LAW 435 CAN CONSTITUTIONAL

INTRODUCTION 1
THE ELEMENTS OF THE CANADIAN CONSTITUTION 1
THE SOURCES OF THE CANADIAN CONSTITUTION 1
REFERENCE CASES 1
CONSTITUTIONAL PRINCIPLES 1
Reference re Secession of Quebec 1
Reference re Senate Reform 2
CONSTITUTIONAL INTERPRETATION 2
UNWRITTEN CONSTITUTIONAL PRINCIPLES 2
Reference re Meaning of the Word "Persons" in Section 24 of the British North America Act, 1867 . 2
Edwards v Canada (Attorney General) **– Living Tree** 3
Constitutional Interpretation and Original Intent – Justice Ian Binnie 3
CONSTITUTIONAL ARCHITECTURE 4
TRIGGERING JUDICIAL REVIEW AND PROCEDURAL ISSUES 4
HOW DO CONSTITUTIONAL ISSUES GET TO COURT? 4
NOTICE REQUIREMENTS 4
PARTIES AND INTERVENORS 4
National Federation of Independent Business v Sebelius 4
FEDERALISM 5
CONFEDERATION 5
John T Saywell, ***The Lawmakers: Judicial Power and the Shaping of Canadian Federalism*** 5
FEDERALISM AND THE MODERN CANADIAN STATE 5
Kenneth Harold Norrie, Richard Simeon & Mark Krasnick, ***Federalism and the Economic Union*** 5
INTERPRETING THE DIVISION OF POWERS 6
VALUES INFORMING THE INTERPRETATION OF THE DIVISION OF POWERS 6
Richard E Simeon, "Criteria for Choice in Federal Systems" 6
Conceptions of Community 6
The Functional Perspective 6
The Democratic Perspective 7
THE PRIVY COUNCIL 7
Why Federalism? 7
Citizen Insurance Company v Parsons **- IMPT for 92(13)** 7
Russell v The Queen **– win for POGG** 8
Hodge v The Queen **– Double Aspect Doctrine** 8
THE DEVELOPING CONSTITUTIONAL STATE 8

Reference re the Board of Commerce Act, 1919 & the Combines and Fair Prices Act, 1919 8
Fort Frances Pulp and Paper Co v Manitoba Free Press Company * reread 9
Toronto Electric Commissioners v Snider 9
POGG AND HALDANE QUOTES 10
THE NEW DEAL 10
WPM Kennedy, "Our Constitution in the Melting Pot" 10
Vincent C Macdonald, "Judicial Interpretation of the Canadian Constitution" 10
AG Canada v AG Ontario (Labour Conventions) 10
AG Canada v AG Ontario (The Employment and Social Insurance Act) 11
AG British Columbia v AG Canada (The Natural Products Market) 12
Remaining New Deal Cases 12
Richard Simeon & Ian Robinson, *State, Society and the Development of Canadian Federalism* 12
PITH AND SUBSTANCE 13
Pith and Substance Test 13
Katherine Swinton, *The Supreme Court and Canadian Federalism: The Laskin-Dickson Years* 13
William R Lederman, "Classification of Laws and the BNA ACT" 13
R v Morgentaler 13
DOUBLE ASPECT DOCTRINE 14
Double Aspect Doctrine Test 15
William R Lederman, "Classification of Laws and the BNA Act" 15
Multiple Access Ltd v McCutcheon 15
ANCILLARY POWERS – OCTOPUS METAPHOR 16
Ancillary Powers Test 16
General Motors of Canada Ltd v City National Leasing 16
Quebec AG v Lacombe 17
INTERJURISDICTIONAL IMMUNITY – CASTLE METAPHOR 17
IJI Test 18
Canadian Western Bank v Alberta – adds impair to the IJI test 18
Quebec (AG) v Canadian Owners and Pilots Association 18
PARAMOUNTCY – STALONE ALWAYS WINS METAPHOR 19
Paramountcy Test 20
Multiple Access Ltd v McCutcheon 20
Bank of Montreal v Hall – step 2 of paramountcy test 20
Rothmans, Benson & Hedges Inc v Saskatchewan 21
Alberta (AG) v Moloney 22
PEACE, ORDER AND GOOD GOVERNMENT 22
Re: Anti-Inflation Act 22

R v Crown Zellerbach Canada Ltd ** come back to this case 24
ECONOMIC REGULATION 25
PROVINICAL POWERS OVER ECONOMIC REGULATION 25
Carnation Company Limited v Quebec Agricultural Market Board et al 25
Note: Manitoba (AG) v Manitoba Egg and Poultry Association Et Al 25
Note: *Reference Re Agricultural Products Marketing* ** 26
Canadian Industrial Gas and Oil Ltd v Government of Saskatchewan et al 26
Central Canada Potash Co Ltd v Government of Saskatchewan 26
The Regulation of Natural Resources 27
Economic Regulation Summary 27
TRADE AND COMMERCE 27
Note: *Labatt Breweries of Canada Ltd v Attorney General of Canada* 27
General Motors of Canada Ltd v City National Leasing 27
Second Branch of Trade and Commerce Power Test 28
CRIMINAL LAW POWER 28
Valid Criminal Law Test 28
Margarine Reference 28
RJR – MacDonald Inc v Canada AG 29
R v Hydro-Quebec 30
Note: *Re Firearms Act* 30
MORALITY AND PUBLIC ORDER 31
Nova Scotia Board of Censors v McNeil 31
Dupond v City of Montreal 31
Westendorp v The Queen 32
Chatterjee v Ontario (AG) 32
FEDERALISM REVIEW 32
Reference Re: Securities Act 32
ABORIGINAL RIGHTS – SECTION 35 *IMPT FOR EXAM* 33
Relevant Constitutional Provisions 33
Themes to Explore 33
Guerin v The Queen 33
R v Sparrow 34
Sparrow Justification Test 35
Remedies to Divisional Powers and Federalism 35
R v Van der Peet 35
Integral to a Distinctive Culture test 37

Note: *R v Sappier*; *R v Gray* **37**
Aboriginal Rights Test – ADD MORE FROM SLIDES **38**
ABORIGINAL TITLE **38**
The Concept of Aboriginal Title **38**
Aboriginal Title Test (*Delgamuukw* test) **39**
Tslhqot'in Nation v British Columbia **39**
ABORIGINAL TREATY RIGHTS **40**
Aboriginal Treaty Right Test **41**
***R v Marshall* – how we should approach treaty rights** **41**
Marshall No 2 ..... **42**
Grassy Narrows First Nations v Ontario (Natural Resource) **42**
THE DUTY TO CONSULT **43**
Haida Nation v British Columbia (Minister of Forests) **44**
NOTES **45**
Beckman v Little Salmon/Carmacks First Nations **45**
METIS RIGHTS **46**
R v Powley **46**
THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS **48**
RIGHTS BEFORE THE CHARTER **48**
IMPLIED BILL OF RIGHTS **48**
Reference re Alberta Statutes **48**
Saumur v City of Quebec **49**
Switzman v Elbling and the AG of Quebec **50**
Dupond v City of Montreal et al **50**
CHARTER HISTORY **51**
THE CANADIAN BILL OF RIGHTS **51**
THE ADVENT OF THE CHARTER **51**
The Honourable Pierre Elliot Trudeau, Minister of Justice, A Canadian Charter of Human Rights, 1968 ..... **52**
A Cairns, "Charter Versus Federalism: The Dilemmas of Constitutional Reform" **52**
P. Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms" **52**
L. Weinrib, "Of Diligence and Dice: Reconstituting Canada's Constitution" **53**
L.E. Weinrib, "Canada's Charter of Rights: Paradigm Lost?" **53**
JUDICIAL REVIEW **53**
W Bogart, "Courts and Country" **53**
A Petter, "Immaculate Deception: The Charter's Hidden Agenda" **54**

L. Weinrib, "'Limitations on Rights' in a Constitutional Democracy" **55**
PW Hogg and AA Bushell, "The Charter Dialogue Between Courts and Legislature" **55**
Vriend v Alberta **56**
CONSTITUTIONAL AMENDMENT **56**
Constitutional Amendment After 1982 ..... **56**
Evaluating the Amending Formula **56**
CHARTER FRAMEWORK AND INTERPRETATION **57**
INTERPRETING RIGHTS **57**
THE PURPOSIVE APPROACH **57**
Hunter v Southam Inc **57**
CHARTER APPLICATION **58**
RWDSU v Dolphin Delivery Ltd **58**
Notes *58*
GOVERNMENTAL ACTORS **59**
Entities Controlled by Government **59**
McKinney v University of Guelph **59**
Notes *59*
Entities Exercising Governmental Functions **61**
Godbout v Longueuil (City) **61**
GOVERNMENTAL ACTS **61**
Non-Governmental Entities Implementing Government Programs **61**
Eldridge v British Columbia AG **61**
Entities Exercising Statutory Powers of Compulsion **62**
GOVERNMENTAL INACTION **62**
Vriend v Alberta **62**
APPLICATION OF THE CHARTER TO COURTS, THE COMMON LAW, AND THE EXERCISE OF ADMINISTRATIVE DISCRETION **63**
Reliance by Government or Common Law *63*
Reliance on Common Law in Private Litigation *63*
Hill v Church of Scientology of Toronto **63**
TERRITORIAL LIMITS ON THE APPLICATION OF THE CHARTER **64**
SECTION 1 ..... **64**
DEFINING LIMITATIONS: SECTION 1 ..... **64**
Greater Vancouver Transportation Authority v Canadian Federation of Students – BC Component **64**
JUSTIFICATION – THE OAKES TEST **65**

R v Oakes 65
Oakes Test 66
Edmonton Journal v Alberta (Attorney General) 66
Irwin Toy Ltd v Quebec (Attorney General) 67
Newfoundland v NAPE 67
THE OVERRIDE 68
Ford v Quebec (Attorney General) 69
The Notwithstanding Clause: Why Non-Use Does Not Necessarily Equate with Abiding by Judicial Norms 69
CHARTER REMEDIES 70
Remedies and Standing 70
Relationship Between Sections 24 and 52 70
Jurisdiction to Award Charter Remedies 70
List of Remedies 70
REMEDIES UNDER S 52(1) OF THE CONSTITUTION ACT 71
Remedies Test Under S 52 71
Schachter v Canada 71
Vriend v Alberta 73
M v H 74
Severance and Reading Down 74
Constitutional Exemptions 75
Temporary Suspension of Declaration of Invalidity 75
REMEDIES UNDER S 24(1) OF THE CHARTER 75
Little Sisters Book and Art Emporium v Canada 75
SECTION 2(A) - FREEDOM OF RELIGION 75
SUNDAY OBSERVANCE AND THE SCOPE OF SECTION 2(A) 76
R v Big M Drug Mart Ltd 76
R v Edwards Books and Art Ltd 77
THE RESTRICTION AND ACCOMMODATION OF RELIGIOUS PRACTICE 78
S 2(A) INFRINGEMENT TEST 78
Syndicat Northcrest v Amselem 79
Alberta v Hutterian Brethren of Wilson Colony 80
SECTION 2(B) - FREEDOM OF EXPRESSION 82
R v Keegstra 82
R Moon, "The Constitutional Protection of Freedom of Expression" 82
2(B) IRWIN TOY TEST 83

Irwin Toy Ltd v Quebec (AG) 83
RJR MacDonald Inc v Canada (AG) 85
HATE SPEECH 87
R v Keegstra 87
Saskatchewan (Human Rights Commission) v Whatcott 89
SECTION 7 - LIFE, LIBERTY AND SECURITY OF THE PERSON 90
INTRODUCTION 90
Section 7 Infringement Test: 90
Reference re 2 94(2) of the Motor Vehicle Act 91
R v Morgentaler 91
Chaoulli v Quebec – **pre-key three PFJs** 93
Canada (AG) v PHS Community Services Society 93
Canada v Bedford 94
Carter v Canada 96
SECTION 15 – EQUALITY RIGHTS 97
Constitutional History of Equality 97
Andrews v Law Society of British Columbia 98
R v Kapp 99
Quebec v A 100
Kahkewistahaw First Nation v Taypotat 101
Reformulated s 15(1) Test 102
EQUALITY'S THREE STEPS 102
1. Differential Treatment 102
Eldridge v British Columbia 102
2. Enumerated and Analogous Grounds 103
Corbiere v Canada 103
3. Disadvantage/Discrimination 104
Withler v Canada 104
M v H 106

INTRODUCTION

- The Canadian Constitution is the supreme law of Canada
    - Provides the legal basis for laws
    - Establishes Federalism (division of power)
    - Protects individual rights and freedoms
    - Maintains justice in society
- The constitution of a society is an assortment of important rules, principles and practices relating to the governance of society
- Constitutional law is an open-ended set of rules, principles, and practices that represent efforts to identify, define and reconcile competing rights, responsibilities and functions of governments, communities and individuals

THE ELEMENTS OF THE CANADIAN CONSTITUTION

- 5 major features: parliamentary democracy, federalism, individual and group rights, aboriginal rights and the principle of constitutionalism
    - these elements are typically in conflict
- Parliamentary democracy – ensures general laws are made by elected legislative bodies
- Federalism – the division of government along territorial lines (which bodies of government can make/enforce which laws)
- Rights – claims that citizens, as individuals and members of particular communities, have against the state
- Aboriginal rights – rights recognized as belonging to Aboriginal peoples in light of the fact that they lived on the continent in organized societies before European contracts
- Constitutionalism – governmental action can be held by the courts to be "of no force or effect: if the courts find the actions to be inconsistent with the Constitution

THE SOURCES OF THE CANADIAN CONSTITUTION

- Made up of a variety of sources, compiled over time
- Common law is a source
- Conventions – rules that have developed from government practice over time and that are enforced not by the courts, but by political sanction
    - Not legally enforceable, still lie at the heart of the constitution
    - i.e. first past the post is a convention but not legally enforceable in court

REFERENCE CASES

- A reference case is the government asking the courts a legal question
- The answers are not binding, just advice
    - In reality, **they are binding**
- The court reserves the right not to answer some questions
- It's a good way to check if a law you are looking to pass is a good one (constitutional)
- Benefits to *no* reference cases? You could use a law while it is being fought, you can build concrete evidence around how the law works in practice
- Downside: reference cases give courts legislative power and there should be a separation between courts and the legislature

CONSTITUTIONAL PRINCIPLES

Reference re Secession of Quebec

- Up until the point of this case, there was no real rule on how to properly amend a piece of the constitution
- Three questions under consideration
    - Under the Constitution, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally? No
    - Does international law give the National Assembly, legislature or government of Quebec the right to affect the secession of Quebec from Canada unilaterally? N0
    - In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to affect the secession of Quebec from Canada unilaterally, which would take precedence in Canada? No answer required

- Four foundational constitutional principles: federalism, democracy, constitutionalism and rule of law, and respect for minority rights
    - These are the unwritten constitutional principles

Reference re Senate Reform

- The question of senate reform and whether it affects the constitution is brought to the supreme court
- The court makes the distinction that they are only going to be commenting on the legality of the issue, not the parliamentary or political issues
    - Creating the separation of the courts and the government
- Those for senate reform argue that the change won't actually change the wording of the constitution
    - The text itself can remain as is
- Those arguing against the senate reform say the new purposed senate would remove that sober second thought aspect and would instead make senators more of a political candidate
    - If it moved to an electoral position, you would have senators running with platforms and agendas, working for change, not the sober second thought
    - The senate would mirror the house of commons rather than remain its own separate legal body
- It would change the structural architecture of the constitution
    - Not a direct change to s 24, but an indirect change to the architectural structure of the constitution
- Section 52 says "includes" and therefore includes the internal architecture of the constitution, which requires approval of all provinces to change the constitution

CONSTITUTIONAL INTERPRETATION

UNWRITTEN CONSTITUTIONAL PRINCIPLES

- Where do unwritten constitutional principles come from? Our preamble
- British constitutional principles are historically unwritten, and our constitution incorporates them
    - The preamble of our constitution speaks to the fact that we will have a constitution similar to that of Britain's
- Adaptation theory: we want things flexible and unwritten, so we can keep changing and adapting over time
- Controversial issues with unwritten principles:
    - Why do judges have the power to decide these principles?
    - No electoral legitimacy - Judges are not elected officials yet they have the ability to make laws
- ***BC v Chrisitie*** – this case shows that that if there is a specific right outlined in the constitution, there cannot be a general right
    - s 10 states the right to a lawyer <u>on arrest or detention</u>. The question of unwritten principles arises, but the law clearly states on arrest or detention, so there cannot be a general right to a lawyer (s 10 would be pointless if this were the case)

Reference re Meaning of the Word "Persons" in Section 24 of the British North America Act, 1867

<u>*Question:*</u> "Does the word "Persons" in section 24 of the *British North America Act, 1867* include female persons?"
<u>*Facts:*</u> - Emily Murphy and the rest of the "famous five", through the Governor in Council brought this question to the Supreme Court when Murphy was rejected from applying for a Senate seat as women were not recognized as "persons"

- The court made the distinction that while the questions asked if "persons" included women, the wording in the BNA Act used "qualified persons" so they were going to examine whether women fit into "qualified persons", *not* whether they should be in senate
- They looked at the context in which this section was constructed
- Prior to 1867, women had a legal incapacity to sit in Parliament
- The judges agreed that "persons", when standing along, *prima facie*, most definitely included women (and criminals)
    - But the "fit and qualified" piece excluded criminals so did it exclude women as well?

<u>*Answer:*</u> All 5 judges agreed that women did not fit into "qualified persons" under section 24 of the BNA Act
<u>*Reasons:*</u> - women were not allowed in parliament when the BNA Act was enacted in 1867

- If they were to be allowed now, it would have to be explicitly legislated
- The courts held that the common law incapacity of women to exercise public functions excluded women from the class of "qualifies persons" under s 24 of the *Constitutions Act, 1867*
- The SCC looked at what was intended when the constitution was written, and they found that "qualified persons" was intended to include only men (women had a legal incapacity to participate in government)
    - Strict construction
- Express language required to deviate – if women were to be included, it would have been stated explicitly

***Edwards v Canada (Attorney General)* – Living Tree**

Facts:
Issues: Do the words "qualified persons: in section 24 of the *BNA Act, 1867* include women? Are women eligible to be summoned to and become members of the Senate of Canada
Held: Yes – "qualified persons" is to include both men and women and women are therefore eligible to be summoned to and become members of the Senate of Canada
Reasons: - ss 41 and 88 explicitly state that the "persons" referred to are male

- If s 24 had the same intent, it would be explicitly stated
- "The *British North America Act* planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada"

Dead Tree Doctrine Benefits	**Living Tree Doctrine Benefits**
- Less room for uncertainty; the law is the law - Takes pressure off the judicial system to make a decision - Change will come from a democratic decision rather than from the court (i.e. from the people) - Judges making legislative decisions potentially stops a healthy democratic moment in which the people actively participate in change - Rule of law – what citizens need to know is written in a stable and predictable constitution	- Gives the ability to look at the history and context that brought a law about - Amending parliament is slow, cumbersome and at times, impossible - The *intention* of the framers was to create a constitution that could evolve and grow - Evolutionist Argument: Framers put qualifications and precision into their text where they intended to be precise and qualified, and otherwise intended to leave it open for future generations to interpret the Constitution in light of recent events/changes

Constitutional Interpretation and Original Intent – Justice Ian Binnie

- The Constitution as a living tree has been used by Canadian judges who felt at liberty to extrapolate and interpolate words and meaning into the written text of our constitutional documents
  - Used by SCC judges since 1980
  - 1930 → Adopted and reinforced by Lord Sankey in the *Persons Case*
- Oppositions to this view say the Constitution should be read and applied as is
- Two major issues between originalists and evolutionists:
  1. Originalists put a lot of weight on the use of extrinsic evidence of what "framers" said and what "ratifies" seem to have understood. Evolutionists assume that the framers put qualifications and precision into their text where they intended to be precise and qualified, and otherwise intended to leave it open for future generations to interpret the Constitution in light of recent events/changes
  2. Legitimacy

The Doctrine of Original Intent in the United States

- In Canada, it is rare to speak of what the "framers" meant when writing the Constitution
  - This is actually the opposite, and taken very seriously, in the States
- Original intent – a function of the purposes and opinions of the framers of the Constitution that lie behind the constitutional text
- Original understanding – covers what notional listeners and readers would have understood the text to mean at the time it was drafted
- Another dimension of originalism is looking at what the farmers thought the constitution "would *do*" in terms of the policies it would require or forbid

Original Intent Issues in Canada

- Best known encounter is the *Persons Case* – judges ruled "qualified persons" to exclude women
  - This result was so manifestly inappropriate by 1930 that Lord Sankey jettisoned the original meaning and place his famous living tree
- Canadian courts have no consistent doctrine or accepted methodological approach to divine the intentions of the framers

CONSTITUTIONAL ARCHITECTURE

TRIGGERING JUDICIAL REVIEW AND PROCEDURAL ISSUES

HOW DO CONSTITUTIONAL ISSUES GET TO COURT?

1. Ordinary Litigation and Rules of Standing

- Constitutional issues can be raised in the course of ongoing civil or criminal proceedings
- The rules of standing determining who has a sufficient legal interest in a legal issue to raise it before a court
- Traditional common law rules of standing are typically satisfied in the situation where a law is being challenged on federalism or Charter grounds in the course of ongoing legal proceedings
- In *Canada (AG) v Downtown Eastside Sex Workers United Against Violence Society,* the court came up with a test for determining the law of standing:
    - Whether the case raises a serious justiciable issue
    - Whether the party bringing the action has a real stake or genuine interest in its outcome
    - Whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court

2. The Reference Procedure

- Provincial cabinets are empowered under provincial legislation to send reference questions to provincial appellate courts
    - Federal can go right to the SCC
- Abstract review → the technical term for this type of judicial review
- The federal reference power is given under s 53 of the *Supreme Court Act*
- This section also gives the court a duty to answer these questions
- S 53 also provides a provision for the appointment by the court of an *amicus curiae* in respect of "any interest that is affected and with respect to which counsel does not appear"
    - i.e. Quebec in the *Reference re Secession of Quebec*
- This reference procedure departs from the common law requirement that courts consider legal issues in the context of concrete disputes between interest parties
- The reference procedure provides a quick mechanism for obtaining an answer on a question of constitutional validity because it bypasses the trial level proceedings
- Reference cases are not binding, but in practice, they are

NOTICE REQUIREMENTS

- Legislation requires litigants to notify the affected attorney general of any constitutional issues raised in court
- If the AG is already party to the litigation, the notice provisions serve to provide the details of the particular constitutional claims at the time and place for the hearing
- If the issues arise in private litigation, the AG must be notified and invited to participate
    - If the AG intervenes at trial level, he may also introduce evidence

PARTIES AND INTERVENORS

- Constitutional reference → envision broad participation by interested and affected parties
- Private constitutional litigation → confined to the parties to the litigation
- In cases where a private party has commenced a court proceeding to directly challenge a piece of legislation, the AG, or another cabinet minister or government official, will be the respondent
- S 55 of the *Rules for the Supreme Court of Canada* provide that "any person interested in an application for leave to appeal and appeal or a reference may make a motion for intervention to a judge"
- The intervenor is not allowed to present oral arguments or introduce new issues, unless authorized by the judge
    - Since the introduction of the Charter, intervention by public interest groups has become a common feature of constitutional litigation
- In private constitutional challenges, the courts must consider more before allowing an intervention
    - Concerns about unfairness to the parties or the accused, the cost to all participants of additional participants, and any delay in resolving the specific dispute

National Federation of Independent Business v Sebelius

- This was a constitutional challenge to Obamacare
- **Outcome:** The courts upheld that the legislation falls within federal jurisdiction
- The US National Government possesses only limited powers; the States and the people retain the remainder
- The Constitution lists or enumerates the Federal Government's powers

- The Constitution's express conferral of some powers makes clear that it does not grant others
    - The federal government can only exercise powers it is granted
- The Bill of Rights, when enacted, made the express provision that "the powers not delegated to the United States by the Constitution are reserved to the States respectively, or to the people"
- The same does not apply to the States because they are not governed by the Constitution
    - The Constitution does restrict State governments in some ways – i.e. forbidding them to deny any person the equal protection of the laws
    - Where such prohibitions don't apply, the States don't need constitutional authorization to act
- **Police Power –** the general power of governing, possessed by the States but not by the Federal government. States are to govern those powers that affect people's daily lives; this also provides a check on the power of the Federal Government
- The federal government can tax
    - This gives them influence where they don't have the ability to regulate
    - By exercising its spending power, Congress may offer funds to the States and may condition these offers on compliance with specified terms

FEDERALISM

American vs Canadian Federalism	
Same	Different
- Law separates from politics - Federalism - Subsidiary – local government (putting the power in the hands of the people) - Promotes the idea that power can be held by smaller units of government and be controlled by the people - Spending power – federal government can influence provincial governments through the donation of money - Deference – to allow parliament to go first - Courts are cognizant of the fact that they do not pass laws so they will defer to parliament to do so - Presumption of constitutionality	- Residual power in the US: likes in the States - Residual powers in Canada: Lies in the Federal government

CONFEDERATION

John T Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism*

- John A MacDonald argues for a constitution that differs from the US, to avoid their mistakes
    - He argued for a Constitution that will have all the rights of sovereignty except those given to local governments
- These discussions ultimately led to section 91 and 92 of the Constitution
    - Divisions of legislative power

FEDERALISM AND THE MODERN CANADIAN STATE

Kenneth Harold Norrie, Richard Simeon & Mark Krasnick, *Federalism and the Economic Union*

- The most significant development within the BNA Act is the increase in shared, overlapping jurisdiction
- A vast range of governmental functions are now concurrent, *de facto* if not *de jure*
- This is a result of 4 distinct processes:

1. The projection of federal concerns and interests into areas once reserved primarily for the provinces, largely through the device of the spending power
    - Federal and provincial programs in social policy now intersect each other at virtually every point
2. The federal government has projected itself into other areas that were previously, predominately provincial, notably economic development
    - i.e. the joint work on the Trans-Canada Highway
    - to a lesser extent, the provincial governments have project themselves into areas that were predominately federal concerns
        - i.e. provinces have become involved in international activities

3. Overlap has increased massively in the field of revenue-raising
    - both levels rely heavily on the same fields, especially income and corporate taxes
4. The growth of new policy areas that fall outside any of the categories that were set out in the BNA Act

- Concurrency, overlapping, and shared responsibilities are fundamental features of Canadian federalism
- The cause and consequence of concurrency: breakdown of clear rationale for determining how responsibilities should be allocated
    - The BNA Act uses broad distinctions such as "local" and "national" and this leaves a lot of room for interpretation
- There is "spillover" between local and national distinctions
- SCC judgments help to draw the lines between powers
- 1930's Canadian commentators → argued decentralized federalism was inherently incapable of undertaking the responsibilities that economic and social developments were forcing on the modern state
    - the "dead hand" of the Constitution had to be removed
    - the division of powers had to be reworked to reflect the new responsibilities of government
- the post-war era saw the federal government's ability achieve its goals through shared cost programs with the provinces
    - very few responsibilities were formally transferred to the federal government
- The strength and confidence of provinces increased
- Executive federalism → the relationship between elected and appointed officials representing federal and provincial governments

INTERPRETING THE DIVISION OF POWERS

Three arguments that can be used to challenge legislation on division of power grounds:

1. *Validity of legislation* – legislation was enacted in relation to a "matter" beyond the enacting level of government's jurisdiction and thus within the exclusive jurisdiction of the other level of government
2. *Applicability of valid legislation* – even if legislation is within the jurisdiction of the enacting level of government, it may have to be limited in its application so as not to touch matters that lie at what has become the core of one of other level of government's area of exclusive jurisdiction
    a. More often used to limit the applicability of provincial statues to protect the exclusivity of federal heads of power
3. *Operability of provincial statues* - even if a provincial law is valid, and even if its applicable in the circumstances in question, it will be rendered inoperative if it conflicts with valid federal legislation as it applies to the same facts

- The continued involvement of the SCC in division of power disputes is required
    - How new legislation should be understood to best fit within the division of powers framework established many decades ago in a very different world can pose serious challenges to the courts that are called on to provide answers
- Striking feature of recent federalism jurisprudence: The Supreme Court's tendency to invoke in support of the approach it takes to division of power issues a number of broad overarching principles
- Cooperative federalism → this principle suggests that its value lies in the belief that if the two levels of government are left to work out their jurisdictional disputes themselves, rather than have the courts resolve them, those governments will find a way to resolve those disputes through some form of cooperative action

VALUES INFORMING THE INTERPRETATION OF THE DIVISION OF POWERS

Richard E Simeon, "Criteria for Choice in Federal Systems"

- Federalism is not inherently balanced or unbalanced
- Federalism can be evaluated from three perspectives: community, democratic theory and functional effectiveness

Conceptions of Community

- What conception of the political community if to be embodied in the political arrangements?
- Federalism is assessed largely in terms of its ability to defend and maintain a balance between regional and national political communities
- There is controversy over whether the communities in Canada are to be defined largely in political terms or in terms of the relationship of linguistic and ethnic communities
- Federalism represents a dynamic balance between regional and national communities
- People can be members of multiple communities
- The community perspective is in the domain of sociologists
    - Collectivist orientation

The Functional Perspective

- Federal and provincial governments are seen to be different elements within a single system
- Powers are allocated according to a division of labour criterion: which level can most efficiently and effectively carry out any given responsibility of contemporary government?
- The system as a whole is evaluated on its ability to respond to citizens needs
- The functional perspective is that of economists and public admins
    - Individualist orientation
    - View the community perspective as illegitimate
- Some argue the system is ineffective because it is too decentralized, others argue it is too centralized
- Not all interests are defined in territorial terms
    - Workers v owners, producers v consumers, etc. may be more important and could be neglected by a regime that focuses on territory
- Functional theorists look at the allocation of power in terms of watertight compartments
    - Overlapping is inefficient, costly and perverse

The Democratic Perspective

- What are the consequences of alternative federal arrangements for different conceptions of democracy – for participation, responsiveness, liberty and equality?
- One approach is to protect citizens from government
    - Stresses preservation of liberty and of minority rights against oppression by the majority
    - Federalism is a device to place limits on government
    - Decentralization
- This approach places excessive faith in the capacity of institutions to prevent tyranny
- The reverse of protection of minorities is the frustration of majorities
- The democratic view of federalism supports both a high degree of decentralization and of overlapping between governments

THE PRIVY COUNCIL

Why Federalism?

- Advantages
    - There is no one overall power head
    - Closer to the people
    - Facilitates democratic participation
    - Decentralization of power – creates checks and balances
    - Standards differ across provinces and citizens have the ability to move where their ideals align with the government
- Drawbacks
    - Conflict producing
        - Inefficiencies
        - Buck-passing
        - Citizens fall between the gaps
        - Overemphasis on provinces (i.e. Secession of Quebec)
    - Courts get more power; takes away from the people
    - Standards differ across Canada (health care, education, etc.)

Citizen Insurance Company v Parsons - IMPT for 92(13)

Facts: - Parson's bought fire insurance and sued Citizen Insurance when they refused to pay his claim

- They say he failed to disclose proper information and Parson's said that Citizens didn't comply with the Provincial insurance legislations
- Citizens argued that legislation was *ultra vires* the Province of Ontario
    - They say insurance is a federal issue – Trade and Commerce
    - Citizens argues insurance is a trade and if it's not trade, its commerce
- Ontario gets involved because someone has claimed their legislation is unconstitutional

Issues: Is the legislation *ultra vires* of the Province of Ontario?

Held: No – insurance falls under s 92(13), Property and Civil rights and is therefore a provincial jurisdiction

Reasons: - the dispute is a contract issue and therefore fits under s 92

- If insurance were to fall under s 91(2), Trade and Commerce, that would be a very broad interpretation
- Ss 91 & 92 overlap in trade and commerce (91) and property and civil rights (92)
    - Read together – interpretation by mutual modification
- S 91 should be interpreted narrowly

- Specific legislation should override the general
- Trade and Commerce encompasses:
    - International Trade
    - Interprovincial Trade
    - General regulation of trade affecting the whole dominion (general branch)
- There are other specific examples that fall within trade and commerce so it cannot therefore mean every type of commerce
- "Civil rights plainly used in its largest sense" – relating to Quebec's private law

Dissent: Gewn J (SCC)

Notes: - the provinces get civil rights because Quebec has a civil code
    - Quebec has a distinct code which differ from all provinces which inhibits the federal government from ruling over all for private law
    - S 92(13) is large grant of power of your civil personhood
    - S 91(18) lists specific types of contracts so it therefore doesn't cover *all* contracts (i.e. The one in this case)

***Russell v The Queen* – win for POGG**

Facts: - a private citizen began an action against Russell under the *Canada Temperance Act* for selling liquor in violation of its terms
- The Act was created by the federal government
- The Act provided the banning of alcohol, but allowed each province to make that decision
- The argument is that this should have been decided provincially because it falls under property and civil rights

Issues: Does the federal government have the authority to enact the *Canada Temperance Act*?

Held: Yes – it does not infringe on any of the provincial powers in s 92

Reasons: - parliament can enact laws under the peace, order and good government even if it affects property and civil rights
    - The courts say liquor is a matter of public safety rather than strictly property and civil rights
- Parliament can limit provincial rights if there were a need for uniform legislation
- Ask: what is this law in relation to? Courts say criminal, the public wrongs of drinking the alcohol
- Despite the fact that this case *involves* property, we only care what the law is in relation to
- The Act itself does not come within any of the questions enumerated in s 92 and therefore falls within the federal jurisdiction
- There is overlap between provincial and federal laws

***Hodge v The Queen* – Double Aspect Doctrine**

Facts: - Hodge was a tavern keeper who was charged with permitting billiards to be played in his tavern contrary to the regulations made by the licence commissioners for Toronto
- Hodge challenges the act on two grounds:
    - It conflicted with the Dominion power over trade and commerce
    - The provincial legislature could not delegate law-making powers to the boards of commissioners
        - "*delegatus non potest delegare"* – delegates may not delegate
        - Hodge argues the provincial government didn't have the right to transfer responsibility
        - They say Provinces are delegates of Parliament

Issues: - Is this act *ultra vires* the Province of Ontario?

Held: No

Reasons: - subjects which in one aspect and for one purpose fall within s 92, may in another aspect and for another purpose fall under s 91
- Double Aspect Doctrine: Subjects can fall within both domains and there is no ultra vires issue as long as both laws can be adhered to
    - The laws govern different pieces of the matter
    - Look at the issue in terms of: "What is the law in relation to?"
    - This law was not in relation to the prohibition of alcohol, this law was in relation to local interests, the local regulation of pool playing, the local interest in regulation
- Assuming a provincial legislature possess certain powers, it is possible to assume it can delegate those powers
    - The province is not a delegate and therefore "delegatus non potest delgare" does not apply
    - Both federal and provincial governments have supreme powers within their respective jurisdictional spheres

THE DEVELOPING CONSTITUTIONAL STATE

Reference re the Board of Commerce Act, 1919 & the Combines and Fair Prices Act, 1919

Question: Whether the board (federal) had power to make a specific order setting profit margins for clothing prices in Ottawa

Answer: Yes – the Act is *ultra vires* the Federal Government and is not saved under s91
- General objective of the act: restrict two sorts of perceived abuses

    - combines, monopolies and mergers
    - taking unfair profits, or hoarding "necessaries of life", including food and clothing, for the purpose of unfairly increasing prices
- the board had extensive powers to investigate and to make orders
- Anglin J says that the statue could be upheld through POGG
    - Although it deals with property and civil rights, it did not do so in a matter that was local or private
    - The piece on hoarding necessities can fall under s 91(27) – criminal law power
- Opposing, Idington J, says it falls within s 92(13) and doesn't believe that POGG can infringe on provincial powers
- Duff J turns to *Parsons* and says that s91(2) does not authorize the enactment by the Dominion Parliament regulating in each of the provinces the terms of the contracts of a particular business or trade
- Price setting involves contracts and is therefore a property and civil rights issue
- This case is escalated to the Privy Counsel
- Provincial legislatures possess quasi-sovereign authority
    - It can therefore be only under necessity in highly exceptional circumstances such as cannot be assumed to exist in the present case, that the liberty of the inhabitants of the Provinces may be restricted by the Parliament of Canada
- Only under necessity in high exceptional circumstances the liberty of the inhabitants of the Provinces may be restricted by the Parliament of Canada, and that the Dominion can intervene in the interests of Canada as a whole
- HALDANE: POGG should only be enacted to infringe on provincial powers in the case of war and famine
- POGG **cannot** just allow the federal government to enact a law as long as it applies everywhere in Canada
    - This would just evaporate all of the Provincial powers
- Just because the Act points to some federal aspects, it cannot give exclusive jurisdiction over the provinces

***Fort Frances Pulp and Paper Co v Manitoba Free Press Company* * reread**

<u>Facts:</u> - similar to the *Board of Commerce* Case, but with different legislation
- *War Measures Act* was enacted by the federal government and gave them the power to do whatever was considered necessary for the security, defence, peace, order and welfare of Canada
    - This act was limited to the existence of a real or apprehended war and invasion
- The act allowed for government regulation of newsprint prices with resulted in the Paper Controller (made the initial decisions) and the Paper Control Tribunal (appeals)
- The Controller made an order about prices and ordered the Fort Frances company to repay whatever it had received from the Manitoba Free Press in excess of these prices
- Fort Frances refused to pay

<u>Issues:</u> At what point after war ends does the federal government continue to have power of provincial matters?
- Is the *War Measures Act* ultra vires?

<u>Held:</u> Appeal dismissed, the act is upheld under POGG and the fact that wartime conditions may still exists

<u>Reasons:</u> - the temp exercise of power by the federal government can be ended after the exceptional circumstances cease to exist
    - There is a requirement that there must be clear evidence showing the crisis has passed
- POGG is reasonable in cases of sudden danger to social order arising from outbreak of war, when national life requires preservation, exceptional necessity
- There are certain scenarios where consequential conditions arising out of war may continue to produce effects remaining in operation after war itself is over

Toronto Electric Commissioners v Snider

<u>Facts:</u> - The *Industrial Disputes Investigation Act* was a federal act that applied to mining, transportation and communication undertakings, as well as public service utilities, and limited to those with more than ten employees
- Any employee/employer that was in dispute about the conditions of work could apply to the Minister of Labour for the appointment of a Board of Conciliation and Investigation
    - The board would endeavor to resolve the dispute and reach a settlement
- A board was appointed to inquire into a dispute between the Toronto Electric Commissioners and some of its employees
- The Commissioners sought an injunction, alleging the act was *ultra vires* the Parliament
- Court of Appeal: the act is valid under s 91(2) for the reasoning that to deprive the city of electric power is to disturb and hinder trade and commerce and to endanger public peace, order and safety under s 91(27)
- Court of Appeal dissent: There are only two grounds that enact POGG and this matter does is not a response to an emergency
    - The act is in within provincial power

<u>Issues:</u> Whether the *Industrial Disputes Investigation Act* was *ultra vires* the federal government's power

<u>Held:</u> Appeal and injunction allowed, the Act was *ultra vires* the powers of Parliament

Reasons: - the situation at hand is not so pressing that provincial powers are inadequate to deal with it

- Under POGG, the federal government does not have power to trump s92 unless there is a pressing concern
- Labour relations are a civil and local matter
- As a result of this case, labour standards are now regulated by provinces
    - Only 6% of employees are federally regulated
- POGG is available when "extraordinary peril to the national life of Canada, as a whole" and the instances are highly exceptional
- It is obvious the provisions under the *Industrial Disputes Investigations Act* dealt with civil rights
    - It was not within the federal government's power to make this a criminal matter merely by imposing ancillary penalties
- S 91(2) cannot be relied on as enabling the federal government to regulate civil rights in the provinces

POGG AND HALDANE QUOTES

- POGG available "to meet special conditions in wartime" on a "temporary" basis, but not under "normal circumstances" (*Board of Commerce)*
- "only under necessity in highly exceptional circumstances", "such as those of war or famine, when the peace, order and good Government of the Dominion might be imperilled" (*Board of Commerce*)
- Dominion "cannot ordinarily legislate so as to interfere with property and civil rights in the Provinces." (*Fort Frances*)
- POGG available in cases "of sudden danger to social order arising from the outbreak of a great war," "when the national life may require for its preservation," "national emergency", "sufficiently great emergency", "exceptional necessity" (*Fort Frances*)
- "general principle, the Dominion is to be excluded from trenching on property and civil rights" *(Fort Frances)*
- POGG available when "extraordinary peril to the national life of Canada, as a whole" (*Snider*).
- Such instances are "highly exceptional" (*Snider*).
- *Russell* explained as a "menace to the national life of Canada so serious and pressing that the National Parliament was called on to intervene to protect the nation from disaster. An epidemic of pestilence might conceivably have been regarded as analogous." (*Snider*).

THE NEW DEAL

WPM Kennedy, "Our Constitution in the Melting Pot"

- The federal government had to assist with financial aid during the Great Depression
- They were getting involved in many provincial matters as a result
- WPM Kennedy argues it was no longer possible to look at the BNA Act as a sacred instrument

Vincent C Macdonald, "Judicial Interpretation of the Canadian Constitution"

- Argues that the constitution today is ill-adapted in many important respects
    - Prevailing political theories indicate the priority or necessity of a greater degree of national control over matters of social welfare and business activities
- New legal facts, emergent conditions as a result of the great depression, and a new philosophy of government make up a background vastly different from that against which the act was projected in 1867
- The constitution needs to be revised
- Whether amended or not, the Canadian constitution will continue to be a written instrument requiring interpretation by supreme judicial authority

AG Canada v AG Ontario (Labour Conventions)

Facts: - reference about the validity of the following acts as enacted by Parliament:

- *Limitation of Hours Work Act,* which stipulated 8 hours a day and 48 hours a week as maximum hours of work
- *Weekly Rest in Industrial Undertakings Act*, which required a rest period of at least 24 hours for industrial workers
- *Minimum Wages Act*, which gave the governor in council power to establish minimum wages
- 1919 → Canada signed the Treaty of Peace as a member of the British Empire to secure human conditions; in 1930 the International Labor Organization and the League of Nations adopted conventions about hours of work, minimum wages, and days of rest
- March + April 1935 → the federal government ratified those conventions and enacted the three statutes to explicitly implement treaty obligations

- Parliament relied on s 132 (treaty powers) to enact these acts, but the Provinces say they fall within s 92

Issues: Are these Acts *ultra vires* Parliament? Are they valid based on s 132?
Held: All three acts are *ultra vires* Parliament.
Reasons:

- The federal government cannot, just by making promises with foreign countries, clothe itself with legislative authority inconsistent with the Constitution
- S. 132 is not about the power of Canada to enter treaties, but about treaties to do with the British Empire à Parliament has right to engage in treaty, NOT right to legislate it into s 92
    - S 132. The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.
    - Essentially, Canada is required to adopt treaties that Britain enters into
    - S 132 doesn't allow implementation of treaties, these have to be legislated, which turn to s 91/92she

SCC Analysis (split 3-3):
Intra-vires: used *Radio* and *Aeronautics* references to hold that the treaty came within s 132, giving the federal government the power to implement its terms even though the subject matter would otherwise fall under s 92

- POGG gave the federal government the power to implement
- It was never imagined that Canada would ever sign its own treaties

Ultra-vires: the conventions were adopted by Canada, they do not fall within s 132

- Provincial consent is required for the validity if it falls under s 92

PC Analysis:

- Decided it does not fall under s 132, turn to look at ss 91 and 92
- Radio – doesn't apply to s 91/92
- Aeronautics – imposed treaty between the British Empire and foreign countries, not applicable to this argument
- The distribution of power is based on classes of subjects; if the treaty deals with that class/subject, it falls under that legislation
- Division of power must remain in watertight compartments
- POGG – this was not an emergency, POGG is only available when there is a national emergency peril to the life of Canada
- Labour relations are a civil and local matter

- Both wages and hours of work fall under contractual obligations, which is under s 92(13) and therefore cannot be federally regulated

AG Canada v AG Ontario (The Employment and Social Insurance Act)

Facts: - *Employment and Social Insurance Act* provided compulsory insurance against unemployment for workers

- Fund created by contributions of employers and workers, federal act
- SCC (4-2) held the act invalid, dealt with Property and Civil Rights due to its insurance aspect
    - Therefore, in its "pith and substance" within s 92 and was not a response to an emergency justified by POGG
- Dissenting SCC: the act was in essence a taxation measure, justified under 91(3)
    - There was no constitutional restriction against the Dominion spending public money for the benefit of individuals
- Taken to PC

Issues: Is this Act *ultra vires* Parliament?
Held: Yes – the act is *ultra vires*
Reasons:
POGG:

- the Act does not deal with any special emergency
- The Act is intended to be permanent and therefore cannot be supported upon the suggested existence of a special emergency

S91/92:

- The Dominion can impose taxation for the purpose of creating a fund for special purposes, and may apply that fund for making contributions in the public interest
- Whether this act, which requires a compulsory payment from employees to a fund out of which he will receive a period of proportionate benefits, is in fact taxation is at question
- It is hard to differ this system from that of insurance in which a premium is paid
- This is bigger than "spending outside of jurisdiction", the federal government is trying to legislate outside of its jurisdiction
- If on the true view of the legislation it is found that in reality in pith and substance the legislation invades civil rights within the Province, or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid
    - To say otherwise would allow the Dominion easy passage into the Provincial domain

Notes: the constitution was amended to allow the federal government to have jurisdiction over unemployment insurance and to this day, it remains a federal act

AG British Columbia v AG Canada (The Natural Products Market)

Facts: - the purpose of the *Natural Products Marketing Act* was to establish regulation of natural products for the benefit of producers and to establish effective marketing arrangements and to impose the pooling to equalize prices in particular products and areas
Issues: Is this act *ultra vires* Parliament?
Held: Yes – it is *ultra vires*
Reasons:

- Parliament cannot acquire jurisdiction to deal in the sweeping way in which these enactments operate with such local and provincial matters by legislating at the same time respecting external and inter-provincial trade and committing the regulation of external and inter-provincial trade and the regulation of trade which is exclusively local and of traders and producers engaged in trade which Is exclusively local to the same authority
    - No sweeping power over a subject just because you can point to some elements that fall within your jurisdiction
- Cannot be s 91(2): the regulation of trade and commerce does not allow the regulation of individual forms of trade or commerce confined to the provinces
- It does not fall anywhere is s91 and therefore out of the scope of the federal jurisdiction

Remaining New Deal Cases

AG British Columbia v AG Canada

- Amendments to the *Criminal Code* prohibited 2 kinds of conduct:
    - Selling good at prices that discriminated among competitors
    - Selling goods at prices designed to eliminate competitors
- The SCC held both provisions valid
- Falls under 91(27)
- Parliament is not restricted by any rule limiting the acts declared to be criminal acts to such as would appear as criminal 'in their own nature'
- Dissenting judges argue the first provision in invalid because it is not a provision of criminal conduct
    - More of a private wrong

AG Ontario v AG Canada (Dominion Trade and Industry Commission Act)

- The Act included two major parts:
    - It authorized administrative approval for agreements among businesses to restrict undue competition
    - It established a national trademark, "Canada Standard" to be used to identify products that complied with standards to be set by the dominion
- The SCC found both parts invalid
    - Duff CJ found that the standard was not a trademark, but a "civil right of entirely novel character… Generally speaking… Parliament possess no competence to create a civil right of a new kind"
- The PC said part 1 is invalid, but the second part can be upheld by s 91(2)
    - Should be no reason why the federal government could not extend the creation of juristic rights in new fields – if they can be brought fairly within their classes of subjects

Farmers Creditors Arrangements

- Established administrative boards with powers to impose compromises/extensions of farmers' obligations to their debtors
- Upheld under s.91(21) – federal power to legislate about bankruptcy and insolvency

- Overall, the Privy Council was very much in favor of provincial powers
    - Their decisions reflected their goal of protecting provincial matters
    - Wanted to hammer home that you can't just add a federal aspect to a law and consider it within federal jurisdiction

Richard Simeon & Ian Robinson, *State, Society and the Development of Canadian Federalism*

King's Reign

- Best explanation for his inactivity during the Depression was national unity – believed the principal threat lay in French English conflict
    - Federal inaction minimized federal-provincial conflicts related to language, however it increased criticism from those who saw the nation through lenses of region/class
- Deemed essential the federal government expand its jurisdiction
- Agreement that the solution to economic/constitutional crisis lay in a centralization of federal powers

PITH AND SUBSTANCE

Pith and substance – determined by examining both the purpose and effect of the law.

Pith and Substance Test

1. The true purpose of the enacting body:
    a. Intrinsic evidence
    b. Extrinsic evidence
2. The law's legal and practical effects
    a. Legal effects: how the legislation as a whole affects the right and liabilities of those subject to its terms…determined from the terms of the legislation
    b. Practical effects: the actual or predicted effect of the legislation in operation

- Matter is determined by the law's dominant purpose: incidental effects will not disturb the constitutionality of an otherwise *intra vires* law
- Colourability – effects of the law diverge substantially from the stated aim
    - Don't be overly swayed by the legal purpose, outside effects can sway the actual purpose

Katherine Swinton, *The Supreme Court and Canadian Federalism: The Laskin-Dickson Years*

How does the court choose between competing classifications? Abel suggests it can be broken down into three steps:

1. Identification of the "matter" of the statute
2. Delineation of the scope of the competing classes
3. A determination of the class into which the challenged statue falls

- The first place to look when identifying the matter is its place in statutory context
- The court may also look at the purpose of the legislation and the history as to why it came into place
- The double aspect doctrine is widely acknowledged by courts
    - The Fathers of Confederation wished for exclusivity of legislation/watertight compartments, but it became clear that overlap was necessary
- Precedent and history may assist the courts in defining the classes of power, but they do not fix boundaries of classes nor show whether a law should come within one class rather than another

William R Lederman, "Classification of Laws and the BNA ACT"

- It is important to realize that these enumerated "subjects" or "matters" are classes of laws, not classes of fact
    - One must take a specific law which is relevant to those facts and then as if that rule is classifiable as a trade or commerce law
    - Don't question whether the cat falls into 91 or 92, look at the laws that regulate that cat and where they fall
- Matters of intention cause confusion – it is virtually impossible to find determinate human intenders behind most statutes
- A rule of law for purposes of the distribution of legislative powers is to be classified by that feature of its meaning which is judged the most important one in that aspect
- Lederman suggest that answering the division of powers issues involves considerations of policy in addition to law and logic
    - Logic alone will not give us definitive answers
    - Logic does not always give us an answer – have to look to policy to see where it best falls (i.e. the fact that your will is void upon marriage, this is both a property and marriage issue)
- When a rule has features of meaning relevant to both federal and provincial classes of laws, then the question must be asked, "Is it better for the people that this thing be done on a national level or on a provincial level?"
    - Uniform application (federal)? Diverse application (provincial)?
- There are constraints to judicial interpretation of ss 91 and 92
    - The text (cannot change what is written in the constitution)
    - Precedent (i.e. Parsons)

R v Morgentaler

Facts: - The Nova Scotia *Medical Services Act* and its regulation make it an offence to perform abortions outside of a hospital

- Jan 1988, the Court ruled that the *Criminal Code* provisions relation to abortion were unconstitutional because the violated the women's *Charter* guarantee of security of the person
- The court did confirm that the provisions were a valid exercise of federal criminal law power, but the 1988 decision meant abortion was no longer regulated by criminal law
- Dr. Morgentaler opened his own abortions clinic and was subsequently charged with 14 counts of unlawfully performing a designated medical service other than in an approved hospital
- Morgentaler did not dispute that he performed the services, but rather that the Act was *ultra vires*
- He argued that the Act and its regulations were inconsistent with the Constitution and consequently of no force or effect, on the grounds that they violate women's Charter rights and that they infringe on Parliament's exclusive jurisdiction of criminal law
- Nova Scotia argues that the Act is a valid provincial legislation enacted pursuant to the provinces legislative authority over hospitals, health, and the medical profession and the practice of medicine

Issues: Whether the Nova Scotia *Medical Services Act*, and the regulation made under the Act are *ultra vires* the province of Nova Scotia on the ground that they are in pith and substance criminal law

Held: The Act and Regulations are criminal law in pith and substance and consequently *ultra vires* the province of Nova Scotia

Reasons:

Pith and Substance:

- What's the "matter"? - a law's "matter" is its leading feature or true character, i.e. pith and substance
    - can also look at the "mischief" – what is the mischief the law is trying to address
- Pith and substance begins by looking at the legislations legal effect, how the legislation as a whole affects the rights and liabilities of those subject to its terms
- The court will also look beyond the direct legal effect; social and economic purpose, its background, and in some cases, the actual or predicted practical effect
- It is not only permissible, but essential to consider the material the legislature had before it when the statute was enacted

Analysis:

- If Nova Scotia had regulated the place for delivery of a medical service with a view to controlling the quality and nature of its health care delivery system, it would have fallen within their jurisdiction
- The Act, by attempting to prohibit the performance of abortions outside of hospitals with a view to supressing or punishing what it perceives to be social undesirable conduct of abortion, makes it a criminal matter
- The provincial jurisdiction over health care general includes matters of cost and efficiency, the nature of the health care delivery system and privatization of the provision of medical services
- In both the UK and Canada, the prohibition of abortion with penal consequences has long been considered a subject for the criminal law
- Any provincial jurisdiction to regulate the delivery of abortion services must be solidly anchored in one of the provincial heads of power which give the provinces jurisdiction to legislate in relation to such matters as health, hospitals and the practice of medicine and health care policy
- 92(15) allows the province to create offences and punishments as long as it is within their jurisdiction
- An examination of the terms and legal effect of the Act leads to the conclusion that the legislation's central purpose is the restriction of abortion as socially undesirable practice which should be supressed or punished
- The Act is allowed to prevent the privatization of designated services, but the prohibition and consequences piece falls within criminal matters
- Guiding principle: the provinces may not invade the criminal field by attempting to stiffen, supplement, or replace the criminal law… or to fill perceived defects or gaps
- The overlap of legal effects between the now defunct criminal provision and the Nova Scotia legislation is capable of supporting an inference that the legislation was designed to serve a criminal law purpose
- The Act was enacted upon a rumor that Morgentaler was going to open his own clinic
- Nova Scotia provided no evidence towards their claim that the Act was to prevent privatization and a two-tier medical system
- This case allowed for the evaluation of Hansard evidence: the review of the legislative debates/activities that led to the law
    - The debate around this act was actually focused more on abortion than it was on privatizing health care concerns
    - Law remains dominant, but the Hansard evidence can be review with **caution**

DOUBLE ASPECT DOCTRINE

- Courts understand this doctrine in three different ways:

1. Origins in *Hodge v The Queen* – no more than an opens the door to the possibility that both levels of government might be able to legislate in the same area
2. Viewed with the notion that not only is it possible in some circumstances for both levels of government to legislate in the same area, it is often inevitable and sometimes a good thing that they should be able to
    a. Led to courts upholding federal and provincial legislations touching the same areas that overlapped to a significant degree (i.e. highway driving, the regulation of film, gaming, interest rates and more)

3. Lederman's approach: calls for the courts to ask in respect of the legislation that was being challenged on division of power grounds (1) whether that legislation had a federal aspect (2) whether it had a provincial aspect and (3) if the legislation was held to have both federal and provincial aspects and then which of these is said to be most important

Double Aspect Doctrine Test

1. Does the provision intrude into the other government's area of constitutional jurisdiction?
    a. If yes, to what extent? From "encroaches marginally" to "highly intrusive"
2. Is the overall Act constitutionally valid (*intra vires*)?
    a. If yes, then is the intrusive provision sufficiently integrated into the legislative scheme? From "functional relationship to "intimate connection" or "necessarily incidental"

William R Lederman, "Classification of Laws and the BNA Act"

- The overlapping of federal and provincial categories of laws is inevitable, no matter how often the BNA Act cries "exclusive"
- Mutual modification – limiting the generality of the classes of laws in ss 91 and 92 which eliminates some of the encroachment on each other
- Where overlap occurs, the nature of the challenged law relevant to a provincial class of powers has been completely ignored as only an "incidental affection" of the provincial sphere, and the law concerned has been classed only by that feature of it relevant to a federal class of laws
    - Thus, in spite of the overlap, the decision has been made that only Parliament can enact this law
- If overlapping principles occur such that both federal and provincial legislations can be enacted that are directed towards the same people concerning the same thing, but require different courses of conduct and thus have differing effects, then both rules may operate
- If there is conflict between the legislations, they both cannot be obeyed
    - In this case the courts have laid it down that the federal rule is to prevail
    - This is the Doctrine of Dominion Paramountcy
- <u>*Doctrine of Dominion Paramountcy*</u> – principle of our constitution that in the event of collision between a federal law and a provincial law each valid under the double aspect theory, the federal features of the former law are considered in the last analysis more important than the provincial features of the latter
    - They are typically deemed more important because they have a national as opposed to sectional reference

Multiple Access Ltd v McCutcheon

<u>*Facts:*</u> - the ON *Securities Act* prohibited insider trading in shares traded on the TSX
- The *Canada Corporations Act* had almost identical provisions, applicable to corporations incorporated under federal law
- The insider trading prohibitions protect shareholders by regulating the marketplace in shares and also by enabling them to initiate proceedings against alleged insider traders
- An action was filed by a shareholder against Multiple Access Ltd, a federally incorporated company on the TSX
- The proceedings were filed under the ON *Securities Act* and as such, the ON Securities Commission took the case
- The accused argues that as a federally regulated company, the ON statutes cannot validly apply as it is out of their jurisdiction
- They relied on the doctrine of paramountcy to assert that the ON provisions were inoperative by the *Canada Securities Act* (this argument favored the accused because the limitation period for filing under the federal act had elapsed)

<u>*Issues:*</u> Whether both the federal and provincial Acts are applicable. Should one be struck down?
<u>*Held:*</u> Both statutes are valid and applicable on the facts
<u>*Reasons:*</u> - Don't be tempted to regard the fact that provisions in each Act seem redundant of each other
- The legality of the federal act must be determined without heed of the ON legislation
- A number of provinces have yet to legislate insider trading regulations so striking down the federal law will leave federal companies in these provinces without the double protection
    - Which ON shareholders enjoy
- Striking the federal act would create a potential gap in the present regulatory schemes that might be exploited by the unprincipled
- Does the pith and substance of the insider trading provisions of the federal act fall within a head of power allocated to Parliament?
    - Viewing ss 100.4 and 100.5 in insolation can leave no doubt that they matter in trading securities

- The provisions deal with obligations attached to the ownership of shares in a federal company, which extend to shareholders, officers and employees of such companies, a subject matter that is not within the exclusive jurisdiction of provincial legislatures
- These provisions are enacted through Parliaments company law power
- The judge takes the Lederman approach
- The insider trading provisions have both a securities law and a company's law aspect and would adopt as the test for applying the double aspect doctrine
- Double Aspect Doctrine: each Act is of equal importance and it would seem there is little reason to kill one and let the other live – not the best description here, isn't really followed through on other cases
- Not every case in which a court is asked to consider the double aspect doctrine is analyzed in the manner in which Lederman proposed
- In most cases, the application of the doctrine simply entails the court evidencing a willingness to apply the pith and substance doctrine flexibly, and to characterize similar federal and provincial enactments in such a manner as to permit the court to uphold both enactments as valid

ANCILLARY POWERS – OCTOPUS METAPHOR

- The pith and substance doctrine results in a law being upheld if its dominant characteristic falls within the classes of subject matter allocated to the jurisdiction of the level of government that enacted the law
    - Incidental Effect Rule - A law may have an impact on matters outside the enacting legislatures jurisdiction, so long as these effects remain secondary or incidental features of the legislation rather than its most important feature
- Ancillary Powers Doctrine – extension of the incidental effect rule, used in cases where the challenge is to a part of a larger scheme of legislation, rather than to the entire scheme itself
- When the impugned part is examined in isolation, it appears to intrude into the jurisdiction of the other level of government. However, if the larger scheme of which the impugned provision forms part is constitutionally valid, the impugned provision may also be found valid because of its part in the larger scheme
    - If it's not an integral part of the large scheme, it will be declared invalid
    - If it is closely related, it will be deemed "ancillary" or "necessarily incidental"
- This allows federal and provincial powers to intrude on each other so long as the most important features of the legislation remain in their jurisdiction

Ancillary Powers Test

1. The court must determine whether the impugned provision can be viewed as intruding on provincial powers, and if so to what extent
    a. If it does not intrude, then the only possible issue is the validity of the act
2. The court must establish whether the act is valid
    a. If the scheme is not valid, end of inquiry
3. If the scheme of regulation is declared valid, the court must then determine whether the impugned provision is sufficiently integrated with the scheme that it can be upheld by virtue of that relationship (rationally and functionally connected)

General Motors of Canada Ltd v City National Leasing

Facts: - CNL brings an action against GM alleging it suffered losses as a result of a discriminatory pricing policy that constituted a kind of anti-competitive behaviour prohibited by the *Combines Investigation Act*

- GM argues the provision was beyond the federal jurisdiction because it falls under 92(13)

Issues: Is the provision an integral part of the *Combines Act* despite infringing on provincial powers?

Held: Yes – upheld via the ancillary powers doctrine

Reasons: - - It is necessary to consider both the impugned provision and the Act as a whole when undertaking constitutional analysis

- First step is to consider whether and to what extent the impugned provision infringes on the provincial power
- If at its pith and substance, it is a federal law, it cannot be characterized as intruding
- In this case, it can be concluded that the impugned provision does intrude on provincial powers
- Must examine "fit" – how well the provision is integrated into the scheme of the legislation and how important it is for efficacy of the legislation
- Steps of the analysis:
    a. The court must determine whether the impugned provision can be viewed as intruding on provincial powers, and if so to what extent
        i. If it does not intrude, then the only possible issue is the validity of the act
    b. The court must establish whether the act is valid
        i. If the scheme is not valid, end of inquiry
    c. If the scheme of regulation is declared valid, the court must then determine whether the impugned provision is sufficiently integrated with the scheme that it can be upheld by virtue of that relationship

Applying the test:

- The provision creates a civil right and therefore encroaches on provincial powers
- This is a significant provincial power that is not easily encroachable on
- However, the provision is only a remedial provision (less intrusive by nature), it does not create a general cause of action (its application is limited), and it is well established that the federal government is not constitutionally precluded from creating rights of civil action where such measures may be shown to be warranted
- Therefore, the impugned provision encroaches on an important provincial power, however, the provision is a remedial one
- Federal encroachment in this situation is not unprecedented and in this case, is limited by the act itself
- There is a link between the provision and the Act itself that the court finds necessary (low end functional requirement)
    - It provides a mechanism for upholding the legislation, there is a legislated cause of action if the Act is breached
    - It passes the necessarily incidental test

Quebec AG v Lacombe

Facts: - A bylaw was added by way of an amendment to the municipality's general zoning bylaw, for the purpose of prohibiting the construction and use of aerodromes within a particular part of the municipality which included Gobeil Lake

- This bylaw was enacted after vigorous lobbying by the owners of summer homes and other users of a recreational lake (Gobeil Lake)
- Zoning is a provincial power
- Aerodromes are a federal matter

Issues: Whether the amendments brought by the bylaw, which in its pith and substance lie outside the provincial power, are nevertheless valid because they are ancillary to valid provincial provisions

Held: The impugned bylaw is *ultra vires* the province – fails the ancillary powers doctrine

Reasons: - In order for provisions to be valid, they must further the valid legislative scheme and not just compliment it

- It also cannot function as a stand-alone provision and must instead work to further the objectives of the legislation it is under; can be used to fill in a gap that the original legislation is missing
- The bylaw does not further the objectives of the zoning law
- The Province asserts that the bylaw was enacted to protect vacationers from aerodromes, but the ban is not confined to the areas in which vacationers visit
- Ancillary powers will only save a provision that is rationally and functionally connected to the purpose of the legislative scheme that it purportedly (actively) furthers – not enough that the measure supplement the legislative scheme
- Is it ancillary?
    - How far is the intrusion – is it a marginal or serious encroachment?
        - Is a prohibition the most serious interference?
    - What is the rational functional reason for this intrusion – seems to be the more important question
        - This bylaw fails on the rational function side of the test
            - A blanket ban of aerodromes across the entire municipality was not a rational purpose – could have only banned on vacation areas, and it may have been saved in this particular case – overbroad
            - This blanket ban does not further the objectives of the zoning law, and there is a lack of connection on the areas affected
- The federal government must remain in control of aerodromes due to the inter-provincial matters of flying
    - Avoid plane crashes

INTERJURISDICTIONAL IMMUNITY – CASTLE METAPHOR

- The interjurisdictional immunity doctrine is a departure away from the tendency of the pith and substance, double aspect and ancillary powers doctrines to create overlapping jurisdiction
    - This doctrine emphasizes exclusivity of jurisdiction
    - Creates a castle wall around the matter, the other jurisdiction cannot get passed the wall
- Interjurisdictional Immunity Doctrine – comes into play where a generally worded law is clearly valid in most of its applications, but in some of its applications it arguably overreaches, affecting a matter falling within a core area of the other level of government's jurisdiction
- This doctrine protects certain core areas of legislative jurisdiction from the impact or interference of otherwise valid laws enacted by the other level
- Has only been used to protect core areas of federal jurisdiction from encroaching provincial legislation
    - The SCC has acknowledged that the doctrine can work the other way
- *Reading down* – a technique of interpretation used to save statutes from being struck down – the words of the statute are interpreted to apply only to matters within the jurisdiction of the enacting body

- Read it down so it doesn't apply to absolutely everything within that province (i.e. minimum wage at McDonalds v minimum wage of a mailman, a federally regulated job

- Three major concerns with the doctrine of interjurisdictional immunity:
  1. Its emphasis on exclusivity of jurisdiction, it is at odds with the tendency of modern federalism to allow considerable overlap between federal and provincial powers
  2. It appeared to extend to the federal level of government an exclusivity of jurisdiction not available to the provinces and hence is inconsistent with a balanced approach to Canadian federalism (not as large of a concern today because the SCC has accepted that the doctrine works both ways)
  3. It is unnecessary, because if Parliament wants to protect one of its core areas of legislative jurisdiction from encroaching provincial legislation, it can do so by enacting legislation to cover that area and rely on the federal paramountcy doctrine to oust the provincial legislation
- Dickson J: "this doctrine and concepts have not been the dominant tide of constitutional doctrines; rather they have been an undertow against the strong pull of pith and substance, the double aspect doctrine and in recent years, a very restrained approach to concurrency and paramountcy issues"

IJI Test

1. Does the provincial law trenches on the protected 'core' of a federal competence?
2. If so, then to determine whether the law's effect on the exercise of the protected federal power is sufficiently serious to invoke the doctrine of IJI [The test to determine how serious an interference must be, is whether the provincial law impairs the federal exercise of the core competence (Canadian Western Bank)]
   a. Must be seriously or significantly restricting to federal power à If yes, then law is inapplicable by virtue of IJI

Canadian Western Bank v Alberta **– adds impair to the IJI test**

Facts: - In 2000, Alberta enacted changes to the Insurance Act and included federally incorporated banks to fall under these provisions as well to ensure people had 'peace in mind' in insurance at both provincial and federally incorporated banks

- The federally incorporated banks took action against this Act saying their insurance was only bound by the *Bank Act* which fell under 91(15) of the Constitution and that the Insurance Act was constitutionally inapplicable by virtue of the interjurisdictional immunity doctrine, or inoperative by virtue of the doctrine of federal paramountcy

Issues: - Whether this case should be determined by virtue of the doctrine of interjurisdictional immunity?

Held: Appeal dismissed – there is no conflict between the provincial and federal legislation at issue and that the provincial legislation can therefore operate in relation to the banks in Alberta which seek to promote 'peace of mind'

Reasons: - In theory, IJI is reciprocal: it applies both to protect provincial heads of power and provincially regulated undertakings from federal encroachment, and to protect federal heads of power and federally regulated undertakings from provincial encroachment. However, in practice, the application has only been invoked in favour of federal immunity at the expense of provincial legislation

- Dominant tide principle – a court should favor the ordinary operation of statutes enacted by *both* levels of government
- The banks argument, to enact IJI, exposes the dangers of allowing the doctrine to exceed its proper limit and to frustrate the application of the pith and substance analysis and of the double aspect doctrine
- A broad application of IJI is inconsistent with the flexible federalism that the constitutional doctrines of pith and substance, double aspect and federal paramountcy are designed to promote
- Excessive reliance on the doctrine of IJI would create serious uncertainty
  - Hard to define the "core" of legislative power
- IJI means that despite the absence of law enacted at one level of government, the laws enacted by the other level cannot have even incidental effects on the so called "core" of jurisdiction
  - Increases the risk of "legal vacuums"
- The "asymmetrical" application of interjurisdictional immunity is incompatible with the flexibility and coordination required by Canadian federalism
- In order to apply IJI, the level of intrusion must ***impair*** a vital or essential part of that undertaking
  - "Affects" is not enough
- It is when the adverse impact of a law adopted by one level of government increases in severity from "affecting" to "impairing" that the core competence of the other level of government is placed in jeopardy
- *Bell Canada* limited the scope of IJI to the "basic, minimum and unassailable content" (i.e. the core of the legislative power)

Quebec (AG) v Canadian Owners and Pilots Association

Facts: - Two Quebec residents constructed an airstrip on a lot they owned in QC

- Under the *Aeronautics Act*, the construction and operation of an airfield for private purposes is not subject to a requirement of prior permission

- The two men registered their airstrip
- The land that their airstrip was on was within an area designated as an agricultural region under a provincial Act and s 26 of the act prohibits use of the land for anything other than agricultural purposes unless permission was granted
- The men did not get permission but argue that the Act is *ultra vires* or at least inapplicable where it affects aerodromes (by virtue of IJI)

Issues: Whether s 26 of the Act, having been found valid, applies in a situation where it impacts on the federal powers over aeronautics

Held: The Act impairs federal power of aerodromes and IJI applies

Reasons: - s 26 of *ARPALAA* is a valid provincial legislation under ss 92(13), 92(16) and s 95 of the Constitution

- The provincial law survives under pith and substance – they were only trying to regulate agricultural land
- Still a limited/narrow application of IJI
- First step – determine whether s 26 trenches on the protected "core" of a federal competence
- If it does, second step – determine whether the provincial law's effect on the exercise of the protected federal power is *sufficiently serious* to invoke the doctrine of IJI
- Aeronautics has been held to be a Federal power and is supported under POGG
    - The jurisdiction encompasses not only the regulation of the operation of aircrafts, but also the regulation of the operation of airports which extends to the location and design of airports
- The test is whether the subject comes within the essential jurisdiction – the "basic, minimum and unassailible content" – of the legislative power in question
    - The core of the federal power is the authority that is absolutely necessary to enable Parliament to achieve the purpose for which exclusive legislative jurisdiction was conferred
- Precedent helps resolve this current issue – the court has repeatedly and consistently held that the location of aerodromes lies within the core of the federal aeronautics power
- Since *ARPALAA* purports to limit where aerodromes can be located, it follows that it trenches on the core of the federal aeronautics power
    - It's not enough that s 26 strike at the heart of the federal power, it must be shown that this interference is constitutionally unacceptable
    - Must *impair* the federal power
- S 26 does impair the federal power to decide when and where aerodromes should be built
    - It prohibits the building of aerodromes in designated agricultural regions unless prior authorization has been obtained
    - This is not a minor effect of the federal power to determine where aerodromes can be built
- Summary: the doctrine of IJI is applicable in this case. The location of aerodromes lies at the core of the federal competence over aeronautics. S 26 of the Act impinges on this core in a way that impairs this federal power. If s 26 applied, it would force the federal Parliament to choose between accepting that the province can forbid the placement of aerodromes on the one hand, or specifically legislating to override the provincial law on the other. This would seriously impair the federal power over aviation.
    - Having to legislate would mean there would need to be a legislation for every airstrip

Canada v PHS Community Services Society - NOTES HERE

- Insite facility
- Can insite claim IJI to protect its operations from the application of federal drug laws
- Use 92(7) and 92(13) to validate what insite is doing
- By criminalizing the acts that they're doing, you are taking away their ability to operate. Impairing the core
- Court doesn't like IJI here

PARAMOUNTCY – STALONE ALWAYS WINS METAPHOR

- Federal systems require a mechanism for dealing with the possibility of conflict between valid national and regional laws
- In Canada, the Constitution is silent on the issue, with three very specific, narrowly defined exceptions:
    1. S 95 – recognizes agriculture and immigration as areas of concurrent jurisdiction and provides that provincial law shall have effect only to the extent that that are not repugnant to any Act of Parliament
    2. S 92A – confers on provincial legislature a concurrent power to enact law in relation to the export of natural resources to other provinces, subject to the paramountcy of federal legislation in the case of conflict
    3. S 94A – provides for concurrency in relation to old-age pensions and supplementary benefits, but provides a form of provincial paramountcy by stating that no federal law "shall affect the operation of any law present or future of a provincial legislature in relation to any such matter"
- The absence of an explicit paramountcy law may be explained by the belief that the drafters that overlap would not occur given the exclusivity of jurisdiction
- The doctrine of federal paramountcy is modelled on the rule found in s 95

    - Provides that in cases of conflict between federal and provincial laws, the federal law is paramount and the provincial law is *inoperative* to the extent of the conflict
    - Doesn't automatically render the provincial law invalid
    - The operation of the provincial law is merely suspended to the extent that, and for as long as, it conflicts with federal legislation
- The different meanings of, or tests for, "conflict" as determined by the SCC can be summarized as follows:
    - *Impossibility of dual compliance* - asks whether it is impossible for the people who are subject to the federal and provincial enactments in question to comply with both
    - *Duplication* – asks whether the provincial legislation duplicates the federal
    - *Impossibility of giving dual effect* – asks whether a judge or other government decision-maker before whom both enactments are relied on by contesting parties can give effect to both
    - *Frustration of federal purpose* – asks whether permitting the provincial enactment to operate in the circumstances in question would serve to frustrate the purpose underlying the federal enactment
    - *Federal intention to cover the field (negative implication)* – asks whether parliament, by legislating in a particular area, has enacted a code that was intended to be complete and thus by implication was intended to oust the operation of any provincial laws
- These tests are not mutually exclusive

Notes on the tests to far

- Validity - Use the pith and substance test to determine this answer
- Applicability – The IJI test: does a law of general application apply the work or undertaking falling within other jurisdiction?
- Operability – the paramountcy test: is a valid and applicable provincial law operable?

Paramountcy Test

- Both laws valid?
    - Use Pith and Substance test
    - Does the double aspect doctrine apply?
- Is there conflict?
    - Is it impossible to comply with both?
    - Does the provincial law frustrate the federal purpose?

Multiple Access Ltd v McCutcheon

Facts: Facts are the same as above

- This excerpt is focusing on the argument made on appeal that the provincial laws was inoperative by virtue of the doctrine of paramountcy
    - This was not held up at the SCC level

Issues: Whether duplicate legislation could operate at both the federal and provincial levels, or was duplication a kind of conflict that should give rise to federal paramountcy?
Held: Where both laws can operate concurrently, there is no need for paramountcy
Reasons: - Martland J, "It may happen that some acts might be punishable under both provisions and in this sense that these provisions overlap. However, even in such cases, there is no conflict in the sense that the compliance with one law involves breach of the other. It would appear, therefore, that they can operate concurrently"

- Any diseconomies resulting from the proliferation of laws and administration were inherent in the federal system
- Double liability would be avoided by "cooperation between administrators and the ordinary supervision of the courts over duplication of proceedings before them"
- If the negative implication test is rejected, there is no reason why duplication should be a case of inconsistency
    - The idea that its messy and confusing reflects a federal value that must be subordinate to provincial autonomy
- There is no true repugnancy in the case of merely duplicative provisions since it does not matter which statute is applied; the legislative purpose of Parliament will be fulfilled regardless of which statute is invoked by the remedy-seeker; application of the provincial law does not displace the legislative purpose of Parliament
- In principle: there is no good reason to speak of paramountcy and preclusions except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"

***Bank of Montreal v Hall* – step 2 of paramountcy test**

Facts: - Hall defaulted on a loan from BMO and BMO seized the machinery he had used as security interest on his loan

- BMO seized the machinery pursuant to provisions in the *Bank Act* (federal)

- BMO did not follow the procedures for seizure, which included proper notice, under the *Limitation of Civil Rights Act* (provincial)
- The parties took the matter to the SKQB for determination as to whether BMO was required to comply with the *Limitation of Civil Rights Act* when enforcing a security interest under the *Bank Act*
- The chambers judge held that BMO did not have to comply with the provincial legislation
- SKCA revered that decision

Issues: Whether each legislation was *intra vires* its jurisdiction

- Whether the security interest created under the *Bank Act* could be subjected to the procedures for enforcement of security interests prescribed in the provincial legislation

Held: The *Limitation of Civil Rights Act* is within s 92(13) and thus *intra vires* the Province of Saskatchewan. The *Bank Act* is within s 91(15) and thus *intra vires* Parliament.

- The acts conflict with each other, doctrine of paramountcy invoked, federal act upheld

Reasons: - The doctrine of paramountcy need only be invoked in instances where it is impossible to comply with both legislative enactments

- The *Limitation of Civil Rights Act* requires that a judge decides if, when and under what circumstances a security interest is to be seized
- The *Bank Act* assigns to the bank, on the taking out of the security, right and title to the goods in question, and to confer, on default of the debtor, an *immediate* right to seize and sell those goods
    - This increase efficiency of lending
    - This is a striking difference when compared to the provincial act
- There is an actual conflict in operation between these two acts
    - There could be no clearer instance of a case where compliance with the federal statute necessarily entails defiance of its provincial counterpart
- If the Bank were to have to comply with the provincial act, it would displace the legislative intent of Parliament
- Dual compliance is impossible when application of the provincial statute can fairly be said to frustrate Parliament's legislative purpose
- Parliament, under its power to regulate banking, has enacted a complete code that at once defines and provides for the realization of a security interest. There is no room left for the operation of the provincial legislation and that legislation should, accordingly, be construed as inapplicable to the extent that it trenches on valid federal banking legislation

Rothmans, Benson & Hedges Inc v Saskatchewan

Facts: - s 19 of the federal *Tobacco Act* prohibits the promotion of tobacco products and tobacco product-related elements, except as authorized elsewhere in the *Tobacco Act*

- Under s 30 of the federal *Tobacco Act* any person may display, at retail, a tobacco product or an accessory that displays tobacco
- S 6 of the *Tobacco Control Act* bans all advertising, display and promotion of tobacco in any premise in which people under 18 are allowed
- Parliament sues on the grounds that s 6 of the *Tobacco Control Act* is in operative in light of s 30 of the *Tobacco Act*

Issues: Whether Saskatchewan legislation, and in particular, s 6 of the *Tobacco Control Act* is sufficiently inconsistent with s 30 of the federal *Tobacco Act* so as to render it inoperative pursuant to the doctrine of federal legislative paramountcy

Held: There is no inconsistency between s 6 of the *Tobacco Control Act* and s 30 of the *Tobacco Act* that would render the former inoperative pursuant to the doctrine of federal legislative paramountcy

Reasons: Multiple Access v McCutcheon – there is an inconsistency for the purpose of the doctrine if it is impossible to comply simultaneously with both provincial and federal enactments

- Impossibility of dual compliance is not the sole mark of inconsistency
    - Provincial legislation that displaces or frustrates Parliament's legislative purpose is also inconsistent for the purposes of the doctrine
- The actual purpose of the *Tobacco Act* was to address a national public health problem not as an act to grant retailers a positive entitlement to display tobacco products
    - The Act has more of a criminal focus
    - It's difficult to imagine how granting retailers a freestanding right to display tobacco products would assist Parliament in providing a legislative response to a national public health problem of substantial and pressing concern
- Two questions arise in this case:
    - Can a person simultaneously comply with s 6 of the *Tobacco Control Act* and s 30 of the *Tobacco Act?*
- Dual compliance is possible in this case: a retailer can easily comply with each provision of each act
    - Don't admit anyone under the age of 18 on the premise or don't display tobacco products
- S 6 of the *Tobacco Control Act* does not frustrate the legislative purpose underlying s 30 of the *Tobacco Act*
- Could even say that the provincial act furthers at least two of the state purposes of the federal act:

- To protect young persons and other from inducements to use tobacco products
- To protect the health of young persons by restricting access to tobacco products

Alberta (AG) v Moloney

Facts: - Alleged conflict between the federal *Bankruptcy and Insolvency Act* and Alberta's *Traffic Safety Act*

- Stems from a car accident in which an uninsured individual caused injury to another party and Alberta was looking to have the debt repaid by the individual
- The respondent files for bankruptcy under *BIA* and as a result, is released from all debts that are claims provable in bankruptcy
- The *TSA* allows the province to suspend the respondent's licence and permits until he pays the amount owed
- The respondent does not pay the amount of compensation owed due to bankruptcy and thus AB suspends his licence
- The responded contested the suspension, arguing the *TSA* conflicted with the *BIA* in that it frustrated the purpose of the bankruptcy

Issues: Whether section 102(2) of the *TSA* is constitutionally inoperative by reason of the doctrine of federal paramountcy, to the extent that it is used to enforce a debt discharged in bankruptcy pursuant to the *BIA*

Held: The *TSA* is in direct conflict with the *BIA* and is rendered inoperative under the doctrine of federal paramountcy

Reasons: - situations in which overlap will not lead to a conflict: duplicative federal and provincial provisions will generally not conflict, nor will a conflict arise where a provincial law is more restrictive than a federal law

- The application of a more restrictive provincial law may however frustrate the federal purpose if the federal law, instead of being merely permissive, provides for a positive entitlement

- Doctrine of paramountcy is applied with restraint; presumed that Parliament intends for its laws to co-exist with provincial laws
- Conflict must be defined narrowly so that each level of government may act as freely as possible within its respective sphere of authority
- The focus of the paramountcy analysis is on the effect of the provincial law, rather than its purpose
  - Look at the substance of the law rather than the form
- In this case, we cannot disregard the fact that whether the debtor pays or not, the province, as a creditor, is still compelling payment of a provable claim that has been released, which is in direct contradiction with the *BIA*
- The laws at issue give inconsistent answers to the question whether there is an enforceable obligation: one says yes and the other says no
- Both laws cannot operate concurrently
- The *BIA* is a complete code that sets out which debts are released on discharge and which debts survive bankruptcy
  - The provincial law is allowing something that the federal law prohibits

Dissent (aka concurring) – the appeal should have been decided on the basis of the frustration of a federal purpose, an issue in respect of which the applicable standard is higher and that requires an in-depth analysis of Parliaments intent

- Therefore, the party must first establish the purpose of the relevant federal statute and then prove that the provincial law is incompatible with or frustrates this purpose

PEACE, ORDER AND GOOD GOVERNMENT

- POGG emerges from the opening line in the opening lines of s 91
- Distinguishing feature of modern POGG: the national concern doctrine
- National Concern Doctrine: if it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole, then it will fall within the competence of the Dominion Parliament as a matter affecting the POGG of Canada
- Viscount Simon also expands POGG's scope to recognize the power to legislate for the prevention of an emergency
- Modern POGG: 3 Branches
  - Gap branch – residuary capacity of 91/92
    - Anything not addressed in s 92 falls to the feds
  - Emergency branch (privy council, real power)
    - Can also be used in emergency prevention
    - Limited to the extent of what is necessary to deal with the actual emergency
    - Temporary
  - National concern – things beyond provincial jurisdiction, rise to the level of national concern
    - Causes the most conceptual issues, hard to define boundaries, what is a concern?
    - FOREVER able to legislate in this area once it has been decided to be that of a national concern

Re: Anti-Inflation Act

Facts: - The Anti-Inflation Act established a system of price, profit, and income controls – applied to private sector firms with more than 500 employees, members of designated professions, construction firms with more than

20 employees, and other private sector firms – also to public sector if agreement was made with province
- "zap, you're frozen" – Trudeau attempts to freeze prices and wages as an inflation measure

Issues: Whether the Act is supported under POGG as an emergency or 'crisis' legislation (emergency branch, not the national concern branch)

Held: Act is valid under POGG and does not invade provincial legislative jurisdiction due to its temporary nature

Reasons: Laskin J, begins by looking at the extrinsic material, bearing on the circumstances in which the legislation was passed to determine if the legislation rests on a constitutional base

- The *Anti-Inflation Act* is supported by the AG of Canada under the opening words of the preamble of the *BNA Act* as being a law for POGG ("serious national concern" is mentioned in the preamble)
- Opt-in mechanism does not concede that it is not a real emergency and it actually allows for cooperative federalism (8/10 provinces opted in)
- 1. Did the Act contradict content because it excluded provincial public sector from scope, notwithstanding that it is framed as temporary measure?
    - Purpose: bringing businesses within the act which are of strategic importance to the containment and reduction of inflation in Canada
    - Reasonable policy to allow provinces to contract into program under own admin if that was their preference
    - Cooperative federalism allowed (Board of Commerce) Adding provisions to include public sectors does not indicate they did not act with urgency
- 2. Is the federal contention assisted by the preamble?
    - Preamble states that inflation is a matter of serious national concern, necessary to restrain profit margins, etc.
    - The preamble is indicative that Parliament was introducing a far-reaching programme prompted by what in its view was a serious national condition
    - The validity of the Act does not stand or fall on that preamble, but the preamble does provide a base for assessing the gravity of the circumstances which called for the legislation
- 3. Does the extrinsic evidence put before the court show that there was a rational basis for that Act as a crisis measure?
    - The coexistence of high unemployment and high inflation rates was not encountered before the 1960s
    - These factors were the prime reasons for enacting the *Anti-Inflation Act*
    - Court did have **rational basis** for regarding anti-inflation act as measure to temporarily necessary to meet situation of economic crisis imperiling wellbeing of Canada and requiring parliament's intervention
    - Courts defer to parliament to pick the expert evidence (economist) that they think is better – the courts don't want to weigh the evidence and make themselves "Super-economists"
    - Rising inflation and decreased employment
- 4. Is it a tenable argument that exceptional character could be lent to the legislations as rising beyond local or provincial concerns because Parliament could not reasonable take the view that it was a necessary measure to fortify action in other related areas of admittedly federal authority, such as that of monetary policy?
    - The fact that there had been rising inflation at the time the federal action was taken, that inflation is regarded as a monetary phenomenon and that monetary policy is within exclusive federal jurisdiction persuades the Court that Parliament was entitled to act as it did
- The emergency branch is narrower than the concern branch, which why the court wanted to try and fit the act in there
    - Narrow due its temporary action

***Dissent:* Beetz J in favor of the provincial government (used in Crown Zellerbach)

- If we interpret POGG broadly, and characterize certain social phenomenon as unprecedented, it will upset provincial jurisdiction and constitutional order.
- The Anti-Inflation Act is ultra vires the Parliament of Canada. It directly interferes with matters within the exclusive jurisdiction of the Provinces, 92(13). This interference is not incidental or ancillary; it is interference on a large scale.

Is inflation an issue of national concern?

- If parliament had power to control inflation, it is difficult to see what would be beyond the reach of Parliament. Inflation is an aggregate of many subject matters, some falling within provincial jurisdiction. It is so pervasive that its primary effects of the Act are related to property and civil rights.
- If we consider that Inflation should be parliament power, then everything else should be as well because inflation touches many fields (salaries, budgets, wages, rent controls, etc).
- Inflation is too general a concept and it would obliterate provincial powers, property and civil rights.

Is the current legislation an emergency measure?

- The Act does not clearly use the language of express emergency. Provinces should not have choice to opt in or out.
- He warns that emergency should be kept separate so that courts cannot re-appropriate the decision to validate federal laws of "national concern" in the future.

***R v Crown Zellerbach Canada Ltd* ** come back to this case**

Facts: - s 4(1) of the *Ocean Dumping Control Act* prohibits the dumping of any substance at sea except in accordance with the terms and conditions of a permit, the sea being defined for the purposes of the Act as including the internal waters of Canada other than fresh waters

- The general purpose is to regulate the dumping of substances at sea in order to prevent various kinds of harm to the marine environment
- The act appears to have been enacted in fulfillment of Canada's obligation under the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter
    - This is not expressly stated in the Act, but there are references to the Convention
- CZC carries on logging operations on Vancouver Island in connection with its forest products business in BC and maintains a log dump on a water lot leased from the provincial Crown
- The Company was charged under s 13 with violated s 4 of the Act for dumping actions it took in the water
- Trial judge found s 4(1) to be *ultra vires* and dismissed the charges
- CZC concedes that Parliament has jurisdiction to regulate dumping in waters lying outside the territorial limits of any province and that they can regulate dumping within provinces that causes pollution
    - CZC challenges federal jurisdiction to control the dumping in provincial waters of substances that are not shown to have a pollutant effect in extra-provincial waters
- AG of Canada submits that the controlled dumping in provincial marine waters was part of a single matter of national concern or dimension which fell under POGG
    - National concern: prevention of ocean pollution

Issues: Whether s 4(1) of the *Ocean Dumping Control Act* (federal) is constitutionally valid

Held: s 4(1) of the *Ocean Dumping Control Act* is constitutionally valid as enacted in relation to a matter falling within the national concern doctrine of the POGG power of Parliament

Reasons:

Conclusions on the National Concern Doctrine of POGG:

1. The national concern doctrine is separate and distinct from the national emergency doctrine, which is distinguishable due to the fact that it is temporary in nature
2. The doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern
3. For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguished it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution
4. In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility (TEST) that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter

- Last factor is generally known as the "provincial inability" test and is noted as the most satisfactory rational of the cases in which the national concern doctrine of POGG has been applied as a basis of federal jurisdiction
    - Involves a limited or qualified application of federal jurisdiction
    - Only justified to the extent that the federal legislation only fills the gaps in the provincial legislations
- National concern doctrine applies because:
    1) Interprovincial regulation: fed. Jurisdiction to leg. For pollution of provincial waters applies because it reduces the risk that citizens of one province would be harmed by non-cooperation of another province.
    2) Scientifically difficult to draw clear line btw prov. And fed. Waters
    3) Indivisible: This problem involves federal competence. The matter is indivisible due to movement of pollution through water
- Canada has signed treaties in regard to ocean dumping so it shows that there is this national concern in regard to pollution (international issue, in fact) (can't overtake the argument due to *Labour Conventions*, but it helps)
- Marine pollution, because of its predominately extra-provincial as well as inter-national character and implications, is clearly a matter of concern to Canada as a whole
    - These marine waters are right by the oceans and they may affect the water that is in the ocean
- Marine waters are salt water which are closer to ocean waters – we are not talking about dumping in provincial ponds/lakes
- There is a difficulty of ascertaining by visual observation the boundary between the territorial sea and the internal marine waters of a state creates an unacceptable degree of uncertainty for the application of regulatory and penal provisions
- It essentially impossible to divide the matter of marine pollution by the dumping of substances

Dissent: Dissenting: (La Forest): Only a local matter, not an emergency requiring grave proportions that displace ordinary divisions of power. Prohibition not linked to purpose: because prohibits ANY dumping.

- Must respect the scheme of federalism

- Result: environmental issues will have fed. aspect
- Ocean pollution is insufficiently distinct. Argument that water moves = wrong because water seeps everywhere. Can apply to federal waters, but to apply to provincial waters = ultra vires.
- Provision prevents province from dealing with property w/o fed. Consent. (due to dumping of ANY substance)

ECONOMIC REGULATION

PROVINICAL POWERS OVER ECONOMIC REGULATION

Carnation Company Limited v Quebec Agricultural Market Board et al

Facts: - The Marketing Board was created pursuant to the *Quebec Agricultural Marketing Act*
- The Marketing board approved the Plan that determined the price to be paid by the appellant for milk purchased from producer's subject to the Plan
- The majority of Carnation's milk is shipped and sold outside of Quebec
- Carnations takes the position that the three orders of the Marketing Board are invalid because they enable it to set a price to be paid by Carnations for a product, the major portion of which will be used for export outside of Quebec
    - They say this is a 91(2) matter

Issues: Whether, in making these orders, the Marketing Board had infringed on the exclusive legislative powers under s 91(2) to regulate trade and commerce

Held: Not a 91(2) trade and commerce matter

Reasons:

First Order: Creating the Quebec Carnation Company Milk Producer's Board and empowered it to negotiate, on behalf of milk producers, for the sale of their products
- This is analogous to the creation of a collective bargaining agency in labour relations
- The purpose of the order was to regulate, on behalf of a particular group of Quebec producers, their trade in Quebec of their milk
- Its object was to improve their bargaining position
- The order provided a machinery whereby the price of milk could be determined by arbitration if agreement could not be reached (this is constitutional)

Second + Third Order: The price determinations
- It is not the possibility that these orders might "affect" the appellant's interprovincial trade which should determine their validity, but rather, whether they were made "in relation to" the regulation of trade and commerce
- In determining the aim of these orders, the fact that they may have some impact upon the appellant's interprovincial trade does not necessarily mean they come within s 91(2)
- These orders were not directed at the regulation of interprovincial trade

Note: Manitoba (AG) v Manitoba Egg and Poultry Association Et Al

- This case came to be known as the "chicken and egg war"
- The war was primarily an engagement fought by the bordering provinces of ON and QC
- ON produced a lot of eggs and QC farmers had an abundance of chickens
- When the less efficient producers went to their governments for protection, the response was legislation facilitating a marketing scheme
- A controlled market with a fixed price for eggs in ON and chickens in QC emerged
- The marketing boards went too far and gave undue preference in marketing to those products coming from within the province
    - This had adverse effects on other provinces (MB) who began innocent bystanders in the chicken and egg war
- The federal government was not addressing the issue quick enough so MB drafted their own scheme that was an exact copy of the QC scheme and took it to their court to determine its constitutionality. It got escalated to the SCC
- The issue at trial was whether Manitoba's legislation was ultra vires due to the fact that it trespassed on the exclusive legislative authority of Parliament to regulate trade and commerce
- The court found that the legislation not only affects interprovincial trade in eggs, but that it aims at the regulation of such trade. It's an essential part of the scheme, the purpose of which is to obtain for Manitoba producers the most advantageous marketing conditions for eggs, specifically to control and regulate the sale in Manitoba of imported eggs. It is designed to restrict or limit the free flow of trade between provinces
- Therefore, *ultra vire* the Province of MB
- However, there was controversy around the courts even answering the question

- MB did not have to provide reason for legislating and once the decision was made, ON and QC could not state the reasons in which they were vitally interested in sustaining the legislation

Note: ***Reference Re Agricultural Products Marketing*** **

The marketing of agricultural products have both local and interprovincial aspects. Must negotiate framework together with prov and fed to make constitutional scheme

- production and marketing quotas
  - Production regulation = provincial
  - Marketing = federal matter if market beyond province
- Affect v control
  - Qualitative distinction between legislation that "affects" inter-provincial trade vs. legislation to "control" inter-provincial trade
- As a result: Encourage co-operative federalism
  - These court decisions push fed and prov to work together

Ratio: Both levels fed/provinces developed integrated scheme that deals with production quotas and marketing of agri goods w/in Canada. Courts want to foster this type of cooperative arrangement. Best balance of power? One that is negotiated by both parties

Canadian Industrial Gas and Oil Ltd v Government of Saskatchewan et al

Facts: - CIGO is engaged in the exploration for, drilling for and production of oil and natural gas in Sask

- The government of Sask enacted legislation following the sharp rise in the price of oil on the world market
  - The legislation created a "mineral income tax" and it expropriated all petroleum and natural gas in all producing tracts and subjected them to a "royalty surcharge"
- The practical consequence of the legislation is that government of sask will acquire the benefit of all increases in the value of oil produced in the province
- CIGO contends two issues:
  - The mineral income tax and royalty surcharge constitute indirect taxation and are therefore *ultra vires* the province due to its ability to only impose direct taxation
  - The legislation relates to the regulation of interprovincial and international trade and commerce, also under federal jurisdiction

Issues: Whether the statutory provisions, and the Regulations and orders enacted and made relating to the imposition of the mineral income tax and royalty surcharge enacted by the Government of Saskatchewan are *ultra vires*

Held: Yes, *ultra vires*. Trenches on s 91(2)

Reasons:

- The effect of the legislation is to set a floor price for Saskatchewan oil purchased for export by the appropriation of its potential incremental value in interprovincial and international markets, or to ensure that the incremental value is not appropriated by persons outside the province
- The Minster is empowered to determine well-head value of oil which is produced which will govern the price at which the producer is compelled to sell the oil which he produces
- This legislation is directly aimed at the production of oil destined for export and has the effect of regulating the export price, since the producer is effectively compelled to obtain that price on the sale of his product
- No question that oils purpose is to be exported, that is its purpose

Dissent: - subject to the Constitution, the power of the Province to tax, control and manage its natural resources is plenary and absolute

- Dickson J – uphold the mineral income tax as a form of direct taxation
- The mineral income tax and royalty surcharge relate only to oil produced in Sask
- There are no impediments to the free movement of goods
- There is no extraneous evidence to form the basis that the impugned legislation in its *effect* regulated interprovincial or international trade
- The Government of Saks had a *bona fide* legitimate and reasonable interest of its own to advance in enacting the legislation in questions, as related to taxation and natural resources, out of all proportion to the burden on the Canadian free trade economic unit through the legislation
- The effect on the interprovincial trade in oil is indirectly and remotely incidental to the manifest revenue-producing object of the legislation

Central Canada Potash Co Ltd v Government of Saskatchewan

Facts: - facing possible trade sanctions by the US arising out of a complaint of dumping and a depressed market for potash, Sask instituted a potash portioning scheme

- The scheme controlled production through licences, which prevented Central Canada Potash form fulfilling one of its contracts

Issues: Whether the potash scheme enacted by the Government of Saskatchewan is *ultra vires*
Held: The scheme is *ultra vires*
Reasons: - Sask had in view the regulation of the marketing of potash through the fixing of a minimum selling price to the production quota. The only market the scheme had any significance on was the export market

- While natural resources are within provincial jurisdiction, the situation changed when the province establishes a marketing scheme with price fixing as its central feature
- Province has control over production, not price fixing
- By saying the legislation is ultra vires, it does not give the feds the power to regulate natural resources
    - Doesn't mean that all laws passed by governments, if it can't be passed by one then it can be passed by the other
    - If either gov't tried to pass this law, it would likely be struck down
    - The subject matter falls someone, but poorly drafted laws can be ultra vires

The Regulation of Natural Resources

- S 92(5) - The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
- S 109 → AB is not mentioned, we were not a province at the time of writing
- Living tree doesn't apply here, can't add words that are not here
- When AB joins confederation, they are told no natural resources beyond 92(5)
- *Natural Resources Transfer Agreements*, 1930 – gives AB jurisdiction over their natural resources, like other provinces
- S 92A added to the constitution giving all provinces the ability to legislation on non-renewable and natural resources in the provinces
    - S 92A (1) does not really do anything, nothing new added here
    - Production being within provincial jurisdiction was already the law
    - 92A (2) – may not change the result in the *Potash* case at all
        - doesn't allow for international exportation, just inter provincially

Economic Regulation Summary

- Pith and substance will determine the "true nature" of the legislation
- Provincial: local production and conservation (*Carnation*)
- Federal: inter-provincial marketing, trade or export (*Egg Reference, CIGOL, Potash*)
- Court disfavours provincial protections schemes (*Egg Reference*)
- Court favours large- scale federal provincial agreements in the name of cooperative federalism (*Re Agricultural Products)*

TRADE AND COMMERCE

Note: *Labatt Breweries of Canada Ltd v Attorney General of Canada*

Facts: - s 6 of the *Food and Drugs Act* regulated the content of a variety of food and drug products

- Labels were to comply with prescribed standards
- Labatt advertised a "Special Lite Beer" which had an alcohol content higher than allowed to be called a light beer
- Labatt challenged the validity of the act and regulations
- Parliament says its allowed to under trade and commerce, criminal law power and POGG

Issues: Whether the Act is valid
Held: The Act and regulations are *ultra vires* Parliament
Reasons: - Trade and Commerce: the first branch of *Parsons* giving Parliament power over interprovincial trade was not applicable

- The impugned regulation was concerned with production and local sale
- 2nd branch, general trade power, didn't apply either
    - The regulation of a single trade or industry is not of general national concern
- The Act attempted to regulate one industry or trade at a time, by a varying array of regulations or trade codes applicable to each sector and thus was not a regulation of trade and commerce in the sweeping general sense
- General regulations should be ***general***

POGG and Criminal Law Power: no basis for this argument

- the provisions were not directed at the protection of health nor the prevention or deception
    - not a matter of national concern

General Motors of Canada Ltd v City National Leasing

Facts: - s 31.1 of the *CIA* creates a civil cause of action for certain infractions of the Act
    - civil actions are within provincial powers

Issues: Whether the *Combines Investigation Act* is valid under the federal trade and commerce power (s 91(2))
Held: The *CIA* is valid under the second branch of trade and commerce power

Reasons:

- Since Parsons, the jurisprudence on s 91(2) has largely been an elaboration on the boundaries of the two aspects or "branches" of federal trade and commerce power:
    1. The power over international and interprovincial trade and commerce
    2. The power over general trade and commerce affecting Canada as a whole
- First branch fails, this is a local matter, dealing with the local sale of a car
- Five hallmarks of validity for legislation under the 2nd branch of the trade and commerce power:
    1. The impugned legislation must be part of a general regulatory scheme
    2. The scheme must be monitored by the continuing oversight of a regulatory agency
    3. The legislation must be concerned with trade as a whole rather than a particular industry
    4. The legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting
    5. The failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country
- Does the Act have a scheme? The Act has a whole embodies a complex scheme of economic regulation
    - The purpose of the Act is to eliminate activities that reduce competition in the marketplace and the entire act is geared towards this objective
    - It is a well-integrated scheme of regulation designed to discourage forms of commercial behaviour viewed as detrimental to Canada and the Canadian economy
- Is the Scheme monitored by a regulatory agency? Yes, controlled by the Director of Investigation and Researcher and the Director has the authority to launch an inquiry into susceptive anti-competitive conduct
- All other 3 criteria are met
    - The act is clearly concerned with the regulation of trade in general, rather than the regulation of a particular industry or commodity
    - The effects of anti-competitive practices transcend provincial boundaries
    - Logical that competition be regulated on a national level
- Provinces can still deal with competition in terms of consumer protection, labour relations, marketing, etc.
    - Parliament has the power to regulate it too

Second Branch of Trade and Commerce Power Test

1. Presence of a general regulatory scheme
2. Monitored by the continuing oversight of a regulatory agency
3. Concerned with trade as a whole rather than a particular industry
4. Incapable of provincial enactment
5. Failure to include one or more provinces would jeopardize the scheme

* Factors to be considered + weighed, but it is not a strict application test. Use these factors as a guide

CRIMINAL LAW POWER

- S 91(27) assigns responsibility over criminal law and criminal procedure to Parliament
- Unlike other countries in that we assigned criminal law power to a different level than power over property and civil rights
    - Emerged because the *Quebec Act* adopted English law over criminal power but French law over civil and property rights
- Form creates jurisdiction – prohibition and a penalty (two p's)

Valid Criminal Law Test

Does the law have:

1. Prohibition
2. Penalty
3. Purpose in a criminal law sense

Margarine Reference

Question: Is s 5(a) of the *Dairy Industry Act ultra vires* Parliament either in whole or in part and if so in what particular or particulars and to what extent?

- The provision was a result of a legislation enacted in 1886 that banned the manufacture and sale of butter substitutes due to harmful health effects
- Parliament prohibited the manufacture, importing, selling and owning margarine and included a penalty
- Preamble disappeared from this act and the harmful health facts are no longer true about margarine
- Parliament contends that the act falls under criminal law

    - Lord Atkin – a crime is an act which the law, with appropriate penal sanctions, forbids
        - Effect can be in relation to social, economic, or political interest
- The object of this Act is economic and the legislative purpose is to give trade protection to the dairy industry in the production and sale of butter
- To forbid manufacture and sale for such an end is *prima facie* to deal directly with the civil rights of individuals in relation to particular trade within provinces
- Public interest here lies with trade effects
- Provincial – regulating a trade and industry (*Parsons*)
- The importation piece of the prohibition survives

Answer: The prohibition of manufacture, possession and sale of margarine was *ultra vires* Parliament and cannot be upheld under criminal law power or the trade and commerce power

Notes: The two "p" system for creating a criminal law is not going to work anymore

- Rand added a third "p" – **purpose** (criminal/public law purpose, those things that are evil and injurious to the public)

RJR – MacDonald Inc v Canada AG

Facts: - *Tobacco Products Control Act* was enacted by Parliament and was a response to a national public health problem

- The act prohibited all advertising and promotion of tobacco products offered for sale in Canada, with an exemption for advertising foreign tobacco product in imported publications
- Violation of the Act constituted an offence punishable by way of summary conviction or indictment, with penalties ranging from a fine to imprisonment
- Tobacco companies challenged the constitutionality of the Act saying it was ultra vires as an intrusion into provincial powers over advertising in s 92(13) and (16)
- The SCC ruled that it was a valid criminal law power but it unjustifiably infringed on freedom of expression

Issues: Does the Act fall under criminal law power?

Held: Yes – valid criminal law power

Reasons: - criminal law power is broad, plenary in nature

- Pith and substance: Parliament's purpose was to prohibit three categories of acts: advertisement of tobacco products, promotion of tobacco products, and sale of tobacco products w/o health warnings
- All prohibitions are accompanied by penal sanctions (this is a *prima facie* indication that the act is criminal)
- Evil targeted by the act: detrimental health effects caused by tobacco
- Note! This was not a complete prohibition because foreign magazines could still contain cigarette advertisements (more regulatory than prohibitory)
- Health is not an enumerated ground in the *Constitution* – parliament and provincial legislatures can both validly legislate on this topic (DOUBLE ASPECT)
- Protection of health is one of the ordinary ends served by criminal law power (*Margarine Reference)*
- Scope of federal power to create criminal legislation with respect to health matters is broad, circumscribed only by the requirements that the legislation must contain a prohibition accompanied by a penal sanction and must be a legitimate public health evil
- This Act is not a 'colourable' intrusion upon provincial jurisdiction
    - Cannot find another other reason parliament would enact this Act except to target tobacco
        - They are not trying to regulate the tobacco industry
- Would be impossible to outright prohibit tobacco consumption (increase smuggling)
    - Parliament is allowed to get creative path to accomplish its goals as long as the goals are constitutionally valid
- Criminal law may validly contain exemptions for certain conduct without losing its status as criminal law (i.e. in Morgentaler abortion was outlawed except when a woman had a miscarriage)

Dissent: - Parliament can require manufactures to disclose health effects and can punish those who don't

- Parliament should not be entitled to prohibit *all* advertising and promotion of tobacco products and restrict use of tobacco trademarks
- The activity that Parliament wishes to supress through criminal sanction must pose a significant, grave and serious risk of harm to public health, morality, safety or security before it can fall within the purview of the criminal law power
- Lesser threats to society and its functioning do not fall within the criminal law, but are addressed through non-criminal regulation
- The objective of the advertising ban is to prevent Canadians from being persuaded by advertising to use tobacco
    - Disagrees that this type of persuasion falls within criminal conduct
- Hard to understand why tobacco is legal but tobacco advertising is not
- There must be some affinity with a traditional criminal law concern

R v Hydro-Quebec

Facts: - Canadian *Environmental Protection Act* established a process for regulating the use of toxic substances
- Under the Act, Hydro-Quebec was charged with a violation of an interim order restricting it PCBs emissions

Issues: Is s 34 and 35 of the *EPA ultra vires* Parliament?
Held: Yes, valid source of criminal law power
Reasons: [broad approach to criminal law power]
- preamble speaks to the fact that toxic substances are a matter of national concern and provincial inability
- Criminal law power cannot permit Parliament, simply by legislating in the proper form, to colourably invade areas of exclusive provincial legislative competence
- To determine if this attempt is being made, the court must look into the purpose of the legislation
    - A legitimate public purpose must underlie the legislation
- The environment is a public purpose sufficient to support criminal prohibition (shared jurisdiction similar to health)
    - Pollution is an evil that Parliament can seek to supress
- The purpose of criminal law is to underlie and protect our fundamental values
    - The stewardship of the environment is a fundamental value of our society Parliament may use criminal law power to underlie that value
- National concern doctrine operates by assigning full power to regulate an area to parliament
    - Criminal law does NOT work in this way – narrower, prohibit with penalties which provinces can't do (only prohibit)
        - Seeks by discrete prohibition to prevent evils falling within a broad purpose
- In criminal law, reference to such a broad policy objective is simply a means of ensuring that the prohibition is legitimately aimed at some public evil Parliament wishes to suppress and so is not a colorable attempt to deal with a matter falling exclusively within an area of provincial legislative jurisdiction
- The legitimate use of criminal law does not encroach on provincial legislative power, though it may affect matters falling within the latter's ambit
- Provincial gov't can also regulate/prohibit pollution if they want
- The Act does not bar the use of important chemical products, just the ones that are considered toxic and dangerous to the environment
    - The definition is on toxic substances, not just anything
- This is dealt with in Part II of the act and has penal sanctions attached
- There is a limited prohibition applicable to a restricted number of substances, the prohibition is enforced by penal sanctions and is undergirded by a valid criminal objective, and so is valid criminal law
- "may have harmful effects" – literally prohibits anything

Dissent: [narrow approach to crim power]
- Main issue: "Toxic" is not defined.
- "Toxic" = any substance that poses harm to human life/health/environment. Then Acts says it may be made subject of comprehensive fed regulation.
- In pith and substance: aimed at protecting environment/human health. Can this be justified under crim law power?
    - Must contain prohibitions backed by penalties: more an attempt to regulate environmental pollution than to prohibit or proscribe it = not justified
    - Must be directed at legitimate public purpose: cannot be supported at human health because toxic defined broadly. But protection of environment = legitimate criminal public purpose – but they are not intended to prohibit environmental pollution simply regulate it (Minister has discretion, lists when, what and quantities)
    - How to tell if its prohibitive or regulatory?
        - 1. It is allowed to contain exemptions which effectively make regulatory schemes
        - Consider nature and extent of regulation it creates + context w/in it purports to apply
        - The more elaborate the scheme – more likely it is regulatory
        - Must have general prohibition (not something that is not an offence until admin agency intervenes i.e. Adding to list of substances) (in contrast to Macdonald, which has a general prohibition)
    - This framework is regulatory – Not criminal. This is the type of framework that a province could use, but not the fed. Power. Fed must be more specific
- Distinguishing prohibition from regulation is an art, not a science

Note: *Re Firearms Act*

- 1995 → federal government passed new gun control legislation
- The *Firearms Act* banned or restricted certain types of firearms and established a comprehensive licencing system for the possession and use of firearms and a national registry
- Failure to comply with the act resulted in an offence under the *Criminal Code*
- Complex scheme, GOA would argue it is a licencing scheme that falls within provincial jurisdiction (how you own it, where you store it, how you use it etc.)

- Government of Alberta challenged this act by way of reference to the Alberta Court of Appeal
- The argument was that the scheme was regulatory rather than criminal legislation
    - Argued this matter fell into the already existing property regulation scheme in AB
- SCC ruled that gun control fell within federal criminal law power, continuing the trend in expansive interpretations of criminal law power
- The law was found in pith and substance to be directed at enhancing public safety by controlling access to firearms through prohibitions and penalties
- Guns were distinguishable from provincial regulatory schemes for the registration of motor vehicles and land titles because of the inherently dangerous nature of firearms
- The gun control law did not upset the balance of power because its effects on property rights were incidental
    - Didn't hinder AB's ability to regulate the property and civil rights aspect of guns, nor did the law precipitate the federal government's entry into a new field
- Regulation schemes are sometimes (or more regularly) used to generate revenue rather than to prohibit (i.e. buy a hunting licence)
- Parliament may validly regulate with a public safety intent

MORALITY AND PUBLIC ORDER

Sections to Consider:
92(13), 92(14), 92(15) and 92(16)

- 92(15) once you are operating within provincial jurisdictions, you can penalize
- 92(16) gives provinces the power to care about morality
    - There are different morals and values within different provinces, so the provinces need the ability to accommodate this
- 91(27) gives Parliament the ability to care about morality

Nova Scotia Board of Censors v McNeil

Facts: - NS *Theatres and Amusements Act* established a system for regulating the showing of films

- Board had to review the films before showing and breach of this process was a monetary penalty and revocation of a theatre's licence

Issues: Is this decision with the powers of NS?
Held: Yes – regulatory business decision
Reasons: - The Act, read as a whole, is directed at the regulation, supervision and control of the film business

- The provisions are enacted for the purpose of reinforcing the authority vested in a provincially appointed board to regulate
- The legislation is concerned with property (film) and takes place wholly within the province
- The legislation constitutes nothing more than the exercise of provincial authority to regulate the exhibition and distribution of films within its own boundaries which are considered unsuitable for local viewing by a local board on grounds of morality
- The act is not concerned with created a criminal offence or providing punishment
- **Even if it were criminal, the province has the power to prevent crimes**
- Pith and substance: property and civil rights

Dissent: - unqualified power to determine the fitness of films for public viewing on considerations that may extend beyond the moral and may include the political, the social and the religious

- The board has the power to decide what is decent or indecent and morally fit for public viewing
    - This determination is within Parliament's criminal law power
- This is about censorship: at its heart is a moral component and how it impedes free speech
    - Also worried about free speech: doesn't want provinces limiting free speech
- Not a case where civil consequences are attached to conduct defined and punished as criminal under federal legislation, but rather a case where a provincially authorized tribunal itself defines and determines legality, what is permissible and what is not.
    - Direct intrusion into criminal law

Dupond v City of Montreal

- By law prohibiting parades or gatherings (requires licence and bans parades for 30 days)
- When a city passes a bylaw, it is examined under Provincial Powers (provinces gave municipalities the power to enact bylaws)
- SCC upholds by-law (SCC split similar to McNeil)

- By-law is intra vires because it regulates a local matter – peace and tranquility on the streets of Montreal is a matter of local concern
- There is a heavy role of the double aspect doctrine over criminal law/regulatory schemes when it comes to matters of public safety
    - Provinces can legally enact the prohibition of unsafe uses of cars just as well as the feds can
- Dissent: Laksin (concerned about free speech).
- Can prevent future unrest through provincial powers (public order, peace, all valid provincial jurisdiction)

Westendorp v The Queen

Facts: Westendorp charged with being on the street for the purpose of prostitution in contravention of a Calgary bylaw
Issues: Is the bylaw *ultra vires* the City of Calgary?
Held: Yes
Reasons: - the bylaw is not, as Calgary offered, looking to control the streets
- If this were the purpose, it would have dealt with the congregation of persons regardless of their reason for congregating
- Instead, the bylaw is only activated by what is said by a person, referable to the offer of sexual services
- This is not a property issue or an attempt to deal with a public nuisance
- Allowing this provision may create a slippery slope towards allowing a huge part of criminal law to be regulated by provinces (i.e. anything that happens on the street)
- This was a **colourable** intrusion – Calgary was entering a traditional criminal law domain (crim has long covered this)

Notes: - this may have been intra vires by requiring a license to sell *anything* on the streets
- Could have made the aim to protect prostitutes on the streets
- Could have attempted to regulate where people could be at certain times

Chatterjee v Ontario (AG)

Facts: ONs *Civil Remedies Act* authorized the forfeiture of proceeds of unlawful activity
- Property can be forfeited under the CRA if, on a BOP, it is demonstrated that the property constituted the proceeds of crime in general
- Chatterjee was arrested and police found $29k in small bills that smelled of weed. Wasn't charged with any drug trafficking offence, but rather under the CRA and the money was seized as proceeds of unlawful activity

Issues: Is the *CRA ultra vires* the province of Ontario?
Held: No – valid legislation
Reasons: - a court should favour, where possible, the ordinary operation of statues enacted by *both* levels of government (*Canadian Western Bank*)
- The CRA was enacted to deter crime and to compensate its victims
- The former purpose is broad enough that both the federal government (in crim) and the provincial governments (in civil) can validly pursue it
- Crime imposes substantial cost on provincial treasuries and it would be out of step to conclude that a province must shoulder the costs to the community of criminal behaviour but cannot use deterrence to supress it
- Pith and substance: the CRA creates a property-based authority to seize money and other things shown on a balance of probabilities to be tainted by crime and thereafter to allocate the proceeds to compensating victims of and remedying the societal effects of criminality
    - May incidentally affect criminal law without doing violence to the heads of power
- Differs from crim law which couples prohibition w/ penalty
- General purpose: to make crime unprofitable, to capture resources tainted by crime, and to compensate individuals and public institutions for cost of crime. = Valid criminal object. Not colourable.

** AB has a similar act: Victims Restitution and Compensation Payment Act

FEDERALISM REVIEW

Reference Re: Securities Act

Question: Does the proposed Securities Act fall within the legislative authority of the Parliament of Canada?
- Securities are regulated by provinces but Parliament attempted to create a Canadian *Securities Act*
- Parliament alleged they could enact this under s 91(2), trade and commerce
- Provinces argued it was a matter of 92(13), property and civil rights
- Double Aspect: Parliament attempts to argue that securities are rightfully provincial, but that the securities market has evolved into a national matter as a consequence, Parliament gets to regulate

- In P&S, this act is aimed at protecting investors and ensuring the fairness of capital markets through the day-to-day regulation of issuers and other participants in the securities market
    - This has been a long standing local matter, strictly within provinces
- Parliament was unable to show that the securities market had changed so that the regulation of all aspects falls within the first branch of trade and commerce
- Parliaments interpretation of trade and commerce would disrupt federalism rather than maintain its balance
    - Cannot regulate all of securities simply because aspects of it have a national dimension
- Only the general trade and commerce power is invoked by Parliament. This power, while on its face broad, is necessarily circumscribed. It cannot be used in a way that denies the provincial legislatures the power to regulate local matters and industries within their boundaries. Nor can the power of the provinces to regulate property and civil rights within the provinces deprive the federal Parliament of its powers under s. 91(2) to legislate on matters of genuine national importance and scope -- matters that transcend the local and concern Canada as a whole.

Answer: No – *ultra vires* Parliament

- Parliament can regulate securities in exercise of their respective powers, in spirit of cooperative federalism
- It is not up to the courts to decide the relative merits of a federal or provincial regulation
    - They do not want to decide if a federal or provincial scheme is preferable
    - The answer is solely based on the validity of the act
- The Act does not address a matter of genuine national importance and scope going to trade as a whole in a way that is distinct and different from provincial concerns.
- The Act is chiefly concerned with the day-to-day regulation of all aspects of contracts for securities within the provinces, including all aspects of public protection [page840] and professional competences. These matters remain essentially provincial concerns falling within property and civil rights in the provinces and are not related to trade as a whole.

ABORIGINAL RIGHTS – SECTION 35 *IMPT FOR EXAM*

Relevant Constitutional Provisions

- S 91(24) *Constitution Act, 1867* … Indians, and Lands reserved for the Indians
    - Confusing – what does Indian mean? Who is included?
        - Are Metis included? Court sometimes said yes, and other times said no
        - 2015 – Indians also includes jurisdiction over Metis people (enhances the jurisdiction)
- S. 25 *Charter*
- S 35 *Constitution Act, 1982*
    - "existing" has multiple interpretations, was forced in at the end (Alberta was worried about the scope of rights that would be added)
    - "recognized and affirmed" seems flexible, typical Charter language is "guaranteed"
    - Being in the Constitution and not the Charter means the section is not bound by section 1 (reasonable limits) of the Charter
    - "Include" leaves the aboriginal peoples definition open
    - "Rights" – what are aboriginal rights?
    - Doesn't invent AB rights
    - History of relationship between Crown and AB peoples is thought of in the drafting of s 35

Themes to Explore

- Role of history
    - Doctrine of discovery – if you find the land, you are sovereign over it (used by Europeans)
        - Reality: there were already people living there
        - Therefore, Europeans just considered the land "empty" because there was no form of civility people living there (as defined by the Europeans)
        - The doctrine is based on a false and racist doctrine
    - Eventually disallowed the Discovery Doctrine
- Legal Pluralism
- *Sui generis* nature of aboriginal rights
- Recognizing prior occupation with Crown sovereignty
- Fiduciary duties of the Crown – honour of the Crown

Guerin v The Queen

Facts: - An Indian Band surrendered reserve land to the Crown for the purpose of leasing the land and did so pursuant to the *Indian Act*

- A surrender document contained the approved terms of the lease, but the Crown did not follow these terms when leasing
    - Instead created terms much less favorable to the Band
- Initially, Crown found in breach of Trust
- Crown appealed to FCA and won
- Band now appealing to SCC

Issues: Whether the appellants are entitled to recover damages from the Federal Crown for leasing to a golf club land on the Musqueam Indian Reserve?
Held: Yes, appeal allowed – set aside judgment in the Court of Appeal and reinstate the trial judge's award
Ratio: The nature of Indian title comprises two key aspects: (1) a general inalienability of land except to the Crown, and (2) the Crown's fiduciary obligation to deal with Indians' land in their best interests
Reasons: - Through the Indian Act – the Crown asserted sovereignty and title on what was once Aboriginal land and say they will control reserve lands and deal with them on Indian's behalf -- Due to the Crown's power must exercise it according to the principles of a fiduciary

Fiduciary Relationship

- There is a fiduciary duty between the Crown and the Indians [Honor of the Crown] and if it is breached then liable to the Indians in the same way as if such a trust were in effect.
- Depends on the proposition that the Indian interest in the land is inalienable except on surrender to the Crown
- The Crown should always act honorable in dealing with Aboriginal people

Inalienability

- The surrender provisions in the Indian Act prohibit directly transferring its interest to a third party; no sale/lease can be carried until after a surrender with Crown – the source of a distinct fiduciary obligation
- Nature of Indians' interest it best characterized by its general inalienability coupled with the fact that the Crown in under an obligation to deal with the land on the Indians' behalf when the interest is surrendered

Existence of Indian Title

- Indian title is an independent legal right which, although recognized by the Royal Proclamation of 1763 none the less predates it – it emerged when the Crown claimed sovereignty of the land (but Aboriginal's retained title)

The Nature of Indian Title

- In Privy Council – held that Indians had a 'personal or usufructuary right'
    - Concept of usufructuary right – a mere qualification of or burden on the radical or final title of the Sovereign
- S. 109 of Constitution Act 1867 – The Indian's interest was an 'interest other than that of the Province'

** The principle of "fiduciary duty" later became integral in the interpretation of Section 35 of the Constitution Act, 1982 which provides for protection of Aboriginal rights **

What is the guiding purpose of s. 35(1)?

- The government has a fiduciary responsibility to the people
- Limiting the sovereignty over Aboriginal people
    - Governments have to justify any legislation or use of power over Aboriginal people

R v Sparrow

Facts: - Sparrow was charged under s 6(1) of the *Fisheries Act* of the offence of fishing with a drift net longer than that permitted by the terms of the Band's Indian food fishing licence

- S contends that he was exercising an existing aboriginal right to fish and that the net length restriction contained in the Band's licence is inconsistent with s 35(1) of the *Constitution Act, 1982* and therefore invalid

Issues: - Whether Parliament's power to regulate fishing is now limited by s 35(1) of the *Consitution Act, 1982*
Specifically: Whether the net length restriction in the licence is inconsistent with that provision
Held: Confirm CA decision to set aside the conviction
Reasons:

Test for justifying an interference of an aboriginal right under s 35(1)

1. Whether the legislation in question has the effect of interfering with an existing aboriginal right – if so, it represents a prima facie infringement of s. 35(1)
    a. Is the limitation unreasonable/unnecessary?
    b. Does the regulation impose undue hardship?
    c. Does the regulation deny to the holders of the right their preferred means of exercising that right?

[The onus of proving an infringement lies on the individual or group challenging the legislation]

2. Is the interference justified? [onus is on gov't to prove it is a valid legislative object]
    a. Is there a valid legislative objective? What was the objective of the department setting out the legislation? [Can be valid if necessary for the proper management and conservation of the resource]
    b. The fiduciary duty must be considered when determining whether the legislation can be justified
    c. Priority allocation

- "Existing rights" means that the rights to which s 35(1) applies are those that were in existence when the *Constitution Act* came into effect
    - Extinguished rights were not revived by the *Constitution Act*
    - Academic commentary holds that "existing" means "unextinguished" rather than exercisable at a certain time in history
    - Must be interpreted flexibly so as to permit their evolution over time
- "Frozen Rights" also means an existing right that cannot be read to incorporate the specific manner in which it was regulated before 1982
- "Extinguishment" → for the test of extinguishment to be adopted the Sovereign intention must be clear and plain to extinguish an Aboriginal right AND there is nothing in the *Fisheries Act* or its regulations that demonstrates a clear + plain intention to extinguish Indian Aboriginal rights to fish (must have occurred prior to section 35 being enacted)
    - Regulation is not extinguishing rights and cannot define a right by incorporating the ways in which it has been regulated in the past
    - Government regulations cannot be determinative of the content + scope of an existing Aboriginal right, however can regulate the exercise of that right within s 35(1)
    - AFTER 1982 – can extinguish rights within modern treaties
        - Could extinguish existing aboriginal rights and create a *new* set of aboriginal (now treaty) rights
        - Outside of areas with treaties, you are back to arguing about unextinguished aboriginal rights
    - Rights that have constitutional status cannot be extinguished with clear and plain language
- "Recognized and Affirmed" – means something less than absolute or guaranteed therefore, rights are subject to a justificatory process
    - Section 35(1) provides a solid constitutional base upon which subsequent negotiations can take place – it also affords constitutional protection against provincial legislative power
    - The nature of section 35(1) suggests it should be construed in a purposive way – when the purposes of the affirmation of aboriginal rights are considered it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded
    - The government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples – the relationship between the government + Aboriginals is trust-like rather than adversarial and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship
    - S. 35(1) is not subject to s. 1 of the Charter, however it does not mean that any law or regulation affecting aboriginal rights will automatically be of no force or effect by the operation of s. 52. Legislation affecting exercising aboriginal rights can still be valid as long as it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1).

Sparrow Justification Test

1. Whether the legislation in question has the effect of interfering with an existing aboriginal right – if so, it represents a prima facie infringement of s. 35(1). The onus of proving an infringement lies on the individual or group challenging the legislation
    a. Is the limitation unreasonable/unnecessary?
    b. Does the regulation impose undue hardship?
    c. Does the regulation deny to the holders of the right their preferred means of exercising that right?
2. Is the interference justified? [onus is on gov't to prove it is a valid legislative object]
    a. Is there a valid legislative objective? What was the objective of the department setting out the legislation? [Can be valid if necessary for the proper management and conservation of the resource]
    b. The fiduciary duty must be considered when determining whether the legislation can be justified
    c. Priority allocation

Remedies to Divisional Powers and Federalism

- Making a law inapplicable
- Rendering a law *ultra vires*
- Making a law inoperable
- When an aboriginal right is involved, the law may be inapplicable to the extent that it infringes on an existing Aboriginal right

R v Van der Peet

<u>Facts:</u> - VdP is charged under s 61(1) of the *Fisheries Act* with the offence of selling fish caught under the authority of an Indian food fish licence

- The charges arose out of the sale of 10 salmon
- VdP defends her right to sell the fish as an exercise of existing aboriginal rights to sell fish

- Also states that the regulations infringe on her aboriginal rights and are therefore invalid under s 35(1)

Issues: Was there an existing aboriginal right to sell fish such that s 27(5) is invalid?
Held: No - the appellant failed to demonstrate that the exchange of fish for money or other goods was an integral part of the distinctive Stolo culture that existed prior to contact – appeal dismissed
Reasons: - Question to ask in all cases of this kind: "What is the right being address (per nation)?"

- There is no pan-aboriginal rights → It is on a nation by nation basis
- S 35 recognizes and affirms existing aboriginal rights, but it must not be forgotten that the rights it recognizes and affirms are *aboriginal*
- Although equal in importance and significance to the *Charter*, aboriginal rights must be viewed differently from *Charter* rights because they are rights held only by aboriginal members of Canadian society
- The court is tasked with defining the scope of s 35(1) in a way which captures both the aboriginal and the rights in aboriginal rights
- Fiduciary duty → When there are doubts/ambiguities between the Crown and aboriginals these must be resolved in favor of aboriginal peoples AND because of the duty the constitutional provisions protecting aboriginal interests must be given a generous and liberal interpretation
- The test for identifying the aboriginal rights recognized and affirmed by s 35 must be directed at identifying the crucial elements of those pre-existing distinctive societies
    - It must aim at identifying the practices, traditions, and customs central to the aboriginal societies that existed in NA prior to contact with the Europeans
    - Keep reconciliation in mind → use a large and liberal interpretation

Integral to a Distinctive Culture test

- 1) Identify/characterize the right being claimed
    - Right to use the resource – (salmon); sell, exchange, eat, etc. (broad construal)
        - Would lead to 'yes'
    - Here it was characterized as the 'right to sell the salmon' (narrow construction)
        - Court – has to think about it from the legislation→ not interfering with her uses of salmon; the legislation is saying she cannot sell the salmon
        - Must be particular about what the resource is, where it is (rights do not travel)
- 2) Is the practice, custom, or tradition a defining or central feature of the culture in question? (distinctive but not necessarily distinct)
    - **TEST:** In order to be an aboriginal rights and activity must be an element of a practice, custom or tradition integral to the distinctive culture, that emerged pre-contact, of the aboriginal group claiming the right
    - Has to make the culture what it was – emblematic to the culture (eating is not going to fit the bill)
    - Historical uses; ask them
    - ISSUE: Metis have aboriginal rights, but they did not exist at contact, how can this test claim that the rights must have existed at pre-contact (this issue is dealt with later)

Analysis of the Test

1. Courts must take into account the perspective of Aboriginal peoples themselves
    a. The definition of an aboriginal right must [if it is truly to reconcile the prior occupation of Canadian territory by aboriginal peoples with the assertion of Crown sovereignty over that territory] take into account the aboriginal perspective in terms that are cognizable [perceptible] to the non-aboriginal legal system
    b. True reconciliation will place equal weight on the aboriginal perspective and that of the common law
2. Courts must identify precisely the nature of the claim being made in determining whether an aboriginal claimant has demonstrated the existence of an Aboriginal right
    a. A court must first identify the nature of the right being claimed in order to determine whether a claim meets the test of being integral to a distinctive culture of the aboriginal group
    b. The significance of the practice, custom, or tradition to the aboriginal community is a factor to be considered in determining whether the practice, custom, or tradition is integral to the distinctive culture – but the significance cannot itself constitute an aboriginal right
    c. Factors to consider → the nature of the action which the applicant is claiming was done pursuant to an aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the practice, custom, or tradition being relied upon to establish the right
3. In order to be integral a practice, custom, or tradition must be of central significance to the Aboriginal Society in question
    a. More than just that a practice, custom, or tradition was an aspect of the aboriginal society of which he or she is a part – must demonstrate that it was a significant and central part of the society's distinctive culture → that it truly made the society what is was
    b. Cannot look at aspects that are true of every human society or those that are only incidental or accessional to that society
4. The practices, customs, and traditions which constitute Aboriginal rights are those which have continuity with the practices, customs, and traditions that existed prior to contact

a. The courts must look to the pre-contact period to identify aboriginal rights – the relevant time period is the period prior to the arrival of Europeans [not the period prior to the assertion of sovereignty by the Crown]
b. The evidence may relate to customs, practices, traditions post-contact – it simply needs to be directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact
c. Where an aboriginal community can demonstrate that a particular practice, custom, or tradition is integral to its distinctive culture today and that this practice, custom, or tradition has continuity with the practices, customs, or traditions of pre-contact times, that community will have demonstrated the it is an aboriginal right for the purposes of s. 35(1)
d. Continuity helps 'frozen rights' approach to be avoided → allows for evolution
e. An interruption of a P, C, T will not preclude the establishment of an aboriginal right – flexibility

5. Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims
   a. Understand the evidentiary difficulties in proving a right which originates in times where there were no written records of the P, T, C engaged in
6. Claims to Aboriginal rights must be adjudicated on a specific rather than general basis
   a. Depends on the particular aboriginal community claiming the right – nation specific
   b. The scope of aboriginal rights must be determined on a case-by-case basis
7. For a practice, custom, or tradition to constitute an Aboriginal right it must be of independent significance to the Aboriginal culture in which it exists
   a. It cannot exist simply as an incident to another P, T, C but it itself must be of integral significance to the aboriginal society
   b. Only integral not incidental will qualify as an aboriginal right
8. The integral to a distinctive culture test requires that a practice, custom, or tradition be distinctive; does not require it be distinct
   a. Distinct = one that is unique – different in kind or quality
   b. Distinctive = a claim that is not relative, the claim is one about the culture's own P, C, T considered apart from the practices, customs, or traditions of any other culture – this makes the culture what it is, not that it is different from those of another culture
9. The influence of European culture will only be relevant to the inquiry if it is demonstrated that the practice, custom, or tradition is only integral because of that influence
   a. European arrival and influence cannot be used to deprive an aboriginal group of an otherwise valid claim to an aboriginal right
   b. If the P, C, T arose solely as a response to European influences, then it will not meet the standard
10. Courts must take into account both the relationship of Aboriginal peoples to the land and the distinctive societies and cultures of aboriginal peoples
    a. Aboriginal title is a sub-category of aboriginal rights which deals solely with claims of rights to land
    b. Rights arise from the prior occupation of land but also from prior social organization and distinctive cultures of aboriginal peoples on that land
    c. Must look at both the relationship of an aboriginal claimant to the land and at the practices, customs, and traditions arising from the claimant's distinctive culture and society

Application

- Nature of the claim → Here, she is claiming an aboriginal right to exchange fish for money or for other goods – she is claiming that the P, C, T of the Sto:lo include as an integral part the exchange of fish for money or other goods sold 10 salmon = exchange of fish for money and not commercial or market-based sale
- Prior to contact exchanges of fish were only incidental to fishing for good purposes; there was no regularized trading system prior to contact; the trade engaged in between Stolo and Hudson's Bay was different from that typical of Stolo culture prior to contact; the exploitation of the fishery was not specialized and that suggested the exchange was not central to the culture

Integral to a Distinctive Culture test

- 1) Identify/characterize the right being claimed
  - Right to use the resource
    - Must be particular about what the resource is, where it is (rights do not travel)
- 2) Is the practice, custom, or tradition a defining or central feature of the culture in question? (distinctive but not necessarily distinct)
  - Has to make the culture what it was – emblematic to the culture
  - Historical uses; ask them

Note: *R v Sappier*; *R v Gray*

- At issue was whether the Maliseet and Mi'kmaq peoples in NB possessed an Aboriginal right to harvest timber on Crown lands for personal use

- Bastarache J noted that "an aboriginal right cannot be characterised as a right to a particular resource because to do so would be to treat it as akin to a common law property right"
    - Attention must instead be paid to the significance of the resource to the community in question
- In order to grasp the importance of a resource, the court seeks to understand how that resource was harvested, extracted and utilized
- The relevant practice [for purposes of the Van der Peet test] is harvesting wood – however, they are not claiming a right to harvest wood for all purposes – here, they claim a right to harvest timber for personal uses [also too general]
- The way of life for Maliseet and Mi'kmaq during the pre-contact period is that of migratory people who lived from fishing and hunting and who used the rivers and lakes of Eastern Canada for transportation – therefore, the practice should be characterized as the harvesting of wood for certain uses that are directly associated with that particular way of life
- Here, the wood was used to fulfill the community's domestic needs for things such as shelter, transportation, tools, and fuel – would characterize the claim as a right to harvest wood for domestic uses as a member of the aboriginal community
- 'Distinctive culture'→ the focus of the court should be on the nature of aboriginal people's prior occupation-
    - what is meant by 'culture' is really an inquiry into the pre-contact way of life of a particular aboriginal community, including their means of survival, their socialization methods, their legal systems, and potentially their trading habits
    - 'distinctive' is meant to incorporate an element of aboriginal specificity – however it does not mean distinct and the notion of aboriginality must not be reduced to racialized stereotypes of Aboriginal people
- Must first inquire into the way of life of the group pre-contact [seek to understand how the particular pre-contact practice relied upon relates to that way of life]
- Here, harvesting wood for domestic uses [shelter, transportation, fuel, tools] directly relates to the pre-contact way of life of the Maliseet and Mi'kmaq cultures [using rivers/lakes for transportation and living from hunting and fishing]
- Does not need to go to the core of the culture – the fact that harvesting wood for domestic uses was undertaken for survival purposes was enough to meet the integral to a distinctive culture threshold

Aboriginal Rights Test – ADD MORE FROM SLIDES

1. Characterize the right in question: exactly what activity, for what purpose and where? (*VdP, Sappier)*
2. Was the practice integral to the distinctive culture at the time of contact/control(Metis) of the aboriginal peoples in questions? (*VdP, Sappier)*
3. Extinguishment: has the right been extinguished by clear government intent? (*Sparrow)*
4. Has the right been infringed on (onus on claimant)?
5. Is the aboriginal right justifiably infringed? (*Sparrow)*

ABORIGINAL TITLE

- In *R v Adams*, the course of dealing with a claim for recognition of Aboriginal fishing rights, a majority of the court held that under s 35(1) Aboriginal title was a specific subset of Aboriginal Rights that could be distinguished from other Aboriginal rights recognized under the *Van der Peet* test, such as site-specific hunting and fishing rights
- These "lesser" rights could even exist if a claim for Aboriginal title was not made out
- Historically, one of the primary methods to deal with Aboriginal title has been the signing of treaties following the principles outlined and agreed to in the *Royal Proclamation*
    - Aboriginal title and treaty making era
- Oldest form of rights claims amongst Aboriginal peoples
    - These were their territories and they exercised control over them
- *Calder* is the first case in which the SCC recognizes that there may in fact be something called common law Indian Title (1973)

The Concept of Aboriginal Title *(Delgamuuku):*

- Encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need *not* be aspects of those Aboriginal practices, cultures and traditions which are integral to distinctive Aboriginal cultures
- **Inherent Limit:** must not be irreconcilable with the nature of the group's attachment to that land which forms the basis of the group's claim to AT
    → i.e. if occupation is established with reference to the use of the land as hunting ground, then the group that successfully claims title to that land may not use it in such a fashion as to destroy the value for such a use (i.e. by strip mining it)
- It is a *sui generis* interest and is one way in which Aboriginal title is distinct from fee simple.
    - that Indians held **prior occupation** before sovereignty
    - that Indian land can **only be surrendered to the Crown**
    - that the land was **communally held**, and
    - they held these lands in **usufructury** right, or right and enjoyment of this land

Aboriginal Title Test (*Delgamuukw* test)

1. The land must have been occupied prior to sovereignty (sufficient).
2. If present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation (continuous).
3. At sovereignty, that occupation must have been exclusive (exclusive).

- Aboriginal title is not absolute: title may be infringed according to justification test, considering whether the Crown acted accordingly

Tslhqot'in Nation v British Columbia

Facts: - In 1998, T filed an Aboriginal title claim the court – the trial judgment was according in their favour and used a broad declaration of title

- This decision was overturned at the Court of Appeal and a narrower test was applied
    - Only specific, intensively occupied areas can support Aboriginal title

Issues: Do the T have title to the lands at issue? Did BC breach its duty? How should the courts determine whether a semi-nomadic indigenous group has title to lands?

Held: Appeal allowed and declaration of Aboriginal title granted over the area – further that BC breached its duty to consult owed to T through its land use planning and forestry authorizations

Reasons:

Test for Aboriginal Title (*Delgamuukw* test) → (1) The land must have been occupied prior to sovereignty (sufficient). (2) If present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation (continuous). (3) At sovereignty, that occupation must have been exclusive (exclusive).

- "Aboriginal title is what it is" – *sui generis*

Sufficiency of Occupation

- Context-specific inquiry
- Can be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources
- An Aboriginal group must show that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes
- Does not demand notorious or visible use akin to proving a claim for adverse possession, but neither can the occupation be purely subjective or internal
- Must be evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group
- Notion of occupation must also reflect the way of life of the Aboriginal people, including those who were nomadic or semi-nomadic
- Summary: what is required is a culturally sensitive approach to sufficiency of occupation based on the dual perspectives of the Aboriginal group in question – its laws, practice, size, technological ability and the character of the land claimed – and the common law notion of possession as a basis for title

Continuity of Occupancy

- Does not require AB groups to provide evidence of an unbroken chain of continuity between their current practices, customs and traditions, and those which existed prior to contact
    - Same applies to AB title
- Simply means that for evidence or present occupation to establish an inference of pre-sovereignty occupation, the present occupation must be rooted in pre-sovereignty times

Exclusivity of Occupation

- The AB group must have had the intention and capacity to retain exclusive control over the lands
- Depends on various factors such as the characteristics of the claimant group, the nature of other groups in the area, and the characteristics of the land in question
- Can be established by proof that others were excluded from the land or by proof that others were only allowed access to the land with the permission of the claimant group
    - Even the lack of challenges to occupancy may support an inference of an established groups intention and capacity to control

Was AB Title Established in this Case?

- The trial judge applied a test of regular + exclusive use of the land → this is consistent with the correct legal test
- The CA did not establish that the trial judge's conclusions were unsupported by evidence or otherwise in error – his findings should not be disturbed

Legal Characteristics of AB Title

- AB title gives the right to exclusive use and occupation of the land… and for a variety of purposes, not confined to traditional or distinctive uses
    - AB title is a beneficial interest in the land and thus, the Crown has no beneficial interest
    - Cannot use the land in a way that is irreconcilable with the purpose of that land
- The notion of *terra nulliens* was expressly rejected, as the land was clearly held by people who had Aboriginal title. The AB interest that burdens the Crown's underlying title is an independent legal interest giving rise to a fiduciary duty.
- Cannot alienate the land to anyone but the Crown
- It is a collective title, held by the entire nation
- The Crown has a fiduciary duty owed by the Crown to AB people when dealing with AB lands
- The Crown has a right to encroach on AB title if it can justify this in the broader public interest under s 35

The Incidents of AB Title

- AB title confers ownership rights similar to those associated with fee simple, including:
    - The right to decide how the land will be used
    - The right of enjoyment and occupancy of the land
    - The right to possess the land
    - The right to the economic benefits of the land
    - The right to pro-actively use and manage the land
- Restrictions → AB title is a collective title held for both the present and future generation
    - Cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the group from using and enjoying it
    - Cannot be developed or misused in some way that would substantially deprive future gens of the benefit
- The right to control the land conferred in AB title means that the government and others seeking to use the land must obtain the consent of AB title holders

Justification on Infringement

- To justify overriding AB title-holding group's wishes on the basis of the broader public good, the government must show:
    1. That it discharged its procedural duty to consult and accommodate
        - Where the Crown has real or constructive knowledge of the potential or actual existence of AB title, and contemplates conduct that might adversely affect it, the Crown is obliged to consult with the group asserting AB title
        - The level of accommodation and consultation requires is proportionate to the strength of the claim and to the seriousness of the adverse impact the action would have on the claimed right
    2. That its actions were backed by a compelling and substantial objective
        - Must be considered from both AB and public perspectives
        - To constitute a compelling and substantial objective, the broader public goal asserted by the government must further the goal of reconciliation, having regard for all interests
    3. That the governmental action is consistent with the Crown's fiduciary obligation to the group
        - The Crown's fiduciary duty means that the government must act in a way that respects the fact that AB title is a group interest that inheres in present and in future generations
        - The beneficial interest in the land held by the AB group vests communally in the title-holding group
            - Incursions on AB title cannot be justified if they would substantially deprive future generation of the benefit of the land
        - The Crown's fiduciary duty infuses an obligation of proportionality into the justification process
            - Implicit is the requirement that the incursion is necessary to achieve the government's goal (rational connection); that the government can go no further than necessary to achieve it (minimal impairment); and that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the AB interest (proportionality of impact)

Remedies

- If the Crown fails to discharge its duty to consult, various remedies are available including injunctive relief, damages, or an order that consultation or accommodation be carried out

Application

- Prior to the declaration of Aboriginal title, the province had a duty to consult + accommodate the claimed interest in the land – they had a strong claim to the land and the intrusion was significant therefore the duty to consult owed by the
- Crown fell at the high end of the spectrum + required significant consultation and accommodation
- Crown's duty to consult was breached when the Crown officials engaged in planning process for the removal of timber

ABORIGINAL TREATY RIGHTS

- Section 35(1) protects AB rights and treaty rights (distinct)
- Treaty making in Canada can be divided into three eras:
    - Pre-confederation (Peace & Friendship Treaties)
    - Post-confederation (Numbered Treaties)

    - Modern treaties
        - The way title can now be extinguished
- Treaty rights have their origins in the treaty → not necessary to classify the right in the same manner as an AB right
- Written text of the treaty is just one component (*Marshall*)
- From 1764 until 1867 there were approximately 375 treaties between the British Crown and First Nations – from 1867 until 1932 there were approximately another 150 treaties between the Crown and indigenous peoples north of the 49th parallel
- Starting in 1973 with the James Bay and Northern Quebec Agreement there have been another 16 modern treaties between First Nations and Canada
- Each of these eras has its own social, economic, and political distinctiveness that must be considered in order to approach a satisfactory understanding of the treaties signed within these eras
- Who gets treaty rights? – signatories to individual treaties and the descendants of that group
- S 25 + 35 of the *Constitution* exclusively recognize treaty rights
- Pre-1982, a treaty right could be extinguished by clear and plain intent on the part of the government
- Now, legislation cannot extinguish treaty rights in and of itself (they are constitutionally protected)
    - Legislation cannot stop you from doing something you have a treaty right to do
        - Unless the right is justifiably infringed

Aboriginal Treaty Right Test

- Three kinds of treaties: peace & friendship, numbered, and modern treaties

1. Characterize the treaty right in question
2. Does the treaty protect the right? Consider treaty text, common intention of the parties, oral history evidence, aboriginal perspective, internal limits
3. Has the treaty right been extinguished?
4. Has the treaty right been interfered with
5. Has the treaty right been justifiably infringed (*Sparrow/Badger)*

***R v Marshall* – how we should approach treaty rights**

Facts: - Marshall, a Mi'kmaq citizen, was charged with selling 463 pounds of eels for $787 without a licence, contrary to federal regulations made pursuant to the *Fisheries Act*

- Marshall argues he was entitled to sell the eels by virtue of a treaty right agreed to by the BC Crown
- The issue at trial was whether Marshall had an existing treaty right that exempted him from compliance with the federal legislation
- In 1760, Aboriginal leaders in the Maritimes asked for truck houses [trading posts] 'furnishing them with necessaries, in' Exchange for their Peltry' – however, the written document recording the treaty contained only the promise by the Mi'kmaq not to traffic, barter, or exchange any commodities except with such persons [not with non-government individuals]
- The issue was whether this 'trade clause' framed in negative terms as a restraint on trade reflected the positive right to M people to bring the products of their hunting, fishing, and gathering to a truck-house to trade – the trial judge held there was no positive right and rejected Marshall's defense that he had a treaty right to catch + sell fish

Issues: Does Marshall [and the Mi'kmaq people] have an existing treaty right to catch and sell fish, exempting them from the regulations of the *Fisheries Act*?

Held: Yes – In the absence of any justification for the regulatory prohibitions, the appellant is entitled to an acquittal – appeal allowed and an order to acquit on all charges

Reasons: - Determining the intention of specific words was challenging because the BC government entered into a number of treaties with the M people between 1760 and 1761 that were intended to be consolidated and never were

Evidentiary Sources

- The Court of Appeal took a strict approach to interpreting the meaning of the treaties in 1760/61
- This approach should be rejected because even in a modern commercial context, extrinsic evidence is available to show that a written document does not include all terms of an agreement
    - Only respecting the written words, you are only respecting the party with the pen
    - There were two languages involved in this treaty and one is a written culture and one is an oral culture
    - Wouldn't be fair to the M peoples
- The Court's obligation is to choose from among the various possible interpretations of the *common (*implied as used in class) intention at the time the treaty was made

The 1760 Negotiations

- The NS judgements erred in concluding that the only enforceable treaty obligations were those set out in the written document of March 10, 1760
- It is to both the common intention and the terms of the treaty that effect must be given

    - the trade clause would not have advanced British objectives or M objectives unless the M were assured of continuing access to wildlife and trade

The Rights of Other Inhabitants

- The treaty rights-holder not only has the right or liberty 'enjoyed by other British subjects' but may enjoy special treaty protection against interference with its exercise
- The fact that the content of M rights under the treaty to hunt and fish were no greater than those enjoyed by other inhabitants does not [unless those rights were extinguished prior to April 17, 1982] detract from the higher protection they presently offer to the M people

The Honour of the Crown

Principle: The honour of the Crown is always at stake in its dealings with AB peoples

- An interpretation of events that turns a positive M trade demand into a negative M covenant is inconsistent with the honor and integrity of the Crown
- Also, inconsistent to conclude that the LG, seeking in good faith to address trade demands of the M people, accepted the M suggestion of a trading facility while denying any treaty protection to M access to the things that were to be traded, even though these things were identified and priced in the treaty negotiations
- The trade aranngement must be interpreted in a manner which gives meaning and substance to the promises made by the Crown

The Limited Scope of the Treaty Right

- Crown expresses concern that recognition of a constitutionally entrenched right [as here w/ trading] would open floodgates to uncontrollable and excessive exploitation of natural resources – this is based on a misunderstanding of the narrow ambit and extent of the treaty right
- Here, what is contemplated is not a right to trade for economic gain, but a right to trade for necessaries – the treaty right is a regulated right and can be contained by regulation within its proper limits
- Necessaries = 'moderate livelihood' [Van der Peet] → includes basics such as food, clothing and housing, supplemented by a few amenities but not the accumulation of wealth – addresses day-to-day needs
    - Had Marshall been fishing for $700 worth of eels every day of the year, that may take it out of the bounds of moderate livelihood

Application to the Facts

- There is nothing in the regulations which gives direction to the Minister to explain how he/she should exercise the discretionary authority to grant licences in a manner which would respect Marshall's treaty rights
- The *Adams* test is applied to licencing schemes:
    - Parliament cannot adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance
    - In the absence of specific guidance, the statute will fail to provide representatives of the Crown w/ sufficient directives to fulfill their fiduciary duties + the statute will be found to represent an infringement of aboriginal rights under Sparrow
- *Badger* held that the test for AB rights and treaty rights is the same and thus *Adams* is applicable in this case
- Under the applicable regulatory scheme, the appellants' exercise of his treaty right to fish and trade for sustenance was exercisable only at the discretion of the Minister
    - M treaty rights were not accommodated in the regulations because the Crown's position was that no such rights existed
- The regulatory prohibitions against fishing without a license and selling eels without a license do prima facie infringe the appellant's treaty rights under the Treaties of 1760-61 and are inoperative against the appellant unless justified under the Badger/Sparrow test
- The Court has held on numerous occasions that there can be no limitation on the method, timing, and extent of Indian hunting under a Treaty – apart from a treaty limitation to that effect
- The appellant caught + sold eels to support himself and his wife – the imposition of a discretionary licensing system would interfere with the appellant's treaty right to fish for trading purposes and the ban on sales would infringe his right to trade for sustenance

Notes: This case establishes that when there are discrepancies between Crown and AB expectations, we should resolve them in favor of the AB peoples

Marshall No 2

- Make notes from pg. 613

Grassy Narrows First Nations v Ontario (Natural Resource)

Facts: Treaty 3 → The Ojibway FN yielded ownership of their territory (except for certain reserve lands), receiving in return the right to harvest the non-reserve lands surrender by them until such time as the land was "taken up"

- Taken up could mean settlement, mining and lumbering by the Dominion of Canada

- Appellants are descendants of the Ojibway and are challenging a forestry licence issued by Ontario that authorized forestry operations in areas under Treaty 3
- Trial judge found that the "taking up" clause imposed a two-step process (involving provincial authorization and then federal approval) before any lands covered by the treaty could be taken up
- Court of Appeal reversed this finding

Issues: Whether ON can "take up" lands in the Keewatin area under Treaty 3 so as to limit the harvesting rights under the treaty, or whether it needs federal authorization to do so

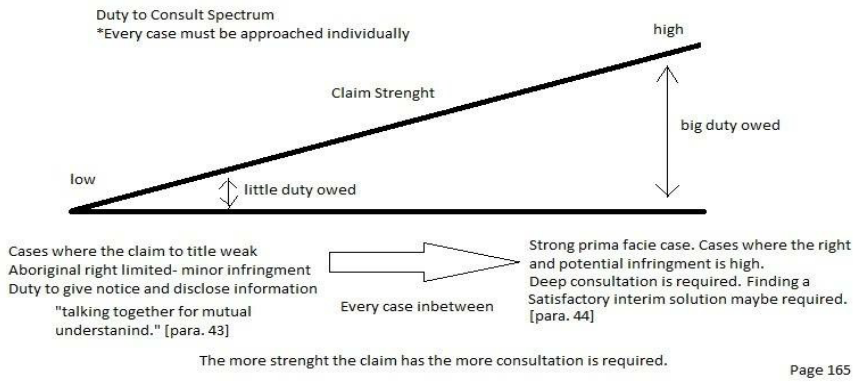
Held: ON had the authority to take up lands in the Keewatin area so as to limit the harvesting rights set out in Treaty 3

Reasons: - By virtue of ss 109, 92(A) and 92(5) of the *Constitution Act, 1867*, ON alone has the ability to take up Treaty 3 land and regulate it in accordance with the treaty and its obligations under s 35 of the *Constitution*

- A two-step process involving federal approval for provincial taking up was not contemplated by Treaty 3
- Once the Keewatin lands came within ON borders in 1912, s 109 of the *Constitution* became applicable
- S 109 established conclusively that ON holds the beneficial interest in the Keewatin lands and the resources on or under those lands
- S 92(5) gives the Province the exclusive power over the "management and sale of the public lands belonging to the Province and of the timber and wood thereon"
- S 92A gives the Province exclusive power to make laws in relation to non-renewable natural resources, forestry resources and electrical energy
- All together, these provisions give ON the power to take up lands in the Keewatin area under Treaty 3 for provincially regulated purposes, such as forestry
- The view that only Canada can take up, or authorize the take up of, lands under Treaty 3 rests on a misconception of the legal role of the Crown in the treaty context
    - It's true that treaty 3 was negotiated with the Crown in the right of Canada but that doesn't mean that the Crown in right of ON is not bound by and empowered to act in respect to that treaty
- The promises made in Treaty 3 were promises of the Crown, not those of Canada
    - Both levels of government are responsible for fulfilling these promises when acting within the division of powers under the *Constitution*
- When the lands covered by the treaty were determined to belong to the Province of ON, the Province became responsible for their governance with respect to matters falling under its jurisdiction by virtue of ss 109, 92A and 92(5)
- S 91(24) allows the federal government to enact legislation dealing with Indians and lands reserved for Indians, but this only has an incidental effect on provincial land
- The applicability of provincial legislation that affects treat rights through the taking up of land is determined by *Mikisew* and s 35
- ON's power under treaty 3 is not unconditional
    - The province is bound by the duties attendant on the Crown
    - It must exercise its powers in conformity with the honour of the Crown and is subject to the fiduciary duties that lie on the Crown in dealing with AB interests
- When a *government* exercises Crown power, the exercise of that power is the burden by the Crown obligations toward the AB people in question
- Where a province intends to take up lands for the purposes of a project within its jurisdiction, the Crown must inform itself of the impact the project will have on the exercise by the Ojibway and their rights to hunt, fish, and trap
    - Must deal with the O in good faith

THE DUTY TO CONSULT

- **SOURCE:** Grounded in honour of the Crown and *sui generis* relationship with Aboriginal societies (*Haida*) and there is a constitutional duty (where sec. 35 is engaged). Does not extend to third parties, only the Crown has a legal duty to consult with aboriginals (i.e. Weyerhauser in *Haida*) because the duty arises out of the Crowns honor in the "special relationship" it has with aboriginals, which does not exist with third parties.
- **DEFN:** Must reasonably ensure that AB peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action (*Mikisew*)
    - DTC is low, only duty on Crown may be to give notice, disclose information, and discuss any issues raised in response to notice (*Haida)*
    - DTC is high, may entail opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision (*Haida*)



TRIGGER for DTC: (*Haida*)

- **When there is knowledge (real or constructive) of Aboriginal right or title and contemplates conduct that might adversely affect it**
- Duty to consult must be discharged prior to carrying out the action that could adversely affect the right
- Where Aboriginal title is unproven, the Crown owes a procedural duty imposed by the HOC to consult, and if appropriate, accommodate the unproven Aboriginal interest
- Knowledge of a credible, but unproven claim suffices to trigger a duty to consult and accommodate but the content of the duty varies with the circumstances

Haida Nation v British Columbia (Minister of Forests)

Facts: - involved a claim launched, but not resolved, by the Haida peoples to the lands of Haida Gwaii and the waters surrounding it

- 1961 → Province of BC issued a licence that permitted a private firm to harvest trees in a designated area of HG
- 1999 → the government approved a transfer of the licence to Weyerhaeuser Co
- The Haida challenged the action and sought an order that the replacements and transfer be set aside
- At the CA, it was declared that the government and Weyerhaeuser both owed a duty to consult and accommodate the Haida with respect to harvesting the time, even though common law AB title to the lands in question had not yet been resolved
- DIFFERS FROM OTHER CASES: this is not a justification of an infringement, it's deciding if there is an AB right (title) that requires consultation

Issues: How do you know when there is a duty to consult with AB peoples, and what does the duty entail?

Held: The Crown's appeal is dismissed, and Weyerhaeuser's appeal is allowed

- The BCCA's order is varied so that the Crown's obligation does not extend to Weyerhaeuser

Reasons:

When the Duty to Consult and Accommodate Arises

- Honourable negotiations imply a duty to consult with AB claimants and conclude an honourable agreement reflecting the claimant's inherent rights
- The Crown, acting honourably, cannot cavalierly run roughshod over AB interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof
    - It must respect these potential, but yet unproven, interests
- To unilaterally exploit a claimed resource during the process of proving and resolving the AB claim to that resource, may be to deprive the AB claimants or some or all of the benefit of the resource
- Neither the authorities nor practical considerations support the view that a duty to consult and, if appropriate, accommodate, arises only upon final determination of the scope and content of that right
- The jurisprudence supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution
- Reconciliation is not a final legal remedy
    - Rather, it is a process flowing from rights guaranteed by s 35(1)
    - This proves flows from the Crown's duty of honourable dealing toward AB people and *de facto* control of land and resources that were formerly in the control of that people
- To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the "meaningful content" mandated by the "solemn commitment" made by the Crown in recognizing and affirming AB rights and title
    - When the distant goal of proof is finally reached, the AB peoples may find their land and resources changed and denuded and this isn't reconciliation
- The foundation of duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the AB right or title and contemplates conduct that might adversely affect it
- Consultation and accommodation before final claims resolution, while challenging, is not impossible, and indeed is an essential corollary to the honorable process of reconciliation that s 35 demands

The Scope and Content of the Duty to Consult and Accommodate

- Varies with the circumstances
- The scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed

- In all cases, the honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances
    - In discharging this duty, regard may be had to the procedural safeguards of natural justice mandated by administrative law
- Good faith is required by both sides
- There is no duty to agree; rather, the commitment is to a meaningful process of consultation
    - Mere hard bargaining will not offend an AB people's right to be consulted
- A concept of spectrum is helpful to determine what duty arises in different situations
    - One end lies cases where the claim to title is weak, the AB right limited, or the potential for infringement minor
        - In these cases, the only duty on the Crown may be to give notice, disclose information and discuss any issues raised in response to the notice
    - At the other end lies cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the AB peoples and the risk of non-compensable damage is high
        - In these cases, deep consultation, aimed at finding a satisfactory interim solution may be required
    - Between these two situations will lie other situations → every case must be approached individually
- When the consolation process suggests amendment of Crown policy, we arrive at the stage of accommodation
    - The effect of good faith consultation may be to reveal a duty to accommodate
- This process does not give AB groups a veto over when can be done with land pending the final proof of the claim

NOTES

Taku River Tlingit First Nations v British Columbia (Project Assessment Director)

- Decided at the same time as *Haida*
- In this case, which arose in the context of ongoing treaty negotiations, the court determined that the provincial government's duty to consult with the Taku River Tlingit First Nations (TRTFN) was engaged because the proposed action – the construction of a 160km long road through the group's traditional territory to reopen an old mine – could significantly and negatively affect the TRTFN
- The court went on to hold that the provincial government had consulted and fulfilled its duty to accommodate before approving the reopening of the mine
    - This was accomplished through the environmental assessment that was conducted, which included consultation with interested Aboriginal groups, including the TRTFN
- Not all of the TRTFN were addressed when the final construction plan was approved
    - However, court was satisfied that the assessment committee had given sufficient attention to the specific issues raised by the TRTFN both in the initial assessment process when the group brought forward additional concerns after the assessment's report
- The Province was not under a duty to reach agreement with the TRTFN and its failure to do so did not breach the obligations of good faith that it owed to the TRTFN

Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)

- Involved the Crown taking up lands surrendered under a treaty (8) to build a winter road to meet regional transportation needs
- The proposed road would reduce the territory over which the Mikisew would be entitled to exercise its treaty rights to hunt, fish and trap
- Court found that the Crown had a duty to consult which it breached
- The Crown did have a right to "take up" surrendered lands, but it was nevertheless under the obligation to inform itself about the impact its project would have on the Mikisew exercise of their treaty rights
- The Crown was then required to attempt to deal with the Mikisew in good faith and with the intention of substantially addressing their concerns
- The road had some negative impacts on the Mikisew and the Crown therefore had a duty to consult
    - The road wasn't creating *that* large of an impact so the duty to consult was on the lower end
    - Duty more required that the Crown provide notice and listen to concerns

Rio Tinto Alcan Inc v Carrier Sekani Tribal Council

- Add class notes

Beckman v Little Salmon/Carmacks First Nations

<u>*Facts:*</u> - 1997, after 20 years of negotiations, the Little Salmon/Carmacks FN completed a land claim agreement with Canada and the Yukon territory

- As part of the treaty, members of the LSCFN secured access to Crown lands for subsistence hunting and fishing activities

- 2004, Yukon gov't transferred 65 hectares of this land to a non-native man who had applied on an agricultural land grant in 2001
    - conflict arose because the land was being used by the LSCFN
- Binnie J found that the Crown had a duty to consult the FN about this change of use of land
    - Duty existed outside of the treaty as part of the Crown's ongoing constitutional duty to FNs

<u>Issues:</u> What is the Crown's obligation to the First Nation when Crown land is transferred to individual, non-native use?
<u>Held:</u> There was a duty to consult (on the low end of the spectrum)
<u>Ratio:</u> - Modern treaties are still subject to the honour of the Crown
<u>Reasons:</u> - the reconciliation of AB and non-AB Canadians in a mutually respectful long-term relationship is the grand purpose of s 35 of the *Constitution*

- The modern treaties attempt to further the objective of reconciliation not only be addressing grievances over the land claims but by creating the legal basis to foster a positive long-term relationship between AB and non-AB communities
- Thoughtful admin of the treaty will help manage, even if it fails to eliminate, some of the misunderstandings and grievances that have characterized the past
    - The treaty will not accomplish its purpose if it is interpreted by territorial officials in an ungenerous manner of as if it were an everyday commercial contract
- However, the LSCFN is bound to recognize the $34mil and other treaty benefits it received in exchange to surrender
    - This gave the gov't a measure of flexibility in taking up surrendered lands for other purposes

The Role and Function of the LSCFN Treaty

- The LSCFN treaty is a major advance over what happened in the past
- The LSCFN treaty provides a solid foundation for reconciliation and the territorial government is correct that the LSCFN treaty should not simply set the stage for further negotiations from ground zero
    - Just must keep in mind that the honour of the Crown is *always* at stake during negotiations
- *Haida Nation* represented a shift in focus from *Sparrow*
    - The court in *Sparrow* had been concerned about sorting out the consequences of infringement, *Haida* attempted to head of such confrontations by imposing on the parties a duty to consult and (if appropriate) accommodate in circumstances where development might have a significant impact on AB rights when and if established
- Consultation in some meaningful form is the necessary foundation of a successful relationship with AB peoples
    - Works to avoid the indifference and lack of respect that can be destructive of the process of reconciliation that the Final Agreement is meant to address
- The decision maker was required to take into account the impact of allowing the land application on the concerns and interests of members of the FN
    - Consultation was required to address these concerns

The Source of the Duty to Consult is External to the LSCFN Treaty

- The duty to consult is treated in the jurisprudence as a means of upholding the honour of the Crown
    - The Crown cannot contract out of its duty to consult
- It is a doctrine that applies independently of the expressed or implied intention of the parties
- Cannot call the LSCFN a 'complete code'
- The duty is at the lower end of the spectrum
    - LSCFN should have been given notice and a chance to make concerns aware
    - No duty to accommodate

METIS RIGHTS

- *Van der Peet* → "the history of the Metis, and the reasons underlying their inclusion in the protection given by s 35 are quite distinct from those of other AB peoples in Canada"
- Metis compelled MacDonald to recognize their interests
- The *Manitoba Act* was created as a result of negotiations between Metis and the government of Canada
- The Metis' regarded the *Manitoba Act* as embodying a treaty that recognizes and affirms their nation-to-nation relationship with Canada, even though its provisions concerning land and resources were not fulfilled

R v Powley

<u>Facts:</u> - Steve Powley and his son were charged with unlawfully hunting moose and knowingly possessing game hunted in contravention of the *Game and Fish Act*

- They admitted to killing the moose without a hunting licence, but claimed that as Metis, they had an AB right to hunt for food in the Sault Ste. Marie arear and that this right could not be infringed on without justification

<u>Issues:</u> Do the Powley's, as Metis, have an AB right to hunt for food?
<u>Held:</u> Yes – appeal dismissed
<u>Reasons:</u>
The Van der Peet Test

- The emphasis on prior occupation as the primary justification for the special protection accorded AB rights led to the majority in *Van der Peet* to endorse a pre-contact test for identifying which customs, practices or traditions were integral to a particular AB culture, and therefore entitled to constitutional protection
- The majority also recognized that the pre-contact test might prove inadequate to capture the range of Metis customs, practices or traditions that are entitled to protection
- The purpose of s 35 as it relates to Metis is different from that which relates to the Indians and Inuit
- The *Van der Peet* test must be modified in regard to pre-contact when dealing with Metis issues
    - Must account for the unique post-contact emergence of Metis communities, and the post-contact foundation for their AB rights

1. *Characterization of the Right*
    - First step is to characterize the right being claimed
    - AB hunting rights are contextual and site-specific
    - The respondents shot a moose within the traditional hunting grounds of their Metis community
        - Also made a point of documenting that the moose was for food for the winter
    - The right being claimed is therefore a right to hunt for food in the environs of Sault Ste Marie
2. *Identification of the Historic Rights-Bearing Community*
    - History shows that the settlement in Sault Ste Marie was one of the oldest and most important Metis settlements in the upper lakes area
3. *Identification of the Contemporary Rights-Bearing Community*
    - AB rights are communal rights
    - They must be grounded in the existence of a historic and present community and they may only be exercised by virtue of an individual's ancestrally based membership in the present community
    - The TJ found that a Metis community has persisted in and around Sault Ste Marie despite its decrease in visibility after a treaty signing in 1850
        - SCC does not take this "invisible entity" to mean that the community ceased to exist or disappeared entirely
    - Despite the changes post-treaty, the metis continued to live in much the same manner as they had in the past – hunting, fishing, trapping and harvesting other resources for their livelihood
    - European control interfered but did not eliminate this community
    - There was never a lapse; the Metis community went underground, so to speak, but it continued
    - The "continuity" requirement puts the focus on the continuing practices of members of the community, rather than more generally on the community itself
4. *Verification of the Claimants Membership in the Relevant Contemporary Community*
    - May be harder to determine membership in a Metis community, but Metis people are full-fledged rights bearers
    - Courts currently must ascertain Metis identity on a case-by-case basis
        - This inquiry takes into account both the value of community self-definition, and the need for the process of identification to objectively verifiable
        - The criteria for Metis identity under s 35 must reflect the purpose of this constitutional guarantee: to recognize and affirm the rights of the Metis held by virtue of the continuity between their customs and tradition and those of their Metis predecessors
    - Until a formal way of recognizing Metis membership is formed, the Court looks at 3 broad factors as indicia of Metis identity for the purpose of claiming Metis right under s 35
        1. Self-identification
            - Claimant must self-identify as a member of a Metis community
        2. Ancestral connection
            - Evidence must be presented
            - The objective requirement ensures that beneficiaries of s 35 rights have a real link to the historic community whose practices ground the right being claimed
        3. Community connection
            - The core community acceptance is past and ongoing participation in a shared culture, in the customs and traditions that constitute a Metis community's identity and distinguish it from other groups
5. *Identification of the Relevant Time Frame*
    - The unique status of the Metis as AB people with post-contact origins requires an adaptation of the pre-contact approach to meet the distinctive historical circumstances surrounding the evolution of Metis communities
    - The test for Metis practices should focus on identifying those practices, customs and traditions that are integral to the Metis community's distinctive existence and relationship to the land
    - The unique history can most appropriately be accommodated by a post-contact but pre-control test that identifies the time when Europeans effectively establish political and legal control of a particular area
    - Focus should be on the period after a particular Metis community arose and before it came under the effective control of European laws and customs
6. *Determination of Whether the Practice is Integral to the Claimants' Distinctive Culture*

- The practice of subsistence hunting and fishing was a constant in the Metis community, even though the availability of particular species might have waxed and waned
- Subsistence hunting was an important aspect of Metis life and a defining feature of their special relationship with the land

7. *Establishment of Continuity Between the Historic Practice and the Contemporary Right Asserted*
   - S 35 reflects a new promise: a constitutional commitment to protecting practices that were historically important features of particular aboriginal communities
   - A certain margin of flexibility might be required to ensure that AB practices can evolve and develop over time
   - Hunting for food was an important feature of the Sault Ste Marie community and the practice has been continuous to the present
8. *Determination of Whether or Not the Right was Extinguished*
   - The doctrine of extinguishment applies equally to the Metis and to the FNs
   - There is no evidence of extinguishment here
     - Crown argued it was extinguished via treaty, but the treaty explicitly excluded Metis
9. *If There is a Right, Determination of Whether There is an Infringement*
   - ON currently does not recognize any Metis right to hunt for food or any "special access to natural resources"
   - This lack of recognition, and the consequent application of the challenged provisions to the Powelys, infringed their AB right to hunt for food
10. *Determination of Whether the Infringement is Justified*
    - Main justification from the Crown was conservation
    - Record does not support this justification
    - Even if the moose population in this area were under threat, the Metis would still be entitled to a priority allocation to satisfy their subsistence needs in accordance with the criteria in *Sparrow*
    - ON's blanket denial of any metis right to hunt for food cannot be justified

Daniels Case – 2015 SCC
- SCC confirmed that federal jurisdiction over lands that are held by Indians extends to Metis and non-status Indians
- S 24 was meant for a broad jurisdiction over Indigenous peoples

THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

RIGHTS BEFORE THE CHARTER

IMPLIED BILL OF RIGHTS

- Prior to the Charter, the Constitution did not expressly limit the legislative authority of Parliament or a province to interfere with fundamental freedoms
- "Implied bill of rights" → suggests that the Constitution itself, perhaps as a result of the preamble in the *BNA Act*, implies that there is a zone of liberty into which the state must not unjustifiably enter, regardless of whether the legislation in question is federal or provincial
  - Common law bill of rights
  - Constitutional liberty/Parliamentary democracy → good sense and right feeling of the people
  - Rule of law (legal equality)
  - Provincial rights
  - Minority rights – s 93(1) minority education rights and s 133 language rights

Reference re Alberta Statutes

Facts: - Pertains to the following statutes: *The Bank Taxation Act; The Credit of Alberta Regulation Act; and the Accurate News and Information Act*
- 1930s→ The Social Credit government of Alberta is elected and it's a dramatic event
- The gov't imposed social credit, which people had to spend to maintain the balance between payments and production
- The newspaper accounts of the election victory and this economic policy were hostile
- The gov't imposed the *Publication of Accurate News and Information* Bill as a result of this hostility
  - Newspapers were required to publish statements that it considered necessary to correct public misapprehension
  - Were also required to publish their sources
- The LG refused to assent the bill and two others about economic policy

Question: What is the extent of the powers of Alberta to enact these bills?
Held/Answer: The power is *ultra vires* the Province of Alberta and all three bills are *ultra vires*

Reasons: - The type of credit that the gov't is trying to impose will not work unless everyone is induced to believe in it and help it along

- It is essential to control the sources of information of the people of Alberta, in order to keep them immune from an vacillation in their absolute faith in the plan of the government
- The bill aims to control any statement relating to any policy or activity of the government of the province and declares this object to be a matter of public interest
- The pith and substance of this bill is to regulate the press of AB from the viewpoint of public policy by preventing the public from being misled or deceived as to any policy or activity of the Social Credit Government and by reducing any opposition to silence or bring it upon it and ridicule the public contempt
- Cannon J agrees with the AG (Canada) that this bill deals with the regulation of the press of Alberta from the viewpoint of public wrongs or crimes
    - AG argues this invades the criminal law → goes outside the scope of private law and private matters
- No political party can erect a prohibitory barrier to prevent the electors from getting information concerning the policy of the government
    - Freedom of discussion is essential to enlighten the public opinion in a democratic society; it cannot be curtailed without affecting the right of the people to be informed through sources independent of the government concerning matters of public interest
- Democracy cannot be maintained without its foundations: free public opinion and free discussion throughout the nation of all matters affecting the State within the limits set by the criminal code and the common law
- Alberta can deal with a person's property and civil rights, but they cannot interfere with their rights as a Canadian
    - i.e. fundamental freedoms
- These Bills interfere with the free working of the political organizations of the Dominion
    - They cannot be considered as dealing with matters purely private and local in nature
- The federal government is the sole authority to curtail, if deemed expedient and in the public interest, the freedom of the press in discussing public affairs and the equal rights in that respect of all citizens throughout the Dominion
- These subjects are matters of criminal law and have been expressly dealt with in the *Code*
- Citizens outside the province of AB have a vital interest in having full information and comment, favorable and unfavorable, regarding the policy of the AB government and concerning events in that province

Duff CJ: - The practice of the right of free public discussion of public affairs is the breath of life for parliamentary institutions

- Parliament possess authority to legislate for the protection of this right

Saumur v City of Quebec

Facts: - ongoing struggle between the Quebec government and Jehovah's witness

- Prosecution under bylaws regulating the distribution of pamphlets in the streets was one of the principal ways in which the government sought to silent he Witnesses
- Saumur was charged and convicted under a bylaw of this kind, and brought an action for a declaration that it was *ultra vires*

Issues: Whether the bylaw issued by Quebec is *ultra vires*

Held: The bylaw is invalid

Reasons: - first inquiry is to the real nature and character of the bylaw – in what substance and aspect of legislative matter is it enacted?

- The practice under the by-law demonstrates that the language comprehends the power of censorship
- The only legislative powers that may validate this law are s 92(13) and (16)
- However, civil rights arise from positive law; but freedom of speech, religion and the inviolability of the person, are original freedoms which are not at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order
- Religion is not a matter of civil rights or local in nature
    - They are a national right
- What is proposed is that a newspaper, just as a religious, political or other tract or handbill, for the purposes of sale or distribution through use of the streets, can be placed under the uncontrolled discretion of a municipal officer; that is, that the province, while permitting all others, could forbid a newspaper or any writing of a particular colours from being so disposed of
- If there were a neutral requirement to restricting publications, this law may have survived
- Its sole effect is to create and vest in a functionary power, to be exercised for any purpose or reason he sees fit, disclosed or undisclosed
- The only practice actually followed is not remotely connected with street regulation
- To authorize action which may be related indifferently to a variety of incompatible matters by means of the device of discretionary licence leaves the Court powerless to delineate and preserve valid power in a segregated form

- If the purpose is street regulation, etc, the language must, with sufficient precision, define the matter and mode of administration; and by no expedient which ignores that requirement can constitutional limitations be circumvented

Dissent: - a bylaw may be valid even if the aim of the municipal council is bad

- The bylaw says nothing of the fact that it targets JWs
- No need to search behind the text which it adopted to see what its aim could have been in making it
- Would go even further to say that the use of streets in a municipality is unquestionably a local matter
- Cannot see how this does not fall entirely under s 92

Switzman v Elbling and the AG of Quebec

Facts: - Essentially a challenge to the *Padlock Act* to control communism

- Switzman's landlord brought an action to evict him because he had used the leaved premises for purposes prohibited by this section

Issues: Whether this section of the *Padlock Act* is *ultra vires*

Held: Yes

Reasons: - The prohibition of political expression as an evil would be within the scope of criminal law

  - It is sufficient to say that this not a matter within the regulation of a Province

- Freedom of religion does not fall exclusively within the federal jurisdiction and can fall to other levels
- Apart from sedition, obscene writings and criminal libels, the public law leaves the literary, discursive and polemic use of language in the broadcast sense free
- The object of the legislation here, as the title expresses, is to prevent the propagation of communism and bolshevism
- The ban is directed against the freedom or liberty of the actor – no civil right or anyone is affected nor is any civil remedy created
- The aim of the statue is, by means of penalties, to prevent a poisoning of men's minds, to shield the individual from exposure of dangerous ideas, to protect him from his own thinking propensities
  - None of this falls within s 92(13)
- Ban as a local matter under s 92(16) → the freedom of discussion in Canada, as a subject matter of legislation, has a unity of interest and significance excluded from s 92(16) as a local matter
  - Preamble says we should be similar to the UK

Abbott J: - the impugned statue does not deal with matters of s 92(13) or 92(16)

- Parliament itself could also not abrogate the right of discussion and debate – the power to limit it is restricted to powers as may be exercisable with respect to criminal law and to make laws under POGG
- Maybe neither level should be able to enact these laws

Dissent: - If the provincial legislature has no power to create criminal offences, it has the power to prevent crimes, disorders as treason, sedition, illegal public meetings → it therefore, may validly legislate as to the possession and use of property

  - As this is exclusively within the domain of civil law + by s. 92(13) is within provincial competence

- Appeal should be dismissed

Dupond v City of Montreal et al

Facts: - By law prohibiting parades or gatherings (requires license and bans parades for 30 days)

- The bylaw is challenged on two grounds: (1) as an invasion of criminal law power and (2) as an infringement of the fundamental freedoms of speech, assembly, and association, the press and religion
- When a city passes a bylaw, it is examined under Provincial Powers (provinces gave municipalities the power to enact bylaws)
- SCC upholds by-law (SCC split similar to McNeil)

Issues: Whether the bylaw is *intra vires* the Municipality of Montreal

Held: Yes

Reasons: On the second submission:

1. None of the freedoms referred to is so enshrined in the Constitution as to be above the reach of competent legislation
2. None of those freedoms is a single matter coming within exclusive federal or provincial competence
3. Freedoms of speech, of assembly and association, of the press and of religion are distinct and independent of the faculty of holding assemblies, parades gatherings, demonstrations or processions on the public domain of a city
4. The right to hold public meetings on a highway or in a park is unknown to English law
   - Could be trespass or nuisance
5. The holding of assemblies, parades or gatherings on the public domain is a matter which, depending on the aspect, comes under federal or provincial competence depending on the aspect
6. The *Canadian Bill of Rights*, assuming it has anything to do with the holding of assemblies on the public domain, does not apply to provincial and municipal legislation

CHARTER HISTORY

THE CANADIAN BILL OF RIGHTS

- 1960 → Parliament enacts the *Canadian Bill of Rights*
- Two external influences were clear and important:
    - International declaration about rights, especially the Universal Declaration of Human Rights adopted by the UN (stemming from the holocaust)
    - The American Bill of Rights and the liberal interpretations by the SCC
- *Board of Education* – landmark decision on equality between blacks and whites
- One large factor was probably the fears about regulation by legislatures and admin agencies
    - Troubles about the denials of civil liberties + treatment of Japanese Canadians during the war
- Issues implementing the Bill – no amending formula and the move from parliamentary supremacy to judicial supremacy

The Canadian Bill of Rights, RSC 1985

- The *Bill of Rights* is simply a statute of Parliament and not entrenched, like the *Constitution*
- Two consequences follow
    1. It governs only matters within federal government's power
    2. It can be amended like any other statute, although no significant amendments have been made
- The Bill also presented two major problems for the courts:
    1. Its effects on other statutes – according to its own terms, the Bill had no effect on a statute that declared that it was to be effective regardless of the Bill
    2. How should courts approach the Bill? Should its grants of rights be interpreted expansively or restrictively?
- Decisions were usually disappointing to those who thought the SCC would approach it sympathetically and liberally
- *R v Drybones*
    - Indian Act – held that an Indian intoxicated off reserve was guilty of an offence
    - Liquor Ordinance of NWT – creates an offence to be intoxicated in public
    - Drybones was charged under the *Indian Act* and challenged the section saying it violated his rights to equality under s 1(b) of the Bill
    - SCC dismissed an appeal by the Crown from an acquittal
    - Rejected the approach that the Bill was simply a guide to interpretation and said it could have an impact as it is quasi-constitutional
    - Courts must allow for previous law to be *inoperative* if it conflicts with the Bill of Rights
    - Where conflict arises between Bill of Rights and an earlier statute, the statute would be inoperative
    - Ritchie – no individuals are to be treated more harshly than another under the law and an individual is denied equality under the law if it is an offence for him to do something which his fellow Canadians are free to do without having committed an offence
- During the 70s and 80s, several SCC members announced that the Bill (and similar provincial bills) prevailed over later statutes
- "Frozen Rights" approach – a denial of expansive interpretation
    - S 2 did not create *new* rights; its purpose was to prevent the infringement of *existing* rights
- *AG Canada v Lavell* 1974 → Indian woman who married non-Indian man and lost her registration, challenged the Indian Act because there was no similar provision for man
    - Rejected by SCC – the impugned section could still be enforced without denying equality of treatment in the administration of the law. As long as treatment was the same for all status Indian women
- *Bliss v AG Canada* – Unemployment Insurance Act established a program of benefits for women whose employment was interrupted because of pregnancy but imposed a longer qualifying period for women claiming these benefits than for individuals claiming regular benefits
    - It also excluded interruption of employment because of pregnancy from categories of entitlements for regular benefits
    - SCC held that this did not discriminate against her on the specified ground of sex – any inequality between sexes in this area is not created by legislation, but by nature
        - Also, discrimination could not be grounded in the more general term 'equality before the law'
    - SCC said equality meant treating all pregnant women the same
- This decision was displaced in *Brooks v Canada*
- Bill is occasionally used as a ground for decision, but has been almost totally eclipsed by the Charter

THE ADVENT OF THE CHARTER

- The Charter project formally began at a federal-provincial first minister's conference in Jan 1968
- Victoria Charter – all provinces agree to it but would have been a narrower entrenched bill of constitutional rights
    - QB pulled out at the last minute
- Trudeau wanted to unilaterally amend the constitution but gets defeated by Joe Clarke (and ultimately gets re-elected)
- AB and QB do not want a constitutional amendment
    - Trudeau promised QB that if they didn't separate there would be an amendment
    - QB believed it would be more power under s 92, but Trudeau meant adding the Charter
- *Reference re Resolution to Amend the Constitution* is issued by the provinces
    - SCC said that legally, yes, the federal government can unilaterally amend the Constitution without provincial consent, however, it is a constitutional convention that they would need *substantial* provincial consent
- April 1982 – Constitution Act added the Charter, s 35 and the amending formula

The Honourable Pierre Elliot Trudeau, Minister of Justice, A Canadian Charter of Human Rights, 1968

- Human rights, matters which affect individual dignity, are natural rights
    - The rights which all men were entitled to because they are endowed with a moral and national nature
- The denial of these rights was regarded as affront to "natural" law, the elementary principles of justice which apply to all human beings by virtue of their common possession of the capacity to reason
- Natural rights were the origins of the western world's more modern concepts of individual freedom and equality
- Historically, there has been a deep-seated desire for recognition of human dignity
    - This is reflected in the words of the Declaration of Independence
- WWII events were proof of a need to safeguard rights of individuals
- Provinces have introduced human rights legislations and a Quebec Civil Code
- Rights to life, liberty, property, to free speech and free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote – they depend on the outcome of no elections
    - Need to entrench the rights

A Cairns, "Charter Versus Federalism: The Dilemmas of Constitutional Reform"

- Post 1945, the status of parliamentary government in Canada was weakened by the decline of the country of its origin (Britain)
- After war, many of post-war immigrants came from areas where the trusting attitude to the state implicit in the British parliamentary tradition would have been marked as naïve
- Minorities were fearful of being singled out for negative treatment and so were naturally drawn towards idea of judicially entrenched rights and away from parliamentary majoritarian
- Support for the Charter was facilitated by removal of the PC and a national support for the Bill of Rights
    - This was part of the movement that had propelled steps in Canada's independence from GB
- The Charter emerged to fill the gap of a weakened appreciation of Britain and brought entrenched rights, judicial supremacy and enhanced role for the written part of the Constitution
- Society had gone a transformation since WWII – the chief characteristic being a dramatic escalation of nationalism and ethnicity
- Movements behind self-confidence had an international component
- UN was the most influential catalyst behind the transformed climate of Canadian and international opinion
    - Fostered respect for fundamental freedoms and human rights
- Greater influence of US – second half of the 20th century is on the rise

P. Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms"

- Two purposes of the Charter:
    1. To contribute to national unity
    2. To protect rights
- Context the federal gov't made a charter → Quebec demanded major constitutional change giving them more recognition + power [fed gov't did not want any reform in response]
- Believed if constitutional reform was to be pursued, it was essential that Quebec's demands be countered by proposals
- designed to have a unifying effect on Canada – this is when the fed gov't urged that a charter of rights be at the top of the constitutional reform agenda
- Following WWII talk about bill of rights – concern for human rights arising from war against fascism and Canada's obligation under the UN declaration of human rights

- Addition of large numbers of new Canadians w/ no education/experience in liberal democratic values meant that Canada could no longer rely on the British method of protecting civil liberties – a written code was needed
- Trudeau – constitutional strategy [so Quebec would not rely on constitutional reform to solve their problems of political and social modernization]
- Coupling of a constitutional charter w/ Patriation shows how strongly the Trudeau gov't believed in the nation-building potential of a constitutional charter – risked dividing the country in order that it might become more united

L. Weinrib, "Of Diligence and Dice: Reconstituting Canada's Constitution"

- Canadian Constitutional Charter , 1971 [Victoria Charter] → unanimous consensus of all provincial premiers, however Premier of Quebec later withdrew his approval when he failed to achieve his desired resolution on the issue of social policy
- Victoria Charter was more limited than Trudeau's initial proposal – did not guarantee legal rights, economic rights, mobility rights, or egalitarian rights – it expanded protection to 'political freedoms' only [including freedoms of thought, conscience + religion, opinion + expression, and peaceful assembly + association]
- 1978 – Bill C-60 – expanded on Victoria Charter's fundamental freedoms to include protection for freedom of the press,
- right to life, liberty, security; right against deprivation of property contrary to law; right to equality before the law
- Recommendations of Royal Commission on Bilingualism + Biculturalism bore fruit in the creation of language rights guarantees for minority language education

L.E. Weinrib, "Canada's Charter of Rights: Paradigm Lost?"

- With the new rights protection, Canada did not create new special constitutional courts or reconstruct political institutions – vested the new judicial review function in existing courts + marked out an innovative constitutional role for the established legislatures
- Complex array of institutional directives – distinguishes from older texts such as US Bill of Rights which does not refer to judicial review
- The most important elements of the Charter's institutional structure are found in 1) s. 1 – the guarantee + limitation clause; and 2) s. 33 – the notwithstanding or override clause
    - The limitation formula [following post-war model of rights-protecting instruments] requires the state to formulate any exercise of power that limits guaranteed rights
    - The remedial aspirations for the Charter adopt the postwar model of right-protections where the rights only provide one level of constitutional guarantee; the other level is provided by strict terms of the limitation formula
    - The override gives legislatures the last word – unless the constitutional context is transformed/extraordinary consensus for amendment is satisfied
- Limitation/notwithstanding clause mark the culmination of contentious federal-provincial negotiations seeking agreement on a constitutional text for inclusion by amendment into Canada's written constitution
- The Charter reflected Trudeau's dual commitment to liberal democracy under the rule of law + a national citizenship based on rights, including minority language rights designed to counter Quebec nationalism
- Every draft of the Charter included express limitation formulation reflecting the fact that the legitimacy of the judicial role remained a strong concern
- Sustained provincial opposition to the Charter finally produced a compromise draft that subordinated a range of rights to a single, expansive, limitation clause
- As the price for acceptance of the Charter as redrafted in the Joint Committee, 7 premiers exacted agreement to a fall-back mechanism in respect to the rights they considered most controversial – this legislative override or 'notwithstanding' mechanism made it applicable to rights they believed should not rest for final determination in the courts →sub fundamental freedoms, legal rights, and equality rights
- This mechanism allowed legislature to suppress guarantees for up to 5 years – re-enactment was permitted
- Left to final judicial determination were the democratic rights, the mobility rights, and the language rights
- Quebec did not agree w/ this compromise
- The notwithstanding clause allowed for parliament/legislature to assert primacy over specified Charter rights for the duration of its electoral mandate by expressly indicating this desire – judicial affirmation if reasonable limits on rights was not part of this

JUDICIAL REVIEW

- The Charter transformed Canadian politics from a legislative supremacy to a constitutional supremacy

W Bogart, "Courts and Country"

- Two very different models of democracy are at stake

- 1) the power of the ballot is curbed by independent and tenured judges who ensure that rationality and principle are never ejected by impetuous legislatures, rigid bureaucracies, and a dulled citizenry and
- 2) the second model places its confidence in those who can claim the power of the ballot – judge's independence and tenure make them unaccountable, elitist, and unrepresentative

Pros:

1. The entrenched bill of rights allows individuals, particularly those with minority interests, to seek vindication in an open, public, and responsive process as opposed to legislators who may be unresponsive and are more attentive to majority concerns. Judges can protect minority rights as they are not subject to same pressures as Parliament.
2. Ability to unite Canadians
    - Before entrenchment, the structure of Canadian society was significantly influenced by executive federalism, elite form of accommodation dominated by a very small, unrepresentative handful of white males, but not there is protection equally across Canada
3. Use of s. 33 – allows judicial decisions under most of the provisions of the Charter to be overridden by the competent legislative body

Cons:

1. Substantive outcomes and claims that the elected member of government and their agencies have been the more effective vehicle for improving the lives of most Canadians in many circumstances
    a. The assistance of the disadvantaged/poor has more often happened because of legislative action
    b. This argument reveals that courts have been uncaring or actively hostile
    c. Undermines elected officials and gives unelected judiciary more power
2. The best chance for a vigorous, responsive, and respected democracy comes from elected representatives
    a. We should not rely on a small unelected corps
    b. The worry here is that the critical, social, and political questions will be translated into legal issues that will be left to lawyers/judges instead of citizens to work out
3. The costs of access to the courts which privilege the powerful and organized and therefore allow them disproportionate use of judicial review either to dismantle legislation and programs or to shield themselves from attack by government or other groups
    a. Whatever meaning is possible in interpreting the Charter, it will become slanted towards the rich and the organized
    b. Charter is a reflection of the inherent contradiction of liberal ideologies
4. Not democratic → why do a small portion of people get to set the rights and freedoms?
5. Litigation is costly

A Petter, "Immaculate Deception: The Charter's Hidden Agenda"

- The Charter is a regressive instrument more likely to undermine than to advance the interests of socially and economically disadvantaged Canadians

The Nature of Charter Rights

- Charter rights are predominately negative in nature – aimed at protecting individuals from state interference or control (rights 'against') – little reference to positive economic or social entitlements, such as the right to employment, shelter, social services
- The negative nature = a systematic bias in favor of interests of upper-middle class
- The systematic bias is reinforced by a highly selective view of the state
- However, victories that have been won on behalf of workers, unemployed, women, etc. have been achieved in the democratic arena – legislation helped workers have collective bargaining rights, women and labor standards, and minimum wage laws and human rights codes
- Where there has been progress it has come through the democratic rather than judicial arena
- The negative conception of liberty imposed by courts to protect the 'haves' of society has been partially supplanted by positive conception of liberty imposed by legislatures to further interests of 'have-nots'
- HOWEVER, the Charter threatens to slow or reverse this process – the rights + freedoms are predicated on the hostility to legislative action that animated the common law
- What the Charter is likely to do is to allow the courts to chisel away at certain aspects of the regime and to erect barriers to future innovations
- Progressive' Charter decisions will be the exception and not the rule, and looking to the courts to improve legislation is perverse as most legislation was enacted to counteract the laissez-faire individualism of court-made common law
- The message the charter is saying is that the State abuses people's rights and courts are going to protect them (mistrust)

The Nature of the Judicial System

- There are two features of the judicial system that make it an inappropriate forum for advancing the interest of the
- disadvantages –1) the cost of gaining access to the system, and 2) is the composition of the judiciary itself
- The barrier created by money not only denies the disadvantaged access to the courts, it also serves to shape the rights themselves

- Ex. Freedom of expression – who can afford to engage in litigation about this matter? – businesses – therefore, freedom of
- expression will come to reflect business concerns
- Lawyers/judges attitudes tend to reflect the values of the legal system in which they were schooled – unrepresentative and are not elected, are appointed (economically, well-off, white males)

L. Weinrib, "'Limitations on Rights' in a Constitutional Democracy"

- The 'Supremacy of rights' model
- Underlying this model is respect for the equal dignity and autonomy of each member of the community – in interactions w/ the state each individual is autonomous, equal to all others, an end and not a means to others' ends
- This model values independent, highly trained and educated judges as a means of tapping a deeper, long-term political voice
- An independent judiciary unlocks the grip of day to day political deal-making and expediency, offers the politicians relief from final responsibility in an unknowable world, and lends legitimacy to a variety of legal operations, such as applying enacted law to particular circumstances evolving judicial doctrines, and constraining lawmakers to legislative direction and policing constitutional proprieties
- Rights/texts are the product of the historical moment in which they are drafted – need to be read as conditional upon the preservation of the whole system of government committed to those underlying values
- In this model, both the legislature and the courts, working to its own strengths, mold society to its deepest commitments
- Chretien said the role of the courts is to interpret the law where citizens raise claims as a check on what is otherwise the absolute and arbitrary power of the legislatures

PW Hogg and AA Bushell, "The Charter Dialogue Between Courts and Legislature"

- Where the judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the
- relationship between the Court and the legislative body as dialogue
- This dialogue can only take place if the judicial decision to strike down a law can be reversed, modified, or avoided by the ordinary legislative process
- When a court strikes down a law it often offers a suggestion for how the law could be modified to solve the constitutional
- problems – it is rare that the constitutional defect cannot be remedied
- The Charter can act as a catalyst for a two-way exchange between judiciary and legislature on the topic of human rights and freedoms

The Four Features of the Charter that Facilitate Dialogue

1. Section 33 – the power of legislative override
    a. All the legislature needs to do is insert an express notwithstanding clause into a statute and this will liberate the statute from the provisions of s. 2 and ss. 7-15
2. Section 1 – allows for 'reasonable limits' on Charter rights
    a. If a law is struck down because it does not meet the s. 1 justification, the court will explain the measure that would have satisfied s. 1 – this is available to the enacting body and will generally be upheld
3. Sections 7, 8, 9, and 12 – the 'qualified' rights which allow for action that satisfies standards of fairness and reasonableness
4. Section 15(1) – The guarantee of equality rights, which can be satisfied through a variety of remedial measures

- In all 65 cases where the law has been struck down by the SCC for Charter violations – legislative action followed in the vast majority of cases and the typical outcome is new legislation that accomplishes the same legislative objective but more protective of rights
- Judicial decisions can also have an impact on legislation even when the Court does not actually strike down any law
- Judicial review is not a veto over the politics of the nation, but rather the beginning of a dialogue as to how best reconcile the individualistic values of the Charter with the accomplishment of social and economic policies for the benefit of the community as a whole
- Also, judges write reasons for their decisions and explain themselves whereas Parliament does not have to give reasons and bad decisions are subject to appeal and to critique

<u>Other Cons</u>

- Judicial activism → Listening to a bunch of special interests' influences policy – Canadian Civil Liberties Association, Unions, Feminist Groups
- Decisions are made based on the evidence put in front of judges → individual facts; moral questions are solved with what's in front of them and precedent

<u>K Roach – The Supreme Court on Trial</u>

- Because of ss. 1 + 33 which allow governments to limit and even override rights, judges do not have the last word on
- controversial issues of social policy
- The Charter has created a middle ground between the extremes of legislative and judicial supremacy

Vriend v Alberta

Facts: - Vriend was fired from his teaching position because he was a homosexual
- Challenged the Alberta Human Rights Legislation under s 15 of the Charter because sexual orientation was not included in the list of prohibited grounds

Issues: What is the appropriate role of the courts regarding interfering with the role of the legislature?
Held: Vriend's s 15 rights had been violated. The omission of sexual orientation from AB's human rights legislation constituted an unjustifiable violation of s 15
Reasons:
- Ongoing argument that Courts are getting involved in *Charter* issues that should be left to Parliament
- Role of the judiciary is to resolve the dispute that arise as a result of the fact that s 1 allows for reasonable interference
- The Charter's introduction and the consequential remedial role of the courts were choices of the Canadian people through their elected representatives as part of a redefinition of our democracy
- So, courts in their trustee or arbitrator role must perforce scrutinize the work of the legislature and executive not in the name of the courts, but in the interest of the new social contract that was democratically chosen
    - All of this is implied in the power given to the courts under s 24 of the *Charter* and s 52 of the *Constitution*
    - The legislator gave Courts the power of judicial review under s 52
    - The Courts did not give themselves the power
- The Charter has given rise to a more dynamic interaction among the branches of governance
- In reviewing legislative enactments and executive decisions to ensure constitutional validity the courts speak to the legislative and executive branches
    - Holds the branches accountable to each other
- Democratic values and principles under the Charter demand that legislators and executives take these into account, and if they fail to do so, courts should stand ready to intervene to protect these democratic values as appropriate

CONSTITUTIONAL AMENDMENT

- Only a few of the world's constitutions do not entrench amendment procedures authorizing alterations to their text
- Main purpose for the amendment formula is to initiate the process of constitutional amendments to free their constitution from the observed fault without having to write an altogether new constitution

Constitutional Amendment After 1982

- Difficult issues arise in creating an amendment formula:
    - Locus of sovereignty → which institutions should be vested with the power of constitutional amendment?
    - The correct balance to be struck between stability and flexibility
- Provinces in Canada must consent to a constitutional amendment to a *"substantial degree*"
- There are 5 rules for amending the Canadian Constitution, in Part V of the Constitution Act:
    1. General amending formula or '7/50 formula' [s. 38(1)] requires consent of Parliament of Canada + of 2/3 of provinces having at least 50% of the population of Canada – no province alone has a veto on the amendment
        a. An amendment cannot be proclaimed until at least 1 year after the initiation of the amendment unless every province has indicated assent/dissent + dies in 3 years if does not have appropriate support
        b. If amendment transfers educational or cultural powers the province opting out is entitled to compensation
    2. The 'unanimity procedure' [s. 41] requires consent be provided by Parliament and the legislatures of all provinces in relation to amendment to the office of the Queen, the Governor General, and the Lieutenant General if a province
    3. The 'bilateral procedure' [s. 43] deals w/ provisions of the Constitution affecting only some provinces – where an amendment is in relation to a provision affecting one or more, only the legislatures of the provinces affected, and Parliament need to consent
    4. The 'federal unilateral procedure' [s. 44] allows parliament alone to make amendments to the federal executive or House of Commons or Senate – as long as do not affect other powers
    5. The 'provincial unilateral procedure' [s. 45] replaces the old 92(1) of the Constitution Act and allows provinces to amend its constitution provided that the amendment does not affect matters governed by other amending formula
- S. 35(1) – amendments affecting Aboriginal rights will be preceded by a constitutional conference of first ministers and representatives of Aboriginal people – however, do not need consent of Aboriginal people

Evaluating the Amending Formula

Constitutional Amendment After 1982
- Amending formula has been successfully used on 10 occasions since 1982 → 7/50 once for Aboriginal rights, including adding s. 35; s. 44 used twice for new rules governing House of Commons and provide for appointment of Senator from Nunavut; the rest made through s. 43 – federal government and one other province
- 2 significant failures: Meech Lake Accord and Charlottetown Accord → both began as efforts to win Quebec's acceptance of the 1982 constitutional amendments

- Meech Lake - constitutional recognition of QB as a distinct society, entrenchment of the SCC and provincial nomination of its justices, an increase in terms requiring unanimity under the amending formula, and controls on federal spending power. All provinces went in agreeing but at last minute NF and MB pulled out because it did not take full account of Aboriginal rights in amending constitution.
- Charlottetown - many of the Meech lake appeared here as well – along with changes to distribution of powers, an entrenched Aboriginal right to self-government, and an elected Senate with equal provincial representation, and guaranteed level of QB representation in H of C

- Requirements of ss. 38 and 41 meant the accord needed unanimous approval within 3 years – the Meech lake accord died in 1990 and Charlottetown was voted down in 1992'
- Constitutional reform - 'mega-constitutional' politics → the unwillingness of various constitutional actors to undertake piecemeal or incremental constitutional reform, tackling issues one at a time
  - instead complex packages (Meech +Charlottetown) will be the norm into the foreseeable future
- A legal implication - s. 38 + 41 → will apply cumulatively to future packages of constitutional amendments, making amendment very difficult

Is Part V Undemocratic?

- Cairns argued that the dominance of governments in the amending formula is inconsistent with popular sovereignty and the citizens' constitution enshrined in the Charter
  - The amending formula presupposes that federalism is the most important constitutional organizing principle, that gov'ts are the major actors in federalism, and that amendment is a matter of those gov'ts to handle –
  - This 'governments constitution' contrasts with the 'citizens' constitution' [Charter] which presupposes that the citizen-state axis is no less fundamental than the federal-provincial constitutional axis
  - The community message of the charter contradicts the community message of the amending formula
- Monohan argued that the process surrounding the Charlottetown accord illustrates the democratic potential of Part V
- Some say that resort to a referendum during the Charlottetown accord established a constitutional convention of popular ratification of amendments

Relevant Legislation

- Referendum Act, 1982
- Constitutional Amendments 1996 – Gave out constitutional veto's – to ON, QB, BC, AB technically
  - Gave the four big provinces veto power as a response to the Quebec secession request
- Constitutional Referendum Act, RSA, 2000 – AB has to have a referendum before agreeing to any constitutional changes and if AB voting public does not vote for constitutional change, we do not give our consent
  - Still constitutional because not amending the 7/50 formula, but instead setting a higher bar, with more procedural requirements
  - Was a response to the 1995 referendum (Quebec secession)
- Secession Reference Case – If there is a clear democratic expression that gives rise to the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire

CHARTER FRAMEWORK AND INTERPRETATION

- Charter establishes a two-step process for the adjudication of rights claims:
  1. Whether a Charter right has been breached by a state act
  2. If a breach has been found, is it justified under section 1 of the *Charter*?

INTERPRETING RIGHTS

THE PURPOSIVE APPROACH

Hunter v Southam Inc

Facts: - A search of newspaper offices was carried out by the Combines Investigation Branch
- The statutory basis for the search did not require prior judicial authorization

Issues: What does the term 'unreasonable' mean in the s 8 freedom from unreasonable search and seizure?
Held: S. 8 protects an individual's reasonable expectation of privacy – provisions of the Combines Act that allowed the search were invalid. Appeal dismissed.
Reasons: - the guarantee under s 8 is vague and open

- Section 8 protects an individuals reasonable expectation of privacy
- Must first understand the purpose of the section in question and delineate the nature of the interest it is meant to protect and consider the purpose of such a guarantee, including reference to :
    - The character and language of the Charter
    - Historical origins of the concepts enshrined
    - The meaning/purpose of the other specific rights and freedoms which it is associate within the text of the *Charter*
- Then focus on the reasonable/unreasonable impact in the case, not in furthering some valid government objective
- It is not easy to determine the meaning of a word in the Constitution
    - A dictionary definition will not suffice
- A Constitution differs drastically from a statute, which can be amended and repealed
- A constitution is drafted with an eye on the future
    - Its function is to provide a continuing framework for the legitimate exercise of governmental power and when joined by a Charter, the unremitting protection of individual rights and liberties
- It must be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers
    - Judges have the role of guarding this tree
- There needs to be a generous interpretation avoiding what has been calued the 'austerity of tabulated legalism' suitable to give to individuals the full measure of the fundamental rights and freedoms referred to
- The *Charter* is intended to constrain governmental action inconsistent with those rights and freedoms
    - It does not in itself confer any powers, even of 'reasonable' search and seizure, on governments

CHARTER APPLICATION

RWDSU v Dolphin Delivery Ltd

<u>*Facts:*</u> - At issue was the validity of the Court order restraining the appellant union from picketing the premise of the respondent company, Dolphin Delivery

- Union members were engaged in a labour dispute with their employer, Purolator, and they wished to picket Dolphin's premises on the grounds that the company was related to Purolator, and was performing work for Purolator during the strike
- A BC court issued an injunction to restrain the picketing
- On appeal, the union sought to have the injunction overturned on the ground that it violated its member's freedom of expression (2b)
- The first issue related to charter application

<u>*Issues:*</u> Whether the *Charter* applied to the common law

- Whether the *Charter* applied to litigation between private parties

<u>*Held:*</u> Yes

- No

<u>*Reasons:*</u> - Under the first issue, McIntyre used s 52 to hold that the Charter applied

    - S 52 provides that any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect
- Under s 32, the Charter does not apply to litigation between private parties
- S 32 refers to the Parliament and Government of Canada and to the legislatures and governments of the Provinces in respect of all matters within their respective authorities
- The word "government" is used in s 32 of the *Charter* in the sense of the executive (cabinet) government of Canada and the Provinces
- The *Charter*, as determined by s 32, applies to the legislative executive and administrative branches of government
- It will apply to these branches regardless of whether their action is invoked in private or public litigation
- The *Charter* will apply to the common law, whether in private or public litigation
    - It will apply only as far as the common law is the basis of some government action which, it is alleged, infringes a guaranteed right or freedom
- Just because an action has entered the Court, it cannot be said to be bound by the *Charter*
    - The Courts are bound by the *Charter* as they are bound by all laws
    - But to see the court as an element of governmental intervention necessary to invoke the *Charter* would widen the scope of the *Charter* application to virtually all private litigation
- It is difficult to attempt to define with narrow precision that elements of governmental intervention which will suffice to permit reliance on the *Charter* by private litigants in private litigation

Notes

- This decision has spawned a great deal of criticism
- Many people support the basic premise, they are critical of the way the court drew the line between governmental and non-governmental action

- Creates a wide scope of Charter application in Quebec given that much of their private law is codified
    - Allows other governments, without codified laws, to possibly escape Charter scrutiny
    - Quebec is the one province that didn't want the Charter

GOVERNMENTAL ACTORS

- There are two ways to determine whether the *Charter* applies to an entities' activities:
    - By enquiring into the nature of the *entity*
    - By enquiring into the nature of the *activities*
- If an entity is found to be government either because of its very nature or because the government exercises significant control over it, all of its activities will be subject to the *Charter*
- If the entity itself is not government entity but nevertheless performs governmental activities, only those activities which can be said to be governmental in nature will be subject to the *Charter*

Entities Controlled by Government

- If an entity is part of the government, then the Charter will apply to all of its actions
- Laws passed by the government must comply with the Charter
- The Charter applies to actions taken by a legislative assembly so long as those actions are not shielded from Charter scrutiny by constitutionally protected parliamentary privileges

McKinney v University of Guelph

Facts: - 8 faculty members and a librarian challenged the mandatory retirement policies of 4 ON universities
- Argued that the universities policies violated the equality guarantees found in s 15 of the Charter by discriminating on a basis of age
- Raised the question of whether the Charter was applicable to universities (whether they could be considered government actors under s 32)

Issues: Whether universities could be considered government actors under s 32 of the Charter
Held: Universities were not government actors and, in the absence of government participation or compulsion, their adoption of mandatory retirement policies did not amount to government action
Reasons: - to open up all private and public action to judicial review could strangle the operation of society and diminish the area of freedom within which individuals can act
- Opening up private activities to judicial review could impose an impossible burden on the courts
- The mere fact that an entity is a creature of statute and has been given the legal attributes of a natural person is in no way sufficient to make its actions subject to the Charter
- Such an entity may be established to facilitate the performance of tasks that those seeking incorporation wish to undertake and to control, not to facilitate performance of tasks assigned to government
- It would undermine the obvious purpose of s 32 to confine the application of the *Charter* to legislative and government action to apply it to private corporations
- The Charter was not intended to cover activities by non-governmental entities created by government for legally facilitating private individuals to do things of their own choosing without engaging governmental responsibility
- Charter apart, there is no question of the power of the universities to negotiate contracts and collective agreements with their employees and to include within them provisions for mandatory requirement
    - These actions are not taken under statutory compulsion, so a Charter attack cannot be sustained on that ground
- A universities fate is largely in the hands of the government and universities are subjected to important limitations on what they can do, either by regulation or because of their dependence on government funds
- They are not organs of the government
    - Each university has its own governing body
    - Their duty is to act in the interest of the university, not the government
- The government has no legal power to control the universities even if it wished to do so
- Universities manage their own affairs and allocate these funds
- Any governmental attempt to influence universities would be strenuously resisted by universities on the basis that this could lead to breaches of academic freedom
- "Public Purpose" test would be too broad and bring too much within Charter scrutiny

Notes

- The SCC has yet to rule on whether public schools or school boards are subject to the *Charter*

- Even if schools or school boards are not controlled by government, they may still be found to be governmental actos, and therefore subject to the *Charter*
- They may also be subject to the Charter when making discretionary decisions pursuant to their statutory power
- An issue that still remains unsettled is whether Crown corporations are subject to the Charter
- A number of cases have found that the Charter does not apply to CBC
    - Although recognizing that CBC is a Crown agency whose functions are public in nature, the decisions have gone on to emphasize that CBC has programming independence and its policy decisions are neither decisions are neither government or subject to government influence

Stoffman v Vancouver General Hospital 1990 SCC (p. 808)

- Doctors at the hospital have a mandatory retirement at 65
- 14/16 members were appointed by government and the governing statute required all regulations be approved by the Minister of Health
    - Court still decided that the hospital was not a part of government nor was the regulation in issue an act of the government
- Routine control of the hospital was in the hands of the hospital's board of trustees rather than in the hands of the provincial government, and these independent/autonomous decisions of the Board were not sufficient to make it subject to the Charter.
- If this routine control of policies was in hands of government or if the mandatory policy had been dictated by government, the Charter would have applied
- Dissent: greater degree of governmental involvement here than in McKinney

Douglas/Kwantlen Faculty Association v Douglas College 1990 SCC

- Challenge to a mandatory retirement provision in a collective agreement between a college and a union
- The affairs of the college were managed by a board appointed to the provincial government
- Minister allowed to establish and issue directions and approve all bylaws of the board
    - Charter applied to the actions of the college in negotiation and administration of the collective agreement between itself and the association representing the teachers and librarians at the college
- The government may at all times by law direct the operation of the board → it is part of the apparatus of government both in form + fact
- DIFFERENCE – BC/ON schools = significant amount of internal autonomy; BC college = subject to routine or regular governmental control

Greater Vancouver Transportation v Canada Federation of Students 2009 SCC

- Whether the corporations that operated public transportation in BC violated Charter's freedom of expression by refusing to accept political advertising to be placed on the sides of their busses
- Found that both TransLink and BC Transit were bound by the Charter and so their advertising policies had to be rewritten to comply with s. 2(b)
- Found it to be a statutory body designated by legislation as an 'agent of the government' and the Lieutenant Governor has the power to manage BC Transit's affairs and operations by means of regulations.
- Cannot be found to be operating autonomously because government has substantial control over day-to-day activities
- TransLink not itself part of the apparatus of gov't, but governmental because of the substantial control that the municipality exercised over it
- All directors appointed by gov't must look at actual control over the entity itself
- And if found to be controlled by the government, then all policy/actions/regulations are subject to the Charter (even those private in nature)

Lavigne v Ontario Public Service Employees Union 1991 SCC

- Union payments regardless of belong to union or not. Did not want to pay because did not support the specific political views.
- Agreement between union and Council of Regents (exclusive statutory authority to negotiate collective agreements on behalf of all colleges in the province) provided for the compulsory payment of union dues
- Charter does not apply to the union, but it did apply to the Council of Regents because it was subject to 'routine or regular control' by the Minister of Education
- Commercial + contractual activities of the government are not exempt from the Charter
- Colleges are controlled by government, then part of government for purposes of s. 32, therefore everything the college does is subject to the Charter (routine and regular control)
- Once an entity is found to be controlled by gov't, all of its activities are subject to the Charter

Entities Exercising Governmental Functions

- If an entity is not part of the apparatus of either the federal or provincial government, because it is not subject to routine or regular ministerial control, it may nevertheless qualify as government for the purpose of s 32 of the *Charter* if it is excercising governmental functions

Godbout v Longueuil (City)

Facts: - The city of Longueuil adopted a resolution requiring all new permanent employees to reside within is boundaries
- As a condition of her employment, Godbout signed a declaration promising that she would establish her principal residence in the city and that she would continue to live there while a city employee
- If she moved, she could be terminated without notice

Issues: Whether the Charter applies to municipalities
Held: It does.
Reasons: - the ambit of s 32 is wide enough to include all entities that are essentially governmental in nature and is not restricted merely to those that are formally part of the structure of the federal or provincial governments

- The charter can also apply to particular entities whose actions can be considered governmental
    - It will be subject to the Charter to the extent of performing these actives
- Were the Charter to only apply to those bodies that are institutionally part of government but not to those that are, as a simple matter of fact, governmental in nature, governments could easily shrink their Charter obligations by conferring certain powers on other entities and having those entities carry out what are essentially government activities
- Governments cannot simple create bodies distinct from themselves, vest those bodies with the poer to perform governmental functions, and, thereby avoid the constraints imposed upon their activities through the operation of the Charter
- Charter rights must be safeguarded from possible attempts to narrow their scope unduly or to circumvent altogether the obligations they engender
- Municipalities can be described as governmental entities
- Municipal councils are democratically elected by members of the general public and are accountable to their constituents in a manner analogous to that in which Parliament is accountable
- Municipalities possess a general taxing power, that, for the purposes of determining whether they can rightfully be described as government is indistinguishable from the taxing power of Parliament
- Municipalities are empowered to make laws, to administer them and to enforce them within a defined territorial jurisdiction
- Municipalities derive their existence and law-making authority from the provinces

GOVERNMENTAL ACTS

Non-Governmental Entities Implementing Government Programs

Eldridge v British Columbia AG

Facts: - 3 deaf individuals whose preferred method of communication was sign language sought a declaration that the failure to provide public funding for sign language interpreters for the deaf when they received medical services violated s 15 of the Charter
- According to the *Medical and Health Care Services Act*, the power to decide whether a service is "medically required" and hence a benefit under the act is delegated to the Medical Services Commission
- In the case of the *Hospital Insurance Act*, hospitals were given discretion to determine which services should be provided free of charge

Issues: Does protection under s. 15(1) apply to mandatory sign language interpretation under the Hospital Insurance Act in hospitals? Does the Charter apply to the Commission?
Held: Charter applies to actions through the *HIA*
Reasons:
The Sources of the Alleged Charter Violations

- There are two ways in which the Charter can apply to provincial legislations:
    - Legislation may be found to be unconstitutional on its face because it violates a Charter right and is not saved by s 1
    - The Charter may be infringed, not by the legislation itself, but by the actions of the delegated decision-maker in applying it
- The Charter applies to action taken under statutory authority
- Since neither Parliament nor Legislature can itself pass a law in breach of the Charter, neither body can authorize action which would be in breach of the Charter
- The limitations on statutory authority which are imposed by the Charter will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action which depends for its validity on statutory authority
- The source of the violation of s 15 was not the legislation, but the action of the Commission and the hospitals, the entities exercising statutory decision-making authority pursuant to that legislation

- Legislature can give authority to a body that is not subject to the Charter
- Legislation creating corporations is subject to the Charter, but corporations themselves are not part of "government" for the purposes of s 32
- Legislatures have created many other statutory entities that are not as clearly autonomous from government
    - There are a myriad of public or quasi-public institutions that may be independent from government in some respects, but in other respects may exercise delegated governmental powers or be otherwise responsible for the implementation of government policy
- It must be established that the entity in performing the particular action, is part of "government" within the meaning of s 32
- When an entity is determined to be part of the fabric of government, the Charter will apply to all of its activities, including those that might in other circumstances be thought of as "private"
    - The rationale is obvious: governments should not be permitted to evade their Charter responsibilities by implementing policy through the vehicle of private arrangements
- The Charter may apply to non-governmental entities as well
- A private entity may be subject to the Charter in respect of certain inherently governmental actions
    - Applies insofar as they act in furtherance of a specific governmental program or policy
- Governments should not be able to evade their constitutional responsibilities by delegating the implementation of their policies and programs to private entities
- Two important points must be made:
    - The mere fact that an entity performs what may loosely be termed a "public function", or the fact that a particular activity may be described as "public" in nature, will not be sufficient to bring it within the purview of "government" for the purposes of s 32
        - In order for the Charter to apply to a private entity, it must be found to be implementing a specific governmental policy or program
    - The charter may be found to apply to an entity on one of two bases: the entity itself is "government" or the particular activity can be prescribed to the government
- Government in nature → involves an inquiry into whether the entity whose actions have given rise to the Charter breach can, either by its very nature or in virtue of the degree of governmental control exercised over it, properly characterized as "government" within the meaning of s 32
    - All of the activities of the entity will be subject to the Charter, regardless of whether the activity in which it is engaged could, if performed by a non-governmental actor, correctly be described as private
- Government in action → this demands an investigation not into the nature of the entity whose activity is impugned but rather inot the nature of the activity itself
    - One must scrutinize the quality of the act at issue, rather than the quality of the actor
    - If the act is truly governmental in nature, the entity performing it will be subject to review under the Charter only in respect of that act and not in its other private activities
- It is not enough to say that hospitals are not government
    - Hospitals in BC are non-governmental entities whose private activities are not subject to the charter
    - BUT it remains open to be seen whether hospitals effectively implement government policy in providing medical services under the HIA
- The purpose of the HIA it to provide particular services to the public
    - Although the services are delivered through private institutions, it is the government that is responsible for defining both the content of the service to be delivered and the persons entitled to receive it
- The structure of the HIA reveals that in providing medically necessary services, hospitals carry out a government function
    - It provides for the delivery of a comprehensive social program
    - Hospitals are merely the vehicles the legislature has chosen to deliver this program
- There is a direct and defined connection between a specific government policy and the hospitals impugned conduct

Entities Exercising Statutory Powers of Compulsion

- In addition to gov't actors and non-gov't actors implementing specific gov't programs, the Charter also applies to non-governmental actors exercising coercive statutory powers
- In Slaight Communications Inc v Davidson SCC it was held that the Charter applied to the order of an adjudicator acting pursuant to the Canada Labor Code because the adjudicator was exercising power conferred by legislation

GOVERNMENTAL INACTION

Vriend v Alberta

Facts: - Case involved a challenge to the omission of sexual orientation from Alberta's *Individual's Rights Protection Act*

- The general scheme of the IRPA was to prohibit discrimination in public life and to establish a commission for enforcement

- It prohibited discrimination from public notices, public services, rentals, and employment or union membership on the basis of race, religious beliefs, colour, sex, marital status, age and ancestry
- Legislative history shows that omitting sexual orientation was deliberate
- Vriend was an employee of King's College where his employer asked him about his sexual orientation and dismissed him after he affirmed he was gay
- He was rejected a complaint under the act

Issues: Does s 32 of the Charter prohibit considerations of s 15 violation when that issue arises from a legislative omission?
Held: The omission violated Vriend's equality rights and the words "sexual orientation" should be read into the Act
Reasons: - There is nothing in the wording of s 32 to suggest that a positive act encroaching on rights is required; rather the subsection speaks only of matters within the authority of the legislature

- S 32 is worded broadly enough to cover positive obligations on a legislature such that the Charter will still be engaged even if the legislature refuses to exercise its authority
- The application of the Charter is not restricted to situations where the government actively encroaches on rights

APPLICATION OF THE CHARTER TO COURTS, THE COMMON LAW, AND THE EXERCISE OF ADMINISTRATIVE DISCRETION

- Dolphin Delivery stands for the proposition that the Charter does not apply to the common law when relied upon by private litigants – nor does it apply to a court order issued at the conclusion of litigation between private parties resolved on the basis of the common law interpreted in a manner that is consistent with Charter principles
- However, courts have started to become more comfortable with the notion that the common law needs to be applied and developed in a manner consistent w/ Charter values
- The common law does not to be and developed in a manner consistent with Charter values

Reliance by Government or Common Law

- The Charter will apply to common law when its relied on in litigation involving a government party or proceedings initiated for public purpose

Reliance on Common Law in Private Litigation

- The Charte does not directly apply in this sense – but it is still relevant
- *Dolphin Delivery* → the judiciary ought to apply and devlop principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution

Hill v Church of Scientology of Toronto

Facts: - Case arose as a libel action brought by Crown attorney Casey Hill against the Church of Scientology and its lawyer, Morris Manning

- The action was brought in response to a press conference held by the Church representatives and Manning to publicize criminal contempt proceedings, which they planned to commence against Hill
- Their allegation was that Hill misled a judge of the SCON and breached orders sealing documents belonging to the Church
- These allegations were found to be untrue
- In the libel action, Manning and Scientology were found to be liable at trial

Issues: Whether the common law of defamation can be subject to Charter scrutiny
Held:
Reasons: - The common law must be interpreted in a manner consistent with the Charter

- When determining how the Charter applies to the common law, it is important to distinguish between those cases in which the constitutionality of government action is challenged, and those in which there is no government action involved
    - Its important not to import into private litigation the analysis which applies in cases involving government action
- Private parties owe each other no constitutional duties and cannot found their case on a Charter right
- Charter rights do not exist in the absence of state action
- The most that parties can do is argue that the common law is inconsistent with Charter values
    - Must draw a distinction between charter values and charter rights
- The Charter will "apply" to the common law only to the extent that the common law is found to be inconsistent with Charter values
- S 1 analysis is not appropriate in the case of conflicting charter values and the common law
- The balance must be more flexible than the traditional s 1 analysis undertaken in cases involving governmental action cases
- Charter values should be weighted against the principles which underlie the common law

- The division of onus which normally operates a Charter challenge to government action should not be applicable in private litigation
- The party who alleging that the common law is inconsistent with the Charter should bear the onus of proving that the common law fails to comply with Charter values and that, when balanced, the common law should be modified

TERRITORIAL LIMITS ON THE APPLICATION OF THE CHARTER

- Foreign gov'ts are not bound to comply with the Charter
- S. 32 does not provide a territorial limitation, it just that it applies to all matters within the authority of Canadian governments. It does not say it has to stop at the borders.
- The general rule in public international law is that a state can enforce its law beyond its territory. Therefore, the Charter cannot be used to impose Canadian constitutional standards on foreign officials and procedures.
- In Cook 1998 SCC, it was held that the Charter applies on foreign territory in circumstances where the impugned act falls within the scope of s. 32 of the Charter on the jurisdictional basis of the nationality of the state law enforcement authorities engaged in governmental action, and where the application of Charter standards will not conflict with the concurrent territorial jurisdiction of the foreign state
- *R v Hape* → Is the conduct at issue that of the Canadian state actor?
    - If so, is there an exception to the principle of sovereignty that would justify applying the *Charter*?
- *Canada v Khadr* (2008) → "The Charter bound Canada to the extent that the conduct of Canadian officials involved it in a process that violated Canada's international obligations"
    - E.g "A clear violation of fundamental human rights protected by international law"
- *Amnesty International Canada v Canada* → But – "This does not mean that the Charter applies as a consequence of these violations…all the circumstances in a given situations must be examined before it can be said that the Charter applies"
    - E.g. Is there "effective control" over territory? Has there been acquiescence to the extension of Canadian law?

SECTION 1

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

DEFINING LIMITATIONS: SECTION 1

- Before the government (or any party defending a Charter challenge) may argue that competing interests justify the limitation of a Charter right, it must first show that the limit is "prescribed by law"
    - Serves as a gatekeeper function, limiting the instances in which an infringement will be upheld by s 1
- Prescribed by law → the law must be adequately accessible (the citizen must be able to have an indication that is adequate in the circumstance of the legal rules applicable to a given case); and a norm cannot be regarded as "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct (he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail
    - In summary: accessibility and intelligibility to the citizen
- The prescribed by law requirement has been interpreted to entail a two-step analysis:
    - Is the limit on the right authorized by "law"?
    - Does the law have the required degree of precision?
- Courts have tended to lean towards flexibility as opposed to precision when it comes to s 1 analysis
- If you have a vague law, the first question to ask is: "Is this law so vague that it cannot be considered prescribed by law?"
    - Courts are reluctant to find this

Greater Vancouver Transportation Authority v Canadian Federation of Students – BC Component

Facts: - BC Transit and TransLink refused to carry the political advertisements of a student organization and a public sector union on the sides of their buses

- In doing so, they relied on their advertising policies, enacted pursuant to statutory authority that permit commercial but not political advertisements
- Students allege this is a breach of their s 2(b) rights
- TJ dismissed the action; CA reversed, saying it was a breach and could not be upheld under s 1

Issues: Whether the advertising policies adopted by two transit authorities were "law" and hence capable of satisfying the requirement of prescribed by law

Held: Yes – fit in "prescribed by law"

Reasons: - first must assess whether the policies come within the meaning of the word "law" in s 1

- It must be asked whether the government entity was authorized to enact the impugned policies and whether the policies are binding rules of general application
    - If so, they are "law"
- The Court doesn't require that the limit be prescribed by a "law" in the narrow sense of the term; it may be prescribed by a regulation or by the common law
- It is sufficient that the limit simply results by necessary implication from either the terms or the operating requirements by "law"
- The court has chosen to take a liberal approach to the precision requirement as regards both the form and the articulation of a limit on a Charter right
- There is a need to distinguish between limits which arise by law and limits which result from arbitrary state action; those resulting from arbitrary state action continue to fail the "prescribed by law requirement"
- This inclusive approach is based on recognition that a narrow interpretation would lead to excessive rigidty in a parliamentary and legislative system that relies heavily on framework legislation and delegations of broad discretionary powers
- As a binding rule adopted pursuant to a government entity's statutory powers, a policy may have a legal effect similar to that of a municipal bylaw or a law society's rules, both which fall within the meaning of law for the purpose of s 1
- Rules or policies that act as interpretive aids in the application of a statute or regulation cannot themselves be viewed as law that prescribes a limit on the charter
- Where a policy is not administrative in nature, it may be "law" provided that it meets certain requirements
    - The policy must establish a norm or standard of general application that has been enacted by a government entity pursuant to a rule-making authority
- A rule-making authority will exist if Parliament or a provincial legislature has delegated power to the government entity for the specific purpose of enacting binding rules of general application which establish the rights and obligations of the individuals to whom they apply
- For the purpose of s 1, these rules need not take the form of statutory instruments
    - So long as the enabling legislation allows the entity to adopt binding rules, and so long as the rules establish rights and obligations of general rather than specific application and are sufficiently accessible and precise, they will qualify as "law" which prescribes a limit on a Charter right
- Thus, where a government policy is authorized by statute and sets out a general norm or standard that is meant to be binding and is sufficiently accessible and precise, the policy is legislative in nature and constitutes a limit that is "prescribed by law"
- A review of the enabling legislations suggests that the transit authorities' policies were adopted pursuant to statutory powers conferred on BC Transit and Translink
    - They this confer broad discretionary powers on each entity's board of directors to adopt rules regulating the conduct of its affairs, including the generation of revenue for the public transportation system
- The policies are not administrative in nature, they act as rules that establish the rights of the individuals to whom they apply
- They fall within the meaning of "law" for the purpose of s 1 and will satisfy the "prescribed by law" requirement provided that they are sufficiently accessible and precise
    - They are

JUSTIFICATION – THE OAKES TEST

R v Oakes

Facts: - S 8 of the *Narcotics Control Act* created a "rebuttable presumption" that once the fact of possession of a narcotic had been proven, an intention to traffic would be inferred unless the accused established the absence of such intention

- The accused challenged this reverse onus provision, arguing that it violated s 11(d) of the Charter

Issues: Can the violation be upheld under s 1?
Held: Failed the proportionality test, cannot be upheld
Reasons: - Section 1 has two functions:

- It constitutionally guarantees the rights and freedoms set out in the provisions which follow
- It states explicitly the exclusive justification criteria against which limitations on those rights and freedoms must be measured

- Any s 1 inquiry must be premised on an understanding that the impugned limit violates constitutional rights and freedoms
- "free and democratic society" → inclusion of these words as the final standard for justification for limits on rights and freedoms refers the Court to the very purpose for which the Charter was originally entrenched in the Constitution: Canadian society to be free and democratic
- The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown to be reasonable and demonstrably justified

- The rights and freedoms are not absolute
- The onus of proving that a limit is justified under s 1 is on the party seeking to uphold the limitation
- To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied:
    - First, the objective, which measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding constitutionally protected right or freedom"
        - The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s 1 protection
        - Referred to as being a pressing and substantial objective
    - Second, once a sufficiently significant objective is recognized, then the party invoking s 1 must show that means chosen are reasonable and demonstrably justified
        - This involves a form of proportionality test with three components:
            - The measures adopted must be carefully designed to achieve the objective in question
                - They must not be arbitrary, unfair or based on irrational circumstances
            - The means, even if rationally connected to the objective, should impair **"as little as possible"** the right or freedom in question
            - There must be a proportionality between the effects of the measure which are responsible for limiting the Charter right or freedom
- The nature of the proportionality test will vary depending on the circumstances

Oakes Test

1. Pressing and substantial objective
2. Rational connection
3. Minimal impairment
    - From "as little as possible" to "as little as reasonably possible" to "margin of appreciation"
    - Had to shift from "as little as possible" because you could likely always argue that there is a way to always impair less
4. Proportionate effects
    - Even if the importance of the objective itself (when viewed in the abstract) outweighs the deleterious effects on protected rights, it is still possible that the actual salutary effects of the legislation will not be sufficient to justify these negative effects.

- NOTE: On an exam, it will clear that the issue is prescribed by law

Edmonton Journal v Alberta (Attorney General)

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

- The Court found that the section violated freedom of expression, but they were split on the justification issue

Issues: Can s 30(1) be justified as a reasonable limit under s 1?
Held: No
Reasons: - Wilson J

- Two approaches to the Charter's application: abstract approach and contextual approach
- Under each approach, it is important to ascertain the underlying value which the right alleged to be violated was designed to protect
- Also important to ascertain the legislative objective sought to be advanced by the impugned legislation
- When both the underlying value and the legislative objective have been identified, and it becomes clear that the legislative objective cannot be achieved without some infringement of the right, it must then be determined whether the impugned legislation constitutes a reasonable limit on the right which can be demonstrably justified in a free and democratic society
- In this particular case, freedom of expression and privacy in matrimonial disputes cannot both be fully respected
- One should not balance one value at large and the conflicting value in its context
    - To do so could well be to pre-judge the issue by placing more weight on the value developed at large than is appropriate in the context of the case
- Both interests must be viewed as public interests
    - In this case, the public interest in protecting the privacy of litigants generally in matrimonial cases against the public interest in an open court process
- One virtue of the contextual approach is that is recognizes that a particular right or freedom may have a different value depending on the context
- The contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it

- Seems more sensitive to the reality of the dilemma posed by the particular facts and therefore more conducive to finding a fair and just compromise between the two competing values under s 1
- The importance of the right or freedom must then, in accordance with the dictates of this court, be given a generous interpretation aimed at fulfilling that purpose and securing for the individual the full benefit of the guarantee
- The **abstract** approach looks at the freedom or right as a whole

NOTE: ALWAYS TAKE A CONTEXTUAL APPROACH TO S 1

Irwin Toy Ltd v Quebec (Attorney General)

Facts: - This case involved restrictions on advertising directed at children
- The judges here set out some of the circumstances in which deference to legislative judgment is appropriate

Issues:
Held: Context is the better way to deal with this issue
Reasons: - Deference to legislative choice is appropriate – where the government has sought to balance competing rights; to protect a socially vulnerable group; to balance interests of various social groups competing for scarce resources' or to address conflicting social science evidence as to the cause of a social problem

- Where the legislature mediates between competing claims of different groups in the community, it will inevitably be called upon to draw a line marking where one set of claims legitimately begins and the other fades away without access to complete knowledge as to its precise location
- If the legislature draws a line, it is not for the court to guess
- In matching means to ends and asking whether rights or freedoms are impaired as little as possible, a legislature mediating between the claims of competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how that balance is best struck
- Must determine whether the government had a reasonable basis, on the evidence tendered, for concluding that the ban on all advertising directed at children impaired freedom of expressions as little as possible given the government's pressing and substantial objective
- Here a distinction was introduced between those cases in which the government is seeking to mediate the interests of competing groups (where a more deferential application of s 1 is appropriate) and those cases where the government is the singular antagonist of the individual whose rights have been infringed (where a more stringent approach of s 1 is warranted)
- CONTEXT MATTERS in s 1 adjudication

- There are at least 3 different ways the courts can 'defer' to legislative judgement or lower the standard of justification:
    1. **Judicial deference to relevant findings of fact by the** legislature (or a lowering by the court of the standard of proof that the legislature must meet when establishing the factual basis for its justification argument)
        a. E.g. *Irwin Toy* → social science the legislature used to determine whether advertisements manipulated children was not clear cut; however, the Court deferred to the governments reading of the evidence – likely because it recognized it had limited competence in such matters, or not greater competence than the ledge
    2. **Deference to the legislatures accommodation of competing values or interests** – if the legislature has made an apparently reasonable judgement that concerns about a certain interest justify a limited restriction on expression then the courts may be reluctant to substitute their own judgement for that of the legislature
        a. This reluctance may be greater when it recognizes the legislature is making a reasonable attempt to protect the interests of a vulnerable group or to accommodate competing "private" interests
    3. **Lowering a standard of justification under s 1** – the courts have held that a less substantial or signifigant competing interest may support the restriction of a less valuble form of expression – such as commercial advertising or hate promotion (different forms of expression under s 2(b) may have greater or lesser value under s 1)

Newfoundland v NAPE

Facts: - The Newfoundland government signed a pay equity agreement in '98 that would have resulted in pay increases for female health-care workers who had been earning less than their male counterparts
- Three years later, and before any monies had flowed to the recipients, the Newfoundland government enacted the *Public Sector Restraint Act* which postponed the pay increases for three years and cancelled any arrears for the period 1988 to 1991, thereby relieving the government of an obligation of approximately $24 million

Issues: What kind of government fiscal crises is sufficient (if any) to justify limiting a right or freedom guaranteed by the Charter? Should greater deference be afforded to Parliament under the Oakes test?
Held: No – the acceptance of a greater level of deference would be inconsistent w/ the clear words of s. 1 and undermine the delicate balance the Charter was intended to achieve
Reasons: - Hansard evidence is important in this s 1 analysis
- "The general objectives of the legislature are readily apparent from a reading of the debates leading to their enactment"

Was there a pressing and substantial legislative objective?

- The provincial government faced a sever fiscal crisis in the spring of '91
- This was in part due to a reduction of anticipated federal transfer payments by $130mil
- If the government continued the way they were, they would be in a deficit of over $200mil
- They did introduce an expenditure reduction program
- The severity of the measures, including the cut to pay equity, corroborates the government's statement that it believed itself to be in the middle of a financial crisis
- This was not a "normal" budgetary constraint for the government
- The courts cannot close their eyes to the periodic occurrence of financial emergencies when measures must be taken to juggle priorities to see a government through the crisis
- In this context, the requirement that the measure impair "as little as possible" the infringed Charter right cannot be applied in a way that is blind to the consequences for other social, educational and economic programs.
    - The provincial government in this case could have thrown other claims and priorities to the winds and simply paid the $24 million but in its view, the cuts it would have had to make elsewhere to permit this to happen would have created even greater grief and social disruption
    - It is not convincing simply to declare that an expenditure to achieve a s. 15 objective must necessarily rank ahead of hospital beds or school rooms. To do so would be to ignore the very difficult context in which these decisions were made.

Should Conformity with the Separation of Powers Doctrine Be Added as an Element of the Section 1 Analysis?

- Marshall J – the *Oakes* test does not sufficiently respect the actual wording of s 1 of the *Charter* and that in the result inadequate deference is paid to legislative and executive choices at each and every stage of the s 1 justification
    - It is thus out of step with the doctrine of the separation of powers

Fidelity to the Text of Section 1

- It is clear from the text of s. 1 that limits on the rights and freedoms enumerated in the *Charter* are exceptions to their general guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria which justify their being limited. This is further substantiated by the use of the word "demonstrably" which clearly indicates that the onus of justification is on the party seeking to limit
- No doubt Parliament and the legislatures, generally speaking, do enact measures that they, representing the majority view, consider to be reasonable limits that have been demonstrated to *their* satisfaction as justifiable

The Separation of Powers

- While the separation of powers is a defining feature of our constitutional order, the separation of powers cannot be invoked to undermine the operation of a specific written provision of the Constitution like s. 1 of the *Charter*
- Section 1 itself expresses an important aspect of the separation of powers by defining, within its terms, limits on legislative sovereignty
- The Constitution, which must be interpreted by the courts, limits the legislature
- In summary, whenever there are boundaries to the legal exercise of state power such boundaries have to be refereed
- Canadian courts have undertaken this role in relation to the division of powers between Parliament and the provincial legislatures since Confederation
    - The boundary between an individual's protected right or freedom and state power must also be refereed
    - The framers of the *Charter* identified the courts as the referee
- While I recognize that the separation of powers is an important constitutional principle, I believe that the s. 1 test set out in *Oakes* and the rest of our voluminous s. 1 jurisprudence already provides the proper framework in which to consider what the doctrine of separation of powers requires in particular situations, as indeed was the case here
- To the extent Marshall J.A. invites a greater level of deference to the will of the legislature, I believe acceptance of such an invitation would simply be inconsistent with the clear words of s. 1 and undermine the delicate balance the *Charter* was intended to achieve. I would therefore not do as he suggests.

THE OVERRIDE

- S 33 of the *Charter*, the "override" or "notwithstanding" clause, began as and remains, a controversial portion of the Charter
    - Ongoing political issue
- *Ford v Quebec* is the only case in which the SCC has been asked to review the exercise of the override power
- S 33 is a selective override (includes s 2 and 7 – 15)
    - Essential covers fundamental freedoms, legal rights and equality rights
    - Excludes sections such as 3 (democratic rights) and 6 (mobility rights)
- S 33(3) is the *sunset clause*
    - Every clause using s 33 has a "sunset"
    - Relieves future governments
        - It will always be a perpetual government issue
- A government may invoke s 33 in a situation in which the SCC has a rejected an infringement under s 1 and the government still wants to invoke the law

- There is a disagreement about whether the infringement is justified (whether it satisfied s 1 or not)
- Genius → keeps the court out of the governments choices at this point

Ford v Quebec (Attorney General)

Facts: - Involved a challenge to those provisions in the *Charter* that required French-only public signs, posters, and commercial advertising

- Appellants challenged these provisions successfully
- Quebec enacted legislation regarding the Constitution Act, 1982 – made all their former legislation attach to the notwithstanding clause – every law in Quebec was under this.
  - So the Charter does not function in QB with regard to those sections. Political stance as Quebec didn't sign on to the constitutional amendment.
- The essential contention against the validity of the standard override was that the provision did not sufficiently specify the guaranteed rights or freedoms which the legislation intended to override

Issues: Whether Quebec's standard clause, omnibus use of the override was valid

Held: Yes, can be invoked in this fashion

- S 7 of An Act respecting the Constitution Act is inconsistent with s 33 and of no force or effect with the result that the standard override provisions enacted by s 1 came into force on June 23, 1982 in accordance with the first paragraph of s 7

Reasons: - The sunset clause is there to let the people decide if s 33 has been properly invoked; not for the court to intervene.

- The purpose of s 33 is to keep parliament away from judicial review
  - To require the court to decide whether the reasons behind a s 33 enaction was right is in conflict with the purpose of s 33
- But, the language of s. 33 'shall operate' does not allow for a retroactive use, so laws can only go forwards
  - Must prefer the rights protecting approach when there is ambiguity
- S 33 lays down requirements of form only, and there is no warrant for importing into it grounds for substantive review of the legislative policy excercising the override authority in a particular case
- The requirement for an apparent link or relationship between the overriding act and the guaranteed rights or freedoms to be overridden seems to be a substantive ground of review
- The essential requirement of form laid down by s 33 is that the override declartation must be an express declaration that an Act or a provision of an Act shall operate notwithstanding a provision included in ss 2, 7 or 15 of the *Charter*
- A s 33 declaration is sufficiently express if it refers to the number of the section, subsection or paragraph of the *Charter* which contains the provision or provisions to be overridden
- In so far as requirements of the democratic process are relevant, this is the form of reference used in legislative drafting with respect to legislative provisions to be amended or repealed
  - There is no reason why more should be required under s 33
- S 33(1) admits two interpretations, one that allows Parliament or a legislature to enact retroactive override provisions, the other that allows prospective derogation only
- Conclude that the latter and narrower interpretation is the proper one and that s 7 cannot give retrospective effect to the override provisions
- Argument: By using boiler plate clause in all their legislation, Quebec failed based on "Expressly declare": means that you have to explicitly say what provision of the constitution they are overriding, not just the numbers but the actual right
- Purpose of the charter is to protect and guarantee rights (*Hunter v Southam*) – purposive argument/approach
- Purpose of s 33 – what is it designed to protect? Balance democratic engagement with protection of rights – cannot interpret it in a way to undermine its own purpose
- Court said Quebec followed the form that s 33(1) dictates
- Court also said sunset clause is there to let the people decide if it has been improperly invoked - not for the court to intervene. Deciding whether it is a good reason for invoking are political questions, not for the court.
- S 33 says parliament and legislatures can override courts as long as they follow the formal requirements laid down by s 33 – doesn't make sense that the court can override back
- However, court said Language of s 33 does not allow for retroactive use because of the word "shall operate" in s 33 – Laws can only go forward, not backwards. It could be define as invoking past tense, however when there is ambiguity must prefer the rights protecting approach (Hunter)
- Court not doing substantial review when it comes to s 33, just that the requirements are followed

The Notwithstanding Clause: Why Non-Use Does Not Necessarily Equate with Abiding by Judicial Norms

- To date, notwithstanding clause has been invoked in an omnibus and retroactive fashion, as well as in 16 specific instances

Most uses fall into one of four categories:

1. A form of political protest

2. An exercise of risk aversion in the face of constitutional uncertainty about how protected rights would be interpreted
3. An exercise in risk aversion as a result of uncertainty about how s.1 arguments would be interpreted
4. Expression of political disagreement with SC jurisprudence

Potential use of the notwithstanding clause:

- Allow parliament to revise legislation following a suspended judicial declaration of invalidty
- When legislation is found to be inconsistent with the charter, instead of declaring the legislation as invalid immediately, the court will suspend the effect of this ruling for a period of time (usually 12 months) to allow parliament to address the identified charter deficiencies
- Time frame may be insufficient for parliament, if the government has been unwilling to act promptly, if the issue involves extension consultation with the provincial gov't or if an election has delayed the effective period for legislation redress
- Declarations of invalidity can be controversial because they suspend the remedial effects of judicial review
- By seeking more time, a gov't is effectively asking the court to bear institutional responsibility for further delaying remedies. Yet, depending on parliaments response, it is entirely possible that he revised legislation would be declared constitutionally valid, in which no remedy is owed.

CHARTER REMEDIES

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

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

Remedies and Standing

- The relationship between s 24(1) of the *Charter* and s 52(1) of the *Constitution* has been a source of confusion
- Court rejected the view that s 24 was the exclusive source of remedial relief for Charter infringements in *R v Big M Drug Mart Ltd*
    - S 52 is avaliable in cases where the constitutionality of the legislation was at issue and a declaration of invalidity was sought
- S 24 sets out a remedy for individuals (people or corporations) whose rights under the Charter have been infringed
- S 52 sets out the fundamental principle of constitutional law that the constitution is supreme
- A declaration of invalidity sought under s 52 is governed by more generous standing requirements than the relief available under s 24(1)
- Following *Big M*, corporations that cannot claim an infringement of their own Charter rights have not been allowed to bring an independent civil actions seeking declaration of law's invalidity despite the fact that they are subject to regulation under the law in issue and to possible criminal or penal sanctions should they violate it
- Another way individuals or corporations may be allowed to argues the violation of another person's Charter rights is through a grant of public interest standing under the rules in *Thorson-McNeil-Borowski*

Relationship Between Sections 24 and 52

- S 52 provides a variety of remedies for unconstitutional *laws*
- S 24(1) provides a variety of remedies for unconstitutional *acts* by public officials
- As a general rule, an individual remedy under s 24(1) will not be available when a declaration of invalidity has been granted under s 52(1)

Jurisdiction to Award Charter Remedies

- As a basic rule, the provincial superior courts will always have jurisdiction to award both a Charter remedy under s 24(1) and to declare laws of no force or effect to the extent of their inconsistency's with the Constitution under s 52(1)

List of Remedies

- Declaration of invalidity – striking down
- Severance – strike down the offending provision only
- Reading in
- Reading down
- Suspension of declarations of invalidity
- Tailored remedies under s 24(1)
    - Damages

- Injunction

REMEDIES UNDER S 52(1) OF THE CONSTITUTION ACT

- A declaration that a law is invalid in its entirety may constitute an overly broad remedy in cases where only some parts of the law or some of its application infringe the Charter
- Partial invalidation of sections of the law may be accomplished through the techniques of *severance, reading down, reading in* and *constitutional exemptions*
- A declaration of invalidity may also be a problematic remedy in the case of so-called under inclusive laws, where the problem with the law is that benefits being provided to some individuals are not being provided to others, creating a situation that violates s 15 of the Charter
    - Striking down the law will have the result of depriving those who are currently entitled to benefits, as well as providing no benefits to the person challenging the law
- Another remedial option, which avoids the legislative void created by the immediate nullification of a law does not involve the judiciary in reshaping a new law that will meet the dictates of the Charter, is this *temporary suspension of a declaration of invalidity* for a period of time to allow Parliament to fill the voids
    - Could be an immediate suspension as well

Remedies Test Under S 52

1. The first step in choosing a remedial course is defining the extent of the inconsistency which must be struck down. Usually the manner in which the law violates the Charter and the manner in which it fails to be justified under s. 1 will be critical to this determination
    - If not justified under first part of s. 1 test = usually a broad striking down of law
    - Striking down, severing, or reading in may be appropriate in cases where the second and/or third elements of the proportionality test are not met
2. The next step is determining whether the inconsistency may be dealt with by way of severance or in some cases reading in or whether it must be struck down in its entirety
    - The court should not read in in cases where there is no manner of extension which flows with sufficient precision from the requirements of the Constitution - to read in would amount to making ad hoc choices from a variety of options – this is for the legislature to do
    - The legislature's choice of means to implement its objective must also be examined – ex. budgetary considerations are relevant once a violation that does not survive s. 1 has been established – court needs to decide whether they can appropriately make decisions which impact budgetary policy
    - Look at whether the remaining portion has been significantly changed – when the group added is smaller than the original one is usually a safe assumption; not when a larger group is added
    - Look at the significance of the remaining portion in general

Temporary Suspension of the Declaration of Invalidity

3. The last step is determining whether the declaration of invalidity should be temporarily suspended
    - This is appropriate if striking down poses a potential danger or threatens a rule of law or in cases of under inclusiveness
    - This is a serious matter because a delayed declaration allows a state of affairs which has been found to violate standards embodied in the Charter to persist despite the violation – reading in is preferable where appropriate

Schachter v Canada

<u>*Facts:*</u> - EI provided mothers who had given birth with 15 weeks of maternity benefit and adoptive parents with 15 weeks of parenting leave, following the placement of the child, the benefits to be split between the parents

- A father, whose claim for "paternity benefits" following the birth of his child was dismissed as not falling within the provisions of the Act, challenged the decision as a breach of his s 15 rights
- The TJ found a violation of s 15 in that s 32 discriminated between natural parents and adoptive parents with respect to parental leave
- With respect to the issue of appropriate remedy, the TJ granted declatory relief under s 24(1), extending to natural parents the same benefits as were granted to adoptive parents under s 32, without affecting the woman's right to maternity benefits
- The remedy was appealed

<u>*Issues:*</u> Was the TJ correct to read in natural parents to these benefits
<u>*Held:*</u> No – would be too large of an intrusion and better left for parliament – temporarily suspend and allow legislation to deal with appropriate remedy

- Appeal allowed and judgment at trial set aside

<u>*Reasons:*</u>

Reading In as A Remedial Option Under s 52

- A court has flexibility in determining what course of action to take following a violation of the charter which not does not survive s 1 scrutiny
    - Can strike down an entire law under s 52, or just pieces of it
- S 24 of the Charter extends to any court the power to grant an "appropriate and just" remedy to anyone who's Charter right have been infringed
- In choosing how to apply s 52 or 24, a court will determine its course of action with reference to the nature of the violation and the context of the specific legislation under consideration

A. The Doctrine of Severance

- Courts have always struck down laws only to the extent of the inconsistency using the doctrine of severance or "reading down"
- Severance is used by the courts so as to interfere with the laws adopted by the legislature as little as possible
- Generally speaking, when only one part of a statute or provision violates the Constitution, it is common sense that only the offending position should be declared to be of no force or effect, and the rest should be spared
- Where a statute violates the division of powers, it tends to do so as a whole
    - More likely to strike a whole Act rather than a portion of it
- Test for Severance: whether what remains is so inextricable bound up with the part declared invalid that what remains cannot independently survive

B. Reading in as Akin to Severance

- The same approach should be applied to the question of reading in since extension by way of reading in is closely akin to the practice of severance
- The difference is the manner in which the extent of the inconsistency is defined
- In the usual case of severance, the inconsistency is defined as something improperly included in the statute which can be severed and struck down
- In the case of reading in the inconsistency is defined as what the statute wrongly *excluded* rather than what it wrongly *included*
- Where the inconsistency is defined as what the statute excludes, the logical result is of declaring inoperative that inconsistency may be to include the excluded group
- Whether a court "reads in" or "strikes out" words from a challenged law, the focus should be on the appropriate remedy in the circumstances and not on the label used to arrive at the result
- There is nothing in s 52 to suggest that the court should be restricted to the verbal formula employed by the legislature in defining the inconsistencies

C. The Purpose of Reading In and Severance

- With both severance and reading in, the purpose is to be as faithful as possible within the requirements of the constitution
- Reading in does not always constitute the lesser intrusion
- The absolute unavailability of reading in would mean that the standards developed under the Charter would have to be applied in certain cases in was which would derogate from the deeper social purposes of the Charter
- Reading in should be recognized as a legitimate remedy akin to severance and should be available under s 52 in cases where it is an appropriate technique to fulfil the purposes of the Charter and at the same time, minimize the interference of the court with the parts that do not violate the Charter

Choice of Remedial Options Under s 52

A. Defining the Extent of Inconsistency

- The first step in choosing a remedial course under s 52 is defining the extent of the inconsistency which must be struck down
    - Usually the way in which the law violated the Charter and the manner in which it fails to be justified under s 1
- A broad definition may be required in a case where the legislation or legislative provisions do not meet the first part of the Oakes test in that the purpose is not sufficiently pressing or substantial to warrant overriding a Charter right
- Where the purpose of the legislation or legislative provision is deemed to be pressing and substantial, but the means used to achieve the objective are found not to be rationally connected to it, the inconsistency to be struck down will generally be the whole of the portion of the legislation which fails the rational connection test (*Big M*)
- Where the second and/or third elements of the proportionality test are not met, there is more flexibility in defining the extend of the inconsistency
- Striking down, severing, or reading in may be appropriate in the case where the second/third elements of the proportionality test are not met

B. Deciding Whether Severance or Reading In is Appropriate

- Step 2: Whether the inconsistency may be dealt with by way of severance (or reading in), or whether the impugned provisions must be struck down in its entirety
- In severance, the inconsistent part of the statutory provisions can be defined with some precision on the basis of the requirements of the Constitution
    - This will not always be the case with reading in

- In come cases, it is the legislature's role to fill the gap, not the courts
    - *Hunter*
- In *Hunter*, the court decided that the scheme for authorizing searches under the relevant legislation did not withstand Charter scrutiny
    - In such circumstances, it would therefore be possible to characterize the "extent of the inconsistency" as the absence of certain safeguards
- The court should not read in in cases where there is no manner of extension which flows with sufficient precision from the requirements in the constitution
- The degree to which a particular remedy intrudes into the legislative sphere can only be determined by giving careful attention to the objective embodied in the legislation in question
- Legislatures choice of means to implement its objective must also be examined
- A remedy that intrudes into budgetary constraints is inappropriate
- Where the group to be added (by reading in) is smaller than the group originally benefited, this is an indication that the assumption that the legislature would have enacted the benefit in any case is a sound one
    - When the group is larger, this could indicate that the assumption is not safe

C. Whether to Temporarily Suspend the Declaration of Invalidity

- Having identified the extent of the inconsistency, and having determined whether the inconsistency could be dealt with by way of striking down, severance or reading in, the court has identified what portion must be struck down
- The final step: determine whether the declaration of invalidity of that portion should be temporarily suspended
- A court may strike down legislation but suspend the effects until Parliament has the opportunity to fill the void
- The question of whether to delay the effect of a declaration is an entirely separate question from whether reading in or nullification is the appropriate route

Application to This Case

- Here the violated right was the right to equal benefit of the law (positive right) – positive rights cases are more likely to be read in/down or stricken down and suspend the operation than to immediately strike down
- The benefit is monetary and not one that Parliament is constitutionally obliged to provide – what Parliament is obliged to do (by s 15) is equalize the provision of that benefit – the benefit is under-inclusive, not prohibited
- If going to strike down – need to suspend to allow Parliament to bring in a provision in line with constitutional requirements
- Without a mandate based on a clear legislative objective, it would be imprudent to reading the excluded group into the legislation – must consider budgetary implications and the group sought to be included likely vastly outnumbers the group to whom benefits were already extended; this would be a substantial intrusion into the legislative domain and would be substantial enough to potentially change the nature of the scheme as a whole
- Parliament is much better equipped to assess the whole picture in formulating solutions in cases such as these

Vriend v Alberta

Facts: - SCC found that the omission of sexual orientation from the list of prohibited grounds for discrimination found in Alberta's human rights legislation constituted an unjustifiable violation of s 15 of the Charter

- Legislative history showed that the omission was deliberate
- A gay employee was fired when his homosexuality was discovered and he wished to bring a complaint of discrimination under the Act however he could not because of the legislation's failure to protect against discrimination on the grounds of sexual orientation
- This is a significant case where the SCC extended constitutionally under-inclusive legislation by reading in rather than striking it down

Issues: What is the best way to remedy this unjustifiable violation of s. 15?

Held: Reading in sexual orientation to the provisions of the IRPA is the best way to remedy this under-inclusive legislation

Reasons:

- The first step is to define the extent of the charter inconsistency which must be struck down
- The next step is to determine the appropriate remedy
    - There are different remedies available depending on the violation
- Because the Charter violation in this case occurs from an omission, reading down is not an available remedy
- Given the considerable number of sections at issue in this case and the important roles they play in the scheme of the IRPA as a whole, severance of these sections from the remainder of the Act would be akin to striking down the entire act
- Twin guiding principles: respect for the role of the legislature and respect for the purpose of the Charter
- The remedy of reading in would minimize interference with this clearly legitimate legislative purpose and thereby avoid excessive intrusion into the legislative sphere
- Striking down the Act would deprive all Albertans of human rights protection and therefore unduly interfere with the scheme enacted by the legislature
- The internal balancing mechanism in the Act is sufficient to deal with the conflict between religion and sexual orientation

    - The mechanism included a general defence that the discrimination was reasonable and justifiable in the circumstances and an exemption for *bona fide* occupational requirements
- Reading sexual orientation into the Act can only enhance the purpose of the Charter
- The Charter is concerned with the promotion and protection of inherent dignity and alienable rights
    - Striking down the Act would not align with the purpose of the Charter
- The twin guiding principles can only be fulfilled if due consideration is given to several addition criteria
    - Remedial precision
    - Budgetary implications
    - Effects on the thrust of legislation
    - Interference with legislative objectives
- Remedial precision → the court must be able to define with a sufficient degree of precision how the statute ought to be extended to comply with the Constitution
- There is no issue in a lack of concrete definition for sexual orientation
    - It is a commonly used term with an easily discernible common sense meaning
- Budgetary repercussions → such considerations are not sufficiently significant to warrant avoiding the reading in approach
    - The impact will not be substantial enough to change the scheme of the legislation
- Thrust of legislation → hard to see any delirious impact
- Interference with legislative objectives → reading in does not interfere with the objective of the legislation
    - It would actually enhance the objective
- It was excluded and may interfere with the will of the government, but Charter scrutiny will always have some conflict with the will
- Seemed to be that the legislature wanted to defer to the courts on the inclusion of sexual orientation

<u>*Dissent*</u>: (Major J)

- Cannot make the assumption that the legislature would have extended the benefit or protection to a previously purposely excluded group. It is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements – not for the courts to fill in details
- It is more preferable to declare the offending sections invalid and provide the Legislature with an opportunity to rectify them. There is no intention to deprive Albertans of the protection, but to ensure that the legislation is brought into conformity with the Charter while respecting the role of the legislature therefore this declaration of invalidity should be suspended for 1 year

M v H

<u>*Facts:*</u> - SCC found that the exclusion of same sex couples from the definition of spouse in s 29 of Ontario's *Family Law Act* – the act that governed the right to claim spousal support – was an unjustifiable infringement of s 15

- Constitutionally under inclusive because of the omission of gays and lesbians
- SCC chose a different remedy than in Vriend

<u>*Issues:*</u> What is the remedy for this under inclusive legislation?

<u>*Held:*</u> Severing just s. 29 of the legislation with a 6-month declaration of invalidity

<u>*Reasons:*</u> - Reading in is not suitable in this case

- The remedy of reading in is only sufficient where the court can direct with a sufficient degree of precision what is to be read in to comply with the Constitution
- In this case, the defect in the definition of "spouse" can be precisely traced to the use of the phrase "man and woman" which has the effect of excluding same-sex partners
- Reading in won't ensure the validity of the legislation
- Here – substituting "a man and woman" with "two persons" would remedy the constitutional wrong
    - However, the Court is not persuaded it would ensure the validity of the legislation – any extension of s. 29 would have no effect on other sections (opt out by cohabitation and separation that only apply to man and woman) – therefore, same-sex could not opt out of the default system
- Where reading in to one part of a statute will have significant repercussions for a separate and distinct scheme under the act, it is not safe to assume that the legislature would have enacted the Act in its altered form
- Where it is inappropriate – must either strike down entirely or sever only offending portions (Schacter – where the offending portion of a statute can be defined in a limited manner it is consistent with legal principles to declare inoperative only that limited portion)
- Severing just s. 29 (of no force or effect) is most appropriate remedy with suspension for 6-months

Severance and Reading Down

- Severance is a remedy familiar from federalism cases and involves partial invalidation of the law – ex. *Margarine* Reference – it preserves the parts of the legislation that do not violate the Charter

- Reading down is used to avoid declaring a law to be of no force or effect – it allows courts to save from invalidity a law that would be unconstitutional if given its broadest interpretation by giving the law a narrower interpretation (ex. *McKay v The Queen*) – it is not only a remedy but also a technique of interpretation (to keep w/in the constitutional bounds)
- *Hunter v Southam* – reluctant to save legislation through strong forms of reading in

R v Sharpe – strong reading down to save overbroad legislation prohibiting possessed of child porn and made an exception to 1) self created expressive material and 2) private recordings of lawful sexual activity

- *Schacter* – reading in only appropriate where 1) legislative objective is obvious + reading in would further that objective or constitute a lesser interference with that objective than striking down the legislation; 2) the choice of means used by the legislature is not so unequivocal that reading in would constitute an unacceptable intrusion into the legislative domain; and 3) reading in would not require an intrusion into the legislative budgetary decisions so substantial as to change the nature of the particular legislative enterprise
- Neither of first 2 are impaired here

Constitutional Exemptions

- When a constitutional exemption is granted, the law remains in force but is declared inapplicable to individuals/groups whose Charter rights are infringed by its effects
- *R v Ferguson* – this could only be formulated as a remedy under s. 52(1) – laws are of no force or effect to the extent that they are unconstitutional

Temporary Suspension of Declaration of Invalidity

- In some cases, it is appropriate to suspend the effect of the declaration for a period of time in order to allow Parliament/legislature to fill the void
- Should not be used indiscriminately – criteria = potential danger to public, threat to constitutional order, or an under inclusive law where striking down would deprive deserving persons of benefits w/o providing them to the individual whose rights have been violated
- Manitoba Language Reference introduced this remedy into Canadian constitutional law
- Issue – can a declaration issued under s. 24(1) be delayed? – Eldridge v BC – declaration of entitlement to sign language interpretation was delayed for 6-months

REMEDIES UNDER S 24(1) OF THE CHARTER

Little Sisters Book and Art Emporium v Canada

Facts: - Little Sisters is a lesbian and gay bookshop owned by the appellants who say their equality rights as gay men have been violated by Customs officials who had wrongly delayed, confiscated or misclassified materials imported by the appellant on numerous occasions.

- The rights of the appellants under s 2(b) and 15(1) of the Charter have been infringed in many ways

Issues: Whether the court can apply a remedy under s 24(1)
Held: Not practical to do so
Reasons: - In the six years since this case began, Customs addressed the institutional and administrative problems encountered by the appellants

- The Court has not been informed by the appellants of the specific measures (short of declaring the legislation invalid (which was ruled out)) that would remedy the continuing problems

Dissent: - systematic problems call for systematic solutions

- Customs' history of improper censorship, coupled with its inadequate response to the declarations of the courts below, confirms that only striking down the legislation will guarantee vindication of the appellant's constitutional rights
- There is nothing in the Act holding the Custom's officers accountable to remaining non-discriminatory

An Appropriate and Just Remedy Will:

1. Meaningfully vindicate the rights and freedoms of the claimants
2. Employee means that are legitimate within the framework of our constitutional democracy
3. Be a judicial remedy which vindicates the right while invoking the function and powers of a court
4. Be fair to the party against whom the order is made
5. Evolve to meet changing needs and circumstances

SECTION 2(A) - FREEDOM OF RELIGION

2. Everyone has the following fundamental freedoms:

a. freedom of conscience and religion

- The text of the Charter reveals that religion is an important element in the understanding of the Canadian Constitution
- Section 15, provides that the state cannot discriminate, inter alia, on the basis of religion
- Section 15(2) states that it is not contrary to the equality guarantees set out in s. 15(1) for the state to ameliorate conditions because of religion
- Religious freedom consists of 2 basic ideas:
    - 1) 'Establishment' of religion – That the state cannot, in the exercise of its powers, impose the state's preferred religion on individuals or on groups
    - 2) Emphasis is given to individual or group religious practice and stipulates that it is inappropriate for the state to interfere with religious belief or practice – the protection of 'free exercise' of religion

SUNDAY OBSERVANCE AND THE SCOPE OF SECTION 2(A)

- Cases challenging Sunday closing laws – which were in place both at the federal and provincial level when the Charter came into force
- In Big M Drug Mart, the SCC struck down the federal Lord's Day Act on the ground that it unjustifiably interfered with freedom of conscience and religion as guaranteed by s 2(a)

R v Big M Drug Mart Ltd

Facts: - Big M was charged with unlawfully carrying on the sale of goods, on Sunday, contrary to the *Lord's Day Act*
- Big M has challenged the constitutionality of the *Lord's Day Act*, both in terms of division of power and the Charter
- Freedom of religion has been seen to be a matter falling within federal legislative competence
- "Lord's Day" → Saturday midnight to Sunday midnight
- S 4 of the Act makes it unlawful for any person to carry out business on Sunday
- Note: s 52 says an unconstitutional law is of no force or effect so Big M can challenge the constitutionality as a corporation
    - S 24 may restrict Big M's "individual remedy" under religious freedoms, because Big M has no religion
    - In summary, no s 24 but yes s 52

Issues: Does the Act infringe s 2(a) of the Charter?
Held: Yes – cannot be upheld under s 1
Reasons:
Purpose and Effect
- There are two ways to characterize the purpose of the Lord's Day act
    - The religious one, namely securing public observance of the Christian institution of the Sabbath
    - The secular one, namely providing a uniform day of rest from labour
- Cannot be said to have a secular purpose; it is a religious purpose
- Consideration of the object of legislation is vital if rights are to be fully protected
- The Court shuts down the "shifting purpose" argument (that the prupose may shift or transform over time)
    - Practical difficulties – uncertainty in laws and encourage re-litigation of the same issues (end stare decisis)
    - Stands contrary to 'Parliamentary intention' – purpose is a function of intent of those who drafted and enacted the legislation at the time, and not of any shifting variable
- Purpose is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable

Freedom of Religion
- A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes, and customs
- Freedom can be characterized by the abscene of coercion or constraint
- Is a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free
- Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, it also includes indirect forms of control which determine or limit alternative courses of conduct avaliable to others
- Freedom embraces the absence of coercion and constraint
- Freedom means that, subject to limitations that are necessary to protect public safety, order, health or morals, or the fundamental rights of others, no one is to be forced to act in a way contrary to his beliefs or his conscience
- The Charter safeguards religious minorities from the threat of the "tyranny of the majority"
- The *LDA* works as a form of coercion
- The Act takes Christian views and using the force of the state translates them into a positive law binding on believers and non-believers alike

The Purpose of Protecting Freedom of Conscience and Religion
- *Hunter* → the proper approach to interpretation of the Charter is a purposive one – the meaning of a right or freedom is to be ascertained by an analysis of the purpose of such guarantee – it is to be understood in the light of the interest it was meant to protect
    - The interpretation is meant to be generous but not overshoot the actual purpose of the right in question

    - It must be placed in its proper linguistic, philosophic and historical contexts
- The overall purpose (as per *Hunter*) is the "unremitting protection of individual rights and liberties"
- Purpose of freedom of conscience and religion → Every individual be free to hold and to manifest whatever beliefs and opinions his/her conscience dictates provided that such manifestations do not injure his/her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own
    - this prevents the government from compelling individuals to perform or abstain from performing otherwise harmless acts because of the religious significance of those acts to others
- It is for each Canadian to work out for him/herself what his/her religious obligations are and not for the state to dictate otherwise
- The purpose of the *Lord's Day Act* is to compel observance of the Christian Sabbath
    - This **infringes** s 2(a)

Section 1

- Once a sufficient government interest is recognized, the Court must decide if the means chosen to achieve the interest are reasonable – proportionality
- Two arguments that justify the *LDA*:
    - Sunday is the most practical day to be chosen for one of rest
    - Everyone accepts and needs a universal day of rest from work, business and labour
- Legislation cannot be saved because it achieves a goal that the legislators did not primarily intend
- There is no pressing and substantial purpose because the purpose itself is unconstitutional

R v Edwards Books and Art Ltd

Facts: - Court is called on to consider the constitutional validity of Sunday closing legislation enacted by the province of ON, the *Retail Business Holiday Act*

- Division of powers note: ON has the jurisdiction to create an act of this type because it was affecting businesses and contracts, NOT religion so it is *intra vires* ON
- The Act contained some exemptions to the Sunday closing requirement (small businesses could remain open, etc)
    - Removes the indirect coercion of forcing people to observe the sabbath
- 4 ON retailers were charged with failing to ensure that no goods were sold or offered for sale by retail on a holiday, contrary to s 2
- 3 retailers were convicted and now appeal

Issues: Is the act constitutionally valid or does it infringe on s 2(a)

Held: Infringes s 2(a), upheld under s 1

- Legislation with a secular inspiration does not abridge the freedom from conformity to religious dogma merely because its statutory provisions coincide with the tenants of a religion

Reasons:

Legislation

- S 2 – 7 of the Act make it an offence to carry on a retail business on a holiday
- A particularly controversial exemption is contained in s 3(4)
    - It applies to businesses, which on Sundays, have seven or fewer employees engaged in the service of the public and less than 5000 sqft used for such service
    - These business are exempt if they closed on the previous Saturday
- The *TBHA* was enacted with the intent of providing uniform holidays to retail workers
- The act was not a superstitious attempt to encourage religious worship
- The title and text of the act, the legislative debates and the Commission all point to the secular purpose underlying the Act

Freedom of Conscience and Religion Under s 2(a)

- The act has a secular purpose which is not offensive to the Charter guarantee of freedom of conscience and religion
- *Big M* → both the purpose and the effects of legislation are relevant to determining its constitutionality
- Even if the law has a valid purpose, it is still open to a litigant to argue that it interferes by its effects with a right or freedom guaranteed by the Charter
- Must still consider the impact of the Act
- 2 coercion arguments:
    - The RBHA makes it more expensive for retailers and consumers who observe a weekly day of rest other than Sunday to practise their religious tenets
        - The act indirectly coerces these persons to forego the practice of a religious belief
        - The purpose of s 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature and in some cases, a higher or different order of being – the Constitution only shelters those to the extent that religious beliefs or conduct might reasonably or actually be threatened

        - For a state imposed cost/burden to be proscribed by s 2(a) it must be capable of interfering with religious beliefs or practice – if action increases the cost or practicing/manifesting religious beliefs is trivial/insubstantial then it is not prohibited
    - The Act has the direct effect of compelling non-believers to conform to a majoritarian religious dogma, by requiring retailers to close their doors on Sunday
    - One is not being compelled to engage in religious practices merely because a statutory obligation coincides with the dictates of a particular religion
    - A legislative prohibition such as theft or murder is not a state-enforced compulsion to conform to religious practices, merely because some religions enjoin their members not to steal or kill
- There is an **internal limit** to s 2(a) – there has to be an actual state act that threatens religious practice
    - Real impact is on Saturday observers – can't shop Saturday, and now can't shop Sunday either
    - Forcing to compromise religious beliefs – actual burden, not trivial

The Impact of the Act

- The act has a different impact on person depending on religious beliefs:
    - Non-Observers
        - The effects are generally secular in nature and do not impair or abridge their freedom of conscience or religion
        - It does not interfere with their religion
    - Sunday Observers
        - The is act is favorable to Sunday observers – the cost of for religious observance has been decreased
    - Saturday Observers
        - It is argued that there is no nexus between the law and the freedom of Saturday observers to exercise their religious beliefs
        - This Act leaves the Saturday observers at the same natural disadvantage relative to non-observers – the competitive pressure to abandon Saturday observance is not insubstantial or trivial
            - Government action chose that they would have to be closed on Sunday – but they are also closed on Saturday (indirect coercion) would be easier if they gave up that religious tenant of faith and used Sunday as a day of rest
        - It can also affect Saturday observing consumers – can't shop on Sunday
        - It is an abridgment of their religious freedom
    - Other Day Observers

Section 1

- The Act is aimed at a pressing and substantial concern – enabling parents to have regular days off in common with child's days off from school
- There is a rational connection
- Disproportionate infringement (minimal impairment) → No – option for retailers with less than 8 employees to stay open so it can be justified for large retailers but not small; this is where deference should be afforded to the legislature (balancing competing groups)
- Changed to "as little as reasonably possible"

Concurrence (Beetz):

- No discrimination from act itself – discrimination is from beliefs – act doesn't make you close on Saturday; religion makes you close on Saturday

Dissent: (Wilson J)

- A limit on freedom of religion which recognizes the freedom of some members of the group but not of other members of the same group cannot be reasonable and justified in a free and democratic society = there is no rational connection
- This is not as little as possible – there are less infringing measures

THE RESTRICTION AND ACCOMMODATION OF RELIGIOUS PRACTICE

- The central focus of s 2(a) seems to be the protection against coercion
- This freedom from coercion was understood to have two sides:
    - The protection of the individual's freedom *from* religion
        - That is, the freedom from being compelled by the state to engage in any form of religious practice
    - The protection of the individual's freedom *to* religion
        - That is, the freedom to engage in religious practice without restriction by the state
- S 2(a) is breached any time the state restricts a religious practice in a non-trivial way

S 2(A) INFRINGEMENT TEST

An infringement of s 2(a) of the *Charter* will be made out where:

- Stage 1 of freedom of religion analysis:
    - 1) He/she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and (2) He or she is sincere in his or her belief
- Stage 2 → Once an individual has shown that his/her religious freedom is triggered, court must ascertain whether there has been enough of an interference with the exercise of the implicated right to constitute an infringement of religion under the Charter [more than trivial or insubstantial]
    - Substantially interfered with or actually threatened
    - Consider context of harm and rights of others

If s 2(a) is found to be infringed, conduct a s 1 analysis

Syndicat Northcrest v Amselem

Facts: - The appellants, all Orthodox Jews, are divided co-owners of residential units in Montreal

- Amselem set up a "succah" on his balcony for the purposes of fulfilling a biblically mandated obligation during the Jewish festival of Succot
- Succah: small, enclosed hut opened to the heavens in which Jews are commanded to dwell temporarily during the festival
- After Amselem put up his succah, the syndicate of co-ownership, Syndicat Northwest, requested its removal, claiming the succah was in violation of the buildings by-laws as stated in the declaration of co-ownership which prohibited decorations and alterations to the balcony
- Despite the refusal, the appellants set up the succahs and the respondents filed an application for a permanent injunction prohibiting the appellants from setting them up

- NOTE: This is a *Quebec Charter* problem because there are no state actors in here, the Canadian *Charter* does not apply
    - Religious freedoms apply to private individuals as well
    - SCC said the outcome would have been the same had this been an issue under the Canadian Charter

Issues: Whether the clauses in the by-laws of the declaration of co-ownership, which contained a general prohibition against decorations or constructions on one's balcony, infringe the appellant's freedom of religion

- If so, whether the refusal by the respondent to permit the setting up of a succah is justified by its reliance on the co-owner's rights to enjoy property under the *Quebec Charter* and their rights to personal security under s 1
- Whether the appellants waived their rights to freedom of religion by signing the co-ownership declaration

Held: The appellant's religious freedom under the Quebec Charter has been infringed by the declaration of co-ownership

Reasons:

Definition of Religious Freedom

- Only beliefs, convictions and practices rooted in religion, as opposed to those that are secular, socially-based or conscientiously held, are protected by the guarantee of freedom of religion
- Religion typically involves a particular and comprehensive system of faith and worship
    - Also tends to involve the belief in a divine, superhuman or controlling power
- Religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of spiritual faith
- Claimant seeking to invoke freedom of religion should not need to prove the objective validity of their beliefs in that their beliefs are objectively recognized as valid by other members of the same religion
- 2(a) allows EVERYONE the right to religion, which is why a subjective and personal approach should be taken
- Freedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he/she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his/her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials
- This freedom encompasses objective as well as personal perceptions of religious beliefs
- Both obligatory and voluntary expressions of faith should be protected under the Charter
- An inquiry into the mandatory nature of an alleged religious practice is not only inappropriate, it is plagued with difficulties
- While a court is not qualified to rule on the validity or veracity of any given religious belief, or to choose among various interpretations of belief, it is qualified to inquire into the sincerity of a claimant's belief, where sincerity is in fact at issue
    - Inquires must be limited
    - There are internal limits of this protection as well as the application of s 1 so not ALL sincere religious beliefs will be upheld under s 2(a)

- At the first stage of the religious freedom analysis, an individual advancing an issue premised upon a freedom of religion claim must show the court that:
    - He/she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials
    - He/she is sincere in his/her belief

Infringement of Religious Freedom

- Once an individual has shown that his/her religious freedom in triggered, a court must then ascertain whether there has been enough of an interference with the exercise of the implicated right so as to constitute an infringement of freedom of religion under the Quebec *Charter*
- It suffices that a claimant show that the impugned contractual or legislative provision interferes with his/her ability to act in accordance with his/her religious beliefs *in a manner that is more than trivial or insubstantial*
- The context of each case must be examined to ascertain whether the interference is more than trivial or insubstantial
- Not every action will become summarily unassailable and receive automatic protection under the banner of freedom of religion
- No right is absolute
    - We live in a society of individuals in which we must always take the rights of others into account
- Freedom of religion should not be narrowly construed
- We must still consider how an exercise of a religion impacts upon the rights of others in the context of the competing rights of private individuals
- The ultimate protection of any particular charter right must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises
- Freedom of religion must be made subject to overriding societal concerns

Application

- Claim Steps:
    1. An individual's freedom of religion has been infringed – claimant must demonstrate that he/she sincerely believes in a practice or belief that has a nexus with religion
    2. Demonstrate that the impugned conduct of a third party interferes with the individual's ability to act in accordance with that practice or belief in a manner that is non-trivial
- Rabbi's chosen as trial/appeal said it was not a commandment for the succahs to be erected
    - This is wrong as the Charter does not require any person to prove his/her religious practices are supported by any mandatory doctrine of faith
- Regardless of position in religious texts/officials – if an individual demonstrates he/she sincerely believes a certain practice/belief is religious in nature either it is objectively required, or he/she subjectively believes it engenders a connection to the divine – as long as the practice has a nexus with religion it should trigger protection
- The proper test here is whether the appellants sincerely believe that dwelling in or setting up their own individual succah is of religious significance to them irrespective of whether they believe the religion requires them to build their own succah
- Amselem sincerely believed he is obligated by the Jewish religion to set up and dwell in his own succah and that a communal one is not an option – his right is infringed
- The respondent's rights would be minimally harmed by allowing the appellants to set up succahs – 9 days only so property value would not decrease (even if, the infringement of rights would outweigh the decrease in property value)
- If blocked fire exits/security reasons – this would require recognition – however, here this is not a concern

Alberta v Hutterian Brethren of Wilson Colony

Facts: - Alberta regulations require that all persons who drive motor vehicles hold a driver's licence

- Since 1974, each licence has borne a photograph of the licence hold, subject to exemption for people who objected to having their photographs taken on religious grounds
- At the registrar's discretion, religious objectors were granted a non-photo licence (Condition Code G licence)
- 2003 → the province adopted a new regulation in which the photo requirement became universal
- 56% of the Code G licences were held by Hutteriates who sincerely believe that the second commandment prohibits them from having their photograph taken
- The photo requirement was aimed at reducing the risk of fraud
- The colony challenges the requirement's constitutionality

Issues: Whether the universal photo requirement infringes s 2(a) of the *Charter*

Held: S 2(a) is infringed, but it is justifiable under s 1

Reasons:

- The infringement meets the *Syndicat* test for an infringement of s 2(a)

    - Alberta may have had the ability to argue that this was not an interference in the Hutteriates ability to practice their religion
    - It can be seen as an indirect coercion in that they have to choose between driving and maintain their belief
    - BUT AB could argue that it was more of a trivial interference rather than significant
    - As per Adams, would likely still find an infringement because the Hutteriates also believe in being self-sufficient so the solution of hiring a driver infringes that right as well

Justification Under S 1

- Giving effect to each religious claim may undermine the universality of many regulatory programs – including an attempt to reduce abuse of driver's licence as here.
- There is an **indirect coercion** here, not saying that the Hutteriates cannot practice their religion or cannot have a licence, but that they have to make a choice between them
- The internal limit is non-trivial or substantial
    - It is non-trivial because someone else could drive, but it is substantial because it is hard to get a driver out to the colony
- When a complex regulatory response to a social problem is challenged, courts will give more deference throughout the s 1 analysis

1) <u>Pressing and Substantial Concern</u>

- Maintaining integrity of the licence system to minimize identity theft is clearly pressing and substantial
    - Also to create a universal driving licence system
        - This objective is one more heavily used in the majority decision
- It is also to ensure that no individual has more than one licence
- Other provinces are moving towards this harmonization as well

2) <u>Rational Connection</u>

- Yes – this is more effective than a system that grants many exemptions

3) <u>Minimal Impairment</u>

- Are there less harmful means of achieving the legislative goal? The burden is on the government to show the absence of less dramatic means of achieving the objective in a real and substantial manner
- Here – *accord legislature deference* especially on complex social issues
    - S 1 does not demand that the limit on the right be perfectly calibrated, judged in hindsight, but only that it is reasonably and demonstrably justified
- *RJR MacDonald* → measure must impair the right as little as reasonably possible to achieve the objective
- Internal limitation – chose the least dramatic means of achieving its objective
- If the government action or administrative practice is alleged to violate a Charter right, then the Court's remedial jurisdiction is not under s 52, but rather under s 24 – a reasonable accommodation analysis may be helpful here
    - **Reasonable accommodation** – parties adjust the terms of their relationship in conformity with human right's legislation
- Different when a legislature and people subject to its laws – these laws of general application are not tailored towards the unique needs of individual claimants
- The broader societal context must inform the s 1 analysis
- The question is whether the infringement is justifiable in a free and democratic society and not whether a more advantageous arrangement for a particular claimant could be envisioned
- **Where the validity of a law of general application is at stake, reasonable accommodation is not the appropriate substitution for a proper s 1 analysis**

4) <u>Proportionate Effects</u> – THIS IS ONE OF THE FIRST TIMES THAT THE SCC HAS SERIOUSLY USED THIS STEP

- Balance the harm done to the claimant's religious freedom and the benefits associated with the universal photo requirement for licences
- <u>Salutary Effect (Benefits)</u>
    - Enhancing the security of the licencing scheme
    - Assisting in road side safety and identification
    - Harmonizing Alberta's licencing scheme with those of other jurisdictions
    - Making sure no one holds more than one licence and requiring *all* licences to have a photo will accomplish the objective more effectively than allowing restrictions – internal integrity would be compromised
    - These effects are sufficient to support some restriction on the rights
- <u>Deleterious Effects</u>
    - Harder cases are where the limit on the religious freedom are due to incidental and unintended effects of the law – this does not preclude the choice of religious belie but it makes it more costly
    - Cost – not being able to drive on the highway, but this does not deprive the Colony of a meaningful choice as to their religious practice
        - Could hire people to drive them – driving is not a right, but rather a privilege

- In balancing the effects, it was concluded that the impact of the limit on religious practice associated with universal photo requirements is proportionate
- There may be many possible solutions to a particular social problem, and a complex 'regulator response' to a social ill will garner a high degree of deference

Dissent (Abella J):

- The real objective is the interest in reducing identity theft, this is a valid pressing and substantial objective
    - The universal requirement is rationally connected to the objective
- Disagrees in the minimal impairment analysis – the law must be carefully tailored so that the rights are impaired no more than necessary (RJR) – not minimally impairing because all alternatives involve taking a photo and this completely extinguishes the right
- Proportionality – cannot say the salutary effects are more than speculation → the effects are slight and largely hypothetical
    - So many people not in the database (700,000) therefore adding 250 individuals from the Colony would be a marginal benefit
- Believes the government has not discharged its burden for justification under s.1
- Would dismiss appeal but suspend declaration of invalidity for one year

Dissent (Lebel J):

- Agree with Abella on views on the lack of justification under s. 1 – believes AB failed to prove that the regulation is a proportionate response to the identified societal problem of identity theft
- Detriments to the Colony (having them rely on others for transportation, not being able to drive) outweigh the potential benefits of the scheme

SECTION 2(B) - FREEDOM OF EXPRESSION

2. Everyone has the following fundamental freedoms:

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

R v Keegstra

- Salient among the justifications for free expression in the first category is the postulate that the freedom is instrumental in promoting the free flow of ideas essential to political democracy and the functioning of democratic institutions
    - Sometimes referred to as the political process rationale
- A piece of this view that expression must be free is because its role in the politic process is that only expression relating to the political process is worthy of constitutional protection
    - Within these limits, protection for expression is said to be absolute
- The validity of this rationale is limited
    - It justifies only a relatively narrow sector of free expression
- Another rational is that it is essential in the search for truth
- Criticism: there is no guarantee that the free expression of ideas will in fact lead to the truth
    - Quite dangerous, destructive and inherently untrue ideas may prevail
- To confine the justification for guaranteeing freedom of expression to the promotion of truth is arguably wrong, because however important truth may be, certain opinions are incapable of being proven either true or false
- Many ideas which cannot be justified are valuable
- Essential precondition of the search for truth rationale → freedom of expression is seen as promoting a marketplace of ideas in which competing ideas vie for supremacy to the end of attaining the truth – the truth may not always prevail, but freedom of expression will assist the promotion of truth in ways impossible without the freedom
- As an end in itself à all persons have the right to form their own beliefs + opinions and to express them – freedom of expression is seen as worth preserving for its own intrinsic value
- Words of 2(b) suggest that there is no need to adopt any one definitive justification for freedom of expression

R Moon, "The Constitutional Protection of Freedom of Expression"

- All arguments for protection of freedom of expression seem to focus on a combination of three values à truth, democracy, and individual autonomy. This freedom protects the individual's freedom to communicate with others – this freedom is valuable because human agency and identity emerge in discourse
- Some accounts say the freedom is either instrumental or intrinsic
- Intrinsic - an aspect of the individual's fundamental liberty or autonomy that should be insulted from the demands of collective welfare – this view hard to explain the other regarding or community-oriented character
- Instrumental - freedom protects another-regarding or social activity and so must be concerned with something more than respect for individual autonomy (focus on collective goals of truth and democracy) – here, the fundamental character seems less obvious – its value is contingent upon the goals of truth and democracy
- Listener theories = listener can hear and judge the expression for herself
- Speaker theories = value self-expression

2(B) IRWIN TOY TEST

1. Was the plaintiff's activity with the sphere of conduct protected by freedom of expression?
    - Expression is defined as anything that attempts to convey meaning
        - The internal limit is violence, this is not protected by 2(b)
2. Was the purpose or effect of the government's action to restrict freedom of expression?
    - Restricting content and form v physical consequences
        - Purpose: Restricting content → If it is the purpose of the law to restrict content, there is a *prima facie* infringement of s 2(b)
        - Effect: Physical consequences → If it was not the *intent* of the law to restrict freedom of expression, but simply an incidental effect, then the rights claimant has an extra burden to overcome:
            - Claimant must demonstrate that the expressive activity promotes the underlying values of free speech: self-fulfillment, promoting democracy, search for the truth

- If the 'expression' undermines the values of free speech and the limitation on free speech is only an incidental effect, then s 2(b) will not be infringed
- The effects analysis is essentially a mini section 1 analysis
- The reason for this is due to the broadness of s 2(b), it is an internal limiting factor
    - This limits what has to be justified under s 1

Example Question – Fun Times Party

1. Does the charter apply?
    - Yes – Municipalities are governmental in nature and the charter therefore applies. Cite *Godbout*

Apply Irwin Toy Test Now:

2. Is the Fun Times Party of Alberta creating an expression?
    - Likely yes
3. Was the purpose of the by law to restrict content?
    - Likely not, its purpose is more towards keeping the peace and maintaining quite neighbourhoods
    - This is a general prohibition on noise, that means an individual cannot do more than just hold a rally
        - i.e. cannot run your chainsaw at 10pm
4. Are the effects of the bylaw restrictive on content?
    - The FTP is being swept up in the effects of the bylaw
    - The must now show that the expression aligns with an underlying vaule of freedom of expression
        - Very likely that they will be found to be promoting democracy, may even say that its self-fulfilment

Section 1 –

5. Is it prescribed by law
    - Yes likely. Excessive may be considered broad, but there are some defining factors
6. Does the City have a pressing and substantial objective?
    - Yes, keeping the neighbourhoods quiet, allowing people to sleep
7. Is this a rational means of achieving that objective?
    - Yes
8. Minimal impairment
    - Yes likely, has to be excessive, it is time restrictive
    - It can be a range of reasonable alternatives, does not have to be perfect
        - Therefore, even the 10-7 time frame is ok, even if people try to say it should be 11pm…
9. Ultimate proportionality?
    - Likely passed it
    - Harms to disturbing neighbourhoods is likely greater than the benefits awarded to the Fun Times Party

Irwin Toy Ltd v Quebec (AG)

Facts: - Challenge to the provisions of Quebec's *Consumer Protection Act* and the relevant regulations governing children's advertising

- S 248 provided that no person may make use of commercial advertising directed at persons under 13 years of age
- The regulations set out certain exemptions from the prohibition on children's advertising
- Irwin Toy broadcast messages that the *Office* claimed were in contravention of the act
- Irwin instituted an action for a declaration that the sections were ultra vires the province or inconsistent with the guarantee of freedom of expression found in s 3 of the Charter

Issues: Do these sections limit freedom of expression? If so, are they justified?
Held: Yes – infringe s 2(b) but are upheld under s 1

Reasons:

Step 1 – Was the plaintiff's activity within the sphere of conduct protected by freedom of expression

- Activity is expressive if it conveys a meaning; the meaning is its content
- We cannot exclude human activity from the scope of guaranteed free expression on the basis of the content or meaning being conveyed
- If the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of a guarantee
- Violence as a form of expression does not receive protection
    - To allow someone to create expression through violence, it cheapens and devalues the protection of expression
    - BUT → threats of violence may be protected, this court would address it under s 1
- The message at issue → clearly conveys a meaning and cannot be excluded as having no expressive content

Step 2 – Was the purpose of effect of the government action to restrict freedom of expression

Purpose

- When applying the purpose test to the guarantee of free expression, one must beware of drifting to either of two extremes:
    - On one hand, the greatest part of human activity has an expressive element and so one might find, on an objective test, that an aspect of the government's purpose is virtually always to restrict expression
    - On the other hand, the government can almost always claim that its subjective purpose was to address some real or purported social need, not to restrict expression
- If the government's purpose is to restrict the content of expression in order to control particular meanings that are not conveyed, it necessarily limits the guarantee of free expression
- If the government's purpose is to restrict a form of expression in order to control access by others to the meaning being conveyed or to control the ability of the one conveying the meaning to do so, it also limits the guarantee
- In determining whether the government's purpose aims simply at harmful physical consequences, the question becomes: does the mischief consist in the meaning of the activity or the purported influence that meaning has on the behaviour of others, or does it consist, rather, only in direct physical results of the activity

Effects

- The court must still decide whether the effects of the government action was to restrict the plaintiff's free expression
    - The burden is on the plaintiff to demonstrate that such an effect has occurred
- Principles underlying the vigilant protection of free expression:
    - Seeking and attaining the truth is an inherently good activity
    - Participation in social and political decision making is to be fostered and encouraged
    - The diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey meaning, but also for the sake of whom it is conveyed
- Plaintiff must show that their activity promotes at least one of these principles
- In this case, the government's purpose was to prohibit particular content in the name of protecting children
- These provisions therefore constitute a limitation on s 2(b)

Whether the Limit on Free Expression Imposed by the Act is Justified under s 1?

Pressing and Substantial Objective

- The concern that prompted the enactment of the legislation is pressing and substantial and that the purpose of the legislation is of great importance
- The concern is for the protection of a group which is particularly vulnerable to the techniques of seduction and manipulation abundant in advertising
- The concerns are the susceptibility of young children to media manipulation and their inability to differentiate between reality and fiction to grasp the persuasive intention behind the message – used the Trade Commission report on young children saying 2-6 cannot distinguish fact from fiction – reasonable to expand this older children and advertising in other media
- Courts are not called upon to substitute judicial opinions for legislative ones (*Edward Books*)
- Here – what legislation mediates between competing claims of different groups it will have to draw a line marking where one set of claims begins and the other fades away
- If legislature makes an assessment on where to draw the line, especially if done by weighing the scientific evidence and allocating scare resources, it is not for the court to second guess
    - Substitute one for another
- Onus is discharged under this section

Means Proportional to the Ends

- When striking a balance between claims of competing groups the choice of means will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources
- The evidence sustains that the reasonableness of the legislature's conclusion that a ban on commercial advertising directed at children was the minimal impairment of free expression consistent with the goal of protecting children against manipulation through such advertising

Deleterious effects

- No suggestion that the effects are so serious to outweigh the pressing and substantial objective – advertisers will have to develop new marketing strategies for children's products

Dissent: (McIntyre J)

- Does not agree that this infringement can be justified under s 1
- No case has confirmed children have suffered harm from advertising
- No proportionality – total prohibition of advertising under an arbitrary age makes no attempt to achieve proportionality
- Freedom of expression should not be supressed except in cases where urgent and compelling reasons exists and then only to the extent necessary for the protection of the community

RJR MacDonald Inc v Canada (AG)

Facts: - The *Tobacco Products Control Act* prohibited the advertising and promotion of tobacco products offered for sale in Canada and required manufacturers to add packages an unattributed warning about the dangers of smoking

- The Act stated it was enacted to protect the health of Canadians in light of evidence of the harmful effects of tobacco use
- Tobacco manufacturers challenged the Act on federalism grounds and Charter grounds
- Said it violated free speech: inability to advertise (*Irwin Toy*), and forced them to add warning labels (forcing expression upon them)

Issues: Does the Act infringe on the freedom of expression? Can it be saved under s 1?

Held: Yes – cannot be justified under s 1

- The prohibition against advertising and requirements of unattributed warnings are of no force and effect – appeals allowed

Reasons: - Both the prohibition on advertising of tobacco products and s 9 which requires the unattributed health warnings on packages, infringes the right of free expression

Justified Under s 1?

- The Oakes test must be applied flexibly having regard for the factual and social context of each case
    - BUT a contextual approach does not reduce the obligation of the state to meet the burden of demonstrating that the limitation on rights imposed by the law is reasonable and justified
    - It does not give the government a free pass to determine free speech
- Deference may vary with the social context in which the limitation on rights is imposed – but should not extend this too far
- Standard of proof on a balance of probabilities at all stages of the proportionality analysis is appropriate

Pressing and Substantial Objective

- The object is to prevent people in Canada from being persuaded by advertising and promotion to use tobacco products
- The objective of the mandatory package warning must be to discourage people who see the package from tobacco use
- The objective of reducing tobacco-related health risks by reducing advertisement related consumption is of sufficient importance to justify overriding freedom of expression
- Cannot state the objective too broadly or else it will immunize the law from being challenged

Rational Connection

- TJ found that the items of 'direct or scientific' evidence were not persuasive; taken together with the scientific evidence is sufficient to establish a link between certain forms of advertising and tobacco consumption

Minimal Impairment

- Fails at this stage
- A full prohibition will only be constitutional under the minimal impairment stage where the government can show that only a full prohibition will enable it to achieve its objective
- Other options that would have been less intrusive include:
    - A partial ban
    - Ban on lifestyle advertising only
    - Measures to prohibit advertising at children
    - Labelling requirements
    - Attributed health messages
- Even with difficult social issues where the stakes are high, Parliament does not have the right to determine unilaterally the limits of intrusion on the rights and freedoms guaranteed by the Charter
    - The Constitution, as interpreted by the courts, determines this
- Commercial speech should not be lightly dismissed
- Motivation to profit is irrelevant to determination of whether the government has established that the law is reasonable or justified as an infringement on freedom of expression
- For the unattributed label, it was for the government to show why this is required to achieve the objective and it failed to do so
- Danger of core v periphery → you now have judge deciding what is important and what is not
    - It is very subjective, shouldn't be left to judges

Dissent: (La Forest)

- In drawing a distinction between legislation aimed at "mediating between different groups" where a lower standard of s 1 justification may be appropriate, and legislation where the state acts at the "singular antagonist of the individual" where a higher standard of justification is necessary – draw a distinction between courts and legislatures
- In according more deference to social legislation (policy decisions) than to criminal justice context, the Court has recognized these important institutional differences between legislatures and the judiciary
- Tobacco is highly addictive, bad for health, dangerous
    - But it is unrealistic for parliament to prohibit the manufacturing, sale, or use → so made a compromise: prohibiting advertising and promotion of the products
- *Keegstra* → fundamental core value served by freedom of expression; search for political, artistic and scientific truth; the protection of individual self-development and autonomy; and the promotion of public participation in the democratic process
- When the form of expression falls father from the 'center core of the spirit' the SCC has ruled restrictions on such expressions less difficult to justify – here, the harm engendered by tobacco place this form of expression far from the 'core' of freedom of expression values + therefore entitle it to a very low degree of protection under s 1
- The core v periphery of expression:
    - This is a controversial idea in free speech – not all speech is created equally
    - Some speech lies at the core and some lies at the periphery
    - Do not look at rights in abstract – look at them in actuality
    - What is it actually an infringement of – in context
        - Right to advertisement of cigarettes
    - For the dissent – this falls away from the core of free speech protections
    - CORE → political speech; Periphery = commercial purpose – making money
    - If periphery should be easier to infringe that speech in s. 1
    - Who ranks and who has the power to rank this?
        - This is subjective
    - This idea of core/periphery starts to break down
    - But context (given the Edmonton Journal contextual) helps to shape this
- Sole purpose for tobacco advertising → inform consumers about and promote the use of a product that is harmful and often fatal to the consumers who use it – the main (if not sole) motivation is profit
- Rational connection → the common sense observation is enough to establish a rational connection here – banning advertising to reduce tobacco consumption
    - However, there was enough evidence to bear out the rational connection between advertising and consumption
- Minimal impairment → in choosing to prohibit only advertisement of tobacco products, it is clear that Parliament adopted a relatively un-intrusive legislative approach to the control of tobacco products
- Proportionality → the deleterious effects of this limitation (the restriction on the rights of tobacco companies to advertise products for profit) do not outweigh the legislative objective of reducing the number of direct inducements for Canadians to consume these products

The Unattributed Warning

- Does not mean they must endorse the message or that consumers will believe they endorse it
- It is common that labelling of products are subject to state regulation – no different than having to label hazard material as 'hazard' or 'dangerous'
- This is proportionate to the objective of informing consumers about the risks of tobacco use

Legislative Sequels to this Case:

The Tobacco Act, S.C. 1997, c. 13

- Legislative sequel to *RJR*
- Now – attributed warning labels; ALSO – warning labels are much larger

Canada (Attorney General) v. JTI-Macdonald Corp., [2007] 2 S.C.R. 610

- This was their first legislative sequel case
- When a law gets struck down; then legislature responds with new law to try again
- Should be more deferential? NO – same standard – apply Oakes Test
- P. 1006 – para 8 → government presented detailed and copious in support of its contention… gov't listened and demonstrated evidence on why the rights are being infringed
- Para 43 – a certain measure of deference may be appropriate where the problem parliament is tackling is a social policy problem – it may be possible to infer a solution that impairs the right less than the one that has been implemented – but this might not achieve the same goal then what the legislature had in mind – this is a complex task – on complex social issues the minimal impairment test has been met when parliament has chosen one of the reasonable alternatives
- Irwin Toy; Edwards Books
- Here, the rights are upheld, even though they are more restrictive than they were in *RJR*

HATE SPEECH

- Hate speech is currently restricted/regulated by both federal and provincial laws
- *Criminal Code* prohibits 3 types of "hate propaganda"
    - S 318(1) – prohibits the advocacy or promotion of genocide
    - S 319(1) – prohibits the incitement of hated against an identifiable group, when this incitement is likely to lead to a breach of the peace
    - S 319(2) – prohibits the wilful promotion of hatred against an identifiable group
    - S 320 – enables a court to order the seizure or erasure of material that the court determines to be hate propaganda

R v Keegstra

Facts: - Keegstra was a high school teacher in AB and was dismissed
- He was charged under s 319(2) with unlawfully promoting hatred against an identifiable group by communicating anti-Semitic statements to his students and was convicted
- Keegstra's teachings attributed various evil qualities to Jews and was a holocaust denier
    - He expected his students to reproduce his teachings on exams
- Keegstra argued that s 319(2) unjustifiably infringed on his freedom of expression as guaranteed by s 2(b) of the *Charter*
    - TJ rejected the argument
    - CA overturned

Issues: Does s. 319(2) unjustifiably infringe Keegstra's right to freedom of expression by preventing him from hateful speech against Jews?

Held: S 319(2) infringes s 2(b) but is justifiable under s 1

Reasons:

Section 2 (b) of the Charter: Freedom of Expression
- Communications which wilfully promote hatred against an identifiable group without doubt convey a meaning and are intended to do so by those who make them
- **First Stage:**
    - *Irwin Toy* → stressed that the type of meaning conveyed is irrelevant to the question of whether s 2(b) is infringed
    - Therefore, the fact that the expression covered by s 319(2) is invidious and obnoxious is beside the point
    - It is enough that those who publicly and wilfully promote hatred convey or attempt to convey a meaning and it must therefore be concluded that the first test of *Irwin Toy* is satisfied
- **Second Stage**:
    - One notes that the prohibition in s 319(2) aims directly at the words that have as their content and objective the promotion of racial or religious hatred
    - S 319(2) therefore overtly seeks to prevent the communication of expression, and hence meets the second requirement of the *Irwin Toy* test
- S 319(2) constitutes an infringement of the freedom of expression guaranteed by s 2(b) of the Charter
- Dickson noted that this type of hate speech does not fall into the exception under *Irwin* that excludes expression through violence (must be physical)

Section 1 Analysis of s 319(2)
- A free and democratic society embraces the very values and principles which Canadians have sought to protect and further by entrenching specific rights and freedoms into the Constitution although the balancing exercise in s 1 is not restricted to values expressly set out in the Charter
- **A rigid or formulistic approach to s 1 must be avoided**

Pressing and Substantial Objective of s 319(2)
- Must ask if hate propaganda in Canada causes sufficient harm to justify legislative intervention of some type
- The report of the Special Committee found that hate propaganda is prevalent and has risen since the Cohen Committee
- The presence of hate propaganda in Canada is sufficiently substantial to warrant concern
- There are two harms caused by hate propaganda:
    - The harm done to members of the target group
    - The influence upon society at large
        - NOTE: **this is a pressing and substantial concern**
        - First criteria of s 1 analysis is met
- Canada took on international human rights obligations and no aspect has been given more attention than discrimination
- S 15 and 27 of the Charter represent a strong commitment to values of equality and multiculturalism, and hence underline the great importance of Parliament's objective in prohibiting hate propaganda
- Parliament has recognised the substantial harm that can flow from hate propaganda and in trying to prevent pain and suffering by target groups members and to reduce racial, ethnic and religious tension in Canada, has decided to supress the wilful promotion of hatred against identifiable groups

Proportionality

- The interpretation of s 2(b) in *Irwin Toy* gives protection to a very wide range of expression
- However, a s 1 analysis of a limit upon s 2(b) cannot ignore the nature of the expressive activity in which the state seeks to restrict
- We must guard carefully against judging expression according to its popularity, but it is equally destructive of free expression values to treat all expression as equally crucial to those principles in the core of s 2(b)
- Dickson J → makes it clear that, in his opinion, the expression prohibited by s 319(2) is not closely linked to the rationale underlying s 2(b)
- At the core of freedom of expression lies the need to ensure that truth and the common good are attained
- There is very little chance that statements intended to promote hatred against an identifiable group are true, or that their vision of society will lead to a better world
- Another central component of s 2(b) → the vital role of free expression as a means of ensuring individuals the ability to gain self-fulfilment by developing and articulating thought and ideas as they see fit
- The message put forward by individuals who fall within the ambit of s 319(2) represents a most extreme opposition to the idea that members of identifiable groups should enjoy this aspect of s 2(b) benefits
- The extent to which the unhindered promotion of this message furthers free expression values must therefore be tempered insofar as I advocates with inordinate vitriol an intolerance and prejudice which views as execrable the process of individual self-development and human flourishing among all members of society
- The degree of limit is no substantial
- The suppression of hate propaganda reduces the harm such expression does to individuals who belong to an identifiable group and to relations between various cultural and religious groups in Canada
- Rational Connection:
    - There are 3 ways where the effect of the legislation might be seen as an irrational means of carrying out the Parliamentary purpose:
        - The provision might actually promote the cause of hatemongers by earning them extensive media attention
            - Argument – sends out a message that hate propaganda is harmful and threatening + to demonstrate the severe reprobation the society holds against these messages
        - The public might view the suppression of expression by the gov't with suspicion – making it seem as though the expression is true
            - This is so the values beneficial to a free and democratic society can be publicized
        - Germany in 1920s/30s used these same type of laws and they did not to stop the racist philosophy under the Nazis
            - Does not say it could have stopped – but this is one way to prevent the spread of racism
    - This branch of the test has been met
- Minimal Impairment:
    - Statements made in private are excluded from s 319(2), even if they are made in public forums, indicating Parliament's intent to not intrude into the privacy of individuals
    - Will it chill free speech? – People self-censor? Statements made in private conversation are excluded
        - "wilful" means that the accused has the subjective desire to promote hatred
        - Goes to the *mens rea* of hate speech
    - Proof of actual hatred is not required in order to justify a limit under s. 1
    - "Hatred" must be defined according to the context in which it is found – emotion of an intense and extreme nature that is clearly associated with vilification and detestation and hatred is predicated on destruction
    - S. 319(2) provides definitional limits which act as safeguards to ensure it will only capture the expressive activity which is openly hostile to Parliament's objective
- Other Modes That Could Further The Objective:
    - Using human rights statutes instead of criminal law
    - It may be that a number of courses of action are available in the furtherance of a pressing and substantial objective, each imposing a varying degree of restriction upon a right or freedom – the government may legitimately employ a more restrictive measure to further the objective in ways that alternative responses could not
- Ultimate Proportionality:
    - Few concerns can be as central to the concept of a free and democratic society as the dissipation of racism and the especially strong value which Canadian society attaches to this goal must never be forgotten in assessing the effects of an impugned legislative measure
    - The effects of s 319(2) are not of such a deleterious nature as to outweigh any advantage gleaned from the limitation of s 2(b)
        - There are real concerns created by hate speech and those are addressed in a reasonable way through the criminal sanction

Dissent: (McLachlin J)

- Rational Connection:

- This section may have a chilling effect on expression by law-abiding citizens and it is far from clear that is provides an effective way of curbing hatemongers
- This speech also confers publicity for causes and can bring sympathy; gov't trying to suppress truth; did not work in Nazi Germany
- The connection is tenuous and it cannot be said there is a strong connection between the criminalization and its suppression
- Also a publicity problem and conspiracy theories if government says no people think it's true
  - In an effort to prohibit the speech, it is being promoted

- Minimal Impairment:
  - The definition may catch many expressions which should be protected
  - "Hatred" is broad and capable of catching a wide variety of emotion
    - Use it every day to express even things like dislike
  - It is also subjective and is proved by inference – usually by judge or jury
- The danger is that the legislation may have a ***chilling effect*** on legitimate activities important to our society by subjecting innocent persons to constraints born out of fear of the criminal process
- Balancing → harm to expression – people afraid to express out of fear; benefit – are worthy but the claims of gains to be achieved are tenuous
  - The Human Rights Code would have been better to deal with this
- Any questionable benefit is outweighed by the significant infringement on the constitutional guarantee of free expression
- Lays out three main rationales for freedom of expression:
  a. Political process/democracy
  b. Search for truth/marketplace of ideas
  c. Inherent value/self-actualization

Saskatchewan (Human Rights Commission) v Whatcott

Facts: - Concerns a challenge to a prohibition on hateful publication in the *Saskatchewan Human Rights Code*

- **S 14(1)** – No person shall publish or display or cause or permit to be published/displayed on any lands or premises or in a newspaper, through a TV or radio or any other broadcasting devise, or in any printed matter – including any notice, sign, symbol, emblem, article, statement, or other representation
  - (a) tending or likely to tend to deprive, abridge or otherwise restrict the enjoyment by any person or class of persons, on the basis of a prohibited ground, of any right to which that person or class of persons is entitled under law; or
  - (b) that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground.
- Mr. Whatcott distributed flyers on behalf of Christian Truth Activists – two of the flyers were entitled 'Keep Homosexuality out of Saskatoon's Public Schools' (D) and 'Sodomites in our Public Schools' (E)
- 4 individuals filed complaints alleging these materials promoted hatred against individuals because of their sexual orientation
- The flyers included many offensive statements – linking homosexuality to HIV/Aids and pedophilia
- SKCA reversed trial findings finding that they failed to take the moral context of the flyers properly into account and that these flyers were a polemic on public policy issues and not hate speech

Issues: Is Whatcott's freedom of expression justifiably infringed by preventing him from handing out his flyers?

- Does s 14(1)(b) infringe s 2(a)? Do the flyers contravene s 14(1)(b)?

Held: Yes, but can be upheld under s. 1, if sever 'ridicules, belittles, otherwise affronts' and keep 'hatred'

- Flyers D and E are seen as hatred and compensation awards reinstated; but flyers F and G are not and do not contravene s 14(1)(b) of the Code

Reasons:

- *Big M* → You're allowed to manifest your beliefs
- *Taylor* → defined hatred as 'involving unusually strong and deep-felt emotions of detestation, calumny and vilification'
  - Rothstein tweaked this by removing 'calumny' (speech amounting to false misrepresentations)
  - This definition excludes merely offensive or hurtful expression and the question the courts must ask is whether a reasonable person, aware of the context and circumstances surrounding the expression, would view it as exposing the protected group to hatred
- Violent expression and expression that threatens violence does not fall within the protected sphere of s 2(b)
- Apart from that, not all expression will be treated equally in determining an appropriate balance of competing values in a s 1 analysis
  - Certain types of expression will be relatively closer to or further from the core values behind the freedom, depending on the nature of the expression
  - This will affect its value relative to other Charter rights

- Hate speech is at some distance from the spirit of s 2(b) because it does little to promote, and can in fact impede, the values underlying freedom of expression
- S 14 of the Code provides an appropriate means by which to protect almost the entirety of political discourse as a vital part of freedom of expression
    - It extricates only an extreme and marginal type of expression which contributes little to the values underlying freedom of expression and whose restriction it is therefore easier to justify
    - It is not overbroad

S 2(a) of the Charter

- To the extent that Whatcott's choice of expression is caught by the hatred definition in s 14(1)(b), the prohibition will substantially interfere with Whatcott's ability to disseminate his belief by display or publication of those representations
- This section infringes freedom of conscience and religion as guaranteed by s 2(a) of the Charter
- It is justified under s 1
    - But the Court found that the words "ridicules, belittles or otherwise affronts the dignity of" in s. 14(1)(b) were not "rationally connected to reducing systemic discrimination against vulnerable groups". The expression captured by those words was found not to rise to the level of "ardent and extreme feelings" essential to the constitutionality of the limitation on expression in Taylor, so the Court ordered those words struck out
- If despite the context of the entire publication, even one phrase or sentence is found to bring the publication in contravention of the Code, this precludes publication of the flyer in its current form
- The message that a reasonable person would take from the flyers is that homosexuals by virtue of their sexual orientation are inferior, untrustworthy, and seek to proselytize and convert our children
- Flyers D and E would objectively be seen as exposing homosexuals to detestation and vilification
- But flyers F and G (identical) – but have a reprint of a gay magazine and saying ads with men who want to get sodomized shouldn't be legal in Saskatchewan; and a bible passage saying if you cause one of these little ones to stumble it would be better that a millstone was tied around your neck and you were cast into the sea' – this would not be found as exposing persons of same-sex orientation to detestation and vilification – reproduction of ads and statements of how ads could be interpreted as 'men seeking boys' do not demonstrate hatred required by the prohibition
    - The biblical passage stated on these flyers cannot be taken as inspiring detestation and vilification of homosexuals

SECTION 7 - LIFE, LIBERTY AND SECURITY OF THE PERSON

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

INTRODUCTION

- S 7 – guarantees that everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice
- *Lochner v New York* (1905) → US Supreme Court struck down a NY statute that set maximum hours of work for bakers on the ground that it violated the due process clause of the Bill of Rights which prohibits state gov'ts from taking away a person's liberty without due process – the liberty violated was the employees liberty to make contracts about hours of work → interfering with property rights/contracts to do what they want (baker's want to work more, and agreed to be paid less than min. wage) – substantive due process [dominant view is that judges imposed own ideology, frustrating efforts of progressive legislatures to reform working conditions]
- Administrative law → an individual who will be affected in some distinctive or particular way by a proposed administrative action or decision by the gov't is entitled to 'natural justice' – to have a hearing and to have the decision made by officials who are impartial and independent
- Both were a part of the knowledge of lawyers who helped draft s 7

Section 7 Infringement Test:

1. Determine the nature and scope of the interference to right to life, liberty, OR security of the person
2. The nature and scope of fundamental justice; state depriving claimant of the right to principles of fundamental justice:
    - **Arbitrariness** → asks whether there is a direct connection between the purpose of the law and the impugned effect on the individual, in the sense that the effect on the individual bears *some* relation to the law's purpose
        - Court is unsure about whether there must be no relation to the law's purpose or whether it can be a lower standard
    - **Overbreadth** → deals with a law that is so broad in scope that it includes some conduct that bears no relation to its purpose
    - **Gross Disproportionality** → targets the second fundamental evil: the effects on life, liberty or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported
3. The applicability of s 1 of the Charter

Internal Limits:

- Fundamental freedoms have no internal limits but courts interpret internal limits into these provisions
- Free speech – violent acts are not captured; freedom of religion – harm to others
- S 7 – there must be an interference with life, liberty, or security of the person AND must be contrary to the principles of fundamental justice

Reference re 2 94(2) of the Motor Vehicle Act

Facts: S 94(2) imposed a fine and imprisonment on a driver for driving while his license was suspended regardless of knowledge of the suspicion or intent

- Lack of *mens rea*

Issues: Does s 94(2) unreasonably infringe s. 7 of the Charter?

Held: Here, the interference is with liberty

- Absolute liability offends the principles of fundamental justice – from the basic principle that the innocent should not be punished – and cannot be justified under s 1

Reasons:

The Principles of Fundamental Justice

- In the framework of a purposive analysis designed to ascertain the purpose of s 7 and the interests it was meant to protect (*Big M*), it is clear that the interest which are meant to be protect by the words ' and the right not to be deprive thereof except in accordance with principles of fundamental justice' of s 7 are life, liberty and the security of the person
- The principles of fundamental justice are not a protected interest, rather a qualified of the right not be deprived of life, liberty and the security of the person
- **The principles of fundamental justice must be determined by reference to the interest which those words of the section are designed to protect and the particular role of the phrase within the section**
- Must be interpreted broadly
- Ss 18-14 address specific deprivations of the right to life, liberty and security of the person in breach of the principles of fundamental justice and as such, are in violation are in s 7
    - It would be incongruous to interpret s 7 more narrowly (as it is more important) than the rights in ss 8-14 (less important)
        - In effect, these sections are examples of instances in which the 'right' to life, liberty and the security of the person would be violated in a manner which is not in accordance with the principles of fundamental justice
- The principles of fundamental justice are to be found in the basic tenants of our legal system – they not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system
- *Cannot replace the words 'fundamental justice' for those of 'natural justice'*
    - Aka procedural fairness
- Although many principles of fundamental justice are procedural in nature, cannot narrow the interpretation of principles of fundamental justice as there are also substantive elements as well
- Proper approach to determination of principles of fundamental justice – the future growth will be based on historical roots
- The principles of fundamental justice has two prongs:
    - Is the law substantively fair?
        - Should we have the law at all?
    - It the procedure fair?

R v Morgentaler

Facts: - s 251(1) [now 287(1)] of the Code provided that anyone who took steps to cause an abortion was guilty of an offence and liable to imprisonment for life; (2) female who sought to cause own abortion liable to 2 years; (4) exception for those in approved hospital if pregnancy likely to endanger life/health

- Morgentaler and two colleagues established and operated an abortion clinic in TO
- Every abortion performed in their clinic violated s 251(1) because their clinic was not an approved or accredited hospital and therefore had not therapeutic abortion committee to issue certificates
- They were charged and argued that the provision violated s 7 of the Charter

Issues: Does s. 251 of the Code violate s. 7 of the Charter?

Held: The deprivation of security of the person caused by s. 251 is not in accordance with the second clause of s 7 – and s 251 cannot be justified under s 1 because its procedural delays impairs s 7 rights far more than is necessary

- S 251 struck down

Reasons: Dickson J;

Security of the Person

- The law has long recognized that the human body ought to be protected from interference by others
    - The state it not to interfere

- State interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal context, constitutes a breach of security of the person
- S 251 is a violation of the security of the person of thousands of Canadian women who have made the difficult decision not to continue with their pregnancy
    - It clearly infringes with a woman's bodily integrity in both a physical and emotional sense
- Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of a person
- S 251 also creates an unnecessary delay for women who meet the criteria
    - The measurement requirements impose up to a 6 week delay
- This creates a clear risk of damage to the physical well-being of a woman and is sufficient to warrant an inquiry into whether s 251 comports with principles of fundamental justice
- S 251 forces women to carry a fetus to term contrary to their own priorities and aspirations and imposes serious delays causing increased physical and psychological trauma to those women who meet its criteria

The Principles of Fundamental Justice

- Only 20% of hospitals in Canada performed abortions due to the requirements and provinces were also able to impose even more restrictive requirements for approval
- Failure to provide an adequate standard for therapeutic abortion committees which must determine when a therapeutic abortion should be granted – only defined as when the continuation of the pregnancy would be likely to endanger the 'life or health' of the pregnant women – however, 'health' is not defined for the purposes of the section
- Doctors testified at trial that the abortion committees apply differing definitions of health – some allow psychological health to be a justification and others do not
- When the decision of the abortion committee is so directly laden with the consequences, the absence of any clear standard to be applied to the committee is a serious procedural flaw
- The combined effect of these problems and the procedure stipulated in s 251 for access to therapeutic abortions is a failure to comply with the principles of fundamental justice
- Parliament must be given room to design an appropriate administrative and procedural structure for bringing into operation a particular defence to criminal liability – but if that structure is 'so manifestly unfair, having regard to the decisions it is called upon to make, as to violate the principles of FJ that structure must be struck down'
- Here, the structure of the system regulating access to abortions is manifestly unfair – it contains so many potential barriers to its own operation that the defence it creates will be practically unavailable to women in many circumstances who would otherwise qualify for the defence (AKA -- arbitrariness, overbreadth, GD)
- The procedures in s 251 do not comport with the principles of fundamental justice and it is not necessary to determine whether s 7 also contains a substantive content leading to the conclusion that the deprivation of pregnant women's right to security of the person can never comport with fundamental justice
- The requirements do not comport with the principles of fundamental justice in the procedural sense, and since they cannot be severed from the provisions creating the substantive offence, the whole s 251 must fail

Section 1

- Not justified because it impairs s 7 rights far more than is necessary in that they hold out an illusory defence to many women who would otherwise qualify under the exculpatory provisions of s 251(4) – many women Parliament would not wish to subject to criminal liability will be forced by the unavailability of the defence to risk liability or otherwise suffer harm
    - Such as late abortion
- The effects of the limitation upon s 7 rights are out of proportion to the objective sought to be achieved
    - Objective → protect life, health of women – may be defeated because the structures of s(4) are so cumbersome that women whose health is endangered may not be able to gain an abortion

Concurrence (Beetz):

- If a rule of criminal law prevents a person from obtaining appropriate medical treatment when his/her life is in danger, then the state has intervened and this constitutes a violation of that person's security of the person
- 'Security of the person' must include a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction + if must choose between the two, then the right to security of the person has been violated
- The delays a pregnant woman may have to suffer as a result of (4) must undermine the security of person for s 7 to apply → if the delays result in additional danger to the health, then the state has intervened and this intervention constitutes a violation of that woman's security of the person (the state created additional burdens which violated the principles of fundamental justice)
- The delays caused by (4) result in 3 additional types of risk, and this violates the principles of fundamental justice:
    - The risk of post-operative complications increase; risk that the woman requires a more dangerous mens of procuring a miscarriage; and this may result in additional psychological trauma
- Disagrees that having an independent medical opinion offends the principles of fundamental justice

Concurrence (Wilson J):

- Must view the legislative scheme not only in the procedural sense but in the substantive sense as well

- Must ask what is meant by the right to liberty in the context of the abortion issue – does it give pregnant woman control over decisions affecting her own body?
    - Believes that it is a liberty right to make fundamental personal choices without interference from the state
- **Liberty** in a free and democratic society does not require the state to approve the personal decisions made by its citizens, but it does require the state to respect them
    - This guarantees every individual a degree of personal autonomy over important decisions affecting their private lives
    - This no doubt gives a woman a choice to decide whether or not to terminate her pregnancy
- Liberty is a fence → fundamental personal decisions belong inside a fence, free from state entrance
- S 251 clearly violates this right since it takes the decision away from the woman and gives it to a committee
- This is also an interference with the right to personal autonomy in decision-making – a direct interference with her physical person as well
- NOTE from class: liberty certainly includes liberty from prison, but this judgment expands it to include these fundamental personal choices

Dissent (McIntyre J):

- If no right to have an abortion can be shown, then it cannot be said that security of the person has been infringed
- The interpretive approach to the Charter affords no support for the entrenchment of a constitutional right to abortion – to be accepted as a constitutional right it would have to be based on something more than the mere imposition of stress and anxiety
- A breach of a right would have to be based upon an infringement of some interest which would be of such nature and importance to warrant constitutional protection
    - The right to have an abortion is not such an interest

***Chaoulli v Quebec* – pre-key three PFJs**

- How to determine principles of fundamental justice?
    - Must be a vital legal principle
    - Reasonable people must regard it as vital to our societal notice of justice (social consensus)
    - Capable of being identified with precision and applied in a manner that yields predictable results
- This doesn't get us much further along either

Canada (AG) v PHS Community Services Society

Facts: - Insite provided medical services to IV drug uses in the DTES

- Local, provincial and federal authorities came together to create a legal framework for a safe injection facility in which clients could inject drugs under medical supervision without fear of arrest
- In 2008, the federal government failed to extent Insite's exemption from the operation of criminal laws in the *Controlled Drug and Substances Act*
- Insite brought an action for declarations that the CDSA is inapplicable to Insite and that its application to Insite resulted in a violation of s 7
    - Or, that the Minister of Health, in refusing to grant an extension of Insite's exemption, had violated the claimants s 7 rights
- TJ held that the relevant sections of the CDSA were unconstitutional, suspended the declaration of invalidity and granted Insite a constitutional exemption
- CA held that the application of the CDSA to the activities at Insite would violate the Charter and that the CDSA was inapplicable to Insite under IJI

Issues: Whether Insite is exempt from federal criminal laws that prohibit the possession and trafficking of controlled substances, either because Insite is a health facility within the exclusive jurisdiction of the Province or because the application of the criminal law would violate the Charter

Held: The federal minister's actions of not granting an exemption violated s 7 of the Charter, and was, therefore, "not in accordance with the principles of fundamental justice because it was arbitrary, disproportionate in its effects, and overbroad"

- Minister ordered to grant an exemption to Insite (remedy under s 24)

Reasons:

- Canada cannot argue that the negative health risks drug users may suffer is a result of the consequences of the decision to use illegal drugs and not an effect of the CDSA's prohibition on the possession of illegal drugs
    - This contradicts the TJ's finding that addiction is an illness, characterized by a loss of control over the need to consume the substance to which the addiction relates
- Whether a law limits a Charter right is simply a matter of the purpose and effect of the law and not whether the law is right or wrong
    - The morality of the activity the law regulates is irrelevant at the initial stage of determining whether the law engages a s 7 right

- Canada also attempts to argue that the decision to allow supervised injection is a policy question and thus immune from Charter review
    - Policy is not relevant at the stage of determining whether a law or state action limits a Charter right
        - This can be considered under s 1

Has the Minister's Decision Violated the Claimants s 7 Rights?

- The discretion vested in the Minister of Health is not absolute; as with all exercises of discretion, the Minister's decisions must conform to the Charter
    - If the Minister's decision results in an application of the CDSA that limits the s 7 rights of the individual in a manner that is not in accordance with the Charter, then the Minister's discretion has been exercised unconstitutionally
- The decision here was the Minister's decision to reject the application for an exemption and that this decision engage the claimants s 7 rights
    - Security of the person and life of the users are being infringed by this state action
        - 336 overdoses were prevented as a result of this site, therefore working to prevent overdoses
        - The cleanliness of the facility is greater for the security of the person over them doing drugs in an alley
- The Minister's refusal to grant Insite a s 56 exemption was arbitrary and grossly disproportionate in its effects and hence not in accordance with the principles of fundamental justice
- When s 7 rights are at stake, any limitations imposed by the minister's decision must be in accordance with the principles of fundamental justice

Arbitrariness

- When considering whether a law's application is arbitrary, the first step is identify the laws objective
- Decisions of the Minister under s 6 of the CDSA must target the purpose of the act
    - The main purpose is the protection of health and public safety
- The second step is to identify the relationship between the state interest and the impugned law (or the decision in this case)
- Exempting insite does not affect the purpose of this act, therefore it is arbitrary
    - The purpose of this exemption was for a total prohibition on drugs

Gross Disproportionality

- Gross disproportionality describes state actions or legislative responses to a problem that are so extreme as to be disproportionate to any legitimate government interest
- Insite saves lives, its benefits are known
- There has been no discernable negative impact on the public safety and health objectives on Canada during its operation
- The effect of denying the services of Insite to the population it serves is grossly disproportionate to any benefit that Canada might derive from presenting a uniform stance on the possession of narcotics
    - People dying is the other side of the leger

Overbreadth

- Not necessary to consider where arbitrariness and gross disproportionality are met

Section 1

- Section 1 was not argued, but even if it were, it would not succeed
- The goals of the CDSA are the maintenance and promotion of public health and safety
    - The Minister's decision to refuse the exemption bears no relation to these objectives and therefore does not justify an infringement
- Rule of law argument is rejected
    - This is a narrow exemption, does not allow anyone and everyone to possess drugs or open 'safe injection sites'

Canada v Bedford

<u>*Facts:*</u> Three applicants, all former or current prostitutes, brought an application seeking declaration that three provisions of the Criminal Code are unconstitutional

- S 210 makes it an offence to be an inmate of a bawdy-house, to be found in a bawdy-house without lawful excuse, or to be an owner, landlord, lessor, tenant or occupier of a place that knowingly permits it to be a bawdy house
- S 212 makes it an offence to live on the avails of another's prostitution
- S 213 makes it an offence to either stop, or attempt to stop, or communicate or attempt to communicate with, someone in a public place for the purpose of engaging in prostitution or hiring a prostitute
    - Also alleged that s 213 infringes on s 2 of the Charter and that none are provisions saved under s 1 of the Charter
- Prostitution itself is not illegal – it is not against the law to exchange sex for money
- Applicants allege that these three provisions infringe on s 7 of the Charter by preventing prostitutes from implementing certain safety measures that could protect them from violent clients

<u>*Issues:*</u> Does ss 210, 212(1)(j), and 213(1)(c) infringe s 7 of the Charter (security of the person) and if so, are they justified under s 1?

<u>*Held:*</u> They all infringe s 7 and are therefore inconsistent with the Charter, and hence void – 1-year temporary suspension

- Appeal dismissed, cross-appeal allowed

<u>*Reasons:*</u>

Precedent

- The issue of when, if ever, such precedents may be departed from takes two forms:
    - Vertical → When, if ever, may a lower court may depart from a precedent established by a higher court
        - If new legal issues are raised as a consequence of significant development in the law, or there is a change in circumstances or evidence that fundamentally shifts the parameters of debate
    - Horizontal → When can the SCC depart from its own precedent?
- The *Prostitution Reference* was an SCC decision that upheld the constitutionality of the prohibitions on bawdy houses and communicating – two of the provisions challenged here

Section 7

<u>Is Security of the Person Engaged?</u>

- The focus is on the security of a person and not liberty for 3 reasons:
    - The *Prostitution Reference* decided that the communicating and bawdy-house provisions engage liberty, and it is binding on this point
        - Security is a novel issue and why the court can stray from the reference
    - It is not clear that any of the applicant's personal liberties are engaged by living on the avails of prostitution
    - Breaking the law doesn't engage person liberty, but rather, compliance with the law infringes the applicant's security
- The prohibitions at issue do not merely impose conditions on how prostitutes operate
    - They go a critical step further by imposing *dangerous* conditions on prostitution; they prevent people engaged in a risky but legal activity from taking steps to protect themselves from that risk
- Sections 197 and 210 prevent prostitutes from working in the safest place (their own residence) and it interferes with provisions of health checks and preventative health measures
- S 212 prevents prostitutes from hiring drivers or security guards, which would lessen their risk
- S 213 prevents face to face communication which is an essential tool in enhancing prostitutes safety
- The impugned laws negatively impact and thus engage security of a person's rights of prostitution
- There is a sufficient causal connection between the law and the effect on s 7 interests
- It is not necessarily a choice for prostitutes to partake in this line of work and even if it is, sex for money is not illegal

Principles of Fundamental Justice

- We are concerned with the basic values against arbitrariness, overbreadth and gross disproportionality
    - These constitute failures of instrumental rationality
        - The situation where the law is inadequately connected to its objective or in some sense goes too far in seeking to attain it
- The first evil is addressed by the norms against arbitrariness and overbreadth which target the absence of connection between the law's purpose and s 7 deprivation
- The second evil lies in depriving a person's life, liberty or security of the person in a manner that is grossly disproportionate to the law's objective
    - The law's impact on the s 7 interest is connected to the purpose but the impact is so severe that it violates our fundamental norm
- Arbitrariness → asks whether there is a direct connection between the purpose of the law and the impugned effect on the individual, in the sense that the effect on the individual bears some relation to the law's purpose
    - There must be a rational connection between the object of the measure that causes the s 7 deprivation and the limits it imposes on life, liberty and security of the person
- Overbreadth → deals with a law that is so broad in scope that it includes some conduct that bears no relation to its purpose
    - In a sense, the law is arbitrary *in part*
    - At its core, overbreadth addresses the situation where there is no rational connection between the purpose of the law and *some*, but not all of its impacts
- Gross Disproportionality → targets the second fundamental evil: the effects on life, liberty or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported
    - This portion does not consider the beneficial effects of the law for society
    - It balances the negative effect on the individual against the purpose of the law, not against the societal benefits
    - A grossly disproportionate effect on one person is sufficient to violate the norm
- All three do not look at how well the law achieves its object or how much it benefits the public

Do the Impugned Laws Respect the Principles of Fundamental Justice?

- S 210: The Bawdy-House Prohibition
    - Purpose – to combat neighbourhood disruption or disorder and safeguard public health and safety
    - The harmful impacts are grossly disproportionate to its purpose
    - A law that prevents street prostitutes from restoring to a safe house while a suspected serial killer prowls the streets is a law that has lost sight of its purpose
- S 212: Living on the Avails of Prostitution
    - Purpose – to target pimps and the parasitic, exploitative conduct in which they engage

    - Overbroad
    - The law punishes everyone who lives on the avails of prostitution without distinguishing between those who exploit prostitutes and those who could increase the safety and security for prostitutes
- S 213: Communicating in Public for the Purposes of Prostitution
    - Purpose – to take prostitution "off the streets and out of public view" in order to prevent the nuisance that street prostitution can cause
    - The harm caused is grossly disproportionate to the provisions objective
    - Prostitutes need the ability to screen clients face to face

Section 1

- Appellant did not argue a s 1 justification – but did try to justify the living on the avails provision in that it must be drafted broadly to catch all exploitative relationships
    - However, is not minimally impairing since it catches clearly non-exploitative ones
- At the final stage 1 inquiry → effect of taking away measures that protect safety and possibly safe lives are not outweighed by effect of protecting them from exploitative relationships
- On exam → broaden gaze more slightly to talk about the societal benefits and effects

Carter v Canada

<u>*Facts:*</u> - It is a crime in Canada to assist another person in ending her own life (s 241 *CC*)

    - People who are grievously and irremediably ill cannot seek a physician's assistance in dying
    - The person has to choose between taking their own life or waiting for the illness to kill them
- The court says this is a cruel choice
- It's a balance between the autonomy and dignity of an adult and the sanctity of life and the need to protect the vulnerable

<u>*Issues:*</u> Whether the criminal prohibition that puts a person to this choice violates his/her ss 7 and 15 Charter rights

<u>*Held:*</u> Violates s 7, not justifiable under s 1

- The prohibition on physician-assisted dying is void insofar as it deprives a competent adults of such assistance where:
    - The person affect clearly consents to the termination of life
    - The person has a grievous and irremediable medical condition that causes enduring suffering that is intolerable to the individual in the circumstances of his/her condition

<u>*Reasons:*</u>

Was the TJ bound by Rodriguez?

- *Stare decisis* is not a strait jacket that condemns the law to stasis
- Trial courts may reconsider settled rulings of higher courts in two situations:
    - Where a new legal issue is raised
    - Where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of debate"
- Both conditions were met in this case
- The legal framework for s 7 has changed and the evidence on controlling the risk of abuse associated with assisted suicide has also changed

Does the law infringe the right to life, liberty and security of the person?

- The prohibition had the effect of forcing some individuals to take their own lives prematurely, for fear that they would be incapable of doing so when they reached the point where suffering was intolerable
    - The right to life is engaged
- The right to life is engaged where the law or state action imposes death or an increased risk of death on a person, either directly or indirectly
- SCC does not agree that the existential formulation of the right to life *requires* an absolute prohibition on assistance in dying
    - This would create a duty to live rather than a right to life and would call into question the legality of any consent to the withdrawal or refusal of lifesaving or life-sustaining treatment
- Liberty protects the right to make fundamental personal choices free from state interference (Wilson's opinion in *Morgentaler*)
- Security of a person encompasses a notion of personal autonomy involving control over one's bodily integrity free from state interference
    - It is engaged by state interference with an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering
- The prohibition limited s 7 right to liberty and security of the person by interfering with "fundamentally important personal and medical decision making", imposing pain and psychological stress and depriving an individual of control over bodily integrity

The Principles of Fundamental Justice

- S 7 does not promise that the state will never interfere with a person's life, liberty or security of the person, but rather that the state will not do so in a way that violates the principles of fundamental justice
- S 7 encompasses laws that impugn on life, liberty or security of the person that are arbitrary, overbroad or have consequences that are grossly disproportionate to their object

- When looking at these, the first step is to identify the object of the prohibition on assisted dying
- PURPOSE → to protect vulnerable persons from being induced to commit suicide at a time of weakness
- Canada argues it should be – the preservation of life
    - NO
        - 1) Rodriguez did not adopt this as the object – remarks to it are best understood as a reference to an animating social value rather than a description of the specific object;
        - 2) if object is stated broadly it becomes difficult to say that the means used to further it are overbroad or grossly disproportionate;
        - 3) object needs to be defined precisely for purposes of s 7 – the direct target of the measure is the narrow goal of preventing vulnerable persons from being induced to commit suicide at a time of weakness

Arbitrariness

- The principle of fundamental justice that forbids arbitrariness targets the situation where there is no rational connection between the object of the law and the limit it imposes on life, liberty and security
- Not capable of fulfilling its objectives
- Purpose of the prohibition on physician assisted dying is to protect the vulnerable from ending their life in times of weakness
    - A total ban on assisted suicide clearly helps achieve this object
- Individuals rights are not limited arbitrarily

Overbreadth

- Inquiry asks whether a law that takes away rights in a way the generally supports the object of the law goes too far by denying the rights of some individuals in a way that bears no relation to the object
- The question is not whether Parliament has chosen the least restrictive means, but whether the chosen means infringe life, liberty or security of the person in a way that has no connection with the mischief contemplated by the legislature
- The prohibition is overbroad
    - The law catches people outside of the object
- Court didn't decide on gross disproportionality because the law was overbroad

Section 1

- Here it is prescribed by law and has a pressing and substantial objective
- Parliament did face a difficult task in balancing the perspectives of those at risk vs. those who seek the assistance of dying – deference needed
    - But here, since it was an absolute prohibition cannot describe it as a 'complex regulatory response' therefore, the degree of deference (while high) is reduced
- Rational connection → yes - where a certain activity poses risks, prohibition of that activity is a rational method of curtailing risks; it is clearly rational to conclude that a law that bars all persons from accessing assistance in suicide will protect the vulnerable from being induced to commit suicide at a time of weakness
- Minimal impairment → no - TJ concluded (after reviewing the evidence) that a permissive regime with properly designed and administrative safeguards was capable of protecting vulnerable people from abuse and error
    - Can apply the informed consent standard to those wishing to seek assistance in dying
    - The burden of establishing minimal impairment is on the government and they did not discharge this burden – the evidence did not support the contention that a blanket ban was necessary to substantially meet the gov'ts objectives, as there is international evidence showing no abuse; a theoretical/speculative fear cannot justify an absolute prohibition
- Not necessary to look at final stage and balance benefits/effects

SECTION 15 – EQUALITY RIGHTS

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

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

Constitutional History of Equality

WS Tarnopolsky, "The Equality Rights"

- Dicey – 'equality before the law' à one of the 3 meanings of the fundamental principle, the 'rule of law'
    - This excludes the exemption of officials or others from the duty of obedience to the law which governs other citizens

- Marshall – the doctrine implies 'equality of state and individual before the law' à requires that rules granting powers to officials be precise and that is the duty of the courts to hold an equal balance between citizens and officials
- *Roncarelli v Duplessis* → the individual may do anything he pleases unless there is a provision prohibiting him – freedom is presumed; and the authority of the state [public official] can do nothing in his public capacity unless the law permits it

WS Tarnopolsky, "The Equality Rights in the Canadian Charter of Rights and Freedoms"

- S 1 of *Canadian Bill of Rights* includes both a non-discriminatory clause + one on 'equality before the law'
- *Regina v Drybones* → only case where the SCC held a federal provision contravened the 'equality before the law' clause and was therefore inoperative [Indian Act made it an offence for Indians to be intoxicated off a reserve]
    - "S 1(b) means that no individual or group is to be treated more harshly than another under that law + a person is denied equality before the law it is an offence because of his race for him to do something which his fellow Canadians are free to do without committing an offence"
- *Lavell* → *Indian Act* – women lose band membership if marries non-Indian, but man does not; found this does not contravene 'equality before the law.' Said all women being treated the same to does not matter if being treated worse than men.
- 'Equal benefit of the law' (motivation behind this clause) – Bliss case à worked long enough for ordinary benefits but not long enough for maternity; could not claim either – SCC found this did not contravene because it was a benefit and was distinguished from *Drybones* in that that was equal protection of the law

D Gibson, The Law of the Charter: Equality Rights

- Special Joint Committee recommended major changes to the equality provisions
    - Expanding to include equality under the law + equal benefit of the law
    - Adding disability to the expressly prohibited grounds of discrimination
    - Making unmistakable provision for other unspecified forms of unconstitutional discrimination
    - Elaborating the affirmative action provision to ensure the criteria of 'disadvantage' include those that form the basis for prohibited discrimination
    - Altering 'everyone' to every individual – to deny rights to corporations
- Lobbying efforts to include s 28 → rights and freedoms guaranteed equally to male and female persons – the notwithstanding clause is inapplicable to this provision
- S 32(2) of the Charter postponed s 15 coming into force for 3 years to allow governments to house clean and deal with any equality violations

Andrews v Law Society of British Columbia

Facts: Andrews was a British citizen and a lawyer

- He moved to Canada and attempted to join the Law Society of British Columbia
- He passed all of the necessary tests for individuals with international degrees, however he was not allowed to become a member because s 42 of the Barristers and Solicitors Act (now replaced with the Legal Profession Act) limited membership to Canadian citizens
- He sued the Law Society claiming that this provision is contrary to s. 15 of the Charter. The Law Society was successful at trial but this was overturned on appeal

Issues: Does s 42 of the Act violate s 15 of the Charter, and, if it does, is it justified by s 1?
Held: S 42 violates s.15 of the Charter as it treats non-citizens differently on an analogous ground to those enumerated in the Charter and that it imposes a disadvantage on them as they cannot work as a lawyer
Reasons: The general issue that must first be decided in this case is how something can violate s. 15 of the Charter – what must a law possess in order to infringe upon the rights guaranteed, and which rights are protected?

- McIntyre → it is important to realize that equality does not mean treating "like groups alike, and differing groups differently" as this would allow for entire groups to be discriminated against
- What is truly meant by protecting equality is that it must be ensured that everyone is treated fairly under the law, and is not treated differently because of a characteristic that has no legal bearing.
- McIntyre rejects the view that any differential treatment results in discrimination that violates s 15 (Hogg's argument) as this trivializes the values of the Charter
- He also reject's McLachlin's view that the reasonableness and fairness of the legislation must be considered as this assigns too minor a role to s 1
- In order for something to be "discrimination" under s 15 three things must be established:
    - Differential treatment
    - An enumerated or analogous ground (open for interpretation)
    - That the legislation imposed a disadvantage
- If these are established, then the Oakes test must be used to see if the discrimination is permitted under s 1
- The judges all agree that s 42 violates s 15 of the Charter as it treats non-citizens differently on an analogous ground to those enumerated in the Charter and that it imposes a disadvantage on them as they cannot work as a lawyer
- Everyone except for McIntyre agrees that this violation is not justified by s.1

- The Law Society puts forward three arguments attempting to justify the provision:
    - Lawyers should be citizens to ensure that they are familiar with Canadian customs
    - Citizenship attaches a real connection to Canada
    - Lawyers should be citizens as they play a role in the governance of our country
- The majority find that these are not saved by s 1 as they can be established by other means (tests to ensure non-citizen lawyers understand Canadian customs), being a citizen doesn't necessarily mean you are connected to the country, and finally that lawyers do not really play a role in governing our country.
- McIntyre, dissenting in part, believes that lawyers do play a role in governing our country, and their duties are distinct and allow them to access information that could reasonably be desired to remain among citizens. Further, he states that this is a policy decision to be left to the legislature.
- La Forest agrees with the majority, but says that Charter discrimination should not only apply to people who are discriminated against by laws, but to people discriminated against in general. He also talks at length about how to argue an analogous ground – things that are generally out of your control, and that you should not be expected to change.

R v Kapp

Facts: - Aboriginal bands were granted permission to fish one day in advance of the general Fraser River under the Aboriginal Communal Fishing License Registration

- Kapp was a non-aboriginal fisherman who, along with several others, organized a protest fish during this day so that they would be able to claim that the issuing of the licenses was contrary to s 15(1) of the Charter as it discriminated against them on the basis of race
- The appellants were charged with fishing without a license, and raised the Charter claim in defence
- The trial judge found that the issuing of licenses violated s 15 and that it was not saved by s 1
- The first appeal was allowed stating that this program did not affect the human dignity of the non-aboriginal fisherman
- The appeal to the British Columbia Court of Appeal was dismissed

Issues: Have the appellants s. 15 equality rights been breached?

Held: No – no breach of s 15 has been established

- The program is protected by s 15(2) as a program that has, as its object, the amelioration of conditions of disadvantaged individuals or groups

Ratio: - When a claimant makes a s 15(1) discrimination claim they must first prove that a distinction has been drawn on an enumerated or analogous ground

- After they have proven this, the government has the opportunity to prove that the program in question falls under s 15(2). In order to do this the government must prove:
    - The program has an ameliorative or remedial purpose; and
    - The program targets a disadvantaged group identified by the enumerated or analogous grounds.
- To fall under s 15(2), the program must only have a sincere ameliorative purpose; the effects are not to be strictly considered (the burden is on the government to prove that the purpose is sincerely to promote the amelioration of the disadvantaged group; they must prove that there is a correlation between the program and the disadvantage of the group).
- Although the ameliorative purpose does not need to be the sole purpose of the program, the more important the ameliorative purpose is, the more likely it is that the program will fall under s 15(2).
- The fact that not all members of the group being helped by the program suffer disadvantage is not important so long as there is a group disadvantage suffered by the group targeted by the program.

Reasons:

- Federal government has pursued policies to increase Aboriginal involvement in the commercial fishery – as a response to Sparrow to respect rights recognized; provided them with a larger role in fisheries management and increased economic benefits; and minimizing disruption of non-Ab commercial fisheries

Purpose of S 15

- Ss 15(1) and (2) work together to promote the vision of substantive equality:
    - (1) Is prevented at preventing discriminatory distinctions that impact adversely on members of groups identified by the grounds enumerated in s 15 and analogous grounds;
    - (2) The Charter preserves the right of the government to implement programs aimed at helping the disadvantaged to improve their situation
- In *Andrews* – discriminatory impact viewed through 2 concepts:
    - 1) Perpetuation of prejudice or disadvantage to members of a group on the basis of personal characteristics identified in the enumerated and analogous grounds, and
    - 2) Stereotyping on the basis of these grounds that results in a decision that does not correspond to a claimant's or group's actual circumstances and characteristics
- In *Law* – the SCC suggested that discrimination should be defined in terms of the impact of the law or program on the 'human dignity' of members of the claimant group having regard to 4 contextual factors:

    - 1) Pre-existing disadvantage, if any, of the group;
    - 2) Degree of correspondence between differential treatment and claimant group's reality;
    - 3) Whether the law/program has an ameliorating purpose or effect;
    - 4) The nature of the interest affected
- Factors 1 and 4 go to go to the perpetuation of disadvantage + prejudice; factor 2 deals with stereotyping; and 3 goes to whether the purpose is remedial within the meaning of s 15(2)
- These factors affirm the approach to substantive equality in *Andrews* – to combat discrimination defined in terms of perpetuating disadvantage and stereotyping
- Central purpose of combatting discrimination –
    - 15(1) = to prevent gov'ts from making distinctions based on the enumerated or analogous grounds that have the effect of perpetuating group disadvantage and prejudice; or impose disadvantage on the basis of stereotyping;
    - 15(2) = focus on enabling governments to proactively combat discrimination through affirmative measures

Section 15(2)

- Not every distinction is discriminatory – programs designed to ameliorate the disadvantage of one group will exclude individuals from other groups but this does not make them unconstitutional or discriminatory
- Discrimination requires more than differentiation [need to show the impact of the law is discriminatory]

77

- Here, the appellants were treated differently based on race – need to determine if the program that targeted the aboriginals falls under s 15(2) in the sense that it is a 'law, program, or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups'
- It was issued pursuant to an enabling statute + regulations – which qualifies as a law, program, or activity
- S 15(2) approaches – as an interpretive aid to s. 15(1); as an exception or exemption from s. 15(1); or (added here) if gov't can demonstrate that an impugned program meets the criteria of s. 15(2) it may be unnecessary to conduct a s. 15(1) analysis at all
- It tells us that s 15(1) cannot be read in a way that finds an ameliorative program aimed at combatting disadvantage to be discriminatory and in breach of s 15
- Once complainant establishes a distinction made on an enumerated or analogous ground, it is open for the gov't to show that the impugned law is ameliorative + thus constitutional, if the gov't fails to do so, then at this point the program must receive full scrutiny under s. 15(1) to determine whether it's impact is discriminatory

<u>"Has as Its Object"</u>

- Language suggests the main consideration is the legislative goal (purpose) rather than actual effect in determining whether a program qualifies for protection (subjective approach) – Courts can examine the legislation to ensure the declared purpose is actually genuine
- To determine the purpose – can look at statements made by drafters and also whether the legislature chose means rationally related to that ameliorative purpose
- The ameliorating purpose does not need to be the sole object of a program

<u>"Amelioration"</u>

- Laws designed to restrict or punish behavior would not qualify for s 15(2) protection – nor should the focus be on the effect of the law
- But the fact that the law has no plausible or predictable ameliorative effect may render suspect the state's ameliorative purpose – cannot protect discriminatory programs on colorable pretexts

<u>"Disadvantaged"</u>

- Vulnerability, prejudice, and negative social characterization
- S. 15(2) is to protect gov't programs targeting the conditions of a specific and identifiable disadvantaged group – not all members need to be disadvantaged as long as the group as a whole has experienced discrimination
- *Application*
- Appellants have demonstrated a distinction imposed on the basis of race (an enumerated ground) as the gov't conferred
- the fishing license to particular aboriginal bands only
- 1) Ameliorative or remedial purpose? → provided economic opportunities to bands, to negotiate solutions to fishing rights claims, support progress towards self-sufficiency – means chosen to achieve the purpose are rationally related to serving the purpose
- 2) Program targets disadvantaged group → the disadvantage of Ab people is indisputable – face high rates of
- unemployment, poverty, face disadvantages in housing, education, health – the license, by addressing long-term goals of self-sufficiency and providing sources of income/employment relates to the social + economic disadvantages suffered by
- the bands

Quebec v A

<u>*Facts:*</u> A and B met in A's home country. She came to Canada. They broke up soon after. Then they saw each other sporadically, where A became pregnant with their first child

- She had 2 other children with B. They spoke about marriage on at least 2 occasions.

- By the time they had stopped living under the same roof, the couple had lived together for seven years.
- A began proceedings seeking custody of the children, spousal support, a lump sum support payment, and use of the family home
- She challenged constitutionality of the Quebec Civil Code, claiming access to the same protections as married spouses

Issues: Whether provisions in Quebec's Civil Code that exclude common law couples from the property and support rights granted to married spouses violated the right to equality under s 15, and if so whether the provisions could be upheld under s 1 of the Charter
Held: No violation of s 15
Reasons: Justice Abella's, while dissenting in the result, expressed the view of the majority on s 15(1) analysis

- The most notable aspect of her opinion is that she dropped the requirement that the claimant demonstrate that the challenged law operate through the perpetuation of prejudice or stereotyping
    - Large shift from the *Kapp* test
- But the court on a different majority decided that her s 15 rights had not been violated, and if they were, they were saved under s 1
- Whether the focus on discrimination should focus on the purpose behind the legislation (behind excluding common law couples) or if it should focus on the effect (disadvantage suffered)
- Abella: When you look at this in a contextual way, given the story of this claim, recognize that one party to this relationship is clearly vulnerable, the economic interdependencies that arise of a co-habitant relationship are not necessarily a choice, but they arise. And excluding common law couples from these statutory schemes, you are disadvantaging those
- Primary reason for the exclusion is autonomy for people. People should be able to choose whether they want to have their relationship recognized by the law. This is not discriminatory
- Abella: look at the effect, not the purpose. What is the effect? It is likely to make a class of individuals that are already vulnerable, who are in an unequal power relationship, who lack the ability to protect their own interests in these types of relationships. Effect is to impose a serious disadvantage on persons like A, that we have relieved for people in marital relationships
- Any exploration for the purpose of the legislation should happen under s 1, not under s 15
- Where court really struggles is that they can understand why people in common law relationships are vulnerable to the same type of economic dependency as those who had been formerly married, but they also want to respect people's choice not to become married
    - Is s 15 flexible enough to allow the national assembly to exclude common law relationships from the provisions of spousal support, or whether that offends s 15
- In Quebec, you have to be married or have registered your relationship in order to gain the rights under the legislation. The two hadn't gotten married or registered their relationship

Kahkewistahaw First Nation v Taypotat

Facts: - In response to the *Report of the Royal Commission on Aboriginal Peoples,* which emphasized education as a priority for Canadian AB communities, the K FN in Sask formulated an election code requiring a Grade 12 education for those wishing to be chief or band councillor

- Taypotat, who had been chief for the previous 30 years, contested the constitutionality of the requirement; he was 76 and had a Grade 10 education
- His challenge was based on the argument that the new educational prereq infringed s 15(1) of the Charter, and that educational attainment was analogous to prohibited grounds of discrimination based on race and age for the purpose of s 15(1)
- SCC held that it was not discriminatory
- Abella's approach to s 15(1) drew on her opinion in *Quebec v A*
- The unanimous decision in *Taypotat* signals that the court is now united around Abella's approach
- Her opinion rejected the position, expressed in the *Kapp* test, that a finding of discrimination requires proof of the operation of prejudice and stereotyping
- Discrimination is now characterized as "arbitrary disadvantage"
- Note: it is too early to say whether this amounts to a systematic reformulation of the s 15(1) test or only a minor seismic shift

Issues: Whether Taypotat's s 15 rights were violated
Held: No
Reasons:

- *Quebec v A* clarifies that s 15(1) requires a "flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant *because of his/her membership in an enumerated or analogous group*"
- S 15 protects substantive equality
- It is an approach which recognizes that persistent systematic disadvantages have operated to limit the opportunities available to members of certain groups in society and seeks to prevent conduct that perpetuates those disadvantages

    - Such an approach rests on the idea that not every difference in treatment will necessarily result in inequality and that identical treatment may frequently produce serious inequality
- **The focus of s 15 is therefore on laws that draw *discriminatory* distinctions – that is, distinctions that have the effect of perpetuating arbitrary disadvantages based on an individual's membership in an enumerated or analogous group**
- Reformulated s 15(1) Test:
    - Whether, on its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground
    - Whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage
- At the second stage of the analysis, the specific evidence required will vary depending on the context of the claim., but "evidence that goes to establishing a claimant's historical position of a disadvantage" will be relevant

Application to This Case

- The education requirement for employment, could, in certain circumstances, be shown to have a discriminatory impact in violation of s 15
- In this case, there is no evidence about the relationship between age, residency on a reserve, and education levels in the Nation to demonstrate an employment requirement that is unrelated to measuring job capabilities
- The education requirement does not have the effect of imposing arbitrary disadvantage on community members based on their residence on the reserve

Reformulated s 15(1) Test

1. Whether, on its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground
2. Whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage

EQUALITY'S THREE STEPS

1. Differential Treatment

- The first step in the s. 15(1) analysis is to determine whether the impugned gov't action/inaction has produced differential treatment
- A difference in treatment most often will be apparent on the face of the challenged law/policy
- Direct discrimination – ex. Andrews – law made citizenship a requirement for being called to bar treating citizens vs. noncitizens differently
- Adverse effects discrimination – 'facially neutral' law has a differential impact on the basis of a prohibited ground of discrimination
- Can look at the effects of the law to determine discrimination

Eldridge v British Columbia

Facts: 3 individuals born deaf and whose preferred means of communication was sign language sought a declaration that the failure to provide public funding for sign language interpreters for the deaf when they received medical services violated s 15

- According to the Medical and Health Care Services Act, the power to decide whether a service is medically required and hence a 'benefit' is delegated to the Medical Services Commission – the Commission and the hospitals did not make sign language interpretation available as an insured service

Issues: Does the failure to provide funding for sign language interpretation violate s. 15?

- Have the appellants been afforded equal benefit of the law without discrimination?

Held: No – the failure of the Commission/hospitals to provide sign language interpretation where it is necessary for effective communication constitutes a prima facie violation of the s 15(1) rights of deaf persons

- Appeal allowed

Reasons: - Under the adverse effects of discrimination, the government may be required to take special measures that disadvantaged groups are able to benefit equally from government services

- The principle of discrimination can accrue from the failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public
- S 15(1) is to be interpreted generously and purposively
- As deaf persons, the appellants belong to an enumerated ground under s 15 – being physically disabled – persons with disabilities have been excluded from labor force, denied opportunities for social interaction, subjected to stereotyping – have not been afforded the equal concern, respect, and consideration that s 15 demands
- There is no question that the distinction here is based on a personal characteristic that is irrelevant to the functional values underlying the health care system – the values are promotion of health, prevention/treatment of disease, and the realization of those values through the vehicle of publically funded health care system

    - There could be no personal characteristic less relevant to these values than an individual's physical disability
- On its face the medi-care system applies equally to deaf and hearing populations and does not make an explicit distinction based on disability by singling out deaf persons – but appellant's have an adverse effects claim – the lack of sign language funding renders them unable to benefit from the legislation to the same extent as hearing persons
- It is sufficient that the effect of the legislation is to deny someone the equal protection or benefit of the law
- Elimination of discrimination for disabled persons – seen in the failure to make reasonable accommodation and fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation which results in discrimination against them
- Here, the adverse effects result from a failure to ensure that deaf persons benefit equally from a service offered to everyone
- Trial/CA decision → sign language interpretation services are not medically required; they are ancillary services which are not publicly funded therefore, the appellants were not denied a benefit available to the hearing population
    - This approach mischaracterizes the practical reality of health care delivery – communication is an integral part of the provision of medical services – so if there are circumstances in which deaf patients cannot communicate effectively with their doctors without an interpreter, how can they be receiving the same level of medical care as hearing persons?
- Where it is necessary for effective communication, interpretation cannot be considered an ancillary service
- The SCC has repeatedly held that once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner – this can have the effect of requiring the gov't to take positive action [ex. by expanding the scope of the benefit to previously excluded persons]
- Here, the failure to provide interpretation denies deaf people equal benefit of the law and discriminates against them in comparison with hearing persons

Note:

- *Vriend v AB* is another successful claim of 'adverse effects' discrimination
    - Fired when employer discovered he was gay – attempted to file complaint to AB Human Rights Commission alleging discrimination on basis of sexual orientation but did not allow as was not a prohibited ground of discrimination
    - AB government argued the exclusion of sexual orientation was not differential treatment but a 'neutral silence'
    - SCC – the exclusion amounted to differential treatment directly and in terms of its adverse effects – by reason of under-inclusiveness
    - Distinction between homosexuals and other protected disadvantage groups but also between homosexuals and heterosexuals
- Equal benefit of the law

2. Enumerated and Analogous Grounds

Corbiere v Canada

Facts: Members of a native band that do not live on a reserve are prohibited from voting in band elections pursuant to s.77(1) of the Indian Act

- The respondents are native band members who do not live on a reserve, and they claim that this prohibition is contrary to s 15 of the Charter
- They were successful at the lower courts, which the government appealed

Issues: Is prohibiting band members living off reserve from voting in band elections contrary to s 15 of the Charter?
Held: Yes – appeal dismissed
Reasons: - It is clear that non-reserve aboriginal status qualifies as an analogous ground, but distinctions based on analogous grounds do not always constitute discrimination

- Markers (grounds) of discrimination cannot change from case to case; if something is deemed to be an analogous ground then it will be considered one in all cases
- Analogous grounds serve as the basis for stereotypical decisions made not on the basis of merit but a personal characteristic that is either unchangeable, or changeable only at an unacceptable cost to personal identity
- Step 1) Does the impugned law make a distinction that denies equal benefit or imposes an unequal burden? – Yes, the exclusion of off-reserve band members from voting privileges satisfies this requirement
- Step 2) Is this distinction discriminatory?
    - Based on an enumerated ground or a ground analogous? – look at the general purpose of s 15(1) → to prevent the violation of human dignity through the imposition of disadvantage based on stereotyping and social prejudice, and to promote a society where all persons are considered worthy of respect and consideration – believe Aboriginality-residence constitutes a ground of discrimination analogous to the enumerated grounds

- Enumerated grounds function as legislative markers of suspect grounds associated with stereotypical, discriminatory decision making – they are a legal expression of a general characteristic, not a contextual, fact-based conclusion about whether discrimination exists – therefore, they must be distinguished from a finding of discrimination existing in a particular case
    - Distinctions on these grounds are not always discriminatory
- The same applies to the grounds recognized as 'analogous' – this is to identify a type of decision making that is suspect because it often leads to discrimination and denial of substantive equality
- Enumerated and analogous grounds stand as constant markers of suspect decision making or potential discrimination – what varies is whether they amount to discrimination in a particular case
- Do not agree that a marker of discrimination can change from case to case – it is not the ground that changes but the determination of whether a distinction on the basis of a constitutionally cognizable ground is discriminatory
- If Aboriginality-residence is to be an analogous ground, then it must always stand as a constant marker of potential legislative discrimination, regardless of what the challenge is
- Once a distinction on an enumerated or analogous established, the contextual and fact-specific inquiry proceeds to whether the distinction amounts to discrimination in the context of the particular case
- Step 3) Whether the distinction amounts (in purpose or effect) to discrimination on the facts of the case
- Criteria for determining whether a ground is analogous
    - Enumerated grounds (sex, race, national/ethnic origin, color, religion, age, mental/physical disability) all have in common the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of personal characteristic that is immutable or changeable only at unacceptable cost to personal identity
    - Must reveal grounds based on characteristics that we cannot change or that gov't has no interest in expecting us to change to receive equal treatment under the law
    - Other factors – the decision adversely impacts a discrete and insular minority or a group historically discriminated against
    - Actually immutable – race; constructively immutable – religion
    - Sexuality, marital status
- Once a personal characteristic is recognized or rejected as an analogous ground it will hold across all legal contexts

Dissent: L'Heureux-Dube, in the dissent, further discusses the discrimination

- Classifies analogous grounds and states that they are things that, considered by a reasonable person in the position of the claimant, would be deemed important to their identity, personhood and belonging
- There are several things that help to determine this: being immutable, or very difficult to change in terms of personal identity; lacking in political power; disadvantaged or vulnerable; and inclusion in human rights codes are all factors
- Why this distinction is discrimination → the interest here is very important, and that it is completely prohibited, showing a serious violation
- It reinforces the view that aboriginals who do not live on reserves are "less aboriginal" than those who do, which harms the dignity of the group.

NOTE: The following characteristics do not qualify as analogous grounds: employment status or occupation, with respect to the RCMP, with respect to health care workers, province of residence, persons charged with war crimes/crimes against humanity outside of Canada, bringing a claim against the Crown, marijuana users

3. Disadvantage/Discrimination

Withler v Canada

Facts:

- Plaintiffs (widows) whose federal supplementary death benefits were reduced because of the age of their husbands at the time of death [Public Service Superannuation Act and the Canadian Forces Superannuation Act] – provide federal civil servants and members of the Canadian Forces, and their families with a suite of work-related benefits both during employment and after retirement – both include a supplementary death benefit – akin to life insurance – provides a lump sum payment to be made to a plan member's beneficiary at member's death. For younger plan members, purpose is to insure against unexpected death at a time when the deceased's member surviving spouse would be unprotected by a pension/entitled to limited pension funds + for older member's, purpose is to assist surviving spouses with the costs of the plan members last illness and death – not intended to be a long-term income stream for spouses of older plan members
- The amount (twice the plan member's salary at time of death) reduces by 10% for every year the plan member exceeds 65 or 60 (depending on the Act). This is only one part of the package of survivor benefits – includes pension, health care, dental care, children's allowance, student's allowance
- Argue the legislation discriminates on the basis of age violating s 15(1)

Issues: Does the legislation's Reduction Provisions discriminate on the basis of age violating s 15(1)?

Held: No – appeal dismissed

- The reduction provisions do not violate s 15(1) so it is unnecessary to consider under s 1

Reasons:

- Step 1 ensures courts address only distinctions intended to be prohibited by the Charter – enumerated grounds or grounds analogous [an analogous ground = a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity – included sexual orientation, marital status, and citizenship]
- Step 2 show that the law has a discriminatory impact in terms of prejudicing or stereotyping
    - Establish this by showing that the law perpetuates prejudice and disadvantage to members of a group on the basis of personal characteristics within s. 15(1) – perpetuation typically occurs when law treats a historically disadvantaged group in a way that exacerbates the situation of the group
    - Can also show that the disadvantage is based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant/group
    - If can show that the law imposes a disadvantage by stereotyping members, s. 15 may be found to be violated even in absence of proof of historic disadvantage
- Determine if the law violates substantive equality – [formal equality = mere presence or absence of difference] – goes beyond the façade of similarities and differences, looks at characteristics of the treatment, and the characteristics in the circumstances
- Look at the full context – social, political, economic, and historical factors concerning the group

Comparison under s 15

- Formal comparison based on the logic of treating likes alike is not the goal of s. 15(1) – need substantive, not formal equality. Comparison is an essential facet of s. 15 but usually not by a formalistic comparison between groups, but by relevant contextual factors
- Mirror comparator group approach – look at group claimed to be protected and whether there is a distinction established by the comparison
- The Court in the final analysis must ask whether, having regard to all relevant contextual factors, including the nature and purpose of the impugned legislation in relation to the claimant's situation, the impugned distinction discriminates by perpetuating the group's disadvantage or by stereotyping the group
- Concern of mirror comparator groups → can mean the definition of the comparator group determines the analysis and outcome; this may become a search for sameness as opposed to a search for disadvantage; can place an unfair burden on the claimants to find the 'right' comparator group (can be no group to use for the purposes of comparison and it may be difficult to decide which characteristics must be mirrored)
- The mirror comparator analysis may fail to capture substantive inequality, may become a search for sameness, may shortcut the second stage of substantive equality analysis, and may be difficult to apply

Proper Approach

- Step 1) Does the law create a distinction based on an enumerated or analogous ground?
    - The role of comparison here is to establish a 'distinction' – claimant asserts she is denied a benefit that others are granted/carries a burden that others do not, by reason of personal characteristics falling within enumerated/analogous provisions
    - Provided that the claimant establishes a distinction based on one or more enumerated/analogous grounds the claim should proceed to step 2
    - If it is an **indirect discrimination** – more work – focus on effect of the law and the situation of the claimant group
- Step 2) Does the distinction create a disadvantage by perpetuating prejudice and stereotyping?
    - Comparison may bolster the contextual understanding of a claimant's place within a legislative scheme and society at large and thus help to determine whether the impugned law or decision perpetuates disadvantage or stereotyping. The probative value of comparative evidence will depend on the circumstances
    - All factors relative to the analysis should be considered
    - Want to focus on the purpose of the provision that is alleged to discriminate in the broader context of the scheme as a whole – whom did the legislature want to benefit and why? – whether the lines drawn are appropriate having regard to circumstances and objects of the scheme

Application

- Step 1)
    - Do the pension schemes at issue deny a benefit to the claimants that others receive?
    - Yes – the Reduction Provisions reduce the death benefit payable to surviving spouses of plan members over 60 of 65 years
- Step 2)
    - Do the Reduction Provisions violate s. 15(1)'s protection of substantive equality?
    - Does the impugned law perpetuate disadvantage or prejudice, or stereotypes of the claimant group?
    - Look at purpose of provision in the context of broader scheme à it is in the nature of a pension scheme that it is designed to benefit a number of groups in different circumstances w/ different interests – but are these lines drawn appropriate given the circumstances of the group impacted and the objects of the scheme? [perfect correspondence not required]
    - Where the impugned law is a broad-reaching benefits scheme, comparison with multiple other groups will be necessary

    - The reality is such schemes of necessity must make distinctions on general criteria, including age à look at the death benefit in relation to other benefits that form the comprehensive benefit scheme to determine whether the claimants had been denied an equal benefit of the law – evidence showed the surviving spouses were better equipped than most Canadians to meet their expenses
    - The package will target the same people through different stages of lives/careers – attempts to meet specific needs at particular moments in their lives
    - It treats beneficiaries differently depending where they find themselves – but it is discriminatory neither in purpose nor effect – have Pension benefits to assist them at this time, which (some) younger persons do not, and have other benefit packages as well
- "The analysis is contextual, not formalistic…" (para. 37) "the multiplicity of interests [the legislation] attempts to balance will also color the discrimination analysis" (38) "The focus of the inquiry is on the actual impact of the impugned law, taking full account of the social, political, economic, and historical forces concerning the group." (40)
- "the Court … must ask whether, having regard to all relevant contextual factors, including the nature and purpose of the impugned legislation in relation to the claimant's situation, the impugned distinction discriminates by perpetuating the group's disadvantage or by stereotyping the group" (54)
- "the probative value of comparative evidence, viewed in this contextual sense, will depend on the circumstances." (65)
- "Factors such as those developed in Law … may be helpful. However, they need not be expressly canvassed in every case…" (66) "At the end of the day, all factors that are relevant to the analysis should be considered." (66)
- The provisions do not treat the claimants unfairly taking into account all of the circumstances of the legislative framework of the impugned law – the plaintiffs have failed to prove that they suffer from pre-existing disadvantage, stereotyping, prejudice, or vulnerability based on the economic well-being

M v H

Facts: - Two women, M and H, cohabited in a same-sex relationship for 10 years
- H was financially stronger than M and they lived in a house owned by H and started own advertising
- business where H's contributions were greater than those of M (devoted more time to domestic tasks)
- When the business failed, H was able to find other employment but M was not
- After they broke up, M filed a claim against H for support pursuant to the Family Law Act – here, the definition of 'spouse' extended governing support applications beyond married persons to include a man and woman who were not married and had cohabited for a period of not less than 3 years
- M said this definition was unconstitutional by virtue of its exclusion of same-sex couples and that the appropriate remedy was an extension of the definition to include same-sex couples

Issues: Does the definition of 'spouse' by not including same-sex couples' violation s 15?
Held: The definition of spouse violates s 15(1). It is of no force and effect – 6 months delayed declaration of invalidity (instead of replacing with words 'two persons')
Reasons:
- First 2 steps of the s 15 analysis are satisfied – definition of spouse resulted in differential treatment on basis of sexual orientation which is an enumerated ground
- The determination of whether differential treatment imposed by legislation on an enumerated or analogous ground is discriminatory must be undertaken in a purposive and contextual manner
- Need to inquire whether the differential treatment imposes a burden upon or withholds a benefit from the claimant in a manner that reflects the stereotypical application of presumed group or personal characteristics, or which otherwise had the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society equally deserving of concern, respect, and consideration
- The spousal support provisions are there to protect economic interests of individuals in intimate relationships so when a relationship breaks down it ensures that a member of a couple who has contributed to the couple's welfare in intangible ways will not find himself or herself utterly abandoned
- There are various contextual factors that can be used to determine whether legislation demeans a person's dignity – the list is not closed and there is no specific formula that must be considered
- In examining contextual factors, a court must adopt the point of view of a reasonable person, in circumstances similar to those of the claimant taking into account the relevant contextual factors:
    1. The pre-existing disadvantage, stereotype, vulnerability by the individual/group at issue – here there is significant pre-existing disadvantage and vulnerability and these circumstances are exacerbated by the impugned legislation
        - The denial of the potential benefit contributes to a general vulnerability experienced by homosexual individuals
    2. The correspondence between the ground on which a claim is based and actual need, capacity, or circumstances of the claimant or others – must view from the perspective of the claimant whether the differential treatment imposed by the legislation has the effect of violating human dignity

3. Whether the impugned legislation has an ameliorative purpose or effect for a group historically disadvantaged in the context of the legislation – argued that here the legislation is to meant to target women in opposite-sex relationships and that women in same-sex relationships are not similarly disadvantaged – disagree
4. The nature of the interest affected by the impugned legislation – here the interest protected is fundamental – the ability to meet basic financial needs following the breakdown of a relationship and same-sex couples of entirely ignored
    - Exclusion promotes the view that same-sex couples are less worthy of recognition and protection and implies that they are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite sex couples

- An examination of these 4 factors indicate that the human dignity of individuals in same-sex relationships is violated by the impugned legislation

Dissent

- The primary purpose of the Act was to ameliorate the position of women who had become dependent on their partners in both married and conjugal opposite-sex relationships
- Agreed that the legislation imposed differential treatment and that this treatment resulted in the withholding of a benefit
- The unique social role of opposite-sex couples has 2-related features – women bear a disproportionate share of the child care burden in Canada and that one partner tends to be economically dependent on the other (usually the woman) – the legislation has sought to address this dynamic of dependence and there is no evidence that same-sex couples exhibit this type of dependency
- The evidence is to the contrary – show lesbian relationships as having a more equal distribution of labor and a lower degree of financial interdependence than is prevalent in opposite-sex couples; there is economic disparity in opposite-sex – not present in same-sex relationships
- The legislation takes into account the claimant's actual need, capacity, and circumstances as compared with individuals in opposite-sex couples and by doing so it does not violate human dignity
- The distinction drawn does not discriminate because it does not involve the stereotypical application of presumed group or personal characteristics and does not otherwise have the effect of perpetuating or promoting the view that individuals in same-sex relationships are less deserving of concern, respect, and consideration
- Where a legislative distinction is drawn on the basis off an accurate picture of capacity and circumstance there is no stereotype and discrimination is unlikely