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I. INTRODUCTION

In its seminal 1986 decision in *R. v. Oakes*,[1] the Supreme Court of Canada first promulgated a framework for the application of section 1 of the *Canadian Charter of Rights and Freedoms*.[2] From the outset, the *Oakes* test was intended to be a "stringent standard of justification" to be applied in a common or universal manner to all Charter breaches. This "one size fits all" approach has proven to be problematic. In short, attempts to shoehorn all section 1 analysis into an *Oakes* framework have led to a dilution of the *Oakes* test, and a context-driven and unpredictable approach. The thesis of this paper is that the time has come to abandon the *Oakes* test, and develop in its place a rights-specific approach to section 1 analysis.[3]

To develop this thesis, the paper first reviews briefly the *Oakes* test as it was originally articulated. The next section describes how the *Oakes* test has been eroded through definitional balancing, diluted through the contextual approach and the weakening of the evidentiary requirement, and in some cases not applied at all. We then review the movement towards a rights-specific approach in Israel, and the *Dagenais/Mentuck*

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1 [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.) [hereinafter "*Oakes*"].

2 *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 [hereinafter "Charter"].

3 Some of the ideas developed in the paper were considered in Christopher D. Bredt & Adam M. Dodek, "The Increasing Irrelevance of Section 1 of the Charter" (2001) 14 S.C.L.R. (2d) 175 and C. Bredt, "The Right to Equality and *Oakes*: Time for Change" (2010) 27 N.J.C.L. 59.

test, wherein the Supreme Court has explicitly abandoned *Oakes*. In the final section, we argue that the Supreme Court's struggles with *Oakes* are inherent in any attempt to apply a universal approach to the myriad of rights protected by the Charter, and conclude that transparency, predictability and fairness dictate that the Court adopt an explicitly rights-specific approach to section 1 balancing.

II. THE *OAKES* TEST: "A STRINGENT STANDARD OF JUSTIFICATION"

Section 1 of the Charter provides that it "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 Canadian approach — to include an explicit limitation clause rather than relying on the courts to shape the analysis with respect to the balancing of competing interests — is consistent with international human rights conventions,[5] and is in contrast to the American *Bill of Rights*, which does not contain an explicit balancing clause.[6]

The wording of section 1 was a matter of some debate during the drafting of the Charter. A previous iteration of section 1 allowed for limits on rights that were "generally accepted in a free and democratic society".[7] The addition of "reasonable" and "demonstrably justified" to the final text of section 1 reflects the intention that limitations on Charter rights be held to what the Supreme Court later referred to as a "stringent standard of justification".[8]

Although the Charter came into effect in 1982, the Supreme Court of Canada did not provide a comprehensive framework for the justification of limitations on Charter rights under section 1 until 1986. In *Oakes*, Dickson C.J.C. articulated the four-part "section 1 test" which has continued to be applied for over 25 years, and, as Hogg has put it, "has taken on some of the character of holy writ":[9]

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[4] Charter, *supra*, note 2, s. 1.

[5] Peter W. Hogg, *Constitutional Law of Canada*, looseleaf (Scarborough, ON: Thomson Carswell), at 38-2 and 38-3 [hereinafter "Hogg"].

[6] *Id*., at 38-3.

[7] E. Mendes, "The Crucible of the Charter: Judicial Principles v. Judicial Deference in the Context of Section 1" (2005) 27 S.C.L.R. (2d) 47, at 51.

[8] *Oakes*, *supra*, note 1, at para. 65.

[9] Hogg, *supra*, note 5, at 38-17.

> To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied.
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> 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". 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". 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". 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".[10]

A few points with respect to the *Oakes* test merit consideration at this stage.

First, although *Oakes* requires that that a government actor which seeks to uphold a violation of rights satisfy a four-part test, as Hogg has observed, it is the third step of the test — "minimum impairment"[11] — upon which nearly all section 1 cases have turned.[12]

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[10] *Oakes*, *supra*, note 1, at paras. 69-70 (citations omitted).

[11] Hogg, *supra*, note 5, cautions that it is not accurate to describe the test as the "minimal impairment" test, "because the word 'minimal' carries the connotation of trivial or slight, and a justified limit on a Charter right might be quite a severe limit on the right" (at 38-36). As is summarized later in this paper, the dilution of the *Oakes* test has clearly transformed Dickson C.J.C.'s "minimal impairment" test into a "minimum impairment" test.

[12] Hogg, *id.*, at 38-18.

Second, there is a tension in the case itself regarding the universal applicability of *Oakes*. Although the test is styled (and has subsequently been interpreted) as a test to be applied every time that section 1 is engaged, Dickson C.J.C. recognized that the test had to maintain some flexibility in order to respond to the variable rights and freedoms engaged by the Charter, and the factual scenarios which will be the subject of section 1 justification:

> 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 a 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 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.[13]

Third, although Dickson C.J.C. described the *Oakes* test as a "stringent standard of justification",[14] just a few months later in *Edwards Books*,[15] the minimum impairment arm of the test had already been softened. In that case, Dickson C.J.C. amended the "as little as possible" language with respect to least drastic means to "as little as is reasonably possible".[16] As we describe in greater detail below, this was but the first step in the dilution of *Oakes*.

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13 *Oakes*, *supra*, note 1, at para. 71.
14 *Id.*, at para. 65.
15 *R. v. Edwards Books & Art Ltd.*, [1986] S.C.J. No. [1986] 2 S.C.R. 713 (S.C.C.).
16 *Id.*, at para. 126.

III. THE FALL OF *OAKES*: DEATH BY A THOUSAND CUTS

The notion that the *Oakes* test has been diluted from the outset has been described by Sujit Choudhry as the "dominant narrative" with respect to its legacy.[17] In this section, we discuss a number of examples which demonstrate how this dilution has taken place. First, the Court has consistently engaged in a balancing of interests in defining the scope of the rights protected by the Charter, rather than leaving it to the section 1 analysis. Second, the "stringent standard of justification" promised in *Oakes* has been softened, both through the use of a contextual approach to section 1 analysis, and through the weakening of the evidentiary threshold required to support a section 1 justification. Finally, in certain contexts, the Court has expressly allowed for the section 1 analysis to be done without applying *Oakes* at all.

1. Definitional Balancing

The language and structure of the Charter dictate that the determination of whether a right has been infringed is confined to the first, "definitional" stage of the analysis, and that balancing rights and freedoms against reasonable limits on those rights and freedoms is undertaken separately, within the section 1 analysis. However, notwithstanding this clear distinction between definition/breach and justification, the Court has increasingly moved the justification analysis into the definitional stage of its Charter analysis.

In some cases, such a shift has been the inevitable result of language which suggests some balancing in the definition of the right. For example, section 7 of the Charter 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." Section 8 protects against "unreasonable search and seizure", and section 9 entrenches the right not to be "arbitrarily detained or imprisoned". Thus, the language of sections 7, 8 and 9 of the Charter mandate an internal balancing at the definitional stage of the analysis.[18] Given the internal balancing that

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[17] Sujit Choudhry, "So What is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian Charter's Section 1" (2006) 34 S.C.L.R. (2d) 501.

[18] There are other examples: s. 11(a) entrenches the right "to be informed without unreasonable delay of the specific offence"; s. 11(b) provides for the right "to be tried within a reasonable time"; and s. 11(d) provides for the right "not to be denied reasonable bail without just cause".

takes place at the definition/breach stage of these Charter rights, it is not surprising that section 1 rarely plays a role in the analysis of these rights, or that when it does it is duplicative of the analysis of breach.[19]

However, even where the language of the Charter does not compel balancing at the definitional stage, the Court often imports a balancing analysis in determining whether the right has been infringed. The best example of this approach is the Court's tortured section 15 equality analysis.

(a) Section 15

The Court recently revisited the test for an infringement of section 15(1) in *R. v. Kapp*,[20] finding that, going forward, the test should consist of the following questions: (1) Does the law create a distinction based on an enumerated or analogous ground?; and (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotype (*i.e.*, is it discriminatory)? The Court moved away from the "human dignity" analysis employed in *Law v. Canada (Minister of Employment and Immigration)*,[21] replacing it with the concept of "discrimination".

One of the main critiques of the *Law* test had been that it improperly shifted balancing and justification from the section 1 analysis to the section 15 analysis.[22] However, despite *Kapp* the Court has continued to employ a "contextual analysis" at the definitional stage of the section 15(1) analysis, and has thereby continued to include the types of considerations typically included in a section 1 analysis into the definitional stage. In fact, Hogg has suggested that the second arm of the section 15 test set out in *Kapp* "seems to come down to an assessment by the Court of the legitimacy of the statutory purpose and the reasonableness of using a listed or analogous ground to accomplish that purpose".[23]

In *Withler v. Canada (Attorney General)*,[24] the Court recently considered whether multiple different approaches to the calculation of a

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[19] In *Reference re Motor Vehicle Act (British Columbia) S 94(2)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.), Lamer J. (as he then was) stated that s. 1 could only justify an infringement of s. 7 in "exceptional circumstances, such as natural disaster, war or epidemic" (at para. 85). Justice Wilson opined in the same case that s. 1 could never justify an infringement of s. 7 (at para. 105).

[20] [2008] S.C.J. No. 42, [2008] 2 S.C.R. 483 (S.C.C.).

[21] [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497 (S.C.C.).

[22] See Christopher D. Bredt & Adam M. Dodek, "Breaking the Law's Grip on Equality: A New Paradigm for Section 15" (2003) 20 S.C.L.R. (2d) 33.

[23] Hogg, *supra*, note 5, at 55031.

[24] [2011] S.C.J. No. 12, [2011] 1 S.C.R. 396 (S.C.C.).

"supplementary" lump sum federal death benefit on the basis of the age amounted to a violation of section 15(1) of the Charter. The Court held that the legislation creates a distinction on the basis of age, but does not create a disadvantage, based on a contextual analysis akin to that set out by Hogg in his critique of *Kapp*. The Court held that the purpose of the benefit, which was only one part of a package of survivor benefits, was not to provide a long-term income stream for surviving spouses,[25] and the reductions in benefits for survivors aged 65 and older reflected the fact that a younger group of survivors would have different needs. The Court concluded that the "package of benefits, viewed as a whole and over time, does not impose or perpetuate discrimination".[26]

Another recent section 15 case, *Ermineskin Indian Band and Nation v. Canada*,[27] provides a further example of this "contextual approach". In *Ermineskin*, the Court considered whether the payment of oil and gas royalties to First Nations pursuant to the *Indian Act*, in contrast with royalty payments to non-Aboriginals, was in violation of section 15 of the Charter. Again, the Court held that the legislation creates a distinction, but not a disadvantage, citing an early section 15 case, *R. v. Turpin*:[28]

> In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also the larger social, political and legal context.[29]

The contextual approach which the Court applies to section 15 jurisprudence clearly duplicates the balancing and justification inherent in the section 1 analysis. The result of such "definitional balancing" has been to further marginalize section 1 (and, necessarily, any robust or thoughtful application of the *Oakes* test).

Although the Court seems to be making some attempts to address this issue, most recently in *Quebec (Attorney General) v. A.*,[30] it has not

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25 "For younger plan members, the purpose of the supplementary death benefit is to insure against unexpected death at a time when the deceased member's surviving spouse would be unprotected by a pension or entitled to limited pension funds. For older members, the purpose of the supplementary death benefit is to assist surviving spouses with the costs of the plan member's last illness and death." *Id*., at para. 5.

26 *Id.*, at para. 81.

27 [2009] S.C.J. No. 9, [2009] 1 S.C.R. 222 (S.C.C.) [hereinafter "*Ermineskin*"].

28 [1989] S.C.J. No. 47, [1989] 1 S.C.R. 1296 (S.C.C.).

29 *Ermineskin*, *supra*, note 27, at para. 193.

30 [2013] S.C.J. No. 5, 354 D.L.R. (4th) 191 (S.C.C.) [hereinafter "*Lola*"].

yet been successful. In that case, A. ("Lola") applied for a declaration that certain spousal support and property provisions of the *Civil Code of Québec*[31] were discriminatory under section 15(1), on the grounds that those provisions denied *de facto* spouses protection that was offered to spouses who were either married or in a civil union.

While the decisions of Abella, Deschamps and LeBel JJ. engaged in significant public policy analysis at the definition/breach stage, McLachlin C.J.C. preferred to undertake much of the same equality analysis under section 1. She argued that public policy considerations are more appropriate to a proportionality analysis than a discrimination analysis:

> [I]t is important to maintain the analytical distinction between s. 15 and s. 1. While the public policy basis for legislation has a limited relevance to the s. 15 analysis, it is central to the s. 1 inquiry. This flows from the two-stage model of constitutional review inherent in the *Charter*.[32]

Chief Justice McLachlin therefore preferred to separate the question of whether a disadvantage arising from a legislated distinction amounts to discrimination (properly answered under section 15) from whether that discrimination was reasonable when balanced against other public policy considerations (properly answered under section 1).

This approach may appear on an initial review to be a step in the right direction, as it addresses some of the concerns with respect to duplication. However, it remains to be seen how this aspect of *Lola* will be applied going forward; it is likely that most section 15 cases will continue analyze public policy considerations primarily at the definition/breach stage of the analysis rather than in the analysis of justification under section 1. In any event, *Lola* fails to shift other aspects of equality balancing, apart from public policy concerns, to the section 1 analysis.

(b) Section 2(b) — Public Forum Analysis

Generally speaking, the Court has taken a robust approach to the section 1 justification analysis in freedom of expression cases, due to the broad definition of section 2(b) of the Charter, which encompasses any attempt to convey meaning. As a result of the broad definition of the

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[31] S.Q. 1991, c. 64.

[32] *Lola*, *supra*, note 30, at para. 421 (citation omitted). Although disagreeing on the result, Abella J. concurred that the reasonableness of the distinction was a question properly left for s. 1.

right, section 2(b) cases have been at the forefront of section 1 analysis.[33] However, an exception to this approach is the Court's analysis of "public forum" issues — the right of freedom of expression on public property.

In *Committee for the Commonwealth of Canada v. Canada*,[34] the Court confronted the public forum issue for the first time, and split on the appropriate stage of the analysis to balance the competing interests. The majority of the Court[35] adopted an analytical approach that required that the balancing inherent in public forum cases — between the interests of the individual and the interests of government — take place at the definition/breach stage, as well as at the section 1 stage, of the analysis. Only L'Heureux-Dubé J. would have taken an approach that mandated that the balancing take place as part of the section 1 analysis.

More recently, in *Montreal (City) v. 2952-1366 Quebec Inc.*,[36] the Court reviewed and revised its analytical approach to public forum issues. The Court reiterated that despite the fact that "all expressive *content* is worthy of protection, the method or location of the expression may not be".[37] In order to perform this "screening" analysis, the Court engages in significant balancing at the definition/breach stage, and develops a test for future application which the Court affirms is the responsibility of the Charter claimant to satisfy. The Court goes on to address potential concerns with this approach:

> Another concern is whether the proposed test screens out expression which merits protection, on the one hand, or admits too much clearly unprotected expression on the other. Our jurisprudence requires broad protection at the s. 2(b) stage [but] also reflects the reality that some places must remain outside the protected sphere of s. 2(b). People must know where they can and cannot express themselves and governments should not be required to justify every exclusion or regulation of expression under s. 1. As six of seven judges of this Court agreed in *Committee for the Commonwealth of Canada*, the test must provide a preliminary screening process. Otherwise, uncertainty will prevail and governments

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[33] See, *e.g.*, *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927 (S.C.C.) [hereinafter "*Irwin Toy*"]; *Edmonton Journal v. Alberta (Attorney General)*, [1989] S.C.J. No. 124, [1989] 2 S.C.R. 1326 (S.C.C.) [hereinafter "*Edmonton Journal*"].

[34] [1991] S.C.J. No. 3, [1991] 1 S.C.R. 139 (S.C.C.).

[35] *Id.*, *per* Lamer C.J.C., La Forest J.

[36] [2005] S.C.J. No. 63, [2005] 3 S.C.R. 141 (S.C.C.).

[37] *Id.*, at para. 60 (emphasis in original).

> will be continually forced to justify restrictions which, viewed from the perspective of history and common sense, are entirely appropriate.[38]

However, this is precisely the function of the section 1 analysis: to ensure that the government bears the onus of justifying restrictions on the rights and freedoms protected by the Charter.

It is important to note that the effect of the Court's use of definitional balancing is to shift the evidentiary burden from the government to Charter claimants. This shift of the evidentiary burden is accompanied by the Court's willingness to dilute the government's evidentiary burden at the section 1 stage, which is discussed below. Together, the result is to substantially weaken *Oakes*' "stringent standard of justification".

2. Dilution of the Strictness of *Oakes*

(a) The Contextual Approach to Section 1

The emphasis on context that the Court has imported into the definition/breach stage of the analysis is mirrored in the contextualization of the section 1 analysis. The approach of the Court has been to recognize that a protected right or freedom may be assigned a different value depending on the context of the alleged breach. This approach to the application of the *Oakes* test originates in a decision of Wilson J. in *Edmonton Journal v. Alberta (Attorney General)*,[39] where she wrote:

> 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.[40]

The contextual approach was quickly adopted by the Court and remains an integral part of its section 1 analysis. In many cases, the contextual approach is expressly used as a means of diluting the stringent standard of justification otherwise required by *Oakes*.

Further evidence of "contextual" balancing in the section 1 analysis is found in the Court's willingness to defer to legislative choices in a number

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38 *Id.*, at para. 79.
39 *Supra*, note 33.
40 *Id.*, at 1355-56.

of circumstances, starting with its decision in *Irwin Toy Ltd. v. Quebec (Attorney General)*.[41] In that case, the Court drew a distinction between cases where the legislature was attempting to strike a balance between the claims of competing groups and those cases where "the government is best characterized as the singular antagonist of the individual whose right has been infringed".[42] The Court's rationale for this distinction was that the government is well-placed to analyze the claims of competing groups, but the courts are better positioned to analyze disputes between the government and individuals. On this basis, the Court purported to justify a higher level of scrutiny in so-called "singular antagonist" cases, and a higher level of deference in cases where competing groups are in competition for scarce resources. Regardless of whether there is a legitimate policy which underpins this distinction,[43] there is no question that the Court's explicit recognition of deference to the legislature in certain circumstances has weakened the application of the *Oakes* test.

(b) Weakening of the Evidentiary Requirement

As noted above, the shifting of the balancing analysis from section 1 to the definition/breach stage also shifts the onus from the government to the claimant. However, this is not the only means that the court has employed to weaken the strictness of the *Oakes* test. The Court has also significantly reduced the strictness of the evidentiary standard at the section 1 stage of the analysis through the development of a "reasoned apprehension of harm" test.[44]

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41 *Supra*, note 33.

42 *Id.*, at 994.

43 Arguably, there is none. The paradigm case of the "singular antagonist" would appear to be the criminal law. However, there is frequently balancing of interests and competing demands in Charter review of criminal provisions. In subsequent criminal law cases such as *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 (S.C.C.) (a challenge to the hate speech provisions in the *Criminal Code*, R.S.C. 1985, c. C-46), the Court did not make reference to the stricter requirement when the state is acting as a singular antagonist.

44 In other contexts, the Court has required that the government meet a higher threshold in order to justify a Charter breach. For example, in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] S.C.J. No. 68, [1995] 3 S.C.R. 199 (S.C.C.), the government was held to a standard of "demonstrable justification", and in *R. v. Mentuck*, [2001] S.C.J. No. 73, [2001] 3 S.C.R. 442 (S.C.C.) [hereinafter "*Mentuck*"] the government was held to a standard of "convincing evidence". The shifting sands of the s. 1 evidentiary standard provide a further concern with respect to certainty and predictability, particularly for Charter claimants, but also for the Crown.

A good example of this approach is the Court's decision in *R. v. Butler*.[45] In that case, the Court considered whether the *Criminal Code* definition of "obscenity" infringed section 2(b) of the Charter. It held that the definition was an infringement of section 2(b), but that the infringement was justified under section 1. In *Butler*, the Court concluded that, in the face of inconclusive social science evidence, Parliament was entitled to proceed on the basis of a "reasoned apprehension of harm", and relieved the government of its obligation to prove a clear link between obscenity and harm to society on a balance of probabilities as would normally be required in order to justify a breach under section 1.[46]

Another example of this approach is the Court's decision in *Harper v. Canada (Attorney General)*,[47] which considered limits on third party spending in federal elections. The Attorney General offered no evidence to support a connection between third party spending and electoral fairness. Despite this lacuna, the majority framed the analysis as follows:

> The legislature is not required to provide scientific proof based on concrete evidence of the problem it seeks to address in every case. Where the court is faced with inconclusive or competing social science evidence relating the harm to the legislature's measures, the court may rely on *a reasoned apprehension of that harm.*
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> …
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> On balance, the contextual factors favour a deferential approach to Parliament in determining whether the third party advertising expense limits are demonstrably justified in a free and democratic society. Given the difficulties in measuring this harm, a reasoned apprehension that the absence of third party election advertising limits will lead to electoral unfairness is sufficient.[48]

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[45] [1992] S.C.J. No. 15, [1992] 1 S.C.R. 452 (S.C.C.) [hereinafter "*Butler*"].

[46] *Butler* was applied in *R. v. Sharpe*, [2001] S.C.J. No. 3, [2001] 1 S.C.R. 45 (S.C.C.) and *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] S.C.J. No. 66, [2000] 2 S.C.R. 1120 (S.C.C.) to again relieve the government of the usual burden of demonstrating harm and to support a s. 1 justification of infringements of s. 2(b).

[47] [2004] S.C.J. No. 28, [2004] 1 S.C.R. 827 (S.C.C.).

[48] *Id.*, at paras. 77, 88 (emphasis added).

3. By-Passing *Oakes*: Charter Values

In *Doré v. Barreau du Québec*,[49] the Supreme Court recently affirmed that Charter analysis can proceed in some circumstances without applying *Oakes* at all.

In *Doré*, the Supreme Court affirmed the decision of the Tribunal des professions that a disciplinary reprimand issued by the Barreau du Québec's Disciplinary Council for a discourteous private letter sent to a sitting judge was a reasonable limitation of a lawyer's right to freedom of expression.

Justice Abella, writing for a unanimous Court, proposed that administrative decisions that undertook a proportionality analysis of Charter rights were to be reviewed on a standard of reasonableness, using administrative law principles, rather than scrutinized on the basis of the *Oakes* test. She notes that this is consistent with the Court's approach in previous cases to the application of Charter values to common law principles, where no *Oakes* analysis has been required.[50] This suggests that the *Oakes* test will not be applied when a Charter question is raised with respect to the exercise of discretion in an administrative forum, as it need not be applied by either the administrative body or in subsequent judicial review. Given the wide jurisdiction of administrative tribunals to decide Charter questions, as was recently affirmed in *R. v. Conway*,[51] this is a significant departure from the supposed universality of the *Oakes* test.[52]

IV. Time to Abandon *Oakes* — Toward a Rights-Specific Approach

1. International Perspectives

Instead of trying to apply *Oakes* universally to the section 1 analysis, the Supreme Court of Canada should begin to construct rights-specific section 1 tests to suit the context of the various rights and freedoms protected by the Charter. This has been the approach taken to the

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49 [2012] S.C.J. No. 12, [2012] 1 S.C.R 395 (S.C.C.).

50 *Id.*, at para. 39. See also *R. v. Daviault*, [1994] S.C.J. No. 77, [1994] 3 S.C.R. 63 (S.C.C.).

51 [2010] S.C.J. No. 22, [2010] 1 S.C.R. 765 (S.C.C.).

52 The Court in *Doré* also affirms that administrative law decisions on Charter values will be reviewed on the basis of reasonableness rather than correctness. This reinforces the gap between the application of the "strict standard" required by *Oakes* and the deferential approach taken to the review of the exercise of statutory discretion in *Doré*.

interpretation of the United States *Bill of Rights* — although the *Bill of Rights* does not contain an explicit justification clause akin to section 1 of the Charter, the American judiciary clearly and explicitly engages in balancing of competing interests in determining whether fundamental rights have been infringed. Importantly, the balancing that takes place in the American jurisprudence is rights-specific — there is no attempt to develop a universal approach.[53]

A similar approach is emerging in the Israeli jurisprudence. Justice Aharon Barak, former President of the Supreme Court of Israel, has written about the similarity between the limitation clauses in the Canadian and Israeli human rights provisions, noting that the Israeli provision was influenced by section 1 of the Charter.[54] He notes that although Israel initially followed Canada's lead and applied a universal justification test, regardless of the right invoked by a Charter litigant, the Supreme Court of Israel has more recently applied a rights-specific approach to justification. As he puts it:

> [F]or the purposes of safeguarding human rights against limitations by law, not all rights are of equal status. The status of the right to human dignity is not the same as the status of a property right, and, within the framework of the same right, the extent of protection from limitation may vary. Thus, for example, the extent of protection from limitation of the freedom of commercial expression in the framework of a specific aspect of a right (such as political speech), a limitation upon the core of the right is not the same as a limitation upon its outer rim.[55]

President Barak proposes a proportionality analysis (at the fourth stage of *Oakes*) which explicitly acknowledges a rights-specific hierarchy. However, his approach has been criticized on the basis that a focus on the fourth step of the *Oakes* test does not resolve one of the central concerns with a universal section 1 analysis: the "balancing" it calls for remains too subjective and lacks rigor and certainty.[56]

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[53] For example, certain grounds of discrimination, such as race, are strictly scrutinized, while others, such as age, are typically held to a lower standard of scrutiny.

[54] Aharon Barak, "Proportional Effect: The Israeli Experience" (2007) 57 U.T.L.J. 369, at 370.

[55] *Id.*, at 371-72.

[56] See Sara Weinrib, "The Emergence of the Third Step of the Oakes Test in *Alberta v. Hutterian Brethren of Wilson Colony*" (2010) 68(2) U.T. Fac. L. Rev. 77-97, at para. 53.

2. The *Dagenais/Mentuck* Model

In some instances, the Supreme Court has already adopted a rights-specific approach. A good example of this is the *Dagenais/Mentuck* test, which was developed and is applied in the context of section 2(b) cases which engage the open court principle. The Court explicitly acknowledged in *Dagenais v. Canadian Broadcasting Corp.*[57] and *R. v. Mentuck*[58] that the balancing of freedom of expression and the right to a fair trial requires a specially designed test in instances where a publication ban is sought. The test dictates that a publication ban should only be ordered where it is shown to be necessary to prevent a real and substantial risk to the fairness of the trial, and where reasonably available alternative measures would not prevent the risk. In addition, the test dictates that "the salutary effects of the publication ban outweigh the deleterious impact the ban has on free expression".[59]

The *Dagenais/Mentuck* test reflects the principles underlying the *Oakes* test — necessity and proportionality — while recognizing that particular circumstances require a context-specific test, and provides Charter litigants with a more predictable, transparent and coherent approach to the justification analysis. It therefore provides a helpful model which the Court may look to in developing context-specific approaches tailored to other rights protected by the Charter.[60]

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[57] [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835 (S.C.C.) [hereinafter "*Dagenais*"].

[58] *Supra*, note 44.

[59] *Id.*; *Dagenais*, *supra*, note 57. The Court recently applied the *Dagenais/Mentuck* approach to the balancing of the open court principle and freedom of religion in *R. v. S. (N.)*, [2012] S.C.J. No. 72, [2012] 3 S.C.R. 726 (S.C.C.), where it considered the right of the complainant in a sexual assault case to testify wearing a niqab and the right of the accused to a fair trial.

[60] A similar rights-specific approach to s. 1 analysis of s. 2(b) Charter claims is proposed by Chanakya Sethi in "Beyond *Irwin Toy*: A New Approach to Freedom of Expression Under the Charter" (2012) 17 Appeal 21. Sethi reviews the s. 2(b) analysis undertaken in Charter cases and concludes that the Court has suggested a hierarchy among different types of expression, with laws that limit political expression being strictly scrutinized, and laws that draw distinctions on the basis of commercial expression being held to a less rigorous standard of scrutiny. Sethi goes on to propose a s. 1 test which reflects these varied approaches, with three tiers of scrutiny of limits on expressive rights: "Each of these tiers can be applied under section 1 to ratchet up — or down — the level of scrutiny given by courts to proposed limits on the right, including the appropriate level of deference given to Parliament" (at para. 42).

V. CONCLUSION: LESSONS FROM THE COURT'S STRUGGLE WITH *OAKES*

The examples discussed above — the Court's use of definitional balancing, the contextual approach to definitional balancing and to section 1, the weakening and shifting evidentiary requirements, and the deference afforded by the Court — demonstrate that *Oakes* as a universal standard is not working. Implicit in the Court's jurisprudence is a recognition that not all rights are the same, and the factors that are relevant to the balancing of competing interests differ accordingly. Thus, any attempt to revert to a universal and stringent application of *Oakes* will devolve into the same fragmented approach that we see today.

The time has come to recognize that a universal approach does not make sense, and to explicitly abandon *Oakes* in favour of a rights-specific approach. Such an approach will enable the Court to tailor its section 1 analysis to the particular context, and to do so without being tied to *Oakes*. The Court is already moving in this direction in specific areas, as the *Dagenais/Mentuck* test and its application illustrates.

More importantly, a rights-specific approach will have a salutary effect on the rule of law. First, the current approach can be unduly complicated and repetitive — the current section 15 analysis requires that the same factors be considered both in determining whether section 15 has been breached, and then again in applying the *Oakes* analysis. A simpler rights-specific approach would clearly assist the lower courts as well as Charter litigants. Second, the current approach lacks transparency and predictability — in part caused by the Court's artificial attempt to maintain the universal application of *Oakes*, while in fact applying a context specific approach. A rights-specific approach will require the Court to more clearly articulate the factors relevant to a section 1 inquiry for each specific right. The rule of law demands no less.