# The Criteria of Justification Under *Oakes*: Too Much Severity Generated Through Formalism

*Pierre Blache*[*]

THE MERE PRESENCE OF SECTION 1 in the *Canadian Charter of Rights and Freedoms*[1] might have led one to conclude that rights and liberties were not as strongly protected in Canada as was the case in countries where no limitation clause had been inserted in the constitution. Since most people agreed that the courts would have come to justify limits to rights and liberties in the absence of such a provision it was at least logical to ask whether its presence was not a sign that limits were to be justified more easily than where no mention of such a power existed. The fact that the text required that such limits, prescribed by law, had to be reasonable enough to be demonstrably justified in a free and democratic society, could have been taken as obvious, the mere mention of the possibility of justification being seen as the most significant aspect of the provision. In short, the suggested reading would have been that it was more easy to find such reasonable limits demonstrably justified in Canada since it was expressly provided for.

As everyone knows judicial and legal history did not unfold according to such a reading of section 1. Stringent criteria of justification were initially established, for reasons that the Supreme Court of Canada has given mainly in *R.* v. *Oakes*.[2]

I wish to concentrate on the criteria of justification as they were expressed and founded in *Oakes*. My purpose is to remind us of the difficulty of the decisions that were then made. I will try to show that they might have been different. I consider that initially the Court did

[*] Faculty of law, Université de Sherbrooke.

[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*], s. 1.

[2] [1986] 1 S.C.R. 103; I know that flexibility has been introduced in the implementation of the criteria, and it was done early. Cases like *Edwards Books & Art Ltd.* v. *R.*, [1986] 2 S.C.R. 713, *Irwin Toy Ltd.* v. *A.G. Québec*, [1989] 1 S.C.R. 927, and *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143, reveal that such a development occurred. I am happy with such an evolution. But since *Oakes* was the turning point and remains the basic reference, I submit that it still is of the utmost interest to try to understand what happened in *Oakes* and assess it.

establish criteria of justification which were too stringent, and chose a process that was too formalist when we consider its dynamics. Its reasons for doing so were not always convincing, and I suspect that we were not told at the time what the deciding factor was. Perhaps it was not seen — but I doubt it.

To make my point I will start by expressing doubts about the construction on which the Court ostensibly first based its choices. I will then identify two criticisms addressed to its work and try to demonstrate that they are, to a great extent, well founded attacks. The intervening history exhibits a prudent revisionism that seems to confirm the doubts that I express here.

## I. OF GUARANTEE, JUSTIFICATION, UNITY, DUALITY, AND BALANCING

GIVEN THE TITLE OF SECTION 1, "Guarantee of Rights and Freedoms," one might have insisted on the unity of the provision and drawn the conclusion that its purpose was to confer a limited guarantee, the whole provision being read as a unified norm rather than divided in two basic proposals as was done in *Oakes*:[3] an absolute or almost absolute guarantee and a high standard of justification. The English wording, in one sentence, is in harmony with a reading of section 1 as a relative guarantee of rights and freedoms. The French text uses two phrases — one guaranteeing rights and freedoms and the other stating the conditions to be met by limits — introducing a duality that is foreign to the title and to the English wording.

Such a unified reading would have led to a unified analytical process, under which interpretation and justification would have been integrated.[4] It would then have been difficult — if not impossible — to contrast under section 1 a pure vision of a right or freedom and the limitation that a specific law was imposing on it, thereby justifying a very severe test, as the court did in *Oakes*.

The slow development of a realist theory of each right and freedom resulting from such an approach would have been in keeping with the usual way of asserting judicial powers and would have been prudent in a field where law and policy meet and the legitimacy of judicial intervention is questioned.

The solution that has finally been adopted, strictly separating interpretation and justification, creates two risks. The first is that it

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[3] *Supra*, note 2.

[4] By "interpretation" I refer here to the task of defining the rights and freedoms, while "justification" is concerned with the reasons that may justify an infringement.

tends to multiply the areas in which the State will be seen as authorized to infringe on rights and freedoms, but where a unified approach would describe the result as simply not an infringement. The second is that the courts run a much higher chance of having to amend their interpretation of rights and freedoms, since the dual process that has been chosen may often lead to a general *a priori* formulation of a right or freedom.

Section 1 of the *Charter* might quite easily have been construed as a mandate to balance societal interests and individual and group rights. The use of the term "reasonable" points clearly toward an explicit involvement in such a task and a spectrum going from "mere rationality" to "strict scrutiny," or the necessity of measuring, by example, the degree of over-inclusiveness or under-inclusiveness. It is flexible enough to refer to various degrees of fit to be reached depending on the relative importance of objectives and the gravity of the infringement on rights and freedoms. The Supreme Court of Canada, as I will explain hereafter, has chosen instead to formulate the rules of the analysis of justification so as to leave very little room for balancing. By doing so it seems that the court has refused the role that it was asked to play. One of my aims is to explain to what extent, why, and at what costs it has made this choice.

Notwithstanding the serious arguments in favour of a high degree of deference to Parliament and the legislatures, a unified approach to guarantees, and a mandate to balance interests, the Supreme Court has chosen other paths. It has devised in *Oakes* a very stringent test to assess justifications being advanced by the State. To reach such a conclusion it has strongly opposed two steps in the process to be followed to study any complaint under the Charter: first, an investigation in order to see if a right or freedom has in fact been limited; and second, an analysis of the reasons and facts submitted by the State to support its conduct. It has also preferred to resist, to a very large extent, its mandate to balance interests and rights and freedoms.

## II. Accusations of Severity and Formalism

Since *Oakes*, the attitude of the Supreme Court has been attacked mainly for two reasons: the rigour of its test; and the formalism that

characterizes its approach. The two-step procedure and the use the court has made of it have encountered less opposition.[5]

Both criticisms are serious. The first stems from the democratic respect for anything prescribed by law where such law is the product, directly or indirectly, of representative legislatures. That opposition to the stringency of the test imposed on such laws owes nothing, in itself, to the methodology which is used in the assessment of the State's justification, since the argument is aimed at the impact of the test *as such*.

The second criticism, the one against formalism, takes two forms. In its most radical version it comes down to denouncing the hypocrisy or the naïvete of those who seek to hide or do not see the balancing of values going on behind the veil of a neutral looking device.[6] In a less radical fashion it simply calls for a supplement to the *Oakes* test that should take the form of an intelligible political theory of the Charter.[7]

These criticisms may be combined or made separately. Thus, the rigour of the test may be criticized all the more strongly because it involves a legislative second-guessing of the choices made by legislatures. According to such a view a candid acknowledgment of what is going on and a process well adapted to the task would legitimate a flexible test.

But it is also possible to oppose the test for its methodology only, without regard to its rigour or weakness. It is then rejected only because it hides a political process or is in need of a political theory that would rid it of its deceptive impact or of its inadequacy.

As I have already mentioned, some could oppose the severity of the test as such *whatever* be its methodology. To them deference to the legislature stems from the majoritarian conception of democracy,

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[5] However, Henri Brun and Guy Tremblay have expressed their strong opposition to the construction adopted by the Court, which appears to them to proceed from a confusion of limitations on and derogations from rights and freedoms. They consider that a limitation clause is by nature related to the construction of rights and freedoms and not to their wilful bypassing. See *Droit constitutionnel*, 2d ed. (Cowansville, Que.: Les Editions Yvon Blais, 1990) at 830.

[6] P. Monahan, *Politics and the Constitution; The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987) at 53; 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; P.A. Chapman, "The Politics of Judging: Section 1 of the Charter of Rights and Freedoms" (1986) 24 Osgoode Hall L.J. 867.

[7] See E.P. Mendes, "In Search of a Theory of Social Justice; The Supreme Court Reconceives the *Oakes* Test" (1990) 24 R.J.T. 1.

which requires great respect for the present day clear choices of the majority against the long term and vague values an ancient majority has written in the constitution. The logical and legal characteristic of the test has no effect on their opposition. Basically, they consider that the legislature must be seen as having balanced the pros and cons of limiting a right or a freedom, and that its decision on such a topic deserves great respect.

The position of the Supreme Court appears to be based on two related choices: the one for a severe test and the other for a mainly means-ends test as opposed to a balancing one. I consider that these choices were wrong, and I intend to demonstrate how they fed on each other and which one was decisive in building the *Oakes* test. My aim is not to reveal an historical event: I have no particular insight on the way the various choices were made. In the following paragraphs I intend to do three things: I will identify the two choices that were made; I will give my reasons for entertaining strong reservations concerning the basis of such choices and their impact; and, finally, I will try to reveal the basic choice. Was it the option for severity or the choice of a means-ends model that was determining?

## III. Is There Severity and Formalism?

In a sense a criticism that denounces the *Oakes* test as being too severe and formalist looks contradictory. Indeed, if formalism is seen as the quality of what is without substance, it is logically impossible to criticize a test for being both too severe and formalist. I use the concept of "formalism" here in a less drastic manner: to underline the fact that a given analytical process is characterized by a means to ends assessment that does not imply a balancing of deleterious effects on rights and freedoms against legislative objectives, but only an evaluation of the degree of rational fit between means and legislative objectives. If this second meaning is given to "formalism," then severity may combine with it in the same test.

To assess the *Oakes* test as to severity and formalism it is necessary to remember the meaning given to formalism above. I suggest, however, that it is also necessary to distinguish analysis based on the "on the face" test and one based on the dynamics of the process. For example, if a test is such that its usual effect is to lead to a result before a true balancing of deleterious effects and legislative objectives takes place, we must conclude that it is a formalist test.

My view is that, seen as applied or from a dynamic perspective, the *Oakes* test is too severe and formalist in the sense that it normally

consists of a means to ends analysis that does not integrate a true balancing of effects and objectives, even if on its face the test is not formalist.

### A. Severity

How is the test a severe test? As applied, it does not seem to be by reason of the control being exercised on the purpose of the law. Even if the decision in *R.* v. *Big M. Drug Mart*[8] was a result of such a control, the general trend seems to be to concentrate on the proportionality analysis rather than on a weighing of the aim of Parliament. That proportionality test is described as follows by the Court:

> First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in the first sense, should impair "as little as possible" the right or freedom in question: R. v. Big M. Drug Mart Ltd., *supra* at p. 352. Third there must be a proportionality between effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as a "sufficient importance."[9]

After having mentioned that the effect of the measure is an infringement of a right or freedom the Court adds that the third component must lead to a more thorough investigation. It writes:

> Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violations and the degree to which the measures which impose the limit trench open the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purpose it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.[10]

The two first elements of the proportionality test impose the heavy burden to demonstrate that there was no other way to pursue the objective than the one chosen by the legislature. I see no difference bet-

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[8] [1985] 1 S.C.R. 295.

[9] *Supra*, note 2 at 139.

[10] *Ibid.* at 140.

ween such a demand and the necessity test used in the United States under the strict scrutiny level of judicial control. Such a high degree of fit between means and ends imposes a very heavy burden on legislatures. And, if at times laws do succeed in the face of such a demand for an exact fit, they will surely be very few. Some will argue that the third step of the proportionality test, the one where the balancing of objective and deleterious effects takes place, might lead to varying levels of scrutiny. I will discuss that possibility in a moment. My impression is that the test is to be applied in following the order that is established by the court. If this is the case it means that the third step has no real weakening impact on the first two steps. It comes too late in the process. As described above it seems that it is a step that should almost never be reached.

**B. Severity and Formalism**

How is the test a formalist test without ceasing to be a severe one? To answer this question, I must consider the two senses already given to formalism, the first demanding a total absence of substantive dimension, and the other excluding only a true balancing of values. I must also distinguish the test on its face from the test according to its dynamics.

If formalism is conceived as meaning total unsubstantiality of the test, the accusation fails. As we have seen the balancing of the degree of fit between the objective and the measures limiting rights or freedoms is not based on a vague hierarchy of objectives and deleterious effect; certainly not when we consider the dynamics of the test. Applied in the order indicated by the court the test asks for necessity. We are not in the presence of a spectrum of different degrees of fit, but are required fundamentally and primarily to assess the necessity of the measures.

However, if we consider the test on its face, it seems to authorize the use of two levels of rigour. This stems from prescriptions given by the Court concerning the third step of the proportionality test. It indicated that "the more severe the deleterious effects of a measure, the more important the objective must be "for the measure to be justified". And this is so "even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied". The net result is a higher demand: that the measure be necessary for a more than sufficient objective, more than "pressing and substantial". The court refers to some criteria in order to justify such higher objective. It mentions "the nature of the right or freedom violated, the extent of the violation and the degree to which the measures which impose the

limit trench upon the integral principles of a free and democratic society."[11] Even if it has given guidance on these integral principles the failure to give criteria with which to weigh rights and freedoms leaves a substantial amount of formalism in its approach. But we must not forget that the usual operation of the test does not allow the court to reach this formalist step.

If formalism is seen instead as something which results from the lack of true balancing of values, what do we find? As we have just seen, on its face, the test calls for a kind of balancing at the third step of the measure of proportionality. But such a balancing does not usually take place since it is very difficult not to end the operation during the two first steps of the analysis which require proof of necessity. Thus, seen in a dynamic perspective, the test is formalist.

On its face, however, the test cannot be described as formalist when one takes into consideration the last step of the procedure. At that time the court may conclude that the deleterious effect of a measure necessary to achieve the objective is such that, its necessity is insufficient since the objective of the measure is not important enough. At that stage it is clear that we are no longer controlling the fit between means and ends but are balancing effects and objectives. The process is undirected, the only possible result being a rejection of the measure and it seems impossible to discover that the effect of the measures was so marginal as to require a less important objective or a weaker degree of fit between means and ends.

In conclusion the dynamics of the dual test devised in *Oakes* is such that it is a severe and formalist process since a rational connection is required between means and ends and hence the analysis is limited to an assessment of the degree of fit between the means chosen and the objective.

The test would lose much of its formalism and become more flexible if seen as a process that begins with an assessment of the measured deleterious effects. If such a reading were authorized it would lead to a direct balancing of measures and objectives. Losing its formalism by the passage from a strictly means-ends analysis to a balancing process, the test would then appear incomplete to the extent that no criteria is offered to rank rights, freedoms, and objectives. Some may answer that the integral principles of a free and democratic society supply us with those criteria. But they must know that quite divergent conclusions might be reached from such a vague source.

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[11] *Ibid.* at 139.

## IV. Were Severity and Formalism Justified?

The solution which the Court has found in *Oakes* might appear as optimal. It seems to have two virtues: ensuring to rights and freedoms the strong protection that they should get, and containing the decisional process in a setting that protects the Court from attacks based on an involvement in policy assessments inconsistent with the Court's status and capacity.

But one may also see as utterly inappropriate a single test to control the various justifications offered to sustain limits on different rights and freedoms in almost any circumstances. And, in the same perspective, the choice of a very severe test leads to a rigour that will be excessive in many cases, especially in the context of a process that exhibits a built-in bias for a generous construction of rights and freedoms at the definitional stage. In such a situation one may conclude that many levels along a sliding scale approach would have been more suited to the complexity of the task.

I do not intend to discuss here the argument for an intermediary test. I will concentrate my comment on the fact that the dynamics of the chosen test tends to make it incompatible with the sliding scale or multiple degrees options that might have been chosen. Such solutions would have required a passage from means-ends analysis to the balancing of objectives and effects in order to justify at different levels of scrutiny.

Since very good reasons must be offered for the kind of severity and formalism that were retained in *Oakes* I will propose my assessment of these reasons in the following paragraphs, taking into account the repercussions and the grounds of the choices made.

### A. Severity

The repercussions of the choice of a very severe test have already been mentioned. But they must be more clearly identified. I have indicated that the type of severity flowing from the test leads to one level of scrutiny since any nuances that might be inserted in the process come too late. Such a result seems to be particularly inappropriate where there is such a stress on the part of the Court on two factors: the justifications of limits on rights or freedoms must be found only under section 1, and rights and freedoms are to be construed according to a very liberal approach before coming to justifications. Under a charter that contains only one justification clause such a strict construction of that section leads toward too strict a measure of control.

The expressions used in section 1 to refer to the degree of scrutiny to be applied are not without ambiguity. I do not share the view of those who infer a mere rationality test from the indication that rights and freedoms may be restricted "within reasonable limits". And I do not see in the ultimate resort to a free and democratic society a clear mandate to impose a kind of strict scrutiny in all cases. The Supreme Court has not suggested that the answers were clearly given in the text. It invoked rather the entire context.

It did so, first, in the following terms:

> It is important to observe at the outset that s. 1 has two functions: first, it constitutionally guarantees the rights and freedoms set out in the provisions which follow; and, second, it states explicitly the exclusive justificatory criteria (outside of s. 33 of the Constitution Act, 1982) against which limitations on those rights and freedoms must be measured. Accordingly, any s. 1 inquiry must be premised on an understanding that the impugned limit violates constitutional rights and freedoms — rights and freedoms which are part of the supreme law of Canada.[12]

The essence of the argument for severity is that a right or freedom has already been found violated when section 1 stage is reached, and that this compels a highly severe test. I find that such an inference involves an unjustified dualist construction of section 1 and a circularity in inferences that seriously weaken the process.

As I have indicated at the outset, one of the central questions to be answered concerning section 1 concerns precisely its unity or duality. Is it to be read as a guarantee clause or a clause containing two provisions: one guaranteeing the rights and freedoms and the other setting the criteria of justification for limits. The title and the English version indicate that it is a guarantee clause. As such it means that rights and freedoms are guaranteed up to such reasonable limits as can be demonstrably justified in a free and democratic society, limits to be ascertained when prescriptions of law will be submitted to the court for assessment. According to such a reading one cannot speak of a violation of rights or freedoms before such an assessment has been made. The court has unanimously agreed with such a position recently in *Slaight Communications Inc.* v. *Davidson*.[13] The performance of the control under section 1 is a step in the search for a right or freedom violation. Notwithstanding all this, the court has based its choice of a very severe test on the existence of a violation of a right or a freedom where none has been proved in a *prima facie* manner.

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[12] *Ibid.* at 135.

[13] [1989] 1 S.C.R. 1038 at 1079.

To this unwarranted dualist reading of section 1 must be added the circularity of the reasoning followed by the Court. It concludes that a highly severe test must be applied under section 1 since a violation has already been established at the first stage. But it also infers from the presence of section 1 that the construction of a right or freedom must be made without considering limits except where the text explicitly requires it. We are thus faced with a situation where the cause engenders the effect which produces the cause. The test is derived from the discovery of a violation of a right or freedom, which discovery is to be made in a way that is inferred from the presence of a justification test at the section 1 stage.

The court invoked a second context in the following manner:

> The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.[14]

The court saw in the values and principles of a free and democratic society the "final standard of justification". It wanted to stress that such values had to be kept in mind at the justification stage and that it was not a time to accommodate easily the policy considerations of the State. The fact that the same values that had been the genesis of rights and freedoms were the ultimate standard of justification pointed towards a continuity of rigour between the first and second stage of the study of an alleged Charter violation. What is surprising here is that this approach which is invoked, at the section 1 stage, to justify a highly severe test of justification, does not seem to have been stressed in the same way at the first stage when rights and freedoms had to be defined to establish the prima facie violation. A balanced application of these values would have suggested that the democratic aspect plays as significant a role at the first stage as the free character of the society might play at the second.

Finally, I must stress that the only proposition which the court claimed to have established by the contextual arguments was that "a stringent standard" must be applied to justifications presented by the State.

It was not clear that the standard had to take the form of a single or unique level of scrutiny. Since, as I have already mentioned, the standard includes on its face two levels of scrutiny, but its dynamics

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[14] *Supra*, note 2 at 136.

strongly favour one level (necessity for a "pressing and substantial" objective), it is for considerations other than the ones I have just criticized that the Court ultimately adopted a unique level of scrutiny. Could it be because formalism was required?

**B. Formalism**

The type of formalism selected by the Court is not the radical type that may easily be branded as without content, except if one feels justified to make such a diagnosis where substantial judicial discretion remains. It may be described as formalism in the sense that, considering its dynamics, it does exclude a hierarchy of various State objectives to balance several levels of deleterious effects on rights and freedoms. The result is a singular level of scrutiny whose characteristic lays in the strong link being required between state measures and objectives. Its application does not ask for an initial balancing of state objectives and deleterious effects to establish various levels of scrutiny to be applied. Once a limit on rights or freedoms is perceived at the first stage, it follows that the measures will have to be necessary to the objective being pursued.

Some might oppose the conclusion that no such balancing is taking place. They will point out that two levels of sufficiency of objectives flow from the varying degrees of deleterious effect if the test is considered on its face. A deleterious effect requires a pressing and substantial objective, and a more deleterious effect might require an even more compelling objective, if one takes into consideration not only the initial control of objectives provided for under the test but also the third element of the proportionality assessment of means. The process, on its face, will then be seen as leading to four possible situations, depending on the types of objectives being required by changing gravity of deleterious effect. If the effect is not deleterious the law is justified. If it is deleterious it is justified only if the measures are necessary to pressing and substantial objectives. If the deleterious effect is very high it is justified only if the measure is required by a compelling state interest. If the effect is extreme on rights and freedoms the measure cannot be justified.

The answer to such views is that the higher importance of objectives being required appears only if one reaches the third element of the proportionality test, and that such a possibility is marginal because of the very high level of fit required by the two first elements of that same test.

But is it not possible to consider that the notion of balancing on which the accusation of formalism is based here is an unwarranted

one, that balancing does not require that several degrees of importance of legislative or state objectives be inferred from various intensities of deleterious effects? May we not argue that there is balancing of effects and objectives where an effect has to be deleterious to be compensated by a pressing and substantial objective? My answer is yes. Since the finding of a deleterious effect requires that a pressing and substantial objective be found to balance such effect it is clear that there is balancing since there is comparison and search for equilibrium. But the process is formalistic because the spectrum of solutions, being so narrow, is inappropriate to reflect the various shades of reality, What are the consequences of and the reasons for such a choice?

We have already explained that the choice of very stringent criteria of justification did not imply a singular level of scrutiny. We have also described the kind of formalism which characterizes the test of justification as one that reduces the spectrum of criteria of justification. We may then infer that it is formalism that led the Court to express its demand for high severity under the form of a single level of scrutiny. Severity was thus heightened as a consequence of formalism.

But we must observe that the test was not described as is the strict scrutiny test in the United States under the Fourteenth Amendment. If necessity was demanded concerning the link between the measures and the objectives here, the State interest that ultimately was to legitimize the effect on rights and freedoms was only to be a pressing and substantial one instead of a compelling one. Is there, here, a kind of softening of the attitude? If so does it annul the formalistic impact of the test? I do not see a softening of the option for severity in the fact that a less drastic requirement than the one of strict scrutiny along the United States model was imposed. Since the severity chosen by the Court was to govern most situations and was to be the less demanding level of scrutiny under the Charter, even if we consider the effect of the third element of the proportionality test in *Oakes*, the court could not borrow the highest level of scrutiny under American constitutional law. There is no real softening and in fact high severity is the clear consequence of the decision.

If formalism strengthened the option for severity and served it well, it also gave, at least, a more legal appearance to the decisional process of the Court. Such a result that does not need to be explained must be taken into account if one is to pass judgment on the choice of the Court. Indeed it seems that this preoccupation was the dominant factor since no specific reasons were given for a formalist approach that left so little room for balancing of effects and objectives. The

"stringent standard of justification" adopted by the Court would have been stringent enough if it had provided for a necessary relationship of measures to a compelling State interest where deleterious effect were severe, and for a substantial relationship of measures to pressing and substantial state interest where there was a somewhat less deleterious effect. But the spectrum of levels of scrutiny would thus have been expanded. The Court seems to have tried to retain such an approach, to a certain extent, without adding *levels* of scrutiny, by asking for necessity in relation to a pressing and substantial interest instead of a compelling state interest. Such a synchronising effort to unite two levels of scrutiny in a unique test is telling of the Courts' will to avoid too stringent a criteria without clearly introducing several levels of balancing. But, by resorting to such a stratagem, it has imposed too stringent a test to control the bulk of the cases to be assessed under section 1: the necessity test.

Such a test, considering the varying gravity of the deleterious effect that the courts are called to justify, would undoubtedly have led the Court to look as an intruder in the legislative field and one that waved much too strong an axe. Had it been perfectly loyal to the very stringent demand it had decided to impose as a minimum hurdle to the elected parliaments it would have jeopardized its credibility. For that reason, which has the same roots as its dubious try at a formalist compromise, we may expect that it will some day expand the range of possible levels of scrutiny.

The Court has tried to legitimate stringent criteria of justification by adhering to formalism in the analytic process in basing the severity of the norm on an excessively dualist reading of section 1 and resisting too much to balancing. All this was done in the name of respect for a free and democratic society and the separation of politics and law. But such a choice, which seems dubious when its reasons and repercussions are scrutinized, appears also to illustrate a loss of touch with the Canadian constitutional tradition and the larger context of the Constitution. The sovereignty of parliament, section 33, section 1, and the Canadian character should have led the Court toward less stringency and more opened balancing. Judicial history reveals however that this has been taking place since then.