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## Reasonable Limits: *R. v. Oakes* and the Standardization of Limitation Criteria

Prior to the Supreme Court of Canada decision in *R. v. Oakes*, there was much debate over how section 1 of the *Canadian Charter of Rights and Freedoms* should, and would, be interpreted by the Courts. The ambiguity of terms in section 1 left space for a wide array of judicial interpretations as to what constituted a “reasonable limit” on Charter rights. The decision in *R. v. Oakes* ended the debate; through its construction of a stringent set of limit criteria that government policy would have to meet in order to contravene a protected right. By placing a high burden of proof on the government, the decision in *Oakes* has ensured that Charter right limitation by government under s. 1 would be the exception rather than the rule in Canada. This paper will explore *R. v. Oakes* in relation to its impact on the interpretation and application of s. 1 of the Charter. In doing so, it will argue that the stringent limitation criteria formulated in the *R. v. Oakes* decision has had the affect of reducing the provincial and federal governments ability to pursue policies that limit Charter rights under s. 1. It will begin by describing the evolution of the Supreme Court and the entrenchment of the Charter of Rights and Freedoms, move on to examine the *R. v. Oakes* case and decision, and conclude by analyzing the impact of the *R. v. Oakes* decision on politics and governance today.

The establishment of the Supreme Court of Canada as the final court of appeal in Canada on both civil and criminal matters was a gradual process. *The Constitution Act 1867* allowed space for a federal court of appeal to be established. Section 101 states that the Parliament of Canada may “provide for the constitution, maintenance, and organization of a general court of appeal for Canada”. The parliament of Canada subsequently passed the *Supreme Court Act* in 1875, establishing the Supreme Court of Canada by ordinary federal statute. Section 35 of the *Supreme Court Act* proclaimed that the Court “shall have and exercise an appellate, civil and criminal jurisdiction within and throughout Canada”. The court, however, did not receive final court of appeal status until appeals to the Judicial Committee of the Privy Council were abolished in 1949. The entrenchment of the *Charter of Rights in Freedoms* in the Constitution in 1982 further expanded the Court’s competencies by extending judicial review to the Charter. The Court has since been enabled to hear Charter challenges on the constitutionality of provincial and federal government legislation or the actions of their bodies from individual citizens, groups and the Crown itself. The Court now has the ability to review legislation brought to it, and determine if the legislation is inconsistent with Charter provisions, such as it did in *R. v. Oakes (1986)*.

*R. v. Oakes* was brought to the Supreme Court on appeal by the crown from the Ontario Court of appeal in March 1985 . The respondent David Edwin Oakes was convicted of unlawful possession of a narcotic under section 4(2) of the *Narcotic Control Act 1970*. Under section 8 of the *Narcotic Control Act* any person convicted of possession through section 4(2) would be given an opportunity to establish that they were not in possession of the narcotic for the purposes of trafficking; if they failed to determine that they were not in the possession of the narcotic for the purposes of trafficking the defendant would then be convicted of the offence and sentenced accordingly. In other words, section 8 placed a ‘reverse onus’ on the defendant; the burden of

proof was on the defendant to determine their innocence, rather than on the Crown to determine the defendant's guilt. Upon conviction of possession, Oakes brought a motion challenging the constitutional validity of s. 8 of the *Narcotic Control Act* in relation to s. 11 (d) of the Charter, which states that any person charged with an offence has the right "to be presumed innocent until proven guilty". The Crown appealed to the Ontario Court of Appeal who ruled in favour of Oakes arguing that s. 8 did constitute a 'reverse onus' and was unconstitutional because it went against the presumption of innocence entrenched in s. 11(d) of the Charter.

Upon judgment, the Crown appealed to the Supreme Court, asking two constitutional questions. Whether (a) s. 8 of the *Narcotic Control Act* violates s. 11 (d) of the Charter; and if it does (b) is s. 8 a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society for the purpose of s. 1 of the Charter?

The decision of the Court was unanimous over these two questions. The first question was any easy one for the Court to answer. The 'reverse onus' in s. 8 of the *Narcotic Control Act* clearly violated s. 11 (d) of the Charter, under s. 8 those accused are not found innocent until proven guilty, they are "found innocent until found in possession". Moreover the Court claimed that there was no rational connection between possession of an unlawful narcotic and the trafficking of that narcotic.

The second question, on the other hand, required the court to interpret and reflect on the meaning of s. 1 of the Charter.

Section 1 of the Charter states that "the 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 was drafted into the Charter in order to ensure that the rights and freedoms in the Charter would not be interpreted by the Courts as absolute or exhaustive. As a government document points out in a free and democratic society "rights and freedoms are not absolute; they are often qualified or limited in order to protect the rights of others or in light of other constitutional values". Moreover, as Janet Hiebert claims, another purpose of s. 1 "is to ensure that legislators, in certain circumstances, [are] able to ensure the primacy of non-enumerated values over specified Charter rights". Many argue that s. 1 was placed in the Charter in order to appease provincial legislators, who wanted to retain parliamentary sovereignty. What makes this a difficult section for the courts is the relative ambiguity of the terms and concepts related to it. The Supreme Court has had to interpret, in this case and many others, the meaning of "reasonable" and "demonstrably justified in a free and democratic society".

In *R v. Oakes*, Chief Justice Dickson and the other judges on the bench attempted to alleviate this problem by devising a set of criteria, aptly named the Oakes test, for determining the validity of s.1 claims. The question at hand in *R. v. Oakes* was whether or not the violation of s. 11(d) of the Charter was a reasonable limit given the harm drug trafficking brings to society. Dickson C. J and his colleagues on the bench, began their interpretation of the meaning of s. 1 by arguing that it serves a dual purpose. It first, "constitutionally guarantees the rights and freedoms set out in the provisions which follow [ss. 2-34 of the Charter]; and, second, it states explicitly the exclusive justificatory criteria (outside of s. 33 of the *Constitution Act, 1982*) against which

limitations on those rights and freedoms must be measured”. Furthermore, Dickson C. J. argued that due to fact that Canada is a ‘free and democratic society’, the Court must keep in mind the “values and principles essential to a free and democratic society”.

The Court agreed that the rights present in the Charter were not absolute, arguing that limits may be needed in some circumstances in order to guarantee goals of society. However, the Court interpreted s. 1 as placing ‘stringent justification criteria’ on the application of limits, with the onus for justifying the limitation of a right placed squarely on the party trying to uphold the limitation. First, the government, either provincial or federal, have to prove that the objective of the limit is ‘sufficiently important’, the standard of ‘sufficient importance must be set high in order to guarantee that unimportant issues do not receive s. 1 protection, the objective must be both ‘pressing and substantial’. Secondly, the measures taken to meet the ‘significantly important’ objective must be properly drawn. Thirdly, the government has to illustrate that there is proportionality between the law and the objective in question, ensuring the benefits of society outweigh the limits on the individual. Lastly, the measure outlined in the law must be rationally connected to the objective.

To clarify the four Oakes test criteria are:

The law must have a Sufficiently important objective;

The law must be rationally connected to the objective;

The law must not infringe a right more than is necessary to meet objective; and

The law must not have a disproportionately severe effect;

Using these criteria, the court ruled in *R. v. Oakes*, that the objective of reducing drug trafficking was not connected to the measures taken under s. 8 of the Narcotic Control Act. As stated above, the Court concluded that the possession of narcotics is not rationally connected to the trafficking of that said narcotic. Therefore, s. 8 has a disproportionately severe affect. The Court unanimously concluded that s.8 of the Narcotic Control act was (a) unconstitutional in relation to s. 11(d) of the Charter and (b) not subject to s. 1 of the Charter.

*R. v. Oakes* has had a major impact on both the work of judicial officials and legislators, as the Oakes test has developed into the standard ‘reasonable limits’ test for s. 1 Charter challenges. The Oakes test has been used in a number of cases since, such as, *Attorney General of Quebec v. Ford (1988)*, *Dagenais v. Canadian Broadcasting Corp (1994)*, *RJR-MacDonald v. Canada (1995)* and *Rosenberg v. Canada (1998)* just to name a historic few. *Attorney General of Quebec v. Ford* is an example of a case in which politics and the judiciary collided through the use of the Oakes test. Tempers flared in Quebec and across Canada over the seemingly trivial issue of public signage. Under criteria 4 of the Oakes test the Supreme Court found that the banning of English signage disproportionately impaired English-speakers despite Quebec’s minority language claims. The government of Quebec was outraged by the decision and closely thereafter, reenacted the law under s. 33, the other clause in the Charter that allows for the limitation of rights.

The Oakes test is not only a powerful tool of the judiciary, politicians have been forced to take into account the stringent criteria when formulating and debating policy. Although, some analysts argue that the application of the Oakes test has become more flexible and largely depends on “judges preconceptions”. Its development alone has ensured that legislators meet stringent justification criteria when formulating policy that infringes on Charter rights. Most importantly, the Oakes test, has helped to ensure that legislation that has allegedly placed unreasonable limits on a Charter right or rights, will by subject to a standardized set of criteria for judgment.

For many politicians, political pundits, and scholars, *R v. Oakes* has been arguably one of, if not the most significant Supreme Court decisions ever made in the Charter’s 25-year history. David Beatty argues that *R v. Oakes* signals the first time the “court attempted to describe in a coherent and comprehensive way, the principles it would use to determine if a law ... which limited constitutional guarantees could be limited under section 1”.

The decision in *R. v. Oakes* has also been the subject of much controversy. A debate has emerged in the post-Charter era between individuals who believe that the entrenchment of the Charter has signaled constitutional supremacy in Canada, while others believe that the Charter has signaled an era of judicial activism. *R v. Oakes* has since been used as a prominent example on both sides of the debate. On the constitutional supremacy side of the debate, much of the media and civil rights activists heralded the decision in *Oakes* as a triumph for ‘the little guy’ over government’s curtailing of civil liberties. They believe the initial ambiguity of s. 1 of the Charter required the Supreme Court to interpret the meaning of “reasonable limits” and “demonstrably justifiable in a free and democratic society”, and argue that the Court was justified in standardizing stringent criteria for the use of s. 1 because upholding the Constitution and specifically Charter rights is the main function of the Supreme Court. On the other hand, those who argue that *R. v. Oakes* is an example of judicial activism believe the Supreme Court was not justified in its decision. They argue that, the Oakes test places the judiciary in a political and activist role by enabling the Court to make decisions based on the balancing of interests and cost-benefit analysis. Furthermore, anti-activist scholars, such as, Troy Riddle and F. L Morton, argued that the Supreme Court was persuaded by ‘public interest litigators’ and legal scholars to take an interventionist approach in the *R. v Oakes* decision rather than a deferential approach which had characterized the Court prior to the Charter.

*R. v. Oakes* influenced Charter politics and law today by forcing the government to meet stringent limitation criteria when enacting policy under s. 1 of the Charter. Whether or not the Oakes test criteria is an example of constitutional supremacy or judicial activism remains to be seen. Nevertheless, the Oakes test has subsequently been used in a number of cases to strike down provincial and federal statutes deemed to have failed one of the four standardized criteria of the Oakes test. *R. v. Oakes* has, ultimately, had the impact of ensuring that government does not unlawfully limit Charter rights.

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