

***Big M's Forgotten Legacy of Freedom***  
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**May 2020**

**Abstract:**

Part of a collection of papers on section 2's "forgotten freedoms" (forthcoming (2020), 100 S.C.L.R.(2d)), "*Big M's Forgotten Legacy of Freedom*" returns to the Supreme Court of Canada's foundational concept of freedom as the absence of coercion or constraint. That early and important legacy of freedom under the *Charter* failed to inspire and influence the evolution of section 2, especially section 2(b)'s guarantee of expressive freedom and section 2(d)'s guarantee of associational freedom. This paper both claims and demonstrates that section 2's fundamental freedoms have been less meaningful as a result. In doing so, it places emphasis on section 2(b) and its legacy of limits, rather than freedom, and section 2(d) and its legacy of relative failure, except – and only recently – for labour union claims. After more than thirty-five years, the section 2 jurisprudence lacks a fundamental conception of freedom and theory of section 2 constitutionalism. *Big M* provides a starting point in working toward those goals.

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### ***Big M's legacy***

At a time of first-impression decision making under the Charter, *R. v. Big M Drug Mart* set section 2 on an auspicious course, defining freedom in imperative terms as the absence of coercion or constraint.<sup>1</sup> When a drugstore invoked section 2(a)'s guarantee of religious freedom to challenge

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a Sunday closing law, Justice Dickson took the improbable step of establishing a bedrock conception of freedom.<sup>2</sup> Though corporate store hours may not be the constitutional stuff of forcing schoolchildren to join in patriotic exercises, *Big M* is to the Charter what *Flag Salute* is to the first amendment.<sup>3</sup> In disparate settings and constitutional traditions, these iconic decisions paired deep insight with literary flair to offer matchless reflections on the essence of freedom.

Thirty-five years later, *Big M* remains freedom's first and most important legacy under the Charter.<sup>4</sup> It is a rich but mixed legacy. While Justice Dickson's aspirational call for a generous but not legalistic interpretation had monumental influence, the other part of *Big M*'s legacy – its vital core – fared less well.<sup>5</sup> Unfortunately, *Big M*'s simple and formative definition of freedom failed to infuse or substantially influence the section 2 jurisprudence. Today, section 2's guarantees are less meaningful as a result.<sup>6</sup>

The papers in this collection on the Charter's forgotten freedoms demonstrates how section 2's guarantees and promises have been "forgotten" or slighted in different ways.<sup>7</sup> Yet oversights and deficits in the jurisprudence are not limited to elements of text that have been overlooked, but extend to the concept of freedom itself. Even as Charter claims succeeded, an overarching concept

<sup>1</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

<sup>2</sup> *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (S.C.C.) [*Big M*]. *Big M* challenged s. 4 of the *Lord's Day Act*, federal legislation that prohibited any work or commercial activity on "the Lord's Day" (*i.e.*, Sunday).

<sup>3</sup> See *West Virginia State Board of Education v. Barnette*, 319 US 624 (1943) (U.S.S.C.) (propounding a theory of freedom and upholding a first amendment challenge, by Jehovah's Witness children, to mandatory flag salute).

<sup>4</sup> *Big M*'s 35th anniversary was April 24, 2020. See Brian Bird & Derek Ross, "The Charter, freedom and a drugstore", *The Lawyer's Daily* (April 24, 2020), online: <<https://www.thelawyersdaily.ca/articles/18753/the-charter-freedom-and-a-drugstore-brian-bird-and-derek-ross>>.

<sup>5</sup> *Big M*, *supra* note 2, at 344 (stating that this approach is aimed at "securing for individuals the full benefit of the Charter's protection", without overshooting the "actual" purpose of rights and freedoms).

<sup>6</sup> Section 2(c) of the Charter, which guarantees freedom of peaceful assembly, has not generated Supreme Court jurisprudence, even in *obiter*. See Basil S. Alexander, "Exploring a More Independent Freedom of Peaceful Assembly in Canada" (2018) 8:1 W. J. Legal Stud.; and in this collection, see Nnaemeka Ezeani, "Understanding Freedom of Peaceful Assembly in the *Canadian Charter of Rights and Freedoms*"; and Kristopher E. G. Kinsinger, "Positive Freedoms and Peaceful Assemblies: Reenvisioning Section 2(c) of the Charter".

<sup>7</sup> See generally, "The Forgotten Freedoms Project".

or theory of section 2's fundamental freedoms was lost in the details of decision making. That centerpiece of section 2 constitutionalism is largely missing and must be supplied: freedom is cherished but fragile, and vulnerable to the impulse to suppress what is unfamiliar, unwelcome, and a threat to dominant values. Freedom cannot be robust, across section 2's guarantees, until its vital principles are securely embedded in the jurisprudence and culture of the Charter.

Exploring the heart of section 2 constitutionalism begins, as it must, with *Big M* and its legacy of freedom. Despite its stature as an icon of Charter interpretation, *Big M*'s conception of freedom was sidelined in section 2's evolution, and must be restored. In this, sections 2(b) and (d) are instructive. Not only did the Court reject the claim both times, its landmarks on expressive and associational freedom bear little resemblance to *Big M*.<sup>8</sup> While *Big M*'s legacy rests, principally, on a definition of freedom as the absence of coercion or constraint, the section 2(b) jurisprudence went in another direction, focusing on a methodology of limits that served more to subvert than protect expressive freedom. Meanwhile, section 2(d)'s guarantee of associational freedom was literally paralyzed by the Court's inability to conceive a right of association. Amid fractured decision making, the jurisprudence failed to protect the entitlement or generate a definition of associational freedom. Among other things, section 2(d)'s anomalous evolution had adverse consequences for the concept of non-association, or freedom from compelled association.

*Big M* marked a moment of conceptual imagination that has been lost, obscured, or forgotten in the evolution of the Charter's fundamental freedoms. In the process, the guarantees were shortchanged by deficits in the interpretive methodology. Confronting those deficits is the initial step in working toward a prescriptive theory of these freedoms. Though offering a theory

<sup>8</sup> *Irwin Toy v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 (S.C.C.) [*Irwin Toy*] (s.2(b)); The "Labour Trilogy" (s.2(d)): *Reference re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313 (S.C.C.) [*Alberta Reference*]; *PSAC v. Canada*, [1987] 1 S.C.R. 424 (S.C.C.); *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460 (S.C.C.) [collectively, hereinafter "*Labour Trilogy*"].

here is premature, the discussion explains how *Big M*'s legacy offers a conceptual vantage and starting point in framing a theory of section 2 constitutionalism.

### ***Big M*'s conception of freedom**

Remarkably, *Big M* transcended the less than compelling issue of corporate relief from Sunday closing and proposed a definition of freedom. In this, section 2(a) served as the setting for a conception, not only of religious freedom, but of all the Charter's fundamental freedoms. If the Court's vision of a "truly free society" was informed by the history of persecution by and against religious communities, *Big M*'s message that state-prescribed coercion or constraint profoundly violates section 2 could hardly have been clearer.<sup>9</sup> Even as the jurisprudence protected section 2's entitlements over the years, *Big M* stands apart as the Court's signature decision and monument to freedom.

*Big M* was emphatic that the Charter proscribes the state from interfering with freedom, especially and including through forms of state-based coercion. Declaring that "[o]ne of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint", Justice Dickson pronounced that no one who is compelled by the state, "either to act or refrain from taking an action", is "truly free."<sup>10</sup> His conception of coercion was broad and inclusive, incorporating indirect as well as direct or "blatant" forms of control.<sup>11</sup> Though not under section 1, *Big M* also linked permissible limits to a concept of harm, stating that section 2(a) prevents the government from "compelling individuals to perform or abstain from performing *otherwise harmless acts*".<sup>12</sup> In this, Dickson J. insisted that actions do not become harmful because of their religious

<sup>9</sup> *Big M*, *supra* note 2, at 336.

<sup>10</sup> *Big M*, *supra* note 2.

<sup>11</sup> *Big M*, *supra* note 2.

<sup>12</sup> *Big M*, *supra* note 2, at 350 (emphasis added).

significance to others. In principle, *Big M*'s exegesis on freedom meant that a Sunday closing law simply restricting store hours was as offensive as more blatant forms of coercion.<sup>13</sup>

Though it can be overlooked, *Big M* linked coercion and constraint, showing how the two can be combined to pose dual threats to freedom. The nuance is that a constraint may prohibit but not compel an action. Sunday closing was instructive, because the law prohibited stores from being open on Sunday and compelled businesses to observe the Christian Sabbath.<sup>14</sup> *Big M* was alive to that dynamic, dating the pairing of coercion and constraint at least to the reign of Henry VIII, when mandatory religious observance was combined with restrictions on the religious practices of other denominations.<sup>15</sup>

A confluence of coercion and constraint compounds the interference with freedom, in turn demanding heightened scrutiny under the Charter. A few years after *Big M*, Bill 101 presented another model of regulation that prohibited one activity and compelled another. There, Quebec's sign law banned businesses from advertising in their language of choice and mandated French as the exclusive language of outdoor signage. While *Ford v. Quebec* invalidated the constraint on choice of language, *Devine v. Quebec* cited *Big M* and held that compelling the use of French also violated the Charter.<sup>16</sup> Albeit without discussing or referring to *Big M*, the Court invalidated dual violations on other occasions, including *RJR-Macdonald v. Canada* and *Libman v. Quebec*. In *RJR-Macdonald*, the federal government placed an absolute ban on tobacco advertising and compelled companies to place an unattributed government warning on cigarette packages.<sup>17</sup> In *Libman v. Quebec*, provincial referendum legislation essentially prohibited third party

<sup>13</sup> *Big M*, *supra* note 2. Compare *R. v. Edwards Books & Art Ltd.*, [1986] 2 S.C.R. 713 (S.C.C.) (upholding a provincial Sunday closing law, in large part, because the regulation addressed secular and not religious objectives).

<sup>14</sup> Some Christian denominations, such as Seventh Day Adventists, do not recognize Sunday as the Sabbath.

<sup>15</sup> *Big M*, *supra* note 2, at 318.

<sup>16</sup> *Ford v. Quebec (A.G.)*, [1988] 2 S.C.R. 712 (S.C.C.) [*Ford*]; *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790 (S.C.C.) [*Devine*] [the "Bill 101 cases"].

<sup>17</sup> *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 (S.C.C.) [*RJR-Macdonald*].

participation in referendum campaigns and compelled citizens to participate, if at all, by associating with state-prescribed “yes” or “no” national committees.<sup>18</sup>

The Court was less sympathetic when faced with dual violations in other instances. For example, *Slaight Communications v. Davidson* upheld an arbitrator’s order compelling an employer to write a letter of reference of prescribed content and absolutely prohibiting additional comments or information.<sup>19</sup> Many years later, an issue arose under section 2(a) when members of a religious community were prohibited from driving without a photo licence and were compelled – in order to drive – to violate religious conviction.<sup>20</sup> *Big M*’s insight on coercion mattered little in *Alberta v. Hutterian Brethren of Wilson Colony*, where the analysis focused on a distinction between direct compulsion and a law’s “incidental and unintended” effects.<sup>21</sup> That distinction enabled the majority opinion to uphold the photo requirement on the pretext that members of the community had a meaningful choice between maintaining religious observance and not driving, or driving and not maintaining religious observance.<sup>22</sup> In this way, what *Big M* would readily classify as coercion was presented in *Wilson Colony* as meaningful choice: a choice between coercion or constraint.<sup>23</sup>

More recently, the duality of coercion and constraint has arisen with fresh urgency under Quebec’s Bill 21, *An Act respecting the Laicity of the State*, which prohibits individuals from wearing apparel that represents a form or symbol of religious observance, as a condition of

<sup>18</sup> *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569 (S.C.C.) [*Libman v. Quebec*].

<sup>19</sup> *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (S.C.C.) [*Slaight Communications*]. With Beetz and Lamer JJ. dissenting separately, Dickson J., the author of *Big M*, wrote the majority opinion in this case. See Beetz J., stating that coercing a mandatory letter of recommendation constituted a “violation of the freedoms of opinion and expression” (at 1061) (emphasis added).

<sup>20</sup> *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567 (S.C.C.) [*Wilson Colony*]. For members of the Colony, a photograph is prohibited because it is a “likeness” and prohibited by the Second Commandment.

<sup>21</sup> *Wilson Colony*, *supra* note 20, at paras. 92-94 (S.C.C.).

<sup>22</sup> *Wilson Colony*, *supra* note 20, at paras. 97-98 (S.C.C.).

<sup>23</sup> Similarly, the Court did not consider Bill 101’s sign law as a meaningful choice between using French and not advertising at all. *Supra*, note 16.

providing or receiving most government services.<sup>24</sup> While clearly a constraint on religious observance, Bill 21 is also an insidious compulsion of identity that publicly coerces compliance with a state-prescribed policy of secularity. Legislation flagrantly affronting the admonition that “[a]ttempts to compel belief or practice [deny] the reality of individual conscience” comprises a dual violation that vitally infringes section 2’s freedoms of religion, expression, and association.<sup>25</sup>

As shown, the pairing of coercion and compulsion represents a persistent threat to freedom that can reach troubling proportions. *Big M*’s mindfulness of the dual threat must be addressed in the jurisprudence, whenever it surfaces, and not forgotten.

*Big M*’s insight on the question of *per se* violation – in principle, a form of rights exceptionalism – is another part of its legacy that has been largely forgotten. There, the Court set its conception of freedom apart, untempered or offset by reasonable limits under section 1. Justice Dickson was adamant that an *ultra vires* purpose cannot be saved by section 1 and, from that perspective, the Sunday closing law was unconstitutional because its religious purpose was *per se* a violation of section 2(a).<sup>26</sup> Moreover, in stating that not every government interest or policy objective is “entitled to” consideration under section 1, he suggested that some violations are by definition outside the scope of justification.<sup>27</sup>

<sup>24</sup> Bill 21, *An Act respecting the laicity of the State*, 1st Sess., 42d Leg., Quebec, 2019 (assented to June 16, 2019), S.Q. 2019, c.12 [Bill 21].

<sup>25</sup> *Big M*, *supra* note 2, at 345. Not only does it explicitly violate freedom of religious belief and practice, Bill 21, *supra* note 24, infringes expressive freedom and compels members of religious communities publicly to express and be associated with a mandatory policy of state secularity. Section 33 of Bill 21 invokes s. 33 of the Charter, the legislative override or notwithstanding clause, to exempt it from challenge under most Charter guarantees, including s. 2’s fundamental freedoms. It should also be noted that Justice Gascon cited *Big M* and relied on *Big M* in discussing the state’s duty of religious neutrality in *Mouvement laïque québécois v. Saguenay (City)*, 2015 2 S.C.R. 3 (S.C.C.).

<sup>26</sup> That is why *Big M*’s corporate status was not at issue under s. 2(a). See also *Quebec (AG) v. Quebec Protestant School Boards*, [1984] 2 S.C.R. 66 (S.C.C.) (describing Bill 101’s limits on English language instruction in Quebec schools as an “archetype” of regimes requiring reform under the Charter and not “legitimate” under s. 1 as a result).

<sup>27</sup> *Big M*, *supra* note 2, at 352.

That part of *Big M*'s legacy was displaced, and the concept of a violation that cannot be saved effectively disappeared when the *Oakes* test emerged one year later.<sup>28</sup> That framework changed the calculus immeasurably, including the assumption that every breach is subject to justification under section 1. Even without *Oakes*, it is uncertain how *Big M*'s proposition that some violations cannot be justified would have fared. Regardless, a vital perspective on the nature and severity of a breach was lost.<sup>29</sup> Rendered invisible in the analytical symmetry of rights and limits – and attendant focus on section 1 – was the insight that some infringements are so offensive to the Charter's purposes as to defy justification.<sup>30</sup> A form of rights exceptionalism remains in place for section 7's principles of fundamental justice, but not elsewhere in the jurisprudence.<sup>31</sup> As its acquiescence in grave violations attests, the Court's attention to the severity of the breach has been uneven over the years.<sup>32</sup>

*Big M* represents an early and unexpected highwater mark for freedom, offering a singular conception that was not tethered to the methodology of a formal balance between rights and limits.

<sup>28</sup> *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.) (establishing a structured framework for analyzing the justifiability of Charter violations under s. 1).

<sup>29</sup> But see *Slaight Communications*, *supra* note 19, at 1061 (*per* Beetz J., dissenting, pronouncing that an order compelling a former employer to provide a letter of prescribed content was "totalitarian in nature" and can "never be justified under s. 1" (emphasis added)).

<sup>30</sup> In a panel we participated in, Dwight Newman and Brian Bird made this point another way, suggesting that s. 2(b)'s forgotten entitlements – the inner rights of thought and belief – might be absolute or near absolute entitlements. See the Charter Day webinar: "Celebrating Canada's Fundamental (and Sometimes Forgotten) Freedoms", April 17, 2020, online: Christian Legal Fellowship <<http://www.christianlegalfellowship.org/forgottenfreedoms>>. See also Brian Bird, "Are All Charter Rights and Freedoms Really Non-Absolute?" (2017) 40 Dalhousie L.J. 107; Dwight Newman, "Interpreting Freedom of Thought in the Canadian Charter of Rights and Freedoms" (2019) 91 S.C.L.R. (2d) 107.

<sup>31</sup> *Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 331, at para. 95 (S.C.C.) (confirming that although it is difficult to save violations of s. 7's principles of fundamental justice under s. 1, "in some instances" the state may be able to show that the breach is justifiable). See also *R. v. Michaud*, 2015 ONCA 585 (Ont. C.A.) (justifying a highway regulation that violated s. 7 under s. 1).

<sup>32</sup> Decisions that have permitted the overt silencing of certain voices are particularly problematic. Examples include *R. v. Lucas*, [1998] 1 S.C.R. 439 (S.C.C.) [*R. v. Lucas*] (upholding criminal defamatory libel convictions against individuals protesting a miscarriage of justice), see discussion *infra*; *Little Sisters Book and Art Emporium v. Canada*, [2000] 2 S.C.R. 1120 (S.C.C.) (failing, in the face of cumulative, purposeful and grave violations of rights, to grant an effective remedy); and *Baier v. Alberta*, [2007] 2 S.C.R. 673 (S.C.C.) (citing *Big M*, *supra* note 2, on the question of invalid purpose, but upholding a statutory provision – enacted following a bitter labour strike – that disqualified school board employees from running for office as school trustees).



Surprisingly, *Big M* had little or no influence on the Court’s “landmark” decisions under sections 2(b) and (d), or on the evolution of the section 2 jurisprudence. It is uncertain whether *Big M*’s authority was diminished because section 1 was taken out of the equation and not discussed; alternatively, the Court may not have considered its conception of freedom informative, holistically, of section 2. Either way, *Big M*’s trailblazing insights – on the state as a threat to freedom, on the pairing of coercion and constraint, on the concept of *per se* violation – have been overlooked, if not forgotten, in section 2’s evolution. While section 2(b)’s guarantee of expressive freedom developed a methodology of limits, protection for associational freedom under section 2(d) stalled at the outset, as discussed in the following two sections, respectively.

### **Section 2(b): a legacy of limits**

Section 2(b) leads the Charter’s fundamental freedoms, generating a volume of more than eighty decisions and outpacing its companion guarantees by a substantial margin. Though poised to play a pivotal role, showing other guarantees the way, section 2(b)’s promise did not materialize. Despite enforcing the entitlement a number of times over the years, the Court’s ambivalence toward expressive freedom dates from its landmark decision in *Irwin Toy v. Quebec*.<sup>33</sup> There, the Court dealt section 2(b) a blow from which it has not recovered. Subsequently and throughout, the jurisprudence has been preoccupied with the content of expression and whether expressive activity is deserving of Charter protection. Using a standard of worthiness to determine that issue misconceives the guarantee’s central purpose of treating all content as free, whether valuable or not. In this, the jurisprudence either forgot or missed the essential point that section 2(b) protects freedom, not expression or its content. After all, that is the baseline principle of section 2’s

<sup>33</sup> *Irwin Toy*, *supra* note 8 was predated by other decisions but is s. 2(b)’s landmark because it defined freedom and proposed a methodology for s. 2(b). See *Ford and Devine*, *supra* note 16; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 (S.C.C.); and *BCGEU v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214 (S.C.C.).

fundamental freedoms: it is freedom itself, and not a particular religion, expressive activity, or association that is protected. Under section 2(b), then, freedom is the principle and limits on content the exception. While content can be limited, the distinction between expressive freedom and its expressive content is critical.

In the early years, the Court developed frameworks for interpreting the Charter's rights and freedoms and though section 2(b) was little different, addressing that challenge in *Irwin Toy* was unwise. Once *Ford v. Quebec* granted commercial expression status under the Charter, it was unnecessary for the Court to prescribe a framework for section 2(b) in *Irwin Toy*.<sup>34</sup> Within the space of only a few months, *Irwin Toy* would bear little resemblance to the Court's Bill 101 decisions, which applied a strict section 1 standard and boldly invalidated legislation of surpassing political and symbolic importance in Quebec. Fortuity was partly to blame for an inauspicious start that embedded misunderstandings in the section 2(b) jurisprudence.<sup>35</sup> A companion case to *Ford* and *Devine*, the decision in *Irwin Toy* was postponed because of internal problems at the Court and, in the interim, Quebec invoked section 33, the override clause, against the Bill 101 decisions.<sup>36</sup> At a difficult moment, Lamer J. picked up Le Dain J.'s unfinished draft in *Irwin Toy* and cobbled a majority opinion joined by only three members of the Court.<sup>37</sup> In the face of those challenges,

<sup>34</sup> *Ford's* decision, *supra* note 16, to grant Charter status to commercial expression under s. 2(b) applied to the children's advertising at issue in *Irwin Toy*, *supra* note 8.

<sup>35</sup> For an account of the circumstances surrounding these threshold s. 2(b) cases, see Jamie Cameron, "To the 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 Inc., 2009) 237 [Cameron, "To the Rescue"] (explaining how internal difficulties brought the Court to the brink of losing quorum and being unable to decide the s. 2(b) trilogy from Quebec). The details are drawn, primarily, from Robert Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press, 2003), at 423-38.

<sup>36</sup> Internally, the Court was in a state of "disarray"; Estey J. unceremoniously quit in spring 1988; Le Dain J. was hospitalized that summer; Beetz J. had been diagnosed with cancer; and McIntyre J. was anxious to retire. Decision in *Irwin Toy* was sidelined to prioritize the intensely controversial Bill 101 cases. Cameron, "To the Rescue", *supra* note 35, at 242.

<sup>37</sup> *Irwin Toy* was decided by a panel of five judges. Though sometimes attributed to Dickson C.J.C., the majority opinion was presented in all three names – the Chief Justice and Lamer J. and Wilson J. (at 249-50, explaining the difficulties that arose in converting Le Dain J.'s unfinished draft and proposing an approach that was agreeable to Dickson C.J.C. and Wilson J.).

the Court should have left section 2(b)'s "landmark" interpretation to another day and been content to decide the case on its merits.

In contrast to *Big M*, which set out a straightforward and compelling definition of freedom, *Irwin Toy*'s primary rule of content neutrality was marred by equivocation. *Irwin Toy* initially set a low threshold for entitlement, stating that any attempt to convey meaning is expression and *prima facie* protected by section 2(b).<sup>38</sup> That standard reflected a value-neutral approach that is inclusive of expressive content, regardless how objectionable.<sup>39</sup> At a time when the scope of section 2(b) was uncertain, the decision to embrace content neutrality marked a bold and significant step. Had *Irwin Toy* stopped there, section 2(b)'s evolution might have looked quite different. Either because of the confusion surrounding decision making – an instance of "too much collaboration and not enough leadership" – or because the judges did not sufficiently trust it, the majority opinion went on to graft exceptions and an incongruous purpose-effect test onto its low threshold of entitlement.<sup>40</sup>

These caveats and add-ons have done more to obscure section 2(b)'s conception of freedom than to narrow the guarantee. Although set in a cluttered analytical framework, *Irwin Toy*'s *prima facie* test withstood the test of time. Meanwhile, and though of limited doctrinal influence, the purpose-effect test is problematic because it modelled how section 2(b)'s values could be repurposed to limit the scope of freedom.<sup>41</sup>

<sup>38</sup> *Irwin Toy*, *supra* note 8, at 969.

<sup>39</sup> Notably, 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*, *supra* note 8, at 969. Without providing a definition, the Court excluded "violent forms of expression" from s. 2(b) (at 970).

<sup>40</sup> Cameron, "To the Rescue", *supra* note 35, at 250.

<sup>41</sup> But see *R. v. Khawaja*, [2012] 3 S.C.R. 555 (S.C.C.) (applying the purpose-effect test in the setting of anti-terrorism legislation); *City of Montréal v. 2952-1366 Québec, Ltd.*, [2005] 3 S.C.R. 141, at para. 74 (S.C.C.) [*City of Montreal*] (introducing a test that uses s. 2(b)'s underlying values to determine access to government property for expressive purposes); see also *Ontario (Public Safety and Services v. Criminal Lawyers' Association*, [2010] 1

The addition of this test was a critical step in section 2(b)'s interpretation because it generated a content-based, double standard of breach. Though adapted from *Big M*, the doctrine took an unusual turn under section 2(b).<sup>42</sup> The wrinkle in *Irwin Toy* was that while purposeful infringements of expression would proceed directly to section 1, non-purposeful interferences merely affecting expressive freedom faced a further burden. Under that branch of the test, section 2(b) was not engaged unless expressive activity advanced the guarantee's underlying values: the pursuit of truth, participation in social and political decision making, and individual self-fulfilment.<sup>43</sup> Put simply, the analysis of impermissible effects on expressive freedom was overtly content-based, limiting the guarantee to putatively "valuable" expression and imposing a burden on claimants to demonstrate the worthiness of expressive activity. As such, this construct set up an overt contradiction between a values-based test and content neutrality that re-surfaced under section 1, where it took the form of the contextual approach. That is when section 2(b)'s underlying values began playing a key role in justifying limits on expressive freedom. *Irwin Toy* facilitated that development by taking an important intermediate step that expressly lowered the standard of justification under section 1.

After proposing an analytical framework under section 2(b), *Irwin Toy* adjusted the section 1 analysis, modifying the *Oakes* test to create a double standard of justification.<sup>44</sup> Under that approach, a strict standard of justification applies when the state acts as the "antagonist" of an

S.C.R. 815, at para. 31 (S.C.C.) (stating that s. 2(b) only protects a right of access to documents that are "necessary to permit meaningful discussion on a matter of public importance").

<sup>42</sup> *Irwin Toy*, *supra* note 8, at 972 (stating that "the importance of focussing ... on the purpose and effect of the legislation is nowhere more clearly stated than in *Big M*"); see also *Big M*, *supra* note 2, at 331-2 (stating that both purpose and effect are relevant in determining constitutionality).

<sup>43</sup> *Irwin Toy*, *supra* note 8, at 976 (stating, at 977, that a claimant must show that "her aim was to convey a meaning that is reflective of the principles underlying freedom of expression"). See also 978-79 (providing a summary and conclusion of the two steps in the purpose-effect test).

<sup>44</sup> In this, the Court focused its attention on minimal impairment, stating that what it requires will vary, depending on "the government objective and the means available to achieve it". *Irwin Toy*, *supra* note 8, at 993.

individual, but deference is sufficient when the legislature “mediates the competing claims of different groups in the community”, allocating scarce resources or protecting the vulnerable.<sup>45</sup> A “reasonable assessment” of competing claims would be enough, under that standard, to justify a violation of section 2(b).<sup>46</sup> Invoked episodically, this section 1 dichotomy has had limited influence. Less obviously a content-based doctrine, in the moment it enabled the Court to uphold restrictions on children’s advertising and avoid provoking Quebec to rely on the override a second time, in quick succession after the Bill 101 cases.<sup>47</sup>

*Irwin Toy* set section 2(b) on a course that increasingly misapprehended the guarantee by focusing on the content, rather than the freedom, of expression. Within a year, its dichotomy of strict-deferential section 1 review was overtaken by an alternative methodology – the contextual approach – which offered an unprincipled but effective way to place limits on expressive activity. Inspired by Justice Wilson’s concurring opinion in *Edmonton Journal*, the appeal to context was grounded in her observation that competing interests cannot be balanced in the abstract.<sup>48</sup> She sought a way to align comparables, matching the context or content of expression with the context or goal of regulation.<sup>49</sup> Imagining how the *Oakes* test could accommodate that objective was not

<sup>45</sup> *Irwin Toy*, *supra* note 8, at 990, 993-94 (proposing and explaining the rationale for using these variables to bifurcate the s. 1 standard of review).

<sup>46</sup> *Irwin Toy*, *supra* note 8, at 990.

<sup>47</sup> Between the Bill 101 cases, *supra* note 16, and *Irwin Toy*, *supra* note 8, the s. 1 test changed dramatically, and there is much to suggest that the three Quebec cases would or should have been decided the same way under *Ford*’s s. 1 standard (*supra* note 16). Cameron, “To the Rescue”, *supra* note 35, at 253, 248.

<sup>48</sup> See *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.), at 1353-56 [*Edmonton Journal*] (concurring opinion, stating that the majority opinion put more weight on expressive freedom “at large” than is “appropriate in the context of the case”). Her intense dissatisfaction with the *Labour Trilogy*, *supra* note 8, was the genesis and inspiration of Wilson J.’s contextual approach. See Jamie Cameron, “Justice in her own Right: Bertha Wilson and the *Canadian Charter of Rights and Freedoms*” in Jamie Cameron, ed., *Reflections on the Legacy of Justice Bertha Wilson* (Toronto: LexisNexis Canada Inc., 2008), at 399-405.

<sup>49</sup> Her idea of context would “bring into sharp relief” the aspect of s. 2(b) “truly at stake”, as well as the relevant aspects of any competing values. *Edmonton Journal*, *supra* note 48, at 1355-56.

easy, because there was no obvious place in its abstract framework for facts, circumstances, and “context” to enter the calculus.<sup>50</sup>

Though the contextual approach offered a solution to the dilemma of an overly abstract conception of rights, it assumed a form under section 2(b) that undermined a principled conception of freedom. There, it provided the rationale for a methodology that appropriated section 2(b)’s underlying values and moved them across the structural divide from section 2(b) to section 1, where the entitlement’s values were co-opted against expressive freedom. Justice Wilson’s declaration that a “particular right or freedom may have a different value depending on the context” was developed in *Rocket v. Royal College of Dental Surgeons*, where McLachlin J. stated – for a majority – that some restrictions are easier to justify than others, because “not all expression is equally worthy of protection” and “[n]or are all infringements equally serious”.<sup>51</sup> First incorporated into section 1 by *R. v. Keegstra* and then dominant in the evolution of section 2(b), context was the proxy for an outcome-based approach that focused on value, not harm, in determining limits.<sup>52</sup>

<sup>50</sup> Early on, the final step in the proportionality test played little or no role in the s. 1 analysis. Much later, that step became the doctrinal focus for a balancing of interests that is contextual, or particular to the interests at stake. *Wilson Colony*, *supra* note 20 (enhancing the salutary benefits and deleterious consequences test as an analytical venue for juxtaposing and balancing competing interests).

<sup>51</sup> *Edmonton Journal*, *supra* note 48, at 1355-56; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, at 247 (S.C.C.).

<sup>52</sup> *R. v. Keegstra*, [1990] 3 S.C.R. 697, at 726, 737, 759-67 (S.C.C.) [*Keegstra*] (stating that s. 2(b)’s values come “to the forefront” under s. 1, approving the contextual approach, and proposing a methodology to compare the “expression at stake” to “free expression values”). Though the Chief Justice and Wilson J. concurred in *Irwin Toy*’s singular antagonist model for Charter issues arising in the criminal justice system, both joined the application of a contextual approach, with a lowered standard of justification, in *Keegstra* (at 765) (concluding that the hate speech at stake was only tenuously connected to s. 2(b)’s values and warranted less protection under s. 1 as a result). See generally Jamie Cameron, “The Past, Present, and Future of Expressive Freedom under the *Charter*” (1997) 35 O.H.L.J. 2, at 7-27 (explaining and critiquing the contextual approach, as introduced in *Keegstra* and applied in the s. 2(b) jurisprudence).

In practice, the contextual approach invited the Court to assess expressive activity and designate content as “low value” because it “strayed” from section 2’s core.<sup>53</sup> It meant that difficult content, like sexually explicit, defamatory, or discriminatory expression, and some advertising, fell short of section 2(b)’s aspirational values, deserved little or no protection under section 1, and could be limited under a relaxed standard of justification.<sup>54</sup> That, in brief, is how the contextual approach substituted a subjective assessment of expression’s value for an evidentiary threshold of harm. In that process, values aimed at informing a generous definition of freedom were repurposed to discount section 2(b)’s guarantee of expressive freedom.<sup>55</sup> Once the Court found that the expression at stake was low value, the severity of the violation mattered less and played little or no role in the analysis.<sup>56</sup>

Not only were section 2(b)’s underlying values subverted, roles were reversed. While a focus on expressive value imposed an effective burden on the rights holder under section 1, the Court relied on proxies like common sense and experience to link a perception that expressive content is valueless to an assumption that it is also harmful.<sup>57</sup> Furthermore, the Court has routinely

<sup>53</sup> Examples include *Keegstra*, *supra* note 52; *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 (S.C.C.) (federal human rights legislation); *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 (S.C.C.) (extracurricular expressive activity of a schoolteacher); *RJR-Macdonald*, *supra* note 17 (tobacco advertising) (*per* La Forest J., dissenting); *Hill v. Scientology of Toronto*, [1995] 3 S.C.R. 1130 (S.C.C.) (common law of defamation); and *R. v. Lucas*, *supra* note 32 (defamatory libel).

<sup>54</sup> See, e.g., *R. v. Butler*, [1992] 1 S.C.R. 452, at 496-497, 500 (declaring that sexually explicit materials “seriously offend the values fundamental to our society” and do not “stand on an equal footing with other kinds of expression which directly engage the ‘core’ of the freedom of expression”).

<sup>55</sup> In *RJR-Macdonald*, *supra* note 17, at 282-283, for example, La Forest J. declared that tobacco advertising was as far from s. 2(b)’s core as prostitution, hate mongering and pornography, and should only receive “a very low degree of protection” under s. 1. In *R. v. Lucas*, *supra* note 32, at paras. 93-94, Cory J. described defamatory statements as “inimical” to s. 2(b)’s core values, adding that it would “trivialize the magnificent panoply” of rights guaranteed by the Charter to attach significant value to such content; in his view, defamatory libel should receive no more than “scant protection” under s. 1.

<sup>56</sup> A low value designation influenced the proportionality analysis – where the severity of the violation must be considered – because the salutary benefits of achieving the regulatory goal could easily outweigh the deleterious consequences of prohibiting valueless expression.

<sup>57</sup> See, e.g., *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] 1 S.C.R. 467, at paras. 132, 135 (S.C.C.) [*Whatcott*] (stating that a court is entitled to use “common sense and experience” in recognizing that certain activities, such as hate speech, inflict “societal harms”, adding that the discriminatory effects of hate speech are “part of the everyday knowledge and experience of Canadians”).

assumed that prohibitions on expressive activity represent a considered legislative response to a “reasoned apprehension” of harm.<sup>58</sup>

Over time, the contextual approach relegated section 2(b)’s *prima facie* test to a pro forma role and elevated the analysis of limits under section 1. Section 2(b)’s values shifted in function from protecting the entitlement to justifying limits on expression. As a result, the methodology is disproportionately weighted to the question of limits, and is seriously out of balance. Unlike *Big M*, which focused exclusively on entitlement at the expense of justification, the jurisprudence on expressive freedom is almost the opposite: *Irwin Toy*’s egalitarian concept of entitlement catalyzed an approach that glossed the violation and placed the weight of analysis almost exclusively on the section 1 question.<sup>59</sup>

Paradoxically, the contextual approach did not solve the problem of avoiding uneven comparators between the abstract and the particular. To the contrary, it perpetuated the anomaly. In *Edmonton Journal*, Justice Wilson worried that abstracting expressive freedom’s values would privilege or advantage section 2(b) in any analysis of competing interests, at the expense of regulatory objectives. The approach she suggested was aimed at achieving a balance, by juxtaposing the context of the entitlement and the state’s interest in imposing limits. Under section 2(b), the contextual approach created a new imbalance, using abstract values to set a standard for particular content to meet.

<sup>58</sup> *R. v. Butler*, *supra* note 54 (introducing this standard); see also *Harper v. Canada*, [2004] 1 S.C.R. 827, at paras. 77-78 (S.C.C.) (stating, in the context of “high value” election campaign expression, that when faced with inconclusive evidence the court may rely on a “reasoned apprehension” of the harm); *Whatcott*, *supra* note 57, at para. 135, stating that the legislature was entitled to a “reasonable apprehension of societal harm” arising from hate speech).

<sup>59</sup> Note that s. 2(b) excludes expressive activity that is a form of violence and that the purpose-effect test is occasionally applied; *Irwin Toy*, *supra* note 8. In addition, the Court set a threshold under s. 2(b) for access to government property and information; see note 41, *supra*.



The section 2(b) jurisprudence confirms that freedom cannot prevail under a methodology that tests the context or content of expression against abstract and aspirational values. Robust concern for section 2(b)'s freedom principle is rare and that, when found, it often takes the form of dissent.<sup>60</sup> An example is McIntyre J.'s dissent in *Irwin Toy*. There, he sounded an early warning, presciently cautioning against even "a small abandonment of a principle of vital importance", and admonishing that "[w]e should not lightly take a step in that direction, even a small one."<sup>61</sup> In principle, McIntyre J. would require "urgent and compelling reasons" to limit expressive freedom, and then only for the time and extent necessary to protect the community.<sup>62</sup>

Despite its origins and weakness as precedent, the Court's conception of section 2(b) in *Irwin Toy* has endured. In the circumstances, it was a mistake to propose a methodology, and fundamental flaws in the jurisprudence can be traced to this landmark.<sup>63</sup> As section 2(b)'s counterpart to *Big M's* definition of freedom, the principle of content neutrality failed – except superficially – to anchor or guide the jurisprudence. The Court rendered that principle meaningless, garbling it and diverting values that promote the scope of freedom to the contrary objective of justifying limits on expression. By treating abstract values as a test of merit under section 2(b), *Irwin Toy's* purpose-effect test was the forerunner of the contextual approach, which assumed a similar and determinative role under section 1.

<sup>60</sup> See, e.g., *City of Montreal*, *supra* note 41 (*per* Binnie J., dissenting against a bylaw's application to a strip club and insisting that it be re-enacted to comply with the Charter); *Baier v. Alberta*, *supra* note 32 (*per* Fish J., in dissent, invalidating a statutory disqualification from office, in part because the measure was enacted shortly after a bitter labour dispute and was aimed at excluding school board employees from running for office as trustees).

<sup>61</sup> *Irwin Toy*, *supra* note 8, at 1008.

<sup>62</sup> *Irwin Toy*, *supra* note 8, at 1008.

<sup>63</sup> Critiques include Robin Elliott, "Back to Basics: A Critical Look at the *Irwin Toy* Framework for Freedom of Expression" (2011) 15 *Rev. of Const. Studies* 205; Chanakya Sethi, "Beyond *Irwin Toy*: A New Approach to Freedom of Expression under the *Charter*" (2012) 17 *Appeal: Current Law and Law Reform* 21; Jamie Cameron, "The Original Conception of Section 1 and its Demise: A Comment on *Irwin Toy v. Attorney General of Quebec*" (1989) 35 *McGill L.J.* 253.

Decided in 1989, *Irwin Toy* was predated by the *Alberta Reference*, which formed part of the Court's landmark on section 2(d), the *Labour Trilogy*.<sup>64</sup> Albeit over Dickson C.J.C.'s influential dissent, this landmark also failed the guarantee. Not only did the Court reject the labour's bid to constitutionalize collective bargaining and the right to strike, for years it was even unable to agree on a concept of associational freedom.

### **Section 2(d)'s anomalous legacy**

Even before *Irwin Toy*, the *Labour Trilogy* damaged section 2(d)'s prospects, marginalizing freedom of association to the point of insignificance in section 2's family of fundamental freedoms. Part of the problem was that association did not fit the model of individual rights, and a collective entitlement of potentially indeterminate reach posed an unfamiliar and puzzling challenge for the Court. Whether and to what extent labour relations should be constitutionalized was the overlay that dominated and complicated section 2(d)'s development.

After many years, the guarantee's prospects brightened and associational freedom has to some extent recovered. For the most part, section 2(d)'s comeback has yet more emphatically reinforced its destiny as a mechanism for advancing labour union objectives.<sup>65</sup> In this, section 2(d) is anomalous, effectively serving as a dedicated, or single-purpose entitlement. The Court may not have set out to dampen the guarantee, but has done little to encourage an inclusive conception of associational freedom. Section 2(d) has little presence outside the context of labour relations, in large part, because the Court failed to cultivate section 2(d)'s development in other settings.<sup>66</sup> The

<sup>64</sup> See note 8, *supra*.

<sup>65</sup> Section 2(d)'s comeback began with *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016 (S.C.C.) and continued to 2015, when the Court overruled precedent that rejected labour union claims, in *Mounted Police Association of Ontario v. Canada (Attorney General)*, [2015] 1 S.C.R. 3 (S.C.C.) [*Mounted Police*]; and *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] 1 S.C.R. 245 (S.C.C.).

<sup>66</sup> The claim failed in *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591 (S.C.C.) [*Black*] (professional regulation); *R. v. Skinner*, [1990] 1 S.C.R. 1235 (S.C.C.) (soliciting prostitution); and *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157 (S.C.C.) (marketing regulation); and *Suresh v. Canada*, [2002] 1 S.C.R. 3 (S.C.C.) (deportation). It succeeded in *Libman v. Quebec*, *supra* note 17, at paras. 36, 37 (discussing the breach of

guarantee's anomalous evolution matters especially in this discussion for its impact on the freedom from association, or non-association.

Following *Big M*, freedom from coercion and forms of compulsion should have been a cornerstone in the section 2 jurisprudence. Once labour issues were welded onto section 2(d), freedom from coerced association could not succeed, because the Court was unwilling to tolerate asymmetry between negative and positive elements of the entitlement. The *Labour Trilogy's* rejection of collective bargaining and the right to strike was a monumental loss for labour, and to some it confirmed the Charter's proclivity for re-enforcing, rather than redressing, social and economic advantage. Perhaps realizing that rejecting other claims could forestall further criticism, the Court in *Black v. Law Society of Alberta* deflected a claim clearly grounded in section 2(d) to section 6 mobility rights.<sup>67</sup> The question there was whether law society regulations could deter and prevent the rise of interprovincial law firms. Resolving the claim under section 6 avoided a section 2(d) win for lawyers and law firms not long after the *Labour Trilogy* had rejected the claims of labour unions. In much the same way, the Court maintained symmetry between association and non-association by resisting a concept of freedom from compelled association.

A decisive moment arose in the 1990s when union authority was challenged under section 2(d). The question in *Lavigne v. OPSEU* was whether applying mandatory dues to objectionable non-workplace causes violated the Charter rights of a non-union member.<sup>68</sup> Three members of a fragmented seven-member panel rejected non-association as definitionally inconsistent with a

associational freedom in the context of referendum campaigns); and was referenced in *Trinity Western University v. College of Teachers*, [2001] 1 S.C.R. 772 (S.C.C.) (professional accreditation).

<sup>67</sup> *Black*, *supra* note 66. Justices McIntyre and L'Heureux Dubé concluded that law society regulations prohibiting resident lawyers from associating professionally with non-resident lawyers and firms did not engage s. 6 mobility rights, and were instead a violation of s. 2(d).

<sup>68</sup> *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211 (S.C.C.) [*Lavigne*]. The Charter applied because the statutory framework for community colleges authorized mandatory dues check off.

guarantee of associational freedom.<sup>69</sup> From that perspective, associational freedom was one-dimensional and could only be conceptualized as a “positive” entitlement. A fourth member of the panel also expressed skepticism of non-association, but addressed the question of breach, proposing an onerous standard based on a concept of “forced ideological conformity”.<sup>70</sup> All told, a majority in *Lavigne* either rejected or voiced considerable resistance toward a concept of freedom from compelled association.<sup>71</sup> In addition, all members of the panel rejected freedom from compelled expression under section 2(b).<sup>72</sup>

*Lavigne* marked a serious setback, not only for section 2(d), but for section 2 as well. Reviewing it again reveals how protective the Court was of union hegemony and how that, in turn, impelled an outcome-oriented and formalistic response to the question of non-association. Those who rejected compulsion under section 2(d) maintained, for example, that valid claims could be absorbed by other Charter guarantees.<sup>73</sup> In other words, it was permissible to read section 2(d) down because other guarantees could step in and fill any gaps on issues of compelled association. Nor did inconsistency seem to trouble the Court. While promoting section 2(d) as a positive entitlement with no negative scope, it styled section 2(b) the other way, as a negative entitlement with limited potential as a positive right.<sup>74</sup> These analytical anomalies make it difficult to resist the

<sup>69</sup> *Lavigne*, *supra* note 68, at 249-63 (*per* Wilson J., L’Heureux Dubé and Cory JJ. concurring, stating that Lavigne’s “right to freely” associate was not infringed because he was not prevented from forming or joining associations of his choosing; at 263).

<sup>70</sup> *Lavigne*, *supra* note 68, at 342-51 (stating that Lavigne’s union dues did not “bring him into association” with ideas and values to which he did not subscribe; at 342).

<sup>71</sup> The plurality opinion by La Forest J. cited *Big M*, *supra* note 2, and adopted a bilateral concept of s. 2(d) but upheld the limit under s. 1.

<sup>72</sup> The s. 2(b) claim foundered because union dues did not count as a form of expression, and paying dues did not publicly identify Lavigne with objectionable causes or prevent him from disavowing those causes. *Lavigne*, *supra* note 68, at 340, 279 (*per* La Forest J. and Wilson J., respectively).

<sup>73</sup> *Lavigne*, *supra* note 68, at 263 (*per* Wilson J.).

<sup>74</sup> See *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995, at 1034, 1039 (S.C.C.) (characterizing s. 2(b) as a negative entitlement and acknowledging the possibility of a positive entitlement in “the proper context”); *Native Women’s Association of Canada v. Canada*, [1994] 3 S.C.R. 627, at 655 (S.C.C.) (confirming that s. 2(b) is a negative entitlement, without ruling out the “possibility” that positive governmental action might be required in some circumstances to make expressive freedom meaningful).

conclusion that non-association was excluded from section 2(d) to pre-empt Charter-based challenges to union authority.

Following *Lavigne*, the Court's departure from principle would only deepen in *R. v. Advance Cutting & Coring Ltd.*, which tested a statutory provision compelling union membership as a precondition to employment in Quebec's construction industry.<sup>75</sup> On any view, compelling union membership was a more profound violation of freedom than deflecting a fractional portion of mandatory dues to objectionable, off-site causes.<sup>76</sup> As in *Big M*, the scheme entailed concurrent violations, both constraining access to employment and compelling construction workers to join one of five province-approved unions as a prerequisite to work.<sup>77</sup> The Court upheld both provisions, albeit over a dissent that powerfully maintained that the freedom not to associate was "markedly infringed" by a system of "forced association and state control over work opportunity".<sup>78</sup>

Despite differing on its application, both plurality opinions in *Advance Cutting* focused on the concept of forced ideological coercion.<sup>79</sup> On reflection, it is striking how radically that standard departs from the approach in *Big M*, which included indirect as well as direct or blatant forms of coercion. Under *Lavigne* and *Advance Cutting*, the state can compel beliefs and actions up to the point of forced *ideological* conformity, objectively understood.<sup>80</sup> On its face, this standard grossly

<sup>75</sup> *R. v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209 (S.C.C.) [*Advance Cutting*].

<sup>76</sup> *Advance Cutting*, *supra* note 75, at para. 32 (*per* Bastarache J., dissenting).

<sup>77</sup> Not only was union membership mandatory in Quebec's construction industry, the scheme included a variety of constraints on the right to join one of the province's prescribed construction unions. *Advance Cutting*, *supra* note 75, at para. 42. In dissent, Bastarache J. found both violations of s. 2(d) unconstitutional.

<sup>78</sup> *Advance Cutting*, *supra* note 75, at paras. 31, 34 (*per* Bastarache J.).

<sup>79</sup> *Advance Cutting*, *supra* note 75, at para. 3 (*per* Bastarache J., proposing a "contextual" version of the standard) and paras. 224-32 (taking an evidentiary approach to the concept of ideological coercion). Note that Iacobucci J., concurring alone, preferred the more liberal approach to compelled association that was proposed by La Forest J. in *Lavigne* (see paras. 283-89).

<sup>80</sup> *Lavigne*, *supra* note 68, at 344 (*per* McLachlin J., stating that the standard is objective, and asks whether the compulsion is reasonably regarded as a form of association with values and ideas to which an individual does not subscribe).

understates the threat compulsion poses to freedom; in doing so, it diminished the content and scope of section 2(d). Just as the claim in *Big M* might have failed under a doctrine of forced ideological conformity, the non-association at stake in *Lavigne* and *Advance Cutting* could have succeeded under *Big M*'s conception of coercion.

Section 2(d)'s non-association decisions also had implications for compulsion in the larger frame of section 2's fundamental freedoms. Apart from *Big M*, there is little in the section 2 jurisprudence to deter governments from compelling endorsement of or compliance with official political, religious, and ideological messages. Though non-association was addressed in a labour relations setting, the courts have not been particularly receptive in other settings, acknowledging the claim in a sprinkling of decisions and rejecting it in others.<sup>81</sup> Seldom recognized or remembered is *Big M*'s insight that forms of mandatory affirmation, observance, or endorsement are a profound affront that may be more intrusive of freedom than prohibiting an activity. *Big M* notwithstanding, freedom from association has languished in a jurisprudence that failed to develop conceptual or doctrinal empathy for those who are compelled to adopt, voice, or comply with state-prescribed messages.

With coercive measures seemingly on the rise, the relatively low status of freedom from compulsion represents a concerning deficit in the section 2 jurisprudence that is timely and matters greatly. Recent examples include mandatory gas pump stickers compelling gas station owners in

<sup>81</sup> In addition to *RJR-Macdonald*, *supra* note 17, and *Libman*, *supra* note 18, the Court was sensitive under s. 2(a) to the prospect that religious officials could by law be compelled to violate their beliefs in *Reference re Same-Sex Marriage, Reference*, [2004] 3 S.C.R. 698 (S.C.C.). Provincial appellate courts have rejected freedom from compulsion in significant decisions, including *McAteer v. Canada (Attorney General)*, 2014 ONCA 578 (Ont. C.A.) (concluding that a mandatory oath to the Queen, as a condition of citizenship eligibility, did not violate any of s. 2's guarantees); *In re Marriage Commissioners*, 2100 SKCA 3; 327 DLR (4th) 669 (Sask. C.A.) (concluding that providing services for same-sex marriage would not violate the Charter rights of marriage commissioners); and *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons*, 2019 ONCA 393 (Ont. C.A.) (finding that mandatory referrals of services that are religiously objectionable violated s. 2(a) but were justifiable under s. 1 of the Charter).

Ontario to carry the Ontario government’s partisan message about carbon taxes, as well as mandatory free speech policies at colleges and universities in Ontario and Alberta, compelling compliance with the state’s conception of free speech on campus.<sup>82</sup> On other frontiers of compulsion, intense controversy arose from mandatory attestations under the federal government’s 2017 Canada Summer Jobs program, and the Law Society of Ontario’s mandatory declaration of Statement of Principles (SOP).<sup>83</sup> Most egregious is Quebec’s Bill 21, because it constitutes a compulsion of identity, coercing members of the democratic community to comply, publicly, with a prescribed policy of state secularity. Though it is a more profound violation than Sunday store hours in *Big M*, it is unclear whether Bill 21’s compulsion of identity would satisfy the Court’s exacting standard of forced ideological conformity.<sup>84</sup>

There is another, profound consequence of section 2(d)’s capture by labour union interests. Its perceived exclusivity as a labour entitlement has isolated the guarantee, preventing or deterring connections between associational freedom and freedom of religion and expression. There, as well, the jurisprudence missed an important opportunity to build a bridge across section 2’s guarantees. Justice Le Dain’s plurality opinion in the *Alberta Reference* proposed the narrowest conception of associational freedom, but recognized that a violation of section 2(d) can occur in concert with a

<sup>82</sup> See *Federal Carbon Tax Transparency Act*, S.O. 2019, c.7, Sched. 23 (mandatory gas pump stickers); Office of the Premier, “Upholding Free Speech on Ontario’s University and College Campuses” (August 30, 2018) (government directive on campus free speech), online: Government of Ontario News <<https://news.ontario.ca/opo/en/2018/08/upholding-free-speech-on-ontarios-university-and-college-campuses.html>>, See also see Jamie Cameron, “Compelling Freedom on Campus: A Free Speech Paradox” (2020) 29:2 Constitutional Forum 5 (also discussing a similar government policy on campus free speech in the province of Alberta).

<sup>83</sup> On Canada Summer Jobs, see generally Brian Bird, “Canada Summer Jobs Program and the *Charter* Problem”, *Policy Options* (January 16, 2018), online: <<https://policyoptions.irpp.org/magazines/january-2018/canada-summer-jobs-and-the-charter-problem/>>. The Law Society of Ontario’s Statement of Principles generated controversy and a voluble commentary and was repealed in September 2019. See Jacques Gallant, “Law Society scraps key diversity initiative”, *The Star* (September 11, 2019), online: <<https://www.thestar.com/news/gta/2019/09/11/law-society-scraps-key-diversity-initiative.html>>.

<sup>84</sup> As noted, Bill 21, *supra* note 24, is protected by the override from challenge under most provisions of the *Charter*, though not s. 28’s guarantee of gender equality, notwithstanding anything in the *Act*.

breach of other section 2 guarantees.<sup>85</sup> That insight opened up a line of communication between the guarantees that was at least latent in *Big M*'s recognition of the inherently collective and associational nature of religious belief and practice.<sup>86</sup> Had it not been so decisively dedicated to union issues, section 2(d) could have played a vital role in forging links between section 2's guarantees and contributing, in that process, to an overarching conception of freedom.

Instead, there is little sense of connection between guarantees in the section 2 jurisprudence. Though a violation that engages two or even three of section 2's guarantees aggravates the breach, the Court rarely addresses compound infringements. In 2001, *TWU v. BC College of Teachers* addressed a trifecta of violations, but the Court refused to do so in *R. v. Khawaja*, and again in *Law Society of British Columbia v. TWU*.<sup>87</sup> There and in *TWU v. Law Society of Upper Canada*, the Court upheld law society non-accreditation of a proposed law school with a religiously-based covenant that applied to all students on campus.<sup>88</sup> The Court had a critical opportunity to recognize a compound violation of section 2 and act on the renewed conception of associational freedom introduced in *Mounted Police*.<sup>89</sup> Writing on her own, then Chief Justice McLachlin stated that, though a separate analysis was not required, the Court must include expressive and associational freedom "in the ambit" of section 2(a), because the limits on those

<sup>85</sup> *Alberta Reference*, *supra* note 8, at para. 143 (stating that freedom of association is "particularly important for the exercise of other fundamental freedoms, such as freedom of expression and freedom of conscience and religion", which "afford a wide scope for protected activity in association").

<sup>86</sup> At the least, *Big M*'s recognition of the associational bonds of religious community intuited the interface of s. 2's guarantees.

<sup>87</sup> See note 66, *supra* (treating freedom of religion as the primary claim and acknowledging that associational and expressive freedoms were implicated in the College's refusal to approve the teacher training program). In *R. v. Khawaja*, *supra* note 41, the Court's analysis of anti-terrorism legislation focused on s. 2(b) to the exclusion of s. 2(a) and (d), which were also argued; in *Law Society of British Columbia v. Trinity Western University*, [2018] 2 S.C.R. 293 (S.C.C.) [*Law Society of BC v. TWU*], (concerning the Law Society's decision not to accredit the proposed law school), the majority opinion dismissed associational and expressive freedom).

<sup>88</sup> See also *Trinity Western University v. Law Society of Upper Canada*, [2018] 2 S.C.R. 453 (S.C.C.) (companion case from Ontario).

<sup>89</sup> See discussion *infra*.



values flowed from the community’s religious beliefs.<sup>90</sup> In comparison, the majority opinion was dismissive, declaring that the factual matrix of the claims was indistinguishable, and that section 2(a) was “sufficient” to account for the expressive, associational, and equality rights of the TWU community.<sup>91</sup> Minimizing the severity of the violation in that way demonstrated a lack of insight into the scope and severity of the breach and how it engaged section 2’s guarantees as an integral whole.

Dual breaches of section 2 are more common, and the pattern there is mixed. At times, the Court addresses both violations, but more often treats one as governing, or deflects ancillary, subordinate infringements.<sup>92</sup> In cautioning the Court against deciding more than is minimally necessary, principles of adjudication can diminish the significance and severity of compound violations. In addition, the practice discourages the Court from treating section 2 as a composite or suite of guarantees, collectively protecting freedoms that are fundamental alone and as an integral whole.

From the outset, section 2(d)’s interpretation was entangled in labour issues and indecision about individual and collective conceptions of association. Though it is the only guarantee that has been re-worked, the Court has not released section 2(d)’s promise of associational freedom from the bonds of precedent. For instance, its first decision overruling part of the *Labour Trilogy* and constitutionalizing collective bargaining failed to acknowledge a role for section 2(d) outside that context.<sup>93</sup>

<sup>90</sup> *Law Society of BC v. TWU*, *supra* note 87, at paras. 122, 126.

<sup>91</sup> *Law Society of BC v. TWU*, *supra* note 87, at para. 77. The majority opinion also found that the denial of law society accreditation was not a “serious limitation” of the s. 2(a) rights of community members (at para. 102).

<sup>92</sup> See *Whatcott*, *supra* note 57 (addressing ss. 2(b) and 2(a) claims); *Libman*, *supra* note 18, at paras. 35-36 (citing Le Dain J.’s opinion in the *Alberta Reference*, *supra* note 8, and making a perfunctory finding of breach under s. 2(d)); *Suresh v. Canada*, *supra* note 66, at paras. 100-111 (addressing ss. 2(b) and (d) collectively, in the context of deportation proceedings against an individual allegedly involved in an alleged terrorist organization).

<sup>93</sup> *Health Services and Support – Facilities Subsector Bargaining Ass’n v. British Columbia*, [2007] 2 S.C.R. 391 (S.C.C.). See Jamie Cameron, “Due Process, Collective Bargaining, and Section 2(d) of the *Charter*: A Comment on

While remaining fixed on labour issues, section 2(d)'s ongoing "renaissance" also encouraged a wider conception of associational freedom. In *Mounted Police*, McLachlin C.J.C. and Le Bel J. returned to section 2(d)'s roots, proposing a purposive, generous *and contextual approach* – citing *Big M* – and suggesting that the entitlement is not limited to labour issues.<sup>94</sup> The Court's intention to signal a more generous interpretation nonetheless confirmed the deep-seated limits of its conception. Not only did it celebrate the non-association decisions, *Mounted Police* gestured toward a content-based standard of entitlement.<sup>95</sup> As long as it resists or excludes freedom from compelled association, section 2(d)'s scope of coverage will be deficient, and incomplete. Moreover, criteria that focuses on relative disadvantage mistakes section 2(d)'s core purpose of protecting associational freedom from threat by the state.<sup>96</sup> As recent initiatives demonstrate, relative disadvantage is not the issue when the state targets organizations and associations because they have the power to challenge or threaten government policies.<sup>97</sup>

Despite the renaissance, it remains unclear whether section 2(d) is more inclusive. For the guarantee to be taken seriously, the Court must validate associational freedom in non-labour cases,

*BC Health Services*" (2006-2007) 13 C.L.E.L.J. 323, at 352-61 (discussing the limits of the Court's conception of entitlement).

<sup>94</sup> *Mounted Police*, *supra* note 65, at paras. 47-66.

<sup>95</sup> *Mounted Police*, *supra* note 65, cited *Lavigne*, *supra* note 68, and *Advance Cutting*, *supra* note 75, with approval, describing the decisions as models of purposive interpretation. It is interesting to note in a joint opinion that is set against its authors being on different sides of the issue in *Advance Cutting*.

<sup>96</sup> *Mounted Police*, *supra* note 65, at paras. 58-61 (focusing on marginalized and vulnerable groups, stating that the purpose of s. 2(d) is to reduce, not enhance social imbalances, and suggesting a contextual approach to determine the constitutional status of associational freedom).

<sup>97</sup> After 2012, the Canada Revenue Agency targeted a number of organizations for audit that, coincidentally, had been critical of the Harper government and its policies; these included the David Suzuki Foundation, Tides Canada, Equiterre, Environmental Defence, Amnesty International, Physicians for Global Survival, and others engaged in the promotion of social justice causes. These audits were suspended by the Liberal government in 2017; Dean Beeby, "Political activity audits of charities suspended by Liberals", *CBC News* (May 4, 2017), online: <<https://www.cbc.ca/news/politics/canada-revenue-agency-political-activity-diane-lebouthillier-audits-panel-report-suspension-1.4099184>>. More recently, Alberta premier Jason Kenney announced a public inquiry into the finances of environmental organizations, including sources of foreign funding. In doing so, the premier spoke of a "premeditated, internationally planned and financed operation to put Alberta energy out of business"; quoted in Tyler Dawson, "Alberta announces public inquiry into 'shadowy' foreign funding of environmental groups", *National Post* (July 4, 2019), online: <<https://nationalpost.com/news/politics/alberta-announces-public-inquiry-into-shadowy-foreign-funding-of-environmental-groups>>.

expressly acknowledge the threat posed by compelled association, and activate section 2(d)'s role as a bond between section 2's guarantees.<sup>98</sup>

### **Toward a prescription for freedom**

With each guarantee generating its own issues and complexities, defining the scope of section 2's entitlements was an enormous challenge. Once landmarks were in place, the Court was less inclined to revisit or build on the underlying core of section 2's guarantees. A definition of section 2(a)'s entitlement was not introduced until 2004; in contrast to *Big M*, which made constant reference to freedom of conscience and religion, the Court's conception in *Amselem* was limited in scope to elements of religious freedom, and either subsumed or disregarded the guarantee's express protection of conscientious freedom.<sup>99</sup> As discussed, in recent years the Court overruled its section 2(d) landmarks for the purpose of constitutionalizing labour union entitlements. Meanwhile, and apart from occasional tweaks of the contextual approach, the Court showed little interest in reconsidering its section 2(b) methodology. For the most part, section 2(b)'s conception of freedom stayed the course.

Section 2(b) lacks an analogue to *Big M*, and rarely has the Court attempted to explain, philosophically and as a matter of principle, why expressive freedom matters.<sup>100</sup> For instance, it was never sufficient for *Irwin Toy* simply to recite its well-known underlying values of self-

<sup>98</sup> See André Schutten, "Recovering Community: Addressing Judicial Blindspots on Freedom of Association", in this collection (providing a critique of the Court's limited conception of associational freedom).

<sup>99</sup> *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 (S.C.C.).

<sup>100</sup> But see *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.) [*CBC v. New Brunswick (AG)*](*per* La Forest J.'s masterful majority opinion, forging links between self-government, a free press and the open court principle, and implementing that theory of s. 2(b) by requiring a sufficient evidentiary foundation for any limits on open court). See also *Keegstra*, *supra* note 52 (*per* McLachlin J., dissenting, and discussing s. 2(b)'s values); *CBC v. Lessard*, [1991] 3 S.C.R. 421 (S.C.C.) (*per* McLachlin J., dissenting, and drawing on rationales for a free press to propose an evidentiary standard for search warrants against the press and media).

governance, truth seeking, and individual fulfilment.<sup>101</sup> Rather than vitalize the guarantee, those values became a counter-productive force against freedom. In a way, *Irwin Toy*'s low threshold for breach backfired by making it unnecessary to deepen the discussion of freedom under section 2(b). Nor did that happen under section 1, where freedom's values entered the register to justify limits.<sup>102</sup>

Section 2(b) cannot flourish without an account of freedom. Elsewhere, the perennial search for a singular theory or organizing principle has prompted a rich first amendment literature that ceaselessly churns the relative merits of free speech values.<sup>103</sup> Short of joining that debate, two simple observations can provide a starting point here. The first is that freedom is powerful, but fragile, and the second is that it therefore poses a test of courage, and reciprocal courage. To explain, freedom places a demand on tolerance, asking a democratic community to forego its instinct to suppress what is objectionable, discordant, disruptive. Though those who defend the courage of their convictions may be valorized, pilloried – or more likely – ignored, a principled conception of freedom is uninterested in preferring some voices and silencing others. Prizing

<sup>101</sup> See Derek Ross, "Truth-seeking and the Unity of the *Charter*'s Fundamental Freedoms", in this collection (reflecting thoughtfully on the search for truth as an overarching principle that unites the Charter's fundamental freedoms). Under s. 2(b), see Robin Elliott, "The Supreme Court's Understanding of the Democratic Government, Advancement of Truth and Knowledge and Individual Self-Realization Rationales for Protecting Freedom of Expression, Part 1: Taking Stock" (2012) 59 S.C.L.R.(2d) 435, at 436-37 (providing an extensive review of the values and their functions in s. 2(b) doctrine, stating that the Court has provided "very little in the way of guidance on the general conception of values that inform its application", and that the Court has "very rarely engaged in careful and considered analysis of the values" at the s. 1 stage, tending instead to treat them as "perfunctory").

<sup>102</sup> It is well beyond the scope of this discussion to join issue on the broader methodology of "values" in Charter methodology, especially the concept of Charter values, other than to note in passing the problems associated with values methodologies more generally. See also Peter D. Lauwers, "What Could go Wrong with Charter Values?" (2019) 91 S.C.L.R. (2d) 1.

<sup>103</sup> A voluminous first amendment literature engages in relentless debate and reflection on free speech's core values. Recent contributions include Alexander Tsesis, "Free Speech Constitutionalism" (2015) U. Ill. L. Rev. 101 (proposing a general theory of free speech) and David S. Han, "The Value of First Amendment Theory" (2015) U. Ill. L. Rev. 87, at 87. Not all the discussion is celebratory, and much is critical or skeptical of the long-held premises of free speech in the US. See, e.g., P.E. Morkowitz, *The Case Against Free Speech: The First Amendment, Fascism and the Future of Dissent* (USA: Hachette Book Group, Inc., 2019) (maintaining that freedom of speech has never existed and is empty, hollow, and meaningless). In Canada, see, e.g. Richard Moon, *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press, 2000).

freedom in turn demands reciprocal courage because tolerating profound difference – granting space to all views and voices – challenges a community to permit what is widely held and believed to be unsettled, and even placed at risk.

It is not immediately obvious why a democratic community cannot protect its values from challenge by those who are unlikeable or detestable, and may provoke social anxiety in deliberate or reckless ways. When it adopts a truly inclusive view of freedom, a community acts beneficently and in self interest, from a place of democratic humility. That humility is a function of insight into the limits of individual and collective capacity for knowledge, understanding, and empathy. It reflects an acceptance that matters of truth and reality are dynamic, organic, and elusive. Those limits explain freedom’s power and define its value, but expose its essential fragility. Freedom may be at or near its zenith when it is subversive of dominant values, but that is also a touchpoint of vulnerability. In that setting, social anxiety breeds intolerance of uncertainty, leading to demands for defensive reaction.<sup>104</sup>

Forbearing from censoring and silencing discordant voices is not an easy ask for a community that attributes its stability to the legitimacy of accepted values, protocols, and rules of self governance. Recognizing that it is imperative to the resilience of democratic community for beliefs, practice and values to be vulnerable to change is profoundly a matter of trust. That trust

<sup>104</sup> At present, access to public library space is ripe for censorial oversight through demands for content-based, prior approval schemes. While public libraries in Vancouver and Toronto resisted intense pressure to deny space to a controversial speaker, a less sturdy public library in Ottawa foreclosed controversy by cancelling a rental agreement. See, e.g., “Toronto Public Library Collaborators Condemn TPL’s Decision on Meaghan Murphy Talk”, online: [change.org <https://www.change.org/p/toronto-public-library-toronto-public-library-collaborators-condemn-tpl-s-decision-on-meghan-murphy-talk>](https://www.change.org/p/toronto-public-library-toronto-public-library-collaborators-condemn-tpl-s-decision-on-meghan-murphy-talk); Libby Emmons, “Labour union tries to shut down feminist speaker”, *The Post Millennial* (February 19, 2020), online: <https://thepostmillennial.com/labour-union-tries-to-shut-down-feminist-speaker>>. See also *Weld v. Ottawa Public Library*, 2019 ONSC 5358 (Ont. Sup. Ct. J.) (challenging the termination of Ms. Weld’s contract for the rental of library space).

fortifies a democratic community's reciprocal courage to withstand and even welcome forms of disruptive uncertainty.

At once powerful and fragile, freedom – democracy's most prized value – is fraught with risk. Precisely because it cannot be exercised without risk, freedom requires a risk management plan. Risk and harm are elastic concepts grounded in subjectivity, running the spectrum from the slightest offence against norms to the outright incitement of violence.<sup>105</sup> Under a system of rights constitutionalism, the point at which freedom poses unacceptable risks and is subject to limits must be informed by principle and defined with precision. Limits cannot be grounded in an instinct to suppress, an aversion to unwelcome or hostile ideas, or a raw assessment of merit, content, or value.

Any commitment to freedom must turn on two pivots. First is a philosophic narrative of freedom's value in an organic community that is resilient and open to difference, tolerance, and change under a framework of constitutional principle. Second is a methodology that separates value from harm and focuses on an evidence-based approach to limits on freedom. Reconstructing section 2(b) methodology must therefore begin by rejecting the proposition that less valuable expression *per se* deserves less constitutional protection. From there, a framework for realizing section 2(b)'s potential must be grounded in a conception of freedom that places conditions on the methodology of limits. It is critical for that framework to embed an evidentiary conception of harm.<sup>106</sup>

<sup>105</sup> See generally, Emmett Macfarlane, "Hate Speech, Harm, and Rights" in Emmett Macfarlane, ed., *Dilemmas of Free Expression* (forthcoming).

<sup>106</sup> In this, the Charter jurisprudence on the open court justice is a model. See Jamie Cameron, "A Reflection on Section 2(b)'s Quixotic Journey" (2012) 58 S.C.L.R. (2d) 163, at 165 (declaring this jurisprudence s. 2(b)'s "crowning achievement") and 184 (describing the thickness of the principle and the rigour of the *Dagenais/Mentuck* test as its distinguishing features).

Finally, it is not only a conception of freedom that is lacking. As section 2(b)'s connection to self-governance demonstrates, at critical junctures the jurisprudence poorly or incompletely defends its underlying values. A robust conception of freedom validates and preserves the community's prerogative – as individuals and a collective – to participate in and take steps to protect the integrity of democratic governance.<sup>107</sup> The Court's repeated endorsement of this rationale has not translated into a jurisprudence protective of self governance and its core values of transparency and accountability.<sup>108</sup> A case in point is its reluctance to recognize freedom of the press and media as an independent section 2(b) entitlement.<sup>109</sup> Despite rehearsing and celebrating the role of the press on a number of occasions, the Court has been unwilling to constitutionalize its institutional status and protect its independent functioning from interference by the state.<sup>110</sup>

A troubling example is *R. v. National Post*, which implicated a sitting prime minister in acts of corruption, conflicts of interest, and even illegal activity.<sup>111</sup> On its face, and narrowly, the question was whether police could compel production of the envelope containing an allegedly forged bank document. Yet by refusing to protect a journalist's confidential source, the Court failed to grasp or attribute importance to the functional role of investigative journalism in promoting democratic accountability – in that instance, by exposing the Shawinigate scandal over

<sup>107</sup> *Ford*, *supra* note 16; *Irwin Toy*, *supra* note 8.

<sup>108</sup> See, e.g., *Harper v. Canada*, *supra* note 58; *R. v. Bryan*, [2007] 1 S.C.R. 257 (S.C.C.) (upholding limits on high value political expression, pursuant to a deferential standard of justification under s. 1.).

<sup>109</sup> See *R v. Vice Media Canada Inc.*, [2018] 3 S.C.R. 374 (S.C.C.) (concluding that it was neither desirable nor necessary to address the status of the press under s. 2(b) and acknowledge it as an entitlement on its own). But see *CBC v. New Brunswick (AG)*, *supra* note 100 (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).

<sup>110</sup> See generally Jamie Cameron, "Section 2(b)'s Other Fundamental Freedom: The Press Guarantee, 1982-2012" in Lisa Taylor and Cara-Marie O'Hagan, eds., *The Unfulfilled Promise of Press Freedom in Canada* (Toronto: University of Toronto Press, 2017); Benjamin Oliphant, "Does Independent Protection for Freedom of the Press Make a Difference? The Case of *Vice Media v. Canada (Attorney General)*" in this collection.

<sup>111</sup> *R. v. National Post*, [2010] 1 S.C.R. 477 (S.C.C.).

a period of time.<sup>112</sup> In this, the Court was unmoved that no less than a fullscale investigation into corruption in Canada’s highest elected office was at stake.<sup>113</sup>

Meanwhile, an earlier decision in *R. v. Lucas* reveals how values of transparency and accountability were sideswiped by the contextual approach. There, the Court upheld criminal convictions for defamatory libel that were aimed at silencing two individuals who protested a miscarriage of justice by publicly calling out the police officer in charge.<sup>114</sup> In upholding jail sentences for both, the Court missed the point that the Lucases were whistleblowers – albeit uncivil ones – whose protest engaged section 2(b)’s core principles. Instead, Cory J.’s majority opinion described their protest as inimical to the guarantee’s purposes, and concluded that the criminal law should be available to offset the deficiencies of the civil process so that front line workers – including police officers – are protected from defamation in the course of their duties.<sup>115</sup> In this scenario, the Lucases went to jail for carrying placards that damaged his reputation but pointed to wrongful criminal charges in the dozens, and the officer’s failure to protect young and highly vulnerable siblings from a known intra-familial sexual predator.<sup>116</sup> Events at the time and afterward demonstrated that accountability and transparency – speaking truth to power – were fundamentally at stake.<sup>117</sup> For these reasons, *Lucas* marks a serious misstep in section 2(b)’s

<sup>112</sup> For a critique, see Jamie Cameron, “Of Scandals, Sources and Secrets: Investigative Reporting, *National Post* and *Globe and Mail*” (2011) 54 S.C.L.R. (2d) 233. See also *Globe & Mail v. Canada (Attorney General)*, [2010] 2 S.C.R. 592 (S.C.C.) (proposing a more generous approach to journalist-source privilege).

<sup>113</sup> Gaps in the jurisprudence were addressed by the *Journalistic Sources Protection Act*, S.C. 2017, c.22 [JSPA] (creating statutory protection for journalists from search and production, and disclosure of confidential sources). See *Denis v. Côté*, 2019 SCC 44 (S.C.C.) (interpreting the JSPA).

<sup>114</sup> *R. v. Lucas*, *supra* note 32.

<sup>115</sup> *R. v. Lucas*, *supra* note 32, at para. 74.

<sup>116</sup> *R. v. Lucas*, *supra* note 32, at paras. 4-6. Its summary of the background facts leading up to the placard demonstration show that the miscarriage-of-justice facts were before the Court at the time of the *Lucas* appeal.

<sup>117</sup> An action in malicious prosecution against the officer succeeded at trial and was not appealed, though actions against the child therapist and Crown Attorney failed on appeal. See *Miazga v. Kvello Estate*, [2009] 3 S.C.R. 339 (S.C.C.) (dismissing the action against the Crown Attorney but describing the wrongful charges as a “clear miscarriage of justice” that “undoubtedly had a devastating effect” on those charged, especially in the absence of an acquittal) [the proceedings on dozens of charges were stayed in the early 1990s]. See also “Scandal of the Century”, *The Fifth Estate* (December 20, 2011 (CBC documentary in which siblings recanted their allegations against the 16



development and history. Not only should defamatory libel be removed from the *Criminal Code*, at the first opportunity the Court should distance itself from the methodology and outcome in *Lucas*.<sup>118</sup>

Deficits on these points of self-governance, transparency, and accountability bear mention because they form part of section 2's narrative, and are connected to the theme of forgotten freedoms in yet another way. Weaknesses in this branch of the jurisprudence reflect, refract, and reinforce systemic problems and patterns in section 2's concept of fundamental freedoms. In other words, a synergistic and holistic approach to section 2's freedoms must build from a robust response to each part of the guarantee. Forgetting some freedoms, reading others down, and failing to protect their underlying values exposes cracks and weaknesses in the foundation that compromise section 2's discrete entitlements, as well as its integral whole.

### **Toward a theory of section 2 constitutionalism**

Now more than thirty-five years in the making, the jurisprudence records victories and setbacks, demonstrating that even without a solid foundation of principle, section 2's fundamental freedoms can be protected. Despite reinforcement by the Charter, these freedoms are fragile, subject to the pressures that buffet any dynamic, evolving community. Experience under the Charter has demonstrated that freedom cannot be protected by a contextual conception of entitlement. Equally important, section 2 lacks a baseline or overarching conception of freedom and its place in the Charter's matrix of rights. Long overdue, section 2 constitutionalism must be

individuals who were wrongfully charged, admitting that their tales of ritual sex practices were completely fabricated) (copy of the CD on file with the author).

<sup>118</sup> Jamie Cameron, "Repeal Defamatory Libel", *Centre for Free Expression Blog* (July 5, 2017), online: <<https://cfe.ryerson.ca/blog/2017/07/repeal-defamatory-libel>>.

set in a framework of principle that is holistic as well as responsive to each of its fundamental freedoms.

After generating strong momentum early in the Charter's interpretation, *Big M's* contributions to an overarching conception of freedom under section 2 were largely overlooked and even forgotten. For different reasons, freedom under sections 2(b) and (d) was misconceived and compromised at inception. Presented with opportunities along the way, the jurisprudence failed to establish a beachhead of principle to guard against encroachments on freedom. As noted, the Court could have moved section 2(d) away from labour issues at an early stage in its development, and did not.<sup>119</sup> That, together with the Court's resistance of non-association, shrunk section 2(d), both in concept and scope. Many years later, *Little Sisters* provided a compelling setting for the Court to reflect more deeply and thoughtfully on the fragility of expressive freedom, especially for those with marginalized voices who were targeted in that case.<sup>120</sup> The Court's anemic response to systemic state censorship in *Little Sisters* revealed limited insight into *Big M's* core insights on coercion and constraint. Meanwhile, section 2(a)'s guarantee of freedom of conscience was sidelined, and the Court has been unwilling or unable to show conceptual flexibility in interpreting its central promises, especially when communal interests are at stake.<sup>121</sup>

A prescriptive theory of section 2 constitutionalism begins by exposing the limits of the Court's conception of freedom. The key takeaways in that discussion are basic, but critical. First, the section 2 jurisprudence quickly lost contact with *Big M's* identification of coercion and constraint as profound threats to freedom. That insight must be re-introduced and should infuse

<sup>119</sup> See discussion above.

<sup>120</sup> See note 32, *supra*.

<sup>121</sup> A recent example is *Ktunaxa Nation v. British Columbia (Forest, Lands and Natural Resource Operations)*, [2017] 2 S.C.R. 386 (S.C.C.) (excluding a claim of aboriginal spirituality from s. 2(a)); see also *Wilson Colony*, *supra* note 20. See Benjamin Berger, "Is State Neutrality Bad for Indigenous Religious Freedom?" in Jeffrey Hewitt, Beverly Jacobs & Richard Moon, eds., *Indigenous Spirituality and Religious Freedom* (forthcoming), online: SSRN <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3508967](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3508967)>.

the section 2 jurisprudence, including section 2(d). It should be accompanied by attention to self governance and its associated values of transparency and accountability, both in the context of the press and media guarantee, and more generally.<sup>122</sup> Second, a candid overhaul, not only of the entitlement under section 2(b), but also of the limits calculus under section 1, must be undertaken. In part because the jurisprudence never made a commitment to freedom – *qua* freedom – the principle of content neutrality was subsumed in caveats and a misuse of expression’s underlying values. The distortion of section 2(b)’s values as an instrument of limits and disproportionate attention to the question of justification did not augur well for expressive freedom, and must be addressed.

Third, the section 2(d) jurisprudence must step away from its fixation with labour relations issues. In the past, the Court has declined the opportunity to develop associational freedom in non-labour contexts. When the issue recently arose in *Law Society of BC v. TWU*, a majority of the Court chose not to address sections 2(b) or (d), perhaps because doing so would acknowledge the compound nature of the violation.<sup>123</sup> Moreover, and to avoid undermining union authority, *Lavigne* and *Advance Cutting* marginalized the concept of freedom from compelled association. In doing so, the Court’s response to non-association disregarded *Big M*’s conception of freedom as the absence of coercion, including indirect forms of compulsion. Finally, it is unfortunate that the Court has not developed a role for section 2(d) as a bonding agent for section 2’s guarantees, or considered how an infringement of associational freedom – in the context of sections 2(a) or (b) – compounds the Charter violation.

<sup>122</sup> This point, made above, can be multiplied many times over. See, e.g., *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395 (S.C.C.) (dismissing the s. 2(b) claim and upholding the Barreau’s decision to discipline a lawyer who wrote a private letter to a judge which was impolite, but sought accountability at that level of personal interaction, for the judge’s unacceptable behaviour toward him in court).

<sup>123</sup> *Law Society of BC v. TWU*, *supra* note 87.

The challenge at this juncture is to revive the conceptual imagination that inspired *Big M*'s interpretation of freedom, and return to the core principles of section 2's fundamental freedoms. In this, it is notable and promising that the Court undertook a radical re-structuring of section 2(d) that overruled a group of first generation precedents on associational freedom. More recently, Rowe J. and others have begun a process of critical engagement with the underlying assumptions of Charter interpretation and methodology.<sup>124</sup> Opening up debate is positive, because it promotes an active and organic interpretation of freedom that is candid about the gaps and faults of the status quo and forward looking in framing a conception of freedom for the future. At the least, it is clear that any re-tooling of section 2 is a complex task that must proceed from and be based on a foundational concept of freedom. Without offering a doctrinal panacea – for how could it? – *Big M* modelled an approach to the essential question and challenge of protecting freedom under the Charter. It is time now to pick up where *Big M* left off, pursuing a theory of section 2 constitutionalism for each of the guarantees and for fundamental freedoms as a whole.

<sup>124</sup> See especially Rowe J.'s concurring opinion in *Law Society of BC v. TWU*, *supra* note 87 (calling for a review of the *Doré* methodology, offering a critique of Charter values, analyzing the scope of Charter entitlement, and addressing the role of justification, including the burden of proof).