CONSTITUTIONAL CAN – Term 2

EXTRATERRITORIALITY (FEDERALISM) 8

Reference re Upper Churchill Water Reservation Act 1984 (Newfoundland) (1984) 8

Unifund Assurance Co v Insurance Corp of BC (2003) 9

BC v Imperial Tobacco (2005) 9

APPLICABILITY (CHARTER) 10

McKinney v University of Guelph (1990) 12

Douglas/Kwantlen Faculty Association v Douglas College (1990) 12

Stoffman v Vancouver General Hospital (1990) 12

Grant v Torstar (2009) 12

Eldridge v British Columbia (AG) (1997) 13

Vriend v Alberta (1998) 13

Godbout v Longueuil (City) (1997) 13

JUSTIFICATION 13

R v Nova Scotia Pharmaceutical Society (1992) 14

R v Oakes (1986) 14

Newfoundland (Treasury Board) v (NAPE) (2004) 14

REMEDIES 14

Schachter v Canada (1992) 17

Vriend v Alberta (1998) 18

R v Ferguson (2008) 18

Vancouver v Ward (2010) 18

R v Conway (2010) 19

FREEDOM OF EXPRESSION 19

Irwin Toy v Québec (Attorney General) (1989) 23

R v Butler (1992) 23

City of Montreal v 2952-1366 Quebec Inc (2005) 24

R v Bryan (2007) 24

Baier v Alberta (2007) 25

Greater Vancouver Transportation Authority v. CFS – BC (2009) 25

Saskatchewan Human Rights Commission v Whatcott (2013) – SCC 26

FREEDOM OF RELIGION AND CONSCIENCE 26

R v Big M Drug Mart (1985) 28

Syndicat Northwest v Amselem (2004) [Quebec Charter case] 29

Multani v Commission Scolaire Marguerite Bourgeoys (2006) 29

Alberta v Hutterian Brethren of Wilson Colony (2009) 30

ACCESS TO JUSTICE; CONSTITUTIONAL PROCEDURE 30

BCGEU v British Columbia (AG) (1988) 30

British Columbia (AG) v Christie (2007) 30

Minister of Justice v Borowski (1981) 31

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| **CHARTER: freedom of expression, s. 2(b)** |
| **1. Determine if activity is *prima facie* w/in protected sphere of 2(b)** |
| Conveys Meaning  If activity conveys meaning, it qualifies *pf* as protected expression w/in meaning of s. 2(b) (*Irwin Toy*). Purely physical activity can also convey meaning (*Butler*). The content of the expression is not what determines whether it falls w/in the protected sphere of s(b).  Right to Disseminate Expression and Receive Expression  2(b) includes the right to hear/receive expression, not just right to disseminate expression (*Bryan*: issue was right to disseminate, but SCC recognized in obiter that 2(b) also includes right to receive).  Characterizing the Nature of Expression and Locating it w/in Protected Sphere of 2(b)  Crt must characterize the type of expression, and locate it w/in the protected sphere, either at the “core” of freedom of expression, at its “fringe”, or somewhere in between (*Irwin Toy*). Most recently in *Whatcott,* SCC said: “different types of expression will be relatively closer to or further from the core values behind the freedom, depending on the nature of the expression”. The closer to the core, the greater protection afforded to that type of expression.   * Advertising for children = **commercial expression**, outside core but not at fringe (*Irwin Toy*) * Pornographic videos = **sexual/obscene expression**, at the fringe (*Butler*) * Loudspeaker strip club = **commercial expression**, outside core but not at fringe (*City of M)* * Election results = **political expression**, at the core of 2(b) (*Bryan*) * Anti-gay pamphleting = **hate expression**, way the periphery/fringe of 2(b) (*Whatcott*) * **Receiving expression** = at the periphery/fringe of 2(b) (*Bryan,* in obiter) * **Religious expression** = pretty close to the core   [SCC has negative view of profit-making forms of expression, like advertising and porn > helpful if trying to argue that expression is not w/in protected scope of 2(b), or that infringement is justified] |
| **2. Determine if method or location removes activity from protected sphere of 2(b)** |
| Non-Violent  If method of expression is violent, it does not fall w/in protected sphere of 2(b). If method non-violent, expression comes w/in protected sphere of 2(b) (*Irwin Toy*). If content of expression is violent (e.g. violent sexual activity), but method is non-violent (e.g. video), that expression falls w/in 2(b) (*Butler*).  Location of Activity  Individuals do not have constitutional right to express themselves on all govt property. Some govt spaces are private in nature and excluded from protection under 2(b) (*City of Montreal*, affirmed in *GVTA*). Overarching test to determine if location is included in or immune from 2(b): *Is the place a public place where one would expect constitutional protection for free expression on the basis that the expression does not conflict w/ purposes underlying 2(b)?* Look at: (1) historical fcn of place, (2) present actual fcn of place, (3)whether others aspects of space suggest expression w/in it would undermine values underlying 2(b) [truth-finding, democratic discourse, self-fulfillment].   * Streets (*City of Montreal*). McLachlin CJ and Deschamps J: “Streets are clearly areas of public, as opposed to private, concourse, where expression of many varieties has long been accepted” * Buses (*GVTA*). Deschamps in *GVTA* said: “Like a city street, a city bus is a public place where individuals can openly interact with each other and their surroundings.” |
| **3. Determine if claim is for a positive right (access to a platform for expression)** |
| Defendant govt can argue or claimant can concede that they are claiming a positive right under 2(b) (*Baier*) [if defendant, you want to argue claim is for positive right b/c then claimant must overcome more hurdles before getting to *Oakes* test!]. Deschamps J in *GVTA* clarified that a positive right involves placing an obligation on the govt to provide the claimants w/ access to a platform for expression. If claimant is claiming a positive right, claimant must establish three additional *Dunmore* factors (*Baier*) b/c underinclusive legislation/govt actions have been generally held not to infringe 2(b), per *Haig.* 2(b) protects individuals from undue govt influence but generally does not go as far as requiring govt to facilitate expression, or to extend an underinclusive platform of expression to a particular group or individual (*GVTA).*  Three *Dunmore* Factors (set out in *Baier*)   1. That the claim is grounded in the fundamental freedom of expression rather than access to a particular statutory regime (*Baier*:SCC found claim grounded in access to school trusteeship, rather than fundamental freedom of expression) 2. That exclusion from statutory scheme has the:    1. Effect of substantially interfering w/ freedom of expression (*Baier*:SCC found exclusion from school trusteeship did not constitute substantial interference b/c school employees could still express themselves re education matters in other ways)    2. Purpose of infringing freedom of expression 3. That the govt is responsible for the claimant’s inability to exercise their fundamental freedom.   If claimant establishes these three factors = 2(b) infringement, and burden shifts to defendant govt to justify infringement under s. 1 (skipping to step #5). |
| **4. Determine if govt law infringes freedom of expression** |
| Purpose of law  Claimant can show that the purpose of the law was to restrict his or her freedom of expression (*Irwin Toy*). If this is established, burden shifts to govt to justify the infringement under s. 1.   * Purpose of ss. 248, 249 of QB’s *Consumer Protection Act*: to control nature and content of advertising (*Irwin Toy*) * Purpose of s. 163 obscenity provisions of Criminal Code: “specifically to restrict the communication of certain types of materials based on their content” (*Butler*) * Purpose of ss. 9(1) and 11 Montreal noise by-law prohibiting amplification of noise from sound equipment that can be heard outside = benign (*City of Montreal*)   Effect of law  Claimant can show that the effect of the law was to restrict his or her freedom of expression (*Irwin Toy*). To do so, claimant must persuade the crt that effect of law goes to one or more of principles underlying 2(b): (1) pursuit of truth; (2) participation in community; (3) individual self-fulfillment and human flourishing.   * Effect of ss. 9(1) and 11 Montreal noise by-law was to limit expression by restricting self-fulfillment (b/c loudspeaker encouraging passersby to engage in lawful leisure activities inside club > these activities promote self-fulfillment and human flourishing) (*City of Montreal*)   If claimant establishes purpose of law is to restrict his or her freedom, or that the effect of the law is to restrict his or freedom (and effect goes to one or more underlying principles of free expression), the burden then shifts to defendant govt to justify infringement under s. 1. |
| **5. Determine if infringement is justified as a reasonable limit under s. 1** |
| Limit “prescribed by law”  This requirement is flexible, both wrt form (e.g. statute, regulation, municipal by-laws, rule set by regulatory body) and standard for that form (doctrine of vagueness > law must be intelligible to public and those who apply it). Test for determining if a govt policy qualifies as “law” for purposes of s. 1: (a) policy must be binding rule of general application; (b) policy must not be for internal, administrative use only; (c) policy must be sufficiently precise and accessible to those to whom it applies. In *GVTA*, transit authorities’ advertising policies found to be “law” w/in meaning of s. 1.  Pressing and substantial objective   * Provisions of Quebec’s *Consumer Protection Act* prohibiting advertising directed at children 13 and under (*Irwin Toy*): protecting vulnerable children from “persuasive force of advertising”. * Criminal Code obscenity provisions (*Butler*): protect society from harm, esp women + children. * Montreal noise by-laws (*City of Montreal*): combatting noise pollution. * *Canada Elections Act* prohibition on election results publication (*Bryan*): informational equality. * Advertising policies (*GVTA*): to provide “a safe, welcoming public transit system”.   No shifting purpose: SCC in *Butler* said a law cannot have a shifting purpose. The original purpose of a provision remains the operative provision. In *Butler*, govt found a way to “(re)discover” the original intent of s. 163 Code in a way that “fit” w/ modern society. SCC said today it is not wrong for a law to have a moral component, but morality cannot be its sole purpose. Govt in *Butler* successfully argued that purpose of s. 163 obscenity provisions was to uphold morality and to protect certain portions of society, particularly women and children, from harm.  Rational Connection   * *Irwin Toy:* ban on advertising directed at children rationally connected to objective of protecting children from harmful “persuasive force” of advertising. * *Butler*: no need for direct causal link b/w obscenity and harm to society > sufficient for Parl to have “reasoned apprehension of harm”. * *City of Montreal:* prohibiting amplification of noise into street rationally connected to objective of combatting noise pollution. * *Bryan:* allowing voters access to results of voting in other areas would potentially violate objective of maintaining informational equality > govt need not establish empirical causal connection > logic and reason + available evidence sufficient to establish rational connection. * *GVTA:* NO RATIONAL CONNECTION > prohibiting *political* ads not rationally connected to preventing a dangerous, hostile public environment.   Minimal Impairment  **Vulnerable Groups** [important to rational connection + minimal impairment!]  Where claimant can identify a “vulnerable group”, crts will give Parliament/legislature more room (*Irwin Toy*, *Butler*).   * Children as a vulnerable group (*Irwin Toy*): “While evidence exists that other less intrusive options reflecting more modest objectives were available to the government… The Court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups.” * Women and children as a vulnerable group (*Butler*): though there was no direct causal link b/w obscenity and harm to society, to establish a rational connection b/w the objective of preventing harm to society and prohibition on obscene material in s. 163 of Code, sufficient for Parl to have a “reasoned apprehension of harm”. * Gay community (*Whatcott*): Sask legislature entitled to “a reasonable apprehension of societal harm as a result of hate speech” toward gay community   **Balancing Competing Interests** [important to rational connection + minimal impairment!]  Where Parliament/legislature was trying to mediate or find balance b/w competing groups in society, crts will give Parliament/legislature more room (*Irwin Toy, City of Montreal*) > sufficient for govt to have reasonable apprehension of harm (no need to prove empirical harm, or that absolutely least intrusive means chosen) > govt allowed a greater degree of deference. In *City of Montreal,* balancing public’s interest in healthy urban environment and club owner’s interest in business: “…in dealing w/ social issues like this one, where rights and interests conflict, elected officials must be accorded a measure of latitude. The Crt will not interfere simply b/c it can think of a better, less intrusive way to manage the problem. What is required is that the City establish that it has tailored the limit to the exigencies of the problem in a reasonable way” > govt entitled to deference if limit is reasonable. Majority SCC said by-law minimally impairment b/c possible to apply for permits to emit noise onto street, and no other reasonable way to solve noise pollution > cannot expect city officials to be running around w/ decibel metres. But Binnie J in dissent argued not minimal impairment b/c by-law too broad.  **Contextual Factors** [important to rational connection + minimal impairment!]  In *Bryan*, the SCC gave itself even more room to manoeuvre in s. 1 analysis, dispensing w/ the requirement for hard evidence and thereby reducing the defendant govt’s evidentiary burden. The SCC said no hard evidence is necessary when applying s. 1 b/c analysis can be based on logic and common sense, looking that the context of the impugned provisions. Contextual factors to consider, per *Bryan*: (1) the nature of the harm and the inability to measure it, (2) the vulnerability of the group protected, (3) subjective fears and apprehension of harm, (4) the nature of the infringed activity.  Proportionality b/w deleterious and salutary effects   * *Irwin Toy:* advertising companies are to some degree affected but still free to direct their messaging at parents and other adults. * *City of Montreal:* beneficial effects of by-law preserving healthy urban environment outweigh prejudicial effects on rights of strip club owner. * *Bryan*: importance of safeguarding our electoral democracy outweighs inconvenience to news broadcasters for 2-3 hrs only on election day.   In *Hutterian Brethren*, McLachlin CJ explained how a law that has passed the first three stages of the *Oakes* test might fail at the final stage of the s. 1 analysis: b/c while the first three stages are anchored in an assessment of the law’s purpose, the fourth stage branches out and takes into account the full “severity of the deleterious effects of a measure on individuals or groups”. The final stage of *Oakes* test allows for “a broader assessment of whether the benefits of the impugned law are worth the costs of the rights limitation” (*Hutterian Brethren*) > showing Hogg incorrect in suggesting that the proportionality of effects part of the justification analysis was redundant and never decisive in outcome of the analysis. *Hutterian Brethren* = first case where majority and dissent decisions hinged on final state of s. 1 analysis. |

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| **CHARTER: remedies under s. 52(1) or s. 24(1)** | |
| **Section 52(1)** is a blunt tool which provides that laws inconsistent w/ the Constitution are of no force or effect to extent of their inconsistency > general remedy for **unconstitutional laws** (*Ferguson*).  **Section 24(1)** gives judges wide discretion to grant remedies for Charter violations based on what it considers “appropriate and just in the circumstances” > case-by-case remedy for **unconstitutional govt acts committed pursuant to constitutional laws** (*Ferguson*). Section 24(1) limited to Charter breach only.  **Relationship b/w ss. 52(1) and 24(1):** Lamer CJ in *Schachter* left open the possibility of combining ss. 52(1) and 24(1), but unusual. Possibility: 52(1) temp suspension + 24(1) exemption (*Ferguson*).  Remember: focus of our remedies section was questioning the relationship b/w the judiciary and the legislative branch (= the separation of powers).  How to make seek a remedy for breach of Charter right or freedom   1. **[If law is inconsistent: define the extent of Charter inconsistency > one provision? one section? whole act?]** 2. **Identify the remedy/ remedies that will suit you client best.** 3. **Persuade crt that the particular remedy/remedies you are seeking represents the minimal degree of interference w/ the legislative branch.** | |
| **Striking Down**  s. 52(1) | **Where the whole of a statute is inconsistent, or if the whole of the statute cannot operate without the inconsistent parts, crts can strike down the whole statute** (*Schachter*). e.g. *Lord’s Day Act* struck down by SCC in *Big M.* |
| **Severance**  s. 52(1) | **Where a statute is inconsistent only to a certain extent, crts can strike down only the offending portion of that statute, plus any other parts that are necessarily connected to that offending portion (*Schachter*).** Need to ask: *Could the rest of statute operate as Parliament or legislature intended?* If yes, sever. If no, whole statute must be struck down (*Schachter*). Severance is not appropriate when the inconsistency is an omission (underinclusive law) (*Vriend*). How to justify severance: crt’s attempt to interfere w/ legislative branch as little as possible b/c severing is less intrusive than striking down (and reading in). |
| **Reading Down**  s. 52(1) | **Where a statute is inconsistent because it is too broad, or not express or explicit.** Because there is a presumption of constitutionality, reading down an overly broad provision is a way to make that provision constitutional. |
| **Reading In**  s. 52(1) | **Where a statute is inconsistent b/c it wrongly excludes rather than wrongly includes, crts can “read in” excluded group into statute (*Schachter*).** Lamer CJ in *Schachter* said need to consider two principles when deciding if reading in is appropriate remedy: (1) respect for role of legislature; (2) respect for purpose of Charter (e.g. enhancing protection for dignity and rights, per *Vriend*). So if you want something read in, you must justify it! Reading in is not appropriate remedy where it would constitute an intrusion by crts into legislative domain (*Schachter*). |
| **Temporary Suspension of Declaration of Invalidity**  s. 52(1) | **Where a statute is inconsistent, either in whole or in part, crt make suspend declaration of invalidity (striking down or severance) until Parliament or legislature can “fill the void” (*Schachter*).** A temp suspension of execution is an appropriate remedy: (a) when striking down legislation w/o enacting smthg in its place would pose danger to public, or threaten rule of law (*Schachter*); (b) when the law is inconsistent b/c underinclusive, so striking down whole/portion immediately would result in depravation of benefits to deserving ppl (*Schachter*). Advantage of temp suspension: gives Parliament or legislature time to change the law (*Schachter*). Disadvantage of temp suspension: unconstitutional law remains in force for period of time (*Schachter*). \*If temporary suspension granted, consider whether a s. 24(1) constitutional exemption is also warranted to give the claimant an effective remedy (*Ferguson*). |
| **Constitutional exemption**  s. 24(1) | **Where law remains in force but not applied where it violates a claimant’s Charter rights (*Ferguson*).** A constitutional exemption is an appropriate remedy only in unusual cases, when applied in connection w/ s. 52(1) declaration of invalidity and where doing so is necessary to give claimant an effective remedy (e.g. where law temporarily suspended) [but SCC left open possibility that you can get a constitutional exemption when law is valid = a loophole] (*Ferguson*). Constitutional exemption is generally an inappropriate remedy b/c it constitutes legislative interference and undermines the rule of law. A constitutional exemption should not be granted where Parl or legislature has made a law mandatory (e.g. mandatory min sentence, *Ferguson*). |
| **Damages**  s. 24(1) | **Damages are a unique public law remedy for breach of Charter, and a new endeavour so should be developed incrementally (*Ward*).** Damages are appropriate and just to extent that they serve a useful function or public purpose, which include: compensation, vindication, deterrence (*Ward*).  Five Steps for Awarding Damages (McLachlin CJ, *Ward*)   1. **Proof of Charter breach** 2. **Functional justification of damages:** need to show why damages are a “just and appropriate” remedy in this case, having regard to the following fcns they are capable of fulfilling    1. **Compensation** [focused on compensating claimant for their personal loss > physical, psychological, pecuniary]    2. **Vindication** [focused on harm Charter infringement causes society]    3. **Deterrence of future breaches** [aimed at influencing govt behaviour, to secure state compliance w/ Charter in the future] 3. **Countervailing factors:** if claimant succeeds at #2, state can argue that other considerations render 24(1) damages inappropriate or unjust    1. **Existence of alternative remedies** [if other remedies can meet need for compensation, vindication and/or deterrence, damage award serves no fcn not be “appropriate and just”]    2. **Concerns for good governance** [awarding damages may have chilling effect on govt conduct, negatively impact good governance]    3. **Not an exhaustive list.** Govt can raise other countervailing factors. 4. **Determine quantum of damages:** consider seriousness of breach, with regards to objects of 24(1) damages [compensation, vindication, deterrence] > “The award must be appropriate and just from the perspective of claimant and the state”. 5. **Crt awarding damages under 24(1) must be a crt of “competent jurisdiction”:** any crt (including administrative tribunals; but excluding provincial crts) w/ the power to decide questions of law, and from whom constitutional jurisdiction has not been clearly withdrawn, is a crt of competent jurisdiction (*Conway*). To have jurisdiction to apply a particular 24(1) remedy, crt must determine if Parliament or legislature anticipated that this particular remedy fit w/in admin tribunal or statutory crt’s jurisdiction (*Conway*, absolute discharge for dangerous offenders not w/in jurisdiction of ORB). Provincial crts ≠ crts of competent jurisdiction b/c range of remedies are limited (e.g. cannot award damages) < but Abella J (*Conway*)seems to ignore her own analysis (following another case). |
| **Declaration of violation**  s. 24(1) | **Crt may issue a declaration that a particular govt action has violated the claimant’s Charter rights (*Ward*).** A declaration of violation is an appropriate remedy where damages under s. 24(1) are not functionally justified, or overruled by countervailing factors (availability of alternative remedies, concern for good governance) (*Ward*). |
| **Other Remedies** s. 24(1) | 24(1) does not have finite list of remedies. It is up to complainant to ask crt for remedy that they think would be “appropriate and just” in their own circumstances. |

# JUSTIFICATION

### R v Oakes (1986)

**OAKES TEST: (1) PRESSING + SUBSTANTIAL OBJECTIVE, (2) PROPORTIONALITY TEST: (i) RATIONAL CONNECTION, (ii) MINIMAL IMPAIRMENT, (iii) PROPORTIONALITY B/W POSITIVE AND DELETERIOUS EFFECTS.** *Narcotics Control Act* raised presumption (if accused in possession of narcotic, presumed to be in possession for purpose of trafficking) and placed reverse onus on accused. SCC found reverse onus violated s. 11(d) Charter. Section 1 says rights and freedoms in Charter “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. SCC articulated four part test: (1) must be a pressing and substantial objective; (2) measures chosen must be rationally connected to objective; (3) measures must impair the right/freedom as little as possible; (4) must be proportionality b/w deleterious and positive effects of the measure. SCC found protecting society from drug trafficking was a pressing and substantial objective, but no rational connection so proportionality test not satisfied.

# REMEDIES

**Section 52(1):** a blunt tool which provides that laws inconsistent w/ the Constitutional are of no force or effect to extent of their inconsistency > general remedy for **unconstitutional laws** (*Ferguson*).

**Section 24(1)** gives judges wide discretion to grant remedies for Charter violations based on what it considers “appropriate and just in the circumstances” > case-by-case remedy for **unconstitutional govt acts committed pursuant to constitutional laws** (*Ferguson*). Section 24(1) limited to Charter breach only.

Relationship b/w ss. 52(1) and 24(1): Lamer CJ in *Schachter* left open the possibility of combining ss. 52(1) and 24(1), but unusual. Possibility: 52(1) temp suspension + 24(1) exemption (*Ferguson*).

Remember: focus of our remedies section was questioning the relationship b/w the judiciary and the legislative branch (= the separation of powers).

Remedies in Federalism cases:

* Declaration of invalidity, in whole or in part (validity, extraterritoriality)
* Declaration of inoperability, in whole or in part (IJI)
* Declaration of inapplicability, in whole or in part (paramountcy, extraterritoriality)
* Reading down (severance) or reading up > based on presumption of constitutional validity

Analysis for Charter remedies (adapted from *Schachter*):

1. **[If law is inconsistent: define the extent of Charter inconsistency].**
   1. Broad definition of inconsistency when law fails Part 1 of Oakes test
   2. Narrow definition of inconsistency when law fails Part 2 of Oakes test
   3. Flexible definition of inconsistency when law fails Part 3 or 4 of Oakes test
2. **Identify the remedy/ remedies that will suit you client best.**
   1. Striking down, s. 52(1) (*Schachter*)
   2. Severance, s. 52(1) (*Schachter*)
   3. Reading in, s. 52(1) (*Vriend*) [consider two principles set out by Lamer CJ in *Schachter*]
   4. Striking down or severance w/ temporary suspension of execution, s. 52(1) (*Schachter*)
   5. Constitutional exemption, s. 24(1) (*Ferguson*)
   6. Damages, s. 24(1) (*Ward*) [apply McLachlin CJ’s test for damages from Ward!]
   7. Declaration of violation of Charter right, s. 24(1) (*Ward*)
3. **Persuade crt that the particular remedy/remedies you are seeking represents the minimal degree of interference w/ the legislative branch.**

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| **Remedy** | **Description & Appropriateness** |
| **Striking Down**  s. 52(1) | **Where the whole of a statute is inconsistent, or if the whole of the statute cannot operate without the inconsistent parts, crts can strike down the whole statute** (*Schachter*). e.g. *Lord’s Day Act* struck down by SCC in *Big M.* |
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| **Temporary Suspension of Declaration of Invalidity**  s. 52(1) | **Where a statute is inconsistent, either in whole or in part, crt make suspend declaration of invalidity (striking down or severance) until Parliament or legislature can “fill the void” (*Schachter*).** A temp suspension of execution is an appropriate remedy: (a) when striking down legislation w/o enacting smthg in its place would pose danger to public, or threaten rule of law (*Schachter*); (b) when the law is inconsistent b/c underinclusive, so striking down whole/portion immediately would result in depravation of benefits to deserving ppl (*Schachter*). Advantage of temp suspension: gives Parliament or legislature time to change the law (*Schachter*). Disadvantage of temp suspension: unconstitutional law remains in force for period of time (*Schachter*). \*If temporary suspension granted, consider whether a s. 24(1) constitutional exemption is also warranted to give the claimant an effective remedy (*Ferguson*). |
| **Constitutional exemption**  s. 24(1) | **Where law remains in force but not applied where it violates a claimant’s Charter rights (*Ferguson*).** A constitutional exemption is an appropriate remedy only in unusual cases, when applied in connection w/ s. 52(1) declaration of invalidity and where doing so is necessary to give claimant an effective remedy (e.g. where law temporarily suspended) [but SCC left open possibility that you can get a constitutional exemption when law is valid = a loophole] (*Ferguson*). Constitutional exemption is generally an inappropriate remedy b/c it constitutes legislative interference and undermines the rule of law. A constitutional exemption should not be granted where Parl or legislature has made a law mandatory (e.g. mandatory min sentence, *Ferguson*). |
| **Damages**  s. 24(1) | **Damages are a unique public law remedy for breach of Charter, and a new endeavour so should be developed incrementally (*Ward*).** Damages are appropriate and just to extent that they serve a useful function or public purpose, which include: compensation, vindication, deterrence (*Ward*).  Five Steps for Awarding Damages (McLachlin CJ, *Ward*)   1. **Proof Charter breach** 2. **Functional justification of damages:** need to show why damages are a “just and appropriate” remedy in this case, having regard to the following fcns they are capable of fulfilling    1. **Compensation** [focused on compensating claimant for their personal loss > physical, psychological, pecuniary]    2. **Vindication** [focused on harm Charter infringement causes society]    3. **Deterrence of future breaches** [aimed at influencing govt behaviour, to secure state compliance w/ Charter in the future] 3. **Countervailing factors:** if claimant succeeds at #2, state can argue that other considerations render 24(1) damages inappropriate or unjust    1. **Existence of alternative remedies** [if other remedies can meet need for compensation, vindication and/or deterrence, damage award serves no fcn not be “appropriate and just”]    2. **Concerns for good governance** [awarding damages may have chilling effect on govt conduct, negatively impact good governance]    3. **Not an exhaustive list.** Govt can raise other countervailing factors. 4. **Determine quantum of damages:** consider seriousness of breach, with regards to objects of 24(1) damages [compensation, vindication, deterrence] > “The award must be appropriate and just from the perspective of claimant and the state”. 5. **Crt awarding damages under 24(1) must be a crt of “competent jurisdiction”:** any crt (including administrative tribunals; but excluding provincial crts) w/ the power to decide questions of law, and from whom constitutional jurisdiction has not been clearly withdrawn, is a crt of competent jurisdiction (*Conway*). To have jurisdiction to apply a particular 24(1) remedy, crt must determine if Parliament or legislature anticipated that this particular remedy fit w/in admin tribunal or statutory crt’s jurisdiction (*Conway*, absolute discharge for dangerous offenders not w/in jurisdiction of ORB). Provincial crts ≠ crts of competent jurisdiction b/c their range of remedies are limited (e.g. cannot award damages) < but Abella J (*Conway*)seems to ignore her own analysis (just following another case). |
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| **Other Remedies** s. 24(1) | 24(1) does not have finite list of remedies. It is up to complainant to ask crt for remedy that they think would be “appropriate and just” in their own circumstances. |

### Schachter v Canada (1992)

**OVERVIEW OF S. 52 AND S. 24 REMEDIES = A “MONOGRAPH” ON REMEDIES. FACTORS TO CONSIDER WHEN CHOOSING B/W SEVERANCE + READING IN. CRTS MAY TEMPORARILY SUSPEND DECLARATION OF INVALIDITY SO PARLIAMENT/LEGISLATURE CAN FILL VOID.** Schachter applied for child care benefits but was denied these benefits b/c he was not an adoptive parent (*Unemployment Insurance Act* only extended these benefits to adoptive, not biological, parents). Schachter challenged provision as violation of s. 15. **Where a law is inconsistent w/ the Charter, Lamer CJ said need to define the extent of the inconsistency to determine the appropriate remedy.** If legislation or legislative provision does not have a pressing substantial objective (fails Part 1 of Oakes Test), the inconsistency to be struck down should be defined very broadly. If legislation or legislative provision is deemed to have a substantial pressing objective but no rational connection (fails Part 2 of Oakes Test), the inconsistency to be struck down should be defined more narrowly > limited to the whole portion of the legislation that failed rational connection test. If legislation or legislative provision is not minimally intrusive (fails Part 3) or has disproportionate effects (fails Part 4), the inconsistency to be struck down can be defined flexibly > striking down, severing, or reading in may be appropriate. **Deciding whether severance or reading in is appropriate, crts should consider the following factors:** (1) remedial precision [crts should not read in where there is insufficient degree of precision b/c crt would be filling gaps in legislature’s job]; (2) interface w/ legislative objective [crts should avoid intruding into legislative sphere]; (3) change in significance of remaining portion [need to consider legislative scheme as whole; if remaining consistent provisions are necessarily connected to inconsistent parts, these should be severed too]; (4) significance or long-standing nature of remaining portion [if remaining portion is significant, long-standing in nature, strengthens assumption legislature would have enacted remaining section w/o inconsistent section]. **Temporary suspension of declaration of invalidity warranted when:** striking down immediately would pose danger to public or threaten the rule of law, or if legislation deemed unconstitutional b/c of underinclusiveness, so striking down law immediately would deprive deserving people of benefits and at the same time not benefit the individual whose rights violated. **Application to facts:** provision of benefit to adoptive parents unconstitutional b/c of underinclusive > severance not appropriate remedy b/c adoptive parents would lose benefit too. Reading in is also an inappropriate remedy b/c of budgetary implications of extending the benefit to biological parents (much larger group than adoptive parents) > “Given the nature of the benefit and the size of the group to whom it is sought to be extended, to read in natural parents would in these circumstances constitute a substantial intrusion into the legislative domain.” SCC decided to temporarily suspend declaration of invalidity of provision, to give legislature opportunity to amend the *Unemployment Insurance Act*.

### Vriend v Alberta (1998)

**READING IN AS AN APPROPRIATE REMEDY FOR UNDERINCLUSIVE LEGISLATION.** Vriend dismissed from job at private school when school learned he was gay. Vriend filed complaint under AB’s *Individual Rights Protection Act* but complaint dismissed on ground that sexual orientation not listed in prohibited grounds of discrimination under the Act. Vriend challenged constitutional validity of Act on basis that it violated his s. 15 rights. SCC agreed > omission of sexual orientation as a prohibited ground for discrimination violated s. 15 + not justified under s. 1. *Appropriate remedy for breach of Vriend’s Charter right?* SCC found severance not appropriate b/c inconsistency came from omission, and severing discrimination section akin to striking down whole Act. SCC concluded reading in was appropriate remedy that would minimally interfere w/ legislative intent. Iacobucci J noted, whatever remedy crt chooses, “legislative intent is necessarily interfered w/ to some extent”. Also, Iacobucci J noted that legislature can always pass new legislation in response to crts reading in, or can apply s. 33 override provision = “parliamentary safeguards”.

### R v Ferguson (2008)

**A CONSTITUTIONAL EXEMPTION UNDER S. 24(1) IS GENERALLY NOT AN APPROPRIATE REMEDY FOR A LAW THAT IS INCONSISTENT W/ THE CHARTER (APPROPRIATE REMEDY IS STRIKING DOWN OR SEVERANCE). A CONSTITUTIONAL EXEMPTION UNDER S. 24(1) WILL ONLY BE AN APPROPRIATE REMEDY IN UNUSUAL CASES, WHEN APPLIED IN CONNECTION W/ A S. 52(1) DECLARATION OF INVALIDITY + WHERE DOING SO NECESSARY TO PROVIDE CLAIMANT W/ EFFECTIVE REMEDY (e.g. where execution temporarily suspended).** Constable Ferguson challenged 4-yr min sentence imposed by Code for manslaughter w/ firearm as cruel unusual punishment contrary to s. 12 of Charter, and sought constitutional exemption under s. 24(1). *Is a stand-alone constitutional exemption an appropriate remedy where law inconsistent w/ Charter?* SCC found 4-yr min sentence did not constitute cruel and unusual punishment. In obiter, McLachlin CJ discussed appropriateness of constitutional exemption as a remedy. Arguments in favour: where mandatory min sentence is constitutional in most cases, and only generates unconstitutional result in small # of cases, better to grant constitutional exemption rather than strike down law as a whole. Arguments against: need to avoid intruding on role of legislature, general remedy for unconstitutional laws is s. 52, granting constitutional exemptions in mandatory min sentence cases undermines rule of law (“constitutional exemptions buy flexibility at the cost of undermining the rule of law”). McLachlin CJ says: a constitutional exemption will only be appropriate remedy in unusual cases, when applied in connection w/ s. 52(1) declaration of invalidity and where doing so necessary to give claimant an effective remedy (e.g. where striking down law has been temporarily suspended). Ferguson’s appeal dismissed.

### Vancouver v Ward (2010)

**DAMAGES = S. 24(1) REMEDY. DAMAGES = AVAILABLE REMEDY FOR CHARTER BREACH IF FUNCTIONALLY JUSTIFIED (COMPENSATION, VINDICATION, AND/OR DETERRENCE) + NOT INAPPROPRIATE, UNJUST B/C OF COUNTERVAILING FACTORS (ALTERNATIVE REMEDIES, GOOD GOVERNANCE). QUANTUM DEPENDS ON OBJECT(S) OF DAMAGES + SERIOUSNESS OF BREACH.** Ward’s Charter rights violated by municipal and provincial officials who detained and stripped searched him and seized his car following pie-throwing threat to PM Chretien in Chinatown. *When can damages be awarded under s. 24(1), and what is the appropriate quantum for these damages?* Damages can be awarded for a Charter breach where: (1) there is an established Charter breach; (2) claimant demonstrates that damages functionally justified b/c they fulfill compensation, vindication of the right, and/or deterrence of future breaches; and, (3) the state fails to establish that countervailing factors, like the existence of alternative remedies or concern for good governance, make damage award inappropriate or unjust. Once these requirements met, crt must determine appropriate quantum of damages based on “the seriousness of the breach, having regard to the objects of s. 24(1) damages” > “The award must be appropriate and just from the perspective of the claimant and the state.” SCC upheld $5000 award for strip search + $5000 award for wrongful imprisonment; substituted declaration under s. 24(1) that seizure of car violated Ward’s s. 8 right in place of $100 damages [b/c alternative remedy of declaration sufficient to meet need for vindication and deterrence; Ward suffered no injury w/ seizure so no compensation required].

### R v Conway (2010)

**ADMINISTRATIVE TRIBUNALS MAY QUALIFY AS COURTS OF COMPETENT JURISDICTION UNDER 24(1) > AUTHORITY TO RESOLVE CONSTITUTIONAL QS + GRANT 24(1) REMEDIES.** Conway found NCRMD and detained in ON mental health facilities. Conway sought an absolute discharge and order for psychotherapy (remedies under s. 24) on the basis that his Charter rights had been violated. Ontario Review Board concluded it did not have jurisdiction to consider Conway’s application for s. 24(1) remedy. SCC found that “administrative tribunals with the power to decide questions of law, and from whom constitutional jurisdiction has not been clearly withdrawn” have the jurisdiction to apply the Charter to issues arising in the course of carrying out their statutory mandate. Need to ask two Qs: (1) *Does admin tribunal or statutory crt have jurisdiction to answer Qs of law? (2) Did Parliament or legislature anticipate that this particular remedy fit w/in admin tribunal or stat crt’s jurisdiction?* Abella J’s conclusion: Board is a quasi-judicial body with authority to decide legal questions = a court of competent jurisdiction w/in s. 24(1). But not w/in Board’s mandate to grant remedies Conway seeks b/c requiring treatment not w/in Board’s mandate, and Parliament did not intend dangerous patients to have access to absolute discharges.

# FREEDOM OF EXPRESSION

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| --- |
| **1. Determine if activity is *prima facie* w/in protected sphere of 2(b)** |
| Conveys Meaning  If activity conveys meaning, it qualifies *pf* as protected expression w/in meaning of s. 2(b) (*Irwin Toy*). Purely physical activity can also convey meaning (*Butler*). The content of the expression is not what determines whether it falls w/in the protected sphere of s(b).  Right to Disseminate Expression and Receive Expression  2(b) includes the right to hear/receive expression, not just the right to disseminate expression (*Bryan*: issue was right to disseminate, but SCC recognized in obiter that 2(b) also includes right to receive).  Characterizing the Nature of Expression and Locating it w/in Protected Sphere of 2(b)  Crt must characterize the type of expression, and locate it w/in the protected sphere, either at the “core” of freedom of expression, at its “fringe”, or somewhere in between (*Irwin Toy*). Most recently in *Whatcott,* SCC said: “different types of expression will be relatively closer to or further from the core values behind the freedom, depending on the nature of the expression”. The closer to the core, the greater protection afforded to that type of expression.   * Advertising for children = **commercial expression**, outside core but not at fringe (*Irwin Toy*) * Pornographic videos = **sexual/obscene expression**, at the fringe (*Butler*) * Loudspeaker strip club = **commercial expression**, outside core but not at fringe (*City of M)* * Election results = **political expression**, at the core of 2(b) (*Bryan*) * Anti-gay pamphleting = **hate expression**, way the periphery/fringe of 2(b) (*Whatcott*) * **Receiving expression** = at the periphery/fringe of 2(b) (*Bryan,* in obiter) * **Religious expression** = pretty close to the core   [SCC has negative view of profit-making forms of expression, like advertising and porn > helpful if trying to argue that expression is not w/in protected scope of 2(b), or that infringement is justified] |
| **2. Determine if method or location removes activity from protected sphere of 2(b)** |
| Non-Violent  If method of expression is violent, it does not fall w/in protected sphere of 2(b). If method non-violent, expression comes w/in protected sphere of 2(b) (*Irwin Toy*). If content of expression is violent (e.g. violent sexual activity), but method is non-violent (e.g. video), that expression falls w/in 2(b) (*Butler*).  Location of Activity  Individuals do not have constitutional right to express themselves on all govt property. Some govt spaces are private in nature and excluded from protection under 2(b) (*City of Montreal*, affirmed in *GVTA*). Overarching test to determine if location is included in or immune from 2(b): *Is the place a public place where one would expect constitutional protection for free expression on the basis that the expression does not conflict w/ purposes underlying 2(b)?* Look at: (1) historical fcn of place, (2) present actual fcn of place, (3)whether others aspects of space suggest expression w/in it would undermine values underlying 2(b) [truth-finding, democratic discourse, self-fulfillment].   * Streets (*City of Montreal*). McLachlin CJ and Deschamps J: “Streets are clearly areas of public, as opposed to private, concourse, where expression of many varieties has long been accepted” * Buses (*GVTA*). Deschamps in *GVTA* said: “Like a city street, a city bus is a public place where individuals can openly interact with each other and their surroundings.” |
| **3. Determine if claim is for a positive right (access to a platform for expression)** |
| Defendant govt can argue or claimant can concede that they are claiming a positive right under 2(b) (*Baier*) [if defendant, you want to argue claim is for positive right b/c then claimant must overcome more hurdles before getting to *Oakes* test!]. Deschamps J in *GVTA* clarified that a positive right involves placing an obligation on the govt to provide the claimants w/ access to a platform for expression. If claimant is claiming a positive right, claimant must establish three additional *Dunmore* factors (*Baier*) b/c underinclusive legislation/govt actions have been generally held not to infringe 2(b), per *Haig.* 2(b) protects individuals from undue govt influence but generally does not go as far as requiring govt to facilitate expression, or to extend an underinclusive platform of expression to a particular group or individual (*GVTA).*  Three *Dunmore* Factors (set out in *Baier*)   1. That the claim is grounded in the fundamental freedom of expression rather than access to a particular statutory regime (*Baier*:SCC found claim grounded in access to school trusteeship, rather than fundamental freedom of expression) 2. That exclusion from statutory scheme has the:    1. Effect of substantially interfering w/ freedom of expression (*Baier*:SCC found exclusion from school trusteeship did not constitute substantial interference b/c school employees could still express themselves re education matters in other ways)    2. Purpose of infringing freedom of expression 3. That the govt is responsible for the claimant’s inability to exercise their fundamental freedom.   If claimant establishes these three factors = 2(b) infringement, and burden shifts to defendant govt to justify infringement under s. 1 (skipping to step #5). |
| **4. Determine if govt law infringes freedom of expression** |
| Purpose of law  Claimant can show that the purpose of the law was to restrict his or her freedom of expression (*Irwin Toy*). If this is established, burden shifts to govt to justify the infringement under s. 1.   * Purpose of ss. 248, 249 of QB’s *Consumer Protection Act*: to control nature and content of advertising (*Irwin Toy*) * Purpose of s. 163 obscenity provisions of Criminal Code: “specifically to restrict the communication of certain types of materials based on their content” (*Butler*) * Purpose of ss. 9(1) and 11 Montreal noise by-law prohibiting amplification of noise from sound equipment that can be heard outside = benign (*City of Montreal*)   Effect of law  Claimant can show that the effect of the law was to restrict his or her freedom of expression (*Irwin Toy*). To do so, claimant must persuade the crt that effect of law goes to one or more of principles underlying 2(b): (1) pursuit of truth; (2) participation in community; (3) individual self-fulfillment and human flourishing.   * Effect of ss. 9(1) and 11 Montreal noise by-law was to limit expression by restricting self-fulfillment (b/c loudspeaker encouraging passersby to engage in lawful leisure activities inside club > these activities promote self-fulfillment and human flourishing) (*City of Montreal*)   If claimant establishes purpose of law is to restrict his or her freedom, or that the effect of the law is to restrict his or freedom (and effect goes to one or more underlying principles of free expression), the burden then shifts to defendant govt to justify infringement under s. 1. |
| **5. Determine if infringement is justified as a reasonable limit under s. 1** |
| Limit “prescribed by law”  This requirement is flexible, both wrt form (e.g. statute, regulation, municipal by-laws, rule set by regulatory body) and standard for that form (doctrine of vagueness > law must be intelligible to public and those who apply it). Test for determining if a govt policy qualifies as “law” for purposes of s. 1: (a) policy must be binding rule of general application; (b) policy must not be for internal, administrative use only; (c) policy must be sufficiently precise and accessible to those to whom it applies. In *GVTA*, transit authorities’ advertising policies found to be “law” w/in meaning of s. 1.  Pressing and substantial objective   * Provisions of Quebec’s *Consumer Protection Act* prohibiting advertising directed at children 13 and under (*Irwin Toy*): protecting vulnerable children from “persuasive force of advertising”. * Criminal Code obscenity provisions (*Butler*): protect society from harm, esp women + children. * Montreal noise by-laws (*City of Montreal*): combatting noise pollution. * *Canada Elections Act* prohibition on election results publication (*Bryan*): informational equality. * Advertising policies (*GVTA*): to provide “a safe, welcoming public transit system”.   No shifting purpose: SCC in *Butler* said a law cannot have a shifting purpose. The original purpose of a provision remains the operative provision. In *Butler*, govt found a way to “(re)discover” the original intent of s. 163 Code in a way that “fit” w/ modern society. SCC said today it is not wrong for a law to have a moral component, but morality cannot be its sole purpose. Govt in *Butler* successfully argued that purpose of s. 163 obscenity provisions was to uphold morality and to protect certain portions of society, particularly women and children, from harm.  Rational Connection   * *Irwin Toy:* ban on advertising directed at children rationally connected to objective of protecting children from harmful “persuasive force” of advertising. * *Butler*: no need for direct causal link b/w obscenity and harm to society > sufficient for Parl to have “reasoned apprehension of harm”. * *City of Montreal:* prohibiting amplification of noise into street rationally connected to objective of combatting noise pollution. * *Bryan:* allowing voters access to results of voting in other areas would potentially violate objective of maintaining informational equality > govt need not establish empirical causal connection > logic and reason + available evidence sufficient to establish rational connection. * *GVTA:* NO RATIONAL CONNECTION > prohibiting *political* ads not rationally connected to preventing a dangerous, hostile public environment.   Minimal Impairment  **Vulnerable Groups** [important to rational connection + minimal impairment!]  Where claimant can identify a “vulnerable group”, crts will give Parliament/legislature more room (*Irwin Toy*, *Butler*).   * Children as a vulnerable group (*Irwin Toy*): “While evidence exists that other less intrusive options reflecting more modest objectives were available to the government… The Court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups.” * Women and children as a vulnerable group (*Butler*): though there was no direct causal link b/w obscenity and harm to society, to establish a rational connection b/w the objective of preventing harm to society and prohibition on obscene material in s. 163 of Code, sufficient for Parl to have a “reasoned apprehension of harm”. * Gay community (*Whatcott*): Sask legislature entitled to “a reasonable apprehension of societal harm as a result of hate speech” toward gay community   **Balancing Competing Interests** [important to rational connection + minimal impairment!]  Where Parliament/legislature was trying to mediate or find balance b/w competing groups in society, crts will give Parliament/legislature more room (*Irwin Toy, City of Montreal*) > sufficient for govt to have reasonable apprehension of harm (no need to prove empirical harm, or that absolutely least intrusive means chosen) > govt allowed a greater degree of deference.   * Public’s interest in healthy urban environment and club owner’s interest in business (*City of Montreal*): “…in dealing w/ social issues like this one, where rights and interests conflict, elected officials must be accorded a measure of latitude. The Crt will not interfere simply b/c it can think of a better, less intrusive way to manage the problem. What is required is that the City establish that it has tailored the limit to the exigencies of the problem in a reasonable way” > govt entitled to deference if limit is reasonable. Majority SCC said by-law minimally impairment b/c possible to apply for permits to emit noise onto street, and no other reasonable way to solve noise pollution > cannot expect city officials to be running around w/ decibel metres. But Binnie J in dissent argued not minimal impairment b/c by-law too broad.   **Contextual Factors** [important to rational connection + minimal impairment!]  In *Bryan*, the SCC gave itself even more room to manoeuvre in s. 1 analysis, dispensing w/ the requirement for hard evidence and thereby reducing the defendant govt’s evidentiary burden. The SCC said no hard evidence is necessary when applying s. 1 b/c analysis can be based on logic and common sense, looking that the context of the impugned provisions. Contextual factors to consider, per *Bryan*: (1) the nature of the harm and the inability to measure it, (2) the vulnerability of the group protected, (3) subjective fears and apprehension of harm, (4) the nature of the infringed activity.  Proportionality b/w deleterious and salutary effects   * *Irwin Toy:* advertising companies are to some degree affected but still free to direct their messaging at parents and other adults. * *City of Montreal:* beneficial effects of by-law preserving healthy urban environment outweigh prejudicial effects on rights of strip club owner. * *Bryan*: importance of safeguarding our electoral democracy outweighs inconvenience to news broadcasters for 2-3 hrs only on election day.   In *Hutterian Brethren*, McLachlin CJ explained how a law that has passed the first three stages of the *Oakes* test might fail at the final stage of the s. 1 analysis: b/c while the first three stages are anchored in an assessment of the law’s purpose, the fourth stage branches out and takes into account the full “severity of the deleterious effects of a measure on individuals or groups”. The final stage of *Oakes* test allows for “a broader assessment of whether the benefits of the impugned law are worth the costs of the rights limitation” (*Hutterian Brethren*) > showing Hogg incorrect in suggesting that the proportionality of effects part of the justification analysis was redundant and never decisive in outcome of the analysis. *Hutterian Brethren* = first case where majority and dissent decisions hinged on final state of s. 1 analysis. |

### Irwin Toy v Québec (Attorney General) (1989)

**SCOPE OF 2(B) AND TEST FOR DETERMINING INFRINGEMENT OF 2(B). “CORE” & “FRINGE” OF 2(B). COMMERCIAL EXPRESSION FALLS OUTSIDE CORE, CLOSER TO FRINGE.** Irwin Toy sought declaration that ss. 248 and 249 of QB’s *Consumer Protection Act,* which prohibited advertising directed at children, infringed 2(b). First, need to determine whether activity characterized as “expression” w/in meaning of 2(b): “if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee”, except if form of expression is violent. Meaning can be conveyed through spoke word, art, physical gestures, acts, etc. Advertising aimed at children conveys meaning in a non-violent form = *pf* w/in scope of 2(b). Second, need to determine whether purpose or effect of govt law/action is to restrict freedom of expression. If purpose is to restrict > s. 1 analysis. If purpose is not to restrict, need to analyze effect. Claimant must demonstrate activity promotes one+ principles underlying 2(b): pursuit of truth, participation in social and political decision-making, individual self-fulfillment [types of activities that promote these activities = “a matter of judicial appreciation to be developed on a case by case basis”]. Purpose of ss. 248, 249 of *Consumer Protection Act* is to control the nature and content of advertising. Burden shifted to QB AG to justify infringement. Yes pressing substantial objective (protecting vulnerable children from “persuasive force of advertising”). Yes rational connection (ban on advertising directed at children rationally connected to objective of protecting children from advertising). Yes minimal impairment (evidence that other “less intrusive options reflecting more modest objectives were available to the govt” but vulnerable group, no crt should not take restrictive approach to social science evidence “and require legislatures to choose the least ambitious means to protect vulnerable groups”). Yes proportionality b/w deleterious and salutary effects (advertising companies are to some degree affected, but free to direct messaging at parents and other adults). Conclusion: ss. 248, 249 of *CPA* reasonable limits on freedom of expression. [Dickson CJ, Lamer and Wilson JJ]

### R v Butler (1992)

**AN ACTIVITY CAN BE PURELY PHYSICAL BUT STILL CONVEY MEANING. IF THE MEANING OF AN ACTIVITY IS VIOLENT, BUT ITS FORM IS NON-VIOLENT, THE ACTIVITY FALLS W/IN PROTECTED SPHERE OF 2(B).** Butler sold sexual paraphernalia, videos, magazines in his sex shop and was charged with 77 counts under Code’s obscenity provisions in s. 163. Butler was convicted on 8 counts related to 8 pornographic films. SCC emphasized distinction b/w purely physical activities that do not convey meaning (e.g. parking car, day-to-day tasks) and activities w/ expressive content that may be “physical” but convey “ideas, opinions, or feelings”. Form of expression = video, which is non-violent, so does not fall outside protected sphere of 2(b). Purpose of s. 163 of Code = “specifically to restrict the communication of certain types of materials based on their content” > therefore, s. 163 Code infringes 2(b). Burden shifts to govt to defend impugned provision as a demonstrably justified limit. Qualifies as “limit prescribed by law” b/c “undue” does not have technical defn but crts have had no problem interpreting it (“flexibility and vagueness are not synonymous”, per *Morgentaler*). Yes pressing substantial objective (avoiding harm to society, particularly women and children). Yes rational connection (s. 163 rationally connected to objective of preventing harm to society > no direct causal link b/w obscenity and harm to society, but sufficient for Parl to have “reasoned apprehension of harm”). Yes minimally intrusive (s. 163 designed to capture only material that create risks of societal harm > does not capture sexual activity that is not degrading or not dehumanizing). Yes proportionality b/w deleterious and salutary effects. Conclusion: s. 163 of Code reasonable limit on freedom of expression. [Sopinka J]

### City of Montreal v 2952-1366 Quebec Inc (2005)

**NOT ALL LOCATIONS FALL W/IN PROTECTED SPHERE OF 2(B). TEST FOR DETERMINING IF LOCATION IS W/IN PROTECTED SPHERE.** Respondent operated strip club in Montreal, and had a loudspeaker at the club entrance amplifying music and commentary from inside the club onto the street. Respondent charged w/ offence of producing noise that could be heard outside using sound equipment, contrary to ss. 9(1) and 11 of noise by-law. Respondent argued ss. 9(1) and 11 of by-law infringed freedom of expression. Loudspeaker conveyed meaning (about show inside club) > non-violent expressive content therefore *prima facie* w/in protective scope of 2(b). But 2(b) protection does not extend to all places/locations (e.g. some govt owned places like cabinet meeting rooms or private office require privacy, and are not w/in scope of 2(b)). Test to determine if govt-owned property is location that falls w/in protected sphere of 2(b): *Is the place a public place where one would expect constitutional protection for free expression on the basis that the expression does not conflict w/ purposes that 2(b) intended to serve [democratic discourse, truth finding, self-fulfillment]?* Consider historical + actual fcn of place, whether others aspects of space suggest expression w/in it would undermine values underlying freedom of expression. Streets as a location = clearly w/in protected sphere of 2(b). Purpose of by-law is benign. However, effect of by-law is to limit expression by restricting self-fulfillment (b/c loudspeaker encouraging passersby to engage in lawful leisure activities inside club > these activities promote self-fulfillment and human flourishing). Burden shifts to govt to defend impugned provision under s.1. Yes pressing substantial objective (combatting noise pollution). Yes rational connection (prohibiting amplification of noise into street rationally connected to objective of combatting noise pollution). Yes minimal impairment (“in dealing w/ social issues like this one, where rights and interests conflict, elected officials must be accorded a measure of latitude. The Crt will not interfere simply b/c it can think of a better, less intrusive way to manage the problem. What is required is that the City establish that it has tailored the limit to the exigencies of the problem in a reasonable way” > City entitled to deference so long as the limit is reasonable). Yes proportionality (beneficial effects of by-law preserving healthy urban enviro outweigh prejudicial effects on rights of club owner). Conclusion: ss. 9(1) and 11 of noise by-law reasonable limit on freedom of expression. [Binnie J in dissent argued by-law not justified = “a clear case of legislative overkill” > by-law too broad b/c it could cover someone listening quietly to radio on a bench] [McLachlin CJ, Deschamps J for majority; Binnie J dissent]

### R v Bryan (2007)

**WHEN APPLYING OAKES TEST, IMPUGNED PROVISION MUST BE VIEWED IN ITS CONTEXT (SCC GIVING ITSELF MORE ROOM TO MANOEUVRE > REDUCING GOVT’S EVIDENTIARY BURDEN IN S. 1 ANALYSIS). CONTEXTUAL FACTORS: (1) NATURE OF HARM + INABILITY TO MEASURE IT, (2) VULNERABILITY OF GROUP PROTECTED, (3) SUBJECTIVE FEARS AND APPREHENSION OF HARM, (4) NATURE OF INFRINGED ACTIVITY. EXPANSION OF 2(B) TO INCLUDE RIGHT TO RECEIVE EXPRESSION (IN *OBITER*).** During 2000 fed election, Bryan posted election results from Atlantic Canada online before polling stations closed; this constituted a violation of s. 329 of *Canada Elections Act >* Bryan was charged, then challenged s. 329 on basis that it infringed 2(b). Bastarache J said: impugned provision must be viewed in context, and context can best be established by reference to four factors: (1) nature of harm and inability to measured it [nature of harm based on logic and common sense, b/c lack of empirical data, is loss of public confidence in electoral system]; (2) vulnerability of group protected [s. 329 intended to protect Cdb votes as a whole, but particularly Western voters]; (3) subjective fears and apprehension of harm [Cdns subjective perception of that election system is fair + informational equality is vital]; (4) nature of infringed activity [election results are part of political process and at core of expression > of fundamental importance to free, democratic society; but informational equality also important]. Yes pressing substantial objective (maintaining informational equality). Yes rational connection (allowing voters access to results of voting in other areas would potentially violate objective > AG need not establish empirical causal connection > logic and reason + available evidence = sufficient to establish rational connection). Yes minimal impairment (context most important at this stage of Oakes Test; staggered voting hours another option, but publication ban reasonable to protect public confidence). Yes proportionality b/w salutary and deleterious effects (2-3 hrs election day > inconvenience to news broadcasters outweighed by importance of safeguarding our electoral democracy). Conclusion: s. 329 of *Canada Elections Act* a reasonable limit on freedom of expression. [Abella J in dissent argued fails minimal impairment and proportionality > no reasonable basis for assuming Cdn voters will perceive electoral process as unfair, will adjust voting behaviour; the harm of suppressing core political speech outweighs benefits of ban] [Bastarache J for majority]

### Baier v Alberta (2007)

**IF CLAIMANT SEEKS POSITIVE ENTITLEMENT TO GOVT ACTION (ACCESS TO PLATFORM FOR EXPRESSION), NEED TO CONSIDER 3 *DUNMORE* FACTORS TO ESTABLISH 2(B) INFRINGEMENT = EXCEPTION TO GENERAL RULE THAT UNDERINCLUSIVE LAW OR GOVT ACTION DOES NOT INFRINGE 2(B).** AB’s *Local Authorities Election Act* amended to prohibit school employees from running for election as school trustees while employed (school employees had to take leave of absence or resign to run). Yes expressive activity (school trusteeship). Yes positive right claimed (claimants seek reinclusion in currently underinclusive statutory scheme). Dunmore factors: first factor not met b/c claim grounded in access to a particular statutory regime (school trusteeship), not grounded in the fundamental freedom of expression; also, second factor not met b/c exclusion from statutory scheme does not amount to a substantial interference w/ their freedom of expression (they cannot be school trustees, but can express themselves re education matters in other manners). Conclusion: claim was for access to a statutory platform and does not meet *Dunmore* criteria so does not warrant “an exception to the general rule that freedom of expression under s. 2(b) of the Charter does not grant the right to a statutorily created platform for expression”. No infringement, so no need to consider Oakes Test. [Rothstein J]

### Greater Vancouver Transportation Authority v. CFS – BC (2009)

**COMPLETE 2(B) ANALYSIS: s.32? > *pf w/in* 2(b)? > method? > location? > positive right? > infringement? > justified? > remdy?** Translink and BC Transit refused Canadian Federation of Students and BC Teachers’ Federation ads (encouraging young people to vote) for sides of buses, on basis that ads not permitted by Articles 2, 7 and 9 of transit authorities’ advertisement policies (restricted ads to non-political, non-ideological, non-controversial, non-offensive information). CFS + BCTF challenged Articles 2, 7, 9 as violations of their right to freedom of expression. SCC determined BC Transit and Translink both govt entities w/in meaning of s. 32 (substantial control by provincial, municipal govts) > b/c govt entities, all Translink and BC Transit activities subject to the Charter. Next, SCC determined that CFS and BCTF were not claiming a positive right (claim not characterized as one against underinclusion) > the transit authorities rejected their ads on the basis of their content (political msgs) > CFS and BCTF were not excluded from advertising on the sides of buses (platform of expression), only the content of their ads restricted (distinguishing *Baier* > teachers sought access to platform, trusteeship). *Baier* not triggered in this case b/c CFS and BCTF asserting negative, not positive, right. Next, SCC considered whether 2(b) protection should be denied on the basis of location (side of bus). Crt determined that sides of buses are public places where one would expect constitutional protection for free expression [historical and actual fcn = some history and present use as platforms for expression; also, buses by nature public, not private, spaces > “Like a city street, a city bus is a public place where individuals can openly interact with each other and their surroundings” > finally, expression on side of buses would enhance democratic discourse, truth-finding and self-fulfillment, rather than undermining these principles underlying 2(b)]. Infringement established > burden shifted to transit authorities to establish ad policies reasonable limits. Yes pressing substantial objective (to provide “a safe, welcoming public transit system”. No rational connection (prohibiting *political* ads not rationally connected to preventing dangerous, hostile enviro). No minimal impairment either (policies a “blanket exclusion of a highly valued form of expression in a public location” > political expression!). Finally, SCC determined policies were also “law” for purpose of s. 52(1), so appropriate remedy is declaration of invalidity.

### Saskatchewan Human Rights Commission v Whatcott (2013) – SCC

**LATEST SCC COMMENTARY ON FREEDOM OF EXPRESSION > DISCUSSION ABOUT “CORE”.** Whatcott a member of a Christian organization distributing fliers w/ anti-gay messages to peoples’ homes in Sask. Human Rights Tribunal received several complaints that Whatcott was distributing hate literature. SCC held that part of Human Rights Code was too broad, infringed freedom of expression > this portion was severed from the Code. Other portion of Human Rights Code was upheld as a reasonable limit on freedom of expression. SCC said: “different types of expression will be relatively closer to or further from the core values behind the freedom, depending on the nature of the expression”. *Where is hate speech located?* “Hate speech is at some distance from the spirit of s. 2(b) b/c it does little to promote, and can in fact impede, the values underlying freedom of expression. …hate speech can also distort or limit the robust and free exchange of ideas by its tendency to silence the voice of its target group.”