

MEMORANDUM

TO: All Canadian Legislators

FROM: Andreae Sennyah, Director of Policy, Cardus

DATE: March 14, 2022

SUBJECT: EVALUATING REASONABLE LIMITS ON RELIGIOUS FREEDOM

WHO WE ARE

Cardus is a non-partisan think tank dedicated to clarifying and strengthening, through research and dialogue, the ways in which society's institutions can work together for the common good.

ISSUE

Throughout the COVID-19 pandemic, Canadian legislators have faced questions about what constitutes "reasonable limits" on the rights and freedoms set out in the *Canadian Charter of Rights and Freedoms*. Section 1 of the *Charter* acknowledges that rights are not absolute and that certain reasonable limits are inevitable. Our recent paper [Reasonable Limits: How Far Does Religious Freedom Go in Canada?](#) outlines the dominant legal framework for how these limits are understood in Canadian jurisprudence. Our goal is to help policy-makers have more informed and nuanced discussions about reasonable limits on our fundamental freedoms in a free and democratic society.

FRAMEWORK

In most cases, the Supreme Court of Canada applies a proportionality analysis known as the "*Oakes test*" to determine if the infringement of a right or freedom is demonstrably justified. The *Oakes test* asks the following questions, putting the onus on the government to demonstrate their justification for the limit(s):

1. **Pressing and substantial objective:** Is the government's objective important enough to warrant the limitation of a right?
2. **Rational connection:** Is there a rational connection between the law and how it achieves the government's objective?
3. **Minimal impairment:** Was the impairment more than necessary to achieve its stated objective?
4. **Final balancing:** Did the overall negative effects of the rights impairment outweigh the relative benefits of the policy?

Critiques of the *Oakes test* challenge the consistency of its application and question if this utilitarian analysis properly acknowledges the distinct nature of constitutional rights and freedoms. However, the *Oakes test* remains the dominant form of analysis for cases involving religious freedom.

CASE STUDIES AND FURTHER CONSIDERATIONS

Our analysis identifies two examples that fail to pass the *Oakes test*, namely the 2018 attestation for the Canada Summer Jobs Program and Quebec's *Act Respecting the Laicity of the State* (commonly referred to as Bill 21). Our paper also applies the reasonable limits analysis to certain COVID-19 pandemic restrictions.

These case studies raise further questions that can guide policy discussions in the current context:

- **Comparative treatment:** What restrictions were placed on places of worship compared to secular organizations with similar risk levels?
 - Significant differences in the treatment of religious versus secular facilities within the same jurisdiction would violate the minimal impairment test, especially if some other policy could have achieved the same objectives.
 - In some jurisdictions, religious services were banned outright when other public services remained open. The reverse could also apply. Places of worship that defied restrictions when public facilities fell under the same rules may have been stretching the boundaries of what was acceptable.
- **Inadequate respect for religious freedom:** To what extent do policy-makers understand the importance of religious worship, especially for communities where physical attendance is a fundamental component?
 - Access to religious services implicates a fundamental freedom enshrined in the *Charter*. Policies should recognize and affirm that these services have a privileged status compared to secular activities that are not protected as fundamental freedoms.
 - The categorization of liquor and cannabis stores as essential services without due consideration for places of worship illustrates this lack of sensitivity to the role of religion in society. Vaccine mandate rules that permitted medical exemptions in businesses but not in places of worship also demonstrate this unequal treatment. Other examples include limits on ostensibly low-risk activities, such as restrictions on drive-in religious services.
 - The timing of restrictions is also a factor. The imposition of restrictions right before major religious holidays may have been unreasonable if other measures could have been put in place to facilitate the observances safely.

RECOMMENDATIONS

This framework and case studies are a starting point for both discussion and meaningful action around reasonable limits on religious freedom. Faith communities are key institutions in our society. During the pandemic, these communities have adapted to meet the spiritual, and often material, needs of believers and non-believers alike.

We acknowledge that governments have a role that is important, but limited. As such, Cardus encourages Canadian legislators, political staffers, and civil servants to actively engage with faith communities to better understand the implications of any policies that may limit religious freedom. These efforts could include establishing permanent faith community advisory boards or the appointment of faith leaders to advisory positions. Recognizing the inevitability of limits on religious freedom both during the pandemic and beyond, permanent and institutionalized changes should be made to ensure that any limits imposed are reasonable.

CONTACT

We would welcome the opportunity to meet with you and be of assistance in your considerations on this issue. Please do not hesitate to contact us at asennyah@cardus.ca.

Read the full report here: [Reasonable Limits: How Far Does Religious Freedom Go in Canada?](#) (Cardus, February 2022)