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Ch 16 – The Advent of the Charter

The Adoption of the Charter

The Honourable Pierre Elliott Trudeau, Minister of Justice, A Canadian Charter of Human Rights, January 1968 p. 719

Over time, human rights have garnered more attention and been recognized as necessary. Thus, they must be protected from the government. In Canada, there is the *Bill of Rights*, but it could be repealed as easily as any other statute. An entrenched guarantee of rights would provide protection for certain rights from political controvers and the whims of the majority.

A. Cairns, Charter Versus Federalism: The Dilemmas of Constitutional Reform p. 722

An entrenched *Charter* is an erosion of parliamentary supremacy. However, the perceived importance of parliamentary supremacy was waning into the 1970s and 80s. This was in part due to its connection with "Britishness" which no longer seemed as important as the prestige of the empire fell and Canadians wanted a symbol of nationalism. Increase in immigrants and discussion about human rights in the international arena both led to the *Charter* being that symbol. Immigrants would be helped by having a written Bill of Rights, rather than being expected to know what the "British way" of doing things was.

Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms" p. 725

Quebec, in the 1960s, was pushing for constitutional reform in order to get more rights, but the federal government, including Trudeau, was concerned about the alienation that would cause. Trudeau government felt that a *Charter*, as an agreement on common values, would be a unifying and nation building document. Domestic events also contributed to the desire for a guaranteed bill of rights: treatment of Japanese Canadians; persecution of JW; treatment of Doukhabors, etc.

L. Weinrib, "Of Diligence and Dice: Reconstituting Canada's Constitution" p. 728

History of *Charter* drafting. Initially protected only rights involved in the political process.

L.E. Weinrib, "Canada's Charter of Rights: Paradigm Lost?" p. 730

History of ss. 1 and 33. Original s. 1 was too expansive and was revised to the language of "reasonable limits". Provincial governments unhappy with this and fought to get the notwithstanding clause added in.

M.E. Gold, "The Mask of Objectivity: Politics and Rhetoric in the SCC" p. 734

Patriation Reference resulted in SCC declaring a constitutional convention that the proposed *Charter* required support of a substantial majority of the provinces. Quebec allied with 7 other provinces to oppose the *Charter*. As political pressure for a *Charter* mounted, provinces went to the federal government without Quebec in order to make a deal.

The Merits of Entrenchment and the Legitimacy of Judicial Review

W. Bogart, Courts and Country p. 737

Charter pros: independent judges protect the disadvantaged; allows individuals, especially those from minorities, to seek vindication in an open process; unifies Canadians.

Charter cons: independent judges are unaccountable and elitist; help for the disadvantaged occurs through legislative action; citizens, through elected officials, should be responsible for finding solutions; any legal discourse will invariably favour the rich.

A. Petter, "Immaculate Deception: The Charter's Hidden Agenda" p. 739

Charter cons: selective view of "state" means unequal distribution of wealth cannot be addressed; protections for the poor arise out of legislation, not common law; judiciary has no exposure to or understanding of the disadvantaged sections of our population; *Charter* protects individual interests – profit, at the cost of government interference – regulation and redistribution of wealth.

L. Weinrib, "Limitations on Rights in a Constitutional Democracy" p. 743

Charter pros: judiciary avoids problems of political motivations; can force legislature to recognize and correct unforeseen consequences of legislative activity.

P. Hogg and A. Bushell, "The Charter Dialogue Between Courts and Legislatures" p. 746

Charter pros: encourages legislatures to amend legislation in breach of the *Charter*, which is a form of dialogue; increases awareness of *Charter* rights.

Vriend v. Alberta p. 751

Court has found that the omission of sexual orientation as a prohibited ground of discrimination in Alberta's human rights legislation is an unjustifiable violation of s. 15. Iacobucci comments on appropriate relationship between courts and legislatures: both are somewhat accountable to the other – legislation is reviewed by the courts, and decisions are reacted to by passing new legislation.

Arguments Con

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.

Arguments Pro

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").

Ch 17 – The Framework of the Charter

Analytical Framework

A. Preliminary Issues

1. Is the court/tribunal before which the Charter claim is being made a "court of competent jurisdiction" (as required by s. 24(1))?
2. Does the Charter apply?
3. Has the requisite notice of constitutional question been given (based on legislation in relevant jurisdiction)?
4. Does stare decisis preclude a full Charter analysis in respect of any or all of the issues raised?
5. Is this an appropriate case in which to consider the merits of the claim (standing, mootness, ripeness, etc.)?

B. Merits: First Stage (Onus on the challenger)

1. Is the claimant's interest protected by the Charter right/freedom being invoked?
2. If so, has that right/freedom been infringed by the impugned governmental action?

C. Merits: Second Stage (Onus on the government)

1. Is the infringement "prescribed by law"?
   a. If the impugned governmental action was taken by a government official or other subordinate body, was there a legal basis for that action?
   b. If the impugned governmental action is legislation, is that legislation reasonably/sufficiently precise in its wording?
2. If so, is the infringement reasonable/demonstrably justified? (*Oakes*)
   a. Are the objectives of the impugned governmental action both (i) valid, and (ii) sufficiently important to warrant overriding the Charter right/freedom in question?
   b. is the impugned governmental action proportional to the objectives underlying it:
      (i) is that action rationally connected to those objectives?
      (ii) does that action minimally impair the right/freedom in question?
      (iii) do the benefits of that action outweigh the costs?

D. Remedies

1. Is this a case to which s. 52(1) of the *Constitution Act*, 1982 applies and, if so, which of the available s. 52(1) remedies is appropriate (eg., declaration of invalidity, suspended declaration of invalidity, reading down, reading in)?
2. Is this a case to which s. 24(1) of the *Charter* applies, and, if so, what is the "appropriate and just" remedy (eg, injunctive relief, damages, stay of proceedings)?

3. Is this a case to which s. 24(2) of the *Charter* applies, and, if so, should the evidence be excluded?

NOTE: The analysis called for by the above questions, especially by those in Merits: Second Stage, is to be undertaken with a high degree of sensitivity to the specific legislative and factual context out of which the case has arisen. How much, if any, deference to the other branches of government the court shows will depend on its assessment of that context.

Interpreting Rights

The Purposive Approach

Hunter v. Southam p. 758

F: Search of newspaper offices undertaken under a process that did not require judicial authorization. This was challenged as a violation of s. 8

I: What is the meaning of "unreasonable" in s. 8?

L: Cannot interpret the *Charter* in the same manner as an ordinary statute, since it cannot be easily modified. Just like the *Constitution Act, 1867*, it must be given a broad and purposive interpretation. First identify the interest that was meant to be protected, then interpret the right so that it protects that interest.

A: Purpose of s. 8 is to protect reasonable expectations of privacy. To allow it to do so, it must be interpreted as a constraint on governmental action which interferes with that protection.

C: The provisions allowing search warrants with no judicial approval are struck down.

Aids to Interpretation p. 762

1. Interpretive Provisions in the Charter: particularly ss. 27 & 28 which refer to multiculturalism and gender equality.
2. Parliamentary and Committee Debates leading up to the *Charter* should not be given too much weight lest the ability of the *Charter* to develop is stunted.
3. Canadian Pre-Charter Jurisprudence, particularly the *Bill of Rights* is not relevant.
4. Comparative and International Sources can be considered, but with caution. See Patrick Macklem, “Social Rights in Canada” p. 764

Finding an Infringement

R. v. Big M Drug Mart Ltd p. 843

F: Big M challenged *Lord's Day Act*, prohibiting commercial activity on Sundays, as a violation of s. 2(a).

I: Does the *Act* infringe upon freedom of religion?

L: Can consider either the purpose or the effect of the legislation to determine whether there is an infringement. A purpose that is "illegitimate", "invalid" or inconsistent with the "guarantees enshrined in the *Charter*" will constitute an infringement. The relevant purpose is the one at the time the legislation was enacted. Effects based infringements can include indirect infringements.

A: "Purposive" approach from *Hunter* applied to find that the purpose of freedom of religion is to allow individuals to hold and manifest whatever beliefs they choose. Both the purpose of the *Act* (compulsion of sabbatical observance) and the effect (coercing and alienating non-believers) are infringements on s. 2(a).

C: *Act* not saved under s. 1 and is declared of no force and effect under s. 52.

Edwards Books and Art Ltd. v. The Queen p. 851

F: Ontario's *Retail Business Holidays Act*, which requires businesses to close on Sundays, challenged under s 2(a) of the C*harter*.

I: Does the *Act* infringe upon freedom of religion?

L: Indirect effects must be more than miniscule in order to constitute an infringement.

A: Purpose of the *Act* is accepted as secular. There is no direct infringement – being forced to close on Sundays is not equivalent to being forced to participate in religious practices. Majority finds the effect to be of putting Saturday observers at a competitive disadvantage to Sunday observers and that this effect is substantial.

C: There is an infringement under 2(a), but the *Act* is upheld under s. 1.

Justifying an Infringement: Section 1

Prescribed by Law p. 766

This requirement has two parts:

1. Infringing acts must be expressly provided for in legislation or common law. (*R v Therens*, p 766, ruling that a police officer breaching s. 10(b) had no basis in law for doing so.) This has not been applied strictly (*Slaight Communications*) and may only be applicable where

government actors, such as police officers, overstep the bounds of the legislation.

2. Infringing legislation must be sufficiently/reasonably precise. In *Irwin Toy* this standard was set fairly low, as an "intelligible standard" for the judiciary. The SCC has recognized legislature exists in a world of generalities, and so prefers to consider vagueness as part of the minimal impairment test under s. 1. (*Taylor, Osborne, Nova Scotia Pharm*)

R. v. Nova Scotia Pharmaceutical Society p. 769

Court considers the doctrine of vagueness in detail. It can be considered equally as a principle of fundamental justice under s. 7 or as part of prescribed by law under s. 1. The rationales of the doctrine are "fair notice" to citizens and limitation of law enforcement division. However, the court must realize language and legislation are not exact tools and prefer to consider vagueness as part of the minimal impairment considerations.

Justification

The Oakes Test

R. v. Oakes p. 774

F: Reverse onus provision in s. 8 of the *Narcotics Control Act* found to violate s. 11(d).

I: Can the violation be upheld under s. 1

L: Standard of proof to be used is the civil one, but it must be applied rigorously. See Merits Second Stage on p. 7 of this CAN. Also, Dickson attempted to define a “free and democratic society” in terms of a set of “values and principles” (top of p 775).

C: There is no rational connection between possession of a small quantity and an intent to traffic, so the provision can not be upheld.

Notes p. 777

Almost every purpose that doesn't directly contradict a *Charter* value has been considered as pressing and substantial. From *Big M Drug Mart* (p. 9 of this CAN) the purpose must be the one originally motivating the legislation. But, in *Butler*, this test was fudged by considering the purpose in very general terms and saying the specifics have varied over time. Both the rational connection and the minimal impairment stages of the *Oakes* test necessarily involve balancing competing interests, so the final proportionality test is often merely formal. At this stage the actual effects of the legislation must be considered, as opposed to the purpose (*Dagenais*).

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. The overbreadth argument is more often successful.

The Subsequent Development of the Oakes Test: Context and Deference

Edmonton Journal v. Alberta (Attorney General) p. 781

F: Alberta *Judicature Act* limits publication of court hearings in matrimonial disputes. Challenged as a violation of freedom of expression and defended as protection of privacy.

I: Should courts consider rights in the abstract (expression vs privacy) or in the specific context in which they arise in each case?

L: Given by Wilson in a concurring judgement, now accepted by the entire court: Have to use a "contextual approach" when applying the *Charter*. In other words, consider the actual rights and freedoms in THIS CASE, not in an abstract sense.

A: Have to balance the public's interest in an open court process with the public's interest in protecting the privacy of litigants in matrimonial cases.

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

The Deference Story

The need for deference was first mentioned in *Edwards Books*. The legislature was trying to protect vulnerable workers and had considered a number of different options. Since they had made a good attempt and finding the appropriate balance, the courts should not quickly overturn that decision. In *Irwin Toy*(p. 783), the court suggested that where the government was balancing competing interests there should be more deference that when the government is asserting authority over individuals. In effect, any choice within a "margin of appreciation" will be acceptable. However, in *RJR* the court decided this bright line test was unworkable and instead decides deference should be applied on a sliding scale.

Factors taken into account for deference, from *Thomson Newspapers*: whether or not the government was trying to protect the interests of a vulnerable group, the subjective fears and apprehension of harm of any such group, whether or not the relationship between the particular harm the government was seeking to address and the activity the government chose to prohibit or regulate can be measured scientifically, whether or not the effectiveness of action taken by the government can be measured scientifically, and the relative importance of the interest protected by the right/freedom at stake.

Other factors worth considering inthe context of deference: 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). See also p. 787.

The Override

The use of the notwithstanding clause ceases to be of effect after 5 years, but it can be reenacted indefinitely. This forces the government to reconsider the use of the clause every election period.

Ford v. Quebec (Attorney General) p. 791

F: Goverment of Quebec upset about the *Charter* and enact legislation inserting the override clause into all existing legislation and having effect retroactively from the date the *Charter* came into force.

C: The retroactive effect is not allowed within the language of s. 33.

Ch 18 – Application

Elliot's Seven Principles of Charter Application

1. The *Charter* applies to the legislative and executive/administrative branches of the federal and provincial governments in respect of all of the functions that they perform, and in respect of inaction as well as action.
   All Functions – Includes where government is performing private actions, such as collective bargaining. (*Lavigne*, *Godbout*)
   Inaction – Not protecting certain groups while protecting others (under-inclusiveness) can constitute an infringemnt. (*Vriend*, *Dunmore*)
2. Entities that are not formally within the legislative and executive/administrative branches of the federal and provincial governments will nevertheless be considered to be entities to which the *Charter* applies if they (a) are subject to the routine and regular control of government, (b) perform quintessentially governmental functions, and/or (c) exercise the power of statutory compulsion pursuant to statutory authority.
   (a) Community colleges are controlled by government, but hospitals and universities are not. Consider whether there is "routine and regular" control of "day to day operations". (*Douglas College, Translink*).

(b) Such as municipalities making laws of general application, imposing taxes. (*Godbout*).
(c) Arbitrator giving an order enforceable by State action. (*Slaight Communications*, *Blencoe*)

3. The *Charter* does not apply to private actors (i.e., actors not considered to be "government" for the purposes of Principle #1). (*McKinney*)
4. However, if a private actor is implementing a specific policy or program on behalf of either the federal or a provincial government, that private actor will be considered to be "government" insofar as – but only insofar as – its action/inaction in implementing that policy or program is concerned. (*Eldridge*, *Blencoe*)
5. The *Charter* does not apply to the courts when they are adjudicating private disputes on the basis of the common law. (*Dolphin Delivery*)
6. However, the courts will entertain claims that the common law in this context is inconsistent with "*Charter* values," and is therefore in need of revision. (*Dolphin Delivery*, *Swain*, *Dagenais*, *Hill*)
7. The *Charter* does apply to the courts when they are presiding over criminal/quasi-criminal disputes and otherwise performing "public functions." (*BCGEU*, *Dagenais*)

Introduction: The Debate About Application to Private Action

Retail, Wholesale, & Department Store Union, Local 580 v. Dolphin Delivery p. 797

F: Union employed by Purolator picketing Dolphin Delivery since they DD was working for P during the union's strike. No legislation applied to secondary picketing, so common law tort of inducing breach of contract applied and injunction against the picketing was granted. Union argued this violated freedom of expression.

I: Does *Charter* apply to courts ruling between private parties on common law rules?

L: *Charter* applies to the common law, but not to litigation between private parties since there needs to be exercise of governmental action to invoke the *Charter*.

C: Cannot apply the *Charter* here, so the appeal by the union fails. Courts should nevertheless develop the common law consistently with *Charter* values.

Governmental Action

Government Actors

Entities Controlled by Government

McKinney v. University of Guelph p. 803

F: University policy requiring mandatory retirement at age 65 challenged as a violation of s. 15.

I: Does the *Charter* apply to univerities?

L: *Charter* does not apply to private entities. Universities are creatures of statute and are primarily funded by the government. However, especially in the area of staffing, universities are entirely autonomous. They manage and allocate funds independently of government.

C: Universities' retirement policies not subject to *Charter.*

Notes p. 807

Stoffman v VGH – Hospital not subject to the *Charter*, despite higher level of government control.

Douglas College – *Charter* applied, as the college was subject to government control at any time.

Translink – *Charter* applied since Lieutenant Governer appoints board and can manage operations.

Lavigne – *Charter* applies to Ontario Coucil of Regents, since they were subject to "regular control" by the Minister of Education. *Charter* applies to all actions of government, including commercial.

Entities Exercising Governmental Functions

Godbout v. Longueuil (City) p. 811

F: City policy required employees to reside within the municipality. Minority concurring opinion considered whether the city was subject to *Charter*.

I: Is a municipality subject to the *Charter*?

L: Performing a "public function" is not sufficient to make an entity governmental in nature. Rather, the entity must be functioning in a "governmental" way. Once an entity is determined to be governmental in nature, the *Charter* applies to both its "private" and "governmental" actions.

A: Municipalities are publicly elected and can impose taxes and make laws, thus making them governmental in nature.

C: The city is subject to *Charter* challenges and violated s. 7. This was a minority decision and the issue hasn't been considered by a majority yet.

Governmental Acts

Entities Implementing Government Programs

Eldridge v. British Columbia (Attorney General) p. 816

F: Hospital policy didn't provide public funding for sign language interpreters for people receiving medical services. Challenged as a violation of s. 15.

I: Does the *Charter* apply to the hospital when delivering health care?

L: From *Stoffman*, hospitals are private entities. However, private entitites implementing a specific governmental policy or program are subject to the *Charter* in how they implement that program. This has to be more than just a "public function".

A: There is a direct connection between the government policy – providing health care – and the alleged violation – not providing sign language interpretation. In essence, the hospital acts as agents for government when providing medical services and are therefore subject to the *Charter*.

C: A s. 15 violation was found.

Entities Exercising Statutory Powers of Compulsion

Notes p. 820

Slaight Communications – Adjudicators derive all their power from statutes and are therefore subject to the *Charter*.

Blencoe – Human Rights Commission subject to the *Charter* both as implementing a specific government policy, like *Eldridge* and as having powers of statutory compulsion, like *Slaight*.

It remains unclear whether citizen's arrests by private actors are subject to *Charter*. #

Government Inaction

Vriend v. Alberta p. 821

F: Alberta human rights legislation did NOT protect against discrimination on the basis of sexual orientation. Vriend was fired after informing employer that he was gay and his complaint under the legislation was rejected. Vriend argued the ommission was a violation of s. 15.

I: Does the *Charter* apply to legislative ommission?

L: Text of s. 32(1)(b) makes no requirement of positive action. Allowing a distinction between omission and explicit exclusion makes the *Charter* a mere requirement of form, not substance. Alternatively, a deliberate decision to omit is an "act" to which the *Charter* applies anyway.

C: Ommission is a violation of the *Charter* and protection for sexual orientation read into the Act.

Dunmore v Ontario p. 824

F: Labour legislation excluded agricultural workers from the right to form a union.

I: Does an exclusion constitute an infringement of freedom of association?

L: Protecting some groups but not others both discriminates against the unprotected group and encourages a violation of fundament freedoms. However, if there is no legislation (as opposed to underinclusive legislation) then the *Charter* will not apply.

Application of the Charter to Courts and the Common Law

Reliance by Government on Common Law p. 825

Charter applies to common law when government is relying on it. In *BCGEU* the *Charter* was held applicable to a injunction issued by the court to prevent picketing. The injunction was issued on the Chief Justice's own motion, thus was an element of governmental action. In the criminal context, all common law rules are subject to *Charter* challenges and can be modified by judges to bring them into accordance with the *Charter* (*Swain*, *Dagenais*).

Reliance on Common Law in Private Litigation

Hill v. Church of Scientology of Toronto p. 827

F: Libel action brought by Hill against the Church.

I: Is the common law of defamation subject to *Charter* scrutiny?

L: *Charter* rights do not exist without state action. At most, can argue *Charter* values are not being followed. Only incremental changes should be made to the common law. In this context, the traditional s. 1 balancing should be more flexible and the challenger is responsible for both showing the violation and that the balance is in favour of modifying the common law.

C: Common law of defamation already reflects an appropriate balance between freedom of expression and protection of the reputation of an individual.

Notes p. 829

Pepsi-cola, much like *Dolphin*, involved picketing at secondary locations. Court fashioned common law to allow secondary picketing as long as it didn't involve tortious conduct. Distinguished from *Dolphin* where they assumed all secondary picketing would be tortious.

Ch 20 – Freedom of Expression

Introduction: Purposes of the Guarantee

R. v. Keegstra p. 963

FIAC: See p. 19 of this CAN.

L: Freedom of expression can be seen as a means to certain ends. Those ends include the proper functioning of political democracy and the search for truth. However, freedom of expression could also be seen as an end of its own right, as it is necessary for self-realization of both speaker and listener. There are some problems with using these ends as justification. #1 & 2 only protects speech within narrow bounds. #3 is unhelpful as an analytical device and doesn't answer why we don't protect other forms of self realization. *Charter* wording is very broad and perhaps does not require a single justification. Nevertheless, the three rationales above should provide guidance in interpreting the scope of 2(b). These rationales are also seen in *Ford* and *Irwin Toy*.

The Scope and Limits of Freedom of Expression

Irwin Toy Ltd. v. Quebec (Attorney General) p. 975

F: Irwin Toy charged with advertising to children, contrary to the *Consumer Protection Act* in Quebec. They alleged those provisions were a violation of s. 2(b).

I: Is there a violation of 2(b) and if so is it justifiable under s. 1?

L: Court sets out special framework for the "Merits 1st stage" analysis:

1. Is the claimant's activity protected by s. 2(b)?
    a. Does the claimant's activity constitute an attempt to convey meaning?
    b. If so, is it non-violent in form?
2. If so, has the government infringed on that protected interest?
    a. Is the restriction "tied to content" (purpose-based infringement)?
    b. If not, does the protected activity further one of the three rationales for protecting freedom of expression (effects-based infringement)?

Note that this only applies where the government is allegedy restricting ability to engage in expressive activiy. It does not apply where the government is forcing expression, denying access to government property, or failing to provide some people with an opportunity to express themselves when others have been provided that opportunity.

A: 1a&b: obviously yes. 2a: yes. Proceeding to the regular "merits: 2nd stage" analysis, the court finds the sections provide an intelligible standard and thus classify as "prescribed by law". Then, applying *Oakes*, they defer to the legislature's decision based on competing credible evidence and find the rest of the test to be met.

C: The legislation is a violation of s. 2(b) but is justifiable under s. 1.

Notes and Questions p. 984

It is unclear why a special framework was developed for freedom of expression cases. This has made it very easy to show a violation of s. 2(b) and all non-violent activities have fallen under s. 2(b)'s protection. As such, most freedom of expression cases are resolved at the s. 1 stage.

Commercial Expression

RJR MacDonald Inc. v. Canada (Attorney General) p. 988

F: *Tobacco Products Control Act* prohibited advertising of tobacco products and required an unattributed health warning be placed on packaging. Government conceded the ban on advertising was an infringement under s. 2(b).

I: Do either/both of these form an unjustifiable violation of s. 2(b)?

L: [1]*Oakes* must be applied flexibly given the specific context of each case. However, deference and context must not be carried too far. [2]Common sense can be used by the court to find rational connection. [3]To justify a complete ban on a type of expression the government must show that a partial ban would be less effective. Compelling expression is also a violation of 2(b).

A: [1]In performing the balancing under s. 1, consideration must be taken for the gap in society's knowledge about the root causes of tobacco consumption. Requiring definitive evidence would paralyze governmental operation. Nonetheless, cannot accept government's assertion with no proof whatsoever. [2]Rational connection is easily found – if advertising didn't promote use of tobacco products, why would companies advertise! [3]No evidence was given as to the effectiveness of a partial ban or of an attributed health warning.

C: Challenged provisions declared of no force and effect.

D/O: La Forest J (dissent) suggested that commercial expression (advertising) was of less value and therefore deserving of less protection than other expressive activity. Iaccobucci J (concurring) suggested that almost any legislative tailoring would have sufficied as a minimal impairment.

Notes and Questions p. 1003

Five years earlier, in *Rocket v Royal College of Dental Surgeons*, McLachlin had suggested that

restrictions on commercial expression were easier to justify due to their motive being one of profit. *Slaight* also recognized a right not to speak. This right could stem either out of concern that the listener would incorrectly attribute the speech to the forced party, or out of the lack of ability to express a contrary view.

Canada (Attorney General) v. JTI-Macdonald Corp. p. 1005

F: Legislation enacted in response to *RJR*. Allows for "information" and "brand preference" advertising. Forbids "false, misleading or deceptive" promotion. Requires a health warning, taking up 50% of the packaging, but it is attributed to Health Canada.

I: Are these requirements justifiable limits on freedom of expression?

L: Legislation enacted as a response to a court decision does not change the deference required. *Charter* protects the expression of both truths and falsehoods. Court considers each provision, accepted as an infringement, and uses *Oakes*. Once again, forced expression as long as it is more than minor, constitutes an infringement.

A: The prohibition against false advertising is a violation of 2(b) but justifiable to combat promotion of tobacco products as "safe" (p 1010). Similarly, prohibition against advertising appealing to young persons is justifiable in order to protect them from taking up smoking (p. 1011-12). Labelling requirements are an infringement, but are found to be justifiable since bigger warnings have greater effect.

C: All aspects of the legislation upheld under s. 1.

Hate Speech

R v. Keegstra p. 1018

F: Keegstra charged with wilful promotion of hatred for promoting anti-Semitic rhetoric to his high school students.

I: Does the provision in the criminal code unjustifiably violate s. 2(b)?

L: Application of *Irwin Toy* and *Oakes*. A variety of available alternative means does not require the government to take the least infringing one if it would be less effective at achieving the goal.

A: Easy to find that 2(b) is violated. Exception for violence only applies where there is direct physical violence. Pressing and substantial objectives are preventing harm to victims of hate speech and promoting a tolerant society. In assessing the proportionality, the value of hate speech is set at a fairly low level. Court rejects arguments that criminalization of hate speech in fact makes the speech more attractive. Although other means may be used (and perhaps should be) use of

criminal law is a valid “minimally” impairing choice.

C: Legislation upheld.

D: Limitations cannot be upheld under s. 1 (p 1031).

Regulation of Sexually Explicit Expression

R v. Butler p. 1042

F: Butler sold and rented "hard core" pornography and was charged with violating obscenity provisions in the *Criminal Code*.

I: Is s. 163(8), detailing what is "obscene" constitutionally valid?

L: Similar application of *Irwin Toy* and *Oakes*. *Big M* notionally followed but a different emphasis within a general purpose is held to be permissible. Another emphasis that, for minimal inpairment, there need not be a "perfect" scheme, just one that appropriately considers rights and freedoms.

A: Violation of 2(b) not contested. "Intelligible standard", from *Irwin Toy* and *Osborne* found (p 1047). The objective cannot shift, but court rules it was always prevention of harm associated with obscene materials. Although the emphasis used to be on moral harm, it is now on exploitation of woman and equality concerns. It is argued that pornography is valuable speech because it celebrates human sexuality. However, the obscene materials in question do not do that as they are demeaning. Rather, this is expression for commercial profit which may be easier to justify an infringement. Conflicting evidence is sufficient to provide a rational basis on which the legislature can act. In determining minimal impairment, the court finds sufficient evidence that the legislature considered competing evidence in order to come up with a plan. Suggestion that other techniques could have been taken not accepted by the court. Balancing test quickly dealt with, since expression already set at a low value and legislative objective is serious.