

THE LIMITATION CLAUSES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A GUIDE FOR THE APPLICATION OF SECTION 1 OF THE CHARTER?

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I. INTRODUCTION

Since the adoption of the *Canadian Charter of Rights and Freedoms*,¹ academic comment and the case law indicate that the jurisprudence of other jurisdictions with constitutional bills of rights will be examined as a possible guide to the application of the *Charter*. In particular, the United States' experience has received considerable attention. A few commentators,² however, have urged consideration of the *European*

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¹ *Constitution Act, 1982*, Part I, enacted by the *Canada Act, 1982*, U.K. 1982, c. 11.

² See, e.g., Beckton, *Freedom of Expression*, in THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS 75 (W. Tarnopolsky & G. Beaudoin eds. 1982); M. MANNING, RIGHTS, FREEDOMS AND THE COURTS: A PRACTICAL ANALYSIS OF THE CONSTITUTION ACT, 1982 (1983); Marx, *Entrenchment, Limitations and Non- Obstante*, in THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS 61 (W. Tarnopolsky & G. Beaudoin eds. 1982); D. McDONALD, LEGAL RIGHTS IN THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS: A MANUAL OF ISSUES AND SOURCES (1982); Christian, *The Limitation of Liberty: A Consideration of Section 1 of the Charter of Rights and Freedoms*, [1982] U.B.C.L. REV. (Charter ed.) 105; Claydon, *International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms*, 4 SUP. CT. L. REV. 287 (1982); Cohen & Bayefsky, *The Canadian Charter of Rights and Freedoms and Public International Law*, 61 CAN. B. REV. 265 (1983); Mendes, *Interpreting the Canadian Charter of Rights and Freedoms: Applying International and European Jurisprudence on the Law and Practice of Fundamental Rights*, 20 ALTA. L. REV. 383 (1982).

*Convention on Human Rights*³ and some judges have followed this suggestion.⁴ It is the purpose of this paper to explore the jurisprudence on Articles 8 to 11 of the *Convention* and to focus on its utility as a guide to the application of section 1 of the *Charter*. In these articles, the guaranteed rights are qualified by limitations clauses expressed in terms quite similar to those in section 1. Indeed, the existence of the general limitation clause in section 1 reflects the influence of international human rights instruments, especially the *European Convention* and the *International Covenant on Civil and Political Rights*.⁵ The European jurisprudence on these limitations clauses, therefore, seems an obvious source to which Canadian courts could refer as an aid in the interpretation of section 1.

Any analysis of the *Convention*, particularly an analysis which focusses on its use in interpreting a national bill of rights, must take into account the nature of the *Convention* and the machinery which enforces it. Accordingly, Part II of this article provides an overview of the *Convention* and the enforcement process. Part III then examines the case law on the limitations clauses of Articles 8 to 11. This jurisprudence employs concepts and reasoning which are instructive in the application of section 1 of the *Charter*. However, it does not represent a blueprint to be rigidly followed in Canada. Therefore, throughout Part III an attempt is made to critically evaluate the utility of the case law as a guide to the application of section 1.

II. AN OVERVIEW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS⁶

The *Convention* is a multilateral, regional treaty to secure certain rights and freedoms. Drafted under the auspices of the Council of Europe, it was signed in Rome on November 4, 1950 and came into effect

³ *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 Nov. 1950 (in force 3 Sep. 1953), Europ. T.S. No 5 [hereafter cited as *Convention*].

⁴ See, e.g., Quebec Ass'n of Protestant School Bds. v. A.G. Quebec (No. 2), 140 D.L.R. (3d) 33 (Que. C.S. 1982), *aff'd* [1983] Que. C.A. 77, 1 D.L.R. (4th) 573, *aff'd* [1984] 2 S.C.R. 66, 10 D.L.R. (4th) 321; R. v. Oakes, 40 O.R. (2d) 660, 145 D.L.R. (3d) 123 (C.A. 1983); Soenen v. Edmonton Remand Centre, 48 A.R. 31, [1984] 1 W.W.R. 71 (Q.B. 1983); R. v. Red Hot Video, 6 C.C.C. (3d) 331 (B.C. Prov. Ct. 1983); Public Service Alliance of Canada v. The Queen, 55 N.R. 285, 11 D.L.R. (4th) 387 (F.C. App. D. 1984), *leave to appeal granted* 11 D.L.R. (4th) 387 (S.C.C. 1984).

⁵ *International Covenant on Civil and Political Rights*, 16 Dec. 1966 (in force 23 Mar. 1976), U.N. Doc. A/6316.

⁶ For background material on the *Convention*, see generally F. CASTBERG THE EUROPEAN CONVENTION ON HUMAN RIGHTS (G. Borch transl. 1974); J. FAWCETT, THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (1975); A. ROBERTSON, HUMAN RIGHTS IN EUROPE (2d ed. 1977).

on September 3, 1953.⁷ It has now been ratified by all twenty-one members of the Council of Europe.⁸

The rights covered by the *Convention* are set out in section 1 of the *Convention* and in the *First*⁹ and *Fourth Protocols*.¹⁰ A broad range of civil and political rights¹¹ are secured: the right to life, freedom from slavery and forced labour, the right to liberty and security of person, the right to a fair trial and a public hearing in civil and criminal matters, protection against retroactivity of criminal law, respect for one's private and family life and one's home and correspondence, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association (including the right to form and join trade unions), the right to marry and found a family, the right to an effective remedy before a national authority should the rights and freedoms of the *Convention* be violated, prohibition of discrimination in the enjoyment

⁷ *Supra* note 3. See Robertson, *The European Convention for the Protection of Human Rights*, 27 BRIT. Y.B. INT'L L. 145 (1950) for the history of the *Convention*.

⁸ The Council of Europe, as distinct from the European Economic Community, was established in 1949 to achieve "greater unity between its Members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress". *Statute of the Council of Europe*, Cmd. 7686 (1949), art. 1, para. a. This aim is to be pursued by, among other things, "the maintenance and further realisation of human rights and fundamental freedoms". *Id.* at art. 1, para. b. Respect for human rights is a condition of membership. *Id.* at art. 3. See generally A. ROBERTSON, THE COUNCIL OF EUROPE, ITS STRUCTURE, FUNCTION AND ACHIEVEMENTS (1961).

The twenty-one members are Austria, Belgium, Cyprus, Denmark, France, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, The Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, The United Kingdom and The Federal Republic of Germany. 4 HUMAN RIGHTS L.J. 512 (1983).

⁹ *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 Mar. 1952 (in force 18 May 1954), Europ. T.S. No. 9 [hereafter cited as *Protocol No. 1*].

¹⁰ *Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms other than those Already Included in the Convention and in the First Protocol Thereto*, 16 Sep. 1963 (in force 2 May 1968), Europ. T.S. No. 46 [hereafter cited as *Protocol No. 4*].

It should be noted that, as of 1 Jan. 1984, Liechtenstein, Spain and Switzerland had not ratified *Protocol No. 1* and only thirteen Member States had ratified *Protocol No. 4*. See 4 HUMAN RIGHTS L.J. 512 (1983). A *Protocol No. 6*, opened for signature 28 Apr. 1983, Europ. T.S. No. 114, prohibiting capital punishment in peacetime, will come into effect once it is ratified by five Member States. See 5 E.H.R.R. 167 (1983). A *Protocol No. 7* was adopted by the Committee of Ministers and opened for signature by Member States on 22 Nov. 1984. It deals with the following diverse topics: procedures to be followed in the expulsion of lawfully resident aliens, the right of appeal following a criminal conviction, compensation for victims of a miscarriage of justice, double jeopardy and equality of spouses. It will come into effect once ratified by seven Member States.

¹¹ Regarding the possibility of widening the scope of the *Convention* to include social, economic and cultural rights, see Jacobs, *The Extension of the European Convention on Human Rights to Include Economic, Social and Cultural Rights*, 3 HUMAN RIGHTS REV. 166 (1978).

of the rights and freedoms set forth in the *Convention*,¹² the right to peaceful enjoyment of property, the right to education, the right to free elections,¹³ freedom from imprisonment on the ground of inability to fulfil a contractual obligation, the right of free movement within any country and freedom to leave any country, the right of a national to enter and remain in his country, and prohibition of the collective expulsion of aliens.¹⁴

Under Article 1 of the *Convention*, the ratifying States have undertaken to secure for everyone within their jurisdiction the rights and freedoms defined in the *Convention* and, by extension, in its *Protocols*.¹⁵ However, the *Convention* provides explicitly for the limitation of specific rights. The grounds and conditions for such restrictions will be examined in Part III of this paper. In addition, Article 15 permits certain derogations from these rights in time of war or other public emergency threatening the life of the nation but only "to the extent strictly required by the exigencies of the situation". However, no derogation is permitted from the right to life (except in cases of death resulting from lawful acts of war), freedom from torture and inhuman and degrading treatment, freedom from slavery and forced labour or freedom from retroactivity of criminal law.

The second part of the *Convention* provides for the establishment of organs with jurisdiction to exercise control over the fulfilment of the undertakings entered into by the Ratifying States. The Convention's enforcement apparatus consists of three organs: the European Commission of Human Rights ("Commission"), the European Court of Human Rights ("Court"), and the Committee of Ministers of the Council of Europe ("Committee of Ministers"). In addition, the Secretary-General of the Council of Europe has an auxiliary but limited role in monitoring the operation of the Convention system.¹⁶

¹² *Convention*, art. 1, & s. 1, arts. 2-14.

¹³ *Protocol No. 1*, arts. 1-3.

¹⁴ *Protocol No. 4*, arts. 1-4.

¹⁵ The European Court on Human Rights has, thus far, shied away from the conclusion that Article 1, either alone or in conjunction with Article 13, requires the incorporation of the *Convention* into domestic law. For information concerning the relationship between the *Convention* and the domestic law of the various Contracting States, see A. DRZEMCZEWSKI, THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN DOMESTIC LAW: A COMPARATIVE STUDY (1983).

¹⁶ See O'Boyle, *Practice and Procedure under the European Convention on Human Rights*, 20 SANTA CLARA L. REV. 697 (1980) for a detailed account of practice and procedure under the *Convention*.

A draft protocol, *Protocol No. 8*, which would alter the procedures of the Commission and the Court is presently (March 1985) under discussion. The major change contemplated is that the Commission would be empowered to set up committees of three members to deal with the admissibility of a petition and to establish chambers of seven members to deal with certain petitions which have been ruled admissible.

Any alleged violation by a Contracting State of the secured rights or freedoms can be submitted to the Commission by another Contracting State.¹⁷ Moreover, and this procedure was an innovation in international law at the time the *Convention* was drawn up, any person may lodge a complaint with the Commission alleging that he has been a victim of a violation of the *Convention* provided that the state in question has recognized by express declaration the right of individual petition. Seventeen Contracting States¹⁸ have declared that they accept the jurisdiction of the Commission to deal with individual complaints under Article 25. The vast majority of these declarations are effective for only a limited time, generally three or five years. However, they have always been renewed.

When the Commission¹⁹ receives an application, it must first determine if the application is admissible for consideration on its merits.²⁰ In order to appreciate the significance of this task, it should be noted that over ninety-five per cent of registered individual applications have been declared inadmissible²¹ and that the individual cannot appeal such a determination. Frequently, the decision that an application is inadmissible does not involve any interpretation of the substantive rights and freedoms secured by the *Convention* or *Protocols*. For example, the Commission may simply conclude that the applicant has failed to exhaust all possible domestic remedies or that the application was lodged after the six-month period following the final decision on the issue. In addition, the Committee often rejects complaints on the grounds that they are incompatible with the provisions of the *Convention* or are manifestly ill-founded. Both of these grounds require the Commission to interpret the scope of the substantive rights and freedoms secured by the

¹⁷ *Convention*, s. III, art. 24. There have only been eighteen interstate applications and these dealt only with six distinct fact situations, *see* EUROPEAN COMMISSION OF HUMAN RIGHTS, STOCKTAKING ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A PERIODIC NOTE ON THE CONCRETE RESULTS ACHIEVED UNDER THE CONVENTION (1984) [hereafter cited as STOCKTAKING].

¹⁸ Austria, Belgium, Denmark, France, The Federal Republic of Germany, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, The Netherlands, Norway, Portugal, Spain, Sweden, Switzerland and The United Kingdom. *See* 4 HUMAN RIGHTS L.J. 512 (1983). A separate declaration is required for *Protocol No. 4*, both regarding the individual's right to petition the Commission and recognition of the Court's jurisdiction.

¹⁹ The Commission's members are elected by the Committee of Ministers for six-year terms. The number of members is equal to that of the number of Contracting States, currently twenty-one.

²⁰ *See* L. MIKAELSEN, EUROPEAN PROTECTION OF HUMAN RIGHTS: THE PRACTICE AND PROCEDURE OF THE EUROPEAN COMMISSION OF HUMAN RIGHTS ON THE ADMISSIBILITY OF APPLICATIONS FROM INDIVIDUALS AND STATES (1980) for a detailed examination of the Commission's case law on admissibility.

²¹ By the end of 1984, the Commission had taken 10,566 decisions on registered applications and had declared only 380 admissible, *see* EUROPEAN COMMISSION OF HUMAN RIGHTS, SURVEY OF ACTIVITIES AND STATISTICS 11 (1984). An even greater number of complaints are never registered.

Convention system. Although it is often stated that a complaint is manifestly ill-founded only where the applicant has failed to establish a *prima facie* case, such a decision is frequently indistinguishable from one on the merits. The proceedings on admissibility can be very lengthy: they may require written observations from the government involved as well as from the applicant and possibly even oral hearings. The decision that a complaint is manifestly ill-founded will often indicate that the Commission has engaged in a detailed examination of the facts and concluded that either the complaint does not involve a violation of a right or freedom as defined by the Commission or it falls within one of the limitation clauses.²² As a result, any assessment of the Convention's effectiveness or the impact of the limitation clauses must take into account the Commission's decisions on admissibility that effectively filter out the vast majority of applications.

If the complaint is admissible, the Commission undertakes a more detailed investigation of the facts and explores the possibility of obtaining a friendly settlement.²³ If no settlement is reached, the Commission prepares a report which sets out the facts and states whether or not there has been a violation. This report is sent to the Committee of Ministers and the state concerned. Within three months of the transmission of the report, the matter may be referred for adjudication to the Court by the Commission, an applicant state, a state whose national is alleged to be the victim, or the state against which the complaint has been lodged. In recent years, an increasing number of matters have been referred to the Court.²⁴ The Commission, in particular, has exhibited a growing desire to obtain the Court's authoritative ruling on controversial issues of interpretation of the *Convention* even where the Commission itself has not found a violation.²⁵

The Court can hear cases only if the state responsible for the alleged violation has accepted its jurisdiction.²⁶ The judges,²⁷ whose number

²² See, e.g., Christians Against Racism and Fascism v. United Kingdom, 1 HUMAN RIGHTS L.J. 334, at 337-40 (Eur. Comm. of Human Rights 1980) where a challenge to a police ban on public processions was declared manifestly ill-founded because the ban was justified under Article 11(2).

²³ By the end of 1984, friendly settlements were reached in only 30 of the 380 applications declared admissible, see EUROPEAN COMMISSION OF HUMAN RIGHTS, SURVEY OF ACTIVITIES AND STATISTICS 11 (1984).

²⁴ Although the Court heard only two cases before 1966, by 1 Jan. 1984, seventy-two cases involving 110 applications had been referred to the Court. See STOCKTAKING, *supra* note 17, at 320.

²⁵ See, e.g., Handyside v. United Kingdom, 1 E.H.R.R. 737 (Eur. Ct. of Human Rights 1976).

²⁶ *Convention*, s. IV, art. 45. All of the Contracting States except Malta and Turkey have accepted the Court's jurisdiction on a compulsory basis. See 4 HUMAN RIGHTS L.J. 512 (1983). The declarations are generally effective for three to five years. See COUNCIL OF EUROPE, 18 *Information Bulletin on Legal Activities* (Jun. 1984).

²⁷ A high proportion of the judges have been academics or former judges in

equals that of the number of member States of the Council of Europe, are elected for a nine-year term by the Consultative Assembly of the Council from a list of persons nominated by the Member States. The *Convention* provides for the consideration of each case by a Chamber of seven judges, but the Rules of Court authorize the Chamber to relinquish jurisdiction in favour of the Plenary Court where the case raises a serious question affecting the interpretation of the *Convention*. The parties before the Court are the Commission, which does not necessarily share the applicant's view of the case, and the state against which the complaint has been brought.²⁸ However, the Commission and the Court established practices during the 1960's whereby the applicant's views were made known to the Court.²⁹ The new Rules of Court, which came into effect in January, 1983, now expressly provide a means for ascertaining such views as well as those of other interested states, organizations or parties.³⁰

Once a matter is referred to the Court, the decision of the Court is final and binding on all those involved. Upon finding a violation, the Court is able to award "just satisfaction" to the injured party. Generally, the Court has confined itself to ordering payment of costs and a monetary sum to compensate for damages directly attributable to the violation. In many cases, payment of costs together with the finding of a violation has been held to be "just satisfaction" for the victim.³¹ The Committee of Ministers³² is entrusted with the duty of supervising execution of the judgment.

Where a case is not referred to the Court following a report of the Commission, the Committee of Ministers must decide, by a two-thirds majority of the members entitled to sit, whether there has been a violation. If there has been, the Committee prescribes a period during which the state involved must take remedial action. The Committee

domestic courts. No two judges may be nationals of the same state and Member States generally nominate their own nationals.

²⁸ Where an inter-state application is referred to the Court, the Applicant State is also a party. Only one such application has been referred. *See Ireland v. United Kingdom*, 2 E.H.R.R. 25 (Eur. Ct. of Human Rights 1978).

²⁹ *See O'Boyle, supra* note 16.

³⁰ *See Drzemczewski, The European Convention on Human Rights*, 2 Y.B. EUROPEAN L. 327 (1982).

³¹ The limited nature of the remedy granted is perhaps best illustrated in those cases where the Court has found a violation of the procedural safeguards set out in Article 6. The decision of the domestic authorities will still stand and no damages will be awarded unless the victim can prove that a different result would have obtained had the procedures stipulated by Article 6 been followed. *See Campbell and Fell v. United Kingdom*, series A, vol. 80 (Eur. Ct. of Human Rights 1984).

³² This Committee, composed of the foreign ministers of Member States, is the executive decision-making body of the Council of Europe. The foreign ministers generally meet only twice a year and are represented in other regular sessions by their deputies. The fact that a political organ is given extensive quasi-judicial powers has often been the subject of criticism.

takes the view that it can give advice or make recommendations under this provision but that such action is not binding on the state concerned. In practice, therefore, it is left to the state to decide what corrective measures should be adopted and the Committee simply notes the action taken. If satisfactory measures are not taken within the prescribed period, the Committee decides, again by a two-thirds majority, what effect should be given its original decision. The only sanction expressly mentioned in the *Convention* itself is the publication of the Commission's report.

The control machinery does not provide for an elaborate system of sanctions against non-compliant states. As a result, there are clear limits to what the Committee of Ministers can do in response to a state's non-compliance. It can bring pressure on the representative of the state in the meetings of the Committee itself; it can publish the Commission's report; or, as a last resort, it may suspend or expel a state from the Council of Europe.³³ Essentially, however, compliance is voluntary and dependent on political pressure. Although there are examples of clearly inadequate responses to findings of a violation,³⁴ the Contracting States have generally ensured that past violations are remedied and that future ones are avoided. The United Kingdom, for example, has frequently responded to the finding of a violation by altering its laws or administrative practices.³⁵

The fact that states have altered their laws in response to decisions of the Convention institutions deserves some emphasis because a similar change occurs when domestic courts have jurisdiction to invalidate laws which conflict with a constitutional bill of rights. Legislative change may occur in response to the rulings of Convention organs in two types of cases. First, there are some cases in which a finding of a violation

³³ The only time the exercise of this power has been considered was following the Commission's report in *The Greek Case*, 12b Y.B. EUROPEAN CONVENTION ON HUMAN RIGHTS (1969). Withdrawal from the Council by the Greek military regime rendered a decision unnecessary.

³⁴ In 1971, the Committee of Ministers endorsed the Commission's view that Turkey had violated the *Convention* following the invasion of Cyprus, asked that measures be taken to put an end to the violations and urged the parties to the dispute to resume intercommunal talks. When these requests were not acted upon within the prescribed three months, the Committee of Ministers simply resolved to review its call for intercommunal talks under the auspices of the Secretary-General of the United Nations. See *Cyprus v. Turkey*, RESOLUTION DH (79) 1, 22 Y.B. EUROPEAN CONVENTION ON HUMAN RIGHTS 440 (1979).

In response to *Tyrrer v. United Kingdom*, 2 E.H.R.R. 1 (Eur. Ct. of Human Rights 1978), the Committee simply noted that the United Kingdom authorities had informed the judges on the Isle of Man that birching constituted a violation of the *Convention*. See RESOLUTION (78) 39, 21 Y.B. EUROPEAN CONVENTION ON HUMAN RIGHTS 654 (1978). The Committee may have been sensitive to the United Kingdom's constitutional difficulties in imposing legislative change on the Isle of Man.

³⁵ See Bayefsky, *The Impact of the European Convention on Human Rights in the United Kingdom: Implications for Canada*, 13 OTTAWA L. REV. 507 (1981) for an analysis of the United Kingdom response.

of the *Convention* amounts to a declaration that the very existence of a law is incompatible with a state's obligations under the *Convention*. Although an individual cannot challenge a law or practice *in abstracto*, both the Commission and the Court have held that an individual may be directly affected by a law in the absence of any specific measure directed at him and may, accordingly, qualify as a victim with standing to bring an application alleging that the law itself violates one of his rights or freedoms. For example, in *Klass v. Federal Republic of Germany*,³⁶ the Court accepted that an individual could claim that his right to respect for his private life and correspondence was violated by the mere existence of a law authorizing secret surveillance of telephone calls. If a violation is found in such a case, the only way a state can meet its obligation under the *Convention* is by altering the law in question. Even where the Court's ruling is that the *Convention* has been violated by the application of a law in particular circumstances, the class of potential victims may be large. The state may decide to avoid the possibility of further violations by altering the law as well as remedying the actual violation. Such a response is in fact encouraged by the Rules of Procedure of the Committee of Ministers regarding its supervision of the Court's decision. These Rules specify that the state is to be invited to inform the Committee of the measures it has taken in response to the decision and that the Committee is not to regard its supervisory function as fulfilled until it has taken note of any such measures. In many cases, therefore, the Committee has been provided with information indicating that legislative changes are proposed or have actually occurred. In such cases, the Committee, without any substantial analysis of whether the changes conform with the *Convention*, has taken note of or expressed its satisfaction with the legislative amendments.³⁷

Because the Committee is a political organ, it is not surprising that the task of interpreting and applying the *Convention* has been borne by the Commission and the Court. If one focusses on the results attained by the applicants, a general pattern of restraint emerges from the case law. Less than one hundred of the more than 10,000 registered applications have resulted in the finding of a violation. Moreover, many of these findings involve decisions taken by administrative officials or judicial organs. In only a handful of cases, admittedly some significant ones, has the *Convention* acted as a clear limitation on state sovereignty, particularly legislative sovereignty.³⁸

The pattern of restraint is quite understandable. First, the *Convention*

³⁶ 2 E.H.R.R. 214 (Eur. Ct. of Human Rights 1978). See also *Dudgeon v. United Kingdom*, 4 E.H.R.R. 149 (Eur. Ct. of Human Rights 1981).

³⁷ See, e.g., COMMITTEE OF MINISTERS, RESOLUTION DH (81) 2, 3 E.H.R.R. 615 (1981), noting the United Kingdom response to *Sunday Times v. United Kingdom*, 2 E.H.R.R. 245 (Eur. Ct. of Human Rights 1979).

³⁸ The results in individual cases are obviously not the sole measure of the *Convention's* effectiveness in fostering human rights. Its mere existence puts pressure

is an international treaty, albeit a special one, and the whole system is ultimately dependent on the continued willingness of sovereign states to be governed by it. Unacceptable results could cause states to refuse to renew either the declarations that permit the Commission to deal with individual petitions or those that recognize the Court's jurisdiction. Denunciation of the treaty itself remains an ultimate, though unlikely, response. The pressure for restraint was probably greatest in the early years of the *Convention*: the concept of an international treaty of this type was new and the machinery was being tested; the number of declarations recognizing either the right of the individual to petition the Commission or the jurisdiction of the Court was relatively small and unpopular results could jeopardize further declarations; and the Convention organs may not have wished to discourage additional protocols. Secondly, the *Convention* operates as a secondary means of protecting human rights and fundamental freedoms. As such, the Convention organs have frequently recognized that it establishes only minimum standards. Finally, the Convention organs are somewhat removed from the societies in which the laws and practices under challenge must operate. Therefore, they have acknowledged that the domestic authorities are often in a better position to judge the particular needs of a society.³⁹

Nevertheless, this pattern of restraint and deference to domestic authorities must not be overstated. The Convention organs soon recognized that if the *Convention* was to be an effective instrument for the protection of human rights and if, in particular, individuals were to view the system as a legitimate one, some degree of supervision had to be established. The organs responded by asserting their jurisdiction to supervise the actions of domestic authorities, in accordance with the standards set in the *Convention*. They also held that the *Convention* was a special treaty whose terms had to be interpreted in a purposive way, insisting that the *Convention* was "a living instrument which . . . must be interpreted in the light of present day conditions".⁴⁰ As a result, there have been findings of violations in significant, well-publicized cases that have led to changes in the laws and practices of Member States. Often these violations involve laws or practices which are out of step with current trends in Western Europe and are the subject of persistent criticism within the state concerned. Finally, the language used in the cases is often more demanding than the result would indicate, offering guidelines to the national organs coupled with an implicit threat that the Convention organs may be taking a stricter line in the future.

on states not to act against its provisions. In many states it has become part of their municipal law and decisions of domestic courts relying on the *Convention* must also be considered.

³⁹ This has led to the development of the doctrine of "margin of appreciation" which is discussed *infra*.

⁴⁰ Tyrer, *supra* note 34, at 10.

III. THE LIMITATIONS CLAUSES OF ARTICLES 8 TO 11

A. *Introduction*

Unlike the *Canadian Charter of Rights and Freedoms*, the *Convention* does not contain a general limitations clause. Instead, the *Convention* employs a variety of techniques to limit the scope of the rights and freedoms or to permit restrictions on rights and freedoms in specified circumstances. First, some of the articles⁴¹ contain interpretative clauses which indicate that certain activities do not fall within the scope of the article. Secondly, Article 15 allows special restrictions on a number of rights and freedoms in time of war or other public emergency threatening the life of the nation. Finally, some of the articles setting out specific rights or freedoms make express provision for restrictions that meet certain qualifying conditions.⁴² Articles 8 to 11 fall into the latter category. The qualifying clauses in these articles most closely resemble section 1 of the *Charter*, both in conception and wording. They are, therefore, the focus of this paper.

Article 8 guarantees respect for private and family life, home and correspondence. Paragraph 2 continues:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9 provides for the right to freedom of thought, conscience and religion. Paragraph 2 stipulates:

Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10 prescribes the right to freedom of expression and contains its own interpretive clause, permitting the States to require the licensing of broadcasting, television or cinema. Paragraph 2 adds:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions

⁴¹ 41 See, e.g., *Convention*, s. 1, art. 2, para. 2; art. 4, para. 3.

⁴² In addition to Articles 8 to 11, see *Convention*, s. 1, art 6, expressly providing for restrictions on the right to a public hearing; *Protocol No. 1*, art. 1, which specifies that no one shall be deprived of his possessions "except in the public interest and subject to the conditions provided for by law and by the general principles of international law"; *Protocol No. 4*, art. 2, para. 3, permitting restrictions on the exercise of freedom of movement within a country and freedom to leave any country.

or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Finally, Article 11 guarantees the right to freedom of peaceful assembly and association, including the right to join and form trade unions. Paragraph 2 reads as follows:

No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

The limitations clauses of Articles 8 to 11 thus permit interferences or restrictions provided they satisfy three conditions: they must be in accordance with the law or prescribed by law, they must have a "permissible" aim or aims and they must be "necessary in a democratic society".⁴³ Each of these requirements is examined below in the order in which it is applied by the Commission or Court. No attempt is made here to examine how the Convention organs have interpreted the specific right or freedom in issue, but it is worth noting that the Court and Commission, perhaps influenced by the presence of limitations clauses, have generally given a broad scope to the rights and freedoms of Articles 8 to 11.⁴⁴ In particular, the doctrine that the rights and freedoms are subject to "inherent limitations" has been rejected as incompatible with express limitations clauses.⁴⁵ As a result, the emphasis in cases dealing with Articles 8 to 11 is almost always on the applicability of the limitations clause rather than the scope of the particular right or freedom.

⁴³ The restrictions or limitations must also not discriminate in such a way as to violate Article 14.

⁴⁴ There are nonetheless some notable exceptions. The Court has defined freedom of association quite narrowly in cases where union rights are involved. *See, e.g.*, *National Union of Belgian Police v. Belgium*, 1 E.H.R.R. 578 (Eur. Ct. of Human Rights 1975); *Swedish Engine Drivers' Union v. Sweden*, 1 E.H.R.R. 617 (Eur. Ct. of Human Rights 1976); *Schmidt v. Sweden*, 1 E.H.R.R. 632 (Eur. Ct. of Human Rights 1976). The Commission has also limited the scope of the right to privacy covered by Article 8 when an interest other than that of the victim's privacy is in issue. In *Bruggemann v. Federal Republic of Germany*, 3 E.H.R.R. 244, at 253 (Eur. Comm. of Human Rights Report 1977), the majority held that pregnancy could not "be said to pertain uniquely to the sphere of private life. Whenever a woman is pregnant, her private life becomes closely connected with the developing foetus." In *X v. Belgium*, 18 D. & R. 255 (Eur. Comm. of Human Rights 1979), a complaint about compulsory seat belts for motorists was similarly considered to fall outside of Article 8.

⁴⁵ *Golder v. United Kingdom*, 1 E.H.R.R. 524, at 537 (Eur. Ct. of Human Rights 1975).

B. Prescribed by Law

The limitations clauses of Articles 9, 10 and 11 of the *Convention* require that the restrictions or limitations on the rights and freedoms contained in these articles must be "prescribed by law". On the other hand, Article 8(2) specifies that there should be no interference with the right to respect for an individual's private and family life, his home and correspondence unless such interference is "in accordance with the law". Nevertheless, the Convention organs have held that the principles developed to determine if government action limiting or restricting rights is "prescribed by law" should also apply to Article 8(2).⁴⁶ Accordingly, the case law of the Court and Commission involving the limitations clauses of Articles 8 to 11 may prove useful in analyzing the phrase "prescribed by law" contained in section 1 of the *Charter*. Although the implications of this phrase are still developing, the Convention case law already indicates the kinds of issues that Canadian courts are likely to face and provides some guidance for their resolution.⁴⁷

For almost three decades, the Court and Commission refrained from any substantial analysis of the expressions "in accordance with the law" and "prescribed by law". Both organs appeared to consider it sufficient that a limitation or restriction was in accordance with domestic law.⁴⁸ It is now well established, however, that more is required. The imposition of additional conditions has been explained on the basis that the phrases not only refer back to a state's domestic law but also relate to the "quality of law requiring it to be compatible with the rule of law that is expressly mentioned in the preamble to the Convention".⁴⁹ As the preamble to the *Charter* specifically asserts that Canada "is

⁴⁶ See *Sunday Times*, *supra* note 37, at 270; *X v. United Kingdom*, 5 E.H.R.R. 162, at 164 (Eur. Comm. of Human Rights 1982); *Silver v. United Kingdom*, 5 E.H.R.R. 347, at 371 (Eur. Ct. of Human Rights 1983); *Malone v. United Kingdom*, series A, vol. 82, para. 66 (Eur. Ct. of Human Rights 1984). In part, this conclusion is based on the fact that the equally authoritative French version of the *Convention* uses the same phrase, "prévues par la loi", in both contexts.

⁴⁷ This was recognized by the court in *R. v. Red Hot Video*, *supra* note 4.

⁴⁸ See, e.g., the following admissibility decisions by the Commission: *X v. Federal Republic of Germany*, 3 Y.B. EUROPEAN CONVENTION ON HUMAN RIGHTS 184 (1960); *X v. Belgium*, 17 Y.B. EUROPEAN CONVENTION ON HUMAN RIGHTS 222 (1974); *X v. United Kingdom*, 16 D. & R. 32 (1978); *X v. Austria*, 18 D. & R. 154 (1979). For a similar tendency in Court decisions prior to the *Sunday Times* case, see *De Wilde v. Belgium* (No. 1), 1 E.H.R.R. 373, at 412 (1971); *Engel v. Netherlands* (No. 1), 1 E.H.R.R. 647, at 684; *Handyside v. United Kingdom*, *supra* note 21, at 752.

Although additional criteria have been developed in subsequent case law, the Convention organs have continued to demand that any limitation or restrictions comply with the domestic law. However, the Court has re-emphasized in its recent decision in *Barthold v. Federal Republic of Germany*, series A, no. 90, para. 48, that the Convention organs should generally defer to the national authorities' interpretation and application of domestic law.

⁴⁹ *Malone*, *supra* note 46, at para. 67.

founded upon principles that recognize . . . the rule of law", a similar analysis could be used in Canada.

The Convention organs have held that the rule of law or "principle of legality"⁵⁰ does not dictate the nature of the law which is used to restrict or limit the rights and freedoms set out in Articles 8 to 11. A restriction may be prescribed by the common law as well as by legislation.⁵¹ It has also been established that limitations may be contained in delegated legislation.⁵² These conclusions are significant in the Canadian context because many of the limitations on the rights and freedoms contained in the *Charter* are specified in the common law or secondary legislation.

The first case in which the Court explored the meaning of the phrase "prescribed by law" was *Sunday Times v. United Kingdom*.⁵³ The Court held that an injunction granted by the English courts was a breach of the freedom of speech guaranteed by Article 10. Following the thalidomide tragedy, some of the parents of the deformed children brought actions against Distillers Company Limited alleging that the company had been negligent in the manufacturing and marketing of the drug. Some actions were expeditiously settled, but others were not. On September 24, 1972 the Sunday Times published an article examining settlement proposals under consideration. It criticized the English law governing recovery of damages in personal injury cases, urged Distillers to make a better offer and promised a future article which would examine how the tragedy had occurred. This proposed article suggested that Distillers had been negligent and should be willing to make a much larger settlement. The Attorney-General obtained an injunction on the ground of contempt of court. The injunction was discharged by an unanimous Court of Appeal but was restored by the House of Lords. The reasons of the Lords varied. Lords Reid, Morris and Cross emphasized the "prejudgment principle" whereby "trial by newspaper" of issues that are the subject of court proceedings is not permitted. Lords Diplock and Simon relied mainly on the "pressure principle": it is contempt to deliberately attempt to influence the settlement of pending proceedings by bringing public pressure to bear on a party. All of Their Lordships agreed that the proposed article presented a real threat to the proper administration of justice. The injunction was eventually discharged in 1976 after almost all claims against Distillers had been settled.

The publisher, editor and a group of journalists of the Sunday Times brought an application against the United Kingdom before the

⁵⁰ *Silver v. United Kingdom*, 3 E.H.R.R. 475, at 498 (Eur. Comm. of Human Rights 1980).

⁵¹ *Sunday Times*, *supra* note 37, at 270.

⁵² See, e.g., *Silver*, *supra* note 46; *Barthold*, *supra* note 48.

⁵³ *Supra* note 37.

Commission alleging that the injunction violated Article 10. The Commission, which proceeded on the assumption that the injunction had been prescribed by law, expressed the opinion that there had been a violation and referred the case to the Court. The Court agreed that Article 10 had been infringed. The injunction, although prescribed by law and imposed for a legitimate purpose, was not necessary in a democratic society for the maintenance of the authority of the judiciary.⁵⁴

Regarding the expression "prescribed by law", the Court began by stating that "it would clearly be contrary to the intention of the drafters of the Convention to hold that a restriction imposed by virtue of the common law is not 'prescribed by law' on the sole ground that it is not enunciated in legislation".⁵⁵ It then found that two requirements were implicit in the phrase:

First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able — if need be with appropriate advice — to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.⁵⁶

The Court concluded that the law of contempt applied by the English courts met the test. It harboured "no doubt" about this compliance in so far as the House of Lords had relied on the "pressure principle" which was clearly recognized in earlier case law and "formulated with sufficient precision to enable the applicants to foresee to the appropriate degree the consequences which publication of the draft article might entail".⁵⁷ Although the "pre-judgment principle" was not as well established prior to the House of Lords' decision in *Sunday Times*, there were sufficient indications in the various authorities⁵⁸ that it could provide a basis for a finding of contempt. Moreover, although the Court expressed "certain doubts concerning the precision with which that principle was formulated at the relevant time", the applicants "were able to foresee, to a degree that was reasonable in the circumstances, a risk that

⁵⁴ This aspect of the judgment is discussed *infra*.

⁵⁵ *Sunday Times*, *supra* note 37, at 270.

⁵⁶ *Id.* at 271.

⁵⁷ *Id.*

⁵⁸ *Id.* at 272. The Court noted that there were *obiter dicta* in the English case law suggesting that comment on the issues in a pending case might constitute contempt and that Halsbury's Laws of England stated boldly that such comment was contempt. See 8 HALSBURY, LAWS (3d) paras. 11-13.

publication of the draft article might fall foul of the principle".⁵⁹ Of particular significance to this latter conclusion was the fact that the editor of the Sunday Times had received legal advice indicating that the proposed article was more likely to be considered in contempt of court than articles previously published because it included evidence which related to the issue of liability in the pending thalidomide proceedings.

There have been a number of cases in which the Commission and the Court have applied the two requirements formulated in *Sunday Times* to other fact situations. The subsequent application of each of these requirements and its relevance in the Canadian context will now be examined. The adequate accessibility of a law has rarely been a contentious issue. Most of the alleged violations of the *Convention* considered by the Court and the Commission have been based on published statutory provisions. In these circumstances, the Commission has indicated that the law is adequately accessible unless the domestic courts or other authorities applying the law adopt an arbitrary or unreasonable interpretation of the law amounting to the imposition of retrospective liability.⁶⁰ The test used regarding the common law is similarly a liberal one. In *Sunday Times* itself, the Court held that it was sufficient that the applicant could have known, with legal advice if necessary, that a particular principle might be applied by the courts.⁶¹

The Commission in *Gay News v. United Kingdom*⁶² adopted a similar approach, but its more extensive reasoning also indicated when a common law principle might be considered insufficiently accessible to be considered "law". The applicant had been convicted of blasphemous libel, a common law offence, for publishing a poem in *Gay News*. In the course of the private prosecution by Mary Whitehouse, the Central Criminal Court held that the prosecution did not have to prove the intent to blaspheme, only the intent to publish and the fact that the publication vilified Christ. The trial court, therefore, refused to consider lack of intention to blaspheme as a possible defence in the case. The Court of Appeal unanimously upheld the conviction and the House of Lords ruled, by a three to two margin, that the trial judge correctly decided the issue of *mens rea*. In his application to the Commission, the applicant argued, *inter alia*, that the previous authorities had been

⁵⁹ *Sunday Times*, *supra* note 37, at 273.

⁶⁰ In *Arrowsmith v. United Kingdom*, 3 E.H.R.R. 218, at 230-31 (Eur. Comm. of Human Rights Report 1978), the Commission suggested that the same test should apply in these circumstances as was applied to determine whether a conviction violated Article 7 which prohibits retroactive criminal legislation. *See also* *Gay News v. United Kingdom*, 5 E.H.R.R. 123, at 128 (Eur. Comm. of Human Rights 1982); *Barthold v. Federal Republic of Germany*, 6 E.H.R.R. 82, at 91 (Eur. Comm. of Human Rights Report 1983).

⁶¹ *Sunday Times*, *supra* note 37, at 273.

⁶² *Supra* note 60.

unclear on this point and that, therefore, his conviction and fine were not "prescribed by law". The Commission rejected the application as manifestly ill-founded. It acknowledged that the law-making function of the courts had to remain within reasonable limits, especially when determining criminal liability:

This implies that constituent elements of an offence such as, e.g., the particular form of culpability required for its completion may not be essentially changed, at least not to the detriment of the accused, by the case law of the courts. On the other hand it is not objectionable that the existing elements of the offence are clarified and adapted to new circumstances which can reasonably be brought under the original concept of the offence.⁶³

However, the House of Lords' decision "did not amount to the creation of new law in the sense that earlier case law clearly denying such strict liability and admitting evidence as to the blasphemous intentions was overruled".⁶⁴ As a result, the Commission concluded that "the courts therefore did not overstep the limits of what can still be regarded as an acceptable clarification of the law"⁶⁵ and that the particular interpretation of the law was reasonably foreseeable to the applicant with the assistance of appropriate advice.

The restrained approach taken by the Convention organs to the requirement that the law be adequately accessible or sufficiently ascertainable can be explained on several grounds. In part, it merely reflects the general approach to the *Convention*. Moreover, a more rigorous test would require the Commission and the Court to scrutinize the merits of a decision in terms of domestic law. The Convention organs have repeatedly indicated that this is not their proper role.⁶⁶ They are also sensitive to the need for evolution in the common law.

The requirement of accessibility enunciated by the Court in *Sunday Times*⁶⁷ suggests that all legal rules limiting the rights and freedoms set out in the *Charter* should be published if they are to be considered "law" for the purposes of section 1. More importantly, it also raises questions about the process of judicial lawmaking in Canada after the *Charter*. At the very least, it indicates that a judicial decision changing the common law in such a way as to make it more restrictive of a Charter right or freedom and applying the changed rule retroactively is impermissible. A similar restriction should apply to judicial overruling of a previously established interpretation of legislation. Moreover, Canadian courts faced with a situation comparable to that confronting the English courts in *Sunday Times* or *Gay News*⁶⁸ should perhaps feel

⁶³ *Id.* at 128-29.

⁶⁴ *Id.* at 129.

⁶⁵ *Id.*

⁶⁶ See, e.g., *Malone*, *supra* note 46, at para. 79; *Barthold*, *supra* note 48, at para. 48.

⁶⁷ *Supra* note 37.

⁶⁸ *Supra* note 60.

obligated to adopt the common law rule which is least restrictive of rights and freedoms in order to ensure that the defendant is not surprised by a novel and unexpected decision. Of course, under the Canadian constitutional system these limits on judicial lawmaking will have to be imposed by the courts on themselves. In doing so, the courts will be faced with considerable difficulty. When, for example, is a common law principle or a judicial interpretation of legislation to be considered clearly established? Is the existence of a lower court decision of some longevity sufficient?

The second requirement from *Sunday Times* — that a norm cannot be regarded as law unless it is formulated with sufficient precision to enable a person to regulate his conduct — has, perhaps surprisingly, rarely presented a serious obstacle for a government. In most of the Commission's decisions, the issue has simply been ignored or summarily dismissed even though the alleged violation of a Convention right or freedom is based on a vague law providing little guidance for the courts or other authorities applying it.⁶⁹ Several reasons for this approach may be advanced. First, the test enunciated in *Sunday Times* is a fairly recent development. In the decisions made previously, both the Court and the Commission appeared to equate the phrase "prescribed by law" with "lawful according to the domestic law".⁷⁰ The Convention organs have only gradually been coming to grips with the full implications of the test laid down in *Sunday Times*.

Secondly, the Convention organs are aware that the requirement for precision cannot entail absolute certainty in the law. In *Sunday Times*, the Court expressly acknowledged that absolute certainty was unattainable⁷¹ and added:

Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.⁷²

The Court reiterated this caution in *Silver v. United Kingdom*,⁷³ a case involving restrictions on prisoners' correspondence, and found:

These observations are of particular weight in the "circumstances" of the present case, involving as it does, in the special context of imprisonment, the screening of approximately 10 million items of correspondence in a year. It would scarcely be possible to formulate a law to cover every eventuality.⁷⁴

⁶⁹ See, e.g., the cases mentioned in note 78, *infra*.

⁷⁰ See *supra* note 48.

⁷¹ *Sunday Times*, *supra* note 37, at 271.

⁷² *Id.*

⁷³ *Supra* note 46, at 372.

⁷⁴ *Id.*

Recently, in *Barthold v. Federal Republic of Germany*,⁷⁵ the Court again emphasized that the subject matter of the law may dictate a degree of imprecision. It acknowledged that the German unfair competition legislation in issue employed "somewhat imprecise wording" and therefore conferred a "broad discretion in the courts".⁷⁶ However, it concluded that greater certainty could not be expected "in the sphere of conduct governed by the 1909 Act, namely competition, this being a subject where relevant factors are in constant evolution in line with developments in the market and in the means of communication".⁷⁷

Many of the cases in which the Commission has summarily dismissed the issue of the certainty of the law involve areas of law in which precision is difficult to achieve, such as, the definition of pornography, obscenity and defamation.⁷⁸ In other areas, such as custody of and access to children,⁷⁹ the law must be sufficiently flexible to allow the domestic authorities to evaluate the individual circumstances of the case. The Commission's approach to the lack of precision of the law in these cases may, therefore, be an implicit acknowledgement that the degree of attainable certainty is quite low.⁸⁰

Both the Court and the Commission are also aware that an overly zealous quest for precision in the law may result in the imposition of

⁷⁵ *Supra* note 48, at para. 47.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ See, e.g., X v. Austria, 3 Y.B. EUROPEAN CONVENTION ON HUMAN RIGHTS 310 (1960) (concerning defamation of the armed forces); X v. Federal Republic of Germany, 6 Y.B. EUROPEAN CONVENTION ON HUMAN RIGHTS 204 (1963) (publications manifestly likely to corrupt the young); X v. Austria, 45 Coll. 87 (1974) (importation of obscene books); X v. Belgium, 9 D. & R. 13 (1977) (distribution of immoral publications); X v. Federal Republic of Germany, 29 D. & R. 194 (1982) (defamation of Jews); Application No. 9615/81 v. United Kingdom, 5 E.H.R.R. 591 (1983) (seizure of obscene publications). Obviously, some of these cases predate *Sunday Times* and the lack of substantial analysis of this issue in these cases may be explained by that fact alone.

⁷⁹ See, e.g., X v. Sweden, 4 Y.B. EUROPEAN CONVENTION ON HUMAN RIGHTS 198 (Eur. Comm. of Human Rights 1961); X v. Federal Republic of Germany, 14 D. & R. 175 (Eur. Comm. of Human Rights 1978); Hendriks v. Netherlands, 5 E.H.R.R. 223 (Eur. Comm. of Human Rights Report 1982). The dissenting opinions in the report in the latter case suggested that the law itself should specify at least that parents are entitled to access unless the child's interests demand otherwise.

⁸⁰ Surprisingly, this point is not specifically made in any of the cases mentioned in notes 78 and 79, *supra*. Indeed, the issue of precision in the law is rarely addressed. The matter is usually raised in the context of Article 14 which prohibits discrimination in the enjoyment of the rights and freedoms set out in the *Convention*. In X v. Federal Republic of Germany, *supra* note 78 and X v. Belgium, *supra* note 78, the Commission acknowledged that the vague standards set in the obscenity laws might be applied differently by courts in various parts of the country. However, it held that such differences were "inherent in the existence of a democratic and liberal society" and did not amount to discrimination "[u]nless such differences display an arbitrary character or an intention to favour or prejudice certain persons or certain groups of persons by reason of a personal characteristic". X v. Belgium, *supra* note 78, at 21.

restrictions on the rights and freedoms of individuals in circumstances where such restrictions are not necessary in a democratic society. In *Sunday Times*,⁸¹ the Court indicated that one of the defects of the prejudgment principle laid down by some of the Lords was that it established an absolute, rigid rule to the effect that any prejudgment of issues or evidence in pending cases before the courts was impermissible.⁸² Such a rule was precise, allowing the press to determine with considerable certainty whether a particular publication was in contempt of court. However, it might prohibit publications which did not, in the particular circumstances of a given case, interfere unduly with the proper administration of justice.⁸³ The Court preferred a more flexible rule that would permit the courts to balance the values of freedom of expression and the proper administration of justice in individual cases.

The most important reason that the second requirement from *Sunday Times* has not presented a more serious obstacle to a government seeking to assert that a restriction is "prescribed by law" is the fact that the Convention organs generally analyze the issue by asking: could this applicant have foreseen the application of this law in the specific circumstances? This approach stems from both the rationale for the imposition of the precision requirement put forward in *Sunday Times* and the nature of the Convention organs' task in the vast majority of cases. As formulated in *Sunday Times*, both requirements of ascertainability and precision are based on the principle that in a society governed by the rule of law an individual should be able to plan so as to avoid acting illegally. The issue is not, therefore, whether a law is too vague or uncertain; rather, the focus is on whether the applicant could have foreseen the application of the law in the specific circumstances. This approach meshes well with the nature of the Commission's and Court's usual task of determining whether a particular government act violated an individual's rights and freedoms under the *Convention*. Only rarely does the question arise of whether a law, as such, violates the *Convention*.⁸⁴

As the Commission and the Court generally analyze the requirement of certainty in laws governing civil liberties in terms of whether the particular applicant could reasonably foresee the application of the law to his individual circumstances, laws drafted in vague, general terms often meet the test. This conclusion is illustrated in numerous cases. In *Sunday Times* itself, the Court expressed doubts concerning the precision with which the "prejudgment principle" was formulated prior to the House of Lords' decision in the case.⁸⁵ Nevertheless, the Court

⁸¹ *Sunday Times*, *supra* note 37.

⁸² *Id.* at 280.

⁸³ Indeed, the Court found that this had occurred in this instance. See *NECESSARY IN A DEMOCRATIC SOCIETY infra*.

⁸⁴ See *OVERVIEW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS supra*.

⁸⁵ *Sunday Times*, *supra* note 37, at 272.

concluded that "the applicants were able to foresee, to a degree that was reasonable in the circumstances, a risk that the publication of the draft article might fall foul of the principle".⁸⁶ In *Arrowsmith v. United Kingdom*,⁸⁷ the applicant had been convicted under sections 1 and 2 of the *Disaffection Act 1934*⁸⁸ for distributing leaflets to troops about to be stationed in Northern Ireland with intent to seduce them away from their duty or allegiance. In response to the applicant's argument that the legislation defined the offence in an extremely broad and imprecise way, the Commission stated:

[The legislation] is not so vague as to exclude any predictability as to which act might give rise to prosecution under it. From the wording of the statute it is quite clear that acts which are intended to persuade soldiers illegally to leave their duty will be an offence if the subjective requirements are fulfilled. The applicant was convicted for acts of that sort.⁸⁹

As these cases focus on whether the applicant could have reasonably foreseen the application of the law in his circumstances, the Commission has consistently held⁹⁰ that account should be taken not only of the statutory provision itself but also of any previous domestic court decisions interpreting that provision. The requirement of certainty is satisfied where the applicant could determine that a particular act or omission is subject to a statutory law even if that determination can only be made by considering the domestic courts' interpretation of the law in previous cases. In *Silver*,⁹¹ the Court went further and held that, at least in certain situations, it would also have regard to administrative directives and guidelines. In that case the restrictions on prisoners' correspondence were imposed not only by the Prison Rules enacted under the *Prison Act*⁹² but also by prison authorities acting under directives contained in Standing Orders and Circular Instructions. These directives were not published but prisoners had been informed of some of the rules contained in them. As these administrative instructions were not legally binding within the domestic system, the Court held that they could not provide the legal basis for the prison authorities' actions. However, in determining whether the particular restrictions on the prisoners' correspondence were foreseeable from the Prison Rules, the Court considered the administrative Orders and Instructions to the extent that prisoners had actually been made aware of their contents.⁹³

⁸⁶ *Id.* at 273.

⁸⁷ *Supra* note 60.

⁸⁸ *Incitement to Disaffection Act, 1934*, 24 & 25 Geo. 5, c. 56.

⁸⁹ *Arrowsmith, supra* note 60, at 231.

⁹⁰ *E.g., id.; Barthold, supra* note 60.

⁹¹ *Supra* note 46.

⁹² *Prison Act, 1952*, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 52, sub. 47(1).

⁹³ As a result, the Court disagreed with the Commission's findings regarding some of the letters. The Commission had focussed exclusively on the Prison Rules.

Finally, it should be noted that Convention organs have never questioned the certainty of a law which couples a general prohibition to an activity with a leave-granting power in some authority. In *Fell v. United Kingdom*,⁹⁴ for example, the applicant complained that he had been unable to receive certain visitors because of a prison rule specifying that a prisoner could not communicate with any person other than a relative or friend, except with leave of the Secretary of State. Although the law did not provide guidelines for the exercise of this discretion, the Commission considered the certainty issue resolved once it concluded that the context made it clear that visits as well as letters were covered by the Rules. The Commission's failure to analyze whether the law should have contained some criteria for the granting of leave seems odd unless one recalls that the Convention organs are generally concerned only with the foreseeability of a particular restriction. In a situation like Fell's, the applicant is not surprised by the application of the rule in his circumstances. He knows that, until he obtains leave, the visit is prohibited.

Canadian courts can certainly be expected to endorse the view that in any society based on the rule of law, a law restricting civil liberties should be sufficiently precise to permit individuals to reasonably foresee its applicability in advance. The Convention case law, therefore, provides a useful rationale for the conclusion that a limitation on the rights and freedoms set out in the *Charter* is not prescribed by law for the purposes of section 1 unless the law containing the limitation provides detailed criteria for its application. In applying this principle, the Canadian courts may be guided by the Convention organs' recognition that the precision attainable will vary with the subject matter being regulated. Finally, the Court's observations that absolute certainty is impossible and that there are dangers in pursuing the quest for certainty too strenuously may prove useful cautions.

However, the manner in which the certainty principle has been applied by the Convention organs could not and should not be rigidly followed in the Canadian context. The focus in the Convention case law is on the foreseeability of a particular application of the law in specific circumstances. This approach seems ill-suited to the Canadian constitutional system. In Canada, the validity of a law is frequently challenged. Where the constitutionality of a law is directly in issue, it would be odd for the courts to confine their analysis of the uncertainty or vagueness of a law to the foreseeability of its application in the case at hand. Indeed, this would be impossible in some cases because

⁹⁴ 23 D. & R. 102 (Eur. Comm. of Human Rights 1981). The Commission found only the applicant's complaints regarding restrictions on his mail correspondence, particularly that with his solicitor, to be admissible. These complaints were eventually referred to the Court which found a violation of the *Convention*. See *Campbell and Fell*, *supra* note 31.

of the liberal rules of standing which have developed in Canada. In certain circumstances, individuals who are not peculiarly affected by a law, are accorded standing to challenge its validity. It would also be wrong in principle for the Canadian courts to focus exclusively on the foreseeability of a particular application of the law since this approach could result in the continuation of vague, overly broad laws which might inhibit an individual from exercising his constitutional rights. Any law limiting the rights and freedoms in the *Charter* should be sufficiently precise to permit all those potentially affected to determine when and how the law applies. Other more specific aspects of the Convention case law on the certainty principle also appear troublesome. As explained above, the Court has been willing to take into account, in some circumstances at least, the administrative directives guiding the authorities in the application of the law provided the contents of these directives were known to the applicant. The exclusive concern with the foreseeability of the restrictions actually applied to the applicant also explains why the Convention organs have not considered the certainty principle violated where the law consists of a general prohibition coupled with a leave-granting power even though no criteria are set out for the exercise of that power. If the Canadian courts in *Re Ontario Film & Video Appreciation Soc'y and Ontario Bd. of Censors*⁹⁵ had been concerned only with the foreseeability of the limitations there imposed, the result reached might well have been different. But the requirement for precision in the law itself can be justified on grounds other than the foreseeability principle.⁹⁶ Precise legal criteria for the exercise of discretion help to prevent arbitrary decisions and facilitate judicial review when such decisions occur. Moreover, requiring these criteria to be contained in the law itself, rather than in administrative guidelines, strengthens political accountability and makes it more likely that the law will be subject to public discussion and scrutiny.

Indeed, the European Court of Human Rights has recently

⁹⁵ 41 O.R. (2d) 583, 147 D.L.R. (3d) 58 (Div'l Ct. 1983), *aff'd* 45 O.R. (2d) 20, 5 D.L.R. (4th) 766 (C.A. 1984). The Divisional Court concluded that the limits on freedom of expression imposed by the censorship scheme under the *Theatres Act*, R.S.O. 1980, c. 498, were not prescribed by law because the legislation simply authorized a censorship board to censor or prohibit the exhibition of any film of which it disapproved. The Court acknowledged, however, that the "Standards for Classification and/or Censorship of Films", an administrative document published by the Board and to which it purported to adhere in exercising its authority, and various pamphlets issued by the Board contained "certain information upon which a film-maker may get some indication of how his film will be judged". *Id.* at 592, 147 D.L.R. (3d) at 67. Also, the Act expressly prohibited the exhibition of films without the approval of the Board. Those seeking to exhibit films, therefore, could know with absolute certainty that exhibition without approval would be an offence.

⁹⁶ Thus, the American concept of "void for vagueness" is quite distinct from the fair notice requirement which is part of the due process demanded by the Fifth Amendment. See A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 159 (1962).

recognized in *Malone v. United Kingdom*⁹⁷ that the requirements of accessibility and certainty may be based on considerations other than the foreseeability principle. The case concerned the secret interception of telephone communications, by or on behalf of the police, in the course of criminal investigations. The Court readily found that an actual interception was an interference with the affected individual's right to respect for his private life and correspondence. In fact, the very existence of laws permitting a system of secret surveillance amounted to such interference in the case of the applicant who, as a suspected receiver of stolen goods, was a member of a class of persons against whom measures of telephone interception were liable to be employed. The principal issue of contention was whether the interferences were justified under Article 8(2), notably whether they were "in accordance with the law" and "necessary in a democratic society". Regarding the first point, the United Kingdom government observed that the accessibility and certainty requirements stipulated in *Sunday Times* had been developed in cases involving the imposition of penalties or restrictions on the exercise of an individual's rights or freedoms.⁹⁸ It argued that they were less appropriate in the wholly different context of secret surveillance of communications where the law imposed no restrictions or controls to which the individual was obliged to conform. There was accordingly no need for him to be in a position to plan his activities. Indeed, foreseeability of the imposition of secret surveillance would defeat the very purpose for which interceptions were required.

The Court responded to this argument as follows:

[T]he phrase "in accordance with the law" does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law.... The phrase thus implies — and this follows from the object and purpose of Article 8 — that there must be a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by paragraph 1.... Especially, where a power of the executive is exercised in secret, the risks of arbitrariness are evident. Undoubtedly, as the Government rightly suggested, the requirements of the Convention, notably in regard to foreseeability, cannot be exactly the same in the special context of interception of communications for the purposes of police investigations as they are where the object of the relevant law is to place restrictions on the conduct of individuals. In particular, the requirement of foreseeability cannot mean that an individual should be enabled to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly.

⁹⁷ *Supra* note 46. To some extent the Commission's report in *Klass v. Federal Republic of Germany*, series B, no. 26, para. 63, foreshadowed the development. Regarding the secret surveillance legislation in issue, it stated:

Interferences must be in accordance with the law.... That must be taken to mean that the law sets up conditions and procedures for an interference. Since the application is directed against the German legislation which provides for a detailed system of restrictive interferences this requirement of Article 8(2) is clearly fulfilled.

⁹⁸ *Malone, supra* note 46, at para. 67.

Nevertheless, the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence.⁹⁹

Nor was it sufficient that public administrative directives had defined the circumstances in which and the conditions under which a public authority would engage in secret surveillance of telephone conversations. Although the *Silver* case¹⁰⁰ had established that the detailed procedures and conditions to be observed in the exercise of a discretionary power did not necessarily have to be incorporated in rules of substantive law, the degree of precision required in the law itself was always dependent on the particular subject matter. In the context of secret surveillance these demands were fairly stringent:

Since the implementation in practice of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope and the manner of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.¹⁰¹

In *Malone*, there was no question that the settled practice of intercepting communications on behalf of the police pursuant to a warrant issued by the Secretary of State for the purposes of detecting and preventing crime was lawful under the law of England and Wales.¹⁰² But there was considerable uncertainty about whether the detailed administrative procedures governing this practice were part of the domestic law.¹⁰³ Therefore, the Court concluded that the law did not indicate with sufficient clarity the scope and manner of the exercise of the power to interrupt telephone conversations. To that extent, the

⁹⁹ *Id.*

¹⁰⁰ *Supra* note 46.

¹⁰¹ *Malone*, *supra* note 46, at para. 68.

¹⁰² The legality of the power to intercept telephone conversations in accordance with the settled practice was established in *Malone v. Comm'r of Police*, [1979] 2 All E.R. 620 (Ch.).

¹⁰³ The government urged that the essential aspects of the practice were incorporated by reference into the statutory law by section 80 of the *Post Office Act 1969*, 17 & 18 Eliz. 2, c. 48. This argument was considerably weakened by the following: government statements to the House of Commons were inconsistent with this position; it was unclear precisely which elements were allegedly incorporated by reference and which were not; and, the judgment in *Malone*'s civil action in the High Court expressed a contrary opinion. *Supra* note 102. The Commission concluded that the administrative practice was not part of domestic law but the Court declined to determine this question because it "would be usurping the function of the national courts were it to attempt to make an authoritative statement on such issues of domestic law". *Malone*, *supra* note 46, at para. 79. The very uncertainty regarding the issue indicated that the domestic law did not clearly lay down the essential elements of the authorities' power.

minimum degree of legal protection to which individuals are entitled under the rule of law in a democratic society was lacking. Accordingly, the interferences with the applicant's rights under Article 8 were not "in accordance with the law".

Although the Commission has indicated that accessibility and precision do not necessarily represent the only requirements implicit in the phrases "prescribed by law" and "in accordance with the law",¹⁰⁴ it seems unlikely that the list will be significantly extended by the Convention organs. Although it has been argued that these phrases require the law to provide adequate safeguards against a misuse of the power conferred, this view has not prevailed.¹⁰⁵ An issue that has not been definitively addressed is whether a restriction is "in accordance with the law" or "prescribed by law" if it is permitted under the domestic law but nevertheless conflicts with an international obligation of the state. In one case the Commission suggested that the only international obligations that were relevant were those which were incorporated into domestic law.¹⁰⁶ However, it has been argued by one commentator that even unincorporated international obligations may be relevant under the limitations clauses either on the basis that a restriction which violates a state's international obligation is not in accordance with the law or that such a restriction cannot be necessary in a democratic society.¹⁰⁷ If this view were adopted by Canadian courts, it could curtail the ability of the government to rely on section 1 particularly in emergency situations as the *International Covenant on Civil and Political Rights* does not permit derogation of certain rights and freedoms under any circumstances.¹⁰⁸

¹⁰⁴ *X v. United Kingdom*, 5 E.H.R.R. 162, at 164 (Eur. Comm. of Human Rights 1982).

¹⁰⁵ This argument was made by the applicants in *Silver*, *supra* note 46, but the Court preferred to address the question of effective safeguards in the context of Article 13 which established the right to a remedy for a violation of the *Convention*. In *Klass*, *supra* note 36, the Court examined the adequacy of controls on secret surveillance but it based the enquiry on whether the interferences were "necessary in a democratic society".

The question whether the law provides adequate safeguards for the prevention of abuse is conceptually distinct from the issues raised by the certainty principle discussed earlier. In *Malone*, *supra* note 46, the Court indicated that, in some circumstances at least, the interference is "in accordance with the law" only if the law authorizing the interference indicates the circumstances in which and the procedures by which an interference can occur. If the law meets this test, it may nevertheless fail to provide controls to ensure that the interference only takes place in those circumstances and in accordance with those procedures.

¹⁰⁶ *Caprino v. United Kingdom*, 12 D. & R. 14, at 18 (Eur. Comm. of Human Rights 1978).

¹⁰⁷ *Duffy, The Sunday Times Case: Freedom of Expression, Contempt of Court and the European Convention on Human Rights*, 5 HUMAN RIGHTS REV. 17, at 25-26 (1980).

¹⁰⁸ See *Tarnopolsky, A Comparison Between the Canadian Charter of Rights and Freedoms and the International Covenant on Civil and Political Rights*, 8 QUEEN'S L.J. 211 (1982-83).

C. Legitimate Purpose

Unlike section 1 of the *Charter*, the limitations clauses of Article 8 to 11 of the *Convention* list the grounds on which a state may restrict the rights and freedoms contained in those articles. Apart from being “prescribed by law” or “in accordance with the law”, a restriction must in every case be “necessary in a democratic society” for one of the prescribed purposes. Although the detailed provisions vary, Article 8(2) may be taken as an example. Article 8 provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The requirement that a restriction must serve one of the purposes listed has not, in practice, imposed any significant burden on the state. There has never been a case in which a restriction fell outside the limitations clauses because it did not foster one of the enumerated purposes. This requirement is usually the least contentious aspect of any case involving the application of a limitations clause. The Convention organs have generally interpreted the various aims so broadly that any restriction imposed by the domestic authorities in a democratic society is inevitably covered. For example, the Court has held that the concept of “order” in the phrase “for the prevention of disorder” “refers not only to public order or ordre public . . . it also covers the order that must prevail within the confines of a specific social group”.¹⁰⁹ Accordingly, restrictions on freedom of expression imposed to preserve morale and discipline in the armed forces furthered “the prevention of disorder”. The reference to health or morals has also been read to include the health or morals of groups smaller than society at large and even the health or morals of particular individuals.¹¹⁰ Finally, despite the cautions of commentators,¹¹¹ the Commission appears to interpret the phrase “for the protection of the rights and freedoms of others”

¹⁰⁹ *Engel*, *supra* note 48, at 684. See also *Arrowsmith*, *supra* note 60; Application No. 9337/81 v. United Kingdom, 6 E.H.R.R. 354 (Eur. Comm. of Human Rights 1983).

¹¹⁰ See, e.g., *X v. Sweden*, 7 Coll. 7 (Eur. Comm. of Human Rights 1961).

¹¹¹ See Connelly, *The Protection of the Rights of Others*, 5 HUMAN RIGHTS REV. 117, at 127 (1980); Duffy, *The Protection of Privacy, Family Life and Other Rights under Article 8 of the European Convention on Human Rights*, 3 Y.B. EUROPEAN L. 191, at 208 (1983).

as referring simply to the interests of others recognized under the national law. In *X v. Austria*,¹¹² the Commission found that a court order permitting the authorities to obtain a blood sample by force from the respondent to a paternity suit was imposed to secure evidence which would ensure that the court could make a finding. Therefore, the order had as its purpose the protection of the rights of others. The Commission also concluded that the criminal offence of blasphemous libel was necessary to protect the rights of others, namely, the right not to have their religious feelings offended by publications.¹¹³ In *Barthold*,¹¹⁴ the Court adopted a similarly broad definition of the expression "the rights of others". It found that an injunction prohibiting the applicant veterinarian from repeating certain statements made to the press was issued "in order to prevent the applicant from acquiring a commercial advantage over professional colleagues prepared to conduct themselves in compliance with the rule of professional conduct that requires veterinary surgeons to refrain from advertising".¹¹⁵ It then concluded that the injunction had been imposed to protect the rights of others.

In determining the purpose behind a restriction, the Convention organs use a variety of evidentiary sources. The legislation on which the limitation is based may expressly or by its very subject matter indicate the aim being pursued.¹¹⁶ The Convention organs will also examine any reports of commissions¹¹⁷ which have studied a particular area of law and statements made by the government in introducing the legislation.¹¹⁸ When the restriction is imposed by a court or administrative body, any reasons given will be considered relevant.¹¹⁹ Finally, the effect of a particular restriction is considered.¹²⁰

Under the Canadian *Charter*, any limitation on the rights and freedoms set out must be "reasonable" and "demonstrably justified in a free and democratic society". While these requirements are obviously intimately related,¹²¹ the reasonableness criterion seems to correspond more closely to the express stipulation in the limitations clauses of the

¹¹² 18 D. & R. 154 (Eur. Comm. of Human Rights 1979).

¹¹³ *Gay News*, *supra* note 60.

¹¹⁴ *Supra* note 48.

¹¹⁵ *Id.* at para. 51.

¹¹⁶ E.g., legislation dealing with obscene publications is invariably found to be "for the protection of morals". In *Klass*, *supra* note 36, at 231, the Court found that the legislation providing for secret surveillance in specified circumstances indicated by its very subject matter that it had a legitimate purpose: to preserve national security and prevent disorder and crime.

¹¹⁷ In *Sunday Times*, *supra* note 37, at 274, the Court simply adopted the Phillimore Report's description of the general aim of the law of contempt.

¹¹⁸ *X v. Netherlands*, 16 D. & R. 184 (Eur. Comm. of Human Rights 1978).

¹¹⁹ See, e.g., *Sunday Times*, *supra* note 37; *Barthold*, *supra* note 48.

¹²⁰ See, e.g., *Barthold*, *supra* note 60.

¹²¹ See the comments of Deschenes C.J.S.C. in the trial decision in *Quebec Ass'n of Protestant School Bds.*, *supra* note 4, at 67.

Convention that a restriction on rights and freedoms must serve a legitimate public purpose. Unless it furthers such a purpose, a limitation is surely not reasonable.¹²² The experience under the *Convention* suggests that the government will not normally encounter much difficulty in establishing that a legitimate goal is being fostered. It also indicates that the listing of specifically acceptable aims in the limitations clause itself does not substantially clarify what restrictions are permissible.

D. Necessary in a Democratic Society

Each of the limitations clauses in Articles 8 to 11 specifies that interferences with or restrictions on the rights and freedoms they contain must be "necessary in a democratic society". The outcome of the cases in which a state relies on a limitations clause to justify an interference or restriction almost always turns on whether this standard is met. No attempt is made here to provide a comprehensive survey of the results reached in particular fact situations. Instead, the focus is on the main issues which have arisen in determining the necessity of a limitation on rights and freedoms in a democratic society and the extent to which the Convention organs' handling of these issues may be relevant to the application of section 1 of the *Charter*.

It might be argued that the use of the expression "demonstrably justified in a free and democratic society" in section 1 of the *Charter* instead of "necessary in a democratic society" suggests that section 1 imposes a less stringent test than the limitations clauses of Articles 8 to 11 of the *Convention*.¹²³ However, the definition of "necessary" adopted by the Convention organs makes such an interpretation highly

¹²² This is not meant to suggest that the requirement of reasonableness is automatically met once it is found that the limitation furthers a legitimate goal. *R. v. Oakes*, *supra* note 4 and, albeit in the context of section 8, *Hunter v. Southam Inc.*, 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641 (S.C.C. 1984), indicate that additional conditions may be imposed under the rubric of reasonableness. In the context of the *Convention's* limitation clauses, these additional criteria can only be examined in determining whether a limitation can be considered necessary in a democratic society.

¹²³ Mr. Justice McDonald observed in *Re Reich and College of Physicians and Surgeons of Alberta* (No. 2), 8 D.L.R. (4th) 696, at 711 (Alta. Q.B. 1984):

[Section] 1 says "Can be demonstrably justified", not "can be demonstrably shown to be necessary" or "can be demonstrably shown to be the only possible course of action that could be chosen to meet the need". The standard to be met by the State, in order that a limit on a guaranteed right be protected, is therefore lower than would have been required if the notion of "necessity" had been employed, as in those sections of the European Convention on Human Rights that provide expressly for legislative derogation from certain guaranteed rights. . . .

If Mr. Justice McDonald is simply indicating that the Canadian courts will adopt a less stringent test in applying section 1 than they would have if it had specified that a limitation must be "necessary", he is probably correct. If, however, he is arguing that the Canadian courts must adopt a lower standard of review than that of the

unlikely. In *Sunday Times*¹²⁴ the Court noted that “the adjective ‘necessary’ . . . is not synonymous with ‘indispensable’, neither has it the flexibility of such expressions as ‘admissible’, ‘ordinary’, ‘useful’, ‘reasonable’ or ‘desirable’ . . . it implies the existence of a ‘pressing social need’ ”.¹²⁵ Indeed, the test of necessity in a democratic society has proved to be extremely flexible, permitting the Commission and the Court to balance the needs of society and the individual’s right or freedom. As the Commission has emphasized:

It emerges from the case law of the Convention organs that the “necessity” test cannot be applied in absolute terms, but required the assessment of various factors. Such factors include the nature of the right involved, the degree of interference, i.e. whether it was proportionate to the legitimate aim pursued, the nature of the public interest and the degree to which it requires protection in the circumstances of the case.¹²⁶

The need for flexibility in the application of the limitations clauses seems obvious when account is taken of the broad range of rights and freedoms covered by Articles 8 to 11.¹²⁷

The emerging case law on section 1 of the *Charter* indicates that the Canadian courts will adopt a similar, flexible approach to determine whether a limitation on Charter rights and freedoms is “demonstrably justified in a free and democratic society”. Mr Justice Blair has recently stated:

Section 1 of the Charter requires the courts engage in a balancing process. The permissible limits of government action on the one hand, must be measured against the rights of the individual on the other. Courts must be flexible in their approach to Charter cases particularly in the admission of evidence of relevant facts in order to ensure that the competing interests involved are fully considered.¹²⁸

The experience under the European *Convention* suggests that the more liberally the Canadian courts interpret the rights and freedoms in the *Charter*, the more variable will be the burden on the government to establish that a particular limitation is justified.

Convention organs under Articles 8 to 11, then he is advocating a form of judicial restraint which would virtually emasculate the entire *Charter*.

¹²⁴ *Supra* note 37.

¹²⁵ *Id.* at 275.

¹²⁶ *X v. Sweden*, 16 D. & R. 68, at 73 (Eur. Comm. of Human Rights 1979).

¹²⁷ In *X v. United Kingdom*, 5 E.H.R.R. 162 (1982) the Commission found that the requirement that prisoners wear uniforms interfered with the applicant prisoner’s section 8 rights. Obviously, the “pressing social need” for an interference of this type need not be as acute as it would have to be where, for example, the interference curtails the press’s freedom to comment on important political issues. In the case, the Commission found that the requirement was necessary in a democratic society for public safety and the prevention of disorder and crime because it facilitated the prevention of escapes and helped to recapture escaped convicts. For an examination of other cases illustrating the broad range of human activity covered by Article 8, see Duffy, *supra* note 111.

¹²⁸ *R. v. Bryant*, 48 O.R. (2d) 732 (C.A. 1984).

Although it has been argued that the balancing model does not give sufficient weight to the value of individual rights and freedoms,¹²⁹ the Court's judgments in *Sunday Times*¹³⁰ and *Dudgeon v. United Kingdom*¹³¹ illustrate that this approach does not require that the right or freedom at issue and any countervailing interests be viewed as qualitative equals. In the former case, the Court acknowledged that the injunction imposed on the newspaper furthered the legitimate aim of maintaining the authority of the judiciary. However, it concluded that "the interference complained of did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression".¹³² In particular, the Court found that the article involved could not really have pressured Distillers to settle on better terms.¹³³ While the "prejudgment principle" was more relevant to the facts, the Court referred to several factors which either limited the prejudicial effect of the article or indicated the strength of the countervailing interest of freedom of expression.¹³⁴ Recognizing that the House of Lords considered the injunction to be a necessary limit on freedom of expression in order to preserve the proper administration of justice, the Court stressed that it was not free, as was the House of Lords when applying the English law, to give equal weight to the competing principles of freedom of speech and the proper administration of justice.¹³⁵

In *Dudgeon*,¹³⁶ the applicant was a homosexual who alleged that his right to respect for his private life, protected by Article 8, was violated by the existence of laws making it a criminal offence for consenting male adults to engage in certain homosexual acts even in private. These laws, enacted in 1861 and 1865, were still in force in Northern Ireland though not in the rest of the United Kingdom. The government argued that the alleged interference was "necessary in a democratic society . . . for the protection of . . . morals, or . . . the rights and freedoms of others". The Court agreed that the laws promoted legitimate aims, but concluded:

[S]uch justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved.¹³⁷

¹²⁹ R. DWORKIN, TAKING RIGHTS SERIOUSLY 197-204 (1977).

¹³⁰ *Supra* note 37.

¹³¹ *Supra* note 36.

¹³² *Sunday Times*, *supra* note 37, at 283.

¹³³ *Id.* at 278.

¹³⁴ *Id.* at 278-82.

¹³⁵ *Id.* at 281.

¹³⁶ *Supra* note 36.

¹³⁷ *Id.* at 167.

Both section 1 of the *Charter* and the limitations clauses of Articles 8 to 11 of the *Convention* dictate that restrictions on rights and freedoms must be measured by reference to standards of acceptability in a democratic society.¹³⁸ It has frequently been noted that this requirement in section 1 of the *Charter* directs the courts to inquire whether similar limitations exist in other democratic societies.¹³⁹ The Convention case law illustrates that it also fosters the development of a conceptual framework in which to evaluate any limitations on rights and freedoms. The acceptability of any limitation should be determined in light of the values and characteristics of an ideal democracy.

Although the Convention organs are not prone to engage in lengthy philosophical discussion, they have addressed the concept of a democratic society in several cases. In *Young v. United Kingdom*,¹⁴⁰ a closed-shop agreement had come into effect at the applicants' place of employment. The applicants argued that their dismissal for refusing to join the unions with whom the agreement had been made, infringed their right to freedom of association as guaranteed by Article 11. The Court agreed and also held that the restriction on their right could not be justified under the limitations clause of Article 11 because it was not "necessary in a democratic society". It observed:

[P]luralism, tolerance and broadmindedness are hallmarks of a "democratic society". Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.¹⁴¹

The Court then engaged in a careful scrutiny of the facts to determine if this balance had been achieved. It concluded that no adequate reason had been advanced to establish that it was necessary to require existing employees in a newly introduced closed shop to become union members.

The Court's view that "two hallmarks" of a democratic society are "tolerance and broadmindedness" played a crucial role in *Dudgeon*¹⁴² where the Court gave little weight to the fact that members of the public who regarded homosexuality as immoral might be offended by the mere knowledge that individuals engaged in private homosexual acts. This conception of democracy has not, however, persuaded either the Court or the Commission to apply a stringent standard of review

¹³⁸ It is unclear what, if anything, is added by the inclusion of the adjective "free" in section 1 of the *Charter*. Perhaps it was intended to emphasize the commitment to individual liberty as well as representative institutions.

¹³⁹ See, e.g., Finkelstein, *Section 1: The Standard for Assessing Restrictive Government Actions and the Charter's Code of Procedure and Evidence*, 9 QUEEN'S L.J. 143, at 156, 185 (1984).

¹⁴⁰ 4 E.H.R.R. 38 (Eur. Ct. of Human Rights 1981).

¹⁴¹ *Id.* at 57.

¹⁴² *Supra* note 36.

with respect to obscenity laws or their application. In *Handyside v. United Kingdom*¹⁴³ the Metropolitan Police seized approximately 1,200 copies of a book entitled *The Little Red Schoolbook* from the publisher's premises under a warrant pursuant to the *Obscene Publications Act, 1959*.¹⁴⁴ The publisher was charged and convicted by the Lambeth Magistrates of having in his possession obscene articles for gain contrary to the *Obscene Publication Acts, 1959* and *1964*.¹⁴⁵ He was fined fifty pounds and ordered to pay costs. A forfeiture was also made and the seized books were destroyed. The publisher applied to the Commission on the ground that these circumstances gave rise, *inter alia*, to a breach of Article 10 of the *Convention*. The Commission found against the applicant, but referred the case to the Court. The government, acknowledging the interference with the applicant's right to freedom of expression, argued that the actions of the authorities were justified under Article 10(2). The Court noted that its "supervisory functions oblige it to pay the utmost attention to the principles characterising a 'democratic society'" and that "[f]reedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man".¹⁴⁶ Nevertheless, it concluded that the domestic authorities had to be given a wide latitude or "margin of appreciation"¹⁴⁷ in the measures taken to protect morals. Therefore, even though many of the states that are parties to the *Convention* had permitted publication of the book and some 18,000 copies had been sold in other parts of Britain without prosecution, "the competent English judges were entitled, in the exercise of their discretion, to think at the relevant time that the *Schoolbook* would have pernicious effects on the morals of many of the children and adolescents who would read it".¹⁴⁸ This degree of deference to the domestic authorities' application of obscenity legislation also characterizes the decisions made by the Commission.¹⁴⁹ It appears that the Convention organs do not perceive such legislation as a threat to the type of free speech which is fundamental in a democratic society.¹⁵⁰

¹⁴³ *Supra* note 25.

¹⁴⁴ 7 & 8 Eliz. 2, c. 66.

¹⁴⁵ 12 & 13 Eliz. 2, c. 74.

¹⁴⁶ *Supra* note 25, at 754. The Court added that freedom of expression was: applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".

Id.

¹⁴⁷ See discussion *infra*.

¹⁴⁸ *Handyside, supra* note 25, at 756.

¹⁴⁹ See, e.g., X v. Federal Republic of Germany, *supra* note 78; X v. Austria, *supra* note 78; X v. Belgium, *supra* note 8; Application No. 9615/81 v. United Kingdom, *supra* note 78.

¹⁵⁰ Compare, e.g., the approach of the Court in *Sunday Times*, *supra* note 37, when analyzing a restriction on newspaper comment on a matter of public interest

In some cases, the Convention organs simply view a democratic society as the antithesis of a totalitarian one and government action is evaluated by comparing it with that which would prevail in the latter. This approach reflects the central concern of the founders of the European human rights system which was to prevent re-occurrence in any state of a process similar to Germany's slide into totalitarianism in the 1930's.¹⁵¹ It has led the Court to conclude that political indoctrination through the state educational system, which is a feature of a totalitarian regime, is impermissible in a democracy.¹⁵² In another case, the Court warned that democratic governments must not prevent professionals from forming their own association to protect their interests:

Totalitarian regimes have resorted — and resort — to the compulsory regimentation of the professions by means of closed and exclusive organisations taking the place of professional associations and the traditional trade unions. The authors of the Convention intended to prevent such abuses.¹⁵³

The tendency to carefully scrutinize state practices that are reminiscent of those prevalent in totalitarian states is best illustrated by the Court's judgment in *Klass*.¹⁵⁴ The applicants alleged that a German law permitting secret surveillance of citizens in specified circumstances infringed upon their right under Article 8 to respect for private life and correspondence. The key issue was whether the law could be considered necessary in a democratic society for the protection of national security. The Court invoked a strict standard of scrutiny: "Powers of secret surveillance

with that taken in *Handyside*, *supra* note 25. The Convention organs also appear to be influenced by the fact that Article 10(2) specifically notes that freedom of expression "carries with it duties and responsibilities". *Handyside*, *supra* note 25, at 755.

¹⁵¹ A. ROBERTSON, *supra* note 2, at 3-4.

¹⁵² *Kjeldsen v. Denmark*, 1 E.H.R.R. 711, at 731 (Eur. Ct. of Human Rights 1976). In this case the parents of school children objected to an Education Ministry curriculum change which directed that sex education be integrated into all aspects of the curriculum. They argued that such education violated their rights under Article 2 of *Protocol No. 1* which specifies in part:

In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the rights of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

The Court declined to find a violation of the *Protocol* for several reasons. One reason was an absence of indoctrination: sex education in Denmark was primarily biological, rather than moral, in nature.

¹⁵³ *Le Compte v. Belgium*, 4 E.H.R.R. 1, at 23 (Eur. Ct. of Human Rights 1981). The applicants objected, *inter alia*, to the requirement in Belgian law that all doctors had to be members of the *Ordre des Medecins*. The Court held that this was not an infringement of the applicants' right to freedom of association under Article 11, reasoning that the *Ordre* was not an association but a public authority because of its role in policing the medical profession. It also emphasized that doctors were free to form their own associations.

¹⁵⁴ *Supra* note 36.

of citizens, characterising as they do the police state, are tolerable under the Convention only in so far as strictly necessary for safeguarding democratic institutions."¹⁵⁵ Noting the widespread development of terrorism in Europe, the Court concluded that secret surveillance was necessary to deal with such activities.¹⁵⁶ However, "being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it",¹⁵⁷ the Court also insisted that it "must be satisfied that whatever system of surveillance is adopted, there exist adequate and effective guarantees against abuse".¹⁵⁸ The Court carefully examined the legal safeguards in the German system before reaching the conclusion that the law was covered by the limitations clause.¹⁵⁹

The desire to prevent any possible drift into totalitarianism has sometimes led to results that are at odds with the Court's characterization of a democratic society as one marked by tolerance and pluralism.¹⁶⁰ In two cases,¹⁶¹ the Commission has found that restrictions on political

¹⁵⁵ *Id* at 231.

¹⁵⁶ *Id.* at 232.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ The Court asserted:

The rule of law implies, *inter alia*, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure.

Id. at 235. The Court further stated that "in a field where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge". *Id.* The Court nevertheless concluded that the German system of control, which did not provide for judicial authorization of the surveillance did "not exceed the limits of what may be deemed necessary in a democratic society". *Id.*

These comments typify the Convention organs' approach in many cases. They urge the States to live up to high standards even though the present law or practice does not violate the *Convention*. This is sometimes a signal that the higher standard will in fact be demanded by the Convention organs in the future. Indeed, in the subsequent case of *Malone v. United Kingdom*, *supra* note 46, Judge Pettiti, in a concurring opinion, urged the Court to indicate clearly that the interception of communications by the police in the course of an ordinary criminal investigation would only be covered by the limitations clause of Article 8(2) if prior judicial authorization was required. The majority did not address the question of whether the British system provided adequate guarantees against abuse, having concluded that the United Kingdom government could not rely on the limitations clause because the procedures for secret surveillance were not set down in law. *See PRESCRIBED BY LAW* *supra*.

¹⁶⁰ The Commission's decision in *Gay News*, *supra* note 60, is more difficult to explain. Although the offence of blasphemous libel could be committed without intent to blaspheme and irrespective of the intended audience or of the possibility that a potentially offended person could avoid the publication, the Commission found the existence of the offence and its application to the facts of that case could be justified under Article 10(2) as necessary for the protection of rights and freedoms of others.

¹⁶¹ *X v. Austria*, 6 Y.B. EUROPEAN CONVENTION ON HUMAN RIGHTS 424 (Eur. Comm. of Human Rights 1963); *X v. Italy*, 5 D. & R. 83 (Eur. Comm. of Human Rights 1976).

expression could justifiably be imposed in Austria and in Italy to prevent the reintroduction of Nazism and fascism respectively. These cases may simply illustrate that measures which would not be considered necessary in some democratic countries may be required in others. Curiously, however, the Commission made no reference to either the historical background of or any peculiar circumstances prevailing in Italy or Austria. In other cases, the Commission has invoked Article 17 to preclude "totalitarian groups" or those who espouse "totalitarian causes" from claiming that their rights of free speech or peaceful assembly have been violated.¹⁶² Most recently, the Commission has found inadmissible, by virtue of Article 17, an application by the President of the Nederlandse Volk Unie.¹⁶³ This political party believed that the public interest of the Netherlands was best served by preserving an ethnically homogenous population and advocated the removal of "Surinamers, Turks and other so-called guest workers". The applicant had been convicted of inciting racial discrimination and had also been prevented from participating in the municipal elections in Amsterdam.

The Canadian courts may find the Court's comments about a democratic society useful as they reinforce the truism that a democratic society, particularly one with a bill of rights, is governed by principles other than simply "the majority rules". The intent of the Convention organs to ensure that government actions, in particular secret surveillance, are subject to effective controls to prevent abuse is one that should be reflected in the application of section 1 of the *Charter*. Finally, the Court's description of a democratic society as a tolerant, pluralistic one which is concerned to achieve a just balance between majority and minority interests could provide a general guide in determining whether a limitation is "demonstrably justified in a democratic society". Obviously, it will be necessary to fill out this skeletal conception in the light of the Canadian experience.

The Convention organs have held consistently that an interference can be considered necessary in a democratic society only if it is "proportionate to the legitimate aim pursued". The concept of proportionality dictates that a limitation on rights and freedoms be

¹⁶² Article 17 specifies:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein. . . .

This article was specifically designed to prevent adherents to totalitarian doctrines from claiming protection under the *Convention* for the exercise of their political rights. In Application No. 250/57, 1 Y.B. EUROPEAN CONVENTION ON HUMAN RIGHTS 222 (Eur. Comm. of Human Rights 1957) it was relied on to declare inadmissible on application arising from the German Federal Constitutional Court's declaration that the Communist Party was illegal. The German Court ordered the Party to dissolve and authorized confiscation of its assets.

¹⁶³ Glimmerveen v. Netherlands, 4 E.H.R.R. 260 (Eur. Ct. of Human Rights 1979).

restricted to that which is clearly necessary to the attainment of the desired objective. If the restriction is excessive, it will not be permitted even though it may be successful in achieving the desired purpose. As it appears likely that a similar concept will be incorporated into section 1 of the *Charter*,¹⁶⁴ the Convention case law may be instructive.

In those cases where the Court has found that an interference cannot be considered necessary in a democratic society, it has invariably found that the interference is not proportionate to the legitimate aims being pursued. In *Sunday Times*,¹⁶⁵ for example, the Court acknowledged that some restrictions on media coverage of the subject matter of pending litigation were necessary in a democratic society. However, it was impermissible to adopt and apply an absolute rule that any prejudging of an issue before the courts was contempt irrespective of the circumstances. Such a rule was not proportionate to the aim pursued because it restricted freedom of expression more than was required to preserve the maintenance of the authority of the judiciary.¹⁶⁶ Again in *Dudgeon*¹⁶⁷ the Court expressly recognized that some degree of regulation of private homosexual conduct by means of the criminal law could be justified in order to protect vulnerable groups in a society such as the young and the mentally incompetent, but found that an absolute prohibition on all male homosexual conduct was disproportionate to this goal. In *Young*,¹⁶⁸ the Court did not query the legitimate ends furthered by the closed shop system in general,¹⁶⁹ but it concluded that these goals could be achieved without making it lawful for employers to dismiss employees, such as the applicants, who were

¹⁶⁴ See, e.g., *Bryant*, *supra* note 128, at 739, where Mr. Justice Blair stated: The standard by which the reasonableness of the limitation of the Charter right must be assessed is that the court must be satisfied that a valid legal, social or other objective is served by the limitation of the right and that the limitation is restricted to that which is necessary for the attainment of the desired objective.

¹⁶⁵ *Supra* note 37.

¹⁶⁶ The law covering contempt of court was not itself in issue. The Court was concerned only to determine whether the injunction granted against the *Sunday Times* was covered by the limitations clause of Article 10(2). However, its comments on the absolute rule formulated by some of the Law Lords, *id.* at 280-81, and its conclusion that the restraint imposed on the *Sunday Times* was not proportionate to the legitimate aim indicated clearly that the application of such a rule could lead to other violations of the *Convention*. The United Kingdom responded by enacting the *Contempt of Court Act, 1981*, U.K. 1981, c. 49, which established a very flexible test to determine if publications dealing with issues in pending legislation are in contempt. See, Lowe, *Contempt of Court Act 1981*, [1982] PUB. L. 20.

¹⁶⁷ *Supra* note 36.

¹⁶⁸ *Supra* note 140.

¹⁶⁹ See, *id.* at 56, where the Court explicitly noted that the closed shop system was not itself under review and focussed exclusively on whether the claimed benefits of a closed shop could be achieved without requiring employees such as the applicants to join a union.

engaged at a time when union membership was not a condition of employment.¹⁷⁰ It noted particularly that the Royal Commission Report of 1968 had recommended special safeguards for employees in these circumstances, that many closed shop agreements in the United Kingdom did not require existing non-union employees to join a specified union, that the substantial majority of trade union members in the United Kingdom did not favour the dismissal of employees such as the applicants and that ninety-five percent of the employees covered by the closed shop agreement in question were already members of the three unions involved.¹⁷¹ The Court concluded that the railway unions who had entered into the closed shop agreement with British Rail could have adequately protected their members' interests even if legislation had not made it possible to compel existing members to join a specified union.¹⁷² As a result, the detriment suffered by the applicants went further than was required to achieve a proper balance between the conflicting interests of those involved. The infringement was not proportionate to the legitimate aim pursued by the legislation and was not necessary in a democratic society.

In *Barthold*,¹⁷³ the most recent decision to hold that a restriction was not necessary, the Court again relied on the concept of proportionality. The applicant was a veterinarian whose professional rules placed him under a duty to refrain from advertising or seeking publicity for his services. He gave a newspaper interview in which he expressed the view that the veterinarian night service in Hamburg was inadequate. The article, which featured the applicant's photograph, noted that the applicant's clinic was open at night and quoted the applicant's criticisms of his colleagues' unwillingness to provide effective night service. It resulted, therefore, in favourable publicity for Barthold's services. The domestic courts found that Barthold had violated both the professional rules and the applicable unfair competition legislation. An injunction prohibiting him from repeating his criticisms in this manner was issued. The Court acknowledged that the stated intention of the Hanseatic Court of Appeal in issuing the injunction was to prevent the

¹⁷⁰ Although the government did not attempt to rely on the limitations clause, the Court felt obligated to consider whether it applied. The Court seems to have relied heavily on the oral and written submissions of the representative of the Trade Union Congress, Lord Wedderburn of Charlton, in order to discover the goals served by the closed shop system.

The government's failure to claim that the limitations clause applied and the fact that legislation, *Employment Act 1980*, U.K. 1980, c. 42, had already been passed to alter the law no doubt encouraged the Court to apply a stringent standard of review.

¹⁷¹ *Supra* note 140, at 57.

¹⁷² Although the Court here added the words "having objections like the applicants", *id.*, it is difficult to fathom any circumstances in which employees who refused to join a union would not satisfy this requirement. For a description of the applicants' wide-ranging objections, *see id.* at 47-50.

¹⁷³ *Supra* note 48.

applicant from acquiring a commercial advantage over his professional colleagues.¹⁷⁴ The purpose of the domestic court's action was, therefore, to protect the rights of others, a legitimate aim under Article 10(2). However, the European Court of Human Rights concluded that the injunction did not strike a fair balance between the competing interests involved.¹⁷⁵ The Court of Appeal had unduly emphasized Barthold's colleagues' rights at the expense of the newspaper's interest in informing the public on a matter of genuine concern. The Court of Appeal had held that the applicant was seeking publicity because he had not established that this motive was subordinate to other, altruistic ones. The European Court of Human Rights decided that a restriction based on the intention of those giving interviews to the press on matters of public concern hampered freedom of expression more than was necessary in order to prevent publicity seeking by professionals. In particular, the Court stressed the decision's negative effects on freedom of expression:

A criterion as strict as this in approaching the matter of advertising and publicity in the liberal professions is not consonant with freedom of expression. Its application risks discouraging members of the liberal professions from contributing to public debate on topics affecting the life of the community if ever there is the slightest likelihood of their utterances being treated as entailing, to some degree, an advertising effect. By the same token, application of a criterion such as this is liable to hamper the press in the performance of its task of purveyor of information and public watchdog.¹⁷⁶

As a result, the injunction was "not proportionate to the legitimate aim pursued".¹⁷⁷

In these cases, the Court was obviously engaged in balancing competing interests. Despite the ambiguity of some of the language used, the Court did not in fact conclude that any equally effective but less restrictive means was available to reach the legitimate goal pursued by the domestic authorities. Instead, the Court insisted that the value of the right or freedom at stake required the domestic authorities to settle for less effective means.

Although the concept of proportionality often operates, therefore, as a thin veil behind which the Convention organs balance competing values, it retains some usefulness as a distinct analytical tool because it focusses attention on the alternative means available to reach legitimate goals. This usefulness is illustrated best by several Commission decisions.

In *Rassemblement Jurassien v. Switzerland*,¹⁷⁸ the Executive Council of Canton Berne had twice banned all political meetings within the municipal boundaries of Moutier for two days. The Commission found

¹⁷⁴ *Id.* at para. 51.

¹⁷⁵ *Id.* at para. 58.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at para. 59.

¹⁷⁸ 17 D. & R. 93 (Eur. Comm. of Human Rights 1979).

that the bans had been imposed at a time of considerable tension and that serious clashes between demonstrators and counter-demonstrators could have occurred if the authorities had taken no action. It nevertheless went on to determine whether the means used were proportionate to the purpose sought to be achieved. Noting that the bans were territorially and temporally very limited, the Commission concluded that the principle of proportionality had not been violated. In response to the applicant's argument that a ban on counter-demonstrations would have sufficed or that an agreement providing for the peaceful conduct of public meetings could have been negotiated between the authorities and the various groups, the Commission stated that it was "not convinced that less stringent measures than those taken would have been suited to the situation".¹⁷⁹

In *Christians Against Racism and Fascism v. United Kingdom*,¹⁸⁰ the Commissioner of Metropolitan Police had ordered a ban on all public processions in the metropolitan area of London for two months. Only processions of a religious, educational, festive or ceremonial nature which were customarily held were exempted. The ban was clearly prompted by an intended procession planned by the National Front in the London Borough of Ilford, but it also resulted in the cancellation of a planned counter-march by the applicant organization. In light of the effects of previous demonstrations by the National Front, the Commission readily accepted that some form of ban was necessary in order to preserve public order.¹⁸¹ The key issue was whether a ban on all processions for two months, in all of the metropolitan area, could be justified. The Commission began its analysis of this issue by stating:

A general ban on demonstrations can only be justified if there is a real danger of their resulting in disorder which cannot be prevented by other less stringent measures. In this connection, the authority must also take into account the effect of the ban on processions which do not by themselves constitute a danger for the public order. Only if the disadvantages of such processions being caught by a ban is clearly outweighed by the security considerations justifying the issue of the ban, and if there is no possibility of avoiding such undesirable side effects of the ban by a narrow circumscription of its scope in terms of territorial application and duration, can the ban be regarded as being necessary within the meaning of Art. 11(2) of the Convention.¹⁸²

It concluded that neither the duration of the ban nor its territorial scope was "unreasonable" in the circumstances.¹⁸³ The two-month period had been chosen so the ban would expire three days after a by-election

¹⁷⁹ *Id.* at 121. Under the *Charter*, the onus would be on the government to establish that the measures were covered by section 1.

¹⁸⁰ *Supra* note 22.

¹⁸¹ *Id.* at 338-39.

¹⁸² *Id.* at 339.

¹⁸³ *Id.* at 340.

in Ilford which was being contested by the National Front. The Commissioner had determined that the ban should apply to all of the metropolitan area because a more local ban could readily be circumvented by the National Front. Strangely, the Commission did not expressly examine whether a ban only on marches by the National Front or those expressing similar causes would have sufficed. Perhaps it was convinced in this regard by the Home Office's explanation to the National Union of Civil Liberties that a complete ban was necessary to ensure the orders left no scope for the organisers of those processions likely to lead to serious public disorder to circumvent them by some subterfuge such as representing their procession as being for a purpose not covered by the terms of the bans.¹⁸⁴

In some respects, the doctrine of proportionality may operate as a counter-balance to the requirement that laws which restrict or limit freedoms must be precise and certain. In *Sunday Times*,¹⁸⁵ the Court noted that some of the Law Lords had favoured the adoption of an absolute rule which held that any prejudging of an issue before the courts was contempt irrespective of the circumstances.¹⁸⁶ Such a rule would be more certain than one which provided for the balancing of the competing interests of freedom of expression and the proper administration of justice in the light of the particular circumstance of each case. The Court indicated, however, that an absolute rule of this nature was not proportionate to the aim pursued because it restricted freedom of expression more than was required to preserve the maintenance of the authority of the judiciary.¹⁸⁷ The result has been the enactment of a law which is extremely flexible and grants considerable discretion to the courts.¹⁸⁸ The undemanding approach that the Convention organs have taken to the certainty requirement¹⁸⁹ where statutory laws are involved may be explained partly by their concern that more certain rules are often more absolute and may restrict rights and freedoms in circumstances where this is not strictly necessary.

As the principle of proportionality allows the Convention organs to carefully scrutinize whether a restriction on rights and freedoms is more limiting than is strictly necessary to achieve a legitimate goal,

¹⁸⁴ This explanation was noted by the Commission in its outline of the facts, *id.* at 339. Under the *Public Order Act 1936*, 1 Edw. 8 and 1 Geo. 6, c. 6, the Commissioner may not have had the authority to order a ban only on marches by the National Front or its supporters. Certainly he believed he had no such authority. However, this would not preclude the Commission from considering whether such a ban would have sufficed. The state of domestic law is obviously not an excuse for failure to comply with the *Convention*.

¹⁸⁵ *Supra* note 37.

¹⁸⁶ *Id.* at 280.

¹⁸⁷ See note 166 *supra*.

¹⁸⁸ *Contempt of Court Act 1981*, U.K. 1981, c. 49.

¹⁸⁹ See PRESCRIBED BY LAW *supra*.

it is potentially a powerful tool for the review of government action. Yet the Convention organs have rarely found the principle violated. The explanation for this lies, to a considerable degree, in the doctrine of "margin of appreciation" which has featured prominently in the Convention case law on the limitations clauses. This doctrine was initially formulated in the context of Article 15 to indicate that the Convention organs would give the domestic states a certain latitude in determining whether a "public emergency threatening the life of the nation" existed and, if so, what "measures derogating from its obligations under the Convention" were "strictly required by the exigencies of the situation". The Court explained in *Ireland v. United Kingdom*:

By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter, Article 15(1) leaves those authorities a wide margin of appreciation.¹⁹⁰

The concept was soon extended to other Articles of the *Convention*, especially those with limitation clauses. The rationale for so doing was set out as follows in *Handyside*:

[T]he machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. The Convention leaves to each Contracting State, in the first place, the task of securing the rights and freedoms it enshrines. The institutions created by it make their own contributions to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted (Art. 26).

These observations apply, notably, to Article 10(2).

[I]t is for the national authorities to make their initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context.

Consequently, Article 10(2) leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator . . . and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force.¹⁹¹

The concept of a margin of appreciation is essentially a mechanism whereby the Convention organs can exercise self-restraint by deferring to the judgment of domestic authorities. Sir Humphrey Waldock, a past President of both the Commission and the Court, described the concept as "one of the more important safeguards developed by the Commission and the Court to reconcile the effective operation of the Convention with the sovereign powers and responsibilities of governments in a democracy".¹⁹² However, it has attracted strong criticism. Some critics

¹⁹⁰ *Supra* note 28, at 92.

¹⁹¹ *Supra* note 25, at 753-54.

¹⁹² Waldock, *The Effectiveness of the System Set Up by the European Convention on Human Rights*, 1 HUMAN RIGHTS L.J. 1, at 9 (1980). See also C. MORRISON, THE DEVELOPING EUROPEAN LAW OF HUMAN RIGHTS 150-52 (1967).

argue that the doctrine represents an abdication by the Commission and the Court of their enforcement responsibilities, causing them to merely ratify national action.¹⁹³ Such criticisms are misleading. They suggest that the concept is inflexible, always requiring the Convention organs to give great weight to the views of the national authorities and always leading to a finding in favour of the respondent state. In fact, the Convention organs have been careful to emphasize that they are empowered to determine whether domestic authorities have exceeded the margin of appreciation.¹⁹⁴ The case law, particularly that of the Court, indicates that the margin of appreciation left to the domestic authorities is variable. In some cases the margin of appreciation is wide and the Convention organs readily defer to the domestic authorities. In others, the margin is narrow and the Convention organs closely supervise national decisions. The doctrine, therefore, leaves the Court and the Commission room to manoeuvre in exercising restraint.

As the Convention organs are engaged in the enforcement of an inter-state agreement, they sometimes use the doctrine of margin of appreciation to adopt a degree of restraint that should not be duplicated by national courts enforcing a constitutional bill of rights. It does not follow, however, that the doctrine is entirely irrelevant in the Canadian context. In the first place, it is possible that the Canadian courts will expressly defer to decisions of the legislature or the executive in determining whether a limit on a right or freedom is justifiable in a democratic society. Where legislation itself is at issue, this deference could be explained on the basis that "the opinion of the majority on the subject expressed through the legislation must be given considerable weight by a court".¹⁹⁵ Where administrative action is being challenged, deference could be based on the fact that the administrator, having first-hand knowledge of the situation and being experienced in these matters, is in the best position to judge whether a restriction is necessary in particular circumstances. If the Canadian courts do adopt a deferential attitude to the opinions of other branches of government, the Convention organs' application of the doctrine of margin of appreciation would be instructive. The Court's application illustrates that such an approach does not require the Canadian courts to uphold the limitation in all circumstances. It also indicates that the degree of deference could vary

¹⁹³ See Feingold, *The Doctrine of Margin of Appreciation and The European Convention on Human Rights*, 53 NOTRE DAME LAW. 90 (1977); Burke, *Secret Surveillance and the European Convention on Human Rights*, 33 STAN. L. REV. 1113 (1981).

¹⁹⁴ See, e.g., *Ireland*, *supra* note 28, at 92; *Handyside*, *supra* note 25, at 754. The Commission Report in *The Greek Case*, *supra* note 33, illustrates that the Convention organs may find a violation of the Convention even in the context of an alleged emergency where the margin of appreciation is widest.

¹⁹⁵ *Re Service Employees' Int'l Union, Local 204 and Broadway Manor Nursing Home*, 44 O.R. (2d) 392, at 418, 4 D.L.R. (4th) 231, at 257 (H.C. 1983) (Galligan J.). This approach would be in keeping with that taken by the Supreme Court of Canada

considerably from one situation to another. Finally, the Canadian courts would find some guidance in the Convention case law when determining the extent of the deference due in particular circumstances.

Even if the notion of judicial deference in the application of section 1 is rejected, the Convention case law on the application of the margin of appreciation retains some relevance. It is clear that the test for limitations on rights and freedoms in section 1 of the *Charter* is a subtle and flexible one. The state's burden varies depending on the nature of the right or freedom involved, the context in which it is asserted and the extent of the limitation in question. While Canadian courts may not choose to express this variable standard of review in terms of a "margin of appreciation" or a degree of deference due to other branches of government, they are likely to develop principles to determine what level of scrutiny is appropriate in a particular context. The criteria used by the Convention organs to determine the breadth of the margin of appreciation granted to the domestic authorities in specific circumstances may provide some guidance.

Unfortunately, the Convention organs have not yet developed a comprehensive set of principles governing the application of the doctrine of margin of appreciation.¹⁹⁶ The amount of discretion left to domestic authorities is determined largely on an *ad hoc* basis and is, one suspects, governed to some extent by what can loosely be termed political considerations.¹⁹⁷ Nevertheless, it is possible to discern, especially in the Court's judgments, the beginnings of a principled approach and to identify several influential factors.¹⁹⁸ Probably the most important factor

under the *Canadian Bill of Rights*, R.S.C. 1970 (App. III). See Hovius, *The Legacy of the Supreme Court of Canada's Approach to the Canadian Bill of Rights: Prospects for the Charter*, 28 MCGILL L.J. 31 (1982).

Judicial deference in the application of section 1 simply requires that the courts give some weight to the view of the legislature or executive that a particular limitation on a right or freedom is required in the public interest. It is, therefore, not synonymous with the related presumption of the constitutional validity of legislation which assumes that the legislature has acted in a constitutionally valid manner after taking into account the limits of its powers. Therefore, the cases which have rejected the relevance of the presumption of constitutionality in the application of section 1 of the *Charter* do not necessarily preclude deference. Indeed, it seems inevitable that the views of the legislature in particular will influence the judges. The key issue is how much weight should be given to those views in specific circumstances.

¹⁹⁶ This has led Professor Higgins to describe the doctrine as "increasingly difficult to control and objectionable as a viable legal concept". Higgins, *Derogations under Human Rights Treaties*, 48 BRIT. Y.B. INT'L L. 281, at 315 (1977). In part, the lack of principled standards stems from the fact that so few cases involving the limitations clauses have been decided by the Court.

¹⁹⁷ For example, it is likely that the Convention organs' strict standard of scrutiny in *Young*, *supra* note 140, reflected the facts that the government did not rely on the limitations clause and that legislation had already been passed in the United Kingdom to alter the legal position.

¹⁹⁸ For a detailed, helpful analysis see O'Donnell, *The Margin of Appreciation*

is the existence of a consensus in the law or practice among the Contracting States.¹⁹⁹ The effect of such a consensus was acknowledged by the Court in *Sunday Times*:

The domestic law and practice of the Contracting States reveal a fairly substantial measure of common ground in this area. . . . Accordingly, here a more extensive European supervision corresponds to a less discretionary power of appreciation.²⁰⁰

The fact that a state's law or practice is out of step with that prevailing in other member states does not necessarily imply that it cannot be considered necessary in a democratic society.²⁰¹ However, the state must then provide convincing arguments to explain the discrepancy particularly if the right concerned is considered fundamental in a democracy or the restriction is an onerous one.²⁰²

Where a state's law or practice is duplicated in a number of the Member States, the standard of review is set at a much lower level.²⁰³ Similarly, the margin of appreciation granted to domestic authorities is likely to be broad where a comparative survey of the laws and practices in the Member States does not reveal a consensus. In *Handyside*,²⁰⁴ the Court stressed that considerable weight should be given to the English courts' determination that a particular book was obscene because "it is not possible to find in the domestic case law of the various Contracting

Doctrine: Standards in the Jurisprudence of the European Court of Human Rights, 4 HUMAN RIGHTS Q. 474 (1982).

¹⁹⁹ The presence or absence of a European consensus generally corresponds closely with another factor identified by the Court in *Sunday Times*, *supra* note 37, at 277: this factor involves the extent to which the goal pursued by the domestic authorities is an "objective notion" permitting the Court to evaluate objectively whether the restriction is indeed necessary to reach that goal.

The laws and practices adopted by Member States are also used as a guide when interpreting the substantive rights and freedoms themselves and when applying the non-discrimination article, Article 14. *See, e.g.*, *National Union of Belgian Police*, *supra* note 44; *Engel*, *supra* note 48; *Marckx v. Belgium*, 2 E.H.R.R. 330 (Eur. Ct. of Human Rights 1979).

²⁰⁰ *Supra* note 37, at 276. *See also Dudgeon*, *supra* note 36, where the Court was influenced by the fact that most Member States no longer considered it appropriate to criminalize homosexuality.

²⁰¹ This was emphasized by the Court in *Sunday Times*, *supra* note 37, at 277; *Dudgeon*, *supra* note 36, at 165-66. *See also X v. United Kingdom*, 3 E.H.R.R. 63 (Eur. Comm. of Human Rights Report 1978).

²⁰² Similarly, it is likely that Canadian courts will examine whether a Canadian consensus exists when a provincial law or practice is in issue. Where a federal law or practice is being challenged, the courts will be influenced by whether similar restrictions exist in other democratic societies. If other democratic societies operate without similar restrictions, the government will presumably be required to show why the Canadian situation uniquely requires it.

²⁰³ *See, e.g.*, *supra* note 118, where a law requiring a driver suspected of being under the influence of alcohol to provide a blood sample was considered to fall within Article 8(2).

²⁰⁴ *Supra* note 25.

States a uniform conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in an era which is characterized by rapid and far-reaching evolution of opinions on the subject.”²⁰⁵

To some extent the Convention organs have also indicated that the margin of appreciation will vary according to the nature of the right or activity being restricted. Where the right or freedom is fundamental to a democratic society, the margin of appreciation is narrow.²⁰⁶ This hierarchy of rights is still evolving. Moreover, the results in the cases are mixed. While the identification of a right as fundamental causes the Convention organs to use strong language, the restriction in issue is still frequently considered permissible.

Freedom of expression has often been described by the Convention organs as “one of the essential foundations of a democratic society” because the free exchange of ideas and a well-informed public is seen as essential in a democratic society. The Court in *Sunday Times*²⁰⁷ emphasized the benefits of a free press which could comment without restriction on matters of public interest. These benefits led, in part, to the narrow margin of appreciation accorded to the House of Lords in the application of contempt law. The need for a well-informed public was also influential in the recent Court decision in *Barthold*.²⁰⁸ The Court declared that freedom of expression “constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for the development of every man and woman”.²⁰⁹ As a result, “[t]he necessity for restricting that freedom for one of the purposes listed in Article 10 para. 2 must be convincingly established”.²¹⁰

While the importance of freedom of expression in a democratic society has been stressed in the Convention case law, it is clear that some types of expression are considered more socially useful than others and that some restrictions are viewed as more dangerous than others.

²⁰⁵ *Id.* at para. 48.

²⁰⁶ Similarly, the nature of the activity affected by the restriction may dictate close scrutiny. In *Dudgeon*, *supra* note 36, at 164, the Court stated:

not only the nature of the aim of the restriction but also the nature of the activities involved will affect the scope of the margin of appreciation. The present case concerns a most intimate aspect of private life [the sexual activities of homosexuals]. Accordingly, there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate for the purposes of Article 8(2).

The margin of appreciation may also be affected by the dangers posed to a democratic society by the law or practice in issue. Recall the strict standard of review adopted by the Court in *Klass*, *supra* note 36, where secret surveillance by state agents was in issue.

²⁰⁷ *Supra* note 37, at 280.

²⁰⁸ *Supra* note 48.

²⁰⁹ *Id.* at para. 58.

²¹⁰ *Id.*

Unfortunately, the Convention organs have not developed any exact principles to determine the level of scrutiny that should be applied in specific contexts. The cases do not, for example, draw an express distinction between content-based and medium-based restrictions²¹¹ although it can be inferred that the state has a greater burden in justifying the former.²¹² In the cases dealing with content-based restrictions, the standard of review has varied. Restrictions on the ability of the press to inform the public regarding matters of public interest were closely scrutinized in *Sunday Times*²¹³ and *Barthold*.²¹⁴ A lesser standard of review has been applied to restrictions on commercial advertising.²¹⁵ Finally, the Convention organs have accorded the domestic authorities an extremely wide margin of appreciation in determining the extent and manner of control of obscenity.²¹⁶ There is thus some support in the case law for the proposition that not all categories of speech are equally protected and that the level of scrutiny depends on the importance of the particular category to the functioning of a democratic society. Nevertheless, it should be added that limitations on political speech in its widest sense have frequently been upheld.²¹⁷ Indeed, some of the Commission's decisions seem incongruous in light of the Court's explicit recognition of the importance of the free flow of ideas in a democratic society.

In *Rassemblement Jurassien*,²¹⁸ the Commission affirmed that the

²¹¹ Content-based limitations are those triggered by the content of the message, for example, laws respecting sedition, contempt of court, the content of advertising and obscenity. Medium-based restrictions focus on the medium through which the message is transmitted, for example, laws concerning noise control or the posting of notices. In the United States, the state's burden of justifying the latter is not as onerous as in the former situation because the fear of the propagation of a state line is not as clearly present. See L. TRIBE, AMERICAN CONSTITUTIONAL LAW 576-736 (1978).

²¹² See, e.g., Application No. 9820/82 v. Sweden, 5 E.H.R.R. 297 (Eur. Ct. of Human Rights 1982); Application No. 9628/81 v. Netherlands, 6 E.H.R.R. 138 (Eur. Comm. of Human Rights 1983).

²¹³ *Supra* note 37.

²¹⁴ *Supra* note 48.

²¹⁵ See, e.g., X v. Sweden, *supra* note 126.

²¹⁶ E.g., *Handyside*, *supra* note 25.

²¹⁷ See, e.g., X v. Austria, *supra* note 78; X v. Austria, 6 Y.B. EUROPEAN CONVENTION ON HUMAN RIGHTS 424 (Eur. Comm. of Human Rights 1963) (dealing with restrictions intended to prevent the re-introduction of Nazism); X v. Austria, 42 Coll. 105 (Eur. Comm. of Human Rights 1972) (public encouragement of illegal acts); X v. Italy, 5 D. & R. 83 (Eur. Comm. of Human Rights 1976) (restrictions intended to prevent the re-introduction of Fascism); Arrowsmith v. United Kingdom, *supra* note 60 (incitement to disaffection); Lingens v. Austria, 4 E.H.R.R. 373 (Eur. Comm. of Human Rights 1981) (criminal defamation); X v. Federal Republic of Germany, 29 D. & R. 194 (Eur. Comm. of Human Rights 1982) (group defamation); *Gay News*, *supra* note 60 (blasphemous libel); Application No. 9417/81 v. Federal Republic of Germany, 5 E.H.R.R. 288 (Eur. Comm. of Human Rights 1982) (discipline of a lawyer for disrespectful remarks about the judiciary).

²¹⁸ *Supra* note 178.

right of peaceful assembly, like freedom of expression, is one of the foundations of a democratic society. While this suggests that particularly serious reasons must be advanced before an interference can be considered necessary in a democratic society, the domestic authorities were in fact given a broad discretion to determine whether a temporary ban on political meetings of all kinds was required to prevent disorder. Convinced that the Executive Council of Canton Berne had been faced with a "situation of indisputable tension", the Commission concluded that the margin of appreciation should be "fairly broad once the authority, as in this case, is confronted with a foreseeable danger affecting public safety and order and must decide, often at short notice, what means to employ to prevent it".²¹⁹ The case, therefore, indicates a third factor in determining the margin of appreciation to be accorded to domestic authorities — whether the authorities are faced with a crisis to which they must respond quickly. This approach reflects the case law on Article 15 in which the Convention organs have stressed that national authorities who are in direct and continuing contact with the situation are in the best position to decide on both the presence of an emergency and the measures required to deal with it.²²⁰

IV. CONCLUSION

The limitations clauses of Articles 8 to 11 play a central role in the jurisprudence on the rights and freedoms contained in these Articles. They have generally led the Commission and the Court to give a broad scope to the Convention's rights and freedoms and to reject explicitly the vague and undefined notion of inherent limits. The clauses provide a highly flexible means of balancing the various interests involved in particular cases. As applied by the Convention organs, they have proved useful when deferring to the domestic authorities' decisions while still preserving the Convention machinery as an ultimate safeguard in the event of clearly unjustified restrictions.

The case law on Articles 8 to 11 of the *Convention* is relevant to the application of section 1 of the *Charter* in two ways. First, a Canadian court faced with the argument that a particular limitation is reasonable and demonstrably justifiable in a free and democratic society should consider whether similar restrictions exist in other democratic nations. The fact that international organizations charged with upholding basic rights and freedoms have or have not been convinced of their necessity should also be influential. Of course, the treatment

²¹⁹ *Id.* at 120.

²²⁰ See, e.g., *Lawless v. Ireland* (No. 3) (Merits), 1 E.H.R.R. 15 (Eur. Ct. of Human Rights 1961); *Ireland v. United Kingdom*, *supra* note 28.

of similar restrictions by the Commission and the Court under the *European Convention of Human Rights* is not conclusive. Account must obviously be taken of the context in which a restriction is imposed. For example, restrictions on the content of political speech in order to prevent the re-emergence of totalitarianism in Austria, Italy or Germany may be necessary in those democratic societies but are unlikely to be required in Canada. On the other hand, there may be unique circumstances justifying a limitation in Canada which has not been considered necessary in other democratic countries. Moreover, the special nature of the *Convention* and its organs must be kept in mind. The results in the case law, especially in the early Commission cases, sometimes reflect a degree of self-restraint which would be inappropriate in the application of a constitutional bill of rights by national courts.

Second, on a more general level, the Convention case law provides useful guidance for the interpretation and application of section 1 of the *Charter*. The Convention organs' treatment of the phrase "prescribed by law" is an excellent starting point from which to analyze the requirements imposed by the use of the same expression in section 1. The concept of proportionality is one which could be fruitfully transposed into the Canadian context. The Convention case law also contains some insightful comments about the nature of a democratic society and the significance of certain rights and freedoms to the proper functioning of such a society.

