Charter Injunctions, Public Interest Presumption, and the Tyranny of the Majority

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Introduction

Quebec's Bill 21, which seeks to restrict employees in its public service from displaying religious symbols at work, has attracted a number of constitutional challenges. In one of those challenges, *Hak v Quebec (Attorney General)*, the plaintiffs sought an injunction suspending the operation of parts of Bill 21 pending a decision on the merits.¹ Both the Quebec Superior Court and the Quebec Court of Appeal declined to issue an injunction. The majority of the Quebec Court of Appeal found that in enacting Bill 21 the legislature must be presumed to have acted in the public interest and, as such, the third part of the injunction test — balance of convenience — could not be satisfied.

The idea that Parliament and provincial legislatures must be presumed to be acting in

the public interest — what I will call the public interest presumption — is problematic in *Charter* cases concerning constraints of fundamental rights and the treatment of minorities. Parliament and provincial legislatures are majoritarian institutions; they are the product of elections where the candidates and parties with the most votes win. A core objective of the *Charter* is to protect minorities from being oppressed by the majority. Giving too much weight to a majoritarian conception of the public interest in interlocutory injunction applications concerning minority rights undermines the *Charter* and negates injunctions and stays as effective remedies, particularly where an applicant establishes real harm. To fulfill the *Charter*'s mandate to protect minority rights it must be recognized that the government does not have a monopoly on representing the public interest and that a majoritarian conception of the public interest cannot control the outcome of the balance of convenience test in the face of evidence that other aspects of the public interest are harmed by the impugned legislation. This short article argues for a much weaker public interest presumption: one that may be rebutted by an applicant adducing evidence of harm to an identifiable group.

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1 *Hak c Procureure Générale du Québec*, 2019 QCCA 2145 [*Hak*].

Hak v Quebec (Attorney General)

Hak is a challenge to *An Act respecting the laicity of the State* which is commonly known as Bill 21.² Bill 21, amongst other things, prohibits individuals in the Quebec public service, including teachers, from wearing religious symbols when at work. Bill 21 is widely perceived as being targeted at Muslim women who wear a niqab, though it also affects the members of other faiths who wear religious symbols. The Quebec National Assembly recognized that Bill 21 was potentially unconstitutional and pre-emptively invoked the notwithstanding clause. *Hak* challenges the constitutionality of Bill 21 on several grounds, including section 28 of the *Charter* which provides for the equality of women and which is not subject to the notwithstanding clause.³

The applicants in *Hak* sought an injunction to prevent the operation of certain parts of Bill 21 pending a full hearing on the merits of the case. The Quebec Superior Court denied the injunction application.⁴ On appeal to the Quebec Court of Appeal, the applicants were granted leave to adduce new evidence that showed Muslim women who wore a niqab had been denied employment as teachers by reason of Bill 21. The Quebec Attorney General accepted that there was a serious issue to be tried and two of the three judges of the Court of Appeal accepted that there was evidence of irreparable harm, leaving the appeal to be decided on the question of balance of convenience.

All three judges agreed that at the balance of convenience stage it must be presumed that

the government is acting in the public interest. Chief Justice Hensler concluded that despite the public interest presumption, the balance of convenience favoured a temporary suspension of the provision of Bill 21 because it jeopardized the employment of new teachers who wore a niqab. The two other judges disagreed holding that the public interest presumption trumped all other considerations. Belanger JA held that “[e]ven in the absence of an urgent evil to eradicate or a situation affecting a pressing public need ..., it is not for the courts to interfere in the legislature’s choice to define the public interest as it sees fit.”⁵ Mainville JA agreed, holding that “...the Court must presume that the public interest is served by keeping these provisions in force.”⁶

Presumptions and Constitutional Injunctions

i. Manitoba (AG) v Metropolitan Stores Ltd.

The presumption of constitutional validity was a feature of federalism jurisprudence prior to the advent of the *Charter*.⁷ The Supreme Court of Canada confronted the question of whether the presumption of constitutionality applied in the context of the *Charter* in a stay application in *Manitoba (AG) v Metropolitan Stores Ltd.*, a case where a labour board’s effort to impose a collective agreement was alleged to have been unconstitutional.⁸ Justice Beetz held that a presumption of constitutionality was inappropriate because a court cannot delve deeply into the merits on an interlocutory stay or injunction application as would be required to rebut such a presumption. He further explained, “there is no room for the presumption of constitutional validity ... [given that] the innovative and evolutive character of the *Canadian Charter of Rights and Freedoms* conflicts with the idea that a legislative provision can be presumed to be consistent with the

2 *Act respecting the laicity of the State*, CQLR, c L-0.3.

3 *Canadian Charter of Rights and Freedoms*, s 28, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. Section 28 provides: “Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.” For a discussion of the argument that Bill 21 is unconstitutional contrary to section 28, see Kerri Froc, “Shouting into the Constitutional Void: Section 28 and Bill 21” (2019) 28 Const Forum Const 19.

4 *Hak c Procureure générale du Québec*, 2019 QCCS 2989 [*Hak*].

5 *Hak*, *supra* note 1 at para 98.

6 *Ibid* at para 148.

7 Joseph Eliot Magnet, “The Presumption of Constitutionality” (1980) 18:1 Osgoode Hall LJ 87.

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

Charter.⁹ Beetz J's point was that a presumption of constitutionality makes no sense in light of the fact that the *Charter* exists to hold the legislature accountable.

After dispensing with the argument that the first part of the injunction/stay test was determined by the presumption of constitutionality, Beetz J focused on the need to consider the public interest in the third part of the injunction/stay test — balance of convenience — in *Charter* cases. He observed that an injunction or stay affecting the operation of legislation goes beyond the private interests of the applicant to engage the public interest. Accordingly, he held that the Court of Appeal had erred in failing to “consider the public interest as well as the interest of the parties.”¹⁰ The requirement to consider the public interest in the context of the balance of convenience is a sound principle. A careful reading of *Metropolitan Stores*, however, shows that Beetz J never styled the consideration of the public interest as a presumption in favour of the government.

Beetz J drew the germ of the idea that later becomes the public interest presumption from *Canada (Attorney General) v Fishing Vessel Owners' Assn. of British Columbia*, a federalism case.¹¹ The Fishing Vessel Owners' Association sought to prevent the implementation of the 1984 Commercial Fishing Guide which the Regional Director of the Department of Fisheries and Oceans published ostensibly pursuant to his authority under the *Fisheries Act* and associated regulations. The Federal Court granted an injunction restraining the Regional Director from implementing the quotas and fishing times set out in the 1984 Commercial Fishing Guide on the basis that he did not have the constitutional authority to do so. The Federal Court of Appeal overturned the injunction on the basis that the lower court failed to take into account public interest considerations in the balance of convenience stage of the test. In particular, the Federal Court of Appeal held, “[w]hen a public authority is

prevented from exercising its statutory powers, it can be said, in a case like the present one that the public interest, of which that authority is the guardian, suffers irreparable harm....”¹²

Three observations may be made on the reasoning of public interest in *Fishing Vessel Owners* and the subsequent incorporation of that reasoning in *Metropolitan Stores*. First, while consideration of the public interest may be required at the balance of convenience stage of the injunction test, the inference that the public interest is harmed by enjoining a public body from acting is framed in permissive and tentative terms. The Federal Court of Appeal held that “it can be said, that the public interest, of which that authority is the guardian, suffers irreparable harm....” The Federal Court of Appeal's words suggest that the public interest presumption is not a presumption and is not appropriate in all cases.¹³ Second, in *Metropolitan Stores*, Beetz J did not expressly consider whether it was appropriate to import a concept from a federalism case into *Charter* jurisprudence. Perhaps the question of whether the legislature was acting in the public interest would have weighed more heavily on his mind in a case involving minority rights than one involving freedom of association and a collective bargaining agreement. Third, the reasons in *Metropolitan Stores* make it clear that the existence of a public interest in favour of enforcing legislation is not dispositive of the question of balance of convenience. Beetz J concluded that “the public interest [should be] taken into consideration in the balance of convenience and weighted together with the interest of private litigants.”¹⁴ The admonition to consider the public interest in *Metropolitan Stores* was not framed as a presumption and, even if it can be described that way in retrospect, it is a weak presumption that can be overcome by evidence to the contrary.

The Court in *Metropolitan Stores* rejected the application of the presumption of constitutional validity in the first stage of the injunction test (merits), but lays the foundation for the public interest presumption to be weighed on the third

9 *Ibid* at para 16.

10 *Ibid* at para 112.

11 *Canada (AG) v Fishing Vessel Owners' Assn. of British Columbia*, [1985] 1 FC 791 (Fed CA).

12 *Ibid* at para 7.

13 *Ibid*.

14 *Ibid* at para 80.

branch of the injunction test (balance of convenience). Professor Cassels saw this as progress, writing that “[t]he decision to jettison the presumption [of constitutionality], and to address concerns for the public interest more directly and openly in the balance of convenience further promotes a more purposive and transparent approach to *Charter* issues.”¹⁵ As seen in *Hak*, however, a strong presumption that the government acts in the public interest in the third part of the injunction test often has the same effect as a presumption of constitutionality in the first part of the test; it nullifies interlocutory injunctions and stays as remedies in the *Charter* context.¹⁶

ii. *RJR-MacDonald Inc. v Canada (Attorney General)*

The Supreme Court of Canada returned to the issue of the appropriate test for a *Charter* injunction in *RJR-MacDonald Inc. v Canada (Attorney General)*, a case concerning freedom of expression and limits on cigarette advertising and sales.¹⁷ Sopinka and Cory JJ, writing for the Court, declined to grant an injunction suspending the government’s legislation. An important point to keep in mind when considering *RJR-MacDonald* is that the cigarette companies, perhaps understandably, did not adduce evidence of the public interest or contend that their continued advertising and sale of cigarettes without the legislated restrictions was in the public interest.

The *RJR-MacDonald* case was the Supreme Court’s first clear articulation of the public interest as a presumption. The presumption, however, is not automatic. It only arises if there is “proof that the [public] authority is charged with the duty of promoting or protecting the public interest and upon some indication that the

impugned legislation, regulation, or activity was undertaken pursuant to that responsibility.”¹⁸ These are, as Sopinka and Cory JJ recognized, “minimal requirements.”¹⁹ Once the presumption arises, the applicant cannot deny that an aspect of the public interest will be harmed by issuing an injunction; but, at the same time, the applicant is not prevented from adducing evidence that other aspects of the public interest would be harmed by a failure to grant the injunction. The Court explained that “[i]n order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.”²⁰

iii. *Harper v Canada (Attorney General)*

The most recent Supreme Court of Canada decision to consider the presumption that government acts in the public interest is *Harper v Canada (Attorney General)*.²¹ Stephen Harper, who was at the time a private citizen, obtained an injunction from the Alberta Courts suspending the limits on third-party advertising expenses on the eve of the 2000 federal election so that his organization, the National Citizens Coalition, could purchase advertising in excess of the limits. The Attorney General sought a stay of the injunction from the Supreme Court of Canada. The Supreme Court of Canada accepted that there was a serious issue to be tried and that there was irreparable harm to Mr. Harper. The case turned on the question of the balance of convenience. Unfortunately, the majority’s reasons are brief and conclusory. The majority held that the trial judge had erred in not assuming that the law was “directed to the public good and serves a valid public purpose.”²²

One interpretation of the majority in *Harper* is that the presumption that the government is acting in the public interest is dispositive of the question of public interest and almost invariably

15 Jamie Cassels, “An Inconvenient Balance: The Injunction as a Charter Remedy” in Jeffery Berryman, ed, *Remedies: Issues and Perspectives*, (Toronto: Carswell, 1991) 271 at 296.

16 Robert Sharpe, “Interim Remedies and Constitutional Rights” (2019) 69:1 UTLJ 9 at 26,

17 *RJR-MacDonald Inc v Canada (AG)*, [1994] 1 SCR 311, 111 DLR (4th) 385 [*RJR-MacDonald*].

18 *Ibid* at para 76.

19 *Ibid*.

20 *Ibid* at para 85.

21 *Harper v Canada (AG)*, 2000 SCC 57 [*Harper*].

22 *Ibid* at para 9.

controls the outcome of the balance of convenience test. Supporting this interpretation is the majority's conclusion that "we must take as given at this stage that the legislation imposing spending limits on third parties will serve a valid public purpose."²³ This was the interpretation of *Harper* that guided the majority decisions in *Hak*.

The majority's insistence in *Harper* that it was acting "as *RJR-MacDonald* directs"²⁴ runs counter to the interpretation that the public interest presumption is dispositive. As such, the majority did not seem to intend to overrule the principles outlined in *RJR-MacDonald*.²⁵ A better explanation of the outcome in *Harper* is that the third-party election advertising spending limit was one of a number of spending limits and funding provisions that make up the *Canada Elections Act*'s political finance regime. The provisions were facially neutral and did not plausibly single out any minority. Indeed, the Court observed that "the law may be seen not only as limiting free expression but as regulating it in order to permit all voices during an election to be heard fairly."²⁶ The complexity of the regulatory regime together with Parliament's obvious balancing of expressive interests provides more justification for the majority's deferential approach than the public interest presumption.²⁷

The Nature of the Public Interest Presumption

There are several different kinds of presumptions: presumptions of fact and presumptions of law, as well as rebuttable presumptions and conclusive presumptions.²⁸ What kind of presumption is the public interest presumption? Is the public inter-

est presumption a presumption of fact or law? Is it rebuttable and, if so, by which standard?

A presumption of fact is a conclusion that may be logically inferred or deduced from an already proven fact or set of facts.²⁹ Presumptions of fact are permissive; they allow a judge to draw an inference, but do not require the inference to be drawn. The public interest presumption set out in *Metropolitan Stores*, if it can be called a presumption at all, is a presumption of fact. The presumption is expressed in terms that indicate that it is discretionary, not mandatory.

A presumption of law is one that a judge is required to make upon proof of a fact or set of facts. Upon proof of one fact, a second fact is presumed. Presumptions of law may be conclusive or rebuttable. In the case of a rebuttable presumption of law, "[o]nce the basic fact is established, the party against whom the presumption operates has either an evidential or a persuasive (legal) burden to satisfy the legal consequence of the presumption."³⁰ The public interest presumption as described in *RJR-MacDonald* is a presumption of law because it arises upon demonstrating that the "authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility."³¹ While the public interest presumption may be dispositive of the question of balance of convenience "in most cases," Sopinka and Cory JJ leave the door open by indicating that either party "may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in granting or refusal of the relief sought."³² In establishing the balance of convenience, the public interest presumption as expressed by Sopinka and Cory JJ places the burden on the applicant to overcome the presumption with evidence.³³

23 *Ibid* at para 11.

24 *Ibid* at para 10.

25 *Ibid*.

26 *Ibid*.

27 Four years later in *Harper v Canada (AG)*, 2004 SCC 34, the majority of the Court held that the third party advertising expenditure limits were constitutional.

28 See generally, Sidney Lederman, Alan Bryant, & Michelle Fuerst, *The Law of Evidence in Canada*, 5th ed, (Toronto: LexisNexis, 2018) ch 4.

29 *Ibid* at §4.5.

30 *Ibid* at §4.29.

31 *RJR-MacDonald*, *supra* note 17 at para 76.

32 *Ibid* at para 71.

33 Justice Sharpe considers the public interest presumption to be rebuttable. See. Robert Sharpe, *Injunctions and Specific Performance*, (Toronto:

The public interest presumption expressed in *Harper* appears to be closer to a conclusive presumption of law. The Court in *Harper* held that the lower court had erred in not applying what it considered to be the “principles enunciated in previous decisions...,”³⁴ indicating that it considered the presumption a question of law. The Court then sent mixed signals as to whether it is a conclusive presumption, saying that it “must take as a given ... that the legislation ... will serve a valid public purpose”³⁵ and shortly thereafter weighing the balance of convenience. The best reading of *Harper* is that the public interest presumption is a conclusive presumption of law with respect to the question of public interest, but the question of public interest is not dispositive of the question of balance of convenience.

The Public Interest and Minority Rights

The more robust versions of the public interest presumption sit uncomfortably with the *Charter*’s intended protection of minority rights and the unwritten constitutional principle of protection of minorities.³⁶ Minority rights — whether they are language rights, equality rights, or other rights — enjoy protection in the *Charter* precisely because majorities cannot be trusted to protect those rights through the legislative process and may succumb to temptation to use legislation to trample upon those rights. Chief Justice Dickson explained this idea in the specific context of freedom of religion in *R v Big M Drug Mart Ltd.*, explaining that “[w]hat may appear good and true to a majoritarian religious group,

or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. *The Charter safeguards religious minorities from the threat of ‘the tyranny of the majority.’*”³⁷

Some years later, Professor Hogg wrote that “*Charter* rights provide support for vulnerable groups (“discrete and insular minorities”) who are not properly represented in the democratic process.”³⁸ Why, then, in the context of legislation that obviously affects minority rights, should courts charged with the responsibility of protecting minorities’ *Charter* rights presume the government to be acting in the public interest any more than they should presume the legislation to be constitutional? Isn’t this exactly why Beetz J rejected the application of the presumption of constitutionality in *Metropolitan Stores*? Professor Cassels wrote:

...the assumption that the Attorney General is the exclusive guardian of the public interest is a hangover from ancient rules of standing in public nuisance and criminal law cases. This assumption can no longer be maintained in light of the *Charter*, the very existence of which belies the notion that government authorities have a monopoly over the public interest.³⁹

Comments by Sopinka and Cory JJ in *RJR-MacDonald* give some support to the argument that the public interest presumption should be tempered or abandoned in cases involving minority rights.⁴⁰ The Court in *RJR-MacDonald* made it clear that the government does not have a monopoly on the public interest and that there

Thomson Reuters, loose-leaf updated to November 2019) at para 3.1330.

34 *Harper*, *supra* note 21 at para 11.

35 *Ibid.*

36 *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 81, 161 DLR (4th) 385: “...one of the key considerations motivating the enactment of the *Charter*, and the process of constitutional judicial review that it entails, is the protection of minorities. However, it should not be forgotten that the protection of minority rights had a long history before the enactment of the *Charter*....”

37 *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at para 96, 18 DLR (4th) 321 [emphasis added]. See also, *Vriend v Alberta*, [1998] 1 SCR 493 at para 176, 156 DLR (4th) 385: “Where the interests of a minority have been denied consideration, especially where that group has historically been the target of prejudice and discrimination, I believe that judicial intervention is warranted to correct a democratic process that has acted improperly.”

38 Peter Hogg, “The *Charter* Revolution: Is it Undemocratic?” (2001/2002) 12:1 Const Forum Const 1 at 5.

39 Cassels, *supra* note 15 at 304.

40 *RJR-MacDonald*, *supra* note 17 at para 71.

may be differing conceptions of what constitutes the public interest. In particular, the Court held that “[p]ublic interest’ includes both the concerns of society generally and the particular interests of identifiable groups.”⁴¹ This statement indicates that the Court understands that the interests of society generally, as represented by majoritarian government, may be at odds with the interests of identifiable groups. Nothing in *RJR-MacDonald* indicates that the majoritarian concept of the public interest should automatically trump the minority concept of the public interest.

The specific mention of “identifiable groups” in *RJR-MacDonald* hints that the Supreme Court may be open to a different approach in the context of minority rights.⁴² The leading cases — *Metropolitan Stores*, *RJR-MacDonald*, and *Harper* — concern primarily freedom of association and freedom of expression, not minority rights. This alone might be enough to distinguish those cases and recommend a different approach in the context of minority rights. However, freedom of expression and freedom of association are important and may, in some cases, raise the same concerns of tyranny of the majority as minority rights. Rather than a special exception from the public interest presumption for minority rights, the presumption should be explicitly recognized to be a weak presumption and one that is easily displaced by actual evidence.

The public interest presumption should be explicitly recognized to be a presumption of law that operates only in the absence of evidence to the contrary.⁴³ When the presumption is met

by the applicant with evidence that suspension of the law pending a hearing on the merits is in the public interest, the government cannot rely on the public interest presumption alone. If the applicant adduces evidence of the public interest, the burden shifts to the government, which then must adduce evidence to support its position. This is a reasonable requirement given that, in any *Charter* litigation, the government has the burden to establish that a law addresses a pressing and substantial objective.

Conclusion

Hak is an easy case to decide. The public interest presumption is rebutted because the applicants adduced actual evidence of harm to individuals and an identifiable group — Muslim women who wear a niqab seeking employment as teachers. Recognizing that there may be more than one conception of the public interest and that minority conceptions of the public interest are as valid as the majority conception, the evidence adduced by the applicants supports the view that suspension of certain parts of Bill 21 is in the public interest. The absence of evidence from the Quebec Attorney General leaves the Court with no alternative but to grant the injunction pending a determination of the case on its merits.

A weak public interest presumption is consistent with the role of the courts in checking legislative abuse and, at the same time, it tips the scales ever so slightly in the favour of the legislature prior to a full hearing on the merits. Moreover, the weak public interest presumption still operates as a disincentive to meritless applications, thus keeping the floodgates shut. The weak public interest presumption, however, is not so formidable that applicants challenging a law are doomed to failure.

41 *Ibid.*

42 At least one appellate court has taken this hint. The British Columbia Court of Appeal in *Halalt First Nation v. North Cowichan (District)*, 2011 BCCA 544 at paras 22-3 cited *RJR-MacDonald* for the proposition that the public interest includes the interests of “identifiable groups” in rejecting the submission that a local water authority should be presumed to be acting in the public interest in the face of constitutional claims by a First Nation.

43 Justice Sharpe agrees that the public interest presumption is sometimes too great an obstacle to the granting of injunctions in constitutional

cases, but offers a different solution. Justice Sharpe would allow courts to take a deeper look at the merits in the first stage of the injunction test and a “litigant who can show a strong claim should be permitted to demonstrate the likelihood of success and to have the strength of the claim weighed in the balance.” See Sharpe, *supra* note 16 at 32.

Operation of laws like Bill 21 that are targeted at minorities and cause harm to those minorities should be enjoined, prior to a trial, on the merits when applicants come forward with evidence that operation of the law harms the public interest. The possibility of success on an injunction application is important because the wheels of justice turn slowly and a hearing on the merits and a decision in a constitutional case may take several years; that is too long for a law that oppresses minorities to operate on the basis of a presumption.⁴⁴

44 Sopinka and Cory JJ recognized this in *RJR-MacDonald*, observing that "[f]or the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of Charter rights. Such a practice would undermine the spirit and purpose of the *Charter* and might encourage a government to prolong unduly final resolution of the dispute." (*RJR-MacDonald*, *supra* note 17 at para 44).