Ontario Justice Education Network
IN BRIEF
STUDENT HANDOUT

SECTION 1 OF THE CHARTER AND THE OAKES TEST

SECTION 1 OF THE CHARTER

The *Canadian Charter of Rights and Freedoms*, enacted in 1982, changed the law so that Canadians now have constitutionally guaranteed rights that cannot be infringed unless the government can show that such an infringement is 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.

Charter issues are decided in the ordinary course of litigation. Any person whose *Charter* rights are impacted is entitled to raise a constitutional issue in a civil proceeding or as a defence to a criminal proceeding. Section 32 of the *Charter* states that the *Charter* only applies to government action, and not to disputes between private individuals. As such, a *Charter* claim typically arises when a party (i.e. an individual or corporation) argues 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 their *Charter* rights. If a court finds that a law infringes a *Charter* right, the onus is on the government to prove on a balance of probabilities that any limitation to *Charter* rights is justified under s. 1.[1]

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.

[1] Section 1 is used to determine if legislation that breaches the *Charter* is justified. *Charter* breaches in the criminal context involving state action (e.g. an unlawful search) do not proceed to a s. 1 analysis. In these cases, once a *Charter* breach is found, the next question is that of remedy; in particular, whether or not evidence obtained illegally should be excluded under s. 24(2) of the *Charter* or if the proceeding should be stayed.

LIMITATION OF CHARTER RIGHTS: THE SECTION 1 ANALYSIS

Once a *Charter* infringement has been found, the court will consider each step in a s. 1 analysis to determine if a law that infringes a *Charter* right can be saved.

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 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

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)* (now called the *Controlled Drugs and Substances Act*) 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 to be presumed innocent until proven guilty.

The SCC 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.

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.

   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 *Vriend v Alberta* (1988), Mr. Vriend had been fired from his job as a laboratory coordinator at a private Christian college after the college became aware that he was a gay man. The SCC held that the exclusion of sexual orientation as a ground of discrimination in Alberta's *Individual's Rights Protection Act* violated s. 15 of the *Charter* and could not be saved under s. 1, and ordered that sexual orientation be read in to the provincial legislation. The SCC found thatthe government of Alberta had failed to articulate any pressing and substantial objective or purpose that would be achieved by denying the protection of its human rights law to gays and lesbians.

Despite this decision, 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, in the course of achieving its legislative objectives, the government 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 of 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

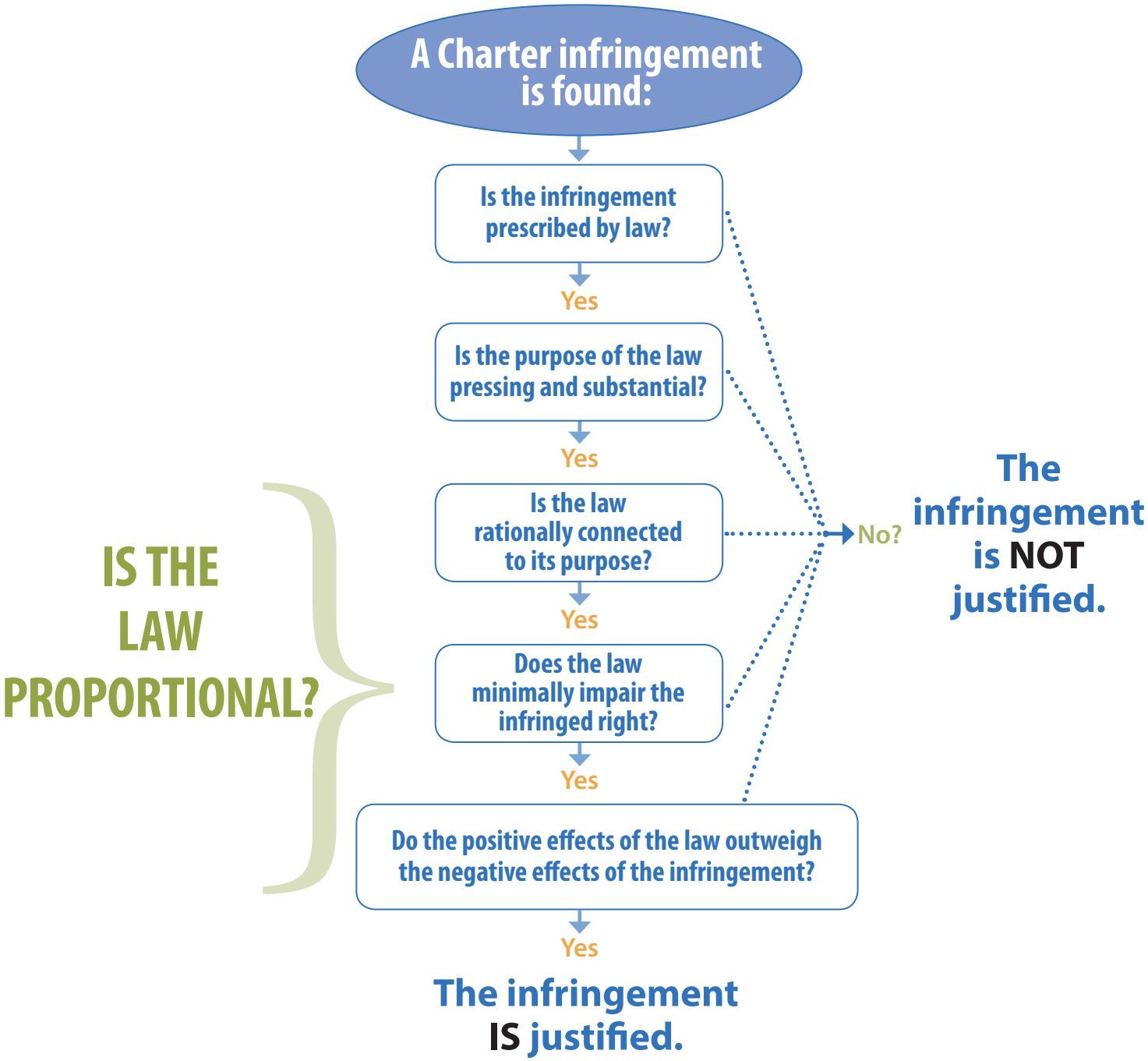
This part of the *Oakes* test is concerned with the overall benefits and effects of the law in question. Here, courts seek to balance the negative effects of any limitation of a right with the positive effects that the law may have on society as a whole. It asks if the limit on the right is proportional to the importance of that law's purpose. It also asks whether the benefits of the 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 a limit on freedom of expression, 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 freedom of expression limited in this way.

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

SUMMARY OF THE SECTION 1 ANALYSIS

If a court finds that legislation infringes a right guaranteed under the *Charter*, the government can try to prove, on a balance of probabilities, that this breach is justifiable. The following is a summary of the test for determining if a *Charter* infringement can be justified under s. 1.



REMEDIES

If the government is successful in its s. 1 argument, the law in question will be upheld and remain in place. However, if the court rules that the *Charter* breach was not justified, a remedy (i.e. means of rectifying the situation) will be ordered. Section 24(1) of the *Charter* states that any person whose *Charter* rights have been violated may ask a court to determine an appropriate remedy. It reads as follows:

> *Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.*

Remedies affecting unconstitutional legislation are usually dealt with under s. 52(1) of the *Constitution Act, 1982*, which holds that:

> *The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.*

In other words, the provisions of the *Canadian Constitution*, including those outlined in the *Charter*, are the supreme law of the land and any laws that are inconsistent with them cannot stand. Some of the remedies available to courts are:

1. **Striking Down** – A court may declare that a law that infringes the *Charter* is nullified and is of no force of effect.
2. **Partial Invalidity** – A common alternative to striking down an entire law is to declare only the unconstitutional portion(s) of the law invalid. This technique has often been used where a provision in the *Criminal Code of Canada* has been found to be unconstitutional. The specific provision will be declared invalid rather than striking down the entire *Criminal Code*. 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*.
3. **Reading Down** – Reading down is where the court interprets the legislation in a sufficiently narrow way to bring it in line with the *Charter*. For example, in *R v Butler*, the SCC read down the extremely broad terms of the obscenity laws in the *Criminal Code* in order to avoid an infringement of freedom of expression. The court held that the provision should be interpreted narrowly to catch only certain forms of pornography.

4. **Reading In** – This technique is used when a statute is under-inclusive and fails to extend to those who have a legitimate constitutional claim to its protection. In such cases, the court may "read in" those categories of individuals rather than strike down the law entirely. This approach was taken in *Vriend v Alberta* when sexual orientation was read in to the human rights legislation in Alberta. Reading in is a controversial remedy as the court appears to be taking on a legislative role and adding to the legislation itself. However, it is often a more suitable alternative to striking down the legislation as a whole.
5. **Constitutional Exemption** – A court may order that a particular law is valid but a certain individual is exempt from its application. This remedy is rarely applied and used only in exceptional circumstances.
6. **Temporary Suspension of Invalidity** – A court may declare that a statute, or a provision within it, is invalid but allow the law to remain in force for a set period of time in order to allow Parliament or the legislature to change the law and bring it into compliance with the *Charter*.

In response to one of these orders, the government may invoke s. 33 of the *Charter* – the notwithstanding clause – which would exempt the government from following the court's directions. However, s. 33 only applies to ss. 2 and 7-15 of the *Charter* and history has shown that the use of s. 33 is quite rare.[2]

DISCUSSION QUESTIONS

1. Describe how s. 1 both guarantees and limits *Charter* rights?

2. Why does the government have to justify limiting a person's rights?

3. Explain the significance of the *R v Oakes* case.

[2] For more information on s. 33 of the *Charter,* see OJEN's resource, *In Brief: Canadian Charter of Rights and Freedoms*, available at: http://ojen.ca/resource/3514

4. Do you think there should ever be limits to *Charter* rights? Why or why not?

5. Describe a situation where an infringement of a right would be justified.

6. Describe a situation where an infringement of a Charter right would not be justified?

7. What do you think about the courts' role in deciding whether an infringement of a right can be justified?

8. What happens if the government cannot show that a *Charter* infringement is justified (i.e. it does not satisfy the elements of the s. 1 analysis)?

9. If a law is declared to have no force or effect, can Parliament or the legislature do anything about it?

CASE STUDY: *R v LEPAGE*

In an effort to combat gang activity, the government has passed a law called the *Stop Gangs in Ontario Act (SGOA)*. 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 *SGOA* is 30 days in a provincial penitentiary.

Jackie Lepage, 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 the *SGOA*. Jackie is also bringing a *Charter* claim, arguing that the law unfairly infringes freedom of expression under s. 2(b) of the *Charter* and should be struck down.

A number of advocacy groups have also become involved in the case. An organization known as the *Defenders of the Under 20, (DU–20)* has been protesting the new law and argue that in addition to limiting expression, it treats young people differently than adults by only applying in schools. Another lobby group called *Take Back Our Schools (TBOS)* has been advocating for this legislation because they feel that combating youth participation in gangs is a crucial step toward building safer communities.

Jackie was convicted at trial and has appealed the conviction to the Court of Appeal for Ontario.

SECTION 1 ANALYSIS

1. You are a judge of the Court of Appeal for Ontario. You and your colleagues have just heard this case and ruled that s. 49 of the *SGOA* violates s. 2(b) of the *Charter*. You must now determine if this infringement is justified under s. 1 of the *Charter*. Use the following organizer to record your ruling for each step in the s. 1 analysis. Provide justifications for your decisions. Once you have completed all of the steps in the s. 1 analysis, give a final judgment on whether or not the *Charter* infringement is justified under s. 1.

SECTION 1 ANALYSIS

Section 1 Analysis	Reasons
Is the infringement prescribed by law?	
Is the purpose of the law pressing and substantial?	
Is the law rationally connected to its purpose?	
Does the law minimally impair the infringed right?	
Do the positive effects of the law outweigh the negative effects of the infringement?	
Is the infringement justified?	

REMEDY

2. Assume that you find that the infringement is not justified under s. 1 of the *Charter*. What remedy would you recommend and why?