IN BRIEF: Section 1 of the *Charter* & the Oakes Test

SECTION 1 OF THE *CHARTER*

The Canadian *Charter of Rights and Freedoms*, enacted in 1982, changed the law so that Canadians 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, s. 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 s. 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 s. 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 s. 33 of the *Charter* – the notwithstanding clause – which would exempt the government from following the court’s directions. Section 33 only applies to ss. 2 and 7-15 of the *Charter.* The use of s. 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 s. 1 analysis would occur after each section is argued. For example, if ss. 7,
8 and 9 of the Charter are argued as being infringed, the government would have to argue a separate s. 1 analysis for each. In addition, the government must satisfy all the steps in the Oakes test.

**LIMITATION OF CHARTER RIGHTS: THE SECTION 1 ANALYSIS**

Once a Charter infringement has been found, the court will consider each step in a section 1 analysis to determine if a law that infringes a Charter right can be saved by s. 1. The burden of proof is on the party seeking to justify the infringement (i.e. usually the government) and the standard of proof is on a balance of probabilities.

**A. Limits Prescribed by Law**

According to the wording of s. 1, 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 (i.e. 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.

**B. Justification of Limits – The Oakes Test**

In the case of *R v Oakes* (1986), the Supreme Court of Canada (SCC) interpreted the wording of s. 1 and established the basic legal framework for how s. 1 would apply to a case. This test two-part legal test, known as the Oakes test, is applied each time a Charter violation is found in order to determine if a law that infringes a Charter right can be justified under s. 1 of the Charter. The Oakes test is outlined as follows:

1. There must a pressing and substantial objective for the law or government action.
2. The means chosen to achieve the objective must be proportional to the burden on the rights of the claimant.
   i. The objective must be rationally connected to the limit on the Charter right.
   ii. The limit must minimally impair the Charter right.

**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, s. 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.
iii. There should be an overall balance or proportionality between the benefits of the limit and its deleterious effects.

1. Pressing and Substantial Objective
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 M Drug Mart* (1985), the SCC found that the *Lord’s Day Act*, which required all stores to close for business on Sunday regardless of the owner’s religion, infringed freedom of religion under s. 2(a) of the *Charter*. 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 in *Big M*, the government does not often have difficulty showing the pressing and substantial nature of a law.

2. Proportionality
This stage 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 *Oakes*, the SCC found that there was no rational connection between the requirement that an accused disprove intent to traffic and the purpose of the law, to prevent drug trafficking. The court found that the government did not satisfy the rational connection element 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 can achieve its legislative objective in a way that involves less impairment on a right, it must do so. 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 of freedom of association under s. 2(d) of the *Charter*. 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. Many s. 1 arguments by government fail to satisfy this step of the *Oakes* test.

The SCC has, however, 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 than the judiciary.

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 freedom of expression under s. 2(b), may have as its purpose to promote equality rights under s. 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. Here, the courts seek 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, s.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 *Criminal Code* in place than it loses by having s. 2(b) limited in this way.

This final step applies when all other aspects of proportionality have been satisfied.
Summary

If a court finds that legislation infringes upon a right guaranteed under the Charter, the government can try to prove that this breach is justifiable. In order for the legislation to stand, the government is obliged to pass a three-step test, the last step of which has three stages of its own.

A Charter infringement is found:

- Is the infringing action prescribed by law?
  - Yes

- Is the purpose of the law pressing and substantial?
  - Yes

- Is the law rationally connected to its purpose?
  - Yes

No?

The infringement is NOT justified.

- Does it minimally impair the infringed right?
  - Yes

- Is it proportionate in its effects?
  - Yes

- The infringement IS justified.
Discussion Questions

1. Describe how s. 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 s. 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 an 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, s. 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:
s. 2(b): freedom of expression
s. 7: right to life, liberty and security of the person
s. 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 s. 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 s. 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 s. 1, while the other three apply s. 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