- ***A fortiori*** – for similar but more convincing reasons
- ***A priori –*** in a way based on theoretical deduction rather than empirical observation
- ***Action on the case –*** One of the old common law Forms of Action. In particular, the term refers to the writs of trespass to either person or property that provided a remedy for the invasion of personal or property interests. Action on the case is also called Trespass on the case because it developed from the common law action of trespass during the fifteenth century in England. It is a legal remedy for recovery of damages for tort in instances where injury was neither immediate nor direct —> Action brought to recover damages
    - A legal method of seeking recovery; action to recover damages for torts not committd by force; older name for tort law; cause of action that arises NOT out of property
- ***Amicas curiae –*** a person, not a party to the litigation, who advises the court on some matter before it. Friend of the court/ intervener.
- ***Animus Contrahendi –*** expressed or implicit intent that a contract should emerge as a result of the language or conduct of the alleged parties. W/o this, no contractual obligations can be said to exist b/t the parties for enforcement purposes
- ***Appeal*** – Only discusses the law from trial. Only in rare cases will the appeal process retry facts. The Court of Appeal decides only on the question raised at the Appeal and NO others
- ***Arrest of judgment –*** the postponement or stay of an official decision of a court, or the refusal to render such a determination, after a verdict has been reached in an action at law or a criminal prosecution, b/c some defect appears on the face of the record that, if a decision is made, would make it erroneous or reversible.
- ***Assizes*** – One of the periodic court sessions formerly held in each of the counties of England and Wales for the trial of civil or criminal cases. May also refer to the time or place of such sessions.
- ***Assumpsit –*** a common-law action for breach of promise or for breach or non-performance of a simple contract
- ***Attorney General*** – top lawyer for the state, acting for same
- ***Bill*** – draft of a proposed legislation, new statutory laws
- ***Binding Decisions –*** A case is binding on all lower courts in that jurisdiction
- SCC binds all Canadian courts but not necessarily on them (can change the law/rules)
- ***Bona fides*** – "in good faith"; honestly, openly, and sincerely; without deceit or fraud. Truly; actually; without simulation or pretense. Innocently; in the attitude of trust and confidence; without notice of fraud, etc.
- ***Canons of Construction*** – The system of basic rules and maxims applied by a court to aid in its interpretation of a written document, such as a statute or contract (also known as ***Cannons of interpretation*** or ***statutes of interpretation)***
- ***Case of first impression*** – no binding authority on case presented. Normally happens when cases are distinguishable.
- ***Causa causae est causa*** - the cause of the things causing is the cause
- ***Cause of action*** - you have to plead elements of a cause of action — Matter for which an action may be brought. The ground on which an action may be sustained. The right to bring a suit. Cause of action is properly the ground on which an action can be maintained; as when we say that such a person lias no cause of action. But the phrase is often used to signify the matter of the complaint or claim on which a given action is in fact grounded, whether or not legally maintainable.
- ***Certiorari*** - is a writ seeking judicial review. It is issued by a superior court, directing an inferior court, tribunal, or other public authority to send the record of a proceeding for review.
- ***Charge to the jury –*** Instructions to the jury ("finder of fact") on the existing law
    - The judge gives them additional things to consider as legal matters such as facts of the case
- ***Civil Law*** – one of 2 prominent legal systems in the western world, intellectualized within the framework of late Roman law and French Legal system (the Civil Code of Napoleon), whose core principles are codified into a referable system that is the primary source of law. [*2nd meaning – law of civil or private rights, as opposed to criminal law or administrative law*]

- ***Common law*** – "the part of English law that is derived from custom and judicial precedents rather than statutes."
- ***Common law method***: Case 1 establishes Rule 1; Case 2 uses Rule 1 or makes a new rule 2; Case 3 uses Rule 1 or Rule 2, or makes a new Rule 3; and so on
- ***Concurrence*** – judge agrees with the majority but writes own reason. A vote cast by a judge in favor of the judgment reached, often on grounds differing from those expressed in the opinions explaining the judgement."
- ***Contra*** – "against or contrary to;" or in "response"
- ***Court of Common Pleas –*** covered "common pleas"; actions between subject and subject, which did not concern the king. Created in the late 12th to early 13th century after splitting from the Exchequer of Pleas, the Common Pleas served as one of the central English courts for around 600 years.
- ***Court of Exchequer or Exchequer of Pleas*** – akin to a *tax* court, but had the option of taking other cases as well, for personal, financial interests. It was a court that dealt with matters of equity, a set of legal principles based on natural law and common law in England and Wales. Originally part of the curia regis, or King's Council, the Exchequer of Pleas split from the *curia* during the 1190s, to sit as an independent, central court. The Court of Chancery's reputation for tardiness and expense resulted in much of its business transferring to the Exchequer. The Exchequer and Chancery, with similar jurisdictions, drew closer together over the years, until an argument was made during the 19th century that having two seemingly identical courts was unnecessary. As a result the Exchequer lost its equity jurisdiction. With the Judicature Acts (1873), the Exchequer was formally dissolved as a judicial body by an Order in Council of 16 December 1880. The Exchequer's jurisdiction, at various times, was common law, equity, or both. Initially a court of both common law and equity, it lost much of its common law jurisdiction after the formation of the Court of Common Pleas, and from then on concerned itself with equitable matters and those common law matters it had discretion to try
  - **TODAY –** is the Federal Court of Canada, as per the 1971 *Federal Courts Act*
- ***Crinkum-crankum –*** the law is "full of twists and turns"
- ***Cross-action*** - an action brought by D against P or another D
- ***cur adv vult*** – term meaning "the court wishes to consider the matter." When the bench takes time away from the courtroom to consider the matter. Takes the case "under advisement," or "reserves the judgment".
- ***Per Curiam*** – "A decision written/rendered by the Court as a whole" signed by the group as a whole, or maybe written by a clerk of that Court.
- ***Damnum absque injuria*** - injury without harm; loss or harm without remedy - someone causes damage or loss to another but does not 'injure' them - doesn't give rise to a cause of action
- ***De minimis no curiat lex*** – "the law cares not for small things"; the court refuses to consider trivial matters (matter not worthy of judicial scrutiny)
- ***Demurrer –***method of objection where D concedes facts of the P's argument completely but denies that they sustain the pleading that is based upon them (argues that there is no cause of action)***.*** Today called "motion to strike." Akin to saying "you're right, so what?" -- document that makes pleading that objects to/challenges pleading from opposing party; e.g.) if P brings demurrer, court can decide in favour of D - question of law!
- ***Directed Verdict*** – no other option to consider besides verdict of [xyz], according to law, therefore jury must choose such verdict; Judge instructs the jury on the trial
- ***Dissent*** – "A disagreement with a majority opinion among judges." Useful because it gives another way of looking at the case and sometimes could predict decisions future cases, (especially when it was a close call 5/4 decisions for example)
  - Will explain what happened in the case
  - Not important for the present but very important for future

    - Today's majorities were at times sowed as seeds of dissent
    - Obiter from SCC majority decisions is binding on lower courts but not necessarily on SCC.
- ***Ejusdum generis* rule –** "of the same kind," used to interpret loosely written statutes. Where a law lists specific classes of persons or things and then refers to them in general, the general statements only apply to the same kind of persons or things specifically listed. Example: if a law refers to automobiles, trucks, tractors, motorcycles and other motor-powered vehicles, "vehicles" would not include airplanes, since the list was of land-based transportation
- ***En Banc*** -
- ***Ensuing term*** – sitting of the court
- ***Error to Review*** – Appeal from a lower court
- ***Equity*** – Fair, impartial and even-handed dealing. In England it became a law or body of principles originating in the Court of Chancery and superceding the common and statute law where the 2 would conflict. These principles supplement strict rules of law where their application would operate harshly
    - authorizes the departure from legal rules to meet the requirements of justice
- ***Ex contractu –*** "from a contract," is a legal term that indicates a consequence of a contract
- ***Ex delicto –*** "from a wrong" or "from a transgression," is a legal term that indicates a consequence of a tort
- ***Exch of Pleas. -***Court of Exchequer -tax/equity court - used to be court of equity in Britain; equivalent to the Federal Court; Law is money; equity is everything else
- ***Formal Law:*** written down in codes, regulations etc.
- ***Forms of action*** – "the different procedures by which a legal claim could be made in the early history of the English common law;" types of causes; ways things can be carried out
    - The old common-law patterns for different kinds of lawsuits. A plaintiff could start an action only if it was possible to state the claim in words that followed one of the forms. The forms of action governed all common law pleading
    - a "cause of action" that does NOT arise out of property
- ***General Term –*** a sitting of the court en banc (full bench), w/ the participation of the entire membership of the court rather than the regular quorum (majority)
- ***General verdict*** – "jury makes a complete finding and single conclusion on all issues presented to it"
    - *Langridge v Levy* used a general verdict; more grounds for appeal
    - Get a better idea of what they jury was thinking; For psychological reasons (unless you are wanting appeal)
    - One sticks, and you're liable — balance of probabilities (doesn't allow the D as much of an opportunity to appeal) - Judge decides if it'll be a special or general verdict.
    - If the jury is inclined against you, may exacerbate rather than dampen finding
- ***Gravamen*** – "the substance or material grounds of a complaint"
- ***In Error*** - on appeal – i.e.: *Hoke v US* 1913
    - ***Plaintiff in Error –*** appellant
    - ***Defendant in Error*** – respondent
- ***Informal Law:*** customs, bodies (Law Society - not a government agency, but given authority)
- ***Inter alia*** – among other things
- ***Interpretation*** – imposition of meaning on an object, like a statute
- ***Intra vires*** – within the jurisdiction/power of the enacting body
- ***Joinder*** – two issues joined together and heard concurrently

- ***Leave reserved*** – trial judge has set aside (deciding, no verdict yet)
- ***Legislation*** – act of some legislature that declares, commands, or prohibits something
- ***Lis*** – a controversy or dispute; an issue
- ***Majority***
    - Appellant decision can become ***precedent (see: stare decisis)***
    - Becomes controlling law onward, binding on lower Courts in the same jurisdiction
- ***Michaelmas Term –*** (England – middle ages to present day) One of the four terms of the courts; it begins on the 2d day of November, and ends on the 25th of November. It was formerly a movable term.
- ***Motion*** – A request (written or oral) to a court or judge to obtain a ruling directing that some act be done (presumably in favour of the applicant)
- ***Motion to show cause*** –t require a party (or parties) to justify, explain, or prove something to the court. Courts commonly use orders to show cause when the judge needs more information before deciding whether or not to issue an order requested by one of the parties
    - On a General Verdict, one party asks why so ruled
- ***Moved –*** The past tense form of bringing a motion in court
- ***Nolle prosequi*** – stay of proceedings; a request by P (civil suit) or prosecutor (criminal suit) to discontinue the action
- ***Nonsuit*** – "stop (a lawsuit or the plaintiff bringing it), either by voluntary withdrawal by the plaintiff, or by a finding by the judge that the plaintiff has failed to make a legal case or bring sufficient evidence." - a dismissal
- ***Obiter dicta*** – remarks by the judge on issues that are secondary to the decision in that they do not establish precedent but are important nonetheless
    - A latin term meaning said in passing, it is a judge's statement that is based on some established facts, but does not affect the judgement; all the other fluff (that which is not relevant to the case) — judges may use this as part of the ratio (for precedence)
    - not binding in subsequent cases regardless of the level of court in which *dicta* expressed
- ***Per Curiam*** – "A decision written/rendered by the Court as a whole" signed by the group as a whole, or maybe written by a clerk of that Court
- ***Per quod servitum*** – employer brings action against tortfeasor (D) for loss of employee's services (as in *Dixon v Bell* and in *Brownlee* with father's "loss of servant")
- ***Persuasive Decisions***
    - A case from lateral jurisdictions may be persuasive for all other jurisdictions
    - England (House of Lords) – can also influence current matters, **but** their decisions prior to the patriation of the constitution that have not been since overturned in Canada are still binding.
- ***Pleadings (D or P)*** - these are just allegations until proven (their rendition of the case)
- ***Pleading in the alternative*** - 'I didn't kill him, but if I did, I was insane
- ***Prima Facie –*** a case of sufficient weight presented by the party having the burden of proof to warrant judgment in that party's favour absent a response from the other party
- ***Privity*** - a close, mutual, or successive relationship to the same right of property or the power to enforce a promise or warranty. Important concept in CONTRACT LAW. It dictates that an individual cannot sue on a contract to which he or she was not a party. A common example of the principle in operation is that if A (a consumer) buys goods from B (a retailer) which B had originally bought from C (the manufacturer) which turn out to be faulty, A cannot sue C in contract law because A has no contract with C.
- ***Quo ad hoc*** – "As to this; with respect to this"
- ***Ratio decidendi*** – the rule of law treated by the judge as the basis for the decision; the material facts and legal conclusions necessary to

resolve issue before court; the legal basis of the outcome; binding on lower or co-equal courts in subsequent cases

- ***Rejoinder*** – D response to the P replication (which is P's reply to D's plea in response to P SoC)
- ***Replication*** – P's reply to D's plea (which follows the P's SoC)
- ***Res Integra*** – a legal case in which there is no binding precedent on the matter presented; "matter of the first impression"
- ***Res judicata –*** a matter that has been adjudicated by a competent court and therefore may not be pursued further by the same parties (to not try matters that been settled before)
- ***Rule*** or ***ruling*** - a decisions or order made by the court
- ***Rule of nisi*** - can we pause the effect of this judgement (if trial judge says no, can appeal to higher court) - in Langridge v Levy, defence requested this after jury had come back with general verdict; Judge allowed because P and D had no privity - likely had some doubts himself —> if rule is granted, jury verdict is thrown out; overturned based on fact!**---** suspend remedy or judgment while appealing
- ***Sequela –*** an abnormal condition resulting from a previous disease
- ***Sine qua non*** – the indispensable and essential action, condition, or ingredient
- ***Sharia law,*** traditional Aboriginal law (in Canada and elsewhere), a system of law, rather than a codification of laws, based on the Koran or traditional sources
- ***Show cause motion (rule to show cause)*** - a rule that orders a party to show why he has not carried out certain acts or why they should not be carried out; requires a party to compel the other side to show why the victory is valid
- ***Somersetshire Summer Assizes*** - Langridge v Levy - courts held regularly as needed; pop-up court - "riding circuit" where judges move around (still happens today)
- ***Special verdict –*** "the jury's decisions or findings of fact with the application of the law to those facts left up to the judge, who will then render the final verdict"
    - jury finds the accused guilty on specific charge —> yes to #1, no to #2, yes to #3 - if there are specifics - more grounds for appeal from the defendant; can have a cascading or totality effect (higher damages) which can be counterproductive for the D; Judges and appeal courts don't like this because they have to entangle the mess
- ***Statement of claim***; not so strict – "The document which sets out the plaintiff's allegations of fact and thus, engages the judicial process by seeking trial"
- ***Stare decisis –*** "let the decision stand" [reference: Master Funduk – "little peckers don't overrule big peckers."]
    - the doctrine that once a court has laid down a principle of law in relation to a certain set of facts, it should apply that same principle where the material facts are similar
- ***Statutory delegation*** – a higher body delegates a lower body to legislate on its behalf in respect to some matter
- ***Strict liability*** – "Absolute legal responsibility for an injury that can be imposed on the wrongdoer without proof of carelessness or fault"
- ***Style of cause*** – the name of the parties as represented on the title of the case *Plaintiff v Defendant*
    - In Admiralty Court: only 1 name in style of cause = the name of the ship
- ***Trial*** – judicial examination and determination of the issues, or law and fact, between the parties
- ***Trier of fact*** (or **finder of fact**): a person, or group of persons, who determines facts in a legal proceeding, usually a trial.
- ***Trier of law*** (or**finder of law*)***: the judge
- ***Trover*** – Early common-law tort action to recover damages for conversion of personal property, the damages generally being measured by the property's value; or to recover such property
- ***Ubi jus ibi remedium***- where there is a right, there is a remedy
- ***Ultra vires*** – beyond the jurisdiction/power of the enacting body
- ***Vis-à-vis*** – face to face w/; opposite to; compared w/; in relation to

- ***Voir dire –*** a preliminary examination of prospective jurors or witnesses under oath to determine their competence or suitability
- ***Writ –*** fill-in-the-blank document; approx 40 existed; still important for how we approach tort claims; each form of action had one
- ***Writ of Certiorari*** – "a type of writ seeking judicial review." The process of seeking leave to appeal at the SCC.

Finder of Fact: Jury (or Judge)

- —> these facts are admitted on appeal
- on appeal, you are very unlikely to win on the factual side of the case - findings of fact are very seldom overturned/disturbed because jury and judge watched and saw these things during the trial; they decided what was the truth and appeal court isn't going to overturn this (they weren't in the room at the trial)

Finder of Law: Judge

- —> together, law and facts lead to the verdict or judgement (at trial)

Appeals:

- trial judgement (law applied to findings of fact) —> appeal on grounds of appeal —> appeal examines trial judgement
- legal and factual issues from trial — only those put into appeal are at play
- PROCESS:
    - findings of fact (trial finder of fact receives deference)
    - application of law - no deference (exceptions)
    - outcome on appeal - uphold (appeal dismissed) or reverse (appeal granted)
        - sometimes send the case back to lower courts to be dealt with again pursuant to specific instructions
- unanimous or dissent and majority
    - dissent is not the law!
- sometimes (most), the Justices sign their names and sometimes (few), it is signed Per Curiam (By the Court)
    - In AB today, CA issues its judgements per curiam
- case becomes precedent with the facts as stated in the case only relevant facts for future parties
    - next time lower court encounters these facts, they have to rule the same way as preceding cases
- case is binding on all lower courts in that jurisdiction
    - may be persuasive for all other jurisdictions
- law may be changed, affirmed, extended, retracted, or overturned

The Common Law:

- Statutes
- Judge-made cases
- Cases interpreting statutes and previous cases
- English system of judge-made law
- system of legal reasoning

- supremacy of precedents (that can be overturned by new precedent or statute or both)
    - once court says something, that is it

The Civil Law:

- Europe (not UK) & Quebec (Louisiana, South Africa, Scotland)
- some systems have a mix
    - Shariah law, traditional aboriginal law (in Canada and elsewhere)

RANDOM:

- when you see the word jury, you know this is a trial because you are finding the facts
- admiralty cases deal with ships - the name of the case is usually just the name of the boat (Eg Cruiser)
- start to finish of a case: pleadings, allegations, trial (evidence, testimony, exhibits), jury instructions, verdict, motion
- Judges: Denning & Cardozo (Cardozo is more modest than Denning)

PART 1: COMMON LAW REASONING

Dixon (P) v Bell (D) (1816) — LIABILITY

BINDING ON AB COURT UNLESS OVERRULED AFTER 1870

- Facts:
    - Parties: D was the owner of a gun and P was the father of the son / servant who was shot.
    - D told P to empty powder from gun and give it to his servant (12 year old Mulatto girl) to return to D; P gave D's gun to D's servant, and she accidentally fired gun (that obviously was not rendered completely safe) and injured son of P; P brings action for damages
    - Procedural posture: Court of King's Bench and then appeal - to the same court (internal appeal)
- Issue: Is D liable for negligence in entrusting a loaded gun to a young girl
    - whether a reasonable and prudential precaution had been taken to render the gun innocent, before it had been entrusted to the care of the mulatto servant
        - standard of care for an inherently dangerous object? Was a reasonable and prudent precaution taken to render the object innocent?
    - **action on the case: a legal method of seeking recovery**
        - here, negligence in improperly entrusting a loaded gun
        - negligence implies there is a standard care and breach of duty - if no duty, then no breach has occurred
- Decision: Jury found special verdict for P
    - D was liable for the loss of son / servant's services to the P
    - P was entitled to fees owing to the physician and surgeon for son's injuries (damages of 100 pounds)
    - ***Per quod sevitium amisit*** – loss of services - sue for this to get more money
    - D moved for a rule to show cause - why verdict should be set aside (this is an appeal)
- Reasons:

- AG for the D arguing that guns should be held to a standard of negligence and not strict liability and that the D was not negligent because he took precautions he thought reasonable to make the gun safe.
- Lord Ellenborough found that D did not meet standard of care - rule to set aside refused; P wins
  - told the jury that they were to consider 1) whether the D had been guilty of negligence in entrusting such an instrument to such an agent; and 2) whether a reasonable and prudential precaution had been taken to render it innocent, before it had been entrusted into the care of the young girl
  - trial judge instructs the jury on the law; the jury is the trier of fact and applies the law to the facts —> essentially charged the jury with the answer (telling them to rule in favour of the P)
- **the jury found that the gun in such a state ought not to have been trusted to such a person —> the P should be entitled to his verdict**
  - **it is incumbent on the D to safeguard a dangerous instrument** (Even against 3rd parties)
  - D did not put the gun out of harms way and did not do everything required to ensure safety
- AG for D moved for rule to be set aside to have a new trial on the grounds that the D had done everything that in point of care and prudence he could be called upon to do and that he had thought the gun to be perfectly safe so he shouldn't be found guilty of such culpable negligence as to be liable in an action
  - Lord Ellenborough (appellate judge) held (IN APPELLATE DECISION) that it was incumbent (the duty) on the D to render the instrument safe and innocuous — he should have taken more care so as to put it beyond the reach of danger
    - saying that - "the facts as they are, the D is negligent"
  - this court sets a binding precedent

- Ratio:
  - A person having in his possession a dangerous weapon, such as a gun, ensues the natural and probable consequence of taking care of the weapon, even if the damage is caused by a third party.
  - You have an obligation to make a dangerous object safe by not only doing your best to do so by taking obvious precautions by putting it out of reach of danger (in other words but not putting it in someone's hands)
  - Negligence – omitting to do something that a reasonable man would do
- Rule:
  - **You have an obligation to make a dangerous object safe by not only doing your best to do so by taking obvious precautions but also to put it out of reach of danger (in other words but not putting it in someone's hands)**
  - **LIABILITY, NEGLIGENT ENTRUSTMENT**
  - **Narrowly drawn:** D causing loss of service of one's servant when entrust a gun to 12-yr-old mulatto girl (mulatto is not a legally relevant fact) servant is found nonetheless liable when that other person causes damage.
  - **Broadly drawn**: anyone who owns an inherently dangerous object is responsible for ensuring that it does not cause any harm. negligent entrustment.
- Notes:
  - race of the servant girl is not legally relevant (race and gender —> social context comes into play)
  - AG was counsel for the D because he wasn't paid much under employment of the Crown
    - case is of interest to the government and this isn't a criminal case so there's no conflict of interest
  - there is no reference to another case or statute so this is an example of **judge-made law** - they can do this because they have authority to (common law) - he's making it up!
  - son could sue for physical damages — father wants to sue for loss of services -> for medical damages and for lost wages

Langridge (P) v Levy (D) (1837) - LIABILITY (3rd party) — appeal

BINDING ON COURT UNLESS OVERRULED AFTER 1870 - Court of Exchequer

- Facts:
  - Parties - D is the store owner and seller of gun; P is the son of the father who bought the gun
  - D sells gun to father, knowing that the son would be using it too; D tells P's father that the gun was of high quality; son (P) uses it, gun explodes and blows his hand off. Father bought the gun and P used it after relying on the misrepresentation of the D. P sues for misrepresentation and fraud (contracts), and negligence (tort)
- Issue: Is the seller liable to an extended third party (not the party in which the contract was formed) for fraud and misrepresentation?
  - Does D owe a duty of care to P to ensure that D's inherently dangerous product does not cause harm?
- Decision: D won at trial; on appeal, **P won under general verdict**, D guilty of fraud
  - Court refused to set a precedent by imposing duty of care to third parties because this might result in indefinite liability (floodgates) BUT awarded damages to the P on the basis of fraud - a duty arose that the gun should be safe because of the D's representation that it was (this duty extended to the P because D knew that P would be using it)
- Reasons:
  - Broad interpretation of D v B (this was court of KB - not binding on Judge here because Exchequer but still persuasive)
  - There was no warranty because D and P did not have a contract (no privity) - so can't sue in contract
    - BUT D knew that the son would be using the gun —> seller made a misrepresentation by saying that the gun was safe in order to effect sale which was relied on - FRAUD
  - Defence pleads in the alternative "first, not guilty, second, that the defendant did not…" - first, Im not guilty, but if I am ….
  - Trial Judge (Alderson, B) — asks jury 3 questions and to make a verdict — 1) had the D warranted the gun to be made by Nock; 2) whether it was in fact unsafe or of inferior materials / workmanship; 3) whether the D warranted it to be a safe gun, knowing that it was not so
    - jury needed to decide if the instrument was immediately dangerous or mischievous by the act of the D or is it such as may become so by some further act to it
    - general verdict finding the D guilty
  - Erle is defence counsel and he moves / requests '*leave reserved by the learned judge'* - sought to have ***rule of nisi*** on the ground that no duty could result out of a mere private contract — wants a pause from the effect of this judgement (Judge allows this pause possibly because they have doubts or do not agree with the jury's decision)
    - Jury verdict is thrown out, rule is granted (likely because Judge recognizes **no privity** - can't overturn on basis of fact; Judge rules that there was no law to allow this case to go to trial)
    - Judge wants to send it upstairs so it can be binding — if trial judge thought no liability but had some doubts, better to allow trial to take place and then when it goes upstairs, there has already been a trial - there was fresh testimony, facts, memories etc.)
    - because of this, D won
  - Appeal Judge (Parke, B)
  - P is appealing because lost below and wants the jury verdict restated
    - Statute of Westminster - 1285 - no harm without a remedy (still good law unless overturned or statute overruled it
    - use D v B - person who puts dangerous weapon in hands of someone and it goes off —> LIABLE! (maybe just persuasive but still its a precedent and helps make P's argument)
  - Parke asks 'whether there is enough stated on this record to entitle the P to sue' - includes everything from trial

        - if it was just because of the law, he would have lost but P won because of the record
    - Rule of nisi discharged -> jury verdict reinstated (if rule was granted, then the jury verdict is overturned forever)
    - Fraud was never proved directly BUT general verdict so assume that all 3 were proven (including fraud)
- Ratio:
    - when you sell an object, the seller is liable for fraud to the customer and for 3rd parties whom you know will be using the object
    - a seller cannot knowingly make a false warranty in order to effect a sale
    - **LIABILITY - there must be fraud available to find P negligent**
        - **if the vendor fraudulently warrants the object safe for the use of that person - you are liable if you deal in dangerous commodities or instruments that harm someone, regardless of not being the direct dealer of the good to that injured party**
- Notes:
    - Case being heard in Exch of Pleas — Court of Exchequer because the judges got paid by the litigants in the case (nothing to do with taxes but the court has broader jurisdiction at this time)
    - verdict is that there is fraud but there are more qualifications: Judge specified that he doesn't want people to read too much into the case - fact specific — "on this record" — this case only!
    - if judge had ruled on the basis of the contract issue, the floodgates would be open
    - employs a broad reading of DIXON

Winterbottom (P) v Wright (D) (1842) - NO LIABILITY (3rd party)

BINDING ON AB COURT UNLESS OVERRULED AFTER 1870 - court of Exchequer

- Facts:
    - Parties: Contract 1: P was contracted by Postmaster (3rd party) to drive a mail coach supplied by Postmaster; Contract 2: D was contracted by Postmaster to maintain the coach - supplier of the coaches that are in safe condition/fit for purpose; Contract 3: Atkinson and others have separate contract with Postmaster to supply drivers and horses
    - P was injured after coach broke down and is suing D on the grounds that D behaved negligently. P acted and confided in the contract between D and Postmaster which was breached on the grounds that D knew the mail coach was not in a safe and working order
    - no trial in this case - take alleged facts as true — want to know if there is a cause of action
    - Court of Exchequer
    - "case of first impression" - aren't bound by L v L
- Issue: Can P sue D for negligence (breach of duty of care) even though they didn't have an exclusive contract? — is there a cause of action here? (no trial) To whom does a supplier owe a duty of care?
- Decision: on the demurrer, court ruled in favour of D - D did not have a duty to P, only to the Postmaster —> no privity
    - **no liability - judgement for D**
    - decided on pleadings alone - **no trial** —> no cause of action here - pleadings were insufficient
- Reasons:
    - Judges say this is an **action of first impression** - this is done to avoid using precedent set in LvL
    - no privity of contract between D and P - floodgates argument if duty is extended to 3rd parties
        - law recognized only negligence in respect to breach of contract and not a tort on its own
    - D did not know that the coach was unsafe or that P would be driving the coach — different from L v L where the D knew about the son using the gun

- D pleaded several pleas and P brings *demurrer* ('so what') - wants to stop this in its tracks but the Judge decided in favour of D
  - Court agreed! — P made demurrer which opened the floodgates and the court was free to consider the whole thing and made a decision for the D (backfired on P)
- Byles for D - the party injured by the negligence of another cannot go beyond the party who did the injury unless he can establish that the latter was a servant to the party sued
- Peacock for P - tried to use L v L; tried to make case for fraud (that D represented the coach to be in proper state for use)
- Lord Abinger, Alderson, B, Gurney, B & Rolfe, B - D entitled to judgement;
  - Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue
  - *damnum absque injuria* - loss or harm without remedy
  - 'hard cases are apt to introduce bad law' - no good reason to make new law - shouldn't be swayed by sympathies to P

- Ratio:
  - On the basis of privity of contract, a party cannot sue another party for negligence (or breach of contract) if there in no direct contract
  - when a wrong arises out of breach of contract, the party who made the contract alone can sue
  - **no liability - a vendor who enters into a contract to provide an object that is not inherently dangerous only owes a duty of care to parties who have privity of contract, can't win if you don't allege fraud**
- Notes:
  - **In L v L**, there was no privity but there was knowledge (knew son would be using the gun) - also sued for fraud. Also, there was a trial and the jury could see the harm caused to the P —> here, no trial so no opportunity to see the P and feel sympathy for him; also gun is more dangerous than carriage
    - implied warranties in both cases
    - In W v W, SHOULD HAVE followed up more with the idea of fraud (say seller is a crook) - this worked for L v L
  - D v B and L v L both had guns and liability!
  - P couldn't sue Postmaster General because owned by the government and therefore the king and the King can so no wrong - rules in God's name; state itself is the source of the law so it can't be sued (gov't can only be sued when it consents to be sued)
  - **"hard cases make bad law" -** typically means extreme cases make a poor basis for more broad reaching law
  - note: when ***demurrer*** is pleaded, always take the facts as truth!

Longmeid (P) v Holliday (D) (1851) - NO LIABILITY (3rd party)

BINDING ON AB COURT UNLESS OVERRULED AFTER 1870 - court of exchequer

- Facts:
  - Parties: D is the maker and seller of the Holliday Lamp; P - husband and wife
  - P holds that Holliday sold Patrick Longmeid a lamp that he said was reasonably fit and proper for use, when he knew the lamp was cracked, leaky, unsafe and wholly unfit for use by P; Eliza Longmeid used the lamp and it exploded into pieces injuring her
  - Court of Exchequer
- Procedural History: D appeals after Trial Judge ruled in favour of P: At trial, it was decided thatIf D sells an article as secure, and does not tell the purchaser he did not construct the article himself (and that it might be unsafe) he is guilty of breach of duty.
  - At trial,
    - P suing on fraud because she cannot sue on contract because she did not have one (learned the lesson from W v W so sues using fraud)

        - L v L and W v W - binding precedent because same court
        - Jury says no fraud - makes us think no liability - D loses jury trial except on the charge of fraud (special verdict)
            - jury found all other facts for P (**special verdict** - meaning they told them specifically what the p was charged with)
        - D wants to stop the case - no fraud, therefore the action won't lie;
        - Judge directs jury to find for the Ps —> find D guilty
        - D's counsel obtains **rule nisi -** on appeal, the jury verdict is overturned
- Issue: Is D guilty of breach of duty of care, misrepresentation and fraud in regards to the unsafe lamp that he did not construct himself but sold to P's husband and is he responsible for the injuries P's wife sustained?
    - To whom does a vendor owe a Duty of Care for items not inherently dangerous?
    - Is the shopkeeper (D) liable for defect?
- Decision: on appeal, D was not found guilty of fraud or deceitful misrepresentation
- Reasons:
    - P tried to argue warranty after fraud was didn't succeed at trial — implied warranty because lamp sold for express purpose (Even if D is not aware of defect, still responsible if he represented it for that purpose)
    - D argues that the jury negated fraud - in L v L they only found negligence on account of fraud — no duty is imposed on a tradesman to furnish articles fit for the purpose of every individual into whose hands they may come
    - Parke, B
        - **rule ought to be made absolute** - rule in favour of D —> rule from jury verdict is not confirmed so D wins; rule
            - "nonsuit must be entered"
        - there was no proof that D knew that the lamp was defective - he did not construct it himself and didn't know it was unfit for use
        - The action is not found on fraud - only on contract (with husband only) - no privity with wife so she cannot sue
        - the purchaser cannot recover if the vendor does not know the representation of quality goods was false — no fraud —> the action cannot be maintained
- Ratio:
    - A seller of an article to a tradesman for the use by another third party is not, in the absence of fraud, liable for injury caused to that third person by some defect in the construction of the article
    - **no liability -** a vendor of an item not inherently dangerous is not liable to an injured party for injuries sustained using the product if the injured party was not privy to the contract which sold the item and the item was not fraudulently represented —> can't win if you can't prove fraud
- Notes:
    - Parke, B - was the same judge as in L v L
    - in L v L, the object was inherently dangerous and there was fraud (even though no privity) - D was held to be liable; here, no fraud —> no liability
    - Based on the following cases, it would seem like **fraud is what you need to get some sort of liability when there's no contract**:
        - D v B is floating - liability
        - L v L —> you'll win if fraud — liability
        - W v W —> won't win if there's no fraud - no liability
        - L v H —> alleged fraud, rejected (tried your best) —> don't win - no liability

Thomas (P) v Winchester (D) (1852) - LIABILITY (3rd party) - appeal

BINDING ON AB COURT UNLESS OVERRULED AFTER 1870 - NY CA

- Facts:
  - Parties: Ps - Thomas, and wife who got sick when she took belladonna; D was the dealer of these drugs
  - Mrs. Thomas was prescribed dandelion and her husband purchased what was labeled as dandelion at the store of Dr, Foord, but was actually belladonna (poisonous) and made Mrs. Thomas very ill; Dr.Foord had bought the drug from Aspinwall, who bought it from the D as extract of Dandelion. D did not manufacture the drugs. Gilbert prepared the labels for the drugs (similar sequence as W v W)
  - Procedural History:
    - P accused D of negligence; D filed for nonsuit on the accounts that:
      - D was a remote vendor (no transaction or privity between P and D) - like in W v W
      - the negligence of the other vendors was chargeable - D saying that P hasn't proved fraud
    - Judge overruled this motion
  - Court of Appeals of New York
    - Winchester (D) is appelant — Thomas (P) is defendant
- Issue: Whether an action can be maintained given that the D is a remote vendor of the medicine, and there is no privity or connection between him and the Ps
  - D poses this question to the court (if P had posed the question, probably would have been more along the lines of a woman being maimed by the mislabelling of a poison)
  - TO WHOM is a pharmacist liable? does liability extend past the first party who a drug is sold to?
- Decision: D is guilty of negligence and liable for damages to P
- Reasons:
  - P arguing that giving a poison to someone without looking after it is just like giving a child a gun (D v B)
    - his case is different from W v W because it involved **dangerous goods** - put human life in danger
    - if P had dies, D would have been liable for manslaughter
  - D knew that the article would be sold to a customer for its intended use - no privity does not excuse the wrongdoing
  - a dealer in drugs and medicines, who carelessly labels a deadly poison as a harmless medicine, and sends it so labeled into market, is liable to all persons who, without fault on their part, are injured by using it as such medicine in consequence of the false label
  - liability of the dealer arises not out of any contract or direct privity between him and the person injured, but out of the duty which the law imposes upon him to avoid acts in their nature dangerous to the lives of others
  - extension of D v B — inherently dangerous (gun is, but lamp/carriage is not)
- Ratio:
  - For the selling of dangerous goods, a producer or labeler will be held liable by the party injured by a misrepresented good even if there was no direct contract with the injured party (no privity of contract)
  - **Narrowly construed**: A dealer in drugs and medicines, who carelessly labels a deadly poison as a harmless medicine, and sends it so labeled into the market, is liable to all persons, who, without fault on their part, are injured by using it as such medicine in consequence of the false label.
  - **Broadly construed**: A person or party, regardless of how remote might be to the manufacturing of the product, who puts falsely labeled good (inherently dangerous product) into the market and thus "**puts human life in an imminent danger**" should be liable in damages to the ultimate consumer.
- Notes:
  - *Supreme court or Superior Courts does not mean the Supreme Court of Canada (ex. British Columbia). It is still a trial court. Every

jurisdiction has its own names.
    - in this case, went from Supreme court to CA
  - compared to L v H where there was no liability on account of the article itself (lamp) not being imminently dangerous
  - This far, it seems as though cases dealing with dangerous objects (and sometimes fraud) the D has been found liable/negligent, and cases not dealing with inherently dangerous objects the D has not been found liable
  - this is a US case but they are referencing an English case - D v B (they use and extend it)

George (P) v Skivington (D) (1869) - LIABILITY

BINDING ON AB COURT UNLESS OVERRULED AFTER 1870 - court of Exchequer

- Facts:
  - Parties: George and Wife - Ps; Skivington - D
  - Court of Exchequer
  - George bought chemical fit for hair wash (shampoo), which was used by his wife; wife used it and was injured; Ps claim that D had negligently prepared and sold the hair wash, which was actually unfit
  - the action is, in effect, against a tradesman for negligence and unskillfulness in his business
  - Procedural History: on demurrer, held that declaration disclosed a good cause of action
- Issue: Whether the Ds duty to use ordinary care in compounding the wash extends to the person for whose use the vendor knew the compound was purchased (the wife)
- Decision: Declaration shows good cause —> judgement for the Ps - demurrer: pleadings are sufficient to go to trial
- Reasons:
  - For the Defendant:
    - was in support of the demurrer and argued that there was no implied warranty and that the D did not know the compound he manufactured and sold was unsuitable for the purpose it was bought for (tries to argue there was no privity between him and wife)
  - For the Plaintiff:
    - D claims he did not know the compound he sold was unfit for use
    - Because the D knew the compound was intended for the use by the wife the contract could be extended to her
      - Like in L v L – substitute the word negligence for the word fraud
    - there was negligence and injury came from that
      - regardless of whether there was a warranty, express or implied, there was a duty on the defendant, the vendor, to use ordinary care in compounding this wash for the hair
    - *a vender who has been guilty of fraud or deceit is liable to whomever has been injured by that fraud, although not one of the parties to the original contract, provided at least that his use of the article was contemplated by the vender*
  - Different than in L v L (in L v L there was no negligence found, just fraud; here, no fraud, just negligence)
  - Different than in L v H because in L v H the jury found bona fides and no negligence on the part of the vendor
- Ratio: If a seller produces and sells an article negligently he is liable to not only the party with whom he directly contracted with but also to any third parties injured by the article if he is aware of the third party and their intended use
  - **LIABILITY - for the first time in British common law,** a third party that was not directly involved in the incident was awarded damages for the manufacturer failing to foresee reasonable omissions in a breach of contract
    - **ISSUE OF LATENT DANGER**

- Notes:
  - W v W is binding precedent so should expect same outcome, but no —> don't mention this case but essentially overturn it
    - they can do this because this is the Court of Exchequer; a trial judge can overturn if they point out how the facts are different
  - shampoo - inherently dangerous item

Loop (P) v Litchfield (D) (1870) - NO LIABILITY - appeal

PERSUASIVE ON AB COURT UNLESS OVERRULED AFTER 1870

- Facts:
  - Parties: Ps are the benefits of Loop; D is Litchfield
  - D sold a balance wheel manufactured for sale by them, to man named Collister., who purchased it for his own use in a machine for sawing wood by horsepower; The wheel had a hole that was repaired by D on C's request. C used the wheel for four years until it burst and the fragments killed P's intestate (Loop)
  - Procedural History: Charged for causing death by negligence; Lower court – ruled for P; Appeal then reversed this and now a new trial
  - Court of Appeals of New York
    - Litchfield is respondent (D) and Loop is appellant (P)
- Issue: Whether the D is guilty of negligence and liable for the defect and the subsequent injury due to that defect because of their negligence
  - Is D liable to Loop's estate? Was there a duty on D to exercise greater duty of care?
- Decision: judgement absolute for the D - no cause of action; verdict cannot be sustained
- Reasons:
  - T v W: When dealing with a dangerous object the person whose negligence caused death or bodily harm is liable even if there is no contract between the D and plaintiff.
    - Here wheel was not imminently dangerous
  - No concealment on the part of the D - the P knew the defect (in T v W, the P did not know of the defect)
  - in T v W, the injury was a natural result of the negligent act but here the bursting of the wheel happened and the unjust was not the natural result or the expected consequence of the manufacture and sale of the wheel
  - Jury decided there was negligence and the object should not be considered in itself a dangerous item
  - the privity requirement barred a products liability action unless the product in question was "inherently dangerous"
- Ratio: When an object is bought with the knowledge that there is a defect, the seller cannot be held liable for negligence if an injury occurs because of the defect
  - **NO LIABILITY -**
    - D who sells a defective, non-inherently dangerous component to be used in a greater machine and informs P of the defect, will not be found liable if a third party is injured, unless the article is in its nature dangerous (this continues the "imminently dangerous to human life" rule).
    - If an injury is caused by an item that is not inherently dangerous and that injury is not the expected consequence of using the item, the vendor of the item is not liable.

Losee (P) v Clute (D) (1873) - NO LIABILITY - appeal

PERSUASIVE ON AB COURT UNLESS OVERRULED AFTER 1870

- Facts:
  - Ds manufactured the boiler for the Saratoga Paper Company; Testimony showed it was constructed improperly and of poor materials and they knew it would be used near a village and if it exploded would be destructive to human life; action was brought to recover damages caused to the property of the P by the explosion of a steam boiler while the same was owned and bring used by the Saratoga Paper Company
  - Ps bring case against Ds as the manufacturers of the boiler - say that they made the boiler out of poor and brittle iron and in a negligent and defective manner, in consequence of which negligence said explosion occurred
  - Procedural History: Complaint was dismissed at trial - Clute (D) won
  - Court of Appeals of New York
    - Losee (P) is appellant and Clute (D) is respondent
- Issue: Is D liable as the manufacturer of defective materials?
  - Does D still owe a duty of care to P after boiler has been inspected and accepted?
- Decision: No - complaint dismissed; P does not have a claim against D - no cause of action against manufacturer
  - no grounds for the reversal of the judgement
- Reasons:
  - Ds held that after the boiler was sold it had nothing to do with the management of it and the paper company has exclusive ownership
    - argue that the damages are too remote (3rd party - no privity)
    - an agent is not liable for neglect of duty in the matter of his agency, the principal is alone liable
  - T v W has no application because steam boiler is not seen as a dangerous object and the damages are too remote
  - A manufacturer of a steam boiler is liable only to the purchaser for defective materials and want of care in its construction, and if, after delivery to and acceptance by the purchaser, an explosion occurs from defective construction, a third person has no cause of action against the manufacturer.
- Ratio: When a manufacturer sells an object to a company and the company accepts the object outright and assumes exclusive ownership the builder is not liable for accidents or injuries which may occur after the execution of the work - third party has no cause of action against the manufacturer
  - NO LIABILITY - once a purchaser inspects and accepts an item that is not inherently dangerous in nature, the vendor no longer has control over the item or its maintenance and the purchaser is solely responsible for keeping it in safe and working condition
- Notes:
  - looks like W v W is still alive —> even if it only applies for non-dangerous goods
  - G v S clearly didn't completely overrule W v W
    - fraud and negligence must only be for inherently dangerous - gun, medicine

Devlin (P) v Smith (D) (1882) - LIABILITY

PERSUASIVE ON AB COURT UNLESS OVERRULED AFTER 1870

- Facts:
  - Parties: Smith and Stephenson are both Ds; Devlin, P, is the wife of deceased Devlin who was the employee of Smith
  - D (Smith) was a painter with no experience building scaffolds. He hired scaffold-builder (Stephenson) to build the scaffold as he was experienced - it was defectively constructed. P was the employee of D and was at work on the scaffold when it gave way - he died from his injuries
    - It didn't appear as though D knew or ought to have known of the defect

- Procedural History: at trial, D won - D was not found liable
  - held that scaffold-builder was not the agent or servant of the D and therefore D had not been negligent in relying on the judgement of scaffold-builder also that the scaffold builder was not liable because there was no privity between him and P (Stephenson's duty was to Smith, with whom he contracted)
- New York Court of Appeals
  - Devlin (P) is appelant — Smith (D) is respondent

- Issue: Is D guilty of negligence and liable for P's death — is P entitled to recover damages?
- Decision:
  - on appeal, the court affirmed as to the D (not liable) and reversed as to the scaffold-builder (liable) - STEVENSON IS LIABLE
  - Court thinks there should be a new trial as to the D Stephenson, and that it will be for the jury to determine whether the death was caused by negligence on the part of Stephenson in his construction of the scaffold
- Reasons:
  - P (appelant) trying to show that it was sufficient that Smith out to have known, or could have, by the exercise of reasonable care, ascertained its defective condition — trying to argue vicarious liability (liable for employee (Stephenson)'s actions)
  - there was no evidence of negligence on the part of the D in selecting the scaffold-builder, nor was there evidence that the employer knew or had reason to know of any defect in the scaffold (D should not be liable for independent contractor's acts or omissions)
  - Scaffold-builder was liable even though there was no privity of contract between him and the P — he negligently constructed the scaffold that would be imminently dangerous
    - liability to third parties has been held to exist when the defect is such as to render the article in itself imminently dangerous, and serious injury to any person using it is a natural and probable consequence of its use. As where a dealer in drugs carelessly labeled a deadly poison as a harmless medicine, it was held that he was liable not merely to the person to whom he sold it, but to the person who ultimately used it, though it passed through many hands. This liability was held to rest, not upon any contract or direct privity between him and the party injured, but upon the duty which the law imposes on every one to avoid acts in their nature dangerous to the lives of others.
  - the common law rule was extended to provide liability for the negligent manufacture of a product that becomes dangerous because it was defectively produced
- Ratio: liability to third parties has been held to exist when the defect is such as to render the article in itself imminently dangerous, and serious injury to any person using it is a natural and probable consequence of its use
  - a seller of an inherently dangerous item, specifically scaffold, will be held liable for damages occurring to the buyer or to a third party if that item was made negligently, and therefore becomes inherently dangerous.
- Notes:
  - similar to T v W - dangerous goods — scaffold-builder's liability can rest upon this principle
  - *Loop v Litchfield* – distinguished – fly-wheel not imminently dangerous
  - *Losee v Clute* – distinguished – boiler was not imminently dangerous

McPherson (P) v Buick Motor Co. (D) (1916) — LIABILITY

- Facts:
  - Buick sold a car to a dealer who sold the car to the P (McPherson); One of the wheels was made of defective wood, and although Buick did not know of the defect, they should have inspected the car and discovered it; The car collapsed and the P was thrown from the car; P charged D for negligence (not fraud)

- Procedural History: Trial judge held for P and found D liable
- New York Court of Appeals
  - McPherson (P) - respondent and Buick (D) - appelant

- Issue: whether D owed a duty of care and vigilance to anyone but the immediate purchaser
  - Looking at negligence, not fraud
- Decision: trial judgement affirmed - P (respondent) won
- Reasons:
    - T v W - analogous - when danger can be foreseen, there is a duty to avoid the injury; negligence put human life in danger so liable to third party
    - L v L - distinguished - vendor pointed out defect; risk was not imminent; lasted 5 years before breaking — not liable
    - L v C - distinguished - decision criticized - steam boiler risk of injury too remote (testing had been done on boiler) so not liable
    - D v S - analogous - extends rule of T v W - D built scaffold for P's use so he owed him a duty; regardless of his contract with employer - scaffold is a dangerous trap because built improperly so liable
  - Judge extending the rule of liability of inherently dangerous objects (W v W) to non dangerous objects but says he is not changing the law
    - **creating new rule**
  - Whenever one person supplies goods, or machinery, or the like, for the purpose of their being used by another person under such circumstances that every one of ordinary sense would, if he thought that unless he used ordinary care there will be danger of injury to the person whose use the thing is supplied, and who is to use it, a duty arises to use ordinary care
    - If he is negligent, where danger is to be foreseen, a liability will follow
    - The car could be dangerous – travel is different than it used to be (faster) – danger can reasonably be forseen
    - W v W – does not apply here because the defendant was not the manufacturer
  - Bartlett J Dissenting:
    - D bought the tire from a different company and was reasonable to assume it was fit for use
    - No contract to third parties (no privity)
    - And because the car was only moving at a speed of 8mph it was not more inherently dangerous that the carriage in Winterbotton v Wright, where in that case the D was not held liable
    - Believed that liability to third parties should not exist with regard to inherently dangerous objects (objects that are made dangerous when constructed improperly, negligently, and with poor care
- Ratio:
  - If a person is negligent, and danger is forseen, even with only non-inherently dangerous objects, a duty arises to subsequent parties (third parties) to use ordinary care.
  - The obligation to inspect must carry with the nature of the thing to be inspected
  - **If the thing is such that it is (1) reasonably certain (probable) it could be negligently made, then it is a thing of danger, (2) if it will be used by others and (3) will not be it tested, the manufacturer is under a duty to make it carefully or he will be liable for negligence.**

Donoghue (P) v Stevenson (D) - LIABILITY —— LOOK AT PASSAGE IN LEVI!

- Facts:
  - appellant (P) drank bottle of ginger beer, manufactured by the respondent, which a friend had bought from a retailer and given to her

        - had remains of snail — appellant suffered from shock and gastro-enteritis
    - appellant's case: that the respondent, as the manufacturer of an article intended for consumption and contained in a receptacle which prevented inspection, owed a duty to her as consumer of the article to take care that there was no noxious element in the goods, that he neglected such duty and is consequently liable for any damage caused by such neglect
- Issue: does manufacturer owe a duty to the consumer? irrespective of the fact that there is no contract (no privity)
- Decision: yes - D is liable
- Reasons:
    - there must be a duty of care — P has to establish that manufacturer owed duty of care to the eventual consumers of the beverage
    - goes beyond any existing category of duty existing at the time
        - novel duty!
    - Lord Atkin:
        - you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour
            - who is your neighbour? — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation s being so affected when I am directing my mind to the acts or omissions which are called in question
        - relevant factors:
            - neighbour principle
            - causal proximity - not everything caused by wrongful act falls under the umbrella of liability
            - what you have in contemplation when you're engaging in the act - how reasonable people would act and what reasonable people would foresee
    - look at W v W - no liability here BUT distinguishing factor is that this was a decision made out of contract law and here we are looking at tort law
- Ratio: no privity is needed for cause of action to proceed for case of flawed products

SUMMARY:

Dixon v Bell	liability	discharge of gun	dangerous; reasonable person standard
Langridge v Levy	liability	exploding gun	dangerous; 3rd party - no privity BUT fraud
Winterbottom v Wright	no liability	mail carriage	not dangerous; 3rd party - no privity (should have claimed fraud)
Longmeid v Holliday	no liability	exploding lamp	not dangerous; 3rd party - no privity; tried claiming fraud but rejected
Thomas v Winchester	liability	poison, not medicine	dangerous; 3rd party - no privity BUT human life in danger

George v Skivington	liability	hair shampoo	dangerous; 3rd party - no privity, no fraud BUT he was aware of 3rd party and their intended use
Loop v Litchfield	no liability	balance wheel	not dangerous; not an imminent risk; bought with knowledge of defect
Losee v Clute	no liability	steam boiler	not dangerous; risk of injury was too remote (like W v W)
Devlin v Smith	liability	scaffolding	dangerous; when serious injury is natural and probable consequence
MacPherson v Buick Motor Company	liability	car	non-dangerous; 3rd party - no privity BUT if person is negligent and danger is foreseen, even with non-inherintely dangerous items, duty to 3rd parties (opposite of W v W)
Donoghue v Stevenson	liability	beer with snail remains	non-dangerous; 3rd party - no privity BUT no privity is needed for cause of action to proceed for case of flawed products

Old cases:

- need privity, and if not then fraud - unless its inherently dangerous
- **no recovery if no privity unless dangerous good - this was old rule**Dangerous: guns, poison, shampoo, scaffold (if defectively made)
    - this is hard to keep straight —> MacPherson (& Donoghue) announce new rule overrules Winterbottom
- Not dangerous: carriage, lamps, wheel for saw, boiler
- NOTE: it was the judges (triers of law) not triers of fact who were deciding what constituted an inherently dangerous product)

PART 2: SOURCES OF LAW

TEXTBOOK: CHAPTER 1 PGS 1-9, 12, 13, 21,22

The Common and Civil Law Traditions

Reception of European Law

- in the case of conquest or cession, pre-existing laws of the Indigenous sovereign remained in force, subject to modification or replacement by the Crown or Parliament where necessary to operate government

- simple answer to why Canada adopted British Law was because Canada is a colony; more to it than that - outlined in *Cooper v Stuart (1889)* by Lord Watson
- **Blackstone Rules -** "the law in force depended on whether colonies were simply settled, or conquered or ceded by indigenous peoples."
    1. **Rule of Settlement**: If colony is settled, then it takes the old common law (from England) as given and can then develop its own new laws by statute – if the case is before date of settlement, it counts as part of common law
    2. **If colony is conquered**, law is made up of statutes, original law from colony and it can develop its own laws
- The **rule of conquest** applied in Central Canada and the **rule of settlement** everywhere else
- The **rules of reception** dictated that the entire body of English Law, both statutory and common, was imported into the settled colony.
- Even a statute that was repealed in England after the reception date would still be in force in the colonies unless it was clearly intended to be repealed in a colony.
- Courts determined the date of statutory reception. The date of reception for common law was much less important, b/c common law decisions simply declared what had always been the law from time immemorial
- Blackstone – the common law is a universal, uniform set of principle and precepts
- In the formative years, once JCPC or the House of Lords made a decision on a common law principle, all common law jurisdictions accepted it as binding.

Note: both conquered and settled, the common law evolves after that date; the differentiation comes from how the law is interpreted prior to the date of settlement and whether or not precedents from England are binding before that

Reception of European Law contd.

Problem in determining which rules of reception would apply was compounded by 2 factors

1. indigenous peoples were already present, so true settlement (as per Blackstone) could not apply
2. France also had an interest in much of British North America & claimed much of its territory

In practice, rule of conquest applied to central Canada, rule on settlement everywhere else

- Upper Canada - enacted leg to receive the common law of England as applicable legal code
- Lower Canada - used civil law "*Laws of Canada"* codified in 1866 by *Civil Code of Lower Canada*
- Maritimes, Western Provinces - regions used the settled rule, ignored First Nations presence. Note: the date of reception was important because it was used to determine which English stat law applied: all statutes passed prior to such date were automatically "received" (unless clearly unsustainable) and remained in force

Dates of Reception – date at which last created statute from England applies

- NB – 1660 – fixed by judicial decision
- NS – 1758 – fixed by first meeting of the local legislature
- ON – 1792
- NFLD – 1832 – fixed by first meeting of the local legislature
- BC - 1858
- MB – 1870 – fixed by provincial statute – Originally received the common law through the grant of Rupert's Land to HBC on May 2, 1670. The 1870 date was fixed by statute however
- **AB – 1870 – fixed by federal statute**
    - NOTE: English law created in 1871, NOT binding in AB, but persuasive. Old precedents CAN be overruled

SOURCES OF THE LAW

- The Constitution – what are its sources?
  - Written
  - Unwritten (crown prerogative/ general practice)
- Statutory Law – legislation by Parliament and provinces
  - Regulations
  - Rules
- Common Law (and Equity) – judicial interpretation
  - Common law evolves and it is slow. One day there is no common law and a judge makes a normative decision and later all judges take positive approaches and use that decision. But it becomes outdated.
    - **Positive: written down – statutes, legislation**
    - **Normative: underlying principles**
- Other sources:
  - Civil Law in Quebec – no binding precedents in previous decisions
  - Aboriginal Law – plays important role in constitutional law & ADR
  - International Law
    - International Trade Law
    - International Human Rights Law

Questions:

- What are the sources of the law in the jurisdiction that I'm in?
  - Binding vs. Persuasive precedents
    - Use hierarchy to establish the difference
  - Federal vs. Provincial jurisdiction (division of powers)

Where does the law come from?

- depended on the land they were in
  - conquered land or settled land
  - in Canada, **its settled**
    - rule is that all the common law in England prior to the date of settlement, is now also the common law in the place that you settled
    - Dixon and Bell is common law of AB, Langridge, Winterbottom
      - Donoghue - not part of our common law —> after 1870, we develop our own common law; after 1870, this is our binding precedent
    - cases from England before 1870 in AB are part of our legal framework - before date of settlement
    - can still cite old English law if it's on point and hasn't been overturned
  - **it's conquered**
    - if theres an existing legal system, kept it as is but then common law can be continued to be developed

- in both, law continues to develop after that date - only difference in what is the law prior to that date
- Other provinces that were settled first (before the cases we have looked at), would only be able to look at them as persuasive

Key Developments in Canadian Legal Independence (know the underlined ones)

1. *Royal Proclamation, 1763*
    - King can still legislate
    - Quebec governed by English Law
    - Aboriginal lands and hunting rights protected
2. *Quebec Act, 1774*
    - Reverse governance by English PRIVATE LAW (no reversal of governance by English PUBLIC LAW
3. *Constitutional Act, 1791*
    - divided Quebec into two provinces: English-speaking Upper Canada and French-speaking Lower Canada
4. *Colonial Laws Validities Act, 1865 (CLVA)*
    - set forth that imperial statute, defined as an act of the British Parliament, was deemed to extend and apply to colonies only if the statute expressly or by necessary implication made that clear.
5. *British North America Act, 1867 (UK)*
    - Imperial statute (Canada could not amend it)
    - Federation of four original provinces
        - Division of powers
        - Retention of Governor's powers of reservation and disallowance
    - Retention of CLVA
6. *Statute of Westminster, 1931 (UK)*
    - Stated that no law made by the Parliament of the UK would apply to any of its dominions unless specifically requested and consented to by a dominion.
    - Repeal of CLVA, **EXCEPT for BNA Act**
7. *Abolition of criminal Appeals to JCPC (1933)*
    - JCPC – house of lords, Privy Council
8. *Abolition of all other Appeals to JCPC (1949)*
    - Until this time, higher than SCC in hierarchy
    - Any pre-1949 decisions not overturned by SCC still binding
9. *Canada Act, 1982 (UK)*
    - completion of Canada's independence
    - Patriation
        - Charter
        - Other amendments
    - No more new UK statutes apply to Canada
    - Any amendments prior to 1982 had to go to the PM in Britain; after – this no longer happens

- CLVA – clarifies relationship of colonial statute law and the common law; relationship of colonial statute law and imperial statute law
- JCPC = House of Lords: Hear appeals from colonies (Joint Committee of the Privy Council) – was essentially our supreme court until 1949

Nature of the Common and Civil Law

- **the common law**
  - English invention
  - didn't consist of any written laws as we would understand them today
  - judge-made, developed through the common law courts (as opposed to the court of chancery)
    - **judges do not make the law but merely declare it**
    - **all relevant past decisions are considered as evidence of the law, and judges infer from these precedents what is the true law in a given instance**
  - historically seen as set of fixed rules, unearthed by judges from cases through deductive legal reasoning, analogy, and application of precedent
  - contemporary understanding: don't rely solely on case law; statutes seen as incursions into the common law
- **the civil law**
  - **customary law of Paris**
  - based not on cases but established laws, generally written as broad legal principles
    - **legislation is seen as the primary source of law**
  - judgements normally rely on the provisions of codes and statutes, from which solutions in particular cases are derived
  - includes doctrinal writings and interpretations written by learned scholars
  - civil codes
  - *stare decisis* is not part of QC law, but court decisions are still given considerable weight in judicial analysis
- difference between the two lies in the different methodological approaches as opposed to codification per se
  - in **civil law** countries, legislation is seen as the primary source of law. Judgements normally rely on the provisions of codes and statutes, from which solutions in particular cares are derived. Judicial reasoning is based extensively on the general principles of the rule or code. On the other hand, **common law** methodology, even where statutory sources of law are present, employs analogical reasoning from statutory provisions to fill gaps
    - this bijuralism remans largely intact today

The Operation of Common Law and Precedent

- **Judgments** – written, oral
  - Fully developed decisions or just quick unpublished (now they are on the website but may not be in official reports)
- **In Alberta**
  - Court of Appeals: Memorandum of Judgment (binding on lower courts but not on Court of Appeal)
  - Court of Appeal: Reasons for Judgment Reserveed (binding on lower courts AND Court of Appeal)
- the law must have some stability and certainty —> due to precedence
- reliance on past cases is called the principle of ***stare decisis* (let the decision stand)** and is related to the doctrine of precedent
  - this is the formal term to describe how the common law relies on precedent - the value of a precedent is connected to the level of court from which it originates
  - *stare decisis* is the primary idea behind common law because:
    1. a higher ranking court is not bound to follow the decision of a lower court

2. some courts do not apply the rule of *stare decisis* with regard to their own prior decisions

- **Stare Decisis** – "stand by that which has been decided"
  - Two types of judgments by **CA** in AB:
    - **Memorandum of Judgment MoJ**– binding on lower courts and on counsel, but not on own court
      - Reasons they are not binding on their own court, is they are typically very short, typically routine appeals
      - Shown in *R. v Melnyk*, 2014 ABCA 313
      - This case surrounded an application for leave to reconsider a binding precedential opinion in *R v Maskell*, 1981 ABCA 50.
      - The below factors for overruling a precedent were outlined here
    - **Reserved Reasons for Judgment RRfJ** – binding on lower courts and own court (CA). Typically requires 5-member panel to overturn, court has to be petitioned to overturn. It is used to protect benchmark case decisions
      - Same in BC and ON
      - **When to reconsider own Court's judgment** – Bedford!! Reconsidered the prostitution reference from the mid-90s
  - **Precedent** economizes on information and minimizes idiosyncratic conclusions. It serves a variety of **purposes**:
    - Aids in the stability and coherence of the law, making it more predictable
    - Provides fairness in decision making, promotes efficiency and eliminates sources of error, such as judicial bias
    - Fulfills a symbolic role by recognizing the relationship b/t courts and the legislature. Therefore, it has **independent value**
  - Factors for overruling precedent. If precedent is:
    - Recent or old
    - Has been disapproved of or is contrary to decisions of other CA's
    - Contains some "simple, obvious, demonstrable flaw"
    - Was created by overlooking binding statute or authority
    - Created settled expectations
    - Reserved Reasons for Judgment or Memorandum of Judgment
  - These criteria are considered cumulatively, and no one factor outweighs any other.
    - In *R v Melnyk* 2014 ABCA, the application failed on the first and last criteria
  - Power to overrule is exercised cautiously by Courts
- **current position for most courts in Canada:**
  - (SCC is not bound by its own decisions or those of the JCPC, although it was in the past)
  - all canadian courts, except the SCC, are bound to follow a precedent of the SCC and any pre-1949 decision of the Privy Council that has not been overruled by the SCC
  - prov CAs are not bound to follow a decisions of the appellate court of another province
  - prov CAs will generally be bound by their own prior decisions
  - prov courts lower that the highest appellate court are bound to follow a decision of that province's appellate court
  - prov courts at any level are not bound by the decisions of the appellate courts of other provinces or by decisions of the Federal CA
  - a decision of a court of coordinate jurisdiction (courts of the same level in the appeal hierarchy) is not binding, merely highly persuasive (**JUDICIAL COMITY)**
- precedent in law helps in categorization
  - aids in the stability and coherence of the law, making it more predictable
  - provides fairness in decision-making
  - promotes efficiency and eliminates sources of error such as judicial bias

- it fulfills a symbolic role by recognizing the relationship between courts and the legislature
- it has an independent value

- a general rule called the *ratio decidendi* (reason of deciding) that is said to constitute the binding rule for the purposes of precedent
- every case has to be looked at from 2 points of view
  - that of the **narrowest rule** that a subsequent unkind court will concede has been laid down
  - the **widest rule** that a later friendly court could use to suppose a more novel position
- **In Ontario**
  - Court of Appeal: ENDORSEMENT (binding on lower courts but not Court of Appeal)
  - Court of Appeal: regular Judgment with no special title (binding on lower courts AND Court of Appeal)
    - Check other courts for their rules
- **Res Judicata** – the matter cannot be re-litigated
  - The law must have some stability and certainty
- The **ratio decidendi** (reason for deciding) is said to constitute the binding rule for purposes of precedent
  - There is no true ratio decidendi of a case. It is only as wide as a subsequent court will concede it to be.
- **Obiter dicta** - remarks by the judge on issues that are secondary to the decision in that they do not establish precedent but are important nonetheless

Things to Know

- Need to know historical structures of court to know which level
- Alberta: used to be part of NWTIn 1905: Province created (and Sask)
  - Alberta Courts were original under Supreme Court of NWT (trial court of general jurisdiction with appeals to the court *en banc)*
- In 1907: New Court: Supreme Court of Alberta (also trial with appeal to *en banc)*1907 - 1921: dates when en banc has the same significance as today's CA
  - Chief Justice Horace Harvey
- 1921: New Alberta Supreme Court Appellate Division (and Alberta Supreme Court Trial division)
  - Chief Justice David L Scott (note: should have been Harvey; got shafted by political party allegiance)
- 1979: Court of Appeal of Alberta
- Reference re Chief Justice of Alberta, 1922, 64 SCR 135 (Harvey) reversed by Privy Council (Scott)
  - Harvey: Chief 1924-1949
- Conscription Crisis
  - Drafted people argued that they were unlawfully drafted
  - Alberta CA held 2:1 that it was unlawful (Harvey was the 1)
  - Habeas Corpus – a court order to release the prisoner
  - They refused – therefore no deployment until released

Hierarchy of Laws

- Masters are like substitute judges; do the work even trial judges don't want to do
- **The judicial pecking order does not permit little peckers to overrule big peckers**

International Law — see below!

- Treaty (must be enacted by all legislatures) – eg. If it affects the provincial legislatures they must ratify it, as well as the federal gov't
- Customary Law – like the common law of International Law – don't need a treaty to enforce, just custom (goes back 100s of years)

STATUTORY LAW (pg 21)

- parliament and provincial legislatures are free to enact new statutes to displace the common law
- a statutory rule will supersede a judge-made rule
- more difficult whiter the statutory scheme does not expressly overturn a common law rule, or where the common law ventures into new territories

Statutes

- Legislation passed by Parliament or Provincial legislature
- Must pass both houses of Parliament (House of Commons and Senate) or (just one house) legislature, and then be signed by the Queen (or her representative (Governor General or Lieutenant Governor) – called receiving Royal Assent
- What happens if Queen doesn't sign?
    - Doesn't become law. Can delay the introduction of the legislation by waiting for signature. Regardless of time passed, legislation will take effect as soon as signed
    - Note: John C. Bowen and Aberhart (Social Credit) in 1930's (legislation struck down by courts)
    - why not signed? change of government and they don't both taking it over to be signed; don't get it signed until they need it - pass it and then its on standby till they need it; don't have the money; etc.
- Statute is binding law that is interpreted by the courts
- Sometimes the Lieutenant Governor/Governor General in Council (Cabinet) will pass **regulations that augment the Statute**. This is called an **Order in Council** (what is actually passed, the resolution in cabinet)
    - A new regulation is drafted (likely by a ministry. The minister in charge takes the proposed change to cabinet. Here is can be discussed and, hopefully, approved. Then it is taken to get the signature of the governor general or lieutenant governor (provincially).
    - If it is never signed, then it is not law – could not be signed due to change of gov't, or typically the gov't could be figuring out how to actually enforce the Bill (budgetary restraints, lack of resources)
    - There is no vote of it in the House of Commons
    - Sometimes legislation cabinet (called Lieutenant Governor in Council or Governor General in Council) to pass Regulations that augment the Statute
    - Act must explicitly state that the Act can be changed by the Lieutenant Governor
    - Note: statute is the law – allows cabinet to make a regulation
- **Regulations** - easy, straightforward - don't put in legislation things like fees (statute is the source/the law —> allows Cabinet to make regulation) - contains the nature of details, information
- **Henry VIII Clauses** – a clause in an Act that allows things to be added or removed at any time to/from the Act (itself!); frowned upon by courts, but never explicitly struck down.
    - Problem with Henry VIII clauses is they essentially allow cabinet to legislate; essentially allows executive to do what parliament said they can't do - allows cabinet to sneak stuff in (So whats the point of legislation?)
- Sometimes legislation **creates an agency** (see administrative agencies below) that administers the legislation

- They can pass rules
- Ministry charged w statute proposes regulations, which the Minister brings to the Cabinet
- **Amending legislation** is done by **Cabinet**
- **Regulations** are amended by **Cabinet**
- **Rules** are amended by **agency**

- **Statutory Interpretation**
  - Expansive or narrow reading
  - Purposive approach (expansive)
  - Canons of construction or interpretation

Administrative Agencies – specialized bodies created to administer the statute, especially regulatory statutes

- not all agencies are adjudicative but are granted the right to adjudicate by law!
- agencies have legislative role - rules on how to give out grants, employment, immigration, aboriginal
- agencies can go to Court of QB, get them to hold someone in contempt, give out fines etc.
- securities commission can charge you, send it to Crown to prosecute you for criminal ramifications
  - but agency still plays a role (in this case, first)
- E.g. Alberta Utilities Commission, what was the Energy Resources and Conservation Board (ERCB)
- Structure can vary
  - Some just administer the law by regulating various aspects of the law
    - E.g. Canadian Food Inspection Agency
  - Some have **quasi-judicial powers** (ability to administer rules) as well as **regulatory** powers (ability to make rules)
    - E.g. AUC
    - **Quasi-judicial bodies: Have Court-like Powers**
      - Have their own rules of procedure and evidence
      - Have legislative and adjudicatory authority
      - Conduct hearings
      - Make decisions
      - Losing party can appeal internally (or can appeal to court – which court depends on statute)
- **Administrative Law**
  - You can appeal a ruling in a regulatory tribunal. But where you appeal to depends on what the statute says. Below are two examples:
  - E.g. Immigration and Refugee Board of Canada
    - Initial hearing → Internal Appeal → Federal Court (judicial review) → Federal CA → SCC
  - E.g. AUC (Alberta Utilities Board)
    - Initial hearing → Internal Appeal or can request to appeal to ABCA → SCC
    - Have to ask court for permission to review the case – not a given you can just take the case to the ABCA

INTERNATIONAL LAW (pg 28)

- domestic law is the body of principle most people encounter most of the time
- two most important sources of international law are:

- **treaties** - law-making contracts between states
  - when a treaty binds 2 states, it is called bilateral; more than 2 states = multilateral
  - treaties are binding on the states that are parties to them and generally on no others
- **customary international law**
  - binds all states, excepting only those that have been sufficiently persistent in rejecting it prior to its emergence as a binding norm
  - formed by general and universal state practice with a sense of legal obligation (called *opinio juris)*
  - when state practice and opinio juris become sufficiently widespread among the states of the world, the practice in question is said to become legally binding as customary international law

- **once a treaty is signed and ratified, Canada is bound and must comply with it or risk being found in contravention**
- Canada is a dualist jurisdiction
  - an international treaty may require Canada, as a matter of international law, to change its domestic law
  - but in the dualist rendition, that treaty has no direct effect in domestic law until legislation is passed to transform or implement it into Canadian law
- Canadian law insists that treaties be transformed into domestic federal law by an Act of Parliament
- When Parliament fails to implement treaty law into domestic law the result is an unfortunate legal quandary: Canada is bound by the treaty as a matter of international law and yet its policy-makers need not abide by the treaty under the terms of domestic law
- when the federal government exercise its power to conclude as international treaty, Parliament and provincial legislatures may face a dilemma in cases where the law is not consistent with the treaty
- Once a rule becomes recognized as customary law, it is *automatically* part of the Canadian common law
- **customary rules of international law are directly incorporated into Canadian domestic law unless explicitly ousted by contrary legislation. So far as possible, domestic legislation should be interpreted consistently with those obligations**

Issues raised by the incorporation of customary international law:

- when a legislature does legislate in a manner that displaces customary international law, Canada may be subsequently in violation of its international obligations
- if customary international law is part of the common law in Canada, its existence as domestic law in a matter determined by the courts exclusively
- there may never be any clear and direct input by political branches of government into the rules by which law in Canada is made binding
- since the content of customary international law is sometimes uncertain (and disputed), courts asked to apply it as the domestic law of Canada rely on expert testimony (often competing) from international lawyers and academics, raising further questions of legitimacy

Cooper (P) v Stuart (D) 1889 Australia

Facts:

- The colony of New South Wales was peacefully annexed to the British Dominions. Some confusion ensued regarding which rules of reception should apply.
- Governor made a land grant in 1823 whilst saying he could reacquire it at a later date for the purposes of the public; P, the successor in title to the original grantee, argued that this clause is invalid, as it goes against the law against perpetuities.
  - ENGLISH RULE AGAINST PERPETUITIES: basically means that once you give away property, you relinquish all control and you can't stop the next person from controlling that property.
    - a property law designed to limit the duration of a condition imposed as part of the transfer of land

- D argued that the law against perpetuities was not part of the New South Wales law back then.

Issues: Did the English rule against perpetuities apply to the Colony of New South Wales in the year 1823? Does the rule apply to reservations made by the Crown in the interests of the public?
Decision: Appeal dismissed. P loses.

- *Lord Watson* found that since no land law or tenure existed in the Colony at the time of its annexation, all transactions in relation to it were governed by English law insofar as that law could be justly and conveniently applied to them. The rule against perpetuities is an important feature of the common law of England. There is no reason to suppose that that the rule is not required in New South Wales or that its operation there would be less beneficial than in England. However, it only applies between private subjects.

Reasons:

- NSW was a **settled** colony. Therefore, the law of England is immediately in place.
- It is only in force **in so far as it is applicable to the circumstance of an infant colony.**
- Some principles are not received by the colony when it is at its infant stages, because they do not yet suit it. As the colony grows and prospers, those principles of English law which were unsuitable before, would gradually be introduced.
- In a new colony, a government needs to give away land grants. But it also needs to reserve space for public use. In its infant stages, it is impossible to tell which spaces will be needed for public use.
- Therefore, the law against perpetuities was unsuitable to the colony in its infancy, and was not in effect in 1823.

Notes:

- In practice, the rule of conquest was applied to central Canada, and the rule on settlement everywhere else
- The rules of reception dictated that the entire body of English law, both statutory and common, was imported into the settled cooling. local exceptions and variances were allowed were the received laws would be unsuitable to the circumstances of the colony

***Saumur v. The City of Quebec* [1953] 2 S.C.R. 299 [Justice Rand's concurrence, Justice Cartwright's dissent]**

- Facts:
  - P was JW who challenged the validity of by-law forbidding the distribution of pamphlets, book etc. without the permission of the Chief of Police — wanted to distribute Jehovah's Witnesses leaflets according to religious worship.
  - City by-law requires Chief of Police to give permission for distributing anything of this sort. He would not give permission.
  - Questions arose over if the statute was valid. Quebec Sup Ct and Quebec QB (Appeal Side) upheld legislation.
  - JW's argued it was censorship
  - City argued it was an anti-littering by-law (civilians just dropped the pamphlets after they were given to them) - important because the framing of the question changes how the Judge would answer it
- **Issues**:
  - Does the regulation giving Chief of Police discretion to grant/deny permission to distribute pamphlets in public streets contravene Quebec's *Freedom of Worship Act, 1941*
  - Does it violate and freedom of the press within Civil Rights in the Province?
  - Does by-law infringe freedom of religion according to s. 91?
- **Outcome**: The bylaw is ultra vires the provincial power because it infringes freedom of worship and freedom of the press, even if it legitimately controls the streets. It targets one group.
- **Reasons**: The regulation is not in relation to streets, as the dissent argues. Freedom of worship and press are not civil rights or matters of a

local or private nature in the provinces.

- **Rand** - Since the by law is in relation to religion and free speech and not in relation to the administration of the streets, and since freedom of worship and the press are not civil rights or matters of local or private nature in the province, the subject matter of the by law was beyond the legislative power of the Province. Rand says "civil rights arise out of **positive law".**
  - **Positive law awards you something because they said so - the law is what the law is (whatever is written is the law)**
    - comes from case law and statutes
  - natural law - is a philosophy that certain rights or values are inherent by virtue of human nature, and universally cognizable through human reason - they are ancient inalienable rights
    - theres a source of law that's higher up (ancient principles, fundamentally shake the structure if you tinker with these)
  - right to regulate the time, place and manner - but these restrictions apply to everyone!
- **Rand** sums it up nicely: basically says, "some things you just don't do, I don't know where the rights come from, but they're there"
- **Dissent** by Cartwright: NOT UNLTRA VIRES - extreme form of Positive law! Bylaw includes police regulations of what is likely to cause disorder. JW actions could insult or annoy others and possibly give rise to disorder and violence. Therefore, the regulation interferes to a limited extent with either freedom of press/religion. Pamphlets are not part of worship. P&S is to control the streets (traffic bylaw essentially) from littering and inciting conflict between people, not to control religious practices. Freedom of worship is not at issue in the legislation.
  - focussed on the purpose of the law - intended to protect the public and keep the streets clean

- **Ratio**: the bylaw is ***ultra vires the province's power*** - can't pull an actual ratio due to Judge's differing reasons for finding for the plaintiff - one of the arguments from the judges - religion should have been feds not the prov - basically **Rand preached that some rights transcend positive law**
  - **religion should be federal not provincial jurisdiction**
- Notes:
  - case is primarily about freedom of religion
  - case took place before *Canadian Charter of Rights and Freedoms*, which wasn't enacted until 1982

***Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37**

Facts:

- since 1974 all Drivers Licenses needed a photo except if contested on religious grounds
- 2003 AB (P/app) changed regulation to apply universally
- ~250 people from the Colony affected - would either have to override strong beliefs or live without driving which is huge impact on community self-sufficiency in rural Alberta
  - they reject on religious grounds to having their photos taken
- AB offered two compromises which the Colony rejected
  - take photo, put in sterile/sealed packet to give to P.O., never see it
  - take photo, not put on license but keep in online database
- ABQB - regulation fails minimal impairment (proportionality) because contravention can = jail
- ABCA - Law not objectively related to high traffic/safety/regulation if re: fraud/identity. Therefore; it is not saved under s. 1, not meet minimal impairment standardAlberta Appealed
  - Dissent said it was rationally connected. Photo taking not forced. Minor infringement on religion, which is okay

Issues: Does the new AB regulation requiring photos on driver's licenses infringe the Hutterites' freedom of religion contrary to s. 2(a) – Freedom of conscience and religion? Does it discriminate against them contrary to s. 15(1) (minority rights - Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental/physical disability), of the *Charter*? If yes, whether the legislation is saved according to section 1.

Decision: Writing for majority, McLachlin ruled in favour of AB. Regulation is justified according to s. 1.

- they must be thinking about how 250 people isn't a lot - since 9/11 , all about security!

Reasons:

- There is no reasonable alternative to meet both needs.
- A reasonable accommodation is not a substitute for the *Oakes* test.
- Regulation fundamentally has to include all drivers and individual tailoring is not appropriate under s. 1.

Ratio: The goal of minimizing theft and fraud is justifiable, proportional (minimal impairment), and demonstrates a pressing and substantial public goal.

Dissent: Hutterites had no photo Drivers License for 29 years; govt gave no evidence of harm to system. This majority's decision impairs s. 2 rights a great deal. Regulation = indirect coercion forcing choice between religious beliefs or community self-sufficiency. They disagreed with the dichotomy of the right to drive vs privilege to drive.

Commentary:

- The court takes a utilitarian view/approach by stating that the negative impact on the Hutterites does not outweigh the benefit of the regulation. Yahya said that McLachlin probably decided based on personal feelings toward Hutterites and built reasons for the decision backwards
- Reading between the lines, McLachlin was concerned with security; she was biased; not a very neutral decision —> she was from the area (not undue hardship but she's deciding based on personal preference
- **Oakes Test: 2 Step Test**
  1. The objective to be served by the measures limiting a Charter right must be sufficiently important to warrant overriding a constitutionally protected right or freedom
  2. the party invoking s.1 must show the means to be reasonable and demonstrably justified (involves a form of proportionality test involving 3 components: 1) measure must be fair and not arbitrary 2) means should impair the right in question as little as possible 3) must be proportionality between the effects of the limiting measure and the objective

***West Virginia State Board of Education v Barnette*, 319 U.S. 624 (1943) [Jackson majority & Frankfurter dissent]**

Facts:

- Jehovah's Witnesses did not pledge/salute flag
  - It is against their beliefs to idolize a symbol.
- However, children would be expelled when they did not salute.
- Parents also incurred fines for truancy (any intentional unauthorized illegal absence) by keeping children home after expulsion.
- Barnette children expelled daily and parents sent them back to school every day - avoided fines & jail.
- Suit by Walter Barnette against appellant for restraint of an enforcement of a regulation requiring children in public schools to salute the American Flag

- Injunction granted from District Court; decision overruled in 1940

Issues: Whether the pledging allegiance/saluting flag law infringes 1st amendment right to freedom of speech

Decision: in favour of Barnette; defend free speech & constitutional rights

Reasons:

- *Gobitis* was a case on point from just a few years earlier - 4 points made by Frankfurter in that case which were overruled by Jackson here:
  - Jackson criticized the pedestal Frankfurter put the flag on (reversed decision)
  - Jackson denied saluting as appropriate way to build cohesive sentiment = coercive elimination of dissent
  - Jackson rejected that it is a permissible way to foster national unity
    - Conflict b/w authority & individual is inappropriate for the ballot box to deal with; need Bill of Rights & courts
  - School disciplinarians are not judges → "the problem is that the flag in question is our own"

Ratio: freedom to not speak is as equally protected by 1st Amendment as is freedom of speech

Dissent: Frankfurter saw the majority of the court overstepping bounds; slippery slope of rule-breaking

- saw Jackson's criticism as a personal attack; called the majority "libertarian" (libertarian: a person who believes in the doctrine of free will)
- believes in positive law - the law is what the law is
- worried about judicial activism → positive law v natural law

Commentary

- Gobitis case dealt with the same issue;
- Frankfurter and Cartwright – just argue the law is what the law is
- Note: Justice Jackson was the prosecutor in the Nuremburg Trials
- Jackson formed his argument around the state not being able to tell you how to practice your religion, not the right to exclusively practice their religion
- scathing dissent is unusual; judges tend avoid personal comments
- Certain judges bring different perspectives to a court
- Two schools of thought:
  - **Natural Law** – inherent rights; non-denominational/religious
  - **Positive Law** – man-made law (statutory)
  - If a judge wants a certain result, they will find a way to get it (provided they have jurisdiction)

Above cases show that judges' power of discretion is not greatly affected by *Charter*

Common Law and Equity (pg 12)

- common law must sometimes be distinguished from the body of law produced from the Chancery Court and known as **equity**
- **Equity** developed in tandem with the common law — formally defined as the body of law developed by the Court of Chancery (court in England that followed loose rules to avoid the slow movement of common law) prior to its dismantling
  - its original function was to provide a corrective to the perceived harshness of the common law
  - fluid, pragmatic, conscience-based system of law, profoundly anti-formal and anti-establishment

- no strict doctrine of precedent
- equity is a supplementary system that allows for the exigencies of the special case
- in its ideal form, its principles are more clearly tied to considerations of conscience, morality, and the conduct of particular persons than those of law

- Typically relates to:
  - property (trusts; married women's ppty; equitable rules related to transfer)
  - contracts (remedies such as specific performance and injunctions; undue influence, mistake, and misrepresentation)
  - procedure (set-off and account)
  - guardianship
  - commercial matters (fiduciary duties; subrogation and contribution)
- since 1873, equitable principles have counted to develop alongside common law principles; the rules of common law and equity are now applied concurrently in all superior courts with equity prevailing in cases of conflict
- the court relies on equitable principles to interpret a statutory provision

COMMON LAW AND EQUITY

Origins of equity:

- Judges (usually clergy) from ecclesiastical (church) courts were appointed by the King to look into cases were appointed by the King to look into cases where common law result was too harsh
  - Equity ameliorates (lessens) the harshness of common law
- Court of Equity was a parallel court – not an appeal court – gave second opinions on legal decisions
- Common law gave rise to harsh results -> equity did not change legal title but imposed equitable title on land in son's name
  - Only go to the Court of Equity if you got a harsh ruling from Court of Law

Equity:

- Equity is formally defined as the body of law developed by the Court of Chancery prior to its dismantling (around 1873 for most countries)
- Courts of Chancery were originally separate from the common law courts
- Original function was to provide a corrective to the perceived harshness of the common law
- Cases were decided according to the rules of equity and good conscience; there was no abstract, formal methodology and no strict doctrine of precedent
- Equity is a supplementary system that allows for the exigencies of the special case
- Its principles are more clearly tied to considerations of conscience, morality, and the conduct of particular persons that those of the law
- Chancellor – a judge in Courts of Equity – now 2 courts are fused in most cases with the common law courts – no separate court in Canada – but the concepts of equity are still with us
- Matters typically falling w/i the equitable jurisdiction, include:
  - Property (trusts; married women's property; equitable rules related to transfer
  - Contracts (remedies such as specific performance and injunctions; undue influence; mistake, and misrepresentation)
  - Procedure (set-off and account)
  - Guardianship
  - Commercial matters (fiduciary duties; subrogation and contribution)
  - 1873 – fusion of equitable and common law systems through the adoption of the ***judicature acts***

        - **Today there are 3 US states that have separate courts of law and equity**
            - Mississippi, Tennessee, Delaware (Court of Chancery)
            - Delaware emerged as the most favourable state for corporate adjudication
                - Most "Fortune 500" and large companies are incorporated in Delaware
                - Delaware is the gold standard in Corporate Law
                - Most family trusts are held in Delaware
                - All Canadian businesses are modelled on the "US Uniform Commercial Code" and we follow cases from the Delaware jurisdiction (being highly persuasive)
                    - We look to Delaware Court of Chancery (Court of Appeal if need)
                - The above court ONLY deals with business law
    - **Rules of common law and equity are now applied concurrently in all superior courts, w equity prevailing in cases of conflict**
    - Modern view of equity: A **body of rules, principles, maxims, and doctrines** that originated in the Court of Chancery but that has continued to evolve and develop since its abolition.
    - **Equity applies on a person** – does not deal with money, doesn't say "pay" it says "do" ie) in orphan example (uncle holding land for underage orphan), Court would say give the land back, not pay for the land; typically, this is because the cash will not work, damages are insufficient – think trespass – don't want money, want people to stop trespassing
        - not about money - it acts on a person
    - **Law is about loss to plaintiff** – always relates to loss; think *Longmeid, Langridge, etc.*
    - What if gain to defendant is greater than loss to plaintiff?
        - this is when equity kicks in under unjust enrichment – more importantly, the loss to plaintiff is not the real issue
        - **when gain to D is greater than loss to P —> equity kicks in**
    - **Unjust Enrichment** – this is the cause in action on the situation above– it's not just about the gain to the plaintiff – it is the incentive that is created for future thieves etc. – it's about protecting certain rights
    - Injunctions can be issued in these cases
    - Today, law and equity are merged, so evolving concepts - sometimes don't distinguish

Equitable Remedies

- Unjust enrichment – restitution
- Trusts
- Equity can order disgorgement (makes them give the money back)
- Equity can impose constructive trust (that money you are holding is not yours anymore, maybe legally it is, but not in equity, make you (trustee) required to look after the money), accounting (figuring out which money in an account belongs to which party), and disgorgement (give the money back)

EQUITY

JUSTICE YOUNG, EQUITY, MATERIALS PREPARED FOR NSW BAR ASSOCIATION

- History of Equity
    - Middle ages
        - Local disputes dealt w/ by local Baron
        - King's Court had no jurisdiction unless there was a wrong done against the King

- **Writs of Roll** – beginning of Common Law as we know it; earliest forms of action; developed from the doctrine of the King's Peace (**writs of wrong**)
- King also has jurisdiction as the fountainhead of all justice, so also developed the **writs of right** (no longer exist today)
- **Prerogative writs** – developed from the King's obligation to see that right was done; still exist in Administrative law
- King started stepping in more and dealing w/ cases where the common law was too harsh
- After the Cromwellian revolution, this power was vested in the Court of Chancery alone

- **Chancellor's basic rule –** if something was against "good conscience" then the Chancery should intervene and do right no matter what may have been the situation at Common Law
- **Lord Eldon**
  - Chancellor who was partially responsible for the development of stereotypes regarding who would get relief and when.
  - Codified the **principles of equity**
  - Equity became relatively rigid in for (there were certain types of cases where one knew that Equity would intervene)
- Traditional Fields, included:
  - fraud (contract can be undone), undue influence (separate - back off!), breach of confidence
    - legal remedy - money for fraud; equitable remedy - take this product back, you can rescind, undue the contract
  - breach of trust
    - stealing money from trust account (criminal and civil aspects)
    - violated special relationship
  - specific performance
    - contracts - generally, if you breach contract, you just get money, BUT if it's really special, unique, can enforce the contract - **order** the person to **do** the special thing! (not money, it's equity!) e.g.) land
  - injunctions to prevent injustice; injunctions in aid of legal rights
    - stop trespassing, stop stealing etc
  - wills and estates
    - dividing things up
    - setting up trusts
  - Appointment of receivers - bankruptcy
    - dealing with money that's no longer there - court will appoint receiver
  - corporations and partnerships
    - all equity!
    - Delaware keeps law and equity separately
      - has 'invested' in its laws - makes money on these incorporations (50,000$ for incorporation) - makes up 1/5th of the budget of Delaware
      - because it's a specialized court - great Judges, people want to incorporate there
  - marriage and divorce matters
    - cutting something up = equity
    - you get the kid, you don't etc.
- Equity jurisdiction
  - Inherent jurisdiction and statutory jurisdiction
  - Exclusive jurisdiction, concurrent jurisdiction and auxiliary jurisdiction

- Basic Rules:
  - Injunctions: order to stop doing something
  - Laches: essentially a statute of limitations
    - statute of limitation: after certain time period, you can't bring a lawsuit —> extinguished your right
    - laches is equivalent in equity - the Court can choose not to enforce something even though the 2 years hasn't gone by - but it's too late!
      - Green Peace protestors on lawn
        - dont do anything for couple months by which time most have left, they're not so noisy whatever - Court could say no - if you really cared, you would have shown up next day
      - court has discretion — 'you waited too long'
        - just sue them for damages
      - DISCRETIONARY!
  - Equity: no jury trials; done strictly by the Chancellor in the Court of Chancellery; note; this isn't a huge deal in AB now because we rarely do Jury trials
  - Equity: more power to fashion remedy
  - Estoppel: Just means stop – when the other party relies on a statement, the other party is stopped from asserting the original deal
  - Rescission – undoing a contract
  - Equity discretionary (in contrast with law)
  - Today: law & equity merged, so evolving concepts – sometimes doesn't distinguish
- Jurisdictions today based on nature of dispute:
  - Property dispute (e.g. specific performance equitable interests, easements, restrictive covenants)
  - Family disputes (e.g. FPA claims)
  - Commercial disputes (e.g. companies, partnerships, Mareva injunctions)
- Basic propositions:
  - Equity usually only intervenes where remedies at Common Law are inadequate to do justice
  - Equity acts *in personam* (Against the person. NOT against the world)
- "Uses of Action" in Equity
  - Completely different process from Common Law
  - **Have an equitable cause of action, if:**
    - There is a Common Law cause of action and the remedies at Common Law are inadequate
    - Even though there is no Common Law cause of action, the matter is one where Equity traditionally has given relief
    - Some statute gives a right and you need an equitable remedy to fill it out, or
    - The matter can be dealt w/ in terms of a whole lot of new "equities" that have been discovered or rediscovered in the last thirty years or so
  - In modern times, Equity has found a remedy to get rid of a lot of the old limitations on the Common Law causes of action
  - Law and Equity doctrines remain distinct and separate
  - **Judicature Acts: Supreme Court Act 1970** combined both doctrines (Law and Equity) into one court
    - This is also the case in Canada and the USA as well. Only 3 US States have NOT fused/merged their equity courts (Miss., Tenn., and Del.)
      - Delaware is particularly important as there are a lot of corporate headquarters are there. They have a very specialized court

system and they do not want to clog up the system with non-commercial matters

- **Law Reform (Law and Equity) Act 1972 –** if there is any conflict or variance b/t Equity and Common Law, Equity shall prevail

- Equity damages
  - Different from Common Law damages
  - Damages are a matter for the discretion of the court
  - Equity usually decides damages should be assessed at the date of judgment, rather than the date of breach.

EDWARDS AND STOCKWELL, TRUSTS AND EQUITY (FOUNDATIONS), CHAPTER 2: MAXIMS OF EQUITY:

General points on the maxims of equity

- Described as a set of general principles which are said to govern the way in which equity operates
- Illustrate the qualities of Equity
- Applied only when the court feels it appropriate
- Very broadly worded, so cannot treat as binding

Maxims of Equity:

1. **Equity follows the Law**
   - An attempt to indicate the relationship b/t common law and equity
   - Stressed that equity did not attempt to overrule common law judgments, but rather to act *in personam* on the parties to prevent injustice
   - Equity supplements but does not contradict the common law
2. **Where the equities are equal, the law prevails. Where the equities are equal, the first in time prevails.**
   - Interests take effect in order of their creation
   - It is necessary for the party to show that he is *bona fide* (in good faith)
   - The question of notice will be crucial in determining priorities, especially where both legal and equitable interests are in conflict
   - General principle – the purchaser is taken to have notice unless he can show he took all reasonable care and made inquiries and did not thereby acquire notice, whether actual, constructive, or imputed.
   - **Principle of 'overreaching'** – has the effect of enabling a purchaser of land held on trust to take free of the beneficial interests even if he has notice of them
3. **Equity looks to the substance rather than the form**
   - Distinguishes b/t matter of substance and matter of form
   - If by insisting on the form, the substance will be defeated, court holds it inequitable to allow a person to insist on such form (defeating the substance in the process)
   - The court looks not at the words of the settlor, but rather the result he was attempting to achieve
4. **Equity will not permit a statute to be used as an instrument of fraud**
   - More specific example of the previous maxim regarding formality
   - Equity will not ignore statutory requirements normally. It ignores them only where it would be unconscionable by allowing a party to rely on a statutory requirement to another's detriment
5. **Equity imputes an intention to fulfil an obligation**
   - Basis of the equitable doctrines of performance and satisfaction

- Where a person has undertaken an obligation his later conduct will be interpreted as fulfillment of that obligation where possible

6. **Equity regards as done that which ought to be done**
   - Relates to specific performance
7. **Equity acts *in personam***
   - Equitable remedies operate against the person of the defendant, being enforceable by imprisonment for contempt
   - Generally, English courts will not entertain actions concerning title to foreign land – this is exception
   - Also discussed in relation to search orders and freezing injunctions
8. **Equity will not suffer a wrong to be w/o a remedy**
   - Equity will not allow the technical defects of the common law to prevent worthy plaintiff's from obtaining redress
   - Opposite of the maxim that equity follows the law
9. **He who seeks equity must do equity**
   - Equitable remedies are discretionary and the court will not grant them if it feels that the plaintiff is unworthy, in spite of a *prima facie* right/interest he has shown
     - In the common law, wherever certain facts are found and a right or interest has been established, common law remedies will be available regardless of fairness
   - The person who seeks an equitable remedy must be prepared to act equitably, and the court may oblige him to do so
   - Behind the principle of mutuality of remedies – if specific performance is available to one party then it will be available to the other, even though damages would be adequate for that part
   - Behind the doctrine of election
10. **He who comes to equity must come w/ clean hands**
    - A party seeking an equitable remedy must not himself be guilty of unconscionable conduct
    - The 'uncleanness' must relate directly to the matter in hand
      - If otherwise, anyone might be denied a remedy simply b/c he was of bad character
    - This is not a principle of justice; it is a principle of policy. Application is indiscriminate
    - A man may rely on evidence of his illegal purpose where that purpose has not, in fact, been carried out
    - 9 and 10 create the "Clean Hands Doctrine" – has a lot of bite
11. **Delay defeats equity**
    - The time in which an action for equitable relief may be sought may be governed by the *Limitation Act, 1980*
      - 2 years
    - Even where there is no statutory limitation, it will be governed by the equitable principle of laches (like statute of limitations)
    - Delay may be evidence of acquiescence
    - Failure to bring an action may tend to confirm other slight evidence that the innocent party has accepted or agreed to the ground for seeking relief, thus preventing him from enforcing his right to remedies.
    - Flexibility is important
12. **Equity will not allow a trust to fail for want of a trustee**
    - If a settlor created an otherwise valid trust, that trust should be allowed to take effect even if no one had been appointed to act as trustee
    - The court has a residuary inherent jurisdiction to appoint trustees in circumstances where the settlor has failed to appoint (or has appointed persons who are dead and has not given anyone else the power to appoint)
13. **Equality is equity**

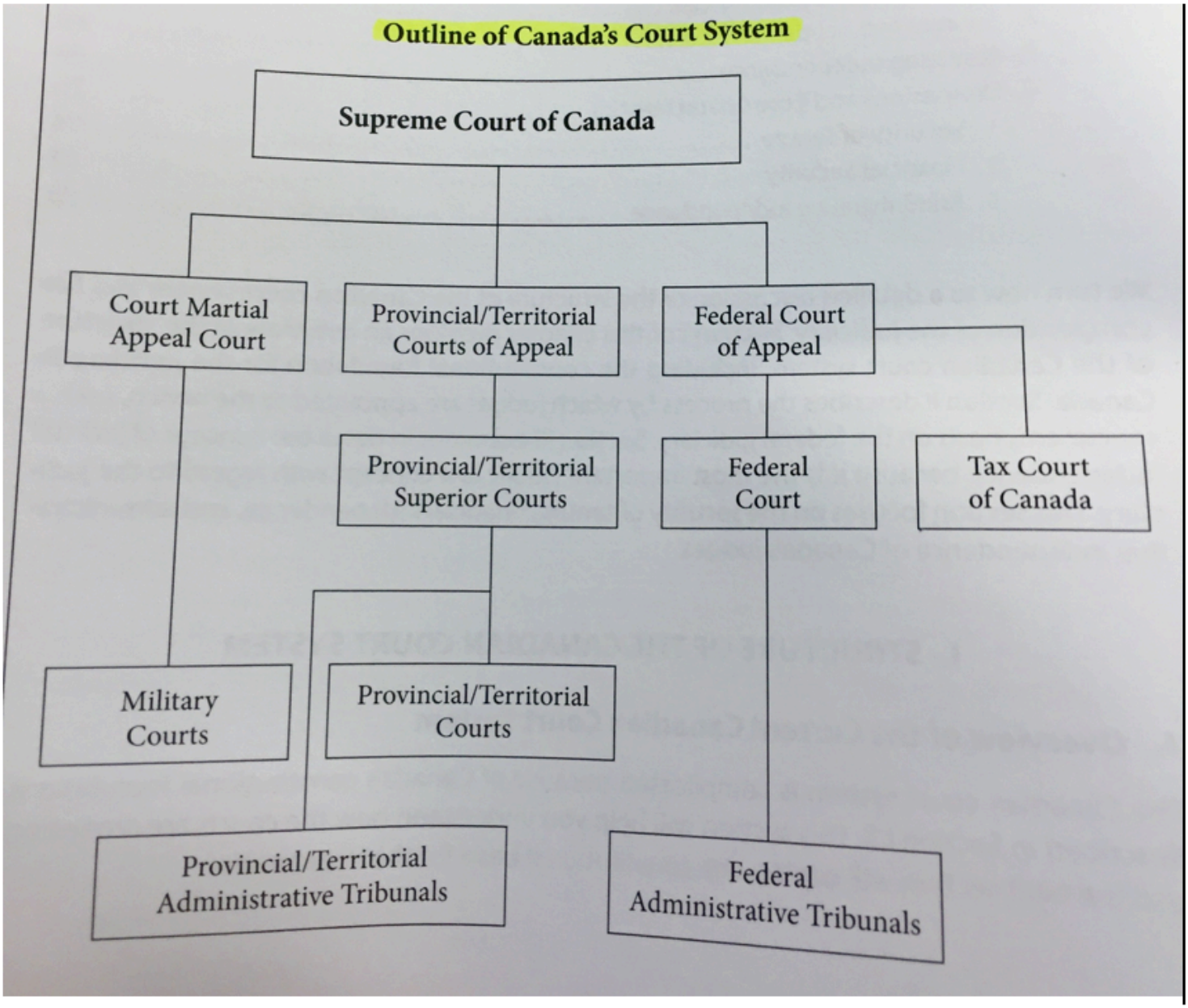
- With no contrary evidence, equity will tend towards the adoption of equal division of any fund to which several persons are entitled

14. **Equity will not assist a volunteer**
    - A volunteer is a person who has not given consideration for a bargain
    - Equity will not enforce a convent to create a trust in favour of a volunteer
15. **Equity will not perfect an imperfect gift**
    - unless property in the thing promised has been transferred, the intended donee can do nothing to enforce

Remaining notes on equity

- Law is about loss to plaintiff
    - If gain to def is greater than loss to pff → unjust enrichment
- Equitable remedies:
    - If unjust enrichment → restitution (disgorgement)
        - Equity can order disgorgement
    - Trusts → equitable title
        - Equity can impose constructive trust, accounting, and disgorgement
- No juries!
- More power to fashion remedy
- **Estoppel –** A legal principle that bars a party from denying or alleging a certain fact owing to that party's previous conduct, allegation, or denial.
- **Rescission** – to undo (as if parties never had a contract)
- Equity is discretionary

PART 3: STRUCTURE OF THE COURTS



Court Hierarchy

- **Supreme Court of Canada**
  - Final court for provinces and for federal government
  - Chief Justice + 8 Judges; 3 from PQ, 3 from ON, 2 West, 1 Atlantic
  - Jurisdiction is discretionary (seek leave for appeal)
  - Leave to appeal granted ONLY if (panel of 3 judges review)
    - public importance
    - Important issue of law or mixed law and fact
    - Or significant enough to be considered by SCC

- Automatic right to appeal:
  - criminal cases where one judge dissented on interpretation of law at CA
    - guilty in CA but acquitted in trial (reasonable doubt)
    - reference questions, especially concerning the constitution
  - where a Court of Appeal has found someone guilty when they were acquitted at trial
    - CA sets aside your acquittal - either say to try him again, or say you're guilty —> SCC

- **Provincial and Territorial superior courts – s. 96 courts**
  - more serious crimes and civil cases and appeals from provincial and territorial courts
  - Inherent jurisdiction – can hear anything (anything + must hear above $50,000).
  - But has more formal rules – Rules of Civil Procedure
  - Alberta Court of Appeal
    - Usually panel of 3 judges; varies in jurisdictions
  - Alberta Court of Queen's Bench
    - Superior Court of Justice, Supreme Court, Court of Queen's Bench
    - Inherent jurisdiction; most serious criminal and civil cases
    - Most have special divisions
    - could be called Court of Justice
    - ALL appeals to matters dealt with here go to the CA
  - Appeals are relatively a new phenomenon in law
- **Federal Courts**
  - Canada's nation trial court civil matters assigned to it by statute, such as immigration and patents, claims against the govt of Canada, etc.
  - Federal Court of Appeal
  - Federal Court of Canada
    - FC and FCA essentially superior courts with civil jurisdiction – used to be divisions, now separate courts
    - Enacted by Parl → only hears federal laws or interprovincial, IP, citizenship, Competition Act, crown corporations/gov't departments,
    - Trial-level; based in Ottawa but judges travel
    - Judicial review on federal tribunals
    - Some matters--maritime law(admiralty)--jurisdiction shared with Prov Sup Ct
    - Federal courts are not superior courts
- **Specialized Federal Courts**
  - Tax Court of Canada
    - Handles disputes between Fed Govt and individual or company - fed tax/revenue legis
    - Independent of Canada Revenue Agency
  - Military Courts
    - includes civilians who accompany Forces on active duty
    - Appeal; panel of three
- **Provincial Courts s. 92(14)**
  - handle most cases that come into system (non-serious crimes, family law, young persons, regulatory offences, claims involving money

up to $50,000, small claims)

- Limited jurisdiction – small claims (<$50,000) + small criminal matters + bail/preliminary hearings + traffic etc.
- Provincial Court of Alberta
  - family law (not divorce)
  - Youth Court: age 12-17 in conflict with the law (federal youth justice laws)
  - traffic violations
  - regulatory offences, claims involving money (set limits of how much $)
  - Small Claims court (less than $50K)
  - All preliminary hearings to determine whether enough evidence to justify a full trial in serious criminal cases
  - Drug Treatment Court: non-violent offenders, addiction motivates crime
  - Domestic Violence Courts - ON, MB, AB, YK - reduce times

Notes:

- There are some areas of law that fall into either federal or provincial court – Admiralty, for example

Alternative Approaches

- *ADR (Alternative Dispute Resolution)*
  - mediation - independent 3rd party is brought in to help the parties negotiate an agreement
  - arbitration - parties agree to refer the dispute to a 3rd party for judgement
  - negotiation - parties get together and sort out a problem between themselves
    - mediation and negotiation are consensual so usually no appeal
- *Nunavut Court of Justice*
  - Combines power of the superior trial court and the territorial court so that the same judge can hear all that cases arise
  - Circuit system because of isolation
- *Unified Family Courts*
  - Permit all aspects of family law to be dealt with in a single court with specialized judges and services
- *Sentencing Circles*
  - Pioneered in the Yukon in the 1990s to deal with aboriginal offenders and victims

Constitutional Framework

- Section 96-100 (provincial superior courts)
  - ABCA ABQB
- Section 101
  - SCC and any courts for betterment of Canada (fed courts)
  - statutory courts
- Section 92(14)
  - fed govt sets criminal code but provinces deal with procedures

Constitutional Framework

Constitution Section	Subsection	Note
Section 96-100 (Provincial Superior Courts)	• Federal appointment of judges (s. 96) • Judges must be members of provincial bar (ss. 97 and 98) • **Judges removable only on joint address of House of Commons and Senate (s. 99 (1))** • Mandatory retirement at age 75 (s. 99(2)) • Salaries fixed by Parliament (s. 100)	• Alberta Court of Appeal • Alberta Court of Queen's Bench
Section 101 (Federal Courts)	• "The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada."	• SCC - "General Court of Appeal" o Top of food chain on all matters (even Que civil law) • Federal Court of Appeal • Federal Court of Canada • Tax Court of Canada • Military Courts Better administration of Laws of Canada = Federal Courts
Section 92(14) (Provincial Court)	• Exclusive provincial jurisdiction over "The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts."	• Provincial Court of Alberta • Province creates and maintains BOTH superior courts and provincial courts • Provincial court judges are appointed by the province • Both the province and Parliament can confer jurisdiction on provincial courts (most criminal offences are tried in provincial court)

Note:

- it would strictly speaking be Constitutional to abolish the SCC, although, it would never happen – SCC is there for uniformity purposes
- a prov court judge has the authority to claim certain statutes are unconstitutional – usually gets appealed up though (authority to make constitutional calls is not restricted to SCC)
- "the court" is actually the superior courts of the province, not the SCC (despite being the top of food chain on legal matters)

Appointment of Judges

- **96.** The Governor General (in reality this would be done by the PM) shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick. **(appointed by an order in council)**

Selection of Judges in Ontario, etc. [i.e. MUST BE MEMBERS OF **THE** PROVINCIAL BAR]

- **97.** Until the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and the Procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor General shall be selected from the respective Bars of those Provinces.

Selection of Judges in Quebec [i.e. MUST BE MEMBERS OF **THE** PROVINCIAL BAR]

- **98.** The Judges of the Courts of Quebec shall be selected from the Bar of that Province.

Tenure of office of Judges

- **99.** (1) Subject to subsection (2) of this section, the judges of the superior courts shall hold office during good behavior, but shall be removable by the Governor General on address of the Senate and House of Commons.

- **Termination at age 75**: (2) A judge of a superior court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-five years, or upon the coming into force of this section if at that time he has already attained that age.

Salaries, etc., of Judges

- **100.** The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, **shall be fixed and provided by the Parliament of Canada**.

Section 101 (federal courts)

  - Supreme Court of Canada
  - Federal Court of Appeal
  - Federal Court of Canada
  - Tax Court of Canada
  - Military Courts

General Court of Appeal, etc.

- **101.** The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada

  - General “court of appeal”
  - Rationale is to provide “better administration of the Laws of Canada”
  - Are higher than but related to the s 96 and s 101 courts

Section 91(24) (provincial courts)

- Provincial Court of Alberta
- Exclusive provincial jurisdiction over the following

Subjects of exclusive Provincial Legislation

- 92(14) The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts
    - Province creates and maintains BOTH superior and provincial courts
    - Provincial court judges are appointed by the province
    - Both the province and Parliament can confer jurisdiction on provincial courts (most criminal offences are tried in provincial court)

Administrative Tribunals

- Administrative tribunals are not courts even if the only thing they do is adjudicate disputes
    - Therefore, they do not have the same protection as courts (no lifetime appointment)
- BUT they have similar functions and deference by the courts to their factual (and legal to some extent) findings

Inherent vs Statutory Jurisdiction

- Provincial superior courts have inherent jurisdiction
    - They can hear any matter at all that takes place within the province
    - Inherent Jurisdiction is the highest Jurisdiction – remember Provincial Superior Courts come from the old King's Bench
- Court of appeals only have appellate jurisdiction – cannot hear all matters, can only hear appeals
- Can we create substitute courts?
    - No, because the superior courts have the final say à they are granted these rights under s 96
    - Although, we do this all the time under the guise of efficiency à think of WCB, abolished torts against the employer – but can't be abolished entirely
    - Test as per *Re Residential Tenancies Act*
        - Issue was whether a province was encroaching on the federal government's s 96 power to appoint judges by creating its own quasi-judicial body
        - Holding: 3-part test:
            - 1) Were those powers under exclusive s 96 jurisdiction in 1867?
            - 2) If yes, is the issue solely legal and not just to be decided on policy grounds?
            - 3) If yes, is the "institutional setting" itself fundamentally judicial?
    - All other courts have statutory jurisdiction
    - Court is inherent jurisdiction can have their jurisdiction limited by statute
    - Courts of statutory jurisdiction have ONLY the jurisdiction conferred by statute

Appointment of Judges

Appointment

- Informal consultation with judiciary and legal profession to create long list of candidates
- Long list of candidates reviewed by 5-member Parliamentary Committee (3 members from Govt; 2 from Opposition)
- Unranked list of 3 qualified candidates presented to Prime Minister
- Nominee interview by Parliamentary Committee
- Appointment by Prime Minister
- Process developed by Martin govt, picked up by Harper. W/ exception of Cromwell, has been used to appoint SCC

Has characteristics of all three 3 styles of appointment processes:

1) Patronage: no vehicle to apply; choice made by political actor; no requirement for reason why choice was made
2) Meritocratic: Ability to do the job dominant consideration (committee looks at candidates)
3) Democratic: Not purely PM decision. PM is bounded by role of screening by Parliamentary Committee (limited # of candidates) *however, with 3 members of govt on Parliamentary committee, not fully independent. PM Committee does public interview of candidates.

- Judicial Appointments Advisory Committee
  - exist both federally and provincially
- Criteria for appointment
- Judicial independence

Federally vs Provincially Appointed Judges

- Must live in Ottawa
- Court as an institution has to be able to provide service in English and French; but not every judge has to be bilingual. … just need enough judges that can speak both languages.

Appointments

- *Judges Act* and *Federal Courts Act* eligibility requirements
  - 10 year provincial bar or bar / "judicial" experience
- Appointment process not set out in statute
- Current process (see Text pp. 304-307)
  - Application process
  - Use of Judicial Advisory Committees
  - Assessment criteria
  - "Recommended" or "Unable to recommend"
- Scope for Ministerial discretion (see Text pp. 308-310)

Hallmarks of meritocratic system (applications, formal criteria, but ultimately decision after recommend / not recommend moves to political process)

- Judges of provincial superior courts are appointed and paid federally (as per ss 96 and 100)
- Judges of SCC and federal courts are appointed and paid federally (ss 100 and 101)
- Judges of provincial courts are appointed and paid provincially (s 92(14))
- Note: if they are superior court judge in Alberta, you actually could go sit in Vancouver, however they don't because of convention

Provincial Court

- Limited jurisdiction:
  - Small claims less than $50,000
  - Small criminal matters (Bail/preliminary hearings; Traffic etc)

Appointment Process:

- *Judicature Act* and *Provincial Court Act* requirements
  - Appointed by Lieutenant Governor in Council
  - Must be a Canadian citizen
  - May be considered and recommended by Judicial Council

- Details of appointment process not set out in statute
- Alberta Judicial Council screens candidates and forwards candidates to Provincial Court Nominating Committee appointed by Minister of Justice
- Nominating Committee recommends best candidates to Minister of Justice for Order in Council appointment
- Compare Ontario appointment model (Text pp. 302-303) [Much more formal]
- NB: Don't have to be a lawyer, but as a matter of practice, won't appoint someone who hasn't been @ the bar for 5 yrs.

Know the Following

- In the provinces the laws are created by the provincial legislature, by the common law of that province – in the province, by the province, for the province
- The only court they get to appoint are the provincial court judges (note: also provincial crown that prosecutes)
  - Interesting, because a lot of the criminal stuff takes place here, even though the *Criminal Code* is federal
  - Even though it should be the same throughout the country, jail time, etc. is local.
- The big stuff goes up to the superior court. They mostly adjudicate provincial common law.
- Federal courts usually deal with provincial law?

Superior Court

- Inherent jurisdiction (can hear anything + must hear above $50,000)
- BUT more formal rules (*Rules of Civil Procedure* or criminal procedure, *Criminal Code, CDSA*)

Supreme Court - Final court for the provinces and the fed govt

- Jurisdiction is discretionary
  - Must seek leave to appeal
  - Crim cases: dissent or overturn by CA; Principle of reasonable doubt

Criminal Code

- Appeal process is set out in the *Criminal Code*

- **Appeal from Conviction**
  - **691 (1)** A person which is convicted of an indictable offence and whose conviction is affirmed by the court of appeal may appeal to the SCC
    1. on any question of law on which a judge of the court of appeal dissents; or
    2. on any question of law, if leave to appeal is granted by the SCC
- **Appeal Where Acquittal Set Aside**
  - (2) A person who is acquitted of an indictable offence other than by reason of a verdict of not criminally responsible on account of mental disorder and whose acquittal is set aside by the court of appeal may appeal to the SCC

    1. on any question of law on which a judge of the court of appeal dissents
    2. on any question of law, if the court of appeal enters a verdict of guilty against the person; or
    3. on any question of law, if leave to appeal is granted by the SCC

Appeals

- Federal Court have their own rules of procedure
- Administrative agencies have their own rules
- Check civic and criminal rules (statutes)

Appeal Process

- Rules for criminal and civil appeals in the provincial courts are found in various statutes such as the *Criminal Code* and *Rules of Court*
- BUT:
  - Federal Courts have their own rules of procedure
  - Administrative agencies also have their own rules

Decision

- Judgments can be given both in *written* form and *orally*
- Judgments can be a fully developed decision or just quick and unpublished
  - (most are now electronic but still may not be in official reporters)

Judicial Appointment

- *Provincial* – mixture of the community
  - Short list presented to cabinet, recommended by the **Advisory Committee**
    - Apply first – used to be patronage
    - In province there is an interview, in federal there isn't
    - Then they ask people – committee decides whether qualified or not
    - Minister of Justice – Prime Minister picks
  - Advisory committee -> Minister of Justice -> Cabinet-> appointment by Governor in Council
- *Federal* (SCC, "section 96 judges," federal judges and tax court judges)
  - No interview

- SCC:
  - SCC appointed by governor-in-council
  - Criticism that it does not follow other appointment processes because, since they are "legislating, "should be more accountable to the public through the appointment process
  - 2005 Minister of Justice – *Proposal to Reform the SCC Appointments Process:*
    1. merit
    2. constitutional framework for appointments
    3. judicial independence and integrity of the courts
    4. transparency
    5. parliamentary input
    6. provincial input
- Non-SCC:
  1. Commissioner for Federal Affairs Canada and Executive Director, Judicial Appointments
     - Assesses candidates
  2. expression of interest and eligibility
     - Personal history form
     - Authorization form
     - Background check consent form

Judicial Independence

- 2 DIMENSIONS:
  1. **strength and Independence of the individual Judge**
  2. **Collective independence of the court**
  - must be interpreted in light of the public interests it is meant to protect: a strong and independent judiciary capable of upholding the rule of law and our constitutional order, and public confidence in the administration of justice
  - ***Ell v Alberta*** (2003) [Major wrote: judicial independence has been recognized as "the lifeblood of constitutionalism in democratic societies."
- 3 hallmarks of independence
  - **1) security of tenure**
    - Can't be fired – unless they do something really bad (misconduct or disability)
    - Canadian Judical Council – removal and discipline of judges: Bienvenue (degrading remarks against women), Matlow (conflict of interest as was ruling on case the involved him personally), Cosgrove (crazy)
    - Anyone can make a complaint —> Complaints are directed to the CJC
    - in practice, every judge facing convincing allegations of misconduct has resigned at some stage of the council's proceedings rather than going before Parliament for an ultimate determination
    - Allows both the public to complain and judges to respond
    - Process:
      - 1) review of complaint
      - 2) investigation
      - 3) review panel

        - 4) inquiry committee
        - 5) recommendations
        - 6)notice of the decision
        - *Bienvenue* – Quebec justice in Superior court; lost his sense of impartiality
            - Questioned for remarks against women
            - Per *Judges Act* (guilty of offence in execution of office)
            - Undermined public confidence in judicial system
            - [Dissent] Integrity was never been questioned
                - Judges should be permitted to speak minds
                - On balance of probabilities his opinions did not affect his judgment – "having predilection does not mean he actually put it to work"
            - He resigned before judgment given
    - **2) financial security**
        - SCC cases on remuneration —> usually a committee is appointed to determine what is a fair salary for judges
        - *Reference Re Remuneration of Judges of the Provincial Court of PEI* (1997)
        - "independence of the judiciary implies not only that a judge should be free from executive or legislative encroachment and from political pressures and entanglements but also that he should be removed from financial or business entanglements likely to affect or rather to seem to affect him in the exercise of his judgments."
            - Establishes test for commissions charged with responsibility of dealing with remuneration
                - **1) independent; 2) objective; 3) effective**
                - salaries can be frozen, changed, increased etc. but require prior recourse to a special process which is independent, effective and objective
                - under no circumstances will the judiciary engage in negotiations over renumeration with the exec or reps of the legislature
                - any reductions cannot take those salaries below a basic minimum level of renumeration which is required for the office of a judge
        - New Brunswick reference in 2005 revisited and reconfirmed the issue
    - **3) administrative independence**
        - Courts themselves must have control over the administrative decisions that concerns judges
        - apprehension of bias – when you think the judge has a problem with you – most common option is to make a motion to recuse
        - *Tobiass* (1997) – federal govt interfered with adm independence
            - Was judicial independence impaired by a private meeting between a senior Department of Justice official and the chief justice of the Federal Court
                - SCC answered yes, it was a serious affront to judicial independence

Contrasting System (for comparison)

United States Judicial System

- As per US Constitution Articles III (their equivalent of s 96)
- "The judicial power of the US shall be vested in **one Supreme Court**, and in such interior courts as the Congress may from time to time establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at states times,

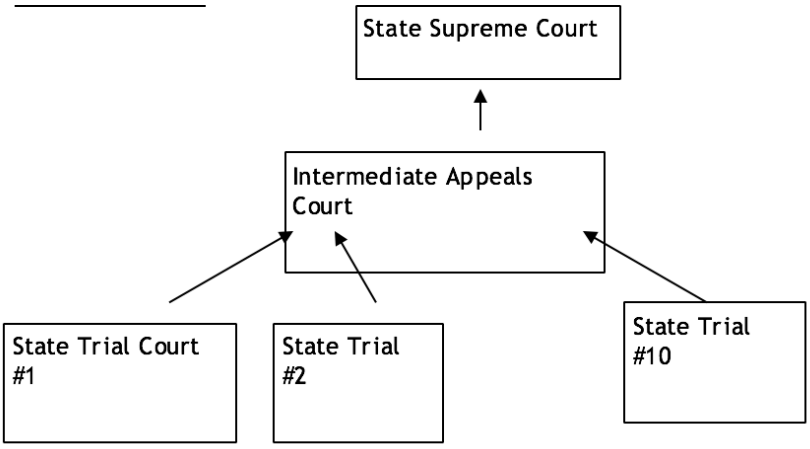
receive for their services , a compensation, which shall not be diminishes during their continuance in office”

- top down approach whereas ours is bottom up

Introduction to the US Legal System

- US is a federal system
- 50 states plus the Federal Government
- Each system has its own court structure
  - each state has its own trial court; most states have intermediate appellate court and then all states have supreme court

State Court System

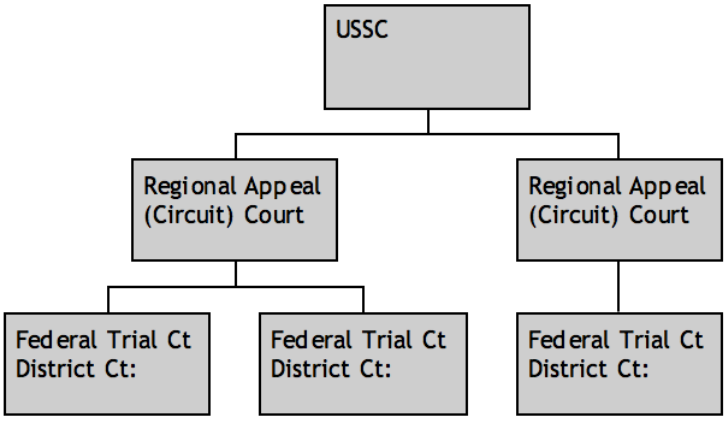


- State judges are appointed for limited years, life, or permanently but mandatory retirement OR elected
- Some are elected like congress (primaries etc.), Some are appointed and then retention vote every few years (Missouri plan), Need to check each state.

Note: State Curt is the final court of state law issues. Cannot appeal to the USSC

- It is not an integrated system of courts; they are parallel

Federal Court System



- The US Supreme Court can hear appeal from the Circuit courts, there is (generally) no mandatory jurisdiction
- The US Supreme Court can also hear appeals from the state supreme courts on matters involving federal law
- All Federal judges are appointed for life

Federal Court System

- **Federal trial court – Regional Appeal (Circuit Court) -> United States Supreme Court**
- The U.S. Supreme Court can hear appeals from the Circuit courts. There is (generally) no mandatory jurisdiction.
- The U.S. Supreme Court can also hear appeals from the state supreme courts on matters involving federal law.
- Federal judges appointed by President with advice and consent of the Senate (for life).

Federal and State Court Jurisdiction

- *State Courts* are courts of general jurisdiction
  - They can adjudicate any case regardless of whether the subject is state or federal
- *Federal courts* are courts of limited jurisdiction US Supreme Court only final court for the federal government (and federal matters from state courts)
  - They hear cases involving federal legislation and diversity (diversity cases are state law matters; but the litigants are from 2 different states)
- State Supreme Courts final court for each state (except on federal matters)
- Federal judges appointed by President with advice and consent of the Senate (for life)
- State judges are appointed from limited years, life, or permanently but mandatory retirement OR elected
  - Some are elected like congress (primaries etc)
  - Some are appointed and then retention vote occurs every few years (i.e. Missouri Plan)
- every state is different – check each state when information is required
- Commentary – *Rocha v Ahmad* (Texas 1983)
  - "It is not surprising that attorneys are the principle source of contributions in a judicial election. We judicially know that voter apathy is a continuing problem, especially in judicial races and particularly in contests for a seat on an appellate bench. A candidate for the bench who relies solely on contributions from non-lawyers must reconcile himself to staging a campaign on something less than a

shoestring. If a judge cannot sit on a case in which a contributing lawyer is involved as counsel, judges who have been elected would have to recuse themselves in perhaps a majority of the cases filed in their courts. Perhaps the next step would be to require a judge to recuse himself in any case in which one of the lawyers had refused to contribute or, worse stull, had contributed to that judge's opponent."

PART 4: STATUTORY INTERPRETATION:

MANN ACT CASES: White Slave Act 1910

"An Act to Further Regulate interstate and foreign Commerce by Prohibiting the Transportation Therein for Immoral Purposes of Women and Girls, and for Other Purposes" 25 June 1910

Background: Immigration and migration; industrial revolution & urbanization; general perception of loose morality; racial exploitation of black men over white women.

- CONTEXT: attempted to stop the luring of women into prostitution
- "whoever knowingly transports any woman or girl for the purpose of prostitution or debauchery at common law or for any immoral purpose or with intent to the same"

Hoke v US, 227 U.S. 308 (1913). SC

- **Facts**: Hoke & Economides charged w violating Mann Act for convincing a woman to travel from Louisiana to TX
  - Hoke was charged with violating the White Slave Act. She unlawfully, feloniously, and knowingly persuaded, induced, and enticed Annette Baden, a woman, to go from New Orleans, to Beaumont, Texas, in interstate commerce, for the purpose of prostitution
  - Hoke restrained the women at her house in the place where the transportation ended
- **Issue:** Whether the Act is unconstitutional and violates federal jurisdiction. Police power over prostitution rested with the states, therefore federal congress could not regulate it. The ultimate determining question is "the power of Congress under the commerce clause of the Consttn".
- **Decision**: Conviction upheld. Demurrers at trial were overruled. Not unconstitutional; **within Fed powers to regulate interstate commerce**
- **Reasons:** States still control police power and legality of prostitution. This is no different from other Fed Acts that regulate interstate or international trade. Federal commerce power can also prohibit the trade of obscene literature.
  - Congress can't regulate prostitution *per se*- this is matter for provinces to deal with BUT Congress could regulate interstate travel
  - because it's 'commerce' — includes the transportation of persons and property.
- **Ratio**: Interstate travel for the purpose of prostitution is "immoral" under the Mann Act, so the Fed Gov't can regulate it through interstate commerce, even though there is no Federal prostttn power**.**
- **Comments**: **raised constitutionality of Act**
  - set common law precedent for expanding scope of Act. The Court basically analogized the conspiracy of activities relating to prostitution across state lines to "transportation of women" so that they could regulate the practice under interstate trade.
  - Congress regulate/prohibit interstate transportation of lotteries, obscene literature, diseased cattle or people, & impure foods.
  - **The construction in the case emphasized involuntary nature of woman's conduct, presumably organized traffic involved, and the belief many women affected were minors**

***Athanasaw v US*, 227 US 326 (1913).**

- **Facts:** Agnes Couch, 17, from Georgia applied to become chorus dancer in Atlanta; PiE dance club/house paid for her train ticket. Upon arrival, it was seedier than she'd anticipated. She was repulsed; not the friendly dance environment she'd anticipated.
- **Issue**: whether arranging for a train ticket across state boundaries to hire a woman/girl for dancing in a seedy performing house falls within the statutory interpretation of "debauchery" or "other immoral purposes".
    - wasn't recruited for prostitution, debauchery or immoral purpose so he shouldn't be found guilty...
- **Decision**: Guilty!
    - took a **BROAD APPROACH**
- **Reasons**: The intent when they arranged for her transportation and employment in the dance club across state lines was to influence or entice her into a life of immorality and debauchery; corruption in morals or principles, to lead astray; to lead into unchastity. "Debauchery, then, is an excessive indulgence of the body."
- **Ratio**: the term debauchery as used in this statute as an idea of sexual immorality, not only sexual intercourse, designed to reach acts which might ultimately lead to that phase of debauchery which consisted in sexual actions
    - anything that would lead to a course of immorality —> offence denounced by Mann Act
- **Comments**: Same judge (McKenna) as in Hoke
    - **Debauchery now extends to dancing**
    - This case TAKEN TOGETHER with *Hoke* amount to a direct decision on the point of the Act
    - Act not confined to cases of white slavery

***US v Holte*, 236 U.S. 140 (1915)**

- **Facts:** Clara Holte conspired with Laudensnschleger to transport herself from Ill. to Wis. for purposes of prostitution. As the defendant was the woman the lower courts sustained a demurrer to an indictment on the ground that although the offense could not be committed without her, she was no party to it. She was only the victim.
- **Issue**: whether a woman could be found guilty for transporting herself across stateliness "for the purposes of prostitution, debauchery, or other immoral purposes"
- **Decision**: Demurrer Reversed - she was convicted
- **Reasons**: **Although woman was the 'victim' transported, she could still be guilty of conspiracy to commit the crimeRatio**: statute punishes transportation of a woman for the purpose of prostitution even if she were the first to suggest the crime.
    - Penal code says that you cannot conspire to commit any offence against the USA. However, the argument that the object of the conspiracy cannot be a party to the conspiracy fails. "Commit" means no more than to "bring about," which Holte did in this case. "So we think that it would be going too far to say that the defendant could not be guilty in this case." "We see equally little reason for not treating the preliminary agreement as a conspiracy that the law can reach, if we abandon the illusion that the woman always is the victim" (tries to refute the dissent's argument here)
    - **BROAD APPROACH** - making conspiracies with yourself is a crime
- **Comments**: **Dissent:** the woman, whether coerced or induced, whether willingly or unwillingly transported for purposes of prostitution, debauchery, and immorality, is regarded as the victim of the trafficker.
    - Lamar & Day said that "Congress has no power to punish immorality".
    - She cannot therefore be punished for being enslaved, nor for consenting and agreeing.
        - "…Whoever knowingly transports…" implies groups or others involved. Legislation could have specified this "… whoever

knowingly transports ANOTHER"
    - If she is punished for transporting, then she ceases to be the object of traffic and travels on her own account.
  - The majority has to give a very strained reading justified by the social ill. Showing extreme **paternalism** in the law - sexist decision
    - "protect you to the point of putting you in jail because you can't protect yourself"

***Mortensen v US*, 322 U.S. 369 (1944).**

- **Facts:** The petitioners operated a house of prostitution in NE. Two girls employed as prostitutes went on vacation with the 2 being accused of violating the Mann Act. No acts of prostitution or other immorality occurred during the two-week trip. They did not even think about it, although they never considered leaving their work after returning. Upon returning in to Grand Island, they resumed their work. Charged with violating the Mann Act in that they transported the two girls.
  - Jury found Guilty, and the conviction was affirmed in Circuit Court of Appeals.
- **Issue**: whether there was any evidence from which the jury could rightly find that petitioners transported the girls from Salt Lake City to Grand Island for an immoral purpose in violation of the Mann Act.
- **Decision**: Overturned (aka "not guilty") - they were acquitted
  - **decision being made 30 years after the 2 broad approach decisions were made**
  - maybe because of WWII - shift in paternalism
- **Reasons**: The statute penalizes only those who use interstate commerce for unlawful purposes.
  - To violate the Act, the interstate transportation must have for its object or be the means of effecting or facilitating the proscribed activities.
  - An intention that the girls shall engage in the conduct outlawed must be found to exist and must be the dominant motive of such interstate movement. And the transportation must be designed to bring about such result.
  - **Without that necessary intention and motivation, immoral conduct during or following the journey is insufficient to subject the transporter to the penalties of the Act.**
  - The sole purpose of the journey from beginning to end was to provide innocent recreation and a holiday for petitioners and the two girls. This activity is distinct from what Congress wanted to punish when they created the Mann Act. The fact that the two girls actually resumed their immoral practices after their return does not inject a retroactive illegal purpose into the return trip to Grand Island.
- **Ratio**: US is cool with taking girls/prostitutes on vacation with you and bringing them back where you found them
- **Comments**: An example of vacillating between ruling (back and forth as per the "(gun" inherently dangerous" cases studied

***US v Beach*, 324 U.S. 193 (1945).**

- **Facts:** R accompanied girl in taxi to hotel 4 blocks from apartment for purposes of prostitution; R was transporting a girl within the District of Columbia
  - Beach was indicted and convicted upon a jury trial of transporting another woman within DC for the purpose of prostitution.
  - The Court of Appeals set aside the conviction on the ground that the Mann Act was inapplicable to transportation taking place wholly within the District. This was supported by fact congress had created local laws for prostitution in DC The court thought that the addition of the prohibition of the Mann Act to this legislation, specifically applicable only in the District, was so useless and unnecessary as to indicate that the Mann Act was not designed to apply to the District of Columbia 'except in its interstate aspect.'
- **Issue**: Does Mann Act apply to transportation of prostitutes wholly within DC?
- **Decision**: Lower decision overruled SCC ruled Guilty

- **Reasons**: Congressional enactments regarding prostitution in DC do not speak of 'transportation' for immoral purposes, which is the act condemned by the Mann Act.
    - The Mann Act not only penalizes such transportation in interstate commerce, but also wholly within DC
    - hide behind the wording of the Act - say that the wording is clear
- **Ratio**: Transporting a prostitute wholly within DC is covered by the Mann Act
- **Comments**: Dissent disagreed. MURPHY J said, effectively, that Congress distinguished this vicious traffic from immorality and prostitution in general. The Mann Act was was aimed solely at the white-slave traffic, which would not seem to include paying taxi cab fare to go meet a john. In passing the act, it was pointed out that 'the women who are the victims of the traffic are unwillingly forced to practice prostitution' that are forced against their will to do these things. background of Congressional intent and the clear and obvious title of the Act give meaning and boundaries to the broad language used in the statute. Majority distorts the legislative purpose
    - Kind of a hokey case. I guess you cannot escape the law after all

***Cleveland v US*, 329 U.S. 14 (1946).**

Ejusdem generis- "of the same kind." used to interpret loosely written statutes. Where a law lists specific classes of persons or things and then refers to them in general, the general statements only apply to the same kind of persons or things specifically listed.
Sine qua non- refers to an indispensable and essential action, condition, or ingredient. Can't do without

- **Facts:** Petitioners are members of a Mormon sect, known as Fundamentalists. They practice polygamy. All but one defendant has plural wives. Each has transported at least one plural wife across state lines either for the purpose of "cohabiting" with her. he judgments of conviction were affirmed on appeal
- **Issue**: Does "for any other immoral purpose" include polygamy?
- **Decision**: Conviction sustained (GUILTY)
- **Reasons**: A previous case, pre-Mann Act decided that "for any other immoral purpose" included taking a woman as a concubine. Similarity b/t language of the old act and the Mann Act. The following amended passage is particularly impt
    - While Mortensen… rightly indicated that the Act was aimed 'primarily' at the use of interstate commerce for the conduct of the white slave business we find no indication that a profit motive is [an essential condition] to its application. Prostitution… normally suggests sexual relations for hire… but debauchery has no such implied limitation. In common understanding the indulgence which that term suggests may be motivated solely by lust. And so we start with words which by [nature] … embrace more than commercialized sex. What follows is 'any other immoral purpose'. Under the ***ejusdem generis rule*** of construction the general words are confined to the class and may not be used to enlarge it. But we could not give the words a faithful interpretation if we confined them more narrowly than the class of which they are a part.
- **Ratio**: "other immoral purposes" in the Mann Act includes polygamy
    - a person can be prosecuted under the Mann Act even when married to the woman if the marriage is polygamous —> immoral purpose
- **Comments**: Dissent by MURPHY J complains of misapplying the statutory language and disregarding the intention of the legislative framers. Their acts had nothing to do with white slavery, whatever else may be said of their conduct. He disagree with the conclusion that polygamy is 'in the same genus' as prostitution and debauchery. Thus the phrase 'any other immoral purpose' cannot include polygamy simply because it has sexual connotations and has 'long been branded as immoral. Reasoning of the majority ignores reality and results in an unfair application of the statutory words.
    - Despite the differences that may exist between polygamy and monogamy, such differences do not place polygamy in the same category as prostitution or debauchery. When we use those terms we are speaking of acts of an entirely different nature, having no relation whatever to the various forms of marriage

NOTE:

- All these cases are distinguishing each other, they are not overruling each other
- Different judicial philosophies will affect the decision
- Good reason to have more than one judge
- The Mann Act has now been changed and is much more narrowly defined
    - Today, any individual, any sexual activity for which any person *can* be charged with criminal offence, or *attempts* to do so, shall be fined or imprisoned
- When courts engaged in interpreting statute – start more broadly but HOW they interpret these words can change
- Statute passed for legitimate reason BUT statutory interpretation — Judges can play games, inject own values into reading of the act. This is no different than what we saw in the torts cases.
    - Courts use biases, values, preferences, than they used when they look at common law cases

Sources of Interpretation

Three main sources of interpretation law: *interpretation acts*, *interpretation rules* and *individual statutes and regulations*, further broken down as follows:

- 1) Statutes, within a statute and *Interpretation Act* (enacted within each province and federally)
    - Interpretation Acts
        - It is open to a sovereign legislature to issue instructions on how particular legislation, or legislation in general, is to be interpreted
        - Every Canadian jurisdiction has an Interpretation Act that contains various rules to statutes in general
        - Also found in general acts governing that making of regulations and statute revisions
        - For all the statutes this is how to interpret – within the act there is an interpretation section
    - Interpretation Rules/Section in Acts and Regulations
        - Definitions used to tell how particular words are to be understood
        - Application provisions – indicated scope in terms of time, space, persons, or subject matter
        - Purpose Statements/Preambles – reasons for the legislation
        - Commencement/transitional provisions – indicate when the legislation will end or come into force
        - These help narrow the terms for interpretation but the common law usually prevails
- 2) Common law methods
    - Operate as guidelines
    - Per Ruth Sullivan in *Sullivan on Construction of Statutes*

- **Mischief rule (equitable construction)** – reflects a wish to achieve parliament's actual intentions
    - words are less important than intentions
    - ask what the nature or mischief is that the statute is trying to protect
    - "The office of all the judges is always to make such constriction as shall suppress the mischief and advance the remedy
    - Into 20th century judges became more influences by natural law theory (per Locke) – the belief in reason and fundamental rights, which led to strict constructions
- **Strict construction (plain meaning rule)**

- [19th and 20th century were dominated by parliamentary sovereignty and rule of law, and so strict construction began to dominate
- stick to the literal meaning
- Judges don't want to be making or changing the law - they are applying it
- Courts should adhere to the plain meaning of the text because it offers the best evidence of the law giver's intent

- **Golden rule** (avoids absurd results)
  - "[T]he grammatical and ordinary sense of the word is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument…"
  - opposite of plain meaning rule
    - avoiding absurd results
- **Modern approach**
  - Textual meaning - words are to be read in their entire context (grammatical and ordinary sense)
    - need to be read harmoniously with the scheme of the Act, the object of the Act, and the intention of the Parliament
  - Complex, multidimensional character of statutory interpretation
  - look at t**extual meaning, legislative inten**t (express, implied, presumed, declared), **entire context** within the scheme of other Acts

Legislative intent:

- 1) Express
- 2) Implied
- 3) Presumed
- 4) Declared
  - Entire context (scheme of Act and other acts)

Examples of equitable construction:

- no toilets in the park (not allowed, or factually)
- no vehicles in the park (not allowed, or factually)
- no Ewoks in the park - is the context clear? not really
  - No Ewoks *allowed* in the park?
  - Chewbacca shows up, and is arrested
  - he's a wookie not an Ewok
  - Can statute be read to cover more than stated???
    - does the word Ewok narrowly mean a type of thing or is Ewok a generic term?
- no food in the park - is the context clear here? not really
  - differentiate between meanings based on context
- all houses open at night for public refreshment, resort and entertainment must be licensed
  - D serves refreshment but no entertainment —> does D need license?
    - Crown argues - intended and to mean or
    - context should tell you
  - literal would be all 3
- whoever draws blood in the streets shall be punished with...

- D is a surgeon who performed elementary surgery to save life of pedestrian who collapsed
- literally drew blood but is he guilty?
- more pragmatic - look at the mischief - aimed at curving violence

- any prisoner who breaks out of prison shall be guilty of felony
  - fire - prisoners break out of the prison
  - are you guilty of violating this statute?
    - the statute is aimed at running away from prison but necessity forces you, have you broken out according to the meaning of the statute —> most likely, no
- importation and migration law
  - Church brings priest over
  - is the church guilty?
  - is a priest a foreigner, yes, did they import him, yes, contract, yes, labour, yes - should be guilty!
    - pretty straight forward meaning
  - but the point of this law - all about taking jobs away!
  - could probably find someone local
  - act itself is pretty iron clad
  - Church maybe argues that not actually 'bringing him over'
    - statute seems to be aimed at hands-on labour, factory workers
  - is the Church guilty?
    - in 1890s, it would be odd that the conger would have aimed this statute at a religious organization
    - not only wha is the goal, what is purpose; but also why is it not being passed!
    - church was not guilty of bringing in the priest
    - focus on the **object of the legislation and what is the legislation NOT aimed at**

Presumptions About Text

- 1) *Implied Exclusion* **(Exclusio unius rule)**
  - "actions for the recovery of personal property survive the enactment of this statue"
  - statute trumps the common law
- 2) *Associated Words* **(Noscitur a sociis)**
  - "cats, toys, and food"
- 3) *Limited Class* **(Eusedem generis rule)**
  - "dogs, cats, and other animals"

Interpretational Challenges

- 1) **Disputed meaning**
  - must establish the preferred meaning is the ordinary meaning
  - Eg: *Perrier Group of Canada v Canada*
    - Is carbonated water a beverage for the purposes of the *Excise Tax?*
  - Eg: *R v McIntosh* - self defence case, and that "without having provoked the assault" should be implied from 34(2) to 35. Lamer J

wants the plain meaning applied

- 2) **Static vs Dynamic Interpretation**
  - should the text be interpreted as it would have when the text was first enacted or in light of current understanding and social conditions
  - *Harvard College v Canada (Commissioner of Patents)*
    - Is a mouse an invention
  - Is questionable whether constitutional law, the *Charter* or the *BNA* be interpreted dynamically or statically
- 3) **Non-application –** *Re Vabalis*
  - **"**the interpreter identifies a reason not to apply a provision to the facts even though, given its ordinary meaning, it would otherwise apply. A provision may be "read down" in this way for any number of reasons – to promote legislative purpose, to avoid absurdity, or to comply with the presumptions of legislative intent
- 4) **Incorrigible gap argument** – act cannot apply even though, given its purpose it should
- 5) **Supplementation** - the interpreter concedes that the legislation as drafted does not apply, but claims that the common law does apply so as to supplement the under-inclusive legislation
- 6) **Corrigible mistake argument** – provision contains a mistake which must be corrected
- 7) **Paramountcy argument** – conflict between two provisions and one takes precedence

Interpretation Challenges (chart)

Type of problem	**Type of argument in response**
Ambiguous, vague, or incomplete text	Disputed meaning
Evolving context	Static versus dynamic interpretation
Overinclusive text	Non-application
Underinclusive text	Incorrigible gap in legislative scheme; supplement with Cmn law rule/remedy
Contradictory or incoherent text	Corrigible mistake
Overlapping provisions	Non conflict: Overlap versus exhaustive code; Conflict: Paramountcy rule

Challenges

- **Incorrigible Gap**
  - *Beattie v National Frontier Insurance Co*
    - "The interpreter claims that the legislation as drafted cannot apply to the facts even though, given its purpose, t probably should apply; whether this omission is deliberate or inadvertent, the court has no jurisdiction to fill a gap in a legislative scheme or otherwise enlarge the scope of legislation"
- **Supplementation**

- *Beson v Director of Child Welfare for Newfoundland*
  - "the interpreter concedes that the legislation as drafted does not apply, but claims that the common law does apply so as to supplements the under-inclusive legislation"
  - Why doesn't the supplementation fix the incorrigible gap issues?
    - Because one cannot extrapolate from existing common law to bridge the gap where no sensible analogies exist

- **Corrigible Mistake**
  - *Morishita v Richmond (Township)*
    - "the interpreter claims that the provision in question contains a drafting mistake, which must be corrected before determining whether the provision applies to the facts. He or she must establish what the legislature clearly intended and what the text would have said had it been properly drafted"
      - This is common in the bilingual context
    - Dissent by McLaughlin in *R v McIntosh* – "without having provoked the assault" does not appear in *CC* 34(2) but it appears in 35. She thinks it is a corrigible mistake that it not in there
- **Paramountcy**
  - *Insurance Corporation of BC v Heerspink*
    - "the interpreter claims that there is a conflict between two provisions or between a provisions and the common law and that one takes precedence over the other on the basis of some principled reason. For example, legislation prevails over the common law or the specific prevails over the general"

Rules About Meaning

- **Ordinary Meaning Rule**
  - The meaning that is spontaneously comes to the mind of a competent reader upon reading a legislative text
  - Presumed to be the intended meaning by parliament
  - BUT the presumption can be rebutted by evidence suggesting that some other meaning was intended
- **Technical Meaning Rule**
  - We presume that the legislature uses words in their popular, non-technical sense
  - BUT when legislation deals with a specialized subject and uses language that people governed by the legislation would understand in a specialized way, that specialized understanding is preferred over ordinary usage
    - *Re Witts* (1982) – discusses the sex of a horse purchased in a claiming race, and what "gelding" means. Ruling was that "gelding" was consistent with meaning of "Sex" when the racing commission published the information
    - "No" to the implied exclusion rule
- **Shared Meaning Rule**
  - When a discrepancy between a bilingual statute, the meaning that is shared by both versions is presumed to be the intended meaning
    - *R v Chartrand* (1994) – accused charged with taking a boy to take pictures of him for his parents
      - *"unlawfully"* was different in the French and English versions
      - Parliament had intended to distinguish between stranger and parent "takings"
      - Ruled that French meaning was correct and "unlawful" takings only applied to strangers
      - [NOTE: L'Dube used similarities, social context, history and other secondary sources, purposive meaning to arrive at her conclusion)
    - *Medovarksi v Canada (Minister of Citizen and Immigration)* (2005)

        - After crime committed, right to appeal removed pending interpretation of "granted a stay" in the French and English versions of the *Immigration and Refugee Protection Act*
            - Court decided that both counsel must consider both language versions of bilingual legislation
- **Original Meaning Rule**
    - Meaning is fixed at the original time of enactment
    - Applied as when the legislature first enacted it
- **Plausible Meaning Rule**
    - If an ordinary meaning is rejected to give effect to what the actual or presumed contemporary intent of the word is, meaning must be one the text is capable of bearing

Presumptions about the Text – "Maxims of Interpretation"

- **Straightforward Expression**
    - Legislature choses the clearest, simplest and most direct way of stating a meaning
- **Uniform Expression**
    - Legislature uses the same words and techniques to express the same meaning and different words and techniques to express different meanings
- **No Tautology or Redundancy ("the legislature does not legislate in vain")**
    - No superfluous words in legislation
    - Every word, every feature of the text is there for a reason and plays a meaningful role in the legislative scheme
- **Internal Coherence**
    - All the provisions of a legislative text fit together logically and work together coherently to achieve this purpose of the legislation
- **Implied Exclusion** (expressio unius est exclusio alterius)
    - If something is not mentioned in circumstances where one would expect it to be mentioned, it is impliedly excluded
        - *R v Daoust* – pawn broker charged with transferring property to conceal or convert it
        - Interpretation of the word "transfer" – court decided that he bought it knowing it was stolen, BUT that he did not "transfer" it according to the literal meaning of *CC* 462.31.
- **Associated Words** (noscitur a sociis)
    - Meaning of a word or phrase is affected by the other words or phrases which link it in a sentence
- **Limited Class** (ejusdem generis)
    - when a list of things that all belong to an identifiable class is followed by a more general terms, the general terms may be read down to include only things within the identifiable class
- **Alternate Expression** ("legislature would have said x …")
    - a legitimate basis for rejecting a proposed interpretation is to point out that had the legislature intended the proposed interpretation, if would have framed the legislation in a different way

Presumptions about Legislative Intent

- Strict construction in:
    - 1) criminal law
    - 2) laws expropriating private property

- Cases of exceptions to well-established legal principles
- *legislation that interferes with individual rights or freedoms

- Liberal construction in:
  - 1) social welfare legislation
  - 2) quasi-constitutional legislation (Human Rights)
  - **applied in legislation that cures mischief or confers benefits
- Additional Maxims About Intent:
  - “presumed compliance with constitutional law and constitutional law values”
  - “presumed compliance with international law”
  - “presumed continuation of common law”
  - “presumed compliance with rule of law”
  - “presumed non-interference with common law rights”
  - “presumption against the extraterritorial application of legislation
  - “presumption against the retroactive application of legislation”
  - “presumption against the interference with vested rights”
  - “presumption against applying legislation to the Crown and its agents”

Avoiding Absurdities

- Interpret text to avoid an absurd result (Golden Rule)
  - Eg: Statute makes it a criminal offense to “obstruct or prevent the passage of the mail or if its carrier”
    - Mailman murders someone on the street and is witnessed by passers-by

Extrinsic Aids

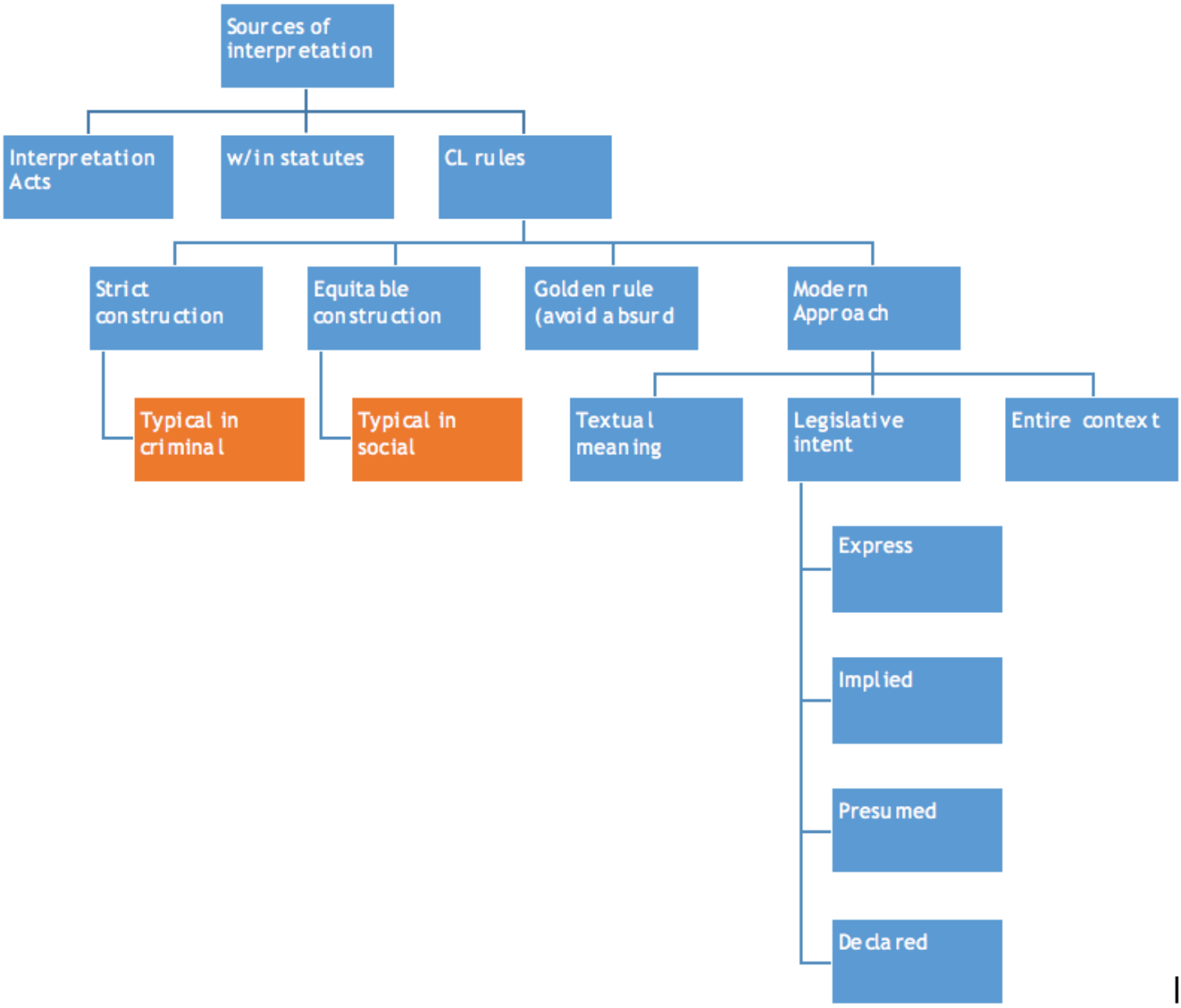
- Legislative source (model codes) - agreements that the legislation is intended to implement
  - like PPSL
- Legislative history
  - *Hansard* - transcript of what’s said in parliament and legislative debates
  - hansard gets less weight because includes statements like fuddle duddle
  - Parliamentary (committee) Reports
- Legislative evolution (transition from one statue to another) - successive amendments and re-enactments
- Expert opinion - precedent, admin opinion, expert testimony, scholarly legal publications
- Dictionaries; statutes in related areas; canons

Look at words themselves - the purpose, mischief - why the act came into force in the first place (strict, liberal construction)

- **what is this aimed at? what is the mischief that this is trying to cure?**
- **framing of the law**
  - **criminal law - read it narrowly**
  - **broader than criminal - read it more liberally**

“Reading In” versus “Reading Down”

- ***Reading In*** – expands the scope of a legislative provision or fills the gap in a legislative scheme
  - Courts typically refuse to do this because it amounts to amendment rather than interpretation, which is something the courts won’t do
  - As per *Re Rizzo* (1998)
    - When a group is terminated do they still get their benefits as per the Ontario *Employment Standard’s Act?*
    - The meaning of “terminated” – i.e. when bankruptcy occurs, the employment be said to be terminated by an employer?
    - Ultimately, read in, because the more senior personnel who are likely to be employed up until the time of bankruptcy and who would thereby lose their entitlements to these payments. The legislation cannot mean this
- ***Reading Down*** – accepting an interpretation of a provision that is narrower in scope than the ordinary meaning of the text would support
  - *Canada (AG) v Mossop* (1993)
  - When Mossop tried to take time off for his partner’s dad’s funeral, the union denied him, and so he took his appeal to the Canadian Human Rights Commission
  - “common law spouse” and “family status” were queried for a possible narrowed down reading
  - Mossop denied because he did not have “family status” as per the collective agreement’s wording



Movie "Scottsboro Boys"

- **Events**
  - March 25, 1931 – Scottsboro boys arrested for rape of two white women
  - March 26, 1931 – Scottsboro boy nearly lynched
  - March 30, 1931 – Grand jury (all white men) indicts Scottsboro boys for rape
  - April 6, 1931 – Trials begin in Scottsboro
  - April 7-9, 1931 – All are tried and convicted, and sentenced to death
  - March 1932 – Alabama Supreme Court affirms 6-1

        - C.J. Anderson of Alabama dissented – no fair trial
        - US Supreme Court agrees to hear case
        - US Supreme Court reverses convictions for lack of adequate legal representation at trial.
            - *Powell v. Alabama*, 287 US 45 (1932)
        - Back to trial
- **Issues:**
    - Race; Gender; Economic Conditions; Lawyers' role;
    - Defendants' reaction – false confessions
    - Judge's role – overturn jury verdict
    - Did NY lawyer help or hurt – outsider – is it about you or the client?
    - Did they do it?
    - Social Conditions
    - Tough witness – chick who was "raped"
    - DNA? – bad forensics
    - Length of trial
    - Re-offend
- **Canada Wrongful Convictions**
    - Donald Marshall, Jr.
    - Martensville Satanic sex scandal
    - David Milgaard
    - Guy Paul Morin
    - Steve Truscott
    - Etc.

MILITARY LECTURE:

Military Justice System: Mike Madden & Patricia Beh

- separate constitutionally valid system that applies to 60,000 people in Canada
    - different expectations —> need different system that responds to those different needs
- completely stand alone system
    - Parallel operation with civilian criminal justice system, including concurrent jurisdiction over civil offence
- Essential for the Canadian Forces to ensure that its members uphold the highest standard of conduct

2 purposes of military justice system:

- promote the operational effectiveness of the CAF by contributing to the maintenance of discipline, efficiency and morals; and
- contribute to respect for the law and the maintenance of a just, peaceful and safe society

Service Tribunals:

1. Summary Trials
    - non-judicial proceedings, typically at unit-level by officers who are responsible for discipline — people who don't have legal training have control over
    - prompt and fair justice in respect of *minor service offences*
        - up to 1 month in jail
        - e.g.) in the military, if you don't show up for work —> charged with absence without leave —> take this seriously
    - In all but the least serious cases, accused persons are offered an election to be tried by court martial
2. Courts Martial
    - like civilian criminal courts, and military judges have the same degree of judicial independence as civilian judges - accused also have right to be represented by counsel
    - uniformed Judge, defence lawyer and prosecutor
    - can try and service offence, and can impose punishment provided for under National Defence Act

Service Offence:

- an offence under the National Defence Act, the Criminal Code or any other federal statute, committed person while subject to the Code of Service Discipline
- includes uniquely military offences (e.g. desertion, drunkenness, negligence, cowardly act in front of enemy)
- includes civil offences under Canadian and foreign law (stealing from convenience store when off-duty)
    - sometimes argued this is too broad
    - BUT argued that he is in armed forces and his actions can't be tolerated if undisciplined
- for military person, offence under national defence act even when cross borders

Independent Reviews:

First Independent Review - 2003

- By former Chief Justice Canada, Antonio Lamer, in 2003
- found that the military justice system is generally working well, but made a series of recommendations
- Bill C-15 (2013) will implement outstanding Lamer recommendations

Second Independent Review

- by former Chief Justice of Not Sup Ct, Patrick LeSage in 2011
- found that the military justice system is generally working well but made 35 recommendations relating to military justice

Significant Appeals:

Offences under the Criminal Code or other Acts

- R v Morality; R c Larouche; R c Arsenault
- revived requirement for 'military nexus'
- decisions raise a more fundamental issue about the military justice system: concurrent and parallel or 'subordinate' and 'subsidiary'?
- the SCC heard appears on May 12 2015 - awaiting the decision

Independence of the MND for the Purpose of Appeals

- R c Thibault, R v Cawthorne
- members seeking to quash the minister's appeals on the basis that the Minister of National Defence is not an independent AG
    - the legal principle that needs to be looked at is the independence of the MND or AG - their title itself does not matter

Fundamental questions:

- civilian oversight / democratic control of the armed forces?
- scope of personal jurisdiction: who is / should be subject to military law?
- scope of subject matter jurisdiction: what is an "offence under military law" for the purpose of s 11(f) of the Charter?
    - we all have a right to be tried by a jury for anything with a jail time of 5 years or more
- Equal treatment: is there a charter right to a particular form of criminal process?

R v Genereaux (1992) 1 SCR 259

- military has its own Code of Service Discipline to allow it to meet its particular disciplinary needs
- "there is a need for separate tribunals to enforce special disciplinary standard in the military"
- section 15 - different treatment for minorities
    - military personnel don't fall into this category
    - unequal treatment of military personnel — is this unfair? Probably not

Other Sources of Military Law:

1. The Canadian Forces deploys a substantial force into another country to fight in an international armed conflict
    - once you're in a conflict, what type of law governs if someone shoots someone in the other land?
        - Geneva Convention; law of war; law of armed conflict; customary international law
2. During the armed conflict, Private Jones kills a soldier fighting for the armed force of an opposing state

Relevant Source of Military Law:

- Customary and treaty-based international law governing the resort to force by a state.
- Crown prerogative to deploy the armed forces.
- Customary and treaty-based international law governing the conduct of hostilities within an armed conflict.
- Complex interplay between customary international law of armed conflict, SCC case law, and domestic criminal law.