SECTION ONE OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*: AN EXAMINATION AT TWO LEVELS OF INTERPRETATION

*Paul G. Murray**

---

* Tutorial leader, Jurisprudence, University of Essex. This paper was prepared as part of the requirements of the Master of Laws Program at the London School of Economics and Political Science (University of London). I would like to thank Professor Leonard Leigh for his supervision in its preparation.

I. INTRODUCTION

Each application of the *Canadian Charter of Rights and Freedoms*[1] involves a conflict between two or more interests, at least one of which is believed to be protected by the *Charter*. The resolution of these conflicts requires the interpretation and application of the *Charter's* provisions, which in turn involves the judicial assessment of a number of issues.

The first of these concerns the definition of the right, or rights, to which the interest alleged to be protected by the *Charter* relates. In this respect, certain *Charter* rights[2] protect what may be termed qualified interests. For these rights the actual protection offered is qualified by an internal modifier so that, for example, it is not the right not to be detained, but the right not to be "arbitrarily" detained which is protected. Likewise it is not the right to life, liberty and security of the person which is protected, but rather the right not to be deprived thereof "except in accordance with the principles of fundamental justice."

If the right includes within its scope the interest (or qualified interest) in question, then that interest will be entitled to at least a qualified protection. The protection is qualified in the sense that even if it is established that there is an interference with an interest guaranteed by the *Charter*, that interest will not be protected when the interference is determined to be a reasonable limit "prescribed by law as can be demonstrably justified in a free and democratic society".[3] First, this will require a determination of whether the limit is prescribed by law. Second, if it is, the interest will be protected only when the limit placed upon it is not a "reasonable" one. Such a determination must take place with reference to what is demonstrably justified in a free and democratic society.

---

[1] Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[2] Ss 7 and 9. *See also* ss 6(2), 8, 12 and 15.

[3] S. 1.

The objective of this paper relates to this last issue, and is limited to describing what is involved in the Supreme Court of Canada's (the Court) determination of whether a limit is "reasonable" for the purposes of section 1 of the *Charter*.[4] To achieve this objective it is necessary to examine the Court's interpretation of section 1 at two levels. The first level relates to the meaning of the phrase "reasonable limits". At this level two distinct aspects of the meaning of the term "reasonable limits" can be identified. These will be discussed briefly and their interrelationship at this level will be examined before proceeding to consider in more detail their elaboration at both levels of interpretation. In particular, it will be seen that the interpretation at the first level has given rise to certain criteria of reasonableness.[5] It will be necessary to explore the meaning of these criteria.

The examination at the second level of interpretation concerns the application of these criteria in specific circumstances. At this level each criterion will be examined and an effort made to identify the analytical steps involved in its application. It will be seen that part of the assessment of the reasonableness of a limit involves the utilization of, and reliance on, empirical data. The weaknesses inherent in such data, combined with institutional limits both on the Court's ability to assess the data and generally to determine whether the criteria are satisfied, as well as concerns about the proper scope of judicial review, can lead to a limited or non-application of the criteria of reasonableness in some circumstances. The objective of the final part of the paper is to examine the circumstances surrounding, and the discernible reasons relied upon to support, the exercise of judicial deference by the Court and, as well, to observe how these various circumstances can alter the assessment of the reasonableness of a limit.

In pursuing these objectives, criticism is limited to disagreement over the description of what is involved in the application of section 1, and over the proper way to frame the structure of the inquiry in order to achieve clarity of assessment. Accordingly, the very important issues that surround the merits of competing theories of constitutional

---

[4] There are a growing number of articles dealing with s. 1. *See, e.g.*, P.A. Chapman, *The Politics of Judging: Section 1 of the Charter of Rights and Freedoms* (1986) 24 OSGOODE HALL L.J. 867; R.M. Elliot, *The Supreme Court of Canada and Section 1 — The Erosion of the Common Front* (1987) 12 QUEEN'S L.J. 277 [hereinafter Elliot]; P. Monahan & A. Petter, *Developments in Constitutional Law: The 1985-86 Term* (1987) 9 SUP. CT L. REV. 69 [hereinafter Monahan & Petter (1987)]; S.R. Peck, *An Analytical Framework for the Application of the Canadian Charter of Rights and Freedoms* (1987) 25 OSGOODE HALL L.J. 1 [hereinafter Peck]; A. Petter & P. Monahan, *Developments in Constitutional Law: The 1986-87 Term* (1988) 10 SUP. CT L. REV. 61 [hereinafter Petter & Monahan (1988)]; L.E. Weinrib, *The Supreme Court of Canada and Section One of the Charter* (1988) 10 SUP. CT L. REV. 469 [hereinafter Weinrib].

[5] *R.* v. *Oakes*, [1986] 1 S.C.R. 103 at 135-40, 26 D.L.R. (4th) 200 at 224-28 [hereinafter *Oakes* cited to S.C.R.].

interpretation and the proper scope of judicial review are not addressed.[6] As well, any criticisms which would require putting forward such theories will not be undertaken.

II. Section One: An Examination at the First Level of Interpretation

A. *Two Aspects of the Phrase "Reasonable Limits"*

There are two distinct aspects to the meaning of the phrase "reasonable limits", as interpreted by the Court in the context of section 1. The first is found in the *Oakes* criteria[7] which, according to the Court's interpretation, represent the qualities a limit should possess to reflect the importance of protected rights. Such an interpretation involves a consideration of the value to be attributed to, or the balance of interests between, limits and rights.

The second aspect of the term "reasonable limits" relates not so much to the value or balance of interests between limits and rights, but more to the existence of certain circumstances which surround the assessment of whether a particular limit possesses such qualities. These concern matters of imperfect information and decision-making processes which are relevant to both the Court's and the legislature's ability to satisfy and evaluate the criteria.[8] Accordingly, the further content of the term "reasonable limits" encompasses what, in the circumstances, would be a reasonable standard of review. The two aspects of "reasonable limits" reflect, on the one hand, the qualities of a limit as they relate to its importance, and, on the other hand, the reasonable qualities of a limit as determined by the ability of the relevant institution to satisfy or evaluate those qualities.

The Court's interpretation with respect to the first aspect of the term reasonable limits, as reflected in the *Oakes* criteria, is one which establishes one standard of review for all rights and does not tie the standard of review to the importance of the particular exercise of a right concerned.[9] In that the *Oakes* criteria reflect a particular balance between the value of protected rights and the value of permitting certain limits, this approach reflects the view that the least important exercise of a right, when weighed in the balance, justifies a stringent

---

[6] These two issues are of course related. For articles dealing with these issues *see, e.g.*, Elliot, *supra*, note 4 at 286-300; P.W. Hogg, *The Charter of Rights and American Theories of Interpretation* (1987) 25 Osgoode Hall L.J. 87; P. Monahan, *Judicial Review and Democracy: A Theory of Judicial Review* (1987) 21 U.B.C. L. Rev. 87.

[7] *Supra*, note 5 at 135-40. *See also infra*, notes 21-27 and accompanying text.

[8] *See infra*, note 174 and accompanying text.

[9] *See infra*, notes 22-23 and accompanying text.

review. It could be argued, however, that while such a standard of review is justified for rights of particular importance, some rights, or exercises of rights, are not of sufficient importance to warrant such a stringent review. For example, the appropriateness of the first *Oakes* criterion requiring that all limits meet a certain threshold of importance, irrespective of the exercise of a right involved, has been at least indirectly questioned by McIntyre J.[10] in *Andrews* v. *Law Society of British Columbia*,[11] where he suggested that the threshold of importance should be reduced, in the circumstances of that case, because adherence to the existing threshold might prevent desirable legislation from being passed.[12] The basis for this suggestion must have been that legislation of such importance could warrant overriding a protected right. This view is possible only if one believes that some rights are not of sufficient importance to warrant a higher threshold.

The second aspect of reasonable limits is, in a sense, responsive to the establishment of the criteria through the first aspect. It is responsive in that the problems of imperfect information and decision-making processes arise and are relevant in the application of the particular criteria of reasonableness. The response of the Court has been primarily to deal with these concerns through the exercise of judicial deference at the second level of interpretation.[13] However, more recently some members of the Court, because of review problems, have made attempts to alter the *Oakes* criteria of reasonableness. These attempted alterations have related primarily to the components of the proportionality test.[14]

This is most clearly illustrated in the judgment of McIntyre J. in *Andrews*. In that case, in the context of subsection 15(1) (the equality rights guarantee), McIntyre J. articulated a proportionality test which involved the balancing of a number of factors. Although his proposed proportionality test included the *Oakes* requirements of "rationality" and "least restrictive means" as factors to be considered,[15] such a test is significantly less demanding than the *Oakes* test. His reason for this proposed revision of the *Oakes* criteria was the inability of the Court to determine the correctness of a legislative decision in this context. This consideration meant that the legislature required more room to manoeuvre than the *Oakes* criteria could reasonably permit.

A similar generalizing or collapsing of the components of the *Oakes* proportionality test is found in the judgment of La Forest J.[16]

---

[10] *See infra*, note 11. Dissenting opinion. Lamer J. concurred.

[11] (1989), 91 N.R. 255, 56 D.L.R. (4th) 1 (S.C.C.) [hereinafter *Andrews* cited to N.R.].

[12] *Ibid.* at 313-14.

[13] *See infra*, notes 119-63 and accompanying text.

[14] *See infra*, notes 143-63 and accompanying text.

[15] *See infra*, note 150 and accompanying text.

[16] *See infra*, note 17. Majority opinion. Dickson C.J. and Wilson J. concurring.

in *Black and Co.* v. *Law Society of Alberta*.[17] In that case La Forest J. stated that section 1 required a form of proportionality test, but he made no mention of the specific components of that test as set out in *Oakes*. Instead, he simply commented that:

> The legislature must be given sufficient scope to achieve its objective. . . . The term 'reasonable limit' is used in s. 1 and must be given meaning. Inherent in the word 'reasonable' is the notion of flexibility. Section 1 does not advocate perfection.[18]

These comments suggest that the *Oakes* criteria do not fully define what is "reasonable" for all circumstances, and that in defining the term, some account must be taken of what a reasonable standard of review is in the circumstances. It is important to note, however, that in applying it in this particular case, La Forest J. addressed the concerns inherent in the *Oakes* proportionality test.[19]

Attempts to revise the *Oakes* criteria through a loosening or collapsing of the components of the proportionality test raise at least one concern. An important part of the process of justifying the imposition of a limit on a right is the articulation of clear and coherent reasons for either upholding the limit or for choosing to defer in the assessment of the reasonableness of the limit. The danger of a loose approach to this assessment is well stated by Professor Stone:

> There is, moreover, another reason for articulating standards of scrutiny in constitutional analysis. As American courts have learned from experience, unstructured inquiries into "reasonableness" in the realm of individual liberties too often result in the sacrifice of fundamental rights in the face of what may seem at the time of decision to be more pressing societal needs. Clear, narrowly defined standards are more likely in the long run to preserve fundamental liberties, for they are less likely to induce courts in stressful times to "balance" those rights out of existence.[20]

Where a more general deference is needed than can be accommodated through a deferential application of the *Oakes* criteria at the second level of interpretation, the way to avoid balancing rights out of existence is to embody the appropriate standard of review in requirements which reflect a reduced standard of scrutiny. Accordingly, through the combination of both aspects of the meaning of reasonable

---

[17] [1989] 1 S.C.R. 591, 93 N.R. 266 [hereinafter *Black* cited to N.R.].

[18] *Ibid.* at 306.

[19] *See infra*, note 165 and accompanying text.

[20] G.R. Stone, *Limitations on Fundamental Freedoms - The Respective Roles of Courts and Legislatures in American Constitutional Law* in A. de Mestral *et al.*, eds, THE LIMITATION OF HUMAN RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW (Cowansville, Que.: Yvon Blais, 1986) 173 at 182.

limits, different standards of scrutiny can be developed which reflect the importance of the right concerned and the circumstances which mitigate against a full review.

If this course is followed, the result may be that in defining the criteria of reasonableness, the influence of the importance of the right and the reasons for granting deference will become blurred. It is important, therefore, in defining such criteria, to articulate clearly the influence that each has on the formulation of the criteria. As well, in respect of the reasons for deference, careful scrutiny would be required to ensure that these reasons are relevant in each case to which these criteria are applied. Arguably, the varying relevance of such reasons favours the exercise of deference at the second level of interpretation, at which point the Court can determine if such deference is required in the circumstances.

It is important to recognize the dynamics of the first level of interpretation. The Court's more recent and incomplete qualification of the *Oakes* criteria can be explained in terms of concerns about the appropriate standard of review. However, this movement could be a response to concerns which have arisen in the application of the *Oakes* criteria. Accordingly, while the interpretation at the first level sets the parameters of reasonableness, it is the experience in applying them that illuminates the appropriateness of that interpretation. With this in mind, it is hoped that in the remainder of this paper, the consideration of the meaning of the *Oakes* criteria and what is involved in their application will provide insight into the Court's interpretation of section 1.

B. The Oakes Criteria

The criteria for establishing the reasonableness of a limit on a *Charter* right or freedom for the purposes of section 1 were articulated for the first time in *Oakes*.[21] Two basic criteria were established: the first relates to the objectives of the measures responsible for the limit; the second to the means by which they are to be achieved.

1. *Objective*

The objective of the limit must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. This means that the objective must not be trivial or discordant with the principles integral to a free and democratic society and that, at a minimum, it relates to concerns which are pressing and substantial in such a society. This criterion requires a consideration of the "principles integral to a free and democratic society".[22] In this respect, Chief

---

[21] *Supra*, note 5 at 135-40.
[22] *Ibid.* at 138-39.

Justice Dickson set out in a non-exclusive manner the values and principles essential to a free and democratic society which must guide the courts in their evaluation of the limits before them:

> [T]o name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.[23]

The Chief Justice noted that these principles were the genesis of the rights and freedoms guaranteed by the *Charter*, and must be the ultimate standard against which a limit is judged to be reasonable and demonstrably justified despite the effect of that limit.

2. *Means*

The second criterion involves a form of "proportionality test" in which the Court is required to balance the interests of society with those of individuals or groups. This test is comprised of three components:

> First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R.* v. *Big M Drug Mart Ltd.*, *supra*, at p. 352. Third, there must be a proportionality between the *effects* of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance."[24]

The third component requires a consideration of the degree of infringement, its deleterious effects and the objectives of the infringing action in the following manner:

> A wide range of rights and freedoms are guaranteed by the *Charter*, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious

---

[23] *Ibid.* at 136.
[24] *Ibid.* at 139.

> effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.[25]

It was stated that the criteria — the objective and the proportionality test — are to be understood in terms of the more general "contextual elements" of the *Charter*.[26] The first of these contextual elements is that, as set out above, courts are to be guided by the "values and principles essential to a free and democratic society". The other contextual element is that the section 1 inquiry must be "premised on an understanding that the impugned limit violates constitutional rights and freedoms". Although it is acknowledged that "[i]t may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance,"[27] it is further stated that these contextual elements operate together with the criteria to impose a stringent standard of justification.

C. Meaning — Summary and Elaboration

1. *Summary*

In order to understand the *Oakes* criteria, it is useful both to condense and elaborate upon them. The approach in *Oakes* is first to inquire as to the importance of the government objective which has been embodied in measures found to infringe a *Charter* right. If this threshold of importance is satisfied, the limit is subjected to a second stage of review which involves a determination of whether the conflict between the limit and the right is necessary. The necessity of the conflict involves an inquiry as to whether the particular infringing measures actually advance the government objective such that, in order to achieve that objective, a degree of infringement of the right is unavoidable. The necessity of the conflict also demands an inquiry as to whether there are other methods of achieving the government objective without infringing a protected right. This aspect of reasonableness is what the "rationality" and "least restrictive means" components of the *Oakes* proportionality test represent. Once the importance of the limit and the necessity of the conflict have been established, there follows a determination of the relative values of the limit and the right infringed. If the beneficial effects of the limit are proportionate to the deleterious effects caused by the infringement of the right, then the limit will be a reasonable one for the purposes of section 1.

---

[25] *Ibid.* at 139-40.
[26] *Ibid.* at 135-36.
[27] *Ibid.* at 136.

While condensing the criteria is meant to illustrate how the *Oakes* test is intended to establish a coherent framework for the assessment of the reasonableness of a limit, the elaboration of the criteria is directed toward uncovering those aspects of the criteria requiring further definition for their proper application.

2. *Elaboration*

(a) *Criterion One: Objective of Sufficient Importance*

The first criterion provides that a limit must be of "sufficient importance" to warrant overriding a constitutionally protected right or freedom. The limit must, at a minimum, relate to concerns which are pressing and substantial in a free and democratic society.

The establishment of this standard requires an interpretation of the term "reasonable limits", the meaning of which is determined in part by referring to the "essential values and principles" underlying the *Charter*. This interpretation establishes a threshold against which the importance of a particular objective may be compared. This criterion is not concerned with whether the particular limit is important enough to warrant overriding the particular right in question, as this is the concern of the last component of the proportionality test.[28] Instead, this criterion refers to a more abstract notion of the importance of protected rights. The difficulty presented in identifying this abstract notion of importance is that particular exercises of rights under the *Charter* vary in their importance. The extent of their infringement will also vary. Defining this abstract notion of importance by referring to a single, stringent requirement that the limit relate to a pressing and substantial concern leads to a standard that fails to reflect the fact that infringements of *Charter* rights may vary in their significance.

A second element, in terms of the meaning to be given to this criterion, concerns the identification of the objective, the importance of which is to be evaluated. In the *Oakes* test the objective is identified as that "which the measures responsible for a limit on a *Charter* right or freedom are designed to serve. . .".[29]

This element was elaborated upon by Beetz J. in *R* v. *Morgentaler*,[30] where the legislative measures attempted to limit the degree to which the *Charter* right in question was infringed. Beetz J. noted that in *R.* v. *Edwards Books and Art Ltd*[31] the Court had held that "an

---

[28] *But see* G. Marshall, *Liberty, Abortion and Constitutional Review in Canada* [1988] PUB. L. 199 at 205-206.

[29] *Supra*, note 5 at 138.

[30] [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385 [hereinafter *Morgentaler* cited to S.C.R.].

[31] [1986] 2 S.C.R. 713, 35 D.L.R. (4th) 1 [hereinafter *Edwards Books* cited to S.C.R.].

exemption must be read in light of the affirmative provisions to which it relates".[32] Therefore, procedures providing for abortions in some circumstances were to be seen as an exemption from the broader objective of protecting the foetus. It was primarily the pursuit of the latter objective that was responsible for the limit on the *Charter* right in question.

The definition of this criterion in a manner which establishes a single, high threshold arguably arises from the initial abstract standard of importance set in relation to rights generally. As stated earlier, such a standard of importance can be and has been criticized.[33] Accordingly, in the future it is possible that this criterion will be reconsidered, at least as it applies to certain rights.

(b) *Criterion Two: Component One — Rationality*

The first component of the proportionality test requires that the measures adopted be carefully designed to achieve the objective in question, and that the measures not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective.

The rationality standard is concerned with the application of a particular concept to a particular relationship. The relationship to be examined is made clear if it is recalled that the objective to be considered with respect to the first criterion is that "which the measures responsible for a limit on a *Charter* right or freedom are designed to serve".[34] Accordingly, the aspect of the impugned measures that is responsible for or contributes to a limit on a *Charter* right is to be identified and assessed in terms of its connection to an objective of "sufficient importance".

A consideration of the particular concept to be applied to this relationship must address two issues. The first of these relates to the concept itself and the second to its meaning. The initial statement of this criterion seemed to suggest that in order for a measure to be carefully designed, it had to be rationally connected to its objective. However, since that time the terms "necessary" and "overinclusive" have also been used in this context. All of these terms — rationality, necessity, overinclusiveness, and care of design — have come to be used interchangeably and loosely. For example, ineffective medical procedures for the determination of whether the continuation of pregnancy would endanger the life or health of the pregnant woman were termed arbitrary and "unfair",[35] "unnecessary"[36] and "not sufficiently

---

[32] *Ibid.* at 123.
[33] *See supra*, notes 9-12 and accompanying text.
[34] *Supra*, note 5 at 138.
[35] *Supra*, note 30 at 75.
[36] *Ibid.* at 125.

tailored to the legislative objective".[37] An inflation restraint programme which restricted only the compensation package of federal public sector employees was said to be arbitrary, unfair and not carefully designed.[38] Restrictions on collective bargaining on non-compensation issues, in the same case, were held not to have any apparent connection to the objective of an inflation restraint programme.[39] A reverse onus clause, which presumed an intention to traffic in narcotics once a person was found in possession of a narcotic, was held to be "overinclusive and could lead to results in certain cases which would defy both rationality and fairness".[40] The inclusion of all hospital workers within a prohibition of strike activity directed toward the disruption of essential services was held to be "overinclusive".[41] Chief Justice Dickson suggested that there was no justification for extending the prohibition to include all workers in order to achieve the objective.[42] Similarly, it was held that a French-only language law, directed toward ensuring the survival of the French language, could have been tailored to impair minimally freedom of expression.[43] However, the factual necessity of the particular limit was not established.[44]

The tendency to use these terms interchangeably would not appear to present difficulties because these concepts, to a large extent, are interrelated. However, a problem which does arise concerns the failure to attribute a definite meaning to these terms. This concern relates to the identification of the particular conceptions of the concepts to be applied. The importance of this concern is illustrated by considering what is meant by, and involved in, the application of the concept of rationality.

It has been stated that "rationality means, at a minimum, that a positive relationship must exist between means and ends".[45] One may consider the form of this positive relationship by examining the likelihood that a particular measure, which impairs a right, has the effect of advancing an objective of sufficient importance for the purposes of section 1. This concept of rationality could give rise to different

---

[37] *Ibid.* at 183.

[38] *Pub. Serv. Alliance of Canada* v. *R.*, [1987] 1 S.C.R. 424 at 458, 38 D.L.R. (4th) 249 at 273 [hereinafter *P.S.A.C.* cited to S.C.R.].

[39] *Ibid.* at 449.

[40] *Supra*, note 5 at 142.

[41] *Re Pub. Serv. Employee Relations Act (Alta)*, [1987] 1 S.C.R. 313 at 385-86, 74 N.R. 99 at 215 [hereinafter *Re Pub. Serv. Employee Relations Act* cited to S.C.R.].

[42] *Ibid.* at 376-78.

[43] *Chaussure Brown's Inc.* v. *Québec (Procureur Général)* (1988), 90 N.R. 84 at 160-61 (S.C.C.), (*sub nom. Ford* v. *A.G. Québec*), [1988] 2 S.C.R. 712 at 780 [hereinafter *Chaussure Brown* cited to S.C.R.].

[44] *Ibid.* at 160.

[45] S.H. Bice, *Rationality Analysis in Constitutional Law* (1980) 65 MINN. L. REV. 1 at 6.

conceptions of rationality which are perhaps most readily distinguished by the degree of probability they adopt. Different degrees or standards of probability could include proof of the relationship "beyond a reasonable doubt", proof that there is a "substantial likelihood" the objective will be advanced, proof that it is "more probable than not" that the objective will be advanced, or proof that the measures "conduce or tend" to the achievement of the objective.

It is important for courts to select a particular standard of rationality because a failure to do so leaves them open to allegations that their application utilizes many conceptions of rationality. The claim is that a court may vary its standard of rationality so that where it feels the balance of interests favours the protection of the right in question it may apply a high standard of rationality, and if it favours the government interest, it may apply a low standard. This type of analysis would be cloaked by an apparently objective application of a general requirement of rationality.[46]

The claim that the Court's application of the rationality requirement shields a subjective assessment of the relative importance of the interests of the parties has been made in the context of determining whether a particular measure is internally rational.[47] The requirement of internal rationality is concerned with the internal operation of a means. In *Oakes*, the Court considered the internal rationality of section 8 of the *Narcotic Control Act*[48] which made it an offence to have possession of a narcotic for the purpose of trafficking. The Court was specifically concerned with the reverse onus aspect which provided that if the accused was found to be in possession of a narcotic, he or she was presumed to be in possession for the purpose of trafficking. The Court found that this aspect of section 8 infringed the presumption of innocence guaranteed by subsection 11(d) of the *Charter*.

The Court stated that for the reverse onus clause in section 8 to be rationally related to the objective of curbing drug trafficking, it required, at a minimum, that section 8 be "internally rational; there must be a rational connection between the basic fact of possession and the presumed fact of possession for the purpose of trafficking".[49] The Court concluded that, in fact, section 8 was not internally rational

---

[46] These concerns as to the meaning of rationality apply equally to the meaning to be attributed to the care of design, necessity or overinclusiveness of the measures. With respect to each, the questions which arise are: how carefully designed must a law be; how necessary must the particular measure be; and, what degree of overinclusiveness is prohibited? Perhaps only the term "arbitrary" is able to be understood without further definition.

[47] Monahan & Petter (1987), *supra*, note 4 at 117; Elliott, *supra*, note 4 at 318; B. Hovius, *The Limitations Clauses of the European Convention on Human Rights and Freedoms and Section 1 of the Canadian Charter of Rights and Freedoms; A Comparative Analysis* (1986) 6 Y.B. EUR. L. 1 at 42.

[48] R.S.C. 1970, c. N-1, s. 8, as am. R.S.C. 1985, c. N-1.

[49] *Supra*, note 5 at 141.

because "it would be irrational to infer that a person had an intent to traffic on the basis of his or her possession of a very small quantity of narcotics".[50] Accordingly, the Court concluded that the first component of the proportionality test was not satisfied and therefore the infringement of subsection 11(d) by section 8 of the *Narcotic Control Act* was not a reasonable limit for the purposes of section 1 of the *Charter*.

In *R.* v. *Whyte*,[51] the Court considered whether section 234 of the *Criminal Code of Canada*,[52] which makes it an offence to have the care and control of a motor vehicle while impaired, was internally rational. Paragraph 237(1)(a) of the *Criminal Code* provided that for the purposes of section 234, "where it is proved that the accused occupied the seat ordinarily occupied by the driver of a motor vehicle, he shall be deemed to have had the care or control of the vehicle unless he establishes that he did not enter or mount the vehicle for the purpose of setting it in motion".[53]

In considering the first component of the proportionality test, the Chief Justice stated that where the presumption is that a person in the driver's seat of a vehicle has the care or control of the vehicle, there is plainly a rational connection between the proved fact and the presumed fact. He based his conclusion on the fact that "[t]he driver's seat is designed to give the occupant access to all the controls of the car to be able to operate it."[54] A person not intending to assume care and control, he added, "is likely to assume a position in the vehicle intended for a passenger rather than the driver".[55] Therefore, he concluded that "the relationship between the proved fact and the presumed fact under s. 237(1)(a) is direct and self-evident, quite unlike that which confronted the Court in *Oakes*".[56]

The claim made about these cases is that when the Court applied the rationality requirement, it simply determined the issue based on what it believed to be the appropriate balance of interests in the circumstances. On this view, the decision in *Oakes* was based on the fact that "the benefits that might flow from section 8 (which are never really quantified in the judgment) would come at too high a price".[57]

---

[50] *Ibid.* at 142.

[51] [1988] 2 S.C.R. 3, 42 C.C.C. (3d) 97 [hereinafter *Whyte* cited to S.C.R.].

[52] R.S.C. 1970, c. C-34, s. 234. Section 234 of the *Criminal Code* was repealed by R.S.C. 1985, c. C-46 and replaced by s. 237 in S.C. 1985, c. 19, s. 36. The section was further replaced and presently appears as s. 253 in R.S.C. 1985, c. 27 (1st Supp.), s. 36. The "care and control" provision is found in s. 258(1)(a).

[53] S. 237 (1)(a). This section was repealed by R.S.C. 1985, c. C-46 and replaced by s. 241 (1)(a) in S.C. 1985, c. 19, s. 36 and further replaced by s. 258 (1)(a) in R.S.C. 1985, c. 27 (1st Supp.), s. 36.

[54] *Supra*, note 51 at 21-22.

[55] *Ibid.* at 22.

[56] *Ibid.*

[57] Elliot, *supra*, note 4 at 318.

It has been explained how this could be the case, given that there are multiple conceptions of rationality that courts might apply. However, it is equally important to recognize that a determination of a case based on the balance of interests appropriate to the circumstances is not inherent in the application of a rationality requirement. It would be possible for a court to adopt one conception of rationality that would apply, for example, to the drawing of an inference of a presumed fact from a proven fact, such as, that there be a "substantial likelihood" that the presumed fact follows from the proven fact.[58] Although the selection of a particular conception of rationality reflects a particular determination as to the relative importance of limits and rights under the *Charter*, this is a decision which constrains the imposition of a judge's view in this respect in particular circumstances.

In fact, it is unclear, in the context of the internal rationality of a reverse onus clause, which conception of rationality the Court is adopting. In *Oakes*, the Chief Justice adopts Martin J.A.'s statement on this point in the lower court; namely, that the fact proved must "raise a probability" that the presumed fact exists.[59] In *Whyte*, when the Chief Justice notes that the connection, unlike the reverse onus clause in *Oakes*, is "direct and self-evident" he could be applying the same conception of rationality used in *Oakes*.

In summary, although the Court has not directly articulated the conception of rationality it uses in any particular context, there is equally no basis for the claim that the Court is applying multiple conceptions of rationality. In this respect, we should note that the Court's application of these terms reflects either one pre-determined meaning, a constrained range of meanings, or is entirely flexible. Certainly the Court's manner of application suggests that it intends or believes that its application of both the rationality standard and the other terms is not one which varies with the context.

It is perhaps fair to conclude that while there is flexibility in the application of these concepts, they possess a content which does impose constraints on the freedom of the Court, and on courts in general, to assess the reasonableness of a limit in specific circumstances. However, with a more particular articulation of the meaning to be given these terms, greater constraints would be created which could further objectify the application of this component of the proportionality test.

---

[58] C.R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity* (1979) 92 HARV. L. REV. 1187 at 1199-1215. Professor Nesson notes that this has been the approach in the American cases. Although he is critical of a probabilistic approach to the justification of such inferences, this arises out of a view that the standards derived therefrom have been unclear and ultimately insufficient to guarantee a non-violation of the presumption of innocence. However, in *Oakes* and *Whyte*, it is accepted that there is a violation of this right. Our concern is with whether the violation is justified and it is in this context that the rationality requirement is considered.

[59] *Supra*, note 5 at 142. For the comments of Martin J.A., *see R.* v. *Oakes* (1983), 40 O.R. (2d) 660 at 682, 145 D.L.R. (3d) 123 at 147 (C.A.).

(c) *Criterion Two: Component Two — Degree of Impairment*

The statement in *Oakes* of this criterion was that the means must impair as little as possible the right or freedom in question. This determination clearly involves a consideration of the degree to which alternative means impair the right in question. The question which follows is whether there are other relevant bases of comparison involved in the assessment of whether there is a reasonable alternative means.

In fact, the Court has not used the degree of impairment as the sole basis of comparison. This reflects the recognition that, as the sole basis of comparison, it would require *any* less restrictive measures to be adopted so long as, presumably, they were rationally connected to the objective. This would be the case irrespective of whether they were considerably less effective in achieving that objective. None of the cases have adopted such a strict interpretation of this component. Instead, the cases have also considered a second basis of comparison — the extent to which an alternative means would advance the government's objective. A restatement of what is required by this component was made by Chief Justice Dickson in *Edwards Books*.[60] He stated that this component requires a decision as to "whether there is some reasonable alternative scheme which would allow the province to achieve its objective with fewer detrimental effects on religious freedom".[61]

This second basis of comparison presents a new concern. If interpreted literally, this basis of comparison would require any alternative means to be *equally* as successful in advancing the objective. If it failed to achieve fully the objective, it would not be the preferred approach even if it impaired the right in question to a lesser degree.

There are two difficulties with this approach. The first is that alternative means will seldom achieve an objective to the same extent as the means under review. The most that could be required is that the alternative achieves the objective in a comparable fashion. The second difficulty suggests a competing or third basis of comparison. It arises through the observation that, while the difficulty with the first approach was that it ignored the degree to which the objective was achieved, this second comparative approach ignores the degree to which the right is infringed, other than to establish that it is less restrictive. Accordingly, a third basis of comparison would involve comparing the balance each alternative means achieves between the competing interests. Using this basis of comparison, if an alternative was far less restrictive of the right in question, it might be the preferred approach, even if it was less effective in advancing the government

---

[60] *Supra*, note 31.
[61] *Ibid.* at 772-73.

objective. For the purposes of this analysis this basis of comparison will be termed "comparative balancing".

The object of the following analysis is to identify the extent to which each of these bases of comparison has found expression in the Court's application of the degree of impairment criterion. *Edwards Books* is illustrative of a standard examination, and uses as the basis of comparison the degree of impairment and whether the alternative means advance the government objective in a comparable fashion.[62] The case involved provincial legislation which prohibited retail stores from being open on certain holidays, including Sundays, subject to specified exceptions, one of which included stores of a specified size that had been closed on the preceding Saturday. This latter exemption was intended to relieve partially what the government viewed as an undesirable economic impact on those businesses operated by individuals who, as part of their religious practice, observed Saturday as a day of rest and, as a result of the legislation, would be closed an additional day each week, over those who observed Sunday as a day of rest. It was found that for those not exempted, the effect described constituted an interference with their freedom of religion under subsection 2(a) of the *Charter*. The aim of the legislation was to promote a common pause day by protecting employees in the retail industry from involuntary Sunday labour.

Dickson C.J. carefully considered the alternative schemes available to the legislature.[63] The first alternative considered was to replace a Sunday closing requirement with a clause conferring on workers the right to refuse Sunday work. In practice, however, employees would be subjected to subtle pressures not to rely on their right, and the remedy of enforcement of this right by a (human rights) tribunal was not an adequate substitute. Accordingly, this alternative, although it impaired rights to a lesser extent, did not advance the objective in a comparable fashion.

The second alternative considered was to replace subsection 3(4) with a complete exemption for those who held sincere religious beliefs, the existence of which would be determined by a board which would issue permits. The Chief Justice rejected this option for two reasons. First, to the extent that the exemption permitted relatively larger retailers to open on Sundays, it would reduce the achievement of the objective of protecting employees from involuntary Sunday labour because, as noted, the employees effectively would have no choice but to work. Second, in his view it was not a good idea to encourage judicial inquiries as to one's faith. The undesirable effects of such a

---

[62] *Ibid. See also Canadian Newspapers Co.* v. *A.G. Canada*, [1988] 2 S.C.R. 122 at 130-32, 52 D.L.R. (4th) 690 at 696-98 [hereinafter *Canadian Newspapers* cited to S.C.R.].

[63] *Edwards Books, ibid.*

"distasteful" inquiry would need to be weighed against the benefits achieved through the use of it.

A third alternative would have been to retain the exemption for the employers specified and to make available to others a permit which could be obtained through an inquiry establishing sincerity of religious observance. The problem with this alternative is that it would reduce the extent to which the objective was achieved in the manner discussed above.

The fourth alternative would have been to select a different threshold for the size exemption. As to the choice of the specific number of employees and space requirement, the Chief Justice would defer, to a certain degree, to the legislature.

The Chief Justice concluded by stating that the effects were proportionate as "[a] serious effort has been made to accommodate the freedom of religion of Saturday observers, in so far as that is possible without undue damage to the scope and quality of the pause day objective."[64] Although this is stated in the context of the last criterion, it clearly suggests that the bases of comparison were the degree of impairment and whether the alternative advanced the government objective in a comparable fashion.

The distinction between the second and the third bases of comparison is well illustrated by the judgments of McLachlin J.A. (as she then was) and Wilson J. in the decisions of the British Columbia Court of Appeal in *R.* v. *Ferguson*[65] and the Supreme Court of Canada in *R.* v. *Stevens*.[66] In the *Stevens* case, the accused had been charged with the offence of having sexual intercourse with a girl under the age of 14 years contrary to subsection 146(1) of the *Criminal Code*,[67] which provided that "[e]very male person who has sexual intercourse with a female person who (a) is not his wife, and (b) is under the age of 14 years, whether or not he believes that she is 14 years of age or more, is guilty of an indictable offence and is liable to imprisonment for life." The offence had been committed prior to the proclamation of the *Charter*. As the majority of the Court determined that the *Charter* could not be given retrospective effect, it did not consider the merits of the accused's claim under section 7. Three members of the Court dissented on this point and, therefore, considered the application of the *Charter* in the circumstances. A violation of section 7 was found,[68]

---

[64] *Ibid.* at 783.

[65] [1987] 6 W.W.R. 481, 16 B.C.L.R. (2d) 273 (C.A.) [hereinafter *Ferguson* cited to W.W.R.].

[66] [1988] 1 S.C.R. 1153, 86 N.R. 85 [hereinafter *Stevens* cited to S.C.R.].

[67] R.S.C. 1970, c. C-34, s. 146(1). The provisions relating to sexual offences have been substantially revised in Part V of R.S.C. 1985, c. C-46. In particular, new offences have been created together with new age levels in relation to those offences.

[68] Wilson J. referred to the analysis in *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486, 69 B.C.L.R. 145, and *R.* v. *Vaillancourt*, [1987] 2 S.C.R. 636, 81 N.R. 115.

and it fell to be determined whether subsection 146(1) of the *Criminal Code* could be saved as a reasonable limit under section 1 of the *Charter*.

In *Ferguson*, in considering whether there was a less restrictive means available, McLachlin J.A. compared subsection 146(1) with what was at the time a proposed and, later adopted, amendment to subsection 146(1). The amendment provided a defence as to the belief of the woman's age being greater than 14 years if the accused had taken "all reasonable steps to ascertain the age of the complainant". McLachlin J.A. reasoned that:

> Section 146(1) provides a considerably stronger deterrent than the alternative embodied in Bill C-15. Given the importance of the goal of protecting children against the evils of immature intercourse, it can be argued that the need for the additional deterrent effect of s. 146(1) outweighs the need to permit accused persons to raise the defence of innocent belief.[69]

McLachlin J.A. concluded that subsection 146(1) infringed the accused's right as little as "reasonably possible". In *R.* v. *Stevens*, Wilson J. stated in relation to the amended subsection 146(1) that, "[t]here can be no doubt that this provision infringes the accused's s. 7 rights less than the section challenged in the present appeal. Parliament has therefore concluded that society's needs can be served by a less stringent provision."[70]

In comparing these two approaches it is important to note that, as a factual matter, the degree to which the alternative means advanced the government objective was interpreted differently. Accordingly, as Wilson J. was of the view that the two alternatives advanced the government objective in a comparable fashion, it was necessary only to determine which led to a lesser degree of impairment of the right in question. In contrast, McLachlin J.A. evaluated the alternative means by balancing its reduced deleterious effects in respect of the infringement of the right in question, with its reduced effectiveness in achieving the objective. She found that the latter outweighed the former in importance.

This basis of comparison is present, in differing degrees, in a number of the cases the Court has considered.[71] In *Hufsky*,[72] the Court considered a random stop-and-spot-check procedure used for the purpose of checking licences, insurance, mechanical fitness of cars and sobriety of drivers. The Court found that this procedure led to the

---

[69] *Supra*, note 65 at 524.

[70] *Supra*, note 66 at 1183.

[71] *See supra*, note 51 at 22-27. *See also R.* v. *Hufsky*, [1988] 1 S.C.R. 621, 4 M.V.R. (2d) 170 [hereinafter *Hufsky* cited to S.C.R.].

[72] *Hufsky*, *ibid.*

arbitrary detention of drivers and therefore violated section 9 of the *Charter*.

Le Dain J., after finding that the first two components of the *Oakes* criteria were satisfied, applied the second component of the proportionality test quite loosely. He stated that if the stopping of motor vehicles for the stated purposes is not to be "seriously inhibited", conditions and restrictions on this activity reflected in the American jurisprudence should not be adopted as they "would appear seriously to undermine its effectiveness while not significantly reducing its intrusiveness".[73] This is clearly a consideration of other less restrictive means and a rejection of them on the basis that they would be much less effective in advancing the objective, and would not be significantly less restrictive.

The case which best illustrates the need to undertake a comparative balancing approach is *Chaussure Brown*.[74] This case involved the requirement that all public signs, posters and commercial signs appear in the French language only. The Court decided that such a severe restriction on freedom of expression in other languages was unnecessary to achieve the objective of ensuring the survival of the French language. The Court was of the view that the predominant display of French, in the absence of evidence to the contrary, was all that was required.[75]

It is interesting to consider how that case would have been decided had there been evidence to support the view that the exclusive use of the French language, as provided, would have better advanced the government objective. In such circumstances, it might have been difficult to state that such measures were unnecessary. However, as to the merits of the available alternatives, it might still be argued that the predominant use of French was the preferred alternative. An argument in favour of this alternative is that such an alternative would advance the objective to a lesser extent, but also would be far less restrictive of the *Charter* interest. Therefore, even in the circumstances as posited, on a comparative balancing approach, the conclusion of the Court could be justified.

There is a further development which suggests that, at least in some cases, there is a need for an approach which permits a balancing of interests as part of the comparison of alternative means. This development concerns the impact on the merits of an alternative of an interest other than the specified government objective and the *Charter* interest. This would take the form of a secondary effect of legislation either of a positive or negative nature. For example, the distasteful inquiry into the sincerity of one's religious beliefs referred to in *Edwards Books* would be a negative secondary effect of the alternative

---

[73] *Ibid.* at 637.
[74] *Supra*, note 43.
[75] *Ibid.* at 160.

considered therein. This secondary effect, as the Court acknowledged, is a legitimate government concern in fashioning its means, and must be considered along with the government objective and the *Charter* interest.

It is clear from an analysis of the cases that the degree of impairment is not the exclusive point of comparison. The Court will also generally require that a proposed alternative advance the objective in a fashion comparable to the impugned measures. However, the above analysis suggests that the Court does not exclude from consideration all means which advance the objective to a lesser extent. It appears that in appropriate cases the Court will engage in a comparative balancing. The remainder of the analysis will proceed on the understanding that each of these bases of comparison play a role in the application of the degree of impairment component of the proportionality test.

(d) *Criterion Two: Component Three — Proportionality of Effects*

This component requires proportionality between the deleterious effects of the measures which infringe a *Charter* right and the objective which has been determined to be of "sufficient importance". In *Oakes*, the Chief Justice discussed the factors[76] which will affect proportionality and concluded that the more severe the deleterious effects, the more important must be the objective in order for the limit to be reasonable.

Two issues arise when elaborating upon the meaning of this component of the test. The first concerns the appropriate standard of proportionality for the purposes of section 1. To set this standard, the relative importance of rights and conflicting interests must be weighed and this requires an interpretation of what is reasonable as determined with reference to the principles and context of the *Charter*. Although there is a direct relationship between the deleterious effects of the infringement and the importance of the objective, there is no statement of the relative proportions envisaged. It could be one of equality of effects, or it could be one where the benefits of the objective must outweigh, by a particular degree, the deleterious effects of the infringement. To date, the loose and infrequent manner in which this criterion has been applied has left these issues unaddressed.

The second issue concerns whether the benefits of the objective are to be assessed on the assumption that they are fully achieved, or only insofar as the measures actually advance them. The finding of a rational connection may be held to establish that the effects of the measures are those intended. This appears to be the approach taken

---

[76] *See supra*, note 25 and accompanying text.

thus far. However, the case of *R.* v. *Stevens*,[77] discussed above,[78] and the judgment of Wilson J. illustrate the effect that the rational connection requirement may have on the evaluation of the actual effects of the measures. In the context of a particular criminal law provision, Wilson J. accepted that there may be a rational connection between absolute liability and the objective of deterrence but added that any such connection in that case was tenuous. Regarding the proportionality of the effects, she adopted the view that "the deterrent effect of the denial of the defence of mistake of fact in s. 146(1) would be so marginal as not to justify the punishment of innocent persons or the placing of restraints on proper and legal activities."[79] Clearly, the tenuous connection between the objective and the measures lessened the degree to which the objective was achieved and, therefore, lessened the importance to be attributed to it in assessing the proportionality of effects.

Although these two issues raise unanswered questions, it does not mean that courts have not had to answer these questions in the course of rendering decisions under section 1. Clearly, when applying this component courts must adopt a notion of what is proportionate and must attribute to the objective certain effects, either those alleged to be advanced or those actually advanced. One concern raised is that the failure to make known these answers results in the possibility that different answers will be given to the questions in different circumstances.

(e) *Conclusion*

The identification by the Court of formal criteria for the assessment of the reasonableness of a limit completes only the first level of interpretation. The selection of these criteria and their elaboration reflect a particular interpretation of what is reasonable for the purposes of section 1. In doing so, the Court constrains the parameters of what is or is not a reasonable limit. The extent to which the Court constrains this determination depends on the precision of the Court's criteria. The next section examines the application of these criteria with a view to identifying what constitutes a coherent application. The final section of the paper consists of a consideration of the Court's approach to the issue of deference in the application of these criteria.

---

[77] *Supra*, note 66.
[78] *See supra*, notes 65-70 and accompanying text.
[79] *Supra*, note 66 at 1184.

III. The Oakes Criteria: An Examination at the Second Level of Interpretation

A. *Method of Application*

1. *Criterion One: Objective of Sufficient Importance*

This criterion, concerned with whether a particular government objective is of sufficient importance to warrant overriding a constitutionally protected right, requires that the objective relates to a "pressing and substantial" concern. The analytical steps required for this determination are as follows: (a) the proper characterization of the objective to be assessed; (b) the examination of evidence which establishes as a fact the dimensions of the government objective (whether or not it in fact relates to a pressing and substantial concern); and (c) an evaluation of the importance of the government objective in relation to certain essential principles. It is proposed to examine each of these analytical steps in turn.

(a) *The Proper Characterization of the Objective to Be Assessed*

The level of generality used to characterize the government objectives raises a concern. To identify the Court's approach to this issue, it is best to draw from the cases a list of some objectives that have been assessed in the context of this criterion of reasonableness. Some of the government objectives considered in this context have been: protecting our society from the grave ills of drug trafficking;[80] effectively enforcing motor vehicle laws and regulations in the interest of highway safety;[81] preserving at least one uniform day each week as a pause day, to enable activities to be carried out in common;[82] suppressing crime and improving the administration of justice;[83] and, ensuring the survival of the French language.[84]

These examples illustrate that the characterization of the objective, in order to determine whether it is of sufficient importance, has occurred at a high level of generality. This may be appropriate because, in order to assess the importance of a particular objective which is directed toward advancing a more general objective, it is necessary to evaluate the importance of the more basic concern. Accordingly, rather than simply assessing the importance of facilitating the prosecution of

---

[80] *Supra*, note 5 at 140.
[81] *Hufsky*, *supra*, note 71 at 634-36.
[82] *Supra*, note 31 at 769-70, 773.
[83] *Canadian Newspapers*, *supra*, note 62 at 129-30.
[84] *Chaussure Brown*, *supra*, note 43 at 779-80.

drug traffickers,[85] the detection (or perceived risk of detection) of motor vehicle offences,[86] the protection of workers from involuntary Sunday labour,[87] the encouragement of victims to complain and thereby facilitate the prosecution and conviction of those guilty of sexual offences,[88] or the communication of the "visage linguistique",[89] the Court also assessed the more general objectives to which these related.

A second element to consider in the characterization of the objective concerns whether the relevant purpose is that which was intended at the time the legislation was passed or is that which is put forward at the time of the litigation.[90] Prior to the formulation of the *Oakes* criteria the Court stated that the objective to be attributed to legislation is that which the legislature intended at the time the legislation was passed.[91] This is consistent with the approach that the Court has taken in the application of the *Oakes* criteria.

(b) *Examination of Evidence Which Establishes the Dimensions of the Government Objective*

Once the preliminary question of characterizing the objective is complete, the Court must, unless it finds this to be self-evident, undertake a factual investigation into the importance of the objective and whether it relates to a pressing and substantial concern. To appreciate what is involved in such an investigation it is necessary to note the onus and standard of proof and the nature of the factual data to be assessed. Most of the discussion in this regard applies to all of the criteria.

It has been held that the onus for establishing that a limit is justified rests upon the party seeking to uphold the limitation[92] and that the standard of proof required is proof on a preponderance of probability. It was stated further that a high degree of probability would be required.[93] This standard of proof applied to all elements of a section 1 inquiry and required clear and cogent evidence.[94] However, in some instances the importance of an objective may be self-evident.[95]

---

[85] *Supra*, note 5 at 140.

[86] *Hufsky*, *supra*, note 71 at 634-36.

[87] *Supra*, note 60 at 769-70.

[88] *Supra*, note 62 at 129-30.

[89] *Chaussure Brown*, *supra*, note 43 at 778-80.

[90] The merits and concerns related to each approach are discussed in Peck, *supra*, note 4 at 61-65 and Weinrib, supra, note 4 at 502.

[91] *R.* v. *Big M Drug Mart Ltd*, [1985] 1 S.C.R. 295 at 335, 18 D.L.R. (4th) 321 at 352-53.

[92] *Supra*, note 5 at 136-37.

[93] *Ibid.* at 137-38.

[94] *Ibid.*

[95] *Ibid.*

It is important to recognize the difficulties inherent in the nature of the factual evidence necessary to establish the section 1 criteria. The type of evidence typically utilized to establish factual matters in this context is of a social science nature. There are a number of difficulties associated with the use of such evidence, including availability, comprehension, reliability, weight and cost.[96] In addition, such evidence is usually tentative and seldom addresses directly the fact in dispute. Where an attempt is made to solve this latter problem by preparing evidence for this purpose, further difficulty arises in that it may have been prepared with a slant which may favour one side of the dispute.[97] These problems, inherent in social science evidence, are complicated by limits on the Court's ability to understand and, therefore, properly assess the material. The problem of assessing whether a factual element necessary to the determination of the legal question is established presents a dilemma for the Court which is well stated by Professor Swinton:

> This problem with evidence will usually arise under s. 1 and one solution for a judge is to say that the government or litigant supporting the legislation has failed to make the case to uphold the law in the absence of compelling evidence. But the result may then be costly to important social and economic measures in our society, and judges must at this point consider the question of the degree to which they should defer to the legislatures which have had to act on incomplete data in enacting the measure.[98]

There are two possible approaches to the problem of a factual record which does not meet the standard of proof required under section 1. The first approach is for the Court to decide that the case to uphold the law has not been made. The second is to accept the factual record as it is on the basis that it reflects the quality of the evidence available, and adjust the weight to be given it in establishing the factual dimensions of the criteria.[99] In these circumstances the Court would then apply the criteria to the facts.

The Court's use of these two approaches requires at least some evidence upon which it can direct its factual findings. Prior to *Oakes*, the Court had stated that a factual record was required and that it would not uphold limitations on the basis of mere speculation.[100] In

---

[96] K. Swinton, *What Do the Courts Want From the Social Sciences?* in R.J. Sharpe, ed., CHARTER LITIGATION (Toronto: Butterworths, 1987) 200.

[97] *Ibid.*

[98] *Ibid.* at 202.

[99] *See supra*, note 31 at 769, per Dickson C.J.

[100] R.J. Sharpe, *The Charter of Rights and Freedoms and the Supreme Court of Canada: The First Four Years* [1987] PUB. L. 48 at 54. *See L.S.U.C.* v. *Skapinker*, [1984] 1 S.C.R. 357 at 383-84, 9 D.L.R. (4th) 161 at 182 [hereinafter *Skapinker* cited to S.C.R.]; *Singh* v. *Min. of Employment and Immigration*, [1985] 1 S.C.R. 177 at 217, 17 D.L.R. (4th) 422 at 468.

several cases since *Oakes* significant evidence has been produced in the context of the first criterion, including statistics, reports, studies, articles, Canadian legislative history and foreign legislation.[101] In other cases, however, the Court has found that the importance of the objective was established without requiring significant factual evidence because in those cases the objective's importance was self-evident.[102]

(c) *Evaluation of the Importance of the Government Objective*

Once the factual dimensions of a proposed objective are established, the actual importance of the objective must be assessed. The object of the latter assessment is to identify the importance of the objective as a pressing and substantial concern and to compare it with the threshold level of importance required to warrant overriding a constitutionally protected right or freedom. Just as identifying this threshold level of importance requires an interpretation of what is reasonable in the context of the *Charter* and the "essential values and principles" which underlie it, the importance of a particular objective requires an identification of the values it advances and their importance as measured against the same context and background.[103]

Characterizing the objective in very general terms, establishing a factual basis, considering the actual importance of the objective (and whether it satisfies the meaning attributed to the terms "sufficient importance" and "pressing and substantial"), all represent separate and distinct steps in the assessment of the importance of the government objective. Such distinctions are particularly important when questions arise as to limitations or difficulties in the application of the criteria.

2. *Criterion Two: Component One - Rationality*

The meaning of the concepts involved in this aspect of the proportionality test have already been discussed. To evaluate whether this component is satisfied requires an identification of the relationships to which these concepts are to be applied, the examination of evidence which establishes as a factual matter the relationship between the objective and the measures, and an evaluation as to whether that relationship may be characterized as rational.

---

[101] *See supra*, note 30 at 53-72 and *Hufsky*, *supra*, note 71 at 634-36.

[102] *See supra*, note 31 at 770; *Jones* v. *R.*, [1986] 2 S.C.R. 284 at 299-300, 28 C.C.C. (3d) 513 at 537-38 [hereinafter *Jones* cited to S.C.R.]; *British Columbia Gov't Employees Union* v. *A.G. British Columbia*, [1988] 2 S.C.R. 214 at 248, 53 D.L.R. (4th) 1 at 25 [hereinafter *B.C.G.E.U.* cited to S.C.R.]; *Canadian Newspapers*, *supra*, note 62 at 130.

[103] *See infra*, note 119 and accompanying text concerning the nature of such an assessment.

(a) *Identification of the Relationship to Be Assessed*

It has been suggested, in respect of the first criterion, that the objective is to be characterized at its most general. While this approach is appropriate, indeed necessary, in order to assess its importance, such a characterization can create difficulties in assessing the rationality of the measures in question. This is so because the essence of evaluating rationality requires a particularized analysis of the connection between the objective and the measures chosen to achieve that objective. In *Hufsky,*[104] the Court, after having determined that the objective of improving highway safety was of sufficient importance for the purposes of the first criterion, had to consider whether this objective was rationally related to a random stop-and-spot-check procedure. The Court identified the more particular objective in this case to be increasing the detection, or perceived risk of detection, of motor vehicle offences. Only in respect of an objective of this particularity could the rationality of the impugned measures be assessed. To expand further the necessary connections between the general objective and the means, the Court could have noted that highway safety would be advanced by effective deterrence of motor vehicle offences, an objective which is further advanced by increasing the detection, or perceived risk of detection, of motor vehicle offences. It should be noted that for the more general objective to be rationally connected to the measures, each of the more particular objectives must also be rationally connected to the more general objective.

In *Edwards Books,*[105] the Court had to determine whether the objective of promoting a common pause day was rationally related to legislation which prohibited retail stores from being open on certain holidays, including Sundays, subject to exemptions for specific businesses and stores of a specified size which had been closed on the preceding Saturday. The Chief Justice, in his judgment, was specifically concerned with the following: the rational basis for focussing exclusively on the retail industry; the rational basis for excluding certain businesses which provided services that make the pause day more enjoyable; and, the rational basis for the specified size exemption. As to the first, the Chief Justice examined particular problems which distinguished the retail industry in so far as the need for legislative action to ensure a common pause day was concerned. These problems, he later stated, concern the need to protect "workers from involuntary Sunday labour", a need he concluded to be more prominent in the retail industry.[106] Only by identifying the more particular objective of protecting workers from involuntary Sunday labour could the rational

---

[104] *Supra*, note 71.
[105] *Supra*, note 31.
[106] *Ibid.* at 771 and 773. *But see* the comments of Wilson J. at 811-12.

basis of focussing on the retail industry be assessed. Similarly, the exemption of businesses of a specified size, which had been closed on the preceding Saturday, is understandable in relation to the objective of reducing the extent to which the legislation infringed the right in question. However, this objective does not explain why the exemption was limited to those businesses of a specified size. However, when this objective is read in conjunction with the more particular objective of the broader legislation (protecting as many employees as possible from having to work on Sunday), it seems clear that a size requirement for the exemption is rationally related to achieving the objective.

Finally, the Chief Justice assessed the series of specified services exemptions and noted that they related to conflicting interests. The two interests in conflict were to "protect as many employees as possible from having to work on Sundays", and to provide a "quality environment permitting the fulfillment of family and community recreational pursuits".[107] To evaluate whether there is a rational connection with the businesses actually exempted, one would have to consider how they advanced these conflicting objectives. On this point the Chief Justice exercised deference to the legislative choice.

These cases illustrate the benefit of applying the rationality standard to the connection between the impugned measures and the more particular, rather than the more general, objective. Once the relationship to be assessed has been identified, it is necessary to establish factually the correlation between the objective and the measures and to assess the rationality of that relationship.

(b) *Examination of Evidence Which Establishes the Relationship Between the Objective and the Measures*

The onus and standard of proof and the difficulties associated with the evidence required to assess factual questions under section 1 were discussed in the context of the first criterion. The use of factual evidence in this context has, as with the first criterion, varied. In one case in the criminal law context,[108] and two cases more generally identified as relating to the administration of justice,[109] the Court has found this criterion to be satisfied without factual evidence. In another case, where evidence was required, the Court was relatively undemanding, basing its decision on a report prepared in 1970.[110] However, the Court will require evidence in some cases, as illustrated by its

---

[107] *Ibid.* at 771.

[108] *Supra*, note 51 at 21-22.

[109] *Canadian Newspapers*, *supra*, note 62 at 130; *B.C.G.E.U.*, *supra*, note 102 at 248.

[110] *Supra*, note 31 at 769-72.

decision in *Chaussure Brown*, where it required evidence that the exclusive, rather than the predominant, use of French on public signs was necessary for the survival of the French language.[111]

(c) *Evaluation of the Rationality of the Relationship*

If the Court finds a sufficient factual basis to permit the application of this criterion, it must then assess the rationality of the relationship in question. In this respect, it has been claimed that an ostensibly objective inquiry hides a political evaluation of the legislation under review. It is proposed to illustrate the nature of the rationality assessment by addressing this claim.

The claim states that because no legislation is passed without a reason, no law can be said to be "irrational". It further states that if a law is to be challenged, that challenge must occur through an evaluation of the policy underlying the law. Therefore, the "rationality standard, although ostensibly neutral, requires just such a political evaluation on the part of judges".[112]

Although each of these premises may be conceded, it is submitted that they do not justify the stated conclusion. The rationality standard applies to the connection between a government objective which, through the application of the first *Oakes* criterion, will have been found to be of "sufficient importance", and the particular measures which will have been found to impair a *Charter* right. It is noteworthy that we are concerned with the rationality of this connection and not with whether the law is rational. The most significant difference between the two is that there may be a number of reasons for passing a particular law, all of which may be good reasons and therefore make the law rational. However, our concern is with that aspect of the law which impairs a right and with the reason or objective related to it. If the law has multiple reasons or objectives which relate to different aspects of the law and each contributes to the impairment of a right, then each objective must be judged sufficiently important under the

---

[111] *Supra*, note 43 at 779.

[112] Monahan & Petter (1987), *supra*, note 4 at 108-12. The problem with this argument stems from the reliance placed on the "rationality standard" as applied in American jurisprudence, which involves not only an assessment of whether the means are likely to achieve the ends but also requires the characterization and evaluation of the legislative purpose of the law. For discussions of the American "rationality standard" *see supra*, note 45; R.W. Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory* (1979) 67 CAL. L. REV. 1049; H.A. Linde, *Due Process of Lawmaking* (1976) 55 NEB. L. REV. 197. The "rational connection" requirement of the *Oakes* test has the same meaning as the terms "rational nexus" and "classificatory fit" when used by Bennett (at 1059 and 1065) and should not be equated with the term "rationality requirement" as used in that article and elsewhere.

first criterion. If only one objective is so judged, then those aspects of the law which infringe a right must be rationally related to it.

The example used by Professors Petter and Monahan[113] concerned a law requiring brakes to be installed on all trucks, except those carrying seafood, with the goal of promoting traffic safety. This law was challenged on the basis that it discriminated in favour of those trucks carrying seafood. On the assumption that this would violate the *Charter's* equality guarantee, it could only be justified under section 1 if conferring a benefit on the seafood industry was found to be an objective of sufficient importance under the first criterion. If the objective did not satisfy this requirement, then the seafood exemption would not survive the first criterion. However, this evaluation of the exemption would have occurred under the first criterion and not the rationality component of the proportionality test. Alternatively, if it were argued that the seafood exemption was intended to promote traffic safety, then the exemption would also have to advance that objective. This determination, so long as a particular conception of rationality is applied, requires no further evaluation of the importance of the objective.

This analysis does not challenge the second premise of Professors Monahan and Petter that to challenge a law requires an evaluation of policy. This argument illustrates that if the evaluation occurs, it is in the context of the application of the first criterion.[114] Accordingly, the premises put forward do not support the conclusion that the rationality standard "requires a political evaluation on the part of judges".[115]

The above analysis suggests that this claim concerning the subjectivity of the rationality criterion is misconceived because it involves a misapplication of the rationality criterion. A second claim in this respect, based on the meaning to be ascribed to rationality in this context, should also be recalled. Addressed earlier was the claim that the Court applies the rationality requirement in a manner which permits the conception of rationality utilized to be varied by the Court to suit the balance of interests it deems appropriate in the circumstances.[116]

It is difficult to identify the extent to which the Court is applying fixed notions of rationality, or the other concepts referred to in the first component. However, if the Court does apply a particular conception of rationality, then the claim that a subjective element is involved in its application appears to be mistaken. Instead, the application of the concept of internal rationality in the case, for example, of a reverse onus clause would involve identifying the probability of the presumed fact following from the proved fact and comparing this with the conception of rationality embodied in the criteria.

---

[113] Monahan & Petter (1987), *ibid.* at 110-11.
[114] *See also* Weinrib, *supra*, note 4 at 501.
[115] Monahan & Petter (1987), *supra*, note 4 at 110.
[116] *See supra*, notes 45-59 and accompanying text.

An examination of the rationality component of the proportionality test illustrates that both the proper characterization of the connection to which the component is to be applied and the meaning of the concept of rationality in this context contribute in important, though different, ways to a clear and objective application of this criterion. The former helps to focus the analysis on the limited area which needs to be addressed. The latter, through a more precise definition, further clarifies and constrains the application of this criterion. It is in this last area that the Court needs to articulate further the content of this criterion.

3. *Criterion Two: Component Two — Degree of Impairment*

In the analysis of the content of this criterion, a preliminary question arises concerning the qualities of a means which are to form the basis of comparison. Once such qualities are identified, there must be a factual investigation as to whether means possessing these qualities exist. The final step is to evaluate whether a qualifying means is preferable to the alternative chosen. In this section of the paper, each of these steps, as undertaken by the Court, is explored in turn.

(a) *Examination of Evidence Which Establishes the Aspects of the Measures Which Are to Be Compared*

The issues concerning the factual elements of the application of section 1, discussed above, apply equally here. In addition, the Court has made other statements which apply more particularly to this criterion. In *Oakes* it was stated that evidence was required that would be cogent, persuasive and make clear to the Court the consequences of imposing or not imposing the limit.[117] It was further stated that the Court needs to know what alternative measures for implementing the objective were available to the legislators when they made their decision.[118]

There should be evidence to illustrate the different points of comparison, in particular the extent to which an alternative achieves or fails to achieve an objective, and the degree to which alternative approaches impair the right in question. In most cases, these factual questions will have been determined in an assessment of the infringement of the right and an assessment of the first two criteria. However, it will also be necessary to offer evidence in this context as to the factual existence and dimensions of alternative schemes.

---

[117] *Supra*, note 5 at 138.
[118] *Ibid.*

(b) *Evaluation of Alternative Measures According to the Bases of Comparison*

Where alternatives have been factually established, courts must undertake to compare the alternatives according to the bases of comparison suggested above. If the comparison concerns the degree of impairment or the advancement of the objective in a comparable fashion, then the comparison will involve an empirical assessment as to the relative extent to which each alternative impairs the right and advances the objective. This can either be determined from a consideration of the operation of the legislation itself or, at other times, may require a factual inquiry. If it is the latter, the difficulties concerning the limits of factual evidence apply.

If the comparison requires what has been described as comparative balancing, then the process is somewhat more involved. It is still necessary to determine the difference between the measures in the degree of impairment and the extent to which the objective is achieved. The determination of whether a reduction in one is justified by an increase in the other, however, cannot be determined in a comparative factual manner as the differences are not directly commensurable. It is only possible to compare the increased, or decreased, benefits and detriments through identifying a common denominator. The common denominator for these elements are the "essential values and principles" and the *Charter* context. Accordingly, the relative values of the benefits and detriments of the measure are to be determined with reference to this subject-matter. Such an evaluation is important and complex. Courts must identify how a measure trenches upon these principles and how it advances them. As the negative effects of the infringement may relate to different values and principles than do the beneficial effects of the measures, some sense of the relative importance of those values and principles is required. In this way, the relative importance of the negative and beneficial effects of the measure is to be determined.[119]

This last aspect of the analysis involved in the comparative balancing of alternative means does not duplicate the final component of the proportionality test. The criterion in question here is concerned with balancing a difference between alternative means, while the other is concerned with the balance that a particular means achieves and compares this with some external standard of proportionality.

---

[119] Difficulties related to achieving an objective and determinate evaluation for these purposes are addressed in: Peck, *supra*, note 4 at 48-49; M.V. Tushnet, *Anti-Formalism in Recent Constitutional Theory* (1985) 83 MICH. L. REV. 1502; P. Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship* (1980-81) 90 YALE L.J. 1063; and J.H. Ely, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (Cambridge, Mass.: Harvard University Press, 1980) c. 3. *See also* sources referred to therein. For a response to the claims of indeterminacy in the law *see* K. Kress, *Legal Indeterminacy* (1989) 77 CAL. L. REV. 283.

4. *Criterion Two: Component Three — Proportionality of Effects*

If the measures have satisfied the other criteria, establishing that the degree of infringement is as limited as possible, then it must be determined whether the degree of infringement is, in fact, acceptable. This requires that the effects of the limit be proportionate.

It is unclear what proportion between the objective and the right is to be considered acceptable. Nonetheless, in order to understand the application of this criterion, it is essential to understand that this criterion is intended to establish a particular conception of what is "proportionate" for the purposes of section 1. It is against this general standard of proportionality, set at the first level of interpretation, that the actual proportion of effects embodied in a particular measure is to be evaluated.

To make this comparison requires an identification of the actual benefits and detriments which result from the operation of the legislation. This inquiry draws on the factual establishment of these characteristics in the consideration of the infringement of a right and the other criteria under section 1. Once the factual dimensions of the measure are established, a value must be attributed to both the beneficial and deleterious effects of the measure in a manner which permits some commensurability. This must be done by evaluating these effects in light of the "essential values and principles", and within the *Charter* context.[120] Once a value is assigned to the beneficial and deleterious effects, their proportionality can be determined and compared with the proportionality standard required to be met by this criterion. In this way, it will be determined whether the measures satisfy this criterion.

In the application of this last criterion, the imposition of the judicial interpretation of what is required by the *Charter*, over the legislature's decision, is most visible. The varying inability of courts to demonstrate with certainty the correctness or superiority of their interpretations, or to define the proper judicial role in this context, leads to concern as to whether it is appropriate in all cases to apply rigorously the *Oakes* criteria. Although an assessment of the appropriate judicial response to these problems is beyond the scope of this paper, to appreciate fully what is involved in a court's assessment of the reasonableness of a limit requires an examination of the limits the Court has imposed upon itself and other courts in applying this and the other criteria.

B. The Application of Section 1 and Judicial Deference

1. *Introduction*

The object of this part of the analysis is to identify, in a preliminary manner, the circumstances in which the Court has exercised

---

[120] *See generally ibid.* and accompanying text.

deference in the application of the *Oakes* criteria, the reasons given for such deference, and the manner in which such deference is exercised. Deference, for these purposes, is a decision by a court to subject legislation to less than a full assessment as to its satisfaction of the *Oakes* criteria. This analysis of judicial deference in applying the *Oakes* criteria will consist of an examination of cases in which the issue of deference in the application of the criteria has been most directly addressed. However, for the specific purpose of identifying the circumstances which surround the exercise of judicial deference, these cases will be contrasted briefly with those cases in which the criteria have received a relatively full application.

2. *The Court's Use of the Technique of Judicial Deference — A Case Review*

The first case, *Edwards Books*,[121] involved provincial legislation directed toward ensuring a common pause day through prohibiting retail stores from opening on certain holidays, including Sundays, subject to a series of specified exceptions which were set out and discussed earlier.[122]

The Court found that this legislation violated the guarantee of freedom of religion under subsection 2(a) of the *Charter*. The Court, therefore, considered whether the legislation could be saved under section 1. The Chief Justice, in restating the *Oakes* criteria, added an important qualification:

> The court stated that the nature of the proportionality test would vary depending on the circumstances. Both in articulating the standard of proof and in describing the criteria comprising the proportionality requirement the Court has been careful to avoid rigid and inflexible standards.[123]

The Chief Justice then applied each of the criteria and observed that the objective of preserving at least one uniform day each week as a pause day, to ensure that activities were carried out in common, was aimed at a pressing and substantial concern. He then considered the means used to achieve this objective. The Chief Justice's discussion of the rational connection component of the proportionality test was discussed earlier.[124] In particular, he noted certain exemptions from the legislation, related to services which enable the pursuit of activities and thus render the pause day more enjoyable. As to the choices made by the legislators in this respect, the Chief Justice, apparently drawing

---

[121] *Supra*, note 31.
[122] *Supra*, notes 62-64 and notes 105-107 and accompanying text.
[123] *Supra*, note 31 at 768-69.
[124] *Supra*, notes 105-107 and accompanying text.

on his earlier qualification of the *Oakes* criteria, was prepared to exercise some deference:

> Legislative choices regarding alternative forms of business regulation do not generally impinge on the values and provisions of the *Charter*, and the resultant legislation need not be tuned with great precision in order to withstand judicial scrutiny. Simplicity and administrative convenience are legitimate concerns for the drafters of such legislation.[125]

Therefore, he concluded that there was a rational connection. The Chief Justice's examination of the least restrictive means component was also discussed earlier.[126] The Chief Justice examined a number of alternative measures to those actually chosen and assessed the merits of each. However, as the measure, to a certain degree, attempted to balance the interests in conflict, and because the form of the measure required the drawing of a precise line, he was prepared to grant the legislature some leeway in the drawing of such a line:

> A "reasonable limit" is one which, having regard to the principles enunciated in *Oakes*, it was reasonable for the legislature to impose. The courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line.[127]

La Forest J., in his application of section 1, drew on the Chief Justice's qualification of the *Oakes* criteria to articulate the manner in which he believed courts should review legislation in these circumstances:

> Given that the objective is of pressing and substantial concern, the Legislature must be allowed adequate scope to achieve that objective. It must be remembered that the business of government is a practical one. The Constitution must be applied on a realistic basis having regard to the nature of the particular area sought to be regulated and not on an abstract theoretical plane.[128]

La Forest J. did not intend that "this Court should, as a general rule, defer to legislative judgments". Instead, what he envisioned is that:

> In seeking to achieve a goal that is demonstrably justified in a free and democratic society, therefore, a legislature must be given reasonable room to manoeuvre to meet these conflicting pressures. Of course, what is reasonable will vary with the context. Regard must be had to the nature of the interest infringed and to the legislative scheme sought to be implemented.[129]

---

[125] *Supra*, note 31 at 772.
[126] *Supra*, notes 62-64 and accompanying text.
[127] *Supra*, note 31 at 781-82.
[128] *Ibid.* at 794-95.
[129] *Ibid.* at 795.

Given that there are competing pressures which require a more in-depth knowledge than is available to a given court, he considered it a matter of legislative choice as to whether to provide an exemption and as to the form that exemption should take. In this case the circumstances involved the objective of a common pause day, a matter of social or public policy, and the scheme for its attainment involved the regulation of business and employment. The right involved was the freedom of religion which, although infringed in an indirect manner, was viewed with some importance.

The manner in which deference is exercised and how it relates to the circumstances or other reasons given for granting deference should be noted. The Chief Justice deferred on both the "rationality" and "least restrictive means" components of the section 1 inquiry. However, he did so only after applying these criteria to certain aspects of the legislation. Only when he was faced with a matter of "business regulation" did he accept that "simplicity and administrative convenience" were legitimate concerns for legislators and, therefore, great precision was not required on their part in the selection of measures to advance an objective. He stated elsewhere that "courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line".[130] In these circumstances, La Forest J. was prepared to give the legislature greater room to manoeuvre. In particular, where legislation relates to competing pressures, in an area in which a court lacks the knowledge to assess the appropriate balance between those pressures, he was reluctant to review the legislature's choice. As he stated: "In the absence of unreasonableness or discrimination, courts are simply not in a position to substitute their judgment for that of the Legislature."[131]

In summary, the Chief Justice related his exercise of deference to the nature of the particular scheme and the practical nature of government. While La Forest J. was influenced by these factors, he was also motivated by the nature of the particular objective and the presence of competing pressures. The difference between these approaches is that La Forest J. believes that there is a limitation on the ability of courts to assess the appropriate balance of interests which shape the objective and which the means are designed to advance. The result is a broadening of the scope of judicial deference and the room within which the legislature can manoeuvre.

Another series of cases concerned labour relations and whether there was a constitutionally protected right to strike. In *Re Pub. Serv. Employee Relations Act*,[132] the majority of the Court concluded that subsection 2(d) did not guarantee the freedom to strike. However, the Court commented on why it was inappropriate for courts to review

---

[130] *Ibid.* at 782.
[131] *Ibid.* at 806.
[132] *Supra*, note 41.

legislation in this context. As Le Dain J. stated: "The resulting necessity of applying s. 1 of the *Charter* to a review of particular legislation in this field demonstrates in my respectful opinion the extent to which the Court becomes involved in a review of legislative policy for which it is really not fitted."[133]

These sentiments were expressed at greater length by McIntyre J. As well as stressing the expert knowledge required to resolve labour disputes, which he stated the courts do not possess, he noted the specific political sensitivity of this area:

> It is based upon a political and economic compromise between organized labour — a very powerful socio-economic force — on the one hand, and the employers of labour — an equally powerful socio-economic force — on the other. The balance between the two forces is delicate and the public-at-large depends for its security and welfare upon the maintenance of that balance. One group concedes certain interests in exchange for concessions from the other. There is clearly no correct balance which may be struck giving permanent satisfaction to the two groups, as well as securing the public interest. The whole process is inherently dynamic and unstable.[134]

The characteristics of this legislative area, McIntyre J. stated, make judicial review difficult, if not impossible. He concluded that with respect to the trilogy of labour cases,[135] "[n]one of these issues is amenable to principled resolution. There are no clearly correct answers to these questions."[136]

Although the case did not require deference to be exercised, these comments reflect the majority of the Court's view, in this case, of the circumstances which render deference appropriate. The circumstances identified concern legislation which relates to a socio-economic context and which is characterized by complex, political relationships. There are two reasons why deference might be exercised in such a context: first, such circumstances limit a court's ability to assess the merits of a particular means in terms of its actual effects; second, even if the effects of a means can be identified, a court is unable to assess what is the appropriate balance of interests that such means should advance. This latter concern arises in the labour relations context because legislation in this area seeks to balance two competing interests, while accommodating a broader public interest. The former concern relates to an informational problem which affects the ability of a court to review the legislation.

---

[133] *Ibid.* at 392.

[134] *Ibid.* at 414.

[135] *Supra*, note 41; *supra*, note 38; *Retail, Wholesale and Department Store Union* v. *A.G. (Saskatchewan)*, [1987] 1 S.C.R. 460, 38 D.L.R. (4th) 277 [hereinafter *R.W.D.S.U.* cited to S.C.R.].

[136] *Supra*, note 41 at 419.

These concerns also play a role in the Chief Justice's application of section 1 in these cases. *P.S.A.C.*[137] involved an attempt by the federal government to combat inflation, in part, by restricting the ability of its employees to seek improvements in compensation plans for a period of two years, fixing wage increases at six per cent in the first year, and five per cent in the second year. It provided that the existing compensation plans, or the collective agreements or arbitral awards including them, continued to be in force without change. However, it further provided that these could be amended in respect of non-compensatory terms and conditions by agreement only, without the right to strike or to submit the proposed amendments to binding arbitration.

With respect to the application of the rationality component of the section 1 test, the Chief Justice was prepared to grant a high degree of deference. He stated:

> In my opinion, courts must exercise considerable caution when confronted with difficult questions of economic policy. It is not our judicial role to assess the effectiveness or wisdom of various government strategies for solving pressing economic problems.[138]

After stating that due deference to the "symbolic leadership role of government"[139] should be paid and that this "must not be undervalued",[140] he explained what a court's role is in this situation:

> The role of the judiciary in such situations lies primarily in ensuring that the selected legislative strategy is fairly implemented with as little interference as is reasonably possible with the rights and freedoms guaranteed by the *Charter*.[141]

The Chief Justice, although he deferred on the rationality of the general thrust of the measure, assessed the particular means adopted. In this respect, he found that the aspect of the measure which prevented collective bargaining on non-compensatory issues was not rationally connected to the objective of an inflation restraint programme.

In this case, the objective related to a difficult question of economic policy, and the particular scheme related to the reduction of inflation through the regulation of the labour relations of the government. On the matter of economic policy, the Chief Justice exercised a high degree of deference in view of both the limited ability of courts to assess the merits of such policy and the appropriateness of reviewing such a policy. The Chief Justice was prepared to examine the merits

---

[137] *Supra*, note 38.
[138] *Ibid.* at 442.
[139] *Ibid.*
[140] *Ibid.*
[141] *Ibid.*

of the particular scheme used but did so with reference to what was reasonable in the existing labour relations context. It is such a review that the majority felt that courts were ill-equipped to undertake. However, it is relevant that their concerns related more to the dynamics of the labour relations context broadly speaking, while here the legislation was concerned less with employer/employee relations generally than with the government as employer and the broader public interest. Accordingly, in this sense the legislation was "extraordinary" and, therefore, at least the means employed could usefully be compared with the ordinary, less controversial aspects of the regulation of labour relations.[142]

The Chief Justice adopted a similar approach in *R.W.D.S.U.*[143] In this case, he deferred on the issue of the importance of the government objective, though indirectly, by accepting what could be viewed as a slim factual record,[144] and by comparing the particulars of the scheme to what was reasonable in the labour relations context.

The case of *Andrews*[145] involved section 42 of the *Barristers and Solicitors Act*[146] of British Columbia, which provided that only citizens of Canada could be admitted to practice law in the province. The Court found that this legislation infringed section 15 equality rights, as it barred an entire class of persons from certain forms of employment, solely on the grounds of a lack of citizenship status and without consideration of educational and professional qualifications or the other attributes or merits of individuals in the group.

The Court divided into three camps on what was required for a limit to be reasonable for the purposes of section 1. Wilson J. applied the *Oakes* criteria in a standard fashion.[147] Aware of the contrary position being taken by McIntyre J., she prefaced her application of the criteria by stating that the requirement that the objective relate to a pressing and substantial concern remained the appropriate standard in the context of section 15.

In stark contrast, McIntyre J. expressly repudiated the application of the *Oakes* criteria in this context.[148] Some of McIntyre J.'s comments were discussed near the beginning of this paper in the context of

---

[142] For another analysis endorsing the deferential approach of Dickson C.J. *see* D. Beatty & S. Kennett, *Striking Back: Fighting Words, Social Protest and Political Participation in Free and Democratic Societies* (1988) 67 CAN. BAR REV. 573 at 603-10.

[143] *Supra*, note 135 at 478-80.

[144] *Ibid.* at 494, *per* Wilson J. *See also* Petter & Monahan (1988), *supra*, note 4 at 114, where the authors noted Dickson C.J.'s willingness, in this case, to uphold legislation on a slim factual record.

[145] *Supra*, note 11.

[146] R.S.B.C. 1979, c. 26.

[147] Dickson C.J. and L'Heureux Dubé J. concurred.

[148] Lamer J. concurred.

discussing the alteration of the criteria of reasonableness.[149] In this respect, he suggested altering the requirement that the objective relate to concerns which are "pressing and substantial", noting the ". . .broad ambit of legislation. . .dealing largely with administrative and regulatory matters and the necessity for the Legislature to make many distinctions between individuals and groups for such purposes. . .".[150] He suggested instead that the limitation should represent a "legitimate exercise of the legislative power for the attainment of a desirable social objective which would warrant overriding constitutionally protected rights".[151]

McIntyre J. also proposed replacing the *Oakes* proportionality test with the following "factors" that are to be balanced. He stated:

> The Court must examine the nature of the right, the extent of its infringement, and the degree to which the limitation furthers the attainment of the desirable goal embodied in the legislation. Also involved in the inquiry will be the importance of the right to the individual or group concerned, and the broader social impact of both the impugned law and its alternatives.[152]

He then asserted that "[t]here is no single test under s. 1; rather, the Court must carefully engage in the balancing of many factors in determining whether an infringement is reasonable and demonstrably justified."[153]

In support of this clearly more deferential approach, McIntyre J. stated the following:

> The section 15(1) guarantee is the broadest of all guarantees. It applies to and supports all other rights guaranteed by the *Charter*. However, it must be recognized that Parliament and the Legislatures have a right and a duty to make laws for the whole community: in this process, they must make innumerable legislative distinctions and categorizations in the pursuit of the role of government. When making distinctions between groups and individuals to achieve desirable social goals, it will rarely be possible to say of any legislative distinction that it is clearly the right legislative choice or that it is clearly a wrong one.[154]

In his application of section 1, McIntyre J. held that the citizenship requirement "may reasonably be said to conduce to the desired result",[155] that its selection cannot be said to reflect a choice "that is

---

[149] *Supra*, notes 9-15 and accompanying text.
[150] *Supra*, note 11 at 313.
[151] *Ibid.* at 314.
[152] *Ibid.*
[153] *Ibid.*
[154] *Ibid.* at 314-15.
[155] *Ibid.* at 320.

clearly right and one that is clearly wrong"[156] and that "the measure is not disproportionate to the object to be attained".[157] He concluded, therefore, that this was a reasonable limit. In coming to these conclusions he stated that this law concerns a matter of public policy.

La Forest J.[158] agreed with McIntyre J. as to the manner in which legislation is to be approached under section 1. In particular, he noted the "need for a proportionality test involving a sensitive balancing of many factors in weighing the legislative objective". However, he then stated:

> If I have any qualifications to make, it is that I prefer to think in terms of a single test for s. 1, but one that is to be applied to vastly differing situations with the flexibility and realism inherent in the word "reasonable" mandated by the Constitution.[159]

Although this suggests his agreement with the *Oakes* criteria as the single test, he was careful to express his caution in its application. He stated that the appropriate proportionality "cannot be ascertained by an easy calculus", that there will rarely "be a perfect congruence between means and ends" and that in cases of this kind "the test must be approached in a flexible manner". He also stated the factors which he suggests are to be considered in assessing the reasonableness of a limit.[160]

Although he applied the test in a flexible manner and did not refer to the *Oakes* criteria, he nonetheless examined the necessity of the citizenship requirement and stated that while the objectives were legitimate, they "could easily be accomplished by means that would not impair a person's ability to practice law in the province to as great an extent".[161] He concluded, therefore, that this was not a reasonable limit. Accordingly, while La Forest J. was reluctant to adopt the *Oakes* criteria, unlike McIntyre J., they continue to play a role in and affect his application of section 1.

The objective of legal competence may be characterized as a matter of public policy and the measures relate to the regulation of professionals. It is noteworthy that the right was viewed differently by the members of the Court, with the majority attributing greater importance to it than McIntyre J.

The reasons of La Forest J. and McIntyre J. (speaking for a minority of the Court) for granting deference in this context are familiar ones. They referred to the practical limitations on government in

---

156 *Ibid.* at 322.
157 *Ibid.*
158 Joined the majority of the Court in the result.
159 *Supra*, note 11 at 274.
160 *Ibid.*
161 *Ibid.* at 278.

selecting means in this area and the difficulty in assessing whether the proportionality, or balance of interests selected, is the appropriate one.

This case is perhaps most important for the manner in which deference was exercised. As was discussed earlier, La Forest J. and McIntyre J. were no longer content to exercise deference in relation to the application of the *Oakes* criteria. Instead, they attempted to relax the criteria by collapsing or submerging them beneath a more general proportionality test. This was an attempt to infuse the exercise of deference into the formulation of the criteria at the first level of interpretation. The implications of this approach were discussed earlier.[162]

The *Black*[163] case will be considered briefly as it reflects an approach similar to that taken in *Andrews* by La Forest J., with the significant additional fact that La Forest J. is joined by Dickson C.J. and Wilson J. in the majority. Rules were passed by the Law Society of Alberta prohibiting its members who ordinarily reside and practice in that province from entering into partnership with anyone who is not an active member ordinarily resident in Alberta, or from being partners in more than one firm. These rules were directed toward prohibiting interprovincial law firms. A majority of the Court held that these rules violated section 6, the mobility rights provision of the *Charter*. The Court considered whether the rules were justified under section 1.

La Forest J. stated that the section 1 inquiry involves two steps: a consideration of the importance of the objective and a proportionality test. However, his elaboration of the second step was vague and unrelated to the *Oakes* criteria. In particular, in referring to his comments in *Edwards Books* concerning the need to give the legislature room to manoeuvre in dealing with matters of social policy, he suggested that the term "reasonable" connotes "flexibility".[164]

Both the reasons for and manner of granting deference in this instance are similar to those identified in *Andrews*. The circumstances are substantially similar as well. The objective was characterized as relating to public policy, the measures relating to the regulation of professionals and the right in question (mobility) of some importance.

While La Forest J. distanced himself from the more specific components of the *Oakes* proportionality test, as he did in *Andrews*, there appears to be a vague structure to his analysis that reflects the criteria. For instance, in his assessment of the proportionality of the measures, he considered a series of "purported justifications" for the prohibition on interprovincial law firms. In doing so, he questioned whether the concerns expressed were advanced by the prohibition. While no reference was made to the rationality standard, he was clearly

---

[162] *See supra*, note 20 and accompanying text.
[163] *Supra*, note 17.
[164] *Ibid.* at 306.

concerned with the rationality of the relationship between the more particular concerns put forward and the impugned measures. He also considered whether there were other means of achieving the government's objective and concluded that "[t]here are many reasonable alternatives for obtaining the legislative purpose aimed at without so drastically affecting these mobility rights."[165] Accordingly, he held that this was not a reasonable limit.

It is important to recognize in these two cases a movement (primarily by a minority of the Court) toward watering down the proportionality test at the first level of interpretation, in order to achieve a greater degree of deference. However, this should not be seen as a dismissal of the relevance of the *Oakes* components of this criterion, even in circumstances where deference may be appropriate.

3. *Summary*

It is important to formulate a coherent statement as to the circumstances surrounding the reasons for, and the manner of, granting deference in the application of section 1.

The relevant circumstances to be identified relate to the nature of the objective, the nature of the measures utilized to achieve that objective and, to a lesser degree, the importance of the right involved. The cases discussed earlier illustrate that objectives which relate to social[166] or economic policy,[167] or matters generally relating to public policy, are likely to receive a more deferential application of section 1.[168] The measures which attract deference are often regulatory or administrative in nature.[169] Finally, where the objective or measure is as described above and the infringement is of a relatively minor nature, courts may be more likely to defer.[170]

The relationship between the presence of these circumstances and a deferential application of the *Oakes* criteria is supported by noting those circumstances in which a relatively strict application of the criteria has occurred. Where the objective has related to the suppression of crime or the administration of justice and the measures formed part of a judicial or quasi-judicial process, the *Oakes* criteria have been

---

[165] *Ibid.* at 312.

[166] *Supra*, note 11; *supra*, note 31; *supra*, note 17. *See also Jones*, *supra*, note 102, which reflects a deferential application of the *Oakes* criteria.

[167] *Supra*, note 38.

[168] The categorization of legislation of this nature by the Court, as compared to criminal law, as appropriate for a deferential approach to s. 1, has also been noted in terms of socio-economic reform/criminal justice, and simply non-criminal law/criminal law. *See* P.H. Russell, *Canada's Charter of Rights and Freedoms: A Political Report* [1988] PUB. L. 385 at 397-98 and Petter & Monahan (1988), *supra*, note 4 at 68-69.

[169] *See supra*, note 166 and 167.

[170] *Jones*, *supra*, note 102.

applied relatively more strictly.[171] One case which is not in accordance with this observation is *R.* v. *Schwartz*.[172] The Court was divided on the application of section 1, with two of its members[173] applying the *Oakes* criteria rigorously and the majority,[174] in obiter, applying the criteria deferentially. One factor relevant to the majority of the Court was that they found the infringement of the *Charter* right to be relatively trivial.[175] It was suggested above that the relative importance of the right might play a limited role in the decision as to whether to exercise deference. It may be expected to play a more important role in approaches of courts to the future application of the criteria.

Perhaps it is more instructive to recognize the reasons deference is granted than it is to point to those circumstances in which deference has been and is likely to be granted. The first of these reasons concerns a recognition by the Court of practical difficulties in assessing the reasonableness of a limit, these difficulties arising either because of the practical nature of government or as a result of the type of scheme involved. This involves a recognition that the practical business of government and the nature of the legislative process may themselves limit the availability of certain alternatives. In such cases, it would be inappropriate for the Court to point to such an alternative as a less restrictive means, as such means may not realistically be available. The second reason concerns the Court's recognition of institutional limits on such an assessment as a result of a lack of knowledge with respect to, for example, labour relations matters or the merits of pursuing different strategies concerning economic policy. The ability of courts to assess the rationality of measures and to assess the availability and appropriateness of alternative schemes is often lacking. The third reason is a reluctance to pass judgment not on measures, but on the policies, or balance of interests, reflected by them. This is tied to the inability of either the legislature or the court to demonstrate the actual merits of a policy as seen in light of the *Charter*. Where this question of demonstrability arises, a court's decision to exercise deference is motivated by its view of its role vis-à-vis the legislature in the particular context and, more generally, in the application of the *Charter*.[176]

---

[171] *See supra*, note 5; *Hufsky*, *supra*, note 71; *R.* v. *Thomsen*, [1988] 1 S.C.R. 640, 63 C.R. (3d) 1 [hereinafter *Thomsen* cited to S.C.R.]; *supra*, note 51; *supra*, note 66; *Canadian Newspapers*, *supra*, note 62; *B.C.G.E.U.*, *supra*, note 102; *R.* v. *Smith*, [1987] 1 S.C.R. 1045, 58 C.R. (3d) 193.

[172] [1988] 2 S.C.R. 443, 66 C.R. 251 [hereinafter *Schwartz* cited to S.C.R.].

[173] Dickson C.J. and Lamer J.

[174] McIntyre J. wrote the majority judgment.

[175] *Supra*, note 172 at 492-93.

[176] The first two reasons for granting deference relate to functional concerns while the third relates to a prudential concern. *See* L. Tribe, AMERICAN CONSTITUTIONAL LAW (Mineola, N.Y.: Foundation Press, 1978) at 71 n. 1.

The manner of deference is closely related to the reasons for exercising deference. Where either acknowledging the practical nature of government or an institutional competence to assess alternatives is in issue, deference is likely to be case and criterion specific. In these instances, the room to manoeuvre will be determined by the specific circumstances faced by the courts. Although the members of the Court appear to differ on the importance of this factor, one might expect a more consistent approach as to its influence on the exercise of judicial deference. On the other hand, where the Court defers because it is unable to demonstrate whether the policy adopted by the legislature satisfies the requirements of the *Charter*, there is more likely to be a disagreement as to the appropriate manner of deference. Arguably, where the members of the Court have been divided on the appropriate scope of judicial deference, it has been a function of the degree to which they have been prepared to review such matters in light of the *Charter*.[177] Although the manner of deference generally has been to exercise deference in the application of the *Oakes* criteria, there have been attempts to infuse deference into the formulation of the criteria. Concerns related to this approach, such as the need to retain clearly defined criteria and the need to justify the revision of the criteria with reference to the particular circumstances to which they apply, were discussed earlier.[178]

It is difficult to evaluate the Court's approach to the issue of judicial deference without putting forward a theory of the proper scope of judicial review. The object of this discussion has been primarily to illustrate the concept of judicial deference and how it is manifested in section 1 of the *Charter*.

IV. Conclusion

At the outset of this discussion two distinct aspects of the term "reasonable limits" were identified. The first concerned the qualities which a limit should possess in order to reflect the importance of the right in question. The second is responsive to the first and takes into account the difficulties present in assessing the reasonableness of a limit.

The first aspect of the term "reasonable limits" gave rise to the formulation of the *Oakes* criteria. In exploring the meaning of the *Oakes* criteria it was seen that the concepts and requirements embodied in the criteria require elaboration. It was noted that, to the extent that the meaning of these terms remains flexible, the criteria play a lesser role in directing and constraining the assessment of the reasonableness of a limit. An examination of the Court's application of these criteria suggests that more precision in defining the relevant terms is needed.

---

[177] *See also* the comments of Elliot, *supra*, note 4 at 337-40.

[178] *See supra*, note 20 and accompanying text.

An exploration of the application of the *Oakes* criteria drew attention to the distinct analytical steps involved in the application of each criterion. The identification and separation of these aspects of the analysis illustrated that widespread claims of the subjective nature of this analysis are misleading. The proper characterization and identification of the objective and its relationship to the impugned and alternative measures was seen as a necessary part of a clear and coherent application of the *Oakes* criteria.

Through this exploration of the definition and application of the *Oakes* criteria, it became apparent that the Court had a limited ability both to evaluate the *Oakes* criteria and to demonstrate that the criteria were satisfied. The Court's response was to exercise deference in the application of the criteria. The reasons for such deference and the manner of exercising deference varied.

The exercise of deference, as a response to difficulties in assessing whether the *Oakes* criteria are satisfied, reflects the development of the second aspect of the meaning of the term "reasonable limits". Although the exercise of deference in the application of the criteria attempts to accommodate these difficulties, a more recent response by some members of the Court has been to suggest that the criteria themselves may not permit sufficient deference in the circumstances. In this respect, the components of the proportionality test, as they apply in certain circumstances, have been the primary focus of suggestions for revision.

This development illustrates the dynamic relationship between the first level of interpretation, where the reasonableness requirement is given content, and the second level of interpretation, where that content is applied to specific circumstances. An appreciation of the relationship between these two levels of interpretation is necessary to ensure the formulation of appropriate criteria of reasonableness and the proper application of the criteria in particular circumstances.