

4-1-2017

Are All Charter Rights and Freedoms Really Non-Absolute?

Brian Bird
McGill University

Follow this and additional works at: <https://digitalcommons.schulichlaw.dal.ca/dlj>



Part of the [Constitutional Law Commons](#)

Recommended Citation

Brian Bird, "Are All Charter Rights and Freedoms Really Non-Absolute?" (2017) 40:1 Dal LJ 107.

This Article is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Law Journal by an authorized editor of Schulich Law Scholars. For more information, please contact hannah.steeves@dal.ca.

Brian Bird*

Are All *Charter* Rights and Freedoms
Really Non-Absolute?

This article challenges the conventional legal wisdom that no right or freedom in the Canadian Charter of Rights and Freedoms is absolute. Section 1 of the Charter is the most commonly cited source of this wisdom, but this provision merely sets out the standard that the state must meet to justify a limit on a Charter right or freedom. Section 1 does not provide advance confirmation that limits satisfying this standard exist for all Charter rights and freedoms. This interpretation, if correct, does not automatically render any of the rights or freedoms in the Charter absolute. Indeed, the standard in section 1 may ultimately capture all of these rights and freedoms. Nonetheless, this article proposes two candidates for absolute status: (a) freedoms that concern the internal forum of the person (e.g., freedom of thought) and (b) the right not to be subjected to any cruel and unusual treatment or punishment.

Cet article remet en question le principe juridique classique voulant qu'aucun droit, aucune liberté garantis dans la Charte canadienne des droits et libertés n'est absolu. L'article 1 de la Charte est la source la plus souvent citée de ce principe. Cependant, l'article ne fait qu'énoncer la norme que l'État doit satisfaire pour justifier une limite imposée à un droit ou à une liberté garantis par la Charte, il n'affirme pas qu'il existe des limites qui satisfont à cette norme pour tous les droits et toutes les libertés garantis par la Charte. Si cette interprétation est correcte, elle ne rend pas automatiquement absolu l'un des droits ou l'une des libertés garantis par la Charte. En effet, la norme énoncée dans l'article 1 pourrait éventuellement englober tous ces droits et toutes ces libertés. L'auteur propose néanmoins deux éléments qui pourraient être considérés comme étant absolus : (a) les libertés qui concernent le for intérieur d'une personne (p. ex. la liberté de pensée) et (b) le droit de ne pas être soumis à des peines ou à des traitements cruels et inhabituels.

* Doctor of Civil Law Candidate, McGill University. This paper sprung from a presentation I gave at the 2016 Osgoode Hall Graduate Law Student Conference at Osgoode Hall Law School (York University) in Toronto.

Introduction

I. *Emergence of the non-absolute principle*

II. *A better interpretation of section 1*

III. *Candidates for “absolute” status*

Conclusion

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.¹

Introduction

It is a well-established principle that no right or freedom guaranteed by the *Canadian Charter of Rights and Freedoms* is absolute. In other words, all *Charter* rights and freedoms can be limited by the state. In this paper, I challenge this principle. I argue that the text of the *Charter* does not foreclose absolute *Charter* rights and freedoms. The question of which *Charter* rights and freedoms (if any) are absolute if my textual interpretation is correct is a separate matter on which I offer preliminary reflections.

The most commonly cited basis for the “non-absolute” principle is section 1 of the *Charter*, the omnibus limitation clause at the beginning of the document (reproduced in full at the beginning of this article). Section 1 “guarantees” the rights and freedoms in the *Charter* “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”² The drafting history of the *Charter* as well as *Charter* scholarship and jurisprudence generally conclude that section 1 confirms the non-absolute nature of all *Charter* rights and freedoms.

Yet the text of section 1 does not confirm the existence of limits to each and every *Charter* right and freedom. Neither does the legal test that governs the application of section 1 (the so-called *Oakes* test). Section 1 simply sets a standard for when limits on these rights and freedoms may be imposed (limits must be “reasonable,” “prescribed by law,” and “demonstrably justified in a free and democratic society”). Section 1 does

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

2. *Ibid.*

not say that this standard can or will definitively be satisfied. Yet section 1 has been interpreted as confirming in advance, in respect of all *Charter* rights and freedoms, the existence of limits conforming to that standard. We have, in this way, jumped the gun on absolute *Charter* rights and freedoms and made a false start.

It may very well be that, ultimately, no *Charter* right or freedom is absolute. Many *Charter* rights and freedoms have been found to have limits conforming to the standard in section 1. However, the text of the *Charter* does not prejudge this issue. Where a breach of a *Charter* right or freedom occurs it is for the state to justify that the breach satisfies the section 1 standard. Section 1 does not preclude the possibility that this standard, in respect of a given *Charter* right or freedom, may *never* be satisfied. In this paper I nominate two candidates for “absolute” status: (1) freedoms concerning the internal forum of the person (e.g., freedom of thought) and (2) the right not to be subjected to cruel and unusual treatment or punishment.

Part I of this paper traces the emergence of the principle that no *Charter* right or freedom is absolute within the drafting history of the *Charter* as well as *Charter* jurisprudence and legal scholarship. Part II outlines what I submit is the better interpretation of section 1 and certain ramifications of that interpretation. Part III identifies the *Charter* rights and freedoms that may be candidates for “absolute” status should my interpretation of section 1 be accepted.

Looking forward, this paper invites legal scholars in all fields to take a closer look at conventional legal wisdom that, like the non-absolute principle in the *Charter*, has escaped serious scrutiny and has come to be taken for granted.

I. *Emergence of the non-absolute principle*

In February 1968, then Minister of Justice Pierre Elliott Trudeau presented a policy paper entitled “A Canadian Charter of Human Rights” to a first ministers’ conference in Ottawa. The policy paper advocated for adding a bill of rights to the Canadian Constitution and presented what became the first draft of the *Charter*. While the drafting history of the *Charter* generally favours the conventional wisdom that has developed around absolute *Charter* rights and freedoms, Trudeau made room for absolute rights in his policy paper. In the context of discussing freedom of conscience and religion, Trudeau wrote this:

Freedom with respect to the individual's internal belief or conscience might well be considered absolute and not qualified in any way. It is the external manifestation of the exercise or furtherance of beliefs which may give rise to problems and the need for limitations in the interest of public safety and order.³

This may be the only statement made in support of absolute rights during the drafting of the *Charter*. Trudeau suggests that freedom concerning the internal forum of the person might be absolute. The internal forum implicates *Charter* rights such as freedom of thought and belief guaranteed by section 2(b) and freedom of conscience guaranteed by section 2(a).

Aside from this statement in Trudeau's 1968 policy paper, the drafting history of the *Charter* supports the conventional wisdom in *Charter* interpretation that no right or freedom guaranteed by the *Charter* is absolute. The 1972 Final Report of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada recommended that the "rights and freedoms recognized by the Bill of Rights should not be interpreted as absolute and unlimited, but should rather be exercisable to the extent that they are reasonably justifiable in a democratic society."⁴

In academic circles, the non-absolute status of *Charter* rights and freedoms has, to my knowledge, never been seriously questioned. Writing in 1982, shortly after the *Charter* came into force, Peter Hogg wrote that section 1 "guarantees the rights and freedoms" in the *Charter* "but makes clear that they are not absolutes."⁵ The non-absolute nature of *Charter* rights and freedoms is often described as uncontroversial and obvious:

Although [the *Charter*] purports to *guarantee* rights, the symbolism implied in this word is unfortunate. Common sense dictates that rights cannot possibly be absolute. In a civilized society we can no more embrace the idea that liberty allows people to act in any manner they wish than we can give sanction to murder as a protected form of expression.⁶

The first reference to the non-absolute nature of *Charter* rights and freedoms by the Supreme Court of Canada appears in *Operation Dismantle v. The Queen*, a 1985 decision concerning the Canadian government's decision to

3. The Hon Pierre Elliott Trudeau (Minister of Justice), *A Canadian Charter of Human Rights* (Ottawa: Queen's Printer, 1968) at 18.

4. Anne F Bayefsky, *Canada's Constitution Act 1982 & Amendments: A Documentary History* (Toronto: McGraw-Hill Ryerson, 1989) at 239. Also see 423 and 662.

5. Peter W Hogg, *Canada Act 1982 Annotated* (Toronto: Carswell, 1982) at 10.

6. Janet Hiebert, *Limiting Rights: The Dilemma of Judicial Review* (Montreal: McGill-Queen's University Press, 1996) at 150 [emphasis in original].

allow U.S. cruise missile testing on Canadian soil.⁷ The claimants argued that this practice increased the risk of nuclear war and, should that risk materialize, Canada would be a more likely target for a nuclear attack. The claimants argued that this scenario unjustifiably infringed section 7 of the *Charter*, which guarantees “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.”⁸ The Court dismissed the section 7 claim.

Justice Bertha Wilson, writing for herself in *Operation Dismantle*, commented on absolute rights and freedoms in the *Charter*. In the course of considering section 7, she concluded that this right cannot be absolute and opined that “the right to liberty, which I take to be the right to pursue one’s goals free of governmental constraint, must accommodate the corresponding rights of others.”⁹ She then discussed what the concept of a “right” is for the purposes of the *Charter*, quoting American philosopher Mortimer Adler:

Living in organized societies under effective government and enforceable laws, as they must in order to survive and prosper, human beings neither have autonomy nor are they entitled to unlimited liberty of action. Autonomy is incompatible with organized society. Unlimited liberty is destructive of it.¹⁰

Shortly after, and somewhat out of the blue, Wilson J. noted that the “rights under the *Charter* not being absolute, their content or scope must be discerned quite apart from any limitation sought to be imposed upon them by the government under s. 1.”¹¹ Thus, Wilson J. does not rely on section 1 to conclude that all *Charter* rights and freedoms are non-absolute. Rather, she relies on conditions that she believes are required for an organized society ruled by government and law (in the words of Adler, the absence of “autonomy” and “unlimited liberty”). To use a phrase that has appeared in *Charter* jurisprudence from time to time, Wilson J. seems to suggest that all *Charter* rights and freedoms have “internal limits” aside from whether the state-imposed limit on the right or freedom satisfies the standard in section 1 of the *Charter*. It may be problematic, however, to apply the “internal limits” principle to all *Charter* rights and freedoms. The text of certain rights and freedoms lends itself to this principle easily, while the

7. *Operation Dismantle v The Queen*, [1985] 1 SCR 441, 18 DLR (4th) 481 (cited to SCR) [*Operation Dismantle*].

8. *Charter*, *supra* note 1 at s 7.

9. *Operation Dismantle*, *supra* note 7 at 488.

10. *Ibid* at 488-489, citing Mortimer J Adler, *Six Great Ideas* (New York: Macmillan Publishing Co, 1981) at 144.

11. *Operation Dismantle*, *ibid* at 489.

text of others does not. The “right to be secure against unreasonable search and seizure” in section 8 has an internal limit (the *reasonableness* of the search or seizure) whereas “freedom of thought” in section 2(b) does not.

The analysis of Wilson J. concerning absolute *Charter* rights and freedoms has been scarcely cited in subsequent jurisprudence.¹² This is most likely the case because the approach of finding internal limits to *Charter* rights and freedoms (where such limits are not explicitly provided by the text) has not enjoyed much purchase in *Charter* jurisprudence. The preferred approach has been to leave the questions of limits on *Charter* rights and freedoms to section 1:

Although a *Charter* right is defined broadly, generally without internal limits, the *Charter* recognizes, under s. 1, that social values will at times conflict and that some limits must be placed even on fundamental rights.¹³

The basis for asserting the non-existence of absolute *Charter* rights and freedoms in Canadian jurisprudence has almost universally rested on section 1. An early example of this reasoning appears in a 1983 decision of the Ontario Court of Appeal, which held that an extradition order against a Canadian citizen to the Federal Republic of Germany violated the right of a Canadian citizen to remain in Canada (as guaranteed by section 6(1) of the *Charter*) but that it satisfied the section 1 standard.¹⁴ In discussing section 1, the Court held that “it is recognized that the listed rights and freedoms [in the *Charter*] are never absolute and that there are always qualifications and limitations to allow for the protection of other competing interests in a democratic society.”¹⁵

Many Supreme Court of Canada decisions have affirmed the non-absolute nature of *Charter* rights and freedoms on the basis of section 1. The Court did so in *R v. Oakes*, a 1986 decision that outlined the legal test for section 1, with these words:

The rights and freedoms guaranteed by the *Charter* are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance. For this reason, s. 1 provides criteria of justification for limits on the rights and freedoms

12. One of the few references is by Wilson J herself in *The Queen v Jones*, [1986] 2 SCR 284, 31 DLR (4th) 569 at 314.

13. *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130, 126 DLR (4th) 129 at 1173.

14. *Germany (Federal Republic) v Rauca* (1983), 41 OR (2d) 225, 4 CCC (3d) 385 (CA) (cited to CCC) [*Federal Republic*].

15. *Ibid* at 401. Wilson J cites *Federal Republic* in *Operation Dismantle*, but not for the proposition that the non-existence of absolute *Charter* rights and freedoms is confirmed by section 1.

guaranteed by the *Charter*.¹⁶

There are several other instances in which the Supreme Court has affirmed the non-absolute nature of all *Charter* rights and freedoms (not to mention lower Canadian courts).¹⁷ This principle has, to my knowledge, never been subjected to serious scrutiny or challenge.

The conventional wisdom that all *Charter* rights and freedoms are non-absolute on account of section 1 is understandable given that the text of the *Charter* begins with a single, omnibus limiting provision followed by the rights and freedoms. This arrangement gives the structural impression that all *Charter* rights and freedoms are affected by section 1 in the same way (the *Oakes* test gives the same impression). But this one-size-fits-all approach overlooks the fact that not all rights and freedoms are made equal—they protect different values and interests, some of which are arguably more vital than others to a free and democratic society. In a 1987 decision, the Supreme Court of Canada held that “the *Charter* protects a complex of interacting values, each more or less fundamental to the free and democratic society that is Canada.”¹⁸

In my view, the principle that no *Charter* right or freedom is absolute stems from a misreading of section 1 of the *Charter*, the provision that has been most often cited as the legal basis for the principle. I now turn to how this provision should, in my view, be interpreted with respect to the limitability of *Charter* rights and freedoms.

II. *A better interpretation of section 1*

Section 1 of the *Charter* declares: “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.”¹⁹ During the drafting of the *Charter*, an earlier version of section 1 read as follows: “The *Canadian Charter of Rights and Freedoms* recognizes the following rights and freedoms subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government.”²⁰ This version was criticized for “making it too easy for governments to

16. *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200 at 136 (cited to SCR) [*Oakes*].

17. See, for example, *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 SCR 519 at para 84; *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326, 64 DLR (4th) 577 at 1373 [*Edmonton Journal* cited to SCR]; *R v Nikal*, [1996] 1 SCR 1013, 133 DLR (4th) 658 at 1057; *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350 at para 66 [*Charkaoui*].

18. *R v Lyons*, [1987] 2 SCR 309, 44 DLR (4th) 193 at 326.

19. *Charter*, *supra* note 1 at s 1.

20. Bayefsky, *supra* note 4 at 704. An even earlier version of section 1 omitted the phrase “with a parliamentary system of government” (see 669).

restrict the rights and freedoms.”²¹ The language of the final version of section 1 “was intended to narrow the limits that could be placed on those rights and freedoms which were guaranteed.”²²

While section 1 is often cited as the basis for the non-existence of absolute *Charter* rights and freedoms, the provision does not explicitly confirm this point. It merely declares that *Charter* rights and freedoms are guaranteed with the qualification that they may be limited by the state if the limit is “reasonable” and “demonstrably justified in a free and democratic society.” This standard may or may not be satisfied when the state breaches a *Charter* right or freedom. In other words, section 1 does not read as follows (or as something to this effect): The rights and freedoms guaranteed in this *Canadian Charter of Rights and Freedoms* are subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society, *limits of which kind exist for all these rights and freedoms*. Yet this is the prevailing interpretation given to section 1—i.e., limits of the kind described in section 1 in fact exist in respect of all *Charter* rights and freedoms (though the precise nature and extent of these limits remains unknown).

Section 1, however, does not purport to provide advance confirmation that limits satisfying the standard set out in the provision exist in respect of all *Charter* rights and freedoms. Whether that is so is for time and circumstance to tell. A better interpretation of section 1 is that *Charter* rights and freedoms may be limited where the limits are prescribed by law, reasonable, and demonstrably justified in a free and democratic society but—and this is important—it is not a foregone conclusion that each and every *Charter* right and freedom will attract such limits.

That section 1 does not preclude absolute *Charter* rights and freedoms is supported by the phrase “demonstrably justified in a free and democratic society” in two respects. First, the word “demonstrably” supports the notion that it is for the state to prove—to demonstrate—that a limitation of a *Charter* right and freedom meets the standard of being justified in a free and democratic society. By interpreting section 1 in a manner that confirms in advance the limitability of all *Charter* rights and freedoms (and thus excludes the possibility of absolute *Charter* rights and freedoms), an aspect of the state’s justificatory burden under section 1 is lifted. In other words, part of the state’s burden under section 1 is to demonstrate that the

21. Morris Manning, *Rights, Freedoms and the Courts: A Practical Analysis of the Constitution Act, 1982* (Toronto: Emond-Montgomery, 1983) at 149.

22. *Ibid.*

Charter right or freedom in question is even subject to the sort of limits articulated in the provision.

One of the contributing factors to the current interpretation of section 1 regarding absolute *Charter* rights and freedoms may be the neglect of the “free and democratic society” phrase in the provision. The *Oakes* test for section 1 sheds little light on the meaning of this phrase, which is the “ultimate standard” against which limitations of *Charter* rights and freedoms must be “demonstrably justified.”²³ The *Oakes* test itself makes no reference to this standard; it is mainly concerned with ascertaining whether limits of *Charter* rights and freedoms are reasonable, which is a distinct element of the standard set out in section 1.

Accepting the interpretation of section 1 that I advance would not automatically render certain *Charter* rights and freedoms absolute. Accepting this interpretation would, however, have two obvious ramifications. The first is it would open the door to the possibility of finding certain *Charter* rights and freedoms absolute. If a given *Charter* right or freedom is eventually declared absolute the state would not be entitled to attempt to justify a breach of that right or freedom. If, for example, freedom of thought were declared absolute, a claimant would simply have to establish that the state has breached this freedom. If a breach is established, the case is closed. The freedom’s absolute status would dictate the result of the section 1 analysis.

The second ramification of accepting the interpretation of section 1 that I advance builds on the materialization of the first ramification. Should certain *Charter* rights and freedoms be declared absolute, this might challenge the well-established principle that there is no “hierarchy” of *Charter* rights and freedoms. The rubber hits the road for this principle where there is a conflict between *Charter* rights and freedoms. In this scenario, courts are required to conduct a balancing act and seek a reconciliation of the conflict:

A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law. When the protected rights of two individuals come into conflict...*Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights.²⁴

23. *Oakes*, *supra* note 16 at 136. Dickson CJ identified some “values and principles essential to a free and democratic society,” including “respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.”

24. *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 SCR 835, 120 DLR (4th) 12 at 877.

The non-hierarchical approach to *Charter* rights and freedoms would be unsettled even if one *Charter* right or freedom is declared absolute. Such a declaration would create an inescapable hierarchy between absolute and non-absolute rights and freedoms. The approach that the Court has developed for reconciling (non-absolute) *Charter* rights and freedoms when they come into conflict may not apply to a conflict between an absolute right and a non-absolute right. Were such a conflict to arise, the case for preferring an absolute right to a non-absolute right may be more compelling than preferring a non-absolute right to another non-absolute right.

This thought experiment presupposes the existence of at least one absolute *Charter* right or freedom. In the next section I offer some preliminary reflections on which *Charter* rights and freedoms may qualify for “absolute” status.

III. Candidates for “absolute” status

If section 1 does not preclude absolute *Charter* rights and freedoms, which rights and freedoms, if any, are candidates for “absolute” status? It may very well be that no *Charter* right or freedom enjoys this status. I simply argue that we cannot know at the outset—or even decades after the advent of the *Charter*—that each and every *Charter* right and freedom is non-absolute.

That said, I submit there are potential candidates for “absolute” status. The right “not to be subjected to any cruel and unusual treatment or punishment” guaranteed by section 12 is one. In *R v. Smith (Edward Dewey)*, the appellant pleaded guilty to importing cocaine into Canada but challenged the seven-year mandatory minimum sentence as contravening certain of his *Charter* rights and freedoms, including his right to be free from cruel and unusual treatment or punishment.²⁵ The trial judge found that the mandatory minimum sentence constituted cruel and unusual treatment or punishment but nevertheless imposed a sentence of eight years in light of the surrounding circumstances. The majority of the British Columbia Court of Appeal reversed the trial judge’s conclusion that the mandatory minimum sentence violated section 12 of the *Charter* but maintained the sentence of eight years. The majority of the Supreme Court of Canada restored the trial judge’s conclusion that the mandatory minimum sentence violated section 12 and that this infringement of the accused’s *Charter* right could not be justified under section 1. Justice McIntyre dissented and stated this with respect to section 12:

25. *R v. Smith (Edward Dewey)*, [1987] 1 SCR 1045, 40 DLR (4th) 435 (cited to SCR) [*Smith*].

Cruel and unusual treatment or punishment is treated as a special concept in the *Charter*. The prohibition is in absolute terms. No discretion to any sentencing authority is permitted, no exception to its application is provided. In this, s. 12 differs from many other sections conferring rights and benefits which speak of reasonable time, or without unreasonable delay or reasonable bail, or without just cause. Section 12, in its terms and in its intended application, is absolute and without qualification. It may well be said that, in s. 12, the *Charter* has created an absolute right, that is, a right to be free or exempt from cruel and unusual punishment.²⁶

In his subsequent discussion of section 12, McIntyre J. refers to the right as an “absolute constitutional prohibition,”²⁷ an “absolute right,”²⁸ and an “absolute prohibition.”²⁹

One reason why the right not to be subjected to cruel and unusual treatment or punishment may be more conducive to “absolute” status is that it is one of the *Charter* rights and freedoms that features internal limits. Another example is section 8, which guarantees “the right to be secure against unreasonable search and seizure.” In a 2009 decision of the British Columbia Court of Appeal, Groberman J.A. made this *obiter* statement:

There are, of course, *Charter* provisions that do have internal limitations, such that s. 1 justifications for infringements are no more than theoretical possibilities—it is difficult, for example, to conceive of a s. 1 justification for an *unreasonable* search and seizure which violates s. 8 of the *Charter*.³⁰

At first blush, this statement does not appear revolutionary. Yet Groberman J.A. suggests that section 8, by virtue of having an internal limit, provides an absolute right. A violation of section 8, Groberman J.A. suggests, may never be justifiable under section 1. Other *Charter* rights with internal limits include the right “not to be arbitrarily detained or imprisoned” (section 9), rights upon arrest or detention (section 10),³¹ and rights in

26. *Ibid* at 1085.

27. *Ibid* at 1090.

28. *Ibid* at 1091.

29. *Ibid* at 1108. See also *R v Daniels*, 1990 CanLII 7612, [1990] 4 CNLR 51 (SKQB), in which Wedge J, after referring to the judgment of McIntyre J in *Smith*, noted that it “seems implicit in this case and others that s. 12 confers an absolute right and may not be saved by s. 1 of the *Charter*” (para 25).

30. *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153, 306 DLR (4th) 193 at para 115.

31. *Charter*, *supra* note 1, s 10 (“Everyone has the right on arrest or detention” to, *inter alia*, “be informed promptly of the reasons therefor” and “to retain and instruct counsel without delay” [emphasis added]).

the context of criminal proceedings (section 11).³² Section 11 of the *Charter* also guarantees rights without internal limits. An example is s. 11(i), which guarantees a person guilty of an offence the lesser punishment where the punishment has changed between the offence date and the sentencing date. Noting the “unequivocal” wording of this right, Abella J. of the Supreme Court of Canada opined (in dissent) that the “absolutist language” of section 11(i) “must colour the s. 1 analysis by demanding the most stringent of justifications.”³³

Section 7 is another example of a *Charter* right or freedom that features internal limits; it not only protects the “right to life, liberty, and security of the person” but also “the right not to be deprived” of these interests “except in accordance with the principles of fundamental justice.” Just as it is difficult to imagine a section 1 justification for an unreasonable search and seizure with respect to section 8, it is equally difficult to imagine a section 1 justification for a deprivation of a person’s life, liberty, or security of the person that is *not* in accordance with the principles of fundamental justice. The Supreme Court of Canada has held that “it is hard to justify a law that runs afoul of the principles of fundamental justice and is thus inherently flawed.”³⁴ In short, “violations of s. 7 are not easily saved by s. 1.”³⁵

Aside from the right not to be subjected to cruel and unusual treatment or punishment, I believe *Charter* rights and freedoms that deal exclusively with the internal forum of the person are candidates for absolute status. Here I have in mind freedom of thought, belief, and opinion under section 2(b) of the *Charter*. Freedom of conscience under section 2(a), to the extent that it protects the internal forum, is also a candidate. I referred earlier to the 1968 policy paper of Pierre Trudeau containing what turned out to be the first draft of the *Charter*. I agree with Trudeau that freedom “with respect to the individual’s internal belief or conscience might well be considered absolute and not qualified in any way.”³⁶ When would it be “reasonable” and “demonstrably justified in a free and democratic society” to limit personal thoughts and beliefs as distinct from the manifestation

32. *Ibid*, s 11 (“Any person charged with an offence has the right” to, *inter alia*, “be informed without unreasonable delay of the specific offence,” “to be tried within a reasonable time,” “to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal,” and “not to be denied reasonable bail without just cause” [emphasis added]).

33. *R v KRJ*, 2016 SCC 31 at paras 123-124 (Abella J).

34. *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331 at para 95.

35. *Charkaoui*, *supra* note 17 at para 66.

36. *Trudeau*, *supra* note 3 at 18.

of those thoughts and beliefs by acts or omission? In a labour law arbitration ruling in Ontario, the arbitrator noted that the “right of freedom of thought (but not the freedom to act on thought) may be a right that has no limits—at least at present.”³⁷ Prosecution of thought crimes hearkens back to totalitarian regimes during the 20th century and their representation by Orwell in *1984* through the Thought Police that monitor the thoughts of citizens for opposition to the ruling party’s authority or ideology.³⁸

To date, the Supreme Court of Canada has gone no further than saying that the freedom to hold beliefs is broader than the right to act on those beliefs. The Court made this point in a 2001 case in the context of section 2(a), which guarantees freedom of conscience and religion. The Court held that the “freedom to hold beliefs is broader than the freedom to act on them.”³⁹ In an earlier decision, the Court held that “although the freedom of belief may be broad, the freedom to act upon those beliefs is considerably narrower.”⁴⁰ That the Court has gone no further than to say that freedom with respect to the internal forum is “broader” than the freedom to manifest by action what the person entertains within this forum is not surprising given the well-established non-absolute approach to *Charter* rights and freedoms.

For comparative purposes, the European Convention on Human Rights appears to grant absolute status to internal forum rights.⁴¹ Article 9 of the Convention provides the following:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

37. *La-Z-Boy Canada Limited v Communications Workers of America, Local 80400 IUE*, 2005 CanLII 56336 (ON LA) at para 23.

38. George Orwell, *1984* (London: Secker & Warburg, 1949).

39. *Trinity Western University v College of Teachers*, 2001 SCC 31, [2001] 1 SCR 772 at para 36.

40. *B (R) v Children’s Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315, 122 DLR (4th) 1 at 435.

41. *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 at 223, Eur TS 5. The Convention is structured differently from the *Charter* insofar that it does not feature a single limiting provision akin to section 1. Instead, nearly every right in the Convention is declared and is immediately followed by a limiting provision. Notably, Article 3 (prohibition of torture or inhuman or degrading treatment or punishment) is not accompanied by a limiting provision and is thus an absolute right.

The limiting provision—Article 9(2)—only refers to limitations of the freedom to manifest one’s religion or beliefs. No reference is made to the limitation of the thoughts or beliefs themselves (i.e., the internal forum). Article 9 has, for this reason, been interpreted as guaranteeing an absolute right with respect to the internal dimension of freedom of thought, conscience, and religion.⁴²

I reiterate that I do not propose that any *Charter* right and freedom is in fact absolute—my central point is that the text of the *Charter* (and particularly section 1) does not preclude the existence of absolute *Charter* rights and freedoms. By identifying certain *Charter* rights and freedoms for which an argument of absolute status could be advanced I am simply flagging potential avenues of deeper inquiry should my central point about section 1 be accepted.

Conclusion

Courts, legal academics, and lawyers in Canada have jumped the gun on what section 1 says with respect to absolute rights and freedoms in the *Charter*. The legal profession has accepted the non-existence of absolute *Charter* rights and freedoms without critical reflection. Today, the principle that no *Charter* right or freedom is absolute is taken for granted.

Absolute rights and freedoms cause concern because the state cannot limit them. There is also a floodgates concern with respect to such rights. Declaring a *Charter* right or freedom absolute may also be an irreversible step. It is difficult to conceive of absolute status being changeable, such that a *Charter* right or freedom could shift over time from absolute to non-absolute status or vice versa. Absoluteness (or non-absoluteness) may very well be an immutable and intrinsic definitional characteristic of the right in question.⁴³

These concerns, however, should neither dictate the answer to the question of absolute *Charter* rights and freedoms nor preclude discussion of absolute *Charter* rights and freedoms. This issue is important because it concerns the full meaning of these rights and freedoms. By taking non-absoluteness of *Charter* rights and freedoms as the starting point for the analysis of whether a breach of a *Charter* right or freedom is justified under section 1, we have already—and, I argue, prematurely—curtailed the scope

42. *R v Secretary of State for Education and Employment ex parte Williamson*, [2005] UKHL 15, 2 AC 246 at para 16 (Bingham J).

43. However, if the “absolute” status of a *Charter* right or freedom hinges on whether it is justified to limit the right or freedom at all in a “free and democratic society,” it is arguable that the absolute vs non-absolute status could shift in conjunction with the evolution of what constitutes a “free and democratic society” (assuming that this concept is capable of evolution).

of the right or freedom in a manner that lessens the state's justificatory burden. Starting, instead, from the posture of the potential absoluteness of *Charter* rights and freedoms is not only correct as a matter of statutory interpretation. It also better ensures that these and rights and freedoms will receive the "liberal, contextual, and purposive interpretation" often called for by the Supreme Court of Canada.⁴⁴

Ultimately, all *Charter* rights and freedoms may be subject to limits. The non-absolute principle that prevails in *Charter* discourse may, in the final analysis, hold true. But given what is at stake—namely the scope of these rights and freedoms—it is crucially important that careful consideration be devoted to this issue. To date, the non-absolute principle has been unchallenged despite the absence of a textual basis in the *Charter* provision cited as authority for it. There was a false start on absolute *Charter* rights and freedoms—we have jumped the gun on this issue. With this paper, I am calling for a return to the starting line.

Placing the principle of non-absolute *Charter* rights and freedoms under the microscope invites reflection on how quickly and firmly prevailing (but untested) wisdom can take hold in the law. It also invites legal scholars in all fields to identify and scrutinize wisdom of this sort. As this article has demonstrated, this exercise may lead us to reconsider our conventional understanding of the law.

44. *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 SCR 789 at para 31.

