

CHARTER LAW

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BACKGROUND

Pre-Charter Rights Protection

- **Pre-Charter means of protecting rights** included:
 - CL 'civil rights', eg *habeas corpus*.
 - Judicial review of admin action.
 - Rules of stat interpretation.
 - Certain minority rights, eg language.
- **'Implied Bill of Rights'**
 - Legislative authority to infringe 'fundamental freedoms'?
 - Only found in the context of provincial laws.
 - Preamble gives us constitution similar in principle to UK, which has Parli democracy, which requires certain rights like freedom of expression [Rand J in **Switzman** SCC 1957 ★※].
- **Rule of law.**
 - **Power must be grounded in law:** A gov agency's actions must be grounded in law and the rule of law, discretionary power is limited, a gov body only has the power a stat gives it [**Roncarelli** SCC 1959 ★].
- **Canadian Bill of Rights (1960)**
 - Regular stat, applied to fed stats (s5(3)).
 - Cs deferential to gov.
 - **Property rights**, not in Charter.

Relevant Cases (p23)

Roncarelli v Duplessis

★ SCC 1959, p23

- QC Premier tried to take away JW's license w/o good reason; gov must act within rule of law, actions grounded in stat, discretionary power not unlimited.

Switzman v Elbling

★※ SCC 1957, p23

- Anti-communist law; ultra vires prov; Rand J says also against implied bill of rights.

APPLICATION OF THE CHARTER

Eligible Claimant

- **If Charged:** The nature of the law A is charged under, not the status of A, matters [**Big M** SCC 1985 ★].

Section Language

- **s2:** Everyone (all *legal* persons)
 - **Exception:** Corporations do not have freedom of religion, but if they are charged they may fight the constitutionality of any law [**Big M** SCC 1985 ★].
- **s15:** Every individual (all *human* persons)

- s3: Every citizen
- s7: Everyone

Public Interest Standing

Downtown Eastside Sex Workers SCC 2012 ★

- **Consider purposively and flexibly.**
- **1: Seriousness.** Serious justiciable issue.
- **2: Real stake.** Party bringing case has a real stake in the proceedings or is engaged with the issues that it raises; and
- **3: Reasonable means.** Proposed suit is a reasonable and effective means to bring the case to court (*previously*, 'no other reasonable and effective means').
 - **Purposive and flexible approach** should be taken re 3. Consider the following: Is this an economical use of judicial resources? Are the issues suitable for an adversarial setting? Will this action forward the principle of legality, in that *no law should practically be immune from CH challenge?*

Eligible Entities and Eligible Acts

Application of Charter

“This Charter applies (a) to the Parliament and government of Canada ... and (b) to the legislature and government of each province.”

Idealized Test

- **Are both parties purely private entities?** [*Dolphin Delivery* SCC 1986 ☼].
- **Is there effective gov control?** E.g., Ministerial approval/power, board dominated by gov appointees *and* evidence of non-independence through control or approval? [*McKinney* SCC 1990 ★].
- **Is the entity performing a delegated gov function**, i.e. through stat? [*Eldridge* SCC 1997 ★].
- **Inaction is reviewable**, if there was a decision not to act [*Vriend* SCC 1998 ★].

Detail

- **CH does not apply to private entities**, only gov [*Dolphin Delivery* SCC 1986 ☼].
 - **Cs are not gov** [*supra*].
- **A creature of statute is not automatically gov, look for effective control** [*McKinney* SCC 1990 ★].
 - **Begin with McKinney and then draw from examples.**
 - **Signs may include** needing ministerial approval; even if majority of a board appointed by gov, if there is no indication of control or approval by them, then may not be control [*supra*].
 - **Wilson J ‘u gov m8’:** Takes a socdem approach, says a creature of statute using public funds to do a public interest task is probably gov [*McKinney* SCC 1990 ★/].
 - **Example: Stoffman** SCC 1990 ☆ (no gov control found); **Douglas** SCC 1990 ☆ (gov control found).
- **Delegated Authority:** An entity performing a delegated function is gov [*Eldridge* SCC 1997 ★].

- **Effective Control:** Not needed if the entity is performing a delegated function [*supra*].

Eligible Laws, Common Law, Extraterritorial Application

Primacy of Constitution of Canada

“The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”

Common Law

- **CL not law but must evolve with CH.** A limited CH values analysis may weigh CH and CL, leading to CL changes [*Dolphin Delivery* SCC 1986 ☺].
 - **P must prove** CL fails CH values [*Hill* SCC 1995 ☆].
 - **Weighing involves** a flexible CH analysis where the CL value and CH value are assessed and compared to achieve a balance [*Hill* SCC 1995 ☆].
 - **Substantial changes** should be left to the legislature [*Hill* SCC 1995 ☆].
- **Example:** CL rule against picketing was found contra CH; changed to picketing + tortious/criminal conduct to be illegal [*RWDSU* SCC 2002 ☆].

Extraterritorial Application

- **Test** for extraterritorial application [*Hape* SCC 2007 ☆]. CH applies if either component is satisfied:
 - **International Obligations:** Would the actor’s activity lead to Canada being in violation of its international obligations, or international human rights?
 - **Consent:** Did the foreign gov consent to an exercise of Canadian enforcement jurisdiction within its authority?
- **Example:** This test was followed in *Khadr* SCC 2008 ☆, where CH applied because there was an IL human rights violation.

Relevant Cases (p23-27)

RWDSU v Dolphin Delivery

☺ SCC 1986, p23

- Corp asks for injunction against union; does CH apply to C? Is CL under CH? No to both. CH does not apply to private entities and C isn’t gov. CL not law.

McKinney v University of Guelph

★ SCC 1990, p24

- Faculty sues uni under CH; ‘effective control’ test articulated; uni in this case not gov.

Stoffman v Vancouver General Hospital

☆ SCC 1990, p24

- Mandatory retirement; maj of VGH board appointed by gov but no gov compulsion/coercion in terms of employment; VGH not gov for this purpose.

Douglas-Kwantlen Faculty Association v Douglas College

☆ SCC 1990, p25

- Faculty sues over retirement policy; is DougCollege gov? Yes, as had effective control via Ministerial scrutiny, board appointment and control.

Eldridge v BC

★ SCC 1997, p25

- 🐦 Deaf patients not given interpreter; non-gov actor; but performing gov function via delegated stat so CH applies.

Vriend v Alberta

- ★ SCC 1998, p26
- 🐦 P fired based on orientation; AB chose not to update ABHRC; gov *deciding* not to do something is reviewable.

Hill v Church of Scientology

- ★ SCC 1995, p26
- 🐦 P suing for defamation; D says CL defamation contra CH values; far reaching changes should be left to the ledge.

RWDSU v Pepsi-Cola

- ☆ SCC 2002, p26
- 🐦 Union challenges CL 2nd-picket rule; C says CL was contra CH values, changes it; follows Hill.

R v Hape

- ★ SCC 2007, p27
- 🐦 Creates test for extraterritorial application of CH.

Canada v Khadr

- ☆ SCC 2008, p27
- 🐦 D held in Gitmo; interrogated; CH applies outside Canada when IL is violated.

R v Big M Drug Mart

- ★ SCC 1985, p27
- 🐦 Corp sued via ON stat saying can't work Sunday; corps don't have freedom of religion; doesn't matter, suing on validity of law.

Canada (AG) v Downtown Eastside SWUAV

- ★ SCC 2012, p27
- 🐦 Sex workers case; challenges prostitution laws; changes rules for public interest standing.

LIMITS AND OVERRIDES

s1 Rights and Freedoms in Canada

“The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

- **Two-step process:** First, has a CH right been infringed? (Onus on claimant). Second, is that limit (1) prescribed by law and (2) demonstrably justified?

Prescribed by Law

- **Purpose:** This separates legal limits from arbitrary acts of gov; the underlying principle is the rule of law.
- **Demonstrated by** showing the law is adequately accessible, and that the average citizen can regulate their conduct accordingly. It must not be arbitrary [**Sunday Times v UK** ☝].
 - **Statute, Regs, CL:** If expressly provided in a statute or regulation, or implied by such, or results from CL, this will suffice [**Therens** SCC 1985 ☆].
 - **Executive Action:** CH applies to executive action [**Operation Dismantle** ☝].
 - **Policy:** Gov policy of a ‘administrative’ nature will not fall under prescribed by law, but those that are ‘legislative’ in nature (ie of general application) will [**Greater Vancouver Transportation** SCC 2009 ★].
- **Vagueness or uncertainty:** A law needn't be precise but it must be clear [**Little Sisters** SCC 2000 ★].

- People must be able to have [*R v Nova Scotia* ☞]:
 - **Notice** of the law.
 - **Touches conduct**: Law must touch some sort of conduct.
 - **Not automatic conviction**: Law must not be so vague that prosecution automatically leads to conviction.
 - **Approximation is enough**, rather than precision. Absolute certainty isn't needed.

Demonstrably Justified (Oakes)

Idealized Test

Described in *Oakes* ★.

- **1. Pressing and Substantial Objective**: The limit on the infringed right specifically must forward a pressing and substantial objective that is CH valid [*supra*].
- **2. Demonstrably Justified**: The means chosen to achieve the objective must be reasonable and demonstrably justified [*supra*].
 - This involves a **proportionality test** with three components [*supra*].
 - **2.1. Rational connection** between the means and the end [*supra*].
 - **2.2. Minimal impairment** of the right should occur to achieve this end [*supra*].
 - **2.3. Proportionality** between the objectives and the means employed must be found [*supra*].

Detail

- **1. Pressing and Substantial Objective**: The limit on the infringed right specifically must forward a pressing and substantial objective that is CH valid [*Oakes* ★].
 - **Purpose cannot shift** [*Big M* SCC 1985 ★].
 - **Emphasis** may shift [*Butler* SCC 1992 ★].
 - **Broad focus**: This test looks at society as a whole not just the claimant group [CF s7] [*Carter* SCC 2015 ★].
- **2. Demonstrably Justified**: The means chosen to achieve the objective must be reasonable and demonstrably justified [*Oakes* ★].
 - **Infringement must be justified**, not the scheme of the whole act [*RJR* SCC 1995 ★].
 - This involves a **proportionality test** with three components [*Oakes* ★].
 - **2.1. Rational connection** between the means and the end [*Oakes* ★].
 - **Likely, evidence for**: It must be 'likely' to prove the objective, and evidence is needed [*Sauvé* =★].
 - **Arbitrary distinctions** will lead to failing this part of the test [*Guignard* SCC 2002 ★].
 - **2.2. Minimal impairment** of the right should occur to achieve this end [*Oakes* ★].
 - **Not further than necessary** to achieve the objective [*Sauvé* =★].
 - **Not Least Impairing**: Impairment needn't be the least restrictive means, but one of a reasonable range of alternatives [*Keegstra* SCC 1990 ★].
 - **Substantially satisfy objective**: Consider if this is the least drastic means to substantially satisfy the gov's objective — less drastic means that *do not* satisfy the objective needn't be considered here [*Hutterian* SCC 2009 ★].

- **Impracticality:** If it would be impractical to have a more nuanced ban, then SCC will allow for this [*Montréal* SCC 2005 ★].
- **Blanket bans** are not viewed favourably by the courts. R must prove that this was within a range of reasonable alternatives, that it was the best way to achieve the objective [*RJR* SCC 1995 ★; *Guignard* SCC 2002 ★].
- **Non-blanket bans** are viewed favourably [*JTI* SCC 2007 ★; *Montréal* SCC 2005 ★].
- **2.3. Proportionality** between the objectives and the means employed must be found [*Oakes* ★].
 - **Balancing act:** R must show the benefits outweigh the negative effects [*Sauvé* =★].
 - **Compare with society:** Compare the benefits/drawbacks to society at large, not just the claimant [CF s7] [*Carter* SCC 2015 ★].

Deference

- **Important benefits** such as preventing smoking may lead to more deference [*JTI* SCC 2007 ★].
- **Venerable group protection** through the rights infringement; or alternatively, that the right violation is done only so far as it is needed to **balance** another right or freedom will afford deference.
- **Complex social problems** will lead to C giving more deference [*JTI* SCC 2007 ★].
- **Social science evidence** presented by R is taken into account by the SCC, if it seems the legislature legitimately drew a conclusion from the literature to forward a goal that, while in the public interest in some way (ie protects a venerable group) violates a right, the SCC will be very tolerant of the gov's action.
 - **Reasonable apprehension:** A reasonable apprehension of harm due to the evidence is sufficient [*Butler* SCC 1992 ★].
- **Singular antagonist:** When the SCC sees the gov acting as the 'singular antagonist' of the right in question (rather than, say, acting as an arbiter to balance competing rights), it is generally less willing to tolerate gov's arguments.
 - **Criminal Law:** Less deference afforded to criminal law [*Carter* SCC 2015 ★].

Freedom of Expression

- **Nature/value:** What is the nature or value of the speech, how does it relate to core values? [*Irwin Toy* SCC 1989 ★].
 - **Core speech** is less likely to be found justifiably infringed regarding **minimal impairment** as well as **proportionality** [*Guignard* SCC 2002 ★].
- **Venerable Groups:** Is the limit protecting venerable groups? [*Irwin Toy* SCC 1989 ★].
- **Quality of Debate:** What was the quality of the legislative debate? Includes social science evidence [*Irwin Toy* SCC 1989 ★].
 - **High quality social science evidence** will be rewarded particularly if the scope of the law is narrowed [*JTI* SCC 2007 ★].

Specific Claims

Freedom of Expression

- **1. Pressing and Substantial Objective**
 - ✓ **Preventing hate speech** [*Keegstra* SCC 1990 ★; *Whatcott* SCC 2013 ★].
 - ✓ **Preventing gendered harms promoted through obscenity** [*Butler* SCC 1992 ★].
 - ✓ **Preventing entry of socially harmful material into Canada** [*Little Sisters* SCC 2000 ★].
 - ✓ **Preventing exploitation of children/child pornography** [*Sharpe* SCC 2001 ★].
 - ✓ **Preventing noise pollution** [*Montréal* SCC 2005 ★].
 - ✓ **Promoting a safe and welcoming TransLink experience** [*Greater Vancouver Transportation* SCC 2009 ★].
- **2. Demonstrably Justified:**
 - **2.1. Rational connection**
 - ✓ **Prohibiting objectively hateful representations** to eliminate discrimination and harmful effects of hatred [*Whatcott* SCC 2013 ★].
 - ✓ **Prohibiting violent depictions of sex** which give a substantial risk of harm to prevent gendered harms promoted by them [*Butler* SCC 1992 ★].
 - ✓ **Inspecting materials for obscenity** to prevent harmful materials entering Canada [*Little Sisters* SCC 2000 ★].
 - ✓ **Banning noise** that stood out over environmental noise to stop noise pollution [*Montréal* SCC 2005 ★].
 - ✗ **Limiting some signs and not others** to reduce visual pollution [*Guignard* SCC 2002 ★].
 - ✗ **Banning all political ads** to promote a safe and welcoming TransLink experience [*Greater Vancouver Transportation* SCC 2009 ★].
 - **2.2. Minimal impairment**
 - ✓ **Preventing hate speech that is objectively hateful** to reduce hatred [*Whatcott* SCC 2013 ★].
 - ✓ **Banning possession of sexually explicit material involving children** [*Sharpe* SCC 2001 ★].
 - ✓ **Banning noise that stands out** over the environment [*Montréal* SCC 2005 ★].
 - ✗ **Serious intrusions on s2(b)** core speech to prevent visual pollution [*Guignard* SCC 2002 ★].
 - **2.3. Proportionality**
 - ✓ **Hate speech:** If a hate speech law is a little over-broad that might be fine [*Keegstra* SCC 1990 ★].
 - ✓ **Infringing on low-value speech** [*Butler* SCC 1992 ★].
 - ✗ **Infringing on core speech for sign pollution** [*Guignard* SCC 2002 ★].
 - ✗ **Prohibiting self-expressive material or legal private recordings (of oneself) as/of minors** [*Sharpe* SCC 2001 ★].

Freedom of Religion

- **1. Pressing and Substantial Objective**
 - ✓ **Drivers licensing system** to prevent identity theft [*Hutterian* SCC 2009 ★].

- **2. Demonstrably Justified:**
 - **2.1. Rational connection**
 - ✓ **Photo requirement** to uphold a drivers licensing system [*Hutterian* SCC 2009 ★].
 - **2.2. Minimal impairment**
 - ✓ **Mandatory photo requirement** without religious exemption [*Hutterian* SCC 2009 ★].
 - **2.3. Proportionality**
 - ✓ **Creating inconvenience** by essentially stopping some people getting licensed in order to secure the licensing scheme, roadside safety, and ID harmonization [*Hutterian* SCC 2009 ★].

Equality

- **1. Pressing and Substantial Objective**
 - ✓ **Autonomy of choice** with respect to property division and support [*QC v A* SCC 2013 ★].
- **2. Demonstrably Justified:**
 - **2.1. Rational connection**
 - ✓ **Discriminating between couples** the QC dual regime approach was to promote choice and autonomy for all QC spouses [*QC v A* SCC 2013 ★].
 - **2.2. Minimal impairment**
 - ✓ **Requirement of an active choice to undertake obligations** with the objective of enhancing autonomy [*QC v A* SCC 2013 ★].
 - **2.3. Proportionality**
 - ✓ **CL couples being unprotected** in terms of division of property is not disproportionate to the overall benefits of the legislation [*QC v A* SCC 2013 ★].

Life, Liberty, and Security of the Person

- **Never upheld:** SCC has never upheld a violation of s7 [*Carter* SCC 2015 ★].
 - **Exceptional conditions needed:** “A violation of section 7 will be saved by section 1 only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like.” [Lamer CJ in *NB v G(J)* SCC 1999 ☰].
 - **No balancing of competing interests:** “The rights protected by s7 ... are very significant and cannot ordinarily be overridden by competing social interests. Second, rarely will a violation of the principles of fundamental justice ... be upheld as a reasonable limit.” [Lamer CJ in *NB v G(J)* SCC 1999 ☰].
- **1. Pressing and Substantial Objective**
 - ✓ **Protecting venerable persons** from committing suicide in a moment of weakness [*Carter* SCC 2015 ★].
 - ✓ **Improving highway safety** by limiting speed of trucks, despite the fact that they may need to go above this speed to avoid accidents [*Michaud* ONCA 2015 ★].
- **2. Demonstrably Justified:**
 - **2.1. Rational connection**

- ✓ **Making assisted suicide illegal** to prevent vulnerable persons in a moment of weakness from committing suicide [**Carter** SCC 2015 ★].
- ✓ **Limiting truck speeds** to improve highway safety [**Michaud** ONCA 2015 ★].
- **2.2. Minimal impairment**
 - ✓ **Limiting truck speeds** to improve highway safety despite potential that it may render trucks unable to avoid accidents, as this was within the reasonable range of policy choices open to government [**Michaud** ONCA 2015 ★].
 - ✗ **Blanket ban on assisted suicide** is not minimally impairing, as there could be manageable safeguards to allow some people to die with dignity [**Carter** SCC 2015 ★].
- **2.3. Proportionality**
 - ✓ **Limiting truck speeds** in order to improve highway safety [**Michaud** ONCA 2015 ★].

Notwithstanding Clause

s33 Exception Where Express Declaration

“(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter. (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.”

- **Simple referral enough:** Simply referring to s33 is enough to invoke the notwithstanding cause. All parts of CH can be overridden in a single declaration in an omnibus basis [**Ford** SCC 1988 ★].
- **Retroactive application not permitted:** s33 cannot apply retroactively, early uses are deemed to come into effect with CH [**Ford** SCC 1988 ★].

Relevant Cases (p28-30)

R v Therens

★ SCC 1985, p28

- A not informed of right to retain council; prescribed by law; includes those things that are necessarily implied by statute.

Greater Vancouver Transportation

Authority v Canadian Federation of

Students

★ SCC 2009, p29

- TransLink didn't want political ads on busses; had policy; this policy was prescribed by law as it was less admin and more legislative in nature.

R v Oakes

★ SCC 1986, p29

- Drug trafficking; law reversed onus of proof; reasonable limits; Oakes test.

Sauvé v Canada

±★ SCC 2002, p30

- Law limits right to vote; reasonable limits; this was not a reasonable limit.

Ford v QC (PC)

★ SCC 1988, p30

- Bill 101; omnibus use of s33; simple referral to s33 enough; s33 cannot apply retroactively.

CHARTER REMEDIES

s52(1) Invalidity of Laws

s52 Primacy of Constitution of Canada

“The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”

- **Applies to all:** May be available to everyone, not just the person whose right has been infringed [*Big M* SCC 1985 ★; *Downtown Eastside Sex Workers* SCC 2012 ★].

Specific Remedies

- **Declaration of invalidity:** This was the default position. If the law is not saved by s1, it is declared invalid.
 - **Delayed declaration of invalidity:** Increasingly used. The law is declared invalid but Parli is given time to draft a replacement.
- **Reading in, reading down:** Inserting or removing words as necessary to the statute to make it valid.
- **Severance:** Cutting pieces of the stat to make it valid.
- **Constitutional exemption:** Rarely used. The law is determined to be otherwise valid but will not apply to an individual — seen, at times, with delayed declarations of invalidity.

Choosing a Remedy, Guiding Principles

- **Guiding principles** in choosing a remedy involve [*Schachter* SCC 1992 ★]:
 - **Respect for the Ledge.** Would the ledge still want the stat in its new form? [*supra*]
 - **Respect for CH.** Sometimes, the will of the ledge must be overridden to satisfy CH [*supra*].
- **Factors to consider** include [*Schachter* SCC 1992 ★]:
 - **1. Level of inconsistency:** If the stat fails at step 1, or 2.1 of *Oakes*, then **sever** or **strike**. If it fails at 2.2 or 2.3, be more forgiving as maybe only a small change is needed, consider factors in the next step [*supra*].
 - **2. Schacter Factors** [*supra*].
 - **2.1. Remedial Precision.** For **severance**, inconsistent part of provision is usually easy to define. For **reading in**, sometimes hard for court to define extent to which statute should be expanded – in those cases, ledge should fill the gaps, not C [*supra*].
 - **2.2. Interference with Ledge** or Objective/Budget Considerations: If **reading in** would create a huge budgetary change or change substantially the scheme of the stat, don't do it [*supra*].
 - **Reading In Creates Incoherence/Repercussions:** In these cases it is better to strike the clause and give a delayed suspension [*M v H* SCC 1999 ★].
 - **Reading in Exemptions:** Sometimes it will be necessary to do this where striking down is too much interference but Parli still has a legit objective [*Sharpe* SCC 2001 ★].
 - **2.3. Significance of the Change to Remaining Stat:** If a part is **severed** would it drastically change the remaining portion? Or when **reading in** is the group included in the stat now drastically larger than originally? [*supra*]

- **2.4. Would Ledge Still Pass this Stat:** If remaining portion is significant and longstanding, it is safe to assume that Parli would still have enacted it, even with the impermissible part **severed** [*supra*].
- **Re Exclusions:** C will only defer to ledge intent when they exclude something if the means are so central to the aims of the ledge, or the means are so integral to the scheme that the ledge would not have enacted the stat at all if they had to include it [*Vriend* SCC 1998 ★].
- **3. Suspension:** Especially with benefit conferring stat, suspend striking down to allow redraft (though increasingly done to promote dialogue) [*supra*].

s24(1) Individualized Remedies

s24(1) Enforcement of Guaranteed Rights and Freedoms

“Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.”

- **Applies only to one who’s right has been infringed.**
- **Any court of competent jurisdiction** may apply these remedies (ie, not just the SCC).
- **Flexible approach** is used to create remedies [*Doucet* SCC 2003 ★].

Specific Remedies

- Declarations
- Injunctions
- Damages
- Stays of proceedings
- Order stat-funded legal council
- Costs

General Principles, “Appropriate and Just in the Circumstances”

Defined in *Doucet* SCC 2003 ★.

- **1. Meaningfully vindicates** the rights and freedoms of the specific claimant.
- **2. Separation of powers is respected**, the roles of other gov branches are not treaded on.
- **3. Uses appropriate C functions** and powers.
- **4. Fair against other party** against whom the order is made.

Damages

Damages involves a 4 part test, outlined in *Ward* SCC 2010 ★.

- **1. Infringement** must have occurred.
- **2. Serve a useful purpose**, in that they further a goal of compensation; vindication, and/or; deterrence — this test is not rigid.
- **3. There is no better alternative**, and this does not have a chilling effect on good governance (gov may raise either as concerns)
- **4. Quantum** — the amount must be a meaningful response to the seriousness of the breach; the objective of compensation; the upholding of CH values, and; deterring future breaches.

Ordering Government to Act

- **Declaration insufficient:** C may determine a declaration of recognition of breach is insufficient and demand the gov act in some way — but the case is typically serious [*Khadr* SCC 2010 ★].

s24(1) With s52(1) Remedies

- **Serious cases:** In serious cases where an individual's needs are not sufficiently met by a delayed declaration of invalidity C may allow individual remedies also [*Carter* SCC 2016 ★].

s24(2) Exclusion of Evidence

s24(2) Exclusion of Evidence Bringing Administration of Justice into Disrepute

“Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.”

Relevant Cases (p31-34)

Schachter v Canada

- ★ SCC 1992, p31
- 🐦 Provisions of unemployment act asymmetrical; appropriate remedy; 2-part test with factors given.

Vriend v AB

- ★ SCC 1998, p31
- 🐦 P fired for being gay; ABHRC didn't cover orientation as a prohibited ground; clarifies Shacter factors.

M v H

- ★ SCC 1999, p32
- 🐦 Same sex couple, family act doesn't include same sex spouse; reading in makes incoherent; strike down with delayed declaration.

R v Sharpe

- ★ SCC 2001, p32
- 🐦 Child pornography law was found contra CH; reading in not typically used but if Parli has legit law it may be best option rather than striking down.

Doucet-Boudreau v NS

- ★ SCC 2003, p33
- 🐦 s24(1) remedies; is C supervision of exec appropriate; yes; provides factors to consider; s24(1) remedies are flexible.

Vancouver v Ward

- ★ SCC 2010, p33
- 🐦 D arrested and strip searched; 'Pieminister'; s24(1) damages remedies; test created.

Canada (PM) v Khadr

- ★ SCC 2010, p34
- 🐦 Khadr; s24(1) remedy of declaration not sufficient remedy; request for repatriation ordered; fact that req may not be accepted not determinative.

Carter v Canada

- ★ SCC 2016, p34
- 🐦 Assisted dying case; law found invalid; declaration of invalidity delayed, C granted rare system for individual s24(1) remedies.

FREEDOM OF EXPRESSION

s2(b) Fundamental Freedoms

“Everyone has the following fundamental freedoms: freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication”

Idealized Test

Described in *Irwin Toy* SCC 1989 ★.

- **Expression:** Is the activity ‘expression’?
- **Restriction:** Is the gov’s purpose or effect to restrict expression?
 - **s1:** If it is, do a s1 analysis.

Detail

- **1. Expression:** Is the activity ‘expression’? Consider the following factors [*Irwin Toy* SCC 1989 ★]:
 - **Meaning** is it *any* attempt to express meaning, regardless of the content, whether it is verbal or physical? Even parking suffices if P can demonstrate meaning [*Irwin Toy* SCC 1989 ★].
 - **Violent forms** of expression is not protected speech (though content is) [*Irwin Toy* SCC 1989 ★].
 - **Unlikely to fail here**, considering the bounds of what SCC considers protected speech [*Sharpe* SCC 2001 ★].
- **2. Restriction:** Was the gov’s purpose or effect to restrict expression? [*Irwin Toy* SCC 1989 ★]
 - **Purpose to Restrict:** If the gov intended to restrict the meaning of the speech or its influence, this is a violation [*Irwin Toy* SCC 1989 ★].
 - **Effect of Restriction:** If the gov’s purpose was only to control the direct physical results of the activity, but the result had the effect of restriction, the speech must align with a core value of expression [*Irwin Toy* SCC 1989 ★].
 - **Core Values of Expression** [*Irwin Toy* SCC 1989 ★].
 - **Truth:** Promotes a search for truth through facilitating a “marketplace of ideas” [*Irwin Toy* SCC 1989 ★].
 - **Democracy:** social/political participation [*Irwin Toy* SCC 1989 ★].
 - **Self-fulfillment** [*Irwin Toy* SCC 1989 ★].
- **3. If Infringed**, see if the limit is justified by s1 [*Irwin Toy* SCC 1989 ★].

Core Values of Speech

- **Lower value speech** can be infringed more easily [*Butler* SCC 1992 ★].
 - **Commercial speech** is easier to justify restricting, but there is no recognized links between the claimant’s motives and degree of protection given — profit motives shouldn’t figure into an s1 infringement [*RJR* SCC 1995 ★].
 - **Of lesser value** than other sorts of speech [*JTI* SCC 2007 ★].
 - **Hate speech** is of low value [*Keegstra* SCC 1990 ★]

- **Hatred means** “whether a reasonable person, aware of the context and circumstances surrounding the expression, would view it as exposing the protected group to hatred” [*Whatcott* SCC 2013 ★].
- **Obscenity** is lower value speech [*Butler* SCC 1992 ★].
- **Obscene does not account for ‘taste’** and can allow minority expression [*Little Sisters* SCC 2000 ★].
- **Counter-advertising** is a form of speech that is considered core political; blanket ban on things affecting such will not be permitted [*Guignard* SCC 2002 ★].

Access to Public Property for Expression

Involves the test outlined in *Montréal* SCC 2005 ★

- **1. Historical or actual function:** What is the historical/actual function of the place? Is it an area that we expect to have expression? Examples are telephone polls, etc. [*Montréal* SCC 2005 ★].
 - **Busses** are such a place [*Greater Vancouver Transportation* SCC 2009 ★].
- **2. Does it undermine core values** (of truth, democracy, self fulfillment) to have such expression in this place? [*Montréal* SCC 2005 ★].
 - **Political ads on busses** would not undermine these core values [*Greater Vancouver Transportation* SCC 2009 ★]

Relevant Cases (p35-41)

QC v Irwin Toy

★ SCC 1989, p35

- QC act banning toy ads for kids; not blanket ban; creates test for freedom of expression.

RJR MacDonald v Canada

★ SCC 1995, p35

- Blanket ban on tobacco advertising + Health Canada warnings; infringement of s2(b); R must justify infringing measure; not justified.

Canada v JTI MacDonald

★ SCC 2007, p36

- Palri introduced new ad ban; more narrow and more social science evidence; speech was of low value and evidence strong; saved by s1.

R v Guignard

★ SCC 2002, p36

- Counter-advertising against insurance company; sign-by law; counter-ads are core speech; less deference; fails Oakes.

R v Keegstra

→★ SCC 1990, p37

- Racist teacher; caught by hate speech law; violates s2(b) but saved by s1.

SK Human Rights Commission v Whatcott

★ SCC 2013, p38

- D distributed homophobic material; SKHRC challenged; upheld as reasonable limit.

R v Butler

★ SCC 1992, p38

- D operated porn shop; obscenity law; gendered harm; shifting emphasis; lower value speech can have infringement justified more easily.

Little Sisters Book and Art Emporium v Canada

★ SCC 2000, p39

- LGBT bookstore; books held at customs; s2(b) violation in admin of stat not in stat itself; stat upheld.

R v Sharpe

★ SCC 2001, p40

- 🐦 Child pornography law was found contra CH; Oakes test; proportionality.

Montréal v 2952-1366 QC

★ SCC 2005, p40

- 🐦 Montréal strip club violates noise bylaw; challenges on s2(b); justified; outlines public property for expression test.

Greater Vancouver Transportation Authority v Canadian Federation of Students

★ SCC 2009, p41

- 🐦 TransLink didn't want political ads on busses; violation of s2(b); application of Montréal test.

FREEDOM OF RELIGION

s2(a) Fundamental Freedoms

“Everyone has the following fundamental freedoms: freedom of conscience and religion.”

Establishment

- **State cannot prefer one religion in its laws**, Sunday shopping law invalid. Gov cannot shift its purpose [*BigM* SCC 1985 ★].
 - **Secular purposes for the same thing** are okay [*Edward Books* SCC 1986 ☞].

Exercise

Prevailing Test

Outlined in *Syndicat* SCC 2004 ★.

- **1. Nexus with religion:** The belief or practice must have a nexus with religion.
- **2. Sincere belief:** The belief that X is required must be sincere to the claimant.
 - **Not about ‘strength’** but just sincerity [*R v NS* SCC 2012 ★].
- **3. More than trivial interference:** The impugned K or ledge provision interferes with ability to act in accordance with religious belief in a more than trivial or insubstantial way.
- **4. Balance.** Protection is not automatic. Protection must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises.

Balancing Competing Rights

Outlined in *R v NS* SCC 2012 ★

- **Trial fairness > religious rights**, in terms of niqab, as it substantially impairs trial fairness [*R v NS* SCC 2012 ★].
- **Case by case basis:** This analysis is to be done only on a case by case basis.
- **1. Reasonable available alternative measures?** Consider if there is a way to avoid the conflict of competing interests.
- **2. Balance the rights.** Do the salutary effects of infringing the religious right outweigh the deleterious effects?

Government Bodies and Judicial Review

- **Balance, act on evidence:** Balancing both rights should be considered but be sure to act only on the evidence you have and ensure you give freedom of religion sufficient weight [*Trinity Western* SCC 2001 ○].

Relevant Cases (p42-44)

Syndicat Northcrest v Amselem

★ SCC 2004, p42

- ✎ Jewish ceremony; involved building structure; condo board didn't allow; sues under QCHRC; test for freedom of religion.

AB v Hutterian Brethren of Wilson Colony

★ SCC 2009, p42

- ✎ Hutterites don't want photos taken; licensing scheme; religion infringed but upheld by s1.

R v NS

★ SCC 2012, p43

- ✎ Niquab at hearing; balancing of competing rights; analysis for balancing competing rights.

Trinity Western University v BC College of Teachers

○ SCC 2001, p44

- ✎ TWU has religious covenant that discriminates against LGBT ppl; BCCT unimpressed, doesn't want to accredit; SCC riffs on religious freedom.

EQUALITY

s15 Equality Before And Under Law And Equal Protection And Benefit Of Law

“(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

S15(2) Test

Consider first, prior to s15(1). There may be no need to go to s15(1). The prevailing test was outlined in *Kapp* SCC 2008 ★.

- **If claimant has shown a distinction made on enumerative ground, if gov can demonstrate:**
 - **1. Program has ameliorative purpose;** and
 - **2. Program targets disadvantaged group** (an enumerated or analogous ground) [lots of deference afforded]
- **No s15(1) analysis is needed, the program is constitutional.**

S15(1) Violation

Prevailing Test

Outlined originally in *Andrews* SCC 1989 ☺, revived in *Kapp* SCC 2008 ★.

- **1. Differential treatment** on the basis of an analogous ground? [*Andrews* SCC 1989 ☺; *Kapp* SCC 2008 ★].
 - **Neutrality on face not enough** — the law’s application should be taken into account, as it may be discriminatory. Sometimes equality means positive rights [*Eldridge* SCC 1997 ★].
 - **At times a neutral law won’t be discriminating** against an enumerated or analogous ground [*QC v A* SCC 2013 ★].
- **2. Resulting in discrimination in a substantive sense** [*Andrews* SCC 1989 ☺], creates a disadvantage by perpetuating prejudice or stereotyping [*Kapp* SCC 2008 ★].
 - **Consider factors** such as stereotyping, prejudice, or disadvantage [*Andrews* SCC 1989 ☺].
 - **Focus is disadvantage** — finding stereotyping, perpetuating prejudice is just part of finding that disadvantage [Abella J in *QC v A* SCC 2013 ★ ✓ in *Kahkewistahaw* SCC 2015 ★].
 - **Consider further** the following contextual factors [*Law* SCC 1999 ↯]:
 - **1. Pre-existing disadvantage** of the claimant’s group.
 - **2. Correspondence between distinction** drawn and actual needs, capacity or circumstances.
 - **3. Ameliorative purpose or effect** of the law on a more disadvantaged group.
 - **4. Nature and scope** of the interest affected by legislation.
- **Discriminatory impact** of the law. **Do not need proof of intent to discriminate** [*Andrews* SCC 1989 ☺].
 - **Discrimination is defined as:** Distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society [*Andrews* SCC 1989 ☺].

Examples in Practice

- **1. Differential treatment**
 - ✓ **Treating Citizens/Non-Citizens differently** to join bar [*Andrews* SCC 1989 ☺].
 - ✓ **Benefits based on age** [*Law* SCC 1999 ↯].
 - ✓ **Not accommodating deaf patients** by providing language services [*Eldridge* SCC 1997 ★].
 - ✓ **Aboriginality-residence** [*Corbiere* SCC 1999 ★].
 - ✓ **Marital status** re division of property upon breakdown of relationship [*QC v A* SCC 2013 ★].
 - ✗ **Education requirement** to become an FN chief [*Kahkewistahaw* SCC 2015 ★].
- **2. Resulting in discrimination**
 - ✓ **Citizenship**, as this is something that is fairly immutable and not relevant to determining if the person will be a good lawyer [*Andrews* SCC 1989 ☺].

- ✓ **Not accommodating deaf patients**, as they are not treated as equal and have less access to services if they are not accommodated [*Eldridge* SCC 1997 ★].
- ✓ **Aboriginality-residence**, as it relates to the cultural identity of off-reserve band members in a stereotypical way and denies substantive equality as a result [*Corbiere* SCC 1999 ★].
- ✗ **Benefits based on age**, as it's somewhat of a proxy and encourages people to get into work, not based on stereotypes [*Law* SCC 1999 ↵].

Analogous Grounds

Establishing New Grounds

Outlined in *Corbiere* SCC 1999 ★.

- **Immutability/constructive immutability**: Is the ground “based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law”?
 - **Actually immutable**: like race.
 - **Constructively immutable**: like religion.
- **Once an analogous ground, always an analogous ground.**

Established Grounds

- **Marital Status** [*Miron v Trudel* SCC 1995 ☰].
- **Sexual Orientation** [*Egan and Nesbit v Canada* SCC 1995 ☰].
- **Citizenship** [*Andrews* SCC 1989 ☯].
- **Off-reserve aboriginal status/Aboriginality-residence** [*Corbiere* SCC 1999 ★].
- **Sex Discrimination** [*Thibaudeau v Canada* SCC 1995 ☰].

Rejected Grounds

- **Employment status or occupation** [*Re Workers' Compensation Act* SCC 1989 ☰].
- **Province of residence** [*R v Turpin* SCC 1989 ☰; *Haig v Canada* SCC 1983 ☰].
- **Persons charged with war crimes or crimes against humanity outside of Canada** [*R v Finta* SCC 1994 ☰].
- **Persons bringing a claim against the Crown** [*Rudolph Wol & Co v Canada* SCC 1990 ☰].
- **Marijuana users** [*R v Malmo-Levine* SCC 2003 ☰].

Relevant Cases (p45-48)

Andrews v Law Society of BC

☯ SCC 1989, p45

- UK citizen wanted to practice law in BC; Act required they be citizen; s15(1) test created; citizenship now analogous ground.

Law v Canada

↵ SCC 1999, p45

- Survivor benefits; age discrimination; moves away from *Andrews*, no longer good law; contextual factors still used.

R v Kapp

★ SCC 2008, p404

- Non-AB fishers challenge AB fishing license; s15(2) test is created.

Eldridge v BC

★ SCC 1997, p47

- ✎ Decision not to fund sign lang for deaf people; law neutral on face; neutrality on face not enough if it discriminates in reality.

Corbiere v Canada

★ SCC 1999, p47

- ✎ Aboriginality-residence; establishing new analogous grounds.

QC (PC) v A

★ SCC 2013, p48

- ✎ Marital discrimination; Abella J confirms prejudice is mere *indicta*; saved by s1.

Kahkewistahaw FN v Taypotat

★ SCC 2015, p48

- ✎ Confirms Abella J's judgement in QC v A. Edu req for FN chief; challenged on equality grounds; not differential here.

LIFE, LIBERTY, AND SECURITY OF THE PERSON

s7 Life, Liberty, and Security of Person

“Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

Prevailing Test

From *Motor Vehicle* SCC 1985 ★.

- **Narrow focus:** This test only looks at the impact on the claimant, not broadly at society [*Carter* SCC 2015 ★].
- **1. Denial of protected interest:** Is there a denial of one of the three interests protected.
 - **The three interests**
 - **Life:** Rare, but see *Carter* SCC 2015 ★.
 - **Liberty:** Engaged when imprisonment is possible.
 - **Fundamental choice,** treading on fundamental choices regarding personal autonomy also engage liberty [*Carter* SCC 2015 ★].
 - **Security of person:** At least, impact on physical health when state imposed, but can also be state action that exacerbates physical health or even psychological stress if serious enough and state imposed.
 - **Causal connection** between the impugned law and the negative impact.
 - **Sufficient connection** is ‘does the law make X more dangerous/worse’? Not deprivation from law directly or even dominant cause [*Bedford* SCC 2013 ★].
- **2. Contrary to fundamental justice:** Is the denial contrary to the principles of fundamental justice? Be sure to ID relevant principles of fundamental justice.

Examples in Practice

- **1. Denial of protected interest.**
 - **Life**
 - ✓ **Right not to die** by taking one’s life prematurely [*Carter* SCC 2015 ★].

- **Liberty**
 - ✓ **Imprisonment:** [*Motor Vehicle* SCC 1985 ★].
 - ✓ **Fundamental personal choices** such as to die, without state interference [*Carter* SCC 2015 ★].
- **Security of person**
 - ✓ **Threat to physical health:** Depriving people of an option to have a therapeutic abortion without a CC defence is a denial of a protected interest [*Morgentaler* SCC 1988 ☆].
 - ✓ **Threat of physical harm** [*Bedford* SCC 2013 ★].
 - ✓ **Physical or serious psychological suffering** caused by state action [*Rodriguez* SCC 1993 ☰; *Carter* SCC 2015 ★].
- **2. Contrary to fundamental justice.**
 - ✓ **Jail without fault.** This goes against the underpinnings of the legal system [*Motor Vehicle* SCC 1985 ★].
 - ✓ **Illusory defence.** Having a defence that is illusory or not evenly available violates a principle of fundamental justice [*Morgentaler* SCC 1988 ☆].
 - ✓ **Gross disproportionality.** The law deprives people of their s7 rights in an inordinate way compared to the objective of the law [*Bedford* SCC 2013 ★].
 - ✓ **Arbitrary and grossly disproportionate:** Fed refusal to grant exemption to criminal drug laws for safe-injection site [*Insite* SCC 2011 ☰].
 - ✓ **Arbitrary:** Medical marijuana regulations were arbitrary [*Smith* SCC 2015 ☰].
 - ✗ **Respect for human dignity** is not a principle of fundamental justice as there is no societal consensus re dying with dignity, it is not precise enough, and it is not a legal principle [*Rodriguez* SCC 1993 ☰].
 - ✗ **Preservation of life** — “to protect vulnerable persons from being induced to commit suicide at a time of weakness” is not sufficiently precise, and society believes that there are manageable standards to allow dying with dignity [*Carter* SCC 2015 ★].

Principles of Fundamental Justice

- **Basic tenets:** Principles of fundamental justice are basic tenets of the legal system [*Motor Vehicle* SCC 1985 ★].
- **Not narrow:** Principles of fundamental justice must not be construed in a narrow way so as to undermine the interests s7 is to protect [*Motor Vehicle* SCC 1985 ★].
- **Broad interpretation** and a purposive manner is required [*Motor Vehicle* SCC 1985 ★].
- **Beyond procedural justice** or natural justice — look to the law itself [*Motor Vehicle* SCC 1985 ★].

Finding New Principles

Outlined in *Rodriguez* SCC ☰ .

- **Consensus of vitalness:** There must be some consensus that the principle is vital or fundamental to our societal notion of justice
 - **Restated as** “significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate” [*Malmo-Levine* SCC 2003 ☰].
- **Precise and consistent:** Must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result.
- **Legal principle:** Must be a legal principle [also in *Malmo-Levine* SCC 2003 ☰].

- **Consider the following** when discerning the principles of fundamental justice governing a particular case:
 - **History:** Review CL and the ledge history of the offence in question.
 - **Rationale:** What is the rationale behind the offence itself and the principles which underlie it?
 - **State interest:** What is the state's interest here? A fair balance should be struck between the interests of the state and the individual.

Recognized Principles

Primary Principles

- **NB: Re the claimant group.** Do not consider the beneficial effects of the law for society. Balance the effect to the individual against the purpose of the law, not society in general [**Bedford** SCC 2013 ★].
- **Arbitrary:** Targets the situation where there is no rational connection between the object of the law and the limit it imposes [**Bedford** SCC 2013 ★].
 - **Not capable of fulfilling its objectives.** It exacts a constitutional price in terms of rights, without furthering the public good that is said to be the object of the law [**Carter** SCC 2015 ★].
- **Overly broad:** Goes too far by denying the rights of some individuals in a way that bears no relation to the object. The chosen means infringe in a way that has no connection with the mischief contemplated by the ledge [**Carter** SCC 2015 ★].
 - **Narrow focus:** Not on broad social impacts, but on the impact on the individuals whose right is trammelled [**Carter** SCC 2015 ★].
- **Grossly disproportionate:** The effect of the law on the s7 right are inordinate compared to its purpose. The deprivation is totally out of sync with the objective of the measure, entirely outside the norms accepted in our free and democratic society [**Bedford** SCC 2013 ★].

Other Principles

- **Jail without fault:** One cannot be put in jail without fault [**Motor Vehicle** SCC 1985 ★].
- **Defence cannot be illusory:** A CC defence must be actually available and not practically illusory, and available in an even manner, in a principled way [**Morgentaler** SCC 1988 ☆].
- **Fair hearing:** **NB v G(J)** SCC 1999 ☰.

Failed Principles

- **Right to die with dignity,** right to control one's death — denied as there was no societal consensus [**Rodriguez** SCC 1993 ☰]
- **Harm principle,** CC law should only be used when harm to others occurs — denied as this is not a legal principle or manageable standard [**Malmo-Levine** SCC 2003 ☰].
- Best interests of the child — denied as not a manageable standard; too imprecise and contextual [**Canadian Foundation for Children Youth & Law** SCC 2004 ☰]

Positive Rights, Beyond Administration of Justice

- **No protection of standalone right:** “Section 7 does not protect standalone right to security of the person” [McLachlin OG in *Gosselin* SCC 2002 ☞].
- **Primarily about interaction with justice system:** The dominant strand of jurisprudence on s7 sees its purpose as guarding against certain kinds of deprivation of life, liberty and security of the person, namely, those “that occur as a result of an individual’s interaction with the justice system and its administration.” [*supra*].
- **Potential positive right:** “One day s. 7 may be interpreted to include positive obligations” ... but this case does not warrant “novel application of s. 7.” [*supra*].
 - **Positive right for social assistance unsuccessful** as factual record not sufficient, but leaves door open for later [*supra*].
 - **Right to not have shelter destroyed** by the state has been recognized, ie, to allow tarps or boxes for homeless people — this is not a positive right [*Victoria* BCCA 2009 ★].
- **“The underfunding of the public healthcare system infringes on your s7 rights, the government must give more resources to the public syst– NOPE LET’S JUST LET RICH PEPOLE GET BETTER CARE LOL” – SCC:** SCC decides that we (or at least QC) should have 2-tier healthcare because 🙄(ツ)🙄 [*Chaoulli* SCC 2005 ★].

Relevant Cases (p49-52)

Reference Re Motor Vehicle Act

- ★ SCC 1985, p49
- 🐦 BC refers stat; outlines test for s7.

R v Morgentaler

- ☆ SCC 1988, p49
- 🐦 Anti-abortion law; challenged; violates s7 because of procedural justice.

Canada (AG) v Bedford

- ★ SCC 2013, p50
- 🐦 Sex workers case; s7; outlines principles of fundamental justice; outlines rational connection.

Carter v Canada

- ★ SCC 2015, p50
- 🐦 Assisted dying case; CC banned assisted death; violates s7; outlines principles of fundamental justice.

R v Michaud

- ★ ONCA 2015, p51
- 🐦 Challenge to road regulations; rare example of s7 violation being upheld by s1.

Gosselin v QC (PC)

- ★ SCC 2002, p51
- 🐦 Does s7 have a positive aspect; not yet; factual record here too thin.

Victoria v Adams

- ★ BCCA 2009, p52
- 🐦 Tent by-law; s7; not positive right but right to not have shelter torn down.

Chaoulli v QC (PC)

- ★ SCC 2005, p52
- 🐦 Challenge to public only healthcare; violation of s7; not saved by s1; capitalism is awful.

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BACKGROUND

Roncarelli v Duplessis

★ SCC 1959, p404

🐦 QC Premier tried to take away JW's license w/o good reason; gov must act within rule of law, actions grounded in stat, discretionary power not unlimited.

Facts

D was QC Premier, P was Jehova's Witness, restaurant owner. QC gov was persecuting Jehovah's, P would pay their bail. D directed gov to take away P's liquor license; P brings action against D.

Issues

Did D have the right to revoke D's liquor license?

Reasons

While stat gave liquor commission broad power, must be in accordance to rule of law. Gov organization or official can only have powers lawfully given to them, no power exists outside of what statute gives them. Discretion must be based on relevant considerations and good faith. It was not here.

Precedents

Rule of law; gov actors only have the powers that the law grants them.

Switzman v Elbling

★ SCC 1957, p404

🐦 Anti-communist law; ultra vires prov; Rand J says also against implied bill of rights.

Facts

'Padlock law' made it illegal to use a house for the 'propagation of communism'. Law challenged as ultra vires, prof argued fell under property and civil rights.

Issues

Was the law ultra vires the prov? Did it violate any rights?

Reasons

Majority (8)

The law is ultra vires on fed grounds.

Rand J (Obiter ※)

"I am unable to agree that in our federal organization power absolute in such a sense resides in either legislature." The preamble of the BNA gives us a constitution similar in principle to that of the UK – which has a Parli democracy, which requires free public opinions, and a marketplace of ideas. Freedom of expression is a requirement to have Parli democracy.

Precedents

There may be an implied bill of rights in Canada.

APPLICATION OF THE CHARTER

RWSDU v Dolphin Delivery

★ SCC 1986, p404

- ✈ Corp asks for injunction against union; does CH apply to C? Is CL under CH? No to both. CH does not apply to private entities and C isn't gov. CL not law.

Facts

D asks for injunction to stop P (union) from secondary-picketing them (an illegal act in CL). P says if J grants injunction, this was a violation of freedom of expression, Cs are gov so CH applies.

Issues

Does the CL rule making secondary picketing illegal violate s2(b) CH? Does CH apply in litigation between two private actors when one relies on CL rule? Does the 'gov' in s32 include C? Does 'law' in s52 include CL

Reasons

P loses on interpretation of s32. CH does not apply in this case, there is no 'gov action' (e.g., a stat) that infringes a CH right. Js are involved in adjudication, not governance.

Draws a line between how CH applies to CL and stat, CH does not apply to CL rules here. If two private parties are in dispute where no active gov is relied upon to support the action, CH does not apply. However, CL should evolve in a way consistent with CH.

Precedents

CH does not apply to private entities, only gov. Law does not strictly speaking mean CL for s52. CL should evolve in a manner consistent with CH. C orders are not government actions.

McKinney v University of Guelph

★ SCC 1990, p404

- ✈ Faculty sues uni under CH; 'effective control' test articulated; uni in this case not gov.

Facts

Faculty member at uni (under CH) challenging mandatory retirement. Faculty association enters into negotiations with admin for provisions like salaries, promotion, etc.

Issues

Are unis 'gov' for purposes of s32?

Reasons

Majority (La Forest J)

This uni not gov as it is autonomous from it, not controlled by it. A majority of their board not appointed by gov — had a majority of the board been appointed by gov, this *may* indicate control. Coercion is a major part of gov control. Search for effective control.

Dissent (Wilson J)

A public entity doing a public function with public funds created by statute is gov. Control test is one way of looking at this but also a public authority acting in the public interest is something to consider being gov too.

Precedents

A gov entity must be controlled by gov.

Stoffman v VGH

☆ SCC 1990, p404

✎ Mandatory retirement; maj of VGH board appointed by gov but no gov compulsion/coercion in terms of employment; VGH not gov for this purpose.

Facts

Mandatory retirement case at VGH. Member sues under CH.

Issues

Is VGH 'gov' for the purposes of s32?

Reasons

14/16 board members appointed by gov, but gov was not exercising power of compulsion over VGH, who could make their policies re employees with no gov involvement. Although appointed, they acted independently re employment.

Precedents

This case follows the precedent in ***McKinney*** SCC 1990 ★.

Douglas-Kwantlen Faculty Association v Douglas College

☆ SCC 1990, p404

✎ Faculty sues over retirement policy; is DougCollege gov? Yes, as had effective control via Ministerial scrutiny, board appointment and control.

Facts

Faculty sues over forced retirement policy.

Issues

Is Douglas College 'gov' for the purposes of s32?

Reasons

Douglas is a community college, considered an agent of R with a more direct relationship and less autonomy than a uni. The board was appointed by gov and there was evidence of effective control, as Minister of Education has power to approve bylaws for Douglas and direct them.

Precedents

This case follows the precedent in ***McKinney*** SCC 1990 ★.

Eldridge v BC

★ SCC 1997, p404

✎ Deaf patients not given interpreter; non-gov actor; but performing gov function via delegated stat so CH applies.

Facts

Deaf patients at a hospital were not provided interpreters.

Issues

Does CH apply to non-gov actors performing a gov function? Is the decision of a BC hospital board to deny funding for sign-language services for deaf patients a gov action?

Reasons

Yes, the hospital is implementing a gov policy. Here, the entity was performing delegated statutory authority. Different from ***Stoffman*** SCC 1990 ☆ as that power was not delegated to them.

Precedents

CH will apply to a non-gov entity performing a power delegated to it by gov, even if there is not effective control over it.

Vriend v AB

★ SCC 1998, p404

🐦 P fired based on orientation; AB chose not to update ABHRC; gov *deciding* not to do something is reviewable.

Facts

P fired on basis of sexual orientation; evidence showed ledge chose not to update ABHRC to reflect CH ruling that sexual orientation a protected ground. P sues.

Issues

Does AB's gov decision not to include 'sexual orientation' as a prohibited ground of discrimination in its human rights ledge violate s15?

Reasons

CH applies. AB had clear ledge auth, its silence was not neutral. Saying inaction is unreviewable while action is, is a false distinction. This will not always apply; here there was evidence of a distinct choice not to act.

Precedents

A decision not to act is an act that is reviewable.

Hill v Church of Scientology

★ SCC 1995, p404

🐦 P suing for defamation; D says CL defamation contra CH values; far reaching changes should be left to the ledge.

Facts

P, an R prosecutor in ONSCJ prosecuted D, who start a criminal contempt proceeding against P — it was found untrue and unfounded. P now sues D for defamation.

Issues

Should the CL tort of defamation be modified to conform to s2(b)?

Reasons

Citing **Dolphin Delivery** SCC 1986 🐦, C says CH does not directly apply to CL disputes, but CL must evolve consistently with CH values. Engages in a 'weighing' of the CH value of freedom of expression with protection of reputation. More flexible CH analysis. Far reaching changes should be left to ledge.

Precedents

CH rights are not involved in private disputes, but CH informs CL. P must show CL fails to comply with CH. If proven, C may weigh CH values against CL principles.

RWDSU v Pepsi-Cola

☆ SCC 2002, p404

🐦 Union challenges CL 2nd-picket rule; C says CL was contra CH values, changes it; follows Hill.

Facts

Union challenges CL rule on secondary picketing, which made it essentially illegal.

Issues

In light of the CH value of freedom of expression, should the CL be struck down?

Reasons

C determined that the CL rule that secondary picketing is unlawful is contra CH values, applying **Hill** SCC 1995 ☆. Evidence of tortious/criminal conduct will be needed before a secondary picket can be restricted through the CL.

Precedents

Follows **Hill** SCC 1995 ★ precedent.

R v Hape

★ SCC 2007, p404

🐦 Creates test for extraterritorial application of CH.

Reasons

C develops a test for extraterritorial application of CH: Would the actor's activity lead to Canada being in breach of international obligations or human rights? Did the foreign gov consent to exercise of Canadian enforcement jurisdiction within its authority? If yes to either, captured by CH.

Precedents

Creates a test for extraterritorial application of CH.

Canada v Khadr

☆ SCC 2008, p404

🐦 D held in Gitmo; interrogated; CH applies outside Canada when IL is violated.

Facts

D, Canadian citizen, held in Gitmo for 6 years, Canadian officials interrogated him and gave documents to US officials, D wanted those documents disclosed.

Issues

Does CH apply to Canadian officials operating outside of Canada?

Reasons

SCOTUS already found detainee treatment was contra international law, thus CH applies.

Precedents

Follows **Hape** SCC 2007 ★ precedent.

R v Big M Drug Mart

★ SCC 1985, p404

🐦 Corp sued via ON stat saying can't work Sunday; corps don't have freedom of religion; doesn't matter, suing on validity of law.

Facts

D charged with operating on Sunday contra *Lord's Day Act*.

Issues

Can D, a corporation, benefit from freedom of religion in s2(a)?

Reasons

Corporations do not have freedom of religion. However, anyone can challenge a law as violating CH if they are charged by it, it's the nature of the law not the status of the A that is at issue.

Precedents

The nature of the law, not the status of A, matters in standing. Corporations cannot have a religion.

Canada (AG) v Downtown Eastside SWUAV

★ SCC 2012, p404

🐦 Sex workers case; challenges prostitution laws; changes rules for public interest standing.

Facts

D challenged prostitution provisions saying they violated CH, TJ said they had no standing.

Issues

Does D have public interest standing?

Reasons

Takes the test in *Borowski* SCC 1981 [⬆] and modifies the third step. The test is now (3) the proposed suit is reasonable and effective means of bringing the case to court [previously, no other reasonable and effective means].

In determining (3), take a purposive and flexible approach.

There was parallel litigation, but it was different enough for this to be an economical use, and even though there were other people charged with prostitution laws, having one big case made sense, and they were not in a position to launch a CH challenge — D was. Thus, standing was found.

Precedents

Changed the test for public interest standing.

LIMITS AND OVERRIDES

R v Therens

♣ SCC 1985, p404

🐦 A not informed of right to retain counsel; prescribed by law; includes those things that are necessarily implied by statute.

Facts

After A was involved in a single-vehicle accident, a police officer made a demand pursuant to s. 235(1) of CC that A accompany the officer for a breathalyzer test. A was not informed of his right to retain and instruct counsel.

Issues

Was the breathalyzer administered in violation of A's right to counsel as guaranteed by s10(b) of the Charter?

Reasons

When the police officer administered the breathalyzer test under s. 235 of CC the accused was "detained" within the meaning of s. 10 of the Charter. As such the accused's rights under s. 10(b) of the Charter to retain and instruct counsel without delay and to be informed of that right were violated.

The question of the admissibility of the breathalyzer evidence fell to be determined under s. 24(2) of the Charter, which empowers a court to exclude evidence where "that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the Charter". Here, the police flagrantly violated a Charter right without statutory authority for doing so and such an overt violation had to result in the rejection of the evidence thereby obtained. If s. 10(b) could be offended without statutory authority for the police conduct here in question and without loss of admissibility of evidence obtained by such a breach, it would be stripped of any meaning. The evidence was therefore excluded since to admit it would clearly "bring the administration of justice into disrepute".

Precedents

Limit is prescribed by law within meaning of s.1 if it is expressly provided for by statute or regulation, necessarily implied by such, or results from application of the common law.

Greater Vancouver Transportation Authority v Canadian Federation of Students

★ SCC 2009, p404

🐦 TransLink didn't want political ads on busses; had policy; this policy was prescribed by law as it was less admin and more legislative in nature.

Facts

A student federation and a teachers' federation tried to place ads encouraging youth voting and expressing concern about the education system on the sides of buses operated by Vancouver and provincial transit authorities. The transit authorities refused the ads pursuant to articles 2, 7 and 9 of their advertising policies, which barred all political or controversial ads.

Issues

Does a government policy satisfy the prescribed by law threshold?

Reasons

The provincial transit authority was a statutory body and the Vancouver transit authority was substantially controlled by local government, so both were government entities subject to CH.

The transit authorities' advertising policies were formally adopted, pursuant to their statutory powers. The policies were generally applicable rules, falling within the meaning of "prescribed by law" for the purposes of s. 1 of the Charter.

Precedents

Gov policies of an 'administrative' nature do not fall under prescribed by law, but those of a general nature of general application that are 'legislative' in nature do.

R v Oakes

★ SCC 1986, p404

🐦 Drug trafficking; law reversed onus of proof; reasonable limits; Oakes test.

Facts

The accused was charged with unlawful possession of a narcotic for the purposes of trafficking, contrary to s. 4(2) of the Narcotic Control Act.

After the trial judge had found that there had been proof beyond a reasonable doubt of possession, the accused brought a motion to challenge the constitutional validity of s. 8, which provides that, if the court finds the accused in possession of a narcotic, the accused is presumed to be in possession for the purpose of trafficking unless he establishes that he had no intent to traffic.

Issues

Was the infringement of A's s11(d) rights (the reversal of the onus of proof by s8 of the *Narcotics Control Act*) saved by s1?

Reasons

S1 sets a stringent standard for justification. The language of 'demonstrably justified' places an onus on government, and the standard of proof is preponderance of probability.

You must look at the objective and purpose of not just the overall ledge scheme, but the CH violation itself. The purpose cannot shift, though a shift in emphasis is permitted.

In this case — what is the purpose and reversing the onus of proof for drug offenders?

Precedents

Creates the Oakes test.

Sauvé v Canada

=★ SCC 2002, p404

🐦 Law limits right to vote; reasonable limits; this was not a reasonable limit.

Facts

Challenges law that any inmates serving more than 2 years in prison can not vote.

Issues

Is the denial of voting rights to a certain group of citizens (prisoners) saved by s1?

Reasons

Majority (McLachlin OG)

McLachlin OG takes a civil libertarian approach, noting that the notwithstanding clause doesn't apply to s3; making it an especially sacred right. Frames the gov as clearly being the singular antagonist.

Dissent (Gonthier J)

Rather than this being a case of the gov being the singular antagonist, the law is framed as a social policy.

Precedents

This case reveals differing approaches to the court's role in reviewing CH limits. The court also re-articulates the Oakes Test.

Ford v QC (PC)

★ SCC 1988, p404

🐦 Bill 101; omnibus use of s33; simple referral to s33 enough; s33 cannot apply retroactively.

Facts

Respondents challenged the validity of s58 and s69 of the QC Charter of the French Language (Bill 101) on the grounds the sections contravened the guarantee of freedom of expression in s2(b) CH. The Act was to operate notwithstanding s2 and s7-15 CH, due to an "omnibus" override clause to all QC legislation.

Issues

Can s33 be invoked in an 'omnibus' manner?

Reasons

s214 of the language legislation, which was the standard override clause put into all QC Acts adopted before April 17, 1982 by s1 CH, operated as a valid override clause. It was sufficient to refer to the number of the section continuing the provision to be overridden and there was no reason why all the provisions in s2 and s7-15 CH could not be validly overridden in a single declaration. However, s33 cannot apply retroactively, thus override clauses can only come into effect when the legislation is amended or CH came into force.

The use of s33 to protect French-only signs is valid.

Precedents

A simple referral to s33 is enough, a specific deliberative use of s33 is not needed.

CHARTER REMEDIES

Schachter v Canada

★ SCC 1992, p404

🐦 Provisions of unemployment act asymmetrical; appropriate remedy; 2-part test with factors given.

Facts

Provisions of Unemployment Insurance Act provided benefits for birth mothers (15 weeks) and adoptive parents (15 weeks), but excluded birth fathers, s15 infringement.

Issues

What is the appropriate remedy?

Reasons

There are two guiding criteria when determining a remedy: (1) Respect for the ledge, meaning stat should remain as true to its original form as possible — consider: Would the ledge still enact the stat in its changed form? (2) Respect for the CH, meaning that sometimes the law must change to fulfil CH's purpose. These two are always relevant, no matter which s52 remedy is used.

Precedents

Provides a guiding principle for s52 remedies, and factors to consider in reading in/out.

Vriend v AB

★ SCC 1998, p404

🐦 P fired for being gay; ABHRC didn't cover orientation as a prohibited ground; clarifies Shacter factors.

Facts

P was fired from their employment because of their homosexuality. P attempted to file a complaint with the ABHRC, but the Commission could not help as the Act did not include sexual orientation as a prohibited ground of discrimination.

Issues

What is the proper remedy for the exclusion of sexual orientation in the Act?

Reasons

Reading in sexual orientation as a prohibited grounds of discrimination into the impugned sections of the Act was the best remedy for the Charter violation.

Re respect to the ledge, reading in sexual orientation into the Act minimized interference with the ledge's goal. In contrast, striking down the impugned sections would have, in effect, gutted the Act. With respect to respect for CH, adding to the list of prohibited grounds of discrimination is consistent with the purposes of CH, while the other option of striking down the impugned sections would have been inconsistent.

Re remedial precision, the expression "sexual orientation" is a term with an easily discernible meaning. Re budgetary repercussions, they were not significant in this case. Re thrust of the legislation, there was no deleterious impact. It was reasonable to assume that the legislature would prefer to include sexual orientation in the Act than to having no human rights legislation.

Precedents

Clarifying guiding principle 1 in Schacter: even with a clear intention on behalf of parliament to exclude something from legislation, the court will only defer to the legislative intent if the means are so central to the aims of the legislature, or the means are so integral to the legislative scheme of the Act that the legislature would NOT have enacted the legislation at all if they had to include it.

M v H

★ SCC 1999, p404

🐦 Same sex couple, family act doesn't include same sex spouse; reading in makes incoherent; strike down with delayed declaration.

Facts

M and H were a same-sex couple, shareholders in a business. M left the common home and H changed the locks. M applied for an order for partition and sale of the house and other relief, challenging the validity of the definition of "spouse" in s 29 of the *Family Law Act*.

Issues

What remedy is to be used?

Reasons

In C below, the words "a man and a woman" were read out of the definition of "spouse" in s29 of the Act and replaced with the words "two persons" and the application of the order was suspended for one year. This remedy is not suitable in the circumstances of the case.

Where reading in to one part of the statute would have significant repercussions for a separate and distinct scheme under the Act, it was not safe to assume that the legislature would have enacted the statute in its altered form. Striking down the entire Act was excessive. The assumption that the ledge would have passed the constitutionally sound parts of the statute without the unsound parts was safe. The appropriate remedy was to sever s29 of the Act such that it alone was declared to be of no force or effect. This remedy should be temporarily suspended for a period of six months in order to give the legislature some latitude to address the possible repercussions of the severance in a more comprehensive fashion.

Precedents

Where reading into a stat makes it incoherent or creates wide ranging repercussions, it's better to sever the offending section with a delayed suspension if it will have big repercussions in the Act and other parts.

R v Sharpe

★ SCC 2001, p404

🐦 Child pornography law was found contra CH; reading in not typically used but if Parli has legit law it may be best option rather than striking down.

Facts

A was charged with two counts of simple possession of child pornography and two counts of possession of child pornography for the purpose of distribution or sale. A brought a motion challenging the CH validity of the offence of simple possession. R conceded that the charging provision was a *prima facie* violation of s2(b), but argued that it could be upheld by s1.

Issues

What exemptions to the offence should be read in?

Reasons

While reading-in is an unusual remedy, in the present case reading-in will uphold the force of the generally valid prohibition on the possession of child pornography while ensuring that constitutionally invalid uses of the prohibition do not occur. To declare the CC section to be of no force or effect and to strike it out would needlessly subvert the intent of Parli in enacting laws to meet a bona fide pressing and substantial objective.

Precedents

Where Parli has a legitimate pressing and substantial objective but the law violates a CH right and is not fully saved by s1, it may a times be appropriate to read-in exemptions rather than strike down the section, as this needlessly subverts Parli's will.

Doucet-Boudreau v NS

★ SCC 2003, p404

🐦 s24(1) remedies; is C supervision of exec appropriate; yes; provides factors to consider; s24(1) remedies are flexible.

Facts

Francophone parents successfully brought an action to compel the NS government to comply with s23 CH by establishing French language schools at the secondary level.

Issues

What does “appropriate and just in the circumstances” mean in s 24(1)? Does it apply to a reporting order to the gov?

Reasons

C ordered the following remedies: Ordered the school districts to have schools opened within specified timelines; C retained jurisdiction to hear reports.

C must be sensitive to their role as judicial arbiters and not fashion remedies which usurp the role of the other branches of governance. s24(1) of CH contemplates any remedy that is “appropriate and just” in the circumstances that meaningfully vindicates the rights and freedoms of the claimants using legitimate means within the framework of Canada's constitutional democracy.

The reporting order was “appropriate and just”. It took into consideration and did not depart unnecessarily from the role of C in a constitutional democracy. It vindicated the rights of the parents yet left the details of the means largely to the executive.

Constitutional remedies involving some degree of ongoing supervision do not represent a radical break with past practices.

Precedents

Factors to consider are: Meaningfully vindicate rights; respect separation of powers; judicial remedy that invokes functions of C; fair to the party against whom the order is made; flexible approach responsive to need in a given case.

Vancouver v Ward

★ SCC 2010, p404

🐦 D arrested and strip searched; ‘Pieminister’; s24(1) damages remedies; test created.

Facts

D was arrested, strip-searched, car impounded — all without charge. \$5K in damages were given for this CH breach under s24(1).

Issues

What should the remedy for this CH breach be?

Reasons

The damages were appropriate. The degrading nature deserves compensation, violation calls for vindication by damages, and it needs to be deterred. Re quantum of damages: Compensation — moderate damages (humiliating but D was never touched and kept underwear on); Vindication/Deterrence — substantial damages (officers' conduct was serious and reflected lack of concern for rights but it was not malicious or oppressive).

Precedents

Creates a 4-part test for CH damages.

Canada (PM) v Khadr

★ SCC 2010, p404

🐦 Khadr; s24(1) remedy of declaration not sufficient remedy; request for repatriation ordered; fact that req may not be accepted not determinative.

Facts

Violation of s7 rights of Canadian citizen detained in Gitmo, related to actions of Canadian officials.

Issues

What is the appropriate s24(1) remedy?

Reasons

Remedy of ordering request for repatriation was appropriate, as D would be left without remedy if only a declaration recognizing breach were issued. The fact that the request might not be accepted was not determinative. A mere declaration that Charter rights had been breached would not vindicate the suspected terrorist.

Precedents

Sometimes a mere declaration of rights being violated is not enough.

Carter v Canada

★ SCC 2016, p404

🐦 Assisted dying case; law found invalid; declaration of invalidity delayed, C granted rare system for individual s24(1) remedies.

Facts

The portion of the CC prohibiting physician assisted death was declared of no force or effect.

Issues

What is the correct remedy as the law was found invalid?

Reasons

A declaration of invalidity was suspended for 12 months. Canada AG sought a 6 month extension afterwards. If this were granted, QC PG asks that legislation regulating end-of-life assistance adopted in QC be exempted from suspension. Original claimants and certain interveners ask this Court to grant a constitutional exemption for individuals who wish to seek assistance in ending their life during the period of any extension. C complied and created a system where people could request an individual remedy.

Precedents

In certain exceptional cases the law will grant s24(1) remedies with s52(1) remedies.

FREEDOM OF EXPRESSION

QC v Irwin Toy

★ SCC 1989, p404

🐦 QC act banning toy ads for kids; not blanket ban; creates test for freedom of expression.

Facts

QC law restricted toy ads aimed at children.

Issues

Does this infringe on D's freedom of expression?

Reasons

We cannot exclude human activity from the scope of free expression on the basis of the content or meaning being conveyed. If the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee. Of course, some human activity is purely physical. It might be difficult to characterize certain tasks, like parking a car, as having expressive content. To bring such activity within the protected sphere, the plaintiff would have to show that it was performed to convey a meaning.

The limitations imposed on freedom of expression were justified by s1. When analyzing an alleged violation of freedom of expression it must first have been determined that the activity in question conveyed or attempted to convey a meaning in a non-violent manner. If the gov's purpose was only to control the direct physical results of the activity, the guarantee would not have been infringed. Where the purpose was found not to restrict but the result had the effect of restriction, it must have been demonstrated that the meaning conveyed related to the pursuit of truth, participation in the community or individual self-fulfilment and human flourishing.

Precedents

Creates a test for freedom of expression.

RJR MacDonald v Canada

★ SCC 1995, p404

🐦 Blanket ban on tobacco advertising + Health Canada warnings; infringement of s2(b); R must justify infringing measure; not justified.

Facts

Gov implemented a blanket ban on tobacco advertising, mandated unattributed health warnings on tobacco packages. P company sues, R concedes s2(b) violation on the ban, but not the warnings (though they were found to also infringe).

Issues

Is this infringement saved by s1?

Reasons

Majority (McLachlin OG)

A high level of justification is required. The objective should not be overstated — it is the objective of the *infringing measure* which must be justified. The blanket ban was too broad, not minimally impairing. Certain types of ads (like brand preference ones) should not be caught.

The protection of s2(b) extended to commercial expression such as advertising. The prohibition on the advertising and promotion of tobacco products, and the requirement

for unattributed health warnings, infringed the right of free expression. The objective of reducing health risks by reducing advertising-related consumption of tobacco was of sufficient importance to justify overriding the right of free expression. The provisions of the Act were rationally connected to the objective of reduced tobacco consumption. However, Minister failed to demonstrate that a total ban on advertising and a requirement for an unattributed health warning were minimal impairments on the freedom of expression that were necessary to achieve the objectives of the Act. The offending provisions were not justified under s1. The remedy is to suspend, as striking down would create no limits on ads.

Precedents

Objective in s1 analysis is the objective of infringing measure specifically.

Canada v JTI MacDonald

★ SCC 2007, p404

🐦 Palri introduced new ad ban; more narrow and more social science evidence; speech was of low value and evidence strong; saved by s1.

Facts

In 1995, SCC struck down the advertising provisions of the Tobacco Products Control Act. In response to Cs decision, Parli enacted the Tobacco Act ("TA") and regulations. Section 20 banned "false, misleading or deceptive" promotion, as well as promotion "likely to create an erroneous impression about the characteristics, health effects or health hazards of the tobacco product or its emissions". The TA was challenged.

Issues

Was this limit on s2(b) saved by s1?

Reasons

Deference could be appropriate in assessing whether the requirement of rational connection was made out. Effective answers to complex social problems, such as tobacco consumption, may not be simple or evident. On the one hand, the objective was of great importance, nothing less than a matter of life or death for millions of people who could be affected, and the evidence showed that banning advertising by half-truths and by invitation to false inference would help reduce smoking. The reliance of tobacco manufacturers on this type of advertising attested to this. On the other hand, the expression at stake was of low value. On balance, the effect of the ban was proportional.

Precedents

Speech of lower value will be less likely to be protected; complex social issues afford more deference.

R v Guignard

★ SCC 2002, p404

🐦 Counter-advertising against insurance company; sign-by law; counter-ads are core speech; less deference; fails Oakes.

Facts

Municipal by-law prohibited 'advertising signs'. D was 'counter-advertising' against an insurance company, which was caught by the bylaw.

Issues

Does this unjustifiably infringe D's freedom of expression?

Reasons

Counter-advertising is seen as core political speech. Blanket bans are bad. The objective here was against visual pollution and distracted driving. If that's the case a

more minimally impairing means could be used rather than a blanket ban. The remedy is a declared declaration of invalidity (6 months).

There was no rational connection. The zoning by-law only prohibited in residential areas signs containing a business' trade name. The by-law did not apply to any other type of sign. The prohibition and the distinctions it made were arbitrary because if the accused had not written the name of his insurance company on his sign, the sign would have respected the by-law.

With regards to minimal impairment, the by-law was not a reasonable solution as among the solutions normally available to a government within the latitude it has to make these judgments. It seriously limited the accused's freedom of expression, as it prohibited him from publicly expressing his dissatisfaction with his insurance company.

As for proportionality, the impact of the zoning by-law on the accused's freedom of expression was disproportionate to any benefit that it secured for the municipality. By limiting the right to post signs, the by-law seriously and unjustifiably infringed a form of expression that has been long used and is closely connected to the values underlying the protection of freedom of expression.

Precedents

Core speech is afforded less deference in infringement; counter-advertising is core speech.

R v Keegstra

→★ SCC 1990, p404

🐦 Racist teacher; caught by hate speech law; violates s2(b) but saved by s1.

Facts

AB teacher communicated anti-Semitic statements to his class, contra CC prohibition against “communicating statements, other than in private conversation, [that] willfully promotes hatred against any identifiable group.” The law was challenged based on freedom of expression.

Issues

Is this an infringement of s2(b), if so is it saved by s1?

Reasons

As the speech is not violent in *form* it is protected speech and s2(b) is violated. Arguments saying s2(b) should be narrowed to accord with s15 and s27 (multiculturalism) are rejected.

Majority

This speech is of low value. The law is tailored to cover the worst types of hate speech and nothing else — promotion of hatred against an identifiable group and not in private conversation. It has a demanding level of MR (willful). The word ‘hatred’ is not too vague. The law even has a defence — truth. Even in the context of criminal law, the government has used the least intrusive means.

Dissent (McLachlin not-an-OG-in-this-specific-instance)

The law does satisfy a pressing and substantial objective, but it fails at rational connection. By prosecuting hate mongers, they are empowered, and they are also sent underground, and become more violent. Additionally, the word ‘hatred’ is too vague and contains an emotional component, which may not be minimally impairing.

Precedents

Example of a hate speech law being upheld; low value speech gets less protection.

SK Human Rights Commission v Whatcott

★ SCC 2013, p404

🐦 D distributed homophobic material; SKHRC challenged; upheld as reasonable limit.

Facts

Regards the constitutionality of s14 of the SK Human Rights Code prohibiting hateful publications — this was a human rights code with a remedial focus and administrative process, not a criminal prohibition.

Issues

Does s14 violate s2(b), if so is it saved by s1?

Reasons

The purpose of the legislation was pressing and substantial.

Prohibiting representations that were objectively seen to expose protected groups to "hatred" was rationally connected to the objective of eliminating discrimination and the other harmful effects of hatred.

S14 met the minimal impairment requirement. The limitation imposed on freedom of expression by the prohibition in s14, when properly defined and understood, was demonstrably justified in a free and democratic society. The accused combined expression exposing homosexuals to hatred with expression promoting their discriminatory treatment. It was not unreasonable for the Tribunal to conclude that this expression was more likely than not to expose homosexuals to hatred.

Precedents

The definition of hatred is read from “unusually strong and deep-felt emotions of detestation, calumny and vilification” to exclude calumny (false misrepresentations). The test is now, essentially, ‘you’ll know it when you see it’ — more specifically, “whether a reasonable person, aware of the context and circumstances surrounding the expression, would view it as exposing the protected group to hatred.”

R v Butler

★ SCC 1992, p404

🐦 D operated porn shop; obscenity law; gendered harm; shifting emphasis; lower value speech can have infringement justified more easily.

Facts

D’s store sold hard-core pornography, and was caught by the obscenity provision of the CC which states “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.”

Issues

Does this CC provision violate s2(b), and if so, is it saved by s1?

Reasons

This was a s2(b) violation as it was content not violent in form.

C describes what the threshold of ‘prescribed by law’ is — intelligible standard that is not too vague. Undue exploitation must be defined. C articulates 3 categories: Explicit sex with violence is undue exploitation, as is explicit sex with dehumanizing/degrading treatment if risk of harm is substantial — explicit sex without violence will generally not

be found to be unduly exploitive. When understood in this way, this is a clear limit prescribed by law.

Prior, the objective of this law was a moral harm (a Victorian-era view towards sex), however now it is a gendered one. Gov presents social science evidence that, while not fully established (ie the *Bandura* study and similar ones were with regards to violence only, not violence with sex) the gov presents a reasonable apprehension of harm. This represents a shift in *emphasis* not a shift in objective [which was the case in *BigM* 404].

Sexually explicit materials are to be protected by s2(b) unless they create a 'substantial risk of harm' — there are also exceptions for content of a scientific or artistic merit.

C sides with feminist arguments re gendered harms from these materials.

Precedents

Speech of lower value will be afforded less protection.

Little Sisters Book and Art Emporium v Canada

★ SCC 2000, p404

🐦 LGBT bookstore; books held at customs; s2(b) violation in admin of stat not in stat itself; stat upheld.

Facts

Bookstore that sold LGBT books imported from the US, had to go through customs. Shipments were regularly (~75% of the time) held at the border and dined as 'obscene', and constantly had to prove their content was not obscene, although similar materials were not held by customs when imported by other larger bookstores.

Issues

Was there an s2(b) infringement? What is the appropriate remedy?

Reasons

P makes two arguments: Re *Butler*, they state the harm-based definition of obscenity (particularly the degrading/dehumanizing standard) unduly suppressed LGBT erotica. Re CBSA review process, they state that the administrative proceedings were incapable of being applied in a manner consistent with s2(b) as they placed a reverse-onus on P to prove the content was *not* obscene.

The first point is not accepted — the *Butler* definition is to be upheld. The second point is successful. The reverse-onus is to be severed and declared invalid.

Majority (Binnie J)

The interpretation of "obscene" adopted by the SCC in *Butler* was concerned with the question of harm, not taste, and could encompass minority expression. The source of the CH violation was not the customs legislation itself.

The prohibition in the Customs Tariff was not void for vagueness or uncertainty, and was therefore validly "prescribed by law."

The legislation reflected a pressing and substantial parliamentary objective of prohibiting the entry of socially harmful materials into Canada, and customs procedures were rationally connected to that objective. Apart from s152(3), the basic statutory scheme set forth in the customs legislation, if properly implemented by the government within the powers granted by Parliament, could be administered with minimal

impairment of importers' s2(b) rights. The source of the plaintiffs' problem lay at the administrative level which reversed the onus of proof rather than the legislative level.

A s24(1) declaration that CH rights were infringed is given.

Dissent (Iacobucci J)

The relevant portions of the Customs Tariff cannot be administered in a CH-consistent way, they should be declared invalid.

Precedents

Sometimes problem with law is administration and not the law itself.

R v Sharpe

★ SCC 2001, p404

🐦 Child pornography law was found contra CH; Oakes test; proportionality.

Facts

A was charged with two counts of simple possession of child pornography and two counts of possession of child pornography for the purpose of distribution or sale. A brought a motion challenging the CH validity of the offence of simple possession. R conceded that the charging provision was a *prima facie* violation of s2(b), but argued that it could be upheld by s1.

Issues

Is this law saved by s1?

Reasons

Even this counts as protected expression under 2(b).

There is obviously a pressing and substantial objective here.

The law is also minimally impairing when interpreted properly. It is alleged to be overly broad. When dealing with an allegation that the law is overly broad, a fair and accurate characterization of what the law actually covers must be done. It is alleged that the law would capture even a photo taken by a parent of their baby in a bathtub — this is not the case, however. The law explicitly uses the words 'for a sexual purpose.' Casual intimacy (ie, a parent hugging their child) would not be caught by the law either, as it states that it must depict an 'explicit sexual activity.' There are also deferences for artistic merit and the public good.

However the law fails at proportionate effects. Even on a fair reading, the law can capture situations that are not meant to be caught, such as self-created expressive material (something made by, held by, and used by the accused alone), as well as private recordings of lawful sexual activity. These exemptions are to be read in.

Precedents

Laws that are overbroad will not pass Oakes.

Montréal v 2952-1366 QC

★ SCC 2005, p404

🐦 Montréal strip club violates noise bylaw; challenges on s2(b); justified; outlines public property for expression test.

Facts

A bylaw prohibited noise produced in the street. D used a loudspeaker on the street to promote their strip-club.

Issues

Was this an infringement of s2(b), if so is it saved by s1?

Reasons

This counts as protected expression under s2(b).

It is not excluded from protection due to the method or location.

The By-law's object was legitimate, but its effect would be to limit expression, which promotes two of the underlying values of s2(b) — self-enrichment and self-fulfilment — and this was not denied by the fact that the value of exotic dancing was debatable.

This is a reasonable limit on expression. Noise pollution is a pressing and substantial objective, and this law is rationally connected to the goal. This is also minimally impairing. Though the claimant argued that there could be a regulation by *degree* of noise, this is impractical.

The law is upheld.

Precedents

Access to public property for expression test.

Greater Vancouver Transportation Authority v Canadian Federation of Students

★ SCC 2009, p404

🐦 TransLink didn't want political ads on busses; violation of s2(b); application of Montréal test.

Facts

A student federation and a teachers' federation tried to place ads encouraging youth voting and expressing concern about the education system on the sides of buses operated by Vancouver and provincial transit authorities. The transit authorities refused the ads pursuant to articles 2, 7 and 9 of their advertising policies, which barred all political or controversial ads.

Issues

Is this a public place where access to expression is warranted?

Reasons

Applies Montréal test. This is consistent with core values of freedom of expression. TransLink buses are like city streets and utility poles, they are places where historically, expression is permitted. No aspect of busses suggests that political expression on them would undermine core values.

Re Oakes, the government states the purpose is to create a safe and welcoming TransLink experience. The limit is not rationally connected to that purpose. There is nothing unsafe or unwelcoming about political ads in and of themselves. Even if there was a rational connection, this is not minimally impairing as it captures all political ads.

Precedents

Applies Montréal test, and a rare example of Oakes failing at rational connection.

FREEDOM OF RELIGION

Syndicat Northcrest v Amselem

★ SCC 2004, p404

🐦 Jewish ceremony; involved building structure; condo board didn't allow; sues under QCHRC; test for freedom of religion.

Facts

The respondents were Orthodox Jews. They were divided co-owners of residential units in a complex. Incorporated in the declaration of co-ownership, a by-law provided that the balconies were "common portions" of the building. One of the respondents built on his balcony a "succah", a small enclosed temporary hut, to comply with their religion. The succah had to be installed for nine days. The syndicate requested that they dismantle the succah because it violated the by-law which prohibited decorations, alterations and constructions on the balconies.

Issues

Does 2(a) apply to voluntary exercises of religion?

Reasons

Though unnecessary, the respondents' expert evidence established their sincere and honest belief that compliance with the commandment of living in a succah was a highly personal decision. The terms of the co-owners' declaration prohibiting any construction significantly impeded his right. The limits imposed after application of the contested terms were clearly considerable, and consequently, the interference was non negligible.

The syndicate did not show that the presence of the succahs would diminish the buildings' market value nor did it show the existence of any fears with respect to the immovable since the balconies were used as emergency exits.

Precedents

Creates test for freedom of religion.

AB v Hutterian Brethren of Wilson Colony

★ SCC 2009, p404

🐦 Hutterites don't want photos taken; licensing scheme; religion infringed but upheld by s1.

Facts

AB changed law and required photos for drivers' license; HBWC do not want photos taken; believe it is prohibited by the second commandment.

Issues

Is this infringement of the freedom of religion justified?

Reasons

Freedom of religion was found to be infringed.

Majority (McLachlin J + 3)

Upheld the universal photo requirement as a justifiable limitation to Hutterites' freedom of religion.

Objective: Maintaining integrity of system for licensing drivers in a way that minimizes the risk of identity theft – yes pressing and substantial.

Rational Connection: A universal requirement is more effective than a system that grants exemptions.

Minimal Impairment: No alternative means that would substantially satisfy the government's objective while allowing the claimants not be photographed. The gov only needs to choose the least drastic means of achieving its objective, less drastic means which do not actually achieve the objective are not considered here.

Proportional Effects: Salutary: 3 benefits — security of the licensing scheme, roadside safety, and ID harmonization with other jurisdictions. Deleterious: deprived of choice.

Abella J (Dissent)

Minimal Impairment: No evidence that "the not for ID purposes" version would dramatically interfere with govt objective [note use of analogy: RJR majority]

Proportional Effects: Salutary: none proven. Deleterious: Huge impact on daily life.

Lebel J (Dissent)

Objective: s1 should not be about sidestepping constitutional rights. I don't know what the limits clause does and quite frankly I don't care to learn.

Rational Connection: Balance cannot be obtained by belittling the impact of the measures on beliefs & practices.

Minimal Impairment: Of HBWC by asking them to rely on taxi & truck rental services to operate their farms & preserve their way of life.

Precedents

An example of *Oakes* with a religious freedom infringement.

R v NS

★ SCC 2012, p404

🐦 Niquab at hearing; balancing of competing rights; analysis for balancing competing rights.

Facts

Niqab-wearing Muslim woman is complainant in sexual assault trial. Accused seek order to remove niqab to testify.

Issues

Complainant's s2(a) right vs Accused's s7/11(d) rights to fair trial. Can both rights be accommodated?

Reasons

Where a witness wears a niqab because of a sincerely held religious belief, J should order it removed if the wearing of the niqab poses a serious risk to trial fairness, there is no way to accommodate both rights, and the salutary effects of requiring the witness to remove the niqab outweigh the deleterious effects of doing so.

In concluding that S's religious beliefs were not sufficiently "strong," the preliminary judge did not make an appropriate determination; her belief only needed to be sincere in order for it to receive protection.

The record did not show long-standing CL assumptions regarding the importance of a witness's facial expressions to cross-examination and credibility assessment to be unfounded or erroneous.

If there are no "reasonably available alternative measures" that would avoid the conflict between competing interests, J must then determine whether the salutary effects of requiring the witness to remove the niqab outweigh the deleterious effects.

The salutary effects of requiring the witness to remove the niqab include preventing harm to the fair trial interest of the accused and safeguarding the repute of the administration of justice. The nature of the proceeding and the importance of the evidence may also be relevant factors in assessing the risk posed by the witness's face being concealed.

Always permitting a witness to wear a niqab in court offers no protection for the accused's fair trial interest. However, holding that the niqab has no place in the courtroom is inconsistent with Canadian jurisprudence, courtroom practice, and our tradition of requiring state institutions and actors to accommodate sincerely held religious beliefs insofar as possible. By limiting religious rights where there is no countervailing right and hence no reason to limit them, it fails the proportionality test.

CA was correct that the matter must be returned to the preliminary inquiry judge for full consideration.

Precedents

Creates test for competing rights with religious rights.

Trinity Western University v BC College of Teachers

o SCC 2001, p404

🐦 TWU has religious covenant that discriminates against LGBT ppl; BCCT unimpressed, doesn't want to accredit; SCC riffs on religious freedom.

Facts

A private university, based on Christian principles, required its students to sign a code of conduct, in which they agreed to refrain from biblically prohibited activities, including homosexual behaviour. The university applied to for accreditation of its teacher training program. It was refused on the ground that the university's prohibition against homosexual behaviour was contrary to public interest as a form of discrimination. The university and one of its students applied for judicial review. The student claimed that her individual rights to freedom of religion had been violated by the college's decision.

Issues

Was there a violation of freedom of religion?

Reasons

The university's community standards code of conduct was limited to prescribing the conduct of members of the university while in attendance. The code of conduct alone was not sufficient to support the conclusion that the college should anticipate intolerant behaviour in the public schools by graduates of that program.

No evidence was gathered to show that student teachers have exhibited discriminatory behaviour. Furthermore, the completion of the fifth year at a public university could not, alone, correct discriminatory attitudes. The college acted unfairly in considering the religious precepts of the university instead of the impact of those religious beliefs on the learning environment in the public schools.

The college properly considered equality concerns pursuant to its public interest jurisdiction, and should balance competing rights, but the right to freedom of religion must be reconciled with the guarantee against discrimination based on sexual orientation contained in CH and acted on concerns not based on the evidence.

Precedents

Judicial review re religious freedom analysis ... example?

EQUALITY

Andrews v Law Society of BC

⊕ SCC 1989, p404

🐦 UK citizen wanted to practice law in BC; Act required they be citizen; s15(1) test created; citizenship now analogous ground.

Facts

P, UK citizen, Canadian PR, wished to practise law in BC without becoming a citizen as required by the Barristers and Solicitors Act. Sought declaration that citizenship requirement violated s15.

Issues

Does the statutory citizenship requirement for lawyers violate s15(1)?

Reasons

A rule which bars an entire class of persons from certain forms of employment solely on the ground that they are not citizens violates the equality rights of that class and discriminates against them on the ground of their personal characteristics. Accordingly, they are in a category analogous to those categories specifically enumerated in s15, and are entitled to protection.

Here there was not a sufficiently rational connection between citizenship and the governmental interests in ensuring lawyers are familiar with Canadian institutions, are committed to Canadian society, and are capable of playing a role in our system of democratic government. The requirement of citizenship affords no such assurance, and this objective could be better achieved by an examination of the particular qualifications of the applicant.

Precedents

Creates the prevailing test for s15(1) violations.

Law v Canada

⊗ SCC 1999, p404

🐦 Survivor benefits; age discrimination; moves away from Andrews, no longer good law; contextual factors still used.

Facts

Following the death of her husband, P was refused a survivor's pension under CPP on the basis that she was ... under the age of 35. P appeals on the ground that the age distinctions in the CPP constituted age discrimination contrary to s15.

Issues

Does the age requirement violate s15(1)?

Reasons

The purpose of s15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping or prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect, and consideration. The existence of a conflict between the purpose or effect of

an impugned law and the purpose of s15(1) is essential in order to found a discrimination claim.

A variety of contextual factors may be referred to in order to demonstrate that the impugned legislation demeans the claimant's dignity, including the claimant's association with an historically more advantaged or disadvantaged group, the correspondence or lack thereof between the ground upon which the claim is based and the actual need, capacity or circumstances of the claimant or others, the ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group, and the nature or scope of interest affected by the impugned law.

The purpose or the effect of the impugned legislative provisions do not violate the claimant's human dignity so as to constitute discrimination. While the law on its face treats younger people differently, the differential treatment does not promote the notion that they are less capable or less deserving of consideration or less worthy of value as human beings or members of Canadian society. The impugned distinctions do not withhold a government benefit on the basis of stereotypical assumptions about the demographic group of which the claimant is a member. The impugned provisions do not infringe s15(1).

Precedents

Establishes more contextual factors to consider.

FALLOUT OF HUMAN DIGNITY FOCUS IN THIS CASE [NO LONGER USED]

Gosselin v QC (PC) (2002) — no impairment in dignity to young people because in providing those under 30 with less social assistance than with older recipients, gov attempting to create incentives for young people to enter labour force.

Canadian Foundation for Children, Youth and the Law v Canada (AG) (2004) Spanking case, justifies reasonable use of force by parents and children against children in their care. Sought declaration that violated s15. No violation — not about devaluation of children but rather a concern that criminalizing conduct risks ruining lives and breaking up families.

R v Kapp

★ SCC 2008, p404

🐦 Non-AB fishers challenge AB fishing license; s15(2) test is created.

Facts

Non-Aboriginal fishers challenge Aboriginal communal fishing license.

Issues

Was there an s15 violation?

Reasons

In the present case, R conferred the communal fishing licence to particular Aboriginal bands. Therefore, A demonstrated a distinction imposed on the basis of race, an enumerated ground. Through the fishing licence, R was pursuing the goal of redressing the social and economic disadvantage of the targeted bands. The means chosen to achieve the purpose were rationally related to serving that purpose. It followed that R established a credible ameliorative purpose for the program. R's aims, and the fishing licence, correlated to the actual economic and social disadvantage suffered by members of the three Aboriginal bands.

The program was protected by s15(2) as a program that had as its object the amelioration of conditions of disadvantaged individuals or groups. It followed that the program did not violate the equality guaranteed by s15.

Precedents

If the government can demonstrate that an impugned program meets the criteria of s. 15(2), it may be unnecessary to conduct a s. 15(1) analysis.

Eldridge v BC

★ SCC 1997, p404

🐦 Decision not to fund sign language for deaf people; law neutral on face; neutrality on face not enough if it discriminates in reality.

Facts

Decision not to fund sign language interpretation for deaf patients was discrimination on the basis of disability.

Issues

Was s15(1) violated?

Reasons

Deaf persons are protected by s15(1). The province could not argue that deaf persons were not discriminated against because they received the exact same health care services as hearing persons. Effective communication is an indispensable component of the delivery of a medical service and the province has an obligation to ensure that deaf persons are able to communicate effectively with their health care providers in order to take full advantage of those benefits.

This s15(1) violation was not saved by s1. The province failed to establish that a total denial of medical interpretation services for deaf persons constituted a minimal impairment of their rights.

Law does not single deaf individuals out for negative treatment but the effect/impact is negative. No "equal benefit of the law" (diminished/unequal access to public medical care). Substantive equality may require positive state action (more than "negative rights" to be free from state interference).

Precedents

A law neutral on its face in application can have adverse affect to an enumerated/ analogous group.

Corbiere v Canada

★ SCC 1999, p404

🐦 Aboriginality-residence; establishing new analogous grounds.

Facts

The members of a native band who did not reside on the reserve sought a declaration that s77(1) of the *Indian Act* which requires that band members be "ordinarily resident" on the reserve in order to vote in band elections violated s15(1).

Issues

Was there an s15(1) infringement?

Reasons

Aboriginality residence as it pertained to whether an aboriginal band member lived on or off the reserve was a ground analogous to those enumerated in s15. S77(1) of the Act relates to the cultural identity of off-reserve band members in a stereotypical way

and so engages the dignity aspect of a s15 analysis and results in the denial of substantive equality.

Precedents

Test for analogous grounds.

QC (PC) v A

★ SCC 2013, p404

🐦 Marital discrimination; Abella J confirms prejudice is mere *indicta*; saved by s1.

Facts

QC law limits division of property upon the breakdown of relationship to married couples (not unmarried cohabitants – “de facto” or “common law” unions).

Issues

Differential treatment on the basis of an analogous ground: Marital status?

Reasons

Court is divided over content of the 2nd stage of the s15 test: Whether the differential treatment on the basis of an enumerated/analogous ground is discriminatory.

Majority (Abella + 4 [including McLachlin OG])

The need to prove prejudice or stereotyping is merely *indicia* that point to violations of substantive justice. Disadvantage is the key.

Dissent (Lebel +3)

To prove that she had been discriminated against, A had to show on a balance of probabilities that the provisions in question created an adverse distinction based on an enumerated or analogous ground and that the disadvantage was discriminatory because it perpetuated prejudice or stereotypes.

Goin' Rogue (McLachlin OG — As a result of this, the provision was saved by s1)

The objective of the distinction between de facto spouses and married or civil union couples made by the QC dual regime approach was to promote choice and autonomy for all QC spouses with respect to property division and support. That objective was sufficiently important to justify an infringement of the right to equality. The distinction between married, civil union and de facto spouses was rationally connected to that objective. The requirement of an active choice to undertake obligations was consistent with the objective of enhancing autonomy. While one could imagine alternative schemes that would impair the equality right of de facto spouses to a lesser degree than the QC scheme, such approaches would be less effective in promoting the goals of the QC scheme of maximizing choice and autonomy for couples in QC. Finally, the unfortunate situation de facto spouses such as D in this case found themselves in was not disproportionate to the overall benefits of the legislation. Therefore, the QC scheme was constitutional.

Precedents

Key SCC equality decision: Some clarification/revision of the test from Kapp.

Kahkewistahaw FN v Taypotat

★ SCC 2015, p404

🐦 Confirms Abella J's judgement in QC v A. Edu req for FN chief; challenged on equality grounds; not differential here.

Facts

Education requirement (Gr 12) for FN chief and council challenged on equality grounds

Issues

Was this an infringement of s15?

Reasons

No differential treatment on the basis of enumerated or analogous ground here. Focus of 2nd step is disadvantage (approach of Abella J. in QC v A). While facially neutral qualifications may be discriminatory in some cases, there was no evidence to indicate that the requirement had a disparate impact upon an enumerated or analogous group.

Precedents

Confirms Abella J's judgement in QC v A.

LIFE, LIBERTY, AND SECURITY OF THE PERSON

Reference Re Motor Vehicle Act

★ SCC 1985, p404

🐦 BC refers stat; outlines test for s7.

Facts

Section 94(2): Person who drives while license suspended faces fine/imprisonment whether or not they knew of the suspension.

Issues

Do the principles of fundamental justice extend only to procedural fairness (or to the substance of laws)?

Reasons

The law itself can deprive of rights — C will look beyond procedural fairness. A principle of fundamental justice is a basic tenet of the legal system.

C can accomplish s7 only by a purposive analysis and the articulation of objective and manageable standards for the operation of the section within such a framework. The interests which the section is meant to protect are the life, liberty and security of the person. The right not to be deprived of these rights "except in accordance with the principles of fundamental justice" is a qualifier of those rights and is not itself a protected right; it serves to establish the parameters of the protected interests, and it cannot be interpreted so narrowly as to frustrate or stultify them.

Precedents

Establishes the test for s7.

R v Morgentaler

☆ SCC 1988, p404

🐦 Anti-abortion law; challenged; violates s7 because of procedural justice.

Facts

A doctors set up clinic to perform abortions upon women who had not obtained a certificate from a therapeutic abortion committee of an accredited or approved hospital as required by CC. CC made it an offence to cause an abortion, had a defence that required elaborate steps and was not evenly available throughout country.

Issues

Does the CC provision violate the rights of pregnant women under s7?

Reasons

CC defences must be *actually* available and not illusory, and available in an even principled way.

Lowest common denominator on which at least 4 can agree (see Beetz J. Plurality)
 (1) deprivation of security of person (threat to physical health; others would have allowed serious state-imposed psych stress;
 (2) not in accord with PFJ – defence cannot be illusory; manifest unfairness
 Abortion law invalid on procedural violation (not substance of criminalizing abortion).

Precedents

Follows ***Motor Vehicle*** SCC 1985 ★.

Canada (AG) v Bedford

★ SCC 2013, p404

🐦 Sex workers case; s7; outlines principles of fundamental justice; outlines rational connection.

Facts

Three applicants brought a constitutional challenge to ss. 210, 212(1)(j) & 213(1)(c) Criminal Code on the basis that they infringe s7 of the Charter by preventing prostitutes from implementing safety measures to protect themselves against violence.

Issues

What causal connection is required for impugned provisions to engage s 7 (security of the person)? If s 7 is engaged, is it in accordance with principles of fundamental justice?

Reasons

s210 (the bawdy-house prohibition) was found to be grossly disproportionate – purpose is public health and safety but impact on security of sex workers is very deleterious.
 s212(1)(j) (living off the avails of prostitution) was found to be over-broad, as it catches both pimps and accountants. s213(1)(c) (the communication prohibition) was found to be grossly disproportionate – purpose is to prevent nuisance but puts people in danger.

Precedents

Outlines fundamental principles of justice, outlines rational connection test.

Carter v Canada

★ SCC 2015, p404

🐦 Assisted dying case; CC banned assisted death; violates s7; outlines principles of fundamental justice.

Facts

Constitutional challenge to Criminal Code s. 241(b): aiding or abetting suicide is an indictable offence. Claimants seek physician-assisted death.

Issues

Does the prohibition on assisted dying violate s7?

Reasons

Background – Rodriguez

P had ALS, argued inability to have assisted death this was a violation of s7 and s15 (discrimination on basis of disability, as able bodied could die by suicide which is not illegal). P lost in a split decision, partially because no consensus re principles of fundamental justice. Right to die with dignity rejected as no society consensus, not a

legal principle, not precise enough, and gov argued sanctity of life, protection of vulnerable people.

Present Case

The object of the prohibition should not be defined broadly as simply "the preservation of life". Rather, the object is to protect vulnerable persons from ending their life in times of weakness. The prohibition on assisted dying is overbroad. The law catches people outside the intended class of vulnerable persons. TJ accepted that P was such a person. It followed that the limitation on their rights was in at least some cases not connected to the objective of protecting vulnerable persons.

Life is engaged as this is the right not to die, as there was evidence that people were taking their lives prematurely when they still could themselves rather than do it later.

The remedy is a delayed declaration of invalidity (12 months) + subsequent extension and constitutional exemption.

Precedents

Defines principles of fundamental justice.

R v Michaud

★ ONCA 2015, p404

🐦 Challenge to road regulations; rare example of s7 violation being upheld by s1.

Facts

Challenge to an ON regulation that required commercial truckers to equip their vehicles with devices that limited their speed to 105 km/h.

ONCA accepted the TJ's conclusion that in a small number of cases, a truck driver would have to travel faster than 105 km/h for a short period of time in order to avoid collisions. The regulation therefore affected truck drivers' security of the person; moreover, it was arbitrary in part (that is, overbroad) in light of its overall objective of improving highway safety.

Issues

Was this s7 violation saved by s1?

Reasons

This infringement of s7 was justified. On the minimal impairment, the choice of a 105 km/h limit was, in the context of "a complex regulatory response to the social problem of motor vehicle and highway safety", "within the reasonable range of policy choices open to the government ... and is well within the margin of appreciation or room to maneuver due to the regulator."

Precedents

A rare example of an s7 violation being saved by s1.

Gosselin v QC (PC)

★ SCC 2002, p404

🐦 Does s7 have a positive aspect; not yet; factual record here too thin.

Facts

P was a welfare recipient and was under 30 years old. She brought a class action on behalf of all welfare recipients under the age of 30 on the ground that the inferior base amount payable to recipients under 30 violated s7.

Issues

Does s7 have a positive obligation?

Reasons

The factual record was insufficient to support the plaintiff's submission that her right to security included the right to receive from the state a sufficient social assistance to provide for her basic needs. The circumstances of this case do not warrant a novel application of s7 as the basis for a positive state obligation to guarantee adequate living standards.

Precedents

The dominant strand of jurisprudence on s 7 sees its purpose as guarding against certain kinds of deprivation of life, liberty and security of the person, namely, those “that occur as a result of an individual’s interaction with the justice system and its administration.”

Victoria v Adams

★ BCCA 2009, p404

🐦 Tent by-law; s7; not positive right but right to not have shelter torn down.

Facts

By-laws prohibited homeless people from erecting any form of temporary overhead shelter at night, including tents, tarps attached to trees, boxes or other structure in public parks.

Issues

Was there a right to erect tents?

Reasons

Right asserted by defendants was not property right, but right to be free of state-imposed prohibition which was found to impose significant and potentially severe health risks on vulnerable and marginalized population.

Prohibition went further than necessary in pursuit of legislative goal of protecting urban parks, and was therefore not minimally impairing, and benefits of prohibition did not outweigh deleterious effects.

Precedents

Right to have shelter not torn down.

Chaoulli v QC (PC)

★ SCC 2005, p404

🐦 Challenge to public only healthcare; violation of s7; not saved by s1; capitalism is awful.

Facts

A patient and a doctor brought a motion for a declaration that acts which prohibited private insurance for health care services provided by the public system CH invalid as it prevented them from having access to health services not subject to the public system's waiting lists. They claim the delays inherent to the waiting lists infringed their CH rights.

Issues

Was there a right to private healthcare?

Reasons

Majority

The right to life was affected by the delays inherent to waiting lists because some patients on them could die before having their surgery.

Concurrence (McLachlin)

The evidence produced at trial supported the finding that the impugned provisions were arbitrary and that the resulting infringement of the right to life and security was not in accordance with principles of fundamental justice. In order to not be arbitrary, a restriction on life, liberty and security requires the existence of both a theoretical connection between the restriction and the legislature's objective, as well as a real factual link.

The evidence did not show that the ban was necessary to preserve the public health care system.

The infringement was not justifiable under s1. While the government undeniably had an interest in protecting the public health care plan, no rational connection between the ban and the objective sought was established, given the lack of evidence that the ban protected the health care system. Finally, the advantages of the prohibition did not outweigh its prejudicial effects.

Precedents

A right to private healthcare I guess? ㄟ(っ)_/_