The Original Conception of Section 1 and its Demise: A Comment on *Irwin Toy Ltd* v. *Attorney-General of Quebec*

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The author submits that the logic and purpose of the *Canadian Charter of Rights and Freedoms*, as it was originally conceived, demand that the substantive rights be given a broad and literal interpretation, with limitations imposed exclusively under section 1. This distinction between breach and justification must be maintained to preserve the *Charter*'s integrity. The author suggests that the Supreme Court of Canada's decision in *Irwin Toy* will only perpetuate the confusion surrounding *Charter* interpretation. The Court again failed to articulate a concrete conception of section 1 review, and, in *obiter dicta*, noted that forms of expressive activity having physical consequences were not expression under s.2(b). The incorporation of justificatory criteria in defining the scope of the right doctrinalizes the choices which the Court would otherwise have to make openly under section 1. The author concludes that only a return to the original conception of the *Charter* can salvage its uniquely Canadian balance between individual and collective values. Such a reinterpretation entails the reform of the rigid *Oakes* test to allow for diverse standards of justification.

L'auteur soutient que la logique interne de la *Charte canadienne des droits et libertés* et le but qu'elle doit poursuivre ne permettent pas une limitation des droits substantifs par une approche définitionnelle. Une interprétation large et littérale doit être donnée et des limites peuvent être imposées uniquement sous l'article 1. L'intégrité de la *Charte* force le maintien d'une distinction entre l'atteinte à un droit et la justification de celle-ci. D'après l'auteur, la décision de la Cour suprême dans *Irwin Toy* c. *P.G. Québec* maintient la confusion entourant l'interprétation de la *Charte*. La Cour n'élabore pas une approche concrète de la révision judiciaire permise sous l'article 1 et, en *obiter dicta*, note que l'expression donnant lieu à des conséquences physiques n'est pas protégée sous l'ar. 2(b). L'application de critères de justification à la définition du droit supplante l'analyse de la Cour sous l'article 1. L'auteur conclut que seul un retour à la conception originale de la *Charte* peut sauvegarder l'équilibre canadien distinct entre les valeurs individuelles et collectives. Une telle réinterprétation exige un assouplissement du test *Oakes* afin de permettre divers standards justificatifs.

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Synopsis

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Introduction

Section 1 of the *Canadian Charter of Rights and Freedoms*[1] remains as important and mysterious today as it was in 1982.[2] A limitations clause was included in Canada's *Charter of Rights and Freedoms* because a similar provision does not exist in the American Bill of Rights.[3] Ironically, section 1's presence has created interpretive dilemmas that may ultimately be as irresolvable as those caused by its absence from the U.S. Constitution. The *Charter*'s bifurcation of rights and limitations has already complicated the task of defining the substantive guarantees. Until recently, one unsolved mystery was whether those rights could be restricted as a matter of definition, or whether limitations should be imposed exclusively under section 1.

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

[2]W. Conklin, "Interpreting and Applying the Limitations Clause: An Analysis of Section 1" (1982) 4 *Sup. Ct L. Rev.* 75.

[3]See H. Marx, "Entrenchment, Limitations and Non-Obstante" in W.S. Tarnopolsky & G.-A. Beaudoin, eds, *Commentary: The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1982) at 63-66; and A. Bayefsky, "Defining Equality Rights" in A.F. Bayefsky & M. Eberts, eds., *Equality Rights and The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) at 73-78 (tracing the origins of section 1 in international human rights covenants).

Twice this year the Supreme Court of Canada has addressed that issue. First, *Law Society of British Columbia* v. *Andrews* gave s.15's guarantee of equality a definitional interpretation.[4] Then *Irwin Toy Ltd* v. *A.G. Quebec* limited the scope of expressive freedom under s.2(b).[5] In rejecting a literal definition of "equality", *Andrews* explicitly considered the relationship between the concepts of breach and justification.[6] However, only a few months later, in *Irwin Toy*, the Court failed to explain why limitations on the scope of s.2(b) were appropriate.[7] Having rejected a *prima facie* concept of breach in *Andrews*, the Supreme Court of Canada might have assumed that consistency required a non-literal or definitional interpretation of s.2(b).[8] Though it could have invoked that argument, or otherwise advanced a substantive theory of expressive freedom, it did neither. Instead, the Court adopted a complex and overlapping set of principles to define "freedom of expression". The difficulty is that these principles are not based on any theory of the relationship between breach and justification, or of expressive freedom as a substantive concept.

This Comment argues that the decision in *Irwin Toy* compromises the structural integrity of the *Charter*. As a matter of textual logic, the purpose of the substantive provisions is to guarantee individual rights, and that of section 1 to measure those entitlements against the claims of the community. Under such a scheme, democratic values should be irrelevant in defining the scope of the guarantees. Despite this logic, the momentum in favour of definitional limitations has blurred the concepts of breach and justification. This pattern of

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[4][1989] 1 S.C.R. 143 at 178-82, [1989] 2 W.W.R. 289 [hereinafter *Andrews* cited to S.C.R.]. Dickson C.J. and Lamer, Wilson, and L'Heureux-Dubé JJ., joined Justice McIntyre's majority opinion rejecting a literal interpretation of s. 15. Instead, the Court limited the scope of s. 15 to the enumerated categories and other classifications based on similar kinds of personal characteristics.

[5][1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577 (per Dickson C.J., Lamer and Wilson JJ.; McIntyre and Beetz JJ. dissenting) [hereinafter *Irwin Toy* cited to S.C.R.].

[6]Justice McIntyre rejected a literal interpretation because "it virtually denies any role for s.15(1)." *Supra*, note 4 at 181. Similarly, he declined to follow the B.C. Court of Appeal's definitional approach because its focus on the reasonableness of the classification meant that "virtually no role would be left for s.1." *Ibid.* at 182. While conceding that it may be difficult to determine the relationship between s.15 and section 1 on "a wholly satisfactory basis", he advanced a textual justification for his definition of equality by characterizing "without discrimination" as the governing substantive concept of s.15. *Ibid.* at 178.

[7]Although a textual rationalization was available for s.15, the wording of s.2(b) does not as readily suggest definitional restrictions. In such circumstances, *Irwin Toy*'s interpretation of s.2(b) rested primarily on the statement that "[c]learly, not all activity is protected by freedom of expression". *Supra*, note 5 at 967.

[8]In *Andrews*, *supra*, note 4, Justice LaForest's concurring opinion raised questions about the consistent interpretation of the substantive guarantees. Specifically, he suggested that it might be "out of keeping with the broad and generous approach given to other *Charter* rights", such as s.7, to adopt a restrictive interpretation of s.15. In concurring on the question of breach, he specifically reserved his views about the scope of s.15. *Ibid.* at 193. Justice LaForest was not a member of the panel which heard *Irwin Toy*.

interpretation recently culminated in an interpretation of s.2(b) based partly on justificatory criteria.[9]

The first part of this Comment analyzes the text of the *Charter*, with particular emphasis on its separation of the individual rights from their permissible limitations. The logic of section 1, or the "original conception", as it is referred to in this paper is first examined and it is then suggested that a scheme appears to be structurally and analytically logical is, in fact, profoundly ambivalent. Having outlined the interpretive dilemma posed by the text, the section concludes with some observations on the Supreme Court of Canada's early jurisprudence. It suggests that, by reinforcing the ambivalence of the text, these decisions have perpetuated the ideological vacuum in which the *Charter* was enacted.

The text's separation of the substantive rights and their permissible limitations is one manifestation of a deep-seated equivocation about the *Charter*'s purposes.[10] In exploring the relationship between breach and justification, this Comment tests two assumptions which have gained a foothold, both explicitly and implicitly, in the jurisprudence. One is an instinct that retreat from the original conception of section 1 is unavoidable;[11] and the other is the related view that definitional limitations are as sound as they are imperative.[12] Though both are in tension with the structural logic of the *Charter*, each is evident in a jurisprudence which wavers between individual rights and democratic values. The Supreme Court of Canada simultaneously embraces generous and restrictive conceptions of the substantive rights,[13] as well as strict and deferential applica-

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[9]By defining expression as "the attempt to convey meaning", *infra*, note 56, *Irwin Toy* initially appeared to adopt a literal interpretation of the guarantee. This Comment demonstrates that further criteria which exclude certain expressive activity from s.2(b) encroach on the justificatory function of section 1.

[10]The tension inherent in this bifurcation is a more subtle reflection of the contradiction between the *Charter*'s entrenchment of individual rights and its provision for a legislative override.

[11]In *Edwards Books and Art Ltd* v. *R.*, [1986] 2 S.C.R. 713 at 768-69, 71 N.R. 161 [hereinafter *Edwards Books* cited to S.C.R.], the Court cautioned against "rigid and inflexible" section 1 review. Similarly, two members of the Court rejected a monolithic application of *R.* v. *Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 [hereinafter *Oakes* cited to S.C.R.], in *Andrews*, *supra*, note 4 at 154, per Wilson J. and 184-85, per McIntyre J. More recently, Justice LaForest denounced a mechanistic approach to section 1 in *United States* v. *Cotroni*, [1989] 1 S.C.R. 1469 at 1489. To the extent that *Oakes* represents the original conception, the Court has mixed feelings about it.

[12]*Andrews* and *Irwin Toy* provided the first real tests of the original conception of section 1 and the structural logic of the *Charter*. Significantly, both followed the momentum in favour of a definitional, or non-literal interpretation. Without assessing the Court's definition of equality, this Comment focusses on the assumption that limitations on the scope of s.2(b) are appropriate.

[13]Although the Court repeatedly invokes the purposive approach, *infra*, note 45, it limited the scope of section 2 in *Retail, Wholesale and Dept Store Union* v. *Dolphin Delivery Ltd*, [1986] 2 S.C.R. 573, 1 W.W.R. 577, 9 B.C.L.R. (2d) 273, 33 D.L.R. (4th) 174 [hereinafter *Dolphin Delivery* cited to S.C.R.] and the *Labour Trilogy*, *infra*, note 47. More recently, compare *Ford* v. *A.G. Quebec*, [1988] 2 S.C.R. 712 at 766, 54 D.L.R. (4th) 577 [hereinafter *Ford* cited to S.C.R.] (stating

tions of the *Oakes* test.[14] Curiously, in struggling with difficult issues of interpretation and institutional responsibility, the Court has ignored the purpose of the *Charter*'s bifurcated scheme.

The second part of the Comment analyzes the viability of definitional limitations on s.2(b) through a critique of *Irwin Toy Ltd* v. *A.G. Quebec*. It establishes that the restrictions which this decision places on the scope of the substantive guarantee compromise the original conception of section 1. By introducing justificatory concepts into the definition of expressive freedom, *Irwin Toy* has made it virtually impossible to maintain any analytical distinction between the scope of the right and its permissible limitations. In such circumstances, doctrinal confusion is inevitable. However, more troubling than the Court's elusive definition of expression is its failure to recognize that breach and justification are distinct concepts. Although elements of *Irwin Toy*'s definition of expression reflect a cultural instinct that freedom cannot be absolute, the decision's implications for constitutional interpretation are far-reaching. By undercutting section 1, *Irwin Toy* compromises the *Charter*'s structural integrity. In light of these conclusions, a final section proposes a literal interpretation of s.2(b), a return to the original conception of section 1, and a reform of the *Oakes* test.[15]

I. The Original Conception of Section 1

A. *The Logic and Purpose of Section 1*

The original conception of section 1 is both logical and democratic. At the outset, the *Charter*'s limitations clause was ballyhooed as its distinguishing feature and the hallmark of its textual superiority over the U.S. Bill of Rights. By guaranteeing individual rights and refusing to provide for their limitation, the American Constitution created an impossible contradiction.[16] The *Charter*

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that "[i]t is within the perimeters of s.1 that courts will in most instances weigh competing values in order to determine which should prevail") and *Irwin Toy*, *supra*, note 7 (declaring that s.2(b) does not protect all expressive activity).

[14]In addition to emerging doubts about the universality of the *Oakes* test, *supra*, note 11, the Court also applies its criteria selectively to produce different results in seemingly analogous cases. The Sunday closing cases, *R.* v. *Big M Drug Mart Ltd*, [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321 [hereinafter *Big M* cited to S.C.R.] and *Edwards Books*, *supra*, note 11, remain the best examples of this.

[15]A second paper undertakes a comprehensive review of the relationship between s.2(b) and s.1, ultimately advancing a proposal for the modification of *Oakes* in all s.2(b) cases. This paper is titled "Rights and Their Limitations: Section 2(b), the First Amendment and the Future of *Oakes*" [hereinafter *Cameron*] and is tentatively scheduled for publication in the first issue of a new journal provisionally called *The Media and Communications Law Journal*.

[16]The contradiction is that, as a matter of practical reality, collective life and an atomistic conception of the individual cannot co-exist. By guaranteeing absolute rights, the American Bill of

addressed that flaw with unassailable logic: self-contained provisions guarantee the substantive rights and a limitations clause determines what restrictions on those rights are consistent with democratic values.[17] The structure of the *Charter*, and section 1 in particular, precluded any fiction of absolute rights.

Not only is section 1 logical, it is democratic as well: textual primacy makes the concept of justification the *Charter*'s fundamental organizing principle. As American experience demonstrates, the hierarchy of values created by the Constitution is important. The ideological and symbolic significance of the first amendment's absolute guarantee of expressive freedom was immortalized by Justice Cardozo's description of free speech as "the matrix, the indispensable condition, of nearly every other form of freedom".[18] Just as the first amendment is one of America's cherished symbols of freedom, section 1 is Canada's statement of attachment to the values of parliamentary democracy. By expressly subjecting individual rights to the legislature's social and political judgment, the concept of reasonable limits weakened the argument that the *Charter* exalted individualism at the expense of collective values.[19]

Along with its symbolic and ideological importance, section 1 also generated a set of doctrinal expectations. Canadian commentators initially believed that the text of the *Charter* had cured the interpretive dilemmas caused by the American Bill of Rights' rigid presumption in favour of individual liberty. Because the Constitution does not acknowledge the legitimacy of the state's claim, the U.S. judiciary was forced to treat restrictions on rights as discrete, isolated exceptions.[20] In such circumstances, a coherent theory of justification was impossible. Instead, through a slow and uneven pattern of evolution, a wide

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Rights does not acknowledge that the requirements of social organization must also be accommodated.

[17]Some of the *Charter*'s guarantees contain qualifying language. See, for example, s.6 (permitting restrictions on mobility rights); s.8 (prohibiting searches which are unreasonable); s.9 (guaranteeing the right not to be arbitrarily detained or imprisoned); s.11 (establishing a variety of standards of fairness in the criminal justice system); s.12 (prohibiting punishment which is cruel and unusual); s.15(2) (qualifying s.15(1)); and s.23 (making minority language education contingent on sufficient numbers). Even though the relationship between breach and justification is complicated by the presence of qualifying language, the definitional issue does not displace section 1 review. Moreover, guarantees such as ss. 2 and 15, which are cast in broad open-ended terms, are tailor-made for the original conception.

[18]*Palko* v. *Connecticut*, 302 U.S. 319 at 327 (1937). This statement introduced the "preferred freedoms" theory, which the U.S. Supreme Court invoked throughout the 1940s to justify a double standard of adjudication which gave "civil" liberties active protection while deferring to the legislatures on questions of socio-economic regulation.

[19]While the *Charter* endures, this argument will be as perpetual as it is inevitable. Section 1 was never intended as a cure; only as a palliative.

[20]The U.S. Constitution does not guarantee all rights absolutely. For example, the fourth amendment only prohibits unreasonable search and seizure and others, sueh as the fifth, only guarantce due process or just compensation. The eight amendment prohibits punishment that is cruel and unusual.

array of disconnected doctrines emerged. Without a limitations clause, the American judiciary could only address the permissibility of restrictions on individual rights on an *ad hoc*, issue-specific basis.[21]

Under the *Charter*, it appeared that the Canadian judiciary might avoid such contortions. First, by separating the individual's *prima facie* entitlements from the limitations on freedom which are inevitable in collective life, the *Charter*'s bifurcated scheme obviated the need for doctrinal subterfuge.[22] In theory, Canada could avoid the institutional awkwardness of American doctrines which argue, among other things, that certain types of speech are not "speech".[23] Such unconvincing interpretations would be unnecessary under the *Charter* because section 1 makes restrictions on the rights redundant.[24] Second, by legitimizing limitations on individual liberty, section 1 would enable the Canadian judiciary to discuss the issue of justification openly, pursuant to an express mandate to balance the competing demands of individual freedom and social organization.[25] Once again, the Canadian concept of reasonable limits would resolve the American dilemma of rationalizing limitations which the constitutional text does not contemplate. Initially, therefore, the optimism that section 1 realism would replace the formalism of U.S. doctrine was not wholly misplaced.[26]

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[21]For a comprehensive analysis of the evolution of first amendment doctrine, see Cameron, *supra*, note 15.

[22]See, for example, P. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1985) at 715 (stating that because the American Bill of Rights contains no limitation clause like section 1 of the Canadian *Charter*, "American courts have had difficulty in supplying principled justification for upholding laws that restrict speech...."); and M. Manning, *Rights, Freedoms and the Courts: A Practical Analysis of the Constitution Act, 1982* (Toronto: Emond-Montgomery, 1983) at 155 (concluding that if the Bill of Rights had a section similar to section 1, the court would not have had to stretch the concept of due process).

[23]See, for example, *Roth* v. *United States*, 354 U.S. 476 (1957) (holding that obscene speech is not "speech" for purposes of the first amendment).

[24]See *Soenen* v. *Director of the Edmonton Remand Centre* (1983), 28 Alta L.R. (2d) 62 at 76, 48 A.R. 31 at 38 (Q.B.) (asserting that any balancing of individual interests against those of the collectivity only comes into play under section 1); *Re Service Employees' Int'l Union, Local 204* (1983), 44 O.R. (2d) 392 at 465 (H.C.) (stating that any conclusion that *Charter* rights and freedoms are anything but absolute would render section 1 redundant); D. Gibson, *The Law of the Charter: General Principles* (Toronto: Carswell, 1986) at 140 (rejecting any internal balancing through definitions of the rights, except in the case of s.15); and Manning, *supra*, note 22 at 195 (stating that s.2 rights are "cast in an absolute form" and "are subject only to the limits allowed by operation of section 1").

[25]See Gibson, *ibid.* at 134 (claiming that "the forthright consideration by judges of the reasonableness and justifiability ... of particular limits ... seems likely to produce a more consistent and fully informed body of rights restrictions than that which has emerged from the more indirect definitional exercises in which American courts have had to engage because of the absence of an explicit limitation clause").

[26]See, Gibson, *ibid.* (stating that section 1 has had "beneficial effects" because its open acknowledgment of reasonable limits has given the Canadian public a "more *realistic* appreciation of the significance of constitutional guarantees than it once had" (emphasis added)); and T. Christian,

Finally, by implying a single standard of justification,[27] section 1 suggested a further improvement on American constitutional jurisprudence. The Canadian courts could apply s.1's neutral and universal criterion of "reasonable limitations in a free and democratic society" the same way in every case. Not only is the U.S. doctrine a confusing jumble, articulating almost as many tests as there are issues to decide, its justificatory analysis is implicit at best and rarely explicit.[28] Given a body of American jurisprudence that appeared arbitrary, expedient and needlessly complex, section 1 made an objective and egalitarian approach to rights feasible in Canada.

B. The Dilemma of the Text

At stake in defining the relationship between the substantive rights and their permissible limitations are alternative conceptions of the *Charter*. At the level of statutory construction, the issue is out of choosing between a definitional and a literal interpretation. A definitional interpretation would limit the scope of the guarantee itself; instead of presuming that interference with expressive freedom violates s.2(b), this approach would place a burden on the individual to establish that the claim invokes values that are protected by the *Charter*. By contrast, a literal interpretation would reject a narrow conception of the guarantees in favour of a justificatory approach. This alternative would presume the breach whenever there is an interference with individual liberty and oblige the state to establish the permissibility of any limitations under section 1.

However, in deciding whether to read the substantive provisions literally or not, more is at stake than a question of statutory construction or evidentiary burden. A definitional conception focuses on "entitlements", or the legitimacy of the *individual*'s right to claim the Constitution's protection, while a literal interpretation focuses on "exceptions", or the justifiability of any *state* interference with individual liberty. Thus a definitional conception of the rights assumes that the guarantees are themselves qualified by political, social and cultural values. On this view, hate propaganda might be outside the scope of s.2(b),

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"The Limitation of Liberty: A Consideration of Section 1 of the *Charter of Rights and Freedoms*" [1982] *U.B.C. L. Rev. (Charter Edition)* 105 at 106 (concluding that the Canadian draftsmen "*realistically* realized that the courts will not, and in many cases cannot, give an absolute construction to *Charter* freedoms" (emphasis added)).

[27]By subjecting all interferences with individual liberty to section 1's criterion of reasonable limits, the *Charter* implies that all cases will be governed by the same standard. Though it does not *require* the judiciary to apply the same definition of reasonableness in every case, section 1 unquestionably sets a universal standard that only legitimizes *reasonable* limits on rights.

[28]Christian, *supra*, note 26 at 106 (asserting that "Rather than having judicial energy misspent on the creation of techniques for avoiding absolute interpretations, the Canadian limitation clause focusses judicial attention on the adequacy of the policy reasons advanced to justify limitations..."); and Gibson, *supra*, note 24 at 137 (stating that "if the American model is predictive, ... a morass of complex and exclusive standards would result").

despite the fact that it is undeniably expression.[29] By contrast, a justificatory conception assumes that a *prima facie* violation has occurred whenever an individual can establish an interference with his liberty. Even though both conceptions permit collective values to prevail under section 1, the presumptions of validity and invalidity expose distinct perceptions of the functions of breach and justification.

Significantly, the *Charter* is as ideologically equivocal as it is analytically logical. Unlike the U.S. Constitution, it does not indicate how the tension between individual liberty and community values should be resolved. Under the American document, freedom prevails because the text makes an irrefutable presumption in favour of individual rights.[30] By contrast, the text of the *Charter* equivocates. First, by indicating that the state can prevail, but not that it shall, section 1 threatens the democratic values it was intended to reinforce.[31] Whatever was intended, the words of section 1 are ideologically indifferent: the concept of reasonable limits is so elastic that, in any given case, either the state or the individual can win. This equivocation is aggravated by the *Charter*'s failure to resolve the relationship between breach and justification. On this issue, it is open to the courts to adopt either an "entitlements" or an "exceptions" approach because, once again, the text is different between the two. Structurally, however, the problem is that an approach that invokes collective values to restrict the substantive guarantees will inevitably conflict with a self-conscious separation of the rights and their limitations. This stalemate forces an interpretive choice between the introduction of definitional limitations based on justificatory criteria and the duplication of section 1 review.

By separating the abstract entitlement from the question of justification, the original conception joined a romanticism about rights with a realistic acceptance of life in a democracy. If the U.S. Constitution's failure to acknowledge limits on individual rights created an impossible dilemma for Americans, the *Charter* introduced the distinctive contradiction of "romantic realism". As coined here, this expression describes the interpretive problems arising from a document that creates textual equipoise between individualist values and the

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[29]See, for example, *R.* v. *Zundel* (1987), 58 O.R.(2d) 129, 18 O.A.C. 161 (holding that holocaust denial is not protected by s.2(b)); and *R.* v. *Andrews* (1988), 65 O.R.(2d) 161 (C.A.) (upholding provisions prohibiting the dissemination of hate literature).

[30]Despite the absolutism of the text, a complex jurisprudence determines when limitations on individual liberty are consistent with the Constitution. Although the doctrine rationalizes these limits, it developed in the context of a document that creates an unambiguous presumption in favour of the individual. Ultimately, therefore, the jurisprudence is answerable to the text.

[31]Although the purpose of section 1 is to vindicate democratic values, this provision directs the courts to judge the reasonableness of democratic policy and thereby highlights the anti-democratic nature of rights review, instead of diminishing it.

conflicting demands of social organization.[32]

The source of this ambivalence can be illustrated, once again, by comparison with the U.S. Constitution. The American text is based on a principle of limited government and a negative and distrustful conception of the state. In the United States, individual rights are entitlements which are imperative against the state as a matter of supreme law. Interferences with individual liberty are presumed invalid because the text does not acknowledge the legitimacy of the state's claim.[33] In Canada, however, the *Charter*'s equivocation between individual liberty and collective values stems from a conception of their relationship that is more organic and symbiotic than static and confrontational.[34] Parliamentary democracy recognizes that individual autonomy and social values will conflict, but contemplates their reconciliation on a pragmatic, *ad hoc* basis. As a result, parliamentary systems impose only a few categorical rules because "responsible government" is based on an assumption of flexible political and social relations. These relations evolve through a dynamic process which balances competing demands through discussion and reform .

The organicism of the parliamentary tradition stands in stark contrast to the ideological assumptions of American constitutionalism.[35] One strength of Canada's pre-*Charter* tradition was that because it did not represent the relationship between the individual and the state as irresolvably in conflict, it declined to make any categorical choice between the two.[36] However, by attempting to join that organicism with the positivism of entrenched rights, the *Charter* created an unresolved contradiction. It is sometimes portrayed as shifting Canada into the direction of American constitutional culture but although the institutions of rights review may formally be in place, its ideological values are not.

Unfortunately, instead of making a choice between these conceptions, the text delegates the task of grappling with this contradiction to the Canadian judi-

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[32]The contradiction between a guarantee of constitutional rights and the override provision of s. 33 provides the most compelling evidence of the *Charter*'s ideological ambivalence.

[33]The first amendment states, for example, that "Congress shall make *no law* respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances" (emphasis added).

[34]Americans idealize their Constitution, in part, because it has endured; to them, this flexibility reinforces its status as a fundamental truth. There can be little doubt that, through necessity, the document has been given a flexible interpretation. That does not alter the fact that the text itself is based on a conception of the relationship between liberty and authority that is inflexible, static and adversarial.

[35]See J. Cameron, "Liberty, Authority and the State in American Constitutionalism" (1987) 27 *Osgoode Hall L.J.* 257 for a preliminary analysis of American constitutional ideology and, in particular, of the role which a distrust of authority plays in American culture.

[36]Though parliamentary supremacy meant that the state would prevail as a matter of law, it did not mean that the state should prevail as a matter of "responsible government".

ciary. The *Charter* has not only forced the judiciary to adopt an institutional role that compromises its self-image as a neutral and apolitical body,[37] it also abdicates much of the responsibility for a Canadian ideology of rights.[38] By equivocating between individualist and democratic values, the *Charter* compounded the strain inherent in any system of rights review.

Dissatisfaction with the statutory bill of rights aggravated this strain even more. As a result, early *Charter* adjudication was conditioned as much by context as by the unresolved problems of text. Burdened by the negative legacy of the federal *Bill of Rights* and seemingly untroubled by institutional concerns, the Supreme Court of Canada initially gave the *Charter* an "activist" interpretation.[39] To the extent that it interpreted the Chapter too aggressively in this period, its decisions became the target of attack.[40] A second period of comparative "restraint" then set in.[41] If they were ever sharply defined, those extremes have been superseded by the current phase, in which the Supreme Court of Canada's *Charter* jurisprudence is less unstable, but almost as unpredictable. From one perspective, this is a welcome development, because it shows that, with increasing confidence, the Court is overcoming the pendulum swings of the earliest years. From another perspective, however, the unsteadiness of this jurisprudence is disturbing, because it reveals how ill at ease the Court is with the ideological choices which the *Charter* forces it to make.

This equivocation is evident in the way the Court has addressed the relationship between the concepts of breach and justification. Because these concepts are symbiotic, it would be impossible for the Court to interpret section 1 without affecting its perception of the substantive guarantees. Although the converse is equally true, the judiciary's concerns about section 1 have controlled its interpretation of the substantive guarantees, rather than the reverse. Given this dynamic, much of the discussion has focussed on the Court's conception of sec-

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[37]The Supreme Court of Canada's resistance to this aspect of change is documented in *The B.C. Motor Vehicle Reference*, [1985] 2 S.C.R. 486 at 496, [1986] 1 W.W.R. 481, 69 B.C.L.R. 145, 24 D.L.R. (4th) 536 (asserting that neither before nor after the *Charter* have the courts been enabled to adjudicate the merits of public policy); and *Dolphin Delivery*, *supra*, note 13 at 600 (describing the judiciary as "neutral arbiters").

[38]The *Charter* unquestionably indicates a variety of ideological choices: by including sections 1 and 33; by guaranteeing minority language rights; by s.15(2)'s qualification of s.15(1); and by its declaration of multiculturalism, to mention only a few. The point this Comment makes is that, by failing to resolve the relationship between breach and justification, or indicate a presumption either in favour of the individual or the state, the *Charter* contains no ideological statement of its raison d'être.

[39]See A. Petter and P.J. Monahan, "Developments in Constitutional Law: The 1985-86 Term" (1987) 9 *Sup. Ct L. Rev.* 69 [hereinafter *Petter and Monahan*] (documenting the Supreme Court of Canada's "activism" in the early jurisprudence).

[40]See A. Petter, "The Politics of the *Charter*" (1986) 8 *Sup. Ct L. Rev.* 472 [hereinafter *Petter*].

[41]See Petter and Monahan, "Developments in Constitutional Law: The 1986-87 Term" (1988) 10 *Sup. Ct L. Rev.* 61 at 61-70 (documenting this period of comparative restraint).

tion 1.[42] Not surprisingly, a consensus has emerged that *Oakes* propounded a strict standard of justification which the Court subsequently found impossible to implement.[43] The Court's retreat from *Oakes* has been documented but neither the judiciary nor its commentators have examined the issues inherent in the *Charter*'s bifurcation of breach and justification. Precisely because these concepts are symbiotic, that analysis is a prerequisite to any reform of the *Oakes* test. This Comment on *Irwin Toy* demonstrates that the Court's definitional limitations on the scope of expressive freedom are justificatory and, ultimately, advocates a return to the original conception of section 1.

II. *Irwin Toy Ltd* v. *A.G. Quebec*[44]

A. *Introduction*

The scope of the substantive guarantees is governed by the "purposive" approach[45] whose content has been defined with more precision through subsequent adjudication. Although commentators have favoured a restrictive interpretation of s.15 from the start, the status of limitations on freedom of expression was more ambiguous.[46] In light of this uncertainty, the early *Charter* decisions dealing with labour relations, especially *Dolphin Delivery*, are pivotal.[47] In *Dolphin Delivery*, the Supreme Court of Canada flatly asserted that s.2(b) would not protect "threats or acts of violence, property destruction, assault, or other clearly unlawful conduct".[48] In making that pronouncement, it failed to explain why certain activity is excluded from s.2(b).[49] Without exploring their concep-

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[42]Although sections 15 and 2 have also generated a body of literature, section 1 has been featured in commentary for the simple reason that it applies in every case. The three year moratorium on section 15's operation, together with the lack of an early section 2(b) jurisprudence, have helped retain the focus on section 1.

[43]For commentary along these lines, see Monahan and Petter, *supra*, notes 39 and 41 and Petter, *supra*, note 40; see also R. Elliot, "The Supreme Court of Canada and Section 1: The erosion of the common front" (1988) 12 *Queen's L.J.* 277.

[44]*Supra*, note 5.

[45]*Big M*, *supra*, note 14 at 344 (stating that this interpretation 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").

[46]See Gibson, *supra*, note 24.

[47]*Supra*, note 13; see also *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 S.C.R. 313, 51 Alta L.R. (2d) 97, [1987] 3 W.W.R. 577, 38 D.L.R. (4th) 161; *Public Service Alliance of Canada* v. *R.*, [1987] 1 S.C.R. 424, 32 C.R.R. 114, 38 D.L.R. (4th) 249; and *Retail, Wholesale and Dept Store Union* v. *Saskatchewan*, [1987] 1 S.C.R. 460, 56 Sask. R. 277, 38 D.L.R. (4th) 277 (holding that s.2(d) does not include the right to strike or bargain collectively] [hereinafter referred to collectively as the *Labour Trilogy*).

[48]*Ibid.* at 588.

[49]For a brief comment, see J. Cameron, "The Forgotten Half of *Dolphin Delivery*: A Comment on the Relationship Between the Substantive Guarantees and Section 1 of the *Charter*" (1988) 22 *U.B.C. L. Rev.* 147.

tual or analytical viability, *Dolphin Delivery* simply assumed that limitations on the scope of the substantive right were appropriate. This decision is significant because it legitimized a justificatory interpretation of s.2(b), thereby blurring the distinction between the scope of the right and section 1's vindication of democratic values.[50] The decision in *Irwin Toy* further obscures that distinction.

A majority of those who participated in *Irwin Toy* concluded that Quebec legislation prohibiting advertising aimed at children under thirteen years of age was a justifiable breach of the *Charter*'s guarantee of expressive freedom.[51] In reaching this conclusion, the Court articulated a complex test to determine the scope of s.2(b).[52] A few months earlier, however, *Ford* had held that s.2(b) protects commercial expression.[53] This conclusion avoided the need for any discussion of that issue in *Irwin Toy*. It is trite law that a court should not offer abstract opinions on important questions of constitutional interpretation, and it is unfortunate that the Supreme Court of Canada ignored one of its own principles of adjudication in this case.[54] In large part because it was promulgated in the abstract, *Irwin Toy*'s test is vague and imponderable.

Following *Irwin Toy*, courts must apply two tests to determine the scope of s.2(b). Under the first, the Court held that "[a]ctivity is expressive if it attempts

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[50]There can only be two rationales for excluding violent or destructive picketing activity from s.2(b): that it constitutes pure conduct rather than expression, or that it is justifiable for the state to limit expressive activity which causes harmful consequences. By including a reference to other "clearly unlawful conduct", Justice McIntyre's reasons suggest the latter interpretation, and his concurring reasons in *B.C. Govt Employees' Union* v. *R.*, [1988] 2 S.C.R. 214 at 250-52, 53 D.L.R. (4th) 1, confirm that view.

[51]Only five judges participated in this decision [Dickson C.J., Lamer and Wilson JJ.; Beetz and McIntyre JJ., dissenting]. Two of the five, Justices Beetz and McIntyre, have retired, and two others who heard the case but did not participate in the decision, Justices Estey and LeDain, have also resigned.

[52]Technically, this test consists of two steps: the first determines what activity is expression, and the second, whether such activity is protected expression. However, within the second step, the Court created a further dichotomy between the purpose and effect of legislation, making this a three-step test.

[53]*Supra*, note 13 at 767: "there is no sound basis on which commercial expression can be excluded from the protection of s.2(b)".

[54]This principle can be traced to *Citizens Insurance Co.* v. *Parsons* (1881-82) 7 A.C. 96 at 108. It was ignored then and despite being regularly invoked, is still ignored today. Perhaps in anticipation of *Irwin Toy*, the Court stated, in *Ford*, *ibid.* at 767 that "the focus [in this case] is on choice of language and ... [w]e are not asked ... to deal with the distinctive issue of the permissible scope of regulation of advertising...." This passage was then cited in *Irwin Toy*, *supra*, note 5 at 967. Although *Ford* technically reserved the point, it also indicated that the permissible scope of advertising *regulation* was a section 1 issue, not a s.2(b) issue, *ibid.* at 767. This meant that *Irwin Toy* raised no real issue about the scope of s.2(b); see McIntyre J., dissenting in *Irwin Toy*, *ibid.* at 1006. It is revealing that *Irwin Toy*'s discussion of the s.2(b) status of advertising is set out in a single paragraph. The rest of its discussion of s.2(b) has nothing to do with the issue which the Court claimed it was addressing. Effectively, it is *obiter dicta*.

to convey meaning".[55] In doing so, it appeared to adopt a literal interpretation of s.2(b).[56] Somewhat inconsistently, the second part of the analysis adds qualifications which explore the nature of the violation. According to these criteria, whenever the state has committed an act of purposeful interference with expressive freedom, the breach is presumed and section 1 review is required; in all other cases, the individual has the burden of establishing entitlement to s.2(b) protection by proving that the expressive activity in question serves its underlying values.[57]

There are further complexities. Not only is the purpose-effect distinction grafted onto a concept of expression that is essentially literal, but exceptions are also grafted onto both parts of the test. Violent forms are excluded from the first test's definition of expression[58] and, under the second test, the presumption of invalidity for purposeful breach is qualified by an exception for the physical consequences of expressive activity.[59] In this way, activities that would satisfy the preliminary definition are excluded from s.2(b).

To the extent that it defined what is included in s.2(b), *Irwin Toy* is less problematic.[60] More difficult to understand are its exclusionary criteria and adoption of the purpose-effect distinction in this context. Inherent in such an elaborate series of inquiries is substantial analytical overlap. Following this decision, the lower courts will be required to draw distinctions between form and content,[61] purpose and effects,[62] and speech and its consequences in order to determine the preliminary issue of breach.[63] Then, under section 1, they must assess the legitimacy of the state objective and apply the three part proportion

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[55]*Irwin Toy*, *supra*, note 5 at 968.

[56]*Ibid.* at 969 (stating that "if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee"). Any interpretation of s.2(b), including one that is literal, will be definitional, because it gives the words "freedom of expression" meaning. In constitutional terms, however, a literal approach is non-interpretive: the words receive a popular, rather than a jurisprudential, interpretation.

[57]*Ibid.* at 971-77.

[58]*Ibid.* at 970.

[59]*Ibid.* at 974-76.

[60]A definition of expression as any activity which attempts to convey meaning is somewhat vague because it does not specify whether this criterion is subjective or objective. The Court may have a mixed test in mind: the claimant must show a subjective intention to communicate, which can objectively be understood as having "meaning". Interpreted in this way and without reading substantive content into the word "meaning", *Irwin Toy* would only exclude activity that is not cognizable as expression. Given the function of section 1, this definition would have sufficed without any further qualification.

[61]This is the dichotomy the Court created in the first step of its test.

[62]This distinction is the basis on which the second step of the test rested.

[63]This is the "physical consequences" exception the Court grafted onto the second step's concept of purposeful breach.

ality test of *Oakes*.[64] Such a complex doctrinal overlay can only cause problems of implementation. This difficulty is compounded by the lack of any substantive concept of expressive freedom or vision of the *Charter*'s structural logic.[65]

B. Defining "Expression"

Unless the Supreme Court of Canada is prepared to protect all conduct which an individual subjectively characterizes as expressive, a definition of expression is unavoidable. Accordingly, the first step in *Irwin Toy*'s test seeks to separate activity that is constitutionally protected from that which is not. In doing so, it defines what expression is, distinct from conduct, with more precision than the *dicta* in *Dolphin Delivery*.[66] The examples which the Court invoked to illustrate the difference between protected expression and unprotected conduct initially appear unproblematic: they recall the speech-conduct distinction of American first amendment jurisprudence. Conclusions that parking a car, murder and rape are not protected by s.2(b) respond to the instinct that there must be a difference between pure conduct and constitutionally protected expression.[67]

The difficulty is that, although parking a car normally has no expressive content beyond the observable physical act, in some cases it might. *Irwin Toy* acknowledged this possibility by stating that car parking can attain constitutional dimensions when a claimant establishes that the physical act is accompanied by an attempt to convey meaning.[68] Nonetheless, having articulated a definition of "expression" that is effectively literal, and having potentially extended it to all conduct which conveys a meaning, the Court retreated into a double standard. Though car parking may occasionally come within s.2(b), murder and rape are absolutely excluded.[69] As an explanation, the Court simply

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[64]*Supra*, note 11 (requiring the courts to determine the permissibility of the state's objective before assessing the reasonableness of its means through a three part proportionality test).

[65]At the outset, the Court stated that "[c]learly, not all activity is protected by freedom of expression, and governmental action restricting this form of advertising *only* limits the guarantee if the activity in issue was *protected* in the first place." *Irwin Toy*, *supra*, note 5 at 967, emphasis added. Since advertising is undeniably a form of expressive activity, this statement reveals an assumption that a non-literal or definitional interpretation of s.2(b) is appropriate. The Court did not rationalize this concept of expressive freedom, except by citing *Dolphin Delivery*, *supra*, note 13, *Big M*, *supra*, note 14 and some American commentary, none of which addresses the relationship between s.2(b) and s.1.

[66]*Ibid.*

[67]*Irwin Toy*, *supra*, note 5 at 969 (stating that "some human activity is purely physical and does not convey or attempt to convey meaning.").

[68]Thus an unmarried person might park in a zone reserved for spouses of government employees to protest that form of preferential treatment based on employment and marital status. *Ibid.*

[69]"While the guarantee of free expression protects *all content of expression*, certainly violence as a *form of expression* receives *no* such protection." *Ibid.* at 970, emphasis added.

asserted that "freedom of expression ensures that we can convey our thoughts and feelings in non-violent ways without fear of censure".[70]

With respect, a definition of expression which selectively excludes certain types of communication on the basis of their "form" fails to explain why some expressive activities are governed by a concept of breach, and others by section 1's standard of justification. When an act is purely violent and not cognizable as expression, perhaps it should be excluded from s.2(b), as in the case of murder or rape *simpliciter*.[71] When conduct can be identified as expression, however, the real issue is whether its undesirable elements are harmful enough to justify its prohibition under section 1. As a result, the analysis which the Court applies to car parking applies with equal force to "violent" forms of expression. Just as a court might conclude that blocking the emergency entrance to a hospital is an unjustifiable means of protesting the lack of intensive care services, it might also conclude that property destruction is not an acceptable by-product of labour picketing. Under a bifurcated scheme, consequences which compromise an individual's entitlement to *Charter* protection do not raise a question about the *definitional* scope of the right; more accurately, they raise an issue about the justifiability of denying *Charter* protection in the *contextual* circumstances surrounding the exercise of the right.[72]

Instead of denying that activity which has a violent element can be considered "expression" under s.2(b), the Court should give it *prima facie* protection and deal with any elements that compromise its constitutional status under section 1.[73] The justificatory analysis need not be complex: it can hardly be disputed that peace and order are sufficient reasons for prohibiting expression which incites acts of violence.[74] In lieu of a simple justificatory analysis, however, the first part of *Irwin Toy*'s s.2(b) test introduced criteria which have the effect of pre-empting section 1 review. The reflex to exclude violent forms is

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[70]*Ibid.* The Court cited the *dicta* of *Dolphin Delivery*, *supra*, note 13 that s.2(b) would not protect threats of violence or acts of violence. Curiously, it did not include *Dolphin Delivery*'s references to assault, property destruction and other clearly unlawful conduct, and otherwise did not explain why violent expression should be singled out for exclusion.

[71]In excluding violent forms of expression, the Court drew no distinction between those that attempt to convey a meaning, and those that do not. Instead of limiting the exclusion to acts of pure physical violence, the Court explicitly stated that certain forms of expression are outside the guarantee, even if they are "chosen to convey a meaning". *Ibid.* at 970.

[72]In *Ford*, *supra*, note 53 at 766, the Court suggested that the functional difference is that s.2(b)'s analysis is definitional, and section 1's is contextual. The difficulty is that any non-literal definition of expression will unavoidably be contextual. The point is pursued in the text.

[73]It bears repeating that conduct should only receive preliminary recognition under s.2(b) if it attempts to convey meaning or, in other words, is cognizable, on a mixed subjective-objective test construed liberally in favour of the guarantee, as expression.

[74]A detailed proposal suggesting the modifications to the *Oakes* test which would be necessary to accommodate the possible range of s.2(b) issues which can arise is beyond the scope of this Comment. See Cameron, *supra*, note 15.

instinctive, but it nevertheless obscures the distinction between breach and justification. Because "violent forms" do not exist in the abstract, the threat which they pose to society can only be assessed contextually. By failing to distinguish between acts of gratuitous violence and violent conduct which may also be expressive, the Court's concept of expression as "meaning" and violence as "form" renders uncertain the status of many communicative activities.

One step removed from pure violence having no discernible communicative intent, the exclusion is problematic. Any number of violent "forms" can be placed along a spectrum from political terrorism to flag desecration to picketing to hate literature and obscenity to the abstract advocacy of socialist revolution. Whether or not any particular form is protected by the *Charter* will depend, in large part, on the imminence and severity of the violence threatened or incited: in other words, by the justifiability of prohibiting it on the facts of the case. By making this an issue of initial entitlement, rather than of contextual assessment, the Supreme Court of Canada has confused the concepts of breach and justification, and encouraged the lower courts to draw non-existant definitional lines. In the end, an exclusion that might appear both limited in scope and intuitively correct is unworkable because it is analytically flawed.[75] As Justice LaForest has stated: the Constitution must be applied "on a realistic basis ... and not on an abstract theoretical plane".[76]

C. Purpose and Effect

The first step of the analysis is symptomatic of problems inherent in the entire decision. Whereas that step introduced justificatory criteria to rationalize an exclusion for violent communications, the second step did so by drawing further distinctions between protected and unprotected expression. The result is a decision which endorses a baffling double standard whereby a presumption of invalidity applies in cases of *purposeful* interference with expressive freedom, and a presumption of validity, in all other cases where the state has merely *affected* expressive freedom. Although the presumption of validity can be rebutted by evidence that the claimant's activity is valuable s.2(b) expression, that inquiry is completely irrelevant in cases of purposeful breach.[77] In this way, *Irwin Toy* discriminates between different kinds of s.2(b) claims.

This analytical structure demonstrates, once again, the Supreme Court of Canada's unwillingness to choose between competing conceptions of the *Charter*'s bifurcated scheme. As a result, its twin doctrinal standards are in a state of tension, both with themselves and with each other. For example, by ini-

[75]The same is true of the Court's exception for "physical consequences", which is discussed in the next section of text.

[76]*Edwards Arts*, *supra*, note 11 at 795 (concurring opinion).

[77]*Irwin Toy*, *supra*, note 5 at 971-77.

tially defining expression as the attempt to communicate, the Court adopted a conception of the right that was essentially literal. As such, the first part of the analysis appeared to approve of a justificatory approach, which presumes the breach and requires the state to establish its reasonableness. At the same time, however, the Court excluded violent forms from this definition of expression. In the absence of an explanation, it seems to have concluded that violent expression does not warrant *Charter* protection, thereby simultaneously embracing a conception of the right as a privilege to which a claimant must establish entitlement.

There is a parallel in the second part of the analytical framework. A finding of breach in every case of purposeful interference suggests that limitations are viewed as exceptions from a presumption in favour of the right.[78] However, by imposing a burden on all those whose expressive freedom has merely been adversely affected, *Irwin Toy* also endorsed a conception of the right that requires the claimant to establish his entitlement to the constitutional guarantee.[79] Finally, the literal approach of the first test creates tension with the purpose-effect focus on the quality of the violation. This conceptual see-saw reveals the Court's unwillingness to decide whether limitations on individual rights should be substantively defined, or otherwise identified through a justificatory analysis. In the end, *Irwin Toy*'s framework appears guided by raw instinct, rather than by any concept of the *Charter*'s structural logic or of expressive freedom.[80]

Turning specifically to the Court's discussion of purposeful interference, *Irwin Toy* grafted additional exceptions onto its presumption of invalidity in such cases. In doing so, it further dissected the substantive right and created additional difficulty. Restrictions on expressive freedom which are aimed at the content of a communication constitute a *prima facie* breach of the *Charter* because they are purposeful, unless they merely prohibit the physical consequences or the direct physical results of expressive activity.[81] Presumably, such

[78]The accuracy of this statement turns on the definition of "purpose". If any direct interference is considered purposeful, that effectively would mean that a breach occurs every time the state infringes expressive freedom. Because most infringements arise from provisions that prohibit expressive freedom on the face of the legislation, this interpretation of "purpose" would give the presumption of unconstitutionality a broad scope. On the other hand, if a claimant must show bad "motive" or *mala fides* to establish a breach, this would restrict the presumption of invalidity. This issue is discussed further in the text.

[79]Under this criterion, the fact that the state has interfered with the constitutional guarantee is not sufficient to constitute a breach until the claimant establishes the social utility of his expressive activity.

[80]The purpose-effect distinction was introduced in *Big M*, *supra*, note 14, a case concerning the scope of s.2(a). Not only did the decision in *Irwin Toy* merely assume its applicability to s.2(b), *infra*, note 94, it used the distinction to restrict the scope of the guarantee, though *Big M* did not.

[81]*Irwin Toy*, *supra*, note 5 at 974-76.

prohibitions do not violate s.2(b) because they control the results of expressive activity, not its content.

Even without section 1's overlay of reasonable limits, this distinction would be difficult to grasp. The attempt to isolate an act of communication from its consequences is artificial and formalistic. Expressive activity is not always discrete; when speech is merged with conduct and communication is inseparable from its consequences, an abstract right cannot be defined in terms of protected expressive elements and unprotected consequences. As Justice Holmes observed, "[e]very idea is an incitement".[82] Expressive elements cannot be detached from their contextual setting because the scope of the right and its permissible limits inescapably collapse into a question of fact.[83] Precisely because section 1 exists, a literal conception of expressive freedom is structurally and analytically unavoidable.

The Court's exclusion of physical consequences may have its roots in *Dolphin Delivery*'s exceptions for acts of violence, property destruction and assault. But it is also predicated on an assumption that it is possible to deal with some undesirable consequences under s.2(b) and others under section 1. The difficulty is that *Irwin Toy* never explains why "non-physical" consequences pose a section 1 issue and "physical" consequences, a s.2(b) issue.[84] For example, is perjury included because it is not a violent form and usually does not produce physical consequences; and is the incitement of non-violent crime constitutionally protected, though the solicitation of violent crime is not; or finally, are the physical consequences of expression somehow more damaging than its non-physical results, as in defamation cases? Additionally, *Irwin Toy* also fails to suggest how the physical and non-physical should be distinguished as a mat-

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[82]*Gitlow* v. *New York*, 268 U.S. 652 at 673 (1925) (dissenting opinion).

[83]The same is true of the exception for violent forms.

[84]The Court's distinction between a prohibition against the distribution of pamphlets and a rule against littering illustrates the point: whereas the former is tied to content, the latter simply aims to control the physical consequences of conduct, "regardless of whether that conduct attempts to convey meaning." *Irwin Toy*, *supra*, note 5 at 975. Assuming the soundness of that example, it is unclear how it would apply to others such as flag desecration, the erection of a peace camp on Parliament Hill, and a prohibition on overnight sleeping in a public park. See *Texas* v. *Johnson*, 109 S.Ct 2533 (1989) (flag desecration); and *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288 (1984) (sleep-in to protest the plight of the homeless). They all fit the Court's exclusionary criterion for physical consequences, despite the attempt to convey meaning in each case. Only the prohibition on flag desecration appears aimed at the content of the message.

ter of doctrinal application.[85] Ultimately, therefore, the dichotomy is less analytical than intuitive.

These points can be further illustrated through an analogy between advertising aimed at children and other forms of solicitation, such as tobacco advertising and street-walking.[86] Given evidence about the consequences of advertising aimed at children, it is not even clear why *Irwin Toy* was decided under section 1.[87] Conceptually, it is doubtful there is much difference between buying a toy, a carton of cigarettes or sexual services: much expressive activity eventually leads to physical action. Functionally, in terms of the relationship between s.2(b) and section 1, it is doubtful there is any difference at all. The characterization is unworkable because, ultimately, undesirable consequences, whether physical or non-physical, raise a question of justification, not of abstract entitlement.

However, by creating a dichotomy and then neglecting to articulate a concept of causation to support it, *Irwin Toy* leaves lower courts free to draw the exception as narrowly or expansively as they please. While a generous interpretation of the exception could result in the exclusion of advertising, a peace camp or flag burning, a narrow interpretation could render it ineffective. Under an alternative reading, as long as the state remains free to punish the perpetrator of physical consequences, any expressive activity which is discrete would initially

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[85]The Court makes confusing reference to the role of any "intervening element of thought, opinion, belief, or a particular meaning"; *Irwin Toy, ibid.* The distinction appears to be that where any intent to communicate can be found, the activity will be protected as expression. Where such an intention cannot be found, the state's prohibition of the subsequent physical consequences will not be considered a violation because the activity did not constitute a communication. Unfortunately, this refinement is not helpful. Because it is expressed in abstract terms, it overlooks the fact that physical action is always preceded by a decision to create consequences. If that is so, the exception is meaningless: where a cognitive element has not intervened, as perhaps in cases of murder and rape, the activity in question is pure conduct. The definition of expression addressed that point, and by employing slightly different doctrinal language to cover it again under step two, the Court added a confusing gloss.

[86]The cases dealing with solicitation for the purpose of prostitution are currently before the Supreme Court of Canada. For lower court opinions, see *Reference Re Sections 193 and 195.1(1)(c) of the Criminal Code*, [1987] 6 W.W.R. 289, 49 Man. R. (2d) 1 (C.A.); *Skinner* v. *R.* (1987), 58 C.R. (3d) 137, 196 A.P.R. 8 (N.S. C.A.); and *R.* v. *Jahelka* (1987), 58 C.R. (3d) 164, 54 Alta. L.R. (2d) 1 (C.A.). An action challenging the constitutionality of restrictions on tobacco advertising is pending; see *Rothmans, Benson & Hedges* v. *A.G. Canada* (August 17, 1989), A-301-89 (F.C.T.D.).

[87]The Court's distinction between regulations aimed at content and mere physical consequences is based on a distinction between conduct that is triggered by elements of thought, opinion or belief, and conduct which is not, *supra*, note 84. Despite this distinction, the Court upheld these regulations because of the susceptibility of young children to manipulative or misleading advertising. If the basis of the decision is that children, as listeners, lack the capacity to interpose an element of cognition, consumer purchases resulting from the speaker's advertising are a physical result which might be excluded from s.2(b) on the Court's own analysis.

be protected.[88] As the Court pointed out, legislation prohibiting the distribution of literature would violate s.2(b), though legislation punishing those who commit the act of littering would not.[89]

This interpretation of *Irwin Toy* produces a rule of adjudication which would treat any interference with expressive activity, even that which is quasi-physical, as a breach, because the state can punish any purely harmful conduct. If this is how *Irwin Toy* should be read, prohibitions on expression that produces consequences, whether immediate or remote, trigger section 1 review.[90] On this view, the Court's definitional restrictions collapse into the preliminary definition: the exceptions for violent forms and physical consequences are redundant because pure conduct is outside the conception of expression as an attempt to convey meaning.[91]

Beyond these problems of implementation, *Irwin Toy* is troubling because it fails to respect the structural integrity of the *Charter*. The Court appeared unaware of the need to distinguish between breach and justification, or to preserve the functional role of section 1.[92] Although the Court may have been correct in excluding non-communicative conduct from the scope of s.2(b) because, definitionally, it is not "expression", *Irwin Toy*'s other criteria are justificatory. The exclusion of violent forms and other expressive activity giving rise to physical consequences is not based on any conclusion that it is not expression, but on an instinct that it is permissible for the state to prohibit communicative activity that is linked to undesirable consequences.

Both conceptually and structurally, the problem with imposing definitional limitations on freedom of expression is that the right cannot be defined in the abstract, without a contextual assessment of its surrounding circumstances. Because that assessment must be experiential, it cannot be reduced to an

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[88]On this analysis, pure physical conduct would remain outside s.2(b) but activity which has undesirable physical consequences would be protected, subject to section 1's justificatory analysis.

[89]*Irwin Toy*, *supra*, note 5 at 974-75. By adding the qualification that littering is excluded, "even if it attempts to convey meaning", the Court created additional confusion. Littering is somewhat like parking a car: it is an ordinary physical act which only occasionally has expressive content. In the case of car parking, however, the Court acknowledged that the physical act would be protected if it attempted to convey a meaning, *supra*, note 68. By stating a different rule for car parking and littering, the second step of *Irwin Toy* contradicts the first. The purpose-effect distinction does not explain the conflict.

[90]This interpretation would extend s.2(b)'s protection to tobacco advertising, solicitation for the purpose of prostitution, incitement, hate literature, obscenity, and a range of expressive activities which induce physical results, whether directly or indirectly.

[91]"Violence" is a subset of the more amorphous category of "physical consequences". By separating violent forms from other physical consequences, the Court inferred a distinction between the two which may not exist.

[92]Compare *Ford*, *supra*, note 13 at 766 (emphasizing the distinction between s.2(b) and s.1 analysis).

abstract definition. An assessment which is inescapably contextual and justificatory should be conducted under section 1. By doing otherwise, *Irwin Toy* has introduced a confusing doctrinal solution which attempts to bifurcate the issue of permissible limitations, addressing it under both s.2(b) and section 1.

If *Irwin Toy*'s exceptions for violent forms and physical results are difficult because they undercut section 1, the purpose-effect distinction is problematic for additional reasons. First, it is implicit in *Irwin Toy*'s definition of expression as an attempt to convey meaning that any interference with expressive activity constitutes a *prima facie* breach. From this perspective, the conceptual and analytical utility of a second level of analysis is not apparent.[93] Second, and perhaps more importantly, the purpose-effect distinction does not apply in this context: whether or not an individual's expressive activity advances s.2(b)'s underlying values is irrelevant in determining the existence of a violation. According to the Court, however, regulations which undeniably infringe expressive freedom are presumed to be valid until the claimant affirmatively establishes that the activity promotes s.2(b)'s underlying values.[94] The Supreme Court of Canada has created a double standard based on the erroneous assumption that its severity somehow determines whether a breach has occurred.[95]

Conceptually, the difficulty is that *Irwin Toy* treats *Big M*'s purpose-effects distinction as a proxy for the principle of content neutrality.[96] Unfortunately, the analogy does not work. Any requirement of purposeful interference is actually in conflict with content neutrality because it implies that the state's motive is relevant.[97] Any focus on the state's purpose requires the judiciary to speculate on why the legislature prohibited certain activity. In many cases, it will be difficult, if not impossible, for the judiciary to determine whether a breach was purposeful. Anti-solicitation legislation may seek to censor the offer to engage in immoral conduct, to eradicate a visible public nuisance, or both. Parliament's motive should be irrelevant, however, because the mere fact that it has selec-

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[93]In adopting the distinction in *Irwin Toy*, the Court simply stated that "[t]he importance of focussing ... on the purpose and effect of the legislation is nowhere more clearly stated than in [*Big M*]". *Irwin Toy*, *supra*, note 5 at 972.

[94]*Ibid.* at 976-77.

[95]It is beyond the scope of this Comment to discuss the relevance of purpose and effect in other contexts, such as s.15.

[96]The Court's discussion suggests that it views the concept of purposeful breach as the functional equivalent of a principle of content neutrality, the governing rule of first amendment doctrine. Unfortunately, the Supreme Court of Canada has erred in equating this principle with the purpose-effect distinction. In American doctrine, content discrimination presumptively violates the first amendment, without any inquiry into purpose or motive. Furthermore, state action which has the effect of denying expressive freedom is also considered a *prima facie* violation of the Constitution. Although content distinctions are judged by a higher standard of review, that is reflected in the American equivalent of section 1 analysis, rather than in any preliminary determination about the definitional scope of the right. For further discussion of this point, see Cameron, *supra*, note 15.

[97]*Irwin Toy*, *supra*, note 5 at 973.

tively regulated expressive activity on the basis of its content betrays a purpose that is presumptively unconstitutional. In this context, "purpose" should be synonymous with purposeful.[98] Accordingly, a breach is established whenever the state interferes with expressive freedom, regardless of its purpose or motive in doing so.

Any other interpretation of this requirement would compromise the concepts of breach and justification. In the case of street-walking, for example, it would be difficult to argue that Parliament's selective targeting was not purposeful, because the provision regulates a single form of solicitation based on its content. However, when motive is confused with purpose, a less insidious interpretation can be suggested: on this view, the legislation simply regulates the streets, without censoring prostitution. Tobacco advertising provides a further example of the way in which a focus on purpose can deflect the analysis. It is undeniable that, on its face, restrictions on tobacco advertising constitute a form of content discrimination; at the same time, however, the legislature's interest can be characterized as concern for the safety of smokers, prospective smokers and those exposed to secondary smoke. If purpose is made synonymous with motive, the health and street control rationales become the functional equivalents of *Oakes*'s sufficiently important government objective.[99] Ultimately, any assessment of the legislature's objectives unavoidably engages the justificatory issue. Because this is the function of section 1 review, the state purpose is not relevant in determining whether there has been a breach.

Furthermore, any distinction between purpose and *effect* is also unsound. Once an interference with expressive freedom is established, the state's reasons for violating that constitutional right have no relevance whatsoever. Even if the purpose of the anti-solicitation legislation is street control, this does not mean that the prohibition interferes any less with the expressive freedom of those who wish to solicit acts of prostitution. Similarly, Parliament's prohibition against the erection of structures on Parliament Hill might not be "aimed at" expressive

[98]Instead of suggesting a subjective intent, it should only require a direct interference with expressive freedom.

[99]This is alarming because it assumes the relevance of division of powers principles in *Charter* adjudication, *Irwin Toy*, *supra*, note 5 at 973-74. However, the purposes of the analysis are entirely different: in the division of powers context, the judiciary would ask whether restrictions on the activities of prostitutes were aimed at the regulation of streets or were, in their pith and substance, an attempt to engage the federal criminal law power. See *Westendorp* v. *R.*, [1983] 1 S.C.R. 43, 2 C.C.C. (3d) 330. Jurisdictional analysis cannot apply under the *Charter*, because the state's purpose in violating a guarantee is irrelevant. By suggesting that division of powers concepts somehow control the scope of s.2(b), the Court has introduced the justificatory criteria into the concept of breach. Any focus on purpose at this stage of the analysis destroys the distinction between breach and justification.

freedom but when the state tears down a peace camp pursuant to such regulations, expressive freedom has nevertheless been violated.[100] Although the state's objective in restricting expressive activity is unquestionably relevant under section 1, it makes no contribution to the prior question whether the state has interfered with expressive freedom. Requiring one set of claimants to establish the social utility of their expressive activity, while assuming its value in the case of others, is inappropriate. Moreover, by requiring some to prove the social utility of their expressive activity, while assuming its value for others, *Irwin Toy* creates further conflict between its definitional restrictions and the initial definition of expression. The result is confusion.

Conclusion

This Comment has challenged the assumption that definitional limitations are either conceptually sound or analytically workable. *Irwin Toy* demonstrates that, at least in the context of s.2(b), restrictions on the substantive guarantee compromise the functional integrity of section 1. Though the decision to exclude violent forms and expressive activity resulting in physical consequences is instinctive, such exceptions are directly based on justificatory criteria. Despite the strength of those instincts, it matters where the justificatory analysis is undertaken.[101]

The right cannot be limited, as an abstract entitlement, by definitions that require contextual application. In addition, because this analysis must be contextual, it unavoidably focusses on the permissibility of limitations on expressive freedom. Criteria that fail to distinguish between a "violent form" and violence itself or between physical and non-physical consequences, and which make the initial entitlement contingent on a purpose-effect distinction render *Irwin Toy* unworkable.

Furthermore, these criteria do not have a jurisprudential content independent of the justificatory issue. They are offered without any substantive or institutional explanation of the Court's conception of expression. Given the purposes of the bifurcated scheme, it is doubtful that any definition imposing normative restrictions on the scope of s.2(b) can be sustained.[102] Institutionally, the covertness of definitional interpretation may do more to undermine the legitimacy of

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[100]*Supra*, note 84. The peace camp was removed pursuant to regulations which prohibited the erection of structures on Parliament Hill.

[101]I am often confronted with the accusation that the original conception of section 1, as I describe it, is both purist and unrealistic. I am told that not only do definitional limitations ease the burden of section 1 review, but they are positively beneficial. For example, who could doubt the wisdom of denying all constitutional status to perjury or criminal solicitation? For a full defense of my views, see Cameron, *supra*, note 15.

[102]Once again, support for this position will be found in Cameron, *ibid.*

review than would analysis under section 1.[103] Finally, the Court's unwillingness to confront the interpretative issues inherent in the bifurcation of the rights and their limitations perpetuates the ideological confusion surrounding the text and the reluctant jurisprudence it has generated.

However, the Supreme Court may be able to remedy the confusion created by *Irwin Toy*. First of all, *Irwin Toy* can and should be"read down".[104] Instead of applying its complex framework literally, it is open to the Supreme Court of Canada to treat the preliminary definition of expression as its governing concept. Thus, the exceptions for violent forms and physical consequences would be understood as illustrations of pure conduct outside the scope of expression as an attempt to convey meaning. The purpose-effect distinction can also be minimized by following decisions which endorse an expanded interpretation of s.2(b).[105] The distinction can then be recalled under section 1, where the reasons for the state's violation of a constitutional right are weighed against the values which the expressive activity serves. In this way, the functional equivalent of a literal interpretation can be substituted for *Irwin Toy*'s definitional limitations.

A literal interpretation of s.2(b) is synonymous with the original conception of section 1. Adopting that interpretation therefore makes the reform of *Oakes* necessary. Accordingly, a second suggestion is that the Supreme Court of Canada introduce diverse standards of justification to accommodate the range of s.2(b) issues that will arise. Such a project is as imperative as it is inevitable.[106]

Section 1 makes the *Charter* distinctive: it is a testament to our commitment to democratic values. We should not shy away from the task or be frightened by it. The balance between individual rights and community values will not be found in the guarantees but must be addressed, frankly and openly, under section 1. Retreating into doctrinal formulas within the substantive guarantees is not the answer.

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[103]A doctrinal framework that is vague and difficult will generate a jurisprudence of irreconcilable results.

[104]*Irwin Toy* is a weak precedent: only five members participated; two dissented from the majority opinion, and two of the five have resigned their positions. Still, it is more realistic to expect the Court to reinterpret these criteria than abandon them.

[105]*Supra*, note 45. It is open to the Court to give s.2(b) a liberal interpretation, despite *Irwin Toy*'s references to the purpose-effect distinction. Given liberal statements about the scope of s.2(b)'s underlying values in *Dolphin Delivery*, *supra*, note 13 and *Ford*, *supra*, note 13, there should be no difficulty in finding a breach in cases where the state interfered with expressive freedom, but not purposefully.

[106]Once again, see Cameron, *supra*, note 15, which provides a comprehensive proposal for the reform of *Oakes* in all s.2(b) cases.