THE INTERPRETATION AND EVOLUTION OF SECTION 1 OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

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Abstract

The enactment of the *Canadian Charter of Rights and Freedoms* in 1982 brought rights and freedoms to all Canadians. All sections of the Charter are of great importance, however, one could argue that section 1 is the most important to understand. This is because section 1 not only guarantees the rights and freedoms within the Charter but also grants Courts the ability to place limits on those same rights and freedoms. Through analysis of case law from the Supreme Court of Canada, this research paper analyzes the wording of section 1, the influential case that came before *R. v. Oakes* [1986], the case that changed the interpretation and application of section 1 (*R. v. Oakes)*, the cornerstone test that came out of it, the pivotal cases that came after that made adjustments to the Oakes test, criticisms, and two case studies.

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In completion of this document, I will be graduating from Mount Royal University and eventually continuing my studies in law school. The future is looking bright and I cannot wait to begin making my mark on the world.

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The Interpretation and Evolution of Section 1 of the Canadian Charter of Rights and Freedoms

Since its enactment on April 17, 1982, the *Canadian Charter of Rights and Freedoms* has been regarded as the supreme law of Canada. All laws, government action, and those acting on the behalf of the government must abide by the rights and freedoms in the document. All sections of the Charter are important in their own regard, but section 1 is particularly important. It both simultaneously guarantees the rights and freedoms set out in the Charter and gives the ability to justify limitations on the rights and freedoms. Section 1 can potentially be raised by the appellant or respondent in any Charter case. Due to this, the Supreme Court quickly created a test that could be used whenever section 1 is raised. However, the road to get there was not so simple. The court cases that came before the monumental Supreme Court decision of *R. v. Oakes* [1986] had to navigate the vague and broad wording of section 1 for the very first time without any guidance.

Even almost four decades after the Oakes test's inception, it still provides the framework for which limitation analysis is conducted (Choundry, 2006, p. 505). As of March 24, 2021, CanLII has the *R. v. Oakes* [1986] decision as having been cited 3,030 times in other court cases (*R. v. Oakes*, 1986). For comparison, another well-known case, *R. v. Big M Drug Mart* [1985], has been cited 1,880 times as of the same date (*R. v. Big M Drug Mart*, 1985). This 1985 case is worthy of comparison with Oakes because of the influence it also had on the legal system. The Court set precedent relating to the freedom of religion section of the Charter and laid the foundation for what would become the steps of the Oakes test the next year. It is another of the Supreme Court's most influential decisions.

On the 25th anniversary of the Charter's enactment, Osgoode Hall Law School held a symposium to celebrate this monumental milestone in Canadian law. At the event, a panel of ten Charter experts compiled a list of what they believed to be the top ten Charter cases in its first 25 years. TheCourt.ca, a legal blog based on the York University campus, was the only source allowed to publish their decision. *R. v. Oakes* [1986] was overwhelmingly chosen to be the number one most influential Charter case by the panel. Among their reasons was the fact that it is the most frequently cited Charter case and symbolizes all that the Charter aims to accomplish (TheCourt.ca, 2007). *R. v. Oakes* [1986] has had a major influence on how the Supreme Court makes its decisions and legislative drafting for the government (TheCourt.ca, 2007).

Other research in and around this same topic mainly considers the specific steps of the Oakes test and how they should be rearranged and changed. This article fills a hole in the research concerning how the Oakes test even came about and what happened before, during, and after its inception. This article begins with a statement of the research question and a discussion of the methodology. Next, the wording of section 1 is analyzed and important cases that came before *Oakes* are discussed. Then, a full case study of the keystone decision *R. v. Oakes*, as well as a discussion of the Oakes test is had. Following that, the changes to the Oakes test after 1986 and criticisms from the legal community are shown. Finally, two case studies that show the Oakes test in action are presented. All of this comes together to produce an answer to the research question.

Research Question

With regard to R. v. Oakes, how has the interpretation of s.1, the guarantee section, of the *Charter of Rights and Freedoms* evolved over time and how has this affected the Supreme Court of Canada's process of placing limits on the *Charter* rights and freedoms?

Methodology

The purpose of this analysis is to gain a better understanding of the evolution and the importance of section 1 of the Canadian Charter of Rights and Freedoms. This exploration uses a mixture of case analysis research design and historical analysis research design to achieve this and be able to answer the research question. The case study design is an "in-depth study of a particular research problem" and is good for extending or adding to what is already known through existing research (University of Southern California, 2020). It is useful for detailed descriptions of specific cases (University of Southern California, 2020). On the other hand, the historical analysis study is used to "collect, verify, and synthesize evidence from the past to establish facts" and makes use of secondary sources and primary documentary evidence (University of Southern California, 2020). This design is unobtrusive, well suited for trend analysis, and adds important contextual background to be able to understand and interpret a research problem (University of Southern California, 2020). These methods were chosen for the benefits they provide and their direct relationship with the type of data to be used. Thus, the research design informs the research methods.

Case law is the primary source of data for this thesis, but journal articles, news articles, books, blogs written by qualified legal professionals, and governmental reports are also used. The Supreme Court jurisprudence relating to section 1 of the Charter was taken from Lexum (the

Supreme Court of Canada's website) and the legal database CanLII. The other sources were retrieved from databases such as Google Scholar, CanLII Docs, the Canadian Department of Justice, ProQuest, and Sage Journals.

A potential limitation of this study is that only so much can be covered and discussed within the scope of this project and this research question. The possible discussion topics under the umbrella of section 1 of the Charter are endless and it would be impossible to acknowledge them all. Every Justice that applies the Oakes test interprets and applies it a bit different, so it would be impossible to acknowledge them all in a paper this size. Thus, only the most important moments are featured. The selection of cases highlighted in this thesis was made by reviewing the scholarly work of other researchers who wrote on section 1 and finding what they deemed most relevant.

However, this research is timely, now more than ever, as the government is being questioned about the decisions they are making in terms of the Covid-19 pandemic. Specifically, the mask mandate and whether or not it potentially violates the Charter rights and freedoms of Canadian citizens. When considering potential limitations being placed on Charter rights and freedoms, section 1 will always come into play as it directly involves placing reasonable limitations on Charter rights, which is the whole focus of this thesis. This research looking into the evolution of the way the Supreme Court has dealt with Charter violations will be useful when placing current potential Charter issues, like the mask mandate, in focus. It will be useful in the way that this article shows how the Oakes test is applied and the discretion judges have when applying is to their case's specific circumstances. Something like a mask mandate has never gone

to the Supreme Court so looking at past applications of the test would be instrumental in their duties.

The Wording of Section 1

The wording of the Charter is general, vague, and open (*Hunter et al. v. Southam Inc.*, 1984, p. 154). It requires Courts to interpret them in their application, but this is not an easy task. Interpreting words in a constitution is vastly different from interpreting words in a statute so it was completely new to the Supreme Court (McCormick, 2015, p. 51). To emphasize this, section 1 of the *Canadian Charter of Rights and Freedoms* is 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.

What exactly is a reasonable limit? What is meant by prescribed by law? What is meant by demonstrably justified? What makes society free and democratic? Understanding the meaning of these terms is essential to understanding what the purpose of section 1 is. Thus, this section of the thesis attempts to examine the terms individually by what they have been interpreted as in Charter cases.

Reasonable Limit

The term reasonable is used a lot in the Canadian legal system. Reasonableness is most commonly understood as the judgement from an ordinary, cautious, and prudent individual. This individual is most often a judge. In relation to the Charter and section 1, it is the same. A judge will make the ultimate decision of whether a limit is reasonable or not. However, this cannot be answered with a simple yes or no. Extensive consideration and analysis of the limiting law or

action must be taken. *R. v. Oakes* [1986], as discussed later, created a step-by-step test to determine the reasonableness of a limit, with a judge being involved at every step and making the major decisions.

Prescribed by Law

The first and main definition of what is meant by "prescribed by law" comes from *R. v. Therens* [1985] which states that to be "prescribed by law" the limit is explicitly or implicitly mentioned in a statute or regulation (para. 60). The limit is also prescribed by law if done in the application of a common law rule. In *R. v. Thomsen* [1988], it was further clarified that a limit "prescribed by law" may result from a legislative provision or its operating requirements (para. 15). In *Greater Vancouver Transportation Authority v. Canadian Federation of Students - British Columbia Component* [2009], the Supreme Court asserted that a limit "prescribed by law" could also be contained in municipal by-laws, provisions of a collective agreement involving a government entity, and rules of a regulatory body (para. 50). Actions from those acting on behalf of the government while following regulations or statute is also "prescribed by law".

There are also a few requirements outside of being written into a law, statute, or regulation that must be met for a limit to be "prescribed by law." First, the limit must be adequately accessible to the public (Hogg, 2007, p.122). Second, it must be written with sufficient enough precision so that it allows people to regulate their conduct by it and provides guidance to those who apply the law (Hogg, 2007, p.122). Third, it must be ascertainable and not vague. It cannot imply an absolute denial of the Charter right or freedom by allowing a limitation (Jackson, 2012).

Demonstrably Justified

The first interpretation of what "demonstrably justified" means comes from *Hunter et al. v. Southam Inc.* [1984]. The Supreme Court found that "demonstrably justified" puts the onus of proof on the person seeking to justify the right or freedom limitation. It was determined in *R. v. Oakes* [1986] that the standard of proof would be the civil standard, on a preponderance of probability (para. 67). Later, in *RJR-MacDonald Inc. v. Canada (Attorney General) [1995],* the Supreme Court advanced that "demonstrably" was not a decision made on intuition or by deference to Parliament's choice (p. 204). It means considering the social and political context of the impugned law and enforcing that "before the state can override constitutional rights, there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement" (*RJR-MacDonald Inc. v. Canada (Attorney General), 1995, p. 204)*. Proof offered will be looked at from a common sense point of view, rather than a scientific one.

Free and Democratic Society

In order to understand what is meant by a free and democratic society, one must first look to the purpose the Charter was originally entrenched in the Constitution for; Canadian society is meant to be free and democratic (*R. v. Oakes,* 1986, para. 64). To achieve this, there are certain values that must be incorporated into Canadian society, the very values the Charter aims to protect. Courts must be guided by these values in all of their decisions and actions. Dickinson named a few in *R. v. Oakes* [1986]:

> Respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group

> identity, and faith in social and political institutions which enhance the participation of individuals and groups in society (para. 64)

Thus, a free and democratic society is one that enshrines values like these into every step of the legal process and only places limits on them to be reasonable, when prescribed by law, and when demonstrably justified.

The Dickson Court and Pre-Oakes Cases

Between the enactment of the Charter in 1982 and the creation of the Oakes test in 1986, the Supreme Court had to navigate section 1 without the standardized test that would later become customary. When the Supreme Court first began dealing with Charter cases, there was considerable debate about whether or not the interpretation of the Charter would end up as narrow as it was with the *Canadian Bill of Rights* (Sharpe, 2000, p. 204). Brian Dickson made sure this did not happen. Dickson became the Chief Justice of Canada in 1984 and was instrumental in the new way to interpret Canadian constitutional law (Sharpe, 2000, p. 204). Cases where Dickson delivered the judgement became a part of what is known as "Dickson court" (McCormick, 2015, p. 49). A few of his most seminal judgements include *Hunter et al. v. Southam Inc.* [1984], *Singh v. Minister of Employment and Immigration* [1985], *R. v. Big M Drug Mart Ltd.*[1985], and *R. v. Oakes* [1986]. These first few cases set the tone for how the Court would interpret Charter cases; that rights are of utmost importance and limitations are only acceptable if they can pass a rigorous test of justification (Choundhry, 2006, p. 502). As Dickson was so instrumental in the development of the Oakes test, the three other cases with considerable influence on the journey to get there are relevant for this thesis.

Hunter et al. v. Southam Inc

The first major Charter case that went to the Supreme Court was *Hunter et al. v. Southam Inc.* in 1984. This case is about the warrantless searches of multiple Southam Inc. offices under the *Combines Investigation Act*, which the Court ended up ruling was unconstitutional under s. 8 of the Charter. The Court was facing uncharted territory so this judgement set the standard for how future Charter cases would be dealt with. Dickson placed a lot of emphasis on the fact that the Charter is a purposive document, that to interpret a Charter right or freedom the Courts must consider the values of a free and democratic society that depend on that Charter right or freedom (*Hunter et al. v. Southam Inc.*, 1984, p. 146). The Charter also adopted the "living tree doctrine" from a 1930 Judicial Committee decision, meaning that the interpretation and meaning of Charter rights must evolve as Canadian society evolves (McCormick, 2015, p. 51). The Charter is an ever changing and evolving document that will adjust to fit the changes in Canadian society. Although the application of section 1 was not necessary in this case, it is still important to note as precedent was set so that section 1 will only be considered when it is raised by one of the parties. It is also important because Dickson deemed that in a balance of interests, the Court will favour an individual's rights over governmental interests, unless absolutely necessary (*Hunter et al. v. Southam Inc.*, 1984, p. 160).

Singh v. Minister of Employment and Immigration

The case of *Singh v. Minister of Employment and Immigration* [1985] found that Singh and five others' section 7 rights had been violated. Specifically, one's right to security of person and fundamental justice. The claimants were attempting to claim convention refugee status under the *Immigration Act 1976* but were denied by the Minister of Employment and Immigration. In

the Court's judgement, they acknowledged the lack of a proper test for section 1 yet and its immediate importance (*Singh v. Minister of Employment and Immigration,* 1985, para 66). They also acknowledged the difficulty that would come along with that; as if too low a standard is created there is a risk of emasculating the Charter, while too high of a standard risks unjustifiably restricting government action (*Singh v. Minister of Employment and Immigration,* 1985, para 66). Nonetheless, reasonable limits granted by section 1 were not to be used as a fix-all for governmental convenience (McComick, 2015, p. 55).

R. v. Big M Drug Mart Ltd.

The judgement for *R. v. Big M Drug Mart Ltd.* was delivered in 1985 and involves s. 2(a) of the Charter, the freedom of religion section. Big M Drug Mart was unconstitutionally charged for opening on a Sunday, which at the time was in violation of the *Lord's Day Act*. This case was the first to recognize the need for a standardized test that could be used in Charter cases where one of the parties raised section 1. The ideas for a proportionality test, the need for minimal interference, and sufficient importance were first presented by Dickson. In *Oakes*, these ideas were elaborated on and organized into a fully formed test. The Court determined that any law whose purpose is aimed to promote a specific religion or practice of religion can not be saved by section 1. The Court also set a precedent that when looking at the purpose of a law, it cannot be "ultra vires" or beyond the power of Parliament (*R. v. Big M Drug Mart Ltd.,* 1985, para 141). Allowing that would "invite colourability" and allow Parliament to do "indirectly what it could not do directly" (*R. v. Big M Drug Mart Ltd.,* 1985, para 141). Thus, when looking at the journey towards the Oakes test, *R. v. Big M Drug Mart Ltd.* is undeniably the starting point.

R. v. Oakes

As demonstrated in the previous section, some progress was being made towards a section 1 test prior to *Oakes*, but nothing concrete. The Court was essentially dealing with section 1 on a general case by case basis. They would hear the arguments and then decide whether the limit was reasonable or not under the specific circumstances (McCormick, 2015, p.68). They were forced to make it up as they went along because of the lack of guidelines (McCormick, 2015, p.68). Consistency in the Supreme Court is exceptionally important so that there cannot be accusations of improper or unfair section 1 applications. If the Supreme Court were to be lenient in their application in one case and then strict in another, it would go against the very values of the Charter and judicial discretion. Thus, a formulated step-by-step test was desperately needed.

Oakes looked like many other criminal appeals when it arrived at the Supreme Court. Nothing signalled beforehand the importance it would have on the criminal justice system. Justice Dickson formulated a test with clear logical steps that the Court could use in all future section 1 decisions. The elevated standard of protection for Charter rights and freedoms achieved by the Oakes test signalled the true priorities of the Supreme Court. It became possible to place limitations on Charter rights, but only if the violation could pass through the rigorous steps laid out in this case.

Facts of the Case

In 1981, David Oakes was found to have $619.45 and eight one gram vials of hashish oil, worth about $150, in his possession. Oakes claimed that the hashish oil was for his own use, but that the $619.45 was from a workers' compensation cheque. Oakes was thereafter charged with

unlawful possession of a narcotic under the *Narcotics Control Act.* However, section 8 of the same act presumes anyone in possession of a narcotic to be in possession for the purpose of trafficking, unless the accused can prove otherwise. This gives the burden of proof to the accused and is known as reverse onus. Relevant portions of s.8 in the *Narcotics Control Act* (1970) are as follows:

> If the court finds that the accused was in possession of the narcotic ... he shall be given an opportunity of establishing that he was not in possession of the narcotic for the purpose of trafficking ... if the accused fails to establish that he was not in possession of the narcotic for the purpose of trafficking, he shall be convicted of the offence as charged.

At trial, the judge found that the connection between possession of a narcotic and possession for the purpose of tracking was irrational and not necessary in Oakes' situation. Oakes was convicted only on the lesser charge and was acquitted of the trafficking charge. The Attorney General of Canada appealed the acquittal. On a unanimous decision, the Ontario Court of Appeal dismissed the appeal and determined that the reverse onus nature of s. 8 of the *Narcotic Control Act* was unconstitutional. This decision was appealed by the Crown once again and was sent to the Supreme Court. Although Oakes' arrest happened before the Charter was enacted, his court dates happened afterwards so the Charter was applicable.

Legal Questions

The Supreme Court had two main questions they needed to answer: (1) Does s.8 of the *Narcotic Control Act* violate s. 11(d) of the *Charter*, and (2) if it does, is s.8 a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of

the Charter? Section 1 was being considered in this case as the Crown asserted that s. 8 of the *Narcotic Control Act* was a reasonable limit under s.1 in a previous stage.

Section 11(d)

Does s. 8 of the *Narcotic Control Act* violate s. 11(d) of the Charter? To answer this question, the Court began by looking at what s. 8 was attempting to accomplish. It requires that once the Crown proves beyond a reasonable doubt the possession of a narcotic for an accused, the accused must prove they were not in possession for the purpose of trafficking. If unsuccessful, the accused is to be convicted of the more severe trafficking charge. This is known as a reverse onus provision as it imposes a legal burden on a balance of probabilities.

Section 11(d) of the Charter states that "any person charged with an offence has the right to be presumed innocent until proven guilty, according to law in a fair and public hearing by an independent and impartial tribunal" (*R. v. Oakes*, 1986, para. 27). The notion of innocent until proven guilty has long been used in international legal systems. This section goes hand in hand with s.7 of the Charter*,* which gives the right to life, liberty, and security of the person. Minimally, s. 11(d) requires that (1) an individual must be proven guilty beyond a reasonable doubt, (2) the State must bear the burden of proof, and (3) criminal prosecutions must be carried out using lawful procedures and fairness (*R. v. Oakes*, 1986, para. 32). To help his determination, Dickson turned to pre-Charter *Canadian Bill of Rights* jurisprudence dealing with the presumption of innocence, provincial courts that have examined s. 11(d) of the Charter already, and United States jurisprudence dealing with their own presumption of innocence. After this analysis, the Court found that requiring an accused to disprove a presumed fact is in direct contrast with the presumption of innocence in s. 11(d), and is "radically and fundamentally

inconsistent with the societal values of human dignity and liberty" (*R. v. Oakes*, 1986, para. 61). Therefore, the answer to question (1) is affirmative, s. 8 of the *Narcotic Control Act* does, in fact, violate s. 11(d) of the Charte*r*.

Section 1

The Supreme Court began their analysis of s. 1 analyzing the wording and functions of it. The two functions of s. 1 are to (1) guarantee the rights and freedoms set forth in the Charter, and (2) explicitly state exclusive justificatory criteria against which limitations on those rights and freedoms can be measured (*R. v. Oakes*, 1986, para. 63). As mentioned in a previous section of this thesis, the Court analyzed the main terms of s.1, including "prescribed by law", "demonstrably", "reasonable", and "free and democratic society". The analysis of these terms allowed for the formation of the section 1 test that would come to be known as the Oakes test, which is to be discussed next.

After putting s. 8 of the *Narcotic Control Act* through the newly formed Oakes test, the Court found that the limitation of s. 11(d) could not be justified as it failed the rational connection part of the test. Thus, the answer to question (2) is no, s.8 does not impose a reasonable limit under s.1 and can no longer be of force and effect.

The Oakes Test

In essence, the Oakes test is a standardized system created by the Supreme Court to put an infringing law, regulation, or government action through to test if the limitation is reasonable and can be justified. Prior to the Oakes test being engaged, the Court has one important consideration to be made. They must consider whether the Charter infringement was "prescribed by law". As previously defined in the wording section of this thesis, for a Charter infringement to

be “prescribed by law” it must be codified in an existing public law, policy, regulation, and be accessible to the public, written with precision, and not vague. If the limit is found to be “prescribed by law”, the Oakes test may be engaged.

There are four parts of the Oakes test that need to be satisfied: sufficient importance, rational connection, minimal impairment, and a balancing test. The last three of the steps are a part of what is called the proportionality analysis. The standard of proof is the civil standard, proof by a preponderance of probabilities. If the legislation fails at any one step of the test, it will not advance to the next stages and the infringement will be considered unjustified and unconstitutional (Moore, 2018, p. 146). If the legislation can satisfy all four steps of the test, the infringement can be justified and considered a reasonable limitation (Moore, 2018, p. 146). The steps of the Oakes test will be explained in this section, as well as a demonstration of how they were applied to s. 8 of the *Narcotics Control Act* in the *Oakes* case.

Sufficient Importance

After confirming that the limitation is prescribed by law, the Court looks to the objective of the law. The burden of proof falls to the infringing party to show that there is a pressing and substantial need for the Charter infringement. The rights and freedoms of Canadians should take precedence over the needs of the government unless there is a pressing and substantial social issue that can be addressed by the limitation. The objective of the limiting law should be of sufficient importance to warrant overriding a constitutional right or freedom (Sharpe & Roach, 2017, p. 70). The objective should also be related to the pressing and substantial concerns of a free and democratic society (*R. v. Oakes*, 1986, para. 69). The objective needs to be concrete, precise, and applicable to the real problems or harms of Canadian citizens (Choundry, 2006, p.

523). It cannot be vague or symbolic, as the objective needs to satisfactorily be presented to the Court (Choundry, 2006, p. 523). Not all governmental interests or policy objectives are entitled to s. 1 consideration, thus those with objectives that are trivial or discordant will not pass this stage (*R. v. Oakes*, 1986, para. 69).

In *Oakes*, the Court began the Oakes test by examining the objective of s. 8. The Crown presented to the Court that the objective of s. 8 was to "curb[...] drug trafficking by facilitating the conviction of drug traffickers" (*R. v. Oakes*, 1986, para. 73). To Chief Justice Dickson, this was a substantial and pressing objective. Drug trafficking had been increasing since the 1950s, when there was already considerable concern to be had. Canada had already enacted multiple statutory provisions and signed international agreements relating to drug trafficking, so the problems associated were no stranger to the Court. The "grave ills" and seriousness of drug trafficking was self-evident to the Court, thus the objective of s. 8 was found of sufficient importance to warrant overriding the Charter's s. 11(d) right to innocence until proven guilty, in this specific case (*R. v. Oakes*, 1986, para. 76).

Rational Connection

If the objective of the law is determined to be of sufficient importance, the Court will consider the connection between the law's objective and the limitation itself. It is again the infringing party that the burden of proof falls on. They must show that the sufficiently important objective is rationally connected to the means used to achieve it. The means used must be demonstrably justified in a free and democratic society and reasonable (*R. v. Oakes*, 1986, para. 77). The connection can not be arbitrary, unfair, or based on irrational considerations (*R. v.*

Oakes, 1986, para. 70). The connection does not have to be scientific and can instead be social, political or philosophical (Sharpe & Roach, 2017, p. 70).

This step of the Oakes test is where s. 8 failed and could not advance to further steps. A failure at this stage means the Charter limitation is not justified. It is rare for the Court to not find a rational connection between the law and its objective (Mathen, 2012, p. 494). It has only happened in a few other cases besides *Oakes*, including *Suavé v. Canada (Chief Electoral Officer)* [2002] and *Benner v. Canada (Secretary of State)* [1997] (Mathen, 2012, p. 494). When examining the rational connection of s. 8's objective and the limitation it imposes, the Court needed to answer the question: Is the reverse onus clause in s. 8 rationally related to the objective of curbing drug trafficking? (*R. v. Oakes*, 1986, para. 77). Minimally, there needed to be a rational connection between the act of possession and the presumed fact of possession for the purpose of trafficking (*R. v. Oakes*, 1986, para. 77). Dickson did not believe this to be true and failed s. 8 at this stage. He referred to the Ontario Court of Appeal judge who stated that the possession of a small amount of narcotics does not support the inference of trafficking (*R. v. Oakes*, 1986, para. 78). To presume in such a way is irrational and overinclusive. Trafficking carries with it the possibility of imprisonment for life so this cannot be taken lightly.

Minimal Impairment

If there is a rational connection between the law's objective and the limitation, the Court will move on to consider the impact of the limitation. Most laws that fail the Oakes test fail at this stage, with about 55% of cases being decided here (Johnston, 2009, p. 103). For a limitation to be reasonable, the Charter right or freedom needs to be impaired as minimally as possible. Again, the burden of proof rests with the infringing party and they need to show that there is no

less drastic way to achieve the same pressing and substantial objective. There must be no other reasonable alternative that would achieve the same objective. If a less restrictive measure does exist, the infringing party should show that it would not be as effective in achieving the objective (Sharpe & Roach, 2017, p. 78).

In this stage, it must be shown that care was taken when crafting the law, that there is no unwarranted infringement of rights that is unnecessary to achieve the objective of the law (Davidov, 2000, p. 197). Legislatures and governments are much more aware of this when creating laws now that the Charter has been around for a while (Davidov, 2000, p. 197). When the Charter was still new, there was a period of adjustment to learn to consider the Charter in new laws and statutes (Davidov, 2000, p. 197). Since s. 8 of the *Narcotics Control Act* failed the previous step of rational connection, it was not necessary for the Court to apply this step or the following step to the case.

Balancing Test

At this final step of the Oakes test, the legislation has already been found to have a sufficiently important objective, an objective that is rationally connected to the means to achieve it, and minimally impairs Charter rights and/or freedoms. In this stage, the Court is examining whether the law is constitutionally just within a proportionality test (Davidov, 2000, p. 197). This test weighs the significance of the infringement against the importance of obtaining the objective (Sharpe & Roach, 2017, p. 78). In essence, the benefits or salutary effects must be proportional to the negative or deleterious effects (Sharpe & Roach, 2017, p. 78). The main question to be asked is whether the benefits of the law's objective are greater than the negative effects of the

Charter infringement. The more severe the deleterious effects of a measure are, the more important the objective of the infringing law must be (*R. v. Oakes*, 1986, para. 71).

Changes to the Oakes Test

The Oakes test remains the guiding outline for the Supreme Court when section 1 is raised in a Charter case. However, in the 35 years since the Oakes test's inception, there have been some considerable changes and reinterpretation performed by the Court. Many Court decisions have made minor changes to the Oakes test for it to apply to their cases' specific circumstances, but does not change the application of the test in future cases. Therefore, only cases with considerable influence on the future application of the Oakes test will be discussed in this section of the thesis. The cases to be discussed, in chronological order, are *R. v. Edward Books and Art Ltd.* [1986], *Irwin Toy Ltd. v. Quebec (Attorney General)* [1989], and *Dagenais v. Canadian Broadcasting Corp.* [1994].

R. v. Edward Books and Art Ltd.

Less than 10 months after the Oakes test was formulated, the Court made a key change to minimal impairment parts of the proportionality analysis. The case of *R. v. Edward Books and Art Ltd.* [1986] began when Edward Books and Art Ltd. was one of four Ontario retailers charged under s. 2 of the *Retail Business Holidays Act* [1980] for selling goods and being open on a Sunday. The Court had to determine whether any part of that act infringed upon one's ss. 2(a), 7, or 15 Charter rights. No infringement was found under s. 7 or s. 15, but s. 2(a), the freedom of religion section, was found to be infringed upon (*R. v. Edward Books and Art Ltd.,* 1986, para 159). Thus, the Court attempted to use the newly formed Oakes test to see if the infringement of s. 2(a) could potentially be justified.

Chief Justice Dickson wrote the majority judgement for this case and found that a more flexible interpretation of the Oakes test was necessary for the circumstances. The Court found that the same level of strictness used for a criminal case like *Oakes* was not necessary for a case that dealt with retail store regulation (Choudhry, 2006, p. 12). In *Oakes*, the minimal impairment test required that the Charter right or freedom be impaired "as little as possible" (Bredt & Pessione, 2013, p. 488). Dickson changed this requirement to "as little as reasonably possible". (Bredt & Pessione, 2013, p. 488). He also added that "[t]he courts are not called upon to substitute judicial opinions for legislative ones" and that "[b]y its nature, legislation must, to some degree, cut across individual circumstances to establish general rules" (*R. v. Edward Books and Art Ltd.,* 1986, para 777-782). Under this more flexible interpretation, the infringement was found justified under section 1. These pivotal changes in the Oakes test changed the way future cases would apply *Oakes*, likely for the better.

Irwin Toy Ltd. v. Quebec (Attorney General)

Irwin Toy Ltd. v. Quebec [1989] was the Court's first significant freedom of expression case, also known as s. 2(b) of the Charter (Moon, 2017, p. 57). The goal of the Court was to find out whether a Quebec law restricting advertising to children under the age of 13 was unconstitutional or not, and if yes, whether the infringement could be justified under section 1 using the Oakes test. It was determined that the legislation did infringe upon s. 2 (b) of the Charter, but it was found justified under s. 1. Dickson, for the majority judgement, went through the Oakes test as presented in *Oakes*, but with one new consideration. In cases where the infringing legislation is a part of an attempt to protect vulnerable groups, a more relaxed standard of scrutiny is to be used (Sharpe & Roach, 2017, p. 85). The freedom of expression doctrine

requires that the ideas are presented to a willing audience who can receive and assess the information without interference from the state (Moon, 2017, p. 57). Children, a particularly susceptible audience whose reasoning capacities are not fully developed yet, should be protected from the manipulation of advertising (Moon, 2017, p. 57).

Additionally, the Court found that cases where "the government is best characterized as the singular antagonist of the individual whose right has been infringed" should be treated differently than cases where the government is "mediating between the claims of competing groups" (*Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989, p. 933-934). In the latter of these situations, the Court is trying to strike a balance between protecting the vulnerable, while also infringing as little as possible on the Charter rights and freedoms (Sharpe & Roach, 2017, p. 86). Thus, the first type of situation should be held to a rigorous standard, while the second type should not be tested so strictly (Sharpe & Roach, 2017, p. 86). Situations of competing group interests may include: obscenity and child pornography laws, provisions about the prior sexual conduct of sexual assault victims, limiting access to the medical records of sexual assault victims, and hate-crime laws (Sharpe & Roach, 2017, p. 86).

Dagenais v. Canadian Broadcasting Corporation

The *Dagenais v. Canadian Broadcasting Corporation* [1994] case is the cardinal Supreme Court decision on publication bans and their relation to s. 2(b) of the Charter, the freedom of expression section. Four members of a Catholic religious order were charged with the physical and sexual abuse of young boys at an Ontario Catholic School. The defendants requested the judge place a publication ban on a mini-series by the Canadian Broadcasting

Corporation (CBC) that was on a similar sexual abuse scandal until the four trials were over. The publication ban was granted by the trial judge.

CBC challenged this publication ban as they believed it violated their s. 2(b) freedom of expression right. The Supreme Court agreed with this assertion. The Oakes test was then engaged, but Chief Justice Lamer had an important new addition to the balancing test, the third step of the proportionality test. He felt that just comparing the salutary effect with the deleterious effects was far too narrow an approach (Johnston, 2009, p. 105). He submitted that there should be both "a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective" and proportionality between the salutary effects and deleterious effects of the measures (*Dagenais v. Canadian Broadcasting Corporation,* 1994, p. 839). This clarification is noteworthy because the Court would not only need to consider the proportional results, but also consider the effects of the objective on individual and group rights in a more abstract way (Johnston, 2009, p. 105). Furthermore, this case produced its own test called the Dagenais/Mentuck test that determines the situations in which a publication ban should be ordered.

Criticisms of the Oakes Test

Supreme Court justices and scholars alike seem to agree on the fact that the original form of the Oakes test was much too strict in its application. The Oakes test was originally meant to be a "stringent standard of justification" that could be applied in a common and universal one size fits all way (Bredt & Pessione, 2013, p. 485). However, as mentioned earlier, only 10 months after the Oakes test was created, the Court was already trying to make it more flexible. Over

time, the Court adopted a more contextually driven and flexible approach that seems much more applicable than back in 1986.

Despite the adjustments continually being made to the Oakes test, there are countless scholarly peer reviewed articles written about further changes that need to occur. Some rearrange and reformulate the steps, while others believe the Oakes test should be thrown out and the Supreme Court should start from scratch (Bredt & Pessione, 2013; Davidov, 2000; Moore, 2018). (Zion, 2012). It is to be expected that 35 years after the inception of such a critical test there might be some criticism. No one is claiming that the Oakes test is perfect and changes likely still do need to be made.

Some have argued that section 1 subordinates Parliament and the judiciary will of the provincial legislatures by giving Courts the ability to deem laws unconstitutional and make changes to them or strike them out completely (McLachlin, 2007, p. 369). Typically, if a law is found unconstitutional after being put through the Oakes test, it is because the law impairs a Charter right or freedom more than is reasonably necessary, not because the Court believes that Parliament made a law with no pressing and substantial reason (McLachlin, 2007, p. 369). Dickson, who gave the *Oakes* judgement, believed that the Courts were the ultimate protectors of constitutional values but needed Parliament and the legislatures as partners to do that effectively (Sharpe, 2000, p. 217).

The Oakes Test in Action - RJR-MacDonald Inc v. Canada (Attorney General)

To illustrate what the Oakes test looks like when applied to a case that is not *Oakes*, the case of *RJR-MacDonald Inc v. Canada (Attorney General)* [1995] will be explained and analyzed. This case is similar to *Oakes* in the way that it does not pass the Oakes test and the

legislation in question is found unconstitutional. This case was selected after a thorough review of the literature available on section 1 and what multiple qualified authors have deemed an important case in relation to the Oakes test (Choudry, 2006, p. 504; Davidov, 2000, p. 198).

Facts of the Case

This Supreme Court decision involves the constitutionality of select sections of the *Tobacco Products Control Act* [1988]. It was argued that the selected sections were a violation of s. 2(b) of the Charter, the freedom of expression section. The proceedings that led to this case were first seen as two separate motions by the Quebec Superior Court: one appeal from RJR-MacDonald Inc. and one appeal from Imperial Tobacco Ltd. This judgement is to deal with both of them. As each appeal was concerned with different sections of the *Tobacco Products Control Act* [1988], this case will look at them all. The relevant sections to this case involve ss. 4 and 5, which deal with the advertisement of tobacco products, ss. 6 to 8, which deal with the promotion of tobacco products, and s. 9, which deals with the sale of tobacco products without printed health warnings (*RJR-MacDonald Inc v. Canada (Attorney General)***,** 1995, p. 201). Though the main sections being considered are sections 4, 8, and 9.

At trial in the Quebec Superior Court, the ruling judge found that the *Tobacco Products Control Act* [1988] was ultra vires, or beyond the powers, of the Parliament of Canada. They also found that the discussed sections violated the appellants' s. 2(b) right to freedom of expression under the Charter. When applying the Oakes test to see if the violation could be justified, the judge found that the sections failed the Oakes test and could not be saved. On appeal to the Quebec Court of Appeal, the Court found unanimously that the *Tobacco Products Control Act* [1988] was intra vires, or within the powers of Parliament. They went on to agree with the trial

judge that the selected section did violate s. 2(b) of the Charter and that the sections failed the Oakes test. On appeal once again, the case was accepted by the Supreme Court.

Main Legal Questions

There are three main legal questions before the Court: (1) Is the *Tobacco Products Control Act* [1988], wholly or in part, a valid exercise of federal criminal law power pursuant to s. 91(27) of the *Constitution Act* [1867]? (2) Is the *Tobacco Products Control Act* [1988], wholly or in part, infringe upon the right to freedom of expression, also known as s. 2(b), in the Charter? (3) If so, can the infringement be justified as a reasonable limit under s. 1 of the Charter? (*RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995, p. 240). The reasoning for each question is to be explained next, but the answers according to the majority judgement of 5-4 are (1) Yes, (2) Yes, and (3) No (*RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995, p. 350).

The Validity of the Act

The first job of the Court was to determine whether the *Tobacco Products Control Act* [1988] is a valid exercise of the federal criminal law power and is intra vires of the federal government. Section 91(27) of the *Constitution Act* [1867] grants the federal Parliament the exclusive power to legislate criminal law. Precedent shows that criminal law should be enacted with a public purpose in support of "public peace, order, security, healthy, [and] morality", non-exclusively (*RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995, p. 350). Taking this definition into consideration, the Court wanted to look at the purposes of the Act to make a fully informed decision. Section 3 of the *Tobacco Products Control Act* [1988] lists its purposes as:

> **3.** The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular: (*a*) to protect the health of

> Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases; (*b*) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and (*c*) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products (p. 223-224).

From reading the purposes of the Act, it is clear that commonality between them is a concern for public health. The detrimental health effects of tobacco consumption are both substantial and dramatic, i.e. tobacco kills (*RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995, p. 350). Thus, the Court found that the Act is a valid exercise of the federal criminal law power.

Section 2(b)

In all three of the judgments to do with this case, the Court briefly mentioned that freedom of speech was violated by sections 4, 8, and 9 and moved quickly onto the Oakes test. McLachlin quickly submits that the guarantee of free expression is extended to commercial speech like advertising, prohibiting the advertisement and promotion of tobacco products is an infringement on that right. Additionally, not allowing tobacco companies to put anything on their packaging besides "the name, the brand name, trademark," and the health warning required by s. 9(2) is also a breach of freedom of expression (*RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995, p. 326). Fortunately, this thesis is not based on how the Supreme Court decides whether or not there has been a violation of the Charter. Therefore, the Court's application of the Oakes test is most valuable.

The Oakes Test

Before the Oakes test can be engaged, the Court must show that the limit is prescribed by law. As the Court spent a portion of their judgment already proving that the *Tobacco Products Control Act* [1988] and its sections are a valid part of Canadian criminal law, they need not do it again. The limit is prescribed by law and the Oakes test may be engaged. To reiterate, the steps to be satisfied in order are sufficient importance, rational connection, minimal impairment, and a proportionality analysis. If any of these steps are not met, the limit cannot move onto the next stage and will be automatically considered an unreasonable infringement.

The Court's first step is to look at the objective of the limit and see if it is of sufficient importance. The Court has already discussed the overarching objective of the entire Act, but what about the specific infringing sections? The objective of prohibiting advertising and requiring trademarks is to block Canadians from the persuasion of advertising that would make them want to buy tobacco products. The objective of requiring a mandatory package warning is to dissuade those who see the package from buying it. Together, these have an objective to decrease the consumption of tobacco products in Canada. The Court believes that even a small reduction in tobacco use would have a significant benefit to the health of Canadians. Therefore, the objective of the limiting sections is sufficiently important.

Next, a rational connection must be made between the objectives and the means to achieve them. The Court found the use of warnings of boxes and lack of advertising has been linked, admittedly inclusively, to encouraging people to reduce or cease their tobacco use. Thus, this is enough evidence on a balance of probabilities advertising, warnings, and tobacco consumption are rationally connected and can move onto the next step. However, s. 8 of the Act,

which has to do with the trademark symbol of a cigarette on boxes cannot be logically or causally linked to the objective of reducing consumption and fails the rational connection test.

For the remaining two sections, sections 4 and 9, the next step is to see if the Charter right is being minimally impaired. The Court found that requiring tobacco companies to put a warning on their package is fully justified, but not allowing companies to say the warning is a requirement of the government is not minimally impairing. The Court also found that the advertising ban did not need to be a total ban and that other alternatives were available and not minimally impairing. Therefore, both s. 4 and 9 fail this step. As all three sections have failed a step of the Oakes test, it is unnecessary for the Court to apply the last step and the sections are considered an unjustified infringement on s. 2(b) of the Charter. As a remedy, the Court chose to make sections 4, 8, and 9 no longer of force and effect, but because they were intricately woven with other sections, sessions 5 and 6 also become of no force and effect (*RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995, p. 175).

Dissenting Opinion

The dissenting opinion in this case came from La Forest, L'Heureux-Dubé, Gonthier, and Cory. They believed that there was a violation of s. 2(b) of the Charter in this case, but could be found justified after using the Oakes test. They believed that the legislation passed all four steps of the Oakes test and could be kept pursuant to a free and democratic society. However, as shown, this was not the majority decision and the legislation was found not justified under s. 1 at the end of the judgement.

Impact of this Case

The *RJR-MacDonald Inc. v. Canada (Attorney General)* [1995] case brought some clarity to an aspect of the Oakes test that the Court was uncertain about. The original *Oakes* case did not clearly explain the "quality of evidentiary record" (Choundry, 2006, p. 504). In other words, how the Court was meant to express their findings at each step of the test. The pressing question for the Court was how to "allocate the risk of factual uncertainty when governments legislate under conditions of imperfect information" (Choundry, 2006, p. 504). Chief Justice MacLachlin found that the Oakes test needed to be a fact-specific inquiry that was a reasoned demonstration and not just based on the say-so of governments (Choundry, 2006, p. 523). The analysis is to be done in a "highly contextual manner" that considers how the infringing policy operates in the real world (Moore, 2018, p. 153). To fully convey this point, the explanation is best said by MacLachlan in *RJR-MacDonald Inc. v. Canada (Attorney General)* [1995] herself:

> In determining whether the objective of the law is sufficiently important to be capable of overriding a guaranteed right, the court must examine the actual objective of the law. In determining proportionality, it must determine the actual connection between the objective and what the law will in fact achieve; the actual degree to which it impairs the right; and whether the actual benefit which the law is calculated to achieve outweighs the actual seriousness of the limitation of the right. In short, s. 1 is an exercise based on the facts of the law at issue and the proof offered of its justification, not on abstractions (para. 133).

Additionally, this case set precedent that in the minimal impairment part of the Oakes test that it is not enough that there are theoretical less-restrictive means, but the means need to be good enough to meet the objective in full, to the same extent that was intended by the government. (Davidov, 2000, p. 198).

The Oakes Test in Action - Alberta v. Hutterian Brethren of Wilson Colony

To demonstrate the impact of the test that came out of *Oakes* and demonstrate what the Oakes test looks like in full, the case of *Alberta v. Hutterian Brethren of Wilson Colony* [2009] is explained and analyzed. This case was selected after a thorough review of the literature available on section 1 and what multiple qualified authors have deemed an important case in relation to the Oakes test (Zion, 2012; Moore, 2018; Leckey, 2010). The infringing legislation passes the Oakes test in this case and is considered a reasonable limitation, the opposite of what happened in *Oakes*. The Court also makes some changes to the Oakes test that become precedent for all future cases that apply the Oakes test.

Facts of the Case

Beginning in 1974, the Province of Alberta allowed some citizens to not have a photo on their driver's license for religious reasons. This was called a Condition Code G license. About 450 Condition Code G licenses were issued in Alberta, with about 56% held by members of the Hutterian Brethren colonies (*Alberta v. Hutterian Brethren of Wilson Colony*, 2009, p. 568). The members of this religion sincerely hold the belief that willingly having a photograph taken of themselves is a violation of the Second Commandment. Later, in 2003, Alberta amended this previous regulation and under s. 14(1)(b) of Alberta's *Operator Licensing and Vehicle Control Regulation* [2002] required that:

> Before issuing or renewing an operator's licence or missing a duplicate operator's license, the Registrar [...] must require an image of the applicant's fact, for incorporation in the licence, be taken by equipment provided by the Registrar (p.16).

It now did not matter what your religious beliefs were, you were required to have photo identification on an Alberta driver's license no matter what.

The Hutterian Brethren people of Wilson Colony made it known that this did not work for them. They proposed that they be issued with a non-photo driver's license marked with "Not to be used for identification purposes". After being unable to reach an agreement with the Province, they challenged the constitutionality of this requirement. To them, it was an infringement of their s.2(a) freedom of religion. The case proceeded to trial where the chambers judge found that the universal photo requirement was inconsistent with s. 2(a) of the Charter and could not be saved by s. 1. He declared the regulation of no force and effect. At the appeal, the majority reached the same conclusion. S. 2(a) was infringed upon by the regulation and could not be justified under s. 1. The case was once again appealed and was accepted by the Supreme Court. The majority decision of 4-3 was delivered by Chief Justice McLachlin. On a decision of 4-3, the appeal was allowed. The Court found that there was an infringement of s. 2(a), but could be justified under s. 1. Thus, the regulation was deemed constitutional and was allowed to be kept.

Main Legal Questions

The main legal questions are as follows: (1) Does section 14(1)(b) of Alberta's *Operator Licensing and Vehicle Control Regulation* infringe on s. 2(a) of the Charter? (2) If yes, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and

democratic society under s. 1 of the Charter? (3) Does section 14(1)(b) of Alberta's *Operator Licensing and Vehicle Control Regulation* infringe on s. 15(1) of the Charter? and (4) If yes, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the Charter? The reasoning of each question is to be explained but the answers are: (1) Yes, (2) Yes, (3) No, and (4) It is not necessary to answer this question **(***Alberta v. Hutterian Brethren of Wilson Colony*, 2009, p. 617).

Section 2(a) and the Amselem Test

The Supreme Court case of *Syndicat Northcrest v. Amselem* [2004] previously established the precedent method for dealing with possible s. 2(a) infringements called the Amselem test. The Amselem test consists of two main steps: First, the claimant/plaintiff must demonstrate that he/she sincerely believes in a practice or belief that has a nexus with religion. This is a subjective test because religious beliefs are profoundly personal and it is not up to the Court to decide the validity of one's religious beliefs or practices (*Syndicat Northcrest v. Amselem*, 2004 p. 581). The official stance of a religion is not considered either. The burden of proof rests with the claimant and it is up to them to convince the court on a balance of probabilities of their sincere religious belief of practice through evidence (*Syndicat Northcrest v. Amselem*, 2004 p. 581). The second step is an assessment of whether there has been an infringement or not. The claimant must show that a legislative or contractual provision interferes with their ability to act in accordance with their religious beliefs, in a manner that is more than trivial or insubstantial. The specific context of each case must be considered to determine this. It must also be shown that the performance of their freedom of religion is not negatively affecting anyone else's *Charter* rights. This part of the

test is fully objective. Again, the burden of proof rests with the claimant and the proof is on the "balance of probabilities" (*Syndicat Northcrest v. Amselem*, 2004 p. 585).

Thus, the Amselem test was to be applied by the Court to section 14(1)(b) of Alberta's *Operator Licensing and Vehicle Control Regulation*. The first step of the Amselem test was easily met. Members of the Colony sincerely believe that allowing their photo to be taken violates the Second Commandment. Having their photo taken could potentially result in censure for them, like being made to stand during religious services. Given this belief, the universal photo requirement puts members of the Colony in a position where they have to make a choice between having a driver's license and violating their religious commitments, or not being able to possess a license and risking their livelihood. As the first part of the test is satisfied, the second part may be engaged. The Court did not receive evidence of the interference, but the lower courts proceeded in their application of the Amselem test as if they had so the Court proceeded as their lower counterparts did. Therefore, the second part of the test was also satisfied, meaning s. 14(1)(b) of Alberta's *Operator Licensing and Vehicle Control Regulation* did violate s. 2(a) of the Charter.

Section 15(1)

Briefly a violation of s. 15(1) was brought up but was quickly rejected. The respondents were not denied licenses because of discrimination for their religious beliefs, but rather because they do not meet the statutory requirement to hold a license, which includes having your photo taken. Thus, s. 15(1) was not violated and the Oakes test was not necessary for this Charter section.

The Oakes Test

As the Court has shown a s. 2(a) Charter infringement exists, the Oakes test may be engaged. However, the Oakes test can only be engaged if the limit is prescribed by law. Regulations, such as this one, are passed by Order in Council and are applied in accordance with the principles of administrative justice, and therefore are prescribed by law and the Oakes test can begin. As a reminder, the steps to be satisfied in order are sufficient importance, rational connection, minimal impairment, and a proportionality analysis. If any of these steps are not met, the limit cannot move onto the next stage and will be automatically considered an unreasonable infringement. But, if it can pass through all the steps successfully, the infringement will be considered justified under s. 1.

The first step of the Oakes test is determining if the objective of the regulation is pressing and substantial. The government's goals of imposing a universal photo requirement include the regulation of traffic safety, preventing identity theft, and the harmonization of international and interprovincial standards for photo identification **(***Alberta v. Hutterian Brethren of Wilson Colony*, 2009, p. 592). These goals come together to form a larger objective of maintaining the integrity of the driver's licensing system **(***Alberta v. Hutterian Brethren of Wilson Colony*, 2009, p. 592). Requiring a universal photo requirement allows the government to have a digital data bank of facial photos so wrongdoers are prevented from using driver's licences for identity theft **(***Alberta v. Hutterian Brethren of Wilson Colony*, 2009, p. 592). The Court found this objective to be both pressing and substantial. Thus, this stage of the Oakes test is passed.

Next, the Court must decide if the limit is rationally connected to the purpose. It is argued that a universal system of photo identification for drivers is the most effective way of preventing

identity theft and giving any sort of exemption to these rules would increase the vulnerability of the licensing system and the risk of identity fraud **(***Alberta v. Hutterian Brethren of Wilson Colony*, 2009, p. 594). Allowing people to hold non-photo licences risks the possibility that a person could possess multiple licences in different names. As the limit is to protect against identity theft, it is rationally connected to the objective of the regulation and this stage of the Oakes test is satisfied.

Next, the Court looks at the minimal impairment step of the Oakes test. The main consideration here is whether or not there is a less impactful way to achieve the pressing and substantial objective of the regulation. The Province offered the only other reasonable alternative to the Hutterian claimants that would still achieve the universal photo requirement but also minimize the impact on the Colony members **(***Alberta v. Hutterian Brethren of Wilson Colony*, 2009, p. 598). The alternative was denied. The only acceptable measure in their eyes is to remove the limit entirely. The only way to reduce the risk as much as possible is with a universal photo requirement, and therefore the regulation is minimally impairing and within the range of the most reasonable options to achieve the purpose.

Finally, the Court must consider the proportionality analysis. This step involves weighing the positive and negative effects of the regulation against each other. The benefits of the regulation include enhancing the security of the driver's licensing system, assisting in roadside safety and identification, and the eventual harmonization of licensing systems in other jurisdictions **(***Alberta v. Hutterian Brethren of Wilson Colony*, 2009, p. 608). The negative effects of the regulation may include additional financial costs to the community to arrange for highway transport and a departure from being self-sufficient in terms of transportation **(***Alberta v.*

Hutterian Brethren of Wilson Colony, 2009, p. 614). The Court found that not holding a driver's license may be inconvenient, but driving is a privilege, not a right **(***Alberta v. Hutterian Brethren of Wilson Colony*, 2009, p. 614). Additionally, the law is not compelling them to take a photo. It simply requires a photo to be able to hold a driver's license. In weighing the benefits against the negative impacts of the law, the Court submitted that being able to reduce the risk of identity-related fraud is on the more serious end of the scale when compared to the potential costs and inconvenience for the Colony people **(***Alberta v. Hutterian Brethren of Wilson Colony*, 2009, p. 614).

To summarize, the objective of reducing the risk of fraud related to driver's licenses is both pressing and substantial **(***Alberta v. Hutterian Brethren of Wilson Colony*, 2009, p. 615). The limit is also rationally connected to the objective. The limit minimally impairs the right without sacrificing the objective. The benefits that come with the limit are substantial, while the negative impact on the Hutterians, while not trivial, does not take away their ability to practice their religious beliefs **(***Alberta v. Hutterian Brethren of Wilson Colony*, 2009, p. 615). In conclusion, the regulation passed all steps of the Oakes test and therefore the limit of s.2(a) can be justified under s.1.

Dissenting Opinions

There were two dissenting opinions in this case. The first came from Abella, who believed that in a balancing test, the harm to the Hutterites was far more severe than the at best marginal benefits of keeping the regulation. The second came from Lebel and Fish, who believed that the regulation would fail at the minimal impairment step of the Oakes test. Their main

reasoning was that a driver's licence was more than a privilege to a member of the Hutterian Brethren of Wilson Colony, it was their livelihood.

Impact of this Case

Two influential adjustments to the Oakes test came out of this decision. First, the Court extended on what was previously decided in *R. v. Edward Books and Art Ltd.* [1986]. *Edward Books* set precedent that a law's objective must infringe upon rights as little as reasonably possible. This case expanded on this notion by adding that rights must be infringed upon as little as reasonably possible "within a range of reasonable options" (Leckey, 2010, p. 1043). Also addressing the minimal impairment section, the Court found that when analyzing a law's objective in the minimal impairment section that the government is allowed deference in formulating objectives for their policies and laws. However, that deference has a limit and cannot be absolute or blind (*Alberta v. Hutterian Brethren of Wilson Colony*, 2009, p. 597).

The second adjustment was a declaration of distinction between the minimal impairment step and the proportionality analysis, which involve a different sort of balancing (Moore, 2018, p. 150). Chief Justice Maclaclin found that Canadian Courts often did not follow this and discussed law's effects in the minimal impairment section when they should only be discussed at the proportionality analysis (Moore, 2018, p. 150). Maclaclin also pointed out that Courts often placed too much emphasis on the minimal impairment step when it should be on the proportionality analysis (Moore, 2018, p. 150). As "most of the heavy conceptual lifting and balancing ought to be done in the final step" and "proportionality is, after all, what s. 1 is all about" (*Alberta v. Hutterian Brethren of Wilson Colony*, 2009, p. 630). Ultimately, the Court found that if a law is able to pass the first three steps of the Oakes test, then it is highly unlikely

that it will be struck down based on its deleterious effects in the proportionality analysis (Zion, 2012, p. 446).

Conclusion

The effects of the Supreme Court's decision of *R. v. Oakes* [1986] can still be felt almost 40 years later. As demonstrated throughout this paper, the *Oakes* case brought the Charter's section 1 test to life, but it did not stop there. The Supreme Court cases that came after have just as much of an impact on the current day application of the Oakes test as the original decision does. The test continues to be improved upon to this day. The *Oakes* case is comparable to the centerpiece of section 1 analysis. Upon first glance, it appears that the *Oakes* case created the Oakes test and it became the standard test with no further changes. This is simply not the case. The Oakes test is a continuously evolving mechanism that would not be what it is today without the improvements made in the cases that came after *Oakes.* Every adjustment is instrumental in the success of the valuable Oakes test.

As demonstrated, a lot has gone into getting the Oakes to where it is now. It all began when the Charter was first enacted and the Supreme Court began applying it to their cases. The wording was broad and needed interpretation. Four years after the Charter's enactment, the case of *R. v. Oakes* went to the Supreme Court. Nothing hinted at the impact this case would have on the Canadian legal system. It created a test that would be used in every future section 1 case. After *Oakes*, the Supreme Court had an outline in which they would conduct limitation justification analysis. Different court cases would add their own little touch when applying it and further add to the legacy of the Oakes test. However, a case so huge would not go without criticism. Finally, to show the impact of *Oakes* and how it looks in action, two important cases

were selected and examined. The Oakes test continues and will continue to be the legacy of section 1.

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