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# *The Drafting of Section 1 of the Canadian Charter of Rights and Freedoms, and The Foundations of Oakes*

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## Introduction

Section 1 of the *Canadian Charter of Rights and Freedoms* is widely understood to ground a demanding framework for justifying limits of Charter rights. Yet how the text of Section 1 grounds this framework remains inadequately explained. While *Oakes* (1986) is the framework for determining how rights are limited under Section 1 of the Charter, the existing literature led by Hogg (2014) and Hiebert (1990) has only cursorily examined the link between the drafting history of section 1, the stringency found in the text of section 1, and the demanding framework developed later by *Oakes*.

While the existing literature tends to focus on Section 1's role in preserving the legislatures' room in limiting rights, this paper does not disagree with this but focuses on how Section1 came to possess a demanding standard. This paper also argues that the drafting history cautions us that the standard of justification should remain a workable one, not a standard so rigid that governments would be driven toward overuse of the legislative override (Section 33) of Charter rights. This drafting history matters because it documents the strengthening of the standard of justification that *Oakes* attempts to articulate. If the stringency of *Oakes* is grounded in the text and drafting of Section 1, the *Oakes* test is more than just an invention of the courts; the drafting history should be an important source for understanding *Oakes*. Access to new archival materials, including cabinet memoranda, briefing books, drafts of the Charter and internal government correspondence between 1980 and 1981,[1] adds to this account in Hogg (2014) on how several key formative moments in the drafting of Section 1 strengthened the standard of justification, but only to a certain extent.

This argument unfolds in two Sections. Section I reconstructs the textual evolution of Section 1 by identifying four parts that gave it its final form. Section II develops the implications of this drafting history for *Oakes*, arguing that the test's stringency is grounded in the text and design of Section 1, while also cautioning that the justification standard needs to remain workable.

## Section I: The New Archival Drafting History
### Part I. The Spring-Summer 1980: From Specified Sub-Clauses to a General Limitation Clause

When the Trudeau government returned to constitutional negotiations after the Quebec referendum in May 1980, federal officials and cabinet members began reassessing the earlier "best efforts" 1979 draft. They began reassessing, among several things, the wording of specified limitation sub-clauses to several Charter rights. Drafting difficulties, along with public criticism to limitations, led in July 1980 to the

[1] While an extensive second literature on Section 1 exists, the purpose of this commentary is to focus solely on the archival materials recently accessed, which is also publicly available on PrimaryDocuments.ca website. This material has been consolidated, with commentary, in Michael Scott and Charles Dumais, "The Drafting History of the *Canadian Charter of Rights and Freedoms"* (2024). Original digitized copy of documents referenced in this paper can be found in the above paper or on PrimaryDocuments.ca website.

eventual replacement of specified limitations sub-clauses with a general limitation clause that not only declared Charter rights were not absolute, but also laid down the principles that would constitutionally recognize the limitations of these rights.

On June 16, 1980, Minister of Justice Jean Chrétien submitted to cabinet a memorandum titled "Towards a New Canadian Constitution: Federal Position on the Priority Items" that revealed the governments doubts on several of the specified limitations sub-clauses. The document intended to pose "many questions on the generality of constitutional renewal and on the specific priority items… between now and September." (PDF p. 5) In the 1979 "Best Efforts Draft", limitations were provided only to categories "Fundamental Freedoms", "Legal Rights", and the "Mobility Rights" provision. In each case the text was similar: limitations had to be "prescribed by law as are reasonably justifiable in a free and democratic society" (PDF p. 7-9). The rest of the other provisions of the Charter were entrenched (meaning no limitations clauses general or not existed) implying that they would be subject to judicial development: the judiciary in Canada was expected to give legal interpretation of the Charter somewhat on the American model of judicial review where limitations to rights are a judicial led development as the court in Canada had done with the *Bill of Rights* (1960). Chrétien did not however express doubts about this approach so much as to the wording of each of the three limitation provisions of the 1979 "Best Efforts Draft". First, he invited cabinet ministers to reconsider whether the expression of "national security", in the limitations for the category of "Fundamental Freedoms", had not been discredited by American misuse (PDF p. 7). This concern with national security is not insignificant as it may have had a role later in winter 1980-81 in the federal approach to raising the standard of justification in the general limitations clause in Section 1. Chrétien also expressed doubts whether the limitation expressed in the category of "Legal Rights" would not invite unnecessary rigidity and litigation (PDF p. 8). And whether the mobility rights "limitations based on overriding economic and social considerations should be modified or withdrawn" given recent legislation passed in Nova Scotia and Newfoundland limiting the rights of out of province workers (PDF p. 9).

But the issue was not only scope of these sub-clauses, it was also how to tighten their final form. Up to this point they were merely shorthand, bullet points. The new federal draft dated July 4, 1980, tightened the limitations by adding the expression "subject only", certainly raising the existing language of being "prescribe by law", "reasonably justifiable" and "free and democratic society". The sub-clauses were also renamed "justifiable limitations" (as opposed to "limitation clauses") and the category of legal rights also introduced the term "derogated" instead of "limited".

The hurdle of redrafting the individual sub clauses that were cherished and guarded by the provinces appeared so large, coupled with public criticism, led to a federal memorandum dated July 16, 1980, accompanied by a new Federal draft proposing to side-step the difficulties by doing away with the limitations sub-clauses and replacing them with a single unspecified general limitations clause. Instead of renegotiating each limitation sub-clause, efforts were instead redirected to crafting general principles of limitations, in a single provision, that first noted that all rights while "guaranteed" were not absolute, and second, laid down the principles for limitation of Charter rights recognized by the earlier sub-clauses (free and democratic society) and adding a new one ("under the rule of law").

The first draft of the general clause was in the July 16 1980 federal draft and it was proposed to read as follows:

> "The Canadian Charter of Rights and Freedoms guarantees the fundamental rights and freedoms of individuals in Canada in accord with the principles of a free and democratic society under the rule of law."[2]

[2] July 16, 1980 Charter Draft https://primarydocuments.ca/wp-content/uploads/2023/10/CharterJuly161980.pdf

This federal proposal however notably removed the word "limitations" and the expression "prescribed by law" found in the limitations sub-clauses. And with the exception of justifiable limitations for Property Rights (although significantly reduced in scope), this July 16, 1980 federal draft replaced all the other limitations sub-clauses with this opening entrenchment clause. For the Federal government, this change addressed public criticism and allowed the government to recast Charter rights and freedoms as "not unlimited but subject to the principles of a free and democratic society under the rule of law",[3] thinking that would be "more attractive to the public (although perhaps not to provincial governments)".[4] In another confidential memorandum, also dated July 16, 1980, titled "Possible Alternatives to Section 1 of July 4, 1980 Draft", it is revealed that the new general clause chosen was the more rigorous of two proposed versions, presumably because it did not explicitly contained the word "limits" and that the alternative which did explicitly authorized "limits" were "generally recognized" as opposed to "in accord with the principles" – the latter being more rigid than the former (PDF p. 3).[5]

The two alternatives in the July 18, 1980, titled "Charter of Rights: Possible Alternatives to Section 1of July 4, 1980 Draft" were:

> "Alternative A
> 1. The Canadian Charter of Rights and Freedoms guarantees the fundamental rights and freedoms of individuals in Canada in accord with the principles of a free and democratic society [under the rule of law]."
>
> "Alternative B
> 1. The Canadian Charter of Rights and Freedoms guarantees the fundamental rights and freedoms of individuals in Canada subject only to such reasonable limits as are generally recognized in our free and democratic society."

This shift to a general limitation clause is significant because it embodies a standard of justification and thus rejects the implied American model of judicial review requiring the court to develop jurisprudence on interpreting limits without explicit textual guidance – a distinction discussed in these papers. The provinces seemed to have at this point preferred the specified limitations sub-clauses on rights that mattered to them and had accepted an open-ended judicial development based on the American model for the other unspecified provisions in the Charter. But by removing the bulk of the limitations sub-clauses (they kept a sub-clause limitation for property rights) and casting the general limitation clause as constraining both the court and the legislature (on how to give interpretation to rights with expressions like "guarantees", "principles" and "free and democratic society under the rule of law") the federal government was intentionally rejecting the American system of judicial review by opting to constrain the courts in the interpretation of limitations, paving a new model of judicial review recognizing the tradition of legislative deference in the parliamentary model but constraining it and the courts in how to do so.

Enough provinces rejected the Federal proposal for a general limitation clause: in context we might read the opposition not yet as philosophically against a greater role for the courts, they had after all accepted some role for provisions that did not have limitations sub-clauses as long as parliamentary sovereignty was recognized in the provisions that mattered to them. But on July 24, 1980, in the Report to Ministers by the Sub-Committee of Officials – a sub-committee of officials to federal and provincial Ministers "representing all eleven governments and under the chairmanship of Roger Tasse" – revealed that the provinces thought the language of the federal draft had left too much the court, not that it had given the court a new role. The provinces were thinking here of areas of provincial legislative powers and quickly evolving. The drafting

[3] This reasoning is revealed in the August 5, 1980, titled "Revised Discussion Draft with Memo". And July 24, 1980 memo https://primarydocuments.ca/wp-content/uploads/2024/01/Jul241980ChartofRightsReport.pdf
[4] Ibid.
[5] August 5, 1980, titled "Revised Discussion Draft with Memo" gives clarity as to why we see the specific limitations removed.

difficulties continued but were at least for now narrowed to this one general clause: the new general limitations clause attempted to articulate a standard for justifying limitations and it had done so by entrenching all Charter rights, but also subjecting them to judicial review under an explicitly legal standard. Manitoba opposed leaving the "limitations on the right to vote" to the courts. And the provinces opposed entrenching the category of "Non-discrimination Rights" saying that "It was recognized that entrenching this category would create a very substantial limitation on existing legislative powers in an area where rights are evolving, and would leave to the courts broad powers to judge social values." (PDF p. 3)

By July 24, 1980, the provinces were not open to a general limitation clause. As Roger Tasse reported:

> "On several occasions during discussion of the foregoing rights, concerns were expressed about the scope and meaning of the limitation clauses found in various sections. As one possible means of overcoming this problem federal representatives suggested that consideration be given to an opening clause in the Charter that would indicate that none of the rights and freedoms were absolutes but must be balanced against the interests of an organized free and democratic society operating under the rule of law. This could eliminate the need for any specific limitation clauses. This proposal was not favourably received by most provinces that responded to it". (PDF p. 3)

Although, some hope was expressed that "Non-Discrimination Rights" (what would be renamed later as "Equality Rights" could be subjected to entrenchment and judicial interpretation on its limits "if appropriate wording can be found", Tasse wrote. (PDF p. 3)

It is not clear why the Federal officials responded by returning to second alternative in the July 18, 1980 memorandum, but combining it with the proposal that the provinces rejected, given provincial opposition to it. If anything, Federal officials must have believed that "if appropriate wording can be found" might produce different results. On August 5, this amalgamation was presented to Prime Minister Pierre Trudeau for his consideration. The amalgamation combined both alternative options in the July 18, 1980, memorandum "Charter of Rights: Possible Alternatives to Section 1of July 4, 1980 Draft" read:

> "Alternative A
> 1. The Canadian Charter of Rights and Freedoms guarantees the fundamental rights and freedoms of individuals in Canada in accord with the principles of a free and democratic society [under the rule of law]."
>
> "Alternative B
> 1. The Canadian Charter of Rights and Freedoms guarantees the fundamental rights and freedoms of individuals in Canada subject only to such reasonable limits as are generally recognized in our free and democratic society."

And produced this draft version presented to the Prime Minister Pierre Trudeau in the August 5, 1980, titled "Revised Discussion Draft with Memo":

> "The Canadian Charter of Rights and Freedoms recognizes the following fundamental rights and freedoms of everyone subject only to such reasonable limits as are generally accepted in a free and democratic society." (PDF p. 2)

Under Trudeau's direction, the federal counterproposal to the provinces dated August 5, 1980, draft titled "Discussion Draft: The Canadian Charter of Rights and Freedoms", reverted back to the July 16, 1980 rejection, softening the federal version in only two respects: removing "guarantees" and substituting it with

the word "recognizes", and removing "individuals" and replacing it with "everyone" – a distinction that would matter later in 1981 with women's equality advocates.

> "The Canadian Charter of Rights and Freedoms recognizes the following fundamental rights and freedoms of everyone consistent with the principles of a free and democratic society under the rule of law." (PDF p. 12)

This draft version is what the federal government went into further negotiations in the late-summer 1980.

**Part II: Late Summer-September 1980 Provincial Counterproposal and the Federal Compromise**

Several more weeks of drafting ensued after the Federal proposal of August 5, 1980, was circulated. It appears that the provinces responded later on August 28, 1980, with a counterproposal of their own general clause, and that an agreement of sorts based on it was achieved between the federal and provincial officials ahead of the September First Ministers Conference in 1980. The reason for this is according to the August 15, 1980, "Charter of Rights: Status Report", is that the problems over drafting the limitations sub-clauses might have been considerable enough for some of the other provinces as well. One might wonder if public criticism was also a factor.

The provincial counterproposal circulated on August 28, 1980, titled "Provincial Proposal (In the event that there is going to be entrenchment)", incorporated new language, like "parliamentary democracy" (replacing the phrase "democratic society" in the federal draft) unsurprisingly emphasizing the role of the legislature in crafting rights limitations in this new standard of justification. This showed that the problem was not only getting the "right wording" but whether some of the more political deferential language found in the earlier limitations sub-clauses could be incorporated. The provinces accepted Trudeau's "recognizes" wording but opted for the other expressions in the Alternative B in the July 18 1980 memorandum that the Trudeau draft did not chose: "reasonable limits" and "generally accepted".

The Provincial August 28, 1980, draft proposal read:

> "1. The Canadian Charter of Rights and Freedoms recognizes the following rights and freedoms subject only to such reasonable limits as are generally accepted in a free society living under a parliamentary democracy.

The federal government accepted the provincial counterproposal in the lead up to the First Ministers' Conference in September 1980. An agreement of sort can be found expressed in the federal draft dated September 3, 1980, titled "Revised discussion Draft: The Canadian Charter of Rights and Freedoms" incorporating the provincial proposing. The federal draft of September 3, 1980, would read:

> 1. The Canadian Charter of Rights and Freedoms recognizes the following rights and freedoms subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government.

This is confirmed in the September 4, 1980, report titled "Charter of Rights: Background: Assessment of Provincial Positions: Entrenchment of the Charter", which stated that now the "Provinces favour this approach over the specific limitation clauses included in earlier federal drafts of the Charter" (PDF p. 162).

There were in August 1980 several attempts at finding the so called "right wording". The September 5, 1980, document titled "First Ministers Conference, September 8-12, 1980", in section "Talking Points" and "Status Report and Negotiating Position", federal officials had examined other expressions for

"parliamentary democracy" including alternatives like "representative system of government". The August 22, 1980, "Discussion Draft (Federal)" first settled on the "generally accepted" as a response to provincial concerns, but while this was as we know not successful, it may have been the key as the August 29, 1980, document titled "Charter of Rights. Report to Ministers by Sub-Committee of Officials" noted "to remove the specific grounds for limiting rights by specifying in section 1 that all rights are subject to generally accepted reasonable limits." (PDF page 1)

We also find in the section titled "Talking Points" in the September 5, 1980, in the document "First Ministers Conference, September 8-12, 1980", a summary rationale for why the provinces and the federal government accepted this undefined general limitation clause.

The most important reasons were twofold. First, the difficulties in negotiating and redrafting the limitations sub-clauses were significant for both provincial and federal governments. It was "very difficult to develop appropriate specific grounds for limiting certain rights and in doing so there is the danger that they will be cast too broadly or narrowly." (PDF p. 94) Again, public pressure may have played a role in this. And second, it appears that constraining the courts became a concern for both federal and provincial governments. "[B]y adopting the language of our new section 1, we feel we have both given sufficient guidance to the courts as to the standards to be applied by use of such words as "free and democratic" and "parliamentary system of government" and at the same time enhanced the supremacy of lawmakers by imposing on them the duty to ensure that they spell out what are reasonable limits when they enact laws and rules." (PDF p. 94)

While an agreement on a general limitation clause surfaced leading into the FMC in September 1980, a difference in understanding the language they agreed may or may not have played a role in how the conference concluded without substantial progress. It may be that other items such as federalism and amendment formula were large roadblocks to agreement, as well as other controversies. Surprisingly or unsurprisingly, the Federal government declared that it would pursue constitutional reform and patriation unilaterally, leading the charge in Parliament in the fall and winter of 1980-1981.

**Part III. Fall 1980 to January 1981: Public Pressure and the Emergence of Heavier Onus**

In Parliament, the federal government carried the general limitations clause that had gained some provincial acceptance in the lead up to the September FMC, 1980, but public criticism of the clause in Fall 1980 led it to be strengthened in two respects fundamentally shaping the standard of justification found today in the Charter. The first is seen in the September 24, 1980, a charter draft titled "Resolution for joint address to Her Majesty the Queen respecting the constitution of Canada", which reverted back to Trudeau's preferred option of "guarantees" over the wording "recognizes".

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government.

This change was found in three federal drafts dated October 2, 1980 (first draft); October 2, 1980 (second draft); October 2, 1980 (Resolution submitted to Parliament).[6] A briefing book dated October 1980, the section titled "Section 1 – Guarantee of and Limits on Rights", revealed that the return to "guarantees" mattered to the Federal government because it was used to separate and distinguish the Charter from its weaker the Canadian Bill of Rights. The change reinforced the idea that the Charter offered legally secured

[6] See Sep. 24 Draft. Oct. 2 Draft 1. October 2 Draft 2. October 2 Resolution submitted to Parliament on Oct. 5.

rights.[7] This briefing book also shows the confidence the federal government had this draft of the general limitation. For the federal government, "[t]he limitation clause is cast in general terms that will permit the courts to determine if a particular limit imposed on a right is reasonable in the circumstances of the case, having regard to standards of conduct generally accepted in our society and others of a similar nature." (PDF p. 34).

Second, what changed was the public criticism that led the federal government not only to remove the expression of "parliamentary system of government" but heightened the language in the provision that would justify limitations on Charter rights. In quick succession between November and December 1980, the expression of "parliamentary system of government" was removed, "generally accepted" was replaced with "reasonable limits" and the inclusion of "demonstrably justifiable" led to the narrowing of political deference in Section 1. The inclusion of "prescribed by law" while might seem by some a softening to obtain provincial support, it had also for federal officials a desirable effect of imposing on legislatures requirements of enacting limitations in legislation.

The influence of public criticism should not be underestimated. The November 17, 1980, document titled "Memorandum to Ministers: Re: Possible Amendments to Proposed Resolution on Constitution of Canada", reveals that the public criticisms of the text of Section 1 general limitations were a factor. The draft text, the report stated, "has been severely criticized as being too broad, enabling the courts to find any limit imposed on a right to be permissible if it is 'generally accepted' (i.e., if it is a limit enacted by several legislatures). It is also contended that limits should only be imposable in wartime (and even then not applicable to non-discrimination and certain legal rights), that limits should be more specifically defined for each category of rights, or that there be no limitation clause included at all since the courts will themselves imply reasonable limits on the various rights recognizing that no right is absolute. While the criticisms appear to overlook the fact that section 1 speaks of reasonable limits, there may be some merit in considering alternatives to the present provision of section 1 in order to defuse criticism of it". (PDF p. 3).

This was documented in the November 10, 1980, a memorandum titled "Amendments to Proposed Resolution", and in the November 14, 1980, "Memorandum" from Miss E.I. Macdonald, which both had proposed removing the expressions "generally accepted" and "parliamentary system of government", replacing them with "limits as are reasonably justifiable" and "free and democratic society" (PDF p. 1).

> *"*1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits as are reasonably justifiable in a free and democratic society *[*with a parliamentary system of government.*] [no]"*

By November 17, 1980, further movement was made to raise the standard by adopting the higher onus expression of "demonstrably justifiable" instead of "reasonably justifiable" in the text of section 1. While several of the options at this time considered retaining the expression "parliamentary system of government", it seems that in light of public pressure, the federal government adopted both the higher onus expression "demonstrably justifiable" along with the removal of the phrase "parliamentary system of government". The November 17, 1980, "Memorandum to Ministers: Re: Possible Amendments to Proposed Resolution on Constitution of Canada", stated it in plain terms:

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[7] In a briefing book dated October 1980, a section titled "Section 1 – Guarantee of and Limits on Rights". See the passages: "This introductory section serves two purposes: (1) to indicate that the rights and freedoms set forth in the Charter are guaranteed and (2) to indicate that no right or freedom is absolute but subject to uncertain limits – limits that are reasonable in the context of a free and democratic society with a parliamentary system of government." (PDF p. 34). And, "[t]he guarantee of rights and freedoms is an attempt to overcome any implication that the rights are only those as they existed at the date of adoption of the Charter – one of the problems that arose in the courts' Bill of Rights which "recognized and declared" that certain rights "have existed and shall continue to exist". By simply stating that the Charter guarantees the rights and freedoms, there is no implication that the rights are only in the state and with the limits that existed in 1980." (PDF p. 34).

> "Recommendation: that if pressure continues to build for modification of section that the government agree to adoption of language that makes the rights and freedoms subject only to such reasonably limits as are demonstrably justifiable in a free and democratic society". (PDF p. 5)

By November 20, 1980, in a draft found in an "Annex" of proposals, internal Federal drafts of the Charter would from now onward feature this higher burden of justification ("guarantees", and "demonstrably justifiable") and without the text of "parliamentary system of government".

> "1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits established by law as are demonstrably justifiable in a free and democratic society."

What might seem to some a softening of Section 1, the re-introduction of the expression "prescribed by law" was not openly at least an effort to preserve political deference, but an attempt at explicitly limiting the use of Section 1 to be expressed in legislation. While all drafts after November 17, 1980, had incorporated the heavier language of justification, it was on November 21, 1980, in an internal memorandum titled "Appendices", that an attempt at re-incorporating this expression of "prescribed by law".[8] It is found re-incorporated in the November 24, 1980, federal draft found in "Annexes to Memorandum to Cabinet from Minister of Justice", and the November 25, 1980, document titled "Annexes to Memorandum to Ministers from Minister of Justice".

> "1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as are demonstrably justifiable in a free and democratic society."

This revised federal drafting (with the exception of the word "as are" replaced at the recommendation of cabinet to "can be")[9] would become the final text of Section 1. It was revealed and tabled in Parliament on January 12, 1981.[10]

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

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[8] There is documentary evidence that the standard of justification in the French version of Section 1 was different suggesting that the English and French drafting of Charter provisions may have had their own paths and developments. My colleague Michael Scott and I have begun exploring the drafting history of the French version of section 1, which seems to have had a distinct path from the English version. We have conducted preliminary research and will continue with this endeavour in the near future. See the *Annexes to Memorandum to Cabinet from Minister of Justice Dated November 24, 1980 Respecting Possible Amendments to Proposed Resolution on Constitution of Canada* (Nov. 24, 1980), and *Annexes to Memorandum to Ministers from Minister of Justice dated November 25, 1980 respecting Possible Amendments to Proposed Resolution on Constitution of Canada* (Nov. 25, 1980).

[9] December 12, 1980, "Memorandum to Ministers from Minister of Justice: Re. Possible Amendments to Proposed Resolution on Constitution of Canada". The cabinet document cites the briefs presented to the Special Joint Committee that defended and in fact wanted a stricter provision along with the provincial desire for including a limitation clause. In response to cabinet ministers wondering if the verb tense would strengthen the clause, the memorandum states that "[a]n analysis of this change indicates that it would not alter the substance of the test involved, namely that the limits imposed must be both reasonable and demonstrated, by those asserting them, to be justified in the circumstances." In response to suggestions that a literal English translation of the French text of section rendering "demonstrably justifiable" to "manifestly justifiable" would weaken the test. "On consideration, it would appear that demonstrably is likely a stronger term since it implies the necessity of showing that the limit is justified whereas manifestly leaves the issue to judicial inference." And in response to considerations about reflecting Canada's diversity by adding the phrase "a pluralistic free and democratic society", the memorandum was not recommended to ensure the provision remains balanced. This is interesting timing, as a day later, the Multicultural clause would be suggested, in two alternatives, in the drafts—one as a standalone and one as an amendment to Section 22 (language rights). It is clear that the drafters were trying to find a place for this need in the Charter, but were unclear where it was going to go.

[10] "Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada"

Two internal cabinet documents shed light on the Federal government's understanding of the changes that had been incorporated into the final text: the January 9, 1981, Federal Special Joint Committee Briefing Book and the January 15, 1981, in cabinet memorandum titled "Note on Section 1 Limitation Clause in Charter". They both outline the same understanding of section 1's two tests. First, the removal of the expressions "generally accepted"[11] and "parliamentary system of government" were problematic because of the fear that they "enable any limit that was found in laws to be a reflection of one that was generally accepted, and that the idea of parliamentary supremacy would be preserved, thus obliging the courts to give effect to any limit imposed by Parliament." (Jan. 15, 1981) (Jan. 9, 1981 Document) Second, the expression "prescribed by law" required a constraining element (in addition to being appealing to the provinces) that "any limit must be found in specific law, and cannot be one simply imposed by a government or an official." Here, "any limit prescribed by law must meet two tests to be valid: it must be reasonable and it must be justified as one permitted in a free and democratic society. In addition, the authority imposing the limit must demonstrate to the court that the limit is justified in the circumstance. Thus, for example, the onus will be on the prosecutor to prove to the court's satisfaction that a limit on freedom of expression is reasonable and justified in the circumstances of the case." (Jan. 15, 1981 Document) (Jan. 9, 1981 Document) The purpose was to "create a very strict test in section 1 for imposing limits; one that would make it extremely difficult, if not impossible, to demonstrate to a court that a limit on certain rights was ever justified in even the most extreme circumstances." (Jan. 15, 1981)[12]

It would be a mistake to understand the standard of justification in section 1 as impossibly high. There are two reasons for this. The first is that it would contradict the language of the provision itself which promises simultaneously "guaranteed" rights and freedom and "reasonable limits". The idea guiding this expression of limits may be traced through the concerns beginning in June 1980, through April 1981, to ensure that the standard of justification in section does not find exceptions in cases of national security, war and emergencies in peacetime.[13] This is to say that the standard of justification is the same throughout all contexts, so long as limitations can be found reasonable. The second reason is that internal federal discussions later in October 1981, did not find limitations impossible.[14] To the contrary, high ranking federal officials believed that the reasonable limitations clause would not force governments to resort to the notwithstanding clause as Quebec had done with its *Charter of Human Rights and Freedoms* as they would have had an outlet to limit rights through section one.[15]

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[11] Some federal officials thought this criticism disregarded that limits still needed to be reasonable. See January 9, 1981, these issues are summarized in Federal Special Joint Committee Briefing Book contains several documents and responses worth considering. The first is dated January 5, 1981, titled "Section 1: Limitation Clause".

[12] The government also acknowledged in particular the submissions of Mr. Gordon Fairweather, Chief Commissioner of the Canadian Human Rights Commission and by Professor Walter Tanopolsky, President of the Canadian Civil Liberties Association. See January 12, 1981, in the document titled "Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada. "The purpose of the original draft was to ensure that the people, the legislatures and the courts would not look upon rights as absolute, but would recognize them as subject reasonable limitations. While some believed no limitation clause was necessary, many witnesses agreed such a clause is desirable but argued that a more stringent formulation is necessary." "You have received a number of constructive suggestions. I am prepared on behalf of the government to accept an amendment similar to that suggested by Mr. Gordon Fairweather, Chief Commissioner of the Canadian Human Rights Commission and by Professor Walter Tanopolsky, President of the Canadian Civil Liberties Association. The wording I am proposing is designed to make the limitation clause even more stringent than that recommended by Mr. Fairweather and Professor Tarnopolsky. And January 9, 1981, these issues are summarized in Federal Special Joint Committee Briefing Book contains several documents and responses worth considering. The first is dated January 5, 1981, titled "Section 1: Limitation Clause".

[13] See January 9, 1981, these issues are summarized in Federal Special Joint Committee Briefing Book contains several documents and responses worth considering. The first is dated January 5, 1981, titled "Section 1: Limitation Clause". "More Restricted Limited Clause: Several suggestions were made by witnesses for a more restricted general limitation clause (Walter Tarnopolsky, Gordon Fairweather) which would delete reference to generally accepted limits and to parliamentary system of government. Limits would have to be prescribed by law and there would be an onus of demonstrating that the limits were reasonable and justified." And this: "These modifications would create a much more stringent limitation clause which would cover both the peacetime and wartime circumstances. It would thus be unnecessary to spell out specific rights that could not be abrogated even in wartime, since it would be difficult if not impossible to demonstrate that such restrictions were justified, e.g., internment and deportation of Japanese Canadians"

[14] Ibid. See "Under this formulation, the courts will only accept a limitation if it is a reasonable one; one which is spelled out in law; and one that can be shown to the court to be justified by a preponderance of evidence in a society that is free and democratic".

[15] See the next section, in particular October 29, 1981, "Memorandum from Deputy Minister of Justice to Michael Kirby re Non obstante clause".

## Part IV. 1981: Preservation of Section 1 and the development of Section 33

While there were several attempts at amending the limitation clause by the opposition in federal Parliament in the late-winter 1981 – notable instances by the Progressive Conservatives (PC) introducing "the supremacy of God" and "the dignity and worth of the human person", and so forth, and the other instances by the New Democratic Party (NDP) introducing "the equal right of males and females" and reintroduction of sub-clause amendments – they did not succeed. The limitation clause itself would remain unchanged throughout the remaining of the drafting process—through the Special Joint Committee's Final Report on February 13, 1981, to April, 1981 with the federal Draft submitted to the Supreme Court of Canada reference case in 1981 and afterward with the November First Ministers Conference, and the November Accord in 1981 through its enacting into law in April 1982.[16]

The First Ministers Conference in November 1981 begs several important questions, none however more important than why the provinces accepted without revision Section 1, which had abandoned the wording the provinces had advocated for in September 1980 – notably "parliamentary system of government", the "recognition" not "guarantees" of rights, and not "demonstrably justifiable", but "generally accepted"? A possible answer may lie in the minor amendments made to several provisions that mattered to the provinces in areas like equality rights, mobility rights, legal rights, and finally the addition of an override mechanism on several categories that mattered initially to the provinces.

However, as mentioned above, a federal memorandum dated October 29, 1981, "Memorandum from Deputy Minister of Justice to Michael Kirby re Non obstante clause" holds a different answer: it is likely that the federal belief was that reasonable limitations under Section 1 was stringent but workable in practice. Roger Tassé doesn't just state this, but he shows it when comparing the Canadian Charter to that of Quebec's *Charter of Human Rights and Freedoms*, noting how Quebec's Charter did not have a reasonable limitation clause, suggesting that the use of its provincial override would have been less difficult publicly if its constitution had a general limitations clause as was being proposed in the Charter.

> "[…] the Quebec Charter does [not] have a reasonable limitable cause like Section 1 of the Canadian Charter.[17] We do not have much doubt that that section would have permitted the kind of limits that are found in the attached list without any need for an override. Except with respect to the derogation (#5) relating to the right of parties to be represented by lawyers in small claims courts, none of these derogations seem, in any event, to raise much problem as they seem to be reasonable, and thus one wonders why an override clause was necessary. Indeed, none of this other override has roused much public controversy. This is in contrast with the derogation that the Quebec government had wanted to impose in respect of Bill 101 and which the government was forced to withdraw by public opinion in the province."

In other words, the provinces at the November FMC in 1981 may have accepted the more rigorous standard because of the amendments to certain controversial provisions along with a notwithstanding clause may have offered a safety release valve in cases where the standard of justification in Section 1 was not workable in a particular case.

The text of Section 1 was not amended at the First Ministers Conference in November 1981, nor subsequently in the flurry of amendments to the November Accord, 1981, in late-November 1981. As Lorraine Weinrib (1990) as shown, we may have gotten an override because of the stringency of Section 1, but it would be a mistake to say that we obtained a "loose" override because of the stringency of Section

[16] On April 24, 1981, the federal version of the Charter of Rights and Freedom passed in the Senate https://primarydocuments.ca/wp-content/uploads/2024/01/April24Consolidated.pdf

[17] There is a typo in this document. It is certainly a typo because Quebec's initial Charter enacted in 1975 did not have a reasonable limitations clause, and it did not contain one until it was amended until 1982.

1.[18] A stringent Section 1 is compatible with a stringent Section 33, envisioned as a limited tool intended to be a pressure release valve to be used sparingly.

The federal papers show cautions against an overly rigid Section 1 that would lead to an over usage of Section 33. That this is not a situation that is desirable, as can be readily seen with the overuse of the override in recent years. As I will show in the next section, the danger lies where the *Oakes* tests risks overburdening legislative limitations of Charter rights. It is not to say that the use of the override is illegitimate. As I have argued elsewhere, the highly thought-out limitations and constraints of Section 33 imply that it is legitimate but limited tool in the Canadian constitution.[19]

## Section II. Oakes and the Demands of Justification

*This paper is a draft. Work in progress.*

[18] Lorraine E. Weinrib, "Learning to live with the Override", in *McGill Law Journal*, Vol. 35 (1990), pp. 542-571.
[19] See Dumais, Charles; Scott, Michael; Buck, Charlie "Mapping the Limitations of the Notwithstanding Clause: The Primary Documents.ca Drafting History for Section 33 of the Canadian Charter of Rights and Freedoms" (2025).