R. v. Oakes: The Rationale Behind Canada’s Key Charter Case

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The case of R. v. Oakes was a Charter case heard before the Supreme Court of Canada in 1981, which established the procedure for testing whether a Charter Right violation could be justified under section one of the Charter. During his trial, Oakes challenged the constitutional validity of section 8 of the Narcotics Control Act (NCA). The trial judge found the law was thus in violation of s.11(d), of the Canadian Charter of Rights and Freedoms and as a result Oakes was acquitted of the charge of trafficking; however, the prosecution appealed the decision.

In the Supreme Court’s ruling on R. v. Oakes, it struck down s. 8 of the NCA as inconsistent with s.11(d) of the Charter, despite previous decisions by lower Courts that s. 8 of the NCA did not place a legal burden on the accused. Why, in February of 1986, did the Court make this historic ruling?

One theory proposed was that s. 8 was struck down on the basis that it violated the absolute freedom of the presumption of innocence, but in its decision, the Supreme Court held that if a law satisfied s.1 it would be upheld.

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1 In the first part of his trial for unlawful possession of a narcotic for the purpose of trafficking, Oakes was convicted of being illegally in possession of the narcotic. In the second phase of the trial Oakes was to be tried for having the drugs for the purpose of trafficking.
2 s.8 of the Narcotic Control Act outlines the procedure for prosecuting a suspect of drug trafficking. The most controversial provision was that 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 and sentenced accordingly.”
3 s.11 (d) of the Canadian Charter of Rights and Freedoms protects the right to be presumed innocent until proven guilty when it states:
   11. Any person charged with an offence has the right
   
   (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.
4 First to the Ontario Court of Appeal, then to the Supreme Court of Canada.
5 These decisions took place on many other cases across Canada, both of the lower Court decisions in Oakes ruled s.8 was unconstitutional.
6 LEARN, Case study C: (2009).
However, the most convincing theory is that the Supreme Court of Canada ruled, in relation to R. v. Oakes, that s.8 of the NCA was inconsistent with s.11 (d) of the
Charter because s.8 contained a reverse onus\(^8\) that imposed a legal burden on Oakes, this onus violated s.11 (d), and most significantly because s.8 could not be saved by s.1 of the Charter\(^9\).

Firstly, the basis of the Supreme Court of Canada’s decision to strike down s.8 of the NCA in R. v. Oakes, was the Court’s decision, based on legal definitions, precedents, and a purposive analysis of s.8, that s.8 put a legal burden on the accused that would be judged on a balance of probabilities. To begin, the Court determined through legal definitions that the presumption described in s.8 was a legal presumption “on a balance of probabilities.” Specifically, the Court consulted Cross on Evidence to “categorise” legal burdens, concluding that s.8 was a mandatory presumption requiring proof of innocence\(^10\) on a balance of probabilities.\(^11\) Based on another legal definition, because the accused is to be found guilty “unless he or she rebuts the presumption on a balance of probabilities”, the Court decided s.8 imposed a legal burden on the accused.\(^12\)

The Court’s next step in determining that s.8 put a reverse onus on Oakes was to examine precedents; the Court found that the procedure set out in previous decisions interpreted s.8 as imposing a reverse onus. For instance, the Court quotes R. v. Babcock and Auld stating “It is then that the Court must find whether or not the accused has

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\(^8\) A reverse onus was defined in this case as a legal burden on the accused to prove their innocence “on a balance of probabilities” as opposed to simply raising reasonable doubt.

\(^9\) s.1 of the Canadian Charter of Rights and Freedoms states “1. 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 could be demonstrably justified in a free and democratic society.”

\(^10\) That he or she was not in possession of a drug for the purpose of trafficking


\(^12\) Ibid.
discharged the onus placed on him under said section.” The requirement for an onus to be discharged, made a situation the Court deemed a reverse onus. Also, the Court looked into lower Court decisions to conclude that in cases where the Court held that s.8 was constitutional, the decision was made because the Courts argued that the legal burden to prove guilt beyond a reasonable doubt “remains with the Crown.” Finally, the Court looked at R. v. Appleby which it considered equivalent to conclude s.8 is a reverse onus.

The Court’s last step in determining if s.8 implied a reverse onus was to use a purposive approach to determine that the wording of s.8 was designed to impose a legal burden on the accused. For instance, in referencing s.8 the Court put an emphasis on part of the law to show the intent to impose a “legal burden [is] apparent.” Moreover, the Court specifically states that ‘The legislature, by using the word ‘establish’ in s. 8 of the NCA, intended to impose a legal burden on the accused.” Other analyses confirmed that the “purposive approach” was crucial throughout the case to interpret legislation in light

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13 Ibid.
14 The Court also quoted Quotes R. v. Babcock and Auld stating “If the accused does not so establish he must then be convicted of the full offence as charged.” Ibid.
15 That the the “accused will be found guilty of the offence of trafficking unless he or she can rebut this presumption on a balance of probabilities.” Ibid.
16 Terry Rumaniuk, The Oakes Test (20 August 2007).
17 The Courts ruled this because the Narcotic Control Act only requires the accused to present evidence that he or she is innocent rather than prove that he or she is innocent. Supreme Court of Canada, R. v. Oakes, [1986] 1 S.C.R. 103 (Montreal: Lexum, 2009), 7.
18 Appleby dealt with a similar clause, where it was held that it is legal for the accused to be required to disprove the presumed fact according to a balance of probabilities.
19 Ibid., 8.
20 The purposive approach was a way to interpret laws that used the context of the law as well as the law itself to determine what the law was designed to mean and to apply the intent of the law.
21 Ibid.
22 Ibid.
of what it was designed to achieve, which in this case was a violation of s.11(d).

Through legal definitions, precedents, and a purposive analysis of s.8 the Court felt it had determined that s.8 put a legal burden on the accused that would be judged on a balance of probabilities, a nature of law that would be found to be in conflict with s.11(d).

Furthermore, contributing to the Supreme Court of Canada’s decision to strike down s.8 of the NCA in R. v. Oakes, the Court found s.8 was inconsistent with s.11(d) of the Charter through a purposive examination of Canada’s international treaties, cases dealing with a near similar clauses, and lower Court decisions. Specifically, the Court looked at UN treaties for “evidence” of the “widespread acceptance of the principle of innocent until proven guilty,” to decide that s.11(d) must at minimum mean that the state must “prove the accused guilty beyond reasonable doubt.” Other analyses confirm that the Court used context of international treaties to understand s.11(d).

The second factor in the Court’s decision that s.8 was inconsistent with s.11(d) of the Charter, was that the Court’s examination of conflicts with the near identical s.2(f) of the Canadian Bill of Rights and Freedoms led to the process which came to the conclusion that the reverse onus in s.8 violated s.11(d) of the Charter. To consider the key precedent, the Court looked at R. v. Appleby to determine that by the Court’s logic

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23 Interestingly, the two dissidents preferred the Ontario Court of Appeal’s “constructive approach” which relied only on dictionary meanings. Terry Rumantiuk, The Oakes Test (20 August 2007). <http://www.law.ualberta.ca/centres/ccs/rulings/theoakestest.php> [13 May 2009], 2.
the “statutory exemptions”\(^{27}\) to the presumption of innocence might allow s.8.\(^{28}\) However, the Court felt that this interpretation was insufficient and instead it looked at the minority concurrence of Laskin J., which instead of reading into the phrase “according to the law” takes “the right to be presumed innocent” to mean that in the end the state has the ultimate burden of proving guilt.\(^{29}\) The Court then followed Laskin J.’s process to conclude that s.8 and s.11(d) were in conflict.\(^{30}\)

The final factor in the Court’s decision that s.8 was inconsistent with s.11(d) of the Charter, was that that the Court acknowledged lower Court judgements that concluded that s.8 and s.11(d) were inconsistent. For instance, the Court recognised the argument’s credibility by its widespread support in citing that seven appellate Courts had found s.8 to be inconsistent with s.11(d).\(^{31}\) More specifically, the Court approved of the logic followed to find s.8 inconsistent with s.11(d) at the PEI Supreme Court\(^{32}\) and Nova Scotia Supreme Court, and especially voiced its support of the minority concurrence of Mitchell J.\(^{33}\) The Court then further examines Mitchell J.’s opinion demonstrating its

\(^{27}\) In R. v. Appleby there was a burden on “the accused to prove that he or she, though occupying the driver’s seat did not enter the vehicle for the purpose of setting it in motion...” In this case the argument that this violated s.2(f) of the Canadian Bill of Rights was rejected because phrase “according to the law” meant the presumption of innocence was subject to “statutory exemptions.” Supreme Court of Canada, R. v. Oakes, [1986] 1 S.C.R. 103 (Montreal: Lexum, 2009), 10.

\(^{28}\) The Court examined a statement for the majority from Ritchie J. which interpreted the phrase “presumed innocent until proved guilty according to the law” as envisaging a law which recognizes “statutory exemptions” including allowing a reverse onus in cases where certain facts had already been proven by the crown. Ibid.

\(^{29}\) The ultimate burden meant if there is reasonable doubt the accused must be acquitted. This still allows laws to limit rights, but must not cause a conviction if reasonable doubt exists. Ibid.

\(^{30}\) Ibid.

\(^{31}\) Ibid., 11.

\(^{32}\) Cites MacDonald J. at the PEI Supreme Court “The presumption of innocence cannot be said to exist if by shifting the persuasive burden the Court is required to convict despite the existence of reasonable doubt.” Ibid.

\(^{33}\) Cites concurring Mitchell J. who adds that “...if an accused is to be presumed innocent until proven guilty, he must not be convicted until the Crown has proven each and every of the elements necessary to constitute a crime.” Ibid.
support of his argument that s.8 presumes an “intent to traffic.” The logic of previous Court cases and the Court’s analysis of international treaties persuaded it to find that the reverse onus in s.8 was inconsistent with s.11(d) of the Charter.

Finally, the Supreme Court of Canada struck down s.8 of the NCA because the Court determined it could not be rescued by s.1 of the Charter as a result of a purposive examination of s.1 of the Charter, an analysis that a high degree of probability was required to violate a Charter right, and a breakdown of the language of s.1 into simpler tests. To elaborate, the Court’s purposive evaluation of s.1 of the Charter led the Court to focus on s.1 as a means of guaranteeing rather than limiting rights. For instance, to aid it in discovering the purpose of s.1, the Court also cited a statement by Wilson J, which interprets the focus of s.1 as “a commitment to uphold the rights and freedoms set out in […] the Charter.” Furthermore, the Court also established the purpose of s.1 by noting that the words “free and democratic” indicates that the Charter was embedded in the Constitution to keep Canada free and democratic, and concluded their judgement must “be guided by the values and principles essential to a free and democratic society.”

The second factor in the Court’s decision that the violation of s.11(d) could not be justified under s.1 was that the Court’s analysis that a very high degree of proof was required for a justification under s.1. For instance, the Court considered that the purpose

34 Cites, in applying this principle to s.8, Mitchell J. stating “[An accused under s. 8] is only presumed innocent until found guilty of possession. Once the Crown proves the accused had possession of a narcotic, he is presumed to be guilty of an intent to traffic unless he proves otherwise.” Because s.8 implied a presumption of guilt, Mitchell J. felt it needed to be struck down and the SCC agreed with his rationale. Ibid.
36 In Wilson J. on Singh v. Minister of Employment and Immigration
38 These values were deemed to include: respect for the inherent dignity of the human person, commitment to social justice and equality, multiculturalism, and faith in social and political institutions. Ibid.
of s.1 as a way to guarantee rights to determine that exemptions under s.1 are to be rare occurrences. The Court also concluded through citing legal references that a high level of proof was required because of the importance of Charter rights.

The final factor in the Court’s decision that the violation of s.11(d) could not be justified under s.1 was that the Court’s breakdown of the language set simpler tests that decided that s.8 should be struck down, in order to add predictability to decisions. For instance, the Court decided to break down the phrase “reasonable and demonstrably justified in free and democratic society” into two established tests, in order to add predictability to its decisions. To make future decisions more predictable it further broke down one of the two tests into three more subtests. One of these subtests was the rational connection test, which the Court found s.8 did not satisfy. While future cases focused on these simpler tests, the Court’s conclusion that s.1 was designed to protect rights, and that a high degree of probability was required to violate a Charter right were both also crucial to the Court’s decisions that s.8 could not pass the reasonable connection test.

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39 The Court concluded this because rights will be upheld unless the law can be brought within the exclusive justificatory criteria of s.1. Ibid.
40 The Court consulted, Smith v. Smith [1952], and The Laws of Evidence in Civil Cases which states that the level of probability required must be proportionate to the situation. Because in this case the situation is the very serious limitation of a charter right, the Court decided a high degree of probability would be required. Ibid.
41 The tests were that the objective must be “of sufficient importance to warrant overriding a constitutionally protected right or freedom” and the means must be reasonable and demonstrably justified. They were similar to the tests the Court used in R. v. Big M Drug Mart Ltd. Ibid.
44 That the means chosen to pursue the goal (inhibiting drug trafficking) were carefully designed to achieve their objective. Ibid., 17.
In summary, the most convincing theory is that the Supreme Court of Canada ruled, in relation to R. v. Oakes, that s.8 of the *NCA* was inconsistent with s.11 (d) of the *Canadian Charter of Rights and Freedoms* because s.8 contained a reverse onus that imposed a legal burden on Oakes, and this onus violated s.11 (d), and most significantly because s.8 could not be saved by s.1 of the *Charter*. 