

From: Jakki Jeffs

Sent: Monday, May 2, 2022 1:01 AM

To: Bunn, Jerri-Joanne <jbunn@London.ca>

Cc: Council Agenda <councilagenda@london.ca>

Subject: [EXTERNAL] Graphic Flyer deliveries to residential Properties - Report to Community and protective Services Committee April 20 2022

Dear Mayor and City Councillors

It is our judgement that the suggested “Graphic Imagery Delivery by-law” is yet again an effort which remains unconstitutional since one cannot be compelled by any state actor to make statements one does not agree with since this would be an infringement of the Charter Right to freedom of expression. We sincerely doubt it could be saved by section 1, on an appropriate OAKES analysis.

*“ The **Oakes** test was created by the Supreme Court of Canada in the 1986 case of R v Oakes.^[1] The test interprets section 1 of the Charter of Rights and Freedoms, which states that rights are guaranteed, “subject only to such reasonable limits . . . as can be demonstrably justified in a free and democratic society.”^[2] This means that the government must establish that the benefits of a law outweigh its negative impact—that is, its violation of a Charter right.*

R v Oakes

In R v Oakes, the police caught the accused, Oakes, with hashish oil and cash. They charged him with possession for the purpose of trafficking under the Narcotic Control Act (NCA).^[3] He claimed that the drugs were his own and that he did not intend to sell them. At that time, under section 8 of the NCA, anyone found with illegal drugs was presumed guilty of trafficking. Usually, the Crown must prove guilt beyond a reasonable doubt, but under the NCA it was up to the accused to prove that he was not guilty. This is called a “reverse onus”.

Oakes challenged the law, arguing that it violated the presumption of innocence guaranteed by section 11(d) of the Charter. The Supreme Court found that this right had been violated. They then had to consider whether the government could justify this violation using section 1.

The Test

The Court in R v Oakes created a two-step balancing test to determine whether a government can justify a law which limits a Charter right.

1. *The government must establish that the law under review has a goal that is both “**pressing and substantial**.” The law must be both important and necessary. Governments are usually successful in this first step.*

2. *The court then conducts a **proportionality analysis** using three sub-tests.*

a. *The government must first establish that the provision of the law which limits a Charter right is **rationaly connected** to the law’s purpose. If it is arbitrary or serves no logical purpose, then it will not meet this standard.*

b. *Secondly, a provision must **minimally impair** the violated Charter right. A provision that limits a Charter right will be constitutional only if it impairs the Charter right as little as possible or is “within a range of reasonably supportable alternatives.”^[4]*

*c. Finally, the court examines the law's **proportionate effects**. Even if the government can satisfy the above steps, the effect of the provision on Charter rights may be too high a price to pay for the advantage the provision would provide in advancing the law's purpose.*

In Oakes itself, the court considered that combatting the public health and safety risk created by narcotics was a pressing and substantial goal. However, the Court ruled that a "reverse onus," where an accused is presumed guilty of drug trafficking unless he proves otherwise, was not rationally connected to this goal.^[5] The Court found that it would be irrational to presume an intention to traffic narcotics when an accused only possessed a small amount of drugs. Having failed this first step, the court did not consider step 2 (b) or (c), and the law was "struck down," that is, declared unconstitutional.

Legacy

The Oakes test is employed every time the government tries to defend a restriction on the Charter rights of Canadians. Some legislation has passed the test. For example in R v Keegstra,^[6] the Supreme Court held that a law against hate speech was a reasonable and justifiable limit on section 2(b) of the Charter, freedom of expression. The test provides a mechanism for the courts to balance, on the one hand, the government's ability to achieve its goals and, on the other, the protection of individual rights. This balancing test is now considered a cornerstone of Canadian constitutional law.

^[1] R v Oakes, [1986] 1 SCR 103, 1986 CanLii 46 (1986) [Oakes].

^[2] 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.

^[3] Narcotic Control Act, RSC 1970, c N-1.

^[4] Oakes, supra note 1 at 46.

^[5] Oakes, supra note 1 at 142.

^[6] R v Keegstra, [1990] 3 SCR 697, 1990 CanLii 24 (SCC)."

<https://www.constitutionalstudies.ca/2019/07/oakes-test/>

We believe that It is also arguably void for vagueness, as there is no objective basis for determining whether any particular content is "graphic" and it is our consideration that the Council's decision to simply restrict it to images of "fetuses" to deal with this legal problem is capricious and arbitrary.

Why single out such photos from all the other kinds that might be graphic? It is our conclusion that this appears to be an underhanded effort to censor a pro-life message and estimate that City Council will leave itself open for litigation should it pass this by-law.

Sincerely

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