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Competing Constitutional Rights: Developing the Canadian Approach

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ABSTRACT

When the state limits a right protected by the *Canadian Charter of Rights and Freedoms* (*Charter*), it must demonstrate that the limitation is justified in a free and democratic society. However, in certain circumstances a *Charter* right may also be limited by the valid simultaneous exercise of another individual's rights. To address these situations, Canadian courts have developed a test similar to the *Oakes* framework that asks: First, whether the rights conflict or overlap at all; second, if that conflict can be overcome by alternative, accommodating measures; and, if not, third, whether the proposed approach strikes a rights-respecting balance. But when they reach the third stage there is a palpable risk that they will conduct an improper balancing inquiry wherein the effects of *denying* one right are weighed against protecting the other, rather than the effects of *limiting* the right(s). Instead, if the exercise of both rights creates a true competition which cannot be accommodated, courts must reconcile the claims: They must redefine the strength of each right relative to the other's competing claims, to the broader factual matrix, and to the *Charter*'s interpretative guidelines, with the objective of facilitating

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the meaningful exercise of both rights. A balancing inquiry is only appropriate to the extent that it assesses whether the limitations (i.e., the results of the reconciliation analysis) are proportionate.

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RÉSUMÉ

Lorsque l'État limite un droit protégé par la *Charte canadienne des droits et libertés* (la *Charte*), il doit démontrer que cette limitation se justifie dans une société libre et démocratique. Toutefois, dans certaines circonstances, un droit garanti par la *Charte* peut aussi être restreint par l'exercice légitime des droits d'autrui. Pour traiter ces situations, les tribunaux canadiens ont élaboré un critère analogue au teste d'*Oakes*, qui amène à se demander : premièrement, si les droits sont en conflit ou se chevauchent ; deuxièmement, si ce conflit peut être surmonté par des mesures alternatives et accommodantes ; et, dans le cas contraire, troisièmement, si l'approche proposée établit un équilibre respectueux des droits. Cependant, à la troisième étape il y a un risque réel que les tribunaux effectuent une mise en balance inadéquate dans laquelle les effets du refus d'un droit sont mis en balance avec la protection de l'autre, plutôt qu'aux effets de la limitation des droits concernés. Au contraire, si l'exercice des deux droits crée une véritable concurrence qui ne peut être conciliée, les tribunaux doivent concilier ces revendications en redéfinissant la portée de chaque droit par rapport aux prétentions concurrentes de l'autre, au contexte factuel plus large et aux lignes directrices interprétatives de la *Charte*, afin de permettre l'exercice efficace des deux droits. Une analyse comparative n'est pertinente que pour apprécier si les limitations issues de la conciliation demeurent proportionnées.

Introduction 540

I. Worrisome Consequences of the Current Balancing Framework: *R. v. N.S.* 547

II. The Canadian Approach to Competing *Charter* Rights: *Dagenais* and its Progeny 553
A. The Competing Rights Case Law 553
B. A Three-Part Framework: The Competing Rights Test 557
C. Principles Gleaned from the Case Law 562

III. Practical Concordance, Reconciliation, and Balancing 569
A. The Utility of Comparative Constitutional Law 570
B. Konrad Hesse's *Praktische Konkordanz* and Reconciliation, Generally 571
C. Reconciliation vs. Balancing the Effects of a Right's Denial 574

Conclusion 582

INTRODUCTION

WHEN a government law or action limits a right protected by the *Canadian Charter of Rights and Freedoms* (*Charter*),[1] the applicable framework is familiar. By virtue of section 1, the state must demonstrate that its limitation is justified in a free and democratic society, pursuant to the multipart *Oakes* test.[2] Although these kinds of *Charter* claims might be most common or familiar, it is also possible for one's rights to be limited by, or compete with,[3] *another individual's Charter* rights. These claims often arise within the administration of justice[4] when one person or group engages in a constitutionally protected activity, but the exercise of that right significantly limits—if not precludes—the simultaneous exercise of another's protected right.[5] In the seminal case of *Dagenais v. Canadian Broadcasting Corporation* (*Dagenais*), for example, the motions judge imposed a publication ban on materials related to the sexual assault trials of several accused, due to the "highly explosive and inflammatory issue to be decided."[6] As a result, the freedom of expression rights of the respondent broadcaster were pitted against the fair trial rights of the accused. But it is precisely because the respondent's rights were limited by the motion judge's discretionary publication ban, as opposed to mandated by law, that it should be clear why these cases do not fit well within the standard *Oakes* framework: If the

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1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

2 *Ibid* ("[t]he *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society," s 1). See *R v Oakes*, 1986 CanLII 46 at paras 62–71 (SCC) [*Oakes*].

3 The language of "competing" or "conflicting" rights is addressed in Part II, *below*.

4 In her reasons, Justice McIntyre held that while the *Charter* "[d]oes not apply to private litigation," it does apply "to the legislative, executive and administrative branches of government ... *whether [their action is] invoked in public or private litigation*" (see e.g. *RWDSU v Dolphin Delivery Ltd*, 1986 CanLII 5 at paras 33–34 (SCC) [emphasis added] [*Dolphin Delivery*]).

5 See e.g. *R v NS*, 2012 SCC 72 [*NS*] ("*[h]ow should the state respond* to a witness whose sincerely held religious belief requires her to wear a niqab that covers her face, except for her eyes, while testifying in a criminal proceeding?" at para 1 [emphasis added]).

6 *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at 853–54, 1994 CanLII 39 (SCC) [*Dagenais*].

isolated exercise of both rights is otherwise perfectly valid, which claimant should bear the justificatory burden?

Since the *Charter* does not provide an analogous framework for resolving conflicts between rights,[7] the Supreme Court of Canada in *Dagenais* had to revise its usual section 1 justificatory analysis in these drastic, zero-sum circumstances. When the exercise of two (or more) equally valid *Charter* rights places them in conflict, the Court held that it would be "inappropriate" to prioritize one set over the other:

> *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.*[8]

Over the next two decades, the Court expanded on this "balancing" framework to develop, as I detail later, a general three-part framework which roughly mirrors the proportionality stages of the *Oakes* test. It asks: First, whether there is a conflict at all between two impugned rights; second, if that conflict can be overcome by alternative, accommodating measures; and, if not, third, whether the proposed approach strikes a rights-respecting balance.[9]

While the case law since *Dagenais* does in fact emphasize a proper respect for this rights-respecting balance, the courts risk running into at least two concerning issues in applying this framework. First, there is a fundamental misunderstanding as to their ultimate task: A court will attempt to "balance" the competing claims, but that term is often

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7 See *B(R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at 388, 1995 CanLII 115 (SCC), La Forest J [*Children's Aid Society*] ("[t]he *Charter* makes no provision for directly balancing constitutional rights against one another. It is aimed rather at governmental and legislative intrusion against the protected rights; see s. 32 of the *Charter*" at 388).

8 *Dagenais*, *supra* note 6 at 877.

9 See Part II, *below*.

interchangeable with "reconciling,"[10] "harmonizing,"[11] "co-existing,"[12] or other similar concepts, all of which appear to mean something different to each court. This is likely the result of applying a test which arose from the narrow and specific context of *Dagenais*—namely, the imposition of publication bans in criminal trials—to much broader uses.[13] But there are critical differences between balancing and reconciliation (or other such concepts), both in their definitions and their effects. As a corollary of this first issue, then, a second major concern is the potential for courts to balance one set of rights away in favour of a competing right. This is because when they arrive at the balancing stage of the current framework, there is a risk of nullifying one right at the absolute protection of the other.

This result is alarming for a number of reasons but especially so in light of one of the *Charter*'s primary interpretative guidelines—that no right stands in hierarchy to any other[14] (known as the Equality Principle). The importance of this principle can be illustrated by contrast to the parallel context of a typical section 1 analysis. In these cases, we understand that the "stringent" justificatory standards of the *Oakes* test are imposed in order to uphold "the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free

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10 See e.g. *Reference Re Same-Sex Marriage*, 2004 SCC 79 [*Same-Sex Reference*] ("[w]here the rights cannot be reconciled, a true conflict of rights is made out. In such cases, the Court will find a limit on religious freedom and go on to balance the interests at stake under s. 1 of the *Charter*" at para 50).

11 See e.g. Frank Iacobucci, "'Reconciling Rights': The Supreme Court of Canada's Approach to Competing Charter Rights" (2003) 20 SCLR (2d) 137 ("[t]he more correct term, however, may be 'reconcile,' which implies harmonizing seemingly contradictory things so as to render them compatible" at 141).

12 See e.g. *R v O'Connor*, 1995 CanLII 51 (SCC), Lamer CJC & Sopinka JJ, dissenting [*O'Connor*] ("[a]s important as the right to full answer and defence may be, it must coexist with other constitutional rights, rather than trample them. ... Privacy and equality must not be sacrificed willy-nilly on the altar of trial fairness" at para 130 [reference omitted]). See also the majority opinion in *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31 [*Trinity Western* 2001] ("[f]reedom of religion, conscience and association coexist with the right to be free of discrimination based on sexual orientation" at para 34).

13 See e.g. *NS*, *supra* note 5 ("[t]he framework was developed in the context of publication bans, but its principles have broader application" at para 7).

14 *Dagenais*, *supra* note 6 at 877.

and democratic."[15] This test ensures that the state does not infringe on constitutionally entrenched rights and freedoms for trifling reasons or in a disproportionate manner. Moreover, the test also precludes the state from "overriding" any rights or freedoms without the explicit authority of section 33, the "notwithstanding clause."[16] With no such analogous guidance in the context of competing rights, the Equality Principle fills that gap and directs that no right or freedom may be "swept away" by simply gesturing to some other right or freedom because, otherwise, each standard could be played against every other, and "no standard would bind."[17] In this way, the Equality Principle provides a stringent standard against which to assess the justifiability of a right or freedom's limitation; without it, courts would have the subjective discretion to decide which right is more deserving of protection.

To understand the significance of this approach, it is helpful to situate it within the polarizing academic debate concerning the proper delineation of a right's scope and strength. On the one hand, there are proponents of narrow but absolute rights protections. These scholars (known as absolutists) maintain that by circumscribing the scope of a right as precisely as possible, including only "the very core of what it is that we value in the right,"[18] we can avoid conflicts of rights altogether. Such a delineation is informed by "moral"[19] or "practical reasoning,"[20]

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15 *Oakes*, *supra* note 2 at paras 65–64.

16 *Charter*, *supra* note 1 ("Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this *Charter*," s 33(1)).

17 Jacob Weinrib, *The Impasse of Constitutional Rights* (Cambridge, UK: Cambridge University Press, 2025) at 63 [J Weinrib, *The Impasse*].

18 Stavros Tsakyrakis, "Proportionality: An Assault on Human Rights?" (2009) 7:3 NYU Intl J Cont L 468 at 488.

19 See *ibid* at 492:

> The position that there is an inviolable core content of the right implies a substantive moral assessment about what is right and wrong. Once we have accepted that this core content cannot be compromised under any circumstances we have left behind the idea that the right at stake can be weighed against competing public interests.

20 Grégoire Webber, "On the Loss of Rights" (2013) London School of Economics and Political Science Law Department, Working Paper No 16/2013 ("[i]f it is concluded

which facilitates filtering out interests or activities that do not attract the highest legal priority,[21] thereby ensuring the absolute protection of those activities that do deserve such priority.[22] This approach therefore obviates the need for a proportionality or balancing analysis, which often prioritizes "illegitimate interests."[23] Applied to situations such as *Dagenais*, this means that the ambit of the broadcaster's expressive freedom rights will be interpreted narrowly so as to never overlap with the accused's fair trial rights (or vice versa), and a rights competition will simply never arise.[24] On the other hand, there are proponents of broad but defeasible rights protections. These scholars (known as relativists) defend that the scope of each right should be interpreted as widely as possible—with some proposing that it "must extend to *everything* that is in the interest of a person's autonomy"[25]—notwithstanding how trivial or immoral the interests may be.[26] Once it is determined that the state has infringed on

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that what is just or justified according to practical reasoning is not what the claimant seeks, then the conclusion is that the claimant has *no right*" at 20 [emphasis in original]).

21 In the context of human rights, generally, "[h]uman rights need to be carefully limited to those precise requirements that deserve legal priority. To delimit human rights more generously would entail attributing legal priority to demands for which such priority is not warranted" (see Francisco J Urbina, *A Critique of Proportionality and Balancing* (Cambridge, UK: Cambridge University Press, 2017) at 242).

22 For the contention that certain "exceptionless or absolute" rights include "the right not to have one's life taken directly as a means to any further end" and the "right not to be condemned on knowingly false charges," see e.g. John Finnis, *Natural Law and Natural Rights*, 2nd ed by Paul Craig (Oxford, UK: Oxford University Press, 2011) at 225.

23 See e.g. Urbina, *supra* note 22 ("one problem associated with proportionality is its inability to filter out illegitimate interests. ... The problem lies in the confusion between values and the rights that protect some types of conduct that can realise values" at 87). See also Tsakyrakis, *supra* note 19 ("[o]nce we have accepted that this core content cannot be compromised under any circumstances we have left behind the idea that the right at stake can be weighed against competing public interests. Put simply, there is no balance to talk about in the first place" at 492–93).

24 See e.g. Robert Alexy, *A Theory of Constitutional Rights*, translated by Julian Rivers (Oxford, UK: Oxford University Press, 2002) ("an absolute guarantee of an essential core cannot say that outweighing reasons do not outweigh, but only that there are *no* outweighing reasons" at 195 [emphasis added]).

25 Kai Möller, "Proportionality and Rights Inflation" in Grant Huscroft, Bradley W Miller & Grégoire Webber, eds, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (New York: Cambridge University Press, 2014) 155 at 163 [emphasis in original removed].

26 See e.g. *ibid* at 166–67:

any of those interests, we can reach "the right conclusion" through a proportionality analysis which "deals with the permissible limitations" of one right and "addresses all morally relevant considerations."[27] In this way, relativists do not deny that there are "final untouchable areas of a right," but, as opposed to absolutists, they maintain that the determination of those areas "depend[s] upon the relevant reasons against protection in a particular case."[28] Applied to conflicts between rights, this means that a court must determine whether the exercise of one right, and the limitations it imposes on the exercise of another, represents a "just and proportionate balance" between the two.[29]

The crux of this debate therefore concerns which method is appropriate for determining whether and to what extent a right may be exercised in certain circumstances. For absolutists, we exclude certain trivial interests from the scope of each right from the outset so that only the most deserving rights receive absolute protection; for relativists, we determine whether any relevant considerations weigh against the protection of either right or interest, widely conceived, in a balancing analysis.[30] While Canadian courts have dabbled in both the absolutist[31] and

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> Rights inflation [i.e., widening the scope of rights] is required because showing the right attitude toward a person requires taking all of his projects seriously, including those of trivial importance and even immoral or evil ones. Proportionality is required because, properly understood, it assesses precisely the question of whether a person's autonomy interests have been adequately taken into account by the policy that interferes with his autonomy.

27 *Ibid* at 164.

28 Matthias Klatt & Moritz Meister, *The Constitutional Structure of Proportionality* (Oxford, UK: Oxford University Press, 2012) at 68.

29 See e.g. *NS*, *supra* note 5 at para 31, McLachlin CJC.

30 For an—albeit critical—explanation of the relativist approach of the German Constitutional Court, see Alexy, *supra* note 25 at 194 –95. See also J Weinrib, *The Impasse*, *supra* note 18 ("[a]ccordingly, the dispute between rights relativism and absolutism is ultimately about when to apply the label *right*. Whereas relativists apply this label to the *inputs* of balancing, absolutists apply it to the *outputs* of balancing" at 11 [emphasis in original]).

31 For example, the dissenting opinion of Justices Côté and Brown in *Frank v Canada (Attorney General)*, where the justices addressed a restriction on Canadian citizens' right to vote once they have lived abroad for five or more years:

> This is simply one instance (albeit one that is constitutionally enshrined) of the principle that no right is absolute, including *Charter* rights such as the s. 3 right to vote. To be clear, then, a reasonable limit does not justify an *infringement*, but is inherent

relativist approaches,[32] they have largely settled on a middle ground between them. In particular, and similar to the relativist approach, the third and final "balancing" stage is meant to mirror its counterpart in *Oakes*; to compare the deleterious effects of the limitation of a right against the salutary ones, and determine if the former impermissibly outweighs the latter.[33] But this approach also borrows from the absolutist regime by precluding certain interests and activities that do not attract constitutional protection from the ambit of a right's protection.[34]

Thus, while the case law since *Dagenais* does in fact emphasize a proper respect for the Equality Principle, the risk of balancing rights away crystallizes exceptionally easily when the concept of balancing strays too far from this middle ground and is misunderstood or improperly applied. Accordingly, the purpose of this article is twofold: First, I will briefly review the competing rights case law, beginning with *Dagenais*, in order to ascertain its core guiding principles. In so doing, I highlight how its otherwise rights-respecting guidance can be easily misapplied, or how the guidance itself can lead to an impermissible balancing inquiry. Accordingly, my second purpose is to supplement that guidance. To that end, I apply principles from existing Canadian jurisprudence concerning the reconciliation of competing rights, rather than the balancing of their negative and positive effects, as well as principles from the parallel German doctrine, *praktische Konkordanz*. I suggest that a balancing approach is permissible only to the extent that the denial of one right is not being weighed against the absolute protection of another. In such situations, only a reconciliation inquiry is appropriate in our constitutional

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in the right itself, shaping the right's outer boundaries. ... *In short, a right is infringed only where the right, as reasonably limited, is breached*" (see e.g. 2019 SCC 1 at para 120, Côté and Brown JJ, dissenting [latter emphasis added, references omitted]).

32 In *Children's Aid Society*, Justice La Forest held, for the majority, that "[t]he right of parents to rear their children according to their religious beliefs, including that of choosing medical and other treatments, is a fundamental aspect of freedom of religion," and then proceeded to a section 1 proportionality analysis (see e.g. *supra* note 7 at 382).

33 See e.g. *Oakes*, *supra* note 2 at para 71. See also *Dagenais*, *supra* note 6 at 878.

34 In the concurring opinion of Justices Cory, Iacobucci and Major for *Children's Aid Society*, they state that "[t]he freedom of religion is not absolute. ... [T]he right itself must have a definition, and even if a broad and flexible definition is appropriate, there must be an outer boundary. Conduct which lies outside that boundary is not protected by the *Charter*" (see e.g. *Children's Aid Society*, *supra* note 7 at 434–35).

structure, which takes rights seriously by assigning them equal priority. What is needed from Canada's highest court, therefore, is unequivocal guidance which directs courts to: First, engage in a *reconciliation* inquiry when the harmonious exercise of two competing rights appears utterly impossible, and second, only undertake a *balancing* inquiry when assessing whether the effects of the *limitations* on rights, resulting from the first step, are proportional. This approach ensures that no *Charter* right has carte blanche over any other, thereby respecting the Equality Principle and providing the meaningful rights protection which the *Charter* was meant to guarantee.

This article will proceed as follows. Part I presents a stark example of how the current balancing framework can balance rights away in the case of *R. v. N.S.* (*N.S.*)[35] In Part II, I review the Canadian approach in order to extrapolate its structure and guiding principles, and I formulate a three-part framework which I believe best represents the approach used by the majority of the case law to date. I conclude this Part by summarizing the core principles extracted from that case law. Part III introduces the concepts of reconciliation and practical concordance, as compared to the Canadian approach of balancing, to demonstrate the deficiencies in the Canadian account—namely, the risk of impermissibly balancing *Charter* rights away. I conclude with the observation that the majority of the Canadian case law is consistent with the Equality Principle, but risks diverging from it when courts resort to "balancing" at the final stage. Therefore, I suggest that courts must *reconcile* the exercise of two (or more) seemingly incompatible rights and should only resort to *balancing* when they assess whether the effects of a right's limitations—not denial—are proportionate.

I. WORRISOME CONSEQUENCES OF THE CURRENT BALANCING FRAMEWORK: *R. V. N.S.*

To begin, it is worth highlighting one prominent example demonstrating the alarming potential for the current Canadian framework to completely deny one set of rights through the balancing analysis. *N.S.* concerned two accused—the uncle and cousin of the complainant and primary Crown witness—who were charged with sexual assault. The

35 *Supra* note 5.

complainant was a Muslim woman who sought to give her evidence while wearing a niqab—an action protected by her right to religious expression under section 2(a) of the *Charter*.[36] The accused argued that this impaired their rights to a fair trial and to make a full answer and defence, covered by sections 7 and 11(d) of the *Charter*.[37] Specifically, they submitted that the witness's face must be visible so that the defence could conduct an effective cross-examination and accurate credibility assessment.[38] This rights competition was, therefore, not the result of the state imposing its own ban or limitation on the complainant's right, but rather of the valid exercise of the accused's fair trial rights which seemed to preclude such religious expression.[39] While remitting the matter back to the preliminary inquiry judge,[40] Chief Justice McLachlin for the majority presented the following rule:

> [W]here a niqab is worn because of a sincerely held religious belief, a judge should order it removed if the witness wearing [it] poses a serious risk to trial fairness, there is no way to accommodate both rights, and the salutary effects of requiring the witness to remove the niqab outweigh the deleterious effects of doing so.[41]

As discussed later on, this test culminated from the Court's approach to competing *Charter* rights in the context of publication bans imposed

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36 *Charter*, *supra* note 1 ("[e]veryone has the following fundamental freedoms: (a) freedom of conscience and religion," s 2(a)).

37 *Ibid* ("[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice," s 7); *ibid* "[a]ny person charged with an offence has the right ... (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal," s 11(d)).

38 *NS*, *supra* note 5 at paras 16–17.

39 Justice McIntyre held in *Dolphin Delivery* that where the "exercise of, or reliance upon, governmental action is present and where one private party invokes or relies upon it to produce an infringement of the *Charter* rights of another, the *Charter* will be applicable" (see *Dolphin Delivery*, *supra* note 4 at para 39). The *Charter* was therefore engaged in *NS* because the court had the discretion to enforce or apply certain rules of evidence—i.e., common law or statutory rules—and, thereby, to affect the ability of the accused and the witness to exercise their *Charter* rights.

40 *NS*, *supra* note 5 at para 57.

41 *Ibid* at para 46.

during criminal proceedings; however, the three sets of opinions in this case present drastically divergent understandings of that case law.

The majority determined that not being able to see a witness's face while they give evidence may unduly impair the effectiveness of a cross-examination because of hidden nonverbal cues or changes in the witness's demeanour, both of which may be "highly instructive."[42] Despite the lack of expert evidence presented by the defence on this point, the chief justice agreed that there was a true conflict between the exercise of both rights:

> On the record before us, I conclude that there is a strong connection between the ability to see the face of a witness and a fair trial. Being able to see the face of a witness is not the only — or indeed perhaps the most important — factor in cross-examination or accurate credibility assessment. But its importance is too deeply rooted in our criminal justice system to be set aside absent compelling evidence.[43]

She then canvassed possible less-impairing alternatives, akin to the minimal impairment stage of the *Oakes* test, including "excluding men from the courtroom," which would allow the witness to give her evidence without having to cover her face.[44] But this alternative was deemed unworkable because it may "have implications for the open court principle, the right of the accused to be present at his trial, and potentially his right to counsel of his choice."[45] Finding it unlikely that the accommodation of both rights was possible in this case,[46] the majority then turned to the final "balancing" step of the framework.

Despite acknowledging that it would be "difficult to measure the value of adherence to religious conviction, or the injury caused by being required to depart from it,"[47] Chief Justice McLachlin suggested that

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42 *Ibid* at paras 22–26.

43 *Ibid* at para 27.

44 *Ibid* at para 33.

45 *Ibid*.

46 *Ibid*.

47 *Ibid* at para 36.

this could be done by considering a number of "helpful" factors, including:

> How important is the practice to the claimant? What is the degree of state interference with the religious practice? ... How does the actual situation in the courtroom — the people present and any measures that can be put in place to limit facial exposure — affect the harm to the claimant of limiting her religious practice?[48]

In effect, the majority understood the final balancing inquiry to ask: Would it really be *that* bad to require the witness, in testifying against her alleged abusers, to abdicate her religious convictions? As I explain later in this article, my issue is not with the potential outcomes of this test but rather with its supporting methodology. The majority fundamentally misunderstands the ultimate proportionality question when they inquire whether the negation—as opposed to the limitations—of one set of rights produces proportionate positive effects for the individual(s) with competing rights claims. Moreover, it completely denies that all *Charter* rights possess an equal claim to fulfilment, as well as the corollary principle that no right may be defined or exercised in a way that abrogates that of another.[49]

Even more concerning was the concurring opinion of Justices LeBel and Rothstein, who determined that an absolute rule could and should be adopted in these cases:

> Given the nature of the trial process itself, the niqab should be allowed either in all cases or not at all when a witness testifies. In my opinion, a clear rule should be chosen. *Because of its impact on the rights of the defence*, in the context of the underlying values of the Canadian justice system, *the wearing of a niqab should not be allowed*.[50]

If adopted by the majority, this absolutist rule would completely run afoul the nonhierarchy principle of *Charter* interpretation in an alarming, Orwellian sense: While all rights are equal, some rights are more equal

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48 *Ibid* [reference omitted].

49 *R v Mills*, 1999 CanLII 637 at para 17 (SCC) [*Mills*].

50 *NS*, *supra* note 5 at para 69 [emphasis added].

than others.[51] Worse still, this opinion presents the tangible possibility that the balancing inquiry will be misunderstood or improperly applied, and one claimant's rights will be completely denied "because of [their] impact" on another individual's equally valid rights claims.[52] This is because the majority proceeded on the (correct) assumption that the witness had "established a sincere religious belief that she must wear a niqab while testifying in a public criminal proceeding,"[53] meaning this practice was protected by section 2(a) of the *Charter*. As such, Justices Rothstein and LeBel's approach unduly narrows the scope of the witness's right so as to *exclude* (i.e., deny the exercise of) a constitutionally protected practice.[54] Without the Equality Principle to guide this analysis, the concurring approach suggested by Justices Rothstein and LeBel would therefore allow a court to simply make its own subjective, "normative judgments about which rights should be prioritized at the expense of others."[55]

While Justice Abella employs the same balancing framework in her dissent, she eschews an all-or-nothing approach and places more emphasis on the accommodation stage of the analysis. In particular, she notes

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51 George Orwell, *Animal Farm: A Fairy Story* (London, UK: Penguin Books, 2008) ("[a]ll animals are equal, but some animals are more equal than others" at 90).

52 *NS*, *supra* note 5 at para 69, LeBel J, concurring.

53 *Ibid* at paras 11–14, McLachlin CJC.

54 This is true notwithstanding the importance of the accused's fair trial rights, or how short-lived the denial may be, because those factors are *justifications* which should only be considered in a section 1 or Competing Rights Test analysis. On this point, see Aharon Barak, *Proportionality: Constitutional Rights and their Limitations*, translated by Doron Kalir (Cambridge, UK: Cambridge University Press, 2012) at 80–81:

> [T]he scope of the right to freedom of expression should not be narrowed due to considerations of other people's right to privacy or to enjoy a good reputation. Therefore, a constitutional right to freedom of expression should include expressions that may be hurtful to other people's reputation, or even affect their privacy. These considerations, relating to the rights of others, are extremely important. They should not be ignored. They should be taken into account. *The stage of reviewing such considerations, however, should not be within the determination of the right's scope; rather within the discussion of the possibilities of its realization* [i.e., strength; ability to be exercised]. It should thus be a part of the second stage of the constitutional review. Such considerations constitute important elements that may affect the proportionality of the measures limiting the right [emphasis added].

See Part III, *below*, for a discussion of limitations versus denials of rights.

55 Iacobucci, *supra* note 12 at 140.

that "[t]he court system has many examples of accepting evidence from witnesses who are unable to testify under ideal circumstances because of visual, oral, or aural impediments."[56] She details various accommodations examples such as screens for children and language interpreters for individuals who are unable to speak either official language, both of which help to "facilitate a witness' ability to give evidence in the courtroom."[57] In this way, while witnesses would typically and ideally testify with their faces unobstructed, "abridgements of this 'ideal' often occur in practice yet are almost always tolerated."[58] Thus, "it does not follow that if they are unable to [show their faces], they cannot testify."[59] Moreover, she properly recognized that, notwithstanding its importance, an accused's right to trial fairness is not absolute—it "cannot reasonably expect ideal testimony from an ideal witness in every case," and is instead "subject to several exceptions and qualifications in the interests of justice."[60]

The vast differences between the opinions in *N.S.* results from the Court being misguided as to its ultimate task. While the majority seeks to balance the harmful effects of denying one right over another, Justice Abella recognizes that it would be unacceptable to compel a witness to abdicate their religious convictions or practices, regardless of how beneficial it would be for an accused's fair trial rights. In other words, an approach that prioritizes one right *absolutely* over another is indefensible, especially where it would create a judicial environment in which victims are "asked to choose between their religious rights and their right to seek

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56 *NS*, *supra* note 5 at para 82, Abella J, dissenting.

57 *Ibid* at para 92.

58 *Ibid* at para 97. See also the majority opinion of Justice La Forest in *R v Lyons*, 1987 CanLII 25 ("[i]t seems to me that s. 7 of the *Charter* entitles the appellant to a fair hearing; it does not entitle him to the most favourable procedures that could possibly be imagined" at 362 (SCC)).

59 *NS*, *supra* note 5 at para 92.

60 *Ibid* at para 107. See also Justice Wilson's concurring opinion in *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326, 1989 CanLII 20 (SCC) [*Edmonton Journal*] ("one should not balance one value at large and the conflicting value in its context" at 1353). In the same way, Justice Abella accepted that "demeanour itself represents only one factor in the assessment of a witness' credibility," so it would therefore be inappropriate to "demand full 'demeanour access' where religious belief prevents it" (*NS*, *supra* note 5 at paras 107–08).

justice."[61] This middle-ground approach stands in stark contrast to that of Justices Rothstein and LeBel, who seem to have altogether disregarded the guidance from *Dagenais* that courts must strike a balance which "fully respects the importance of *both* sets of rights."[62] *N.S.* therefore makes painfully clear how, without the Equality Principle to anchor its analysis, a court can subjectively decide which factors do or do not outweigh a competing *Charter* claim—even if that means denying one set of rights altogether.

With a brief look at the various applications and consequences of the current framework, I now turn to the case law leading up to *N.S.* in order to understand both its guiding principles and how a misapplication of those principles can lead to such unacceptable results.

II. THE CANADIAN APPROACH TO COMPETING *CHARTER* RIGHTS: *DAGENAIS* AND ITS PROGENY

The Canadian approach to resolving competing *Charter* rights claims has been somewhat piecemeal since the *Dagenais* decision, as it has developed from the narrow context of publication bans imposed during criminal trials into much broader uses. Despite this fragmentation, I argue that it provides ample guidance for striking a proper rights-respecting balance; the danger of balancing rights away only crystallizes when courts either misunderstand or misapply that guidance.

A. The Competing Rights Case Law

Dagenais was the Supreme Court's first opportunity to address a rights competition. The case concerned the constitutionality of a publication ban put in effect during criminal proceedings against members of a Catholic religious order, in which the accused were charged with sexual and physical abuse against children in their care. They obtained an order preventing the respondents (the CBC) from broadcasting a miniseries, which presented "a fictional account of sexual and physical abuse of children in a Catholic institution," anywhere in Canada until the trials were

61 *NS*, *supra* note 5 at para 95.

62 *Dagenais*, *supra* note 6 at 877 [emphasis added].

complete.[63] The publication ban therefore placed several *Charter* rights in competition. On the one hand were the accused's rights to a fair trial and to be presumed innocent until proven guilty, under sections 7 and 11(d) of the *Charter* respectively, and the CBC's right to freedom of the press, covered by section 2(b) of the *Charter*, on the other. This required the Court to revisit the common law rule governing publication bans, which prioritized the right to a fair trial over the expression interests of those affected by the ban.[64]

The new test provided that a publication ban should only be ordered when (a) it is necessary to prevent a real and substantial risk to an accused's trial fairness, due to the lack of alternative measures to prevent the risk, and (b) the ban's salutary effects outweigh the deleterious ones it poses to those affected.[65] In a later case, Chief Justice McLachlin clarified that this test is only to be applied when publication bans are *discretionary*; for any mandatory orders, an objection "should be framed as a *Charter* challenge to the legislation itself," and therefore addressed under section 1.[66] Seven years after *Dagenais* was decided, the Court revised that test, while maintaining its "essence," in *R. v. Mentuck*.[67] In sum, the Court in *Mentuck* broadened the "trial fairness" components of the test to encompass risks to the operation and efficacy of the administration of justice more generally.[68] Since then, the Canadian approach to competing *Charter* rights has typically been dubbed the *Dagenais/Mentuck* test.[69]

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63 *Ibid* at 851–52. On the connection between the broadcast and the criminal proceedings, the majority noted, "[t]he objective of the ban ordered in the case at bar was the diminution of the risk that the trial of the four accused persons might be rendered unfair by adverse pre-trial publicity" (see *ibid* at 879).

64 *Ibid* at 877.

65 *Ibid* at 878.

66 *Toronto Star Newspapers Ltd v Canada*, 2010 SCC 21 at para 18, McLachlin CJC [*Toronto Star Newspapers*], citing *Dagenais, supra* note 6 at 874.

67 *R v Mentuck*, 2001 SCC 76 ("[t]his reformulation of the *Dagenais* test aims not to disturb the essence of that test, but to restate it in terms that more plainly recognize, as Lamer C.J. himself did in that case, that publication bans may invoke more interests and rights than the rights to trial fairness and freedom of expression" at para 33) [*Mentuck*].

68 *Ibid* at paras 32–33.

69 See e.g. *Reference Re Vancouver Sun*, 2004 SCC 43 at para 30 [*Vancouver Sun*].

In the same year as the *Mentuck* decision, the Court provided further guidance in *Law Society of British Columbia v. Trinity Western University* (*Trinity Western*).[70] This case concerned the evangelical university's "Community Standards," required to be signed and adhered to by all staff and students, which prohibited "homosexual behaviour" amongst other things.[71] Because the university sought the College of Teachers' permission to run its teacher education program, this placed its freedom of religion rights in direct competition with the section 15 *Charter* equality rights of other students in the public school system.[72] However, the majority of the Court found that the potential conflict in this case could be resolved and avoided by "properly defining the scope of the rights" involved.[73] In essence, there was no conflict between the two rights because the impugned discriminatory harm to the students was based in the university's *belief* rather than *conduct*; and since there was no "concrete evidence" that the school's religious views would "have a detrimental effect on the learning environment,"[74] the two rights could therefore operate harmoniously.

Building on this approach, the Court further clarified the test in the landmark *Reference Re Same-Sex Marriage* in 2004.[75] When faced with the "collision" of two *Charter* rights, it directed that the "first question is whether the rights alleged to conflict can be reconciled"; where they could not, the next step is to "balance the interests at stake under section 1."[76] Although the *Reference* concerned rights limitations stemming from state conduct, as opposed to the exercise of another individual's *Charter* rights, this balancing guidance has nevertheless been incorporated into the post-*Dagenais* case law.[77] This approach was also employed

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70 *Trinity Western* 2001, *supra* note 13.

71 *Ibid* at paras 3–4.

72 As framed by the majority, "[t]he issue at the heart of this appeal is how to reconcile the religious freedoms of individuals wishing to attend TWU with the equality concerns of students in B.C.'s public school system, concerns that may be shared with their parents and society generally" (see *ibid* at para 28).

73 *Ibid* at para 29.

74 *Ibid* at paras 32–37.

75 *Same-Sex Reference*, *supra* note 11.

76 *Ibid* at para 50.

77 See e.g. *NS*, *supra* note 5 at para 85.

by the majority in *B. (R). v. Children's Aid Society*,[78] in which the freedom of religion rights of two parents were held to be in conflict with those of their infant daughter when the former refused life-saving blood transfusions for the latter on religious grounds.[79] Once a true conflict was found, the majority then assessed the legislation which prevented the parents from exercising their religious rights under the *Charter*'s section 1 framework.[80]

Finally, the Court provided a somewhat revised framework in *N.S.* in 2012.[81] As mentioned, this case concerned the ability of the accused to effectively cross-examine the complainant who wore a niqab. Having determined that "there is a strong connection between the ability to see the face of a witness and a fair trial,"[82] and, thereby, that a conflict existed, the majority then found it likely that "no accommodation is possible" after rejecting various alternatives, such as excluding men from the courtroom.[83] Using the *Dagenais/Mentuck* framework, they espoused a three-part test, requiring a court to consider:

> (1) whether allowing the witness to testify while wearing the niqab was necessary to protect her freedom of religion;
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> (2) if requiring her to testify without the niqab was necessary to protect trial fairness, including whether there were alternative measures for protecting such fairness; and

78 *Children's Aid Society*, *supra* note 7.

79 The nature of the parents' right was characterised by the majority as the "right to rear their children according to their religious beliefs, including that of choosing medical and other treatments, [which] is an equally fundamental aspect of freedom of religion" (see *ibid* at 382).

80 Although the effect of legislation in this case was to pit the parents' religious freedom rights against those of their child, the nature of the challenge was nevertheless against legislation. Thus, the majority held that "[t]his is simply a situation where competing constitutional rights fall within the equation in the balance called for by ss. 1 and 7" (see *ibid* at 388).

81 *NS*, *supra* note 5.

82 *Ibid* at para 27.

83 *Ibid* at para 33.

> (3) if there was a true conflict, whether the salutary effects of requiring her to remove the niqab outweighed the deleterious effects of so doing.[84]

The *N.S.* test largely mirrors the two-part test espoused in *Dagenais*, altering it only by breaking the first *Dagenais* step into two distinct ones. In addition, the *N.S.* test generally mirrors the proportionality stages of the *Oakes* test, consistent with the Court's prior comparison in *Dagenais*: The first question asks whether the limitation is necessary, albeit a somewhat more stringent standard than the rational connection requirement; the second asks if any less restrictive measures could have been chosen; and the final asks whether the resulting, least restrictive measure nevertheless produces disproportionate negative consequences.[85]

The three-part *N.S.* framework is arguably the most concrete guidance the Court has provided since *Dagenais* in this respect. However, in the following section, I suggest that the majority of the case law tends to follow a similar yet slightly altered version of it.

B. A Three-Part Framework: The Competing Rights Test

From the above overview, we can ascertain that a court typically engages in a three-part inquiry—hereinafter the "Competing Rights Test."

At the first stage, a court determines whether there is a true conflict of rights. This is not typically identified as a stand-alone first step but rather is often done in conjunction with another step; for example, the first *Dagenais* question asks whether the competing rights can be reconciled through reasonable alternative means, implicitly assuming that a conflict exists. But the existence of this first step is reflected in cases like *B. (R.) v. Children's Aid Society of Metropolitan Toronto* (*Children's Aid Society*) (*B. (R.)*), in which Justices Cory, Iacobucci, and Major found that there was no true conflict because "a parent's freedom of religion does not include the imposition upon the child of religious practices which threaten the safety, health or life of the child."[86] Somewhat akin to the absolutist approach, the parents' impugned religious practices did

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84 The Court noted that the salutary effects under the third step could include "reducing the risk of a wrongful conviction" (see *ibid* at para 8).

85 *Dagenais*, *supra* note 6 at 878.

86 *Children's Aid Society*, *supra* note 7 at 435.

not engage the *Charter*'s section 2(a) protection, so there was no overlap of rights to necessitate a proportionality analysis.[87] This approach was also seen in *Trinity Western*, where the majority found no conflict between the university's religious freedom rights and public school students' right to freedom from discrimination because "the proper place to draw the line ... is generally between belief and conduct."[88] Thus, without any "concrete evidence" that the university's anti-same-sex beliefs actually fostered discrimination in British Columbia's public schools, the majority found that the scope of each right could "be circumscribed and thereby reconciled."[89]

Important to note at this first stage as well is the Supreme Court's guidance in the *Reference Re Same-Sex Marriage*, that a court must determine whether a conflict exists based on a factual context, not abstract hypotheticals.[90] The *Reference* concerned the constitutionality of a proposed law, which would legalize same-sex civil unions, in opposition to the religious freedom rights of various interveners.[91] However, the Court clearly stated that conflicts between rights must not be adjudicated in "undefined spheres":

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87 Justices Cory, Iacobucci and Major's rationale provided that "[t]he parents ... are constitutionally entitled to manifest their beliefs and practise their religion, as is their daughter. ... However, the freedom of religion is not absolute. ... [T]he right itself must have a definition, and even if a broad and flexible definition is appropriate, there must be an outer boundary. Conduct which lies outside that boundary is not protected by the *Charter*" (*ibid* at 434–35).

88 The majority continued, "[t]he freedom to hold beliefs is broader than the freedom to act on them. Absent concrete evidence that training teachers at TWU fosters discrimination in the public schools of B.C., the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected" (see *Trinity Western* 2001, *supra* note 13 at para 36).

89 *Ibid* at paras 36–37.

90 *Same-Sex Reference*, *supra* note 11 at paras 51–52.

91 The exact nature of the conflict in this case was described as follows:

> It is argued that the effect of the *Proposed Act* may violate freedom of religion in three ways: (1) [it] will have the effect of imposing a dominant social ethos and will thus limit the freedom to hold religious beliefs to the contrary; (2) [it] will have the effect of forcing religious officials to perform same-sex marriages; and (3) [it] will create a 'collision of rights' in spheres other than that of the solemnization of marriages by religious officials (see *ibid* at para 47).

> *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not ... a mere technicality; rather, it is essential to a proper consideration of *Charter* issues.[92]

Put simply, a proper appreciation for the context and factual matrix in which an impugned rights competition arises may actually resolve the issue without needing to limit either right at all. Importantly, this is because, at this stage, courts are dealing with the *scope* of each impugned right; if the scope of claimant A's right is defined so broadly so as to encompass practices or beliefs that do not properly fall within it, this will inevitably create a conflict with the exercise of claimant B's rights,[93] as encountered by the relativist school of thought.

At the second stage of the Competing Rights Test, if a true conflict is found, a court then determines whether it can be overcome by reasonably available alternative measures that would avoid the conflict altogether.[94] In this respect, the case law has largely followed the model of "accommodation." In *Dagenais*, the majority determined that the apparent conflict between the fair trial rights of the accused and the expressive freedom rights of the CBC could have been overcome through several possible alternatives such as trial adjournments, juror sequestration, or providing strong judicial instructions to the jury.[95] This was also seen in

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92 *Ibid* at para 51, citing *MacKay v Manitoba*, [1989] 2 SCR 357 at 361, 1989 CanLII 26 (SCC).

93 A good example of this issue can be seen in the differing opinions in the 2018 decision of *Law Society of British Columbia v Trinity Western University*. The majority found that section 2(a) protects the "right of [the religious university's] community members to enhance their spiritual development through studying law in an environment defined by their religious beliefs in which members follow certain religious rules of conduct" (see 2018 SCC 32 at para 75 [*Trinity Western* 2018]). In contrast, and in line with Justices Iacobucci and Major's reasoning in *Children's Aid Society*, Justice Rowe found that this "alleged infringement [did] not fall within the scope of freedom of religion" because section 2(a) "does not protect measures by which an individual or a faith community seeks to impose adherence to their religious beliefs or practices on others who do not share their underlying faith" (*ibid* at paras 210, 251). In other words, a rights competition can be avoided altogether if the scopes of each competing right are properly delineated to begin with.

94 See e.g. *Dagenais*, *supra* note 6 at 877–78. See also *NS*, *supra* note 5 at para 8.

95 *Supra* note 6 at 881.

N.S. where the majority directed that, once a true conflict is found, a judge

> must try to resolve the claims in a way that will preserve both rights. *Dagenais* refers to this as the requirement to consider whether "reasonably available alternative measures" would avoid the conflict altogether. ... We also call this "accommodation". We find a way to go forward that satisfies each right and each party. Both rights are respected, and the conflict is averted.[96]

The concept of *averting* the conflict is subtle, yet important. At this stage, courts are not yet tasked with reconciling (i.e., limiting the exercisable strength of) two seemingly incompatible rights; rather, they must determine whether any accommodative solutions can overcome the conflict without having to resort to any such limitations. Under this guidance, the *N.S.* majority canvassed, but rejected, various alternatives to requiring the complainant to remove her niqab, such as having her testify behind a one-way screen.[97] For her part, however, Justice Abella found it "beyond dispute" that the use of various alternatives, such as interpreters or screens for children, may impact a judge's assessment of demeanour but would render it "neither impossible nor impracticable."[98]

Thus, by the second step of the Competing Rights Test, a true conflict between rights has been acknowledged and a court must then assess if that conflict is amenable to any nonimpairing, accommodating solutions. If it determines, as the majority surmised in *N.S.*, that "no accommodation is possible,"[99] the jurisprudence directs a court to the third and final question: whether the salutary effects of limiting one right outweigh the deleterious effects imposed by doing so.[100] The case law seems to agree that this last stage, and the overall test itself, "clearly reflects the

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96 *NS*, *supra* note 5 at para 32 [reference omitted].

97 *Ibid* at para 33.

98 *Ibid* at para 102, Abella J, dissenting.

99 *Ibid* at para 33.

100 See e.g. *Dagenais*, *supra* note 6 at 878; *Mentuck*, *supra* note 68 at para 23; *NS*, *supra* note 5 at para 34; *Vancouver Sun*, *supra* note 70 at para 29, citing *Mentuck, supra* note 68. See also *Same-Sex Reference*, *supra* note 11 ("[w]here the rights cannot be reconciled, a true conflict of rights is made out. In such cases, the Court will find a limit on religious freedom and go on to balance the interests at stake under s. 1 of the *Charter*" at para 50).

substance of the *Oakes* test"[101] in that it assesses whether the balance between the positive and negative effects of a right's limitation are proportional; if they are not, the proposed limiting measure will be found unconstitutional. In *Dagenais*, Chief Justice Lamer for the majority was careful to emphasize that any attempt to merely balance the objective of a right's limitation with its deleterious effects was "too narrow a conception of proportionality."[102] Instead:

> [T]here must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measures. ... This suggests that when a [publication] ban has a serious deleterious effect on freedom of expression and has few salutary effects on the fairness of a trial, the ban will not be authorized at common law.[103]

This standard was meant to mirror its counterpart in *Oakes*:[104] "The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society."[105]

Further, a court's approach to this final stage must take into account the discretionary nature of a right's limitation. This is important for two reasons: First, as mentioned, the element of discretion is what distinguishes a competing rights analysis from a section 1 *Charter* analysis, the latter of which pits a mandatory government law or action against the exercise of one's *Charter* right(s).[106] Second, unlike a section 1 inquiry

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101 *Dagenais*, *supra* note 6 at 878. See also *Mentuck*, *supra* note 68 at paras 27, 36.

102 *Supra* note 6 at 889.

103 *Ibid* [emphasis in original].

104 *Ibid* ("[t]he analysis that is required at this stage of the application of the common law rule is very similar to the third part of the second branch of the analysis required under s. 1 of the *Charter,* as set out by this Court in *R. v. Oakes*" at 887 [reference omitted]).

105 *Oakes*, *supra* note 2 at para 71.

106 See *Toronto Star Newspapers*, *supra* note 67 at para 18:

> Indeed, as Lamer C.J. said in *Dagenais*, '[i]f legislation requires a judge to order a publication ban, then any objection to that ban should be framed as a *Charter* challenge to the legislation itself.' The validity of a statutory

where the state bears the justificatory burden, it is the *courts* in these cases who hold the ability to restrict—or deny—*Charter* rights:

> [A] common law rule conferring discretion cannot confer the power to infringe the *Charter*. Discretion must be exercised within the boundaries set by the principles of the *Charter*; exceeding these boundaries results in a reversible error of law.[107]

Similar to its counterpart in the *Oakes* framework,[108] then, the final stage of the Competing Rights Test prohibits a discretionary limiting measure where its negative effects are disproportionate to its positive ones—even if it is the least restrictive measure possible. However, as I detail later, judgments such as Justices Rothstein and LeBel's in *N.S.* present a tangible possibility that those disproportionate negative effects will be downplayed, or even ignored altogether, in favour of the subordinating right.

For now, with an understanding of the general three-part framework since *Dagenais*, we can identify a number of relevant principles which must guide a court's inquiry. The following section will provide a brief summary of those principles in order to assess how sufficiently they actually protect *Charter* rights in competition.

C. Principles Gleaned from the Case Law

The case law that employs the *Dagenais/Mentuck* approach reveals (at least) six principles which guide the courts' approach(es) to competing *Charter* claims.[109] A brief overview of each suggests that the current jurisprudence offers sufficient and principled guidance to prevent *Charter* rights from being balanced away improperly. However, as I argue in Part III, when that guidance is misapplied, the "balancing" inquiry becomes a constitutionally impermissible *denial* of one set of rights.

> mandatory ban ... will be determined by conducting an analysis based on the *Oakes* test [emphasis in original, references omitted].

107 *Dagenais*, *supra* note 6 at 875.

108 *Oakes*, *supra* note 2 at para 71.

109 Iacobucci provides a similar analysis, but I suggest that several additional principles are relevant and applicable (*supra* note 12 at 156–61). See also Jena McGill, "'Now It's My Rights Versus Yours': Equality in Tension with Religious Freedoms" (2016) 53:3 Alta L Rev 583 at 589–91.

The first and arguably most important principle is the Equality Principle—that the *Charter* imposes no hierarchy of rights.[110] That all rights must be given equal priority mandates "a balance to be achieved that fully respects the importance of both sets of rights."[111] Thus, while the strength of rights may be *limited* in order to resolve a true conflict, it may never be *denied* altogether.[112] An example of the former was seen in *Dagenais*, where the majority presented alternatives to the publication ban that were less restrictive of the CBC's expressive freedom rights, such as trial adjournments or allowing jury challenges for cause.[113] The accused's fair trial rights may therefore be limited—or, rather, delayed—to a minimal extent so as to allow the CBC to exercise its section 2(b) *Charter* rights. On the latter hand, the most obvious example that we have seen of a total denial of rights was in *N.S.*, in which the majority crafted a test which could reasonably result in one's religious freedom rights being denied altogether. Indeed, the concurring justices directed that result in all cases where a witness's religious freedoms conflict with an accused's fair trial rights.

Thus, the second discernible principle is related to the first: No *Charter* right is guaranteed absolutely.[114] The Supreme Court laid out

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110 *Dagenais*, *supra* note 6 at 877; *Trinity Western* 2001, *supra* note 13 at para 31; *O'Connor*, *supra* note 13 at para 129; *Mills*, *supra* note 50 at para 17.

111 *Dagenais*, *supra* note 6 at 877.

112 The importance of this distinction between a right's limitation and denial is discussed Part III, *below*.

113 *Supra* note 6 at 881.

114 *R v Crawford*, 1995 CanLII 138 at para 34 (SCC) [*Crawford*]; *Trinity Western* 2001, *supra* note 13 at para 29. See also Justice McLachlin's dissenting opinion in *Dagenais*, where he states that

> [t]he right to a fair trial is fundamental and cannot be sacrificed. ... Nevertheless, in some instances, ... unlimited free expression may interfere with the accused's right to a fair trial. ... "[F]ree speech or expression is not an absolute, unqualified value. Other values must be weighed with it" (*supra* note 6 at 949 [references omitted]).

Section 28 of the *Charter* also arguably provides a quasi-limitation on the exercisable strength of each *Charter* right, stating that "[n]otwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons" (*supra* note 1, s 28). On this interpretation, see Beverley Baines, "Section 28 of the Canadian Charter of Rights and Freedoms: A Purposive Interpretation" (2005) 17:1 CJWL 45 ("we are free to construe section 28 as an interpretive provision that

the fundamentals of this principle in *R. v. Crawford*, which concerned an accused's pretrial right to remain silent standing in apparent conflict with their coaccused's right to a full answer and defence, both of which are protected by section 7 of the *Charter*. The majority began its analysis by affirming the *Dagenais* rights-respecting balance, and explained:

> *Charter* rights are not absolute in the sense that they cannot be applied to their full extent regardless of the context. Application of *Charter* values must take into account other interests and in particular other *Charter* values which may conflict with their unrestricted and literal enforcement. This approach to *Charter* values is especially apt in this case in that the conflicting rights are protected under the same section of the *Charter*.[115]

As a corollary of the Equality Principle, then, the *Charter* regime precludes the "unrestricted and literal enforcement" of every person's rights which would deny the enforcement of the rights of others.[116] It is important to note that this principle relates to the *strength* of a right's application, not to the *scope* of the activities it protects. While considerations of claimant A's rights may be relevant to some extent in determining the scope of claimant B's rights, they should never be determinative. I say "to some extent" because the scope of each *Charter* right is to be determined by reference to a number of external considerations, just one of which is "the meaning and purpose of the other specific rights and freedoms with which it is associated."[117] In this way, the Supreme Court's guidance should be understood to mean that claimant A's rights cannot be exercised absolutely so as to preclude an otherwise constitutionally protected activity from the scope of claimant B's rights.[118] As a result, courts must strike a delicate

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operates as a prism—limiting *Charter* limits *and* preserving *Charter* rights" at 62 [emphasis added]).

115 *Crawford*, *supra* note 115 at para 34.

116 *Mills*, *supra* note 50 at para 17.

117 The other external considerations include "the character and the larger objects of the *Charter* itself, ... the language chosen to articulate the specific right or freedom, ... [and] the historical origins of the concepts enshrined" (see *R v Big M Drug Mart Ltd*, 1985 CanLII 69 at para 117 (SCC) [*Big M*]). See also Iacobucci, *supra* note 12 ("[a] particular Charter right must be defined in relation to other rights and with a view to the underlying context in which the apparent conflict arises" at 138).

118 See e.g. *Dubois v The Queen*, 1985 CanLII 10 ("[t]he courts must interpret each section of the *Charter* in relation to the others. ... [We must avoid] an interpretation of

balance: The strength of a right can never be absolute, but it can never be completely balanced away, either.

Relatedly, the third appreciable principle is that courts must consider the context in which each rights conflict takes place.[119] Justice Iacobucci submits that an appreciation for such context is "key to rights reconciliation" because "Charter rights are not defined in abstraction, but rather in the particular factual matrix in which they arise."[120] Accordingly, because the "relevant rights and interests will be aligned differently in different cases, ... [the] effects invoked by the parties must be taken into account in a case-specific manner."[121] In tandem with the first and second principles, then, this means that resolving competing rights claims "does not amount to repudiating" one right over the other, "but rather to facilitating the exercise thereof in a way that takes the rights of others ... into account."[122] This guidance has been amply incorporated into the first stage of the Competing Rights Test; that an impugned rights competition may be overcome through a proper appreciation for the facts and context of that competition. Although deciding in the context of a *Charter* section 1 analysis, this principle was eloquently explained by Justice Wilson in her concurring opinion in *Edmonton Journal v. Alberta*:

> One virtue of the contextual approach ... is that it recognizes that a particular right or freedom may have a different value

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a *Charter* right which would imply a violation of another *Charter* right" at para 43 (SCC) [references omitted]). For a similar account, see Barak, *supra* note 55 at 80–81.

119 See e.g. *Mills*, *supra* note 50 at para 21:

> *Charter* rights must be examined in a contextual manner to resolve conflicts between them. Therefore, unlike s. 1 balancing, where societal interests are sometimes allowed to override *Charter* rights, under s. 7 rights must be defined so that they do not conflict with each other. The rights of full answer and defence, and privacy, must be defined in light of each other, and both must be defined in light of the equality provisions of s. 15.

See also *Same-Sex Reference*, *supra* note 11 at para 50; *Crawford*, *supra* note 115 at para 34; *Trinity Western* 2001, *supra* note 13 at para 34.

120 Iacobucci, *supra* note 12 at 140.

121 *Mentuck*, *supra* note 68 at para 37.

122 *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 178, Bastarache, LeBel & Deschamps JJ, dissenting [*Syndicat*]. It should also be noted that the context of this case concerned the Quebec *Charter of Human Rights and Freedoms*, CQLR c C-12, not the Canadian *Charter*, but the right to freedom of religion was considered analogous to both (see *ibid* at paras 46–47).

> depending on the context. ... [It] attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it. ... [T]he importance of the right or freedom must be assessed in context rather than in the abstract and that its purpose must be ascertained in context. This having been done, the right or freedom must then ... be given a generous interpretation aimed at fulfilling that purpose and securing for the individual the full benefit of the guarantee.[123]

In addition to providing a generous and purposive interpretation of a *Charter* right, a proper appreciation for context is critical because such interpretations "often inform, and are informed by, other similarly deserving rights or values at play in particular circumstances."[124] In tandem with the second principle (the nonabsolute strength of rights), this third principle assists in the proper delineation of each competing right's strength, thereby bringing into "sharp relief"[125] the relevant aspects of each right and the actual consequences that arise from the limitation of each. This principle was clearly disregarded by Justices LeBel and Rothstein in *N.S.*, as other commentators have observed, because their proposed absolute ban "severely limits the impact of the contextual factors" which the Supreme Court itself has directed courts to consider when making this decision.[126]

As part of the necessary context in principle three, the fourth principle is that "the *Charter* must be read as a whole."[127] This is so courts can "give the fullest possible expression to all relevant Charter rights, having regard to the broader factual context and to the other constitutional values at stake."[128] This guidance further denounces Justices Rothstein and LeBel's judgment in *N.S.*: An accused's fair trial rights must be interpreted "in relation" to the exercise of a witness's religious freedom

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123 *Edmonton Journal*, *supra* note 61 at 1355–56, Wilson J, concurring.

124 *Mills*, *supra* note 50 at para 61.

125 *Edmonton Journal*, *supra* note 61 at 1355, Wilson J, concurring.

126 Ranjan K Agarwal & Carlo Di Carlo, "The Re-emergence of a Clash of Rights: A Critical Analysis of the Supreme Court of Canada's Decision in R. v. S. (N.)" (2013) 63 SCLR (2d) 143 at 160.

127 *Trinity Western* 2001, *supra* note 13 at para 31, citing *Dagenais*, *supra* note 6 at 877.

128 Iacobucci, *supra* note 12 at 140.

rights,[129] meaning that a witness's wearing of a niqab in the courtroom can never be categorically prohibited in order to preserve an accused's rights absolutely. Thus, when the *Charter* is "read as a whole," the exercise of one right is not privileged at the expense of another.[130]

Fifth, and more technically, the Supreme Court has emphasized that the language of "conflicting" or "clashing" rights is often an inappropriate characterization.[131] In *Dagenais*, for example, the Court noted that freedom of expression and an accused's fair trial rights are not always in conflict: "Sometimes publicity serves important interests in the fair trial process," such as a case in which a publication ban accords with an "accused's interest in public scrutiny of the court process."[132] Thus, as Justice Iacobucci has put it, the imagery of "clashing" or "colliding" rights "is fundamentally incongruous with the notion of 'reconciling' rights."[133] As a corollary, this means the potential competition between rights "does not necessarily imply unconstitutionality."[134] By this the Supreme Court refers to the fact that rights which are seemingly incongruous may actually be reconcilable when the contextual facts are properly assessed[135]—a concept which has been well established in the first stage of the Competing Rights Test. In tandem with the second, nonabsolute principle, then, this fifth principle directs courts to avoid characterizing the competing claims in a way that presupposes their irreconcilability.[136]

The final principle is a result of the onus of proof in competing rights cases, which necessarily differs from those in which a right is limited by a

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129 *Dubois*, *supra* note 119 at para 43; see also *Big M*, *supra* note 118 at para 117.

130 *Trinity Western* 2001, *supra* note 13 at para 31.

131 *O'Connor*, *supra* note 13 at para 129, L'Heureux-Dubé JA, dissenting.

132 *Dagenais*, *supra* note 6 at 882.

133 Iacobucci, *supra* note 12 at 156.

134 It should be noted, however, that the Court used the phrase "collision of rights" ("[t]he potential for a collision of rights does not necessarily imply unconstitutionality," see *Same-Sex Reference*, *supra* note 11 at para 50), which the fifth principle notes is not always a proper characterization.

135 *Ibid*.

136 See also *ibid* ("[c]onflicts of rights do not imply conflict with the *Charter*; rather the resolution of such conflicts generally occurs within the ambit of the *Charter* itself by way of internal balancing and delineation" at para 52).

state action or law.[137] Justice Iacobucci suggests that in this context, "there is no rule about onus *per se*" because the nature of the two valid but competing claims will often require the judiciary to simply reconcile the competing rights.[138] In other cases, it has been suggested more specifically that the "analysis should be carried on without privileging or disadvantaging either of the rights at issue."[139] This was seen, for example, in *Mentuck*. Writing for the Court, Justice Iacobucci noted that a trial judge's understanding of the conflicting rights or freedoms will typically be informed by the parties' arguments,[140] but where "there is no party or intervener present to argue the interests" of one side, he directed:

> The consideration of unrepresented interests must not be taken lightly, especially where *Charter*-protected rights such as freedom of expression are at stake. It is just as true in the case of common law as it is of statutory discretion that ... "[t]he burden of displacing the general rule of openness lies on the party making the application." ... In cases where the right of the public to free expression is at stake, however, and no party comes forward to press for that right, *the judge must consider not only the evidence before [them], but also the demands of that fundamental right*. The absence of evidence opposed to the granting of a ban, that is, should not be taken as mitigating the importance of the right to free expression in applying the test.[141]

Thus, the sixth and final principle is that the onus is on *the courts* to ensure that any limitations on claimant A's rights, imposed by the exercise of claimant B's rights, are constitutionally permissible. This principle emphasizes the fundamental difference between these cases and a section 1 analysis: In the latter, the state must demonstrate that the reason for, manner in, and extent to which it has infringed an individual's rights is justified in a free and democratic society; but in the former, a court assesses whether *its own* discretionary limitation on such a right strikes a proper rights-respecting balance. Put differently, the courts are

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137 Iacobucci, *supra* note 12 at 141.

138 *Ibid* at 142.

139 *Dagenais*, *supra* note 6 at 922, Gonthier J, dissenting.

140 *Mentuck*, *supra* note 68 at para 37.

141 *Ibid* at para 38 [italics emphasis added, underlining in original, references omitted].

responsible for ensuring that the importance of both competing rights is fully respected.[142]

To summarize, each of these principles may be stated as follows:

(1) There is no hierarchy of *Charter* rights: All rights must be given equal priority.

(2) The strength of a *Charter* right is never absolute: An unrestricted, literal application of *Charter* values may preclude the equally valid exercise of another individual's rights.

(3) Context is crucial: Courts must appreciate how the exercise of one right affects that of another in order to facilitate their harmonious exercise.

(4) As part of the context in principle (3), the *Charter* must be read as a whole to appreciate and give the fullest expression possible to all affected rights.

(5) Rights competitions should not be framed as "conflicts": A rights competition does not necessarily entail unconstitutionality, so courts must avoid a characterization which presupposes the irreconcilability of both rights.

(6) Onus is on the courts: In contrast to a section 1 justificatory analysis, judges have a stringent duty to ensure the meaningful exercise of both competing rights.

With an understanding of the principles that guide courts in the Competing Rights Test, the next section will assess whether they are sufficient to achieve a rights-respecting balance, as compared to the doctrines of reconciliation and practical concordance.

III. PRACTICAL CONCORDANCE, RECONCILIATION, AND BALANCING

In this Part, I suggest that the above-mentioned principles, abundantly entrenched in the case law, are sufficient to allow courts to reach a proper rights-respecting balance at the first and second stages of the Competing Rights Test. However, when they reach the final balancing

142 *Dagenais*, *supra* note 6 at 877.

stage, there is a palpable possibility that they will interchange the concept of reconciling competing rights, on the one hand, with balancing the positive and negative effects produced by denying one right, on the other. Instead, I argue that Canadian courts must heed the following guidance concerning the reconciliation of competing rights and should only resort to a balancing inquiry to the extent that they assess the effects of a right's *limitation*(s), not its denial.

The proceeding section will review the Canadian jurisprudence and Konrad Hesse's concept of *praktische Konkordanz* applied in German constitutional law to demonstrate the fundamental differences between reconciling and misinformed balancing. I suggest that any confusion between them risks impermissibly prioritizing, or otherwise balancing away, an individual's constitutionally protected rights.

A. The Utility of Comparative Constitutional Law

It is worth briefly pausing here to understand why the approach of a foreign jurisdiction should be viewed as a potential guide for the Canadian approach to competing rights. To be sure, some take issue with a comparative approach to legal dilemmas, especially for constitutional issues;[143] however, while not appropriate in every instance,[144] a comparative constitutional analysis can be an exceptionally useful "source of practical wisdom to the tough business of deciding hard cases where the

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143 This view is especially prominent in the Supreme Court of the United States; as just one example, see Justice Scalia's dissenting opinion in *Lawrence v Texas* where he held that the majority's discussion of foreign views was "meaningless dicta," and even "[d]angerous dicta, ... since 'this Court . . . should not impose foreign moods, fads, or fashions on Americans'" (see 539 US 558 (2003) at 598, citing *Foster v Florida*, 537 US 990 (2002)).

144 See e.g. Claire L'Heureux-Dubé, "The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court" (1998) 34:1 Tulsa LJ 15 at 26:

> [T]hough the solutions of other countries or of the international community are useful and important considerations, we must ensure that foreign reasoning is not imported without sufficient consideration of the context in which it is being applied. There are important reasons why the solutions developed in one jurisdiction may be inappropriate elsewhere. Political and social realities, values, and traditions differ across borders, regions, and levels of development.

positive legal materials run out."[145] Indeed, as the former Supreme Court Justice L'Heureux-Dubé observed over two decades ago, "perhaps more than ever, the same issues are facing many courts throughout the world," such as assisted suicide, abortion, hate speech, LGBTQIA+ rights, environmental protection, and the nature of democracy.[146] Moreover, a comparative analysis can assist a court "to understand the uniqueness of our Constitution and reach a decision appropriate for our circumstances."[147] Since, as I argue, the Canadian case law generates inconsistent or even impermissible conceptions of how to reconcile rights, it is helpful to understand how another jurisdiction has addressed the same issue. Germany in particular offers a valuable model because, as I explain in a later section, the doctrine of *praktische Konkordanz* is most consistent with the six principles outlined above.[148]

B. Konrad Hesse's Praktische Konkordanz *and Reconciliation, Generally*

Much of the reconciliation approach is informed by Hesse's concept *praktische Konkordanz*, often translated as "practical concordance."[149] As

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145 Sujit Choudhry, "Migration as a New Metaphor in Comparative Constitutional Law" in Sujit Choudhry, ed, *The Migration of Constitutional Ideas* (Cambridge, UK: Cambridge University Press, 2006) 1 at 4.

146 L'Heureux-Dubé, *supra* note 146 at 23.

147 Adam M Dodek, "Comparative Law at the Supreme Court of Canada in 2008: Limited Engagement and Missed Opportunities" (2009) 47 SCLR (2d) 445 at 454.

148 This is especially true in contrast to the (theoretical) approach of some scholars, see e.g. Alexy, *supra* note 25 at 67, where he argues:

> Principles are optimization requirements relative to what is legally *and* factually possible. The principle of proportionality in its narrow sense, that is, the requirement of balancing, derives from its relation to the *legally* possible. If a constitutional rights norm which is a principle competes with another principle, then the legal possibilities for realizing the norm depend on the competing principle. To reach a decision, one needs to engage in a balancing exercise ... [T]he character of constitutional rights norms as principles implies that when they compete with other principles, a balancing exercise becomes necessary [emphasis in original removed].

149 Thilo Marauhn and Nadine Ruppel suggest that this translation is "inadequate" but do not provide an alternative, suggesting that this translation is likely sufficient to capture the doctrine (Thilo Marauhn & Nadine Ruppel, "Balancing Conflicting Human Rights: Konrad Hesse's Notion of '*Praktische Konkordanz*' and the German Federal

Thilo Marauhn and Nadine Ruppel explain, Hesse conceived of this doctrine as "a kind of substitute for a general limitation clause" for rights in Germany's Basic Law that do not contain their own.[150] While Hesse's account does not provide a multipart structure or framework to the reconciliation process, as in *Dagenais* or *N.S.*, it does offer several guiding principles,[151] many of which are consistent with those guiding the Canadian approach.

Arguably the most important of those principles is the distinction between practical concordance and "pure balancing of constitutional interests," the former of which derives from the consideration that all constitutional interests hold equal weight and, by definition, are not considered superior to any other.[152] Notably, this principle is one and the same as the Equality Principle (i.e., that the *Charter* does not impose a hierarchy of rights). As a result of the equal status between rights, Hesse conceived that practical concordance "requires the establishment of a *proportional correlation* between individual rights and community interests that are limiting those rights"[153]—except, in our situation, "community interests" would be substituted with "another individual's right(s)." This is also consistent with the second and third Canadian principles which mandate a consideration of the exercise of other individuals' rights and of the broader factual context, respectively.

Furthermore, practical concordance requires and is aimed at "the preservation of the unity of the constitution," which is reflected in its consideration of all fundamental rights being of equal rank and validity.[154] This principle is, again, consistent with the Equality Principle and with the Canadian requirement that the *Charter* be read as a whole "so that one right is not privileged at the expense of another."[155] In addition, and as a corollary of this unity principle, practical concordance also requires optimization: "Conflicting rights and interests must be subject to

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Constitutional Court" in Eva Brems, ed, *Conflicts Between Fundamental Rights* (Antwerp: Intersentia, 2008) 273 at 274).

150 *Ibid* at 276.

151 *Ibid* at 280–81.

152 *Ibid* at 281.

153 *Ibid* at 280–81 [emphasis added].

154 *Ibid* at 296.

155 *Trinity Western* 2001, *supra* note 13 at para 31, citing *Dagenais*, *supra* note 6 at 877.

limitations, so that each one attains its optimal effect."[156] These limitations, however, must be equal to each other and, much like the Canadian guidance, they must take into account the specific circumstances of each case.[157] Thus, this doctrine does not redefine the strength of a right at the determination of conflict stage; it only applies "if there is a conflict which necessitates reference to the principle of proportionality."[158] In other words, a right's strength, or ability to be exercised, only becomes limited in relation to another right when the two are in a true conflict that cannot be overcome by accommodation or nonlimiting measures. Practical concordance is therefore only applicable when all other methods of managing the conflict have been exhausted,[159] which is akin to the Canadian approach—which only resorts to balancing once a true conflict of rights, unresolvable through accommodation or reconciliation, is found.

In direct opposition to the Canadian approach, however, "practical concordance does not weigh fundamental rights but exclusively refers to criteria included in the Constitution."[160] Perhaps the starkest contrast we have seen in this regard was the majority's attempt in *N.S.* to weigh the salutary and deleterious effects of requiring a witness to completely abdicate her religious convictions, despite acknowledging that such an inquiry would be "difficult."[161]

With a brief understanding of the principles that guide reconciliation, and of their general consistency with those guiding the Canadian approach, the next section discusses the extent to which the latter diverges from those principles in applying its balancing framework.

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156 Marauhn & Ruppel, *supra* note 151 at 280.

157 Barak, *supra* note 55 at 369. See also Marauhn & Ruppel, *supra* note 151 ("'[p]ractical concordance' addresses conflicting fundamental rights only with regard to the specific circumstances of the case" at 281).

158 Marauhn & Ruppel, *supra* note 151 at 282–83.

159 *Ibid* at 281.

160 *Ibid*.

161 *NS*, *supra* note 5 at para 36.

C. Reconciliation vs. Balancing the Effects of a Right's Denial

For the most part, the Competing Rights Test and the discernible principles which guide it are on par with the analogous guiding principles of reconciliation and practical concordance. Indeed, as noted, they both direct that: all constitutional rights must be weighted equally; the scope and strength of each right is to be determined with reference to the purpose of each right and to the broader factual and constitutional context of the conflict; no right may be defined so broadly or exercised absolutely so as to negate the exercise of another; and that nonlimiting, accommodating alternative measures must be canvassed before moving to the final stage of the inquiry. In this way, the Competing Rights Test appears consistent with the reconciliation guidance at the first and second stages—namely, the proper delineation of each competing right's scope and the assessment of less restrictive alternative measures.

However, the concepts of reconciliation and balancing begin to diverge when the courts turn from the second step to the third one. This is because the final step requires courts to balance the negative and positive effects produced by each right's limitation, but, if misapplied, can be interpreted to require courts to balance the effects of one right's denial at the absolute protection of another. On the one hand, the *Dagenais/Mentuck* test asks whether the conflict can be resolved, either by properly characterizing the nature of the complaint (as the dissent does in *B. (R.)*), or through an alternative solution that does not require the rights to be limited at all (as the majority determined in *Dagenais*); and where it cannot be resolved, the solution is to balance. Reconciliation, on the other hand, does not permit a finding of an unresolvable conflict because that is "fundamentally incongruous" with its entire purpose.[162] As Justice Iacobucci notes, at its basic definitional level the concept of balancing "connotes assigning primacy to one right over another" once the effects of each are weighed; in contrast, reconciliation "implies harmonizing seemingly contradictory things so as to render them compatible."[163]

Thus, the key difference between the two approaches appears to lie in the *tolerance* of (seemingly) irreconcilable *Charter* claims under the

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162 Iacobucci, *supra* note 12 at 156.

163 *Ibid* at 141.

balancing approach—so long as their salutary effects outweigh the deleterious ones—as opposed to the requirement of *coexistence* between them under reconciliation. In the former, if a court determines that one right cannot be exercised without precluding the exercise of another, it will determine if the negative effects of such an arrangement are disproportionate to the positive ones; in the latter approach, however, there cannot be a finding of such disproportionate negative impacts because that means that one right is entirely negated.[164] The core purpose of the reconciliation approach is to find a solution that allows *both rights* to be meaningfully exercised. Any attempt at balancing the effects of one right's negation is fundamentally at odds with the principles that all *Charter* rights possess equal priority, and that no right may be protected at the denial or extinguishment of another. Thus, when Canadian courts move from step two to three of the Competing Rights Test, they risk, by definition, not reconciling the competing rights but actually prioritizing one right over the other.[165]

Reconciliation, then, may also be described as the relative re-definition[166] or "proportional limitation" of the strength of each competing right because it aims to define those strengths in light of the other's valid

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164 For a similar approach, see Jacob Weinrib, "The Essence of Rights and the Limits of Proportionality" in Geneviève Cartier & Mark D Walters, eds, *Promise of Legality: Critical Reflections on the Work of TRS Allan* (Oxford, UK: Hart Publishing, 2025) 161 [J Weinrib, "The Essence of Rights"] ("[t]hus, when the essence of a right is breached, ... justification is impossible because the nullification of a member of the system of rights can neither be justified by appealing to a sub-constitutional consideration nor to another member of the system of rights" at 175).

165 Although critical of balancing *and* reconciliation, see e.g. Patricia Hughes, "Resiling from Reconciling?: Musing on *R. v. Kapp*" (2009) 47 SCLR (2d) 255 ("[a]lthough reconciling rights through the definitional exercise is an admirable objective, it is difficult to do. And the end result is often not much different from a section 1 analysis: one right takes priority over the other" at 261).

166 See e.g. *Same-Sex Reference*, *supra* note 11 at para 52:

> The right to same-sex marriage ... may conflict with the right to freedom of religion if the Act becomes law. ... However, the jurisprudence confirms that many if not all such conflicts will be resolved within the *Charter*, by the delineation of rights prescribed by the cases relating to s. 2(*a*). *Conflicts of rights do not imply conflict with the* Charter*; rather [their] resolution ... generally occurs within the ambit of the* Charter *itself by way of internal balancing and delineation* [italics emphasis added, underlining in original].

competing demands, so that they are both limited to an equal extent,[167] and so that both may be exercised harmoniously.[168] This redefinition, however, does not affect the *scope* of what each competing right protects; it affects their *strengths*, relative to the other right(s), the facts of the case, and the *Charter*'s unity requirement. Moreover, this redefinition is only required when all other methods of accommodating the two rights have been exhausted,[169] such as interpreting the facts in a way that creates no true conflict or employing less restrictive alternatives.[170]

The importance of this distinction—between reconciliation and an improper balancing inquiry—cannot be understated: There is a fundamental difference between the *limitation* of a *Charter* right on the one hand, and its complete denial, abrogation, or negation on the other. Lorraine Weinrib adroitly explains this distinction in the following way:

> [Our] constitutional arrangements do not permit the state to abrogate these rights altogether but allow limits on restricted grounds. Limitation differs from abrogation in the way that an exception to a rule differs from the absence of the rule. A limitation attests to the primacy of that which it limits and maintains some conceptual continuity with it, coming into play only upon demonstration of stringent justifying conditions. In contrast, abrogation nullifies that which it abrogates. It is the traditional role

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167 See Barak, *supra* note 55 at 369:

> The weight of the first scale (containing the first constitutional right) should not overtake the second scale (containing the other constitutional right). Instead, the balance should be conducted while trying to satisfy both rights, so that the limitation on the first right is equal to the limitation on the other.

168 See Marauhn & Ruppel, *supra* note 151 ("[r]ights and interests guaranteed by the Constitution must be related to one another in such a way that each of them can be put into effect" at 280).

169 *Ibid* at 281.

170 For a recent example, one may refer to *R v MacKinnon*, which concerned a witness's ability to wear a face mask while giving testimony during the COVID-19 pandemic in competition with an accused's fair trial rights (see 2021 ONSC 2749). The court found that no balancing analysis was required because "testimony by videoconference is a reasonable alternative to requiring witnesses who testify in person to remove their masks, which can accommodate both the public health interest during the pandemic, and the defendant's fair trial rights" (*ibid* at para 93).

> of courts to sustain this distinction wherever it arises in our legal system.[171]

In this way, once the scope of a *Charter* right has been determined (e.g. that section 2(a) protects a witness's right to wear a niqab while testifying[172]), any restrictions on a claimant's ability to exercise that right thereafter are considered limitations because the existence of the right has nevertheless been established. A right is ***denied***, however, where an activity or practice which otherwise accords with the purpose of that right is excluded from its scope[173]—especially if excluded solely because of its impact on another individual's right(s).[174]

Another way to understand this point is to consider the difference between the purpose of an *Oakes* analysis and of section 33 of the *Charter*—the "notwithstanding clause."[175] Regarding the former, the *Oakes* framework provides a set of standards against which to determine whether a government's actions or laws have appropriately respected the importance of an impugned right.[176] It is for this reason that the final

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171 Lorraine E Weinrib, "Canada's *Charter of Rights*: Paradigm Lost" (2002) 6:2 Rev Const Stud 119 at 121. See also *Edmonton Journal*, *supra* note 61 at 1355–56, Wilson J, concurring:

> [T]he importance of the right or freedom must be assessed in context rather than in the abstract and that its purpose must be ascertained in context. This having been done, the right or freedom must then ... be given a generous interpretation aimed at fulfilling that purpose and securing for the individual the full benefit of the guarantee.

172 *NS*, *supra* note 5 at paras 11–14.

173 See e.g. *Quebec (Attorney General) v 9147-0732 Québec inc*, 2020 SCC 32, Abella J, concurring ("[p]urpose ... remains the 'central' consideration when interpreting the scope and content of a *Charter* right" at para 80 [internal citations omitted]). See also *Big M*, *supra* note 118 ("[t]he meaning of a right or freedom guaranteed by the *Charter* [is] to be ascertained by an analysis of the purpose of such a guarantee; it [is] to be understood, in other words, in the light of the interests it was meant to protect" at para 116 [emphasis in original]).

174 See e.g. *NS, supra* note 5 at para 69, LeBel & Rothstein JJ, concurring.

175 *Charter*, *supra* note 1, s 33(1).

176 See e.g. J Weinrib, *The Impasse*, *supra* note 18 at 64:

> The constraints that proportionality imposes on the means through which a right may be limited reflect the idea that each member [i.e., *Charter* right] of the system of rights is *a standard that legislative authority must fulfill*. The standards that comprise the system of rights are not fulfilled by

proportionality substage of the test "precludes the abject nullification of one member of the system of rights to further the fulfillment of another."[177] This principle is amply reflected in the case law concerning rights reconciliation, particularly in the first and second principles noted above. However, under section 33, the state may validly override (i.e., deny) any right or freedom in sections 2 and 7 to 15 of the *Charter* without any comparable justificatory burden, so long as that override is expressly authorized by law. Thus, when a court misapplies the Competing Rights Test and seeks to balance the effects of a right's denial, the result is an abject sacrifice, akin to a section 33 override, but *without* any comparable prior legislative authority to do so. Courts are thereby given the green light "to make normative judgments about which rights should be prioritized at the expense of others"[178]—the antithesis of their proper role, which is "to give the fullest possible expression to *all* relevant Charter rights, having regard to the broader factual context and to the other constitutional values at stake."[179]

Finally, the distinction between balancing and reconciling *Charter* claims cannot be understood without appreciating the differing functions played by the proportionality substage of the *Oakes* test and the third stage of the Competing Rights Test. The two analyses play parallel roles insofar as they both assess the extent and effect of a limitation on a claimant's *Charter* right(s). They diverge, however, because in a section 1 analysis the government must demonstrate that its limiting measure is justified and, if it is not, the *measure* is constitutionally unenforceable; but in competing rights claims the courts must ensure that both parties' *Charter* rights are protected and, if they are not, the proposed solution is therefore unenforceable. The final stage of the Competing Rights Test therefore differs from pure balancing precisely because of the requirement imposed by the Equality Principle: A court cannot declare claimant A's rights to be constitutionally unenforceable (in the same way as a government's limiting measure) *because of their impact* on claimant B's rights.

> legislative measures that impede one member of the system without advancing another. Nor are these standards respected by measures that restrict one member to a greater extent than another's claim to fulfillment can justify [emphasis added].

177 J Weinrib, "The Essence of Rights", *supra* note 166 at 9.

178 Iacobucci, *supra* note 12 at 140.

179 *Ibid* at 140 [emphasis added].

In such a case, the court has committed an error in one of the first two stages: Either it found a rights competition to exist because it overbroadly or improperly defined the scope of a claimant's rights,[180] or it has not canvassed or simply refused to apply the full "myriad" of accommodative solutions available in the given circumstances.[181]

It should therefore be exceptionally clear why the majority opinion in *N.S.* represents an impermissible violation of the Equality Principle: when Chief Justice McLachlin determined that the two competing rights could not be reconciled or operate harmoniously, she then provided factors to assist in determining which right was more deserving of protection. More drastically, Justices LeBel and Rothstein would have ordered an absolute ban on witnesses wearing a niqab in the courtroom "[b]ecause of its impact on the rights of the defence,"[182] which can only be described as the unequivocal prioritization of the accused's rights over those of the complainant. For this reason, Justice Abella's dissenting

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180 As decided by the majority in *Trinity Western* 2018, *supra* note 94 at para 75. For Justice Rowe's concurring opinion, see *ibid* at paras 210, 251. See also *Big M*, *supra* note 118 at para 117:

> The 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. At the same time it is important not to *overshoot the actual purpose of the right or freedom in question*, but to recall that the *Charter* was not enacted in a vacuum, and must therefore ... be placed in its proper linguistic, philosophic and historical contexts [emphasis added, references omitted].

181 *NS*, *supra* note 5 at para 92, Abella J, dissenting. A failure to find that *any* available accommodative solutions apply or are appropriate in a given case may mean that the court has improperly treated the strength of one claimant's rights as absolute. In *NS*, for example, the majority found it likely "that no accommodation is possible," but this was because they accepted that the importance of being able to see a witness's face during cross-examination "is too deeply rooted in our criminal justice system to be set aside absent compelling evidence." In contrast, Justice Abella found that "abridgements of this 'ideal' often occur in practice yet are almost always tolerated" (*ibid* at paras 97, 210, 251). On this issue, one may refer to the Ontario Superior Court in *R v Robinson*, which affirmed that "the right to full answer and defence does not entitle an accused to be in the same physical space or courtroom with a complainant, even when that witness's credibility is in issue" (see 2021 ONSC 2447 at para 15). See also *R v Jones*, 1995 CarswellOnt 5619, 29 WCB (2d) 12 [*Jones*] ("[t]he right to full answer and defence is not absolute. Like all other constitutional rights, it must be carefully balanced against other just as important competing rights" at para 9).

182 *NS*, *supra* note 5 at para 69.

opinion reflects a more appropriate, comprehensive approach to the question of accommodation, and to the "relative re-definition" characterization of reconciliation, because the strength of the accused's right to a fair trial was defined in relation to the witness's right to freedom of religion, not in absolute terms.[183] Her approach therefore properly understands that courts must determine *how* to give the fullest expression possible to each impugned *Charter* right, not *whether* to do so.[184]

Some have argued that it is impermissible to limit the strength of *Charter* rights in a "relative re-defining" manner because it is ad hoc or otherwise arbitrary. Matthew Harrington, for example, maintains that at this stage, "there is no precise standard for determining the boundaries of the definitional exercise. ... [Judges] are largely free to define a right in individual cases as seems best to them under the circumstances."[185] Without engaging in an exhaustive response to this critique, I would simply suggest that, first, the Equality Principle provides the "precise standard" referred to and, second, this is in fact what judges do in every instance of determining whether a *Charter* right was infringed. With respect to its scope, "the purpose of the right or freedom in question is to be sought by reference to ...," amongst other things, "... the meaning and purpose of the *other specific rights and freedoms* with which it is associated" in the *Charter*.[186] In the same way, a right's strength "is not absolute ... it must be carefully balanced against other just as important competing rights."[187] The strength of each competing right can therefore be properly defined not "in abstraction, but rather in the particular factual

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183 Justice Abella notes that "realistically, not being able to see a witness' whole face is only a partial interference with what is, in any event, only one part of an imprecise measuring tool of credibility, [so] we are left to wonder why we demand full 'demeanour access' where religious belief prevents it" (see e.g. *ibid* at para 108). The issue of defining the scope of one claimant's rights too broadly is also seen in the contrasting opinions of the majority and Justice Rowe in *Trinity Western* 2018 (see *supra* note 94 at paras 210, 251).

184 Iacobucci, *supra* note 12 at 140.

185 Matthew P Harrington, "Canada's New Hierarchy of Rights" in Derek BM Ross & Sarah E Mix-Ross, eds, *Canadian Pluralism and the Charter: Moral Diversity in a Free and Democratic Society* (Toronto: LexisNexis, 2019) 297 at 312–13.

186 *Big M*, *supra* note 118 at para 117, Dickson J [emphasis added].

187 *Jones*, *supra* note 183 at para 9, citing *Crawford*, *supra* note 115, Sopinka J.

matrix in which they arise."[188] Moreover, as Patricia Hughes has noted, a reconciliation approach will "result in recognition of both rights, even if not in the form originally claimed,"[189] which is clearly preferable to letting the exercise of one right deny that of another.

In summary, in a constitutional system which places its rights and freedoms on equal footing, not permitting one to override any other, the finding of an irreconcilable conflict is intolerable and cannot end the inquiry. Courts must reconcile those competing claims instead of merely balancing the positive and negative effects they produce because, in such cases, the term "deleterious effects" can easily disguise what is actually the *denial* of one claimant's rights. I do not pretend that such a task will be simple or straightforward for the courts; seemingly black-and-white, zero-sum cases like *N.S.* will arise, instead with new, unique circumstances with which a court must grapple. But because the six guiding principles noted above—especially the Equality Principle—do not permit preference for one competing right, the only other constitutionally permissible solution is to limit, as minimally as necessary, the strength of each right so that they may both be exercised.[190] Indeed, Justice Abella

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188 Iacobucci, *supra* note 12 at 140.

189 Patricia Hughes, "The Reconciliation of Legal Rights" in Shaheen Azmi, Lorne Foster & Lesley Jacobs, eds, *Balancing Competing Human Rights Claims in a Diverse Society: Institutions, Policy, Principles* (Toronto: Irwin Law, 2012) 271 at 273 [emphasis added]. She continues, however, that "there will be times [where reconciliation] is not possible because one right claimed is too antithetical to the other right or to societal values and interests," the former objection of which directly opposes my contentions that claimant A's rights can never be exercised absolutely so as to exclude an otherwise constitutionally protected activity from the scope of claimant B's rights, and that the scope of one claimant's right cannot be defined overbroadly so as to encompass practices or beliefs that do not properly fall within it, which will inevitably create a conflict with the exercise of another's rights (*ibid*).

190 Assuming that the scope of each right has been properly delineated. On the issue of zero-sum circumstances, one may refer to *Trinity Western* 2018, in which the majority found that the Law Society of British Columbia "was faced with an either-or decision on which compromise was impossible — either allow the mandatory Covenant in TWU's proposal to stand, and thereby condone unequal treatment of LGBTQ people, or deny accreditation and limit TWU's religious practices" (see *supra* note 94 at para 146). However, Justice Rowe found that there was no compromise necessary—and, therefore, no competition of rights—because section 2(a) is "a right designed to shield individuals from religious coercion [and therefore] cannot be used as a sword to coerce [conformity to] religious practice" (*ibid* at para 251, citing Factum, Intervenor (Canadian Secular Alliance)). In other words, what appears to be a competition of rights at

was well aware that "abridgements of [the] 'ideal' often occur in practice yet are almost always tolerated."[191] Accordingly, a balancing inquiry is only appropriate to the extent that it assesses whether the limitations (i.e., the results of the reconciliation analysis) are proportionate, and not whether the denial of one right produces sufficient positive effects. To the extent that the *Dagenais/Mentuck* test (or Competing Rights Test) diverges from these considerations by moving to an ill-informed balancing inquiry at stage three, it therefore risks violating the guiding principles laid out in Part II.

CONCLUSION

We began with a distinction between two types of *Charter* limitations: those that arise from a state action or law, and those which result from the exercise of two valid, yet seemingly conflicting *Charter* rights. While the *Charter*'s section 1 framework for resolving claims in the former camp is well established, the guidance for resolving those in the latter has been somewhat fragmented. Academics in the absolutist and relativist camps advocate for divergent methods of adjudicating such claims, but Canadian courts have largely adopted a rational middle ground. Accordingly, my first aim of this article has been to provide a comprehensive account of the Canadian approach and its guiding principles. I suggest that the case law mandates a general three-part Competing Rights Test in these cases, directing courts to: First, determine if a competition truly exists based on a proper delineation of the scope of each impugned right; second, assess whether any accommodating, nonimpairing measures could be imposed to overcome the conflict; and third, if no such alternatives are appropriate or available, determine whether the positive effects of a right's limitation are proportional to its negative effects. I suggest that the case law's guidance for resolving these claims reflects a proper concern for core constitutional principles, including the equal status as between rights, their nonabsolute strength, and that the exercise of one right can never negate or deny that of another right. However, while the majority of the case law requires a solution that "fully respects the

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first blush may be resolved by properly delineating the scope of each right involved—the very essence of the first stage of the Competing Rights Test.

191 *NS*, *supra* note 5 at para 97.

importance of both sets of rights,"[192] the final balancing stage of the Competing Rights Test has the potential to pull in the opposite direction. In essence, when improperly applied (or ignored altogether), the aims of the balancing inquiry are fundamentally at odds with those of reconciliation. The former places priority for the exercise of one right in the face of an irreconcilable conflict, while the latter precludes such a finding. Instead, reconciliation requires the seemingly incompatible rights to be rendered compatible[193] through a redefinition of each right's strength, relative to the facts of a given case, to the other right(s) in question,[194] and to a broader consideration of the *Charter*'s purposes as a whole.

Thus, my second aim has been to identify whether and to what extent the Competing Rights Test diverges from pure reconciliation or "practical concordance." To that end, I suggest that they are consistent in the first and second stage (i.e., determining whether a conflict truly exists and whether that conflict can be accommodated, respectively). However, the Competing Rights Test mandates a balancing inquiry where a true conflict cannot be accommodated while the reconciliation approach precludes such a finding, because an irreconcilable conflict necessarily means that one right must "win." My concern, therefore, is not with the nature of a balancing inquiry in general, such as the one employed in the final substage of the *Oakes* test, but rather with courts' confusion of balancing negative and positive effects of a *limitation* with the *total denial* of one right. Thus, if Canadian courts wish to truly respect the importance of both competing rights, and to meaningfully protect *Charter* rights against the unrestricted exercise of another's rights, they must follow the reconciliation guidance abundantly established in the current jurisprudence and reject a balancing inquiry which merely disguises the abject sacrifice of a competing right.

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192 *Dagenais*, *supra* note 6 at 877.

193 Iacobucci, *supra* note 12 at 141.

194 See e.g. *Mills*, *supra* note 50 at para 21:

> Therefore, unlike s. 1 balancing, where societal interests are sometimes allowed to override *Charter* rights, under s. 7 rights must be defined so that they do not conflict with each other. The rights of full answer and defence, and privacy, must be defined in light of each other, and both must be defined in light of the equality provisions of s. 15.