REMARKS ON THE CHARTER: RIGHTS, DUTIES AND RESPONSIBILITIES

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It is commonplace to speak of Charter rights, to say that the *Charter of Rights and Freedoms*[1] has brought a new dimension to the law, to the Constitution, to the roles of Parliament and the courts.

We all have in mind the oft–quoted statement of Lamer J., as he then was, in the *Reference re s.94(2) of the Motor Vehicle Act (B.C.)*[2]:

> The issue in this case raises fundamental questions of constitutional theory, including the nature and the very legitimacy of constitutional adjudication under the Charter as well as the appropriateness of various techniques of constitutional interpretation.
> ...It ought not to be forgotten that the historic decision to entrench the Charter in our Constitution was taken not by the courts but by the elected representatives of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility. Adjudication under the Charter must be approached free of any lingering doubts as to its legitimacy.[3]

This new role has a number of aspects. The Charter is a recognition of the dignity of the human person, its most important attributes and what they call for on the part of society and of Government in particular. It is an inducement to all of us to recognize the equal inherent worth of every person, and for every person both to act accordingly and require recognition.

In the field that is yours and mine, the Charter is a call to all of us involved in the law and particularly the judges to share in defining these rights, in weighing them and thereby setting standards, or more precisely a framework, limits to be abided by by legislators, their delegates, the executive branch of Government and administrators.

This role which is assigned to the courts is not entirely new. Think for a moment of the law of torts where courts have been called upon from time immemorial to determine what is negligence, setting standards of care. Equally in our federal system, courts, in deciding upon the division of powers, have been

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*Justice of the Supreme Court of Canada. Lecture delivered at the Faculty of Law, University of New Brunswick, 7 February, 1991.

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

[2][1985] 2 S.C.R. 486.

[3]Ibid. at 495, 497.

called upon to set aside acts of Parliament.

What is new, however, is the extent to which the law is being called upon to set standards by which the acts of Parliament themselves are to be judged.

The Charter has brought to the law a vast area where previously the law did not dare tread except within narrow limits, matters which society left to be governed solely by morality and sanctioned by conscience, family and church.

Undoubtedly, this development is a great step, a necessary step forward in the evolution of our society and the world necessary because of the increasing complexity of society and social relationships which carry with them the need for guidance, necessary because of the increasing diversity of individual backgrounds and values.

The, Charter, however is but a small first step and must be heard as a call for personal dedication to a better society, for this goal cannot be fulfilled by paper declarations. The Charter raises great hopes but as any other human endeavour, it does have its downside, its drawbacks. It is a stimulant to us to realize the existence of rights and to work for them. It is an attractive stimulant because it offers the image of a carrot. However, it can also induce aggressiveness and conflict. For a right means nothing if it is not respected, not satisfied. In legal terms, it means nothing if there is not a corresponding duty to satisfy the right. This must be the duty of someone or some institution. Duties are much less attractive and far less saleable than rights. However, it is they that give reality to rights.

Indeed, one should be reminded that traditionally our law, our moral precepts going back to the Ten Commandments and, indeed, Genesis were expressed in terms of duties, obligations. One might say that if everyone fulfilled their duties, there would be no need for rights.

This aspect of the Charter is, I believe, much less spoken to. It is almost like the other side of the moon, unseen, perhaps forgotten and unattractive, yet vitally important.

I would invite you to consider it. It is important in many ways and at many levels to you, of course, in your everyday life, in your choice of career and in the manner you engage in them. It is not the moment to deal with this aspect of things.

But this also has an important bearing on your approach to the law, to the Charter and even in the way you may present and argue Charter cases.

A right cannot be seen in isolation. It must be considered in relation to other rights in terms of balancing rights. This has largely been the focus of section 1 of

the Charter up to this time. However, even more immediately to every right corresponds a duty, and both rights and duties have consequences. Rights have consequences largely in terms of the benefits which they provide. Duties have consequences in terms of the burdens they impose. In defining the extent of rights and balancing rights, regard must be had both to the benefits and the burdens. But for you, in arguing for or against a right, all of these aspects should be considered. One must consider the effects not only of the rights but of the duties, as well as upon whom the duty rests and how it can be met and also enforced. For one must ever keep in mind that a law by itself is powerless to ensure the fulfilment of duties, in the sense that unless a law is generally accepted and abided by it will soon become ineffective and a dead letter. The willingness to abide by the law is at the root of the proper functioning of society. It tests our sense of responsibility which must inspire our whole way of life. It is essential to the operation of the rule of law and of any democracy. Responsibility is both a moral and a legal concept. It underlies and must inspire the law, but for society to function properly it must inspire action well beyond the specific requirements of the law.

To illustrate, let us think of one of our prime concerns these days, the environment. While we are calling for more laws and regulations to protect the environment, and rightly so, I think we are all conscious that protection of the environment involves both broadly–based measures such as those for the discharge of industrial and community wastes and every day activities. One can no more legislate cleanliness than virtue if people are not prepared to abide by the laws. The same is true of the Charter, and we in particular who have chosen the law as our life's work must have a special sense of responsibility vis–à–vis the Charter.

The Charter sets forth the underlying minimum standards by which our society is to be governed. It is the basic statement of our social consensus. It is all the more necessary as the former consensus attached to a more homogeneous society tends to wane. It is the duty of all of us to put flesh on this consensus. This cannot be easily accomplished in the face of a diminishing bank of common standards which results in good measure from the coming together of the world. This coming together, in turn, sets the path to a new social consensus which we have no choice but to achieve.

The novelty of the Charter and the greater awareness of rights have naturally enough led us to place the emphasis on rights. We are now becoming more conscious of the necessity of balancing rights, of finding means of reconciling rights and that, in this process, we must have regard to their effects, to the duties to which they give rise.

We require the best of minds, the best of dedication and the best of experience. For this, we must look to ourselves, but also look to others. In this country, we are fortunate to be the heirs to the two great legal traditions of the

western world: the common law and the civilian traditions. These give us a special opening to be interested and informed as to the insights of comparative law. We need to draw on all available sources of information and experience; at the same time we must do so with discernment and not allow ourselves to be smothered in information which loses its significance for us. We have at hand resources and working instruments unheard of a very few years ago. At the same time, we must not allow their marvels to tempt us away from thought and reflection. Our eyes must remain firmly cast on what is essential, the greater respect for and fulfilment of the human person.

Over the few years since the adoption of the Charter, the Supreme Court has undertaken the task of setting some guidelines for the definition and balancing of rights under the Charter. The process is necessarily piecemeal and continuing as the various cases which come before the Court call for solution and offer opportunities. Former Chief Justice Dickson has compared this work to the building of the cathedral at Chartres. One may also compare it to a painting upon which colour is added and created stroke by stroke of the brush. Unlike a cathedral or a painting, however, the work of the Charter will never be complete, it is the work of life itself. The decisions of the Court on the application of section 1 of the Charter are living illustrations of this.

The Supreme Court's decision in *R.* v. *Oakes*[4] established the basic test for the application of section 1. In that case, the Court was faced with an accused who was caught in possession of narcotics. The *Narcotic Control Act*[5] provided that the Court could presume that the accused was in possession of narcotics for the purpose of trafficking, unless he or she could prove to the contrary. This was, therefore, a case dealing with a so–called "reverse onus" clause.

Of course the problem with a reverse onus clause is that it seems to undermine one of our most basic legal principles – the presumption of innocence, enshrined in section 11(d) of the Charter. And this was precisely the challenge in *Oakes*. Once the Court determined that the reverse onus clause infringed section 11(d), it had to decide whether section 1 could justify the infringement. How was the Court to balance an individual's right to be presumed innocent with public need to convict drug traffickers?

To answer these questions, the majority of the court formulated a multiple test for applying section 1, now known as the *Oakes* test which required that the government persuade the Court of two things:

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[4][1986] 1 S.C.R. 103 [hereinafter *Oakes*].

[5]R.S.C. 1970, c. N-1.

First, that the legislative objective was of sufficient importance to warrant overriding the constitutional right or freedom.

Second, that the infringement or limitation of the right be proportional to the important legislative objective. This "proportionality branch" was said to have three elements:

1) the legislation must be rationally connected to the objective – not arbitrary or based on irrational considerations;
2) it should impair the right as little as possible; and
3) its effects must be proportional to the objective.

In applying this test to the situation in *Oakes*, the Supreme Court adopted what may seem, in today's light, a strict approach. It held that the limitation on the right to be presumed innocent was not proportional to the legislative objective of curbing drug trafficking by facilitating the conviction of drug traffickers. The means were not justified by the legislative end, because the reverse onus clause was found to be irrational, hence in violation of the first branch of the proportionality test. It was not rational to infer that a person had an intent to traffic simply because he or she possessed a very small quantity of narcotics. This irrationality was unjustifiable in the context of a limitation of the right to a presumption of innocence, or what then Chief Justice Dickson coined as:

> a hallowed principle lying at the very heart of criminal law...
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> a principle which confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.[6]

Following the *Oakes* decision, some may have expected that section 1 would always be applied rigidly and strictly, irrespective of the particular factual and legal context in which Charter litigation arose. But over time, and up to the present day, the inaccuracy of that perspective has become quite evident. It can readily be seen that the collage of Charter jurisprudence which the Supreme Court has been painting is of a rather more nuanced, flexible nature. Mr. Justice La Forest expressed this view very pointedly in the recent criminal extradition case of *U.S.A. v. Cotroni*.[7] Writing for the majority of the Court, he stated that the *Oakes* test cannot be applied.

> ...in too rigid a fashion, without regard to the context in which it is to be applied, for the language of the Charter invites a measure of flexibility...
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> A mechanistic approach must be avoided because, the underlying values must be sensitively weighed in a particular context against other values of a free and

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[6] *Oakes, supra*, note 4 at 119-20.

[7] [1989] 1 S.C.R. 1469.

democratic society to be promoted by the legislature.[8]

To better see this contextual approach in action, I propose to outline the unique way the Court has applied section 1 in a variety of settings. As just one example, it is somewhat instructive to isolate the Court's approach to a Charter case where one social or economic group is pitted against another as compared to a case like *Oakes*, where an individual's right under the criminal law was infringed by the public apparatus of the police and the judicial system.

The case of *R.* v. *Edwards Books and Art Ltd.*[9] may be taken to illustrate this distinction. Although it was decided very close on the heels of *Oakes*, already the contextual approach was in evidence.

The Supreme Court was confronted in *Edwards Books* with a challenge to the validity of an Ontario statute (the *Retail Business Holidays Act),*[10] requiring retailers of a certain size to close their businesses on Sunday, to promote the secular objective of a uniform holiday, or "common pause day" for retail workers. The statute was primarily challenged for violating certain retailers' freedom of religion under section 2(a) of the Charter. After an extensive analysis of the various conditions and exemptions built into the statute, the majority of the Supreme Court held that the right to freedom of religion of some Saturday observers was abridged by the Ontario law. However, it also determined that the abridgement was justifiable as a reasonable limit under section 1 of the Charter, and was therefore upheld.

A complex amalgam of interests and values was at stake in the balancing act under section 1: the interest of retail workers in a guaranteed day of rest, the religious freedom of Sunday observers and of retailers whose Sabbath fell on a day other than Sunday, the commercial liberty of all retailers, as well as the religious freedoms and commercial interests of Ontario's consumers. Yet, despite this diversity of interests and values, section 1 commanded that the Court provide a principled legal answer to the question of how far the right to freedom of religion could justifiably be infringed.

Upon determining that the objective of securing a common day of rest was of sufficient importance to warrant overriding the section 2(a) right, the majority of the Court delved into a proportionality analysis of whether the legislative means abridged freedom of religion reasonably and "as little as possible." In giving meaning to that term, the Court assessed a few alternative legislative schemes which the legislature might have enacted, but chose not to adopt. In particular,

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[8]Ibid. at 1489-90.

[9][1986] 2 S.C.R. 713 [hereinafter *Edwards Books*].

[10]R.S.O. 1980, c.453.

it evaluated whether the legislature could be faulted for providing an exemption for retail stores with fewer than seven employees working on a Sunday.

Former Chief Justice Dickson took the occasion to provide some careful insight into the application of section 1 in this type of legal setting. He indicated to us that:

> *Legislative choices regarding alternative forms of business regulation do not generally impinge on the values and provisions of the Charter of Rights*, and the resultant legislation need not be turned with great precision in order to withstand judicial scrutiny.
>
> Simplicity and administrative convenience are legitimate concerns for the drafters of *such* legislation.
>
> A "reasonable limit" is one which, having regard to the principles enunciated in *Oakes*, it was reasonable for the legislature to impose. The courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line.[11] (emphasis added)

With these principles as guides, the majority of the Court concluded that the legislature deserved a certain measure of deference. It had sought to limit the infringement as little as reasonably could be expected in choosing an effective means of achieving the objective of a common day of rest.

A somewhat similar approach to that in *Edwards Books* may be found in the context of a Charter dispute arising a few years ago in the Province of Quebec, where a toy manufacturer challenged a provision of the *Quebec Consumer Protection Act*.[12] The manufacturer claimed that the Act's ban on television advertising directed at persons under 13 years of age was an unconstitutional violation of its section 2(b) Charter right to freedom of expression. That case is *Irwin Toy* v. *The Attorney General of Quebec*.[13]

The factual complexity of *Irwin Toy* called upon latent resources of section 1 jurisprudence not previously tested. The Court was presented with a bewildering barrage of social science reports, government studies and academic analyses; all with their own particular penchant and perspective on the issue. One even devoted attention to the impact of the legislation on Captain Kangaroo. Once the Court decided that the impugned provision infringed section 2(b), the Court had the rather daunting task of determining whether the resultant infringement was justified under section 1 of the Charter.

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[11] *Edwards Books*, *supra*, note 9 at 772, 781-82.

[12] R.S.Q., c.P-40.1.

[13] [1989] 1 S.C.R. 927 [hereinafter *Irwin Toy*].

The Court determined at the outset that the purpose of the prohibition was to protect a group must vulnerable to commercial manipulation. This objective was based on a sufficiently pressing and substantial concern. Following the framework of *Oakes*, the Court then concluded that the ban was rational because it was directed only at the vulnerable group – children under 13 – and not at their parents. As for the minimal impairment branch, Chief Justice Dickson and Justices Wilson and La Forest stated:

> What will be 'as little as possible' [impairment] will of course vary depending on the government objective and on the means available to achieve it...
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> Thus, in matching means to ends and asking whether rights and freedoms are impaired as little as possible, a legislature mediating between the claims of competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how that balance is best struck...
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> The choice of means, like the choice of ends, frequently will require an assessment of conflicting social science evidence and differing justified demands on scarce resource. Thus, as courts review the results of the legislature's deliberations, *particularly with respect to the protection of vulnerable groups*, they must be mindful of the legislature's representative function.
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> [For example, when] regulating industry or business, it is open to the legislature to restrict its legislative reforms to sectors in which there appear to be particularly urgent concerns *or to constituencies that seem especially needy*.
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> In other cases, however, rather than mediating between different groups, the *government is best characterized as the singular antagonist of the individual* whose right has been infringed ... In such circumstances, and indeed whenever the government's purpose relates to maintaining the authority and impartiality of the judicial system, the courts can assess with some certainty whether the "least drastic means" for achieving the purpose have been chosen.
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> ... *the same degree of certainty may not be achievable in cases involving the reconciliation of claims of competing individuals or groups or the distribution of scarce government resources*.[14] (emphasis added.)

On the basis of these distinctions, the Court upheld the infringement under section 1. It deferred to the rationality of the Quebec legislature, taking into account a variety of special factors: 1) the commercial nature of the regulations; 2) the vulnerability of the group at stake; (3) the classification of the dispute as one between competing groups; and 4) the conflicting nature of the available social science evidence – evidence whose implications reasonable people could disagree upon.

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[14] *Ibid.* at 994.

Even at this point in the discussion it may be seen that section 1 has experienced an evolution of sorts, and that its application depends on contextual considerations. Moreover it has become clear in very recent times, indeed even over the past few months, that the range of contexts is open–ended, and that the list of special contextual factors which tends to influence the standard of strictness of the *Oakes* test is not closed. The months–old judgments in the cases of *McKinney*[15], Chaulk[16], and *Committee for the Commonwealth of Canada*[17] all add new colour to the jurisprudence of section 1.

The Supreme Court released its decision in *McKinney* v. *Board of Governors of Guelph University*,[18] in the month of November just passed. Apart from determining whether a university was a branch of "government" attracting Charter review, *McKinney* was an equality case, under section 15 of the Charter. Eight professors and a university librarian applied for declarations that their universities' policies of mandatory retirement, at the age of 65, were discriminatory and violated section 15. The Court was sympathetic to the claim that the policies infringed section 15 because its distinction was based on the enumerated personal characteristic of age. But in the end the majority held that the limitation was reasonable and justified under section 1. Mr. Justice La Forest wrote the judgment containing the majority's section 1 analysis. It was an analysis which paid close attention to the factor of scarce public resources.

Two pressing and substantial objectives were readily isolated by Mr. Justice La Forest. First was the government's goal of promoting excellence in higher education. Preserving academic freedom was a second. As for proportionality, the Court's majority had little problem identifying a rational connection between mandatory retirement policies and these two legislative objectives. In its view, mandatory retirement was a burden that universities could reasonably impose on professors in exchange for the academic freedom they enjoyed by virtue of the institution of tenure – a benefit not enjoyed by the vast majority of working Canadians. It reasoned further that mandatory retirement promoted excellence in universities by systematically encouraging a regular infusion from below of new professors and ideas. Once again, the more difficult part of the section 1 analysis involved the minimal impairment and proportional effects branches of the *Oakes* framework. Just take a minute to reflect on the various interests and values being weighed in the balance.

On the one hand were the professors – highly educated women and men,

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[15]*Infra*, note 18.

[16]*Infra*, note 22.

[17]*Infra*, note 2826.

[18][1990] 2 S.C.J. (6 December 1990)[hereinafter *McKinney*].

devoted to scholarly research and teaching, many or most still highly competent and willing to work at the age of 65. They were being told that they must stop working in their life's profession, after a seemingly arbitrary number of years. On the other side of the coin were the graduate students who wished to replace the more senior professors so that they too could apply themselves to reading and research. And of course I shouldn't forget about university *students*. I would think students will always have a legitimate interest in being introduced to the newest ideas and approaches in an academic discipline – whether it be astrophysics, the classics or law. And society at large must surely share this interest. Certainly this was the Court's opinion in *McKinney*.

In this particular context, the Supreme Court in the *McKinney* case decided that it was not possible to consider whether the professors' equality rights were minimally impaired unless it took into account not only the claims of the various competing groups but also: "... the proper distribution of scarce resources – here, access to the valuable research and other facilities of universities."[19] Since this factor was a significant component of the factual setting for the Charter dispute, the Court held that to pass over this hurdle of the *Oakes* test, a university was simply required to establish that it had: "... a *reasonable basis* for concluding that mandatory retirement impaired the relevant right as little as possible given their pressing and substantial objectives."[20]

The Court applied the same flexible standard to the third limb of the proportionality test. It held that where academic freedom and excellence in higher education are necessary to our continuance as a lively and healthy democracy, where staff renewal is vital to that end, and where there is competing social science evidence as to the precise effects of limiting legislation, the Court need only consider whether the government had a *reasonable basis* for believing the burdensome effects were proportionate to its goals. Furthermore, in the words of the majority:

> A legislature should not be obliged to deal with all aspects of a problem at once. *It should be permitted to take incremental measures* to balance possible inequalities under the law against other inequalities resulting from the adoption of a course of action.[21]

The deference to Parliament or, put differently, the judicial sensitivity to Parliament's functional constraints, was once again recently witnessed, this time in the case of *R.* v. *Chaulk*,[22] in which judgment was released last December. In

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[19] *Ibid.*

[20] *Ibid.*

[21] *Ibid.*

[22] [1990] 3 S.C.R. 1303 [hereafter *Chaulk*].

that case, the dispute focused on what was mentioned at the outset of this discussion, namely a challenge to a reverse onus clause in the Criminal Code based on the right to be presumed innocent. Thus *Chaulk* has a definite parallel with Oakes, and because of that, affords an interesting glimpse of refinements in the application of the *Oakes* test; although it is also true that the case is factually unique and, in some respects, possesses quite distinctive implications.

In *Chaulk* the Court was faced with two accused, 15 and 16 years of age, who had been tried and convicted in Winnipeg of first–degree murder. Each had been sentenced to life imprisonment, without eligibility for parole for 25 years. The only defense raised at their trial was one of insanity. Having lost at trial on the insanity claim, the accused argued that one of the insanity provisions in the Criminal Code violated section 11(d) of the Charter because it placed the onus of proving *insanity* on the accused. In their view, this burden undermined their right to be presumed innocent until proven guilty by the Crown. In other words, the two accused argued that section 11(d) of the Charter required the *Crown* to prove the *sanity* of the accused beyond a reasonable doubt. If it could not, then the insanity defence should automatically apply to preclude their conviction.

The Court found that the reserve onus clause infringed section 11(d). The legislative objective was determined to be the purely evidentiary one of relieving the prosecution of the tremendous difficulty of proving an accused's sanity to secure a conviction. Yet, unlike the *Oakes* case, the Court in *Chaulk* held there *was* a rational connection between ends and means, because placing the evidentiary burden on the accused directly promoted the goal of making the prosecution's task less difficult. This branch of proportionality having been satisfied, the Court proceeded to analyze "minimal impairment." Its analysis revealed that, even where section 1 is applied in the criminal law context, and thus where, to invoke the language of *Irwin Toy*, the state is "the singular antagonist of the individual"[23] whose right has been infringed, it will not always follow that a very strict standard of minimal impairment will be operative.

The Court conceived of alternative insanity provisions which *might* have trenched less severely on the right to be presumed innocent. It noted that Parliament could have prescribed that, when an accused raises insanity as a defence, he is first required to raise a reasonable doubt as to his sanity, after which an onus to disprove insanity on a balance of probabilities would fall on the Crown. Alternatively, Parliament could have stated that an accused must submit to a psychiatric examination at the request of the Crown. However, speaking through Chief Justice Lamer, the Court then emphasized that while these alternatives *might* be less intrusive, that did not necessarily mean that when all things were considered those less intrusive means would be as *effective* in

[23] *Irwin Toy, supra*, note 13 at 994.

promoting the legislative ends set by Parliament. It stressed even more strenuously that the role of the Court did not permit it to second guess these finely distinguishable policy choices, especially where it was: "... impossible to know what the effects of alternatives would be until they were put into practice."[24]

Citing the Court's judgments in *Edwards Books, Irwin Toy*, and *Reference Re ss.193 and 195.1(1)(c) of the Criminal Code (Man.)*,[25] Chief Justice Lamer specified that in most contexts:

> ...Parliament is not required to search out and to adopt the absolutely least intrusive means of attaining its objective.
> Furthermore, when assessing the alternative means available to Parliament, it is important to consider whether a less intrusive means would achieve the "same" objective or would achieve the same objective as effectively.[26]

So, even if the courts identify less intrusive means, if in some way they might not be as effective, or if they are possibly not as directly focused on Parliament's policy goals, then the means Parliament has chosen will not fail the minimal impairment test. In short, there may be a *range* of alternatives that are all minimally impairing and open to Parliament to choose from as it wishes – even in the criminal law context.

On the facts of *Chaulk*, the Court held that even thought Parliament may not have chosen "the absolutely least intrusive means of meeting its objective," Parliament *had* chosen from "a range of means which impair section 11(d) as little as possible" and that "within this range it is virtually impossible to know, let alone be sure, which means violate Charter rights the least."[27] Thus, this branch of proportionality was satisfied. And by applying the same rationale to the third branch of proportionality, again stressing the "uncertainty of our scientific knowledge," the Court was persuaded to uphold the reverse onus provision.

Before I conclude this discussion, I will touch on one last decision which illuminates the nuances of section 1. This is the case of *R.* v. *Committee for the Commonwealth of Canada*,[28] whose judgment by the Supreme Court was released only two weeks ago. It brought before the Court for the first time the question of the extent of the Charter guarantee of free expression on state–owned property. The reasoning of the Court was divided. I will refer to Madam Justice McLachlin-'s section 1 analysis as an example of another variation in approach.

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[24] *Ibid.*

[25] [1990] 1 S.C.R. 1123.

[26] *Chaulk, supra*, note 22.

[27] *Ibid.*

[28] [1991] 1 S.C.J. (25 January, 1991)[hereinafter *Committee for the Commonwealth of Canada*].

The *Committee for the Commonwealth of Canada* involved a section 2(b) challenge to the practice of Dorval airport authorities of preventing all "political propaganda activities" on its premises. The practice amounted to a blanket exclusion of all political solicitation and advertising on airport grounds. Madam Justice McLachlin found that the Committee's right to freedom of expression under section 2(b) was unjustifiably infringed and could not be saved under section 1. Her path to this conclusion was somewhat unique.

In determining whether a limitation of section 2(b) had occurred, Madam Justice McLachlin crafted the following framework of questions, or tests. It must first be decided whether the government's objective in imposing the restriction was to regulate the *content* of expression, or whether it was merely to regulate its harmful *consequences* irrespective of content.

If the aim is to regulate content, section 2(b) is infringed, and one proceeds to section 1 of the Charter. If, on the other hand, the restriction is aimed only at undesirable consequences of the expression, the claimant can only establish a violation by showing links between his intended expression, the forum for that expression (in this case an an airport), and one of the underlying purposes of the section 2(b) guarantee of free speech; 1) the pursuit of truth; 2) political or communal participation; and 3) individual fulfilment. If speech in the context of the particular forum in dispute does not serve one of these three purposes, then section 2(b) is not infringed. For instance, section 2(b) would not be infringed if the expression sought to be protected by section 2(b) was "in the sanctum of the Prime Minister's [or Dean's] office" or in "an airport control tower."[29]

In *Committee for the Commonwealth of Canada*, there was no question about this linkage. Airports were held to be modern equivalents of streets, and the speakers at issue in the case sought to engage in political speech. Thus, the Court turned to a section 1 analysis, which Madam Justice McLachlin stressed must be a balancing act "done contextually, having regard to the facts and values of the particular case before the Court: *Edmonton Journal* v. *Alberta*, [1989] 2 S.C.R. 1326, per Wilson J. at 1355–5."[30] In the opinion of Madam Justice McLachlin there is a particular way in which section 1 balancing "can best be achieved in a case such as this."[31]She begins from the following set of premises:

> The Charter recognizes that the exercise of constitutional rights inevitably raises conflicts. Sometimes the conflict is with another right. Sometimes the conflict is with another interest, usually public. As a result, rights cannot be viewed as absolute. Sometimes a right must yield to another, conflicting right; sometimes a

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[29]*Ibid.* at 20.

[30]*Ibid.* at 25-26.

[31]*Ibid.* at 26.

right must give way to an overriding objective of public importance.

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Only if certain conditions are established can a limit on a fundamental right or freedom be justified. First, the state should be required to demonstrate a compelling reason for the limitation. Second, the limit on the right should not go beyond what is necessary to achieve that objective – it should not be overboard, and should contain sufficient safeguards to ensure that as the law is applied, the right in fact will not be infringed more than necessary. *This latter danger may occur, for example, if too much discretion is granted to administrators charged with applying the limit or law in question.*[32] (emphasis added).

These concerns are reflected in *R.* v. *Oakes.*

Notice that Madam Justice McLachlin's formulation of the test for applying section 1 does not stop with a general warning about overly mechanistic applications of the *Oakes* criteria. She adds pointedly that:

...the practical limitations of legislation must also be recognized. The reality is that the government must develop rules and policies which apply to many cases. It may be impossible to tailor a rule to fit the precise circumstances of each individual case, with the result that with the benefit of hindsight a less restrictive limit can be conceived for a particular situation. As this Court pointed out in *R.* v. *Edwards Books and Art Ltd.*, some deference must be paid to the legislators and the difficulties inherent in the process of drafting rules of general application. A limit prescribed by law should not be struck out merely because the Court can conceive of an alternative which seems to it to be less restrictive. What is required by section 1 is that the limit be *reasonable* and *justifiable* in a free and democratic society. If the limit represents a reasonable legislative choice tailored so as to limit the right in question as little as possible the minimum impairment required is met. *What must be guarded against are the evils of vagueness and overbreadth, the broad sweep that catches more conduct than is justified by the government's objective.*[33] (latter emphasis added.)

The factors of vagueness, overbreadth and excessive administrative discretion are, therefore, thought by Madam Justice McLachlin to constitute particularly important features of the context which helps to determine the strictness with which section 1 will apply to governmental infringements on the free expression of individuals.

Applying this test, Madam Justice McLachlin found that the federal government failed to justify the section 2(b) infringements. In the first place, its objective was no more than an unsupported assertion, namely that "an airport is not an appropriate place for this type of communication." Secondly, even if the objective were sufficient, the means it did not pass muster under section 1 of the

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[32] *Ibid.* at 26-27.

[33] *Ibid.* at 28-29.

Charter, because there was no proportionality between preserving an airport's silence and a blanket exclusion of all political propaganda activities in the airport – the exclusion being unrelated to the airport's function – especially where the exclusion was devoid of safeguards to protect against over–reaching application.

Well, so much for strokes of the brush under section 1. May they serve to illustrate the many aspects and possible approaches to the delicate task of defining and balancing Charter rights and their less spoken to partner, Charter duties, and be an invitation to creative and sensitive thinking.

As a parting word, may I invite you to treat the Charter with respect for the importance which it has, conscious of its strengths and limits, and invoke it with discernment and awareness of the many facets of the rights which it grants and the duties which it creates. In its development at various times, the accent will be placed on certain aspects more than others. This is natural. There are and will be fashions in this area as in others. However, let us be conscious of this and retain our awareness and sense of responsibility for the promotion of all Charter rights and not allow the fad of the moment to let us forget and delay tackling other more difficult, important and perhaps intractable problems.

In the justice system, we are particularly entrusted with maintaining a balance through the protection of those whose rights are disregarded and who are less able to protect themselves. This holds true for institutions as well. The political process tends to favour the new, more glamorous projects sometimes at the expense of maintaining the continuity and reasonable development of existing services. The administration of justice is not immune from this. Generally, it is not glamorous and it does not directly affect most of the population, yet it is a cornerstone of our social structure. You, as future lawyers, law professors and judges, have a special duty towards it. Even if your career leads you along other paths, the knowledge and awareness which you have acquired during your studies give you a special responsibility to promote the awareness of the justice system, its administration and its needs. For it does have special needs and does require special understanding. The function of a judge is unique. His fellow citizens have confided in him their greatest trust, namely that of judging their acts. He must be impartial, independent and should be exemplary in his way of life. He may be in the limelight of the media but must not seek it, nor respond to criticism. He is not allowed to speak in his defence though he may on occasion speak in furtherance of the administration of justice. As people knowledgeable in the law and the administration of justice, you have a special responsibility in promoting a better understanding of the work of judges, their responsibilities and their needs. They are directly connected to the values of our society and like them can never be taken for granted but require continued vigilance, understanding and support.