

Oakes Test

"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 of the *Canadian Charter of Rights and Freedoms* (see above) tells us that the *Charter* protects the specific rights and freedoms laid out in it. However, it also states that these rights and freedoms may be lawfully limited by the state, so long as these limits are "reasonable" and can be "demonstrably justified in a free and democratic society."^[2]

Several years after the *Charter* was enacted, the Supreme Court of Canada created a general framework for deciding whether government action that infringes a *Charter* right is justified. This is known as the *Oakes* test (named after the case in which it was created). Before using this test, a *Charter* right must be proven to have been infringed. If that is the case, then the *Oakes* test is used, with the government bearing the burden of proving that it has complied with the requirements of the test and that the infringement is therefore justified. The test consists of four distinct steps:

Step 1 - The government that infringed the *Charter* right must explain the objective of its impugned law or conduct. The objective must be ***pressing and substantial***.

Step 2 - The government must demonstrate that the law or policy is ***rationally connected*** to the ***pressing and substantial objective***. If the law or policy is arbitrary or serves no logical purpose, then it will not meet this standard.^[3]

Step 3 - The government must demonstrate that the law or policy is ***minimally impairing*** of the *Charter* right. This means that the law must impair the *Charter* right as little as possible or is "within a range of reasonably supportable alternatives."^[4]

Step 4 - The government must demonstrate that the beneficial effects of the law or policy are not outweighed by its negative effects on the *Charter* right in question. This is generally known as the ***proportionality*** requirement.

If the government fails at any of the steps within the *Oakes* test, the infringement is not justified. If this happens, the court will invalidate the law or policy on the ground that is

“inconsistent” with the Constitution of Canada.^[5]

Although allowing for *Charter* rights to be infringed may initially appear to undermine them, it can also be viewed as a way of promoting a more balanced approach to rights protection. In this regard, section 1 recognizes that the rights it establishes are not absolute, and allows for conflicts between different rights — and between rights and other societal interests — to be reasonably resolved.



^[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 1.

^[2] *Ibid.*

^[3] *R v Malmo-Levine; R v Caine*, 2003 SCC 74, para 90-91, 98.

^[4] *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 37.

^[5] Being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 52.