EMERGING CONSTITUTIONAL NORMS: CONTINUOUS JUDICIAL AMENDMENT OF THE CONSTITUTION— THE PROPORTIONALITY TEST AS A MOVING TARGET

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I

INTRODUCTION

If "constitutions are what judges say they are," to paraphrase Kannar,[1] then it does not only follow that "it matters who is talking," but also that we must accept, as other consequences, that constitutions will change not only when judges change, but also when judges change their minds. This is not news in the United States, where legal realism and its contemporary variations have unquestionably led the constitutional theory and interpretation for more than half a century. But it is not a statement that most Canadian constitutionalists, even the realists among them, would have, until recently, held to apply to the same degree or with the same accuracy to the Canadian constitutional scene. However, given the rigidity of legislative modes of amendment, especially in Canada,[2] the indirect judicial modifications to the Constitution that can now be implemented through the application and interpretation of the Charter may very well be the most important ones to which the Charter will ever be subjected.

Of course, the Constitution in Canada, like constitutions everywhere else, has always been thought of as a text of some permanence, one that must nevertheless evolve with times and mores if it is to remain functional under changing circumstances. The functionalist approach to constitutional interpretation has done nothing more than take this notion into account and give it the status of first principle. Under closer scrutiny, that kind of constitutional evolution may be seen as the proverbial living tree, albeit a tree living in an English garden, where nature is helped by benevolent hands and

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1. George Kannar, *Representative Egos*, 16 Harv CR-CL L Rev 875 (1982).

2. Peter W. Hogg, *Formal Amendment of the Constitution of Canada*, 55 L & Contemp Probs 253 (Winter 1992).

where growth and harmony must appear to have happened under benign neglect, without much fertilizing and certainly no harsh pruning.

This perception of Canadian constitutional amendment through the judicial process as slow-paced and somewhat subdued probably has been enhanced by the way Quebec constitutionalists tend to adhere more closely to the text, a practice at once more favorable to their political interests and more akin to their legal universe, where the legislator has a clear and more legitimate preeminence over the judiciary, somewhat in contrast to the assumptions of common law.

In that context, the advent of the Charter of Rights and Freedoms in 1982 has had the dual effect of opening the text much more to interpretation by the judiciary in the future, and putting the past in a new comparative light, where what we had wanted to paint as mere evolving interpretation cannot but now appear as what it always has been: the creation of new constitutional rules by the judges. It became at once obvious that unless the rights and freedoms entrenched in the Charter were to be read forever as they then stood at common law—and not all of them even had some status in common law—the judges would have to define them anew and thus create parts of the Constitution.

This reading in the constitutional text of the substance of rights and liberties is already a form of constitutional amendment by judicial addition. But it is a mild form of constitutional modification when compared to the newer and broader one now practiced by the courts. This technique consists of the implementation by the courts of section 1 of the Charter, through which the meaning of the expression "free and democratic society" must be defined, re-defined, and variously characterized in order to justify or void legislative or governmental limits to guaranteed rights and freedoms. For the benefit of our American colleagues and readers and for those few Canadians, including myself, who have not memorized our constitution, it will be useful to quote section 1: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[3]

It has been noticed previously that this supreme constitutional control, specified by its application to the substance of the law instead of merely to its form, as often existed previously, cannot be anything but political control as well, given the discretion awarded to the judiciary. Several authors have commented on that subject: Professor Gibson's earlier article, *Judges as Legislators, Not Whether But How*,[4] has a title that tells all, and Peter Hogg, issued a similar warning equally early in the history of the interpretation of section 1: "the phrase 'demonstrably justified' calls for a normative judgement by the court as to the legitimacy and necessity in a free and

3. Can Const (Constitution Act, 1982) pt I (Canadian Charter of Rights and Freedoms), § 1.
4. Dale Gibson, *Judges as Legislators, Not Whether But How*, 25 Alberta L Rev 249 (1986).

democratic society of the impugned restriction on liberty, and that judgement cannot depend wholly upon what has seemed acceptable to legislative bodies in Canada and elsewhere."[5]

Others could be quoted as well,[6] but perhaps Professor Patrick Monahan has been even more forthright. In his book, *Politics and the Constitution*, he writes:

> The very process of defining the content of the rights protected by the Charter seems inherently political. Many of these rights—most notably the right to "equality" and "liberty"—contain little or no substantive criteria; they resemble blank slates on which the judiciary can scrawl the imagery of their choice. . . . Section 1 of the Charter appears to invite the Court to assess and to second-guess the "wisdom" of the balance struck by the legislature.[7]

The purpose of this article is to link that specifically political aspect of the discretion afforded to the courts by section 1 with another and less well-documented consequence of its introduction into our Constitution. We want to focus on the possibility that section 1 has opened to judges, not merely for a new form of constitutional control of legislative and governmental action, but even for constitutional amendment itself. Indeed, the compliance to the standards of a free and democratic society of state-imposed restraints to entrenched rights and freedoms is a constitutional principle that has been handed to the judiciary as an empty shell to fill with their own images of what is a free and democratic society, according to a process that was left for them to design.

It was an open invitation to define the meta-rules, the value system behind the rights and liberties guaranteed by the Charter, the rules of "sur-determination" of the cultural code which, according to the most recent and most advanced European theories,[8] are the third but foremost intrinsic element of a legal rule. Despite some initial resistance on the part of some judges, it has been an invitation some of them could not resist. Neither have we been able to resist the temptation to examine the constitutional modifications that have resulted.

Thus, the concepts of a "free and democratic society" held by each judge merit attention. But this article will explore another tool of constitutional amendment that the judges have found in section 1. Over and above the obvious constitutional modifications judges are able to introduce by defining and characterizing both the content of the rights guaranteed by the Charter and the standards that a free and democratic society may impose on their

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5. Peter W. Hogg, *Section One of the Canadian Charter of Rights and Freedoms*, in Armand de Mestral, et al, eds, *The Limitation of Human Rights in Comparative Constitutional Law* 17 (Les Editions Yvon Blais, 1986).

6. See, for example, Bruce Elman, *Altering the Judicial Mind and the Process of Constitution-making in Canada*, 28 Alberta L Rev 521-34 (1990); Luc Huppé, *Une bien petite Charte*, 47 Rev du B 813-16 (1987).

7. Patrick Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* 54 (Carswell, 1987).

8. See Gérard Timsit, *Les noms de la loi* (Presses Universitaires de France, 1991).

limits, they can further amend the Constitution by the very *process* by which they ascertain the conformity of these limits to these standards.

Thus, in first designing the test they follow in applying section 1, and then modifying that test as time passed and as the benefits of experience were brought to bear (and often during the same period according to factors related to the legal and factual circumstances of each case), the judges proceeded to introduce frequent variations into the Constitution itself—that is, to amend the Constitution when they changed their minds. Even if it is too early in the history of the post-Charter Supreme Court to be sure that the Constitution will also change with the changes that have already occurred in the Court's composition, if not in the majorities that have started to emerge in different spheres of its work, we are strongly inclined to believe that when the dust settles and trends become clear again, we have every reason to expect that such has been the case. However, it is already possible to show that the Court has amended the Constitution over time, sliding from an initially very strict application of section 1 that culminated in the early *Oakes* test, to a much more lenient one in its most recent decisions, according to the particular right being restricted, the branch of law involved, or the factual circumstances of the case.

We may find out that our constitutional tree has not only been grafted with a new branch, but given new gardeners, in whose hands generous fertilization is now succeeded by heavy pruning, as if some very intricate shape of topiary were intended.

II

MODIFICATIONS SINCE 1984

The first case involving Charter interpretation to reach the Court was *Skapinker*,[9] decided in 1984. Section 1 was invoked but did not apply. Nevertheless, the Court, in express dicta, stated that when it would apply, the standard of evidence required should be very high. Mr. Justice Estey, as he then was, commenting on briefs in which the appellant and some intervenors had submitted several reports of commissions of inquiry and other public documents relating to the question at stake, wrote for the Court:

> May it only be said here, in the cause of being helpful to those who come forward in similar proceedings, that the record on the section 1 issue was indeed minimal, and without more would have made it difficult for a court to determine the issue as to whether a reasonable limit on a prescribed right had been demonstrably justified. Such are the problems of the pioneer and such is the clarity of hindsight.[10]

The tone thus was set for the early and stiff phase of the Court's interpretation of the burden of evidence required under section 1. During the next year, the Court decided some important cases[11] by applying section 1,

9. *The Law Society of Upper Canada v Skapinker*, [1984] 1 SCR 357.

10. Id at 384.

11. *Hunter v Southam, Inc.*, [1984] 2 SCR 145; *In re B.C. Motor Vehicle Act*, [1985] 2 SCR 486; *Singh v Ministre de l'Emploi et de l'Immigration*, [1985] 1 SCR 177.

but in the effort to maintain its credibility in the face of criticism of those interventions, it neglected to reveal its analytical process. In *Big M Drug Mart*,[12] however, the Court hinted at a standard that crystallized, after another year had passed, into the well-known *Oakes*[13] test.

Referring to the above quoted passage of *Skapinker*, then Chief Justice Dickson articulated the steps required "to establish that a limit is reasonable and demonstrably justified in a free and democratic society":[14] the objective to be served by limiting the Charter right must be "sufficiently important to warrant overriding a constitutionally protected right or freedom"[15] and should be attained by means that are "reasonable and demonstrably justified."[16] That second step would from then on be described as "a form of proportionality test" involving three components:[17]

> First the measures adopted must be carefully designed to achieve the objective in question. . . . 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."[18]

Such was then the state's burden of evidence when it argued to legitimize any restrictions it tried to impose. Such was then the reading of the Constitution. Five years later, both the burden and the rule appear to be much lighter, and the Constitution quite different.

Indeed, after the Court's decision in *Keegstra*,[19] it is no longer necessary for the government to show that the measures chosen to implement the sufficiently important objective "impair as little as possible" the right or freedom involved:

> In assessing the proportionality of a legislative enactment to a valid governmental objective, however, s[ection] 1 should not operate in every instance so as to force the government to rely upon only the mode of intervention least intrusive of a Charter right or freedom. It may be that a number of courses of action are available in the furtherance of a pressing and substantial objective, each imposing a varying degree of restriction upon a right or freedom. In such circumstances, the government may legitimately employ a more restrictive measure, either alone or as part of a larger programme of action, if that measure is not redundant, furthering the objective in ways that alternative responses could not, and is in all other respects proportionate to a valid s.1 aim.[20]

A long distance has been travelled in terms of section 1 interpretation in the five years since *Oakes*, and from one benchmark to another, the standard of evidence has been lowered, and thus the Constitution amended. Of course, from the beginning, the *Oakes* test was not free of ambiguities, if not

12. *R. v Big M Drug Mart*, [1985] 1 SCR 295.
13. *R. v Oakes*, [1986] 1 SCR 103.
14. Id at 105.
15. Id.
16. Id at 106.
17. Id, citing *Big M Drug Mart*, [1985] 1 SCR at 352.
18. *Oakes*, [1986] 1 SCR at 139.
19. *R. v Keegstra*, [1990] 3 SCR 697.
20. Id at 784-85.

contradictions. In fact it stated both that the standard should be absolute and that it should vary with circumstances, as can be seen from the following passages:

> Having regard to the fact that s.1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the Charter was designed to protect, a very high degree of proportionality will be, in the words of Lord Denning, "commensurate with the occasion."
>
> 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.[21]

This statement should be contrasted with:

> Some limits of 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.[22]

This became the loophole through which the Court developed divergent versions of the test in subsequent decisions, thus introducing further amendments to the Constitution, some related coherently to the right or the branch of law involved, others seemingly decided *ad hoc* on the spur of the political questions at stake. Summing up the evolution in the Court's attitude, then Chief Justice Dickson ascribed the variations to values and circumstances when he wrote:

> Obviously, a practical application of s.1 requires more than an incantation of the words "free and democratic society." These words require some definition, an elucidation as to the values that they invoke. To a large extent, a free and democratic society embraces the very values and principles which Canadians have sought to protect and further by entrenching specific rights and freedoms in the Constitution, although the balancing exercise in s.1 is not restricted to values set out in the Charter. . . .
>
> Undoubtedly these values and principles are numerous, covering the guarantees enumerated in the Charter and more. Equally, they may well deserve different emphases, and certainly will assume varying degrees of importance depending upon the circumstances of a particular case.
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> It is important not to lose sight of factual circumstances in undertaking a s.1 analysis, for these shape a court's view of both the right or freedom at stake and the limit proposed by the state; neither can be surveyed in the abstract.[23]

One can hardly be more candid. We will turn now to these variations in values and circumstances and the constitutional modifications that have ensued.

A. Modifications Based on the Right Involved and Its Relationship to Underlying Values

One of the effects of the presence of section 1 in Canada's Constitution that is not directly under study here, but must nevertheless be mentioned, is that it provides for even more encompassing definitions of protected rights due to its mere presence. Because it acts as a mitigating factor, expressly

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21. *Oakes*, [1986] 1 SCR at 138.
22. Id at 139.
23. *Keegstra*, [1990] 3 SCR at 736-37.

written into the Constitution, that the judges can invoke to validate some restrictions to guaranteed rights, it enables the courts to give more scope to the right in the first definitional step of their analysis.

These wider definitions in turn lead to a ranking of rights, or elements of a right, according to their importance as it is judicially perceived and measured on a scale based on their respective proximity to the core of the expressly protected right or, to put it another way, to the value central to the definition of the right involved. It is then to be expected that the burden of evidence on the government to justify limitations to a right will be lighter when the limitations intended aim at elements of a right that are peripheral to the right's core value. The Court has applied this rule so far to all cases when it has made such findings, except in matters relating to the control of professional activities and, of course, when political concerns dictated other results.

The most explicit statement of this doctrine and its most extreme formulation comes from Mr. Justice La Forest in *Jones*,[24] in which he requires no evidence, merely judicial notice, claiming that common and judicial knowledge of values such as education are a sufficient basis for the Court's decision:

> A court must be taken to have a general knowledge of our history and values and to know at least the broad design and workings of our society. . . . No proof is required to show the importance of education in our society or its significance to government. The legitimate, indeed compelling, interest of the state in the education of the young is known and understood by all informed citizens. Nor is evidence necessary to establish the difficulty of administering a general provincial educational scheme if the onus lies on the educational authorities to enforce compliance. The obvious way to administer it is by requiring those who seek exemptions from the general scheme to make application for the purpose. Such a requirement constitutes a reasonable limit on a parent's religious convictions concerning the upbringing of his or her children.[25]

The same judge, writing the majority opinion in *Cotroni* and *El Zein*,[26] considered that the limits imposed by extradition on the right to remain in Canada, constitutionalized in section 6(1) of the Charter, aimed at a peripheral right and that the priority of guaranteed rights must be mitigated by other values. The Court has made use of this concept of peripheral rights in three similar cases,[27] all decided on the basis of *Reference re Criminal Code (Man.)*, where Chief Justice Dickson, as he then was, stated:

> When a Charter freedom has been infringed by state action that takes the form of criminalization, the Crown bears the heavy burden of justifying that infringement. Yet, the expressive activity, as with any infringed Charter right, should also be analysed in the particular context of the case. Here the activity to which the impugned legislation is directed is expression with an economic purpose. It can hardly be said that communications regarding an economic transaction of sex for money lie at, or even near, the core of the guarantee of freedom of expression.[28]

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24. *R. v Jones*, [1986] 2 SCR 284.
25. Id at 299-300.
26. *United States v Cotroni*, [1989] 1 SCR 1469; *United States v El Zein*, [1989] 1 SCR 1469.
27. *R. v Stagnitta*, [1990] 1 SCR 1226; *R. v Skinner*, [1990] 1 SCR 1235; *Reference re Criminal Code (Man.)*, [1990] 1 SCR 1123.
28. [1990] 1 SCR at 1136.

Needless to say, none of the measures under consideration in these last cases, particularly those related to extradition and prostitution, would have passed the far stricter *Oakes* test had the Court not modified the Constitution in the meantime. For some reason, that modification does not hold when the Court is dealing with government control over the professions, despite the peripheral character of expression through professional activity within the realm of freedom of expression. The burden of evidence imposed on the governments involved in professional activity cases was so high that they were unable to justify measures aiming at restricting inter-provincial mergers of law firms,[29] or at curtailing publicity for professional services,[30] or even to show that restrictions to equal access to the Bar on the basis of citizenship could be justified on the ground that it ensured the familiarity of lawyers with Canadian customs and institutions.[31]

One may be tempted to infer that judges, having been practicing lawyers earlier in their careers, would remain prone to defend the freedom of professionals from government interference, in particular when the legal profession is involved. The temptation is enhanced by Ms. Justice McLachlin's candid statement in *Rocket* about the importance of promoting professionalism.[32] However, closer scrutiny shows the effects of these decisions not to be unequivocally in favor of the interests of individual professionals, although not at variance with wider liberal ideals.

To explain the exceptionally heavy burden of evidence imposed on the state in the face of restrictions to these peripheral professional rights, a departure from the Court rule in such cases outside the professional domain, one must resort to another motivation expressly invoked: a growing reverence for the autonomy of the legislator, the reason most often mentioned by the Court when it is not in a mood to intervene. In that regard, these last three cases (*Stagnitta, Skinner, Reference re Criminal Code (Man.)*) could also have been included with the next category of constitutional modifications, which encompasses modifications often formulated in terms of reverence for the legislator, although related to the branch of law involved.

B. Modifications Related to the Branch of Law Involved

The constitutional rule has suffered amendments related not only to the right invoked but to the branch or field of law to which the challenged restriction to that right belongs. The Court will not apply the same standard in questions of social policy as in criminal law, a fact it has already expressly admitted. Accentuating the effects of the "singular antagonist" doctrine,[33] Ms. Justice L'Heureux-Dubé has stated in *Commonwealth of Canada*:

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29. *Black v Law Society of Alberta*, [1989] 1 SCR 591.
30. *Rocket v Royal College of Dental Surgeons of Ontario*, [1990] 2 SCR 232.
31. *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143.
32. *Rocket*, [1990] 2 SCR at 253 ("Indeed, having regard to the importance of promoting professionalism . . . a heavy duty rests on professional bodies to adopt appropriate regulations . . . without restricting unduly the freedom of expression of their members.").
33. *Irwin Toy v Quebec (Attorney General)*, [1989] 1 SCR 927, 994.

> These comments strongly suggest that the *Oakes* approach, especially the second component, is not a talisman or incantation which is dutifully recited in every case. Rather its purpose is to concentrate the inquiry into reasonableness with sharper resolution. . . . In addition, *what may be applied strictly in the context of criminal law may warrant more relaxed implementation with respect to social issues.*[34]

1. *Deference to the Legislator's Choice in Matters of Social Policy.* It is somewhat surprising, if not tautological, to find reverence of the legislator as an expressed reason not to intervene in the legislative domain by a Court empowered precisely to intervene in that domain when such action is required in order to protect constitutionalized rights from restrictions unacceptable in a free and democratic society. Yet, since *Edward Books*,[35] the Court has embarked on a regressive trend, culminating, so far, in *McKinney*,[36] where the requirement of the least possible infringement of the right, first applied in *Singh*[37] and *Big M*,[38] before being formally stated in *Oakes*, has been gradually scaled down, in certain circumstances, to any reasonable means chosen by the legislator. The circumstances required to mitigate the test have varied; we must now look at these variations.

a. *Proportionality: from "minimal impairment" to reasonableness.* The high standard set in *Oakes* was already, in a way, a watering down of the implicit standard underlying Justice Wilson's reasons in *Singh*, where no infringement of the right was allowed, but it nevertheless enforced the rule of the least possible impairment of the right and kept within judicial discretion the decision as to whether a governmental measure met that test. This phase of enforcement of a still high standard of protection of rights would not last.

As Professor Gibson would signal after *Irwin Toy*: "It would appear, therefore, that the 'minimal impairment' test has now evolved into a requirement that there be no 'unreasonable impairment' of the Charter rights affected."[39] The trend had already started with *Edward Books*,[40] the first decision to move downward from "proportionality" to "reasonability" as a basis for the test. In his reasons for the majority, then Chief Justice Dickson begins by distancing himself from his own statement in *Oakes*:

> The Court stated that the nature of the proportionality test would vary depending on the circumstances. Both in articulating the standard of proof and in describing the criteria comprising the proportionality requirement the Court has been careful to avoid rigid and inflexible standards. . . . A "reasonable limit" is one which, having regard to the principles enunciated in *Oakes*, it was reasonable for the legislature to impose. The courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line.[41]

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34. *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139 (emphasis added).
35. *R. v Edward Books and Art, Ltd.*, [1986] 2 SCR 713.
36. *McKinney v University of Guelph*, [1990] 3 SCR 229.
37. [1985] 1 SCR 177.
38. [1985] 1 SCR 295.
39. Dale Gibson, *A Representative Ruling:* Attorney-General of Quebec v. Irwin Toy Ltd., 69 Can Bar R 339, 350 (1990).
40. [1986] 2 SCR 713.
41. Id at 768-69, 781-82.

He then goes on to apply this new principle to the case at hand, making clear that the Court will from now on follow this course when the legislator has to devise a measure for the protection of a vulnerable group, an element of the test that will be further elaborated in *Irwin Toy*,[42] but modified again in *McKinney*.[43] It is important to notice now, however, in view of developments then yet to come, that Mr. Justice La Forest, although concurring with the conclusions of the majority, would have gone further and allowed an even less stringent test. He writes:

> While, like the Chief Justice, I favour the making of whatever exemptions are possible to accommodate minority groups, I am of the view that the nature of the choices and compromises that must be made in relation to Sunday closing *are essentially legislative in nature. In the absence of unreasonableness or discrimination, courts are simply not in a position to substitute their judgement for that of the Legislature.*[44]

b. *Reasonableness: from judicial appraisal to acceptance of conditional legislative discretion.* The new criteria established by then Chief Justice Dickson in *Edward Books* were developed and refined in *Irwin Toy*. The circumstances in which these criteria apply have been at least temporarily limited to cases where the legislature must make a choice of social consequence between measures involving the distribution of resources and the protection of vulnerable groups. The then Chief Justice, writing again for the majority, elaborated on all of the modified test's elements:

> Thus, 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. . . . Where the legislature mediates between the competing claims of different groups in the community, it will inevitably be called upon to draw a line marking where one set of claims legitimately begins and the other fades away without access to complete knowledge as to its precise location. If the legislature has made a reasonable assessment as to where the line is most properly drawn, especially if that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the court to second guess.[45]

If the last position of the Dickson court on what it meant by the standard of "minimal impairment" is to be summed up at this point, and we think it is legitimate to do so, it can be said to have weakened the proportionality test, to the point of making it a reasonableness test when it applies to circumstances characterized by three conditions. The test requirements will be so attenuated when the Court reviews a state action in which (1) the legislature was faced with a choice of social consequence, (2) the choice was between measures designed to protect a vulnerable group, but affecting at least one other competing group, and (3) the legislature has made a reasonable evaluation of where the appropriate line should be drawn between conflicting

42. [1989] 1 SCR at 989-91.
43. [1990] 3 SCR at 237.
44. *Edward Books*, [1986] 2 SCR at 806 (emphasis added).
45. *Irwin Toy*, [1989] 1 SCR at 993, 989-90.

claims, especially if allocation of scarce resources is at stake. Hence, the rule has clearly changed since *Oakes*, not so much because the judges have changed—the bench is almost the same in *Irwin Toy* as in *Oakes*, with only Justice Beetz replacing Justice Chouinard—but because judges have changed their minds.

c. *Toward tolerance of unconditional legislative discretion in matters of reasonable social policies?* Some judges, however, do not seem to have changed their minds, and Mr. Justice La Forest is one of them. If he rallies a majority of the Court's new members around his conception of how the Constitution should have been read since the beginning, and a still lower standard of state evidence is required where section 1 applies, there may not be as much a change of mind as a change of Court. In *Edward Books*, Mr. Justice La Forest already stated that some legislative choices and compromises, such as those regarding Sunday closing, "are essentially legislative in nature. In the absence of unreasonableness or discrimination, courts are simply not in a position to substitute their judgement for that of the [l]egislature."[46]

In *McKinney*,[47] Mr. Justice La Forest reiterated his position in a broader context. The question in this case, and in two others[48] the Court recently decided, related to the constitutional validity of different forms of mandatory retirement in various universities and hospitals. It entailed deciding the applicability of the Charter to university and hospital management decisions. The Court concluded the Charter did not apply to these institutional decisions and therefore found it unnecessary to examine whether the retirement provisions under attack were discriminatory under section 15 of the Charter. However, Mr. Justice La Forest speculated that if the Charter had applied, such policies would indeed constitute discrimination based on age. He wrote a long *obiter*, in which Justices Dickson and Gonthier concurred, to show that these policies could nevertheless be validated by applying section 1. Mr. Justice La Forest used the arguments put forward in *Irwin Toy*, stating:

> In short, as the Court went on to say, the question is whether the government had a *reasonable basis* for concluding that it impaired the relevant rights as little as possible given the government's pressing and substantial objectives. . . . Decisions on such matters must inevitably be the product of a mix of conjecture, fragmentary knowledge, general experience and knowledge of the needs, aspirations and resources of society, and other components. They are decisions of a kind where those engaged in political and legislative activities of Canadian democracy have evident advantage over members of the judicial branch, as *Irwin Toy* [at 993-94] has reminded us. This does not absolve the judiciary of its constitutional obligation to scrutinize legislative action to ensure reasonable compliance with constitutional standards, but it does import greater circumspection than in areas such as the criminal justice system where the courts' knowledge and understanding affords it a much higher degree of certainty.[49]

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46. *Edward Books*, [1986] 2 SCR at 806.
47. [1990] 3 SCR 229.
48. *Harrison and Connell v U.B.C.*, [1990] 3 SCR 451; *Stoffman v Vancouver General Hospital*, [1990] 3 SCR 483.
49. *McKinney*, [1990] 3 SCR at 286, 304-05.

What makes this statement potentially more detrimental to the protection of rights is the fact, noted in Mr. Justice Wilson's dissent, that no vulnerable minority was involved in this case, notwithstanding that Mr. Justice La Forest made no express reference to that element of the test. If this trend were to be sustained as a *ratio* by a majority in the future, we would be heading toward another modification of the Constitution, enforcing a standard of even less conditional legislative discretion. Indeed, if it follows this path, the Court may have to abstain from reviewing all reasonable state decisions on social policies, whether or not they are aimed at protecting a vulnerable minority. Constitutional control based on the Charter would then not be more encompassing than classical judicial review.

2. *Modulated Intervention in Criminal Law.* In matters of criminal law, perhaps because the rights guaranteed had traditionally been more clearly defined at common law, the Court has been less hesitant to intervene. Until recently, its intervention has been modulated according to whether the right involved was substantive or procedural, although this distinction has always been set aside in dangerous driving cases.

a. *A dichotomy between substantive and procedural rights.* Before *Chaulk, Ratti,* and *Roméo*,[50] the *Oakes* test was always fully applied when a substantive right was at stake, especially if the right was closely linked with fundamental values underlying our system of criminal law. Examples include components of the presumption of innocence, such as the right to full answer and defense, and the *mens rea* or the onus of proof. This has been the Court's attitude when absolute liability,[51] reverse onus,[52] cruel and unusual punishment,[53] or constructive murder[54] were at issue. Most of these cases were decided in favor of the accused after finding state violations of their constitutional rights were not justified under section 1 of the Charter, based upon the strictly-defined *Oakes* standard.[55] When cases involving substantive rights were dismissed,[56] it was always on the ground that the state laws involved did not infringe upon constitutional rights, not because section 1 was not held to apply. In contrast, when procedural rights were infringed, cases were

50. *R. v Chaulk*, [1990] 3 SCR 1303; *R. v Ratti*, [1991] 1 SCR 68; *R. v Roméo*, [1991] 1 SCR 86.

51. See *In re B.C. Motor Vehicle Act*, [1985] 2 SCR 486.

52. See *Oakes*, [1986] 1 SCR 103.

53. See *R. v Smith*, [1987] 1 SCR 1045.

54. See *R. v Vaillancourt*, [1987] 2 SCR 636; *R. v Martineau*, [1990] 2 SCR 633; *R. v Arkell*, [1990] 2 SCR 695; *R. v J.*, [1990] 2 SCR 755; *R. v Logan*, [1990] 2 SCR 731; *R. v Luxton*, [1990] 2 SCR 711; *R. v Rodney*, [1990] 2 SCR 687.

55. See *In re B.C. Motor Vehicle Act*, [1985] 2 SCR 486; *Oakes*, [1986] 1 SCR 103; *Smith*, [1987] 1 SCR 1045; *Vaillancourt*, [1987] 2 SCR 633; *Martineau*, [1990] 2 SCR 633; *Arkell*, [1990] 2 SCR 695; *R. v J.*, [1990] 2 SCR 755; *Logan*, [1990] 2 SCR 731; *Luxton*, [1990] 2 SCR 711; *Rodney*, [1990] 2 SCR 687.

56. See *R. v Lyons*, [1987] 2 SCR 309; *R. v Wigglesworth*, [1987] 2 SCR 541; *R. v Holmes*, [1988] 1 SCR 914; *R. v Schwartz*, [1988] 2 SCR 443; *R. v Bernard*, [1988] 2 SCR 833; *R. v Stevens*, [1988] 1 SCR 1153; *Thompson Newspapers v Director of Investigation and Research*, [1990] 1 SCR 425.

dismissed after a less stringent version of the *Oakes* test had been applied.[57] Until December 1990, this dichotomy, similar to the one that applies to variations observed outside the field of criminal law when social policies are not involved, governed the Court in all criminal matters except dangerous driving. In view of the importance of the legislature's objective of reducing mortality, the Court always confirmed restrictions of guaranteed rights in dangerous driving cases.[58]

b. *Some notable exceptions.* The Court seems to have taken a new direction in criminal law since December 1990. In *Chaulk, Ratti,* and *Roméo*,[59] where the onus of proof of mental illness was at issue, the Court applied a particularly soft version of the test: administrative inconvenience and cost justified a seemingly reverse onus. Such decisions show a departure from the Court's previous course in criminal law, where the strict *Oakes* test was always applied to limitations to substantive rights, linked to the core of the presumption of innocence. *Chaulk, Ratti*, and *Roméo* are surprising because they come at about the same time as *McKinney*.[60] They are even more surprising because Chief Justice Lamer, who until then had been thought by many to have almost single-handedly rewritten justice into criminal law, wrote the majority opinion in all three cases.

It may, however, be easy to read too much into these decisions and give them a scope unintended by their author. Nonetheless, before evaluating future trends, we must consider a third kind of constitutional modification implemented through the application of section one: those modifications spurred by the truly political implications of cases.

C. Modifications Spurred by the Political Circumstances of the Case

None of the rules that we have painstakingly sifted out apply when the political stakes are high enough, as demonstrated by *Ford*,[61] *Devine*,[62] *Keegstra*,[63] *Quebec Protestant School Boards*,[64] and *Mahé*.[65] The deviations from the rules have taken different paths in applying section 1 to these cases: a stringent test applied in the presence of restrictions to a peripheral right, in contrast to a soft test or no test at all in the presence of limits to core rights.

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57. See *Canadian Newspapers v Canada (Attorney General)*, [1988] 2 SCR 122; *The British Columbia Government Employees' Union v British Columbia (Attorney General)*, [1988] 2 SCR 214; *R. v Lee*, [1989] 2 SCR 1384 (infringements of procedural rights justified by section 1 of the Charter).

58. See *R. v Whyte*, [1988] 2 SCR 3; *R. v Hufsky*, [1988] 1 SCR 621; *R. v Thomsen*, [1988] 1 SCR 640; *R. v Ladouceur*, [1990] 1 SCR 1257; *R. v Wilson*, [1990] 1 SCR 1291 (infringements of substantive rights in automobile cases justified by section 1 of the Charter).

59. *Chaulk*, [1990] 3 SCR 1303; *Ratti*, [1991] 1 SCR 68; *Roméo*, [1991] 1 SCR 86.

60. [1990] 3 SCR 229.

61. *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712.

62. *Devine v Quebec (Attorney General)*, [1988] 2 SCR 790.

63. [1990] 3 SCR 697.

64. *Quebec (Attorney General) v Quebec Protestant School Boards*, [1984] 2 SCR 66.

65. *Mahé v Alberta*, [1990] 1 SCR 66.

1. *A Stringent Test Applied to a Peripheral Right.* The Court held in *Ford* and *Devine* that freedom to advertise in English in Quebec is part of freedom of commercial expression but nevertheless applied the most stringent test of proportionality to legislative measures restraining this freedom. At the time, these decisions were not really a departure from a rule because the rule had not yet been formally established, but soon after, in *Irwin Toy* and later in *Reference re Criminal Code (Man.)*, the Court would unequivocally characterize freedom of commercial expression as a peripheral right that could be impaired by measures meeting a much softer test. Needless to say, the issue in *Ford* and *Devine* was not so much freedom of commercial expression in general as the use of their language by the English Quebecers, which is not per se constitutionally protected.

2. *A Lenient Test or No Test at All Applied to Core Rights.* Quite the opposite happened in *Keegstra*, *Quebec Protestant School Boards*, and *Mahé*, where the Court subjected the restriction of core rights to either a soft test or no test at all.

In *Keegstra*, the issue was the right to express political opinions in particular circumstances relating to anti-Semitic hate propaganda. Whatever the distasteful character of the political opinions involved, it would seem, however, that in the eyes of the Court, their expression would lie at the core and not at the periphery of freedom of expression, whether as traditionally defined at common law or as constitutionalized by the Charter. Nevertheless, then Chief Justice Dickson considered the expression of such distasteful political views not to lie at the core of freedom of expression like other, more palatable opinions, but to be peripheral to values underlying freedom of expression as established by section 2(b) of the Charter. Having so characterized the expression of hate propaganda, he applied section 1 through a lenient test.[66] The term "peripheral" was used in *Keegstra* to refer to something different from that which the Court had meant before by that word. We agree entirely with Mr. Justice Dickson's statement that such use of freedom of expression was peripheral to the values underlying that freedom; however, our agreement stems from our common political views on that subject, and not from the fact that certain political opinions, however revolting, are less protected by freedom of expression than others.

In *Quebec Protestant School Boards*, limitations on rights to instruction in the language of minorities (in this case, the English-speaking minority in Quebec), specifically established by section 23 of the Charter, were being challenged. Despite the fact that these rights could by no means be described as peripheral, or perhaps precisely because they are so central to the very purpose of the Charter, the Court did not subject them to any real test. The Court apparently took for granted that the aim of the constituent was to preclude precisely such limitations which could consequently never satisfy the standard of section 1. The Court even went so far as to remark that the applicability of section 1 to rights protected by section 23 had only been

66. *Keegstra*, [1990] 3 SCR at 765, 787-88.

assumed for the sake of discussion, but never decided.[67] Similarly, in *Mahé*, indirect quantitative restrictions on rights to instruction in the French language of the minority in Alberta were being contested. As in *Quebec Protestant School Boards*, the restrictions under attack were almost automatically invalidated under section 1. Yet, the Court in *Mahé* did not describe the analytical process it had used in applying the validity test, much in the way it used to proceed before the *Oakes* test was designed.

Rationality is not absent from either *Quebec Protestant School Boards* or *Mahé*. Rather, the rationality present is a political rationality, aimed at establishing respect of minority language rights, whatever the language or the province, to further the cause of national unity. "Circumstances of the cases" motivated the Court to give preeminence to that political rationality over the different legal rationality it had devised for the same purpose in a different context: where the political implications of its decisions were less obvious.

It cannot be denied that the Court, in certain political circumstances, will not apply the stringent test it has imposed on its own discretion for the validation of infringements to core rights. Instead, it will characterize as peripheral a right that is not necessarily so, as it did in *Keegstra* in the presence of hateful anti-Semitism. Alternately, if it is unable to do so in cases involving highly volatile language rights like *Quebec Protestant School Boards* and *Mahé*, the Court will find a reason to modify the next step of its test, thereby almost waiving the application of section 1 or invalidating the contested restrictions without going through its usual "demonstration" of why they are unjustified in a free and democratic society.

III

CONSEQUENCES IN 1991

Since 1984, the Court has deviated from the "proportionality" test it designed for its own application to section 1 of the Charter. The net result of these deviations is that the Constitution has been significantly amended. The Constitution is not the same now as it was then; furthermore, in its present phase, it now varies depending on to what and to whom it applies. The Constitution has changed when the judges have changed their minds, and it will most probably change again now that the judges have changed.

Of course, it is possible to assert that the cardinal constitutional rule is that the Constitution must change in order to adapt to circumstances, and that when the Constitution adapts, it does not really change. One could even argue that the real *Oakes* test is not the two-step-three-standards mechanism we have analyzed at length here, but only an appraisal of reasonableness, given the circumstances. This view was best captured by then Chief Justice Dickson: "It is important not to lose sight of factual circumstances in undertaking a s[ection] 1 analysis, for these shape a court's view of both the right or freedom at stake and the limit proposed by the state; neither can be

67. *Quebec Protestant School Boards*, [1984] 2 SCR at 85, 88.

surveyed in the abstract."[68] Even for a realist, it is not entirely convincing to look at constitutional change only in this perspective. After all, realists too must take reality into account, and that entails looking at the whole picture, which includes some real and effective modifications.

Where the text of the Constitution requires that limitations on Charter rights be both reasonable and demonstrably justified in a free and democratic society, its application might be sometimes satisfied with some limitations only being reasonable. Restrictions are more easily justified when they aim at the rights of beneficiaries of social programs, rather than at those of persons accused of criminal offenses, and the ranking in the judges' minds of the right invoked will affect the limits to its scope that will be tolerated. Political implications of cases will introduce even greater, though sometimes only ad hoc, changes in the Constitution.

The rule that has replaced the "proportionality" test can tentatively be formulated as the following: a strict proportionality test would apply only to core rights outside the domain of social policies, to most substantive rights of the accused, and to some peripheral rights when their impugned limitations materialize state control of the professions or become justified by political overtones of the case. On the other hand, all entrenched rights embodied in social programs, procedural rights of the accused, some of their substantive rights, and peripheral rights other than those related to an overt political context or to government control of the professions would only be required to meet a softer reasonability test.

In applying the softer reasonability test, the Court has not only in certain circumstances abandoned the "justification" element required by the text of section 1, but is also prone to defer to the judgment of the legislator as to what is a reasonable measure. But so far, this very lenient attitude of the Court has been—at least expressly—circumscribed, in the domain of social policies, to cases where a vulnerable group is affected by measures involving the allocation of scarce resources. More surprising is the use of a soft test, without any reference to such conditions, in circumstances where no vulnerable group was affected either way and no balancing should consequently intervene between a Charter right and other rights that are not entrenched in the Constitution and contractual in origin. That dictum was an *obiter*, however.

IV

CONCLUSION

Supporters and opponents of judicial restraint will react differently to this *obiter* in *McKinney*, which some will be tempted to analyze in conjunction with the *Chaulk, Ratti,* and *Roméo* trilogy,[69] where the soft test has been applied to a

68. *Keegstra*, [1990] 3 SCR at 737.

69. Indeed, some held that view of the evolution of the Court even before *Chaulk*. See Huppé, 47 Rev du B 813-16 (1987) (cited in note 6).

substantive legal right of the accused. Read together and in a certain light, these cases could support the view that the Court is leaning towards an interpretation of the Constitution where only reasonableness would matter, whatever the right at stake or the branch of law involved, a reasonableness moreover, about which the Court would hesitate to second guess the legislature, since it sees the legislator as better equipped to appraise it. In other words: back to square one or, more precisely, to *Drybones*[70] and more classical judicial control.

In our opinion, which most readers will have by now guessed is not favorable to judicial restraint unless it means restraint of conservative interventions, this is a pessimistic view. *McKinney* is an *obiter* signed by only two present members of the Court, and deciding *Chaulk, Ratti*, and *Roméo* in the opposite way might have been, in a way, the equivalent of creating a presumption of mental illness applying to all persons accused of murder. In those circumstances, it would not be prudent to read too much into decisions that might not have been intended to become precedents outside the realm of proof of insanity. Even precedents, after all, are sometimes of limited use, as Ms. Justice McLachlin aptly remarked in *Keegstra*: "In this task logic and precedent are but of limited assistance."[71]

Moreover, when making explicit some implicit positions of judges, or in proposing a general application for some specific dictum, as we have had to do in order to map our way through this maze of cases, it is easy, through lack of skill or for the sake of contrast, to exceed the intentions of the authors and give to their writings a more extended scope than they had intended. Let us hope this is the case: In this forum, our mistakes might even have the virtue of bringing forth a welcome denial.

Whatever the present consequences on the reading of the Constitution of the recent modifications of the so-called "proportionality test," these consequences most likely will not remain what they now are unless the judges stop changing and changing their minds. To predict at any time, and especially after death, illness, and other retirements have claimed two-thirds of the Court in a few years, the direction an almost entirely new Court will take on this question, would require something more than legal scholarship.

What we hope we have shown, however, is that important constitutional amendments have resulted from modifying just one element of the test designed to separate the reasonable limits to Charter rights that are demonstrably justified in a free and democratic society from those that are not. There is little reason to believe that an analysis of the evolution over the same period of the other explicit elements of that test would not show that they too have provoked equally important and diversified constitutional modifications. And this is not taking into account modifications resulting from other non-explicit elements of judicial reasoning that are a prerequisite

70. *R. v Drybones*, [1970] SCR 282.
71. [1990] 3 SCR at 845.

to the application of the test but are not formally part of it, and are rarely discussed in the open, such as which objective is to be attributed to the measures adopted by the state, before deciding that such an objective is sufficiently important to warrant overriding a Charter right. Formal legislative amendment has a long way to go before it can claim such important impact to the Constitution.

Given not only the extreme porosity of section 1, but the even better documented open-ended character of other concepts embodied in the Charter, and especially of the entrenched rights themselves, the relevant question might be whether it is not the Constitution itself rather than only the proportionality test that should be described as a moving target.