

Ontario Justice Education Network

Section 1 of the *Charter* & the Oakes Test



SECTION 1 OF THE *CHARTER*

The Canadian *Charter of Rights and Freedoms*, enacted in 1982, changed criminal law so that an accused had constitutionally guaranteed rights that could not be infringed unless the government could show that such an infringement was demonstrably justified in a free and democratic society.

Section 1 of the *Charter* is often referred to as the “reasonable limits clause” because it is the section that can be used to justify a limitation on a person’s *Charter* rights. *Charter* rights are not absolute and can be infringed if the Courts determine that the infringement is reasonably justified. Section 1 of the *Charter* also protects rights by ensuring that the government cannot limit rights without justification. Thus, section 1 both limits and guarantees *Charter* rights.

Section 1 reads as follows:

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.

Section 1 arises in cases where a *Charter* infringement is being argued. Often a party is arguing that some action by the government – either a specific provision of a law, a law in its entirety, or a direct action by a government agent – has infringed that person’s *Charter* rights. The party seeking to limit a *Charter* right, which in most cases is the government, must prove that any limitation is justified under section 1 of the *Charter*. As such, it is often the government that argues that a *Charter* infringement is a reasonable and justifiable limit prescribed by law.

In order for the *Charter* infringement to be justified, the government has to prove to a court that its actions satisfy the steps in a section 1 analysis. The standard of proof is the civil standard – on the balance of probabilities, which is not as difficult to prove as the criminal standard of beyond a reasonable doubt. If the government is successful, the law, statute, or action in question will likely be upheld and remain in place. However, if the government is unsuccessful in its section 1 argument, a court may find that the specific law is of no force or effect, or it will be read down. Reading down is where the Court interprets the legislation in a way that takes into account the *Charter* right. If the Court has ordered the law, in whole or in part, to be struck down, Parliament or a provincial legislature may choose to redraft that law so that it complies with the *Charter*. Government may also invoke section 33 of the *Charter* – the notwithstanding clause, which would exempt government from following the Court’s directions. Section 33 only applies to sections 2 and 7-15 of the *Charter*. The use of section 33 is quite rare.

Section 1 is used every time a *Charter* infringement is argued. If a case involves three separate sections of the *Charter*, a section 1 analysis would occur after each section is argued. For example, if sections 7, 8 and 9 of the *Charter* are argued as being infringed, the government would have to

argue a separate section 1 analysis for each. In addition, the government must satisfy all the steps in the Oakes Test.

THE OAKES TEST

The Oakes Test is a legal test created by the Supreme Court of Canada in the case *R. v. Oakes* (1986). *R. v. Oakes* provided the Court with the opportunity to interpret the wording of section 1 of the *Charter* and to explain how section 1 would apply to a case. The result was the Oakes Test – a test that is used every time a *Charter* violation is found.

The Case of R. v. Oakes

David Edwin Oakes was charged with possession of drugs, and possession with the intent to traffic. At the time of the trial, a person charged with drug possession was automatically charged with possession with the intent to traffic.

If a person was found guilty of possession of drugs, section 8 of the *Narcotic Control Act* (“*NCA*”) placed the onus on the person charged to prove that there was no intent to traffic. If the accused could not prove lack of intent, the accused would automatically be found guilty of the charge. Mr. Oakes challenged this section of the *NCA* as an infringement of his s.11 (d) *Charter* right, the right to be presumed innocent.

The Court found that s. 8 of the *NCA* violated s.11 (d) of the *Charter*. The Court then considered whether the government could justify this infringement under s. 1 of the *Charter*. Section 1 requires the government to show that the law in question is a reasonable limit on *Charter* rights, which can be demonstrably justified in a free and democratic society. The Court found that the government failed to satisfy s.1 of the *Charter*, and as a result, held that s. 8 of the *NCA* was of no force or effect.

A SECTION 1 ANALYSIS: THE OAKES TEST

Once a *Charter* infringement has been found, the Court will consider each of the three main steps in a section 1 analysis, known as the Oakes Test. The government must prove each step in this test.

1. Prescribed by Law

The limitation of any *Charter* right must be prescribed by law. This means that the limitation must be legal, and be part of a law, statute, or regulation that is within the jurisdiction of the level of government that passed it. The law must be clear (not vague) and accessible to citizens so that they may know what kinds of activities are allowed and not allowed. This protects against arbitrary actions by government. For example, a customs officer at the Canada-United States border, who is an agent of the federal government, cannot subjectively decide what products or consumer items to forbid from entering into Canada. Items that are on any forbidden list must be set out in a law, passed by Parliament.

2. Pressing and Substantial

The government must prove that the objective of the law is *pressing and substantial*. In other words, the purpose of the law must be important to society. For example, in the case of *R. v. Big Drug Mart*, the Supreme Court of Canada found that the Lord’s Day Act, which required all stores to

close for business on Sunday, regardless of the owner's religion, infringed s.2 (a) of the *Charter*, freedom of religion. The Court found that the purpose of this law was to force people to observe a Sunday Sabbath, a law that was not of significant importance, or pressing and substantial enough, to justify the infringement of s.2 (a). Despite the decision of *R. v. Big Drug Mart*, the government does not often have difficulty showing the pressing and substantial nature of a law.

3. Proportionality

This step in the Oakes Test contains three sub-steps. The concept of proportionality refers to whether the government, in the course of achieving its legislative objectives, has chosen proportional, or relative ways, to achieve those objectives. In other words, government has to find reasonable ways to achieve, or implement, its legislation. The analysis that occurs in these sub-steps is a fundamental aspect of the Oakes Test.

i. Rational Connection

The limitation of the right must be rationally connected to the objective of the law in question. Any limitation to a *Charter* right cannot be arbitrary, or unconnected to the purpose of the law.

For example, in *R. v. Oakes*, the Supreme Court of Canada found that there was no rational connection between the requirement that an accused disprove intent to traffic with the purpose of the law, to prevent drug trafficking. The Court found that the government did not satisfy the rational connection of the Oakes Test.

ii. Minimal Impairment

In order for a government action that infringes *Charter* rights to be justifiable, the *Charter* right must be impaired as little as possible. If the government could achieve its legislative objective another way, one that involves less impairment on a right, the government must do so. Many section 1 arguments by government fail to satisfy this step.

For example, a law that does not allow unions to form because its purpose is to protect businesses affected by a strike would likely be found to be an unjustifiable infringement on s.2 (d), freedom of association. If there are less drastic means of achieving the purpose of protecting businesses, then those means should be taken by government when they draft the law.

However, the Supreme Court of Canada has identified specific situations where the government does not have to impair a *Charter* right as little as possible. The Court has found that in some situations it may be appropriate to take a deferential approach to government action. This means that the Court takes a flexible approach to the minimal impairment portion of the Oakes Test. Situations where deference may be given often occur where the legislature has to balance multiple interests. The Court has held that deference may be appropriate in situations where a legislature is better suited to weigh the evidence and policy considerations, and also, where the legislature has shown it has exercised judgment within a range of reasonableness. In other words, the Court acknowledges that the legislature, an elected body, is often in a better position to respond to the needs of Canadians.

Courts may also take a deferential approach toward a law when the law in question infringes a right or freedom in order to support another right or freedom. For example, a law prohibiting hate speech, which infringes on freedom of expression under section 2 (b), may have as its purpose to promote equality rights under section 15, and thus, a court may take a deferential approach to the minimal impairment aspect of the Oakes Test.

iii. Proportionate Effect

This part of the Oakes Test is concerned with the overall benefits and effects of the law in question. Proportionate effect seeks to balance the negative effects of any limitation of a right with the positive effects that law may have on society as a whole. It asks if the limit on the right is proportional to the importance of that law's purpose. It also asks whether the benefits of that law are greater than any negative effects produced by a limitation on a right.

For example, section 300 of the *Criminal Code of Canada* makes it an offence for a newspaper to knowingly publish false information about a person that will have the effect of damaging, or defaming, that person's reputation. While it may be arguable that to prevent people from publishing whatever they want infringes freedom of expression under s.2 (b), it is reasonable to conclude that without s. 300 of the *Criminal Code*, any newspaper could knowingly publish false information about a person without facing any consequences. In this example, the central question of proportionality is whether society benefits more from having s. 300 of the *Code* in place than it loses by having s. 2(b) limited in this way.

Discussion Questions

1. Describe how section 1 both guarantees and limits *Charter* rights?
2. Why does the government have to justify limiting – or infringing – a person’s rights?
3. What happens if the government doesn’t prove to the Court that its action satisfy a section 1 analysis?
4. If a law is declared to have no force or effect, can Parliament or the legislature do anything about it?
5. Explain the significance of the *R. v. Oakes* case.
6. What kind of evidence could a government use to prove each branch of the Oakes Test?
7. Do you think there should ever be limits to *Charter* rights? Why or why not?
8. Describe a situation where a infringement of a right would be justified.
9. Describe a situation where an infringement of a *Charter* right would *not* be justified?
10. What do you think about the Courts’ role in deciding whether an infringement of a right can be justified?

Case Study

In an effort to combat gang activity, the government has passed a law called *Stop Gangs in Ontario*. (“*SGO*”). The purpose of this law is to help discourage people from joining gangs, and also to make it easier for police to identify gang members. The legislation was debated for one week in the Ontario legislature before it was passed by a vote of 61-46. The law took effect immediately.

A provision of this law, section 49, prohibits all people from wearing bandanas in schools. The penalty under the *SGO* is 30 days in a provincial penitentiary.

Jackie, a seventeen-year old high school student, was wearing a green bandana while walking to school. The Principal noticed Jackie’s bandana and called the police. Jackie told the police that she didn’t know why she was being arrested because she wears her green bandana to raise awareness about the environment. Jackie’s parents hired a lawyer to defend her against the charges laid pursuant to *SGO*.

An organization known as the *Defenders of the Under 20*, (“*DU – 20*”) has been protesting the new law because it only applies to schools, and therefore treats young people differently from adults. The group is hoping to have the law struck down because they feel it unfairly infringes on the following *Charter* rights:

Section 2 (b): freedom of expression
Section 7: right to life, liberty and security of the person
Section 15: equality guarantee

Another lobby group called *Take Back Our Schools* (“*TBOS*”) has been advocating for this legislation. *TBOS* supports the law because they feel that combating youth participation in gangs is a crucial step toward building safer communities.

Jackie was convicted at trial. She is appealing the conviction at the Court of Appeal. *DU – 20* and *TBOS* have both been granted intervener status at the hearing.

Activity

You and your colleagues work for the Crown (government). As a team, you must try to justify s. 49 of the *SGO* using section 1 of the *Charter*. You are being asked to conduct an analysis of each *Charter* challenge in turn, (i.e. ss. 2(b); 7; and 15), using a section 1 analysis for each. You will prepare a factum and will argue your conclusions orally.

Suggested Teaching Strategies

- Guidelines for preparing a factum and a factum template are available for free download from the *Resources* section of the OJEN website, www.ojen.ca.
- Refer to the instructions, template, and evaluation rubrics in OJEN's *Making the Case: Mock Hearing Toolkit*, available for free download from the OJEN website, www.ojen.ca.
 - Exemplar evaluation samples can be found on pages 18-22.
 - Exemplar time management plans can be found on pages 53-57.
 - Pages 26-38 explain the various roles of the court for teacher and student.
- This activity can be run as a mock appeal to be completed in groups of four. One student can explain the steps in section 1, while the other three apply section 1 to each alleged *Charter* infringement. Each group of four can represent one of the following parties: Jackie, the Crown, *DU – 20* and *TBOS*. Three students can play the Court of Appeal panel.
- This activity can also be developed into a mock trial. Suggested student roles:
 - 4 counsel for the Crown prosecutor
 - 4 Defence counsel for Jackie
 - 4 witnesses (e.g. Jackie, a member of the *DU – 20*, a MPP who supported the law, a police officer)
 - 12 students as jurors
 - 1 as the court clerk
 - 1 as the court security officer
 - 1 as the court artist
 - 1 as the trial judge