Constitutional Law – Fall 2018 – Professor Wright

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# Government in Canada

* **Constitutional monarchy:** formally, every act of government is done in the name of the Crown, but the Queen’s functions have been delegated to the:
  + Governor General at the federal level
  + Lieutenant General at the provincial level
* **Parliamentary Democracy:** People elect representatives to the legislature, and it is the legislature, not the people themselves, who elect the government
* **Federalism:** the division of government along territorial lines
* A federal state requires:
  + At least two orders of government that must be constitutionally protected
  + Neither order of government can control activities of the other order
  + Federal and provincial governments both have jurisdiction to make laws in relation to particular subjects
* **Rights:** claims that citizens, as individuals and as members of a community, have against the state
* **Aboriginal rights:** rights recognized by the Constitution as belonging to Aboriginal peoples in light of the fact that they lived on the continent in organized societies before European contact
* **Constitutionalism:** refers to the fact that governmental action, including legislation enacted by Parliament and provincial legislatures, can be held by the courts to be “of no force or effect” if the court finds that action to be inconsistent with a provision of the Constitution

## Branches of Government

1. Legislative Branch

a) Federal

* “Parliament” – role is to make and unmake law and to hold the government accountable
* Members:
  + Crown/Governor General (appointed)
  + House of Commons (elected MPs)
  + Senate (appointed Senators) (virtually the same powers as the House of Commons)

b) Provincial

* Role is to make and unmake law and to hold the government accountable
* Members:
  + Crown/Lieutenant General (appointed)
  + Legislature (elected MPPs/MLAs)

2. Executive Branch

* Role:
  + sets policy agenda
  + prepares and introduces most new laws for legislative consideration
  + implements laws
  + enforces laws
* Members:
  + Crown
  + Cabinet 🡪 “political executive” – Ministers appointed by Gov. General on advice of PM
  + Civil service
  + Military
  + Police, prosecutors
  + Administrative decision-makers

3. Judicial Branch

* Two key functions:
  + Adjudicate legal disputes
  + Judicial review: review actions of executive and legislative branches to ensure they are acting within their jurisdiction

## Legislative Supremacy

* Legislature can make or unmake any law, and no other body can invalidate them
* Legislature cannot bind itself for the future
* Seen as a fundamental democratic guarantee – we the people have the power to make the rules that govern us
* Limitations:
  + **Manner and Form requirements:** the legislature must follow its own procedural requirements
  + The Constitution is supreme

## Responsible Government

* Ensures the government (executive branch) is “responsible” to the legislature
  + The government must win votes of confidence from Parliament and provincial legislatures
  + So theoretically the legislature has power over the executive branch. This is means as a measure of democratic accountability
* **Executive dominance:** In practice, the government which controls the executive branch often controls the legislative branch (i.e. through party discipline)

## Separation of Powers

* Legislative branch makes the law
* Executive branch implements and enforces the law
* Judicial branch interprets and applies the law
* **Descriptive:** an account of what is
* **Normative:** an account of what should be
* Descriptively, there is no strict separation of powers. Legislative and executive branch are fused

# The Constitution

S. 52(2) of the *Constitution Act, 1982* defines the Constitution: “The Constitution of Canada includes:

1. the *Canada Act 1982,* including this *Act*;
2. the Acts and orders referred to in the schedule; and
3. any amendment to any Act or order referred to in paragraph (a) or (b).”

Constitution includes 2 key documents:

1. Constitution Act, 1867

* Substance of Act was produced in Canada, but formally it was a British Parliamentary Act
* Created the federal system
* Constitutes the House of Commons & Senate
* Defines powers of federal and provincial governments
* Establishes rules for composition of judiciary
* Largely missing: individual and group rights

1. Constitution Act, 1982

* Charter of Rights and Freedoms
* Aboriginal and Treaty rights
* **Equalization formula:** equalize the services provided among the provinces
* “Patriated” the constitution 🡪 ended all ties with British Crown & Parliament
* Quebec never signed on to *Constitution Act, 1982*

Use of the word “includes” in s. 52(2) of the *Constitution Act, 1982* has been read to include additional things, like unwritten constitutional principles, written texts not explicitly listed (e.g. parts of the *Supreme Court Act*)

**Constitutional supremacy:** the Constitution is the source of all law and any law that is inconsistent with it is invalid

* Supremacy clause: s. 52(2) of the *Constitution Act, 1982*
* Implies a hierarchy of laws

**Constitutional entrenchment:** the Constitution is subject to special amendment procedures that make it harder to change

* Amendment clause: s. 52(3) of the *Constitution Act, 1982*
* Protects the rights and freedoms that the Constitution mandates (anti-majoritarianism)
* Enhances stability, since all our other laws depend on the Constitution

## Big “C” Constitution v Little “C” Constitution

Big “C” Constitution

* The formal definition of Constitution
* Refers to only those rules and principles relating to the governance of Canada that are:
  + Supreme; and
  + Entrenched

Little “c” constitution

* The functional definition of constitution
* Refers to all rules, principles and practices relating to the governance of Canada
* Includes the Constitution (formal) definition, plus much more:
  + Constitutional conventions (e.g. responsible government)
  + Historical documents (e.g. *Quebec Act, 1774*)
  + Statutes (e.g. Federal and Provincial elections act)
  + Decisions of the courts
  + Indigenous laws relating to governance

## The Constitution’s Function

Conventional view:

* Establish, empower and limit governments

Other functions:

* Transformation 🡪 help break from a previous policy & create new ones
* Conflict management 🡪 E.g. managing different minority groups
* Recognition 🡪 of minority groups
* Symbolic/aspirational 🡪 demonstrates fundamental values and aspirations of a county (e.g. peace, order, good governance)
* Stability & certainty
* Advance a particular moral/political philosophy 🡪 e.g. some claim it advances a libertarian agenda

## Constitutional Conventions

**Constitutional conventions** are rules that have emerged from government practice over time and that are considered binding upon relevant government actors.

* They are not legally binding – they are enforced by political sanction rather than by the courts.
* Fall within the little “c” constitution
* Many key features of our constitutional system are constitutional conventions
  + e.g. Governor General taking advice from PM about who to appoint to senate, cabinet, courts

## Unwritten Constitutional Principles

* Principles that underlie the Constitution
* Principles that inform and sustain the constitutional text – they are the vital unstated assumptions upon which the text is based
* It wasn’t necessary to state UCPs in the constitution because it was assumed that they were the underlying meaning

### *Reference Re Secession of Quebec*, [1998] SCC – UCPs

Came about as aftermath of Quebec sovereignty referendum in 1995. PM Chrétien asked the SCC for a reference about whether Quebec should have another vote and what would happen if they got a majority vote.

**Issue:** (1) Can Quebec secede unilaterally from Canada under the Constitution? (2) Does international law give Quebec the right to effect secession? (3) In the event of a conflict between domestic and international law, which prevails?

**Held:** No, a majority vote would not be sufficient. Quebec would have to amend the Constitution to secede. Amending the Constitution in this case would not require provincial unanimity, just a clear majority.

What are UCPs?

* Constitution includes written and unwritten “rules” including fundamental and organizing principles
* These organizing principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based
* Sources: text of Constitution, history, judicial interpretations
* Decision supports two views of the relationship between UCPs and the text of the Constitution:
  + UCPs are derived from the text of the Constitution explicitly and/or implicitly
  + UCPs were the ideas that the constitution was based on so UCPs exist prior to and independently of the text

Role of UCPs:

1. To help interpret the text of the Constitution
2. Constitutional architecture/structure – to help us understand how the disparate pieces fit together
3. Evolution – to give us a modern lens through which to interpret an old document
4. Substantive force independent of the written text – have the power to strike down laws

Recognized UCPs:

* Federalism
* Democracy
* Rule of law
  + the law is supreme over the acts of both government and individuals
* Constitutionalism
* Respect for Minorities
* Judicial independence (*BC v Imperial Tobacco*)
* Cooperative federalism (from another case)

### *British Columbia v Imperial Tobacco Canada Ltd*, [2005] SCC

**Facts:** BC passed a law allowing the province to sue tobacco companies for the cost of health care related to tobacco use. The law made it easier for BC to succeed in suing tobacco companies by changing the rules of evidence requirements and procedures, and made the changes retroactive to 1950. Province then sued Imperial Tobacco for health care costs. Tobacco company argued that the Act was unconstitutional on 3 grounds: 1) it exceeds the territorial limits on provincial jurisdiction, 2) violates judicial independence and 3) infringes on the rule of law.

**Issue:** Is the Act unconstitutional based on extra-territoriality, judicial independence or the rule of law?

**Held:** No, the law does not conflict with UCPs

**Reasons: Argument 1:** Imperial Tobacco argued the law conflicted with judicial independence because it interferes with the court’s adjudicative role. Court rejects this argument. The fact that the law shifts certain onuses of proof or limits the compellability of information does not in any way interfere with the court’s adjudicative role or any of the essential conditions of judicial independence. **Argument 2:** Imperial Tobacco argues the Rule of Law means that laws have to be perspective (not retrospective), and that a law can’t single out one party (i.e. only tobacco companies). Major J holds that you can’t use the Rule of Law to overrule legislation. Doing so would be inconsistent with democracy because the legislature was democratically elected. Government actions constrained by the rule of law are usually that of the executive and judicial branches. Actions of the legislature are constrained too, but only in the sense that they must comply with requirements as to manner and form (i.e. procedural requirements).

**Judicial independence:** protects the freedom of the court to render decisions on law and justice without outside interference from legislative and executive branches. Core characteristics include:

* Security of tenure: legislative and executive branches can’t get rid of judges if they don’t like the judge’s decisions
* Financial security: to continue working
* Administrative independence: legislative and executive branches can’t interfere with assignments of judges

Purpose of judicial independence is to safeguard constitutional order and ensure public confidence. Sources include s. 11(d) of the Charter, ss. 96-100 and preamble of *Constitution Act, 1867*.

**Rule of Law:** the law is supreme, including over government.

* Requires laws to preserve normative order
* State-individual relations are governed by law (individuals are allowed to do anything unless the law says they can’t. This is flipped for the government, where they can only do things the law has given them the power to).

**Takeaway:** Judicial independence is recognized as a UCP, and the courts do not have a problem with using judicial independence to strike down/uphold laws. Rule of Law is a UCP but cannot be used to strike down laws.

### *Trial Lawyers Association of BC v BC (Attorney General)*, [2004] SCC

\*SCC strikes down BC’s court hearing fees

**Facts:** BC passed a law imposing hearing fees for going to court. Two parents were involved in a custody battle and the mother couldn’t afford to pay the hearing fees. She claimed the law violated her right to access to justice.

**Issue:** Does the impugned law (hearing fees) violate s. 96 of the *Constitution Act, 1867*?

**Held:** Yes, s. 96 is violated.

**Majority (McLachlin):** Courts have interpreted s. 96 to protect the court’s core jurisdiction, which includes resolving disputes of individuals. The fee impedes s. 96 by preventing individuals from accessing justice. Hearing fee also contravenes the Rule of Law by preventing access to justice. Distinguishes from *BC v Christie* by saying that *Christie* prevented access to lawyers, which was okay, whereas in this case the fee prevents access to the actual court.

**Dissent (Rothstein):** The majority based its finding on an overly broad reading of s. 96, with support from the UCP of the rule of law. There is no express constitutional right to access the civil courts without hearing fees.

**Takeaway:** Majority decision undermines *BC v Imperial Tobacco*. Can distinguish from *Imperial Tobacco*, which used Rule of Law on its own, from this case, which uses Rule of Law to support a specific part of the constitution. This case opens the door a little bit on using UCPs to strike down laws. The catch is that you must use UCPs to support reading the Constitution in a particular way, as opposed to using them standing on their own.

## Judicial Review

**Judicial Review** is the power of courts to determine if a particular government Act complies with the Constitution, and if not, to declare it unconstitutional

* Basis for judicial review was historically the *Colonial Laws Validity Act*
* Basis for judicial review now is the Supremacy clause (s. 52) in the *Constitution Act, 1982*
* We largely accept that we should have judicial review because of its historical context
* Supremacy Clause doesn’t specifically mention judicial review – so why does it have to be the courts that review laws?

Differing theories about who should have a say in how we interpret the Constitution:

* Judicial sovereignty/exclusivity 🡪 the courts alone should get to determine consistency with Constitution
* Judicial supremacy/primacy 🡪 courts shouldn’t be alone in determining consistency with Constitution, but they should have the final say
* \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ 🡪 each branch of government should determine for itself if the law is consistent
* Legislative supremacy 🡪 legislature has final say about consistency
* Legislative sovereignty 🡪 only the legislature gets to determine if the law is consistent

A problem with judicial review is that it seems to imply that the legislature has no legal duty to ensure that the laws it passes comply with the Constitution.

## Perspectives on the Constitution

Different perspectives on the Constitution impact debates about Constitutional interpretation, function, evolution, role of courts etc.

1. Community perspectives

* E.g. studying the Constitution in Quebec would be different because Quebec has a role to play in protecting French Canadian language/culture, and therefore they have a 2-nation view of the Constitution
* Vs. Ontario’s view of Canada as a unified nation
* Vs. Indigenous communities view Canada as 3 nations

2. Political/moral/legal philosophy

* Libertarian reading of the Constitution 🡪 emphasis on Constitution limiting the government’s power
* Communitarian reading 🡪 emphasis on group rights
* Feminist reading 🡪 looks at the way women have been disadvantaged and how the Charter can be used to rectify this

## Constitutional Amendments (see Prof’s Handout)

Canada lacked a formal amending theory prior to 1982 for 2 reasons:

1. Imperial history 🡪 could just go to London, England to have the Constitution amended
2. Provinces and federal government could not agree on what a domestic amending formula would entail
   1. i.e. Quebec wanted veto power, rest of provinces did not want veto power

Two main issues in designing an amending formula:

1. Where should power to amend the Constitution be vested?
   1. Citizens? Government? Underlying issue is whose voices actually matter.
2. Finding a balance between stability and flexibility
   1. If its too easy to amend, stability is reduced. If its too hard to amend, it is incapable of adapting to the changing nature of the political community

Amending formulas are in **Part V** of the *Constitution Act, 1982*.

**Two step approach to making amendments to the Constitution:**

1. Is there an amendment to the big “C” Constitution?

* Includes, but is not limited to, formal textual changes
* Also includes less formal changes to structure or architecture
* Includes changes to the fundamental nature and role of foundational constitutional institutions and structures
* May include fundamental features of their nature and role agreed to by the framers (*Senate Reference*) or that develop organically (*Supreme Court Reference*)

1. If so, which amending procedure applies?

**S. 38 – General Procedure** (aka the “7/50” rule)

* Requires the consent of the Federal Parliament and the legislatures of 2/3 of the provinces representing at least 50% of the population of Canada
* In practice: requires at least 1 Western province, at least 1 Atlantic province, and Quebec or Ontario
* Does not allow for a provincial veto
  + But, the *Regional Veto Statute* adds legislative requirements to the constitutional amendments, which effectively gives Quebec its veto
* Subject to 3 year time limit from the start of the process, and an amendment cannot be proclaimed until at least 1 year after the initiation of the amendment process
* Allows provincial opt out in some cases (s. 38(3)), at times with compensation (s. 40)
* This is the **default formula** – it applies to all amendments that do not fall under other amending formulas
* Expressly applies to:
  + Principle of proportionate representation of provinces in House of Commons
  + Senate powers, appointment method
  + Senators per province and residence qualifications
  + Supreme Court of Canada (other than its “composition”)
  + Parliament’s power to extend existing provinces (with consent) and establishing new provinces or territories

**S. 41 – Unanimity Procedure**

* Requires unanimous consent of the federal Parliament and all the provinces
* Applies only to certain listed matters that are considered most essential to state survival
* Relates to amendments to:
  + Office of the Queen, Governor General, Lieutenant General
  + Senate Floor
  + Use of English/French in federal institutions
  + Composition of the Supreme Court
  + Amending procedures

**S. 43 – Bilateral Procedure**

* Requires consent of federal Parliament and the legislatures of impacted provinces
* Relates to amendments to:
  + Provincial boundaries
  + English and French use in a province

**S. 44 – Federal Unilateral Procedure**

* Parliament alone may make amendments to:
  + Federal executive, House of Commons and Senate

**S. 45 – Provincial Unilateral Procedure**

* Province may amend its constitution, provided that the amendment does not affect matters governed by other amending formulae

**Note re: Amending Formula**

* Applies only to the big “C” Constitution
* Locates amending power directly in the hands of government, not citizens
* Federalism is a key concern of Part V
* Amending formulas have been used 10 times successfully since 1982
* There have been two significant failures to amending the Constitution. Both began as efforts to win Quebec’s acceptance of the 1982 Constitutional amendments:
  + Meech Lake Accord
    - Included constitutional recognition of Quebec as a distinct society, entrenchment of the SCC and provincial nomination of its justices, an increase in the number of items requiring unanimity under the amending formula, and controls on federal spending power
    - Accord failed having not met requirements within 3 years
  + Charlottetown Accord
    - Included elements from the Meech Lake Accord together with changes to the distribution of powers, and entrenched Aboriginal right to self-government, and elected Senate with equal provincial representation and a guaranteed level of Quebec representation in the House of Commons.

### *Reference Re Supreme Court AcT, ss. 5 and 6*, [2014] SCC

**Facts:** Justice Nadon of the Federal Court of Appeal was appointed to the SCC, pursuant to s. 6 of the *Supreme Court Act*. Nadon was not a member of the Quebec bar or a Quebec advocate. The Harper government challenged his appointment. Government claimed they had the power to amend the Constitution unilaterally to add provision for appointing judges to the SCC that were former members of the Quebec bar.

**Issues:** (1) Does a person who was a member of the Quebec bar for 10 years at any time satisfy the *Supreme Court Act’s* “from among the advocates of the province” requirement? (2) If not, can Parliament unilaterally amend the Act to make them eligible?

**Held:** No to both issues.

**Reasons:** To determine if Parliament can amend the Constitution, use the 2-step approach:

Step 1: would this constitute an amendment to the Constitution?

* Yes – certain aspects of the *Supreme Court Act* are constitutionally entrenched, so you need to amend the Constitution to make changes (note that the SCC was not formally entrenched in 1867 or in 1875 when it was created)
* SCC became entrenched some time between 1949-1975
  + 1949 was when appeals stopped going to the Privy Council and went to SCC instead
  + 1975 was when the SCC’s jurisdiction was changed to become the final arbiter of Canada

Step 2: Which amending procedure to use?

* Unanimity (s. 41) – because a change to eligibility is a change to the Court’s “composition”
* Note: if you were changing “essential features” you could use s. 38 - 7/50 rule. “Routine” changes necessary for the “continued maintenance” of the SCC can be amended by federal unilaterally.

**Takeaways:** The Court is suspicious of federal unilateralism in amending the Constitution. Constitutional entrenchment of the SCC was organic – it did not happen at a specific point in time.

### *Reference Re Senate Reform*, [2014] SCC

**Facts:** Bill C-7 proposed to impose term limits of 9 years and impose a framework for consultative elections in an effort to democratize the senate. Government claimed it could implement these reforms unilaterally. Quebec disagreed and launched a reference to the Court of Appeal, and Federal government expedited it to SCC.

**Issues:**

1. Can Parliament unilaterally implement a framework for consultative elections?
2. Can Parliament unilaterally set fixed terms?
3. What degree of provincial consent is required to abolish the senate?

**Held:**

1. No – 7/50 rule applies
2. No – 7/50 rule applies
3. Unanimity procedure

**Reasons:** Use the 2-step approach for each issue:

Issue 1:

* Step 1: would consultative elections fundamentally alter the Constitution?
  + Yes – elections would endow the senate with a political mandate. This would be a substantive change to architecture and structure of the Constitution.
* Step 2: What amending procedure?
  + Requires general rule, s. 38

Issue 2:

* Step 1: would changing the terms of senate appointment fundamentally alter the Constitution?
  + Yes – no debate about that here
* Step 2: what amending procedure?
  + Requires general rule, s. 38

Issue 3:

* Step 1: would abolishing the senate fundamentally alter the Constitution?
  + Yes
* Step 2: what amending procedure?
  + Unanimity

**Comments on the Constitution:**

* Constitution is informed by UCPs
* UCPs show that the Constitution has an “internal architecture” or basic structure
* The notion of **architecture** expresses the principle that the individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole
* By extension, amendments to the Constitution are not confined to textual changes. They include changes to the Constitution’s architecture.
* Part V requires significant provincial consent if provincial interests are engaged by a constitutional change. This consent fosters “dialogue” and “preserves status quo” until constitutional changes are agreed upon.

# Canadian Charter of Rights and Freedoms

Prior to the Charter there was the **Canadian Bill of Rights**. This was a statute; it was not constitutionally entrenched. The Charter was the first attempt to have an entrenched bill of rights. The Charter is the principle embodiment of Canada’s commitment to protecting rights. It guarantees some rights that are so important they deserve to be entrenched.

The Charter hugely expanded the role of the Courts. Prior to 1982, the Courts played an indirect role in protecting rights, by reading things in through statutory interpretation

Two objectives in adopting the Charter:

1. Protect fundamental individual and group rights
   1. This objective was brought about by WW2, Canadian internment of Japanese soldiers, treatment of Jehovah’s Witnesses, Marshall Law in Quebec
2. Promote national unity
   1. There was a large sovereignty movement in the 1970s

**Right:** a constitutionally protected trump card over political process and public institutions.

**Freedom:** a particular form of right – the right to live your life without government interference in some respects.

## Charter Features

* Fundamental freedoms: s. 2
* Democratic rights: ss. 3-5
* Mobility rights: s. 6
* Legal rights: ss. 7-14
* Equality rights: s. 15
* Language rights: ss. 16-22
* Minority language education rights: s. 23
* S. 1: guarantee and limitation clause
  + Guarantees rights but also justifies certain limitations on those rights
* S. 24: remedy clause
  + Allows you to seek remedy if your rights have been violated
* S. 25-31: interpretive provisions
* S. 31: “override”/notwithstanding clause
  + Allows legislative branch to override rights or judicial interpretations of rights

The Charter does NOT protect:

* The right to bear arms
* Freedom of speech (our Freedom of Expression has been interpreted by courts to be more restrictive than the US right to freedom of speech)
* Does not explicitly protect privacy – but particular aspects of provisions have been read to protect particular aspects of privacy (i.e. unlawful search and seizure)
* The right to property

## Charter Debates – Entrenchment & Judicial Review

Two key debates:

1. About the necessity and desirability of the Charter itself
2. About the desirability of judicial review under the Charter

**Debate 1: Necessity/desirability of the Charter**

Proponents of the Charter site the following defences:

* Charter is a product of a democratic process
* Charter helps protect democracy
  + Charter can’t be explained simply in majoritarian terms. It includes other substantive considerations. Democracy is more than just “majority rules”.
* Guards against tyranny of the majority
  + Democratic decision making will, at times, be insufficiently responsive to minority and individual rights
  + Democratic process may fail to anticipate how a certain measure will impact individuals

Critics of the Charter:

Political left:

* Charter is unnecessary, the political branches to fine on their own
  + Especially when looking at the protection of rights of socially and economically disadvantaged people – the government is better at protecting the rights of disadvantaged people than the court is.
* Charter is undesirable – it undermines the ability of the political branches to help the disadvantaged
  + Charter identifies the government as the “enemy” – the government infringes your rights so the Charter limits government.
  + But really, the government is there to protect rights of the disadvantaged
  + Focusing on limiting state action misses the root of the problem, which is private wealth and power – the Charter doesn’t protect citizens against this.
* Democratic debilitation
  + Charter weakens the impulse for democratic change because it diverts resources/motive away from the legislature – if courts will review laws to ensure they meet the Charter, why bother taking the time of the legislature to do that?
  + Promotes democratic backlash – e.g. *Roe v Wade* in the US mobilised a counter revolution opposing abortion that may never have been if the courts hadn’t been the ones to decide the abortion matter

Political Right:

* Charter is anti-democratic & we are better off without the Charter at all
  + Prefer legislative supremacy, where the legislature can make or unmake any law
  + Underlying this is a strong majoritarian theory – majority should always win
  + Not much of an effort here to question private power and wealth distributions

**Debate 2: Judicial Review**

Proponents of judicial review:

* Judicial review was contemplated by the Charter and the framers
* Helps protect democracy – provides a mechanism for accountability in government when democratic process fails to protect rights
* Ensures independent, impartial decision-making
* Overcomes errors/oversights of other branches

Critics of Judicial review:

Political left:

* Vague language and conservative judges is a bad combination
  + Vague text allows the judges (who are usually conservative and comfortable with the status quo) to read in the biases
* Its expensive, and so privileges the powerful
  + Because often only the wealth can afford to pursue claims, the earliest freedom of expression cases were brought by corporations and thus the jurisprudence started to reflect business concerns
* Lack of judicial expertise or “institutional competence”

Political right:

* Vague language and liberal judges is a bad combination
* Judges are too “activist”
  + Claim courts are acting illegitimately because they aren’t following the original intent of the framers of the Constitution

## Dialogue Theory

Hogg, Bushell & Wright

**Thesis:** Charter decisions usually leave room for, and usually receive, a legislative response that accomplishes the main objectives of the original law, but using means that better respect the Charter.

* Judicial review is part of a “dialogue” between judges and legislatures
* The Charter can act as a catalyst for a two-way exchange between judiciary and legislature, but it is rarely an absolute barrier to the wishes of the democratic institutions.
* Done through two avenues:
  + **S. 1 – the limitation clause**
    - When a law that impairs a Charter right fails to satisfy the least restrictive means standard of s. 1, courts will usually say what means would satisfy it and legislatures can use that to amend the law
  + **S. 33 – the override clause**
    - Allows parliament/legislatures to insert and express notwithstanding clause into a statute to liberate the statute from s. 2 and ss. 7-15
    - Allows the legislative body to re-enact the original law without interference from the courts
* Dialogue theory holds that judicial review has a much smaller impact than critics claim
* Critics hold that dialogue theory overestimates the ability of the legislature to respond and underestimates the staying power of the courts decisions

# Constitutional Interpretation

## Sources of Constitutional Interpretation

1. Historical

* Marshals the intent of the framers of the Constitution
* “Originalism”

2. Textual

* Consideration of the words of the Constitution itself.
* Where the text is clear, this is the primary method.

3. Doctrinal (precedent)

* Decisions of courts interpreting language of the Constitution – results of cases
* Very common method of interpretation

4. Prudential

* Weighing of costs and benefits

5. Ethical

* Appeal to values of the country and its constitutional system
* Less common in Canada, more common in the USA
* UCPs may be viewed as ethical interpretations
* Criticized for giving judges too much freedom to read in their own interpretation

6. Structural

* Draws inferences from basic features of the Constitution and applies them to specific situations

## Aids to Interpretation

1. Interpretive provisions of the Charter

* E.g. s. 25-31 – provisions set out the broad principles relating to interpretation of the Charter

2. Legislative History (see *BC Motor Vehicle Reference*)

* Originalists give this aid more weight, courts don’t usually give this much weight
* Pre 1970 the court made no appeals to legislative history
* Problems with appealing to legislative history:
  + Usually means appealing to the statement of only one person, as opposed to the entire group who drafted the Charter
  + Court questions the possibility of a “common intent” – more likely that the drafters all had different intents
  + It would freeze the Charter in the time it was entrenched

3. Canadian pre-Charter case law

4. Academic Writing

5. Comparative domestic sources (e.g. USA)

6. International Sources

* Charter ought to be interpreted to provide at least the same amount of protection as the international treaties Canada has signed on to

## Theories of Interpretation

1. Textualist

* E.g. early Privy Council cases
* ONLY the text of the Constitution can be used for interpretation

2. Originalist

* Interpret Charter with reference to Constitution’s original meaning
* Constitution is frozen in the time period of its original enactment – “Constitution is dead”
* Before, “original meaning” meant the intention of the framers
* Shift to “original meaning” meaning the intention of the ratifiers of the Constitution
* Now, “new originalism” means “original public meaning” – what the ordinary people living at the time of enactment would understand the Constitution to mean
* String backers in the USA

3. Purposive

* Interpretation should involve an attempt to determine a purpose
* This theory has been adopted in Canada
* Criticism: approach is too flexible – gives judges more room to read in own biases

4. Procedural

* Constitutional interpretation should not be aimed at finding substantive results, but at ensuring a robust political system
* Some scholarly backers

5. Substantive

* Interpret the Constitution in a way that advances rights and freedoms as they are set out in the Constitution
* Some scholarly backers

6. Eclectic

* Combination of all these theories

In **theory**, Canada takes a purposive approach. In **practice**, it may be more of an eclectic approach.

The SCC has also taken a:

* **Progressive approach** to interpretation 🡪 Constitution as a **“living tree”**, not “dead”
* **Generous approach** (not narrow) to interpretation 🡪 large and liberal interpretation

### “Persons” Case, [1928] SCC, Privy Council

**Statute:** S. 24 of the *Constitution Act, 1867* – “The Governor General shall…summon qualified Persons to the Senate; and…every Person so summoned shall become a Member of the Senate and a Senator”

**Issue:** Does the term “qualified persons” include women, making them eligible to be senators?

**Held:** By SCC: no. By Privy Council: yes.

**Reasons:** **SCC** adopted an originalist analysis for interpreting the Constitution. Women were ineligible to hold public office at common law and there was no express evidence of intent to abandon this in the *Constitution Act, 1867* for the Senate. **Privy Council** adopted a progressive interpretation. “The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits.” Also adopts a generous approach. It is not the duty or desire of the Court to cut down the provisions of the Act but a narrow and technical construction, but rather to give it a large and liberal interpretation. Rejects appeal to custom and history. Rejects appeal to earlier Roman/English law.

### *Hunter v Southam*, [1984] SCC

**Facts:** The Combines Investigation Branch carried out a search of newspaper offices. The statutory basis for the search did not require prior judicial authorization. The claimant argued the law violated s. 8 of the Charter, guarantee of freedom from unreasonable search and seizure.

**Takeaways:**

* Interpreting a Constitution is different from interpreting a statute because a statute defines rights and duties and is easy to change, while the Constitution was drafted with an eye to the future to guide society and is hard to change.
* Court reaffirms a **progressive, generous** approach to interpreting the Constitution
* Adopts a **purposive** approach to interpretation, which entails specifying the purpose underlying the provision. In this case, the purpose of s. 8 is the protection of a reasonable expectation of privacy.

### *R v Big M Drug Mart*, [1985] SCC

Appellants challenged mandatory store closings on Sunday, claiming it forced them to follow the Christian Sabbath. Court agreed with the appellants.

**Dickson CJC:**

* Reaffirms the SCC’s commitment to a purposive approach
* Clarifies how to conduct a purposive analysis. Must consider:
  + “Character and objects” (purpose) of the Charter;
  + Language of the specific right/freedom (textual approach);
  + Historical origins of the concepts enshrined; and
  + Meaning and purpose of other associated rights (structural approach).
* Also affirms court’s commitment to a generous approach.

\*Note that in practice the analysis ends up being more eclectic than purposive.

# General Framework for Charter Analysis

1. Does the Charter apply to the facts?

* Does the Charter apply at all as per s. 32?
* If so, does the law contain a valid override clause (s. 33)? (Answer will be no: there are no overrides in any current legislation)
* Does the Charter right of freedom apply to the claimant?

1. If the Charter applies, has the government infringed, in purpose of effect, a Charter right or freedom (ss. 2-23)?
2. If so, is the infringement a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society? (Apply Oakes test)
3. If not, what is the appropriate remedy? (ss. 24 & 52)

# S. 1 of the Charter

**S. 1** of the Charter: “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

S. 1 has 2 roles:

* Guarantees rights
* Provides that rights are not absolute

Court has held the following to be **pressing and substantial objectives:**

* Protection of French language (*Ford v Quebec*)
* Protecting children from seductive and manipulative advertising (*Irwin Toy*)
* Preventing people from being persuaded by advertising to use tobacco (*RJR MacDonald*)
* Dissuading people from using tobacco (*RJR MacDonald*)
* Preventing harms caused by the promotion of hatred (*R v Keegstra*)
* Prohibiting discrimination (*Saskatchewan v Whatcott*)
* Preventing societal harm (through regulation of pornography) (*R v Butler*)
* Combating noise pollution (*Montreal (City)*)
* Protection of public health and safety (*Canada v PHS Community Services*)
* Protecting vulnerable persons from being induced to commit suicide (*Carter v Canada*, 2015 SCC)

## S. 1 Requirements for Charter Breach

A law/action must meet two requirements for it to breach a Charter right:

1. The breach/limit on a Charter right or freedom must be prescribed by law; and
2. It must be reasonable and demonstrably justified in a free and democratic society

### Requirement 1: Prescribed by law

Requiring that the breach be prescribed by law serves 3 purposes:

1. Fair notice 🡪 citizens must know what conduct is required so they can govern themselves accordingly
2. Limiting government discretion 🡪 helps impose limits on government decision makers to prevent arbitrary application of the law
3. Accountability 🡪 ensures public accountability for restrictions imposed on Charter rights

Three requirements must be met for something to be “prescribed by law”

**1. The limit/breach must result from a “law”** (*General Vancouver Transportation Authority*)

* Government entity must be legally authorized to enacted the impugned “law”; and
* The impugned law must contain “binding rules of general application” (*General Vancouver Transportation Authority*)
  + E.g. consider whether a province tried to enact a law that was under federal jurisdiction, or whether the statute only applies to a particular group of people
  + Following have been held to constitute a “law” under s. 1: statutes, subordinate legislation (i.e. regulations, municipal by-laws), common law rules, rules enacted by administrative agencies

**2. The law must be adequately accessible** (*General Vancouver Transportation Authority*)

* A law is adequately accessible when it is available to the general public, i.e. in published form, online, through sings etc.

**3. The law must be sufficiently precise** (*General Vancouver Transportation Authority*)

* The following are generally sufficiently precise:
  + Limits that result expressly or by necessary implication from the terms of the law itself
    - E.g. “roadside breathalyser must be administered forthwith” 🡪 necessary implication was that access to counsel was denied because client didn’t have time to call a lawyer.
  + Laws conferring discretion, provided not too broad
  + Laws that are vague, provided not too vague
* The following may NOT be sufficiently precise:
  + Laws conferring to must discretion – not constrained by “intelligible standards” (*Irwin Toy*)
  + Laws that are too vague. A law is too vague when it is “incapable of interpretation with any degree of precisions using ordinary tools of analysis.” (*Osborne*)

Note: Not much fails the “prescribed by law” test.

#### Greater Vancouver Transportation Authority v Canadian Federation of Students, [2009] SCC

Case illustrates the “prescribed by law” test

**Facts:** Students and public union wanted to post political advertisements on buses. Two separate public transit authorities had policies of not allowing political ads on their buses. Students & public union brought s. 2(b) claim.

**Issue:** Were the advertising policies prescribed by law?

**Held:** Yes, the policies are prescribed by law.

**Legislative policies** are considered “law” for the purpose of s. 1:

* Policies that establish a norm or standard of general application
* Would be enacted pursuant to a statutory authority

**Administrative policies** are NOT considered “law” for the purpose of s. 1:

* Policies intended for internal use, not accessible to the general public
* Are usually informal in nature, not indented to create legally enforceable rights
* Express legal authority to create admin policies is not required

The transit authorities’ policies are legislative in nature. Applying the test for “prescribed by law”:

1. The limit breach resulted from a law

a) Transit authorities’ were granted the power to enact these policies by legislation; and

b) The policies are general in scope – apply to everyone who wants to advertise

2. The policies are adequately accessible

3. The policies are sufficiently precise (outline types of ads allowed, etc.)

#### R v Therens, [1985] SCC

Justification for the “prescribed by law” requirement comes from the need for public accountability for any restriction on a constitutional right. A commitment to public accountability precludes the legislature from granting broad discretion to administrative actors to limit protected rights.

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

The court is reluctant to circumvent the balancing analysis of the s. 1 test by finding that the words of a provision are so vague as to not constitute a limit “prescribed by law” unless the provision can truly be described as failing to offer an intelligible standard.

#### Osborne v Canada (Treasury Board), [1991] SCC

Vagueness can have constitutional significance in at least two ways in a s. 1 analysis:

* A law may be so uncertain as to be incapable of being interpreted so as to constitute any restraint on governmental power. In this circumstance there is no limit prescribed by law, and so no s. 1 analysis is necessary.
* In the analysis of s. 1, a law that passes the “prescribed by law” test may nevertheless, by reason of its vagueness, not qualify as a reasonable limit.

### Requirement 2: Justification (Oakes Test)

Is a limit prescribed by law reasonable and demonstrably justified in a free and democratic society?

The Oakes Test: (see handout)

1. Pressing and substantial objective

* Few laws fail here. Exceptions:
  + Laws aimed directly at denying Charter rights or freedoms (*Big M Drug Mart*)
  + Shifting objectives (*Big M Drug Mart*)
  + Cost or convenience as objective (but see *Newfoundland v NAPE*)
* How the objective is framed has a big impact on the analysis – the broader the objective, the harder it might be for the government to demonstrate it is proportional to the means.

1. Proportionality test
   1. Rational connection between means and objective

* Focus is on effectiveness, not scope. If the measure does not achieve the objective, then it is arbitrary.
  1. Minimal impairment of the right/freedom
* Focus on scope, not effectiveness.
* *Oakes* framed this branch strictly – had to interfere “as little as possible.” This has since been relaxed to “as little as reasonably possible.”
  1. Overall balance between salutary effects and deleterious effects
* **Salutary effects** include:
  + Importance of the law’s objective; and
  + Benefits that actually result from the law’s implementation (*Dagenais v CBC*)
* **Deleterious effects** include:
  + Value of the right or freedom breached; and
  + Value of the restricted activity itself in relation to the right or freedom, and the actual impact of the breach on it.
* Originally in *Oakes*, this part was just weighing the value of the objective against the limits. This was changed to valuing the benefits that actually result against the costs of the limits. If a law doesn’t fully achieve its objective, then this will weigh against the value of the benefit.

#### R v Oakes, [1986] SCC

**Facts:** S. 8 of the *Narcotic Control Act* created a “reverse onus” provision, where once possession of a narcotic had been proven, an intention to traffic would be inferred unless the accused could establish absence of intention to traffic. Accused claimed reverse onus provision violated s. 11(d) of the Charter.

**Held:** S. 8 of the *NCA* did violate s. 11(d), and the violation is not justified under s. 1.

**Dickson CJ:** Two purposes of s. 1: (1) guarantees rights, and (2) states exclusive criteria for limits. The words “free and democratic society” in s. 1 point to the Charter’s purpose: to ensure Canada is “free and democratic.” The values of a “free and democratic society” provide the ultimate standard for a s. 1 analysis: respect for inherent dignity of humans; social justice and equality; accommodation of various beliefs; respect for cultural and group identity; faith in social and political institutions to enhance participation of groups/individuals.

**Test:** The standard of proof under s. 1 is the **civil standard – proof on a balance of probabilities**. This standard must be applied **rigorously** (need a high degree of probability). Note the burden of proof is on the party seeking to justify the limitation **(the government).**

1. The objective must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. At minimum, the objective must relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
2. Proportionality test – means chosen must be reasonable and demonstrably justified:
   1. The measures adopted must be **rationally connected** to the objective. The must not be **arbitrary**, unfair, or based on irrational considerations.
   2. The means chosen should impair the right or freedom as little as possible
   3. Must be proportionality between the effects of the measures chosen and the objective

**Application:** The objective of protecting society from the ills associated with drug trafficking was of sufficient importance to warrant overriding a constitutionally protected right or freedom. But the means chosen to implement the objective (the reverse onus) is not rationally connected to the objective – there is no rational connection between possession of a small quantity of narcotics and the intent to traffic.

#### Hutterian Brethren, [2009] SCC

**McLachlin CJC:** Regarding the minimal impairment stage of the Oakes test, the government must show the absence of less intrusive means of achieving the objective in a “real and substantial manner.” If less impairing means are available, but they don’t actually achieve the government’s objective, then they don’t count as alternative less impairing measures.

More matters should be decided at the final step of Oakes test – the balancing of salutary benefits and deleterious effects. Resolving matters at the final state is preferable because the overall balancing allows a broader assessment of whether the benefits of the impugned law are worth the cost of the rights limitation.

### Contextual Approach to S. 1 Analysis

There has been a recent move towards a contextual approach to the Oakes test.

**Abstract approach** would balance the value of the right against the cost, without getting into detail about the actual case, i.e. value restriction of hate speech against the value of protecting freedom of expression.

**Contextual approach** requires the courts to look at the details and the particular circumstances of the case, i.e. would look at whether the measure achieves its objective, or how valuable hate speech is as a form of freedom of expression.

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

**Facts:** A newspaper challenges s. 30(1) of the Alberta *Judicature Act*, which limited the publication of information arising out of the court proceedings in matrimonial disputes. The newspaper claimed the provision was contrary to s. 2(b) of the Charter.

**Held:** Entire court held that s. 31(1) violated s. 2(b), but court split on the s. 1 analysis.

**Takeaways:** Court adopts a contextual approach. They look beyond the law’s objective and the right in the abstract. Looks at whether the law actually achieves its objective, the importance of the activity actually restricted, and the extent of the restriction.

### Deferential Approach to S. 1 Analaysis

**Deferential approach** is where the court defers more to the government’s judgment about the need for, and effectiveness of, a particular limit on a Charter right. Contrasted to a strict approach.

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

**Facts:** Toy company launched a freedom of expression claim against a law restricting advertising aimed at children.

**Takeaway:** Courts should **defer more to legislatures when:**

1. Balancing competing claims and interests (especially if allocating scare public resources)
2. Weighing conflicting (social) scientific evidence

* Comparative institutional competence 🡪 Courts are not policy experts and they are not good at weighing conflicting scientific evidence, while legislatures have committees and evidence etc.
* Imperfect information 🡪 policy is often made on imperfect information, and where the information is imperfect, there is not reason to prefer the Courts deal with it over the legislature.

1. Protecting vulnerable groups

* Charter should not be an instrument for better-situated individuals to roll back the rights of less advantaged groups.

**Less deference is given to legislatures** when the claim involves the government as the singular antagonist of the individual whose rights have been infringed (so **stricter application of s. 1 is warranted**).

Context is an important part of when deference should be given.

#### Doré v Barreau du Québec, [2012] SCC

**Facts:** Disciplinary body reprimanded a lawyer for the contents of a letter he wrote to a judge after a court proceeding. The lawyer challenges the constitutionality of the decision, claiming it violates s. 2(b) of the Charter.

**Takeaways:** If a challenge to a discretionary administrative decision is involved, do NOT use the Oakes test. Rather than using Oakes, apply “administrative law reasonableness analysis.” The decision is to be reviewed for “reasonableness”, looking at whether the “relevant Charter value” and “statutory objectives” were properly balanced.

\*Won’t be given an administrative decision to analyze on exam.

# S. 33: The Override

**S. 33 of the Charter**

(1) Parliament or the legislature of a province may expressly declare an Act of Parliament or of the legislature…that the Act or a provision thereof shall operate **notwithstanding** a provision included in s. 2 or ss. 7-15 of this Charter.

(3) A declaration made under subsection (1) shall cease to have effect **five years** after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

* The Override is a compromise that preserves legislative supremacy
* It allows the government to insert a provision into legislation that expressly overrides the Charter and its application in relation to a law for 5 years
* Note that it applies only to s. 2 and ss. 7-15
* Note that there are no overrides in any current legislation

## *Ford v Quebec*, [1988] SCC

**Facts:** Began with the exclusion of Quebec from the final discussion and agreement that led to the amendment and “patriation” of the Constitution. As a way of protecting itself against a significant constitutional amendment to which it had not agreed, Quebec made use of s. 33 to shield its laws from the Charter’s application. By an omnibus amendment enactment, Quebec repealed all pre-Charter provincial legislation and re-enacted it with the override clause, which was to apply retroactively to the day the Charter came into force. The challenge involved a law banning the use of English on signs in Quebec.

**Issue:** Was Quebec’s use of the omnibus override valid?

**Held:** The use of the override clause is valid but it can’t be applied retroactively.

**Reasons:** The essential contention against the validity of the standard override provision was that it was insufficiently specific. Court held this wasn’t an issue. Court also held it was not an issue that the override was introduced to all Quebec statutes enacted prior to a certain date by a single enactment. But the override can’t be enacted retrospectively. S. 33 says “shall operate notwithstanding” and the word “shall” is interpreted to mean prospective derogation only.

**Note:** The override passed, but it wasn’t re-enacted after it expired 5 years later. Quebec amended their language laws. This case was controversial, and some attributed it to the cause of the failure to the Meech Lake Accord.

# Charter Application

Recall the General Framework for Charter analysis 🡪 this is STEP 1

**S. 32(1)** of the Charter: This Charter applies

(a) 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; and

(b) To the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

* Note that the Charter does NOT apply to **private parties** or the **courts**.

There are 3 views regarding Charter application:

1. Governmental Approach
   1. S. 32(1) is exhaustive of Charter application
   2. Charter applies only to public/state action
   3. Attempts to draw distinction between private action (not caught by Charter) and state action (caught by Charter)
2. Comprehensive Approach
   1. S. 32(1) is not exhaustive, only affirmative
   2. It applies to at least these bodies, but also to other things
   3. This is a very broad approach – rejects the distinction between private and public action
3. Contextual approach (middle ground)
   1. Application of the Charter varies by context, but closer to comprehensive view

The private/public divide is contentious. Critics of this divide site that private areas of law are sustained through state institutions (e.g. you would not have property rights if the state did not enforce them for you)

## *Dolphin Delivery*, [1986] SCC – Governmental Approach to Charter Application

**Facts:** Involved secondary picketing of Dolphin Delivery by a union. Regulation of picketing was governed by a federal code, which was silent on whether the picketing of a secondary institution was legal.

**Issue:** Does the Charter apply to private actors? Does the Charter apply to judge made common law?

**Held:** No to both.

**Ratio:** Charter does not apply directly (but maybe indirectly) to private parties or to judge made common law.

**McIntyre J:** Discusses Charter application by actor and by source:

Charter application by actor:

* S. 31(1) applies to Parliament and provincial legislatures – and thus to all statutes and delegated legislation (like regulations)
* Applies to federal and provincial “governments” and thus to all executive and administrative actors
* Does NOT apply directly to private parties – but can apply indirectly
* Decision generally interpreted to mean Charter does NOT apply directly to the courts because they don’t want the Charter to apply to court orders that regulate private actions. (This is qualified in later cases)

Charter application by source:

* Charter applies to statutes, regardless of whether the statute is relied upon by a government actor or a private party. This includes delegated legislation, like regulations.
* May apply common law, but only if relied upon by “government.” Does not apply is the private party is relying on common law. In cases with only private parties, the common law must be developed consistently with Charter values (so Charter applies indirectly).

|  |  |  |
| --- | --- | --- |
|  | Statute | Common Law |
| Government party involved | **Charter applies** due to party involved and the source | **Charter applies** where common law is relied upon by the government |
| Private party involved | **Charter applies** due to the source | **Charter does not apply** where common law is relied upon, **BUT** courts must take Charter “values” into account in developing the common law |

Rationale:

* Assumes the Charter’s application is dictated by some sort of public/private distinction
* Need a “requisite level of government intervention” for the Charter to apply
* Where common law is relied upon by private parties, there is not enough government intervention for Charter to apply

**\*Note:** McIntyre J’s ruling that the Charter does not apply directly to judges when developing and applying the common law has been significantly weakened by subsequent cases. His conclusion that the Charter does not apply directly to private actors is generally accepted.

\*\* Value as a precedent has been diminished in light of recent cases.

**Criticism for *Dolphin Delivery***

* How much government intervention is required for Charter to apply?
* What about provincial anomalies? Charter would apply more to Quebec because of their civil code. (Note the irony – Quebec didn’t sign on to Charter)
* Does excluding courts/common law weaken the Charter too much?
* What are “Charter values”?

## Defining “Government” For s. 32(1) Purposes

Two ways to qualify as “government” for the purpose of s. 32(1):

1. If the entity involved is part of the “government”
   1. Focus here is on the nature of the entity. If an entity is part of the “government”, the Charter applies
   2. In this case, all of the activities of the entity will be subject to the Charter
2. If the entity is engaged in “governmental activities”
   1. Focus here is on the nature of the acts the entity is engaged in. Charter applies only to the entity’s “governmental activities.”
   2. In this case, the Charter only applies to the act that is “governmental” in nature, and not to its other private activities.

It has not yet been definitively resolved whether the following are “government” for the purpose of s. 32(1):

* School boards
* Municipalities (but see *Godbout*)
* Crown corporations (like CBC)
* Indigenous governments

## Category 1: “Government” Entities

“Government” includes:

* Components and members of the executive branch like cabinet, civil servants, police, military etc.
* Entities “controlled” by government (executive)
* Entities exercising “government functions”

### Entities “Controlled” by Government

#### Stoffman v Vancouver General Hospital, [1990] SCC – Control Test = “Routine and Regular Control”

**Facts:** Hospital Board regulation contained a mandatory retirement policy.

**Issue:** Does a hospital count as “government” for the purposes of s. 32(1) so that the Charter applies?

**Held:** No, hospital is not “government” and Charter does not apply.

**Ratio:** An entity is “governmental” for the purposes of s. 32(1) when it passes the “Control Test.” To pass the Control Test, need **routine and regular control by the government.**

**La Forest (majority):** “Routine and regular” control of the hospital was in the hospital board’s hands, not in the government’s hands. The retirement policy was not dictated by the government – it was put in place by the hospital’s board of directors. It is not enough that 14/16 board members were government appointed, or that all regulations required ministerial approval. The provision of a public service, even one as important as health care, does not qualify as a government functions under s. 32.

#### Greater Vancouver Transportation Authority, [2009] SCC – Control Test = Substantial Control

**Recall facts:** Students & union challenged transportation authorities’ ban on political ads on busses.

**Issue:** Are the transportation authorities “government” entities as per s. 32(1)? Does the Charter apply?

**Held:** yes, they are government entities and the Charter applies.

**Ratio:** An entity is “governmental” for the purposes of s. 32(1) when the government has **substantial control** over operations. (Language of “routine and regular” has been replaced with “substantial control”, but no practical difference).

**Reasons:** Translink 🡪 city had “substantial control” over day-to-day operations; city appointed 12/14 board members; city ratified strategic plan that Translink had to follow. Therefore Translink passes the Control Test. BC Transit also passes the Control test 🡪 explicitly designated an “agent” of the provincial government (might think this would be sufficient to constitute “government actor” but the court doesn’t say this); all members of the board appointed by the province; provincial cabinet has power to manage affairs and operations.

## Category 2: Entities Engaged in “Government Activities”

A private entity may be subject to the Charter in respect of certain inherently governmental actions (*Eldridge*)

Two ways this category is engaged:

1. If implementing a specific government program or policy
2. If exercising a statutory power of compulsion

### A) Implementing a Government Program/Policy

#### Eldridge v BC, [1997] SCC

**Facts:** Under the *Hospital Insurance Act*, hospitals were given the discretion to determine which services should be provided free of charge. Hospital chose not to provide free sign language interpretation for deaf people seeking medical services. 3 individuals who were born deaf claimed the failure to provide public funding for sign language interpretation violated s. 15 of the Charter.

**Issue:** Does the Charter apply to the hospital pursuant to s. 32(1) of the Charter?

**Held:** In this context, yes.

**Ratio:** The Charter will apply, pursuant to s. 32(1), to an entity that is carrying out a specific governmental program or policy and where there is a direct connection between the policy and the Charter breach.

**La Forest:** Charter does not apply to all of a hospital’s day-to-day operations: per *Stoffman*. But the Charter will apply where the hospital is implementing a specific government policy. There must be a “direct” connection between the policy and the breach because otherwise the government could “contract out” a policy/program that is in violation of the Charter to a non-governmental entity where it is immune from Charter.

**Wright says:** The distinction between *Stoffman* and this case is a distinction without a difference. The Court just wanted the Charter to apply to this case.

### B) Exercising Statutory Powers of Compulsion

The Charter also applies to non-governmental actors exercising coercive statutory power.

**Statutory powers of compulsion:** powers given by statute to compel someone to do something that you would not otherwise have.

#### Slaight Communications v Davidson, [1989] SCC

**Facts:** Employee commenced claim complaining that he was unlawfully fired. Labour arbitrator ordered complainant’s former employer to write a reference letter.

**Held:** The Charter applies to the order of an adjudicator acting pursuant to the *Canada Labour Code* because the adjudicator was exercising statutory powers conferred by legislation.

**Reasons:** Legislators cannot violate the Charter directly. They also cannot violate it indirectly by granting coercive power and making other entities violate the Charter.

\*The result of this decision is that some adjudicative bodies, such as administrative tribunals and labour adjudicators, are bound by the Charter, while courts, following *Dolphin Delivery* are not, at least insofar as their orders are at the requires of private parties relying upon the common law.

#### Blencoe v British Columbia (Human Rights Commission), [2000] SCC

**Facts:** Issue revolved around whether lengthy delays resulting from the Human Rights Commission’s processing of sexual harassment complaints against Blencoe violated his rights under s. 7 of the Charter. It was argued that the Commission’s independence from government rendered the Charter inapplicable to its actions.

**Bastarache J:** Even though the Commission was not part of “government”, its acts are subject to the Charter because: (1) it was charged with implementing a specific government policy/program; and (2) it exercised statutory powers of compulsion (the Commission’s authority was not derived from the consent of the parties).

## Charter Application to Government Inaction/Omission

It is controversial whether the Charter applies to government omissions. An omission is a failure to act.

Cases show the Charter applies where the:

* Legislature actually acts, but fails to go far enough, in breach of a Charter right or freedom (but this is not a complete omission – the legislature *has* acted in some way); and
* Legislature carves out an explicit exception.

Whether the Charter can impose obligations on a blank slate, where the legislature has done nothing, is still unresolved.

### *Vriend v Alberta*, [1998] SCC – Charter Applies to Some Omissions

**Facts:** Vriend was employed by a private Christian school and was fired when employers found out he was gay. Alberta’s Human Rights Code did not include sexual orientation as a prohibited ground of discrimination.

**Issue:** Did the government’s omission engage the Charter?

**Held:** Yes, the Charter applies to Alberta’s failure to include sexual orientation in its human rights code.

**Ratio:** The application of the Charter under s. 32(1) is not restricted to situations where the government actively encroaches rights – it can apply to omissions too.

**Cory J:** Nothing in the wording of s. 32(1) says that a positive act of encroachment was needed to engage the Charger. If s. 32(1) was meant to only capture positive acts by the legislature, s. 32(1) would have specified “action”, rather than saying “in respect of all matters within their authority.”

**\*Note** that there was still an act by the legislature – they enacted a human rights code to prevent discrimination. But they omitted to include sexual orientation. The decision may have gone differently if Alberta had no human rights code at all.

## Charter Application to Courts

* *Dolphin Delivery* held that the Charter does not apply to the Courts. This aspect of the ruling is now usually ignored
* E.g. *BCGEU*, 1988 SCC 🡪 Charter applied to a court order issued on the court’s own motion for a public purpose (distinguished from *Dolphin* because *Dolphin* involved purely private matters, whereas this case was purely public in purpose.

## Application of Charter to Common Law

* Charter DOES apply where the common law is invoked by a government party.

### *Hill v Church of Scientology of Toronto*, [1995] SCC – “Charter Values” Analysis

**Facts:** Church falsely accused a Crown Attorney of breaching a court order. Crown Attorney brought a defamation action against the Church (so NOT challenging the constitutionality of any provision in a statute). Court held the Charter didn’t apply directly, but must undertake analysis to find out if it applies indirectly.

**Cory J**: Reaffirms *Dolphin Delivery’s* holding on the common law:

* If a government party is involved, the Charter applies directly.
* If only private parties are involved, the Charter does NOT apply directly, but the common law must be interpreted and developed consistently with “Charter values”

**Charter values analysis:**

* Cannot use the Oakes test – must use a more flexible balancing analysis
* Charter values should be weighed against the principles which underlie the common law
* The party alleging that the common law is inconsistent with the Charter should bear the onus of proving both that the common law fails to comply with Charter values and that, when these values are balanced, the common law should be modified.

**Ratio:** In the context of civil litigation involving only private parties, the Charter will apply (per s. 32(1)) to the common law ONLY to the extent that the common law is found to be inconsistent with Charter values.

# Freedom of Expression – s. 2(b)

This is STEP 2 of the General Framework for Charter analysis: If the Charter applies, has the government infringed, in purpose or effect, a Charter right or freedom?

**S. 2** Everyone has the following fundamental freedoms:

**(b)** Freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

**S. 2(b) Analysis:**

1. Is the claimant’s activity within the sphere of activity protected by s. 2(b)? (*Irwin Toy*)
   1. Did the activity convey or attempt to convey meaning, thereby bringing it within s. 2(b) protection? (*Montreal (City)*)
   2. If so, does the method or location of the expressive activity remove that protection (*Montreal (City)*)
2. If so, does the government’s restriction of it infringe s. 2(b) either in:
   1. Purpose (s. 2(b) necessarily infringed); or
   2. Effect – claimant must show expressive activity promotes one of the three purposes of FoE for s. 2(b) to be infringed. (*Irwin Toy*)

Expression NOT protected by s. 2(b)

* Violence (*Irwin Toy*)
* Threats of violence (*R v Khawaja*)

### *R v Keegstra*, [1990] SCC – 3 Purposes of FoE

**McLachlin J** comments on the purpose of Freedom of Expression:

1. Political process

* FoE fosters democracy – it promotes the free flow of ideas
* Holds decisions makers to account – we need to be able to learn about their decisions and voice our opinions about them (political expression is very much protected)
* Limitation of this purpose: only justifies a very narrow category of speech

2. Truth seeking and the “marketplace of ideas”

* Search for truth by allowing ideas to compete with each other
* Criticism: no guarantee that the free expression of ideas will in fact lead to the truth. Can we truly trust the opinion and though that the market generates? History shows us we can’t.
* But this does not negate the essential validity of the notion of the value of the marketplace of ideas.
* Criticism: certain opinions are incapable of being proven either true or false, but are still valuable expressions.

3. Individual self-realization and self-fulfillment

* Protects a much broader array of expression (e.g. music, art, things that wouldn’t necessarily be protected under the other categories)
* But why do we protect expressive activities when we don’t protect other self-fulfilling activities?

None of these ideas are perfect on their own, so they should all be taken together to provide us with the purpose of FoE.

## Scope and Limits of s. 2(b)

Two possible interpretations of the scope of s. 2(b):

1. Inclusive approach

* FoE extends to all expression, broadly understood

1. Selective approach

* FoE includes only certain expressive activities
* Court would have to come up with some standard/test to determine what sorts of expression is protected

Courts have largely adopted an **inclusive approach**, with a tiny bit of the selective approach.

Pre-*Irwin Toy*, FoE was held to extend to:

* Picketing (*Dolphin Delivery*)
* Chosen medium of expression (i.e. language of choice) (*Ford v Quebec*)
* Commercial advertising (*Ford v Quebec*)

### *Irwin Toy Ltd v Quebec (AG)*, [1989] SCC – Broad Approach & 2(b) Analysis

\*Court adopted a broad approach to interpreting s. 2(b) and articulated a framework for s. 2(b) analysis

**Facts:** Involves a challenge to s. 248 of Quebec’s *Consumer Protection Act* which banned advertising directed at children under the age of 13.

**Issue:** Is commercial expression protected under s. 2(b) freedom of expression?

**Held:** Yes, commercial expression is protected. S. 2(b) was violated, but the violation was saved under s. 1.

**Dickson CJC, Lamer & Wilson JJ (majority):** Articulated 2-step test for s. 2(b) analysis:

Step 1: Is the claimant’s activity within the sphere of activity protected by s. 2(b)?

* Expression has both a content and a form
* Content is the meaning that the expressive activity attempts to convey
* Form is the way in which you express something
* All content is protected. If the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of s. 2(b).
* While most human activity combines expressive and physical elements, some activity is purely physical and does not convey or attempt to convey meaning (e.g. parking a car).
  + Note: the court is adopting a **very broad** definition of content protected by s. 2(b)
* While all content is protected, NOT all forms of expression are protected – e.g. violence is not protected

Step 2:If so, does the government’s restriction on it infringe s. 2(b) in purpose **or** effect?

* **Purpose** based restrictions on expressive activity **necessarily infringe s. 2(b)**
  + They are attempts to control the content of expression (e.g. ban on hate speech)
  + Restrictions on form of expression can constitute purpose-based restrictions if the underlying motive is to restrict a particular content (i.e. if Gov. knows certain groups get their message across in a certain form and the Gov. bans that form of expression)
  + Where the government aims to control only the physical consequence of certain human activity, regardless of the meaning being conveyed, its purpose is not to control expression.
* **Effects**-based restrictions control only the physical consequences of the activity, regardless of the message being conveyed. They only infringe s. 2(b) if the activity promotes one of s. 2(b)’s purposes:
  + - Political process
    - Truth-seeking (marketplace of ideas)
    - Self-fulfillment
  + Are often called “time, manner and place” restrictions

**Application to case:** Step 1: the claimant’s activity IS within the sphere of activity protected by s. 2(b). Advertising aimed at children aims to convey a meaning, and cannot be excluded as having no expressive content. Nor is there any basis for excluding the form of expression chosen. Step 2: Purpose **–** The government’s purpose was to prohibit particular content of expression in the name of protecting children. Thus s. 2(b) is violated.

**\*Note:** See *Montreal (City)* for refinement to Step 1 of the 2(b) analysis.

### *Montreal (City) v 2952-1366 Quebec Inc*, [2005] SCC – Refinements to s. 2(b) Analysis

Divided the first step of the *Irwin Toy* s. 2(b) analysis into two steps:

1. Did the activity convey or attempt to convey meaning, thereby bringing it within s. 2(b) protection?
2. If so, does the **method** or **location** of the expressive activity remove that protection?

While all expressive content is worthy of protection, the method or location of the expression may not be. Expressive activity should be excluded from the protective scope of s. 2(b) only if its method or location clearly undermines the values that underlie the guarantee of free expression. E.g. violent expression may be a means of political expression and may serve to enhance the self-fulfilment of the perpetrator. But it is not protected by s. 2(b) because violent means and methods undermine the values that s. 2(b) seeks to protect. Violence prevents dialogue rather than fostering it. It prevents the self-fulfillment of the victim, rather than enhancing it.

### *R v Khawaja*, [2012] SCC – Threats of Violence

**McLachlin CJC:** Threats of violence are not protected under s. 2(b). It makes little sense to exclude violence from s. 2(b) but to confer protection to threats of violence. Threats of violence take away free choice and undermine freedom of action. They undermine the very values and social conditions that are necessary for the continued existence of freedom of expression. Threats of violence therefore fall outside the s. 2(b) guarantee.

## Commercial Expression

* Expression designed to promote the sale of goods or services

### *Ford v Quebec*, [1988] SCC

**Recall facts:** Law banned use of any language other than French on signs.

Court held commercial expression was protected under s. 2(b). Justification:

* Intrinsic value
* Doesn’t just protect the speaker, also protects the listener (listeners need commercial info)

Court held the medium of expression (language) is also protected. The violation of s. 2(b) was not justified under s. 1 🡪 failed the at the minimal impairment stage of Oakes. The Court was very sceptical of a complete ban on expression. **Complete bans will receive intense scrutiny under s. 1**.

**Note:** The court held protection of the French language to be a pressing and substantial objective.

### *Irwin Toy Ltd v Quebec*, [1989] SCC

**Facts:** Involves a challenge to s. 248 of Quebec’s *Consumer Protection Act* which banned advertising directed at children under the age of 13.

**Held:** Impugned law violated s. 2(b), but the violation was justified under s. 1.

**Ratio:** Commercial expression is protected under s. 2(b).

**Dickson CJC (majority):** S. 2(b) violated. S. 1 analysis:

Step 1: Pressing and substantial objective

* Objective: protecting children from seductive and manipulative advertising
* Children below a certain age can’t tell fact from fiction so they are susceptible to media manipulation
* Concern about secondary impacts of advertising – children giving parents a hard time
* But the impact of advertising on children is not clear – the evidence for children under 6 is clear (they can’t distinguish fact from fiction) but the evidence for children 7-13 was unclear whether they could make this distinction. Quebec relied on a US report about TV advertising to children 6 and under. Quebec argued it was reasonable to extend the conclusions in the report to other forms of advertising and older children.
* Court **adopts a deferential approach** – says government isn’t limited to protecting only the most vulnerable people in society, it can “exercise a reasonable judgment” in deciding who to protect
* Concludes the objective is pressing and substantial

Step 2a: Rational connection

* Easily satisfied

Step 2b: Minimal impairment

* Courts must **defer more** to legislation if:
  + Balancing competing claims and interests – especially when allocating scarce resources
  + Weighing conflicting scientific evidence
  + Protecting vulnerable groups
* Courts must **defer less** to legislation if:
  + Claim is individual vs. state
* Court adopts a **more differential standard of justification**. Asks whether the government has a reasonable basis, on the evidence, for concluding that the ban on all advertising directed at children impaired freedom of expression as little as possible.
* The US report that Quebec relied on says the ban is necessary to protect children from media manipulation, but actually recommended AGAINST a ban – you would need very accurate audience composition data and a comprehensive definition of advertising directed at children to make the ban work and these are very hard to achieve.
* Court gives Quebec the benefit of the doubt and holds that the evidence sustains the reasonableness of Quebec’s conclusion that the ban is minimally impairing.

Step 2c: Overall balance

* Easily met – there is no suggestion that the effects of the ban are so severe as to outweigh the government’s pressing and substantial objective.

Impugned provision is therefore upheld under s. 1 of the Charter.

**Dissent (McIntyre J):** Impugned law violates s. 2(b) but is not justified under s. 1. The law doesn’t even get past the pressing and substantial objective stage of Oakes. There is insufficient evidence that children are actually harmed by advertising aimed at them. FoE should not be supressed except in cases where urgent and compelling reasons exist and then only to the extent and for the time necessary to protect the community.

### *RJR MacDonald Inc v Canada (Attorney General)*, [1995] SCC

**Facts:** *Tobacco Products Control Act* prohibited advertising and of tobacco and required manufacturers to place and unattributed warning on packaging.

**Held:** 5-4 split. Majority held the advertising ban and the unattributed warning both violated s. 2(b) and neither were saved under s. 1.

**Dissent (La Forest J +3):** Ban on advertising:

Step 2 (of general framework): applies *Irwin Toy* test

* Government conceded there was a s. 2(b) violation

Step 3: Oakes test

* Oakes step 1: pressing and substantial objective
  + Frames objective **broadly**: protecting Canadians from health risks of tobacco use and informing them about the risks of tobacco use
  + This objective is pressing and substantial
* Oakes step 2: proportionality. La Forest comments on application of Oakes test:
  + Oakes test must be applied flexibly, with an eye to context
  + Evidentiary requirements will vary based on context. It is not always necessary to have evidence meet the civil standard of proof.
  + Invokes institutional competence as justification for more defence to legislature
  + **More deferential approach** is appropriate in this case 🡪 parliament is mediating competing interests
  + Type of expression involved is far from the core of freedom of expression values so is worth less protection – it’s promoting an unhealthy habit and the core motivation is profit.
    - **Note** that the type of expression is not taken into consideration in determining whether the law violates s. 2(b), but type of expression IS considered in the s. 1 analysis stage.
* Oakes step 2a: rational connection
  + Government doesn’t need to demonstrate a rational connection according to civil standard of proof, just needs a reasonable basis for believing rational connection exists
  + Relies on **common sense** in finding rational connection: tobacco companies would not spend so much on advertising if it did not increase their sales. But also finds evidence to show rational connection.
* Oakes step 2b: minimal impairment
  + Tobacco argues government could have just banned “lifestyle” advertising
  + La Forest finds complete ban is minimally impairing – government could have adopted a more extreme position of banning all sale and production, but they only banned advertising
  + Government provided enough evidence of necessity of ban to meet its objective of reducing consumption (but earlier he said evidence wasn’t necessary, just need common sense…)
  + Ban is minimally impairing
* Oakes step 2c: overall balance
  + Legislative objective of reducing tobacco consumption outweighs the deleterious effects of the limitation (restriction of the rights of tobacco companies to advertise).

Dissent concludes s. 2(b) violation from ban on advertising is justified under s. 1.

Dissent holds mandatory unattributed health warning does not violate s. 2(b). S. 2(b) protects not just a right to speech, but also a right to silence. But everyone knows the warning comes from the government.

**Majority (McLachlin J +4)**: Both the advertising ban and the unattributed health warning violate s. 2(b) and neither is justified under s. 1. Makes the following comments about the s. 1 analysis:

* Context and deference are important in applying the Oakes test, but they cannot be taken so far as to relieve the government of its burden to prove justification. Disagrees with La Forest J’s comments about not having to meet the civil standard of proof.
* *Irwin Toy* factors re: deference must be applied cautiously
* The civil (balance of probabilities) standard of proof DOES apply. but can be met by “common sense”

Applying Oakes:

* Oakes step 1: pressing and substantial objective
  + **Narrower** interpretation: the objective of the ban on advertising is to prevent people from being persuaded by advertising to use tobacco. Objective of health warning is to dissuade people who see the package from using tobacco.
* Oakes step 2a: rational connection
  + Don’t necessarily need evidence – can rely on logic and reason when link between objective and measure are not “scientifically measurable”. The question is whether it is “reasonable or logical to conclude that there is a causal link” between means and end.
  + McLachlin agrees with La Forest on the factors that he relies upon to find a rational connection
* Oakes step 2b: minimal impairment
  + Even if there is a less impairing measure, if the law is within a range of reasonable alternatives, it is justified under this part.
  + The scope of the advertising ban is a complete ban – so must be scrutinized heavily
  + There is no evidence that shows that a partial ban would be less effective at achieving the same objective. Government had a report that studied alternative partial bans, but refused to provide it to the court and said the court should just defer to government. McLachlin hard pressed not to infer that the results of the study went against the government’s complete ban.
  + Takes issue with La Forest’s portrayal of commercial expression as low value form of expression. Commercial expression should not lightly be dismissed – it has benefits to consumers (shifts focus from protection of speaker to protection of listener)
  + Concludes ban is not minimally impairing
  + As for the unattributed warning label, government failed to show that the unattributed, as opposed to an attributed warning, was required to achieve its objective

Majority concludes s. 2(b) violation for both the ban and the unattributed warning label are NOT saved under s. 1.

### *Canada v JTI-Macdonald Corp*, [2007] SCC

**Facts:** New law enacted creating a narrower ban on tobacco advertising.

**McLachlin J (majority):** Law is justified. The new law is narrower; the government provided copious evidence; new   
evidence about tobacco addition/costs; international and domestic consensus. In overall balancing stage of Oakes, McLachlin characterizes commercial expression as a low value form of expression (at odds with what she says in *RJR* about discounting the type of expression).

## Hate Speech

Hate speech is expression that promotes hatred against some identifiable minority group based on some characteristic of the group. It is regulated by various federal laws in the *Criminal Code* and various provincial laws.

### *R v Keegstra*, [1990] SCC

**Facts:** Keegstra was a high school teacher who conveyed anti-Semitic rhetoric to his students and required students to reproduce his teachings on exams. He was charged under s. 319(2) of the Criminal Code with unlawfully promoting hatred against an identifiable group. Keegstra challenged the constitutionality of s. 319(2).

**Held:** Unanimously agreed that s. 319 violated s. 2(b). Majority of 4 held that the violation was justified under s. 1.

**Dickson CJC (majority):** Hate speech is protected by s. 2(b) – 2(b) protects all expression, no matter its content. S. 2(b) is violated in purpose, so it is necessarily infringed. S. 1 analysis:

* Oakes step 1: pressing and substantial objective
  + Objective of s. 319(2) is to prevent harms caused by the promotion of hatred.
  + Hate speech causes 2 types of harms:
    - Harm to members of the target group
    - Harm to members of the community as a whole
  + This objective is pressing and substantial
* Oakes step 2a: rational connection
  + There is rational connection between objective and means
  + McLachlin argues: criminalization gives hatemongers a platform
    - Dickson: the existence of the law serves a symbolic function, to register societal disapproval of hate speech
  + McLachlin argues: it creates impression of truth in hate speech
    - Dickson: rejects this argument. Again, cites symbolic function of hate speech laws
  + McLachlin argues: hate speech laws are ineffective i.e. Nazi Germany
    - Dickson: no one claims these laws alone can combat hatred, but they are one tool in the toolbox
* Oakes step 2b: minimal impairment
  + Main argument against the law is the possibility of punishing speech that is not hate speech
  + Dickson argues the provision is not too broad – it excludes private conversations, even in public. Also imposes a demanding mens rea requirement (wilfulness). But it does not require proof of harm, just risk of harm.
  + **Defines hatred narrowly** – requires an “emotion of an intense and extreme nature that is clearly associated with **vilification and detestation**.
  + There are defences available (e.g. religious belief)
  + There are alternative less impairing methods than criminalization (education programs, using human rights codes), but Dickson holds that a variety of measures are necessary.
  + **Defers** significantly to Parliament – because hate speech is not closely linked with purposes underlying FoE
  + Concludes there is rational connection
* Oakes step 2c: overall balance
  + Passes this stage – high importance of objective vs. low value of expression.

Therefore the impugned law violates s. 2(b) but is justified under s. 1.

**Dissent (McLachlin J):** S. 319(2) violates s. 2(b). Concludes the objective of protecting social harmony and individual dignity is of a pressing and substantial nature. Cites 3 arguments for rational connection (see majority reasons). Must look beyond whether the law on its face promotes the legislative objectives – must determine if the law truly achieves its objective in practice. Concludes rational connection is “tenuous.” Fails minimal impairment stage – definition of hatred is overbroad. It captures too much and is too subjective. The mens rea is not a sufficient limit on hate speech. Dickson said mens rea would preclude statements made for an honest purpose. But these two are not mutually exclusive. Criminalization has a **chilling effect** – because it is vague and overbroad, it could be applied to catch legitimate expression and so people may self-censor. Less impairing alternatives are available. Concludes deleterious effects outweigh salutary effects. Deleterious effects = supresses speech based on content in a broad way and the consequences are severe. Objective is worthy, but benefits are tenuous. Therefore s. 2(b) is violated and impugned law is not justified under s. 1.

### *Saskatchewan (Human Rights Commission) v Whatcott*, [2013] SCC

**Facts:** Whatcott is an anti-abortion, anti-queer activist. He became the subject of a human rights complaint under s. 14 of the Saskatchewan Human Rights Code for handing out anti-queer flyers at a pride parade.

**Held:** S. 14 violated s. 2(b) but was justified under s. 1.

**Rothstein J (majority):** Confirmed definition of “hatred” from *Keegstra*: exposing people to **detestation and vilification** (in the eyes of the community, not in the eyes of the victim). Held that s. 14 was a violation of s. 2(b). Apply Oakes:

* Step 1: pressing and substantial objective
  + Yes – objective of prohibiting discrimination is pressing and substantial
* Step 2a: rational connection
  + The phrase “ridicules, belittles or otherwise affronts the dignity” goes too far and has no rational connection to reducing discrimination against minorities. Hatred has to impact the social standing of the group in society as a whole; it can’t just involve hurt feelings or offence on behalf of the group. Must contribute to subordination of the group as a whole.
    - **Wright says:** The Court is imposing a really high burden here. Ridiculing leads to people trying to justify their hate speech. Disagrees with the court on this point.
  + Court strikes out phrase “ridicules…” and rational connection is satisfied
* Step 2b: minimal impairment
  + Yes – after the phrase is severed, the provision is not overbroad

## Sexually Explicit Expression

Regulation of sexually explicit expression has shifted from focus on morality to focus on harm alleged. This change in justification brought a shift in the focus of restriction from sexually explicit material in general to sexually explicit material that depicts violent or degrading activity.

Opponents of pornography site harms:

* Physical violence
* Trafficking of women and children
* Gender based harm – it exploits those with limited life choices
* Claim that it perpetuates subordination of women in society
* Predisposes others to commit antisocial acts by contributing to formation of negative attitudes

Proponents of pornography site:

* History of censorship – obscenity laws have been used to suppress works of art
* Obscenity laws have been used to target members of minority communities (i.e. queer community)
* Obscenity laws are aimed at imposing dominant taste and morals on society, and not actually aimed at preventing harm
* Some harms caught by obscenity laws are caught by other laws
* Obscenity laws fail to distinguish good pornography from bad pornography, and good pornography can benefit society

### *R v Butler*, [1992] SCC – Undue Test, Internal Necessities Test

**Facts:** S. 163 of the Criminal Code makes it an offence to make, possess and distribute obscene materials. Butler owned a sex shop and was charged multiple times under s. 163. He claimed s. 163 violates s. 2(b)

**Held:** S 163 violates s. 2(b), but violation is justified under s. 1.

**Sopinka J (majority):** S. 163 classified something as obscene if: (1) the dominant characteristic is the **undue exploitation** of sex; or (2) contains sex + crime/horror/cruelty/violence. Defined the **Undue Test** as “what the community would tolerate others being exposed to on the basis of the degree of harm that may flow” (aka the **Community standards of tolerance test**). Focus on harm is the basis of the test. **Harm** involves material that would predispose others to antisocial behaviour. The **degrading and dehumanizing test** determines what is undue based on materials that exploit sex in a degrading or dehumanizing manner. Material that is degrading or dehumanizing would fail the community standard test not because it offends against morals but because it is perceived by public opinion to be harmful to society, particularly women. **Antisocial behaviour** is recognized as “incompatible with society’s proper functioning” (e.g. physical or mental mistreatment). But he adds an exception: the **Internal necessities test** which states that if something (like art or scientific work) would fail the undue test, but it is part of a larger artistic or scientific work, then you have to apply the undue test to the entire work rather than to just the sexually explicit part. So the Internal necessities test “waters down” the sexually explicit content of a work. So:

Explicit sex with violence 🡪 almost always “undue”

Explicit sex, no violence, with degradation or dehumanization 🡪 “undue” if risk of harm is substantial

Explicit sex, no violence, no degradation or dehumanization 🡪 not “undue” unless children employed

S. 2(b) analysis: Pornography expresses meaning, so it is protected under s. 2(b). Purpose of the law is to limit sexually explicit expression – so s. 2(b) is violated.

S. 1 analysis:

* Prescribed by law?
  + Law has to provide an intelligible standard according to which the judiciary can do its work (*Irwin Toy*). After doing all the interpretation above, concludes the law does provide an intelligible standard.
* Step 1: pressing and substantial objective?
  + Pre 1959 (when changes were made to the definition of obscenity), the provision was targeted at immoral influences. Hints that the objective of imposing a standard of morality would NOT be pressing and substantial
  + Morality as an objective is ok where the government is furthering “Charter values”, but not when advancing a particular idea of public or sexual morality
  + Post 1959, the objective shifted to preventing societal harm, which is pressing and substantial
* Step 2: proportionality
  + Discounts the value of expression involved – it is not on equal footing with other forms of expression
  + Type of expression involved is also of lower value because it is profit-motivated
* Step 2a: rational connection
  + Adopts a **more differential approach** to this stage and minimal impairment stage
  + Evidence is inconclusive whether exposure to pornography actually causes harm
  + Hard to show causal connection between exposure and harm. Under a strict rational connection test, this failure would be fatal.
  + In this case, it is reasonable to presume a connection exists. Because the value of expression involved is not so important, the court adopts a deferential approach and requires only a “reasoned apprehension of harm.” So rational connection satisfied.
* Step 2b: minimal impairment
  + Law does not impose a total ban – it doesn’t catch material that is non-violent and non-degrading or dehumanizing. Also doesn’t capture meritorious works (internal necessities test)
  + Previous efforts to define pornography exhaustively have failed (**Wright says:** so the courts give more defence because something is hard to define? Questionable.)
  + Need a multi-pronged approach
* Step 2c: overall balance
  + Salutary benefits outweigh deleterious effects
  + Expression caught is far from the core of FoE values, appeals to the “most base” aspect of self-fulfillment, is profit-motivated
  + Objective of prevention of harm is very important

So s. 2(b) violation is justified under s. 1.

**\*Note**: the harm test for sexually explicit materials is subsequently developed in *Little Sisters*.

### *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, [2000] SCC

**Facts:** *Customs Tariff* s. 136 prohibits importation of goods that are deemed obscene under s. 163(8) of the *Criminal Code*. Little Sisters alleged that customs targeted shipments destined for gay and lesbian bookstores and challenged the customs legislation.

**Held:** the customs legislation violated s. 2(b) but the violation was justified under s. 1. But court found the manner in which the law had been administered was flawed and so issued an order to correct administration of law.

**Arguments made by Little Sisters:**

* *Butler* was wrongly decided – failed to appreciate benefit that pornography can have. It provides a vehicle to celebrate forms of sexual expression that are suppressed in society.
* Definition of obscenity in *Butler* cannot be transferred to queer erotica – it uses a community based standard which prejudices members of minorities by importing majority values into the standard

**Binnie J (majority):** The provision is constitutional. Violence, degradation and dehumanization are present in the queer community as well, not just in the straight community. The targeting of the bookstore by customs officials is an administrative problem, not a problem with the constitutionality of the provision. Bookstore’s argument that the *Butler* test imports majority values into the community standards test underestimates *Butler*. The community standards test was adopted to underscore the unacceptability of the trier of fact indulging personal biases. A concern about majority expression is one of the principal factors that led to the adoption of the community standards test in *Butler*.

**Iacobucci J (dissent):** Would have struck down the restriction on importation of obscene materials. The current procedures by which Customs enforces s. 163(8) at the border are grossly inadequate.

# Life, Liberty and Security of the Person – s. 7

**S. 7** “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

* S. 7 does not promise that the state will never interfere with a person’s L, L or SoP, but rather that the state will not do so in a way that violates the PFJs (*Carter v Canada*, 2015 SCC).

Drafters of s. 7 had in mind:

* Substantive due process 🡪 process-based review focuses on the process of procedure used at arriving at the decision
  + The basis of some of the most controversial cases in the US (e.g. *Roe v Wade*)
* Natural justice (drawn from administrative law)
  + Refers to a bundle of rights you have where government makes decisions about you as an individual in implementing a government program (e.g. giving you a driver’s license)
  + I.e. the right to be heard

These ideas affected the wording of s. 7:

* Drafters used the wording “fundamental justice” with natural justice in mind
* Framers expected that the substantive review would be avoided under s. 7. The expected procedural review only. But substantive review was assumed to be part of s. 7 by the SCC almost immediately
* Left out the right to property and right to contract in response to the “Lockner era” in the US where the US Supreme Court struck down progressive laws (e.g. minimum wage) of the government

**STRUCTURE OF S. 7 CLAIMS**

1. Does the claimant fall within the reference to “everyone” in s. 7?
2. If so, has the “right to life, liberty and security of the person” been violated? and
3. If so, was the violation of life, liberty and security of the person contrary to the “principles of fundamental justice”?

All 3 steps must be satisfied to make out a s. 7 violation.

## Step 1: Everyone

Does the claimant fall within the reference to “everyone”?

* Corporations not included (compare to s. 2(b) where corporations are included)
  + But corporations can bring “parasitic claim” if they can show a private individual’s right would be violated, they can piggy-back on that claim
* Includes non-citizens
* Foetus remains unclear

## Step 2: Life, Liberty, Security of the Person

Has the claimant’s right to, or interest in, L, L, or SoP been violated? Sufficient causal connection is required.

### *BC Motor Vehicle Reference*, [1985] SCC

**Facts:** S. 94(2) of the *Motor Vehicle Act* imposed an absolute liability offence with mandatory imprisonment for driving with a suspended license.

**Held:** Impugned law violated s. 7 and is not justified under s. 1.

**Lamer J:** The absolute nature of the offence is inconsistent with the PFJ that imprisonment is the severest form of punishment and is inconsistent with punishing someone who acted without mens rea. The government was unable to prove why imprisonment was necessary, so failed s. 1 analysis. The law should be one of strict liability so that defences can be used. Makes several important comments on s. 7:

* Judicial review should be approached “free of lingering doubts as to its legitimacy”
  + The decision to adopt the Charter was taken by the elected representatives of the people – it was a democratic decision
* Need to be careful about borrowing from the US
  + Critics said SCC should be following decisions from US who had decades of experience interpreting law
  + But the Constitution is unlike the US Bill of Rights – we have a s. 1 and s. 33, which makes the whole structure of the Charter different
* Substantive review is an option in Canadian Charter
  + Fundamental justice is broader than natural justice – if framers had wanted to limit Charter to procedural issues, they could have used the words “natural justice”
  + Consistent with “generous” approach to Charter interpretation
  + Distinction between substantive and procedural is hard to draw
  + SS. 8-14 are “illustrative” of s. 7 – since they go beyond procedure, s. 7 must as well
  + Minimal weight given to legislative history to the contrary (to the fact that drafters didn’t want to include substantive review)
* Principles of fundamental justice
  + PFJs “are to be found in the basic tenets of our legal system” – not in the “realm of general public policy.”
    - So review under s. 7 is not going to involve general cost benefit analysis that public policy makers would engage in, it will involve something more, like review based on broad principles that underlie the Constitution.

**\*Note:** This case impliedly accepted a **“two-right” view of s. 7** 🡪 that s. 7 confers a right to L, L and SoP, AND it confers a second right not to be deprived of L, L and SoP except in accordance with the PFJs. Court stated that a deprivation of L, L or SoP would require s. 1 justification, even in the PFJs were satisfied. Thus the first clause in s. 7 affords additional protection, over and above that afforded in the second clause. The result is that mere compliance with the PFJs does not itself guarantee that the rights to L, L and SoP are not violated.

### “Life”

Engaged at least where government: (1) causes death; or (2) creates a serious threat of death (*Chaouilli*). Not many claims fall under “life”.

### “Liberty”

Liberty is interpreted broadly. Engaged at least by:

* Actual physical restraints/denial of physical liberty (e.g. imprisonment)
* Where imprisonment is a possibility (*BC Motor Vehicle Reference*)
* Fundamental personal decisions
  + E.g. *B(R) v Children’s Aid Society* 🡪 Liberty includes the right of the parent to choose how to raise their child.
  + E.g. *R v Heywood* 🡪 protects everyone’s interest in being able to move freely around Canada
  + E.g. *R v Malmo-Levine* 🡪 does NOT protect lifestyle choices as they are not basic choices going to the core of what it means to enjoy individual dignity and independence
  + E.g. *Blencoe v British Columbia* 🡪 does NOT protect alleged right to be free from stigma associated with human rights complaint

### “Security of the Person”

Engaged at least by:

* State interference with bodily integrity (e.g. DNA samples, use of force during arrest)
* Severe state-imposed psychological harm (*New Brunswick v G(J)*)
  + Extends to state action with a “serious and profound effect on a person’s psychological integrity” assessed objectively. Does not extend to ordinary stresses and anxieties.
  + Includes removal of child from parental custody 🡪 gross interference into private sphere causes stigma for parent, loss of companionship
  + Not engaged by child sentenced to jail, conscripted or killed negligently by police 🡪 because state is not interfering with the parent in their “role as a parent” – not stigmatized

### Causal Connection

In order to make out a violation of s. 7, the claimant must show a **sufficient causal connection** between the government action and the prejudice to the claimant’s L, L, or SoP (*Bedford*, 2013 SCC). This lowers the burden on a claimant to make out a s. 7 violation.

## Step 3: Principles of Fundamental Justice

PFJs are found in the “basic tenets of the legal system” not “in the realm of general public policy” (*BC Motor Vehicle Reference*).

**3-part test for determining what is a PFJ (*R v Malmo-Levine*)**

1. PFJ must be a “legal principle”

* Must be grounded in law (common law, statute, international law)

2. Significant societal consensus that it is “vital or fundamental to our societal notion of justice”’ AND

* Requires evidence of the importance of the idea – frequency of reference to the concept and frequency of reference to the importance of the concept.

3. Capable of being identified/applied with precision

All 3 requirements must be met.

**Recognized PFJs include:**

* Principles of natural justice or procedural fairness
* Vagueness
* Overbreadth (*PHS Community Services*)
* Arbitrariness (*Rodriguez, PHS Community Services*)
  + Involves a 2-step analysis (*Canada v PHS Community Services*)

1. Identify the objective of the law/provision
2. Identify the relationship between the objective and the impugned law/provision

* Gross disproportionality (*PHS Community Services*)
  + Describes legislative responses to a problem that are so extreme as to be disproportionate to any legitimate government interest. Infringement may serve government’s purpose, but is out of sync with regards to the balance it strikes between the means and the objective.

**\*Note** that overbreadth, arbitrariness and gross disproportionality look a lot like minimal impairment, rational connection and overall balance, respectively, from Oakes. Raises the question of whether PFJs actually add anything to the analysis, because we’re already considering these in Oakes. May be moving towards a regime where we have a freestanding right to L, L and SoP.

## Bodily Integrity – s. 7 – s. 7 Analysis Applied

### *R v Morgentaler*, [1988] SCC

**Facts:** s. 251 of the Criminal Code prohibits abortion. The exception was for women who obtained a certificate from a therapeutic committee. Dr. Morgentaler operated an abortion clinic that was not approved and did not obtain certificates from therapeutic committees. He was charged with violating s. 251. He argued the provision violates s. 7.

**Held:** 5-2 split held that s. 251 violated s. 7 and was not saved by s. 1. 3 separate majority opinions written.

**Beetz J (+ 1):** Understood to be the narrowest of the 4 majority decisions. S. 7 analysis:

Step 2: s. 251 does engage SoP

* Delays prevent women who would be able to have an abortion under the exception from obtaining “effective and timely” medical care, increasing risk of physical and psychological harm.
  + Where government increases risk to life or health, s. 7 is engaged. This reasoning is adopted in subsequent s. 7 claims.

Step 3: violation of SoP is contrary to PFJs

* Requiring independent medical opinion is ok, not contrary to PFJs 🡪 at some point, the state’s interest in protecting the welfare of the foetus becomes compelling
* “Procedural requirements” ARE contrary to PFJs
  + These are manifestly unfair 🡪 they either bear no relationship to Parliament’s objective (arbitrary) or were unnecessary to meet Parliament’s objective (overbreadth)
    - **Note:** Beetz is anticipating arbitrariness and overbreadth as PFJs

**Dickson (+1):** Slightly broader opinion than Beetz J. S. 7 analysis:

Step 2: s. 251 does engage SoP

* Procedural delay = increased risk of physical and psychological harm (agrees with Beetz J)
* ALSO engaged because pregnant women deprived of decision making control over body

Step 3: violation of SoP is contrary to PFJs

* Standard to apply in exception is too vague: protecting life and health of women is interpreted in too many different ways by varying hospitals. (Frames this as a procedural flaw, not substantive flaw)
* Defences should not be “illusory” 🡪 if there is a defence in law, it should be usable. Here, due to barriers, the defence is unavailable, or available only at substantial cost.

S. 7 is not justified under s. 1.

**Wilson J:** Broadest opinion. Court must first tackle the primary issue: Can a pregnant woman be forced by the state to carry to term? Wilson criticizes colleagues for focusing on the procedural aspects of the case. Should have first dealt with the question of whether state can limit abortion at all. If state cannot limit abortion, procedural issues are irrelevant. S. 7 analysis:

Step 2: Liberty & SoP are engaged

* **Liberty** protects freedom to make important decisions affecting private life
  + Note: this definition has NOT been adopted by the SCC
  + Decision to terminate pregnancy qualifies – has profound psychological, economic and social consequences for a woman
* **Security of the person** protects both physical and psychological integrity
  + Focuses on the loss of control over a woman’s own body, rather than the resulting physical and psychological harm

Concludes infringement on liberty and SoP not in accordance with PFJs. S. 7 violation not saved by s. 1.

**Dissent (McIntyre** + La Forest)**:** Find no specific reference in test of s. 7 to right to abortion. Finds no specific textual or historical support for a Charter right to abortion. He does not interpret L, L or SoP to see whether these could include the right to abortion – looks solely for explicit right to abortion. There is no reference so concludes s. 251 does not violate s. 7.

### *Rodriguez v British Columbia (Attorney General)*, [1993] SCC – Arbitrariness = PFJ

**Facts:** Appellant was terminally ill and claimed that the criminal prohibition on physician-assisted dying violated her rights under s. 7.

**Issue:** Does the criminal prohibition on assisted dying violate s. 7?

**Held:** 5-4 split. Ban on assisted dying does not violate s. 7. Dissent held s. 7 is violated and not saved by s. 1.

**Sopinka J (majority):** S. 7 analysis:

Step 2: engages SoP

* SoP protects personal autonomy, which includes at least control over physical and psychological integrity (*Morgentaler*)
* Ban on assisted death deprives appellant of personal autonomy, causing physical pain and psychological stress
* But clash between life and SoP 🡪 SoP cannot encompass a right to take action that will end one’s life, as security of the person is intrinsically concerned with the well being of the living person. But also says that we cannot value one interest above the others.
* Common law recognizes the right to refuse treatment that would extend life
* Ban thus infringes SoP

Step 3: violation of SoP is NOT contrary to PFJs

* Rejects appellant’s argument that human dignity and autonomy is a PFJ. Applies test from *Malmo-Levine* and finds it does not satisfy the precision requirement – not capable of being applied with precision. The purpose of the ban is to protect the vulnerable who might be induced in moments of weakness to commit suicide. Given concerns about abuse and the difficulty in creating appropriate safeguards to prevent these, it cannot be said that the blanket prohibition on assisted suicide is arbitrary or unfair, or that it is not reflective of fundamental values of society.

**Dissent (McLachlin):** Held that the ban deprived the appellant of her SoP by denying her the right to make decisions about her body. The violation of SoP is contrary to the PFJs because it is **arbitrary**. A law will be arbitrary if the violation of L, L or SoP bears no relation to or is inconsistent with the objectives of the law. The ban draws a distinction between suicide and assisted suicide and it is not illegal to attempt suicide. Thus an able-bodied person can commit suicide, but a disabled person can’t.

### *Canada v PHS Community Services Society*, [2011] SCC Key Discussion of PFJs

**Facts:** Insite is a safe injection facility. The federal government failed to extend Insite’s expemtion from the operation of criminal laws in the *Controlled Drugs and Substances Act*. Insite brought an action claiming that the prohibition on possession and trafficking violated s. 7 (challenge to act itself) and that the failure to extend their exemption from federal drug laws violated s. 7 (challenge to act as applied).

**Ratio:** Arbitrariness, gross disproportionality, and overbreadth are now key PFJs.

**McLachlin CJ (unanimous):** S. 7 analysis:

Step 2: L, L or SoP engaged?

* Prohibition on trafficking does not violate L, L or SoP because clients and staff are not trafficking drugs in the clinic
* Prohibition on possession engages Liberty interests of staff and clients
* Prohibition on possession engages Life and SoP interests of clients (because it would prevent them from obtaining health services, endangering their lives)

Step 3: contrary to PFJs?

* Prohibition on possession is not contrary to PFJs 🡪 act itself is not arbitrary, overbroad or grossly disproportionate, due to the exemption provision
* BUT, the refusal to grant the exemption is arbitrary and grossly disproportionate in its effects
* Government argues that using drugs is a choice, and those who do something illegal should suffer the consequences
  + Rejects both arguments 🡪 evidence shows addiction is a disease, not a choice, and morality is irrelevant here
* **Arbitrariness involves a 2-step analysis:**

1. Identify the objective of the law/provision
2. Identify the relationship between the objective and the impugned law/provision
   * In this case, the objective is the protection of public health and safety. The refusal to grant the exemption is arbitrary because it actually undermines the objective of the provision itself.

* **Gross disproportionality:** describes legislative responses to a problem that are so extreme as to be disproportionate to any legitimate government interest.
  + It is accepted that the infringement may actually serve the government’s objective, but it is completely out of sync (i.e. too harsh) with regards to the balance it strikes between objective and means
* **Overbreadth:** Not necessary to consider since violation already shown.

S. 7 is thus violated, and the violation is not saved under s. 1 (fails at rational connection – similar to arbitrariness analysis).

**Judgment:** Court ordered federal government to grant Insite the exemption. This was controversial – usually the court doesn’t grant a positive order.

### *Carter v Canada (Attorney general)*, [2015] SCC

**Facts:** S. 214(b) of the *Criminal Code* makes aiding or abetting a person to commit suicide a criminal offence. Appellants claimed prohibition violated s. 7 by denying a competent adult a physician-assisted death. Key finding by TJ: neither appellants were vulnerable people.

**Held:** Prohibition violates s. 7 by denying a competent adult a physician assisted death where: (1) the person clearly consents to termination of life; and (2) the person has a grievous and irremediable medical condition (including illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition.

**Reasons (unanimous):** Places claim in context: pushes for legislative reform since *Rodriguez*; Quebec and other nations’ enactment of a law on physician-assisted death; doctors under oath to do no harm. S. 7 analysis:

Step 2: infringes L, L and SoP

* Life: forces some to end life prematurely (by committing suicide while they still can)
  + Right to life is engaged where the law imposes death or increased risk of death on a person, either directly or indirectly
  + Sanctity of life does not require absolute prohibition on assisted dying
  + Court refuses to read the right to life more broadly 🡪 does not adopt a qualitative approach where the right to life includes a quality of life
  + State cannot take or risk your life, but it also can’t require you to live 🡪 implication is that the right to life can be weighed
* Liberty & SoP
  + Both protect individual autonomy and dignity
  + Liberty protects fundamental personal decisions
  + SoP protects physical and psychological pain/suffering
  + Prohibition interferes with liberty because it interferes with decisions of bodily integrity and decisions about medical care
  + Prohibition interferes with SoP by causing physical or psychological pain

Step 3: violation is contrary to PFJs

* Objective is to protect vulnerable persons from being induced to commit suicide
* **Arbitrariness:** No, prohibition is not arbitrary 🡪 there is a rational connection between the objective of the law and the limit. An arbitrary law is one that is not capable of fulfilling its objectives – it exacts a constitutional price in terms of rights, without furthering the public good that is said to be the objective of the law.
  + Note: this is contrary to McLachlin J’s dissent in *Rodriguez* – she said it was arbitrary
* **Overbreadth:** Yes, the law goes too far, taking away rights in a way that bears no relation to law’s object. The question is not whether parliament has chosen the least restrictive means, but whether the chosen means infringe L, L or SoP in a way that has no connection with the mischief contemplated by the legislature.
  + Prohibition catches people like Gloria Taylor and Kay Cater who are not vulnerable people and don’t need the protection that the prohibition is aimed at providing
* **Gross disproportionality:** Court doesn’t answer whether the impact on individuals is “completely out of sync” with the objective of the law. PFJs violated at overbreadth, so unnecessary to consider.

S. 1 Analysis:

* Objective is pressing and substantial. Courts must accord legislature a measure of deference at proportionality stge. Proportionality does not require perfection; it only requires that the limits be reasonable. The complex issues of social policy and the number of competing societal values mean Parliament should be given a high degree of deference. However, the TJ found that the prohibition could not be described as a “complex regulatory response” so degree of deference, while high, is reduced. Prohibition is rationally connected. Fails at minimal impairment (not surprising, because it is overbroad). Government failed to prove an absolute prohibition is necessary.

Note: SCC says that it is hard to justify s. 7 violations under s. 1, but it is NOT impossible (e.g. where competing interests are protected by the Charter). Hasn’t been a case yet where a s. 7 violation was justified under s. 1.

Note also that the s. 7 analysis is concerned ONLY with the individual’s interests. The analysis in s. 1 can take into consideration societal interests in the claim.

**Court’s order:** “[The provisions] ... are of no force or effect to the extent that they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition.”

**In response**, government enacted a new provision in the *Criminal Code* regarding physician-assisted dying that generally matches the Court’s conditions, but adds in “(d) their natural death has become reasonably foreseeable.” This addition has raised questions about whether it makes the provision inconsistent with the Court’s order.

## Note: s. 7 and s. 1

* Supreme Court has never upheld a violation of s. 7 under s. 1 & has often commented that it would be difficult to do so because of correlation between PFJs (arbitrariness, overbreadth and gross disproportionality) and the proportionality test in Oakes (rational connection, minimal impairment, overall balance)
* Discussion in *Bedford* at para. 127 is important. SCC seems to be opening the door a crack to the possibility that a s. 7 violation could be saved under s. 1
  + S. 1 and s. 7 ask different questions. The questions under s. 7 are whether the law’s purpose, taken at face value, is connected to its effects and whether the negative effect is grossly disproportionate to the law’s purpose. Under s. 1, the question is whether the negative impact of a law on the rights of the individuals is proportionate to the pressing and substantial goal of the law in furthering public interest. The question of justification on the basis of an overarching public goal is at the heart of s. 1, but plays no part in the s. 7 analysis. (*Bedford*)
  + The claimant only has burden to show that s. 7 is violated and contrary to PFJs only for one individual (and in light of recent cases, it doesn’t even have to be a real person). The Crown has the burden in proving a violation is justified under s. 1 and can call on social science and experts to justify the law’s impact in terms of society as a whole. (*Bedford*)

# Equality – s. 15

**S. 15(1)** – Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

S. 15 contemplates 4 types of equality:

1. Equality before the law 🡪 equal application and enforcement
2. Equality under the law 🡪 framing of law itself must respect principles of equality
3. Equal protection of the law 🡪 imported from US Bill of Rights
4. Equal benefit of the law 🡪 requires equality not just in relation to burdens that the law imposes but also in relation to benefits of the law.

These 4 types of equality are guaranteed **“without discrimination”**. Prohibited grounds (aka enumerated grounds) of discrimination are explicitly listed in provision. The words **“in particular”** suggest that it is possible to add grounds of discrimination (analogous grounds).

Pre-Charter, we had the *Canadian Bill of Rights*, which was interpreted very narrowly. The Charter was drafted with the intention to show that the narrow interpretation should not be followed.

**S. 15(2)** – Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

S. 15 known as “the most difficult right” because of:

* Different ideas of equality
  + Equal treatment for everyone?
    - Government shouldn’t draw distinctions at all based on any of the prohibited grounds
  + Equal outcomes?
  + Equal opportunity?
    - Aimed at fixing “third base outcome” – in the “game of life” some people were born on 3rd base, so it’s easier for them to reach home.
  + Something else? (e.g. anti-oppression – aims at rectifying power imbalances in society)
* Different ideas about the role of the courts
* Different ideas about s. 15’s interpretation:
  + s. 15 should be interpreted broadly to prohibit any distinctions made by law 🡪 criticism: all laws would be caught by s. 15 because all laws make distinctions (*Andrews*)
  + s. 15 should be interpreted to only prohibit unreasonable or unfair distinctions (“rationality review”) 🡪 criticism: this approach would leave very little work for s. 1 analysis (*Andrews*)
  + s. 15 should be aimed at group disadvantage
  + s. 15 should be aimed at individual stereotyping and prejudice
  + s. 15 is violated every time there is a distinction drawn based on an enumerated ground (*Andrews*)

Approaches to equality:

**Formal equality:** associated with the **“similarly situated”** test – like cases should be treated alike and unlike cases should be treated unalike in proportion to their differences.

* Issue: similarly situated test is hard to apply in practice – how do you determine when cases are alike?
* The purpose of the law is usually used to decide when cases are alike. Is the formal distinction drawn relevant to the purpose of the law?
* This approach is heavily criticized: it can leave unaddressed unfair inequalities from distinctions drawn and has no way of weeding out discriminatory purposes (e.g. same-sex marriage laws)

**Substantive equality:** looks beyond the formal distinctions drawn by the law to look at the impact on the members affected. Aims to ensure laws do not impose subordinating impacts on groups that are already disadvantaged.

* E.g. a law that everyone must work on Saturday would pass the formal equality test because everyone is treated the same. But it would fail the substantive equality test because it has adverse impacts on those who observe the Sabbath.

Intentional vs. unintentional discrimination

* **Intentional discrimination:** discrimination that is animated by prejudice. Involves contempt.
* **Unintentional discrimination:** usually arises from an inattention to difference.

Direct vs. indirect discrimination

* **Direct discrimination:** discriminates on the face of the law, explicitly. Usually overlaps with intentional discrimination. E.g. a law that prohibited women from serving in the police force.
* **Indirect (adverse effects) discrimination:** does not draw a distinction explicitly on the face of the law itself, but has a negative and disproportionate effect on some group. E.g. law that proposed height or weight restrictions on joining the police force.

## *Andrews* Period (1989-1995)

2-part analysis for s. 15 claims:

1. Differential treatment between claimant and others in the form of a benefit denied or burden imposed
2. Differential treatment constitutes discrimination on the basis of an enumerated or analogous ground

### *Andrews v Law Society of BC*, [1989] SCC

**Facts:** Andrews was a British subject and a permanent resident in Canada. He brought an action for a declaration that the Canadian citizenship requirement for admission to the Law Society of BC violated s. 15 of the Charter.

**Issue:** Does the citizenship requirement violate s. 15?

**Held:** Yes, the citizenship requirement violates s. 15 and the violation is not saved under s. 1.

**McIntyre J** (unanimous decision on s. 15 analysis, but in dissent on s. 1 analysis): S. 15 is not a general guarantee of equality; it does not provide for equality between individuals/groups within society in a general or abstract sense, nor does it impose on individuals/groups and obligation to accord equal treatment to others. It is concerned with the application of the law. The similarly situated test (that alike things are treated alike, while unalike things are treated unalike in proportion to their differences) is deficient in that it excludes any consideration of the nature of the law. **Discrimination is defined** as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual/group not imposed on other groups, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will usually be classified as discrimination. Distinctions based on an individual’s merits and capacities will usually NOT be classified as discrimination. **Two-part framework for s. 15 claims**:

1. Claimant must show differential treatment between him/her and others in the form of a benefit denied or burden imposed

* s. 15 equality guarantee is “comparative” 🡪 a benefit or burden can be imposed so long as it is imposed on everyone equally

2. Differential treatment must constitute discrimination on the basis of an enumerated or analogous ground

* 2a: discrimination
  + A law is discriminatory if in purpose or effect it withholds a benefit/imposes a burden on an individual based on personal characteristics associated with group affiliation rather than individual effort.
  + Can involve: burdens imposed; benefits withheld; direct or indirect discrimination; intentional or unintentional discrimination
* 2b: prohibited grounds = enumerated or analogous grounds
  + Test for adding analogous grounds is not settled
    - Wilson & McIntyre J 🡪 “discrete & insular minority” (lack of political power)
    - Wilson 🡪 perpetuating historical disadvantage
    - La Forest 🡪 immutability (personal characteristics that cannot be changed)
    - La Forest 🡪 irrelevance to legitimate government work

Application to facts: Step 1 is passed 🡪 distinction is created between citizens and non-citizens and the distinction imposes a burden in the form of some delay on permanent residents in practicing law. Step 2 is passed 🡪 distinction is drawn on an analogous ground (citizenship) and the distinction is discriminatory (reasons don’t really explain why).

**McIntyre (dissent):** Relaxes the Oakes test, so the violation is saved under s. 1.

**Majority:** Violation is not justified under s. 1 🡪 fails at minimal impairment.

**Principles resolved:** This case establishes a number of important principles:

1. Adopts substantive equality: equality cannot be reduced to sameness of treatment. Equality sometimes requires that difference be taken into account and therefore differential treatment does not necessarily amount to legal discrimination.
2. Rejects formal equality & the similarly situated test: consideration must be given to content, purpose & impact of the law and these are not recognized under formal equality
3. Recognizes adverse effects discrimination. It is NOT necessary to establish intentional discrimination or that the purpose of the law is discriminatory. The actual effects of an impugned law should be the focus of the s. 15 analysis.
4. To make out a s. 15 violation, claimant must establish differential treatment amounting to discrimination on the basis of a personal characteristic that is either an enumerated or analogous ground
5. A personal characteristic will be accepted as an analogous ground if it shares the essential features of the personal characteristics listed in s. 15

**\*Note:** In later cases, *Andrews* is read to adopt a 3-part test: (1) differential treatment; (2) on the basis of a prohibited ground; (3) that is discriminatory. With this reading, step (3) is read to require something more, but not sure what this is.

## Equality Trilogy of 1995 (1995-1999)

***Miron v Trudel* 🡪** 5-4 Court held that the denial of automobile accident benefits to an unmarried opposite-sex couple constituted discrimination on the basis of marital status contrary to s. 15. Majority held the discrimination could not be justified under s.1.

***Egan v Canada*** 🡪 5-4 Court held that the denial of an old age spousal allowance to same-sex couples was discriminatory on the basis of sexual orientation contrary to s. 15. Majority held the discrimination was justified under s. 1.

***Thibaudeau v Canada*** 🡪 Inclusion-deduction rules in the *Income Tax Act* permitted a parent who paid spousal support and child support to deduct it from income while requiring the parent receiving support to add the amount to income. A s. 15 claim based on sex discrimination arose because 98% of payers were men and 98% of receivers were women and therefore it imposed a disadvantage on custodial parents (mostly women) and provided an advantage to non-custodial parents (mostly men). Court held there was no s. 15 violation.

3 competing approaches to the s. 15 analysis arose from these 3 cases:

**1.** Three-part test in *Andrews* where the final step requires proof of disadvantage, prejudice or stereotyping

* Supported by McLachlin, Cory, Iacobucci and Sopinka JJ
* Characterized the purpose of the equality guarantee as the prevention of “the violation of human dignity and freedom by imposing limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics rather than on the basis of individual merit, capacity or circumstance.”

**2.** Three-part test in *Andrews* + a 4th step of irrelevance

* Supported by Lamer, Gonthier, La Forest and Major JJ
* 4th step holds that the personal characteristic at issue must be irrelevant to the functional values underlying the challenged law

**3.** Abandon focus on grounds of discrimination, and instead focus on nature of the group and interests impacted

* Supported by L’Heureux-Dubé exclusively
* The more vulnerable the affected group, and the more fundamental the interest at stake is, the more likely that differential treatment will be discriminatory.

In the first 4 decisions on s. 15 since the 1995 trilogy, the SCC applied all 3 approaches in each cause because they couldn’t decide which one to use.

## *Law* Period (1999-2008)

The *Law* ruling replaced *Andrews* as the leading case on s. 15 until 2008 when the court decided *R v Kapp.*

S. 15 analysis: (see handout)

1. Differential treatment in purpose or effect
2. Enumerated or analogous ground
3. Discrimination in a substantive sense
   1. 4 contextual factors:
      1. Pre-existing disadvantage, stereotyping, prejudice or vulnerability
      2. Correspondence factor (between ground claim is based on and nature of differential treatment)
      3. Ameliorative purpose
      4. Nature and scope of the interest affected

Under the *Andrews* approach to s. 15(1) claims, the claimant could establish a violation of s. 15(1) if they could show differential and disadvantageous treatment based on a prohibited ground of discrimination.

Now, under the *Law* approach, such treatment is discriminatory only if the complainant can also establish that the differential treatment implicates his/her human dignity in terms of the 4 contextual factors.

**Criticism of *Law* test:**

* Approach to comparator groups is criticized – can doom the whole claim just by changing comparator
* Consideration of human dignity at stage 3 is too malleable, making it too hard to predict how claims will play out
* Some steps (especially contextual factor #2 – correspondence factor) import s. 1 considerations into the s. 15 analysis.

### *Law v Canada (Minister of Employment and Immigration)*, [1999] SCC

**Facts:** Nancy Law was denied survivor’s benefits under Canadian Pension Plan for her husband’s death because she was under the age of 45 and had no dependant children. She brought a claim that the age distinction violated s. 15.

**Held:** Age distinction drawn by CPP does NOT violate s. 15(1).

**Iacobucci (unanimous):** The equality analysis under s. 15 must be purposive and contextual. The basic principles that underlie s. 15 are guidelines for analysis, not a rigid test. The purpose of s. 15 is to prevent the violation of essential human dignity had freedom through the imposition of disadvantage, stereotyping or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as humans & members of society. At the core of the **definition of human dignity** is a focus on whether an individual/group feels self-respected and self-worth. The idea of dignity thus revolves around how a person feels (**Wright says:** this has been criticized on the basis that it leads to very subjective analysis by the courts).

**The *Law* Test:**

* Does a law impose differential treatment between the claimant and others in purpose or effect?
  1. Considers whether the law draws a formal distinction or an indirect/adverse effects distinction
* Is the basis for the differential treatment one or more of the enumerated or analogous grounds?
* Does the differential treatment discriminate in a substantive sense, in purpose or effect, bringing into play the purpose of s. 15(1)?
  1. Consider whether the law violates essential human dignity
     1. By imposing a burden upon or withholding a benefit
     2. In a manner that:
        1. Reflects the stereotypical application of presumed group/personal characteristics; or
        2. Perpetuates or promotes the view that the individual is less worth of recognition/value as a human or member of society
* 4 Contextual factors to consider in determining whether claimant’s human dignity has been demeaned:
  1. Pre-existing disadvantage, stereotyping, prejudice or vulnerability
     1. Stereotype is a misconception whereby a person/group is unfairly portrayed as possessing undesirable traits, or traits which at least some members do not possess
  2. Correspondence factor (between ground claim is based on and nature of differential treatment)
     1. Some enumerated and analogous grounds have the potential to correspond with need, capacity or circumstances (e.g. disability, where the avoidance of discrimination will require distinctions be made to take into account actual personal characteristics of the disabled person)
  3. Ameliorative purpose
  4. Nature and scope of the interest affected
     1. The more severe and localized the consequences of the legislation for the affected group, the more likely that the differential treatment responsible for these consequences is discriminatory

Application to case:

1. Differential treatment? **Yes**
2. On the basis of a prohibited ground? **Yes** – age is an enumerated ground
3. Substantive discrimination? **No.** Appellant has not demonstrated that either the purpose or the effect of the impugned law violates her human dignity so as to constitute discrimination. Court found there was “correspondence” between the ground upon which the claim is based and the nature of the differential treatment 🡪 underlying message from the court was “get a job”.

## *Laws* Analysis (Current Analysis??)

*Kapp* introduced a 2-part test for s. 15 analysis, but case law demonstrates the first part contains 2 inquiries, so it’s really a 3-part test:

1. Does the law create a distinction?
2. Is this distinction based on enumerated or analogous grounds?
3. Does the differential treatment on the basis of a prohibited ground discriminate in a substantive sense, by violating essential human dignity?

### Step 1: Differential Treatment

Step 1: Does the law create a distinction?

Differential treatment can come in different forms:

* **Direct** differential treatment 🡪 obvious on the face of the law itself (e.g. in *Andrews*, the law made distinction between citizens and non-citizens) – the purpose of the law
* **Indirect (adverse effects)** differential treatment 🡪 results from the application of the law – the effect of the law – the law itself is, on its face, neutral.

#### Eldridge v British Columbia (Attorney General), [1997] SCC

Example of a successful s. 15 claim based on differential treatment resulting from a facially neutral policy (adverse effects discrimination).

**Facts:** Under the *Hospital Insurance Act*, hospitals were given the discretion to determine which services should be provided free of charge. Hospital chose not to provide free sign language interpretation for deaf people seeking medical services. 3 individuals who were born deaf claimed the failure to provide public funding for sign language interpretation violated s. 15 of the Charter.

**Held:** Denial of publicly funded sign language services violates s. 15(1) and is not saved under s. 1.

**La Forest J (unanimous):** Two purposes of s. 15(1): (1) expresses a commitment to the equal worth and human dignity of all persons; and (2) instantiates a desire to rectify and prevent discrimination against particular groups suffering social, political and legal disadvantage in society. S. 15 analysis:

Step 1 – differential treatment

* No direct discrimination here, but s. 15 extends to adverse effects discrimination at issue
* No intentional discrimination, but s. 15 extends to unintentional discrimination at issue
* Failure to fund sign language services has the effect of preventing the deaf from benefitting equally from a public service offered to everyone – adverse effects discrimination.
* Government’s choice not to provide sign language is not neutral – it reflects the vast majority of society’s circumstances, but it is not neutral.
* Not needed to identify a direct effect – an adverse effect is enough.
* Especially important for cases involving disabilities – government doesn’t identify those with disabilities in many statutes/laws anymore.
* Emphasizes that this is a mode of communication – the government created the health care system in which communication is important and to not provide this service to deaf people, it is creating an adverse effect.

### Step 1 Pt 2: Enumerated or Analogous Grounds

Enumerated grounds include: race, national or ethnic origin, colour, religion, sex, age, mental or physical disability

Analogous grounds recognized by SCC: Citizenship (*Andrews*), sexual orientation (*Egan*), marital status (*Miron*), off-reserve residence (*Corbiere*) – once recognized as an analogous ground, it remains a ground.

Rejected by SCC as analogous grounds: Employment status or occupation (*Delisle*), province of residence (*Turpin*), marijuana users (*Malmo-Levine*), persons charged with war crimes/crimes against humanity outside of Canada (*R v Finta*), persons bringing a claim against the Crown (*Rudolph Wolff & Co v Canada*).

Controversy around language and poverty as being recognized as analogous grounds – haven’t made it to the SCC yet. But lower courts have recognized additional analogous grounds.

**Criticism** of focus on enumerated or analogous grounds: they compartmentalize people’s experiences and ignore intersectionality. The true experience of discrimination by an individual can only be understood from an intersectional approach. The courts often make the grounds distinct (if there is more than one enumerated/analogous ground), and analyze them separately.

**Defence** of enumerated and analogous grounds: they are useful because they help us to focus on the areas of discrimination – help focus on the history of different groups

Test for recognizing new analogous grounds was not settled:

* *Andrews* – citizenship:
  + “Discrete and insular minority” (non-citizens lack of political power) (Wilson and McIntyre, separately)
  + Perpetuating disadvantage (Wilson)
  + Immutability (La Forest)
  + Usually irrelevant to legitimate government work (La Forest)
* *Egan* – sexual orientation
  + “Deeply personal characteristic” (La Forest)
  + Immutable (“unchangeable”) or constructively immutable (“changeable only at unacceptable personal cost”) (La Forest)
    - There is a sense that if you can’t change something, it’s unfair for you to be discriminated on that basis. So underlying immutability is this societal understanding of equality as about not who we are but about what we do
    - **Wright says**: why does it matter so much that you can’t change something? Suggests there are some problems with immutability.
  + History of stereotyping historical disadvantage and prejudice (Cory)
* *Miron* – marital status
  + Touches matters “essential to the dignity and worth of the individual” (McLachlin)
  + Associated with historical disadvantage and prejudice (McLachlin)
  + Limited control (McLachlin) (marital status is not immutable, but people have limited control)

#### Corbiere v Canada (Minister of Indian and Northern Affairs), [1999] SCC – Test for recognizing analogous grounds

**Facts:** S. 77(1) of the *Indian Act* required band members to be “ordinarily resident” on their reserve in order to vote in band elections. Non-resident band members brought a challenge under s. 15, alleging that residence was an irrelevant personal characteristic on which to deprive them of a vote.

**Issue:** Is the exclusion of off-reserve members from the right to vote in band elections inconsistent with s. 15(1)?

**Held:** 5-4 denial of right to vote violates s. 15(1) and is not justified under s. 1.

**McLachlin & Bastarache JJ (majority):** Existence of grounds does not vary by context.

**Test for identifying analogous grounds:** analogous grounds serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity. – analogous grounds analysis looks for actual immutability (does it involve a characteristic that cannot be changed – actual immutability or constructive immutability – something that the government has no business asking us to change).

**Reasoning/notes**: Band members have been forced to move off of reserves for various reasons – due to size of reserves, due to actions of the government/crown, reasons beyond their control. This makes their place of residence an immutable characteristic.

Immutable characteristic – something that we often cannot change about ourselves - it is unfair for the government to single these people out because of this ground.

Benefit denied – ability to vote within the band elections. Enumerated grounds – place of residence. Discrimination - stereotype that off-reserve band members were not interested in their reserve/band elections.

**L’Heureux-Dubé (dissent):** Recognition of grounds can vary by context. Consider the following factors in determining if analogous ground:

* The characteristic is important to identity, personhood, or belonging
* The characteristic is immutable
* The characteristic is lacking in political power, disadvantaged or vulnerable to becoming disadvantaged
* The ground is included in federal and provincial human rights codes

**\*Note:** SCC has adopted majority’s position that once a personal characteristic is recognized as an analogous ground, that determination will hold across all legal contexts. Court has rejected LHD’s position that analogous grounds can vary from context to context.

### Steps 1 & 2 (&3) – Choosing Comparator Group

In *Law*, the SCC emphasized that equality is a comparative concept and that establishing different treatment on the basis of enumerated or analogous grounds involves comparing the treatment of the claimant under the law in issue to that of other persons or groups. Thus locating the appropriate comparator has become part of the s. 15 analysis.

***Law* on choosing comparators:**

* Start with claimant’s chosen comparator – but in some cases, the courts substitute/refine the comparator
* The analysis must be based on the right comparator – if you chose the wrong comparator, the court would change it, and this would often defeat the claim.
* Refinement may be necessary. Consider:
  + Purpose and effect of legislation
  + Biological, historical and sociological realities
    - **Wright says:** s. 15 is supposed to be a substantive analysis that does not just import purpose to justify government action. Substantive analysis is supposed to help identify purposes that promote discrimination. But the court here is importing purposive analysis.

The issue of whether the claimant has chosen the appropriate comparator group is typically addressed in the initial stages of the s. 15 analysis, before the analysis of disadvantage/discrimination.

#### Hodge v Canada, [2014] SCC – Mirror Comparator Test for Choosing Comparator Group

**Facts:** Hodge was in a common-law relationship with a man for many years. They separated a few months before he died. Hodge applied for survivor’s pension and was denied on the grounds that she was no longer a spouse. She claimed s. 2(1) of the *Canada Pension Plan* violated s. 15 by discriminating on the grounds of marital status. The CPP recognized married women who were not living together at the time of the death of spouse, while it did not recognize common law women who were not living together at the time of spouse’s death. Hodge alleged she belonged to a group of separated common law spouses and that she should be compared to separated married spouses.

**Held:** Denial of survivor’s pension to separated common law spouses does not violate s. 15(1).

**Binnie J (unanimous):** Disagreed with Hodge’s chosen comparator. The correct comparator is not separated but still married spouses but rather divorced spouses. Divorced spouses are not entitled to CPP survivor’s benefits, so since divorced spouses and former common law spouses were treated the same, there was no discrimination based on marital status and so no s. 15 violation. There is no need for the court to defer to chosen comparators – the comparator group is a matter of law to be chosen by the court. (Note how court’s choice of new comparator dooms the claim).

**Test for choosing comparator group – “mirror comparator”:**

* The appropriate comparator groups is the one which mirrors the characteristics of the claimant/group relevant to the benefit or advantage sought, except that the statutory definition includes a personal characteristic that is offensive to the Charter, or omits a personal characteristic in a way that violates the Charter.
  + This is a “but for” test 🡪 the appropriate comparator group is the group that would be entitled to the legal benefit sought, but for the disqualifying characteristic that the claimant has
* To apply “mirror comparator” approach:
  + Begin with analysis of legislation that denied the benefit or imposed the burden
  + Determine the “universe of people” potentially entitled to equal treatment in relation to it
  + See if claimant would fall within “universe of people” but for the disqualifying characteristic
  + Make sure comparator group won’t run contrary to law’s purpose, or deny biological, historical or sociological realities

**\*Note:** This case was a big turning point in s. 15 analysis. The decision has been highly criticized because the court’s reframing of the comparator group just makes the claim disappear. It does not allow for analysis of the actual issue (i.e. why are common law separated spouses treated different then separated married couples?).

### Step 3: Substantive Discrimination

Does the differential treatment on the basis of a prohibited ground discriminated in a substantive sense, by violating essential human dignity?

4 contextual factors to consider (from *Law*, remain part of the test in *Kapp*).

1. Pre-existing disadvantage, stereotyping, prejudice
2. Correspondence factor
3. Ameliorative purpose or effects
4. Nature and scope of the interest affected

#### M v H, [1999] SCC

**Facts:** H & M cohabitated in a same-sex relationship for 10 years. When relationship broke down, M sought spousal support from H pursuant to s. 29 of the *Family Law Act*. S. 29 of the FLA defined “spouse” as a “of the opposite sex”. M claimed the definition of spouse violated s. 15 by excluding same-sex couples, and argued the appropriate remedy was to read out “of the opposite sex” from the provision and read in “two persons”.

**Held:** Opposite sex definition of spouse in FLA spousal support provision violates s. 15 and is not justified under s.1.

**Cory J (majority):** Two purposes of spousal support provision: (1) main purpose is t protect economic interests of individuals in intimate relationships; and (2) secondary purpose is to relieve the burden on the public purse from the breakdown of relationships. Held steps 1 &2 of the s. 15 analysis were satisfied. For step 3, considered contextual factors:

1. Pre-existing disadvantage?
   1. Yes – history of disadvantage and vulnerability. The law increases this disadvantage
2. Correspondence?
   1. No correspondence – law fails to take into account actual situation of queer couples (involve same degree of conjugal/permanence as opposite sex relationships).
3. Ameliorative purpose or effect?
   1. No ameliorative purpose – those in same-sex relationships can also be financially disadvantaged
      1. Gonthier dissents on this part of the analysis – argues that the law is ameliorative to women in opposite sex relationships
4. Nature of interest?
   1. Nature of interest is fundamental (ability to meet financial needs)

There is thus a violation of s. 15(1). Court concludes the violation is not justified – fails the rational connection stage. Neither purpose of the FLA provision is served by denying spousal benefits to same sex couples.

**Gonthier (dissent):** Finds no substantive discrimination, so fails at 3rd stage of *Laws* test. Frames purpose very differently from majority. Purpose of provision is “to recognize the social function specific to opposite sex couples and their position as a fundamental unit in society, and to address the dynamic of dependence unique to men and women in opposite sex relationships. In addition to this specific social function, this dynamic of dependence stems from the roles regularly taken by one member of that relationship, the biological reality of the relationship, an the pre-existing economic disadvantage that is usually, but not exclusively, suffered by women.” Under step 3 of the s. 15 analysis, Gonthier finds there is correspondence (contextual factor #2). Finds no evidence of dependence in same-sex couples, and where it does happen, it is not due to gender distinctions. Gender distinctions are what the purpose of the FLA provision is about.

**Ontario’s response** to decision was to enact *An Act to Amend Certain Statutes Because of the Supreme Court of Canada Decision in M v H*. The Act extended benefits & burdens to same-sex couples, but did not change the definition of “spouse.” Instead, it introduced “same-sex partner” category.

## *Kapp* Period (2008-Present?)

*Kapp* Test: (see handout)

1. Has the claimant shown that the law makes a distinction, in purpose or in effect, of the basis of an enumerated or analogous ground?

* Two requirements:
  + A distinction drawn, in purpose or effect; and
  + On the basis of an enumerated or analogous ground

2. If so, and if the government relies in s. 15(2) to defend the distinction, has the government shown that the distinction is saved by s. 15(2)? If so, claim fails. If not, proceed to step 3.

* A law that draws a distinction on an enumerated or analogous ground will be save under s. 15(2) if:
  + It targets the conditions of a “disadvantaged group identified by the enumerated or analogous grounds”; and
  + It has an ameliorative or remedial purpose. A law will have ameliorative/remedial purpose if:
    - It is actually aimed at improving the situation of the disadvantaged group; and
    - It was rational for the government to conclude that the means chosen to achieve the purpose would contribute to it

3. If the distinction is not protected under s. 15(2), has the claimant shown that the distinction creates a disadvantage by perpetuating prejudice or stereotyping? If not, s. 15 is not violated. If so, s. 15 is violated and proceed to s. 1 analysis.

* Does the distinction perpetuate prejudice?
  + Consider contextual factors:
    - Pre-existing disadvantage; and
    - The nature and scope of the interest affected
* Is the distinction based on stereotyping?
  + Contextual factor to consider here – “correspondence” factor (degree of correspondence between the differential treatment and the claimant’s needs, capacities or circumstances)
* Disadvantage as an independent factor?
  + If so, ameliorative purpose may be considered here

### *R v Kapp*, [2008] SCC

**Facts:** Appellants were non-aboriginal commercial fishers. Exclusive right to fish was given to 3 aboriginal bands for a period of 24 hours. Appellants held a “protest fish” and fished during the 24 hours. Appellants were charged. Appellants claim reverse discrimination via violation of s. 15 rights.

**Held:** Fishing license does not violate s. 15, as it falls within protection of s. 15(2)

**McLachlin CJC & Abella J (majority):** S. 15(1) and s. 15(2) have complementary roles. S. 15(1) prevents discrimination on enumerated or analogous grounds. S. 15(2) enables governments to combat discrimination, helping disadvantaged groups. Develop a new test for s. 15 analysis and attribute it to the *Andrews* case (**Wright says:** a lot of casual reformatting of previous case law in this case).

**The Kapp Test**:

1. Does the law create a distinction based on an enumerated or analogous ground?
   1. Is there a distinction, in purpose or effect, or burdens imposed or benefits denied?
   2. Is the distinction on the basis of an enumerated or analogous ground?
2. Is this distinction saved by s. 15(2)? Will be saved by s. 15(2) if:
   1. The law/program has an ameliorative or remedial purpose. This will be achieved when:
      1. Purpose is aimed at improving situation of disadvantaged group; and
      2. Rational for government to conclude the means adopted will serve the end.
   2. The law/program targets a disadvantaged group identified by an enumerated of analogous ground; and
3. Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? – Abandonment of human dignity as the focus of the test (under Law period). Prejudice is associated by intentional discrimination - Law was motivated by the belief of inferiority of a particular group. Stereotyping – associates a specific characteristic of a group with the entire group.

**Things to note:**

* Court adopts a 2-part test for the s. 15(1) analysis (steps 1 &3), rather than their previous readings of *Andrews* as a 3-part test
* **Human dignity** is gone from the analysis – the new focus is on disadvantage, prejudice and stereotyping
* Prejudice: a belief in the inferiority of a particular individual due to their membership or association with a particular group
* Stereotyping: does not necessarily involve prejudice, although it can. It is a generalization that is treated as though it captures some individual due to their perceived membership in a group. Can be positive or negative.
* Majority frames the s. 15(1) analysis around 2 concepts:
  + Perpetuation of “prejudice or disadvantage”
  + Stereotyping on the basis of grounds that don’t correspond to the needs of a group
* But seemingly 3 concepts underlie s. 15(1) analysis:
  + Prejudice
  + Stereotyping
  + Disadvantage
    - It is unclear from the decision what the role of disadvantage is in the analysis. Some believe that disadvantage is only in relation to prejudice or stereotyping, so it doesn’t add anything separate to the analysis. Others believe that it is a separate consideration that adds to the analysis by bringing in historical disadvantage.
* Role of contextual factors:
  + Court brings them into the analysis under the 3rd stage of the entire s. 15 analysis. They are not relevant to human dignity, but rather to whether the claimant has been discriminated based on stereotyping/prejudice/disadvantage
  + Now consider these factors at step 2 of the Kapp test - Pre-existing disadvantage (factor 1) and the nature/scope of the interest impacted (factor 4) go to the “perpetuation of disadvantage and prejudice.”
  + Correspondence (factor 2) goes to stereotyping. If the distinction responds/corresponds to the actual needs or circumstances of the individual, there is no stereotyping and so no discrimination
  + Ameliorative purpose (factor 3) goes to the s. 15(2) analysis (and maybe to disadvantage? This is a “tipping of the hat” towards the idea that disadvantage does have an independent role in the s. 15(1) analysis).
* Role of s. 15(2)
  + Prior to *Kapp*, s. 15(2) was just an interpretive aid to s. 15(1) and didn’t have an independent role (*Lovelace*)
  + Court holds that ameliorative programs are not reverse discrimination
  + s. 15(2) allows anti-discrimination measures, and operates as an absolute defence to s. 15(1)
  + Court holds that on the purpose and NOT the effect of the law is considered under s. 15(2) in determining whether there is an ameliorative purpose. Court responds to potential criticism of this by saying the don’t have to accept government’s purported purpose, they can interrogate it to ensure its genuine.
  + Ameliorative purpose needn’t be the sole purpose
  + The purpose cannot be to restrict of punish a group

**Application to case:** Step 1 met – distinction is drawn on the basis of race. Step 2 is met, so the program is saved by s. 15(2). The purpose of the program has an ameliorative purpose and the means chosen were rationally connected to the purpose. It is irrelevant that the program had additional purposes, like managing the fishery. The program also targets a disadvantaged group – the disadvantage of aboriginal peoples is undisputable. So no need to consider s. 3 because the policy is saved under s. 15(2).

Criticism of Kapp:

* Focus on stereotyping and prejudice.
* Law helps one disadvantaged group but, in the process, hurts another disadvantaged group.
* The extent to which s 1 Oakes factors have been brought into the analysis.

## Post-*Kapp* Period (Present?)

SCC on s. 15 post *Kapp*:

* *Ermineskin* (2009 SCC): SCC drops all reference to “disadvantage”; focuses on prejudice and stereotyping
* *AC v Manitoba* (2009 SCC): SCC again drops all reference to “disadvantage”; focuses on prejudice and stereotyping

### *Withler v Canada*, [2011] SCC – COmparator discussion

**Facts:** Plaintiff’s are widowers whose husbands died (husbands were civil servants and Canadian Forces members). Supplementary death benefit they received was reduced because of their age. Younger plan members received more money because other benefits, such as pensions, were available for older members, but younger members received no other benefits. Older members claimed discrimination on the basis of age.

**Held:** Reduced supplementary death benefits for older recipients do not violate s. 15. (Note that if the claim had been successful, the cost to the government would have been $2.6 billion).

**McLachlin CJC & Abella J (unanimous):**

* Affirms the *Kapp* test, but does not clarify role of disadvantage. References it, but does not discuss it
* Affirms role of contextual factors, but adds additional factor:
  + **Contextual factor #5**: if a law is part of a larger benefit program, must consider the ameliorative effects of the law on others, and the multiple interests it balances – where the government is balancing a multiplicity of interests, a discrimination is less likely to be found. This imports the interests of others (society as a whole) into the s 15 claim (which should be about individuals).
    - **Wright says:** this looks like s. 1 analysis…
  + Also suggests the factors “need not be expressly canvassed in every case” – so contextual factors are optional? (But note the Court still goes through them all)
* Adopts more flexible approach to comparison (Mirror Comparator Approach)
  + Previous approach: mirror comparator group (*Hodge*)
  + SCC now acknowledges problems with comparator group (becomes search for sameness, overlooks intersectionality, places unfair burden on claimants)
  + **In step 1** (distinction in purpose/effect on enumerated/analogous grounds), **it is NO LONGER NECESSARY to pinpoint a particular (mirror) comparator**. Only has to show a distinction for one or more prohibited grounds. BUT, for **adverse effects** discrimination, there might be more work for the claimant here (e.g. may have to provide evidence of historical disadvantage to help court see nature of distinction claimed – that reveals differential treatment)
  + **In step 2** of s. 15(1) (distinction create a disadvantage by prejudice/stereotyping) comparison can help explain disadvantage, but not necessary to have comparator group. BUT, strategically as a claimant, you might want to draw comparisons to highlight your disadvantage.

Application to case: Step 1 is met – distinction based on age. No comparator group used (they didn’t have to identify a distinct comparator group). There was no attempt by government to invoke s. 15(2), so move to step 2. Court found no discrimination because of the new 5th contextual factor. Held policy responded to needs of younger people – can’t focus just on the supplementary death benefit, must look at it in the context of survivor’s benefits as a whole. There is other funding provided for older people.

**Takeaways:** No clarity about the role of “disadvantage.” Addition of 5th contextual factor; other contextual factors are helpful but they aren’t always necessary to consider. Playing down the role of comparison in the s. 15 analysis.

### *Kahkewistahaw First Nation v Taypotat*, [2015] SCC

**Facts:** Community Election Code adopted by First Nations group that governed elections of band chief. Code required chief have a grade 12 education. Mr. Taypotat had served as chief for 27 years, but was prevented from running for election for chief because he only had a grade 10 education. He argued the Code violated s. 15.

**Held:** Eligibility provision in Community Election Code does not violate s. 15.

**Abella J (unanimous):** The proper approach to s. 15 is to adopt a “flexible and contextual” inquiry into whether a distinction has the effect of perpetuating “arbitrary disadvantage” on the claimant because of his or her membership in an enumerated or analogous group. (Note the 2 new references here – prejudice and stereotyping are gone). Affirms *Kapp* test, and step 1 remains the same.

Second step of s. 15(1) analysis: “…focuses on arbitrary – or discriminatory – disadvantage, that is, whether the impugned law fails to respond to the actual capacities and needs of the members of the group (contextual factor 2) and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage (contextual factor 1).”

* Note reference to arbitrary disadvantage and discriminatory disadvantage
* Note the words “prejudice” or “stereotyping” do not appear in this decision at all
* Contextual factor 2 “correspondence factor” and factor 1 “historical/pre-existing disadvantage” are now imported directly into the second step of the s. 15(1) analysis. They are no longer separate factors.

Application to case: Claim fails at step 1 – no distinction on the basis of a prohibited (enumerated or analogous) ground. The law did not directly discriminate on the basis of age or residence on reserve. The law may indirectly make this distinction, but Taypotat failed to adduce evidence to show a distinction created on these grounds.

**What to make of this shift in focus?**

* For now, treat arbitrary disadvantage (and perhaps just disadvantage) as alternative basis to find discrimination at step 2 of the s. 15(1) analysis
* This may be the beginning of a new era for s. 15, with a permanent shift away from prejudice and stereotyping. But its too early to tell.

**ON EXAM, add this in as an alternative step 2 to the s. 15(1) test. *Taypotat* suggests that (arbitrary) disadvantage is a consideration at step 2 of the s. 15(1) test and the test set out by Abella J can be used to assess whether there is arbitrary disadvantage.**

### *Centrale des syndicats* [2018] scc

**Facts:** Law aimed at compensating for a historically disadvantaged group, that further disadvantages them. Pay equity law in Quebec. Law requires all employers with 10 or more employees to ensure pay equity for women by 2001; adjusting their wages if necessary (equal pay for work of equal value). Compared jobs within workplaces to determine equal pay for women within each organization. But what to do with workplaces with no male comparators? It took 6 years longer to determine this for workplaces with no male comparators.

**Issues:** Did the delay discriminate against the women who were forced to wait for pay equity?

**Held:** Abella J (for 4 judges) s 15 was violated but the violation was justified under s 1. Cote J (for 4 judges) s 15 is not violated. McLachlin (on her own) s 15 violation not justified. 5-4 majority held the delay violated s 15. 8 of 9 judges dismissed the s 15 challenge.

**Notes:  
Step two of s 15(1) Test:**

* Does the law have the effect of reinforcing perpetuating or exacerbating disadvantage?
* What is missing?
  + Emphasis is placed on disadvantage
  + At stage 2 you have to determine, is the law imposing a burden or denying a benefit on those with a historical disadvantage.
* Focus is shifted to disadvantage.

**Application of s 15(1) test**

* **Stage 1** – Majority - Distinction is on the basis of sex – pay equity law draws a distinction between male and female employees whether or not the employees are in the same workplace. Sex is an enumerated ground of discrimination. Categories between mixed gender and female dominated workplaces would not exist but for the distinctions draw for some time between men and women in the workplace. Adopting the *Withler* view, of a more relaxed comparator model.
  + Dissent - Comparator group – should be women in workplaces with men, who didn’t have to wait for the delay to – this turns on the employment location not sex. Viewing this in a narrow context. Strict approach to comparators.
* **Stage 2** –Majority - Easily satisfied, pay discrimination for 6 additional years resulted. Impact/effect of the law was clear. It further disadvantaged these women for another 6 years.
  + Dissent – contextual factors addressed; ameliorative nature of law is emphasized. Quebec was actually trying to address this issue in the workplace – this is about trying to help women, not harm them.

**Application of S 15(2) Test**

* Majority – only applies to cases of reverse discrimination, not claims of the intended beneficiaries of ameliorative laws. Law is aimed at improving the conditions of women in the workplace; the law cannot shield its legislation because it is helping some women, but further disadvantaging another group of women.
  + Dissent – doesn’t expressly disagree with the majority.

**Step 2 of s 15(1) – Test Now?**

* Does the law have the effect of reinforcing, perpetuating or exacerbating disadvantage, including historical disadvantage?
* Ways to satisfy – does the law, in purpose or in effect, reinforce, perpetuate or exacerbate:
  + Prejudice?
  + Stereotyping? Or
  + Disadvantage?
* Use contextual factors to support a claim
  + Take cues from Kapp and later cases – where factors will be helpful to support particular types of claims

# Remedies

This is step 4 of the General Framework for Charter analyses.

**ON EXAM**, exercise reasonable judgment about which remedy to use, unless you have been explicitly told not to discuss remedies.

Two provisions are relevant in considering remedies:

1. S. 52(1) of the *Constitution Act, 1982* (the supremacy clause); and
2. S. 24 of the Charter

S. 52(1) provides a remedy for a law that violates the Charter. From the Big C Constitution.

S. 24(1) provides a remedy for government acts or inaction that violate the Charter. S 24 (2) provides a special remedy for evidence obtained in violation of the Charter.

There is an idea that you can’t combine a s. 52 and a s. 24 remedy. It has happened, but not very often. If you are seeking a s. 52 remedy, then you are invalidating a law. If you are invalidating a law, then the government action should fall into line. So if you see a s. 52 remedy, then you don’t need to seek a s. 24 remedy as well.

## Remedies Under s. 52(1)

**S. 52(1) of the *Constitution Act, 1982*** – The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

* This applies to all breaches of the Charter AND the Constitution

Remedies include (see handout):

* Declaration of invalidity (striking down) – for the entire law
* Suspended declaration of invalidity
* Severance and partial invalidity
* Reading in
  + This method is very controversial
  + Note that the court doesn’t have the power to actually change the wording of the statute, so the language of the statute stays the same. Must therefore be familiar with the case law
* Reading down
* Constitutional exemptions
  + The Court has never actually granted this as a remedy, they have only alluded to the possibility of it in *obiter*
  + Caveat: in the *Carter* case, during the suspension of the declaration of invalidity the Court allowed people like Gloria Taylor to come forward to seek an exemption
  + Exclude a specific individual or group of individuals from a part of the constitution or charter from its application.

## Remedies Under s. 24(1) – Charter Breaches Only

**S. 24 of the *Charter* –** (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

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

* **Applies** **ONLY to Charter breaches**

Remedies include (see handout):

* Declarations
  + No order for government to actually do anything, but we usually expect that where the court has said a government action has infringed rights, the government will make changes
* Defensive remedies:
  + Dismissing a criminal charge
  + Quashing a search warrant
  + Quashing a committal or conviction in a criminal case
  + Enjoining the government action with an injunction
  + Exclusion of evidence obtained in breach of the Charter (s. 24(2))
* Affirmative remedies:
  + Ordering the government to pay damages or costs
  + Ordering the government to provide a state-funded lawyer
  + Ordering the return of goods improperly seized
  + Mandatory injunction requiring positive government action
  + Supervised court orders allowing court to supervise proper completion of terms of a court order