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| **S. 32: To Whom & When does the *Charter* apply?** |

**Defining Government**

*Entities* ***Controlled by*** *Government*

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| *McKinney v University of Guelph*, 1990 – **University** faculty/staff challenge mandatory retirement policies; prelim issue = is *Charter* applicable to actions of uni’s? Do uni’s = gov under s. 32? NO  -La Forest J: Classical liberal approach, gov as coercive, *Charter* constrains gov; Mere fact of being *creature* of statute insufficient to subject actions to *Charter* (only if derive all power/operational capacity from legislation); **public purpose test inadequate** (many entities perform public functions but are not part of gov); unis have legal autonomy from gov (despite receiving $); **uni ≠ gov**, so uni MR policy **not subject to *Charter*** ✓  -Wilson J dissenting: Social democratic view, Canada diff than US, see gov *not* as coercive force but provider of services, remedy-er of inequalities, pro active force; definition of gov should go further, include uni’s, hospitals ✗ |
| *Douglas/Kwantlen Faculty Assoc v Douglas College*, 1990 – **College:** Challenge of MR provision in coll agrmt b/t college and union; does *Charter* apply to college? Does college = gov under s. 32? YES; ***Charter* applies to college’s actions**  -La Forest J: Distinguishes from *McKinney*; college board app’d by gov, gov issues directives vs. uni’s who operate autonomously; **college as part of gov in form and fact**; Form: board apptd by gov (vs only some members @ uni), Fact: History of institutions (whole idea of uni = academic *freedom*, *can* criticize gov) |
| *Stoffman v VGH*, 1990 – **Hospital:** Docs challenged board reg est’g MR policy at 65; **does *Charter* apply to employment relations @ hospital? NO**; although governing statute required all regs be approved by Min, and most board members app’d by gov, no gov bureaucrats *on* board, and gov approval really just rubber stamp (Form); even if **some *formal* measures of control** if as matter of *fact*, control not routinely exercises, will NOT be gov; ***factually*, institution operates indep/autonomously**; L’H-D (majority in *McKinney*) dissents: hospital *does* act as gov, greater degree of gov involvement here than in *McKinney*; stronger dissent, closer nexus b/t gov as matter of form controlling hospital (vs. uni’s) |
| *Greater Vancouver Transportation Authority*, 2009 – Did Translink/BC Transit violate *Charter* FoE guarantee in refusing to accept poli ads on buses; is **public transit bound by *Charter*? YES**; BC Transit = stat body, designated by legislation as “agent of gov” w/ BoD appointed by LG; not operating autonomously from gov (gov has power to exercise subst’l control over day to day); Translink gov’l too in light of **subst’l municipal control** over it; gov can’t shirk *Charter* obligations by conferring powers on another entity; set up by gov, funded by gov, run pub serv = gov |

*Entities Exercising* ***Governmental Functions***

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| *Godbout v Longueuil (City)*, 1997 – City adopts resolution, perm empl’s must reside within boundaries; P empl moved, was terminated; **are municipalities gov/subject to *Charter*? YES**; though distinct from prov gov that creates them, munic’s are‘gov’l entities’: councils elected by public like Feds, provs; possess taxing power; can admin/enforce laws; not enough to be created/reg’d/funded by gov and perform public service (//unis @ *McKinney*), but gov unique – has coercive powers, decides/limits freedoms; gov can’t escape *Charter* respons’y through *way* it goes about it (K clause); rqrmt violates, P wins |

**Defining Government Action**

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| *Lavigne v OPSEU*, 1991 – follows *Douglas College*; are **all gov actions caught by *Charter*? YES**, even private acts; argmt re: employment K (is gov hiring, as private K, part of gov act? YES, //*Godbout*); once gov, always gov (once deemed gov, subject to *Charter*); court wary of gov circumventing *C*O’s by re-org’g service delivery into private-looking FW (//*GVTA*); all actions of gov are subject to *Charter* but not all actions of *non*-gov actors are *not* subject (see *Eldridge*, *Vriend*) |

**“Governmental” Acts of Non-Governmental Bodies – when is private/non-gov entity subj to *Charter*?**

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| *Eldridge v BC*, 1997 – Deaf individuals sought declaration that failure to provide public $ for interpreters for med services violated s. 15; **does *Charter* apply to hospital in way it provides med services? YES**; Govs not permitted to evade Charter resp’s by implementing policy through private arrgmts (Charter scope cannot be K’ed by gov downloading function to priv operator); distinguished from *Stoffman* (hosp’s as non-gov whose priv acts not subject to Charter), purpose of *Hosp Insur Act* provide services to public, benefits admin’d through priv inst (H), but it is gov (not H) responsible for defining context of services, persons entitled; **in providing medically necessary services, hospitals carry out a specific gov obj, must conform to *Charter*** (even though they are private entities), H = vehicle chosen by legislature to deliver program; *failure to act* (provide interpreters) can attract *Charter* scrutiny (inaction as form of gov action, //*Vriend*) |
| *Slaight Inc v Davidson*, 1989 – Adjudicator made order requiring employer who had wrongfully dismissed E to write specific letter of ref for E, = infringement of FoE, = exceeding jurisdiction; ***Charter* applies to non-gov actors exercising coercive statutory powers** (adjudicator exercising powers conferred by legislation, = stat creature apptd pursuant to leg’ve provision and derives all power from statute; **some adjudicative bodies** (admin tribunals, labour adj’rs) **bound by *Charter*** (while courts are NOT: *Dolphin*, at least insofar as their orders are at request of privte litigants relying on CL) |

**Governmental Inaction**

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| *Vriend v Alberta*, 1998 – P dismissed from teaching job when he disclosed homsex’y; attempted to file complaint; Challenge to omission of SO from AB’s *Indiv Rights Prot’n Act*; omission vs commission: Fact that state has *failed to act* – attract Charter scrutiny? YES (if omission is discriminatory, court can hold you to Charter in same way as active discrim); **failure to do s/t can attract *Charter* scrutiny** (//*Eldridge* failure to provide interp); **gov *inaction* as form of gov action** |

**Is the Judiciary ‘Government’? NO** (at least insofar as their orders are at request of private litigants relying on CL)

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| *RWSDU v Dolphin Delivery*, 1986 – P Union challenging const’ty of injunction for 2° picketing – Court says **NO app of *Charter***; outside gov apparatus, adjudicates cases involving gov; like indep agency; obligations to *apply* Charter  -CL created by J, J not subject to *Charter* (vs. legislation created by legislature *is* subject); private parties involved not subject to *Charter* so judicial order can’t be 🡪 **Judiciary not subject to *Charter***  -McIntyre J: Courts not gov, so no *C* oblig’ns (if courts not gov, injunction ≠ gov action 🡪 NO, **when court is in its adjudicative role, it’s *not* subject to *Charter***; Charter applies at CL by virtue of s. 52 (even if J not subject by virtue of s. 32); **order of court NOT subject to *Charter* b/c judiciary not subject to Charter**; mistake here was to challenge *order*, they should have challenged *CL rule* allowing inj’s to be passed (see *Hill*); policy/slippery slope argmt |
| *Hill v Church of Scientology*, 1995 – P brought libel action against D church under **CL rules** of defamation (dispute b/t 2 priv parties under CL); **CL of defam presumptively violation of FoE** (church argues this, defence = rules under which P is suing are contrary to s. 2(b) - // *Dolphin* but church goes after CL rule rather than court order); priv parties owe e/o no Con duties, cannot found CoA on Charter right (only argue CL inconsis w/ Charter *values*); party alleging (church) should bear onus of proving that CL fails to comply w/ *C*V’s (FoE) and unjust’d – Ds fail, CL of defam approp’ly reflects balance b/t competing intrts (FoE v prot’n of rep), vs *Dolphin* where court modified CL rule (2° pktg allowed for FoE unless violent); no *Oakes* here (high onus on gov), rather **balancing test**, onus on D, show value of FoE outweighs values of CL of def – no |
| *RWDSU v Pepsi Cola*, 2002 – P union lawful strike against D at 2° locs; //*Dolphin,* validity of 2° pktg TBD by CL; Court affirms **importance of ensuring dev of CL influenced by *Charter* values**; reboots *Dolphin* (revises CL rules re: 2° pktg); lawyers get it right, go after *per se* ban on 2° pktg (*all* 2° banned – no, = violation of FoE); more robust approach to protecting FoE in labour disputes, brings CL in line w/ *C*Vs; no presumption that 2°pktg illegal, requires ev prior to restraint |

**S. 32 ANALYSIS:** – **Does the *Charter* apply?**

* **YES, *Charter* applies if:**
  + It is a **GOV ENTITY**/part of government
* *McKinney* 🡪 Not enough to be created/reg’d/funded by gov and perform public service, must have ***coercive force*** of Gov, which uni’s do not, academic freedom
* *Godbout* 🡪 Municipality as gov entity; created by prov gov/statute, derives powers from prov legisl., has coercive powers to decide/limit freedoms; has taxing power, councils elected by public (//Feds)
  + It is ***CONTROLLED* BY GOV** (under “routine and regular” control of gov)

Look at *technical composition of governing body* (are members appointed by gov?)

* *McKinney* – Uni’s: only minority of Board appointed by gov so uni’s not deemed controlled by Gov
* *Douglas College* 🡪 College Board all appointed by gov; gov issues directives; not meant to operate autonomously, simply part of apparatus of gov both in form and fact
* *GVTA* 🡪 Transit authorities do NOT operate autonomously from gov b/c gov can exercise substantial control over day to day of GVTA; set up, funded by gov, run public service = gov; (can’t shirk resp’y)
* *Stoffman* 🡪 Hospital board membership only *rubber stamped* by gov, not substantively controlled by it (FORM), operates autonomously (FACT); routine control of H in hands of board of trustees, not prov gov; Hs in BC = non-gov entities whose private activities not subj to *Charter*
  + **Traditions, FUNCTIONS, PURPOSE, history of body**
* *McKinney* 🡪 Idea of uni = act independently; to *not* do what gov wants, fulfill own objectives (not gov), history = academic freedom, vs. colleges:
* *Douglas College* 🡪 Specifically designed to deliver post-sec job training, closely controlled by Min of Post-Sec Ed, defined in legislative mandate as agent of gov, = gov
* *GVTA* (Transit) 🡪 Purpose = deliver gov policy (= gov); set up/funded by gov to run public service
* *Slaight* 🡪 Purpose of labour adjudicator = operationalize statute (= gov purpose)
* *Godbout* 🡪 Aim of municipality = operationalize specific policy, coercive authority exercised rooted in statute, subject to *Charter* (vs. uni, created by statute but meant to fulfill its own obj)
* *Vriend, Eldridge* 🡪 Failure to act by gov/non-gov entity performing gov function can attract *Charter* scrutiny; gov inaction as form of gov action
  + If is **non-gov entity ENGAGED IN GOV’L ACTIVITY**/performing gov function
* *Eldridge* 🡪 Hospital = private body (as decided by *Stoffman*)but performing gov function/engaging in inherently governmental activity (providing free med services through *HIA*) so subject to *Charter*

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| **S. 1: Permissible Limits on Rights & Freedoms** |

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| *R v Oakes*, 1986 – Challenge to reverse onus, rebuttable presumption (possession = trafficking), violates s. 11(d) – justifiable? S. 1: SoP for justification = *heightened* civ std, Bal/P (strict criteria for infringement of rights); Test =  **1)** *Pressing and substantial objective* (save $ doesn’t count; must be suffic to override right, how you define/charac is imp)  **2)** *Reasonably and demonstrably justified means* (Rational Connection, Minimal Impairment, Proportionality)  -This case lost on RC, but today would probably fail under MI; laws seldom struck down at final Prop’y stage (usu MI)) |

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| **S. 2(b): Freedom of Expression** |

\*Threshold for restrictions very low so there is lots of application of *Oakes* under FoE

**Basic Principles**

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| *Irwin Toy v Quebec*, 1989 – QC *Consumer Protection Act* **prohibited ads** directed at kids under 13; P contravened, brought action for declaration that ss *ultra vires* prov/inconsistent w/ *QC Charter*, = limit on FoE; **2(b) violated, justified under s.1**  **Purposes of FoE** (the more speech in Q serves values below, greater justification for limit on it must be)  1) FoE necessary to serve *truth* (seeking/finding it as inherently good); Exception: violence *cannot* be form of expression  2) FoE as essential to *democracy* (participation in social/political decision making should be encouraged)  3) FoE fosters *self-fulfillment/human flourishing* (intrinsic value to individuals)  **Threshold Q:** Ps activity (ads aimed at kids) was within conduct protected by FoE (expression) – i.e. Is it expression?  **Purpose Q:** Purpose and/or effect of gov action was to restrict FoE – to prohibit content in name of protecting children (limit on 2(b) to be justified under s. 1) 🡪 *Oakes*:  *Pressing/subst obj* 🡪 YES (protect vulnerable kids, power imbalance)  *Rational Connection* 🡪 YES, easily satisfied  *Minimal Impairment* 🡪 YES, balancing intrts, assessing competing evidence; ban proportionate to action in other jurisd’s  *Proportionality* 🡪 YES; No suggestion that effects of ban so severe as to outweigh gov’s obj 🡪 passes, restriction justified |

**Commercial Speech – Less important than other forms, restrictions easier to justify (b/c of profit motive)**

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| *RJR-MacDonald Inc v Canada (AG)*, 1995 – Fed gov ***total* ban** on tobacco ads (restrict. on comm speech) challenged by tobacco Co’s; **SCC strikes it down** 5-4 (gov fails to prove MI); how high should court set bar for gov to justify?  -McLachlin J: Prohibition on ads = *unjustifiable* violation of FoE, so are unattrib wrngs 🡪 law fails *Oakes*  1. Pressing Obj (prevent ppl being persuaded by ads) ✓ 2. RC ✓ 3. MI ✗ (robust approach, lack of evidence, prohibition of info/brand pref ads deprives public of learning re: availability of legal product, some aspects of ads give info, help w/ choices, but ban is TOTAL, too intrusive); **value of speech as *high*** (promoting consumer decisions re: health) – fails test  -La Forest J dissenting: Parliament balancing competing interests; strict app of proportionality would put impossible burden on gov; courts well placed to scrutinize crim justice, NOT social/econ regulatory ones – best left to gov (courts should defer); **value of speech as *low***; harm and profit motive underlying promotion means expression far from ‘**core’ of FoE** values, low degree of protection under s. 1; law should pass test/be upheld as justifiable infringement on FoE |
| *Canada (AG) v JTI-Macdonald Corp*, 2007 – Tobacco Co’s challenge laws; Parliament went away after *RJR*, re-did laws, to reflect concerns, + evidence (*dialogue!*); **Court upholds new provisions** (permit info/brand pref ads; forbids lifestyle ads, ads to youth;  size of health warnings, attrib’d to HC); Act less restrictive in some ways, more in others (restrictions on deceptive bans, aimed at dubious marketing techniques, esp vulnerable gps); new/diff context that *RJR* (more info now)  -Prohibitions on: false promotion (OK, **low value speech**), lifestyle ads (OK), ads to youth (OK, **VG**), sponsorship (OK), warnings (OK) 🡪 new law came w/ **evidence**, upheld this time; McLachlin J who struck down old in *RJR*, upholds new |
| *R v Guignard*, 2002 – D posted signs re: dissatisfaction w/ insurer, municipality ordered removal (contravened zoning bylaw), D refuses/charged/claims bylaw = violation of FoE in defence, wins – **law invalid** (*complete* ban on erecting signs in res areas) 🡪 **curtails important speech**, ‘counteradv’ng’ by consumers, FoE not ltd to priv comm’s, signs as cheap, effective means (justified as quasi political speech); bylaw curtails A’s FoE, forces him to use ad methods that presuppose $ or restrict to purely priv comm’s (less effective); if adv’rs can avail themselves of FoE, so can consumers (both bound by def/libel); court links decision to **unequal terrain of expression** (Co’s can advertise, consumers have few avenues to do so) |

**Equality Issues**

***Hate Speech*** **–** Of **low value** (*characterization* process important)

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| *R v Keegstra*, 1990 – AB teacher charged w/ unlawfully promoting hatred (anti-semitic) under provision covering comm other than private, challenges provision – **upheld, justified under s. 1**; carefully crafted law, underlying purpose = prevent pain suffered by members of group, reduce religious/ethnic tensions; ideological clash b/t social democ & classical liberal  -Dickson J: (**Social Democratic**) Doesn’t want *Irwin Toy* violence exception to get out of control – *threats* of violence don’t fit in exception; if it’s comm/words, it is speech (content neutrality), broad approach; *but* @ s. 1, no content neutrality, nature of speech crucial (up to gov to defend, show criteria met); **In determining value, use *Irwin Toy* criteria:**  -**Truth** 🡪 Keegstra’s speech promotes *untruths* (marketplace of ideas should not be totally unreg’d), ability of ppl affected by speech to express themselves compromised (fear); focuses on **large obj of law** (vs. benef/delet effects) 🡪 deleterious effects not bad since value of speech low; obj very important, outweighs neg effects  -**Democracy; Self-Fulfillment** 🡪 Speech as political? No, hate speech *undermines* commitment to equality; denies respect/dignity; low value speech, groups vulnerable (court takes deferential approach to MI); crim law not overextending  -McLachlin J dissenting: (**Classical Liberal**//US) RC – could chill expression; rejects gullability of citizens (believe hateful expr); when gov dignifies speech, can inflame (“isn’t it better to just ignore it?”); concerned w/ *effect* of law (lots of bad, not much +); MI – overbroad/vague; other remedies better, not draconian crim law; interested in weighing ‘**+’ vs ‘-’ effects** (serious infring., strikes at content, broad prohib, serious conseq’s, obj worthy but claims of gain tenuous, no obv benefit) |
| *Whatcott* 2013 – Prohibition on hate speech = **balance b/t FoE and equality rights**; Reaffirms *Keegstra,* gives more nuanced understanding of what/when speech will be restricted; D published flyers w/ homophobic messages, complaints to SKHRC under s. 14 SKHRC; **Court upholds provisions on HS, but severs words** (“ridicules/belittles” *not RC’ed* to obj)  -*Oakes*: Pressing/substantial obj ✓ (recognize harm caused by hate speech; aim to eliminate discrim, recognize dignity)  RC ✓ (prohibit reps obj’vely seen as exposing group to hatred serves obj of eliminating discrim/harmful effects of hatred)  MI ✓ (court deferential; may be less intrusive means, don’t have to choose least restrictive, just option in reasonable range)  Overbreadth 🡪 “Ridicules, belittles, affronts dignity of” severed, remainder not overbroad  Benefits outweigh deleterious ✓ (speech undermines values underlying FoE 🡪 limits exchange of ideas, shuts down dialogue, undermines search for truth); precautionary appr to social fact ev re: harm (need ev but not precise causal links) |
| ***Obscenity*** – Establish principles to justify parliament in criminalizing certain kinds of speech/communications |
| *R v Butler* 1992 – D ran sex shop, charged under s. 163; SCC: **provision infringes 2(b) but = rsnble limit, saved by s. 1**  -Sopinka J: Test for whether material = “obscene”🡪 “***Community Stds of Tolerance***” (materials that exploit sex in degrading/dehumanizing way will fail; undue exploitation of sex; what would community tolerate others being exposed to on basis of *degree of harm that may flow* from exposure, harm meaning predisposing person to act in anti-social manner)  -Law was passed for moralism (wouldn’t pass *Oakes* step 1, no role for gov in dictating sex mores), **court rejects** **shifting purpose**, says purpose was more general one of protecting society from harm 1959 – still is purpose 1992; enforcing sex morality was specific manifestation of this general obj; obscenity as defined is *NOT at core of values* underlying FoE (it’s about econ profit, subjugation of women, physical arousal)  -There is **VG** (women, their subjugation/harm) and **speech is** **low value**, causes harm 🡪 deferential court (legislation OK)  -*Oakes*: Pressing obj ✓ (not gov acting as moral custodian w/ shifting purpose, rather aim = avoidance of harm, legit)  RC ✓(Rltnsp b/t obscenity& risk of harm to society, even w/o exact evidence, reasonable to presume causal relationship)  MI ✓ (leg. doesn’t have to be perfect/most eff technique; doesn’t proscribe sex explicit erotica w/o violence/dehumaniz’n)  Balance ✓ (type of expression far from core of FoE; obj of fundamental importance, restriction on FoE does not outweigh) |
| *Little Sisters Book and Art Emporium v Canada* 2000 – Customs keeping gay erotica out b/c they think it violates obscenity law (no, wrong, too broad), bookstore challenges Con validity, court holds **law infringes 2(b) but saved/justified by s.1**  -Ps argued *Butler* test (CSoT) incorrect/‘degrading’ as subjective/majoritarian bias, shouldn’t apply to LGBTQ minority 🡪 Binnie J: Court **defends test**, but says *manner* in which Customs applied test was wrong; ‘degrading’ language of *Butler* qualified: where risk of harm substantial, ***harm-based* test** gender neutral; harm has to do w/ violence/dehumanization |
| *R v Labaye* 2005 – Group sex/orgy club; Crim case, no Con challenge; Court tries to address *what harm is* in context of sexually explicit material, considers meaning of “indecency” under s. 210(1); court should no longer look to CSoT test  -McLachlin J: Elaborates on “harm” from *Butler*; materials causing harm *can* be restricted; Q = **meaning of indecency**; law has moved from **morality** to **harm** approach (completed in *Butler*, confirmed in *Little Sisters*); no harm here (D wins)  -What **nature/degree** of harm sufficient to est indecency? (2 part test); 3 *types* of **harm** can support finding of **indecency**  1) Offence – if other offended, that = harm (to those whose autonomy/liberty restricted by being confronted by conduct; not enough to be offensive, must be such that people have no choice but to see it 🡪 NO, this club is *private*  2) Causing other to act in harmful way – crim law can limit expression to prevent people who may see it from becoming pre-disposed to act in anti-social way; may only arise if members of *public* may be exposed to material/conduct in Q  3) Harm to individuals participating in conduct – physical or psychological; consent significant but complex  -*Degree* of harm must be serious (incompatible w/ social functioning, high threshold); must be persuasive argument that it is causing harm, requires significant evidence but not precise causal links, use common sense, recall low values of speech and VGs involved🡪 McLachlin holding gov to std, use criteria, but at same time no requiring proof BARD re: causal links |
| *R v Sharpe* – Prohibition on child porn prod/sale/distrib AND possession (w/ exception for art/education); Court upholds law but **reads in 2 exceptions** (poss of material created by single person, held by him/her alone; private consensual video)  *Oakes*: OBJ ✓ (crim possession of material posing risk of harm to kids)  RC ✓ (Seeing child porn could fuel fantasies, incite offences; RC b/t law and reduction of harm to kids through child porn)  MI ✓\* (Law may also capture material posing little/no harm, but risk is small/incidental)  Proportionality ✗\* (Limits justified by protection for kids BUT not certain exceptions: teen possessing sex explicit photos of self – peripheral inclusion trenches on FoE, adds little protection) 🡪 Court reads in exclusion of problematic application |

**S. 2(B) ANALYSIS:**

**A. Threshold Q:** Is the restricted activity “expression”? (*Irwin Toy*)

* Easy to meet (interprets broadly then strikes down under *Oakes* if necessary)
* All forms of communication are protected (as long as it’s not actual physical violence)
  + *Keegstra* 🡪 *Threats* of violence don’t fall in to exception (still form of speech, only content = violence)
* Includes *content* AND *form* (restriction on either limits the s. 2(b) guarantee)
* Generally expression must be made *publicly*

**B. Purpose Q:** What is legisl’s purpose in restricting expr’n? Purposeful attack or mere effect of diff purpose? (*Irwin Toy*)

* ***Purpose***: To restrict 🡪 straight to s. 1 (all claimant has to show is they tried to communicate, were stopped by law)
  + *Irwin Toy* – purpose of law = prohibit content to protect children (= limit on s. 2(b))
* ***Effect***: Incidentally restricts 🡪if effect unintended, claimant must demo speech serves 1 of 3 purposes of FoE (*Irwin Toy*), if successful, then proceed to s. 1 justification

**If s. 2(b) violated, proceed to S. 1 analysis…**

**\*\*Recall that ONUS SHIFTS to government who now has burden to make arguments** (*Oakes*)

**C. S. 1 analysis: *Oakes* Test:** Is infringement on FoE justified?

**CONTEXTUAL FACTORS** – Determine how rigorously *Oakes* should be applied to gov (contextual analysis basis for court calibrating *how deferential/rigorous* they should be in relation to impugned law – ADD UP)

* + Value of the Speech
    - *Irwin Toy* criteria (Does prohibited speech go to ‘core’ of underlying purposes of FoE)
      * **Truth** (*Keegstra* ✗, *Whatcott* ✗)
      * **Participation/democracy** (*Guignard* ✓, *Keegstra* ✗)
      * **Self-fulfillment**
    - **Hate** (*Keegstra*) & **Comm’l speech** of *lower* value (*RJR, JTI, Irwin Toy*), further from core of prot’n of FoE
    - Closer fit to those 3 underlying purposes of speech means it better serves values 🡪 higher bar for government to met to justify restriction
      * *RJR McDonald* 🡪 McLachlin says value of speech being limited is **high** (can promote consumer decision making); LaForest J dissenting says low (harm engendered, profit motive, puts speech far from ‘core’ of FoE values)
      * *Keegstra* 🡪 Degrading anti-Semitic speech of very **low** value; actually promotes *untruths* (antithetical to criteria of purposes for protecting speech: undermines search for **truth**, promotes ideas anathemic to **democracy** values)
      * *Whatcott* 🡪 Hate speech impedes values underlying FoE; doesn’t promote truth, democracy, dialogue, is actually antithetical to those objectives; **low** value
  + Protection of Vulnerable Groups
    - Easier for gov to justify FoE restriction if it is necessary in order to protect a VG (this is court’s social democratic impulse, gov as friend, responsibility to even out, promote equality)
      * *Keegstra* 🡪 Engaged on both speaker’s side and those being targeted (s. 15), but more authority to gov’s side (s. 27 multiculturalism: **Jews**)
      * *Butler* 🡪 This is about subjugation of/harm to **women**, a VG (harm to members of target group women but also influence of society at large = harmful)
      * *Guignard* 🡪 Protection for **consumers**, have less power in “marketplace of ideas”
      * *Irwin Toy* 🡪 Protection of **children** (vulnerable w/ respect to speech at issue)
  + Nature of Law – balancing interests or being sole antagonist of individual?
    - **Regulatory? 🡪** Balancing competing interests (difficult policy choices), court will be more deferential to government, won’t raise bar as high for s. 1, less rigorous application
      * *Irwin Toy* – Legislature trying to balance interests; restricts ads aimed at kids; gov makes call, court’s call is no better (gov’s is more informed: social sci evidence) and leg’s decision has democratic accountability so makes more sense that gov makes call
      * *RJR McDonald* (La Forest J dissenting) 🡪 Parliament balancing interests b/t doing nothing and outright ban on manuf/prod; court should defer
    - **Crim law?** 🡪 State as singular antagonist of individual, targeting/prohibiting behaviour; court will take harder line, more difficult for gov to justify under s. 1 (**more rigorous**, less deferential approach) – more classically liberal, protect individual *from* state
      * *RJR McDonald* (McLachlin) 🡪 Law = crim (even though it also balance interests)
      * *Keegstra* 🡪 Law is in *Code*, stigmatizes/prosecutes, court must be vigilant not to circumscribe free speech in applying MI test (careful but not too careful!)
  + ADD UP
    - **Deference** (by court to gov/impugned law) – if speech value low, harm to VGs high, etc. more OK to restrict
      * *Irwin Toy* – Legislature as unique: can commission inquiries/do research; democratically accountable
      * *Keegstra* – Valueless speech + harms vulnerable groups (deferential) BUT it’s crim law (vigilant) 🡪 2/3 factors push toward more deferential approach
      * *Whatcott* – Factors go in deferential approach direction (not crim but piece of HR leg)
      * *Butler* – Speech of low value, causes harm to VG, court deferential, law OK
    - **Rigor** (stricter look at law, stricter application of *Oakes*) – higher value speech, crim law, no VG

***Oakes:***

1. ***Pressing and Substantial Objective***(*Oakes*)
   * Restrictions rarely fail this portion of test; low threshold to meet; justify overriding right/freedom
   * How do define/characterize aim is important
     + E.g. *K-Mart* – law against 2° pktg designed to stop union from shutting down store (2° pktg prevents workers from accessing), OR was it purely info’l picketing (if so, no RC or MI b/c you’re shutting down info pktg to prevent employees from being blocked which info pkt doesn’t do) 🡪 characterize differently, different result
   * No shifting purpose (purpose = intent of those who drafted/enacted *at that time*)
     + *Butler* 🡪 Court rejects shifting purpose; but says 1959 aim of obscenity law was not enforcing sexual *morality* (certainly not aim in 1992) but rather was and remains avoiding *harm*, which *is* a valid aim
2. ***Reasonable and demonstrably justified means/Proportionality***(*Oakes*)
   1. ***Rational Connection*** (law seldom struck down here) (*Oakes*)
      * *Butler* 🡪 Even w/o exact evidence, reasonable to presume exposure to porn images bears causal relationship to changes in attitudes, so RC b/t provision and obj of preventing harm
      * *Irwin Toy* 🡪 Does NOT have to be direct causal link; easily satisfied (protect kids🡨🡪prohibit ads)
      * *RJR*🡪Common sense analysis; sufficient evidence of connection b/t ads and consumption
      * *Keegstra* (McLachlin dissenting) 🡪 RC tenuous, unclear whether it will curb hatemongering, could chill expression among law abiding citizens; (many bad consequences, few good)
      * *Oakes* 🡪 Had more rigorous approach to RC (crim case)
      * *Whatcott* 🡪 Severs words not RC’ed to objective (more rigorous approach to RC)
   2. ***Minimal Impairment*** (laws often struck down at this stage)(*Oakes*)
      1. **More deferential**/less rigorous app: As long as gov considered if 1 way was better than another
         * *JTI McDonald* 🡪 Ban falls within “reasonable range of alternatives”
         * *Guignard* 🡪 Total ban on signs in res areas curtail’s P’s FoE, forces him to use methods that presupp $ or restrict him to priv comm (approaching reasonableness test, ≠ least intrusive means possible)
         * *Whatcott* 🡪 May be less intrusive/alt options but b/c speech is of such low value, court is deferential (don’t have to choose *least* restrictive means, it’s within reasonable range)
         * *Butler* 🡪 Rejects argument that other more eff techniques available; provision does not proscribe sex explicit erotica w/o violence; materials w/ sci/art/literary merit not captured
         * *Irwin Toy* 🡪 Judgment call, gov is better placed, has evidence, is democratically elected
         * **Note**: Evidence doesn’t have to be 100%; as long as there is some good science to support reasonable link; especially when CFs point to deferential approach
      2. **Less deferential**/more rigorous approach: Want proof of no alt’s, truly least intrusive means

* *RJR McDonald* (McLachlin) 🡪 Law fails MI, robust approach, b/c of how contextual factors add up, due to lack of evidence; ban deprives public of learning re: legal product
* *Keegstra* (McLachlin dissenting) 🡪 Law overbroad, too vague, potential chilling effect, shouldn’t use extreme draconian means of crim law (leg. focused on reparation, HR tribs)
  1. ***Proportionality***(*Oakes*)
* B/t effects of impugned law and legislative obj; Courts rarely strike down here, don’t like getting here
* *Keegstra* (McLachlin dissenting) 🡪 Law = serious infringement, broad prohibition, obj’s worthy but claims of gain tenuous, any Q’able benefit outweighed by sig infringement
* *JTI McDonald* 🡪 Proportionality met, prohibited speech of low value, benefits of ban to society signif
* *Irwin Toy* 🡪 No sugg that eff’s of ban so severe as to outweigh gov’s obj (can still to ad to adults)

***\*Dagenais* gloss** 🡪 Have to balance *actual* + effects against ‘-’ effects of measure (have **salutary** outweighed **deleterious**? more stringent than just obj test); in applying test, court must consider not only obj of impugned law but also its salutary effects (especially important where law might not completely achieve its objective but could still have positive effects)

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| **S. 15: Equality Rights** |

**Interpreting S. 15(1) –** must show restriction AND that restriction is *discriminatory*

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| *Andrews v Law Society of BC* 1989 – Brit said citizenship requirement for admission to LSBC violated s. 15, wins – provision **unjustifiably violates s. 15**; majority puts onerous burden on gov to justify discrim; citizenship requirement not closely tailored to obj of ensuring candidates to bar had sufficient understanding of/commitment to Cdn institutions; **citizenship as analogous ground** (immutable, lack of political power, irrelevant to assessment of ability to do job)  -McIntyre J dissenting: Should relax *Oakes*, not unduly hinder gov in making distinctions, would have upheld law; but his ruling reps Court’s unanimous position on interpretation of s. 15 (equality ≠ treat e/o alike):  ***-Andrews* Test:** C must show – 1) Unequal treatment before/under law 2) On basis of E/AG 3) With discriminatory impact (any justification takes place under s. 1 analysis) |
| *Law v Canada (Minister of Employment and Immigration)* 1999 – P widow 30yrs old denied CPP survivor’s benefits b/c of age, no kids, no disability; Court ruled **age distinction did NOT violate s. 15(1)** (no s. 1 analysis needed)  -Iacobucci J: Equality analysis must be *purposive, contextual*; purpose of s. 15 as preventing violation of **human dignity**  -3 key elements to discim claim: 1) Differential treatment (purpose or effect) 2) Based on E/AG 3) That is discriminatory  -Need for *comparator* (locate **comparator group**, consider claimant’s view, evaluate contextual factors from clmt’s POV)  -**Contextual Factors:** 1) Pre-existing disadvantage 2) Relationship b/t grounds and claimant’s characteristics/circumstances 3) Ameliorative purpose/effect 4) Nature of interests affected (more severe/localized = more likely to be discrim) |
| *R v Kapp* 2008 – Court abandons commitment in *Law* to conditioning infringement of s. 15 on violation of human dignity, reverts to approach in *Andrews*; D non abo fishers charged for fishing @ prohibited time, claim s. 15 rights violated by fishing license granted to abo’s for exclusive right to fish for 24 hours; Court says NO, s. 15(2) reserves right of gov to implement programs to combat discrim by helping disadvantaged groups improve situation (**affirmative action**); combines ***Andrews + Law* for 2 part test for discrim:**  1) Does law create *distinction*, based on *enumerated/analogous grounds*?  2) Is distinction *discriminatory,* i.e. does it create disadvantage by perpetuating prejudice or stereotyping? |
| *Withler v Canada* 2011 – Widows’ fed supplementary death benefits reduced b/c of Hs’ ages; Court abandons mirror approach to comparison (no formalistic use of comparator groups) and human dignity approach, goes back to 1st decision on equality (*Andrews*): Discrim as un/intentional distinction based on grounds of personal characteristics that has affect of burdening, limiting access available to members outside group 🡪 i.e. does distinction perpetuate prejudice or stereotypes (**contextual analysis**) 🡪 See Below; **age-based benefit reduction did *NOT* breach s. 15**, no s. 1 needed (scheme designed to benefit multiple groups, benefits reductions reflected reality that different groups of survivors have different needs) |

**Differential Treatment**

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| *Eldridge v BC* – Deaf complained re: **lack of interpreters** in H, said they suffer **adverse impact** under medicare (facially neutral – equivalent/free HC for all); adverse impact *on basis of EG* (disability); characterizing interpreters as ‘ancillary’ services does not reflect reality of provision of med services (once state provides benefit – i.e. free HC – has oblig to do so in non-discrim way); failure to provide interpreters = ***prima facie* s. 15 viol, not justified** under s. 1 (no rsble basis to say denial of interpreters = MI; no proof denying right nec’y to achieve leg. obj of limiting HC costs); law linked to soc disadv |
| *Vriend v Alberta* – Appellant fired from Bible college when he revealed he was gay, attempted to file complaint w/ ABHRC; AB HR legislation grants e/o right not to be discriminated against, *but doesn’t include SO* as ground of discrim (even though it is analogous ground under *Charter*); LGBTQs get less protection as a direct result of under-inclusiveness, are adversely impacted; superficial formal equality of law but distinction b/t gay and straight in terms of *operation* of law  -Court reads/writes in SO to protection of IRPA (// deaf entitled to interpreters @ *Eldridge*) |
| *Symes v Canada* – P = female lawyer in TO; Ss. 63 (deductions for CC) and 18 (permissible biz expenses) of Income Tax Act together cap what parent can deduct for CC made necessary by biz, P claims cap arbitrary, disproportionately impacts women (even though facially neutral) b/c women bear disproportionate *social* cost of CC; Court disagrees, no evidence that women bear disprop *econ* cost of CC, high hurdles for evidence (has to be direct link b/t alleged disadvantage and impact of law; majority unwilling to draw inferences from social to economic); Court willing to look at *adverse impact* (of FN law); bar high to show AI (not willing to infer that more social costs leads to more econ costs, must be **direct link**, no ev led here) |

**Enumerated and Analogous Grounds**

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| *Corbière v Canada* 1999 – Non-resident band members challenge provision of *Indian Act* that requires residence on reserve to vote in band elections; Court finds that law violates s. 15 (aboriginality-residence = AG, ground serves as basis for stereotypical decisions based on *immutable* personal charac – can’t change or that gov has no legit interest in expecting us to change to receive = treatment); Distinction drawn perpetuates historic disadvantage, based on stereotype, cannot be justified under s. 1 (restriction on voting RC’ed to obj of giving voice in affairs of reserve only to those directly affected, but not MI’ing of equality rights, not demo’d to be necessary, no evidence re: costs/admin difficulties of other schemes that would give off-reserve mems role); Words “and is ordinarily resident” struck from statute |

**Discrimination**

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| *M v H* 1999 – 2 women parties co-habited in SS relationship for 10yrs, H $ stronger, M more domestic; after break-up M unemployed, brought action against H for support under Part II of *Family Law Act* (s. 29 extends def of ‘spouse’ to include 3yr co-habiters), claimed provision unCon’l b/c it excludes SS couples 🡪 scheme available to CL hetero couples but not LGBTQ couples; Distinction is drawn, on basis of E/AG (SO), is it discrim? 🡪 Contextual factors – not every case raises every CF, no Ameliorative Purpose here ✗, gives benefit to heteros, not historically disadvantaged group; look to other 3:  -Vulnerable Group ✓(pre-existing disadvantage/stereotype exacerbated by legislation)  -Arbitrariness ✓ (why do hetero couples need it and LGBTQ don’t? Law fails to take acct of claimant’s actual situation; being in SS rltsp doesn’t mean it’s impermanent/non-conjugal, no diff in fact so diff must be based on stereotype/prejudice)  -Severity of effects ✓ (substantial encroachment on equality values, gays ignored by statute despite importance of benefits)  Exclusion from socially significant benefits **promotes view that SS relationships are less worthy** of recognition, protection, societal significance cannot be overstated; **s. 29 is discriminatory, violates s. 15(1), struck down** (gov could go through s. 1 but really no point, usually once discrim found, rare to say it’s OK under s. 1 – vs. 2(b)) |
| *Weatherall v Canada (AG)* 1993 – P argues allowing male inmates to be frisked by female guards is discrim since female inmates not subject to searches by male guards; SCC holds this differential treatment based on sex does *not* violate s. 15(1)  -LaForest J: Equality does not necessarily mean identical treatment; diff treatment may actually be called for to *promote* equality (// ameliorate inequality); given historical/biological/sociological diffs b/t men and women, equality does not require practices banned where males guard females must also be banned where females guard men (diffs justify ameliorative program); reality of relationship: historical trend of VAW by men not matched in reverse way, woman friskin gman’s chest does not implicate same concerns, women generally occupy disadvantaged position in society vis a vis men; **no discrimination found**, law OK |
| *Law* 1999 – Impugned CPP provision draws distinction on basis of EG of age that results in unequal treatment (delay/reduction of benefits) BUT when Court looks at *contextual factors*, they find **no discrimination**;  -Adults under 45 not routinely subj to discim (not VG), does not perpetuate any disadv/prej or suggest young less deserving  -Program actually *helps* people who lose spouse/aren’t competitive in labour market (ppl under 35 have better job prospects)🡪 not arbitrary  -Law has egalitarian/ameliorative purpose (allocate funds to ppl whose ability to overcome need is weakest) |
| *Withler* 2011 – 2 step analysis for s. 15: 1) Does law create **distinction** based on **E/AG**? 2) Is distinction **discriminatory** (does it offend substantive equality)? 🡪 Use **Contextual Factors** (work through, cumulative)  **1)** Vulnerable group? (Historical suffering of prejudice/stereotyping; pre-existing disadvantage)  **2)** Arbitrariness (Distinction fails to take account of realities of different groups involved; presumes stereotypes)  **3)** Ameliorative Purpose? (Aimed at trying to get rid of inequality? Promoting equality? E.g. Aff Act @ *Kapp*, benefits for old but not young @ *Law*)  **4)** Severity of encroachment (More law encroaches on equality values, more likely there is discrimination; more severe/localized consequences = more likely to be discriminatory – most fall in b/t!; // considering *value* of speech @ FoE) |

**S. 15(1) ANALYSIS** – 2-step analysis from *Withler*

**STEP 1** (This will take less time that Step 2)

**A. Does the law create a DISTINCTION?**

* **Formal:** On its face (Group A treated differently than Group B)
  + *Kapp* 🡪 Fishing licenses granted exclusively to aboriginals for 24 hours
  + *Law* 🡪 CPP survivor benefits unavailable to 30yr old w/ no kids, no disability
  + *Andrews* 🡪 Non citizen bar on law practice
  + *Withler* 🡪 People over certain age subject to reduced benefit
* **Differential Impact:** No formal/explicit distinction (law is facially neutral) but has adverse impact
  + *Symes* 🡪 CC cap in Income Tax Act argued to have disproportionate adverse impact on women (NO)
  + *Eldridge* 🡪 Facially neutral *HIA* but in absence of interp, deaf patients get inferior med service (YES)
  + *Vriend* 🡪 Facially neutral prov HR legislation doesn’t include SO as ground of discrim, LGBTQs suffer as a direct result (YES)

**B. Is distinction drawn on an ENUMERATED/ANALOGOUS GROUND?**

* **Enumerated:** Included in s. 15(1): Race (*Kapp*), national/ethnic origin, colour, religion, sex (*Symes*), age (*Law*, *Withler*) or mental/phys disability (*Eldridge*)
* **Analogous:** Read in b/c *of immutable or constructively immutable* character (fundamental to ID/personhood, gov cannot expect you to change it in order to be treated equally): SO (*Vriend*), citizenship (*Andrews*), marital status (*Morin*), non-resident of reserve (*Corbière*)

**STEP 2**

**A. Is distinction drawn in Step 1 DISCRIMINATORY**? (Does it offend *substantive equality*?)

* **Discriminatory =** Creates disadvantage by perpetuating *stereotypes or prejudice* (*Withler*) (It’s OK to draw distinction as long as it’s not discriminatory; so, it is necessary to show distinction but not sufficient)
  + **NO** 🡪 S. 15(1) *not* violated
* *Weatherall, Withler, Law*
  + **YES** 🡪 S. 15(1) *is* violated
* *M v H*
* **CONTEXTUAL FACTORS:** *Law* (Define whether or not distinction drawn on E/AG is discrim; in theory burden on P/complainant to make argument/bring evidence technically, but courts often expect govs to bring evidence)

\*\*These are *cumulative/additive*, work through all, say why/not relevant; none is determinative\*\*

* 1. VG? – If targeted gp has suffered hist’lly from prej/stereo (**pre-ex disadv**), more likely dist’n = discrim
     + *M v H* 🡪 LGBTQ = historically subject to discrim, law further disadvantages them
     + *Withler*🡪Surviving spouses over 65 *not* VG, no pre-existing disadv based on econ well being
  2. Ameliorative purpose/eff to law/distinction? – If law aimed at getting rid of inequality, discrim less likely
     + *Weatherall* 🡪 Distinction drawn b/t men/women in recognition of inequality of women
     + *M v H*🡪No ameliorative purpose, giving benefit to gp *not* historically disadv’d (hetero’s)
     + *Law*🡪Help support older widow/ers less able to make up loss of spousal income via emplymt
  3. Arbitrariness – If distinction fails to take account of *actual needs/circ’s* of target gp, discrim more likely
     + *M v H*🡪Why do hetero couples need support under *FLA* but LGBTQ couples don’t?!
     + *Law*🡪Program helps people who lose spouse and aren’t as competitive in labour market
     + *Withler*🡪Age-bsd rules eff’ve at meeting needs of claimants (younger = income rplmnt; old = help w/ final illness/death, requires less $)
  4. How much does distinction undermine equality values? – More severe encroachment, more likely discrim
     + *M v H*🡪Arbitrariness, not recognizing needs, perpetuates view that LBGTQ rlnsps less significant than hetero’s, i.e. not as worthy 🡪 undermines equality values (severe encroachment)
     + *Law*🡪Does not perpetuate prej (ppl under 45 not routinely subj to discrim); distinction = rational

**\*\*Situate Exam Case in between appropriate Book End Cases\*\***

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| BOOK END CASES for **S. 15(1): DISTINCTION** | |
| ***Formal Distinction*** | ***Adverse Impact*** |
| *Kapp* (preferential fishing license given to aboriginals)  *Andrews* (non citizen bar from practice of law @ LSBC)  *Law* (no CPP survivor benefits for young/no kids/no disab’s) | *Eldridge* (medicare FN, but adverse impact on deaf)  *Symes* (CC cap in *ITA* = AI on women – court says NO)  *Vriend* (LGBTQs get less under HR leg. that doesn’t include SO as ground of discrim) |

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| BOOK END CASES for **S. 15(1): Adverse Impact – Direct Link** | |
| *Symes*  -**No direct link** shown b/t alleged disproportionate adverse economic impact on women b/c of their role in CC and the impact of the law (Income Tax Act’s cap on CC deductions)  -No link shown, so no differential impact/distinction shown, can’t pass first stage of s. 15(1) analysis | *Eldridge* 🡪 Court finds **sufficient/direct linkage** b/t effect/operation of law/policy and social disadvantage to say that there **is** an adverse impact: latter flows from former’s failure to provide interpreters (in absence of interpreter, deaf people will get inferior med services vs. hearing people 🡪 facially neutral law but adverse impact)  *Vriend* 🡪 FN HR leg. doesn’t grant same level of protection to LGBTQs (covered by SO as analogous *Charter* ground, but prov HR law doesn’t include SO as ground of discrim) 🡪 under-inclusive law denies substantive equality, they get less than other groups; direct link (law excludes them from protection and as a result they suffer more, don’t get same benefit as heteros) |

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| BOOK END CASES for **S. 15(1): Perpetuates Prejudice** | |
| *Law*  -Distinction b/t those under and over 45 is rational (not arbitrary, does not perpetuate any stereotype)  -Doesn’t suggest under 45s are less worthy, no stigma  -Takes account of *both* groups, aimed at ameliorating suffering of older people in labour force | *M v H*  -Only reason for excluding LGBTQ couples from law was stereotypical view (seems arbitrary)  -Suggests deficiency in LGBTQ couples, less worthy of protection  -Perpetuates stereotypes, no ameliorative goal |

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| BOOK END CASES for **S. 15(1): Discrimination** | |
| *Law, Weatherall, Withler*  -No Discrimination | *M v H; (Eldridge; Andrews)*  -Discrimination |

**ESSAY TOPICS/IDEAS**

**Ideological Clash**

-Conception about what government should or shouldn’t be doing

-Tension in cases/jurisprudence b/t judges and courts at different times, of view of gov:

* **Social democratic**/egalitarian (gov as + force in protecting ppl’s rights; promote equality) vs.
  + Gov as source of *protection* for individuals (e.g. creates Human Rights Acts; redistrib to poor; public HC)
  + Gov as benevolent/protecting vulnerable/challenging private sector power (social dem)
  + More prevalent in our SCC right now
  + We see this impulse in consideration of **vulnerable groups** in the contextual analysis of s. 2(b) leading up to application of *Oakes* test (*Irwin Toy*: kids, *Guignard*: consumers *Butler*: women)
* **Classical Liberal** approach (gov should stay out of private realm; gov as potentially dangerous/coercive)
  + Gov as inherently problematic, potentially dangerous/coercive force that needs to be constrained (//Weinrib, John Stuart Milne)
    - Weinrib: “supremacy of rights” model of understanding Charter; those holding ground in society have interests secured; those cut off from political power must constantly monitor how policies affect their interests; even less well positioned are criminally accused/incarcerated
  + Give judiciary power to oversee (theory of distrust)
  + Negative rights (stop gov from acting)
  + Gov as problem needing to be contained and Charter as containing it
* E.g. *Keegstra* – majority vs minority 🡪 re: role of gov, relative importance of speech, who is **VG** here
  + Egalitarian/**social democratic** (Dickson J) – sees gov as positive force in protecting people’s rights; public authority used to promote equality
    - Does speech promote truth? (Provision doesn’t prohibit truthful speech, that is actually defence), but we are dealing with speech promoting *untruths*; argument of ‘marketplace of ideas’ for finding truth: not for gov or judicial process to decide; MoI should not be entirely unregulated, needs some guidance, needs gov to come in and regulate as provision does
    - People affected by speech 🡪 chilling effect on their expression, could lead to violence, some people’s expression rights actually infringe other people’s (SD idea that you have inequality in society, need gov to come in, help remedy those inequalities)
    - What about hate speech as ‘political’? No – it can actually *undermine* commitment to equality (individuals denied respect/dignity)
    - Dickson has greater conf in gov to make right call, not be overreaching, not unduly restrict rights
  + McLachlin J dissenting: **Classical liberal** approach – best thing gov can do for private realm is to stay out of it; gov as potentially dangerous force in need of “constitutional shackles” – LaForest J
    - Vulnerable group usually that one being targeted by gov (b/c they see gov as bad); everything shifts if we shift these presumptions
    - Rejects gullability of citizens to believe hateful expression if exposed
    - When gov dignifies such speech by coming in on side of it, can actually inflame situation, give it *credibility*, create martyrs (i.e. isn’t it better to just ignore them?)
    - Very interested in weighing beneficial vs deleterious effects (Dickson not so much)
      * Serious infringement, broad prohibition, could catch a lot, consequences serious
    - More // US approach
* E.g. *McKinney* – to whom does the Charter apply? What/who does that include?
  + LaForest J majority, **Classic liberal** – coercive, Charter protects by constraining gov (university not coercive, doesn’t need to be included in Charter application); individual or body exercising statutory authority (e.g. municipality, police officer) subject to Charter b/c what they’re doing is emanation of legislative act)
  + Wilson J dissenting, **Social Democratic** – whole thing about Canada is that we are diff from US in how we see gov (*not* a coercive force from which we need to be protected); in Canada, gov is our friend, provider of services, remedier of inequalities, positive/pro active force in promoting freedoms, social inequality; coercion is not definition of gov in Canada, so definition should go further than just State, to include universities/hospitals; rejects concept of “minimal state”, adopts broader view of gov sensitive to wide variety of roles gov has come to play; uses gov apparatus to achieve equality/freedom/liberty (argument goes down in flames! ☹)
* Freedom of Expression violation, s. 1 analysis/justification
  + Nature of law (regulatory vs. crim) – if reg, court will be more deferential to gov, w/ crim law, court will take harder line, more difficult to justify (more rigorous, more ***traditionally classically liberal*** approach, to protect individual from state); *Irwin Toy*
* Can be portrayed as a prioritization of “transcendent” values: **Liberty (class. lib.) vs. Equality (soc.dem.)** 🡪 NO:
  + “Nobody’s free until everybody’s free” – Fannie Lou Hamer (US voting rights activist, civil rights leader)
  + “I am not free while any woman is unfree (even when her shackles are very different from my own)” – Audre Lorde (Caribbean-American writer, radical feminist, civil rights activist)
  + Equality as inherently linked to liberty; if we argue (class. lib.) that some inequality must be maintained in order to preserve the liberty (e.g. FoE) of others/all, this is antithetical to substantive equality; rather, equality promotes the liberty of all (impossible to have liberty w/o equality!)
  + E.g. Free Speech controversy:
    - Class Lib: ltd state as serving liberty
    - Soc Dem: Egalitarian obj’s require strong exercise of state power (incl curbs on FoE)

**Legitimacy (of Charter, of Court; also dialogue)**

* Charter effected a revolutionary transformation of the Canadian polity from legislative to constitutional supremacy – changed role of every public institution (SCC = major agent of this transformation, mandated to bring entire legal system into conformity w/ complex new structure of rights protection) (Weinrib, p. 736) 🡪 transformation has not been w/o controversy, debate on legitimacy of Charter within Canada’s democratic system of gov
  + Every draft of the Charter included express limitation formulations 🡪 reflects fact that legitimacy of judicial role remained strong concern (Weinrib, p. 732)
* Judiciary unelected, unrepresentative, therefore illegitimate??
* **Q of legitimacy** 
  + What individuals/groups/bodies are deemed democratically legit, why/not?
  + Ministers as accountable/responsible for those working in their purview, but judiciary different (appointed by gov, on “non political” bases) but *not* responsible/accountable to it 🡪 idea = get best Js on superior/appellate courts, *not* political appointments, not part of gov (can’t be, many cases involve gov!)
  + Legitimacy of judicial review – role of unelected courts in reviewing decisions/laws of elected govs (court engaging in fundamentally political exercise where they have no democratic accountability)
    - Bogart: 2 models of democracy: 1) Power of ballot *curbed* by Js 2) Conf in power of ballot
* *Vriend* – SCC addressed issue of **legitimacy of judicial review**, allegations that it is anti democratic
  + Activist decision, imposes positive duty on AB gov to include in their anti discrim law SO as protected ground for discrim (even Charter doesn’t explicitly include it) – Court reads it in
  + Rejects notion that under Charter courts are wrongfully usurping role of legislatures 🡪 = misunderstanding of what was going on when Charter was adopted
  + Defence of judicial review (i.e. of Court’s legitimacy):

1. Was delib choice of fed/prov leg in adopting to *assign interpretive role* to courts, to command them under s. 52 to declare uncon’l leg invalid 🡪 gives democratic character to their discretion
2. Charter’s intro, remedial role = choices of Cdn people through elected reps (including giving Js new power)
3. Since courts = independent, citizens can rely on them to make **reasoned/principled** decisions according to dictates of Con; courts *not* 2nd guessing legislatures or making value judgments but rather upholding Con, ensuring other branches respect one another’s role/role of court (don’t make decisions in same way politicians do, i.e. to satisfy certain gps, lobbyists, constituents)
4. Democracy means *more* than just majority rule (other principles/values to uphold, means protecting FoE, ensuring equality, religious tolerance, etc.) – if just left to majority we’d have to be concerned that majority would act in ways to perpetuate its power in perpetuity; would undermine democratic process/principles; we need another mechanism to allow us to stay democratic: Charter and courts (//Senate justification), ensure freedoms can’t be politically negotiated away
5. **Dialogue Theory** – Ss. 1 and 33 (= incredible power, rarely invoked, cost prohibitive to gov; AB backed off in this case, didn’t invoke) 🡪 Charter gives rise to more dynamic interaction among branches **(//dialogue**, Hogg); branches accountable to one another, enhances not denies democratic process (Hogg: this is complete answer to concerns of legitimacy)

* **S. 33** allows judicial decisions to be overridden by legislative body = justification of judicial review; gives legislature last word (for max 5yrs), only applies to certain rights
  + 2 of most important elements of Charter’s institutional structure = s. 1 (guarantee and limitation clause) and s. 33 (notwithstanding/override clause) – vs. US
* Charter Pros – allows individuals, particularly those w/ minority interests, to seek vindication in open/public/responsive process as opposed to legislators who may be unresponsive and/or more attentive to majority concerns; sign of the full maturity of the Cdn legal system (Bogart); ability to unite Cdns (less elitist and unrepresentative than former dominant executive federalism dominated by white males)
* Charter Cons – did not arise from widespread abuse and public outcry but was bron as device to shore up centralizing tendencies that Trudeau believer ewere vital to enhance QC’s stake in nation, check forces of separatism (Bogart); judges’ role as subverting any possibility of true democracy; assistance of disadvantaged/poor/ordinary citizens often happens/should happen through leg’ve action; decisions affecting people should be made by elected reps; cost of court response
* Worry is NOT that Js will impose views on demo maj’y but that critical soc/poli Qs will be translated into legal issues left to Js instead of citizenry (*imposition* rather than persuasion/consensus)
* **Critiques of Charter from Left**
  + Originally that SCC would use it to restrain socially desirable regs/redistrib; (more recently re: “judicial activism” from Right saying Court forcing unwilling majority to accept rights of unpopular minorities)
  + Could block social demo or activist use of gov; promote equality in market system that operates unequally (in US SCOTUS stopped gov from enacting min wage rates, protecting employee rights, socializing HC)
  + Where powerful entities get rights under Charter, and those rights are used in ways that arguably undermine public interest and public policy in protecting health (e.g. *RJR McDonald*)
  + Petter
    - Charter as regressive, undermining interests of disadvantaged (due to nature of rights and nature of judicial system)
    - Main enemies of freedom not wealth/power disparity but *state*
    - Progress better achieved by action through political arena (rather than Charter we should work toward more responsive gov) – judicial system as inappropriate for advancing interests of disadvantaged b/c of cost of gaining access and composition of judiciary itself
    - (But what about optimism, working towards it?!)
* Morton & Knopff – critics of judicial activism, argue **dialogue theory** is *flawed*; “court party” (interest groups, equality seeking and civil libertarian groups like feminists, gays, disadvantaged minorities) have used Charter to advance their policy interests in courts seeking to constitutionalize policy prefs that could not be easily achieved through legislative process; claim poli cost of saying No to winning minority has been raised and gov concludes safest thing to to is nothing! (NO – what about *cost* of Charter litigation! See left critiques)
* 3 models/sets of discussion/criticisms re: Charter
  + Substantive **outcomes** likely with or without Charter (e.g. don’t like Charter b/c it will lead to certain outcomes, putting more hands of powerful, etc.)
  + **Process** – putting aside Q of outcomes, our concern is, b/c of indeterminacy of Charter, what we’re doing is enabling Js to make decisions re: how democratic institutions can and should make decisions (constraining/binding democratic institutions w/ dictates of unelected non demo body/institution; courts as regulating democratically elected bodies) 🡪 legitimacy debate (see Hogg on **dialogue**, *Vriend*)
  + **Access to Justice** – what happens when you’re member of minority group being repressed – how likely are you to be able to launch Charter challenge against gov who is repressing you?? (No contingency arrangement option for Charter challenge) – will be difficult to vindicate claim, Charter claims $$$ (no Judicare like Medicare!)
* Legitimacy concerns of courts reflected in their judicial deference to relevant findings of fact by legislature; deference by courts to legislature’s accommodation of competing values/interests (court’s lingering doubts about legitimacy of 2nd guessing value judgments of demo institutions)
  + Lower std of justification under s. 1 (less substantial/significant competing interests may support restriction of less valuable form of expression) 🡪 see *Irwin Toy*, s. 2(b) flow chart, deferential s. 1
* LaForest dissenting, *RJR McDonald* – Parliament as balancing competing interests (taking middle ground b/t doing nothing and banning manuf/prod of tobacco = compromise), law as regulatory, dealing w/ complex social and econ data and as balancing interests = exactly the kind of law where courts should should *defer*, leave it to legislature who have **democratic legitimacy**, and the means to collect/analyze data (vs. McLachlin J who says it is actually a crim law – that was its basis for surviving the federalism analysis – so we can’t call it regulatory/econ)

**Dialogue Theory (also re: legitimacy)**

* Hogg & Bushell – Charter **dialogue** b/t courts and legislature (including judicial review); **legitimacy** debate
  + When Court strikes down a law, legislature can modify, amend (broaden/narrow) – Charter as catalyst for exchange
  + BUT, features exist to allow legislature to overcome judicial decision striking down law for a breach (//legitimacy):
    - S. 33 (power of legislative override; notwithstanding clause; veto power)
    - S. 1
    - Ss. 7, 8, 9, 12 qualified rights; s. 15(1) guarantee of equality rights (remedial measures)
    - These features = complete answer to concerns of legitimacy (see above)
  + Critiques of Charter based on democratic **legitimacy** cannot be sustained
    - SCC is unelected, unaccountable and does strike down laws made by elected bodies BUT they leave room for response (dialogue)
    - Judicial review is not a veto over politics but beginning of *dialogue* as to how to best reconcile individualistic values of Charter w/ accomplishment of social/economic policies for benefit of community as whole
    - // Kent Roach – presence of ss. 1 and 33 means judges *don’t* have last word on controversial issues of social policy (diffuse powers, balance)
* *JTI-McDonald* – Courts struck down law in *RJR*, gov went away, came back 12yrs later w/ new law responding to court’s criticisms/concerns; brought evidence (correct probs) 🡪 Court upholds second law (is result better?)’
  + E.g. Lifestyle ads (based on science) 🡪 previous law was fairly broad instrument, Court’s decision forced Parliament/ministries to go back to drawing table, look at evidence, find where problem lay (lots of evidence showing that lifestyle ads are particularly pernicious, very effective in getting people to smoke, emotionally manipulative, deliberate psychologically evidenced way of getting people to smoke)
  + Size of health warning increased (more restrained/nuanced than previous legislation)
  + How court approaches issue depends on context, “zeitgeist of day”/dominant tide (*RJR* historical context, new Act must be examined in current social, economic, evidentiary context
* *Vriend* – See above **5.** (legitimacy), Charter gives rise to more dynamic interaction among branches (dialogue); branches accountable to one another, works of legislature viewed by courts and vice versa

**Living Tree**

* Canada vs US
  + US always trying to figure out what framers intended
  + Canada, court have said they’ll take *purposive* approach (look at history, traditions, sociology of our society and what we think purpose of right in Q is *today*) = living tree doctrine
* Charter as indeterminate, judges have discretion (see above)

**Section 15(2)**

* *Kapp* – does program fall under s. 15(2)? 🡪 aimed at ameliorating economic disadvantage (gives them 24hr advantage = significant)
  + Test (p.1273): Program does NOT violate s. 15 if gov can demo (Crown has onus)

1. Program has an ameliorative/remedial purpose? YES
   1. Rational connection b/t purpose and means? YES (easy standard to meet; for distinction to be rational there must be correlation b/t program and disadvantaged suffered – deference to legislature but allows judicial review; not high req of evidence)
   2. No need for ameliorative purpose to be sole object (unlikely!)
2. Program targets disadvantaged group ID’ed by E/AGs? YES
   1. Not all members of group need to be disadvantaged as long as group as whole has experienced discrimination – look at group in Q in context; court as fairly deferential)

* Section can be read as interpretive aid to s. 15(1) or as exception from it – court in *Kapp* says if gov can demo that impugned program meets criteria of s. 15(2) it may be unnecessary to conduct s. 15(1) analysis at all
* Section 15(1) as *preventing* govs from discriminating, s. 15(2) as *enabling* govs to combat discrimination
* **Under substantive definition of equality, differential treatment in service of equity for disadvantaged groups is an *expression*  of equality, not an *exception* to it**