THE BURDEN OF PROOF, THE *CHARTER*, AND A HIERARCHY OF LEGAL NORMS

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INTRODUCTION

In the recent Supreme Court of Canada decision *Dagenais* v. *Canadian Broadcasting Corporation*,[1] the majority canvassed the issues surrounding a situation where two fundamental legal rights come into conflict with one another. In that case, the CBC had been restrained from broadcasting the mini-series *The Boys of St. Vincent* until after the trials of several members of a Catholic religious order charged with physical and sexual abuse of young boys. The common law judicial discretion to impose a publication ban was held to have emphasized the right to a fair trial over the free expression rights of the media.

The Court was particularly concerned with the tension between these two rights since both are now protected under sections 11(d) and 2 (b) of the *Canadian Charter of Rights and Freedoms*,[2] respectively. Writing for the majority, the learned Chief Justice said:[3]

> It would be inappropriate for the courts to continue to apply a common law rule that automatically favoured the rights protected by section 11(d) over those protected by section 2(b). *A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the Charter and when developing the common law.* When the protected rights of two individuals come into conflict, as can occur in the case of publication bans, *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights.

Acting on this concern, the Court reformulated the common law rule dealing with publication bans and modified the third step in the second stage of the *Oakes*[4] test such that a proportionality must exist between the salutary and deleterious effects of the measure used to achieve the government objective. In other words, if protecting an accused's right to a fair trial through a publication ban unduly restricts the media's freedom of expression, the ban may be held to be an unreasonable limit under section 1 of the Charter even though it is aimed at achieving a sufficiently important objective.

Despite the Court's clear direction on the importance of affording equal status to all fundamental rights and freedoms, it is respectfully submitted that this view does not reflect the current state of the law and may be a goal which is unattainable. This will be illustrated through an approach which focuses on the burden of proof placed on the respective parties in cases involving *Charter* challenges under three of the protected fundamental freedoms.

THE BURDEN OF PROOF AND THE *CHARTER*

The particular analytical framework constructed in a *Charter* case can be more restrictive or more flexible depending on which right or freedom is in question. One way to analyze these frameworks is in terms of the relative weight of the burden of proof placed on applicants in attacking government action and on the Crown in defending the government action as a reasonable limit.

It is through the burden of proof that law, in part, expresses social policy and determines the pattern of decisions that will be made. Burden of proof evinces an attitude the law takes toward things.[5] By examining the burdens of proof that have been imposed by the Supreme Court of Canada it will be demonstrated that three of the fundamental freedoms protected under section 2 of the *Charter*, namely, religion, expression and association, fall into a judicially-created hierarchy which tells us something about their relative significance in our society.

In cases involving a *Charter* challenge, the basic analytical framework applied by the courts places the initial burden of proof on the plaintiff to establish a *prima facie* breach of his or her constitutional rights. If successful, the burden then shifts to the Crown to justify the infringement under section 1.[6] In both cases each party bears the ultimate burden of proof. The standard of proof is the same for the applicant and the Crown, that is, proof on a balance of probabilities, but the burden may be lighter or heavier at each stage and also from case to case; sometimes the challenger will have to prove a great deal in order to establish a breach, while at others the burden may be heaviest on the Crown.

Where the burden of proof is the lightest on the applicant (i.e., easiest to establish a *prima facie* breach), and heaviest on the Crown under section 1 (i.e., hardest to justify an infringement), it could be said that that particular right or freedom enjoys the highest status under the *Charter*. This is so because the courts will be least tolerant of abridgements of that right or freedom as compared to others. Analyzing *Charter* cases in terms of burden of proof alerts us to this phenomenon which otherwise might remain hidden if we simply took for granted that all 'fundamental' rights and freedoms are equally important.

FREEDOM OF RELIGION

In the leading cases on freedom of religion, one of the few restrictions on a person's freedom to hold, profess and manifest his or her religious beliefs imposed by the Supreme Court of Canada is that no one can, in exercising this freedom, interfere with the rights of others to do the same.[7] Little time has been spent defining what "religion" actually is and an understanding of this concept is almost taken for granted by the Court.

The more important first issue entails a look at the purpose and effects of the impugned legislation or government action to determine whether a *prima facie* breach has occurred. If the purpose is found to be clearly aimed at restraining freedom of religion, that is the end of the inquiry; there is an irrebuttable presumption of unconstitutionality irrespective of whether the government could show that no adverse effect actually resulted. So, for example, in *Big M Drug Mart*,[8] the federal *Lord's Day Act* was held to violate section 2(a) because of its religious purpose and the Court dismissed the Crown's assertion that its only effect was to force people to take a day of rest from work. The Chief Justice held that: "If the legislation fails the purpose test, there is no need to consider further its effects, since it has already been demonstrated to be invalid."[9]

Another aspect of the purpose test that decreases the weight of the burden of proof on the applicant is that the Court will not allow the Crown to advance arguments which attribute a contemporary, secular purpose to legislation that originally was religiously based.[10]

Furthermore, even if the government's purpose is found not to be directed at interfering with freedom of religion, an applicant can still show that the effect is such that his or her rights have been infringed. By adding this second option the Court has made it relatively easy to establish a *prima facie* breach once the initial hurdle of showing that some aspect of one's religion is involved has been overcome. Applicants are given two avenues to pursue and the cards are stacked in their favour at both the purpose and the effects stages.

The only real limitation occurs in situations, such as in the *Jones* case,[11] where a "trivial infringement" has occurred. In that case, a pastor who wanted to educate his children at home because of his religious beliefs claimed that the government requirement that he apply for an exemption from the school system was a violation of his freedom of religion. He argued that the requirement involved his acknowledging that government had final authority over his children's education instead of God. The Court emphasized that it was in no position to question the validity of a religious belief, even though few people may share it, but held, nevertheless, that the requirement did not infringe his section 2(a) rights because it constituted only a "minimal" or "peripheral" intrusion. The fact that the possibility for an exemption did exist for

those with strong religious convictions against state controlled education was important to this finding.

Once an applicant has established an abridgement of his or her freedom of religion the burden then shifts to the Crown to prove justification. In cases where the legislation's purpose has been shown to be directly aimed at restricting freedom of religion the Crown will face an insurmountable burden. The Supreme Court has placed such high importance on the sanctity of religious freedom (perhaps in the interests of separating Church and State), that such governmental action will not be justified under virtually any circumstances.[12] It is only where the government's purpose was purely secular that the Crown will have a chance to meet the burden of showing that the restriction was a reasonable limit.

The analytical framework in freedom of religion cases thus favours applicants over the Crown and the relative burdens placed on each party evidence the stringent protection religious freedom is afforded. The next two sections will compare this framework to those applicable to freedom of expression and freedom of association challenges.

FREEDOM OF EXPRESSION

As was stated above, there is usually not much debate over whether some aspect of religion is involved when a section 2(a) challenge is brought. The situation is different, however, in freedom of expression cases. A broader inquiry takes place into whether the activity alleged to have been affected can be considered "expression." The two questions that have to be answered in this regard are whether the activity has expressive content and whether its form is protected. It is only after this initial stage, during which the applicant bears the burden of proof, that an examination of the purpose and effects of the government action begins.[13] So, even where an applicant has little difficulty with this step, his or her burden of proof is quantitatively heavier.

This fact illustrates an important point: that the weight of the burden of proof is affected by how equivocal a legal concept is. Here, "expression" is a more nebulous legal concept than "religion" and, as a result, the plaintiff in a freedom of expression case must prove *more* than the plaintiff in a freedom of religion case and, thus, has a heavier burden to bear.

Furthermore, though the purpose test applies in roughly the same way in expression cases as it does in religion cases, the effects test is more onerous in the former. Assuming an applicant can establish that the activity in question counts as expression, he or she must then bring the claim of interference within the ambit of one of the three values underlying section 2(b). Specifically, it must be shown that the government action adversely affected the applicant's freedom to seek or attain truth, participate in social and political decision-making, or realize individual self-fulfilment.[14]

Instead of only ruling out "trivial infringements" as is the case when religion is involved, here the Court specifies the circumstances where an interference with expression will constitute a *prima facie* breach. The values which underlie religion seem to be taken for granted and protected for their own sake whereas only expressive conduct aimed at the enunciated values will be defended.

The Court's decision to narrow the range of protected expressive activities to a greater degree than religious ones points toward a higher status for religious freedom. This conclusion is supported on the other side of the analysis where the burden is on the Crown to justify the infringement.

Under the first stage of the section 1 analysis, the emphasis is on the legislative or governmental objective. This perhaps is because the potential harm that could ensue from a person exercising his or her freedom of expression is perceived to be greater than the range of possible deleterious effects resulting from the free exercise of religion. The leading Supreme Court of Canada case *R.* v. *Keegstra*[15] is a good example of this. In *Keegstra*, free expression led to the propagation of hatred against an identifiable group. The Court was clearly concerned about the potential harm associated with such a use of expressive conduct.

It follows that the greater the weight that is given to the objective, the easier it will be for the Crown to justify an infringement. When the Court is assessing whether the abrogated right has been impaired as little as is reasonably possible, the Crown will benefit from a weighty objective, for the more important it is, the more serious an abridgement will be tolerated to fully achieve the objective. Thus by emphasizing the importance of the first stage of the section 1 inquiry, the Court has effectively lightened the Crown's burden. For example, in *Irwin Toy*,[16] a provincial statute that prohibited advertising specifically directed at persons under the age of

thirteen was upheld under section 1. The Court held that the legislation's objective was to protect a group that is most vulnerable to commercial manipulation. Phrased in those terms, it is not surprising that the objective was found to be important enough to warrant overriding a corporation's expressive freedom.

Another interesting addition to the section 1 analysis that the Court has incorporated into freedom of expression cases provides that where the applicant's conduct is only "tenuously" linked to the values underlying this freedom, it will be easier to justify an infringement.[17] Consequently, the same obstacle that the applicant had to overcome during the first stage resurfaces and is used to lighten the burden on the Crown.

In sum, freedom of expression challenges require the applicant to prove a *prima facie* breach within narrower parameters, and thus also to prove more than is the case in freedom of religion challenges. The opposite is true for the Crown. Under section 2(a) the Crown will not be able to meet the burden of justification if the government's very purpose was to abrogate religious freedom. It will also have difficulty establishing an important enough objective to warrant overriding this constitutional right. Under section 2(b) it will be easier for the Crown to show good reasons for limiting freedom of expression which, in turn, will enhance its ability to justify a *Charter* breach. It is also aided at this stage by the narrow parameters already faced by the applicant during stage one.

Based on this analysis, then, freedom of religion enjoys a higher status in the hierarchy of legal norms under the *Charter* than freedom of expression. It remains for us to examine where freedom of association fits in to this scheme.

FREEDOM OF ASSOCIATION

Courts have taken a fairly restrictive view of what is essential to a person's freedom to associate. It is clear that any restraint on membership in or formation of associations will offend the *Charter*. However, the activities pursued by a particular association will not be covered *per se*. Only those pursuits which involve other constitutionally protected rights or freedoms or other lawful rights of individuals will be protected when carried out in association with others. Even the fact that an activity is fundamental to an association's existence will not ensure it protection under section 2(d).[18]

Additionally, the phrase "other lawful rights of individuals" has been interpreted narrowly to mean lawful *in the particular context*. So, for example, in the *Professional Institute of the Public Service of Canada* v. *N.W.T.* case,[19] the Court held that where a collective bargaining regime is in place it is not lawful for an individual to bargain with his or her employer. This reasoning contributed to a finding that collective bargaining itself was not an activity covered by freedom of association.

The scope of freedom of association thus is even narrower than that of freedom of expression. As a result, the burden of proof is heavier on applicants than in both the other frameworks discussed, but here the cause is somewhat different.

It has been shown that the difficulty in delineating the legal concept of expression led to an increase in the weight of the burden of proof. The concept of association, however, poses even fewer problems than religion at that initial stage; an individual is either associating with other people in some way or they are not. The courts, in freedom of association cases, will almost always skip right to an assessment of whether that freedom has been abridged based on the considerations outlined above. At this stage the extremely narrow construction of what will be protected is not a function of any difficulty in defining the concept. Rather, it would appear to be connected to the fact that most freedom of association challenges have arisen in the context of labour and employment law. It has been suggested that the judicial restraint evident in these decisions is a result of the belief that the legislative and administrative branches of government are better equipped to deal with the policy issues within this field.[20] Unlike criminal or other matters which are administered on a day-to-day basis by the judiciary itself, the labour and employment field is dealt with by legislatures and administrative boards and tribunals. Consequently, the Court has narrowly and restrictively construed freedom of association, at least in part, to avoid too extensive a role in the collective bargaining arena.

These stringent definitional limits would lead to the expectation that the Crown would have great difficulty in justifying infringements under section 1 when an applicant successfully establishes a breach.

Since a very limited range of activities is protected, the ones that do qualify should be protected forcefully. However, in the few judgments in which section 1 has been considered, the analysis has not led to the imposition of an unusually heavy burden on the Crown. If anything, government objectives which have been held to be sufficiently important to warrant overriding section 2(d) indicate that the Crown may have an easier time justifying an infringement under this sub-section as compared to the other two.[21]

The strong focus on the applicant in freedom of association cases combined with the narrow definition of what will be protected are evidence of the lower status the judiciary has assigned to this freedom as compared to the other two. Freedom of association would thus appear to rank third in the hierarchy of constitutional norms.

Burdens of proof determine how difficult it is to make or defend legal claims. The Supreme Court of Canada has placed a very light burden of proof on a party challenging legislation or other government action as a violation of freedom of religion, a heavier burden of proof on challengers under freedom of expression, and an almost impossibly heavy burden of proof on the applicant in a freedom of association case.

Under section 1, the Crown bears a heavy burden when attempting to justify an interference with freedom of religion (particularly where the legislative purpose was religious) and a somewhat lighter burden of proof in freedom of expression cases. When freedom of association is involved, while the Crown might be expected to face a very heavy burden, the indications so far are that the opposite may in fact be true. The Court could allow a great deal of latitude in the formulation of the government objective thus making the Crown's task easier.

Therefore, the hierarchy among these fundamental freedoms is revealed through the burdens of proof placed on the parties: religion is guarded more forcefully than expression which, in turn, takes precedence over association. And, the definitional, conceptual and other differences among the rights and freedoms enshrined in the *Charter*, through their impact on the burden of proof, make unequal treatment of these rights and freedoms seem inevitable.

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Endnotes

1. [1994] 3 S.C.R. 835.
2. Part I of the *Constitution Act*, 1982 being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11
3. *Supra* note 1 at 877 [emphasis added].
4. *R.* v. *Oakes* (1986), 24 C.C.C. (3d) 321.
5. S.M. Wexler, *Burden of Proof: The Essence of Law* (forthcoming, McGill Queen's University Press) *passim*.
6. See *R.* v. *Oakes, supra* note 4.
7. *R.* v. *Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295.
8. *Ibid.*
9. *Ibid.* at 334.
10. This is known as the "shifting purpose" doctrine and has been rejected by the Supreme Court.
11. *R.* v. *Jones*, [1986] 2 S.C.R. 284.
12. See *Big M Drug Mart, supra* nopte 7 and *Zylberberg* v. *Sudbury Board of Education* (1988), 65 O.R. (2d) 641 (C.A.)
13. *Irwin Toy Ltd.* v. *A.-G. of Quebec*, [1989] 1 S.C.R. 927
14. *Ibid.*
15. [1990] 3 S.C.R. 697
16. *Supra* note 13.
17. For a discussion of this analysis see *Rocket* v. *Royal College of Dental Surgeons*, [1990] 2 S.C.R. 232
18. This framework was set out in the so-called "Labour Trilogy" cases. The approach was outlined in *Reference re: Public Service Employee Relations Act*, [1987] 1 S.C.R. 313
19. [1990] 2 S.C.R. 367.
20. See Paul C. Weiler, "The Charter at Work: Reflections on the Constitutionalizing of Labour and Employment Law" (1990) 40 U.T.L.J. 117.
21. See Dickson, C.J.C.'s judgments in the Labour Trilogy generally, *supra* note 18. In two of the cases, government objectives arising out of purely economic concerns, such as combating inflation and the economic interests of dairy farmers, were held to be sufficiently pressing and substantial to warrant overriding section 2(d). Note, however, that these judgments did not represent the views of the majority in any of the *Labour Trilogy* cases. Also see *Lavigne* v. *Ontario Public Service Employee's Union*, [1991] 2 S.C.R. 211.