CONSTITUTIONAL PRIMERS

The Charter at 40

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EXPLANATORY NOTE

The following reports are generally geared towards a single, limited task: describing the extent to which the *Canadian Charter of Rights and Freedoms* and the jurisprudence surrounding it addresses or could address certain urgent human rights problems in Canada. In this sense, the reports are intended (as far as reasonably possible) to be descriptive rather than prescriptive, and to focus on law rather than politics. Taken together, the reports are intended to convey the limited capacity of Canadian constitutional law to address the identified problems — economic insecurity, climate change, and hate speech — and to explain how these limits are grounded, to a large extent, in the basic structure and philosophy of the *Charter*.

THE *CHARTER* AT 40: CONSTITUTIONAL PRIMER 1 — SOCIO-ECONOMIC RIGHTS

In 1992, a South African lawyer and constitutional expert summarised the importance of including judicially enforceable socio-economic rights — rights to food, water, shelter, and healthcare — in South Africa's new Constitution:

> [Y]ou cannot expect people to take the constitution seriously as fundamental law if it offers nothing to satisfy their most fundamental needs. If one is starving, food is more important than free speech, and a document which declares the latter a basic right and the former not is likely to attract derision. A bill of rights containing only … [rights like freedom of speech, association, assembly, etc.] would be perceived to be elevating luxuries over necessities, and that would discredit it as a charter of fundamental values. In the mind of the majority, it would make the bill of rights a charter of luxuries.[1]

The point here isn't that there is anything "luxurious" about rights like freedom of speech. Rather, the point is that these rights will mean little, and maybe even nothing, if one lacks access to the basic necessities of life, such as food or shelter. Free speech rights are not luxuries per se, in other words, but are luxuries *when compared with* socio-economic rights.

Despite the obvious importance of socio-economic rights, Canada's *Charter of Rights and Freedoms* does not explicitly recognize and protect them. This omission raises two questions. First, why are socio-economic rights not explicitly covered by the *Charter*? And second, given that economic insecurity constitutes a significant barrier to the exercise and vindication of other fundamental rights, how might socio-economic rights be given coverage under the *Charter*?

To explore these questions, it is first important to briefly explain the key, "building block" ideas that underpin the concept of judicially enforceable socio-economic rights: 1) that national constitutions and other human rights laws ought to place *positive* obligations on the state, and 2) that courts are well placed to interpret and enforce these obligations. Until recently, these were widely regarded as radical ideas.[2] In the United States, the birthplace of modern constitutional law, constitutional rights were traditionally conceived as purely *negative* guarantees which prohibit certain forms of illiberal "state action"[3] without requiring the state to actually *do* anything. The US Constitution's First Amendment, for example, tells Congress *not* to make laws "abridging freedom of speech" (as opposed to *requiring* Congress to make laws that protect free speech), and the US Supreme Court has held, controversially, that the state has no positive constitutional duty to protect individuals from lethal violence, even if it has concrete knowledge of an imminent threat to someone's life.[4]

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[1] Etienne Mureinik, "Beyond a Charter of Luxuries: Economic Rights in the Constitution" (1992) 8 South African Journal on Human Rights 464 at 465.
[2] Even today, many commentators remain highly skeptical about these ideas. See, for example, Frank Cross, "The Error of Positive Rights" (2000-01) 48 UCLA Law Review 857.
[3] On this idea — and more generally on early understandings of constitutional rights in the US — see Erwin Chemerinsky, "Rethinking State Action" (1985-86) 80 Northwestern University Law Review 503.
[4] See *DeShaney v Winnebago County Department of Social Services* 489 US 189 (1989).

Positive State Obligations and the Charter of Rights and Freedoms

While the *Charter* doesn't explicitly recognize the existence of positive state obligations to protect rights, some such obligations *are* implicit in certain provisions (an obligation to maintain a functioning electoral system, for example, is implicit in the right to vote[5]). Moreover, the Supreme Court has recognized several positive state obligations deriving from section 15 of the *Charter*, the equality rights provision. For example, in *Vriend v Alberta*, the Supreme Court effectively imposed a positive obligation on the Alberta legislature to protect individuals from discrimination on the basis of their sexual orientation,[6] and in *Eldridge v British Columbia*, the Court held that hospitals are required to provide sign language interpreters for deaf persons to ensure that "disadvantaged members of society have the resources to take full advantage of … [medical services offered to the general population]."[7]

Cases like *Vriend* and *Eldridge* suggest that the Canadian courts have been less beholden to a negative understanding of fundamental rights than their US counterparts, but they have not yet been willing to embrace the idea that the *Charter* imposes a positive obligation on Canada's governments to meet individuals' basic material needs. That said, in 2002, the Supreme Court went out of its way to leave this possibility open. In *Gosselin v Quebec*, the Court considered whether the right to a "minimum level of social assistance"[8] could be read into section 7 of the *Charter*, which states that "[e]veryone 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."[9] While the Court refused to give an affirmative answer to this question there and then, it left the door ajar to the possibility that "[o]ne day s[ection] 7 may be interpreted to include positive obligations,"[10] including obligations to safeguard "economic rights fundamental to human … survival."[11]

In a separate, dissenting judgment in *Gosselin*, Justice Louise Arbour went even further, suggesting that the time was already ripe for "deconstructing the various firewalls"[12] that inhibit judicial enforcement of positive rights. While Justice Arbour's opinion was not endorsed by her fellow Justices and is not legally binding, it is worth mentioning because it provides a roadmap of the "formidable obstacles"[13] that a future Court would need to overcome to read positive socio-economic rights section 7. In this regard, Justice Arbour was particularly attentive to three key obstacles. First, she dealt with the placement of section 7 in the "Legal Rights" section of the *Charter*, which some have suggested limits its scope to "one's dealings with the justice system and its administration."[14] Second, she dealt with the claim that the word "deprived" in section 7

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[5] See *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 3.
[6] *Vriend v Alberta*, [1998] 1 SCR 493, 156 DLR (4th) 385.
[7] *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 72.
[8] *Gosselin v Quebec (Attorney General)*, [2002] 4 SCR 429 at para 312 [*Gosselin*].
[9] For an overview of section 7, see Peter Hogg, "The Brilliant Career of Section 7 of the *Charter*" (2012) 58 Supreme Court Law Review 195 [Hogg].
[10] *Gosselin*, supra note 8 at para 82.
[11] *Ibid* at para 80 (quoting *Irwin Toy Ltd v Quebec*, [1989] 1 SCR 927 at 1003).
[12] *Ibid* at para 309.
[13] See Jamie Cameron, "Positive Obligations Under Sections 15 and 7 of the Charter: A Comment on *Gosselin v Québec*" (2003) 20 Supreme Court Law Review 65 at 79 [Cameron].
[14] See *Gosselin*, *supra* note 8 at 317.

precludes a positive rights interpretation of the provision (can the state really *deprive* an individual of life, liberty, or security of the person by omission?). And third, she dealt with what is probably the most common criticism of judicially enforceable positive rights: the claim that courts are institutionally "ill-equipped"[15] to handle positive rights claims insofar as such claims involve "policy questions concerning resource allocation"[16] that unelected and politically unaccountable judges can't legitimately or competently answer.[17] By tackling and purporting to overcome each of these arguments, Justice Arbour's dissent offers the best available (judicial) commentary on how section 7 could one day be used to "breathe positive rights into the *Charter*"[18] and, hence, to use the *Charter* as a means of addressing economic insecurity in Canada.

Negative State Obligations and Socio-economic Rights

While *Gosselin* confirms that section 7 of the *Charter* does not currently (but one day could) require the state to meet individuals' basic economic needs, *Victoria v Adams* confirms that section 7 at least prohibits state *actions* that deprive persons of the ability to (legally) meet their own basic needs.[19] In *Adams*, the City of Victoria had prohibited temporary homeless shelters in city parks, despite the fact that the City's emergency shelters were unable to accommodate its full homeless population. In response, the BC Court of Appeal ruled that although section 7 does not impose a positive obligation on governments to provide emergency shelter to homeless people (per *Gosselin*), it does entail a negative requirement: namely, that the state must refrain from actions that prevent individuals from lawfully sheltering themselves.

In *Adams*, the BC Court also referenced an earlier Supreme Court judgment, *Chaoulli v Quebec* (2005), which applied the same principle in a healthcare context.[20] In *Chaoulli*, the Court ruled that "although there is no free-standing right to health care"[21] under section 7, long delays in the public healthcare system may render state bans on private health insurance in breach of "the right to life (since delays sometimes increased the risk of death) and the right to security of the person (since delays prolonged pain and stress)."[22] A subsequent Supreme Court case, *Bedford v AG*, applies similar reasoning to the regulation of sex work, suggesting that although section 7 does not give rise to a freestanding right to engage in sex work, it does prohibit the passage of laws that increase the risk that individuals engaging legally in sex work will suffer privately inflicted harm and abuse.[23]

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[15] *Ibid* at 332.
[16] *Ibid.*
[17] For a survey of the principal legitimacy and competence-based arguments against judicially enforceable socio-economic rights, see Jeff King, *Judging Social Rights* (Cambridge: Cambridge University Press, 2012).
[18] Cameron, *supra* note 13 at 85.
[19] *Victoria (City) v Adams*, [2009] BCCA 563.
[20] *Chaoulli v Quebec (Attorney General)*, [2005] 1 SCR 791, 254 DLR (4th) 577. Note: *Chaoulli* is complicated by the fact that the Court was actually split 3-3-1 on the question of whether Quebec's ban on private health insurance violated section 7 of the federal *Charter*. In the end, a slim majority (4-3) held that the ban violated the equivalent provisions of Quebec's *Charter of Human Rights and Freedoms.*
[21] Robert J Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 6th ed (Toronto: Irwin Law, 2017) at 275.
[22] Hogg, supra note 9 at 208.
[23] *Bedford v AG*, [2013] SCC 72.

Can't We Just Amend the Charter?

Leaving section 7 aside, an alternative option for adding positive socio-economic rights to the *Charter* is formal constitutional amendment. In one sense, constitutional amendment is preferable to reading socio-economic rights into section 7, since it would enable the adoption of a tailormade provision rather than relying on a strained interpretation of an existent one. However, constitutional amendment is far from easy in Canada,[24] with most changes to the *Charter* — including the addition of socio-economic rights — requiring the consent of both houses of the federal Parliament (the House of Commons and the Senate) and at least seven provincial legislatures which together represent at least 50% of the population of all the provinces.[25] That said, Canada *did* come close to formally adding socio-economic rights to its Constitution when all levels of government — federal, provincial, and territorial — and four national Indigenous organisations endorsed the Charlottetown Accord in 1992. The Accord was a package of proposed constitutional amendments that included a social charter covering rights to "housing, food, and other basic necessities." In the end, the Accord was rejected decisively in a national referendum, but its rejection has often been attributed to its status as a vast omnibus package, and one may therefore wonder if a more targeted, issue-specific approach to the constitutionalization of social rights could succeed where Charlottetown failed.[26]

Socio-economic Rights in Other Jurisdictions: The South African Example

If such an amendment were possible, could it be framed in a way that balances the protection of socio-economic rights with the need to maintain appropriate institutional boundaries between courts and elected officials? On this front, South Africa serves as a useful example. There, fears of judicial overreach were addressed in the 1996 Constitution by couching justiciable socio-economic guarantees in very specific language. For example, section 26 of the Constitution, on the right to housing, requires only that the state take "reasonable legislative and other measures … to achieve the *progressive realization*"[27] of each person's right to housing, and recognizes that the state can only act "within its available resources."[28] In practice, this has arguably yielded a level of institutional balance by allowing the Constitutional Court of South Africa to intervene when the state lacks a rational public housing plan while leaving it up to elected and publicly accountable officials to "determine the priorities, texture and detail[s]"[29] of such plans. The question is: how much is institutional balance worth if it leaves some individuals with no realistic way of vindicating their constitutional right to housing, or their rights to other basic necessities of life?

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[24] See Richard Albert, "The Difficulty of Constitutional Amendment in Canada" (2015) 53:1 Alberta Law Review 85.
[25] See the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 38.
[26] See Richard Albert, *Constitutional Amendments: Making, Breaking and Changing Constitutions* (Oxford: Oxford University Press, 2019) at 165-168.
[27] *The Constitution of the Republic of South Africa*, 1996, s 26.2 [emphasis added].
[28] *Ibid*.
[29] See Albie Sachs, *The Strange Alchemy of Life and Law* (Oxford: Oxford University Press, 2011) at 179.

THE *CHARTER* AT 40: CONSTITUTIONAL PRIMER 2 — ENVIRONMENTAL RIGHTS

"As a biological species, all human beings depend on healthy eco-systems for life, health, and well-being."[1] This quote illustrates the close link between this report and the first one, above. Report 1 began by noting that rights to the necessities of life — socio-economic rights to food, water, shelter, and healthcare — are more fundamental, logically, than other human and constitutional rights (after all, what good is freedom of speech if you don't have reasonable access to food or shelter?).[2] Given that all human beings depend on "healthy eco-systems for life, health, and well-being," the right to a clean environment surely counts as one such logically fundamental right. And yet, the *Canadian Charter of Rights and Freedoms* makes no reference to the environment or the state's duty to protect and preserve it.

Given the parallels between socio-economic and environmental rights, several basic points can be carried over from Report 1. Firstly, meaningful recognition of environmental rights in the Constitution of Canada would involve imposing *positive* obligations on the state, not just the kind of negative obligations to refrain from certain actions that are generally prioritised by the *Charter*. Secondly, since all other *Charter* rights are judicially enforceable, constitutional recognition of environmental rights in Canada would *likely* mean giving courts the power of enforcement, thereby begging the question of whether they are up to this task.[3] And thirdly, as with socio-economic rights, the two key avenues for including environmental rights in the *Charter* are 1) by persuading courts to read them into section 7 of the *Charter* (on "life, liberty and security of the person"),[4] and 2) through a constitutional amendment that receives the assent of Parliament and seven provinces representing 50% of the population of all the provinces.[5]

To avoid repetition, this report will briefly re-examine the third of these points as it applies to environmental rights before considering: 1) the Supreme Court of Canada's recent decision on the constitutionality of the *Greenhouse Gas Pollution Pricing Act*, and 2) the German Constitutional Court's recent judgment on the constitutionality of the state's climate targets (and its relevance in the Canadian context).

Section 7 as a (Difficult) Way Forward: La Rose and Mathur

Reading positive rights to life's necessities — including the right to a clean environment — into section 7 of the *Charter* is beset by various interpretive and institutional "obstacles," as strong as the moral case for recognising such rights may be. However, despite these difficulties, several section 7 environmental claims are currently working their way through the courts. For example, in two cases, *La Rose* and *Mathur*, the Governments of Canada and Ontario are being sued by

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[1] David R Boyd, *The Right to a Healthy Environment: Revitalizing Canada's Constitution* (Vancouver & Toronto: UBC Press, 2012) at 2.
[2] See Etienne Mureinik, "Beyond a Charter of Luxuries: Economic Rights in the Constitution" (1992) 8 South African Journal on Human Rights 464.
[3] On this question, see Jamie Cameron, "Positive Obligations Under Sections 15 and 7 of the Charter: A Comment on *Gosselin v Québec*" (2003) 20 Supreme Court Law Review 65 [Cameron].
[4] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 7.
[5] *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 38.

large groups of children, many of whom "have unique personal characteristics that make them vulnerable to climate change … or … live in locations that are exposed to the most obvious effects of climate change such as wildfires, sea level rise, and insect-borne disease."[6] In both cases, the claimants allege that specific inadequacies in state climate policies violate their section 7 rights by effectively depriving them of the stable environmental conditions that are essential to their "basic health and development (or security of the person) and to … [their] survival."[7] While such deprivations are permissible under section 7 if they are shown to be "in accordance with the principles of fundamental justice," the claimants suggest that this cannot be the case here because the deprivations are "contrary to Canada's international law obligations"[8] under the *Convention on the Rights of the Child* and other international covenants.

While these claims hold promise for environmental rights advocates, making such arguments stick is not easy.[9] In particular, section 7 claimants bear the steep burden of overcoming various interpretive obstacles posed by the language of section 7,[10] and some commentators remain deeply concerned about giving unelected and politically unaccountable judges the power to enforce positive rights (the power, in other words, to second guess and overrule the considered judgments of elected officials). The following quote, from a Canadian constitutional expert, illustrates the nature and texture of this concern:

> Determining what must be done to combat climate change … involves weighing a host of factors like economic interests, the basic structure of the tax system and local versus national concerns, to name a few. This balancing act is more appropriately settled … through state-society mechanisms of representative institutions and electoral politics. Courts are not well equipped to examine or understand the various policy instruments that might be brought to bear to ensure effective environmental policy, nor do they have the expertise to evaluate the medium- and long-term consequences of various policy options. By contrast, the elected branches have the resources of the bureaucracy at their disposal, as well as the time to engage in long-term policy analysis through legislative committee work and broader policy consultation processes.[11]

Can't We Just Amend the Charter?

The above concern could perhaps be addressed, in part, by a constitutional amendment recognising the right to a healthy environment, since this would allow for careful drafting that could limit the enforcement role of courts. On this front, the environmental rights scholar David

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[6] Colin Feasby, David De Vlieger & Matthew Huys, "Climate Change and the Rights to a Healthy Environment in the Canadian Constitution" (2020) 58:2 Alberta Law Review 213 at 224 [Feasby et al]. See also *La Rose v Her Majesty the Queen in Rights of Canada* (25 October 2019), Vancouver, T-1750-19 (FCTD) (Statement of Claim); and *Mathur v Her Majesty the Queen in Rights of Ontario* (25 November 2019), Toronto, CV-19-00631627 (ONSC) (Application of the Plaintiffs).
[7] Feasby et al, *supra* note 6 at 224.
[8] *Ibid*.
[9] In this regard, it is worth noting that the claimants in *La Rose* have already had their claim rejected by a federal court, although they are now appealing that decision. See here: <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20201027_T-1750-19_order.pdf>.
[10] See Feasby et al, *supra* note 6 at 236-238. See also Cameron, *supra* note 3.
[11] Emmett Macfarlane, "Should Environmental Rights Be in the Constitution? Parliament, Not the Courts, Should Decide" (March 3, 2014), online: *Policy Options* <https://policyoptions.irpp.org/magazines/opening-eyes/boyd-macfarlane/> [Macfarlane]. See also Cameron, *supra* note 3.

R Boyd suggests that formal amendment is both an ideal and realistic path to the inclusion of environmental rights in the *Charter*.[12] In support of his claim re: the realism of amendment, Boyd notes that there have actually been 11 constitutional amendments ("including 2 revisions of the *Charter*"[13]) since the current amending formula was adopted in 1982, thereby undermining routine claims that amendment is "difficult … if not impossible"[14] to achieve in Canada. However, a number of important provisos must be applied to these comments. Firstly, of the 11 constitutional amendments passed since 1982, only one, back in 1983, was passed using the amending procedure that applies to major *Charter* revisions like the addition of environmental rights (the general amending procedure, which requires the consent of Parliament and seven provinces representing 50% of the population of all the provinces). Secondly, of the two revisions that have been made to the *Charter*, one of these was only applicable to New Brunswick and was accordingly passed without the use of the more arduous, national procedure that would be required for putting environmental rights into the *Charter*.[15]

That said, the history of constitutional amendment in Canada is not entirely hopeless. The Charlottetown Accord of 1992 — an extensive, sixty-item package of constitutional amendments — contained a social charter which included, among other things, recognition of environmental rights "for present and future generations." The Accord was eventually rejected in a national referendum, but only after it received the support of the federal government, the provinces, the territories, and four national Indigenous organisations, thereby showing that intergovernmental and inter-community consensus on the right to a healthy environment is *possible*, even if it is not easy to achieve.

The References re Greenhouse Gas Pollution Pricing Act (2021)

Protecting fundamental rights is arguably as much about empowering institutions as it is about disempowering them or rendering them accountable. A key example of this is the empowerment of courts to invalidate legislation that unjustifiably infringes *Charter* rights. Without this step, or some version of it, *Charter* rights may well have remained hypothetical and symbolic. Yes, the *Charter* would still have been a legal document, but what would it have meant if no body or institution had the power to enforce it?

By this logic, the *GGPPA Reference*, which is ostensibly a case about the distribution of legislative power between the federal and provincial governments, can also be seen as a case about the right to a clean environment.[16] In the *GGPPA Reference*, the Supreme Court considered whether Canada's federal Parliament has the constitutional power to set "minimum national standards of greenhouse gas price stringency to reduce greenhouse gas emissions"[17] and "mitigate the effects of climate change."[18] In a landmark ruling, the Court held that setting

[12] David R Boyd, "Should Environmental Rights Be in the Constitution? Enshrine Our Right to Clean Air and Water in the Constitution" (March 3, 2014), online: *Policy Options* <https://policyoptions.irpp.org/magazines/opening-eyes/boyd-macfarlane/> [Boyd].
[13] *Ibid*.
[14] *Ibid*.
[15] See Macfarlane *supra* note 11 (Macfarlane's piece is a direct response to Boyd, *supra* note 12).
[16] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 [*GGPPA Reference*]
[17] *Ibid* at para 4.
[18] *Ibid* at para 2.

minimum national standards of GHG price stringency is a "matter of *national* concern"[19] that falls within Parliament's constitutional power to make laws for the "Peace, Order and good Government of Canada."[20] The impact of this ruling is that Parliament now has a "permanent"[21] power to address climate change via minimum national pricing of GHG emissions, thereby ensuring that the institution that is surely best placed to address an inherently national crisis — and hence, to vindicate the basic environmental right to have that crisis addressed — has a key tool at its disposal to do so. As the Court wrote: "[I]t is necessary to consider the interests that would be harmed — owing to irreversible consequences for the environment, for human health and safety and for the economy — if Parliament were unable to constitutionally address the matter at a national level."[22]

Environmental Rights in Other Jurisdictions: The German Example

Just a month after the Canadian Supreme Court handed down its *GGPPA Reference* judgment, the German Constitutional Court "issued probably the most far-reaching decision ever made by a supreme court … on climate protection."[23] Relying on Article 20 of Germany's Constitution, which obliges the state to "protect the natural foundations of life and animals" for the sake of "future generations,"[24] the Court invalidated provisions of federal law that govern "national climate targets and the annual emission amounts allowed until 2030."[25] These targets, the Court said, left too much of the heavy lifting to "future generations" and would greatly "narrow the remaining options for reducing emissions after 2030, thereby jeopardising practically every type of freedom protected by fundamental rights."[26]

On the one hand, this judgment grants welcome recognition to this report's earlier point about most individual human rights: that they can only be enjoyed, and can only mean something, when their protection is coupled with the fulfilment of life's most basic necessities (including the protection of our environment). On the other hand, the specificity of Germany's Article 20, and the lack of an equivalent in Canada, means that the German Court's ruling couldn't necessarily or easily be replicated here. Moreover, such rulings pose significant challenges for observers who are concerned about giving courts too much power to second guess elected officials' responses to complex, polycentric policy issues. At the same time, though, one may ask: given the scale of the climate crisis, are concerns with judicial competence and legitimacy really a good enough reason to oppose judicial intervention on environmental rights? This report can only leave this question hanging, and open for discussion.

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[19] *Ibid* e.g. at para 107 [emphasis added].
[20] *The Constitution Act*, *1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, s 91. See also "Peace, Order and Good Government" (Key Term), online: *Centre for Constitutional Studies* <https://www.constitutionalstudies.ca/2019/07/peace-order-and-good-government/>.
[21] *GGPPA Reference*, *supra* note 16 at para 90.
[22] *Ibid* at para 206.
[23] Felix Ekardt, "Climate Revolution with Weaknesses" (May 8, 2021), online: *Verfassungsblog* <https://verfassungsblog.de/climate-revolution-with-weaknesses/>.
[24] "Constitutional Complaints Against the Federal Climate Change Act Partially Successful, Press Release No 31/2021" (April 29, 2021), online: <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html>.
[25] *Ibid*.
[26] *Ibid.*

THE *CHARTER* AT 40: CONSTITUTIONAL PRIMER 3 — HATE SPEECH AND FREE EXPRESSION

The internet has made hate speech an increasingly rampant problem in Canada and globally, but the *Canadian Charter of Rights and Freedoms* does not address it. On the contrary, hate speech is *itself* afforded constitutional protection under section 2(b) of the *Charter*, which guarantees the freedom of expression. This means that governments that wish to legislate against hate speech are required to demonstrate, if challenged in court, that the limits they have imposed on the expressive freedom of hatemongers can be "justified in a free and democratic society,"[1] per section 1 of the *Charter*. To do this, the government must establish that its anti-hate speech laws 1) pursue a "pressing and substantial" objective, 2) are "rationally connected" to that objective, 3) are "minimally impairing" of the freedom of expression, and 4) reflect an overall balance between "deleterious and salutary effects."[2]

Before examining how courts have applied these standards in practice, a few words are needed on why the *Charter* defines the problem of hate speech in terms of the rights of individuals engaging in hate speech; not in terms of the rights of individuals who are harmed by hate speech, or in terms of wider societal interests. In short, there are two details regarding the *Charter*'s scope that explain its focus on the rights of hatemongers rather than their victims. First, by design, the *Charter* only regulates the relationship between the individual and the state, which means that an individual who harms another individual cannot, by definition, violate constitutional rights (see section 32 of the *Charter*). Second, the *Charter* is primarily a bill of *negative* rights, which means that it requires governments in Canada to refrain from actions that infringe certain fundamental interests while only rarely requiring governments to take positive steps to protect or promote those interests.[3] In combination, these basic rules regarding the *Charter*'s scope define its arguably counter-intuitive framing of hate speech as a constitutional problem. Put simply, private abuse and the state's failure to address it are not constitutionally actionable, whereas regulation of a protected activity (in this case, expression) is.

Hate Speech as Constitutionally Protected Expression

Irwin Toy Ltd v Quebec (1989):

So, how did it come to be that hate speech — as destructive and valueless as it is — is protected by the *Charter*? The story basically begins with the *Irwin Toy* case, when the Supreme Court offered an early and definitive ruling on the type of expression that is protected by section 2(b).[4] In the Court's words, an activity will be considered expressive, and will be afforded *prima facie* protection by section 2(b), "if it attempts to convey meaning."[5] Adopting this broad, content-

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[1] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 1.
[2] "Section 1 — Reasonable Limits" (date modified: July 2, 2021), online: *Department of Justice* <https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art1.html>. See also *R v Oakes*, [1986] 1 SCR 103.
[3] See Lawrence David, "A Principled Approach to the Positive/Negative Rights Debate in Canadian Constitutional Adjudication" (2014) 23:1 Constitutional Forum 41. Report 1 of this series describes some of the (limited) ways in which the *Charter* does and could place positive obligations on the state.
[4] *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927, 58 DLR (4th) 577 [*Irwin Toy*].
[5] *Ibid* at 968.

neutral framing of protected speech was necessary, the Court said, "to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream."[6] The only exception to this content-neutral framing is that "[physical] violence as a form of expression receives no … protection."[7]

R v Keegstra (1990):

Just one year after *Irwin Toy* defined constitutionally protected expression as any non-violent activity that "attempts to convey meaning," the Supreme Court was confronted with the question of how this definition applies to hate speech. In *R v Keegstra*, the Court considered whether section 319(2) of the *Criminal Code*, which makes it an offence to engage in public communications which "incite … hatred against an identifiable group,"[8] limits expressive activity protected by section 2(b) of the *Charter*.[9] The Court ruled that the expression targeted by section 319(2) — hate speech — satisfies the *Irwin Toy* test and qualifies for constitutional protection insofar as "[c]ommunications which wilfully promote hatred against an identifiable group without doubt convey meaning."[10] In reaching this conclusion, the Court explicitly rejected the claim that hate speech is in fact a "form of violence that would fall within the *Irwin Toy* exception."[11] However, this does not mean that the regulation of hate speech is necessarily unconstitutional, but only that it must pass the section 1 test referenced above, which allows Canada's governments to infringe a constitutional right where that infringement can be "demonstrably justified in a free and democratic society."

As Lorraine Weinrib notes, there is a "startling"[12] and "stark"[13] shift of perspective when one moves from the *Keegstra* Court's interpretation of section 2(b) to its application of section 1. As stated above, under the *Irwin Toy*-*Keegstra* interpretation of section 2(b), the content of expression is irrelevant: all (purportedly non-violent) expressive activity is granted *prima facie* constitutional protection under section 2(b), even if its content is extreme and repugnant. However, when the Court in *Keegstra* proceeded to the question of whether criminal restrictions on hate speech are justified under section 1, its emphasis on content-neutrality gave way to a hierarchical, value-based approach whereby infringements of section 2(b) become easier to justify the further the content of the targeted expression "strays from the spirit of section 2(b)."[14] As Chief Justice Dickson explained, writing for the Court:

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[6] *Ibid*.
[7] *Ibid* at 970.
[8] *Criminal Code*, RSC 1985, c C-46, s 319(2).
[9] *R v Keegstra*, [1990] 3 SCR 697, 61 CCC (3d) 1 [*Keegstra*].
[10] *Ibid* at 730.
[11] *Ibid* at 732. To quote: "Turning specifically to the proposition that hate propaganda should be excluded from the coverage of s[ection] 2(*b*), I begin by stating that the communications restricted by s[ection] 319(2) cannot be considered as violence, which on a reading of *Irwin Toy* I find to refer to expression communicated directly through *physical* harm [emphasis added]. Nor do I find hate propaganda to be analogous to violence, and through this route exclude it from the protection of the guarantee of freedom of expression."
[12] See Lorraine Weinrib, "Hate Promotion in a Free and Democratic Society: *R v Keegstra*" (1991) 36:4 McGill Law Journal 1416 at 1425 [Weinrib]. See also Jamie Cameron, "The Past, Present, and Future of Expressive Freedom Under the *Charter*" (1997) 35:1 Osgoode Hall Law Journal 1 at 15-22.
[13] Weinrib, *supra* note 12 at 1425.
[14] *Keegstra*, supra note 9 at 766.

> [T]he s[ection] 1 analysis of a limit upon s[ection] 2(b) cannot ignore the nature of the expressive activity which the state seeks to restrict. While we must guard carefully against judging expression according to its popularity, it is equally destructive of free expression values, as well as the other values which underlie a free and democratic society, to treat all expression as equally crucial to those principles at the core of s[ection] 2(*b*).[15]

What, though, are the "free expression values" at stake here? The Court highlights three: "the quest for truth, the promotion of individual self-development … [and] the … fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged."[16] After considering its relationship with each of these values, the Court concluded that hate speech is not only "not closely linked to the rationale underlying s[ection] 2(b),"[17] but is in many ways antithetical to that rationale. For example, when considering the link between hate speech and democracy, the Court noted that "expression can work to undermine our commitment to democracy where employed to propogate ideas anathemic to democratic values."[18] Hate speech "works in just such a way," the Court continued, "arguing as it does for a society in which … individuals are denied respect and dignity simply because of racial or religious [or other] characteristics."[19] While this disjoint between hate speech and "free expression values" does not guarantee that restrictions on hate speech will pass the section 1 justification test, it does make this far more likely. In the end, the result in *Keegstra* was illustrative of this: after a detailed section 1 analysis, the Court upheld the *Criminal Code*'s prohibition on hate speech, albeit by a slim majority.

Hate Speech Provisions in Provincial Human Rights Codes

Unlike the *Charter*, provincial human rights codes *do* protect individuals from hate speech. In Alberta, for example, section 3 of the *Alberta Human Rights Act* (*AHRA*) states that "[n]o person shall publish, issue or display … any statement, publication, notice, sign, symbol, emblem or other representation that (a) indicates discrimination or an intention to discriminate against a person or a class of persons, or (b) is likely to expose a person or a class of persons to hatred or contempt"[20] because of certain enumerated characteristics (e.g. the person's race or gender). In theory, this provision is a powerful tool for addressing hate speech, enabling individuals to submit official complaints to the Alberta Human Rights Commission and, where the Commission's complaints resolution process fails, to the Alberta Human Rights Tribunal. However, in practice, section 3 complaints have been "rare."[21] Indeed, *none* of the 145 decisions

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[15] *Ibid* at 760.
[16] *Ibid* at 766.
[17] *Ibid* at 762.
[18] *Ibid* at 764.
[19] *Ibid.*
[20] *Alberta Human Rights Act*, RSA 2000, c A-25.5, s 3. It is worth noting that although an equivalent provision in the federal *Canadian Human Rights Act* was repealed in 2013, the Trudeau government recently introduced a new bill (C-36) to reinstate a modified version of this provision. See here: <https://parl.ca/DocumentViewer/en/43-2/bill/C-36/first-reading>.
[21] Jennifer Koshan, "Hate Speech and Human Rights in Alberta" (March 26, 2014), online: *ABlawg* <https://ablawg.ca/wp-content/uploads/2014/03/Blog_JK_Motion_502_March-2014.pdf> at 2 (quoting former Alberta Justice Minister, Jonathan Denis) [Koshan].

issued by the Alberta Human Rights Tribunal in 2021 (as of August 10th) deal with section 3,[22] and in some years only "1 or 2"[23] section 3 complaints to the Commission were recorded.

Saskatchewan v Whatcott: Provincial Human Rights Codes and the Charter

Low usage aside, the *Charter* poses an additional challenge for laws like section 3 of the *AHRA*, since it requires that restrictions on hate speech can pass the section 1 justification test mentioned above. In *Saskatchewan v Whatcott*, the Supreme Court addressed this issue when it considered the constitutionality of section 14 of Saskatchewan's *Human Rights Code*, a provision that bears a striking resemblance to section 3 of the *AHRA*.[24] However, unlike Alberta's section 3, which focuses only on communications that elicit "hatred or contempt," section 14 of the Saskatchewan *Code* extended further to cover speech that "ridicules, belittles, or otherwise affronts the dignity" of someone "on the basis of a prohibited ground."[25] For the Court, this more expansive language couldn't pass the "rational connection" prong of the section 1 test, because it's too remotely linked to the pressing and substantial state goal of limiting individuals' "exposure to *hatred*."[26] To quote the Court:

> Expression criticizing or creating humour at the expense of others can be derogatory to the extent of being repugnant. Representations belittling a minority group or attacking its dignity through jokes, ridicule or insults may be hurtful and offensive. However … offensive ideas are not sufficient to ground a justification for infringing on freedom of expression. While such expression may inspire feelings of disdain or superiority, it does not expose the targeted group to hatred.[27]

Having failed the section 1 test, the reference to speech that "ridicules, belittles, or … affronts dignity" was accordingly removed from the Saskatchewan *Code* while leaving the remainder of section 13 intact and operational. Above all, this makes clear that non-constitutional human rights laws on hate speech must be framed, construed, and enforced *narrowly*. In this regard, the *Whatcott* Court stressed that hate speech provisions should "be interpreted to apply only to extreme speech that would in the eyes of a reasonable person expose persons to *detestation and vilification.*"[28] As the Court noted, this type of *particularly* extreme speech is easier to justifiably limit via human rights laws because it "contributes [so] little to the values of freedom of expression."[29] As in *Keegstra*, justification of the law depended on how far the limited speech strayed from section 2(b)'s underlying values.

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[22] All decisions of the Alberta Human Rights Tribunal are available here: <https://www.canlii.org/en/ab/abhrc/>.
[23] Koshan, *supra* note 21 at 2.
[24] *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 [*Whatcott*].
[25] *The Saskatchewan Human Rights Code*, 2018, SS 2018, c S-24.2, s 14.
[26] See *Whatcott*, *supra* note 24 at para 92 [emphasis added].
[27] *Ibid* at para 90.
[28] Robert J Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 6th ed (Toronto: Irwin Law, 2017) at 183 [emphasis added].
[29] *Ibid*.