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# So What Is the Real Legacy of *Oakes*?

## Two Decades of Proportionality Analysis under the Canadian *Charter's* Section 1

Sujit Choudhry\*

### I. *OAKES* AND BRIAN DICKSON

As we reflect upon the 20th anniversary of *R. v. Oakes*,<sup>1</sup> it is hard not to think of Brian Dickson C.J., for the two are inextricably tied together in the Canadian constitutional imagination. This is true not only for the obvious reason that the former Chief Justice penned the majority judgment, but also because *Oakes* has come to be synonymous with the former Chief Justice's broader jurisprudential legacy. For along with *R. v. Big M Drug Mart Ltd.*,<sup>2</sup> *Hunter v. Southam Inc.*,<sup>3</sup> *Singh v. Canada (Minister of Immigration and Employment)*,<sup>4</sup> and *Reference re Motor Vehicle Act (British Columbia), s. 94*,<sup>5</sup> *Oakes* set the tone for the early years of the Dickson Court. *Oakes* spoke in a boldness and confidence that permeated the Court's early Charter case law. Indeed, it clarified the Court's interpretive methodology for Charter cases, perhaps most centrally that rights are of presumptive importance, and limitations the

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<sup>1</sup> [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 [hereinafter "*Oakes*"].

<sup>2</sup> [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 [hereinafter "*Big M*"].

<sup>3</sup> [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145.

<sup>4</sup> [1985] S.C.J. No. 11, [1985] 1 S.C.R. 177 [hereinafter "*Singh*"].

<sup>5</sup> [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 [hereinafter "*B.C. Motor Vehicle Reference*"].

exception that are only acceptable if governments meet a demanding test of justification. The citation of *Oakes* by courts in Antigua and Barbuda,<sup>6</sup> Australia,<sup>7</sup> Fiji,<sup>8</sup> Hong Kong,<sup>9</sup> Ireland,<sup>10</sup> Israel,<sup>11</sup> Jamaica,<sup>12</sup> Namibia,<sup>13</sup> South Africa,<sup>14</sup> the United Kingdom,<sup>15</sup> Vanuatu<sup>16</sup> and Zimbabwe<sup>17</sup> has made *Oakes* one of the central models for rights-based constitutional adjudication, and has only confirmed its status as the poster-child of the Dickson Court.

So the Court's almost immediate retreat from *Oakes* in *Edwards Books*, acknowledged and consolidated soon thereafter by *Irwin Toy Ltd. v. Quebec (Attorney General)*,<sup>18</sup> is of broader constitutional significance, both domestically and abroad. If *Oakes* was a model for how to interpret the Charter, and how rights-protecting documents in other jurisdictions should be construed, the question is *what kind of model* it remains two decades on.<sup>19</sup> In an important sense, this is a completion of the circle, given the importance of comparative models to the drafting of section 1.<sup>20</sup> And rather than merely telling us something

<sup>6</sup> *Attorney-General & Anor v. Goodwin & Ors*, [1999] I.C.H.R.L. 143.

<sup>7</sup> *Kartinyeri v. The Commonwealth*, [1998] HCA 22; *Mulholland v. Australian Electoral Commission*, [2004] HCA 41.

<sup>8</sup> *Chaudhry v. Attorney-General*, [1999] FJCA 28.

<sup>9</sup> *R. v. Sin Yau Ming*, [1991] HKCA 96.

<sup>10</sup> *Blascaod Mor Teoranta v. Commissioners of Public Works in Ireland*, [1998] IEHC 38.

<sup>11</sup> *United Mizrahi Bank Ltd. v. Migdal Cooperative Village*, 49 P.D. 221; *Ron Menachem v. Minister of Transportation*, P.D. 57(1) 2345.

<sup>12</sup> *Jamaica Bar Association v. Ernest Smith & Company*, [2003] JMSC 17.

<sup>13</sup> *Kauesa v. Minister of Home Affairs & Ors*, [1995] I.C.H.R.L. 56.

<sup>14</sup> *S v. Zuma*, 1995 (2) SA 642; *S v. Coetzee*, 1997 (3) SA 527; *S v. Manamela*, 2000 (3) SA 1; *Case v. Minister of Safety and Security*, 1996 (3) SA 617; *S v. Bhulwana*, 1996 (1) SA 388; *S v. Singo*, 2002 (4) SA 858.

<sup>15</sup> *Ex Parte Kebeline*, [1999] UKHL 43; *R. v. Lambert*, [2001] UKHL 37; *A (FC) v. Secretary of State for the Home Department*, [2004] UKHL 56.

<sup>16</sup> *In re the Constitution, Korman v. Natapei*, [1997] VUSC 46.

<sup>17</sup> *Chavunduka v. Minister of Home Affairs*, [2000] I.C.H.R.L. 34.

<sup>18</sup> [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927 [hereinafter "*Irwin Toy*"]; *R. v. Edwards Books & Art Ltd.*, [1986] S.C.J. No. 70, [1986] 2 S.C.R. 713.

<sup>19</sup> I have explored the use of comparative models in constitutional adjudication in: "Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation" (1999) 74(3) *Indiana L.J.* 819; S. Choudhry, "The *Lochner* Era and Comparative Constitutionalism" (2004) 2(1) *Int'l J. Const. L.* 1; S. Choudhry, "Migration as a New Metaphor in Comparative Constitutional Law" in S. Choudhry, ed., *The Migration of Constitutional Ideas* (New York: Cambridge University Press, forthcoming 2006).

<sup>20</sup> B. Hovius, "The Limitation Clauses of the European Convention on Human Rights: A Guide for the Application of Section 1 of the *Charter*" (1985) 17 *Ottawa L. Rev.* 213; L.E. Weinrib, "Canada's *Charter of Rights*: Paradigm Lost?" (2002) 6 *Rev. Const. Stud.* 119.

about section 1, 20 years of the Court's coming to terms with *Oakes* sheds light on its evolving self-understanding of the judicial role under the Charter. The fate of *Oakes* holds broader lessons for the fate of the Charter and the judicial review of rights-protecting constitutional instruments more generally.

There is a dominant narrative on what the true legacy of *Oakes* and the retreat from *Oakes* are.<sup>21</sup> The argument is that *Oakes* set out a uniform approach for assessing justifiable limitations on Charter rights irrespective of differences in context, but that in the decade following *Oakes*, the Court searched for criteria of deference, to reliably and predictably categorize cases where deference was warranted and those where it was not. These categories were not applied consistently by the Court, and, indeed, produced disagreement within the Court over how they should be applied in specific cases. Underlying both trends were concerns regarding the cogency of the distinctions employed by the Court to delineate the boundaries of these categories. The broader lesson of *Oakes* is the need to tailor judicial review to the unique context of each case.

Although the dominant narrative captures much of *Oakes*' legacy, it misses much of what is at stake in many recent section 1 cases, and by implication, what the true legacy of *Oakes* and the retreat from *Oakes* are. In my view, *Oakes* created an enormous institutional dilemma for the Court, by setting up a conflict between the demand for definitive proof to support each stage of the section 1 analysis, and the reality of policy making under conditions of factual uncertainty. And so the legacy of *Oakes* is that the central question of section 1 is how the Court

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<sup>21</sup> For example, see D.M. Beatty, *Talking Heads and the Supremes: The Canadian Production of Constitutional Review* (Toronto: Carswell, 1990), ch. 3; E. Mendes, "In Search of a Theory of Social Justice: The Supreme Court Reconciles the *Oakes* Test" (1990) 24 R.J.T. 1; R. Elliot, "Developments in Constitutional Law: The 1989-90 Term" (1991) 2 S.C.L.R. (2d) 83; R. Knopff & F.L. Morton, *Charter Politics* (Scarborough: Nelson Canada, 1992), at 45-47; A. Lajoie & H. Qullinan, "Emerging Constitutional Norms: Continuous Judicial Amendment of the Constitution — The Proportionality Test as a Moving Target" (1992) 55 L. & Contemp. Prob. 285; C.M. Dassios & C.P. Prophet, "Charter Section 1: The Decline of Grand Unified Theory and the Trend Towards Deference in the Supreme Court of Canada" (1993) 15 Advocates' Q. 289; J.L. Hiebert, *Limiting Rights: The Dilemma of Judicial Review* (Montreal & Kingston: McGill-Queen's University Press, 1996), ch. 4; K. Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001), ch. 9; C.D. Bredt & A.M. Dodek, "The Increasing Irrelevance of Section 1 of the Charter" (2001) 14 S.C.L.R. (2d) 175; E. Mendes, "The Crucible of the Charter: Judicial Principles v. Judicial Deference in the Context of Section 1" (2005) 27 S.C.L.R. (2d) 47; J.B. Kelly, *Governing with the Charter* (Vancouver: UBC Press, 2005), ch. 5.

should allocate the risk of factual uncertainty when governments legislate under conditions of imperfect information. *RJR-MacDonald v. Canada (Attorney General)*<sup>22</sup> is the pivotal case here, because it brought home how the central debate in many section 1 cases is the quality of the evidentiary record. But not only has the Court failed to recognize this as a central question; it has failed to adopt a consistent approach in how it answers it.<sup>23</sup> Two recent examples which lie at the heart of this counter-narrative are *Thomson Newspapers Co. v. Canada (Attorney General)*<sup>24</sup> and *Harper v. Canada (Attorney General)*.<sup>25</sup> Although these cases have attracted minimal attention from constitutional scholars for their broader importance to the Court's understanding of the judicial role under the Charter, they warrant close attention because they tell us that there is another legacy of *Oakes*.<sup>26</sup>

Understanding these problems to be the legacy of *Oakes* allows us to view judgments *outside* the section 1 context in a different light. In my conclusion, I will link my counter-narrative to the Court's recent decision in *Chaoulli v. Quebec (Attorney General)*,<sup>27</sup> in which the Court struck down Quebec's ban on private health insurance. Although the principal focus of *Chaoulli* was section 7, I read it through the lens of the general problem of how to fashion judicial review in a rights-protecting democracy where governments often legislate with imperfect information. Neither the majority nor the dissenting judges in that case understood the case in these terms. As a consequence, they asked themselves the wrong question. Getting the legacy of *Oakes* right would have led them to avoid this mistake.

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<sup>22</sup> [1995] S.C.J. No. 68, [1995] 3 S.C.R. 199 [hereinafter "*RJR-MacDonald*"].

<sup>23</sup> And as the Court's decisions in *R. v. Marmo-Levine*, [2003] S.C.J. No. 79, 2003 SCC 74 [hereinafter "*Marmo-Levine*"] and *R. v. Labaye*, [2005] S.C.J. No. 83, 2005 SCC 80, illustrate, similar questions arise outside the s. 1 context, and the Court has sent contradictory signals there as well.

<sup>24</sup> [1998] S.C.J. No. 44, [1998] 1 S.C.R. 877 [hereinafter "*Thomson Newspapers*"].

<sup>25</sup> [2004] S.C.J. No. 28, [2004] 1 S.C.R. 827 [hereinafter "*Harper*"].

<sup>26</sup> Exceptions include P. Hogg, *Constitutional Law of Canada*, vol. 2, looseleaf ed. (Scarborough: Carswell, 1997), sec. 35.4; R.E. Charney, "Evidence in *Charter* Cases: Expert Evidence and Proving Purpose" (2004) 16 N.J.C.L. 1; R.E. Charney & Z. Green, "Prophets of Doom, Seers of Fortune: 20 Years of Expert Evidence under the *Oakes* Test", this volume; and the Rt. Hon. A. Lamer, "Canada's Legal Revolution: Judging in the Age of the Charter of Rights" (1994) 28 *Isr. L. Rev.* 579, at 582-83.

<sup>27</sup> [2005] S.C.J. No. 33, 2005 SCC 35 [hereinafter "*Chaoulli*"].

## II. THE DOMINANT NARRATIVE

The details of the dominant narrative are widely known. Section 1 was at play in a number of early Charter judgments, in which the Court offered some preliminary observations on how it would interpret the provision.<sup>28</sup> But it was not until 1986 that the Court devoted sustained attention to section 1, in a pair of judgments handed down 10 months apart. In *Oakes*, Dickson C.J. set out the analytical framework governing section 1 interpretation, which, despite two decades of doctrinal elaboration, qualification and modification, still provides the basic framework within which limitations analysis is conducted. *Oakes* states that parties seeking to uphold a rights-violation must satisfy a four-part test. First, the reason for the rights-violation must be “pressing and substantial”,<sup>29</sup> which entails that the legislative objective must further the values of the “free and democratic society” referred to by the text of section 1. These values encompass a broad but not all-inclusive set of values which underlie Charter rights which are also guaranteed by section 1, and for that reason are the exclusive reasons that can justify their limitation.<sup>30</sup> The next three steps together constitute the well-known proportionality test. Thus, there must be a “rational connection” between the rights-infringing measure and the objective, interpreted by the Court in *Oakes* to require that the means chosen be “carefully designed” so as to minimize problems of over-inclusion. Moreover, the measure must be the least restrictive means — *i.e.*, the means which impairs the right “as little as possible” — for realizing the government’s objective. Finally, the deleterious effects of the measure must be proportionate to the importance of the objective.<sup>31</sup> On the facts of *Oakes* itself, the Court considered a challenge to a reverse onus provision which presumed the intent to traffic narcotics from the mere fact of

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<sup>28</sup> These early judgments were of *Quebec (Attorney General) v. Quebec Assn. of Protestant School Boards*, [1984] S.C.J. No. 31, [1984] 2 S.C.R. 66; *Singh*, *supra*, note 4; *Big M*, *supra*, note 2, and the *B.C. Motor Vehicle Reference*, *supra*, note 5.

<sup>29</sup> *Oakes*, *supra*, note 1, at 138.

<sup>30</sup> *Id.*, listed the values of a free and democratic society in the following famous passage (at 136):

The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.

<sup>31</sup> *Id.*, at 140.

possession. The Court found the objective underlying the provision — to protect society from the evils of drug trafficking — to be pressing and substantial (although puzzlingly, it made no attempt to tie this objective to the values of a free and democratic society). But the provision failed the rational connection test because it was over-inclusive, since it inferred the intent to traffic in cases of possession in which no such intent was present.

The clear message sent by *Oakes* is that it sets out a “stringent standard of justification”.<sup>32</sup> Thus, rights are the norm and of presumptive importance, and cannot be limited unless “the exceptional criteria which justify their being limited” are met.<sup>33</sup> Lorraine Weinrib correctly observed that on *Oakes*, “[t]he state will seldom satisfy section 1 justification because the supreme law states that certain rights and freedoms are to be honoured in the normal course”.<sup>34</sup> In this respect, *Oakes* confirmed the views of commentators writing before the judgment that the drafting history of section 1 evinced a legislative intention that the provision be strictly interpreted to the benefit of rights-claimants.<sup>35</sup> Moreover, although *Oakes* stated that “the nature of the proportionality test will vary depending on the circumstances”<sup>36</sup> the test in *Oakes* itself was framed in abstract terms which did not invite courts to differentiate its application in future appeals that might differ radically from *Oakes* itself, either with respect to the rights at play or the policy context.

But *Oakes* was followed less than ten months later by *R. v. Edwards Books & Art Ltd.*,<sup>37</sup> in which superficially, the Court invoked and applied *Oakes* as precedent. But notwithstanding that Dickson C.J. wrote both judgments, *Edwards Books* was radically different. The key shifts concerned the rational connection and minimal impairment components of the proportionality analysis. Since *Oakes* had interpreted

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<sup>32</sup> *Id.*, at 136.

<sup>33</sup> *Id.*, at 137.

<sup>34</sup> L.E. Weinrib, “The Supreme Court of Canada and Section One of the *Charter*” (1988) 10 S.C.L.R. 469, at 492. For a similar but critical view of the implications of the strictness of *Oakes*, see P.A. Chapman, “The Politics of Judging: Section 1 of the *Charter* of Rights and Freedoms” (1986) O.H.L.J. 867.

<sup>35</sup> T.J. Christian, “The Limitation of Liberty: A Consideration of Section 1 of the *Charter* of Rights and Freedoms” (1982) 16 U.B.C. L. Rev. 105, at 107; W.E. Conklin, “Interpreting and Applying The Limitations Clause; An Analysis of Section 1” (1982) 4 S.C.L.R. 75, at 81 to 82.

<sup>36</sup> *Oakes*, *supra*, note 1, at 139.

<sup>37</sup> [1986] S.C.J. No. 70, [1986] 2 S.C.R. 713 [hereinafter “*Edwards Books*”].

the requirement of fit between means and ends to preclude legislative over-inclusion, it was thought that the same would apply to problems of legislative under-inclusion. *Edwards Books* presented two such gaps between legislative ends and means, because notwithstanding the broad goal of providing a common pause day, the legislation only applied to the retail sector, and, even there, contained significant exceptions. But the Court responded by justifying the limited scope of the legislation, suggesting that a legislature could restrict its efforts to sectors “in which there appear to be particularly urgent concerns or to constituencies that seem especially needy”, and, more generally, that “[l]egislative choices regarding alternative forms of business regulation ... need not be tuned with great precision in order to withstand judicial scrutiny”, since “[s]implicity and administrative convenience are legitimate concerns”.<sup>38</sup> Now the obvious question was why the same kinds of arguments could not have been deployed in *Oakes* itself, given the obvious utility of reverse onuses to the effectiveness of criminal prosecution. But *Edwards Books* neither explicitly disapproved of *Oakes* nor explained why it should operate so differently in this context.

And the same sorts of questions arose from the Court’s minimal impairment analysis. Again, without explicit acknowledgment, the Court modified *Oakes*, stipulating that the challenged measure need only impair Charter rights “as little as is reasonably possible” and asking “whether there is some reasonable alternative scheme”, as opposed to whether the measure chosen was the least intrusive one available.<sup>39</sup> The Court wrestled openly with the various trade-offs involved in alternatives to the Sunday closing law. Thus, the Court reasoned that an employee’s right to refuse work on Sundays would fall prey to “the subtle coercive pressure which an employer can exert on an employee”.<sup>40</sup> A complete exemption for retailers who could demonstrate “a sincerely held religious belief requiring them to close their stores on a day other than Sunday”<sup>41</sup> was also undesirable. It would mean that employees in the retail sector — a particularly vulnerable group — would have little realistic option but to work on Sundays, and the legislature was entitled to give priority to employee interests in observing a common pause day over the commercial interests of

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<sup>38</sup> *Id.*, at 772.

<sup>39</sup> *Id.*, at 772.

<sup>40</sup> *Id.*, at 773.

<sup>41</sup> *Id.*, at 773.



employers. Moreover, the exemption would require a distasteful state-conducted inquiry into religious beliefs, and again, the state was entitled to prefer a scheme which was less comprehensive but which avoided such a process. And in addition to reasons particular to the appeal, *Edwards Books* stated more generally that “[t]he courts are not called upon to substitute judicial opinions for legislative ones”, that “[b]y its nature, legislation must, to some degree, cut across individual circumstances in order to establish general rules”, and that deference was mandated lest the Charter “simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons”.<sup>42</sup> Although the Court did not reach the minimal impairment stage of the proportionality analysis in *Oakes*, once again, the question raised by *Edwards Books* was why similar factors were not even signalled by the Court just a few months earlier.

Academic commentators quickly noted that something was afoot.<sup>43</sup> Robin Elliot observed that when “*Oakes* was delivered, the decision appeared to settle what had become a vexing and very important question — how was s. 1 of the *Charter* to be applied?”, but that *Edwards Books* made it abundantly clear “that the Court is far from *ad idem* on the matter of how s. 1 is to be applied”.<sup>44</sup> Although *Oakes* purported to be “comprehensive in scope”, Elliot presciently suggested that “[t]he prospect that we will see a single, uniform approach to s. 1 emerging from the Court in the foreseeable future is dim indeed”.<sup>45</sup> Andrew Petter and Patrick Monahan went even further, arguing that “judges have recoiled from all but the formal trappings of the *Oakes* test”.<sup>46</sup> The net result was that the Court “still has the stringent *Oakes* test sitting on the shelf waiting to be dusted off for use at an appropriate moment ... any time that the Court wants to strike down a law”, but

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<sup>42</sup> *Id.*, at 782, 777, and 779.

<sup>43</sup> But compare A.C. Hutchison, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995) at, 50-55, and J. Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997), at 27-30, who emphasize the indeterminacy of the *Oakes* test, a view which would seem to minimize the differences between *Edwards Books* and *Oakes*.

<sup>44</sup> R.M. Elliot, “The Supreme Court of Canada and Section 1 — the Erosion of the Common Front” (1987) 12 *Queen’s L.J.* 277, at 339.

<sup>45</sup> *Id.*, at 340.

<sup>46</sup> A.J. Petter & P.J. Monahan, “Developments in Constitutional Law: The 1986-87 Term” (1988) 10 *S.C.L.R.* 61, at 66.

“[o]n the other hand when they are dealing a law with which they are relatively sympathetic, the Court is able to step aside and basically allow the legislature to do what it wants”.<sup>47</sup>

Clearly, the Court needed to explain exactly how *Oakes* and *Edwards Books* fit together. And the scholarly literature offered some preliminary suggestions. Elliot suggested, for example, that the strict approach to rational connection in *Oakes* may have flowed from the consequence of over-inclusion — “that innocent people might be convicted of a serious criminal offence”.<sup>48</sup> Presumably, the stakes were somewhat lower in *Edwards Books*, which arose outside the criminal context. Along a similar vein, Petter and Monahan astutely observed that the Court was far less deferential in its criminal Charter cases than in the non-criminal context, and that while “the cases in which the Court’s rhetoric and reasons have been most deferential have all been non-criminal cases ... the Court has continued to operate on the basis of the paradigm developed in its early cases” in the criminal law area.<sup>49</sup> The rationale for this pattern of decisions, they suggested, might flow from the Court’s assessment that “[s]upervision of the criminal process is a staple item on the judicial menu”, and the Court is able in these cases “to maintain the illusion that the judiciary is choosing between the state and the individual rather than between the competing interests of individuals or groups”, whereas the non-criminal cases raised “broad issues of social policy” where “the trade-offs inherent in rights litigation are more visible”.<sup>50</sup>

The Court offered a partial response to these academic criticisms (albeit without citing them) in *Irwin Toy* and subsequent cases. To some extent, the Court simply continued the unannounced yet transparent trend toward deference by adopting less stringent interpretations of the first two steps of the *Oakes* test in almost every case that came before it.<sup>51</sup> The need for a “pressing and substantial objective” that furthered the values of a free and democratic society set out in *Oakes* was quietly replaced with the less demanding requirement that the objective merely

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<sup>47</sup> *Id.*, at 95.

<sup>48</sup> R.M. Elliot, “The Supreme Court of Canada and Section 1 — the Erosion of the Common Front”, *supra*, note 44, at 318.

<sup>49</sup> A.J. Petter & P.J. Monahan, “Developments in Constitutional Law: The 1986-87 Term”, *supra*, note 46, at 68-69.

<sup>50</sup> *Id.*, at 69.

<sup>51</sup> R.M. Elliot, “Developments in Constitutional Law: The 1989-90 Term”, *supra*, note 21, at 139-144.

be “valid”<sup>52</sup> or “sufficiently important”.<sup>53</sup> Indeed, given that *Oakes* and *Edwards Books* both failed to connect the objectives of the challenged

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<sup>52</sup> *R. v. Whyte*, [1988] S.C.J. No. 63, [1988] 2 S.C.R. 3.

<sup>53</sup> *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] S.C.J. No. 52, [1990] 1 S.C.R. 1123 [hereinafter “*Prostitution Reference*”].

However, some more recent decisions point to a more demanding application of this requirement of the *Oakes* test. In *R. v. Advance Cutting and Coring Ltd.*, [2001] S.C.J. No. 68, 2001 SCC 70 [hereinafter “*Advance Cutting*”], the Court rejected a constitutional challenge to the unique system of collective bargaining which governs the Quebec construction industry. Employers can only hire workers who hold a competency certificate, and the regime grants five unions the monopoly to issue these certificates. In order to obtain a certificate, legislation requires that a worker join one of these five legislatively recognized unions. Moreover, the legislation establishes regional quotas as to the maximum number of certificates that can be issued. The majority argued that the purpose underlying this regime was to bring industrial peace to the construction industry, and that the means chosen met the test of proportionality. The dissenting judges (*per* Bastarache J.) rejected this objective, on the basis that *Oakes* mandated reviewing courts to consider “the objective of the legislation as it stands today”, as opposed to the historical reasons for which it was enacted (at para. 45). Justice Bastarache then went on to reject two contemporary objectives for the legislation — “to have structured collective bargaining and to provide for competency requirements” — because he could not accept “that these are the true objectives of the legislation” (at para. 46). Justice Bastarache then found no rational connection between the mandatory union membership and regional quotas and the legislation’s purported objectives. What was missing from his analysis is what he considered the true objectives to actually be, and how these objectives fared under *Oakes*. A plausible way of reading the judgment is that Bastarache J. considered the true objective underlying the challenged measures to be to accord a monopoly to a limited number of construction unions and to restrict the supply of construction workers in exchange for labour peace, and that this objective was insufficiently important under *Oakes*. The legislation, in other words, was a form of illegitimate special-interest legislation which protected the interests of five construction unions from *economic* competition for no offsetting public interest.

*Figuroa v. Canada*, [2003] S.C.J. No. 37, 2003 SCC 37 [hereinafter “*Figuroa*”], likewise can be read in a similar way. Under challenge there was a 50-candidate threshold for political parties to be registered. Registered political parties possess the right to issue tax receipts for donations received outside the election period, and to extend to candidates the right to transfer unspent election funds to the party. Moreover, candidates of registered parties can include their party affiliation on an election ballot. The Court found no rational connection between these measures and the purported objectives underlying the scheme: to improve the effectiveness of the electoral process, to protect the integrity of the electoral financing regime, and to increase the possibility of a stable Parliament. The Court’s failure to find a rational connection, of course, suggests that the true objective may have been rather different — to protect larger political parties from *electoral* competition to the detriment of the public interest. And *Figuroa* can be read as holding that that objective cannot justify a limitation on s. 3. In other words, *Figuroa* holds that the Charter will prohibit democratic lock-ups.

In addition, the Court has recently reaffirmed its earlier precedents that discriminatory objectives (*Big M*) and fiscal considerations (*Singh, B.C. Motor Vehicle Reference*) are insufficiently important to justify the limitation of Charter rights: *Vriend v. Alberta*, [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493 [hereinafter “*Vriend*”], L’Heureux-Dubé J.’s dissenting reasons in *Nova Scotia v. Walsh*, [2002] S.C.J. No. 84, [2002] 4 S.C.R. 325 [hereinafter “*Walsh*”] (discriminatory objectives) and *Nova Scotia (Workers’ Compensation Board) v. Martin; Nova Scotia (Workers’ Compensation Board) v. Laseur*, [2003] S.C.J. No. 54, [2003] 2 S.C.R. 504 (fiscal considerations). But the Court has left open the door to fiscal emergencies counting as a legitimate reason to limit Charter rights: *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] S.C.J. No. 61, [2004] 3 S.C.R. 381.

measures in those appeals to the values of a free and democratic society, this move hardly came as a surprise. Similarly, the need for careful legislative design to minimize the possibility of over- and under-inclusion at the rational connection stage — applied by *Oakes*, but then diluted by *Edwards Books* — was replaced with the much less onerous requirement that the means chosen simply further the legislative objective.<sup>54</sup>

But it was principally the development of the minimal impairment test which drove the jurisprudence. Here, the Court explicitly acknowledged that it had departed, and would continue to depart, from the strictness of *Oakes*. Yet rather than adopting an across-the-board demobilization in every case — as it had with respect to the first two stages of the *Oakes* test — it instead attempted to draw a series of categorical distinctions to identify cases in which it should defer under section 1, asking only whether it could be said that the government had a “reasonable basis”<sup>55</sup> for concluding that it had impaired the right as little as possible, and those where it should not.<sup>56</sup> The Court relied on a diverse set of criteria which often overlapped in individual cases, providing multiple grounds for deference.<sup>57</sup>

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<sup>54</sup> *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] S.C.J. No. 65, [1990] 2 S.C.R. 232 [hereinafter “*Rocket*”]. Also see P.W. Hogg, “Section 1 Revisited” (1992) 1 N.J.C.L. 1.

However, in three recent sets of cases, the Court has moved away from the deferential, “minimal rationality” view of the rational connection test and taken a stricter approach: (a) situations of legislative omission or under-inclusion, where the exclusion of rights-claimants from a legislative regime according benefits has been held to bear no rational connection to the goals of the scheme as a whole: *M. v. H.*, [1999] S.C.J. No. 23, [1999] 2 S.C.R. 3 and L’Heureux-Dubé J.’s dissenting reasons in *Walsh*; (b) cases where the means chosen would actually cause the mischief the legislation seeks to cure: see the dissenting reasons of Cory and Iacobucci JJ. in *Delisle v. Canada (Deputy Attorney General)*, [1999] S.C.J. No. 43, [1999] 2 S.C.R. 989, and the concurring reasons of L’Heureux-Dubé J. in *Dunmore v. Ontario (Attorney General)*, [2001] S.C.J. No. 87, [2001] 3 S.C.R. 1016 [hereinafter “*Dunmore*”]; and (c) cases involving the restriction of the right to vote guaranteed by s. 3, where the means are only intelligible on the basis of assumptions that communicate a lack of respect for democracy: *Sauvé v. Canada (Chief Electoral Officer)*, [2002] S.C.J. No. 66, [2002] 3 S.C.R. 519 [hereinafter “*Sauvé*”]. This development warrants more in-depth analysis than I can provide here, particularly given that the “minimal rationality” version of the rational connection test is still routinely used by the Court.

<sup>55</sup> *Irwin Toy*, *supra*, note 18, at 994.

<sup>56</sup> A. Lokan, “The Rise and Fall of Doctrine Under Section 1 of the *Charter*” (1992) 24 *Ottawa L. Rev.* 163.

<sup>57</sup> For an early prediction that this would happen, see N. Finkelstein, “Section 1: The Standard for Assessing Restrictive Government Actions and the *Charter*’s Code of Procedure and Evidence” (1983-4) 9 *Queen’s L.J.* 143. For a puzzling analysis of the 11 years of s. 1 case law subsequent to *Oakes* that omits detailed discussion of these doctrinal distinctions, see L.E. Trakman, W. Cole-Hamilton & S. Gatién, “*R. v. Oakes* 1986-1997: Back to the Drawing Board” (1998) 36 *O.H.L.J.* 83.

One strategy was to differentiate different policy areas based on *comparative institutional advantage* or *relative judicial expertise*. Thus, in *Irwin Toy*, the Court indicated it would not defer in the criminal justice context, or, for that matter, whenever “the government’s purpose relates to maintaining the authority and impartiality of the judicial system”, because of its “accumulated experience in dealing with such questions”.<sup>58</sup> Indeed, the judiciary is a central government actor in the criminal justice system. By contrast, the Court lacks relative expertise vis-à-vis other branches of government in other contexts, for example, labour relations or commercial regulation. This distinction explained the Court’s differing approaches in *Oakes* (a criminal law case) and *Edwards Books* (which concerned the regulation of the retail industry). It also accounted for the Court’s subsequent deference under section 1 in two decisions arising in the labour relations context, *McKinney v. University of Guelph*<sup>59</sup> and *Advance Cutting*, where the Court extended its historic deference to labour boards and arbitrators to legislatively-set labour policy — and in the latter case, the unique need to secure labour peace in the Quebec construction sector.

A second strategy was to differentiate cases according to the *competing interests* at stake, on the theory that both the range and relative weight of different interests should guide the Court’s choice of standard. On one reading, *Irwin Toy*’s criminal versus non-criminal distinction was a proxy for this underlying set of considerations. Thus, in the criminal law context, the state is “the singular antagonist” of the rights-claimant, where the state acts “on behalf of the whole community”.<sup>60</sup> By contrast, in other situations, the state attempts to mediate “competing claims among different groups”.<sup>61</sup> The claim here is that when the state acts on behalf of *third parties* whose interests are opposed to those of the rights-claimant, the interests of these individuals are a legitimate counter-weight to the rights of Charter-claimants. The idea is that some successful Charter claims have real costs for important interests of identifiable individuals whom the state acts to protect. Enforcing the Charter is therefore not costless in real human terms — rights claims are redistributive, producing winners and losers. Constitutional adjudication is a form of interest-balancing which is

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<sup>58</sup> *Irwin Toy, supra*, note 18, at 994.

<sup>59</sup> [1990] S.C.J. No. 122, [1990] 3 S.C.R. 229 [hereinafter “*McKinney*”].

<sup>60</sup> *Irwin Toy, supra*, note 18, at 994.

<sup>61</sup> *Id.*, at 993.

difficult to distinguish in many cases from legislative decision-making, counselling deference. By contrast, when the state promotes the interests of the “community”, successful claims apparently do not impose the same costs, and the balance is more heavily tilted in favour of the rights-claimant. Criminal justice falls into the former category, while social and economic policy into the latter. *Edwards Books*, *McKinney* and *Advance Cutting* can be explained as cases in which the Court deferred on the presence of competing interests, and *Oakes* as a case in which the lack of deference is attributable to the absence of competing interests.

This strategy generated a number of variations. For example, the Court reasoned that the interests of third parties count even more as a reason for deference when the third parties are *vulnerable groups* to whose interests the state grants priority, or whom the state protects.<sup>62</sup> Thus, the Court has deferred when legislation protects employees (*Slaight Communications Inc. v. Davidson*),<sup>63</sup> or at least those who are “low-skilled, non-union and poorly educated” (*Edwards Books*),<sup>64</sup> and children (*Irwin Toy, R. v. Sharpe*).<sup>65</sup> Arguably, although not explicitly invoked, this consideration can also explain the Court’s deference to measures which it described as protecting the interests of members of racial and religious minorities (*R. v. Keegstra*)<sup>66</sup> and women (*R. v. Butler*).<sup>67</sup> Another strand of this line of analysis was to focus on interest balancing in the context of the allocation of scarce public

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<sup>62</sup> R. Colker, “Section 1, Contextuality, and the Anti-Disadvantage Principle” (1992) 42 U.T.L.J. 77. It also follows that when legislation disadvantages members of a vulnerable group, then the Court should show less deference under s. 1. Arguably, this position was adopted and applied by the Court in *U.F.C.W., Local 1518 v. KMart Canada*, [1999] S.C.J. No. 44, [1999] 2 S.C.R. 1083 [hereinafter “*KMart*”], where the Court refused to defer to a legislative prohibition on secondary protection, *inter alia*, because (at para. 68) “those who are subject to the legislative restriction ... form a vulnerable group in Canadian society”. Also see: L’Heureux-Dubé J.’s dissenting reasons in *Adler v. Ontario*, [1996] S.C.J. No. 110, [1996] 3 S.C.R. 609; Cory and Iacobucci’s JJ.’s joint dissent in *Delisle v. Canada (Deputy Attorney General)*, [1999] S.C.J. No. 43, [1999] 2 S.C.R. 989; McLachlin C.J.’s dissenting reasons in *Lavoie v. Canada*, [2002] S.C.J. No. 24, [2002] 1 S.C.R. 769 [hereinafter “*Lavoie*”].

<sup>63</sup> [1989] S.C.J. No. 45, [1989] 1 S.C.R. 1038.

<sup>64</sup> *Edwards Books*, *supra*, note 37, at 778.

<sup>65</sup> [2001] S.C.J. No. 3, [2001] 1 S.C.R. 45 [hereinafter “*Sharpe*”].

<sup>66</sup> [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 [hereinafter “*Keegstra*”].

<sup>67</sup> [1992] S.C.J. No. 15, [1992] 1 S.C.R. 452 [hereinafter “*Butler*”].

<sup>68</sup> In addition, members of the Court have suggested that smokers, who tend to be “the young and the less educated”, should also be regarded as a vulnerable group (*RJR-MacDonald*, *supra*, note 22, at para. 66 (*per La Forest J.*)), as should consumers of cigarettes, because “the sophistication of advertising campaigns ... creates an enormous power differential between these companies and tobacco consumers” (*RJR-MacDonald*, *supra*, note 22, at para. 76).

resources, a situation alluded to by *Irwin Toy* itself. Thus, in *McKinney*, a reason offered by the Court for rejecting the constitutional challenge to a university's mandatory retirement policies was that one reason for mandatory retirement was to give universities flexibility in distributing scarce resources among faculty "to enhance and maintain their capacity to seek and maintain excellence".<sup>69</sup> *McKinney* also introduced the much-criticized doctrine of incrementalism, whereby scarce resources counted as a reason to defer, so as to permit the legislature to "deal with problems one step at a time" as opposed to obliging it "to deal with all aspects of a problem at once".<sup>70</sup> The most infamous application of this doctrine was Sopinka J.'s concurring judgment in *Egan v. Canada*,<sup>71</sup> in which he held that the denial of old age security to same sex couples was minimally impairing because "equating same-sex couples with heterosexual spouses, either married or common law, is still regarded as a novel concept".<sup>72</sup> A final variation on this approach was to elevate the interests of third parties to the *constitutional* level, so that the state can be seen as protecting their Charter rights by limiting the Charter rights of others. So *Keegstra* can be understood as a case in which legislation protected the rights to freedom of expression of racial and religious minorities by protecting them from the harm of silencing, and *Edwards Books* a case where Sunday closing legislation protected the right to freedom of religion of Sunday-observing retail employees.

A third strategy, which flowed from the second, was to downgrade the importance of the constitutional right at stake. Just as the interests of third parties might counter-balance the claims of rights-claimants, the latter might be easier to outweigh if they are less important. The Court developed this approach from the purposive approach to rights-interpretation set out in *Big M*, in which the interpretation of the scope of a Charter right proceeds from an account of the interests it is meant to protect. The Court reasoned that since some protected activity bore an attenuated connection to these interests, it warranted less constitutional protection. This line of analysis was developed principally in the context of freedom of expression, where the Court distinguished between core and peripheral expression. The interests underlying section 2(b) are the search for the truth, participation in social and political decision-

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<sup>69</sup> *McKinney*, *supra*, note 59, at 286.

<sup>70</sup> *Id.*, at 317-18.

<sup>71</sup> [1995] S.C.J. No. 43, [1995] 2 S.C.R. 513 [hereinafter "*Egan*"].

<sup>72</sup> *Id.*, at 576. This aspect of *Egan* was overruled by the Court in *Vriend*, *supra*, note 53.

making, and individual self-fulfillment. The Court reasoned that commercial expression (*Irwin Toy*,<sup>73</sup> *Rocket*, *Prostitution Reference*, *Butler*), hate speech (*Keegstra*, *Canada (Human Rights Commission) v. Taylor*,<sup>74</sup> *Ross v. New Brunswick School District No. 15*),<sup>75</sup> defamation (*Hill v. Church of Scientology*,<sup>76</sup> *R. v. Lucas*)<sup>77</sup> and sexually explicit expression (*Butler*, *Sharpe*, *Little Sisters Book and Art Emporium v. Canada*)<sup>78</sup> are peripheral to the interests protected by section 2(b) and accordingly trigger deference under section 1. By implication, political speech lies at the core of section 2(b) (*Thomson Newspapers*, *Harper*) and laws which restrict it do not warrant any deference. The commercial character of operating a retail establishment on Sunday also appeared to lead the Court in *Edwards Books* to treat the rights-claim as being of lesser value.

This elaborate set of categories and distinctions shaped the culture of constitutional argument for many years. But it has generated a number of problems. The first was that the Court has not followed its own schemas. In particular, notwithstanding *Irwin Toy*, it deferred in criminal law cases. Perhaps the most vivid examples are a series of appeals in which the Court turned back constitutional challenges to reverse onus provisions, notwithstanding that it had struck down such a provision in *Oakes*. In *R. v. Chaulk*,<sup>79</sup> the Court upheld the presumption that an accused is presumed sane until the contrary was proved, and, in so doing, applied not *Oakes* but *Edwards Books*. Indeed, it actually extended *Edwards Books*, by clarifying that the question under minimal impairment was whether a less intrusive means was available that “would achieve the same objective as effectively” as the measure under challenge.<sup>80</sup> Although the Court cited *Irwin Toy*, it did not refer to the distinction it drew between criminal and non-criminal matters, let alone attempt to apply it. Justice Iacobucci’s concurrence in the confusing set of judgments in *R. v. Wholesale Travel*<sup>81</sup> takes a similar approach. But

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<sup>73</sup> As read by the Supreme Court in *Rocket*, *supra*, note 54, at 251.

<sup>74</sup> [1990] S.C.J. No. 129, [1990] 3 S.C.R. 892.

<sup>75</sup> [1996] S.C.J. No. 40, [1996] 1 S.C.R. 825.

<sup>76</sup> [1995] S.C.J. No. 64, [1995] 2 S.C.R. 1130.

<sup>77</sup> [1998] S.C.J. No. 28, [1998] 1 S.C.R. 439.

<sup>78</sup> [2000] S.C.J. No. 66, [2000] 2 S.C.R. 1120.

<sup>79</sup> [1990] S.C.J. No. 139, [1990] 3 S.C.R. 1303 [hereinafter “*Chaulk*”].

<sup>80</sup> *Id.*, at 1341.

<sup>81</sup> [1991] S.C.J. No. 79, [1991] 3 S.C.R. 154.



perhaps the most startling judgment is *R. v. Downey*,<sup>82</sup> in which the Court upheld a reverse onus provision largely identical to the one which was challenged in *Oakes* — that presumed living off the avails of prostitution from the fact of living with a prostitute. Not surprisingly, McLachlin J. in dissent argued that *Oakes* meant that the law was unconstitutional because it was over-inclusive. But the majority — without even citing *Irwin Toy* — baldly stated that “Parliament is not required to choose the absolutely least intrusive alternative”.<sup>83</sup>

More recently, the Court has *not* deferred in cases in which it was clearly faced with legislation which balanced conflicting economic interests. Consider *M. v. H.* Although the Court acknowledged that it should defer “where the impugned legislation involves the balancing of claims of competing groups”, it concluded that “[t]his is not such a case”, since “no group will be disadvantaged by granting members of same-sex couples access to ... spousal support”.<sup>84</sup> But while it is true that extending the spousal support regime to same sex couples does not harm the interests of opposite sex couples, it does affect the economic dynamics and balance of power *within* same sex relationships. Indeed, precisely for that reason, H. opposed M.’s constitutional challenge. Another example is *Dunmore*. The Court appeared to reason that since deference was warranted where the legislature acts on behalf of a vulnerable group, no deference is required when the legislature is balancing the interests of two different vulnerable groups — in *Dunmore*, family farmers and agricultural workers. However, even if there were vulnerable groups on both sides of the equation — such that vulnerability came off the table as a reason for deference — on *Irwin Toy*, the existence of competing interests alone is a reason for deference.<sup>85</sup> Indeed, in this respect, it is hard to square *Dunmore*’s lack of deference with *McKinney* and *Advance Cutting*.<sup>86</sup>

But perhaps a more serious problem which emerged is that the distinctions drawn by the Court were untenable. This became most

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<sup>82</sup> [1992] S.C.J. No. 48, [1992] 2 S.C.R. 10.

<sup>83</sup> *Id.*, at 37.

<sup>84</sup> *M. v. H.*, *supra*, note 54, at para. 126.

<sup>85</sup> However, compare *Auton v. British Columbia*, [2004] S.C.J. No. 71, 2004 SCC 78, where the Court misapplied s. 15 arguably because it did not wish to enter the hornet’s nest of resource allocation in health care.

<sup>86</sup> *KMart*, *supra*, note 62, is arguably different, because of the presence of the public interest in freedom of expression in the context of secondary picketing.

apparent in the context of freedom of expression.<sup>87</sup> Recall that the Court had classified political expression as core expression worthy of the highest level of constitutional protection. It became quickly apparent that expression which the Court had classified as peripheral was arguably political in character. Indeed, debates over how to classify expression were central to the doctrinal politics of each appeal. In *Butler*, for example, the intervener British Columbia Civil Liberties Association argued that since “sexual norms, behaviours and identities have a bearing on the structure of political life”, sexually explicit expression was in fact a form of political expression.<sup>88</sup> This claim has been most forcefully advanced by sexual minorities, who argue that dominant portrayals of sexuality are part and parcel of a culture of discrimination. This view was at the heart of the submissions made by the appellants and the interveners LEAF and EGALE in *Little Sisters*. And an even clearer example is hate speech, whose political character is hard to dispute, notwithstanding its odious content.<sup>89</sup> Indeed, the disagreement between the majority and dissent and *Keegstra* largely turned on whether hate speech should be understood as political expression — and hence as lying at the core of section 2(b). As McLachlin J. wrote in dissent, “[e]xperience shows that in actual cases it may be difficult to draw the line between speech which has value to democracy or social issues and speech which does not.”<sup>90</sup>

Even in the commercial speech context, McLachlin J.’s plurality judgment in *RJR-MacDonald* offered rather qualified support for the Court’s earlier statements in *Butler* and the *Prostitution Reference* regarding the peripheral nature of advertising. Thus, she stated that it was “arguably less important than some forms of speech” and “may be easier to justify than other infringements”, and then proceeded to explain the positive value to consumers of tobacco advertising, emphasizing that commercial speech in general “should not be lightly

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<sup>87</sup> For a useful overview, see K. Roach & D. Schneiderman, “Freedom of Expression in Canada” in G.-A. Beaudoin & E. Mendes, eds., *The Canadian Charter of Rights and Freedoms*, 4th ed. (Markham, ON: LexisNexis Butterworths, 2005), at 257-323.

<sup>88</sup> L. Gotell, “Shaping *Butler*: The New Politics of Anti-Pornography” in B. Cossman *et al.*, *Bad Attitude/s on Trial: Pornography, Feminism and the Butler Decision* (Toronto: University of Toronto Press, 1997) 48, at 76.

<sup>89</sup> S. Braun, *Democracy Off Balance: Freedom of Expression and Hate Propaganda Law in Canada* (Toronto: University of Toronto Press, 2004).

<sup>90</sup> *Keegstra*, *supra*, note 66, at 842.

dismissed”.<sup>91</sup> Justice LeBel in *R. v. Guignard*<sup>92</sup> went even further, and recognized “the substantial value” of commercial expression because of “the very nature of our economic system, which is based on the existence of the free market” and “[t]he orderly operation of that market depends on businesses and consumers having access to abundant and diverse information”.<sup>93</sup> Finally, the Court has refused to accord less constitutional protection to economically motivated expression in the labour relations context, in a pair of decisions on secondary picketing, *KMart* and *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West)*.<sup>94</sup> The fact that economic interests motivate picketing by employees did not warrant deference, because working conditions and terms of employment “inform one’s identity, emotional health, and sense of self-worth” and “may impact on the personal lives of workers even outside their working hours”.<sup>95</sup>

And even if one brackets the problem of how to categorize different kinds of expression, another problem arises. In several cases involving restrictions on freedom of expression, the considerations on the question of deference point in opposite directions. On the one hand, certain kinds of speech have been criminalized with the possibility of imprisonment, and therefore on *Irwin Toy* attract the highest standard of review under section 1. But on the other hand, the speech in many cases has been peripheral, which argues for deference. Thus, the peripheral nature of sexually explicit expression was acknowledged in *Butler* and *Sharpe*, and of hate speech in *Keegstra*, as a reason for deference. Likewise, in the *Prostitution Reference*, Dickson C.J. stated that “[i]t can hardly be said that communications regarding an economic transaction of sex for money lie at, or even near, the core of the guarantee of freedom of expression”,<sup>96</sup> and deferred for that reason. So too in *Butler*, in which the Court reasoned that “the fact that the targeted material is expression which is motivated, in the overwhelming majority of cases, by economic

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<sup>91</sup> *RJR-MacDonald*, *supra*, note 22, at paras. 170, 171 and 170 (emphasis added).

<sup>92</sup> [2002] S.C.J. No. 16, 2002 SCC 14.

<sup>93</sup> *Id.*, at para. 21. For an early criticism of the positive value attached by the Court to commercial expression, see D. Schneiderman, “Consumer Interests and Commercial Speech: A Comment on *RJR-McDonald v. Canada (A.G.)*” (1996) 30 U.B.C. L. Rev. 165.

<sup>94</sup> [2002] S.C.J. No. 7, [2002] 1 S.C.R. 156. Strictly speaking, this was a common law judgment, but the development of the common law was informed by the Charter.

<sup>95</sup> *Id.*, at paras. 33 and 34.

<sup>96</sup> *Prostitution Reference*, *supra*, note 53, at 1135.

profit”<sup>97</sup> reinforced the case for deference. But in none of these cases did the Court acknowledge the fact that the criminal nature of the prohibition counted *against* deference, let alone provide any additional criteria to sort out the conflict between the guidance provided by its previous case law. This is all the more bizarre given that *Irwin Toy* itself raised this problem, because it involved the regulation of commercial speech (warranting deference) through a regime that created criminal sanctions, including imprisonment (warranting no deference), albeit through provincial law.

The difficulties raised by *Keegstra*, the *Prostitution Reference*, *Butler*, *Sharpe*, and *Irwin Toy* itself point to perhaps the most fundamental problem of all — the distinction between criminal law and other areas of public policy as a determinant of deference. The case in which the Court squarely faced this problem was *RJR-MacDonald*, in which restrictions on tobacco advertising were backed up by criminal sanctions. But as judges in both the majority and dissent noted, the legislation *also* balanced competing interests, as opposed to simply setting up the state as the singular antagonist of the individual. Justice La Forest listed the relevant interests who expressed views during the legislative deliberations surrounding the adoption of the challenged legislation: “medicine, transport, advertising, smokers’ rights, non-smokers’ rights, and tobacco production”.<sup>98</sup> Justice La Forest famously deferred in his dissent, and obviously viewed the criminal character of the legislation as not dispositive. Even though McLachlin J. did not defer, she acknowledged the fundamental challenge that understanding the legislation as simultaneously criminal and as balancing competing interests posed for *Irwin Toy*. “Such distinctions may not always be easy to apply”, she observed, since “the criminal law is generally seen as involving a contest between the state and the accused, but it also involves an allocation of priorities between the accused and the victim, actual or potential”.<sup>99</sup> In other words, since crimes are not victimless, criminal laws necessarily and inescapably balance the competing interests of victims and the accused. Indeed, one could push this line of analysis even one step further, and argue that in many cases, the criminal law is a form of protective legislation which is designed to

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<sup>97</sup> *Butler*, *supra*, note 67, at 501.

<sup>98</sup> *RJR-MacDonald*, *supra*, note 22, at para. 70.

<sup>99</sup> *Id.*, at para. 135.

protect vulnerable groups, and, indeed, the Charter interests (*e.g.*, bodily integrity) of those groups. Perhaps the leading examples are sexual offences, the victims of which are overwhelmingly women and children. The failure of the Court to appreciate these points in *R. v. Seaboyer*,<sup>100</sup> *R. v. O'Connor*,<sup>101</sup> and *R. v. Daviault*<sup>102</sup> led Parliament in legislative replies to highlight these facts, clearly with a view to directing the Court to defer in future constitutional challenges.<sup>103</sup>

So in sum, the dominant narrative of the legacy of *Oakes* is the rise and collapse of simple, dichotomous categorizations meant to help the Court to calibrate the degree of deference according to the particular

<sup>100</sup> [1991] S.C.J. No. 62, [1991] 2 S.C.R. 577 [hereinafter "*Seaboyer*"].

<sup>101</sup> [1995] S.C.J. No. 98, [1995] 4 S.C.R. 411 [hereinafter "*O'Connor*"].

<sup>102</sup> [1994] S.C.J. No. 77, [1994] 3 S.C.R. 63 [hereinafter "*Daviault*"].

<sup>103</sup> The reply to *Seaboyer*, *supra*, note 100, and *O'Connor*, *supra*, note 101, Bill C-46, S.C. 1997, c. 30, opened its preamble with the following passages:

WHEREAS the Parliament of Canada continues to be gravely concerned about the incidence of sexual violence and abuse in Canadian society and, in particular, the prevalence of sexual violence against women and children;

WHEREAS the Parliament of Canada recognizes that violence has a particularly disadvantageous impact on the equal participation of women and children in society and on the rights of women and children to security of the person, privacy and equal benefit of the law as guaranteed by sections 7, 8, 15 and 28 of the *Canadian Charter of Rights and Freedoms*;

WHEREAS the Parliament of Canada intends to promote and help to ensure the full protection of the rights guaranteed by the *Canadian Charter of Rights and Freedoms* for all, including those who are accused of, and those who are or may be victims of, sexual violence or abuse;

WHEREAS the rights guaranteed by the *Canadian Charter of Rights and Freedoms* are guaranteed equally to all and, in the event of a conflict, those rights are to be accommodated and reconciled to the greatest extent possible;

Bill C-72, S.C. 1995, c. 32, the reply to *Daviault*, contained similar language in its preamble:

WHEREAS the Parliament of Canada recognizes that violence has a particularly disadvantaging impact on the equal participation of women and children in society and on the rights of women and children to security of the person and to the equal protection and benefit of the law as guaranteed by sections 7, 15 and 28 of the *Canadian Charter of Rights and Freedoms*;

WHEREAS the Parliament of Canada recognizes that there is a close association between violence and intoxication and is concerned that self-induced intoxication may be used socially and legally to excuse violence, particularly violence against women and children;

...

WHEREAS the Parliament of Canada desires to promote and help to ensure the full protection of the rights guaranteed under sections 7, 11, 15 and 28 of the *Canadian Charter of Rights and Freedoms* for all Canadians, including those who are or may be victims of violence ...

For commentary on Bill C-72 which emphasizes the importance of the preamble to future constitutional litigation, see I. Grant, "Second Chances: Bill C-72 and the *Charter*" (1996) 30 O.H.L.J. 379.

features of each case. An interesting piece of supporting evidence is that in recent jurisprudence we only rarely see the quotation of the famous passage in *Irwin Toy*, whereas it was commonplace for the entire passage to be reproduced in the years immediately following that judgment, as a kind of Rosetta Stone for section 1. If we had to date the death of the categorical approach to section 1, it would be with *Thomson Newspapers* in 1998. In that case, a majority of the Court agreed with McLachlin J.'s scepticism towards *Irwin Toy*'s categorical distinction between criminal and non-criminal legislation, and went further, stating that "nothing ... suggests that there is one category of cases in which a lower standard of justification under s. 1 is applied, and another category in which a higher standard is applied".<sup>104</sup> But although the categories have collapsed, they have survived as *factors* which direct, but do not determine, the judicial approach in individual cases. And so *Thomson Newspapers* recasts many of the categorical distinctions developed by the Court as factors to be weighed and balanced, without any clear criteria as to their relationship and relative priority. The result is a highly context-driven inquiry. Categories, unsuccessful on their own terms, have paved the way for *context* as the new touchstone of section 1.

### III. THE COUNTER-NARRATIVE

The dominant narrative makes sense of much of the last 20 years of working with *Oakes*. But it misses out on another legacy of *Oakes*, which is of equal and increasing importance.

This counter-narrative begins with *Oakes* itself. In many ways, the centrality of *Oakes* to the Court's evolving experience with the Charter is puzzling, given the procedural history of the case. As Robert Sharpe and Kent Roach tell us in *Brian Dickson: A Judge's Journey*,<sup>105</sup> *Oakes* came before the Court as a garden variety criminal appeal. The lower court litigation gave no hint of the enormous importance of the case, and so, not surprisingly, no Attorneys-General intervened. Moreover, since the Court had not determined in advance of the hearing that this would be the case in which it set out the test for section 1, and the Court's own stance on the role of interveners in Charter cases was still in its infancy and a topic of considerable internal debate, the question of scheduling a

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<sup>104</sup> *Thomson Newspapers*, *supra*, note 24, at para. 90.

<sup>105</sup> (Toronto: University of Toronto Press, 2003), at 332-36.

re-hearing and inviting intervenor submissions on this very point did not even arise.<sup>106</sup> And so it was left to the parties to present arguments to the Court. But to the extent that the parties addressed questions of constitutional method, they focused largely on the interpretation of section 11(d), since this was also the first case concerning that provision. They devoted minimal attention to the methodological question of how section 1 should be interpreted. The hearing likewise focused on section 11(d). And even in the post-hearing conference, section 1 was not an issue. It was only later that Dickson C.J. decided to tackle section 1, working closely with his clerks (Joel Bakan and Colleen Sheppard) and Executive Legal Officer (Jim McPherson).

Against this procedural backdrop, and with 20 years of hindsight, it is questionable whether the Court was wise to strike out as boldly as it did in *Oakes*.<sup>107</sup> For in addition to setting up a stringent test of justification, *Oakes* also made *empirics* central to every stage of the *Oakes* test. As the Court said in a largely ignored passage:

Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit.<sup>108</sup>

This passage appears to have been largely overlooked in the academic literature. Moreover, it has been quoted infrequently by the

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<sup>106</sup> Compare the Court's later approach in *R. v. Stillman*, [1997] S.C.J. No. 34, [1997] 1 S.C.R. 607, which also came up as a garden variety ss. 8 and 24(2) appeal, with submissions by the parties only. After the initial hearing was held (on 26 January 1996), the judges decided that they needed a re-hearing with the benefit of submissions from interveners, I suspect because disagreements emerged on the Court over how to interpret s. 24(2). The Court therefore issued the following order (on 24 May 1996):

In view of the importance of the issues raised on the facts of this appeal which, in some aspects, invite a re-consideration of established principles as regards the application of s. 24(2) of the *Canadian Charter of Rights and Freedoms*, and in view of the fact that this appeal was heard by a bench of seven Justices without representations from any interveners, a re-hearing is ordered, to be heard by the full Court during the Fall session.

In the re-hearing (on 7 November 1996), there were 11 interveners in total, including many provincial attorneys-general.

<sup>107</sup> For other misgivings regarding *Oakes*, see P. Blache, "The Criteria of Justification Under *Oakes*: Too Much Severity Generated Through Formalism" (1991) 20 Man. L.J. 437; N. Siebrasse, "The *Oakes* Test: An Old Ghost Impeding Bold New Initiatives" (1991) 23 Ottawa L. Rev. 99; M.L. Friedland, "The Criminal Justice in Canada Revisited" (2004) 48 Crim. L.Q. 419, at 445-53.

<sup>108</sup> *Oakes*, *supra*, note 1, at 138.

Court — only in four Charter cases,<sup>109</sup> whereas *Oakes* has been cited by the Court in 152 subsequent judgments.<sup>110</sup> But it is becoming increasingly central to the Court's jurisprudence. The justice most responsible for bringing the Court's attention to this issue has been McLachlin C.J. As she explained in *RJR-MacDonald*, the *Oakes* test sets up a process of “reasoned demonstration”, as opposed to simply accepting the say-so of governments.<sup>111</sup> By this, she meant that “[t]he s. 1 inquiry is by its very nature a fact-specific inquiry”.<sup>112</sup> As she continued:

In determining whether the objective of the law is sufficiently important to be capable of overriding a guaranteed right, the court must examine the *actual objective* of the law. In determining proportionality, it must determine the *actual connection* between the objective and what the law *will in fact achieve*; the *actual degree* to which it impairs the right; and whether the *actual benefit* which the law is calculated to achieve outweighs the *actual seriousness* of the limitation of the right. In short, s. 1 is an exercise based on the facts of the law at issue and the proof offered of its justification, not on abstractions.<sup>113</sup>

Later on, in *Sauvé*, McLachlin C.J. built upon these themes. She held that governments seeking to justify the denial of the right to vote to prisoners under section 1 cannot rely on “vague and symbolic objectives”, such as inculcating respect for the rule of law.<sup>114</sup> Rather, rights can only be justifiably limited in response to concrete, precise and real problems or harms whose existence can be demonstrated to the satisfaction of a court through the normal trial process.

Needless to say, in *Oakes* itself, no such factual record was before the Court, because the parties had no notice that they were required to produce one. To understand why *Oakes* may have been unwise, imagine if the Crown *had* known the requirements of the *Oakes* test in advance

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<sup>109</sup> *RWDSU v. Saskatchewan*, [1987] S.C.J. No. 8, [1987] 1 S.C.R. 460; *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] S.C.J. No. 10, [1987] 1 S.C.R. 313; *R. v. Jones*, [1986] S.C.J. No. 56, [1986] 2 S.C.R. 284; *PSAC v. Canada*, [1987] S.C.J. No. 9, [1987] 1 S.C.R. 424.

<sup>110</sup> Based on a keyword search of “Oakes” in the Supreme Court of Canada judgment database on 14 April 2006.

<sup>111</sup> *RJR-MacDonald*, *supra*, note 22, at para. 129.

<sup>112</sup> *Id.*, at para. 133.

<sup>113</sup> *Id.* (emphasis added).

<sup>114</sup> *Sauvé*, *supra*, note 54, at paras. 21-22.



and attempted to adduce evidence sufficient to justify the challenged provision. Would it have been possible to provide evidence meeting the civil standard of proof mandated by *Oakes* with respect to each constituent element of the test? In particular, would it have been possible to definitely prove that the means chosen minimally impaired the right to be presumed innocent — *i.e.*, that other less intrusive means would not have been equally effective? Indeed, what *kind* of proof would have sufficed? The conundrum raised by this hypothetical is in fact a more general problem that has emerged as a central feature of Charter adjudication. Public policy is often based on approximations and extrapolations from the available evidence, inferences from comparative data, and, on occasion, even educated guesses. Absent a large-scale policy experiment, this is all the evidence that is likely to be available. Justice La Forest offered an observation in *McKinney* which rings true: “[d]ecisions on such matters must inevitably be the product of a mix of conjecture, fragmentary knowledge, general experience and knowledge of the needs, aspirations and resources of society”.<sup>115</sup>

In other words, *Oakes*’ approach to interpreting section 1 has unwittingly created a major institutional dilemma for the Court, given the practical reality that public policy is often made on the basis of incomplete knowledge. In many important cases, disputes over justifiable limits on Charter rights have been *factual* disputes about the nature of social problems, and the effectiveness of government policy instruments in combating them. Although it has never been framed in this way, the basic question in these cases is the same: who should bear the risk of empirical uncertainty with respect to government activity that infringes Charter rights? This has become one of the unarticulated yet central questions in Charter litigation. It has given rise to an extensive jurisprudence, and is one of the principal legacies of *Oakes*.

One answer would be that in a constitutional, rights-based regime, in which rights are the rule and of presumptive importance, limitations on rights are the exception, governments bear the onus of justification in upholding rights-infringing measures, and the state bears the risk of empirical uncertainty. But to set such a high bar for governments may be to ask too much of them. It may simply be impossible to prove with scientific certainty that the means chosen to combat the problem actually will do so, and that other, less intrusive means to tackle the

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<sup>115</sup> *McKinney*, *supra*, note 59, at 304.

problem are equally effective. As La Forest J. wrote in his dissenting judgment in *RJR-MacDonald*, to require governments to bear the risk of empirical uncertainty “could have the effect of virtually paralyzing the operation of government ... it will be impossible to govern ... it would not be possible to make difficult but sometimes necessary legislative choices. There would be conferred on the courts a supervisory role over a state itself essentially inactive”.<sup>116</sup> And so another answer would be for the courts to not require governments to adduce much in the way of a factual record at all. But this would seem to read out the requirement that reasonable limits be “demonstrably justified”, set out in the text of section 1 itself, and to ask courts to accept the say-so of governments on the existence of public policy problems, and the relative efficacy of policy instruments in dealing with them.

The Court has struck a compromise between these two extremes. In cases in which there is conflicting or inconclusive social science evidence, the question is whether the government has a “reasonable basis” for concluding that an actual problem exists, that the means chosen would address it, and that the means chosen infringes the right as little as possible.<sup>117</sup> This standard is understood as expecting something less of governments than definitive, scientific proof. But an absolute lack of evidence is unacceptable; there must be some factual basis for the public policy.

A pair of examples explains how these principles have operated in practice. In *Irwin Toy*, the Court upheld a Quebec statute prohibiting advertising directed at children under 13 years of age, on the basis that children were unable to distinguish fact from fiction and were susceptible to manipulation. The evidence before the Court clearly demonstrated that children between the ages of 2 and 6 could not distinguish fact from fiction, whereas expert opinion was divided on at what point between 7 and 13 years old “children generally develop the cognitive ability to recognize the persuasive nature of advertising”.<sup>118</sup> However, this evidence, albeit inconclusive, was enough for the Court. As it said, the cut-off age of 13 was made “without access to complete knowledge”, but as long as “the legislature has made a reasonable assessment as to where the line is most properly drawn, especially if that

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<sup>116</sup> *RJR-MacDonald*, *supra*, note 22, at 67.

<sup>117</sup> *Irwin Toy*, *supra*, note 18, at 994.

<sup>118</sup> *Id.*, at 989.

assessment involves weighing conflicting scientific evidence ... it is not for the court to second guess. That would only substitute one estimate for another".<sup>119</sup> Conversely, in *Ford v. Quebec*,<sup>120</sup> the Court was faced with a blanket requirement that commercial signage in Quebec only be in French. The Court held that while the evidentiary record was sufficient to demonstrate the importance of the government's objective, there was a complete absence of evidence on the critical question of whether "the requirement of the use of French only is either necessary for the achievement of the legislative objective or proportionate to it".<sup>121</sup> As a consequence, the Court found that the government had not met its burden of justification under section 1.<sup>122</sup>

As *Irwin Toy* and *Ford* illustrate, the "reasonable basis" test has largely been worked out in the context of cases on freedom of expression. The Court has rejected conventional morality as an acceptable justification for limiting free speech, opting instead for the principle that speech can only be limited if it is harmful. Richard Moon usefully terms this the "behavioural approach", since it posits that expression will encourage listeners to act in harmful ways.<sup>123</sup> This interpretive choice has had the unanticipated effect of locking the Court into a search for evidence of the real, concrete harms of prohibited speech. The difficulties this has created for the Court have come home in its decisions on pornography and hate speech. Unable to rely on morality-based justifications for these laws, the Court has been confronted with the absence of definitive evidence demonstrating that these forms of speech are harmful. Wayne Sumner has recently reviewed the available empirical evidence, and concluded "that reliable evidence of harm is relatively scarce".<sup>124</sup> So not surprisingly, the Court

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<sup>119</sup> *Id.*, at 990.

<sup>120</sup> [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712 [hereinafter "*Ford*"].

<sup>121</sup> *Id.*, at 717.

<sup>122</sup> Also see *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] S.C.J. No. 41, [1991] 2 S.C.R. 22, where the Court found unconstitutional a cut-off age of 65 for the receipt of unemployment insurance benefits. One reason offered in defence of the cut-off was to prevent abuse by individuals who no longer intended to seek employment. In finding the cut-off unconstitutional, the Court noted that the federal government had not adduced any evidence to substantiate this claim.

<sup>123</sup> R. Moon, *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press, 2000), at 70-75.

<sup>124</sup> W. Sumner, *The Hateful and the Obscene: Studies in the Limits of Free Expression* (Toronto: University of Toronto Press, 2004), at 181. This evidence is reviewed in ch. 5 of his

has had to alter the standard of proof. In three of its pornography decisions (*Butler, Sharpe, Little Sisters*) the Court has been able to point to *some* social science evidence, which satisfies the reasonable basis test. And in cases on hate speech (*Keegstra, Ross*), where such evidence was entirely absent, the Court has relied on “experience and common sense”<sup>125</sup> and “reason or logic”<sup>126</sup> to bridge the empirical gap. Moreover, common sense and logic were relied on in two of the pornography decisions (*Butler, Sharpe*) as additional support for the conclusion that the speech was harmful.<sup>127</sup>

Taken together, the Court terms this approach the “reasonable apprehension of harm” test. But although the Court has been unanimous in accepting the reasonable basis test to assess inconclusive social science evidence, and in permitting governments to rely on common sense or logic to surmount evidentiary gaps, there have been significant disagreements in recent cases over the boundaries of these doctrines. Significantly, these divisions on the Court have not turned on the sorts of problems which arose out of the categorical distinctions which it developed in *Irwin Toy* and other cases. For example, there is no disagreement in these cases over how to categorize the speech in question, or on whether to defer under minimal impairment.

So what *is* the basis of disagreement? In some cases, the disagreement has centred on what kinds of *inferences* governments are entitled to draw from inconclusive evidence. The most famous clash occurred in *RJR-MacDonald*, and centred on the link between tobacco advertising and consumption, given the absence of definitive evidence linking the two. The Court divided on whether governments were entitled to infer from the widespread use of “brand preference” and “informational” advertising by tobacco companies that such a link existed. Justice La Forest in dissent was willing to infer that by

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work. In the absence of reliable evidence of harm, Sumner is led to the conclusion that *Keegstra, Taylor, Butler* and *Little Sisters* and *Sharpe* were all wrongly decided.

<sup>125</sup> *Sharpe, supra*, note 65, at para. 94.

<sup>126</sup> *RJR-MacDonald, supra*, note 22, at para. 154.

<sup>127</sup> Chief Justice McLachlin’s position on the circumstances under which reason or logic can be relied on by the Court seems to have evolved over time. Thus, in *RJR-MacDonald*, she appeared to suggest that *some* evidence (which she termed “less direct evidence” at para. 156) was required. But in *Sharpe*, she was clearly willing to bridge the empirical gap even in the absence of evidence although some inconclusive evidence was available, making this unnecessary, strictly speaking.

convincing smokers not to quit, these advertisements had the effect of sustaining levels of consumption, while McLachlin J. refused to do so.<sup>128</sup>

And the Court has also split on the circumstances in which it is appropriate to apply “logic” or “common sense” to surmount an absence of evidence. What is particularly interesting is that the Court has divided on this question in two cases concerning political expression, *Thomson Newspapers* and *Harper*. From the vantage point of the categories of deference set out in *Irwin Toy* and subsequent decisions, these were easy cases, because political expression lies at the core of section 2(b), and is a clear instance in which governments should be held to a strict standard of review. But although the Court agreed that political speech was at issue, it was nonetheless sharply divided over how to address the lack of definitive proof for the factual premises underlying the challenged laws. Although these cases have attracted minimal attention from constitutional scholars for their broader importance to the Court’s understanding of the judicial role under the Charter, they are worthy of close attention because they tell us that there is another legacy of *Oakes*.

At the heart of the majority judgment in *Thomson Newspapers* was the concern that too broad an approach to bridging empirical gaps through judicial notice could undermine entirely the idea that governments can only justifiably limit constitutional rights to respond to real problems. The majority accordingly attempted to set some limits on when it could accept the existence of harm without evidence. It suggested that its common sense or logic approach to the existence of harm applied to hate speech and pornography because “the possibility of harm is within the everyday knowledge and experience of Canadians, or where factual determination and value judgments overlap”.<sup>129</sup> Thus the majority refused to infer from the fact that opinion polls influence voter choice in election campaigns that inaccurate polls mislead large numbers of voters and have a significant impact on the outcome of an election, “without more specific and conclusive evidence to that effect”.<sup>130</sup> It therefore found unconstitutional a publication ban on public

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<sup>128</sup> In my view, that decision was largely driven by the refusal of the Attorney-General of Canada to disclose to the Court a study examining the comparative effectiveness of a partial and complete advertising ban on tobacco advertising, which led the Court to draw an adverse inference that such an option would have been an equally effective means for achieving the government’s objective (as emphasized in a separate concurring judgment by Lamer C.J. and Iacobucci J.).

<sup>129</sup> *Thomson Newspapers*, *supra*, note 24, at para. 116.

<sup>130</sup> *Id.*, at para. 117.

opinion polls within the final three days of a federal election campaign. The message was that pornography and hate speech were in a special and narrow category.

But then in *Harper*, a divided Court disregarded this self-imposed limitation, and upheld restrictions on third party expenditures during election campaigns on the eve of the last federal vote. The justifications for the restrictions were to further the value of political equality (to equalize participation in political debate, to protect the outcome of an election from being distorted by third party expenditures, and to safeguard the public's confidence in the electoral process) and to protect the integrity of spending limits for candidates and political parties. The majority openly acknowledged that both the alleged harm and the efficacy of legislative responses to it were "difficult, if not impossible, to measure scientifically",<sup>131</sup> but nonetheless was willing to reason both that the harm existed and that the cure was effective. The dissent, led by McLachlin C.J., argued that in the absence of evidence, "[t]he dangers posited are entirely hypothetical" and "unproven and speculative" and that "the legislation is an overreaction to a non-existent problem", and was completely unwilling to entertain the common sense argument.<sup>132</sup>

And these disagreements have now spilled over into cases outside the context of freedom of expression. Consider *Figueroa*, which concerned the right to vote protected by section 3. The Court unanimously found unconstitutional the 50-candidate threshold for federal political parties to be registered. Registered political parties possess the right to issue tax receipts for donations received outside the election period, and to extend to candidates the right to transfer unspent election funds to the party. Moreover, candidates of registered parties can include their party affiliation on an election ballot. For Iacobucci J. (speaking for six members of the Court), an important consideration was the lack of any evidence demonstrating a link between these measures and two of the stated objectives underlying the scheme: to improve the effectiveness of the electoral process, and to increase the possibility of a stable Parliament and better governance. But LeBel J. (speaking for three judges) found it "hard to imagine how one could prove empirically" that stable Parliaments provided better governance.<sup>133</sup> The

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<sup>131</sup> *Harper*, *supra*, note 25, at para. 79.

<sup>132</sup> *Id.*, at paras. 34, 41 and 34.

<sup>133</sup> *Figueroa*, *supra*, note 53, at para. 181.

second is *Lavoie*, in which the Court rejected a section 15 challenge to hiring preferences for Canadian citizens in the federal civil service. Central to the reasoning of McLachlin C.J. in her dissenting reasons (speaking for two judges) was that the government had adduced no evidence at all to demonstrate a rational connection between the hiring preference and the goals of encouraging non-citizens to naturalize and enhancing the value of Canadian citizenship. She was unwilling to bridge this gap through reason, logic or common sense, even though the doctrinal tools were available for her to do so. But Bastarache J. (speaking for four judges in the majority) was willing to do precisely that.

In retrospect, it may have been imprudent for the Court in *Oakes* to stipulate that the evidence to justify a limitation on a Charter right must be “cogent and persuasive” in a case in which no government had attempted to grapple with this requirement and to bring to the Court’s attention the difficulties attendant in adducing such evidence. It is interesting to speculate on what the test for section 1 would have looked like had a re-hearing with interveners been held in *Oakes*, had *Edwards Books* been handed down first, or had *Oakes* and *Edwards* been heard and drafted together.

#### IV. CONCLUSION: REFLECTIONS ON *CHAULLI*

For the last two decades, the Court has struggled to come to terms with the institutional task it set itself in *Oakes*. In response to the question of who bears the risk of empirical uncertainty with respect to government activity that infringes Charter rights, the rights-claimant or the government, the answer has been, in effect, both. But even though the Court has agreed on this compromise, deep disagreements persist along its ragged edges. The Court has yet to work out under what circumstances it will use common sense, reason or logic to bridge an absence of evidence, and to delineate when it will allow inferences to be drawn from inconclusive social science evidence.

Understanding these sorts of problems to be the legacy of *Oakes* also allows us to view judgments outside the section 1 context in a different light. I want to conclude by linking this counter-narrative to *Chaoulli*, in which the Court struck down Quebec’s ban on private health insurance. Although the focus of the case was section 7, *Oakes* and the jurisprudence under section 1 have an obvious relevance. To be

sure, the two provisions have a complicated relationship, since the principles of fundamental justice are an internal limit on the scope of section 7 which in theory could do some of the work of section 1. The Court recently sought to differentiate the two provisions in *Malmo-Levine*, suggesting that:

... for a rule or principle to constitute a principle of fundamental justice for the purposes of s. 7, it must be a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.<sup>134</sup>

By contrast, the inquiry under *Oakes* is rather different. Unfortunately, the Court has not entirely succeeded in minimizing the overlap between the two provisions. The key problem is that the Court has held that section 7 protects individuals from “arbitrary” deprivations of life, liberty and security of the person, where arbitrary is defined as a deprivation that “bears no relation to, or is inconsistent with, the objective that lies behind [it]”.<sup>135</sup> This replicates the “rational connection” analysis of the *Oakes* test, albeit in a very deferential fashion. Chief Justice McLachlin’s reasons in *Chaoulli* further run the two provisions together by interpreting arbitrariness as connoting necessity — exactly the sort of inquiry mandated by *Oakes*. This move makes directly relevant to the interpretation of the principles of fundamental justice under section 7 the case law under section 1 subsequent to *Oakes*.

So how would my counter-narrative of *Oakes* have assisted the Court in *Chaoulli*? In the debate over whether governments should allow a parallel private system to deliver medically necessary services, there are two types of disagreements. The first is a disagreement at the level of principle, over whether individuals should be able to purchase faster and/or higher quality care on the private market. The second is the empirical disagreement over the impact of a parallel private system on Medicare. Quebec had defended the ban on private insurance on the

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<sup>134</sup> *Malmo-Levine*, *supra*, note 23, at para. 113.

<sup>135</sup> *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519, at 594-95, 619-20; *Malmo-Levine*, *supra*, note 23, at para. 135; *Chaoulli*, *supra*, note 27, at para. 130.



basis that doing so was necessary to preserve the integrity of the public system. This claim was the key point of disagreement between the majority and the dissenting judges, and, indeed, was the focus of extensive expert testimony at trial. Health services researchers testified that a parallel private system would reduce public support for the public plan because of the possibility of exit. Indeed, those most likely to exit — the wealthy — also have the greatest power to protect the public system, because they are disproportionately powerful politically. The trial court also heard testimony that a private sector would lead to the bleeding of human resources from the public sector, either if physicians leave Medicare entirely, or if physicians practising in both sectors prioritize their private patients. Finally, because private insurers would cherry-pick the healthiest and wealthiest patients, public health insurance would be left holding the bag for the sickest and the poorest, without the ability to pool risk across the entire population.

But there was evidence on the other side. An expert witness, and an interim report prepared by the Standing Senate Committee on Social Affairs, Science and Technology pointed to the co-existence of public and private sectors in a number of Organization for Economic Co-operation and Development (OECD) countries (*e.g.*, the United Kingdom and New Zealand) to dispute Quebec's claim that a ban on private insurance and a public monopoly were necessary to maintaining quality of care in the public sector.

The trial judge made a definitive finding of fact that Quebec's fears were well-founded: "We cannot act like ostriches. The result of creating a parallel private health care system would be to threaten the integrity, sound operation and viability of the public system".<sup>136</sup> The dissenters in the Supreme Court argued that absent a palpable error, the trial judge's findings of fact could not be disturbed, and was equally certain in its conclusions: "Failure to stop the few people with ready cash does not pose a structural threat to the Quebec health plan. Failure to stop private health insurance will, as the trial judge found, do so."<sup>137</sup>

But the majority strenuously disagreed. Justice Deschamps, writing for herself, stated that the trial judgment was "based solely on the 'fear' of an erosion of services",<sup>138</sup> and that "no study was produced or

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<sup>136</sup> *Chaoulli v. Quebec (Attorney General)*, [2000] J.Q. no 479 at para. 263.

<sup>137</sup> *Chaoulli*, *supra*, note 27, at para. 181.

<sup>138</sup> *Id.*, at para. 68.

discussed”<sup>139</sup> which substantiated this claim. Chief Justice McLachlin was even harsher, characterizing the empirical arguments both for and against Quebec’s ban on private health care as “competing but unproven ‘common sense’ arguments, amounting to little more than assertions of belief”.<sup>140</sup> “We are in the realm of theory”, she wrote.<sup>141</sup> The tie-breaker was the evidence from OECD countries, which “refutes the government’s theoretical contention that a prohibition on private insurance is linked to maintaining quality public health care”.<sup>142</sup>

Underlying this factual disagreement was a remarkable degree of agreement on the nature of the judicial role. Chief Justice McLachlin was clearest, stating that the courts’ task in Charter challenges to government policies “is to evaluate the issue in the light, not just of common sense or theory, but of the evidence”.<sup>143</sup> Testable, provable facts drive adjudication; judges must “look to the evidence rather than to assumptions”.<sup>144</sup> And for the most part, the dissenting judges defined their task as producing firm conclusions grounded in evidence, which pointed in the opposite direction. Thus, the trial judge’s definitive findings of fact merited deference from the Supreme Court. And the majority’s treatment of OECD data was dismissed as amateur public policy tourism. The dissenting judges’ assumption through most of its reasons, like the majority’s, appeared to be that governments had to meet a stringent test of justification; they only differed on whether that test had been met.

But in an important sense, setting up the nature of judicial review in this way misconceived the character of the problem. The trial judge was too definitive in concluding that private health care posed an unequivocal threat to the viability of the public system, and so too was the majority’s position that there was an absence of evidence on the issue. In reality, the Court was presented with a case in which the evidence was inconclusive or conflicting. Consider the two most comprehensive studies of health care reform in recent years, the Romanow Commission and the Kirby Committee. On the impact of a parallel private system on public health care, both are equivocal. Thus,

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<sup>139</sup> *Id.*, at para. 64.

<sup>140</sup> *Id.*, at para. 138.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*, at para. 149.

<sup>143</sup> *Id.*, at para. 150.

<sup>144</sup> *Id.*, at para. 152.

the Romanow Commission states that “Private facilities ... *may* actually make the situation worse for other patients because much-needed resources are diverted from the public health care system to private facilities”.<sup>145</sup> The Kirby Committee is likewise qualified in its conclusions, suggesting that “allowing a parallel private system ... *may* even make the public waiting lines worse”.<sup>146</sup>

Once the problem is framed in these terms, the direct and significant relevance of the counter-narrative of *Oakes* is obvious. Indeed, given that McLachlin C.J. has figured prominently in Canada’s jurisprudence of self-doubt and empirical uncertainty — in *RJR-MacDonald*, in *Sauvé*, in *Lavoie* and in *Harper* — one would have expected this material to be front and centre in her judgment. Astonishingly, however, she does not even mention, let alone engage with, these cases. And it is equally surprising that these cases only make a cameo appearance in the dissent.<sup>147</sup>

The Court’s complete failure to cite, follow, or even attempt to distinguish its own precedents led it to make a fundamental legal error: it posed the wrong question. The question was *not* whether Quebec had convincingly demonstrated that a ban on private insurance was necessary to maintain the integrity of public health insurance. Rather, the question was whether Quebec had a “reasoned apprehension of harm” that opening the door to private insurance would pose this threat. Instead of proceeding with cocksure certainty, the Court should have approached the constitutional challenge with self-doubt and judicial modesty. Mere disagreement with the Quebec government was not enough. The standard was whether the Quebec government lacked a “reasonable basis” upon which to proceed, and the materials put into evidence more than met this attenuated standard. The Court’s disregard for this evidence is nothing short of astonishing.

Had the Court only grasped the true legacy of *Oakes*, perhaps it could have avoided this grave mistake. And if *Oakes* is a comparative model for proportionality analysis under other rights-protecting

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<sup>145</sup> Canada, Commission on the Future of Health Care in Canada, *Building on Values: The Future of Health Care in Canada — Final Report* (Saskatoon: Commission on the Future of Health Care in Canada, 2002) (Commissioner: Roy J. Romanow, Q.C.), at 139 (italics added).

<sup>146</sup> Canada, The Standing Senate Committee on Social Affairs, Science and Technology, *The Health of Canadians — The Federal Role, Vol. 6: Issues and Options* (Ottawa: Senate Standing Committee on Social Affairs, Science and Technology, 2002) (Chair: The Honourable Michael J.L. Kirby), at 42 (italics added).

<sup>147</sup> *Chaoulli, supra*, note 27, at para. 176.

constitutions, then these kinds of problems are not particular to Canada. More generally, what is striking about the comparative reception of *Oakes* is that neither the narrative nor counter-narrative of the legacy of the judgment appears to have travelled outside of Canada. Foreign courts would be wise to grapple with these difficulties with the benefit of two decades of reflection by Canadian courts instead of simply applying the *Oakes* test in its original and undeveloped form.<sup>148</sup>

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<sup>148</sup> For a similar view, see M. de Merieux, “Establishing the Democratic Credentials of Legislation: *R. v. Oakes* and the Section 4 of the Human Rights Act (1998) (UK)” (2001) 30 *Comm. World L. Rev.* 193.

