JUSTIFICATIONS FOR LIMITING CONSTITUTIONALLY GUARANTEED RIGHTS AND FREEDOMS: SOME REMARKS ABOUT THE PROPER ROLE OF SECTION ONE OF THE CANADIAN CHARTER

Paul A. Bender*

I would like to talk to you tonight about what has emerged, during the first eighteen months in the life of the *Charter of Rights and Freedoms*, as perhaps the most pervasive and important issue of *Charter* interpretation, both for now and for the indefinite future. The issue to which I refer, of course, is that of the meaning and proper rôle in *Charter* litigation of section 1 of that document. It is not an overstatement, I think, to say that the ultimate strength and vitality of *Charter* rights may well depend more upon the significance that Canadian courts assign to section 1 than upon the resolution of any other single *Charter* issue. The importance of the meaning assigned to that section may indeed even transcend the significance of the controversial "notwithstanding" provision of section 33 — the textual embodiment of the political compromise that led directly to the *Charter*'s adoption.

Section 1 bears the title, "Guarantee of Rights and Freedoms." Its thirty-six word text (which all Canadian lawyers, judges and law students will, I imagine, soon be able to recite from memory, whether voluntarily or not) is as follows:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in its subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

On its face, this language appears primarily designed to make explicit, at the outset of the *Charter*, two very significant basic propositions about the rights and freedoms that the *Charter* seeks to protect. Section 1 thus first provides that the rights and freedoms described in subsequent *Charter* sections are "guaranteed". This means, I take it, that those rights and freedoms have, for the first time in Canadian history, become constitutionalized or "entrenched". As a result of their new constitutional status, *Charter* rights cannot, from now on, be ignored or modified merely because a legislature, court, government, government official or democratic majority wishes to ignore or modify them.[1] Section 1 then goes on to tell us, however, that although *Charter* rights and freedoms are constitutionally guaranteed, those rights are not, in general at least, to be deemed to be absolute in nature. Rather, they are qualified rights that are subject to (and "only" to) "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Thus, while *Charter* rights may not be overridden at will,[2] there are nevertheless some

* Professor of Law, University of Pennsylvania Law School. This text was the basis of an address to conference delegates on the evening of October 14, 1983 following the Conference Dinner.

1. This statement needs to be qualified to some extent to reflect the potential impact of the "notwithstanding" provision of Charter section 33. Where section 33 applies and is properly invoked, the resulting legal situation is as though there were no applicable Charter guarantee.

2. This statement, once again, must be qualified in light of the "notwithstanding" provision of section 33.

circumstances in which those rights and freedoms must give way to sufficiently strong governmental justifications.

What I have said so far is, I believe, relatively non-controversial. It would be difficult, that is, to disagree with the twin propositions (1) that *Charter* rights are constitutionally "entrenched", but (2) that those rights are generally in the nature of qualified rather than absolute rights. What, however, is the nature of the qualification that applies to "guaranteed" *Charter* rights? What is the character of what I have just referred to as those "sufficiently strong governmental justifications" to which *Charter* rights and freedoms must sometimes defer? How can one tell in a specific case whether a proferred justification is, in fact, constitutionally adequate? What legal test (or tests) are to be applied in making such determinations? These are enormously important questions for the future level of constitutional protection for human rights in Canada. They are at least as important as the more obvious question of what rights and freedoms the *Charter* protects in the first place. For, once it is established that rights are qualified (rather than absolute) in character, one needs to know, not only whether a certain right exists in the abstract, but also how easily that right may be overcome or limited by assertedly adequate competing societal interests. Rights that are easily qualified by such asserted interests are weak rights that may offer little real protection in many situations. On the other hand, strong standards of required justification lead to strong rights that do promise meaningful protection.

Let me take a moment to draw briefly on the experience with guaranteed rights in the United States constitutional system to illustrate the point that I am trying to make here.

The scope of protected constitutional rights in the United States substantially resembles the range of rights and freedoms that are now guaranteed, to at least some extent, by the Canadian *Charter*. The U.S. *Constitution,* for example, guarantees (as does the *Charter*) free expression and assembly rights, the right to freedom of religion, mobility rights, equality rights, the right to a fair trial, and the right to be free from numerous criminal procedure abuses such as unreasonable or arbitrary arrests and searches, compelled self-incrimination, double jeopardy, *ex post facto* laws, and cruel and unusual punishments. The U.S. also has — as you in Canada may not — a concept of "substantive" due process that theoretically constitutionalizes, in addition, a broad category of general individual liberty and property rights. Almost all of these rights are (again as in Canada) recognized as being in the nature of qualified rather than absolute constitutional protections.

Over the years, American courts have employed a dazzling and often confusing variety of different standards of constitutional justification in connection with these various qualified constitutional guarantees. These constitutional tests range across a spectrum from those that very strictly

regulate governmental intrusions on rights to those that are extraordinarily permissive toward governmental limitations. Where certain kinds and forms of speech are concerned, for example, government in the U.S. has been held in some cases to be able to limit individual behavior only where it is able affirmatively to demonstrate to a court, as a matter of fact in the particular situation, the existence of a "clear and present" — that is, plainly immediate — danger of great and perhaps intended harm from the speech that it seeks to regulate, penalize or prohibit. Qualified freedom of religion rights can, somewhat similarly, be limited only where there is an affirmative governmental showing of a strict necessity to do so in order to serve a "compelling" governmental objective. Most forms of racial discrimination and most invasions of certain aspects of personal privacy are subjected to an equally rigorous constitutional standard of justification. Gender discriminations are subject to a somewhat milder, but nevertheless substantial, rule. Pursuant to these so-called "strict scrutiny" justification tests, many of these rights, although not theoretically absolute in nature, are very nearly so. They can be overridden only in narrow and pressing circumstances; the constitutional presumption against such limitations is a strong one, and the rights involved are, correspondingly, quite strong in character.

Other qualified rights, however, are treated in quite a different way. Most regulations of commercial practices, for example, although they may limit theoretically protected rights of liberty or property under the broad American substantive due process concept, are nevertheless deemed constitutionally justifiable so long as they are found by a court to have a "conceivable" relationship to a legitimate government objective. No factual showing need be made in court or elsewhere that the relationship actually exists, and the legislature itself need not even find or assert that it exists. The same "minimum scrutiny" approach is applied to equal protection challenges to legislative classifications that are not aimed at minority groups and that do not have an impact on a limited category of "fundamental" rights. Where these minimum scrutiny rights are concerned, government may act on the basis of experiment and speculation; its regulations need not be precisely tailored to the objective at hand, but may be broader (or narrower) than strictly necessary. The presumption in favor of regulation or limitation on these rights is a heavy one; as a result these are weak rights that often seem, in practice, to amount to no constitutional rights at all.

There is thus wide variation in the strengths of different U.S. constitutional rights, and this variation is the direct and immediate result of the employment by U.S. courts of quite different standards of required constitutional justification when those rights are limited or restricted. What justification standard, it then becomes natural and necessary to ask, will be applied under the Canadian *Charter*? Is there to be a single such standard, applicable to all protected Charter rights and freedoms? If so, will

that standard resemble the U.S. level of "strict" scrutiny (leading to relatively strong Charter rights), will it resemble American "minimum" rationality review (leading to correspondingly weak rights), or will it fall somewhere in between? Even more fundamentally, is the effort to settle on a single overall justification standard for all Charter rights and freedoms a proper endeavour at all? Or should the *Charter* perhaps be read (as is the U.S. *Constitution*) as incorporating a variety of justification standards, sensitive to the purposes and needs of the different rights and freedoms that the *Charter* guarantees? If so, how are these standards to be derived and formulated? And in answering these important questions, what is the relevant Charter text? What, specifically, is the rôle of section 1 of the *Charter* in determining the applicable standard or standards of justification?

It is, of course, far too early in the *Charter*'s history to expect any definitive answers to these questions. (If the U.S. experience is any guide, it will indeed be many years before some of even the most basic *Charter* questions are given authoritative and comprehensive answers, and even then "established" meanings and approaches will continue to develop and erode over time — sometimes precipitously, often tentatively and incrementally. A properly drafted charter of rights (and the Canadian *Charter* in my view generally fits that description) is, after all, a living document, the meaning of which is never completely "settled".) I would, in all events, like to focus critically tonight on one approach to these problems that, while perhaps not yet a trend, may nevertheless constitute a current tendency that may be becoming fairly prevalent. For want of a better term, let me call this the "section 1" approach to questions of justification under the *Charter*. Pursuant to this section 1 approach all issues about the applicable constitutional standard of justification for limiting *Charter* rights are apparently sought to be addressed through reference to the text of section 1. That is, this approach would read section 1, not only as a statement of the general (and, I think, eminently correct) proposition that *Charter* rights and freedoms are qualified rather than absolute in character, but also as though the text of that section also embodied the single operative legal test to be applied whenever limitations on any *Charter* right or freedom are sought to be constitutionally justified. Thus, one may hear it suggested that the central legal questions in every *Charter* case are whether the challenged restriction on protected rights is a "limit", whether, if so, that limit is "prescribed by law", whether it is "reasonable", and whether it can be "demonstrably justified in a free and democratic society". And the momentum generated by this approach often seems so strong that these four questions appear, at times, to be deemed to be the only *Charter* issues worth exploring. Issues regarding the scope and meaning of the other thirty-three *Charter* sections, including those that describe and define the various Charter rights, occasionally seem to be in danger of being wholly overwhelmed and obscured by the "section 1" inquiry.

The main thesis that I would like to place before you is that this more or less monochromatic "section 1" approach to all *Charter* issues is incorrect both as a matter of proper technical analysis of the language and structure of the *Charter* and also as a matter of good human rights policy. The issues surrounding asserted justifications for limiting *Charter* rights are certainly, as I have said, extremely important matters. But I hope to convince you that they are by no means the only important *Charter* questions. They are not, in all events, the *initial* legal questions that need to be faced when the *Charter* is invoked by those who assert that their constitutionally guaranteed rights are being violated. I am also going to attempt to at least raise in your minds the distinct possibility that, when justification issues *are* properly reached in the process of applying the *Charter*, the operative rules of justification are, by and large, not to be found in section 1, but that those rules ordinarily derive instead from the various subsequent *Charter* sections that define the rights and freedoms that the *Charter* means to protect.

I.

Let me start with the tendency that one sometimes perceives to approach *Charter* cases as though they raised only issues regarding the permissible justifications for limiting rights. This kind of analytic approach, I submit, is demonstrably wrong. Every judicial application of the *Charter* is of necessity, I suggest, not a one, but a two-stage process, only the second part of which concerns purported justifications. In all *Charter* cases, it seems to me; one must first ask whether an individual rights interest protected by the *Charter* has been (or is being or is about to be) infringed or limited. Only if one finds that such a protected interest is involved, does one then ask whether, given the non-absolute nature of *Charter* rights, the limitation is nevertheless constitutionally justifiable according to the applicable test or standard of justification. Section 1, it seems plain, can only be relevant in answering the second of these inquiries. Section 1 neither creates nor defines rights; it can have nothing whatever to do with whether an interest protected by the *Charter* is involved in the first place. Indeed, if no protected *Charter* interest is in fact found to be present, section 1 type justification questions never come into play at all.

This last observation is not merely hypothetical or fanciful. It is too early in the *Charter*'s history for any of us to have a terribly accurate sense of how broadly the various Charter rights will come to be defined over the course of time. It seems quite probable, however, that at least some significant range of governmental policies and activities — including actions that both generate controversy and that have direct and obvious impacts upon individuals — will not be deemed to intrude upon interests that are protected by the *Charter*. American lawyers, for example, notice that the *Charter* offers no express protection for "property" rights. I have argued

elsewhere[3] that Charter section 7's concepts of "liberty" and "security of the person" may, in fact, provide protection for some types of individual property rights, but this is by no means an obvious interpretation. Such an approach, in all events, would not appear to be a very fruitful source of protection for corporate or business property. Nor is it at all clear that section 7, whatever the scope given to the terms "liberty" and "security of the person", is a source of *substantive* protection for these interests. Section 7, that is, may simply require what we in the United States think of as *procedural* due process — the rights to notice, a fair hearing, a neutral decision maker, etc., when laws that restrict protected interests are sought to be applied to particular individuals or entities. Section 7 may possibly not provide any basis whatever for so-called "substantive" due process attacks on the rationality or appropriateness of legislation that is applied with adequate procedural fairness.[4] It is thus not at all clear that *Charter* interests are implicated by a broad range of regulatory, economic and social legislation — wage and hour regulations, safety requirements, tax rates, restrictions and "takings" of business property, and so on.

My point is that it is a serious mistake to assume that the *Charter* has constitutionalized all concerns about legislation and governmental practices that may affect individual or commercial interests, thus requiring courts, in every case in which such legislation or practices are attacked, to ask whether there is a constitutionally adequate justification for the challenged rules or activities. The concern I have is not merely that, by ignoring the initial question of whether a *Charter* right is implicated at all, courts may be led into unnecessary consideration of the legitimacy of government behavior when the *Charter* did not mean to subject all such behavior to judicial review (although that is certainly an important consideration). I am also greatly troubled by what, I think, may turn out to be quite dire consequences for the future strength of important *Charter* rights if all concerned too readily assume that *all* governmental action inevitably implicates protected *Charter* interests.

If the *Charter* is assumed to apply to every conceivable aspect of governmental behavior, thus raising questions of constitutional justification about all such activity, it seems to me that the constitutional standards of permissible justification that will be developed for dealing with such inquiries may very well turn into extremely weak and deferential standards. Such deference may be essential in order to allow government the wide degree of latitude that is necessary when it seeks to deal — often tentatively and experimentally — with the full range of new and complex economic and social problems that seem constantly to confront modern society. That large degree of deference, however, may be quite *in*appro-

3. Paul Bender, "The Canadian Charter of Rights and Freedoms and the United States Bill of Rights: A Comparison" (1983), 28 McGill L. J. 811, at 842.

4. Again, it is at least arguable that some aspects of "substantive" due process may apply under the *Charter*. See *Ibid.*, at 845-846.

priate where fundamental rights and freedoms are at stake; such rights might, indeed, all but disappear as a practical matter if weak and deferential standards of governmental justification came to be employed in *Charter* cases across the board. If, on the other hand, the scope of *Charter* scrutiny of governmental justifications is restricted to legislation and government behavior that invades the limited category of fundamental interests that the *Charter* does, indeed, protect, courts will likely take *Charter* rights more seriously and apply relatively strong constitutional standards of justification — standards that will make these rights truly meaningful as a constitutional matter. As is true in some other areas of human endeavor, less is sometimes more.

Another consideration bearing upon the appropriate strength of *Charter* rights also seems relevant here as well. What I have described as the second stage of adjudication in *Charter* cases — consideration of the question whether adequate justification exists in the circumstances for limiting interests that the *Charter* has been found to protect — obviously requires some kind of judicial "balancing" process. That is, once they reach stage two of the adjudicative process, courts inevitably must evaluate and compare competing legitimate concerns: the guaranteed *Charter* right or freedom must in some manner be weighed against the alleged societal need for regulation. In order properly to perform this judicial balancing act it seems to me imperative that courts develop a meaningful and substantial jurisprudence about the function, scope, nature and importance of the various *Charter* rights. Otherwise, one side of the balance may remain essentially empty and without appropriate force or weight. That is, before one decides whether a limit sought to be imposed upon a guaranteed right or freedom is a constitutionally justifiable limit, one urgently needs to have a good understanding of the protected interest. Why has that interest been constitutionally guaranteed? What about it makes it that important? What affirmative functions does constitutional protection of the interest serve for individuals and society as a whole? What unfortunate harms may occur when the interest is restricted? Only after these questions are thoroughly considered can one expect an appropriately sensitive decision about whether a challenged limit is, indeed, constitutionally justifiable. If courts look only to the affirmative reasons offered by government for imposing limits on *Charter* rights, those reasons will, one hopes, almost always seem plausible in and of themselves. But what is required is an appropriate *balance*. Deciding a *Charter* case by addressing only the justification issue is like deciding other cases after hearing argument from only one of the two opposing litigants.

I have one final point to offer in support of the strong desirability of giving close consideration to those parts of the *Charter* that guarantee rights as well as to those *Charter* provisions that recognize the possibility of their limitation. When adoption of the *Charter* was being debated, one of the principal concerns expressed about the proposed constitutional

entrenchment of certain rights was the potentially anti-democratic nature of the authority that would necessarily be given to the judiciary to critically evaluate — even to "second-guess" — legislative judgments in the consideration of *Charter* claims. This kind of judicial behavior, however, occurs primarily in the second stage of *Charter* adjudication, where rights are balanced against asserted governmental justifications for placing limits upon them. The first stage of *Charter* analysis — the stage in which rights are defined — does not ordinarily involve courts in legislative-type balancing judgments. Rather, the questions in that stage most often involve inquiries about the purposes and meaning of constitutional language: What behavior constitutes "expression" under section 2? What beliefs amount to "conscience and religion" under the same section? What police activity constitutes a "search or seizure" under section 8? Do laws that are neutral on their face but that have a statistically greater negative impact upon women than men constitute "discrimination based on... sex" within the meaning of section 15? When courts answer these and similar *Charter* questions they perform a function — discerning the meaning of governing language in light of its purposes, history and context — that is closely similar to the function they have traditionally performed in interpreting statutes, common law precedents, or even the federalism provision of what used to be known as the *B.N.A. Act*. Defining the scope and meaning of *Charter* guarantees in the first stage of *Charter* adjudication is an enormously important task that is not dominantly legislative or anti-democratic in nature. It would be unfortunate, in my view, if courts were to forego the opportunity to further the development of the *Charter* in the area in which, by training, competence and tradition, they are most well-equipped to contribute, and instead concentrated their energies exclusively in the most subjective and value laden of *Charter* inquiries — that of balancing governmental justifications against protected *Charter* interests.

II.

Until now I have, I am afraid, largely been belaboring the obvious by stressing the importance of giving serious consideration in every *Charter* case to the right involved before considering the possible existence of a constitutionally adequate justification for limiting or impinging upon that right. Where a protected *Charter* interest *is* ultimately found to be involved, however, the justification question must eventually be faced. I would like now to comment briefly about the way in which, in my view, these justification issues generally ought to be approached under the *Charter*.

The somewhat heretical proposition that I want to put before you in this connection is that section 1 is not the primary source of law about when limits upon *Charter* rights and freedoms are constitutionally justifiable. In my view, those rules, instead, are mainly to be found in — or derived from — the subsequent provisions of the *Charter* that define and describe the guaranteed rights that the *Charter* seeks to protect.

I think that I can develop my point most effectively if you will join me in examining a few substantive *Charter* sections — that is, provisions that define guaranteed rights and freedoms — with the objective of seeing whether and to what extent it makes sense to conclude that the rules of justification for limiting those rights and freedoms flow primarily from the text of section 1. Let us begin with *Charter* section 4, which provides in its subsection (1) that "No House of Commons and no legislative assembly shall continue for longer than five years...". Subsection (2) of section 4, you will note, then modifies that requirement (that legislative elections occur at least every five years) by providing that "in time of real or apprehended war, invasion or insurrection" elections may be delayed and existing legislatures continued when "such continuation is not opposed by the votes of more than one-third of the members" of the legislature in question.

Now suppose that it is a time of real or apprehended war, that the House of Commons has sat for almost five years, and that a motion is introduced in the Commons to continue the session beyond the five-year period. Suppose that this motion, after full and vigorous debate, has the support of 60% of the members — clearly more than a majority but also clearly less than the two-thirds super-majority that section 4(2) seems explicitly to require for such a continuation. Having failed to achieve the prescribed two-thirds vote, is it possible that the 60% majority could nevertheless enact legislation extending the life of the House and then, when that legislation is challenged as a violation of the democratic right set out in section 4(1), invoke section 1 and argue that the extension is nevertheless constitutionally valid because it is a "reasonable" limit on the democratic right, that has been "prescribed by law" and that "can be demonstrably justified in a free and democratic society"? It seems to me that the appropriate judicial response to such an argument would and should be a resounding rejection of it, whatever the court might think of the "reasonableness" of the majority's position. The *Charter* has carefully set out, in section 4(2), the limited conditions upon which the democratic right of section 4(1) can be postponed. These conditions would not have been met. That, it seems to me, should be the end of the matter. It would plainly be wrong, I submit, to read section 1 as creating a judicial authority to establish different and less stringent conditions than those laid out in section 4(2). If I am correct about this, then we have discovered at least one *Charter* right that cannot be limited by reference to the terms of section 1; the constitutionally justifiable conditions for limiting that right are contained instead, not in section 1, but in section 4 itself.[5]

Is section 4 an aberration, or do other *Charter* guarantees also contain within themselves the applicable rules of justification — the basic conditions upon which they can be limited? Section 4 is, I concede, unusual in

5. It is worth pointing out here that the "notwithstanding" provision of section 33 would also be of no avail to the hypothetical 60% majority here, since section 33 does not apply to section 4 rights, but only to provisions included in "section 2 or sections 7 to 15 of this Charter".

the precision and specificity of the terms in which it describes the allowable justifications for limiting its guarantee. No similar level of explicitness is present in, for example, section 12, which provides that "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment". I will use section 12, then, as my second example. Suppose that a legislatively imposed penalty for a certain offence is challenged under that section as constituting a cruel and unusual punishment. Suppose further that the court that hears this challenged concludes that the punishment is, indeed, "cruel and unusual" within the meaning of section 12. Am I to believe that that court must then go on to consider whether the punishment is, nevertheless, constitutionally permissible because it is a "reasonable limit, prescribed by law" that "can be demonstrably justified in a free and democratic society"? Again, it seems to me that this section 1 inquiry is out of bounds. The section 12 right is one to be free, not from all punishments, but only from "cruel and unusual" ones. Having found that such a punishment is present it makes, I submit, precious little sense to then ask whether a cruel and unusual punishment is a reasonable limit on a provision that seeks to bar cruel and unusual punishments. Of course it isn't. Whatever judicial balancing needs to be done between asserted governmental justifications and *Charter* interests has already *been* done in arriving at the conclusion that the challenged punishment violates the qualified terms of section 12.

Another example along the same lines arises out of a consideration of the terms of section 8. If a search or seizure is determined to be "unreasonable" under section 8 there seems to me little point in asking whether it is, under section 1, nevertheless a "reasonable" limit on the right to be free from "unreasonable" searches. Once again, the required balancing of interests should take place through application of the qualified language of the substantive *Charter* guarantee itself.

Let me propose the following general formulation of the point I have been trying to establish. When a substantive Charter section describes a protected right or freedom in a way that requires a balancing between the protected interest and the asserted governmental justification for limiting that interest — when, for example, the right is one, not to be free from all punishments but only from "cruel and unusual" punishments, or when the right is directed not at all searches and seizures but only those that are "unreasonable" — the primary test for determining the constitutionality of the asserted justification is to be found in or derived from the qualifying language in the substantive section itself. Section 1 is not the source of the balancing test for such sections, although it constitutes a recognition that such a test is contained in the substantive section. The balancing criteria in these substantive *Charter* sections are, if you will, among the "reasonable limits, prescribed by law" to which section 1 refers. And it is worth noting, I think, that a perhaps surprising number of substantive *Charter* sections do indeed contain, in varying degrees of explicitness,

their own balancing criteria. In addition to sections 4, 8 and 12, which I have already mentioned, I commend to your attention, among others, section 9 (guaranteeing the right to be free from "arbitrary" detention or imprisonment), section 11(a) (requiring trial within a "reasonable" time), section 11(d) (requiring a "fair" trial), section 11(e) ("reasonable" bail) and section 2(d) (freedom of "peaceful" assembly). The same kind of balancing language, it seems to me, may well also be present in section 7 ("principles of fundamental justice") and in section 15. The latter section prohibits certain forms of "discrimination". That is a word that might easily (and I think quite properly) be read as referring not to all classifications along racial and similar lines, but only to classifications that are, to a significant degree, invidious or otherwise seriously unjustifiable.

What, then, you may ask, is the role (if any) of section 1 in the adjudication of *Charter* justification issues? It seems to me that it has at least two important parts to play. Where balancing or qualifying language is contained in the substantive *Charter* sections that language often is, we have seen, rather vague and general in character — "reasonable", "arbitrary" and so forth. The primary source of meaning for this language should, in most cases, be derived from the subject matter context of the *Charter* section at issue — the concepts of "reasonable" search, "arbitrary" detention, "peaceful" assembly and racial "discrimination" have, after all, not heretofore been entirely unknown. But section 1 adds a tone and a direction to the process of elaborating the meaning of these terms in the new constitutional environment that the *Charter* has created. To me, the "prescribed by law" language of section 1 suggests, for example, that the formulation of limits on *Charter* rights must take place, whenever possible, through the legislative or administrative process, rather than through *ad hoc* decisions. Section 1's reference to limits that can be "demonstrably justified" suggests to me that *Charter* balancing tests ought to be closer in character to the U.S. brand of "strict" judicial scrutiny than to U.S. "minimum" scrutiny. The burden of showing an adequate justification, that is, should be on the proponent of limiting *Charter* rights; that burden, moreover, should be a heavy one — it should have factual (rather than speculative) support in a substantial or compelling (rather than merely legitimate) governmental or societal interest. I would think that care should also be taken that limits on protected rights and freedoms be no greater than demonstrably necessary to serve the relevant governmental concerns.

The second major rôle that I envision for section 1 applies where the text of a substantive *Charter* section contains no limiting or balancing language. It is possible, I think, to argue with at least some force that, given the presence of such language in so many *Charter* sections, its omission in a few provisions was not inadvertent and that those rights and freedoms are, in fact, to be treated as absolutes. This, it seems to me, is not at all an implausible result where interests such as the freedoms of

"conscience", "thought", "belief", "religion", even "opinion", and perhaps even "expression" (all protected by section 2) are concerned. The same result may also be plausible in the case of the citizen's right to vote (section 3) if one is somehow able to cope adequately with potential claims by young children to the franchise. Whatever its attractions (and I confess, that those attractions are, for me, considerable ones) there is also a potential danger to the enforcement of basic rights that is hidden in such a limited "selective absolutist" approach. For should it be established that certain rights and freedoms were, in fact, to be absolute in nature, those protected interests would, I suspect, tend thereafter to be defined with extreme caution, narrowness and lack of generosity by the judiciary in order to avoid overly rigid libertarian results. If so, meaningful constitutional protection of much "absolute" fundamental interests may, in the end, be more difficult to achieve than would be the case if the possibility of justifiable limits is openly admitted. In the United States, for example, a minority view has, from time to time, taken the position that the First Amendment's "freedom of speech" should be treated as a constitutional absolute. I suspect that, had that view prevailed, the current (and in my view proper) broad U.S. concept of protected "speech" would not have developed.

For present purposes, then, let me assume, as I indicated to you at the outset of these remarks, that section 1 is correctly read as establishing that all *Charter* rights and freedoms are potentially subject to qualification where the circumstances sufficiently require that result. If so, section 1 serves, I think, as a direction to courts to fashion appropriate rules of constitutional justification when those rules do not otherwise appear in the *Charter's* text. If I have been correct in previously urging that, when balancing language *does* appear in the various *Charter* sections, section 1 counsels that those balancing tests be strong tests, it seems to me that that should even more emphatically be the case when words like "reasonable", "fair" and "arbitrary" are not incorporated in the definition of *Charter* rights. The message of section 1, that is, is that the very strictest level of judicial scrutiny of asserted limits on *Charter* interests is required where limitations on "conscience", "belief" and the like are at issue.

* * *

In closing these remarks I would like to express my gratitude to you for giving me the chance to delve into these wonderful *Charter* issues with you during the past few days. I have enjoyed it enormously. I would also like to express a little bit of outright envy at the opportunity you now have to spend a good part of your professional lives in working through these and other *Charter* problems. The *Charter* is an exciting document, and its adoption presents a rare occasion for the exercise of what is, to me, the most interesting and worthwhile kind of challenge that can face a lawyer

— the chance to use one's skill and intellect to give meaning and effect to fundamental human values in a democratic society. I wish you enjoyment, success and good luck in that noble enterprise.