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# THE ADVENT OF THE CHARTER

* Prior to the Charter, what we had was an ‘implied’ bill of rights which was a British inheritance that protected basic political liberties (freedom of association, expression)
* Canadian Bill of Rights had narrow scope b/c it only applied to matters w/in federal jurisdiction
* Human rights codes exist @ almost every jurisdiction and still play an important role in discrimination

# The Adoption of the Charter

Charter project formally began at a federal-provincial first ministers’ conference, spearheaded by Justice Minister Pierre Trudeau. In *“A Canadian Charter of Rights”* Trudeau sketches the historical development of the concept of human rights from the philosophical underpinnings of natural law, social contract theory, as the motivation behind the American and French Revolutions and the need for an entrenched Charter of Rights in Canada.

# The Merits of Entrenchment and the Legitimacy of Judicial Review

→ Judges have no roots to legitimacy, contrast w/ legislature which at least notionally derives its power from the ‘people’ via democratic election

|  |  |  |
| --- | --- | --- |
| PETTER “Immaculate Deception [1987]”  | BOGART “Courts and Country” | WEINRIB “Limitations on Rights} |
| * Charter is a regressive instrument more likely to undermine than to advance interests of socially/econ disadvantaged
* Sees rights going up against the disparities in wealth distribution and large private powers rather than going up against the state Catered to upper-middle class professionals who are opposed to wealth distribution (i.e. the people who go into the legal profession)
* Most progress for rights have been pushed forward by leg - the Charter will proscribe their ability to legislate like this
* Litigation is expensive and so will likely not be brought by those who really need rights protection but rather by 'big interests'
* “what is conveniently forgotten in all of this is that the liberty of many Canadians is better protected by the regulatory and redistributive policies of the state than by the market (assuming “liberty” includes the liberty to be clothed, housed and fed, and the liberty not to be preyed upon by those who command social and economic power).”
 | * Two different models of democracy are at stake
1. independent judges curb the tyranny of the majority and protect vulnerable parties through rationality and principle. They ensure rationally and principle are paramount over impetuous legislatures, rigid bureaucracies and a duller citizenry.
2. realistic about democracy’s shortcomings, is even more reserved about using judicial intervention to solve them. In this model, judges’ independent and tenure make them unaccountable, elitist and always unrepresentative. Far from promoting democracy, judges will sap it with regressive decisions, progressive decisions that nonetheless blunt popular responses to societal problems, and cause barriers of access due to the costs of litigation.
 | * Charter is a supplement to democracy and a good guide to the legitimate exercise of legislative authority
* Founded on a commitment to certain irreducible substantive values to which all other lawmaking must conform
* Valuable for filling in the gaps – not antagonistic to majoritarianism
* Legislative policy might not always be the best arena for human rights questions b/c it’s a messy, future-oriented system that isn’t just focused on the rights-impact of law
* Judges ought to be highly trained and independent b/c they give us a better way of discerning deeper, longer-term political voice
 |

## Hogg + Bushell: Charter Dialogue

**RELATIONSHIP BETWEEN CTS AND LEG IS AN ONGOING DIALOGUE; 4 FACTORS THAT HELPS FACILITATE THIS: S. 33, S. 1, QUALIFIED RIGHTS, WIDE RANGE OF REMEDIAL MEASURES TO CORRECT EQUALITY INFRINGEMENTS**

* Writing in response to ‘new wave’ conservative criticism of judicial activism
* In Professor Roach’s view, the Charter has created “a fertile and democratic middle ground between the extremes of legislative and judicial supremacy.”
* Because judicial decisions striking down a law on *Charter* grounds can be reversed (section 33 override provision), modified or avoided by a new law, any concern about the legitimacy of judicial review is “greatly diminished”.
* Although the judiciary is unrepresentative and unelected it nevertheless always allows the legislature to respond so there is no problem of legitimacy

**1) section 33** (override provision) which allows legislature to re-enact the original law without interference of the courts (for sections 2, 7-15 rights)

**2) section 1,** which allows for “Reasonable limits” on guaranteed *Charter* rights. The court will explain why section 1 was not met, which will involve explaining the less restrictive alternative law that would have satisfied the section 1 standard (*Bedford*).

**3) The “qualified rights” (s 7, 8, 9, 12)** which allow for action that satisfied the standard of fairness and reasonableness. // functionally has its own s.1 built into it

**4) the guarantee of equality rights under section 15(1)** that can be satisfied through a variety of remedial measures.

[Critical response to this has been that judicial review underestimates the degree of political pushback and when an issue is tossed back to the leg, there’s all sorts of barriers]

## Andrew Petter “Twenty years of Charter justification” [2002]

**NOTES A SHIFT IN THE JUSTIFICATION OF JUDICIAL REVIEW, WHICH UNDERMINES ITS LEGITIMACY EVEN AS IT PURPORTS TO PROMOTE IT.**

* Before, judicial review was premised on legal liberalism thinking that the courts were ‘neutral arbiters’
* Judiciary then started to understand their roles as largely discretionary and expand available *Charter* remedies, admitting that the *Charter* may require as well as constrain governmental action → In comes Dialogue theory.
* “While held out as a justification for judicial review under the *Charter*, dialogue theory mitigates more than it legitimates. By acknowledging the subjective nature of *Charter* decision-making, dialogue theory undercuts the legitimacy of judicial review as it seeks to explain why legislatures should be allowed to trump judicial decisions. And, in arguing that court decisions under the *Charter* are ultimately less influential than is sometimes supposed, dialogue theory calls into question why courts should be allowed to make such decisions in the first place.”
* Dialogue theory also discounts the extent to which judicial decision-making under the *Charter* drives public policy-making in Canada:
1. Not all legislative responses are evidence of genuine dialogue and many are better characterized as **reflections of, rather than responses to, judicial norms**
2. Dialogue theory plays down the privileged position that courts occupy in *Charter* dialogues. There is **an imbalance of power** since Courts speak in the “rhetoric of rights” leaving legislatures to “mouth the language of limits”. They are the ones that interpret the scope of the rights and whether a given limit is justified.
3. ***Charter* rights shape public debate and influence public policy** independently of any dialogue taking place, (i.e. independently of any decisions.)
* “For this reason, the rise of dialogue theory carries with it a disturbing message about the declining value of democracy in Canada. Say what you will about liberal legalism, its acceptance of judicial interference with democratic decisions is based on its assumption that judicial review yields "right answers."”

→ not justifying judicial review but what it is really doing is describing the exercise of judicial power // doesn’t explain why judges get to exercise such power in the first place

**Morton and Knopff:** also concerned about the undemocratic nature of Charter litigation think that the left is winning through special interests – i.e. the ‘court party’ is taking over

**ROACH** → just because it’s okay under the Charter, doesn’t mean it’s actually okay. It doesn’t mean it’s right. It shouldn’t close the door to conversation about what is being contested.

Vriend v Alberta [1998]

**COURT USES DIALOGUE THEORY AND THE FACT THAT THE CHARTER WAS ENTRENCHED BY DEMOCRATIC WILL TO UNDERPIN THE LEGITIMACY OF JUDICIAL REVIEW.**

|  |  |
| --- | --- |
| **F** | Vriend was fired because he was gay. The Alberta Human Right’s Code offered him no protection. He challenged its constitutionality because the Code went against his section 15 equality rights. He could not challenge his dismissal because the *Charter* does not apply to private actors, so he challenged the HRC.  |
| **D** | The Supreme Court used the *Charter* to read in protection of sexual orientation into the Alberta Human Rights Code, which was considered by their legislature but consciously excluded. |
| **RE** | * They essentially offer the dialogue theory.
* Taking on these rights was not something the Judiciary asked for, the elected officials put them in charge of it.
* The judiciary and the legislature are accountable to each other, which promotes democracy.
* The concept of democracy is broader than the notion of majority rule, but democracy “free and democratic society” (Section 1) underlies the *Charter*. The Court must explain its decisions by appealing to a democratic and free society.
 |

# The Framework of the Charter

## Interpreting Rights: The Purposive Approach

The courts have adopted a “purposive approach” to the interpretation of *Charter* rights.

A judgment about the scope or value of the right can only be made after the court has **“specified the purpose underlying” the right** or “delineate[d] the nature of the interests it is meant to protect”

### Hunter v Southam [1984]

**THE COURT MUST ADOPT A PURPOSIVE AND BROAD APPROACH TO DEFINING CHARTER RIGHTS WITH AN EYE TO SPECIFIED UNDERLYING PURPOSE OF THE RIGHT OR AN ANALYSIS OF THE INTERESTS THE RIGHT IS MEANT TO PROTECT. RIGHTS MUST BE GIVEN A LARGE AND LIBERAL INTERPRETATION. PRODUCTIVE TENSION.**

|  |  |
| --- | --- |
| **F** | A search of newspaper offices was carried out by the Combines Investigation Branch. The statutory basis for the search did not require prior judicial authorization. The *Charter* guarantees freedom from unreasonable search and seizure under Section 8. |
| **I** | What constitutes ‘unreasonable’ for the purposes of s. 8 protection? |
| **D** | The purpose of Section 8 is found to be the protection of an individual’s reasonable expectation of privacy. |
| **RA** | Charter interpretation should be both purposive and broad and large and liberal. These two requirements are not necessarily consistent. The purpose of the drafters of the Charter and the history, context and language of it might go against an overtly liberal and large interpretation.“**Productive tension**” between these two requirements. |
| **RE** | * The court finds that defining terms in the *Charter* cannot be a simple dictionary approach, nor an approach of statutory construction because the Constitution’s function is to provide a continuing framework for the legitimate exercise of governmental power.
* Court calls for **purposive analysis**. Narrow and technical approach not appropriate.
* Charter is a **purposive document**.
* Section 8: serves as a limitation on whatever powers of search and seizure the government already and otherwise possesses. An assessment of the constitutionality of a search and seizure must focus on its “reasonable” or “unreasonable” impact on the subject, and not simply on its rationality in furthering some valid government objective.
* **Purposive** – gets to interests protected and reasons for recognizing rights. Limits judicial interpretation by being bound by historical contextual circumstances.
* **Broad** – look at whole Charter, history, context, language.
* L**arge and liberal approach**. Expansive, because it is a rights -protecting document. Not legalistic, narrow interpretation. Rights enhancing. Supposed to be evolving. Fact that section 1 is in the Charter should be taken by the courts to encourage them to read the rights largely.
 |

R v Big M Drug Mart [1985] – In interpreting a right the court needs to refer to the character and larger objects of the Charter itself, the language chosen, to the historical origins of the concepts enshrined, and to the meaning and purpose of the other rights with which it is associated. Reiterates Courts commitment to broad and purposive interpretation

R v Therens [1985] – there is no need to read in “internal” limits into the definition of a particular right to narrow their understanding of interests protected, since those limits are considered in section 1.

## Justifying a Rights Infringement: Section 1

1. **Prescribed by Law:**

Before a section 1 analysis, the Government must prove that the limitation was prescribed by law (fair notice and limitation of enforcement discretion).

### R v Nova Scotia Pharmaceutical Society [1992]

**EXTENSIVE DISCUSSION ON VAGUENESS: FAIR NOTICE, LIMIT OF DISCRETION AND RULE OF LAW.**

|  |  |
| --- | --- |
| **F** | The accused were charged under the *Combines Investigation Act* with conspiring to lessen competition unduly in the sale of prescription drugs. They moved to quash the indictment, arguing that the provisions under which they were charged violated s. 7 on grounds of vagueness.  |
| **D** | The Supreme Court rejected Δ’s argument and dismissed the appeal. |
| **RE** | * Doctrine of vagueness is a single concept whether invoked as a principle of fundamental justice under section 7 of the Charter or as part of the section 1 “prescribed by law” requirement (*in limine* – at the start/threshold issue)
* The doctrine is founded on the principles of fair notice and limits of law enforcement discretion
* The substantive aspect of fair notice is a subjective understanding that the law touches upon some conduct, based on the substratum of values underlying the legal enactment and on the role that the legal enactment plays in the life of the society (i.e., murder).
* The limit of discretion principle is that a law must not be so devoid of precision in its content that a conviction will automatically flow from the decision to prosecute.
* The citizen is entitled to have the state abide by constitutional standards of precision whenever it enacts legal dispositions. The law must be precise enough to serve as ground for debate, i.e., it must intelligibly outline the boundaries of permissible and impermissible behaviour.
 |

1. **Justification:**

### R v Oakes [1986]

**PROPORTIONALITY TEST: I) PRESSING AND SUBSTANTIAL OBJECTIVE, II) RATIONAL CONNECTION, MINIMAL IMPAIRMENT AND BALANCING/PROPORTIONALITY OF EFFECTS**

|  |  |
| --- | --- |
| **F** | Section 8 of the *Narcotic* *Control Act*, created a “rebuttable presumption” that once the fact of possession of a narcotic was proven, an intention to traffic would be inferred unless the accused established the absence of such an intention.  |
| **I** | The accused challenged this “reverse onus” provision, arguing that it violated s. 11(d) of the Charter. |
| **D** | After finding that s. 8 did violate s. 11(d) of the Charter, the Court then went on to discuss whether the limit could nonetheless be upheld under s. 1. |
| **RA** | To establish that a limit is justified under section 1 two central criteria must be satisfied:1. The objective of the limiting measures should be at minimum **“pressing and substantial”** to be held “sufficiently important” to justify infringement.
2. The means chosen are reasonable and justified (a form of **proportionality** test)
	1. Provisions must have a **rational connection** to the objective
	2. The limit should impair “as little as possible” the right or freedom in question [**minimal impairment**]
	3. There must be **proportionality** between the effects of the measures which are responsible for limiting the Charter right or freedom and the pressing and substantial objective. The more deleterious the effects of the measure the more important the objective must be.
 |
| **RE** | * The onus of proof that a limit on a right or freedom is reasonable and demonstrably justified in a free society is on the party seeking to uphold the limitation.
* The standard of proof under s. 1 is the civil standard: balance of probabilities.
* The “reverse onus” in *Oakes* passed all of the requirements up to rational connection where the court held there was no rational connection between possession of a small quantity of narcotics and an intent to traffic.
 |
| **ETC** | * Cts seem to regard almost any purpose as “pressing and substantial”.
* **Rational connection** concerns the **effectiveness of the infringing measures** and **minimal impairment concerns their scope**.
* Usually Cts strike down provisions b/c of minimal impairment, rarely for rational connection.
* The fact that judgments about rational connection and minimal impairment almost invariably involve a balancing or trade-off between competing interests may explain why the final “balancing” step of the test seldom plays more than a formal role in the s 1 analysis.
 |

#### Dagenais v Canadian Broadcasting Corp [1994]

**REFINES OAKES “DELETERIOUS EFFECTS” TEST TO BALANCE THE DELETERIOUS EFFECTS NOT ONLY WITH THE IMPORTANCE OF THE OBJECTIVE BUT WITH ITS SALUTARY EFFECTS.**

* Dagenais involved a publication ban for the purpose of guaranteeing a fair trial but which was found to have only limited effect given the difficulty of effectively enforcing such bans in light of technological advances.
* “Even if the importance of the objective itself (when viewed in the abstract) outweighs the deleterious effects on protected rights, **it is still possible that the actual *salutary effects* of the legislation will not be sufficient to justify these negative effects**”
* May be relevant in cases where the challenged law may not be completely successful in achieving the objectives for which it was enacted

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

* When doing a section 1 analysis the Court should assess **the value and significance of the right and the restriction in their actual context**.
* The court should not balance the value of a law’s purpose against the value of the right in the abstract, but in practice (e.g. if a law will actually reduce hate speech vs. its actual costs to freedom of expression.
* Thus, the court may divide the right, as with freedom of expression, into more or less valuable expressions of the right. The Supreme Court held that hate speech is a less valuable form of expression (go against the purposes of the right).
* The second trend is that Courts have been willing to defer in certain circumstances to the legislature’s judgment about the need for, and effectiveness of, a particular limit on A charter right. This is related to context since deference varies by context.

### Edmonton Journal v Alberta (Attorney General) [1989]:

**RIGHTS AND LIMITS MUST BE INTERPRETED IN THEIR CONTEXT TO PROPERLY BALANCE THEM UNDER SECTION 1**

|  |  |
| --- | --- |
| **F** | Newspaper challenged Alberta legislation which banned publication of court proceedings in matrimonial disputes claiming that the provision was contrary to s. 2(b) of the Charter, freedom of expression. |
| **D** | All members of SCC found it violated s. 2(b) they were split on justification issue. Four members ruled that the provision was not a reasonable limit. Cory J wrote a decision supporting this result, with which Dickson and Lamer concurred [abstract approach]. Wilson wrote a separate concurring Judgment. La Forest J wrote a dissent, with which Heureux-Dube and Sopinka concurred, finding a justified limit.  |
| **RA** | A context-sensitive approach must be taken to s. 1 justifications. |
| **RE** | Wilson J [later, would be adopted by entire ct]* **The right at stake is not freedom of expression in the abstract** but the right to the public to an open court process. It must be balanced against the right of litigants to the protection of their privacy in matrimonial disputes.
* We should not balance one value at large and the other in context.
* One Virtue of the contextual approach is that it recognizes that **a particular right or freedom may have a different value depending on the context**. It is more sensitive to the reality of the dilemma.
* The right or freedom must then, in accordance with the dictates of this court, be given a generous interpretation aimed at fulfilling that purpose and securing for the individual the full benefit of the guarantee.
 |

### Irwin Toy Ltd v Quebec (Attorney General) [1989]

**REPRESENTS THE HIGH WATER MARK OF JUDICIAL DEFERENCE TO LEGISLATIVE JUDGMENT. WHEN THERE ARE MANY INTERESTS AT STAKE (POLYCENTRIC), AND WHERE THE LEGISLATURE HAS TO WEIGH CONFLICTING SCIENTIFIC EVIDENCE, OR PROTECT A SOCIALLY VULNERABLE GROUP MORE DEFERENCE SHOULD BE GIVEN. LESS DEFERENCE WHEN THE GOVERNMENT IS A SINGULAR ANTAGONIST.**

|  |  |
| --- | --- |
| **F** | Restrictions on advertising directed at Children. |
| **I** | Whether the restrictions infringed s. 2(b); whether it was a justifiable infringement |
| **D** | Yes; The restrictions are justified. |
| **RA** | If the legislature has made a reasonable assessment as to where the line is most properly drawn, especially if that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the court to second guess policy decisions.  |
| **RE** | * More deference should be given when the government attempts to protect a socially vulnerable group [the object of the Charter is itself to protect socially vulnerable groups.]
* Where the government is a singular antagonist of the individual whose right has been infringed, as in criminal law, less deference should be given (e.g. in the criminal context where the full force of the state is aligned against an individual person)
 |

#### After Irwin Toy:

You see that there is still need for flexibility after the Oakes test; There are different forms of deference that the Court does not always distinguish among:

R. Moon recognizes 3 types of deference.

1) judicial **deference** to relevant **findings of fact** by the legislature (or lowering the standard of proof that the legislature must meet when establishing the factual basis for its justification argument) [important when there is conflicting social science evidence]

2) deference to **accommodation of competing values or interests** (when polycentric issue) // will be more likely to get through the minimal impairment test which is the most difficult

3) lowering the standard of justification (when the value or interest in context is less substantial or significant) – in this case the standard should only be lowered in the final balancing stage of Oakes according to McLachlin (see *Lucas* decision), but other judges such as Cory and La Forest think that a lesser value should lower the standards of minimal impairment and rational connection.

The Oakes test remains flexible and vague (context, deference) since not all rights are the same in the Charter and demand the flexibility of a test that can accommodate them.

“Wilson tells us from Edmonton Journal that the analysis is a contextual one, both in terms of the rights infringement and the expression of the right at stake and Irwin Toy shows us the example of the greatest judicial deference to legislative accommodation of the competing values and interests at state. This **makes the minimal impairment test easier to pass for the government**.”

#### Sujit Choudry, “So What is the Real Legacy of Oakes? Two Decades of Proportionality Analysis Under the Canadian Charter’s Section I” (2006)

**THE CENTRAL ISSUE OF SECTION 1 JURISPRUDENCE IS HOW THE COURT SHOULD ALLOCATE THE RISK OF FACTUAL UNCERTAINTY WHEN GOVERNMENTS LEGISLATE UNDER CONDITIONS OF IMPERFECT INFORMATION. THE COURT SETTLED ON A COMPROMISE OF “REASONABLE BASIS” AND WILL ALLOW APPEALS TO COMMON SENSE, LOGIC OR REASON TO BRIDGE AN ABSENCE OF EVIDENCE, BUT HAS NOT MADE THE DOCTRINE CLEAR OR CONSISTENT.**

* The Oakes test created an “enormous institutional dilemma” because it created a conflict between the demand for definitive proof for each step of the test and the reality of policy making under factual uncertainty.
* The central question of section 1 is how the Court should allocate the risk of factual uncertainty when governments legislate under conditions of imperfect information → the risk here means who gets the benefit of the doubt on these things – do you err on the side of the rights-holder or on the side of the gov’t’s need to do stuff
* The Court has failed to recognize this issue and has failed to adopt a consistent approach to deference → uncertainty and inconsistency gives rise to questions about the legitimacy of judicial review
* How can the government prove things like minimal impairment, rational connection and proportionality on a factual basis, when public policy is often based on approximations and extrapolations from the available evidence, inferences from comparative data and even educated guesses? To maintain a strict requirement of factual proof could, as La Forest J wrote in his dissent in *RJR-Macdonald* could have the effect of “virtually paralyzing the operation of government”
* Yet to remove the requirement of the government providing factual evidence in justification would run counter to the requirement that reasonable limits be “demonstrably justifiable”.
* The Court has struck a **compromise between these two extremes**. In cases in which there is conflicting or inconclusive social science evidence, the question is whether the government has a **“reasonable basis”** for concluding that an actual problem exists, that the means chosen would address it and that the means chosen infringes the right as little as possible.
* There is significant disagreement in accepting the reasonable basis doctrine (notably in RJR when La Forest was willing to infer that tobacco advertising sustained consumption and McLachlin was not).
* Another issue is **when** the court is willing to allow appeals to common sense and popular opinion overcome the gaps left by insufficient evidence. **When the possibility of harm is within the everyday knowledge and experience of Canadians, or where factual determination and value judgments overlap then the Court will infer the existence of harm without factual evidence** (pornography, hate speech).
* In *Thomson* the majority refused to infer from the fact that opinion polls influence voter choice in election campaigns that inaccurate polls mislead large numbers of voters and have a significant impact on the outcome of an election.
* But then in *Harper* v *Canada (AG)*, a divided Court disregarded this self-imposed limitation and upheld restrictions on third party expenditures during election campaigns on the eve of the last federal vote. The majority openly acknowledged that both the alleged harm and the efficacy of the legislation were “difficult, if not impossible, to measure scientifically” but were willing to reason both that the harm existed and the cure was effective. McLachlin, in furious dissent, argued that in the absence of evidence the dangers posited are entirely hypothetical, unproven and speculative, and that the legislation was an overreaction to a non-existent problem. Dissent was completely unwilling to listen to a common sense argument.
* **The Court has yet to work out under what circumstances it will use common sense, reason or logic to bridge an absence of evidence, and to delineate when it will allow inferences to be drawn from inconclusive social science evidence.**

# APPLICATION

# Application to Private Action? S. 32

Questions about whether the Charter applies horizontally or just vertically (Dolphin Delivery shows that the application of the Charter is strictly vertical) → the rights that are cast by the charter are public, not on other private individuals ---- so the next question is…what do we mean by ‘government’?

Before considering whether a Charter right or freedom exists has been infringed by an impugned course of action or inaction, we need to deal first with a threshold question: does the Charter even apply?

**Section 32(1) of the Charter provides**:

This Charter applies

1. to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories
2. to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

The Charter does not apply to private actors after *Dolphin Delivery* → but how the line is drawn between public and private/gov’t and non, involves anomalies, contradictions, prov’l variations, court immunity. This matters because it is will determine whether or not you actually have Charter rights in a given circumstance.

Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd [1986]

**THE CHARTER WILL APPLY TO THE LEGISLATURE, EXECUTIVE AND ADMINISTRATIVE ACTIONS, BUT NOT TO PRIVATE PARTIES AND NOT COURT ORDERS OR THE COMMON LAW. THE COMMON LAW SHOULD BE DEVELOPED IN A MANNER CONSISTENT WITH CHARTER VALUES.**

|  |  |
| --- | --- |
| **F** | There were picketers protesting Dolphin Delivery’s association with Puralator. Relying on the common law tort of inducing breach of contract, a BC court issued an injunction to restrain the picketing. On appeal, the union sought to have the injunction overturned on the ground that it violated its members’ freedm of expression. The BCCA dismissed the appeal and the union appealed to the Supreme Court of CanadaMcIntyre J held that peaceful picketing enjoyed protection under 2(b) but the injunction was a reasonable limit on expressive freedoms that could be justified pursuant to s. 1 because Dolphin Delivery was not related to Purolator (3rd party picketer)He went on to discuss whether the Charter even applied to the dispute in the first place: |
| **I** | Does the Charter apply to litigation between private parties? |
| **D** | No, it does not.  |
| **RA** | Where a private party “A” sues private party “B” relying on the common law and where no act of government is relied upon to support the action, the Charter will not apply.The Charter applies to legislature, executive and administrative branches of the government.  |
| **RE** | * They read “government” in s 32 in the sense of executive government of Canada and the provinces. It also applies to the legislative and administrative branches of government.
* It will apply to those branches whether or not their action is invoked in public or private litigation**.**
* It will apply to the **common law** only insofar as it is the **basis of some governmental action** which, it is alleged, infringes a guaranteed right of freedom.
* It will apply to all statutes regardless of whether it is the basis of governmental action.
* **The Court, and its orders, is not considered a governmental actor** and so it is not subject to the Charter, but the Court should develop the common law in “a manner consistent with the fundamental values enshrined in the Constitution” (i.e., **Charter Values**)
* This is justified because the Court are “neutral arbiters” not as “contending parties” (Petter criticizes this), and if Charter did apply to court orders it would apply *a fortiori* to all private litigation (because of enforcement orders).
 |
| **ETC** | Petter and other left wing commentators heavily criticize this case because of its dubious distinction between governmental and private actors (Court is not State action), because it doesn’t protect disadvantaged parties’ rights against large private parties, which are more likely to infringe them than the government. They criticize the distinction because it is unprincipled to subject statutes to the Charter but not the common law since both govern private relationships. This has the negative implication of unequal Charter application for provinces based on whether they have codified common law, or for Quebec where there is no common law.Hogg says it is correct to hold that purely private action should be unconstrained by the Charter, it drew the line in the wrong place and should have subjected the common law to the Charter to the extent that the common law has “crystallized” into a rule that can be enforced by the courts. |

Note that cases after Dolphin have 3 channels:

* + - 1. Government: exec/admin
			2. Courts
			3. Common Law

# Governmental Actors

## Entities Controlled by Government

If an entity is part of the government, then the **Charter will ordinarily apply to all of its actions** (legislature, executive/administrative). The Charter not only applies to all legislative actions, it also applies to actions taken by the legislative assembly (**unless they are parliamentary privileges)**

In *Dolphin Delivery*, the Court found that the term “government” does not extend to the judiciary although this has been since called into question.

“Government” in section 32 includes cabinet, ministers, officials employed in government departments, police officers, and other public agencies or agents that are subject to ministerial control or charged with the performance of government responsibilities.

The case law makes it clear that not all entities that have powers conferred on them by statute, that are controlled to some degree by government, or that receive public funding will qualify as “government” for the purposes of s. 32.

### McKinney v University of Guelph [1990]

**BEING A CREATURE OF STATUTE IS INSUFFICIENT TO ATTRACT CHARTER APPLICABILITY, PUBLIC PURPOSE IS INSUFFICIENT, PUBLIC FUNDING/GOVERNMENTAL REGULATION IS INSUFFICIENT, THE TEST SEEMS TO BE GOVERNMENTAL CONTROL**

|  |  |
| --- | --- |
| **F** | Eight faculty members and a librarian challenged the mandatory retirement policies of four Ontario universities. They argued that the universities’ policies violated the equality guarantees found in s. 15 of the Charter by discriminating on the basis of age. |
| **I** | The main issue at the Supreme Court was whether universities could be said to be government actors under section 32 of the Charter. |
| **D** | On the issue of the application of the Charter to universities, a majority of the court concluded that universities’ mandatory retirement policies did not come within the concept of government action.  |
| **RA** | In order to be considered an entity controlled by government, the entity must be under **direct governmental control**. The test seems to be whether the government can legally control the actions of the entity or whether they are autonomous.  |
| **RE** | La Forest J:* He talks about the reasons why private actors were chosen not to be subject to Charter scrutiny. One justification is that Government is the body that can enact and enforce rules and authoritatively impinge on individual freedom.
* “**Only government requires to be constitutionally shackled to preserve the rights of the individual. Others, it is true, may offend against the right of individuals.”**
* To open all of private and public action to judicial review would be to “strangle the operation of society”, and “diminish the area of freedom within which individuals can act”
* Appellants argued that universities are creatures of statute, which exercise powers pursuant to statute and carry out a public function pursuant to statutory authority. Therefore, they should be subject to the Charter since they are part of the government.
* Being a creature of statute, i.e., a corporation, is not sufficient to count as a governmental actor since it is still a vehicle of private interests and since it would raise all the same problems as blanket application of Charter to private actors.
* The Charter covers municipalities because they “**perform quintessentially governmental function**”: [don’t try to do anything with this – it’s not used in the case law] they enact coercive laws binding on the public generally, for which offenders may be punished. This may be sufficient to attract Charter scrutiny but it is not necessary.
* Appellants also argued that universities should constitute part of the government because they have a special relationship to the provincial government: depend on public funding, government structures largely coordinate and regulate their activities, are subject to tuition fee control and new program approval.
* Public funding and regulation is not sufficient/relevant since many private actors are subject to these things, and government appointment of members is insufficient.
* The real test seems to be whether **the government has legal power to control the entity**.
* Any attempt by the government to influence university decisions would be met with resistance and seen as a violation of academic freedom.
 |
| **DIS** | Wilson dissentShe criticizes the “minimal state” conception of Government which she saw La Forest J’s decision to be based on.The government should be given a broader view “sensitive to the wide variety of roles that government has come to play in our society and the need to ensure that in all those roles it abides by the Charter”She lays out the **three tests** to help identify the kinds of bodies that ought to be constrained by the Charter1. the **control test**, which asks whether any branch of government exercises general control over the entity in question
2. the **government function test**, which asks whether the entity performs a traditional government function or a function that in more modern times is recognized as the responsibility of government
3. the **statutory authority and public interest** test, which asks whether the entity is one that acts pursuant to statutory authority specifically granted to it to enable it to further an objective that government seeks to promote in the broader public interest.
 |

###

### Stoffman v Vancouver General Hospital [1990]

**PUBLIC HOSPITALS ARE NOT GOVERNMENT ACTORS, REAFFIRMS GOVERNMENTAL CONTROL TEST**

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| --- | --- |
| **F** | Stoffman involved a challenge by doctors at the Vancouver General Hospital to a hospital board regulation that established a policy of mandatory retirement at 65. Fourteen of the sixteen members of the board were appointed by government. The government statue required all regulation be approved by the Minister of Health Services Public hospital, part of public health programme set up by prov’l govt |
| **RA** | Governmental control is the test for governmental actors. The type of control is routine or regular control. Public service or government irrelevant. \*\*\*Note that Eldridge goes the opposite way… |
| **RE** | Nonetheless, the majority of the court ruled that the hospital was not part of government nor was the regulation in issue an act of government.The majority emphasized that routine control of the hospital was in the hands of the hospital’s board of trustees rather than in the hands of the provincial government (even though majority of board members were appointed by gov’t)If routine or regular control of hospital was in the control of the govt, then Charter would apply.Mandatory retirement policy, instituted by regulation was not **dictated** by govt - even though minister could review the regulations ∴ not gov’tal action  |
| **DIS** | Wilson, Heureux-Dube and Cory were in dissent concluding that the hospital was acting as government. Dubé distinguished McKinney where the government involvement there was a matter of mostly funding.  |

### Douglas/Kwantlen Faculty Association v Douglas College [1990]

**COLLEGES ARE SUBJECT TO CHARTER SCRUTINY BECAUSE THEY ARE SUBJECT TO ROUTINE AND REGULAR CONTROL, AND BECAUSE THEIR BOARD MEMBERS SERVED AT PLEASURE OF THE MINISTER.**

|  |  |
| --- | --- |
| **F** | Challenge to mandatory retirement policy in a collective agreement between a college and a union. The affairs of the college were managed by a board appointed by the provincial government (like in *Stoffman*). The minister **was allowed to establish and issue directions and approved all bylaws of the board**.  |
| **RA** | Colleges attract Charter scrutiny because they are subject to routine and regular governmental control |
| **RE** | * The Court was unanimous in concluding that the Charter applied to the actions of the college in the negotiation and administration of the collective agreement between itself and the association representing the teacher and librarians at the college.
* They distinguish *McKinney* and *Harrison* by noting that the board served *at pleasure* of the Minister, and that the Minister could at any time lawfully direct the college’s operation.
	+ In *McKinney* and *Harrison*, the university is autonomous.
 |

Lavigne:Charter didn’t apply to union but did apply to the college’s council of Regents was simply an emanation of gov’t b/c it was under the routine regular control by minister of education – anything the college did was a gov’t action

What is important to remember is that the facts will largely determine where the court will draw the line between gov’t\*public/non-gov’t\*private – but this will necessarily be an arbitrary line. But the point is that, an overarching concern is rights as liberating individual action versus rights as coercive limitation of autonomy

## Entities Exercising Governmental Functions:

**NON-GOVERNMENTAL ENTITIES EXERCISING GOVERNMENTAL FUNCTIONS ARE SUBJECT TO CHARTER SCRUTINY.**

Even if an entity is not part of the apparatus of government, because it is not subject to routine or regular ministerial control, it may nevertheless qualify as government for the purposes of s. 32 if it is **exercising governmental functions**.

### Godbout v Longueuil (City) [1997]

**MUNICIPALITIES ARE SUBJECT TO THE CHARTER**

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| **F** | The city of Longeuil adopted a resolution requiring all new permanent employees to reside within its boundaries. An employee was fired for moving after signing an agreement she would not. |
| **D** | The Supreme court held unanimously that the city’s residence requirement violated the Quebec Charter of Human Rights and Freedoms. Six justices found it unnecessary to consider Charter arguments but La Forest J also found it violated Section 7 of the Charter (life, liberty and security of person). |
| **RA** | Municipalities are governmental entities that exercise governmental powers. **If it is a governmental actor, then all of its actions are reviewable** under the Charter – gov’t entity cannot perform a private act – they’re all considered gov’t actions.  |
| **RE** | LaForest J:Municipalities are subject to Charter Review.Entities may be subject to *Charter* scrutiny in respect of certain governmental *activities* they perform, even if they cannot be described as governmental *per se*He justifies this principle because Charter includes “matters within the authority” of the particular legislative body that created them. Otherwise, the government could easily “*shirk*” their Charter obligations by conferring certain of their powers on other entities and having those entities carry out what are, in reality, governmental activities or policies.This is **still not a “public function” test**. It has to be acting in **“governmental capacity”.**Municipalities are “governmental entities” because:These look a lot like other levels of est’d gov’t 1. Democratically elected by general public (accountable to electorate)
2. Possess a general taxing power indistinguishable, for the purpose of Application analysis, from the taxing powers of Parliament or the Provinces
3. Make, administer, enforce laws w/in a defined territory
4. Municipalities **exist and derive law-making powers from provincial legislation**.
 |

### Eldridge v. British Columbia (Attorney General) [1997]:

**HOSPITAL CASE #2 // ACTING IN FURTHERANCE OF A SPECIFIC GOVERNMENTAL PROGRAM OR POLICY**

|  |  |
| --- | --- |
| **F** | Pregnant mom is deaf and her preferred means of communication was sign language. interpreters for the deaf when they received medical services violated s. 15 of the Charter. According to the *Medical Services Act*, the power to decide whether a service was “medically required” and hence a “benefit” under the Act is delegated to the Medical Services Commission. In the case of the *Hospital Insurance Act*, hospitals were given discretion to determine which services should be provided free of charge. The Commission and the hospitals did not make sign language interpretation available as an insured service.  |
| **I** | She sought a declaration that the failure to provide public funding for sign language Does the Charter apply? |
| **RA** | A private entity may be subject to the Charter in respect of certain inherently government actions. There is not an *a priori* test for when an act is “governmental”.It is sufficient to attract Charter scrutiny, however, when private **entities act in furtherance of a specific governmental program or policy**.The private entity “**must be found to be implementing a specific governmental policy or program**.” This is still not the “public function” test. |
| **RE** | La Forest J:When it is alleged that an action of a statutory entity, and not the legislation that regulates them, violates the Charter, it must be established that the entity, in performing that particular action, is part of “government” within the meaning of section 32 of the Charter.Two important considerations:1. If the entity is found to be governmental then all of its actions are subject to Charter scrutiny (*Godbout*)
2. If the entity is non-governmental but attract Charter scrutiny with respect to a particular activity that can be ascribed to the government [Governmental Act] then **only that act is subject to Charter review**, and not the other private acts of that entity. **The investigation is of the nature of quality of the activity itself**.

LaForest clarifies his statement in Stoffman that providing health services is just a public function and not enough to make the entity governmental. * In Stoffman, the mandatory retirement policy was a **“matter of internal hospital management”**. (not under the control of gov’t)
* The Hospital Insurance Act is designed to provide particular services to the public. Although the benefits of that service are delivered and administered through private institutions–hospitals– “it is the government, and not hospitals, that is responsible for defining both the content of the service to be delivered and the persons entitled to receive it**”**
* He thinks that in providing medically necessary services, hospitals carry out a specific government objective. The Act provides for a delivery of a “comprehensive social program”.
* Unlike *Stoffman*, there is a “**direct and precisely-defined connection”** between the specific government policy (medical services) and the hospital’s impugned conduct. The provision of these services is not simply a matter of internal hospital management; **it is an expression of** government policy.
 |

Greater Vancouver Transport Authority v Canadian Federation of Students [2009] the GVTA was found to be a governmental actor because it was an “agent of the government”, and because it had a board all appointed at pleasure of the Lieutenant Governor and the LG has the power to exercise substantial **control over its day-to-day activities** → reiteration of Eldridge // gov’t cannot shirk responsibilities by circumventing charter; otherwise there would be no point in having a charter; it’s a rule of law question

#### Notes: Slaight, Blencoe

**CHARTER APPLIES TO NON-GOVERNMENTAL ACTORS (TRIBUNALS, ADJUDICATORS) EXERCISING COERCIVE STATUTORY POWERS**

The Charter also applies to non-governmental actors **exercising coercive statutory powers** (i.e., administrative tribunals, labour adjudicators). In *Slaight* it was an order of a labour adjudicator, in *Blencoe* it was the BC Human Rights Commission.

**The exercise of coercive/discretionary statutory powers cannot infringe the Charter**, definitionally, b/c gov’t can’t itself infringe Charter, the gov’t can’t delegate power to infringe the Charter ∴ they’re **subject** to the Charter.

# Governmental Inaction

**MAY BE THE SUBJECT TO CHARTER IN VARIETY OF CONTEXTS B/C MOST CHARTER RIGHTS IMPOSE BOTH POSITIVE AND NEGATIVE OBLIGATIONS**

### Vriend v Alberta [1998]

**LEGISLATIVE OMISSION IS SUBJECT TO CHARTER SCRUTINY AND THE COURT CAN READ IN PROVISION TO REMEDY UNDERINCLUSIVENESS**

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| --- | --- |
| **F** | Alberta’s *Individual’s Rights Protection Act* didn’t include “sexual orientation” in its protection from discrimination and Vriend, following termination on that ground from his employment, challenged its constitutionality. The omission was deliberate.The supreme court found an unjustifiable limit and read “sexual orientation” into the legislation |
| **I** | Is the Charter applicable to governmental inaction? |
| **RA** | 1. IRPA is leg’n
2. Underinclusive does not alter the fact that it’s a leg’ve act
3. Language of s. 32 do not limit application to positive acts only. **The deliberate decision to exclude can be read as an ‘act’**
4. If omission not subject to Charter, then underinclusive leg’ve wording in such a way as to simply omit one class rather than to explicitly exclude would be immune which would allow form to triumph over substance
 |
| **ETC** | It was deemed unnecessary to consider whether failure to act at all (as opposed to underinclusiveness) can be subject to Charter scrutiny. For some rights, like minority language rights, the government has to take positive actions to ensure those rights are respected. |

##

#### Dunmore v Ontario:

The court has typically characterized the fundamental freedoms in section 2 of the Charter as being purely negative in character, imposing no positive obligations on the state. A trad’l view of freedom of expression is that it “**prohibits gags, but does not compel the distribution of megaphones**.” (*Haig v Canada*)

On this traditional view, a governmental inaction that is alleged to infringe civil liberties will not attract Charter scrutiny.

In *Dunmore v Ontario* the Court suggested that governments may have positive obligations to protect the freedom of association of vulnerable groups. At issue was labour legislation that excluded agricultural workers from the right to form a trade union and bargain collectively with their employers. The court found exclusion violated freedom of association.

Note the maturation of the notion of state action since *DD*

# Application of the Charter to Court and the Common Law

* In Dolphin Delivery, the Court stated that the courts were not part of government for the purposes of s. 32(1) of the Charter. This proposition makes little sense and has since been generally ignored. The Charter has several substantive rights directly related to procedural law (right to a fair trial within reasonable time).
* Dolphin delivery also stands for the proposition **that the Charter does not apply to the common law when relied upon by private litigants, nor to court orders issued at the conclusion of litigation between parties resolved on the basis of the common law. These aspects of the decision have been followed.**
* *BUT* Their significance appears to be dwindling as the courts become more comfortable with the notion, also emanating from *Dolphin* that the common law needs to be applied and developed in a manner consistent with Charter values.

##

## Reliance by Government on the Common Law

### BCGEU v British Columbia (AG) [1988]

**LITIGATION INVOLVING A GOVERNMENT PARTY OR IN PROCEEDINGS INITIATED FOR A PUBLIC PURPOSE – CHARTER APPLIES**

|  |  |
| --- | --- |
| **F** | The Chief Justice of BCSC, on his own motion, issued a temporary injunction restraining government employees on lawful strike from picketing a courthouse, on the ground that this interference with access to the courts constituted a contempt of court. |
| **I** | The union challenged the (common law) injunction as a violation of their Charter rights of freedom of expression. |
| **D** | Dickson CJ writing for a majority of the Court concluded that the Charter applied to the Chief Justice’s order |
| **RA** | The Charter will apply to the common law where the common law is relied upon to fulfill a public purpose.  |
| **RE** | He distinguished Dolphin where the court said the Charter will not apply to the common law when it is invoked with reference to a purely private dispute. Here, **there is a public element**. Court action on its own motion and not at the instance of any private party. However, they justified injunction under s. 1.  |

### Criminal Proceedings (*Swain; Dagenais*)

**WHERE CL RULES ARE RELIED UPON BY THE CROWN IN CRIMINAL PROCEEDINGS, CHARTER APPLIES [ENOUGH OF A PUBLIC COMPONENT]**

## Reliance on Common Law in Private Litigation

### Hill v Church of Scientology of Toronto [1995]

**CHARTER WILL APPLY TO THE COMMON LAW IN CIVIL CONTEXTS ONLY TO THE EXTENT WHICH THE COMMON LAW IS INCONSISTENT WITH CHARTER VALUES. SECTION 1 IS NOT APPROPRIATE, BUT CHARTER VALUES FRAMED IN GENERAL TERMS SHOULD GUIDE THE MODIFICATION OF THE COMMON LAW.**

|  |  |
| --- | --- |
| **F** | Libel action brought by Crown Attorney Casey Hill against the Church of Scientology and its lawyer, Morris Manning. Response to a press conference held by Church representatives and Manning to publicize criminal contempt proceedings, which they planned to commence against Hill. Allegations against Hill were found to be untrue in the subsequent contempt proceedings.Δs held liable at trial and on appeal for libel and appealed to the Supreme Court |
| **I** | Whether the common law of defamation was inconsistent with the Charter guarantee of freedom of expression |
| **RA** | The Charter will “apply” to the common law in the context of civil litigation only to the extent that the common law is found to be inconsistent with **Charter values**. When the common law is inconsistent with Charter values, **a traditional section 1 framework is not appropriate.** Instead, Charter values, framed in general terms, should be weighed against the principles which underlie the common law. The Charter will then provide the guidelines for any modification to the common law which the court feels is necessary. |
| **RE** | Cory J:* Reaffirms that the common law must be interpreted in a manner which is consistent with Charter principles, but also that the common law when relied upon in a purely private matter is not subject to Charter scrutiny the same was a governmental action is.
* The most that the private litigant can do is argue that the common law is inconsistent with Charter *values*.
* The onus to justify modifying the common law due to inconsistency with Charter values, after a balance of values (separation of powers vs supremacy of rights), is on the party alleging the inconsistency.
* He found that there was no need to amend the common law.
* Courts must not make far-reaching changes to the common law since that should be left to the legislature.
 |

R v Salituro Court considered the common law rule that prevents the spouse of an accused from testifying against him or her in criminal proceedings and found that it was inconsistent with the dignity of the witness and therefore had to be abrogated when spouses are irreconcilably separated to better reflect Charter values.

RWDSU v Pepsi-Cola Court applied the methodology set out in *Hill* to boldly revise the common law rules regarding secondary picketing. **Charter values required evidence of tortious or criminal conduct before secondary picketing could be restrained**. Rejection that secondary picketing is necessarily tortious. This decision takes a much more robust approach to protecting freedom of expression.

Express-Vu Re-reading CL rules to be read in light of Charter value → this is **not** done for statute; must have the 2-stage analysis. Otherwise, you’re not giving gov’t the chance (given under the Charter) to infringe the value but justify it under s. 1. Presumption of constitutionality only applies to statutes with 2 equally plausible meanings, one of which is constitutional and the other not. You only use this presumption when it’s truly ambiguous.

# FREEDOM OF EXPRESSION

# Purposes of the Guarantee

## R v Keegstra [1990]

**FREEDOM OF EXPRESSION VALUABLE FOR DEMOCRACY, AS PRECONDITION OF THE SEARCH OF TRUTH, AND AN END IN ITSELF [PURPOSIVE ANALYSIS]**

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| --- | --- |
| **F** | Hate speech case. Alberta teacher was fired for promoting anti-Semitic speech following Hate Speech Legislation and challenged the decision on the basis that it infringed his section 2(b) rights of freedom of expression.McLachlin (dissent on other grounds) wrote on the purposes of freedom of expression |
| **RA** | The underlying purposes of freedom of expression are1. political process rationale (democracy)
2. market place of ideas (pre-condition of truth)
3. self-fulfillment and self-realization (intrinsic good)
 |
| **RE** | Freedom of expression as a means to valuable ends, but also partially as an end in itself for the purposes of self-realization.One major rationale is that the freedom is “**instrumental in promoting the free flow of ideas essential to political democracy and the functioning of democratic institutions**” [valid but too narrow b/c only applies to political speech.]An **essential precondition of the search of truth**; means of promoting a “marketplace of ideas” in which competing ideas vie for supremacy to the end of attaining truth [also valid but too narrow b/c certain important opinions are incapable of being proven either true or false] An **end in itself necessary for self-realization** and so has an intrinsic value [too broad and amorphous to support a constitutional principle and doesn’t tell us why it later should be upheld as supreme law but is NTL useful to supplement the other means]No need to adopt one justification of the freedom because of the broad language of 2(b). Different justifications might assume varying degrees of importance in different contexts. |

**→** Margot thinks the **core** of freedom of expression is related to these three values and speech that has no connection to these three values is at the **periphery.**

### Richard Moon:

Social character of expression; modify individualism to include recognition that human agency and identity emergence in social interaction. A communicative relationship.

### Owen Fiss:

Inevitable conflict between equality and liberty? No, states it’s a conflict between two different forms of liberty – liberty as the freedom to do whatever you want or liberty nuanced as allowing each person to have an equal opportunity for liberty.

# The Scope and Limits of Freedom of Expression:

**CONTENT-NEUTRAL, NON-VIOLENT FORM.**In most Freedom of expression cases, the Court finds, with little difficulty, that the restricted “Expression” is protected under 2(b) and quickly moves to s. 1 where the real debate seems to take place.

## *Dolphin Delivery*

First significant freedom of expression case to come before the Supreme Court but was decided on application grounds. McIntyre J went on to consider the substantive Charter issues.

Always some element of expression in picketing; rejects the conduct/speech distinction from America, which says picketing is not speech. Reaffirms that the bar is low and that picketing would only be unprotected where it involved threats of violence or acts of violence or destruction of property. However, injunction was justified as a reasonable limit in a free and democratic society because Dolphin Delivery was a third-party.

## *UFCW Local 1518 v Kmart Canda Ltd [1999]*

Tribunal order to stop leafleting as a form of secondary picketing was struck down as not a reasonable limit b/c leafleting is more valuable than picketing. It is less coercive and more discursive.

## *Pepsi Cola*

Overturned Dolphin Delivery and said secondary picketing is generally lawful unless it involves tortuous or criminal conduct.

## *Ford v Quebec*

Freedom of expression includes the freedom to express oneself in the language of one’s choice, and overturned Quebec legislation prohibiting English advertising on signs. Language is not just a medium of expression but colours its content and is an expression of cultural identity. Also, freedom of expression extends to commercial speech.

## *Irwin Toy v Quebec (AG)* [1989]

**GENERAL FRAMEWORK OF RIGHTS ANALYSIS**

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| --- | --- |
| **F** | * challenge to the provision of Quebec’s *Consumer Protection Act*, and the relevant regulations governing children’s advertising (banned advertising targeted at children under 13)
* It had some exceptions such as advertising in children’s magazines and announcements of children’s programs or shows.
* Irwin Toy was charged for violation of the Statue for its broadcasts and then instituted an action for a declaration that the sections were *ultra vires* the province or inconsistent with the guarantee of freedom of expression of the Charter which had come into effect between initiation of action (originally under the Quebec human rights code) and the appeal.
* The Court of Appeal found that the act violated Irwin Toy’s section 2(b) rights and could not be saved under section 1. It was appealed to the Supreme Court.
 |
| **D** | The charter ought not to be used to roll back legislation that protects the vulnerable and less powerful. |
| **RA** | 2(b) protects any non-violent activity that conveys or attempts to convey a meaning (content + form).Lays out three stage analytical framework for Section 2(b) claims:1) whether activity falls within the sphere of protection 2) whether the Act in purpose or effect (then tie to values) infringes a right, 3) Section 1 analysis [majority is very deferential] |
| **RE** | general framework of a Section 2(b) claim1. **SCOPE: Was the plaintiff’s activity within the Sphere of Conduct Protected by Freedom of Expression?**

Expression has both a content and a form:**Content: activity is expressive if it attempts to convey meaning**. * The meaning is its content.
* broad definition b/c it is content-neutral = no restrictions on meanings that are protected and those that are not.
* If the conduct expresses meaning it has an expressive content and *prima facie* falls within the scope of the guarantee.
* Certain day-to-day tasks, like parking a car, might not have expressive content. To bring such an activity within the protected sphere, the plaintiff would have to show that it was performed to convey a meaning.

**Form**: the content of expression can be conveyed through an infinite variety of forms of expression. **The only thing not protected is violence as a FORM of expression**.→ Advertising conveys a meaning and is non violent ∴ court must move on to step two1. **INFRINGEMENT: Was the Purpose or Effect of the Government Action to Restrict Freedom of Expression?**
	1. Purpose
* The government’s **purpose** must be assessed from the **standpoint of the guarantee** in question…
* If the government’s **purpose is to restrict the content** of expression by singling out particular meanings that are not to be conveyed (hate speech legislation) it necessarily limits the guarantee of free expression.
* If the government’s **purpose is to restrict** **a form** of expression in order to control access by others to the meaning being conveyed or to control the ability of one conveying the meaning to do so, it also limits the guarantee.
* On the other hand, if the government’s purpose is to restrict the **physical consequences of certain human activity**, **regardless of the meaning** being conveyed, its **purpose is not to control expression**.
* Ex: rule prohibiting handing out pamphlets is a restriction on a manner of expression and is “tied to content” even if that restriction purports to control litter, but a rule against litter is not a restriction on a manner of expression in purpose.
* In determining whether the government’s purpose aims simply at harmful physical consequences, the question becomes: **does the mischief consist in the meaning of the activity or the purported influence that meaning has on the behaviour of other, or does it consist only in the direct physical result of the activity.**
	1. Effect
* If the government’s purpose was not to control or restrict attempts to convey a meaning, the Court must still decide whether the effect of the government action was to restrict the plaintiff’s free expression.
* The burden is on the plaintiff to demonstrate that such an effect occurred and in order to demonstrate, a plaintiff must state her claim with reference to the principles and values underlying the freedom: the attainment of truth, participation in social and political decision-making, self-fulfillment and human flourishing.
* She must show her activity promotes at least one of these principles. The plaintiff must at least identify the meaning being conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing.
* → note that this is not really taken up by subsequent cases – you won’t see it very often.
* The Act’s purpose was to restrict the expression of some content ∴ purposeful infringement

**SECTION 1 analysis is *not* content-neutral…Remember the value of the speech in relation to the purposes behind protecting expression; polycentric issues; and protection of vulnerable group** 1. **JUSTIFICATION:** Whether the Limit on the Freedom of Expression Imposed by the Provisions is Justified Under Section 1 of the Canadian Charter
* *in limine* issue of “prescribed by law” which the Act is clearly not vague enough to make an issue
* This involves the government first establishes the existence of a “sufficiently important” objective → Here, the government must prove that children under 13 are unable to make choices and distinctions respecting products advertised and whether this in turn justifies the restriction on advertising put into place.
* **The government isn’t allowed to plead a different objective than the one that motivated it to enact the legislation but it can plead new evidence that was not available at the time to prove that the objective remains pressing and substantial.**
* Here, factual evidence must be adduced.
	1. Pressing and Substantial Objective
* pressing and substantial objective (**the protection of a group which is particularly vulnerable to the techniques of seduction + manipulation abundant in advertising**)
* Studies provided a “sound basis” [reasonable basis] on which to conclude that television advertising directed at young children is per se manipulative.
* evidence to suggest that children younger than 7 are more vulnerable, and this lead the Court of Appeal to say that the legislation was not sufficiently tailored to the objective, but the Supreme Court gave **deference to the legislation** and reasoned that “the legislature is not obliged to confine itself solely to protecting the most clearly vulnerable group”, it only had to exercise a “reasonable judgment” in specifying the vulnerable group.
* **The Court should not draw the line for the legislature**.
* The Court reaffirms its stance on deference to the legislature when there is competing social science evidence, and where the issue is polycentric (balancing of many interests). The standard is only a balance of probabilities and so a reasonable basis is needed.
* The Attorney General of Quebec has successfully pleaded the existence of a pressing and substantial objective.
	1. Means proportional to the Ends (rational connection, minimal impairment, deleterious effects)
* Rational connection test is easily found to have been satisfied. The analysis then moves to the issue of minimal impairment.
* The majority decision gives the government deference for the same reasons above, and because of the fact of empirical uncertainty in where it drew the line for the purpose of minimal impairment. Where the government is a singular antagonist there should be less deference.
* The standard is again “Reasonable basis” for concluding that it impaired freedom of expression as little as possible given the government’s pressing and substantial objective.
* They look at the Report again and ruled content based restrictions would not be effective and a blanket ban on all advertisement was required.

***This is the high water mark of deferential Oakes analysis for speech; b/c it’s taking a deferential approach, it is looking at things on a reasonableness basis.*** * 1. Balancing Deleterious effects

There is no suggestion that the effects of the bans are so severe as to outweigh the government’s pressing and substantial objective. The value of the commercial speech in this context that protecting it is not more important than it is to protect children from manipulation by advertisers |
| **DIS** | * They agree that the Act infringes but disagree that it can be justified.
* They think there is no reasonable basis on the evidence to infer the existence of a pressing and substantial problem/objective. No conclusive evidence that advertisement hurts kids.
* They also say that the total prohibition of advertising aimed at children below an arbitrarily fixed age makes no attempt at the achievement of proportionality.
* They in effect give way less deference to the government’s factual findings and place way more value in the freedom of expression rights.
* **You can see the importance of contextualization in the dissent. Majority contextualizes activity as manipulative speech aimed at vulnerable group, dissent talks about expression as the lynchpin of democracy, Margot thinks this shows that dissent did not contextualize the activity**.
 |

**Notes:**

* Irwin Toy shows the development of a more deferential, flexible, reasonableness-based approach to the various strands of the s. 1 test, esp. minimal impairment
	+ Less stringent application of s. 1 viewed as appropriate in cases classified as ‘regulatory’ (i.e. involving socioeconomic considerations where gov’t acts as the mediator between the claims of competing individuals or groups in the community) vs. more rigorous s. 1 application warranted in criminal law cases where gov’t is the singular antagonist of the individual
* Other theme is the comparative institutional competence of cts and legislatures re: socioeconomic matters
* Second rationale for deference being the protection of vulnerable populations reflects the ct’s desire to ensure that the Charter be used as a tool of social justice – that it be interpreted in such a way as to improve, or at least not worsen, the situation of the economically and socially disadvantaged

R v Bryan, 2007 SCC

**INDICATED A VARIETY OF FACTORS THAT MAY AFFECT THE STANDARD OF PROOF UNDER S. 1:**

* Nature of the harm and the inability to measure it
* The vulnerability of the group protected
* Subjective fears and apprehension of harm
* The nature of the infringed activity

### Rocket v Royal College of Dental Surgeons [1990]

**IF SPEECH HAS VALUE TO CONSUMERS, PROHIBITION THEREOF MIGHT BE VOID FOR OVERBREADTH**

Test:

1. **Expressive activity?** Yes. In *Ford* the Supreme Court of Canada held that commercial expression fell within the scope of s. 2(b)
2. **Infringement?** Yes, purposeful. Regulation enacted under the Ontario *Health Disciplines Act* imposing stringent restriction on advertising by dentists.

Section 1:

* Court agreed with but when it came to a section 1 justification they said that the fact that the speech was commercial, and not motivated by political discourse, truth or self-fulfillment, and only economic profit it might be easier to justify its restriction.
* Distinction between core and marginal expression and plays a significant role in the SCC’s approach to a variety of freedom of expression issues, including commercial advertising, hate speech and pornography.
* When the Court decides a certain form of expression is marginal it applies some or all of the section 1 steps more flexibly and less rigorously.

Conclusion:

**However,** ct notes that, despite the fact that it was commercial speech targeted at a vulnerable group, that **there is a public interest served by such expression in enhancing the knowledge of the audience/consumers** ∴ The Court held that the regulation could not be justified under s. 1. It was overbroad in banning all advertisement including non-harmful informational advertising.

### Prostitution Reference [1990]

**DIFFERENCE BETWEEN THE OUTCOMES IS SOLELY ATTRIBUTABLE TO THE JUDICIAL ATTITUDES ABOUT THE VALUE OF PROSTITUTES’ SPEECH.**

Court held that Criminal Code provisions banning any communication in a public place for the purpose of engaging in prostitution could be upheld under s 1 as a proportionate response to the nuisance created by street solicitation. Iacobucci implied that because such communication was only economically motivated it was w/in the periphery of freedom of expression.

All female justices dissented → leg’n not confined to places where there are concern about nuisance, lacks definitional limit on what kind of speech ∴ found that legislation was overbroad, did not minimally impair and should be tailored.

# Commercial Expression

## RJR Macodnald Inc. v Canada (Attorney General) [1995]

**COMMERCIAL SPEECH IS NOT LESS VALUABLE. DEFERENCE AND CONTEXT UNDER SECTION 1 SHOULD NOT ALLEVIATE THE GOVERNMENT’S BURDEN. THE GOVERNMENT HAS THE BURDEN OF PROVING THAT IT STRIVED FOR MINIMUM IMPAIRMENT. THE COURT HAS TO CONSIDER THE OBJECTIVE OF THE LIMITATION NOT THE ACT AS A WHOLE. MINIMAL IMPAIRMENT DOES NOT REQUIRE PERFECTION BUT ONLY PLACEMENT WITHIN A RANGE OF REASONABLE ALTERNATIVES. IN THE EVENT OF EMPIRICAL UNCERTAINTY ARGUMENTS FROM REASON OR LOGIC MAY BE HEARD.**

|  |  |
| --- | --- |
| **F** | The *Tobacco Products Control Act* prohibited the advertising and promotion of tobacco products offered for sale in Canada and required manufacturers to add to packages an unattributed warning about the dangers of smoking. The Act stated that it was enacted to protect the health of Canadians in light of evidence of the harmful effects of tobacco use. Two tobacco companies challenged the Act on both federalism and Charter grounds.During the litigation, the federal government refused to disclose policy documents revealing alternatives to a total ban on advertising that had been considered prior to the enactment of the legislation. |
| **I** | Whether TPCA unjustifiably infringes s. 2(b) |
| **D** | The majority of the Supreme Court of Canada struck down a general ban on tobacco advertising. |
| **RA** | Commercial speech is not less valuableDeference to the legislature should be given (LaForest thinks this means that the Oakes test should be applied more flexibly and that the standard of proof of section 1 should be lowered) but not to the extent of removing the burden of section 1 There is an **important relationship between** objective (pressing and substantial) and proportionality, the broader the objective the more options that come up as “reasonable alternatives” in minimal impairment and “rational connection” stage.  |
| **RE**McL | Both the general ban on advertising and the unattributed warnings are infringements.Unattributed warnings are infringements, following *Slaight*, because 2(b) necessary entails the right to remain silent or the right to not say certain things.Contextual factors: * Socioeconomic leg’n (i.e. overstated)
* Vulnerable group
* Competing interests
* Value of expression

She goes on to section 1 and says1. context should not lower the evidentiary burden on the government. Context cannot “be carried to the extreme of treating a challenged law as a unique socioeconomic phenomenon”
2. deference should also not be used as an excuse to lower the evidentiary burden below a civil standard for a section 1 analysis
3. Legislative facts: facts like social science evidence that an appellate judge can discern and sift through with as much authority and skill as TJ vs. adjudicative facts which are those discerned best by TJ (e.g. witness evidence)

Objective: * **objective of the infringing measure**, and should not be **overstated** because its importance may be exaggerated and the analysis compromised
* The objective of the advertising ban must be to prevent people in Canada from being persuaded by advertising and promotion to use tobacco products.
* The objective of req’ing unattributed warning must be to discourage people who see the package from tobacco use.

→ these narrower objectives meet the substantial and pressing standard.Rational connection* Rational connection between infringement of rights and the benefit sought may be proved by scientific evidence but where legislation is targeted at changing human behaviour, the causal relationship may not be scientifically measurable ∴ct can admit arguments based on reason, common sense or logic w/o insisting on a direct proof
* defers to TJ’s findings that the “Direct or scientific” evidence was not persuasive.
* But, using reason and common sense and finds that there is a rational connection between the objective/benefit and the infringement.

Minimal impairment* Leg’re should be given some deference and does not have to prove that it’s chosen means was the least infringing alternative, just that it fell w/in a range of reasonable alternatives
* **But** the impairment must be “minimal”, or infringe as little as reasonably possible to achieve the legislative objective

**→ what happened to the “court not drawing the line for the legislature” rule from Irwin Toy?*** Ban is overbroad and includes advertising which arguably produces benefits to the consumer like purely informational advertising (e.g. reminders of package appearance and of tar contents.)
* Smoking is a legal activity but consumers would be deprived of an important means of learning about product availability to suit their preferences with an aim to reduce their risk to health.
* Gov’t gave no evidence that a partial ban would be less effective than a total ban.
* Total prohibitions will only be constitutionally acceptable under the minimal impairment stage of analysis where the government can show that only a full prohibition will enable it to achieve its objective.
* relies on a distinction between lifestyle advertising designed to increase consumption and informational or brand preference advertising.
* Parliament does not have the right to determine unilaterally the limits of its intrusion on the rights and freedoms guaranteed by the Charter.
* Infers from the federal government refusing to provide evidence about alternatives it considered that the gov’t was hiding that alternatives really were workable
* motivation to profit is irrelevant to the determination of whether the government has established that the law is reasonable or justified
* The government also did not show that an unattributed warning would be more effective than an attributed warning

----------------------------Iacobucci wrote a concurring judgment saying context should inform a section 1 analysis and that the lynch-pin of the Act’s unconstitutionality was that the amount legislative tailoring required to sustain minimal impairment was not very significant but the government did not even try. |
| **DIS** | * The government conceded that the prohibition on advertising constituted an infringement of freedom of expression under s. 2(b) of the Charter, although it did not include in this concession the requirement of the unattributed warning.
* The Oakes test demands a rigorous standard of proof for a section 1 analysis, which the Court of Appeal judge adhered to but which the dissent said should be relaxed. **Oakes test is only a tool and is not a substitute for section 1**.
* The evidentiary requirements will vary depending on context of both legislation and right.
* The nature and scope of the health problems raised by tobacco consumption are highly relevant to the section 1 analysis. There is empirical uncertainty about the root causes of tobacco consumption and the effects of tobacco consumption so requiring the government to prove the existence of a pressing and substantial objective (or the rest of section 1) on a rigid standard would be unfair and place an impossible onus on Parliament. It would **virtually paralyze the government in the socio-economic sphere**. All the government has to establish is a “reasonable basis” for inferring the objective.
* This is a polycentric issue so more deference should be given to the government. The harm of tobacco use and the profit motive underlying its promotion makes tobacco advertising as far from the core of freedom of expression values as prostitution, hate mongering and pornography. Where the form of expression falls further from the “centre core of the spirit” the Court will lessen the burden of proof on the government.
* The pressing and substantial objective was conceded by the Tobacco companies.
* The dissent would reverse the Appeal finding on proportionality. La Forest concludes that while a trial judge is in a privileged position with respect to adjudicative fact finding, it is owed **less deference for legislative or social fact finding**. This is because social or legislative facts are complex.
* The causal connection between advertising and consumption is a hallmark example of legislative or social facts.
* The dissent says only rational basis for believing in a rational connection between infringing provisions and the objective (much less than a civil standard) is required. La Forest relies on **a “common sense”** observation based on how much the tobacco companies spend on advertising that it works. The tobacco companies argue that their advertisement only serves to promote brand loyalty among already existing smokers and not expand the market. La Forest counters that sustaining consumption is enough to justify rational connection.
* He also says he doesn’t have to rely on common sense because there was sufficient evidence adduced at trial to maintain a reasonable basis for a rational connection between advertising and consumption. He looks to internal tobacco marketing documents, expert reports, and international materials. In particular, the internal marketing documents introduced at trial strongly suggest that the tobacco companies perceive advertising to be a corner stone of their market strategy in both expansion and sustainment.
* On minimal impairment the dissent also wants to reverse the Court of Appeal decision because of the context. The Court should not draw the line in balancing effectiveness of a provision with intrusion on rights in cases where there is empirical uncertainty and where many interests are at stake.
* They also find that the deleterious effects do not outweigh the salutary benefits or the legislative objective.
* About the unattributed health warnings, they say its no different from warnings on other hazardous products and so are not infringements because they cannot be seen as coming from the Tobacco companies. Even if they were they would be saved under Section 1.
 |

##

## Canada (Attorney General v JTI-Macdonald Corp [2007]

**SEPARATE SECTION 1 TEST FOR EACH LIMIT, PARLIAMENT SHOULD BE GIVEN DEFERENCE FOR RATIONAL CONNECTION AND MINIMAL IMPAIRMENT FOR COMPLEX ISSUES BUT STILL HAS TO PROVE EACH ELEMENT OF SECTION 1 TO A CIVIL STANDARD, PARLIAMENT DOES NOT HAVE TO IMPLEMENT LESS EFFECTIVE ALTERNATIVES BUT MUST SHOW IT IS NOT OVERBROAD OR VAGUE.**

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| **F** | In 1997, the federal government passed new legislation regulating tobacco advertising and labeling. The new act prohibits most tobacco advertising but creates an exception for “information advertising” and “brand-preference advertising” contained in publications (primarily magazine) directed at an adult readership. All “lifestyle advertising” is banned. The legislations also requires the placement of attributed health warnings. The Supreme Court unanimously upheld the legislation. |
| **RE** | McLachlin for a unanimous court:* The new legislation represents a “genuine attempt” by Parliament to craft controls on advertising and promotion that would meet its objectives as well as the concerns expressed by the majority in *RJR*.
* They talk about the international context has changed because governments are enacting heavier bans. Furthermore, there was more supporting evidence about the harms of tobacco advertising
* None of these developments remove the burden on the Crown to show that limitations on free expression imposed are justified and same legal template in *Oakes* and *RJR* remains applicable.
* They go provision by provision to determine the scope of the act.
* The court engages in an overview of section 1 emphasizing **the appropriateness of a certain measure of deference at both the rational connection and minimal impairment stages when the Parliament is tackling a complex social problem, citing Edward Books and Irwin Toy**.
* The court also notes the minimal impairment analysis must take into consideration the possibility of overbreadth being resolved by statutory interpretation.
* It also follows McLachlin’s suggestion and determines the objective of each part of the Act and each limit, as opposed to the act as a whole.
* It analyzes each limit under a separate section 1 analysis. A separate objective is identified for false advertising, advertising targeted at youth and lifestyle advertising, and attributed warnings.
* Under attributed warnings it finds that the Court takes a broad view of “expressive activity” (includes silence in certain circumstances) and so attributed warnings (compelled speech) is enough to constitute impairment.
* The test is whether the law deprives one of the ability to speak one’s mind or associates someone with a message they don’t agree with (*Lavigne*)
* However, it is justified under section 1, particularly minimal impairment since there is evidence that bigger warnings may have a greater effect. Parliament is not required to implement less effective alternatives.
 |

**NB:** Overbreadth and vagueness is discussed under minimal impairment. Margot thinks this is important. Essentially, the government has to show that its legislation does not catch more than it needs to and that it is sufficiently clear as to not be vauge.

**Factors:** defences, definitions, distinctions. You have to target precisely the prohibited activity. How tailored is it? How fitted?

## R v Guignard [2002]

**CITIZEN-GENERATED COUNTER-ADVERTISING IS PROTECTED AND IMPORTANT**

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| **F** | Guignard was charged for violating a bylaw against advertisement by erecting a sign expressing his dissatisfaction with the delay of an insurance claim for a loss from his insurance provider. |
| **D** | In many of its commercial speech cases, the SCC has identified the informational interests of listeners as one of the reasons for protecting such expression. In this case, the Court struck down a bylaw banning “counteradvertising” by consumers. |
| **RE** | LeBel J* Counter-advertising is valuable because it is derived from political opinion not commercial speech.
* Most people can’t access media publication so they have to distribute leaflets, or post on the internet to express their discontent.
* The bylaw infringes the rights of a vulnerable group.
 |

# Hate Speech

## R v Keegstra [1990]

**HATE SPEECH IS ‘EXPRESSION’ AND ∴ PROTECTED BUT LESS VALUABLE AND LIMITED JUSTIFIABLY. THE COURT WILL CONSIDER THE CONFLICT OF A FORM OF EXPRESSION WITH OTHER CHARTER VALUES UNDER SECTION 1.**

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| **F** | Mr. James Keegstra was a high school teacher in Eckville Alberta who was charged with an offence under the Criminal Code for unlawfully promoting hatred against an identifiable group by communicating anti-Semitic statements to his students.He challenged it on Charter grounds for unjustifiably limiting his freedom of expression. He was successful at the Court of Appeal in Alberta and it was appealed to the SCC.The dominant theme is the need to prevent the dissemination of hate propaganda without unduly infringing the freedom of expression.  |
| **I** | Is hate speech protected by the charter?If so, is the criminal code provision a justifiable infringement? |
| **D** | Yes, protected. Yes, it’s justifiable.  |
| **RE** | * Following the Irwin Toy test Dickson finds expression of meaning in hate speech and infringement (purpose based legislation) so hate speech falls under section 2(b)
* Hate speech is not a form of violence that would fall within the *Irwin Toy* exception, which he interprets to exempt only forms of physical violence. Threats of violence do not fall within the exemption.

∴ must go through s. 1 justification: **STAGE ONE: OBJECTIVE OF S. 319(2)** 1. *Harm Caused by Expression Promoting the Hatred of Identifiable Groups*
2. there is harm done to members of a target group
3. influence upon society at large, active dissemination can attract individuals to its cause
4. *International Human Rights Instruments*
5. Convention on the Elimination of All Forms of Racial Discrimination (CERD): demands under Article 4(a) that parties to the agreement: “Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof”
6. *International Convenant on Civil and Political Rights (CERD):* Guarantees freedom of expression and prohibits advocacy of hatred.
7. *Other Provisions of the Charter:* ss. 15 and 27:

commitment to the values of equality and multiculturalism → underline importance of Parliament’s objective in prohibiting hate propaganda **Impossible to deny that the objective is of the utmost importance:** trying to prevent the pain suffered by target group members and to reduce racial, ethnic and religious tension **STAGE TWO: PROPORTIONALITY**1. *Rational Connection*
* Hate speech is not closely linked to the rationale underlying 2b (3 values)
* Hate speech does not add to the market place of ideas leading to truth because there is a very little chance that statements intended to promote hatred are true or that their vision of society will lead to a better world.
* Intolerance and prejudice go against self-fulfillment and human flourishing
* While prohibition of hate speech takes certain individuals out of democratic discourse, hate speech itself is not consistent with democracy (equality) and so the society it promotes is inherently undemocratic

**Rational connection is met because there is a rational basis to conclude it stops the spread of racism.**1. *Minimal Impairment*

Under minimal impairment Dickson addresses the main argument that the legislation has a real possibility of punishing expression other than hate speech and might be overbroad. That is, merely unpopular or unconventional communications might be prohibited. He argues that the **provisions are tailored because they do not apply to private speech**, and that the mens rea requirement that the promotion of hatred be **“willful” excludes merely unpopular and unconventional speech.**He points to **defences to further narrow the scope**. *Other routes to achieve object?* It may be that a number of courses of action are available in the furtherance of a pressing and substantial objective, each imposing a varying degree of restriction upon a right or freedom. In such circumstances, a government may legitimately employ a more restrictive measure, either alone or as part of a larger programme of action, if that measure is not redundant, and furthers the objective in way the alternative responses could not, and is in all other respects proportionate to a valid s. 1 aim. |
| **DIS** | McLachlin finds the legislation infringing and unjustified because of no rational connection, because it does not minimally impair and because no obvious rational connection then the deleterious effects of criminalizing people outweigh the objective/salutary effects. * Chilling effects of an overtly broad prohibition on speech causing people to not say anything out of fear of criminal reprimand
* Also, criminal sanction earns racists media attention, and the public might view censorship as suspicious ∴ enhancing hateful views
* Nazis had hate propaganda laws which were obviously not effective were found as not convincing
* Media attention gives notice of severe reprobation of engaging in hate speech
* But defamation and pornography laws do not glorify defamation or pornography
* Hate propaganda laws should be seen as the democratic will to purge society of racism, conditions in pre-WW2 Germany and modern Canada are obviously different
 |

### Reflections:

* McL seems to state that evidence needs to be show that suppression of hate speech = less hate speech but takes for granted that suppression = chilling effect
	+ Vs. *Hill* where the ct stated that “w/o evidence of the deleterious effects of the law of defamation on freedom of expression, this court is faced with evaluating the Charter challenge in a factual vacuum”
* Responding to claims not with censorship but by offering competing views that make the case for equal respects or by creating more avenues for marginalized groups to express themselves, **Falls into three traps:**
	+ Assumes that discriminatory views are rational and will be countered effectively if marginalized voices are simply given more platforms
	+ Takes out of context the factual scenario here where the hate-speaker was in a position of power and actually demanded that his students reflect his own bigotry
	+ Clearly Keegstra was aware that there were counter-arguments; he viewed himself as running against the mainstream. This goes to show that even where a view is relatively overshadowed by ‘authoritative’ counter-arguments, it will still persist

### Mugesera v Canada, *[2005] SCC 40:*

In determining whether speech conveys hatred, the ct must take into acct the character of the audience and the social and hx context of the speech

### Taylor v Canadian Human Rights Commission, [1990] SCC:

|  |  |
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| **F** | Taylor and the Western Guard Party started a telephone message service which had pre-recorded messages on the ‘Jewish conspiracy to control Canadian society’. Complaint brought under s. 13(1) of *Canadian Human Rights Act*; tribunal issued a cease-and-desist order. T continued practice, found in contempt. Party fined and Taylor imprisoned for 1 yr; after his release, T resumed the practice. Once again HRC sought an order of committal and T responded by challenging s. 13(1) under s. 2(b)  |
| **I** | Whether s. 13, which found it a discriminatory practice to use the phone to repeatedly communicate messages “likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.” Infringed s.2(b) |
| **D** | Breached s. 2(b) but a reasonable and justified limit under s. 1 |
| **RE** | Meaning of ‘hatred’ and ‘contempt’ too vague?→ as long as the Human Rights Tribunal continues to be well aware of the purpose of s. 13(1) and pays heed to the ardent and extreme nature of the feeling described in the phrase ‘hatred or contempt,’ there is little danger that subjective opinion as to offensiveness will supplant the proper meaning of the section.Problematic b/c no intentionality needed, just effects (does s. unduly limit expression?)→ No, the preoccupation w/ effects rather than intent sensible when considering that systemic discrim >widespread than intentional discrim It will be more restrictive than the criminal sanctions but the purpose of HR leg’n is to compensate and protect victim rather than to stigmatize and punish the hate-speaker |

### Ross v. New Brunswick School District No. 15, [1996] SCC

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| --- | --- |
| **F** | R was schoolteacher who expressed anti-Semitic views o/s classroom in published writings and public appearances. Found by a HRT to have created a poisoned environment w/in the classroom and ordered R to be removed. SCC upheld the decision to remove R as a reasonable limit on 2(b). |
| **RE** | * The attempt to foster equality, respect and tolerance in the Canadian educational system is a laudable goal.
* But the additional driving factor in this case is the nature of the educational services in question: we are dealing here with the education of young children. … Young children are especially vulnerable to the messages conveyed by their teachers; less likely to make an intellectual distinction between comments a teacher makes in the school and those the teacher makes outside the school.
* ∴ more likely to feel threatened and isolated by a teacher who makes comments that denigrate personal characteristics of a group to which they belong & unlikely to distinguish between falsehoods and truth and more likely to accept derogatory views espoused by a teacher.
* The importance of ensuring an equal and discrimination free educational environment, and the perception of fairness and tolerance in the classroom, are paramount in the education of young children. This helps foster self-respect and acceptance by others.
 |

# Access to Public Property

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

**NOT ALL PLACES ARE PROTECTED UNDER 2(B), THE ULTIMATE QUESTION IS WHETHER FREE EXPRESSION IN THAT PLACE (OR MANNER) WOULD UNDERMINE THE VALUES UNDERLYING THE GUARANTEE, TWO IMPORTANT FACTORS ARE HISTORICAL/ACTUAL FUNCTION OF THE PLACE AND WHETHER ASPECTS OF THE PLACE SUGGEST THAT EXPRESSION WITHIN IT WOULD UNDERMINE THE VALUES UNDERLYING FREE EXPRESSION, SOME IMPRECISION IS INEVITABLE.**

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| **F** | * power of the city of Montreal to prohibit noise produced in the street by a loudspeaker located in the entrance of an establishment.
* Two arguments are raised, one based on limits on the power to regulate and the other on the Charter Section 2(b) grounds.
* The bylaw limiting noise is validly enacted and although it limits the freedom of expression guaranteed by s. 2(b) the limit is reasonable and can be demonstrably justified within the meaning of Section 1
* The respondent operates a strip club and put a loudspeaker at its entrance projected into the street to amplify the noise inside and attract customers in violation of the city bylaw.
 |
| **I** | 1. Does the noise have an expressive content?
2. Does the manner or location in which content is expressed preclude the expression from s. 2(b) protection?
 |
| **D** | 1. The answer is yes. The loudspeaker sent a message into the street about the show going on inside the club. Section 2(b) is content-neutral.
2. Expressive activity should be excluded from the scope of 2(b) only if its method or location clearly undermines the values that underlie the guarantee.
 |
| **RA** | The **basic question with respect to expression on government-owned property is whether the place is a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s. 2(b) is intended to serve, namely 1) democratic discourse, 2) truth finding and 3) self-fulfillment.** |
| **RE** | * Expressive activity may fall outside the scope of section 2(b) **protection because of how or where it is delivered.**
* The method or location of the expression may not be protected (e.g. violent expression)
* Expression on private property will fall outside the scope of protection unless it is infringed by a government act
* Public property, however, by definition implicates the state.

Two countervailing arguments, both powerful, are pitted against each other where the issue is expression on public property.* One argument says the crucial distinction is between who owns the property, and since the government owns the public property any action restricting rights on it will be governmental action and attract Charter scrutiny.
* The other argument, is that the crucial distinction is between **public use** of property and **private use** of property. Regardless of whether the government owns the property and controls it, some government property is essentially private in use (like governmental offices). It cannot be the intention of the framers of the Charter to allow freedom of expression in these essentially private places and leave it to the government to justify infringement.
* In *Committee for the Commonwealth of Canada* six of the seven judges endorsed the second general approach although they differed on what the test in determining the nature of a particular government property is. This second approach was followed in *Ramsden v Peterborough* but it was held that emission of noise onto a public street was protected.
* This method of expression is not **repugnant to the primary function of the public street** on the test Lamer CJ proposes in *Committee*.
* McLachlin’s test was whether the method and location of the expression also arguably serve the values that underlie the guarantee of free expression.
* Finally Hureux-Dube thinks the public/private use distinction is better addressed under section 1 sticking to the broad requirement of expressive content.
* The Court endorses McLachlin’s test: Expressive activity should be excluded from the scope of 2(b) only if its method or location clearly undermines the values that underlie the guarantee.

Test for determining if 2(b) applies to a particular public-property [onus on claimant]:The **basic question with respect to expression on government-owned property is whether the place is a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s. 2(b) is intended to serve, namely 1) democratic discourse, 2) truth finding and 3) self-fulfillment.**The following questions should be considered:* historical or actual function of the place
* whether other aspects of the place suggest that expression within it would undermine the values underlying free expression
* Historical function of a place for public discourse is an indicator that expression in that place is consistent with the purposes of s. 2(b)
* Actual function as a private or public place is also important.
* Other factors may be relevant
* Some imprecision is inevitable.
* They find the existence of a pressing and substantial objective (preventing noise pollution) and that the means was proportionate to it.
 |

### *Committee for the Commonwealth of Canada v Canada,* 1991 SCC

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| **F** | Federal airport regulation prevented people from leafleting at airport. Committee members who were prevented from doing so brought motion seeking a declaration that under the Charter they had a right to express themselves in the public areas and that the regulation was an unjustified restriction on freedom of expression  |
| **I** | Whether the airport regulation was a justified restriction on freedom of expression |
| **D** | The interference w/ the communication of political views was a restriction on freedom of expression that could not be justified under s. 1 → **3 different approaches to the issue of communicative access…** |
| **Lam** | The question of whether an individual has a right to communicate on state-owned property should be resolved under s. 2(b) and depend simply on whether the particular communication is consistent w/ the state’s use of the property. A restriction that is based on incompatibility of the particular form of expression w/ the state’s property use does not violate s. 2(b) ∴ doesn’t req’re s. 1 justification |
| **McL** | Restriction on communicative access based on incompatibility of uses (not content of the communication) will violate 2(b) only if the restricted communication can be shown to advance the underlying values of 2(b). Restriction on communicative access to private state-owned property won’t violate and so won’t req’re justification but if the state-owned property is one which has been traditionally dedicated to public expression, then it will violate s. 2 and req’re justification |
| **L’HD** | Anytime the state restricts expression on its property it violates 2(b) and must be justified under s. 1Balancing of competing individual and state interests should take place under s. 1 But the standards of the s. 1 justification shouldn’t be applied strictly for access cases  |

### *Ramsden v Peterborough (City),* 1993 SCC

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| **F** | Musician affixed posters to hydro poles announcing an upcoming performance + charged w/ contravening a municipal bylaw that imposed an absolute prohibition on the affixing of posters on any public property.  |
| **D** | Bylaw was an unjustifiable infringement of freedom of expression (did not set out a test for communicative access to public property) |
| **RA** | Posters have communicated political, cultural and social information for centuries. Postering on public property, including utility poles, increases the availability of those messages, and thereby fosters social and historical decision making.  |
| **RE** | Although the municipality’s concern w/ litter and aesthetic blight were legit, they could be dealt w/ in far less restrictive manners  |

**Notes:**

* Another access right potentially grounded in 2(b) is the access to information related to the operation of gov’t and issues of public policy
* Has been interpreted as including a prima facie right of public access, including the media, to judicial and quasi-judicial proceedings, with the result that leg’ve provisions for in camera proceedings are req’d to be justified under s. 1
* ONCA has held that in some circs, 2(b) might give a right of access to gov’t information

### Dagenais v CBC [1994] SCC

**LEADING CASE ON ISSUE OF PUBLICATION BANS. SCC REFORMULATED THE CL RULE GOVERNING PUBLICATION BANS, TAKING INTO ACCT FREEDOM OF EXPRESSION INTERESTS.**

A publication ban should only be ordered when:

1. It is necessary in order to prevent a real and substantial risk to the fairness of a trial, b/c reasonably available alternative measures will not prevent the risk **and**
2. The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban

### CBC v Canada (AG), 2011 SCC 2

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| **F** | The CBC and other media outlets want to film, take photographs and conduct interviews in the public areas of courthouses, and they also want to broadcast the official audio recordings of court proceedings.There are rules that limit the places where the first of these activities may take place and that prohibit the second. The media organizations, which submit that these rules unjustifiably infringe the freedom of the press to which they are entitled, applied for a declaration that rules together with Directive A‑10 of Quebec’s Ministère de la Justice entitled Le maintien de l’ordre et du décorum dans les palais de justice, are of no force or effect |
| **I** | Whether the restrictions on media activities (interviews and camera usage) infringe 2(b) *and* Whether the ban on usage of official audio recordings infringes 2(b)If they are protected, whether the infringements are justified.  |
| **D** | Yes to both. Restrictions upheld. |
| **RA** | To determine whether an expressive activity is protected by the *Charter*, we must answer three questions:(1) Does the activity in question have expressive content, thereby bringing it, *prima facie*, within the scope of s. 2(*b*) protection?  (2) Is the activity excluded from that protection as a result of either the location or the method of expression?  (3) If the activity is protected, does an infringement of the protected right result from either the purpose or the effect of the government action? Freedom of the press and the fair administration of justice are essential to the proper functioning of a democratic society and must be harmonized with one another.  But freedom of the press cannot foster self‑fulfilment, democratic discourse and truth finding if it has a negative impact on the fair administration of justice.  |
| **RE** | Connection between freedom of expression and the administration of justice: It is imperative that the public have access to ct proceedings b/c “where there is no publicity, there is no justice” Openness fosters the fair administration of justice and protects citizens from arbitrary state action ∴ helps maintain and enhance public confidence in and serves as a guarantee of the integrity of the ct system ∴ freedom of the press and the legitimacy of the justice system are clearly linked but should not be confused for one anotherMethod and Location:Although all expressive content is prima facie worthy of protection, an expressive activity may be excluded from 2(b) protections b/c of the way it is undertaken (i.e. method) or where it is undertaken (location) For either the method or the location of the conveyance of a message to be excluded rom Charter protection, ct must find that it conflicts with the values protected by 2(b) [self-fulfillment, democratic discourse, and truth-finding]Must consider: historical or actual function of the location of the activity or the expression and whether other aspects of the location/method suggest that expression thus communicated would undermine the values underlying free expression Not limited to primary function of the location (airports, hydro poles, city streets and buses are locations where engaging in certain expressive activities is not inconsistent with the other values s. 2(*b*) is meant to foster even though their primary function is not expression.)Filming and interviews:the activities of filming, taking photographs and conducting interviews are not incompatible with the purpose of the public areas of courthouses.the purpose of the impugned measures was to limit filming, taking photographs and conducting interviews to certain predetermined locationsSince news gathering is an activity that forms an integral part of freedom of the press, the measures that limit filming, taking photographs and conducting interviews infringe s. 2(*b*) of the *Charter*.Justification:increase in the number of journalists together with a greater sophistication of the technologies they used in courthouses had adverse consequences for the administration of justice ∴ undermined the values which underlie freedom of expression. Audio Recordings: the method of expression and the expressive content are inseparable in this case ∴broadcasting audio recordings is protected under s. 2(b). The method cannot exclude the expressive activity. The ban obviously limits the expressive content and therefore 2(b) is infringed. JustificationAlthough I accept that the broadcasting of official audio recordings would add value to media reports and make them more interesting, I cannot find that the prohibition against broadcasting these recordings adversely affects the ability of journalists to describe, analyse or comment rigorously on what takes place in the courts.Broadcasting the recordings would undermine, too. They are a means of conserving evidence.  To broadcast them in the name of freedom of the press would undermine the integrity of the judicial process, which the open court principle is supposed to guarantee. |

###  R v Khawaja, 2012 SCC 69

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| **F** | Accused was convicted under terrorism provisions in criminal code. Argued that they violated Charter protections of freedom of expression and freedom of religion. ***NB:*** *this is all framed re: freedom of expression b/c it is the ‘broadest’ right and if it is not infringed, then there is no argument for religion/assoc.*  |
| **I** | 1. Definition of ‘terrorist activity’ and ‘terrorist group’: infringement of s. 2(b)?
2. Does the ‘motive clause’ have the effect of
	1. chilling speech or
	2. legitimizing law enforcement action targeted at individuals based on religious beliefs
 |
| **D** | No infringement. The provisions are constitutional.  |
| **RA** | The impugned provision allows for the non-violent expression of political, religious, or ideological views. Violent expression has never been protected. “Improper conduct by states actors charged with enforcing leg’n cannot render what is otherwise constitutional legislation, unconstitutional. Where the problem is with the enforcement of a constitutionally valid statute, the solution is to remedy improper enforcement, not to declare the statute unconstitutional.” |
| **RE** | Purpose of the provisions:Activities targeted by the leg’n are in a sense expressive. **However,** as noted in Irwin Toy, violent expression is not protected. This extends to threats of violence (*Vancouver Transit Auth*) b/c they take away free choice and undermine freedom of action. They undermine the values and social conditions that are necessary for the continued existence of freedom of expression (*Keegstra*) The acts enumerated, and threats to commit them, are violent or threats of serious violence and are not protected by s. 2(b). **The purpose of leg’n does not infringe.** Effect of the provisions:\*\*firstly, what is the evidentiary basis req’d to establish chilling effect? Causal connection between the motive clause and chilling effect has not been made out; chill in expression has been based on the ‘post-9/11 climate of suspicion’ (interesting that the leg’n not considered part of that climate)Chilling effect that results from how the provision operates (i.e. that misunderstands that the criminalization of violent acts only) cannot ground a finding of unconstitutionality Any chilling effect that results from police misconduct (i.e. profiling) is not chilling created by the terrorism leg’n  |

### Saskatchewan (HRC) v. Whatcott, 2013 SCC 11

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| **F** | Whatcott distributed homophobic fliers and people complained because they promoted hatred, contrary to SK’s HR Code. The HRC set up a tribunal to hear the complaints. Tribunal found that the fliers violated the code, and that the code was a reasonable restriction on his freedom of expression and religion. Whatcott ordered to pay compensation to each of the complainants.  |
| **I** | 1. Is the impugned provision unconstitutional for infringing the freedom of expression?
2. Did the Tribunal err in holding that Whatcott violated the code provisions with his pamphlets?
 |
| **D** | 1. Partially. The words in s. 14 about “ridicules, belittles, or otherwise affronts the dignity of” were not found to be extreme enough to justify infringing s. 2. After striking those words out, the prohibition was no longer overbroad.
2. Partially. Some of the pamphlets did promote hatred, while others did not.
 |
| **RA** | Whether or not Whatcott intended his expression to incite hatred against homosexuals, it was reasonable for the tribunal to hold that, by equating homosexuals with carriers of disease, sex addicts, pedophiles and predators who would proselytize vulnerable children and cause their premature death, 2 of the flyers would objectively be seen as exposing homosexuals to detestation and vilification.  |
| **RE** | Hatred: “unusually strong and deep-felt emotions of detestation and vilification” (excludes merely offensive or hurtful expression). Must ask whether the reasonable person, aware of the context and circs surrounding the expression would view it as exposing the protected group to hatred. |

# Charter Analysis Chart

