

Charter Framework

I. Application

S 32 Analysis

32(1) 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.

General Principles

- The *Charter* directly binds government (s 32) and indirectly shapes how we interpret common law (*Dolphin Delivery dicta, Hill*).
 - Applies to laws and statutes enacted by Parliament or provincial legislatures (Section 32(1))
 - Applies to **legislative, executive, and administrative branches of government** (*Dolphin Delivery*)

Category 1: Governmental Nature¹

Issues: What level of power or delegation turns a private actor into a state actor subject to the *Charter*?

Rules:

- There are two ways an entity may engage the *Charter*: **a)** through its nature – it is itself government by virtue of control; or **b)** through its activities (*Eldridge*).
- When an entity is governmental in nature, the *Charter* will apply to all its activities – regardless of whether they are regulatory, contractual, or “commercial” (*Lavigne*).
- However, when an entity is nongovernmental, the *Charter* will only apply to specific governmental acts (**GVTA**).

Analysis:

1a) Controlled by Government (*McKinney*)

As in *McKinney*, a plaintiff may argue the *Charter* does apply because:

- The entity is a **creature of statute** ✗ (government **funded**, subject to government **regulation**, statutory **incorporation** or authority)

¹ **Note:** when an entity is governmental in nature, the *Charter* will apply to all its activities. However, when an entity is nongovernmental, the *Charter* will only apply to specific governmental acts.

- Many private actors, such as corporations, are established by statute but not governmental in nature (*McKinney*)
- The entity performs a **public service** / has a **public purpose** ✗ (ie education)
 - Many entities perform significant public services but are undoubtedly not part of the government: railroads, airlines, symphonies (*McKinney*)
- The test adopted by the SCC was the **Control Test** ✔:
 - Does this actor exist under “**routine and regular**” government control, or do they **retain legal autonomy**?
 - The key issue is whether the government exercises such **systematic influence** over the structure, policies, or daily operations that the entity is effectively a branch of government (*McKinney, Stoffman*)
 - Relevant factors may include:
 - **Statutory foundation** (“creature of statute” can be relevant, but not determinative: *Multani*)
 - **Operational autonomy** (can it manage its own affairs, such as appointments? Are its decisions subject to gov’t approval or veto? Does the gov’t dictate how it operates in practice?: *Stoffman*)
 - **Financial control** (does it retain the ability to allocate its own funds?: *McKinney*)
 - **Powers of compulsion or regulation** (can it enact binding rules on the public – a power normally associated with government?: *McKinney*)

1b) Entities Exercising Governmental Functions (*Godbout*)

- If an entity is effectively an “**emanation of government**,” it must be subject to the *Charter*.
- **Government functions**: implementing a **specific government policy** or exercising **statutorily delegated powers on behalf of** government.
- **Municipalities** fit this definition.

Godbout: Factors for “Governmental Function”

- Municipalities are democratically elected and accountable to their constituents (**structurally analogous** to Parliament and provincial legislatures)
- They possess a general **taxing power**
- They **make laws, administer them and enforce them** in a defined territorial jurisdiction
- They possess **powers of coercion**
- They owe their existence and law-making authority to enabling provincial legislation

- **Policy rationale:** prevents governments from sidestepping Charter obligations by delegating power to separate “non-governmental” bodies.

Governmental Entities	Not Governmental Entities
● Community college in <i>Douglas</i>: “was a Crown agency established to implement government policy” and thus “unlike the universities who manage their own affairs.”² ● Airport Authority in <i>Booyink</i>: significant degree of control exercised by federal, municipal, and provincial levels of government ● School board in <i>Multani</i>: board was a “creature of statute and derives all its power from statute” ● Municipality in <i>Godbout</i> ● Greater Vancouver Regional District operating public transit in <i>GVTA</i> (relied on <i>Godbout</i>)	● University in <i>McKinney</i>: although it was (and historically had been) subject to government regulation and funding, it retained legal autonomy: the ability to <i>manage its own affairs</i> and <i>allocate funds</i>. ● Hospital in <i>Stoffman</i>: although it had a government appointed board + had to approve policies with the minister of health, <i>routine control</i> was in the hands of the hospital board of trustees. ● Canadian Blood Services in <i>Freeman</i> (legal autonomy) ● Organizing committee for Paralympic Games in <i>Sagen</i> (legal autonomy) Note: The <i>Charter</i> can still apply to specific activities of these actors.

Unsettled

- Public schools
- Crown corporations such as Canada Post

Category 2: Government Activities of Non-Governmental Actors

2a) Specific Governmental Programs (*Eldridge*)

Issue: Is there a direct and precisely-defined connection between the impugned activity and a **specific governmental policy**? (*Eldridge*)

Rules:

² *Douglas College* distinguishing facts: all 7 board members **appointed by the Lieutenant Governor in Council (can be hired or fired at will)**; governing body is set up in a way where there is no independence, therefore, **no legal autonomy**; and the Minister exercises “**direct and substantive control**” over the implementation of the budget.

- When an entity is non-governmental but implementing a **specific governmental program or policy**, those activities may be subject to *Charter* review (*Eldridge*)
- Merely performing what may be loosely defined as a **“public function”** is **not sufficient**. There must be a **“direct and precisely-defined connection”** between a specific government policy and the entity’s impugned action.³
- **Rationale**: “It is a basic principle of constitutional theory that since legislatures may not enact laws that infringe the Charter, they cannot authorize or empower another person or entity to do so” (*Eldridge*)

Analysis:

- In *Eldridge*, the failure to provide sign language interpretation was **“intimately connected”** to the medical service delivery system instituted by the legislation”
 - Specific connection: the statutes *required* “medically necessary services,” hospitals *delivered* those services, and the failure to provide sign language directly affected access to that *statutorily mandated* core health service.⁴

2b) Entities Exercising Statutory Powers of Compulsion (*Slaight, Blencoe*)

- A non government entity to which a statute has conferred “a power of compulsion not possessed by private individuals” will be bound by the *Charter* (*Slaight*)
- This usually refers to **administrative tribunals** and **labour adjudicators**. They will be bound if they act under statutory powers (*Blencoe, Slaight*).
 - Ex: In *Blencoe*, the *Human Rights Code* granted the Commission power to investigate complaints, decide how to deal with such complaints, and to compel the production of documents. Thus, the Charter applied.
 - Ex: In *Slaight*, the Charter applied to a *Canada Labour Code* adjudicator because he was exercising power conferred by legislation

State Responsibility for Private Acts

- The test for whether the Charter applies to the acts of private persons is whether they are acting **on behalf of the state** or **“on their own initiative”** (*Buhay*).⁵
- This may change if the person was exercising a “citizen’s arrest” pursuant to s494 of the *Criminal Code*. According to the ABCA, a citizen conducting an arrest is exercising a delegated government function (*Lerke, Dell, Contra: Skeir*)

³ Kene: analysis needs to include this point!

⁴ The Medical Services Commission had delegated authority to decide whether a service was “medically necessary” pursuant to the *Medical and Health Care Services Act*. However, the decision was **not a matter of internal management** but an **“expression of government policy.”**

⁵ In this case, security guards searched a rented locker at a Winnipeg bus depot, and the Court found they “acted entirely on their own initiative”

Government Inaction

- Sometimes governments have *duties to deliver certain positive entitlements*. Their failure to do so will engage the *Charter*.⁶
 - For example, governments have a positive obligation to fund minority language educational facilities under **s.23** and interpreters under **s.14**.
- There is nothing in the wording of s.32(1)(b) to suggest that the Charter only applies to acts encroaching on citizens' rights. The subsection speaks only of matters within the authority of the legislature – this includes inaction (*Vriend*).
- Once the government **chooses to implement a policy or program**, it cannot exclude groups in a way that creates discrimination (*Vriend*)
- **Underinclusive legislation is reviewable**, but courts should be more cautious about reviewing pure legislative silence (*Dunmore*).
 - The state is not normally obliged to act where it has not already legislated (*Dunmore*)

Application to the Common Law

Applies	Does Not Apply
<i>Direct</i> → To common law if common law is the basis of governmental action which allegedly infringes a right or freedom (<i>Dolphin</i>) → To common law where it is relied on by the government for a public purpose (<i>BCGEU</i>)⁷ → To common law where the government is a party to the action (<i>BCGEU</i>) → If the Crown invokes a common law rule in criminal or regulatory proceedings (<i>Swain, Dagenais</i>)	→ To common law in disputes between private litigants where there is no direct governmental action (<i>Dolphin; Hill</i>) → Charter rights do not exist absent state action (<i>Hill</i>)

⁶ **Note:** s.15 does not typically impose a duty on a government to initiate new programs to combat inequality; underinclusive = government has already acted but failed to include certain groups in a discriminatory manner. There is also typically no duty on the state to protect fundamental freedoms under **s.2**. Freedom of expression “prohibits gags, but does not compel the distribution of megaphones” – if the government has already provided an expressive platform, excluding a group will engage the Charter.

⁷ “Government” in BCGEU included the court acting in its public capacity

<i>Indirect</i> → Courts must develop and apply the common law in accordance with Charter values (<i>Dolphin dicta, Hill</i>).	
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Examples:

- In *Dolphin*, the BCSC granted Dolphin Delivery Ltd an **injunction** against Purolator employees who were peacefully picketing, as their acts were tortious. The **Charter did not apply**, because both parties were private and there was no direct governmental action being challenged.
- In *BCGEU*, Chief Justice of BCSC issued an injunction (on his own motion) restraining government employees from picketing a courthouse. He relied on the common law rule of contempt.
 - ◆ The **Charter applied** because the order was “public” in nature (protecting the administration of justice).
 - ◆ Thus, the case demonstrates that government reliance on common law will engage the *Charter*.

★ **Interpreting the Common Law in Light of Charter Values** (*Hill*)

A private litigant can argue that the common law is inconsistent with Charter values. They will bear the burden of showing **a)** that the common law fails to comply with Charter values and **b)** that it should be modified (requires balancing Charter values are against the common law’s objective): *Hill*

- In *Hill*, the Court held that common law of defamation was a proportionate restriction on the Charter value of free speech, given the public interest in protecting individuals’ reputations.
- In *Swain*, the Crown relied on a common law rule allowing it to raise the insanity defence against the accused’s wishes. The SCC found the rule inconsistent with Charter principles and reformulated it.
- In *Dagenais*, the SCC adapted the common law on publication bans to align with freedom of expression.
- In *Halpern*, the ONCA adapted the common law definition of marriage to accord with s 15 equality rights (previously was exclusive to men and women; now contemplates a union of “two persons”).

S 33 Analysis

If the *Charter* applies, is there an override clause?

Section 33

(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision

thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

- (3)** 5 year limitation period (notwithstanding declaration made under s.33 ceases to have effect 5 years after it comes into force or on an earlier date as specified in declaration)
- (4)** Parliament or the legislature may reenact a declaration made under s(1)
 - 5-year limitation period can be extended / reviewed

Effect

- Can shield laws from scrutiny re: **s.2, 7-12, and 15**; as if provisions of *Charter* do not exist, relative to impugned act or provision, for **5 years**
 - Very rarely used – only one case on overrides (*Ford*)
- Can allow a legislature to prioritize rights that are not codified in the Charter
 - **Ex: QC's *Laicity Act***: reflected distinctive Quebec values, not sufficiently accommodated by *Charter*. Thus, s.33 override allowed QC to prioritize their values.

Requirements for Overrides (*Ford v Quebec*)

- 1)** Must be **express**, not implicit
- 2)** Must refer to **Charter section** to be overridden (which out of 2, 7-15 it wants to override)
 - Referring by **section numbers** is sufficient
 - Can be applied in an omnibus fashion
- 3)** Can be used for **prospective overriding only** – cannot override past acts.⁸

Ford v Quebec (1988 SCC)

- Since QB was not consulted and did not approve the Charter for patriation, it used s. 33 to shield its laws through an **“omnibus amendment enactment.”**
 - Repealed and re-enacted all pre-*Charter* provincial legislation with this standard clause: “The Act shall operate notwithstanding the provisions of s. 2 and 7 and 15 of the Constitution Act, 1982”
 - Omnibus = many things combined in one bill
- The Court held that this use was valid.
 - There was no reason the specific guaranteed right or freedom had to be explicitly addressed in a notwithstanding clause, and the omnibus enactment was not a problem.

⁸ Override applies from its date of enactment onward, affecting future legal consequences – can't affect *Charter* issues that arose before override was enacted

II. Infringement

If the Charter applies, has the government infringed a Charter right or freedom? (ss.2-23)

1. Analyzing the Scope of a *Charter* Right

- The burden of proving a Charter infringement lies on the claimant. The civil standard (a preponderance of probabilities) applies.
- At this stage, we use principles of interpretation to define the **scope of the right** or freedom in question.
- Constitution is a "living tree capable of growth and expansion within its reasonable limits" (*Edwards* cited in *Hunter*)

A) Purpose

- In Canada, we use a **purposive** approach (*Hunter v Southam*).
- Before judging the scope of a right, the court must specify its **purpose** and delineate the **interests** it is meant to protect (*Hunter v Southam Inc*)
 - ◆ Relevant factors for assessing **purpose** of right or freedom (*Big Drug Mart*):
 - The **character and larger objects** of the *Charter*
 - Purpose of the Charter broadly is to **protect** individual rights and **constrain** government action inconsistent with them (*Hunter*)
 - **Language** chosen to articulate the specific right or freedom (text itself)
 - **Historical** origins of the concepts enshrined
 - Meaning and purpose of the **other specific rights** with which it is associated within the text of the Charter (the **structure** – interpretation of one right should not conflict with other rights)

B) Scope

- We should give rights a “large, liberal, and purposive” interpretation (*Quebec 2020*). There is no need to read internal limitations into them; we have s.1 (*Therens*).
- The text must anchor interpretation – the words themselves form the “**outer bounds**” of the interpretive enterprise (*Quebec 2020*)
- Aids to interpretation (Big M)
 - Interpretative Provisions in the Charter (s 25-31)
 - **Section 25:** Shall not be construed so as to abrogate or derogate Aboriginal rights
 - **Section 27:** Charter has to be interpreted in a manner that is consistent with the multicultural heritage of Canada⁹
 - **Section 28:** Rights and freedoms are guaranteed equally to males and females
 - Parliamentary and Committee Debates (Hansard)

⁹ Has been used both as an interpretative aid and as an element of s.1 analysis. This illustrates the difficulty of ascertaining the impact of these provisions on the rest of the *Charter*.

- Not to be given too much weight – inherently unreliable, as they only represent the words of the few (*Re BC Motor Vehicle*)
- Comparative and International Sources (Quebec 2020)
 - There is a **presumption of conformity** with international law (*Quebec 2020*)
 - American Bill of Rights (but not too much reliance can be placed on this: *Keegstra*)
 - UN Universal Declaration of Human Rights (1945) was a source for the *Charter*
- Academic and Scholarly Sources

Section 2(B): Freedom of Expression

Section 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.

Irwin Toy Test for s.2(b) Infringement¹⁰

1) Was The Activity Within the Scope of s.2(b)?¹¹

- The scope of the right to freedom of expression is circumscribed by its purposes: **a)** democratic participation, **b)** search for truth, and **c)** self-actualization (*Keegstra*).
- s2(b) protects “**all expressions of the heart or mind**, however unpopular or distasteful” (*Irwin Toy*).
- “If the **activity conveys or attempts to convey a meaning**, it has expressive content and ***prima facie* falls within the scope** of the guarantee” (*Irwin Toy*).
- An expression need not be rational or tasteful to merit s.2(b) protection (*Keegstra*).

Issues:

a) Conduct vs Speech

- Conduct and speech are both protected *if they attempt to convey meaning*.
- Thus, it may be necessary to determine whether conduct is a “purely physical act” or an “expression of the heart or mind.” (*Irwin Toy*).

Public demonstration

✗: Collective action rather than “expression” (*Dupond 1978*; pre-*Charter* case)

¹⁰ All content in this section is from *Irwin Toy* unless otherwise attributed.

¹¹ First step looks at activity being restricted; then focus shifts to purpose/effect of gov’t action

Secondary picketing	✓: Picketers convey a persuasive message (<i>Dolphin</i>)
Leafleting	✓: Leafleting seeks to persuade (<i>UCFW Local 1517 v KMart Canada</i>)

b) Form vs Content

→ Both form and content are protected under s.2(b).

Language of communication	✓: Form, such as language, colours content and therefore conveys meaning (<i>Ford v Québec</i>)
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c) High Value vs Low Value Expression

- Some argue that activities near the “core” of freedom of expression merit protection under s.2(b), while activities further removed from the “core” do not.
- Courts have rejected this distinction (*Keegstra, Irwin Toy*). We do not consider the value of the expressive content when determining whether an activity comes within s.2(b).

Hate speech	✓: Clearly attempts to convey meaning (<i>Keegstra, Zundel, Ross</i>)
Tortious activity	✓: As long as it conveys meaning and is nonviolent (<i>Dolphin</i>)
Pornography or obscenity	✓: Physical communication that attempts to convey meaning (<i>Butler</i>) Exception: violence or threats of violence remove porn from protection (<i>Khawaja</i>)
Defamation	✓ (<i>Hill, Grant v Tolstar</i>)
Child pornography	✓: Physical communication that attempts to convey meaning (<i>Sharpe</i>) ¹²
Commercial advertising	✓: <i>Irwin Toy, Ford v Quebec</i>

¹² It may be helpful to point out the inclusion of child pornography under section 2(b) in indicating how low the bar is (on the ground).

1a) Does the Method or Location of the Expression Remove the Activity from s.2(b) Protection?

- “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” (*Montréal v 2952-1366 Québec inc*)
- **a) Form:** The variety of ways in which content can be conveyed (ie. speech, artistry, physical gestures or actions)
 - **Language** is protected under s.2(b) (*Ford*).
 - Does it include **violence** (*Dolphin*) or **threats of violence** (*Khawaja*)? If so, not protected under s.2(b).¹³
- **b) Place:** Would expressing oneself in this place **undermine the values** underlying freedom of expression?
 - **Relevant factors:** public or private, current and historical function, any other aspects of the place (*Montréal*)¹⁴
 - **Ex:** A street was analogous to a public square, a historical locus of free expression. In public squares, individuals could speak freely without threat of harm or backlash (*City of Montréal*).

3) Was The Purpose or Effect of the Government Action to Restrict Freedom of Expression?

a) Purpose

i) Is gov’t purpose to **restrict expressive content** by singling out particular meanings not to be conveyed? → *prima facie* infringement

- Restrictions on **hate speech** come within this category (*Keegstra*), because the test for hate speech concentrates on the specific meaning conveyed (*Whatcott*)
- Restrictions on **defamation** would also come within this category, because the test focuses on specific defamatory words (*Grant v Tolstar*)

ii) Is gov’t purpose to **restrict a form of expression** to **control access** to the meaning conveyed or the **ability** of the conveyer to do so? → *prima facie* infringement

- Restrictions on **obscenity** would come within this category, because the “community standard” test looks for content that would offend the public if accessed widely (*Butler*)

iii) Is gov’t purpose to control only the **physical consequences** of an activity (ie. noise or other physical intrusions), regardless of meaning? → not a limitation

- The distinction is regulation of the time, place, and manner of expression *tied to content* vs regulation of time, place, and manner of expression *regardless of content*
 - **Ex:** rule against handing out pamphlets → restriction on a manner of expression “tied to content” (even if purports to control litter)

¹³ “Violent expression is not protected...because the method by which the message is conveyed is not consonant with Charter protection” (*Montréal*): violence prevents democratic dialogue, self-fulfillment, and truth-seeking.

¹⁴ However, administrative inconvenience will not deny someone the right to express themselves in a particular place.

- **Ex 2:** rule against littering → restriction on physical consequences of expression not “tied to content”
- However, watch for **rules framed neutrally** where the true purpose is to control attempts to convey a meaning.
 - **Hint:** Ask whether the “mischief” being controlled is in the meaning of the activity or its influence on the behaviour of others, or rather only in the direct physical result of the activity

b) Effects: If the purpose of the government action was not to restrict attempts to convey meaning, did the action do so in **effect**?

→ **Note:** Where the effect is at issue, the plaintiff must demonstrate that the effects of the law undermine at least one underlying purpose of the guarantee.

Types of Freedom of Expression Infringements (For Step 3 of *Irwin Toy* Test)

Activity	Nature and Purpose or Effects of Restriction	Prima Facie Infringement
Commercial Advertising (<i>Irwin Toy</i>)	Nature: Regulatory prohibition Purpose: i) To restrict expressive content by singling out particular meanings	✓

Secondary Picketing (<i>Dolphin</i>)	Nature: Injunction Purpose: iii) To restrict physical consequences tied to meaning	✓
Hate Speech (<i>Keegstra</i>)	Nature: Criminal Code prohibition Purpose: i) To restrict expressive content by singling out particular meanings → Aims directly at words, singles out specific content	✓
Undue Sexual Exploitation (<i>Butler</i>)	Nature: Criminal Code prohibition Purpose: i) to restrict expressive content by singling out particular meanings and or ii) to restrict a form of expression to control access to the meaning conveyed	✓
Obscenity (<i>Little Sisters</i>)	Nature: Customs Tariff prohibition on importation of gay and lesbian materials Purpose: i) to restrict expressive content by singling out particular meanings and or ii) to restrict a form of expression to control access to the meaning conveyed	✓
Defamation (<i>Hill, Grant v Tolstar</i>)	Nature: Tortious liability Purpose: i) To restrict expressive content by singling out particular meanings → Test for defamation aims at particular words (<i>Grant</i>)	✓

Section 1 Analysis for Freedom of Expression

Section 7: Life, Liberty, and Security of the Person

Section 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**.

General Principles

- Section 7 grants **one right**, not two (*Bc Motor Vehicle*).
 - ◆ This means state action that affects life, liberty, or security of the person but complies with the principles of fundamental justice does not violate s 7.
 - ◆ Similarly, state action that is inconsistent with fundamental justice but does not affect life, liberty, or security of the person does not violate s 7.¹⁵
- A law or state act can **engage multiple interests** under s.7.¹⁶

¹⁵ Ex: In *R v Transport Robert Ltée*, a penal statute of absolute liability was upheld because, although it violated the PFJs according to which we don't punish the morally innocent, it did not affect life, liberty or security of the person

¹⁶ Ex: in *Carter*, the law engaged the right to life (pressured individuals to end life early), liberty (infringed freedom to make fundamental personal decisions), and SOP (forced people to endure severe physical and mental suffering).

Structure of a Section 7 Claim (*Re BC Motor Vehicle Act*)

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

- Encompasses all individuals physically present in Canada (*Singh*)
 - ◆ This includes **non-citizens**.¹⁷
- Corporations → no (*Irwin Toy*)
 - ◆ However, a corporation accused of a criminal offence can raise the Charter in its defence irrespective of whether it enjoys the particular right or freedom in question (*Big M; Wholesale Travel*)
- Fetuses → no (*Daigle v Tremblay*)

Note: If the complainant is not in one of these categories, consider whether they are **analogous** to one of those categories.

2) If so, has the claimant been deprived of their right to **life, liberty, or security of the person** by a law or some other form of state action?

Life

★ Engaged where government action **causes, creates a threat of, or increases the risk of** death (*Chaouilli, Carter*)

Ex:

- Government action creates serious threat to an individual’s life by preventing him or her from obtaining **access to medical care** (*Insite*)
- Pressuring someone to **take their life prematurely** over fear of being incapable of doing so when it becomes necessary (*Carter v Canada*)
 - There is no duty to live (*Carter*)
- **Extradition** to a country where **death penalty** is a possible penalty

Liberty

★ Engaged where government action threatens to restrain someone physically or deprives them of the ability to make a fundamental personal choice (*Children’s Aid Society of Toronto*)

Ex:

- Imprisonment or possibility thereof (*Re BC Motor Vehicle Act*)¹⁸
- Detention in non-criminal contexts, such as involuntary mental health detentions or immigration detentions (*Re BC Motor Vehicle Act*)
- Interference with decisions of “**fundamental personal importance**” (*B(R) v CAS Toronto; Wilson J in R v Morgentaler*)

¹⁷ These rights are too fundamental not to extend to non-citizens. Also, the multiculturalism provisions in the Charter (ss.14 and 15) suggest an inclusive interpretation of “everyone.”

¹⁸ **Note:** definitions of criminal offences – especially fault elements – are also subject to s.7 scrutiny.

- Important **parenting** decisions, such as whether a child should receive a blood transfusion (*B(R) v CAS Toronto*)¹⁹
- Decisions relating to **bodily integrity**, or ones that affect how a person thinks about themselves and their relationships with others and society at large (*Wilson J in Morgentaler*)
 - Choice to **end one's own life** (*Carter v Canada*; contra: *Rodriguez*)
 - Choice to **abort a fetus** (*Morgentaler*)
- **Where to live**, a **lifestyle choice** that goes to the core of what it means to enjoy autonomy and independence (*Godbout v Longueuil*)
 - Choices about which public places to visit (*Heywood*)²⁰

Exclusions:

- Property, economic liberty (*Gosselin*)
- Freedom of contract (*Prostitution Reference*)
- Freedom from **stigma** or **reputational injury** associated with human rights complaints (*Blencoe*)
- Choices re: one's "**preferred lifestyle**" that are not of fundamental personal importance (ie. smoking weed: *Malmo-Lévine*)

Case	Facts	Liberty Interest Engaged?
<i>Re BC Motor Vehicle Act</i>	s.94(1), an absolute liability offence, ²¹ imposed a fine + mandatory 7-day imprisonment for driving with a suspended license.	✓: Even the possibility of imprisonment engages the liberty interest, because the government is threatening physical restraint .
<i>B(R) v Children's Aid Society of Metropolitan Toronto</i>	Children's Aid obtained a wardship order to seek a blood transfusion on a child's behalf. The parents, Jehovah's Witnesses, challenged the order.	✓: The wardship order deprived appellants of the right to decide which treatment should be administered to their child. This is a decision of fundamental importance .
<i>Godbout v Longueuil</i>	City made permanent employees sign contracts requiring them to	✓: Where to live is a "quintessentially private

¹⁹ However, the freedom to make parenting decisions may be limited under s.7 if it unreasonably infringes upon the child's own liberty interests: "Assuming that the rights of children can qualify the liberty interest of their parents, that interest exists nonetheless" (*Children's Aid Society of Metropolitan Toronto*).

²⁰ The S 7 "liberty" interest protects the right to move freely around Canada.

²¹ Recall: absolute liability + possible imprisonment = unconstitutional (possible imprisonment engages s.7 liberty interest; absolute liability violates PFJ against conviction of morally innocent).

	reside within its boundaries ²²	decision going to the very heart of personal or individual autonomy "
<i>Blencoe</i>	Blencoe had a HR inquiry against him re: sexual harassment. He argued that s.7 covered freedom from associated "stigma."	✗: Liberty cannot be so broad as to include freedom from stigma of HR complaints.
<i>Morgentaler</i>	<i>Criminal Code</i> s.251 prohibited anyone from taking steps to provide an abortion, with exception for an accredited "therapeutic abortion committee."	✓ (Wilson J, concurring) ²³ : Liberty is inextricably tied with human dignity. Compelling a woman to carry a fetus to term violates her dignity. ²⁴
<i>Carter</i>	<i>Criminal Code</i> s.241(b) prohibited physician-assisted suicide for competent, consenting adults	✓ Autonomous decision-making over one's own body and medical care is central to both liberty and security of the person

Security of the Person

Security of the person is a matter of control over one's physical and mental integrity.

Bodily Integrity

Section 7 is engaged **whenever the state uses force against a person's body or otherwise impairs their bodily integrity (*Carter v Canada, Morgentaler*)**.

Includes:

- Right to **access life-saving medical treatment (*Morgentaler, Insite*)**
- The right to make **choices** respecting one's own body (*Carter, Morgentaler*)
- Freedom from physical interferences with one's person
 - Taking samples for forensic DNA analysis (*R v SA(B)*)

²² Noncompliance = termination

²³ Dickson and Beetz J analyzed the issue under SOP.

²⁴ The basic theory underlying the *Charter* is that the state will respect choices made by individuals and avoid subordinating them to "any one conception of the good life": "Liberty in a free and democratic society does not require the state to approve of the personal decisions made by its citizens; it does, however, require the state to respect them."

- Using force during arrest (*R v Nasogaluak*)
- State-imposed medical treatment (*AC v Manitoba (Director of Child and Family Services)*)
- State restrictions on abortion which threaten women’s physical and mental integrity (*Morgentaler*, Dickson J)
- Forcing people to choose between accruing health risks or commission of a crime (*Morgentaler*, Beetz J)
- State restrictions on assisted death which require people to suffer until their natural death (*Carter v Canada*; contra: *Rodriguez*)
- Laws which increase the risk of violence or bodily harm associated with engaging in an otherwise lawful activity (*Bedford*)
- Laws which, in effect, deny health services to drug users, increasing risk of disease or death (*Insite*)
- Security of the person during the **passage to death** (*Carter*)

Mental Integrity

Serious Psychological Harm (*NB v G(J)*)

- A state action can engage section 7 if it has a **serious and profound effect** on a person’s psychological integrity
 - The effects must be assessed **objectively**, with a view to the impacts of the state action on a **reasonable person**.
 - The result need not be nervous shock or psychiatric illness, but it must be **more than ordinary stress or anxiety**
- If the state makes a pronouncement as to a **parent’s “fitness”** that carries serious consequences, e.g. removal of a child from parent’s custody, SOP may be engaged (*NB v G(J)*).
- However, not every state act interfering with parent-child relationship will engage SOP.
 - SOP is not engaged when a child is sentenced to jail, conscripted, or negligently shot and killed by a police officer (*NB v G(J)*).

Exclusions

- Economic security (*Gosselin*)

Case	Facts	SOP Interest Engaged?
<i>New Brunswick v G (J)</i>	An order made under child welfare legislation suspended parents’ custody of their child. They applied for legal aid, but the Minister of Health failed to provide certificates.	✓: Removal of child can seriously disrupt psychological integrity (loss of companionship, significant stigmatization, “parent” role is fundamental to personal identity)

<i>Blencoe</i>	Suffered severe depression while awaiting HR inquiry	✗ If purpose of proceedings is to redress private rights, some stress and stigma must be accepted.
<i>Morgentaler</i>	s.251(1) of the Criminal Code provided that anyone who took steps to provide an abortion was guilty of an indictable offence and liable to imprisonment for life. There was an exception under 251(4) for abortions performed by an accredited "therapeutic abortion committee," if they certify that a woman's life is endangered.	✓ (Dickson CJ): The law threatens women in a physical sense, and the uncertainty + delays inflict severe emotional stress ✓ (Beetz J): Any law that prevents a person from getting medical treatment when their life or health is in danger violates SOP ✓ (Wilson J): s251 makes a woman "the passive recipient of a decision made by others as to whether her body will be used to nurture a new life...How can [she] have any sense of security with respect to her person?" ✗ (McIntyre J, dissent): Saying SOP is violated implies women have the right to an abortion. The Charter is silent on abortion, but mentions other specific and controversial matters (mobility, language, and minority rights). Thus, no such right exists.
<i>Rodriguez</i> 🚩	R had ALS; s.241 of Criminal Code prohibited aiding or abetting suicide	✓ Prevented R from choosing to end her life at a time and in a manner she considered most dignified; required her to live until deterioration from disease; forced her to bear psychological and physical pain
<i>Insite</i> (2011)	Federal Minister of Health refused to grant a supervised injection site an exemption from CDSA s.56 (prohibition of drug possession + trafficking).	✓ CDSA provision would expose Insite staff to criminal sanctions and thus threaten SOP of patients dependent on their services. The minister's failure to grant an exemption exacerbates the risk of overdose, disease, and death by pushing drug users away from supervised facilities.

<i>Bedford</i> (2013)	Challenge to prostitution-related criminal code offences (1) bawdy houses, (2) living off the avails, and (3) communication	✓ All 3 provisions had the effect of putting sex workers at greater risk of violence ²⁵
<i>Carter</i> (2015, overturned <i>Rodriguez</i>)	Section 241(b) of the <i>Criminal Code</i> makes it a criminal offense to aid or abet another person to commit suicide. A plaintiff with ALS challenged this.	✓ The absolute ban forced people with unbearable, terminal or serious conditions either to end their lives prematurely (while still physically able) or to suffer until death.

2a) Is there a sufficient **causal connection**?

Note: do not separate causation; analyze this issue under step 2.

- There must be a causal connection between the state action and the effect on the applicant's life, liberty, and security of person (*Bedford, Blencoe*).
- **Test:** Did the state action **negatively affect** the claimant's s.7 interests?
 - ◆ **Timing** is a relevant factor (*Blencoe*)
- The government can argue that the effects on the applicant's s.7 interests were caused by some other factor, such as the actions of a third party, a natural force, or the applicant's own personal choice.
 - ◆ However, the "**sufficient** causal connection" standard is flexible and does not require the government's acts to be the sole or dominant cause (*Bedford*).
 - ◆ More than mere speculation

Case	Facts	Sufficient Causal Connection?
<i>Bedford</i>	A group of former prostitutes challenged prostitution-related offences in the <i>Criminal Code</i> . The government argued that the	✓ : The issue is not whether the individual chose to engage in a risky yet lawful activity. The issue is whether the law makes that choice

²⁵ **Bawdy house provision** → forces sex workers to work in less safe settings (outdoors, the streets, hotels, house visits)

Living on the avails provision → aims to prohibit exploitative "pimping" but is drafted so broadly that it also criminalizes drivers, security staff, or receptionists

Communicating provision → deprives street-based sex workers of the ability to screen potential clients (ie. to detect intoxication or signs of violence)

	adverse effect on SOP arose from the prostitutes' own choice to engage in sex work.	more dangerous. ²⁶
<i>Insite</i>	Minister refused to grant Insite an exemption to federal drug laws. The government argued that any adverse effects on drug users' SOP came from their voluntary decision to use drugs.	✓ : Addiction is marked by "impaired control" over drug use. Besides, all that is required for sufficient causal connection is that government action exacerbates the risk of harm.
<i>Blencoe</i>	While awaiting proceedings, Blencoe suffered severe depression.	✗ : Blencoe suffered serious psychological stress, but it was not causally connected to the state act. The fact that the depression occurred before commencement of proceedings militated against a causal connection.

3) If so, was the deprivation in accordance with the **principles of fundamental justice**?

General Rules

- Once a complainant has been deprived of a Section 7 interest, we must determine whether the deprivation accorded with the principles of fundamental justice.
- If it was **in accordance**, there is Section 7 no violation.
- If it was **not in accordance**, there is a Section 7 violation.

Recognized Principles of Fundamental Justice

★ Arbitrariness, Overbreadth, and Gross Disproportionality (**Malmo-Levine, Bedford**)

- **Arbitrariness**: there is no connection between effect and object of law, or where effect actually contravenes the objective of the law
 - ◆ **Test**: is there a **direct connection** between the purpose of the law and the impugned effect on the individual?
 - ◆ Ex: In **Rodriguez**, the law was **not arbitrary**, as carving out an exception for terminally ill individuals would have rendered it nearly impossible for Parliament to achieve their objective.
 - ◆ Ex: In **Insite**, the refusal to grant an exemption was **arbitrary**, as it **ran counter to the law's objective** (purpose: to promote health; effect: removes place for health).

²⁶ The Court also noted that not all are truly free to exit prostitution (issues of poverty, addiction, or coercion).

- **Overbreadth**: captures conduct unrelated to its legitimate purpose.
 - ◆ Ex: In *Bedford*, the **living on the avails** provision was overbroad, as it purported to target exploitative pimps, but also criminalized bodyguards, receptionists, and drivers.
 - ◆ Ex: In *Carter*, the objective was to protect **vulnerable people** from being coerced into committing suicide, but the **absolute ban** extended to terminally ill and mentally competent individuals.
- A law cannot be **grossly disproportionate** in relation to its own purpose
 - ◆ Ex: In *Insite*, the minister's refusal to grant a CDSA exemption **created a drastic risk** to human life, and any "benefit" to the government's uniform stance on drug possession was minuscule.
 - ◆ Ex: In *Bedford*, the bawdy house provision and communicating in public provisions were grossly disproportionate. The government's objective was to prevent public nuisances and exploitation, but to do so they created a drastic risk to sex workers. The harm grossly outbalanced the objective.

★ Other Principles from Jurisprudence

- We do not punish the **morally innocent** (*Re Bc Motor Vehicle*)
- A defence should not be **illusory** (Dickson J in *Morgentaler*)
- **Procedural fairness**: people should not have to choose between delayed medical treatment and committing a crime (Beetz J in *Morgentaler*).
- The deprivation of a Section 7 right which also deprives someone of **a right elsewhere in the Charter** cannot accord with the principles of fundamental justice (Wilson J in *Morgentaler*).

Novel Principles of Fundamental Justice

- The principles of fundamental justice are not enumerated expressly in the *Charter*. They are developed judicially.
- Although some of the Charter's drafters only wanted "justice" to be procedural, the procedural-substantive distinction is very difficult to make. Thus, the principles of fundamental justice cover **both** procedural and substantive fairness.
- The Court may be willing to recognize a novel PFJ if it adheres to the **Malmo-Lévine test**:
 - ◆ **1) The rule must be a "legal principle"**
 - Not a "mere common law rule"
 - Not found in the "realm of public policy" (*Re BC Motor Vehicle Act*)
 - Rather, an underlying tenet of the justice system (*Re BC Motor Vehicle Act*)
 - ◆ **2) There must be "significant societal consensus"** that is "vital or fundamental to our societal notion of justice" (*Rodriguez*)
 - ◆ **3) It must be "capable of being identified and applied with sufficient precision to yield a manageable standard"**

Case	PFJ Infringed?
<i>Re BC Motor Vehicle Act</i> (1985)	✓: S.94(1), which imposed a mandatory 7-day prison sentence, was an absolute liability offence. This means an accused would be convicted immediately on commission of the actus reus.²⁷ This violated the principle of fundamental justice that the morally innocent should not be punished.²⁸
<i>B(R) v Children's Aid Society of Metropolitan Toronto</i> (1995)	✗: Although there was a deprivation of liberty, procedural fairness was upheld. Laforest J stressed provisions in the <i>Child Welfare Act</i> about notice, the requirement for a hearing before a judge where parents had opportunity to present concerns, and the onus on the applicant (CAS) in obtaining the wardship order.
<i>Morgentaler</i> (1988)	✓ (Dickson J): "One of the basic tenets of our system of criminal justice is that when Parliament creates a defence to a criminal charge, the defence should not be illusory or so difficult to attain as to be practically illusory"²⁹ ✓ (Beetz J): a) The offence and defence violated the PFJ of procedural fairness. They forced women to choose between unsafe delays in medical treatment and the commission of a crime. b) The law was arbitrary: Parliament's objective of ensuring only medically necessary were allowed could be met by requesting independent medical confirmation of the threat to a woman's life. There was no reason to mandate the intercession of a three-person "therapeutic abortion committee." ✓ (Wilson J): Deprives a woman of freedom of conscience (s.2a). The deprivation of a Section 7 right which also deprives someone of a right elsewhere in the Charter

²⁷ Note: absolute liability offences would also seem to be overbroad.

²⁸ The Court also rejected the BC AG's argument that "fundamental justice" only encompasses procedural fairness.

²⁹ The defence at issue contained so many barriers to its own operation that it may as well not have existed.

Barriers concerning Dickson J: most women do not live in areas where hospitals have accredited "therapeutic abortion committees"; travelling is an enormous emotional and financial burden; where such committees do exist, they may define health in purely physical terms.

	cannot accord with the principles of fundamental justice.
<i>Rodriguez (1993)</i>	✗ Human dignity and autonomy are not principles of fundamental justice, but rather aspects of security of the person. To call them a PFJ would be to call the security of the person a PFJ. The ban on medically assisted dying was not arbitrary, as Parliament’s objective was to protect vulnerable people from choosing death in moments of weakness or being coerced to choose death. It would be impossible to attain this objective while carving out an exception for terminally ill people. There was a powerful societal consensus on the sanctity of life. The Court could not conclude that a law aligning with social consensus was contrary to the principles of fundamental justice.
<i>Insite (2011)</i>	✗ The CDSA itself did not violate PFJs, due to s.56, a “safety valve” which allowed the minister to grant exemptions ✓ The refusal to grant an exemption was arbitrary, as it ran counter to the law’s objective: the CDSA’s purpose was to protect health, but the refusal to grant an exemption removed the place for health. The refusal to grant an exemption was also grossly disproportionate. The refusal created a drastic risk to human life, and any “benefit” to the government’s uniform stance on drug possession was minuscule.
<i>Bedford (2013)</i>	✓ The living on the avails provision was overbroad, as criminalizing non-exploitative staff was not necessary. The bawdy house and communicating in public provisions were grossly disproportionate, as the drastic risks they created outweighed the objective of eliminating public nuisance.³⁰

³⁰ Evidence showed that a safe place to stay and the ability to screen clients were essential for prostitutes’ safety, and complaints about nuisance from indoor establishments or street communication were very rare.

Carter (2015)	✓ Overbroad ; objective was to protect vulnerable people from being coerced into committing suicide, but the absolute ban extended to terminally ill and mentally competent individuals.
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Intersection of Section 1 and Section 7

- Section 7 protects fundamental interests, so violations are usually egregious (**Carter**).
 - ◆ **Arbitrary** will usually fail **rational connection** (**Insite**)
 - ◆ **Overbroad** will usually fail **minimal impairment**
 - ◆ **Grossly disproportionate** will usually fail **proportionality** between salutary and deleterious effects
- Even though Section 7 violations are hard to justify, the Court recognized in **Bedford** that s 1 might still apply in rare cases.
 - ◆ The SCC has never seen a Section 7 violation upheld under Section 1, but the ONCA upheld a Section 7 violation under Section 1 in *R v Michaud*³¹
- Thus, a Section 1 analysis should still be conducted distinct from the Section 7 analysis. In **Bedford**, McLachlin J outlines the differences between these analyses:

Section 7	Section 1
Purpose: determine whether law's negative effect on the life, liberty, and security of the person accords with PFJs Claimant bears burden to establish <i>not</i> in accordance with PFJs Overarching public interest "plays no part in the s.7 analysis, which is concerned with whether the impugned law infringes individual rights" ● Impact on one person sufficient to establish breach Focus is nature of objective, not effectiveness	Purpose: determine whether law's negative impact on rights of individuals is proportionate to a pressing and substantial objective in the public interest Government bears burden to show rational connection, minimal impairment, proportionality Overarching public interest is "at the heart of s.1"

³¹ An ON regulation engaged the SOP interest by requiring commercial truckers to equip vehicles with devices that limited speed to 105 km/h (this could increase risk of collisions in a small number of cases). The law was also overbroad, so it violated s.7 overall. However, the Court justified the infringement as part of a complex regulatory scheme intended to promote highway safety.

	Actual effectiveness of law is considered here (salutary/deleterious effects)
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Section 15: Equality Rights

Section 15

(1) Every individual³² is equal before and under the law and has the right to the equal protection and equal benefit of the law **without discrimination** and, in particular, without discrimination based on **race, national or ethnic origin, colour, religion, sex**, age or mental or physical disability.

(2) Section (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.

General Principles

- **Traditional Rule:** As long as a law appeared to treat everyone within a certain group alike, it was not discriminatory (formal equality: *Bliss v Canada*).³³
- **Modern Rule:** The guarantee of equality is substantive (*Andrews*).
 - ◆ The “like treatment” model of equality (ie. formal equality) may in fact produce inequality (*Kapp*).
 - ◆ “*Andrews* set the template for substantive equality, which subsequent decisions have enriched but never abandoned” (*Kapp*).
- **Purpose of Section 15:**
 - ◆ “To ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration” (*Andrews*).
 - ◆ This has a “large remedial component” (*Andrews*), but does not impose a positive obligation on the government to respond to inequality (*Sharma*).³⁴
- **Analytical approach:**
 - ◆ Purposive and substantive (*Andrews, Kapp*)
 - ◆ Contextual and comparative (*Fraser, Hodges, Withler*)

³² “Every individual” excludes estates of individuals (*Hislop*). In addition, the SCC’s reasoning in *Hislop* would suggest that corporations do not have Section 15 rights.

³³ “If section 46 treats unemployed pregnant women differently from other unemployed persons, be they male or female, it is...because they are pregnant and not because they are women” (*Bliss v Canada*).

³⁴ However, where the government does act, it must not discriminate (*Eldridge, Vriend*).

Proving Discrimination: Evidence For a Section 15 Claim (*Fraser*)

- The burden of proof lies with the claimant (**Law, Fraser**).
- Two types of evidence are helpful (neither necessary, but ideally both present):
 - ◆ **A)** Evidence about the **situation** of the claimant group: “Physical, social, cultural, or other barriers” which provide the “full context of the claimant group’s **situation**”
 - ◆ **B)** Evidence about the **results** of the challenged law in practice.³⁵
- Courts should take a **holistic and generous approach** to weighing evidence, recognizing that problems affecting marginalized groups may be under-documented.
 - ◆ Thus, evidence does not have to be statistical or academic. It can come from within the claimant group itself.
 - ◆ Where appropriate, courts may rely on **judicial notice** or **logic** (**Law, Fraser, Sharma**)
- While no specific type of evidence is required, there must be enough overall to establish that the law contributes to a disproportionate impact on the claimant group relative to others (**Sharma**)
 - ◆ Evidence of the claimant group’s historic and systemic disadvantage is not enough on its own (**Sharma**)
- The goal of adducing evidence is to establish a **statistically significant pattern** of exclusion or harm (**Fraser**)
- Evidence can overlap at stages 1 and 2 of the test (**Fraser**)

1) Does the law, on its face or in its impact, create a distinction based on an enumerated or analogous ground?**★ Does the law create a distinction?**

- A distinction means the claimant is treated differently than others (**Whitler**).
- Demonstrating a distinction involves comparison (**Hodge**).
- Thus, we need a “**mirror comparator group**”: a group that matches the complainant in all relevant ways except for the characteristic on which the distinction was based (**Hodge**).
 - ◆ The group does not have to correspond precisely: we should allow the flexibility to accommodate claims based on intersecting grounds of discrimination (**Whitler**).
 - ◆ The onus is on the claimant, but identifying the correct comparator group is a matter of law (**Hodge**).
- An omission can be a distinction where a law is underinclusive, meaning it extends protection to one group but not another (**Vriend**)

Case	Complainant Group	Mirror Comparator	Distinction
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³⁵ Here, statistics are particularly helpful where the pool of people affected by the law includes both individuals from the claimant group and individuals from the comparator group (**Fraser**).

Andrews	Non-citizen bar applicants	Citizen bar applicants	✓
Hodge	Separated common-law spouses	Divorced couples, not separate married couples	✗ ³⁶
M v H	Homosexual couples in permanent conjugal relationships	Heterosexual couples in permanent conjugal relationships	✓
Vriend	Deaf patients	Hearing patients	✓
Fraser	Female RCMP officers	Male RCMP officers	✓
ON v G	Sex offenders found NCRMD	"Sane" sex offenders	✓

★ "On its face or in its impact": Direct and adverse effects discrimination

→ **Pre-Charter rule**: only direct discrimination was recognized. Laws that were **facially neutral** were justified under the principle of "**formal equality**."³⁷

- ◆ However, this principle was rejected as "seriously deficient" in **Andrews**. The Court adopted **substantive equality**, shifting the focus from discriminatory **intent** to discriminatory **effect**.

→ Section 15 protects against differential treatment regardless of whether it is explicit or simply the result of negative effects stemming from the law (**Fraser**).

- ◆ Now, discrimination may arise on the face of a law or in its impacts (**Andrews, Law, Kapp/Withler, Taypotat, Fraser**).

- ◆ Identical treatment is not always equal treatment (**Vriend**).

Case	Facts	Type of Distinction
Andrews	Provincial law explicitly stated non-citizens could not be admitted to BC bar.	Direct
Centrale	Pay equity legislation created a delay for females accessing pay equity	In effects
Fraser	The RCMP benefits program prevented job-sharers from buying back full pension. Due to caregiving responsibilities, most	In effects

³⁶ Divorced couples did not receive pensions either.

³⁷ **Ex**: In **Bliss v Canada**, the claimant brought a claim for sex-based discrimination under the Bill of Rights, because her pregnancy disentitled her to unemployment benefits. The court dismissed her claim as the impugned law did not overtly discriminate based on sex, and it treated all pregnant people alike.

	job-sharers were women.	
Vriend	The Alberta Individual Rights Protection Act excluded sexual orientation as a protected ground.	Direct ("direct exclusion," not a neutral silence) + in effects
Eldridge	The Medical Services Commission and hospitals declined to provide funding for sign language interpreters, holding it was not medically required. ³⁸	In effects

★ Enumerated and analogous grounds

- **Enumerated grounds**: "race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability" (**Section 15.2**).
 - ◆ "Must be interpreted in a broad and purposive manner" (**Fraser**).
 - ◆ **Intersectionality** can bring a claimant group within an enumerated ground (**Fraser**: parenting → sex).³⁹
- Recognized analogous grounds:
 - ◆ Citizenship (**Andrews**)
 - ◆ Sexual orientation (**Egan**)
 - ◆ Marital status (**Quebec v A; Miron**)⁴⁰
 - ◆ Aboriginality-residence (**Corbière**)
- NOT analogous grounds:
 - ◆ Municipality or province of residence (**Siemens, Turpin**)
 - ◆ Professional status (**Delisle v Canada, Baier v Alberta**)
 - ◆ "Substance orientation" (**Malmo-Levine, Caine**)
- Test for novel 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 **constructively immutable**, ie. changeable only at unacceptable cost to personal identity" (**Corbière**).
 - **Note**: This test is not entirely settled. The jurisprudence is in flux.
- Open questions:
 - ◆ Gender identity or expression
 - ◆ Homelessness

³⁸ **Note**: the legislation itself was upheld, but the exercise of discretion was discriminatory.

³⁹ The majority held that the claim could be "can be carried out under the enumerated ground of sex, by acknowledging that the uneven division of childcare responsibilities is one of the **persistent systemic disadvantages that have operated to limit the opportunities available** to women in Canadian society."

⁴⁰ **Note**: not immutable, but recognized nevertheless as individual exercises "limited control"

Intermediary Step: Section 15(2) (*Kapp*, affirmed in *Cunningham* and *Alliance*)

Not every distinction is discriminatory. A program will **not violate s15** if the government can demonstrate:

i) The program has an ameliorative or remedial *purpose*

- **Key question:** where a law, program or activity creates a distinction based on a protected ground, was the government's goal in creating that distinction to **improve the conditions of a group that is disadvantaged?**
 - Focus must be purpose, **not effect**⁴¹
 - To determine the **genuine** purpose, we ask: was it **rational** for the state to conclude that the **means chosen** to reach the ameliorative would **contribute to that purpose?**

ii) The program targets a **disadvantaged group identified by enumerated or analogous grounds**

- Disadvantaged → groups that are **vulnerable** and **prejudiced**
- **All members** of the group do not need to be disadvantaged, as long as the group **as a whole** has experienced discrimination
- The government can **pick and choose** who it wants to help. It can put in place laws, policies and programs that serve one disadvantaged group, even if it means that **other disadvantaged groups are excluded (*Cunningham*)**.

If this test is satisfied, we do not proceed to step 2. The law is not discriminatory, end of story (*Kapp*).

Exception: Claimant is a Member of the Beneficiary Group

- The purpose of S15(2) is to shield ameliorative laws from claims of “**reverse discrimination**.” These claims can only arise from people who are not part of the beneficiary group (*Alliance*, *Centrale*).
- Thus, Section 15(2) should not apply where the claimant is a member of the group the ameliorative law was intended to protect (*Alliance*, *Centrale*).
 - ◆ *Contra*: Section 15(2) should shield laws from scrutiny even where the claimant is a member of a beneficiary group. Courts should defer to the government whenever it tries to act benevolently (Cote, Brown, and Rowe’s dissent in *Alliance*).

2) Is the distinction **discriminatory?**

⁴¹ This will ensure the court does not unduly interfere with ameliorative programs created by the legislature (the effects of a new program cannot be easily ascertained, and programs are a work-in-progress, so government should be given leeway).

- Used to have to show disadvantage amounted to an **“impairment of human dignity”** (*Law*)
- Now, it suffices if a law **“imposes a burden or denies a benefit** in a manner that has the effect of reinforcing, perpetuating, or exacerbating ... disadvantage” (*Fraser, Alliance*)
- **“Imposes a burden or denies a benefit”**
 - ◆ Failure to accommodate where the government has acted (*Eldridge*)
 - ◆ Denial of access to remedial procedures for discrimination (*Alliance, Vriend*)
 - ◆ Denying job-sharers the right to “buy back” full pension credit (*Fraser*)
 - ◆ Denying exemptions to sexual offenders found NCRMD (*ON v G*)
 - ◆ Creation of a delay in accessing pay equity (*Centrale*)
- **“Has the effect of reinforcing, perpetuating, or exacerbating disadvantage”**
 - ◆ Discriminatory intent is irrelevant. The focus of the analysis is the effect (*Fraser*).
 - ◆ There is no **“rigid template”** of factors applicable here (*Fraser*).
 - **Law** suggests that the claimant must show a historical disadvantage or vulnerability.
 - If a law **“widens the gap”** (*Quebec v A*) or creates **“headwinds”** (*Fraser*), that is sufficient.
 - ◆ The claimant has to establish a **link** between the law and the adverse impact (*Sharma*), but does not have to show **why** the law caused that impact. Nor do they have to show that the adverse effect impacted **all members** of the complainant group in the same way (*Fraser*).
 - The causal connection may be satisfied by a **reasonable inference** (*Fraser*).
 - The claimant does not have to prove definitively that the impugned law **“caused”** or **“created”** the discriminatory effect (*Fraser*).
 - The discrimination can be the result of an **intersection** between the claimant’s characteristics, “choices,” and social factors.
 - We do not consider the reasonableness, fairness, or arbitrariness of the distinction drawn at this stage. That must be left for Section 1.
 - **Prejudice** and **stereotyping** are indicia of discrimination at stage two, but not necessary (*Quebec v A*).
 - **Prejudice:** holding pejorative attitudes based on strongly held views about the appropriate capacities or limitations of individuals or groups
 - **Stereotyping:** a disadvantaging attitude, but one that attributes characteristics to a group regardless of their actual capacities
 - The claimant no longer has to show that a law is arbitrary (*Fraser*), but arbitrariness may be a relevant factor (*Sharma*)

Jump to [Section 1 Analysis for Section 15](#)

III. Justification

If there is an infringement, is it justifiable?

Section 1: 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

General Principles:

- *Charter* rights and freedoms are generally guaranteed, but they can be limited in exceptional cases (**Oakes**)
- Once a *Charter* right is shown to be violated, the **onus shifts** to the infringing party to **justify** the limitation (**Hunter v Southam**).
 - The government has to show on a balance of probabilities that the infringement is justified (**Hunter**).

(1) Legality Step: Prescribed by Law (criteria from **GVTA**)

A) Is the limit authorized by a “law”?

i) Was a government entity authorized to enact the impugned policies?

ii) Are the policies binding rules of general application?

- This can include statutes, common law, municipal by-laws, rules of regulatory body, laws or regulations that have not been formally enacted (**GVTA**)
- This does not include **administrative policies** (**GVTA**):
 - Administrative provisions **interpret or implement the “rules”** laid down in a statute.
 - They are for “**indoor management**,” are often informal in nature and are often inaccessible to the public.
 - They are **not intended to establish individuals’ rights and obligations** or create entitlements.

→ Ex: In **GVTA**, BC Transit and TransLink refused to carry political advertisements based on their policies.

- The policies were “**law**,” because they were enacted pursuant to **statutory authority** conferred on BC Transit and TransLink.
- They were **not administrative**: they were themselves rules establishing the rights of the individuals to whom they applied.

→ Ex: In **Little Sisters Book and Art Emporium v Canada**, a customs policy prohibiting importation of gay and lesbian books was not “law” but rather an administrative policy, as it was based on an internal memorandum setting guidelines for interpreting legislation.

B) Is the “law” sufficiently accessible?

- Yes, if available to interested members of the public through publication, online, publicly (**GVTA**)
→ Ex: in **GVTA**, interested members of the public were people who wanted to advertise on buses.

C) Is the “law” sufficiently precise?

- i) Is it capable of interpretation using ordinary tools of analysis? (**Osborne**)
- ii) Does it yield an intelligible standard according to which the judiciary can work? (**Irwin Toy**)
→ Absolute precision is not required; such is the nature of language (**Irwin Toy**)
- iii) Is the language sufficiently precise to operate **as a limit** on arbitrary exercises of government power? (**Osborne, Irwin Toy**)
→ Cannot confer too much discretion (**Irwin Toy**)
→ Must enable people to regulate their conduct and provide guidance to those who apply the law (**Rule of Law rationale**)
→ Ex: In **GVTA**, the policy was sufficiently precise because it **clearly outlined the types of ads that would or would not be accepted**, and was worded precisely enough that potential advertisers could understand

★ **Deferential vs Stringent Approach**

Courts may apply a deferential or stringent approach to reviewing the legislature’s choice.

In **Irwin Toy**, the Court stated that a **deferential approach** is appropriate:

1) When addressing conflicting findings of fact or social science evidence

- Where there is conflicting evidence, courts should sometimes trust the government’s assessment.
→ Ex: In **Irwin Toy**, there was a factual issue regarding whether banning advertisements would actually protect children (whether the restriction would actually advance the objective)
 - The legislature relied on social science evidence that children are unable to assess advertisements critically.
 - The courts recognized their lack of expertise in evaluating social science studies and deferred to the legislature’s reading.

2) When legislature is mediating competing interests (especially in protecting vulnerable groups or allocating scarce resources)

- When the government is balancing different groups’ interests or protecting vulnerable people, courts may avoid second-guessing those decisions (**Irwin Toy**).
- The rationale is that elected bodies are better at policy decisions about social issues.

3) If the government is limiting a “less valuable” aspect of the right

- When balancing interests, it is important to acknowledge **relative value**. Some aspects of *Charter* rights are “less valuable” under s.1.
→ Ex: In *Thomson Newspapers*, Bastarache J acknowledged that different forms of expression protected under s.2(b) may have greater or lesser value under s.1.
 - For example, a less significant social interest may justify restricting commercial advertising or hate speech, as these are less valuable forms of expression.
- Ex: In *R v Lucas*, the SCC upheld the **defamatory libel** offence in the Criminal Code as a justified restriction of freedom of expression.
 - Defamation was a less valuable form of expression, so it was easier to justify.

However, a **more stringent review of legislative choice** is appropriate when the government acts as the **direct adversary** of an individual (such as in criminal matters).

(2) Justification Step: “Reasonable” and “Demonstrably Justified” (*Oakes* Test)

Issue: Is the limit reasonable and demonstrably justified in a free and democratic society?

Rules:

- A “**free and democratic society**” encapsulates values such as respect for the inherent dignity of humans, social justice and equality, accommodation of various beliefs, respect for cultural and group identity, and faith in social and political institutions (Aaron Baharak, “Proportionality and Principled Balancing”).

Analysis:

Oakes Test

1) “Sufficiently Important” Objective (Refined from “Pressing and Substantial” in *Irwin Toy*)

- The interest furthered by the limitation must be “of sufficient importance to warrant overriding a constitutionally protected right or freedom” (*Big M*)
- The threshold must be high enough to prevent interests that are **trivial or discordant with democratic principles** from gaining s.1 protection (*Oakes*)
- Courts rarely find that a limit fails the first step of the *Oakes* test – usually, they account for any insubstantial character of a restriction’s purpose at the proportionality stage.
→ **Exception:** In *Big M*, the purpose was to compel a religious practice (Sabbath Sundays). This was not “pressing and substantial.”

2) Proportionality Test⁴²

a) **Rational Connection:** measures must be “carefully designed to achieve the **objective** in question,” not irrational or arbitrary

- The focus here is effectiveness. Few laws fail here, save where means chosen reflect **arbitrary, irrational, or discriminatory assumptions**.

⁴² **Note:** Step 1 (pressing and substantial) looks at **purpose**. For steps 2a and 2b (rational connection and minimal impairment), the focus shifts to the **means**.

→ Ex: In *Oakes*, the **objective** was preventing drug trafficking; **measure** was reverse onus on accused. There was no rational connection.

- A small amount of drug possession could not justify inference of drug trafficking, so the reverse onus did not advance the objective of the limitation.
- In *Little Sisters*, the SCC held that a reasoned apprehension of harm is sufficient to demonstrate a rational connection.

b) Minimal Impairment: “as little as possible”⁴³

- A law will fail at this stage if the Court can identify an **equally effective and less intrusive means** to achieve the objective.
- Some post-*Oakes* cases suggested a somewhat relaxed approach:
 - *Keegstra* (1990): a measure (such as criminalization of hate speech) need not be the very least restrictive if it furthers the objective in ways alternative responses could not.
 - *RJR MacDonald* (1995): Suffices to fall within a range of reasonable alternatives
 - *Charkaoui v Canada* (2007): Parliament’s approach need not be the least restrictive
- However, in *Hutterian Brethren* (2009) the SCC tightened the test by adding the qualification that to pass this stage, the government must show that there is no less intrusive means of achieving the objective.

c) Proportionality Between Salutory Effects and Deleterious Effects

- This step is about placing colliding interests side by side and weighing them against each other (*Alberta v Hutterian Brethren*). The more serious the **deleterious effects** on the right, the higher the **salutory effects** on the public good must be (*Dagenais*).
- To measure the **deleterious effects**, consider:
 - i) *Value of Right and Freedom Breached*
 - We must assess the value of a right in context, not in the abstract (*Edmond Journal*).

→ Ex: Freedom of expression has greater value in political context than in context of disclosure of details of a matrimonial dispute (*Edmond Journal*).
 - ii) *Actual Impact of the Breach (Dagenais)*⁴⁴
- To measure the **salutory effects**, consider:
 - i) *Value of Objective*
 - Judged both qualitatively and quantitatively: the government can invoke **social science** and **expert evidence** (*Canada v Bedford*)
 - If there is conflicting factual social science evidence, courts should defer to the legislature (*Irwin Toy*)

⁴³ Usually the most important stage.

⁴⁴ Courts must now compare the **actual deleterious impacts of the law** on the affected right with the **actual contribution** the law makes to the public good (*Dagenais*).

- Courts can also use common sense and experience in recognizing that certain activities inflict societal harm (*Saskatchewan v Whatcott*)
- ii) Actual Contribution to the Public Good (*Dagenais*)

Note: Discretionary Decisions of Administrative Bodies (*Doré, Loyola*)

When making discretionary decisions, administrative decision-makers must balance *Charter* values with the statutory objectives. On judicial review, the question is whether the balancing is proportional.⁴⁵

Rights-Specific Section 1 Jurisprudence
Section 2(b): Freedom of Expression

Hate Speech

TEST (*Whatcott* 2013):

- Would a **reasonable person** knowing the full context and circumstances of the hateful speech, **believe it is likely to raise the risk of discrimination or some type of societal harm?**
- “Hallmarks” of hate speech:
 - ◆ Vilifies targeted group by blaming members for social problems
 - ◆ Delegitimizes them by suggesting members are illegal or unlawful
 - ◆ Labels them “thugs,” “liars” or “cheats”
 - ◆ Equates them with groups traditionally reviled in society (child abusers)
 - ◆ Dehumanization (describing as animals, subhuman, “creatures,” genetically inferior)
- Rothstein J removed “calumny” from the common law definition of hate speech. For him, detestation and vilification are the key indicators.

Restriction	Sufficiently Important Objective?	Rational Connection?	Minimal Impairment?	Proportional?
Provincial <i>Human Rights Code</i> prohibited publication of hateful materials (<i>Whatcott</i>)	✓: “To promote recognition of the inherent dignity and the equal inalienable rights of all members of	✗: The words “ ridicules, belittles or affronts the dignity of ” are overinclusive, so	✓ Once the over-broad words were struck out, the prohibition was tailored to impair s.2(b) as	✓ SCC rejected the argument that there would be deleterious effects on the “marketplace of

⁴⁵ This is the same principle articulated in *Oakes*, but incorporating a recognition that administrative bodies are tasked with **applying** the law, which requires a balancing act (legislative objectives against *Charter* values).

Restriction	Sufficiently Important Objective?	Rational Connection?	Minimal Impairment?	Proportional?
	the human family.”	not rationally connected. ✓: However, the rest of the prohibition was rationally connected.	little as possible. It extricates only an extreme and marginal type of expression.	ideas.” Hate speech undermines the values s.2(b) seeks to protect. Any potential chilling effect on expression is outweighed by the benefits for the targeted group.
<i>Criminal Code</i> offence against wilful promotion of hatred: S 319(2) (<i>Keegstra</i> majority)	✓: Hate propaganda causes two types of harm – harm to members of affected group + broader community; stopping this harm is a pressing and substantial objective, importance enshrined in other Charter provisions (ss. 15 and 27) + International Human Rights Instruments ⁴⁶	✓: Criminalizing hate speech will reduce it & thus harm	✓: Yes – definitional limits + <i>mens rea</i> act as a safeguard to ensure the offence is not overinclusive. The offence need not require proof of actual hatred to be minimally impairing. The Court rejected the argument that overzealous policing is a sign that the legislation is overbroad.	✓: Few concerns are as important to a free + democratic society as dissipation of racism. Also, hate speech is inimical to s.2(b)’s underlying values (“largely removed from the heart of free expression values”). ⁴⁷
<i>Criminal Code</i> offence against	✓	✗: Legislation may impede	✗: Criminalization is	✗: Deleterious effects are very grave;

⁴⁶ International Convention on Elimination of Racial Discrimination + International Covenant on Civil and Political Rights

⁴⁷ Can stifle democratic aspirations, thwart search for truth + self-fulfillment

Restriction	Sufficiently Important Objective?	Rational Connection?	Minimal Impairment?	Proportional?
wilful promotion of hatred: S 319(2) (Keegstra, McLachlin J's dissent)		objective (counterproductive) ⁴⁸	excessive and severe when other means exist Provision does not require proof of actual hatred Dangers are posed by the subjectivity of "hatred," not its breadth Overzealous policing is a sign of vagueness in the law.	strikes at diverse viewpoints + chilling effect on defensible expression by law-abiding citizens
<i>Criminal Code</i> offence against publication of false news: S 181 (Zundel)	✗ : At best, the law was originally enacted "to protect the mighty and the powerful from discord or slander"			
Human Rights Tribunal: teaching suspension (Ross)	✓ : Ensuring respect and tolerance in schools is pressing and	✓ : Ross was creating a "poisoned environment" so removing him		

⁴⁸ Three tenets of argument: **1)** Suppressing hate speech may **draw attention** to those who are claiming FoE has been violated (I.e., platforming them); **2)** Person might publicize it as government suppression of free speech (could create **suspicion** & risk creating a perception of truth); **3)** Hate propaganda laws ineffective at stopping the triumph of a racist philosophy under the Nazis

Restriction	Sufficiently Important Objective?	Rational Connection?	Minimal Impairment?	Proportional?
	substantial given students' vulnerability	was rationally connected to rectifying that		
Human Rights Tribunal: permanent ban on writings (<i>Ross</i>)		✗: Ross no longer teaching, so banning his writings did not further the objective of promoting tolerance in schools.		

Obscenity

TEST (*Butler* 1992):

→ Community Standards of Tolerance Test

- ◆ "What matters is what Canadians would not abide other Canadians seeing because it would be beyond the contemporary Canadian standard of tolerance to allow them to see it."
- ◆ **Note:** The community will not tolerate anything that is **degrading or dehumanizing** if there is a substantial risk of harm.

→ Three Categories of Undue Exploitation (*Butler* re: *Criminal Code* s.163.8)

- ◆ Sex with violence → undue exploitation
- ◆ Sex without violence but with degrading or dehumanizing content → undue exploitation *if* substantial risk of harm
- ◆ Sex without violence that is neither dehumanizing or degrading → not undue exploitation unless it employs children in its production

→ Artistic Defence

- ◆ If a work contains sexually explicit material that by itself would constitute undue exploitation, we can apply the "**internal necessities**" test to see if the art defence applies.
- ◆ Is exploitation the **object of the whole work**, or does it serve a larger purpose (artistic, literary, or scientific expression)?
- ◆ If the material serves a **larger literary, artistic, or scientific purpose**, is the sexually explicit content **tolerable in the context of the whole work**?

Restriction	Sufficiently Important Objective?	Rational Connection?	Minimal Impairment?	Proportional?
<i>Criminal Code</i> prohibition of undue exploitation of sex: s.163(8) (Butler)	✓: Parliament entitled to legislate on the basis of morality for the purpose of safeguarding values important to society.			
<i>Criminal Code</i> prohibition on possessing child pornography (Sharpe)	✓: Suppressing risk of harm to children	✓: Yes, despite the lack of evidence, Courts cannot hold Parliament to a higher standard of proof than subject matter exists	✗: May also capture possession of material that one would not normally think of as “child pornography.” ⁴⁹ Instead of nullifying law, McLachlin read exceptions into law. ⁵⁰	
<i>Customs Tariff</i> discretionary prohibition on imports of “obscene” books, printed paper drawings, etc (Little Sisters) ⁵¹	✓	✓: Reasoned apprehension of harm is sufficient to demonstrate a rational connection	✓	✓
Acts of customs officials (Little Sisters)	✓	✗: Customs authorities were inadequately trained to assess obscenity	✗: Many publications were barred from entry into Canada which would not have been found obscene if officers were properly trained	

Defamation

⁴⁹ “The legislation prohibits a person from articulating thoughts in writing or visual images, even if the result is intended only for his or her own eyes...It further prohibits a teenager from possessing, again exclusively for personal use, sexually explicit photographs or videotapes of him-or herself.”

⁵⁰ Uses “twin guiding principles” approach: allows reading in or reading down particular unconstitutional provision instead of striking down law in entirety.

⁵¹ While *Customs Tariff* provision was justified, customs officials’ exercise of authority could not be saved by s.1.

TEST (*Grant v Torstar*):

The Plaintiff in a defamation action is required to prove:

- **1)** That the **impugned words** were **defamatory**, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person
- **2)** That **the words in fact referred** to the plaintiff; and
- **3)** That the words were published, meaning that they were **communicated to at least one person other than the plaintiff**

Defamation is a tort of strict liability. Thus, if these elements are established on a balance of probabilities, falsity and **damage are presumed**.

Once the plaintiff proves these elements, the onus shifts to the defendant to raise a defence.

Responsible Communication Defence (*Grant v Torstar*)

A defendant can escape liability for defamation if they can prove:

- 1)** The publication is on a matter of **public interest** (question of law for judge)
 - Has to be a matter "about which the public has **some substantial concern** because it **affects the welfare of citizens**, or one to which **considerable public notoriety or controversy** has attached"
- 2)** The publication was **responsible**, in that he or she was diligent in trying to verify the allegation(s), having regard to all the relevant circumstances (question of fact)

Restriction	Sufficiently Important Objective?	Rational Connection?	Minimal Impairment?	Proportional?
\$1.6 million in damages for defamatory statements made by Church of Scientology (<i>Hill</i>)	✓ Protection of individual reputations as paramount public interest	✓ ⁵²	✓	✓
Defamation action against newspaper and reporter (<i>Grant</i>)	Issue: Should the common law of defamation be modified to better reflect Charter values? Held: Developed the responsible communication defence. Reasons: → Defamation does not forbid anyone from expressing themselves; it merely requires people to compensate others for damages flowing from injurious statements. → However, to avoid “libel chill,” the defences must be expanded.			

Access to Social Media

International law allows freedom of expression to be limited on social media when the following 3 requirements are met (**Facebook Oversight Board Case Decision**):

I. Legality (clarity and accessibility of the rules)

II. Legitimate aim

III. Necessity and proportionality

- Restriction must be the least intrusive way to achieve a legitimate aim
- This means developing mechanisms to avoid amplifying harmful speech rather than banning it outright
- *Ex:* Since Trump’s violation was severe (severity assessed using the *Rabat* factors), a temporary suspension was justified. However, the indefinite suspension was unjustifiable.

Miscellaneous

⁵² However, it could be argued that the presumption of damage is not rationally connected to the objective of reputational protection. For example, Hill was awarded 1.6mil in damages, but he likely did not suffer any reputational decline.

Restriction	Sufficiently Important Objective?	Rational Connection?	Minimal Impairment?	Proportional?
Regulatory prohibition of marketing targeted at children under 13 (<i>Irwin Toy</i>)	✓: “Particular susceptibility of young children to manipulation secondary effects on family or parental authority”	✓ “Easily satisfied”	✓	✓: The deleterious effects were not so severe as to outweigh the salutary ones. Advertisers were still free to direct their messages at parents and other adults, and to direct educational advertisements towards children
Injunction against secondary picketing (<i>Dolphin</i>)	✓: Business will suffer economically if no injunction to restrain picketing	✓	✓	✓: The deleterious effects are minimal. First, the restriction is on secondary picketing (that of a third party not concerned in the dispute at hand). Also, the injunction is only an interim one effective until the issues can be more fully canvassed at trial.

Section 15: Equality Rights

- It is important to maintain analytic distinction between Section 15 and Section 1 (*Fraser, Quebec v A*).
- We analyze whether **the limitation on equality rights can be justified** – not the legislative scheme as a whole (*Fraser*).

Case	Sufficient Objective?	Rational Connection?	Minimal Impairment?	Proportional?
<i>Vriend</i>	 : Excluding sexual orientation had no “pressing and substantial objective”	N/A	N/A	N/A
<i>Centrale</i>	 : Giving Parliament a 2-year grace period allowed them time to find a “credible methodology”	 : Methodology required time-intensive research.	 <i>Dicta</i> : an “indefinite” delay would not be minimally impairing.	
<i>Sharma</i> (Dissent ⁵³)	 : To ensure people who commit “most serious” offences cannot have conditional sentences/		 : Provisions overreach by denying conditional sentences to <i>all</i> offenders who have committed maximum sentence offences.	N/A
<i>Eldridge</i>	N/A	N/A	 : The cost of providing sign language interpretation would have been \$0.00025 cents per citizen. ⁵⁴	N/A

⁵³ **Majority** (Browne, Rowe, Wagner, Moldaver, Cote JJ) held that the Criminal Code provisions preventing offenders convicted of “serious offences” from obtaining conditional sentences **did not violate S15**, as there was no sufficient link or nexus between it and the discriminatory impact on Ms. Sharma. **Dissent** (Karakatsanis, Martin, Kasirer, and Jamal JJ) held that the law **did violate S15 and would not have been upheld at S1**.

⁵⁴ **La Forest J**: refusing to expend such an insignificant sum to extend the service could not possibly constitute minimal impairment. “The failure to provide sign language interpreters would fail the minimal impairment branch of the *Oakes* test under a deferential approach.”

Remedies

Section 52(1): Remedies for *laws* that violate the Charter

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.**

- Declaration of invalidity
- Suspended declaration of invalidity (promotes *Charter* dialogue: **Bedford**)
- Severance and partial invalidity
- Suspension
- Reading down (for overtly discriminatory legislation)
- Reading in (for underinclusive legislation: **Vriend**)
- Constitutional exemptions

Section 24(1): Remedies for *acts* that violate the Charter

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.**

- **Defensive remedies** (nullify or stop government action):
 - ◆ Dismissal of a criminal charge
 - ◆ Quashing a warrant
 - ◆ Quashing a committal or conviction in criminal cases
 - ◆ Enjoining government action with an injunction
- **Affirmative remedies** (impose a positive obligation)
 - ◆ Order to pay damages
 - ◆ Order to pay costs
 - ◆ Ordering to provide a state-funded lawyer
 - ◆ Ordering to return goods improperly seized
 - ◆ Mandatory injunctions
 - ◆ Supervised court orders

Section 24(2): Remedies for evidence obtained contrary to the *Charter*

(2) Where...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.**

- cf. *R v Ippak*