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I. INTRODUCTION

This paper addresses the topic of judicial deference to legislative choices under section 1 of the Charter. More specifically, it asks, in what circumstances will the Supreme Court of Canada accord such deference and has the standard of justification under section 1 become diluted? We begin by examining how the Supreme Court of Canada has treated the *Oakes*[1] test in the 15 years that have elapsed since its adoption in 1986. We then identify three different themes that have emerged from the Supreme Court's application of section 1 over this time. These themes are: first, that section 1 has been marginalized through the development of internal balancing tests in the definition of many of the substantive rights protected by the Charter — these internal tests consider factors that are very similar to those considered in a section 1 inquiry; second, that the original universality of the *Oakes* test has given way to context or right-specific adjudication whereby section 1 seems to be applied on an *ad hoc* basis; and third, that in recent years the Supreme Court of Canada has severely weakened the evidentiary requirement needed to justify an infringement of a right under section 1. We conclude by suggesting that the *Oakes* test be abandoned as a universal standard of justification, and that instead, a rights-specific approach be developed.

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1 *R. v. Oakes*, [1986] 1 S.C.R. 103.

II. The Rise and Fall of the Oakes Test

If a canon of Canadian Charter jurisprudence exists, the first entry would be the *Oakes* test. It is learned by rote by first-year law students, recited time and again by lawyers in their factums, and referenced by judges in judgment after judgment. The *Oakes* test is so ingrained in our collective constitutional consciousness that we do not often take the time to consider it.

When the Charter came into effect in 1982,[2] it took time for constitutional challenges to traverse the system. The Supreme Court of Canada did not decide its first Charter case until 1984.[3] Between 1982 and 1986, lower courts struggled with the application of section 1 which reads, "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."[4] The Supreme Court of Canada did not address what section 1 required until *R. v. Oakes*,[5] where Chief Justice Dickson articulated the test that had to be met under section 1:

> First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
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> Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. 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 this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big*

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2 Except for section 15, which did not come into force until 1985.

3 *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357 (interpreting section 6 of the Charter) was released on May 3, 1984. *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, was in fact heard before *Skapinker* but decided a few months after *Skapinker*.

4 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

5 *Supra*, note 1.

> *M Drug Mart Ltd.*, *supra*, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".
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> With respect to the third component, it is clear that the general effect of any measure impugned under s. 1 will be the infringement of a right or freedom guaranteed by the *Charter*; this is the reason why resort to s. 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the *Charter*, and an almost infinite number of factual situations may arise in respect of these. 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 violation, and the degree to which the measures which impose the limit trench upon 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 purposes 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.[6]

As Dickson C.J.C. acknowledged in *Oakes*, this was a "stringent standard of justification."[7]

If *Oakes* were to be taken at face value, courts would accord minimal deference to legislative choices and many laws would have to be struck down as failing this "stringent standard of justification."[8] However, the *Oakes* test soon proved that its bark was worse than its bite. In the same year that *Oakes* was decided, Chief Justice Dickson retreated from its strict language in *Edwards Books*,[9] where the Supreme Court upheld Ontario's Sunday closing law. In examining the minimal impairment prong of the *Oakes* test, Dickson C.J.C. stated that the appropriate inquiry was whether the law impaired the right "as little as is reasonably possible."[10] This was a noticeable addition to the language of *Oakes*, which required that the right be impaired "as little as possible."[11] *Edwards Books* marked the beginning of the Supreme Court of Canada's softening of the minimal impairment part of the *Oakes* test. In subsequent cases, instead of demanding that

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6 *Id.*, at 138-39.

7 *Id.*, at 136.

8 On this generally, see Beatty, *Constitutional Law in Theory and Practice* (Toronto: University of Toronto Press, 1995).

9 *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713.

10 *Id.*, at 772.

11 *Oakes*, *supra*, note 1, at 139.

the legislature choose the least restrictive means of achieving its policy objective, the Court would give the legislature room to manoeuver.[12]

III. The Increasing Irrelevance of Section 1

In the 1980s, the Supreme Court of Canada struggled with the challenge of applying section 1. Since 1990, it has increasingly reduced the relevance of this section to the adjudication of Charter rights. As we discuss below, this has resulted from the development of internal balancing tests at the rights' definition stage, the rejection of the universal application of the *Oakes* test, and the weakening of evidentiary requirements under section 1.

1. Balancing of Interests in Defining Rights

The structure of the Charter contemplates a two-stage analysis for the adjudication of rights. In the first stage, the court determines whether a right has been infringed. This is largely a definitional stage where the scope of the protected right is determined. In the second stage, under a section 1 inquiry, the court determines whether the infringement of that right is justified. This system sets up an *external balancing test* where section 1 is used to determine whether the impugned governmental action is constitutional. Over the last decade, the Supreme Court has moved towards greater reliance on *internal balancing tests*. It now

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[12] Professor Hogg termed this flexibility in applying section 1, granting the Legislature "a zone of discretion." See Hogg, *Constitutional Law of Canada*, looseleaf (Toronto: Carswell, 1997), at §35.33. In *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at 999, the Court referred to this as "a margin of appreciation.' "Certainly, the cases after *Edwards Books* have applied the requirement ['margin of appreciation'] in a flexible fashion, looking for a reasonable legislative effort to minimize the infringement of the Charter right, rather than insisting that only the least possible infringement could survive." Hogg, *supra*, at §35.11(*b*). See, *e.g.*, *R. v. Whyte*, [1988] 2 S.C.R. 3 (upholding provision of the *Criminal Code* which presumes that a person occupying the driver's seat has care and control of the car for the purposes of the offence of drunk driving); *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122 (upholding provision of *Criminal Code* authorizing court order banning disclosure of the identity of complainant in sexual assault case); *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 214 (upholding injunction prohibiting striking union from picketing courthouse workplace of some of its members); *United States of America v. Cotroni; United States of America v. El Zein*, [1989] 1 S.C.R. 1469 (upholding extradition of a Canadian citizen to the United States); *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)* (*"Prostitution Reference"*), [1990] 1 S.C.R. 1123 (upholding the offence of communicating for the purpose of prostitution); *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 (upholding mandatory retirement laws); *R. v. Keegstra*, [1990] 3 S.C.R. 697 (upholding *Criminal Code* provision on hate propaganda); *R. v. Butler*, [1992] 1 S.C.R. 452 (upholding *Criminal Code* provision on pornography); *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876 (upholding provision of provincial election legislation imposing five-year disqualification on a member of the legislative assembly who had been found guilty of a corrupt or illegal practice). In each of the above cases, as noted by Hogg, *supra*, it is not difficult to conceive of less restrictive means of accomplishing the government's objective.

engages in significant balancing at the definitional stage and only proceeds to a section 1 inquiry if it finds that the right, balanced against other competing interests, has been infringed.

The end result of the move from external to internal balancing has been that many Charter cases rise and fall at the first part of the inquiry and not at the section 1 stage. Between 1990 and 2000, section 1 was used to uphold impugned governmental action in only a handful of cases outside of section 2(*b*).[13] The only area where section 1 use remains significant is in section 2(*b*) freedom of expression cases.[14] Between 1990 and 1999, the Court used section 1 to strike down governmental action in five out of 25 freedom of expression challenges. In the two most recent section 2(*b*) cases, the Court used section 1 to uphold the impugned legislation.[15]

How has the Court moved towards this preference for internal over external balancing? In some instances, rights protected under the Charter contain language that lends itself to internal balancing. For example, section 7 provides that "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

The text of section 7 itself mandates a two-stage inquiry. The first is whether the right to life, liberty or security of the person has been deprived and the second is whether that deprivation is in accordance with the principles of fundamental justice. Only after a deprivation has been found not to be in accordance with the principles of fundamental justice would a court proceed to section 1. However, there is a real question whether government action that has been held to violate section 7 could ever be justified to under section 1.[16] In the *B.C. Motor Vehicle Act Reference*, Lamer J. (as he then was) stated that section 1 could only justify an infringement of section 7 in exceptional circumstances such as natural disaster, war or epidemic.[17] In the same case, Wilson J. opined that section 1 could never justify

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[13] According to Professor Patrick Monahan, between 1990 and 2000, only 1/33 of section 15 cases turned on the application of section 1. During the same years, only 1/102 section 7 cases turned on section 1. See Monahan, "The Supreme Court of Canada in 1999: A Year in Review" (1999 Constitutional Cases: An Analysis of the 1999 Constitutional Cases of the Supreme Court of Canada, Osgoode Hall Law School, Toronto, 7 April 2000). Our examination of the Charter cases decided by the Supreme Court of Canada in 2000 would increase these figures to 1/35 and 1/105 respectively.

[14] This is not surprising given the broad interpretation that the Supreme Court of Canada has given to section 2(*b*) and the Court's unwillingness to engage in balancing in determining whether section 2(*b*) has been infringed. See *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.

[15] See *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69 and *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2. But see the dissenting opinion in *Sharpe* which indicated a willingness to consider revisiting the question of the scope of section 2(*b*).

[16] For an excellent discussion of this issue, see the decision of Vertes J. in *R. v. Brenton* (1999), 180 D.L.R. (4th) 314, at 343-45 (N.W.T.S.C.).

[17] *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at 518.

an infringement of section 7.[18] Most recently, in *United States of America v. Burns*,[19] the Supreme Court held that the extradition of two murder suspects without assurances that they would not face the death penalty violated section 7 and could not be justified under section 1. Similarly, section 8's protection against "unreasonable search and seizure" also lends itself to internal balancing, as does the right under section 9 not to be "arbitrarily detained or imprisoned."[20]

However, increasingly, it is the proclivity for the use of "contextual factors" in internal balancing tests that has closed the door on section 1. The Supreme Court's reliance on contextual factors in internal balancing tests is illustrated most graphically in its recent decisions under section 15 and section 12.

In *Law v. Canada (Minister of Employment and Immigration)*,[21] Mr. Justice Iacobucci, writing for a unanimous Court, articulated the principles for analysis under section 15(1) of the Charter. The Court summarized the test in *Law* as follows:

> The approach adopted and regularly applied by this Court to the interpretation of s. 15(1) focuses upon three central issues:
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> (A) whether a law imposes differential treatment between the claimant and others, in purpose or effect;[22]
> (B) whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment;[23]
> (C) whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee.[24]

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[18] *Id.*, at 523.

[19] (2001), 195 D.L.R. (4th) 1, at 56-58, 2001 SCC 7.

[20] The Supreme Court of Canada has said that arbitrary detention or imprisonment may be justified under section 1, at least in the context of random roadside sobriety checks: see *R. v. Hufsky*, [1988] 1 S.C.R. 621. For other examples of rights that lend themselves to internal balancing consider also the right under section 11(*a*) "to be informed without unreasonable delay of the specific offence"; the right under section 11(*b*) "to be tried within a reasonable time"; the right under section 11(*d*) "not to be denied reasonable bail without just cause."

[21] [1999] 1 S.C.R. 497. The Court applied the *Law* test in subsequent decisions: see *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203; *M. v. H.*, [1999] 2 S.C.R. 3; *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703; *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37.

[22] The Court expressed the first step of the test as follows (at 548):

> Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?

[23] The enumerated grounds under section 15(1) are clear. The Court has provided guidance on analogous grounds in *Corbiere*, *supra*, note 21, at 251-52.

[24] *Law*, *supra*, note 21, at 548.

In this third prong of analysis, context becomes important to the Court's inquiry. The Court has identified the purpose of section 15(1) as follows:

> In general terms, the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.
>
> The existence of a conflict between the purpose or effect of an impugned law and the purpose of s. 15(1) is essential in order to found a discrimination claim. The determination of whether such a conflict exists is to be made through an analysis of the full context surrounding the claim and the claimant.[25]

According to the Court, discrimination is to be determined by an examination of contextual factors.[26] In *Law*, the Court identified at least four contextual factors which influence the determination of whether section 15(1) has been infringed. However, it noted that the list of contextual factors was an open one which could vary from case to case.[27]

The complex, contextual and subjective nature of the Court's section 15 test bodes ill for the future of section 1. Essentially, the *Law* test's analysis of a section 15(1) breach overlaps with the section 1 analysis in a manner that effectively eviscerates section 1. The *Law* test now requires a judge to consider the purpose of the legislation under the initial rights inquiry rather than under the first stage of the *Oakes* test. As well, the test articulated by the Court for the determination of "discrimination" under section 15(1) contains many of the same elements found in the proportionality part of the section 1 analysis. Finally, the heavy reliance on "context" in section 15(1) is matched by the Court's insistence on "context" in the application of the section 1 test. The net effect of this overlap is to strip section 1 of any meaningful role in section 15 jurisprudence.[28]

A similar phenomenon has occurred in the section 12 jurisprudence. Section 12 prohibits the imposition of cruel and unusual treatment or punishment. As in section 15's *Law* test, it is hard to envision any meaningful role for section 1 in

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[25] *Id.*, at 549.

[26] *Id.*, at 550. The focus of the inquiry is both subjective and objective. The relevant view is that of the reasonable person, in circumstances similar to those of the claimant, who takes into account the contextual factors relevant to the claim. See also *id.*, at 534.

[27] See *id.*, at 550-51.

[28] See Bredt and Nishisato, "The Supreme Court's New Equality Test: A Critique" (1999 Constitutional Cases: An Analysis of the 1999 Constitutional Cases of the Supreme Court of Canada, Osgoode Hall Law School, Toronto, 7 April 2000).

section 12 jurisprudence because "In order to properly consider a s. 12 challenge to a punishment, the court must examine all of the relevant contextual factors."[29] In so doing, the Court considers many factors which would be relevant to a section 1 inquiry.

A final example of the triumph of internal balancing over section 1 external balancing can be found in the Supreme Court's recent decision in *Burns*.[30] In *Burns*, the Supreme Court held that extraditing two murder suspects, without seeking assurances that they would not be executed, violated their right to life and liberty under section 7 in a manner that was not in accordance with the principles of fundamental justice. The Court devotes over 60 paragraphs to its discussion of the principles of fundamental justice whereas the section 1 analysis is contained in just 10 paragraphs. The Supreme Court expressly recognized its use of an internal balancing test under the heading, "*The Balance of Factors in This Case Renders Extradition of the Respondents Without Assurances a Prima Facie Infringement of their Section 7 Rights*."[31] The end result is that the section 1 analysis that follows this extensive internal balancing is short and conclusory. The Court found that extraditing the murder suspects to face the death penalty without assurances served a pressing and substantial objective of advancing mutual assistance in the fight against crime. However, the Court determined that the Minister of Justice failed to show that extraditing the murder suspects to face the death penalty without assurances was necessary to achieve that objective.

In short, section 1 has been usurped by the development of internal balancing tests which rely heavily on context.

2. The Rejection of Oakes' Universal Application

Originally, *Oakes* set one standard of justification that was to apply to all rights under the Charter. However, in *Andrews v. Law Society of British Columbia*, McIntyre J. opined that *Oakes* was too stringent for application in all cases.[32] McIntyre J. rejected the *Oakes* test completely and applied a different standard of justification under section 1.[33] McIntyre J.'s reluctance to apply *Oakes* in all circumstances has been amplified by the Court in at least two ways: (1) the contextualization of section 1; and (2) other departures from universality.

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29 *R. v. Morrisey*, [2000] 2 S.C.R. 90, at 108, 2000 SCC 39.

30 *United States of America v. Burns*, *supra*, note 19.

31 See Heading Number 12 which can be found, *id*., at 53.

32 See *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at 184.

33 *Id.*, at 185.

(a) The Contextualization of Section 1

While the development of internal balancing tests at the rights-definition stage stole some of section 1's thunder, the Court has also "contextualized" the section 1 analysis. In *Edmonton Journal v. Alberta (Attorney General)*,[34] Wilson J., writing for herself, opined that a contextual approach was preferable under section 1. She contrasted the contextual approach with the abstract approach to determining the underlying value sought to be protected by a right. Wilson J. promoted the virtue of the contextual approach as recognizing that a particular right or freedom may have a different value depending on the context:

> The contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it. It seems to be more sensitive to the reality of the dilemma posed by the particular facts and therefore more conducive to finding a fair and just compromise between the two competing values under s. 1.[35]

McLachlin J. adopted the contextual approach of Wilson J. in writing for a unanimous Court in *Rocket*.[36] McLachlin J. stated that in undertaking a section 1 analysis, the Court must place the conflicting values in their factual and social context thus enabling the courts to have regard for the special features of the aspect of the protected right under scrutiny.[37]

Similarly, in *Thomson Newspapers*,[38] another freedom of expression case, Bastarache J., writing for the majority, cemented the centrality of context in section 1 adjudication. The first heading in the section 1 portion of his judgment is entitled "Contextual Factors" and Bastarache J. states that "The analysis under s. 1 of the *Charter* must be undertaken with a close attention to context."[39] Bastarache J. opined that the emphasis on context "is inevitable as the [*Oakes* test] requires a court to establish the objective of the impugned provision, which can only be accomplished by canvassing the nature of the social problem which it addresses."[40]

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[34] [1989] 2 S.C.R. 1326.

[35] *Id.*, at 1355-56 (*per* Wilson J.). Although not cited by Wilson J., the origin for the contextualization of section 1 may arguably be found in the passage in *Oakes* stating that "Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups" (*R. v. Oakes*, [1986] 1 S.C.R. 103, at 139).

[36] *Rocket v. Royal College of Dental Surgeons*, [1990] 2 S.C.R. 232.

[37] See *id.*, at 246-47. In *Rocket*, freedom of expression under section 2(*b*) was the particular right being considered by the Court under section 1.

[38] *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877.

[39] *Id.*, at 939.

[40] *Id.*

Bastarache J. continued, asserting that the proportionality could only be evaluated through a close attention to detail and factual setting, stating that:

> In essence, context is the indispensable handmaiden to the proper characterization of the objective of the impugned provision, to determining whether that objective is justified, and to weighing whether the means used are sufficiently closely related to the valid objective so as to justify an infringement of a *Charter* right.[41]

The problem with the Supreme Court's increasing reliance on "context" is that it essentially reduces adjudication to a highly subjective exercise with little predictability. The *Oakes* test was intended to provide a degree of objective analysis and predictability; in contrast, extensive emphasis on context undermines the rule of law. The amorphous concept of "context" makes it increasingly difficult for lawyers to advise their clients as to how a court will consider a constitutional challenge.

(b) Other Departures from Universality

In *Irwin Toy*, the Court indicated its willingness to defer to legislative choice in a number of circumstances, stating that a more flexible approach to justification under section 1 should be applied in such cases.[42] The Court explained that:

> … in matching means to ends and asking whether rights or freedoms are impaired as little as possible, a legislature mediating between the claims of competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how that balance is best struck. Vulnerable groups will claim the need for protection by the government whereas other groups and individuals will assert that the government should not intrude.[43]

The Court further reasoned that this legislative exercise often would require "an assessment of conflicting scientific evidence and differing justified demands on scarce resources" of which the Court must be mindful.[44] These were further circumstances where a more flexible approach to section 1 justification was warranted, reasoned the Court.

The Court contrasted the governmental role in mediating between different groups with the governmental role as the "singular antagonist of the individual."[45] As the Supreme Court defined it in *Irwin Toy*, the paradigmatic instance of the

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41 *Id.*
42 *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at 993-94.
43 *Id.*, at 993.
44 *Id.*
45 *Id.*, at 994.

state as "singular antagonist" against the individual was in the criminal justice sphere. In such instances, the Court opined that "the courts can assess with some certainty whether the 'least drastic means' for achieving the purpose have been chosen, especially given their accumulated experience in dealing with such questions."[46] In short, in the criminal justice sphere, the Court will apply the stringent version of the *Oakes* test.[47]

3. Weakening of Evidentiary Requirements Under Section 1

Generally, the government bears the burden of demonstrating that a limit is justified under section 1. As set out in *Oakes*, the standard of proof is the civil standard of proof by a preponderance of probability.[48] In *Oakes* itself, Dickson C.J.C., while stating that evidence would generally be required, opined that "there may be cases where certain elements of the s. 1 analysis are obvious or self-evident."[49] In the early years after *Oakes*, there were a number of instances where the Court was willing to defer to the legislative decisions in the complete absence of evidence[50] or with very little of it.[51] From time to time, the Court would express a willingness to accept recourse to common sense in lieu of evidence under section 1.[52]

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[46] *Id.*

[47] It is not clear to us that mediation is any less an aspect of the criminal law. The Court has arguably recognized this in a number of cases where it applied a more flexible version of the *Oakes* test and explicitly recognized the interests of other groups: see *R. v. Keegstra*, [1990] 3 S.C.R. 697 (upholding the hate propaganda section of the *Criminal Code*); *R. v. Butler*, [1992] 1 S.C.R. 452 (upholding obscenity provisions of the *Criminal Code*). Indeed, many sections of the *Criminal Code* are aimed at protecting specific groups such as children, married persons, creditors, property owners, etc. We believe that the legislation of criminal law is fundamentally an exercise in mediation between different groups in our society.

[48] See *Oakes*, *supra*, note 35, at 137.

[49] *Id.*, at 138.

[50] See *R. v. Jones*, [1986] 2 S.C.R. 284, at 299-300, 315; *Retail, Wholesale & Department Store Union, Local 580 v. Dolphin Delivery*, [1986] 2 S.C.R. 573, at 590.

[51] See, *e.g.*, *R. v. Edwards Books and Art*, [1986] 2 S.C.R. 713, at 769-70. This case and those cited in the previous note have been the subject of criticism. See Hogg, *Constitutional Law of Canada*, looseleaf (Toronto: Carswell, 1997), at §35.4 and sources cited therein.

[52] See *e.g.*, *R. v. Schwartz*, [1988] 2 S.C.R. 443, at 448, where McIntyre J., writing for a plurality, stated that in considering proportionality under the *Oakes* test, "A certain element of common sense must dictate." See also *R. v. Lucas*, [1998] 1 S.C.R. 439, at 465 (*per* Cory J.); *Adler v. Ontario*, [1996] 3 S.C.R. 609, at 720 (*per* McLachlin J.); and *R. v. Sharpe*, [2001] 1 S.C.R. 45, at para. 78 ("To justify the intrusion on free expression, the government must demonstrate, through evidence supplemented by common sense and inferential reasoning, that the law meets the test set out in *R. v. Oakes*, [1986] 1 S.C.R. 103, and refined in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877.").

The high-water mark for requiring evidence under section 1 occurred in 1995 in *RJR-MacDonald*.[53] Despite comments to the contrary,[54] McLachlin J., writing for the majority, imposed a demanding burden of justification on the government. She criticized the government for failing to adduce evidence to show that less intrusive regulation would not achieve its goals.[55]

However, *RJR-MacDonald* remains an anomaly. Both before and after *RJR-MacDonald*, the Court has shown itself willing to defer to legislative assumptions so long as they appear to be reasonable.[56] Thus, in *Butler*,[57] and recently confirmed in *Little Sisters*,[58] the Court accepted that Parliament had a "reasoned apprehension of harm"[59] in banning pornography. Furthermore, in *Butler* the Court stated that it was reasonable to assume harm in the absence of any hard evidence.[60]

Similarly, the Court has demonstrated a willingness to make a section 1 determination in the absence of evidence and without the *Oakes* test. In *Stone*,[61] Bastarache J., writing for a majority, imposed the onus of proving automatism on the party that raised the issue. Writing in dissent, Binnie J. criticized the majority for making such a determination because none of the parties or interveners argued for such a change or brought forth any evidence under section 1 to justify the limitation on the accused's rights.[62]

IV. Conclusion: Should Oakes Be Abandoned?

In the 15 years that have elapsed since its birth, the *Oakes* test has become far more flexible than readers of the original language would have predicted. Perhaps this result should not be surprising. The *Oakes* test was created in the early years of Charter adjudication when the Court was anxious to send a signal that, unlike its

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[53] *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at 336-50.

[54] *Id.*, at 333 ("Discharge of the civil standard does not require scientific demonstration; the balance of probabilities may be established by the application of common sense to what is known, even though what is known may be deficient from a scientific point of view").

[55] *Id.*, at 339. McLachlin J. was also critical of the government for failing to adduce evidence to show that attributed health warnings would not be as effective as unattributed warnings on tobacco packaging. This was a clear retreat from the Court's so-called "margin of appreciation."

[56] For a review of this position, see *Thomson Newspapers*, *supra*, note 38, at 940-43 (*per* Bastarache J.).

[57] *R. v. Butler*, [1992] 1 S.C.R. 452, at 491.

[58] *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, at 1198.

[59] *Butler*, *supra*, note 57, at 504, and *Little Sisters*, *id.*, at 1165.

[60] It is particularly important to note the Court's continued embrace of this doctrine in *Little Sisters* where it was confronted with a body of evidence about the salutary effects of gay and lesbian pornography.

[61] *R. v. Stone*, [1999] 2 S.C.R. 290, at 377-79.

[62] *Id.*, at 324-25.

interpretation of the Canadian Bill of Rights, it intended to give strong support to the rights protected by the Charter. The strict test established by *Oakes* clearly accomplished that result. However, as it became clear that a strict application of *Oakes* would make it difficult to uphold any breach, the Court developed techniques to dilute the test. Thus, outside of section 2(*b*), section 1 is being eclipsed by the development of internal balancing tests. When the section 1 stage is reached, the Court continues to pay homage to *Oakes*, but its application is more result-oriented than principled.

The time has come for the Court to abandon the myth of *Oakes*' universality. Instead of asserting in each case that *Oakes* applies and then contextualizing each application of the test, the Court should begin to construct rights-specific section 1 tests to suit the context of various rights in the Charter. The Court has already acknowledged that the context of a section 1 inquiry under a section 2(*b*) claim is different than under a section 7 claim, etc. The challenge that lies ahead is to articulate these differences in a rational and comprehensive manner in order to create section 1 tests that will lend some stability and predictability to Charter adjudication.