

objectives that impairs free speech as little as reasonably possible? and 4) Are the objectives proportional to their effects?¹⁹

In 1986 the Supreme Court of Canada identified two central criteria that must be satisfied in order to establish that a limit is allowable under Section 1. First, the objective must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom." Second, once such an objective is recognized, "the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified."²⁰ The Court elaborated on this second criterion in *R. v. Whyte* by explaining that a "proportionality test" must be met to show that the measures are reasonable and demonstrably justified.²¹ The three parts of this test are:

- 1) The measures must be carefully designed to achieve the objective of the legislation, with a rational connection to the objective;
- 2) The measure should impair the right or freedom as little as possible; and
- 3) There must be proportionality between the effects of the impugned measures on the protected right and the attainment of the objective.²²

The Court applied these rules to two cases directly involving freedom of expression under Section 2(b) of the Charter and ruled in one that an Alberta law prohibiting publication of certain materials from court proceedings was not justifiable under Section 1.²³ In the other, the Court ruled that an injunction restraining picketing and other activities calculated to interfere with the operations the court was justified by Section 1 of the Charter.²⁴ This decision caused one analyst to conclude that the court, in this decision, displaced and relegated the *Charter's* guarantee of freedom of expression to a constitutionally inferior position *vis-à-vis* other constitutional rights.²⁵ In the *Dolphin Delivery* case two years earlier, the Supreme Court recognized picketing as a constitutionally protected form of expression.²⁶

Section 33, which allows the federal and provincial governments to pass laws that "shall operate notwithstanding a provision included in section 2 or sections 7 to 15" of the Charter, offers a balance between judicial and legislative supremacy under the Charter.²⁷ Given the history of parliamentary supremacy in Canada, the language of this section seems to leave the last word to the legislatures while not indicating whether legislative action under this section is beyond judicial review. The major case testing the strength of this provision dealt with an act by the parliament of Quebec declaring that the rights and freedoms of the Charter do not apply to any legislation in Quebec.²⁸ Here, Superior Court Judge Deschênes identified four conditions of form imposed by Section 33 of the Charter: a) an express declaration; b) concerning an Act therein described; c) with

¹⁹ M. David Lepofsky, "Toward a Purposive Approach to Freedom of Expression and Its Limitations," in Frank E. McArdle, ed., *The Cambridge Lectures 1989* (Montreal: Les Editions Yvon Blais, 1990) at 5-6.

²⁰ *R. v. Oakes*, [1986] 1 S.C.R. 103, at 138-139, referring to *R. v. Big M Drug Mart Ltd.* In separate cases, the Supreme Court twice ruled that certain provisions of Quebec's Bill 101, *The Charter of the French Language*, exceeded the limits of and were not justified under Section 1. See *A.G. (Que.) v. Quebec Protestant School Boards*, [1984] 2 S.C.R. 66 and *Ford v. Quebec (A.G.)*, [1988] 2 S.C.R. 712.

²¹ [1988] 2 S.C.R. 3, at 20.

²² *Ibid.*

²³ *Edmonton Journal v. Alta (A.G.)*, [1989] 2 S.C.R. 1326.

²⁴ *B.C.G.E.U. v. British Columbia (A.G.)*, [1988] 2 S.C.R. 214. The Court reached this conclusion even though the lower court record included an affidavit from a member of the Law Society of British Columbia explaining that the "picket line was orderly and peaceful" and that "Persons appearing to have business inside the Courthouse entered and left the building at will and at no time appeared to be impeded in any way by the picketers." At 221.

²⁵ D. Schneiderman, *supra* note 17, at xxiv.

²⁶ *R.W.D.S.U., Loc. 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 [B.C.].

²⁷ Anisman, *supra* note 17, at 5.

²⁸ *Alliance des Professeurs de Montréal v. A.-G. Que.*, 5 D.L.R. (4th) 157 [1984].