# Term 2: Charter

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# Intro to Charter

* 1867 = CA ; legislative jurisdiction is divided
  + Has nothing to do with rights: simply a recipe for what each head of govt can do
  + But SCC capable of using division of powers creatively = easy for court to find statute UV if the content of the statute turned court's stomach
    - CONTENTS of statutes, had effects on validity of statutes
* Then in 1950s : Rand court started discovering i**mplied rights** between the lines of the constitution (used to strike legislation down); everyone else used division of powers
* Thought would get implied Bill of Rights
* 1960s: Diefenbaker's Bill of Rights enacted; good statute but had weakness because didn't apply to provincial statutes
  + Also, not entrenched = could be repealed (never has been though)
  + Wet the appetite of Canadians for a Charter-like document
* Lot's of human rights acts popping up = ordinary statutes, not entrenched
* Finally, 1982: CA 1982 which contained amending procedures AND the Charter :)
  + S 31-34 and s 52
  + This document is entrenched, cannot be repealed unilaterally
  + Any such action requires Constitutional amendment
* Charter applies to both prov and fed govts
* We are Charter children

**“Prescribed by law” reflects two values basic to rule of law**

1. In order to preclude arbitrary and discriminatory action by govt officials, all official action in derogation of rights must be authorised by law
2. Citizens must have reasonable opportunity to know what is prohibited so that they can act accordingly

Therefore, law must be

* Adequately accessible to public and
* Formulated with sufficient precision to enable people to regulate their conduct

# APPLICABILITY

Charter applies to both levels of govt (prov and fed) and to all statutes and legislation

### When can Charter be invoked?

* **Have to have an eligible plaintiff** in order to invoke Charter rights; but who can be a plaintiff??
  + Natural persons, fetuses, corporations, citizens, permanent residents, aliens? Who can claim **depends on what right is being invoked** 
    - S 2(10) - everyone
    - S 6 - citizens and permanent residents
    - S 11- any person
    - S 15 -individual

= not the most carefully crafted document

* + Have to match plaintiff to right
  + **Question on 2007 exam = she likes it** 🡪 **Animals still not covered under Charter**
* **Then you have to have an eligible defendant** 
  + **Section 32 outline the applicability**

(1) This Charter applies

(a) to Parliament and govt of Canada in respect of all matters within the authority of Parliament

(b) to legislature and govt of each province in respect of all matters within authority of legis of each prov.

**If pf, apply this to something you’re subjected to. If df, say that it doesn’t apply.**

Who can get the **benefit** of the *Charter*? Pay attention to the wording 🡪not the same for every provision.

**TWO QUESTIONS IN APPLICABILITY**

* + **Who can claim the benefit of the Charter?**
    - Some rights apply to “everyone” or “anyone”, “individuals” or those charged with an offence
  + **To whom does the Charter Apply?**
    - Applies to all statutes, regulations of both prov and fed govts = challengeable
    - But this is not the limit: it has been given extended application
      * How far can s 32 be stretched? This is what these next cases deal with; they're all about entities that are explicitly under s 32

Private litigation: *Dolphin Delivery*.

Challenging the common law in private litigation: *Hill*.

Delegated govt entities are subject to Charter: *Slaight*.

Determining if a non-govt entity is govt (Control Test): *McKinney*.

Determining if an activity of a private entity is subject to Charter: *Eldridge*.

Underinclusiveness: *Vriend*.

All actions of a govt entity are subject to Charter: *Godbout.*

## McKinney v University of Guelph, [1990] 3 SCR 229

**Non-government entities can be government for a particular purpose; Control test; Charter applies to private entities insofar as they act in furtherance of a specific govt program or policy.**

**Facts:** Employee challenges university policy that mandates retirement at 65 under s. 15 (equality).

**Issue:** Are universities “government” under s. 32 for purposes of challenging mandatory retirement policies at those institutions

**Analysis:**

* Universities are created by statute but you must look at **how they operate** to determine if they are government.
  + - Simply performing public service does not make you a govt institution (railroads, airlines, universities)
    - Unis have own governing bodies appointed by people within the governing body (not by govt) who act in the interests of the uni and its students/faculty, not in the interests of the govt
    - "**the govt thus has no legal power to control the universities even if it wished to do so"** - La Forest
* Being subject to govt regulations does not make you part of govt

**Decision**:  **Universities are not government under s. 32 (IN THIS CASE)**

**Dissent** (Wilson): LaForest too traditional. Cdns aren’t scared of govt, so no reason to find reasons to limit definition of govt.

* + **Purpose of the Charter= to limit/constrain govt action by providing citizens with entrenched rights and freedoms that they can assert against govt when needed (protect citizens, constrain govt)**
  + Should take a broad view with respects to what can come under the definition of govt

### 3 relevant criteria to test whether entity is govt

1. **Do any of the three branches of govt exercise general control over the entity in question?**

Control can be determined by the nature and extent of government control, or can be indicated by a clear nexus between government and the impugned activity.

1. **Does the entity perform a traditional govt function or a function which in more modern times is recognised as a responsibility of the state?**

Functions become govt functions because govt decides it should perform that specific function

Just because a body is *not* performing traditional govt function, does not mean not a govt actor

1. **Is the entity one that acts pursuant to statutory authority specifically granted to it to enable it to further an objective that the govt seeks to promote in the broader public interest?**

whether entity performs task pursuant to statutory authority and whether performs task on behalf of govt in furtherance of govt purpose

**🡪 Delegation** of power to a subordinate body

**Basically...**

(1) **Are they government?**

If no,

(2) **Are they government for *this* purpose?**

* 1. Look at **degree of control** and the **relationship** in determining if it is govt.
  2. Look at **activities, self-government/operations** of the university
  3. Does the govt exercise control over the entity? Is it a traditional govt function? Is it furthering a govt objective?

**NOTE**: These questions come from the dissent. They are still useful though.

Not all entities created by government are government themselves.

* 1. Here, the university is too independent to be considered government for ALL purposes.
  2. Look at the **purpose**: Here, it is employer/employee relations – nothing to do with government.
  3. Gave us Wilson's dissent because court can change it's mind at any time and have a completely different view on something
  4. Not an ABSOLUTE decision: not that university can never be considered a "govt" within meaning of s 32 ; just not in this context

## RWDSU v Dolphin Delivery Ltd [1986] 2 SCR 573

**Charter cannot be invoked in private litigation with no government intersection**

**Facts:** Anti-Purolator picketers were outside Dolphin so Dolphin applied for a common law injunction against them. Union argued that picketing is protected under s. 2 of *Charter*.

**Issue:** Does the *Charter* apply in this case?

**Analysis:**

* Judgment here was centred on the interpretation of **s. 32 of the *Charter* 🡪** What is the meaning of “govt”?
* MacIntyre: **s. 32 cannot be invoked in private litigation between private parties** 🡪 the entity must be government
  + However, **govt includes** **all branches of executive govts of prov and fed**
  + *Charter* **applies to executive/legislative**
  + **BUT does not apply to judges/judicial branch** (judicial independence).
* The *Charter* **always applies to statutes**, **but applies to common law as well**
* If there are only private parties, there must be some sort of **government intersection** (e.g. D relies on a statute) 🡪 injunction as violation of s 2(b) rights
* **court orders are not government actions** 🡪 Charter does not apply to this case

**Decision**: *Charter* can’t be invoked in this case so the injunction stands.

Using the Charter in private litigation

## Grant v Torstar, [2009] SCC 61

**While the Charter does not apply directly in private litigation, Charter *values* do; can be taken into account and can be argued**

Tort case basically ; defamation is strict liability tort: don't have to prove defendant intended to do harm or that defendant was careless

Grant suing Toronto Star for defamation

* limit to freedom of expression s 2(b)
* currently, strict liability torts for defamatory statements; some defences available
* however, existing law inconsistent with s 2(b) of *Charter* and has "chilling" effect on reporting
* Common law should be modified to recognise **Defense of Responsible Communication** 
  + SCC fashions new defence regarding reporting based on Charter values of democratic discourse, truth-finding, and self-fulfilment (in s 2(b) freedom of expression) and comparative jurisprudence
  1. **Can invoke Charter values to support your common law argument**
  2. **Can also use Charter values to convince the court to interpret a particular, ordinary statute in a certain way**

## Eldridge v British Columbia (Attorney General), [1997] 3 SCR 624

**How to determine if the activity of a private entity is subject to the *Charter*; 2 ways legislation can violate Charter**

**Facts:**

* Deaf people claim hospital legislation violates *Charter* because it doesn’t provide for sign language translation services. The legislation did not explicitly list which services should be provided. This was the responsibility of a decision-maker.

**Issue:** Is the hospital violating the *Charter* by not providing sign language services?

**Analysis:**

* Look at the legislation under which services are provided
* There are

two ways that legislation can violate the Charter:

1. Legislation is **unconstitutional on its face** because it violates a *Charter* right and isn’t saved by s 1

* Court compelled to strike it down and declare it of no force or effect (s 52)
* In this case, Court finds that the legislation was not unconstitutional on face --> didn’t explicitly rule things out, gave discretion.

1. *Charter* is infringed, not by the legislation itself, but by the **actions of a delegated decision-maker in applying** it.

* Legislation remains valid but remedy for unconstitutional action may be sought (s 24(1))
* In this case, it was the actions of a delegated decision-marker, who had the discretion to choose the benefits that resulted in Charter infringement

To figure out if legislation violates *Charter* through b) apply Eldridge Test

### Two ways to bring a defendant within s 32

1. To show that it is a **government entity**

* + - Have to look at **nature and degree of control** exercised by govt over it
    - If it is govt entity, all of its activities subject to Charter including private activities

2. Show that the *activities* that the entity is engaging in is a **gov't service**

* + - Particular activity ascribed to govt
    - Look at **nature of the activity itself**
    - Merely serving a “public function” or being “public” not enough --> must be implementing specific govt policy.
    - Here, provision of health services is a gov't service, therefore falls under the Charter *for that purpose*)
* Merely vehicle used by legis to implement a program (providing medical services is NOT internal management)

Does the *Charter* apply to the Medical Services Commission and the hospitals?

* It is **possible** for govt to give authority to a body that is not subject to the *Charter* (because not entrusted to implement specific govt policies – ex: corporations)
* However, if **entity is found to be govt, *Charter* applies to ALL of its activities** --> even ones that are generally “private.”
* Govt can’t evade scrutiny by implementing policy through secondary bodies.
* **Doctrine of Evasion** = if courts didn't go wide with interpretation of s 32, govt would evade responsibilities by delegating tasks to non-gov'tal entities

**Private entities may be subject** to *Charter* **if acting to further a govt program or policy** 🡪 govt for *that* function.

* Merely serving a “public function” or being “public” not enough 🡪 must be implementing specific govt policy.

* **For an entity, = “degree of control.”**
* **For a function, = “nature of the activity.”**

**Hierarchy for challenging something:** Legislation > government entity > government function.

**Decision:** **Hospital not govt but serving govt function. Order to BC govt to fix the Act** (note: no order to do something specific).

## Vriend v Alberta 1998 SCC

* Application of the Charter is not restricted to situations where the govt actively encroaches on rights
* **underinclusiveness/omissions can also be unconstitutional**
* private activity not subject to the Charter but **laws that regulate private activity are subject to the Charter**

## Godbout v Longueuil, [1997] 3 SCR 844

***Every* action of a government entity is subject to *Charter* scrutiny; cities are subject to Charter**

**Facts:**

* + City of Longueuil has a resolution requiring that its employees live within city limits.
  + Godbout signs this but eventually moves into a neighbouring community and is fired.
  + City says employer/employee relations are private, not subject to *Charter*  = breach of contract case

**Issue:** Is every single function of a government entity subject to *Charter* scrutiny?

**Analysis:**

* Has to be performing **governmental, not merely public, activity**
* Yes, **actions of government entities are ALL subject to *Charter* scrutiny.**
* Issue of **colourability**: govt can’t evade *Charter* by incorporating things into private contracts.
* **Municipalities are government within the meaning of s 32**, so everything they do is subject to the *Charter*, even if it’s a “private” thing.
  + Municipal councisl democratically elected by members of general public and are accountable to constituents
  + Possess general taxing power indistinguishable from that of Parliament/prov legislatures
  + Empowered to make laws, administer them and enforce them
  + Derive their existence and law-making authority from provinces
  + This case reinforces the idea that a government can’t shirk *Charter* obligations by delegating to other entities.
  + If succeed in establishing that entity in question is govt within meaning of s 32, everything entity does is subject to Charter scrutiny (different from proving that the action of non-govt entity is subject to Charter scrutiny)

**Decision: Everything government does is subject to *Charter* so the resolution is struck down.**

Summary

S 32 and proper interpretation of it to identify acceptable defendant :

1. Legislature and all their products are all eligible defendants
   * + Court concerned about doctrine of evasion
     + Excluding charter from private litigation but cant also allow legislatures from giving away their powers to private parties whom Charter not applicable to
2. entities **empowered** by legislature ALSO potentially subject to Charter
   * + Focus on the entity = is it **a govt entity?** (crown corporations, admin tribunals created by govt or by statute)
       - If yes, then everything they do and all the decisions they make, subject to Charter
     + If no, look to see if the private entity is performing **govt function** (no jurisprudence on this)
       - can be govt entity for limited purpose and limited purpose only

**3 Hypotheticals**

* + BC Ferries provides internet access but has been censoring certain sites
    - Freedom of expression? Can you sue BC Ferries under the Charter under s 2(b)?
    - Well, who is your plaintiff and who is your defendant?
    - Govt entity
      * If argue under step 1: govt entity with ALL of its actions falling under govt control then internet would be captured under the "everything" category and would be subject to Charter
      * If argue that before, a crown corporation and now a private govt entity (because private company took over) then would be harder to argue that internet would fit under that because the transportation is the essential govt governmental service being performed, not the access to the internet

* + University case: public postings about a prof by various students, prof complains, head of uni brings in the students. Twins get disciplined: non-academic conduct, put on probation. Sue: s 2b freedom of expression
    - Is the university sue-able? Is it subject to the Charter?
    - McKinney : universities are not government entity
      * BUT can argue under step 2: private govt actor performing govt purpose: EDUCATION; therefore govt therefore subject to Charter
      * Students being denied their access to education

* 1. Women Ski Jumpers brought case against VANOC : equality rights
     + Can VANOC be an eligible defendant? Non profit organisation responsible for holding the Olympics
     + IOC( intl Olympic committee) chooses the events; VANOC did not make that decision
     + Olympics are private; funded privately etc
     + BUT organised by 3 levels of govt with both national and international interests
     + However, still not govt entity for the purposes of being sued under Charter = govts putting money but not running it; everything decided by IOC

# JUSTIFICATION

Justification is essentially a statutory interpretation exercise.

* Happens after P and D established/identified
  + S 33 override provision
  + Notice given via Constitutional Questions Act (reference)

**Interpretation provisions**: ss. 27 (multicultural) and 28 (gender).

**Hunter** (1984): For *Charter*, courts must take

1. a **living tree** approach, and

2. a **purposive** approach.

**Notwithstanding clause**: s. 33 of *Charter* 🡪 can NOT be used against s. 2, ss.7-15

**S 33**

* Possibly unique to Canada
* Compromise to provinces = can override certain provisions of the Charter under s 33 ; the only province that has actually used this was Quebec (all of their statutes are exempt from the Charter; have their own)
  + **Use s 33 once legislation already struck down**
  + Have to declare to the public that you're breaching the Charter, and take full responsibility for it (can only breach for a max of 5 years)

**Basic premise: In Charter cases, D has to persuade the court that some provision infringed on Charter rights, and the P (the gov't) has to argue that infringement justified**

* When Charter officially enacted, new responsibility and burden on court of evaluating merits of particular legislation
  + Difficult, because no inside knowledge regarding this new document and how to interpret it
  + Court is always given options, and their results are always criticised by the public (who don't read the judgements obvs lol)
* **We're going to learn what the current interpretations of the Charter are, and how to argue for modifications**

### Justification of infringements: s. 1 Analysis:

**1. Find the breach of right pursuant to your claim**

• Characterization process: interpret the right and your alleged violation

• This is a relatively easy stage b/c Courts are very liberal at this level as the limitations kick in at s.1

**2. Rights are subject to reasonable limits prescribed by law as can be demonstrably justified in a free/demo. society**

(a) “prescribed by law”: **there must be legislation**

(i) If no legislation 🡪 no s.1 analysis – *Charter* challenge fails

(ii) If there is legislation 🡪 Is the provision too vague? (***Nova Scotia Pharmaceuticals***)

* + Yes: no s.1 analysis 🡪 *Charter* challenge fail
  + No: s.1 analysis occurs

**Note:** Provisions of “discretion” often difficult/impossible to define, found as too vague

(b) “demonstrably justified in a free & demo society > ***Oakes* test**

**1. Pressing and Substantial**

**2. Proportional**

**a) rational connection**

**b) minimal impairment**

**c) ends justify the means (balancing)**

**S 1 allows for court to decide on scope of the right without trying to balance everything in the right = really helpful for analysis**

**FREE & DEMOCRATIC VALUES (Oakes)**

* These underlying values and principles of a free and democratic society are the genesis of rights and freedoms guaranteed by Charter.
* ARGUE: **Use these values and try to persuade the court, helping your infringement claim.**
  + - * Respect for the inherent dignity of the human person
      * Commitment to social justice and equality
      * Accommodation of a wide variety of beliefs
      * Respect for cultural and group identity
      * Faith in social and political institutions which enhance participation of individuals and groups

## R v Nova Scotia Pharmaceuticals, [1992] 2 SCR 606

**How to argue against a law by using vagueness ("prescribed by law")**

**Facts:** Guys charged with a Combines Investigation Act offence but say that the provision is too vague.

**Issue:** When can you argue that a law is not actually a law because it is too vague?

**Analysis:**

* Factors to consider in determining if a law is too vague

(1) the need for flexibility and the interpretive role of the courts

(2) a standard of intelligibility is more appropriate than achieving absolute certainty

(3) varying judicial interpretation of a given disposition may exist and perhaps coexist

**Laws cannot have a standardless sweep** > must be able to **control prosecutorial discretion** (as in *Roncarelli*).

* People need to be able to know when to control their activities – require **fair notice**.
* Vagueness is inconsistent with the **rule of law** – people need to know what prohibitions exist to be able to comply.
* Must be able to give rise to legal debate > judges and lawyers need to be able to make sense of it.
* **Overbreadth and vagueness are not the same thing**🡪 law can be perfectly clear (not vague) yet still overly broad
* **One must be wary of using the doctrine of vagueness to prevent or impede State action in furtherance of valid social objectives, by requiring the law to achieve a degree of precision to which the subject matter does not lend itself**
* Once the minimum general standard to avoid the doctrine of vagueness has been met, **any further arguments regarding the precision of the enactments should be considered at the ‘minimal impairment**’ stage of s.1 analysis.
  + **Overbreadth**:
    - over-inclusiveness
    - applies to something specific but drafted so broadly that will apply to people that Parliament didn't intend to catch
    - involves balancing process
    - Analytical tool, always related to some limitation under Charter; No such thing as overbreadth in the abstract

* + **Vagueness**:
    - so broad, don't know what it applies to
    - constant meaning
    - Fair notice to citizen and Limitation of enforcement = theoretical foundations to doctrine of vagueness 🡪 "rule of law"
    - Unintelligible provisions that give insufficient guidance for legal debate = unconstitutionally vague

### There are three times when you can argue vagueness as a defence:

1. Invoke **s. 7 of *Charter* >** if law is too vague, it would go against fundamental values of justice.
2. Argue vagueness in **s. 1 analysis >** Too vague to be “prescribed by law, therefore, not a law ("void for vagueness")
3. More specifically, in the **minimal impairment stage of s. 1 analysis**.; related to overbreadth

**🡪 (Edinger says this will be the most successful; merges with overbreadth)**

* Remedy under s. 1 could possibly be under s. 24 (you can’t strike down a law that doesn’t exist

**Decision: Find that it isn’t too vague and doesn’t violate s. 7 of the *Charter***

**Hypothetical**

No person shall knowingly organise induce aid or abet the coming into Canada of people not in possession of passport visa etc required by this act = concerned with human smuggling but also applies to refugees

* + **Example of overbreadth, know exactly who this applies to, however over-inclusiveness = applies to people not intended**

## R v Oakes, [1986] 1 SCR 103

**Test for justification of a *Charter* rights infringement.**

**Facts:**

Challenge that a reverse presumption provision of the *Narcotic Control Act* violates the s. 11(d) right to be presumed innocent until guilty. If found in possession of drugs, presumed to be for dealing unless accused establishes otherwise.

**Issue:** Does the provision violate s. 11(d)?

**Analysis:**

The burden of proof of a **rights violation** is on the **challenger** (standard of proof: BoP civil)

The burden of proof of **justification** is on the **government**.

Oakes Test:

1. Is the **objective of sufficient importance** to warrant overriding a constitutionally protected right or freedom?
   * Is it **pressing and substantial**?
2. Are the means chosen **reasonably and demonstrably justified**? This involves a **proportionality** test.

i. Are the measures adopted **rationally connected** to the objective? --> this is where the test failed

ii. Do the means **minimally impair** the right?

iii. Is there **proportionality between the effects of the measures and the objective**? (Cost/benefit analysis)

* **“Minimally impair” doesn’t have be the absolute minimum > just needs to be justifiable**.
* Infringements that are more serious will require a higher level of justification from the Crown🡪 proportionality.

**>>>>> Always be prepared to argue all the points <<<<<<**

**Decision:** The provision was found to be unproportional and therefore invalid.

**Some more things to pull out of this case**

Page 563, para 66: burden of proof clearly laid out

* 1. Para 67: **different degrees of proportionality depending on the nature of the case**
  2. There's supposed to be only 2 standards of proof: civil and criminal, however, the above sentence seems to give it more of a spectrum
     1. **"demonstrably justified"**.. The word demonstrably may be what does that = gives the balance of probabilities a little something extra
     2. Ends up being "balance of probabilities + \_\_"

Para 64: where does Dickson J get these "values" from? - no single source: deductions, inferences, interpretations, Charter, Constitution etc ; but mainly, deduced from judges' understandings of what the charter is trying to do

🡪 BUT once set out, then they become values that can be cited in subsequent cases -- gain their authority

* + - * Respect for the inherent dignity of the human person
      * Commitment to social justice and equality
      * Accommodation of a wide variety of beliefs
      * Respect for cultural and group identity
      * Faith in social and political institutions which enhance participation of individuals and groups

For freedom of expression

* + P shows that type of expression fits into 2b
  + Have to show that it's been infringed
  + Then burden of proof shifts to govt (defendant) that s 1 applies and that the violation is justified because it does it clearly, demonstrably (BOP+, but not BARD)

## Newfoundland (Treasury Board) v NAPE, [2004] SCC 66

**Budgetary considerations cannot normally be invoked for s 1 but financial emergencies can be sufficient objectives.**

**Facts:**

NFLD promised to increase women hospital workers’ wages but then NFLD ceased to get transfer payments and became poor. They put out a wide freeze on wages and promised to increase the women’s wages in a few years.

**Issue:** Was the failure to increase the wages a justifiable violation of s. 15 (quality) of the *Charter*?

**Analysis:**

* Court held that there was a violation of equality rights – this is not at issue here.
* Issue: Is there a pressing and substantial objective here?
  + Lamer said in another case that **money is never a justification for a rights infringement.**
  + However, shouldn’t say *never* – an NS court said **that finances can’t be invoked in *normal* times**.
  + Here, this wasn’t a normal time. NFLD was facing a severe financial crisis.
  + So here, **severe financial emergencies are accepted as a pressing and substantial matter**.
  + It helped that it was **temporary** and made up a significant portion of the budget cuts > significant impact.
    - Significant portion = rational connection.
    - Temporary = minimal impairment. Also proportional.

**Judicial notice**: Here, court takes surprise notice of legislative discussions. Try to ask judge to take notice of things so that you aren’t surprised when he does 🡪 focus them on what you want. Courts can take notice of things that are **public knowledge.**

* + Evidence is required during the justification process.
  + Cabinet confidentiality prevents courts from getting to some evidence
  + But that's okay, the court took **judicial notice** ("external evidence"; NFL lucked out, because courts don't HAVE to take judicial notice

Courts should keep **deference to legislature** in mind 🡪 try not to be overly critical of their policy decisions.

**Decision**: Legislation was upheld as valid – the rights infringement was justified.

Rational connection test: wasn't just the pay equity, but there was a pay equity agreement (contract) and then statute enacted to postpone it; no one else challenged any of the other cuts; the only cut was the one required by the statute; any expenditure not made would reduce the deficit (wouldn't cover the deficit, but would help fix it)

**There's no hierarchy of rights and freedoms in the Charter; there can be tension between two, but it's not like one always beats out the others**

**No right is absolute, they can always be qualified and that's the function of the courts**

# REMEDIES

* Always think about: what is the result I want? What remedy do I want? never just go in, just talking about the law
* Have to know where you want to end up; have to ask for a specific remedy and then have to justify asking for that remedy

When analysing constitutional cases**/**All Constitutional cases can be analysed in 3 ways:

1. **Adherence of decision to precedents and guidelines**
   * not always followed though
   * But should always think about how a particular case will fit into precedents and guidelines and if they tend to adhere to them or not
   * Does it expand or narrow the law?
2. **Merits**
   * is it consistent with the Constitution? Is it a good result? Should it have gone the other way?
   * Frequent dissents on s 1
   * Dissents on the scope of a right sometimes become the law so very important to read them
3. **Separation of powers** (judicial, executive, legislative)
   * has the judicial branch, in issuing this remedy, kept to the judicial function or have they exceeded it and encroached on the legislative power? **(edinger likes this the most**)
   * relationship between judicial and legislative branch

Remedial Options (Checklist) -- always have to ask this/think about this when going into a case

1. Pre charter (pre 1982):
   * No statutory source for remedies
   * everything decided under 1867 Act, everything flowed from the logic of the interpretation of the statute/statutory interpretation; and from the jurisdiction
   * Could be held
     + **inapplicable** (IJI, taxation, etc; valid statute but doesn’t apply to specific defendant),
     + **inoperable** (Paramountcy)
     + **invalid** (in whole or in part) (declarations made without statutory authority)
   * Variations:
     + Statute **read down** (restrictive interpretation to ensure statute stays valid)
     + **NEVER AN OPTION: READING IN** OR **SUSPENSIONS OF DECLARATIONS** (always immediate and retroactive)

1. Post Charter:
   * Now the world changed: 2 statutory sources
   * Statutory sources for remedies
     + S 24 (CA 1982) and s 52(1)
     + **s. 52(1)** – For **laws** that are inconsistent with *Charter*.
   * **Basically given no force or effect**
   * **General**, applies to both federalism and charter cases
   * ***Schachter*** gives the guidelines for applying these remedies.
   * Suspension of declaration of invalidity, reading in (***Vriend***) or out, severance.
   * Remedies are all the options in federalism cases + reading in + stay of execution/suspension of Order
   * Available to any and all Constitutional challenges to the validity of the law

* **s. 24 (1)** – For situations where law is valid but plaintiff's *Charter* right was **infringed by govt action** and the situation calls for a **remedy specific for that individual**
* **Limited to Charter breaches** can't use it if just a Federalism case
* Range of options is relatively unlimited (ask for it, justify it; has to be court of competent jurisdiction)
* a remedy that is *just and appropriate in the circumstances*.
* Examples: injunction, damages, restitutionary order, anything consistent w/separation of powers, rule of law, and ordinary remedy considerations

**Note:** A combination of s. 52 and s. 24 has not yet happened or is extremely rare, but SCC has not prohibited it.

**Note:** Declarations of inapplicability (e.g. IJI) and inoperability (e.g. paramountcy) are also remedies.

Frame your argument with wanted remedy in mind and have to *justify* your request for the remedy you want

* So if you want a particular remedy, go see the justifications for using that remedy in these leading cases
* Know where to find the arguments and the general guidelines used for each type of remedy

|  |  |
| --- | --- |
| **Remedies Available Under s.24(1) – a government action infringes a person’s Charter rights** | **Remedies Available Under s.52 – statute/provision is challenged as unconstitutional** |
| - ‘appropriate and just’ remedies  - can include damages | - striking down  - severance  - reading in  - reading down |

## Schachter v Canada, [1992] 2 SCR 679

**Guidelines for application of ss. 24 (*actions*) and 52 (*laws*).**

**Facts:**

* Father sues under s.15 because adoptive parents can get better benefits than him. Govt conceded infringement.
* Violation of Charter rights did not survive s 1 scrutiny = what remedies are open to the individual?
* Lamer J peeved because wants to know the merits of the case/argument : can't do remedies unless know merits

**Issue:** Does s. 52 require than the law be struck down or can judge extend benefits to natural parents through s. 24(1)?

**Analysis:**

* **Uses of s. 52**: strike down, read in, read out, and temporarily suspend declaration of invalidity to give govt time to fix it. 🡪 Use **s. 52 when you are challenging a *law***
* **Uses of s. 24:** provides an individual an "appropriate and just" remedy for actions taken under a law that violate an individual’s *Charter* rights. 🡪 use **s. 24 when you are challenging a governmental *action.***
* **Lamer has concern with reading in** 🡪 must try to be careful to not let judicial branch become legislators.
  + Negative remedies are easily accepted – traditional and standard.

Severability: consider a provision in comparison to rest of statute --> can it be severed? (Generally must request this remedy)

* Question: does it go againstt the Charter? And would legislature still have enacted the statute if they’d known this provision would be severed?
  + If yes, you can sever.
  + If no, you can’t (govt will just repeal the entire statute b/c provision was critical).
* Courts use it as a way to keep interference with legislature to a minimum
* **Usual technique** used in constitutional adjudication
* **Court does this by carefully defining extent of inconsistency between statute and Con requirements and declaring inoperative the inconsistent portion and any parts remaining which cannot be safely assumed would have been enacted without the inconsistent portion**

**Severance depends on finding of invalidity (lack of jurisdiction or breach of Charter provision)**

Reading in: wrongful omissions/underinclusivity. Must consider **budgetary limitations** and compare sizes of omitted/included groups.

* Only do this if **consistent with legislative intent**. Would they have done it/be happy with it? Only way to fix it?
  + **Have to know what Parliament intended in order to justify intrusion to uphold separation of powers**
  + **The point is to interfere as little as possible**
* Reading in and severing can only be used in the **clearest of cases.**
* Preferred over delayed declaration because immediately reconciles legislation in question with requirements of Charter
* **Not done in this case because the group being read in way too large *relative to the group* already getting benefits; focus is on the benefits**

* **Edinger thinks that reading in is always an amendment of legislation 🡪 shouldn't be doing this!!; should maintain separation of powers**
* **THIS IS DIFFERENT FROM broad, purposive interpretation (in reference questions) because simply interpreting a word ALREADY in the statute = broader interpretation**
  + **Whereas reading in is ADDING words/phrases in that weren't there before (adding a whole new category)**

Suspension of declaration: Can’t do this too often/too long because ***Charter* breaches continue during it.**

* Warranted if suspension would cause **danger to public, threaten rule of law or is invalid b/c of underinclusiveness.**

* Court must always consider **separation of powers** 🡪 can’t overstep their boundaries and interfere with legislative branch.

Three Steps to Find Remedy:

1. Identify/define extent of inconsistency

* Should be defined
  + **broadly** where legislation fails first branch of Oakes test (not pressing/substantial) or if purpose is unconstitutional
  + **Narrowly** where purpose sufficiently pressing and substantial but fails first part of proportionality branch (no rational connection)
  + **Flexibly** where fails 2nd/3rd element of proportionality test

2. Determine whether inconsistency should be struck down/severed/read in and which parts

* Reading in only warranted in clearest of cases
* Legislative objective is obvious and reading in/severance would further that objective
* Reading in/severance = lesser interference than striking down
* Choice of means to further objective = not unequivocal
* Severance/reading in would not involve intrusion into legislative budgetary decisions so substantial that would change nature of legislative scheme

3. Determine whether the declaration if invalidity of that portion should be temporarily suspended

* Should be done if striking down legislation without enacting something in its place = danger to public
* Would threaten rule of law
* Would result in deprivation of benefits for person whose rights infringed (underinclusiveness)

**Decision: Yes, s. 52 requires it be struck down if unconstitutional. No, s. 24(1) can’t do that.**

* Because underinclusive, striking down on behalf of non-adoptive parents = "would deprive eligible persons of a benefit without providing any relief to respondent
* Cannot read natural parents in because group vastly outnumbers group legislation originally intended for
* Choose to declare provision invalid but to suspend declaration until parliament fixes legislation

## 

## Vriend v Alberta, [1998] 1 SCR 493

**Reading in for underinclusiveness and issue of severability.**

**Facts:** Man challenges AB’s human rights legislation because it left out sexual orientation as a protected ground.

**Issue:** What is the remedy for a deliberate government omission/underinclusiveness?

**Analysis:**

* Problem of **reading in something that the legislature deliberately excluded** = violates separation of powers.
  + - Intrusion into sphere of legislative branch.
    - HOWEVER Court decides it is **justified for the protection of minorities** – it is NOT undemocratic.
    - **Where the interests of a minority have been denied consideration, especially where that group has historically been the target of prejudice and discrimination, judicial intervention is warranted to correct a democratic process that has acted improperly.**
  + You can only **read in** for underinclusive legislation if it **respects role of legislature and the purpose of the *Charter*.**
  + **Generally, courts avoid making orders to legislature; make declaration instead URGING the legislature to remedy legislation that's been declared invalid**

Rules of severance:

1) Would legislature have passed that statute without that provision?

2) Do the other provisions rely on the provision?

3) Is that provision integral to the statute?

**Decision:** Here, reading in homosexuality is least intrusive remedy. Striking down HR laws is worse than reading in GAY.

**THERE IS A RANGE OF REMEDIES, AND YOU HAVE TO IDENTIFY THE REMEDY THAT YOU WANT FOR YOUR CLIENT, INDICATE WHAT IT IS, AND JUSTIFY IT**

**BUT ALWAYS REMEMBER THE SEPARATION OF POWERS -- IT CAN ALWAYS BECOME AN ISSUE**

* Can see an example of this in the next excerpt case

## Doucet-Boudreau v Nova Scotia 2003

* Section 23: Francophone parents can get their kids educated in French
* School not built in time 🡪 s 23 violated; goes to court in NS
  + Trial judge made a remedy under s 24(1): schools had to be build using best efforts, to construct schools by more or less specific deadlines, and jurisdiction to receive progress reports
  + This remedy appealed to SCC
* Court divided 5:4 on validity of remedy
* **Majority recognised division of powers issue**
  + S 24(1) has to be interpreted **in purposive way** so as to provide an effective and full remedy for Charter breaches (had to **be responsive and effective)**
* **BUT** the courts must also be sensitive to their judicial role and must refrain from usurping role from other branches (but there's some wiggle room)

Can identify some relevant broad considerations; an appropriate and just remedy must:

* 1. Meaningfully vindicates claimant's rights
  2. Must employ legitimate means within const democracy; court must not depart "unduly or unnecessarily from judicial role" (court is aware and sensitive to separation of powers
  3. Must be a judicial remedy (to be an appropriate and just remedy)
  4. Must be fair to the defendant (not just catering to plaintiff)
  5. S 24(1) should be allowed to evolve

* **Vigorous dissent**: focused on 2 things
  1. This is a badly drafted judicial order (technical focus) - what does "best efforts" mean? Etc
     + If client wants some unusual Order, then you should be prepared to draft an order for the court that's clear and everyone can understand: this is what we want you to do
  2. This is not an appropriate role of the judiciary
     + Free as counsel/students to ask for remedies that are out of the norm, but you have to make clear and certain, have to justify them, and have to convince the court that separation of powers are maintained and that no encroachment will happen on either legislative or exec branches

*You are always free to ask for whatever you want under s 24(1), including an Order or reading down (instead of declaration of invalidity), but you have to justify that remedy. Always. Help judges see it your way ESPECIALLY if you're asking for something out of the ordinary (asking for an order is defs out of the ordinary -- don't go there. You can. But try other things first) - Edinger's obiter*

## R v Ferguson, [2008] SCC 6

**Constitutional exemptions under s. 24; example of both s 52 and s 24 being put forward in one case.**

**Facts:**

* Man claims that a 4 year minimum sentence for manslaughter with a firearm is cruel and unusual punishment.

**Issue:** Does the minimum sentence violate the *Charter* in general? Does it violate it in the case of this complainant?

**Analysis:**

* Court finds that the law itself is not cruel/unusual 🡪 s. 52 cannot be used as a remedy.
  + Even if can't strike down a law because it's valid, can still maybe get a remedy under s 24
* Court also rejected the **constitutional exemption under s. 24** that Ferguson sought.
  + Note: Court did not say that they are never available – just not in this case.
  + **General principle: s 52 deals with validity of laws, and s 24 deals with individual remedies, and don't ordinarily use them both in the same case = USUALLY have to make a choice**
* Jurisprudence: no definitive SCC judgement ruling either way on these issues, so Ferguson finally states the law
* **Parliament’s intention** was that there would be a minimum for everyone – an exemption would be in direct conflict to this.
  + **S. 24 remedies cannot undermine the purpose of the law**.
    - **so s 24 is** **NEVER available for minimum sentences** (constitutional exemptions under s 24 are not available)
  + To do so would violate separation of powers and encroach on legislative powers.
* Other considerations: **jurisprudence** (not binding but important), **remedial scheme of *Charter,* impact on rule of law** in granting exemptions in such cases.
* Constitutional exemptions raise concerns related to the rule of law and that values that underpin it: certainty, accessibility, intelligibility, clarity and predictability 🡪 would be problematic for courts

**Decision:** Court rejects this and says the 4 year minimum is fine for as a law and as a punishment in this case.

## Vancouver v Ward, [2010] SCC 27

**An award of pecuniary damages is possible as a s. 24 remedy; this is the first time this has happened**

**(Compensation for Charter breaches under s 24); If you want a certain remedy, ask for it, and justify it**

**Facts:**

Guy is suspected of planning to smash pie into Chretien’s face so cops search his car and arrest him while he is being filmed.

**Issue:** Can you sue for monetary damages under s. 24 as a remedy for a breach of *Charter* rights?

**Analysis:**

No law to challenge here; police justified under law to do this (whether exceeded power is different story)

**BUT** The fact that a claimant has not suffered personal loss does not preclude damages where the objectives of vindication or deterrence clearly call for an award.

**This analysis meant to be applied to any case where plaintiff seeking damages under s 24(1) 🡪 damages must be “appropriate and just”**

🡪 Damages awarded under s.24(1) can serve as: **compensation, vindication or deterrence**

There are 5 steps to sue for damages:

(1) Pf must prove the *Charter* breach.

(2) Pf must justify damages as a remedy – functional justification

(3) Must further **general objects** of the Charter

* + **Compensation** [including intangible interests like embarrassment] 🡪 recognises breach may cause personal loss which should be remedied; must show **actual loss** so claimant can be restored to position prior to breach
    - Pecuniary and non-pecuniary
  + **Vindication** 🡪 recognises that Charter rights must be maintained and cannot be allowed to be whittled away by attrition; focuses on the harm the infringement causes society.
  + **Deterrence** 🡪 deterring future breaches by state actors; social purpose of regulating government behavior to achieve compliance with the Constitution
    - Deterrence and vindication harder to decide, tort law less useful (seriousness, impact on claimant); **needs to be appropriate and just to both claimant and state**

(4) Government has burden of bringing up counter-factors of why damages are inappropriate. (existence of alternative remedies)

* Claimant need not show that all other remedies exhausted; **govt has to show that other remedies are available and more appropriate than damages**
  + Declarations of Charter breach (where no personal damage/loss)
  + If damages = chilling effect on good/effective governance, then also not appropriate especially when conduct are actions only state can perform (***Mackin* principle**)
    - **State action taken under statute which is subsequently declared invalid will not give rise to public law damages** because good governance requires public officials carry out their duties under valid statutes without fear of liability in the event that statute is later struck down (no immunity if state conduct clearly wrong, in bad faith, or an abuse of power)
    - Concurrent action in tort or other private claim bars s 24(1) damages if the result = double compensation

(5) Quantum assessment

* **Principal guide to the determination of quantum is the seriousness of the breach evaluated with regard to the impact on the claimant and the seriousness of the state misconduct.**

**This must be done in a court of competent jurisdiction🡪 Prov crim courts not empowered to award s 24(1) damages**

NOTE: These aren’t private law damages or a tort. Proper approach to awarding damages should be incremental as cases arise.

**Decision:** Plaintiff wins $5000 for getting strip searched.

## R v Conway 2010 SCC 22

**Ontario Review Board deemed a "court of competent jurisdiction" under s 24(1) and thus authorised to provide certain remedies under s 24(1)**

* Mills: court has to have jurisdiction over person, subject matter and remedy
* This case departs from this because focuses on **remedies** = **whether the court has the jurisdiction to grant Charter remedies *generally* not just a specific remedy**

### To determine if Tribunal is court under Charter

1. **look at whether admin tribunal has jurisdiction implicit/explicit, to decide questions of law** (have to interpret and apply statutes that they're responsible for)
   * + If have this competence, then have the competence to make decisions on constitutional issues/law and Charter and to give remedies under s 24(1) (*unless statute bars them from it or particular remedy can't be granted by specific tribunal*)
2. **Look at whether tribunal can grant the particular remedy sought, given the relevant statutory scheme?**

* It is an issue of discerning legislative intent to determine if the remedy sought was intended by the legislature to fit within the framework of the particular tribunal.
* **Board has power to decide questions of law; this includes questions regarding Charter** 
  + - Have certain level of expertise
    - Can't decide questions of **general law** though
  + This case merges the 3 waves to give general conclusion regarding jurisdiction of administrative tribunals
  + tribunals not exempt from Charter, have to exercise judgement in accordance with Charter values
    - However, doesn't have authority to "order" provincial health authorities to engage in specific treatment regarding specific individuals
    - remedies based on such orders cannot be granted
    - *can* grant absolute discharges, but can't give it in this case because he's a danger to the public

**Tribunals deemed courts of competent jurisdiction for giving remedies under s 24(1) *unless statute exempts/bars tribunal from doing it* If you're sitting as a (prov) criminal court, civil remedies are excluded under s 24(1)**

# FREEDOM OF EXPRESSION

Charter: 2. Everyone has the following fundamental freedoms:

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

Just because something is on paper doesn't mean that it'll be transferred in reality

**Questions:**

**1)** What is the scope of FOE (see ***Irwin***)

* Are there are limitations? Qualifications? What are they?.

**2)** How do you make a case for an infringement? *Oakes* test is flexible.

* If Crown, argue for either violence (***Irwin***) or public place (***Ramsden***) exceptions.

## Irwin Toy Ltd v Quebec (Attorney General), [1989] 1 SCR 927 - Broad interpretation

**How to find an infringement of 2(b) using a direct/purpose approach; General framework of analysis for 2(b); Expression is Form and Content; Violent expression not protected under 2(b)**

**Facts:** Irwin opposes a law that restricts advertising to kids.

**Issue:** Is commercial advertising included within s. 2(b)?

### Freedom of Expression Charter Challenge

**Stage 1: plaintiffs must bring themselves within the right.**

* **Establish scope of provision**
  + 2(b) protects "expression" 🡪 defined as any activity that attempts to convey meaning via both **content and form**
  + Interpretation of **scope of 2(b) can be broad** because we have s. 1 to cut it down.
  + **Violence is not protected under 2(b)**
* **Establish that provision applies to you (fit under it)**
  + Pf is a corporation here but are included – “everyone” includes corporations
  + Commercial advertising is a form of expression (no reason why it wouldn't be/not explicitly excluded from 2(b))
  + **Commercial expression** is protected by the *Charter* but **is not at the core of 2(b)**.

**Stage 2: Determine whether purpose or effect of govt action restricts freedom of expression**

* Does the law **explicitly infringe**? Or do the **implications/consequences** of the law have an infringing effect?
* **Purpose**
  + For explicit purpose approach, the legislation must aim to control attempts to convey specific meaning by **directly restricting content** of expression or by restricting **form of expression** tied to content
  + if the government’s purpose is to restrict a form of expression to control access by others to the meaning being conveyed or to control the ability of the one conveying meaning to do so, this also limits the guarantee
* **Effects**
  + If just physical activity and content neutral, have to look at effects
  + effect of govt action restricts free expression
  + Onus is on plaintiff to show that their activity promotes at least one of three principles/values underlying protection of free speech
    - **Seeking and attaining the truth**
    - **Participation in social and political decision-making (democratic discourse)**
    - **Individual self-fulfillment and human flourishing**

🡪 Irwin takes the direct **purpose** route: **must show that legislation is aimed at content or meaning**

After the infringement has been proven (here, infringes **commercial expression**), the court moves to the

**s. 1 *Oakes* analysis**. 🡪 court has to see if this infringement can be justified

1. Here, pressing/substantial objective is to protect **vulnerable persons** (kids).
   * Protecting a vulnerable persons group is always pressing and substantial.
   * For FOE, pressing/substantial objective can be found using social science evidence.

1. Means proportional to ends
   * **Rational connection** established: advertisers prevented from capitalising on children's vulnerabilities by being prevented from directly advertising to children under 13
   * **Minimal impairment:** court will just look for **reasonable impairment**, not absolute minimum.
   * **Balancing:** Paragraph 74🡪 if court **mediating between different groups** will engage in a **balancing act** of competing interests; if the govt is the main antagonist infringing on an individual's Charter right, a **higher standard exists** where court demands evidence and certainty (reports, science, etc) to allow for infringement
     + Cost/benefit analysis : Costs for Irwin toy, benefits to kids = kids win

**Ruling: There is a violation but it is justified through s. 1**.

**Dissent: application of Oakes Test**

* Total ban can never be minimal impairment

**Freedom of expression interpreted very broadly in this case; only excludes violence but violence not defined (only physical or verbal too?...in this case, most likely physical violence only but doesn't mean verbal violence can never be brought up in the future)**

**Difference between Purpose and Effect**

Purpose: content-based so limit content automatically an infringement on free speech

Effect: content-neutral 🡪have to see if effect of prohibiting *activity* infringes expression

* To establish effect, have to show how it infringes on one of the three values

## R v Butler, [1992] 1 SCR 452

**Pressing/substantial objective – “the norm.” Vagueness. Obscenity. Physical expression and 2(b); S 2(b) has *core and periphery***

**Facts:** Guy is charged with selling obscene material at his porn shop. He claims the CC laws violate 2(b).

**Issue:** Can Parliament criminalize obscenity or is it protected by 2(b)?

**Analysis:**

* 3 types of porn 🡪 only the kind that depicts violence, includes children, or is degrading/dehumanising is prohibited because of the harm it results in to specific members of society and society as a whole AND because inconsistent with Charter's aim at creating equality between the sexes
  + "internal necessities"/"artistic expression" test is contextual and used after something is deemed to be harmful to see if it can be "saved"/justified on artistic grounds

**Stage 1: can Butler get under 2(b) and claim protection?**

* Manitoba CA says doesn't fall under 2(b) because the physical expression = violence
* SCC says it does: books are creative expressions, videos need editors who make choices = expression
* Sopinka J **defines "physical"** acts as those void of meaning, opinion, feelings, ideas etc (parking a car for example)
  + Thus, even though depicted purely physical act, the fact that it was captured with an intent to express meaning, opinion, idea etc makes it "expression" under s 2(b)
  + If you can find *some* meaning in the physical act, can bring it into s 2(b)
  + Meaning doesn't have to be "redeeming" (whether values promoted are questionable is irrelevant)
* However, not **at core** of s 2(b) -- on the fringe; so the *location* of the expression is important, affects how you argue you case (harder or easier to justify the interference)

**Stage 2: does it infringe?**

* Aimed at purpose (content) of s 163 🡪 restriction on certain types of materials based on their **contents**
* The fact that a legislative term ("undue") is open to various interpretations makes it **flexible** *not vague* --> this is not fatal
  + Interpretation simply has to be **intelligible** to judges

**Oakes Test**

1. Avoiding harm is a pressing and substantial objective

* Pressing/substantial objective: Butler argues the law targets morality (original purpose from long ago – **Shifting Purpose Doctrine:** you **can’t shift a law’s purpose from the original purpose to a purpose that's more acceptable now** [*Edwards*]) but Sopinka says it also targeted antisocial behaviour/conduct; so purpose was prevention and enforcement = not shifting, just focusing on the other original purpose
* Society’s standards evolve – you must **reformulate so that it is consistent with Parliament’s original intent.**
* If you persuade court that the purpose is to prevent harm to individuals/society, you’re good to go.
* If you think original intent is no longer good, get creative and make up something that *could* have been intended.
  + Obscenity in code from 1892 = long history of being prohibited
  + Problem: over the decades ascribed different purposes to definition of obscenity; for the longest time, objective defined as "protection and preservation of morals"
  + Don't make morality arguments anymore, but always trying to prevent socially undesirable conduct/objectionable conduct: it's always been to prevent harm (morality and harm are related, not separate concepts)
  + **How to determine “norm” (obscenity)**: “What community would tolerate others being exposed to on basis of the degree of harm that may flow from such exposure. Harm in this context means that it predisposes persons to act in an anti-social manner. Anti-social conduct for this purpose is conduct which society formally recognizes as incompatible with its proper functioning.”

1. Banning materials that are harmful to society to avoid harm is proportional

* This kind of expression (base "self-fulfillment") is not at the core of s 2(b) anyway 🡪 core gets more protection, periphery gets less
  + The fact that it's tied to economic profit makes it that much easier to justify infringement
  + If court had accepted argument that porn was a form of "political expression", then would have been closer to the core
  + **can make arguments about how the particular type of expression should be characterised; if defending freedom of expression, want to characterise it as something closer to the core; if defending govt (who has infringed), put it out at the periphery**
* **Rational connection:** There is conflicting evidence so a rational connection is all that is needed.
  + Direct link between this type of "hate propaganda" and societal harm so rational connection is established
* Minimal; impairment is established because it's only a ban on the *harmful* porn and excludes porn that **is good, materials that have another purpose (scientific, artistic, literary merit), encourages a flexible approach to interpretation of "undue exploitation" as times change, excludes private use or viewing**
* Because shifting of purpose unacceptable, find something that if wasn't explicit, at least implicit
* **The meaning of a work can be derived from the fact that it has been intentionally created by its author.**
* **Artistic freedom lies at the heart of freedom of expression values and any doubt in this regard must be resolved in favour of freedom of expression**
* In the absence of inconclusive social science evidence a **reasoned apprehension of harm** may be enough to justify government action

Issue of **vagueness**: Argue it in 2 spots – (1) Pre-*Oakes* (“prescribed by law” or s.7) and (2) Minimal impairment (***NS Pharms***)

**Decision:** Infringement is justified. Hardcore porn is harmful to society, particularly women, which justifies encroachment.

Dorval Case

Airports are owned by govt

Policy: nothing can be handed out at the airport except for poppies; someone wanted to hand out pamphlets -- couldn't

* Committee argues that their right to expression infringed; Court sides with Committee
* Unanimous decision, however, 3 different routes of analysis

Ramsden Case

Bylaw preventing poster posting in public

Musician posted on hydro poles -- got charged under bylaw -- argued that bylaw infringed s 2(b) right, wins

**Charter applies to municipal by-laws**

**The point of these two cases preceding Montreal City = no one knows how to analyse these cases properly/which route to take**

## Montreal (City) v. 2952-1366 Québec Inc, [2005] 3 SCR 141

**Public property and 2(b). Limitations on location; locations that are Charter-free**

**Facts**: Noise pollution by-law, music coming from a club into the street.

**Issue:** Is the by-law a violation of 2(b)? Is the public place where one would expect protection for expression?

**Analysis**:

### To determine if by-law infringes s 2(b) of Charter ask

* 1. **Did the noise have *expressive content*** (brings it under s 2(b))
  2. **Does the *method* or *location* of expression remove it from protection of s 2(b)**

**Test for application of s 2(b) to public property**

* Have to ask: is the place a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s 2(b) is intended to serve (Democratic discourse, Truth finding, Self-fulfillment)

🡪 To answer this, following factors should be considered

1. Place’s **historical or actual function**
   * + - Historical use for public discourse indicates consistent w/2(b) purposes (some evidence will be needed)
2. Whether other aspects of the place suggest that **expression within it would undermine the values underlying free expression**
   * + - is the current function incompatible with 2(b) purposes?
       - Is it essentially private despite being govt-owned?
       - Does the current function require privacy or limited access?
       - Compatible with open public expression?
   1. **If it does not and expression is protected, does by-law infringe either in *purpose* or *effect***
   2. **If it does infringe 🡪 Oakes**

* Public property is govt owned 🡪restrictions on use of public property for expressive purposes = "govt acts"
  + Limiting freedom of expression 🡪 must justify this under s 1
  + Also, in *Ramsden*, emission of noise onto public street is protected by 2(b)
  + Expressive activity should only be excluded from protection if **method or location clearly undermines values that underlie the guarantee**

Used Oakes analysis:

* combatting noise pollution which is a serious problem = pressing and substantial
* prohibited noises that can be heard from outside due to amplifying equipment and noise past a certain degree of loudness (also allowed for exemptions for parades etc) = not an absolute ban

An example of **effect** being infringement, not the **purpose** to infringe

**New limits to s 2(b): Method or location of expression may remove it from s 2(b) protection**

**Decision**: There is an infringement as a public street is compatible w/2(b). However, it is justified by s. 1.

Arguments used to kick Occupy protestors out of parks: others can use the park too and affects others' use; health and safety

Great Hall of the Law Courts

Can people protest here?

Mix of public and legal profession

Has it historically been used as a place of demonstration? No

* If a silent vigil, hard to bar people from protesting
* If gets violent or noisy, then have an argument
* Court rooms would be in a different category than the area in front of a court
* Courts and judges are not Charter-free
* Private property = not government, so charter-free
* For public property, use this case

## R v Bryan, [2007] SCC 12

**Right to receive information; Factors for whether evidence or deference is required; Total bans; Political expression is usually considered at the core of s 2(b)**

**Facts:** Man in BC announces Atlantic Canada election results before BC polls have closed. Charged w/*Elections Act* offence.

Federal govt says it is aimed at informational equality and to promote public confidence in the electoral system.

**Issue:** Does s 329 infringe on the 2(b) right and can it be justified under s 1?

**Analysis (Bastarache):**

Right to publish information is undisputed

* **right to receive information also falls within s 2(b) 🡪** but it is at the **periphery** of 2(b). (*at least for now*)
* **Significance**: Don’t have to wait for person whose positive right was violated to complain. EVERYONE can.
  + E.g. in RJR, customers could complain about the advertising restrictions.

1. **Pressing and substantial**? Yes: because it is elections want to ensure informational equality and the promotion of public confidence in electoral system

🡪 asserted that if public confidence is lost, voting patterns could change and outcomes of elections would be affected

🡪 need to present evidence for this for the proportionality test

To determine nature and sufficiency of evidence required to establish that violation of s 2(b) is saved by s 1, impugned provision must be viewed in its context using 4 factors(from *Thomson Newspapers* and *Harper*)**:**

1) The nature of the harm and the inability to measure it

* Absent determinative social science evidence, logic and common sense can be used.

2) The vulnerability of the group protected

* Certain degree of maturity and intelligence is presumed. Not vulnerable = no need for protection.

3) Subjective fears and apprehension of harm

4) The nature of the infringed activity

* **Absent determinative social science evidence, logic and common sense can be relied to assist in the s.1 analysis**
* **Contextual factors make more room for court to do the proportionality test where actual social scientific evidence may be lacking** 
  + hard evidence not required as it doesn’t exist – just policy analysis, speculation
  + Result in deferential approach to Parliament🡪logic and reason may play large role in establishing causal connection
  + You MUST work through these for evidence in political expression cases

1. **Proportionality?** Yes
   1. **Rational connection**: only need to demonstrate “empirical connection” ; people don’t like info being released early and when broadcast it’s hard to ignore = suppressing dissemination of such info is rationally connected
   2. **Minimal impairment:** contextual factors indicate court should accord deference to Parliament and allow for logic and reason to provide the evidence needed that Parliament struck balance between political expression and meaningful participation
   3. **Salutary and deleterious effects:** s 329 is only effective legislative response ; magnitude of ban is really small compared to large and important benefits

**Dissent (Abella):**

* If you don't have evidence, you can't just make speculations
  + “evidence” largely inconclusive, largely unsubstantiated – doesn’t meet requisite “**reasoned demonstration**.”
  + However, harm of suppressing political speech is profound
  + deleterious effects > benefits of the ban.
* There are other alternatives to these provisions – staggered voting hours, etc. A total ban is not required.
* It is **difficult to conclude that a total ban ever minimally impairs**. There is a **lack of proportionality**.
  + So, if you want it struck down, argue total ban! Even time-limited ban is a total ban for that time. 🡪 e.g. effect of ban on the media, people in Atlantic can’t get their own results, etc.

**Decision**: Bryan loses. Provisions are upheld.

## Baier v Alberta, [2007] SCC 31

**Positive rights claims. Activity doesn’t have to be purely or predominately for expression.**

**Facts:** Law against school employees being school trustees.

**Issue:** Is running for the school board a form of expression? If so, has 2(b) been unjustifiably violated?

**Analysis:**

* There is **no requirement that the activity be purely or predominately expression to qualify** for 2(b) 🡪 can be incidental.
* **Positive versus negative rights**: Negative is telling the govt to get lost, positive is asking them to do something.
* Issue here: teachers are complaining about being unable to access a statutory platform.

How to deal with a positive rights claim (Dunmore):

1. Is the activity in question a form of expression? *(Irwin Toy)* > **as long as SOME expression = expression under s 2(b)** (para 32)

* Not asking if there's an infringement, but if there's underinclusiveness

1. Does pf want a positive entitlement to govt action or the right to be free from govt interference? If positive, go to 3 (want govt to legislate *enabling* expressive activity)
2. Consider the 3 Dunmore factors🡪 **all 3 must be satisfied for an infringement to be made out:**
3. Claim of under-inclusion should be grounded in fundamental freedom of expression rather than in access to particular statutory regime.
4. Claimant must demonstrate that exclusion from a statutory regime has the effect of a **substantial interference** with s. 2(b) or has the purpose of infringing 2(b).
5. The government is responsible for the inability to exercise the fundamental freedom.
6. If all 3 satisfied, move to s. 1 analysis. (**they're cumulative; have to get through all 3**)

* Here, 1 and 2 not met. Teachers want access to a regime and interference is not substantial (not total ban, other vehicles exist)
* Nothing stopping teachers from expression their opinions on these matters otherwise, just couldn't do it through trusteeship (through the statutory regime; vis a vis their employers); in Dunmore case, couldn't organise at all as union because didn't have access to the statutory regime
  + **Diminished effectiveness in the conveyance of a message does not mean that s.2(b) is violated.**
* Must persuade court of a **substantial interference** with 2(b) right to get them to mandate access.
* Only in exceptional circumstances will a claim for a positive right work so legislators are forced to do something.

**Decision**: Teachers lose, law is upheld. No s 2(b) right to access statutory platform to express views.

Dunmore factors relevant to establishing an **exception to the general rule that s.2 does not require positive government action** 🡪 so don’t have to use them unless that comes up

**Statutory Regime: whole legislative set up/platform that allows a certain group of individuals that, in the absence of, deprives them of exercising their Charter rights**

* here, school trusteeship = creation of a level of govt (govt of schools)

**2(b) includes both expression and reception of expressions however just like there's no right to access statutory platforms, there is no right to receive expression through a particular statutory platform under s 2(b)** (para 40)

## Greater Vancouver Transit Authority v Canadian Federation of Students, [2009] SCC 31

**General overview of FOE cases. Issues with advertising limitations and limiting forms of expression.**

**Facts:** BC Teacher’s Federation tried to buy ad space on sides of buses b/c CFS wanted to encourage young people to vote. Transit denied the ads on the basis that they were not permitted by Transit’s advertising policies which banned political ads.

**Issue:** Can govt entities, in managing their property, disregard the right of individuals to political expression in public places?

**Analysis:**

* Translink is govt within s. 32 = Govt basically controls them 🡪 **routine and regular control**.
* Therefore the *Charter* applies to ALL of their activities.
* Btw **have to have government defendant;** if either of the transport companies were not govt, action would cave
* Does claim fall in 2(b)? It involves **political expression but it is a type of expression being excluded** due to content, not a group (i.e. teachers) being denied a platform
  + this is not a claim of underinclusion. It is a limit on content in a **physical, public location not a platform** 🡪Distinguished from *Baier*.
  + Def: arguing that they’re asking for access to statutory platform, so plaintiffs would have to jump through these extra hoops (Dunmore Test))
* location so use ***Montreal***’s 3 factors (listed 2 pages above) instead to determine if there has been an infringement:

1. Do ads include expressive content for 2(b)?
2. Is 2(b) protection removed by **method or location** of the expression?
3. If it is protected by 2(b), does the transit authorities’ policy deny that protection?

Analysis of Montreal's 2nd factor/question:

Is side of a bus a **public space**? 🡪 Yes. It is **not *inconsistent* with buses’ use to have political expression on their sides**.

* Govt argued CFS seeking a **positive right** but court characterizes it as a limitation on 2(b) for public space.
* Ask: How long have buses been used for expression? Are they used for expression? Bus’s primary function?
* Buses are on public streets, used by public, not a charter-free location
* **new idea presented in this case**: locations can become charter-free

Is the **policy of BC Transit a law**? 🡪 Yes, court concludes it is law within s. 1 (use s 52)

* **A policy that is administrative in nature is not “law”** (ie focused on internal management or only accessible to those within the government entity – lees likely to be found “law”)
* **A policy that is legislative in nature is law** 
  + IF the enabling legislation allows the entity to adopt binding rule, the policy establishes a norm of general application and they are accessible and precise.
* Was govt entity authorized to enact the impugned policies? Are the policies binding rules of general application? 🡪 If yes, they are law.
* Where the policies sufficiently precise and accessible? If yes, they were “prescribed” by law for s. 1.

This fails rational connection - Not all political expression offends bus riders as to damage “safe/welcoming environment.”

* Citizens are expected to put up with some controversy in a free and democratic society.
* Also fails minimal impairment: it is a **total ban,** can’t be upheld.

BUT doesn’t mean you can’t limit advertising: can consider presence of kids, audience’s ability to choose to be in that place.

* **Limits on advertising are contextual**.

**Remember to address remedy** – especially if s. 24 is involved. Don’t leave it to the court to figure out themselves.

* S 52 is more appropriate to deal with rules made by govt because important to deal with invalid laws and because requirements for jurisdiction and standing are less strict = largest number of potential claimants and beneficiaries of constitutional challenge
* **Another new idea:** a policy can be a law for purposes of s 1

**Ruling**: Yes, there is an infringement. CFS wins.

**Prescribed by law reflects two values basic to rule of law**

1. In order to preclude arbitrary and discriminatory action by govt officials, all official action in derogation of rights must be authorised by law
2. Citizens must have reasonable opportunity to know what is prohibited so that they can act accordingly

Therefore, law must be

* Adequately accessible to public and
* Formulated with sufficient precision to enable people to regulate their conduct

## Saskatchewan v Whatcot [2013] SCC 11

**Not all expression is equal**

The most recent case on freedom of expression

* Whatcot distributed anti-gay flyers in Regina and Saskatoon on behalf of Christian Truth Activists -- categorised his expression as political
* Does s 14(1)(b) of Saskatchewan Human Rights Code violate s 2(a) and/or s 2(b) of Charter? –
* Whatcot says it does because definition of hatred is subjective and overbroad
* **Just because categorised as political, "does not cleanse it of its harmful effect**" (para 116]
  + Hate > political = puts it at the periphery which doesn't take a lot to justify infringement (para 112)
  + not all expression is equal
* You also can't mask true motives (targeting a group) by saying that you're actually targeting their behaviour
* **Preventative measures found in HR legislation focuses on effects not on intentions**

### How to interpret "hatred"

1. Objective interpretation using reasonable person standard
2. Repugnant and offensive is okay
3. Intention of author = irrelevant; have to look at what is the effect

Oakes Test

1. **Pressing and substantial**? Yes = decreasing harmful effects of social costs of discrimination
2. **Proportional?**
   1. **Rational connection**: expression captured under legislation must marginalise the group by affecting its social status and acceptance in the eyes of the majority ; only prohibits public communications of hate speech (private expressions unaffected)
   2. **Minimal impairment**: doesn't have to be *least* impairing option - reasonable impairment is enough; reasonable to believe that exposing vulnerable groups to hate speech will have negative effects on them as well as on society
   3. **Ends outweigh the means?** Benefits of suppression of hate speech and harmful effects outweigh detrimental effect of restricting expression

S 14(1)(b) 🡪 severed part of the provision but otherwise upheld ; saved under s 1

**Not all expression will be treated equally -- where expression is located in terms of the core values (closer or farther) makes a difference**

* Hate speech does little to promote and can impede values underlying freedom of expression (affects search for truth and distorts/limits free exchange of ideas by silencing groups)
* Therefore, hate speech is at the **periphery**
* Try to categorise as **political expression and as vulnerable group** to win your cases

### One Giant Test For s 2(b)

1. Is there a defendant? Must be govt or govt-regulated entity
2. Does claim fall within s 2(b)?
   * Physical activity and violence exempt from s 2(b) protection
   * Core or periphery characterisation makes difference to argument
3. Means or location?

* Have to ask: is the place a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s 2(b) is intended to serve (Democratic discourse, Truth finding, Self-fulfillment)

🡪 To answer this, following factors should be considered

- Place’s **historical or actual function**?

* + - * Historical use for public discourse indicates consistent w/2(b) purposes (some evidence will be needed)

- Whether other aspects of the place suggest that **expression within it would undermine the values underlying free expression**

* + - * is the current function incompatible with 2(b) purposes?
      * Is it essentially private despite being govt-owned?
      * Does the current function require privacy or limited access?
      * Compatible with open public expression?

1. Purpose or effect?
   * Denying specific **content** (political expression) = Purpose
   * Suppressing specific activity = Effect
     + Claimant has to establish effect violates underlying Charter values of **public discourse, truth finding, self-fulfillment**
2. If negative claim (wanting govt to back off), keep going, but if positive claim (wanting to access to statutory regime/platform because of underinclusiveness) then have to establish all 3 Dunmore factors
   1. Claim of under-inclusion should be grounded in fundamental freedom of expression rather than in access to particular statutory regime.
   2. Claimant must demonstrate that exclusion from a statutory regime has the effect of a **substantial interference** with s. 2(b) or has the purpose of infringing 2(b).
   3. The government is responsible for the inability to exercise the fundamental freedom.
   4. If established, proceed to Oakes, otherwise claim fails
3. Section 1 analysis 🡪 Go through Oakes 🡪 is there a law? (no law = automatic win); provision has to be intelligible to judges; policy decisions can be law for s 1 purposes (Charter or Admin analysis)
   1. Pressing and Substantial Objective
   2. Proportionality
      1. Rational connection
      2. Minimal impairment
      3. Balancing of means and ends
4. Finally get to remedy
   * S 52 or s 24?
     + S 52 is appropriate section to use when a real law is challenged (or when a policy is characterised as law as in Transit case)
     + s 24 is used when it's an administrative action or a govt AGENT, but the law itself is fine

# **FREEDOM OF CONSCIENCE AND RELIGION**

Charter:

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion

* Freedom of conscience and religion not new or unique to Canada
* Creates collective and individual rights
* SCC is very reluctant to delve into religious beliefs

## R v Big M Drug Mart [1985] 1 SCR 295

**Leading case for scope of Freedom of Religion (FOR); govt cannot compel people to do or not do things because of religion**

**No Oakes analysis because hadn't been invented yet**

**Facts**: Big M charged with unlawfully carrying out sale of goods contrary to Lord’s Day Act

* Big M challenged Lord Day’s Act saying that it violation freedom of conscience and religion under s.2(a)

**Issue**: Does Lord’s Day Act violate s.2(a) and can it be saved under s.1

**Analysis**:

* FOR -- matter falling within federal legislative competence
* Under LDA, non-Christians prohibited for religious reasons from carrying out activities which are lawful and moral
  + Argument that Big M (corporation) not entitled to relief under s 24(1) (remedy) because FOR is a personal freedom and corporations cannot be said to have a conscience/hold religious beliefs

= cannot be protected under s 2(a) nor can its rights and freedoms be infringed on or denied under s 24(1)

* Also argued that provincial court judge lacked jurisdiction to make any form of declaration under s 52 of CA
* **Court disagrees**:
* s 24(1) sets out remedy for individuals (real or artificial) whose Charter rights have been infringed
* However, because here the validity of a law is being challenged, s 24(1) is irrelevant --> have to look at s 52
* any accused (corporate or individual) can challenge the *validity* of a criminal law -- don't need standing for that and don't have to go through that process ("Any accused whether person or corporation may defend a criminal charge by arguing the charge is unconstitutional")
  + Whether corporation can exercise FOR is irrelevant
* **FOR: right to entertain chosen religious beliefs, to declare them openly and without fear of hindrance/reprisal, and right to manifest religious belief by worship, practice, teaching, dissemination**
* **ALSO: to ensure freedom from coercion or constraint, either through direct or indirect, action or inaction = no one to be forced to act in a way that is contrary to his/her beliefs (“Freedom”)**
  + imposing Christian ideals on all non-Christians goes against Charter values and freedom of choice in general
* Respect for individual conscience tied to value of human dignity and democracy (being able to make choices freely)
* **Subject to limitations**: protect public safety, order, health, morals rights or freedoms of others (Internal Limits)
  + **Can defend on the basis of public safety, order, health, morals = limitations to the FOR argument**
* Charter should be interpreted with purpose in mind, read broadly but not too broadly as it was not created in a vacuum
* Government cannot give legislative preference for one religion over others
  + Truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct ; must surely be founded in respect for inherent dignity and inviolable rights of human person
* Pre-charter when this statute was created and was based in enforcement of (Christian) morals -- courts stuck with this
* Does not allow shifting purposes
* **Engaging in perfectly legal activities ("harmless acts") cannot be against the law**

**Important paragraphs:**

* 94 and 95 = 95 general outlines of s 2(a)
  + Coercion : direct and indirect means
* 123: **Purpose** of s 2(a) -- vast bulk of FOR is about religion, but conscience is there too!!

**Decision**: LDA infringes s.2(a) of Charter and cannot be justified under s.1 of Charter; No force or effect

**Ratio**: Govt cannot compel individuals to perform or abstain from performing otherwise harmless acts because of religious significance of those acts to others. **The state shall not use the criminal sanctions at its disposal to achieve a religious purpose**

## Syndicat Northwest v Amselem [2004] SCC 47

**Defines FOR; sets out test for making FOR claim; Charter rights can be waived but high threshold**

**Facts**:

* Resident of a condo set up a succah on is balcony for purposes of celebrating Jewish religious holiday
* Condo rules said that no owner may block balcony or make any constructions
* Condo claimed that resident complied when he signed contract
* Resident said violated Quebec Charter

**Issue**:

* Do the condo by-law conditions infringe s.2(a)? Saved under s.1 of Quebec Charter?
* Did resident waive rights by signing contract?

**Analysis**:

* Resident believed that had to set up succah and could not use a communal one
* **Religious practice and sincerely held belief**
* Intrusion cannot be reasonable limit on resident’s freedom
* Resident had no time to negotiate right and therefore could not have given it up freely
* No evidence that resident was aware that signing declaration amounted to waiver of rights to FOR
* Did not waive rights
* Clause infringes s.2(a) and cannot be saved

* **Freedom of religion:** freedom to undertake **practices and harbour beliefs having a nexus with religion** in which individual **demonstrates he/she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective** of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials
* Religion: freely and deeply held personal convictions or beliefs connected to an individual’s spiritual faith and linked to one’s self-definition and spiritual fulfilment, allowing to foster connection with divine or with object of spiritual faith

### Individual must show

1. Have a practice or belief within **nexus** of religion which calls for a particular **conduct**
   * Can be objectively/subjectively required; religious fulfillment is subjective and personal, does not need to be in conformity with religious dogma
   * However it must be **sincere** however must be in good faith and not capricious or fictitious; can change/evolve over time
2. That impugned conduct of third party interferes with ability to practice sincerely held beliefs requiring specihfic conduct
   1. Infringement must be more than trivial or insubstantial

* **Credibility, consistent with other religious practices, expert evidence; sincerity judged on basis of credibility**; also, expert evidence simply there for guidance – not an authority for credibility because religious practices are *personal* and immune to “standards”/dogma
* Just has to be LIKE religion, does not have to be one
* **Waiving FOR:**
* **Possible BUT** waiver of any right must be voluntary, freely expressed and with a clear understanding of the true consequences and effects of so doing if it is to be effective
* Possible to waive them, but you have to be obvious and clear about it
* Court wanting to avoid making any decisions regarding religions and religious beliefs

**Decision**: Have right to set up succah

## Multani v Commision Scolaire Marguerite Bourgeoys [2006] SCC 6

**Duty to make reasonable accommodation only extends to point at which causes undue hardship – threshold still high; in cases of administrative decisions, can use balancing/proportionality test in admin law – don’t always have to use s 1 analysis**

**Facts**:

* Student wearing kirpan to school
* School board banned this as it was dangerous weapon
* Kid claimed violation of s.2(a)

**Issue**: Was school board’s decision prohibiting student’s wearing of kirpan infringement on s.2(a)? Is it justifiable under s.1?

**Analysis**:

* Code of conduct authorised by statute (not just a policy) -- delegated authority to lower levels of admin
* S 2(a) is violated, but judges disagree on how to do the next stage of analysis -- should it be pure s 1 analysis? Or should it just be resolved on administrative law grounds?
  + This applies where there has been a decision made, not a law -- if there is a law, clearly using s 1 (in s 2(b), policies can count as a law if acts like one)
  + Minimal impairment the same as reasonable accommodation in admin law
* Charter applies to decision of council of commissioners/Code of Conduct
* Council is a creature of statute and derives its powers from statute
* Majority decides to go with s 1 analysis
  + Limit “prescribed by law” is within the meaning of s.1
  + FOR can be limited where freedom to act in accordance with beliefs may cause harm to others or interferes with rights of others

### Claimant of FOR infringement must prove:

* 1. Have a sincerely held belief or practice within nexus of religion which is held in good faith and is neither capricious nor fictitious (not objective)
  2. Impugned conduct of third party interferes in a manner that is non-trivial nor insubstantial with their ability to act in accordance with that practice/belief
* Boy proved that he sincerely believes that his faith requires him to wear kirpan (does not matter than other people chose not to, it is only his belief)
* Interference with Kirpan is neither trivial nor insignificant- forced to choose between religious conviction and education, he was forced to transfer schools; difference between affecting ability to practice religion, and outright interference
* Was not a minimal impairment of banning kirpan
* Undue hardship defence against duty of reasonable accommodation in context of human right legislation
* Can argue internal limits of safety, security and morals (not successful in this case) but cautiously

**Decision**: Violation cannot be saved under s.1; Decision nullified

**Dissent:** Don’t need sledgehammer of constitution, look with lesser things first like admin law; Don’t need always s.1 can use other balancing techniques

**When you have an administrative decision applying a perfectly valid statute in a way that infringes the Charter, can go either admin law or charter route when there is a proportionality analysis -- in our class go the charter route because that's what we have been taught BUT be aware of the fact that there is another route**

## Alberta v Hutterian Brethern of Wilson Colony [2009] SCC 377

**Cost/Benefit analysis in Oakes Test; Preservation of Meaningful Choice**

**Facts**:

* Alberta required all person who drive to hold photo drivers licence
* Purpose for preventing identity theft
* Religious group opposed to having photo taken and said this requirement infringed on s.2(a)

**Issue**:

* Infringement of s.2(a)? Saved under s.1?

**Analysis**:

* Pressing and substantial goal: minimizing risk of identity theft
* Photo requirement connected to goal and does not limit freedom more than required to achieve it
* Negative impact does not outweigh benefits associated with universal photo requirement
* Cost of not being able to drive does not rise to level of depriving Hutterian claimants of a meaningful choice as to their religious practice or adversely impacting on Charter values
* Obtaining alternative transport would impose additional economic cost on Colony-not prohibitive
* Law does not compel taking of a photo, it merely Provides that anyone who wishes to obtain a driver’s licence must a permit a photo be taken
* Driving automobile is not a right but a privilege
* Imposing financial cost does not rise to level of seriously affecting claimants’ right to pursue their religion
* Not insignificant cost but not enough
* Photos does not deprive embers of their ability to live in accordance with their beliefs
* Deleterious effects while not trivial fall at less serious end
* Impact of limit on religious practice associated is proportionate

* **Most cases resolved at minimal impairment level; but here, falls apart at the cost/benefit analysis** 
  + **Analysis is *different* when you get to the cost-benefit analysis (measuring the effects of the law-- tons of evidence when law has been in operation for some time)**
  + **when looking at effects, measuring impact of law (and its effects) on Charter values**
  + The deleterious effects of a limit on freedom of religion requires us to consider the impact in terms of Chartervalues such as liberty, human dignity, equality, autonomy and the enhancement of democracy.
  + Legislatures can only be asked to impose measures that reason and evidence suggest will be beneficial
  + No barometer to measure seriousness of particular limit on a religious practice
  + Religion is a matter of faith, intermingled with culture – individual yet also communitarian
  + Inevitable that religious freedom will be infringed from time to time but the **degree** of limit/impact is important 🡪 cannot deprive believers of meaningful choice, however, if effects are incidental and simply make religious belief/practice more costly (or cumbersome), adherents must be expected to bear them

**Decision**: Photo restriction justified under s.1 of Charter’

**Dissent**: Would not prevent identity theft- law is not proportionate; Driving is not a privilege but is vital to everyday life; Other ways to prevent fraud; Significantly impaired on way of life

## Saskatchewan v Whatcot [2013] SCC 11

* Freedom to express religious views is unlimited except by narrow requirement that they not be conveyed through hate speech

## Loyola High School case [2015]

* This decision may be very relevant to TRU decision coming up to SCC
* Question 1: can a high school claim freedom of religion? (in Big M case, SCC didn't decide either way whether a corporation could make this claim)
  + A high school *is* an organisation which is claiming benefit of freedom of conscience and religion (not charged with anything, just asking for this right)
  + Religious institutions can claim benefit of freedom of religion, Loyola is a religious institution
  + Religious organisation including educational institutions (even if they are corporations), can claim the protection of s 2(a) (MacLachlin)
* Question 2: S 1 analysis - admin or charter? -- Abella for majority thinks its admin; MacLachlin for minority thinks should be Charter

# ACCESS TO JUSTICE

## BCGEU v British Columbia (Attorney General), [1988] 2 SCR 214

**Rule of law and *Charter*. Preventing physical access to the courts goes against *Charter* rights. *Charter* applies to judicial orders.**

**Facts:** Union picketing at entrances to all BC courthouses. Judge issued an injunction that they couldn’t picket there.

**Issue:** Could the judge do this? Did it violate ss. 2(b)(c), 7, 11(a)(c) and (d) of the *Charter*? If so, is it justified?

**Analysis:**

* Dickson CJ bases his decision on the **rule of law** – principle that exists *within* the Const Act by implication
* The **rule of law** is the very foundation of the *Charter*. 🡪 **There cannot be a rule of law without access to justice**.
  + Affirmative statement that **timely, physical access to justice through the courts is an aspect of rule of law.**
* **However, there is no specific *Charter* right for access to justice 🡪 *Charter* values are applied instead**
* The picket line impeded access to justice by creating a physical barrier = delays = **justice delayed is justice denied**
* Requirement that entrants get picketers’ permission is a massive interference with legal/constitution rights of BC citizens and amounts to **Contempt of court**

= conduct designed to interfere with proper administration of justice. 🡪 **physical** interference with access to court

🡪 “criminal” because transcends the limits of any dispute between particular litigants and constitutes an affront to the administration of justice as a whole.

* **Judge’s order subject to *Charter* scrutiny** 🡪 The *Charter* applies to common law (*Dolphin*) and picketing for labour disputes is expression and therefore protected by s 2(b) (*Dolphin*).

S. 1 analysis:

* Assuring unimpeded access to courts isplainly an objective of sufficient importance/is pressing and substantial.
* There is a rational connection between the injunction and the objective.
* The injunction impaired the 2(b) rights minimally – it left them other ways and places to express themselves.
* Injunction was proportional – it was not intended to vindicate the dignity of courts/judges but rather to maintain access to the institution in our society directly charged with responsibility of ensuring respect for the *Charter*.
  + a significant element of the objective of the injunction was to protect *Charter* rights.

**Decision**: The order of an injunction was justified; **there is a constitutional right to access the courts**

* Applied in 2011 when the Occupy movement impeded access to courts 🡪 got an injunction and it was upheld because of this precedent (can’t deny access to courts)
* **Rule of Law ensures access to courts**
* **No discussion about access to *justice* though specifically**

## **British Columbia (Attorney General) v Christie, [2007] SCC** 21

**There is no positive right to access to justice in that there is no general constitutional right to counsel.**

**Facts:**

* *Social Service Tax Amendment Act* imposed a 7% tax on legal services for the purpose of funding legal aid in the province.
* However, the tax went into general revenue (impossible to know where it actually went).
* Christie claimed his clients could not pay their legal bills and the *Act* required him to pay the tax even if he himself had not been paid
* Claimed the net effect of the tax was to make it impossible for some of his clients to retain him to pursue their claims 🡪 unconstitutional to deny access to justice in this way
* He won at BCSC and BCCA🡪 got an exemption by being below a certain income level at BCSC; BCCA based their decision on the **core aspects of justice**

**Issue:** Is there a general fundamental constitutional right to access to justice? To access to a lawyer?

**Analysis:**

* **First argument**: a general fundamental constitutional right to access to justice by access to lawyers:
  + The right claimed here is broad– respondent must show Constitution mandates this particular form of access.
  + Based on decision in BCGEU = court affirmed constitutional right to access the courts
* Logical result of Christie’s claim is a constitutionally mandated legal aid scheme for virtually all legal proceedings.
  + The Court is not in a position to assess the cost to the public that the right would entail 🡪 **fiscal implications** can’t be denied
  + It would also lead people to bring claims before courts who would not otherwise do so.
  + What is being argued is not a small incremental change to delivery of legal services
* S. 92(14) gives provs power to pass laws in relation to administration of justice.
  + implies that provs have power to impose at least some conditions on how/when people can access the courts.
* **Second argument**: Right to have a lawyer is constitutionally protected as part of **rule of law** or a precondition to it.
  + Rule of law has at least 3 principles:
    1. The law is supreme over the govt and individuals
    2. Creation and maintenance of an actual order of positive laws
    3. the relationship between the state and the individual must be regulated by law.
  + **General access to legal services not currently recognised aspect of rule of law**
  + However, rule of law may include additional principles (*Imperial Tobacco*)
* The right to counsel is recognized as having constitutional status in certain situation however broad **general right to legal counsel is NOT a general aspect of rule of law**.
  + If it was a general right, the 10(b) right to counsel would be redundant.
  + Right to counsel is historically understood to be a limited right that extended only, if at all, to a criminal context.
  + Constitution, jurisprudence and historical understanding of rule of law do not foreclose the possibility that a right
* Here, there is not an adequate evidentiary base to say that the tax will adversely affect access to justice, so can’t kill the tax.

**Decision**: Christie loses.

\*\***TURNS OUT THAT CHRISTIE'S LAWYER NEVER EVEN ARGUED THAT EVERY PERSON SHOULD HAVE CONST. ACCESS TO A LAWYER**

🡪 he was only arguing that low income clients should be exempt from the tax!!

🡪 court was replying to Newbury’s JA quote on page 806 in casebook (para 7)

**BOTTOM LINE**: rule of law does not extend to right to be represented by a lawyer in court

🡪 Other costs in cases: hearing fees and transcript fees

## Trial Lawyers Association v BC [2014]

**Right to access courts goes beyond physical access**

* Involved a challenge to hearing fees 🡪 litigants have to pay on per diem basis
* First 3 days are free regarding hearing fees; 4-10: $500 a day; 10+ days: $800 a day
* Private family dispute: fighting over custody and property division – self represented
* At the beginning of the family trial, wife requested relief from payment of hearing fees
  + Trial went for 10 days comes out to be about ~$36 000
  + Can waive fees if the person would end up impoverished
* Judge invited trial lawyers association and CBA to argue the constitutionality of the hearing fees

**Decision**: hearing fees are invalid – relied on s 96 (appointing power) (remuneration reference – judicial independence found in between the lines of the preamble and brought into s 96)

* + Access to courts HAS to happen – part of independence of judiciary and its power to control access to courts and to prevent these kinds of situations
  + Hearing fees as impediments –litigants are not consumers
* At the SCC they didn’t quite get Mcewan J’s reasoning
* Start talking about how judicial independence protects core jurisdiction of s 96 courts
* Hearing fees in BC found to be unconstitutional

**Dissent: no proportionality analysis**

**So, impediments to access to the courts (and access to justice) have been declared invalid; goes beyond *physical* access of courthouses**

Rule of law may be a better foundation for this argument though, not s 96

Courts are also free to develop new aspects to rule of law

Btw, problem is that unwritten principles are just created, they cannot be “repealed” or whatever