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The Forgotten Half of Dolphin Delivery: A Comment on the Relationship Between the Substantive Guarantees and Section 1 of the Charter

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CASE COMMENT

THE FORGOTTEN HALF OF DOLPHIN DELIVERY:
A COMMENT ON THE RELATIONSHIP
BETWEEN THE SUBSTANTIVE GUARANTEES
AND SECTION 1 OF THE CHARTER

I. INTRODUCTION

As the first opinion to discuss the constitutional status of the common law, Retail, Wholesale and Dep't Store Union v. Dolphin Delivery Ltd. is one of the Supreme Court of Canada's most significant Charter decisions to date. The Court held in December of 1986 that the Charter does not apply to private litigation. Given the importance of that conclusion, but also because its meaning and implementation remain unclear, most of the commentary thus far has focused on the Court's discussion of section 32. Significantly, however, the Court also considered whether picketing is protected by section 2 of the Charter, either as expressive or associational activity. Despite holding that s. 2 extended to the peaceful picketing contemplated by the union, Mc-

Intyre J. concluded that it could be enjoined under s. 1 as secondary picketing.\(^4\)

This comment addresses the forgotten half of the Supreme Court’s decision in *Dolphin Delivery*. It concentrates on the relationship between the issues of breach and justification, because defining that relationship will be the next major interpretive issue for the Court to decide under the *Charter*.\(^5\) Thus far, however, the jurisprudence reveals a sense of confusion about the division of labour between the substantive guarantees and s. 1. Without offering conclusions, this comment will discuss the nature of that relationship, and implications for the conceptual framework of the *Charter*.

II. THE SUBSTANTIVE GUARANTEES: THE QUESTION OF BREACH

A. Picketing

The litigation in *Dolphin Delivery* arose from a labour dispute. Relying on common law causes of action, Dolphin Delivery sought an injunction to restrain the defendant union from engaging in secondary picketing at its premises. In opposing the injunction, the union invoked the Charter, thereby requiring the judiciary to consider whether picketing is protected by s. 2 and ultimately, whether the Charter could affect legal relations between Dolphin Delivery and the union. The Supreme Court of Canada held that because the Charter does not apply to litigation between private parties, it did not preclude an injunction which was otherwise available under common law principles.

Counsel for Dolphin Delivery also invited the judiciary to decide that picketing is not covered by s. 2(b). The Court’s disposition of the case made it unnecessary, however, for McIntyre J. to address the further issues of breach and justification.\(^6\) Without explaining

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\(^6\) Ibid., note 1 at 604. All seven judges participating in the decision agreed with McIntyre J’s discussion of s. 32. Although Beetz J. joined that part of the opinion, he would have disposed of the case by concluding that the Charter does not protect picketing.
his reasons for embarking on a consideration of those issues, McIntyre J. declined counsel's invitation and held that the proposed picketing was protected, but subject, in the circumstances, to limitations under s. 1.\(^7\)

Despite recognizing picketing as constitutionally protected expression, McIntyre J. was not prepared to agree that s. 2(b) protects all picketing. After noting that the purpose of labour picketing is economic, and implying that picketing can often be more "active" than "expressive", he stated that the Charter would not extend to picketing that is accompanied by threats or acts of violence, property destruction, assault, or "other clearly unlawful conduct".\(^8\)

Though any suggestion that the Charter might protect violent conduct may be intuitively unsound, it is also conceptually unclear why s. 2(b) protects picketing in some cases but not in others. The text of s. 2(b) draws no distinction between different types of expression, and McIntyre J. never stated explicitly that picketing loses its character as "expression" when it is violent, potentially violent, or otherwise "unlawful". Moreover, the fact that s. 2(b) protects picketing does not mean that picketing can never be restricted. Reasonable limitations are explicitly permitted by s. 1. The structure of the Charter draws a distinction between the questions of breach and justification, which suggests that it is the special function of s. 1 review to place any limitations that are permissible on the substantive guarantees. In concluding that certain picketing activities are excluded from s. 2(b), McIntyre J. failed to address these considerations.

His earlier discussion of freedom of expression makes the exclusion of some picketing activities even less explicable. Drawing on a variety of British, American and Canadian sources, he listed an array of reasons for protecting speech.\(^9\) Although he referred to a connection between expression and democracy throughout, at no point did he suggest that s. 2 protects only "political" speech. As a result, he appears to adopt every rationale that is advanced in the numerous passages cited for protecting speech. If that is what the Court intended, such an expansive interpretation of s. 2(b) would

\(^7\) Ibid. at 590. He concluded that s. 2(b) extended to peaceful picketing, but that limitations were reasonable under s. 1 because the picketing was secondary rather than primary. Wilson J. wrote separate reasons under s. 1. Given its decision to protect picketing under s. 2(b), the Court did not discuss s. 2(d).

\(^8\) Ibid. at 588.

\(^9\) Ibid. at 583-86.
make the imposition of definitional limitations virtually impossible. Alternatively though, if McIntyre J. meant to suggest that it is appropriate to restrict the scope of s. 2, his opinion leaves it unclear what those restrictions might be.

Thus it becomes difficult to understand, in the absence of any explanation for such distinctions, why the *Charter* protects some kinds of picketing but not others. For example, if picketing is covered because it is "political" expression, then the conclusion that unpeaceful picketing is not protected appears contradictory. However, if unpeaceful picketing is not protected because it is "economic" speech, then the initial decision to protect peaceful picketing is inconsistent with that conclusion. Moreover, if the "act" of picketing is expression, then one wonders why its status under s. 2(b) should depend on whether or not it is peaceful. Finally, if s. 1 provides the analytical framework for determining the permissibility of restrictions on individual freedom, then it should be irrelevant to the issue of breach whether the expressive activity is considered meritorious or not. In other words, to the extent that violent picketing is not meritorious, perhaps that judgment should be made under s. 1, rather than s. 2.

Concerns about McIntyre J.'s opinion do not necessarily imply disagreement with his conclusion. The difficulty is that he assumed the propriety of restricting the scope of s. 2, without giving any explanation for that interpretation. As the trilogy of labour cases would reveal, in the absence of a substantive theory of s. 2, and a conception of the functional relationship between the issues of breach and justification, the decision to introduce definitional limitations is conceptually unsound.

B. The Right to Strike

*Dolphin Delivery* was followed, in April of 1987, by a trilogy of labour cases. In *Reference re Public Service Employee Relations Act*, a majority held that the rights to strike and bargain collectively are not protected by s. 2(d) of the *Charter*. In support of that

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11 A panel of seven heard the case: Beetz and LaForest JJ. joined LeDain J.'s reasons for judgment; McIntyre J. wrote a separate concurring opinion; Chief Justice Dickson and Wilson J. dissented; and Chouinard J. did not participate in the decision.
decision, LeDain J. stated that those rights are not fundamental because they are the "creation of legislation." His conclusion appears to have been animated by a fear of the "resulting necessity" of applying s. 1, had the decision gone otherwise. Seemingly, the requirements of a s. 1 review made it preferable to deny the Charter's coverage at the substantive or definitional stage. By upholding the legislation on the ground that no breach had occurred, the Court attempted to avoid a discussion of the statute's merits and thereby create some distance between Charter adjudication and legislative decision-making.

McIntyre J.'s lone concurrence represents an honest attempt to rationalize the Court's conclusion. What is extraordinary about this opinion is the Judge's candid explanation of his reasons for restricting the scope of the substantive guarantees. In his view, an expansive definition of the Charter's provisions could cause two "opposite, but equally unhappy, scenarios." First, an unrestricted interpretation of those provisions could encourage the judiciary to invalidate scores of statutes under s. 1, ultimately causing the legislatures to retaliate by relying on s. 33. Alternatively though, leaving the entire question of permissible limitations to s. 1 could cause an opposite result: the dilution of Charter guarantees, should the judiciary timidly defer to the legislatures and uphold virtually all legislation. According to McIntyre J., the courts should safeguard the Charter, but without encroaching on the functions of legislatures. In the absence of definitional limitations on the substantive guarantees, important issues of Charter interpretation would all be resolved under s. 1. Such a burden, however, could compromise the integrity of s. 1 analysis. In order not to enlarge the role of s. 1 and thereby promote that imbalance, McIntyre J. concluded that definitional limitations should be imposed on the substantive guarantees. Thus was the explanation found wanting in Dolphin Delivery provided.

Both opinions demonstrate that two problems currently are worrying the Court. First and foremost is the judiciary's concern about engaging in the kind of decision-making traditionally reserved to the legislatures. The second problem involves the interpretive issue related to that concern. Because the Supreme Court recognizes that s. 1 forces a visible review of legislative policy, it has taken steps to avoid engaging that function. By adopting a restrictive interpretation of the Charter's guarantees, the Court is attempting to make

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13 Ibid. at 418.
any connection between constitutional interpretation and political decision-making appear less obvious.

C. Section 1: The Issue of Justification

The Supreme Court has not always been this wary. Its earliest decisions granted relief on the basis of a breach of the Charter's guarantees, without resort to a s. 1 analysis. Once Regina v. Oakes was decided, it seemed clear that a s. 1 review would be required whenever a breach of the Charter was established. Oakes also makes it plain that derogations from the Charter will be permitted only in exceptional circumstances. The Chief Justice's opinion developed a stringent test under s. 1, which, as promulgated, was designed to ensure that few breaches of the Charter would be found justifiable.

If Oakes were applied faithfully, almost no legislation would pass its standard. In the face of that reality, the Court has retreated. In Jones v. The Queen, for example, the Court blurred the issues of breach and justification, thereby avoiding the necessity of undertaking a discrete s. 1 analysis, which would have required discussion of each of the components of the test set out in Oakes. The Court also has manipulated the criteria of Oakes to justify conclusions seemingly inconsistent with its demands. Most recently, by restricting the scope of the substantive guarantees, the Court has been relieved of any responsibility to engage in a s. 1 review.

Without question, s. 1 raises difficult issues of interpretation. Whether or not to adopt a standard of review which would apply to all s. 1 questions was one of those issues. Unfortunately, not only is the Oakes test extremely strict, it was articulated as a standard of general application. Even though the doctrinal requirements of s. 1 review are set out clearly and emphatically, the Supreme Court

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16 "[L]imits on the [Charter's] rights and freedoms... are exceptions to their general guarantee..., and those rights are to be presumed guaranteed unless the party relying on section 1 "can bring itself within the exceptional criteria which justify their being limited". *Ibid.* at 137.
17 The criteria are set out, *ibid.* at 135-41.
is already uncomfortable with Oakes. This discomfort has affected the Court's interpretation of the substantive guarantees.

III. THE CONCEPTUAL ISSUE

Canadian jurists and commentators often take pride in s. 1, billing it as a testament to the Charter's structural integrity. As a result, we are told that "definitional balancing" is a doctrinal subterfuge in which American jurisprudence indulges because the U.S. Constitution lacks any provision resembling s. 1. Definitional balancing implies that certain activities are not protected by the Constitution. Instead of concluding that it is reasonable to limit those activities under a provision like s. 1, the American judiciary has been forced to insist that they are not protected by the Constitution. In a first amendment context, definitional balancing might suggest that the speech clause does not protect commercial speech, defamation or offensive expression. Commentators have criticized this kind of analysis because it seems counter-intuitive to deny that certain kinds of expression are speech, and because the exclusion of certain categories of speech forecloses any determination of the merits of individual cases. Thus Canadians have claimed that s. 1 constitutes an important structural difference, and indeed an improvement, over the U.S. Constitution. By engaging in its own form of definitional balancing, however, recent Supreme Court jurisprudence reveals the fallacy of any such claim.

Whether to read the Charter's substantive guarantees broadly, or divide the search for limitations between the questions of breach and justification, presents a significant conceptual issue. As yet, however, there has been little debate about the relationship between the substantive guarantees and s. 1. Rather than confront that question, the Supreme Court has restricted the scope of the substantive provisions in order to escape s. 1 and the rigours of the Oakes test. Although the issue is much more complex than this comment suggests, the point of this preliminary discussion is to focus attention on the conceptual implications of deciding in favour of, or against, definitional balancing.

One conception of the Charter sees it as "rights-protective". Under this view, the point of the Charter is to give individuals rights against the state. As the Supreme Court stated not long ago, the Charter was "intended to constrain governmental action", and

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its interpretation, therefore, should be "a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection." This concept promotes an expansive interpretation of the substantive guarantees, and concludes that any restrictions on the substantive guarantees must be determined according to s. 1. Because the objective of the Charter is to confer rights, it is appropriate to place the onus of explaining why any limitations are justifiable on the state, and to allow only those limitations which are patently reasonable.

Proponents of this view are often "value-neutral". From their perspective, if the purpose of the Charter is to protect individual rights, and if the mechanism for recognizing limitations on those rights is s. 1, then the introduction of definitional restrictions undermines the rights the Charter was intended to confer. Although this view may be manifested in a variety of ways, perfect value neutrality would consider any differential treatment as a denial of the equality rights in s. 15, any interference with a liberty interest as a violation of s. 7, and any abridgment of expressive freedom as a breach of s. 2. On this model, the state must explain every interference with individual freedom, and the judiciary must decide, in every case, whether the state's explanations are reasonable.

Far from being extreme, this interpretation of its functional role may well be faithful to the original intent of the Charter. Faithful or not, the institutional consequences of this view have caused pause nonetheless. If it were once unclear what those institutional consequences might be, the decision in Oakes has made it obvious what is at stake in s. 1 review. In practical terms, the wisdom of forcing the state to justify every interference with individuals on a definitionally unlimited conception of the Charter's substantive guarantees is open to serious question.

In addition, the ideological assumptions of "rights-protective" model are also doubtful. This model exalts the constitutionalization of individualism, but even the most dedicated proponent of this view should find it difficult to explain why certain activities should receive constitutional recognition. To give two examples, consider the status of perjury and criminal solicitation. Both constitute forms of expression, and if definitional limitations are inappropriate, each would be protected under s. 2(b), and the state would have to justify its prohibition of them under s. 1. Surely, though, it demeans the concep-

tion of "constitutional rights" to suggest that the Charter protects perjury or a contract for murder, and then to insist that the government must explain why it is reasonable to interfere with an individual's freedom to lie under oath, or negotiate a "hit". Even if a s. 1 review would uphold the state's authority in those cases, the extension of the Constitution's protection to such activities makes a statement about our values. Thus the relationship between the issues of breach and justification reveals a conception of substantive norms as well as institutional function. The "rights-protective" view presumes that the state has no authority to interfere with individual choice, without being answerable under s. 1 in any case that an individual chooses to litigate.

These different interpretations can be plotted along a spectrum. At one extreme, the substantive provisions would protect virtually all individual activity, leaving the question of permissible limitations to s. 1. At the other extreme, the Charter's guarantees would exclude some activities from their coverage and foreclose any s. 1 review. As is often the case, it is easier to justify a point in the middle of the spectrum than to defend either of its extremes. But that middle point is as yet unknown and in the meantime, the constitutional status of defamation, commercial speech and hate literature, to name only a few of many issues yet to be decided, has already generated considerable controversy.

Although it is extremely unlikely that the Court will reject definitional balancing at this point in time, an unarticulated fear of the s. 1 juggernaut is not a very good reason for limiting the substantive provisions. Any decision to introduce definitional limitations should be explained in terms of a substantive and institutional theory of the relationship between the issues of breach and justification.

IV. CONCLUSION

At the end of the day, it is always open to question whether it makes any difference that limitations are imposed definitively through the concept of breach, instead of through a s. 1 review. Although s. 1 forces the judiciary to engage in a visible process of balancing, it is also true that the court cannot avoid policy decisions simply by introducing definitional limitations. In terms of the result, there is not much difference between a decision to uphold legislation because s. 2(d) does not protect the rights to strike and bargain collectively, and a decision to uphold the legislation because s. 1 regards limitations on those rights as permissible. Conceptually,
though, there might be a difference. LeDain and McIntyre JJ. believe that there is. Whatever that difference is, it has yet to be articulated by the Supreme Court of Canada. In the end, this comment implores the Court to explain its interpretation of the Charter. If not in the right to strike cases, perhaps in Irwin Toy or Andrews the Court will explain the relationship between the substantive guarantees and s. 1.

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