The Pluralism of the Charter: Revisiting the Oakes Test

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The Canadian Charter of Rights and Freedoms\(^1\) opens with the solemn declaration that it “guarantees the rights and freedoms set out in it,” thus assuring the constitutional status of the rights enumerated. Section 1 goes on to say that this guarantee is “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society,” thus recognizing that the rights are subject to “reasonable limits” that meet a certain standard. What the section fails to explain is the precise relationship between these two elements. In what way does the standard of “reasonable limits” interact with the rights guaranteed?

There are two main answers to this question. The first holds that section 1 lays down a uniform standard that is “external” to the specific constitutional guarantees and only comes into play once an infringement of a substantive right has been found. We may call this the monistic approach, because it envisages a single standard applicable to the full range of Charter infringements, one that owes its character to the terms of section 1 itself.

The second viewpoint holds that section 1 envisages a multiplicity of standards for assessing limits on Charter rights. These standards are tailored to the particular rights in question and form part of their effective definitions.\(^2\) In this sense they are “internal” to the substantive guarantees. Applying these standards is part and parcel of the process of determining whether

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* I am indebted to Grégoire Webber for his helpful comments on an earlier version of this article.


2. See the argument presented in Daniel WEINSTOCK’s contribution to this volume.
specific Charter rights have been infringed. The standards all reflect the basic requirements set out in section 1, however they are fleshed out with concrete criteria appropriate to the particular rights in question. We may call this the pluralistic approach, because it envisages a range of differing standards for judging limits on Charter rights.

Which approach is correct? The wording of section 1 allows for either possibility. On the one hand, the fact that the section is physically distinct from the individual Charter guarantees and is framed in universal terms favours the monistic approach. It suggests that deciding a Charter case is a two-staged process. At the first stage, a court asks whether a particular Charter guarantee has been infringed. If the answer is affirmative, the court moves to the second stage where it decides whether the infringement can be justified under the uniform standard set out in section 1. This interpretation is supported by a comparison with the text of the European Human Rights Convention (1950), which contains a variety of limitation clauses, some of which are tailored to the specific requirements of the rights they qualify.³ Had the framers of the Charter wished to follow this example, it would have been easy for them to do so.

On the other hand, section 1 is open to a pluralistic reading. The standard set out there is highly abstract and open-ended. The basic criteria—“reasonableness,” “prescription by law,” and “demonstrable justification in a free and democratic society”—allow for a range of more specific standards adapted to the particular rights guaranteed. The process of justification does not always have to follow the same path or satisfy the same detailed criteria. Rather it may be as variegated as the Charter rights themselves and reflect their distinctive natures. The contrast with the wording

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³ Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 221, Eur. T.S. 5. For example, Article 10 guarantees freedom of expression, including the freedom to hold opinions and to receive and impart information and ideas. It goes on to specify: “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 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.”
REVISITING THE OAKES TEST

of the *European Convention* reflects a concern for economical drafting rather than any difference of principle.

If section 1 supports both monistic and pluralistic interpretations, what about the substantive *Charter* guarantees? Here again there is room for argument. Some *Charter* sections affirm rights in an apparently unqualified form, with no hint of reasonable limits—thus supporting the monistic view that such limits should be assessed under section 1. For example, the fundamental freedoms in section 2—freedom of conscience, freedom of expression, freedom of peaceful assembly, and freedom of association—are all set out in ringing terms that apparently do not brook internal limitation. Consider the wording of section 2(b), which declares roundly that everyone has “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.” Arguably, the question whether this fundamental freedom has been infringed is analytically distinct from the question whether such an infringement is “reasonable,” and the latter question is governed by the uniform criteria set out in section 1.

However, not all *Charter* sections feature such unqualified wording. In fact, many incorporate what amount to internal standards of reasonableness—thus lending credence to the pluralistic view. For instance, section 8 provides that everyone has the right to be secure against “unreasonable search or seizure.” Arguably, the term “unreasonable” internalizes the basic standard of “reasonable limits” set out in section 1 and moulds it to the particular needs of the section. According to this view, once a certain kind of search has been judged “unreasonable” under section 8, it would be pointless to inquire whether the search (or the authorizing law) represents a “reasonable limit” under section 1. In effect, the standard of reasonableness in section 8 is a concrete instantiation of the general standard set out in section 1.

There are plenty of other *Charter* sections that refer to reasonable limits. Some do so explicitly, as with section 6, which guarantees mobility rights subject to “reasonable residency requirements.” Others use less direct language which arguably achieves similar results. Thus section 7 guarantees the right to life, liberty, and security of the person, and goes on to specify that no one may be deprived thereof except in accordance with “the principles of fundamental justice”. The latter phrase seems to overlap significantly with the section 1 criterion, and indeed to pose a more stringent standard.
All in all, if we cast an eye over the text of the Charter, we can hardly fail to be impressed by the diversity of the document. Some sections allude to standards of reasonableness, others apparently do not. This factual diversity seems to speak strongly in favour of the pluralistic approach. In effect, advocates of monism have a heavy burden of proof. It is not enough for them to point to the handful of Charter provisions that apparently lack internal limits, such as the fundamental freedoms in section 2, the right to vote in section 3, and the right to an interpreter in section 14. They need to show that all (or at least most) Charter provisions lack such limits. But this argument is hard to sustain. The portion of the Charter devoted to Legal Rights alone provides a host of counter-examples. In addition to sections 7 and 8, already mentioned, we find references to “arbitrarily detained or imprisoned” in section 9, “unreasonable delay” in section 11(a), “reasonable time” in section 11(b), “fair and public hearing” in section 11(d), “reasonable bail” and “just cause” in section 11(e), and “cruel and unusual treatment or punishment” in section 12. These references seem to call for a range of distinctive approaches to the question of reasonable limits, each tailored to the particular right in question.

However, at an early stage in the interpretation of the Charter, the Supreme Court of Canada rejected this viewpoint and opted for a monistic interpretation of section 1. The occasion was the famous Oakes case, where the Court endorsed a two-stage approach to Charter cases, with the first stage devoted to determining if a substantive right has been infringed, and the second to the question whether any such infringement constitutes a “reasonable limit” under section 1. Our next task is to examine how this result came about.

A. THE BACKGROUND TO OAKES

The facts in Oakes are straightforward. The accused, one David Edwin Oakes, was searched by a police officer, who found eight one-gram vials of hashish oil in his pocket. Oakes was arrested and taken to the police station where, upon a further search, the sum of $619.45 was found. Oakes stated

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4 See Grégoire C. N. WEBBER’s essay for an overview of the different degrees of limitation in specific Charter guarantees.
5 Emphasis added throughout.
that the hashish oil was for his own use and that the cash came from a workmen’s compensation cheque. Nevertheless, he was charged with possession of a narcotic for the purpose of trafficking, contrary to section 4(2) of the Narcotic Control Act, a serious offence carrying the maximum penalty of life imprisonment.

Under section 8 of the Act, a trial for this offence is divided into two phases. The first phase proceeds as if it were a prosecution for the less serious offence of simple possession under section 3. After the close of evidence on this point, the court makes a finding as to whether the accused was in possession of the narcotic. If the finding is affirmative, the trial moves into the second phase, where the accused is given the opportunity to establish that he did not have the purpose of trafficking, and the prosecution the opportunity to establish the contrary. If the accused succeeds in discharging his burden of proof, he is acquitted of the offence as charged but convicted of simple possession under section 3. However, if he fails in this task, he is convicted of the offence of possession for the purpose of trafficking and sentenced accordingly.

In the first phase of his trial, Oakes elected not to call any evidence and the trial judge found that he was in possession of the drug. The trial then moved into the second phase, at which point Oakes brought a motion challenging the constitutional validity of section 8, which he argued violated the presumption of innocence guaranteed in section 11(d) of the Charter by imposing a burden on him to prove he did not intend to traffic in the drug. Section 11(d) of the Charter provides:

Any person charged with an offence has the right [...] to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

The trial judge accepted Oakes’ argument and held that section 11(d) of the Charter renders section 8 of the Act inoperative except where the Crown first proves beyond a reasonable doubt that the purpose of the possession was to traffic. The judge gave the Crown the opportunity to adduce further evidence, which the Crown elected not to do. The judge then acquitted Oakes of the offence charged, stating that he was not satisfied beyond a reasonable doubt that Oakes was in possession of a narcotic for the purpose of trafficking, and proceeded to find Oakes guilty of simple possession only.

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The Crown appealed this decision to the Ontario Court of Appeal, where Justice G. Arthur Martin held for a unanimous panel that section 8 was constitutionally invalid because it violated the presumption of innocence entrenched in section 11(d) of the Charter.8 His judgment forms the essential background to the Supreme Court’s decision and merits closer examination.

Justice Martin observes that the fundamental principle that an accused is presumed to be innocent has two aspects: first, an accused stands innocent until proven guilty in accordance with established procedure; and second, proof of guilt must be established beyond a reasonable doubt.9 Prior to the enactment of the Charter, this common law principle was subject to statutory exceptions, which, under the doctrine of Parliamentary supremacy, the courts were bound to respect. With the advent of the Charter, this position changed. Section 11(d) of the Charter recognizes the right of an accused to be presumed innocent until proven guilty “according to law”. The latter phrase, says Justice Martin, indicates that the right is subject to statutory exceptions. However any such exceptions must meet the standard laid down in section 1 of the Charter, which permits only “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. Henceforth, any statutory exceptions that are arbitrary or unreasonable are constitutionally invalid.10

Justice Martin links the phrase “according to law” in section 11(d) with the phrase “prescribed by law” in section 1 and holds that it has the effect of importing the standard of “reasonable limits” into section 11(d), where it generates a set of detailed criteria appropriate to the particular right in question. What are these criteria? Justice Martin explains that the reasonableness of a reverse-onus clause is governed by a number of factors, including: (a) the magnitude of the evil sought to be suppressed, as measured by the gravity of the harm resulting from the offence or the frequency of commission; (b) the prosecution’s difficulty in proving the presumed fact; and (c) the relative ease with which the accused may prove or disprove the presumed fact. Manifestly, says Justice Martin, a reverse-onus clause cannot be justified when it relates to a fact that it is not rationally open to the accused to prove or disprove. Moreover, even where a reverse-

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9 Id., para. 6.
10 Id., para. 23-26.
onus clause might otherwise pass muster, it is not justifiable if the existence of the proved fact does not rationally tend to prove the existence of the presumed fact. In the absence of such a rational connection, the presumption is purely arbitrary.\footnote{11}{Id., para. 28, 61-63.}

It is this last requirement that, in Justice Martin’s view, proves fatal to the reverse-onus clause found in section 8 of the Narcotic Control Act. Mere possession of a small quantity of a narcotic does not rationally support an inference of possession for the purpose of trafficking or even tend to prove an intent to traffic.\footnote{12}{Id., para. 65.} For this reason, section 8 violates section 11(d) of the Charter and must be struck down as unconstitutional.

In effect, then, Justice Martin adopts a pluralistic approach to the question of reasonable limits. He holds that the constitutional standard set out in section 1 should be treated as an integral part of section 11(d). When viewed in this context, the abstract terms of the standard gain a concrete meaning which is adapted to the specific subject matter in question. It is important to note, nevertheless, that integrating section 1 into section 11(d) does not collapse the inquiry into a single stage. To the contrary, Justice Martin envisages at least two stages in the process. At the first stage, a court determines whether the clause under scrutiny constitutes a genuine exception to the presumption of innocence recognized in section 11(d). Where the court rules affirmatively, it proceeds to the second stage, at which point it determines whether the clause represents a justifiable limit on the right, and here it applies the detailed criteria appropriate to the particular subject matter—in this case reverse-onus clauses. We may also note that the pluralistic approach does not rule out a shift in the burden of proof between the first and second stages, with the party alleging the infringement of a Charter right bearing the burden of proof at the first stage and the party seeking to uphold it at the second. Nevertheless, Justice Martin does not address this question in his judgment.

So the essential difference between the pluralistic and monistic approaches does not lie in the number of analytical stages or the location of the burden of proof. Rather it lies in the character of the justificatory test. Under the monistic approach, the court applies a uniform standard that does not reflect the specific Charter right or subject matter under consideration. By contrast under the pluralistic approach, the constitutional test
is part and parcel of each particular Charter guarantee and employs detailed criteria that reflect its distinctive nature, purposes, and genesis, as well as the specific subject matter at issue.

B. The Decision

If Justice Martin’s judgment opens the door to a pluralistic reading of section 1, on further appeal the Supreme Court of Canada seems to slam it shut. While agreeing with Justice Martin that section 8 of the Narcotic Control Act is unconstitutional, the Court takes a different view of the relationship between section 11(d) and section 1 of the Charter. This view has two distinctive features.

First, the Court holds that questions of reasonable limits on Charter rights should be severed from the particular Charter guarantee under consideration and dealt with in a separate stage under section 1. In effect, the standard of justification set out in section 1 should not be read into a particular Charter guarantee and assigned a contextualized meaning in that setting. Second, the Court maintains that section 1 mandates a uniform test which assesses an infringing law in a purely instrumental perspective—as a means for attaining a particular objective.

On the first point, the Court explicitly rejects the approach taken in the Court of Appeal. In his judgment, Chief Justice Brian Dickson draws attention to the fact that Justice Martin imports the requirements of section 1 into section 11(d), using them as the standard for interpreting the phrase “according to law” in the latter section. For the Chief Justice, this approach ignores the need to keep section 1 and section 11(d) analytically distinct. Rather, a court should adopt a two-staged analysis that respects that imperative. At the first stage, the court determines whether the impugned law infringes the specific Charter right in question. So doing, it sets aside any

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13 Oakes, supra note 6. The majority opinion was written by Dickson C.J. In a brief separate opinion, Estey and McIntyre JJ. expressed agreement with Dickson C.J.’s conclusions on the relationship between section 11(d) and section 1 of the Charter, but on all other issues adopted the reasons given by Martin J.A. in the court below.

14 Id., para. 13.

questions of “reasonable limits”. If the court finds an infringement, it moves to the second stage of the analysis under section 1, at which point it determines whether the infringement can be justified as a reasonable limit demonstrably justified in a free and democratic society. As the Supreme Court observes, section 1 sets out the “exclusive justificatory criteria” against which limitations on Charter rights must be measured.\(^\text{16}\) The move from the first to the second stage of the analysis also entails a shift in the burden of proof from the party alleging the Charter infringement to the party seeking to uphold it.\(^\text{17}\)

What test should be applied at the second stage? Here the Court takes the view that an infringing law should be assessed in purely instrumental terms—as a means to a definite objective.\(^\text{18}\) The first and most critical step in the inquiry is determining the law’s objective. Justice Dickson seems to assume that a single objective must be identified, ruling out the possibility of multiple objectives. Indeed, a multiplicity of objectives would require the test to be applied several times over, with possibly inconsistent or inconclusive results. Once identified, the law’s objective must be shown to be pressing and substantial in a free and democratic society.\(^\text{19}\) If the objective fails to meet this standard, the law is struck down. If it passes muster, the focus shifts to the means by which the law goes about attaining this objective. Here the Court applies what it describes as a form of proportionality test.\(^\text{20}\) Although the nature of the test varies depending on the circumstances, it has three important components. First, the measures adopted must be rationally connected to the objective and not arbitrary, unfair or based on irrational considerations. Second, the measures should impair the right in

\(^{16}\) Oakes, supra note 6, para. 63.

\(^{17}\) Id., para. 66-68.

\(^{18}\) The Court expands on the scheme previously outlined in Big M, supra note 15, para. 139, where Dickson J. states: “At the outset, it should be noted that not every government interest or policy objective is entitled to s. 1 consideration. Principles will have to be developed for recognizing which government objectives are of sufficient importance to warrant overriding a constitutionally protected right or freedom. Once a sufficiently significant government interest is recognized then it must be decided if the means chosen to achieve this interest are reasonable—a form of proportionality test. The court may wish to ask whether the means adopted to achieve the end sought do so by impairing as little as possible the right or freedom in question.”

\(^{19}\) Oakes, supra note 6, para. 69.

\(^{20}\) Id., para. 70.
question as little as possible. And third, there must be a proportionality between the deleterious effects of the measures and their objective.

Chief Justice Dickson then proceeds to apply this approach to the case at hand. He asks, at the first stage, if the reverse-onus clause in section 8 of the Narcotic Control Act infringes section 11(d) of the Charter, and he has little difficulty in finding that it does. He then moves to the second stage of analysis, where he inquires whether the infringement may be justified as a reasonable limit under section 1, applying the four-fold test just laid out. He identifies the objective of section 8 as “protecting our society from the grave ills associated with drug trafficking” and he concludes that this objective can be characterized as substantial and pressing, briefly citing governmental reports, international instruments, and legislation in other countries.

He then proceeds to the next stage of the test, which assesses the law as a means for attaining the objective. He focuses first on the question of rational connection and asks whether the reverse-onus clause in section 8 is rationally related to the objective of curbing drug trafficking. At a minimum, he argues, this criterion requires that the clause be internally rational—that there be a rational connection between the basic fact of possession and the presumed fact of an intention to traffic in drugs. Otherwise, the reverse-onus clause could lead to unjustified convictions. However, in his view, section 8 cannot survive this test. As Justice Martin observes in the Court of Appeal, possession of a small quantity of narcotics does not support the inference of an intention to traffic. The presumption required under section 8 is overinclusive and could lead to results that defy both rationality and fairness. In light of the seriousness of the offence in question, which carries the possibility of life imprisonment, Dickson C.J. concludes that the “rational connection” test has not been satisfied by the Crown. Given this conclusion, he finds it unnecessary to consider the remaining components of the test and strikes down the clause as unconstitutional.

In summary, then, the Supreme Court adopts a monistic approach to section 1 of the Charter, rejecting the tacit pluralism of Justice Martin in

21 *Id.*, para. 76.
22 *Id.*, para. 73-76.
23 *Id.*, para. 77-79.
the Court of Appeal. Dickson C.J. holds that the question of reasonable limits on Charter rights should be severed from the inquiry into the meaning and scope of the individual Charter guarantees and postponed to a later stage in the analysis, which takes place under section 1. The standard to be applied at this second stage is uniform and applies to Charter rights across the board. It takes its character from the terms of section 1 itself, without any admixture of elements from the specific Charter right or subject matter under consideration. This standard assumes that a law can be viewed simply as the means to a certain objective and assessed accordingly.

This approach raises two basic questions. The first asks whether it is feasible to sever the question of “reasonable limits” from the scope of the Charter right itself. The second asks whether, in any case, a standardized test of reasonable limits is apt for the varied range of rights found in the Charter. We will consider these questions in turn.

C. THE MEANING OF “REASONABLE LIMITS”

According to the standard analysis, there are two kinds of limits on Charter rights—internal and external. Internal limits are the actual boundaries of the right: they form part of its effective definition and determine its scope and application. By “effective definition”, I mean the way the right is understood in the courts and the broader legal community and not simply the formal definition found in the Charter. For example, in the Irwin Toy case, the Supreme Court affirms that freedom of expression in section 2(b) does not include acts of violence, so that a murderer cannot gain the protection of the section by invoking the expressive nature of his act. In effect, the internal limits of the guarantee do not encompass violent acts. As a consequence, the Criminal Code section prohibiting murder does not breach the Charter guarantee of freedom of expression.

By contrast, external limits on a Charter right do not form part of the effective definition of the right but emanate from outside sources. They breach the internal boundaries of the right and seek to confine the right’s exercise within narrower limits than the effective definition of the right envisages. External limits often take the form of governmental acts, such as statutes and regulations, but they may also consist of common law rules.

For example, in Irwin Toy\textsuperscript{25} the Court holds that statutory restrictions on advertising directed at children constitute a limit on freedom of expression because section 2(b) protects commercial speech. Here the limit is \textit{external} because it stems from an outside source—a statute—and effectively invades the territory protected by the \textit{Charter} right.

There is a close link between internal and external limits. In order to ascertain whether an external act actually infringes a \textit{Charter} right, we have to know the location of the right’s internal boundaries. To determine, for example, if restrictions on advertising infringe freedom of expression in section 2(b), we need to know the effective scope of the section and whether it covers commercial speech. In short, the question whether a law constitutes an external limit on the right depends on the location of the right’s internal limits.

According to the \textit{Oakes} decision, the phrase “reasonable limits” in section 1 refers exclusively to \textit{external limits} and sets out the constitutional standard governing their validity. It does not refer to the \textit{internal limits} of a \textit{Charter} right, which are determined by criteria laid down in the substantive \textit{Charter} guarantee. So, on this analysis, it makes sense to sever the question of the reasonableness of external limits from the question of the internal scope of a \textit{Charter} right and to deal with it in a separate stage under section 1.

But to what extent is it really feasible to sever these two questions? The answer can be formulated quite precisely as follows. The question of the reasonableness of external limits can be postponed to a second stage under section 1, separate from discussion of the scope of the \textit{Charter} right itself, only where the effective definition of the \textit{Charter} right does not incorporate relevant standards of reasonableness. However, as we saw earlier, many \textit{Charter} rights are defined in terms that import standards of reasonableness, directly or indirectly. For example, section 11(b) provides that any person charged with an offence has the right to be tried within a “reasonable time”. Here the effective definition of the right only ensures that trials take place with a reasonable period. Where a trial complies with this requirement, it does not breach the right and so does not constitute an external limit on section 11(b). In such instances, the question of “reasonable limits” cannot be severed neatly from the question of the section’s effective scope and relegated to a separate stage of analysis. So, to make

\textsuperscript{25} \textit{Id.}
sense of section 1, we need to interpret the phrase “reasonable limits” as encompassing any internal limits of reasonableness that form part of the effective definition of the Charter right.26

Even where it is possible to interpret a Charter provision in a manner that prescinds from questions of reasonableness (as might perhaps be done with freedom of expression), such an approach seems of dubious value. It runs counter to the “purposive” approach repeatedly affirmed by the Supreme Court (not least in the Oakes case itself), which stresses that a Charter guarantee must be understood in light of its underlying purposes—the interests it is meant to protect and the cardinal values it embodies.27 Yet any inquiry into the underlying purposes of a Charter right leads naturally to the question of its reasonable scope. The better we grasp the values and principles informing a right, the better we understand its reasonable limits—limits that are internal to the right itself and prevent it from operating in a way that outstrips its purposes.

What is the relationship, then, between reasonable limits that are internal to the right and those that emanate from external sources? It seems that there is (or ought to be) a dynamic tension between the two, which leads in dialectical fashion to a balanced solution. That is, grappling with the question whether a statute constitutes a reasonable limit on a Charter right prompts reflection on the reasonable scope of the Charter right itself, just as reflection on the internal limits of the Charter right stimulates thought on the reasonableness of the statutory intervention. This, at least, is the viewpoint that informs a pluralistic understanding of the Charter. On this approach, the questions of internal and external limits cannot be kept entirely separate.

Thus, Justice Martin in the Ontario Court of Appeal comes closer to the truth than Chief Justice Dickson in the Supreme Court. On one basic point, at least, Justice Martin seems right. The question whether a reverse-onus clause represents a reasonable limit on the right to be presumed innocent

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27 Oakes, supra note 6, para. 28, quoting the Big M case, supra note 15, para. 116-117.
guaranteed in section 11(d) of the Charter is tightly interwoven with the question of the reasonable scope of the guarantee itself.

D. THE POVERTY OF UNIFORMITY

However let us suppose for argument’s sake that it is analytically desirable to detach the question of reasonable limits from the question of the effective scope of a Charter guarantee and to deal with it separately under section 1—at least as far as possible. Here we are confronted with the issue whether section 1 contemplates a uniform constitutional standard or rather a variety of detailed standards that are adapted to the particular Charter rights in question.

Prima facie, it seems implausible that the heterogeneous collection of constitutional rights found in the Charter should be amenable to a single homogeneous standard of reasonable limits. One would expect that the standard for freedom of conscience in section 2(a) would not be very apt for the right to an interpreter embodied in section 14, or the right of English and French communities in New Brunswick to distinct educational institutions in section 16.1. Of course, if the standard is stated in sufficiently abstract terms, it may with some ingenuity be made serviceable for rights of a great variety of shapes and sizes. But inevitably it will be too baggy for some and too tight for others, allowing undue latitude in the one case, and in the other pinching and squeezing in all the wrong places.

The limitations of a uniform approach are apparent in the Oakes judgment itself, when Dickson C.J. applies the test he has crafted to the actual facts of the case. Having identified the objective of section 8 of the Narcotic Control Act as protecting society from the grave ills associated with drug trafficking, the Chief Justice goes on to consider whether the section is rationally connected to this objective and comes to the conclusion that it is not. He argues that at a minimum the provision must be internally rational—there must be a rational connection between the basic fact of possession and the presumed fact of an intention to traffic in drugs. However, in his view, section 8 cannot meet this test. Possession of a small quantity of drugs does not support the inference of an intent to traffic.

Superficially, at least, the Chief Justice seems to suggest that the legislature is guilty of making an elementary mistake. How silly of Parliament to think that mere possession rationally shows an intent to traffic! But this surely misses the point. For no sensible legislature would ever think this way. For what it is worth, the rationale for the provision appears somewhat different—to alleviate the Crown’s difficulty in gathering evidence sufficient to prove an intent to traffic beyond a reasonable doubt. Whether the solution adopted—shifting the burden of proof to the accused—is a fair or just way to proceed may well be doubted, but it is not irrational.\footnote{R. v. Laba, [1994] 3 S.C.R. 965, para. 83-84.}

Indeed the Supreme Court has subsequently repudiated the notion that the rational connection test laid down in \textit{Oakes} requires that a provision be “internally rational”.\footnote{Supra note 6, para. 77-78.}

In fact, the source of the Chief Justice’s discomfort with the provision seems to lie as much in the realm of justice and fairness as in icy halls of logic. He observes that the reverse-onus clause could give rise to “unjustified and erroneous convictions” for drug trafficking—results that “defy both rationality and fairness,” especially considering the gravity of the offence and the possibility of life imprisonment.\footnote{Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486 [\textit{Motor Vehicle Reference}].} Considerations of justice are, of course, highly relevant here. The fact that the Chief Justice feels compelled to squeeze them under the rubric of “rational connection” says much about the value of the uniform test he has concocted.

\textbf{E. A Harbinger of Pluralism: The \textit{Hunter} Case}

On the surface, the \textit{Oakes} case represents a clear victory for a monistic approach to section 1. However, in reality, the victory is less decisive than might appear. By the time \textit{Oakes} was decided, the Supreme Court had already committed itself in practice to a more pluralistic understanding of the \textit{Charter}, a commitment that has only deepened over time. The seeds for this approach were sown in two major cases: \textit{Hunter v. Southam Inc.},\footnote{Supra note 15.} and the \textit{Motor Vehicle Reference}.\footnote{Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486 [\textit{Motor Vehicle Reference}].}
Let us start with the Hunter case, which was decided more than a year before Oakes and concerned the Charter guarantee against “unreasonable search or seizure” in section 8. At issue were certain provisions of the Combines Investigation Act\textsuperscript{34} that gave officials sweeping powers to search for and seize documents. The Director of the Combines Investigation Branch authorized several investigation officers to enter the business premises of the Edmonton Journal (a division of Southam Inc.) and to take away any papers relating to their inquiries. In the Supreme Court’s words, the authorization “has a breathtaking sweep; it is tantamount to a licence to roam at large on the premises of Southam Inc. at the stated address ‘and elsewhere in Canada’.”\textsuperscript{35} Southam sought an injunction prohibiting the search on the ground that it violated section 8 of the Charter. The Supreme Court held that the statutory provisions in question were unconstitutional and struck down the search as invalid.

Writing for a unanimous Court, Justice Dickson (as he then was) notes that the case turns on the meaning of the term “unreasonable” in section 8.\textsuperscript{36} After reviewing the section’s history and underlying purposes, he holds that, while the guarantee has the effect of protecting an individual’s right of privacy, this protection does not extend beyond a “reasonable” expectation. Thus a court must decide whether in a particular situation the public’s interest in being left alone by government must give way to the governmental interest in intruding on the individual’s privacy in order to advance its goals, notably those of law enforcement.\textsuperscript{37}

In Justice Dickson’s view, the appropriate time for making such an assessment is before a search is conducted. He argues that an analysis after the fact would be seriously at odds with the purpose of section 8, which “requires a means of preventing unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place.”\textsuperscript{38} This purpose can only be accomplished by a system of prior authorization, not one of subsequent validation. Justice Dickson notes that prior authorization, usually in the form of a valid warrant, has been a consistent prerequisite for a search and seizure both at

\textsuperscript{34} R.S.C. (1970), c. C-23.
\textsuperscript{35} Hunter, supra note 15, para. 6.
\textsuperscript{36} Id., para. 15.
\textsuperscript{37} Id., para. 25.
\textsuperscript{38} Id., para. 27, (emphasis in original).
common law and under most statutes. This requirement puts the onus on the state to demonstrate the superiority of its interest to that of the individual. While it may not be reasonable to insist on prior authorization in every instance, nevertheless wherever feasible it is a precondition for a valid search and seizure. In effect, then, Justice Dickson lays down the rule that a search without a warrant is prima facie “unreasonable” under section 8. Once the party alleging a violation of the section has shown the existence of a warrantless search, the burden shifts to the Crown to rebut this presumption of unreasonableness.39

What is interesting about this analysis is the clear recognition that section 8 incorporates its own reasonable limits, which require a court to engage in a multi-staged analysis entailing a shift in the burden of proof, all conducted within the four walls of the section itself. The operative standard of reasonableness is relatively concrete and tailored to the distinctive character of the right guaranteed. The standard requires a balancing of interests—the public’s interest in privacy as against the government’s interest in advancing its goals—interests that may have complex and multiple dimensions. In striking this balance, the Court lays down a clear rule governing the matter: in normal circumstances a prior warrant is required for a valid search, so that a warrantless search is prima facie unreasonable.

Once a search has been found to be “unreasonable” under section 8, what room is left for the operation of section 1? Justice Dickson confesses to some puzzlement on this score. He comments that in the present case the governmental parties had made no submissions capable of showing that, even though the searches in question were “unreasonable” under section 8, they nevertheless represented “reasonable limits” under section 1. So, with a barely suppressed sigh of relief, he postpones to another day the “difficult question” of the relationship between the two sections.40 Not surprisingly, subsequent decisions have failed to shed much light on the matter. In practice, the question of reasonable limits has been left to be governed by standards internal to section 8 itself.41

40 Hunter, supra note 15, para. 46.
Another feature of the Hunter case deserves mention. The Supreme Court effectively holds that section 8 finds its origins in the common law and in the legal and political system as a whole, even if it is not wholly shaped or constrained by those sources. The Court quotes Justice Prowse in the Alberta Court of Appeal, who observes that the roots of the right to be secure against unreasonable search or seizure are embedded in the common law, as well as subsequent statutes and court decisions. While it would be presumptuous, says Justice Prowse, to assume we have attained the zenith of our development as a civilization and that the right is frozen for eternity, nevertheless section 8 requires us to be mindful of the criteria applied in the past in securing the right. The Supreme Court betrays a similar cast of mind. At several points in the judgment (if not always), Justice Dickson interprets section 8 in light of its common law and statutory origins. For example, in framing the criterion governing prior authorization of a search, he holds that “Anglo-Canadian legal and political traditions” point to the standard of reasonable and probable grounds, citing the common law and the Criminal Code. In other words, the right secured in section 8 of the Charter is not a mere intellectual construct; it is what we may call an embedded right, one that draws its nourishment and strength from the living law. As an embedded right, it has its own internal limits, ones that respect the need for reasonable constraints on the scope and operation of the right.

F. Pluralism Ascendant: The Motor Vehicle Case

It can be argued that the Court’s approach in the Hunter case is explained by the explicit wording of section 8 and its relatively narrow focus. Has the Supreme Court taken a similar approach to a section of broader scope and more equivocal language? For an answer we need only turn to the Motor
Vehicle Reference,\textsuperscript{45} decided by the Supreme Court in late 1985, a few months before \textit{Oakes}.

At issue here was a provision of the British Columbia Motor Vehicle Act which laid down minimum prison terms for the offence of driving a motor vehicle while the driver was prohibited from driving or his licence was suspended. The provision specified that the offence was one of absolute liability in which guilt was established by the proof of driving, whether or not the driver knew of the prohibition or suspension. It was argued that this provision violated section 7 of the \textit{Charter}, which guarantees the right to life, liberty and security of the person and the right not be deprived thereof “except in accordance with the principles of fundamental justice.” Writing for the majority of the Court, Justice Lamer (as he then was) held that absolute liability offences always offend the principles of fundamental justice because they have the potential to convict persons who have not really done anything wrong. When combined with the possibility of imprisonment, they also violate the right to liberty under section 7. So the offence under consideration, in linking absolute liability with imprisonment, infringes section 7 and cannot be justified as a reasonable limit under section 1.

In construing section 7, Justice Lamer holds that the phrase “principles of fundamental justice” does not refer to a protected right as such. Rather it operates as a \textit{qualifier} of the right not to be deprived of life, liberty and security of the person, set out in the first part of the section. Its function is to set the parameters of that right.\textsuperscript{46} It lays down a constitutional standard governing the legitimacy of actions that deprive individuals of the right to life, liberty and security of the person. In our terms, the standard is \textit{internal} to section 7 and forms part of the effective definition of the right guaranteed. As we will see, it also overlaps appreciably with the standard of “reasonable limits” in section 1.

What is the concrete significance of the phrase “principles of fundamental justice”? Justice Lamer holds that its meaning should be determined by reference to the particular role the phrase plays in the section and the interests it is designed to protect\textsuperscript{47}—that is, it should be determined in a contextual manner rather than in the abstract. This approach leads him to reject the argument that the phrase has an exclusively procedural rather

\begin{footnotesize}
\begin{enumerate}
\item[45] \textit{Supra} note 33.
\item[46] \textit{Id.}, para. 24, 62.
\item[47] \textit{Id.}, para. 25.
\end{enumerate}
\end{footnotesize}
than substantive content. Such an interpretation, says Justice Lamer, would strip the protected interests of much of their content and leave the right to life, liberty and security of the person “in a sorely emaciated state.”

Principles of fundamental justice extend well beyond purely procedural matters. Many have been developed over time as presumptions of the common law, while others have found expression in international conventions on human rights. All have been recognized as essential elements of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and on the rule of law. In other words, the principles of fundamental justice are to be found in the basic tenets of the Canadian legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system.

As such, says Justice Lamer, the proper approach to interpreting the phrase “principles of fundamental justice” is one that respects the adage that “future growth will be based on historical roots”. Whether any given principle may be said to be a principle of fundamental justice rests upon an analysis of “the nature, sources, rationale and essential role of that principle within the judicial process and in our legal system, as it evolves”. Consequently, the phrase cannot be given a simple definition or an exhaustive content. It will take on concrete meaning case by case, as the courts deal with alleged violations of section 7. Note that the Court takes an approach similar to that adopted in the Hunter case. Principles of fundamental justice are viewed as embedded in the Canadian legal system as it has evolved over time, not simply as timeless first principles enthroned in some jurisprudential heaven.

Justice Lamer goes on to hold that the principle that the innocent not be punished has long been recognized as an essential element of the Anglo-Canadian legal system and indeed of any justice system founded on a belief in the dignity and worth of the human person and the rule of law. He cites classic English and Canadian precedents holding that individuals should not be found guilty of a criminal offence in the absence of a guilty

48 Id., para. 17, 26.
49 Id. at para. 29-31, 63-64.
51 Id., para. 66-67.
mind, and he concludes that this fundamental principle, as embodied in section 7, rules out the imposition of a prison term for an absolute liability offence.\textsuperscript{52}

What role does this conclusion leave for the operation of section 1? Is it possible for an absolute liability offence that violates section 7 to be salvaged as a “reasonable limit”? Justice Lamer comments that administrative expediency will no doubt be invoked under section 1 and occasionally succeed, but he says that this can happen only in cases arising out of exceptional conditions “such as natural disasters, the outbreak of war, epidemics, and the like”—none of which have been shown to exist in the present case.\textsuperscript{53} In effect, he confines the operation of section 1 in this context to situations of emergency, recognizing the incongruity of holding that a law which is “fundamentally unjust” can nevertheless be termed “reasonable”.\textsuperscript{54}

To sum up, the \textit{Motor Vehicle Reference} effectively holds that the abstract standard of reasonable limits in section 1 receives concrete instantiation in the phrase “principles of fundamental justice” in section 7, which in turn points to basic tenets of the common law and the legal system more generally. Once a law has been found to violate the principles of fundamental justice under section 7, there is limited room left for the operation of section 1.\textsuperscript{55}

The Court’s decision in \textit{Oakes} did not sweep away its previous rulings in the \textit{Hunter} and \textit{Motor Vehicle} cases. To the contrary, in practice a pluralistic approach has become an integral part of the Court’s interpretive strategy, not only in sections 7 and 8 but also in many other sections that feature explicit or implicit standards of reasonableness.\textsuperscript{56} A pluralistic perspective also seems to inform the Court’s increasing tendency to bring “contextual” factors to bear on such subjects as freedom of expression in

\begin{itemize}
\item[52] \textit{Id.}, para. 69-77.
\item[53] \textit{Id.}, para. 85, 94-96.
\item[54] Arguably, such situations could be handled just as well under section 7 itself, since \textit{salus populi suprema est lex}.
\item[55] Compare the majority opinion of Gonthier and Binnie JJ. in \textit{R. v. Malmo-Levine; R. v. Caine}, [2003] 3 S.C.R. 571, para. 94-99, where an attempt is made to distinguish reasonableness under s. 7 from reasonableness under s. 1.
\item[56] For an overview, see P. W. HOGG, \textit{op. cit.}, note 29, 831-835.
\end{itemize}
ESSAIS CRITIQUES SUR L’ARRÊT R. c. OAKES / CRITICAL ESSAYS ON R. v. OAKES

section 2(b) and equality rights in section 15.57 Nevertheless, in all these instances the Court has retained a role, however notional, for the operation of a distinct stage of analysis under section 1. Perhaps the time has come for the Court to revisit that position.

CONCLUSION

I have argued that a pluralistic understanding of “reasonable limits” in section 1 makes more sense that the monistic approach taken in the Oakes case. Why so? What difference does it make whether we adopt one approach or the other? Let me draw together some of the main themes of our discussion.

First, the pluralistic approach favours the development of reasonable limits that are tailored to the needs of particular Charter rights and reflect their distinctive characters, histories, and underlying purposes. In effect, pluralism encourages courts to identify general legal criteria governing the reasonable scope of each specific Charter right. These criteria go beyond the immediate case under consideration and provide guidance in future cases, contributing to the formation of a complex body of constitutional common law that gives flesh to the bare bones of the Charter guarantees. By contrast, the monistic approach encourages the courts to focus on a particular infringement and to assess its reasonableness in light of highly abstract criteria that owe little or nothing to the distinctive nature of the Charter right in question. Such assessments tend to have a narrow and ad hoc character. As such, they do not lend themselves to the formation of general constitutional standards governing the reasonable operation of the substantive guarantees.

Second, when the courts define Charter rights in a manner that pre-scinds from questions of their reasonable scope, they effectively cut these rights off from their roots in the common law and the broader legal system. At common law no right is without its reasonable limits. When Charter rights are interpreted in an unqualified manner, they are plucked from their natural settings and placed in glass cases. There they are, a wonder to behold, beautiful but desiccated, unchanging but only too fragile, liable to crumble.

57 See the perceptive analysis in Christopher D. BREDT and Adam M. DODEK, “The Increasing Irrelevance of Section 1 of the Charter”, (2001) 14 Supreme Court L. Rev. (2d) 175.
REVISITING THE OAKES TEST

at the slightest touch. Thus freedom of expression in section 2(b) is defined as giving individuals the absolute right to express themselves in any manner whatsoever short of violence, regardless how hateful or threatening or damaging the speech may be. But stated in such an unqualified manner, such a right has never existed in reality, nor can it exist in any just and fair society. It is a mere abstraction rather than an organic entity, rooted in the living body of the law. And as a mere abstraction, it is only too susceptible to being overridden in practice.

Finally, Charter guarantees are cheapened and trivialized when they are applied in a formalistic, mechanical way, one that drains them of their reasonable content and pays limited regard to their underlying purposes and values. For this is the ultimate effect of relegating questions of reasonable limits to section 1. What are we to make of a judgment that in one breath affirms that section 11(d) unqualifiedly guarantees the presumption of innocence and yet in the next breath concludes that reversing the burden of proof for the plethora of strict liability offences is justified under section 1?58

Either the initial guarantee is not worth the paper it is written on, or else, as seems more likely, the Court has misconstrued the reasonable scope of the guarantee in the first place. If the promise of the Charter is to be kept and not betrayed, it must be a promise that is capable of being fulfilled.59

58 R. v. Wholesale Travel Group Inc., [1991] 3 S.C.R. 154. Note, however, the separate opinion of Cory J. (L’Heureux-Dubé J. concurring), which takes a contextual approach to section 11(d) and argues that it applies differently in the regulatory sphere than in a truly criminal context.

59 On this point, see also the essay by Danielle PINARD in this volume.