Limiting Rights, Canadian Style:
The Supreme Court of Canada, American Jurisprudence and
Section 1 of the Charter

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Abstract

The addition of the Charter of Rights and Freedoms represented a fundamental shift in Canadian governance. Many saw the tabling of such a document as a further, even final, step towards the Americanization of the Canadian polity. While the Charter’s presence has significantly altered the relationship between citizens, government and the courts, it has done so by maintaining the traditional values and experiences that has been the hallmarks of Canadian constitutionalism. This is in contrast to the fears harboured by critics suggesting that the Charter was a further Americanization of the Canadian Polity, notwithstanding the very different natures of the American Bill of Rights and the Canadian Charter. Analyzing American Supreme Court precedent use by the Canadian Supreme Court has demonstrated that such an Americanization has not, in fact, occurred. In the present analysis of American precedent use in section 1 limitation of rights cases, the citation of these precedents are at best episodic, at least on the quantitative level. Qualitatively, the Canadian Supreme Court generally uses American jurisprudence to further support broad definitions of ‘great rights’. As for the more intricate details of rights limitations and the process involved in determining how Charter rights are limited, one would be hard pressed to find even cursory references to American case law.
Acknowledgments

The decision to undertake such a project was made with the usual disregard that I have for doing things the easy way. As the scope of the original proposal narrowed, the amount of research involved seemed to escalate: a scenario not anticipated. Throughout, there has been valuable assistance, guidance and lessons learned.

First and foremost, recognition must go to my thesis committee. Garth Stevenson, in the supervisory role, provided, in his terse and direct style, a general theme on which to focus. His helpful and, at times, brutally honest comments and suggestions always gave 'food for thought' if not (additional) 'pages to thesis'. The antithesis to Professor Stevenson's direct style is Carl Baar. Without his excruciatingly detailed comments, suggestions and ideas (not to mention anecdotes about every judge and academic in the known universe), this thesis would still be in its infancy. Notwithstanding personal adversity, Professor Baar continued to provide his meticulous eye for academic precision with his trademark cheerful demeanor. Meeting my demands for his time under such circumstances, went well above and beyond the call of duty and is not a fact I will soon forget. Finally, Ingrid Makus provided cohesion to the original raw, unsanitized versions of chapters. Although my mangled sense of writing has prevented this from becoming a piece of great academic prose, it is at least staring in that direction due to her guidance.

Recognition must also go to Fran Meffe, whose smile and laugh eased much of the tension - real or imagined - that was faced. Her complete attention to my (usually) inane requests, unfailing receptiveness to my upturns, downturns and occasional streaks of silence, and gentle yet strategically timed prodding against my flagrant and consistent disregard for administrative deadlines, makes me realize just how easy I had it. In the end, I may not be any wiser, but I certainly am richer.

The quantitative analysis of chapter five was presented at the annual conference of the British Columbia Political Studies Association (University of British Columbia, Vancouver, 14-15 May 1999). Professor Colin Bennett (University of Victoria), as paper discussant, clarified the approach towards making conclusions drawn from quantitative data. I hope I took good notes. Professor Michael Howlett (Simon Fraser University) challenged my thinking about issues I had never considered. They have been given serious consideration since.

Special recognition goes to Professor Ted Morton (University of Calgary). If I had not registered for Poli 343, this would never have been written.
I have been told that one knows who their true friends are when they continue to be at your side in your seemingly bleakest hour. When all else appears to be crumbling around you, there are the select few who disregard the inevitable changes in ones’ human character, and continue to provide the reassurances and support necessary as they patiently wait for what is the equally inevitable return to ones’ true self. Three men define this trait. Each are so very different yet their core beings are so very much the same. To Dan Crow, Jonathan Sears and Richard Delano I say at the same time and with equal vigour, I am sorry and thank you.

Two fine women made similar impacts. To Rosa, despite it being your job, you went beyond and actually cared, and to Sharon whose energy and perennial smile made me (thankfully) forget about other things.

Finally, although our differences are glaring, it is still easy to see the relation. A finer sister in incomprehensible. Giving me refuge - in its various forms - is not forgotten.
Dedication

The lessons my parents have taught me were not usually of the verbal variety. And when they were they were never from a rehearsed speech. They came, rather, in impromptu situations that called for the true character of the human being to stand out.

Mom's commitment to her family is unwavering. Our joys delight her. Our sorrows pain her. The adversity and sheer pressure unjustly placed on her for the majority of this decade would have made a lesser woman break. And she nearly did. But her strength, resolve and defiance towards the inequities of life stands as a marker to which others should be judged. She defines the adage 'grace under pressure' and is a model for those who believe in the power of the mind and spirit to triumph in the face of seemingly endless darkness. When placed in proper, relative perspective, this project is an inconsequential footnote. I can only hope that it provides her with a small measure of pride and satisfaction.

Never one to accept recognition, let alone accolades, Dad preferred concentrating on the simpler pleasures of family. While he always made sure not to allow various successes to go to our heads, he was nevertheless the first to announce such accomplishments to those he knew, as only a proud father could. His constant mantra involved looking ahead; readying oneself for the inevitable challenges and changes that life thrusts on each one of us. And he was always ready. His fight, drive and yes, stubbornness, left us equally frustrated and awed. It is a shame that one never realizes what they have until it is gone. In retrospect, the opportunity to leave home allowed me to find out who my father actually was and it is only now that I begin to appreciate and truly feel his impact. In his words, but mostly deeds, he has prepared me for what lies ahead. While I still manage to fail, thoughts ultimately turn towards the future: a path that he said must always be taken even if 'por fuerzas'. Dad will never be able to announce this relatively inconsequential accomplishment but its completion has his fingerprints all over it.
The inception of the *Canadian Charter of Rights and Freedoms* in 1982 is the seminal event in Canadian history. With a series of signatures, Canada’s political dynamic took a bold and controversial new course. The controversial nature of this course exists not only on the political front with the ‘exclusion’ of the province of Quebec as a signatory to the new constitution, but on equally important social and legal fronts where the *Charter*, as the “supreme law of Canada”, became a new avenue for individual Canadians and governments to challenge legislation.

This new avenue included a new forum for redress in the form of the judicial branch of government. The courts were obviously not a new creation enacted by the Constitution Act of 1982. What was new was the power of review the courts were now mandated to employ. Rather than simply determining which level of government had

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2 Four signatures in total. Queen Elizabeth II (Queen of Canada and Head of State); Pierre Elliott Trudeau (Prime Minister of Canada); Jean Chrétien (Minister of Justice and Attorney General of Canada); André Ouellette (Minister of Consumer and Corporate Affairs).
3 The negotiations between the federal and provincial governments in the months and days leading up to the final agreement have been extensively analyzed. A beginner’s list of materials covering this period of Canadian political history includes Richard Simeon and Keith Banting eds., *And No One Cheered: Federalism, Democracy and the Constitution Act* (Toronto: Methuen, 1983) and Roy Romanow, John Whyte and Howard Leeson, *Canada ... Notwithstanding: The Making of the Constitution 1976-1982* (Toronto: Carswell/Methuen, 1984).
4 Section 52(1) reads: “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”
jurisdiction to enact legislation, which was the essence of the courts’ constitutional interpretation capabilities before the Charter, they now had the power to review government legislation in accordance with the individual rights guaranteed in the Charter. This addition to the courts’ function “has proved to be a substantial expansion of judicial review”.

Judicial review is not new to Canada. Its basic premise lies in determining which institution should have the final say in deciding the validity of government legislation - the elected representatives who are held accountable every four (more or less) years through elections, or unelected and unaccountable (in this political sense) judges who base decisions on technical, legal grounds rather than the give-and-take of politics which allows for compromises in legislation. With respect to the Charter, the courts have been handed a document that mandates judges to review legislation on human rights grounds. This is an important advance in Canadian jurisprudence and law making. The courts, and for the purposes of this study, the focus will fall solely on the Supreme Court of Canada, can set out guidelines under which legislation must fall. The Supreme Court, as the final court

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of appeal, has carried through this function by rendering judgment in controversial decisions. This, however, is not necessarily the problem that some commentators have with the Court's pronouncements. Rather, their ire is directed at the supposed finality of decisions - what Knopff and Morton call the "oracular" nature of the Court. Most could accept the Court as a vital institution operating within a free and democratic society, rendering decisions - contentious or not - on the issues that come before it. But, it is the idea that once the Court speaks no one, not even the law making bodies, can alter what has been decided regardless of how much the decision affects public policy concerns instituted by the legislatures. Given this new-found tension between law and politics, it is no surprise that this area of Canadian political science has taken on a life of its own since the Charter's introduction.

If judicial review, at least on federalism grounds, is not a new phenomenon in Canada, how has the Court been able to shift its focus to reviewing legislation on human rights grounds? Do judges have an inherent ability to rule on the validity of legislation based on fundamental yet general concepts of individual rights? Common sense would dictate that the Court has had some help in this regard. The obvious and favourite choice is the experience of the United States Supreme Court and its use of the power of judicial

7 Three such decisions are: Singh v. Minister of Employment and Immigration [1985] 1 SCR 177; Ref. re: BC Motor Vehicle Act [1985] 2 SCR 486; Ford v Quebec (AG) [1988] 2 SCR 712
8 Knopff and Morton, supra, note 5, chap. 7 "The Oracular Courtroom"
9 There are two major safeguards that prevent this illusory fear from becoming reality. The first is found in the Charter of Rights itself in the section 33 'notwithstanding' clause which allows governments to enact legislation notwithstanding the Charter rights enumerated under sections 2 and 7-15 (inclusive). There is also the possibility for constitutional amendment to effectively overturn a Court decision. Both safeguards are themselves difficult to utilize, for various reasons, but the fact that they are available is a reassurance against the possibility of Court-made law.
review.\textsuperscript{10} With over two hundred years of experience, it should come as neither a surprise nor an unwelcome act that the Supreme Court of Canada looks to its American counterpart for guidance.

**Thesis Intentions**

The underlying purpose of this study is to dispel what is at best an exaggeration and at worst a myth regarding the Canadian interpretation of rights. That is that with the advent of the *Charter*, and the crucial role that the general limitation clause of section 1\textsuperscript{11} plays in it, there has been an 'Americanization'\textsuperscript{12} of our Supreme Court in terms of how it makes its decisions. Concerns were raised when the *Charter* came into effect about how the Court would react to this new American-style rights document. While the arguments demonstrating an Americanization of the legal system, including increased litigation and interest group activity at the Supreme Court level (as well as lower courts) are convincing, the actual decision-making process of the Court and the influences on it have not changed dramatically. Of course there is a new threshold of validation - human rights. But, as


\textsuperscript{11} Section 1 reads: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits, prescribed by law as can be demonstrably justified in a free and democratic society." For a more detailed explanation of section 1 see infra, chaps. 3 & 4.

\textsuperscript{12} 'Americanization' is used here to describe the supposed creeping American jurisprudence that is finding its way into Supreme Court of Canada decisions. It is not meant to describe the evolution of the entire Canadian judicial process since the *Charter*’s inception. Most commentators would agree that there has been a sizable shift in Canada towards the American penchant for litigation and a stronger, interventionist form of judicial review of government legislation. My aims are to show that the Court, when it does turn to the United States Supreme Court for help, does so for that purpose only and not for outright answers and
Chief Justice Antonio Lamer has pointed out, governments and other interested observers of the Court should realize that it has not "gone berserk ... striking down laws left and right."\(^{13}\)

Section 1 of the Charter demonstrates the eternal balancing between individual liberty and collective safeguards that make up the Canadian rights dialogue. By comparing 'our' model of interpretation with 'their' model (the American), our model can be seen for what it is: ours. As Patrick Monahan correctly asserts "[t]he key to unlocking [the Charter's] secrets does not lie in an alien culture, but in the Canadian political tradition itself."\(^{14}\) Thus, the overarching question guiding this entire exercise is 'what amount of influence has American Supreme Court jurisprudence had on Supreme Court of Canada decisions when the section 1 limitation clause is employed'? Put another way, when the Canadian Supreme Court determines that a Charter right is to be limited, how much American jurisprudence influences the Court's decision? Through this examination, it will be clear that the Court performs its duties in its own way, considering a host of historical, political and cultural variables different from its American counterpart.

**Significance of Research**

This is not intended to be an exercise in the unofficial yet sacred Canadian past-

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time of criticizing things American. On the contrary, American institutions and traditions should command our deep respect and admiration if only because they have survived intact after 200 years of democratic existence.\(^{15}\) The significance of the exercise, rather, comes in defining and distinguishing aspects of our socio-legal culture, especially since the Charter's birth. Since there is no general limitation clause in the United States Constitution, section 1 can be viewed as a "uniquely Canadian mechanism through which the courts are to determine the justiciability of particular issues that come before it."\(^{16}\) This is in contrast to the libertarian flavour of the original American Bill of Rights\(^{17}\) where individual rights are seemingly absolute and supposedly free from any limitations. This, of course, is impossible. No right is inalienable. That is why the United States Supreme Court has taken it upon itself to 'find' the limitations that are required by a democratic polity in order to balance the interests between different groups. It has done so by "[implying] qualifications on the rights" through what has been termed "judicial legislation, and without any express direction from the Bill of Rights."\(^{18}\) Given the "wealth of experience"\(^{19}\) of the American Supreme Court, it is important to determine if limiting 'our' rights is a true Canadian exercise or if it has been a re-wording of American jurisprudence on similar issues. By gauging the amount of external influences on our

\(^{15}\) Stephen Griffin reminds us that American, and for that matter western, democracy is largely a product of the last one hundred years only. He further narrows the scope of the definition to claim that "the United States began to become a contemporary democracy only after World War II". See Griffin, American Constitutionalism: From Theory to Politics (Princeton: Princeton University Press, 1996), chap. 3. His views in this regard are heavily influenced by Arend Lijphart in Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries (New Haven: Yale University Press, 1984).

\(^{16}\) Operation Dismantle v. The Queen [1985] 1 SCR 441.

\(^{17}\) Constitution of the United States of America, Amendments I - X (Passed by the Congress 25 September, 1789; Ratified by 3/4 of the states 15 December, 1791).

\(^{18}\) Hogg, supra, note 5, p. 853.
Supreme Court, at least within the confines set out in this study, one can begin to explore aspects of American jurisprudential influence thereby adding to the small but growing literature into this area of Canadian political science.

This thesis will focus on the section 1 limitation clause of the Canadian Charter of Rights and Freedoms, the most important section of the Charter in terms of judicial control over what is or is not acceptable government action. Since section 1 has no American counterpart, a marked difference between the function of each supreme court is evident when it comes to the almost universally accepted notion that few, if any, rights are absolute. The American Court has responded, generally, by imposing “definitional limits on the literal wording of the protected rights.”\(^{20}\) In other words, limits are read into the guaranteed rights. The Canadian Court performs this important task in a more legitimate manner by virtue of section 1’s presence. Spelling out how the Court defines what are “reasonable” limits and what, if any, influence American jurisprudence has had in this process are two of the major goals of the succeeding chapters.

The decision to focus on the limitation clause of the Charter is threefold. The first reason is, simply, that an analysis of American jurisprudential influence on section 1 Charter cases has not been carried out as of yet. Two similar, major studies examining criminal law under the Charter and the role of American precedents have been completed.\(^{21}\) The first study concluded that a full measure of the role of American

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20 Knopff and Morton, supra, note 5, p. 40.
jurisprudence in Canadian Supreme Court decisions could not be made until a more
detailed examination of section 1 was made in this regard. This, therefore, is an attempt at
filling that gap in the literature.

The second reason is that section 1 embodies the entire judicial review debate. By
allowing the Court to (at times) decide if the collective will of the peoples’
representatives supersedes the rights of individuals granted in the Charter, section 1
becomes the most important section of the entire Charter of Rights. As David Beatty
succinctly puts it, “[s]ection 1, not the substantive sections in which rights and freedoms
are entrenched, is where all the action takes place.”

A final reason for examining section 1 alone is to determine the manner in which
the Canadian Supreme Court interprets rights guarantees and their limitations in the face
of American experience. Since there is no general limitation equivalent in the American
constitution, how has the Supreme Court of Canada dealt with precedents where the
United States Supreme Court does, in fact, impose limits on rights but does so through its
own initiative, without the legitimacy of a constitutional provision allowing it to do so?
Conversely, how has the Canadian Court dealt with precedents where its American
counterpart upholds rights against a legitimate collective interest? How the Court
interprets these decisions is important in gauging how it views section 1 and how broadly
or narrowly it feels the clause should be interpreted.

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Beatty, supra, note 5, p. vii.
Chapter Outlines

This introductory chapter has provided a brief glimpse into the definitions of and the role played by the institution of judicial review in Canada and the United States. This large topic is not the ostensible focus of this essay yet a taste of the underlying force of constitutional bills of rights and how their interpretation complements or clashes with traditional decision making institutions is, nevertheless, required.

Chapter two will elaborate on the traditional conceptions of judicial review in both the American and Canadian context. The differences between political structure and rights and the dynamics of the law-politics divide between the two nations will become evident as both the American experience with a bill of rights and the Canadian preservation of the British parliamentary tradition are discussed.

Chapter three will examine in greater detail the section 1 limitation clause of the Charter. It will also include an overview of the section’s genesis detailing the external influences on its development. Although there is no section 1 equivalent in the American Constitution, it will be demonstrated that there are ample European equivalents to section 1 that played a significant role in its evolution and, by extension, to the development of the Charter as a whole. I will not stake out a position here as to what degree the Charter encompasses American versus ‘other’ influences but I will claim that the inclusion of a limitation clause was mostly a product of other international experiences with human rights charters and covenants. Our contribution to express rights limitations were tailored to meet our needs. The Charter framers did not have to be convinced of some ‘foreign’ theory of rights limitation to preserve order and the respect of minorities, among other
things. Section 1 is a practical and realistic part of our rights document, the purpose of which was advanced long before the Charter negotiations began.\textsuperscript{23}

The specific outline of the third chapter will include an examination of the general theories behind rights limitations, focusing on two fundamental questions that underlie them. The first is why rights must be limited. Given the importance of individual right safeguards in a liberal democracy, the acknowledgment of the need to limit such fundamental aspects of a citizen’s role within the state must be addressed. The second question discussed is how rights are limited. If the first question is the theory behind rights limitations, this second question is the practice of rights limitation. An examination of how other systems have carried out limits to rights is a proper comparative exercise to undertake before focusing on the Canadian answer to this very question. What follows this is a substantial overview of the evolution of the text of the general limitation clause in the Canadian Charter. Over a decade’s worth of negotiations, meetings and various draft wordings of the eventual section 1 text will be analysed. A final brief section outlining various foreign (non-American) influences on the text of section 1, and the Charter as a whole, will also be touched upon.

Chapter four will consider how section 1 has been interpreted since it came into effect. If the wording of section 1 constitutes the culmination of an ‘evolution’ of the limitation clause, then the Court interpretation stage of it can be considered the ‘second’

\textsuperscript{23} Part I, section 1(a) of the Canadian Bill of Rights (S.C. 1960, c. 44) states a specific limitation clause, viz.; “It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
evolution of section 1. This evolution is in the way the Supreme Court has interpreted the section - what it has determined to be the criteria for limiting rights and therefore, the criteria for determining which government legislation is to be 'saved' from the stigma of being labeled 'unconstitutional'. For a court, be it a lower level court through to the Supreme Court, to be handed a section that calls for rights to be 'reasonably' limited so long as the limit is "prescribed by law" and that it can be "demonstrably justified in a free and democratic society" is, to say the least, a daunting task especially if the preceding are the only guidelines. Needless to say, section 1's interpretation has gone through this second evolution.

Chapter five is the crucial portion of the thesis. In order to gauge the depth of American jurisprudence used in Canadian Supreme Court decisions, a rigourous analysis of individual cases is necessary. With any analysis of cases, there will be various types of data to be collected. These data will be presented in two major categories: a quantitative analysis and a qualitative analysis.

The quantitative analysis is itself presented in three distinct categories. The first is the 'raw' numbers that demonstrate the number of American Supreme Court citations used by the Supreme Court of Canada throughout the 13 year period that this study focuses on (1984-1996), as well as a year-by-year breakdown of the same. These are

(a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law."

24 It is true that notwithstanding the upholding of a statute through section 1 justification, the 'stigma' remains, but in the 'win/lose' atmosphere that prevails in the Court setting, a victory remains a victory, no matter how 'back door' it may come about.

25 The quantitative data will also show the number of lower-level American court citations used as well as 'other' foreign court citations used (non-American). Of course, the number of Canadian precedents used will also be displayed.
termed, respectively, the 'overall' and 'evolutionary' figures. 26

The second set of 'raw' numbers involves the further breakdown of the 'evolutionary' figures on a case-by-case basis. Illustrating the use of American precedents on a per case basis will demonstrate a certain degree of concentration of US citations in a select few cases, but as will be demonstrated, the context in which these precedents are used indicates that there is no strong influencing wave originating from the US Supreme Court.

The third and final set of numbers provided is the correlation between the number of American Supreme Court precedents cited in cases where the Canadian Court either 'saves' legislation or when it does 'not save' legislation. Saving legislation, as was alluded to earlier, is when the Court rules that a certain provision is unconstitutional but, after considering whether such an infringement is one that is reasonable enough to impose against the guarantee in the Charter, the Court finds the 'unconstitutional' measure constitutional by declaring it a 'reasonable limit' thereby 'saving' it from being struck down. The legislation is essentially granted a stay of execution. Conversely, 'not saving' legislation means that the Court could not find that the offending legislation was 'reasonable' enough and therefore has no option but to strike down the whole provision or only those sections that are ruled as unreasonable violations.

The guiding hypothesis for this portion of the analysis concerns the relationship between citation use and the comparative idea of rights between Canada and the United States. Briefly stated, given the more absolute nature of rights in the US, confirmed in the

26 See Appendix A, Tables 1 & 2, infra.
US *Bill of Rights,* it is reasonable to hypothesize that US Supreme Court precedents will be cited more often in decisions where the Canadian Supreme Court rules that legislation is both unconstitutional and ‘unsaveable’ under section 1. In this scenario, the *Charter* right remains paramount and therefore the possibility of American precedent use to support this outcome is high. Of course, it would be foolish to suggest that each time this may occur the spectre of American jurisprudence haunts the hallways of the Canadian Supreme Court. Nevertheless, it is in this third section of the quantitative analysis that this type of issue will be addressed.

The second major category presented in order to gauge the depth of American jurisprudential influence on the decision-making of the Canadian Supreme Court is a qualitative analysis of specific policy issues and how the Canadian justices employ American Supreme Court jurisprudence in determining limits on these issues. Gauging how much American jurisprudence was relied upon in helping the Court come up with their decisions in various areas of policy is vital in determining whether our Court decides issues in its own way with its own unique document. More so than individual cases, policy issues raised by a number of similar cases that have American jurisprudential fingerprints on them should give one pause to consider how ‘Canadian’ issues are truly being decided.

A brief mention must be made as to the relationship between two different yet important chapters. 27 Chapter four provides an analysis of the interpretive evolution that

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27 I thank Professor Ingrid Makus for pointing out that I potentially had two theses on my hands and that a brief reminder of what the relationship is between the two major components of this study was necessary.
section 1 has undergone by the Supreme Court of Canada. Chapter five follows for two main reasons. The first is that the chapter outlines how much American Supreme Court jurisprudence has affected section 1’s interpretive evolution. In other words, throughout the exercise undertaken in chapter four, which concentrated on the Canadian Supreme Court’s words, chapter five attempts to find if at least some of these words, were influenced by the words of its southern cousin.

The second reason focuses on the consistency by the Court in its section 1 decisions. The analysis of policy issues in the qualitative section of chapter five provides a strong indication as to whether the interpretive evolution discussed in chapter four has been adhered to using a different form of analyzing variable, namely issues of public policy. Furthermore, any marked divergence between American Supreme Court precedent use of the variable determined by policy in chapter five and the variable determined by time in chapter four, can be isolated.

The underlying theme conjoining the two chapters can itself be found in chapter two. The historical review of the different conceptions of state and the institutional safeguards decided upon to best protect the two countries’ respective citizens, is a mantra that the Canadian Supreme Court regularly takes pains to declare. The consistency between the conclusions of these two chapters will determine if these pronouncements made by the Court are reflected in their decisions.

Finally, chapter six will summarize the various findings in the preceding chapters. As with any piece of academic work, this will not be considered the final word on the subject. But in sounding out the implications of the study further, focused work can
continue to chart the Supreme Court’s use of American and other foreign precedents.

**Methodology**

Two types of material that will be used in the collection of data and in the overall research of this study. The first involves the use of the relevant academic literature which discusses general theories of Supreme Court jurisprudence in both Canada and the United States, the limitation of rights and the law-politics divide. This literature is not restricted to professional commentators. The musings of Supreme Court justices on important socio-legal issues found in writings outside their written, legal opinions, will be included. Not only do such writings provide an opportunity for commentators to gain insight on the stances that some of the justices take, but it also provides the justices with an opportunity to defend themselves against attacks on various of their decisions rendered, albeit in a veiled, polite fashion.

The second type of material that will be used is decisions by the Supreme Court taken from the official reports. Both the quantitative and the qualitative analyses of the section 1 cases will originate from the decisions handed down by the Court.

**Limitations**

The focus of this exercise has had to be narrowed considerably from its original plan to study American jurisprudential influence on all *Charter* decisions. Even now, regardless of the specific nature of what will be examined, various limitations have had to
be placed on the research parameters. These involve such areas as the data to be collected to the definitions of what does and does not constitute 'section 1 cases'.

The overarching theme of these self-imposed limits is 'what gets counted'. As Carl Baar has not failed to tell me on more than one occasion, the first rule of politics is "if you can't count, you can't play". The first such limitation imposed involves determining what counts as a section 1 case. First, when section 1 is used and becomes a major component of the decision - that is when the Court decides whether or not to 'save' legislation - then such a case will be counted as a section 1 case. Second, if the Court considers section 1 in its decision but does not elaborate on the reasoning because it agrees with a lower court's ruling on the matter, this case will also count as a section 1 case. Admittedly, one would think that the Court would nevertheless elaborate on such a decision especially if it planned to save the legislation. Conversely, one would also expect the Court to elaborate, although perhaps not in as much detail, if it did not plan to save legislation. This second type of section 1 case accounts for the possibility that the Court will simply agree with another court's ruling. If the Court feels that it need not elaborate, the case should not go uncounted. Given the Court's penchant for writing however, one would expect this to be a rare occurrence indeed.

The second limitation logically follows the first in terms of deciding what does not count as a section 1 case. Essentially, if section 1 is mentioned (for example in the 'Statutes and Regulations Cited' section of an official decision), but is not considered by the Court, then the case would not be considered a section 1 case. In other words, if the Court does not consider section 1 to be relevant in the case, regardless of what a lower
court has said, then its refusal to elaborate constitutes section 1 playing no role in the outcome of the case and therefore does not count for the purposes of this study.

The variation between what does not constitute a section 1 case and the second scenario for what does count as a section 1 case, is slight. Not considering section 1 at all may be considered a disapproval of it in the particular case at bar. The situation I refer to however, concerns when the Court does not consider section 1 at all because it is not relevant or 'usable'. Those decisions when the Court has rejected a section 1 argument because the government has not provided strong arguments in favour of limiting the right at issue, which is to say that a test of some sort was considered, are counted because the section 1 arguments were examined as part of the decision and not considered irrelevant. The fact that the Supreme Court may agree with a lower court decision pertaining to the section 1 issue does not detract from its importance or relevance to the decision. If one is curious as to why the Court agrees with the decision of a lower court, regardless of whether they accept or reject section 1’s use, then the decision of the lower court can be read to review the arguments the Court agrees with.

A brief overview of the foreign citation use is necessary. With respect to what gets counted, essentially everything does. American Supreme Court citations are the focus of this study but the precedents of American lower courts and foreign courts will be counted as well. Also, the citations will come from all the written opinions in each section 1 case. This includes the majority opinions, concurring opinions and dissenting opinions. It goes without mentioning that a citation will only be counted once per case notwithstanding if it is used multiple times due to more than one written opinion in that
particular decision.

The final limitation does not involve section 1 exclusively. Rather, it involves a critical variable in determining the influence of American jurisprudence. That variable is the specific policy issues that are raised in the cases and how similar policy issues that have been addressed by the American Court affect the decisions that the Canadian justices make.

Determining what the policy issues are is a relatively simple task. Cases grouped by policy areas will either use American precedents, not use American precedents or not have an American counterpart from which to choose. As for the latter, an issue such as language policy would not be expected to use any American precedents for the obvious reason that there is no ‘language issue’ in the United States as there is in Canada. As for those cases that do not use American precedents, regardless of the similarity of the policy issues involved, one may be able to make the assumption that the Canadian Court decided the cases ‘on its own’. Since it will be demonstrated that section 1, as the rest of the Charter, has been influenced by other non-American influences, the Canadian Supreme Court, when deciding a case using no American precedents, may in fact have used other foreign precedents as an aid. This possibility will be kept in mind. The assumption that only Canadian precedents were used still leaves some questions open for discussion. If the relevant Canadian citations themselves rely heavily or even moderately on American jurisprudence, then one could argue that perhaps the case before the Court was not decided entirely ‘on its own’. A consideration that should be made is how far removed do citations have to be from undue American or other foreign influences? Taken to the
extreme, this may be rare indeed. For the purposes of this exercise, this option of investigation will not be entertained.

As for the institutions to be examined, the supreme courts of both countries are similar institutions with similar statures in both nations. To include state court rulings or provincial court rulings in the database may make the exercise more academically sound (not to mention painfully long), but the decisions by the two highest courts in their respective lands provides for a representative sample\(^{28}\) of how one nation’s jurisprudence may be affecting the other’s. Or alternatively, how one nation’s Court may be resisting the other’s jurisprudence.

\(^{28}\) ‘Representative’ is used in the sense that both courts are national high courts and as such, are the final courts of appeal in both countries. This similar authority gives the decisions made by each court a greater degree of importance and finality.
Two Nations, Two Constitutional Traditions

The Canadian and American constitutional traditions are different. This is a fact commentators, moreso Canadian than American, make clear. There are a variety of reasons for these differences including ideological and cultural. It is well documented how the United States was 'born through blood' and how Canada was 'conceived through compromise'. Such disparate beginnings are evident in the evolution that the constitutional systems of each country have undergone. This chapter will provide a brief comparison of the American choice of passing a bill of rights at the dawn (or perhaps early morning) of their nation's founding and the function of the judiciary which necessarily ensued and the Canadian tradition of parliamentary sovereignty and characteristics that have defined the evolution of constitutionalism in Canada. This historical overview provides the genesis for why such a study about American jurisprudential influence on Canadian Supreme Court decision-making is important. Without an idea of where we have been, we cannot debate the merits of where we may be headed.
Canadian Constitutionalism

The cornerstone of Canadian constitutionalism has been a fidelity to British parliamentary traditions, especially the theory of parliamentary sovereignty. Such fidelity did not begin nor culminate with the 1867 British North America Act that explicitly stated in its preamble that Canada was to have a “constitution similar in principle to that of the United Kingdom.” *Prima facie*, such fidelity may appear to be just that - a desire to stay loyal to traditional institutions of government and the citizens’ role in them. A more nuanced view provides underlying reasons for wanting to keep a similar system, namely a distinction from the then new American system. With the creation of the American federation in 1776, a new society established itself devoid of its links to Britain. This purposeful change marked the beginnings of America’s force in the world that is very much in evidence today.

The Canadian choice was to remain faithful to the political and social institutions that had served Canada well. By remaining faithful, an equally purposeful decision to develop a ‘distinct society’ from the United States took root. This development has gone through its own evolution. Some of the characteristics will be briefly discussed below. What will be evident are the ideals and circumstances that Canada, through its British links, wished to preserve and the divergence it took with American values.

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1 *Constitution Act, 1867 U.K.*, 30 & 31 Victoria, c.3
Parliamentary Sovereignty

The clearest example of the divergence between the Canadian and American political systems lies in the theory of parliamentary sovereignty prevalent in Canada. The British scholar A.V. Dicey, provides the most spirited defence of this theory.² He summarizes the sovereignty of parliament as “the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.”³ This is the basis of sovereignty for the representatives of Parliament to make the laws of the nation without fear that their words will be overturned. Indeed, this is the starting point for all discussions about the scope of parliamentary power. While there may be some who may disagree with the terminology Dicey uses,⁴ the terminology eventually used leads to essentially similar conclusions drawn by Dicey. The semantic difficulties seemed to have been perceived since Dicey, immediately after making the original claim on sovereignty, turns his attention to the law and the fact that it can be defined as “any rule which will be enforced by the courts.”⁵ Thus, the principle of parliamentary sovereignty has to undergo a slight modification and be defined as “[a]ny Act of Parliament, or any part of an Act of Parliament, which makes a new law, or repeals or modifies an existing law, will

³ Ibid., pp. 3-4
⁴ See Sir Ivor Jennings, The Law and the Constitution, 5th ed. (London: University of London Press, 1959), especially pp. 147-150. Jennings’ problem with the word ‘sovereignty’ stems from its “quasi-theological origins” and even though it may appear to “fit the facts of the English political institutions .... If sovereignty is supreme power, Parliament is not sovereign.”
⁵ Dicey, supra, note 2, p. 4
be obeyed by the Courts.”6 This is a crucial belief that Dicey holds, namely that Parliament ultimately controls the final interpretation of legislation. Its practical effect, naturally, is that there is no judicial review of legislation. He realizes that the law is made by judges and as long as they adhere to precedent, these eventually become the “fixed rules” or, in effect, laws. As to whether ‘judge made law’ is inconsistent with parliamentary sovereignty, Dicey answers in the negative because “English judges do not claim or exercise any power to repeal a statute, whilst Acts of Parliament may override, and constantly do override, the law of the judges. Judicial legislation is, in short, subordinate legislation, carried on with the assent and subject to the supervision of Parliament.”7

The purpose here is not to outline the theories that have emerged from this conception of parliamentary sovereignty - a conception that formed before Dicey’s time. Parliament had been considered ‘supreme in law’ as far back as 1688 when the English Bill of Rights stated that “the freedome of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of parlyament.”8 Its long-standing tradition had found another home in Canada. What becomes relevant for this study is the constitutional evolution that differentiated the Canadian political system from the American system.

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6 Ibid.
7 Ibid., at p. 18
Canadian Constitutional Evolution

Various characteristics have marked the evolution of Canada’s constitutional tradition. While this is not an exhaustive list, it is intended to demonstrate the basis for which Canadian constitutionalism has evolved differently from its American counterpart. The first of the characteristics is the perennial language issue. More specifically, early references to the ‘distinct’ nature of the province of Quebec and therefore acknowledgment of the ‘French fact’ in Canada. From the Quebec Act of 1774,\(^9\) and the recognition of Quebec and French Canadians, to the Constitutional Act of 1791,\(^10\) which provided for elected assemblies for Upper and Lower Canada thus re-affirming the population of Quebec (Lower Canada). Even the Act of Union (1840),\(^11\) which was meant to ensure an English-speaking majority in a united parliamentary assembly did not, change the two legal systems. This guaranteed a certain amount of recognition for French-speaking Canadians. The important point to consider is the recognition of what was at the time a ‘conquered’ people. The provision of an elected assembly set the groundwork for future management by French Canadians of their own affairs.

A second, closely related characteristic of Canada’s constitutional evolution concerns the recognition of both religious and linguistic rights. This is an obvious departure from the American ideal of the right to equality of all persons. The American founders were adamant about the complete separation of church and state thereby securing against any privileges that a religion might benefit from at the hands of the state.

\(^9\) Quebec Act, 1774 (U.K.)
\(^10\) The Constitutional Act, 1791 (U.K.)
\(^11\) The Union Act, 1840 (U.K.)
The Canadian decision was to explicitly guarantee special rights and privileges to the major religious groups (Catholics and Protestants) which also happened to be traditionally divided against linguistic lines (French Catholic and English Protestant). This was evident, once again, as far back as the 1774 Quebec Act. As per language rights, the Confederation agreement of 1867 guaranteed equal language rights in parliamentary proceedings at the federal level and in legislative proceedings in Quebec. Needless to mention, the Charter of Rights and Freedoms has added an important new dimension with the inclusion of minority language education rights.

A third characteristic, and vital difference between the two nations, is the manner in which each has dealt with internal strife. Violence has played a major role in American history producing, among others, arguably the bloodiest civil war the world has seen. Canada has not been immune to its share of armed confrontation either. The Plains of Abraham, the Red River Rebellion and the October Crisis demonstrate this fact. However, the constitutional and political evolution of the nation has usually taken place by reasoned debate in non-violent forms.

The preceding brief overview of the Canadian constitutional evolution signals various differences that have characterized the Canadian political system and some of the very different starting points from which our debates originate. It is these types of factors that must be taken into account not only during political debate but during judicial consideration of constitutional issues as well. The different cultural, social and political dynamics of the Canadian experience must not be overlooked, especially in comparison to the American.
American Judicial Review

The American production of judicial review has been a long and controversial affair. Unlike the Canadian experience since 1982, the American Supreme Court was never mandated in the Constitution or in the original Bill of Rights (and subsequent amendments) to practice constitutional review. The US Constitution states that “[t]he judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish.”\(^\text{12}\) It should be noted that the Congress does wield some authority over the Court’s structure since the number of justices that can sit on it is left up to Congress. This powerful check on the Supreme Court was evidenced by the ‘Court Packing’ crisis of 1937.\(^\text{13}\) This, plus the much talked about confirmation hearings of Supreme Court Justice nominees, gives Congress (read: the people) a large measure of control over the structure and make-up of the bench.

The American experience with the judiciary and its relationship with democratically elected institutions can be traced to the writing of the 19th century “diagnostician of American democracy,”\(^\text{14}\) Alexis de Tocqueville. He was famous for, among other things, pointing out that due to the exalted status of the judiciary “[s]carcely

\(^{12}\) Constitution of the United States of America, Article III, sect. 2.
\(^{13}\) The ‘crisis’ originated with a conflict between President Roosevelt and the Supreme Court which, in the 1935-36 term, decided eight major decisions against the President’s ‘New Deal’ legislation. In order to pass his legislation through the Court, Roosevelt threatened to increase the number of justices of the Court from 9 to 15 thereby allowing him to appoint judges who were more sympathetic to his legislative goals. Roosevelt’s plan was eventually defeated in the Congress but not before the Court, responding to the resolve of the elected representatives, shifted their direction and began upholding further ‘New Deal’ legislation on a regular basis. See Albert B. Saye, American Constitutionalism: Text and Cases (Columbus, Ohio: Charles E. Merrill Publishing Co., 1975); Griffin, supra, chap. 1, note 15. For a detailed examination see William E. Leuchtenburg, The Supreme Court Reborn: The Constitutional Revolution in the age of Roosevelt (New York: Oxford University Press, 1995).
any political question arises in the United States that is not resolved, sooner or later, into a judicial question." Tocqueville is a proponent of judicial review because of the way it allowed lawyers, with their superior minds and manners, to assume positions of authority in society. The review of legislation by lawyers-turned-judges was favourable because "by enhancing the public influence of lawyers and the legal mind it strengthened what he considered to be one of the most salutary restraints on democratic excesses."

Tocqueville’s observations must be put into context. By the time he finished his journey through 19th century America in 1832, he was no doubt influenced by two major events. The first was the publication of The Federalist Papers in 1787 and 1788. If Tocqueville did in fact read them, a safe assumption can be made that he was influenced by, if not convinced of, the arguments made by Alexander Hamilton concerning the role of the judiciary in the new federation. Although Hamilton’s argument in favour of judicial independence can be misinterpreted as one in favour of judicial supremacy, Tocqueville clearly asserted that review of legislation by lawyers was necessary.

A second influencing factor on Tocqueville was that his travels took place in the post Marbury v. Madison era and during the tenure of Chief Justice John Marshall, the author of Marbury. Since the Supreme Court had by this time acquired the authority to review legislation, the pre-eminence of lawyers and judges was becoming well established by the time of Tocqueville’s arrival. Consequently, given the lustre of Chief Justice

14 Knopff and Morton, supra, chap. 1, note 5, p. 234.
16 Knopff and Morton, supra, chap. 1, note 5, p. 235.
Marshall’s legal star, Tocqueville’s admiration for legal minds would surely have increased exponentially since Marshall was still Chief Justice throughout Tocqueville’s time in America and for three years after his departure. No doubt Tocqueville would have heard about this great legal mind. On would assume that if Tocqueville had not had time actually to read the text of *Marbury*, he would surely have discussed it, among other Supreme Court decisions, and its implications for the future of the republic with supporters and critics of the decision alike.

As mentioned above, even before Tocqueville offered his observations on which institution should be granted the final say in determining the validity of government legislation, the writings of Alexander Hamilton in *The Federalist Papers* offered the definitive, and arguably most famous, view of the role of the judiciary vis-à-vis the other branches of government.

Hamilton was concerned with the independence of the judicial branch rather than the dilemma of judicial review as it is understood in contemporary parlance, namely the review by unelected, unaccountable judges of legislation formulated by democratically elected representatives. That is not to say that he did not raise the possibility of the judiciary becoming ‘superior’ to the legislative branch of government. Like Tocqueville, Hamilton did not consider this possibility a serious one since the immense duty of interpreting the constitution (what he called a fundamental law) would weigh heavily on the minds of the judges and their professionalism alone would overcome any temptation

18 1 (Cranch) 137 (1803). See infra, pp 27-30.
19 Tocqueville left America on 20 February, 1832; John Marshall died 6 July, 1835.
to exercise their "will". This point is an assumption that Hamilton makes about the character of the judges. It is because of the judiciary's independence from the legislative and executive branches that judges derive their authority in interpreting the Constitution.

Hamilton's first task is to assure readers that "in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution." It will be so for two reasons. The first is that the judiciary does not hold the power of the sword (representing coercive force), of the nation. This power is held by the executive. Secondly, it does not wield authority over the purse (representing the finances) of the state. That function belongs to the legislative branch. According to Hamilton "[the judiciary] may truly be said to have neither FORCE nor WILL but merely judgment." To strengthen this weakest of the branches of government, Hamilton proposes the lifetime tenure of judges to protect the institution from its "natural feebleness" and from its "continual jeopardy of being overpowered, awed or influenced by its co-ordinate branches."

Hamilton did raise the idea of judicial review as we might otherwise understand it. His protection against a superior judiciary was the independence of the institution and his assumption relating to the character of the men (this is 1788 after all) occupying the bench. He makes it clear that it is the "proper and peculiar province of the courts" to interpret the laws of which the Constitution "must be regarded by the judges as a

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20 Federalist #78, supra, note 17, p. 465.
21 Ibid. (Emphasis in original)
22 Ibid., p. 466.
fundamental law.” This includes determining the meaning of the Constitution. What Hamilton ignores is the necessarily general nature of a written constitution and the interpreting that must be done in order to give it life. He maintains that when a legislative act is at “variance” with the Constitution, it should be the latter that must be preferred thereby giving predominance to “the intention of the people [over] the intention of their agents.” Hamilton then goes on to assure that this does not give the judicial branch superiority over the legislative branch of government:

It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws rather than those which are not fundamental.

While this may appear to Hamilton as a simple matter of choosing between two documents, it cuts into the heart of the judicial review debate. In determining what the Constitution ‘means’, judges have an enormous amount of discretion. Hamilton acknowledges as much later on in his piece but then appeals to the status of judges as eminent men of reason and, more importantly, independence to assuage any fears of a superior judicial branch:

It not uncommonly happens that there are two statutes existing at one time, clashing in whole or in part with each other and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation. So far as they can, by any fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done.

The crux of the debate concerning judges substituting their preferences over those

21 Ibid., p. 467.
22 Ibid.
23 Ibid.
24 Ibid., p. 468.
25 Ibid.
of the elected representatives is mentioned but not given serious consideration. In effect, Hamilton believes that it could not happen, at least not on a grand scale. "The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it proved anything, would prove that there ought to be no judges distinct from that body."²⁸

Hamilton vigourously defended an independent judiciary to "guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures ... have a tendency ... to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community."²⁹ What Hamilton is attempting to guard against is the oft-quoted 'Tyranny of the Majority'. According to Hamilton, "it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the constitution, where legislative invasions of it had been instigated by the major voice of the community."³⁰ In practical terms, the Constitution is silent on the issue of how it is to be interpreted but Hamilton, as the above illustrates, prescribes this duty to the judiciary, specifically to the Supreme Court. Since the Constitution itself did not give any indication in this regard, it was not clear what the proper role of the courts was to be. As Hamilton would have approved, the time came for the Supreme Court to address the matter.

²⁸ Ibid., p. 469. (Emphasis in original)
²⁹ Ibid.
³⁰ Ibid., p. 470
*Marbury v. Madison*

Whereas Hamilton alluded to the role of judges and the proper power of the courts, Chief Justice John Marshall filled in the outline of Hamilton’s argument. In the 1803 decision of *Marbury v. Madison*, the issue of judicial review and its function within the branches of American government was finally given some clarity.

The case itself was a product of what Canadian observers of government would term ‘patronage’ appointments. Thomas Jefferson’s Republicans defeated John Adams’ Federalists in the election of 1800 but Jefferson was not to assume the office of President until March 4, 1801. During this ‘lame duck’ period, Adams made numerous judicial appointments (among others) and did so right up until his last day in office - March 3, 1801. The Secretary of State at the time, John Marshall, who had himself received an appointment as Chief Justice of the Supreme Court, continued as Secretary until Jefferson and his staff assumed office. William Marbury was to have been given a commission as a justice of the peace in the District of Columbia and while his appointment was signed and sealed, it was not delivered because, literally, the midnight hour had struck and John Adams’ authority as President was gone.\(^{31}\) It was Marshall who had signed and sealed Marbury’s commission but it was the succeeding Secretary of State, James Madison, who refused to deliver it.\(^{32}\) Marbury subsequently brought his

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\(^{31}\) The series of commissions that were delivered at this 11th hour have become commonly referred to as the ‘Midnight Judges’.

\(^{32}\) There are different versions to this story. Laurence Tribe claims that Marshall’s brother did not deliver Marbury’s commission on time while Arthur Sutherland writes that the new Attorney-General-to-be, watch in hand, stood in Marshall’s Secretary of State office as he hurriedly sealed commissions and when midnight had struck - according to the watch he was holding - Marshall was informed that he no longer had the authority to sign and seal any more commissions. “Marshall, so the story ran, left in humiliation.” See Arthur E. Sutherland, *Constitutionalism in America: Origin and Evolution of its Fundamental Ideas*.
suit of mandamus\textsuperscript{33} before the Supreme Court.

The decision that the Court rendered has been the subject of widespread debate in American legal and political circles. It held that “Congress acted unconstitutionally in conferring upon the Court authority to issue original writs of mandamus.”\textsuperscript{34} The unconstitutional provision the Court cited was that “section 13 of the Judiciary Act of 1789 violated Article III, section 2 of the Constitution ... a power not granted to Congress under Article III.”\textsuperscript{35} “Despite finding that William Marbury was entitled to mandamus relief from Secretary of State Madison’s refusal to deliver his judicial commission, Marshall would not issue the writ”\textsuperscript{36} because of what he saw as Congress’ unconstitutional actions.

Marshall’s conception of judicial review rested on two main assumptions. The first was that the Constitution was in some sense regulatory. He had to “postulate that the Constitution was the fundamental and paramount law of the nation and not merely the statement of an ideal political structure to which American government should aspire or an initial distribution of rights and responsibilities which defined the starting point for bargaining among political institutions and individuals.”\textsuperscript{37} If he could not show that the

\textsuperscript{33}Blackstone, in the 3d volume of his Commentaries, page 110, defines a mandamus to be “a command issuing in the king’s name from the court of king’s bench, and directed to any person, corporation, or inferior court of judicature within the king’s dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of king’s bench has previously determined, or at least supposes, to be consonant right and justice”. From Marbury v. Madison, reprinted in Saye, supra, note 13, p. 15.
\textsuperscript{34}Tribe, supra, note 32, p. 20
\textsuperscript{35}Manfredi, supra, chap. 1, note 10, p. 316
\textsuperscript{36}Ibid.
\textsuperscript{37}Tribe, supra, note 32, p. 24
Constitution was itself regulatory, then there could be no way that a law, no matter how "repugnant" to the Constitution it was, could be declared void. Second, in order to declare such a repugnant law void, Marshall had to "assume that the Constitution is the sort of law which courts can recognize and apply."38

A discussion of the impact of Marbury would require an entire study of its own. Simply put, Marbury is the beginning of American judicial review.39 The Court, in granting itself the power to review legislation, laid the groundwork for future Courts to do the same. That is not to say that without this decision judicial review, as it has evolved, would never have happened. On the contrary,

judicial review was not an ingenious political move. ... It was immanent in the structure of the written constitution; it was evident in the federalist debates; it was discussed and never rejected in the opinions of the Supreme Court in the 1790s. The doctrine of Marbury v Madison was not nearly the surprise that its opposite would have been.40

Indeed, the claim has been made, correctly, that discussions of judicial review should be placed in a proper context of constitutional history taking into account historical, theoretical and practical considerations".41 The claim has also been made, questionably, that "it would be possible to discuss contemporary judicial review without making the mistake of thinking that it is based on Marshall’s reasoning in Marbury v.

38 Ibid. It can only be assumed that Marshall’s first assumption had to be made because of the ambiguity surrounding the role of federal judges vis-à-vis the constitution. Article VI(2) declares the constitution as the “supreme law of the land” but that only “Judges in every state shall be bound thereby”. Once he made the assumption that all courts were bound by the constitution, then all courts could subsequently expound on its provisions.

39 Even this is contestable. US v. Yale Todd, decided in 1794, “held invalid a federal statute of 1792 which purported to impose on the Circuit Courts a non-judicial duty to certify pension claims.” Todd was cited for the first time in a footnote in United States v. Ferreira, 13 How, 40 (1851), but Marshall refers to the pension controversy as a precedent in authoring Marbury. See Sutherland, supra, note 32, pp. 377-378.

40 Ibid., p. 261

Madison, thus forcing a clearer public elaboration of an alternative basis." My point is not to question the degree of influence Marshall’s opinion has had on the development of judicial review nor is it to question possible motives behind his opinion given his prominent role in its genesis. Generally stated, Marbury is cited as the first case to declare an Act of Congress invalid on the grounds that it conflicted with the Constitution. With the reasoning advanced by Marshall, Marbury is to be considered one of the most important and influential decisions in American constitutional history and perhaps one of the most influential beyond America’s borders.

Conclusion

As the preceding has attempted to demonstrate, the American experience with judicial review is important to understand if we are to grasp what constitutional interpretation involves. The Canadian Supreme Court’s history in this regard has not been as turbulent as its American counterpart. The fathers of the 1982 constitutional amendment provided for the institution of judicial review by declaring what Marshall had to ‘find’ in Marbury. Section 52(1) of the Constitution Act, 1982 declares that “[t]he Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force

42 Wolfe, supra, note 41, p. 293.
43 Sir Edward Coke in Dr. Bonham’s Case [(1610) 8 Co. Rep. 113; 77 E.R. 646], refused to enforce an Act of Parliament stating; “And it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudges them to be utterly void.” The doctrine, however, never took root in England with scarcely a mention afterwards. Marbury v. Madison had the opposite effect, being one of the most cited and discussed decision in American constitutional history. See Sutherland, supra, note 32, pp. 61-62 and Hogg, supra, chap. 1, note 10, p. 93.
or effect”. This, coupled with the remedial powers within the *Charter* under section 24(1), gives the courts the explicit power to expound on constitutional provisions.

This brief, historical revision between Canadian and American ‘starting points’, provides a glimpse into the different visions of each political system. One is distrustful of government and vigorously checks its powers. The other accepts the government’s role in the functioning of the state and will defer to its mandated authority. On the question of rights for each citizen, different visions are again evident. As years pass, and visions change, societies’ demands for even greater protection of their freedoms required innovative new forms. The innovations come not only in more elaborate rights, but in the inclusion of sophisticated limitations to these rights, in the documents, that recognize the dual importance of individual concerns versus state/collective interests. It is to this area that this study now focuses.

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*Section 24(1) reads: “Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.”*
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The Limitation of Rights: From General Theory to Canadian Model

No right is unlimited. This is a common refrain that is generally agreed on. The limitation of a human right is a serious issue for any constitutional system to address. Not surprisingly, there are various avenues that may be taken to limit rights, each addressing in its own manner the serious nature of the exercise. The two extremes in dealing with this concern are demonstrated by the routes chosen in the United States and in Canada. The American Bill of Rights has no explicit limitation clause and speaks of rights in a strict manner: mainly in absolute terms but with various exceptions. The Canadian Charter of Rights and Freedoms contains a general limitation clause which applies to the entire document. The Canadian example also goes beyond a general limiting provision on rights by outlining further limitations within specific Charter sections.

A reason for such a varied approach to rights by the two neighbouring countries

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2 See Infra, note 16.
3 The exception is the section 33 non-obstante clause which makes legislation beyond the reach of Charter sections 2 and 7-15 (inclusive). If there is a violation of one of these rights, section 1 cannot be applied to strike down the offending legislation if section 33 has been applied already. This is for a minimum of 5 years when section 33 would have to be re-newed. See Hogg, supra, chap. 1, note 5, pp. 897-898.
4 See infra, note 15.
may be linked to the perennial debate over differing ideologies: mosaic vs. melting pot, individualism vs. communitarianism. This is evidenced by a realization that "[l]imitation clauses in effect set out collective rights, which are balanced against individual rights." This is a statement that would seem to describe a more conciliatory and compromising Canadian-style approach. On the other hand, it may be unnecessary to include a general limitation clause in a rights document (or a limit of any kind) since "[c]ommon sense alone indicates that since rights and freedoms inevitably collide, the rights of any one individual or group cannot be absolutely protected." The American experience demonstrates this point. The United States Supreme Court has had to read limitations directly into the substantive portion of the right in question thereby recognizing "that rights cannot be interpreted in an absolute fashion."

In the post-World War II period, when 'writing rights down' took on an urgency never before experienced, both general and specific limits on rights have been acknowledged and accepted as both necessary and desirable. The focus of this chapter is to expand on the Canadian contribution to the theory of rights limitation that is section 1. Before such a detailed examination can begin, an overview of the general theory on the limitation of rights is required. Both the theoretical context, delving into the question of 'why' rights need to be limited, and the practical elements of limitation provisions,

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7 Monahan, supra, chap. 1, note 14, p. 115
outlining what is required to fairly and objectively override a right in favour of another right or value, will be probed. The analysis of section 1 will include a two-prong analysis of its evolution. The first is the evolution of its particular wording. This historical account will comprise the initial designs of a rights limiting device through to section 1’s final text. The second evolution, to take place in the following chapter, will analyse the scope of the limitation provisions as interpreted by the Supreme Court of Canada. The text of section 1 could be interpreted in any number of ways. How the Court has done so breathes life into the section and indicates to Canadian and foreign observers what criteria are necessary when limiting rights in the Canadian context. Throughout, the influence of non-American sources will be demonstrated as having had near exclusive influence in section 1’s development as well as having had a major impact on the development of the entire Charter document.

Why Must Rights be Limited?

The rights and freedoms expressly guaranteed in the Charter provide, at the least, a symbolic measure of freedom and respect. A state transcends this symbolism through the manner in which it believes these rights and freedoms to be true and necessary. Providing abstract rights without the concrete institutional support is tantamount to lying to citizens regarding how the state views their worth as individuals functioning within the polity. It is no secret that the protection of rights - of civil liberties - is best enhanced by democracy and more specifically by the democratic character of a state’s political

* Ibid.
institutions. Since World War II, there has been a desire for further, more specific guarantees of individual freedoms and liberties. Furthermore, the desire for these guarantees has been to include them as part of the fundamental laws of nations, namely state constitutions. The founders of the American republic debated this point long ago. Alexander Hamilton, citing the constitution as providing for the aforementioned democratic nature of political institutions, argued that a bill of human rights was unnecessary since "the constitution is itself, in every rational sense, and to every useful purpose, a bill of rights."  

Since express rights protection appears to be the norm, it has had to contend with certain truisms of human rights. The most important is that rights are not absolute in any practical sense. The clash of rights in a complex community of peoples makes the choice between certain guarantees inevitable. Since rights are not absolute they should not be textually guaranteed as such. The honest acknowledgment to citizens that, as individuals, they may not be granted specific guarantees that override the interests of the greater community, is a necessity in order to avoid polarized divisions to form, with each competing interest waving a supposed inalienable right in hand. This requires some careful consideration as to how to guarantee rights as broadly as they ought to be while at the same time allowing for their limitation in the face of other competing rights or values.

Section 1 of the Charter provides such a limitation, as do other foreign rights documents.

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Each has their own way of limiting a right. The question becomes what is the rationale behind the limitation(s).

There are three main rationales. The first is the guiding notion that rights are not absolute or unlimited. There are, in effect, no inalienable rights. As Patrick Monahan encourages us to realize about the section 1 limitation clause it, and by extension other general or specific limitation features, “must be taken to mean more than the truism that “rights are not absolute”.”¹¹ This ‘warning’ stems from the political dynamics of constitutional guarantees of rights. Even though a society can agree on various crucial liberties that are needed to form the basic core of democratic rights, “it is just as clear that these same rights are often at the center of some of the deepest disagreements in both contemporary democratic thought and practice.”¹² The legitimacy of the contestibility of rights is what defines this ‘politics of rights’. The oft cited example of free speech, and what can and cannot be said, makes this argument clear. Up to what point are people allowed to express opinions? Someone making a speech about the discriminatory effects of affirmative action programs should, in all good conscience, be allowed to do so. Those who are sympathetic with the values of free expression would not think this to be a difficult dilemma. Going further, how far should society allow an unpopular group to hold public rallies? Again, those sensitive to freedom of expression would not consider this a grave dilemma but as opinions become less tolerable - perhaps bordering on hateful - public consideration of what should be allowed or accepted become contested. It is

¹¹ Monahan, supra, chap. 1, note 14, p. 115.
precisely these types of inherent dilemmas faced by all societies that require guaranteed liberties to be checked, be it through a section 1-type general limitation clause or a series of internal limitations found in specific rights provisions.

A second rationale for the need to limit rights is that it promotes social tolerance within the society. Minority groups, who traditionally do not have a foothold on power, need a limitation clause so that legislation made by the will of the majority can be checked.

This rationale is criticized on two counts. The first is that this ‘will of the majority’ is already checked by the constitution, complete with the parameters of power that legislatures must abide by. This was Hamilton’s argument against a bill of rights. There are enough safeguards within the constitution to prevent a “tyranny of the majority”. A second criticism revolves around who interprets a bill of rights. When there is a dispute, this interpretation is necessarily made by the courts. Given the traditional composition of courts, minority interests are “protected” by a traditionally elite, non-minority-status composed body. The interpretation of rights by the courts will protect minority interests if one assumes that the members of this body practice objective and neutral decision-making. Since minority interests are not traditionally represented in the court system, the concern becomes what guaranteed rights are deemed limitable in order to advance the collective (read: majority) good? The weakness of the original argument of promoting social tolerance comes down to ‘who decides what society will allow’? Social tolerance, the argument goes, will still be dictated by traditional, social power bases.
The final rationale as to why rights must be limited is that, with the presence of a limitation clause, rights are actually strengthened notwithstanding their capacity to be limited. The reason lies in what can be assumed to be strict standards of assessment applied against reasons defending a limitation of a guaranteed right. These assessments will make it "more difficult for the government to discharge [a justification to limit a right] than the requirements that would be imposed by the courts in the absence of a limitation clause."\(^{13}\) Courts will, in other words, be more reluctant to impose limitations on rights in the presence of a clause mandating them to do so. This apparent paradox depends on two assumptions. The first is that in order to uphold the concepts of "freedom" and "democracy", rights must be interpreted broadly. This is itself based on a second assumption of an inherent "tension ... between state "intervention" and individual freedom."\(^{14}\): that there is a fine balance that courts must weigh between the interests of the individual, the larger collective interest and the interests of the state.

**How Rights are Limited**

The two poles of constitutional systems between Canada and the United States serves not only to show the differences in ideology between the two neighbours but to also serve as a reminder that there are other choices that states have made in the development of their constitutional order. The focus of this study is on the limitation of constitutionally guaranteed rights. The Canadian choice has been a hybrid approach of

\(^{13}\) Hogg, supra, chap. 1, note 5, p. 853
\(^{14}\) Monahan, supra, chap. 1, note 14, p. 116
one general limitation clause coupled with various internal limitations within the specific
rights in question.\(^\text{15}\) The American choice has been to label guaranteed rights as absolute,
with minimal provisions for limitation.\(^\text{16}\) Within these poles lie other systems. Such
provisions as differentiated limitation clauses (limits within limits) are contained in the
*European Convention on Human Rights*.\(^\text{17}\) The Basic Law of Germany uses different
forms of limitation clauses. Some guarantees do not have any limits, others have general,
almost sweeping, limits and others have limits that are characterized as "halfway houses"
between these two extremes. There are even examples of unwritten guarantees ‘found’ in
the Swiss Constitution, which have attached to them unwritten limitations, presumably
through either judicial interpretation or legislative convention. The newly minted Spanish
Constitution has adopted a system where part of a right can be limited but the ‘essential
core’ of a guarantee cannot be touched. These examples\(^\text{18}\) are meant to show the range of

\(^\text{15}\) Qualified rights in the Charter include section 7 (right to not be deprived of life, liberty and security of
the person “except in accordance with the principles of fundamental justice.”); section 8 (the right to be
secure against “unreasonable” searches and seizures); section 9 (the right not to be “arbitrarily” detained or
imprisoned); section 11(a) (informed of offence without “unreasonable” delay); 11(b) (tried within a
“reasonable” time); 11(e) (not be denied “reasonable” bail); section 12 (right to not be subjected to “cruel
and unusual” punishment). There are also internal limitations in section 6(3) (providing for mobility
rights to be (a) subject to any provincial legislation other than those that discriminate according to present
or previous residence and (b) subject to any provincial residence requirements to be eligible for social
services); section 23(3) (the right for children to receive minority language instruction “where numbers
warrant”). Specific affirmative action provisions are also found in section 6(4) (providing for provinces to
give preference to residents if employment levels are lower than the national employment rate); section
15(2) (providing for programs that are meant to give preference to minority individuals).

\(^\text{16}\) The American *Bill of Rights* does contain some internal limitations. Amendment IV guarantees “[t]he
right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches
and seizures”; Amendment V guarantees that persons not be deprived of life, liberty or property “without
due process of law” and that private property not be taken for public use “without just compensation”; Amended VIII guarantees that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor
cruel and unusual punishments inflicted”; Amendment XIV restates the provision under the fifth
amendment.

Convention*]

\(^\text{18}\) Examples of other state constitutions come from Albert Bleckmann and Michael Bothe, “General Report
on the Theory of Limitations of Human Rights” in Armand de Mestral, ed., *The Limitation of Human
limitations present. They are examples of differences in form. In order to determine how rights are to be limited, that is the reasoning behind how rights are limited, regardless of the form these limitations may take, common elements between them are evident.

A first common element is the notion that no limit is unlimited. This is especially true when dealing with expressly permitted limitation clauses. No matter how general the provision, it will always have its own limitation. In other words, there will always be parameters that the courts, the legislators or the executive must confine themselves to when determining if a right is limitable or not. Consider the limitations placed on the Supreme Court of Canada under section 1. The limit that the Court must decide on has to be “reasonable”, “prescribed by law” and its use must be “demonstrably justified” not only in our Canadian society, but justified under the wider framework of a “free and democratic society”. The presumption is that other free and democratic societies may have found other reasons to limit or not to limit a similar right under similar circumstances and it would be the Canadian Supreme Court’s duty to examine these other free and democratic societies’ choices. Therefore, limits on rights are constrained by similar reasons in other free and democratic societies that can just as easily be attached to the reasons given for why rights are not absolute.

The more difficult justification of this first common element is in its application to guarantees that have no express limitation clauses. The American ideal of absolute rights is the prime example. Even in the United States, certain legislation that limits a

guaranteed right is considered constitutional but this “can only be ... justified by the assumption that what the legislator really does in this case only constitutes a clarification as to the limitations of a fundamental right which exist anyway.”\(^{19}\) The issue falls under the concept that there are implied or inherent limitations of rights and under this element of ‘limits on limitations’ (those systems where rights are written in a much more strict manner), they still fall within certain parameters that determine the limits on rights. The exception is that these parameters are not defined as they might be under a general (written) limitation clause.

A second common element in the reasoning involved in limiting rights is the issue of choosing which rights are to be limited and in what fashion. It is agreed that limitations are acceptable, even necessary, but only if their use serves to protect another valid interest. This would be simple to enforce if there was a list of interests that a limitation clause was meant to protect like those demonstrated in the European Convention of Human Rights. Articles 9 through 11 of the Convention correspond to the Canadian Charter’s section 2 guarantees of fundamental freedoms.\(^{20}\) Despite the disproportionate

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\(^{19}\) Ibid., p. 107.

\(^{20}\) Section 2 of the Canadian Charter of Rights and Freedoms reads; 2. Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly and; (d) freedom of association. Articles 9-11 of the European Convention read; 9(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. (2) freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. Article 10(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television, or cinema enterprises. (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions restrictions or penalties as are prescribed by
lengths of each of these provisions, it is thought that "the details of Articles 9 to 11 are apparently subsumed under the words "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" in section 1 ... [t]he more concrete and specific text of Articles 9 to 11 itself may be of assistance to the Canadian courts in ... giving effect to the limitations recognized in section 1."^21

Since this 'catalogue of interests', as found in articles 9-11 of the European Convention, is not present in the Canadian Constitution to guide the courts, two problems arise. The first problem is interpretation, namely who decides what "competing public or private interest may justify a limitation of fundamental rights."^22 This raises the debate over judicial review which asks if such decisions are the exclusive domain of legislators or whether the courts can legitimately review the legislators' choices. A second problem is "the relationship between the objective of a limitation and the limitation itself."^23 The reasons for limiting a right - in this case the protection of a competing interest - may not always be valid enough thereby giving credence to the saying 'the ends do not justify the means'. While there is no generally agreed upon standard to offset this problem, various interpretive tests, or what the United States

law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. Article 11(1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. (2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state.

^22 Bleckmann and Bothe, supra, note 18, p. 108.

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Supreme Court has defined as 'levels of scrutiny,' have been devised to determine if the objectives of a limitation are sufficiently important to warrant the limitation of a guaranteed right. If one common element is to be found among constitutional systems in terms of determining the objective of a legislated limitation, it is that a rigorous scrutiny of the objective and the implications it will have must be conducted. Beyond this however, approaches vary when the perceived importance of the interest to be protected, and how the proposed limitation achieves that goal, are taken into consideration. A limitation may be deemed an appropriate form in which to protect a given interest but it will eventually fall to a court to determine what relationship lies between the limit and the interest. This relationship is contingent on the importance accorded to the interest as determined by the court. The more important the interest to be protected is considered, the less strict (more general and broad) will be the level of scrutiny employed. Put another way, the more important that a right is considered to be, the more strict the level of scrutiny used. For example, "[a] "clear and present danger" will justify more limitations than a remote [chance of danger]."

A third common element on the reasons for limiting rights, focuses on the balancing of the factors that must be weighed when determining the proper scope of a limitation and the competing interest. This becomes more pronounced when there is a balancing of two competing interests as well as a proposed limitation. This demonstrates

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23 Ibid.
25 Bleckmann and Bothe, supra, note 22
a triangular relationship between "the interest protected by the fundamental right, another competing interest and the measure of limitation which cuts into the field protected by the fundamental right."\textsuperscript{26} Of course, determining the factors that go into a balancing 'test', be it performed by the legislators or by a court, will be different. The legislators are guided by democratic legitimacy and the will of the people. Courts are guided by legal text, precedent and their role as guardians of the legal system.

A final element common to limitation provisions is that they must be described by law. This element combines at least two considerations which impact on the balancing methods outlined above. The first of these considerations involves the interpretation of the constitutional document(s) as a whole thereby garnering support (and therefore legitimacy) for limitations from other enumerated sections. The German Constitution, for example, "recognizes the principle of the "social state" [therefore] it is ... possible to legitimize certain limitations on economic freedoms by that principle."\textsuperscript{27} The second consideration is the text of both the limitation as well as the guarantee to be limited. If the right is phrased in broad, general terms, its limitation can be accepted more easily than if a narrow, precise guarantee is limited.

The preceding overview of the general theory of limitation clauses provides a glimpse into what is required for such an important provision in any human rights document. What it demonstrates is that there are principles and forms that transcend political boundaries. The limitation of a right must include at least some generally agreed

\textsuperscript{26} Ibid., p. 109
\textsuperscript{27} Ibid., p. 110
upon features so that the legitimacy of limitations can gain strength.

**Evolution of the Canadian Limitation Clause**

The Canadian contribution to the practice of limiting constitutionally guaranteed rights was the product of over a decade’s worth of negotiations, proposals and counter-proposals. The federal and provincial governments differed not only in the need for a limitation clause but also in the reach that such a clause would have. Moreover, there was debate whether one general clause was preferable to several narrow limitations ascribed to particular, guaranteed rights. These differences provided the participants the opportunity to advance particular provincial and regional concerns that are the mainstay of federal-provincial negotiations. Fortunately, the debates over the form and, most importantly, the wording of the limitation clause stayed (for the most part) above the fray of political ‘horsetrading’ that was evident in the late stages of the final constitutional negotiations that patriated the Constitution of Canada including the *Charter of Rights*.

The evolution leading to the present section 1 limitation clause reveals the changing nature of the Canadian rights dialogue. Throughout the 12 year span covered, between 1969 and 1981, an underlying theme centered on how individual rights were to be limited since it was implicit that they could not be interpreted in absolute terms. A second theme concerned the ever present debate over which institution was the best guarantor of rights as well as the most appropriate body to impose limits on those rights. While it is true that the nature of the negotiations had the distinct characteristics that only
Canadian intergovernmental negotiations can have, the issue of human rights required examination of forms, styles and words from beyond Canada’s borders. Not only was the limitation of rights heavily influenced by foreign examples of the same, but this was also in keeping with the spirit of the entire Charter exercise which looked to other nations for help both in what to include and perhaps more importantly, what to exclude.

**Beginning the Dialogue - 1969**

The publication of the federal government policy paper *A Canadian Charter of Human Rights*, ²⁸ placed the subject of constitutionally entrenched human rights on the national agenda. It was the first time since 1960 and the *Canadian Bill of Rights* ²⁹ that the issue of individual freedoms and their recognition by the state had been addressed. The difference with this 1968 publication and the 1960 Bill of Rights was that then Justice Minister Pierre Trudeau desired the constitutional entrenchment of individual liberties and freedoms. The following year, and now Prime Minister, Trudeau published a more detailed outline of the rights and freedoms the government wanted entrenched.³⁰ In both documents, a general limitation clause as the tool used for limiting the enumerated rights was not contemplated. Instead, limits were proposed in the form of either specifying them within the particular rights themselves or in not specifying any limits at all and allowing the courts to determine what limitations would be acceptable. Using the American Supreme Court experience with rights limitations, and how First Amendment

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²⁹ S.C. (1960), c.44
freedoms have been given a very broad - although not absolute - interpretation, Trudeau argued that allowing the courts to decide Canadian rights limitations was both necessary and desirable:

The supremacy of the Constitution implies the existence of some agency which is capable of deciding what the Constitution means and when it has been infringed. If the people are to rest assured of the maintenance of the principles of the Constitution, they must rely on some such agency to enforce its provision. It is our tradition - one which the Government of Canada would expect to see preserved - that the courts perform this important function. Because of its position as the final appellate body in Canada, the Supreme Court is of particular importance in the enforcement of constitutional supremacy.\(^{31}\)

Notwithstanding Trudeau’s faith in the judicial branch,\(^{32}\) there was a specific limitation clause in the 1969 federal proposals which would allow Parliament to limit the entrenched human rights only under conditions of war, invasion or insurrection.\(^{33}\)

Predictably, the provinces did not warmly embrace the federal government’s proposals. The main criticism against the entrenchment of rights, never mind their limitation, was that guaranteed rights were an affront to legislative supremacy. In fact, provincial governments called for more explicit limitations on rights so that complete reliance on courts to determine limits would not become the norm.\(^{34}\) In order to get provincial support, entrenched rights without entrenched limits would have to be abandoned.

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\(^{30}\) P.E. Trudeau, The Constitution and the People of Canada: An Approach to the Objectives of Confederation, the Rights of People and the Institutions of Government (Ottawa: Queen’s Printer, 1969)

\(^{31}\) Ibid., p. 38.


\(^{33}\) Proposed provision #7 reads: “It should be provided that where Parliament has declared a state of war, invasion or insurrection, real or apprehended, to exist, legislation enacted by Parliament which expressly provides therein that it shall operate notwithstanding this Charter, and any acts authorized by that legislation, shall not be invalid by reason only of conflict with the guarantees of rights and freedoms expressed in this Charter.”, in Trudeau, supra, note 30, p. 60.
The Victoria Charter - 197135

Art. 3 Nothing in this part shall be construed as preventing such limitations on the exercise of the fundamental freedoms as are reasonably justifiable in a democratic society in the interests of public safety, order, health or morals, of national security, or of the rights and freedoms of others, whether imposed by the Parliament of Canada or the legislature of a province, within the limits of their respective legislative powers, or by the construction or application of any law.36

In the two years following the original federal proposals, general agreement between both levels of government was secured on the principle of constitutionally guaranteeing individual rights. The main reason for this general agreement was the inclusion of a general limitation clause that went far beyond the original proposal of only limiting rights in times of war or other insurrections. Provincial governments also secured the provision that they, too, could limit rights, thereby securing the principle of legislative supremacy.

The original general limitation clause advances similar provisions set out by other international rights documents. What Article 3 provided was not simply the 'How' of limiting rights but it also provided the 'Why' as well. More accurately put, it provided for the circumstances under which rights could be limited.

These were not unfamiliar concepts overseas. The European Convention,37 International Covenant on Civil and Political Rights,38 International Covenant on Economic, Social and Cultural Rights39 and the United Nations Declaration of Human

36 Ibid., Art. 3
37 supra., note 17
Rights, each had similar justifications for restricting rights that Article 3 of the Victoria Charter proposed. Reasons such as the interest of public safely, public order and national security are each found in any one (or more) of these foreign documents. What is evident is the influence that these documents had on the evolution of a general limitation clause in Canada. Although their approaches varied, the principles behind the phrasing used, and eventually the exact wording decided on, provided Canadian Charter drafters at this early stage with highly developed and respected examples that would allow them to construct a suitable limitation provision.

Another evident factor was that the prospects for specific limitation provisions written into particular guaranteed rights was no longer to be the preferred avenue chosen by the Canadian government. This choice of a general limit reflected concessions made by the federal government in order to secure provincial agreement on the issue of entrenched rights in general. Specifically, the general language of Article 3, notwithstanding the written guidelines for limiting rights, appealed to the provincial governments (and to the federal government as well) because it gave each “significant latitude in enacting legislation which conflicted with the enumerated rights.” As well, the wording of the clause seemed to limit the impact of it. By entrenching the notion that the Charter should not prevent a limit that arises from “the construction or application of any law,” seemed to “encourage judicial deference to legislatures’ policies in the event of a conflict with one of the entrenched rights.” Finally, the entrenchment of a general limitation clause, rather

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41 Hiebert, supra, note 34, p. 114
42 Ibid.
than specific limitation clauses, impressed upon the courts that all the enumerated rights would be subject to limits. This alleviated concerns that only those rights with specific limits would be the only limitable ones while the rest could be interpreted in an absolute manner. Given the demise of the *Victoria Charter*, for reasons not affiliated to any limitation provision, this draft was abandoned but would not be forgotten in subsequent attempts to entrench human rights.

**Bill C-60 - 1978**

25. Nothing in this Charter shall be held to prevent such limitations on the exercise or enjoyment of any of the individual rights and freedoms declared by this Charter as are justifiable in a free and democratic society in the interests of public safety or health, the interests of the peace and security of the public, or the interests of the rights and freedoms of others, whether such limitations are imposed by law or by virtue of the construction or application of any law.

Given the disappointment of the *Victoria Charter*, the desire to pursue issues of constitutionally entrenched rights and their limits waned considerably during the rest of the 1970s. Regardless, there was, following the failure at Victoria, a special joint committee of the Senate and House of Commons established to provide recommendations on the Constitution. In its final report the committee made 105 recommendations. The recommendation to entrench a general limitation clause stood out for what it expected a clearly expressed limitation clause to do, namely "to focus the principle of judicial interpretation more clearly [by preferring] to state any such qualification more rather than

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43 Bill C-60, Constitutional Amendment Act, 1978, 3d session, 33d Parliament, 1977-78
44 Ibid., Art. 25
less generally." The proposed recommendation for the limitation clause in the Canadian Constitution was that it, at least when fundamental freedoms are raised, "should be only such "as [is] reasonably justifiable in a democratic society" without any further specification." Clearly, the federal proposal for a limitation that followed six years later did not reflect the general approach that the joint committee felt was necessary to alleviate fears of interpretative liberties performed by the judiciary.

The federal proposals, known as Bill C-60, were published in 1978. The bill included a section entitled "Rights and Freedoms within the Canadian Federation." The drafting of these proposals was essentially a unilateral effort by the federal government. The government chose between the three options: a general limitation, internal limits specified within the enumerated rights or no explicit limitations that would call for a reliance on the courts to effectuate any possible qualifications. For reasons already expressed, the provinces could not agree with the second and third options. Internal limits made some rights limitable and others limitless. Furthermore, provincial governments argued that any future limitations they deemed necessary would be disregarded because of the explicit nature of the already expressed limit(s). As for the third option, Prime Minister Trudeau's faith in the judicial interpretation of limits was not shared by his provincial counterparts. On this point, the American experience with interpreting 'silent' limits was offered as an unacceptable avenue for the Canadian courts

46 Ibid., at p. 18. The official recommendation reads: (21). The rights and freedoms recognized by the Bill of Rights should not be interpreted as absolute and unlimited, but should rather be exercisable to the extent that they are reasonably justifiable in a democratic society.
to take. Given these perennial concerns, the proposed limitation clause of Article 25 of Bill C-60 was similar to Article 3 of the failed Victoria Charter. Due to the broader scope of entrenched rights that Bill C-60 would guarantee compared to that of the Victoria Charter, the provincial fears of having their legislative sovereignty thwarted made the federal proposals irreconcilable to their positions and the bill subsequently died during the dissolution of Parliament in May, 1979.

Discussion Drafts - 1980

The Canadian Charter of Rights and Freedoms recognizes the following rights and freedoms subject only to such reasonable limits as are generally accepted in a free and democratic society.47

The Canadian Charter of Rights and Freedoms recognizes the following rights and freedoms subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government.48

The political urgency with which the federal government under Prime Minister Trudeau pushed for constitutional reform with an entrenched charter of rights, was evident in what was to become the final stage of constitutional renewal.49 A general limitation clause was the only option proposed as opposed to the range of possibilities offered in previous rounds of negotiations. While this may or may not be considered a response to provincial concerns, the draft wording of the proposed limitation clause was

47 "Federal Draft - The Canadian Charter of Rights and Freedoms" (Federal-Provincial Conference of First Ministers on the Constitution, Ottawa, 8-12 September, 1980).
49 The urgency was evident on two fronts. First, most observers saw Trudeau’s mandate as his last as Prime Minister and therefore securing the patriation of the constitution, complete with a charter of rights, would be a crowning achievement for his political career. The second was that the final stage of renewal began immediately after the Quebec Referendum of 1980 and therefore Trudeau had to deliver on the promises made throughout the campaign.
certainly not. The recommendation made by the 1972 Special Joint Committee on the Constitution\(^{50}\) provided the genesis for this draft proposal. Rather than endorse a general limitation clause, with a specific catalogue of qualifications, the committee recommended a more general set of limitation criteria. This is in stark contrast to the report issued in 1978 by another joint committee on the Constitution\(^{51}\) which recommended that the limitation clause of Bill C-60 (Article 25) “be replaced by a clause which exactly specifies permissible limitations on protected rights and freedoms by the *War Measures Act*\(^{52}\) or similar legislation, and the Government should be required to justify to Parliament the invocation of such legislation.”\(^{53}\) The committee made it clear that any limitations should be “exactly spelled out.”\(^{54}\) Whereas it did not explicitly label those specifics as the 1969 proposals or Article 3 of the *Victoria Charter* did, it strongly indicated that any further criteria that were desired by the *Charter* drafters to limit entrenched rights would have to be ‘spelled out’.

With a new political mandate\(^{55}\) and a clear *Charter* strategy,\(^{56}\) the federal government embarked on what it thought would be an appeasement of provincial concerns vis-à-vis the limitation provision. Including the phrase “parliamentary system

\(^{50}\) Supra, note 45 (recommendation 21 at p. 18, supra, note 46)


\(^{52}\) The *War Measures Act* was enacted in 1914 but was replaced by the *Emergencies Act*, S.C. (1988), c. 29.

\(^{53}\) Ibid., at 20:14

\(^{54}\) Ibid. What is interesting to note is that one of the chairmen on both committees was Mark MacGuigan. Notwithstanding the presence of the same individual in a position of authority, the recommendations on the limitation clause were completely different.

\(^{55}\) The Federal Liberal Party was elected back into power on 18 February, 1980 after its defeat to the Federal Progressive Conservative Party less than a year earlier. This fascinating period in Canadian political history is detailed in Jeffrey Simpson, *Discipline of Power: The Conservative Interlude and the Liberal Restoration* (Toronto: MacMillan of Canada, 1984).
of government” was “intended to expand the scope of permissible limitations.”57 Such general wording of the clause could possibly encourage the courts to defer more readily to legislative initiatives, thus risking the possibility that the Charter would become as ineffective as the 1960 Bill of Rights. The government’s faith however, ultimately rested with the courts to interpret rights and their limitations, a fact that was buttressed by the 1972 Special Committee Report on which this draft clause borrowed heavily.58

Contrary to the two previous general limitation proposals - Articles 3 and 25 - the new limitation clause was symbolically placed at the head of the proposed charter of rights document. With the protection and limitation of rights at the head of the document as section 1, the philosophy and intentions of the governments were open and clear. Substantively, the wording was dramatically altered from what had been previously proposed.

The purpose for this limitation clause, called for the first time ‘section 1’, was twofold. The first was the oft-mentioned assumption that rights were not absolute and they were not to be interpreted as such. This had always been a key assumption when any discussion of limits was raised. The second purpose, which was the impetus for this new proposed wording, was to make clear to the courts that they were to ‘honour’ traditional limits on rights.59 Outlining general principles such as determining limits that

56 See Hiebert, supra, note 34 at p. 119.
57 Ibid., p. 120.
58 “We do not agree with the allegation that the proposal for a Bill of Rights conceals a hidden enlargement of Federal powers. Indeed we believe that Federal jurisdiction is more likely to be expanded by the judiciary in the absence of a Bill of Rights ... The fact is that the losers in the “power game” under a Bill of Rights are the totality of governments and the winners are the people. For us, this is as it should be.” Supra, note 45 at p. 19.
59 See Hiebert, supra, note 34, p. 122
are "reasonable" and "generally accepted", underscores to the courts that the task being asked of them is not one to be easily performed.

This should be considered a positive development in the determination of limits. The first reason has been mentioned; courts will not take this task lightly. Explicitly outlining the limiting criteria within the text of the limitation provision could allow judges to strictly defer to the text. This would prevent any necessary balancing of interests that could possibly arise. A second reason that these set of proposals should be considered a positive development is that by making the requirements for limitations broader, the effect would be a strengthening of guaranteed rights. Precisely because of these broad requirements for limitation, they can be interpreted as imposing strict levels of justification on governments that want to declare certain rights limitable in legislation. The opposing view to this would be "that the courts will be so awed by the task in front of them, of telling a majority in a parliament and a free society that it is unparliamentary, unfree and undemocratic, that they will simply refuse to strike down any limitation on our rights and freedoms."\(^{60}\)

These general concerns speculating on the reactions of courts towards legislation in the face of a general limit lent weight to more particular concerns that arose due to the wording of the section 1 draft. Essentially, there were three major sources of contention. The first concern focused on what was a "generally accepted" (reasonable) limit. Arguments against this portion of section 1 ranged from how "generally accepted" limits

would be empirically determined\textsuperscript{61} to what types of situations should be accepted given previous, similar circumstances in Canadian history.\textsuperscript{62} The main thrust of the criticism asked “[h]ow could one argue that a democratically elected legislature that enacts a certain restriction by majority vote has not thereby enacted a piece of legislation that is “generally accepted”?\textsuperscript{63}

The second concern with the wording of section 1 centered on the phrase “in a free and democratic society with a parliamentary system of government”. Dictating which “free and democratic” societies to compare (those with parliamentary systems of government), raised two further questions. The first was the not-so-subtle distinction made to the courts between parliamentary and presidential systems of government. More accurately stated, it attempted to differentiate between Canadian constitutional values and the American experience with the interpretation of rights. The distinction was a further appeasement to the provinces since it was claimed that they “[attached] a good deal of importance to this ... reference to the parliamentary system of government to indicate to the Court some distinction between our system and the American system.”\textsuperscript{64} A second question raised by this particular phrase centered on the principle of the parliamentary system itself. Parliamentary government is founded on the principle of parliamentary supremacy. By definition, it was (and is) argued, that the entrenchment of a bill of rights

\textsuperscript{61} S. Robinson, Member present, Special Joint Committee of the Senate and of the House of Commons, Hearings, 12 November, 1980 (Ottawa: Queen’s Printer, 1980) (Co-Chairs: H. Hays and S. Joyal) at 3:27
\textsuperscript{62} Walter Tarnopolsky, President, Canadian Civil Liberties Association, Special Joint Committee of the Senate and of the House of Commons, Hearings, 18 November, 1980 (Ottawa: Queen’s Printer, 1980) (Co-Chairs: H. Hays and S. Joyal) at 7:9
\textsuperscript{63} Walter S. Tarnopolsky, “The Constitution and Human Rights” in Banting and Simeon, supra, chap. 1, note 3, p. 269
in such a system is impossible. In theory, a bill of rights, and the institution of judicial review that accompanies it, is incompatible with a parliamentary system since “the last word of parliament has to override any previous word of parliament.” This was, admittedly, not a serious concern, at least not as serious as determining “generally accepted” limits. It is, nonetheless, a concern that was serious enough to warrant amendment in the subsequent final draft of section 1.

A third and final concern about this draft of section 1 was that it did not clearly state who would be responsible for ‘proving’ that a limit on one or more of the guaranteed Charter rights was reasonable. In other words, the burden of proof did not fall on any particular party in a Charter dispute. Furthermore, section 1 was criticized for not providing that any limitations be prescribed by law. As Walter Tarnopolsky, whose testimony to the joint committee prompted much of the changes made to this original draft, stated:

> the onus has to be put in terms of being either necessary or demonstrably justifiable or demonstrably necessary; but the onus has clearly to be upon the one who argues in favour of the restriction and, which is important, it has to be prescribed by law ... because the most important aspect of the Canadian Bill of Rights is not so much in the invalidation of parliamentary legislation as it is in the control of administrative acts, police acts, and with respect to that the limitations that are provided in international instruments require that they be provided specifically by law.

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64 R. Tessier, Deputy Minister of Justice, Special Joint Committee of the Senate and of the House of Commons, Hearings, 12 November, 1980 (Ottawa: Queen’s Printer, 1980) (Co-Chairs: H. Hays and S. Joyal) at 3:78
65 Tarnopolsky, supra, note 62
66 “Perhaps - and least important - but nevertheless an issue which detracts from the effectiveness of Section 1 are the very last few words, that we are talking about a democratic society with a parliamentary system of government.” Tarnopolsky, supra, note 62
67 Ibid., at 7:10
Final Wording - 1981

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.68

The criticisms of the 1980 Discussion Draft of the limitation clause focused on the relative ease with which legislative bodies could impose limits. It was labeled everything from the ‘Mack Truck’ section69 (you could drive rights right through it), to the ‘bathtub’ section70 (rights would get washed down the drain), to the ‘game’ of ‘Russian Roulette’ (if given the choice over execution).71 Despite the rhetorically-charged criticisms, changing the proposed draft to the final product in place today was not a voluntary decision on the part of the federal government. In fact, as then Justice Minister Jean Chrétien testified, “[i]t was not my initial proposition. I have done it under pressure from the provincial governments.”72 The more general clause would narrow the limits that could be applied to Charter rights thus allowing governments more latitude in devising legislation. This seems a curious position for the provinces to support considering that it was widely accepted (and criticized) that limitations that were “generally accepted in a free and democratic society with a parliamentary system of government [would give] more than enough intimation to Canadian judges that they should be prepared to accept

68 Section 1 in supra, chap. 1, note 1
69 L. McDonald, President, National Action Committee on the Status of Women, Special Joint Committee of the Senate and of the House of Commons, Hearings, 11 November, 1980 (Ottawa: Queen’s Printer) (Co-Chairs: H. Hays and S. Joyal) at 9:58
70 P. Cooper, Vice President, Coalition for the Protection of Human Life, Special Joint Committee of the Senate and of the House of Commons, Hearings, 9 December, 1980 (Ottawa: Queen’s Printer, 1980) (Co-Chairs: H. Hays and S. Joyal) at 22:32
just about any restraints duly enacted by a Canadian parliamentary assembly."\(^{73}\)

Presumably, if provincial legislatures wanted to uphold the principles of parliamentary government [read: legislative supremacy], the revised discussion draft of September, 1980 would have a better chance to protect this important principle.

Notwithstanding provincial pressure, the federal government was probably not prepared for the criticisms throughout the Special Joint Committee hearings. In announcing changes made to the section 1 draft, the Justice Minister stated to the committee that "[y]ou have been told by many witnesses that Canadians are not satisfied with the type of compromise which weakens the effectiveness of constitutional protection of human rights and freedoms. I accept the legitimacy of that criticism."\(^{74}\)

There were three major changes made to the 1980 discussion draft. The first, and perhaps most important, was the elimination of the notion that rights could be subjected to limits that were "generally accepted". This was replaced by the strict requirement that rights be subject to "such reasonable limits prescribed by law". This "makes clear that an act that is not legally authorized can never be justified under s.1 no matter how reasonable or demonstrably justified it may appear to be."\(^{75}\) The determination of what are reasonable limits do not, therefore, fall under the domain of judicial interpretation. Rather, courts are themselves instructed to find the proper, legal prescription for


\(^{74}\) "Statement made by the honourable Jean Chrétien, Minister of Justice, to the Special Joint Committee on the Constitution, 12 January, 1981 (Ottawa: Queen’s Printer, 1981), at p. 2
identifying a limitation.

The second major change was the removal of the phrase "in a parliamentary system of government". Most critics of this phrase argued that not only would there be the possibility that judicial interpretation of what constituted a reasonable limit would become an automatic deferral to the federal and provincial legislatures, but that the stipulation of a "free and democratic society with a parliamentary system of government" precluded the courts from seeking guidance on human rights issues from other, non-parliamentary yet still free and democratic societies. The system being excluded was arguably the most important system needed in seeking this type of guidance. With over 200 years experience in judicial interpretations using a bill of rights, the United States Supreme Court was a wealth of comparative legal information. If only precedents from parliamentary systems were relevant, Canadian courts could not appeal to the decisions of the American courts which, by 1980, had already faced many of the issues that a charter of rights would thrust upon the Canadian judicial scene. The use of the phrase "justified in a free and democratic society" widens the reach with which courts can compare these "reasonable limits".

Finally, the words "demonstrably justified" were added, signaling for the first time who bore the onus for proving that a guaranteed right must be limited. This addition came as a direct result of the testimony of Walter Tarnopolsky and his criticisms that the

75 Hogg, supra, chap. 1, note 5, p. 861
76 Janet Hiebert notes that up until the Special Joint Committee hearings of 1980-81, the federal government assumed that the courts, when they determined limits, would at the same time determine the issue of onus. See Hiebert, supra, note 34, pp. 131-133
issue of onus was not addressed in the 1980 draft of section 1. A second suggestion about the issue of onus and whether it was addressed or not before these final changes, claims that the duty of justifying a limit was implied with the phrase “reasonable limits”. The 1980 draft that included the phrase “generally accepted”, negated any onus to justify limits since it would be interpreted that any statute enacted by a legislature would be inherently “generally accepted”. Therefore, once “generally accepted” was struck from the final draft, and the phrase “demonstrably justified” was inserted in its stead, it “unequivocably placed upon the state the onus to justify a limitation.” Whichever view is taken, the insertion of “demonstrably justified” underscores the requirement that those wishing to place limits on guaranteed rights and freedoms must bear the burden of justifying why.

The evolution of the wording of section 1 is important because it indicates how Canadian Charter drafters dealt with a host of concerns in formulating a human rights document and how they intended to limit those same rights. From the ideological and theoretical musings about liberty and justice in a free society to the pragmatic and political desire for governments to hold on to as much power as possible, various drafts and countless hours of negotiations were spent trying to reconcile this spectrum of interests and concerns. What should not be forgotten however is the external influences on the Charter document and the limitation clause in particular. International human rights documents were readily consulted and analyzed for possible components

77 See note 62  
acceptable in the Canadian context. While section 1 is unique in that it is a general limit on an entire rights document, its substance, as well as that of the Charter, finds its genesis in various foreign bills of human rights.

**Foreign Influences on Section 1 and the Charter**

The most glaring difference between the Charter of Rights and the US Bill of Rights is the lack of a general limitation in the latter document. Thus, when looking for comparisons for the section 1 limitation clause, they will not be found due south. Rather, "[t]he Charter’s limitations section is inspired directly from international human rights instruments which contain similar provisions."\(^79\) In the initial stages of drafting what would eventually become section 1, the use of specific limitations written into the text of the rights themselves similar to the provisions found in the European Convention\(^80\) and the International Covenant on Civil and Political Rights,\(^81\) was contemplated as a form of limitation that Canada could pursue. Other lesser known and less cited rights documents also contained similar limitation provisions.\(^82\) None were dismissed out of hand. In fact, the perusal of all available international documents by the Charter drafters could be seen as enhancing the legitimacy of the guarantees, and their limitations, by the international community.

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70 Schabas, supra, note 6, p. 110
80 Supra, note 17, arts.: 6(1), 8(2), 9(2), 10(2), 11(2)
81 Supra, note 38, arts.: 12(3), 14(1), 19(3)(a), (b), 21, 22(2)
This does not suggest that *Charter* drafters rejected the rights expressed in the United States.\(^3\) Their eyes were trained on the experience of the American Supreme Court and the way in which it had had to define limitations against guaranteed rights. But in the constant revision of the evolving limitation clause, section 1 “was designed pursuant to scrutiny on Commonwealth and international bills of rights.”\(^4\) Limits that are “reasonable” are synonymous with the *European Convention* definition of limits that are “necessary” and with the *International Covenant on Civil and Political Rights* definition that outline the criteria under which the limitations are to be considered “necessary”. Subsequent interpretation of the “reasonable” provision in the Canadian *Charter* has been broad as a result of the interpretation given to these and other documents. The same can be applied to similar provisions for limits “prescribed by law”. Terms such as “in accordance with law”,\(^5\) “determined by law”,\(^6\) “provided by law”\(^7\) and “imposed in conformity with the law”,\(^8\) are all similar to the Canadian choice.

The purpose of this overview is to underscore the fact that the limitation clause, and more importantly the *Charter* itself, is the product of much non-American influence.

The US *Bill of Rights* is a special document by virtue of its goals during an era when the

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\(^4\) Schabas, supra, note 6, p. 112

\(^5\) *European Convention on Human Rights*, supra, note 17, art.: 8(2)

\(^6\) *Universal Declaration of Human Rights*, supra, note 40, art.: 29(2)

\(^7\) *International Convenant on Civil and Political Rights*, supra, note 38, art.: 19(3)
‘writing of rights’ was not a major (or even minor) consideration for the nations of the world. The democratic principles which it outlines such as freedom of speech and due process of law are hallmarks of any rights document. Simply because a document espouses similar freedoms does not automatically make it a clone of the American ideal. The natural law theorist may argue that similar freedoms of speech or assembly are inherent or simply ‘out there’, bestowed to every human being by virtue of their being human beings. The positivist may equally argue that these same state given freedoms are nevertheless so fundamental that they are guarantees that any democratic government in any free society should give to its citizens because they are what make free societies function. The framers of the American Bill of Rights did not devise these freedoms for the first time in history. They were one of the first to write them down. The obvious point is made though that if they would not have, someone eventually would have. This is not meant to lessen what the United States has contributed to democracy and the rights of the individual. This is meant, however, to dispel certain myths about the Charter of Rights, and the supposed ‘creeping Americanism’ that some attribute to it because it is considered to be, essentially, a copy of the American example. Perhaps the idea that there are certain fundamental rights that make societies free is a proper one to hold. This would then make the Canadian Charter no different, fundamentally, from most other bills of human rights.\(^{89}\) Once these necessary guarantees are expressed, the equally essential

\(^{88}\) Ibid., art.: 21

\(^{89}\) I say “most other” bills of rights since there are constitutional guarantees for citizens by governments that do not hold democratic principles in high regard. The former Soviet Union had a constitution with various individual rights provisions yet no one would assume that the Canadian Charter was ‘fundamentally’ similar to it.
and particular national characteristics can then be added to individual documents, giving them the uniqueness which make them their own. A cursory glance at the Charter should reveal this distinctiveness.

The (Second) Evolution of Section 1

The evolution of the wording of section 1 demonstrates two important facts about constitution-making. The first is that it is a political process, replete with high-level meetings of officials, each attempting to secure certain provisions specific to their own interests. The second concerns the legal component as negotiators outline concerns about how proposed constitutional provisions will be interpreted by the courts. The preoccupation with judicial interpretation makes it clear that the framers’ role is only a first step in the determination of rights. Securing a favourably worded text during the negotiation phase of constitutional design does not always ensure an equally favourable interpretation by the courts. Whatever the reasons for the changes made to the text of section 1 - and other Charter sections as well - the final draft could not be counted on as the definitive word until after the courts had had an opportunity to interpret it.

Judicial interpretation of section 1 constitutes the ‘second evolution’ of the limitation of rights in the Canadian context and without much doubt, it is the more important of the two. Indeed, judicial interpretation of any constitutional guarantee is vital in determining how broad or narrow a scope rights will be given.¹ A parallel consideration concerns limits on these same guarantees. Judicial attitudes towards limits

¹ See Hogg, supra, chap. 1, note 5, esp. pp. 852-857
will also determine how broad or narrow a scope rights are given. A high standard of justification on the imposition of limits - what American constitutional commentators call a ‘strict level’ of scrutiny\(^2\) - will make rights more difficult to limit thereby broadening their scope. The opposite is also true if a low level of justification is employed.\(^3\)

This chapter will focus on the ‘second evolution’ of section 1 by analyzing how the Supreme Court has interpreted the clause and searched for its own standard of justification. Unlike its American cousin, the Canadian Supreme Court eventually formulated one test\(^4\) to determine the reasonableness of a limitation rather than relying on various tests of scrutiny. This is not to suggest that the Canadian test is not free from American influence\(^5\) or that it does not implicitly use different ‘levels of scrutiny’ as part of the section 1 test. The differentiation between the two formal types of scrutiny is meant to demonstrate how the Canadian Supreme Court chose to interpret the final written product that was the limitation clause. It is clear that from the outset, the Court favoured a review of possible rights limitations based on one threshold test. As will become apparent, some modifications to the Court’s intentions have been made.\(^6\)

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\(^3\) Tribe also outlines a third level of scrutiny devised by the United States Supreme Court which he terms ‘intermediate scrutiny’. As the name implies, it is neither a strict nor a minimal requirement, but falls somewhere between the two. See Ibid.

\(^4\) The test is commonly referred to as ‘The Oakes Test’. It was formulated in R v. Oakes [1986] 1 SCR 103. For an overview of the test see infra, pp.92-97.


This review of section 1 jurisprudence demonstrates the difficulty that the Court has faced when balancing the guaranteed rights under the Charter with the interests of society. It is no surprise that the Court did not want to address this issue too quickly, but at the same time, the Court also realized that it could not avoid addressing the issue for an indefinite period.

The first Charter case\(^7\) that the Court decided came in 1984, two years after the Charter’s inception. While the unanimous Court ruled that it was not necessary to deal with section 1 since the right in question had not been violated, the Court nevertheless raised the issue of the limitation of rights and made clear that it would eventually have to “develop standards and practices which will enable the parties to demonstrate their position under section 1”\(^8\) and that the Courts would ultimately decide the issues under the provision. It was not clear what the Court envisaged by way of “standard” or “practice” but it was clear that parameters would eventually have to be defined within which section 1 would function.

Despite only a handful of cases where the Court addressed the section 1 issue,\(^9\) it was not until 1986 in the case of \(R\ v.\ Oakes\),\(^10\) that a formal threshold test was formulated. It outlined the requirements that had to be met in order for a guaranteed Charter right to be ‘reasonably’ limited. This has become known as the ‘Oakes test’.

\(^7\) Law Society of Upper Canada v. Skapinker [1984] 1 SCR 357

\(^8\) Ibid., at 384

\(^9\) ‘Addressing’ the section 1 issue, especially in pre-\(Oakes\) cases, also means when the Court gives detailed reasons as to why section 1 will not be addressed. Generally speaking, cases include Quebec Association of Protestant School Boards v. Quebec (Attorney General) [1984] 2 SCR 66; Singh v. Canada (Minister
The evolution leading to Oakes, short as it was, showed a Court groping for limiting criteria. The underlying theme of the Court during this time (1984-1986) was two-fold; avoidance of section 1 doctrine and waiting for the ‘right case’ to present itself. Until a suitable case was found in which a formal standard of review could be devised, the Court was not going to interpret section 1 unless it had to. After two years, Oakes emerged as that case. With the newly minted threshold test, the justification to limit guaranteed rights would have to pass the rigorous standards set out. Or so it seemed. ‘Post-Oakes’ cases have included modifications to the test from its original form. One might be tempted to call the era following Oakes the ‘revision’ stage of section 1. I will give in to that temptation.

The analysis of this second evolution of section 1 will be divided using the simple format of the Oakes test as the buffer between the two ‘eras’ of interpretation. Although other divisions of time have been used to accent shifts in the Court’s section 1 jurisprudence, using Oakes as the bridge serves the purpose of comparing how the Court has proceeded in defining limits after the formulation of the threshold test with how it carried out this task before any such test. Analysis of this ‘revision’ era of section 1 may indicate important changes in interpretation, but the simple format of comparing a
tangible product (*Oakes* and beyond), to a time when there was no product (pre-*Oakes*), will keep the analysis focused on bridging alternative forms of interpretation.

**Pre-Oakes**

**General Themes**

"Judicial review of the limitation clause of section 1 represents the most significant change in judicial responsibilities introduced by the *Charter.*"15 This fact was evident throughout the *Charter* formulation stages and, more importantly, acknowledged by the Court in its pronouncement that, as the guardians of the constitution, they had the responsibility to interpret its provisions with "an eye to the future". The Court gave the strong indication that it would interpret the *Charter* as broadly as (reasonably) possible by citing American professor Paul Freund who, in his admonishment of the American judiciary, pleaded that the American Supreme Court not "read the provisions of the constitution like a last will and testament lest it become one."16

Throughout the early cases that addressed section 1, be they specific answers that the Court gave to the constitutional questions posed or as part of *obiter dicta*, two dominant themes emerge. The first is the Court's thinly veiled attempt to wait until the 'right' case had presented itself. In the *Charter* cases preceding *Oakes*, the Court consistently avoided setting any firm doctrine as to how section 1 was to be interpreted. This leads to the second dominant theme which is the Court's avoidance of the section 1

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15 Hiebert, supra, chap 1, note 5, p. 53.
16 Quoted in *Hunter v. Southam* ([1984] 2 SCR 145 at 155.)
issue altogether. Rather than interpret the word ‘avoidance’ in the pejorative sense, a more sanguine alternative is that the Court was waiting for the right case to present itself in order finally to outline already detailed and thought-through threshold requirements for the limitation of rights. The appearance of Oakes, and the formulation of the Oakes test, was not a lucky break taken advantage of by a Court that up to that time had little idea of what would be required to reasonably limit a Charter right. In fact, it is apparent that the Court could have made a detailed pronouncement on a section 1 test before Oakes presented itself.

A third, corollary theme to emerge from early section 1 jurisprudence is that although the Court did not provide clear indications of what a section 1 justification would require, it was very clear what could not constitute a limit on an infringed right. Like those of us who do not know much about ‘works of art’, we may not know exactly what it is that we like, but we definitely know what we do not like. The Court, it seems, demonstrated this same principle.

Waiting for Oakes

The Supreme Court’s reluctance in outlining a section 1 standard of review is not an avoidance of the issue stemming from the justices’ lack of knowledge about such notions as what a ‘reasonable’ limit was or to what extent other free and democratic societies should play in determinating rights limitations in Canada. A large measure of the avoidance, rather, can be attributed to the Court’s desire to find a specific case requiring a balance between society’s interests and an individual’s Charter right. It has already been
seen that section 1 was on the Court’s mind in its first Charter decision even though an appeal to section 1 was not necessary. Writing for the Court, Justice Estey forewarned that determining a section 1 justification was difficult in Skapinker for the same reason that it would be difficult in future cases, that being “that the record on the s. 1 issue was indeed minimal, and without more, would have made it difficult for a court to determine the issue as to whether a reasonable limit on a prescribed right had been demonstrably justified. Such are the problems of the pioneer and such is the clarity of hindsight.”

What Estey meant was that there was simply not enough practice in using such a balancing mechanism and until a more substantial amount of literature - both legal precedent and academic commentary - was available, future appellants should not have expected section 1 to be considered let alone interpreted.

This type of thinking was evident in the first Charter case specifically to raise section 1. Quebec Association of Protestant School Boards v. Quebec (Attorney General), raised the highly charged issue of minority language education rights.

Chapter 8 of the Quebec Government’s Charter of the French Language, otherwise known as Bill 101, restricted access to English schools: (1) to children of parents, at least one of whom received their elementary schooling in English in Quebec, (2) to children whose parents moved to Quebec before the law was passed and who received their education in English outside Quebec, and (3) to children with older siblings already

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18 Supra, note 9
enrolled in English language schools in the province. The issue for the Supreme Court was to decide whether Bill 101 violated the section 23 guarantee of minority language education rights under the Canadian Charter. The Court concluded that it clearly did, following the judgment of the Quebec Superior Court and Court of Appeal. Rather than continue with a section 1 analysis, which would have been appropriate since a right had been found to be violated, the Court decided that Bill 101 was not a reasonable limit, or even a limit for that matter. It was, rather, a denial of a right to minority language instruction. Denials, the Court reasoned, were outside the jurisdiction of section 1. By allowing such legislation to pass section 1 muster, the Court would be going beyond the intentions of section 1 which was to only limit rights, not to deny them outright. In the same vein, performing a section 1 analysis would indicate that such “serious” denials of rights could nevertheless be examined as to their ‘reasonableness’. Implying that there may be ‘reasonable denials’ that could be read into the limitation clause was not a message that the Court wanted to send. In keeping with the opinion in Skapinker, the Court made it clear that there was no determined set of limits under section 1. Any determination of what they were was, therefore, still forthcoming.

Similar reasoning concerning the direct conflict between rights and legislation was advanced in R v. Big M Drug Mart. The case involved a challenge to the federal Lord's

20 See generally, Hogg, supra, chap. 1, note 5, chap. 53 “Language”
23 Supra, note 9. The direct conflict between one’s freedom of conscience and religion on one hand and the religious purpose of the Lord’s Day Act is attacked on the grounds that as an “abstract entity”, Big M had no conscience or human feeling and certainly worshipped no religion. See generally, Mandel, supra, chap. 1, note 5, pp. 313-318 and Knopff and Morton, supra, chap. 1, note 5, pp. 185-189.
Day Act\textsuperscript{24} that restricted the sale of goods on Sunday. Big M challenged the legislation on the grounds that the Act violated freedom of conscience and religion under section 2(a) of the Charter. Again, the Court decided to wait rather than conduct a thorough section 1 review. The reason that such a review was considered unnecessary was due to the Court’s ‘purposive interpretation’ of the Lord’s Day Act.\textsuperscript{25} The majority of the justices reasoned that because the original Lord’s Day Act (1906) had such a clear religious purpose (compelling religious observance), it “renders it unnecessary to decide the question of whether section 1 could validate legislation”\textsuperscript{26} providing a common day of rest. It was obvious to the Court that a conflict between the religious purpose of the Act and the guaranteed freedom of religion would have to be decided in the Charter’s favour without recourse to section 1. Justifying such a piece of legislation would allow Parliament to “rely upon an ultra vires purpose under s. 1” and that if used in this way, section 1 “would invite colourability, allowing Parliament to do indirectly what it could not do directly.”\textsuperscript{27}

The purposive stance towards legislation of this nature\textsuperscript{28} allowed the Court to forego a detailed section 1 analysis. As in the Protestant School Boards case, it was noted that “[p]rinciples will have to be developed for recognizing which government objectives

\textsuperscript{24} R.S.C. 1970, c. L-13
\textsuperscript{25} Justice Wilson was the only member of the Court to assess the Act according to its effect as legislation rather than its purpose at enactment. See R v. Big M Drug Mart supra, note 9 at pp. 356-362.
\textsuperscript{26} R v. Big M Drug Mart supra, note 9 at 353.
\textsuperscript{27} Ibid.
\textsuperscript{28} The Court rejected United States Supreme Court precedent holding that Lord’s Day-like Acts had evolved from having a religious purpose to having a secular one thereby not infringing the guarantees of freedom of religion under the First Amendment. See Ibid. at 329-335 and 339-341.
are of sufficient importance to override a constitutionally protected right or freedom.”^{29}

Once again, the Court gave the indication that some form of standard would have to be devised, but it would not be done only a year after the first Charter decision. Notwithstanding this, the Court appeared more confident in Big M about what an eventual section 1 standard of justification would need to include. This confidence stemmed from the handful of Charter cases decided before Big M Drug Mart,^{30} thus adding to the “record” that Estey alluded to in Skapinker. The foreshadowing of things to come included the call for a ‘proportionality test’, where the Court would have to decide “if the means chosen to achieve this interest are reasonable.”^{31} The Court added that it “may wish to ask whether the means adopted to achieve the end sought to do so by impairing as little as possible the right or freedom in question.”^{32} One year after Big M, the principles raised in it would become an integral part of the threshold test laid out in Oakes.

**Avoiding Doctrine**

The first theme prevalent in the Supreme Court’s early Charter jurisprudence was its reluctance to determine the outcome of a case by appealing to a section 1 review. Given the lack of experience with balancing legislative policy against fundamental human rights, it is no wonder that the Court was wary of the task. Early Charter jurisprudence

^{29} Ibid., at 352
^{31} R v. Big M Drug Mart supra, note 9 at 352
^{32} Ibid.
that today would go to a section 1 test was, at the time, decided without a section 1 review. What followed laid the groundwork for refining the eventual test detailed in *Oakes*, and the parameters of some of the substantive sections of the *Charter*.

**Limits vs. Denials**

The avoidance of addressing section 1 in early *Charter* jurisprudence came in a variety of forms. As already mentioned, the distinction between the limitation of a right and the denial of a right precluded recourse to section 1 and became the first technique in avoiding section 1. In *Protestant School Boards*, the “direct collision” between legislation and a guaranteed *Charter* right was determined to be outside the jurisdiction of section 1. Similarly, in *Big M Drug Mart*, Justice Wilson reiterated this principle by ruling, in a concurrent opinion, that “it was made clear in *Quebec Protestant School Boards*, ... that legislation cannot be regarded as embodying legitimate limits within the meaning of s. 1 where the legislative purpose is precisely the purpose at which the *Charter* right is aimed.”

**Internal Limits**

A second technique used by the Court to avoid a section 1 analysis was determining limits to guaranteed rights within the substantive provisions of the rights

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33 supra, note 9
34 Ibid.
35 *R v. Big M Drug Mart*, supra, note 9 at p. 362
themselves. The *Charter* contains many qualified rights\(^{36}\) besides section 1's blanket provision which indicates - if not mandates - that the interpretation of the rights set out can be subject to internal limitations (determining limits through an interpretation of the substantive right itself). In the pre-*Oakes* period, the finding of a limit within the right itself was used to avoid a section 1 analysis in *Hunter v Southam*\(^ {37}\) and *Operation Dismantle v The Queen*.\(^ {38}\) In *Hunter*, the Court was asked to determine whether a warrantless search, conducted under the authority of subsections 10(1) and (3) of the *Combines Investigation Act*,\(^ {39}\) constituted an infringement on the right to be secure against “unreasonable” searches and seizures under s. 8 of the *Charter*.\(^ {40}\) The Court’s task was to weigh the interests of the right to privacy on the one hand and the needs of law enforcement on the other.\(^ {41}\) Rather than proceed with a section 1 analysis, Justice Dickson, writing for the unanimous Court, concluded that a review of the ‘reasonableness’ of a warrantless search should be conducted through an interpretation of s. 8. Dickson agreed with the Alberta Court of Appeal judge who stated that “s. 8 acts as a limitation on whatever powers of search and seizure the federal or provincial governments already and otherwise possess.”\(^ {42}\) Dickson further concluded that “an assessment of the constitutionality of a search and seizure, or of a statute authorizing a search and seizure, must focus on its ‘reasonable’ or ‘unreasonable’ impact on the subject of the search or the seizure, and not simply on its rationality in furthering some

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\(^{36}\) see supra, chap. 2, note 15  
\(^{37}\) supra, note 30  
\(^{38}\) [1985] 1 SCR 441  
\(^{39}\) R.S.C. 1970, c. C-23 ss. 10(1), (3)  
\(^{40}\) Section 8 reads: “Everyone has the right to be secure against unreasonable search or seizure”  
\(^{41}\) LaForest, supra, note 11 at p. 135
valid government objective.” Pursuing what amounted to a ‘rational connection’ test between legislation and policy objective could be seen as questioning the authority of Parliament, something that - be it their new job or not - the Court was not comfortable doing so soon into the Charter era. Since the appellants did not make “submissions capable of supporting a claim” under section 1, the issue was decided under the s. 8 provision itself.

In Operation Dismantle, various interests groups banded together to argue that the federal government’s decision to allow the testing of American cruise missiles on Canadian soil, especially during the Cold War climate at the time, violated the guarantees of life, liberty and security of the person under section 7 of the Charter. This was another case of a clear balancing of interests: those of the individual guaranteed under the Charter and the mandate of the state in the promotion of state security. What appeared to be an invitation to invoke a section 1 analysis was instead relegated to an interpretation of “principles of fundamental justice” under section 7. Wilson indicated that there may be times when the state “[i]n order to protect the community against such threats (may find it necessary) to take steps which incidentally increase the risk to the lives or personal security of some or all of the state’s citizens.” This contextual interpretation of the limitation possibilities of section 7 allows her to conclude that “rights under the Charter

42 Hunter v. Southam, supra, note 30 at p. 156
43 Ibid., at p. 157
44 Ibid., at p. 169
45 Operation Dismantle v. The Queen, supra, note 38 at p. 489
46 Contextuality in the interpretation of the Charter, and especially of section 1, is elaborated on by Colker, supra, note 6. She does not use Operation Dismantle as an example of this form of interpretation, notwithstanding Wilson’s apparent avoidance of a section 1 review using precisely the context of the case
not being absolute, their context or scope must be discerned quite apart from any limitation sought to be imposed on them by the government under s. 1. The “context or scope” used to forego a section 1 analysis is the lack of live warheads on the missiles being tested. As Wilson elaborates,

This is not to say that every governmental action that is purportedly taken in furtherance of national defence would be beyond the reach of section 7. If, for example, testing the cruise missile posed a direct threat to some specific segment of the populace - as, for example, if it were being tested with live warheads - I think that might well raise different considerations. A Court might find that that constituted a violation of s. 7 and it might then be up to the government to try to establish that testing the cruise with live warheads was justified under the Charter .... It is not, however, called into operation here since the facts alleged in the statement of claim, even if they could be shown to be true, could not in my opinion constitute a violation of s. 7.

The avoidance of section 1 in this case gave rise to an interpretation of limits within the actual right in question. Given the many qualifications found in the Charter, it may not come as much of a surprise that this technique was used and is still used. It should come as less of a surprise that this technique was used during the early Charter period. Until the Court was ready to express its opinion about a section 1 test, any violations of Charter rights would have to be answered using other tools at the justices’ disposal. Internal limits was one such tool.

**Negative Analysis**

An underlying reason for the Supreme Court’s avoidance of a section 1 test was the expectations that were placed on the Court for a definitive interpretation of the Charter, not only in determining the breadth of the guaranteed rights but also about their

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as her determining factor. Avoiding section 1 by appealing to contextuality is as important in this instance as in Wilson’s subsequent opinions in *Singh v. Canada* and *BC Motor Vehicle*, supra, note 9.

47 *Operation Dismantle v. The Queen*, supra., note 45
limitations as well. The expectations, as is usually the case, were too high. As mentioned, the Court's reluctance to address section 1 in a clear and definitive manner stemmed partly from its desire to get a few cases 'under its belt'. As the Court became more confident as to what a proper determination of reasonable limits was, the enunciation of such a test would eventually be made when the 'right' case presented itself. As time progressed, not only were pronouncements made as to what a limitation test could involve but just as important, the Court gave very clear direction as to what could not constitute a reasonable limit under section 1. The first of these activist pronouncements came in Singh v. Canada⁴⁹ in which the procedures under the Immigration Act,⁵⁰ specifically the absence of the right to a hearing "for determining whether a person was entitled to stay in Canada as a political refugee",⁵¹ were challenged as violating section 7 of the Charter. The Court agreed that the appeal be allowed and that the "applications of the appellants for redetermination of their refugee claims be remanded to the Immigration Appeal Board for a hearing on the merits in accordance with principles of fundamental justice."⁵² Singh is important not only for attempting to define a relationship between section 1 limitations and section 7 limitations, but also for clearly indicating what could not be used as part of any future section 1 test, namely, administrative convenience. Counsel for the Minister of Employment and Immigration

⁴⁸ Ibid., at pp. 490-491
⁴⁹ Singh v. Canada (Minister of Employment and Immigration), supra, note 9
⁵⁰ Immigration Act, 1976, 1976-77 (Can.), c. 52
⁵² Singh v. Canada, supra, note 9 at p. 184. Despite the importance of the section 7 issues raised, Singh is not considered the authoritative case on s. 7 because half of the participating justices decided the case
submitted that a requirement for an oral hearing "in every case where an application for redetermination of a refugee claim has been made would constitute an unreasonable burden on the Board's [already strained] resources." Wilson viewed the issue as a deprivation of the right to liberty and whether such a limit against it would be in accordance with the principles of fundamental justice. Clearly it was not. Wilson responded strongly to the issue, declaring:

Certainly the guarantees of the Charter would be illusory if they could be ignored because it was administratively convenient to do so. No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice but such an argument, in my view, misses the point of the exercise under s. 1. The principles of natural justice and procedural fairness which have long been espoused by our courts, and the constitutional entrenchment of the principles of fundamental justice in s. 7, implicitly recognize that a balance of administrative convenience does not override the need to adhere to these principles.54

Despite the clarity of the denunciation of the justification put forward, Wilson had no choice but to 'bite her tongue' in continuing with any sort of section 1 threshold test. The major reason was that such an important task would require a unanimous Court speaking with the authority of one voice. With half of the justices not basing their decision on the Charter, this task would have to wait. Nevertheless, Wilson made sure to emphasize, and she was not challenged on the point, that "[w]hatever standard of review emerges under s.1, it seems to me that the basis of the justification for the limitation of rights under s.7 must be more compelling than any advanced in these appeals.55

according to the Canadian Bill of Rights (1960), foregoing a Charter analysis. A more transparent avoidance of the Charter, let alone a possible section 1 analysis, is difficult to imagine.

53 Ibid., at p. 218
54 Ibid., at pp. 218-219
55 Ibid., at p. 219

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Just over 8 months after *Singh*, the *BC Motor Vehicle Reference*\(^56\) was decided, again with section 7 being the focus of attention. The British Columbia government wanted clarification as to whether s. 94(2) of the *Motor Vehicle Act*,\(^57\) with the ability to imprison a person who had not been aware that they had actually done anything wrong, violated the principles of fundamental justice. In simpler terms, do absolute liability and imprisonment mix? Once again, the Court was faced with determining whether administrative convenience (or as it was termed in this case, ‘expediency’) could save a violation of section 7. Justice Lamer suggested that it may when coupled with the threat of imprisonment, but only in “exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like”.\(^58\) Without the threat of imprisonment, administrative expediency “will undoubtedly under s. 1 be invoked and occasionally succeed. Indeed administrative expediency certainly has its place in administrative law.”\(^59\) In this appeal however, Lamer found that the appeal to section 1 by the government of British Columbia had not “in the least” been satisfied.\(^60\)

Wilson continues along the path she took in *Singh* on the issue of fundamental justice. In *BC Motor Vehicle*, she outlines exactly how difficult it is to justify a limit to section 7. “There must first be found an impairment of the right to life, liberty and security. It must then be determined whether that impairment has been effected in

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\(^{56}\) Reference re: s. 94(2) of the *Motor Vehicle Act (British Columbia)*, supra, note 9. In fact, the case before the Supreme Court of Canada was an appeal by the Attorney General of British Columbia of the original reference question submitted to the Court of Appeal of British Columbia.


\(^{58}\) Ref. re: s. 94(2) of the *Motor Vehicle Act (British Columbia)*, supra, note 9 at 518

\(^{59}\) Ibid.

\(^{60}\) Ibid., at p. 521
accordance with the principles of fundamental justice. If it has, it passes the threshold test in s. 7 itself but the Court must go on to consider whether it can be sustained under s. 1.\textsuperscript{61} The 'real' question, according to Wilson, is whether s. 7 is violated because of the addition of the mandatory imprisonment requirement in the legislation. To this she is unequivocal: "I believe that a mandatory term of imprisonment for an offence committed unknowingly and unwittingly and after the exercise of due diligence is grossly excessive and inhumane .... I believe, therefore, that such a sanction offends the principles of fundamental justice embodied in our penal system."\textsuperscript{62} In terms of using section 1 to justify such violations against the principles of fundamental justice, Wilson goes further than Lamer's "exceptional conditions". It would appear that even the examples he gave would not pass a section 1 test because the principles of fundamental justice would be offended and as indicated in Singh, and reiterated in BC Motor Vehicle, "a law which interferes with the liberty of the citizen in violation of the principles of fundamental justice cannot be saved by s. 1 as being either reasonable or justified. The concepts are mutually exclusive."\textsuperscript{63}

**Conclusion**

The Supreme Court's experience with section 1 between 1984 and 1986 was marked by caution. Its reluctance to give an exhaustive definition until it absolutely had to was evident in how it defined only those terms it was required to define or how it

\textsuperscript{61} Ibid., at p. 523
\textsuperscript{62} Ibid., at p. 534
\textsuperscript{63} Ibid., at p. 529
avoided any positive definition of a particular term and focused instead on a negative analysis in which it was made explicit what could not constitute a justification for limiting a Charter right. Estey’s opinion in Skapinker was an accurate foreshadowing of the Court’s performance during its first two years of section 1 jurisprudence. As experience was gained, each subsequent opinion became more explicit about what an eventual section 1 standard would contain, even going so far as to suggest the title ‘proportionality test’ one year before its unveiling in Oakes. This sort of confidence meant that the only thing standing in the way of a detailed section 1 test was a case, or more accurately put, the right case.

**Oakes**

The presumption has been made that R v. Oakes was the ‘right’ case for the Supreme Court to outline its standard for section 1 review. Given the circumstances surrounding the case, this idea has some merit. Realistically though, Oakes may appear to be a victim of fate, namely being at the right place at the right time.

The facts surrounding Oakes “are themselves relatively unimportant”. David Oakes was charged under section 8 of the Narcotics Control Act which stated that anyone found in possession of a narcotic is presumed to be in possession for the purpose of trafficking and unless the accused can prove otherwise, they will be convicted on the

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64 Singh v. Canada (Minister of Employment and Immigration); Ref. re: s. 94(2) of the Motor Vehicle Act (British Columbia), supra, note 9

65 See text accompanying note 17, supra

66 This title is found in R v. Big M Drug Mart, supra, note 9 at p. 352.
more serious charge of trafficking. It is this 'reverse onus' provision that Oakes argued violated his right to be presumed innocent under s. 11(d) of the *Charter*. For such a landmark case, the facts are relatively banal, yet its simplicity determined its significance. The Court decided that the reverse onus provision under section 8 of the *Narcotic Control Act* did violate section 11(d) of the *Charter*. Realizing that this was a possibility, the Crown responded by appealing to section 1 and argued that such a limit on a constitutionally guaranteed right was, in fact, reasonable. The Court disagreed. The significance of the disagreement was that for the first time the Court described the 'formula' it would use to determine when a law could be justified as a reasonable limit against a constitutionally guaranteed right. Whereas in previous cases the Court ducked a thorough section 1 analysis, *Oakes* provided the opportunity to conduct a comprehensive review.

This review was possible for at least two reasons. The first was that after two years of practice with the *Charter*, the Court was at a point where it could speak confidently in one voice as to how this crucially important section would be interpreted.\(^69\) It may be argued that a detailed test could have been written in *Big M Drug Mart* since on the section 1 issue, the Court was clear that a threshold test under section 1 would have to include a proportionality test that would allow it to assess the means chosen by the legislature to achieve a balance between the collective good and the individual right in

\(^{67}\) Beatty, supra, chap. 1, note 5, p. 23. This harsh categorization of the facts is more accurately described as facts that do not 'stand out', representing a rhetorically charged issue.

\(^{68}\) R.S.C. 1970, c. N-1

\(^{69}\) In fact, there were two official opinions written; the judgment written by Chief Justice Dickson and a concurring opinion by Justice Estey. Estey's concurring opinion, however, was only seven lines long and
question. However, the facts in *Big M Drug Mart* allowed the Court to decide the fundamental issues without recourse to section 1, presumably because of their ‘answerability’ under the substantive provisions of the right in question. In *Big M’s* case this would have been the freedom of religion under s. 2(b). The facts in *Oakes* are not so fundamental and therefore allowed for a formulaic analysis of the issues to be weighed.

The second reason that *Oakes* provided an opportunity for a comprehensive review of section 1 was that it was a good ‘example’ case. In *Protestant School Boards*, the Court provided an example of a state imposed religion that would not survive a constitutional challenge. In this same vein, the same tactic could reasonably be assumed to have been used in *Oakes* when Chief Justice Dickson elaborated on the proportionality test. This made the explanation easier to understand which is the reason why any example is put forward when explaining a difficult concept. Taken as a whole, *Oakes* can be viewed as ‘one big example’. Given the facts, it was an easy case in which to go through the newly minted test, step-by-step, in order to demonstrate how a limit would be determined under section 1.

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agreed with Dickson’s treatment of section 1. Therefore, on the section 1 question, the Court was unanimous.

70 *Quebec Association of Protestant School Boards v. Quebec (AG)*, supra, note 9

71 See supra, note 4

72 Yet even during the unveiling of the section 1 test, there was a feeling of incompleteness. Because the reverse onus provision under s. 8 of the *Narcotic Control Act* was found to be an unreasonable limit after only the first step of the proportionality test, the following two steps of the test would have to be interpreted another day. The ‘rightness’ of *Oakes* as ‘The Case’ to conduct a thorough section 1 review is questionable given these circumstances. It may be argued that even in *Oakes* there was evidence of the earlier practice of avoidance.
The Test

The threshold test outlined in Oakes was a straightforward though strict standard. As mentioned, the facts in Oakes made using the test easy. How it would be used in more complex cases was the next test for ‘the test’. Of course, devising a specific formula for determining limits may have been inevitable in order to allow the Court to avoid interpreting such a “malleable”, “onerous” and “externally contestable” set of concepts as those found in the text of section 1.

For a judgment, in the words of Peter Hogg, that “has taken on some of the character of holy writ”, the portion of the decision in Oakes that outlines the actual test is brief, covering approximately two pages of the 40-page decision. Biblical passages being best interpreted in their original form, I set out Chief Justice Dickson’s criteria for establishing a limit of a guaranteed Charter right under section 1 in its entirety:

To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be “of sufficient importance to warrant overriding a constitutionally protected right or freedom” .... The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

Second, once a sufficiently significant objective is recognized then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves “a form of proportionality test” .... Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the

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73 Former Justice Gerard LaForest expressed this concern about Oakes. “My principle problem with Oakes, then, was with how the criteria advanced there could be transposed to more complex situations.” LaForest, supra, note 11, p. 140
75 Hogg, supra, chap. 1, note 5, p. 866
objective in this first sense, should impair “as little as possible” the right or freedom in question .... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance”.\(^7\)

To summarize, *Oakes* can be explained using the ‘two-step’ model\(^7\) or by sequentially explaining the four criteria\(^7\) that need to be fulfilled by the party requesting the limit. With regards to the first part of the two-prong test, the decision whether the government objective is “pressing and substantial”, it can be safe to assume, as it was when it was first introduced in *Oakes*, that the Court would be wary to second guess the legislature in such a manner. The members of the Court are astute enough to realize the political backlash that would ensue from telling the legislature that the statute in question is unconstitutional not because it may infringe a Charter right on procedural grounds but because the very purpose of the law itself is unimportant. Questioning the will of the people in this fashion is not a scenario the Court would want to find itself in.

The second step of the *Oakes* test encompasses three further criteria of analysis. The first is referred to as the ‘rational connection test’ meaning that the law must be rationally connected to its objective. This can only be decided after the objective itself has been determined to be important enough, that is after the legislation has passed the first step of the *Oakes* test. Although it is generally accepted that most section 1 analyses will be decided under the second criterion (the ‘least drastic means’ test), *Oakes* was decided under this rational connection test. The Court ruled that while the objective of the impugned law - to protect society from drug trafficking - was sufficiently

important, it failed the rational connection test. Specifically, the ‘reverse onus’ provision of the *Act*, which placed the burden of proof on the accused to demonstrate that the possession of narcotics found on their person was not for the purposes of trafficking, was found not to be rationally connected to the larger objective. As Dickson wrote, “there must be a rational connection between the basic fact of possession and the presumed fact of possession for the purpose of trafficking.”\(^79\) Since the *Act* did not specify the quantity of narcotics that would infer possession for the purposes of trafficking, the Court found that the legislation was not a reasonable limit of the accuseds’ rights under the *Charter*.

The ‘second step of the second step’ is the requirement that a law limiting a *Charter* right do so using the ‘least drastic means’.\(^80\) As outlined above, the means “should impair as little as possible the right or freedom in question”,\(^81\) meaning that the law “should impair the right no more than is necessary to accomplish the desired objective.”\(^82\) As mentioned, this second step is where most of the section 1 analyses are decided. Since courts will rarely tell legislatures that the objectives behind a law are unimportant or that they will not accept the rational connection between the legislation and the stated objectives, the least drastic means test becomes the most important step of the section 1 analysis to the point where “nearly all the s. 1 cases have turned on the

\[^78\text{See Hogg, supra, chap. 1, note 5, chap. 35 “Limitation of Rights”, esp. pp. 866-885}\]

\[^79\text{R v. Oakes, supra, note 10 at p. 141}\]

\[^80\text{Also referred to as the ‘minimal impairment test’.}\]

\[^81\text{Ibid., at p. 139}\]

\[^82\text{Hogg, supra, chap. 1, note 5, p. 878}\]
answer to this inquiry." The concern with determining what a law of ‘least drastic means’ would entail is that one could continually conjure laws that were regressively ‘less drastic’ in their impact. In fact, “a judge would be unimaginative indeed if he could not come up with something a little less ‘drastic’ or a little less ‘restrictive’ in almost any situation, and thereby enable himself to vote to strike legislation down.” Without proper consideration of all possible circumstances, including administrative expediency and costs (circumstances deemed of secondary importance in Singh), court-imposed legislation of least drastic means has the real threat of forsaking the federal principle of allowing different provincial legislative responses to various public policy areas, thereby making possible more Askov-like decisions. Taken to the extreme, the requirement of least drastic means “would allow only one legislative response to an objective that involved the limiting of a Charter right.” With one court-directed response on this part of the test, no room would be left for diverse provincial responses to the same issues making the guiding principle of federalism a mere theory.

The third and final step of the section 1 Oakes test involves the proportionate effect of the limiting measures employed. Two elements of this step are important to

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83 Ibid., p. 867
86 R v. Askov [1990] 2 SCR 1199. Askov was the Supreme Court decision regarding administrative reasons for delays in judicial proceedings. Rather than invalidate the extreme delay in the particular case alone (Askov waited 23 months between committal and trial), thereby setting a precedent that would have invalidated similar delays, the Court set a much stricter precedent by devising a general standard of between six to eight months. What resulted was not a more expedient judicial system, but a nation-wide stay of proceedings in thousands of cases that were over the new standard set by the Court. For an overview of the implications of Askov see Knopff and Morton, supra, chap. 1, note 5, pp. 217-220 and Carl Baar, “Criminal Court Delay and the Charter: The Use and Misuse of Social Facts in Judicial Policy Making”, Canadian Bar Review, Vol. 72 (1993), pp. 305-336.
87 Hogg, supra, chap. 1, note 5, p. 879
point out. The first is that notwithstanding the definition of this test in Oakes as a 'means test', the proper analysis under which it fits is not clear. It has been argued that this step has nothing to do with 'means' but rather with the objective of the law instead. As Hogg suggests, the proportionate effect test is simply a restatement of the rational connection test:

“If a law is sufficiently important to justify overriding a Charter right (first step), and if the law is rationally connected to the objective (second step), and if the law impairs the Charter right no more than is necessary to accomplish the objective (third step), how could its effects then be judged to be too severe? A judgment ruling that the effects of the law were too severe would surely mean that the objective was not sufficiently important to justify limiting a Charter right.”

Similarly, others have suggested that the proportionate effect test is an extension of the least drastic means test. The original definition of this third step was intended to raise a very different question from the other criteria of the Oakes test, namely that even if the means chosen is the least drastic available, is it still too drastic to justify upholding? Due to the nature of the question, such a determination rests with an analysis of the least drastic means test. “If the Court holds that the government has met that requirement, it invariably holds that this component [least drastic means] has been satisfied as well; similarly, if the Court holds that this component has not met that requirement, it invariably holds that this component has not been satisfied either.”

The second element to consider about the proportionate effect test is that regardless of whether one considers it a separate test or not, as a branch of the Oakes test

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88 Ibid., at p. 883
it has been neglected "almost since it was first articulated."\textsuperscript{90} The guiding question framed from the original \textit{Oakes} test asks "whether the \textit{Charter} infringement is too high a price to pay for the benefit of the law."\textsuperscript{91} This question however, appears to go unanswered since "this step has never had any influence on the outcome of any case."\textsuperscript{92}

Whichever view one takes, it is quite safe to assume that the bulk of any section 1 analysis will fall under the means test component and the determination of the least intrusive type of legislation available. As stated, for obvious reasons, no court will second-guess a legislature about the underlying objectives of the statute. After this has been decided, the strict \textit{Oakes} standard of scrutiny can really begin. As will become evident in the cases following \textit{Oakes}, the Court has tempered the rigid and formalistic stance outlined to allow for broader, less sweeping standards of justification.

\textbf{Post \textit{Oakes}}

While most observers would acknowledge that the test developed in \textit{Oakes} would eventually undergo some interpretive changes, no one could have guessed at the speed with which the Court began to re-interpret the original test. This may not be too surprising considering the strict nature of the test.\textsuperscript{93} There are many cases that have been

\textsuperscript{91} Hogg, supra, note 87
\textsuperscript{92} Ibid. Hogg does allude to McLachlin's decision in \textit{Rocket v. Royal College of Dental Surgeons} [1990] 2 SCR 232, that upheld the impugned law as a sufficiently important objective but failed this third step of the proportionality. The reasons given, however, were essentially a repetition of the 'least drastic means' criterion.
\textsuperscript{93} The standard of proof is the civil standard of proof "on a preponderance of probability". The Court has made it clear in \textit{Oakes} however, that the test for section 1 justification would have to be applied
singed out demonstrating such a re-interpretation of Oakes. This evolution has been called everything from a “decline of grand unified theory,” to a ‘reconceiving’ of the Oakes test, to the “fall of doctrine.” What follows is a representative sample of section 1 cases that are generally accepted as demonstrating shifts in the Court’s thinking towards the original designs of the Oakes test.

**R v. Edwards Books and Art**

Just under ten months after the decision in Oakes was delivered, the Court began its revision of the standard of justification. Edwards Books was the second Charter challenge to Sunday closing legislation that the Supreme Court faced. As discussed above, Big M Drug Mart challenged the federal Lord’s Day Act prohibiting Sunday shopping. Edwards Books challenged Ontario’s Sunday closing legislation. Unlike Big M, a section 1 analysis was conducted for the obvious reason that the Court now had a definitive test of justification for guidance. Rather than uphold the literal reference in Oakes to the means impairing “as little as possible” the right in question, Chief Justice Dickson - the author of Oakes - interpreted the question put forward as whether the provincial act abridged the s. 2(a) freedom of religion for Saturday religious observers “as little as is reasonably possible.”

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rigourously, to the point where there would have to be “a very high degree of probability”. *R v. Oakes,* supra, note 10 at p. 138
94 Dassios and Prophet, supra, note 90
95 Mendes, supra, note 74
96 Lokan, supra, note 5
97 [1986] 2 SCR 713
98 *Retail Business Holiday Act,* R.S.O. 1980, c. 453
99 *R v. Edwards Books and Art,* supra, note 97 at p. 772
Two facts stand out. The first is that the original conception of a limitation impairing a right ‘as little as possible’ was conveyed in *Big M Drug Mart* - the original Sunday closing case. The irony does not go unnoticed with this dilution of limitation criteria. The second fact is not only relevant for this case but for all subsequent revisions to *Oakes* test standards. That is, such revisions were forewarned in *Oakes* and reiterated in *Edwards Books*. The Court acknowledged that contextuality would play a key role in justifying limitations on rights by stating in *Oakes* that “the nature of the proportionality test will vary depending on the circumstances.”\(^{100}\) This, coupled with the civil standard of proof required (albeit a standard that “must be applied rigorously”\(^{101}\)), gives the Court some maneuverability. Indeed Dickson, writing the decision in *Edwards Books*, made the point clear by saying “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.”\(^{102}\) Essentially, the Chief Justice is letting it be known that like all human endeavours, the first draft is usually not the final draft and that changes, however slight or major, should be expected, if not necessary.

*Irwin Toy Ltd v. Quebec (AG)*\(^{103}\)

*Irwin Toy* presented the Court with the question of whether an outright ban on television advertising directed at children under 13 years of age limited as little as possible the advertiser’s freedom of expression guarantee under the *Charter*. The majority of the

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\(^{100}\) *R v. Oakes*, supra, note 10 at p 139

\(^{101}\) Ibid., at p. 137

\(^{102}\) *R v. Edwards Books and Art*, supra, note 97 at pp. 768-769
Court decided that a ban did violate the s. 2(b) freedom but that it was a reasonable limit under section 1. This simple conclusion was reached however, by what some critics have termed the Court’s "bewilderingly" inconsistent nature in section 1 decision making. As alluded to earlier, the Oakes test was perceived by many - mistakenly - as a final, doctrinal pronouncement of how Charter rights were to be limited. Mechanistic though it was, the Court was expected to adhere to the parameters imposed by Oakes in a stringent manner. On one level, this is a desirable goal. Consistency in jurisprudence is one of the hallmarks of any judicial system and is especially important in decisions that focus on the limitation of human rights. But as the Court itself had made clear, the Oakes test of justification was not to be the final word on the determination of rights limitation. To be sure, it would be the framework around which limits would be determined, but the above-mentioned criterion of judicial maneuverability is another important facet of the Oakes test, one that has not been readily granted.

Broadly speaking, the Court appears to limit the freedom of expression based on the first step of the test, the pressing and substantial objective. The impugned legislation had as its goal "the protection of a group which is particularly vulnerable to the techniques of seduction and manipulation abundant in advertising." As for the means by which this objective was achieved, the Court saw that there was "no doubt that a ban on advertising directed to children is rationally connected to the objective," and that the

103 [1989] 1 SCR 927
104 Don Stuart, Charter Justice in Canadian Criminal Law, 2nd Ed. (Scarborough: Carswell, 1996), p. 10
105 Irwin Toy Ltd. v. Quebec (AG), supra, note 103 at p. 987
106 Ibid., at p. 991
impairment of the right was as little as could be expected given the circumstances. This is the area where the Court has endured the most criticism. While most want to see the original strict scrutiny of Oakes maintained, the Court, especially in Irwin Toy, has taken pains since Oakes to clarify its stance on the need for flexibility. The Court cited from the Oakes decision the qualifications inherent in the civil standard of proof, namely the balance of probabilities, as well as English precedent on the same subject. These observations were important in the Court's determination that even though the restriction on advertising directed at children under 13 was not the least intrusive of scenarios, the evidence sustains the reasonableness of the legislature's conclusion that a ban on commercial advertising directed to children was the minimal impairment of free expression consistent with the pressing and substantial goal of protecting children against manipulation through such advertising. While evidence exists that other less intrusive options reflecting more modest objectives were available to the government, there is evidence establishing the necessity of a ban to meet the objections the government had reasonably set.

The major concern is this contextual approach to section 1 determination. While some welcome this form of jurisprudence, others lament the clarification of the Oakes test becoming nothing more than the statement "it all depends". As for Irwin Toy in particular, how the Court can fairly easily grant section 1 protection in this case but be split on the same issue in other cases that have the same objectives of protecting not only society but a smaller and more vulnerable group in society, seems puzzling - and not

107 "Within the broad category of the civil standard, there exist different degrees of probability depending on the nature of the case." Ibid., at p. 992.
108 Ibid. "The case may be proved by a preponderance of probability, but there may be degrees of probability within the standard. The degree depends on the subject matter .... It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion" (Bater v. Bater [1950] 2 All E.R. 458 (C.A.) at 459).
109 This was a point that the Court made sure to be very clear about in order to demonstrate the vulnerability of the targeted group and that the restrictions were not targeted to a wide swath of society.
110 Irwin Toy Ltd. v. Quebec (AG), supra, note 103 at p. 999
consistent.\textsuperscript{113} Framing a response in contextual terms, the Court stated that the group in question was children, a group who “are not as equipped as adults\textsuperscript{114} to evaluate the persuasive force of advertising.”\textsuperscript{115} It would appear that this was the deciding factor in saving the legislation.

\textit{Reference re: ss. 193 & 195.1(1)(c) of the Criminal Code (Man.)}\textsuperscript{116}

This reference to the Supreme Court, commonly referred to as the \textit{Prostitution Reference}, upheld the offence of communication or attempting to communicate in a public place for the purposes of prostitution. It was not difficult to find that the legislation violated freedom of expression under the \textit{Charter}, but on the question justifying the violation as a reasonable limit, the Court split 4-2. Once again, the minimal impairment, or least drastic means, test was the focus of the decision. While Justice Lamer based his section 1 analysis on the infringement of the s. 2(b) freedom of expression, Justice Wilson, in her dissenting opinion, relied on the s. 7 right to liberty. The referred legislation was too broad for Wilson, especially considering the possibility of imprisonment that would fall on someone communicating firstly, in a manner that was not

\textsuperscript{111} See Colker, supra, note 6
\textsuperscript{112} Lokan, supra, note 5, p. 184
\textsuperscript{113} Lokan asks “[h]ow, for example, does one characterize the infringement of rights of the accused in a rape-shield law? [\textit{R v. Seaboyer} [1991] 2 SCR 577] Or a provision banning hate propaganda? [\textit{R v. Keegstra} [1990] 3 SCR 697] In each of these two cases, the impugned law aimed to protect not just society at large but a smaller and assumedly vulnerable group in society.” Lokan, supra, note 5 at p. 183.
\textsuperscript{114} Or older children for that matter. To reiterate, the legislation only dealt with children under 13 years of age, itself a relatively arbitrary figure. By placing a ban directed at ‘non-adults’, as those found in federal and provincial election legislation, would have most likely been found to be too intrusive and would not have secured a section 1 justification.
\textsuperscript{115} \textit{Irwin Toy Ltd. v. Quebec (AG)}, supra., note 103 at p. 990
\textsuperscript{116} [1990] 1 SCR 1123
causing a public nuisance and secondly, for a lawful activity. Wilson’s judgment stems from her decision in BC Motor Vehicle that the sanction of imprisonment was too severe for what could amount to an honest mistake.

Justice Lamer, on the other hand, continued the section 1 evolution by expressly declaring that the freedom in question was impaired “as little as reasonably possible in order to achieve the legislative objective.” Lamer adds the qualified criterion of “as little as reasonably possible” in the section 1 analysis, despite his use of the original wording in Oakes about a freedom being impaired “as little as possible” at the outset of the section 1 analysis. One may assume that at this point in general section 1 analysis, reference to the original text of Oakes on the issue of minimal impairment is a formality and that the addition of the qualifier “reasonably” should be expected as the norm.

A further evolution of the section 1 test is the nature of the legislation before the Court and how the justices view their institution’s relationship with governments. Dickson asks the question “[c]an effective yet less intrusive legislation be imagined?” In effect, the Chief Justice could imagine such legislation but in appealing to what was the pressing objective of the legislation, he did not find it to be “unduly intrusive.” This deference towards Parliament signaled a new criterion for ‘least drastic means’ analysis. The Court should be cognizant of the myriad of possibilities considered by legislators in devising legislation and notwithstanding that “[t]he legislative scheme that was eventually

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117 Prostitution is itself a lawful activity. Wilson equated this lawful activity with general ‘communication’ - another lawful activity - and concluded that the legislative response of imprisonment was far too drastic. See Ibid., at p. 1223

118 Ref. re: s. 94(2) of the Motor Vehicle Act (British Columbia), supra, note 9

119 Ref. re: ss 193 & 195.1(1)(c) of the criminal code (Man.), supra, note 116 at p. 1199

120 Ibid., at p. 1137
implemented and has now been challenged [is not] the 'perfect' scheme that could be imagined by this Court or any other court,"¹²² it is not the role of the Court to substitute what it would consider a 'better' scheme and that it should, therefore, defer to parliamentarians. To make this point clear, Dickson reiterated his decision in Edwards Books: "I should emphasize that it is not the role of this Court to devise legislation that is constitutionally valid, or to pass on the validity of schemes which are not directly before it, or to consider what legislation might be most desirable."¹²³ The deferential tone taken in this reference signaled a further 'loosening' of section 1 criteria for the justification of limits on Charter rights.

**R v. Chaulk**¹²⁴

Up to this point in its jurisprudence, the Court has taken a 'flexible' approach to the original threshold test outlined in Oakes. Such revisions to the test as shifting to whether a right has been impaired "as little as reasonably possible" from the original "as little as possible" standard and an overall acceptance of deference to legislative schemes, notwithstanding the 'imperfection' of them, have been made. Chaulk continues the section 1 revision by adding a new dimension to the original Oakes test.

The issue in Chaulk focused on the presumption of sanity provisions in the criminal code.¹²⁵ The purpose of this reverse onus provision was simply to rid the

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¹²¹ Ibid.
¹²² Ibid., at p. 1138
¹²⁴ [1990] 3 SCR 1303
¹²⁵ R.S.C., 1985, c. C-46 s. 16(4): "Everyone shall, until the contrary is proved, be presumed to be and to have been sane".

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Crown of “the impossibly onerous burden of disproving insanity.”\textsuperscript{126} It appears to be a clear case of Parliament balancing the rights of the accused against the objective of convicting clearly guilty persons.

Turning to the minimal impairment test, a majority of the Court ruled that since Parliament could not be expected to seek out the “absolute least intrusive means of obtaining its objective” then the question becomes “whether Parliament could reasonably have chosen an alternative means which would have achieved the identified objective as effectively.”\textsuperscript{127} This ‘test of effectiveness’ was a further demonstration of the Court’s deference towards parliamentary decision making. To place the burden of proof on the accused to prove insanity was argued - correctly - as “ineffective” since ‘faking’ insanity is a fairly easy task.

The problem with this type of section 1 interpretation, and subsequent deference to parliamentary legislation, was what Wilson described in her dissent as a “significant departure from the approach taken to s. 1 by this Court up until now.”\textsuperscript{128} What Wilson disagrees with is that the objective posed by Lamer protects what she sees as a hypothetical scenario of accused persons who ‘fake it’ to escape conviction. If it has been shown that guilty persons are successful escaping liability through dubious insanity pleas, then such a measure would indeed be warranted. What the reverse onus does, however, is “guard against a possible problem that might arise.”\textsuperscript{129}

\textsuperscript{126} R v. Chaulk, supra, note 124 at p. 1338
\textsuperscript{127} Ibid., at p. 1341
\textsuperscript{128} Ibid., at p. 1373
\textsuperscript{129} Ibid. (emphasis in original)
The majority of the Court does not consider this a major issue for two reasons. The first is that given the strict limitation of liberty the criminally insane incur, such pleas of insanity will be rare. The second, and for the majority the most important reason is that Parliament, having faced a host of possibilities of how to deal with such issues, specifically chose the impugned legislation and it is not for the Court to second-guess Parliament's decision.

*R v. Laba*¹³⁰

Ten years after the Court's first *Charter* decision and eight years after *Oakes*, the Court appears to demonstrate its comfort with section 1 requirements. These are not the original *Oakes* standards but *Oakes* still remains the essential framework. *Laba* is an important case because it signals a 'turning of the corner' with respect to section 1 decision-making. The case dealt with a reverse onus provision under the criminal code which made it an offence to purchase or sell any "rock, mineral or other substance that contains precious metals unless he establishes that he is the owner or agent of the owner or is acting under lawful authority."¹³¹ If the assumption is made that section 1 jurisprudence, and the consistency that was originally hoped for, had been on a constant slide, *Laba* appears to be the point where the slide has stopped. This is evident on two fronts. The first is the oft-mentioned reference to the minimal impairment test in *Oakes* that defines legislation as impairing a *Charter* right "as little as possible" and the near

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¹³⁰ [1994] 3 SCR 965
¹³¹ Ibid., at pp. 965-966
immediate re-definition of the term to “as little as reasonably possible”. The Court, lamentably, does not make an explicit attempt to change the criteria from the former to the latter distinction. *Laba*, as previous cases, takes the second “reasonable” standard as the criterion by which to judge. As in the *Prostitution Reference,* the original wording of the minimal impairment test in *Oakes* is used but the analysis conducted by Justice Sopinka found that the Crown had not demonstrated that Parliament had chosen the alternative that impaired the contested right “as little as is reasonably possible.” Sopinka continues with his reasons why this is so, namely that “Parliament should be accorded some leeway and need not choose the least restrictive alternative that can be imagined.” This is precisely the type of deference that the Court displays in *Chaulk.*

The difference between the two is that in *Chaulk* the reverse onus provision that was appealed was upheld as necessary to pursue the government’s legislative objective. In *Laba,* the reverse onus provision was found to be unconstitutional and could not be saved by section 1, something that had not happened since the reverse onus provision in *Oakes* was struck down in 1986.

Why the difference in outcomes? Simply put, in *Chaulk,* Parliament was found to have chosen the alternative that impaired the right in question as little as reasonably possible whereas in *Laba,* it was decided that Parliament did not accomplish this. The reasons in *Laba* were similar to Wilson’s dissent in *Chaulk,* which focused on a

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132 Ref. re: ss. 193 & 195.1(1)(c) of the criminal code (Man.), supra, note 116.
133 R v. Laba, supra, note 130 at p. 1010
134 Ibid.
hypothetical problem that the reverse onus provision was supposed to guard against, namely sane accused ‘faking’ insanity to escape conviction. This was not demonstrated to be an actual problem but a problem that “might arise”. In Laba, a similar reverse onus provision was struck down because of, one can assume, the objective reality in proving ownership of property versus proving mental capacity. Sopinka felt that Parliament could have (and, in effect, should have) chosen a less stringent burden on the accused, and subsequently a more onerous burden on the Crown. Laba makes clear that reverse onus provisions will not be saved without consideration of all alternatives and, one could add, all possible scenarios.

RJR MacDonald v. Canada\(^{136}\)

The decision by the Court that RJR MacDonald’s freedom of expression was violated, and that the challenged legislation could not be saved under section 1, was telling for at least two reasons. The first is the social context of the case. RJR MacDonald, commonly referred to as a member of ‘Big Tobacco’, challenged federal legislation\(^{137}\) that required, among other things, that tobacco companies place warnings on their products about the health risks associated with them. RJR MacDonald challenged\(^ {138}\) the Act as a violation of its freedom of expression guarantees under the Charter. Having the tobacco industry, with its questionable reputation, seek protection from having to place warning

\(^{136}\) [1995] 3 SCR 199

\(^{137}\) Tobacco Products Control Act, S.C. 1988, c. 20 ss. 3, 4, 5, 6, 7, 8, 9, 10, 17, 18, 19

\(^{138}\) Another member of the ‘Big Tobacco’ group, Imperial Tobacco, was also a part of this challenge but since it only challenged certain subsections of the Act, as opposed to RJR MacDonald’s challenge of the entire Act, the case is indexed with RJR MacDonald being the principal appellant.
labels on their products provides fodder for not only anti-smoking groups, health groups and other professionals, but it also raises the awareness of such issues among the general public as few issues can.

A second reason that the case was telling was the decision rendered. In a 5-4 split, the Court sided with RJR MacDonald, finding that their freedom of expression had indeed been violated and that the legislation passed by Parliament could not be saved by section 1 as a reasonable limit on this right violation. The split demonstrates the clear demarcation line among the justices pertaining to the analysis of section 1 and the use of the Oakes test. This demarcation is between those justices who would bestow upon Parliament a higher degree of deference towards its legislative choices and those who would require that Parliament demonstrate clearly the need for legislation that violates rights.

The dissenting opinion seems to take the position outlined in Irwin Toy, namely that since the government’s legislative objective was so very pressing and substantial, and its construction of the law was made after considering a host of other alternatives, it should not be up to the Court to second-guess the position taken. In fact, RJR MacDonald “conceded that the objective of protecting health from the detrimental effects of tobacco consumption is pressing and substantial,” and argued instead that the measures taken were not proportional to the objective and that “the harmful effect of

\[139\] RJR MacDonald v. Canada, supra, note 135 at p. 273
tobacco [was] irrelevant to the application of the proportionality requirement." The dissenting opinion disagreed, hence its Irwin Toy-like conclusion.

The majority, however, questioned the amount of deference it, as the final court of appeal, should grant law makers. Both sets of opinions felt that "context, deference and a flexible and realistic standard of proof are essential aspects of the s. 1 analysis." The difference lies in degree. In a stark rebuke of the minority position, Justice McLachlin states that "[t]o carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded." The decision means that for the time being, the section 1 analysis will be based on the particular context of the case, the seriousness of the rights violation and the forcefulness with which the Crown can demonstrate the necessity of the measures taken to uphold the objectives of impugned legislation. In other words, as RJR MacDonald demonstrates, section 1 analysis can now be regarded on a case-by-case basis as opposed to its original status, not entirely doctrinaire, but more strict and predictable that what it has evolved into.

Conclusion

This lengthy examination into the interpretive history of section 1 demonstrates the important evolutionary phases of the analysis of rights limitation. From clear

\[^{140}\text{Ibid.}\]
\[^{141}\text{Ibid., at p. 333}\]
\[^{142}\text{Ibid., at pp. 332-333}\]
avoidance to a fairly strict threshold test to the subsequent watering down of standards to its present contextual form, the Supreme Court has shown its ability to not be tied down to one specific set of criteria. From the decision in *Oakes*, when Chief Justice Dickson indicated the need for flexibility in section 1 analysis, the Court has demonstrated its willingness to do just that. Some may suggest that such flexibility is a convenient way to undo previous errors or misjudgments. A more accurate approach to take would be to understand the complexities of limiting rights in a free and democratic society and to acknowledge the Court's approach as one of 'restrained flexibility'; flexible when circumstances warrant but always requiring a fairly strict justification from the appropriate parties.

Now that section 1 has been clarified, the task of adding United States Supreme Court jurisprudence into the equation should provide a new dimension to how the Canadian Court makes its decisions in this area of Canadian constitutional law and what role external influences may be playing in the Court's justification of rights limitations.
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American Jurisprudence in Section 1 Charter Cases

The Canadian Supreme Court has traditionally held a suspicious attitude towards the use of United States jurisprudence.\(^1\) Since the onset of the Charter though, the use of American material has expanded.\(^2\) Although it has not expanded to the degree that was predicted by some authors,\(^3\) American material has not been completely ignored. The following will provide both a quantitative review of American Supreme Court citation use\(^4\) by the Canadian Supreme Court and a qualitative review of various policy issues that both Courts have had to deal with. Concluding whether the Canadian Court has practiced its approach of cautious use of American precedent\(^5\) will depend on how the quantitative and qualitative evidence is interpreted. What may appear to be cautious use to some may

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\(^1\) Harvie and Foster, “Ties That Bind?”, supra, chap. 1 note 21 at p. 735. This attitude has been described as a “prejudice ... against the use of American authorities and texts” as far back as 1943. See ‘Comments’, “The Law of Our To-Day”, Canadian Bar Review Vol. 21 (1943), pp. 57-58


\(^3\) David C. McDonald, Legal Rights in the Canadian Charter of Rights and Freedoms: A Manual of Issues and Sources (Toronto: Carswell Legal Publications (Western), 1982)

\(^4\) It will also provide statistical data of the non-American Supreme Court precedent use by the Canadian Court. These encompass both lower American courts and other international courts.

\(^5\) For a representative sample of this type of warning see, among others, R v. Rahey [1987] 1 SCR 588 at 639: “While it is natural and even desirable for Canadian courts to refer to American constitutional jurisprudence in seeking to elucidate the meaning of Charter guarantees that have counterparts in the United States Constitution, they should be wary of drawing too ready a parallel between constitutions born to different countries in different ages and in very different circumstances, particularly given the substantive implications of both s. 1 and s. 24(1) of the Charter. Canadian legal thought has at many points in the past deferred to that of the British; the Charter will be no sign of our national maturity if it simply becomes an excuse for adopting another intellectual mentor. American jurisprudence, like the British, must be viewed as a tool, not as a master.”
appear as wanton abuse to others. With this in mind, the tedious but necessary task of statistical analysis can begin.

The Numbers Game, Part 1: Overall Figures

In order to determine the extent to which the Canadian Supreme Court has appealed to American Supreme Court jurisprudence in section 1 cases, various guidelines were imposed. The first, and vital, guideline was the compilation of what did and did not constitute a section 1 case.\textsuperscript{7} The second was the arbitrary selection of 1996 as the cut-off date. It was not until the completion of statistical gathering that the ‘real’ cut-off date of 1995 was determined. The reason for this is that 1996 has no section 1 decision according to my definition. Third, and not so much a guideline as it is a question of presentation format, the ‘overall’ and ‘evolutionary’ figures are provided. The set of overall figures is the number of American precedents used by the Canadian Supreme Court through the

\textsuperscript{6} For all statistical data see Appendices A-C, infra

\textsuperscript{7} The cases deemed to be ‘section 1 cases’ are a hybrid of existing data and my personal revisions of it. The existing data originates from Eugene Meehan, et al., eds., The 1997 Annotated Canadian Charter of Rights and Freedoms (Scarborough: Carswell, 1996), under the section titled “Guarantee of Rights and Freedoms”, pp. 17-75. The section 1 cases dealt with by the Supreme Court of Canada are found on pp. 17-47. This was the source for the section 1 cases chosen for this study.

The revisions involved what may appear to be a more strict criterion of section 1 use in each case. For example, when an analysis of section 1 is used and becomes a major component of the case at bar, that is, when the Court decides whether or not to ‘save’ legislation, then such a case was counted as a section 1 case. This also applies if only one justice of the Court considers it necessary to utilize a section 1 test. Notwithstanding that it may be only one person out of a possible nine who considered a section 1 analysis, the fact that it was considered in such a detailed manner at this highest of levels, warrants its inclusion as a section 1 case.

The second scenario for inclusion is when the Court considers section 1 in its decision but does not elaborate on the reasoning because it agrees with a lower court’s ruling on the specific issue. Although it would be safe to assume that the Court would elaborate on this issue, one has to account for the possibility that the Court will say that is simply agrees with the lower court ruling. If the Court feels that it need not elaborate, the case should not go uncounted.

Conversely, some cases that Meehan et al label section 1 are not counted. If section 1 is “not considered” or the Court’s answers to posed constitutional questions allow it to “need not answer” the section 1 issue, then this case would not be considered a section 1 case. This is so regardless whether or
entire 13 year period (1984-1996) while the evolutionary figures will break down the precedents for each year to gauge how the Court has used American jurisprudence from the beginnings of the *Charter* interpretation exercise.

In total, US Supreme Court citations accounted for 10.6% of the 2432 total citations used by the Supreme Court of Canada between 1984 and 1996 in all section 1 cases decided. Going beyond Supreme Court precedent, the appeal to American jurisprudence in general accounted for a slightly higher 14.3% of all citations used. This indicates that the Supreme Court of Canada, in its role as a national high court, is more comfortable citing a court of similar standing, a conclusion that would be expected from any national high court.

Beyond this, two general yet contradictory conclusions can be made regarding the number of American Supreme Court citations used by the Canadian Supreme Court. The first is that 10.6% is too high a figure. Approximately 1 of 10 citations used comes from the Supreme Court of a foreign nation. If the *Charter of Rights* was born in a different age and under different circumstances than its American counterpart, then ‘our’ decision-making by ‘our’ Supreme Court should be done by appealing to ‘our’ jurisprudence.

The opposite conclusion is that 10.6% is an acceptable, even desirable, figure. The text of section 1 guarantees the rights set out in the rest of the *Charter* to such reasonable limits as can be justified “in a free and democratic society”. This has been interpreted as a mandate for the Court to seek out opinions from comparable courts in

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not section 1 is cited in the ‘Statutes and Regulations Cited’ section of the decision. The revisions to the definitions that I have provided bring my total of section 1 cases to 91 from Meehan et al’s total of 108.

* See supra, note 5
other free and democratic societies to aid in the Canadian Supreme Court’s decision-making. This sentiment is articulated by Madam Justice Claire L’Heureux-Dubé when she describes section 1 as being “tantamount to a directive to engage in a comparative exercise [and to] research the position of other jurisdictions, for ... we would be remiss in our duties as the trustees of the legal system in this country if we blindly accepted the Canadian experience as the last word on how a free and democratic society ought to conduct itself.”

When the full extent of the Supreme Court’s use of all foreign material, above that of American Supreme Court and lower court precedent, is taken into consideration, the amount of non-Canadian jurisprudence cited increases to just over 20%. Once again, this can be considered a desirable figure. It suggests that the members of the Court are studying what other courts have done when confronted with similar issues. In fact, the practice of looking beyond the country’s borders is considered routine in many nations. The exception is the United States. As Mary-Ann Glendon laments, “our rights jurisprudence in general could only benefit if American judges and lawyers in difficult and novel cases followed the practice ... of examining important decisions of leading courts elsewhere.” She goes on to state that “this is such an obvious claim that one might be embarrassed to belabor it were it not for the fact that it has not commended itself to any

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10 20.39%. See Appendix A, Table 1, infra
American Supreme Court justice since Story,\textsuperscript{12} who sat on the Court over a century and a half ago.\textsuperscript{13}

Whichever conclusion one chooses depends on the interpretations of the statistics gathered. As will become a dominant theme throughout this exercise, a qualitative analysis of individual cases will provide a more thorough set of conclusions about the influence that USSC jurisprudence has had in specific section 1 issues decided by the Canadian Supreme Court. This quantitative analysis is a first step in gauging the relevance that American Court decisions have in Canada.

The Numbers Game, Part 2: Evolutionary Figures

The original hypothesis for this exercise was twofold. First, it was believed that the number of section 1 cases decided would increase with each passing year, reaching a plateau of some undetermined number followed by a gradual waning of cases decided. This would not, it was thought, reach zero but would remain at some range of cases. As the data demonstrate, this is what occurred with two exceptions. The first was the relative speed in which the ‘plateau’ of cases decided was reached. This occurred in 1990, six years after the Court’s first Charter decision. In that year, the Supreme Court decided

\textsuperscript{12} Joseph Story served as an Associate justice of the Supreme Court of the United States from 3 February 1812 until his death on 10 September 1845.

\textsuperscript{13} Glendon, supra, note 11. Glendon’s depiction of a completely isolated American Supreme Court may not be completely accurate. American Supreme Court Justice Sandra Day O’Connor suggested that Canadian Charter of Rights cases could have an impact on American Supreme Court decisions just as “our country looks to countries as disparate as England and Ceylon for developing the well-known requirement of the Miranda warning.” It may be the case that the US Supreme Court is long (or at least longer than we think) on looking outward but merely short on admitting that it does. For a review of Justice O’Connor’s remarks see Philip Cramer, “Canadian Charter Cases will Influence US Supreme Court”, \textit{Ontario Lawyers Weekly}, Vol. 1, No. 17 (7 September, 1984), p.8.
23 section 1 cases. The following year, 1991, was also a very busy year for the Court on section 1 issues with decisions being rendered in 15 such cases. This gives credence to the claims of a Court deluged with impatient ‘rights seekers’ and a Court willing to accommodate all (or most) comers.

The second exception is obvious if 1996 is taken into account. There are no section 1 cases listed which was a scenario thought to be highly unlikely. Given the consistency in the number of section 1 cases decided in the previous three years (1993-1995), falling to ‘0’ in 1996 is a sharp drop indeed.

The ‘bookend’ years (1984 and 1996) are telling for different reasons. There are no American precedents cited in 1984 in the one section 1 case decided by the Canadian Court. This lack of section 1 decision-making, never mind lack of American citation use, can be attributed to the very early stages of section 1 interpretation, a stage that Justice Estey described in the Supreme Court’s first Charter decision as difficult due to the “minimal” record on section 1.14 In 1996, as mentioned, there were no American citations used by the Court in section 1 cases because there was no section 1 case to choose from. This can be attributed to the original set of data used15 and its definition of what constitutes a section 1 case. Another possibility could perhaps be an early cut-off date (when the authors stopped counting cases), thereby not including the entire year. A third reason for the lack of American Supreme Court precedents cited may be the Canadian Court’s determination that no case required section 1 balancing. Whatever the reasons,

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15 See supra, note 7
1996 presents a puzzle when compared with the other individual years used in this study. Throughout the 1990s there has been a consistent decline in the number of section 1 cases decided by the Supreme Court, but a year in which no decision was rendered seems surprising.

The number of American Supreme Court precedents cited by the Supreme Court of Canada is not uniform when examined on a year-by-year basis. Between 1985 and 1987, there was fairly strong USSC representation in section 1 cases. This number drops, though not drastically, in the next two years only to see a sharp increase in 1990, almost doubling the percentage of 1989 (from 8.8% to 16.4%). This is followed by a sizable decrease the following year in 1991 although it is still the second most productive year in terms of section 1 jurisprudence. The fluctuation follows through the following four years as the number of USSC precedents declined markedly in 1992 and continued the slide until nearly bottoming out to less than 2% of citations used in 1994. This period of decline temporarily ends with a return to ‘normalcy’ in 1995 where USSC precedent use vaults back to pre-1990 levels at 10.1%. The final year, as discussed, completes the fluctuating with a puzzling 0%.

An explanation for such results is not, and should not be, clear and determinative. One suggestion is that the Court uses American Supreme Court jurisprudence whenever it sees fit. Many issues that the Canadian Supreme Court has dealt with since the exercise of Charter review began have already been considered by the American Court. Whatever help the Canadian Court needs in making decisions about similar issues should be accepted irrespective of any considerations other than the pursuit of a fair and just
decision. Such a romantic notion seems obvious but it is one that is necessary occasionally to reiterate.

The first critical analysis in this quantitative study is the number of American Supreme Court citations used per year. This has already been discussed on an aggregate level. A more accurate picture of how the Canadian Supreme Court has used USSC precedent (and other foreign precedents) is in a further breakdown of the statistics gathered, this time by isolating specific cases within each of the individual years. This analysis will demonstrate that it is usually ‘important’ cases on which the Court spends an inordinate amount of resources seen generally in the overall use of a high number of precedents where the majority are domestic but a fair number of which are foreign precedents as well. The fact that the use of such foreign jurisprudence is concentrated in particular cases rather than evenly distributed throughout its decisions, signals the Court’s willingness to seek help when it needs it, that is, when it is confronted with difficult issues.

The Supreme Court’s busiest period with respect to section 1 cases (and with Charter of Rights cases in general) was between 1988 and 1992 inclusive. This is demonstrated by the number of cases decided and the total number of precedents cited. As Appendix B demonstrates, in the first four years of section 1 decision-making (1984-1987), it would not be fair to characterize the use of American precedents as concentrated in a few cases. The reason for this conclusion is that there are too few cases decided by the Court in each of these years. Beginning in 1988 however, such patterns can be determined. For example, of the 25 US Supreme Court precedents cited, 16 were cited in
one case\textsuperscript{16} while the remaining nine were spread over three of the possible ten remaining cases.\textsuperscript{17} The same scenario is evident the following year where 12 of the 15 USSC precedents cited were used in two cases out of a possible seven.\textsuperscript{18} By contrast, the 17 other precedents cited\textsuperscript{19} were evenly distributed among five of the seven cases decided. This would appear to buttress the earlier notion of the Court appealing to foreign sources, be they American or beyond, only when the judges consider it necessary to do so. Even in 1988, 17 of 26 ‘other’ precedents employed were cited in only two of the 11 cases decided. The difference is that in these two cases, neither cited American Supreme Court or any other American lower-court ruling. It would appear that the only pattern of when to use non-Canadian jurisprudence is that there is no pattern at all.

The two section 1 cases that stand out in 1989 for their use of American Supreme Court precedents, \textit{Andrews v. Law Society of British Columbia} and \textit{Edmonton Journal v. Alberta (Attorney General)}, demonstrate a high concentration of American precedents. When the correlation is taken further, the USSC precedents cited in \textit{Andrews} accounts for 21.8\% of the total citations used in 1989 while the USSC precedents in \textit{Edmonton Journal} account for 13\% of the citation total. These are not extraordinary figures, especially when compared with \textit{Morgentaler}, which accounts for 64\% of all the USSC precedents cited in the previous year (1988). More importantly, the USSC citations in \textit{Morgentaler} account for 30.7\% of the precedents cited in that particular case meaning

\textsuperscript{16} \textit{R v. Morgentaler} [1988] 1 SCR 30
\textsuperscript{19} For a definition of appendix terminology see Appendix cover page, infra.
that almost one out of every three citations used in Canada’s abortion case originated from the American Supreme Court. Does this count as influence? On one level it does. But a close reading of the decision in Morgentaler should assuage fears that it is a verbatim copy of the landmark American abortion decision in Roe v. Wade.20

The concentration of American Supreme Court precedents in a few cases is quite apparent in 1990. This was the year when the Canadian Supreme Court decided its greatest number of section 1 cases. The Court cited USSC precedent in 14 of 23 section 1 cases which would indicate a fairly wide distribution of citations. A second look reveals that 68 of the 94 USSC citations used in 1990 were concentrated in four cases.21 Two more cases22 accounted for 11 citations bringing the total to six cases using 79 USSC citations. In 1991, a similar scenario prevails with three of 15 cases23 accounting for 35 of the 47 total USSC citations used.

An important point to consider, especially when gauging the influence that American Supreme Court and other foreign precedents could potentially have on the Canadian Supreme Court’s decision-making process, involves determining the correlation between the number of non-Canadian citations and the total number of citations employed. A high number of foreign precedents may appear to indicate a high degree of influence on the Court’s final decision. Such a conclusion may not be warranted if the

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20 410 US 113 (1973)
22 Rocket v. Royal College of Dental Surgeons (Ontario) [1990] 2 SCR 232; R v. Chaulk [1990] 3 SCR 1303

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total number of citations is itself a very high number that relegates the percentage of all non-domestic citations to a negligible level. The obvious counter to this view is that the number of precedents cited does not automatically determine the influence over the decision made. All that is required for influence is one precedent that the Court isolates as a determining factor in the case at bar. A high number of citations may be desired for the sake of strengthening a legal position but unless the Court indicates that it followed the reasoning in a certain case, then any conclusions about the degree of influence any American Supreme Court precedents or other foreign precedents have is mere speculation. Whether this be true or not, it is probably true that the use of one foreign case, American or otherwise, determining the outcome of a Canadian case would not be acceptable in either the legal community or the general population. Strong influence by external forces must come in numbers and it is for this reason that the concentration of American precedents in certain section 1 (and non-section 1 cases) is important.

This first level of analysis provides a certain degree of insight into how much USSC jurisprudence influences section 1 decisions. The second level, which demonstrates the correlation between American Supreme Court citations used and the total number of citations used in the particular case, provides a more thorough picture of potential American influence. Of the six cases that form the concentration of USSC citations, the two most revealing cases are Thomson Newspapers and Rocket v. Royal College of Dental Surgeons. Thomson Newspapers demonstrates the limits of gauging influence through
quantitative means. The 17 USSC citations (and 5 ‘Other US’ citations^24) appear to provide a strong case in favour of external, American influence. With 116 total citations however, the USSC precedents account for 18.2% of all precedents cited. This is not a small number, but it denotes, at best, a marginal level of influence. Compare this to 

*Rocket* where only 11 cases were cited in the entire decision. Five (45%) are American Supreme Court precedent. From a quantitative perspective, this suggests a far more substantial amount of potential influence emanating from south of the border. This same conclusion can be drawn from a case that is not one of the ‘isolated’ ones. *R v. Duarte,*25 which involved the constitutionality of unauthorized electronic surveillance by law enforcement officials, used only 14 citations. A breakdown of the precedents used shows that three cases were from the American Supreme Court, four from lower American courts and one from England. In other words, 50% of the cases cited by the Canadian Court were decisions made in the United States and 57% were decisions made outside Canada. To reiterate, it is crucial to determine what the Court says about how these particular decisions influence their judgments rather than rely solely on statistical data and infer what that influence may be.

Aside from the concentration of American Supreme Court citations used in a few section 1 cases, another similarity between the 1990 and 1991 statistics is the distribution of American citations among the section 1 cases. The number of cases with at least one USSC citation hovers at a respectable 50% range. For example, 14 of the 25 section 1

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^24 See supra, note 19

^25 [1990] 1 SCR 30
cases (56%) decided in 1990 have at least one US Supreme Court reference while 8 of the 15 section 1 cases (53%) in 1991 have this characteristic as well. With the exception of 1988, this type of representation is found in the years in which this study focuses. This suggests a Court that is prepared to seek out other, external sources for many of the cases before it and not simply the 'important' ones. While it may be true that the major cases will use more external precedents, it would not be true to say that major (or 'important') cases are the only occasions in which external precedents are used.

The conclusion that there is no particular pattern to Canadian Supreme Court use of American Supreme Court precedent is further evidenced in the years 1992-1994. After five years of relative consistency, the Court appears to forego any rigorous appeal to American precedent. As Appendix A, Table 2 indicates, Canadian Supreme Court use of USSC precedent is rare notwithstanding the diminished number of cases decided. This decrease in the number of precedents cited would have been a welcome set of findings with respect to the guiding hypothesis explained earlier. Given the sharp rise in USSC precedent use the following year (1995), and the subsequent rapid decline in 1996, this three year period cannot be viewed as the beginning of the 'leveling off' of the use of American jurisprudence. At the same time, it cannot be viewed as an anomaly. It does, as concluded above, lend weight to the assertion that there is no general pattern to the Canadian Court's use of American precedents and that the only 'pattern' that is followed is one of necessity, namely, when the Court needs to find further information on difficult issues, it will look beyond Canada's borders for help.
The statistical findings are interesting for what they suggest rather than for what they actually reveal. The preliminary conclusions that can be stated is that the Supreme Court of Canada is more comfortable citing another national high court rather than a lower court. The bulk of the section 1 decisions use references from the American Supreme Court rather than from lower courts. Statistically, the Court is inclined to use a greater number of USSC precedents in ‘important’ cases; important according to the Court and not necessarily society in general.\textsuperscript{26} As well, the bulk of USSC citation use per year is concentrated in a small number of cases but there is a fair distribution of the remaining citations among the other section 1 cases. For all the conclusions made, a breakdown of the section 1 cases into those ‘saved by section 1’ and ‘not saved by section 1’ must be briefly analysed to make the conclusions more complete.

**The Numbers Game, Part 3: ‘Saved’ vs ‘Not Saved’**

The critical analysis for this portion of the exercise was the use of American Supreme Court precedent use when legislation is saved by section 1 versus when legislation is not saved by section 1. The American idea of rights is more strict than the

\textsuperscript{26} Determining what is an “important” case is subject to interpretation. Society may view such cases as *Morgentaler* (abortion) or *Rodriguez* (physician assisted suicide) as the Court’s important decisions due to the controversial nature of the issues. Others might take the view that the Court’s stature as final court of appeal, and its ability to choose the cases in which it will render judgment, makes every case that goes to oral arguments before the justices an important one. Ultimately, the context of the case and how the justices approach the issues determine the relative importance accorded to each. For example, one of the Court’s most important decisions is generally agreed, in legal and academic circles, to be the decision in *BC Motor Vehicle*, a case no ‘average Canadian’ will have heard of but which many have been affected by either directly or indirectly. Other factors that indicate that an issue is important “include splits in appellate court on the issue, the impact of the uncertainty in the law and whether the appeal in question presents the right case” to use as a vehicle to clarify or interpret the relevant law.” See Lorne Sossin, “The Sounds of Silence: Law Clerks, Policy Making and the Supreme Court of Canada,” *University of British Columbia Law Review*, Vol. 30, No. 2 (1996), p. 290. The “right case” factor was a key factor, I argue, in *Oakes* becoming the section 1 standard case. See supra, chap. 4.
Canadian idea. That is to say, rights are more absolute in the US Bill of Rights than in the Canadian Charter. Under this assumption, it may be expected that more American precedents will be used by the Supreme Court of Canada when it decides not to save legislation. When it finds a Charter right infringed, to the point where there is no reasonable limit that can save the legislation in question, the possibility that American precedents will be used is higher given that this scenario dictates that the right remains paramount.

A handful of cases were not clearly decided on the ‘saved’ or ‘not saved’ scale. That is, under some circumstances, when more than one piece of legislation was being challenged in the same section 1 case, some members of the Court decided to save some of the legislation but not others or not save a piece of legislation and then not even consider a section 1 analysis for the other(s). For these scenarios, the case in question was categorized under the heading ‘Both’, meaning that the section 1 case was not defined under either of the ‘saved’ or ‘not saved’ headings. A second scenario where both ‘saved’ and ‘not saved’ are the categories under which a section 1 case is defined, is when neither option is the majority decision but each is considered by at least one of the justices. As for the remainder of the cases and their categorization, this was determined by the decision of the majority of the justices. There are cases in which the Court split

27 An example of this scenario is R v. Andrews [1990] 3 SCR 870. Sections 319(2) and 319(3)(a) of the criminal code were challenged. In the decision, four justices saved both sections under section 1. Of the remaining three justices, all three did not save s. 319(2), two did not save s. 319(3)(a) and the third did not consider a section 1 defence for s. 319(3)(a).

28 An example of this scenario is NB Broadcasting v. NS (Speaker) [1993] 1 SCR 319. Five of the seven justices did not consider section 1 in the majority decision but the remaining two split between saving and not saving the directive set out by the NB legislature refusing media access to film from the public gallery.
on whether to save or not save legislation but in this situation, the majority opinion prevailed.

A general conclusion that can be made from the data (Appendix C, Tables 1-3) is that there is no concentration of American Supreme Court precedent in either ‘saved’ or ‘not saved’ categories. In fact, there is an even ratio of cases to citations in both categories. In the 27 cases where the outcome was ‘saved’, 91 USSC precedents were cited by the SCC. In the 59 cases where the outcome was ‘not saved’, 164 USSC precedents were cited. A breakdown of the citation use, however, reveals almost similar findings as outlined earlier. Of the decisions with a ‘saved’ outcome, 76 citations are found in five cases. Conversely, the decisions with a ‘not saved’ outcome did not have a strong concentration of citations in a small number of cases. The three cases with the highest total of USSC citations accounted for 51 of a possible 164 cited precedents. The rest of the USSC citations were distributed in a fairly even manner giving the impression of consistency in the use of external sources by the SCC.

Given these findings, the guiding hypothesis outlined above has not, in fact, been supported - at least not on the quantitative level. Given that the ratio of American Supreme Court precedents for both ‘saved’ and ‘not saved’ outcomes are reasonably similar, a thorough, qualitative analysis of specific decisions rendered by the Canadian Supreme Court, and the way in which it used individual American Supreme Court

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30 R v. Vaillancourt [1987] 2 SCR 636; Thomson Newspapers v. Canada (Director of Investigation and Research) supra, note 21; Committee for the Commonwealth of Canada v. Canada supra, note 23
citations in the section 1 decisions made, is necessary. The only conclusion to draw is that there is no pattern of greater use of American Supreme Court citations in either ‘saved’ or ‘not saved’ categories. As has been suggested elsewhere, “there is a tendency in the Court to cite United States law when it helps.” The second half of this same conclusion states “or, at least, does not stand in the way of a result it wishes to reach but not otherwise.” The quantitative analysis conducted here serves the first portion well. The latter, however, demands a qualitative analysis. It is to that portion of the exercise to which we turn.

**Qualitative Analysis: Policy Issues**

The quantitative analysis has concluded that there is no concentration of American Supreme Court precedents in cases where the Canadian Supreme Court decided to either save legislation under section 1 or not to save legislation, thereby striking down law as unconstitutional. A further breakdown revealed some concentration of American Supreme Court precedent in a handful of section 1 cases. Having exhausted the foray into statistical analysis, the analysis of specific types of cases decided by the Canadian Supreme Court is the next logical sequence in the determination of any significant American jurisprudential influence on section 1 decisions. An examination of specific policy issues will be made to gauge ‘what was said’ with respect to the Supreme Court’s adoption of American jurisprudence. What will become evident is that, like the

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31 Harvie and Foster, “Ties That Bind?”, supra, chap. 1, note 21, p. 778
32 Ibid.
quantitative conclusions drawn, there is no definite pattern as to when the Court will appeal to its American cousin. Once again, American precedent is used on a referencing, ‘help wanted’ basis rather than a consistent recourse to it.

What follows will be a non-exhaustive overview of policy issues addressed by the Canadian Supreme Court under the section 1 limitation clause. Like the post-\textit{Oakes} evolution above, a representative sample, this time of policy issues, that the Court has had to contend with will be analyzed. The selection of the issues involved is not contingent on previous American experience with similar issues since the American Supreme Court has already dealt with most of the issues the Canadian Court now finds itself judging. Rather, the specific issues were chosen for fairly arbitrary reasons that included the recognizability of the issue by the general public and the number of US Supreme Court precedents used to help decide the particular cases within the general policy issue, to name two. Appeal to similar issues by the American Court should not, therefore, come as a surprise.

\textbf{Abortion}

Perhaps the most widely known of all the major legal decisions, both in Canada and the United States, have been the abortion cases. As the quantitative evidence

\footnote{I thank Professor Ted Morton for suggesting this plan of attack.}

\footnote{see supra, pp. 98-111}

\footnote{I consider it a given that the Canadian Supreme Court will seek out other opinions from foreign jurisdiction and especially from the United States. This stems from my earlier support for L'Heureux-Dubé's interpretation of the Court's mandate found in the text of section 1. See text accompanying note 9, supra.}

\footnote{This analysis will concentrate on the landmark decision in \textit{R v. Morgentaler}, supra, note 16, notwithstanding the decisions in \textit{Borowski v. Canada (AG)} [1989] 1 SCR 342 (attempting to declare s.}

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suggested, American jurisprudence played a significant role in *Morgentaler*. Of the 52 total citations used by the Canadian Court in *Morgentaler*, 16 (30.7%) came from the United States Supreme Court. A clearer picture of the influence by US precedent emerges from the analysis of the actual decision and how the justices use American experience to guide their own decision on the matter.

A balanced conclusion that could be made about US influence in the Canadian abortion decision is that any major influencing factors were found in the peripheral opinions of the case rather than in the core opinions. There were four separate opinions written in *Morgentaler*. The one most discussed was written by Justice Wilson who stopped just short of finding a constitutional right to abortion within the section 7 *Charter* guarantee to liberty and security of the person. It was in the concept of liberty where Wilson’s appeal to American experience was greatest. The obvious comparative example is *Roe v. Wade* where the US Supreme Court decided that a woman’s right to decide whether or not to terminate her pregnancy “was mandated by the body of existing law ensuring that the state would not be allowed to interfere with certain fundamental personal decisions such as education, child-rearing, procreation, marriage and contraception.”

She continues by quoting the US Supreme Court’s conclusion that the 14th Amendment’s guarantee of liberty is “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” After discussing *Roe*, she

251 of the criminal code invalid on the grounds that the unborn do not fall under “everyone” in the section 7 guarantee of “life, liberty and security of the person”) and *Tremblay v. Daigle* [1989] 2 SCR 530 (father of unborn obtaining injunction to prevent mother from having abortion).

37 *R v. Morgentaler*, supra, note 16 at p. 169

38 *Roe v. Wade*, supra, note 20 at p. 153, quoted in Ibid.
buttresses her appeal to Roe's reasons by listing subsequent cases that reaffirmed its decision, as well as a host of decisions that demonstrated the American Supreme Court's protection of liberty in such "fundamental personal decisions." Wilson asks whether a decision to terminate a pregnancy "falls within this class of protected decisions". She immediately replies that she has "no doubt that it does".

This is not to suggest that her disapproval of the challenged legislation was a product of American jurisprudence. While the wide array of US Supreme Court decisions allowed her to appeal to other precedents to support her claims, the foundation of her opinions were based as much on the non-legal positions of pro-choice supporters. Cloaking the rhetoric in legal terms made her decision more palatable and more legitimate. But any influence on the core issues of abortion by US constitutional experience is speculative at best.

The main thrust of American Supreme Court influence is in the breadth of judicial interpretation of core rights. If the Wilson opinion can be interpreted as the ultimate example of judicial activism, then the opinion of McIntyre and LaForest is the embodiment of judicial restraint. This opinion also relies heavily on US Supreme Court

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40 Meyer v. Nebraska, 262 US 390 (1923) (USSC striking down law prohibiting the teaching of any subject in a language other than English); Pierce v. Society of Sisters, 268 US 510 (1925) (statute requiring all "normal children" to attend public school thereby limiting access to private schools, ruled unconstitutional because it infringed on the "liberty" of parents and guardians to have control over the education of children under their care); Griswold v. Connecticut, 381 US 479 (1965) (statute forbidding use of contraceptives by married couples ruled unconstitutional mainly due to the infringement of liberty ensuing from law enforcement entering a marital home); Loving v. Virginia, 388 US 1 (1967) (legislation forbidding inter-racial marriage struck down resting its decision on the fact that marriage is "a basic civil right of man")
41 R v. Morgentaler, supra, note 16 at p. 171
42 R.S.C. 1970, c. C-34, s. 251
decisions but mainly to focus on the scope of judicial review under the Charter. Mcintyre, who authored the opinion, concurred with by LaForest, takes a classically restrained view of the role of the Court. He quotes from American Supreme Court Justice Harlan:  

The constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements .... The Court ... does not serve its high purpose when it exceeds its authority, even to satisfy justified impatience with the slow workings of the political process. For when, in the name of constitutional interpretation, the Court adds something to the Constitution that was deliberately excluded from it, the Court in reality substitutes its view of what should be so for the amending process.

With this having been said, McIntyre dismisses in one sentence what Wilson took pains to allude to but not definitively to declare, namely the constitutional right to abortion; "The proposition that women enjoy a constitutional right to have an abortion is devoid of support in the language of s. 7 of the Charter or any other section." McIntyre's interpretation of liberty certainly does not go as far as either the US Supreme Court or Wilson.

The suggestion was made at the outset that any major influencing factors by the American Court would be found in the peripheral opinions of the case. The preceding were those peripheral, 'polar' opinions. Both appealed to American Supreme Court jurisprudence in order to support their very different positions; Wilson's activist call for

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43 John Marshall Harlan served as an Associate justice of the United States Supreme Court from 28 March 1955 until 23 September 1971. He is the grandson of John Marshall Harlan who also served as an Associate justice of the Court from 10 December 1877 until his death on 14 October 1911.

44 Reynolds v. Sims, 377 US 533 (1964) at pp. 624-625, quoted in R v. Morgentaler, supra, note 16 at p. 141

45 Ibid. at p. 143

46 On the specific issue of abortion, Wilson's opinion in Morgentaler makes "[t]he American Supreme Court ruling in Roe v. Wade [seem] timid and pale in comparison". It would be a mistake to equate the two opinions in terms of scope and an obvious mistake to suggest that Wilson's opinion adhered to the
the Court to address the question of constitutionality and McIntyre’s restrained approach that would defer such matters to parliamentarians. The two core opinions\textsuperscript{47} of the case however, did not even mention \textit{Roe v. Wade}. Rather, they focused on the procedural inadequacies of the legislation and not on the substantive question dealing with the constitutionality of abortion. Although there are important differences between the two decisions, these two ‘core’ opinions constitute a middle ground between those of Wilson and McIntyre. Only one of the opinions considered American Supreme Court jurisprudence but only to demonstrate how a specific term has been defined in the legal context.\textsuperscript{48} In fact, much of the evidence that both sets of opinions relied on was drawn from a Royal Commission report on abortion in 1977. “The Badgley Report found uneven access and delays to abortion services, attributing both to the haphazard implementation of the (therapeutic abortion committee) requirements.”\textsuperscript{49} Where the Dickson/Lamer and Beetz/Estey opinions differed was in how much re-tooling s. 251 would need to meet the section 7 requirements of “security of the person”.

\textit{Morgentaler} is a difficult decision to grasp given the four very different opinions written. In terms of true influencing factors by American Supreme Court precedent, Wilson relied heavily on the American definition of ‘liberty’ while McIntyre relied heavily on that sector of the Court that continuously warns against the dangers of judicial American standard when it clearly went beyond it and, arguably, all other standards of jurisprudence. See Knopff and Morton, supra, chap. 1, note 5 at pp. 261-274.\textsuperscript{47} The two opinions were those of Dickson/Lamer and Beetz/Estey.\textsuperscript{48} Beetz cited \textit{United States v. Vuitch}, 402 US 62 (1971) to demonstrate how “health” has been interpreted by the US Supreme Court.\textsuperscript{49} Knopff and Morton, supra, chap. 1, note 5, p. 271
activism. The ‘middle ground’ decision did not rely on American jurisprudence, choosing to forego the problems inherent in substantive pronouncements of legislation.

Sunday Observance Legislation

The issue of Sunday closing legislation and how the Supreme Court of Canada has dealt with it has been examined above. In 1985, before a clear section 1 test had been declared, the Court handed down its decision in *R v. Big M Drug Mart* which found the federal *Lord’s Day Act* a violation of the freedom of religion guarantees under the *Charter* due to its clearly religious purpose that imposed a Christian belief system onto non-Christian employees. In 1986, the Court upheld - through section 1 justification - the Ontario *Retail Business Holidays Act* on the grounds that its purpose was wholly secular, and one that did not impose a certain religious value on others.

In *Big M Drug Mart*, Chief Justice Dickson referred extensively to the quartet of US Supreme Court cases that outline the American stance on Sunday closing legislation. Simply put, Dickson did not find the American jurisprudence to be particularly convincing. The legislation challenged in the United States was found by American Supreme Court Chief Justice Earl Warren to have “evolved” from their clearly religious origins to purely secular labour legislation. Notwithstanding the use of the term “Lord’s

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50 See supra, chap. 4 at pp. 78-80 and 98-100
51 [1985] 1 SCR 295
Day” in the Maryland legislation, any religious vocabulary “was to be seen simply as a historical curiosity.”

The core of both the American and Canadian Supreme Courts’ decisions is based on the purpose and effects of the legislation. The American Supreme Court suggests “that the purpose of legislation may shift, or be transformed over time by changing social conditions.” This “shifting purpose” doctrine allows a separation to take place between the effects of the legislation and its original, underlying purpose. Dickson does not accept this rationale for at least two reasons. The first is the practical difficulties that would ensue. His concern is that “[n]o legislation would be safe from a revised judicial assessment of purpose.” The resulting uncertainty in the law and “re-litigation of the same issues” could give courts the opportunity to decide issues based on reasons other than legal considerations.

The second reason Dickson dismisses this American interpretation is that the ‘shifting purpose’ theory espoused by the US Supreme Court “stands in stark contrast to fundamental notions developed in our law concerning the nature of ‘parliamentary Intention.’” Dickson adds, “purpose is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable.” Small wonder that the federal Lord’s Day Act was struck down precisely because its purpose was “clearly”

53 R v. Big M Drug Mart, supra, note 51 at p. 329. A concurring opinion by Justice Frankfurter ironically stated that “any violation of an individual right of free exercise [by virtue of this evolution of legislative purpose] was justified by an overriding state interest in securing a uniform day of rest”. All that would appear to be missing from this opinion is a “minimal impairment” test!
54 Ibid., at p. 334
55 Ibid.
56 Ibid., at p. 335
57 Ibid.
religious in nature, notwithstanding the supposed similar social conditions present in Canada and the United States, making the Canadian decision a reaction to a perceived weakness of the American decisions.58

* R v. Edwards Books and Art*59 provided the Court with the same issues of Sunday observance legislation but the difference between it and Big M Drug Mart stemmed from the crucial aspect of legislative purpose. The Ontario legislation had clear secular undertones which were demonstrated through the language of the Act as well as the legislative debates preceding the Act’s Royal Assent. The freedom of religion challenge was made through economic arguments, namely that compelling closure on Sunday (as a uniform pause day), adversely affected Saturday observing retailers (who claimed discrimination through an imposed economic burden), and to a lesser degree, Saturday observing consumers who now had to adjust shopping schedules accordingly. Briefly stated, a majority of the Court found that while there was a Charter violation, the legislation could be saved under section 1 as a reasonable limit.

On the issue of whether such Sunday closing legislation imposed an economic burden on Saturday observers, Chief Justice Dickson60 made it a point to show that all the members of the American Supreme Court were in agreement with this view. He singles out Justice Douglas61 by agreeing with his “assessment that the majority was

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58 This can also be suggested as being the case in Operation Dismantle v. The Queen where the ‘political question’ doctrine, not addressed by the American Supreme Court was considered fair game in the Canadian Court. I thank Professor Carl Baar for reminding me of this point.
59 [1986] 2 SCR 713
60 Dickson was now Chief Justice in Edwards Books. Bora Laskin was Chief Justice in Big M Drug Mart although he did not take part in that decision.
61 William Douglas served as an Associate justice of the United States Supreme Court from 17 April 1939 until 12 November 1975.
engaged in a balancing process which, under a constitution like Canada's, would properly be dealt with under a justificatory provision such as section 1.\textsuperscript{62}

While the question of purpose was easily dismissed, the difficult aspect dealt with the effects, or impact, of the legislation, complete with exemptions\textsuperscript{63} for Saturday observing retailers. The US Supreme Court, in upholding similar legislation, impressed Dickson on two fronts. The first was the American Court's debate about "the balancing of an indirect burden on the religious freedom of a retail store owner against the interests of his or her perhaps sometimes numerous employees."\textsuperscript{64} The second impressed Dickson to the point where it "[contributed] to the justification of the legislation under review."\textsuperscript{65} This factor dealt with the consideration - and subsequent dismissal - of a Sabbatarian exemption which a majority of the Court felt could lead to "state conducted inquiries into religious beliefs."\textsuperscript{66}

Despite this, Dickson did not share the majority view of the American Court "that no legislative effort need be made to accommodate the interests of any Saturday observing retailers."\textsuperscript{67} Precisely due to the balancing principles outlined in the Oakes test detailing section 1 justification, "a legislature which enacts Sunday closing laws [must] attempt very seriously to alleviate the effects of those laws on Saturday observers. The

\textsuperscript{62}R v. Edwards Books and Art., supra, note 59 at p. 757
\textsuperscript{63}Retail Business Holidays Act, R.S.O. 1980, c. 453 s. 3(4)
\textsuperscript{64}R v. Edwards Books and Art., supra, note 59 at p. 777
\textsuperscript{65}Ibid., at p. 779
\textsuperscript{66}Ibid.
\textsuperscript{67}Ibid., at p. 782
exemption in s. 3(4) of the Act ... represents a satisfactory effort on the part of the legislature of Ontario to that end and is, accordingly, permissible."  

**Mandatory Retirement**

The requirement that people retire from their place of work at a specified age, usually 65 years, was the underlying issue that the Supreme Court had to deal with in a handful of concurrent cases of which the 1990 decision in *McKinney v. University of Guelph* is the definitive one. The question of whether such an age restriction violated the section 15 equality guarantees of the *Charter* was not difficult to answer. Clearly it did. A central issue in *McKinney* - and in the other mandatory retirement cases - is whether universities or other institutions performing a public service are a part of government and therefore subject to the *Charter of Rights* by virtue of section 32. Put another way, the constitutionality of mandatory retirement would not be an issue unless the challenged institutions were a part of government.

That is not to say that the Court did not proceed with an examination of the constitutional issue. Once it was decided (as it did in *McKinney, Harrison* and *Stoffman*, but not in *Douglas/Kwantlen*) that the institutions were not a part of government, properly defined, and that the *Charter of Rights* therefore was inapplicable, the Court

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68 Ibid.
70 In *McKinney*, the age restriction was found in the *Ontario Human Rights Code*, 1981, S.O. 1981, c. 53 s. 9(a).
71 Section 32 reads: 32(1): This Charter applies (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and
nonetheless proceeded with an elaborate section 1 analysis. The reasons why mandatory retirement would pass constitutional muster under section 1 were similar to those outlined in the US Supreme Court decision in Massachusetts Board of Retirement v. Murgia. The issue in Murgia was whether the state law requiring the retirement of police officers at age 50 violated equal protection of the law. The American Supreme Court declared that it did not because of the state’s “legitimate interest in maintaining a vigorous police force [and] because physical ability generally declines with age.” In similar fashion to the Canadian Court, the American justices conducted a “rational relation test” rather than a test of “strict scrutiny” because age was not as suspect a category for violation as, for example, race. Although on its face there would appear to be similarities between the handling of the policy issues, the Canadian Court, as it often does, distinguished its decision-making from its American counterpart.

The distinction involved an overview of American and Canadian constitutional history and the reasons for the path each country took vis-à-vis ‘state action’ or ‘involvement’ in society. In a phrase, the American Constitution was born of a distrust of government to interfere in the workings of the society whereas “Canadians recognize that government has traditionally had and continues to have an important role to play in

Northwest Territories; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

72 The majority concluded that such retirement provisions, if they were subject to the Charter, would violate section 15 but would nonetheless be a reasonable limitation on the infringed Charter right.

73 427 US 307 (1976). Strangely, Murgia was not cited by the Supreme Court in any of its retirement decisions. It may have been included in the factums presented to the Court, but those were not analysed in this study.

74 Samuel V. LaSelva, “Mandatory Retirement: Intergenerational Justice and the Canadian Charter of Rights and Freedoms” Canadian Journal of Political Science, Vol. 20, No. 1 (March, 1987), p. 151. It should be noted that the article was written well before the Supreme Court of Canada decided its mandatory retirement cases.
the creation and preservation of a just Canadian society." With this as a backdrop, the Canadian Court had to first determine whether the Charter applies to universities as a "part of government" which would mean that the decisions made by university administrators are in effect government policy. Briefly stated, the majority decided that given the facts of the particular case (a contextual 'out' the justices are fond of using), the university could not be called a part of government, thereby falling outside the Charter's umbrella, whereas the dissenting opinion decided that it did form a part of government. The majority based its decision chiefly on the autonomous decision-making structure of the university's administration and the lack of 'real' government influence, with the exception of funding.

The use of American jurisprudence, short as it was, was confined to this question of how much government involvement determined when a supposed autonomous body became part of government. Other public services besides universities were cited, but as for the constitutionality of mandatory retirement per se, the section 1 analysis shared similar characteristics as Murgia, but contained no actual textual references to it or other American jurisprudence.

75 McKinney v. University of Guelph, supra, note 21 at p. 356
76 Greenya v. George Washington University, 512 F.2d 556 (D.C. Cir. 1975). As is evident, this precedent is not even from the Supreme Court.
77 Jackson v. Metropolitan Edison Co., 419 US 345 (1974); Blum v. Yaretsky, 457 US 991 (1982). Jackson was a case about a heavily regulated public utility and Blum about a heavily funded nursing school. In both cases the Court refused to find these as being government entities. There are examples where the Court has decided the opposite to be true but these cases were mostly confined to ones of racial discrimination triggering a 14th Amendment challenge.
Freedom of Expression - Hate Propaganda

Freedom of expression issues constitute a major portion of constitutional jurisprudence in both Canada and the United States. The gamut of Canadian expression issues has been comprehensively discussed elsewhere. What follows is one area of expression that has received much attention in Canada but especially in America. The Canadian Supreme Court's interpretation of the issues surrounding hateful expression proves once again its resolve to use American case law as a referencing source only.

The landmark case in Canada is the 1990 decision in R v. Keegstra. Keegstra was charged under s. 319(2) of the criminal code for willfully promoting hatred against an identifiable group. He argued that the provision under the criminal code infringed his fundamental Charter freedom of expression. The Court split 4-3 in upholding the legislation as a reasonable limit under section 1. Writing for the majority, Chief Justice Dickson did not appeal to American precedent during his analysis of freedom of expression and hate propaganda. Rather, he cited numerous US Supreme Court precedents at the outset of the section 1 analysis and demonstrated the American Court's wont to limit such forms of speech. Simultaneously, he goes to some length in distancing the jurisprudence of the American authorities from the Canadian, not only on this issue but generally. Dickson prefaced the analysis of relevant American Supreme Court jurisprudence in Keegstra by stating, "[i]n the United States, a collection of fundamental rights has been constitutionally protected for over two hundred years. The resulting

practical and theoretical experience is immense, and should not be overlooked by Canadian courts. On the other hand, we must examine American constitutional law with a critical eye. He continues, “Canada and United States are not alike in every way, nor have the documents entrenching human rights in our two countries arisen in the same context. It is only common sense to recognize that, just as similarities will justify borrowing from the American experience, differences may require that Canada’s constitutional vision depart from that endorsed in the United States.”

The appeal to US jurisprudence on the issue of hate propaganda is natural given the seemingly absolute character of the First Amendment in the US Bill of Rights. It would seem natural to appeal to the US Supreme Court because this is a classic case of balancing the First Amendment provisions of free speech with whether one can actually say whatever they want. The landmark American judgment on hate propaganda occurred in 1952 in *Beauharnais v. Illinois*. The Supreme Court upheld a state libel law “designed to punish defamation of racial or religious groups” on the grounds that libelous utterances, or in Beauharnais’ case “anti-Negro” pamphlets, would have a “tendency to cause a breach of the peace.” Dickson was unwilling to follow the decision in *Beauharnais* based on such rigid conditions. He was equally unwilling to commit to subsequent decisions that appeared to weaken the decision in *Beauharnais*, even though it

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79 A trio of cases fall under this category under *Charter* jurisprudence. *R v. Keegstra* supra, note 21; *R v. Andrews* supra, note 27; *Canada (Human Rights Commission) v. Taylor* [1990] 3 SCR 892
80 *R v. Keegstra*, supra, note 21 at p. 740
81 Ibid.
82 The First Amendment reads: (Article I) Congress shall make no law respecting an establishment of religion, or prohibiting the exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.
83 343 US 250 (1952)
has never been explicitly overruled. Dickson cites three reasons why, having “found the American experience tremendously helpful in coming to my own conclusions ... and by no means [wishing to] reject the whole of First Amendment doctrine, in a number of respects, [he is] thus dubious as to the applicability of this doctrine in the context of a challenge to hate propaganda legislation.”  

The first reason is that *Beauharnais*, according to Dickson, does not have to conflict with the seemingly absolute position of the First Amendment. If analysed from the view that “hate propaganda can undermine the very values that free speech is meant to protect ... First Amendment doctrine might be able to accommodate statues prohibiting [it]”. This defence of limitations implies the worth of the Canadian *Charter’s* general limitation clause.

The second reason Dickson is wary of applying First Amendment doctrine to hate propaganda legislation is that it falls under the realm of content analysis. The examination of the content of the ‘speech’ is not necessary on a strict reading of the First Amendment but Dickson points out that the Supreme Court of the United States has sometimes found  

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85 Dickson cites various precedents including, *New York Times Co. v. Sullivan*, 376 US 254 (1964) (in order to bring forth an action for libel, a public official had to demonstrate that the offending remark was directed at the official personally and that the source of the statement had to have actual knowledge that the statement was false); *Brandenburg v. Ohio*, 395 US 444 (1969) (In the prosecution of a Klansman who showed a film that was derogatory against Negroes and Jews and implied that “revengeance” should be taken against them, the Supreme Court struck down a statute forbidding a person to “advocate ... the duty, necessity or propriety of crime, sabotage, violence or unlawful methods of terrorism as a means of accomplishing industrial or political reform). “What emerges from these sets of cases is a weakening of *Beauharnais* in both the recognition that libel laws raise “constitutional problems” and the “clear and present danger” test becomes much stricter under *Brandenburg*. The commentary for these cases are found in *Keegstra*, supra, note 21 at p. 815.
86 Ibid., at p. 741
87 Ibid.
it necessary to “restrict a particular message because of its meaning.”\textsuperscript{88} He outlines various tests and theories that the American Court has developed to determine the legitimacy of government regulation of speech but makes clear that although one must “recognize that content is often examined under the First Amendment [it does not] deny that content neutrality plays a real and important role in the American jurisprudence.”\textsuperscript{89} Such a “relaxation of the prohibition against content-based regulation of expression in certain areas indicates that American courts are not loath to permit the suppression of ideas in some circumstances.”\textsuperscript{90} This is obviously a ‘value’ that Canadian jurisprudence would want to steer clear from.

The reason why Canadian jurisprudence would want to steer clear from this value set found in American First Amendment precedent presupposes Dickson’s third reason for being wary of applying general First Amendment doctrine to hate propaganda. That reason is the unique role that section 1 plays in upholding particular Canadian values and norms. The answer to the question of why First Amendment jurisprudence based on content-analysis should be critically examined before being employed in a Canadian context is that the First Amendment determines the constitutionality of the content of the speech, and therefore suppresses ideas at the level of the substantive right. The nature of section 1, on the other hand, at least in the context of the present case, allows for a “perspective particular to Canadian constitutional jurisprudence.”\textsuperscript{91} It did not determine the constitutional issue by passing judgment on the content of what was being said.

\begin{footnotes}
\item \textsuperscript{88} Ibid., at p. 743
\item \textsuperscript{89} Ibid., at p. 742
\item \textsuperscript{90} Ibid., at p. 744
\end{footnotes}
Rather, the explicit balancing between the 'expression' and other important social interests was conducted. The difference in the constitutionalism of the two countries that stems from the balancing provision of section 1 means that "such independence of vision protects these rights and freedoms in a different way." The balancing provision of section 1 allowed the majority of the Court to depart from the American view that "the suppression of hate propaganda is incompatible with the guarantee of free expression."

The section 1 analysis, of course, outlines such balancing procedures to determine whether the infringement of the expression guarantees of the Charter are reasonable in limiting this form of expression. Both the majority and dissenting opinions do not dispute the objectives pursued by Parliament. Indeed Justice McLachlin, who authored the dissenting opinion, referred to hate propaganda as "evil" and stated that this description of it was "beyond doubt." Nevertheless, she found that the means by which the objectives were carried out, especially the sanction of criminalization for what she saw as only a potential to promote hatred, did not meet the proportionality tests of Oakes. This was in contrast to Dickson's opinion that the means were proportionate to Parliament's objectives due to the "narrowly drawn parameters" of the impugned legislation.

As has been the case with the various policy analyses, appeal to American Supreme Court jurisprudence is very much in evidence at the Canadian Supreme Court

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91 Ibid., at p. 743
92 Ibid.
93 Ibid. Of course, even Dickson acknowledges that this is not the absolute view of the US Supreme Court. He defined this view as "reasonably prevalent in America at present" (quoted in Ibid.)
94 Ibid., at p. 812
95 Ibid., at p. 795
Hate propaganda, and *Keegstra* in particular, demonstrate that the use of American jurisprudence is essentially carried out for two reasons. The first is for reference purposes, that is, a sincere attempt to gain insight into how other jurisdictions have dealt with similar issues. The second is for instruction; instruction in the sense of learning from others’ mistakes. The problems incurred by Supreme Court judgments in the United States are many. With such a different history and evolved set of political, social and cultural characteristics, it is instructive to see how many concepts, from such a close neighbour, would have great difficulty being implemented here. The analysis of American jurisprudence in *Keegstra* accentuates this point well.

**Other Policy Issues**

The preceding, detailed analyses of four major policy issues characterized how different American and Canadian interpretations are from each other. This is not to say that generally speaking, the underlying points of contention are different. The ‘abortion debate’, outside the legal and academic halls, is the same as are the arguments for or against a mandatory retirement age. Decisions based on the constitutionality of these issues however, are different entities from the ‘coffee shop’ debates - the debates at the popular level - and it is decisions that emanate from the high courts that not only fuel these debates, but they eventually become the backdrop for such debates. The Supreme Court in the United States has shaped many of the contentious public policy issues in America. The Canadian Court is finding itself in a similar position in Canada. This is necessarily the case due to the finality of the Courts’ decisions and the deference that is
usually paid to the final court of appeal. What is apparent, and what the following, less detailed accounts of specific issues decided by the Canadian Court will continue to demonstrate, is that the reasoning behind the Canadian decisions differ from that of their American counterparts and thus those who continue to make claims that the Canadian and American Supreme Courts are the same or that the Charter of Rights is an 'Americanized' document, would be well advised to research some of the differences between the institutions and rights documents to correct these errors of fact.

Prostitution

A trio of Canadian cases deal with this issue with the definitive decision handed down in the Prostitution Reference. As the quantitative analysis indicated, this reference cited the second-highest number of American precedents of all section 1 cases, indicating some level of influence flowing from the American Supreme Court. As was also made clear, it is vital to determine what exactly the Canadian Supreme Court says about American Supreme Court jurisprudence and how it uses such precedent before any conclusions about influence can be made. The Prostitution Reference demonstrates how

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important this is. The bulk of US Supreme Court citations were used as historical references to the American concept of ‘Economic Liberty’. This was done because Justice Lamer was drawing a distinction between the ‘liberty’ of section 7 of the Charter and the American ideal of ‘liberty’ found in the context of the 14th Amendment. Lamer eventually rejects the American concept, along with the corresponding precedents, by stating that the cases cited “have a specific historical context ... that incorporated into the American jurisprudence certain laissez-faire principles that may not have a corresponding application to the interpretation of the Charter in the present day.”

This is not to suggest that American ‘liberty’ does not find favour on the Canadian bench. Lamer suggests that Justice Wilson’s view of liberty “seems largely reflective of several leading American decisions.”

Both Wilson and Lamer focus on the section 1 analysis of whether communicating in a public place for the purposes of prostitution was a reasonable limit on freedom of expression. They both differed on the scope of the legislative objective, but as for further appeal to the constitutionality of prostitution, appeal to American authority was lacking.

Electronic Surveillance

This issue was singled out in the quantitative analysis due to its high percentage of American citation use. The decision in Duarte is interesting in the context of this study

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98 Reference re: ss. 193 & 195.1(1)(c) of the criminal code (Man.), supra, note 21 at p. 1171
99 Ibid., at p. 1163
100 R v. Duarte, supra, note 25
for two reasons. The first is the rejection of US Supreme Court jurisprudence on the specific issue of warrantless electronic surveillance. The definitive case in the US is *United States v. White.*\(^{101}\) The American Court upheld such use of electronic surveillance by equating the surreptitious recording of conversations to the risk incurred by having the recipient of the information inform authorities from memory. A similar line of reasoning was followed in *Lopez v. United States.*\(^{102}\) There, the Court is working under the assumption that "participant surveillance is inherently less offensive than third party surveillance"\(^{103}\) and that the evidence garnered by such means simply adds to the reliability of the evidence a third party would have provided. In an act of respect, Justice LaForest acknowledged that the line of reasoning taken "is not without weight [since] it counts among its adherents the Supreme Court of the United States"\(^{104}\)

However, LaForest subsequently rejected this reasoning. This does not though, indicate a lack of American influence since he accepts the reasoning of American state appellate courts that also rejected *White.*\(^{105}\) The decisions not only took exception with the notion of the ‘risk analysis’ mentioned in *White* but also with the sole discretion resting with police as to when to use such procedure. It is not an unreasonable burden, agreed LaForest, to secure judicial approval for the necessity of such a means of securing evidence.

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\(^{101}\) 401 US 745 (1971)
\(^{102}\) 373 US 427 (1963)
\(^{103}\) R v. *Duarte*, supra, note 25 at p. 41
\(^{104}\) Ibid., at p. 42
Freedom of Expression and Press

The fundamental freedoms of expression and of the press "are not absolute rights and were never intended to be so. They are relative in the sense that they are limited by the coexisting rights of others ... and by the demands of national security and public decency."^{106} This definition, perhaps surprisingly given the apparently unqualified nature of the First Amendment, describes the First Amendment rights of free speech and press in American constitutional law. Indeed, there are several landmark decisions by the United States Supreme Court in this area of rights.^{107} The Canadian experience is much less advanced in this regard with the definitive decision being that of *Edmonton Journal v. Alberta (AG).*^{108} In this important Canadian precedent, the Alberta newspaper challenged provincial legislation^{109} that restricted what it could publish in matrimonial proceedings. The values in conflict involve the necessity for open and free courts and the freedom of the press and media. The Court's task was to determine if there are instances when citizens in an open and free court ought not to have such private information, besides basic information such as names, addresses and concise statements of charges/proceedings, published (in this case), in the print medium. A majority of the Court thought such restrictions were overly broad for the continued free operation of press and media.

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^{106} Cushman and Cushman, supra, note 84 at p. 812


^{109} Judicature Act, R.S.A. 1980, c-J-1 ss. 30, 31
The appeal to American Supreme Court jurisprudence focused on the rather narrow concept of 'open and free' courts rather than the more fundamental issue of privacy. US Supreme Court precedents used by both the majority and dissenting opinions were relatively few\textsuperscript{110} and were used simply to buttress the importance of this narrow concept. Justice Wilson provides a somewhat more detailed American Supreme Court analysis, but essentially provides the same 'supporting' information that Justices Cory (majority) and LaForest (dissenting) do. If there is any influencing precedent that guides the Court's final decision, it may be the \textit{Sunday Times Case} and the final appeal by the European Court of Human Rights.\textsuperscript{111} In its judgment, the court stated:

As the Court has already observed, Article 10 [of the European Convention]\textsuperscript{112} guarantees not only the freedom of the press to inform the public but also the right of the public to be properly informed.

In the present case, the families of numerous victims of the tragedy, who were unaware of the legal difficulties involved, had a vital interest in knowing all the underlying facts and the various possible solutions. They could be deprived of this information, which was crucially important for them, only if it appeared absolutely certain that its diffusion would have presented a threat to the "authority of the judiciary".\textsuperscript{113}

Justice Cory, who authored the main majority opinion, stated that "[t]hese words are apposite to a consideration of s. 30(2)\textsuperscript{114} and should govern the decision made pertaining to that subsection."\textsuperscript{115}

\textsuperscript{110} I say "relatively few" because only five USSC precedents are cited from a total of 38 citations but I single this case out in the quantitative analysis, supra, p. 120-121, as demonstrating the concentration of American Supreme Court precedents during 1989. Obviously, such qualitative analyses are vital in order to qualify what would appear to be strong empirical evidence for a particular conclusion.


\textsuperscript{112} \textit{European Convention of Human Rights}, supra, chap. 3, note 19

\textsuperscript{113} \textit{Edmonton Journal v. Alberta (AG)}, supra, note 18 at p. 1349

\textsuperscript{114} S. 30(2) reads: No person shall, before the trial of any proceedings had in a court of civil jurisdiction in Alberta or, if there is no trial, before the determination of the proceedings within Alberta, print or publish or cause to be printed or published anything contained in a statement of claim, statement of defence or other pleading, examination for discovery or in an affidavit or other document other than

(a) the names and addresses of the parties and their solicitors, and
Political Expression

Notwithstanding the implication that freedom of expression issues would not be discussed extensively\textsuperscript{116}, this third foray into this fundamental freedom concerns where people may freely express their views. This was the focus in \textit{Committee for the Commonwealth of Canada v. Canada}\textsuperscript{117} in which the issue was whether a government-controlled airport could prohibit the distribution of leaflets on its premises. The Court decided unanimously that an airport could not, in fact, prohibit this act of expression.\textsuperscript{118} Obviously, the Court had to weigh the values of free expression against what could eventually turn into a disruption of a public area. Once again, the bulk of the American Supreme Court citations employed served to emphasize the importance of the fundamental freedom of expression: not a particularly difficult task. Where appeal to American jurisprudence is most important is in the definition of ‘public’ and the status that airports have in this context. Justice L’Heureux-Dubé does not seem convinced by the narrow scope that the US Supreme Court has applied in defining ‘public arenas’ such

\textsuperscript{115} \textit{Edmonton Journal v. Alberta (AG)}, supra, note 18 at p. 1350

\textsuperscript{116} See text accompanying note 78, supra.

\textsuperscript{117} Supra, note 23

\textsuperscript{118} The unanimous decision did, nonetheless, have three separate opinions that differed on the scope of the expressive freedom and where it could be practiced. L’Heureux-Dubé took the position that all expression on public property falls under s. 2(b) of the \textit{Charter} and must subsequently be justified under s. 1. Chief Justice Lamer held that as long as the expressive activity does not impair the function of the public property, then it will be upheld. Justice McLachlin attempts to come down somewhere in between by stating that only “some expression on some government property is protected under s. 2(b).” Ibid., at pp. 227-228.
as “streets, parks and other public places”. She takes a different path than the American justices by instead focusing on the issue being infringed upon rather than the place it is being performed. In other words, she will decide if one’s freedom of expression has been violated according to the nature of the expression rather than where it is conducted. As she states, “[t]he First Amendment as well as the Canadian Charter of Rights and Freedoms were designed to protect people, not places. While certain areas can acquire a distinctive character, and people’s expectations may be affected by where they find themselves, the rights and freedoms do not extend to the locations, but rather to the people occupying them.”

It is evident that both courts limit freedoms. This case illustrates how section 1 can allow the Canadian Court to interpret such an all-encompassing right very broadly and how the US Court must find different avenues to achieve what is ostensibly the same balancing goal.

**Language**

I would be remiss if the quintessential issue of the Canadian federation was not addressed in relation to US constitutional precedent. Express language protection is one of the fundamental differences between Canada and the United States not only in the constitutional sense, but in the overall historical and cultural aspects of our nations.

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119 See *Cox v. Louisiana* 379 US 536 (1965); *Hague v. Committee for Industrial Organization* 307 US 496 (1939)
120 *Committee for the Commonwealth of Canada v. Canada*, supra, note 23 at p. 202
It would not be expected that any appeal to American jurisprudence would be necessary when the issue of language rights are at the center of debate. This, in fact, has been the case. *Devine v. Quebec (AG)*,\(^{121}\) in which the Court upheld provisions of the Quebec Government’s *Charter of the French Language*,\(^ {122}\) did not mention any American precedents in formulating its decision. The issues found no relevant counterparts in the US Supreme Court, making this a ‘made in Canada’ decision.

*Ford v. Quebec (AG)*\(^ {123}\) provides an interesting example that demonstrates under what circumstances American precedent is cited in a decision. In *Ford*, the Supreme Court struck down the provisions of the Quebec *Language Charter* that required all commercial signs and advertisements to be in French only. The Court based its decision on freedom of expression in section 2(b) of the *Charter*, notwithstanding the important symbolism that language played in the case.\(^ {124}\) As would be expected, the issue of ‘commercial expression’ raised in *Ford*, and the extent of its regulation, did find relevant precedents in American jurisprudence, but only in this area where the US Supreme Court has had experience. The discussion of language was conducted ‘in camera’, so to speak.

A final example involves one of the Court’s first *Charter* decisions, *Quebec Association of Protestant School Boards v. Quebec (AG)*.\(^ {125}\) An overview of the facts of

\(^{121}\) [1988] 2 SCR 790
\(^{122}\) R.S.Q. 1977 c. C-11
\(^{123}\) [1988] 2 SCR 712
\(^{124}\) *Ford* is nevertheless referred to as a language case. It is implied by Hogg, supra, chap. 1, note 5, in discussing *Ford* under Chap. 53 “Language”. It is also expressly labeled “The French Language Case” by Jamie Cameron, “Cross Cultural Reflections: Teaching the Charter to Americans” Osgoode Hall Law Journal Vol. 28, No. 3 (1990)
\(^{125}\) [1984] 2 SCR 66
the case was presented. Given the ‘Canadian’ nature of the case, it should not come as a surprise to find no American jurisprudence utilized by the Court. Issues that deal with such an integral and fundamental aspect of Canadian history and culture, namely language, should not expect to find anything of use from the US Supreme Court or other lower American courts.

Like the text of constitutions themselves, however, this sentiment is true only as far as its interpretation will take it. It is true that any ‘pure’ language case will not find help from the United States. The peripheral issues that surround the main question of language though, do provide for an opportunity to use American material. Consider the admission made by Justice Dickson in Big M Drug Mart when discussing the relevance of ‘purpose and effects’ and how the rights in Protestant School Boards were flatly denied rather than limited. He suggested that the Court followed the approach taken by Chief Justice Warren in the US Supreme Court’s judgment in Braunfeld v. Brown which provided the Court’s definition of what was acceptable purposes versus effects:

Of course, to hold unassailable all legislation regulating conduct which imposes solely an indirect burden on the observance of religion would be a gross oversimplification. If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if a state regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the state’s secular goals, the statute is valid despite its indirect burden on religious observance unless the state may accomplish its purpose by means which do not impose such a burden.  

It would appear that other, ‘non-core’ issues not only have an effect on the outcome of a case in that they have the opportunity to direct the discussion towards a certain path

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126 See supra, chap. 4, pp. 74-78
127 Quoted in R v. Big M Drug Mart, supra, note 51 at p. 332.
(from substantive to procedural issues, for example), but if need be, other jurisdictions may be employed to support such a path. Thus, American precedents could be indirectly influencing more cases than they are given credit for. That, however, is not a conclusion this study would support.

Conclusion

The preceding analysis of various policy issues serves to strengthen further not only the conclusion drawn in light of the statistical data collected in this study, but also the conclusions of other major studies examining the use of American jurisprudence by the Canadian Supreme Court. Canadian Supreme Court Justices have repeatedly reminded Canadians that American doctrine does not necessarily fit the Canadian constitutional mould notwithstanding the similarity of the function of both nations' rights documents. In light of the policy issues examined, which is, to reiterate, not an exhaustive sample, the only conclusion to draw is that use of American decisions in section 1 cases is at best episodic. Appeal to US Supreme Court decisions is made mostly as support for stances taken for or against fundamental aspects of human rights. The freedom of expression issues demonstrate this point well. The large amount of American Supreme Court citation use by the Canadian Court in particular cases, which could be interpreted as high level American influence on issues, is seen for the most part as merely supplying comparative data to reinforce the Canadian Court’s commitment towards guaranteeing

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128 See supra, pp. 113-128
129 Harvie and Foster, supra, chap. 1, note 21
free expression or a free press or other ‘great’ rights.\textsuperscript{130} This is not to suggest that American influence is non-existent or merely superficial. On the contrary, the influence can more often be seen in the Canadian Court’s departure from US Supreme Court decisions. Analyzing what the American Court has decided allows the Canadian justices to examine what particular decisions have accomplished and if these accomplishments would fit the Canadian experience. Clearly, on a qualitative level, this would appear to be the extent of the influence emanating from the south.

Six

Conclusion

The purpose of this study has been to continue the analysis begun elsewhere regarding the use of American jurisprudence by the Supreme Court of Canada in section 1 Charter of Rights decisions. Measuring the extent of American jurisprudential influence on Supreme Court decisions is difficult due to the many facets of Charter interpretation. In criminal law cases under the Charter, it has been demonstrated that the Court’s use of American jurisprudence (both Supreme Court and lower court) has been “somewhat selective” and that the ‘wealth of experience’ that the United States promised “is not being systematically consulted and analysed.” This is not due to a misunderstanding of American jurisprudence nor a concerted effort to signal the Canadian Court’s independence on issues dealing with fundamental human rights. Rather, it demonstrates an understanding of the differences inherent in both national systems including cultural, social and political variations.

3 Ibid., at p. 782
4 Harvie and Foster suggest that this may have been the case in early Charter of Rights decisions. They have concluded in their second study that “the Supreme Court is referring to United States precedent with increasing sophistication, and Canadian judges are becoming less inclined to treat American law as a grab
The Canadian Supreme Court is well aware of these differences and its decisions, especially in the context of rights limitations, have consistently demonstrated this point. As has already been argued, American Supreme Court precedent, and other foreign precedent in general, is not used in order to provide definitive interpretations of rights or the reasons for their limitation. Its use is predominantly found at the ‘front end’ of the reasoning process; as a reinforcement of major concepts of rights and a genuine learning exercise in how other judicial institutions have characterized fundamental rights, leaving the finer, more intricate details of the case to be determined in a domestic context.

The general conclusion to the initial question of how much American Supreme Court jurisprudence influences the judgments by the Canadian Supreme Court in limitation of rights cases, is derived mainly from the qualitative analysis of policy issues. This is not to suggest that the quantitative analysis of citation use by the Canadian Court in section 1 cases was irrelevant. On the contrary, not only did it provide data that were lacking in the literature of Supreme Court jurisprudence, but it also provided a necessary look at the differences between such quantitative and qualitative analyses. Quantitatively, the argument could be made that the Court appealed too much to American and other foreign counterparts. Just under 80% of total citations used originated in Canada\(^5\) and of the 20.4% of foreign citations employed, 10.6% were American Supreme Court precedents.\(^6\) The majority of these US Supreme Court precedents are cited, as concluded above, as support for the position taken by the

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\(^5\) 79.61% See Appendix A, Table 1, infra

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Canadian justices in defining fundamental aspects of rights and values. The American precedents will be found in the section of a written decision that discusses the comparative, interpretive stances upheld in defining such freedoms as expression, religion or liberty. When the technical, legal issues of a case are discussed, and the justices are deciding whether legislation should be saved by section 1 as a reasonable limit against the right in question, one would be hard pressed to find even cursory references to American jurisprudence.

This has become the standard for American precedent use by the Supreme Court of Canada for at least three reasons. The first is the difference in constitutional histories. The American and Canadian conceptions of individual liberty stand apart due to the contrasting ideological stances present at their founding. These differences between inalienable rights and a distrust of government authority versus a deferential attitude by citizens towards authority and the explicit acknowledgment that rights are, in fact, limited, has remained evident in the underlying tone of rights' decisions. Focusing on the American example, despite the existence of a bill of rights for over 200 years, the bulk of activist, 'liberal' rights jurisprudence is a relatively recent phenomenon. That is, despite the lengthy existence of the Bill of Rights, its use by the American Supreme Court in "defining the meaning and the scope of civil liberties" is essentially a post war event. This does not denigrate the importance of decisions such as Marbury v. Madison, Dred

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6 Opposing reasons for why this figure is desirable or not are found in supra, chap. 5, pp. 114-116.
7 'Over' 200 years constitutes from 1992 onward. At the beginning of this activist Bill of Rights jurisprudence, it would have been approximately 150 years old.
8 Morton, supra, chap. 1, note 10, p. 61
9 1 (Cranch) 137 (1803)
Scot v. Sanford or Lochner v. New York. What it signifies is twofold. First, the United States has not been immune from the phenomenon of explicit rights protection. For most of the world community, this has meant writing rights down. For the United States, it has meant a reinterpretation of previous judicial decisions. In both cases, a reevaluation of the relationship between the citizen and the state has been undertaken. Second, notwithstanding the ‘lateness’ of Bill of Rights decision-making, the interpretation of the document stems from the nation-founding ideals of ‘life, liberty and property’ and the protection of them. Such strong principles are readily apparent in the uncompromising nature of certain guarantees that the Court protects. While it may be true that a re-evaluation has occurred, the specific ideals on which America was established remain strong. This is why the Canadian Supreme Court will not find it too difficult to incorporate such values in a holistic discussion of a fundamental right, but will generally defer to its own previous precedents or other domestic information to help decide the specific issues of law.

The second reason that the appeal to American Supreme Court jurisprudence has remained in the peripheral areas of decisions rather than at their core is the nature of section 1 itself. Section 1 allows the Court to define broadly the rights and freedoms guaranteed in the Charter because of its primary function of developing limits on these same guaranteed rights. The American Supreme Court has had to find limits within the rights themselves through the process of ‘judicial legislation’. Defining what the limits to

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10 19 How. 393 (1857)
11 198 US 45 (1905)
right are is easier than shaping the actual right. Under section 1, the right remains untouched because its limitation is not based on the substantive nature of the right but in the contextual analysis of such issues as community standards, minority interests and a general means-oriented evaluation of the limitations' effects. Freedom of expression, for example, is given a very broad definition. It is in the definition of the limits against it, which is not the same as forbidding a certain form of expression based on content, which allows the right to remain very broadly defined. This formal difference between American and Canadian jurisprudence requires specific reasoning to be employed by Canadian courts that takes into account not only the rights that are guaranteed, but their limitations as well.

A final reason for peripheral issue use of American precedent involves the evolution that section 1 has undergone at the hands of the Supreme Court. The Court, as it alluded to in Oakes, has taken a contextual approach to rights limitation. A case-by-case examination does not necessarily preclude a doctrinal approach to deciding cases with similar circumstances. It does, nevertheless, make it difficult to apply set doctrine. The American Supreme Court has found this to be a difficult task as well and has devised different 'levels of scrutiny' to determine such cases. Even these levels though, are criticized for their hierarchical division of issues and circumstances making the final decision of the Court almost a foregone conclusion. The contextual approach by the

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12 'Domestic Information' such as government documents, Royal Commissions, official Hansard records and the like.
13 [1986] 1 SCR 103. See text to note 100 supra, chap. 4 at p. 99
14 See Tribe, supra, chap. 3, note 24
15 For example, if a limitation to a right is to be put under 'strict scrutiny', the chances for limitation are small as opposed to a 'rational relation test' where the criteria of limitation is decidedly more lax.
Canadian Supreme Court can also be seen as allowing it to differentiate between the particular case at bar and supposedly relevant American precedent. While it may be true that the Court might cite the same American precedents when it discusses larger issues of fundamental freedoms, this is preferable to using the same American precedents to decide core areas of specific cases.

Do the conclusions stated in the qualitative analysis - that use of American jurisprudence in section 1 cases is "at best episodic" - and in the quantitative analysis - that there is no "pattern" to when the Canadian Supreme Court uses American Supreme Court precedent - mean that the Canadian Court chooses the precedents it does on a whim? Not quite. The critical variable is the Court's choice to conduct section 1 analyses on a contextual basis. Depending on the facts of the case and how relevant some precedents might be in buttressing certain arguments, be they Canadian or American precedents, the Court appears to choose wisely as to when to use American jurisprudence. As for the particular cases that it ends up choosing, that may be left for another study. Suffice it to say that, at times, the choice of not using a case (or at least not citing it explicitly) is a curious omission.16

The discussion of both the qualitative and quantitative analyses leads into general remarks about what these two types of data sets mean individually and together.17 On

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16 Two examples stand out. The mandatory retirement case of Massachusetts Board of Retirement v. Murgia, 427 US 307 (1976), seems to encompass many of the same reasons for accepting a mandatory retirement age, yet it was not mentioned in the decisions by the Canadian Supreme Court. See text accompanying note 73, supra, chap. 5. The second example involves the original Oakes test and the non-use of United States v. O'Brien, 391 US 367 (1968). Lokan suggests that the test first set out in R v. Big M Drug Mart, and later in Oakes, is similar to the test of "incidental infringements" in free speech set out in O'Brien. See Lokan, supra, chap. 4, note 5 at pp. 173-177.

17 I thank Professor Colin Bennett for drawing attention to this point.
the quantitative level, what does citation use indicate and is it an effective marker for influence? Peter McCormick provides a comprehensive list of reasons why citation use is important. They demonstrate “a basic knowledge of the relevant subject matter”, are used “to locate the immediate analysis in the context of established principles and standards”, meaning that citations link to previous citations in order to resolve apparent “disagreements or divergences within the existing case law, or they try to pull a variety of sources together for an original and creative synthesis.”\(^{18}\) Finally, citation use adds “weight and credibility to the arguments being advanced, making them more convincing and therefore more acceptable to the relevant public.”\(^{19}\) While there are no disagreements with these reasons, they are true only up to a certain point. The conclusions drawn from any quantitative study are mere speculation unless the data are so obvious as to not warrant a further qualitative analysis. For example, the data collected for Appendix A, Table 1 shows that there were 2432 total citations used by the Supreme Court of Canada in section 1 cases between the years 1984-1996. If the amount of American Supreme Court citations numbered 1200, then it would be fairly safe to assume that the Canadian Court was relying heavily on American Supreme Court jurisprudence (yet even this could be contested). However, with only 258 US Supreme Court citations used, any conclusions drawn have minimal weight unless and until a qualitative analysis of the written decisions is conducted to determine how these citations were used by the justices of the Court. The qualitative analysis is necessary and vital in order to buttress any

\(^{18}\) McCormick, supra, note 1, pp. 529-530
\(^{19}\) Ibid., p. 530
speculative conclusions drawn from statistical data. McCormick's data, while important, did not account for such a qualitative addition. Although his quantitative conclusions were similar to the conclusions made in this study, the additional qualitative analysis allows for a more definitive conclusion to be drawn.

As for future considerations, as long as the Court continues with its contextual analyses of section 1 cases, American Supreme Court precedent will continue to be used in its present 'unpatterned', supportive manner. This banal, status-quo prognostication applies to the qualitative area of the study. Quantitatively, the earlier hypothesis that citation use would reach a peak level, to be followed by a gradual decline to a lower threshold number of cases, will eventually become the case. This has already been evident in the latter years in which this study concentrated. Due to the final two years examined however, it is obvious that this threshold number range has not yet been determined.

The best way to learn about political science, in all its various forms, is through comparative analyses. This, as well as previous analyses of American jurisprudential influence on Charter of Rights decisions, is also a vital learning exercise. The inception of the Charter is, as this study said at the outset, the seminal event in Canadian political history, as much for the perception that a certain 'Canadianness' was being lost as for the onset of judicial review of legislation under the watch of a bill of human rights. To

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20 And with good reason since his study covered 50 years to my mere 13.
21 This does not mean that the Court consciously determines quotas for itself in regards to citation use. The threshold range is a natural range which it will settle into once the comfort level with limitation issues becomes firmly established. Of course, just as normally accurate public opinion polls may be accurate 19
demonstrate whether the Canadian idea of governing has suffered as a result is a necessary endeavour to determine the merits of such a fundamental shift in Canadian culture. The Charter is undeniably a Canadian document. Judicial review of legislation has taken on a decidedly Canadian flavour. Given these two, rights limitation (and protection) has evolved in a Canadian context. Some maturation is still forthcoming, and it will come, as it has in the past, with some appeal to larger issues of rights and liberties in a comparative, mostly American, context. But, “ultimately, any theory of the Charter should be judged, not by its conformity to some pre-existing model, whether this be the American Bill of Rights or the European Convention of Human Rights, but by its ability to display the Charter as the development and extension of the best of Canadian constitutional traditions.” The Supreme Court, it appears, heartily agrees.

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Appendices

Appendix A, Tables 1, 2

Appendix B

Appendix C, Tables 1-3

Definitions

USSC: United States Supreme Court
‘Other’ US: Lower American courts (Non-USSSC)
‘Other’: Other foreign courts (Non-US/USSSC)
CAN: Canadian
Appendix A

Table 1

Overall Figures

Supreme Court of Canada Citation Use

1984 - 1996

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# Appendix A

## Table 2

**Evolutionary Figures**

United States Supreme Court Citations Per Year

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Table 1

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Appendix C

Table 3

Supreme Court of Canada Outcomes

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