REASONABLE LIMITS UNDER THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

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> The rights of one citizen will inevitably clash with those of his or her neighbors. The rights of the individual will sooner or later conflict with those of the collectivity.[1]

The most significant restriction on the scope of the *Canadian Charter of Rights and Freedoms* is that which places "reasonable limits" on the rights and freedoms protected.[2] So important did the authors of the *Charter* regard this restriction that they gave it priority of position, in the very first section of the document:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The purposes served by section 1 are not entirely restrictive. This is also the only provision that "guarantees" the various rights and freedoms set out in the *Charter,* which is important because the general enforcement provision, subsection 24(1), is stated to be applicable to "rights and freedoms as *guaranteed* by this Charter."[3] It is as a basis for restricting rights that section 1 is most often employed, however, and it is that function to which this discussion is directed.

This provision, which has no counterpart in the *Canadian Bill of Rights,* was first introduced and adopted in principle, in somewhat different form, at the third federal-provincial Constitutional Conference in February 1971,[4] and it remained a feature in one form or another in all subsequent drafts of the *Charter.* It was borrowed in concept, and partly in phraseology, from the *European Convention on Human Rights.*[5]

The notion it expresses — that no right is absolute, and all rights must sometimes yield to both the rights of others and reasonable restraints for the greater public good — is a constitutional truth applicable to every guarantee of rights in the world. In many cases, such as the *United States Bill of Rights* and the *Canadian Bill of Rights,* this restriction is unarticulated, but it is, nevertheless, implicit in every right protected. Given the necessarily overlapping nature of human rights and the realities of life, this is unavoidable.

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1. Chief Justice Brian Dickson, address to Princeton Alumni Association, April 25, 1985, at 26-7.
2. H. Marx, "Entrenchment, Limitations and Non-Obstante", in Tarnopolsky and Beaudoin, *The Canadian Charter of Rights and Freedoms* (1982) at 61; W.E. Conklin, "Interpreting and Applying the Limitations Clause: An Analysis of Section 1" (1982), 4 Supreme Court L.R. 75; T. Christian, "The Limitation of Liberty: A Consideration of s.1 of the Charter of Rights and Freedoms" (1982), U.B.C.L.R. (special *Charter* edition) 105; N. Finkelstein, "Section 1: The Standard for Assessing Restrictive Government Actions and the Charter's Code of Procedure and Evidence" (1984), 9 Queen's L.J. 143; P.A. Bender, "Justification for Limiting Constitutionally Guaranteed Rights and Freedoms: Some Remarks About the Proper Role of Section One of the Canadian Charter" (1983), 13 Man. L.J. 669.
3. Emphasis added.
4. *The Constitutional Review,* 1968-71, Secretary's Report, c.6, 160 (Canadian Intergovernmental Conference Secretariat).
5. Adopted Nov. 4, 1950, amended May 6, 1963 and Jan. 20, 1966. Limitation clauses of this nature are included in several of the rights set out in the *Convention,* each worded somewhat differently. But there is no general limitation clause like section 1 of the *Charter.*

The decision to make explicit in the Canadian *Charter* that which is merely implied in many other human rights documents, has generated a good deal of controversy. Some fear that an express invitation to interpret rights and freedoms restrictively, particularly appearing at the outset of the document, will discourage courts from taking the *Charter* seriously. This has not generally been the case, however; the early years of *Charter* litigation have seen many laws and governmental actions ruled to be violations of protected rights, and appropriate remedies awarded, despite the existence of section 1.

In fact, the provision has had beneficial effects. The open acknowledgment that "guaranteed rights" are subject to reasonable limits has given the Canadian public a more realistic appreciation of the significance of constitutional guarantees than it once had. The risk of disillusionment when particular protections are found to be inapplicable in particular situations has probably been diminished. More important to lawyers, the forthright consideration by judges of the reasonableness and justifiability in a free and democratic society of particular limits to the protected rights and freedoms seems likely to produce a more consistent and fully informed body of rights restrictions than that which has emerged from the more indirect definitional exercises to which American courts have had to resort because of the absence of an explicit limitation clause.

Does Section 1 Apply To The Entire *Charter*?

Both the Superior Court and the Court of Appeal of Québec have held that section 1 covers all *Charter* rights, including minority language education rights under section 23.[6] The Supreme Court of Canada affirmed the decision of these courts in result, but on this issue it said only:

> We are disposed to take this proposition as established, but for the sake of discussion only and without deciding the point.[7]

It is possible to argue that the right to sexual equality is not subject to section 1 because section 28, which deals with that topic, is prefaced: "Notwithstanding anything in this Charter . . .". However, since section 28 guarantees sexual equality with respect only to "the rights and freedoms referred to" in the *Charter,* the better view seems to be that section 1, which helps to define those rights and freedoms, is still relevant.

Internal and External Limits

A fundamental preliminary question concerning section 1 is its relationship to the various "reasonableness" requirements and similar flexible standards that are inherent to many of the substantive rights.

Several of the rights and freedoms protected by the *Charter* are expressed in absolute terms. This is true of the fundamental freedoms, most of the democratic and mobility rights, and some of the language rights and legal

6. *Québec Association of Protestant School Boards* v. *A.-G. Québec (No. 2)* (1983), 140 D.L.R. (3d) 33 (Qué. S.C.); (1984) 1 D.L.R. (4th) 573 (C.A.).

7. (1984), 10 D.L.R. (4th) 321 at 330 (S.C.C.).

rights. In many cases, however, especially in the area of legal rights, qualifying words are used to describe the substantive rights themselves. Section 8, for example, provides security against "unreasonable search or seizure", and subsection 11(b) gives the right to be tried within a "reasonable time". Altogether, the *Charter* employs the terms "reasonable" or "unreasonable" to modify specific rights in six places, apart from section 1.[8] Other standards that call for a similar balancing of social interests limit several other rights: "principles of fundamental justice",[9] "arbitrarily",[10] "promptly",[11] "fair . . . hearing",[12] "cruel and unusual",[13] and so on. Even some of the rights that have no such overt qualifiers are thought by some to imply internal reasonable limits. For example, the concept of "discrimination", which section 15 employs, could be interpreted, in the light of experience under human rights legislation, to refer only to *unreasonable* differentiation between or among the members of various groups.

What role does the general "reasonable limits" provision in section 1 have to play with respect to rights and freedoms that have their own built-in balancing standards? Does that role vary according to whether the internal standard is overt or implied? The answers to these questions are of practical importance for at least two reasons. First, as we will see, the burden of proof and persuasion lies on those who claim to be the victims of *Charter* violations to establish that the substantive right has been interfered with; but the onus of showing that a reasonable and justifiable limit exists for interfering with that right falls upon those who defend the interference.[14] It therefore makes a considerable difference whether the reasonableness of an interference is dealt with as part of the substantive right or as part of a supervening defence under section 1. Second, to qualify for consideration under section 1, reasonable limits must be "prescribed by law", a condition that is not required of the various reasonableness standards built into substantive rights.[15]

The approach that would accord least significance to section 1 would be to treat it as a mere residual provision, applicable only to those rights and freedoms that do not contain their own built-in balancing standards. This interpretation has been advanced by Professor Paul Bender, an American constitutionalist, who has taken a considerable interest in the Canadian *Charter*.[16] Bender's view, which owes much to his American background, is that it would be preferable for the courts to fashion internal standards — tailored to the needs of each particular right — and to reserve the section 1 limit for the relatively rare situations when that is not appropriate. He suggests that the section 1 limit would be more likely to be taken seriously

8. Sections 6(3)(b), 8, 11(a), 11(b), 11(e), 20(1)(b).
9. Section 7.
10. Section 9.
11. Subsection 10(a).
12. Subsection 11(d).
13. Section 12.
14. See text related to n.20, *infra*.
15. See text under heading "Prescribed By Law".
16. Bender, *supra* n.2.

— and perhaps accorded the "strict scrutiny" approach with which American courts examine restrictions on the most highly valued category of constitutional rights — if used only for special occasions. His proposal would also minimize overlap and confusion between the internal and external limits, and avoid what he regards as the absurdity of a court which has already decided that a person has undergone an "unreasonable" search then having to consider whether the search is, nevertheless, justified as a "reasonable limit" under section 1.[17]

The Bender approach has little to recommend it, beyond a surface simplicity. It will be remembered that the onus of proof and persuasion lies on the claimant to establish both the existence and the violation of all substantive rights under the *Charter*. If that onus were extended to disproving the reasonableness of all limits placed upon certain of their rights it would be impossible to meet in many situations. Statutes empowering searches or seizures without warrant, for example, in the interests of state security, or of the investigation of tax fraud, or of the enforcement of health laws, or hundreds of other plausible purposes, often depend for their "justifiability" upon information to which no ordinary citizen has access.

The apparent simplicity of the Bender approach is deceptive. The reality is, if the American model is predictive, that a morass of complex and inconsistent excusive standards would result. The variation in permissible limits from one right to another would have the consequence, as in the United States, of classifying some rights as more important than others. For example, legislative restrictions on racial equality are subject to "strict scrutiny", while restrictions on age equality must only pass "minimal scrutiny". Sexual equality apparently falls into a category somewhere between these extremes.[18] No heed is paid to the fact that a particular instance of age or sex discrimination may be massively more harmful or immeasurably less justifiable than a particular instance of racial inequality. One of the beauties of the Canadian *Charter* is that section 1 provides a means by which *limitations*, rather than *rights*, can be ranked in importance. This is a much more realistic and practical process. Canadian courts would be unwise to sacrifice any more of that advantage than necessary in favour of an American-style priorization of rights.

There is nothing in the text of the *Charter* that compels Professor Bender's conclusions. Section 1 clearly applies to *all* rights and freedoms set out in the *Charter*, not just to some of them, and, although the Bender analysis could be reconciled with that fact by treating section 1 and the internal standards as equivalents of each other, it seems obvious that they are not. Apart from the differences of onus, and the requirement that section 1 limits must be "prescribed by law", the internal and external standards serve entirely different purposes.

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17. Some support for the "absurdity" argument can be found in the remark of McDonald J. that "[I]f a seizure be unreasonable under s.8, the inquiry whether the provision of the Act (which authorizes the seizure) is a reasonable limit under s.1 would be foreclosed." *Re Reich (No. 2)* (1984), 8 D.L.R. (4th) 696 (Alta. Q.B.).

18. Bender, *supra* n.2, at 671; N. Finklestein, "The Relevance of Pre-Charter Case Law for Post Charter Adjudication" (1982), 4 Supreme Court L.R. 267 at 281.

"Reasonableness" is not something in itself; it is no more than a standard of measurement or judgment. Like inches, kilograms, or beauty, it may be used to measure or judge quite dissimilar things. Women, wallpaper and music have little in common, but all may be judged for their beauty. Tort lawyers are familiar with the use of "reasonableness" as a gauge of various factors. In negligence law, for instance, it is used to determine whether the defendant exercised an appropriate *degree of care*; in the law of private nuisance, it is applied to determine whether the *intrusion* on the plaintiff's use and enjoyment of property is greater than should be tolerated.

A similar distinction can be made between the two uses of "reasonableness" in the *Canadian Charter of Rights and Freedoms*. Where it is applied under the *Charter* to a substantive right, such as protection from "unreasonable search or seizure", it appears to relate to the *impact on the victim* of the search or seizure in question: Is it reasonable, in normal circumstances, that a citizen should have to put up with the injury or inconvenience that the intrusion entails? On the other hand, when reasonableness is used in section 1 of the *Charter*, it addresses the very different question of *special justification*: Are there supervening circumstances that make it justifiable and reasonable for government to limit citizens' rights by means of laws requiring them to put up with certain searches and seizures that would normally be regarded as unreasonably intrusive? There is nothing absurd about applying the standard of reasonableness at two different stages of the adjudicative process.[19] The victim first explains why it is unreasonable in normal circumstances to treat citizens as he or she has been treated. Those responsible for the treatment in question are then called upon to show, if they can, that there are special circumstances which justify (or render "reasonable") a law authorizing the treatment in that situation.

To illustrate how this process operates in practice, consider two hypothetical situations involving personal searches of passengers at a public air terminal. In situation one, a passenger is subjected to the standard x-ray scan of carry-on luggage and a metal-detector 'frisk' (which, for the sake of discussion, is assumed not to be authorized by any legal ordinance). If the passenger complained that this was an "unreasonable search", the onus would be on him or her to persuade a court of its unreasonableness, an onus that would be very difficult to meet in current social conditions. Section 1 would therefore probably have no role to play. In hypothetical two, the passenger is made to undergo a strip search because an anonymous telephone call warned that he would be carrying drugs. Since strip searches of aircraft passengers are not normally justifiable, the passenger would have no trouble satisfying a court that the search was unreasonable. The onus would then fall upon the authorities to show that: (a) there is a law authorizing searches of this kind; (b) the law is a reasonable limit, demonstrably justified in a free and democratic society; and (c) the requirements of the justifying law have been satisfied in this case.

The distinction between internal and external excusive standards can be seen even more clearly when we turn to the internal qualifiers that do

19. Finkelstein, *supra* n.2.

not refer expressly to reasonableness: "arbitrary" detention (section 9); "fair" hearing (subsection 11(d)); "cruel and unusual" punishment or treatment (section 12); and so on. It is for the victim to show that he or she has been treated in a manner that would, in ordinary circumstances, be regarded as "arbitrary", "unfair", or "cruel and unusual".[20] If that onus is met, it falls to the person in authority interfering with the right to establish the existence of a law that authorizes the interference and that special circumstances exist which make that law a "demonstrably justifiable" "reasonable limit".

There are many *Charter* rights and freedoms that are not subject to any explicit qualifications. Most of the "fundamental freedoms" are stated in absolute terms, for example: "freedom of conscience and religion"; "freedom of thought, belief, opinion and expression . . .", and so on. Where these rights are infringed it would appear that the victim need prove only that an infringement has occurred; there are no internal excusive standards to satisfy. This does not mean that the victim must prove only the facts of the incident in question; it must also be shown that the violation complained of is one against which the *Charter* provides protection. An allegation that certain restrictions on the right to strike infringed "freedom of association" under section 2 of the *Charter* was rejected, without any reference to section 1, because the court was not satisfied that "association" included the right of the associated persons to go on strike.[21] The infringement must also be significant; the principle that *de minimus non curat lex* constrains all judicial intervention.[22] But if my freedom of expression is significantly interfered with, the onus is on those responsible for the interference to show that it is authorized by a law establishing a reasonable limit justifiable under section 1.

There are judicial *dicta* at variance with this conclusion. In *Francis* v. *Chief of Police*[23] the Judicial Committee of the Privy Council, interpreting the Constitution of St. Christopher, Nevis and Anguilla, held that an anti-noise law could be invoked to restrict the use of loudspeakers at a public meeting, despite a guarantee of freedom to "communicate ideas and information". In so doing, the Judicial Committee suggested that the law in question could be supported on the basis of *either* an explicit limitation clause similar to section 1 of the Canadian *Charter*, or "a necessary limitation inherent in the fundamental freedom of expression". The same approach was suggested by Mr. Justice Quigley of the Alberta Court of

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20. E.g.: *R.* v. *Moore* (1984), 3 C.R.D. 900.60-02 (Ont. H.C.); *Soenen* v. *Director of Edmonton Remand Centre* (1983), 35 C.R. (3d) 206 (Alta. Q.B.), in which rectal searches, limited visiting and exercise privileges, and certain other prison practices were found not to be "cruel and unusual", even with respect to pre-trial detainees, without reference to section 1. The latter case contains a deceptive statement by McDonald J. to the effect that all *Charter* rights must be construed "in an absolute sense", and that "It is only when section 1 is invoked that any balancing of individual interests against collective interests occurs." In fact, however, the decision did involve a balancing of institutional against individual needs in order to decide what was "cruel and unusual". The balancing to which the *dictum* referred must have been with respect to *exceptional circumstances* that would justify reliance on section 1.

21. *Reference Re Compulsory Arbitration* (1985), 57 A.R. 268 (C.A.).

22. In *Soenen* v. *Director of Edmonton Remand Centre*, *supra* n.20, a prisoner's objection to required applications of insecticide lotion upon re-entry of prison after being outside was rejected as "trivial". While the case involved a claim of "cruel and unusual" treatment under section 12, it is unlikely that the result would have been different if one of the absolutely phrased rights had been involved.

23. [1973] 2 All E.R. 251 (P.C.).

Queen's Bench in *R.* v. *Keegstra*.[24] That case concerned the constitutionality of the "promotion of hatred" provision of the *Criminal Code of Canada*. In upholding the legislation, Mr. Justice Quigley stated that it could not "rationally be considered to be an infringement which limits 'freedom of expression', but on the contrary it is a safeguard which promotes it". However, he then proceeded, like the Privy Council in *Francis*, to hold that the provision was a "reasonable limit" under section 1 in any event. These *dicta* are to be distinguished from cases like the decision holding strikes not to be "association",[25] in that they do not involve genuine attempts to determine the meaning of the right in question, but rather use the guise of a "definitional" exercise to impose limits on the right in the interests of community needs.

The highest-ranking judicial exercise of this kind to date is a holding by Madame Justice Wilson of the Supreme Court of Canada in her separate concurring judgment in the *Operation Dismantle* case.[26] The claim in that case was that the rights to "life" and "security of the person" under section 7 of the *Charter* had been infringed by the Government of Canada's decision to permit the testing of Cruise missiles in Canadian airspace. The statement of claim was struck out as disclosing no reasonable cause of action. Madame Justice Wilson did not agree with the majority's reason for reaching that conclusion — that the alleged increase in risk to life and security was impossible to prove by evidence of a type a court could properly consider — but she concurred in the result on the ground that:

> [T]he concept of 'right' as used in the *Charter* must take account of the fact that the self-contained political community which comprises the state is faced with at least the possibility, if not the reality, of external threats to both its collective well-being and to the individual well-being of its citizens. In order to protect the community against such threats it may well be necessary for the state to take steps which incidentally increase the risk to the lives or personal security of some or all of the state's citizens. Such steps, it seems to me, cannot have been contemplated by the draftsman of the *Charter* as giving rise to violations of section 7.[27]

There are several difficulties with such attempts to infer internal balancing limits from the "definitions" of substantive rights. First, they ignore the obvious textual differences between those rights that have explicit modifiers and those that do not. The interpretation principle *expressio unius est exclusio alterius* suggests that meaning should be attributed to the fact that the drafters of the *Charter* prohibited "unreasonable" searches and seizures, but not "unreasonable" interference with expression. Second, there is no standard provided by which courts can determine which types of conduct fall within the definition and which do not. By what rational standard can it be said that the use of a loudspeaker to make speeches at a public meeting, and the making of hate-inducing comments about a racial group do not constitute "expression"? The *Charter* certainly provides no guidance, and, if we turn, as the judges seemed to in *Francis* and *Keegstra*,

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24. (1984), 5 C.R.D. 525.100-04 (Alta. Q.B.).
25. *Dolphin Delivery Ltd.* v. *Retail, Wholesale & Department Store Union, Local 580* (1984), 10 D.L.R. (4th) 198 (B.C.C.A.).
26. (May 9, 1985), as of yet, unreported (S.C.C.).
27. *Ibid.*, at 53 of typescript.

to what have been regarded as permissible restrictions in the past, we come perilously close to the "frozen rights" approach that the *Charter* seems designed to avoid. A third difficulty is policy-related. To place the onus on those whose activities have been interfered with to prove, by some entirely undefined standard, that the activity is sufficiently permissible to fall within the definition of a protected right or freedom would be to demand much more than most individuals would be capable of doing. The obvious purpose of section 1 — to require government to express limitations on the constitutional rights and freedoms of Canadians in law, and to justify them as reasonable — would be frustrated.

For all these reasons the *Charter*'s pattern with respect to the balancing of social values appears, in general, to be as follows. The alleged victim of a *Charter* violation must always establish a *prima facie* case before the alleged violator is called upon to respond. Where the right or freedom in question is expressed in absolute terms, with no explicit modifier, the *prima facie* case involves proving the facts of the incident in question, and establishing to the court's satisfaction that these facts involved a significant infringement of the asserted *Charter* right. At that point, the onus shifts to the alleged violator to establish that the infringement was authorized by a law that satisfies the requirements of section 1. If the right or freedom asserted is explicitly modified by an internal standard like "reasonable" or "arbitrary", the alleged victim's *prima facie* responsibility extends to showing that the violation is one which, in ordinary circumstances, would exceed that standard. The victim having established that much, the violator's responsibility to establish a section 1 limit comes into operation.[28]

There is one provision of the *Charter* — section 15 — that does not fit easily into this pattern. The guarantees of equality and freedom from discrimination established by that section are not subject to any express qualifications. Yet the concepts of "equality" and "discrimination", as understood in jurisprudence developed under human rights legislation, have built-in qualifiers. Equality does not necessarily imply sameness; it includes the right to distinctive treatment if that should be needed to achieve overall equality of opportunity or equal respect for varying cultural values.[29] Discrimination does not necessarily occur whenever one person is treated differently than another; it involves differential treatment that is unreasonably detrimental.[30]

Should these implied qualifiers be carried over from human rights law to section 15 of the *Charter*? If they were, it would mean that the victim of discrimination would be called upon to prove, as part of his or her *prima facie* case, that treatment was not only different from that of others, but detrimental and unreasonable. A woman who complained about not being

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28. An objection can be raised to according different treatment to rights depending on whether or not they have implicit internal modifiers, since this would, to some extent, involve higher priority for one group of rights than the other — an aspect of American law that was criticized above. (See text related to n.16, *supra*.) While this is true, it appears to be dictated by the wording of the *Charter*, and it involves a simpler and more rational classification than under the U.S. Constitution.

29. *International Covenant on Civil and Political Rights*, Article 27; *Canadian Charter of Rights and Freedoms*, section 27.

30. *R.* v. *Videoflicks Ltd.* (1985), 5 O.A.C. 1; *R.* v. *Big M Drug Mart Ltd.* (1985), 58 N.R. 81 (S.C.C.).

allowed to sunbathe topless in a public park would have to prove more than that men are permitted to do so; she would also have to satisfy a court that the distinction is unreasonable. On the other hand, a promotion policy in a government service that treated women less favourably than men would not be reasonable in normal circumstances, and could survive a *Charter* attack only if the government could justify it under section 1. This would seem to be the better approach. To interpret section 15 as prohibiting every form of differential treatment not prescribed by a law that can be supported under section 1 would place an impossible burden on public authorities, and could not therefore have been contemplated by the designers of the *Charter*. It must be concluded that section 15 belongs in the group of *Charter* rights and freedoms that require the alleged victim to prove, as part of his or her *prima facie* case, that the unequal treatment complained of is such as would be regarded as unreasonable in ordinary circumstances.

Reasonable Limits . . . Justified in a Free & Democratic Society

When a court is faced with a legally prescribed limit on *Charter* rights that purports to be authorized by section 1, its most difficult task is to decide whether the limit is both "reasonable", and "demonstrably justified in a free and democratic society".

This task involves a two-step process:

1. Is the *purpose* of the limit demonstrably justified?
2. Are the *means* which the limit entails reasonable?[31]

It is sometimes suggested that a third step is also involved: a comparison with limits imposed for similar or related purposes in Canada and other free and democratic societies.[32] However, it seems clear from the text that this comparison was intended to be part of determining justifiability of purpose, and perhaps also reasonableness of means,[33] rather than a separate stage of the process.

Purpose. As to the purpose stage, the Supreme Court of Canada has already made a few observations, but has acknowledged that much has yet to be determined. In *R.* v. *Big M Drug Mart Ltd.*, Mr. Justice Dickson commented, on behalf of a majority of the Court:

> Principles will have to be developed for recognizing which government objectives are of sufficient importance to warrant overriding a constitutionally protected right or freedom.[34]

In that case the Court held that the federal *Lord's Day Act*, which prohibited certain activities on Sundays, was an invalid infringement on freedom of religion, and was not justified by section 1 of the *Charter*. The only "plausible" purpose advanced to support the legislation was that, in spite of its original religious objectives, it now served a valuable secular goal by

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31. *R.* v. *Big M Drug Mart, ibid.*, at 116 (*per* Dickson C.J.C.).
32. E.g.: *Québec Association of Protestant School Boards* v. *A.-G. Québec (No. 2), supra* n.6; *Black* v. *Law Society of Alberta* (1984), 5 C.R.D. 685-01 (Alta. Q.B.); *R.* v. *Keegstra* (1984), 5 C.R.D. 525.100-04 (Alta. Q.B.).
33. See text related to n.50, *infra*.
34. *Supra* n.31.

providing a "universal day of rest from all work, business and labour".[35] This purpose was within the jurisdictional domain of the provincial legislatures rather than of the Parliament of Canada, however, and could not therefore be accepted: "While there is no authority on this point, it seems clear that Parliament cannot rely upon an *ultra vires* purpose under s. 1 of the *Charter*."[36] Since the purpose of the legislation was not justified, the Court did not trouble to determine whether the means employed were reasonable.

The significance to be attributed to cost and administrative convenience when determining whether a legislated limit on rights serves a justifiable purpose was addressed by Madame Justice Wilson, on behalf of three Supreme Court judges, in *Singh* v. *Minister of Employment and Immigration*.[37] The case concerned provisions of the *Immigration Act* that subjected claims for refugee status to a purely administrative process, without appeal. After finding that the provisions in question infringed the right to "fundamental . . . justice" under section 7 of the *Charter*, Madame Justice Wilson turned to the question of whether they were justified under section 1, concluding that they were not. Counsel for the Minister of Immigration had submitted two grounds for justification: (a) that the procedures in question had been approved by the United Nations and were in line with those of some other Commonwealth and western countries; and (b) that the Immigration Appeal Board was already overworked, and a requirement to hear appeals from refusals of refugee claims would be "an unreasonable burden on the Board's resources". Madame Justice Wilson did not comment on the first ground, though she obviously did not find it compelling. On the second ground she had this to say:

> The issue . . . is not simply whether the procedures set out in the *Immigration Act* . . . are reasonable; it is whether it is reasonable to deprive the appellants of the right to life, liberty and security of the person by adopting a system for the adjudication of refugee status claims which does not accord with the principles of fundamental justice.
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> Seen in this light I have considerable doubt that the type of utilitarian consideration brought forward . . . can constitute a justification for a limitation on the rights set out in the *Charter*. Certainly the guarantees of the *Charter* would be illusory if they could be ignored because it was administratively convenient to do so. No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice, but such an argument, in my view, misses the point of the exercise under s. 1 . . . [A] balance of administrative convenience does not override the need to adhere to these principles.[38]

These remarks should not necessarily be taken to mean that the avoidance of cost and inconvenience are never justifiable legislative purposes under section 1 of the *Charter*; they could, rather, mean that when those are the goals it must be demonstrated that a situation approaching necessity exists. Madame Justice Wilson's concluding words on the subject left both interpretations open:

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35. *Supra* n.31.
36. *Supra* n.31, at 117.
37. (1985), 58 N.R. 1.
38. *Ibid.*, at 68-69.

> *Even* if the cost of compliance with fundamental justice is a factor to which the courts would give considerable weight, I am not satisfied that the Minister has demonstrated that this cost would be so *prohibitive* as to constitute a justification within the meaning of s. 1.[39]

Another type of purpose whose justifiability has been judicially doubted is punishment. In *R.* v. *Bryant*[40] the Ontario Court of Appeal had to consider the validity of a *Criminal Code* provision that deprived accused persons of the right to trial by jury if, after electing jury trial, the accused failed to appear for trial. When considering whether section 1 authorized this provision, the Court rejected the possibility that it could be justified as a punishment for non-appearance:

> If the only object . . . were to punish accused for absconding, the Court would not have considered it to be a valid legislative purpose which could justify infringement of *Charter* rights. To deny *Charter* rights simply as a punishment is to treat them as mere privileges which a government can take away for improper conduct, rather than as entrenched rights beyond the reach of government.[41]

A good illustration of a legislative objective being found to be demonstrably justifiable (though the means of achieving it were eventually found to be unreasonable) can be found in the reasons for judgment of Chief Justice Deschênes, of the Québec Superior Court, in *Québec Association of Protestant School Boards* v. *A.-G. Québec (No. 2)*,[42] the first extensive judicial discussion of the meaning of section 1. The case involved a challenge to a provision of Québec language legislation that required most children to be educated in French, the chief exception being children whose mother or father was educated in English *in Québec*. This was attacked on the grounds that it denied the right, under paragraph 23(1)(b) of the *Charter*, to English language education for children of parents educated in English *elsewhere in Canada*. Chief Justice Deschênes, and ultimately the Supreme Court of Canada, held that the provision violated the *Charter*. As to the *purpose* of the provision, however, the Chief Justice had no doubt that it was justifiable. After examining the historical and demographic background to the legislation, he continued, in part, as follows:

> . . . Bill 101 set out in an official text the objective of the Assemblée Nationale: . . .
>
> . . . the Assemblée Nationale . . . is resolved . . . to make of French the language of Gouvernement and the Law, as well as the normal and everyday language of work, instruction, communication, commerce and business . . .
>
> . . .
>
> Bill 101 has, for the last five years . . . contributed to solidifying the French fact in America.
>
> The court has not the slightest doubt that this involves a legitimate objective which, to use the words of the Charter, 'can be demonstrably justified in a free and democratic society'.
>
> We are, however, concerned with just one aspect, albeit a major one, of this overall objective: that of education.

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39. *Ibid.*, at 71. Emphasis added.
40. (1984), 5 C.R.D. 725.300-03 (Ont. C.A.).
41. *Ibid.* The court did find that there was a valid objective — attempt to overcome abuses of the judicial system — but ultimately held that the means employed were unreasonable, since other techniques would be equally effective and less abusive of *Charter* rights.
42. (1982), 140 D.L.R. (3d) 33 (Qué. S.C.); Aff'd: (1984), 1 D.L.R. (4th) 573 (C.A.); (1984), 10 D.L.R. (4th) 321 (S.C.C).

> School has a life-long effect on a child. The language that he learns and works with in school will become the language that he uses, the language that he will pass on eventually to his children. Normally this language will give him access to his culture in general as well as to his trade or his profession, it will determine the milieu he chooses and the society he frequents: his language will shape his life.
>
> . . .
>
> This sectorial objective, the francization of education, plays a part in the legitimacy of the overall purpose of the whole of Bill 101. Quebec has demonstrated the justification of this purpose to the satisfaction of the court.[43]

Having decided that the purpose was justifiable, he nevertheless held that the means were not reasonable, and that in any event, the restriction was too sweeping to constitute a mere "limit". These aspects of the case will be considered later.[44]

It has been suggested by some writers and courts that the task of determining whether legal restrictions on *Charter* rights are justifiable is akin to the problem of determining, under the *Canadian Bill of Rights*, whether a federal law or government practice offends the protection of equality before the law.[45] In performing that function the courts have developed a "valid federal objective" test.[46] The difficulty with that test is that it is so permissive as to tolerate virtually any plausible national governmental decision. Mr. Justice McIntyre of the Supreme Court of Canada suggested a broadening of the test in *MacKay* v. *The Queen*. By that broader formulation a court would consider whether the inequality complained about:

> . . . is arbitrary, capricious or unnecessary, or whether it is rationally based and acceptable as a necessary variation from the general principle of universal application of law to meet special conditions and to attain a necessary and desirable social objective.[47]

Another pre-*Charter* formula developed by the Supreme Court of Canada that might be applied to determining whether a limit on *Charter* rights serves a "demonstrably justified" purpose is "need to protect social values of superordinate importance".[48]

It may not be wise, however, to apply old formulations, developed in non-constitutional contexts, to the new constitutionally-entrenched provisions of the *Charter*, lest the extreme judicial deference to lawmakers which those formulations often reflect be carried forward. The *Charter* has changed the respective roles of judges and legislators. The courts now recognize, as Chief Justice Dickson put it extra-judicially, that "reflexive recourse to s.1 to justify infringement of *Charter* rights in blind deference to the judgment of the legislature would trivialize the *Charter* and render its protections nugatory."[49] And a new situation calls for new language.

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43. *Ibid.*, at 70-71.
44. See text related to n.62-64.
45. *Supra* n.2, at 66, ff.
46. See: *MacKay* v. *The Queen*, [1980] 2 S.C.R. 370.
47. *Ibid.*, at 406.
48. *A.-G. Nova Scotia* v. *MacIntyre* (1982), 132 D.L.R. (3d) 385 at 403 (S.C.C.) (*per* Dickson J.). Referred to, re s.1 of the *Charter*, in *Canadian Newspapers Co.* v. *A.-G. Canada* (1985), 5 C.R.D. 425.20-12 (Ont. C.A.).
49. *Supra* n.1, at 28.

Means. If it is established that a legally prescribed limit on *Charter* rights serves a justifiable purpose, the question of *means* must then be considered. As Chief Justice Dickson stated in *R.* v. *Big M Drug Mart Ltd.*:

> Once a sufficiently significant government interest is recognized then it must be decided if the means chosen to achieve this interest are reasonable — a form of proportionality test. The court may wish to ask whether the means adopted to achieve the end sought to do so by impairing as little as possible the right or freedom in question.[50]

Several factors are involved in this second step of the process. One is good faith; the means employed must be genuinely intended to advance the professed purpose.[51] Another is rationality; the means chosen must be such as can reasonably be expected to produce the desired results.[52] The question of alternate means must also be addressed; while courts cannot design government policies, they have a responsibility, as Chief Justice Dickson indicated, to ask whether the government's purpose could be achieved by other means less destructive to *Charter* rights.[53] And, as Dickson's quote points out, proportionality must always be considered: is the purpose being served worth the cost in terms of infringed rights and freedoms? As Mr. Justice Jerome put it in *Canadian Human Rights Commission* v. *Tayor*:

> The test to be applied here is whether the sacrifice of the right is in proportion to the objective of achieving the elimination of the evil under attack from the Canadian way of life.[54]

The *Québec Protestant School Board* case[55] again provides a good illustration of how this stage of the inquiry should be carried out. After a lengthy examination of Canadian and international authorities on the meaning of "reasonable limits", Chief Justice Deschênes devoted nine pages of his reasons for judgment to a summary of the various arguments presented for and against the reasonableness of the denial of English language instruction to children whose parents were not educated in English in Québec. There were eleven arguments in support of reasonableness and nine against. The arguments were based on the evidence presented by five expert witnesses. He concluded, in part, as follows:

> [H]as it been convincingly demonstrated to the Court:
> (a) that the . . . clause is necessary to achieve the legitimate aim set by Quebec; and
> (b) that the rigour of the . . . clause is not disproportionate to its purpose?
>
> . . .
>
> If the Court absolutely had to settle the debate . . . it would be inclined to conclude that the . . . clause is disproportionate to the intended aim and that it unnecessarily exceeds reasonable limits.
>
> . . .
>
> . . . [T]he evidence has shown that the influx of new students into the English language school system because of s.23 of the Charter would be negligible. Clearly, it would not prevent the inevitable reduction of the relative size of the Engish-speaking sector from now

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50. *Supra* n.32.
51. Christian, *supra* n.2.
52. Christian stressed the need for a "rational connection" between purpose and means (108), and the "rationality" test has been adopted in *Layne* v. *Reed* (1984), 5 C.R.D. 725.300-01 (B.C.S.C.) and in the *Keegstra* case, *supra* n.25.
53. *R.* v. *Bryant* (1984), 5 C.R.D. 725.300-03 (Ont. C.A.).
54. (1985), 5 C.R.D. 525.100-07. "Proportionality" was also considered in the *Layne* and *Keegstra* cases.
55. *Supra* n.6.

> to the end of the century in the whole of the Quebec school system; at best, it will act as a slight brake to this reduction, with no effect on the future development of Quebec.[56]

The comparative exercise invited by the phrase "free and democratic society" calls for comment. Although this provision has sometimes been given short shrift with the observation that Canada is an obviously free and democratic society,[57] it is commonly the basis for an examination of laws on similar or related matters in other western democracies.[58] Although there was a risk that the exercise would resurrect the "frozen rights" approach by attributing justifiability to everything that has previously been sanctioned in Canada or other free and democratic societies,[59] that risk has not materialized in practice. The Supreme Court decisions in *Big M* and *Singh* clearly indicate that while past and current practice is a factor to be taken into account, it will never be regarded as conclusive. Although the words "free and democratic society" appear, from a strictly grammatical point of view, to modify only "demonstrably justified", and thus to apply only to the "purpose" stage of the section 1 exercise, it is likely that comparative experience will also be consulted, where appropriate, at the "means" stage, since the standard of reasonableness is flexible enough in itself to take account of such factors.[60]

Limits

The meaning of the term "limits" was the subject of considerable discussion in the *Québec Protestant School Board* case,[61] but the discussion failed to resolve all the questions raised. The issue was whether a complete *denial* of a right can constitute a "limit", and, if not, what degree of restriction short of complete denial is permitted. The legislation challenged in that case, it will be recalled, was a Québec statute requiring education to be conducted in French for most children, the major exception being those having a parent who was educated in English in Québec. This provision was found by the courts at all levels to violate the right to English language education, under paragraph 23(1)(b) of the *Charter*, for children of parents educated in English elsewhere in Canada. In response to the argument by counsel for the Province that the legislation merely imposed a "reasonable limit", as contemplated by section 1 of the *Charter*, Chief Justice Deschênes held, at the trial level, that section 1 was not applicable to a complete denial of a right:

> The Charter clearly makes a basic distinction between a limitation and a denial of a right.
>
> Section 1 . . . allows rights guaranteed by the Charter to be . . . 'subject to reasonable limits' . . .

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56. *Supra* n.6 at 89. He relied ultimately on another ground to settle the question, holding that the law was a "denial" rather than a limit. (*Supra* n.6 at 61.)

57. E.g.: *Supra* n.6, at 66 (*per* Deschênes C.J.).

58. E.g.: *Layne* v. *Reed supra* n.52; *R.* v. *Keegstra, supra* n.24; *Southam* v. *The Queen (No. 1)* (1983), 146 D.L.R. (3d) 408 (Ont. C.A.). See: J.G. Richards, "Proof of Foreign Law Under Section 1 of the Charter" (1984), 3 Adv. Soc. J. 21.

59. Conklin, *supra* n.2.

60. In the *Québec Protestant School Boards* case (*supra* n.6) Deschênes C.J. observed at 67, that the two stages of the inquiry are connected: "These two conditions are intimately related — which is only logical — and the evidence which the Court heard dealt with both together."

61. *Supra* n.6.

> However, in s.24, the Charter speaks of an 'infringement' or 'denial' of these guaranteed rights . . . [I]t expressly opens the door to judicial sanction against such infringement or denial in favour of the individual affected . . .
>
> The frontier is, therefore, clearly marked. No legislature can cross it. It may limit a guaranteed right, but it may not abrogate or 'deny' such a right.[62]

Then, after noting that everyone acknowledged the legislation to constitute more than a "simple limitation", the Chief Justice examined two grounds upon which the Québec government sought, nevertheless, to rely on section 1. The first was that judicial decisions in other contexts, including a rather similar provision of the Constitution of India, had held complete prohibitions to be "restrictions". This argument was rejected on the ground that even if a complete prohibition could be a "limit", it could not be regarded as a *"reasonable"* limit.[63]

The second of the Québec government's arguments was based on a distinction between individual and group rights. Minority language education rights under section 23 of the *Charter* are group rights, it was contended, and although the legislation in question did completely deny the right to certain individuals, it amounted only to a partial limit on the right of the group as a whole. While Chief Justice Deschênes appeared to accept this reasoning with respect to true collective rights (although neither of the two group rights he identified — aboriginal rights and religious separate school rights — is guaranteed by the *Charter* itself) he rejected the argument in this ease because: "It seems clear that s.23 deals with individual rather than collective rights."[64]

The treatment of this issue by the Supreme Court of Canada[65] is not easy to understand. The Court agreed (as had the Québec Court of Appeal[66]) that the statute did not constitute a reasonable limit. It appeared, however, to concur in a statement of Beauregard J.A. in the Court of Appeal that: "even if Chapter VIII denies the s.23 right absolutely, there is nothing *a priori* to prevent s.1 validating Chapter VIII."[67] This would seem to reject Chief Justice Deschênes's denial/limit distinction. Yet the explanation given by the Court for finding section 1 inoperative sounds rather similar to that advanced by Chief Justice Deschênes:

> Whatever their scope, the limits which s.1 of the Charter allow to be placed on the rights and freedoms set out in it cannot be equated with exceptions such as those authorized by s.33 . . . of the Charter . . . Nor can those limits be tantamount to amendments to the Constitution of Canada . . .
>
> . . . The provisions of . . . [the challenged legislation] collide directly with those of s.23 of the Charter, and are not limits which can be legitimized by s.1 of the Charter. Such limits cannot be exceptions to the rights and freedoms guaranteed by the Charter nor amount to amendments of the Charter. An Act of Parliament or of a legislature which, for example, purported

62. *Supra* n.6 at 59.
63. *Supra* n.6 at 61. The fact that the Indian decisions also related to a requirement of "reasonable restrictions" was not addressed.
64. *Supra* n.6 at 63.
65. *Supra* n.7.
66. *Supra* n.6.
67. *Supra* n.6, at 576; *supra* n.7 at 336.

> to impose the beliefs of a State religion would be in direct conflict with s.2(a) of the Charter, which guarantees freedom of conscience and religion, and would have to be ruled of no force or effect without the necessity of even considering whether such legislation could be legitimized by s.1. The same applies to ... [the challenged legislation] in respect of s.23 of the Charter.[68]

How does this rationale differ from that of Chief Justice Deschênes? With respect to the particular legislation involved in that case, there would appear to be very little difference. Whether it is described as a "denial" of rights, or as an attempt to create an "exception" to or an "amendment" of the rights, it is clear that legislation which 'collides with' *Charter* rights as fully as this did is incapable of authorization by section 1. Where the Supreme Court may have felt a need to disassociate itself from the Deschênes reasoning was perhaps with respect to its focus on the rights of the individual. Chief Justice Deschênes can be interpreted as saying that no legislative limit would be justifiable under section 1 if it totally denied a Charter right *to any individual.* Such an interpretation would mean that it would never be possible under section 1 for a complete denial of a particular right to one or more persons to be regarded as a "reasonable limit" on the right as it applies to the community generally. The Supreme Court was presumably unwilling to take so restrictive a view of the scope of section 1.

What restrictions to section 1 are implied by the Supreme Court's own formulation? What does it mean to say that section 1 does not permit "exceptions to the rights and freedoms guaranteed" or limits that "amount to amendments of the Charter"? The problem is that although the Court seemed to have in mind some form of constraint on the *extent* of permissible limits, the concepts used to express the constraint — section 33 opt-outs and constitutional amendments — have nothing to do with extent. They are simply procedures by which *Charter* obligations may be avoided or altered — *to whatever extent may be thought advisable.* It makes little sense to say that section 1 limits do not include those matters that are appropriate for an "opt-out" exception or a constitutional amendment, when *any matter* is appropriate to be dealt with by those procedures.

All that can be safely inferred from the *Protestant School Board* case concerning the scope of section 1 is that restrictions which exceed in magnitude that which the courts regard as appropriate will not be accepted as "limits" under that section. Many indicia of magnitude suggest themselves: the extent of the *Charter* right affected (e.g.: all freedom of the press, or just the freedom to publicize juvenile trials?); the number of persons affected (e.g.: all journalists, or just those found guilty of contempt in regard to previous trials?); the time period affected (e.g.: forever, or just for the duration of a particular trial?); and so on.

It might be thought that these should simply be among the factors taken into account in deciding whether the purpose of the limit is "demonstrably justifiable", or the means chosen are "reasonable", but the Supreme Court left little doubt that they must first be considered as indicia

68. *Supra* n.7, at 337-8.

of whether the law constitutes a "limit" at all. This is clear from its statement that if Parliament attempted to "impose the beliefs of a State religion" the law would be struck down "without the necessity of even considering whether such legislation could be legitimized under section 1". This entire line of tortured reasoning appears to introduce an unnecessary complication to an already difficult process.

Prescribed By Law

It is an important characteristic of section 1 that it permits only such limits to rights and freedoms as are "prescribed by law". This means that a governmental practice or procedure would not be protected from *Charter* attack by section 1, no matter how reasonable the practice or procedure might be, unless embodied in a "law" of some kind. In *R.* v. *Therens*[69] police required a driver involved in an automobile accident to provide breath samples and to go to the police station, without informing him, as required by subsection 10(b) of the *Charter*, of his right to retain and instruct counsel without delay. The Supreme Court of Canada upheld the exclusion of breath analysis evidence from the driver's prosecution for impaired driving, and although the Court was divided on the merits, it was unanimous in holding that the reasonableness of the police conduct was not to be considered, because:

> [Section 1] subjects all *Charter* rights . . . 'only to such reasonable limits prescribed by law . . . '. Here Parliament has not purported to prescribe any such limit and hence s.1 of the *Charter* does not come into play. The limit on the respondent's right to consult counsel was imposed by the conduct of the police officers and not by Parliament.[70]

The definition of "law" in this context is likely to be a matter of dispute in some respects, but it is fairly clear in other respects. There is little doubt that it includes statutes and regulations, and, assuming the *Charter* to apply to local government, municipal by-laws.[71] Proclamations and published Orders in Council would presumably fall into the same category.

The broad term "règle de droit" in the French text would indicate that even judge-made law is included,[72] and it has been so held.[73] A similar decision was reached by the European Court of Human Rights, with respect to the term "prescribed by law" in the European Convention, in the *Sunday Times* case,[74] but there was a suggestion in that case that it may only be relatively well-established common law principles that can qualify as "law" for this purpose.

The *Sunday Times* case had to do with a decision by the House of Lords finding a newspaper to be in contempt of court for publishing a

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69. (1985), 59 N.R. 122.

70. *Ibid.*, at 124.

71. Municipal laws were excluded from the terms "Acts of the Legislature" for language purposes in *A.-G. Québec* v. *Blaikie (No. 2)* (1981), 123 D.L.R. (3d) 15 (S.C.C.), but that was for special historical reasons.

72. Marx, *supra* n.2, at 62; A. Gautron, "French/English Discrepancies in the Canadian Charter of Rights and Freedoms" (1982), 12 Man. L.J. 220.

73. *Canadian Newspapers Co.* v. *Swail* (1985), 5 C.R.D. 525.40-02 (Man. C.A.). See also *Layne* v. *Reed*, *supra* n.52.

74. (1979), 22 *Yearbook of European Convention of Human Rights* 402.

certain article about a current law-suit. Although it ultimately held that the contempt of court principle upon which the House of Lords had relied was not justifiable, it did find the principle to be "prescribed by law". It made clear, however, that it would have found otherwise if the principle had not been well enough established to be reasonably predictable to the public. The summary of judgment states, in part:

> The applicants argued that, in view of the uncertainty of the law of contempt and the novelty of the principles enunciated by the House of Lords, the restraint imposed could not be regarded as 'prescribed by law'. In the Court's opinion, the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case and he must be able to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. The Court concluded that, on the facts of this particular case, these two requirements were satisfied and that, accordingly, the interference was 'prescribed by law'.[75]

The rationale underlying this holding — that the only permissible limits on guaranteed rights and freedoms should be those that have had a sufficiently public airing to be reasonably foreseeable to a citizen — would seem to be transferable to the Canadian *Charter*. If it were, it would hamper to some extent the development of new common law principles that undercut *Charter* rights. It would not prevent such development altogether, however, since resourceful courts can often find ways of providing prior notice of intended changes of direction by means of *obiter dicta* and other techniques.

More debatable categories include unpublished Orders-in-Council, Regulations and By-laws (which would not be reasonably foreseeable to citizens); the accumulated decisions of administrative boards and tribunals (which, while usually available for public scrutiny, are seldom as binding on future decisions as judicial precedents, and can therefore be regarded as something other than "law"), and governmental, professional or commercial custom (which sometimes provides the raw material from which common law or administrative decisions are fashioned, but is not usually regarded as "law" itself).

When deciding whether these and other questionable types of norms constitue "law" by which *Charter* rights may be restricted, courts may be invited to give the term the same meaning in that context as in subsection 52(1) of the *Constitution Act, 1982*, which requires "law" to conform to the *Constitution*. This would be unwise. While the language of sections 1 and 52 is, in this respect, identical in both the English and French texts, the purposes of the two provisions are dissimilar — antithetical indeed. Whereas the aim of subsection 52(1) is to ensure that the supreme law of the *Constitution*, including the *Charter*, prevails over all inconsistent legal provisions, the goal of section 1 is to provide immunity from the *Charter's* requirements in a few special circumstances. It would be entirely consistent with these differing purposes to find, therefore, that secret Orders-in-Council, or administrative customs, are "laws" in the sense that they must comply with *Charter* requirements in accordance with subsection 52(1), but not in the sense of creating reasonable limits to *Charter* rights under section 1.

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75. *Ibid.*, at 404.

The most fundamental meaning of "prescribed", based on its Latin origins, is "written in advance". The reason for requiring a law to be prescribed is usually to ensure that it is capable of being known by the community in order that it may be complied with, or, if disputed, that it may be challenged legally or politically. It was with these considerations in mind, no doubt, that the European Court of Human Rights stated in the *Sunday Times* case that a legal limit on protected rights is not "prescribed" unless the citizen is "able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case and . . . able to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."[76]

A similar line of reasoning has led some Canadian courts to conclude that section 1 cannot be relied upon to justify the granting of general undefined discretionary powers to public authorities. In *Re Ontario Film & Video Appreciation Society and Ontario Board of Censors*[77] the Ontario Divisional Court struck down a sweeping discretionary power of a provincial film censorship board. After pointing out that the purpose of requiring every *Charter* limitation to be "prescribed by law" is "to ensure that it has been established democratically through the legislative process or judicially through the operation of precedent over the years", the Court ruled that the board's powers were not so prescribed:

> The Charter requires reasonable limits that are prescribed by law; it is not enough to authorize a board to censor or prohibit the exhibition of any film of which it disapproves. That kind of authority is not legal for it depends on the discretion of an administrative tribunal. However dedicated, competent and well-meaning the board may be, that kind of regulation cannot be considered as 'law'. It is accepted that law cannot be vague, undefined, and totally discretionary; it must be ascertainable and understandable. Any limits placed on the freedom of expression cannot be left to the whim of an official; such limits must be articulated with some precision or they cannot be considered to be law.
>
> There are no reasonable limits contained in the statute or the regulations. The standards and the pamphlets utilized by the Ontario Board of Censors do contain certain information upon which a film-maker may get some indication of how his film will be judged. However, the board is not bound by these standards. They have no legislative or legal force of any kind. Hence, since they do not qualify as law, they cannot be employed so as to justify any limitation on expression, pursuant to s.1 of the Charter.[78]

The notion that a statute can be "void for vagueness" is new to Canadian law,[79] but it has long applied to municipal by-laws.[80] It has also been a feature of United States constitutional law.[81] Canadian courts have now found it to be implied in the concept of "reasonable limits" under section 1 of the *Charter* as well as in the phrase "prescribed by law",[82] and have

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76. *Ibid.*
77. (1983), 147 D.L.R. (3d) 58 (Ont. H.C.); Aff'd. (1984), 5 D.L.R. (4th) 766 (Ont. C.A.). Leave to appeal to S.C.C. granted.
78. *Ibid.*, at 67. This aspect of the decision was approved by the Ontario Court of Appeal in *Reference Re Education Act* (1985), 10 D.L.R. (4th) 491.
79. Morris Manning, *Rights, Freedoms and the Courts* (1983) was first to advocate the notion.
80. *Re Harrison* and *City of Toronto* (1983), 140 D.L.R. (3d) 309 (Ont. H.C.).
81. *Smith* v. *Goguen*, 415 U.S. 566 (U.S.S.C. 1974).
82. *R.* v. *Robson* (1985), 6 C.R.D. 125.50-01 (B.C.C.A.); *Luscher* v. *Deputy Minister of Revenue Canada, Customs & Excise* (1985), 6 C.R.D. 525.100-04 (F.C.A.).

considered whether it may also be an aspect of "fundamental justice" under section 7.[83]

It should be stressed, however, that not every discretionary power is open to attack on the grounds of vagueness. Discretion is a tool essential to effective administration of justice. If the legislation provides guidelines sufficient to indicate the criteria that are to be taken into account in exercising the discretion, it seems likely that a discretionary power will meet *Charter* requirements. It may also be that wide discretionary powers are permissible if they operate primarily for the benefit of the subject.[84]

Demonstrably

What is the significance of the term "can be demonstrably justified"? Why "can be" instead of "have been"? Why "demonstrably" instead of "demonstrated"?

These words were added to section 1, together with the requirement that limits be "prescribed by law" by an amendment proposed by the Government of Canada to the Joint Parliamentary Committee in January 1981. The previous formulation had been: "such reasonable limits *as are generally accepted* in a free and democratic society . . .".[85]

The purpose of the amendments was stated in the Government's explanatory notes to "narrow the limits that could be placed on the rights and freedoms guaranteed in the Charter",[86] and the insertion of "demonstrably" seems to have been intended to require more by way of proof of justification than a mere assertion by government or an assumption by the court. The suggestion that "demonstrably" be included was first made in the evidence of Professor Walter Tarnopolsky before the Joint Parliamentary Committee,[87] in the context of a submission that the onus under section 1 must lie on those who seek to restrict *Charter* rights, and when the Government of Canada proposed its inclusion in the amendment to section 1 it was with specific reference to that purpose of Professor Tarnopolsky's.[88]

The words chosen were not as clear as they might have been. If the section had permitted only such limits "as *have been demonstrated* to be justified", rather than those that *"can be demonstrably* justified", the need for proof would have been more obvious. But Government of Canada representatives appeared convinced that these two formulations were synonymous. Senator Tremblay brought the question sharply into focus during the deliberations of the Parliamentary Committee:

> Was it the intent of the sponsors of this amendment that the limit actually be demonstrated as justified? In that case, the wording is not appropriate . . . I do not feel that it states

83. *R.* v. *Red Hot Video Ltd.* (1985), 6 C.R.D. 525.100-03 (B.C.C.A).

84. *Re Federal Republic of Germany and Rauca* (1983), 145 D.L.R. (3d) 638 (Ont. C.A.).

85. Proposed *Constitution Act, 1980*, s.1. Emphasis is added.

86. *Consolidation of Proposed Resolution and Possible Amendments as Placed Before the Special Joint Committee by the Minister of Justice*, January 1981 at 3.

87. *Ibid.*

88. *The Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada*, First Session, Thirty-second Parliament, 1980-81, at 38:45 (Jan. 15, 1981).

> exactly what it intends to . . . I would have said 'reasonable limits prescribed by law as it is, or are, demonstrated to be justified' . . . Is the demonstration in question optional or obligatory?
>
> . . .
>
> *Mr. Kaplan* (Acting Minister of Justice): It is up to the judge to determine whether the demonstration is satisfactory or not . . .
>
> *Senator Tremblay:* So does the wording effectively state that the demonstration must be made?
>
> *Mr. Kaplan:* Yes, in my opinion the wording is quite clear . . .
>
> *Senator Tremblay:* . . . Does it mean that the demonstration that is justifiable has to be made or does it refer just to the possibility that it could be made?
>
> *Mr. Kaplan:* My interpretation is that a court would have to be satisfied.
>
> *Senator Tremblay:* With a demonstration?
>
> *Mr. Kaplan:* With a demonstration.
>
> *Senator Tremblay:* So I was wrong in my reading.[89]

Can the intention expressed by Mr. Kaplan be reconciled with the words used? If it was intended that a court be "satisfied . . . with a demonstration" that a limit is reasonable and justified, rather than just assured that the government is capable of so demonstrating if it chooses to do so, why was "demonstrable" used instead of "demonstrated"? One explanation is possible. Perhaps the more conditional form was used to avoid the need for justification of limits to be demonstrated *at the time of their introduction.* It should be borne in mind that most "reasonable limits" have existed since long before the advent of the *Charter.* Perhaps the conditional language of section 1 was intended to make it clear that no demonstration is legally required until such time as the limit in question is challenged in court.

In any event, even if there is a theoretical distinction between proving that a limit *can* be justified, and that it *is* justified, it will probably amount to the same thing in practice, since few courts would accept that something *could* be demonstrated without seeing the demonstration themselves. The demonstration need not always be in open court, of course. Where sensitive matters of a confidential nature are involved, a court might find a legally prescribed use of *in camera* proceedings for the examination of a section 1 justification to be a reasonable limit on the rights of "public hearing" and "fundamental justice" under the *Charter.*

The question of who is responsible for the demonstration will be considered in the next section.

Onus of Proof and Persuasion

It is the responsibility of those who rely on section 1 to establish its applicability.[90] As Chief Justice Dickson has said extra-judicially:

> The language of section 1 . . . casts an onus on the government to demonstrate — which I take to mean by presenting persuasive evidence — that its proposed infringement is justified.[91]

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89. *Ibid.*, at 42:35 (Jan. 21, 1981).
90. Finkelstein, *supra* n.2.
91. *Supra* n.1, at 28.

A contrary argument was rejected by the Ontario Court of Appeal in *Re Southam and The Queen (No. 1)* in the course of considering whether provisions of the federal *Juvenile Delinquents Act* requiring, in effect, *in camera* hearings for all juveniles tried under the Act, were contrary to the *Charter*:

> The Crown takes the initial position that the freedoms granted under s.2 of the Charter, guaranteed by s.1, are conditioned, qualified or limited rights by virtue of the wording of s.1 which qualifies the rights and freedoms by making them subject to reasonable limits on a particular basis. The onus or burden, the argument goes, is on him who is asserting that his particular freedom has been infringed or breached to establish that the limit imposed by the law being attacked, is an unreasonable limit which *cannot* be demonstrably justified in a free and democratic society.
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> It appears to me that that position and the reasoning supporting it is strained . . . Section 1 . . . makes it clear that if there is a limit imposed on . . . rights by law, the limits must be reasonable and demonstrably justified . . . The wording imposes a positive obligation on those seeking to uphold the limit or limits to establish to the satisfaction of the court by evidence, by the terms and purpose of the limiting law, its economic, social and political background, and, if felt helpful, by references to comparable legislation of other acknowledged free and democratic societies, that such limit or limits are reasonable and demonstrably justified in a free and democratic society. I cannot accept the proposition . . . that . . . the person who establishes that, *prima facie*, his freedom has been infringed or denied must then take the further step and establish, on the balance of probabilities, the negative, namely, that such infringement or limit is unreasonable . . .
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> . . .
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> . . . I am of the view that the complete burden of proving an exception under s.1 of the Charter rests on the party claiming the benefit of the exception or limitation . . .[92]

This position has been widely accepted by Canadian courts.[93] The Alberta Court of Appeal cautioned in one case that the fact the burden lies on the authorities under section 1:

> . . . does not mean that the party who successfully alleges that a statute is inconsistent with a right or freedom guaranteed by the Charter ought to be allowed or encouraged to sit back and say nothing to challenge the reasonableness or justifiability of the limit . . .[94]

All the Court appeared to mean by that, however, was that, as a practical matter, if a court hears only evidence or argument on the question from proponents of the limit, its reasonableness might be more readily accepted than if both points of view are fully presented.

Standard of Proof and Persuasion

It seems clear that it is the civil standard of proof — proof by a preponderance of probability — that applies to both the establishment of a *prima facie* case of *Charter* violation by the alleged victim,[95] and the establishment of reasonable and justified limits under section 1 by the authorities,[96] even when the issue arises in a criminal context.

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92. (1983), 146 D.L.R. (3d) 408, at 419-20 (Ont. C.A.). See also: *Canadian Newspapers Co.* v. *A.-G. Canada supra* n.48.
93. *Québec Association of Protestant School Boards* v. *A.-G. Québec (No. 2)*, *supra* n.6, affirmed, without reference to this point, *supra* n.7; *R.* v. *Stanger* (1983), 3 C.R.D. 775.20-05 (Alta. C.A.).
94. *R.* v. *T.R.* (1984), 4 C.R.D. 650.80-01.
95. *Re Jamieson and The Queen* (1983), 70 C.C.C. (3d) 430, at 433 (Que. S.C.).
96. *R.* v. *Huber* (1984), 4 C.R.D. 575.30-01 (Ont. Co. Ct.).

As Chief Justice Evans of the Ontario High Court put it in an extradition case:

> [T]he onus is upon the Federal Republic of Germany to establish that the 'limits', *i.e.*, extradition laws, are reasonable, are prescribed by law and are demonstrably justifiable in a free and democratic society. I consider the extent of that burden to be the usual civil onus based on the balance of probabilities.[97]

Evidence

The mere fact that a democratically elected legislative body has enacted a restriction on a *Charter* right or freedom does not, *ipso facto*, make the restriction a "reasonable" and "demonstrably justified" limit. Chief Justice Dickson, speaking extra-judicially in April 1985, said that the onus which section 1 places on government is to demonstrate "by presenting persuasive evidence" that limits are justified.[98]

The Ontario Divisional Court, when considering the validity of legislation which limited certain workers' rights in the interest of restraining inflation, commented:

> Those who support the validity of the legislation have not put before the Court any material that would tend to justify the complained of infringement of freedom of association . . . Since no evidence has been put before the Court . . . the Court is really being asked to find that the denial of the right . . . is a reasonable infringement . . . simply because a member of the government has said that he believes the government made the most sensible choice. If the government could justify the infringement of a guaranteed right in that fashion, section 1 of the *Charter* would be meaningless.[99]

It is possible for courts to take judicial notice of laws, and of "notorious" matters of fact, and this technique has been employed in some cases to find that section 1 has been satisfied.[100] The reasonableness of "the right of a free and democratic society to deport alien criminals" has been held to be "self-evident and therefore demonstrably justified", for instance.[101]

Judicial notice is unsuitable, however, for many, perhaps most, section 1 matters. An Ontario County Court judge has held, for example:

> Courts take judicial notice of matters which are so notorious or clearly establish that formal evidence of their existence is unnecessary . . . Judicial notice can be taken that thousands of people in Canada are killed or injured each year by drinking drivers, that alcohol is involved in a large percentage of all fatal traffic accidents across Canada and that the economic cost of alcohol-related accidents in the country involves many millions of dollars each year.[102]

On the basis of those assumptions, and in the absence of any evidence on the issue, he found the *Criminal Code* provision, making it an offence to have control of a vehicle while having a blood alcohol level in excess of

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97. *Re Federal Republic of Germany and Rauca* (1983), 141 D.L.R. (3d) 412 at 423 (Ont. H.C.). Approved in *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors* (1983), 147 D.L.R. (3d) 58 (Ont. D.C.).

98. *Supra* n.1.

99. *Service Employees' International Union and Broadway Manor* (1983), 44 O.R. (2d) 392 (Ont. H.C.). See also *R.* v. *Stanger supra*, n.93, in which the Alberta Court of Appeal refused to find legislation to be a reasonable limit in the absence of any evidence on the question.

100. *Re Gittens and The Queen* (1982), 137 D.L.R. (3d) 687 (F.C.T.D.) (*per* Mahoney J.).

101. *Supra* n.97 (*per* McKay C.C.J.).

102. (1985), 5 C.R.D. 525.100-03 (B.C.C.A.).

.08%, is demonstrably justified.[103] His use of judicial notice is open to serious question. Even if one accepts all the facts of which the Court took notice, they merely justify the need for protections against impaired driving; they do not address the accused's complaint, which was that an arbitrary standard of .08%, the suitability of which the accused contended varies from individual to individual, violated his *Charter* rights. To be cogent to a section 1 enquiry, evidence must relate to *both* the purpose of the legislation and the appropriateness of the means employed.

It must also be remembered that judicial notice is permissible with respect to *notorious* facts only. This seems to have been overlooked by the British Columbia Court of Appeal in *R.* v. *Red Hot Video Ltd.*.[104] This case was a prosecution under the obscenity provisions of the *Criminal Code*. The accused took the position that the provisions in question violated its freedom of expression. The Court held that even if they could be construed as infringements on that right, the provisions were nevertheless justified under section 1. Although evidence does not appear to have been introduced on the section 1 question, the Court was prepared to employ judicial notice:

> Judges are not so insulated from observing community standards that they have failed to notice the growing concern expressed by the Canadian community at large that *the undue sexual exploitation of women and children depicted in certain publications and films can, in certain circumstances, lead to abject and servile victimization.* To protect these classes of society, Parliament has enacted s.159, a precise and understandable standard for the guidance of those who would contravene contemporary Canadian community standards.[105]

If the emphasized words were intended to mean that reading or seeking obscene material leads some people to victimize others, the assertion is highly controversial, and therefore inappropriate for a fact-finding technique that is restricted to notorious facts. Strictly speaking, the Court took notice only of the fact that the "Canadian community at large" was expressing "growing concern" about the matter, but the state of public opinion on any given topic is seldom if ever so uniform or obvious as to be notorious. It is difficult, in any event, to understand how the existence of public concern that obscenity may lead to victimization could, in itself, be regarded as demonstrating that a particular form of obscenity control is justified.

This is not to deny the usefulness of judicial notice to establish section 1 justification in proper circumstances, including that which faced the Court in the *Red Hot Video* case. It should not require expert witnesses to persuade a Canadian court that placing legal constraints on obscenity is a justifiable legislative purpose — because of the notorious fact that most free and democratic societies have seen fit, for a variety of reasons, to impose such limits. The reasonableness of the particular limit might also be established to a court's satisfaction without the adduction of evidence if it is similar to those of other jurisdictions of whose laws the court may take notice, or if

103. *Ibid.* Emphasis added.
104. *Supra* n.83.
105. *Ibid.*. Emphasis added.

the provisions of the law, on their face, appear reasonable to the court in light of its knowledge of the notorious characteristics of Canadian society.

Although judicial notice may relieve the authorities of the need to adduce evidence as to the justifiability and reasonableness of restrictive laws in obvious situations, many situations are far from obvious. A restriction may be novel or unique, either as to purpose or means. Or, someone challenging a familiar and long-standing restriction may raise novel reasons to doubt its validity. In many circumstances, therefore, courts must receive and weigh evidence before deciding whether a legal limit on *Charter* rights is legitimized by section 1. In the *Québec Protestant School Board* case, for example, the trial court heard testimony on the reasonableness of the denial of English language instruction to certain children from the three applicants, the Minister of Education, two demographers, a mathematician, an historian, and a sociologist.[106]

Does Section 1 Restrict Section 33?

It has been contended by some that a legislative opt-out enacted under section 33 of the *Charter* is subject to judicial scrutiny under section 1 for the purpose of determining whether it is a "demonstrably justified" "reasonable limit".[107] From a purely textual point of view, this appears to be a plausible argument. Section 1 states that the rights and freedoms set out in the *Charter* are guaranteed "subject only to" legally prescribed and demonstrably justified reasonable limits, and section 33 does not include section 1 in the provisions that may be overridden. The *Charter* seems open to the interpretation, therefore, that when a legislative body opts out of a *Charter* right under the authority of section 33 the supporters of the opting out legislation may be required to demonstrate its justifiability and reasonableness under section 1. Where a full-fledged legislative debate on the merits of the particular overriding provision preceded its enactment, most courts would, no doubt, be satisfied that justification had been demonstrated. In the case of a measure like Québec's Bill 62, however, which opted out of all possible *Charter* rights with respect to every Québec statute, and which was debated in general only, rather than with respect to particular rights or particular legislative enactments, a court might well call for a fuller demonstration of justifiability and reasonableness with respect to the particular legislation before it.

This argument was propounded in a recent Québec case, and rejected by Chief Justice Deschênes. Accepting that the *Charter* is entitled to a "generous interpretation in favour of the citizens whose rights it guarantees", and that section 33, being an exception to those rights, must be given

106. *Supra* n.6.

107. D.J. Arbess, "Limitations on Legislative Override under the Canadian Charter of Rights and Freedoms: A Matter of Balancing Values" (1983), 21 Osgoode Hall L.J. 113; B. Slattery, "Canadian Charter of Rights and Freedoms — Override Clauses Under Section 33 — Whether Subject to Review Under Section 1" (1983), 61 Can. Bar Rev. 391.

a "restrictive interpretation", the Chief Justice nevertheless agreed with those academic writers who believe section 33 to be immune from scrutiny under section 1:

> Section 1 in effect gives the court the power to appreciate the reasonableness of laws as well as their justification and, depending on the circumstances, to quash them. The same is not the situation under s.33. Section 33 imposes conditions of form which the legislature must comply with . . . but, once these conditions are met, the legislature reassumes its sovereign power in the fields of its competence and the substance of its derogated law will escape the control of the courts. Thus, it is in vain that the applicants and the intervenent invoke 'a spirit' of s.33. . .[108]

Whether this point of view will be accepted by the Supreme Court of Canada remains to be seen.

Although Chief Justice Deschênes made no reference to legislative history, there seems little doubt that the politicians who devised section 33 as a compromise between the competing claims of judicial review and legislative supremacy intended that it would be the legislative branch that had the final say under section 33. They would probably have been surprised had someone suggested the possibility that this 'final say' could itself be reviewed by the courts under section 1. However, they would probably have been equally surprised to learn that the opt-out procedures they devised would permit the sort of wholesale override, without debate about specific restrictions, that the Québec legislature adopted. Legislative history is of limited usefulness where unforeseen developments are concerned.

108. *Alliances des professeurs de Montréal* v. *A.-G. Québec* (1984), 5 D.L.R. (4th) 157, at 162 (Que. S.C.).