

24. Limitation of Rights

Section 1 of the Charter

Section 1 provides: 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 makes clear that Charter rights and freedoms are not absolute. The ordinary Charter analysis therefore has two stages:

1. Determine whether the impugned law or governmental action limits a Charter right or freedom; and
2. If a limitation is established, determine whether it is justified under s. 1.

The claimant bears the burden of establishing the Charter infringement. Once an infringement is established, the burden shifts to the government or other party seeking to uphold the limit.

The governing test remains the test established in *R. v. Oakes*, [1986] 1 S.C.R. 103.

Relationship Between Section 1 and Charter Rights

Section 1 performs two related functions. First, its opening words affirm and guarantee the rights and freedoms contained in the Charter. Second, it permits only those limitations that satisfy the demanding requirements of justification in a free and democratic society.

In *Oakes*, Dickson C.J. identified relevant values of a free and democratic society, including respect for human dignity; social justice and equality; accommodation of diverse beliefs; respect for cultural and group identity; and confidence in social and political institutions that promote participation.

Rights should be interpreted purposively. Conduct falling outside the purpose of a Charter guarantee should not artificially be brought within the right merely to be excluded later under s. 1.

Burden and Standard of Proof

The standard under s. 1 is the civil standard of balance of probabilities. The words “demonstrably justified” contemplate a sufficiently persuasive evidentiary or logical foundation for the restriction. Evidence will frequently be required, although some connections may be established through reason, logic or common sense where direct empirical proof is unavailable.

Presumption of Constitutionality

The traditional presumption of constitutionality remains relevant in constitutional interpretation, particularly where legislation is genuinely capable of more than one interpretation. However, in a Charter challenge, the court does not simply presume that an established infringement is justified. Once a limitation has been established, there is no presumption that the limitation satisfies s. 1.

A court may prefer a constitutionally compliant interpretation where the statutory language genuinely permits it, but cannot rewrite clear legislation merely to avoid a Charter violation.

Prescribed by Law

Before applying the substantive Oakes test, the limit must be “prescribed by law.” An unauthorized governmental act cannot ordinarily be justified under s. 1 merely because the government believes the action to be reasonable. The prescribed-by-law requirement reflects two basic rule-of-law values:

1. Governmental interference with Charter rights must have legal authority; and
2. The law must provide adequate guidance so that individuals can reasonably know the rules governing their conduct.

A limit may be prescribed by a statute; a regulation or other delegated legislation; an implied legal requirement arising from legislation; certain binding governmental policies of a legislative character; or a common-law rule where sufficient governmental action exists for the Charter to apply.

R. v. Oakes is [1986] 1 S.C.R. 103

Overview

R. v. Oakes is the leading Supreme Court of Canada decision establishing the legal test for determining whether a government action that infringes a right or freedom guaranteed by the Canadian Charter of Rights and Freedoms can nevertheless be justified under s. 1 of the Charter. The framework developed in the case is commonly known as the Oakes test.

Facts

The police found the accused, Mr. Oakes, in possession of hashish oil and cash. He was charged with possession of narcotics for the purpose of trafficking under the Narcotic Control Act (NCA). Mr. Oakes maintained that the drugs were for his own personal use and that he had no intention of selling them.

At the time, s. 8 of the NCA provided that once an accused was found in possession of a narcotic, the accused was presumed to possess it for the purpose of trafficking unless the accused proved otherwise.

Ordinarily, the Crown bears the burden of proving guilt beyond a reasonable doubt. Under this provision, however, the burden shifted to the accused to prove that he was not guilty of possession for the purpose of trafficking.

This was a reverse-onus provision.

Issue

Whether the reverse-onus provision violated the presumption of innocence under s. 11(d) of the Charter and, if so, whether the infringement could be justified under s. 1?

Section 11(d): Presumption of Innocence

Mr. Oakes challenged the provision on the basis that it violated the presumption of innocence guaranteed by s. 11(d). The Supreme Court agreed. The provision allowed an accused to be convicted of possession for the purpose of trafficking even though the Crown had not proved every essential element of the offence beyond a reasonable doubt. Instead, once possession was established, the accused was required to prove that the possession was not for the purpose of trafficking. The reverse onus therefore infringed the presumption of innocence under s. 11(d).

The Court then had to determine whether this infringement could nevertheless be justified under s. 1.

Section 1: The Oakes Test

Section 1 permits reasonable limits on Charter rights and freedoms where those limits can be demonstrably justified in a free and democratic society. The Supreme Court established a general framework consisting of a pressing and substantial objective followed by a proportionality analysis.

Step 1 (Pressing and Substantial Objective): The government must identify the objective of the impugned law or government action. The objective must relate to concerns that are sufficiently important to justify limiting a constitutionally protected right or freedom. It must therefore be pressing and substantial in a free and democratic society. A trivial or insignificant objective cannot justify an infringement of a Charter right. In *Oakes*, the Court accepted that combating drug trafficking and addressing the public health and safety risks associated with narcotics constituted a pressing and substantial objective.

Step 2 (Rational Connection): The government must demonstrate that the impugned law or measure is rationally connected to the pressing and substantial objective. The measure must be logically capable of furthering the objective and must not be arbitrary, unfair or based on irrational considerations. In *Oakes*, the reverse-onus provision failed this requirement. Proof that an individual possessed a narcotic did not rationally justify a mandatory presumption that the possession was for the purpose of trafficking. This was particularly clear where an accused possessed only a very small quantity of drugs. It would be irrational to presume an intention to traffic merely from proof of simple possession. Accordingly, the reverse-onus provision was not rationally connected to the legislative objective.

Step 3 (Minimal Impairment): The government must demonstrate that the measure impairs the Charter right or freedom as little as reasonably possible. The government is not necessarily required to choose the absolutely least restrictive measure imaginable, but the measure must fall within a range of reasonably supportable alternatives. The question is whether the government could reasonably achieve its objective through a less rights-impairing means.

Step 4 (Proportionality of Effects): Finally, the government must demonstrate that the beneficial effects of the law or measure are proportionate to its harmful effects on the Charter right. The benefits produced by the measure must justify the seriousness of the infringement. In other words, the Court weighs the beneficial effects against the deleterious effects. The more severe the effects of a measure on Charter rights, the more important its objective and benefits must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

If the government fails at any stage of the Oakes test, the infringement cannot be justified under s. 1.

Application in Oakes

In Oakes, preventing and combating drug trafficking was accepted as a pressing and substantial objective. However, the reverse-onus provision failed at the rational connection stage. The fact that a person possessed narcotics, including a very small quantity, did not rationally support the mandatory conclusion that the person intended to traffic those drugs. The government therefore failed to justify the infringement under s. 1. Because the measure failed rational connection, it was unnecessary for the law to survive the remaining proportionality requirements.

Held

The Supreme Court held that the reverse-onus provision infringed the presumption of innocence guaranteed by s. 11(d) of the Charter.

Although combating drug trafficking was a pressing and substantial objective, the reverse-onus provision was not rationally connected to that objective.

The infringement therefore could not be justified under s. 1, and the provision was declared unconstitutional.

Legal Principles

- Oakes establishes the general test for determining whether a Charter infringement can be justified under s. 1.
- A Charter infringement must first be established before the Oakes test is applied.
- The government bears the burden of demonstrating that the infringement is justified.
- The objective of the impugned measure must be pressing and substantial.
- The measure must be rationally connected to that objective.
- The measure must minimally impair the Charter right.
- The measure's beneficial effects must be proportionate to its harmful effects on the protected right.
- If the government fails at any stage of the test, the infringement is not justified under s. 1.
- The more severe the impact of the measure on Charter rights, the more important the objective and benefits must be to justify it.

- In Oakes, the reverse-onus provision violated s. 11(d) and failed s. 1 because simple possession did not rationally justify a presumption of possession for the purpose of trafficking.

OAKES TEST

Once a Charter right has been infringed; and the limit is prescribed by law, the government must establish that the limitation is reasonable and demonstrably justified in a free and democratic society. The Oakes test has two broad requirements.

First Requirement: Pressing and Substantial Objective

The objective of the infringing measure must be sufficiently important to justify limiting a Charter right.

Second Requirement: Proportionality

The means chosen must be proportionate. This has three branches:

1. **Rational Connection**
2. **Minimal Impairment**
3. **Proportionality of Effects**

Thus, for exam purposes, Oakes can conveniently be expressed as four steps:

Step 1 - Pressing and Substantial Objective: Is the objective sufficiently important to justify limiting a Charter right?

Step 2 - Rational Connection: Is the rights-limiting measure rationally connected to that objective?

Step 3 - Minimal Impairment: Does the measure impair the Charter right no more than is reasonably necessary to achieve the objective?

Step 4 - Final Proportionality: Do the salutary effects of the measure outweigh its deleterious effects upon Charter rights?

1. Pressing and Substantial Objective

The government must first identify an objective that is:

- Sufficiently important;
- Consistent with the principles of a free and democratic society; and
- Directed toward a pressing and substantial concern.

Trivial or constitutionally illegitimate objectives cannot justify a Charter infringement.

The objective must be characterized with sufficient precision. The relevant objective is ordinarily the purpose of the specific infringing measure, which may be narrower than the overall purpose of the statute.

RJR-MacDonald v. Canada: The broad purpose of tobacco legislation could be characterized as protecting public health. However, for the challenged advertising restriction,

the relevant inquiry focused more specifically on preventing people from being induced through advertising and promotion to consume tobacco. The objective should therefore not be stated so broadly that the proportionality inquiry becomes meaningless.

Shifting Objectives

R. v. Big M Drug Mart Ltd.: The government cannot save unconstitutional legislation by inventing a fundamentally new legislative purpose after enactment. The relevant purpose is generally the purpose existing when the measure was adopted. A shift in purpose is impermissible. However, subsequent jurisprudence recognizes that a shift in emphasis concerning an existing legislative purpose may sometimes be permissible.

Ford v. Quebec: Quebec sought to protect and promote the French language by requiring commercial signs to be exclusively in French. The Supreme Court accepted that protecting the French language in Quebec was a pressing and substantial objective. The legislation nevertheless failed proportionality because completely excluding other languages impaired freedom of expression more than necessary. Thus, an important objective does not itself establish justification. The government must still satisfy every proportionality requirement.

Financial Cost: Financial considerations or administrative convenience alone will ordinarily not constitute a sufficiently important objective for overriding Charter rights.

Newfoundland (Treasury Board) v. N.A.P.E., 2004 SCC 66: Newfoundland delayed the implementation of a pay-equity agreement during an exceptional provincial fiscal crisis. The Court accepted the seriousness of the fiscal crisis as capable, in the particular circumstances, of satisfying the pressing and substantial objective requirement. N.A.P.E. should therefore be treated as exceptional.

The general rule remains: Ordinary budgetary savings alone are normally insufficient to justify infringing Charter rights.

2. Rational Connection

The second Oakes requirement asks whether the infringing measure is rationally connected to the pressing and substantial objective.

The measure must not be arbitrary; irrational; or unrelated to the objective. There must be a causal or logical relationship between the means chosen and the governmental objective. The rational-connection threshold is generally not especially onerous. The government need not prove with scientific certainty that the measure will achieve its objective. Where empirical proof is difficult, reason, logic and a reasonable apprehension of harm may establish the connection.

Benner v. Canada: Legislation imposed more onerous citizenship requirements upon certain persons born abroad to Canadian mothers than upon comparable persons born to Canadian fathers. Although protecting Canada from dangerous applicants was a legitimate objective,

there was no rational connection between that objective and treating children of Canadian mothers more restrictively than children of Canadian fathers.

3. Minimal Impairment

The third step asks whether the law impairs the Charter right no more than is reasonably necessary to achieve the governmental objective. The modern formulation permits a range of reasonable alternatives.

The question is whether there is a less rights-impairing alternative that would achieve the government's objective in a real and substantial manner.

If such an alternative exists, the more restrictive measure may fail minimal impairment.

If the alternative would significantly undermine achievement of the government's objective, the government is not constitutionally required to adopt it.

Legislative Deference: The minimal impairment stage does not require the Legislature to adopt the single least rights-impairing measure imaginable. Courts recognize that legislatures may have to choose among several reasonable alternatives when addressing complex social problems. Accordingly, the government is afforded a degree of legislative deference, sometimes described by some authors as a “margin of appreciation” or legislative leeway. A law will satisfy minimal impairment where it falls within a range of reasonably supportable alternatives and there is no clearly less impairing measure that would achieve the legislative objective in a real and substantial manner. The degree of deference is contextual. Greater deference may be appropriate where the Legislature is balancing competing interests or Charter rights; protecting vulnerable groups; responding to complex social or economic policy; acting on uncertain or conflicting social-science evidence; or making polycentric policy choices involving allocation of resources.

In *Irwin Toy*, the Court recognized greater legislative latitude where the government was mediating between competing groups and protecting vulnerable children. Similarly, *Edwards Books* accepted that the Legislature need not devise a perfectly tailored scheme and permitted a reasonable range of legislative choice.

However, deference is not judicial abdication. The government still bears the burden under s. 1 and must demonstrate that the impairment is reasonably necessary. Deference is generally reduced where the state is the direct adversary of the individual, particularly in the criminal context, or where a clearly available and substantially less impairing alternative would achieve the government's objective.

Therefore, legislative deference is not a separate step of the Oakes test. It is a contextual principle that primarily informs the application of the minimal impairment stage.

Edwards Books: Ontario's Sunday-closing legislation infringed freedom of religion because it imposed burdens upon persons observing a Sabbath on a different day. Nevertheless, the Court upheld the legislation under s. 1. The decision illustrates that minimal impairment does

not demand constitutional perfection. A legislature may choose from a reasonable range of alternatives if it has made a serious effort to minimize the impairment of Charter rights.

Ford v. Quebec: Quebec's French-only sign law failed this requirement. Protecting French was an important objective, but completely prohibiting the use of other languages went farther than necessary. The government could promote the predominance of French without entirely excluding other languages.

4. Proportionality of Effects

The final stage asks whether the benefits produced by the rights-limiting measure justify the harm done to the Charter right.

The court weighs:

Salutary Effects: What concrete public benefits does the measure reasonably produce?
against

Deleterious Effects: How seriously does the measure interfere with the claimant's Charter right; the values underlying that right; and broader constitutional interests?

The question is: Are the beneficial effects of the law worth the constitutional cost of the limitation?

The final stage is analytically distinct from minimal impairment. The first three stages focus substantially on the relationship between the objective and the means. The final stage focuses squarely upon the actual effects of the law.

Alberta v. Hutterian Brethren of Wilson Colony 2009 SCC 37

Facts

Members of the Hutterian Brethren sincerely believed that voluntarily allowing themselves to be photographed was contrary to their religion.

Although they lived in rural colonies and maintained a largely self-sufficient lifestyle, they relied on automobiles for transportation.

For many years, Alberta had granted an exemption to individuals who objected on religious grounds to having their photograph taken for a driver's licence.

However, in 2003, the province removed the exemption and introduced a universal photograph requirement for all driver's licences. The legislation was changed as part of an effort to protect the integrity of the driver's licensing system and combat identity theft and fraud.

The Hutterites challenged the new requirement, arguing that being forced to have their photographs taken in order to obtain driver's licences violated their freedom of religion under s. 2(a) of the Charter.

Issue

Whether the infringement of the Hutterites' freedom of religion under s. 2(a) could be justified as a reasonable limit under s. 1 of the Charter.

Section 2(a): Freedom of Religion

The Court accepted that the Hutterites sincerely believed that voluntarily allowing themselves to be photographed was contrary to their religion.

Requiring them to submit to a photograph as a condition of obtaining a driver's licence therefore interfered with their religious practice in a manner that was more than trivial or insubstantial.

Accordingly, the universal photograph requirement infringed s. 2(a).

Application of the Oakes Test

1. Pressing and Substantial Objective: The first question was whether the purpose of the regulation was pressing and substantial. The majority concluded that maintaining the integrity of the driver's licensing system in a way that minimizes the risk of identity theft and fraud was clearly a goal of pressing and substantial importance capable of justifying limitations on Charter rights. The first stage of the Oakes test was therefore satisfied.

2. Rational Connection: The next question was whether the universal photograph requirement was rationally connected to the pressing objective of preventing identity theft and protecting the integrity of the licensing system. The majority emphasized that the government did not have to prove that the regulation would certainly achieve its objective. Rather, the government only had to demonstrate that it was reasonable to suppose that the measure would contribute to achieving the objective. A universal photograph database was rationally connected to preventing identity fraud and strengthening the reliability of the driver's licensing system. The majority was therefore satisfied that the regulation was not an arbitrary limitation on religious freedom but was rationally related to the pressing objective.

3. Minimal Impairment: The next question was whether the universal photograph requirement impaired freedom of religion as little as reasonably possible. The Hutterites proposed an alternative involving a driver's licence without a photograph. The majority accepted the government's argument that allowing such an exemption would materially undermine the effectiveness of the universal photograph and facial-recognition system. The purpose of the system depended on having photographs of all licensed drivers in the database. Allowing exceptions would reduce the system's comprehensiveness and effectiveness in preventing identity theft. The government was therefore entitled to insist upon the photograph requirement. The majority concluded that the regulation satisfied the minimal impairment requirement.

4. Final Proportionality (Balancing the Effects): Passing the minimal impairment stage did not eliminate the need to consider whether the overall benefits of the measure outweighed its

harmful effects on the Charter right. The beneficial effects reasonably expected from the universal photograph requirement included:

1. Enhancing the security and integrity of the driver's licensing system;
2. Assisting in roadside safety and identification; and
3. Facilitating the harmonization of Alberta's licensing scheme with those of other jurisdictions.

The universal photograph requirement therefore produced significant benefits by strengthening the licensing system and reducing the risk of identity fraud.

Deleterious Effects on the Hutterites: The majority acknowledged that the religious burden imposed on the Wilson Colony Hutterites was real. Members who refused to be photographed would no longer be able to obtain driver's licences and would therefore have to arrange alternative transportation. They could hire drivers or rely on other transportation arrangements. This would impose additional financial costs, inconvenience and some interference with the Colony's traditional self-sufficiency. However, the majority concluded that the requirement did not prevent members from maintaining their religion or continuing their communal way of life. The regulation did not deprive them of all meaningful choice that would allow them to remain faithful to their religious beliefs.

Proportionality Conclusion: In the final balancing, the majority concluded that the important benefits associated with protecting the integrity of the licensing system and preventing identity fraud outweighed the negative effects on the Hutterites' religious freedom. The salutary effects therefore outweighed the deleterious effects. The infringement of s. 2(a) was therefore proportionate and justified under s. 1.

Held

A narrow majority of the Supreme Court upheld the universal photograph requirement as constitutional. Although the requirement infringed the Hutterites' freedom of religion under s. 2(a), the infringement was justified under s. 1. Hutterites who wished to obtain driver's licences were therefore required to have their photographs taken.

Legal Principles

- A sincere religious belief that is interfered with in a manner that is more than trivial or insubstantial establishes an infringement of s. 2(a).
- An infringement of freedom of religion may nevertheless be justified under s. 1 through the Oakes test.
- Protecting the integrity of a driver's licensing system and reducing identity fraud can constitute a pressing and substantial objective.
- At the rational connection stage, government does not have to prove that a measure will certainly achieve its objective; it is sufficient that it is reasonable to suppose that the measure will contribute to achieving it.

- At the minimal impairment stage, the government is entitled to choose among reasonably available alternatives and is not necessarily required to adopt the absolutely least impairing measure imaginable.
- A proposed exemption may be rejected where it would materially undermine the effectiveness of a universal regulatory system.
- Passing minimal impairment does not eliminate the need for final proportionality.
- At the final proportionality stage, the court must separately weigh the salutary effects of the measure against its deleterious effects on the Charter right.
- A serious religious burden does not automatically invalidate a law where meaningful alternatives remain available and the overall benefits of the law outweigh its harmful effects.

Context and Deference

The Oakes test remains the governing legal framework, but its application is **contextual**. The level of judicial deference may vary depending upon matters such as the nature of the Charter right; the vulnerability of the group government seeks to protect; whether the law addresses complex social policy; uncertainty in social-science evidence; competing claims of different groups; and institutional competence.

For example, more legislative latitude may be appropriate where the government is mediating among competing social interests.

By contrast, deference is generally less appropriate where the government is the direct antagonist of an individual in the criminal process or where core democratic rights are involved.

Context modifies the application of proportionality; it does not replace the Oakes test.

Certain Rights and Section 1

Section 1 is a general limitation clause and, in principle, applies broadly to Charter rights. However, the nature and structure of the particular right may affect how readily an infringement can be justified. For example, violations of s. 7 principles of fundamental justice are difficult to justify.

Application to Common Law

A common-law rule can constitute a limit prescribed by law where the Charter directly applies because sufficient governmental action is involved.

R. v. Swain: The Supreme Court applied s. 1 to a common-law rule governing when the Crown could raise evidence concerning an accused's insanity. Thus, common-law rules involving governmental actors may themselves be subjected to Charter review and Oakes analysis.

Purely Private Common-Law Disputes: The position is different where litigation concerns a purely private dispute. Under *Dolphin Delivery*, the Charter does not directly apply merely

because a court is called upon to enforce an ordinary common-law rule between private parties. Nevertheless, courts must develop and apply the common law consistently with Charter values.

Hill v. Church of Scientology: In a private defamation action, the Court did not mechanically apply the Oakes test. Instead, the court considered whether the common law appropriately balanced competing values, including freedom of expression and protection of reputation.

Thus:

Governmental common-law action - direct Charter scrutiny may apply.

Purely private common-law dispute - Charter generally applies indirectly through Charter values rather than direct s. 1 review.

Emergency Measures

The Charter contains no general provision automatically suspending Charter rights during an emergency. Governmental measures adopted in response to war; epidemics; natural disasters; national-security emergencies; or other exceptional circumstances remain constitutionally reviewable.

However, the emergency context may be highly relevant to whether a restriction can be demonstrably justified under s. 1.

Section 1 is deliberately contextual. A restriction that cannot be justified under ordinary conditions may potentially be justified where the governmental objective and factual circumstances are genuinely exceptional.

Section 33 is a separate constitutional mechanism and should not be confused with s. 1.