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# Chapter 16: The Advent of the Charter

## The Merits of Entrenchment and the Legitimacy of Judicial Review

- Charter = transformation from legislative supremacy to constitutional supremacy (*Vriend*)

### W. Bogart, Courts and Country (p. 737)

- **For the Charter**: allows individuals to seek vindication in an open, public and responsive process; unites Canadians; Canadian society was structured by the elite; recognizes ‘other’ identities, weakens tendencies of regionalism; gives voices to those who are not heard in political forum; s 33; protects democracy’s functioning, does not review substantive decisions made by elected officials; independent judges protect the disadvantaged

- **Against the Charter**: costs of access to courts privilege the powerful and organized; elected reps allow for vigorous, responsive and respected democracy; elected gov’t officials have been more effective at improving societal problems; unaccountable and elitist judges; did not come about because of widespread abuse or popular outcry

### A. Petter, “Immaculate Deception: The Charter’s Hidden Agenda” (p. 739)

- **Against the Charter:** more likely to undermine than to advance interests of socially and economically disadvantaged Canadians. Charter does not apply to major source of inequality: unequal distribution of property among private parties. Progress has almost always come from democratic rather than judicial arena. Costs of gaining access to system = institutional barrier for disadvantaged. Elitist demographics of judiciary – judges view their role as policing the boundary between the ‘natural’ zone of individual autonomy and the ‘unnatural’ activities of the state.

### L. Weinrib, “’Limitations on Rights’ in a Constitutional Democracy” (p. 743)

- **For the Charter:** rights protection operates as supreme law; political forum not always able to address valued embodied in rights; rights protection assures a structure of gov’t faithful to values inherent in a dignified human life; judiciary avoids problems of political motivations; can force legislature to recognize

and correct unforeseen consequences of legislative activity.

### P.W. Hogg and A.A. Bushell, Dialogue Theory (p. 746)

- **For the Charter**: judicial review is part of a dialogue between judges and legislatures; usually judicial decisions to strike down a law can be reversed, modified or avoided by leg process; Charter can act as a catalyst for a 2-way exchange between judiciary and leg on human rights and freedoms, but rarely raises an absolute barrier to wishes of democratic institutions;

- Features that facilitate dialogue: (1) s 33; (2) s 1; (3) ‘qualified rights’ in ss 7, 8, 9 and 12; (4) guarantee of equality rights under s 15(1) which can be satisfied through a variety of remedial measures

- May be barriers to dialogue where objective of impugned leg is deemed unconstitutional or where controversial issues makes it impossible for leg to fashion response to Charter decision

- **K Roach:** American debate about judicial activism has been inappropriately imported into Canada, w/o a recognition of the fundamental structural differences between the Charter and the American Bill of Rights – may lead to excessive judicial deference

- **FL Morton and R Knopff**: Hogg’s defence of judicial review as a form of dialogue between legislatures and courts is too simplistic because it fails to recognize staying power of a new, judicially created policy status quo, especially when issue cuts across normal lines of partisan cleavage and divides a gov’t caucus

* Hogg’s answer to their criticisms: If Charter decisions are ultimately reviewable by elective leg bodies, using the distinctively Canadian vehicles of ss 1 or 33, then it becomes much less significant whether the decisions have been achieved through the efforts of the Court Party or have been made in disregard of popular sentiment

- **Dialogue theory in action**: *RJR* concerned leg enacted by feds on tobacco advertising – struck down as infringement on s 2(b) by SCC – feds made new leg *Tobacco Act and Regulations*, not exactly as suggested by SCC – SCC upheld new leg as valid infringement under s 1

### A. Petter, Twenty Years of Charter Justification: From Liberal Legalism to Dubious Dialogue

- **Liberal legalism**: role of courts is to act as impartial arbiters whose responsibilities do not extend to policy-making, but are limited to objective interpretation of legal texts and unbiased adjudications of legal issues - Oakes test diminished the subjective appearance of section 1 by providing an ostensibly neutral framework for judicial decision-making.

- **Demise of liberal legalism:** not credible that Charter cases were neutral and apolitical; liberal legalism out of sync w/ 20th C social norms and realities; unexpected complexity of cases

- **Dialogue theory:** Charter decisions are another contribution to democratic policy-making process

**- Criticisms of dialogue theory**: acknowledges subjective nature of Charter decisions; lacks normative content; no moral claim for why judges should be involved; discounts extent to which judicial decision-making under Charter drives public policy-making; exaggerates influence of legs; plays down privileged position of courts; ignores extent to which Charter rights shape public debate and influence public policy

#### Vriend v. Alberta (1988) (p. 751)

F: P dismissed from college because of sexual orientation. Sexual orientation not included in *Alberta Human Rights Act* as a conscious decision. P claims that omission is violation of Charter.

A: Iacobucci: Courts must scrutinize leg and exec action in interests of new social K that was democratically chosen. Courts can be relied upon to make reasoned and principled decisions. More dynamic interaction among branches of gov’t – necessitates respect among them – each branch is accountable to others.

C: Sexual orientation read into *AHRA*.

### Arguments Pro and Con the Charter

|  |  |
| --- | --- |
| **Con** | **Pro** |
| 1. History tells us that improvements in the lives of ordinary people, and particularly those who suffer from economic and social disadvantage, have come more often from legislative bodies than from the courts (worker’s compensation schemes, labour relations codes, employment standards legislation, human rights codes, social welfare programs, medicare, etc.).2. By giving unelected and unaccountable judges the power to annul decisions made by the elected representatives of the people, especially on the basis of the vague and general language that one usually finds in an entrenched charter, such an instrument is intrinsically anti-democratic.3. By moving difficult moral and other issues (abortion, assisted suicide, access to health care, etc.) out of the political arena and into the courts, an entrenched charter saps the strength of the democratic process.4. Only those with significant financial resources will be able to enforce their entrenched rights and freedoms through the courts, which means not only that those rights and freedoms will only be meaningful to a few, but also that the courts will tend to construe the rights and freedoms in a way that reflects the interests of those few. 5. Judges are ill-suited in terms of both their education and their professional experience to resolve the often difficult issues of social and economic policy that an entrenched charter will generate.6. The adversarial process itself, which limits participation to two opposing parties and results in outright winners and losers, is ill-suited to resolve such issues, particularly those which engage the interests of many individuals and/or groups within society.7. An entrenched charter promotes in the minds of both judges and ordinary citizens the unfounded notion that the state is always the enemy, and never the friend, of freedom.8. An entrenched charter’s emphasis on individual rights works against the sense of community and collective responsibility for the general welfare that is necessary for the maintenance of a healthy society.9. Entrenching some rights and freedoms and not others in a constitution introduces an undesirable element of inflexibility into the constitutional order, particularly over the long term.10. An entrenched charter has the effect of polarizing individuals and groups within society, thereby reducing their willingness to seek out through the political process compromise solutions to issues that engage their differing interests. | 1. Our legislative bodies are not responsive to the needs and interests of each and every group within society, particularly the marginalized and unpopular, and cannot therefore be trusted to represent everyone fairly.2. Our legislative bodies are also not all-knowing and cannot therefore always foresee the effects that their actions will have on individuals and groups within society.3. An entrenched charter enhances democratic self-government by obliging governments (when called upon by courts to do so) to provide a rational justification for actions they take that infringe on basic rights and freedoms.4. An entrenched charter guarantees that difficult moral and other issues involving basic rights and freedoms can be considered by a dispassionate body on the basis of fundamental values and principles rather than short-term political interests.5. An entrenched charter offers to outsiders to the ordinary democratic process another forum in which they can be heard in the resolution of important societal issues.6. Democracy is about more than simple majority rule – it is also about the promotion of individual human dignity, a higher order value that an entrenched charter also helps to promote.7. An entrenched charter need not be limited to the protection of individual rights and freedoms – it can also protect the interests of collectivities. 8. An entrenched charter need not be limited to the constraining of governmental power – it can also oblige governments to act.9. An entrenched charter constrains the powers not only of legislative bodies, but also of government officials (especially the police), and in its application to the latter, poses no challenge to democratic self-government.10. Depending on the basis upon which they are made, decisions annulling legislation will often leave the elected branches of government with room in which to pursue the same ends in new legislation, thereby leaving the elected branches of government with the last word (the “dialogue theory”). |

# Chapter 17: The Framework of the Charter (p. 757)

See analytical framework sheet.

## I. Interpreting Rights

- Many of provisions of *Charter*, including many of right/freedom-granting provisions, are formulated in vague and general language, which means that judges have had a good deal of room to manoeuvre in giving meaning and content to them.

- Charter is a constitutional doc – constitutional interpretation is different from ordinary statutory interpretation

- SCC evidenced no concerns in its early *Charter* decisions about legitimacy of judicial review (e.g., *Hunter v. Southam* and *Ref. re s. 94(2) of the MVA*).

- SCC showed itself to be reluctant in its early *Charter* cases to rely on sources of guidance that suggested that the rights and freedoms should be construed narrowly (e.g., a prior *Canadian Bill of Rights* decision in *Therens*, and the legislative history of s. 7 in *Ref. re S. 94(2) of the MVA*).

### The Purposive Approach

- A judgment about scope/value of a particular right can only be made after court has specified purpose underlying right or delineated nature of interests it is meant to protect. Provision must be interpreted consistently in light of larger purposes of Charter as a whole.

- Analysis is to be undertaken, and purpose of the right/freedom in question is to be sought by ref to character and larger objects of the Charter itself, to language chosen to articulate specific right, to historical origins of concepts enshrined, and where applicable, to meaning and purpose of other specific rights and freedoms w/ which it is associated within text of Charter (*Big M Drug Mart*)

- Not necessary to read ‘internal’ limits into definition of a particular right, can be left to s 1 stage (*Therens*)

#### Hunter v. Southam (1984) (p. 758) SECTION 8

F: S 8 freedom from unreasonable search and seizure. A search of newspaper offices was carried out by *Combines Investigation Branch.* Statutory basis for search did not require judicial authorization.

L: Dickson: Constitution must be capable of growth and dev’t over time to meet new social, political and historical realities – overall purpose of Act/provision matters, not drafter’s intent. Charter is a purposive doc – its purpose is to guarantee and to protect, within limits of reason, enjoyment of rights and freedoms it enshrines – it is intended to constrain gov’t action inconsistent w/ those rights and freedoms; not in itself an authorization for gov’t action.

A: Purpose of s 8 is to protect reasonable expectations of privacy – must be interpreted as constrain on gov’t action which interferes w/ that protection.

C: Provisions of CIA are invalid – appeal dismissed.

R: **Charter must be interpreted using purposive approach. Courts should identify interests the particular right/freedom was intended to protect, and then construe right/freedom in such a way that it protects those interests. Rights and freedoms should be interpreted generously/broadly/liberally.**

### Aids to Interpretation

To help them decide what meaning and content should be, judges have had a large number of potential sources of guidance to rely on, including *inter alia* the language used in the specific provision in question, the language used in related *Charter* provisions (e.g., s 15(2) in relation to s. 15(1)), the presence of s. 1, the interpretations given to similarly worded provisions in the *Canadian Bill of* *Rights*, other prior Canadian jurisprudence in which rights/freedoms protected by the *Charter* have been discussed, the text of related right/freedom-granting provisions in international and foreign domestic bills/charters of rights, the interpretations given to those provisions, the legislative history of the *Charter* [cautiously], philosophical writings, historical writings about the origins of certain rights/freedoms, the interpretive provisions of the *Charter* itself (e.g., s. 27), academic literature, and the fact that the *Charter* was enacted in both English and French

## II. Finding an Infringement

#### R v. Big M Drug Mart Ltd (1985) (p. 843) SECTION 2(A)

F: D charged w/ unlawfully carrying on sale of goods on Sunday contrary to fed *Lord’s Day Act*. D challenged constitutionality of *LDA* under s 2 of Charter – guarantee of freedom of conscience and religion.

I: Does Act infringe upon s 2 freedom of religion?

L: S 4 of *LDA* prohibits anybody from carrying on business on a Sunday.

A: Dickson: Purpose of *LDA* is coercion of non-Christians into observing Christian Sabbath. Effects are to be considered when law under review has passed, or at least has purportedly passed, purpose test. **There cannot be a shifting purpose**: presents practical difficulties and goes against fundamental notions developed in our law concerning nature of Parliamentary intention. **Freedom = absence of coercion/constraint.** Both purpose and effect are infringement on s 2(a). S 1: Cannot be justified on basis of need for universal day of rest – no shifting purpose.

C: Infringes s 2 Charter, not saved under s 1. Appeal dismissed.

R: **A claimant can demonstrate an infringement of a Charter right/freedom on basis of either purpose/effect of impugned gov’t action.** In order to demonstrate infringement on basis of purpose of impugned gov’t action, claimant has to show that purpose was ‘invalid’ or ‘illegitimate’ or ‘not consonant w/ guarantees enshrined in Charter’. Only purpose that matters in this context is original purpose gov’t had in mind when it enacted impugned leg/took impugned action. Effects-based infringement can be found on basis of not only such blatant forms of compulsion as direct commands to act/refrain from acting on pain of sanction, but also indirect forms of control which determine/limit alternative courses of conduct available to others.

#### Edwards Books and Art Ltd v. The Queen (1986) (p. 851) SECTION 2(A)

F: Constitutional validity of Sunday closing leg enacted by ON – *Retail Business Holidays Act*. More regulatory than prohibitory in comparison to *LDA*. P is Saturday-observer who cannot take off Saturday instead of Sunday because their business is too big.

I: Does *RBHA* infringe on s 2 freedom of religion?

L: Ss 2 and 7 make it an offence to carry on a retail business on a holiday. Diverse array of exceptions under ss 3 and 4. S 3(4) applies to businesses which, on Sundays, have 7 or fewer employees etc. – exempts these businesses from having to close on Sunday if they closed on the previous Saturday.

A: Dickson: Act has secular purpose – was designed to ensure that disadvantaged retail workers could get Sundays off. One is not being compelled to engage in religious practices merely because a statutory obligation coincides w/ dictates of a particular religion. Disadvantages Saturday observers. S 1: balancing of interests of more than 7 employees to a common pause day against freedom of religion of those affected constitutes justification for exemption scheme selected by ON, at least in a context wherein any satisfactory alternative scheme involves an inquiry into religious beliefs. Beetz: economic harm suffered by Saturday observer is because of their religion, not because of Act. Wilson: would sever paragraphs that limit exemption to smaller retailers. La Forest: would be upheld even w/o exemption.

C: Infringes s 2, but upheld under s 1.

R: **Effects-based infringement will not be found where burden imposed by impugned gov’t action on interest protected by right/freedom is trivial or insubstantial.**

## III. Justifying an Infringement: Section 1

S 1 imposes 2 obligations on a gov’t seeking to justify an infringement of a Charter right/freedom: it has to satisfy court that that infringement is both (a) prescribed by law and (b) reasonable and demonstrably justified in a free and democratic society. Standard of proof is civil standard: proof by preponderance of probability (*Oakes*).

## A. Prescribed by Law

**(i) Basis in Law**

- Basic rule of law requirement that, when gov’ts act to limit rights/freedoms of citizenry, they have at a min to have a basis in law (statutory or common) for doing so (*Therens*)

- *Therens:* SCC interpreted the “basis in law” requirement very strictly - failure of a police officer to respect an individual’s s. 10(b) right would only satisfy that requirement if that failure could be said to have been “expressly provided for by statute or regulation [or CL rule], or result by necessary implication from the terms of a statute or regulation [or CL rule]” (which could not be said to have been true in the circumstances of that case).

* SCC has not applied that strict interpretation in all cases in which the “legal basis” requirement has been raised (*Slaight*), and it would appear that that interpretation may only be appropriate now in the context of infringements of rights in the Legal Rights category by law enforcement officials.

- *Slaight*: arbitrator orders employer to write reference letter – compelled expression found to be infringement of freedom of expression – prescribed by law requirement met (flexible application)

* May now be enough if the gov’t official/body that has infringed on a *Charter* right/freedom has been granted a discretion that can fairly be said to authorize action taken (subject to that action being held to be reasonable and demonstrably justified in accordance with the other half of s. 1).

**(ii) Accessible and Precise**

- *Sunday Times v UK* (1979):

1. Law must be adequately **accessible**
2. Must be formulated w/ sufficient **precision** to foresee, to a degree that is reasonable in circumstances, consequences which a given action may entail.

- SCC has interpreted the “reasonable/sufficient precision” requirement very loosely, with test being “whether leg has provided an intelligible standard according to which judiciary must do its work” (*Irwin Toy*).

- SCC has said that it is reluctant to invalidate leg on basis of this requirement, and that it prefers to review allegations of undue vagueness within the context of its application of the minimal impairment requirement under the Oakes framework (*Taylor* and *Osborne*).

- Reason given by SCC for both low standard it has set for gov’ts under “reasonable/sufficient precision” requirement, and its reluctance to invalidate legislation on the basis of that requirement, is that governments in this day and age often need to legislate in relatively general terms - which in some circumstances will entail granting broad discretionary authority to subordinate bodies/officials – in order to govern effectively (*Osborne* and *Nova Scotia Pharmaceutical*).

* Excessive emphasis on precision in language may unduly restrict leg in accomplishing their objectives (*Irwin Toy*)

## B. Justification

- SCC did not attempt to establish a general analytical framework for “reasonable/demonstrably justified” component of s. 1 in first few cases in which it was called upon to apply that section of Charter; however, it made it clear in those cases that it was going to impose a high standard of justification on gov’ts (*Quebec Protestant School Boards, Big M Drug Mart* and *Singh*)

### 1. The Oakes Test

- *Oakes* includes an attempt by Dickson to define **nature of a “free and democratic society”:** this he did in terms of a (non-exhaustive) set of “values and principles” – “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, and faith in social and political institutions which enhance the participation of individuals and groups in society.”

- Criticisms: might be too tough a test for gov’t to meet; in weighing, there were different ways of framing what was in balance

#### R v. Oakes (1986) (p. 774) SECTION 11(D)

F: S 8 of the *Narcotic Control Act* created a ‘rebuttable presumption’ that once fact of possession of a narcotic had been proven, an intention to traffic would be inferred unless A established absence of such an intention. S 8 violates s 11(d) of Charter.

I: Is s 8 of *NCA* upheld under s 1 of Charter?

A: Dickson: Evidence should be cogent and persuasive. Court will need to know what alternative measures were available to legislators. Objective of protecting society from ills associated w/ drug trafficking are of sufficient importance. Means chosen not rationally connected.

C: Appeal dismissed.

### 2. The Subsequent Development of the Oakes Test: Context and Deference

#### Edmonton Journal v. Alberta (AG) (1989) (p. 781) SECTION 2(B)

F: Newspaper challenged s 30(1) of Alberta *Judicature Act*, which limited publication of info arising out of court proceedings in matrimonial disputes. Provision is contrary to s 2(b) of Charter, Court split on justification issue.

A: Wilson: Contextual approach in balancing right to privacy against freedom of press under s 1 is more appropriate. Both interests must be seen as public ones – and balanced in context. Right to freedom of expression is different in context of publishing details of a couple’s marriage.

C: Violation is not a reasonable limit under s 1.

R: *Oakes* framework must be applied in a **contextualized** rather than abstract manner, because a contextual approach recognizes that a particular right/freedom may have a different value depending on context, and is therefore more sensitive to reality of dilemma posed by particular facts and therefore more conducive to finding a fair and just compromise between 2 competing values under s 1.

**Deference Discussion**

- Nothing in *Oakes* to suggest that courts might need to show deference to elected branches of gov’t in some cases, but need for such deference was acknowledged by Dickson in *Edwards Books and Art* (1986).

* Factors considered by Dickson to be relevant to need for deference included fact that gov’t there was seeking to protect interests of a vulnerable group, that leg regulated business activities, that issue w/ which gov’t sought to address was complex one, and that gov’t had clearly given that issue a good deal of careful thought before it selected solution it did.

- In *Irwin Toy* (1989), SCC suggested that cases could be characterized in either one of two ways for purposes of deference inquiry depending on appropriate manner in which to conceive of state in circumstances of each case: (a) state as mediator between and amongst the interests of competing groups within society (high deference), and (b) state as singular antagonist of the individual (low or no deference).

* Bifurcated approach to the deference inquiry was a function of concerns about both democratic legitimacy and functional efficiency.
* Court also considers: conflicting social science evidence; value of infringed activity

- In *RJR*, McLachlin suggested that bifurcated approach was flawed because even in cases within context of criminal law state can be said to be mediating between and amongst the interests of competing individuals and groups within society.

- Since *RJR*, SCC has preferred to deal with the deference inquiry as part and parcel of its contextualized approach to the application of the *Oakes* framework, with appropriate degree of deference in a particular case therefore being a function of a number of factors, including whether or not gov’t was trying to protect interests of a vulnerable group, subjective fears and apprehension of harm of any such group, whether or not relationship between particular harm gov’t was seeking to address and activity gov’t chose to prohibit or regulate can be measured scientifically, whether or not effectiveness of action taken by gov’t can be measured scientifically, and relative importance of interest protected by right/freedom at stake (*Thomson Newspapers*)

- There may be other factors worth considering in the context of the deference inquiry, including whether or not the impugned action was taken by a body/official within the executive rather than legislative branch of government, whether or not Canada’s foreign relations were implicated in the government’s decision to take the impugned action, whether or not the government can be said to have acted hastily when it took the impugned action (especially if that action entailed the enactment of legislation), whether or not judges can be said to have more expertise in the area in question than the other branches of government, and the number of different groups within society whose interests can be said to have been taken into account by the government when it took the action it did (again especially if that action entailed the enactment of legislation).

### 3. Modifications to Merits: Second Stage

2. (a) Courts rarely find that restriction fails ‘**pressing and substantial purpose’** – exception is *Big M*

* *Butler*: rule against shifting purpose does not preclude a shift in emphasis of law’s general purpose
* *N.A.P.E.*: saving money may suffice as a sufficiently pressing purpose

2. (b)(i) Courts most often find that justification under s 1 fails on **minimal impairment/rational connection**

* If rationality or effectiveness is a relative judgment, then plenty of space for other factors, such as importance of law’s objective and value of restricted activity, to affect court’s judgment that law is (in)sufficiently effective/rational in advancement of its purpose
* Rational connection inquiry imposes on gov’ts obligation to satisfy court that there is a logical, common sense connection between impugned gov’t action and objective(s) gov’t was seeking to further when it took that action (*Keegstra*, *Butler* and *RJR*). While evidence supporting existence of such a connection is helpful, it is not always required. As a result of this understanding, gov’ts have very rarely been held to have failed to satisfy this requirement, and claimants now usually concede that it has been met.

2. (b)(ii) Law will fail minimal impairment test when court considers that a small/debatable decrease in law’s effectiveness in achieving its substantial and pressing purpose will significantly reduce its interference w/ protected right

* Minimal impairment, since *RJR*, has been understood as merely within a range of reasonable alternatives, not “as little as possible.” Two common arguments are that there were alternative means and that the legislation is overbroad. Overbreadth argument is more often successful (*Keegstra, Butler* and *RJR*).

2. (b)(iii) Deleterious effects or disproportionate effects test – requires **proportionality** between effects of the measures that are responsible for limiting the Charter right/freedom, and the objective that has been identified as of ‘sufficient importance’

* *Dagenais*: in applying this test, courts must consider not only objective of impugned law but also its salutary effects

*-* Until recently, SCC has rarely spent much time on last step in the *Oakes* framework – costs v. benefits analysis – primarily because it has tended to roll this analysis into its application of minimal impairment step.

- However, there have been signs in a couple of recent decisions (*Bryan* and *Hutterian Brotherhood*) that this step might be becoming more important, at least in cases in which there is a lack of hard evidence supporting the government’s claim that the impugned action has generated/will generate significant salutary effects.

# Chapter 18: Application

## Principles Governing Scope of Charter’s Application

### Government

**1. The *Charter* applies to leg and exec/admin branches of fed and provincial gov’ts**

**(a) in respect of all of the functions that they perform and**

* *Dolphin Delivery*: ‘gov’t’ in s 32 = exec gov’t; Charter applies to leg/exec/admin branches whether or not their action is invoked in public or private litigation
* *Lavigne*: Charter does not exclusively apply to reg actions of gov’t
* *Godbout*: Charter application is not restricted to entities that are part of formal aspects of gov’t

**(b) in respect of inaction as well as inaction.**

* *Vriend*: s 32 can apply to gov’t inaction
* *Dunmore*: gov’t may have positive obligations to protect freedom of association of vulnerable groups
	+ NB: both *Vriend* and *Dunmore* challenged leg that was underinclusive – lacking in equality protection

**2. Entities that are not formally within leg and exec/admin branches of fed and provincial gov’ts will still be considered to be entities to which the *Charter* applies in accordance w/ Principle #1 if;**

**(a) its activities are subject to the routine and regular/substantial control of gov’t,**

* *McKinney, Douglas College, Stoffman, Lavigne*: has to be routine and regular, not enough for it to be general control
* *McKinney* and *Stoffman*: VGH and universities not under sufficient gov’t control
* *Douglas*: Douglas College is under sufficient gov’t control
* *GVTA*: BCTransit and TransLink are under sufficient control – normal statutory control is not enough – need additional controls

**(b) they perform quintessentially gov’t functions, and/or**

* *McKinney/Godbout*: municipalities perform quintessentially gov’t function – they fall under the Charter

**(c) they exercise the power of statutory compulsion pursuant to statutory authority.**

* *Blenco*: acts of BC Human Rights Commission are subject to *Charter*
* *Slaight*: arbitrator under Canada Labour Code is not immunized from Charter despite high degree of independence – discretion conferred by gov’t cannot give power to infringe Charter

- *McKinney*: mere fact that an entity is a creature of statute and has been given legal attributes of a natural person is in no way sufficient to make its actions subject to Charter; public purpose test is not enough

- *Re Klein and Law Society of Upper Canada* (1985): rules of Law Society of Upper Canada w/ respect to lawyers’ advertising were found to be subject to Charter

### Private Actors

**3. The *Charter* does not apply to private actors (i.e. actors not considered to be “gov’t” for purposes of Principle #1).**

* *Dolphin Delivery*: does not apply where A sues B relying on CL and no act of gov’t is relied upon to support action
* *McKinney*: to open up all private and public action to judicial review could strangle operation of society and diminish area of freedom within which individuals can act
* *Hill v Church of Scientology, Harrison*

**4. However, if a private actor is implementing a specific policy/program on behalf of either fed or provincial gov’t, that private actor will be considered to be “gov’t” insofar as – but only insofar as – its conduct in implementing that policy/program is concerned**.

* *Eldridge*: ‘public function’ is not sufficient
	+ To extent that public hospitals in BC are implementing MediCare, hospitals become in that limited sense gov’t and Charter applies to them in course of this implementation
* *Godbout*: s 32 not restricted to entities that are formally part of structure of fed or provincial gov’ts; entity must be acting in ‘governmental’ as opposed to merely ‘public’ capacity; municipalities are governmental entities
* *Re Klein, Slaight, Blenco*

### Courts

**5. The *Charter* does not apply directly to the courts when they are adjudicating private disputes on the basis of the CL.**

* NB: if Charter does not apply to CL, then it applies more heavily in QC
* Criticisms: s 52 says that “any law” that is inconsistent w/ Constitution will be held invalid; legal rights category of Charter; Bill of Rights applies to courts and CL in US
	+ Hogg: should have subjected CL to Charter to extent that CL has ‘crystallized’ into a rule that can be enforced by courts
* *Dolphin Delivery*: courts are not part of gov’t for purposes of s 32; Charter will apply to CL only in so far as CL is basis of gov’t action which infringes a right/freedom
* *Hill; R v Salituro; Pepsi-Cola*

**6. However, the courts will entertain claims that the CL in this context is inconsistent w/ “Charter values”, and is therefore in need of revision**.

* *Salituro* and *Pepsi-Cola*: CL does not reflect Charter values
* *Swain*
* *Dolphin Delivery*: judiciary ought to apply and develop principles of CL in manner consistent w/ fundamental values enshrined in Constitution
* *Hill*: for challenges to infringement of Charter values – more flexible inquiry (don’t have to follow steps in *Oakes*) – Charter values weighed against principles which underlie CL, burden rests on challenger throughout; courts may make incremental revisions to CL to have it comply w/ Charter values
	+ Party challenging CL cannot allege that CL violates a Charter right – but they can argue that it is inconsistent w/ Charter value

**7. The Charter does apply directly to the courts when they are presiding over criminal/quasi-criminal disputes and otherwise performing “public functions.”**

* *Rahey*: s 11 right infringed by court by not being tried within reasonable time
* *BCGEU*
* *Swain:* if it is possible to reformulate a CL rule so that it will not conflict w/ PFJ, such a reformulation should be undertaken

## I. Introduction: The Debate about Application to Private Action

**Vertical application**: Charter applies only to gov’t to protect everyone below gov’t. **Horizontal application** would risk coercing individuals to behave in certain ways.

#### Retail, Wholesale and Department Store Union, Local 580 v Dolphin Delivery (1986) (p. 797) SECTION 2(B)

F: Validity of court order restraining P union from picketing premises of D company. D company is not employer of union. Applicable labour leg, *Canada Labour Code*, did not regulate secondary picketing. D sought injunction on basis of CL. Union sought to have injunction overturned on ground that it violated its members’ freedom of expression and freedom of association.

I: Does the Charter apply to this dispute?

A: McIntyre: Peaceful picketing enjoys protection under s 2(b). Courts are neutral arbiters. To regard a court order as an element of gov’t intervention necessary to invoke Charter would widen scope of Charter application to virtually all private litigation

C: Appeal dismissed.

## II. Governmental Action

## A. Government Actors

Not all entities that have powers conferred on them by statute, that are controlled to some degree by gov’t, or that receive public funding will qualify as ‘gov’t’ for purpose of s 32.

## 1. Entities Controlled by Government

#### McKinney v University of Guelph (1990) (p. 803) SECTION 15

F: Challenge of mandatory retirement policies at universities in ON under s 15 of Charter.

I: Are universities gov’t actors under s 32 of Charter?

A: La Forest: Universities acting on their own initiative. More required than: provincial policies reshaping universities; funding from leg; definition of tuition fees by gov’t; gov’t control over new programs; heavy gov’t reg. Though leg may determine much of env’t in which universities operate, they function as autonomous bodies within that env’t. Wilson (dissent): 3 tests to help identify kinds of bodies that ought to be constrained by Charter; (1) control, (2) gov’t function, (3) statutory authority and public interest – universities satisfy all 3 tests.

C: Universities’ mandatory retirement policies do not come within concept of gov’t action.

#### Harrison v UBC (1990) (p. 807) SECTION 15

C: Charter is not directly applicable to university’s mandatory retirement policy.

#### Stoffman v VGH (1990) (p. 807) SECTION 15

F: Majority of board is appointed by gov’t; governing statute required that all regs be approved by Minister.

C: Hospital not part of gov’t nor was reg in issue an act of gov’t.

#### Douglas/Kwantlen Faculty Association v Douglas College (1990) (p. 807) SECTION 15

F: Affairs of college managed by board appointed by provincial gov’t.

A: Board is not only appointed and removable at pleasure by gov’t; gov’t may at all times by law direct its operation – part of apparatus of gov’t in form and in fact. They are subject to routine and regular control.

C: Charter applies to actions of college in negotiation and admin of collective agreement.

#### Greater Vancouver Transportation Authority v CFS – BC Component (2009) (p. 807) SECTION 2(B)

A: BC Transit is a statutory body designated by leg as an agent of gov’t w/ a board of directors whose members are all appointed by LG in Council. LG in Council has power to manage BC Transit’s affairs and ops by means of regs. Same conclusion for TransLink – relevant leg gave municipality substantial control over TransLink’s day-to-day ops. While TransLink was not itself part of apparatus of gov’t, it was gov’t in light of substantial control that municipality exercised over it. A gov’t should not be able to shirk its Charter obligations by simply conferring its powers on another entity.

C: TransLink and BC Transit bound by Charter – their advertising policies had to be rewritten to comply w/ s 2(b) of Charter.

#### Lavigne v Ontario Public Service Employees Union (1991) (p. 807) SECTION 2(B)

F: Charter challenge by faculty member at community college to union’s expenditure of dues on political causes that he did not support.

A: ON Council of Regents subject to routine/regular control by Minister. Charter does not exclusively apply to reg activities of gov’t.

C: Charter does apply.

## 2. Entities Exercising Governmental Functions

#### Godbout v Longueueil (City) (1997) (p. 811) SECTION 7

F: City of Longueuil adopted resolution requiring all new permanent employees to reside within its boundaries.

A: La Forest (dissent - majority resolved on alternative grounds): Municipalities: democratically elected; accountable to constituents; general taxing power; make, administer and enforce laws; derive authority from provinces.

C: City’s residence requirement violated right to respect for private life set out in s 5 of QC’s Charter of Human Rights and Freedoms. La Forest: residence policy also violates Charter s 7 – municipalities are subject to Charter.

D: Majority of SCC has yet to determine explicitly whether municipalities are subject to Charter.

## B. Governmental Acts

## 1. Entities Implementing Government Programs

#### Eldridge v BC (AG) (1997) (p. 816) SECTION 15

F: 3 individuals sought a declaration that failure to provide public funding for sign language interpreters for deaf when they received medical services violated s 15 of Charter. *Medical and Health Care Services Act* – power to decide whether a service is ‘medically required’ and hence a ‘benefit’ under Act is delegated to Medical Services Commission. *Hospital Insurance Act* – hospitals were given discretion to determine which services should be provided free of charge.

A: La Forest: It is possible for leg to give authority to a body that is not subject to Charter. Alleged discrimination here is intimately connected to medical service delivery system instituted by leg.

C: Failure to provide funding for sign language interpretation violated applicants’ equality rights.

## 2. Entities Exercising Statutory Powers of Compulsion

Charter applies to non-gov’t actors exercising coercive statutory powers.

#### Slaight Communications Inc v Davidson (1989) (p. 820) SECTION 2(B)

A: An adjudicator exercising delegated powers does not have power to make an order that would result in an infringement of Charter, and he exceeds his jurisdiction if he does so.

#### Blenco v BC (Human Rights Commission) (2000) (p. 820) SECTION 7

I: Do lengthy delays resulting from Human Rights Commission’s processing of sexual harassment complaints against Blencoe violate his rights under s 7?

A: Even though the Commission was not part of apparatus of gov’t, its acts could be subject to Charter. Charged w/ implementing a specific gov’t policy or program. Exercised statutory powers of compulsion. Charter applies to Commission’s acts in processing the complaint.

## III. Governmental Inaction

When a court finds that a leg omission violates Charter, it is saying that CL that operates in absence of leg needs to be revised to bring it into conformity w/ Charter.

#### Vriend v Alberta (1998) (p. 821) SECTION 15

F: Challenge to omission of sexual orientation from AB’s *Individual’s Rights Protection Act* – leg history demonstrated clearly that omission was deliberate.

I: Does s 32 of Charter prohibit consideration of a s 15 violation when that issue arises from a leg omission?

C: Cory: Omission violated V’s equality rights – ‘sexual orientation’ should be read into relevant provisions of Act.

#### Dunmore v ON (AG) (2001) (p. 823) SECTION 2(D)

F: Labour leg that excluded agricultural workers from right to form a trade union and bargain collectively w/ their employers.

A: Underinclusive state action falls into suspicion not simply to extent it discriminates against an unprotected class, but to extent it substantially orchestrates, encourages or sustains violation of fundamental freedoms. **BUT one must always guard against reviewing leg silence, particularly where no leg has been enacted in first place.**

C: Exclusion violated freedom of association.

## IV. Application of Charter to Courts and the Common Law

## A. Reliance by Government on Common Law

Where a CL rule is relied upon by Crown in criminal proceedings, Charter applies as state prosecution provides requisite element of gov’t action.

#### BCGEU v BC (AG) (1988) (p. 825) SECTION 2(B)

F: Issued a temporary injunction restraining gov’t employees on lawful strike from picketing a courthouse.

A: Dickson: Motivation for court’s action is entirely ‘public’ in nature. Crim law being applied to vindicate rule of law and fundamental freedoms protected by Charter. BUT this branch of crim law must comply w/ fundamental standards established by Charter.

C: Injunction did not violate Charter.

## B. Reliance on Common Law in Private Litigation

#### Hill v Church of Scientology of Toronto (1995) (p. 827) SECTION 2(B)

F: Libel action brought by Crown Attorney against Church of Scientology and its lawyer.

I: Is CL of defamation inconsistent w/ Charter guarantee of freedom of expression?

L: Far-reaching changes to leg must be left to leg.

#### R v Salituro (1991) (p. 829)

F: CL rule that prevents spouse of A from testifying against him in criminal proceedings.

C: Spousal incompetence rule was contrary to dignity of witnesses who wished to testify, and it’s necessary to abrogate the rule where spouses are irreconcilably separated to better reflect Charter values.

#### RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd (2002) (p. 829) SECTION 2(B)

F: Secondary locations, including retail outlets that sold Pepsi products and residence of Pepi management personnel. Validity of secondary picketing fell to be determined by CL.

C: ‘Wrongful action’ model that treated secondary picketing as lawful unless it involves harmful conduct that amounts to tort/crime.

# Chapter 20: Freedom of Expression

## I. Introduction: Purposes of the Guarantee

**Purposes of freedom of expression** (transplanted from US jurisprudence into Canada) (*Keegstra* – McLachlin)**:**

**(A) Free expression as a means to other ends**

1. **Democratic self-gov’t**
* Expression can work to undermine our commitment to democracy where employed to propagate ideas anathemic to democratic values
* Freedom is instrumental in promoting free flow of ideas essential to political democracy and functioning of democratic institutions – BUT this justifies only relatively narrow sector of free expression.
1. **Advancement of truth and knowledge**
* Marketplace of ideas
* Greater degree of certainty that statement is erroneous/mendacious = less value in quest for truth
* BUT no guarantee that free expression will lead to truth – might still promote truth in ways that would be impossible w/o the freedom – many ideas which cannot be verified are value.

**(B) Freedom of expression as an end in itself**

* **Promotion of individual self-realization**
* For each individual human-being, being able to express one’s emotions and views and to be the recipient of other people’s views etc. will enable each individual to realize his/her full potential
* BUT why don’t we protect other forms of self realization?

## III. The Scope and Limits of Freedom of Expression

In early cases, SCC adopted a broad view of scope of s 2(b): any (non-violent) activity that conveys a message is expression under s 2(b).

**Analytical techniques of limiting freedom of expression from US jurisprudence**: (a) Distinguish ‘conduct’ from speech; (b) Distinguish certain categories that don’t warrant protection; (c) Time, place and manner restrictions versus content-based restrictions.

#### Retail, Wholesale and Department Store Union, Local 580 v Dolphin Delivery Ltd (1986) (p. 971)

F: See above.

I: Is secondary picketing by members of a trade union in labour dispute a protected activity under s 2(b)? Can an injunction based on CL tort of inducing breach of K, which has effect of limiting s 2(b) right to freedom of expression, be sustained under s 1?

A: McIntyre: **No distinction between expression and conduct** – in any form of picketing there is involved at least some element of expression. Picketing would have involved exercise of right of freedom of expression. S 1: necessary that picketing be regulated and sometimes limited – reasonable to restrain so that conflict will not escalate beyond actual parties. Proportionality met.

C: Appeal dismissed. Injunction would infringe s 2(b), but be justified under s 1.

#### UFCW, Local 1518 v Kmart Canada Ltd (1999) (p. 973)

F: Workers distributed leaflets outside entrances of several nonunionized Kmart stores that were not directly involved in labour dispute.

A: Leafleting does not trigger signal effect inherent in picket line and does not have same coercive component.

C: Ban on secondary picketing in BC *Labour Relations Code*, which encompasses leafleting, violated s 2(b) and was not justified under s 1.

#### RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd (2002)

A: Secondary picketing is generally lawful under CL unless it involves tortious/crim conduct. Far from clear that union speech is more likely to elicit an irrational/reflexive response than e.g. speech by political org. **Freedom of expression not confined to ‘rational’ speech.**

#### Ford v Quebec (AG) (1988)

F: Challenge to provisions of QC *Charter of the French Language* which required that outdoor commercial signs be exclusively in French.

A: **No distinction between message and medium.** Language is so intimately related to form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using language of one’s choice. **Commercial expression (advertising) falls within scope of s 2(b).**

C: Violates 2(b) and not upheld under s 1.

#### Irwin Toy Ltd v Quebec (AG) (1989) (p. 975)

F: Challenge to provisions of Quebec’s *Consumer Protection Act* governing children’s advertising. S 258: no person may make use of commercial advertising directed at persons under 13 years of age. Certain exemptions from prohibition.

I: Do ss 248 and 249 of *CPA* limit freedom of expression under s 2(b)?

L: See analytical framework.

A: Dickson: Advertising aimed at children aims to convey a meaning. P’s activity is not excluded from sphere of conduct protected by 2(b). Gov’t’s purpose was to prohibit a particular content of expression. S 1: Purpose/goal was to protect young children from being manipulated. Rationally connected. Re: minimal impairment – **not out of proportion to measures taken in other jurisdictions, leg action to protect vulnerable groups is not necessarily restricted to least common denominator of actions taken elsewhere.** Deleterious effects: ok. McIntyre (dissent): not justified under s 1 – no evidence that children suffer harm, fails on proportionality.

C: Limitation on s 2(b), justified under s 1.

## III. Commercial Expression

While commercial expression is protected under s 2(b), its restriction may be more easily justified under s 1 than restriction of other forms of expression.

#### Rocket v Royal College of Dental Surgeons (1990)

F: Challenge to reg imposing stringent restrictions on advertising by dentists.

A: **Because motive behind expression was primarily pursuit of economic profit**, rather than participation in political process or spiritual or artistic self-fulfillment, restrictions on expression of this kind are easier to justify. **BUT public interest is served by such expression in enhancing ability of consumers to make informed choices.**

C: Fails proportionality test – precluded advertising of info that would be useful to public and would not mislead public or undermine professionalism.

#### Reference re ss 193 and 195.1(1)(c) of Criminal Code (1990)

F: Soliciting for purposes of prostitution protected by s 2(b).

A: Activity to which impugned leg is directed is expression w/ an economic purpose.

C: Provision prohibiting any communication in a public place for purpose of engaging in prostitution can be upheld under s 1.

### Compelled Expression

#### RJR MacDonald Inc v Canada (AG) (1995) (p. 988)

F: *Tobacco Products Control Act* prohibited advertising and promotion of tobacco products offered for sale in Canada and required manufacturers to add to packages an unattributed warning about dangers of smoking. Tobacco manufacturers argued that advertising could be categorized as (1) lifestyle; (2) brand preference and (3) informational – argued that there is no risk for brand preference or informational advertising. Fed gov’t had a study that explored various alternative options – lawyers for fed gov’t refused to disclose contents. NB: had gov’t disclosed that info, result may have been different.

A: McLachlin (majority): **Combination** of unattributed health warnings and prohibition against displaying other info constitutes infringement under s 2(b). BUT consumers will be assisted in making choices by having this info. Objective is of sufficient importance. **Commercial speech, while less important than some forms of speech, should not be lightly dismissed**. **Motivation to profit is irrelevant to determination of whether gov’t has established that law is reasonable/justified under s 1**.

La Forest (dissent): Gov’t conceded that advertising prohibition was infringement under s 2(b). **Lengthy discussion of context** surrounding tobacco industry and advertising. Gap in understanding of health effects and root causes of tobacco consumption. In prohibiting advertising and promotion of tobacco products, as opposed to their manufacture/sale, Parliament has sought to achieve a compromise among competing interests. Harm and profit motive place this form of expression far from core of freedom of expression. Sufficient evidence for rational connection. Parliament adopted a relatively unintrusive leg approach. Deleterious effects of this limitation, a restriction on rights of tobacco companies to **advertise products for profit** that are inherently dangerous and harmful, do not outweigh leg objective of reducing number of direct inducements for Canadians to consume these products. Re: unattributed health message – consumers will know message is coming from gov’t. **Long way in this context from cases where state seeks to coerce a lone individual to make political, social or religious statements w/o a right to respond.**

C: Prohibitions against advertising and requirement of unattributed warning not justified under s 1 – no force and effect.

#### Slaight Communications Inc v Davidson (1989)

F: Labour adjudicator, after finding that an employee had been wrongfully dismissed, ordered employer, inter alia, to provide employee w/ letter of recommendation.

A: **Recognition of right not to speak**.

C: Violates freedom of expression – upheld under s 1.

#### Lavigne v Ontario Public Service Employees Union (1991)

C: Compelled union dues do not violate freedom of expression under s 2(b).

#### Canada (AG) v JTI-Macdonald Corp (2007) (p. 1005)

F: Constitutionality of Canada’s laws on tobacco advertising and promotion. In response to Court’s decision in *RJR*, Parliament enacted *Tobacco Act and Regulations* – new scheme is more restrained and nuanced.

I: Are these limits on freedom of expression justified under s 1?

L: General prohibition on promoting tobacco products, except as authorized. Includes prohibitions concerning: false promotion, advertising and promotion appealing to young persons, lifestyle advertising. Health warning is attributed to Health Canada.

A: McLachlin: **Mere fact that leg represents Parliament’s response to a decision of this Court does not militate for or against deference**. Evidentiary basis for new regime is stronger. S 1 analysis must be set in context of long history of misleading and deceptive advertising by tobacco industry. Prohibited speech is of low value. Different definition of lifestyle advertising than suggested in *RJR*.

C: Appeal allowed – justified under s 1.

## IV. Hate Speech

In US – courts have tended to view restrictions on hate speech as a violation of First Amendment. Counterspeech, rather than censorship, seen as appropriate response to offensive speech. *Keegstra*: US constitutional doctrine is not applicable in area of hate speech: Canadian Charter contains an express limitation clause AND Canada’s int’l law commitments, as well as Charter’s provisions w/ respect to equality and multiculturalism, suggest different pathways.

**Notes re: *Keegstra* and *Butler*:** SCC chose equality over free speech. Very little contextual analysis – look to *RJR* for guidance on context/deference.

#### R v Keegstra (1990) (p. 1017)

F: D was charged under s 319(2) of CC w/ unlawfully promoting hatred against an identifiable group by communicating anti-Semitic statements to his students. Teachings attributed various evil equalities to Jews.

A: Dickson: Communications which willfully promote hatred convey a meaning. S 319(2) is aimed at content. Infringement of s 2(b). Hate speech is not a form of violence that falls within *IT* exception. **Hate speech is low value, almost valueless, expression and its restriction will be easier to justify than other forms of expression**. S 1: Objective of s 319(2) is sufficiently substantial. Hate propaganda causes harm to members of target group and has influence upon society at large. Consider int’l human rights principles and ss 15 and 27 of Charter. Expression prohibited here is not closely linked to rationale underlying s 2(b). Passes rational connection - governmental disapproval of hate propaganda does not invariably result in dignifying suppressed ideology. Stopping hate propaganda is rationally connected to objective of stopping the spread of racism. Minimal impairment: Dickson scrutinizes language of s 319(2) and limits the scope. Does not unduly impair freedom of expression. **Parliament can use criminal law to prevent the risk of serious harms**.

McLachlin (dissent): Should be necessary to show clear and present danger before free speech can be overridden. Objective of suppressing hatred is sufficient. Could have a chilling effect on defensible expression AND may not effectively curb hatemongers – tenuous rational connection. Re: minimal impairment: definition of offending speech is overbroad; vague and subjective application; criminalization itself may be excessive – human rights leg might be more appropriate. Re: proportionality: too broad, serious criminal consequences. Not a reasonable limit under s 1.

C: Infringes s 2(b), but reasonable limit under s 1.

#### Mugesera v Canada (Minister of Citizenship and Immigration) (2005)

Re: s 319(2). **In determining whether speech conveys hatred, court must take into account character of audience and social and historical context of speech.**

#### Hill v Church of Scientology of Toronto (1995)

Court appeared to give little weight to argument that traditional law of defamation, combined w/ high damage awards, chills criticism of public officials. Some form of evidence is required to prove that libel chill exists.

#### Taylor v Canadian Human Rights Commission (1990)

F: P instituted telephone message service w/ prerecorded messages on theme of Jewish conspiracy to control Canadian society.

L: S 13 of *Canadian Human Rights Act* – discriminatory practice for a person to use a telephone to repeatedly communicate message likely to expose a person to hatred/contempt by reason of fact that that person is identifiable on basis of prohibited ground of discrimination.

A: ‘Hatred’ does not necessarily involve mental process of ‘looking down’ on others. **Nature of human rights leg militates against an unduly narrow reading**. McLachlin (dissent): absence of any intent of actual promotion of hatred makes it overbroad.

C: Breach of s 2(b), but upheld under s 1.

#### Saskatchewan (Human Rights Commission) v Bell (1994)

F: Constitutionality of s 14 of Saskatchewan code. Retailer sold stickers w/ caricatures of minorities w/ ‘not allowed’ symbol.

C: Because stickers would tend to expose groups they represented to hatred, not necessary to decide whether a broader ban on materials that ridicule, belittle or otherwise affront dignity of persons would survive s 1 scrutiny.

#### Hellquist v Owens (2006)

F: D published an ad in SK paper that depicted stick men holding hands w/ prohibited line across image and biblical passages forbidding same-sex relations.

A: **Important to consider ad in context of time and circumstances in which it was published**.

C: Was a position advanced in a continuing public policy debate rather than message of hatred/ill will – stickmen were presented in a neutral and straightforward fashion.

#### Ross v New Brunswick School District No 15 (1996)

F: School teacher whose expression of anti-Semitic views outside of classroom was found to have created a poisoned env’t within the classroom.

A: Tribunal relied on evidence of discriminatory conduct engaged in by some students.

C: Upheld order removing Ross from classroom as reasonable limit under 2(b). Did not uphold permanent speech ban as a reasonable limit under s 1 – once Ross was no longer in a teaching position, no reason for his writings to continue to produce a poisoned atmosphere in class.

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

F: D distributed 4 anti-gay flyers on behalf of Christian Truth Activists. 4 individuals who received these flyers filed complaints w/ Commission – alleged that material promoted hatred against individuals because of their sexual orientation, thereby violating s 14 of Code.

I: Does s 14 of SK Human Rights Code violate s 2(b) of Charter?

L: S 14: No person shall publish… that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground.

A: Rothstein: Does infringe s 2(b). Sufficiently pressing and substantial objective. Prohibiting representations that expose protected groups to hatred is rationally connected to objective of eliminating discrimination and other harmful effects of hatred. Prohibiting expression that ridicules, belittles or otherwise affronts dignity of protected groups is not rationally connected – sever this from s 14. Re: minimal impairment: **Trust should be placed in marketplace of ideas to arrive at appropriate balancing of competing rights and conflicting views**. Hate speech reduces participation and self-fulfillment of individuals within vulnerable group. Alternative of criminal leg would **reduce impairment at cost of effectiveness**. After severing, remaining words are not overbroad. **Hate speech is at some distance from spirit of s 2(b) because it does little to promote, and can in fact impede, values underlying freedom of expression. Political expression lies close to core of guarantee. Reasonable apprehension of harm approach recognizes that a precise causal link for certain societal harms ought not to be recognized. Not all truthful statements must be free from restriction.**

C: Severed part of s 14, the rest upheld as reasonable under s 1.

## V. Regulation of Sexually Explicit Expression

Shift in focus of restriction from sexually explicit material in general to sexually explicit material that depicts violent or degrading activity and a change in language from obscenity to pornography.

#### R v Butler (1992) (p. 1042)

F: D operated a shop that sold and rented ‘hard core porn’. Charged under obscenity provisions of s 163.

L: S 163(8): For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.

A: Sopinka: Considers different tests for deciding what is ‘obscene’. Courts must determine what community would tolerate others being exposed to on basis of degree of harm that may flow from such exposure – harm = predisposes persons to act in an anti-social manner. Leg is aimed at restricting content. Sufficiently intelligible to pass prescribed by law. **Mere fact that a law is grounded in morality does not automatically render it illegitimate.** More broadly leg was aimed at avoidance of harm to society which remains the objective. **Understanding of harms caused by materials has developed since provision was created, but this does not detract from fact that purpose of leg remains** – has shifted from emphasis on moral harm to exploitation of women and equality concerns**.** Targeted material is expression which is motivated usually by profit – far from core of s 2(b). Passes rational connection. Passes minimal impairment. NB: Sopinka reinterpreted almost from scratch scope and meaning of the obscenity provision.

C: Reasonable limit under s 1 – appeal allowed and new trial ordered.