CONTEXTUAL EQUILIBRIUM V. CONFLICTING RIGHTS

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ABSTRACT

This article examines what is at the core of situations where it is alleged that rights are in conflict. The article examines critically the thesis of eminent jurist, Justice Frank Iacobucci, who claims that rather than focusing on how to address conflict of rights, courts and tribunals should focus on how to reconcile rights and that this task is different from that of balancing rights under Section 1 of the Canadian Charter of Rights and Freedoms. The article attempts to demonstrate that in reality both what is termed reconciling rights and balancing rights is part of what the author terms ascertaining the "contextual equilibrium" of rights.

1. CONTEXTUAL EQUILIBRIUM V. CONFLICTING RIGHTS UNDER THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

One of the most overlooked quotes from the Supreme Court of Canada is the landmark ruling of Justice Dickson on the overarching values to be kept in mind in interpreting the *Canadian Charter of Rights and Freedoms* including Section 1 in the *R v. Oakes* (1986] 1 S.C.R. 103). He stated that the key values of the Charter can be found in the phrase "free and democratic society" and should also be used as the "ultimate standard" for interpretation of section 1. Chief Justice Dickson put this ultimate standard in the following terms:

> Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the Charter was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

While these values will inevitably conflict in theory, what the Court in *Oakes* and in subsequent decision have strived to do is to "hunch" out a jurisprudential framework of what I call "contextual equilibrium" in concrete cases where these values may conflict. In some of the leading decisions on the *Charter*, the conflict has been between two sets of rights but in other cases between rights and the other values not exhaustively listed by Chief Justice Dickson in his statement on what are the

foundational societal values of a free and democratic society. In both cases, but especially in the latter case, the focus will immediately turn to the proportionality analysis in Section 1 of the *Charter.* This analysis will focus primarily on the situation where the values underlying two sets of rights may appear to be in conflict.

Because these values, even though they may conflict in theory, are the fundamental values of the *Charter*, they are supposed to guide not only the development of the common law, but also the interpretation of statutory law in Canada, including quasi-constitutional human rights legislation, such as the *Ontario Human Rights Code (Code).*

Justice Frank Iacobucci, one of the most influential justices on the Supreme Court that has shaped the evolution of the *Charter,* has proposed that rather than addressing conflict of rights, there should be a focus on *reconciling* rights, (Supreme Court Law Review (2003) 20). This is crucial because the Supreme Court has insisted that there is no hierarchy of rights to be inferred from the jurisprudence of the Charter and that no one right should be privileged at the expense of another. This critical ruling by the Supreme Court was firmly stated by Chief Justice Lamer in *Dagenais v. Canadian Broadcasting Corporation (Dagenais [1994] 3 S.C.R. 858 at 877):*

> 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.

The way in which Justice Iaccobucci and most *Charter* decisions have attempted to avoid the emergence of hierarchy of rights is through the fundamental appreciation of rights in context. Before this can be illustrated, Justice Iaccobucci points out that the reconciliation of rights must be distinguished from balancing rights under Section 1.

While Section 1 analysis deals with putting the onus on the government to justify the violation of a Charter right, Justice Iaccobucci argues that the reconciliation of rights focuses on the values of different *Charter* rights in dealing with the problem before the Court. This requires an examination of the underlying interests at stake in the context in which the *Charter* rights are being asserted.

While Justice Iaccobucci may wish to call this reconciliation of rights, it is suggested that what is really occuring is attempting to put rights that seem to conflict into an equilibrium depending on what particular interests are at stake in any particular fact situation. This is also a key objective of the balancing test under Section 1 of the *Oakes Test*. For that reason, I do not agree with the learned Justice that there is much difference between the framework involved in the balancing of rights and that of reconciling rights. They both involve what I call searching for the "contextual equilibrium" of rights that may at first seem to be in conflict.

Justice Iaccobucci insists that the difference between rights balancing and rights reconciliation is that the former connotes assigning primacy to one right over another right or interest under the Section 1 analysis. In contrast, the learned judge argues that reconciliation of rights is the exercise that courts engage in when they define the content and scope of rights in relation to one another.

What is surprising is that Justice Iacobucci also points to what I consider perhaps the paradigm of reconciling rights or what I term contextual equilibrium as the application of the traditional balancing test, namely the decision on *R. v. Keegstra ([1990] 3 S.C.R. 697*). I suggest the key part of the attempt to find a contexual equilibrium of the rights and interests involved in the Keegstra fact situation was articulated in this crucial statement by Chief Justice Dickson for the majority:

> As I have said already, I am of the opinion that hate propaganda contributes little to the aspirations of Canadians or Canada in either the quest for truth, the promotion of individual self-development or the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged. While I cannot conclude that hate propaganda deserves only marginal protection under the s. 1 analysis, I can take cognizance of the fact that limitations upon hate propaganda are directed at a special category of expression which strays some distance from the spirit of s. 2(b), and hence conclude that "restrictions on expression of this kind might be easier to justify than other infringements of s. 2(b)" (Royal College, supra, at p. 247).

The strong dissent in *Keegstra* by Madam Justice McLachlin (as she then was) focused on how, in primarily principled argumentation, the general prohibition against hate propaganda in Section 319(2) of the *Criminal Code* was overbroad, too vague and subjective and therefore failed under each part of the *Oakes Test.* In contrast, the main thrust of the majority's decision as articulated by Chief Justice Dickson seemed focused on seeking a

contextual equilibrium in concrete situations where the individual right of free expression in the particular context of the facts in *Keegstra* conflict with the group rights of the targeted minorities to equality. In order to find that equilibrium, Chief Justice Dickson sought to locate the core of the rights being asserted and then ascertain based on the facts of the particular context in *Keegstra*, whether those core values of the rights asserted are indeed at play or are really peripheral in the actual factual context. Then the rights whose core values are not at play will have to be placed in a just equilibrium with rights whose core values are at play.

This approach can be termed balancing rights, reconciling rights or my preferred term of contextual equilibrium of rights in concrete factual situations. In *Trinity Western University v. College of Teachers (British Columbia, ([2001] 1 S.C.R. 772)* the Court faced one of the most controversial of so-called conflict of rights contexts. As is well known, here the Court had to reconcile, balance or find a contextual equilibrium between the religious freedoms of individuals choosing to attend an evangelical institution and the equality concerns of potential discrimination against students in the B.C. school system. The Court ruled that the Charter did not apply but went on to make the point that there was not really a *conflict of rights on the particular facts involved*. Instead, the majority judgment ruled that any potential conflict between religious freedoms and equality rights should be resolved through the proper delineation of the rights and values involved. On the particular facts of the case, a delineation of the rights involved did not indicate a conflict of rights. There was no concrete evidence that training teachers at Trinity Western fosters discrimination in the public schools of British Columbia. The Court ruled that the freedom of individuals to adhere to certain religious beliefs while at the institution had to be respected. However, the Court warned that if there was evidence of acting on those beliefs, the context would shift dramatically.

I have argued elsewhere (Mendes,(1992) *N.J.C.L.* 283) that many, if not most of the rights under the Charter can be regarded as collective rights in the sense that they can be experienced in the context of group activities such as freedom of religion, association, assembly, expression and the rights to liberty and security of the person. In some contexts one could regard the claiming of individual rights as a way of advancing the rights of a collectivity.

What are termed collective rights is part of humanity's desire to "self-collect" to belong in community. This is such an essential part of existence, that without the ability to fulfill it, we can not be fully human. The fact of human existence requires that we experience the world as much through community as through individual personhood. Rights are part of the world we experience both as individuals and in community and that is what makes them inalienable and deserving of protection. Contextual equilibrium requires societies that claim to be free and democratic to do justice to both sets of rights in concrete situations.

In this sense, contextual equilibrium moves away from the implication in the term "conflicting rights" that when such conflict occurs one right must trump over another. Contextual equilibrium instead can be analogized to a radar screen where in any factual context, the centre of the screen is the core values underlying each of the contested rights. It is suggested that in the vast majority of cases where there is a conflict of rights, one set of rights is closer to the core values underlying that right than the other one. In the case of the prohibition of the vilest forms of hate propaganda, for example, the equality and security of the person rights of the targeted groups are closer to the core values of those rights, than the freedom of expression rights of the hate monger. The core values of freedom of expression, as enunciated by Chief Justice Dickson in the *Keegstra* decision, are quite distant from the actual contextual free expression of a hate monger.

2. CONTEXTUAL EQUILIBRIUM V. CONFLICTING RIGHTS UNDER THE ONTARIO *HUMAN RIGHTS CODE*

In a paper prepared for the Ontario Human Rights Commission in August 2005 titled "Balancing Conflicting Rights: Towards an Analytical Framework", the unnamed author proposes an intriguing and creative framework for balancing conflicting rights. The paper first highlights what is termed two main paradigms for balancing conflicting rights. The two are termed pragmatic and principled balancing. The two are regarded not as binary opposites but necessarily intertwined in the analysis of any conflicting rights case. I will suggest below, both paradigms are an integral part of what I call the contextual equilibrium of rights that may seem in conflict.

The principled balancing paradigm is stated to focus on the values underlying the *Ontario Human Rights Code* and the *Charter* and delineates the rights in such a way as to avoid conflict. The pragmatic approach looks to provisions in the *Code* such as the exception sections of the *Code* and the duty to accommodate to allow two conflicting rights to be managed within a particular context. The paper first suggests that it is imperative that only actual conflicts of rights are approached as balancing tasks under either or both paradigms. I suggest that the determination of whether there is an actual conflict or not

is part of the first step of ascertaining the contextual equilibrium of rights that may only seem to be in conflict. Indeed, the *Trinity Western* decision of the Supreme Court described above is a classic example of this first step of the search for contextual equilibrium. The pragmatic approach then provides a template for discerning how, in a particular factual context, one determines how close or far any particular right is from the centre of the contextual equilibrium rights radar.

The Ontario Human Rights Tribunal's decision in *Berry v. Manor Inn ((1980) 1 C.H.R.R. D/152)* regarding a woman's right to breastfeed in public is an example of this contextual equilibrium approach. This and other often cited examples of two different claims for reasonable accommodation illustrated by the author of the *Ontario Human Rights Commission* paper is usually not a rights conflict but an inquiry into whether the specific needs of each rights claimer can be met within the parameters set by the *Code*.

2.1 THE PRINCIPLED BALANCING APPROACH: THE PREAMBLE TO THE *CODE* AND INTERPRETATIVE PRINCIPLES

It is suggested in the Ontario Human Rights Commission paper that the values in the preamble to the *Code* and how the courts have interpreted them bring into focus the need to balance individual and group rights along with community development and well-being in any claims brought under the *Code*. As discussed above, Chief Justice Brian Dickson's elaboration of the values of a free and democratic society under the *Charter* reinforces the principled position that individual and group rights are inextricably linked in the realm of human existence. For that reason, I would contest the claim that where the legislated exceptions in the *Code* are protective of certain collective rights, they should always be interpreted in a manner which predetermines the outcome in favour of any asserted individual right against discrimination, no matter how marginal. Where these exceptions are intended to protect fundamental collective rights, the provisions in the exceptions may well be an attempt to lay out a principled framework for contextual equilibrium between the individual rights to be free of discrimination and the collective rights encapsulated in the enumerated exceptions. Indeed, the fundamental purpose of the *Code* is the removal of discrimination, but this can also include unprincipled discrimination against the collective exercise of individual rights protected not only by the *Code,* but also by the *Charter,* which is now the supreme law of the land. Given the adamant rulings of the Supreme Court that there is no hierarchy of rights in the *Charter,* it should be assumed that there is also no principle in the *Code* that would give an automatic priority to any individual right to be free from discrimination against a fundamental collective right encapsulated in one of the exceptions in an actual factual context.

The principled approach outlined in the Commission paper is, I suggest, another way of describing the core values of the rights in the *Code* that identifies the centre of the contextual equilibrium radar screen.

3.1 THE EXCEPTION SECTIONS

The Ontario Human Rights Commission paper suggests there are several exception sections that operate as defenses and that respondents must meet the criteria to prove that they are entitled to the exception. The most critical ones are found in sections 18, 20(3) and 24 of the *Code*. Tribunals and Courts have rightly stated that these exceptions should be narrowly construed while the enumerated rights to non-discrimination must be broadly construed. The paper acknowledges that these exceptions attempt to balance freedom of association (often in the religious context) with the broader right to be free from discrimination protected under the *Code* and indeed under the section 15 equality guarantee of the Charter. The Supreme Court of Canada in *Caldwell v. Saint Thomas Aquinas High School ([1984] 2 S.C.R. 279)* also confirmed that such exception sections confers and protects rights, in particular the right to associate. In a crucial part of the ruling Justice McIntyre made the following ruling:

> There can be no serious question that Roman Catholic schools, having their special nature, have functioned and continue to function lawfully in the Province. On the other hand, the law of the land has conferred rights regarding employment which have come into conflict with the rights of the respondent in the operation of its denominational school…
>
> It is therefore my opinion that the courts should not in construing s. 22 consider it merely as a limiting section deserving of a narrow construction. This section, while indeed imposing a limitation on rights in cases where it applies, also confers and protects rights. I agree with Seaton J.A. in the Court of Appeal where he expressed this thought in these words:
>
> This is the only section in the Act that specifically preserves the right to

> associate. Without it the denominational schools that have always been accepted as a right of each denomination in a free society, would be eliminated. In a negative sense s. 22 is a limitation on the rights referred to in other parts of the *Code*. But in another sense it is a protection of the right to associate. Other sections ban religious discrimination; this section permits the promotion of the religion.

I suggest that what courts and tribunals have done in rulings on the narrow interpretation of the exception sections is to give advance warning that contextual equilibrium requires that such collective assertions of freedom of association, religion or other forms of collective rights *do not overreach* in attempting to "self-collect" in community with others similarly identified. Such examination of whether there is overreaching will include the test of "bona fide", what are the true core or primary interests of the collectivity and after the Supreme Court's ruling in the *Meiorin Grievance, ([1999] 3 S.C.R. 3),* the impossibility of accommodation without the imposing of undue hardship. Without commenting on the correctness of the Tribunal's decisions in the context of the most controversial of the exceptions, namely the special employment exception in section 24(1) of the *Code*, the allegations of overreaching of the collective right to freedom of association and religion was at the heart of the dispute that lead to the decisions in *Brillinger v. Brockie ([2002] O.J. No. 2375 Ont. Sup.Ct.), Parks v. Christian Horizons (16 CHRR D/40)* and in the more recent *Heinz v. Christian Horizons. (63 C.H.R.R. 12).*

2.1.4 CONCLUSION

This analysis has attempted to demonstrate that if we are to take seriously the repeated rulings of the Supreme Court that there is no hierarchy of rights under the *Canadian Charter of Rights and Freedoms* or under the provincial human rights legislation in Canada, there has to be both a principled and pragmatic way of achieving what I am calling a contextual equilibrium of seemingly conflicting rights in an actual factual context. What is often in dispute in situations that are termed conflicting rights is the assertion by one side in a factual context that a group has overreached in promoting its claim to a collective right to freedom of association, religion, expression etc., while the group that is asserting that right is concerned that their cherished beliefs, practices, rites or, in the case of linguistic minorities, their language rights, will be ultimately threatened by the peripheral intrusion against their claimed right.

The task then of the judge or human rights tribunal member is to ascertain where is the contextual equilibrium between the two sets of rights that can do justice to both but not constitute such an intrusion on either right that the fundamental values and principles underlying both the *Charter of Rights and Freedoms* and the *Code* are seriously impaired. In most cases, identifying what are the core values of each right that is situated at the centre of the contextual equilibrium rights radar will assist in the process of adjudicating what are termed conflict of rights. Sometimes it may require the wisdom of Solomon to do justice in these circumstances, but justice demands it.