

Don't do the privacy question

Reasonable Limits; why our rights need to be reasonably limited

- S.1 sets out that the rights and freedoms in the Charter are not absolute, and can be limited if it would be in the best interests of a democratic society
- Why do rights have to be limited?
  - Protecting the general interests of the public:
    - R v. Keegstra explored limiting someone's s. 2(b) freedom of expression to prevent the harm caused by hate propaganda.
    - Given the importance of reducing racial, ethnic, and religious tensions in Canada, forms of expression that clearly seek to harm or affront the dignity of a group should be outlawed
    - SHRC v. Whatcott is more or less the same as R v. Keegstra but with a few differences:
      - While Keegstra was a teacher, and promoted anti-semitic views in his classroom, Whatcott produced and distributed flyers with discriminatory language against homosexuals, motivated, in part, by his Christian views
- Understanding "reasonable"
  - Being wary of the extent to which we limit rights:
    - R v. Keegstra explores how vague wording in the law that infringes s.2(b) creates an adverse chilling effect in which citizens self-censor legal expression out of fear of breaking the law

Oakes Test

- Objective test to apply s. 1 of the Charter, increases consistency when limiting people's rights
- Prescribed by Law
  - Was the infringement actually caused by a law?
- Pressing and Substantial
  - How relevant is the law to society?
  - How big of a problem is the infringement?
- Proportionality
  - Rational Connection
    - Is the limiting on the right connected and appropriate to the case?
    - Will this law achieve the desired effect outlined in pressing and substantial?
  - Minimal Impairment
    - The law must impair the right as little as possible
    - The law should not be an extreme punishment
  - Proportionate effect
    - Is this law limiting a right beneficial to society?
    - Do the pros of keeping the law outweigh the cons of getting rid of the law

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s.2(b) of the Charter

- Protects freedom of thought, belief, opinion, and expression
- Is there a s. 2(b) violation?
  - Does the activity fall under s.2(b)?
    - If the expression conveys meaning through a non-violent form, it will probs fall under the scope of s. 2(b)
  - Is the purpose of the gov't action to restrict freedom of expression?
    - If the government's express purpose is to restrict freedom of speech, s. 2(b) is definitely infringed
    - If gov't has another purpose, but effects from it restrict freedom of speech, s. 2(b) will not necessarily be infringed
- When will freedom of expression be protected?
  - Seeking and attaining truth
  - encouraging participation in social and political decision-making
  - cultivating diversity in forms of individual self-fulfillment and human flourishing.
- Limiting s.2(b) of the Charter only done to uphold societal beliefs and values
  - R v. Keegstra explored limiting someone's s. 2(b) freedom of expression to prevent the harm caused by hate propaganda.
  - Given the importance of reducing racial, ethnic, and religious tensions in Canada, forms of expression that clearly seek to harm or affront the dignity of a group should be outlawed
  - Dissenting of R v. Keegstra:
    - Vague wording in the law that infringes s.2(b) creates a chilling effect, in which citizens self-censor lawful expression because the law doesn't clearly specify what is legal and what isn't
  - SHRC v. Whatcott is more or less the same as R v. Keegstra but with a few differences:
    - While Keegstra was a teacher, and promoted and enforced his anti-semitic views in his classroom, Whatcott produced and distributed flyers with discriminatory language against homosexuals, motivated, in part, by his Christian views, bringing a question about freedom of religion

## Don't do the privacy question

### s.8 of the Charter

- Right to be free from unreasonable search and seizure
- S. 8 exists to balance an individual's privacy interests with the state's interests in investigating and prosecuting crime
- Test to determine whether a state action violated s.8 is:
  - Has there been a search of seizure?
    - A search is defined as a state activity that invades a person's reasonable expectation of privacy, which is the amount of privacy the reasonable person would expect in a free and democratic society.
    - To determine whether a reasonable person would have a reasonable expectation of privacy:
      - Is the search in this location appropriate?
        - A location that closely resembles a home will have a much higher reasonable expectation of privacy
          - Private locations have higher REoP, even if public setting - locker has high REoP even though school has lower REoP
      - Has the search been carried out in a reasonable manner?
        - Was the search overly intrusive?
        - A very intrusive search will result in a much higher reasonable expectation of privacy
      - Consider the surrounding circumstances
        - Any other circumstances that would either support or go against the constitutionality of the search should be considered when considering the totality of the circumstances here
  - Was the search reasonable?
    - A search is reasonable if the police officer/state agent has a search warrant or:
      - Search Incident to arrest (You can search a person after you've arrested them)
      - Exigent Circumstances (Emergency situation requiring immediate search)
      - However, there are still some requirements:
        - The search is authorized by law
        - The law that authorized the search must be reasonable
        - The search is carried out in a reasonable manner
- Cases:
  - R v. M
    - M, a student at a junior high school, found with drugs on him by the vice-principal, but in the presence of an RCMP constable
    - Was the vice-principal's search reasonable?
    - The vice-principal became an agent of the state by the RCMP constable being there, and therefore his search violates the student's s. 8 rights
  - R v. Mann

## Don't do the privacy question

- Mann was walking down the sidewalk and matched the description of the suspect of a nearby breaking-and-entering, police searched him and looked through his pockets, was looking through his pockets reasonable?
- Examine fishing expedition:
  - Basically when the police officer is grasping at straws - searching for some incriminating evidence, and conducts too intrusive of a search to find something.
  - R v. Mann establishes that regardless of whether the officer conducts a frisk search or a pat-down search, that the search must be based on discernibly objective facts to prevent "fishing expeditions"
- R v. Morelli
  - Morelli had possessed and seemed to record child pornography. A warrant was made for his computer and it was searched
  - Defines how digital searches can and should be made - possession of the material is required, not simply having a favourite or icon to the illegal link. Moreover, the browser cache storing the material doesn't count as possession either. False claims arising from the case made it seem as if Morelli legitimately possessed child pornography and made such videos of his daughter, but these claims were unsubstantiated.
- R v. MacDonald
  - A police officer pushed open MacDonald's door because he thought he was holding a firearm
  - s. 8 rights are not violated if it can be demonstrably shown that it was necessary for the police officer to do so to investigate an imminent threat to public and police safety.

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s.24(2): Grant Test

- s.24(2) states that, when considering all the facts of the case, evidence that has been collected in a way that infringes on somebody's Charter rights should be thrown out if including the evidence would make the courts and the judicial system look bad.
- Objective test increases consistency, and forces the courts to consider the conscience of the public when deciding to keep or throw out evidence.

Grant Test:

- Seriousness of Charter-infringing state conduct
  - How serious were the police officer or other state agent's actions?
  - Was the breach deliberate?
  - Were the officers acting in 'good faith'?
  - The severity of the breach is directly proportional to the probability that the evidence will be excluded - a more severe breach by state agents will most likely result in the evidence being thrown out
- Impact of the Charter-protected interests of the accused
  - How did the state's conduct affect the accused?
  - Were the state's actions overly intrusive?
    - Was the accused forced to self-incriminate?
    - How did the breach affect the accused's dignity and reasonable expectation of privacy?
  - A more serious effect on the accused will increase the chance that the evidence is excluded
- Society's interest in the adjudication of this case based on its merits
  - How reliable is the evidence in light of the Charter breach?
  - How important is the evidence to the Crown's case?
  - How serious is the offence?
  - How will society feel about including or excluding this evidence?
- R v. Hebert
  - Hebert was arrested for a charge of robbery and informed of his right to counsel. A police officer dressed up as a suspect and extracted incriminating information from the suspect.
  - The police's violation of basic Charter-protected rights under s.7 of the right to remain silent (outside of being arrested) effectively disqualifies the evidence under s.24(2). Moreover, the precedent that would have been set had this evidence been admitted would be dangerous, promoting the police to routinely extract incriminatory information from suspects through unfair tricks.
- R v. Harrison
  - Addresses the challenges of the Grant test, specifically regarding the public's conscience within the courts - the police officer's conduct blatantly disregarded Harrison's s. 8 rights, but excluding the substantial 35 kg of cocaine the police officer's search revealed would bring the administration of justice into disrepute. Appearing to condone the police officer's behaviour by including the 35 kg of cocaine as evidence would undermine rather than enhance the long-term repute of the administration of justice. "The price paid by society for an acquittal in these circumstances is outweighed by the importance of maintaining Charter standards."