Interlocutory Stays in Charter Challenges: An Alternative to the Private Law

*Nathaniel Reilly**

Applications for interlocutory stays of legislation in Charter *challenges raise difficult issues about the limits of judicial power in a democratic society. Accordingly, the interlocutory injunction analysis in* Charter *challenges raises what are quintessential issues of public law. Nevertheless, courts in Quebec and the rest of Canada apply what is — in origin and essence — a private law framework. This paper argues that a key reason for the current inaccessibility of interlocutory* Charter *stays is that the conceptual tools of the private law do not provide a way to appropriately balance deference to democratically-elected legislatures with the promise of appropriate and just Charter remedies. The main existing proposal for improving the courts' approach, adding review of the merits to the model, provides an incomplete solution to this problem. Thus, in place of the existing alternative approach, this paper argues that a public law model inspired by sections 1 and 24(1) can provide a more successful framework. Throughout, four recent interlocutory judgments in Quebec are used as a focal point to explore both the present approach and the proposed alternative.*

Les demandes de suspension interlocutoire de la loi dans les contestations fondées sur la Charte *soulèvent des questions difficiles sur les limites du pouvoir judiciaire dans une société démocratique. Par conséquent, l'analyse des demandes d'injonction interlocutoire dans les contestations en vertu de la* Charte *soulève ce qui constitue des questions essentielles de droit public. Et pourtant, les tribunaux du Québec et du reste du Canada appliquent ce qui est – à l'origine et par essence – un cadre de droit privé. Le présent article soutient que l'une des principales raisons de l'inaccessibilité actuelle des suspensions interlocutoires fondées sur la* Charte *est que les outils conceptuels du droit privé ne permettent pas d'établir un équilibre approprié entre la nécessaire retenue envers les assemblées législatives démocratiquement élues, d'un côté, et la promesse de recours appropriés et justes fondés sur la* Charte*, de l'autre. La principale proposition existante pour améliorer l'approche des tribunaux, soit l'ajout d'un examen du bien-fondé au raisonnement, offre une solution incomplète à ce problème. Ainsi, au lieu de l'approche alternative existante, le présent article soutient qu'un modèle de droit public inspiré des articles 1 et 24(1) peut fournir un cadre plus concluant. Pour ce faire, quatre jugements interlocutoires récents au Québec sont utilisés pour explorer à la fois l'approche actuelle et l'alternative proposée.*

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I. Introduction

Applications for interlocutory stays of legislation in *Charter* challenges raise a difficult question about the limits of judicial power in a democratic society. If the motions judge rules in favour of the applicant, democratically-enacted legislation will be suspended — without full consideration of the legal arguments, and without the benefit of a detailed evidentiary record. But if the legislation is not suspended, constitutionally-guaranteed rights may be irreparably infringed while the trial is ongoing. Similar issues arise when it is executive action, rather than legislation, that is the target of the application for an interlocutory injunction. How are courts to balance these risks?

The problem is a serious one. Final decisions on the merits of complex constitutional challenges often take many years to be rendered.[1] It is the courts' decisions on applications for interlocutory stays that often determine whether or not rights will be violated during those years of waiting. The framework that governs this balancing is thus of enormous practical importance — and theoretical interest — for constitutional law throughout Canada.[2]

Perhaps the most striking feature of the framework employed to conduct this balancing is that it is, in its origin and its essence, a private law approach. This is so even though the central difficulties of these cases are archetypal matters of public law.[3] Nevertheless, it is now established in Canadian jurisprudence that applications to stay the operation of legislation during a *Charter* challenge are to be assessed using substantially the same framework of analysis as when private parties seek interlocutory injunctions in civil suits.[4]

1 For instance, *Fraser v Canada (AG)*, 2020 SCC 28, an equality rights decision rendered on 16 October 2020, was initiated in the FC on 14 November 2014 — almost six years before the judgement at the SCC. Even the judgment at first instance took over two and a half years to be handed down.

2 See e.g. *Toronto (City) v Ontario (AG)*, 2018 ONCA 761 [*Toronto Ward Boundaries*], aff'd 2021 SCC 34; *Alberta Union of Provincial Employees v Alberta*, 2019 ABQB 577, rev'd 2019 ABCA 320 [*AUPE*], leave to appeal to SCC refused, 38902 (12 March 2020); *Cambie Surgeries Corporation v British Columbia (AG)*, 2018 BCSC 2084, aff'd 2018 BCCA 385, leave to appeal to SCC refused, 38450 (2 May 2019*); AC and JF v Alberta*, 2021 ABCA 24, leave to appeal to SCC refused, 38902 (12 March 2020).

3 See e.g. Abram Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89:7 Harv L Rev 1281. I recognize, of course, that the boundaries between private law rights and constitutionally protections may be contestable: see e.g. Aharon Barak, "Constitutional Human Rights and Private Law" (1996) 3:2 Rev Const Stud 218.

4 As I explain in Part II, the basic framework is that of *RJR–MacDonald Inc v Canada (AG)*, [1994] 1 SCR 311 [*RJR–Macdonald*], 111 DLR (4th) 385, which draws on the private law model in *American Cyanamid Co v Ethicon Ltd*, [1975] AC 376 (UKHL) [*American Cyanamid*]. I consider differences in the approach in Quebec in Part II, below.

The appropriateness of this seemingly-settled analytic harmony between *Charter* cases and the private law approach to interlocutory injunctions has generated relatively little scrutiny in recent years.[5] This paper aims to unsettle this consensus. To that end, I will suggest that the private law interlocutory model employed by Canadian courts is a poor fit in challenges based on the *Canadian Charter of Rights and Freedoms*.[6] In light of the failings of the present analytic approach, I will sketch the contours of an alternative way to answer these difficult public law questions.

The remainder of this paper is organized as follows. Part I sets out some contextual considerations relevant to any interlocutory injunction framework. Part II reviews the existing framework for interlocutory injunctions and some of the Quebec courts' recent applications of that framework in applications for interlocutory *Charter* stays of primary or secondary legislation. Throughout, I examine some of the ways that the framework fails to respond to the differences between private civil litigation and *Charter* challenges to legislation. Part III briefly considers an alternative approach that other authors have proposed which, I will argue, falls short of addressing the main problems identified in Part II. In Part IV, I present one possible novel approach to interlocutory suspensions of laws. This alternative model may, help motions courts be more responsive to the *Charter* context.

II. Contextualizing Interlocutory Injunctions Frameworks

A. Purposes: affinities and divergence

This analysis must begin by considering the ends served by interlocutory injunctions and related orders.[7] There is a broad consensus that the core purpose of all interlocutory injunctions is to protect rights while a judicial process is ongoing, in order to ensure the possibility of a fair outcome at trial.[8] Interlocutory

5 One notable exception can be found in Kent Roach, *Remedies for Human Rights Violations: A Two-Track Approach to Supra-National and National Law* (Cambridge, UK: Cambridge University Press, 2021) at 155 [Roach, *Two-Track Approach*].

6 See *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*].

7 For instance, art 49 CCP (orders to safeguard parties' rights) are addressed to similar ends. In what follows, I intend for my discussion of interlocutory injunctions to include these other kinds of orders.

8 See e.g. Jeffrey Berryman, *The Law of Equitable Remedies*, 2nd ed (Toronto: Irwin Law, 2013) at 22; Adrian Zukerman, *Zuckerman on Civil Procedure: Principles of Practice*, 3rd ed (London, UK: Thomson Reuters, 2013) at 10.1 [Zuckerman, *Civil Procedure*]; John Leubsdorf, "The Standard for the Preliminary Injunction" (1978) 91:3 Harv L Rev 525 at 565; R Grant Hammond, "Interlocutory Injunctions: Time for a New Model?" (1980) 30:3 UTLJ 240 at 278. See also art 511 CCP.

injunctions, in private or public settings, are the remedial response to potential wrongs while a suit is in progress. Described at this level of generality, there is certainly an "affinity" between the purpose of an interlocutory injunction in a private law dispute and in a *Charter* challenge.[9]

But an affinity in purpose does not require using the same conceptual framework in both settings. There is also a certain affinity between determining whether there is a violation of a contractual and constitutional right. In both contexts, the basic purpose of the analysis is to ascertain whether rights have been violated. But Canadian courts have nevertheless developed particular jurisprudential tools for ascertaining when *Charter* rights are infringed by legislation or other government action. These approaches are distinct from the jurisprudential frameworks that structure the inquiry into whether private law rights are infringed.[10] Beyond this, in *Charter* cases, there is also significant departure from the private law approach to, for instance, the interpretation of texts,[11] the law of standing,[12] and many other issues.

Seen in the wider context, employing different frameworks in private and public law — even if the issues have some affinity — is not unusual. Thus, to determine whether the same framework should be used, the appropriate question is not whether there is a degree of affinity between the purposes of private interlocutory injunctions and interlocutory *Charter* stays. Instead, the question should be whether using a private law framework responds to the challenges that courts confront in interlocutory *Charter* stays.

B. Inherent dilemmas

In both private and public law contexts, interlocutory injunctions are conceptually challenging remedies. As Professor Zuckerman has put it, interlocutory injunctions confront a dilemma that "leaves no room for escape."[13] This is because basic values of the civil justice system pull courts in opposite directions: on the one hand, procedural norms and ideals of "due process" suggest that orders should not be issued before the case has been fully considered on its

9 See Jamie Cassels, "An Inconvenient Balance: The Injunction as a *Charter* Remedy" in Jeffrey Berryman, ed, *Remedies: Issues and Perspectives* (Toronto: Carswell, 1989) 271 at 309.

10 *Cf*, for instance, *Bhasin v Hrynew*, 2014 SCC 71; *Syndicat Northcrest v Amselem*, 2004 SCC 47.

11 *Cf*, for instance, *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53; *Edwards v Canada (AG)*, [1929] UKPC 86, Sankey LJ.

12 *Cf*, for instance, *Brunette v Legault Joly Thiffault*, 2018 SCC 55; *Canada (AG) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [*Downtown Eastside*].

13 AAS Zuckerman, "Interlocutory Remedies in Quest of Procedural Fairness" (1993) 56:3 Mod L Rev 325 at 326 [Zuckerman, "Interlocutory Procedural Fairness"].

merits; on the other, allowing rights to be irreparably infringed while a court is seized of the dispute seems to make a mockery of the commitment to vindicating substantive rights.[14] As Professor Zuckerman has argued, "[n]either a universal ban on pre-judgment interference with rights, nor its opposite — a general rule of interference pending judgment — can provide a solution to the dilemma, because each involves either partiality [towards the party whose still-hypothetical rights are protected prior to the final outcome] or neglect of substantive rights or both."[15]

To this point, this dilemma is common to private and public interlocutory settings: in both contexts, procedural and remedial values seem to pull in opposite directions. In *Charter* challenges, however, there are additional issues. As Justice Sharpe (writing extrajudicially) put it, in interlocutory *Charter* stays "the risk of error in granting or withholding interim relief is considerably magnified."[16] Because the enforceability of measures adopted by the democratically-enacted branches of government hang in the balance, interlocutory *Charter* stay applications implicate very real issues about the limits of judicial power in a democratic society.[17] The measures that hang in the balance can, for instance, be responses to pressing health, economic, or political crises. Thus, the temptation to adhere to the kind of one-sided rule that Professor Zuckerman rejects is therefore especially strong in interlocutory *Charter* stays, because such a rule would guarantee that the role of the democratically-elected branches would never be intruded upon. But a one-sided rule would disregard the constitutional commitment to providing "appropriate and just" remedies for *Charter* rights violations.[18]

In interlocutory *Charter* stays, then, tension between "procedural" and "remedial" values takes on a resonance that goes well beyond the ideals of the civil justice system. The difficulty in interlocutory *Charter* stays is one of defining the appropriate form of curial deference in a democratic society that has endowed the judiciary with the power to exert constitutional control over legislation and other government acts.[19] It is trite to observe that this is a quintessentially public law question. If Justice Hammond of the New Zealand Court

14 See *ibid* at 326; Zuckerman, *Civil Procedure*, *supra* note 8 at 10.8 to 10.10; Robert J Sharpe, "Interim Remedies and Constitutional Rights" (2019) 69:1 (Supplement) UTLJ 9 at 10-11 [Sharpe, "Interim Constitution Remedies"]. See also arts 9, 17 CCP; arts 1457-58 CCQ.

15 Zuckerman, "Interlocutory Procedural Fairness", *supra* note 13 at 326.

16 Sharpe, "Interim Constitution Remedies", *supra* note 14 at 16.

17 See e.g. *Harper v Canada (AG)*, 2000 SCC 57 at para 9 [*Harper*].

18 See *Charter*, *supra* note 6 s 24. See also Sharpe, "Interim Constitution Remedies", *supra* note 14.

19 The power to exert constitutional control is most obviously present in the *Constitution Act, 1982*, s 52(1), being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

of Appeal (writing extrajudicially) is correct that the private law framework for interlocutory injunctions was shaped by "a private law system paying regard essentially only to private interests," then it would be somewhat surprising if it dealt effectively with a public law question like this.[20] Certainly none of the venerable British authorities that inspired the Canadian approach contemplated interlocutory stays of statutes as one of their applications.[21] Indeed, until recently, the House of Lords stated that an interlocutory stay of legislation was "unlike any form of order for interim relief known to the law."[22] The conceptual mismatch here runs deep, as British courts did not historically have *any* power to suspend or invalidate acts of Parliament.[23] So, as I turn to the concrete Canadian framework, I focus on whether the existing approach provides any answers to the distinct public law issue at the core of interlocutory *Charter* stays: how to balance deference to democratically-elected branches with the promise of appropriate and just *Charter* remedies enforced by courts.

III. The Interlocutory Injunctions Framework

A. The general framework: *RJR–Macdonald*

The general Canadian approach to interlocutory injunctions was set out in the 1994 Supreme Court decision of *RJR–Macdonald v Canada*, which drew heavily on the House of Lords' private law decision in *American Cyanamid v Ethicon*.[24] The basic framework in *RJR–Macdonald* has been held to be applicable in both private interlocutory injunctions and in interlocutory stays of government actions in *Charter* challenges.[25] The Supreme Court has also suggested that interlocutory stays of legislation on federalism grounds should be treated under the same framework.[26] While the criteria for granting interlocutory injunctions are set out in general terms in article 511 of the *Code of Civil Procedure*, the broad contours of the principles outlined in *RJR–Macdonald*

20 See Hammond, *supra* note 8 at 244.

21 See e.g. *American Cyanamid*, *supra* note 4 (a dispute about medical sutures and patent law). Of course, courts in the UK have historically reviewed executive actions — including certain forms of secondary legislation — for their consistency with the enabling statute creating the delegated power. Because this form of review has distinctive features, I set it aside in the remainder of my analysis.

22 *R v Secretary of State for Transportation, Ex p Factortame (No. 1)*, [1989] UKHL 1 at 9. See also note 109 and the accompanying text.

23 See e.g. William Blackstone, *Commentaries On The Laws Of England* (Oxford, UK: Clarendon Press, 1765) at 91.

24 *RJR–Macdonald*, *supra* note 4; *American Cyanamid*, *supra* note 4.

25 *RJR–Macdonald* was a *Charter* challenge to legislation. For the correspondence with the general private law framework, see e.g. *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at para 25 [*Google*].

26 See *Manitoba (AG) v Metropolitan Stores Ltd*, [1987] 1 SCR 110 at 133 [*Metropolitan Stores*], 38 DLR (4th) 321.

have also long been thought to be applicable in Quebec.[27] Each element of the *RJR–Macdonald* framework will therefore be considered in turn.

Serious issue to be tried

The first stage of the *RJR–Macdonald* framework requires the court to ascertain whether there is a "serious issue to be tried" in the sense that the applicant's case is "neither vexatious nor frivolous."[28] It is generally acknowledged that this implies little scrutiny of the merits of applicants' claims. The reluctance to engage with the merits of the case is usually justified by pointing to the evidentiary defects of the interlocutory stage and the risks of creating a costly preliminary "mini-trial."[29] For many authors, these rationales for not engaging with the merits are not compelling, whether in private or public settings.[30] More attention, however, has been given to the later phases of the test.

(Serious or) irreparable harm

The second stage of the *RJR–Macdonald* analysis asks whether the harm that the applicant is describing can be said to be "irreparable" in the sense of being harm that "either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other."[31] This inquiry focuses on the nature of the harm, not on the magnitude.[32] At this stage of the test, applicants are required to "adduce specific, particularized evidence establishing a likelihood of irreparable harm."[33]

In Quebec, this branch of the analysis instead requires a "serious or irreparable prejudice."[34] Although the jurisprudence does not always bear out a marked difference, there has accordingly been some suggestion that the standard in Quebec is lower than the common law test in *RJR–Macdonald*.[35]

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27 See e.g. *Brassard c La société zoologique de Québec Inc*, [1995] RDJ 573, JE 95-1652, LeBel JA. Where relevant, I note differences between Quebec and the common law provinces.

28 *RJR–Macdonald*, *supra* note 4 at 337.

29 For the reasoning underscoring evidentiary defects, see e.g. *Metropolitan Stores*, *supra* note 26 at 310. For the history of the relationship between a higher standard and "mini-trials" see e.g. Christine Gray, "Interlocutory Injunctions Since *Cyanamid*" (1981) 40:2 Cambridge LJ 307 at 307.

30 See e.g. Leubsdorf, *supra* note 8 at 541; Robert J Sharpe, *Injunctions and Specific Performance* (Toronto: Thomson Reuters, 2018) (loose-leaf updated 2020) at para 2.160.

31 *RJR–Macdonald*, *supra* note 4 at 341.

32 See *ibid*.

33 *Canada (AG) v Oshkosh Defense Canada Inc*, 2018 FCA 102 at para 30. See also *Springs of Living Water Centre Inc v Manitoba*, 2020 MBQB 185 (finding no evidence of irreparable harm for congregants forced to attend church services in their cars). Thank you to one of the anonymous reviewers for bringing this second case to my attention.

34 See art 511 CCP [emphasis added].

35 See e.g. *Groupe CRH Canada Inc c Beauregard*, 2018 QCCA 1063 at paras 61-66 [*Beauregard*].

Whether in Quebec or common law Canada, in private civil suits this portion of the analysis is often described as "the critical phase of the interlocutory proceedings, because it goes to the very heart of the issue."[36] This is because the existence of irreparable harm is central to the justification for taking the extraordinary remedial step of ordering a non-monetary remedy before a trial on the merits has been conducted.[37]

In the interlocutory *Charter* stay context the second phase of the *RJR–Macdonald* test raises distinct issues. To begin, as the Supreme Court has pointed out, rather than harm that cannot be remedied through damages being the exception, it would seem to be the rule in *Charter* challenges.[38] Further, seeing breaches of fundamental human rights commitments as "reparable" is, at least, conceptually awkward. Indeed, there is a rich literature debating whether *all* infringements of constitutional rights should be presumed to be irreparable.[39] Perhaps the most satisfactory mode of analysis of what constitutes "irreparable harm" in interlocutory *Charter* stay applications is Professor Roach's suggestion that the inquiry should focus not on "whether an injury can be compensated in damages *per se*, but rather to whether the interests and purposes of the *Charter* will be irreparably harmed."[40] This suggestion points to the need to firmly ground interlocutory *Charter* stays in the *Charter* context rather than tethering the analysis only to traditional equitable principles. To date, however, Canadian courts have invested relatively little energy in giving content to this arm of the *RJR–Macdonald* framework.[41] Perhaps by consequence, "in a surprising number of cases" courts have *not* found irreparable harm in interlocutory applications based on infringements of *Charter* rights.[42]

36 Berryman, *supra* note 8 at 36.

37 See *ibid*. Of course, specific performance and similar non-monetary remedies may be less at odds with the remedial tradition in Quebec: see e.g. Rosalie Jukier, "The Emergence of Specific Performance as a Major Remedy in Quebec Law" (1987) 47:1 R du B 47.

38 See *RJR–Macdonald*, *supra* note 4 at 341. The SCC has since refined the approach to *Charter* damages, but courts have nevertheless been directed to approach *Charter* damages cautiously and incrementally: see e.g. *Vancouver (City) v Ward*, 2010 SCC 27 at para 21. There remains a general hesitance to award *Charter* damages concurrently with s. 52(1) remedies: see e.g. *Mackin v New Brunswick (Minister of Finance); Rice v New Brunswick*, 2002 SCC 13.

39 See e.g. Beatrice Catherine Franklin, "Irreparability, I Presume: On Assuming Irreparable Harm for Constitutional Violations in Preliminary Injunctions" (2014) 45:2 Colum HRLR 623. Sharpe, "Interim Constitutional Remedies", *supra* note 14 at 23 also reviews related arguments.

40 See Kent Roach, *Constitutional Remedies in Canada*, 2nd ed (Toronto: Carswell, 2018) (loose-leaf updated 2020) ch 7 at para 7.260 [Roach, *Constitutional Remedies*] [emphasis added].

41 See e.g. Berryman, *supra* note 8 at 36.

42 See Roach, *Constitutional Remedies*, *supra* note 40 at ch 7 at para 7.330.

Balance of (in)Convenience

At the third and final stage of the *RJR–Macdonald* analysis, courts must assess what Justice Beetz called the "balance of inconvenience."[43] In essence, this stage of the test asks which course of action — granting the interlocutory injunction or not — will risk greater harm.[44] In interlocutory *Charter* stays this arm of the *RJR–Macdonald* analysis is almost always determinative.[45]

There is some debate as to whether it is permissible, at this stage of the analysis, to examine the strength of parties' cases as part of the balancing exercise.[46] This issue aside, most commentary seems to accept that the conceptual framework of the balance of inconvenience is relatively satisfactory in private interlocutory injunction applications.[47]

One reason that is often advanced for why this portion of the analysis is less satisfactory in interlocutory *Charter* stay applications is that the claims advanced by an applicant may be fundamentally incommensurable with the public interests that the legislation expresses.[48] This is, however, not a difficulty that is unique to interlocutory *Charter* stays.[49] In many areas of private and public law, the courts balance what seem like incommensurable individual and societal interests.[50]

Rather than focusing on incommensurability *per se*, most jurisprudential attention has examined how public interests should be factored into this third arm of the *RJR–Macdonald* analysis.[51] In *Metropolitan Stores*, for instance, the Supreme Court emphasized that courts should recognize the "polycentricity" of public law disputes by giving the public interest in maintaining the law in

43 *Metropolitan Stores*, *supra* note 26 at 129.

44 See *ibid*.

45 See e.g. *RJR–Macdonald*, *supra* note 4 at 342.

46 See e.g. Berryman, *supra* note 8 at 44-48. In the immediate aftermath of *American Cyanamid*, *supra* note 4 this issue provoked considerable debate in the UK: see e.g. *Fellowes v Fisher*, [1976] QB 122 (CA).

47 See e.g. Zuckerman, "Interlocutory Procedural Fairness", *supra* note 13 at 340-41.

48 See e.g. Cassels, *supra* note 9.

49 See e.g. *Beauregard*, *supra* note 35 (weighing health harms against a public interest in an infrastructure project).

50 For instance, all section 1 analysis is arguably balancing incommensurable interests: see e.g. Grégoire CN Webber, "Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship" (2010) 23:1 Can JL & Jur 179. The approach to strategic lawsuits against public participation also arguably weighs incommensurable interests: see e.g. *1704604 Ontario Ltd v Pointes Protection Association*, 2020 SCC 22.

51 See also Robert Leckey, "Advocacy Notwithstanding the Notwithstanding Clause" (2019) 28:4 Const Forum Const 1 at 3-4 (arguing that, when the notwithstanding clause has been used, the balance should tilt towards a stay).

place "the weight it should carry."[52] In the more recent decision of *Harper*, the public interest in enforcing the law was elevated to the status of a presumption.[53] By contrast, while it has been recognized that those challenging the law might also represent a public interest, no methodology has been proposed for how to identify when this will be true. Nor has any methodology been proposed for how to identify when the interests on the challengers' side will outweigh the public interest in enforcing the legislation.[54] There is certainly no presumption that the challengers advance a public interest. For many authors, this state of affairs is tantamount to reintroducing a "presumption of constitutionality" that effectively bars interlocutory *Charter* stays.[55] Thus, rather than outlining a conceptually sensitive way to balance deference to democratically-elected actors with the promise of *Charter* remedies, the private law model now seems to tilt decisively towards leaving legislation in place during the course of *Charter* challenges.[56] This approach forcefully resembles the sort of one-sided rule that Professor Zuckerman decries.[57]

Exceptions and qualifications

In *RJR–Macdonald* itself, the Supreme Court proposed two exceptions to the framework: (1) when the issue presented was a question of law alone; and (2) when the decision on the interlocutory injunction would amount to a final determination of the issue. In each of these circumstances, courts were directed to decide the application on the merits of the case.[58] Neither of these exceptions has received extensive use in subsequent jurisprudence.[59]

There is also a significant body of case law that treats the nature of the injunction being sought as a relevant factor in adjusting up or down the

52 *Metropolitan Stores*, *supra* note 26 at 149, cited with approval in *RJR–Macdonald*, *supra* note 4 at 343. See also *Ontario (AG) v G*, 2020 SCC 38 at 156 Karakatsanis J (describing the public interest in enforcing legislation) [*G*].

53 See *Harper*, *supra* note 17 at para 9.

54 See e.g. Colin Feasby, "*Charter* Injunctions, Public Interest Presumption, and the Tyranny of the Majority" (2020) 29:1 Const Forum Const 21 at 24-27.

55 A presumption of constitutionality was rejected in *Metropolitan Stores*, *supra* note 26 at 122. *Cf* Sharpe, "Interim Constitution Remedies", *supra* note 14 at 26; Feasby, *supra* note 54 at 24.

56 I have characterized the current framework as not being sufficiently adapted to the public law context of interlocutory *Charter* stays. Alternatively, as one of the anonymous reviewers for this paper helpfully pointed out, one might say that the balancing stage of the test is too responsive to the public law setting, in that it over-weights the interests in favour of keeping the legislation in place. When I speak of a test that is sensitive, responsive, or appropriate for the public law context, I have in mind a framework that would facilitate a less one-sided balancing.

57 See note 15, above, and the accompanying text.

58 See *RJR–Macdonald*, *supra* note 4 at 338.

59 See e.g. *Google*, *supra* note 25 in which the majority judgment declined the minority's invitation to employ the "final determination" exception from *RJR–Macdonald*.

appropriate degree of scrutiny of the merits of an applicant's claim.[60] One notable example of this phenomenon is the distinction that is often made between "mandatory injunctions" and "prohibitive injunctions."[61] It remains unclear whether this distinction should be applied in *Charter* stays.[62]

B. Applying the framework in interlocutory *Charter* stays

With the framework explicated, it is now possible to turn to four recent decisions of the Québec courts that provide a useful lens through which to see the failures of the present framework. At the time of writing, these decisions were the four most recent interlocutory judgments in *Charter* challenges to primary and secondary legislation in Quebec.

Bill 21 — Quebec's Secularism Law

In *Hak c. Québec*, the applicant sought a stay of the ban on government employees wearing religious symbols.[63] The first stage of the *RJR–Macdonald* analysis presented no difficulty, for either Justice Yergeau at first instance or for any of the appellate panel.[64]

The second stage of the analysis, showing irreparable harm, was more contentious. The focus at both the Superior Court and Court of Appeal was on the notwithstanding clause. For Justice Yergeau at first instance and Justice Mainville on appeal, because the notwithstanding clause had been employed in Bill 21, the "overridden" *Charter* rights could not be relevant irreparable harms.[65] This conclusion is at least contestable, as the second stage of the *RJR–Macdonald* analysis is generally approached under the assumption that the applicant *can* prove the legal case they are advancing.[66] The strength of the

60 For this reason, it is inaccurate to think of the *RJR–Macdonald* formulation as truly universal: see e.g. *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626, 157 DLR (4th) 385. In Quebec, applications for provisional injunctions must also demonstrate urgency: art 510 CCP.

61 See e.g. *R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 16 [*CBC*].

62 See e.g. Roach, *Constitutional Remedies*, *supra* note 40 ch 7 at paras 7.171-7.172. Applying the mandatory/prohibitive threshold distinction in *Charter* stays would seem inappropriate, principally because any public interest in not ordering the government to undertake positive action would be more appropriately considered in the balance of inconvenience stage of the *RJR–Macdonald* analysis.

63 See *An Act Respecting the Laicity of the State*, CQLR c L-0.3 [Bill 21].

64 See *Hak c Québec (PG)*, 2019 QCCS 2989 [*Hak, QCCS*], aff'd 2019 QCCA 2145 [*Hak*, *QCCA*], leave to appeal to SCC refused, 39016 (9 April 2020). As of the time of this writing, the claim was rejected on the merits: see *Hak c Québec (PG), 2021 QCCS 1466* [*Hak, QCCS (Merits)*]. Appellate merits judgments have not yet been rendered.

65 See *Hak, QCCS*, *supra* note 64, Yergeau J at para 125; *Hak, QCCA*, *supra* note 64, Mainville JA at paras 116-19.

66 See e.g. *American Cyanamid*, *supra* note 4 at 408 (this should be assessed conditional on "if the plaintiff were to succeed at the trial").

case the applicant advances is a matter for the first threshold stage and, arguably, the balance of inconvenience.[67] The case advanced in *Hak* would have established that all of Bill 21 was invalidly enacted, on grounds untouched by the notwithstanding clause.[68] Thus, if the case was made out, interim harms to *Charter*-protected rights would *not* have been shielded by the notwithstanding clause. *Charter* infringements would thus seem to be relevant to the second stage of *RJR–Macdonald*. And even if they were not, section 26 is explicit that the *Charter* does not deny the existence of other rights and freedoms.[69] It is beyond dispute that the right to freedom of religion predated the *Charter*.[70] The mere inapplicability of the version of freedom of religion in the *Charter*, then, does not negate all versions of the rights infringements Bill 21 created. In the end, however, the Court of Appeal found irreparable harm in the denials of job opportunities that Muslim women and others had experienced since Bill 21 came into force.[71] For the purposes of this analysis, it is of interest to note that none of the judgments focused on the purposes of the *Charter* as a way to ground their assessment of whether irreparable harm was present.

At the third arm of the test, in each judgment, anxiety over potential intrusion on the role of the legislature seems to have weighed heavily.[72] Even the one judgment that would have granted the interlocutory stay was almost exclusively focused on the legislature. Chief Justice Duval-Hesler's dissenting analysis in the Court of Appeal decision gave considerable weight to the legislative choice to include transitional provisions allowing individuals to remain in their jobs, even if Bill 21 would have prevented them from starting in those positions as a new employee.[73] For her, the legislature had clearly signaled that there was *not* a pressing public interest in having all aspects of Bill 21 enforced

67 See e.g. Berryman, *supra* note 8 at 44-48

68 See e.g. *Hak, QCCS*, *supra* note 64 (Factum of the Applicant)

69 *Charter*, supra note 6 s 26: "The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada."

70 The most obvious example can be found in *Canadian Bill of Rights*, SC 1960, c 44, s 1(c): "in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely, . . . (c) freedom of religion" [emphasis added].

71 See *Hak, QCCA*, *supra* note 64 at paras 71-72, Duval-Hesler CJA, dissenting (but not on this point); paras 86-90, Bélanger JA; para 115, Mainville JA.

72 See e.g. *Hak, QCCS*, *supra* note 64 at paras 127-28. Throughout this paper, I use the term "anxiety" to characterize the judicial attitude in these cases as an allusion to scholarship like Eric M Adams, "Judicial Agency and Anxiety Under the *Canadian Bill of Rights*: A Constitutional History of *R. v. Drybones*" (2019) 39:1 NJCL 63.

73 See Bill 21, *supra* note 63, art 31. In the popular press, these provisions were often described as "grandfather clauses."

immediately.[74] This approach would seem to suggest that, while legislation should be presumed to be in the public interest, that presumption will not be overriding in contexts where signals of legislative intent suggest that there is no special urgency for the legislation to be universally and immediately enforced.

Justice Bélanger, writing for the majority of the Court of Appeal, however, interpreted the *Harper* presumption less flexibly. For her, "*les ordonnances de suspension neseront prononcées que dans des cas manifestes*."[75] Here, the possibility of an interlocutory *Charter* stay begins to look almost entirely illusory. And yet Justice Mainville's concurring decision seemed to go even further, saying that until the decision on the merits "*la loi doit être présumée constitutionnellement valide*."[76] This is an extraordinarily infelicitous use of language given the Supreme Court's express rejection of a presumption of constitutional validity.[77] Nevertheless, in many provinces, this expression has been creeping back into the jurisprudence in the guise of an onus falling on the applicant to *demonstrate* that a law is constitutionally invalid at the interlocutory stage.[78] How applicants could demonstrate invalidity without the merits of their claim being addressed has not been satisfactorily explicated. In all, the distinct sense that the Quebec courts' decisions in *Hak* leave is that deference to democratically-elected legislatures was the primary value animating the analysis.[79]

Bill 40 — Quebec's school system transformation

By contrast to *Hak*, *Quebec English School Boards Association c. Québec* is one of the relatively rare cases in Canadian constitutional history where an interlocutory *Charter* stay has actually been issued.[80] The reasoning, then, is of interest to help understand the limits of the present-day framework for interlocutory *Charter* stays.

74 *Hak, QCCA*, *supra* note 64 at paras 79-80.
75 *Ibid* at para 92 [emphasis added].
76 *Ibid* at para 152 [emphasis added].
77 See *Metropolitan Stores*, *supra* note 26 at 122.
78 See e.g. *Québec (PG) c D'Amico*, 2015 QCCA 2138, Mainville JA at para 28. In other provinces, see e.g. *AUPE*, *supra* note 2.
79 Notably, an earlier version of the ban face coverings was suspended during the interim period: see *National Council of Canadian Muslims c Attorney General of Québec*, 2018 QCCS 2766. There was no ban on religious symbols in this legislation and the notwithstanding clause was not invoked.
80 See *Quebec English School Board Association c Québec (PG)*, 2020 QCCS 1885 [*English Schools, QCCS*], aff'd 2020 QCCA 1171 [*English Schools, QCCA*]. As of the time of this writing, a judgment on the merits has not been reached.

Bill 40, if enforced, would abolish existing school boards and, in their place, create "school service centers."[81] In these service centers, the English linguistic minority would have limited control over their school system.[82] At first instance, the argument of the English school boards that Bill 40 infringed the constitutionally-guaranteed right to English-language education thus passed relatively easily through the first and second stages of the *RJR–Macdonald* framework.[83]

At the third stage of the interlocutory stay analysis in *English Schools*, particular features of the case were notable. The government had only argued that the public interest that the legislation represented was the supposed "benefits" of the legislation to the English-language school boards.[84] But this argument would have bordered on the absurd to accept when (literally) all of the supposed beneficiaries were present to challenge the law.[85] So, there was an exceptionally strong basis on which to rebut the presumption that the legislation was enacted in pursuit of the public interest that the government had described. Unsurprisingly then, Justice Lussier also saw the third stage of the test as satisfied and granted the requested stay of the portions of the legislation applying to the English-language school boards.

On appeal, Justice Mainville, whose concurring decision on the Bill 21 appeal was examined above, wrote for the Court. Once again, the first two stages of the test presented relatively little difficulty.[86] But even while affirming the decision to grant the stay, Justice Mainville was reticent to agree with Justice Lussier's analysis of the balance of inconvenience.[87] One might plausibly read Justice Mainville's reasoning to suggest that the presumption that legislation is in the public interest is *not* usually rebuttable. Indeed, the rhetorical focus for Justice Mainville was to repeatedly emphasize the limited impact of the order

81 See *An Act to Amend Mainly the Education Act with Regard to School Organization and Governance*, SQ 2020, c 1 [Bill 40].

82 See e.g. Quebec English School Boards Association, "Brief Presented by the Quebec English School Boards Association to the National Assembly Committee on Culture and Education on Bill 40", (4 November 2019), online (pdf): *Quebec English School Boards Association* <qesba.qc.ca/wp-content/uploads/2021/10/Brief-QESBA_Bill40.pdf> [perma.cc/TXF5-4K3V] at 11.

83 *Charter*, *supra* note 6 s 23 has been interpreted to guarantee a degree of "management and control": see e.g. *Mahe v Alberta*, [1990] 1 SCR 342 at para 51, 68 DLR (4th) 69. For legislators' concerns, see e.g. Quebec, National Assembly, *Debates*, 42-1, vol 45 No 98 (7 February 2020) at 6324 (Gregory Kelley).

84 See *English Schools, QCCS*, *supra* note 80 at paras 153-55.

85 See *ibid* at para 18.

86 See *English Schools, QCCA*, *supra* note 80 at paras 48-57. Indeed, at the QCCA, a "serious issue to be tried" was conceded: see *ibid* at para 48.

87 See *ibid* at paras 58-59.

on the functions of the democratically-elected legislature.[88] This was so because the requested order was narrowly constructed to apply only to the English school boards. Because this limited effect convinced Justice Mainville that it "*ne s'agit donc pas ici d'empêcher le gouvernement de mettre en œuvre les réformes législatives pour lesquelles il a été élu*," he was willing to uphold the decision to grant the stay.[89] Thus, even though it is a case where an interlocutory stay was issued, *English Schools* again suggests that the framework focuses attention on deference to legislatures without much explicit reflection on the remedial values that are core to the promise of the *Charter*.

In-Person schooling order — Quebec's pandemic education policy

In *Karounis c. Québec*, the challenged order[90] was designed to reinstitute mandatory in-person schooling during the pandemic.[91] For that reason, the application was made in a context of considerable urgency. As in the other two decisions considered above in this paper, in *Karounis* it was relatively straightforward to conclude that the first and second arms of the interlocutory injunction test were satisfied.[92]

Once again, however, the third stage of the analysis is of considerable interest. In evaluating the balance of inconvenience in *Karounis*, Justice Bachand applied the *Harper* presumption.[93] But he also turned his attention to evidence that the government had adduced. In particular, he drew attention to affidavits from civil servants "*directement impliquées dans l'élaboration du plan*."[94] While Justice Bachand claimed only that the evidence *supported* the presumption, it is this portion of his analysis that is the most compelling. The civil servants' affidavits suggested that "*ce plan a été élaboré en tenant compte de l'avis d'experts sur les risques pour la santé*."[95] This is a much more persuasive rationale for not frustrating the government's action than an inflexible public interest presumption. But after the Supreme Court's decision in *Harper*, focusing on this kind of evidence as the conceptual core of the exercise seems to be precluded.

88 See *ibid* at paras 60-61.

89 See *ibid* at para 61.

90 See *Ordering of measures to protect the health of the population amid the COVID-19 pandemic situation*, OIC 885-2020, (2020) 152 GOQ II, 3534A (issued 19 August 2020) [In-Person Schooling Order].

91 See *Karounis c Québec (PG)*, 2020 QCCS 2817 [*Karounis, QCCS*]. As of the time of this writing, the claim was rejected on the merits: see *Karounis c Québec (PG)*, 2021 QCCS 310 [*Karounis (Merits)*].

92 See *Karounis, QCCS*, *supra* note 91.

93 See *ibid* at para 43. Bachand J has since been elevated to the QCCA.

94 *Ibid* at para 46.

95 *Ibid* [emphasis added].

Curfew Order — Quebec's pandemic movement restrictions

In *Clinique juridique itinérante c. Québec*, the challenged order[96] was designed to impose a curfew to limit movement during the pandemic.[97] The applicants initiated — in the middle of the coldest winter months — a challenge to the application of the order to unhoused individuals. Thus, once again, the application was made in a context of extreme urgency.

Interestingly, the government elected not to challenge any of the evidence submitted by the applicants. For that reason, the evidence of irreparable harm was uncontradicted. Justice Masse was therefore able to conclude that many of the unhoused individuals impacted by the order, "*sont susceptibles de mettre leur santé et leur sécurité en danger dans les conditions hivernales actuelles*."[98] More convincing evidence of irreparable harm is difficult to imagine.

As is by now predictable, it is the third stage of the analysis that bears the most careful consideration. The government took the position that — as a matter of statutory interpretation — the order did not apply to unhoused individuals.[99] The applicants agreed, in the sense that the primary remedy sought by their challenge on the merits was a declaration that the order did not apply to unhoused individuals.[100] Nevertheless, the uncontradicted evidence showed that fines for breaching the curfew had been handed out to unhoused individuals.[101] If the government and the applicants were right in their statutory interpretation and the order did not apply to unhoused individuals, the stream of fines being issued would have raised substantial rule of law concerns. By suspending the order's (potential) application to unhoused individuals, Justice Masse could vindicate one of the oft-cited foundational values of the Canadian constitutional order. And she could do so in a setting where it would be difficult to see any public interest weighing against granting the order: the government itself had not argued that applying the measure to unhoused individuals would be in the public interest. But the discussion of the balance of convenience did not focus on such things. Instead, Justice Masse noted the limited nature of the order, both in terms of the number of people it would apply to and the limited

96 See *Ordering of measures to protect the health of the population amid the COVID-19 pandemic situation*, OIC 2-2021, (2021) 153 GOQ II, 1B (issued 9 January 2021) [Curfew Order].

97 See *Clinique juridique itinérante c Québec (PG)*, 2021 QCCS 182. The government did not appeal the order and revised their policy.

98 *Ibid* at para 10.

99 See *ibid* at para 11.

100 See *ibid* at para 9.

101 See *ibid* at para 13.

time duration for which it would be in force.[102] On this basis, she ordered the measure suspended.[103]

* * *

In each of the recent applications of the *RJR–Macdonald* framework reviewed, the "balance of inconvenience" appears to be the decisive consideration. In the balancing that this stage of the test requires, the Quebec courts seem preoccupied with ensuring that they do not trench on the role of the democratically-elected branches of government. As I have argued in Part I, above, this is indeed one of the crucial goals of a framework for interlocutory *Charter* stays. But it is only one of the issues to be confronted. As I will explain more fully in Part IV, the other crucial requirement for an acceptable interlocutory *Charter* stay framework is that the promise of "appropriate and just" *Charter* remedies be realized. In this respect, however, the current framework does not appear to succeed.[104]

I pause here to note that I am not aware of any comprehensive analyse s of how often the existing framework "gets it right" on applications for interlocutory stays in *Charter* challenges. Such an analysis is, regrettably, beyond the scope of this paper. Nevertheless, it is worth noting that, in the Quebec courts, there are other examples of legislation standing during the interim period even though rights violations were eventually proven in the courts' final decisions. For instance, interim relief was denied to Jehovah's witnesses in the process of challenging a municipal bylaw that was eventually shown to discriminate against them.[105] Interim relief was also denied in the initial litigation surrounding the 1995 referendum on the sovereignty of Quebec, notwithstanding the fact that the Quebec courts concluded that the Parti Québécois legislation on sovereignty violated the *Charter*.[106] By contrast, I am not aware of any Quebec cases where an interlocutory stay was granted for legislation that was ultimately upheld. In statistical terms, the framework appears to be biased towards type II errors (i.e., "false negatives") rather than type I errors (i.e., "false positives").

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102 See *ibid* at paras 15-17.

103 See *ibid* at para 19.

104 See Sharpe, "Interim Constitution Remedies", *supra* note 14.

105 See *Beauchemin c Blainville (Ville de)* (2003), 231 DLR (4th) 706, [2003] RJQ 2398 (QCCA) (the initial request for an interlocutory injunction staying the bylaw's application was made in 1997, six years earlier, but note that an undertaking not to enforce the bylaw was given by the municipal government).

106 See *Bertrand v Quebec (AG)* (1995), 127 DLR (4th) 408, [1995] RJQ 2500 (QCCS). This litigation was overtaken by *Reference re Secession of Quebec*, [1998] 2 SCR 217 [*Re Secession*], 161 DLR (4th) 385.

Looking outside Quebec, it is remarkable that the Supreme Court has denied every request for interim relief that it has heard in the *Charter* era, notwithstanding the fact that three of the five impugned statutes were eventually struck down by the Supreme Court.[107] Thus, the Supreme Court's "type II error rate" in interim relief decisions is currently 60%: there were three "false negatives." By contrast, the "type I error rate" is 0%: there were no "false positives." Some of the Supreme Court's type I errors have led to egregious rights violations. For instance, prisoners were denied their constitutional right to vote for nearly a decade after the Supreme Court denied interim relief in *Gould*.

IV. The Existing Proposal for Improving the Framework

The proposals for how to improve the interlocutory injunction analysis in private interlocutory contexts are legion.[108] In what follows, however, I focus on the most prominent alternative approach specific to interlocutory stays of legislation in *Charter* challenges: increasing the availability of merits review.

A. Engaging in merits review as a proposed alternative

One significant alternative to the current Canadian framework is the one articulated in the first decision of the House of Lords that suspended legislation during a challenge based on European community law: *Factortame II*.[109] In doing so, each of the judgments at the House of Lords applied a version of the private law test from *American Cyanamid*, the test that explicitly shaped the framework in *RJR–Macdonald*.[110] But while theoretically preserving the *American Cyanamid* analysis, *Factortame II* has been interpreted to require a focus on the merits.[111] In the words of Lord Bridge, in challenges to legislation,

107 These occasions are, in chronological order: *Gould v Canada (AG)*, [1984] 2 SCR 124, SCJ No 33, aff'g 54 NR 232 (FC), Mahoney JA [*Gould*] (final constitutional decision striking down the statute eight years later: *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68); *Metropolitan Stores*, *supra* note 26 (final constitutional decision upheld the constitutionality of the statute two years later: [1990] 1 WWR 373 (ABCA), 62 Man R (2d) 157); *RJR–Macdonald*, *supra* note 4 (final constitutional decision striking down the statute one year later: [1995] 3 SCR 199); *Thomson Newspapers Co v Canada (AG)* (1997), 146 DLR (4th) 191, 1997 CanLII 17783 (SCC) (final constitutional decision striking down the statute one year later: [1998] 1 SCR 877); *Harper*, *supra* note 17 (final constitutional decision upholding the statute four years later: 2004 SCC 33).

108 See e.g. Jean-Philippe Groleau, "Interlocutory Injunctions: Revisiting the Three-Pronged Test" (2008) 53:2 McGill LJ 269; Hammond, *supra* note 8; Leubsdorf, *supra* note 8.

109 *R v Secretary of State for Transportation*, *Ex p Factortame (No. 2)*, [1990] UKHL 7 [*Factortame II*]. At an earlier procedural stage, the ECJ held that interim suspensions had to be available in proceedings where national legislation was alleged to be inconsistent with community law: see *R v Secretary of State for Transportation*, *Ex p Factortame*, C-213/89, [1990] ECR I-2466.

110 See *Factortame II*, *supra* note 109.

111 See e.g. Zuckerman, *Civil Procedure*, *supra* note 8 at 10.41-10.42.

"the most logical course in seeking a decision least likely to occasion injustice is to make the best prediction we can of the final outcome and to give to that prediction decisive weight."[112]

Justice Sharpe's proposed revision to the *RJR–Macdonald* framework in Canada is similar to the *Factortame II* approach. Justice Sharpe, in agreement with many authors, would have courts engage in a review of the merits.[113] As the reasoning goes, refusal to consider the merits of an applicant's case gives the motions judge "nothing to weigh against … the almost always-dominant consideration of the public interest in having the law enforced."[114] For Justice Sharpe, opening the door to merits review clears the way for a more "open" approach to interlocutory remedies in *Charter* claims, in line with the promise of the *Charter*.[115] While it has not been accepted in the jurisprudence, neither has there been any significant scholarly or judicial writing that has pushed back on Justice Sharpe's position. Indeed, Professor Roach has made a similar suggestion in his recent monograph.[116] The experience in the United States, however, suggests some reasons why a focus on merits review may not be a panacea.

B. Merits review as an incomplete answer

A full review of the approach to interlocutory stays of legislation in each of the United States federal circuits is beyond the scope of this paper.[117] One example, however, is useful in assessing the plausibility of merits review as a way to open up the approach to interlocutory *Charter* stays of legislation. The eighth circuit does conduct some review of the merits of an applicant's case. But rather than opening space for a balancing exercise more favourable to applicants, the merits of an applicant's case goes to an elevated threshold requirement for courts to be convinced that an applicant "is <u>likely</u> to prevail on the merits."[118]

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112 *Factortame II*, *supra* note 109 at 859.

113 See Sharpe, "Interim Constitution Remedies", *supra* note 14 at 27. This proposal goes to the third branch of the *RJR–Macdonald* test, though Sharpe does not advocate for a watertight approach to the separate aspects of the test. Sharpe also proposes that courts expand the use of "exemption-type" orders (*ibid* at 32). Because my focus is on interlocutory stays of legislation, I do not consider this proposal in this paper. See also Hammond, *supra* note 8 at 279; Leubsdorf, *supra* note 8 at 554-56; Roach, *Constitutional Remedies*, *supra* note 40 ch 7. For an approach not focused on merits review *per se*, see e.g. Feasby, *supra* note 54.

114 See Sharpe, "Interim Constitution Remedies", *supra* note 14 at 19.

115 See *ibid* at 32.

116 See Roach, *Two-Track Approach*, *supra* note 5 at 174-76.

117 But see e.g. Bethany M Bates, "Reconciliation after *Winter*: The Standard for Preliminary Injunctions in Federal Courts" (2011) 111:7 Colum L Rev 1522 (discussing *Winter v Natural Resources Defense Council*, 555 US 7 (2008)).

118 See *Planned Parenthood v Rounds*, 530 F (3d) 724 (8th Cir 2008) at 733 [emphasis added].

In *Planned Parenthood v Rounds*, the eighth circuit's approach was said to "ensure that preliminary injunctions that thwart a state's presumptively reasonable democratic processes are pronounced only after an appropriately deferential analysis."[119] This is extremely reminiscent of *Harper v Canada*, where the majority at the Supreme Court of Canada similarly claimed that courts "must proceed on the assumption that the law … is directed to the public good and serves a valid public purpose."[120] While the eighth circuit engages in a detailed merits review and the Supreme Court of Canada emphatically does not, each court still finds itself struggling to avoid trenching on the institutional role of democratically-elected branches of government.

Justice Sharpe and other prominent proponents of merits review are, of course, conscious that concerns about "the limits of judicial authority in the face of duly enacted legislation" animate the cautious approach to interlocutory *Charter* stays in Canada.[121] But the proponents of merits review do not provide a solution that plausibly addresses how to reassure the judiciary and the public that this "most striking remedy wielded by contemporary courts"[122] will not undermine legislatures' ability to govern. I submit that a transition to more open engagement with the merits of claims would not, in itself, obviate the anxiety about judicial legitimacy in this setting. Indeed, it might plausibly exacerbate the concern by requiring consideration of the merits without the reassuring factual foundation in which bold judgments can be anchored.[123] Instead of a more open approach, by focusing reform efforts on merits review, we may end up with an extremely restrictive framework like that of the eighth circuit. By not explicitly engaging with the core of the concern about the limits of the judicial role, adding merits review to the equation provides an incomplete solution.

V. Towards an Interlocutory *Charter* Stay Framework

A. Interlocutory Charter stays as a *Charter* remedy

Section 24 as a framework for interim Charter *remedies*

The Supreme Court has suggested that interlocutory remedies in *Charter* challenges can flow from the remedial powers in section 24(1) of the *Charter*.[124]

119 *Ibid*.

120 *Harper*, *supra* note 17 at para 9.

121 Sharpe, "Interim Constitution Remedies", *supra* note 14 at 21.

122 Leubsdorf, *supra* note 8 at 525.

123 See e.g. Benjamin Perryman, "Adducing Social Science Evidence in Constitutional Cases" (2018) 44:1 Queen's LJ 121.

124 See *Metropolitan Stores*, *supra* note 26 at 149; *RJR–Macdonald*, *supra* note 4 at 332. See also Sharpe, "Interim Constitution Remedies", *supra* note 14 at 11, 22 (grounding his approach to interlocutory *Charter* stays in section 24(1) of the *Charter*).

This is perhaps somewhat surprising, because the constitutional text indicates remedial authority in section 24(1) only engages when rights or freedoms "have been infringed or denied."[125] This language seems, on its face, to contemplate responses to proven *Charter* violations.[126] Nevertheless, it remains persuasive to ground interim *Charter* remedies in section 24(1). This is principally because section 24(1) guarantees "appropriate and just" remedies for breaches of *Charter* protections.[127] As in private civil litigation, it will sometimes be impossible to issue an appropriate and just remedy without using interlocutory injunctions: harm can occur while litigation is ongoing that *cannot* be remedied when the trial concludes.[128] The power to issue interim or interlocutory remedies is thus a *necessary* component of the power to issue "appropriate and just" remedies. Indeed, other human rights instruments that create comparable remedial regimes have also been interpreted to necessarily imply the power to issue interim remedies.[129] As Justices Sopinka and Cory wrote in *RJR–Macdonald*, "we would be prepared to find jurisdiction [for interim or interlocutory remedies] in s. 24(1) of the *Charter*. A *Charter* remedy should not be defeated due to a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights."[130]

Recognizing that the framework for granting interlocutory *Charter* stays *can* be grounded in section 24(1) evidently does not require departing from existing approaches. What is clear, however, is that the remedial power in section 24(1) "cannot be strictly limited by statutes or rules of the common law."[131] Thus, if a novel approach is required in order to be *Charter*-compliant, courts can depart from existing authorities and approaches, even without legislated reforms. The question, then, is whether the current approach really is "appropriate and just." Courts in Quebec and in common law Canada have not yet directly examined this question. The Supreme Court's jurisprudence on section 24(1), however, suggests at least two reasons why it might not be.

First, the Supreme Court has held that an "appropriate and just" remedy is "one that meaningfully vindicates the rights and freedoms of the claimants."[132]

125 *Charter*, *supra* note 6 s 24(1).

126 On a purely textual basis, s 24 might also have been interpreted to preclude prospective or preventative remedies. This has also not been the courts' approach: see e.g. *R v Demers*, 2004 SCC 46 at para 63.

127 *Charter*, *supra* note 6 s 24(1).

128 See e.g. Zuckerman, "Interlocutory Procedural Fairness", *supra* note 13.

129 See e.g. Jo M Pasqualucci, "Interim Measures in International Human Rights: Evolution and Harmonization" (2005) 38:1 Vand J Transnat'l L 1 at 49.

130 *RJR–Macdonald*, *supra* note 4 at 332.

131 *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 51 [*Doucet-Boudreau*].

132 *Ibid* at para 55.

This statement evidently requires some qualification for the interlocutory context where rights infringements are not yet proven. But the Court has given content to this standard by saying that *Charter* remedies must be "effective" rather than "smothered in procedural delays and difficulties."[133] I have argued above, in Part II, that the current approach to interlocutory *Charter* stays suggests an almost-complete preference for keeping legislation or other government action in force while the courts' procedures for arriving at the merits of *Charter* challenges unfold. Making interlocutory *Charter* stays illusory by stacking the analysis against applicants smothers the remedy more completely than mere delays ever could. Refusing to grant almost all interlocutory *Charter* stays leaves many applicants without *any* possibility of a remedy for the *Charter* infringements they are subjected to. This, I submit, is difficult to see as an "effective" remedial framework.

A second concern is that, arguably, the current approach does not live up to the judiciary's role as a "guardian of the constitution."[134] The Supreme Court has held that an appropriate and just remedy is one that respects "the relationships with and separation of functions among the legislature, the executive and the judiciary."[135] The problem is that a rule that tolerates most infringements of *Charter* rights until after the merits are decided leaves governments free to violate rights for long periods. The judicial role in protecting against rights violations is thus abdicated. In this way, the current approach fails many applicants and, in so doing, fails to respect the constitutional role of the judiciary.[136]

As I have suggested in Part III, while it does recognize the inappropriateness of the current restrictive approach, adding merits review to the existing framework does not answer the central question of how to appropriately manage judicial deference to democratically-elected branches of government. Since, as I have attempted to demonstrate, this anxiety is at the core of the current restrictive approach, it is necessary to look elsewhere for a satisfactory framework.

Demonstrably justifying interim Charter rights violations

An "appropriate and just" framework to govern interlocutory *Charter* stays need not invent a standard out of whole cloth. The *Charter* already provides the measure by which the courts should adjudicate whether limitations on rights can be allowed to stand. In section 1, the *Charter* "guarantees the rights and

133 *Mills v* R, [1986] 1 SCR 863 at 882 [*Mills*], 29 DLR (4th) 161.

134 See *Hunter v Southam Inc*, [1984] 2 SCR 145 at 155, 11 DLR (4th) 641.

135 *Doucet-Boudreau*, *supra* note 131 at para 56 [emphasis added].

136 *Cf G*, *supra* note 52 at para 157 ("courts will not shrink from performing their duty to protect rights").

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."[137] There is no necessary reason why infringements of rights and freedoms that occur while an applicant waits for a *Charter* challenge to be decided on the merits are an exception to this proposition. It is therefore submitted that, contrary to all existing approaches, interlocutory *Charter* stays should ultimately be assessed according to whether the alleged interim rights violations can be "demonstrably justified in a free and democratic society."

It is clear, of course, that the evidentiary defects and incomplete pleadings that characterize the interlocutory phase of proceedings make the *Oakes* analysis inappropriate as a standard for interlocutory *Charter* stays.[138] But the Supreme Court has recognized that different contexts call for particularizing the section 1 analysis. Indeed, in the Supreme Court's eventual judgment on the merits in *RJR–Macdonald*, Justice La Forest suggested section 1 required "a delicate balance between individual rights and community needs. Such a balance cannot be achieved in the abstract, with reference solely to a formalistic [*Oakes*] 'test' uniformly applicable in all circumstances."[139] A much-discussed (and admittedly much-maligned) example of this reasoning came more recently in *Doré v Barreau du Québec*, in which Justice Abella wrote "that while a formulaic application of the *Oakes* test may not be workable in the context of an adjudicated [administrative] decision, distilling its essence works the same justificatory muscles: balance and proportionality."[140] Similarly, there is no necessary reason why the essence of the section 1 analysis cannot be distilled for the interlocutory context. There is, therefore, a need to reframe the question. Instead of asking about how to apply *Oakes* without a conclusive finding of a rights infringement and a full evidentiary record for a proportionality analysis, the question should be about what sort of analysis would most faithfully embody the section 1 standard in an interlocutory context. Canadian courts have not yet considered this question.

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137 *Charter*, *supra* note 6 s 1 [emphasis added]. See also Grant R Hoole, "Proportionality as a Remedial Principle: A Framework for Suspended Declarations of Invalidity in Canadian Constitutional Law" (2011) 49:1 Alta L Rev 107 (arguing that s 1 proportionality should inform the courts' analysis of suspended declarations of invalidity).

138 See *R v Oakes*, [1986] 1 SCR 103 [*Oakes*], 26 DLR (4th) 200. See also *RJR–Macdonald*, *supra* note 4 at 131; *Gould*, *supra* note 107 (all rejecting a full *Oakes*-style s 1 analysis in interlocutory contexts). I note, however, that — as the SCC acknowledged in *RJR–Macdonald* — some constitutional issues may present themselves as questions of law for which no evidentiary record is required. In these cases, there remains no reason to do anything apart from engage in a final determination on the merits.

139 *RJR–MacDonald Inc v Canada (AG)*, [1995] 3 SCR 199 at 270 [*RJR–MacDonald, 1995*], 127 DLR (4th) 1 [emphasis added].

140 *Doré v Barreau du Québec*, 2012 SCC 12 at para 5.

B. Representation-reinforcing interlocutory *Charter* stays

In this section, I outline a new and distinct approach to interlocutory *Charter* stays that is anchored in sections 1 and 24(1). My claim is not that this particular framework is the *only* approach that could flow from the constitutional context. Rather, it is submitted that this approach can help illustrate how there might be a profound divergence between the private law framework and a distinctly public law approach to interlocutory *Charter* stays.[141] After outlining the contours of the novel framework, I then turn to justifying and explaining each element of the proposed model.

A novel proposed model

Rather than a traditional tripartite test, the new proposed model can be divided into two phases: a threshold analysis and a justificatory analysis. Before setting out the details of the framework, I note that if an issue presents itself to the courts as a question of law alone, for which no evidentiary record is required, it remains appropriate for a determination to be made on the merits. Everything that follows is tailored to contexts where this is not possible and the defects of the interlocutory stage prevent a final determination from being made.

As well, I note that a revised framework need not adopt a "one off" approach. The Supreme Court has acknowledged that it may sometimes be "appropriate and just" for courts to retain jurisdiction after a claim has been adjudicated.[142] By analogy, it may be appropriate and just for the courts to remain actively engaged after a decision has been made in response to an application for an interlocutory stay. Thus, when the application of democratically-enacted legislation or other government action is at stake, the courts should hear new submissions from the applicants and the government as new evidence becomes available or new circumstances develop throughout the interim period.[143] As was acknowledged in *Metropolitan Stores*, courts should also insist on expedited timelines for hearing cases where interlocutory stays are in place.[144]

The first phase: the threshold test

The threshold analysis phase would focus on whether the case that the applicant advances is one that might plausibly justify granting an interlocutory stay of duly-enacted legislation. This analysis would have two sub-components.

141 Because of the novelty of this project, I set aside related issues and focus only on interlocutory stays of legislation in *Charter* challenges.

142 *Doucet-Boudreau*, *supra* note 131.

143 See Roach, *Two-Track Approach, supra* note 5 at 175.

144 *Metropolitan Stores*, *supra* note 26 at 150.

The first sub-component would be an analysis of the strength of the case that the applicant advanced. At this stage, it would be appropriate to expect applicants to advance a "plausible case" that a *Charter* protection is infringed.

The second component of this threshold analysis would ask whether there is a plausible case that granting an interlocutory stay of the legislation might serve the purposes of the *Charter.* In particular, this phase of the analysis might ask whether granting the interlocutory stay would reinforce the democratic commitments of Canada's constitutional order.[145] There are several senses in which an interlocutory stay of legislation might reinforce democratic commitments.[146]

To begin, democracy may be reinforced by granting an interlocutory stay when legislation plausibly infringes the rights that are the crucial prerequisites for participation in Canadian democracy.[147] The right to vote, freedom of speech, and freedom of assembly are the most obvious of these rights. But there is no necessary limitation to these examples. The focus of the courts' analysis here could be on whether the alleged infringements of the *Charter* pointed to a plausible relationship with participation in Canadian democracy.

Further, democracy may be reinforced by granting an interlocutory stay where legislation plausibly targets groups that were not effectively represented in the democratic process leading to the legislation, including historically under-represented groups.[148] Targeting, in this analysis, describes circumstances where a law's ill effects are concentrated on the interests or rights of a particular group that is, for example, a so-called "discrete and insular minority."[149]

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145 The language of "reinforcing" democracy or representation is particularly inspired by Patrick J Monahan, "Judicial Review and Democracy: A Theory of Judicial Review" (1987) 21:1 UBC L Rev 87; John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass: Harvard University Press, 1980). It should be noted that neither Monahan nor Ely was explicitly focused on how particular doctrinal approaches could reinforce democracy. Instead, their focus was on an overarching justification for the practice of judicial review. A similar view to mine (*i.e.*, that doctrinal developments can be structured with a view to enhancing the democratic character of a society) was advanced by Justice Breyer of the USSC: see especially Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (New York: Vintage Books, 2005).

146 I turn to a more fulsome discussion of the theoretical underpinnings for these claims below: see note 158, below, and the accompanying text.

147 See Monahan, *supra* note 145 at 138.

148 See *ibid* at 149. For groups who have been historically under-represented but who have begun to be more adequately included in the political process, the institutions of the state may bear the legacy of the period of under-representation. Systemic discrimination may, for that reason, still exist notwithstanding increased or increasing representation. Thus, it would be necessary for historically under-represented groups to also be a focal point for this framework. I thank one of the anonymous reviewers for emphasizing this important point.

149 The language of discrete and insular minorities is drawn from *United States v Carolene Products Company*, 304 US 144 (1938) at n 4, from which Ely draws inspiration. See also Monahan, *supra* note 145 at 146-49.

An understanding of the kinds of groups relevant to this analysis could draw some inspiration from the section 15 jurisprudence that has already articulated "grounds associated with stereotypical, discriminatory decision making."[150]

If an applicant passes each of these stages, the courts could proceed to the second phase, in which the onus would be on the government defending the legislation.

The second phase: justifying interim rights violations

The second phase of the framework can also be divided into two sub-components.

First, the court would ask whether the government can plausibly allege a "pressing and substantial" objective that requires that the legislation be fully enforced during the *interim* period.

Second, the court would ask whether the government could adduce evidence plausibly suggesting that the democratic ideals of the Canadian constitutional order *were* respected by the enacting process.[151] The actual procedural steps taken by the government or the legislature could be examined here to determine whether they were sufficient to justify *not* granting the interlocutory stay that would plausibly support the democratic commitments of the Canadian constitutional order. This is a contextualized form of "proportionality" between the enacting procedures and the legislative action. For instance, a government might demonstrate that, while the interests of a particular group were implicated by the legislation, enough careful consultation with impacted communities, and enough thoughtful policy development, had been done.[152] Equally, they might point to meaningful engagement with experts and civil society actors, in the service of drafting a law that was constitutionally compliant. When this evidence was presented, the government might succeed in this justificatory exercise for only some parts of the legislation. Where this is the case, the parts that are justified may plausibly be exempted from the stay. As well, emergencies and circumstances of extraordinary exigency might require rapid and decisive action without all of the procedural steps that would ordinarily be expected for legislation that plausibly infringes rights. Some forms of more expeditious action may be justifiable in an emergency, even in a country

150 *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 7, 173 DLR (4th) 1.

151 I recognize that there is case law supporting the proposition that the procedures of the legislature are beyond judicial review. I deal with these decisions in the text that accompanies note 175, below.

152 See e.g. *Karounis, QCCS*, *supra* note 91 at para 46, where Bachand J seemed to endorse reasoning of this kind.

committed to democratic ideals.[153] In all of this, sensitive attention to the legislation's true purposes and effects would be crucial.

Justifying and defending the novel framework

The structure of the framework

Rather than follow traditional private law remedial frameworks, this formulation mirrors the "two-step analysis" that structures the inquiry into, first, whether constitutional rights are infringed and, second, whether those infringements are justified.[154] While not all of the constitutionally-guaranteed rights are subject to justification under section 1, the division of the analysis between infringement and justification reflects the basic proposition that constitutionally-guaranteed rights are not generally understood to be absolute.[155]

The first phase: the threshold test

The first phase of the analysis that I have outlined mirrors the eventual question on the merits as to whether constitutionally-protected rights are infringed. But the approach is particularized for the interlocutory context where infringements cannot realistically be proven, or disproven, with certainty. Two aspects of the first phase of the proposed framework are of particular interest.

First, I have employed the language of a "plausible case" to describe the strength of the claim that the applicant must advance. Under the assumption that the approach presented here will be somewhat more likely to lead to interlocutory stays being granted than the existing approach (a claim that I defend below), a slightly elevated threshold standard can help conserve judicial resources. This guards against the (perhaps small) risk of creating undue burdens for courts confronted with applicants emboldened by a more "open" approach.[156] More importantly still, it avoids the risk of interlocutory stays being based on claims that are farfetched. Equally crucial, this small elevation in the threshold does not connote as high a standard as the "*prima facie* case"

153 For a way to reconceptualize the relationship between emergency and democracy, see e.g. Bonnie Honig, *Emergency Politics: Paradox, Law, Democracy* (Princeton: Princeton University Press, 2009).

154 See e.g. *R v Keegstra*, [1990] 3 SCR 697 at 728-29, 117 NR 1; *Irwin Toy Ltd v Quebec (AG)*, [1989] 1 SCR 927 at 765-66, 58 DLR (4th) 577.

155 Constitutional rights that are not subject to s 1 include: s 35 (Indigenous rights), the provisions in the *Constitution Act, 1867*, and — potentially — s 28 (sex equality). Though s 1 does not apply, courts have sometimes read in balancing mechanisms: for instance, in *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385 the SCC asserted that s 35 contained a mechanism for justifying infringements of Indigenous rights.

156 If these are really legitimate concerns at all: see e.g. *Downtown Eastside*, *supra* note 12 at para 28.

from before *RJR–Macdonald*, the "likely case" required by the eighth circuit in the United States, or other similarly restrictive formulations.[157] The standard is a deliberate middle ground. Most importantly, however, the language of a "plausible case" avoids the resonance of the formulations that have dominated private interlocutory injunction applications. By emphasizing the distinctiveness of the public law context, this threshold standard may allow public law principles to develop autonomously without succumbing to the pull to treat the analysis under the same rubric as private law interlocutory injunctions.[158] In effect, having a distinct phrase to govern the public law analysis could force courts to give definitional content to the standard. In so doing, it would be necessary to grapple explicitly with how convincing a case is needed to be before democratically-enacted actions can legitimately be suspended. This question stands at the core of the difficulty posed by interlocutory stays in *Charter* challenges. Through easy reliance on language from the private law, a nuanced answer has not yet been given under the current framework. It is submitted that the proposed framework could go some way to avoiding the perpetuation of this inattention.

A second component of the proposed first phase of the analysis is the emphasis on democracy. The concept of democracy that I have relied on builds on the claim that a central aspiration of democratic societies is to have all voices be heard.[159] The notion that legislation targeting the interests of groups who are not well-represented in the political process undermines democratic values is based on this fundamental proposition.

While recognizing that the language of this new framework proposes a narrower ground on which to consider granting interlocutory *Charter* stays, I do not believe that this framework would inappropriately neglect some *Charter* protections. Freedom of speech, freedom of assembly, democratic rights, and equality rights are clearly within the scope of the core commitments of Canadian democracy. But there are good reasons to think that the other constitutionally-guaranteed rights can also be plausibly linked to the core values of a

157 Sharpe, "Interim Constitution Remedies", *supra* note 14 would also elevate the threshold standard for the merits, but he does not provide an explicit statement of the language he would use to describe the elevated threshold.

158 One such pull is the notion that the threshold standard shifts according to how draconian the requested injunction is understood to be: see e.g. *CBC*, *supra* note 61. In the public law context, my view is that a proportionality analysis, as outlined below, can better account for legislative context.

159 See *Re Secession*, *supra* note 106, where the Court articulated the unwritten constitutional principles of democracy and protection of minorities. These principles are relevant to the interpretation of the constitutional text, including s 24(1). See also Monahan, *supra* note 145 at 149.

democratic society.[160] Thus, it is not just the most obvious democracy-adjacent rights that would be possible reasons to issue interlocutory stays of legislation. If all the rights guaranteed by the *Charter* remain relevant, that is not to say that the proposed framework has no effect. Placing the focus on democracy in the first stage shifts the rhetorical framing of the interlocutory injunction analysis: rather than all interlocutory stays during *Charter* challenges being described as *intrusions* on democracy, interlocutory stays are reconceived as *serving* democratic ideals. The courts, on this view, are part of a democratic society — not hostile to it.[161] So, even though effectively any violation of a *Charter* right would remain a possible trigger for an interlocutory stay, this re-framing may go some way to addressing the anxiety over judicial legitimacy that has permeated the approach to the existing interlocutory injunctions framework. And in so doing, it may provide a rhetorical framework that permits a more generous judicial approach to interlocutory *Charter* stays to develop. This increased "generosity" would likely result in more interlocutory stays being issued in *Charter* challenges.

As a consequence of a more generous approach, it is possible that there might be some "false positives" or "type I errors." An approach that is open to interlocutory stays will likely never be able to achieve 0% type I errors, as the present one-sided framework does. A type I error would undoubtedly be a serious problem. But its impact should not be overstated: the proposed framework would only suspend legislation that failed the proportionality assessment that forms the second stage of the test. In the context of the tightly circumscribed balancing that the second stage requires, the number of type I errors should be very limited. And where they do occur, the consequences of non-compliance during the interim period will — by definition — be of limited severity. Further, if substantial harms do become visible, courts can always intervene to reconsider their assessment of the appropriateness of a stay.

The second phase: justifying interim rights violations

It will be immediately evident that the framework at the second stage of the analysis tracks the *Oakes* test. In particular, the *Oakes* test is also divided into a "pressing and substantial objective" and "proportionality" stage.[162] As in the

160 See e.g. Alana Klein, "The Arbitrariness in 'Arbitrariness' (and Overbreadth and Gross Disproportionality): Principle and Democracy in Section 7 of the *Charter*" (2013) 63:1 SCLR 377. This focus on core democratic values mirrors the focus on the purposes of the *Charter* that Roach believes should animate the analysis: see note 40, above, and the accompanying text.

161 See e.g. *Vriend v Alberta*, [1998] 1 SCR 493 at para 56, Iacobucci J, 156 DLR (4th) 385.

162 See *Oakes*, *supra* note 138.

Oakes analysis, the proposed framework suggests that the onus at the justification stage should fall on the government.[163] This onus adopts the same standard as the threshold burden that the applicant must meet: a "plausible case." This symmetry is appropriate, as it would make clear that the courts had abandoned the current one-sided approach.

But the proposed analysis is also contextualized to reflect the interlocutory context. Thus, the government should be asked to describe a pressing and substantial objective that requires that the measure be enforced during the *interim* period, rather than pointing to an *overall* objective.[164] This is a crucial nuance that the current framework misses by sometimes seeming to employ a blanket presumption that legislation is in the public interest: it is the interest in the enforcement of the legislation during the interim period that should matter. Even if there were a strong public interest in the legislation ultimately being in place, that would say relatively little about the benefits of the legislation during the interim period.

Similarly, the "proportionality analysis" is particularized for the interlocutory context.[165] This particularization draws heavily on the so-called "procedural" or representation-reinforcing theories of judicial review. These theories' basic claim is that the focus of judicial review should be on the preservation and deepening of the democratic and participatory character of Canadian society.[166] It is clear, of course, that in the decades since the *Charter* was adopted, the representation-reinforcing approach has not found universal acceptance in Canadian constitutional theory.[167] Further, American "procedural" theories of judicial review have been met with biting critique.[168] But representation-reinforcing theories nevertheless remind us that there are other lodestars, apart

163 See *ibid* at 136-37.

164 *Cf RJR–Macdonald, 1995*, *supra* note 139 at para 144, McLachlin J (stating that the objective used for s 1 justification must be specific rather than general).

165 See Roach, *Two-Track Approach*, *supra* note 5 at 175-76 for another approach emphasizing proportionality in interlocutory relief decisions.

166 See Monahan, *supra* note 145 at 152-59. See also Martha Jackman, "Protecting Rights and Promoting Democracy: Judicial Review under Section 1 of the *Charter*" (1996) 34:4 Osgoode Hall LJ 661; HS Fairley, "Enforcing the *Charter*: Some Thoughts on an Appropriate and Just Standard of Judicial Review" (1982) 4 SCLR 217.

167 See e.g. Peter W Hogg, *Constitutional Law of Canada*, 2019 student ed (Toronto: Thomson Reuters, 2019) at 36-32; Peter W Hogg, "The *Charter of Rights* and American Theories of Interpretation" (1987) 25:1 Osgoode Hall LJ 87. Further, while the interpretive position advocated by Breyer, *supra* note 145 bears considerable resemblance to Canadian purposive interpretation, the overall focus on enhancing democracy or "active liberty" has not been widely influential in this country.

168 See especially the critiques of Ely, e.g. Ronald Dworkin, "The Forum of Principle" in *A Matter of Principle* (Cambridge, Mass: Harvard University Press, 1985) 33; Laurence H Tribe, "The Puzzling Persistence of Process-Based Constitutional Theories" (1980) 89:6 Yale LJ 1063.

from whether the legislature "got it right" on the merits, that might plausibly guide judicial involvement at the interlocutory stage of *Charter* claims. It is this insight that inspires the focus on procedural measures taken during the legislation's enactment.

An appealing feature of this approach is that it may cut through the Gordian knot that is the intertwined problems posed by the evidentiary defects and incomplete arguments that characterize interlocutory proceedings. Rather than the detailed social-scientific record and extensive submissions that are generally required for merits review, a representation-reinforcing interlocutory *Charter* stay analysis would rely on affidavit evidence describing legislative and executive processes that, by definition, have concluded when legislation, or other government action, goes into force.[169] Because the focus is not on the merits of the claim, anxiety about the risk of premature adjudication may be reduced.[170] If the courts are able to rest their analysis on "procedural" considerations, there will be less room for misinterpreting the interlocutory judgment as a "preview" of the eventual analysis of the merits. At the same time, by focusing on whether the enacting procedure was proportionate to the particular pressing and substantial objective articulated by the government defending the legislation, the framework does not risk sham consultation, sanctioning what might be a flagrantly unconstitutional law. If the law is plausibly egregiously rights-violating, deeper and more expansive forms of consultation would be required for proportionality to exist: a sham would not suffice. Further, some laws may be such serious violations that no amount of consultation could be proportionate. Thus, the proposed framework need not risk consultatory procedures being found to give benediction to what would otherwise have been a clear case for an interlocutory stay.

This focus on procedural evidence is a manageable judicial task. Indeed, it is closely analogous to the so-called "procedural margin of appreciation" doctrine developing in the European Court of Human Rights.[171] In the European context, as in Canada, the justification of rights infringements often turns

169 For instance: parliamentary debates, committee work, consultation hearings, internal policy preparation work, etc.

170 As emphasized at the beginning of this subsection, however, if the issue is a question of law alone, then courts should not engage in this analysis: a final determination on the merits is an appropriate response.

171 See e.g. Matthew Saul, "The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments" (2015) 15 Human Rights L Rev 745. This procedural turn is not without its critics. I do not wish to imply that all of the refinements of the Eur Ct HR approach would need to be imported into Canada.

on whether the infringements can meet a proportionality test.[172] This test has often been operationalized by focusing on the procedures that the national legislatures adopted in arriving at the legislation: if the legislature engaged in fulsome consultation and carefully balanced the rights at issue, the European Court of Human Rights will be less likely to see a serious reason to declare the legislation a violation of European human rights guarantees.[173]

It must be acknowledged that the Supreme Court of Canada has repeatedly held that the procedures of the legislatures are not subject to judicial review.[174] Indeed, the Court recently wrote that "constitutional principles — the separation of powers and parliamentary sovereignty — dictate that it is rarely appropriate for courts to scrutinize the law-making process."[175] Nevertheless, I do not view the proposed framework to be undermined by these principles. Crucially, in the framework outlined, no particular process is *required* of the legislature. All that this model proposes is that, for example, where legislatures have engaged in extensive consultative procedures, courts should be willing to weigh this at the interlocutory stage. Legislative procedures not being susceptible to review need not mean that they cannot be relevant to other kinds of constitutional analysis.

Without making it a constitutional requirement, the model creates an incentive for legislatures to engage in careful efforts to address plausible rights infringements that legislation creates.[176] Such an incentive to openly engage — in advance — with the impacts of legislation on *Charter* protections would be a salutary addition to Canadian constitutional culture.[177] At its core, the rationale is similar to Professor Fuller's contention that when lawmakers "are compelled to explain and justify their decisions, the effect will generally be to pull those decisions toward goodness, by whatever standards of ultimate

172 See e.g. the early discussion in Gráinne De Búrca, "The Principle of Proportionality and its Application in EC Law" (1993) 13:1 YB Eur L 105.

173 See e.g. *Maurice v France* [GC], No 11810/03 (6 October 2005) at paras 121-24. Other examples abound in the caselaw.

174 See e.g. *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525, 83 DLR (4th) 297; *Canada (House of Commons) v Vaid*, 2005 SCC 30; *Authorson v Canada (AG)*, 2003 SCC 39.

175 *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 2, Karakatsanis J.

176 *Cf Schmidt v Canada (AG)*, 2016 FC 269 [*Schmidt*], aff'd 2018 FCA 55, leave to appeal to SCC refused, 38179 (4 April 2019). In *Schmidt*, the issue was the interpretation of a statutory duty to examine the *Charter* compliance of legislation (see *Department of Justice Act*, RSC 1985, c J-2, s 4.1).

177 See e.g. Canadian Civil Liberties Association, "*Charter* First: A Blueprint for Prioritizing Rights in Canadian Lawmaking" (2016) at 47, online (pdf): *Canadian Civil Liberties Association* <ccla.org/cclanewsite/wp-content/uploads/2016/09/Charter-First-Report-CCLA.pdf> [perma.cc/U96P-RT4N].

goodness there are."[178] While it might not ensure just outcomes, creating an incentive for lawmakers to listen to impacted communities — and articulate their reasons if they still wish to dismiss those concerns — might, at the margin, make rights-infringing legislation less likely to be enacted.[179] Further, even if these effects cannot block all capricious legislation, it would nevertheless be an improvement, because the existing approach to interlocutory *Charter* stays seems to almost never provide relief.

This new focus for the balancing exercise at the core of any decision on whether or not to grant an interlocutory stay of legislation would admittedly be a significant departure from the courts' contemporary practice. There would inevitably be considerable uncertainty, as the jurisprudence settled the limits of this model. But it might nonetheless be worthwhile. The core question that should animate interlocutory *Charter* stay decisions is whether the (still hypothetical) rights violation is demonstrably justified in a free and democratic society. What does it mean for a potential rights violation to be demonstrably justified in a democracy if not that the enacting legislature has carefully balanced and circumscribed the potential impacts on rights? To presume that the democratically-elected branches have done so is, sadly, likely to ignore the reality that government action may have (willfully or not) ignored rights impacts.[180] By making consultative procedures a focus of the framework, the courts can insist on a workable version of justification during the interim period.

Applying the framework

To show that the framework that I have proposed would open up new possibilities for interlocutory *Charter* stays — without inappropriately granting every application — I return to the four case studies that have formed the core of this paper.

In the challenge to Bill 21, at the time of the application for an interlocutory stay, it was relatively clear that aspects of the law — including its applica-

178 Lon L Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart" (1958) 71:4 Harv L Rev 630 at 636.

179 I assume that lawyers' ethical obligations, and the threat of criminal sanction for dishonest affiants, would ensure that the evidence would reflect the real procedures employed: see e.g. Federation of Law Societies of Canada, *Model Code of Professional Conduct*, Ottawa: FLSC, 2019, r 5.1; *Criminal Code*, RSC 1985, c C-46 s 131.

180 On the normative obligations of legislatures to consider the constitutionality of legislation, see e.g. Vicki C Jackson, "Pro-Constitutional Representation: Comparing the Role Obligations of Judges and Elected Representatives in Constitutional Democracy" (2016) 57:5 Wm & Mary L Rev 1717; Michael A Bamberger, *Reckless Legislation: How Lawmakers Ignore the Constitution* (New Brunswick, NJ: Rutgers University Press, 2000).

tion to minority language schools and legislators — were constitutionally deficient.[181] In my view there was also a plausible case that section 28, the *Charter* prohibition of sex discrimination, was infringed.[182] It is also plausible, for instance, that Bill 21 is unconstitutional because it runs contrary to the architecture of the Canadian constitution (for instance, by violating the constitution's guarantee of equal access to public institutions), and because the law oversteps provincial legislative competencies.[183] It also seems clear that the interests of Muslim women who choose to wear the hijab or the niqab are particularly targeted by the legislation.[184] Even though the notwithstanding clause was invoked, as Chief Justice Duval-Hesler emphasized at the Court of Appeal, the exemption regimes in the legislation seem to provide a strong signal that there was no actual urgency for Bill 21 to be applied immediately and universally.[185] Further, the procedure employed by the legislature does not seem to have devoted any significant energy to hearing Muslim women's voices or responding to their concerns.[186] Thus, it is plausible that the alternative framework would have granted the interlocutory stay of Bill 21 that was sought in *Hak*.

In the challenge to Bill 40, a plausible case that the legislation breached the *Charter* was also advanced.[187] At the second stage of the analysis, one might note that the *representative* character of certain school boards was being undermined by the legislation. This is important, as democratic ideals in Canadian

181 The QCCS has now declared some aspects of Bill 21 to be of no force or effect pursuant to s 52: see *Hak, QCCS (Merits)*, *supra* note 64.

182 The most expansive treatment of these arguments can be found in Kerri A Froc, "Shouting into the Constitutional Void: Section 28 and Bill 21" (2019) 28:4 Const Forum Const 19. The QCCS has now rejected these arguments: see *Hak, QCCS (Merits)*, *ibid*. The applicants, however, have appealed to the QCCA, and will likely appeal to the SCC in turn.

183 These are, in broad terms, the arguments presently being advanced by the CCLA on appeal.

184 See e.g. *Québec*, Commission des droits de la personne et des droits de la jeunesse, *Mémoire à la Commission des institutions de l'Assemblée nationale : projet de loi n° 21*, Catalogue No 2.412.129 (Quebec: 3 May 2019) at s 4.2 [Commission Memo].

185 See *Hak*, *QCCA*, *supra* note 64 at paras 79-80. Even though *Charter*, *supra* note 6 s 28 may not be subject to s 1, the framework I have outlined does not rest on a strict "application" of s 1. Applying the new framework if the applicants had only advanced division of powers claims, or unwritten constitutional principles, is beyond the scope of this analysis. One might note, however, that the notwithstanding clause is part of the constitutional framework and it may not *always* be possible to avoid its effects without finding limits on the notwithstanding clause itself.

186 Numerous legislators commented on the lack of voice for impacted people: see e.g. Quebec, National Assembly, *Debates*, 42-1, vol 45 No 58 (16 June 2019) at 3807 (Marwah Rizqy), 3812 (Gaétan Barrette), 3816 (Marc Tanguay); 3906 (Sol Zanetti). See also Benjamin Shingler & Jonathan Montpetit "Hearings on Quebec's Secularism Bill Have Little Time for Religious Groups, Critics Say", *CBC News* (7 May 2019), online: <cbc.ca/news/canada/montreal/quebec-secularism-bill-1.5125057> [perma.cc/RHZ2-WDQ7].

187 See *English Schools, QCCA*, *supra* note 80 at para 48.

society extend beyond the federal and provincial governments alone.[188] One might also note that the interests of the Anglophone linguistic minority in Quebec appeared to be targeted. It does not seem that there was any pressing reason for changing the school board structure immediately, nor was there seemingly appropriate consultation to conclude that an interlocutory injunction would not serve to reinforce democratic ideals.[189] Thus, an interlocutory injunction would likely have been issued in *English Schools*.

In the challenge to the in-person schooling order, however, the government could certainly claim a pressing and substantial reason for having legislation in response to the pandemic enforced immediately. Further, Justice Bachand recognized what appears to be significant evidence that the government *did* consider the interests impacted by the decision, to the extent that an ongoing pandemic permitted them to.[190] Particularly in the emergency circumstances with which they were faced, the measures that the government took to consider the order may plausibly be consistent with the democratic commitments of Canadian society. This suggests that, as before, a safeguard order would not have been issued in *Karounis*.

In the challenge to the curfew order, the government did not believe that the order applied to unhoused individuals. To the extent that it was being applied in that way, the process of drafting the order, or training public officials on how to apply it, must have been flawed. Indeed, many claimed that the government had ignored civil society groups who had warned that a curfew would be applied disproportionately to unhoused individuals.[191] Under the alternative framework, then, a safeguard order would likely still have been issued .

Incremental ways to improve the RJR–Macdonald *framework*

I began this section by acknowledging that this proposed framework is not the only approach that could flow from the constitutional context. The guarantees in sections 1 and 24(1) are open textured and could realistically give rise to many different approaches. There is no single "right answer" for how to structure a public law approach to interlocutory stays of legislation in *Charter* challenges. Accordingly, it may be useful to acknowledge another realistic way to improve the *RJR–Macdonald* framework: through incremental change.

188 See e.g. *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at para 19.

189 As with Bill 21, Bill 40 was adopted under a so-called "gag" or "closure" procedure ("*bâillon*").

190 See *Karounis, QCCS*, *supra* note 91 at para 46.

191 See e.g. CBC News, "Legault's Comments About Curfew and the Homeless Out of Touch, Advocates Say" (7 January 2021), online: www.cbc.ca/news/canada/montreal/legault-homeless-curfew-covid-1.5864560 [perma.cc/C2HD-PJLL].

An incremental approach to improving the *RJR–Macdonald* framework would likely focus on the decisive stage of the test: the final balancing. It is submitted that the alternative framework developed above has much to recommend in terms of ways to make this balancing more appropriate for the public law context.

First, the proposed framework emphasizes that legislative and executive efforts to consult during the drafting of the measures at issue can be a useful focal point when conducting a balancing at the interlocutory stage. In effect, courts can ask: do the consultations undertaken by the government provide convincing evidence that the potential rights infringements were recognized, carefully considered, and circumscribed to the extent that it was possible to do so? If marginalized communities who are not well-represented in the democratic process were not consulted, it is unlikely that their interests were fully considered. It is equally unlikely that all possible avenues for circumscribing the potential rights infringements were explored, as many of these avenues will not be obvious to individuals outside of these marginalized communities. A similar emphasis on consultation conducted during the development of the legislation might be brought to bear in an incrementally modified third stage of the *RJR–Macdonald* analysis.

Second, the proposed framework is focused on the interim period, rather than on the legislation as a whole. Since the decision that the courts face is whether to stay the application of legislation during the interim period, the overall benefits of the legislation — or the harms of not having the legislation ever go into effect — are not the appropriate focus. Instead, courts should only weigh interests related to the interim period. A law that is ultimately in the public interest may not do much in a one or two year interim period, particularly if the social circumstances the legislation addresses itself to are longstanding. To understand what is truly at stake, courts must actually grapple with the purposes of the legislation they are faced with.[192] This restricted focus on the interim period could relatively easily be imposed as a condition for the final balancing in the *RJR–Macdonald* analysis.

Third — and related to the point above — the proposed framework is open to legislative signals that there is not a pressing public interest in enforcement during the interim period. Where the legislature provides for transitional regimes, limits the application of the legislation, provides exemptions, and so

192 Thank you to one of the anonymous reviewers for underscoring the importance of returning to this central point.

on, courts should be willing to conclude that there is not an overriding public interest in the immediate and universal enforcement of the law. This is likely the most straightforward way for the presumption that legislation is in the public interest to be qualified at the third stage of the *RJR–Macdonald* analysis: by actually engaging with the content of the legislation.

Finally, the proposed framework emphasizes possibilities within the *RJR–Macdonald* analysis that have been less than completely realized. One such possibility is the direction to consider the merits of issues that present as questions of law alone. In these cases, there is no reason to avoid merits adjudication. The courts should take this exemption seriously. As well, courts should remain engaged throughout the interim period: if an interlocutory stay was granted and it becomes clear that the public interest has suffered as a result, the interim order should be vacated. But if a stay was refused and it later becomes obvious that the applicants or other members of the public are having their rights violated, the court should also reconsider. Further, if only some aspects of the legislation need to be stayed (or kept in force) the courts should engage in the granular assessments of legislative purposes and effects that are necessary to decide those questions. Unless the legislation is such that severance is impossible, each element should be assessed on its own. As these determinations are made, it may be appropriate for the courts to accept undertakings negotiated by the parties. If governments are willing to "stay" the enforcement or application of certain aspects of their legislation on their own, the courts should encourage them to do so.

Conclusion

The approach outlined in this paper should provoke questions about how it would be applied in other interlocutory *Charter* stay cases, or indeed in other contexts.[193] The purpose of this paper was not to resolve all such questions. Instead, it advances the more fundamental claim that the core of the inaccessibility of interlocutory *Charter* stays is a judicial concern with ensuring that the constitutional role of the democratically-elected branches of government is respected. As I have attempted to show, by moving beyond private law frameworks and instead focusing on sections 1, 24(1), and representation-reinforcing theories of judicial review may point towards a way forward. Using public law tools, it may be possible to have a framework that gives *both* deference to dem-

193 For instance *Gould*, *supra* note 107; *Harper*, *supra* note 17; *Toronto Ward Boundaries*, *supra* note 2; challenges on division of powers grounds; statutory human rights instruments; etc.

ocratically-elected actors and the promise of "appropriate and just" *Charter* remedies the weight they should carry.

I have attempted to show by moving beyond private law frameworks and instead focusing on sections 1, 24(1), that representation-reinforcing theories of judicial review may point towards a way forward.