**Introduction**

* Constitutional law primarily governs those who make the law. It imposes obligations on government, courts, etc.
	+ S.52, *Constitutional Act 1982*: The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent… is of no force or effect.”
	+ Government is constrained by the ballot box and by the Constitution
* Governs three broad areas of governmental activity:
	+ How Constitution protects individuals from government by imposing rules on what it can do to individuals
	+ Aboriginal rights are entrenched in the Constitution
	+ Division of powers
* Constitutional provisions:
	+ Establish legally enforceable obligations
	+ Ground judicial decisions concerning the constitutionality of the exercise of power
	+ Symbolic role: set out fundamental values and aspirations of a country
* **Constitutional law:** open-ended set of rules, principles, and practices that represent efforts to identify, define, and reconcile competing rights, responsibilities, and functions of gov’ts, communities, and individuals
* **Five elements of the Canadian constitution**
	+ Parliamentary democracy
	+ Federalism
	+ Individual and group rights – citizen’s rights against the state
	+ Aboriginal rights
	+ Principle of constitutionalism – gov’t action can be held by courts to be of no force or effect if the courts find the action to be inconsistent with a provision of the constitution
* Rule of law: expectation that governments will exercise power according to law and not in an arbitrary manner
* Relative permanence of the Constitution
	+ Only significant modification in 1982
	+ Failed attempts: 1987 Meech Lake, 1992 Charlottetown Convention
	+ S.38: must have approval of federal parliament and at least 2/3 of the provincial legislatures representing at least 50% of the population to change the Constitution
	+ S.41: some areas need unanimous consent, every province has a veto
* If the constitution is going to adapt and reflect the views of society, it is all going to happen in its interpretation. It changes through judicial interpretation.
* Courts believe it is their job to keep the constitution contemporary, relevant. Keep its values parallel to those deemed important in society.
* **P.20 [64]:** Democracy is fundamentally connected to substantive goals, not just about majority rule. (*Oakes*)
* **P.22 [71]:** Rule of law provides two basic things: (1) the law is supreme over government (rulers), and (2) that the rule of law means that there are positive laws that embody the general rules of normative order in society.
* **P.22 [72]:** Constitutionalism principle requires that all government action comply with the Constitution Government’s sole claim to lawful authority rests in powers allocated to them under the Constitution.

**Quebec Secession Reference, p.25**

|  |  |
| --- | --- |
| **Issue** | Can Quebec unilaterally effect its secession from Canada under the Constitution? |
| **Ratio** | * Four fundamental and organizing principles of the Constitution: federalism, democracy, constitutionalism and the rule of law, respect for minorities
* Written constitution promotes legal certainty and predictability.
* Provides principles to fill in gaps of express terms of constitutional text
* P.18[55-56]: It is undisputed that Canada is a federal state. The actual Constitution seems tilted towards federal power. In practice, federal and provincial jurisdictions are coordinated equals.
* Federalism is central organizational theme of the Constitution. It is a political and legal response to underlying social and political realities.
* P.25[82]: Explicit protection of aboriginal and treaty rights. S.35 recognizes not only traditional land, but also their role in building Canada.
 |

**Contact to Confederation, p. 63 – 65**

* Mixed history created a complex web of competing narratives
* Aboriginal law-making authority, French colonial systems, and British colonial systems all interact and influence the constitution.
* Aboriginal law: traditional, customary, oral, written
* *Terra nullius* = unoccupied land, for purposes of distributing sovereignty
* European powers viewed Aboriginal nations as insufficiently Christian or civilized to justify recognizing them as sovereign over their land

**The Charter**

**The case for and against the Charter, p. 736 – 755**

* History:
	+ Quebec did not wished to be subjected to national regime. It was imposed upon them by the court in the *Patriation Reference*
		- Mainly relied on conventions to make this decision
	+ First Nations unhappy with Charter: s.35 did not entrench right to self determination, but “recognition and affirmation of existing Aboriginal rights”
	+ Alberta: constitutional bias in favour of QC and Ont. in legislation
* Judicial review:
	+ The parts of the Constitution that judges deal with (esp. Charter) state really general standards and principles
	+ Standards are not rules: vague and indeterminate
		- For example, in s.1: what is “reasonable”? “Demonstrably justified”? ETC.
* Generally we distinguish politics from law. In theory, judges are supposed to deal with law, not politics. But, if the law is so vague that judges have to rely on politics, then it is a problem.
	+ Politics is supposed to represent the will of the people, whatever that happens to be.
	+ Law is supposed to be about principles, to be objective, to be about reason and rational behaviour.
* Petter (p.740): *against*
	+ “… a regressive instrument more likely to undermine than to advance the interests of socially and economically disadvantaged Canadians”
		- Historically, those with power tend to gain more power through judicial decisions
	+ Progress has tended to come from democratic rather than judicial arena
	+ Elements of the judiciary make it inappropriate forum in which to advance interests of the disadvantaged:
		- Cost of Access
		- Composition of judiciary
	+ Judges inevitably get in the way of progressive movement as expressed by democratic governments because they tend to practice conservative politics
	+ Judges should defer to legislation / Parliament
	+ **Bakan**: courts can respect what democratic bodies do and hold in reserve the power to deal with a situation where they overstep/act arbitrarily or in ways beyond the interest of the people or where they undermine values central to our society. There is a place for judicial review, but you have to know what the standard is that you are balancing against.
* Weinrib (p.743)
	+ Majoritarian: rights often bend to the majority’s assertion of what is good for the individual, groups, or society at large
	+ Supremacy of rights: underlying respect for equal dignity and autonomy, courts as important law creators
* Hogg and Bushell: *for*
	+ Judicial review is a form of dialogue between the courts and legislatures
	+ Judicial decisions open to legislative reversal, modification, or avoidance.
		- It creates a public debate about Charter values, and legislative body must respond in such a way that is respectful of values, while accomplishing the social economic objectives impeded by judicial decision
		- Judicial decision striking down law on *Charter* grounds can be reversed, modified, or avoided by a new law, so democratic process is constrained, but final decision is still made by legislative body, and is therefore, democratic. (FEEDBACK LOOP)
* Roach:
	+ Presence of s.1 and s.33 explicitly allow governments to limit and override rights, so judges do not have the last word on controversial issues of social policy.
* Morton and Knopff
	+ SCC has been more active than they should have been
	+ Hogg’s view is too simplistic because it is hard to overturn SCC decision.
		- Hogg: That’s the point. Where public opinion is strong, reversal is often attempted and is easy.
* Class discussion
	+ Judicial power constrained by law because they are not democratically elected.
	+ Judges are not constrained by the ballot box or the will of the people.
	+ Supreme Court is actually not entrenched in the Constitution
	+ S.33: notwithstanding clause
		- A major incursion on the way judges are allowed to interpret and decide
		- It is typically Canadian in that it tries to find a compromise.
		- Politically costly for a government to say they are going to opt out of constitutional protection of rights. It is not a sellable position unless you are a nationalist gov’t like PQ
	+ Charter only deals with where your rights are infringed by the government, which tends not to be the instance in daily life.
* These issues with the Charter are not resolvable. The court has to make decisions under the Charter, and ultimately, non-legal decisions come into it. (*Vriend*)

**Vriend v Alberta (1998 SCC):** *SCC directly addresses legitimacy of judicial review, and how it should be done*

|  |  |
| --- | --- |
| **Facts** | Private school teacher fired for sexual orientation. He submits that omission of sexual orientation from Alberta human rights act violates the Charter. |
| **Ratio** | It violates the Charter, even though the Charter itself omits sexual orientation. The list stated in s.15 is not exhaustive, but merely exemplary of the kinds of grounds that are forbidden. It is always open to the complainant to say that a ground of discrimination not listed is still analogous to the listed ones. |
| **Judicial Review** | * Criticism: judicial review is illegitimate because it is anti-democratic since unelected officials overrule elected officials
1. Charter is product of democratic choice. People have chosen to have the Charter, so judiciary has permission to interpret and make decisions. Politicians gave them the power to interpret. (P.751)
2. Courts are independent from the executive and legislature. Courts are reasoned and principled, and therefore constrained by the law. (p.752)
3. Judicial review doesn’t really affect legislative supremacy. Charter allows legislation to override the Courts in s.33 (p.752, dialogue argument)
4. Democracy means more than just majority rule. Judiciary must protect democratic values beyond majoritarian rule.
* The Court’s duty is to uphold the Constitution, not to make value judgments on what they think is the proper policy choice.
 |
| **Significance** | First time court articulated what it feels and holds are the basis of its validity |

**Applying the Charter: s.32**

**Defining Government**

* Governmental actors (p.802)
	+ Charter applies to actions taken by a legislative assembly
	+ Not all entities that have powers conferred on them by statute, that are controlled to some degree by government, or that receive public funding will qualify as “government” for the purposes of s.32

**Issue**

*The first step in analyzing a Charter right is to consider whether the Charter applies pursuant to s.32.*

**Rule**

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.

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

* *S.32 provides that the Charter will apply to the Parliament and government of Canada and to the legislature and government of each province in respect of all authority that they exercise. The Charter also applies to entities which are inherently governmental actors. To be characterized as inherently governmental, it is not sufficient to be* ***1)*** *created by statute,* ***2)*** *funded by the government, or* ***3)*** *to serve a public purpose (McKinney). Factors that suggest an actor is inherently governmental include* ***1)*** *an entity under routine and regular control by the government, such as the community college board in Lavigne;* ***2)*** *if the entity performs a governmental function whereby it is created by statute and exercises coercive power derived from statute, such as the municipality in Godbout. An entity which is not a governmental actor may still be subject to the Charter to the extent of its activities which involve governmental action, such as* ***1)*** *entities charged with implementing a specific government policy or program, such as the provision of care by a hospital (Eldridge*), ***2)*** *a private entity exercising coercive statutory power such as the labour board in Slaight*.
	+ To be defined as inherently governmental actors
		- Entity is under routine and regular gov’t control
			* Characterized by lack of autonomy, such as where the board of directors is appointed and controlled by government, which can exercise control over the entity (*Lavigne, Douglas College* – community college board)
			* Entity likely not under government control if there is a separate autonomous board of directors which has a fiduciary responsibility to the entity (*Stoffman* – hospital)
			* Entity likely not under government control where there is security of tenure in the position, there is an arms’ length relationship, and no routine or regular control (*McKinney*)
			* Entity likely gov’t if provincial gov’t has power to exercise substantial control over day-to-day activities (*Greater Vancouver Transportation Authority*)
		- Entity has coercive or compulsive authority derived from statute, which allows it to make someone do something under the law. It exercises a governmental function.
			* It poses a threat of depriving individuals of their rights
			* Labour board: Non-governmental actors exercising coercive statutory powers, all of which are derived from statute (*Slaight*)
			* Municipalities empowered to make laws, administer them, and enforce them (*Godbout*)
		- Entity is delegated with implementing a specific government policy or program
			* The government cannot contract out to avoid the *Charter*, so private entities that exercise statutory discretion are inherently governmental and subject to the Charter (*Eldridge –* hospital).
				+ To apply to private entity, must be implementing specific policy or program (*Eldridge*)
				+ Entity may attract Charter scrutiny with respect to particular activity ascribed to gov’t (*Eldridge*): what is the nature of the activity? Entity is only subject to Charter in those specific activities.
			* Designated by legislation as agent of the government (*Greater Vancouver Transportation Authority (BC Transit))*
* *Charter* also applies to entities that are essentially governmental in nature. Where an entity can accurately be described as governmental in nature, it will be subject in all its activities to *Charter* review. (*Godbout, Douglas, Lavigne*)
* *Charter* will also apply to individuals relying on unconstitutional legislation/statute.
	+ Where one private party sues another private party relying on the common law and where no act of government is relied upon to support the action, the Charter will not apply: *Dolphin*
	+ If the statute is unconstitutional, then all actions taken pursuant to it are also unconstitutional (*Eldridge, Dolphin Delivery*). Further, actions are unconstitutional if it relies on a rule of the common law for authority, and that rule constitutes an infringement of the *Charter* (*Dolphin*).
	+ The *Charter* does not apply to private actions b/t parties (*Dolphin*), but Court may apply it to develop the common law in accordance with Charter values and principles (*Hill*).
	+ Charter may apply to a private entity if it is found to be implementing a specific governmental policy or program, to the extent of the activities which are governmental (*Eldridge*).
* *Charter* can apply to governmental inaction, where government fails to fulfil positive obligation (*Vriend*)

**CHARTER APPLICATION ANALYSIS**

* Is this government?
* Is this inherently governmental? Consider factors suggesting governmental control:
	+ Governmental control: regular and routine control, can exercise compulsion, whose interests are being served
	+ Coercive or compulsive authority: either all its activities (gov’t actor), or some activities (gov’t action)
	+ Exercising statutory authority: implementing gov’t policy or acting as agent of gov’t
* Is it a private party?
	+ Are they relying on an unconstitutional statute?
	+ Should common law be developed in accordance with Charter values
* Is there gov’t action or inaction?

**McKinney v U of Guelph, 1990 SCC**: *Only the government is constitutionally obliged to preserve rights of individual*

* Faculty members challenged mandatory retirement policies of Ont. unis. Violation of s.15, age discrimination.
* Held that university mandatory retirement policies do not fall within gov’t action. Appeal dismissed.
* **Ratio:** Universities are not subject to Charter application. There were factors that were not enough to support application: 1) fact that university **created by statute** not enough to make it lack autonomy, all private corporations are also created by gov’t; 2) most university **funding comes from gov’t**, but this is not enough to make it lack autonomy; 3) it is not enough they serve a **public purpose** – everything serves a public purpose
	+ The defining features of gov’t “do not readily admit of any a priori elucidation”
	+ Added value needed to make a body gov’t (Wilson J dissent):
		- Routine and regular control
		- Coercive authority 🡪 universities have coercive power, but not general coercive power
		- Exercising statutory authority – means through which legislation is implemented
* **P.806[1-3]**: Two things going on: (1) technical, legal control of gov’t isn’t there, (2) traditional arms-length relationship

**Harrison v UBC, 1990 SCC**: *Followed McKinney. Charter not applicable to mandatory retirement policy.*

**Stoffman v VGH, 1990 SCC:** *Effective routine control by board of trustees who owed fiduciary duty to hospital*

* Doctors challenged hospital board regulation establishing policy of mandatory retirement
* **Ratio:** 14/16 board members were government appointed; however, routine control of the hospital was in the hands of the board of trustees who owed a fiduciary duty to the hospital. Therefore, it is not government. That an entity performs a public function in the broad sense does not render it gov’t for purposes of s.32. Specifically leaves open possibility that the Charter could be applied to hospitals in different circumstances.
* **Policy**: tradition of independence between government and delivery of healthcare.
* **Contra:** Eldridge

**Douglas/Kwantlen Faculty Association v Douglas College, 1990 SCC**:

* Faculty challenged mandatory retirement provision in a CBA b/t college and union
* **Ratio:** Affairs of college were managed by board appointed by the provincial gov’t. SCC unanimously held that Charter applied to actions of the college in negotiation and administration of CBA because “the government may at all times by law direct its operation.”
* **P.**808: “Board is appointed and removable at pleasure of the government…”
* **Contra:** McKinney

**Greater Vancouver Transportation Authority v Cdn Federation of Students – BC Component, 2009 SCC**

* Did Translink and BC Transit violated Charter guarantee of freedom of expression by refusing to accept political advertising on sides of their buses?
* **Ratio:** BC Transit is a statutory body designated by legislation as an agent of the government. BC Transit / Translink cannot be said to be operating anonymously from provincial gov’t because the latter has the power to exercise substantial control over its daily activities.
* **Control Test:** Is this body subject to the routine and regular control of the government?

**Godbout v Longueuil (City), 1997 SCC**: *If entity can be described as governmental in nature, subject to Charter*

* Godbout (R) agreed to live within city boundaries as condition of employment. If she moved out of the city, she could be terminated w/o notice.
* **Holding**: residence requirement violated right to respect for private life in QC Charter of Human Rights and Freedom
* **Ratio:** s.32 is wide enough to include all entities essentially governmental in nature, not just those that are formally part of the structure of governments. If the Charter only applied to bodies that are institutionally part of government, but not to those that are governmental in nature, gov’t could simply confer powers on other entities and have them carry out what are actually govt’tal activities and policies.
* **Municipalities are governmental entities**
	+ Elected and accountable to electorate – general taxing power – make, administer, and enforce laws w/i defined territorial jurisdiction – exercise powers conferred on them by provincial legislatures
	+ P. 815: “All the municipality’s powers are derived from statute and are all of a gov’tal character… an act performed by an entity that is governmental in nature is, to my mind, necessarily gov’tal and cannot properly be viewed as “private” at all.”

**Lavigne v OPSEU, 1991 SCC**: *Community college is a crown agent subject to routine or regular control by gov’t*

* Charter challenge by faculty member at a community college to the union’s expenditure of dues on political causes he did not support.
* Ontario Council of Regents for Colleges of Applied Arts and Technology has exclusive statutory authority to negotiate CBAs on behalf of all community colleges in the province. Union provided for compulsory payment of union dues from all employees, whether they belonged to union or not.
* **Ratio**: Charter did not apply to union activities, but it did apply to Council of Regents b/c it was subject to routine or regular control by Minister of Education. Ministry exercised full control over activities including collective bargaining with college employees.
* **Held**:Provision for compulsory pmt of union dues was subject to the Charter, since Council’s agreement was gov’t conduct.
* **Contra**:*McKinney, Stoffman*

**Eldridge v BC (Attorney General), 1997 SCC**: *For Charter to apply to private entity, must be implementing specific governmental policy or program*

* Individuals sought declaration that failure to provide public funding for sign language interpreters for the deaf when they received medical services violated s.15 of the Charter
* **Ratio:** Legislatures may not enact laws that infringe the charter, and they cannot authorize another person/entity to do so. Charter **does not apply** when the entity has not been entrusted to implement specific governmental policies. The Charter **applies to all activities** when the entity is determined to be governmental. In order for the Charter to apply to a private entity, it must be found to be implementing a specific governmental policy or program.
* If the gov’t is providing some benefit, like medical services, then it must provide the benefit in an equal way.
* **Charter may apply to entity on one of two bases**:
	+ Entity is “government” for the purposes of s.32, either by its very nature or by virtue of the degree of governmental control exercised over it.
	+ It may be found to attract Charter scrutiny w/ respect to particular activity that can be ascribed to gov’t
* **Contra:** *Stoffman* – Whether hospitals effectively implement governmental policy in providing medical services under the *Hospital Insurance Act*
* **On the Facts:** *Act* is to provide particular services to the public, and gov’t is responsible for defining both content of service to be delivered and persons entitled to receive it. Thus, hospitals carry out specific governmental objective. This is a **direct and precisely defined connection** b/t specific gov’t policy and hospital’s impugned conduct. While hospitals may be autonomous in daily ops, they act as agents for gov’t in providing specific medical services set out in the Act.
* **P. 817[42]**

**Slaight Communications Inc v Davidson, 1989 SCC**: *applies to non-gov’t actors exercising coercive statutory power*

* Adjudicator ordered employee who wrongfully dismissed employee to write specific reference letter.
* **Held:** Charter applies to order by adjudicator acting pursuant to *Canada Labour Code* 🡪 exercising power conferred by legislation.
* **Ratio:** Adjudicator is appointed pursuant to legislative provision and **derives all powers from statute**. He has no power to make order that would result in Charter infringement.
* **Significance:** Some adjudicative bodies are bound by the Charter, while courts (*Dolphin Delivery*) are not

**Vriend v Alberta, 1998 SCC**: *Charter applies to governmental inaction, failure to do positive act*

* Challenge to deliberate omission of sexual orientation from Alberta’s *Individual’s Rights Protection Act* (IRPA)
* **Ratio**: Nothing in the text of s.32 or jurisprudence requires such a narrow view of Charter application, such that non-action should not be reviewed. Application of Charter is not restricted to situations where the government actively encroaches on rights. If omissions were not subject to Charter, form and not substance would determine if legislation is open to challenge, and this is illogical and unfair.

**REVIEW**

• If you are a governmental body, then everything you do is subject to the Charter

• If you are not a governmental body, then only your governmental actions are subject to the Charter

• Once a body is defined as gov’t or under routine and regular control of gov’t, all activities are subject to Charter

• Governments that don’t act are subject to the charter

**Is the Judiciary Government?**

* The judiciary can constrain the liberty of others, so they themselves need to be constrained.
* In theory, the courts do not make law or policy and is different than other gov’t branches
* A judicial order is not subject to the Charter: it is not law, but an application of law.
	+ **However:** SCC ruled that common law is subject to the Charter, so in a private litigation b/t two parties concerning a common law rule, you can invoke the Charter.
	+ **Rule:** You cannot challenge the order of the court, but you can challenge the common law rule that is the basis of the judgment.
	+ The actual application is that you can challenge the fact that the court should consider the charter in interpreting the rule.
* Whenever the court is administering its own process, it is subject to the Charter.
* **P.799:** Why judiciary should not be included in “government”

**Hypo:** There is a clause that said future buyers of a house could not be of a particular race. Try to knock the restrictive covenant out under the charter for violation of s.15.

🡪 Court holds it is not discriminatory, upholds the covenant.

🡪 It is a court order in resolution of private dispute. Charter does not apply because Court is not administering its own process. It is not executing power in any way, but acting merely as a neutral arbiter.

🡪 If the covenant is on a government bulding, then you could challenge the gov’t.

**You need an anchor into gov’t action. If you cannot challenge the Charter, then you can resort to human rights code since it applies to private actors**

* In a private dispute, the Charter applies if the parties are relying on an unconstitutional statute. If the statute is unconstitutional, then so is any action taken under it: *Dolphin*. Further, the Charter applies in the development of *common law*.
* To the extent that an entity relies on statutory authority which constitutes or results in an infringement of a guaranteed right or freedom, the *Charter* will apply and it will be unconstitutional. It will apply to the common law only insofar as the basis of some governmental action which infringes a guaranteed right or freedom. (*Dolphin*)
* The Charter will apply to common law when it is relied upon in litigation involving a gov’t party or in proceedings initiated for a public purpose.
* Charter will only apply to the common law to the extent that the common law is found to be inconsistent with Charter values (*Hill*)
* *Hill*: In the common law, the balancing of competing principles must be more flexible than the traditional s.1 analysis in governmental action cases (**p.828**)
* The party that alleges the common law is inconsistent with the Charter must prove (*Hill*):
	+ Common law fails to comply with Charter values
	+ When values are balanced, the common law should be modified

\*\***Remember: characterization of the problem in constitutional litigation is 99% of the battle.** (see *application, Hill*)

**RWDSU v Dolphin Delivery Ltd (1986 SCC):** *injunction not gov’t action subject to Charter review*

* Dolphin Delivery performed scab work for Purolator during a strike. Union wanted to picket Dolphin’s premises.
* BC court issued injunction restricting secondary picketing. Does this reasonably limit freedom of expression?
* **Issue**: Does the charter apply to a dispute between private parties?
* **Ratio:** s.32 deals w/ Charter application, and is broad enough to include common law. Gov’t action can depend on statutory authority or on common law. **Charter does not apply to private litigation**. To the extent that gov’t relies on statutory authority which constitutes an infringement of a guaranteed right of freedom, *Charter* applies. Further, it applies to the common law, but only insofar as the common law is the basis of some gov’t action which infringes a guaranteed right or freedom.
* RWDSU challenges court order as unconstitutional. A court order is not governmental action, merely neutral arbiter
* Common law must be developed in a manner consistent with the fundamental values enshrined in the Constittuion.
* **On the facts**: common law renders secondary picketing tortuous and subject to injunctive restraint. However, because it is litigation between two purely private parties, there is no exercise of or reliance upon gov’t action necessary to invoke the Charter. Appeal dismissed.
* **Contra:** *Hill, Pepsi-Cola*

\*\*There is a conceptual difference b/t saying you are challenging the court’s interpretation of legislation and saying you’re challenging the court order. It is the statute that violates s.15, not the court order.

**Hill v Church of Scientology (1995 SCC)**

* Church of Scientology alleged contempt of court by Hill. Hill brought libel action against CoS under CL defamation.
* **Issue:** Did CL defamation infringe on Charter guarantee of freedom of expression?
* **Ratio**: Charter will apply to common law only to the extent that it is found to be inconsistent with Charter values. The common law should be developed in a manner consistent with Charter values.
	+ When developing CL, court says it must do it incrementally and deferentially
* Hill is suing as private citizen, not as AG, so not gov’t. In CL, balancing of competing principles must be more flexible than traditional s.1 analysis (p.828)
	+ Traditional: (1) find breach of right, (2) determine if breach is demonstrably justified under s.1
* Party alleging common law Charter violation bears burden of proof throughout to show that competing values favour its claims
* **Contra**: *Dolphin*
* **Significance:** The problem with this case is that there is no gov’t actor. To balance no gov’t actor with s.52, talk about “quasi-application”.
* **Application**: Court looks at the value underlying the law of defamation. You can say the law of defamation manifests values that appear in the charter (protects reputation which leads to security of person and liberty), so it immediately bumps up the value. So here, it is *security of person and liberty* to be balanced against *freedom of expression*. But since libel is lying, you can say it is not right to free speech so much as your right to lie.

**RWDSU v Pepsi-Cola Canada Beverages (West) Ltd. (2002 SCC)**

* Union engaged in lawful strike against Pepsi. Its picketing activities spread to secondary locations. Secondary picketing is lawful unless it involves harmful conduct that amounts to a tort or a crime.
	+ Secondary picketing of homes of management personnel properly restrained b/c evidence shows it amounted to torts of intimidation and private nuisance
* **Ratio:** When the common law restricts it, freedom of expression is restricted
* **Contra *Dolphin***: In *Dolphin,* McIntyre J assumes that proposed picketing would be tortious. Here, SCC requires evidence of tortious or criminal conduct before restraining secondary picketing.
* **Significance:** Applies *Hill* to revise common law rules regarding secondary picketing.

**Permissible Limits on Rights & Freedoms: s.1**

**Issue**

*The guarantees of rights and freedoms set out in the Charter are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. In effect, s.1 constitutionally guarantees rights and freedoms set out in the Charter and explicitly states the justificatory criteria against which limitations on those rights and freedoms must be measured. Any limitation on a guaranteed right must be measured against the underlying values and principles of a free and democratic society. The party seeking to uphold the limitation of the right bears the burden of proof at a heightened civil standard, that is, on a preponderance of probabilities.*

*The Court will consider if the limit is prescribed by law. Does the law provide an intelligible standard according to which the judiciary must do its work (Irwin Toy)?*

**Contextual Analysis**

*To determine whether such a limitation is justified, the Court will consider the Oakes test, in addition to contextual factors which inform the application of the test. These contextual factors will influence whether the Court will be more activist or more deferential in its position.*

1. ***Difficult policy question.***
	1. *In* ***balancing the competing interests of different groups****, Parliament is inevitably called upon to draw a line between claims. If legislature has made a reasonable assessment as to where line is most properly drawn, especially if it involves weighing conflicting scientific evidence and allocating scarce resources on this basis, court should be deferential and not second guess (Irwin Toy).*
		1. In contrast, where ***the government is the single antagonist of the individual*** *whose right has been infringed, the Court will be less deferential. This factor will arise in criminal cases.*
2. *In* ***protecting a vulnerable group****, the Courts will defer to Parliament.*
3. *In* ***determining the value of the right being violated****, the Courts will consider the nature of the infringed right and the values Parliament has relied on to justify the infringement. Different applications of the same right may result in different judgments of value. Where the Court feels that the social and moral value of the suppressed activity is relatively low, it will be more deferential.*
4. *Occasionally, the Court will have to take into account* ***the level of proof required, especially where there is reasonable apprehension of harm.*** *The party seeking to uphold the limitation must bear the onus of proof at a civil standard: a preponderance of probabilities. The court will be deferential where social scientific evidence is inconclusive if Parliament has assessed there is a reasonable apprehension of harm (Butler, Irwin Toy)*.

**Rule: Application of the Oakes test**

*Having considered the contextual factors, the Oakes test can be applied to determine whether the infringement of a Charter right is justified under s.1. The Oakes test has two key components:* ***1)*** *Pressing and substantial objective, and* ***2)*** *Proportionality, which is further divided into* ***a)*** *rational connection,* ***b)*** *minimal impairment, and* ***c)*** *proportional response.*

* *The legislation must have a* ***pressing and substantial objective****. It must be of sufficient importance to warrant overriding a constitutionally protected right or freedom (Oakes). Is there a good reason to have a law that violates the Charter?*
	+ Note to self: the grander you can make the law, the more important you can make the objective
* *The next branch of the test,* ***proportionality test****, is to determine if the means to achieve the objective can be reasonably and demonstrably justified in a free and democratic society. This requires consideration of three factors:*
	+ ***Rational connection****: will the law do what it is supposed to do? Will it achieved the proposed objective? It is rare for this part of the test to fail. If the test has a pressing and substantial objective, then it is likely that there is a rational connection.*
	+ ***Minimal impairment:*** *the means chosen should impair the right or freedom as little as possible. It must impinge upon as few rights as possible in order to achieve the desired objective. Generally, the Court will examine whether Parliament had other alternatives by which to achieve the desired objective.*
	+ ***Proportional response:*** *There must be proportionality between the effects of the measures responsible for limiting the right or freedom and the objective. The Court will consider the proportionality between the purpose of the law and weigh the salutary effects against the deleterious effects. How severe are the effects of the limitation when weighed against the benefits of the law’s objective?*

**Oakes Analysis:**

1. **Pressing and substantial purpose**
* Is there a good reason to have a law that violates the Charter?
* The objective must be sufficiently important to warrant overriding a constitutionally protected right or freedom (*Oakes*)
* The Courts rarely find that a restriction fails this step.
	+ **Exception:** *Big M Drug Mart* – SCC said the law’s purpose (to compel a religious practice) was not pressing and substantial, and it directly contradicted right to religious freedom.
* The closer the purpose is to the actual means, the easier the argument will be when you get to rational connection and minimal impairment
1. **Proportionality**
2. **Rational Connection**
* Do the means chosen achieve the objective of the legislation?
* Consider the effectiveness and scope of the law.
* There is an effectiveness threshold: the law must reasonably advance the pressing and substantial purpose for which it was enacted.
1. **Minimal Impairment**
* Could the objective have been reached with an alternative measure that impinges upon rights and freedoms less?
	+ High standard: Was the law violated as little as possible? (*Oakes*)
	+ Low standard: Was the law a reasonable choice? (*Irwin Toy*)
* The legislation will fail the test if a small or debateable decrease in its effectiveness in achieving its substantial and pressing purpose will significantly reduce its interference with the protected right.
1. **Proportionality**
* Weigh the purpose of the law against its effects.
* Obviously one of the effects is violation of rights. The rights violation can be placed along a continuum of bad to really bad to worse to horrible. There can be a qualitative sense of how bad the violation is.
* **Disproportionate (deleterious) effects test:** If the negativity of the effects outweighs the benefits of the purpose, then strike it down. If the benefits of the objectives outweigh the negatives, then the law will stand.
* Even if the objective is of sufficient important, it is possible that the severity of the effects will not be justified by the purposes it is intended to serve
* It is also possible that the actual salutary effects of the legislation will not be sufficient to justify these negative effects. The actual effects are not as positive as the gov’t intends for it to be.
* **There must be proportionality b/t deleterious effects of the measures and the objective, as well as the proportionality b/t deleterious and salutary effects of the measure (*Dagenais)***

**R v Oakes (1986 SCC)**

* **Provision**: s.8, *Narcotic Control Act*: once possession of narcotic proved, mandatory presumption of intention to traffic unless accused could establish absence of such an intention (reverse onus provision)
* Reverse onus provision violates s.11(d) presumption of innocence
* **Purpose:** eradicate drug trafficking. **Rational Cxn:** irrational to put non-drug traffickers in jail, fails here. ***Today,*** courts would say it is rational to widen the net to catch more traffickers, even though non-drug traffickers are also caught. If rational cxn passed, would fail **MI**: too intrusive, law is overly broad.

**Freedom of Expression: s.2b**

**Issue:** Has a right or freedom pursuant to s.2 of the *Charter* been breached?

**Rule**:

*S. 2 of the Charter constitutionally enshrines freedom of speech, including expression, religion, freedom of the press, and freedom of association. This analysis is limited to s.2(b), the protection of freedom of expression. In Irwin Toy, the Court summarizes three core values of freedom of expression which warrant constitutional protection:*

*(1) seeking and attaining* ***truth*** *is an inherently good activity;*

*🡪 All speech may contribute to the marketplace of ideas, to finding truth. Censorship distorts the marketplace of ideas.*

*(2)* ***protection of the democratic process*** *- participation in social and political decision-making is to be fostered and encouraged; and*

*(3)* ***self-actualization and self-fulfilment*** *- the diversity in forms of individual self-fulfilment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those for whom it is conveyed.*

* *Core of freedom of expression (Keegstra):*
	+ ***1)*** *“need to ensure the truth and the common good are attained, whether in scientific and artistic endeavours or in the process of determining the best course to take in our political affairs.” (****Truth-seeking f(x)****);*
	+ ***2)*** *Means of ensuring individuals have ability to gain self-fulfilment through articulating and nurturing their thoughts and ideas. (****self-fulfilment, autonomy****)*
	+ ***3)*** *Crucial aspect of democratic commitment, ensures participation in* ***political process***

**What constitutes “expression”? TEST**

*The Courts take a broad interpretation of the term “expression”.*

1. *Is the regulated activity an expressive activity? Is communication its primary purpose? Any activity that conveys or attempts to convey a meaning will prima facie fall within the scope of protection (Irwin Toy).*
	1. ***Exception:*** *Violence cannot convey meaning.*
2. *Is the purpose of the impugned law to regulate content or to restrict a particular form of expression?*
	1. *Charter is content-neutral: protects expression of both truths and falsehoods (JTI)*
	2. *If the provision regulates a particular form of expression regardless of content, the plaintiff must demonstrate that the law restricts one of the three core underlying values of freedom of expression (Irwin Toy, p.978).*
	3. *The court construes expression as content neutral: it doesn’t matter if the content is distasteful.*

*If there is a limitation, then you may proceed to a s.1 justification analysis.*

*To the extent that the law restricts one of the three identified core values, there will be a defence against the law.*

**S.1 Analysis for Freedom of Expression**

*When doing a s.1 analysis, there are three different elements the court will consider in determining if it will be more deferential for or more activist against the government. In Irwin Toy, the Court held that there should be deference where government is balancing competing rights, protecting a socially vulnerable group, balancing competing interests for scarce resources, or addressing conflicting social science evidence as cause of social problem.*

Contextual Factors:

1. *Balancing competing rights or competing interests for scarce resources: line drawing*
	1. ***Line drawing -***  *if legislature has made a reasonable assessment as to where line is most properly drawn, especially if it involves weighing conflicting scientific evidence and allocating scarce resources on this basis, court should be deferential and not second guess. (Irwin Toy) Be mindful of the govt’s representative function.*
	2. *Where the state is the single antagonist of the individual whose rights are infringed, the Court will be less deferential.*
2. *How valuable is the speech? (see Keegstra)*
	1. *How closely does the speech align with the three underlying purposes the court has identified with being the reasons we protect speech (truth seeking / core identity / democratic process)?*
		1. *Close = more valuable*
		2. *Undermines = less valuable*
3. *If the speech is not very valuable, and gov’t is trying to protect a vulnerable group, court is likely to be deferential.*

**Commercial speech:**

*Irwin Toy*: commercial speech low value, profit driven

* **Exception** *RJR:* value of commercial speech is irrelevant

*JTI-Macdonald*: contra-RJR, low value speech, deceptive advertising

*Guignard*: purely commercial expression not valuable, doesn’t contribute to democracy or truth. Commercial speech is expression where it has informational interests or where it deals with counter-advertising (groups constrained by resources)

**Picketing**: Labour picketing is a form of expression, but low value and tortious: *Dolphin Delivery*.

*K-Mart*: contra-*Dolphin*, labour union speech important, workers as a vulnerable group, leafleting is informational – *Pepsi*: do not assume picketing is inherently coercive

**Hate speech**: defined in s.319(2) *Crim Code* – content-neutral: if communicative it gets protected – low value, doesn’t add to pursuit of truth (*Keegstra*)

**Obscenity**: generally given low value; consider harm; exemption for artistic / educational merit (*Butler, Little Sisters, Labaye, Sharpe*)

**Analysis**

* Does the plaintiff’s activity fall within the scope of conduct protected by freedom of expression?
	+ Is communication its primary purpose?
	+ If it conveys or attempts to convey meaning: prima facie within scope of protection
	+ Physical conduct can be protected if it has a communicative meaning
	+ Violence cannot convey a meaning (*Irwin*), but threat of violence can (*Keegstra*)
* Is the purpose of the law to regulate the content of a message? Is the purpose to prohibit particular form of expression?
	+ Regulation of content:
		- Specific meaning: restrict form of expression to control meaning or ability to convey = restriction
		- Restrict harmful physical consequences = not restriction on expression
		- “Does the mischief consist in the meaning of the activity or the purported influence that meaning has on the behaviour of others, or does it consist, rather, only in the direct physical result of the activity.” (*Irwin*)
	+ Content-neutral, regulation of form:
		- Claimant must show law restricts one of the three core values protected by freedom of speech guarantee: political speech, search for truth, self actualization
	+ If yes, then activity is expressive and violated. Go to s.1 analysis: burden is on gov’t to justify why expression can be restricted pursuant to s.1.

**Commercial Expression Cases**

**Irwin Toy v Quebec (Attorney General), 1989 SCC –** *commercial expression profit driven, low value; law upheld*

* Irwin challenges the *Quebec Consumer Protection Act* provisions governing children’s ads. The provisions prohibit advertising directed at persons under age of 13, based on nature and intended purpose of goods advertised, manner, time, and place of advertising. Regulation also allows for exemptions.
* **Identifies 3 essential elements of freedom of expression**: core identity / democracy / truth seeking
* **S.2 violation:** 1) ads for children convey a meaning and have expressive content = expression. 2) plaintiff’s activity not excluded from sphere of conduct protected by freedom of expression b/c prohibition of particular content of expression in the name of protecting children.
* **Context:** line drawing, balance freedom of expression against protection of vulnerable group (children)
* **S.1 justification:**
	+ 1) **P+SO**: protection of group vulnerable to seduction and manipulation of advertising, used conflicting evidence (understand ads b/t 7 – 13, but gov’t only has to exercise reasonable judgment, doesn’t have to confine itself to protecting most clearly vulnerable group). (LINE DRAWING)
	+ 2a) **Rational Cxn**: legislature will achieve its objective, easily established
	+ 2b) **MI:** balancing competing interests, be mindful of govt’s representative f(x); as singular antagonist, assess “least drastic means”. Do not apply “as little as possible” to balance competing interests, but consider **reasonable basis** for as little as possible given objective.
		- There are other less intrusive actions, but are for more modest objectives. Gov’t is not req’d to choose least ambitious means to protect vulnerable groups.
	+ 2c) **Deleterious effects**: good (protection of children) outweighs bad (loss of revenue) – can still advertise to parents, other adults, educational advertising, etc.
* **Dissent:** McIntyre takes US approach: you should only suppress freedom of speech where it has an “urgent and compelling reason” and then “only to the extent and for the time necessary for the protection of the community”.
* **Contra:** *RJR*

**RJR Macdonald Inc v Canada (AG) 1995 SCC:** *No deference, commercial speech value irrelevant; law fails MI*

* Total ban on advertising and mandatory health warnings on tobacco packaging. Mnfts claim 2b violation by *Tobacco Products Information Regulations*

**Issue**: tobacco consumption legal, tough to prove ad restrictions reduce consumption.

* **Context (majority):** gov’t as singular antagonist, civil standard of proof. Less deferential. Speech is valuable b/c some of the restricted speech provides valuable info to consumers in protecting health (core identity value)
	+ Oakes test must be applied flexibly
	+ Degree of deference may vary with the context in which limitation of rights is imposed
	+ Even where contest b/t state and accused, also involves balancing priorities b/t accused and the victim. The difficulty of devising legislative solutions to social problems that can’t be fully understood may affect degree of deference accorded to legislature. (**p.998) 🡺 Deference should not be carried to the point of relieving gov’t of burden to demonstrate reasonable and justifiable limit.**
	+ Standard of proof is not to scientific standard, nor to BRD.
	+ P.997: courts are supposed to maintain constitutional rights, even where it is in the face of popular public opinion
* **S.1 not justified:**
	+ 1) **P+SO:** Protection of Cdns generally from risks associated with tobacco use by reducing ad-related consumption
	+ 2a) **Rational Cxn:** Inconclusive scientific evidence sufficient to establish a link based on reason b/t ads and consumption (balance of probabilities)
	+ 2b) **MI**: Consumers are actually helped by legislation b/c getting info about products. Legislation goes too far b/c consumers are deprived of info that will help them reduce the risk to their health. Law fails here.
* **Dissent (LaForest):** 2b violation is justified.
	+ **Context:** not really at core of freedom of expression: harm engendered by tobacco + profit motive underlying ads. “Tobacco serves no political, scientific or artistic ends; nor does it promote participation in the political process.”
		- Should be deferential b/c legislation is balancing the competing interests. **Do not be too mechanical in application of Oakes**: “reasonable” in s. 1 necessarily imports flexibility. Strict application = impossible onus of definitive proof that consumption of
	+ **S.1 Justification:**
		- **P+SO:** To reduce tobacco consumption because it is harmful: protection of consumers
		- **Rational Cxn:** common sense – spend $$$ on ads to incr. consumption; sufficient evidence adduced at trial to prove otherwise. Body of social scientific evidence support existence of causal connection, so there is a rational cxn.
		- **MI:** consider relevance of context. The product they sell harms and often kills users, and gov’t could use criminal law power to prohibit. Banning of ads is relatively unintrusive. Distressing statistics about numbers of smokers are reasonable grounds for ban. Parliament had compelling reasons – type of line drawing court is not to question.
		- **Deleterious effects**: restricting right to advertise for profit (bad) < objective of reducing consumption (good)

**Canada (AG) v JTI-Macdonald Corp 2007 SCC:** *deference, profit-driven commercial speech is low value*

* In response to striking down of legislation in RJR, gov’t revises *Tobacco Act*. Not a complete ban on advertising: bans false, misleading, deceptive ads – ads with creative use of distortion and half-truths. Bans lifestyle ads (courts accept as inherently deceptive). Expanded warning signs on packaging, but can attribute warnings to gov’t.
* Gov’t was prepared with copious and detailed evidence to support its contention that the limits are demonstrably justified
* **Deceptive Ads**
	+ **Context**: deceptive advertising is a low-value speech. Court is sceptical of the value of this expression. Protection of vulnerable groups (young people). Court is cognizant of its limited ability to deal w/ complicated matters of social policy. Factually, long history of misleading and deceptive ads by mnfts.
	+ **S.2b:** clear infringement. *Charter* is content-neutral: protects expression of both truths and falsehoods
	+ **S**.**1 Justification:**
		- **P+SO**: respond to national public health problem, protect health of Canadians
			* Combat promotion of tobacco products by invitation to false inference and by half-truths
		- **Rational Cxn:** prohibiting such forms of promotion is connected to public health and consumer protection
		- **MI:** quite a broad law, “likely to create an erroneous impression” – directed at covering the grey area b/t demonstrable falsity (traditional legal sense) and invitation to false inferences
		- **Proportionality:** expression (right to invite consumers to draw erroneous inference as to healthfulness of product that, on the evidence will almost certainly harm them) is low value vs objective (life or death, reduce smoking) is pressing 🡺 Proportional.
* **Targeting young persons: justified**
	+ Bans ads that could be of particular interest to youth. Mnfts argue too vague.
	+ **P+SO:** prevent young people from starting to smoke and becoming addicted
	+ **Rat’l Cxn:** easily established
	+ **MI:** Not a total ban: info and brand-preference ads permitted, as long as it is not in places young persons likely to frequent or publications not addressed to adults, not lifestyle ads, etc. Court doesn’t trust tobacco companies to refrain from causing harm b/c have done so in the past. Therefore, it is not overly broad to try to cover all bases in banning ads that might appeal to kids. Very deferential: willing to risk overbroadness to ensure protection.
	+ **Proportionality of effect:** prohibited speech is low value, while benefits are significant.
* **Lifestyle advertising: justified**
	+ No useful information about product, purely emotional pull to be a particular kind of person
	+ **P+SO:** prevent increase of tobacco consumption through advertising; confine permissible advertising to factual data
	+ **Rat’l Cxn**: sophisticated and subtle advertising, so must catch subliminal evocations.
	+ **MI**: True information and brand preference advertising is still permitted. Advertising is only banned when it associates product with way of life or uses lifestyle to evoke emotion
	+ **Proportionality**:suppressed expression is of low value b/c it is just about creating emotional associations; purpose and effect are high value. Furthermore vulnerable groups are involved (young people). Need to be deferential to gov’t.
* **Health warning labels**: **justified**
	+ Warning is attributed to gov’t, but size boosted to 50% of packaging
	+ Supplementary argument: other democratic societies are doing something 🡺 not a powerful argument, but can be useful.
	+ Evidence est. that bigger warnings might have greater effect. Parliament not req’d to implement less effective alternatives.
* **Contra:** RJR

**R v Guignard 2002 SCC**: *commercial speech that is counter-advertising may have considerable social value*

* Guignard put a sign on his building to express his dissatisfaction w/ his insurance company. Municipality says he has to remove it. He refuses to comply, and they charge him w/ contravening by-law.
* **S.2b Violation:** Counter-advertising to criticize a product or make negative comments are considered freedom of expression within limits prescribed by law of defamation. Can be considered circulating information and protecting interests of society just as much as does advertising or certain forms of political expression. This type of communication may be of considerable social importance, even beyond the merely commercial sphere.
	+ “Counter-advertising” is… a form of the expression of opinion that has an important effect on the social and economic life of a society. It is a right not only of consumers, but of citizens.”
	+ Signs are the optimum means of communication for discontented customers. Restricting right to optimum means directly infringes freedom of expression, especially a person who does not have access to substantial financial resources. (**context)**
* Court is attuned to reality that our opportunities to express ourselves are constrained by resources. **Anytime you challenge restriction of mode of speech accessible to ordinary people, this kind of argument is going to be powerful for you.**

**Labour Expression Cases**

**RWDSU v Dolphin Delivery, 1986 SCC**: *Labour picketing is expression, but low value b/c tortious*

* Purolator employees planned to picket at Dolphin Delivery (scab workers). SCC granted injunction preventing secondary picketing b/c it amounted to common law tort
* **Issue**: does picketing fall within sphere of protected activities under freedom of expression? Is infringement by injunction justified?
* **S**.**2b violation:** in any form of picketing, there is involved at least some element of expression – at a minimum, persuasion aimed at deterring customers from doing business w/ respondent.
	+ Signalling effect: tells trade unionists not to cross picket line. Result is damage ops of employer, not communicate. 🡪 Dolphin argues that this is not communication, so cannot be protected.
	+ McIntyre: “all picketing is designed to bring economic pressure on the person picketed and to cause economic loss for so long as the object of picketing remains unfulfilled.”
	+ Action on part of picketers always accompanies expression. If picketing does not involve threats of violence or acts of violence or other unlawful conduct, then it would involve exercise of right of freedom of expression.
* **S.1 justification:**
	+ **P+SO**: concern of respondent – it will suffer economically in absence of injunction based on common law tort of inducing breach of K
		- **Secondary picketing: picketing of third party unconcerned in dispute underlying picketing**
	+ **Rat’l cxn:** established. Injunction will prevent picketing.
	+ **MI:** picketing has high social cost and may heighten general tensions w/I community. Reasonable to restrain picketing so that conflict will not escalate beyond the actual parties
	+ **Proportionality:** interim injunction effective only until trial

**UFCW v Kmart Canada, 1999 SCC:** *leafleting is expression; speech of labour unions important*

* Workers locked out for six months while trying to negotiate first collective agreement. They distributed leaflets outside entrances of Kmart stores describing dispute, asking for boycott. No interference with employees, delivery of supplies, or public access.
* Labour Relations Board held that leafleting fell w/i defn of secondary picketing
* **S.2b violation**: **contra** *Dolphin*, ban on secondary picketing violates 2(b)
	+ **Distinguishes leafleting**: leaflets seek to persuade public to take certain course of action. It does so through informed and rational discourse, the essence of freedom of expression
		- No signalling effect, no coercive component
* **Context:** first time we see court saying that speech of labour unions is important, especially because workers are a vulnerable group. The group is trying to use freedom of speech to overcome inequality.
* Traditionally, court will defer in these contexts where there is balancing to be done.

**RWDSU v Pepsi-Cola, 2002 SCC**: *picketing, including secondary picketing, is lawful and as important as other forms*

* **Contra: *Dolphin***
* **Ratio**: Secondary picketing is generally lawful unless it involves tortious or criminal conduct. Court rejects notion that labour picketing as expression should be treated as less important than other forms of expression.
	+ Should presume that picketing is not inherently coercive, even with secondary picketing.
* Nothing suggests that union speech is more likely to elicit irrational response than other groups. Even if it does, protection of freedom of expression is not confined to “rational speech.

**Hate Speech**: speech defined by s.319(2) of the *Criminal Code*

**R v Keegstra 1990 SCC**:

* Hate literature: denigrates any group
* Keegstra was a high school teacher in Alta. who taught his students that Jews had evil qualities (descriptors on p.1019). He expected his students to reproduce his teachings in class and on exams.
* Charged pursuant to s.319(2): unlawfully promoting hatred against an identifiable group for communicating anti-Semitic statements
	+ 319(2): “everyone who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group…” (p.1019)
* **Provision**: Keegstra claims s.319(2) violates freedom of expression, while truth defence violates presumption of innocence.
* **Context:** History of hate propaganda crimes – prevent dissemination of hate propaganda w/o undue infringement of s.2b
* **S.2b violation:** Content neutral: type of meaning conveyed irrelevant (*Irwin*), even if expression is invidious and obnoxious. S.319(2) prohibition aimed directly at words – overtly seeks to prevent communication.
* **Context:** You must take a contextual approach. S.1 analysis must be sensitive to values and circumstances particular to an appeal. 🡪 **anytime court says they must be flexible, you know they will probably uphold the legislation.**
	+ Dickson says that approach to 2b often doesn’t examine extent to which expression at stake promotes values underlying protection of freedom of expression 🡪 **consider value of speech**
	+ Core of freedom of expression:
		- **1)** “need to ensure the truth and the common good are attained, whether in scientific and artistic endeavours or in the process of determining the best course to take in our political affairs.” (**Truth-seeking f(x)**);
			* Hate speech pursues falsehood, not truth
			* Dickson willing to take substantive rather than purely formal approach to truth and democracy.
			* Marketplace is not some formal mechanism into which you can throw any idea.
		- **2)** Crucial to people’s ability to articulate and nurture their identity. (**self-fulfilment, autonomy**)
			* Hate speech inhibits people’s ability to reach self-actualization.
		- **3)** Crucial aspect of democratic commitment, ensures participation in **political process**
			* Hate speech contradicts idea of democracy. Democracy includes substantive values beyond simple majoritarian preferences, including protection of the minority
			* P. 1025: this brand of expressive activity is wholly inimical to democratic aspirations of free expression guarantee
	+ **Deference:** Given how Dickson has defined nature of prohibited speech **and** it is protection of vulnerable group, obvious that courts will take hands off, deferential approach.
* **S.1 justification:**
	+ **P+SO:** protect individuals from substantial harm flowing from hate propaganda, and protecting society at large from tensions created by hate speech
		- **Harmful effects:** presence of hate propaganda creates social tension; active dissemination of hate can attract individuals to its cause
		- Looking at other provisions of the charter demonstrates strong commitment to values of equality and multiculturalism, demonstrates importance of objective in prohibiting hate speech
	+ **Rat’l Cxn:** hate propaganda laws are one part of free and democratic society’s bid to prevent spread of racism.
		- Suppression of hate propaganda reduces harm such expression does to individuals and to society at large.
	+ **MI:** Dickson rebuts arguments that the legislation is overbroad, infringes excessively on 2b, and could have chilling effect where ppl would self-censor.
		- Definition of the scope of the provision is extremely narrow: exempts private conversation, thus proving narrow scope and carefully tailored. Only captures expressive activity that is openly hostile to P+SO.
		- Court’s job is to interpret the law, police must enforce it within the scope.
		- Even though there are other non-criminal responses, gov’t is not required to rely upon only mode of intervention that is least intrusive. Criminal laws also have a symbolic function of what we as a society abhor.
	+ **Proportionality:**
		- Few concerns are as central to concept of free and democratic society as dissipation of racism 🡪 enormous importance of the objective. The restricted activity is largely removed from core of expression values.
* **S.1 dissent, no justification (McLachlin):**
	+ **Context:** criminal law, state as single antagonist, substantial incursion on liberty 🡪 no deference, hold gov’t to high standard
	+ **P+SO:** protect social harmony and individual dignity, established.
	+ **Rat’l Cxn:** Legislation may actually impede objective – chilling effect, self-censorship. Furthermore, criminal process confers publicity on accused, may even generate sympathy. By repressing the speech, may be making it more powerful.
	+ **MI:**
		- Slippery slope argument: it provokes questionable actions on part of authorities.
		- Criminal law brings full force of law to bear 🡪 Too draconian, there are other alternatives such as HR legislation
	+ **Proportionality:** benefits do not outweigh deleterious effects. (p.1034).

**Obscenity: Sexually Explicit Expression**

*In the s.1 analysis for a restriction of a sexually explicit expression, the Court must consider whether there is an apprehension of harm which flows from exposure to sexually explicit expression. Harm only needs to be proven at a standard of a balance of probabilities.*

*Generally, bad taste, moral views, and majoritarian rule are insufficient to constitute harm. However, a review of the common law shows there are three types of harm which may support a finding of indecency:*

1. *Harm to those whose autonomy and liberty may be restricted by being confronted w/ inappropriate conduct*
	1. *In considering this harm, it is essential that there exists a risk that members of public will be unwillingly exposed to conduct or material, or that they will be forced to significantly change their usual conduct to avoid being so exposed*
2. *Harm to society by predisposing others to anti-social conduct*
	1. *Can only arise if public may be exposed to conduct or material in question*
3. *Harm to individuals participating in the conduct.*

*In order to establish an apprehension of harm, the Courts would apply the test for obscenity, which is the community standard of tolerance determined by reference to the risk of harm entailed by the conduct (Labaye). The test has two essential parts:* ***1)*** *What type of harm is being targeted? The harm must be grounded in norms which society has recognized as essential to its proper functioning either in the Constitution or in similarly fundamental laws. This requirement makes the test objective.* ***2)*** *The harm must be serious in degree. It is not sufficient that the harm detracts from proper social functioning, it must actually me incompatible with it.*

*Finally, in considering the restriction of a sexually explicit expression, it is important to recall that there is an exemption for artistic merit, or educational, medical, or scientific purposes. The court will consider if the obscenity is the main object of the work or if the obscenity is essential to a wider artistic, literary or other similar purpose (Butler). However, the onus is on the accused to prove their expressive activity may be exempted.*

**Analysis:**

1. **Community Standard of tolerance test:** Is the material beyond what the contemporary Canadian standard of tolerance would be? (*Butler)*
	1. Shift to harm-based test: Harm is an essential ingredient of obscenity (*Little Sisters*)
	2. **Critique**: in a pluralistic society where members hold divergent views, who is the “community” and how can you objectively determine what the community would tolerate? (*Labaye*)
		* **Exception**: ***Artistic defence or internal necessities test:*** *even material which itself offends community standards will not be considered undue if it is required for the serious treatment of a theme. Whether the exploitation of sex has a justifiable role in advancing the plot or the theme, and in considering the work as a whole, has a legit role when measured by the internal necessities of the work itself. Butler.*
2. **Test for obscenity**: the community standard of tolerance determined by reference to the risk of harm entailed by the conduct (*Labaye*)
	1. Indecent criminal conduct will be established where the Crown proves BRD
		1. That by its *nature*, the conduct at issue causes harm or presents a significant risk of harm to individuals or society in a way that undermines or threatens to undermine a value reflected in and formally endorsed through the constitution or similar fundamental laws.
			1. **What type of harm is being targeted**?
				1. The harm must be grounded in norms which society has recognized as essential to its proper functioning. These norms are generally recognized in the Constitution or in similar fundamental laws.
	2. That harm or risk of harm is of a degree incompatible with proper functioning of society.
		1. **Harm must be serious in degree**.
			1. The harm must not only detract from proper social functioning, it must be incompatible with proper social functioning.
			2. High threshold: diverse society, must be tolerate conduct of which we disapprove, short of that which can objectively be shown to interfere w/ proper functioning of society.
			3. Where actual harm not established, Crown must rely on risk. The more extreme the nature of the harm, the lower the degree of risk required to permit use of criminal law.

==> Elements that would be applied in a s.1 analysis do not have to prove BRD, only on a balance of probabilities. Understand how the Court will approach a substantive understanding of harm, but be cognizant of how that substantive definition of proof is met in a certain case.

**R v Butler, 1992 SCC:** *defines the kinds of harms related to obscenity*

* Butler operated a shop that sold and rented “hard core pornography” in form of videos, magazines, sex paraphernalia
* **Issue**: Whether and to what extent Parliament may legitimately criminalize obscenity
* **CC s.163(8):** For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene. 🡺 Butler says this infringes 2b, unconstitutional.
* **Judicial interpretation:** law is vague, interprets law saying obscenity is proven by undue exploitation of sex as a **community standard of tolerance test:** is it beyond what the contemporary Canadian would tolerate.
	+ **Consent:** cannot save materials that otherwise contain degrading or dehumanizing scenes
	+ **Artistic defence or internal necessities test:** is undue exploitation of sex the main object of the work or is this portrayal of sex essential to a wider artistic, literary or other similar purpose?
	+ **Three categories of porn: 1)** explicit sex w/ violence; **2)** explicit sex w/o violence, but is degrading or dehumanizing; **3)** explicit sex w/o violence that is neither degrading nor dehumanizing
		- **Obscene:** 1) sex w/ violence; 2) sex that is degrading or dehumanizing; 3) sex involving children
		- **Exception:** artistic merit defence
* **S.2b violation:** The activity is expressive and the provision regulates the content of the expression.
* **S.1 justification:**
	+ **P+SO:** avoidance of harm resulting from antisocial attitudes caused by exposure to obscene material; public interest in maintenance of a “decent society”
		- **Context:** Law is grounded in morality, but that doesn’t automatically render it illegitimate. The overriding objective is avoidance of harm. **Not a shifting purpose**, but a permissible shift in emphasis: it always prevented harm, but our understanding of one of the elements of harm has changed. Harm can be breach of conventional morality or exploitation and other equality related issues
			* **Tool:** You can redefine the element of a purpose, but you cannot change the purpose.
		- **Follow Keegstra:** harm caused by proliferation of materials seriously offensive to values fundamental to our society is a substantial concern.
		- Context: burgeoning pornography industry renders concern more pressing
	+ **Proportionality:**
		- **Context: value of speech –** proper application of test should not suppress “good porn” which validates women’s will to pleasure, celebrates human sexuality, etc. **BUT** reality of porn industry is it does not advance the kind of expression which is on equal footing w/ expressions that directly engage the “core” of the freedom of expression values
		- **Rat’l Cxn:** reasonable to presume that exposure to images bears causal relationship to changes in attitudes and beliefs. Causal relationship b/t obscenity and risk of harm to society at large.
			* ***Irwin Toy:*** *sufficient for gov’t to have reasonable basis in choosing mode of intervention.*
		- **MI:** **1)** it does not restrict 3rd type of porn; **2)** exempts materials w/ scientific, artistic, or literary merit; **3)** considers gov’ts past abortive attempts to replace defn with one that is more explicit and carefully tailored; **4)** impugned section only applies to public distribution and exhibition, not private use
			* The law doesn’t have to be perfect. It is enough if it is carefully tailored b/c of low value of expression to vulnerable groups involved.
		- **Balance effects/objectives:** regulated expression is low value (most base aspect of autonomy, profit motive), while objective is to prevent harm (high value). Content is primarily about physical responses rather than speech to promote rat’l thought.

**Little Sisters Book and Art Emporium v Canada (MoJ) 2000 SCC:** *harm is essential element of obscenity*

* Censorship of hate speech and obscene materials under *Customs Tariff*, s.136. Little Sisters claimed it was victim of customs practice of targeting shipments destined for gay and lesbian bookstores
* Little Sisters bases claims on *Butler* as incorrect upholding of CC: they use “undue” to mean gay and lesbian materials; community standards test is a majoritarian standard and excludes minorities.
	+ **Binnie rejects**: the test only includes harm.
		- Concern for minority expression is one of the principle factrs that led to adoption of community test
		- Not all sexually explicit erotica depicting adults in degrading or dehumanizing acts is obscene: must create a substantial risk of harm which exceeds community tolerance
		- ***Butler* harm-based test is gender neutral (p.1057)**
* Second claim: examine procedures in Customs legislation. Legislation did not infringe Charter, problem was in implementation.
* **Unconstitutional** reverse onus clause to assume Customs in the right unless importer proved them wrong.

**R v Labaye 2005 SCC:** *rejects community standards test, elaborates on concept of harm*

* Accused owned club where people met for group sex. Charged w/ keeping common bawdyhouse for purpose of the practice of acts of indecency
* **Provision: 210(1) CC**: Court interprets indecency as related to obscenity
* **Critique community standards test**: pluralistic society, members hold diverse views, cannot objectively determine what community would tolerate
* **New test for obscenity:** community standard of tolerance determined by reference to the risk of harm entailed by the conduct
	+ **What type of harm is being targeted?**
		- Must be formally recognized in Constitution or similar fundamental laws as a norm that is essential to proper functioning of society.
		- Makes the test objective
		- Types of harm include:
			* Harm to those whose autonomy and liberty may be restricted by being confronted w/ inappropriate conduct.
				+ Protection of autonomy and liberty of public to live w/i zone free from offensive conduct
				+ Essential: risk that members of public will be unwillingly exposed to conduct or material, or that they will be forced to significantly change their usual conduct to avoid being so exposed.
			* Harm to society by predisposing others to anti-social conduct
				+ Criminal law may limit conduct and expression to prevent ppl who may see it from becoming predisposed to acting in anti-social manner
				+ Can only arise if public may be exposed to conduct or material in question
			* Harm to individuals participating in the conduct
				+ Consent of the participant will generally be significant in considering whether this type of harm is established.
	+ **The harm or risk of harm must be of a degree incompatible with the proper functioning of society.**
		- High threshold: diverse society, must be tolerate conduct of which we disapprove, short of that which can objectively be shown to interfere w/ proper functioning of society.
		- Where actual harm not established, Crown must rely on risk. The more extreme the nature of the harm, the lower the degree of risk required to permit use of criminal law.
* The test mainly deals with public context. The standard for offensive conduct is an “ordinary, reasonable person”
* **This case did not involve a constitutional challenge. No 2(b) or 1 analysis.**
* Holding: Court finds in favour of Labaye b/c it is not public context. You have to be present at club voluntarily to see what is going on.

**R v Sharpe 2001 SCC:**

* Amendments to *Criminal Code* prohibiting production, sale, distribution, and possession of child pornography (s.163.1)
	+ Exemption for artistic merit, or educational, medical, or scientific purpose 🡺 burden of proof on accused
* **2b violation**: sexual expression, law controls content.
* **Context: Deferential**
	+ Fairly broad law in the sense that other jurisdictions see child pornography defined at lower ages
	+ Cannot draw bright lines here because it is necessary to take a precautionary approach: very low value expression compared to protection of vulnerable group
* **S.1 Justification:**
	+ **P+SO:** to criminalize possession of child pornography that poses a reasoned risk of harm to children
	+ **Rat’l Cxn:** reasoned apprehension of harm 🡪 it will lead viewers to incite offences
	+ **MI:** overbroad in that it catches some private use, but it is the only effective way 🡪 read in defenses to private use