

# Introduction

Under the *Canadian Charter of Rights and Freedoms*,<sup>1</sup> a theory has emerged pursuant to which a law lacking in precision may be declared invalid. Two essential rationales lie at the core of the vagueness doctrine. First, vague laws are constitutionally suspect because they do not provide “fair warning” to citizens as to what the law prescribes. Thus, individuals can be the victims of “unfair surprise” if a rule is applied to them when they could not have foreseen that such a rule would apply to their particular situation. Second, vague laws have the inevitable effect of increasing the discretionary power of law-enforcing authorities. This is problematic since as a result of these laws the rights and obligations of citizens may be subject to the arbitrary will of such authorities.

In the abstract, the essence of the vagueness doctrine – that laws must meet a certain level of precision – appears rather simple. This impression is misleading, however. In fact, this requirement of definiteness has an inevitable fluid nature that makes it difficult to assess. As Justice Frankfurter once noted in the American context: “‘Indefiniteness’ is not a quantitative concept. It is not even a technical concept of definite components. It is itself an indefinite concept. There is no such thing as ‘indefiniteness’ in the abstract, by which the sufficiency of the requirement expressed by the term may be ascertained.”<sup>2</sup>

Consequently, attempts must be made to explore the boundaries of statutory vagueness under the Constitution. As Lon Fuller writes: “No matter how desirable a direction of human effort may appear to be, if we assert there is a duty to pursue it, we shall confront the responsibility of defining at what point that duty has been violated. It is easy to assert that the legislator has a moral duty to make his laws clear and understandable. But this remains at best an exhortation unless we are prepared to define the degree of clarity he must attain in order to discharge his duty.”<sup>3</sup>

Although a multitude of elements (which will be discussed in this text) come into play in the assessment of legislative precision in a constitutional

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setting, the core of the debate inevitably reaches the basic opposition between legal certainty and flexibility. While the aspiration for certainty in the application of legislation lies behind the requirements of precision, it must always be balanced against the need for flexibility. It would be unrealistic to aim for a legal system governed exclusively by rules settled in advance and mechanically applied by judges. Because of the unforeseeable nature of circumstances that may be involved in the matters being regulated, as well as the inherent limitations of language, the flexibility afforded by vague statutory formulas is often needed to promote justice and efficiency in any legal system. In other words, discretion can often be a useful tool. The object of the vagueness doctrine is the appropriate balance between the two competing imperatives of certainty and flexibility.

The development of the vagueness doctrine in Canadian constitutional law is a relatively recent phenomenon. The issue was addressed for the first time briefly by the Supreme Court of Canada in the 1988 case of *R. v. Morgentaler*.<sup>4</sup> Then, in 1990, its roots were traced back to the principle of legality (*nullum crimen nulla poena sine lege* – no crime nor punishment without law) by Lamer J. (as he was then) in his concurring opinion in the *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*.<sup>5</sup> In 1991, also in a concurring opinion, L'Heureux-Dubé J. linked the vagueness doctrine to the fundamental principle of the rule of law in the case of *Committee for the Commonwealth of Canada v. Canada*.<sup>6</sup>

It was not until 1992, however, that the Supreme Court purported to explain the content of the doctrine at length in the landmark decision of *R. v. Nova Scotia Pharmaceutical Society*.<sup>7</sup> In that case, a challenge was brought under s. 7 of the *Charter* against s. 32(1)(c) of the *Combines Investigation Act*,<sup>8</sup> which makes it a criminal offence “to prevent, or lessen, unduly competition.” The Court upheld the validity of the provision and purported to define the vagueness doctrine in a comprehensive manner.

First, Gonthier J. examined the appropriate place of the vagueness doctrine in the *Charter*. As there is no particular provision in the Constitution that expressly requires precision in legislation, he noted that the vagueness doctrine can be derived implicitly from certain provisions of the *Charter*. Thus, provisions that contain an “internal limitation,” such as s. 7 can render the doctrine relevant.<sup>9</sup> The doctrine can also be made applicable under s. 1, after a breach of a substantive *Charter* guarantee has been established.<sup>10</sup> Vagueness then becomes a notion that will prevent the State from demonstrating that the breach is justified under s. 1. Vagueness can have two distinct roles under s. 1. First, it can be raised in relation to the requirement that limitations on *Charter* rights be “prescribed by law.”<sup>11</sup> In that regard, an overly vague law is considered not to be a “law,” and the Crown is thus denied access to justification under s. 1. Second, vagueness can acquire importance in the context of the *Oakes* test.<sup>12</sup> Since a vague law

possesses the potential for being interpreted in an overly broad manner, the vagueness of a law can thus attract scrutiny under “minimal impairment.”<sup>13</sup> The law is then seen as problematic because of its potential overbreadth on constitutionally protected freedoms. Gonthier J. explained the potential overlap between the concepts of vagueness and overbreadth by quoting a passage from a decision of the Ontario Court of Appeal: “Vagueness and overbreadth are two concepts. They can be applied separately, or they may be closely interrelated. The intended effect of a statute may be perfectly clear and thus not vague, and yet its application may be overly broad. Alternatively, as an example of the two concepts being closely interrelated, the wording of a statute may be so vague that its effect is considered to be overbroad.”<sup>14</sup>

However, Gonthier J. added that the content of what is to be referred to as “the vagueness doctrine” (which he purported to define further in the decision), does not *per se* encompass those instances where a vague statutory formula is objected to for reasons related to overbreadth. He wrote: “For the sake of clarity, I would prefer to reserve the term ‘vagueness’ for the most serious degree of vagueness, where a law is so vague as not to constitute a ‘limit prescribed by law’ under s. 1 *in limine*. The other aspect of vagueness, being an instance of overbreadth, should be considered as such.”<sup>15</sup>

Therefore, what is called the “vagueness doctrine” is limited to the classic concerns of “fair warning” and “law enforcement discretion.” Concerns of overbreadth that can be triggered in the context of minimal impairment are not relevant *per se* under the vagueness doctrine. The applicability of the vagueness doctrine thus can be summarized as follows: “Vagueness may be raised under the substantive sections of the Charter whenever these sections comprise some internal limitation. For example, under s. 7, it may be that the limitation on life, liberty and security of the person would not otherwise be objectionable, but for the vagueness of the impugned law. The doctrine of vagueness would then rank among the principles of fundamental justice. Outside of these cases, the proper place of a vagueness argument is under s. 1 *in limine*.”<sup>16</sup>

In *Nova Scotia Pharmaceutical*, the Court also purported to define the content of the vagueness doctrine. The two fundamental rationales of “fair notice” and “law enforcement discretion” were examined by Gonthier J. He first defined the rationale of fair notice as follows:

Principles of fundamental justice, such as the doctrine of vagueness, must have a substantive as well as procedural content. Indeed the idea of giving fair notice to citizens would be rather empty if the mere fact of bringing the text of the law to their attention was enough, especially when knowledge is presumed by law. There is also a substantive aspect to fair notice,

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which could be described as a notice, an understanding that some conduct comes under the law ...

The substantive aspect of fair notice is ... a subjective understanding that the law touches upon some conduct, based on the substratum of values underlying the legal enactment and on the role that the legal enactment plays in the life of the society.<sup>17</sup>

The content of the law enforcement discretion rationale was then expressed in the following manner: "A law must not be so devoid of precision in its content that a conviction will automatically flow from the decision to prosecute. Such is the crux of the concern for limitation of enforcement discretion. When the power to decide whether a charge will lead to conviction or acquittal, normally the preserve of the judiciary, becomes fused with the power to prosecute because of the wording of the law, then a law will be unconstitutionally vague."<sup>18</sup>

Gonthier J. then went a step further and purported to spell out a general test that, in his view, would encompass the two rationales he had just defined. This is something that had never been undertaken, either in Canada or in the United States.<sup>19</sup> Thus, the Court stated a general criterion for determining whether legislation is unconstitutionally vague. After mentioning that "the threshold for finding a law vague is relatively high,"<sup>20</sup> Gonthier J. stated the general standard as follows: "A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen, nor a limitation of enforcement discretion. Such a provision is not intelligible, to use the terminology of previous decisions of this Court, and therefore it fails to give sufficient indications that could fuel a legal debate. It offers no grasp to the judiciary."<sup>21</sup>

Using this standard, a law will be upheld as soon as it possesses some element, minimal though it may be, to fuel a legal debate. This test, which has been followed ever since in the case law, is obviously very permissive.<sup>22</sup> As Peter Hogg points out, "almost any provision, no matter how vague, could provide a basis for legal debate."<sup>23</sup> All that is required by the test is simply that the law be "intelligible." If some element can be found in the law that provides a "grasp to the judiciary"<sup>24</sup> and allows speculation on its meaning, the law is deemed sufficiently precise. We realize that a great preference for flexibility over certainty is openly advocated through this standard of legal debate.

The object of this book is to discuss the application of the vagueness doctrine as well as its appropriate place in the context of the Canadian Constitution. Among other things, it examines the approach the Supreme Court of Canada has taken to vagueness through this standard of legal

debate. In order for the doctrine to be viable, this primary test cannot be applied to every case. The book examines how the doctrine, which is still embryonic in Canada, can be developed to achieve its purposes of protecting adequately the rationales of providing fair notice to citizens and limiting law enforcement discretion. An approach that strikes a sensible balance between the two competing imperatives of certainty and flexibility is articulated.

The book is divided into four basic chapters: (1) a study of the principle of legality (which is closely connected to the rationale of fair notice); (2) an analysis of the principle of the rule of law (which is closely related to the rationale of limiting law enforcement discretion); (3) a detailed inquiry into the content of the vagueness doctrine; and (4) an examination of the appropriate place of the vagueness doctrine in the *Charter*. Chapters 1 and 2, which are more descriptive, will serve the purpose of introducing and strengthening the developments that will be articulated in Chapters 3 and 4.

It must be realized that vagueness is, as already mentioned, a new phenomenon in our constitutional framework. Moreover, there is no actual provision of the *Charter*, or of the *Constitution Act, 1867*,<sup>25</sup> expressly prohibiting vague legislation. The doctrine can be invoked as it is implicitly triggered by some of the provisions of the *Charter*.<sup>26</sup> We know that the two rationales of vagueness are fair notice and limitation of law enforcement discretion. Taken in the abstract, however, and outside any constitutional justification or support, these rationales are not initially or obviously compelling. In other words, the vagueness doctrine appears at first glance to have little legitimacy because its substantive rationales are not well understood and its constitutional bases are uncertain. It is important to realize, however, that the rationales underlying the doctrine can be traced to other principles that possess stronger roots in our legal tradition. In this regard, the principles of legality and the rule of law will be examined in Chapters 1 and 2.

The principle of legality, which translates the old maxim *nullum crimen nulla poena sine lege*, requires that penal laws be prospective only in reach. It therefore condemns the *ex post facto* application of penal law. This is done with the desire to avoid “unfair surprise” to citizens in a manner very similar to the first rationale of the vagueness doctrine. We recall that fair notice is a rationale of vagueness because vague laws can create “unfair surprise” for citizens who could not have foreseen that a law would apply to their situation. It is therefore useful to begin this book by examining the principle of legality in Chapter 1. Through the enforcement of this principle, we will see how courts are dedicated to protecting the ideal of fair notice in our legal tradition. This is especially important since legality now enjoys explicit constitutional recognition through s. 11(g) of the *Charter*, which provides that no one can be found guilty of an act unless at the time

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it “constituted an offence” under law. An examination of the principle of legality in Chapter 1 will therefore reinforce the constitutional legitimacy of the doctrine. It will justify treating concerns pertaining to fair notice as substantially compelling (in Chapter 3). Also, it will strengthen the bases of the doctrine and even broaden the number of situations where it can be invoked (in Chapter 4).

Along a similar line of thinking, Chapter 2 will examine the principle of the rule of law. This principle seeks to strike a balance between pre-established rules and grants of discretionary powers to law-enforcing authorities. It requires that discretion be granted with caution in order to protect citizens from arbitrary government. The parallel with the second rationale of the vagueness doctrine – that of limiting discretion in law enforcement – is obvious. An inquiry into the implications of this principle will therefore be very useful in better understanding the second rationale of the vagueness doctrine. As we will see in Chapter 2, the rule of law is expressly mentioned in the preamble to the *Charter* and has attracted considerable constitutional importance, especially in recent years. By exploring the rule of law’s rejection of excessive discretion, Chapter 2 will show the importance of legal certainty in our legal and constitutional tradition. This will be useful to better understand the analysis in Chapter 3 on the contents of the doctrine. Moreover, an analysis of the rule of law will also foster a better understanding of the formal conditions under which the doctrine can be applied, as will be seen in Chapter 4.

Thus, Chapters 1 and 2 will introduce Chapters 3 and 4 by reinforcing the rationales of fair notice and law enforcement discretion through discussions of the principles of legality and the rule of law. It should be noted that, although legality will be presented mostly as associated with fair notice on the one hand, and the rule of law will be essentially affiliated with the limitation of law enforcement discretion on the other hand, these are not watertight compartments. In fact, it will be seen that the benefits of fair notice are quite often associated with the rule of law in the case law and the literature, while concerns about limiting discretion are also sometimes considered within the ambit of legality.<sup>27</sup> This interpenetration of the two concepts is quite understandable as they are both aimed at promoting certainty in the legal system. To some extent, legality can even be considered to be included in the broader principle of the rule of law.<sup>28</sup>

Chapter 3 will examine the actual content of the vagueness doctrine. First, through a brief overview of the American situation, we will see that the Supreme Court of the United States will protect citizens against vague laws in only a rather limited fashion. Thus, fair notice will be seen as being offended in American constitutional law only when the law touches upon some conduct usually perceived as “innocent.” Meanwhile, the law enforcement discretion rationale will not provoke the invalidation of vague

laws unless the law is viewed as a “catch-all,” encouraging selective enforcement by the authorities.

The Supreme Court of Canada has defined the two rationales of vagueness restrictively, in a manner similar to the American situation. Thus, pursuant to *Nova Scotia Pharmaceutical*, the rationale of fair notice is seen as offended essentially if the law is detached from the “substratum of values” of society, while the law enforcement discretion rationale is viewed as protecting only against “catch-all” laws that could lead to automatic convictions once prosecution occurs. As dictated by the principles of legality and the rule of law (studied in Chapters 1 and 2), I will explain how a broader protection may be afforded to the two essential rationales of vagueness. I will also show how the Supreme Court of Canada’s narrow definitions of the two rationales may be useful in making the requirement of precision fluctuate in certain cases.

In Chapter 3, emphasis will also be placed on the “legal debate” test, which is, as mentioned earlier, the permissive criterion developed in *Nova Scotia Pharmaceutical* to assess the validity of vague legislation. This test is not inspired by the American situation. It is a creation of the Supreme Court of Canada by which Gonthier J. sought to define in a comprehensive manner the threshold of constitutional validity that is to be applied to all laws, a thing that has never been attempted in the United States. It will be shown how this permissive test of legal debate, if applied indiscriminately to all cases, is likely to undermine the importance of legality and the rule of law. Consequently, the doctrine must inevitably be developed beyond this initial test. A series of factors is articulated in this book in order to help nurture the development of the vagueness doctrine in a manner consistent with the important concerns it seeks to balance. The minimal legal debate test may be appropriate in some cases where the legislative assembly cannot efficiently reach its objectives without considerable flexibility. In some other cases, however, a more demanding and elaborate test will inevitably have to be applied.

Chapter 3 will study some factors that can make the requirement of precision fluctuate depending on the circumstances, thus allowing courts to adequately balance the needs of the State against individual rights. Among these factors, the most important are: (1) the presence of a “substratum of values,” (2) the likelihood of selective enforcement, (3) the necessity of resorting to vague legislation, and (4) the type of law involved.

Chapter 3 will also examine possible solutions towards greater precision that could help statutes comply with the constitutional requirements of the vagueness doctrine. First, it will examine the method that consists of adding words to the law through the judicial process. As will be argued, a difficulty with this approach is that it increases the burden of citizens who wish to know the law, by forcing them to search through volumes of

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reported decisions in addition to reading the statute. Moreover, an *ex post facto* application of the law can occur when a newly defined standard is applied to the accused in the case at bar. We will see that this undermines the principle of legality. Thus, whenever possible, it is preferable that the legal standard be spelled out in the statute itself rather than by the judiciary. The legislative assembly can make its rules more specific by articulating in greater detail the conditions under which they apply, but we will see that it can also resort to other methods. For instance, by providing illustrations of the law's applicability, its scope can be made more certain through the use of the principle of interpretation known as *ejusdem generis*. Another technique that will be examined in Chapter 3 is the potential usefulness of delegated legislation to specify the standards contained in the law.

The object of Chapter 4 will be to study the appropriate place of the vagueness doctrine in the *Charter* in order to determine its practical applicability in particular cases. Its object will also be to understand the influence the bases can sometimes have on the nature of the vagueness analysis on the merits. As already mentioned, the provisions that can render the doctrine applicable are essentially ss. 1 and 7, as well as other provisions that, much like s. 7, contain an "internal limitation." From this fragmented recognition of the vagueness doctrine can arise certain procedural as well as substantive problems, which will be addressed in Chapter 4.

As mentioned earlier, under s. 1 of the *Charter*, vagueness can become relevant in two different ways. First, it can be raised in relation to the requirement that limitations on *Charter* rights be prescribed by law. Second, vagueness can acquire importance under the "minimal impairment" branch of the *Oakes* test, after a breach to a substantive *Charter* guarantee has been demonstrated. A vague law, since it possesses the potential for being interpreted in an overly broad manner, may fail the test of "minimal impairment." In that sense, the concepts of vagueness and overbreadth are similar in some ways but also present some differences, which Chapter 4 will analyze.<sup>29</sup> The relationship between these first two bases of vagueness under s. 1, the "prescribed by law" and "minimal impairment" requirements, will be examined.

Chapter 4 also contains an analysis of other bases that have been recognized in substantive provisions of the *Charter*. Vagueness is normally applicable every time a provision of the *Charter* contains an internal limitation. For example, it is considered to be a "principle of fundamental justice" under s. 7. Some problems surrounding the applicability of the doctrine in the framework of s. 7, as well as in other provisions of the *Charter* containing an internal limitation, will be analyzed.

It will be realized that the vagueness doctrine currently does not have autonomous status. This means that there must always be some other *Charter* interest at stake in order for the precision of legislation to become



relevant. Chapter 4 will explore the possibilities of a broader applicability of the doctrine in the future. The strong interpretative influence of the principles of legality and the rule of law will be helpful in that regard. In particular, we will see that ss. 7 and 11(g) can reasonably be interpreted in light of these principles as permitting an autonomous recognition of the vagueness doctrine in the future, or at least allowing its applicability in all penal matters. Finally, Chapter 4 will address the impact of constitutional bases on the severity of vagueness analysis. We will see that, especially due to the interplay between the concepts of overbreadth and vagueness, the requirement of precision can sometimes vary depending on the constitutional basis under which it is being analyzed.