



# CONFLICTING RIGHTS?

## Balancing Equality and Fundamental Freedoms

Kristopher E.G. Kinsinger  
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## Executive Summary

This report considers the relationship between fundamental freedoms and the right to equality in Canadian constitutional law, specifically within the context of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”).

The first part of the report surveys case law from the Supreme Court of Canada on how apparent conflicts between rights and freedoms are to be reconciled. Although early *Charter* rulings emphasized that constitutional entitlements cannot limit one another, later decisions by the Court held that such apparent conflicts can be resolved by way of reconciliation (i.e., mutual limitation) or by balancing these entitlements against other external “reasonable limits.”

The second part of the report critically engages with the scholarly literature on so-called rights conflicts, including the recurring critique (given voice by scholars across the legal spectrum) that the distinction between rights “reconciliation” and rights “balancing” is illusory.

The report concludes by positing that the very premise of how to resolve apparent “conflicts” between *Charter* rights and freedoms is flawed. Far from opposing one another, it is contended that neither freedom nor equality can exist without a meaningful guarantee of the other. The *Charter* is more than a mere assortment of disparate rights and freedoms: its guarantees, taken together, are intended to preserve Canada’s status as a “free and democratic society.” Indeed, fundamental freedoms may even be said to precede positive law itself, insofar as these freedoms are not bestowed by any external authority, but rather exist first and foremost by virtue of the fundamental human equality to which we are all bound.



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## Introduction

Since the adoption of the *Canadian Charter of Rights and Freedoms* in 1982, the Supreme Court of Canada (the “Court”) has issued multiple rulings on the intersection of constitutional rights and freedoms. These decisions often concern alleged conflicts between fundamental freedoms (specifically, the freedoms of religion and expression) and the right to equality before and under the law without discrimination, which are respectively guaranteed by sections 2 and 15 of the *Charter*.<sup>1</sup> Yet as an increasing number of such cases appear before the Court, so too have the attitudes toward fundamental freedoms been treated with a growing and palpable suspicion—if not outright hostility.<sup>2</sup>

Two of the central truisms of Canadian constitutional law are that a hierarchical approach to *Charter* rights and freedoms ought to be avoided,<sup>3</sup> and that one part of the Constitution cannot be abrogated by another part of the Constitution.<sup>4</sup> The first of these maxims has, at best, been followed inconsistently by Canadian courts, including the Supreme Court. As Matthew Harrington concludes, “A review of the cases . . . indicates that courts and human rights tribunals do, on balance, privilege certain rights above others.”<sup>5</sup> Specifically, Harrington suggests that Court decisions privilege “dignity” rights (that is, “rights that implicate an individual’s concept of identity or self-worth”) over rights of public participation, such as freedom of expression or freedom of association.<sup>6</sup> However, even as dignity rights are broadly favoured within this “new hierarchy of rights,” Harrington observes that “[the right to] equality has, and will continue to have, precedence over religion and conscience [rights], except in very limited circumstances.”<sup>7</sup>

This report considers how apparent conflicts between fundamental freedoms and equality rights have been addressed in *Charter* jurisprudence. The first part

1 Section 2 guarantees “freedom of conscience and religion; freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; freedom of peaceful assembly; and freedom of association.” Section 15 guarantees the right to “[equality] before and under the law and [. . .] the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

2 Office of International Religious Freedom, *2020 Report on International Religious Freedom Report: Canada* (Washington, DC: United States Department of State, 2020), 17, <https://www.state.gov/reports/2020-report-on-international-religious-freedom/canada/>; Cardus, “An Institutional History of Religious Freedom in Canada,” 2nd ed., 2020, 14, <https://www.cardus.ca/research/faith-communities/reports/an-institutional-history-of-religious-freedom-in-canada/>; University of Saskatchewan, “One in Five Prairie Residents Thinks Free Speech Limited or Non-existent,” July 11, 2022, <https://news.usask.ca/articles/research/2022/one-in-five-prairie-residents-thinks-free-speech-limited-or-non-existent.php>.

3 *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at 877.

4 *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 at para 144. See also *Adler v Ontario*, [1996] 3 SCR 609 at paras 38, 137.

5 Matthew P. Harrington, “Canada’s New Hierarchy of Rights,” in *Supreme Court Law Review*, ed. D.B.M. Ross, 2nd ser., vol. 91 (Toronto: LexisNexis Canada, 2019), 317.

6 Harrington, “Canada’s New Hierarchy of Rights,” 317.

7 Harrington, “Canada’s New Hierarchy of Rights,” 317–18.

surveys post-*Charter* jurisprudence from the Court on apparent conflicts between fundamental freedoms and equality rights. The second part critically engages the core themes that have emerged in Canadian legal scholarship on such purported conflicts. The report concludes by arguing that the widely accepted wisdom on how to resolve apparent conflicts between *Charter* entitlements—namely, that such conflicts are a zero-sum calculus—is wrong. Rather, I contend that any meaningful reconciliation of fundamental freedoms and equality rights must recognize that the *Charter's* guarantees are conceptually reinforcing, not mutually circumscribing. Equality rights must thus be reinforced by a robust commitment to the fundamental freedoms: section 15 of the *Charter* guarantees an equality of citizenship, a right that can be exercised only in conjunction with the freedom to fully participate in public discourse and acts of truth-seeking.

## The *Charter* Jurisprudence

A survey of how Court jurisprudence has addressed the relationship between the fundamental freedoms and the right to equality would be incomplete without an initial comment on *R v Big M Drug Mart*, the Court's first ruling on section 2 of the *Charter*. The case concerned a retailer charged with selling goods on Sunday contrary to the federal *Lord's Day Act*. The retailer argued that this explicitly religious law infringed the *Charter's* religious freedom guarantee. At the Court, a six-judge panel held that the *Lord's Day Act* unjustifiably limited freedom of religion as guaranteed by section 2(a). The majority reasons, written by Justice Dickson, have become a largely forgotten treatise on the role of freedom in Canada's constitutional order. As Jamie Cameron aptly concludes, "*Big M* remains freedom's first and most important legacy under the Charter," even as the Court's "simple and formative definition of freedom failed to infuse or substantially influence the section 2 jurisprudence" in the decades after *Big M* was handed down.<sup>8</sup>

"[F]reedom," according to Justice Dickson in *Big M*, "means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience."<sup>9</sup> This is especially crucial for members of minority communities, lest majoritarian religious groups impose their values on them.<sup>10</sup> On this point, Justice Dickson noted that "a free society is one which aims at equality with respect to the enjoyment of the fundamental freedoms and I say this without any reliance upon [section] 15 of the Charter."<sup>11</sup> *Big M*, taken at face value, thus suggests that freedom and equality—having both been guaranteed by

8 Jamie Cameron, "*Big M's* Forgotten Legacy of Freedom," in *Supreme Court Law Review*, ed. D. Newman, D.B.M. Ross, B. Bird, 2nd ser., vol. 98 (Toronto: LexisNexis Canada, 2020), 15–16.

9 *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295 [Big M] at para 95.

10 *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at para 96.

11 *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at para 94.

Big M, taken at face value, thus suggests that freedom and equality—having both been guaranteed by the Charter—are mutually reinforcing concepts.

the *Charter*—are mutually reinforcing concepts. Indeed, although the claimant in *Big M* relied only on section 2(a), the case could have just as easily been framed as a religious equality claim under section 15, a point further addressed in the third section of this report.<sup>12</sup>

In the nearly four decades since *Big M* was handed down, there have been relatively few Court cases that involve head-on conflicts between a fundamental freedom and the right to equality, in the sense that a state actor is faced with an irreconcilable choice between violating or upholding one of these guarantees at the expense of the other. More commonly, state actors seek to limit the exercise of a fundamental freedom in the name of promoting values given effect by other sections of the *Charter*, such as

equality. In such cases, affirming the exercise of a fundamental freedom would not violate the constitutional right to equality *per se*. Private individuals—even those whose actions are perceived to undermine equality—cannot violate the *Charter*, since the *Charter* constrains only state actors.<sup>13</sup> These scenarios often arise when the state limits expression that it deems to be hateful. Indeed, such prohibitions have been held to be justified (at least partially) by the values that inform section 15 of the *Charter*.<sup>14</sup>

The Court addressed the issue of hateful expression in its 1990 ruling in *R v Keegstra*, one of the first major *Charter* decisions concerning prohibitions on hateful expression.<sup>15</sup> The accused, James Keegstra, was a high school teacher alleged to have made antisemitic statements in his class (specifically, denying the Holocaust) and subsequently charged under the *Criminal Code* for wilfully promoting hatred against an identifiable group. Mr. Keegstra argued that this provision unjustifiably limited his freedom of expression as guaranteed by section 2(b) of the *Charter*.<sup>16</sup> The Court unanimously held that the promotion of hatred against identifiable groups is activity protected by section 2(b) of the *Charter*—in other words, that criminalizing this activity limited freedom of expression. However, the Court divided over whether such limitations could be upheld under section 1 of the *Charter*, which permits “reasonable limits” on *Charter* guarantees so long as these limits are “demonstrably

12 See Kristopher E.G. Kinsinger, “Inclusive Religious Neutrality: Rearticulating the Relationship Between Sections 2(a) and 15 of the Charter,” in *Supreme Court Law Review*, ed. D.B.M. Ross, 2nd ser., vol. 91 (Toronto: LexisNexis Canada, 2019), 224–25.

13 Section 32(1) of the *Charter* stipulates that the *Charter* applies only to Parliament and the Government of Canada, the provincial legislatures and their governments, and to all matters falling within their respective authorities.

14 *Criminal Code*, RSC 1985, c C-46, s 318.

15 *R v Keegstra*, [1990] 3 SCR 697 [*Keegstra*].

16 Mr. Keegstra’s case was heard concurrently by the Court with *R v Andrews*, [1990] 3 SCR 870, in which the accused also argued that section 319(2) violated the *Charter*, as well as *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892, which concerned a similar section 2(b) challenge of section 13(1) of the *Canadian Human Rights Act*.



justified in a free and democratic society.”<sup>17</sup> Chief Justice Dickson, writing for the majority, upheld section 319(2) of the *Criminal Code* as constitutional, while the dissent, led by then Justice McLachlin, would have struck down the impugned provision for giving rise to a constitutionally unjustified “chilling effect” on legitimate expression. Although the Court diverged over the constitutionality of section 319(2), the seven-judge panel agreed that the scope of section 2(b) should not be constrained by other sections of the *Charter*.

Arguments in favour of upholding the prohibition on hate propaganda in *Keegstra* had invoked the values of equality and multiculturalism (respectively affirmed by sections 15 and 27 of the *Charter*). “The general tenor of this argument,” Chief Justice Dickson summarized, is that section 2(b) itself “must be curtailed so as not to extend to communications which seriously undermine the equality, security and dignity of others.”<sup>18</sup> The Chief Justice preferred to consider such “various contextual values and factors” in a justification analysis under section 1.<sup>19</sup> Justice McLachlin, on the other hand, cautioned against reading down (i.e., limiting the scope of) section 2(b) “to exclude from protected expression statements whose content promotes such inequality.”<sup>20</sup> The values of equality and multiculturalism, she held, cannot limit the scope of freedom of expression “on the basis that the exercise of the freedom may run counter to the philosophy behind another section of the *Charter*.”<sup>21</sup> Indeed, if the state itself has not actually limited the right to equality, then “the value to be weighed on that side of the balance cannot be placed in a factual context,” thus “render[ing] the exercise of balancing the conflicting values extremely difficult.”<sup>22</sup>

It is beyond the scope of this report (which is concerned, first and foremost, with the relationship between fundamental freedoms and the right to equality) to assess the merits of this so-called contextual approach preferred by Chief Justice Dickson in *Keegstra*. It is worth briefly noting, however, that this methodology has been criticized by Jamie Cameron, who argues that this approach allows courts to more easily designate content that it deems to be objectionable as “low value,” thus “relaxing the standard of justification” under section 1.<sup>23</sup> For our analysis, the main

17 The legal analysis of whether a right or freedom has been infringed upon takes place in two parts: in the first part, the court must determine whether the *Charter* right or freedom in question has been limited; in the second part, the court assesses whether this limitation is justified by section 1 of the *Charter*. The test from *R v Oakes* stipulates how such limits are to be assessed under section 1: limits must be “prescribed by law,” pursue a “pressing and substantial” objective, and achieve proportionality between this objective and the limiting measure in question. Proportionality arises where a limiting measure is: 1) rationally connected to its objective, 2) minimally impairing of the right or freedom in question, and 3) proportionate between its positive and negative effects. See *R v Oakes*, [1986] 1 SCR 103 at paras 69–71. Thus, a *Charter* guarantee can properly be said to be “infringed” only when such a limit is held to be unjustified: see Justices Côté and Brown’s discussion on this important distinction in their dissent in *Frank v Canada (Attorney General)*, 2019 SCC 1 at paras 122–25, Côté and Brown JJ, dissenting. See also *R v Brown*, 2022 SCC 18 at para 126.

18 *R v Keegstra*, [1990] 3 SCR 697 at para 39.

19 *R v Keegstra*, [1990] 3 SCR 697 at para 40.

20 *R v Keegstra*, [1990] 3 SCR 697 at para 243.

21 *R v Keegstra*, [1990] 3 SCR 697 at para 248.

22 *R v Keegstra*, [1990] 3 SCR 697 at para 248.

23 Jamie Cameron, “Resetting the Foundations: Renewing Freedom of Expression Under Section 2(b) of the Charter,” in *Supreme Court Law Review*, ed. B. Bird and D.B.M. Ross, 2nd ser., vol. 105 (Toronto: LexisNexis Canada, 2022), 146.

takeaway is that both the majority and the minority in *Keegstra* rejected the idea that freedom of expression can be circumscribed by relying on values of equality and multiculturalism. This conclusion is consistent with the approach adopted by the Court in *Big M*: far from limiting the scope of religious freedom, Justice Dickson demonstrated how a robust guarantee of freedom, properly understood, will further the objectives of equality by protecting minority groups from assimilation by cultural majorities. The third section of this report further elaborates this point.

Despite unanimously holding in *Keegstra* that equality rights cannot circumscribe the scope of freedom of expression, the Court's 2001 decision in *Trinity Western University v British Columbia College of Teachers* marks a subtle yet significant departure from this conclusion.<sup>24</sup> From the outset, the case was framed as a conflict between freedom of religion and the right to equality. Trinity Western, a private Christian university in British Columbia, sought accreditation for a proposed school of education. The province's College of Teachers (which regulates teachers in British Columbia) refused to approve the university's application, on the grounds that Trinity Western's Community Standards (which, among other things, prohibited "homosexual behaviour") would foster discrimination in the schools where prospective graduates would teach. Trinity Western argued that this decision fell outside of the College's mandate and infringed the religious freedom of its students.

A majority of the Court (with Justice L'Heureux-Dubé dissenting) held that the College of Teachers had acted unreasonably by refusing to accredit Trinity Western. In their reasons for the majority, Justices Iacobucci and Bastarache concluded that there was no evidence that approving Trinity Western's proposed school of education would foster "a risk of discrimination" in British Columbia's public school system, cautioning that "consideration of human rights values . . . encompasses consideration of the place of private institutions in our society and the reconciling of competing rights and values."<sup>25</sup> Trinity Western, as one such institution, was not bound by the *Charter*. Although the British Columbia *Human Rights Code* broadly prohibits discrimination by private actors, special-interest organizations (including religious institutions) are partially exempted from these provisions when serving members of their respective communities.<sup>26</sup> Moreover, based on the evidence, there was no reason to conclude that "graduates of [Trinity Western] will not treat homosexuals fairly and respectfully."<sup>27</sup>

Nevertheless, the majority in *Trinity Western I* concluded that the College of Teachers was not wrong to consider equality values when making its decision regarding Trinity Western; rather, its error was that it had failed to also consider the values of religious freedom. Where conflicts between the right to equality and religious freedom arise,

24 *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31 [*Trinity Western I*].

25 *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31 at para 34.

26 *Human Rights Code*, RSBC 1996, c 210, s 41.

27 *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31 at para 35.

the majority held, they “should be resolved through the proper delineation of the rights and values involved.”<sup>28</sup> Their emphasis was not just on the restriction of a right or freedom but on defining the scope of *Charter* guarantees in a way that avoids potential conflict between them. “In essence,” the majority explained, “properly defining the scope of the rights avoids a conflict in this case. Neither freedom of religion nor the guarantee against discrimination based on sexual orientation is absolute.”<sup>29</sup>

The majority’s reasoning in *Trinity Western I* departs (although perhaps unintentionally) from the Court’s unanimous conclusion in *Keegstra* that *Charter* entitlements do not limit the scope of one other.<sup>30</sup> The majority concluded that “the scope of the freedom of religion and equality rights that have come into conflict in this appeal can be circumscribed and thereby reconciled.”<sup>31</sup> This rationale assumes that purported conflicts between rights and freedoms are a zero-sum calculus, such that giving effect to one entitlement must necessarily come at the expense of the other. The final section of this report addresses the problems with this methodology.

In the year following its decision in *Trinity Western I*, the Court once again addressed the relationship between freedom and equality in its ruling in *Chamberlain v Surrey School District No. 36*. The case arose following a school board dispute over the question of whether books portraying same-sex families ought to be included as supplementary material in a kindergarten–grade one curriculum. The teacher who had made the request to include the material in his curriculum brought his case before the courts after the school board—in part due to the objections of religious parents—voted against authorizing the books. The board’s resolution was challenged on the grounds that it had acted outside of its mandate and that the resolution itself violated the *Charter*.

The majority in *Chamberlain*, led by Chief Justice McLachlin, resolved the case on administrative law grounds (i.e., the law of how authority that has been delegated by the legislature to an executive actor is exercised and judicially reviewed). The board, she concluded, had breached its mandate under the provincial *School Act* by favouring the views of religious parents over those in same-sex relationships. On this basis, the majority declined to address the applicants’ arguments that the school board decision had itself infringed the *Charter*.<sup>32</sup> Justice Gonthier, writing in dissent with the support of Justice Bastarache, would have upheld the school board’s decision, finding that it had properly applied both the provisions of the *School Act* as well as the values and protections afforded by the *Charter*.

28 *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31 at para. 29.

29 *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31 at para 29.

30 Even though other *Charter* values may be relevant under section 1.

31 *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31 at para 37.

32 *Chamberlain v Surrey School District No. 36*, 2002 SCC 86 [*Chamberlain*] at para 73.

*Chamberlain* is one of the few cases decided by the Court to seemingly concern a *bona fide* claim of competing *Charter* entitlements. Those challenging the school board's decision argued that refusing to authorize books that depicted same-sex couples with children discriminated against same-sex-parented families, while the school board maintained that it had protected the religious freedom of objecting families. The majority resolved the dispute through the principles of secularism and tolerance mandated by the *School Act*—which, in their view, precluded the school board from favouring the views of religious parents over same-sex parents—rather than through a *Charter* analysis.<sup>33</sup> The dissent, however, would have applied the framework adopted by the majority in *Trinity Western I*, emphasizing that no *Charter* guarantee is absolute and holding that “where belief claims seem to conflict, there will be a need to strike a balance, either by defining the rights so as to avoid a conflict or within a [section] 1 justification.”<sup>34</sup> As noted, this approach suggests that apparent conflicts between *Charter* entitlements should be resolved by either reading down one guarantee at the expense of the other or by placing limits on those protections under section 1. The final section of this report explains why such thinking fails to account for how *Charter* guarantees conceptually reinforce one another.

Shortly after its ruling in *Chamberlain*, the Court released an advisory opinion on what would eventually become the *Civil Marriage Act*. Though the *Reference re Same-Sex Marriage* did not actually concern a *Charter* claim by a private party, the Court nevertheless considered the potential religious freedom and equality implications of the proposed legislation.<sup>35</sup> The Court unanimously held that “the potential for a collision of rights does not necessarily imply unconstitutionality.”<sup>36</sup> In cases where rights and freedoms appear to be in conflict, the Court adopted a two-step framework. At the first step, courts must assess whether conflicting rights can be reconciled through delineation (i.e., mutual circumscription), as held in *Trinity Western I*: a “true conflict of rights” exists only where “rights cannot be reconciled,” in which case courts proceed to the second step and assess whether limits on a given right are justified by “balanc[ing] the interests at stake under [section] 1 of the *Charter*.”<sup>37</sup>

Strangely, the Court in the *Marriage Reference* did not cite *Chamberlain* in its reasons. Nevertheless, its framework for resolving so-called *Charter* conflicts mirrors the dichotomy that the minority proposed in *Chamberlain*: between reconciliation by delineation, on the one hand, and limitation by justification, on the other. The Court clearly favoured the former approach, concluding that “many if not all such conflicts” are capable of resolution “within the ambit of the *Charter* itself by way of internal balancing and delineation.”<sup>38</sup>

33 *Chamberlain v Surrey School District No. 36*, 2002 SCC 86 at paras 57–59.

34 *Chamberlain v Surrey School District No. 36*, 2002 SCC 86 at para 130.

35 *Reference re Same-Sex Marriage*, 2004 SCC 79 [*Marriage Reference*].

36 *Reference re Same-Sex Marriage*, 2004 SCC 79 at para 50.

37 *Reference re Same-Sex Marriage*, 2004 SCC 79 at para 50.

38 *Reference re Same-Sex Marriage*, 2004 SCC 79 at para 52.

Almost a decade after its advisory opinion in the *Marriage Reference*, the Court’s 2013 decision in *Saskatchewan (Human Rights Commission) v Whatcott* returned to several of the issues that it had explored in the wake of *Keegstra*.<sup>39</sup> The claimant, William Whatcott, was ordered by the province’s Human Rights Commission to pay compensation pursuant to the Saskatchewan *Human Rights Code* for distributing flyers that allegedly promoted hatred against persons based on their sexual orientation and to not distribute any similar materials. Mr. Whatcott argued that the provisions under which these orders were made unjustifiably limited his freedoms of religion and of expression under sections 2(a) and (b) of the *Charter*. In a unanimous decision, the Court largely upheld the impugned provisions of the *Human Rights Code*, deciding to strike down only the sections that prohibited the distribution of material that “ridicules, belittles or otherwise affronts the dignity of” protected classes of person.

As with many of the cases considered in this report, *Whatcott* did not concern an equality rights claim, *per se*. However, the Court’s unanimous reasons, delivered by Justice Rothstein, invoked the values of equality rights to assess whether the limitations imposed on Mr. Whatcott’s section 2 freedoms by the *Human Rights Code* were reasonable. As in *Keegstra*, the Court concluded that the impugned provisions of the *Human Rights Code* prohibited expressive content that fell within the scope of section 2(b). The Court likewise held that these provisions substantially interfered with Mr. Whatcott’s ability to act in accordance with a sincere religious belief.<sup>40</sup> The primary question was whether these limitations on section 2 were reasonable under section 1. Justice Rothstein presented the issue starkly:

We are . . . required to balance the fundamental values underlying freedom of expression (and . . . freedom of religion) in the context in which they are invoked, with competing *Charter* rights and other values essential to a free and democratic society, in this case, a commitment to equality and respect for group identity and the inherent dignity owed to all human beings.<sup>41</sup>

Notably, while treating Mr. Whatcott’s case as one of “competing *Charter* rights and other [essential] values,” the Court’s reasons did not cite the framework for reconciling rights and freedoms developed in *Trinity Western I* and the *Marriage Reference*. Instead, Justice Rothstein’s analysis closely followed the section 1 test adopted in *R v Oakes*.<sup>42</sup> Specifically, the Court held that the prohibition of material that “ridicules, belittles or otherwise affronts the dignity of” protected classes of persons was not rationally connected to its objective of eliminating discrimination.<sup>43</sup>

39 *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 [*Whatcott*].

40 *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at paras 64, 155.

41 *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at para 66.

42 See *R v Oakes*, [1986] 1 SCR 103 at paras 69–71. See also Dwight Newman, “Reasonable Limits: How Far Does Religious Freedom Go in Canada?,” *Cardus*, 2022, <https://www.cardus.ca/research/faith-communities/reports/reasonable-limits/>.

43 *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at paras 79–85. See also *The Saskatchewan Human Rights Code*, SS 1979, c S-24.1, s 3.

In doing so, Justice Rothstein sidestepped the apparent tension between the Court's conclusion from *Keegstra*—namely, that the scope of section 2(b) cannot be limited by other sections of the *Charter*—and its subsequent framework for reconciling apparent conflicts between *Charter* entitlements.

In many respects, the twin 2018 decisions in *Law Society of British Columbia v Trinity Western University* and *Trinity Western University v Law Society of Upper Canada* mark a turning point in the Court's jurisprudence on purported conflicts between rights and freedoms.<sup>44</sup> The facts were remarkably similar to those that had arisen in *Trinity Western I*. Trinity Western University had received approval from the British Columbia Ministry of Advanced Education and the Federation of Law Societies of Canada to open a law school, which would have been the first private and faith-based law faculty in Canada. The proposed law school proved controversial, once again due to the prohibition in Trinity Western's Community Covenant (the successor to its prior Community Standards document) on sex outside of heterosexual marriage. The law societies of British Columbia, Ontario, and Nova Scotia refused in protest to license law graduates of Trinity Western in their respective provinces. The university brought *Charter* challenges against the decisions of all three law societies, winning in the superior courts and Courts of Appeal in British Columbia and Nova Scotia but losing at both levels of court in Ontario. The rulings from British Columbia and Ontario were appealed to the Supreme Court; the Nova Scotia Barristers Society opted not to appeal.

From the outset, the narrative in *Trinity Western II* was framed as a conflict between the religious freedom of the university's faith-based community and the equality rights of prospective LGBTQ law students. In its reasons, the Ontario Court of Appeal described the dispute as “a collision between the broad interpretation of two rights or freedoms” and as “a clash between religious freedom and equality.”<sup>45</sup> The Court ultimately ruled in a 7-2 split in favour of the law societies, though with separate concurring reasons by Chief Justice McLachlin and Justice Rowe. For their part, the majority did not rely on the framework from *Trinity Western I* and the *Marriage Reference* for resolving conflicts between *Charter* entitlements, nor did they explicitly describe the case as a rights conflict. Instead, the majority held that the law societies had proportionately balanced their statutory objections with relevant *Charter* protections (not just *Charter* rights, but also *Charter* values).<sup>46</sup> In doing so, the majority effectively (if by implication) treated the claim as a conflict between *Charter* guarantees, concluding that the law societies had acted reasonably by favouring the equality rights of LGBTQ students in their respective decisions to not license graduates of Trinity Western's proposed law school.<sup>47</sup>

<sup>44</sup> *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32; *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33 [collectively, *Trinity Western II*; citations are to 2018 SCC 32].

<sup>45</sup> *Trinity Western University v Law Society of Upper Canada*, 2016 ONCA 518 at para 4.

<sup>46</sup> Applying the revised section 1 framework adopted in *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*] and refined in *Loyola High School v Quebec (Attorney General)*, 2015 SCC 15 for assessing administrative (that is, non-legislative) limits on *Charter* rights and freedoms.

<sup>47</sup> *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at paras 92, 96.

Only Justice Rowe’s concurring reasons in *Trinity Western II* relied on the framework from *Trinity Western I* and the *Marriage Reference* for resolving apparent conflicts between *Charter* guarantees.<sup>48</sup> Indeed, as the only member of the Court to hold that Trinity Western’s religious freedom had *not* been limited, Justice Rowe was primarily concerned with the scope of religious freedom itself. Rejecting the majority’s reliance on so-called *Charter* values, he emphasized that it is necessary to define the scope of a *Charter* right or freedom on its own terms before proceeding to a section 1 analysis.

Equality rights thus played almost no role in Justice Rowe’s reasons in *Trinity Western II*. Relying on Justice Dickson’s reasons from *Big M*, he instead emphasized that the first stage of the *Charter* analysis “requires [the] courts to ascertain the purpose of the *Charter* right or freedom so as to protect activity that comes within that purpose and exclude activity that does not.”<sup>49</sup> Multiple “indicators” guide this analysis, including the text, context, and overall purpose of the *Charter*, as well as “the historical and philosophical roots of the right or freedom” being claimed.<sup>50</sup> Even though religious freedom has communal aspects, Justice Rowe ultimately held that religious universities such as Trinity Western are incapable of exercising freedoms under section 2(a) beyond those already held by their individual members.<sup>51</sup> As such, he concluded that Trinity Western had sought to “impose adherence to their religious beliefs or practices on others who do not share their underlying faith” in a manner contrary to the underlying purpose of section 2(a).<sup>52</sup>

Justices Côté and Brown did not directly address whether *Charter* guarantees can limit each other in their dissenting reasons. Their concern had more to do with using amorphous *Charter* “values” to justify limits on *Charter* guarantees than it did with using one section of the *Charter* to limit the scope of another. Nevertheless, their reasons speak directly to this report’s core analysis. Rejecting the majority’s reliance on the *Charter* “value” of equality to justify limits on Trinity Western’s religious freedom, Justices Brown and Côté concluded that “without further definition[, equality] is too vague a notion on which to ground a claim to equal treatment in any and all concrete situations, such as admission to a law school.”<sup>53</sup> Indeed, “equality in an absolute sense is also perfectly compatible with a totalitarian state, being easier to impose where freedom is limited.”<sup>54</sup> For this reason, Justices Côté and Brown

48 *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at paras 176–94.

49 *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 184.

50 *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 184.

51 *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 219.

52 *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 251. While I ultimately disagree with Justice Rowe’s conclusion on this point, I admire his framework for defining the purpose of a given *Charter* guarantee on *its own terms*, rather than in the name of promoting other *Charter* rights or values. I discuss this further in the third section of this report.

53 *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 310.

54 *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 310.

concluded that “the liberal state must foster pluralism by striving to accommodate difference in the public life of civil society.”<sup>55</sup>

In summary, the proposition that conflicts between *Charter* entitlements ought to be resolved through mutual limitation was first proposed by the minority in *Chamberlain*, contrary to the Court’s prior conclusion in *Keegstra* that *Charter* rights and freedoms do not limit the scope of one another. The minority’s reasons from *Chamberlain*, while not explicitly cited, appear to have influenced the framework adopted in *Trinity Western I* and refined in the *Marriage Reference*. Though applied inconsistently across the later jurisprudence, this framework assumes that conflicts between *Charter*

*The framework adopted in Trinity Western I and refined in the Marriage Reference . . . assumes that conflicts between Charter guarantees must be resolved either by “reconciling” their respective scope or by imposing external “reasonable limits” on their exercise under section 1.*

guarantees must be resolved either by “reconciling” (i.e., internally limiting) their respective scope or by imposing external “reasonable limits” on their exercise under section 1. Justice Iacobucci (as further discussed in the second section of this report) presents this framework as a choice between “reconciling” or “balancing,” terminology that was subsequently adopted in the *Marriage Reference*.

## Themes in the Scholarly Literature

While conflicts between constitutional rights and freedoms have been discussed perennially in Canadian legal scholarship, the actual methodology the Court employed for resolving such cases remains a niche area of academic interest. The second section of this report does not exhaustively survey this literature but rather highlights several of the core themes that have emerged from it. Justice Iacobucci has loomed large within this discussion, following up his joint reasons with Justice Bastarache from *Trinity Western I* with a 2003 article on the Court’s methodology for reconciling conflicting *Charter* rights and freedoms. His analysis in the latter reiterates the maxim that “there is no hierarchy of rights in the Charter.”<sup>56</sup> To give *Charter* rights and freedoms their “fullest possible expression,” Justice Iacobucci explains, they must be defined “in the particular factual matrix in which they arise.”<sup>57</sup>

55 *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 260.

56 Frank Iacobucci, “Reconciling Rights’: The Supreme Court of Canada’s Approach to Competing Charter Rights,” *Supreme Court Law Review* 20, no. 1 (2003): 139, <https://doi.org/10.60082/2563-8505.1038>.

57 Iacobucci, “Reconciling Rights,” 140.



Within such a framework, “balancing” must be seen as an exercise distinct from “reconciling”; the former seeks to achieve equilibrium between two things, while the latter attempts to “[harmonize] seemingly contradictory things so as to render them compatible.”<sup>58</sup> In Justice Iacobucci’s view, balancing indicates that primacy must be given to one right or freedom over another and thus engages the broader social considerations faced by state actors under a section 1 analysis.<sup>59</sup>

Justice Iacobucci’s article restates the framework adopted during his tenure at the Court in *Trinity Western I* (and as it would later be refined following his retirement, in the *Marriage Reference*), in which “reconciling” takes the place of “delineation,” while “balancing” stands in for “limitation.” Based on these comments, he seems largely unconcerned by the tensions highlighted in the first section of this report between *Trinity Western I* and the Court’s prior decision in *Keegstra*. Indeed, Justice Iacobucci takes the view that the Court’s reasons in *Keegstra* represent a balancing exercise rather than one of rights reconciliation. He further suggests that exercises in rights reconciliation do not concern *Charter* violations. In such cases, the judicial task is “to focus on the values of the different Charter rights in dealing with the problem before the Court, which means that there will be an examination of the underlying interests at stake as reflected in the Charter provisions at play.”<sup>60</sup>

With respect to Justice Iacobucci, his distinction between reconciling and balancing (or, alternatively, between delineation and limitation, to use the language of *Trinity Western I*) lacks methodological clarity. While arguing that reconciliation between constitutional entitlements requires conceptual limitation, he also suggests that such reconciliation is conceptually narrower than under section 1. Responding to this distinction, Harrington aptly notes that “the terms ‘balancing’ and ‘reconciling’ have often been used interchangeably, sowing some confusion in both the cases and commentary.”<sup>61</sup> “In the end,” he explains, “courts are still required to engage in a balancing process regardless of which method judges propose to use.”<sup>62</sup> Both approaches “require that courts eventually give preference to one right over another,” even if Justice Iacobucci’s methodology for reconciliation is somewhat more constrained than a full section 1 analysis.<sup>63</sup>

Errol Mendes, like Harrington, claims that Justice Iacobucci’s distinction between reconciling and balancing is an illusory one.<sup>64</sup> Jena McGill cites this critique by

58 Iacobucci, “Reconciling Rights,” 141.

59 Iacobucci, “Reconciling Rights,” 141–42.

60 Iacobucci, “Reconciling Rights,” 143.

61 Harrington, “Canada’s New Hierarchy of Rights,” 302.

62 Harrington, “Canada’s New Hierarchy of Rights,” 303–4.

63 Harrington, “Canada’s New Hierarchy of Rights,” 304.

64 Errol P. Mendes, “Reaching Equilibrium between Conflicting Rights,” in *Balancing Competing Human Rights Claims in a Diverse Society: Institutions, Policy, Principles*, ed. S. Azmi, L. Foster, and L.A. Jacobs (Toronto: Irwin Law, 2012), 244, quoted in Jena McGill, “‘Now It’s My Rights Versus Yours’: Equality in Tension with Religious Freedoms,” *Alberta Law Review* 53, no. 3 (2016): 588, <https://doi.org/10.29173/alr421>.

Mendes (along with others) in her observation that “there is no exact formula to guide the process of reconciling in cases where rights are in tension.”<sup>65</sup> Nevertheless, McGill identifies four core principles that have emerged regarding conflicts between *Charter* rights and freedoms. First, she accepts the maxim (which she refers to as the “golden rule”) that there is no hierarchy of *Charter* rights. Second, no *Charter* right or freedom is absolute, and every such guarantee is limited by the parallel rights of others. Third, she asserts that where rights and freedoms appear to be in tension, the analysis must be a contextual one and not resolved in the abstract. And finally, when faced with seemingly conflicting rights and/or freedoms, courts must consider “the extent or severity of the interference with each right.”<sup>66</sup>

McGill contends that recent cases pitting religious freedom against the right to equality have undergone a shift as courts engage more thoroughly with equality interests even as the right to equality remains a more “amorphous” concept that is “susceptible to a range of possible framings and definitions.”<sup>67</sup> However, she concurs with Carissima Mathen that it has been easier for courts to understand religious freedom claims than claims to equality, given the wider availability of case law that gives religious freedom a large and liberal interpretation.<sup>68</sup> This trend alarms McGill, who calls for a more “purposive conceptualization of equality,” lest equality interests be “minimized, marginalized, or sidelined in the reconciliation exercise when it comes into conflict with a relatively better-defined fundamental freedom like religion.”<sup>69</sup>

Other lawyers and scholars have similarly bemoaned the opportunities that the Court has missed to provide a more satisfying framework for resolving apparent tensions between *Charter* guarantees. In a comment on the *Whatcott* ruling, Cara Zwibel criticizes how the case was resolved under section 1, in which the Court held that hateful expression is contrary to the values of section 2(b).<sup>70</sup> “As a result of this lowered status,” Zwibel explains, “there is hardly a need to reconcile freedom of expression with the right to equality and the rigorous standards that should be applied to constitutional violations are eroded.”<sup>71</sup> In essence, the “Court evaded the issue by labelling hate speech a form of expression that is less valuable and thus less worthy of protection,” and in doing so “deprived us of a thoughtful discussion on how to approach the problem of hate speech and the goal of achieving equality.” This problem, Zwibel argues, is often seen in cases in which (allegedly) hateful or discriminatory expression arises from sincerely held religious beliefs.<sup>72</sup>

65 McGill, “Now It’s My Rights Versus Yours,” 589.

66 McGill, “Now It’s My Rights Versus Yours,” 590–91.

67 McGill, “Now It’s My Rights Versus Yours,” 603.

68 McGill, “Now It’s My Rights Versus Yours,” 603, citing Carissima Mathen, “What Religious Freedom Jurisprudence Reveals About Equality,” *Journal of Law and Equality* 6, no. 2 (2009): 163–64, <https://dx.doi.org/10.2139/ssrn.1545958>.

69 McGill, “Now It’s My Rights Versus Yours,” 603.

70 Cara F. Zwibel, “Reconciling Rights: The Whatcott Case as Missed Opportunity,” *Supreme Court Law Review* 63, no. 1 (2013): 333, <https://doi.org/10.60082/2563-8505.1272>.

71 Zwibel, “Reconciling Rights,” 333.

72 Zwibel, “Reconciling Rights,” 334.

Derek Ross echoes these themes in his comment on the Court's ruling in *Trinity Western II*, which, in his view, failed to reconcile freedom of religion and the right to equality. The majority, Ross argues, misapprehends both guarantees: "The conflict in [*Trinity Western II*] was not the result of religious freedom infringing on equality rights, but rather a 'sweeping abstraction' of equality being invoked to infringe on religious freedom."<sup>73</sup> In doing so, Ross concludes, the majority "ultimately undermines, not promotes, equality and diversity," since "equality and diversity are not achieved by forcing private associations to alter their defining characteristics (religious or otherwise) to ensure that all people will want to join."<sup>74</sup> Ross affirms the core idea addressed in the final section of this report, namely, that freedom and equality—even if understood in a broad and abstract sense—are not the antagonists they are too often made out to be. To guarantee one without the other is to undermine both.

On this point, I ultimately disagree with how Justice Rowe would have resolved *Trinity Western II* (specifically, his conclusion that a religiously informed code of conduct at a private university coercively imposes religious conformity on those who choose to enrol at that institution). Nevertheless, the Court would do well in future cases to emulate his framework for defining *Charter* guarantees based on their own underlying purposes, rather than whether they "conflict" with other constitutional entitlements.

To Justice Rowe's above framework, I add a further clarification: while one section of the *Charter* cannot circumscribe another (just as, more broadly, one section of the Constitution cannot abrogate another), the guarantees of the *Charter* are properly understood where they are interpreted as reinforcing each other. In other words, to the extent that one *Charter* guarantee is invoked to define the scope of another, this ought to be done only with the aim of *augmenting* rather than *limiting* the scope of the latter guarantee. In the final section of this report, I explain how the fundamental freedoms reinforce (and are reinforced by) such other guarantees as equality rights.

## Beyond a Zero-Sum Approach

The tension highlighted in the first section of this report between *Keegstra* (which holds that *Charter* rights and freedoms cannot limit one another) and the framework adopted in *Trinity Western I* and the *Marriage Reference* (in which apparent conflicts between *Charter* rights and freedoms are resolved through mutual limitation) has gone largely ignored in subsequent jurisprudence and scholarship. Furthermore, as

73 Derek B.M. Ross, "Intolerant and Illiberal? *Trinity Western University* and Its Implications for Charter Jurisprudence," in *Supreme Court Law Review*, second ser., vol. 89 (Toronto: LexisNexis Canada, 2019), 164, citing *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 311, Côté and Brown JJ, dissenting. See also Dwight Newman's similar assessment of the debate over Trinity Western's proposed law school in "The Challenging Parallelism of Rights Claims Based on Religious Identity and on Sexual Identity," in *Religious Liberty and the Law*, ed. Angus J.L. Menuge (Abingdon, UK: Routledge, 2017), <https://www.taylorfrancis.com/chapters/edit/10.4324/9781315270661-8/challenging-parallelism-rights-claims-based-religious-identity-sexual-identity-dwight-newman>.

74 Ross, "Intolerant and Illiberal," 168.

an increasing number of cases have been resolved largely under section 1 of the *Charter*, the case law has shifted toward the language of *Charter* values and away from analyses that seek to understand constitutional entitlements on their own terms.<sup>75</sup>

The majority's reasons in *Trinity Western II* demonstrate how reliance on *Charter* "values" increase the risk that *Charter* rights and freedoms will be needlessly pitted against one another.<sup>76</sup> It is in these "hard cases" (which, as the saying goes, are prone to result in "bad law") that judges are more likely to invoke *Charter* values to arrive at preferred outcomes, unconsciously or otherwise.<sup>77</sup> Writing extra-judicially, Justice Peter Lauwers warns that *Charter* values are "especially susceptible to manipulation" and therefore to undermining the rule of law and constrained judicial decision-making.<sup>78</sup> "Leaving judges to decide what is 'most in keeping' with Charter values," as Harrington similarly argues, "still requires them to make a personal choice as to what each thinks those values might be."<sup>79</sup> Harrington contends that these judicial choices demonstrably favour "dignity" rights over unpopular exercises of the fundamental freedoms.<sup>80</sup> Invoking *Charter* values to resolve apparent conflicts between *Charter* entitlements—as Justice Iacobucci urges—risks further obfuscating the purported distinction between rights reconciliation and rights balancing.<sup>81</sup>

Indeed, as mentioned in an earlier section, Mendes and Harrington each argue that there is no meaningful distinction between Justice Iacobucci's concepts of reconciliation and of balancing. I would take these arguments further and contend that this preferred methodology is premised on a false dichotomy. The general concept of "rights conflicts" incorrectly assumes that many of the *Charter's* guarantees—specifically the fundamental freedoms and the right to equality—exist in tension with one another. McGill, for example, implicitly contends that the resolution of conflicts between fundamental freedoms and the right to equality is a zero-sum calculus. With a more "purposive conceptualization of equality," she argues, equality-rights claimants will be better equipped to defend their interests against religious freedom claims.<sup>82</sup> To be fair, McGill made this argument before the Court's decision in *Trinity Western II*. Yet in the wake of this decision and other similar rulings, there are increasingly few grounds on which to argue that courts are prone to unduly favour fundamental freedoms over equality rights.<sup>83</sup>

75 A trend that began in *Doré* and arguably reached its apex in *Trinity Western II*.

76 Ross, "Intolerant and Illiberal," 168.

77 See Peter Lauwers, "What Could Go Wrong with Charter Values?," in *Supreme Court Law Review*, ed. D.B.M. Ross, 2nd ser., vol. 91 (Toronto: LexisNexis Canada, 2019), 14.

78 Lauwers, "What Could Go Wrong with Charter Values," 6.

79 Lauwers, "What Could Go Wrong with Charter Values," 313–14.

80 Harrington, "Canada's New Hierarchy of Rights," 317.

81 Iacobucci, "Reconciling Rights," 143.

82 McGill, "Now It's My Rights Versus Yours," 603.

83 See *Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2019 ONCA 393. See also *Servatius v Alberni School District No 70*, 2022 BCCA 421.

More fundamentally, McGill's narrative neglects to provide a satisfying account of why the *Charter* guarantees both freedom and equality. Cases such as *Trinity Western II* have reinforced the idea that equality is protected when ostensibly harmful exercises of fundamental freedoms are curtailed. In this regard, I contend that the received wisdom for resolving apparent conflicts between *Charter* rights and freedoms is wrong. Far from opposing one another, neither freedom nor equality can exist without a meaningful guarantee of the other. The *Charter* is more than a mere assortment of disparate rights and freedoms. Its guarantees, taken together,

*Big M demonstrates how the fundamental freedoms enumerated by section 2, perhaps more than any other right or freedom guarantee in the Charter, cultivate the constitutional soil in which a free and democratic society can flourish.*

are intended to preserve Canada's status as a "free and democratic society," as section 1 unambiguously states. To the extent that these interests play any role in limiting other *Charter* rights and freedoms, it is against this constitutional backdrop. Violations of the *Charter* do not arise out of disputes between private parties—as the dissent in *Trinity Western II* held—but only where the state has failed to demonstrate that such limitations are demonstrably justified. Accordingly, to suggest that a robust guarantee of fundamental freedoms somehow undermines or threatens equality rights misapprehends the very purpose of both entitlements.

On this point, we forget the Court's ruling in *Big M* at our peril.<sup>84</sup> The case remains an apt study of the interdependent relationship between freedom and equality. As recounted in the first section of this report, *Big M* concerned the constitutionality of the

federal *Lord's Day Act*. The late Peter Hogg noted that such explicitly religious laws place an unequal burden on anyone who does not assent to the state's preferred religious worldview. From this perspective, state support of religion undermines both freedom of religion and the right to equality.<sup>85</sup> "These cases were not decided under [section] 15," Hogg remarked, "but they could easily be viewed as equality cases in which benefits are conferred on Christians that are denied to the adherents of other religions."<sup>86</sup> Hogg made this point more forcefully in a 2003 article: while the *Big M* challenge to the federal *Lord's Day Act* was framed as a religious freedom question, "the objection to Sunday closing laws is really an equality claim."<sup>87</sup>

*Big M* demonstrates how the fundamental freedoms enumerated by section 2, perhaps more than any other right or freedom guarantee in the *Charter*, cultivate the constitutional soil in which a free and democratic society can flourish. Section 2's fundamental freedoms are not a mere preamble to the other rights guaranteed by the

84 See Cameron, "Big M's Forgotten Legacy of Freedom."

85 See Kinsinger, "Inclusive Religious Neutrality," 224–25.

86 Peter Hogg, *Constitutional Law of Canada*, student ed. (Toronto: Thomson Reuters, 2016), 55–60.2.

87 Peter Hogg, "Equality as a Charter Value in Constitutional Interpretation," *Supreme Court Law Review* 20, no. 1 (2003): 117, <https://doi.org/10.60082/2563-8505.1037>.

*Charter*: to the contrary, their centrality to the scheme of Canadian constitutional governance is precisely why they have been designated as “fundamental.” As Justice Dickson demonstrated, the fundamental freedoms enjoy a similar “primacy” or “first-ness,” as does the First Amendment to the American *Bill of Rights*: “They are,” he explained, “the *sine qua non* of the political tradition underlying the *Charter*.”<sup>88</sup> To be clear, this does not mean that section 2 enjoys preference in a “hierarchy of rights”—a concept that the Court has rightly rejected, in my view. Rather, *Big M* confirms that the fundamental freedoms lay the conceptual foundation for the exercise of the other rights that have been guaranteed by the *Charter*.

Section 2’s freedoms must thus be understood “by reference to the character and the larger objects of the Charter itself . . . [and] to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter,” as Justice Dickson held in *Big M*.<sup>89</sup> In other words, the demands of freedom are inexorably tied to creating a civil polity within which diverse communities can participate equally. Regarding this “forgotten legacy of freedom,” Jamie Cameron remarks that:

Freedom places a demand on tolerance, asking a democratic community to forgo 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 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.<sup>90</sup>

These are the “larger objects” to which the fundamental freedoms are oriented. Such objects manifestly encompass a meaningful right to equality. Theologian and ethicist Andrew T. Walker makes a similar observation regarding the broader relationship between fundamental freedoms:

Societies that allow for free speech, free association, and free assembly are the types of societies that understand that citizens have beliefs and obligations that precede the demands and obligations of the state and civil society. This is why religious liberty is so central to building societies that not only are free but also understand that with freedom comes the corresponding reciprocities of pluralism, respect, civility, kindness, and a commitment to diversity that allows freedom’s continued existence.<sup>91</sup>

88 *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at para 122.

89 *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at paras 117, 122.

90 Cameron, “*Big M*’s Forgotten Legacy of Freedom,” 39.

91 Andrew T. Walker, *Liberty for All: Defending Everyone’s Religious Freedom in a Pluralistic Age* (Grand Rapids: Brazos Press, 2021), 190.

*Fundamental freedoms . . . are, rather, inalienable freedoms that every person bears by virtue of their inherent humanity.*

Accordingly, an individual cannot truly enjoy the “equal protection and equal benefit of the law without discrimination,” as section 15 guarantees, if they are unable to participate in society as free citizens. “The ability of each citizen to make free and informed decision is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government,” as Justice Dickson so aptly explained in *Big M*.<sup>92</sup> The fundamental freedoms, Ross thus argues, collectively “protect the free development, exchange, conveyance and manifestation of ideas (particularly unpopular, dissenting and/or minority viewpoints).”<sup>93</sup> The exercise of these freedoms—unencumbered by the constraints so readily imposed by majorities—is precisely

what allows social-minority groups to participate as equal citizens in public life and in the democratic institutions that govern our civil polity.<sup>94</sup>

And yet there remains a more cardinal explanation for why the freedoms guaranteed by the *Charter* are described as fundamental: namely, that these freedoms precede the adoption of positive law itself. Though such a conclusion may seem better suited to the study of political philosophy, it retains a compelling jurisprudential basis. In *Saumur v City of Quebec*—a landmark Court ruling on religious freedom that was decided decades before the enactment of the *Charter*—Justice Rand explained how such freedoms exist prior to the enactment of a positive legal order:

Strictly speaking, civil rights arise from positive law; but freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order. It is in the circumscription of these liberties by the creation of civil rights in persons who may be injured by their exercise, and by the sanctions of public law, that the positive law operates.<sup>95</sup>

Fundamental freedoms, on this view, do not arise out of any political tradition; they are, rather, inalienable freedoms that every person bears by virtue of their inherent humanity. In other words, these freedoms are not bestowed by any external authority such as the state—or any such constitutional system governing it—but exist first and foremost by virtue of the fundamental human equality to which we are all bound. Conceptions of law that pit fundamental freedoms and equality rights against one another—including those examined in this report—forget this truth at their peril.

92 *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at para 122.

93 Derek B.M. Ross, “Truth-Seeking and the Unity of the Charter’s Fundamental Freedoms,” in *Supreme Court Law Review*, ed. D. Newman, D.B.M. Ross, B. Bird, 2nd ser., vol. 98 (Toronto: LexisNexis Canada, 2021), 69.

94 See Bruce B. Ryder’s excellent article on this point, “The Canadian Concept of Equal Religious Citizenship,” in *Law and Religious Pluralism in Canada*, ed. R. Moon (Vancouver: University of British Columbia Press, 2008), 87.

95 *Saumur v City of Quebec*, [1953] 2 SCR 299 at 329.

## References

- Cameron, Jamie. “Big Ms Forgotten Legacy of Freedom.” In *Supreme Court Law Review*. Edited by D. Newman, D.B.M. Ross, B. Bird, 2nd ser., vol. 98. Toronto: LexisNexis Canada, 2020.
- . “Resetting the Foundations: Renewing Freedom of Expression Under Section 2(b) of the Charter.” In *Supreme Court Law Review*. Edited by B. Bird and D.B.M. Ross, 2nd ser., vol. 105. Toronto: LexisNexis Canada, 2022.
- Cardus. “An Institutional History of Religious Freedom in Canada.” 2nd ed. 2020. <https://www.cardus.ca/research/faith-communities/reports/an-institutional-history-of-religious-freedom-in-canada/>.
- Harrington, Matthew P. “Canada’s New Hierarchy of Rights.” In *Supreme Court Law Review*. Edited by D.B.M. Ross, 2nd ser., vol. 91. Toronto: LexisNexis Canada, 2019.
- Hogg, Peter. “Equality as a Charter Value in Constitutional Interpretation.” *Supreme Court Law Review* 20, no. 1 (2003): 113–33. <https://doi.org/10.60082/2563-8505.1037>.
- Hogg, Peter. *Constitutional Law of Canada*. Student ed. Toronto: Thomson Reuters, 2016.
- Iacobucci, Frank. “‘Reconciling Rights’: The Supreme Court of Canada’s Approach to Competing Charter Rights.” *Supreme Court Law Review* 20, no. 1 (2003): 138–65. <https://doi.org/10.60082/2563-8505.1038>.
- Kinsinger, Kristopher E.G. “Inclusive Religious Neutrality: Rearticulating the Relationship Between Sections 2(a) and 15 of the Charter.” In *Supreme Court Law Review*. Edited by D.B.M. Ross, 2nd ser., vol. 91. Toronto: LexisNexis Canada, 2019.
- Lauwers, Peter. “What Could Go Wrong with Charter Values?” In *Supreme Court Law Review*. Edited by D.B.M. Ross, 2nd ser., vol. 91. Toronto: LexisNexis Canada, 2019.
- Mathen, Carissima. “What Religious Freedom Jurisprudence Reveals About Equality.” *Journal of Law and Equality* 6, no. 2 (2009): 163–200. <https://dx.doi.org/10.2139/ssrn.1545958>.
- Mendes, Errol P. “Reaching Equilibrium between Conflicting Rights.” In *Balancing Competing Human Rights Claims in a Diverse Society: Institutions, Policy, Principles*. Edited by S. Azmi, L. Foster, and L.A. Jacobs. Toronto: Irwin Law, 2012.
- McGill, Jena. “‘Now It’s My Rights Versus Yours’: Equality in Tension with Religious Freedoms.” *Alberta Law Review* 53, no. 3 (2016): 583–608. <https://doi.org/10.29173/alr421>.
- Newman, Dwight. “The Challenging Parallelism of Rights Claims Based on Religious Identity and on Sexual Identity.” In *Religious Liberty and the Law*. Edited by Angus J.L. Menuge. Abingdon, UK: Routledge, 2017. <https://www.taylorfrancis.com/chapters/edit/10.4324/9781315270661-8/challenging-parallelism-rights-claims-based-religious-identity-sexual-identity-dwight-newman>.
- . “Reasonable Limits: How Far Does Religious Freedom Go in Canada?” Cardus, 2022. [www.cardus.ca/research/faith-communities/reports/reasonable-limits/](http://www.cardus.ca/research/faith-communities/reports/reasonable-limits/).



- Office of International Religious Freedom. *2020 Report on International Religious Freedom Report: Canada*. Washington, DC: United States Department of State, 2020.
- Ross, Derek B.M. “Intolerant and Illiberal? *Trinity Western University* and Its Implications for Charter Jurisprudence.” In *Supreme Court Law Review*, 2nd ser., vol. 89. Toronto: LexisNexis Canada, 2019.
- . “Truth-Seeking and the Unity of the Charter’s Fundamental Freedoms.” In *Supreme Court Law Review*. Edited by D. Newman, D.B.M. Ross, B. Bird, 2nd ser., vol. 98. Toronto: LexisNexis Canada, 2021.
- Ryder, Bruce B. “The Canadian Concept of Equal Religious Citizenship.” In *Law and Religious Pluralism in Canada*. Edited by R. Moon. Vancouver: University of British Columbia Press, 2008.
- University of Saskatchewan. “One in Five Prairie Residents Thinks Free Speech Limited or Non-existent.” July 11, 2022. <https://news.usask.ca/articles/research/2022/one-in-five-prairie-residents-thinks-free-speech-limited-or-non-existent.php>.
- Walker, Andrew T. *Liberty for All: Defending Everyone’s Religious Freedom in a Pluralistic Age*. Grand Rapids: Brazos Press, 2021.
- Zwibel, Cara F. “Reconciling Rights: The Whatcott Case as Missed Opportunity.” *Supreme Court Law Review* 63, no. 1 (2013): 313–35, <https://doi.org/10.60082/2563-8505.1272>.