libel in *Boucher*, *Saumur*’s bylaw scheme of street censorship, and *Switzman*’s padlock law aimed at halting the propagation of communism and bolshevism on residential premises. In combination, these decisions reached a jurisprudential apex for freedom that arguably has not been attained in 40 years under the Charter. Pronouncements that represent expressive freedom’s true and forgotten foundations should now be brought forward.

Confronting the threat to freedom is the distinction and genius of these decisions. The Court’s focus on the nature and severity of the interference with freedom in these cases is striking, especially when juxtaposed with the absence of a Charter counterpart and the emptiness of the s. 2(b) analysis. What especially sets the legacy jurisprudence apart is the way members of the Court countered the state’s repressive actions by defending freedom. Not content with reciting abstract values, the judges responded with opinions rich in the rhetoric of freedom. These opinions did not consider the violation a *pro forma* breach, as occurs under s. 2(b), but treated it as the catalyst for an inspired commitment to freedom. As such, these legacy decisions foreshadowed and aligned with *Big M*’s definition of freedom as the absence of coercion and constraint.³⁸

For members of the Court, a threat that could not adequately be addressed by the division of powers called for a fledging theory of freedom. Though *Rand J.* was the

³⁶ In addition to citing the First Amendment jurisprudence on free speech, the Court cited R. Sharpe, “Commercial Expression and the Charter”, (1987), 37 U.T.L.J. 229, at 232 (endorsing the First Amendment’s rationales for free speech under the Charter). See R. Elliot, “The Supreme Court’s Understanding of the Democratic Self-Government, Advancement of Truth, and Knowledge and Individual Self-Realization Rationales for Protecting Freedom of Expression: Part I – Taking Stock” (2012) 59 S.C.L.R.(2d) 436 at 444 (stating that at no point in this discussion did the Court consider its own early Charter decisions, and that nor did it mention the pre-Charter jurisprudence – the legacy decisions in this article – that explain the benefits to society that flow from freedom of expression).

³⁷ *Reference re: Alberta Legislation*, [1938] S.C.J. No. 2, [1938] S.C.R. 100 (S.C.C.); *R. v. Boucher*, [1950] S.C.J. No. 41, [1951] S.C.R. 265 (S.C.C.); *Saumur v. Québec (City)*, [1953] S.C.J. No. 49, [1953] 2 S.C.R. 299 (S.C.C.); *Switzman v. Elbling*, [1957] S.C.J. No. 13, [1957] S.C.R. 285 (S.C.C.).

³⁸ *R. v. Big M Drug Mart*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 (S.C.C.).

pioneer and champion of this initiative, a number of other jurists, including Duff C.J.C. and Cannon, Estey, Locke, Cartwright, Kellock, and Abbott JJ., actively defended freedom of expression.³⁹ Years before the Charter, these four bold decisions pressed up against the limits of the Court's constitutional authority. That the Court lodged its views awkwardly under the structure of federalism does not detract from the creation of a jurisprudential foundation for freedom. Instead, the doctrinal and institutional obstacles to protecting freedom underscore the courage of these moments in Supreme Court history.

In the absence of textual rights, the Court had little choice but to fit its conception of freedom into the broader legal and constitutional tradition. Perhaps because it was not tethered to a text – like the Charter's framework of breach and justification – the Court's conception of freedom was unrehearsed, organic, and authentic. Looking back, what stands out is how much could be said – even within the limits of a division of powers framework – about freedom and its foundational place in Canadian constitutionalism.

In *The Alberta Press Case*, the scale and gravity of repression impelled Duff C.J.C. and Cannon J. to intervene in defence of freedom.⁴⁰ Legislation requiring newspapers to print government propaganda and disclose all sources of information, under threat of being shut down for non-compliance, granted “autocratic powers” that could be “arbitrarily wielded” to frustrate the rights, not only of Albertans, but of “the people of Canada as a whole”.⁴¹ Justice Cannon's opinion denounced the government's attempt to “prevent a free and untrammelled discussion” and “reduce any opposition to silence” as a dangerous affront to the “free working of *the political*

³⁹ See *Reference re: Alberta Legislation*, [1938] S.C.J. No. 2, [1938] S.C.R. 100 (S.C.C.) (Duff C.J.C.; Cannon J.); *R. v. Boucher*, [1950] S.C.J. No. 41, [1951] S.C.R. 265 (S.C.C.) (Rand, Kellock, Estey, and Cartwright JJ.); *Saumur v. Québec (City)*, [1953] S.C.J. No. 49, [1953] 2 S.C.R. 299 (S.C.C.) (Rand, Kerwin, Kellock, Estey, and Locke JJ.); *Switzman v. Elbling*, [1957] S.C.J. No. 13, [1957] S.C.R. 285 (S.C.C.) (Rand and Abbott JJ.).

⁴⁰ *Reference re: Alberta Legislation*, [1938] S.C.J. No. 2, [1938] S.C.R. 100 (S.C.C.). Bill 9 was part of a package of measures enacted by Alberta's Social Credit government, and was titled “An Act to Ensure the Publication of Accurate News and Information”. The press law was ancillary to *ultra vires* legislation and unconstitutional for that reason. Though it was unnecessary to address the government's repression of expressive and press freedom, Duff C.J.C., with Davis J. concurring, stated that there were “some further observations” which “may properly be made”. *Reference re: Alberta Legislation*, [1938] S.C.J. No. 2, [1938] S.C.R. 100, at 132 (S.C.C.). Justice Cannon was alone in finding that Bill 9 also violated the division of powers. See R. Haigh, “The Kook, the Chief, Some Strife and the Lawyers: William Aberhart and the Alberta References of 1938” (2019) 39 N.J.C.L 1 (examining the political concept of social credit, the Alberta premier, and the three *Reference* decisions of 1938).

⁴¹ *Reference re: Alberta Legislation*, [1938] S.C.J. No. 2, [1938] S.C.R. 100, at 135 (S.C.C.) (*per* Duff C.J.C.) (emphasis added).

organization of the Dominion”.⁴² The legislation not only nullified the rights of Albertans, but affected the political rights of citizens in other provinces who have a “vital interest” in access to full information and comment, both favourable and unfavourable, about the policies of the Alberta Government.⁴³ The legislation’s silencing of political opposition prompted Cannon J. to declare that freedom of discussion is “essential to enlighten public opinion in a democratic State”, and therefore cannot be curtailed without affecting “the right of the people” for access to information on questions of public interest from sources independent of the government.⁴⁴

Chief Justice Duff and Cannon J. asserted that democratic institutions derive their “efficacy” from the free public discussion of affairs, including a citizen’s “fundamental right to express freely his untrammelled opinion about government policies and discuss matters of public opinion”, and an “untrammelled publication of the news and political opinions of the political parties contending for ascendancy”.⁴⁵ The Chief Justice’s commitment to the “freest and fullest” examination from every point of view – which he described as the very “breath of life for parliamentary institutions” – could not be compromised by abuse, including grave abuse.⁴⁶ Whether in criticism or counter-criticism, attack or counter-attack, freedom was so vital, in his view, that abuses, including those that are “constantly exemplified before our eyes”, should be dismissed as little more than “incidental mischiefs”.⁴⁷

Shortly after the Supreme Court of Canada became the country’s final court of appeal in 1949, Quebec’s suppression of religious and expressive freedom in the 1950s generated three magnificent decisions that drew strength from *The Alberta Press Case*.⁴⁸ By targeting religious and political minorities and singling them out for persecution under the law, the province provoked the Court to defend freedom *qua* freedom. The key opinions in *Boucher*, *Saumur*, and *Switzman* reflect the insight that the true issue at stake was the freedom, and not the content of expression.

⁴² *Reference re: Alberta Legislation*, [1938] S.C.J. No. 2, [1938] S.C.R. 100, at 144, 146 (S.C.C.) (emphasis added).

⁴³ *Reference re: Alberta Legislation*, [1938] S.C.J. No. 2, [1938] S.C.R. 100, at 146 (S.C.C.).

⁴⁴ *Reference re: Alberta Legislation*, [1938] S.C.J. No. 2, [1938] S.C.R. 100 (S.C.C.).

⁴⁵ *Reference re: Alberta Legislation*, [1938] S.C.J. No. 2, [1938] S.C.R. 100, at 133 (*per* Duff C.J.C) and 146 (*per* Cannon J.) (S.C.C.).

⁴⁶ *Reference re: Alberta Legislation*, [1938] S.C.J. No. 2, [1938] S.C.R. 100, at 133 (S.C.C.).

⁴⁷ *Reference re: Alberta Legislation*, [1938] S.C.J. No. 2, [1938] S.C.R. 100 (S.C.C.).

⁴⁸ *R. v. Boucher*, [1950] S.C.J. No. 41, [1951] S.C.R. 265 (S.C.C.); *Saumur v. Québec (City)*, [1953] S.C.J. No. 49, [1953] 2 S.C.R. 299 (S.C.C.); *Switzman v. Elbling*, [1957] S.C.J. No. 13, [1957] S.C.R. 285 (S.C.C.).

In narrow terms, the question in *Boucher v. the King* was whether a religious pamphlet by the Jehovah's Witnesses constituted an act of sedition against the state.⁴⁹ A majority held that, short of incitement, expressive activity that promotes ill will between groups, even to the point of hatred, cannot be criminalized, because that would “very seriously curtail the liberty of the press and of individuals to engage in discussion of any controversial topic”.⁵⁰ Justice Kellock asserted that the instigator, not the distributor of a pamphlet, is responsible for any breach of the peace.⁵¹ Justice Rand added that the clash of critical discussion on political, social and religious subjects has “too deeply become the stuff of life” for “mere ill-will” to be the test of illegality.⁵²

Justice Rand's remarks on difference and dissent set the foundations for a theory of freedom for Canadian constitutionalism. His forceful rhetoric praised the “clash of critical discussion” – including “controversial fury”, “fanatical puritanism”, and hostility – as the hallmarks of freedom.⁵³ He proclaimed that disagreement in ideas and beliefs, on “every conceivable subject”, is “of the essence of our life” and is “part of our living”.⁵⁴ In this view, “our compact of free society” absorbs the “subjective incidents of controversy” within the framework of freedom and order, because a process of free exchange “ultimately serves us in stimulation, in the clarification of thought and . . . the search for the constitution and *truth of things generally*”.⁵⁵ Justice Rand accepted it as “part of the compact” that Boucher's pamphlet would provoke and inflame. Though it was a “burning protest”, the

⁴⁹ *R. v. Boucher*, [1950] S.C.J. No. 41, [1951] S.C.R. 265 (S.C.C.) (acquitting Boucher of a charge of seditious libel, by a 5-4 vote, because there was no evidence on which a properly instructed jury could find him guilty). See Kerwin J., at 283 (stating that seditious libel requires an intent to incite the people to violence against constituted authority or to create a public disturbance or disorder against that authority); Cartwright J. at 333 (stating that the intended or probable consequences of any promotion of ill-will and hostility is to produce disturbance of or resistance to the government's authority); Kellock J. at 301; and Estey J. at 315 (confirming that an intention to incite violence or disorder against the state is essential).

⁵⁰ *R. v. Boucher*, [1950] S.C.J. No. 41, [1951] S.C.R. 265, at 333 (S.C.C.) (*per* Cartwright J.).

⁵¹ *R. v. Boucher*, [1950] S.C.J. No. 41, [1951] S.C.R. 265, at 301 (S.C.C.) (stating that any other view would “elevate mob violence to a place of supremacy”, and adding that “the lawbreakers are those who resort to violence rather than those who exercise the right of free speech in advocating religious views however such views may be unacceptable to the former”).

⁵² *R. v. Boucher*, [1950] S.C.J. No. 41, [1951] S.C.R. 265, at 288 (S.C.C.) (*per* Rand J.) (reinforcing the view that creating disaffection or ill-will or hostility short of illegal conduct is not a crime).

⁵³ *R. v. Boucher*, [1950] S.C.J. No. 41, [1951] S.C.R. 265, at 288 (S.C.C.).

⁵⁴ *R. v. Boucher*, [1950] S.C.J. No. 41, [1951] S.C.R. 265 (S.C.C.).

⁵⁵ *R. v. Boucher*, [1950] S.C.J. No. 41, [1951] S.C.R. 265 (S.C.C.) (emphasis added).

pamphlet represented an expression of “deep indignation” and an “earnest petition” to the province to discontinue its “iniquitous treatment” of the Jehovah’s Witnesses.⁵⁶

Within two years, the Court considered another test of provincial authority when Saumur, a member of the Jehovah’s Witnesses, challenged a Quebec City bylaw forbidding the distribution of any literature on city streets without first obtaining written permission from the Chief of Police.⁵⁷ A majority found that the bylaw was not enacted in relation to streets, but regulated “the minds of the users of the streets” and was clearly an instance of censorship.⁵⁸ More to the point, the bylaw was an offence to freedom because it granted the Chief of Police the power to control street activity that had been taking place “since time immemorial”.⁵⁹ The uncensored printed word is the “bête noire of the dogmatists”, and the threat of censorship posed by the bylaw was therefore pervasive, even contagious, and capable of spreading from religious to political and other points of view.⁶⁰ Noting its “commendable frankness” in conceding the point, Locke J. considered the City’s overt goal of censorship a matter of “profound importance” to “all of the people of this country”.⁶¹

Finally, *Switzman* considered provincial legislation that criminalized the propagation of communism or bolshevism in any house, and authorized the province to close, or “padlock” such premises.⁶² While a majority on the panel invalidated the legislation as *ultra vires* under the division of powers, some judges addressed the demands of freedom. For instance, Abbott J. strenuously defended the right of free expression on social, political or economic matters, describing this freedom as essential to the “working of a parliamentary democracy” and suggesting in *obiter*

⁵⁶ *R. v. Boucher*, [1950] S.C.J. No. 41, [1951] S.C.R. 265, at 291 (S.C.C.).

⁵⁷ *Saumur v. Québec (City)*, [1953] S.C.J. No. 49, [1953] 2 S.C.R. 299 (S.C.C.) (concluding, by a 5-4 majority, that the bylaw did not extend to the distribution of literature in the streets).

⁵⁸ *Saumur v. Québec (City)*, [1953] S.C.J. No. 49, [1953] 2 S.C.R. 299, at 338 (*per* Kellock J.) and 379 (*per* Locke J.) (S.C.C.).

⁵⁹ *Saumur v. Québec (City)*, [1953] S.C.J. No. 49, [1953] 2 S.C.R. 299, at 361 and 332 (S.C.C.) (stating, *per* Rand J., that the distribution of any newspaper, tract, or handbill, was placed under the “uncontrolled discretion of a municipal officer” and that the province could even permit all others but forbid a newspaper or any writing of a particular colour from being distributed in the streets).

⁶⁰ *Saumur v. Québec (City)*, [1953] S.C.J. No. 49, [1953] 2 S.C.R. 299, at 326 (S.C.C.).

⁶¹ *Saumur v. Québec (City)*, [1953] S.C.J. No. 49, [1953] 2 S.C.R. 299, at 368-69 and 370 (S.C.C.).

⁶² *Switzman v. Elbling*, [1957] S.C.J. No. 13, [1957] S.C.R. 285 (S.C.C.). By a margin of 8-1, the Court found that *An Act Respecting Communistic Propaganda* was *ultra vires* the province as a regulation of the criminal law.

that even Parliament cannot abrogate this right.⁶³

Justice Rand wrote forcefully in defence of freedom – as he had in *Boucher* and *Saumur* – denouncing the statute’s attempt to prevent “a poisoning of men’s minds”, shield individuals from exposure to “dangerous ideas”, and protect them from their own “thinking propensities”.⁶⁴ He was particularly troubled that the object of the prohibition could “just as properly have been the suppression of any other political, economic or social doctrine or theory”.⁶⁵ Justice Rand maintained, to the contrary, that “government by the free public opinion of an open society” demands the “condition of a virtually unobstructed access to and diffusion of ideas”.⁶⁶ In stating that freedom of discussion has a “unity of interest and significance extending equally to every part of the Dominion”, Rand J. pressed the Court’s constitutional authority to its limit but stopped short of creating an enforceable substantive right.⁶⁷

A divided Court vindicated the freedom claim in each of the Quebec decisions. A number of judges resisted the repression of expressive freedom and voiced unparalleled concern for the gravitas of the violation. An emergent theory of freedom is more developed in Rand J.’s opinions, and though his conception warrants much closer attention, including critical scrutiny, key themes can be noted.⁶⁸ First is Rand J.’s conception of the relationship between the democratic community and its government. As he explained in *Boucher*, “the administrators of what we call democratic government have come to be looked upon as servants, bound to carry out their duties accountably to the public”.⁶⁹ In *Saumur* he added that if free discussion is placed under license, its basic condition would be destroyed and the government, as licensor, would be “disjoined from the citizenry”.⁷⁰ Finally, *Switzman* stated that “[p]arliamentary government postulates a capacity in men, acting freely and under self-restraints, to govern themselves”.⁷¹ Meeting that responsibility in turn demands a virtually unobstructed access to and diffusion of

⁶³ *Switzman v. Elbling*, [1957] S.C.J. No. 13, [1957] S.C.R. 285, at 328 (S.C.C.).

⁶⁴ *Switzman v. Elbling*, [1957] S.C.J. No. 13, [1957] S.C.R. 285 at 305 (S.C.C.) (*per* Rand J.).

⁶⁵ *Switzman v. Elbling*, [1957] S.C.J. No. 13, [1957] S.C.R. 285 (S.C.C.).

⁶⁶ *Switzman v. Elbling*, [1957] S.C.J. No. 13, [1957] S.C.R. 285, at 306 (S.C.C.).

⁶⁷ *Switzman v. Elbling*, [1957] S.C.J. No. 13, [1957] S.C.R. 285 (S.C.C.).

⁶⁸ See I. Rand, “The Role of an Independent Judiciary in Preserving Freedom” (1951) 9 U. Tor. L.J. 1-14; see also W. Kaplan, *Canadian Maverick: The Life and Times of Ivan C. Rand*, Chapter 4 (“The Framework of Freedom”) (Toronto: University of Toronto Press, 2009); J. Penney, “Ivan Rand’s Ancient Constitutionalism” (2010) 34 Man. L.J. 43.

⁶⁹ *R. v. Boucher*, [1950] S.C.J. No. 41, [1951] S.C.R. 265, at 288 (S.C.C.). See also Kellock J. at 294-5 (stating that every member of the public who censures the rule is “finding fault with his servant”).

⁷⁰ *Saumur v. Québec (City)*, [1953] S.C.J. No. 49, [1953] 2 S.C.R. 299, at 330 (S.C.C.).

⁷¹ *Switzman v. Elbling*, [1957] S.C.J. No. 13, [1957] S.C.R. 285, at 306 (S.C.C.).

ideas.⁷² In short, and without putting it quite that way, he recognized that freedom is a requisite of democratic accountability and an essential feature of a functioning democracy.

Second, Rand J. did not limit the right of free public opinion and debate to the precincts of parliamentary government. He described freedom of speech as one of the “original freedoms” that are the “necessary attributes and modes of self-expression of human beings and the primary condition of their community life within a legal order”.⁷³ In *Switzman*, Rand J. stated that this “constitutional” fact, of virtually free access to ideas, is the “political” expression of the primary condition of “social” life, thought and its communication by language.⁷⁴ In that conception, liberty is elemental and “little less vital to man’s mind and spirit than breathing is to his physical existence”.⁷⁵ To Rand J., freedom is paramount, stopping “only at perimeters where the foundation of the freedom itself is threatened”.⁷⁶ Apart from sedition, obscenity and criminal libel, the “literary, discursive and polemic use of language” are, in the broadest sense, free.⁷⁷

Third, Rand J. focused on the gravitas of the threat to freedom. In *Switzman*, as well as in *Saumur*, he emphasized that the government could just as easily target any other expressive content it found objectionable.⁷⁸ The freedom at risk in each instance placed the principle of freedom at risk everywhere. In such circumstances, explaining what was fundamentally at stake brought him close to an all-embracing conception of freedom. In *Saumur*, Rand J. declared that “[t]he only security is *steadily advancing enlightenment*, for which the widest range of controversy is the *sine qua non*”.⁷⁹ Though his precise meaning is unclear, Rand J.’s use of “enlightenment” suggests an open, process-oriented, at times combative, and content-neutral concept of free discussion and exchange. Echoing Duff C.J.C.’s view that its abuse is “an incidental mischief”, Rand J. described freedom as the residue within a periphery where the positive law operates to create “minor

⁷² *Switzman v. Elbling*, [1957] S.C.J. No. 13, [1957] S.C.R. 285 (S.C.C.).

⁷³ *Saumur v. Québec (City)*, [1953] S.C.J. No. 49, [1953] 2 S.C.R. 299, at 329 (S.C.C.).

⁷⁴ *Switzman v. Elbling*, [1957] S.C.J. No. 13, [1957] S.C.R. 285, at 306 (S.C.C.).

⁷⁵ *Switzman v. Elbling*, [1957] S.C.J. No. 13, [1957] S.C.R. 285 (S.C.C.).

⁷⁶ *Switzman v. Elbling*, [1957] S.C.J. No. 13, [1957] S.C.R. 285 (S.C.C.).

⁷⁷ *Switzman v. Elbling*, [1957] S.C.J. No. 13, [1957] S.C.R. 285 (S.C.C.). Echoing Duff C.J.C.’s view that its abuse is “an incidental mischief”, Rand J. described freedom as the residue that within a periphery where the positive law operates to create “minor exceptions” to liberty. *Saumur v. Québec (City)*, [1953] S.C.J. No. 49, [1953] 2 S.C.R. 299, at 329 (S.C.C.).

⁷⁸ *Switzman v. Elbling*, [1957] S.C.J. No. 13, [1957] S.C.R. 285, at 305 (S.C.C.).

⁷⁹ *Saumur v. Québec (City)*, [1953] S.C.J. No. 49, [1953] 2 S.C.R. 299, at 330 (S.C.C.) (emphasis added).

exceptions” to liberty.⁸⁰ As he emphasized in all three opinions, limits on freedom are not the norm but, instead, are exceptional and peripheral in nature.

Enduring themes emerge from this jurisprudence. In this legacy, freedom is process-oriented and in its time, strikingly neutral and capacious in scope. A range of opinions from members of the Court accepted rigorous, disputatious, and even hostile exchange as inherent and welcome properties of freedom. Prescient and in anticipation of *Big M*, their judicial instincts were trained on government repression and the threat it posed to the integrity of freedom. For s. 2(b)’s purposes, it matters little that the Court’s burgeoning conception of freedom was not rooted in text, or that it drew on disparate images and strands of jurisprudential thought. On any measure, the legacy decisions offer a wealth of insight that should inform the interpretation of s. 2(b)’s guarantee of expressive freedom. Even and especially on the *Charter*’s 40th anniversary, this legacy remains relevant and can play a pivotal role in s. 2(b)’s renewal.

2. The first foundation: a conception of freedom under s. 2(b)

Re-aligning s. 2(b)’s methodology is not a simple or modest task, and is addressed here in two steps. First is a principle or theory of freedom that must offer more than a re-consideration of *Ford* values and their role in the s. 2(b) analysis.⁸¹ As discussed, the *Ford* values explain why expressive content is valuable but overlook the value of freedom. A conception of freedom itself – apart from the merits of expressive content – was lost in the interpretation of s. 2(b). Second, a concept alone cannot protect freedom, and in turn must be reflected in a principled approach to the question of breach. This proposal reconfigures the current methodology by eliminating step two of *Irwin Toy* and replacing it with s. 2(a)’s standard of infringement.

On the threshold question of freedom, the legacy jurisprudence provides leadership on two key points: the core value of freedom and the gravity or threat to freedom inherent in its repression by the government. While some judges expressed grave concerns about the censorial and repressive acts of government – describing their consequences for a culture of free public discussion – Rand J.’s opinions were more seeking in nature. In his search to find and express freedom’s core value, or truth, Rand J. developed a conception that is content-neutral, process-based, and

⁸⁰ *Saumur v. Québec (City)*, [1953] S.C.J. No. 49, [1953] 2 S.C.R. 299, at 329 (S.C.C.). In *R. v. Boucher*, [1950] S.C.J. No. 41, [1951] S.C.R. 265, at 288 (S.C.C.), he stated that even in “discontent, affection and hostility”, ideas “ultimately serve[] us in stimulation, in the clarification of thought and . . . the search for the constitution and truth of things generally”.

⁸¹ At present, the *Ford* values are incorporated into the test for effects-based infringements, which require proof that the expressive activity seeking s. 2(b)’s protection serves those values. As discussed above, evaluating the value of its content to determine whether s. 2(b) has been infringed is contrary to content neutrality and the protection of expressive freedom.

grounded in a view of expression as an agent of enlightenment, or change. Thus he spoke of freedom's purposes, variously, as being linked to "stimulation", the "clarification of thought", and the "search for the constitution and truth of things generally".⁸² Justice Rand described freedom of speech as one of the "original freedoms" that are the "necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order".⁸³ Critically, Rand J.'s conception separated freedom from its content, and shifted the focus from the substance of expressive activity to the principle of freedom.

It remains to relate the elements of this nascent conception of freedom to the *Ford* values and s. 2(b)'s guarantee of expressive freedom. In primal terms, freedom tests a democratic community's courage to confront its own doubts and fears, and to summon humility in the face of what is unknown, unknowable, and uncertain.⁸⁴ In this matrix, the social and political freedom to challenge, test, and engage in discourse animates a process of change that democratic society depends on for its vitality and progress. That process of engagement is subject to limits but, in principle and at its forefront, is organic, fortuitous, and free.

Under this conception, freedom is consistent with *Irwin Toy's* principle of content neutrality because it enables an open process of free exchange. A conception of freedom focused on processes of discovery, debate, and dispute bears resemblance to the truth-seeking function of the *Ford* values and the First Amendment tradition. The drawback in promoting truth as an organizing principle of freedom is that the concept is abstract, philosophic, religious, and empirical; what is or is not truth is contested, as well as endlessly and inevitably elusive.⁸⁵ By contrast, a truth-seeking rationale places the emphasis elsewhere, on the process of search. Under that variation, truth is an aspiration and not an outcome. A functional approach to freedom protects the process of seeking truth, regardless whether truth can be or is found. In principle, that process of search and discovery is freedom's truth.

A theory of freedom grounded in a process of free exchange references Holmes J.'s magnetic and ever contested "marketplace of ideas" metaphor. In *Abrams v. United States*, Holmes J. spoke of "free trade in ideas" and the "competition of the market" as the best test of truth and the foundation of the First Amendment's free

⁸² *R. v. Boucher*, [1950] S.C.J. No. 41, [1951] S.C.R. 265, at 288 (S.C.C.).

⁸³ *Saumur v. Québec (City)*, [1953] S.C.J. No. 49, [1953] 2 S.C.R. 299, at 329 (S.C.C.).

⁸⁴ See also 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 38-41 (providing a preliminary discussion or account of freedom).

⁸⁵ See D. Ross, "Truth-Seeking and the Unity of the Charter's Fundamental Freedoms", in B. Bird, D. Newman & D. Ross, eds., *The Forgotten Fundamental Freedoms of the Charter*, (Toronto: LexisNexis Canada, 2020) at 63-111 (suggesting that the search for truth is the "hypergood" that connects s. 2's fundamental freedoms).

speech clause.⁸⁶ Few constitutional metaphors have attracted more scholarly attention and critical scrutiny, and while Holmes J.'s elements of "truth" and "marketplace" may not have stood the test of time, the conception of a contest between ideas not only endures but continues to intrigue, in Canada as well as the United States.⁸⁷

One of the First Amendment's foremost scholars, Vincent Blasi, attempted to rescue the *Abrams* metaphor from its improvident roots in marketplace behaviour. He shifted the concept away from that analogy and moved toward another theme in Holmes J.'s philosophy: value skepticism and an ethic of fallibilism.⁸⁸ In this view, certain truth is disarmed by contingency and uncertainty, and therefore cannot claim infallibility; rather, freedom serves the goal of "truth-locating". Accepting that truth cannot be defined for all times and purposes, freedom of speech provides a "comparatively reliable social mechanism for identifying error, for locating truth and, in the aggregate, for advancing social knowledge".⁸⁹ What can be attained, in the face of fallibility, is a commitment to the process of truth seeking that both requires, and depends on, a principle of freedom.

The value of freedom, in this account, is that it provides a counterpoint to a "[c]onformity, deference to authority, stasis, [and] passivity in the realm of beliefs" that is "not just unfortunate or unwise but *dangerous*".⁹⁰ In that environment, voices of difference and dissent can generate "some of the grievances, aspirations and mobilizations that force political adaptation and transformation".⁹¹ In this, it must be accepted and understood that protecting freedom according to principle is not cost-free. Yet the "remote harms" that are associated with or attributed to expression that is subversive of social values should not be regulated, because the legitimate and ongoing process of challenging and displacing dominant forces is inseparable

⁸⁶ *Abrams v. United States*, 250 U.S. 616, 630 (1919).

⁸⁷ F. Schauer, "Free Speech, the Search for Truth, and the Problem of Collective Knowledge" (2017) 70 S.M.U. Law Rev. 231 at 231 (acknowledging that the marketplace of ideas and a basic concept of freedom of speech as enabling a society to increase its level of knowledge, to facilitate its identification of truth, and to expose error "has a wide and persistent currency"). In the case of Canada, see below note 97.

⁸⁸ V. Blasi, "Holmes and the Marketplace of Ideas" (2004) Sup. Ct. Rev. 1, at 19 (noting that "fallibilism" traces to the British empiricist tradition in philosophy, to Mill's essay *On Liberty*, and the tenet that all propositions are subject to perpetual testing); see also V. Blasi, "Democratic Participation and the Freedom of Speech: A Response to Post and Weinstein" (2011) 97 Virg. L. Rev. 531.

⁸⁹ F. Schauer, "Free Speech, the Search for Truth, and the Problem of Collective Knowledge" (2017) 70 S.M.U. Law Rev. 231 at 237.

⁹⁰ V. Blasi, "Holmes and the Marketplace of Ideas" (2004) Sup. Ct. Rev. 1 at 29 (emphasis added).

⁹¹ V. Blasi, "Holmes and the Marketplace of Ideas" (2004) Sup. Ct. Rev. 1 at 39.

from the process of “adaptive political change”.⁹²

In this rendering, freedom has modest aspirations. It makes no claim that expressive content is progressive or valuable, and does not promise it will achieve any, or demonstrable objectives. There are no “heroic assumptions regarding human rationality or self-correcting social dynamics”, and no promise of “wisdom through mass deliberation”.⁹³ In trusting to a process of open discussion and exchange, this model speaks to Rand J.’s aspiration of “steadily advancing enlightenment”.⁹⁴ It accepts that there will be steps forward and back, and progress as well as setbacks.⁹⁵ With the risks it entails, this principle of freedom offers the goal and opportunity to seek the “truth of things generally”, mindful and hopeful of achieving progressive objectives along the way.

Section 2(b)’s renewal begins with a vitalized conception of freedom. While Holmes J.’s rationale was discounted for its marketplace and economic analogies, Rand J.’s conception of a link between freedom and the quest for truth or enlightenment has been overlooked and overshadowed by the *Ford* values and a focus on the value of content. As yet, the s. 2(b) jurisprudence has not fully grasped why freedom – *qua* freedom – is indispensable to democratic life, and that is because it advances, promotes, enables, and even forces change. A conception of freedom as the agent of change – or change maker – has pedigree in the legacy jurisprudence, in the *Ford* values and their endorsement of truth-seeking, and in a re-modelled and non-economic version of Holmes’s process theory of freedom.⁹⁶

Freedom conceived this way cannot be flabby or timid, and must accept the limits of our knowledge and expectations, as individuals and as a community. Democratic

⁹² V. Blasi, “Holmes and the Marketplace of Ideas” (2004) Sup. Ct. Rev. 1 at 44.

⁹³ V. Blasi, “Holmes and the Marketplace of Ideas” (2004) Sup. Ct. Rev. 1 at 44-45.

⁹⁴ *Saumur v. Québec (City)*, [1953] S.C.J. No. 49, [1953] 2 S.C.R. 299, at 330 (S.C.C.).

⁹⁵ See F. Schauer, “Free Speech, the Search for Truth, and the Problem of Collective Knowledge” (2017) 70 S.M.U. Law Rev. 231 at 251 (asking how a society can find truth in the aggregate, what it is for society to know something, and why determining what a society knows may not be as simple as a tally of what constituent members know).

⁹⁶ See, e.g., *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697, at 802-8 (S.C.C.) (*per* McLachlin J., in dissent, providing a philosophical view of expressive freedom and stating, at 803, that “[w]hile freedom of expression provides no *guarantee* that the truth will *always* prevail, its still can be argued that it assists in promoting the truth in ways which would be impossible without the freedom”; emphasis in original); *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at para. 68 (S.C.C.) (explaining that a functioning democracy supports a continuous process of discussion, the marketplace of ideas, and the inclusion of dissenting voices); *R. v. Sharpe*, [2001] S.C.J. No. 3, [2001] 1 S.C.R. 45, at para. 21 (S.C.C.) (*per* McLachlin C.J.C., stating that “[t]he right to freedom of expression rests on the conviction that the best route to truth, individual flourishing, and peaceful coexistence in a heterogeneous society in which people hold divergent and conflicting beliefs lies in the free flow of ideas and beliefs”).

society is restless and dynamic, contingent and changing. That is its strength but also a source of fear, including fear of freedom. Surely, the most compelling lesson of the legacy jurisprudence is that fear centres on those who dissent or speak in a different voice. That jurisprudence also provides compelling demonstration of the irrevocable link between freedom and the principle of democracy, as subsequently identified in the *Secession Reference* as one of the Constitution's cornerstone unwritten constitutional principles.⁹⁷

3. A conception of breach under s. 2(b)

The question of breach is currently governed by *Irwin Toy* and its two-step test. Beyond providing a *prima facie* criterion that is easily satisfied, the attempt-to-convey meaning test adds little depth to the analysis. In re-drawing the standard for breach under s. 2(b), this proposal eliminates step 2 of the *Irwin Toy* test and replaces it with the standard of infringement for s. 2(a)'s guarantee for freedom of conscience and religion. Accordingly, a violation of s. 2(b) is established when the government's interference with expressive freedom is more than trivial or insubstantial.⁹⁸ In addition, the freedom principle must be reflected in an analysis that engages, under that step, with the nature and severity of the violation.

Over the years, calls for a re-calibration of *Irwin Toy*, in particular to claw back s. 2(b)'s broad, undifferentiated protection, have gone unanswered.⁹⁹ Though limits can readily be upheld under s. 1, it is offensive to some that indisputably criminal, hostile, or offensive expression is granted any constitutional recognition at all.¹⁰⁰ Revisiting *Irwin Toy* could address some of s. 2(b)'s counter-intuitive examples, such as perjury and fraud, which are *prima facie* protected under step one of the test. In addition, excluding narrowly prescribed content or drawing distinctions between categories of expression could boost protection for s. 2(b) by raising the standard of justification under s. 1.¹⁰¹ Yet to this day, *Irwin Toy* remains steadfast and

⁹⁷ *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at paras. 61-69 (S.C.C.) (explaining, at para. 68, that the principle of democracy includes a continuous process of discussion, the marketplace of ideas, and the inclusion of dissenting voices).

⁹⁸ *Syndicat Northcrest v. Amselem*, [2004] S.C.J. No. 46, [2004] 2 S.C.R. 551, at para. 59 (S.C.C.), discussed below at II, 3. "A conception of breach under s. 2(b)".

⁹⁹ See, e.g., R. Elliot, "Back to Basics: A Critical Look at the *Irwin Toy* Framework for Freedom of Expression" (2011) 15 *Rev. of Const. Studies* 205; C. Sethi, "Beyond *Irwin Toy*: A New Approach to Freedom of Expression under the *Charter*" (2012) 17 *Appeal: Current Law and Law Reform* 21.

¹⁰⁰ See R. Elliott, "Back to Basics: A Critical Look at the *Irwin Toy* Framework for Freedom of Expression" (2011) 15 *Rev. of Const. Studies* 205 at 219, 217 (stating that the *Ford* rationales should be used to determine the scope of freedom of expression under s. 2(b), and that threatening violence, telling deliberate lies, extortion, counselling the commission of a crime, and fraudulent misrepresentations, among other content-defined categories, should be excluded from s. 2(b)).

¹⁰¹ See C. Sethi, "Beyond *Irwin Toy*: A New Approach to Freedom of Expression under

implacably in place as the governing precedent on freedom of expression.¹⁰²

Section 2(b) doctrine should be modified but not, as suggested above, to add content-based substantive standards or exclude categories of expression from the Charter. Freedom breeds doubt and can pose danger to the status quo. For that reason, its place in our order of values is vulnerable, easily overridden in times of trouble, turmoil, and doubt. Section 2(b)'s imperative of freedom must prevail to the point at which expressive activity poses a risk of demonstrable harm to the community. That is where limits on freedom can be justified, but only under the discipline of a rigorous s.1 analysis. Put another way, expressive content and any harm it might cause are in principle extraneous to the initial question whether the government has violated s. 2(b).¹⁰³

Irwin Toy's principle of *prima facie* protection for all content of expression is sound, but cannot serve as the standard that moves the analysis from s. 2(b) to s. 1 without more. Before s. 1 is engaged, the nature and gravitas of the violation must be registered under s. 2(b). Specifically, courts must examine and explain the insult to freedom, as well as its consequences for expressive freedom and the guarantee's underlying values. That is imperative because, at present, the s. 2(b) analysis is bereft of this element, and expressive freedom is severely disadvantaged under s. 1 as a result. Not to address this gap leaves the analysis incomplete, sending a barebones finding of breach to s. 1.¹⁰⁴

Before addressing that task, *Irwin Toy's* second step – the purpose-effects test – must be dropped from the methodology of breach. The purpose-effects test is infrequently invoked and plays a limited role in the s. 2(b) analysis. More to the point, the standard for effects-based violations imposes a burden on claimants to establish the value of expressive content.¹⁰⁵ That burden is inconsistent with the

the *Charter*" (2012) 17 Appeal: Current Law and Law Reform 21 (proposing an approach that would ensure that limits on "core" expressive content would be properly subjected to a heightened level of scrutiny).

¹⁰² It should be noted that issue-specific doctrines have evolved to address the open court principle, the status of the press and media, access to government property for s. 2(b) purposes, and the scope of positive obligations under s. 2(b) of the Charter. These are not addressed in this article.

¹⁰³ The caveat is *Irwin Toy's* exclusion for violent forms of expression and the Court's definition of this concept. *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927, at 970 (S.C.C.); and *Greater Vancouver Transportation Authority v. Canadian Federation of Students*, [2009] S.C.J. No. 31, [2009] 2 S.C.R. 295, at 315 (S.C.C.) (excluding violent expression and threats of violence from the scope of s. 2(b)).

¹⁰⁴ As noted, the jurisprudence to date demonstrates how the imbalance between breach and justification has worked against expressive freedom, discounting the significance of the violation and leaving it barren in the justification analysis; see *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] S.C.J. No. 11, [2013] 1 S.C.R. 467 (S.C.C.).

¹⁰⁵ That burden also arises under *City of Montreal's* standard for determining access to

content neutrality of step one and contrary to a concept of s. 2(b) that protects *freedom* of expression. Eliminating this step nonetheless leaves s. 2(b) without a standard of infringement and doctrinal mechanism for discussing the severity of the violation.

In place of the purpose-effects test, *Syndicat Northcrest v. Amselem* and its test for violations of s. 2(a)'s guarantee of religious freedom provides a good model for s. 2(b). Specifically, Amselem's standard of an infringement that is more than trivial or substantial should replace the second step of *Irwin Toy*. The caveat is that under s. 2(b), the test of non-trivial or insubstantial interference cannot include any consideration of the expressive activity's impact on others.¹⁰⁶ Section 2's guarantees of religious and expressive freedom are closely related, but not identical. While s. 2(a) extends the Charter's protection to religious beliefs and practices, s. 2(b) does not protect conduct or violent forms of expression, and a standard of infringement that considers harm to others is inconsistent with s. 2(b)'s principle of content neutrality. Apart from *Irwin Toy*'s exception for violent forms of expression, any harm to others arising from expressive activity must be addressed as a matter of justification under s. 1.

A standard of non-trivial and not insubstantial interference with expressive freedom does not signal a more onerous standard or restrictive approach to s. 2(b). Instead, this standard is principled because it provides a doctrinal venue for discussion and acknowledgment of the interference with expressive freedom. In particular, the element that is missing in the current methodology – an analysis of the nature and severity of a violation – can be incorporated into this discussion. In analyzing the infringement, courts must acknowledge and consider how limits on expressive freedom violate s. 2(b)'s underlying principle of freedom and its truth-seeking, process-based rationale.

More must be said to explain how this standard of breach works and, in particular, how it interacts with the *Ford* values. In brief, those values can work in tandem with the overarching principle that expressive freedom advances a process of discovery and exchange that seeks truth, enlightenment, and change. The values do not inform the question of infringement by asking whether expressive activity is sufficiently valuable to warrant protection by s. 2(b). The starting point is a violation of freedom; from there, the *Ford* values can play a role in analyzing the impact of the infringement on one or more of the guarantee's foundational rationales (*i.e.*, truth-seeking; political and social decision making; individual flourishing). In this

government property under s. 2(b) of the Charter: *Montreal (City) v. 2952-1366 Quebec Inc.*, [2005] S.C.J. No. 63, [2005] 3 S.C.R. 141 (S.C.C.). Addressing the government property doctrine is beyond the scope of this discussion.

¹⁰⁶ *Syndicat Northcrest v. Amselem*, [2004] S.C.J. No. 46, [2004] 2 S.C.R. 551, at paras. 59, 62-63 (S.C.C.). (stating that *conduct* that potentially causes harm to others would not automatically be protected (emphasis added)).

way, the infringement will be given the attention and gravitas that s. 2(b)'s guarantee of expressive freedom demands.¹⁰⁷

The objective under s. 2(b) is a generous scope of entitlement that informs a robust and mindful consideration of the violation and its consequences for freedom. In this way, animating a conception of freedom will fortify the analysis of breach before the issue of reasonable limits is undertaken under s. 1. To summarize, a revised methodology of breach retains *Irwin Toy's* attempt-to-convey test, eliminates the purpose-effects step, and completes the analysis by adding a threshold test of infringement borrowed from the s. 2(a) jurisprudence. As such, it renews s. 2(b)'s guarantee of expressive freedom by re-setting and deepening its conceptual and analytical foundations.

III. RESETTING THE FOUNDATIONS, PART 2: SECTION 1, THE CONTEXTUAL APPROACH, AND A CONCEPTION OF JUSTIFICATION

Renewing the s. 1 methodology for violations of s. 2(b) is also imperative, but somewhat more complex because of its implications for other Charter rights and guarantees. While it is admittedly a piecemeal approach to s. 1 reform, this proposal sketches the elements to s. 2(b), sketching the elements of a standard of justification that, when paired with the conception of breach set out above, sets a principled framework for s. 2(b) decision making.

Where a breach of s. 2(b) requires justification, the s. 1 analysis requires attention to three key issues: the contextual approach, the evidentiary requirements of proof, and the proportionality balancing of salutary benefits and deleterious consequences. As explained above, the use of context to assess the value of expressive content is unsound in principle. More to the point, the dual roles the *Ford* values play under s. 2(b) and s. 1, and their direct influence on the question of limits, are a hallmark and central drawback of the s. 2(b) jurisprudence. The comparative irrelevance of the *Ford* values under s. 2(b) becomes more pronounced when juxtaposed with their determinative role under s. 1's contextual approach.

This approach appeared early in s. 2(b)'s evolution before other elements of the s.1 analysis, and especially the proportionality analysis, were developed.¹⁰⁸ The

¹⁰⁷ Another issue is whether the s. 2(b) analysis should consider and adopt issue-specific standards for different categories of expression (*i.e.*, political; commercial) and whether that should be undertaken under s. 2(b) or s. 1. These questions are beyond the scope of this discussion. See C. Sethi, "Beyond *Irwin Toy*: A New Approach to Freedom of Expression under the *Charter*" (2012) 17 *Appeal: Current Law and Law Reform* 21 (proposing that because not all expression is equally worthy of protection, tiers of scrutiny should be introduced under s. 2(b) to direct the s. 1 analysis of reasonable limits).

¹⁰⁸ 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 this test, though it has "never had any influence on the outcome of a case". He concluded, as a result, that this step can "safely be ignored". P. Hogg, *Constitutional Law*, 4th ed. (Toronto: Carswell, 1997) at 898. Note also

backdrop is *Oakes*, which created a structured analytical framework that seemingly failed to accommodate the context of competing values.¹⁰⁹ Justice Wilson identified this gap in *Edmonton Journal* and proposed a contextual approach to place the values at stake “in sharp relief”.¹¹⁰ By directing that expressive content should be measured against the *Ford* values, Dickson C.J.C. gave Wilson J.’s fledgling concept doctrinal form in *R. v. Keegstra*.¹¹¹ Though the contextual approach provided a mechanism for weighing values that the prevailing interpretation of *Oakes* did not accommodate, that gap in the test has now been filled by an enriched form of proportionality balancing.¹¹²

As explained, this approach facilitated a low-value designation for objectionable content that provided a rationale for relaxing the standard of justification. That is how the *Ford* values re-surfaced under s. 1 as an unprincipled form of doctrinal leverage that could easily justify limits on low-value expression.¹¹³ Anomalously, the contextual approach deployed values that are designed to maximize the protection of expressive freedom for the opposite purpose of marginalizing content

that Sethi would eliminate this step because it does little work and there is “no need for a free-standing inquiry at this stage”. C. Sethi, “Beyond *Irwin Toy*: A New Approach to Freedom of Expression under the *Charter*” (2012) 17 *Appeal: Current Law and Law Reform* 21, at 40. More to the point, this step of *Oakes* amounts to a “naked balancing exercise”.

¹⁰⁹ *Irwin Toy* proposed a significant modification to the s.1 analysis, with the proposal for a bifurcated standard of analysis that turned on whether the state acted as the singular antagonist of the claimant, or in its role of mediating social concerns and allocating scarce resources. While it remains active on occasion, this doctrinal modification to *Oakes* had mixed success, at best. *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927, at 989-90 (S.C.C.).

¹¹⁰ *Edmonton Journal v. Alberta (Attorney General)*, [1989] S.C.J. No. 124, [1989] 2 S.C.R. 1326, at 1355 (S.C.C.) (emphasis in original removed). In particular, the purpose of this approach was to address the merits of rights and their limits in an equivalent and contextual manner, and not to set abstract values of entitlement against competing interests.

¹¹¹ [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697, at 761-62, 766 (S.C.C.) (incorporating the contextual approach into the proportionality analysis, applying *Royal College*, and concluding that hate propaganda “contributes little” to the “quest for truth, the promotion of individual self-development or the protection and fostering of a vibrant democracy”; following that analysis, restrictions on this “special category of expression” are easier to justify). See *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] S.C.J. No. 65, [1990] 2 S.C.R. 232 (S.C.C.).

¹¹² See, e.g., *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] S.C.J. No. 37, [2009] 2 S.C.R. 567 (S.C.C.) (providing a full analysis, in the majority and dissenting opinions, of the salutary benefits and deleterious consequences of a photo ID requirement that violated the rights of members of a religious community).

¹¹³ Prior to *Keegstra*, McLachlin J. began the process of developing Wilson J.’s concept of a contextual approach. In *Rocket* she recognized the importance of context in evaluating expressive activity under s.1 and used this approach to evaluate the expression “in light of s.2(b) values”. *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697, at 760-61 (S.C.C.).

and promoting justifiable limits. That deflection of s. 2(b)'s underlying values – from protecting freedom to justifying limits – is a betrayal of the Charter's promise of expressive freedom.

A declaration that expression is not valuable enough to warrant Charter protection is a conclusion, not an evidence-based justification. In practice, the contextual approach's assessment of expressive value serves as a proxy when evidence of harm is unavailable or is equivocal.¹¹⁴ Eliminating the contextual approach would mean that courts can no longer relax the standard of justification when expressive content is deemed to be of low value.¹¹⁵ Abandoning the contextual approach would return to a methodology of limits that rests on an evidence-based conception of harm. That approach rejects the logic that valueless and less valuable expression is harmful, or that proof of harm is not required. Limits under s. 1 must be based on evidence that expressive content is sufficiently linked to demonstrable harm. At the point of considering limits and prohibitions on expression, the government must identify and define the harm at issue, then demonstrate that its measures are carefully tailored to target expression that can permissibly be limited.

On this, the Supreme Court's open court jurisprudence provides principled doctrinal leadership. In a series of decisions, the Court developed a standard of justification, the *Dagenais/Mentuck* test, that is highly protective of s. 2(b).¹¹⁶ One of the key features of this jurisprudence is the requirement that judicially imposed limits on open court rest on a "sufficient evidentiary foundation".¹¹⁷ This test and its requirement of an evidentiary basis led to a stricter standard of justification on these issues than under *Oakes*. Seemingly unaware of a disconnect between the two, the jurisprudence has not discussed, much less resolved, this double standard.¹¹⁸ Incorporating a requirement of evidentiary sufficiency into the *Oakes* analysis can

¹¹⁴ See, generally, E. Macfarlane, "Hate Speech, Harm, and Rights", in E. Macfarlane, ed., *Dilemmas of Free Expression* (Toronto: University of Toronto Press, 2021), at 35-55.

¹¹⁵ That raises a question – which is not answered here – whether issue-specific standards or some differentiation of review for categories of expression (*i.e.*, political, commercial etc.) should be adopted and whether that is a function or breach under s. 2(b) or justification under s. 1. See C. Sethi, "Beyond Irwin Toy: A New Approach to Freedom of Expression under the Charter" (2012) 17 *Appeal: Current Law and Law Reform* 21.

¹¹⁶ *Dagenais v. Canadian Broadcasting Corp.*, [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835 (S.C.C.); *R. v. Mentuck*, [2001] S.C.J. No. 73, [2001] 3 S.C.R. 442 (S.C.C.) (establishing a rigorous standard of justification for judge-made orders that would limit access to proceedings or place a ban on publications). See J. Cameron, "A Reflection on Section 2(b)'s Quixotic Journey, 1982-2012" (2012) 58 S.C.L.R. (2d) 163 (praising the open justice jurisprudence as a "section 2(b) template").

¹¹⁷ *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] S.C.J. No. 38, [1996] 3 S.C.R. 480, at paras. 72, 73, 78 and 85 (S.C.C.) (reinforcing the requirement of a sufficient factual foundation for limits on open court).

¹¹⁸ While legislative restrictions on open justice are governed by *Oakes*, the *Dagenais/*

harmonize these branches of s. 2(b) jurisprudence and ground an evidence-based approach to s. 1 decision making where expressive content is at issue.

In turn, a requirement of evidentiary sufficiency engages the concept of harm and the threshold that must be met to justify limits. Defining harm and its threshold of democratic tolerance – the point at which limits become permissible – is a complex task. At the very least, it must be clear that a finding of harm cannot rest on the low value of the content, or on unsubstantiated notions of “common sense” and general knowledge (*i.e.*, that hate speech is harmful).¹¹⁹ It does not suffice, for instance, that certain communities, or the community at large, perceive content to be harmful.¹²⁰ Moreover, the standard of a “reasoned apprehension of harm” must, at some appreciable level of concreteness, state what the basis is for that apprehension.¹²¹

Setting a concept of harm into the foundation of methodology, in combination with a retreat from the contextual approach, will ground the s.1 analysis in principle. Yet another difficulty with a perceptive conception of harm is that it obviates the need for carefully defined restrictions on expressive freedom. That creates an impermissible risk of regulation that is broad and inclusive, rather than narrowly tailored to address an identifiable and substantiated risk of harm. Where online content is concerned, the further concern is that expressive content can simply disappear under various forms of take down rules, without due process or requirements of procedural fairness.¹²²

To the extent online communications are seemingly beyond regulation, out of

Mentuck test applies to judicial decision making and the discretion to close proceedings or impose a ban on publication.

¹¹⁹ See Macfarlane, “Hate Speech, Harm, and Rights” in E. Macfarlane, ed., *Dilemmas of Free Expression* (Toronto: University of Toronto Press, 2021) at 40-45 (discussing the question of empirically identifying harm).

¹²⁰ See, e.g., *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] S.C.J. No. 11, [2013] 1 S.C.R. 467, at paras. 132, 135 (S.C.C.) (stating that a court can use “common sense and experience” in recognizing that activities such as hate speech inflict “societal harms” and that the discriminatory effects of this speech are “part of the everyday knowledge and experience of Canadians”).

¹²¹ The standard dates from *R. v. Butler*, [1992] S.C.J. No. 15, [1992] 1 S.C.R. 452 (S.C.C.), where pornography was found to have low value, and has been applied in many other contexts, including high-value electoral expression: *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, [2004] 1 S.C.R. 827, at paras. 77-78 (S.C.C.).

¹²² In this, takedown rules are in very broad and general terms the equivalent of the bygone era of postal, book, and film censorship. See J. Cameron, “Process Matters: Postal Censorship, *Your Ward News*, and s.2(b) of the *Charter*”, in E. Macfarlane, ed., *Dilemmas of Free Expression* (Toronto: University of Toronto Press, 2021) at 56-75 (arguing that s. 2(b)’s guarantee of expressive freedom must include process rights, including and especially when the government imposes a prior restraint on the distribution or communication of expressive content).

control, and in need of measures to prevent harm, the answer still cannot be found in crude mechanisms of regulation. In making recommendations for a regulatory framework, the Report by the Canadian Commission on Democratic Expression demonstrates that the details of online regulation are immensely challenging.¹²³ There, the Commission’s recommendations for addressing harmful online communications proposed a regulatory framework comprising, among other things, a duty to act responsibly, an e-tribunal, and a notice-and-notice process (for takedown).¹²⁴ One of the commissioners, Jameel Jaffir, endorsed the “broad outlines”, but did not join the Report because the “harms reduction” model and recommendations provided no details or parameters about the scope and details of regulation.¹²⁵ In doing so, Jaffir flagged a critical issue going forward: that the details of regulation directly engage the principle of freedom. More recently, the federal government introduced Bill C-36 and has promised further measures to regulate social media and online communication.¹²⁶ These initiatives raise serious issues about procedural fairness under s. 2(b), as well as about the nature and scope of regulation.

These and other initiatives must be met by a renewed commitment to minimal impairment that can guard against over-reaching in the regulation of expressive content. New forms of regulation must comply with the Charter, including the rule of justification that an infringement of the Charter must be carefully tailored to avoid

¹²³ Final Report, Canadian Commission on Democratic Expression, “Harms Reduction: A Six-Step Program to Protect Democratic Expression Online (January 2021), online: <<https://ppforum.ca/articles/harms-reduction-a-six-step-program-to-protect-democratic-expression-online/>>.

¹²⁴ See the Executive Summary, Final Report, Canadian Commission on Democratic Expression, “Harms Reduction: A Six-Step Program to Protect Democratic Expression Online (January 2021), online: <<https://ppforum.ca/articles/harms-reduction-a-six-step-program-to-protect-democratic-expression-online/>> (outlining the Commission’s recommendations, which include a duty for platforms to act responsibly, proposing a new regulatory body and social media council, and remedies for online harm, which include A “quick” takedown system).

¹²⁵ Final Report, Canadian Commission on Democratic Expression, “Harms Reduction: A Six-Step Program to Protect Democratic Expression Online (January 2021), online: <<https://ppforum.ca/articles/harms-reduction-a-six-step-program-to-protect-democratic-expression-online/>> at Annex B (explaining why he could not endorse the proposed “Duty to Act Responsibly” or the proposed e-tribunals and notice-and-notice process).

¹²⁶ Bill C-36, *An Act to amend the Criminal Code and the Canadian Human Rights Act (hate propaganda, hate crimes and hate speech)*, (1st Reading, June 23, 2021), online: <<https://parl.ca/DocumentViewer/en/43-2/bill/C-36/first-reading>>. See also A. Karadeglija, “The first 100 days: major battles over free speech, internet regulation looms when Parliament returns”, October 10, 2021, *National Post* (explaining government plans to establish a regulator and to require social media platforms to remove illegal content within 24 hours), online: <<https://nationalpost.com/news/politics/the-first-100-days-major-battle-over-free-speech-internet-regulation-looms-when-parliament-returns>>.

collateral restrictions on constitutionally protected activity. Reinvigorating the requirement that regulations must be minimally impairing sends a signal to the legislatures that measures that do not meet constitutional standard must be invalidated.

Further adjustments are required to complete an overhaul of the methodology. As suggested above, the contextual approach should be displaced by proportionality balancing, which has matured in recent years. In revisiting this step, it is critical to refresh its purpose, which is to enable the right or freedom to prevail against an infringement that is otherwise justifiable. By definition, and because it only arises when a violation passes the other steps of the *Oakes* test, the goal of final proportionality is rights protection: to determine whether the salutary benefits of restrictions on expressive freedom outweigh its deleterious consequences for s. 2(b)'s guarantee of a fundamental freedom. This element of the justification analysis cannot be vitalized or re-vitalized without addressing the "naked balancing" that typifies and problematizes this step.¹²⁷

A principled application of minimal impairment will minimize reliance on this element of *Oakes*, but where it matters and could affect the outcome, proportionality balancing must place an explicit onus on the government to demonstrate why the salutary benefits of the violation outweigh the deleterious consequences for expressive freedom. Section 2(b)'s renewed approach to the question of breach forms the backdrop of that discussion, ensuring that proportionality balancing does not replicate or re-introduce the assumptions of the contextual approach and its disapproval of low-value expression. Under this model, the deleterious consequences of the infringement are directly juxtaposed with its salutary benefits, free from the *a priori* value judgments of the contextual approach. In a renewed version of proportionality balancing, the deleterious consequences of an infringement cannot be brushed off, but must be squarely and rigorously addressed.

In practice, the proposed methodology will raise the threshold for limits under s. 1, placing the analysis in a framework of principle that is consistent with a robust conception of freedom under s. 2(b), and a burden of justification that falls on the state under s. 1. There is sufficient opportunity to justify limits on freedom under this framework because final proportionality enables the analytical calculus of benefits and consequences to be calibrated. Regulatory interests can prevail, even when set against the deleterious consequences for freedom, where the salutary benefits of regulation are exigent and well established by the evidence.

IV. CONCLUSION

Section 2(b)'s progress thus far has been mixed. The Charter's guarantee of

¹²⁷ C. Sethi, "Beyond *Irwin Toy*: A New Approach to Freedom of Expression under the Charter" (2012) 17 Appeal: Current Law and Law Reform 21 at 40. A more developed discussion of what this might look like is beyond the scope of this article and its primary objective of proposing a prospectus for s. 2(b) methodology.

expressive freedom has generated the most diverse and complex jurisprudence under s. 2, including on matters relating to the press and media, and has informed the outcome in cases where s. 2(b) overlaps with other s. 2 guarantees, such as ss. 2(a) and (d). Yet unlike other Charter guarantees, s. 2(b)'s conception of entitlement and Charter methodology have not been significantly refreshed or renewed over the years, on the breach or justification sides of the analysis.¹²⁸ This is despite the criticism this jurisprudence has attracted over the years.

A renewal of s. 2(b) should not be piecemeal, but must instead embrace the very conception of freedom that is protected by the guarantee, as well as the jurisprudential methodology of breach and justification. This article offers a starting point and work in progress on that project. Still early in its development, the proposal explains the goal, which is a principled foundation or conception of expressive freedom, and the steps that must be taken to reset the current s. 2(b) methodology. The model focuses symmetrically on questions of breach and justification because the problems in the current methodology arise under s. 2(b) and s. 1.

The proposal turns the tables on the current jurisprudence and prioritizes the question of breach, leaving a more detailed discussion of s. 1 for a future article. Under s. 2(b), developing a principle of freedom, dropping the purpose-effects test, and replacing it with a new standard of infringement are the first steps. Under s. 1, abandoning the contextual approach and restoring an evidence-based approach to decision making are the central objectives. The proposed framework of renewal acknowledges that other issues must still be discussed. Central among them is the status and wisdom of the assumption that the *Oakes* framework can serve as a monolithic standard for diverse s. 2(b) – and Charter – issues. The next step in this project is to turn the spotlight on s. 1 and offer a more integral approach to the analysis of justification in s. 2(b) cases.

¹²⁸ But see *City of Toronto v. Ontario (Attorney General)*, [2021] S.C.J. No. 34, 2021 SCC 34 (S.C.C.) (discussing *Irwin Toy* and the doctrinal framework that applies to positive obligations under s. 2(b) of the Charter).