

Reasonable Limits on Fundamental Freedoms

A Study of Section 1 of the Canadian Charter of Rights and Freedoms

by

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(abridged from a Masters Thesis)

Introduction

The Canadian Charter of Rights and Freedoms¹ was introduced into Canada on April 17, 1982. It was part of a new constitutional "package" proclaimed in force by the Queen. Other parts of that package included a procedure for future constitutional amendments in Canada. But it was the Charter of Rights and Freedoms which attracted the most interest and popular attention.

The Canadian Charter of Rights and Freedoms guarantees to "everyone" the rights and freedoms which it contains.² It confers power on the Courts to grant remedies to anyone whose rights or freedoms are infringed.³ This includes the power to strike down as invalid any law which is considered to be an unreasonable limitation of those rights and freedoms.

The Charter was not welcomed by everyone. The province of Quebec opposed it. Indian and Inuit associations opposed it. Some provinces assented only after expressing fears at some of its implications — principally the perceived transfer of political power to judges who will have

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¹ The Canadian Charter of Rights and Freedoms is contained in Part I of the Constitution Act 1982. That Act is, in turn, to be found in Schedule B to the Canada Act 1982, an enactment of the United Kingdom Parliament. Thus it was the United Kingdom Parliament which enacted the new Canadian constitution but the constitution is henceforth capable of being amended within Canada. This transfer of the locus of legislative authority from the United Kingdom to Canada was called "patriation" of the Canadian constitution.

² s1 of the Charter.

³ s24.

the final say on the validity of Canadian laws.

A proposal for a Bill of Rights is now being studied in New Zealand. The debate as to whether or not a bill of rights is necessary or a good thing has been resurrected. The arguments for and against bills of rights are, of course, familiar. Recent events in Canada, have, however, added a new element to the debate. Both supporters and opponents of bills of rights can now look to Canada to assess what the Canadian Charter has meant in practice, and what the implications are for New Zealand.

The Canadian experience is significant to New Zealand for at least four reasons:

1. Canada and New Zealand share a common political heritage: a democratically elected parliament in the Westminster tradition.⁴ Parliament in Canada, as in New Zealand, is sovereign.
2. Canada and New Zealand share a common legal heritage: the English common law. Statements of constitutional rights were almost as foreign to Canada before the Charter as they now are in New Zealand.⁵
3. For Canada, as for New Zealand if a Bill of Rights is enacted, the Charter was introduced "midstream". This raised a host of practical issues: what is to be the effect on existing law? Should the Charter apply to events that occurred before its enactment? Will the judges adapt to the new role expected of them?
4. And lastly, Canadian experience will be directly relevant because our proposed Bill of Rights expressly follows the Charter in several key sections.⁶

For all these reasons, Canadian experience under the Charter is a wealth of information for New Zealand, both in debating whether we should have a bill of rights, and how it should be interpreted and applied if we do.

This article examines the key section of the Charter — section 1 —

⁴Canada, however, is a federal state with legislative authority divided, pursuant to the British North America Act 1867 (now renamed the Constitution Act 1867), between provincial and federal legislatures. It remains true, however, that each legislature is sovereign within its sphere and that the sum total of provincial and federal power is equivalent, in sovereignty terms, to the power of the United Kingdom Parliament.

⁵Canada has had, since 1960, the Canadian Bill of Rights 1960. This was an ordinary statute effective at the federal level of government only. It had some of the hallmarks of a constitutional bill of rights although was not itself one. It did not state what the consequences of infringement of one of its terms would be. It was not invoked to invalidate legislation until 1970 in *R v Drybones* (1970) 9 DLR (3d) 473. That was the only case, however, prior to the Charter, in which legislation was struck down as offending the Canadian Bill of Rights 1960. The Canadian Courts' apparent reluctance to invoke the Bill was a source of concern to protagonists of the Charter and explains, for example, why the Charter was drafted so as to confer express power on the Courts to supply remedies for infringement. The concern was that, without such an express mandate, the Courts would be reluctant to grant remedies for breach of the Charter.

⁶Article 3 follows section 1; Article 25 (Remedies) follows section 24(1); Article 1 (Supremacy of the Bill of Rights) follows section 52(1) of the Constitution Act 1982 etc.

the "limitation provision". This provides:

1. The Canadian Charter ... 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.

Section 1 is one of the provisions which the proposed New Zealand Bill of Rights has substantially followed. Article 3 of the proposed Bill of Rights provides:

3. The rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

These provisions are paramount because they condition all the rights and freedoms which follow. They set out the only allowable criterion by which those rights and freedoms may be limited. In adopting this format, the Canadian and New Zealand draftsmen were following neither the American Bill of Rights nor the International Covenant on Civil and Political Rights. The former consists of bald statements of rights with no express limitations.⁷ The latter contains a series of allowable limitations of different types according to the right or freedom concerned.⁸

There is no doubt that the rights and freedoms set out in the Charter *must be* subject to limitations. If the Charter did not expressly say so then the Courts would have been bound in practice to place restrictions on the exercise of those rights.⁹ Few, if any, rights are now regarded as absolute. It was recognised by the Canadian and New Zealand draftsmen that the real practical issue will be "What derogation from these fundamental rights will be permitted?" And the intent of section 1 (and Article 3) is to pre-ordain the criteria which the Courts must consider in determining that question.

It can be seen that there are four basic elements to section 1. A limitation on a Charter right, if it is to be permitted, must be:

1. a reasonable limit;
2. prescribed by law;
3. demonstrably justified;
4. in a free and democratic society.

In this article it is proposed to examine each of these elements, with reference both to the opinions of academic and other commentators prior to enactment of the Charter, and to the manner in which section 1 has been applied in practice.

First, two preliminary questions are addressed:

1. Who has the onus of proof under s 1?
2. Does s 1 qualify *all* the rights and freedoms set out in the Charter — can there be, for example, a "reasonable unreasonable search"?

⁷Eg. "Congress shall make no law ... abridging the freedom of speech" (First Amendment to the United States Constitution, 1789).

⁸Eg. Articles 19, 21, 22.

⁹As indeed the United States Supreme Court has done in applying the American Bill of Rights.

1. Onus of Proof under Section 1

If section 1 is the key section in the Charter, then the question of onus of proof is the key issue. Should a citizen have to prove that a restriction on his rights is *not* permissible, or is it up to the State to prove that the restriction is permissible?

The most natural interpretation of section 1 is that the party seeking to impose the limitation (in practice usually the Crown) has the onus of proof. This is the effect of the words "demonstrably justified". However, despite the unambiguous wording of section 1, in a series of early Charter cases, crown counsel argued that the burden of proof lies on the individual.¹⁰ Finally, in *Quebec Association of Protestant School Boards v Att - Gen Quebec*,¹¹ the leading judgment on section 1, Deschênes CJSC considered that the plain wording of section 1 required a complete onus on the government, and cited academic commentators¹² in support of this position.

Of the three Supreme Court decisions handed down at the time of writing, all have been disposed of without need for consideration of s1. However, in *Hunter v Southam Inc*¹³ the Court addressed s1 briefly (only for the purpose of recording its non-application to the argument) and in so doing Dickson J (for the Court) said:¹⁴

The phrase 'demonstrably justified' puts the onus of justifying a limitation on a right or freedom set out in the Charter on the party seeking to limit.

The onus of proof question can be properly be regarded as settled.

2. The Universal Application of Section 1

A question closely related to onus of proof is that of whether section 1 is to be uniformly applied as the *sole* limiting factor to Charter rights, or whether each right is to be regarded as subject to its own limitations.

As we have seen, the accepted position as to onus of proof is that an applicant need only show that a right has been infringed, and attention then switches to section 1. In practice, the presence of section 1, and strict adherence to this approach, has meant that there are very many infringements of rights where the infringement may be held to be "demonstrably justified" in terms of section 1 without real enquiry. In a typical case a judge will simply state that the limitation of the right is permissible under section 1 without alluding to the individual components of s1 nor to any specific reasons for his finding.

This state of affairs is the logical corollary to the proposition that section 1 is a *complete* code for the assessment of limitations on rights. If, say, freedom of association in s 2(c) is an *absolute* right, then there

¹⁰ *Southam Inc. v The Queen* (1983) 41 OR (2nd) 113 (Ont CA).

¹¹ (1982) 140 DLR (3rd) 33 (Que. Superior Court).

¹² Hogg, *Canada Act 1982 Annotated*, (1982), 10; Marx, "Entrenchment, Limitations and Non Obstante", in Tarnopolsky and Beaudoin, (eds), *The Canadian Charter of Rights and Freedoms : Commentary* (1982), 70.

¹³ (1984) 11 DLR (4th) 641.

¹⁴ *Ibid*, 660.

will be many laws and practices which may be said to infringe that right. Separate male and female lavatories in government buildings would be a simple example. But it will be no surprise that in the majority of those cases, the infringement will be of such minor degree and in such circumstances that there will be no difficulty in holding that the infringement is permissible in terms of s1. Thus, the Charter format of absolute guarantees with a uniform "limitations" provision results in a large number of rights violations, on the one hand, being "clawed back" and validated by s1 on the other.

There is nothing intrinsically wrong with this approach, although it is notable that this aspect of the Charter does not appear to have been predicted by academic commentators. It is a feature which rapidly developed in Charter cases. The practical implications were alluded to in passing by MacKinnon ACJO in *Southam Inc v the Queen*.¹⁵

In some cases, of course, the frivolous nature of the claim to protection of a freedom or right and of the submissions made in support will be immediately apparent and it will not take great effort to determine that the claim to a guaranteed freedom or right is not tenable under the Charter and under the circumstances.

That is, the permissibility of a limitation will often be easily established. Nevertheless, the Court must go through the procedure of determining that a freedom is infringed, and then making an evaluation of "reasonableness" under s1, even if it is straightforward to do so. Whether s1 can have any effect on Charter provisions that contain their own words of limitation is a difficult and as yet unresolved question.

In *Re Moore v The Queen*¹⁶ Ewaschuk J argued that s1 could not apply to rights already limited in terms of the Charter:¹⁷

Where the particular Charter provision contains its own modifier, e.g. unreasonable, arbitrary or cruel and unusual, the provision is self-defined as to what constitutes a reasonable limitation.

A similar view was expressed by Finch J of the British Columbia Supreme Court in *R v Robson*.¹⁸ There, it was held that a provision of the British Columbia Motor Vehicle Act was in conflict with s 7 of the Charter because it was a denial of the right to liberty and was not in accordance with fundamental justice. Finch J considered that s1 was redundant in that situation. A provision which was fundamentally unjust could not be regarded as a "reasonable limit".

However, two important Charter cases have expressly held that the point should remain open. In *Re Reich v College of Physicians & Surgeons of Alberta*¹⁹ McDonald J was prepared to concede that a finding of "unreasonableness" under s8 would also preclude a finding of "reasonable limits" under s1. However, having cited Ewaschuk J's dic-

¹⁵ Supra at note 10, at 124-5.

¹⁶ (1984) 45 OR (2d) 3 (Ont. HC).

¹⁷ Ibid, 10.

¹⁸ (1984) 41 CR (3d) 68 (BCSC).

¹⁹ (1984) 8 DLR (4th) 696 (Alta. QB).

ta in *Re Moore*, he expressly reserved for another time whether or not sections containing *other* qualifying words precluded the application of s1.

In the second case, *Hunter v Southam Inc*²⁰ the Supreme Court had found a search and seizure provision in the federal Combines Investigation Act to be unreasonable and therefore unconstitutional. No argument was addressed to the Court that s1 could validate the unreasonable search provisions, and the Court expressly left to another day:²¹

... the difficult question of the relationship between those two sections and, more particularly, what further balancing of interests, if any, may be contemplated by s.1, beyond that envisaged by s.8.

The point is not likely to often arise in practice, but it is submitted that it is proper that the point should be left open until a case arises in which a determination is required. It is conceivable that there may be circumstances where s1 will be invoked to validate that which is invalid in terms of another Charter qualifier. Emergency measures *may* justify "arbitrary" measures as reasonable limitations. The point remains open.

It can now be appreciated that one of the consequences of the Charter's format is to make s1 the focal point. If there is to be discussion as to the scope of a fundamental freedom or a legal right, it will generally fall (or should properly fall) into the ambit of s1. The right or freedom is *absolute*, except where it contains its own express limitation. Where such a limitation is expressed, section 1 probably still applies, although in practice will generally have no additional bearing on the matter.

The circuitous process demanded in easy cases, of finding a "technical" infringement, and then allowing the infringement under s1, is the price that Canada has to pay for establishing a uniform limiting criterion. New Zealand, by adopting a virtually identical limitation provision, seems set to follow suit.

3. Reasonable Limits

(a) IS A DENIAL A LIMITATION?

Charter rights can be limited so long as the limits are reasonable, and the remaining criteria of s1 are met. But they cannot be denied completely. This was held in the *Quebec Association of Protestant Schools*²² case. As this is a leading Charter case, it is instructive to consider the facts.

Quebec's Charter of the French Language of 1977 established the criteria for allowing English speaking Quebecers to have their children educated in English within the Public School system. The legislation provided that the right to receive education in English was limited to

²⁰ Supra at note 13.

²¹ Ibid, 660.

²² Supra at note 11.

- (i) children of partners who had themselves received education in English in Quebec
- (ii) children of parents who lived in Quebec as at 26 August 1977 and who had received education in English outside Quebec
- (iii) children who were, as at 26 August 1977, receiving education in English
- (iv) the younger brothers and sisters of children described in paragraph (iii).

The effect of this provision was to deny English education to the children of Canadians who, subsequently to 26 August 1977, moved to take up residence in Quebec.

This provision of the Quebec Charter (known as the "Quebec Clause" in the debate and controversy surrounding its introduction) conflicted directly with s23(1)(b) of the Charter of Rights and Freedoms. That section (known as the "Canada Clause") provided a Charter right to English language education in *any* province, for the children of Canadian citizens who had previously been educated in English elsewhere in Canada.

The Quebec clause and the Canada clause were in direct conflict. The conflict was intended by the framers of the Charter — the Federal Government. This was one of the burning issues in the Quebec separatist debate and one of the key factors which led to Quebec disassociating itself from the Charter. What lay behind the conflict was the Quebec government's concern to preserve the French language, and the federal Government's concern to foster Canadian unity.

In the Quebec Superior Court,²³ Deschênes C J based his decision to strike down the Quebec clause on the fact that it was a complete *denial* of the Charter right, as indeed it plainly was. There was, he said, no need to then consider s1 which could, at best, only legitimise *limits* of Charter rights and not denials. But in any event he did go on to consider s1 and determined that this "total" limitation was not permissible.

In reaching this conclusion Deschênes C J was clearly impressed with the fact that whereas s24(1) was worded so as to provide remedies for both infringements *and* denials, s1 would only legitimise *limitations*. As the distinction between infringements and denials was therefore to be found in the Charter itself, it was proper not to read the term "limits" in s1 as including total denials.

In the Quebec Court of Appeal,²⁴ Beauregard J expressed some doubt as to this view. He would not preclude the possibility that s1 could indeed authorise, if its conditions were otherwise met, limitations which were so extensive as to amount to a complete denial. But even so, the Charter framers here had adopted the Canada clause *specifically* to limit the effects of the Quebec clause. With that degree of connection between the two clauses, it was not possible to regard the Quebec clause

²³ *Ibid.*

²⁴ (1983) 1 DLR (4th) 573.

as “other than a prohibited derogation from this right”.²⁵ Further, Beauregard J found the Quebec clause objectionable as its purpose and intent was to challenge the very basis of the Charter right. Allowable limitations, and particularly limitations to the point of denial, must at least assume the merits of the right secured. Thus Beauregard J agreed with the other members of the Court of Appeal in affirming the judgment of *Beschênes C J*.

In the Supreme Court²⁶ particular emphasis was placed on the fact that the Charter provision was intended to correct situations of which the Quebec clause was the prototype. There was such a direct “collision” between the Charter and the Quebec clause that to allow the validity of the latter would in effect amount to a constitutional amendment.

The effect of the Supreme Court decision it is submitted, is to leave open the possibility that denials *could* be legitimated under s1 in certain circumstances. The peculiar feature of the *Quebec Protestant School Boards* case was the specific tailoring of the Charter to meet the situation embodied in the Quebec clause. Section 1 could not authenticate that. There is still room, then, for the principle developed by Beauregard J that limitations to the point of denial *could* be legitimate.

In practice it is difficult to conceive of other Charter rights, which are more generalised than the minority language rights, being totally abrogated by legislation. A statute which declared “there shall be no freedom of religion in Canada” would conflict with s2(a), and be unconstitutional for the same reasons as the *Quebec Protestant School Boards* case. But a statute removing that right in certain circumstances could not properly be called a complete denial of the right, even though it might, for any particular individual, have effect as a complete denial. It is submitted that in such a case, s1 would be applied so as to determine whether the denial of a right which therefore occurs in particular cases is a reasonable limitation on the general right. An analogy is legislation prohibiting admission of the public to juvenile courts. *Southam v the Queen*²⁷ suggests that such a ban can be legitimate in certain circumstances. Legislation which enacted those circumstances would of course involve a complete denial of the Charter rights to the public *in those circumstances*. But that does not preclude the operation of s1. In other words, denials of rights can constitute reasonable limits — provided the denial falls short of complete abrogation of the right as in the *Quebec Protestant Association of School Boards* case.

(b) REASONABLE — WHAT DOES IT MEAN?

The term “reasonable” is at the crux of section 1. Therefore it is at the crux of the Charter. It is the standard by which the Courts must ultimately decide whether invasions of rights and freedoms as set out in

²⁵ *Ibid*, 576.

²⁶ (1984) 10 DLR (4th) 321.

²⁷ *Supra* at note 10.

the Charter are to be permitted.

It is appropriate to attach this importance to the term "reasonable", in contrast to the other terms in s1, for these reasons. First the phrase "prescribed by law" qualifies only the format of the limitation and not its content. Thus, a limitation, however unreasonable, may satisfy the requirements of "prescribed by law" if it satisfies "adequate accessibility" and "sufficient precision"²⁸ — which it will usually do. Secondly, the phrase "demonstrably justified" has an important function as to the onus of proof but does not of itself define the criteria for allowing a limitation with sufficient particularity for it to be useful. That is, a limitation of a right may be capable of being demonstrated to be justifiable, but the final test is — "is it reasonable?"

It is not surprising then that much pre-Charter attention in Canada focused on the meaning of the term "reasonable" in s1, and the likely sources that could be drawn upon to give content to that term.

It is now proposed to review those sources, and to note the extent to which reliance has in fact been placed upon them in interpretation of s1. This will then enable a conclusion as to the extent to which Charter adjudication, under this important clause, involves departure from previously applicable principles of Canadian constitutional law. It will also enable a conclusion as to whether there are any New Zealand counterparts to the various sources of meaning for "reasonable" in Canada.

(i) "*Reasonable*" in general Canadian constitutional jurisprudence

A perennial point of constitutional conflict in Canada has been the division of federal and provincial legislative powers. In assessing whether or not impugned legislation has been validly enacted, the Courts must enquire into whether its content and subject matter falls within a category of legislative power enumerated in s90 or s91 of the Constitution Act 1867. Those sections confer jurisdiction on federal and provincial legislatures and set out the matters within the competence of each government.

In adjudicating constitutional cases, the Courts have in the first instance assumed the *constitutional validity* of the impugned statute. Thus, interpretations which will lead to the result that the legislature has legislated *within* its jurisdiction are to be favoured. In effect, this places a heavy burden on those who attack a statute's validity. For if the Court can assume any set of facts consistent with the statute's validity, it will do so. The test of "unconstitutionality" therefore becomes a negative: can the plaintiff show that there was no "rational basis"²⁹ for the legislation under the head of power concerned?

In the 1947 case of *Co-operative Committee on Japanese Canadians v Attorney-General for Canada*³⁰ the Privy Council enunciated the stan-

²⁸ The test laid down in *Sunday Times v UK* (1979), 2 EHHR 245 at 271.

²⁹ Per Laskin CJ in *Re Anti-Inflation Act Reference* [1976] 2 SCR 373 at 420.

³⁰ [1947] AC 87.

dard of proof that is required in such cases. There the impugned legislation had been passed by the federal Parliament under its "crisis power". The Privy Council said:³¹

... very clear evidence that an emergency has not arisen, or that the emergency *no longer* exists, is required to justify the judiciary, even though the question is one of *ultra vires*, in overruling the decision of the Parliament of the Dominion that exceptional measures were required or were still required. (emphasis added)

It can be seen from this case that legislation would need to be plainly, on its face, irrational before the application of this test resulted in its being struck down. The combined effect of the onus of proof and the substantive test — irrationality — made the burden all but impossible to discharge in the vast majority of cases.

The concept of "unreasonableness" as a test of validity for laws has also arisen in English law in the context of by-laws and regulations.³² The test enunciated there is similar. In one such case³³ Lord Denning M R put it this way:³⁴

No one can properly be labelled as being unreasonable unless he is not only wrong but unreasonably wrong, so wrong that no reasonable person could sensibly take that view.

Such a test of validity for by-laws and regulations forms part of the Canadian and New Zealand legal heritage. In New Zealand the issue has arisen in recent times in relation to regulations made under the Economic Stabilisation Act 1948.³⁵ In one case under that Act,³⁶ the Court of Appeal was asked to consider the validity of regulations introducing the "car-less day scheme". The following passage from the judgment of the Court of Appeal makes it clear that the approach is similar to that enunciated by Lord Denning:³⁷

The Court is concerned with whether, on the true interpretation of the parent Act, regulations are within the powers conferred by Parliament. They will be invalid if they are shown to be not reasonably capable of being regarded as serving the purpose for which the Act authorises regulations. If the only suggested connection with that purpose is remote or tenuous, the Court may infer that they cannot truly have been made for that purpose.

It can be seen that if this test for determining "unreasonableness"

³¹ Ibid, 101-102.

³² *Kruse v Johnson* [1898] 2 QB 91; *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680; *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014.

³³ *Secretary of State for Education and Science v Tameside Metropolitan Borough Council*, *ibid*.

³⁴ Ibid, 1025-1026.

³⁵ *New Zealand Shop Employees Industrial Association of Workers v Attorney General* [1976] 2 NZLR 521 (CA); *ACC v Taylor* [1977] 2 NZLR 413; *Brader v Ministry of Transport* [1981] 1 NZLR 73 (CA); *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374; *Combined State Unions v State Services Co-ordinating Committee* [1982] 1 NZLR 742 (CA).

³⁶ *NZ Drivers' Association v New Zealand Road Carriers*, *ibid*.

³⁷ Ibid, 388.

were to be applied to the Charter, such that "reasonableness" is found where "unreasonableness" is absent, then limitations could very easily be justified. The simple reversal of the onus of proof and *prima facie* rebuttal of the presumption of constitutionality, would not greatly assist a litigant. It is one thing for the onus to be on the Government. But if the onus is discharged simply by proving an absence of irrationality — in the sense of these cases — then the end result is much the same as if the presumption of constitutionality had applied in the first place.

In practice, a less rigorous test appears to be applied under the Charter, notwithstanding that in two leading cases the "by-laws" concept of "unreasonableness" has been expressly referred to as a guide in understanding "reasonable" in section 1.

In *Quebec Protestant School Boards*³⁸ Deschênes C J concluded, after a review of these decisions, that:³⁹

1. A limit is reasonable if it is a proportionate means to attain the purpose of the law;
2. Proof of the contrary involves proof not only of a wrong, but of a wrong which runs against common sense; and
3. The Courts must not yield to the temptation of too readily substituting their opinion for that of the Legislature.

While proposition 2 appears at first sight to merely re-state the strict test of irrationality as enunciated by Lord Denning M R, it will be appreciated that the addition of proposition 3 is indicative of a relaxing of standards. Indeed, if proposition 2 is indeed intended to re-state the "by-laws" test, then proposition 3 would be redundant as the "temptation" would not even present itself.

In *Re Reich v College of Physicians & Surgeons of Alberta*⁴⁰ McDonald J considered the same series of English by-laws cases and concluded there that "reasonable limits" meant those that:⁴¹

[are] capable of being supported as a rational means of achieving a rational objective.

This formulation too carries within it the notion that irrationality may be easier to prove under the Charter; or more strictly, that "rationality" will be harder for the crown to demonstrate, in relation to any particular limitation.

It is submitted that it is entirely appropriate that the test under the Charter should *not* be as severe as that in the by-laws cases. In the latter, the focus is on the *vires* of legislation. It is not on the limitation of individual rights, and whether that limitation is legitimate. This distinction highlights the fact that "reasonable" in s1 is *not* the functional equivalent of "rational" in constitutional theory. This distinction lies at the root of the following comments made by Dickson J in *Hunter v*

³⁸ *Supra* at note 11.

³⁹ *Ibid*, 77.

⁴⁰ *Supra* at note 19.

⁴¹ *Ibid*, 709.

*Southam Inc*⁴² (in addressing the meaning of “unreasonable” in s8):⁴³

... an assessment of the constitutionality of a search and seizure, or of a statute authorising a search or seizure, must focus on its ‘reasonable’ or ‘unreasonable’ impact on the subject of the search or the seizure, and not simply on its rationality in furthering some valid government objective.

Thus, while general constitutional theory has been referred to by the Courts in determining “reasonable limits”, it has not proved to be of real assistance.

(ii) “Reasonable” under the Canadian Bill of Rights 1960

The Canadian Bill of Rights 1960 contains no equivalent to s1. However, it was necessary to consider whether the imposition of laws was “reasonable” in connection with section 1(b) of that Act, which “recognised and declared” the right to “equality under the law”. As it is of course a truism that laws do not operate equally upon all persons (and indeed would often be unjust if they did), it became necessary to develop a test to determine whether an unequally operating law was objectionable. The test that came to be developed was expressed by McIntyre J in *McKay v The Queen*⁴⁴ as follows:⁴⁵

The question which must be resolved in each case is whether such inequality as may be created by legislation affecting a special class — here the military — is arbitrary, capricious or unnecessary, or whether it is rationally based and acceptable as a necessary variation from the general principle of universal application of law to meet special conditions and to attain a necessary and desirable social objective.

In other cases⁴⁶ the expression “valid federal objective” is used to describe what McIntyre J here refers to as a “necessary and desirable social objective”.

Such a test was expressly held by McIntyre J in *McKay*⁴⁷ to be no different to that involved in determining the *vires* of legislation. Accordingly, under the Bill of Rights also, the burden on a litigant was a heavy one, a factor illustrated by the almost total lack of success by plaintiffs in Bill of Rights litigation.

Significantly, however, the purported exercise of the same test in Charter cases has resulted in laws being struck down. Thus in *R v Muddford and Schott*⁴⁸ the Ontario High Court considered McIntyre J’s dicta to be appropriate to determining reasonable limits under s1. The case concerned the so-called “reverse onus” provision of the Narcotics Act. The Court could not postulate any “desirable social objective” for the reverse onus provision and it was struck down.

⁴² Supra at note 13.

⁴³ Ibid, 650.

⁴⁴ (1980) 114 DLR (3d) 393.

⁴⁵ Ibid, 423.

⁴⁶ Eg. *Re Prata v Ministry of Manpower and Immigration* [1976] 1 SCR 376 per Martland J at 382 citing *R v Burnshine* [1975] 1 SCR 693. This is the Canadian counterpart to what in American constitutional law is called “compelling state interest”.

⁴⁷ Supra at note 44.

⁴⁸ (1984) 40 OR (2d) 626.

Here we find the same test, but a result which departs from the trend in Canadian Bill of Rights cases whereunder success in having statutes declared inoperative was, save *R v Drybones*⁴⁹ almost nil. Once again, this indicates that the Courts are prepared to rise to the occasion demanded by the constitutional status of the Charter, even to the point of giving new life to old tests.

(iii) *American constitutional law as a guide to what is a "reasonable" limit*

American constitutional law in this area has developed primarily under the "equal protection" provision of the Fourteenth Amendment. When faced with laws that discriminate on some basis, and which therefore do not provide "equal protection", the Courts have evolved tests to determine what types of discrimination are permissible.

There is a large body of American case law in this area, and Canadian commentators have not unnaturally looked there for guidance in construing "reasonable limits". The American law is complex but its primary feature is the imposition of different standards by the Courts, dependent on the basis upon which discrimination occurs. Thus, discrimination based upon race⁵⁰ and national origin⁵¹ is regarded as in a "suspect category" and subject to strict judicial scrutiny. In practice this amounts to a strong presumption *against* the validity of such measures — so strong that, almost invariably, legislation which discriminates on such a basis will be struck down.

At the other end of the scale are statutes which involve other bases for discrimination — for example, commercial or economic status. Discrimination on these grounds is permissible subject to the overriding test that all such classifications be "reasonable", and connected to a "legitimate state interest".⁵² There the presumption of constitutionality operates as it did in Canada before the Charter.

It is also likely that in between these two extremes there is a "sliding scale".⁵³ That is, depending on the nature of the discriminatory classification made (eg. age, sex, wealth, location) the Courts may in fact apply a test which falls somewhere between "strict scrutiny (a presumption of unconstitutionality) and "rationality".

The obvious question in relation to Canada was whether the Canadian Courts would adopt any of these tests in applying section 1, and if so, which?

Section 1 itself answers much of this question. The onus, as we have seen, is on the person seeking to limit, no matter what type of right is involved. Nevertheless, as a practical matter, the Courts may hold that burden more difficult to discharge depending upon the nature of the

⁴⁹ *Supra* at note 5.

⁵⁰ *Brown v Board of Education of Topeka, Kansas* (1954) 347 US 483.

⁵¹ *Korematsu v United States* (1944) 323 US 214.

⁵² *Eg. McGowan v Maryland* (1961) 366 US 420.

⁵³ *Eg. San Antonio School District v Rodriguez* (1973) 411 US 1.

right or freedom involved. And, to adopt another American distinction, different considerations may well apply depending upon whether the impugned statute purposively infringes a Charter or constitutional right, or whether it does so only as an indirect effect.⁵⁴ In *Quebec Association of Protestant Schools* the Quebec clause was expressly designed to take away minority language rights and the Charter provision was promulgated to counter that intent. In terms of American law, a strict scrutiny standard was probably called for. The result of Deschênes C J's analysis was to reach the same conclusion. Although the American cases on this point were not cited by Deschênes C J, they would have supported his view.

In practice, it is submitted there will inevitably emerge a sliding scale of scrutiny in determining "reasonableness", depending on the Court's view as to the nature of the infringement involved in the case. This, it is submitted, is the explanation of *Quebec Association of Protestant Schools*. There Deschênes C J's finding as to s1 is not explicable on the real basis of the test he articulated, unless one postulates that he was applying a "stricter" standard of scrutiny than Canadian Courts had applied hitherto.

So too, in *Re Reich*, McDonald J said:⁵⁵

The degree to which the justifiability must be demonstrable in this sense will vary from the low end of the scale — when it does little more than to show that the object and means are a rational choice — to the high end of the scale — when the object and means are necessary.

That there should be a "sliding test" is neither surprising nor is it all contrary to the wording of section 1. True, the onus is on the Crown in *all* cases under s1 (and does not slide, as in the United States, from presumptive constitutionality to presumptive unconstitutionality), but that does not preclude the examination of "reasonableness" from being more or less rigorously pursued, according to the Court's perception of the right involved. "Reasonable" is, after all, a relative term. In the end, it all depends on just how far courts will defer to legislative intent. Indications in Canada are that it will be less often than it was in the past, while at the same time there remains the reluctance to substitute judicial for legislative will.

As will be submitted *infra*, the overall tone of s1, with its requirement that reasons for limits be *demonstrably justified*, and its reversal of the usual onus, supports a stricter test than mere rationality.

(iv) *General Considerations in approaches to "reasonable" under the Charter*

Notwithstanding a dramatic increase in the "success rate" of constitutional challenges under the Charter, there is a very strong emphasis on

⁵⁴ This direct/indirect classification is postulated by American constitutional scholar Lawrence Tribe as the true test for invocation of "strict" as opposed to "minimal scrutiny": *American Constitutional Law* (1978).

⁵⁵ *Supra* at note 19 at 712.

the need for judicial restraint in all the leading cases.

In *Re Ontario Film and Video Appreciation Society v Ontario Board of Censors*⁵⁶ the court said:⁵⁷

One thing is sure, however, our Courts will exercise considerable restraint in declaring legislative enactments, whether they be statutory or regulatory, to be unreasonable.

And in *Re Federal Republic of Germany v Rauca*⁵⁸

Following the usual canon of legislation [sic] validity courts should be extremely hesitant to strike down those laws unless they clearly violate the constitutional rights and freedoms set out in the Charter, and should be equally reluctant to characterise the limitation as *not* justifiable in a free and democratic society unless it is obviously unreasonable.

And the third proposition of Deschênes C J in *Quebec Protestant School Boards* was:⁵⁹

3. The Courts must not yield to the temptation of too readily substituting their opinion for that of the legislature.

In observing this restraint, the Courts have generally refrained from passing comment on substantive issues of legislative policy. Indeed, in the majority of cases in which legislation has been struck down, it has been only because the *means* employed to attain a legislative goal have been objectionable.

In *Re Service Employees' International Union v Broadway Manor Nursing Home*⁶⁰, for example, the Ontario High Court readily accepted the legitimacy of legislation which abrogated the rights of unions to bargain collectively and strike in order to control inflation. What was objectionable was that the legislation there went further than was necessary for the control of inflation, because it purported to remove the right to bargain and strike even in respect of non-remuneration matters. And in *Re Ontario Film and Video Appreciation Society v Ontario Board of Censors*⁶¹ it was not disputed that some form of censorship was legitimate — what was objectionable was that the Act laid down no criteria which the Board must follow in censoring movies. Again, it was the means, not the policy, which was in issue.

Even in *R v Big M Drug Mart*,⁶² where laws prohibiting Sunday trading were struck down, it was not argued that statutory provision of one day's rest was, as a matter of policy, illegitimate. What the Supreme Court held was that the particular statute involved — the Lord's Day Act — was objectionable because it was passed for religious

⁵⁶ (1983) 41 OR (2d) 583.

⁵⁷ *Ibid*, 591.

⁵⁸ *Supra* at note 10 at 244.

⁵⁹ *Supra* at note 11 at 77.

⁶⁰ (1984) 4 DLR (4th) 231.

⁶¹ *Supra* at note 56.

⁶² [1984] 1 WWR 625.

purposes and was an enforcement of the Christian Sunday.^{62a}

In conclusion, the Canadian experience to date, with the exception of one or two cases which must be called aberrations, shows that the Courts, while keen to exercise restraint are nevertheless well prepared to strike down legislation in the more obvious cases.

4. Prescribed by Law

The first proposed version of s1 did not contain this phrase. It was added following representations made by several organisations to the Joint Committee. Its purpose was to introduce a standard of certainty into permitted limitations. If they are to be capable of being known and understood, then they must be "prescribed by law".

The phrase has received consideration in several Charter cases⁶³ and the interpretation adopted in the *Sunday Times* case has been adopted. Rules of common law as well as regulations will constitute "prescription by law".

In *Ontario Film and Video Appreciation Society v Ontario Board of Censors*⁶⁴ the Ontario High Court had to consider a constitutional challenge to the statutory provisions which required all films to be submitted to the defendant for approval before being shown, and which authorised the defendant to "censor any film". The Court was satisfied that some form of prior censorship of films was a reasonable limit on the applicant's freedom of expression, and that it was demonstrably justified in a free and democratic society. The case was decided on the phrase "prescribed by law". Although censorship was permissible, it must be on grounds which are ascertainable. The court held:⁶⁵

Law cannot be vague, undefined and totally discretionary; it must be ascertainable and understandable. Any limits placed on the freedom of expression cannot be left to the whim of an official; such limits must be articulated with some precision or they cannot be considered to be law.

Had the Board's empowering legislation laid down some criteria for the exercise of its discretion, then it would have been, subject to the criteria being acceptable, a reasonable limit "prescribed by law".

5. As can be demonstrably justified

These words have two main effects. First, they place the onus of proof on the party seeking to uphold a limitation of a right. Second, they add a degree of stringency to the test to be applied when considering the phrase "reasonable limits". That is to say, the words have impli-

^{62a} The source of the Federal Parliament's power to pass the Act was its jurisdiction to legislate for "religious purposes", which had been established in earlier cases. That the Act had that purpose could not be denied. It is nevertheless possible, even after *Big M Drug Mart*, for provincial legislatures to legislate for days of rest under their "welfare" power.

⁶³ *R v Begley* (1982) 38 OR (2d) 549; *Re Federal Republic of Germany v Rauca* supra at note 10; *Ontario Film & Video Appreciation Soc.* supra at note 56.

⁶⁴ Supra at note 56.

⁶⁵ *Ibid*, 585.

cations not only for the burden of proof, but on the *extent* of that burden. However, the wording of s1 does not specifically say how that burden is to be discharged.

It was clear that Courts would be called upon, under section 1, to evaluate competing arguments as to social policy in Canadian society. There are compelling arguments that, if the Courts are to adjudicate on matters of social policy such as these, then they should be provided with as much relevant evidence as possible.

In fact, Canadian judges have had ready recourse to extrinsic material in Charter cases. In *Re Service Employers International Union v Broadway Manor Nursing Home*⁶⁶ O'Leary J said:⁶⁷

... the court because it is interpreting the Constitution may resort to a wide range of extrinsic material, including statements made by Cabinet Ministers and legislators at or before the introduction of the Charter of Rights; material bearing on the circumstances in which the Inflation Restraint Act 1982 was passed; ... the legislative approaches taken in similar fields by other acknowledged free and democratic societies, and established rules of international law.

In that case, as also in *Re Federal Republic of Germany v Rauca*⁶⁸ reference was made to the proceedings before the Joint Committee which heard submissions on the Charter, as well as to a variety of other sources. In the *Rauca* case the Court cited a passage from the Committee hearings in which the Deputy Minister of Justice testified to the effect that extradition under the Extradition Act was considered to be a legitimate limitation on a Canadian citizen's freedom to remain in Canada.

Cases decided so far under the Charter have revealed a variety of approaches to the means of establishing justification of limitations. Although none of the three Supreme Court decisions so far reported has involved a consideration of s1, there is in the first of these, *Law Society of Upper Canada v Skapinker*,⁶⁹ an indication of the Supreme Court's attitude to the means of proof.⁷⁰

The appellant has, from the outset of these proceedings, relied upon s.1 of the Charter as the final constitutional test supporting the validity of s.28(c) of the Law Society Act. To that end, a minimal record was established to demonstrate the justification of the citizenship requirement as a 'reasonable limit' on the rights granted by the Charter. The appellant's material supporting this part of its response to the application by the respondent was the report of a committee established by the province to study professional organisations in Ontario and which report in turn incorporated the findings of an earlier commission of inquiry. The intervener, the Federation of Law Societies of Canada, added other reports and documents concerning requirements in other professions and in other jurisdictions. Counsel for the appellant Law Society, Mr O'Brien, very candidly admitted that because s.1 and this very process were new to all, the record introduced by the appellant was rather slim. The originating notice which started these proceedings was one of the first under the Charter. As experience

⁶⁶ Supra at note 60.

⁶⁷ Ibid, 277-278.

⁶⁸ Supra at note 10, at 244-255.

⁶⁹ (1984) 9 DLR (4th) 161.

⁷⁰ Ibid, 181-182.

accumulates, the law profession and the courts will develop standards and practices which will enable the parties to demonstrate their position under s.1 and the courts to decide issues arising under that provision. 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 s.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 demonstrable justified. Such are the problems of the pioneer and such is the clarity of hindsight.

In the majority of cases where there is a detailed consideration of s1, the approach has involved a consideration of the comparable legislation in states of the United States, or of Australia, England or New Zealand. In other cases, there has been consideration of international instruments as to human rights. It is not clear from the reports of these cases how these are introduced into evidence, but no doubt they are in the category of facts of which judicial notice would be taken in any event. It would no doubt be different if a litigant based his argument on *practices* in other jurisdictions, which would then require proof.

It is submitted that in New Zealand the Court of Appeal will be receptive to a wide range of matters relative to social policy being placed before it, and that it would be appropriate for this to be done through counsel. In a 1984 address to the New Zealand Society for Legal Philosophy, the Honourable Sir Justice Richardson went so far as to stress the need for counsel appearing before the Court of Appeal to explore:⁷¹

... wider social and economic concerns; to delve into social and legal history; to canvass law reform committee materials; to undertake a review of the general legislative approach in New Zealand to particular questions; to consider the possible impact of various international conventions which New Zealand has ratified; and so on.

These remarks were made in the context of the judge's observations as to "judges as law makers" — judicial lawmaking to some extent is inescapable but if it is to be done properly then the assistance of counsel in the manner described above was considered essential. These comments were made with particular regard to the developments in the common law of negligence and natural justice. It is submitted they will apply all the more strongly in the case of adjudicating on a Bill of Rights.

If the comparable provision in the New Zealand draft Bill of Rights is ultimately enacted, then it is likely that a similar approach to that taken in Canada will be taken here. The role of counsel in appellate litigation may be dramatically changed.

6. In a Free and Democratic Society

This phrase in s1 sets the standard by which limitations on Charter rights are to be measured. A plain reading of s1 leads to the view that the framers intended that *other* free and democratic societies should be examined in order to decide whether any particular limitation is justifiable. This has indeed proved to be a feature of Charter cases. Commonly, a court considering section 1 will consider the laws of

⁷¹ (1985) 15 VUWLR 46, 50.

England, New Zealand, and the state and federal laws of Australia and the United States of America.⁷² In addition, a number of cases have referred to international instruments such as the International Covenant for Civil and Political Rights⁷³ and the European Convention.

As well as having regard to these sources outside Canada, Canadian Courts have in several cases stressed the fact that Canada is itself a free and democratic society. In *Quebec Association of Protestant Schools*, for example, Deschênes C J stated that no demonstration was required that Canada was free and democratic. And in *R v Leclerc*⁷⁴ it was held that judicial notice could be taken of the fact. In the writer's view it is not entirely clear why this point is made in these cases. If it is intended to demonstrate that "Canada" can be substituted for the phrase "in a free and democratic society", then the standard imposed by those words effectively disappears. Section 1 becomes circular — and the possibility emerges that limits may be held to be justified in Canada that are not justifiable in other countries. The point is illustrated in the *Quebec Association of Protestant Schools* case, where the only discussion under the heading "free and democratic society" is designed to prove that Canada is one. The conclusion is then drawn:⁷⁵

The condition of a 'free and democratic society' required by s.1 of the Charter is satisfied.

But this makes the phrase just one item to be "ticked off" in dealing with s1. If Courts simply declare, in every charter case, that Canada is free and democratic, then these words will not get them anywhere. The intent of the phrase is to invite comparison with other countries that are free and democratic.

Conclusion

1. Section 1 of the Charter calls for a specific test to be applied in assessing the reasonableness of limitations on rights and freedoms. While Canadian Courts have not unnaturally looked for guidance in established jurisprudence concerning "unreasonable" by-laws, and "valid federal objectives", these are not ultimately helpful. This has not placed the Courts in any undue difficulty — the wording of s1 is full enough to set out the new test to be applied.
2. The Charter format of a comprehensive limitation clause followed by absolute rights results, arguably, in an artificial level of reliance on s1 to authenticate as "reasonable" those "infringements" which otherwise may not even have been held to amount to infringements.
3. The Courts have tended to look critically at the *means* employed by the legislature to attain legislative goals, but have not yet struck

⁷² See eg. *R v Big M Drug Mart Ltd*, [1984] WWR 625; *Re Broadway Manor* supra at note 60; *Re USA v Smith* (1984) 7 DLR (4th) 12 (Ont. CA).

⁷³ See eg. *Re Mitchell v the Queen* (1983) 150 DLR (3d) 449 (Ont. HC); *Re Broadway Manor*, Supra at note 60.

⁷⁴ (1982) 1 CCC (3d) 422.

⁷⁵ Supra at note 11 at 67.

down a statute on the basis that its *goal* was unconstitutional. This is perhaps indicative of a general tendency to judicial restraint.

4. Courts in New Zealand have only the "by-laws" heritage to fall back on in construing a provision in a New Zealand Bill of Rights like s1. Unlike their Canadian counterparts, New Zealand judges have no experience in the types of constitutional adjudication that arise in federal countries. Nor is there any New Zealand counterpart to the Canadian Bill of Rights 1960. But these sources have proved to be of limited value in Canada in any event. So, for the reasons in conclusion 1 above, this is not likely to be a major disadvantage for New Zealand Courts. Article 3 of the proposed Bill of Rights, like section 1, sets out its own full test calling for principles of its own. The New Zealand Courts now have the emerging Canadian jurisprudence for guidance. This is a source of assistance that will be even more valuable than the Canadian courts' previous experience of general Constitutional litigation was in Canada.