

R. v. OAKES 1986-1997 BACK TO THE DRAWING BOARD[©]

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The Supreme Court of Canada, in *R. v. Oakes*, identified two standards of justification in applying section 1. The first standard was normative. The second was methodological, called the *Oakes* test. The Court, until recently, applied the *Oakes* test mechanically and avoided the normative standard. More recently, in *Egan v. Canada* and *RJR-MacDonald Inc. v. Canada (A.G.)*, it resorted to a normative analysis that is indeterminate and unpredictable. This article challenges both the mechanical application of the *Oakes* test and the Court's new normative approach. It proposes, and illustrates, a preferable alternative that is both determinate and predictable. It is supported by appendices that analyze section 1 cases between 1986 and 1997.

La Cour suprême du Canada, dans *R. c. Oakes*, a identifié deux mesures de justification pour l'application de l'article premier. La première est normative, tandis que la seconde est méthodologique, également surnommée le test de l'arrêt *Oakes*. Jusqu'à récemment, la Cour a appliqué le test de l'arrêt *Oakes* mécaniquement et a évité la mesure normative. Plus récemment, dans les arrêts *Egan c. Canada* et *RJR-MacDonald Inc. c. Canada (P.G.)*, elle a eu recours à une analyse normative, laquelle se révèle être indéterminée et imprévisible. Cet article compare les deux méthodes d'analyse, soit l'analyse mécanique du test de l'arrêt *Oakes* ainsi que la nouvelle approche normative de la Cour. Il propose, et illustre, une alternative préférable qui est déterminable et prévisible. Celle-ci est soutenue par des annexes qui analysent les décisions rendues sous l'article premier entre 1986 et 1997.

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I. INTRODUCTION

[T]he judiciary must consider ... the nature of Canadian society and how this should affect *Charter* rulings. ... In determining whether infringement of rights is "reasonable" and

“demonstrably justified in a free and democratic society” under section 1, what is “reasonable” in the Canadian context? What is “demonstrably justified”? More starkly, what meaning is to be assigned to the phrase “free and democratic society”? If Canadian judges are to properly deal with these questions, they must take steps which were not essential to judicial decision making in the pre-*Charter* era. They must steep themselves in the debates on the questions in academic journals. They must reflect and cogitate, to the end of developing a consistent and appropriate philosophical base for their decisions. In short, decision making under the *Charter* must become a more profound, intellectual and academic endeavour than it has heretofore been in this country.¹

More than a decade has passed since Dickson C.J.’s majority decision in *R. v. Oakes*.² The Chief Justice’s decision in *Oakes* has “taken on some of the character of holy writ” and has become synonymous with section 1 of the *Canadian Charter of Rights and Freedoms*.³ Dickson C.J.’s decision set out the well-known *Oakes* test which evolved into the sole method by which the Supreme Court determined the “reasonable limits” of all *Charter* rights and freedoms. It must be remembered, however, that Dickson C.J. never intended the four-part *Oakes* test to be the unique test of section 1 validity. He also devised a normative standard of justification that was to serve as the backdrop against which the four-fold *Oakes* test was to be applied. Dickson C.J. named this the ultimate standard of justification, which he articulated as follows:

The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter*, and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justifiable.⁴

This ultimate standard was grounded in Dickson C.J.’s assertion that judicial reasoning under section 1 should be framed in light of the

¹ The Hon. B. McLachlin, “The Charter of Rights and Freedoms: A Judicial Perspective” (1989) 23 U.B.C. L. Rev. 579 at 588.

² [1986] 1 S.C.R. 103 [hereinafter *Oakes*].

³ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act* 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11 [hereinafter *Charter*]. Section 1 is the second phase of judicial review mandated by the structure of the *Charter*. *Charter* review is conducted in two phases: (i) assessing whether a law or government action has violated a *Charter* guarantee, and (ii) whether this limit is reasonably and demonstrably justified in a free and democratic society. Peter Hogg refers to this test as “holy writ”: see P.W. Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997) c. 35 at 16. For a detailed analysis of the four-part *Oakes* test, see S.R. Peck, “An Analytical Framework for the Application of the Canadian Charter of Rights and Freedoms” (1987) 25 Osgoode Hall L.J. 1. On the limitations of this four-part test in the first decade following *Oakes*, see Part II, below. For further information on the application of the *Oakes* test by the Supreme Court of Canada, see Appendices A and B, below. Readers interested in further information relating to the Appendices should contact the authors directly.

⁴ *Supra* note 2 at 136.

underlying values of a free and democratic society. He recognized that a limit on a constitutional right would be justified only if it were grounded in values that were both normative and fundamental in character.⁵

An analysis of section 1 decisions of the Supreme Court between 1986 and 1995 demonstrates that the Court consistently avoided engaging in the normative analysis proposed by Dickson C.J. in *Oakes*. The Court instead based its determinations on the four-fold *Oakes* test that is methodological in design and technical in application. The result is that the normative values underlying Dickson C.J.'s ultimate standard were either ignored in applying the *Oakes* test or were simply not articulated. Contrary to Dickson C.J.'s original design, these decisions did not use section 1 as an interpretative vehicle for reconciling the disparate values of Canada's free and democratic society as they conflicted in specific cases. Instead, they carved out an analysis that was mechanical in application and indiscriminate in applying to all section 1 cases. In effect, the *Oakes* test became the methodological tail that wagged the normative dog.⁶

⁵ The term "normative" is used throughout this article in its general sense. It denotes the attributes of judicial decisionmaking as they pertain to fundamental values and principles (norms). These attributes are distinguishable from the factual and technical aspects of legal decisionmaking. Normative attributes inhere in the analysis of s. 1 in these ways. First, the judiciary has a mandate under s. 1 to ground its decisions in the fundamental values of a free and democratic Canadian society. Second, the values underlying s. 1 ground both *Charter* rights and limitations placed on those rights. Third, the values and principles underlying s. 1 are engaged by the social, political, and cultural context that arises in each case. In summary, normative values justify decisions under s. 1. The analysis of those values is also necessary in applying s. 1 to specific cases.

⁶ See Part II, below. For a statistical analysis of Supreme Court decisions on s. 1 of the *Charter*, see Appendices A and B below. For a useful preliminary analysis of the Supreme Court's reluctance to engage in normative analysis under s. 1 of the *Charter*, see P.A. Chapman, "The Politics of Judging: Section 1 of the Charter of Rights and Freedoms" (1986) 24 Osgoode Hall L.J. 867 at 873. Chapman notes that, at that time, "[m]ost of the articles written on section 1 have taken a rather mechanical view of its operation" Her conception of a court system that is unwilling to engage in normative analysis is markedly in contrast with the optimistic vision advanced a few years earlier. On such *Charter* optimism, see L.D. Barry, "Law, Policy and Statutory Interpretation under a Constitutionally Entrenched Canadian Charter of Rights and Freedoms" (1982) 60 Can. Bar Rev. 237. But see R.A. Macdonald, "Postscript and Prelude—The Jurisprudence of the Charter: Eight Theses" (1982) 4 Supreme Court L.R. 321 at 337. Barry, at 264, argues that, with the advent of the *Charter*, judges "will be forced to admit they must make choices between competing values. They will no longer be able to portray themselves as mere mechanical finders and appliers of the law." Sidney Peck argues further, that

[i]n their approach to section 1, the justices of the Supreme Court of Canada developed doctrine which on its face suggests that they intended to embrace judicial activism in order to protect the *Charter* rights and freedoms, that they intended to encourage lower court judges to adopt a similar position, and that they intended to insist on a high standard of justification in order to make it difficult for government to salvage a limit by bringing it within section 1.

Supra note 3 at 78. For the view, in 1983, that the courts are likely to avoid an activist role in

The Supreme Court appears to have recognized the need for a normative standard in recent years. Since 1995, the decisions of that Court have attempted to graft a normative superstructure onto the *Oakes* test, with varying degrees of success. This shift in direction is evident in decisions by the late Mr. Justice Sopinka in *Egan v. Canada*,⁷ and more notably, in the approaches adopted by La Forest J. and McLachlin J. in *RJR-MacDonald Inc. v. Canada (A.G.)*⁸ and by La Forest J. in *Ross v. New Brunswick School District No. 19*. These decisions have some comparable characteristics. We refer to this shift in approach to section 1 as the “*Oakes-Plus*” approach. This latest approach attempts to revive the ultimate standard of justification enunciated by Dickson C.J. in *Oakes*. It also recognizes, in varying respects, that section 1 decisionmaking must be framed in light of fundamental values protected

interpreting and applying the *Charter*, see B. Hovius & R. Martin, “The *Canadian Charter of Rights and Freedoms* in the Supreme Court of Canada” (1983) 61 Can. Bar Rev. 354 at 355. See also T.J. Christian, “The Limitation of Liberty: A Consideration of Section 1 of the Charter of Rights and Freedoms” (1982) Spec. Ed. U.B.C. L. Rev. 105; W.E. Conklin, “Interpreting and Applying the Limitations Clause: An Analysis of Section 1” (1982) 4 Supreme Court L.R. 75; and P.A. Bender, “Justifications for Limiting Constitutionally Guaranteed Rights and Freedoms: Some Remarks About the Proper Role of Section One of the Canadian Charter” (1983) 13 Man. L.J. 669.

⁷ [1995] 2 S.C.R. 513 [hereinafter *Egan*]. For a critical analysis of Sopinka J.’s problematic decision see Part III(A), below. For comments on *Egan*, see B.A. Schnurr, “Claims by Common Law Spouses and Same Sex Partners Against Estates” (1996) Spec. Lect. L.S.U.C. 35; H. Lessard *et al.*, “Developments in Constitutional Law: The 1994-95 Term” (1996) 7 Supreme Court L.R. (2d) 81; M. Bailey, “Developments in Family Law: The 1994-95 Term” (1996) 7 Supreme Court L.R. (2d) 327; R. Wintemute, “Discrimination Against Same Sex Couples: Sections 15(1) and 1 of the Charter: *Egan v. Canada*” (1995) 73 Can. Bar Rev. 682; J. Keene, “Discrimination in the Provision of Government Services and S. 15 of the *Charter*: Making the Best of the Judgments in *Egan*, *Thibaudeau*, and *Miron*” (1995) 11 J.L. & Soc. Pol’y 107; and C.F. Stychin, “Novel Concepts: A Comment on *Egan and Nesbitt v. The Queen*” (1995) 6 Const. F. 101.

⁸ [1995] 3 S.C.R. 199 [hereinafter *RJR-MacDonald*]. In *RJR-MacDonald* both the majority and minority moved towards a less formalist, more flexible construction of s. 1 in balancing individual and community ends. For comments on *RJR-MacDonald* see M. Jackman, “The Constitutional Basis for Federal Regulation of Health” (1996) 5:2 Health L. Rev. 3; N. Campbell, “The Interlocutory Injunction in Canada: Reading Smoke Signals” (1995) Spec. Lect. L.S.U.C. 211; R. Moon, “*RJR-MacDonald v. Canada* on the Freedom to Advertise” (1995) 7 Const. Forum 1; A.C. Hutchinson & D. Schneiderman, “Smoking Guns: The Federal Government Confronts the Tobacco and Gun Lobbies” (1995) 7 Const. Forum 16; R.A. Shiner, “The Silent Majority Speaks: *RJR-MacDonald Inc. v. Canada*” (1995) 7 Const. Forum 8; and E. McNaughton & J. Galway, “*RJR-MacDonald*, Tobacco Ad Restrictions Up In Smoke” (1995) 5 Can. Corp. Counsel 35. For an illustration of a case in which the Supreme Court took a guarded normative approach under s. 7 of the *Charter*, see *R. v. Morgentaler* [1988] 1 S.C.R. 30 at 137-39 [hereinafter *Morgentaler*]. But see *Operation Dismantle v. The Queen* [1985] 1 S.C.R. 441 at 448.

⁹ [1996] 1 S.C.R. 825 [hereinafter *Ross*]. It is pertinent that, with the exception of *Harvey v. New Brunswick (A.G.)* [1996] 2 S.C.R. 876 [hereinafter *Harvey*], all the s. 1 cases following the *RJR-MacDonald* line of cases deal with freedom of expression. On these cases, see Part III(C), below. It is also relevant that, in *Harvey*, the Supreme Court also adopted a normative and contextual approach towards s. 1. See also text accompanying notes 136-40, *infra*.

by the *Charter*. But, to varying degrees, the *Oakes-Plus* decisions share comparable weaknesses: none manages to integrate normative analysis into their opinions in a consistent and coherent fashion. The harsh reality is that the Court has swung the decisional pendulum from an overly technical to an unpredictable normative analysis of section 1. The result has been a disjointed analysis of section 1 that appears to lack a clear and principled foundation.

This article examines section 1 decisionmaking from 1986-1997. It concludes that neither the Supreme Court's decisions in the first decade following *Oakes*, nor its more recent *Oakes-Plus* decisions satisfy the spirit of Dickson C.J.'s ultimate standard and four-fold test set out in *Oakes*. The cases in the decade since *Oakes* suffer from the opposite defect to the cases since 1995. In the first decade following *Oakes*, the Court placed undue reliance upon the four-fold *Oakes* test. Since 1995, its *Oakes-Plus* approach has introduced an unbridled normative analysis under section 1.¹⁰

This article argues that, in distinction to both approaches, a preferable response is to resort to and consolidate *both* a normative *and* a methodological analysis under section 1. We endorse the spirit of

¹⁰ We acknowledge that judges on the Supreme Court have displayed markedly different degrees of judicial activism in deciding *Charter* cases, particularly in its first decade. However, the extent to which judges engaged in normative analysis, in relation to s. 1 in particular, is far more limited. For an early account of this restrained activism under the *Charter*, see P. Russell, "The First Three Years in Charterland" (1985) 28 Can. Pub. Admin. 367. On the proposition that the framers of the *Charter* intended to accord the Courts expanded normative power, see A.F. Bayefsky, "The Judicial Function Under the Canadian Charter of Rights and Freedoms" (1987) 32 McGill L.J. 791. Bayefsky states that, according to the legislative history, ss. 1 and 52 were to give the judiciary "a mandate to review the substance of legislation for its conformity to human rights standards and to render legislation inconsistent with those standards of no force or effect ...": *ibid.* at 819. We maintain, in this article, notwithstanding this legislative authority vested in the courts, that the Supreme Court avoided engaging in normative inquiry under s. 1 during the first decade following *Oakes*: see Part II, below. But see P.W. Hogg & R. Penner, "The Contribution of Chief Justice Dickson to an Interpretative Framework and Value System for Section 1 Of The *Charter of Rights*" (1991) 20 Man. L.J. 428. Hogg and Penner contend, at 434, that the values of the ultimate standard enunciated in *Oakes* do infuse the *Oakes* test. For an excellent study on normative differences among judges on the Supreme Court, see F.L. Morton, P.H. Russell & M.J. Withey, "The Supreme Court's First One Hundred Charter of Rights Decisions: A Statistical Analysis" (1992) 30 Osgoode Hall L.J. 1. See generally, J.C. Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997); P.C. Weiler, "The Charter at Work: Reflections on the Constitutionalizing of Labour and Employment Law" (1990) 40 U.T.L.J. 117; and R. Knopff & F.L. Morton, *Charter Politics* (Scarborough: Nelson Canada, 1992). On the balancing of interests under the *Charter*, see for example, M. Gold, "The Rhetoric of Rights: The Supreme Court and the *Charter*" (1987) 25 Osgoode Hall L.J. 375 at 391 ("C. Limiting the Appearance of Balancing Interests"); and The Hon. G.V. La Forest, "The Balancing of Interests under the *Charter*" (1992) 2 N.J.C.L. 133. On the general reluctance of the Court to engage in normative decisionmaking during the first ten years of the *Charter*, see *supra* note 6.

Dickson C.J.'s normative standard in *Oakes* but argue that the *Oakes* methodology is not integrated with, and fails to satisfy, this normative standard. The goal of this article is to integrate normative and methodological analysis under section 1 in a manner that is consistent and contextual.¹¹ This requires that section 1 be applied consistently, on the basis of an examination of the values at stake and in light of the

¹¹ In proposing a normative and a principled method of analyzing s. 1, we dispute the frequent assumption that normative and principled decisionmaking are in conflict. Determining whether a particular political expression falls within the founding liberal right to free expression requires an evaluation of the normative value that the decisionmaker attributes to the political interests in issue. The fact that such a determination is normative, however, does not deny the need for the decisionmaker to justify those normative choices in a principled manner. See, for example, L.E. Trakman, "Transforming Free Speech: Rights and Responsibilities" (1995) 56 Ohio State L.J. 899 at 902-11 [hereinafter "Transforming Free Speech"]. Those who argue for a principled approach towards judicial decisionmaking, to the exclusion of normative choice, fail to acknowledge the extent to which principles are grounded in normative values. Those who would reject principled decisionmaking for dressing up preconceived norms in principled garb, fail to reckon with the extent to which principles make it more difficult for decisionmakers to hide their own normative preferences. For proponents of principled decisionmaking, see J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980) at 74; and R.M. Dworkin, "The Forum of Principle" (1981) 56 N.Y.U. L. Rev. 469. Dworkin argues that "the Court should make decisions of principle rather than policy—decisions about what rights people have under our constitutional system rather than decisions about how the general welfare is best promoted": *ibid.* at 516. See also R.M. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, Mass.: Harvard University Press, 1996) 1-38. In contrast, critical legal scholars like Peter Gabel argue that such principled decisionmaking is inherently subjective and therefore, not principled at all: see P. Gabel, Book Review (1977) 91 Harv. L. Rev. 302, 305-06; and P. Brest, "The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship" (1981) 90 Yale L.J. 1063. Compare L.G. Sager, "Rights Skepticism and Process-Based Responses" (1981) 56 N.Y.U. L. Rev. 417. For proponents of "normatively neutral" methods decisionmaking, see, for example, R.H. Bork, "Neutral Principles and Some First Amendment Problems" (1971) 47 Ind. L.J. 1. But compare H. Wechsler, "Toward Neutral Principles of Constitutional Law" (1959) 73 Harv. L. Rev. 1. For criticisms of both principled and "normatively neutral" methods of *Charter*-decisionmaking, see, for example, P.J. Monahan & M. Finkelstein, "The Charter of Rights and Public Policy in Canada" (1992) 30 Osgoode Hall L.J. 501; J.C. Bakan, "Constitutional Interpretation and Social Change: You Can't Always Get What You Want (Nor What You Need)" (1991) 70 Can. Bar Rev. 307; J. Fudge & H.J. Glasbeek, "The Politics of Rights: A Politics With Little Class" (1992) 1 Soc. & Legal Stud. 45; H.J. Glasbeek, "From Constitutional Rights to 'Real' Rights—'R-i-i-g-h-t-s Fo-or-wa-ard Ho!'" (1990) 10 Windsor Y.B. Access Just. 468; A. Petter, "Immaculate Deception: The *Charter's* Hidden Agenda" (1987) 45 Advocate 857; C.P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (Toronto: McClelland & Stewart, 1992); A.C. Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995); and S.L. Martin & K.E. Mahoney, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987). On the view that *Charter* rights fail to deliver substantive guarantees and serve the interests of self-interested political groups, see J.C. Bakan, "What's Right with Social Rights," in J.C. Bakan & D. Schneiderman, eds., *Social Justice and the Constitution: Perspectives on a Social Union for Canada* (Ottawa: Carleton University Press, 1992) 85; and J.C. Bakan, "Strange Expectations: A Review of Two Theories of Judicial Review" (1990) 35 McGill L.J. 439. On a method of reconciling normative and principled methods of decisionmaking, see L.E. Trakman & S. Gatién, *Rights and Responsibilities* (forthcoming).

context of each case.¹² The purpose is to facilitate section 1 decisionmaking that is normatively justified, comprehensible, and leads to predictable results.¹³

This article commences with an examination of the decisions of the Supreme Court of Canada during the decade following *Oakes*. This is followed by an evaluation of cases since 1995 that exhibit the *Oakes-Plus* approach. The article then argues for a new approach towards section 1 analysis that redresses weaknesses in the existing analysis and arrives at a constructive alternative. This is the subject of a detailed illustration of this new analysis, grounded in the facts of *RJR-MacDonald*. The article concludes by proposing the adoption of such an analysis by the courts. Two appendices analyze the application of the *Oakes* test by the Supreme Court since 1986.

II. DECISIONMAKING UNDER *R. v. OAKES*

The Supreme Court of Canada's reluctance to set out a section 1 test prior to *Oakes*, handed down in 1986, is understandable. It clearly was a difficult task to devise, from scratch, an analysis of section 1 that could capture its various complexities in a normative and functional judicial analysis. Section 1 of the *Charter* states that:

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.

¹² The Supreme Court of Canada, to some degree, has already resorted to a contextual approach. See, for example, McLachlin J. in *Rocket v. Royal College of Dental Surgeons of Ontario* [1990] 2 S.C.R. 232 [hereinafter *Rocket*], cited with approval by La Forest J. in *RJR-MacDonald* *supra* note 8 at 280. On this contextual approach, in the cases following the *RJR-MacDonald* line of reasoning, see Part III(A) and (C), below.

¹³ By "predictable" we do not mean that a single result will be self-evident. Judges may well reach different determinations in the same context because they conceive of different normative values, or attach different weights to the same values. However, we do claim that, in adopting a normative and principled s. 1 analysis, judicial decisions will have a greater capacity to be predictable because they will encompass the normative assumptions of the court. This is especially likely when judges adopt preferred normative positions and apply them in a principled manner in each context. In these respects we agree with, yet diverge from, those who insist that "until we find a way to make our judges answerable for their views, ... [*Charter* values] will be vulnerable to personal politics on the Bench": D.M. Beatty, "The Canadian Conception of Equality" (1996) 46 U.T.L.J. 349 at 374. It is unavoidable that the personal views of judges will influence their conception of the values underlying a free and democratic society and their manner of construing those values. But the goal is to subject such personal values to more open scrutiny, not to negate their existence. In proposing a principled, contextual, and integrated analysis of s. 1, this article aims at facilitating that scrutiny: see Part IV, below. See also *supra* note 11.

As Dickson C.J. noted in *Oakes*, section 1 plays a unique role within the *Charter*. It both “guarantees the rights and freedoms set out in the *Charter*” and sets “reasonable limits” on infractions upon those rights and freedoms. The Chief Justice noted that the first function of section 1 is to guarantee rights and freedoms. Its second function is to limit them:

Accordingly, any s. 1 inquiry must be premised on an understanding that the impugned limit violates constitutional rights and freedoms—rights and freedoms which are part of the supreme law of Canada. As Wilson J. stated in *Singh v. Minister of Employment and Immigration*, ... “it is important to remember that the courts are conducting this inquiry in light of a commitment to uphold the rights and freedoms set out in the other sections of the *Charter*.”¹⁴

Section 1 has a uniquely broad scope of application because it both safeguards and limits *every* right and freedom in the *Charter*. Unlike any other section of the *Charter*, under section 1 the courts are required to evaluate a range of individual rights and freedoms, many of which are subject to competing values and interests within a constitutional democracy. As a result, section 1 has been applied to determine, *inter alia*, the validity of laws that impact on abortion,¹⁵ mandatory retirement,¹⁶ Sunday closing,¹⁷ same-sex spousal pension benefits,¹⁸ prostitution,¹⁹ hate literature,²⁰ and assisted suicide.²¹ In each instance, section 1 obliges the judiciary to exercise complex social choices, to weigh disparate communal values in an often divided society, and to evaluate different conceptions of rights and freedoms within it.²²

¹⁴ *Oakes*, *supra* note 2 at 135-36, Dickson C.J.

¹⁵ *Morgentaler* *supra* note 8.

¹⁶ *McKinney v. University of Guelph* [1990] 3 S.C.R. 229 [hereinafter *McKinney*].

¹⁷ *R. v. Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295 [hereinafter *Big M*]; and *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 [hereinafter *Edwards Books*].

¹⁸ *Egan*, *supra* note 7.

¹⁹ *Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)* [1990] 1 S.C.R. 1123 [hereinafter *Prostitution Reference*].

²⁰ *R. v. Keegstra* [1990] 3 S.C.R. 697 [hereinafter *Keegstra*]; and *R. v. Zundel*, [1992] 2 S.C.R. 731 [hereinafter *Zundel*].

²¹ *Rodriguez v. British Columbia (A.G.)* [1993] 3 S.C.R. 519.

²² As Patrick Monahan explained: “In order to give content to the [the *Charter*], the courts will have to devise some normative theory about the nature of freedom and democracy”: P.J. Monahan, “Judicial Review and Democracy: A Theory of Judicial Review” (1987) 21 U.B.C. L. Rev. 87 at 97. See also A. Petter & A.C. Hutchinson, “Rights in Conflict: The Dilemma of Charter Legitimacy” (1989) 23 U.B.C. L. Rev. 531; and P.J. Monahan & A. Petter, “Developments in Constitutional Law: The 1985-86 Term” (1987) 9 Supreme Court L.R. 69 at 103.

No other section of the *Charter* engages such a broad palette of normative choices.²³ Nor does any other section require that such norms be weighed against one other.²⁴ Consequently, the then Chief Justice undertook a daunting task in *Oakes*: he devised an analysis that, henceforth, would be used by Canadian judges to transform each and every *Charter* right from an abstract entitlement to a concrete guarantee.²⁵ In *Oakes*, Dickson C.J. set out two distinct but related standards of justification under section 1. He located the first standard of justification, referred to as the ultimate standard, within the values and principles of a free and democratic society, stating:

The Court must be guided by the values and principles essential to a free and democratic society The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter*, and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.²⁶

²³ In setting limits on *Charter* rights under s. 1 in the absence of a principled method of analysis, there is a real risk of ad hoc decisionmaking by courts. Sidney Peck, for example, observes: When judges balance under section 1, they are doing ... ad hoc balancing. They do not state a general rule of law, but rather decide whether the particular limit contained in the particular enactment under review is reasonable and demonstrably justified in the particular circumstances of the case. ... The decision based on section 1 balancing is ad hoc in the sense that it is unique to the particular limit in the particular circumstances considered by the justices. It does not lay down a general rule of law about the degree of protection afforded ... nor even, perhaps, about the validity in general of rules See Peck, *supra* note 3 at 27-28 [footnotes omitted].

²⁴ For some, the open-endedness of s. 1 is also a pitfall. Peter Hogg and Roland Penner, for example, address the risk that a non-elected judiciary will employ s. 1 to “[re-do] the political calculus of costs and benefits that has already been performed by an elected legislative body”: Hogg & Penner, *supra* note 10 at 429. They argue, further, that the courts often lack the “expertise and resources to review the legislature’s judgement that a particular law will increase the general welfare.”

²⁵ In the case of s. 2(b), for example, virtually every restriction on speech has been found to be a violation by the Court. Thus, it is left to s. 1 to determine the final result of each freedom of expression case. The result is that the scope of freedom of expression owes far more to s. 1 jurisprudence than to s. 2(b). See also Hogg, *supra* note 3 c. 40 at 9.

²⁶ *Oakes*, *supra* note 2 at 136. These values and principles, enunciated by Dickson C.J. in *Oakes*, are comparable to the “larger objects of the *Charter*” set out by Dickson C.J. in *Big M*, *supra* note 17 at 344:

In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*’s protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to

Dickson C.J. insisted further that these normative values determine both the nature of rights and the “reasonable limits” to impose upon them.²⁷ In this way, he recognized the integral relationship between normative and principled decisionmaking under section 1: “[The i]nclusion of these words [“free and democratic society”] as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic.”²⁸

Dickson C.J.’s conception of a free and democratic society was principled, but not wholly abstract.²⁹ He provided, as important illustrations, “but a few” of the values and principles of a free and democratic society that courts ought to consider when applying section 1: “respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.”³⁰

Dickson C.J. devised a second standard of justification under section 1. This was the four-fold test, or *Oakes* test, which courts were to apply in reaching logical and comprehensive determinations under section 1. He intended this specific standard of justification to balance the pre-existing tension between freedoms guaranteed by the *Charter* and limits imposed on them by governmental action in light of fundamental values that ground both. The test had a functional aim: to give form to the ultimate standard of justification, to constrain its open-endedness, and to set out criteria to guide decisionmakers in applying the test to specific cases.

Dickson C.J.’s formulation of section 1, therefore, sought to integrate a normative analysis of the fundamental values underlying

recall that the *Charter* was not enacted in a vacuum, and must therefore, as this Court’s decision in *Law Society of Upper Canada v. Skapinker*... illustrates, be placed in its proper linguistic, philosophic and historical contexts.

For an analysis of this statement in *Big M*, see Peck, *supra* note 3 at 8-21.

²⁷ Dickson C.J. evaluated the words “unreasonable search and seizure” in *Hunt v. Southam Inc.*, [1984] 2 S.C.R. 145 at 155, concluding that “[i]t is clear that the meaning of ‘unreasonable’ cannot be determined by recourse to a dictionary, nor for that matter, by reference to the rules of statutory construction.” See also Hogg & Penner, *supra* note 10 at 429.

²⁸ *Oakes*, *supra* note 2 at 136.

²⁹ *Ibid.* at 227. Dickson C.J. referred to his earlier decision in *Big M*, *supra* note 17 at 352, where he stated: “Principles will have to be developed for recognizing which government objectives are of sufficient importance to warrant overriding a constitutionally protected right or freedom.”

³⁰ *Oakes*, *supra* note 2 at 136.

Canada's free and democratic society with a consistent and predictable method of balancing those fundamental values.³¹ This required that a balance be established between the normative touchstone of Dickson C.J.'s section 1 analysis, set out in the ultimate standard of justification, and the principled restraints upon that ultimate standard embodied in the four-fold *Oakes* test. While this ultimate standard was intended to evaluate the substance of the legislation being challenged under section 1 of the *Charter*, the four-part *Oakes* test was to ensure that courts avoided unbridled and unpredictable decisionmaking in applying that normative touchstone in specific cases.

The *Oakes* test has two major components. The first component scrutinizes whether the objective of the law in question is important enough to warrant overriding a *Charter* guarantee. The second component examines the means chosen to satisfy that objective and further, whether that means is reasonable and demonstrably justified. This second component is structured around a "proportionality test" that requires scrutiny of the governmental objective and the legislative means of achieving it.

The sections immediately below analyze the *Oakes* test with three goals in mind. First, it identifies the four sub-tests within *Oakes*. Second, it evaluates them in relationship to Dickson C.J.'s ultimate standard of justification. Third, it demonstrates the insufficiency of that relationship in practice.

A. *Sufficiently Important Objective Test*

To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom ...'.³²

The first branch of the *Oakes* test requires that the government establish the importance of the objective underlying the impugned

³¹ Compare A. Lokan, "The Rise and Fall of Doctrine Under Section 1 of the Charter" (1992) 24 *Ottawa L. Rev.* 163 at 177:

The major problem with the *Oakes* test, as set out in its "logically pure" form, is that it simply purports to announce a standard of judicial review, without reference to any of the factors that may go to how strict that standard should be. The purported standard exists in a vacuum. When it comes to be applied and given definition, it gives no guidance as to when the *Charter* must give way to competing values.

³² *Oakes*, *supra* note 2 at 138 [emphasis added].

legislative provision. In *Oakes*, the Court stated that a valid objective must accord with the values of a free and democratic society and further, that these objectives must “relate to concerns which are pressing and substantial”³³ A valid governmental objective, it concluded, must also further “the realization of collective goals of fundamental importance.”³⁴ Finally, the governmental objective must be *intra vires* the power of the legislature.³⁵ The “pressing and substantial” sub-test within the *Oakes* framework is intended to establish the nature of the government's objective and whether that objective is sufficiently important to justify the impugned violation of a *Charter* right or freedom. It is apparent that this sub-test can only be discharged by evaluating the values underlying the impugned measures and the right or freedom infringed.³⁶ This renders the “sufficiently important objective” test into an important component of Dickson C.J.’s ultimate standard.

In the ten years since the *Oakes* test was adopted, the “sufficiently importance objective” test has played a limited role in the application of the *Oakes* test. The majority of the Supreme Court of Canada found that the government’s objective was sufficiently important in 97 per cent of the instances in which *Charter* violations were considered under section 1.³⁷ Professor Hogg observed that “the requirement of a sufficiently important objective has been satisfied in all but one or two of the *Charter* cases that have reached the Supreme Court of Canada.”³⁸

The following are objectives which the Court found were sufficiently important to *justify* the violation of *Charter* rights and freedoms: “seek[ing] to eradicate the various forms of social nuisance arising from the public display of the sale of sex;”³⁹ “maintenance of a

³³ *Ibid.*

³⁴ *Ibid.* at 136.

³⁵ Hogg, *supra* note 3 c. 35 at 22-23.

³⁶ *Supra* notes 10-12.

³⁷ See Appendix A, Table 1, below. From 1986 to the time of writing (autumn, 1997), a majority of the Supreme Court considered eighty-seven violations under s. 1, eighty-four of which were held to have pressing and substantial objectives.

³⁸ *Supra* note 3 c. 35 at 20. In *Zundel*, *supra* note 20, four justices out of seven failed the objective of a law infringing s. 2(b). In *Andrewsv. Law Society of British Columbia* [1989] 1 S.C.R. 143 [hereinafter *Andrews*], the Court was divided, with three out of six justices failing the objective of a law infringing s. 15. See also Appendix B, Table 3, below.

³⁹ *Prostitution Referencessupra* note 19 at 1225.

high standard of professionalism” among dentists;⁴⁰ “alleviation of poverty of elderly [heterosexual] spouses.”⁴¹ and precluding advertisers “from taking advantage of children both by inciting them to make purchases and by inciting them to have their parents make purchases.”⁴²

In applying the “sufficiently important objective” test, the Supreme Court has varied the degree of precision with which the objectives of impugned legislation have been characterized. Its approach has led to varying characterizations of governmental objectives, without reasons being given for the degree of precision accorded in specific cases. This approach appears to be manipulative. For example, more general objectives typically appear more pressing and substantial than more specific ones. Hogg illustrates this by referring to the Supreme Court’s decision in *Andrews*.⁴³ The minority in that decision characterized the objective of the law more generally, as restricting entry to the legal profession to those qualified to practice law. The majority characterized the objective more specifically, as restricting entry to the legal profession to Canadian citizens. As a result, the majority could not justify the citizenship requirement in order to strike down the legislative objective, while the minority could do so. Neither of these characterizations is logically flawed and both rest upon factual foundations. But it is necessary to resort to an analysis of normative values in order to differentiate the two.⁴⁴

⁴⁰ *Rocket*, *supra* note 12 at 249.

⁴¹ *Egan*, *supra* note 7 at 574.

⁴² *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927 at 990-91 [hereinafter *Irwin Toy*]. In the analysis that follows, and in the Appendices, reference is made to laws having “passed” or “failed” one of the four components of the *Oakes* test, and to laws being “saved” under s. 1 of the *Charter*. These terms are defined in Definition of Terms, below.

⁴³ *Supra* note 38. See Hogg, *supra* note 3, c. 35 at 17-18 where Professor Hogg also points out that general objectives will be easier to strike down under the minimal impairment test because there are more ways to accomplish general tasks than specific ones.

⁴⁴ This problem is accentuated when the Court re-characterizes the objectives underlying seemingly comparable legislation, leading to different results under *Oakes*. For example, in *Big M*, *supra* note 17 at 253, the Supreme Court rejected the objective underlying an impugned “Sunday Closing Law.” It construed that objective as “compelling the observance of a Christian religious duty” and held that it violated the guarantee of freedom of religion. In contrast, in *Edwards Books*, *supra* note 17, the Supreme Court accepted the objective underlying the impugned law, characterizing it as providing a day of rest and upholding the legislation. It justified this distinction on the basis of the division of powers under ss. 91 and 92 of the *Constitution Act, 1867*, U.K., 30 & 31 Vict., c. 3, and by characterizing the impugned law in *Big M*, as religious, not secular in nature and ultimately, as unconstitutional. It arrived at this determination on the basis of the legislative history and purpose: that the impugned law was religious in nature, that in order to constitute a valid exercise of federal criminal power, it had to have a religious rather than secular purpose, that its objective failed to justify limiting freedom of religion, and that, therefore, it was unconstitutional.

The Supreme Court, in the first decade following *Oakes*, applied the “pressing and substantial” test to legislative objectives that were characterized with varying degrees of generality.⁴⁵ In most cases, this ensured that the impugned law would pass this first branch of the *Oakes* test. Had the Court evaluated legislative objectives that had been characterized specifically, more legislative provisions likely would have failed the “pressing and substantial” test.⁴⁶

The analysis developed later in this article assesses the general or specific nature of the objective underlying the impugned provision as *one* component within a more extensive normative analysis.⁴⁷ This can avoid overstating the importance of the objective of the impugned provision in the context of other normative values. As McLachlin J. appropriately emphasized in *RJR-MacDonald* “If the objective is stated too broadly, its importance may be exaggerated and the analysis compromised.”⁴⁸

B. Rational Connection Test

Second, once a sufficiently significant objective is recognized, then the party invoking section 1 must show that the means chosen are reasonable and demonstrably justified. This involves “a form of proportionality test” Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be

In contrast, the Supreme Court inferred that, in *Edwards Books*, the impugned law was provincial, not federal, that it had a secular, not a religious purpose, that it sought to provide a day of rest for workers in the province, and that it constituted a valid exercise of provincial powers.

⁴⁵ See, for example, the *Prostitution Reference* *supra* note 19 at 1136 in which the Supreme Court construed the objective underlying the impugned legislation broadly, as eliminating the nuisance of street solicitation. But see *Rocket*, *supra* note 12, in which the impugned legislation passed the objective test, but failed the minimal impairment test. See also Part II(C), below.

⁴⁶ As McLachlin J. aptly observed in *RJR-MacDonald* *supra* note 8 at 335: “The question at this stage is whether the objective of the *infringing measure* is sufficiently important to be capable in principle of justifying a limitation on the rights and freedoms guaranteed by the constitution” [emphasis added].

⁴⁷ See Part IV(B), below.

⁴⁸ *Supra* note 8 at 335. McLachlin J. stated more fully:

Care must be taken not to overstate the objective. The objective relevant to the s. 1 inquiry is *the objective of the infringing measure* since it is the infringing measure and nothing else which is sought to be justified. If the objective is stated too broadly, its importance may be exaggerated and the analysis compromised [emphasis in the original].

It is to be expected, and hoped, that most objectives of the legislature are appropriate, according with the higher values and principles of a free and democratic society. A high percentage of cases failing this stage of the *Oakes* test would indicate either a judiciary that is extremely activist, or a legislature whose actions violate the long-established principles and values of a constitutional democracy in domestic and international law. Viewed either way, such results would be dysfunctional.

required to balance the interest of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective.⁴⁹

The Court applies the rational connection test *after* it has established that the objective underlying the impugned provision potentially warrants limiting a *Charter* right. At this stage, it is determined whether the particular means chosen pursue the government's objective rationally.

This second stage of the *Oakes* test clearly narrows the net of constitutionality further than the first stage. While 97 per cent of violations have survived the first stage of the *Oakes* test, a lesser majority, 86 per cent of violations, have been found to possess a rational connection.⁵⁰ Where the rational connection test failed, the Court held that the legislative means was either not well-designed to achieve its objective, was arbitrary, unfair, or based on irrational considerations.⁵¹ Monahan and Petter provide a plausible reason as to why most cases pass the rational connection test:

It is always possible to object to the policy underlying a law, but how can it ever make sense to claim that a law is "irrational"? Taken literally, this claim suggests that a law has been enacted without reasons. The legislature has apparently drafted a law that is unconnected to the purposes that give rise to the law in the first place.⁵²

For example, in *Oakes*, Dickson C.J. found that the reverse onus contained within section 8 of the *Narcotics Control Act*⁵³ was not rationally connected to the objective of the impugned law. He evaluated the legislature's chosen means and the connection of the means to the law's objective and concluded: "In my view, section 8 does not survive this rational connection test. As Martin J.A. of the Ontario Court of

⁴⁹ *Oakes*, *supra* note 2 at 139.

⁵⁰ See Appendix A, Table 1, below.

⁵¹ For a recent example, see *Benner v. Canada (Secretary of State)* [1997] 1 S.C.R. 358 at 404-05 [hereinafter *Benner*], where Iacobucci J. stated:

The relevant question is whether the *discrimination* is rationally connected to the legislative objectives. We must therefore ask not whether it is reasonable to demand that prospective citizens swear an oath and to make these demands only of children of Canadian mothers, as opposed to those of Canadian fathers. There is clearly no inherent connection between this distinction and the desired legislative objectives: children of Canadian mothers are not in and of themselves less committed or more dangerous than those of Canadian fathers [emphasis in original].

⁵² *Supra* note 22 at 109.

⁵³ R.S.C. 1970, c. N-1.

Appeal concluded, possession of a small or negligible quantity of narcotics does not support the inference of trafficking.”⁵⁴

Dickson C.J.’s conclusion appears to stand for the proposition that the legislative provision was arbitrary, unfair or irrational, because it would penalize too many of the wrong persons. He inferred, therefore, that the law would not achieve its objective.⁵⁵

The problem with the application of the rational connection test since *Oakes* is that courts tend to construct a formal means-ends relationship between the legislative provision and its purpose. This disregards the substantive norms in which Dickson C.J. grounded the test. An extreme example is for a court to hold that a measure justifying infanticide is “rationally connected” to the objective of reducing the rate of starvation. There is a causal connection between the number of persons living and the number of persons who would starve in the absence of the practice of infanticide, but this is hardly a “rational” strategy. To hold that such a connection is “rational” is to deprive that term of its meaning—it is to ignore Dickson C.J.’s ultimate standard of justification, which grounds the rational connection test in the values of a free and democratic society.⁵⁶

The word “rational,” in the rational connection test established in *Oakes* means more than simply “effective.” Combatting starvation is a pressing and substantial objective, but killing off citizens to reduce the population so that the government can feed other citizens is an “arbitrary,” “unfair,” and “irrational” means to that end, however effective it might be for the survivors. The means employed should

⁵⁴ *Oakes*, *supra* note 2 at 142, Dickson C.J.

⁵⁵ The Supreme Court held that the government had failed to pass the rational connection test in the following cases. In *R. v. Morales*, [1992] 3 S.C.R. 711, five out of seven justices held that the impugned law failed the rational connection test. In *Morgentaler* *supra* note 8, four out of seven justices held the impugned law had failed the rational connection test. In *Zundel*, *supra* note 20, four out of seven justices held that there was no rational connection. In *Andrews* *supra* note 38, three out of six justices held that there was no rational connection. In *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, five out of seven justices held that there was no rational connection. In *Miron v. Trudel*, [1995] 2 S.C.R. 418, five out of nine justices held that there was no rational connection. In *Benner*, *supra* note 51, a full panel unanimously found no rational connection.

⁵⁶ In *Egan*, *supra* note 7, the Supreme Court almost struck down the impugned law on grounds that it lacked a rational connection to its valid objective. Five of the nine justices found an infringement of section 15. However, Sopinka J., in holding that the provision passed the *Oakes* test, saved the provision. This article critically evaluates Sopinka J.’s reliance upon “rational” assumptions about the norms governing judicial decisionmaking under s. 1 of the *Charter*. See especially Part III(A), below. However, it is also significant that Sopinka J. construed the rational connection test more restrictively than the five justices who found that the impugned law was not rationally connected to its objective. For case comments on *Egan*, see generally *supra* note 7.

represent more than a mere *formal or mechanical connection* to the legislative objective. The means should be rationally connected to the values underlying the *Charter*.⁵⁷

Our analysis in Part IV conceives of the rational connection test both normatively and methodologically. It improves upon the *Oakes* analysis by shifting from a purely formal means-ends relationship to an examination of the substance of the connection, including its *effect*. It also enables decisionmakers to assess the arbitrariness or unfairness of the legislative means chosen.⁵⁸

C. *Minimal Impairment Test*

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 ...⁵⁹

The minimal impairment test has been pivotal to section 1 analysis. To date, a majority of the Court has found fifty out of eighty-seven violations to be unconstitutional by virtue of its application of the *Oakes* test.⁶⁰ Forty-three, or 86 per cent, of these fifty infringements passed both the objective and rational connection tests but failed the minimal impairment test.⁶¹ Additionally, where a majority of the Court applied the *Oakes* test, *every* piece of legislation that survived scrutiny under the minimal impairment stage was held to have passed the *Oakes* test.⁶² As Professor Hogg recognized, the minimal impairment test “has turned out to be the heart and soul of s. 1 justification.”⁶³

This test, as set out by Dickson C.J. in *Oakes*, arises only after the Court has established: the existence of a pressing and substantial

⁵⁷ Certainly, if only a mere means-end connection is sought, a high percentage of cases will present legislative means that are rationally connected to their objectives, whether or not they minimally impair *Charter* guarantees or have disproportionate effects relative to the importance of the legislative objective. It may appear that the second and third stages of the proportionality test should safeguard against the shortcomings of a formalistic use of the rational connection test. But as we see in Part II(C-D), below, there is reason to doubt this assumption as the minimal impairment test is frequently relaxed, and the proportional effects test is not used.

⁵⁸ On these claims, see Part IV, below.

⁵⁹ *Oakes*, *supra* note 2 at 139.

⁶⁰ See Appendix A, Table 1, below and accompanying footnotes. See also Appendix B, Tables 2-3, below.

⁶¹ See Appendix B, Table 3, below.

⁶² See Appendix B, Table 3, below.

⁶³ Hogg, *supra* note 3 c. 35 at 30.

objective that is capable of grounding an infringement of a *Charter* right; and that the impugned law is rationally connected to that important objective. The minimal impairment test assesses whether or not the impugned law satisfies *that* objective with minimal intrusion upon fundamental rights *relative to* other possible and practical legislative means of pursuing its objective. The test thereby further narrows the scope of constitutionality.⁶⁴

Courts have differed as to the manner in which the minimal impairment test ought to be applied. Key differences among Supreme Court judges revolve around the extent to which judges ought to defer to the legislature's will in applying it. In *Oakes*, for example, the Court held that the law must impair the right or freedom "as little as possible."⁶⁵ In *Edward Books*⁶⁶ Dickson C.J., writing for the majority, held that the law must limit the right or freedom "as little as is reasonably possible."⁶⁷ Dickson C.J. added in that case, that, in applying the minimal impairment test, the courts are "not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line."⁶⁸ La Forest J., in a concurring decision, also expressed these concerns. He stated that, although the legislature must use the least drastic means to reach its objective, "a legislature must be given reasonable room to manoeuvre."⁶⁹ The Supreme Court assumed an even more cautious approach in the *Prostitution Reference* stating that courts are ill equipped "to second-guess the wisdom of policy choices made by our legislators."⁷⁰

The flexible standard that the Supreme Court applied to the minimal impairment test during the first decade since *Oakes* has

⁶⁴ On cases failing the minimal impairment test, see for example, *R. v. Vaillancourt* [1987] 2 S.C.R. 636; *R. v. Martineau* [1990] 2 S.C.R. 633; *R. v. Logan*, [1990] 2 S.C.R. 731; *R. v. Hess*, [1990] 2 S.C.R. 906; *Ford v. Quebec (A.G.)*, [1988] 2 S.C.R. 712 [hereinafter *Ford*]; *Devine v. Quebec (A.G.)*, [1988] 2 S.C.R. 790; and *Black v. Law Society of Alberta* [1989] 1 S.C.R. 591. On cases that passed the minimal impairment test, see for example, *R. v. Whyte*, [1988] 2 S.C.R. 3; *Prostitution Reference supra* note 19; *Canadian Newspapers v. Canada (A.G.)*, [1988] 2 S.C.R. 122 ; *BCGEU v. British Columbia (A.G.)*, [1988] 2 S.C.R. 214; and *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469 [hereinafter *Cotroni*].

⁶⁵ *Oakes, supra* note 2 at 139. This case dealt with a reverse onus provision in the *Narcotics Control Act, supra* note 53.

⁶⁶ *Supra* note 17. This case dealt with Sunday shopping laws. See *supra* note 44.

⁶⁷ *Ibid.* at 772.

⁶⁸ *Ibid.* at 782.

⁶⁹ *Ibid.* at 795.

⁷⁰ *Supra* note 19 at 1199. This case dealt with a law directed at eliminating street solicitation. See *supra* note 45.

afforded legislatures considerable “manoeuvring room;” it has also led to the conflation of minimal impairment issues with proportional effects issues.⁷¹ For example, where a legislative objective is characterized broadly and a lower level of scrutiny adopted under the minimal impairment test, the overwhelming inference is that the importance of the provision must be proportional to any deleterious effects it may have.⁷² This test has also evolved into a repository for under-unarticulated normative choices that should properly be explained under the proportional effects branch of the *Oakes* test.⁷³ At the very best, this application of the minimal impairment test “makes for an unpredictable jurisprudence.”⁷⁴ It is most suspect, however, when it fails to take account of the values underlying government action and the values that are impacted upon by those values. The analysis we develop later seeks to accomplish this end.⁷⁵

D. *Proportionate Effects Test*

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.”⁷⁶

⁷¹ An overbroad characterization of the objective—a problem mentioned in Part II(A), above—would result in a high failure rate under minimal impairment, unless a less strict level of scrutiny were applied. The broader the objective, generally, the more ways there are to achieve it. See also *supra* note 48 and accompanying text.

⁷² However, this is not certain if other alternatives are not explored under minimal impairment. Perhaps less serious effects could have been incurred. The broad objective may distort the importance of the provision. Both factors impact upon the result reached under the proportional effects test without there being any real evaluation of the values at stake.

⁷³ See also, Monahan & Petter *supra* note 22 at 108-25, where the authors writing shortly after *Oakes*, speculated that the determinative task of “allowing the court to overturn legislation without appearing to be a super-legislature,” *ibid.* at 108, might be shared between the rational connection and minimal impairment tests.

⁷⁴ Hogg, *supra* note 3 c. 35 at 35-36. Professor Hogg aptly observed that, in relation to *Oakes*, *Edwards Books*, and the *Prostitution Reference*

[I]t does not take a vivid imagination to devise a law that would be less intrusive of the applicable Charter right than the law which was enacted. But the Court was willing to defer to the legislative choice on the basis that the choice was within a margin of appreciation, a zone of discretion in which reasonable legislators could disagree while still respecting the Charter right. ... The result makes for an unpredictable jurisprudence, but there is no practical way to avoid uncertainty in the application of the requirement of least drastic means.

⁷⁵ See Part IV(B), below.

⁷⁶ *Oakes*, *supra* note 2 at 139.

The final sub-test in *Oakes* requires that the government prove that the effects of the law are proportional to the importance of the objective and the violation of rights arising from it. This sub-test was later refined by the majority of the Court in *Dagenais v. Canadian Broadcasting Corp.*⁷⁷

[T]here must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measures.

The proportionate effects test plays a wholly vestigial role within section 1 decisionmaking. The authors' survey of section 1 jurisprudence found 115 infringements to which either a majority or minority of the Court applied the *Oakes* test. In every instance in which the minimal impairment test was passed, the proportionality test was passed. In every instance that the minimal impairment test was failed, the proportionality test was either failed or not considered.⁷⁹

Professor Hogg describes the proportionality test as "redundant," stating that "an affirmative answer to the ... sufficiently important objective [step] will always yield an affirmative answer to the ... [final] step—proportionate effect."⁸⁰ However true Professor Hogg's conclusion may be regarding judicial practice, it is not compelled by the logic of Dickson C.J.'s formulation of the *Oakes* test. Under Dickson C.J.'s analysis, the proportionate effects test has the function of balancing the benefits of the infringement against its deleterious effects, as measured by the values of a free and democratic society. As legislation is typically assumed to bring about intended consequences, the importance of its objective (determined on the basis of the first sub-test under *Oakes*) should be factored into the weighing of its benefits. But, while the Court has determined that the infringement falls within the minimal range, it remains to be shown that this particular provision's benefits balance the detrimental effects of this "minimal impairment." These are distinctly different analyses. McLachlin J.

⁷⁷ [1994] 3 S.C.R. 835 [hereinafter *Dagenais*].

⁷⁸ *Ibid.* at 889 [emphasis in original].

⁷⁹ See Appendix B, Table 1, below.

⁸⁰ Hogg, *supra* note 3 c. 35 at 37. Professor Dale Gibson observes that, as a matter of judicial practice, the Court has rendered the final stage of the *Oakes* test, on proportionality, non-determinative: "What has tended, therefore, to happen, is that the final 'means' component has been ignored, and the *Oakes* formula has been boiled down to a simpler three-step test": "The Deferential Trojan Horse: A Decade of Charter Decisions" (1993) 72 Can. Bar Rev. 417 at 441. Gibson does not, however, proclaim this final test "redundant."

describes how the proportional effects branch can be deprived of its crucial role:

First, to argue that the importance of the legislative objective justifies more deference to the government at the stage of evaluating minimal impairment, is to engage in the balancing between objective and deleterious effects contemplated by the third stage of the proportionality analysis in *Oakes*. While it may not be of great significance where this balancing takes place, care must be taken not to devalue the need for demonstration of minimum impairment by arguing the legislation is important and the infringement of no great moment.⁸¹

According to Professor Hogg's analysis, if the deleterious effects of a law are held to be disproportionate to the importance of the legislative objective, the objective could not justify limiting a *Charter* guarantee. Given that previous branches of the *Oakes* test have already decided that the objective is pressing and substantial, that the means chosen are rationally connected to the objective and that the means minimally impair the guarantee that is infringed, Professor Hogg concludes that the law must be an acceptable cost for its benefit.

The problem with Professor Hogg's argument is that the importance of the legislative objective must warrant some *as yet undetermined* legislative action that would limit a *Charter* guarantee. But the analysis of the legislative objective early in the *Oakes* analysis operates at a very general level, allowing the Court considerable latitude in characterizing the objective. It is not a foregone conclusion, after this early stage, that the means chosen by the legislature could not have effects that are more detrimental than the objective is beneficial.⁸² It must not simply be assumed that deciding there are no more minimally impairing alternatives also answers whether the benefits outweigh the ill effects. Nor is deciding that the objective is pressing and substantial an answer to the question of whether the ill-effects of the provision are proportional to the benefits of the provision. This balancing of values under the proportionate effects test of *Oakes*, therefore, is not redund-

⁸¹ *RJR-MacDonald* supra note 8 at 347, McLachlin J.

⁸² In addition, the means chosen may be rationally connected to its objective and minimally impair the guarantee, but the impairment may be minimal relative to any other practical alternative means. It is still possible, realistically and not merely theoretically, that legislative pursuit of the objective is not worth the deleterious effects. That is, the absence of a law may be preferable to the best designed law, in achieving a pressing objective, because even the best designed law may still impact too harshly on other important values in society. That *Charter* guarantees are minimally impaired relative to other possible means, and the law is designed to effectively bring about the objective, does not mean that such pursuit of one important objective could not disastrously impact upon many other important values.

ant.⁸³ As will be demonstrated later, it is a necessary process in any viable approach to section 1.⁸⁴

E. Conclusions

The Supreme Court accorded priority to Dickson C.J.'s methodological four-part *Oakes* test but effectively ignored his normative standard in the first ten years following *Oakes*. It seldom resorted to this normative standard in its methodological construction of the *Oakes* test.⁸⁵ The four-part *Oakes* test remains central to its section 1 analysis.⁸⁶ This article demonstrates that it remains central even after

⁸³ Illustrating the cursory treatment of the proportionate effects test is *Edwards Books*, *supra* note 17, where Dickson C.J. states, at 783: "The infringement is not disproportionate to the legislative objectives. A serious effort has been made to accommodate the freedom of religion of Saturday observers, in so far as that is possible without undue damage to the scope and quality of the pause day objective." Had the Supreme Court invoked the proportionate effects test in that case, it would have been able to evaluate whether the infringement of rights of those who did not observe a Sunday Sabbath was disproportionate to the value of providing a day of rest to workers in the province.

⁸⁴ See Part IV(B), above. Given that the proportionate effects test is the narrowest branch of the *Oakes* test, it might be expected to catch the least number of cases under s. 1. The bulk of legislative provisions that are not reasonable and demonstrably justifiable will already have been caught. But this is no real comfort, as courts are not, in fact, engaging in this balancing of values. They are construing, instead, the rational connection test narrowly and the minimal impairment test loosely. The Court, at most, only tacitly balances legislative effects against legislative objects. The Court's conclusion as to which is weightier must be inferred from the conclusion reached in earlier parts of the analysis. However, there is no guarantee that the balancing is justified, nor that it took place at all. Treating the last test as a foregone conclusion is a potentially dangerous oversight. On the Court's unwillingness to engage in balancing rights against limitations under s. 1 of the *Charter*, see for example, P. Blanche, "The Criteria of Justification Under *Oakes*: Too Much Severity Generated Through Formalism" (1991) 20 Man. L.J. 437 at 439, "It has also preferred to resist, to a very large extent, its mandate to balance interests and rights and freedoms."

⁸⁵ See Part II(A-D), above.

⁸⁶ On the mechanical application of the *Oakes* test, see for example, Chapman, *supra* note 6 at 882, where the author argues: "In each of these cases [applying the *Oakes* test], however, as in *Oakes*, arguments and assertions about this balancing exercise are subordinated to formalist modes of reasoning and traditional approaches such as legislative deference." Chapman stresses the attendant lack of normative analysis in the Court's s. 1 decisions: "The reasons for *Charter* judgments are often difficult to discern, for the language of the judiciary masks the political and moral choices they are making behind a rhetoric of legalism": *ibid.* at 894. For comparable criticism of the Court's resort to formalism in applying s. 1, see D. Stuart, "Will Section 1 Now Save Any Charter Violation?" (1991), 2 C.R. (4th) 107.

normative considerations are reintroduced in *Egan, RJR-MacDonald* and subsequent cases.⁸⁷

The structure of the *Oakes* test itself is partly to blame for the failure of the Supreme Court to implement Dickson C.J.'s ultimate standard of justification. First, upholding legislative objectives that are general while challenging those that are specific in the first stage can leave general laws that limit *Charter* guarantees open to easy attack on the minimal impairment branch of the *Oakes* test. There are numerous ways to fulfil a broad objective, but fewer to fulfil a narrow one.⁸⁸ Second, a broad characterization of the government's objective can skew the "proportional effects" analysis: a broad objective is likely to be of greater importance than all but the most grievous effects of infringements upon *Charter* guarantees. Moreover, if the governmental objective in adopting the infringing provision is unduly magnified at the first stage of the *Oakes* analysis, the balancing of values at the proportionate effects stage is likely to be rendered dysfunctional.⁸⁹

In effect, as it rarely resorted to the objective and rational connection tests, the Supreme Court of Canada avoided questioning government policy in its application of section 1. It relied almost exclusively upon the minimal impairment test. It affirmed the law-making autonomy of the legislature,⁹⁰ subject only to evaluating whether it could have achieved its objective by less invasive means. The message to the legislature was:

[G]iven that you have decided to pursue this goal, you have done so inefficiently. There are other legislative devices available that would allow you to pursue the same goal, but in a manner that would be less restrictive to individual liberty.⁹¹

In relying upon a minimal impairment test that evaluated, primarily, whether the government could have achieved its objective by a less intrusive means, the Supreme Court accepted, as *its* primary norm, that the legislature's law-making authority determined the scope of

⁸⁷ These cases include: *Canadian Broadcasting Corp. v. New Brunswick (A.G.)* [1996] 3 S.C.R. 480 [hereinafter *CBC*]; *Adler v. Ontario*, [1996] 3 S.C.R. 609 [hereinafter *Adler*]; *Ross*, *supra* note 9; and *Harvey*, *supra* note 9.

⁸⁸ Hogg, *supra* note 3, c. 35 at 17-18. See also *supra* notes 48 (and text accompanying it) and 71.

⁸⁹ *Ibid.* c. 35 at 36-37. See also note 48.

⁹⁰ See for example, Stuart, *supra* note 86 at 109, where the author states: "Whether a limit can be demonstrably justified under s. 1 almost always turns on what has become known as the 'minimal intrusion' test."

⁹¹ Monahan & Petter, *supra* note 22 at 108 [emphasis in original].

Charter rights. It did not evaluate whether the norms or values underlying the legislation *themselves* violated *Charter* rights or freedoms. The result was that the Supreme Court avoided articulating values that are *necessarily* engaged by a section 1 inquiry. This restricted evaluation of policy choices was possible only by neglecting Dickson C.J.'s ultimate standard.⁹² It is not that the Court needlessly deferred to the legislatures' will. In fact, the majority of the Court declined to save 60 per cent of rights-infringements on grounds of not satisfying the *Oakes* criteria.⁹³ The problem is that the Court failed to identify and weigh normative values engaged by those infringements. This failure impeded it from drawing a defensible line between deference towards and disdain for the legislature's will.⁹⁴ Until courts are willing to articulate, in a principled and comprehensive manner, both the values that underlie governmental action and the values effected by the infringement of *Charter* rights, section 1 decisionmaking will appear to be grounded in the unarticulated normative preferences of the judiciary. Until the Court is willing to avoid seemingly clandestine normative determinations, the risk is that it will appear that it is arriving at unpredictable and arbitrary results.

We conclude, therefore, that prior to *RJR-MacDonald* the Supreme Court of Canada failed to invoke the ultimate normative standard set out by Dickson C.J. in *Oakes*. Notwithstanding Dickson C.J.'s own acknowledgment that section 1 decisionmaking must be grounded in the values of a free and democratic society, the judicial assumption for the next decade was that it is necessary for judges to consider the four methodological components of the *Oakes* test, but not Dickson C.J.'s ultimate standard. As a consequence, the minimal impairment test has been the major determinant of the constitutionality of limits upon rights under section 1.⁹⁵

⁹² On the Supreme Court's failure to engage Dickson C.J.'s ultimate standard of justification in *Oakes*, see for example, E.P. Mendes, "In Search of a Theory of Social Justice: The Supreme Court Reconcives the Oakes Test" (1990) 24 R.J.T. 1 at 5-6.

⁹³ See Appendix A, Table 1, below. In 47 applications of the *Oakes* test where the Court was unanimous that there was an infringement of a *Charter* guarantee, a majority of the Court failed the infringement on twenty-four occasions (51 per cent of the time). Most infringements were failed with respect to the last two components of the *Oakes* test: see Appendix B, Tables 1 and 3, below.

⁹⁴ Mendes attributes this failure of the Supreme Court to engage in normative analysis to an undue readiness to fall "into the dark recesses of *Charter* precedent": *supra* note 92 at 6.

⁹⁵ See Appendix A, Table 1 and Appendix B, Tables 1 and 3, below. This standard of justification was revived, in a somewhat different form, by La Forest J. in his dissenting judgment in *RJR-MacDonald* *supra* note 8 at 269-72. This decision is addressed in detail Part IV(B), below.

Rather than strike an equilibrium between normative considerations and adherence to principle in applying the *Oakes* test, the Court during the first decade following *Oakes*, neglected to articulate and balance fundamental and underlying normative values.⁹⁶ It emphasized, instead, the four-fold specific standard of justification set out by Dickson C.J. in *Oakes*. In not fully articulating the normative basis for its decisions, the Court appeared to place method over substance in spite of Dickson C.J.'s exhortation to articulate and protect the values underlying the *Charter*.

III. THE SUPREME COURT RESHAPES *OAKES*

The Supreme Court, commencing with *Egan*,⁹⁷ but more cogently with *RJR-MacDonald*⁹⁸ has modified its use of the section 1 inquiry in a most important respect. It has accepted that normative inquiry is an essential aspect of the *Oakes* test and that not engaging in such an inquiry limits the *Oakes* test's probity. As was articulated in Part II, above, this development in the *Oakes* test is significant and praiseworthy, but it is also fraught with difficulty. There is still evidence of the Court's reluctance to encompass the full range of normative considerations that are appropriate to a section 1 inquiry, as envisaged by Dickson C.J. in *Oakes*. There is further doubt about the extent to which the Supreme Court now grounds its *Oakes-Plus* approach in a normative standard, or whether it integrates its normative inquiry into the four methodological sub-tests set out in *Oakes*. Two risks arise from

⁹⁶ The tendency of courts applying the *Oakes* test to avoid normative analysis under s. 1 has led some commentators to challenge the logical and rational basis of judicial reasoning under that section. See for example, Mendes, *supra* note 92 at 14, who argues: "Sometimes the court may not even consciously realize that a particular political sensibility is the driving force of its *Oakes* Test analysis and application. In many cases, one would almost require a form of judicial psychoanalysis to determine what factors were determinative of an *Oakes* Test application [footnote omitted]." At times, the Court has adverted to a normative approach prior to *Egan*, *supra* note 7 and *RJR-MacDonald*, *supra* note 8. See, for example, La Forest J.'s majority decision for five justices (Dickson C.J., L'Heureux-Dubé, Gonthier and Cory JJ.) in *Cotroni*, *supra* note 64; and *United States of Americav. El Zein*, [1989] 1 S.C.R. 1469, particularly at 1489-90 where La Forest J. writes:

In the performance of the balancing task under s. 1, it seems to me, a mechanistic approach must be avoided. While the rights guaranteed by the *Charter* must be given priority in the equation, the underlying values must be sensitively weighed in a particular context against other values of a free and democratic society sought to be promoted by the legislature.

⁹⁷ *Supra* note 7.

⁹⁸ *Supra* note 8.

these doubts. The majority of the Supreme Court may treat normative inquiry under section 1 as peripheral to the methodological sub-tests enunciated in *Oakes*. It may also ground its analysis only marginally in the normative values of a free and democratic society, as mandated by the *Charter*. The sub-sections immediately below outline the nature of these risks. It illustrates them in light of key section 1 cases, commencing with *Egan* in 1995.

A. *Egan v. Canada*

In *Egan*, the Supreme Court assessed the constitutionality of section 2 of the federal *Old Age Security Act*.⁹⁹ Section 2 states that the spousal allowance provided for under section 19(1) of the *Old Age Security Act* is available only to

a person of the opposite sex who is living with [another] person, having lived with that person for at least one year, if the two persons have publicly represented themselves as husband and wife.

James Egan and John Nesbit, a gay couple who had lived together since 1948, argued that this definition of spouse discriminated against same-sex couples, contrary to section 15(1) of the *Charter*. Five of the nine justices found that this definition violates section 15(1).¹⁰⁰ However, one of those five justices, the late Sopinka J., went on to find that the definition was saved under section 1. Sopinka J.'s section 1 analysis tipped the balance in favour of finding that this definition of spouse was constitutional.¹⁰¹

Sopinka J. began his section 1 analysis by setting out the “context [within which] the section 1 criteria must be considered.”¹⁰² He then applied the *Oakes* test to that “context” by resort to three fundamental assumptions. His first assumption related to the government’s duty to respond to violations of rights as they arose. He stated: “I agree with the respondent the Attorney General of Canada that government must be accorded some flexibility in extending social benefits and does not have

⁹⁹ R.S.C. 1985, c. O-9 as am. by R.S.C. 1985, c. 34 (1st Supp.), s. 1.

¹⁰⁰ For a critical analysis of the different opinions articulated by the justices on the Supreme Court, see Lessard *et al.*, *supra* note 7 at 92, 114-17.

¹⁰¹ While we find Sopinka J.'s judgment problematic (see L.E. Trakman, “Section 15: Equality? Where?” (1995) 6(4) Const. F. 112), we do not directly address Sopinka J.'s substantive argument here. Rather, we focus on the structure of Sopinka J.'s analysis of s. 1.

¹⁰² *Egan*, *supra* note 7 at 574.

to be pro-active in recognizing new social relationships.”¹⁰³ Sopinka J.'s second assumption concerned the relationship between *Charter* rights and government spending:

It is not realistic for the Court to assume that there are unlimited funds to address the needs of all. A judicial approach on this basis would tend to make a government reluctant to create any new social benefit schemes because their limits would depend on an accurate prediction of the outcome of proceedings under s. 15(1) of the *Charter*.¹⁰⁴

His final assumption related to the nature of the violation of rights. “This Court has recognized that it is legitimate for the government to make choices between disadvantaged groups and that it must be provided with some leeway to do so.”¹⁰⁵

Not surprisingly, in applying the *Oakes* test, these assumptions were central to the general “context” in which Sopinka J. grounded his analysis. In particular, he assumed away two of the four tests within *Oakes*, the rational connection and the minimal impairment tests. For example, Sopinka J.’s second assumption, that government “must be accorded some flexibility in extending social benefits,”¹⁰⁶ justified his assuming away the rational connection test:

The Attorney General of Canada has taken the position in his factum that “the means chosen does not have to be necessarily the solution for all time. *Rather, there may always be a possibility that more acceptable arrangements can be worked out over time*” viewed in this light, the impugned legislation can be viewed as a substantial set in an incremental approach to include all those who are shown to be in serious need of financial assistance due to the retirement or death of a supporting spouse. It is therefore rationally connected to the objective.¹⁰⁷

To a similar effect, Sopinka J. whittled away the minimal impairment test in adopting a third assumption, that “it is legitimate for the government to make choices between disadvantaged groups and that it must be provided some leeway to do so”:¹⁰⁸

With respect to minimal impairment, the legislation in question represents the kind of socio-economic question in respect of which the government is required to mediate between competing groups, rather than being the protagonist of an individual. In these circumstances, the Court will be more reluctant to second-guess the choice which

¹⁰³ *Ibid.* at 572.

¹⁰⁴ *Ibid.* at 572-73.

¹⁰⁵ *Ibid.* at 573. For comparable, but differently articulated concerns about Sopinka J.’s doubtful resort to “assumptions,” see Wintemute, *supra* note 7 at 700-701.

¹⁰⁶ *Egan, supra* note 7 at 572.

¹⁰⁷ *Ibid.* at 575 [emphasis added].

¹⁰⁸ *Ibid.* at 573.

parliament has made. ... I would conclude, as La Forest J. did in *McKinney*, that I am "not prepared to say that the course adopted by the Legislature, in the social and historical context through which we are now passing, is not one that reasonably balances competing social demands which our society must address."¹⁰⁹

These normative assumptions reflect Sopinka J.'s institutional philosophy. The Court's section 1 inquiry, in Sopinka J.'s view, is constrained by the supremacy of Parliament in a free and democratic society; that constraint is crucial in determining the constitutionality of governmental spending power; and further, that spending which the government believes is in the interests of a free and democratic society presumptively overrides *Charter* rights and freedoms.

Unfortunately, Sopinka J.'s normative analysis is the product of a constrained vision of a free and democratic society which he neither tests, nor elaborates upon, in the context of Mr. Egan, Mr. Nesbit, or others like them. For example, while Sopinka J.'s third assumption is derived from La Forest J.'s decision in *McKinney*,¹¹⁰ his first assumption is derived, without further support, directly from the government's factum.¹¹¹

Sopinka J. also does not offer any method of evaluating the normative virtue of protecting government spending power in a context in which that power is exercised in an unequal manner or with unequal effect. In treating governmental spending power as essential to the operation of a free and democratic society, he does not provide a cogent rationale for favouring the legislative will in this case over other alternatives. His judgment simply endorses the functional value of courts not checking the spending power of elected governments. It fails to evaluate that function in the context of the specific case at hand.

In effect, Sopinka J.'s decision does take account of value choices; but these choices are founded upon a somewhat general vision of the values that inhere in a free and democratic society, as endorsed by the *Charter*. His method provides the judiciary with comparatively unlimited normative choices in preserving governmental spending power. It also offers no apparent mechanism for normative accountability by judges: to save government spending power is a fact that, apparently, is adequate in itself.¹¹²

¹⁰⁹ *Ibid.* at 575-76.

¹¹⁰ *Supra* note 16.

¹¹¹ *Supra* note 103 and accompanying text.

¹¹² Carl Stychin, *supra* note 7 at 104, states:

This degree of deference is quite unprecedented and starkly contrasts with early ringing pronouncements from the Court on the strictness of judicial scrutiny under section 1

The alternative is to conceive of a broader range of normative values that themselves ground governmental spending power. This includes moving beyond a vision of a free and democratic society in which governmental spending is the *central* value to which all other *Charter* values subserve. Certainly, governments are elected to raise and spend money. But, that is merely one of their functions, offset by other functions within a democracy. Government spending is an attribute of democratic action; it is not itself *the* determinant of a democracy. Nor ought it to be so conceived if we are to avoid the tyranny of the majority.¹¹³

In summary, Sopinka J.'s normative analysis lacks explicit grounding in the full range of values that underlie the *Charter*. As such, it provides an insufficient basis upon which to frame any meaningful evaluation of legislative encroachments upon individual rights and freedoms. His analysis is also not framed in the context of the four methodological sub-tests in *Oakes*.

B. *RJR-MacDonald Inc. v. Canada (A.G.)*

In *RJR-MacDonald*¹¹⁴ the Supreme Court determined the constitutionality of sections 4, 5, 6, 7, 8, 9, 17, 18 and 19 of the federal *Tobacco Products Control Act*¹¹⁵. These sections restricted the ability of tobacco companies to advertise their products in Canada (sections 4, 5, and 6); prevented tobacco companies from distributing samples of their products (section 8); required tobacco packaging to carry unattributed health warnings (section 9); and provided for criminal penalties for violation of these sections (sections 18 and 19).

Two of Canada's largest cigarette manufacturers, RJR-MacDonald and Imperial Tobacco, argued that these provisions of the

[footnote omitted]. Moreover, the novelty of the case is hardly in itself a basis upon which to uphold a *Charter* violation; and financial burden has been held by the Court to carry only limited weight as a justification.

Compare Bailey, *supra* note 7 at 348-49.

¹¹³ Sopinka J.'s incremental-normative analysis in *Egan*, *supra* note 7, contrasts with the decisions of Iacobucci J., at 608, and L'Heureux-Dubé J., at 569-70. For critical comments on the reasoning and result arrived at by the Supreme Court in *Egan*, not limited to Sopinka J.'s reasoning, see B.B. Ryder, "Equality Deferred, Again" (1996) 4 Can. Lab. & Emp. L.J. 101; P. MacEachern, "The Impact of *Egan v. Canada* on Lesbian and Gay Equality Claims" (1996) 4 Can. Lab. & Emp. L.J. 87; Stychin, *supra* note 7; and Beatty, *supra* note 13.

¹¹⁴ *Supra* note 8.

¹¹⁵ 1988, c. 20, reprinted in R.S.C. 1985, c. 14 (4th Supp.), as rep. by S.C. 1997, c. 13, s. 64 [hereinafter *TPCA*].

TPCA violated their section 2(b) right to freedom of speech. The government conceded this section 2(b) violation. As a result, the *Charter* issue was disposed of by the Supreme Court's decision under section 1.

La Forest J., writing for four of the nine justices, found that the *TPCA* was saved under section 1. At the outset, La Forest J. stated that he believed the specific "test" arising from *Oakes* was not definitive of section 1. When referring to the analysis of section 1 by the trial judge, Chabot J., La Forest J. stated:

Throughout his judgment, Chabot, J. referred to the requirements set forth in *Oakes* as a "test." In so doing, he adopted the view, unfortunately still held by some commentators, that the proportionality requirements established in *Oakes* are synonymous with, or have even superseded, the requirements set forth in s. 1. ... The appropriate "test" to be applied in a section 1 analysis is that found in s. 1 itself, which makes it clear that the court's role in applying that provision is to determine whether an infringement is reasonable and can be demonstrably justified in a "free and democratic society." In *Oakes*, this Court established a set of principles, or guidelines, intended to serve as a framework for making this determination.¹¹⁶

While La Forest J. accepted *Oakes* as a valid framework for analyzing section 1, he argued against applying that framework rigidly. He evaluated section 1 in light of Dickson C.J.'s ultimate standard: the values of a free and democratic society as embodied in section 1 itself. He also encompassed, as central to his assessment of those values, a balance between individual rights and community needs. As he envisaged *Oakes*, "implicit in the wording of s. 1 [is the requirement] that the courts must, in every application of that provision, strike a delicate balance between individual rights and community needs. ... The s. 1 inquiry is an unavoidably normative inquiry"¹¹⁷

Maintaining the application of a flexible normative approach to section 1, La Forest J. argued that the *Oakes* test should be applied in two stages. In the first stage, the court is required to explore the normative context of the impugned legislation and the right violated. This stage involves determining the degree of deference which the court ought to accord to the action of government. La Forest J.'s second stage applies the *Oakes* analysis to the facts of the case, taking account of the degree of deference accorded the legislature at the first stage. Essentially, La Forest J.'s first stage guides the second stage; but the first stage is not itself determinative of the second stage.¹¹⁸

¹¹⁶ *RJR-MacDonald* supra note 8 at 269-70.

¹¹⁷ *Ibid.* at 270.

¹¹⁸ *Ibid.* at 272, 284.

Applying this two-stage process to *RJR-MacDonald* La Forest J. assessed the relationship between the tobacco companies' speech rights and the "core" values of freedom of expression. He concluded that the tobacco companies' speech rights were "as far from the 'core' of freedom of expression values as prostitution, hate mongering, or pornography and thus entitled to a very low degree of protection under s. 1."¹¹⁹ La Forest J. then assessed the *TPCA* as "the very type of legislation to which this Court has generally accorded a high degree of deference."¹²⁰ La Forest J. found that the government ought to have considerable discretion in such cases and that courts ought to defer to legislation enacted in accordance with that discretion. While maintaining that the *Oakes* analysis was still applicable, La Forest J. concluded that "an attenuated level of section 1 justification is appropriate in these cases."¹²¹ La Forest J.'s approach to section 1 was to attenuate the standard of proof for the entire *Oakes* test. As a result, La Forest J. held that "it is unnecessary ... for the government to demonstrate a rational connection according to a civil standard of proof."¹²²

La Forest J.'s analysis in *RJR-MacDonald* and Sopinka J.'s analysis in *Egan* display a number of similarities in their section 1 analysis. Both contemplate an initial stage in their use of the *Oakes* test in which they establish an applicable normative context in which to ground their ensuing analysis. Both treat this analysis as non-determinative of their subsequent application of the *Oakes* test; but both still utilize it to arrive at a preferred result.

La Forest J.'s decision, while flawed, has several advantages over that of Sopinka J. First, La Forest J. anchors his normative approach in the language of section 1 itself, specifically in the values of a "free and democratic society."¹²³ Second, he applies those values in a more context-specific manner than Sopinka J. In particular, La Forest J. pays regard to the specific relationship between individual rights and community interests in determining the limits of freedom of expression.¹²⁴ He is also more prepared to contemplate the manner in which the legislation impacts upon those individual rights and

¹¹⁹ *Ibid.* at 282-83.

¹²⁰ *Ibid.* at 279.

¹²¹ *Ibid.* at 284.

¹²² *Ibid.* at 290.

¹²³ *Ibid.* at 270.

¹²⁴ *Ibid.* at 279-81.

community interests.¹²⁵ By this means, La Forest J. avoids the inference that could be drawn from Sopinka J.'s analysis in *Egan*: that in almost any context, governmental autonomy in regard to spending is sacrosanct under section 1.

C. *Post-RJR-MacDonald Decisions*

In *CBC*¹²⁶ La Forest J. wrote for a unanimous Court. As he did in *RJR-MacDonald* La Forest examined the normative values underlying the appeal before proceeding to apply the *Oakes* test.¹²⁷ In setting out the normative context, La Forest J. noted the significance of these values, particularly the value of privacy.¹²⁸ Unlike *RJR-MacDonald*, where La Forest J.'s normative examination resulted in his applying an attenuated level of scrutiny under section 1 generally, in *CBC* he did not identify how the normative values engaged in the appeal were to affect the application of the *Oakes* test. He merely set out the value-context and applied the various sub-tests established in *Oakes*.¹²⁹ Only on reaching the proportional effects test did La Forest J. return to his normative considerations.¹³⁰ Nor did he link these normative considerations to his conclusion, that the infringement of section 2(b) of the *Charter* by section 486(1) of the *Criminal Code* is proportional to the legislative objective.¹³¹ With normative analysis being applied

¹²⁵ *Ibid.* at 277-78. Further criticism is directed at the opinions of McLachlin, Iacobucci, and La Forest JJ. in *RJR-MacDonald*, for not taking account of the effects of the impugned legislation upon human behavior. For example, Richard Moon, *supra* note 8 at 2 contends that, “[t]he Court’s behavioural approach suppresses entirely the role of human agency in the communication process and avoids the question of how cigarette ads effect human behaviour.” Moon adds, at 6, “[i]f there is a victory in this case, it is for a rigid and formal approach to freedom of expression adjudication—an approach that does not even begin to come to grips with the commercial domination of public discourse.”

¹²⁶ *Supra* note 87. This case concerned the appeal of a trial judge’s order pursuant to the *Criminal Code*, R.S.C., 1985, c. C-46, s. 486(1), excluding the public and the media during part of an accused’s sentencing hearing. The Supreme Court saved the provision under s. 1.

¹²⁷ La Forest J. identified three different values in the context of the appeal: (1) the value of courts of criminal jurisdiction having the power to control their own process in furthering the rule of law; (2) the value of courts having the power to regulate the publicity associated with their proceedings; and (3) the protection of privacy interests. *Ibid.* at 502-04.

¹²⁸ *Ibid.* at 504-05.

¹²⁹ *Ibid.* at 505.

¹³⁰ *Ibid.* at 512-14.

¹³¹ *Ibid.*

differently in *RJR-MacDonald* and *CBC*, the function of this modified section 1 analysis appears to be unclear: either it attenuates the overall burden of proof borne by the government prior to applying the *Oakes* test, or it lowers the level of scrutiny in relation to a specific component of the *Oakes* test.¹³²

La Forest J. also wrote for a unanimous Court in *Ross*.¹³³ La Forest J. again began his section 1 analysis by setting out the normative context of the infringement. But here, as in *RJR-MacDonald*, he determined the level of deference that was appropriate in that context and proceeded to apply that level of scrutiny to all four components of the *Oakes* test.¹³⁴ In effect, he applied an attenuated level of section 1 justification to all four *Oakes* tests.¹³⁵

Harvey presents yet another variation on the *RJR-MacDonald* theme.¹³⁶ La Forest J., writing for a majority of six justices, again began by examining the context of the infringement.¹³⁷ However, he did *not* examine that normative context in any detail before he applied the four sub-tests in *Oakes*. Nor did he reach any conclusion regarding the appropriate level of justification before applying these sub-tests under *Oakes*.¹³⁸ It was not until he reached the minimal impairment test that La Forest J. engaged in normative analysis by addressing the appropriate level of justification.¹³⁹ In *Harvey* he held that

A degree of deference is especially appropriate in this case where the impugned legislative provisions are aimed at transgressing members of the New Brunswick Legislative Assembly. Surely the members of that body are in the best positions to

¹³² See J. Cameron, "The Past, Present, and Future of Expressive Freedom Under The Charter" (1997) 35 Osgoode Hall L.J. 1.

¹³³ *Supra* note 9. This case involved discriminatory statements made by a teacher. The Court had to determine whether an order by a Human Rights Board infringed the teacher's freedom of expression under s. 2(b) and also, whether that infringement was justified under s. 1 of the *Charter*.

¹³⁴ *Ibid.* at 871-79. La Forest identified three contexts: (1) the educational context; (2) the employment context; (3) the anti-Semitism context. Applying *RJR-MacDonald*, he lowered the evidentiary requirements in the present case because the expression infringed fell far short of "core values" on this normative analysis, *ibid.*

¹³⁵ *Ibid.* at 878-79.

¹³⁶ *Harvey*, *supra* note 9. In that case, a member of the New Brunswick legislature was convicted of illegal electoral practices and was disqualified from holding electoral office for five years. The Court considered whether this disqualification infringed the member's rights under s. 3 of the *Charter*, and if the infringement was justified under s. 1. A majority of the Court held that the infringement was justified as reasonable in protecting the integrity of the electoral process.

¹³⁷ *Ibid.* at 900-901.

¹³⁸ *Ibid.* at 901-08.

¹³⁹ *Ibid.* at 904-06.

choose between available options when it comes to deterring other members from breaching trust that exists between them, the electorate and the house as a whole.¹⁴⁰

The result, in *Harvey*, is that Courts still can marginalize normative analysis under section 1 by over-relying on the more technical application of the four-fold *Oakes* test.

D. Conclusions

The *Oakes-Plus* approach proposed in *Egan*,¹⁴¹ *RJR-MacDonald*,¹⁴² and the cases following *RJR-MacDonald* have attempted to reinvigorate Dickson C.J.'s ultimate standard in *Oakes*. But the Supreme Court has failed to provide a clear normative framework with which to arrive at an appropriate level of deference.¹⁴³ As Iacobucci and L'Heureux-Dubé JJ. warned in *Egan*, this new approach threatens to undercut *Charter* rights and their underlying values.¹⁴⁴

Nonetheless, the apparent endorsement of La Forest J.'s approach in *RJR-MacDonald* by the majority of the Court in *Harvey* is preferable to endorsing Sopinka J.'s approach in *Egan*. La Forest J.'s approach at least attempts to revitalize Dickson C.J.'s ultimate standard of justification under section 1. It also both expands upon *and* renders more explicit the values that ground the Court's normative policies. The problem with La Forest J.'s approach, however, is that the function of normative analysis is unclear. It appears to lack adequate and principled constraints. However beneficial La Forest J.'s approach might be in addressing normative values under section 1, it sometimes unjustifiably skews the balancing of those values in favour of mechanics of the four-fold *Oakes* test. This is apparent in a case like *Harvey*. The harm is that, in such cases, the virtues of a normative approach towards section 1, now accepted by the Court, are outweighed by the harm of a "use-it-as-you-like" methodology.¹⁴⁵ This problem is apparent in *RJR-MacDonald*

¹⁴⁰ *Ibid.* at 906.

¹⁴¹ *Supra* note 7.

¹⁴² *Supra* note 8.

¹⁴³ See also the reasons advanced by Iacobucci and McLachlin JJ. in *RJR-MacDonald* for questioning the majority's normative approach, *supra* note 8 at 351, Iacobucci J., and at 329, McLachlin J.

¹⁴⁴ *Supra* note 7 at 571-72, L'Heureux-Dubé J., and at 618-19, Cory and Iacobucci JJ.

¹⁴⁵ In addition to the cases discussed below, see the dissenting opinion of L'Heureux-Dubé J. in *Adler*, *supra* note 87.

where La Forest J. takes account of “the nature of the legislation” and the “nature of the right infringed.”¹⁴⁶ But his approach does not establish whether the nature of the legislation and the nature of the right infringed should be subject to normative inquiry in general, or to normative scrutiny under each *Oakes* test. He also does not clarify whether he intends a single level of normative scrutiny to apply to all aspects of section 1 justification, or only to one or more of the four *Oakes* tests. The post-*RJR-MacDonald* decisions have done little to resolve this uncertainty.¹⁴⁷

The adequacy of the Court’s approach towards section 1 of the *Charter* depends upon its principled integration of normative considerations to its method of analyzing section 1. Presently, the Court accords selective functions to normative considerations which judges may invoke to direct section 1 decisionmaking as they see fit. If the approach taken in *RJR-MacDonald* and *Ross* is applied, one normative level of scrutiny may be applied in relation to all aspects of the *Oakes* test. If an attenuated level of scrutiny is used to evaluate the pressing and substantial nature of the objective and the rational connection between the provision and the objective, a stricter level of scrutiny is likely under minimal impairment. After all, provisions with broad objectives that are more tenuously connected to those objectives might reasonably be expected to be promoted by resort to the *least* intrusive measures. Applying a lesser level of scrutiny to minimal impairment and proportional effects may give rise to provisions with middling objectives that are tenuously connected to those objectives, that impair rights more than necessary, and that have ill effects that *may* outweigh their benefits.

Alternatively, if the approach taken in *CBC* and *Harvey* is applied, the Court may employ normative analysis to arrive at a lower level of scrutiny in relation to one or more of the four *Oakes* sub-tests.¹⁴⁸ The result, in adopting either approach, is likely to be *some* level of deference accorded under section 1. However, the approach adopted in *RJR-MacDonald* and *Ross* is likely to lower the Court’s overall level of normative scrutiny *prior to* it engaging in a section 1 analysis. The approach employed in *CBC* and *Harvey*, in contrast, is likely to reduce the level of scrutiny in relation to particular sub-tests enunciated in *Oakes*. And there is no way of knowing which approach will be used

¹⁴⁶ See *supra* note 8 at 272, La Forest J.

¹⁴⁷ See Part III(C), above.

¹⁴⁸ It is odd that the values at stake in minimally impairing a right warrant special attention, but the values at stake in ensuring proportionality between the ill effects of the infringement and the benefits of the provision do not.

beforehand, or why one approach will be used over the other until after the fact. The result, in adopting either approach, is the inconsistent integration of normative reasoning into the Court's construction of section 1.

The willingness of the majority of the Court to accord greater worth to the diversity of *Charter* values that are associated with a free and democratic society, however, *does* constitute a laudable return to Dickson C.J.'s original intention in *Oakes*. The problem, however, lies in the manner in which these values will affect its section 1 analysis in subsequent cases. Using Dickson C.J.'s normative analysis to justify a particular level of judicial scrutiny magnifies and perpetuates the flaws in the *Oakes* test because it may be used to arrive at an overly broad classification of objectives and a lower standard of minimal impairment on the one hand, or to a cursory examination of minimal impairment or proportional effects on the other hand. This *Oakes-Plus* approach is not sufficient because the normative analysis under section 1 is not adequately constrained by principles governing judicial reasoning. It also does not afford either clarity or predictability in decisionmaking. Opening the door to unbridled normative analysis, ultimately, is no better a guarantee that *Charter* values will be protected than the reliance which the Court placed upon a narrowly interpreted methodology in the first decade following *Oakes*.

IV. A NEW APPROACH

A. *Why a New Approach*

The *Oakes* test, including its latest mutations in the cases commencing with *RJR-MacDonald* is fraught with difficulties. To summarize, these are:

1. In applying the *Oakes* test in the first decade following that case, the Supreme Court neglected the ultimate, value-based standard of justification. It focused instead on a mechanical methodology.
2. Rather than apply a stringent standard of scrutiny to government action, the Court accorded pressing and substantial importance to governmental objectives, often with little normative inquiry.

3. The Court reduced the link between the legislative objective and its means to a primarily formal and value-free criterion.
4. The Court rendered the minimal impairment test into the pivotal component of section 1 scrutiny. This test has focused on the legislature's efficacious pursuit of its objectives.
5. Given that the minimal impairment test required flexibility in application, this resulted in unarticulated value choices and unpredictability.
6. The Court tended to ignore the proportional effects test.
7. The latest *Oakes-Plus* approach has reintroduced normative analysis into section 1, but only to set the level of judicial deference and to date, mainly in respect of violations of section 2(b). (One case, *Harvey*,¹⁴⁹ deals with a violation of section 3.)
8. This *Oakes-Plus* test has given rise to uncertainty, however, because judges sometimes resort to normative analysis to set the level of deference prior to applying the *Oakes* test. On other occasions judges do so while applying that test.
9. Further uncertainty has arisen because judges sometimes apply normative analysis to all components of the *Oakes-Plus* test: other times, they apply it to only some components of that test.
10. The *Oakes-Plus* test has given rise to unexplained variability in the Court's analysis. This has resulted in unpredictability.

As a result of these last four factors, the Court has resorted to unbridled normative analysis proposed in *RJR-MacDonald*. This has added to, rather than resolved, some of the problems underlying the *Oakes* test. In effect, the Supreme Court has shifted from its all-encompassing reliance upon a technical *Oakes* test in the first decade following *Oakes*, to a normative approach that is not determinative in its application to particular cases. The Court's existing section 1 analysis allows normative considerations to be detached from the factual context and applied selectively to varying components of the *Oakes* test. The result is a section 1 jurisprudence that muddies, rather than clarifies, the role of fundamental values underlying section 1.

¹⁴⁹ *Supra* note 9.

We maintain, for these various reasons, that it is time to return to the drawing board and devise a new approach to section 1. We contend further, that this new approach ought to be more consistent with the principles underlying this section.

B. Returning to the Roots of Section 1

As was set out in the Introduction, an analysis under section 1 of the *Charter* should integrate the principled consideration of fundamental values into the specific context in which the law or other governmental act has, *prima facie*, violated a *Charter* guarantee. As McLachlin J. writes:

[W]hile remaining sensitive to the social and political context of the impugned law and allowing for difficulties of proof inherent in that context, the courts must nevertheless insist that before the state can override constitutional rights, there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement.¹⁵⁰

Consistent with Dickson C.J.'s reasoning in *Oakes*, this principled and contextual analysis should commence with the language of section 1 itself. Again, McLachlin J. explains in *RJR-MacDonald*

I agree with La Forest J. that “[t]he appropriate ‘test’ ... in a s. 1 analysis is that found in s. 1 itself.” The ultimate issue is whether the infringement is reasonable and ‘demonstrably justified in a free and democratic society.’¹⁵¹

It is instructive to return to Dickson C.J.'s interpretation of the text of section 1. Noting its two functions, namely to guarantee fundamental freedoms and to justify imposing reasonable limitations upon them, Dickson C.J. sets up section 1 as a balancing mechanism. Balanced against one another, in constant tension, are *Charter* guarantees and governmental limitations imposed upon those guarantees. Exclusive and stringent criteria of justification must be met before the balance may tip in favour of governmental limitations over *Charter* rights. This is required by the language of section 1, and the commitment of the judiciary to uphold *Charter* rights and freedoms.¹⁵²

¹⁵⁰ *RJR-MacDonald* *supra* note 8 at 329.

¹⁵¹ *Ibid.* at 327-28.

¹⁵² *Oakes*, *supra* note 2 at 135-37, Dickson C.J. For discussion of “reasonable limits” that the Court placed upon *Charter* rights during the first decade of the *Charter*; see Morton, Russell & Withey, *supra* note 10.

By upholding *Charter* rights and freedoms, except where such criteria are satisfied, the judiciary preserves the fundamental values of a free and democratic society protected by the *Charter*. These underlying values and principles are the touchstone of judicial decisionmaking under section 1.¹⁵³ When balancing the importance of *Charter* guarantees and legislative encroachments upon them, the Court must favour that tension which best promotes the values of a free and democratic society. In these respects, we endorse the spirit of Dickson C.J.'s analysis of section 1 in *Oakes*.

Dickson C.J.'s analysis is problematic, however, in supposing that a specific standard of justification, fleshed out as the four components of the *Oakes* test, can satisfy the normative values that underlie a free and democratic society. Given that the language of section 1 requires that there be a cogent justification for limiting *Charter* rights, section 1 analysis should compare the importance of the *Charter* guarantee and its degree of infringement with the importance of the law or other governmental act which limits that guarantee. The importance of each should be measured, ultimately, with respect to the values of a free and democratic society under the *Charter*.

As was demonstrated above, the Supreme Court has *not* engaged in a comparison between the importance of the *Charter* guarantee and the importance of the governmental law or other action.¹⁵⁴ This failure to engage is attributable, in part, to the manner in which judges on the Supreme Court have construed the *Oakes* test. But that failure also derives from limitations that inhere in Dickson C.J.'s construction in *Oakes*, of an ultimate standard of justification on the one hand and a four-part standard of justification on the other. It is in these respects that we diverge from Dickson C.J.'s construction of section 1 in *Oakes*.

C. *The New Approach*

Dickson C.J. envisages, as the limiting function of section 1, that courts are required to compare the governmental objective in issue with the importance of the guarantee and the effect of its infringement. The *Oakes* test, as is demonstrated above,¹⁵⁵ simply does not carry out the comparison properly.

¹⁵³ *Oakes*, *supra* note 2 at 136, Dickson C.J.

¹⁵⁴ See Part II(C-D), above.

¹⁵⁵ See Part II, above.

Under the new test, proposed here, as under the *Oakes* test, the burden of proof remains upon the government to establish, on a balance of probabilities, that the infringement is a “reasonable limit in a free and democratic society.” We propose that this burden should be discharged through a comparison of the importance of the infringed guarantee and the importance and reasonableness of its limitation. This is accomplished by following the four steps below.

- Step 1 Assess the importance of the *Charter* guarantee (*i.e.*, the particular values underlying it that are infringed in the particular case) and the degree of its infringement;
- Step 2 Assess the importance of the governmental objective and the relation of the infringing law to that objective;
- Step 3 Assess the relative weights of the infringed *Charter* guarantee and the infringing law to determine whether or not the trade-off between the infringed guarantee and the legislative objective is justifiable in a free and democratic society.

If the infringed *Charter* guarantee is found, on a balance of probabilities, to be weightier than the infringing law, the section 1 analysis terminates and the remedies analysis begins. Otherwise, the analysis proceeds to step 4.

- Step 4 Assess whether the limit is a “reasonable limit” in light of its effects. This assessment depends upon the Court’s answers to two questions.
 - (A) Could the same objective be achieved by other practicable means that would reduce the degree of infringement?
 - (B) Do the negative effects of the infringing governmental action outweigh its positive effects, notwithstanding the fact that the importance of the purpose and means of the governmental law or other act is greater than the infringed guarantee?

If the answer to both (A) and (B) is negative, then the infringement is reasonable and the government’s law is upheld. If the answer to either (A) or (B) is affirmative, then the limit is not reasonable and the analysis proceeds to the remedies stage.

The new approach to section 1 analysis can be explained as follows. When the complainant has discharged the burden of showing a threshold infringement of a *Charter* guarantee, the analysis moves to the

section 1 stage, which is a four-step analysis. Steps 1-3 of this new analysis place the burden on the government to justify the purpose of the impugned law or government act. Step 1 requires the government to present its view of the importance of the infringement and the *Charter* guarantee. Step 1 also allows the plaintiff to rebut that view.¹⁵⁶

The second step is for the government to establish the importance of the impugned law in issue. This requires that it assess the importance of the governmental objective and the integral relationship between the governmental action and that objective.

The third step is for the government to establish the relative weights of the particular infringement and the governmental law. As a preliminary matter, the government bears the burden of demonstrating that the law in question is of greater importance than the *Charter* guarantee. If the government discharges its burden under step 3, it has justified its purpose and its means, but the government still must justify the effect of its action upon the *Charter* guarantee.¹⁵⁷

This fourth step requires that the government prove (A) that it could not reasonably reduce the detrimental effects of its law or action while maintaining its beneficial effects, and (B) that the beneficial effect of its law justifies the negative effects of the infringement.

This new approach, we maintain, is consistent with the principles underlying section 1. It redresses the problems plaguing the *Oakes* test. It also remedies difficulties arising out of the manner in which the Supreme Court has construed the values of a free and democratic society, both before and after the decision in *RJR-MacDonald*

¹⁵⁶ As stated above, the government ultimately bears the burden of proving that a *Charter* infringement is justified. Nonetheless, the onus of establishing the importance, and degree of violation, of a *Charter* right will fall on the complainant.

¹⁵⁷ *Big M*, *supra* note 17 at 334. In particular we recall:

If the legislation fails the purpose test, there is no need to consider further its effects, since it has already been demonstrated to be invalid. Thus, if a law with a valid purpose interferes by its impact, with rights or freedoms, a litigant could still argue the effects of the legislation as a means to defeat its applicability and possibly its validity. In short, the effects test will only be necessary to defeat legislation with a valid purpose; effects can never be relied upon to save legislation with an invalid purpose.

We do not claim that the purpose underlying the challenged law should be ignored. We claim, rather, that the purpose underlying the law should be conceived in light of its effects, not in disregard of them. As Dickson C.J. maintained in *Big M*, at 331, “purpose and effect are clearly linked.” However, we do question the risk of courts treating the effects of such laws as mere subsets of those laws with overriding purposes or objects. This concern arises in relation to Dickson C.J.’s further statement, at 350, that “intended and actual effects have often been looked to for guidance in assessing the legislation’s object and thus, its validity.” On the need to evaluate the effects of impugned laws as a distinct normative inquiry, see Part II(D), above.

D. *Applying the New Approach*

We return to the facts of *RJR-MacDonald* to illustrate how this proposed new approach functions. We intend the following merely as a hypothetical illustration, not as a detailed analysis of the complex evidentiary and factual issues involved.¹⁵⁸ Rather than argue for a specific finding of the law's constitutional validity or invalidity, we set out the arguments that would be made on both sides: the government's and the plaintiff's. The aim is to better articulate the values at stake, and the ordering of values that would underlie a finding of constitutional invalidity or validity. We illustrate each step, first, by reference to the hypothetical arguments of the government and second, by recourse to the hypothetical arguments of the plaintiff. The aim is to show how these conflicting values can be weighed in order to arrive at a principled and predictable decision that engages the normative context.

1. The importance of the *Charter* guarantee and its degree of infringement

a) *Government's argument*

Free expression is a fundamental value in a free and democratic society.¹⁵⁹ However, free expression competes with other fundamental values that are also deserving of protection, such as the promotion of public health and the protection of the young.¹⁶⁰ Depending upon the nature of the expression, freedom of expression will be accorded varying degrees of importance.¹⁶¹ Its importance and the seriousness of the limitation imposed upon it should be measured according to their impact on the values underlying the guarantee set out in section 2(b) of the *Charter*. These values include the search for artistic, political, and scientific truth, the protection of individual autonomy and

¹⁵⁸ For example, we simply assume (1) that smoking is harmful to health, and (2) that advertising has the effect of increasing the sale and consumption of tobacco products. For a basic summary of the facts of this case, see Part III(B), above. For more details, see La Forest J.'s judgment in *RJR-MacDonald*, *supra* note 8 at 222-40.

¹⁵⁹ See *ibid.* at 281-82, La Forest J.

¹⁶⁰ On the protection of young persons, see generally, *Irwin Toy*, *supra* note 42. On the competition between fundamental values see *RJR-MacDonald* *supra* note 8 at 281-82, La Forest J.

¹⁶¹ See *RJR-MacDonald* *supra* note 8 at 279-80, La Forest J.

self-realization, and the promotion of public participation in political processes.¹⁶²

The government contends that, while the plaintiff's right to expression is infringed because the legislation limits an expressive activity, this infringement is not severe for the following reasons. The commercial expression limited is not strongly related to political, artistic, or scientific truth; nor is it closely related to individual autonomy or self-realization, nor to public participation in the democratic process. Tobacco advertising does not satisfy political, scientific, or artistic purposes, nor does it further participation in the political process. Tobacco advertising and promotion aims to inform consumers about and promote the use of tobacco products. The purpose is to consolidate market share and maintain profits in respect of a substance that harms and sometimes kills those who consume it.¹⁶³ These aims of tobacco companies are reinforced by their enormous economic power in the consumer market and the degree to which they use their psychological sophistication to target less informed consumers within a skewed "marketplace of ideas."¹⁶⁴ This differential is even larger where the consumers targeted are children.¹⁶⁵ Therefore, the expression in issue falls more readily into the category of expression dealt with in *Keegstra*¹⁶⁶ *R. v. Butler*,¹⁶⁷ and the *Prostitution Reference*¹⁶⁸

b) *Plaintiff's argument*

Freedom of expression is a fundamental value in a free and democratic society.¹⁶⁹ Commercial advertising deserves constitutional protection due to its importance to the functioning of the marketplace, in allowing producers to attract consumers, and in enabling consumers

¹⁶² See *ibid.* at 280-81, La Forest J., citing Dickson C.J. in *Keegstra supra* note 20. See also *Irwin Toy, supra* note 42 at 976, Dickson C.J., Lamer and Wilson JJ.

¹⁶³ See *RJR-MacDonald supra* note 8 at 283-84, La Forest J.

¹⁶⁴ On this skewing of the "marketplace in ideas," see "Transforming Free Speechnsibilities," *supra* note 11.

¹⁶⁵ See *RJR-MacDonald supra* note 8 at 284, La Forest J.

¹⁶⁶ *Supra* note 20.

¹⁶⁷ [1992] 1 S.C.R. 452 [hereinafter *Butler*].

¹⁶⁸ *Supra* note 19.

¹⁶⁹ See, for example, *Ford, supra* note 64; *Irwin Toy, supra* note 42; *Keegstra supra* note 20; *Zundel, supra* note 20; and *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038.

to make informed choices.¹⁷⁰ While the plaintiff concedes that consumers should be protected from dangerous products, the issue here is about who is to make the choice in the use of tobacco products and about what risks are acceptable in making those choices. Consuming tobacco is not an illegal activity in most circumstances. The plaintiffs contend that the consumer is free to determine whether to accept health risks in the purchase and consumption of tobacco products. If the government wants to remove that choice, it should outlaw the sale and consumption of tobacco, rather than extinguish the right to engage in expression concerning a legal activity.

The plaintiff contends that its right to freedom of expression is severely infringed because the legislation bans all types of advertising: informative, brand loyalty, and lifestyle advertising. Moreover, it deprives the plaintiff of the right to “say nothing,” by requiring that it provide the consumer with unattributed health warnings relating to the use of tobacco products. This limit upon the plaintiff’s freedom of expression also interferes with the plaintiff’s ability to conduct a legal enterprise, where neither the selling nor the consumption of tobacco is illegal. This governmental action constitutes an unwarranted intrusion into the commercial marketplace. It interferes with the capacity of Canadian companies to market their lawful products; and it undermines the ability of Canadian consumers to decide upon the level of risk in the purchase and use of tobacco products which they consider acceptable. As the law does not reach imported media with tobacco advertisements and promotions, the law puts Canadian businesses at a distinct disadvantage in relation to foreign competition.

2. The importance of the governmental objective and
the relation of the infringing law to that objective

a) *Government’s argument*

The government contends that the infringing legislation is reasonably related to its objective. The government’s objective in enacting this legislation is to promote public health. *That* purpose is fundamental to a free and democratic society protected by the *Charter*; since it serves as a prerequisite to the enjoyment of many of our most

¹⁷⁰ This was recognized in *Ford*, *supra* note 64 at 767.

cherished rights.¹⁷¹ The government's objectives here include: protecting the health of Canadians and young persons in particular; heightening consumer awareness of the health risks associated with tobacco use; raising the awareness of Canadians about risks in the use of tobacco products, including the public cost of health care; reducing the inducements for consumers to use tobacco products; and educating Canadians about the potential health risks arising from exercising the choice to use tobacco products.¹⁷² The government contends, further, that these purposes underlie the importance of its responsibility, since the consumption of tobacco products poses a severe threat to public health. Moreover, advertising directed at promoting the sale of tobacco products is directly related to its consumption, as is evidenced by the fact that Canadian tobacco companies spend seventy-five million dollars a year advertising and promoting the sale of their products.¹⁷³ Tobacco consumption is one of the leading causes of illness and death in Canadian society. It threatens not only the consumers of tobacco, but also the general population that is exposed to the danger of second-hand smoke. It also places a financial burden on Canadians because all Canadians must shoulder the tax burden of paying for the heightened cost of medical care for those who become ill due to tobacco use.¹⁷⁴

The government asserts that by regulating the promotion, advertising and labeling of tobacco products, it can arrive at a more practical and less drastic remedy than by completely prohibiting the sale or consumption of tobacco. This intermediate remedy also reduces the risk of criminal action, such as the smuggling of tobacco. It is more effective than governmental measures that do no more than subject the sale of tobacco products to health warnings. Finally, these regulations enable the federal and provincial governments to develop comprehensive and coordinated strategies by which to better address the needs of the Canadian public.

b) *Plaintiff's argument*

The plaintiff contends that the infringing legislation is not reasonably related to the government's objective. The government's key

¹⁷¹ *RJR-MacDonald*, *supra* note 8 at 278, La Forest J.

¹⁷² *Ibid.* at 272.

¹⁷³ *Ibid.* at 291.

¹⁷⁴ *Ibid.*

objective, here, is to protect the health of Canadians by reducing the *consumption* of tobacco products. But its legislation attacks the *promotion, advertising, and labeling* of tobacco products, which has not been shown to achieve the objective of reducing consumption. Furthermore, the legislation will not protect Canadian citizens from the advertisement of tobacco products outside of Canada, leading to the importation of those products.

3. The relative weights of the infringed *Charter* guarantee and the infringing law

a) *Government's argument*

The government contends that the right to freedom of expression, guaranteed by the *Charter*, is outweighed by the importance of the objectives that underlie the infringing legislation. Maintaining and enhancing public health, the protection of the young, and the ability of consumers to make informed choices are all key governmental responsibilities. While free expression is a fundamental value in a free and democratic society, the expressive activity in this case is of less value than the health of Canadians, the need to reduce youth addiction to tobacco and to inform consumers about the hazards of tobacco consumption. The expressive activity being infringed in this case is commercial expression. That activity aims at consolidating and enhancing the share of tobacco products within a market in which one third of Canadians are addicted to tobacco. Those attempting to increase their profit from the sale of tobacco products which sicken or kill their users, not to mention those who are subjected to second-hand smoke, should not be accorded the same expressive liberties as those marketing products that are not harmful to their consumers. Health, essential to the enjoyment of fundamental rights, must be placed above profit and market share. There are other ways of making a profit. Citizens have only one life to lose.

b) *Plaintiff's argument*

The plaintiff contends that the right to freedom of expression, guaranteed by the *Charter*, outweighs the importance of the objectives that underlie the infringing legislation. The government's measures have not been shown to reduce tobacco consumption. They completely

deny the plaintiff's ability to advertise and promote a product whose sale and consumption is lawful. These measures also deny the plaintiff the right not to engage in expressive activity, as occurs when tobacco advertisement is subject to attributable warnings. Prohibiting tobacco advertising will have a detrimental effect, not only upon the plaintiff's market, but also upon markets related to the sale and consumption of tobacco products, such as the market of tobacco vendors. This constitutes a direct attack upon the freedom to engage in the marketing of lawful products, to the disadvantage of Canadian businesses and consumers alike. It also denies the suitability of other measures by which Canadian citizens choose those risks they are willing to assume in reaching consumption choices. These other measures do not violate fundamental *Charter* rights. They also avoid the public harm that arises when legislation prevents tobacco companies from advertising to promote sporting events, sponsor charitable work, and provide revenues for those promoting such advertisement, such as sports promoters and magazines.

On the basis of such arguments, the Court decides at this stage whether the values engaged, on balance, justify the government's purpose and the means it chose to further that purpose. If the government's argument fails at this stage, the legislation does not constitute a justifiable limit upon a *Charter* guarantee. The section 1 analysis ends; and the Court decides upon the appropriate remedy. If the government's argument succeeds, then the Court proceeds to step 4.

4. Is the limit a "reasonable limit" upon the *Charter* guarantee in light of its effects?

(A) Could the same objective be achieved by other practicable means that would reduce the degree of infringement?

a) *Government's argument*

The government contends that the objective underlying the legislation could *not* have been achieved by other practicable means that would have reduced the degree of the infringement upon freedom of expression. For example, a partial ban on lifestyle advertising would not have achieved the government's objective because tobacco companies could have negated its effect. Alternatively, they could have continued

to advertise their products by legal means, in conjunction with other lifestyle advertisements. Attributed warnings about risks to health arising from the use of tobacco products are likely to have a significantly reduced impact than the legislation in issue, as such warnings encompass a perspective on health, not an accepted scientific truth. Rendering tobacco consumption illegal also gives rise to a black market in tobacco consumption which subverts the government's purpose. It places an undue burden upon addicted citizens who wish to remain law-abiding, but cannot be so in consequence of a law that renders their consumption of tobacco illegal. It also curtails the activities of tobacco companies and has a detrimental impact upon their employees, suppliers, and customers. The economic effect of such radical legislation would be unduly severe. The gradual approach adopted by the government is fairest to all the parties involved. It places the greatest importance upon the health of Canadians. But it also maintains the ability of tobacco companies to continue their profitable activity.

b) *Plaintiff's argument*

The plaintiff contends that the government could employ other practicable means of attaining its objective that infringe upon the rights of tobacco companies to a lesser degree. This includes imposing a partial ban on particular styles of advertising. For example, it could ban lifestyle advertising to protect young persons. It would also require attributed warnings directed at informing consumers of the possible risks of tobacco consumption. This alternative satisfies the government's objective, but it does not infringe upon freedom of expression to the same extent as the legislation currently being challenged.

- (B) Do the negative effects outweigh the positive effects of the legislation, despite the fact that the importance of the purpose and means of the legislation is greater than the infringed guarantee?

a) *Government's argument*

The government contends that the positive effects of decreasing tobacco advertising, and consumption, promote health and shield young people from inducements to consume tobacco. These benefits, even if only partial, justify the negative effects arising from the limits which the

legislation in issue places upon the expressive commercial activity. The protection of health, central to human dignity and liberty, should precede profit-making and the consolidation of market share.

b) *Plaintiff's argument*

The plaintiff contends that the negative effects of the legislation upon the expressive activity of tobacco companies, their profits and market share, is not justified for these reasons. The legislation is likely to have only a negligible impact upon the protection of public health. The burdens it will impose upon a lawful economic enterprise will also disadvantage Canadian companies in relation to foreign competitors whose advertisement of tobacco products are not affected by the legislation.

E. *Benefits of the New Approach*

We have argued that, despite the adoption of the normative *Oakes-Plus* approach by the majority of the Supreme Court since *RJR-MacDonald*, the majority still has not enunciated principled criteria to guide its normative determinations under section 1.¹⁷⁵ The result has been a noticeable pattern in which the Court has displayed normative preferences in respect of some rights and freedoms, but not others. For example, since *Oakes*, the majority has saved infringements on freedom of expression under section 2(b) of the *Charter* 52 per cent (fourteen out of twenty-seven) of the time.¹⁷⁶ However, no majority has saved infringements on liberty under section 7.¹⁷⁷ There are plausible reasons for these discrepancies. For example, the Court may view liberty as *more* fundamental than freedom of expression and more deserving of constitutional protection. It may also believe that unchecked freedom of expression is more likely to undermine the *common good* than an unchecked liberty. But whatever its views may be, the Court has failed to enunciate principled criteria by which to arrive at its determinations.

¹⁷⁵ See Part III, above.

¹⁷⁶ See Appendix A, Table 3, below.

¹⁷⁷ See Appendix A, Table 3, below. A majority of the Court found an infringement of s. 7 and applied the *Oakes* test on fifteen occasions. None of these violations was held to be a justifiable limitation.

As a further example, the majority of the Court has saved 48 per cent of the violations of section 11(d), or eleven of twenty-three violations.¹⁷⁸ But of seven violations of section 11(d) considered by a majority of the Court dealing with constructive murder, none was saved. Alternatively, violations of section 7 dealing with reverse onus provisions and restricted defences to statutory offences were saved 77 per cent of the time.¹⁷⁹ Again, there are patently credible reasons for these results. In saving laws that prevent the Crown from being unable to protect the public from, for example, drunk drivers, the Court is likely concerned about the values of public safety and protection, not to mention reducing the cost of prosecuting offenders. In not saving laws that inflict grave punishment upon an accused without proof of full *mens rea*, the Court is likely protecting individuals from being sentenced out of proportion to the culpable wrong the Crown can prove was their doing.

Our contention is that, whatever its reasons for saving or not saving an impugned law under section 1 of the *Charter*, the Court's normative assumptions are made in the face of *other* possible choices. In addition, the Court grounds each choice in preferred beliefs, despite its attempt to dress them in the garb of "self-evident" truth. Its decisions do not speak for themselves. They rely instead on unstated and unqualified normative assumptions.

The new section 1 approach, proposed in this article, responds to the criticisms leveled against the existing section 1 analysis. An ultimate standard of justification—the values of Canada's free and democratic society—are integral to each step of the new approach. Given that the words of section 1 require a stringent form of justification, a section 1 analysis should compare the importance of the *Charter* guarantee with the importance of the law or action limiting that guarantee. This new approach is consonant with the values of a free and democratic society protected by the *Charter*. It also accords with Dickson C.J.'s ultimate standard.

However, the new section 1 analysis goes further. It conceives of the link between the legislative objective and the means chosen to effect it as more than a formal, value-free criterion. The means used to arrive at the governmental objective tempers the importance of the law or

¹⁷⁸ See Appendix A, Table 3, below. Section 11(d) guarantees the presumption of innocence.

¹⁷⁹ A majority of the Court applied the *Oakes* test to constructive murder provisions on seven occasions. None of these provisions survived the *Oakes* test. A majority of the Court applied the *Oakes* test to reverse onus provisions or presumptions or provisions limiting defences available to an accused on thirteen occasions, ten of which survived the *Oakes* test. See Appendix A, Table 3, below.

other governmental act in question. An important objective bolsters the importance of the governmental means of effecting that objective. In contrast, a tangential or redundant law lessens the importance of an even more pressing governmental objective. The purpose and means of effecting the objective underlying the law, therefore, are integrally related.

This new section 1 analysis displaces the concept of minimal impairment as the pivotal component of section 1 scrutiny. According to our approach, the minimal impairment issue only arises after the government has proven that, on balance, the law and its objective outweigh the infringement of the *Charter* guarantee. The new approach continues to evaluate alternatives by which the governmental law or action would have a less detrimental affect; but this analysis arises only as a fourth step, towards the end of the analysis. The new approach also acknowledges that the government requires some flexibility: in satisfying its objectives, in demonstrating that less infringing means are not workable, and in showing that the positive results of its action outweigh the deleterious effects. These issues, however, arise only at the end of the analysis. This helps to limit the manipulation of values, as occurred under the *Oakes* test. The new approach also requires that value-choices be articulated in the first three steps of the new approach. The anticipated result is greater predictability in judicial decisionmaking under section 1 of the *Charter*.

This new approach also combines normative analysis with contextual sensitivity. The governmental objective is considered in tandem with the infringing law or act. Similarly, the guaranteed right or freedom is considered in tandem with the particular infringement. In rendering these processes parallel, not sequential as occurred under the *Oakes* test, the analysis is coherent and clear in its application. This also reduces the capacity of judges to engage in mechanical manipulation at the expense of normative reasoning, as occurred under the *Oakes* test and unbridled normative analysis, as arose in *RJR-MacDonald*

This new approach, while improving upon the *Oakes* test, is also compatible with the precepts which underlie Dickson C.J.'s conception of judicial responsibility in applying section 1 of the *Charter*. Moreover, judges and lawyers continue to be informed by precedent under this new test, in determining the manner in which the Court ought to:

- A. identify the values underlying the guarantee;
- B. assess the degree of infringement;
- C. identify the values underlying the legislation;
- D. assess the relation between the law or act and the objective(s) of the legislation;

- E. establish the relative weight of the infringement compared to the law or act; and
- F. establish that the limit was reasonable, despite the fact that the value of the legislation's objective outweighed the values of the infringed guarantee.

Courts using the new approach can inform themselves in light of earlier *Oakes* analysis in accommodating relations between normative values and principled reasoning. For example, analysis under *Oakes* can be scrutinized to identify the values that underlie a *Charter* guarantee, to assess the seriousness of the governmental infringement and to identify the values underlying the law or other governmental acts in issue. The *Oakes* analysis also can be referenced in assessing the relation between the law or other act and the governmental objective, in the so-called rational connection test under *Oakes*. Finally, the *Oakes* analysis can be referred to in determining whether the law or act minimally impaired the *Charter* guarantee and whether it produced benefits that are proportional to the ill effects of the governmental intrusion.

But despite the capacity of the *Oakes* test to identify some normative values, it continues to have normative limitations. For example, the first step under the *Oakes* test, assessing the importance of the legislative purpose, requires only that that purpose be important enough “to warrant overriding a constitutionally protected right or freedom.”¹⁸⁰ This has led judges to characterize governmental objectives broadly, raising them to high levels of generality and making them appear self-evidently “pressing and substantial.” The *Oakes* test, at that stage, engages in little comparison between the purpose of the infringed guarantee and its degree of actual infringement. The proportional effects stage of the *Oakes* analysis is all but ignored. The result is that, under the *Oakes* test, the legislative objective is rendered important, but not necessarily more important than the infringed guarantee in relation to the values of a free and democratic society. In contrast, the new approach compares the purpose of the limitation directly to the importance of the purpose of the guarantee and at its third stage, to the degree of the infringement.

Second, under the proportionate effects test in *Oakes*, the importance of the guarantee is modified by its degree of infringement. The *Oakes* test does not directly modify the importance of the legislative objective in light of the importance of the means used to fulfill it. It maintains, instead, that the means chosen merely be “rationally

¹⁸⁰ *Oakes*, *supra* note 2 at 138-39, Dickson C.J.

connected” to that objective. The requirement is, simply, that the connection not be arbitrary, unfair, or irrational. The result is that the importance of the impugned law is overstated because a general objective whose importance is self-evident is allowed to inflate the importance of legislative means that are of remote and trivial importance to the government’s overall purpose. This is not a satisfactory way of assessing the relationship between the purpose of a law or other act and the means chosen to further it. In contrast, the new test, proposed here, requires an assessment of the importance of the governmental means chosen to infringe the *Charter* guarantee in fulfilling the governmental objective (in step 2).

The only real scrutiny of the means chosen by the legislature under the *Oakes* test occurs under the minimal impairment sub-test. This aspect of the *Oakes* test has become a “fudging factor.” Given that broad governmental objectives can be pursued in many ways, it appears that there are other less infringing ways in which to achieve the objectives. This has resulted in either an unduly strict minimal impairment standard or a lesser degree of scrutiny when examining the availability of other means of achieving this legislative objective. The ensuing harm has been an inadequate assessment of the effects of legislative means in relation to the values of a free and democratic society. The new test proposes, instead, that the infringed guarantee and the limitation should be assessed, not only purposively, but also in terms of their particular effects.

The *Oakes* test evaluates the effects of the limitation upon a guarantee under the minimal impairment test and supposedly, also under the proportional effects test. The minimal impairment test really constitutes a comparison of alternative means of realizing the governmental objective. It does *not* compare the importance of the effects of the law with the importance of its effects upon the plaintiff whose guarantee is infringed. This comparison, supposedly, takes place under the proportional effects test in which the importance of the objective is measured against the deleterious effects of the law, and the positive effects of the law are weighed against their harmful effects. This has seldom, if ever, been done by the Supreme Court, as it pays only lip-service to the proportional effects test in practice. The new test proposes, in contrast, that the Court engage in a full scrutiny of the effects of the limitation. This occurs at step 4 of our new approach.

The Supreme Court’s attempt to reinvigorate Dickson C.J.’s words from *Oakes* in *RJR-MacDonald* and in subsequent cases are justified by valid concerns. But the solutions at which the Court has arrived, unfortunately, have distinct limitations. These more recent

decisions on section 1 appear to invoke the values of a free and democratic society to lessen the degree of stringency required. This occurs sometimes *prior* to the Court applying the *Oakes* test. Alternatively, these decisions lower the degree of scrutiny in applying a particular sub-test of *Oakes*. This tends to magnify both normative and methodological defects in the application of section 1. It also fails to produce a principled reconciliation between the ultimate and specific standards of justification.

The proposed new approach integrates normative considerations into a contextual analysis under section 1. This is accomplished by treating the values of a free and democratic society as important criteria at all stages of analysis.

V. CONCLUSION

After more than a decade of section 1 analysis, values play an expanding, but still questionable role in the application of section 1. The normative assumptions grounding the Supreme Court of Canada's section 1 inquiry remain clouded either in mechanical reasoning or in normative vagaries. A court that engages in mechanical reasoning submerges its normative choices in neutral language. One that shrouds its normative choices in vagueness denies them a principled framework. In both cases, the harm is that decisions under section 1 lack a clear normative foundation and do not give rise to predictable or cogent results.

With the advent of *Egan*, and particularly *RJR-MacDonald* a majority of the Supreme Court has endorsed Dickson C.J.'s normative analysis of *Charter* infringements in *Oakes*. That majority has employed *both* La Forest J.'s normative analysis in *RJR-MacDonald* *and* the specific sub-tests devised in *Oakes*. However, the Court has also adopted a tenuous approach in which it has used values to justify a particular characterization of a governmental objective, or to analyze proportionality as enunciated by Dickson C.J. in *Oakes*.

Section 1 of the *Charter* plays a vital role in protecting and refining the values that prevail within the Canadian polity. This includes determining the permissible scope of our fundamental rights and also circumscribing governmental action which conflicts with those values. The balance struck between such rights and laws which undermine them, we contend, is most fully and vigorously grounded in the values of a free and democratic society. The Supreme Court has begun to tackle *that* balance with normative insight. But it has yet to adopt an integrated,

principled, and contextual inquiry into the values that underlie section 1 of the *Charter*. It has also still to apply those values in a consistent and permanent manner, as was envisaged by Dickson C.J. in *Oakes*.

The normative reasoning resorted to by the majority of the Supreme Court since *RJR-MacDonald* is a positive and laudable step. In particular, it demonstrates a willingness to engage the values that underlie a free and democratic society under section 1 of the *Charter*. In *not* dealing with these normative values in a principled and comprehensive manner, however, the Court's decisions reflect untested and unqualified assumptions. The risk is that its unarticulated normative assumption prior to *RJR-MacDonald* will be displaced in favour of untested ones following that case. The harm is that these assumptions will be grounded in dubious suppositions about levels of scrutiny, deference to the legislature and the values of a free and democratic society.

This article proposes an integrated, explicit, and contextual scrutiny of the values underlying section 1. This will increase the normative clarity of section 1 decisions. In particular, it will render judges more accountable for limitations which impugned laws impose upon rights and freedoms under the *Charter*. The benefit will be not only more open recognition of the values that underlie section 1 but the identification of a more cogent line of deference towards the legislature. A further benefit will be a more vital comprehension of the values that underlie a free and democratic society.

VI. DEFINITION OF TERMS

PASSED

The component of the *Oakes* test is shown as "passed" if more justices held that the infringement in question met the particular test of that component, *i.e.* a pressing and substantial objective, a rational connection, minimal impairment the right, or proportional effects, than held that the particular test was not met.

FAILED

The component of the *Oakes* test is shown as "failed" if more justices held that the infringement in question did not meet the particular test of that component, *i.e.* a pressing and substantial objective, a rational connection, minimal impairment of the right, or proportional effects, than held that the particular test was met.

SPLIT

The component of the *Oakes* test is shown as “split” if an equal number of justices held the infringement in question met the particular test of the component as held that the particular test was failed.

NOT CONSIDERED

The component of the *Oakes* test is shown as “not considered” if more justices did not apply the particular test, or did not reach a conclusion under the particular test, than applied the particular test and reached a conclusion whether the particular test was passed or failed.

SAVED

The result of an application of the *Oakes* test is shown as “saved” if a majority of the Court held that the infringement passed the four components of the *Oakes* test.

KILLED

The result of an application of the *Oakes* test is shown as “killed” if a majority of the Court held that the infringement failed one or more components of the *Oakes* test.

NON-OAKESANALYSIS

A non-*Oakes* section 1 analysis is one in which: (a) no evidence is advanced by the government to justify the infringement; (b) the limit is not prescribed by law; (c) the law infringing the *Charter* is a rule of common-law; (d) the judgment is that the infringement is not justifiable “on any basis”.

MAJORITY

A “majority” of the Court consists of the greatest number of justices who agree with the reasoning in the judgment.

MINORITY

A “minority” of the Court consists of those justices who do not agree with the reasoning of the majority. “Minority” in this sense subsumes both decisions that agree (concur) and disagree (dissent) with the result reached by the majority.

APPENDIX A

TABLE 1
APPLICATIONS OF OAKES TEST BY MAJORITY OF COURT

<i>Element</i>	<i>Passed</i>	<i>Failed</i>	<i>Split</i>	<i>Not Cons'd</i>
Objective	84/87—97%	2/87—2%	1/87—1%	0/87—0%
Rational Connection	75/87—86%	8/87—9%	1/87—1%	3/87—4%
Minimal Impairment	35/87—40%	50/87—58%	0/87—0%	2/87—3%
Proportional Effects	35/87—40%	14/87—16%	0/87—0%	37/87—44%
Conclusion of Majority	35/87—40%	52/87—60%	-----	-----

*The conclusion of the majority of the Court regarding the constitutionality of the infringements varied slightly from the conclusion of the majority of those justices applying the *Oakes* test. Of eighty-seven laws or acts giving rise to infringements, a majority of the Court held thirty-seven of these laws or acts to be constitutional. Fifty were held to be unconstitutional. The variation is explained by two cases in which a majority applied the *Oakes* test and found that the law or act failed the test. But a minority held that the law or act passed the *Oakes* test and, together with other Justices held that there was no infringement. The result was that the law passed constitutional scrutiny. The two cases are: *Egan v. Canada*, [1995] 2 S.C.R. 513; and *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154. The *Oakes* test was pivotal in these cases, providing the “swing vote” that saved the infringements in issue.

TABLE 2
“SAVE RATES” FOR CHARTER GUARANTEES

<i>Sec.</i>	<i>Description</i>	<i>Saved by Majority</i>	<i>Saved by Minority</i>	<i>Other Analysis</i>
2(a)	Conscience and Religion	3/4—75%	0/1—0%	-----
2(b)	Thought, Opinion, and Expression	14/27—52%	-----	-----
2(d)	Association	-----	1/7—14%	-----
3	Voting	1/2—50%	0/1—0%	-----
6(1)	Mobility in and out of Canada	1/1—100%	-----	-----
6(2)	Mobility within Canada	0/1—0%	-----	-----
7	Life, Liberty, and Security of Person	0/15—0%	1/7—14%	1/3—33%
8	Search and Seizure	-----	0/1—0%	0/4—0%
9	Arbitrary Detention	2/3—66%	-----	-----
10(b)	Retain Counsel	1/1—100%	-----	0/1—0%
11(d)	Presumption of Innocence	11/23—48%	1/3—33%	0/2—0%
11(e)	Denial of Bail without Reasonable Cause	0/1—0%	-----	-----
11(f)	Trial by Jury	1/1—100%	-----	1/1—100%
11(h)	Double Jeopardy	-----	-----	1/2—50%
12	Cruel & Unusual Punishment	0/1—0%	0/1—0%	-----
13	Self-incrimination	-----	-----	0/1—0%
15(1)	Equality	3/7—44%	1/7—14%	-----
23	Minority Lang. Educ.	-----	-----	0/1—0%
Total Infringements: 130		37/87—43% ¹	4/28—14% ²	3/15—20% ³

*See endnotes after Appendix B.

TABLE 3
“SAVE” RATES BY SUBJECT MATTER

<i>Sec.</i>	<i>Subject Matter</i>	<i>Saved by Majority</i>	<i>Saved by Minority</i>	<i>Other Analysis</i>
2(a)	General Save Rate	3/4—75%	0/1—0%	----
	Blood Transfusions	1/1—100%	----	----
	Hate Propaganda	1/2—50%	----	----
	Sunday Shopping	1/1—100%	----	----
	Therapeutic Abortion	----	0/1—0%	----
2(b)	General Save Rate ⁴	14/27—52%	----	----
	Non-judicial Restrictions on Expression ⁵	1/8 ⁶ —13%	----	----
	Judicial Restrictions on Expression ⁷	3/5—60%	----	----
	Illegal Activity & Hate Speech	8/10—80%	----	----
	Adjudicator Restricting Employer	2/2—100%	----	----
2(d) ⁸	General Save Rate	----	1/7—14%	----
	Union Dues not for Collective Bargaining	----	1/1—100%	----
	Collective Bargaining	----	0/2—0%	----
	Strikes	----	0/2 ⁹ —0%	----
	Partnerships with Non-residents	----	0/1—0%	----
	Public Communication for Prostitution	----	0/1—0%	----
3	General Save Rate	1/2—50%	0/1—0%	----
	Inmates Prohibited from Voting	0/1—0%	----	----

<i>Sec.</i>	<i>Subject Matter</i>	<i>Saved by Majority</i>	<i>Saved by Minority</i>	<i>Other Analysis</i>
3 con'd	Disqualification from Elected Office	1/1—100%	-----	-----
	Size of Constituencies	-----	0/1—0%	-----
6(1)	General Save Rate	1/1 ¹⁰ —100%	-----	-----
6(2)	General Save Rate	0/1 ¹¹ —0%	-----	-----
7	General Save Rate	0/15—0%	1/7 ¹² —14%	1/3 ¹³ —33%
	Constructive Murder	0/8—0%	-----	-----
	Restrictions on Defences of Vagueness ¹⁴	0/8—0%	-----	-----
	Therapeutic Abortion	0/1—0%	-----	-----
	Detainment of Insane	0/2—0%	-----	-----
8	General Save Rate	-----	0/1 ¹⁵ —0%	0/4 ¹⁶ —0%
9	General Save Rate	2/3 ¹⁷ —67%	-----	-----
10(b)	General Save Rate	1/1 ¹⁸ —100%	-----	0/1 ¹⁹ —0%
11(d)	General Save Rate	11/23—48%	1/3—33%	0/2 ²⁰ —0%
	Statutory Reverse Onus/ Removal of Defence	10/13—77%	1/3—33%	-----
	Constructive Murder	0/7—0%	-----	-----
	Miscellaneous ²¹	1/3—33%	-----	-----
11(e)	General Save Rate	0/1—0%	-----	-----
11(f)	General Save Rate	1/1—100%	-----	1/1—100%
11(h)	General Save Rate	-----	-----	1/2—50%
12	General Save Rate	0/1—0%	0/1—0%	-----
13	General Save Rate	-----	-----	0/1—0%
15(1)	General Save Rate	3/7—44%	1/7—14%	-----

<i>Sec.</i>	<i>Subject Matter</i>	<i>Saved by Majority</i>	<i>Saved by Minority</i>	<i>Other Analysis</i>
15(1)	Sex/Marital Status	1/2 ²² —50%	1/2 ²³ —50%	-----
con'd	Age Discrimination	1/2 ²⁴ —50%	0/3 ²⁵ —0%	-----
	Citizenship	0/2 ²⁶ —0%	-----	-----
	Assisted Suicide	1/1—100%	-----	-----
	Denial of Funding to Religious Schools	-----	0/2—0%	-----
23	General Save Rate	-----	-----	0/1—0%

*See endnotes after Appendix B.

APPENDIX B

TABLE 1
MINORITIES AND MAJORITIES APPLYING
THE OAKESTEST COMPARED

<i>Element</i>	<i>Treatment</i>	<i>Majority</i>	<i>Minority</i>
Objective	Passed	84/87—97%	21/28—75%
	Failed	2/87—2%	4/28—14%
	Not Considered	0/87—0%	0/28—0%
	Split	1/87—1%	3/28—11%
Rational Connection	Passed	75/87—86%	15/28—54%
	Failed	8/87—9%	4/28—14%
	Not Considered	3/87—4%	5/28—18%
	Split	1/87—1%	4/28—14%
Minimal Impairment	Passed	35/87—40%	4/28—14%
	Failed	50/87—57%	18/28—64%
	Not Considered	2/87—3%	2/28—7%
	Split	0/87—0%	4/28—14%
Proportional Effects	Passed	35/87—40%	4/28—14%
	Failed	14/87—16%	6/28—21%
	Not Considered	37/87—44%	14/28—50%
	Split	0/87—0%	4/28—14%

TABLE 2
OUTCOMES OF APPLICATIONS OF OAKES TEST

<i>Application</i>	<i># of Infringements</i>	<i># Saved</i>	<i># Failed</i>
<i>Oakes by Maj.</i>	87	37*—43%	50—57%
<i>Oakes by Min.</i>	28	4—14%	24—86%
<i>Non-Oakes</i>	15	3**—20%	12***—80%

*See remark beneath Table I, Appendix A.

**The majority of the Court did not engage in section 1 analysis. The minority engaging in section 1 analysis in each instance would have held the infringement to be an unjustified limitation without applying the *Oakes* test.

***In these twelve instances, the majority of the Court found the infringement to be unjustifiable without applying the *Oakes* test.

TABLE 3
OPERATIVE (FIRST FAILED) COMPONENTS OF OAKES TEST

<i>Judgment</i>	<i># of Infringements</i>	<i># that Failed</i>	<i>First Element Failed</i>			
			<i>Objective</i>	<i>Rational Connect.</i>	<i>Minimal Impair.</i>	<i>Prop. Effects</i>
Majority	87	50	2—4%	5—10%	43—86%	0—0%
Minority	28	21	4—19%	3—14%	14—67%	0—0%
Majority or Minority	115	93*	13—14%	20—21%	60—65%	0—0%

*The *Oakes* test was failed a total of seventy-one times by a decisive number of either a majority or minority of the Court. In a further twenty-two instances, a justice or justices held that an infringement failed the *Oakes* test; but a greater number of the majority or minority applying the test did not.

ENDNOTES

1. Where a majority of the Court applied the *Oakes* test to the infringement, 37/87 were found to be constitutional.
2. Where a minority of the Court applied the *Oakes* test to the infringement, 4/28 were found to be constitutional.

3. Where the Court's s. 1 analysis did not engage the *Oakes* test, 3/15 infringements were found to be constitutional.
4. After this study was concluded, the Supreme Court handed down its decision in *Libman v. Quebec (A.G.)*, [1997] 3 S.C.R. 569. At issue was provincial referendum legislation placing limits on spending permitted during the referendum campaign. The Court unanimously held that this law violated both section 2(b) and (d) and failed the minimal impairment test.
5. These violations exclude non-judicial restrictions on expression placed on illegal activities and hate speech listed below. The eight restrictions enumerated here are in relation to: advertising cigarettes (*RJR-MacDonald Inc. v. Canada (A.G.)*, [1985] 3 S.C.R. 199); advertising by dentists (*Rockett v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232); advertising directed at minors (*Irwin Toy Ltd. v. Quebec (A.G.)* [1989] 1 S.C.R. 927); advertisements and solicitation at airports (*Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139); the prohibition of English signs and advertisements (*Ford v. Quebec (A.G.)* [1988] 2 S.C.R. 712; and *Devine v. Quebec (A.G.)*, [1988] 2 S.C.R. 790); and posters placed on public property (*Ramsden v. Peterborough (City)* [1993] 2 S.C.R. 1084).
6. The violation that was saved related to advertising directed at minors. See *Irwin Toy Ltd. v. Quebec (A.G.)* [1989] 1 S.C.R. 927.
7. Judicial restrictions on expression considered as violations of s. 2(b) have been: the exclusion of the media from sentencing proceedings; publication restrictions dealing with matrimonial matters and civil proceedings; the prohibition of publication of the identity of the complainant in sexual-assault cases; and a judge issuing an injunction on his own motion, *ex parte*, prohibiting picketing of the courthouse.
8. See *supra* note 4.
9. In the violation of s. 2(d) considered by the two dissenting justices in *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460, one (Dickson C.J.) would have saved the provision and the other (Wilson J.) would have failed it. In *Reference Re Public Service Employee Relations Act (Alta.)* [1987] 1 S.C.R. 313 at 373-80, the same two dissenting justices would both have failed the provision on the *Oakes* test on the basis that its objective was not pressing and substantial.
10. This violation was considered in *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469. At issue was the extradition of a Canadian citizen to the United States where he would be charged with narcotics offences.
11. This violation was considered in *Black v. Law Society of Alberta* [1989] 1 S.C.R. 591. At issue was the prohibition of partnerships with lawyers who were not residents of the province.

12. See *R. v. Penno*, [1990] 2 S.C.R. 865.

13. Two of these violations were found by majorities of the Court. One concerned the absence of the defence of intoxication for a general intent offence. (The minority found no infringement. The majority failed the violation under a non-*Oakes* s. 1 analysis.) The other concerned the police recording of an accused's conversation with a friend. (The majority failed the violation under a non-*Oakes* s. 1 analysis). The third violation was found by a minority. It concerned compulsory education legislation. The minority would have failed the provision under s. 1, but not on the *Oakes* test.

14. These violations dealt with a reverse-onus provision, the restriction of evidence of the background of sexual assault complainants, and the prohibition of sexual activity with females under fourteen years of age.

15. This violation concerned an order for a corporate officer to produce evidence and testify. See *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425.

16. In each of these four instances, a majority of the Court failed the violation under s. 1 without getting to the *Oakes* test. These violations concerned: a police search of a backyard for narcotics, police video surveillance, a border search by a customs officer, and a blood sample taken without a warrant.

17. Two of these violations dealt with random traffic checks by police officers. (Both were saved by a majority of the Court applying the *Oakes* test.) The third, which was not saved, concerned the statutory power to detain persons found to be criminally insane.

18. This violation concerned a random traffic check by a police officer. It was saved by a majority of the Court applying the *Oakes* test.

19. This violation concerned a border search by a customs officer.

20. These two violations concerned availability of the defence of intoxication for a general intent-offence (*R. v. Daviault*, [1994] 3 S.C.R. 63) and the Crown's peremptory jury challenges (in *R. v. Bain*, [1992] 1 S.C.R. 91).

21. Two of these violations concerned the structure of a general court martial. The third concerned the restriction of evidence pertaining to the complainant's background in sexual offence cases.

22. These two violations were considered in *Egan v. Canada*, [1995] 2 S.C.R. 513; and *Miron v. Trudel*, [1995] 2 S.C.R. 418. In *Egan v. Canada*, four of the five justices found the infringement to

be a violation on the *Oakes* test. However, Sopinka J.'s application of the *Oakes* test provided the swing vote that saved the infringement.

23. The two infringements found by minorities here were the inclusion of alimony in the income of a divorced woman, *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627, and the criminal offence of having sex with a female person under the age of fourteen in *R. v. Hess*; *R. v. Nguyen*, [1990] 2 S.C.R. 906. In *Thibaudeau v. Canada*, the minority would not have saved the provision. In *Hess* the minority would have saved the infringing provision on the *Oakes* test (the majority found that no infringement had occurred).

24. The two violations were found in *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22; and *McKinney v. University of Guelph* [1990] 3 S.C.R. 229. The majority did not save the age exclusions concerning unemployment insurance benefits in *Tétreault*. But it did save the restricted (from 18-65 years of age) prohibition of age discrimination in s. 19(2) of the Ontario *Human Rights Code, 1981* S.O. 1981, c. 53.

25. See *McKinney v. University of Guelph* [1990] 3 S.C.R. 230 (minority holding the university's mandatory retirement policy to be an unjustifiable limitation of s. 15(1) right); *Stoffman v. Vancouver General Hospital* [1990] 3 S.C.R. 483 (minority finding hospital's mandatory retirement policy to be an unjustifiable limitation of section 15(1) guarantee); *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451 (minority split on whether the university's mandatory retirement policy was a justifiable limit).

26. See *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143, where the majority found that citizenship as a requirement to be called to the bar was an unjustifiable limit on s. 15(1). In *Bennerv. Canada (Secretary of State)* [1997] 1 S.C.R. 358, the majority found that the treatment of children born abroad to Canadian mothers before 1977, as compared to Canadian fathers, was an unjustifiable violation of s. 15(1).