CHARTER

Underlying debate: (Bogart/Petter/Weinrib articles)

Charter entrenchment violates democratic principles, judicial review is not legitimate:

- Judiciary is not a democratic institution, has no democratic accountability
- Idea that elected members of government are most effective at improving the lives of Canadians, progress in law generally comes from legislative change
- Elected reps should not be subject to the decisions of unelected reps
- Court costs create disproportionate access to judicial review
- Composition of the judiciary is problematic- small group of successful, middle-aged lawyers are ultimately given the power to decide what rights are

Charter entrenchment/judicial review is legitimate:

- Unites people, allows them to seek justice in an open, public and responsive process
- Charter was voted upon, court was entrusted with its interpretation
- Judges make principled, not political, decisions (are not constrained by what the majority wants; decisions transcend particular biases and ideologies)
- *Most powerful legitimation argument: majority is not always right in democracy, concept of democracy is broader than majority rule (**Vriend**)

2 major theories:

- **Liberal individualism** = idea that individual rights and freedoms must be protected against the state; by implication, the state is potentially tyrannical and dangerous (American view, Weinrib)
- **Social democratic collectivism** = state is a protector of rights, must use its power to promote equality and freedom (Canadian view, Petter, Bakan)

Petter- says that Charter rights are negative in nature, are founded on the belief that the state is the main enemy of freedom

- Disparities in wealth, power, distribution of property among private parties = society's main sources of inequality, not present in the Charter
- To ensure social rights, proactive redistribution is required by governments

Hogg and Bushell- idea of Charter dialogue

- Judicial review is a dialogue between judges and legislatures, each branch is accountable to the other
- S.33, S.1, inherent limits to rights, equality rights- allow room for legislatures to advance objectives, while still respecting court's interpretation of the Charter
    - ss.1 and 33- effectively restrict the Charter's scope

SECTION 32

S.32: (1) This Charter applies
(*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
(*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

- *only the government is subject to the Charter

Defining government:

1) Does it walk, talk and act like government? Is it a coercive entity?

2) If not, then is it nonetheless controlled by government? (legal structure/substantive function)

- A) What is the legal relationship between the entity and government?
  - Majority of board members appointed by government = more likely to be considered government
- B) What substantive power does the government have over its daily operations?
  - Ability to control daily operations = more likely to be considered government

If it is government:

- All of its actions are subject to the Charter (**Lavigne**)

If it is a private, autonomous body:

- It is subject to the Charter in respect of inherently governmental actions; i.e. implementing statutory scheme or gov't policy/program (**Eldridge**), exerting coercive statutory powers (**Slaight**)

Government	**Not government**
-Colleges (Douglas) -Municipalities (Godbout) -Translink/BC Transit (Greater Van Transportation Authority) -Some adjudicative bodies- admin tribunals, labour adjudicators (Slaight)	-Universities (McKinney) -Hospitals (Stoffman) -Judiciary (Dolphin Delivery)

McKinney v University of Guelph: (mandatory retirement age for university professors, possible violation of s.15) Government = coercive authority; universities are not government- created by statute, supported by gov't, perform a public function, but have own governing bodies, manage own affairs. Retirement policy not within concept of gov't action.

- Broader principle of academic freedom, universities should be autonomous

Douglas/Kwantlen Faculty v Douglas College: (mandatory retirement age in college) Colleges are government- under routine gov't control, majority of board members appointed by gov't, minister able to establish and approve bylaws.

- College training is reflective of gov't demands, should be under gov't control

Stoffman v Vancouver General Hospital: (mandatory retirement age in hospital) Hospitals are not government- majority of board members appointed by gov't, but no real authority in appointments (just "rubber-stamped"), hospitals not under regular, routine gov't control.

- Hospital functions on basis of medical expertise, should be autonomous

Greater Vancouver Transportation Authority: (Translink refused to place political ads on sides of buses, violation of s.2b) Translink and BC Transit are government- designated by legislation as "agent of gov't", all board members appointed by gov't, province/municipality has power to exercise substantial control over daily activities.

Godbout v Longueuil: (requirement to reside in city, Godbout moved and was fired; violation of s.7) Municipalities are government- have democratically elected council members, make and enforce laws, exercise powers conferred on them by prov legislatures.

Lavigne v Ontario Public Service Employees Union: (faculty member at college challenged union dues) Council of Regents = government entity; all activities (regulatory, commercial, contractual) are subject to the Charter.

Eldridge v BC: (failure to provide sign language interpreters in hospitals, violation of s.15) Providing services under Hospital Insurance Act = specific governmental objective, expression of gov't policy. Private entity must conform with Charter in respect of its gov't activity.

*Key idea from Translink, Godbout, Eldridge: Gov't cannot shirk its Charter obligations by conferring powers on another entity (i.e. through privatization).

Vriend v Alberta: (teacher fired for being gay, failure of Alberta to legislate) Charter s.15(1) includes discrimination on the grounds of sexual orientation, this must be read into the Alberta legislation. Democracy is not consistent with discrimination against gay people.

*Idea from Eldridge, Vriend: when governments fail to act, they may be violating the Charter, may be required to act.

Slaight Inc v Davidson: (order made by labour adjudicator under Canada Labour Code required employer to write reference for wrongfully dismissed employee, violation of s.2b saved by s.1) Charter applies to non-governmental actors exerting coercive statutory powers; some adjudicative bodies (admin tribunals, labour adjudicators) are therefore subject to Charter.

RWDSU v Dolphin Delivery: (dispute with Purolator, court order restrained union from secondary picketing at Dolphin; possible violation of 2b) Court orders cannot be subject to Charter, judiciary is not government; injunction is upheld.

- Charter applies to legislative, executive, administrative branches of gov't
- Court must act as a neutral arbiter
- *Lawyers in this case challenged the judicial order rather than the underlying law, were unsuccessful

Underlying law = **common law rule that all secondary picketing is illegal**

- If there was legislation preventing picketing- Charter could be invoked
- If one party was gov't- Charter could be invoked
- 2 private parties with a common law rule → no Charter application

However, common law is included in s.52- must be interpreted consistent with Charter values

S.52 (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

*In Hill and Pepsi-Cola: lawyers challenged the common law rule rather than the judicial order

- Onus on complainant (P) to prove that the restriction is not justified

Hill v Church of Scientology: (church defamed lawyer Hill, argued that defamation violates s.2b) Private parties cannot found cause of action upon a Charter right; however, can argue that common law is inconsistent with Charter values. Tort of defamation = consistent with Charter, appropriate balance btwn free expression/protection of reputation, no modification required.

RWDSU v Pepsi-Cola: (injunction prevented union from secondary picketing at retail outlets) Common law presumption that all secondary picketing is illegal violates Charter value of free expression; must be modified- secondary picketing is permitted as long as it is not tortious.

SECTION 1

S.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 can be demonstrably justified in a free and democratic society.

- *Ultimately, the rights of the individual must balance with the rights of the collective (in order to promote collective interests, individual rights may need to be restricted)
- Onus on individual to demonstrate that Charter right has been violated, onus on D (gov't) to prove that the restriction is justified

S.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

R v Oakes: (Act creates rebuttable presumption that narcotic possession = intent to traffic; violation of s.11d) Objective is pressing and substantial = protecting society from drug trafficking; however, means chosen (reverse onus) not rationally connected to objective- possession of small amt of drugs does not = intent to traffic.

Oakes Test: (D/Crown must prove all elements on heightened BoP std)

- 1) Is the objective pressing and substantial in a free/democratic society? Of sufficient importance to justify overriding a Charter right?
  - Court is very deferential at this stage- only example where obj is not pressing and substantial = morality (**Butler**)
- 2) Are the means chosen reasonable and demonstrably justified?
  - a) Rational Connection- is the law rationally connected to the objective?
  - b) Minimal Impairment- is the law minimally restrictive of the right?
    - Laws are most commonly struck down at this stage
    - However, test is modified in cases suggesting deference: "provided the option chosen is one within a range of possible alternatives, min impairment test will be met" (**Whatcott**)
  - c) Proportionality- are the deleterious effects of the law proportional to the objective?
    - Cost/benefit analysis
    - More deleterious effects of a law = more important objective required

Note different approaches of the judges:

- Dickson developed Oakes test, prefers structured analysis
- La Forest prefers deferential approach, balancing of interests, contextual factors (RJR Macdonald dissent)
- McLachlin more rigorous in RJR Macdonald, more deferential in JTI
- Lamer argues that the actual effect of the law must be considered, adds extra step:
  - d) Proportionality- are the deleterious effects of the law proportional to its salutary (actual/expected) effects?
    - Evidence of the law's actual effect is required (**Dagenais**)

In general- SCC interpretation of the Charter is broad and functional (living tree)

Scope and content of rights is determined by asking: **what is the function of the right in society as it exists today?**

SECTION 2b: Freedom of Expression

*s.2(b) interacts closely with s.1- since expression is interpreted broadly, threshold for finding violation under s.2(b) is very low

S.2: Everyone has the following fundamental freedoms:

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication

Analysis: (from **Irwin Toy**)

1) Can the activity be classified as expression?
   - **Expression** = anything that attempts to convey meaning; only exception = violence (in form, not content)

2) Is the purpose of the law to restrict expression?
   - If yes → s.1 analysis required

3) Is the effect of the law to restrict expression, even if that is not its purpose?
   - If yes → does the kind of speech being restricted serve one of the 3 underlying values of free expression?
     - 1) seeking and attaining the truth
     - 2) enabling and advancing democracy- political speech
     - 3) self-fulfillment and human flourishing- art, music
   - *P must demonstrate that their speech is valuable, promotes 1 of these principles
     - If yes → s.1 analysis required

Irwin Toy v Quebec: (Act banned advertising directed at children under 13 years of age, violation of s.2b) Objective is pressing and substantial = protection of vulnerable group from media manipulation; rational connection btwn law and objective; social science evidence supports conclusion that advertising ban minimally impairs expression; no suggestion that ban effects are so severe to outweigh importance of the objective. Limitation is saved by s.1.

*Strong undercurrent of equality, court is concerned with protecting vulnerable groups.
Deference to legislative judgment is appropriate where gov't has sought to balance competing rights, protect a socially vulnerable group, or address conflicting social science evidence.

RJR Macdonald v Canada: (complete ban on cigarette ads, requirement of unattributed warnings on products; violation of s.2b) Law is struck down, does not pass min infringement test. Lacking evidence in this case. Partial ban would be more appropriate.
- Commercial speech, while arguably less valuable, should not be lightly dismissed (McLachlin)
- Advertising often provides consumers with important info, allows them to make rational choices; profit motive is irrelevant to assessing the value of the speech
- La Forest (dissent)- court should defer to Parliament when commercial advertising is at issue

Contextual factors:
- 1) What kind of legislation?
  - Criminal- state is singular antagonist; less deference to legislature
  - Policy- regulatory, balancing of competing interests; more deference to legislature
- 2) Is the law aimed at protecting a vulnerable group?

    - If yes- more deference to legislature
- 3) What is the value of the speech?
    - More valuable speech = more inclination to protect it, less deference
    - Less valuable speech = more deference

Canada v JTI-Macdonald Corp: (ban on false promotion, ads appealing to young people, lifestyle ads, requirement of attributed warnings) Law is upheld, satisfies Oakes. Example of dialogue btwn courts and legislature.

- Relatively low value speech, vulnerable groups, policy legislation = deference

R v Guignard: (counter-advertising, sign expressing dissatisfaction with insurer, bylaw prohibiting sign) Bylaw is struck down, counter-advertising is valuable social/economic speech, citizens have a right to counter-advertise within the limits of defamation. Issue of access/unequal terrain of expression- cannot allow corporations to monopolize advertising.

Hate speech

R v Keegstra: (teacher willfully promoting hatred against Jewish people, CC = violation of s.2b) Law is upheld, satisfies Oakes. Provision is quite circumscribed because of the available defences (truth, artistic merit) and "willful" requirement. Hate speech undermines the core values of free speech.

- Dickson (majority) takes value-driven, social democratic approach = deference to legislature
- McLachlin (dissent) takes civil libertarian approach = all expression should be permitted, legislation is too broad/draconian

Whatcott: (religious pamphlets attacking homosexuality in schools, civil human rights code "exposing to hatred" = broad restriction of hate speech, no defences, violation of s.2b) Prohibiting expression which exposes protected groups to hatred = upheld under s.1; prohibiting expression which "ridicules, belittles or affronts the dignity" of groups- is not rationally connected/not minimally impairing = severed from the legislation. Anything that falls short of hatred cannot be stopped by the law.

- Even if the speech is political or true, if it takes a hateful form, it is restricted
- McLachlin (in majority) appears to change her position, more deferential

For both **Keegsta/Whatcott**:

- Precautionary approach- court is deferential, does not require definitive evidence of harm (esp when there is a vulnerable group/low value speech)
- "reasonable apprehension of harm"- court is entitled to use common sense in recognizing that certain activities (like hate speech) inflict societal harm
- Benefits of suppressing hate speech outweigh the deleterious effects of restricting expression. Must balance free speech and equality rights.
- ***When dealing with low value speech, vulnerable groups, scientific/policy uncertainty → court is likely to be deferential with low evidentiary requirements**

Obscenity

Butler: (selling and renting porn, CC obscenity provisions = violation of s.2b) Obscenity = undue exploitation of sex (violent, degrading or dehumanizing). Community standard of tolerance test = harm incompatible with society's proper functioning. Law is upheld, satisfies Oakes. Infringement is confined to extreme sexual materials, artistic defence exists.

- Criticism: original purpose of the law was the protection of conventional morality, moralism is not a pressing and substantial objective anymore

- Line between harm-based approach and morality-based approach is blurry; court says the test was always about harm, but the concept of harm has changed
- Similar to Keegstra- balancing free speech with equality rights, goal is to protect vulnerable groups

Little Sisters: (Customs officials authorized to seize obscene materials, were seizing gay and lesbian erotica = violation of s.2b) Community standard = one that condemns harmful types of material and includes equality values, must be objective, taking minority views into account. Harm test for obscenity is affirmed and developed, law is upheld under s.1 analysis although application here unconstit.

Labaye: (club permitting group sex, possible indecency under CC) Courts should no longer look to community standards when determining indecency or obscenity. Harm is conduct that rises to the level of threatening the proper functioning of society. Conduct in this case does not meet definition of harm (note BRD std because this is a crim case).

3 types of harm:

- 1) harm that restricts autonomy and liberty (cannot be avoided)
- 2) harm that predisposes people to anti-social conduct (i.e. violence towards women)
- 3) risk of harm to participants