

1-1-2007

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Recommended Citation

Adam Ship, "Individual Activity & Content Neutrality Under Section 2(d) of the Charter" (2007) 16 Dal J Leg Stud 135.

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INDIVIDUAL ACTIVITY & CONTENT NEUTRALITY UNDER SECTION 2(D) OF THE CHARTER

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This note discusses the nature and scope of protection which is and ought to be afforded to individual activity under s. 2(d) of the Charter through an analysis of two doctrinal models. Since the s. 2(d) jurisprudence is dominated by labour relations cases, which tend to deal squarely with the collective aspect of the right, there is very little case law and commentary on which to structure this debate.

By analogizing from the Charter's other fundamental freedoms, however, it is possible to craft a subjective model for s. 2(d) protection. As this note demonstrates, this model finds little support in the current jurisprudence, and its breadth is probably unworkable. By way of contrast, there is an objective model of association, which can be extrapolated from the core purpose of s. 2(d) as defined by the Supreme Court of Canada. Although principled and restrained, however, the objective model rejects any notion of a personal or subjective understanding of what constitutes association and in this sense it too restrictive. A possible blend of the two models, and the embrace of a qualified principle of content neutrality, may best deal with the concerns raised by each.

It seems only inevitable that, at some point, an appellate court in this country will be confronted with a s. 2(d) claim which asserts, in a novel fashion, an individually or subjectively defined scope of protected association. The law as it currently stands is too modest in its protection of individual associational activity. Hopefully, a balance can be struck between the unworkable breadth of the subjective model and the harsh and stubborn restrictiveness of the current law. A qualified form of content neutrality may provide the right balance.

INTRODUCTION

Freedom of association has long been considered an inalienable and necessary precondition for a fully functioning liberal democracy.¹ Due to the cooperative nature of associational activity, associations play an important role in cultivating a cooperative disposition in society.² Historically, the association has been a main vehicle through which persecuted groups have successfully resisted institutionalized hegemony.³ At the level of the individual, associational activity fosters personal self-fulfilment by facilitating the development of social qualities and behaviour.⁴ In Canada, associational life is especially important because our multicultural tradi-

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¹ *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 at 395, McIntyre J. [*Alberta Reference*], citing A. de Tocqueville, *Democracy in America*, P. Bradley ed. (New York: Alfred A. Knopf, 1945) at 196.

² David Schneiderman & Brenda Cossman, "Political Association and the Anti-terrorism Bill," in Daniels et al., eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) at 174 [Schneiderman].

³ *Alberta Reference*, *supra* note 1 at 365-366.

⁴ *R. v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209 at para. 175, LeBel J. [*Advance Cutting*] ("This Court has adopted the view that ... the right of association ... fosters one's self-fulfilment by allowing one to develop one's qualities as a social being.").

tion has tended to encourage affiliations based on nationality and ethnicity.⁵ The right to associate, which is expressly protected under s. 2(d) of the *Canadian Charter of Rights and Freedoms*,⁶ ultimately recognizes the fundamentally “social nature of human endeavours.”⁷

The jurisprudential development of s. 2(d) has been largely dominated by the phenomenon of collective activity. The seminal Supreme Court of Canada decisions under the provision have arisen in the labour relations context and have grappled with the question of the extent to which it protects the collective actions of labour unions.⁸ It is undeniable that protecting the collective pursuit of individual goals from unjustified governmental interference is a paramount aspect of freedom of association. However, beyond activities undertaken *in* association, individuals pursue an extremely broad range of other activities which, in the vernacular sense, must be understood as associational. Unfortunately, the extent to which s. 2(d) protects individual activity outside the collective context has been largely unexplored by courts in Canada since the proclamation of the *Charter* in 1982. To the extent that the law has explored this issue, there is little protection afforded to individual associational activity; instead, the concept of “associational activity” has been narrowly and formalistically constructed.

The purpose of this note is to explore, in a preliminary fashion, the protection of individual activity under s. 2(d) of the *Charter*. I contrast the jurisprudence with two model frameworks for the protection of association. I briefly outline the doctrinal contours of s. 2(d) in Part I. In Part II, I introduce the model frameworks – the objective and subjective approaches to association. The purpose of Part III is to explore these frameworks through an analysis of several cases. Through applying the model frameworks, I hope to shed light on the current limits and capacities of the jurisprudence. In Part IV, I analyze the wider implications for the current jurisprudence and the model frameworks through an assessment of the constitutionality of one of Canada’s new antiterrorism offences. The *Anti-Terrorism Act*,⁹ to the extent that it criminalizes individual activity undertaken for associational purposes, offers a helpful and topical lens through which to explore these issues. In the end, I hope to provide preliminary treatment of the phenomenon of individual associational activity under the *Charter* while, at the same time, proposing changes to the current analytical framework which embrace the principle of content neutrality.

5 Schneiderman, *supra* note 2 at 174.

6 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 [*Charter*]. Such express protection under the *Canadian Charter* is unlike the U.S. Constitution, under which the freedom to associate has developed derivatively, through judicial interpretation, from other First Amendment freedoms. See Ken Norman, “Freedom of Association” (2005), 28 S.C.L.R. (2d) 229 at 230-231.

7 *Alberta Reference*, *supra* note 1 at 365.

8 *Alberta Reference*, *supra* note 1; *Retail, Wholesale & Department Store Union v. Saskatchewan*, [1987] 1 S.C.R. 460; *Public Service Alliance of Canada v. Canada*, [1987] 1 S.C.R. 424; *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367 [*Professional Institute*]; *Dunmore v. Ontario (Attorney-General)*, [2001] 3 S.C.R. 1016 [*Dunmore*].

9 R.S.C. 2001, c. 41.

I: THE DOCTRINAL CONTOURS OF S. 2(D)

As it currently stands, there are five propositions of law which together encapsulate affirmative¹⁰ s. 2(d) protection.¹¹ First, s. 2(d) protects the freedom to “establish, belong to and maintain an association.”¹² For the purposes of this note, this first proposition is the most important, as it is the only one directly contemplating individual action. The second proposition functions as a constraint rather than a basis of protection: “s. 2(d) does not protect an activity solely on the ground that the activity is a foundational or essential purpose of an association.”¹³ Thus, once formed, the essential activities of an association are not accorded constitutional protection.¹⁴ I believe this proposition also precludes constitutional protection for individual activities taken in furtherance of the interests of an already-established association, or taken in order to advance a collective interest.¹⁵ Under the third and fourth propositions, respectively, s. 2(d) protects the exercise *in* association of the constitutional rights of individuals and the exercise *in* association of the legal rights of individuals.¹⁶ The ultimate rationale for these latter propositions is to protect the individual right to establish associations, since, to restrict the collective exercise of an activity legally pursuable by an individual “is essentially [to] attack ... the ability of individuals to establish an association for that purpose.”¹⁷

Finally, the fifth doctrinal proposition under s. 2(d) flows from *Dunmore*. Although the precise contours of this proposition remain unclear,¹⁸ its motivation stems from a desire to protect certain collective activities which, although deemed to deserve protection, cannot be analogized to the legal and/or constitutional rights of individuals:

[T]here will be occasions where a given activity does not fall within the third and fourth rules [under s. 2(d)]....These occasions will involve activities which (1) are not protected under any other constitutional freedom, and (2) cannot, for one reason or another, be understood as the lawful activities of individuals... [S]uch activities may be collective in nature, in that they cannot be performed by individuals acting alone. The prohibition of such activities must surely, in some cases, be a violation of s. 2(d).¹⁹

10 The so-called freedom “not to associate” has developed separately in the jurisprudence, has a different analytical framework, and will not be discussed. In the leading decision on this aspect of s. 2(d), *Advance Cutting*, *supra* note 4, LeBel J., in the main plurality judgment, held that the freedom ‘not to associate’ was different from the positive aspect of s. 2(d), and was only violated where state-compelled association imposed ideological conformity on the individual claimant. See also *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211.

11 I draw the first four propositions from *Professional Institute*, *supra* note 9 at 401-402. The origin and nature of the fifth proposition is discussed at *infra* notes 18 - 22 and surrounding text.

12 *Professional Institute*, *supra* note 8 at 402, Sopinka J.

13 *Alberta Reference*, *supra* note 1.

14 Peter W. Hogg, *Constitutional Law of Canada*, looseleaf (Scarborough: Carswell, 2004), at 41.3(c), citing in part *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157 [Egg Marketing].

15 I will discuss this further later on: see *infra* note 66 and surrounding text.

16 *Professional Institute*, *supra* note 8 at 402.

17 *Professional Institute*, *supra* note 8 at 402.

18 The remedy provided in *Dunmore*, *supra* note 8, although novel in the sense of confronting under-inclusive legislation, was so modest that much of these *dicta* were probably *obiter* as unnecessary to the disposition. See *infra* note 68.

19 *Dunmore*, *supra* note 8 at para. 16.

According to *Dunmore*, there is but one legal inquiry under s. 2(d):²⁰ “has the state precluded activity *because* of its associational nature, thereby discouraging the collective pursuit of common goals?” A logical interpretation of this inquiry suggests that the underlying concern is for malicious governmental objectives.²¹ In sum, it seems apparent from the discussion in *Dunmore* that the Court was chiefly concerned with expanding the extent to which s. 2(d) protects collective activities.²²

I will also briefly discuss *Suresh v. Canada (Minister of Citizenship and Immigration)*,²³ which stands for the proposition that associational activity constituting violence will not be accorded protection under s. 2(d).²⁴ In my opinion, *Suresh* merely extends to s. 2(d) the narrow threshold limitation set out in the freedom of expression context in *Irwin Toy v. Quebec*.²⁵ In *Irwin Toy*, the Supreme Court was clear that the analysis under s. 2(b) was content neutral;²⁶ however, as a threshold matter, expressive activity taking the form of violence was not to be accorded protection.²⁷ By importing the *Irwin Toy* limitation into the s. 2(d) framework, *Suresh* establishes that associational conduct which takes the form of violence, *i.e.*, associational activity that is, itself, violent, will not fall within the scope of s. 2(d). The implications of this limitation will be discussed later.

II: MODEL FRAMEWORKS FOR THE PROTECTION OF INDIVIDUAL ACTIVITY

In Canadian *Charter* jurisprudence, analytical frameworks tend to develop with an eye to a subsequent s. 1 balancing. For example, under freedom of expression enshrined in s. 2(b), the Supreme Court of Canada has tended to define expression very broadly, largely by reference to whether the activity conveys or attempts to convey meaning.²⁸ The only exception, set out in *Irwin Toy*,²⁹ is for expressive activity taking the form of violence. In *R. v. Keegstra*,³⁰ in holding that threats of violence constituted protected expression, the Court briefly discussed the relationship between content and form:

While the line between form and content is not always easily drawn ... *threats* of violence [as opposed to *acts* of violence] can only be so classified by reference to the content of their meaning. As such, they do not fall within the exception spoken of in *Irwin Toy*, and their suppression must be justified under s. 1.³¹

20 *Dunmore*, *supra* note 8 at para. 16 [emphasis added].

21 The word “because” in the sentence, which is repeated several times throughout the judgment in *Dunmore*, does suggest a concern for improper legislative purposes.

22 *Dunmore*, *supra* note 8 at para. 17.

23 (2002), 208 D.L.R. (4th) 1 [*Suresh*].

24 *Ibid.* at paras. 107-108. The main portion of the s. 2(d) discussion in *Suresh* is only two paragraphs in length and substantially conflates the ss. 2(d), 2(b) and 1 analyses. This renders the precise ambit of the reasoning in that decision difficult to distill.

25 [1989] 1 S.C.R. 927 at 970 [*Irwin Toy*].

26 See also *R. v. Sharpe*, [2001] 1 S.C.R. 45 at para. 27, where content neutrality was implicitly invoked as the rationale for according protection under s. 2(b) to the act of possessing child pornography.

27 *Irwin Toy*, *supra* note 25 at 970; Hogg, *supra* note 14 at 40.5(c) & 40.5(d).

28 *Irwin Toy*, *supra* note 25 at 968.

29 *Irwin Toy*, *supra* note 25. at 973.

30 *R. v. Keegstra*, [1990] 3 S.C.R. 697 [*Keegstra*].

31 *Ibid.* at 733 [emphasis added].

Indeed, in *Keegstra*, the Court refused to analogize hate propaganda to actual violence such as to engage the *Irwin Toy* exception,³² despite the fact that hate propaganda may have the effect of furthering or promoting violence. In sum, it is only in “those rare cases where expression is communicated in a physically violent manner”³³ that an activity which conveys or attempts to convey meaning will be excluded from s. 2(b) protection. Consequently, most s. 2(b) cases reaching the Supreme Court of Canada turn on the s. 1 analysis.³⁴

Similarly, under s. 2(a) of the *Charter*, religion is also given a broad interpretation, the confines of which are essentially dictated by the claimant’s subjective beliefs and conceptions.³⁵ The claimant need only demonstrate, at the threshold, that “he or she sincerely believes that a certain belief or practice is required by his or her religion.”³⁶ As La Forest J. noted for a majority of the Supreme Court of Canada in *B. (R.) v. Children’s Aid Society of Metropolitan Toronto*,³⁷ “[t]his Court has consistently refrained from formulating internal limits to the scope of freedom of religion ... [Instead, it has] opted to balance the competing rights under s. 1...”³⁸ Non-trivial State interference with an honestly held religious belief or practice will generally³⁹ engage s. 2(a) and require justification under s. 1.⁴⁰

By way of contrast, the equality analysis under s. 15(1) of the *Charter* contains important objective elements which cause much of the limiting work to take place outside of the s. 1 context.⁴¹ Section 15(1) is only engaged where a law, beyond being formally discriminatory, demeans the dignity of a “reasonable person, in circumstances similar to those of the claimant.”⁴² As a purely subjective framework would not employ the standard of the “reasonable person,” the “human dignity” analysis contains an objective assessment.⁴³ In analyzing human dignity in a given case, moreover, an important if not decisive⁴⁴ factor is whether the ground of discrimination corresponds to the “need, capacity, or circumstances of the claimant or others.”⁴⁵ In order to satisfy this threshold, the government may, in certain circum-

32 *Keegstra*, *supra* note 30 at 732.

33 *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 at para. 60 [Ross].

34 Hogg, *supra* note 14 at 40.2; Robert Sharpe et. al., *The Charter of Rights and Freedoms*, 2nd ed. (Toronto: Irwin Law, 2001) at 125, 128 & 130.

35 *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 at paras. 40-44 [Amselem]; Ross, *supra* note 33 at para. 71 [Ross].

36 *Multani v. Commission Scolaire Marguerite-Bourgeoys*, [2006] S.C.J. No. 6 (QL) at para. 35 [Multani]; Amselem, *ibid.* at para. 52.

37 [1995] 1 S.C.R. 315 [B.(R.)].

38 *Ibid.* at 383-384; this approach was adopted in Ross, *supra* note 33 at paras. 73-75.

39 There may be an exception where s. 2(a) conflicts, and must be reconciled, with another constitutional right at issue in a given case. In the recent case of *Multani*, *supra* note 36 at paras. 24-31, the Supreme Court of Canada carefully examined the s. 2(a) framework and determined that this narrow exception will only apply where there is “apparent infringement of more than one fundamental right” and the Court is called upon “to reconcile two constitutional rights” (at paras. 28-29). Otherwise, any limitation on s. 2(a) must be justified under s. 1.

40 Amselem, *supra* note 35 at para. 65; Multani, *supra* note 36 at para. 34.

41 *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497 at para. 88; *Egan v. Canada*, [1995] 2 S.C.R. 513 at para. 56.

42 *Law*, *ibid.* at para. 88.

43 Hogg, *supra* note 14 at 52.7(b) (“by introducing this kind of evaluative step into s. 15, the relationship between s. 15 and s. 1 is confused, and s. 1 is left with little work to do.”).

44 Hogg, *supra* note 15 at 52.7(b), suggests that “the ‘correspondence’ factor is usually the decisive one.”

45 *Law*, *supra* note 41 at para. 88.

stances, rely on statistical generalizations,⁴⁶ which tend to objectify the analysis. For example, in *Gosselin v. Quebec*,⁴⁷ a majority of the Supreme Court employed statistical, objective evidence regarding unemployment patterns in Quebec to establish that the purpose of the impugned statutory scheme corresponded with the actual circumstances of the claimant and her group. Therefore, the substantive basis for equality rights are at least partially defined by reference to objective indicia. The self-limiting nature of s. 15(1) analyses impacts on the role of s. 1.

Therefore, the analytical frameworks established under ss. 2(a) and 2(b) are fundamentally different from that set out under s. 15(1). This difference has a strong effect on the analytical relationship between these provisions and s. 1. With these two contrasting frameworks in mind, the purpose of this Part is to offer two alternative models through which to approach individual activity under s. 2(d).

The subjective model adopts the approach taken to other fundamental freedoms under the *Charter*. Under this approach, “association” is a purely personal concept and, as such, is given an extremely broad definition dependent on the subjective conceptions of claimants. Thus, when delineating the scope of the “freedom to establish, belong to, and maintain an association,” the model focuses on whether the activity in question is associationally-motivated; if so, it finds *prima facie* protection under s. 2(d) and the limiting work takes place under s. 1. An activity is associationally-motivated, for example, where through it someone seeks to foster togetherness. Individual actions taken to foster initial togetherness between two or more people falls within the scope of the freedom to establish an association; or, to maintain continuing togetherness, the freedom to maintain an association. An activity is also associationally-motivated where it is undertaken to further the interests of a community of which the claimant is a member. This is because, in pursuing such activities, an individual is nurturing his or her connection to the group.

One version of the subjective model can be reconciled with the narrow exception for violence set out in *Irwin Toy*.⁴⁸ Conduct which takes the *form* of violence will not be protected, despite its associational motivation. However, associational conduct which falls short of actually constituting violence, but which is otherwise socially harmful or offensive, will nevertheless be accorded *prima facie* protection under s. 2(d).⁴⁹ This will be discussed in more detail in Part IV.

By way of contrast, the objective model adopts a particular definition of association which is necessarily self-limiting. Activity is associational when it carries certain objective indicia, adopted from a particular understanding of the core purpose of s. 2(d). The core purpose of freedom of association is consistently defined in the jurisprudence as protecting the coming together of persons for the common pursuit of individual activities and goals.⁵⁰ An activity is protected under the freedom to establish an association insofar as it is an objectively necessary precondition for the coalescing of persons. Although the freedom to maintain an association is also

46 *Law*, *supra* note 41 at para. 106.

47 [2002] 4 S.C.R. 429 at paras. 38-44 [*Gosselin*].

48 *Irwin Toy*, *supra* note 25 at 970.

49 *Keegstra*, *supra* note 30 at 733; *Ross*, *supra* note 33 at para. 60.

50 *Alberta Reference*, *supra* note 1 at 395; *Dunmore*, *supra* note 8 at para. 15; *Professional Institute*, *supra* note 8 at 401-402.

protected, by “maintain,” the model contemplates only those activities which are objectively necessary to retain the cohesiveness of the group. Thus, the essential activities of the association are not protected. Although such substantive activities constitute the purpose of or reason for a particular association, they are considered extraneous to the coalescing of persons and the maintenance of unity. Another important feature of the objective model, also flowing from its focus on the core purpose of s. 2(d), is its resistance to the protection of peculiar manifestations of association. Statutory provisions must interfere with the conditions precedent of the wholesale coming together of persons and/or the maintenance of that unity. It is not enough that an enactment merely precludes a particular instance or form of association if the people targeted can nevertheless come together despite the interference. All in all, the objective-model is based on a minimalist notion of association.

III: THE FRAMEWORKS IN ACTION

In *R. v. Skinner*,⁵¹ a majority of the Supreme Court of Canada held that the *Criminal Code* prohibition on communicating for the purpose of prostitution did not violate s. 2(d), despite the fact that such activity “contemplates as [its] final objective the ‘association’ of...individuals.”⁵² According to Dickson C.J., writing for the majority, since the “target of the...provision [is] expressive conduct,” *i.e.*, public communications which precede prostitution, the provision “does not attack conduct of an associational nature.”⁵³ Dickson C.J. was concerned about the analytical relationship between ss. 2(b) and 2(d) of the *Charter*, and the unworkable breadth of protected associational activity this relationship could engender. Although acknowledging that “[m]ost limitations on expression have the effect of limiting the possibilities for human association,” Dickson C.J. was adamant that the mere limiting of the possibility of a particular form of association, such as commercial activity or agreements, “is not...sufficient to show a *prima facie* interference with the s. 2(d).”⁵⁴

One proposition which emerges out of *Skinner* is that, where the state does not interfere with an association directly, but only targets conduct which precedes its formation, it does not offend s. 2(d). In *Canadian Egg Marketing Association v. Richardson*,⁵⁵ a majority of the Supreme Court cited *Skinner* approvingly for the proposition that where an activity “contemplates an association of the parties,” the state may nevertheless target such activity provided that “the association *per se*,” is left alone. This proposition runs counter to the general, purposive approach to *Charter* interpretation,⁵⁶ and seems to countenance state interference with the objectively necessary preconditions of a particular form of association. This proposition clearly runs afoul of the subjective model of association. The claimant in *Skinner* was undisputedly communicating for the purpose of establishing an association, albeit of a temporary and particular nature.

What is less clear is the interaction between this proposition and the objective mod-

51 [1990] 1 S.C.R. 1235 [*Skinner*].

52 *Ibid.* at 1243.

53 *Ibid.* at 1244.

54 *Ibid.* at 1245.

55 *Egg Marketing*, *supra* note 14 at para. 111.

56 The Supreme Court has consistently held that *Charter* rights are to be given a liberal and purposive interpretation. See generally *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 156.

el. At first glance, the objective model does protect objectively necessary preconditions to the establishment of associations. As discussed earlier, however, the objective model does not protect peculiar manifestations of association. Implicit in the reasoning in *Skinner* is the importance placed on the fact that the accused could still associate with whomever he wished. The statutory provision only interfered with a peculiar manifestation of association – commercial prostitution. Thus, the core purpose of s. 2(d) was preserved as the accused could still technically join together with other persons.

A similar theme arose in the case *RBC DS Financial Services Inc. v. Saskatchewan (Life Insurance Council)*,⁵⁷ a decision of the Saskatchewan Court of Queen's Bench. At issue in this case was a municipal bylaw which withheld licences from all life insurance agents maintaining an office on the same premises as a "bank, trust company, loan company, finance company or credit union."⁵⁸ The purpose of the bylaw was to protect the integrity and autonomy of the life insurance industry. However, its target was clearly, in the vernacular sense, a particular form of association – commercial cohabitation. The Court, citing *Skinner*, rejected the s. 2(d) claim: "[t]he bylaw does not prohibit [the claimant] from associating with her life insurance customers, [the bank] or bank personnel either on or off bank premises. It only prohibits her from maintaining an office on bank premises."⁵⁹ Thus, it was important to the Court that the claimant could still technically associate, that is, come together with, the same people with whom she sought to associate prior to the bylaw: she just could not commercially cohabit with them. Similarly, in *Québec (Procureur général) c. Perreault*,⁶⁰ which involved a regulatory prohibition on performing construction work without employees, the Quebec Court held that hiring and working with employees was not associational activity in the requisite sense. The employer-employee relationship was but one peculiar manifestation of association, thus lacking the constitutional significance requested by the claimant.

Overall, the tide of jurisprudence supports a minimalist notion of association. As *Skinner*, *Life Insurance Council* and *Perreault* illustrate, the courts have not taken seriously claims to constitutionalize peculiar manifestations of association.⁶¹ Instead, they have focused on the minimal right to come together and maintain togetherness by upholding statutory provisions, despite their interference with association, provided they leave room for alternative methods of coalescing. In this way, the jurisprudence accords with the objective model. By way of contrast, the subjective model has not been embraced by the jurisprudence, despite the fact that it accords with the approach generally taken to the other fundamental *Charter* freedoms. No where in the cases cited is any consideration given to the possibility that the activities in question were undertaken with an associational object or mindset. Indeed, insofar as the jurisprudence has rejected the notion that the activities of associa-

57 *RBC DS Financial Services Inc. v. Saskatchewan (Life Insurance Council)*, [1998] 10 W.W.R. 748 (Sask. Q.B.), rev'd on administrative law grounds, [2001] 4 W.W.R. 189 (Sask. C.A.), leave to appeal to S.C.C. refused (2001), 217 Sask. R. 258 [*Life Insurance Council*].

58 *Ibid.* at para. 4.

59 *Ibid.* at para. 18.

60 *Québec (Procureur général) c. Perreault* (1992), [1992] R.J.Q. 795 (C.Q.) [*Perreault*]. Although *Perreault* arose under the freedom *not* to associate, it illustrates nicely the minimalist notion of association in *Charter* jurisprudence.

61 For a strong argument in support of s. 2(d) protection of intimate relationships, see Colleen Sheppard, "Intimacy, Rights and the Parent-Child Relationship: Rethinking Freedom of Association in Canada" (2004) 16 *N.J.C.L.* 103-152.

tion's are protected,⁶² it is arguable that individual activity undertaken to further an association's interests would also be denied protection. The courts have chosen instead to formalistically construct the concept "associational."

IV: WIDER IMPLICATIONS AND THE ANTITERRORISM ACT

Anti-terrorism policy offers a helpful and topical lens through which to analyze wider implications engaged by the model frameworks. The *Anti-Terrorism Act*⁶³ created several new offences through amendments to the *Criminal Code*,⁶⁴ including an offence of providing property to a terrorist group under s. 83.03(b). The definition of "terrorist group" is partially dependent on a list of entities promulgated by the Governor-in-Council.⁶⁵ Many organizations on the list engage in multifaceted activities, including the provision of social services. In some cases, leading social and cultural organizations operating in certain countries are included on the list because the Governor-in-Council has reasonable grounds to believe that they engage in terrorist activity.⁶⁶ Any provision of property, either directly or indirectly, to a terrorist group is prohibited, even if the accused's intention was to further the non-violent activities of the group.

Recall that one postulate of the subjective model is that all activity subjectively motivated by a desire to further the interests of one's association is worthy of *prima facie* protection. It is very easy to imagine situations where a particular instance of providing property to a charitable organization is subjectively motivated by a desire to further the interests of the association with which one identifies. Also recall that the subjective model seeks to protect those activities undertaken for the purpose of establishing or nurturing one's connection with the group. These activities are conceptually narrower than activities undertaken to further the collective interests of an association. It is possible that s. 83.03(b) may capture instances where someone provides money to a charity abroad in order to fulfil a desire to connect or reconnect with an ethnic or religious constituency with which he or she identifies, rather than with an eye to supporting the substantive activities of the group. From a policy perspective, does this interference with an honest attempt to connect with one's constituency abroad make sense, despite a s. 1 justification?

In my opinion, since the first proposition of the subjective model tends to extend *prima facie* constitutional protection to most of the activities of associations, it is probably unworkable. Since associations "act" through the agency of their members, the activities of associations would be cloaked in constitutional protection if characterized as the associationally-motivated actions of its individual constituents. In the *Alberta Reference*, a majority of the Supreme Court of Canada rejected the notion that s. 2(d) "accord[s] an independent constitutional status to the aims, purposes, and activities of the association," thereby conferring "greater constitutional

62 *Professional Institute*, *supra* note 8 at 402.

63 *Supra* note 9.

64 *Criminal Code*, R.S.C. 1985, c. C-46, s. 83.03(b).

65 *Criminal Code*, s. 83.01 "terrorist group," s. 83.05; *Regulations Establishing a List of Entities*, S.O.R./2002-284.

66 *E.g.*, in Lebanon, two main organizations providing cultural and social services, Hezbollah and Amal, are listed.

rights upon members of the association than upon non-members."⁶⁷ Although the subjective model is technically concerned with individual conduct, it can have the effect of converting s. 2(d) into a collective right, thus accomplishing indirectly what has been consistently and out-rightly rejected by the Supreme Court of Canada, at least pre-*Dunmore*.⁶⁸ For example, although there is no constitutional right to gun ownership, gun prohibitions may, in effect, *prima facie* infringe freedom of association insofar as gun ownership is a subjectively necessary incident of establishing or maintaining a gun club or terrorist group.⁶⁹ In fact, most legal prohibitions would violate s. 2(d) under the subjective approach insofar as persons associate for the purpose of participating in the subject-matter of the prohibition. Unless the subjective model adopted the violence exception imported from *Irwin Toy*⁷⁰ and *Suresh*,⁷¹ an individual member of a terrorist group could invoke s. 2(d) to impugn the constitutionality or constitutional applicability of a murder, or terrorism-facilitation, charge on the grounds that the crime in question was committed in the interests of his or her larger association or motivated by a concern to maintain his or her membership therein. Although the s. 1 analysis would almost certainly maintain the functional *status quo*, this approach to s. 2(d) leaves the complete substantive definition of association to the possibly unreasonable, and likely self-motivated, whims of individual persons.

The second proposition of the subjective model – which seeks to protect those activities undertaken for the purpose of establishing or nurturing one's connection with the group – may also be unworkable, at least in its raw form. The concept of a membership fee provides a good illustration. In paying a membership fee, a person is providing property for the purposes of establishing his or her initial connection to the larger group. In paying an annual fee, he or she maintains that connection. However, should the scope of constitutional protection turn on the arbitrary differences in governance and financing structures of various organizations? Insofar as the money is allocated toward the undertaking of the substantive activities of the organization, the instrument of a membership fee could be used by groups to protect a principal source of funding. In this way, constitutional protection for membership fees, which are undoubtedly subjectively motivated by a desire to establish or maintain one's connection to an organization, could provide constitutional protection to the substantive activities of that group, contrary to the *Alberta Reference* and *Professional Institute*.⁷²

One way to temper this effect is to introduce an element of objectivity into the analysis. In this context, the analysis would not turn merely on whether the activity was honestly undertaken to establish or maintain one's connection to the group. Instead,

67 *Alberta Reference*, *supra* note 1 at 404, McIntyre J. (although writing for himself, this aspect of McIntyre J.'s judgment had the substantial support of the short majority judgment of Le Dain J.); see also *Professional Institute*, *supra* note 8.

68 In *Dunmore*, *supra* note 8 at para. 16, the Court appeared to expand the scope of s. 2(d) protection to certain undefined collective activities which cannot otherwise be analogized to individual legal or constitutional rights. The scope of such protection, however, is unclear, as the remedy in *Dunmore* was so narrow as to render much of this novel discussion under s. 2(d) *obiter*; see para. 67.

69 Peter A. Gall, "Freedom of Association and Trade Unions: A Double-Edged Constitutional Sword" in J. Weiler & R. Elliot, eds., *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1986) at 247.

70 *Irwin Toy*, *supra* note 25 at 970.

71 See *supra* notes 24 - 28 and surrounding text.

72 *Alberta Reference*, *supra* note 1 at 404, McIntyre J.; *Professional Institute*, *supra* note 9.

a factual determination must be made about whether the provision of property was a reasonably necessary condition precedent to the establishment or maintenance of the cohesiveness of the group. Although there would be evidentiary difficulties here, it would not be enough that a particular instance of providing property was defined in terms of a membership fee. It would need to be established that the organization requires a certain amount of money to maintain its very establishment, in the minimal sense of maintaining the coalescence of persons that is protected by the core purpose of s. 2(d).

An extension of this idea is that *Skinner* was wrongly decided. Governmental interference with an objectively necessary precondition to the establishment of the prostitution-customer relationship – which was acknowledged to be a particular form of association – should arguably engage s. 2(d).

On its face, s. 83.03(b) criminalizes all financial donations made to a terrorist organization. In theory, this includes donations which are objectively necessary for the minimal establishment and maintenance of such groups. The *Irwin Toy*⁷³ and *Suresh*⁷⁴ exceptions for violence do not apply in this context, as the making of such financial donations do not, in themselves, constitute violence and do not take the form of violence.⁷⁵ Although, as a matter of policy, it is desirable to criminalize financial donations which help establish violent associations, the same was true for criminalizing violent threats⁷⁶ and possession of child pornography,⁷⁷ yet the s. 2(b) analysis was content neutral, and such activity was accorded *prima facie* protection. Moreover, although establishing and maintaining the cohesiveness of a violent association may have the effect of furthering violence, violent threats and hate propaganda carry the same potential, but were nonetheless accorded *prima facie* protection under s. 2(b).⁷⁸

Content neutrality in the context of association requires that the substantive aspirations of the association are ignored in the s. 2(d) analysis, just like the substantive message is ignored in the s. 2(b) analysis. Without content neutrality, we open the door to the censoring of particular kinds of groups outside the s. 1 balancing context. Once the door is open, changes in the political climate could expand the scope of groups accorded no protection. Save for those cases where the associational conduct is itself violent, content neutrality ensures that policy concerns over particular kinds of association are dealt with in the s. 1 analysis. The critical qualification, however, is that only associational activity objectively necessary to establish and maintain the cohesiveness of the association are accorded this protection; associational activity designed to further the substantive activities of the group are excluded under this modified version of the subjective model.⁷⁹ Thus, in the s. 83.03(b) context, if a financial donation has the purpose or effect of facilitating the substan-

73 *Irwin Toy*, *supra* note 25 at 730.

74 See *supra* notes 24 - 28 and surrounding text.

75 *Ross*, *supra* note 33 at para. 60. The blurry line between form and content was acknowledged by the Court in *Keegstra*, *supra* note 31 at 733, and mirrors the notorious difficulty between the legal concepts of “substance” and “procedure.”

76 See *Keegstra*, *supra* note 30. at 733, where the Court discusses violent threats in its discussion of hate propaganda.

77 *Sharpe*, *supra* note 26 at para. 27.

78 See *Keegstra*, *supra* note 30 at 733.

79 This restriction has become trite law. See *Alberta Reference*, *supra* note 1; *Egg Marketing*, *supra* note 14.

tive activities of the association, it will be accorded no protection under s. 2(d).

What about the other aspect of the objective model, *i.e.*, resistance to protecting peculiar manifestations of association? In the present context, an individual charged under s. 83.03(b) is not precluded from associating with the group. He or she is merely precluded from providing it property – a particular manifestation of associating. Under *Skinner* and *Life Insurance Council*, since an accused remains able to come together with others, the prohibition should escape constitutional censure. However, there may very well be situations where, due to geographical or logistic considerations, providing property is really the only reasonable mechanism through which one may associate with a group to which he or she belongs. By precluding that activity, s. 83.03(b) may actually, in certain cases, be precluding objectively necessary preconditions for establishing and maintaining one's connection with a group. The underlying context would thus be important. One should be cautious not to overstate this concern, however, as such a focus on the underlying context could raise difficulties. For example, the more geographically or logistically tenuous a person's connection to a group, the more constitutional protection would be accorded to his or her attempts to connect with that group, since it would take more drastic measures to reasonably maintain a meaningful connection.

In my opinion, the objective model's wholesale resistance to protecting peculiar manifestations of association is unduly restrictive. There are countless forms of associational activity, each constituting a peculiar manifestation. Since legislative interference will generally be directed at a specific associational act, the objective model would rarely be engaged. Through the objective model, the government could often achieve its particular anti-associational policies by crafting prohibitions which are easily characterized as preserving the core freedom to associate. Although some objective indicia may appropriately narrow the scope of s. 2(d) protection, this particular aspect of the objective model permits sweeping governmental interference with associational activity which is objectively necessary to the establishment and maintenance of numerous forms of affiliation.

CONCLUSION

The purpose of this note has been to discuss, in a preliminary fashion, the nature and scope of protection which is and ought to be afforded to individual activity under s. 2(d) of the *Charter*. Since the s. 2(d) jurisprudence is dominated by labour relations cases, which tend to deal squarely with the collective aspect of the right, there is very little case law and commentary on which to structure the debate.

By analogizing from the *Charter's* other fundamental freedoms, however, it is possible to craft a subjective model for s. 2(d) protection. As was evident, this model finds little support in the current jurisprudence. Since its breadth could be unworkable, this raises additional questions. What does this say about the nature of freedom of association as compared to religious or expressive freedoms? Do courts take those freedoms more seriously? Or, perhaps more accurately, is freedom of association somehow less personal or personally definable than freedom of religion and expression?

By way of contrast, the objective model, which was extrapolated from the core pur-

pose of s. 2(d) as defined by the Supreme Court of Canada, has much more support from the jurisprudence. Its focus on protecting those activities reasonably necessary for the establishment or maintenance of minimal togetherness is principled and workable. However, insofar as it rejects any notion of a personal or subjective understanding of what constitutes association, it is probably too narrow. Finally, in my opinion, the model and the case law are simply too restrictive in their resistance to protecting particular manifestations of association.

It seems only inevitable that, at some point, an appellate court in this country will be confronted with a s. 2(d) claim which, in a novel fashion, asserts an individually or subjectively defined scope of protected association. The law, as it currently stands, is too modest in its protection of individual associational activity. Hopefully, a balance can be struck between the unworkable breadth of the subjective model and the harsh and stubborn restrictiveness of the current law. A qualified form of content neutrality could provide the right balance.