CONSTITUTIONAL LAW

INTRODUCTION

HELLO CONSTITUTIONAL LAW

What is a constitution?

> ***Constitution Act, 1982*: Section 52(2)**
> (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.
> (2) The Constitution of Canada includes (a) the Canada Act 1982, including this Act; (b) the Acts and orders referred to in the schedule; and (c) any amendment to any Act or order referred to in paragraph (a) or (b).

- 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 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
- "Includes" → the constitution includes things other than just the documents listed in the schedule
    - **Open to other aspects coming into the definition of what the Canadian constitution is**

The Elements of The Canadian Constitution

- 5 major features
    - these elements are often in conflict

1. Parliamentary democracy – ensures general laws are made by elected legislative bodies
2. Federalism – the division of government along territorial lines (which bodies of government can make/enforce which laws)
3. Rights – claims that citizens, as individuals and members of particular communities, have against the state
4. 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
5. 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

- Supremacy of the Constitution Acts
    - Established in s. 52 of the *Constitution Act 1982*
- Constitutional Text
    - Exclusive Legislative Authority of the Parliament of Canada
        - s. 91 peace, order, and good government
        - s. 91(27) The Criminal Law
    - Exclusive Legislative Authority of the Provinces
        - s. 92(13) Property and Civil Rights in the Province
        - s. 92(16) Generally all Matters of a merely local or private Nature in the Province.
        - S. 93 Education

    - Canadian Charter of Rights and Freedoms
        - s. 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.
        - s. 2 Everyone has the following fundamental freedoms:
            - freedom of conscience and religion
            - freedom of thought, belief, opinion and expression…
        - s. 15 Equality Rights
    - s. 1 "subject only to such reasonable limits…"
- Case Law, scholarship, Treaty relationships, pre-confederation documents (Royal Proclamation of 1763), Unwritten Constitutional Principles and so on
- 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
- Quasi-Constitutional Statutes
    - *The Canadian Bill of Rights*, S.C. 1960, c. 44
    - *Supreme Court Act*, R.S.C. 1985, c. S-26

What is a Constitution Good For? (class)

- It's the law of other laws – the supreme law of Canada. Provides the legal basis for the laws of Canada
- Power & its limits → check and balance
- Framework for governing→ Rules of the game
- Norms & aspirations→ ideals, idealism of how to live together is part
- Entrenchment of individual rights and freedom
    - Seek to identify the individual as an important unit of constitutional governance
    - Creates mechanism in which governments take actions and limit the ways the governments can act upon persons within the nations
    - **Maintaining justice in society – govern ourselves and our institutions with certain ideals in mind**
- "the framework for the country" – the rules for government, by which a government operates
    - **democracy, legitimacy, respect, transparency**
- Symbol of how to live together well – justice, legality, respect for human dignity

Branches of Government

- Legislative
    - Power to make law
    - See sections 17 - 57 *Constitution Act, 1867*
- Executive
    - Power to implement law
    - See sections 9 - 16 *Constitution Act, 1867*
- Judicial
    - Power to interpret law
    - See sections 96 – 101 *Constitution Act, 1867*

CONSTITUTIONAL PRINCIPLES

Reference re Senate Reform 2014 SCC - constitution is more than text – there is a constitutional architecture

- Recurring theme: separation of powers & legitimacy
- Argument (by Harper govt) for holding consultative elections to determine Senators is constitutional:
  - *Cons Act* 1857, s. 24
    - "Governor general shall from time to time, in the queen's name, by instrument…. Summon qualified Persons to the Senate" → therefore no change to the procedure
- Argument against
  - Constitution is more than the text; it includes the assumptions that underlie the text → **constitutional architecture**
    - Para 26: "The assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another must inform our interpretation, understanding, and application of the text".
    - Para 27 "the Constitution should not be viewed as a mere collection of discrete textual provisions. It has an architecture, a basic structure. By extension, amendments to the Constitution are not confined to textual changes. They include changes to the Constitution's architecture".
- → so, if want to change the architecture need an amendment

Ratio	• Amendments to constitution are not confined to textual change & to change the architecture of the constitution must come from an amendment • **SCC does not decide cases on what should be done**, but on what can legally be done. Whether an Act should be enacted or not is a question for legislatures & voters
Facts	• AG of Canada (along with AB & SK) argued elections for senators would not amend the constitution as the formal mechanism for appointing senators (via Gov General acting on advice of PM) would remain untouched
Issue	• Can Parliament unilaterally implement a framework for consultative elections for appointments to the Senate?
Result	• Parliament cannot achieve unilaterally most of the proposed changes → most require consent of at least 7 provinces representing half the population

Reason	• SCC disagrees with AG – states the change **privileges form over substance** → role as a "sober second thought would be significantly altered" (52)
	  ○ legislative body of sober second thought to a legislative body endowed with a popular mandate and democratic legitimacy
	• Section 52 says "includes" and therefore includes the internal architecture of the constitution, which requires approval of all provinces to change the constitution
	• Each proposal would constitute an amendment for three reasons:
	  ○ the proposed consultative elections would fundamentally alter the architecture of the Constitution (role as sober second thought)
	  ○ the text of Part V expressly makes the general amending procedure applicable to a change of this nature; and
	  ○ the proposed change is beyond the scope of the unilateral federal amending procedure (s. 44).

Unwritten Constitutional Principles

- What are the principles?
  - Four foundational principles: federalism, democracy, constitutionalism, and rule of law (re Secession)
  - No one principle trumps the other principle.

- Where do unwritten constitutional principles come from?
  - Our preamble
    - "with a Constitution similar in principle to that of the United Kingdom" → implied will mix written & unwritten
    - British constitutional principles are historically unwritten, and our constitution thus incorporates them
  - S. 52 : "include**s**"
- Why do we have principles?
  - We want things flexible and unwritten, so we can keep changing and adapting over time
  - Need to rectify gaps; documents were not written to by comprehensive
- Controversial issues with unwritten principles:
  - Why do judges have the power to decide these principles? May differ in interpretations
  - No electoral legitimacy - Judges are not elected officials yet they can "make" laws
  - Also concern that the court might use such principles to ground free-standing constitutional obligations that might be used by courts to invalidate legislation
- ***BC v Christie*** **2007 SCC**
  - Do unwritten principles provide a general right to legal counsel and access to justice?
  - The *Charter* s. 10 states the right to "retain and instruct counsel w/o delay and to be informed of that right"
  - 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)
  - **Ratio**: this case shows that that if there is a specific right outlined in the constitution, there cannot be a general right
    - specific overrides the general
    - if one gets a lawyer for every scenario, it makes no sense to outline the specific time it triggers

Background of Re v Secession of QC

- Early controversies: Confederation, amending power, and the nature of federalism
- QC quiet revolution
- PQ and the 1980 referendum
- *Patriation Reference 1981*
  - Legally possible for the parliament to make a constitutional amendment change on its own but there is constitutional convention to receive substantial support from the province
  - Trudeau says he can unilaterally change the constitution (alone). Provs send reference cases to their courts of appeal. Some CoA say yes, and they appeal up to SCC in 1981.
  - SCC says yes, PM can do this on his own, legally. But there is a constitutional convention that says you need substantial provincial support to change the constitution. We're not going to enforce that constitutional convention, but we've identified that it does exist.
  - Quebec was the only province that said no.
  - The court affirmed the existence of an unwritten dimension to the constitution and the majority held that by constitutional convention, amendments to the constitution require a substantial degree of provincial consent.
- *Veto Reference* 1982
  - SCC opinion on whether there is a constitutional convention giving the province of Quebec a veto over amendments to the Constitution of Canada.
  - SCC upheld CoA that QC did not have a veto by constitutional convention
  - "Substantial degree of provincial consent" was clarified to mean it did not require unanimity

- Meech Lake Accord and Charlottetown Accord 1982
    - Both failed; QC said CA did not go far enough; the rest said it went too far
- 1995 Referendum

Reference re Secession of Quebec 1998 – 4 foundational principles; duty to negotiate

Ratio	• There is no right of unilateral secession.
	  ○ Must have a **clear question** referendum and a clear majority, the other provinces have a **duty to negotiate terms of separation** within constitutional amending formula.
	  ○ No one can predict the outcome of negotiations, and the court would play no supervisory role.
	• *COURT IS WILLING TO DRAW ON FOUNDATIONAL PRINCIPLES TO DECIDE/INTERPRET* but text will remain primary
	  ○ Four foundational principles: federalism, democracy, constitutionalism, and rule of law
	  ○ No one principle trumps the other principle.

Facts	• QC held a second referendum to separate in 1995 ○ 50.4% NO; 49.6% YES • Following the close result, feds initiated a reference to the SCC to question the legal issues surrounding unilateral secession.
Issue	1. Under the Constitution of Canada, can Province of Quebec secede from Canada unilaterally? 2. Does international law give the Province of Quebec the right to secede from Canada unilaterally? 3. In the event of a conflict between domestic and international law on the right of the Province of Quebec to secede from Canada unilaterally, which would take precedence in Canada?
Result	1. The referendum itself has no legal effect 2. Quebec's people are neither governed by: (1) a colonial empire; (2) subject to alienation, subjugation, or exploitation; nor (3) denied meaningful access to government. 3. no conflict, void.

Reason	The SCC explored the meaning and nature of Canada's underlying constitutional principles to resolve Q1
	Constitutional principles
	• Not explicit, but impossible to conceive constitutional structure without them.
	  ○ These "principles function in symbiosis" (49), are the "lifeblood" [51] and are thought to be "organizing principles" for the written Constitution (53)
	  ○ "The individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole" (50)
	• **Purpose of Text**: promote legal certainty, predictability, place for constitutional judicial review
	• **Purpose of Preamble**: Reference constitutional principles
	  ○ Not merely descriptive: have powerful normative force binding courts and government
	
	1. Federalism
	• Unity (at national) with diversity (local)
	• Runs through political legal system of Canada, responds to underlying social/political realities, recognizes diversity, facilitates democratic participation
	• Facilitates pursuit of collective goals by cultural and linguistic minorities

	2. Democracy
	• Democracy is more than simply a political system with majority rule, it is also about institutions, the **process**, and **substance**.
	  ○ "Democracy is fundamentally connected to **substantive goals**," including the "**promotion of self-government**" by a "sovereign people", in that it "accommodates cultural and group identities" (64)
	  ○ → Substantial population favours secession = duty to negotiate
	• Political system of majority rule, w/ efforts to extend participation to minorities (women, aboriginal, etc)
	• Consent of governed is basic to understanding of free and democratic society, **requires continuous process of discussion** [69-69]
	
	3. Constitutionalism & 4. the rule of law
	• Rule of Law: Fundamental shield from arbitrary action that requires all government action to comply w/law **including** the constitution (70).
	• **Constitutionalism**: Requires government action comply with Constitution
	• Constitution is entrenched beyond majority rule because:
	• Provides safeguard for fundamental human rights
	• Ensure vulnerable minority groups have rights to promote identities against assimilation
	• Provides division of political power
	
	On **Quebec's secession** referendum:
	• The "majority [or popular sovereignty] vote in a province-wide referendum" cannot legitimately circumvent the Constitution for the following reasons (75)
	  ○ "Our principle of democracy" must be considered "in conjunction with other constitution principles." (76)
	  ○ Canada's constitutional democracy is "predicated on the idea that political representatives… of a province have the … power to commit the province to be bound into the future by the constitutional rules being adopted."
	• Overall, Canada's constitutional democracy, in relation to the rule of law, "facilitates … a democratic political system by creating an orderly framework within which people may make political decisions." (78)
	Other principles
	  • Respect for minorities:
	  ○ Language, Religion, Education Rights
	  ○ Reflected in Charter's provisions for protection of minority rights, i.e., Explicit protection for aboriginal rights (s.35)
	• Judicial independence, separation of powers, parl sovereignty…

Hogg Article	SCC "held that, if a province voted to secede from Canada, the rest of Canada would come under a legal obligation to negotiate the terms of secession with that province. In effect, this decision invented a new constitutional duty to negotiate with a province that had voted to secede. The point, no doubt, was to soften the ruling that Quebec had no right to secede unilaterally"

Alberta's Equalization Referendum (in light of Secession case)

- Claim that using the Succession case, *if* AB votes to change the equalization formula, then the other provinces have a duty to negotiate with AB

- using section 88 of the case: "The federalism principle, in conjunction with the democratic principle, dictates that **the clear repudiation of the existing constitutional orde**r and the clear expression of 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".

- Prof says no
  - Look at section 69: "[T]he existence of [a right to initiate constitutional change] imposes a corresponding duty on the participants in Confederation to engage in constitutional discussions in **order to acknowledge and address** democratic expressions of a desire for change in other provinces"
  - → if a province triggers a constitutional amendment to initiate change, then there is an obligation to have discussions and address those expressions but just a discussion
  - Also, s.88 is situated under the header: "(4) The Operation of the Constitutional Principles in the Secession Context" → only applies to secession not just any issue that touches the constitution
  - duty to negotiate applies only "to the most foundational constitutional crisis: the breakup of confederation itself."

CONSTITUTIONAL INTERPRETATION

Originalists (Dead Tree Doctrine)	Evolutionists (Living Tree)
Focus on the literal wording – the law is the law	Provides ability to look at history & context of the law
put weight on the use of extrinsic evidence of what the "Framers" said and what the "ratifiers" seem to have understood	Believe framers put qualifications & precision into their text when they intended to be precise; and left open the rest for future generations to interpret in light of experience of the country
Rule of law – citizens need to know that what is written is stable and predictable	Essentially the i*ntention* of the framers was to create a constitution that could evolve & grow
Do not believe legitimacy is granted to judge who "grow" the constitution – belongs to the people & therefore left to legislature to update → ensures a change is a democratic decision & takes pressure of judges	Amendments = difficult & slow; originalism imposes conservative values on modern society → keeping law current is the role of judges
Question is: whether framers intended a "frozen rights" approach (dead tree)? If yes, how is the sought-after original intent determined? What weight is given to extrinsic evidence of intent?	

- Canadian courts have no consistent doctrine or accepted methodological approach to divine the intentions of the "fathers"; why?
  - Judicial Committee Privy Council --- British judges held BNA was a British statute and was to be interpreted as such; narrowed the scope of federal powers (decentralizers)
  - Historical record is spotty
  - Doctrine of original intent claims more than it can deliver and often viewed as outdated

Ref re 'Persons' 1928 SCC

Facts	• Emily Murphy and the rest of the "famous five", through the Governor in Council brought this question to the SCC when Murphy was rejected from applying for a Senate seat as women were not recognized as "persons" • Prior to 1867, women had a legal incapacity to sit in Parliament
Issue	• Does the word "Persons" in section 24 of the British North America Act, 1867 include female persons?"
Result	• No

Reason	• 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 → ORIGINALIST
	  ○ Common law incapacity of women to exercise public functions excluded women from "qualified persons" under s. 24
	• Method of interpretation:
	  ○ Construe not merely words but the intent of Legislature (based on cause/necessity for enactment), legislative scheme (based on comparison of several parts) and extraneous circumstances (Hawkins v Gathercole 1855)

Notes	• Argument against this decision:
	  ○ Lord Brougham's Act
	  ▪ "He" means "she" rule was enacted
	  ○ *Charlton v. Lings is* distinguished because it was decided on the language of the Representation of the People Act, 1867 which provided every man with certain qualifications and not subject to any legal incapacity should be entitled to be registered as a voter; whereas this case is about persons

Edwards v. AG Canada 1930 Privy Council – Living tree doctrine

Ratio	• **Living tree doctrine:** Courts can read new meaning into the Constitution as long as it is "within the natural limits" of the original text – needs to remain flexible and responsive to social and historical change • Women are qualified.
Facts	• See above
Issue	• Same question
Result	• Yes – "qualified persons" is to include both men and women and therefore eligible
Reason	• 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" (page 43 of CB) • Object of the Act was to grant a Constitution to Canada, subject to development through usage + convention; Canada is responsible and developing • Should be interpreted in large, liberal, and comprehensive spirit

Notes	• What is the difference between internal and external resources?
	  ○ External resources→ extraneous circumstances
	  ▪ History tells us the framers meant to include women
	  ▪ Lord Brougham's Act 1850
	  ▪ Case law is inherently biased – women weren't allowed to be in office; previous interpretations of 'Persons' would have implicitly excluded women
	• Contrasting with *Persons*:
	  ○ Contrasting approaches to constitutional interpretation
	  ▪ The methodology will shape the outcome
	  ○ Originalism: go back to what the intention of the framers must have been
	  ▪ SCC in Persons – what did the framers intend? They did not intend women to be Senators
	  ▪ So, in order include women, you must amend the constitution (rather than reading women in)

	○ JCPC: used a number of arguments to overturn the SCC. "Its not originalism that should guide constitutional interpretation, but rather a "living tree" approach" (p.43) ▪ Roots, sturdy trunk, branches; it grows and changes over time; its growth is slow ▪ Capable of slow change to meet the elements of the society in which it exists, but always rooted to its text, past and traditions • But this doctrine is limited → limit of where the living tree is willing to grow. ○ Judges re-writing the constitution – that's not the judicial role. ○ They interpret it ONLY. Change the meaning of the words and redraft? Nope

CONSTITUTIONAL ARCHITECTURE

Constitution Act, 1867: 3 Branches of Government

- Legislative – Power to make law – s 17-57
  - Provinces give power to municipalities – bylaws
- Executive – Power to implement (administer) law – s 9-16
  - Cabinet – PM or Premier
  - Doesn't create law; they direct the gov't in the enforcement and administration of the law
  - s 9; the Queen has all the power over everyone all time
    - we've got nothing about the PM, nothing about what constrains the Queens power.
    - This creates an enduring presence of the Crown and the locus of power in Canada.
    - But, unwritten constitutional convention, where she wont ever exercise this power
- Judicial – power to interpret law – s 96-101
  - Judicial independence is an unwritten const. principle
  - BNA gave the fed gov't the power to create a the SCC, which they did in 1875 (not spec. listed)

TRIGGERING JUDICIAL REVIEW & PROCEDURAL ISSUES CB 45

How do Constitutional Issues get to court?

1. Ordinary Litigation and the Rules of Standing
   - 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
     - Not necessarily the case where independent action is commenced seeking a declaration that a law is unconstitutional
   - 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
       - All 3 should be assessed and weighed cumulatively
2. The Reference Procedure
   - "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*

        - "Government in council may refer to the Court for hearing and consideration important questions of law or fact concerning any mater….
    - This section gives the court a duty to answer these questions
        - However, SCC has on occasion invoked discretionary authority to refuse to answer a ref q
        - Ex: *Reference re Same-Sex Marriage 2004*
            - Why? Bc it was already in courts. Would create uncertainty.
    - 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*
    - BAD:
        - This reference procedure departs from the common law requirement that courts consider legal issues in the context of concrete disputes between interest parties
        - Without live case, courts must imagine consequences without real evidence
        - Arguably gives court legislative powers due to its binding nature
    - GOOD:
        - 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 treated as such

Notice Requirements

- Legislation requires litigants to notify the affected attorney general of any constitutional issues raised in court
    - Because gov't have an interest in defending constitutional challenges on their legislature
    - SCC considered consequence of failing to provide notice *in Eaton v Bant County Board of Education* (1997)
        - Held: Failure to give the notice invalidates a decision made in its absence without a showing of prejudice
- If the Attorney General 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 as an intervenor
    - If the AG intervenes at trial level, they may make oral or written submissions on constitutional issues
- Provincial – notify the federal and provincial AGs

Parties and Intervenors

- Constitutional references → envision broad participation by interested and affected parties
- Private constitutional litigation → is initially 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 SCC* 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 (S. 59(2)) or introduce new issues (S. 59(3)), 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, before allowing an intervention the courts must consider factors such as
    - 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
    - The potential usefulness of the intervenor's contribution to full consideration of the constitutional issue
- Where private interests are not exclusively at stake, intervention raises fewer concerns

FEDERALISM

Ideas in the Constitution Act, 1867

- Constitutional Continuity
- Federalism – separate but together
- Democracy – election at least every 5 years
- Rights – no Bill of rights but does not mean no rights within the constitution
    - Section 133 language rights
- Missing
    - Specificity
    - Amending formula
    - Women not really acknowledged
    - One reference to Indigenous but as subjects - "Indians"

National Federation of Independent Business v Sebelius 2012 US SC

- 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's express conferral of some powers makes clear that it does not grant others
- 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
- 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

American and Canadian Federalism

- Same:
    - **Law / Politics** – separation b/w law & politics; do not decide on the qualities of policy; question is whether there is power to enact a law bc the constitution says so
    - **Federalism**: Division of powers – all subjects fall in either s 91 or 92 (no gaps)
    - **Subsidiarity** – local government is best (closer to the people; understand local conditions/culture)
    - **Spending Power** – fed govt can spend $ outside of its jurisdiction
    - **Deference** on matters of policy – courts are aware of the fact they do not pass laws and as such will defer to parl to do so
    - **Presumption** of **constitutionality –** initial presumption is that any impugned law is constitutional
- Different:
    - **residual power**
        - In Canada both levels of government take authority from constitution
            - Fed gets the residual power if it is not listed in s 92
        - In US it is the opposite → states get the residual power

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
    - **Wanted a strong central government** and legislature
    - But people must feel protected – no overstraining of central authority to override their rights
- These discussions ultimately led to section 91 and 92 of the Constitution
    - Divisions of legislative power (federalism)

FEDERALISM AND THE MODERN CANADIAN STATE

Evolution of the Division of Powers

- 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 (this was mentioned in the US case about Obamacare)
            - Federal and provincial programs in social policy now intersect each other at virtually every point
        2. Through economic development (formerly predominantly provincial)
            - Ex: 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 via provincial representation abroad and hosting trade promotion 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
- Due to all of this: **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
    - Distinction sometimes made b/w economic (fed) and sociocultural matters (prov)
      ∴ 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
    - in a piecemeal series, the role of fed govt enhanced

- very few responsibilities were formally transferred to the federal government
- in most cases, the govt achieved its goals of expansion through shared-cost programs (where prov would design and deliver the programs)
- The strength and confidence of provinces increased as their share of taxing and spending rose

- Executive federalism → the relationship between elected and appointed officials representing federal and provincial governments
  - But has this successfully responding to all needs?
    - What about climate change? COVID?

INTERPRETING THE DIVISIONS OF POWER

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
   - These types of arguments resolved **using 3 doctrines**: pith and substance, double aspect, and ancillary powers
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 ("**read down**") 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
   - Doctrine is known as ***interjurisdictional immunity***
   - 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
   - Doctrine is known as ***federal paramountcy***

- The continued involvement of the SCC in division of power disputes is required bc:
  - the type of legislation being passed now is not something that was or could have been contemplated by the original framers of the BNA Act – human reproduction technologies, etc.
  - 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 a number of broad overarching principles in support of the approach it takes regarding the division of power
    - **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
    - Other principles: importance of interpreting in a progressive manner; need for predictability; subsidiarity – wherever possible power should be devolved to the local level
    - *Canadian Western Bank v AB 2007* SCC invokes many of these

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

- Federalism is not an end in itself; not inherently balanced or unbalanced

- Federalism can be evaluated from three perspectives:
    - community, democratic theory, and functional effectiveness

Conceptions of Community

- Asks: What conception of the political community is 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
    - Conflict arises out of competing models of community
        - Country building
        - Province building
        - Two-nation (Quebec nation) building
- 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
    - Also, the reverse of protection of minorities is the frustration of majorities
- Another approach stresses advantages of smaller units in terms of govt responsiveness and citizen participation
    - Smaller = more likely to be homogeneous ∴ clear majority interest is likely to emerge
    - But then struggles to achieve goals due to lack of resources/inefficiency

Conclusion

- The democratic view of federalism supports both a high degree of decentralization and of overlapping between governments
- Critiques of federalism
    - Issue about citizens' interest getting lost in governmental competition for status and power
        - Executive federalism limits citizen participation and effectiveness in many ways

- Denies a level of government the jurisdiction or resources to achieve certain ends or by providing inadequate mechanisms for joint decision-making
- Majority rule in Canada implies inevitably that Central Canada outweighs the East and West and that English-Canadians predominate over French-Canadians
- Major threat to national unity

- Arguments from majority rules depend on prior conception of community and territorial distribution of political cleavages
- Democratic version of containing spillovers is the idea that political boundaries should be aligned with the distribution of preferences so that each region is homogenous as possible
- Hard to make operational and does not deal with the problem of distribution of rewards across units

THE PRIVY COUNCIL

Why Federalism?

- the division of government along territorial lines (which bodies of government can make/enforce which laws)

Advantages	Disadvantages
• Protects minorities ○ local majorities may be operating laws in a way that infringes on rights and the national government can protect • More responsive to needs of a region – prov is 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 • Able to experiment through provinces own initiatives then spread (ex: SK health care)	• Conflict producing – lack of unity (Trudeau v Kenney) • Inefficiencies – economies of scale • Buck-passing • Citizens fall between the gaps • Overemphasis on provinces (i.e., Secession of Quebec) • Lack of consistency/uniformity: standards differ across Canada (health care, education, etc.)

Citizen Insurance Company v Parsons – Mutual Modification/Limitation of T&C

Ratio	• **Mutual modification** doctrine: legislative powers listed in sections 91 and 92 must be defined in **relation** to one another
	  ○ 91 & 92 are intended to provide an exclusive set of legislative powers and also overlap, they must be read <u>contemporaneously</u>. The scope of any head of power is limited by the scope of the others.
	• **Limitation of "Trade and Commerce"**
	  ○ s. 91(2) is limited and interpreted to mean that the feds only have jurisdiction over:
	  ▪ International trade
	  ▪ Interprovincial trade
	  ▪ Trade affecting the dominion

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 • Parsons argues the law requires policy to be in certain font etc; Citizens says well the law is invalid → the feds have exclusive jurisdiction over trade and commerce (91.2) o Ontario gets involved because someone has claimed their legislation is unconstitutional • SCC majority: states the law deals with property & civil rights → prov → intra vires • Insurance appeal to Privy Council
Issue	• Is the legislation *ultra vires* of the Province of Ontario? o Specifically, whether the statutory provisions were a valid exercise of the province's authority over property and civil rights (s 92 (13)) or whether the provisions were *ultra vires* the province because they fell under Parliament's authority over trade and commerce (91(2))?
Result	• No – insurance falls under s 92(13), Property and Civil rights and is therefore a provincial jurisdiction. Appeal dismissed.

Reason	• Citizen's argument: Insurance is a trade; also, commerce – clearly a business activity, exchange of money for G&S
	• Parson's argument: insurance is a property (something you own); or contractual rights as civil rights in 92 (13)
	
	<u>Privy Council Interpretation</u>
	• Overlap of powers:
	  o Ss 91 & 92 overlap in trade and commerce (91) and property and civil rights (92)
	• Specific powers should override the general
	• Interpretation by **mutual modification** -- Must read the heads of powers together
	  o Determine intention by looking at how the use the words elsewhere in the Act
	  ▪ Two sections are subject to mutual modification; where one ends the other begins but you won't know where the line is unless you read them together
	  ▪ "The two sections must be read together, and the language of one interpreted, and, where necessary, modified, by that of the other … to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them." [108]
	• Interpreting s 92 (13)
	  o Specific types of contracts outlined in s 91 – therefore fed powers do not include all contracts
	  ▪ "[i]f the words [trade and commerce] had been intended to have the full scope of which in their literal meaning they are susceptible, the specific mention of several of the other classes of subjects enumerated in sect. 91 would have been unnecessary". [112]
	  ▪ Essentially, if 91(2) meant ALL trade and commerce, then why did they put banking 91(15), bill of exchange and promissory notes 91(18), other specific examples in 91?
	  o They look at S 94 and say that Parliament is empowered to make provision for the uniformity of any laws relative to property and civil rights in Ontario, Nova Scotia and New Brunswick (exempts QC due to different private law)
	  ▪ Contracts and the rights arising from them were intended to be included in this provision for uniformity
	  o Role of Quebec civil law
	  ▪ Civil rights are all the rights that flow from private law (contracts, torts, property).
	  ▪ QC has the civil code rights of property; feds can't impose common law on QC.

	▪ The intention was to give QC complete jurisdiction over its civil law, which must mean that other provinces also have this jurisdiction ▪ Provs can only do that if they have exclusive jurisdiction over civil and property rights. • Limitation of "Trade and Commerce" o s. 91(2) is limited and interpreted to mean that the feds only have jurisdiction over: ▪ International trade ▪ Interprovincial trade ▪ Trade affecting the dominion

Russell v The Queen 1882 – origin of POGG power debate – nationally pressing concern (broad pwr to fed)

Ratio	• Look at the law being challenged and ask**: What is the law in relation to**? • Incidental interference with another law is not sufficient to determine the constitutionality of a law o Validity is based on dominant purpose – "true nature and character" of the law • Parliament could enact laws under the POGG power that incidentally affected property and civil rights as long as it did for a valid purpose o Was a need for uniform legislation to address a **nationally pressing concern –** alcohol • The Act itself does not come within any of the questions enumerated in s 92 and therefore falls within the federal jurisdiction
Facts	• Private citizen begins to prosecute tavern owner (Russell) in Fredericton for the sale of liquor in region, which opted into the federal prohibition scheme (*Canada Temperance Act 1878*) which prohibited the sale (except those necessary by brewers, distillers, and wholesale traders). Anyone who sold liquor in violation of this act was liable on summary conviction. • At Trial, Russell was convicted and appealed on the grounds that the Act was *ultra vires* of the federal government's powers because it violated s. 92(9), (13) and (16) of the Constitution Act, 1867. o 9: shop, saloon, tavern, auctioneer, other licenses to raise revenue for provincial, local, or municipal purposes, o 13: property/civil rights, o 16: all matters of a merely local nature • SCC dismissed the appeal.
Issue	• Is the Canada Temperance Act *ultra vires* of the federal government's powers?
Result	• No, it does not infringe on prov powers in s. 92. • If a legislation has national consequence, i.e., the sale and custody of dangerous goods, it's a matter of POGG w/incidentally affecting 92 (13)
Reason	• What matters is: what is the law "**in relation to"?** o "Incidental interference does not alter the character of the law" o "The true nature and character of legislation … must always be determined" • PC upheld law as a valid exercise of federal power under the doctrine of "peace, order and good government" which means that any law that cannot be found to be allocated to the provincial head of power under section 92 must necessarily fall into the residual power granted to the federal government. • Alcohol issue was seen as a NATIONAL problem = POGG relevant • Section 92 o S 9 – was meant for raising revenue for local purposes, not regulation trade → failed o S 13 – meant to protect civil rights whereas this Act was about crim law (fed juris) → failed

	▪ Not a civil right because it is involved in public safety; designed for the promotion of public order. It incidentally deals with free use of things but not at its core. ▪ Laws are going to have this in all kinds of areas outside of their jurisdiction but does not determine constitutionality ○ S 16 – rejects that it is local; it is a nationwide law aimed at creating a uniform temperance throughout. ▪ Condition of **opting** in does not make it a merely local matter → The Act itself does not come within any of the questions enumerated in s 92 and therefore falls within the federal jurisdiction

Hodge v The Queen 1883 – **Double Aspect Doctrine: law has both fed + prov features of equal importance - coexistence**

Ratio	• **Double Aspect Doctrine** ○ Subjects which in one aspect and for one purpose fall within s. 92, may in another aspect and for another purpose fall within s. 91 → no problem if both can be adhered to ○ Double Aspect doctrine is a tool of constitutional interpretation used when both levels of government have an equally valid constitutional right to legislate on a specific issue or matter. • Parliament and the provinces are equally supreme within their spheres ○ Cooperate or autonomous federalism
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 Canadian legislatures didn't have the right to transfer responsibility as they were created by the British parliament • CoA dismissed all grounds; Hodge appealed and argued *Russell* (decided a week later than CoA) gave feds comprehensive control over liquor
Issue	• Is the act *ultra vires* the Province of Ontario?
Result	• No. CoA decision affirmed.
Reason	• "The powers intended to be conferred by the Act in question, when properly understood, are to make regulations in the nature of police or municipal regulations **of a merely local character** for the good government of taverns... and such as are calculated to preserve, in the municipality, peace and public decency, and repress drunkenness and disorderly and riotous conduct". • *Russell* is not an authority to appellant's argument. *Russell* and *Parsons* hold that "subjects which in one aspect and for one purpose fall w/in s.92 may in another aspect and for another purpose fall w/in 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 (in this case alcohol regulation) ○ Look at the issue in terms of: "What is the law in relation to?" ▪ 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 of the Imperial parl and therefore "*delegatus non potest delgare*" does not apply
	  ○ Both **federal and provincial governments have supreme powers** within their respective jurisdictional spheres

Notes	**Prof: DD = "idea that subjects can exist at either level of government, IF they are being regulated from the valid perspective that those governments possess"**
	• Example for Double Aspect = Drinking and Driving
	  ○ Can be both provincial and federal jurisdiction, feds are concerned with criminal, province is concerned with licensing and ability to operate vehicle.
	• Can a province penalize?
	  ○ Yes, s 92(15): The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

THE DEVELOPING CONSTITUTIONAL STATE

Reference re the Board of Commerce Act, 1919 & the Combines and Fair Prices Act, 1919 1922 – **POGG = emergency pwr**

Ratio	• **POGG has become an emergency power** – only applies where the situation is exceptional and rare ○ We should only turn to POGG with great caution or reluctance.

Facts	• Board of Commerce Act and Combines and Fair Prices Act enacted July 1919 by the Dominion
	• Purpose of Act: to restrict 2 perceived abuses
	  ○ 1. Monopoly and mergers
	  ○ 2. Unfair profits: Hoarding necessaries of life (food/clothing) for purpose of unfairly increasing prices
	  ○ Board Power: Investigate and order: cease formation and operation, pay back unfair profits
	• Lot of commodities in short supply during the war effort. Large unemployment, lots of armed forces personnel returning from the war. Jobs are scarce and wages are low in relation to goods and services. Lots of public discontent
	• Fed gov't says this is within our 91(2) and POGG powers
	  ○ But how is price fixing not the regulation of contracts, business activity (92(13))?

Issue	• Does the board (federal) have power to make a specific order setting profit margins for clothing prices in Ottawa?
Result	• No – the Act is ultra vires of the Federal Government and is not saved under s91

Reason	Privy Council Reasons
	• POGG
	  ○ The Act was not enacted to meet special conditions of wartime or confined to temporary purpose
	  ▪ *Russell*: it is constitutionally possible for dominion regulation to affect property and civil rights even in time of peace (but this is abnormal and applied with reluctance)
	• Trade and Commerce
	  ○ No. If it was it would swallow section 92 (applies *Parsons* logic – must read narrowly).

	○ Subject matter falls under s 92. • Criminal Law ○ Cannot be justified under s 91 (27) – Dominion cannot first attempt to interfere with 92, then attempt to justify this by enacting ancillary provisions, designed to be new phases of criminal law HOGG (CONSTITUTIONAL WRITER) SAYS HALDANE'S JUDGEMENT AND ALL THREE REASONS HAVE BEEN EXPRESSLY REPUDIATED BY LATER DECISIONS OF THE PRIVY COUNCIL AND IS "UNDOUBTEDLY NO LONGER PART OF CONSTITUTITONAL LAW"
Notes	SCC's Duff J also found law ultra vires (SCC was split 3-3) • He argued against POGG • **POGG is meant for war**, pestilence, national emergency, sudden danger to social order, where national life may require for its preservation, exceptional circumstances, peril of Canada • The law is provincial in nature → property and civil rights -- contracts, business activity • National approach/purpose is not sufficient to determine its category --- could apply this to everything and effectively remove provincial rights. ○ Uniformity is not the purpose of POGG. ○ Immediate operation and effect of legislation should bear more weight

Fort Frances Pulp and Paper Co v Manitoba Free Press Company 1923 – POGG = temporary

Ratio	• When state of emergency is over, dominion must repeal all war acts, or ruled ultra vires. ○ **POGG power is temporary** ○ Dominion cannot ordinarily legislate to interfere with 92 (13) in province. POGG available in cases of "sudden danger to social order arising from outbreak of war; when national life requires preservation; exceptional necessity." • There **may be exceptions** where certain measures may be held for a reasonable amount of time (as in this case)
Facts	• Regulation of price for newsprint. • In *War Measures Act,* dominion allowed to do whatever it considered "necessary or advisable for the security, defense, peace, order and welfare of Canada". The Dominion regulated price of newsprint in series of admin arrangements. • 1917: creation of the Paper controller, and Paper Control Tribunal who heard appeals. • December 1919, Controller ordered Fort Frances to repay excess amount above prices received from Manitoba Free Press, Frances refused. • Tribunal confirmed the order. Affirmed by ONCA and Frances appealed to PC.
Issue	• Is the *War Measures Act* ultra vires?
Result	• Appeal dismissed. Paper control still in effect. Upheld the Act under POGG since still semi-wartime conditions.
Reason	• JCPC: in normal circumstances, the feds couldn't have made this legislation (ultra vires its powers). ○ Set out in the *Board of Commerce* case • In the event of war, the interests of individuals may have to be **subordinated** to that of the community (POGG) in a fashion which requires s 91 to preside over s 92 aspects • Governor in Dec 1919 repealed war measures act, but kept paper control

	○ PC could not say that government had NO good reason to keep paper control, so must have thought war time conditions still operative. **No clear evidence that government thought crisis was fully passed.** • When do we decide a law that is only valid during wartime is in fact valid? ○ Courts loathe to override a government on this. Not up to the PC to determine if there was still a "national emergency". ○ However, use must be temporary. ○ 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 • TLDR: Can't say that the government did not have any good reason for temporarily continuing the paper control after actual war had ceased but while the effects of war conditions might still be operative. Therefore, valid law.

Toronto Electric Commissioners v Snider 1925 – POGG = for "extraordinary peril" situations

Ratio	• The fed gov't is **not authorized to trump the provincial powers unless there is a pressing concern** (POGG) • Labour relations are civil and local matter NOT federal jurisdiction • POGG available when extraordinary peril to national life of Canada as a whole (highly exceptional)
Facts	• *Industrial Disputes Investigation Act* 1907 enacted by dominion. Applied to mining, transportation, and communications undertakings, as well as public service utilities, and limited to those with more than 10 employees. • Purpose of Act: enable employee/employer in work conditions dispute to apply to Minister of Labour for investigation by board. If board appointed, then it stopped a strike or lockout. Board's function was to settle a dispute • Board appointed to inquire into Toronto Electric; Commissioners sought an injunction declaring the Act was ultra vires ○ ONTCA dismissed claim, ruling act was not ultra vires
Issue	• Is the *Industrial Disputes Investigation Act* ultra vires the federal government's power
Result	• Yes. Labour relations is a provincial concern.
Reason	• Cannot be upheld under 91(27) Crim ○ Act rendered it unlawful for an employer to lockout, or employees to strike prior or during the investigation → Act is not aimed at making striking generally a new crime; instead it interferes with civil rights ○ It was not within the federal government's power to make this a criminal matter merely by imposing ancillary penalties • Cannot be upheld under 91(2) trade and commerce ○ 91 (2) cannot be relied on to enable dominion to regulate civil rights in province • POGG? ○ *Russell*: Not a general principle that is for the advantage of Canada as a whole ○ If subject matter belongs within any of the enumerated heads of s 92, it belongs exclusively to provincial competency ○ Except in higher exceptional, extraordinarily peril ○ Can only justify *Russell* by saying at that time, temperance was an emergency

Notes	

Attempts to exercise jurisdiction over economic matters during and after the war (**Haldane** quotes):

- POGG jurisdiction restricted to **special conditions in wartime** and on a **temporary basis** (*Board of Commerce*)
- POGG jurisdiction arises 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*)
- The Dominion "cannot ***ordinarily*** legislate so as to **interfere** with **property and civil rights** in the provinces" (*Fort Frances*)
- POGG is 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*)
- As a "general principle, the **Dominion is to be excluded** from **trenching on property and civil rights**" (*Fort Frances*)
- POGG jurisdiction is available when "**extraordinary peril** to the **national life of Canada**, as a whole" and such instances are "**highly exceptional**" (*Snider*)
- *Russell* was re-characterized by PC as an emergency powers case bc **scourge of alcohol was so serious that it validated the emergency powers usage**.

OVERALL: HALDANE/PRIVY COUNCIL GREATLY LIMITED POGG POWERS

BUILD A CONSTITUTIONAL ARGUMENT

It is 1926. Imagine you represent a province in a division of powers case. What quotes and arguments from the cases *Reference re Board of Commerce Act, Fort Frances Pulp and Paper*, and *Snider* would you use in your factum to argue that the federal government cannot legislate a national minimum wage applicable to all workers to deal with the falling standards of living for the working poor under either s. 91(2) or the peace, order, and good government clause? (Include the case name and page number in your answer). **How would you argue that the federal government cannot legislate a national minimum wage under either 91.2 or peace, order, and good governance? Create a factum**

- Principle of mutual modification
- POGG
  - "Be only under necessity in highly exceptional circumstances"
  - POGG could not include a power to affect "property and civil rights… save in the extreme necessity begotten of war conditions, or in manifold ways that do not touch provincial rights" – 122 (*Board of Commerce*)
  - "Some extraordinarily peril to the national life of Canada"; "arising out of war", "evil of intemperance"; "menace to the national life" – 132 (*Snider*)
  - "Sudden danger to the social order" (*Pulp and Paper*)
- S.91(2)
  - POGG cannot support the Act because It "plainly invades the space of provincial legislation "- pg 131 (*Snider*)
  - "Obviously that these provisions dealt with civil rights and it was not within the power of the Dominion Parliament" ....pg 131 (*Snider*)
  - Power to regulate trade and commerce cannot be relied on as enabling the Dominion Parliament to regulate civil rights in the provinces – pg 132 (*Snider*)
    - Case Law: Parsons
      - Cannot legislative individual contracts
  - "Provincial powers, If exercised were adequate to the task of regulating labour relations" – 133 (*Snider*)

        - better suited to be resolved by local people
    - Cannot use "s. 91(2) in a fashion which would... make them confer capacity to regulate particular trades and businesses" - pg. 125 (*Board of Commerce*)

THE GREAT DEPRESSION AND THE 'NEW DEAL CASES'

The Statute of Westminster, 1931

- 2. (1) The Colonial Laws Validity Act, 1865**, shall not apply to any law made after the commencement** of this Act by the Parliament of a Dominion.
    - (2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule, or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.
- *4.* ***No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend*** *or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.*
- 7. (1) **Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration** of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.
    - Why the BNA act still with UK? Could not come up with an amending formula

Hope for POGG?

- Two references regarding technological advancements gave the federal government more power.
    - *Reference re Aeronautics* 1931: airplanes are federal jurisdiction
        - Canada participates and ratifies an international aeronautics agreement and then enacts legislation in order to implement the terms of the treaty. Section 132 gives the government power to perform its international obligations
        - "Useful as decided cases are, it is always advisable to get back to the words of the Act itself…"
        - Privy Council finds federal jurisdiction under s. 132 – treaty making power, s. 91(2) – trade and commerce, and POGG
            - On the whole though, the general matter falls under 132 with the residual under POGG
    - *Reference re Radio* 1932: not mentioned in s 91/92 = POGG
        - "Being…not mentioned explicitly in either s. 91 or s. 92, such legislation falls within the general words at the opening of s. 91…" [i.e., POGG]
            - Residuary aspect of POGG → if it is not provincial because the subject is new, POGG says it must be federal
        - Radio is not mentioned thus federal
    - → MAYBE definition of POGG is opening but then…

New Deal

- During depression: "dire economic crisis, resulting in social disorder and political upheaval", meant that the Canadian government tried to come up with some reforms. They attempted to use the POGG power to assist with an economic crisis.

Kennedy: Our Constitution in the Melting Pot 1934 (pg 157)

- The federal government had to assist with financial aid during the Great Depression

- They were getting involved in many provincial matters as a result
- Kennedy argues it was no longer possible to look at the BNA Act as a sacred instrument
    - "The persistent forces of national tragedy… have combined to rob 1867 of the glamour of romance"
    - Cannot make promises to foreign countries

MacDonald: Judicial Interpretation of Canadian Constitution (1935)

- Constitution is ill-adapted to present social and economic needs
    - 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 because 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

Privy council declare all of Bennet's New Deal Statutes Ultra Vires except:

1. Framers Creditors Arrangements Act
2. Amendments to the Criminal Code
3. Canada Standard Provisions of the Dominion Trade and Industry Commissions Act

AG (Canada) v AG Ontario (Labour Conventions) 1937 -- Gov can make Intl Treaties, but can't override s. 92 with it

Ratio	• Treaty power must bow to watertight compartments set out in s 91 and s 92.
	  ○ The federal government cannot merely by making promises to foreign countries, clothe itself with legislative authority inconsistent with the constitution which gave it birth.
	  ○ → treaty making powers does not breach the division of the two governments

Facts	• 1919 Canada signs the Treaty of Peace to secure humane conditions for workers. 1930 International Labour Organization of League of Nations adopts conventions of hours of work/minimum wages/days of rest. 1935, the Dominion ratifies conventions and enacts statutes. • Provinces fear autonomy and oppose.
Issue	• Is the act under s 132? Is it under ss 91/92? Is it valid based on national dimensions?
Result	• Ultra Vires.

Reason	• TLDR:
	  ○ Atkin rejects the possibility of s. 132 granting new powers to the federal government merely because they have participated in international agreements. Doing so would effectively eliminate all provincial powers. Instead, he performs a regular s 91/92 analysis.
	  ○ When participating in the international arena, Canada will have to consult with provincial governments prior to entering in treaties and/or include a federal state clause.
	
	Page 162 for specifics:
	• The feds cannot just by making promises with foreign countries, clothe itself with legislative authority inconsistent w/ the constitution
	• s. 132 is not about the power of Canada to enter treaties but about treaties but about treaties to do with the British Empire → 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 ○ If the British empire formerly entered into a treaty regarding the same subject, then the fed govt retains that subject under its head of power ○ S 132 doesn't allow implementation of NEW treaties, these have to be legislated, which turn to s 91/92 ○ Why not expand 132? Would essentially undo federalism <u>Turning to validity under s 91/92</u> • SCC say they must follow aeronautics and radio reference cases; PC says we can distinguish them: ○ Aeronautics: imposed treaty b/w Empire and foreign countries (s 132 applied) – not applicable here. Here Canada is trying to sign its own treaties w/o jurisdiction. ○ Radio: matters did not fall under either s 91/92 → so, not applicable ▪ If it did fall within the enumerated class, it was under a heading inter-provincial telegraphs which was expressly excluded from s 92 • POGG irrelevant – there is no emergency • Lord Atkin: "While the ship of state now sails on larger ventures and into foreign waters she still retains the **watertight compartments** which are an essential part of her original structure." i.e. 91/92 of the Constitution Act does not change and cannot be breached. ○ SCC has come back to this and swayed a little* •
Notes	• Why doesn't living tree apply? (*Persons*) ○ Just because they didn't imagine females being Senators doesn't mean that they can't be Senators – still included the word "Persons" ○ Not changing the text when we say we're going to use living tree doctrine to include woman. We're not bound by the intentions that the framers intended it to mean. The living tree hasn't changed the text. The broader interpretation makes more sense and is more appropriate and is in keeping with the natural constitutional development. ○ In this case, would have to re-write the constitution to take out Empire, no can do. ○ So now, s 132 is dead. The labour conventions case makes it clear that s 132 is still good law at the time. • Snider says this is provincial – feds cannot intervene in labour relations ○ But Fed govt CAN make laws about labour in particular industries (postal workers, aeronautics) (**IJI**) Interjurisdictional immunity

AG Canada v AG Ontario (The Employment and Social Insurance Act) 1937 – Can't violate s 92 via spending pwr

Ratio	• Cannot use spending power to expand jurisdiction • Even though an Act deals with federal property, **cannot invade provincial jurisdiction** ○ If in pith and substance it seems to invade on classes of subjects allocated to the provinces, an act is found to be invalid.
Facts	• Act forced compulsory unemployment insurance – employees and employers deposit into fund drawn on by unemployed • SCC 4-2 act invalid. Appeal to PC.
Issue	• does the act fall under s 91?

Result	• No, act is ultra vires

Reason	• POGG
	  ○ Does not deal with any special emergency → so POGG irrelevant
	  ○ Also, intended to be a permanent act → not a special emergency then
	• 91(1) deals with public debt and public property & 91(3) the raising of money by system of taxation.
	  ○ Why does the govt not have authority under those sections?
	  ○ TLDR: Taxing is fine. You can spend outside fed jurisdiction, but you can't LEGISLATE over the use of that money, in areas outside your jurisdiction. Why? Would just give an "easy passage" into provincial jurisdiction
	  ▪ 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", <u>the federal government is trying to legislate outside of its jurisdiction</u>
	  ▪ 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
	• Check out page 164

Notes	• Today: EI comes from Fed gov't – there was a constitutional amendment in 1940 – gives the fed govt jurisdiction over employment insurance, which was basically going over the head of this decision. • Provs agreed because they were pretty much broke after the war.

AG British Columbia v AG Canada (The Natural Products Marketing Act) 1937

Ratio	• Do not want feds to have the ability to expand their jurisdiction unilaterally • Simply **including some aspects of federal jurisdiction** (interprovincial international trade) **doesn't expand jurisdiction over all the local** aspects of the related thing (agriculture)
Facts	• Act established regulation of natural products for benefit of producers to establish effective marketing arrangements and impose pooling to equalize prices in particular products. Act limited to products with a principal market outside province of production + products that were, in some parts, exported. • SCC unanimously declared invalid ○ T&C does not comprise regulation of particular trade/occupations or particular commodities in a local sense; regulation at local levels w/in province; the transfer of property w/in province. Can regulate external trade or interprovincial trade.
Issue	• Does it fall under Trade and Commerce or s 92 (13)?
Result	• Yes. Act is thus *ultra vires* of feds.
Reason	• 91(2) does allow for "general regulation of trade affecting the whole dominion," but that cannot mean particular commodities. • Why not federal jurisdiction under s. 91(2) since some of the Act deals with interprovincial and international trade? ○ *Parsons* says inter-provincial trade is feds, so doesn't that apply?

	○ BUT Privy Council says no sweeping power granted over a subject just because you can point to some elements that fall within your jurisdiction ▪ Parliament cannot regulate intra-provincial trade. Even though there is an interprovincial aspect, it reaches into the regulation of intra-provincial trade (trade w/in provinces; completion of transaction w/in province) (Watertight compartments) ▪ Regulating transaction and productions at the farmhouse level is the pith and substance ○ "Parliament cannot acquire jurisdiction to deal in the sweeping way … with such local and provincial matters by legislating at the same time respecting external and inter-provincial trade…"

- It wasn't long after this that the movement to get rid of the JCPC gains momentum.
- These New Deal cases seal the fate – this is a court that does NOT get it. This is the law and it killeth.
- The stakes here are HIGH. The JCPC and their conception of federalism is dangerous
- There is a core theory of protection of prov jurisdiction that remains really compelling and important and good law. In all these cases, the JCPC worries about the fed gov't giving itself jurisdiction – any time they want jurisdiction, enter a treaty, or create jurisdiction by raising money for a subject, or have a federal component to a provincial law. You can't destroy the div of power by unilateral action of the fed gov't alone.

New Deal Cases Review:

- the JCPC is worried about the fed government having unilateral power to expand its own jurisdiction
  - If the feds could do that, it would slowly erode jurisdiction of the provs and the nature of federalism
- Labour conventions
  - No expanding the treaty making power (feds don't get to do what they want unilaterally).
  - Lord Atkin's watertight compartment metaphor
  - Closes door on s 132 → constitution cannot grow out of the text; no longer British empire treaties then it has no more jurisdiction when it enters into treaties
  - If fed govt could expand – it would give them power that is unsustainable and too large
    - Subjects remain subject to division of powers
- Employment Insurance
  - Feds can raise and sometimes spend money, but it can't expand its own jurisdiction by spending money
  - If we let you spend to gain jurisdiction – again would just enlarge jurisdiction
- Natural products Marketing case
  - Simply including some aspects in federal jurisdiction (interprovincial international trade) doesn't expand jurisdiction over all the local aspects of the statute – struck this act down too.
  - What is important is the purpose of the whole Act

- All these cases are linked by a single theme. Just reinforce what we learned in Parsons and Snider – **not going to have Feds taking power over subjects that are clearly within provincial jurisdiction**

Remaining New Deal Cases - Valid Provisions

AG BC v AG Canada 1937

- Amendment to Criminal Code prohibits: 1) selling goods at prices that discriminate among competitors and 2) selling goods at prices designed to eliminate competition
- Result: SCC majority declared it intra vires, PC affirmed it.
- "The only limitation on the plenary power of the Dominion to determine what shall or shall not be criminal is the condition that Parliament not in the guise of enacting criminal legislation in truth and substance encroach on any of the classes of subjects enumerated in s. 92. It is no objection that it does in fact affect them".

AG Ontario v AG Canada 1937

- *Dominion Trade and Industry Commissions Act* included:
  1. To authorize administration approval for agreements among businesses to restrict undue competition
  2. To establish national trademark to identify products that complied with standards set by the Dominion
- Result:
  - SCC Invalid both: First one they relied on *Natural Products* case. Second one is a civil rights issue.
  - PC: Agreed that 1 invalid, but 2 valid under s 91(2) – T&C
    - 2 is valid under power to create uniform law of trademarks, Dominion okays the extension into novel field

AG BC v AG Canada

- *Farmers Creditors Arrangements Act*: established admin boards to impose compromises/extensions of farmers obligations to their debtors
- SCC and PC: upheld under s 91 (21) dominion power to legislate bankruptcy and insolvency

Reaction to New Deal Cases

R Simeon and I Robinson – State, Society and the Development of Canadian Federalism (1990)

- Mallory: All these decisions made by the JCPC effectively made the Dominion powerless in terms of economic activity.
  - King (prime minister) sensitive to provincial obligations and refused to enact reforms without unanimous consent
  - King was now able to blame the constitution for federal inaction that was his own
- Why was King's government relatively inactive during the Depression?
  - The priority of King was national unity. If he didn't take any official position, he had room to manoeuvre (very worried about French-English conflict)
- Scholars wanted strong dominion government that can respond adequately to depression

Constitutional Scholars

- Kennedy: "federal power is gone with the winds. It can be relied on at best when the nation is intoxicated with alcohol, at wort when the nation is intoxicated with wars; but in times of sober poverty… it cannot be used"
  - Wanted to repeat BNA, rewrite constitution, and abolish all appeals to JCPC
- Scott: No control over economic development anymore; all about controlling provincial autonomy and the doctrine of laissez faire
  - Also, these JCPC decisions cast serious doubt on the effectiveness of Dominion-Provincial cooperation
  - Rid itself of the JCPC
- O'Connor Report:

- In 1938, O'Connor (counsel to the Senate) was directed to examine Confederation, the BNA Act, and the Act's interpretation by the Privy Council. His report is long, and he is angry and frustrated
- Said that we have deviated way far from the original intent of the BNA – and these JCPC judges are to blame
- This report became an authority for 30 years
- Things eased up on the JCPC over time – we are glad the provinces have their autonomy, it's part of what makes Canada, Canada.

PITH AND SUBSTANCE

- P&S is used to determine what the true purpose of the law is
- Key tool we use to determine the validity of a challenged legislation on division of powers grounds
  - Analysis of what is in the statute itself and what is relevant outside, looking at intrinsic evidence, wording of the statute itself, statement of objectives and purposes, as well as extrinsic evidence, e.g., legislative debates

Katherine Swinton – The Supreme Court and Canadian Federalism

- 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
     a. The first place to look when identifying the matter is its place in statutory context
     b. The court may also look at the purpose or effects of the legislation and the history as to why it came into place
        i. Dominant form is to look into its purpose
  2. Delineation of the scope of the competing classes
     a. 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
  3. A determination of the class into which the challenged statue falls
- 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

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

- **The division of powers is about the jurisdiction of laws not subjects, i.e., keep focus on the statute.**
  - Focus on whether the statute is valid; not whether the subject is prov or fed in nature
  - It is important to realize that these enumerated "subjects" or "matters" are classes of laws, not classes of fact
    - Classes of laws, not classes of facts – i.e., 91(2) not just "trade and commerce", rather "regulation of trade and commerce", meaning of course "laws regulating trade and commerce"
    - Not trying to figure out where things fall; we're trying to figure out where the laws regulating things fall
- 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 due to overlap in powers
  - So, we must 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)

- Note *R. v. Morgentaler* – "Courts apply considerations of policy along with legal principle; the task requires 'a nice balance of legal skill, respect for established rules, and plain common sense. It is not and never can be an exact science.'"
    - → do not forget this in the exam; legal rules alone can sometimes lead to illogical answers
- 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)
    - Precedent (i.e., *Parsons)*

PITH AND SUBSTANCE TEST

- STEP 1 Characterization: What is the matter
    - Purpose
    - Legal + practical effects
- STEP 2: Classification:
    - What the heads of power boundaries are
    - Where the law slots in
        - Do not get distracted by incidental effects

Step 1: Characterization: What Is the Matter?

- Matter is determined by the law's *dominant purpose*: incidental effects will not disturb the constitutionality of an otherwise *intra vires* law (*Canadian Western Bank* 2007)
    - Dominant purpose: specific not broad (prohibition of abortion not just "criminal power")

1. The **true purpose** of the enacting body:
    a. **Intrinsic evidence**: preamble, purpose, title of act
    b. **Extrinsic evidence**: surrounding context that tells us why the law exists
        i. Studies, Hansard, policy
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"
        i. What the law DOES → what you must do or don't do
        ii. Contained within Act itself
    b. **Practical effects**: "the actual or predicted effect of the legislation in operation"

- The fundamental consequence of this approach to constitutional analysis is that legislation whose pith and substance falls within the jurisdiction of the legislature that enacted it may, at least to a certain extent, affect matters beyond the legislature's jurisdiction without necessarily being unconstitutional.

R. v Morgentaler 1993 SCC - pith & substance test

Ratio	Pith and Substance Test • the **purpose**

	○ intrinsic evidence – statute itself, read and interpret ○ extrinsic evidence - Hansard • **legal** & **practical effects**
Facts	• Federal Criminal Code (s 251) against abortion was struck down on charter grounds = violating women's charter guarantee of security of person (Morgentaler, 1988). ○ → Abortion is no longer regulated by Crim law. No longer an offence to obtain/perform an abortion in a clinic such as those run by Morgentaler. • Nova Scotia legislation passed: *Medical Services Act* which made it an offence to perform abortions outside of a hospital ○ Purpose: to prohibit privatization of provision of certain medical services (including abortion). ▪ Healthcare is in prov jurisdiction • Accused performed 14 abortions and charged with violating Act • Acquitted at Trial – held Act was *ultra vires*. CoA upheld this. • Province argues this falls under s 92(7), (13), and (16) ○ (7) – hospitals ○ (13) – property and civil rights (medical profession) ○ (16) – generally all matters of a merely local of private nature • Morgentaler says it actually falls under 91(27) – criminal law which is a fed issue ○ Province can say 92(15) gives them the ability to impose fines and punishment
Issue	• Is the Nova Scotia Medical Services Act *ultra* vires on the ground that it is in P&S Crim Law?
Result	• Yes. Appeal dismissed in favour of Morgentaler.
Reason	• What is the "Matter" ○ Leading feature or true character ▪ Often described as the pith and substance ○ Dominant purpose/aim is the key to constitutional validity • Evidence of the "effect" of legislation can be relevant to: ○ Establish legal effect → how it affects the rights and liabilities of those subject to its terms (determined by the terms of the legislation itself) ○ Establish practical effect → actual or predicted practical effect of the legislation in operation • Purpose ○ To determine – court may use extrinsic materials which includes: ▪ Related legislation ▪ Evidence of the "mischief" that legislation is trying to remedy ▪ Legislative history (events during drafting) ▪ Legislative debates and speeches • Scope of applicable heads of power ○ Criminal Law: Any law that has its dominant characteristic the prohibition of an activity, subject to penal sanctions, for a public purpose such as peace, order, security, health, or morality ○ Provincial Health Jurisdiction: Constitution confer on provinces the power over health care in generally – i.e., cost/efficiency, nature of health care delivery, privatization of medical services ○ Regulation of Abortion: subject for criminal law since mid 19th cent; ▪ 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

	• Application of Principles to Case at Bar
	  ○ Central purpose and dominant characteristic of the Act is the restriction of abortion as socially undesirable practice which should be suppressed or punished
	  ○ Legal effect: Legislation prohibits performance of abortion in CERTAIN circumstances with penal consequences → traditionally criminal law
	  ○ Extrinsic Evidence
	  ▪ Duplicates language similarly in the Criminal Code and the overlap of legal effects supports inference that the law was designed to serve a crim law purpose
	  ▪ Background: events leading up to support the assertion that legislation does not relate to provincial jurisdiction over health → strengthen inference that impugned act designed to serve crim law purpose
	  ▪ Catalyst for action: Morgentaler's announcement of his intention to open clinic – trying to correct that mischief
	  ▪ Hansard – debate show the intention was prohibition of clinic, clinic viewed as a public evil.
	  ▪ Provincial Objectives: privatization concerns raised by the crown were "incidental to the paramount purpose of the" law
	• Pith and Substance Test applied
	  ○ Conclusion: In Pith and Substance – the dominant purpose of this law is criminal
	  ○ "An examination of their terms and legal effect, their history and purpose and the circumstances surrounding their enactment leads to the conclusion that the legislation's central purpose and **dominant characteristic** is the restriction of abortion as a socially undesirable practice which should be suppressed or punished".

Colourability:

- effects of the law diverge substantially from the stated aim (*Reference re Firearms Act 2000*)
  - colourable law is one which really means something more than or different from what its words seem at first glance to say
- "In other words, a law may say that it intends to do one thing and actually do something else. Where the effects of the law diverge substantially from the stated aim, it is sometimes said to be "colourable" (*Reference re Firearms Act* 2000 SCC)

Pith and Substance Practice Problem

In August, 2013 two children in Campbellton, New Brunswick died after they were strangled by an escaped African rock python while on a sleepover in an apartment over Reptile Ocean, an exotic pet retailer. Laws regulating possession of pets vary across Canada, including the types and sizes of snakes one is permitted to own. The Canada Safety Council (CSC), in its 2013 annual report, estimated that each year in Canada there are 320,000 people injured by pets. Ninety percent (90%) of these injuries arise from dog bites.

In response, the federal government enacted the Pet Injury Act which provides:

> Whereas there is an increasing danger to Canadians posed by exotic and rare pets; Whereas **regulation of animal possession** varies significantly across Canada;
> The federal Parliament enacts as follows:
> 1. For the purposes of this Act "exotic pet" is defined as **any animal species not native** to Canada intended for personal use as a pet.

2. A National Pet Control Board, comprised of at least two members of the Canada Safety Council, two veterinarians, and one member of the public, is hereby constituted and **authorized to issue exotic pet licences** and make any necessary regulations pursuant to this Act.
3. Either prior to, or within three (3) business days of purchasing or otherwise acquiring possession of any animal species that is not native to Canada, an individual must apply to the National Pet Control Board for an exotic pet licence.
4. Anyone who contravenes this Act is guilty of an offence punishable by imprisonment for up to 5 years and/or a fine not to exceed $10,000.

1. the true purpose of the enacting body:
   - Intrinsic evidence:
     - Preamble: concern about dangerous pets, wants to impose uniform standards
   - Extrinsic evidence:
     - Child's death, annual report: most injuries caused by dog bites
2. The law's legal and practical effects
   - Legal effects:
     - Section 1: wide definition of exotic pet; s. 3: must possess license; s. 4: subject to fines
     - Essentially, there is a creation of a body and a rule to follow
   - Practical effects:
     - Licenses required for virtually all pets
     - Reduction in the market of foreign animals

➔ P&S conclusion:

- Mandatory Pet Licensing regime (copy this simple language for exam)
  - Although they state focus on "exotic" the reality is it encompasses almost all animals
  - Where does this fall? 92(13) property & civil rights
  - Outside federal scope → *ultra vires*

DOUBLE ASPECT / ANCILLARY

Interpretive Strategies for Dealing with "Complex Matters"

1. **Mutual Modification** Theory (*Parsons*) – interpret the federal and provincial heads of powers in s 91 and 92 in relation to one another
2. "**Merely Incidental**" (*Russell*) – where the dominant *matter* is valid, and the invalid impact is minimal, the legislation can be upheld
3. **Double Aspect** (*Hodge; Multiple Access*) – both levels of government can regulate the same topic, just from different aspects
   a. one matter (regulating liquor) may have both federal (public order/safety/prohibition) and provincial (property and civil right/regulation) aspects
   b. Double Aspect doctrine is a tool of constitutional interpretation used when both levels of government have an equally valid constitutional right to legislate on a specific issue or matter.
   c. modern notion of co-operative federalism
4. **Ancillary Powers (***GM Motors v Capital Leasing*) – where the whole legislation is valid, but there is a provision which, standing on its own, is outside of the jurisdiction of the legislative body. Need to consider whether the provision can be saved or needs to be severed from the larger act.
   a. How serious is the encroachment? Marginal or deep intrusion

b. If marginal, the invalid provision must be rationally and functionally necessary to achieve its broader policy objectives. If deeply intruding, must be essential to the Act and its purpose.

DOUBLE ASPECT DOCTRINE

- Recognizes the overlapping jurisdiction of the two levels of government
  - **"Subjects which in one aspect and for one purpose fall within s. 92, may in another aspect and for another purpose fall within s. 91"** *(Hodge v The Queen)*
    - Held that just bc the PC upheld federal legislation that took a prohibitory approach to the liquor trade (*Russell*) does not preclude the provinces from taking a regulatory approach

- "**The double aspect doctrine**, as it is known, which applies in the course of a pith and substance analysis, ensures that the policies of the elected legislators of both levels of government are respected. …. The double aspect doctrine **recognizes that both** Parliament and the provincial **legislatures can adopt valid legislation on a single** subject depending on the perspective from which the legislation is considered, that is, depending on the various "aspects" of the "matter" in question." – *Canadian Western Bank*

- Applied in *Multiple Access v McCutcheon*

Courts understand this doctrine in three different ways (pg 226):

1. As applied in *Hodge v The Queen*, the double aspect doctrine served a limited purpose → does 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, but it is also 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) → "functional" or "de facto" legislative concurrency
      i. Frequently invoked in relation to laws regulation public order, safety, and morality
   b. Two caveats.
      i. First, courts have never applied this doctrine in certain areas for example the regulation of trade. Parl has been restricted to international and interprovincial trade while provinces get intraprovincial trade. Similarly, so with labour relations.
      ii. Secondly, some members of Canadian judiciary have reservations about the broader view of the doctrine (see *Bell Canada QC* 1988 – Justice Beetz)
3. Lederman's approach: calls for the courts to ask in respect of the legislation that was being challenged on division of power grounds:
   a. whether that legislation had a federal aspect; and
   b. whether it had a provincial aspect; and
   c. if the legislation was held to have both federal and provincial aspects and then which of these is said to be most important

WR Lederman "Classification of Laws and the BNA Act"

- Overlapping of federal and provincial powers is inevitable. Court limits generality through mutual modification.
  - **Mutual modification**: read the powers in relation to one another
    - Ex: trade and commerce now typically read as "regulation of interprovincial and international trade and commerce"; likewise, property & civil rights is rendered those rights "except those involved in interprovincial and international trade and commerce"
- But if overlap still exists:

- **Double Aspect doctrine**: When federal and provincial features of a challenged rule are of equivalent importance, challenged rule can be enacted by both the Federal and Provincial under separate aspects

- If Double Aspect Doctrine produces contradictory rules at red and prov levels, federal laws prevail → **Doctrine of Paramountcy**

Multiple Access v McCutcheon 1982 SCC – Double aspect doctrine applied

Ratio	• **Double aspect doctrine** – provinces and Parliament may legislate the same thing under their own heads of power if legislation is operable together.
Facts	• Province: Enacted the *Ontario Security Act* which prohibited insider trading in shares on TSX • Federal: *Canada Corporations Act* – which had identical provisions, applicable to corporations incorporated under federal law • Shareholder initiates action under provincial act. Defendant argues that provincial act is not valid to regulate trading of federally incorporated companies • D also argued even if the provincial act does apply, the doctrine of paramountcy renders provincial act inoperative on the provision that the federal one deals with these issues. • Defendant wanted it under federal because the limitation period had passed for the federal act
Issue	• Is the Canada Corporations Act ultra vires the federal govt? • Is the provincial law valid?
Result	• Both acts valid.

Reason	1. Is the Canada Corp Act ultra vires in whole or in part of the fed govt?
	• Resist regarding fed law as redundant due to existence of ON legislation; must be analyzed alone
	  ○ "The validity of the federal legislation must be determined without heed to the Ontario legislation."
	• Several provinces have not enacted insider trading legislation and w/o fed law this would leave companies and shareholders w/o protection → gap!
	2. Does the "matter" (or P&S) of the insider trading provision fall within the classes allocated to Parliament?
	• Yes
	  ○ Aimed at trading in securities and obligations attached to the ownership of shares in a federal company which extend to shareholders, officers, and employees of such companies (not within the exclusive jurisdiction of provincial legislatures)
	  ○ POGG: As established "since *John Deere Plow Co. v Wharton* 1915, the power of legislating with reference to the incorporation of companies with other than provincial objects belonged exclusively to the Dominion as a mater covered by "POGG"
	  ▪ This power has not been narrowly defined; extends to maintenance of the company, protection of creditors, safeguarding interests of shareholders etc.
	• Statute may fall under several heads of either s 91 or 92
	  ○ Security legislation has a double character
	  ▪ Insider trading provision have both securities law and companies law aspect and would adopt **double aspect doctrine test** to validate both sets of legislation
	• DAD applies when the contrast between the relative importance of the two features is not so sharp → when the fed & prov characteristics of legislation are roughly equal in importance
	  ○ No motivation to kill one and let the other live
	  ○ Concurrent jurisdiction has been recognized – it is not all one or the other

	• TLDR: Federal companies' law is federal jurisdiction, under POGG. Securities legislation is a provincial matter, under 92(13). This legislation can have a double character: company law and securities law. Neither is obviously more important.

ANCILLARY POWERS ("NECESSARILY INCIDENTAL" DOCTRINE)

- 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, the law is valid
        - **Ex**: Abortion – dominant feature: punishment on moral grounds; incidental: health, hospitals, medical profession
- **Ancillary Powers Doctrine**
    - Closely connected to P&S → it is a way of determining validity
    - Applies where a provision is in P&S outside the competence of its enacting body
    - 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 is part of is constitutionally valid, the impugned provision may also be found valid because of its relationship to 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" and upheld
    - 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

- **Test for Ancillary Doctrine (**whether we should save an unconstitutional provision or sever it)
    1) **Does the provision intrude into the other government's area of constitutional jurisdiction?**
        a. Is it ultra vires the enacting body?
    2) **If yes, to what extent does it intrude?**
        a. From "encroaches marginally" to "highly intrusive"
    3) **Is the overall Act constitutionally valid?**
        a. If no, the discussion ends here – it is ultra vires and should not be saved
    4) **If yes, is the intrusive provision sufficiently integrated into the legislative scheme to be upheld?**
        a. from "merely tacked" on to "functional relationship" to "intimate connection" / "necessarily incidental"
            i. If just "tacked on" → sever it
            ii. Functionally related: If the provision is found to be infringe slightly on the other jurisdiction, you then only have to prove that it's functionally related. It is not enough that the measure supplements the legislative scheme though; it must actively further it.
                1. Supplementing is not just enough – must be connected to its purpose – doing something important in relation to the rest the act
            iii. Necessarily incidental: If the provision HEAVILY infringes, you must prove that it's necessarily incidental, and prove that there's a HUGE degree of connection and without that piece, the legislation will crumble.

- *Quebec v Lacombe* Explanation, pg 242 [36-37]
    - Incidental Effects
        - Do not determine the P&S of legislation; do not determine validity
        - IE applies when a provision in P&S lies WITHIN the competence of the enacting body but TOUCHES on a subject assigned to the other level of govt
            - Holds that a provision will not be INVALID merely bc it has an incidental effect on a legislative competence that falls beyond the jurisdiction of its enacting body

- Ancillary Powers
  - It is about provisions that are otherwise invalid in of themselves
  - How do we know it's invalid? Because you can do a P&S on a provision in addition to the whole act
  - Different from DAD which states both levels of govt may regulate the same topic from different aspects
  - Whereas AP applies only where a provision does not come withing the legislated heads of power
- In summary, only the **ancillary powers** doctrine concerns legislation that, in pith and substance, falls **outside** the jurisdiction of its enacting body.
- Laws raising a **double aspect** come **within** the jurisdiction of their enacting body **but intrude** on the jurisdiction of the other level of government because of the overlap in the constitutional division of powers.
- The **incidental effects rule** applies where the main thrust of the law comes **within** the jurisdiction of its enacting body, but the law has **subsidiary effects** that cannot come within the jurisdiction of that body.

General Motors v City National Leasing 1989 SCC - Ancillary powers test

Ratio	**Test for Ancillary Doctrine (**whether we should save an unconstitutional provision or sever it) 1. To what extent, if at all, does the provision intrude into the other government's area of constitutional jurisdiction? o If it does, to what extent? o From "encroaches marginally" to "highly intrusive" 2. Is the overall Act constitutionally valid? o If yes, then is the intrusive provision sufficiently integrated into the legislative scheme to be upheld? o From "functional relationship" to "intimate connection" or "necessarily incidental"
Facts	• CNL brought a civil action against GM, alleging that it suffered losses because of a discriminatory pricing policy that constituted a kind of anti-competitive behavior prohibited by the *Combines Investigation Act* (CIA) • GM argued that s. 31.1 of CIA was ultra vires the feds → the creation of civil causes of action falls within 92(13) o S. 31.1 allowed people who are harmed to sue one another (provincial – property and civil rights) ▪ Recall*: Parsons* defines civil rights as all private law interactions
Issue	• Is the Act valid under the fed trade and commerce power, via s 91(2) • Is s31.1 integrated w/ the Act in such a way that that it too is intra vires (ancillary power)?
Result	• Yes, to both. Appeal dismissed – GM loses.
Reason	• The mere inclusion of a provision in a valid legislative scheme/act does not *ipso facto* confer constitutional validity upon a particular provision. The provision must be sufficiently related to that scheme for it to be constitutionally justified • If the impugned law only encroaches marginally on provincial powers, then the provision must be **functionally related** to the Act o If the impugned provision is highly intrusive on provincial powers, then the provision must be **truly necessary** or **integral** • Justice Dickson: "the dominant tide of constitutional doctrines" is overlap o Not so watertight anymore • "As the seriousness of the encroachment … varies, so does the test required to ensure that an appropriate constitutional balance is maintained."

Test for ancillary doctrine:

Dickson sets out a two-step analytical framework for applying the necessarily incidental test:

1. To what extent, if at all, does the impugned section encroach on the other order of government?
2. Is the act, as a whole, valid? If yes, how connected is the provision in question to the act as a whole?

- 1) Does the provision intrude into the other government's area of constitutional jurisdiction?
  - If the provision is found not to encroach, the provision is intra vires and the inquiry ends → valid
  - If yes, to what extent does it intrude? – from "encroaches marginally" to "highly intrusive"
    - Very subjective
- 2) Is the overall Act constitutionally valid? (How important is the provision to the rest of the Act?)
  - If no, then inquiry ends
  - If yes, then is the intrusive provision sufficiently integrated into the legislative scheme?
    - Ranges from "merely tacked on" to "functional relationship" to "intimate connection" or "necessarily incidental"
    - IF just tasked on → remove/sever
    - Functional relationship→ not an unrelated tack on, it's there for a reason
    - Intimate connection (necessarily incidental) → need to be there for the law to function
    - Is the provision sufficiently integrated with the Act that it can be upheld by virtue of that relationship (do we save or sever the provision?)
  - The greater level of intrusion the greater level of connection you need to save the arm
  - Based on a sliding scale
    - The more intrusive the provision, the greater the connection it requires to save it
  - Highly intrusive, must be necessary to the overall scheme
    - If not highly intrusive, only needs to be functionally related to the overall scheme

TLDR:
How deep is the intrusion?
If, encroaches marginally → needs functional relationship
If highly intrusive → needs to be necessarily incidental/essential
In EXAM → analyze the act and speculate if it is deep intrusion
OCTOBER 27 VIDEO – DISCUSSES THIS

Application to this case

- So, does it encroach on Prov Powers?
  - Yes (92(13) - property and civil rights)
- Is s. 31.1 upheld by its relationship to the rest of the Act?
  - Is the provision functionally related to the general objective of the legislation, and to the structure and content of the scheme?
    - Section is only remedial – just helps enforce the substantive aspects of the Act (remedial provisions are less intrusive provincial powers typically due to its nature)
    - Limited scope of action – application limited to the provisions of the Act
    - Well-established fact the feds are not precluded from creating rights of a civil action where such measures may be shown to be warranted

	○ Note: It's a balance: if impugned provision only encroaches marginally on provisional powers, then a "functional" relationship may be sufficient to justify provision. If highly intrusive, then stricter fit test needed ▪ Necessary link between provision and act = functionally related ▪ Remedy is bound by parameters of the act ▪ Integrated into the purpose and underlying philosophy of the act ▪ Does not create open-ended private right of action
Class Notes	• Octopus analogy • Arms are all different parts of the big part of a law. Some of those arms might be a little outside the fishtank – one section of a law may be stretching outside of its jurisdiction. We can save that arm or sever that arm – to make this decision we use ancillary doctrine • Based on the level of intrusion, what is the relationship between that arm and rest of the octopus – how closely related is that arm to what the rest of the octopus is doing? Is it *necessarily* incidental? Or just rational? • Sometimes important to save because its function is important

Quebec v Lacombe 2010 SCC recent application of ancillary powers

Ratio	• *Modification to 3rd step of **ancillary powers test:** ○ 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
Facts	• Lacombe operates a private landing pad for his aircraft. Lacombe possesses a federal license for airplane activity. • Owner of holiday homes lobby the city to stop the aircrafts. Municipality obtains injunction requiring Lacombe to crease operations on ground that activity violates zoning for the lake. • Lacombe argues that zoning bylaw is *ultra vires*.
Issue	• Does the ultra vires bylaw have constitutional validity because of its relationship to a valid legislative scheme?
Result	• No – bylaw is not saved by its connection to an otherwise valid Act.
Reason	• Pith and Substance: Provision prohibits construction of aerodromes in lake zone, while permitting their construction in other zones. Does not further objectives of zoning law → P&S is regulation of aeronautics ∴ does not meet "rational functional connection" (*General Motors*) • Assign matter to head of power: aeronautics to federal • Is it ancillary? ○ How far is the intrusion? Marginal or serious ▪ Is prohibition a serious interference? Court says no. It is not actually regulating aeronautics. ○ Question is then, is there a rational function for the marginal intrusion? ▪ No. Total ban of water aerodromes across entire municipality is irrational. Why not ban only on vacation areas? It was instead overly broad. ▪ Also, the ban does appear integrated with the rest of the zoning law (land use planning) – rather the provision was flung on (due to citizens lobbying) ○ Conclusion: Amendments on face + impact is directed at removing aviation activities from part of municipality.

	• …Recognizing that a degree of **jurisdictional overlap is inevitable** in our constitutional order, the law accepts the validity of measures that lie outside a legislature's competence, if these measures constitute an integral part of a legislative scheme that comes within provincial jurisdiction • The **ancillary powers doctrine** permits one level of government to trench on the jurisdiction of the other in order to enact a comprehensive regulatory scheme. In pith and substance, provisions enacted pursuant to the ancillary powers' doctrine fall outside the enumerated powers of their enacting body…. Consequently, the invocation of ancillary powers runs contrary to the notion that Parliament and the legislatures have sole authority to legislate within the jurisdiction allocated to them by the Constitution Act, 1867. Because of this, **the availability of ancillary powers is limited** to situations in which the intrusion on the powers of the other level of government **is justified by the important** role that the extrajurisdictional provision plays in a valid legislative scheme. The **relation cannot be insubstantial**…
Notes	• Question: A municipality comes to you and says, we read the case, can we regulate aeronautics? o Of course they do not have jurisdiction over aeronautics, but could you save a rational functional regulation in an overall zoning bylaw? o Probably could if it was connected to other land use regulations and part of the larger scheme o Saved if important part of a broader legislative scheme Page 242 → paragraph 36 • The ancillary doctrine is different from incidental effects rule • Incidental effects do not determine the P&S of legislation • IE does not determine whether something is valid • AD is about provisions are otherwise invalid in and of themselves; how do you know it is invalid? Because you can do a P&S on that provision itself Paragraph 43-44 → Court says getting criticized about how deep the intrusion is question; they say well court finds that the rational connection is the usual test to apply. Say maybe we should get out of this and just ask "is there a rational connection"? Buuuuut they don't change it → nevertheless it is a signal it could change

INTERJURISDICTIONAL IMMUNITY (APPLICABILITY)

Doctrine protects certain core areas of legislative jurisdiction from the impact or interference of otherwise valid laws enacted by the other level

- Emphasizes exclusivity of jurisdiction.
- Comes into play where a generally worded law is clearly valid in most of its **<u>application</u>** 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
    - Protects certain matters that fall with in core areas of legislative jurisdiction from impact or interference of otherwise valid laws enacted by the other level
        - Where IJI applies, valid laws are **<u>NOT</u>** allowed to apply in core areas of jurisdiction assigned to the other level of government & there is no double aspect to the matter regulated
- Doctrine has, so far, only applied to federal legislative jurisdiction
    - Provincial laws – to the extent that they affect the core of the federal undertaking – then do not apply

- Interjurisdictional immunity eliminates overlap. The provincial law has no force or effect applicable to federal undertakings
- When IJI is successfully invoked, the courts will read down the generally worded provincial (or fed) legislation to protect the core of the other power from encroachment
    - Reading down = technique used to save statutes from being struck down
        - words of statute are interpreted to apply only to matters w/in enacting body's jurisdiction

McKay et al v R 1965 SCC

- Whether a municipal bylaw that prohibited all signs (with a few exceptions) in a residential area was constitutional
- McKay's had put up a sign promoting a candidate in a federal election, charged under bylaw for doing so
- SCC (5-4) found the law unconstitutional, because "governments should not be permitted to do indirectly what they cannot do directly"
    - Doing: prohibiting federal campaign signs
    - Direct approach: bylaw that specifically targeted federal campaign signs – which would be struck down (encroaches on federal jurisdiction over elections)
    - Indirect approach: bylaw that prohibits all signs, and therefore includes federal campaign signs (seems provincial under 92(13) (property), but was found unconstitutional)
- Dissent said they were ignoring the P&S doctrine, and specifically the incidental effects rule
- So, the federal campaign sign by the McKay's was given "interjurisdictional immunity" from the bylaw
- This decision had harsh criticism, but didn't stop the SCC from doing it again and again

Bell No 1 1966 SCC

- Whether Quebec *Minimum Wage Act* could be applied to Bell, a federally regulated company
    - The court held that no provincial minimum wage law could apply to federally regulated companies, basically because a valid provincial statute didn't apply if it affected a vital part of federal company's operation/management
- This decision created a much larger area of immunity for federal undertakings from provincial legislation
    - → A valid **generally worded provincial law could be held not to apply** to federal undertakings if it was found to "affect a **vital part of their operation or management**"

The doctrines application was then and still can be quite contentious. 3 major concerns:

- (1) emphasis on exclusive jurisdiction, in our federalist system that encourages overlap
- (2) appears to give federal gov't a level of exclusivity the provinces can't access (not consistent with the balance of federalism but no relevant now since SCC said it goes both ways)
- (3) it is redundant – if you want jurisdiction, just make your own law, feds, to cover the that specific area and rely on the federal paramountcy doctrine
- Justice Dickson in *Ontario (AG) v OPSEAU* 1987 in obiter dictum criticized it too
    - "The history of Canadian constitutional law has been to allow for a fair amount of interplay and indeed overlap…. Doctrines like IJI …. have not been the dominant tide of constitutional doctrines"

Class Notes

- When does IJI arise?
    - When dealing with federal or provincial undertakings: "those heads of power that deal with … things, persons or undertakings" (*CWB*, para 77)

- Doctrine does not question the validity of the provincial law; it only builds a castle around federal undertakings and stops the application of provincial laws even if valid

- What is a provincial law of general application?
  - Alberta minimum wage
  - Adoption – same rules despite who you are
  - Speeding fines – doesn't matter who you are (in theory)
- What are federal undertakings?
  - Turn to section 91
  - Banks → why? Bc federal jurisdiction (91 (15)) covers "banking, incorporation of banks…" which makes banks themselves the undertaking that head of power over banking
  - Post (91 (5)) → undertaking = Canada Post
  - Military (91 (7))
  - RCMP (POGG)
- Section 92 (10)
  - Local works and undertakings are provincial except clause of A, B and C, which designates a number of federal powers despite falling under section 92
    - 92 (C) - anything the federal government declares is federal can become a federal undertaking
      - Used for: atomic energy & grain feed lots but that's about it
    - 92 (A) and (B) --> interprovincial connection falls to feds
      - Telecommunications (Telus)
      - Pipelines
      - Rail
- How do provincial laws of *general application* apply to federal undertakings?
  - Law regarding "Property and civil rights" in *Parsons* is defined broadly
    - Labour/employment law
    - Regulations and zoning
      - This is not about the validity of laws, but the application
  - When federal works and undertakings exist within provinces, all those provincial laws do not apply to those federal works and undertakings.
    - McDonald's is not federally regulated – must follow rules of each province
    - Canada post is federally regulated (s 91(5) postal service), does not have to follow provincial rules, because of IJI. There is a castle wall around that federal work and undertaking.
- Why is that? Core features:
  - The organization of that workplace (pay) is the core feature (a core area of legislative jurisdiction) of what makes that business federal. If you have jurisdiction over the post office, you must have jurisdiction over how the workplace is structured.
  - Would a provincial law impair that core if it had to apply a minimum wage? Yes – that would dictate how they would run their business. We can't do that with federally regulated businesses, because that's impairing their ability to set their own minimum wage laws (a core feature of their business)
    - What is the core and what is peripheral MATTERS.
    - Also, the provincial law must impair the functioning of that federal core.

Bell No 2 **1988 SCC – adjusted the test to be weaker – only required an "affect" → this is changed in CWB**

- IJI to apply where a provincial law "affects a vital or essential part" of federal undertaking (or vice versa); when this occurs the IJI doctrine protects it, and the provincial law does not apply

- Facts: Trilogy of cases dealing with application for provincial health & safety laws to federal undertakings. This concerned application of QC law giving right to protective reassignment of pregnant workers.
- Issue: Can the provincial law be applied to federal undertaking?
- Holding: appeal dismissed.
- **Reason**: Law was constitutionally incapable of applying to the federal undertaking but held that "it is sufficient that the provincial statute which purports to apply to the federal undertaking affects a vital or essential part of that undertaking, without necessarily going as far as impairing or paralyzing it". Since the occupational health and safety law regulated labour relations, that was enough to affect a vital part of the management and operation of the firm.
    - → The province can't get over the castle wall

IJI TEST

- Provincial (or federal) legislation will be inapplicable to federal (or provincial) works and undertakings if that law "**impairs**" a "**core competence**" (or "vital or essential" feature) of that work or undertaking.
- Typically, only use this doctrine where it has been used before (narrow application) (*CWB*)

- **1) Does the law "trench on the protected 'core' of a federal competence?"**
    - "core" – "basic, minimum and unassailable content" – (*Bell 1988*)
    - The core is the "basic, minimum and unassailable content" of the legislative power; the core is the authority that is absolutely necessary to enable Parl to "achieve the purpose for which exclusive legislative jurisdiction was conferred (*QC* v *COPA* quoting Bell then CWB – in exam quote COPA)
- **2) If so, does the law "impair" ("significantly trammel") the federal power?**
    - Affects in a such way that "seriously or significantly trammels" the federal power (*Quebec v COPA*)
    - *The core of the federal power*
- If yes, the law is "inapplicable" by virtue of the doctrine of IJI

Canadian Western Bank v Alberta 2007 SCC – Test changed to require "impair"

Ratio	• **Interjurisdictional immunity test**: Provincial legislation will be inapplicable to federal works and undertakings if that law "**impairs**" a "**core competence**" (or "vital or essential" feature) of that work or undertaking
	  ○ But no need to show it sterilizes
	• **<u>We should only use this doctrine where it has been used before (limited application)</u>**
	  ○ its application is narrow and should be reserved for situations where we already know it exists.
	  ○ If a case can be resolved by P&S and paramountcy, do it that way

Facts	• In 2000, Alberta enacted changes to the Insurance Act that included federally incorporated banks to fall under these provisions, as well to ensure people had 'peace of mind' in insurance at both provincial and federally incorporated banks
	• The federally incorporated banks acted against this Act saying their insurance was only bound by the *Bank Act* which fell under s 91(15) of the Constitution
	  ○ Essentially, "this prov law doesn't apply to us, b/c we are a fed undertaking"
	• Thus, the Act was inapplicable by virtue of IJI doctrine
	  ○ IJI argument: selling insurance is part of the "core" feature of our bank and prov law would impair our federal ability to do so

Issue	• Does IJI apply? Are the banks immune from this provincial law?
Result	• No. No.

Reason	• IJI is a doctrine of limited application
	• The current "dominant tide" of federalism favours, where possible, the application of statutes enacted by *both* levels of govt
	
	Problems with IJIJ
	• The "sweeping immunity" argued by the banks is "not acceptable in the Canadian federal structure"
	  ○ Exposes the dangers of allowing the doctrine of IJI to "exceed its proper (and very restricted) limit and to frustrate the application of the P&S analysis and of the DAD"
	  ▪ The latter have the ability to resolve most problems relating to validity of legislative powers
	• In its application, IJI has produced an asymmetry (feds only get the benefit of this doctrine)
	  ○ Centralizing tendency in constitutional interpretation
	  ▪ → less valid provincial law becomes as walls keep increasing
	• IJI is inconsistent with the "flexible federalism that the doctrines of P&S, DAD, and federal paramountcy are designed to promote"
	• Difficult to determine a "core" feature
	  ○ Could often be argued in multiple ways
	• Possibility of legal vacuums
	  ○ Despite 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
	  ○ If there is a wall, and fed govt has not created a law to apply (ex from prof: minimum wage law)
	• Undermines principles of subsidiarity
	  ○ that decisions are often best made at the level of government that is closest to citizens affected
	
	Modified Test
	• Not enough for a prov legislation simply to "affect" those under federal jurisdiction
	  ○ Judges think it is too broad; and don't particularly like the doctrine
	• It is when the "adverse impact of a law adopted by one level of government increases in severity form 'affecting' to 'impairing' (w/o necessarily 'sterilizing' or 'paralyzing' that the 'core' competence of the other level… is placed in jeopardy and not before"
	• IJI "in general" should be reserved for situations already covered by precedents
	  ○ "in general" gives a little wiggle room
	  ○ Means that in practice, IJI will be reserved for those heads of powers that deal with "Federal things, persons or undertakings, or where in the past its application has been considered absolutely indispensable or necessary to enable Parl or the prov legislature to achieve its purpose"
	
	Application to Case
	• Insurance sales NOT at the core of banking, lending money is
	• "Peace of mind" insurance is to shore up bank's security (in case debtor dies or becomes sick); not at the core of banking

	• Even if insurance is a core banking feature, it doesn't impair the regulatory functioning of the bank that falls under federal jurisdiction • → The entirety of a federal undertaking cannot be said to be "vital/essential" to that federal undertaking

Quebec v Canadian Owners and Pilots Association (COPA) 2010 SCC – aeronautics = core of fed pwr

Ratio	**Interjurisdictional Immunity Test:** • Step 1: Does law **trench** on protected "**core**" of a federal competence ○ The core is the "basic, minimum and unassailable content" of the legislative power; the core is the authority that is absolutely necessary to enable Parl to "achieve the purpose for which exclusive legislative jurisdiction was conferred (quoting *Bell* then *CWB)* • Step 2: Determine **whether the provincial law's effect** on the exercise of the protected federal power is *sufficiently serious* [i.e., **causes impairment**] to invoke the doctrine of interjurisdictional immunity. • → If yes to both these – provincial law is inapplicable by virtue of the doctrine of IJI • → Inapplicable but NOT invalid (will be read down)

Facts	• Two residents of Quebec build a private airstrip on an agricultural lot they owned – don't need prior permission to build/operate this under the federal *Aeronautics Act.*
	• Registration is optional, but if you do, the public can land there and becomes subject to federal standards. They registered it.
	• Area they constructed the strip was within designated agricultural region under the province's Act
	• Under s. 26 of the provincial *Preservation of Agricultural and Agricultural Activities Act*, the airstrip violated the allowed exclusive use of agricultural land unless with authorization – were ordered to demolish the strip. No authorization obtained.
	• Argued that s. 26 was
	  ○ (1) ultra vires (P&S),
	  ○ (2) inapplicable as it affected the location of aerodromes (IJI) or
	  ○ (3) inoperative by conflicting with federal law (paramountcy).

Issue	• Is the s 26 law inapplicable because of interjurisdictional immunity?
	  ○ Is the law valid?
	  ○ Does the strike at the core of a head of power?
	  ○ Is the intrusion sufficiently serious?

Result	• Yes. Valid under s 92(13), 92 (16), and 95. • The location of aerodromes lies at the core of the federal aeronautics power (precedent) • The intrusion impairs fed's ability to decide when and where aerodromes are built – serious.

Reason	Pith and Substance Analysis:
	• The dominant purpose of the agricultural land law is not about banning aerodromes it is about land zoning.
	  ○ Incidental effects (stopping airports being built) don't determine constitutionality.
	  ○ Doesn't make the law invalid → Provincial law is valid.
	• So, we have a valid law. Not ancillary, because it's not outside of the jurisdiction. We've got a valid provincial law.
	
	Interjurisdictional Immunity:
	• Step 1: does law <u>trench</u> on protected core of a federal competence

- Prov law is impeding part of the **core feature** of regulating aeronautics
  - Core = what parliament absolutely needs in order to do what it was tasked with doing under the constitution in regard to this subject
- Province regulating where planes land and take off trenches on the protected **core** because it prohibits the placement of airstrips
  - Placement of air strips is core to the functioning of a regulated aeronautics system
  - Airports and aerodromes constitute a network of landing places that together facilitate air transportation and ensure safety – need to be able to manage together
  - Can't sever the local aspect from national aspect
- IJI limited to situations already covered by precedent in general
  - Aerodrome is something that the court has repeatedly and consistently held lies within the core of federal aeronautics power

- Step 2: does that law then impair the federal power?
  - Must be shown that the interference is constitutionally unacceptable – test is whether the law *impairs* the federal exercise of the core competence (CWB)
  - Does that agricultural law impair the core function? Yes.
    - Affects Parliament's ability to decide when and where aerodromes should be built
    - If you have a provincial law that says no, frustrates federal law
  - QC argues doctrine of paramountcy can be enacted but then Parliament would have to legislate for the specific location of particular aerodromes
    - Can't be a permissive registered regime if force Parl to create legislation for every single airport built
    - Substantial restriction of Parliament's legislative freedom = impairment of federal power
    - Could also be a source of uncertainty and endless dispute if it results in rival systems of regulation
- → If yes to both these – provincial law is inapplicable by virtue of the doctrine of IJI

- TLDR: 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

IJI Practice Problem – from *BMO v Marcotte* case – pg 270

- Provincial law requires banks to clearly disclose "currency conversion" charges to customers when customers use credit cards to make purchases in foreign currencies
  - Banks sued for failure to comply with provincial law
- How will the doctrine of interjurisdictional immunity be raised? How will it be decided?
-
  - First Q: is the law valid?
    - What is the P&S; does it relate to provincial head of power
    - Is the dominant purpose about banking (91.15) or consumer protection (argue via 92.13 or 92.16)? Probably find it is the latter
    - Prov will argue there is just an incidental effect on banking

- Second Q: does the law trench on a core power of the federal undertaking (the banks)?
  - What is the core? Lending and borrowing of money (prov would argue this); regulation of currency rates (bank would say this)
- Third Q: Does the law impair core function?
  - Prov will also argue that the law affects them but does not impair – just a request to be transparent. They are not regulating the price or anything more substantial.

Bank of Montreal v. Marcotte, 2014 SCC 55

- "Interjurisdictional immunity operates to prevent laws enacted by one level of government from impermissibly trenching on the "**unassailable core**" of jurisdiction reserved for the other level of government."
- "While interjurisdictional immunity remains an extant constitutional doctrine, this Court has cautioned against excessive reliance on it. A broad application of the doctrine is in tension with the modern cooperative approach to federalism which favours, where possible, the application of statutes enacted by both levels of government. As such, this Court in Canadian Western Bank held that the doctrine must be applied "with restraint" and "should in general be reserved for situations already covered by precedent". We note that there is no precedent for the doctrine's application to the credit card activities of banks."
- "In the rare circumstances in which interjurisdictional immunity applies, a provincial law will be inapplicable to the extent that its application would "impair" the core of a federal power. **Impairment occurs where the federal power** is "**seriously or significantly trammel[ed]",** particularly in our "era of cooperative, flexible federalism""

IJI Review

- Puts walls around jurisdictional cores
  - Powers cannot apply within those core powers if certain conditions are met
- Spotting an IJI problem:
  - Look for a law of general application and a question of whether or not it applies to a particular person, place, or thing (i.e., undertaking) that is regulated by the other level of govt
    - Almost always a provincial law
    - Bank, airport, telecom, pipeline (areas that fall within federal legislation) → need to know 91 and possible undertakings
    - 92(10) also provides some under federal undertakings (interprovincial pipelines, trainlines that connect provinces, telecom systems that cross provinces)
- Provincial (or federal) legislation will be inapplicable to federal (or provincial) works and undertakings if that law "**impairs**" a "**core competence**" (or "vital or essential" feature) of the jurisdiction/competence of the other level of government.
  - Two questions:
    - What falls within the core?
    - Is that core impaired? Negatively adversely impacted?
  - [more than a sentence in test; less than a meaty paragraph]
-

PARAMOUNTCY (OPERABILITY)

"According to the doctrine of federal paramountcy, when the **operational effects of provincial legislation** are **incompatible with federal legislation**, the **federal** legislation must **prevail**, and the provincial legislation is rendered inoperative to the extent of the incompatibility." (*CWB)*

TEST FOR PARAMOUNTCY

- Searching for incompatibility between federal and provincial laws. (*CWB*)
    - If there is a conflict, federal law prevails.
    - Prov law rendered inoperable – just the portion in conflict with the federal law.
    - If you remove the conflict, the prov law is fully operable again.
- *Rothman* identified two scenarios where a conflict triggers this doctrine
    - Impossibility of dual compliance (*Multiple Access)*
    - Frustration of federal purpose (*Bank of Montreal v Hall)*

1. Are both laws valid?
    a. In pith and substance, is it valid?
    b. Does the double aspect doctrine apply? – necessary part
2. Is there conflict between these valid laws?
    a. Is there impossibility of dual compliance?
        i. Duplication is not conflict (*Multiple Access)*
        ii. Must be strict test – only where it is actually IMPOSSIBLE to comply (*Alberta v Moloney* dissent)
    b. Does provincial law frustrate federal purpose? (*BMO v Hall*)
        i. Prov law can be legislating the same goal (*Rothmans*, *Benson & Hedges*)

➔ CONFLICT? FEDERAL LAW PREVAILS

- 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:
    - 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
    - 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
    - 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"
- Why is the Constitution generally silent?
    - May be explained by the belief of the drafters that overlap would not occur given the exclusivity of jurisdiction
    - Or any conflict would be controlled by feds declaratory power (s 92(10)(c))
    - Or Governor general would decide via s 90
- Eventually, judicial rule filled the gap 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
- Key issue in paramountcy cases is whether a real conflict exists
    - WHEN DOES THE CONFLICT EXIST?
        - Depends on what "conflict" means.

- We will allow laws to exist regarding the same thing – DAD – but when in conflict, paramountcy
- Can be interpreted broadly (if so, many more conflicts found, fed prevail) or narrowly (then conflicts are rare, provinces prevail)

- 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

Class Notes

- 4th Tool in the Toolbox
- Federalism Toolbox: Pith and Substance, Ancillary Doctrine, IJI, Paramountcy
- **Validity** – the pith and substance test: is the legislation valid? Is it *intra* or *ultra vires*? Can an *ultra vires* provision be saved?
  - **P&S**: what is the dominant purpose & how do we classify the law
  - **Ancillary doctrine**: mini validity test for a provision that is sticking out – save or sever
- **Applicability** – the IJI test: does a law of general application apply the work or undertaking falling within the other jurisdiction?
  - Fundamentally distinct from validity
  - A law can be valid but may not be applicable to a particular undertaking → the law is declared "inapplicable" → you "read down" the legislation (that is the remedy)
- **Operability** – the paramountcy test: is a valid and applicable provincial law operable?
  - Applies where there are two laws at both levels are regulating the same person or the same conduct at the same time – question is: are they in conflict?
  - Remedy: provincial law will be rendered inoperable (i.e., ineffective)
  - If fed law disappears (say it is repealed) and prov law remains → now in full effect to cover said issue

Paramountcy Key Cases

Multiple Access v McCutcheon 1982 SCC (Modern paramountcy – duplication ≠ conflict → double aspect doctrine)

Ratio	• Duplication without conflict does not invoke paramountcy; where is it impossible to comply with both, THEN paramountcy applies. • We look for the **impossibility of dual compliance test**: compliance with one is defiance of the other → **express contradiction**
Facts	• Same as above • Both levels regulated insider trading in securities • Alleged insider traders argued prov law could not apply due to bc regulation of the trading in shares of a fed incorporated company falls within a core area of exclusive fed jurisdiction (IJI invoked) • Also, argued via federal paramountcy the prov law was inoperative

Issue	• Was the ON legislation rendered inoperative to the extent that it overlapped with virtually identical provisions of the federal Act?
Result	• No.

Reason	• Narrow test (modern approach) from *Smith v The Queen* 1960
	  ○ Dual compliance: complying with one means complying with the other (∴ no conflict)
	  ○ Duplication is a good thing → its not wasteful; suspension of a prov law may create a gap in scheme of regulation which would then have to be filled by fed law
	• Broad test via Laskin – argued by McCutcheon
	  ○ Simple duplication by a province is not permitted
	  ○ If every situation is covered by both the feds and the provs, then the provs have no autonomy
	• Dickson aligns with narrow test
	  ○ Prov legislation merely duplicates federal, not contradicts it ∴ harmonious duplication
	  ○ Mere duplication without conflict is not sufficient to invoke paramountcy

Class Notes	• What is bad about duplication?
	  ○ Possibility of double jeopardy
	  ○ Inefficient
	  ○ Confusing and messy – who will sue first?
	• McCutcheon says paramountcy comes in and the feds take supremacy
	  ○ BUT in this case, duplication is not conflict in and of itself
	  ○ It is the price of our federal system
	• Page 280
	  ○ Citizens are being told to do inconsistent things

Bank of Montreal v Hall 1990 SCC – cannot frustrate parl legislative purpose

Ratio	• If compliance with provincial statute **frustrates** Parliament's legislative purpose, then dual compliance is impossible.
	• Two step conflict test:
	  ○ 1. Is there impossibility of dual compliance?
	  ▪ If yes, paramountcy is triggered
	  ○ 2. If there is possibility of dual compliance, is there a frustration of federal purpose?
	  ▪ If yes, paramountcy is triggered

Facts	• Bank Act RSC vs Limitation of Civil Rights Act RSS • Hall, a farmer in Saskatchewan, borrowed money from the Bank of Montreal to buy machinery, with the machinery as collateral/security. • He failed to pay the loan, so the bank seized the machinery according to the federal Bank Act that does not require giving advanced notice. • The provincial limitation of civil rights act s 27 required the bank to give notice before seizing collateral property. Otherwise, the bank forfeits its right to make the claim. • The bank challenges the constitutionality under paramountcy claim.
Issue	• Do sections 178 and 179 of the *Bank Act* conflict with s 19 – 36 of the Civil Rights Act to render the latter inoperative? ○ Is there an "actual conflict" b/w the two acts, in the sense that the legislative purpose of the fed law would be displaced by applying the prov law?
Result	• Yes. Fed bill is paramount.
Reason	• McCutcheon test for conflict:

	○ 1. Examine Provincial Legislation: purpose of the law is to prescribe procedure for a secured creditor to follow to possess his security → a judge must determine when, and if a security/article is to be seized (less inefficient, more costly) ○ 2. Examine federal legislation: Act assigned the bank an immediate right to seize and sell those goods, subject only to the conditions required by the bank act (essentially speed, ease, and efficiency as a purpose) • There is actual conflict before them. Compliance with federal entails defiance of provincial. Cannot require bank to defer to provincial legislation = displace intent of parliament. ○ Dual compliance is impossible when application of the provincial statute frustrates parliament's legislative purpose (which is to have uniform banking system across Canada). • More directly, parliament has made a complete code and no room left for provincial. ○ Legislation should be construed as inapplicable to the extent that it trenches on valid federal banking legislation.
	• Why is this not an IJI Case? ○ Federal act is valid bc in relation to banking ○ Prov is valid bc of civil rights • No castle wall around bankruptcy that would impair the civil procedure for how to sue people – those rules of civil procedure are not the core and even if they were the core then setting the procedure does not impair

Rothmans, Benson & Hedges v Saskatchewan **2005 SCC – prov law must not frustrate purpose of fed enactment**

Ratio	• If the purpose of the provincial legislation furthers the purpose of the federal legislation (even if it is more onerous), and it is possible to comply with both, they both can exit – prov law is not frustrating fed purpose • Paramountcy test: ○ 1) Both laws valid? ▪ Pith and substance – double aspect doctrine ○ 2) Is there inconsistency? ▪ Impossibility of dual compliance? ▪ Provincial frustration of federal purpose?
Facts	• Federal Tobacco act prohibits promotion of tobacco products, except as authorized elsewhere in Acts • Saskatchewan adopts the Tobacco Act which bans all advertising in places there may be youth under 18 (via 92(13)).
Issue	• Is SK Act inoperative via paramountcy?
Result	• No, appeal allowed. Can comply with both acts; prov does not frustrate parl' purpose.
Reason	• Impossibility of dual compliance (*Multiple Access)* is not the only mark of inconsistency b/w legislation ○ Prov legislation that displaces or frustrates Parl' purpose is also inconsistent for the purposes of this doctrine (*Bank of Montreal v Hall)* • Rothman argument: fed law is about allowing SOME forms of cigarette advertising then total prohibition must frustrate this purpose • Sask argument: The prov law does not frustrate the legislative purpose of the federal law – both were enacted for the same health related issue. If SK wants to be more restrictive, cool – the

	purposes are actually in alignment. Federal allows for advertising and provincial law says no advertising
	
	Apply Paramountcy Test:
	• 1) Are both laws valid?
	  ○ Pith and substance – double aspect doctrine
	  ▪ Federal: directed at a public health evil and contains prohibitions – therefore it falls within parliaments criminal law power. Purpose is to define with greater precision the prohibition on the promotion of tobacco products contained in s 19
	  ▪ Provincial: directed at health
	• 2) is there inconsistency (conflict)?
	  ○ Impossibility of dual compliance?
	  ▪ Dual compliance is possible in this case – just follow stricter regime, you can do both (*Bank of Montreal v Hall)*
	  ▪ How do you comply with both regimes simultaneously?
	  ▪ Go with the stricter one
	  ▪ Dual compliance is possible in this case: a retailer can easily comply with each provision of each act
	  ▪ Just do not admit those under 18 or do not display tobacco products
	  ○ Does s6 frustrate Parl's purpose in s30?
	  ▪ 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
	• → When there is an inconsistency, the provincial law is inoperative to the extent of the inconsistency

Class Notes	• Page 285 - *BMO v Hall*
	  ○ Parl "has enacted a complete code that … There is no room left for the operation of the prov legislation"
	  ▪ Called "Covering the field"
	  ▪ Did the fed govt intend to cover the field? Essentially oust any other regulation and create a complete and total code which displaced other regimes
	• Page 290 – *Rothmans*
	  ○ Rothsman tries to make the above argument in relation to advertising
	  ▪ Court says, if we assume feds are trying to cover the field and enact a complete code each time then we are never going to allow provincial to stand and invoking paramountcy all the time

Paramountcy Question

- Imagine *intra vires* federal environmental legislation regulating the use of lawn chemicals providing as follows:
  - 1) The purpose of this Act is to establish national standards which are **uniform** across the country.
  - 2) No person may use designated lawn chemicals on their property between 1 May and 30 September.

- Imagine *intra vires* provincial legislation that imposes a *stricter standard* than imposed by the federal law.
  - 1) The purpose of this Act is to **eliminate** the use of lawn chemicals within the province to protect the health and safety of residents.
  - 2) No person may use designated lawn chemicals on their property.
- What will the arguments about paramountcy be? How is the paramountcy issue likely to be resolved? What further information do you need?
  - Frustrates the purpose (Multiple Access)
    - What is the purpose section telling us?
    - Uniformity the most important or limits of the lawn chemicals important?
    - What are the legal and practical effects?
    - Context
    - Look at what happened in the debates about this particular piece of legislation
    - Read closely the description of the purpose of uniformity→ achieving reduction in the chemicals
      - So the reduction is the more important standard here
  - Simply following the stricter regime allows you to comply with both simultaneously (*Rothman*)
    - No impossibility of dual compliance because you can follow both laws simply by following the stricter regime which denies you the ability to use any lawn chemicals.

- Impossibility of dual compliance?
  - No, can follow provincial law and therefore meet the fed law
  - HOWEVER, cannot follow the federal law only without conflicting with provinces (but for paramountcy we just care if prov law conflicts)
- Frustration of federal purpose?
  - If the purpose of fed law is to simply reduce to all extent possible the impact of harmful chemicals, then it seems like a strict prohibition is fully in keeping with that purpose
  - BUT if the purpose is to enable some kinds of uses of lawn chemicals, then maybe there is a little frustration
  - OR if the purpose is to have one standard then there may be frustration
  - OR what if harmful impacts does not cover health and safety of residents and is concerned with the environment only or something else [ask Adams]
- BUT we also need to look at the purpose more broadly – via the Hansard debates and what studies parliament looked at – AND read the full Act to see the provision in context
  - Need to figure out is it purely about reducing harmful substance or something more broad → ARTICULATE THIS IN THE EXAM

OPERABILITY – PARAMOUNTCY TEST

- Is the valid and applicable provincial law operable? Searching for incompatibility between federal and provincial laws (*CWB*)

1. **Are both laws valid?**
   a. Pith and substance
   b. Double aspect doctrine – necessary part
2. **Is there conflict between these valid laws?**
   a. Impossibility of dual compliance?
      i. Duplication is not conflict (*Multiple Access*) → just follow the stricter test
      ii. If yes, paramountcy triggered; if possibility of dual compliance, continue

b. Provincial frustration of federal purpose? (*BMO v Hall*)
    i. Provincial law can be legislating after the same goal, but if the operation of the provincial law is incompatible with the federal law's purpose (*Benson & Hedges*)

3. If there is a conflict, the federal law prevails

a. Provincial law is rendered inoperable to the extent of the inconsistency
b. If the conflict is removed, the provincial law is fully operable again

PEACE, ORDER AND GOOD GOVERNMENT

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say…"

- After Lord Haldane and privy council cases, POGG restricted to emergencies then broadened to 3 branches overtime
    - *Fort Frances*, *Snider*, and *Board of Commerce* case – new deal cases

MODERN POGG EXISTS WITH 3 IDENTIFIABLE BRANCHES

- **Gap Branch** – residuary power of 91/92
    - Stuff must fall somewhere; if its not 92, it's by definition the feds
    - *Radio Reference*, [1932] AC 304
        - Radio "not mentioned explicitly in either s. 91 or s. 92 … falls within the general words at the opening of s. 91
    - *Jones v. AG New Brunswick*, [1975] 2 S.C.R. 182
        - Regulation of official languages "clearly beyond provincial reach" and therefore falls within "the purely residual character of the legislative power [of s. 91]."
- **Emergency Branch** – 1920's – fed gov't has jurisdiction under POGG to deal with emergencies (*Fort Francis*, *Haldane*)
    - Must be temporary (not a permanent addition of federal jurisdiction)
    - There must be a rational basis for that emergency
    - The scope of the emergency power is defined and limited by the extent of that emergency
        - Don't get powers outside of the treatment of that emergency
- **National concern** – emerges from *Russell* and other temperance cases (more below)
    - Things rise to a level of national concern – beyond provincial jurisdiction
    - What are its boundaries, what are its characteristics?
    - *AG Ontario v. Canada Temperance Federation*, [1946] AC 193
        - – affirming Russell
    - *Johannesson v. Rural Municipality of West St. Paul*, [1952] 1 S.C.R. 292.
        - aeronautics as a "concern of the Dominion as a whole"
    - *Munro v. National Capital Commission,* [1966] S.C.R. 663.
        - National capital region as a "single matter of national concern"

NATIONAL CONCERN DOCTRINE

- Modern interpretation of the POGG power: Re-emergence of the national concern doctrine
  - "If **subject matter of legislation goes beyond local** or provincial concern or interests and **must from its inherent nature be the concern" of Canad**a as a whole, "**then it will fall within** the competence of the" **Canadian parliament** "as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures" (Viscount Simon in *AG Ontario v Canada Temperance Federation* 1946 AC)
    - Viscount also reaffirms *Russell* and rejects the notion that *Russell* was based on a finding that alcohol prohibition constituted a national emergency
      - Believes *Snider's* interpretation of *Russell* was too narrow
  - → expands POGG
- Viscount Simon also expanded scope of power to legislate for the prevention of an emergency

- NCD applied in an expansive manner after the *Canada Temperance* case

- *Johannesson v. Rural Municipality of West St. Paul*, [1952] 1 S.C.R. 292.
  - Challenge to municipal law controlling location of airports
  - Aeronautics viewed as a "concern of the Dominion as a whole"
    - Previous justification for Dominion control over aeronautics had been under Canada's treaty power when it was under British rule
    - Basically, aeronautics are too important to be at the whim of municipalities – air passengers, air mail, freight traffic, northern Canada, east west, international
    - Affirmed aeronautics is exclusively federal government
  - 1950's 60's cases – gave an expansive reading of the doctrine
- *Munro v. National Capital Commission*, [1966] S.C.R. 663.
  - SCC upheld the *National Capital* Act on POGG
    - Development of national capital region viewed as a "single matter of national concern"
  - Act created a commission to prepare plans for development of capital region
    - Munro's land was expropriated as a result to establish a green belt

Ref re Anti-Inflation 1976 SCC - Emergency Branch – temporary & exceptional

Ratio	• The POGG power can **temporarily** displace the ordinary division of powers when they have a **rational basis** for responding to **exceptional emergency** circumstances
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 provincial public sector *if* agreement was made with province (opt-in clause) - "zap, you're frozen" – • Trudeau attempts to freeze prices and wages as an inflation measure
Issue	• Whether the Act is supported under POGG as an emergency or 'crisis' legislation (emergency branch, not the national concern branch) • Whether the existence of an emergency was essential to the Act's validity?
Result	• 7 judges support under emergency branch vs 2 oppose • 5 judges yes (rejecting national concern branch) vs 4 judges left open whether it was supportable under national dimensions argument – but does not matter as upheld via emergency

Reason

- Class Note: Major alarm bells – this is classic provincial jurisdiction (92.13, *Parsons*)
  - Wages, prices, regulation of business activity ACROSS Canada

Majority - Laskin

- No issue with meaning of terms of the legislation or objective of the legislation
- Issue: Whether social and economic circumstances provide support for act in power of dominion to legislate for POGG
- Related federal powers: regulation of trade and commerce, currency and coinage, banking, issue of paper money, taxation
- AG of Canada argument: economic crisis = emergency sufficient to warrant federal intervention

1. Did act contradict content because it excluded provincial public sector from scope, notwithstanding that it is framed as temporary?
   - 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 programme under own admin if it was their preference. Co-operative federalism at work i.e., *Board of Commerce* case
2. Is federal contention assisted by preamble?
   - Preamble: inflation = "serious national concern", "necessary to restrain profit margins", etc.
   - Preamble is sufficiently indicative that parliament was trying to introduce a far-reaching programme prompted by view of serious national concern
     - Did not matter that the word "emergency" was not used
     - Although noted that the absence of any preamble would weaken the assertion of crisis conditions
   - Preamble cannot make or break a constitutional jurisdiction
3. Does extrinsic evidence back it up?
   - Using social and economic policy, and hence governmental and legislative judgement
   - **Not courts area to decide IF there was a national emergency, just if there was a rational basis to support parliaments assertion of one**
     - Court did have a rational basis for regarding the act as a measure temporarily necessary to meet the situation of economic crisis
   - Judicial notice is the exception to the normal rules of law in which we say if something is going to be demonstrated in a court of law, we need evidence
     - Some things may not need to be proved with evidence
     - Some things are so notorious and obvious and beyond controversy or dispute that a judge can take judicial notice of it
4. Is it a tenable argument that exceptional character could be lent to the legislation beyond that of local or provincial concerns because parliament could reasonably take view that it was necessary measure to fortify action in other areas of federal authority, such as monetary policy?
   - The fact that inflation has been rising, inflation is a monetary phenomenon, and that monetary policy is within federal jurisdiction, allows parliament of Canada, in these circumstances, to act over monetary policy.

- → upheld via POGG to "wage war on inflation"

Dissent – Beetz

- Interpreting POGG broadly and characterizing social phenomenon as unprecedented will upset provincial jurisdiction and constitutional order.
- Starting premises
  - Employment, wages, prices = provincial

	○ The Act is *ultra vires* the Parliament of Canada. It directly interferes with matters within the exclusive jurisdiction of the provinces, s 92(13). This interference is not incidental or ancillary; it is interference on a large scale. • Hypothetical consequences: ○ If Parliament had power to control inflation, hard to see what would be beyond the reach of parliament then. Inflation is an aggregate of many subject matters, some falling within provincial jurisdiction. Primary effects are property and civil rights. ○ If Inflation is a parliament power, everything should be, since it touches salary, budgets, wages, rent controls, etc. Too general of a concept. • Problems with gap theory ○ Inflation is not in s91 or 92 but what it touches upon is ▪ Inflation wasn't created in 1970 ▪ It's a problem as old as confederation ▪ Father of Confederation was aware of inflation ▪ It was subsumed within the existing divisions of powers ○ → Add by judicial process new matters or new classes of matters to the federal list of powers but in this case, they are trying to fight inflation with powers exclusively reserved to the provinces ▪ You'll unbalance federalism and a whole bunch of things are suddenly becoming federal ▪ And increasingly over time, the province is just going to lose jurisdiction ○ Cannot repackage an old problem within new terminology ○ What is GAP then? GAP is truly distinct, indivisible and new → becomes important in future cases • Degree of unity ○ Need to have a degree of unity as a subject so we know where they begin or end • Emergency branch and the "test of explicitness" ○ Have to be explicit if want emergency powers • Does not believe inflation is the subject-matter of the act • Is the current legislation an emergency measure? Act does not use clear language of an emergency. If it's an emergency, why can provinces opt in or out. Page 323 • "The power of Parliament to make laws in a great crisis knows no limits other than those dictated by the nature of the crisis. But one **of the limits is the temporary nature** of the crisis. The extraordinary nature and the constitutional features of the emergency power of Parliament dictate the manner and form in which it should be invoked and exercised". (reaffirming previous cases about temp nature)
Notes	• After Re: Anti-Inflation Act, the federal government passed the Emergency Act, which requires the federal government to formally declare a national emergency before passing an act under POGG using the emergency power.

***Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC – national concern**

Ratio	• National concern doctrine has three steps: 1) Threshold question

	2) The singleness, distinctiveness, and indivisibility analysis a) Qualitatively different b) Provincial inability test 3) Scale of impact
Facts	• Parl enacted *Greenhouse Pollution Pricing Act* (GGPPA) in 2018 • 3 provinces challenged the constitutionality via their respective CoA → resulted in split decisions w/ SK and ON holding it constitutional and AB saying unconstitutional o Focus is Part 1 and 2 of the Act. Part 1 established a fuel charge; part 2 sets out a pricing mechanism for industrial GHG emissions. o Act acts as a backstop, applies in a prov/territory IF their pricing mechanism is insufficiently stringent • What is not in the legislation? o The legislation does not invalidate, over-ride, or in any material way interfere with provincial legislation any more than federal income taxes interfere with provincial income taxes o The legislation does not set performance standards or otherwise regulate technology, production, or individual activities or behaviour
Issue	• Whether Parliament had the constitutional authority to enact the GGPPA
Result	• Intra vires. POGG – national concern branch
Reason	• To answer, must identify true subject matter then classify (P&S test) o While doing so, must give effect to the principle of federalism which requires that an appropriate balance be maintained b/w the powers of the fed govt and provinces • Jurisdiction as a matter of <u>national concern</u> under POGG clause of s. 91 • **<u>True subject matter</u>:** establishing min standards of GHG price stringency to reduce GHG emissions **<u>P&S Analysis</u>** • Intrinsic evidence o Statute's title (short and long) make it clear the matter is not just to "mitigate climate change" or just regulate GHG emissions but with pricing them through a pan-Canadian application. Main thrust = national GHG pricing not the broader reduction of GHG emissions. o Preamble confirms this. Preamble can help illustrate the "mischief" the law is designed to cure. Here the issue is nationwide harm associated with a purely intraprovincial approach to regulating GHG emissions. • Extrinsic evidence – legislative history and policy papers and debates o Confirms the above • Legal Effects o Ask - how the legislation as a whole affects the rights and liabilities of those subject to its terms o Primary legal effect is to create one GHG pricing scheme in a consistent matter ▪ "Significantly, the GGPPA does not require those to whom it applies to perform or refrain from performing specified GHG-emitting activities. Nor does it tell industries how they are to operate in order to reduce their GHG emissions. Instead, all the GGPPA does is to require persons to pay for engaging in specified activities that result in the emission of GHGs" • Practical Effects o A law's practical effects are "'side' effects flow[ing] from the application of the statute which are not direct effects of the provisions of the statute itself

        - Unknown at the time due to lack of evidence. However, the existing evidence is consistent with the flexibility and support for provincially designed GHG pricing schemes.
- → True subject matter: establishing min standards of GHG price stringency to reduce GHG emissions
    - Pricing scheme is not merely the means of achieving a reduction of emissions rather is it the entire matter of the Act
- **A p&s that "accurately reflects both what the statute does … and why the statute does what it does" (80)**

National Concern Doctrine

- According to the doctrine, the federal government has jurisdiction over matters that are found to be of inherent national concern. As Professor Hogg explains, it "is residuary in its relationship to the provincial heads of power".
    - Therefore, **the national concern doctrine does not allow Parliament to legislate in relation to matters that come within the classes of subjects assigned** exclusively to the provinces under s. 92.
    - The national concern test is the mechanism by which matters of inherent national concern, which transcend the provinces, can be identified.
- As per *Crown Zellerbach*, the framework for national concern doctrine:
    - The national concern doctrine is separate and distinct from the national emergency doctrine of the peace, order and good government power, which is chiefly distinguishable by the fact that it provides a constitutional basis for what is necessarily legislation of a temporary nature;
    - The national concern 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;
    - For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes 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;
    - [provincial inability test] In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility 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. [pp. 431-32]
- This doctrine **applies only to matters that transcend the provinces** owing to their inherently national character

National Concern Doctrine Analysis has three steps:

- **1. Threshold question**
    - Whether the matter is of *sufficient concern* to Canada as a whole (*Crown Zellerbach*)
        - "Inherently national in character" that "transcends provinces"
        - Proven with evidence (rational basis for idea there is a sufficient national problem)
    - Common sense inquiry; operates to limit the application of the doctrine
- **2. The singleness, distinctiveness, and indivisibility analysis**
    - Jurisdiction based on this doctrine should be found to exist only over a specific and identifiable matter that is **qualitatively different** from matters of provincial concern.

        - Consider whether the matter is predominantly extraprovincial and international in character having regard both to its inherent nature and its effects
        - Federal role must be distinct from and not duplicative of the provinces
    - And exist only where the evidence established provincial inability to deal with the matter [prov inability test]
        - (1) the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and
        - (2) 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; and
        - (3) province's failure to deal with the matter must have **grave extraprovincial consequences**
            - Shown by actual harm of serious risk of harm to life, health, or environment (could be others) → "high bar"
- **3. Scale of impact analysis**
    - Canada must show that the proposed matter has "a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution"
        - Requires Court to balance competing interest → identifying a new matter will be justified only if the intrusion upon prov autonomy is outweighed by the need for Parl to address the matter at a national level
        - Goal: prevent federal overreach

<u>Application to the GGPPA</u>

- 1. Threshold Question
    - Min national standards is of sufficient concern to Canada as a whole that it warrants consideration
    - Climate change is an **existential challenge** to Canada and the world (**transcends provinces**)
    - The matter at issue is not about regulation of GHG generally, but establishing min standards of GHG price stringency to reduce emissions
        - "Regulating emissions" (as per AB CoA) implies full power over subject
- 2. Singleness, distinctiveness, and indivisibility
    - Qualitatively different
        - GHG is a specific and precisely identifiable type of pollutant
        - GHG emissions = predominantly extraprovincial and **international** in character and implications
        - **International conventions/treaties** – can be raised to show this is an important topic (use it as evidence but cannot use the treaty in and of itself to create jurisdiction – *Labour Conventions case)*
        - Does not duplicate provincial GHG pricing systems
        - GGPA is tightly focused and does not shift into regulation of all aspects of GHG pricing
    - Inability test
        - the provinces and territories are constitutionally incapable of establishing a binding outcome-based minimum legal standard -- a national GHG pricing floor -- that applies in all provinces and territories at all times.
        - Failure to include one province would jeaopardize success in the rest of Canada (see AB + SK offsetting reduction of other provinces and failing to meet intl agreements)

	• 3. Scale of Impact
	  ○ Provinces may regulate via s 92(13), (16), and 92A but would apply concurrently with paramount federal law → clear *impact* on prov autonomy
	  ▪ But there Is a real risk of grave harm associated with a purely intraprovincial approach
	  ○ The result of the GGPPA is therefore not to limit the provinces' freedom to legislate, but to partially limit their ability to refrain from legislating pricing mechanisms or to legislate mechanisms that are less stringent than would be needed in order to meet the national targets
	  ▪ No loss of prov jurisdiction – GHG impacts both levels - double aspect doctrine
	
	Dissent – Brown
	• the Act's structure and operation is premised on provincial legislatures having authority to enact the same scheme → fatal to the constitutionality under the POGG national concern branch since s91 states prov leg authority is "assigned exclusively"
	• Re: scale of impact analysis:
	  ○ if we say the test is met whenever the matter is important then we shift into politics and not a legal analysis → introduces judicial subjectivity
	  ▪ undoes the division of powers
	  ○ Argument against Brown: judges act as the check + balance → they will ensure overreach does not occur

Notes	• Para 163-166 summarizes national doctrine test
	• Why not emergency doctrine?
	  ○ Longevity of this action that is required
	• *Friends of the Oldman River Society v Canada* 1992 (did not have to read but was referenced here)
	  ○ Environmental regulation – double aspect doctrine applies
	  ○ Touches upon several heads of power assigned to both levels

National Concern Branch POGG Test (*Zelller*)

- **1) Must be a matter of sufficient national concern**
  - "inherently national in character" that "**transcends provinces**"
  - proven with evidence
- **2) Matter must be single, distinctive, and indivisible**
  - "specific and identifiable matter"; not an "aggregate" of matters; qualitatively different from matters of provincial concern (international aspects?; not sufficient to simply be a national problem across Canada
  - "provincial inability" to collectively address matter; "grave extraprovincial consequences" of non compliance (new via *GGPPA*); a "high bar"
    - Is this a topic that provinces cannot regulate either on their own or either when they act together?
- **3) Scale of impact analysis (from *GGPPA*)**
  - Need to weigh competing interests within division of powers
    - "a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative powers under the Constitution"
  - "the intrusion upon provincial autonomy that would result from empowering Parliament to act is balanced against the extent of the impact on the interests that would be affected if Parliament were unable to … address the matter at a national level," i.e. "balancing competing interests"

POGG Summed Up

- Emergency Branch
  - Temporary in scope
  - Flexible in nature: authority extends as far as is necessary given the emergency
  - Applicable in war (*Fort Frances* – the first world war was an emergency, allowed feds to regulate prices & supplies)
  - Potentially available in social or economic emergencies – *Re Anti-Inflation Reference*
- Gap Branch
  - *Radio reference*
  - Dissenting judges in GGPPA says there is no such thing and it is just part of NCB. Majority does not deal with it – so still open question
  - It relates to the residuary capacity of POGG → total dispersal of subjects which means a subject must fall somewhere (has to be a truly new matter)
- National Concern
  - *Aeronautics* case fell under here
    - National concern: safety and organization
  - A permanent addition to s. 91
  - Subjects must possess
    - Nationwide importance
    - Singleness, distinctiveness and indivisibility
      - Degree of it → a spectrum
      - as determined by the "provincial inability test" (necessarily national – something province can't effectively deal with)
    - Scale of impact analysis
      - Is this in keeping with balance of federalism

ECONOMIC REGULATION (CB: 354-366; 368-378)

GENERAL PRINCIPLES

- In the cases below: provinces had marketing regulation scheme for a product that eventually moved into interprovincial and/or international trade. Courts are concerned with the preservation of the Canadian economic union.
- 91(2) – trade and commerce power of federal government (Interprovincial Trade)
- 92(10) – local works and undertakings are within provincial jurisdiction (like farm, factory, business – generating stuff)
- 92(13) – provincial jurisdiction over property and civil rights in province
- 92(16) – matters of a local nature

- Parsons – first case about T&C. Court gave us a way to distinguish 91(2) and 92(13)
  - 91(2) Not all trade and commerce activity – its about interprovincial and international trade
    - Must be narrower than 'all economic activity' b/c some economic activity is to be regulated by provs.
  - Anything more would seriously entrench on 92(13)

Must interpret them so they can live together (mutual modification)

AGRICULTURE

- A province may regulate a matter under provincial jurisdiction that causes incidental effects on matters that fall under s. 91(2), as long as they do not regulate, control, or restrict trade IAW federal jurisdiction (*Carnation*)
- Provincial regulation can incidentally affect trade, but its dominant purpose cannot regulate inter-provincial trade (*Egg Reference*)
- Collaborative legislation schemes should be supported, as long as each jurisdiction regulates within their powers (*Agricultural Products Marketing Act*)

Carnation v Quebec 1968 SCC - Provincial regulation may incidentally affect s. 91(2) power

- Federalism and the administrative state
  - Boards, tribunals, and commissions create regulations
    - Ex: Alberta Human Rights Tribunal; CRTC
- A role for provincial regulation:
  - Parsons defined trade and commerce: International and intraprovincial trade and the general regulation = feds. Intraprovincial = provinces.

Ratio	• The fact that the orders impacted interprovincial trade does not mean that they are a regulation of trade and commerce under 91(2) – **necessarily incidental effects** doctrine
	  ○ Not trying to regulate the price of export milk – trying to regulate the price of milk in QC
	  ○ P&S was the regulation of a local transaction
	• Incidental effects vs dominant purpose
	  ○ interprovincial effects ≠ interprovincial trading

Facts	• Board created by Agricultural Marketing Act, empowered to approve joint marketing plans.
	  ○ The Marketing board had the power to fix the price paid by Carnation (and other buyers) for raw milk purchased from local dairy farmers
	• The majority of Carnation's milk is shipped and sold outside of Quebec
	  ○ Carnations takes the position that the 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

Issue	• Whether, in making these orders, the Marketing Board had infringed on the exclusive feds powers under s 91(2) to regulate trade and commerce
Result	• Not a 91(2) trade and commerce matter. • Although the effects incidentally extend into the federal regulation of interprovincial trade, the dominant purpose is to regulate the local production and sale of products

Reason	• In **pith and substance** – the legislation's purpose is not the regulation of inter-provincial trade. It might affect it, but the **dominant purpose is a 92 (16) local transaction** of 92 (13) property and civil rights within the province of Quebec
	  ○ Question is always, what is the law in relation to? (what's the matter); not what it affects
	  ▪ Matter: Protect local dairy farmers
	  ▪ "a trade transaction completed in a Province, is not necessarily, by that fact alone, subject only to provincial control, [but], … the fact that such a transaction incidentally has some effect upon a company engaged in interprovincial trade does not necessarily prevent its being subject to such control."
	  ▪ Order not directed at interprovincial trade, or to control or restrict such trade
	• SCC held that the ultimate destination of the product could not affect the validity of the prov statute bc it was directed at a transaction taking place wholly within the province (sale of milk from farmers to Carnation)
	  ○ The fact that it would affect the company's cost of doing business in the process would by extension impact the export trade; however, the SCC noted that labour costs (say min wage) also affect the cost of doing business in a prov and yet it is not disputed this subject lays with the province

Note from Irwin books	• One potential difficulty with this expansive interpretation of provincial trade powers is that it makes it possible for provinces to enact laws that, although directed at matters within a particular province, restrict the free flow of goods or services between provinces. • By creating a supposedly non-discriminatory law, provinces may impose conditions or restrictions that favour local products and effectively bar the sale of cheaper or more desirable imported produces • There is also political incentive to establish discriminatory schemes bc local producers have significant lobbying powers

AG Manitoba v Manitoba Egg 1971 SCC - provincial regulations as encroaching s 91(2))

- Never underestimate Friendly Manitoba
- Distinguishing Carnation: the limits of provincial economic jurisdiction – the regulation of interprovincial trade
- "affects" interprovincial trade vs. "aims at" interprovincial trade
  - "It is designed to restrict or limit the free flow of trade between Provinces"

Ratio	• Provincial regulation can incidentally affect trade, but its dominant purpose cannot regulate inter-provincial trade

Facts	• Chicken and egg war between ON (too many eggs) and QC (too many chickens).
	  ○ Local producers in each provinces lobbied their prov govt for protection against cheap imports
	  ▪ QC created board to restrict egg imports; ON did the same w/ respect to chicken
	  ▪ Each disguised the discrimination
	  ○ MB egg and chicken industry were harmed by the regulation
	• Result: Manitoba loses access to two markets in Eastern Canada. Manitoba starts its own scheme – egg-marking plan - wanted to get a precedent from Canada saying that its scheme was unconstitutional. Then Canada would strike down the other two schemes.

Issue	• Whether the plan was ultra vires the province because it trespasses upon s. 91(2) inter-provincial trade?
Result	• The dominant purpose of the provincial legislation effectively regulates trade between the province → ultra vires

Reason	• The P&S – trade and commerce?
	  ○ The law was to "be operated by and for the benefit of egg provides of MB… w/ the power to control the sale of eggs in MB, brought in from outside MB, by means of quotas, or even outright prohibition"
	  ○ ∴ law not only "affects" interprovincial trade but aimed at the regulation of such trade → ultra vires
	• Similar to Carnation because the setting of prices in the province
	  ○ In *Carnation* it was held to be incidental
	  ○ SCC says this is different
	  ▪ Here the pith and substance = price-setting to deter inter-provincial trade
	  ▪ This act was aimed at goods coming from outside the province – interprovincial (ultra vires the prov)
	  ▪ Intention was to disadvantage incoming products – intervene in the export trade market
	  ▪ In *Carnation*, the law in P&S was aimed at helping QC farmers, not about limiting trade
	• "affects" interprovincial trade vs. "aims at" interprovincial trade
	  ○ "It is designed to restrict or limit the free flow of trade between Provinces"
	  ○ Not about effect of interprovincial trade but it's aimed at interprovincial trade
	  ▪ Underlying purpose was to restrict interprovincial trade

Notes	• Section 121
	  ○ All articles of the growth, produces, or manufacturer of any of the provinces shall from an after the union be **admitted free into each** of the other provinces
	  ▪ Laskin said "I do not find it necessary in this case to invoke s. 121, and hence say nothing about its applicability to the marketing scheme under review"

Re Agricultural Products Marketing Act 1978 SCC - "Watertight compartments" should not override cooperation

Ratio	• Provinces and feds can work together to form a scheme that they could not enable on their own
	  ○ Courts want to encourage co-operative federalism
	  ○ Departure from New Deal Acts, where courts emphasized "watertight comp"

Facts	• Federal and provincial joint legislative package regulated the marketing of eggs, which had aspects of both federal and provincial jurisdiction.
Issue	• Can federal and provincial statute legislate on the same matter?
Result	• Yes. legislative package is intra vires.

Reason	• Double aspect doctrine
	• Control of production, whether agriculture or industrial, is *prima facie* a local matter (prov jurisdiction – s92.10)
	  ○ Prov regulation not aimed at controlling extraprovincial trade
	  ▪ In so far as it affects this trade, it is only complementary to the regulations established under the fed authority → valid otherwise it would make cooperativeism impossible
	• Affect v control
	  ○ Provincial regulations that AFFECT trade are valid provincial laws. Regulating production, by its nature, will have some impact on trade. Where it tried to control or regulate the trade directly then the act becomes inadmissibly *ultra vires* over T&C

	○ Qualitative distinction between legislation that "affects" inter-provincial trade vs. legislation to "control" inter- provincial trade ▪ We know that production regulations will have an effect on prices of goods leaving the province (incidental impact) ▪ That's okay – the diff is the diff b/w effect and control ▪ Provinces are not trying to control that export good – just having an effect on that export good • Judicial realism – if the feds/prov move out of their watertight compartments, but are in cooperation, courts should not overrule

R v Comeau 2018 SCC - s 121 purpose is to prohibit laws that purpose is to limit free flow of goods

- **Facts**:
  - Beer is cheaper in QC. He buys a bunch of booze from QC and drives back to NB. Stopped by RCMP. Charged under section 134(b) of the *Liquor Control Act* (NB), of having in his possession an excessive amount of liquor not purchased from the New Brunswick Liquor Corporation.
  - Comeau argues via section 121 this action was allowed. S 121: "All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces".
- **Analysis**
  - "Mr. Comeau did what many Canadians who live tantalizingly close to cheaper alcohol prices across provincial boundaries probably do. He visited three different stores and stocked up." (para 9)
  - "[T]he **purpose of s. 121 is to prohibit laws that in essence and purpose restrict or limit the free flow of goods** across the country….[L]**aws** that pose only incidental effects on trade as part of broader regulatory schemes **not aimed at impeding trade do not have the purpose of restricting interprovincial** trade and hence do not violate s. 121." (at para 97)
    - Takes a purposive reading
    - It is about prohibiting explicitly protectionist schemes
    - NB argue: the prohibition is about sobriety and health/safety of citizens
  - "Put another way, s. 121 allows schemes that incidentally burden the passage of goods across provincial boundaries, but does not allow them to impose such impediments only because they cross a provincial boundary." (para 100)
  - The Court states that section 121 does not impose "absolute free trade across Canada" which would otherwise render any law restricting free trade and free movement of goods throughout Canada unconstitutional → NB law valid
- Section 121 Test: important to know says Adams
  - "It follows that a party alleging that a law violates s. 121 **must establish that the law in essence and purpose restricts trade** across a provincial border."
  - "If it does, the claimant must also establish that the primary purpose of the law is to restrict trade. A law may have more than one purpose. But impeding trade must be its primary purpose to engage s. 121"

Agriculture Summary – NOV 17

- *Carnation* tells us it does not matter there is an impact on a commodity that gets traded
  - The provinces have the power to regulate production issues; those production issues can and do have an impact on price; that price may eventually have an impact on export of that item but that is irrelevant as it is just the incidental effect

- What matter is the P&S; here it was the management and production of sale of milk in Quebec
  - The fact that some exported was irrelevant
- *MB Egg Reference*
  - This distinguished b/w affecting interprovincial trade and one that "aims at interprovincial trade"
  - The scheme aimed at restricting the free flow of trade b/w provinces
  - Protectionist scheme to protect internal producers from those outside province
  - *Ultra vires* as the P&S is now **in relation to interprovincial trade**
- Distinguishing from Carnation v MB Egg Reference
  - The P&S and rationale

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 – mines minerals and royalties
  - Alberta is not listed – because didn't exist at the confederation.
  - Why can't we just assume Alberta is in it? Living wtree?
    - We can give words meaning that grow and develop over time but can't insert words that aren't there.
  - So, when AB joins confederation, no natural resources for you beyond 92(5) – this was not popular in AB
- *National Resources Transfer Agreements*, 1930
  - This changes in 1930 – the NRTA says AB now has jurisdiction over natural resources like other provinces

Canadian Industrial Gas v Saskatchewan 1978 SCC – provincial export

Ratio	• Dominant purpose (effects) of regulation cannot impinge upon other government's jurisdiction
	• A law that has a substantial effect on export markets is *ultra vires* the province.
	  ○ Regulating the price of a good that is inevitably bound for the export market
	  ○ Because the government is aware that this is an export good, when you regulate the price of it, you are by definition regulating the export price of the commodity

Facts	• Following sharp rise in world oil price in early 70s, SK enacted a law designed to capture the increased economic rent accruing to producers
	  ○ Imposed a royalty surcharge on oil produced equal to the difference between the actual well "head price received and the basic well head price
	  ○ Law also provided that where the minister believed oil was being disposed of at less than its fair market value, he could determine what the well head price should have been and calculate the tax payable on the basis of this determination
	  ○ Effectively, the government acquired the benefit of all increases in the value of oil above the set basic well-head price.
	• CIGOL produced crude oil in SK; 98% oil exported
	• CIGOL argued as the surcharge would affect the price of its product in the extra-provincial market, the law amounted to an intrusion into 91(2)

Issue	• Does the legislation constitute indirect taxation beyond s. 91(2) powers? • Does it impinge on s. 91(2) international and inter-provincial trade?
Result	• Yes, it was indirect tax and ultra vires

	• Yes. Regulation effectively regulated the export-price of oil, which infringes on s. 91(2) powers → legislation ultra vires

Reason	• Manitoba egg case says Saskatchewan can't do that
	  ○ Saskatchewan says this is local production section 92(13), citing *Carnation* which simply have an impact on commodity price
	• What makes this case more like egg marketing?
	  ○ What's happening to that oil?
	  ○ Is 98% of it that's being exported?
	  ○ Much of it is going straight out of an export good from the wellhead
	Majority
	• Practically all of the oil to which the mineral income tax or the royalty surcharge becomes applicable is destined for interprovincial or international trade
	• **Purpose** – allocate benefits of increased global oil prices to gov't from producers
	• **Effect** – regulate the export-price of oil; sets a floor price
	  ○ "The legislation effectively gives power to the Minister to fix the price received by SK oil producers on their export sales of a commodity that has almost no local market in SK"
	  ▪ "Prov authority does not extend to fixing the price to be charged or received in respect of the sale of goods in the export market" → trenches upon s91(2)
	• Distinguished from *Carnation*
	  ○ Carnation effect increased the cost of the milk purchased in QC and processed there, mostly for sale inside QC.
	  ○ The law indirectly affected Carnation's export trade in the sense that it's cost of production were increased but the law was designed to establish a method for determining the price of milk sold by QC milk producers to a purchaser in QC who then processed it within the province
	  ○ This case is directly aimed at the production of oil destined for export and effects the export price
	  ○ Directly aiming the scheme at an export commodity. The way they've designed the tax is to effectively set the price ("fixing the price")
	
	Justice Dickson (dissent)
	• Language of the statute does not disclose an intention by SK to regulate, control, or impede marketing or export of oil
	• Province has a legitimate interest related to taxation and natural resources – effect on extra provincial trade is incidental

Notes	• Majority received criticism
	  ○ "one searches in vain in the decision for the process of reasoning which led the courts to conclude that the "real effects" of the legislation were that provincial taxes determined prices…" [page 373]
	• Similarities b/w CIGOL + Carnation
	  ○ Both regulated the sale w/n the province of a good destined for export
	  ▪ Carnation – prov set price for local sale
	  ▪ CIGOL – prov taxed the producer
	• Why can't a province tax what they want? What about oil royalties in AB? Couldn't they have just changed the % then? As it essentially set a floor price. Fixed the price of something that was being exported.

Ratio	• The situation is different where a prov establishes a marketing scheme with price fixing as its central feature – it has been held that Prov does not have control over the marketing of provincial products in interprovincial or export trade ○ S. 91.2 Trade and Commerce: Interprovincial trade and Trade with foreign countries (*Parsons*) ○ S. 91.2 Trade and Commerce: General regulation of Trade (*Parsons*)
Facts	• SK one of the largest potash producers. 1960s, excess supply → decrease in price. • SK, in concert w/ largest US potash supplier, devised a plan to limit production → increase prices • SK then faced possible trade sanctions from US for dumping potash • SK produced regulatory legislation – fixed production quotss and establish floor price • Most potash exported, 64% to US • Central Canada, a SK producer that had an assured market for production in excess of its production allocation challenges the law • SK argument - established production quotas rather than marketing quotas
Issue	• Is the legislation ultra vires because it impinges upon s. 91(2) regulation of international/inter-provincial trade?
Result	• Yes, ultra vires.
Reason	• "production" vs. "price fixing" ○ Province argued that the natural resources, the mineral wealth of the Province, was subject to provincial regulatory control lane and that production controls or quotas were matters within exclusive provincial legislative authority • Provincial legislation cannot fix prices of products predominantly tagged for export (impinges upon s. 91(2)) ○ "Prov authority does not extend to fixing the price to be charged or received in respect of the sale of goods in the export market" (citing *CIGOL*) ○ Statute amounted to an attempt to regulate the export market in potash. The fact that the law took the form of quotas on production was irrelevant. ▪ Just had to look at the true nature + character of the law • Provinces have jurisdiction over production controls w/ respect to natural resources (citing *Egg reference*) ○ However, prov authority does not extend to the control or regulation of the marketing of provincial products, whether minerals or natural resources, in interprovincial or export trade • Just because something is ultra vires the provincial authority does not mean that it is validly enacted by Parliament in its very terms ○ Perhaps the law drafting could also encroach on some prov jurisdiction ▪ Powers fall somewhere; but does not mean an invalid law can be turned around and enacted by the other govt (might be incoherent; colourable)
Notes	• Here and in CIGOL majority of the product is exported ○ What if there was just 51% exported? Or does it have to be 75%? ○ The greater proportion of the good that is being exported interprovincial or internationally, the greater the argument that this is in relation to export, in relation to section 91(2) jurisdiction

Constitution – Section 92A

- S. 92A (added to the constitution after unpopular SCC decisions) gives parallel jurisdiction over inter-prov export of natural resources; however, international export remains within federal jurisdiction.

- 92A (1) In each province, the legislature may exclusively make laws in relation to
  - (a) exploration for non-renewable natural resources in the province;
  - (b) **development**, conservation and management of **non-renewable natural resources** and forestry resources in the province, including laws in relation to the rate of primary **production** therefrom; and
  - (c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.
  - **Note:**
    - Nothing new, sounds like *agricultural marketing* and *carnation*
      - Confirm production is under provincial purview
    - Authorizes the provinces to legislate for the export of resources to other provinces subject to Parliament's paramount legislative power in the area as well as to permit indirect taxation in respect of resources so long as such taxes do not discriminate against other provinces
- 92A (2) In each province, the legislature may make **laws in relation to the export from the province <u>to another part of Canada</u>** of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, **but such laws may not authorize or provide for discrimination in prices or in supplies exported** to another part of Canada.
  - **Note:**
    - Export WITHIN Canada → provinces now have some jurisdiction whose P&S is about export to other provinces BUT cannot be discriminatory
      - E.g., AB turn off the taps → cannot do this as per 92A(2)
    - Does not impact export to an international location
      - Therefore, does not adjust *Central Canada Potash*
      - Might have had an impact in *CIGOL* case because most of that gas was going to other provinces --

- *Ontario Hydro v Ontario (Labour Relations Board)* 1993 SCC
- Issue: what the proper jurisdiction was to issue a certificate for collective bargaining employees at ON nuclear stations
- Held: Canada Labor Code applied to employees employed on or in connection w/ those facilities – fed jurisdiction via s 92(10)(c) and the POGG clause
  - S 92A "Ensures the province the management, including the regulation of labour relations, of the sites an facilities for the generation and production of electrical energy that might otherwise be threatened by s91(10)(a)" --- However, it doesn't interfere with the "paramount power vested in Parliament by virtue of the declaratory power or Parliament's general power to legislate for POGG …of atomic energy"
  - The Court held that the regulation of relations between Ontario government and employees of a nuclear power plant was under federal jurisdiction under the federal declaratory power of section 92(10)(c) of the Constitution Act, 1867, and the national concern branch of the peace, order and good government

Economic Regulation Summary

- Pith and substance test will determine "true nature" and validity of the legislation
  - I.e. whether the dominant purpose is inter-prov or international trade.
- Provincial regulation can incidentally affect trade, but its **dominant purpose** cannot regulate inter-provincial trade (*Egg Reference*)
- Collaborative legislation schemes should be supported, as long as each jurisdiction regulates within their powers (*Agricultural Products Marketing Act*)

- Summary of Cases
    - International and inter-provincial trade, and "general" trade – fed (*Parsons*)
    - **Provincial jurisdiction**:
        - P&S = Local production and/or conservation *Carnation; Re Agricultural Products*)
        - A province may regulate a matter under provincial jurisdiction that causes incidental effects on matters that fall under s. 91(2), as long as they do not regulate, control, or restrict trade under federal jurisdiction (*Carnation*)
    - **Federal jurisdiction**: P&S - inter-prov marketing, trade, or export - provincial legislation cannot regulate interprovincial trade (*MB Egg Ref, CIGOL, Potash*)
        - When the goods being dealt with are export commodities, we are within fed jurisdiction.
            - The greater proportion of the good that is being exported interprovincial or internationally, the greater the argument that this is in relation to export, in relation to section 91(2) jurisdiction
        - When provs set prices with the aim of dealing with price discrimination for incoming goods, its fed jurisdiction
    - Court doesn't like provincial protectionist schemes (*MB Egg Ref*)
        - Courts want to promote economic union of Canada and want to limit the ability or provinces to protect their own markets where possible
    - Court favours large-scale federal-provincial agreements in the name of cooperative federalism *(Re Agricultural Products Marketing*)

EXAM PRACTICE

- 1) Can Carnation be distinguished from Canadian Industrial Gas and Oil v. Saskatchewan? Explain and defend your answer.
    - Yes – how do we distinguish?
        - Carnation is regulating what's happening inside the province (aimed at local producers and buyers), SK is outside (98% exported)
          When you regulate the production of that product, you are regulating an export good – you are regulating exports by definition because of where and how that good is consumed.
    - No
        - This is the regulation of production – a tax of goods at the wellhead – whether that good is then exported is of no consequence → tax is within provincial authority
        - Isn't this just control of production? Says dissent in CIGO. Majority says no to this.
- 2) Courts have held under the theory of total dispersal that all subjects must fall within either federal or provincial jurisdiction. Laskin, CJC also states in *Central Canada Potash* that an *ultra vires* provincial law is not necessarily an intra vires federal law. How can these statements both be true? Explain.
    - If either govt tries to pass that law, its probably going to be struck down as *ultra vires*
    - It was *ultra vires* the province because it was a colourable invasion
    - Could be ultra vires for both if its just badly drafted etc.
    - Just because SK can't do it, doesn't mean the feds can do it

TRADE AND COMMERCE – 388-391; 393-401

- Fed laws cannot enact laws targeting a "single industry" under trade and commerce power of s. 91(2) (*Labatt Breweries*)
- General trade and commerce power 5 factors (*General Motors v CNL*) → do not have to satisfy all 5 but assess them and determine the strengths of eachy

- Presence of a general regulatory scheme
- Monitoring by the regulatory agency
- Concerned with trade as a whole
- Incapable of provincial enactment
- Failure to include one province would jeopardize the scheme
  - The nature of the problem being addressed Is national

- Where do we cross the line into interprovincial trade?
  - When in P&S it tries to stop interprovincial trade (*egg*)
  - Where the commodity at issue is essentially a pure trade commodity – one that leaves the province by definition, therefore regulating that commodity may give rise to the dominant purpose to control that commodity (*Potash; SK Oil*)

Labatt Breweries v Canada 1980 SCC - feds cannot enact law targeting a single industry under 91.2

Ratio	• The federal government cannot enact laws targeting a "single industry" under s. 91(2) • Something that lands under s 91(2) general trade power must be of general national concern
Facts	• Section 6 of *Food and Drugs Act* RSC 1970 – regulated the content of food/drug products • Regulations prescribing min/max alcohol content for beer marketed as light beer • Labatt had a "special lite beer" that was over the allowed alcohol content – so Labatt challenged the validity of the law • Fed gov't – it's justified under 91(2), also criminal law and POGG powers say its good
Issue	• Is this law valid? Intra vires the federal government?
Result	• Act, in so far as it applies to malt liquors and light beer, is *ultra vires*

Reason	• First branch of *Parsons* giving feds power over interprov and international trade not applicable, because the impugned law was about production and local sale
	  ○ in P&S, the regulation is about controlled local production, it is not concerned w/ the control + guidance of the flow of commerce nationally
	  ○ The beer is made locally in every province, and its not shipped to other provs (too $$)
	• Second branch of *Parsons* branch, the general trade power, also not applicable
	  ○ the regulation of a single trade/industry that was "substantially local in character" is not of general national concern
	• the food and drug act were seen as regulating one industry at a time, even though it covered a substantial portion of Canadian economic activity
	  ○ not regulation of trade/commerce in sweeping general sense suggested in *Parsons*
	• there's also no basis for this under criminal or POGG power
	  ○ criminal – not aimed at protection of health, or prevention of deception
	  ○ POGG – no matter of national concern

Notes	

General Motors v City National 1989 – competition act now - test for general trade and commerce power

- In *General Motors v. City National Leasing*, the Supreme Court breathed new life into the general branch of the federal trade and commerce power (section 91(2)) by upholding federal jurisdiction over competition (anti-trust) law.

Ratio	• General trade and commerce power – 5 factors (originally from *Vapor* and then *Canadian National Transportation*): ○ Presence of general regulatory scheme;

	○ Monitoring by the regulatory agency; ○ Concerned with trade as a whole; ▪ Not a particular industry ○ Incapable of provincial enactment; ○ Failure to include one province would jeopardize the successful operation of the scheme in other parts of the country
Facts	• CNL brought a civil action against GM, alleging that it suffered losses because of a discriminatory pricing policy that constituted a kind of anti-competitive behavior prohibited by s31.1 of the *Combines Investigation Act* (CIA) • GM argued that s. 31.1 of CIA was *ultra vires* the feds → the creation of civil causes of action falls within 92(13) ○ S. 31.1 allowed people who are harmed to sue one another (provincial – property and civil rights) ▪ Recall*: Parsons* defines civil rights as all private law interactions • When we previously looked at the case it was to focus on the ancillary doctrine test - The mere inclusion of a provision in a valid legislative scheme/act does not *ipso facto* confer constitutional validity upon a particular provision. The provision must be sufficiently related to that scheme for it to be constitutionally justified • Now – focus is on the general trade power (the second branch of the power as outlined in *Parsons)*
Issue	• Is the Act valid under the fed trade and commerce power, via s 91(2) • Is s31.1 integrated w/ the Act in such a way that that it too is *intra* vires (ancillary power)?
Result	• Yes, to both. Appeal dismissed – GM loses.
Reason	• SCC found the Act intra vires under s91(2), in particular the power over "general" trade and commerce & s31.1 is valid by virtue of being "functionally related to the Act" • What is the general regulation of trade and how does the federal government know when it has the jurisdiction over that thing? ○ *Parsons* ▪ Feds T&C power does not correspond to the literal meaning of the words "regulation of trade and commerce" ▪ Does not extend to regulating the contracts of a particular business or trade ▪ Two "branches": 1) international and interprovincial trade**nand** 2) general regulation of **trade affecting the whole dominion** • The power in this case falls under what is general trade and commerce affecting Canada as a whole ○ Courts have had to balance between property and civil rights (provincial power) with the general trade and commerce power (federal) • Laskin J, in *Macdonald v Vapor Canada* 1977, put up 3 hallmarks for validity of leg under 2nd branch of 91(2) ○ Fact: S7 of Trademarks Act was challenged (prohibited certain commercial practices such as the making of false statements to discredit competitors). Was a general catch-all provision unrelated to the rest of the Act. Struck down. ○ 1. 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 leg must be **concerned with trade as a whole** rather than with a particular industry ▪ These three requirements is evidence of a concern that we don't want fed power encroaching on prov jurisdiction ▪ attempt to maintain delicate balance of federalism

- Dickson, in *AG Canada v Canadian National Transportation* 1983, affirmed Vapor & added 2 further criteria
  - Fact: authority of the AG of Canada to conduct prosecutions under the *Combines* Act.
  - 4. The leg **should be of a nature that the provs jointly or severally would be constitutionally incapable of enacting**
    - (INCAPABLE of prov enactment – uniquely federal) (National in scope)
  - 5. The **failure to include one or more provs or localities in the leg scheme would jeopardize the successful operation of the scheme** in other parts of the country
    - again, these 2 are aimed at maintaining balance of federalism
- Five factors are more is more like a guide
  - Variables and factors to consider but neither one of them is determinative
  - The presence or absence of any of these variables does not conclusively answer the question
  - Not an exhaustive list
  - Still need a case-by-case assessment (*Parsons*)
- Dickson summarizes Steps In Ancillary analysis

1. Court must determine whether the challenged provision can be viewed as intruding on provincial powers, and if so, to what extent
2. Must establish whether the act (or a severable part of it) is valid
3. Must then determine whether the provision is sufficiently integrated with the scheme that it can be upheld by virtue of that relationship

<u>Application to this case:</u>

- 1. Do we have a general regulatory scheme?
    - Regulating competitive practices across industries
  - Purpose of the act is to ensure the healthy level of competition in the Canadian economy
  - Concerned with national economy not purely local concern
  - Satisfied
- 2. Its regulated by a board overseeing its things (regulatory oversight).
  - Regulation is controlled by a regulator w/ authority to launch inquiries
  - Satisfied
- 3. Anti competition act regulates economic activity.
  - Satisfied
  - Applies to ALL SECTORS - Lego, gas, cheese
  - Anti-competitive regulation is of "a crucial important for the national economy"
- 4 The leg should be of a nature that the provs jointly or severally would be constitutionally incapable of enacting
  - Scheme is national in scope and a local regulation would be inadequate. If one province does not partake, they could become the monopoly province → defeats the purpose of the Act
  - AND it would harm other provinces – externalities – and they could not do anything about it
- 5. The failure to include one or more provs or localities in the leg scheme would jeopardize the successful operation of the scheme in other parts of the country
  - Again, local inadequate
  - Negative effects of anti-competitive behaviour transcends national boundaries

- Distinguished from Labatt because this is aimed at all trade in general
  - Labatt was regulating one single industry – that's not the case here

Class Notes	• Page 395
	  ○ Need to reconcile the general T&C of the federal power with the provincial power of property + civil rights
	  ○ Need to keep it in its limited place
	• Recall ancillary doctrine
	  ○ If you have a piece of invalid or ultra vires law within a large scheme that is valid, ancillary doctrine says that it might save that invalid section
	  ○ Arrangements between company contracts isn't that provincial jurisdiction?
	  ▪ Government intervening and saying you can't charge that price and here's a penalty for cooperating on pricing with your competitors, how can the federal government do that?
	  ○ Why does section 91(2) interprovincial and international branch not help them in GM?
	  ▪ How is it about price fixing export commodities?
	  ▪ How is this directed at the movement of goods across borders?
	  ▪ It isn't so that's why it doesn't work
	  ▪ The first branch of 91(2) isn't going to get us there
	  ▪ This deals with the price of goods at the local level

SPOTTING A GENERAL REGULATORY SCHEME

- The Ice Cream Act, SC 2014, c 1.
  - 1) It is illegal to sell ice cream on city streets and public lands.
  - 2) All persons violating section 1 are guilty of an offence punishable by a fine of $1,000.
  - →
    - Nothing being regulated here, not a general regulator scheme
    - There's a prohibition, only of ice cream → criminal
- The Safe Food Act, SC 2014, c 2.
  - 1) The purpose of this Act is to ensure the safe sale of food products.
  - 2) The Minister of Health will appoint a Board of Food Safety to set appropriate health and safety standards in relation to the production, transportation, storage, and sale of food.
  - 3) The Board of Food Safety will consist of five directors each appointed by the Minister.
  - 4) The Board of Food Safety will have the authority to create regulations in relation to:
    - a) health and safety standards for all production facilities involved in the creation of food;
    - b) health and safety standards for the transportation of food;…
  - →
    - This is a general regulatory scheme
    - It's more general in the approach to topic not just ice cream
    - Creation of an entity (Board of Food Safety)
    - The scope for standards implies some discretion which is another sign of regulation of a subject
    - Unsafe food may not stay in that province, it might move to other provinces

General Regulation of Trade and Commerce Test

- How to spot a regulatory scheme:
  - Complexity of the legal regime – more complex, probably regulatory
  - Oversight body
  - Discretion on the part of the regulator (of what conduct may or may not be permissible)
  - The scope of the legal rules – not a prohibition on selling food, its regulating food

CRIMINAL LAW POWER: 427-430, 432-439

- Crim = arguably the broadest power
  - General T&C → got restricted
  - POGG → restricted via the branches and tests
  - Crim → earlier decisions said all you need is penalties + prohibitions (v. broad)
    - Restricted in a way by incl. "purpose" (*Margarine Ref)*

Criminal Constitutional Provisions → not simply 1 jurisdiction (overlap)

- **Federal** – 91(27) + (28)
  - 91(27) The **Criminal Law**, except the Constitution of Courts of Criminal Jurisdiction, but **including the Procedure in Criminal Matter**s.
  - 91(28) The Establishment, Maintenance, and Management of **Penitentiaries**.

- **Provincial** – 92(6) (prisons), 92(14) (courts), 92(15) (imposition of punishment)
  - 92(6) The Establishment, Maintenance, and Management of Public and Reformatory **Prisons** in and for the Province.
  - 92(14) The **Administration of Justice** in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.
  - 92(15) The **Imposition of Punishment by Fine, Penalty**, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

Scope of Criminal Law

- Law must be in relation to a criminal public purpose (e.g. protecting public peace, order, security, health, morality…) *(Margarine Ref*)
- "The heart of criminal law is the prohibition of conduct which interferes with the proper functioning of society or which undermines the safety and security of society as a whole" (*RJR MacDonald*)
- Criminal law more discrete/limited than POGG because the 3Ps test limits the power – it is not regulatory in nature (LaForest J in *Hydro Quebec*)

Prohibition vs Regulation

- Criminal law may employ regulatory bodies, but they must target a legitimate criminal law purpose (McLachlan C.J. in Assisted Human Reproduction Act, Re *Firearms*)
- Distinguishing regulation vs prohibition is an art, not a science (Dissent in *Hydro Quebec*). Look for:
  - Discretion in hands of administrative officials to define the crime – regulatory
  - More complex the scheme and regulations, more regulatory
  - Purpose – greater revenue purpose, more regulatory
  - Clarity of prohibited conduct, more prohibition

Criminal Law Test

- Pith and substance (legislation as a whole and impugned provision)
- Consider:
  - Does the provincial purpose impinge upon an existing or repealed criminal law?
    - Yes → ultra vires (e.g. Morgentaler)
    - No/incidentally (prove prov purpose) → continue to classification

    - A federal regulatory scheme can include punitive measures without being a criminal law; cannot remove punitive measures from regulatory act without fatally impairing the federal legislative scheme
- Criminal law must include the following:
    - Prohibition
        - Or regulation? (*R v Hydro-Quebec*) Or both? (~~*RE Human Reproduction*~~)
        - Prohibition may seek to eliminate the evil directly or indirectly (*RJR*)
        - May include exceptions (*RJR*)
    - Penalty
    - Public purpose (see Scope of criminal law)

Criminal Law Power Test

- To determine if something is falling under the criminal law powers:
    - Prohibitions (*PATA*)
    - Penalties (*PATA*)
    - Purpose (two aspects to this)
        - 1) Those things that are evil/injurious to the public (*Margarine*)
            - Think about this in terms of harm rather than "evil"
        - 2) serve a public purpose (i.e., peace, order, security, health, morality or fundamental social values)
            - Includes public health (*RJR MacDonald*), environment (*hydro*), and security via gun licensing (*firearms reference*)
- Prohibition vs Regulation (*Hydro Quebec*; *firearms*)
    - Discretion – decision maker gets to decide if law is violated or not, or what content of prohibition is
        - More discretion, regulatory
        - The exercise of discretion under the prohibition may be actually more regulating – not clearly defining what you can and cannot do
    - Complexity (although hydro quebec says it can be complex)
    - Revenue generation – regulatory schemes are often about making money, not prohibiting conduct
    - Clarity of the prohibition – do you know specifically what you can and cannot do. If the answer is yes – prohibition
    - All of these variables are in play – distinguishing regulatory from criminal is an art – gut check time

The broad view: two p's

Proprietary Articles Trade Association v. AG Canada (PATA), 1931 - Can the gov't create new crimes? Yes, 3Ps

- Lord Atkin (guy who said, "watertight compartments" and yet is broad here)
- "Criminal law means 'the criminal law in its widest sense …. It is certainly not confined to what was criminal by the law of England or of any Province in 1867…"
    - Wide interpretation of crim law. Requirements: **prohibition & penalty**
- Is the criminal law power locked into 1867?
    - No. The constitution is a living tree
    - PATA says that our heads of power are subject to growth and expansion within their rational limits

Narrowing the Scope: the third P – prohibition, penalty, and PURPOSE

- SCC later says Privy Council definition was too broad. Parl could invade provincial legislative competency colourably.
- In *Margarine Reference*, the SCC narrows the scope. Now a need to identify an evil or injurious effect.

Margarine Ref. 1949 SCC - third P - Criminal law must be in relation to a public purpose

Ratio	• Penalties and prohibition is not enough. Need a substantive quality of the law. • → Criminal law = prohibition + penalty + **public purpose** ○ Public purpose includes: protecting public peace, order, security, health, morality…)
Facts	• Federal criminal legislation -*Dairy Industry Act* (s.5a): "No person shall manufacture, import, or sell margarine"
Issue	• 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?
Result	• Dominant purpose is to regulate the dairy industry, which falls under provincial powers →legislation *ultra vires* federal jurisdiction

Reason	• Criminal law is a body of prohibitions
	• "A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we **can properly look for some evil or injurious or undesirable effe**ct upon the public against which the law is directed."
	• Criminal law may seek to support **public peace, order, security, health, or morality**. But not the object of this law.
	  ○ Object is economic and purpose is trade protection to dairy industry
	  ▪ By forbidding manufacturing and sale, this deals directly with 92(13) – civil rights in relation to trade within provinces

Notes	• Why not intra vires under s 91(2)?
	  ○ Production and sale is provincial
	  ○ Generally regulating dairy. Not just prohibiting it
	  ○ Targeting specific industry
	  ○ What about POGG? It's not about margarine moving across borders, we are regulating/prohibiting the manufactory of a good
	  ○ Import issue – does fed gov't have jurisdiction to ban importation of margarine? yes
	  ▪ International trade – 91(2)
	  ▪ So that survives, but only to that narrow extent (only the importation of margarine part is *intra vires*)
	• But imports -- does the federal government have jurisdiction over interprovincial/international trade?
	  ○ Yes, parsons, egg reference
	• P&S Test - What is this act's dominant purpose?
	  ○ Is it in relation to imports?
	  ○ The Pith and Substance (pg 429) is to give trade protection to the dairy industry
	  ▪ Ancillary doctrine possibly pays a role here → it is about import (fed) but also production (prov) → is the provision just ancillary?
	• Does the federal government have the power to enact that law with that dominant purpose?
	  ○ Go to the text first

	○ That is in relation to property and civil rights or matters of local private nature or 92(13) and 92 (16) ○ Then cite Parsons • Why doesn't the valid part of the law (importing) create validity throughout the law? ○ Natural product marketing act says that you can't just include one little piece of federal jurisdiction and create a federal scheme ○ That would create incentive to parliament to throw in little bits of federal jurisdiction and end up with the whole thing

- Note the changing nature of harms
  - Environmental, social, health, other values are constantly changing
    - Think about banning plastic straws due to climate change seriousness
  - Therefore, courts have tried to limit by focusing on something actually evil or injurious in an effort to preserve federalism jurisdictions

RJR MacDonald v Canada 1995 SCC - Public health = Crim; Prohibitions may include exceptions

Ratio	• **Protection of health** is a **valid** public purpose ○ Feds may employ the criminal law power to prohibit or control the manufacture, sale, and distribution of products that present a danger to **public health** ○ It may also validly impose labelling and packing requirements on dangerous products w/ a view to protect public health • 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's life was in danger)
Facts	• *Tobacco Products Control Act* criminalizes advertising and promoting tobacco products and requires warning labels • Exemption allows tobacco advertising in imported magazines • Two tobacco companies challenged the constitutionality of the legislation seeking declarations that it was ultra vires as an intrusion into provincial jurisdiction over advertising grounded in s. 92(13) and 92(16) ○ Also, argued freedom of expression infringement • Trial judge found it ultra vires; Court of Appeal concluded it was intra vires [under POGG] not under criminal law power
Issue	• Does this constitute regulation of a provincial matter?
Result	• Legislation is intra vires under criminal law power
Reason	• Taking into account the broad definition of criminal law, in P&S this law is criminal. • Prohibition ○ From a plain reading of the Act, Parliament's purpose is to prohibit three categories of acts: advertising, promotion and sale of products w/o warnings • Penalty ○ Accompanied by penal sanctions ○ Provides prima facie indication the Act is criminal law • Criminal Purpose ○ The evil targeted by Parl is the detrimental health effects of tobacco – valid concern ○ While health is not a matter which is subject to specific constitutional assignment, it's an amorphous topic that can be addressed by valid federal or provincial legislation, depending on the circumstances of each case (double aspect!)

	○ **Health** is included in Rand J's *Margarine reference* of possible public law purposes, and the protection of public health falls under both jurisdictions ▪ "Parliament and the provincial legislatures may both validly legislate in this area" ▪ → as long as the law has prohibition, a penalty, and a relevant purpose it will be valid unless it is a "colourable intrusion upon prov jurisdiction" (like in *Margarine*) ○ Why not just ban smoking? ▪ unreasonable to ban the product bc 1/3 of Canadians (at the time) smoked and the US experience with prohibition shows that it leads to black market criminality • Regarding exemptions ○ 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's life was in danger) ○ Exemptions help to define the crime by clarifying its contours ▪ Exempting foreign magazines – about practicability → would require scanning every page **Dissent** • Parliament can require manufactures to disclose health effects and can punish those who don't • But 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 ○ "The heart of criminal law is the prohibition of conduct which interferes with the proper functioning of society or which undermines the safety and security of society as a whole" • 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 • Finally, around 65% of the magazine market will still contain tobacco advertisements as the ban only applies to Canadian media
Notes	• Nuts and bolts → achieving goals by saying no advertising and by requiring warning label on the cigarette package, can the federal government do this? • Prov argument: ○ Advertising so you're regulating, it's civil rights, contracts, property → provincial jurisdiction ○ Does not meet the "purpose" argument ▪ Why go after the advertising and not the actual smoking (what really is the bad thing here?) ▪ This is just health policy not traditional criminal law ○ Prohibition ▪ Not a true prohibition → only targets Canadian magazines. Can't be that bad then. ▪ Discretionary, number of exemptions, more regulatory not prohibiting ▪ Regulating as it is not the true public problem, it is a minor concern (just the ad of the actual bad product)

	• Federal Argument
	  ○ Prohibition
	  ▪ Indirect ways that policy operates. The question of whether this is the best policy if not for the court.
	  ▪ Criminal law has many exemptions → defines the scope/prohibited conduct.
	  ▪ There is a line b/w prohibition + regulation and the more we go to circumstantial evidence in the law the stronger argument will be that the law is regulatory.
	  ○ Purpose
	  ▪ Can ban something that is promoting to people an item that can harm/kill people
	  ▪ Damage to health is important
	• Would likely be invalid under 91(2) → bc regulating an entire industry
	• How can the result in RJR MacDonald be distinguished from the result in Labatt Breweries? If tobacco warnings and bans on advertising fall within jurisdiction why not requirements for the alcohol content of light beer
	  ○ No foundation in evidence that the federal government was regulating the lite beer for the purpose of protecting the health of people
	  ○ It might have been an incidental effect but not a dominant purpose

- EXAM WHEN DOING VALIDITY → p&S THEN CLASSIFY UNDER HEADS OF POWER → CAN ARGUE MORE THAN 1 POSSIBLE HEAD. MAY DECIDE IN ANALYSIS NOT A GREAT ARGUMENT FOR T&C FOR REASONS A,B,C BUT BETTER ARGUMENT UNDER CRIM BC X,Y,Z
- START WITH THE LEVEL OF GOVT THAT HAS ENACTED THE LAW. ARE THERE HEADS OF POWER THAT EXIST FOR THE JURISDICTION THAT MADE THE LAW.
- SO, EX FOR HYDRO
  - FED GOVT → START AT POGG, CRIM, (UNLIKELY T&C IN THE HYDRO CASE)
  - THEN SWITCH TO "OR IS THIS AN INFRINGEMENT"
- THEN ASK IS THERE INTERFERENCE WITH THE OTHER LEVEL, IS THERE COLOURABILITY

R v Hydro-Quebec 1997 SCC - Criminal laws may regulate, and may cover environment/health

Ratio	• Regulation of the environment is a valid use of the criminal law power as long as the 3Ps are met • How to distinguish between regulation and prohibition (dissent)
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 • Hydro claimed the two relevant sections of the Act (34 + 35) were *ultra vires* • Succeeded throughout QC courts; feds appealed to SCC
Issue	• Are the provisions of s34 & s35 *ultra vires* the federal parliament?
Result	• No. Valid under criminal law power. (narrow majority)
Reason	• Preamble speaks to the fact that toxic substances are a matter of national concern and provincial inability (recall: inability test from *GGPPA)* • But Majority find it valid under criminal law, and thus unnecessary to deal with national concern doctrine • Previous cases stated Parliament have "plenary power over criminal law". The qualification to this is that the power cannot be employed colourably.

	○ To determine if this attempt is being made, the court must look into the purpose of the legislation ○ The environment is a public purpose sufficient to support criminal prohibition (shared jurisdiction similar to health) ▪ *Friends of the Oldman River* – confirmed environment is an area of shared jurisdiction; *RJR McDonald* – confirmed health is an area of shared jurisdiction ▪ Supporting clean environment is important to all Canadians, which is fundamental to our values ▪ Pollution is an evil that Parliament can seek to supress • National concern doctrine operates by assigning full power to regulate an area to parliament ○ Criminal law does NOT work in this way – it is narrower, prohibit with penalties which provinces can't do (only prohibit) ▪ We should prefer the narrower law if it is available ▪ It seeks by discrete prohibitions to prevent evils falling within a broad purpose • 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 • Do we have the 3Ps? ○ Prohibition ▪ RJR says you could have exemptions – regulatory measures do not make it not criminal law ▪ This is more regulatory and complicated than RJR, but just because its complicated, doesn't mean its not within the jurisdiction ○ Purpose ▪ regulate toxic substances for public health/environment ○ Penalty applies • **Dissent**: ○ "Toxic" is too broad for prohibition. ○ This is regulation of environmental pollution, not prohibition; distinguishing is an art, not a science ○ To determine whether a law is regulatory, consider the nature and extent of the regulation it created. Look for: ▪ Discretion in the hands of administrative officials to define the crime, more regulatory ▪ More complex the scheme and regulations, more regulatory ▪ Purpose – greater revenue purpose, more regulatory ▪ Clarity of prohibited conduct, more prohibition •
Notes	• Argument for QC ○ The definition of toxic (pg 442) ▪ There is someone deciding what is / is not discretion = regulatory function in nature ▪ Also, very broad definition → does it apply to EVERYTHING? ▪ Straying from protecting some important public purpose (health, safety, etc). Do we risk undermining this if it is expanded?

	• Why does the LaForest prefer the criminal law jurisdiction to that of p.o.g.g?
	  ○ POGG is too broad. Prefers more limited criminal law.
	  ▪ Criminal law preserves a lot of provincial jurisdiction (allowed to regulate) narrower than POGG (has to be in 3P's form) only allows the feds to prohibit for criminal law purpose
	  ▪ POGG – full range of regulatory power
	  ▪ environment is just like health in RJR (it's a shared jurisdiction).
	• Why not an invasion of the provincial power over property and civil rights?
	  ○ Not about regulating property + civil rights (not the {P&S). It is about prohibiting a type of harm. The harm here is the harm of toxic substances.
	  ○ QC argument: not prohibiting though, you're regulating as it is so broad.
	  ○ Majority response → isn't that the way this has to be done? We do not know everything about toxicity. It is an evolving issue.

Hydro Review

Last Class Review

- *Hydro*
  - important as it gives signal as to how broad that power can be
  - Dangerous substance that would then be an offence to release
  - Majority says that is valid fed law
    - Why?
      - There was a prohibition – even though it was extensively regulatory. The heart of it was prohibition. Even though definition of substance was broad and what was considered toxic.
      - There was a penalty.
      - There was a public purpose – protection of the environment.
        - Court says have to keep pace with changes in society. And protection of environment is important.
        - Purpose of crim law is to protect fundamental values.
  - Dissent
    - Too regulatory
      - Too complex and marked by discretion. Not sufficiently clear to be a prohibition.
    - Distinguishing regulation from prohibition is an art not a science.
- Distinguishing regulatory from crim
  - Think about the presence or absence of a regulatory framework. The more the framework is about regulating substance/behaviour, the more it is discretionary, the more it is complex or other policy objectives (say generation of revenue)
  - At the same time, regulatory aspects of a scheme do not mean it cannot be a purpose under crim power (RJR; Hydro)

Example Problems

- 1) After the repeal of the federal legislation, the Quebec Government wants to enact an identical registry but only covering firearms in Quebec. Can they? Why or why not?
  - For Can
    - 92(13)

        - *Morgentaler* – criminal purpose was condemnation of abortion for moral purposes – exclusive fed jurisdiction, Whereas here they are not trying to replace the federal purpose. Instead, the dominant purpose is to regulate property through registration.
    - Against
        - Morgentaler
    - Quebec can create an identical registry
    - Morgentaler won't undo it because the motive isn't to criminalize firearms
    - The dominant purpose was to regulate safety through registration

- 2) After a series of large brawls broke out on Whyte Avenue causing thousands of dollars of property damage (mostly smashed storefront windows and damage to city-owned trees), the City of Edmonton enacted The Safe Streets Bylaw. It provides as follows:
    - 1. The purpose of this **bylaw is to regulate the conduct and activities** of people in public places to promote the safe, enjoyable, and reasonable use of public property for the benefit of all citizens of the City.
    - 2. A person shall not participate in a physical fight or other similar physical confrontation in a public place.
    - 3. A person who contravenes this **bylaw is guilty of an offence.**
    - 4. A person who is guilty of an offence is liable to a fine in an amount not less than that established in this section, and not exceeding $10,000.00, and to imprisonment of not more than six months for non-payment of a fine.
    - Answer
        - Pith and substance Analysis
            - **Characterize**
                - Purpose:
                    - Intrinsic – the text – s1 states the purpose → regulate the conduct
                    - Extrinsic – reason for the law is mischief / protect public property
                - Effects
                    - Legal
                        - See section 2, 3 and 4
                        - prohibit physical fighting and physical confrontation
                        - penalty
                    - Practical effects
                        - fewer fights, less property damage and perhaps cost savings
                        - more law and order
                - **Dominant purpose**:
                    - Promote safe, enjoyable and reasonable use of public property by imposing regulations on fights & damage to property
            - **Classify –** start w/ jurisdiction that enacted it
                - Not municipalities because provinces give them their power
                - Section 92(13) - Property and Civil Rights in the Province.
                - Section 92(15) - The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.
                - Section 92(16) - Generally all Matters of a merely local or private Nature in the Province.
                - Fed
                    - S 91(27) criminal law

        - There is no other federal power to consider but in exam THINK IF THERE IS ANOTHER
    - What cases to cite in the analysis?
        - *McNeil* and *Dupond* (validity) vs *Westendorp*, *Morgentaler* (invalidity)
            - Have to distinguish the invalid ones
            - Westendorp is particularly concerning
                - What appears to me to emerge from Kerans J.A.'s consideration of the by-law is to establish a concurrency of legislative power, going beyond any double aspect principle and leaving it open to a province or to a municipality authorized by a province to usurp exclusive federal legislative power.
                - How to distinguish?
                    - Westendorp P&S
                        - Purpose purported by the city – to reduce bunging up of the streets – does not align with the effects – prohibiting prostitution
                        - Dominant purpose was to control/punish prostitution, not to regulate the enjoyment of public property.
                        - ALSO**, that quote was obiter dicta!**
        - *Parsons* – 92(13)
        - *Chatterjee* → scope of provincial jurisdiction in relation to prevention of crime within the provincial jurisdiction
        - Valid
            - Provincial aspects here
                - City can care about people getting home safely, property damage and disorder on streets
                - Regulating that behaviour not for the same reasons as outlawing punching each other in the face as a moral wrong
            - Judicial realism → what harm is this safe street bylaw doing?
- When answering
    - Do not just say "this is a slam dunk prov power". But focus on the P&S is not criminal and deal with the issues that would come up and then distinguish them!
    -

***Reference re Firearms Act* 2000 SCC - Criminal laws may include regulatory schemes if it meets 3Ps**

- Fed gov't passed gun control legislation which established a comprehensive licensing system for possession/use of firearms.
    - AB claimed it was ultra vires because it heavily regulated property and the legislation's complexity made it regulatory, not criminal – essentially, the program was the same as automobile & land title registries which were under prov control.
    - Also, everyone has to register not just criminals. Impacts who is allowed to own one, conditions of ownership too (isn't this then property)
- Holding: Regulatory effects are secondary to the criminal law purpose
- Analysis:
    - Pith and substance: enhance public safety by controlling access to firearms through prohibitions and penalties.
    - Penalty – satisfied. Prohibition – satisfied.
    - Purpose – safety is a criminal purpose (*Margerine*)

        - Guns are inherently dangerous, which distinguishes them from motor vehicles. Cannot separate the inherent danger from the ownership.
    - Effects on property rights are 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
    - "Whether a law could have been designed better or whether the federal government should have engaged in more consultation before enacting the law has no bearing on the division of powers analysis"
        - Courts only care about what the law is in relation to for the purposes of a validity analysi

Reference re Genetic Non-Discrimination Act 2020 SCC

Ratio	• Serve a public purpose: public peace, order, security, health, morality, environmental protection, fundamental social values (e.g., equality), **autonomy, privacy, human dignity**
	• **Unsettled law → what is the presence of evil in the requirements of criminal law purpose?**
	  ○ Adams thinks we should not be putting "evil" as necessary requirement [agrees w/ majority]
	  ▪ It is about harm and current social values

Facts	• Parliament criminalized compulsory genetic testing and the non-voluntary use or disclosure of genetic test results in the context of a wide range of activities -- activities that structure much of our participation in society.
	  ○ Bill introduced by Senator. Passed House of Commons 222-60. Govt opposed the bill but did not require backbenchers to vote against it.
	  ○ Coalition for Genetic fairness (intervener): argue it is valid as P&S = protect and promote health
	  ○ AG of Canada and QC: argue it is invalid as it relates to regulation of contracts + provision of goods & services (recall *Parsons* says this is provincial!)
	  ○ Amicus curiae (appointed on behalf of parl): valid as P&S directed at protection of the physical & psychological security & dignitity of vulnerable people

Issue	• whether s. 91(27) of the Constitution Act, 1867 empowers Parliament to do so
Result	• Valid under s 91(27)

Reason	• The modern view of federalism "accommodates overlapping jurisdiction and encourages intergovernmental cooperation"…
	  ○ "watertight compartments" approach has been overtaking and doctrine of IJI has been limited
	• Must first characterize the law, then classify the law based on heads of power
	
	<u>Characterization</u>
	• Generally, characterize specific provision first then legislative scheme as a whole (*General Motors)*
	  ○ Look to law's purpose + effects
	  ▪ Purpose:
	  ▪ looking at the short + long title – suggest the Act's purpose is to prohibit discrimination on genetic grounds and prevent such discrimination from occurring in the first place
	  ▪ text + structure – purpose is to combat discrimination based on info disclosed by genetic texts
	  ▪ Effects

- Legal effects "flow directly from the provisions of the statute itself",
  → prohibits genetic testing requirements and imposes penalties
- practical effects "flow from the application of the statute [but] are not direct effects of the provisions of the statute itself"…
  → gives individuals control over decision whether to undergo genetic testing and over access to the results (does so by preventing testing being imposed as a condition of access to goods & services)
- Likely to impact insurance industry but this does not overtake the prohibitions' direct legal and practical effects in the pith and substance analysis. (Could also apply to adoption, accessing govt services, purchases, employment etc.)

- THUS P&S: protect individuals' control over their detailed personal information disclosed by genetic tests

<u>Classification</u>

- Criminal law requires the 3 ps
- Prohibition & penalty – not disputed
- Purpose is satisfied if the Act responds to a threat of harm to a public interest traditionally protected by criminal law such as peace, order, security, health and morality (or similar).
  - As per *Margarine reference*, purpose requires the Act be directed at some "evil, injurious **or** undesirable effect"; secondly, should serve one or more of the public purposes or ends listed above.
    - <u>Notion of harm here helps understand the evil requirement</u>
    - "So long as Parliament's apprehension of harm is reasoned and its legislative action is, in pith and substance, a response to that apprehended harm, it has wide latitude to determine the nature and degree of harm to which it wishes to respond by way of the criminal law power, and the means by which it chooses to respond to that harm"
    - **"I would highlight that Parliament is not, and has never been, restricted to responding to a so-called "evil" or "real evil" when relying on its criminal law power."**
  - a law will have a criminal law purpose **if its matter represents Parliament's response to a threat of harm to public order, safety, health or morality or fundamental social values, or to a similar public interest**

Application

- Karakatsanis J emphasized the ways in which the criminal public purpose has grown to encompass fundamental social values – privacy, autonomy, and equality

Other judgments:

- Moldaver - covered by the public purpose of health protection
- **Dissent** – P&S is to regulate contracts and the provision of G&S (in particular insurance and employment)
  - Purpose needs to be direted at some evil, injurious or undesirable effect (i.e., preventing harm)
  - the concept of evil protects the balance of federalism. It protects provincial jurisdiction by not allowing that Federal jurisdiction to overreach through the criminal law power

MORALITY AND PUBLIC ORDER – PROVINCIAL (485-498)

- Sections to Consider:
  - 92(13) Property and Civil Rights
  - 92(14) Administration of Justice
    - Much of the federal criminal code is provincially enforced
  - 92(15) Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any law of the province
    - power is understood as "ancillary" authorizing the use of sanctions to enforce schemes validly anchored within 92
  - 92(16) generally all matters of a merely local of private nature
    - 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
- Prov law may **impinge** on federal Criminal powers:
  - *Westendorp* (prov laws cannot augment existing Criminal laws)
  - *Goldwax* and *Morgentaler* (prov laws cannot re-establish repealed Criminal laws)
- Prov law may **incidentally affe**ct federal Criminal powers:
  - *McNeil* (impose criminal sanctions on matters of morality)
  - *Dupond* (temporary preventative laws in response to urgent circumstances)
  - *Chatterjgee* (Prov may pass preventative legislation, and mitigate local effects of crime)

Nova Scotia Board of Censors v McNeil 1978 SCC - Provinces may create punitive laws on matters of morality

Ratio	• Provinces may legislate on matters of morality ○ morality is not exclusive to criminal law • Province has jurisdiction over preventative measures
Facts	• Naked Marlon Brando is offensive, says NS Board of Censors
Issue	• Does NS Board of Censors have the authority to ban it?
Result	• Upheld. Provinces have the power to create punitive laws to govern morality as a matter of "local and private nature"

Reason	• **Majority** Ritchie P&S: Dominant purpose is regulation of the film industry; "matters of a local nature" can and should include matters of morality
	  ○ "I find them to be primarily directed to the regulation, supervision and control of the film business within the Province of Nova Scotia, including the use and exhibition of films in that Province"
	  ○ Regulation is *preventative* rather than penal
	  ○ Provinces have power to punish under s. 92(15)
	  ○ Morality not exclusive to criminal law – provinces also have a regional interest
	• **Dissent** - Laskin P&S: Dominant purpose is a matter of civil rights (censorship - freedom of speech)
	  ○ "At its narrowest, in this case the Board asserted authority to protect public morals and to safeguard the public from exposure to ideas and images in films that it regarded as morally offensive, indecent, or probably obscene."
	  ○ Censorship is a moral topic, and morality is in the exclusive domain of the criminal law
	  ○ Controlling the viewing of material to safeguard the public from ideas and images in the film
	  ▪ These concerns are now essentially replaced with the *Charter*

Notes	• Section 2(b) of the *Charter* would be argued now

Dupond v City of Montreal 1978 SCC - Prov may pass preventative laws in response to urgent circumstances

Ratio	• Municipalities (under s. 92(15) powers) may pass laws that prevent federal crimes under urgent circumstances
Facts	• City passed a bylaw prohibiting parades or other gatherings after a period of violent demonstrations. • City's executive committee given the power to prohibit public gatherings with penalty of fines and imprisonment.
Issue	• Does the municipal law impinge on federal criminal power?
Result	• No. upheld.
Reason	• Majority emphasized the preventative character of the municipal regulation ○ Provinces should be able to *prevent* crime in the public domain • Further, matters of safety in the public domain are pre-eminently local in nature • Temporary, urgent nature mitigates risk of long-term abuse **Dissent (Laskin again)**: • Law is an attempt to reinforce federal criminal law, and the barring of all gatherings is a breach of civil liberties
Notes	• Areas within provincial jurisdiction include ability to enforce public order and prevention of crime

- After *Mcneil* and *Dupond,* the SCC reversed the trend and struck down a municipal bylaw regulation public order and morality as an intrusion into the fed criminal law power in *Westerndorp*

Westendorp v The Queen 1983 SCC - Provinces cannot impinge or augment Fed crim laws

Ratio	• Provincial laws that impinge or augment federal criminal laws are invalid
Facts	• the City of Calgary passed a bylaw which controlled the solicitation of business on the streets, which included penalty of fines and imprisonment. Modified to add a new section -- s. 6.1(2) and (3) -- which singled out prostitutes and included more severe penalties • Reason for bylaw - prostitutes "often collect in groups and attract crowns which are a source of annoyance and embarrassment to the public and interfere with their right and ability to move freely and peacefully upon the city streets" • Westendorp claimed it invaded federal authority in relation to criminal law
Issue	• Does the law, and specifically the sections prohibiting prostitution, impinge upon federal criminal powers?
Result	• *Ultra vires*

Reason	**Laskin (majority this time)**
	• Distinguishes from *Dupond*, which was a temporary law, while this appears to be permanent in nature
	• Pith and Substance:
	  ○ Purpose purported by the city – to reduce bunging up of the streets – does not align with the effects – prohibiting prostitution
	  ○ Dominant purpose was to control/punish prostitution, not to regulate the enjoyment of public property.
	• Conflict with federal laws:

	○ Matter is already covered by federal law – prov law augments CC ○ "If a province may translate a direct attack on prostitution into street control through reliance on public nuisance, it may do the same with respect to [any criminal power]" (Laskin C.J.) • From which aspect is prostitution being regulated in this case? Pith and substance = regulation of prostitution for the purpose of morality. Had it been for a provincial reason, it might have been supported.
Notes	• Like *Morgentaler* which could be provincial, but the intention is criminal • Traditionally criminal law, and the only things being targeted were prostitutes and not other ways the streets can be congested • **How can the Court's majority reasons in *McNeil* (p. 452) and *Dupond* (p. 455) be squared with the outcome in *Westendorp*? Are these judgments consistent?** ○ SCC: this is not a matter of protecting property or local or nature (as in *Dupond*), this is prohibiting in general communications for the purposes of prostitution. ○ This looks like classic use of criminal law. ▪ Prohibiting a type of behavior that members of society find offensive. It is not creating a disturbance or undermining public order. It is contrary to public morality. ○ Consistent arguments ▪ McNeil there was no prohibition and penalty – just a regulation of prov morality – viewed as valid only in so far as it incorporates other issues of prov jurisdiction. Film industry was not criminalized or regulated by feds in the same respect. ▪ Westendorp – there was the Ps – morality was used not as a standard but instead to punish activities which pushes it to criminal. The content of the communication is what is being targeted. Prostitution was already criminalized via the feds. ▪ Dupond – prohibiting ○ Inconsistency Argument ▪ Mcneil dealt with morality which is a local issue in regard to films ▪ Westendorp dealt with morality via prostitution law → inconsistent • *Rio Hotel* ○ This is like *McNeil*, regulating dancing here instead of film • Facts important to lead to the various results in the 3 cases above. Shows there is no clean lie. Need to look at the full context.

Goldwax v Montreal 1984 SCC – Provinces cannot legislate on matters struck down in the CC

- Facts: Cities of Calgary and Montreal passed anti-prostitution bylaws because existing *Criminal Code* provisions were being struck down by the SCC under s. 7.
- Issue: Are the municipal laws valid in the absence of federal CC?
- Holding: Provinces cannot legislate on matters that were struck down in the CC (also Morgentaler)

Rio Hotel v New Brunswick 1987 SCC

Ratio	• Confirms to the dominant pattern of concurrency
Facts	• NB *Liquor Control Act* gave the Liquor Licensing Board the power to attach conditions to liquor licences regulating and restricting the nature and conduct of live entertainment in licensed premises • Licence had been issue to a hotel owner w/ a condition prohibiting nude performances • Hotel owner argued condition related to public morality and thus fell w/n fed power via 91(27)

	• Owner also noted Parl had numerous provisions in the CC relating directly or indirectly to public nudity
Issue	• Whether the NB Act was ultra vires and fell in s 91(27)
Result	• No. Upheld NB law

Reason	• P&S "The legislation is … prima facie related to property and civil rights within the Province and to matters of a purely local nature."
	• The sanction for breach … is suspension or cancellation of the liquor license. No penal consequences ensue.
	• SCC confirmed province's ability to prohibit nude entertainment as part of a liquor licensing scheme despite the related provisions in the CC
	  ○ "Although there is some overlap between the licence condition … and various provisions of the Criminal Code, there is no direct conflict. It is perfectly possible to comply with both the provincial and the federal legislation"
	• In distinguishing the case from *Westendorp*, the court emphasized the integration of the provincial prohibition in a comprehensive scheme of regulation and licensing whereas the previous case's bylaw was described as an "intruded provision"
	  ○ In Westendorp, the provision did not relate to any head of prov jurisdiciton

Notes	

Chatterjee v Ontario **2009 SCC - Deterrence of crime has double aspect: Prov may pass legislation on matters of provincial interest (e.g., effects of crime)**

Ratio	• Deterrence of crime has double aspect: Prov may pass legislation on matters of provincial interest (e.g., effects of crime)

Facts	• C stopped for having no front license plate, was in breach of probation. Lots of money and marijuana smell found in his trunk, confiscated under the ON *Civil Remedies Act*, even though he was not convicted under CC charges.
	• Chatterjee's arguments:
	  ○ 91(27) – jurisdiction of this legislation is criminal in nature
	  ○ Defining unlawful activity as crimes (2(a) of the CRA)
	  ○ And punishing people by taking away property (3(1) of the CRA)
	  ○ Colourable attempt by province to try and augment the criminal law

Issue	• Are the forfeiture provisions of the CRA intra vires, even though it reflects provisions of the CC?
Result	• Yes. Valid.

Reason	• Although the prov law is related to CC matters, it has a valid prov purpose.
	• There appears to be an exaggerated view of the immunity of federal jurisdiction on criminal matters that have, in another aspect, valid provincial objectives – just because the provision is related to CC laws, it can have a valid provincial purpose
	• The court "should favour, where possible, the ordinary operation of states enacted by *both* levels of government" (*Canadian Western Bank*)
	• The CRA provision is an incidental intrusion into criminal law
	• P&S - CRA **creates a property-based authority to seize money** and other things shown on a balance of probabilities to be tainted by crime
	• Seizing the property related to criminal activity has prov purpose:
	  ○ Make crime unprofitable – prevention
	  ○ Make profit unavailable to fund future crime – prevention
	  ○ Help compensate individuals and institutions for the costs – local matter

	• **When does a provincial measure designed to "suppress" become itself criminal law?**
	  ○ When the dominant feature is no longer with regards to provincial matters
	  ○ Provinces have ability to SUPPRESS
	• Provinces can enact civil consequences to criminal acts provided the province does so for its own purposes in relation to provincial heads of legislative power
	  ○ Provinces are concerned about the effects of the crime as a generic source of social ill and provincial expenses and not supplementing federal criminal law as part of the sentencing procedures here
	• It was argued the provisions interfere with the administration of the CC forfeiture provisions
	  ○ If this was demonstrated or shown the *CRA* "frustrated" the fed purpose, then doctrine of fed paramountcy would render inoperative the Act to the extent of the conflict
	  ▪ Not an issue here → can operate concurrently
	
	TLDR:
	• P&S – CRA enacted to deter crime and compensate victims of crime
	• Categorization – Crime imposes costs on prov, which impacts provincial interests
	• Ancillary analysis – impugned measure intrudes on crim law only incidentally (CRA does not augment – it is entirely outside of the CC process)
	• Dual compliance – both laws may operate concurrently
	•

Notes	*Civil Remedies Act*, 2001
	• Is the purpose of the Civil Remedies Act in relation to property or the criminal law?
	  ○ Chaterjees arguments [in facts[
	  ○ Province argument
	  ▪ Punishment – Not about punishment and instead about compensating the victims. Further, his property is not being taken. Instead, the proceeds of crime and unlawful activity is. C never had lawful possession of the property in the first place.
	  ▪ Isn't this about crime? ON will say it is about deterring crime and not crime itself. Also, deals with consequences and harms of crime. It is not about just the CC it concerns Fed and prov offences. Does not single out criminal activity under the CC.
	  ○ There are elements of both.
	  ▪ The purpose though is not to
	  ▪ The purpose

FEDERALISM REVIEW & EXAM PREP

Reference re Securities Act, 2011 SCC

Ratio	•
Facts	• The proposed Securities Act represents a comprehensive foray by Parliament into the realm of securities regulation. • If validly adopted, it will create a single scheme governing the trade of securities throughout Canada subject to the oversight of a single national securities regulator.

	• Government argues it is within the general trade & commerce power; does not deny some aspects fall within provincial authority BUT argues securities market is no longer a provincial only matter → "national matter affecting the country" (double aspect; national concern doctrines) • AB and QC argue it falls within 92(13) – property & civil rights & 92(16) – matters of a merely local or private nature
Issue	• whether the proposed Securities Act falls within the legislative authority of the Parliament of Canada?
Result	• No.

Reason	• 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
	• Five elements from *General Motors*
	  ○ First two – clearly met. There is a regulatory scheme with a regulatory agency
	  ○ Third – whether the legislation is concerned w/ trade a whole rather than a particular industry
	  ▪ Engages trade as a whole → goes beyond a particular industry (even if brokers/investment adviser industry is most impacted)
	  ▪ BUT parliament was unable to show that the securities market had changed so that the regulation of all aspects of trading in securities is a matter of national concern
	  ○ Fourth – whether the provinces would constitutionally be incapable of enacting it
	  ▪ Provinces already had similar laws
	  ▪ But the provinces, acting in concert, lack the constitutional capacity to sustain a viable national scheme aimed at genuine national goals such as management of systemic risk or Canada-wide data collection
	  ▪ BUT problem for Feds is the law regulates ALL aspects of contracts for securities – overreach
	  ○ Fifth – absence of a province from the scheme would prevent its effective operation
	  ▪ Cannot succeed because there is an opt-in feature which contemplates possibility not all provinces will participate
	
	• Essentially, 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.
	  ○ "In the end, Dickson J [in *Canadian national Transportation]* opined that to fall under s. 91(2), legislation must be "qualitatively different from anything that could practically or constitutionally be enacted by the individual provinces either separately or in combination""
	• 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 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.
Notes	• **PROVIDES A GOOD OVERVIEW OF FEDERALISM history → watertight to living tree → to flexible approach w/ overlapping jurisdiction ("dominant tide") • OVERVIEW OF T&C (para 75-89) ○ Parsons - In that case, the Judicial Committee of the Privy Council established that a literal interpretation of the words "the Regulation of Trade and Commerce" in s. 91(2) was inappropriate given the balance of powers established in the Constitution Act, 1867. Parsons also established the twin branches of the s. 91(2) power: (1) interprovincial and international trade and commerce; and (2) general trade and commerce ("general regulation of trade affecting the whole dominion" (p. 113)). The Judicial Committee further held that s. 91(2) does not include the power to regulate the contracts of a par-ticular business or trade (p. 113). ○ Five indicia proposed by *General Motors* offers a framework for addressing the Q of whether a law is validly adopted under the general T&C ▪ Originally in AG v CNT ▪ Which built on *Vapor* ▪ (1) whether the impugned law is part of a general regulatory scheme; (2) whether the scheme is under the oversight of a regulatory agency; (3) whether the legislation is concerned with trade as a whole rather than with a particular industry; (4) whether it is of such a nature that provinces, acting alone or in concert, would be constitutionally incapable of enacting it; and (5) whether the legislative scheme is such that the failure to include one or more provinces or localities in the scheme would jeopardize its successful operation in other parts of the country ▪ First two – directed at identifying the required formal structure: fed regulatory scheme under oversight of a regulator ▪ Dickson noted that the final three share a common theme -- namely "that the scheme of regulation [must be] national in scope and that local regulation would be inadequate" (p. 678). ○ → Provided the law is part of a general regulatory scheme aimed at trade and commerce under oversight of a regulatory agency, it will fall under the general T&C power if the matter is genuinely national in importance and scope (para 83) ▪ But cannot be used in a way that denies provinces power to regulate local matters (89) ▪ Under the double aspect doctrine, federal legislation adopted from this distinct perspective will be constitutional even if the matter, considered from another perspective, also falls within prov head of power (85) ▪ ○ What counts as general T&C? ▪ Competition – *General Motors* ▪ Competition law is not confined to a set group of participants in an organized trade, nor is it limited to a specific location in Canada. Rather, it is a diffuse matter that permeates the economy as a whole, as "[t]he deleterious effects of anti-competitive practices transcend provincial boundaries

Class Notes	• Style of cause
	  ○ It's a reference case
	  ○ Reference power – technically advisory but functionally binding
	  ○ Not a real-life legal battle which makes it slightly political
	• It is an unattributed decision – the court is unanimous – "The COURT"
	  ○ Succession ref and firearms ref did this too
	  ○ For touchy topics – court want to speak with a louder voice
	• Parsons – still a leading case authority for two branches of T&C power
	• GM 5 factor test
	  ○ These factors are not a MUST check every factor like other tests; they just must be considered.
	  ○ Most important factor – fifth factor – the Q: is this really federal? Can provinces really do this? National concern branch of POGG draws on similar thinking around provincial inability.
	• Double aspect doctrine
	• Dominant purpose
	  ○ Incidental effects do not determine constitutionality
	• Federalism
	  ○ Cooperative federalism
	  ▪ Judicial deference – to ensure operation of both levels
	• WHAT DID HE SAY ABOUT EXAM ESSAY – ABOUT 25 – 30 MINS IN 3.12PM
	• EXAM
	  ○ MAY REFER TO OTHER AREAS NOT COVERED – LIKE HOSPITALS
	  ○ WRITE OUT THE TESTS – ASSESS FACTS TO FIGURE OUT WHAT IS GOING ON
	  ○ For Essay
	  ▪ Do you prefer decentralized or centralized?
	  ▪ Do you like watertight boundaries? Or the blurring of lines?
	  ▪ Judicial deference and judicial restraint – what role should the court play when determining the effectiveness of a particular law?
	  ○ Are you ready for last year's exam? Not asking last years!
	  ▪ So do not obsess over it. Focus on, do you get it? Do these concepts make sense?

#Aboriginal Rights (55-58, 521-523, 528-535)

- Review sections 25 and 35 Constitution Act, 1982

Constitutional Provisions

- S. 91(24) Constitution Act 1867 - … Indians, and Lands reserved for the Indians
    - What does the term "Indians" mean? Could Metis fall under this definition?
        - Who did they think they were including when they originally wrote it? On balance, the court found that the fed gov't was interested in widest possible jurisdiction. Found that Metis peoples were Indians.
        - So, jurisdiction of s 91(24) was greatly expanded in 2015 *Daniels*
    - Having been given the jurisdiction over Indians, feds passed the *Indian Act* – individuals that fall within the definition of Indian under Indian Act, and are subject to rights/responsibilities under Indian Act
    - Gov't changed the definition of who was an Indian – Financial incentives to shrinking that category.
        - Status women losing status after marrying someone with non-status

- S. 25 Charter
    - rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including (a) any rights or freedoms that have been recognized by the Royal Proclamation; and (b) any rights or freedoms that now exist by way of land claims agreement
    - Shield provisions:
        - other kinds of indigenous rights, from treaty, Proclamation Act, etc., cannot be challenged by other Charter provisions. Must co-exist.

- **S 35 Constitution Act, 1982 – focus of course**
    - (1) The **existing** aboriginal and treaty rights of the aboriginal peoples of Canada are **recognized** and **affirmed**
        - "Existing" added at the insistence of AB Premier, but was interpreted generously by the SCC
            - Wanted to limit the scope of rights
        - "recognized and affirmed" seems flexible, typical Charter language is "**guaranteed"**
        - "aboriginal… rights" – what does this even mean?
            - Does it include self-governance? Hunting? Sovereignty? Fishing?
    - (2) "aboriginal peoples of Canada" includes the Indian, Inuit, and Metis peoples of Canada
        - Note: "includes" means that it is not an exhaustive list
        - How to define "Indian, Inuit, and Metis"
        - Indian is used as a category to recognize certain Indigenous people who hold status under the *Indian Act*
    - (3) For greater certainty, "treaty rights" includes rights that now exist by way of land claim agreements or may be so acquired.
    - (4) Aboriginal and treaty rights are guaranteed equally to male and female persons
    - Remember:
        - the Act was threefold: Charter, Aboriginal rights, and Amending Formula
        - S. 35(1) not subject to s. 1 of the Charter or legislative override (s. 33)

- 1990: Meech Lake Accord granting Quebec "distinct society" status. Elijah Harper represented indigenous voices and refused to cast a vote to ratify Meech Lake Accord without addressing indigenous issues.
- 1992: Charlottetown Accord intended to grant Quebec "distinct society" and include indigenous right to self-governance, which was rejected in a referendum.

- S. 35 remains the focus of Crown-Indigenous relationships.

- Constitutional interpretation
    - Rules of constitutional interpretation: analyze the text, context, and purpose
        - Text: sets the scope of our interpretation (an apple cannot become an orange)
        - Context:
        - Purpose: why is this provision important and included

Themes to Explore

- Role of history – history created this duality.
    - Relationship between Crown and Indigenous Peoples
    - Indigenous peoples were living here when newcomers arrived – Colonialism. Two sovereign bodies, which wins?
    - **Doctrine of discovery** – if you discover land, you get to be the sovereign of the land.
        - Sovereignty can be acquired over unoccupied territory by discovery
        - Sovereignty over occupied land can only be acquired by conquest or cession
        - North America by international law was deemed to be unoccupied or terra nullius for the purpose of distributing sovereignty
    - But the reality was, of course, that there were peoples already there.
        - European settlement thus vested sovereignty in settling nations despite an indigenous presence
        - So, Terra nullius – "conceptually empty", because they are not civilized like we are civilized.
            - Because they were insufficiently Christian or insufficiently civilized to justify recognizing them as sovereign over their lands and people
        - Therefore, we are claiming sovereignty over these lands – its empty of civilized people.
            - Aboriginal nation did not constitute a legal unit in international law
    - SCC said that the doctrine of discovery is totally legal. But this is based on a false and racist premise.
- Legal pluralism **(Diversity)**
    - Reconciling unity and diversity
- *Sui generis* nature of aboriginal rights (**Sovereignty)**
    - it is totally unique. They **exist at the intersection of this diversity** – they're not exactly the common law, they're not Cree law, they're not constitution. This mix of legality creates aboriginal rights
- Reconciling prior occupation with Crown sovereignty:
- Fiduciary duties of the Crown – Honour of the Crown → Always at stake with their dealings with Aboriginal

Royal Proclamation

- Status and rights on behalf of the indigenous people
    - "lands… which, not having been ceded to or purchased by Us" (although it is lessened somewhat by "are reserved")
    - "Nations or Tribes" imply that they are national units
- Crown power and control
    - "Reserving" land infers power and authority over it
    - Elements of power and sovereignty "who live under our Protection",
- However, there is a figleaf:
    - Purpose is for the security of the colonies between two nations

Aboriginal title – Initial Principles

- Common law entitlement that vested Aboriginal land rights by the Royal Proclamation of 1763

- Declared land possessed by Indians throughout British America reserved for their exclusive use, unless ceded to the Crown.
- Lands and territories not included within the limits of the of governments created under the Royal Proclamation or HBC are reserved under the King's protection for the use of the Indians. The lands could not be purchased, settled, or taken by British subjects without the Crown's consent.
- Until *Calder v AG BC* [1973], *Royal Proclamation*, viewed as the sole Anglo-Canadian Legal source of Aboriginal rights

Guerin v The Queen 1984 SCC - development of common law aboriginal title

Ratio	• 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
Facts	• Appellants (chief and councillors or the Musqueam Indian Band) are suing the Crown because the Crown leased the Band's land to a golf club under different T&C than those disclosed to the voting members of the band ○ S. 18(1) of the Indian Act holds that reserve lands are held by the Queen for the benefits of the bands. Land may be sold, alienated, leased, or disposed of only if/when surrendered to her majesty. • Crown leased the land to Shaughnessy Heights Golf Club on terms very unfavourable to the Musqueam Band and failed to keep them appraised of negotiations with the golf club. • At the time, there were little or no judicial recognition of justiciable rights arising from Aboriginal claims of this kind.
Issue	• Did the Crown have a duty to the Musquam nation to act in their best interest?
Result	• Yes. Crown breached their fiduciary duty to the Musqueam.
Reason	• Fiduciary Relationship ○ There is a fiduciary duty between the Crown and the Indians and if it is breached then liable to the Indians in the same way as if such a trust were in effect. ○ This duty stems from the proposition that the Indian interest in the land is inalienable except on surrender to the Crown. Indian band is prohibited from **directly** transferring its interest to a third party, instead the Crown acts on the band's behalf. • Existence of Indian Title ○ *St Catherine's Milling & Lumber Co v The Queen* 1888 - Privy Council acknowledged the existence of aboriginal title but said it had its origin in the Royal Proclamation ○ *Calder* 1973 – Court said Proclamation is not the sole source of Indian title. Aboriginal title is a legal right derived from Indian's historic occupation and possession of their tribal lands ○ Principles of **discovery** gave ultimate title to the nation which had discovered and claimed it ▪ Indian rights to land diminished but rights of occupancy and possession remained unaffected ○ *Amodu Tijani v Secretary* - change in sovereignty over a particular territory does not in general affect the presumptive title of the inhabitants • The Nature of Indian Title ○ St. Catherine's Milling - PC held that Indians have "personal and usufructuary right" in lands which they traditionally occupied ▪ Concept of usufructuary right: "a mere qualification of or burden on the radical or final title of the Sovereign" (Haldane in *Amodu)*

	○ Indians have legal right to occupy/possess land – but ultimate title w/Crown. Indian's interest does not amount of beneficial ownership – it is not completely exhausted by concept of personal right. It is *sui generis* (unique). Interest gives rise, upon surrender, to a fiduciary obligation on part of Crown to deal with land for benefit of Indians • Crown's Fiduciary Duty: Prevent Indians from being exploited ○ Where by statute, agreement or unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carriers with it a discretionary power, the party thus empowered becomes a fiduciary. Equity supervises this by holding them to strict standard of conduct. [533] • Breach of Fiduciary Obligation ○ The crown was not empowered by the surrender document that the band signed to ignore the oral terms that the band understood; crown's behaviour = unconscionable → not supported by equity. ○ Crown cannot promise certain lease and deliver another to band's detriment • ** 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 **
Notes	• My notes from CB notes - Case states Aboriginal title derives from historic occupation. There is no mention of Aboriginal legal systems providing the source of rights.

Aboriginal Rights

R v Sparrow 1990 SCC – definition of "existing" in s. 35 – test for justifying interference with Aboriginal Right

Ratio	**Sparrow test** 1. Does legislation interfere with an existing aboriginal right? [onus on claimant] 2. Is the statutory interference justified? [onus on government] a. Must have a compelling objective b. Must still meet Crown's fiduciary obligations c. Duty of consultation
Facts	• Musquaem food fishing license dictated by *Fisheries Act*. Band member charged with offence of fishing with net longer than permitted by food fishing license. • Defence: exercising existing aboriginal right to fish and net length restriction is inconsistent with s. 35 of Constitutional Act and is therefore invalid.
Issue	• Whether parliament's power to regulate fishing is now limited by s. 35(1) of the Constitution and specifically: whether the net length restriction in the license is inconsistent with that provision
Result	• Confirmed CoA decision to set aside the conviction. New trial ordered.
Reason	• **"Existing"**: rights in existence when constitution came into effect, constitution cannot revive rights ○ An existing right that cannot be read to incorporate the specific manner in which it was regulated before 1982. This would be "freezing" rights and create a patchwork of regulations. ○ "existing" means "unextinguished". Ask - Is the right unextinguished? It's not about whether it was once exercisable at a certain time in history ○ Must be interpreted flexibly, to permit evolution of Aboriginal rights • The Aboriginal Right ○ Evidence revealed fishing for salmon an integral part of the band for centuries ○ Crown insisted that band's right to fish extinguished by *Fisheries Act* ○ **Before 1982 Test of extinguishment**: sovereigns' intention must be clear and plain.

- *Fisheries Act* did not meet extinguishment requirement because still allowed fishing, just within limits
- 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, all AB rights became constitutional, and require constitutional amendment to change.

- "**Recognized and affirmed**"
  - Purposive + Liberal Interpretation of words demanded: "Treaties and statutes related to Indians should be liberally construed and doubtful expressions resolved in their favour" (*Nowegijick v The Queen)*
  - Principle: **Government has responsibility to act in fiduciary capacity with aboriginal peoples. Relationship is trust like.** [pg 543]
  - Band says that AB title entails right to fish by any non-dangerous method. Continuing government power to regulate would have to be exceptional and strictly limited to regulation clearly not inconsistent with s. 35. In certain circumstances, necessary conservation measures MIGHT qualify → argument: section 35 rights are more securely protected than other rights within the Charter.
    - Just because s 35(1) is not subject to s 1 of the Charter doesn't mean that any law or regulation affecting aboriginal rights will automatically be of no force or effect by the operation of s 52.
    - Legislation that affects AB rights must be justified via the test
    - Courts cannot assess legitimacy of govt legislation restricting AB rights BUT there is a fiduciary relationship which restrains sovereign power to an extent.

Sparrow 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). [onus of proving an infringement lies on the individual or group challenging the legislation]
   a) Is the limitation **unreasonable**?
   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?

If prima facie interference found: Move to justification analysis [onus on government]

2) **Is the interference justified**?
   a) Is there a **valid legislative objective**?
      i) Can be valid if law is necessary for the proper management and conservation of the resource or for preventing harm to the populace
   b) **If yes, the**n:
      i) Does it uphold the **fiduciary relationship**?
      ii) Is **priority allocation** met?
         (1) Are the needs of the Indians met first? Indian food requirements met first before allocation to others i.e., Commercial/Sport fishing
         (2) *Jack* → conservation is a valid legislative concern, but the priorities should be conservation, Indian fishing, non-Indian commercial fishing or non-Indian sports fishing in that order.
      iii) **Other potential factors**: minimal infringement (has the government chosen a means of regulating that is the least intrusive available), fair compensation availability in

	expropriation cases, consultation with AB groups w/ respect to conservation measures being implemented

CB: 549-559; 566-568:

R v Van der Peet 1996 – how do you determine whether one has an AB right?

Ratio	• Is the practice, custom or tradition a defining or central feature of the culture in question? (Distinctive, but not necessarily distinct). • Consider the nature of the custom or practice being asserted, Aboriginal perspectives regarding the custom and its cultural significance and the nature of the regulation being impugned • The relevant time period: practice must be pre-European contact, but exercised continuously • Flexible rules of evidence • Site and culture specific
Facts	• Dorothy caught selling fish (which she caught under the Indian Food Fish License) and this is an offence under s. 27 (5) of the BC Fishery Regulations • Defence: Selling fish is an existing aboriginal right. s. 27(5) infringes her right to sell fish and it is therefore in violation of s. 35 (1) of the Constitution
Issue	• Was there an existing aboriginal right to sell fish such that s 27(5) is invalid?
Result	• 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
Reason	• There is no pan-aboriginal rights à 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 General Principles • s. 35(1) should be given generous and liberal interpretation in favour of aboriginal peoples (*Sparrow*) • Crown has a fiduciary obligation to aboriginal peoples. When there is any doubt w/ regards to what is within s 35 cope → resolved in favour or AB peoples (*Sutherland*) Purposive analysis of 35(1) • Doctrine of AB rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. • Purpose of s. 35 is "reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown" • Purpose of reconciliation requires **test for defining Aboriginal rights** that is "**directed at identifying the crucial elements of those pre-existing distinctive societie**s. It must, in other words, **aim at identifying the practices, traditions and customs central to the Aboriginal societies that existed** in North America prior to contact with the Europeans." [para 44] **Test for identifying AB rights under section 35(1)** 1. Take aboriginal perspective into account

a. Perspective must be framed in terms cognizable to the Canadian legal and constitutional structure

2. Identify/characterize the right being claimed
    a. Court must first identify the nature of the right being claimed; to determine whether a claim meets the test of being integral to the distinctive culture of the aboriginal group claiming the right, the court must first correctly determine what it is that is being claimed
    b. What was the nature of the action done?
    c. What is the nature of government regulation/statute or action being impugned?
    d. What is the nature of the practice, custom or tradition being relied upon to est. that right?
3. Is the practice, custom or tradition a defining or central feature of the culture in question?
    a. Must be more than an aspect, or took place in aboriginal society
    b. Must be central and significant part of societies distinctive culture
    c. Was one of the things which made the culture of the society distinctive – truly *made the society what it was*
        i. (Reasoning: Court cannot simply look at aspects that are true to every human society i.e., eating to survive) Nor can it look at incidental or occasional practices
    d. Ask: without that practice, would the culture be fundamentally altered?
4. The relevant time period: practice must be pre-European contact, but exercised continuously
    a. This does not require an unbroken chain of continuity
    b. Existing rights must be interpreted flexibly – not "frozen" in time – to account for evolution
    c. AB group claiming the right does not have to accomplish the next to impossible task of producing conclusive evidence from pre-contract times about the practices, customs and traditions of their community [62]
5. Courts must approach rules of evidence considering "evidentiary difficulties" inherent in adjudicating claims of this kind [68]
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. Practice must be of independent significance to the aboriginal culture in which it exists
    a. Cannot exist simply as an incident to another practice, custom or tradition
    b. It must be integral significance to the aboriginal society
8. Practice must be distinctive but does not need to be distinct
    a. Distinct = one that is unique – different in kind or quality.
    b. Distinctive means that it's about the culture's own practices, customs or traditions considered apart from the practices, customs, or traditions of any other culture
9. 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. If the practice, customs, or traditions *only exist because* of the influence of European culture → does not meet the standard
10. Consider both the relationship of Aboriginal Peoples to the land and the distinctive societies and culture of Aboriginal Peoples
    a. Aboriginal rights arise from the prior occupation of land
    b. They also arise from the prior social organization and distinctive cultures of aboriginal peoples on that land

Application to Case

- In this case, the activity in question is an aboriginal right to exchange fish for money or for other goods
    - Prior to contact, exchanges of fish were only incidental to fishing for food purposes

	○ There was no regularized trading system among the Sto:lo prior to contact ○ Trade engaged between Sto:lo and Hudson's Bay Company was qualitatively different from what which was typical of the Sto:lo culture prior to contact ○ The Sto:lo exploitation of the fishery was not specialized and the exchange of fish was not a central part of Sto:lo culture
Dissent	• L'HD dissent; ○ Approach = too restrictive ○ Misconstrued "distinctive culture" → "focus should be on the significance of activities to natives rather than on the activities themselves" [157] ○ Preferred a "dynamic-right" approach versus "frozen-right" approach → the latter overstates the impact of European influence • McLachlin dissent; ○ Described AB rights at a high-level abstraction rather than focusing on a particular practice. ○ S 35 violated
Class Notes	• Over the past 25 years several criticisms have been levelled at the *Van der Peet* test and its conception of Indigenous rights. What do you suppose some of these criticism have been? Do you find them compelling? If so, Why? ○ White people choosing and possible frozen rights ▪ Does it place the court in an impossible position to evaluate an integral part of a cultures they are not part of? ▪ Language divide between the court and the cultures articulating their right ○ Evidentiary burden on indigenous peoples, is it appropriate? Is there burden being placed that cannot be met (e.g., Evidence of pre-contact) ○ Distinction between what *Van der Peet* characterizes as a right ▪ By doing it in the manner they do, if the Sto:lo were not selling salmon then they cannot do so now ▪ Justice MacLauchlin in dissent: Using salmon? Does the right to use change the equation? Majority says no, we're not interested in generalized right and that the right to self-government is too general of a right for section 35 → Narrow characterization of right ○ The period that matters, the magical point is pre-contact, but cultures change ▪ Doesn't fully appreciate what culture means ▪ Why do we say that it has to be pure indigenous cultures before it's contaminated? • This is not a defining feature of the Sto:lo people – the selling of salmon emerged after contact, and was an incidental practice. Therefore, not a defining feature of that culture, therefore, can't be a violation of Van der Peet's s 35 rights. • We're not talking about their sovereignty and their laws – but we are using that language for us. • Note if you get a question about aboriginal rights, you start with: ○ Do you have a right? ○ Has that right been infringed? ○ Can the government justify the infringement under the Sparrow test?

R v Sappier & *R v Gray*

Ratio	• Court tries to soften Van der Peet sentiment of "it can't be what every community does" • Sappier recognizes that it's about protecting a way of life of the indigenous society.

	• Is the subject of the right something that is an important part of the way of life of the aboriginal community that is claiming that right? Distinctive, not distinct.
Issue	• Whether the Maliseet and Mi'kmaq people in NB possessed an aboriginal right to harvest timber on crown lands for personal use?
Result	• Yes. Right infringed.

Reason	• "An aboriginal right cannot be characterized as a right to a particular resource because to do so would be to treat it as akin to a common law property right."
	  o Attention must instead be paid to the significance of the resource to the community in question
	• The court must be able to identify a pre-contact practice.
	  o Pre-contact, Mi'kmaq and Maliseet was migratory people who lived from fishing, hunting and who used the rivers and lakes of Eastern Canada for transportation
	  o Harvested wood to fulfill the communities' domestic needs for things like shelter, transportation, tools and fuel
	  o → SO, <u>Court characterizes the relevant practice as the right to harvest wood for domestic uses as a member of the aboriginal community</u>.
	• Distinctive Culture
	  o focus of the court should be on the nature of aboriginal people's prior occupation-
	  o 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
	  o '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
	  o 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]
	  o Doesn't have to go to the core of the people's culture
	  o Dissent in Van Der Peet: Maclachlin: different people may entertain different ideas of what is distinctive = problems of indeterminacy in the test
	  o Danger of falling into the trap of reducing an entire people's culture to specific anthropological curiosities and potentially racialized aboriginal stereotypes
	  ▪ Fact that harvesting wood for domestic uses was undertaken for survival purposes is sufficient to meet the integral to a distinctive culture threshold

Lisa Class Notes	• Point of contact makes no sense when we're talking about Metis people because they have aboriginal rights (and defined in 35(2) as having aboriginal rights) but how can we lock them in at the moment of contact when Metis didn't exist at the time of contact? o For Metis rights, the moment when the Crown seized control over indigenous lands

ABORIGINAL RIGHTS TEST - CLASS

1. Is the claimant Aboriginal for the purposes of s 35?
2. **Characterize** the right in question: exactly what activity, for what purpose and where? (*VdP, Sappier*)
    a. Doctrine of evolution
3. Was the practice **integral to the distinctive culture** (way of life) at the **time of contact/control** of the aboriginal peoples in questions? (*VdP, Sappier*)
    a. Distinctive: a "defining feature" protecting important aspects and practices of the pre-contact way of life (*VDP*)
4. **Extinguishment**: has the right been extinguished by clear government intent? (before 1982) (*Sparrow*)
    a. Treaty (dependent on the T) or express regulation – cannot extinguish after 1982
5. Has the right been **infringed** on (onus on claimant)? (*Sparrow*)
    a. Limitation is unreasonable?
    b. Imposes undue hardship?
    c. It denies rights holders their preferred means of exercising the right?
6. Is the aboriginal right **justifiably infringed**? (onus on Crown) (*Sparrow*)
    a. Valid legislative objective? – conservation, safety, etc.?
    b. If yes, then
        i. Does it uphold the fiduciary relationship?
        ii. Minimal impairment? Consultation? Priority allocation.

ABORIGINAL TITLE 572, 589-601

- Aboriginal Title is a unique kind of aboriginal right – but its not listed specifically in s 35, which is now determined to recognize 3 types of rights: treaty right, title right, aboriginal right itself.
- Recall Royal Proclamation of 1763 – One of the primary methods to deal with AB Title was the signing of treaties
    - Ongoing debate about whether treaties actually extinguished title (that was the Crown intention probably)
    - Many places in Canada without treaties
        - Maritimes, south QC, and BC
            - The Maritimes is covered by treaty but it's a treaty of peace and friendship which does not extinguish either title or right
        - Many challenges arising out of BC recently

Tsilhqot'in Nation v British Columbia

Ratio	**"Aboriginal title is what it is"** • Aboriginal title flows from occupation in the sense of regular and exclusive use of land. • Aboriginal title is established over the area designated by the trial judge. • Aboriginal title confers the right to use and control the land and to reap the benefits flowing form it. • Where title is asserted, but has not yet been established, s. 35 requires the Crown to consult - **DUTY TO CONSULT** • Requirements for Aboriginal title: **sufficient pre-sovereignty occupation**; **continuous** occupation where present occupation is relied on; and **exclusive historic occupation**. ▪ **Sufficient** occupation is a question of fact depending on all the circumstances, in particular the nature of the land and the way it is commonly used. Conducted in a culturally sensitive way w/ what was required at common law to establish title based on occupation.

	○ Occupation sufficient to ground Aboriginal title extends to tracts of land regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty. • Once Aboriginal title is established, s. 35 permits intrusions when the following requirements are met: ○ 1. That it discharged its procedural **duty to consu**lt and accommodate ○ 2. That its actions were backed by a **compelling and substantial objective** ○ 3. That the governmental action is **consistent with the Crown's fiduciary obligation** to the group
Facts	• 1792, Captain George Vancouver claimed all the land that would become BC on behalf of British Crown. • Minimal contact between Tsilhqot'in of central BC and European traders and explorers until 50 years later when British attempted to survey lands. • 1864, Tsilhqot'in blocked construction of a road, killed 19 settlers and expelled all Europeans from territory. • Four Tsilhqot'in chiefs were hanged. • For next 100+ years, Tsilhqot'in lived in territory with minimal settler disruption. • 1983, B.C. government granted Carrier lumber a licence to cut trees in Tsilhqot'in territory. • Following years of protest and blockades, title claim filed
Court History	Trial judge • occupation established for the purpose of proving title by showing regular and exclusive use of sites or territory → would enjoy title to all the territory that their ancestors used regularly and exclusively at the time of sovereignty CoA - site-specific occupation • overturned & used a narrower test. • Group would possess small islands of titlend surrounded by larger areas where the group possess only the rights to engage in activities (such as hunting and rapping) in • To prove sufficient occupation for title to land, an Aboriginal group must prove that its ancestors intensively used a definite tract of land with reasonably defined boundaries at the time of European sovereignty • Title to intensively used sites where you build shelters, etc. but these other places where you are traversing through you can't have title to that • Doesn't keep with common law conception of occupation
Issue	• How should the courts determine whether a semi-nomadic indigenous group have title to lands?
Result	• 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
Reason	**Test for Aboriginal Title** (*Delgamuukw* test) 1. The land must have been **sufficiently occupied prior** to sovereignty 2. If present occupation is relied on as proof of occupation pre-sovereignty, there must be a **continuity** between present and pre-sovereignty occupation (easily proven) 3. At sovereignty, that occupation must have been **exclusive** (easily proven) 1. **Sufficient occupation** of land at the time of Sovereignty • The standard is required is determined by **reference to both the common law and AB perspective** ○ When considering AB perspectives, need to consider the group's size, manner of life, material resources and technological abilities and the character of the lands claimed

- CL perspective – idea of possession & control of the lands including surroundings lands where effective control is exercised

- Context-specific inquiry
  - Here – 400 people living on vast but 'harsh' lands
- [42] … a culturally sensitive approach suggests that regular use of territories for hunting, fishing, trapping and foraging is "sufficient" use to ground Aboriginal title, provided that such use, on the facts of a particular case, evinces an intention on the part of the Aboriginal group to hold or possess the land in a manner comparable to what would be required to establish title at common law.
  - "The Court confirmed that Delgamuukw contemplates that "regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources" could suffice (para. 66)" [44]

2. **Continuity** of occupation where present occupation is relied upon

- **No need to show unbroken chain of continuity** b/w current practices, customs & traditions and those which existed prior to contact (*VDP)* → same applies to Aboriginal title
- Just need to establish present occupation is rooted in pre-sovereignty times

3. **Exclusivity** of Occupation

- group must have had "the intention and capacity to retain **exclusive** control" over the lands (*Delgamuukw*)
- Regular use without exclusivity → usufructuary Aboriginal rights
  - Usufructuary - term referring to the right of one individual to use and enjoy the property of another, provided its substance is neither impaired nor altered
- Exclusivity should be understood in the sense of intention and capacity to control the land.
  - Can be established on the basis that others were excluded from the lands or by proof that others were only allowed access to the land with the permission of the claimant group
  - Even lack of challenges to occupancy may support an inference of an established group's intention and capacity to control

Was Aboriginal Title Established in This Case?

- The land was mountainous and could not have sustained a much larger population
- Job of the TJ to sort out conflicting evidence and it does not demonstrate palpable and overriding error
- Yes, aboriginal title established

What Rights Does Aboriginal Title Confer?

- Legal characterization of AB title
  - The notion of terra nullius (that no one owned land) was expressly rejected
    - [Then where does sovereignty come from?]
  - 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 (*Delgamuukw)*
    - In other words, AB title is a beneficial interest in the land (*Guerin)*
    - Thus, the Crown has no beneficial interest
  - Crown has fiduciary duty to Aboriginal people when dealing with AB lands
  - Crown has the right to encroach on AB title if the government can justify this in the broader public interest under s 35 → "reconciling AB interests w/ the broader public interests" (*Delgamuukw)*

- Incidents of aboriginal title
  - Aboriginal title confers ownership rights – right to how the land will be used; right of enjoyment and occupancy; right to economic benefits etc. – but it comes with the restriction

that its collective title is held not only for the present generation but for all succeeding generations
    - → Cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the group from using and enjoying it
    - Nor can the Land cannot be developed or misused in a way that would substantially deprive future generations of the benefit of the land
  - AB title holder may use their land in modern ways, if that I their choice
  - Those seeking to use the land must obtain consent of the AB title holders. If no consent, government's only recourse is to establish they are justified in intruding via s 35

Justification of Infringement

To justify **overriding AB title**-holding group's wishes based on 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 *before* carrying out the action
- 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
  - E.g., Development of agriculture, forestry, mining and hydroelectric power, the general economic development of interior of BC, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims.

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. Impacts justification process in two ways:
  - 1) 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
  - 2) 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

CB Notes	• Truth & reconciliation commission:
	  ○ Unfair to hold AB claimants to this standard of proof
	  ▪ Many of the elders who held the proof or oral testimony have passed. Previously Aboriginal peoples were excluded from obtaining legal advice. Lack of record.
	  ▪ Instead, AB should merely establish occupation at the requisite period of time. Then onus should shift to the other party to show the claim no longer exists.

ABORIGINAL TITLE TEST - *TSHILQOT'IN* & *DELGAMUUKW*

- Aboriginal title may have been **extinguished** prior to 1982
  - Need to look for clear and plain legislative intent or existence of a treaty (depends on the treaty!)
- To make out a claim for Aboriginal title, the Indigenous group asserting title must satisfy the following:
  - 1) the land must have been **occupied prior** to sovereignty
    - Courts use a *sui generis* approach towards establishing **sufficient occupation** (Tsilhqot'in)
    - Context-specific inquiry taking into consideration Aboriginal laws, practices, size, technological ability and the character of the land claimed, and the common-law notion of possession (*Tsilhqot'in*)
  - 2) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a **continuity** between present and pre-sovereignty occupation [although not necessarily an unbroken chain];
    - However, the current occupation must be rooted in pre-sovereignty times (Tsilhqot'in).
  - 3) occupation must have been **exclusive** at time of sovereignty
    - AB group must show that it had the intention and capacity to exclusively control the land (*Delgamuukw)*
    - Must have historically acted in a way that would communicate to third parties that it held the land for its own purposes (*Tsilhqot'in*)
    - Shared exclusivity between two AB groups is possible
    - Insufficient exclusivity may give rise to usufructuary Aboriginal rights, but not full title.
- Aboriginal title is not absolute: title may be **infringed** according to justification test
  - Did the government discharge its **duty to consult** and accommodate?
  - Are the government actions for a **compelling and substantial objective**?
  - Is the action consistent with Crown's **fiduciary** duty?
    - Does it respect **future generations** of rights holders?
    - Is it minimal and **proportional** in its impacts?

TREATY RIGHTS

- Section 35(1) protests: aboriginal rights AND treaty rights
  - **Aboriginal rights** are the inherent rights belonging to the Aboriginal peoples of Canada by virtue of their historic occupation and use of the land we now call Canada before European contact
  - **Treaty rights** - arise from the solemn promises between the Crown and Aboriginal peoples of Canada.
- 3 eras of treaty rights
  - Pre-confederation
  - Post-confederation

- Modern treaties

TWEN: Treaty No. 6

- Spirit in which it should be interpreted
  - The language is grounded in a spirit of mutual consent, not the Crown imposing sovereignty over the land on their own volition
  - Underlying assumption of good faith
  - These are both parties exchanging solemn promises
- Phrases/concepts for interpretation
  - "Medicine chest" – should this be interpreted in a modern context?
    - *R v Swimmer*, 1970: Means no more than for the "crown to keep at the house of the Indian agent a medical chest for the use and benefit of the Indians at the direction of the agent"
  - "Five dollars" – yearly promise to give $5 per year per treaty-person, should this be adjusted for inflation?
  - "Taking up" provision – how much power does that grant governments to override Aboriginal rights?
  - If we're extinguishing claims, what exactly is being extinguished?

Treaty Rights Interpreted: Contextual Approach

R v Marshall 1999 SCC

Ratio	• "Disappearing treaty right" (NS claims) does not do justice to the Crown or the Mi'kmaq people
	• Do not interpret treaties in their strict technical sense → look for the **common intention (*Badger*)**
	  ○ Courts will look for implied terms (officious bystander test)
	  ○ Looking at all the evidence & common intention, there may be limits on rights
	• *Sparrow* infringement applies to both AB rights AND Treaty Rights

Facts	• M, a Mi'kmaq citizen, was charged with selling 463lbs of eels w/o a license counter to the *Fisheries Act*. • Treaty states that Mi'kmaq "will not traffic, barter or exchange any commodities in any manner but with such persons or the managers of such Truckhouses as shall be appointed or established by [the Crown]" → framed in negative terms • A recorded note b/w the two groups states "there might be a Truckhouse established, for the furnishing them with *necessaries*, in Exchange for their Peltry"
Issue	• Does an Aboriginal right to sell eels exist under the Treaty rights?
Result	• Yes. right to fish and trade for necessaries.

Reason	• Why treaty claim instead of aboriginal right claim?
	  ○ Court challenge under Aboriginal rights often refuse commercial aspects of an aboriginal practice
	  ○ Mi'kmaq have relied on the original treaties as supporting their rights
	• Words of the treaty [above] are restrictive, but the written treaty alone failed to capture its meaning:
	  ○ Quoting *Badger* *"when* considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded and committed to writing. The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement"

- Indigenous oral record-keeping tradition did not reconcile with the words written by the English author (power held in he who holds the pen) → **do not interpret in their strict technical sense**
- **Common intention of the parties must be ascertained:** Court needs to overcome the challenge of overcoming language differences and historic practice of negotiating treaties orally
- Need to assume the honour of the Crown in the making of the treaty, but also in interpreting the treaty centuries later
  - Accept oral history evidence
  - Understand historical context (what is the treaty trying to achieve?)

- What is the context?
  - British were attempting to make peace agreements with Indigenous
  - British attempting to gain favour with Indigenous groups to fight against the French
  - Mi'kmaq seeking access to British goods
  - So, British set up truck houses to facilitate the trade
- **Implied rights:**
  - Courts will **imply a contractual term based** on the presumed intentions of the parties where it is necessary to ensure the efficacy of the contract ("officious bystander test")
  - Support the meaningful exercise of express rights; the right was so obvious at the time, and the resources seemed endless at the time, that there was no reason to explicitly agree to them.
  - If the purpose is to trade peace for goods, Mi'kmaq must have been able to come to trade with their own products obtained through traditional means (hunting/fishing)
- Honour of the Crown
  - Turning a positive trade demand into a negative covenant is not consistent w/ the honour and integrity of the crown
  - RE: the NS judgements, "The concept of a **disappearing treaty right** does justice neither to the honour of the Crown nor to the reasonable expectations of the Mi'kmaq people".
- **Limits on rights:** right to fish and trade for the necessaries but not for the accumulation of wealth [59]
  - Internal limit: emerge from the treaty
    - What is the common intention of the parties to the right itself? The right to trade is not the right to commercial exploitation for maximum profit. It is for the achievement of a moderate livelihood ("<u>necessaries</u>") and nobody in the 1700's imagined the scope of commercial fishing in the 300 years later.
  - External limit:
    - Justified limit. Treaty rights may be justifiably infringed using test from *Badger* and *Sparrow*
    - Why? Treaty rights are embedded within s. 35 which <u>recognized + affirmed only</u>- like other kinds of AB rights → they are not absolute and can be infringed
- Critique: A treaty is akin to a contractual agreement where both parties are bound by the terms of their agreement and must jointly agree to new terms

R v Marshall Number 2

- Following *Marshall* there were numerous clashes b/w AB peoples and non-AB fishers in NS and NB

- Maritime Fisher Association petitioned the SCC to review their Marshal decision to quell the unrest caused by the Marshal 1 decision SCC dismissed the case for a rehearing by the fishermen but in an unprecedented move reframed its judgment
- Reiterated
    - The treaty right itself is a limited right
    - Fishing rights limited to the traditional elements of their economy
    - Government can regulate fisheries as long as it is justified
- Critique for SCC review:
    - SCC should not bow to public pressure
    - What does the clarification mean? Does it override, amplify?
    - Maybe there is a political element to the SCC that needs to be expressed under extenuating circumstances

Grassy Narrows First Nation v Ontario (Natural Resources)

Ratio	• Either level of government may interfere w/ Indigenous rights • Although only ON can take up lands under Treaty 3. ON is bound to exercise its powers in conformity with the honor of the crown and a duty to consult.
Facts	• By way of Treaty 3, Ojibway yielded ownership of their territory except for certain reserve lands and received in return the right to harvest the non-reserve lands surrendered by them until such time as that land was "taken up" (for example for settlement, mining and lumbering by the Dominion of Canada) • Ojibway peoples objected to the ON gov't selling a forestry licence on traditional treaty 3 land. • "Taking up". The treaty stipulates a power of the Crown to take up lands for the purposes of development or other crown uses. That power to take up lands exists alongside of (and in tension with) a treaty right to continue hunting and fishing over traditional territories.
Procedural History	• TJ → The treaty was interpreted as meaning that the prov gov't had to get federal authorization to "take up" the land in question. • ONCA reversed this finding.
Issue	• Can ON "take up" lands in the Keewatin area under Treaty 3 to limit the harvesting rights under the treaty, or does it need federal authorization to do so?
Result	• Appeal dismissed – Provinces can take up lands. Two step process involving federal approval for provincial taking up was not contemplated by Treaty 3

Reason	• Ss 109, 92A, and 92(5) of the Constitution Act 1867, ON alone can take up Treaty 3 land and regulate it in accordance with the treaty and its obligations under s 35 of the Constitution Act 1982.
	  ○ S. 109 - ON holds the beneficial interest in Keewatin lands and the resources on or under those lands
	  ○ S 92(5) - Province exclusive power over the Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon
	  ○ S 92(A) - Province has exclusive power to make laws in relation to non-renewable natural resources, forestry resources and electrical energy
	  ○ For provincially regulated purposes, such as forestry
	• The promises made in Treaty 3 were promises of the Crown, not those of Canada
	  ○ Provinces have a say here.

	○ Both levels of government are responsible for fulling these promises when acting within the division of powers under the Constitution Act • Rely on theory of divided Crown – the crown exists in multiple iterations in the Canadian Constitutional state, and numerous executive powers can exercise the powers of the Crown. ○ The Crown can be the Crown in Right of Ontario, or Government of Canada. • S. 91(24) does not give Canada the authority to take up provincial land for exclusively provincial purposes. ○ ON does not need to obtain federal approval before it can take up land under Treaty 3 • ON still has a fiduciary duty when dealing with Aboriginal interests, honour of the Crown and duty to consult and accommodate if possible First Nations' interests beforehand • Sparrow/Badger test to determine whether taking the lands would amount to infringement that is justified
John Burrows Critique (618-619)	• Court failed to apply a large, liberal, and generous perspective of the treaty in favour of the AB group • Shielding of FN groups from local govt has been abandoned ○ Meant to be a nation-to-nation relationship not a nation-to-province relationship • Provinces have the most to gain from infringing and undermining the treaties

ABORIGINAL TREATY RIGHTS TEST

- Approach this test like the other tests→ in a **large generous manner to provide full protection** to Indigenous peoples. Their rights should be interpreted as **solemn promises** that implicate the honour of the crown. Further, s 35 goal is about the **reconciliation** of the competing claims of sovereignty.

- To determine whether a treat right exists:

1. **Characterize** the treaty right in question
2. Does the **treaty protect the right**?
   - ○ This is not an exercise bounded by the words alone of the treaty
   - a. Consider treaty text & the internal limits it places on the rights (*Badger*)
   - b. <u>common intention</u> of the parties [implied rights]
   - c. oral history evidence & aboriginal perspective
3. Has treaty right been **extinguished**?
   - a. It can with clear and plain statutory intent prior to 1982
     - i. BUT regulation ≠ extinguishment (∴ difficult for Crown to prove extinguishment)
4. Has the treaty right been **infringed**? (*Sparrow*; *Badger*)
   - a. Adversely impacted?
5. Has the right been **justifiably** infringed? (*Sparrow*, *Badger*)
   - a. Is a **compelling statutory objective**?
   - b. Is it in keeping with the **fiduciary** relationship?
   - c. Have the affected Indigenous groups been **consulted**?
   - d. Is the **impairment minimal to** achieve the desired result?
   - e. Infringed in a **proportionate** manner?
   - f. Was there **consultation**?

- Was there **priority** allocation?

THE DUTY TO CONSULT AND METIS RIGHTS

DUTY TO CONSULT

- Duty to consult is grounded in the principle that the honour of the Crown is at stake in all its dealings with AB peoples
- DTC exists whenever govt decision-making could adversely affect an AB rights or AB title
    - Lao extends to cases where claims of AB rights or title have been asserted but not yet proven (*Haida*)

Haida Nation

Ratio	• The DTC is extended to cases where claims of AB title or rights have been asserted but not yet proven • DTC grounded in the honour of the crown. Good faith on both sides is required at all times. • DTC triggered by real or constructive knowledge of an AB claim and when govt proposed conduct which may adversely impact the claim or right
Facts	• Haida Nation is claiming title over this territory – not yet proven. • The government is selling tree-farming licenses to cut down trees. • Haida wants to stop these licences while they try to prove title – it takes a long time, and a lot of money. And at this point, no nation has claimed title yet.
Issue	• Is the duty to consult engaged when a title right is claimed but not yet proved?
Result	• Yes – in keeping with the honour of the Crown. The Gov't knew the potential aboriginal rights and title in question could be affected by their decision. ○ Since strength of claim for right/title was high and the impact of the strategy was serious, the honor of the Crown might also require significant accommodation to preserve the Haida interest pending resolution of their claims

Reason	• Gov't of BC: we consider ourselves to have title over the lands until the Haida Nation proves that they have title.
	  ○ SCC: that is not in keeping with the honour of the Crown. It is not honourable to try to get as much land as fast as you can while you're waiting for a lengthy court process.
	  ▪ Process of reconciliation flows from the Crown's duty of honourable dealings towards Aboriginal peoples which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and de facto control of land and resources that were formerly in the control of that people
	• **Duty to consult arises when the Crown has knowledge [real or constructive] of the potential existence of the Aboriginal right/title**, and whenever gov't decision making could adversely affect that aboriginal right or title
	  ○ The Honor of the Crown requires the Crown to participate in processes of negotiation
	  ○ Reconciliation is a process flowing from rights guaranteed by s. 35(1).
	  ○ To limit reconciliation to the post-proof sphere risks treating it as a distant legal goal devoid of the 'meaningful content' mandated by the solemn commitment made by the Crown in recognizing/affirming aboriginal rights/title
	  ▪ There is a **RISK that once proof is met, the AB people may find their land and resources changed and stripped**
	• Real or constructive knowledge of a rights claim.

	○ Its not only what they actually know, and what they should have known ○ Government must investigate rights – if they don't do that, the courts will still find they had constructive knowledge about something they should have tried to find out • **What does consult mean**? What level of participation/agreement/accommodation? 2 spectrums (where we fall on **spectrum** 1 (extent of infringement) tells us where we fall on spectrum 2 (duty to consult)) ○ 1.a How strong is the claim? Strong or uncertain? ▪ Do they have the required elements to make out title/treaty/right under the existing tests (SPARROW)? ○ Are they contemplating litigation, marshalling resources, ready to litigate, or just pulling things together? ○ 1.b How serious is the impact of the government action on the rights claim? ▪ Deep intrusion or minor annoyance? Significant, transient, unknown, minor? ▪ Serious impact: build a mine, dam a river, ruin hunting grounds: ▪ breadth/depth of the disturbance and its impact on the right in immediate, short and long term ▪ Minor impact: Easement is very temporary and minor intrusion. ○ 2.a The extent of government duties to fulfill their obligations under the duty to consult. Answer here is dependent on answer to spectrum #1 (Strong claim, minimal impact OR vice versa). ▪ Lowest end = give meaningful notice (likely also explain/discussion) ○ We are doing this, and it may impact you (Band Office, Town Hall meeting, run ad on radio) ▪ Upwards = meet, talk and listen. Explain, sitting face to face, listening ▪ Higher = accommodation (change plans in response to consultation) ○ the process of accommodation may be best resolved by consultation + negotiation ▪ Highest = consent; ▪ No duty on AB to agree. • Haida's claim to title and an AB right to harvest red cedar were supported by a good *prima facie* case ○ Province knew of this ○ the serious impact of incremental strategic decisions on those interests suggest that the honour of the Crown might also require significant accommodation to preserve the Haida's interest pending resolutions of their claims

Taku River v *BC* 2004 SCC

Ratio	• The Court was not under a duty to reach agreement with the AB group • Group's continued objection was not a sign that sufficient consultation had not taking place
Facts	• constructing a road across Taku territory • ongoing treaty negotiations were taking place
Reason	• DTC engaged because the action – long road through territory to reopen an old mine – could significantly and negatively affect the nation • However, govt had consulted and fulfilled its duty to accommodate

	○ Accomplished through the environmental assessment which included consultation with interested AB groups ○ Not all concerns were addressed ○ Yet court was satisfied the assessment committee had giving sufficient attention to the specific issues raised by the nation • Province was not under a duty to reach an agreement, but duty to consult in good faith with balance and compromise. Crown went ahead • Crown did not directly do the consulting – it was a regulatory process under the Environmental Protection Act so long as the consultations are explicit about performing the Crown's duty to consult

Mikisew Crew FN v Canada 2005 SCC

Ratio	• DTC even if minor impact expected
Facts	• Crown "taking up lands" surrendered under a treaty to build a winter road • Effect reduce territory over which the AB group would be entitled to hunt, fish, and trap
Issue	• What is the obligation to consult when treaty rights exist?
Result	• Crown had a DTC which was breached. Road realignment shifted from reserve to its borders.
Reason	• Even if the impact is relatively minor, the Crown nevertheless has a duty to consult • Required to inform, be open to • The impacts of the proposed road were clear, established, and substantially adverse to the exercise of the M's hunting and trapping rights over the lands in question, therefore triggering the duty to consult • However, fairly minor rwinter road on surrendered lands where the treaty rights were expressly subject to the taking-up limitation → required a DTC at the lower end of the spectrum (to provide notice and engage with the group, solicit and listen carefully to concerns and attempt to minimize adverse impacts)

Beckman v Little Salmon/Carmacks First Nation [not covered in class]

Ratio	• Modern treaties are also subject to the honour of the crown, taking up provisions are also to be governed by duty to consult provisions, and here the duty falls at the low end of the spectrum (because it's a taking up provision)
Facts	• Members of LFSCN surrendered lands to the Crown but secured access under the treaty to use the land for subsistence hunting and fishing activities. • Yukon government transferred 65 hectares of this land to a non-native person (Paulson) who applied for an agricultural land grant in 2001 • The land was also used as a trapline by a member of the LFSCN for hunting, fishing and teaching his grandchildren about his traditions • Yukon Government said that they didn't need to consult unless a duty to consult was specifically included in the terms of the Treaty •

Issue	• What are the obligations of the Yukon territorial government in taking up land under a modern treaty? • What are the Crown's obligations to the First Nation when Crown land has been transferred for individual, non-native use>
Result	• There's still a duty to consult about the change of land use. The duty exists outside the treaty as part of the Crown's ongoing constitutional duty to the First Nations. In this case the duty to consult was lower end of the spectrum so consultation was adequate.
Reason	• Treaty is as much about building relationships as it is about the settlement of ancient grievances • The LSCFN possessed an express treaty right to subsistence hunting and fishing on traditional lands, now surrendered and classified as Crown lands. Thus, although the Treaty allowed the government to grant Crown lands to non-native people, the effect this would have on the LSCFN gave rise to a duty to consult about the effect of such activities. • Modern treaties are also subject to the honour of the crown, taking up provisions are also to be governed by duty to consult provisions, and here the duty falls at the low end of the spectrum (because it's a taking up provision) • The treaty sets out rights and obligations of the parties but the treaty is part of a special relationship • This duty to consult will persist in modern treaties. • Rebuttal: It's not in keeping with the fiduciary duty of the Crown to keep aboriginal out of the legislative process.

METIS RIGHTS

R v Powley 2003 SCC

Ratio	•
Facts	• Powley and his son were charged with unlawfully hunting moose and possessing game hunted in contravention of the Game and Fish Act RSO. • Claimed to have, as Metis, an aboriginal right to hunt for food in the area.
Issue	• Metis rights are part of s 35 – so they are similar, but different. • How to determine who is Metis?
Result	•

Reason	• VDP endorsed a pre-contact test
	  ○ SCC back then left defining Metis rights to another day
	• Metis culture post-date European contact
	
	Step 1. Characterization of the Right being Claimed (contextual and site specific):
	• Site-specific right – to hunt in this particular area (the environs of Sault Ste. Marie).
	  ○ Not species specific, the evidence is about a general hunting practice for food – for their personal use
	• a right to hunt for <u>food</u> in the designated territory
	
	Step 2. Identification of the Historic Rights-Bearing Community
	• There was a distinctive Metis community in mid 17th century
	
	Step 3. Identification of the Contemporary Rights-Bearing Community

- Rights are held collectively (not individually), and grounded in the existence of a historic and present community
- May only be exercised by virtue of an individual's ancestrally based membership in the present community.
    - European control over the land interfered but did not eliminate the Sault Ste. Marie Metis community and its traditional practices
    - There was also underreporting and lack of information about the Metis during this period because of their removal to the peripheries of the town and. Their own disinclination to be identified as Metis
    - There was no continuity issue, they went "underground"

Step 4. Verification of the Claimant's Membership in the Relevant Contemporary Community (3 part test):

- Case by case basis that consider value of community self-definition and the need for the process of identification to be objectively verifiable
- 1. Self-identification
    - Claimant must self-identify as a member of a Metis community
        - This cannot be of recent vintage
- 2. Ancestral connection
    - Must have an ancestral connection to a historic Metis community
        - Require some proof that the claimant's ancestors belonged to the historic Metis community by birth adoption, or other means
- 3. Community acceptance
    - Must demonstrate that the modern community accepts them whose continuity with the historic community provides the legal foundation for the right being claimed
    - Want to restrict Metis rights to the Metis people.
    - Reject the idea of blood-quantum – the question is about community; you are part of a shared culture.
    - How would you prove that? Elders, living in a Metis community, participating in that community, membership card in Metis nation – participation in culture of Metis.

Step 5. Identification of the Relevant Time Frame

- Post-contact but pre-control test
    - Post-control → When Europeans effectively established political and legal control in a particular area
- Identify practices, customs and traditions that are integral to the Metis community's distinctive existence and relationship to the land at post-contact but pre-control era

Step 6. Determination of Whether the Practice is Integral to the Claimants Distinctive Culture

- Subsistence hunting was a constant and important aspect of Metis life, and a defining feature of their special relationship to the land
- Major part of subsistence was the practice of hunting for food

Step 7. Establishment of the Continuity Between the Historic Practice and the Contemporary Right Asserted

- It is the same (but this is the doctrine of evolution)
- S 35 is a constitutional commitment to protecting practices that were historically important features of particular aboriginal communities

	Step 8. Determination of Whether or Not the Right was Extinguished • Not extinguished here, because Metis were specially excluded from a relevant treaty. • Same test as *VDP* – whether legislation has clearly and plainly extinguished that right prior to 1982 • pretty much in all Metis cases this will be no. Step 9. Is there an Infringement • Ontario does not recognize any Metis right to hunt for food – therefore the lack of recognition infringes their aboriginal right to hunt for food Step 10. Is the Infringement Justified • Appellant asserts conservation – but the record here does not show that Moose are under threat, and priority allocation would still let the Metis hunt first (*Sparrow*) • Duty to consul, communicate need to conserve • Evidence shifts to the Crown – there is no evidence.

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

CONSTITUTIONAL RIGHTS BEFORE THE CHARTER

- John A Macdonald 1864
  - Protection of individual rights was at the heart of the British unwritten constitution
    - the most fundamental of these rights was liberty
  - Extent to which a federal system of government can operate to safeguard rights and freedoms
- Individual rights by 18th century were divided into two kinds
  - Political rights - rights to participate in government, especially responsible government including rights of representation and voting
  - Civil rights - rights of individual to liberty from restraint by government, especially freedoms of person, speech, religion, and property

The 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
  - Yet, there was the idea of an implied bill of rights
    - Preamble of the Constitution states there will be a "a Constitution similar in Principle to that of the United Kingdom"
      - The constitution by creating the democratic institution of courts and legislators protected rights.
    - Constitutional also articulated minority language rights (s. 133) and minority education rights (s. 93)
    - Additionally, common law protected rights via courts using a generous interpretative method & requiring governments showing clear and plain intent if they wished to infringe upon rights
    - Certain statutes also protected rights over time: *Canadian Bill of Rights,* and similar provincial ones

The Lead up to the Charter

- In Canada, a key factor leading to the Bill of Rights was the fears about regulation by legislatures and administrative agencies which had expanded greatly during the war

    - For example, the general public were troubled by denials of civil liberties in the treatment of Japanese Canadians during the war and the conduct of an inquiry into espionage in 1946 which was widely criticized for curtailing the civil rights of individuals who were being investigated
        - In 1946 the Privy Council said the exile of Japanese Canadians was fully constitutional because the government could decide what it needed to do to protects its own security in a time of war
        - There was also discrimination of religious groups (in QC in particular)
- → It became clear that as much as the Constitution had a rhetoric of rights protection there were also limits of that protection in the hands of **parliamentary sovereignty**
    - This concept meant that if a legislature wrote down an oppressive or racist law, the courts hands were tied. All that could stop them was the democratic process itself.
- During this time, there is small moments of evidence of the way courts would try to find through federalism issues ways to address rights infringements (see *Ref re AB statutes*)
    - When courts struck down laws there were two views:
        - 1. Parliament, not the provinces, is authorized to enact a law interfere w/ a fundamental freedom
        - 2. Constitution prevents both levels of govt from enacting laws that interfere with freedoms
            - This is known as the "implied bill of rights"

- Constitution includes an implied right of free speech (*Ref Re Alberta Statutes*)
    - Freedom of speech and freedom of religion (*Saumur*)
    - Freedom of speech is essential to a free and democratic society (*Switzman*)

Ref re Alberta Statutes 1938 SCC

Ratio	• **Implied right to free speech** based on following the UK constitution. • Constitution must have the power to protect itself and public institutions. Residuary clause dictates that this matter falls under federal power. • "public discussion of public affairs… is the breath of life for parliamentary institutions"

Facts	• Pertains to the following statutes: The Bank Taxation Act; The Credit of Alberta Regulation Act; and the Accurate News and Information Act
	• 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* because of this hostility
	  ○ Newspapers were required to publish statements that it considered necessary to correct public misapprehension
	  ○ Papers were also required to publish their sources
	• The LG refused to assent the bill and two others about economic policy

Issue	• Are the laws constitutional?
Result	• No. All 3 were held ultra vires.
Reason	AB Gov't argument: Regulating newspapers is a local and private matter, or property and civil rights (*Parsons*) • Setting up of rules that newspapers must comply with to be published in Alberta • This isn't the limiting of free speech because people still get to say what they like, but we get to say our part also.

	• But even if it is limiting free speech, that doesn't make it not provincial law. We can regulate business and free speech under property and civil rights.
	
	Majority: invalid. Connected Act interferes w/ banking. Newspaper statute struck down as they are part of the same package.
	
	Cannon J – criminal → invalid
	• Act interferes with the free working of the political organization of the Dominion.
	  ○ Nullifies the political rights of Albertans and *cannot be considered as dealing with matters purely private and local in that province*.
	• The federal parliament 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 were matters of criminal law before Confederation, have been recognized by Parliament as criminal → outside scope of provinces
	
	Duff (concurring w/ majority but obiter re: news act)
	• Draws on the preamble of the Constitution
	  ○ statute contemplates a parliament working under the influence of public opinion and public discussion.
	  ○ The feds possess authority to legislate for the protection of that right; and any attempt to abrogate that right of public debate or to suppress the traditional forms of the exercise of such right (in public meeting or through the press) would be incompetent to the legislatures of the provinces.
	• There is a right of free public discussion
	  ○ Practice of right of free public **discussion** of public affairs, notwithstanding its incidental mischief, is the **breath of life for parliamentary institutions**
	  ○ So, if the breath of life is going to be restricted, that power rests solely with the federal government

Saumur v City of Quebec

Ratio	• **Freedom of speech and religion are inviolable** • Aspects of religion or free speech may be affected by provincial legislation, but this legislation must be sufficiently definite and precise to indicate its subject matter – and the subject matter must fall within a head of provincial power • Provinces can deal with the civil consequences of the exercise of those freedoms, but the provinces cannot take away those freedoms
Facts	• Premier of Quebec, Maurice Duplessis hates Jehovah's Witness hates Jehovah witnesses who are distributing pamphlets disparaging other religions • QC enacts a law regulating the distribution of pamphlets in the streets. Anyone distributing required police approval. • Incendiary Jehovah's Witness pamphlet led to Saumur's arrest
Issue	• Was the bylaw *ultra vires*?
Result	• Yes. Provincial bylaw prevents freedom of religion – law is invalid
Reason	Province of Quebec's argument (p 175)

	• S. 92(16) – matters of a local nature and local morality – regulating street
	• S. 92(13) – property and civil rights – pamphlets are property, prevention of mobs and disturbances of the peace
	• Suppression of future crime and local effects of cleaning up pamphlets (recall *Chatterjee*)
	
	Saumur's argument:
	• Infringes freedom of religious worship
	• Distinguishes s. 92(13) "civil rights" from the fundamental freedoms that are grounded in natural law
	• Provinces can regulate the consequences of an individual's fundamental freedoms through regulation of advertising, defamation laws, etc.
	• The state (in this case, the Chief of Police) is limiting the ability of people to express themselves
	
	Rand J. (focus on effects of the law)
	• The language of the bylaw pertains to the power of censorship.
	  ○ No limitation on the Chief's discretion
	• The bylaw articulates an unfettered power to censor. Further, that power was being used for a particular purpose. It arose to stop the distribution of JW pamphlets.
	• Religious freedom has been recognized as a principle of fundamental character.
	• Civil rights arise from positive law
	  ○ Likely talking about s 92 – property + civil rights in the province.
	  ○ **BUT Original freedoms:** Freedom of speech, freedom of religion etc. are inviolable and cannot be overridden by municipal bylaws.
	  ▪ These freedoms are not created by law but are pre-law. It is part of the "modes of self-expression of human beings and the primary conditions of their community life within a legal order" [i.e., natural law]
	  ○ These rights are the **"breath of life"** of political institutions (using Duff's quote)
	• So, by definition these matters are not provincial, and it must be federal. He would have struck down the law on that basis.
	
	Majority:
	• It is within provincial power, but an earlier provincial statute had protected freedom of religion and it could not be contradicted by the city bylaws
	
	Other dissent
	• Municipalities have the right to pass laws which protect the peace order and good government and promote and uphold municipal wellbeing.
	• This law is about keeping the peace in the streets

Switzman v Elbling 1957 SCC

Ratio	• freedom of expression is essential to the working of a parliamentary democracy
Facts	• CC used to outlaw communism, later repealed. • Mr. Duplessis (QC premier) enacts the "Padlock" Act where the province gives itself the power to padlock properties that propagated communis • Switzman's landlord evicts him as he used the premises for communism purposes

Issue	• Valid, invalid?
Result	• Invalid
Reason	Province's argument: • S. 92(13) – property and civil rights • S 92(16) - Local and private matter to keep the peace and prevent crime ○ Cites *Bedard* where the province had the jurisdiction to shut down a house being used for prostitution (*Dupond, McNeil, Chatterjee* came later) Majority: criminal law → invalid Rand • "This constitutional fact is the **political expression** of the primary condition of social life, thought and its communication by language. Liberty in this is **little less vital** to man's mind and spirit **than breathing** is to his physical existence" [page 722] • Prohibition of any part of this activity as an evil would be within the scope of criminal law. Not a provincial matter. Abbott (concurring) • purpose of the Padlock Act is to suppress the propagation of communism in the Province. Is that valid provincial matter? • **The right of free expression of opinion and of criticism**, upon matters of public policy and public administration, and the right to discuss and debate such matters, are **essential to the working of a parliamentary democracy** such as ours. Moreover, it is not necessary to prohibit the discussion of such matters, in order to protect the personal reputation or the private rights of the citizen. That view was clearly expressed by Duff C.J. *in Re Alberta Statutes.* • This right cannot be abrogated by provincial legislatures NOR parliament. Taschereau J (dissent) • The legislation is not in respect of criminal law but deals with property in the Province, under s 92(13) • It is "calculated to suppress conditions favouring the development of crime and to control properties in order to protect society against illegal uses that may be made of them". •

Dupond v City of Montreal

Ratio	•
Facts	• City passed a bylaw prohibiting parades or other gatherings after a period of violent demonstrations. • City's executive committee given the power to prohibit public gatherings with penalty of fines and imprisonment.
Issue	• Does this law violate freedom of assembly, speech, association, the press, and religion?
Result	• No. upheld.

Reason	• Majority emphasized the preventative character of the municipal regulation
	  ○ Provinces should be able to *prevent* crime in the public domain
	  ○ Further, matters of safety in the public domain are pre-eminently local in nature

	○ Temporary, urgent nature mitigates risk of long-term abuse • **No freedom is so enshrined as to be beyond the reach of legislation** (parliamentary sovereignty, above the Constitution) ○ Rights and freedoms do not fall within federal jurisdiction: these are not single subjects that fall within federal or provincial jurisdiction ○ They fall under either jurisdiction, depending on the aspect. ○ The right to hold meetings in the public domain are not part of Canadian constitution • Canadian Bill of Rights does not apply to provinces or municipalities
Notes	• Later in *ON (AG) v OPSEU*, Beetz J. changed his position: ○ Legislators cannot enact legislation which would substantially interfere with the operation of the basic constitutional structure, which includes free public discussions of affairs ○ Canadian Rights and Freedoms gives broader protection to these rights and freedoms than is called for by the structural demands of the Constitution.

- At the end of these cases, **implied bill of rights never adopted by a majority of the court**. Always questioned **but always present**.
  - Lingering idea that maybe through federalism there was an ability to protect individual rights.
  - In time, the courts state that is not the role of federalism.
  - Then with the arrival of the Charter, these debates take on some less immediacy.
- Something to think about:
  - In QC, they have banned religious clothing/symbols – direct interference w/ a freedom of religion. But QC invoked the notwithstanding clause (cannot undo this legislation despite Charter violation).
    - Nevertheless, Justice Rand would argue this goes against an original freedom, an implied bill of rights. So, it is possible the above arguments may reappear.

CHARTER HISTORY

727-750

- In 1960, Parliament enacted the *Canadian Bill of Rights*
- Two external influences shaped this development
  - 1: Universal Declaration of Human Rights
  - 2. American Bill of Rights and the liberal interpretations by the Supreme Court from the mid 1950s onward
- One large internal influence: abrogation of civil rights
  - There were fears about the regulation by legislatures (which had greatly expanded since WWII). The regulation threatened legal values. Additionally, public were troubled by denial of civil liberties in treatment of Japanese Canadians during and after the war along with the conduct of an inquiry into espionage

Universal Declaration of Human Rights

- First half is grounded in liberal conceptions: view of rights as negative freedoms
  - The idea that the protection of individual rights meant the restriction on the state to stop interfering
  - similar to the *Charter (*part s7)
    - Although there is protection of property here that does not make its way into the charter
  - Right to liberty, not to be subjected to arbitrary arrest, right to freedom of though etc.

- Non-western countries incorporated theories of positive rights (see articles 23-26)
    - right to work, right to leisure, right to standard of living etc.
        - this is missing form the *Charter*
- Before the final vote, there was a penultimate vote to see where the document stood in terms of support
    - Canada voted against declaration. Eventually they are cornered by US, French, British.
    - Canada said we have federalism. Article 25 is provincial jurisdiction (housing, health, education etc.)
    - Allies said they do not care. Vote in favour so Canada did when the formal vote occurred.
    - But it did not change the fundamental problem: how do you change the constitution?
        - Instead of amending, passed the *Canadian Bill of Rights*

Canadian Bill of Rights 1960

- Bill is not entrenched. It is merely a statute of Parliament. Two important consequences flow from this:
    - 1. It governs only matters within the fed govt power
    - 2. It can be amended like any other statute – although no significant amendments have been made
- Two major problems arose for the courts:
    - 1. What was its effect on other statutes?
        - According to section 2 of its own terms, the Bill had no effect on a statute that declared it was to be effective regardless of the Bill (essentially a notwithstanding clause)
        - What about statutes that came earlier – did the Bill make a violation of rights in earlier statutes ineffective? What about those that came later – did parliamentary sovereignty mean the latter statute prevailed? Or was there an exception?
    - 2. How should the Court approach the Bill?
        - Expansive? Or restrictive?
            - No law can contradict the constitution due to constitutional supremacy (s52). No supremacy clause here and therefore it falls behind the constitution. Instead, federal laws will be interpreted to not infringe the freedoms (s2)
    - Essentially, Parliament tried to create a constitutional arrangement in a statutory context. Court then interprets the Bill as a *quasi*-constitutional statute.
        - Not constitutional but Parl has clearly tried to send a signal that its statute is of a higher elevation.
- What are the implications of these problems?
    - Case law viewed as disappointing in terms of capacity to protect rights.
        - Courts tended to approach it quite technically and narrowly. They locked in the legislation to rights that existed in 1960. Explicitly rejected the living tree doctrine.
    - *Drybones* 1970 – Indian Act said it was illegal to be intoxicated off the reserve only applied to status Indians. Lawyers argued it was an inequal application of the law under s 1(b). SCC agreed – could not construe the Bill in an unequal fashion. Since *Indian Act* predated the Bill, they did not need to solve the parliamentary supremacy issue. The later statute then met the intent of Parl was that the earlier statute could not apply and effectively it was inoperable.
        - Ritchie J stated the legislation was glaringly discriminatory and "no individual or group… is to be treated more harshly than another under the law" → opened up the possibility the courts would be generous with interpretation
    - *Lavell* 1974 - Indian woman who married a non-Indian man lost her status under the Indian Act but there was no corresponding provision for an Indian man. In fact, the woman a man married would gain status. Court says, it's fine. All Indian women needed to be treated the same, not all Indigenous people.
        - Rejected US Supreme Courts' understanding of equality before the law in egalitarian terms. Instead, the language employed at the time when the Bill was enacted is where to find the meaning.

- *Bliss* 1979 – a woman sought unemployment insurance for interrupted employment due to pregnancy. It required a longer qualifying period than it did for non-pregnant individuals claiming regular benefits. Bliss did not meet the longer qualifying, argued the discrepancy b/w benefits = discrimination. Ritchie J says pregnant women did not lose their work *because* of sex, but because they were pregnant. Pregnant men would be denied employment insurance, too. "Any inequality in the sexes is not created by the law, but by nature"

- Applicability & scope:
  - S1(a) – property right protection – not in *Charter*
  - S 2(e) – right to fair hearing not replicated in the charter

The Advent of the Charter (p 733

- Charter project begins in Jan 1968 during fed-prov first minister's conference
  - There was division of opinion as to whether the Charter was a good idea
- Trudeau – tabled doc "A Canadian Charter of Human Rights":
  - Natural rights tradition – rights all were entitled to because they are endowed w/ a moral & natural tradition
    - Denial of these rights = afford to natural law
  - Natural rights were the origins of the west's modern concepts of freedom and equality
  - International commitments demand entrenched rights
  - Preference for individual rights as a check against state power – theory of democracy where the individual is at the centre
  - There is a lack of constitutional protection (beyond the BNA Act) – need to entrench these rights
    - It is at the price on some restriction on legislative supremacy but the positive is it places rights "beyond the reach of majorities and officials""
  - 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
- Cairns – "Charter versus Federalism: Dilemmas of Constitutional Reform"
  - Composition of Canada is changing, and is less attached to British and French ideals → more welcoming of individual rights over homogenous culture
    - Many of the new post-war immigrants who were visible minorities had little prior experiences with constitutional government, and were fearful of being singled out for negative treatment since they were minorities
      - They were drawn towards the idea of a judicially entrenched rights and away from parliamentary majoritarianism
    - Canadians started to move away from their connection to the UK resulting in a gap in the constitutional symbolism
  - The world is changing from British supremacy towards US hegemony → Canadians are becoming more culturally aligned with US principles of rights protections
    - Impact of US culture
  - Role of United Nations – fostered respect for fundamental freedoms and human rights
- Russell – "Political Purposes of the Charter"
  - Two purposes:
    - To contribute to national unity
    - To protect rights
  - Legal ideas are interesting, but the Charter is essentially about politics and QC's Quiet Revolution – separatism

        - Recall that in the mid 1960s the liberal govt was not interest in constitutional reform at all
        - QC kept pushing for change
        - New phase of QC nationalism enters
        - Quiet revolution led to leading politicians becoming "constitutional radical"
    - Charter changes the conversation from separatism/federalism → unifying narrative of individual human rights
- Weinrib – "Of Diligence and Dice"
    - Politicians were moved because rights-seeking groups pressured them to do so. They were not very well-protected under the parliamentary supremacy model
    - Desire to reach an agreement on a domestic amending formula (thereby removing role of Westminster)
        - Two agreements nearly achieved success. Both times QC would have received a veto but refused to sign.
    - Joint Committee meetings on developing the Charter were televised → people pressured the government to make s.1 clause (first iteration was too broad)
- Provincial reference challenges:
    - Courts – you need a "substantive consent" to follow the constitutional convention re: amendment
    - "Night of the long knives" when late-night negotiations without QC reaches a compromise in the "Kitchen Accord". ON agreed to give up their veto in the amending formula in favour of the 70/50 formula and notwithstanding clause (now s 33).
- QC makes a reference challenge: QC's consent is not required to achieve "substantive consent"

JUDICIAL REVIEW

750-766

- Two very different models of democracy are at stake
    - 1) the <u>power of the ballot is curbed by independent and tenured judges</u> who ensure that rationality and principle are never ejected by impetuous legislatures, rigid bureaucracies, and a dulled citizenry and
        - Courts will <u>shelter the disadvantaged</u>, who will harness that rationality and principle
    - 2) the second model places its confidence in those who can claim the power of the ballot
        - <u>Judge's independence and tenure make them unaccountable</u>, elitist, and unrepresentative
        - Judicial review will sap it with regressive decisions, progressive decisions that nonetheless blunt popular responses to societal problems and barriers to access because of the costs of litigation

Arguments for Judicial Review

- William Bogat, *Courts and Country.* And class notes
- It 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.
    - Parliamentary supremacy is governance by the majority, for the majority, and the minority is inherently vulnerable
        - Critique: If the "majority rules" is undemocratic, why do courts decide on a majority of the judges?
    - **Judges can protect minority rights** as they are not subject to same pressures as Parliament.
        - Protects minority interests where legislators might not
        - Majoritarian governments don't do a good job of this
- Courts are sometimes better suited to address moral issues than Parliament.
    - The law is about discourse of reason, but Parliament can get drawn into the "whims of the people" or matters that appeal to a particular constituency. Courts go slowly, deliberately, and provide reasons for

their decisions that is open to scrutiny. Court decisions are always open to challenge and evolution. Courts only worry about the law, reason, justification based on evidence; politicians are not as deliberate.
    - Courts are obliged to listen to both sides – nonpartisan, including interveners, and consider the evidence in rendering its decision.
        - Critique: Courts just deal with cases in front of them, are not experts in the field, and make decisions grounded in precedent
- 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
    - More representative of actual Canadians, not just legislators
        - unity – females will be united by their gender, not where they are from geographically
- The ***Charter* must be construed to protect democracy**; not to review substantive decisions made by elected officials
    - Democratically elected official enacted this
        - But Quebec wasn't part of this
    - S 52 of the Charter (supremacy clause) says that laws inconsistent with the constitution have no force or effect.
- Charter balances the systems of parliamentary supremacy with American judicial supremacy
    - S. 1: governments can argue that they implement reasonable limits on Charter rights, especially in response to court's decisions (Hogg's "legislative sequels")
    - S. 33: governments can choose to override the court's decisions
    - Sections 1 and allow governments to limit and even override rights – judges do not have the last word
    - How can this be undemocratic when you have a system that lets parliaments and legislatures override?
    - Rebuttal: Comes with a 5-year renewal period. S 3 has rarely been used. Public often push back on governments for overriding their rights but this may be chancing (see QC).
- Dialogue theory
    - When courts make decisions contrary to what Parliament wants, Parliament gets to legislate
        - Critique: It may be a dialogue, but "the courts have the ability to shout, and Parliament can only whisper"

Arguments Against Judicial Review

- [from William Bogat and Andrew Petter (considered a "left" critique) page 753+]
- The best chance for a **vigorous, responsive, and respected democracy comes from elected representatives**
    - We should not rely on a small unelected corps
        - 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
        - Ruins the political process
    - Focus should be with the citizenry working out acceptable and supportable solutions to problems (Petter)
        - The Charter serves to weaken the impetus for further legislative reform by diverting resources from the political to the judicial arena
            - Women's groups are raising millions of dollars to engage in Charter litigation to defend from Charter challenge legislation that is beneficial to women
            - Money, time and energy devoted by such groups to the Charter are money, time and energy that will be taken away from lobbying and other forms of political action
- **Undermines elected officials** and gives unelected judiciary more power

    - Majority of public no longer gets to govern. Courts usurp democracy.
    - Unaccountable judges
    - rebuttal: politicians are not representative of the constituents either nor does the full population vote. FPTP also means that sometimes the majority did *not* vote for the candidate.
- Concern over j**udicial activism**
    - judges taking moral questions and turning them into legal questions where judges have no better expertise (e.g., why would a judge get to answer the question of whether assisted death is legal? This is a moral, not legal question)
- Judicial review **saps energy from politics and** displaces it into the courts; it promotes Charter litigation over political dialogue (evidence: decreasing voter turnout since the Charter)
- **Costs**: Access to the legal system is premised upon money → only wealthy people will participate matters that warrant judicial review → causes law to trend in favour of wealthy persons and corporations → system of rights which only upholds the rights of the wealthy
    - 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
    - The barrier created by money not only denies the disadvantaged access to the courts, but it also serves to shape the rights themselves (Petter)
        - 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
    - Rebuttal: It takes money to succeed in politics, too
- "regressive instrument more likely to undermine than advance interests of socially and economically disadvantaged" (Petter)
- *Charter* is based on a 19th century view of the world where the state is the entity from whom we must be protected (instead of disparities in wealth or concentrations of power)
    - Charter rights are predominately negative in nature – aimed at protecting individuals from state interference or control with respect to this matter or that
    - Therefore, **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
        - This class of people sees their economic and social status most threatened by the regulatory and redistributive powers of the modern state
    - Therefore, they see fundamental values that afford them protection from such state powers
    - The systematic bias is reinforced by a highly selective view of the state
        - View is that existing distributions of wealth are a private matter, not state. Yet, the distributions depend largely on the existence and legitimacy of state sponsored laws + institutions. Nevertheless, the distribution as viewed as beyond *Charter* review
- **Elected member of government and their agencies have been the more effective** vehicle for improving the lives of most Canadians in many circumstances
    - The assistance of the disadvantaged/poor has more often happened *because* of legislative action
        - Health care, workers rights, peace and order in the streets, safety, etc.
    - This argument reveals that courts have been uncaring or actively hostile
    - The 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
        - Won by harnessing the power of the state to redistribute wealth and place limits on "private" economic power Where there has been progress it has come through the democratic rather than judicial arena

- 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
- Judges go to law school, succeed as a lawyer, hear cases from predominantly wealthy people and institutions (rare exception of those who practiced criminal or family law), and end up in the upper-middle class themselves → judges become divorced from reality
    - Rights to property, rights to negative freedoms versus redistribute resources tends to be idealized by wealthier

Dialogue Theory – Hogg & Bushell

- 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**
- 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
- Four features of the Charter that facilitate dialogue and allow legislature to overcome judicial decision in striking down a law for breach of the Charter
    - Section 33 – the power of legislative override
        - 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
        - Most obvious and direct way of overcoming a judicial decision striking down a law for an infringement of Charter rights
        - Allows competent legislative body to re-enact the original law without interference from the courts
    - Section 1 – allows for 'reasonable limits' on Charter rights
        - 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
        - Even if the court has a weak grasp of the practicalities of the particular field of regulation and the court's alternative is not really workable, it will usually be possible for the policymakers to devise a less restrictive alternative that is practicable
    - Sections 7, 8, 9, and 12 – the 'qualified' rights which allow for action that satisfies standards of fairness and reasonableness
    - Section 15(1) – The guarantee of equality rights, which can be satisfied through a variety of remedial measures
- *Vriend*
    - Accepted dialogue theory
    - "Charter's introduction and the consequential remedial role of the courts were choices of the Canadian people through their elected representatives…" [134]
    - Section 33 "establishes that the final word in our constitutional structure is in fact left to the legislature and not the courts (see Hogg and Bushell)" [137]
    - "the courts speak to the legislature…" [138]

- Criticisms of theory
    - Less of a dialogue as it fails to recognize the "staying power" of new judicially created status quo
    - Example – *Morgentaler* 1988
        - striking down abortion restrictions based on s7
        - Govt of Canada introduced new law recriminalizing abortion but with les onerous requirements to meet the decision and yet was defeated in the senate from both sides
    - Hogg countered
        - All the cases proved was that it was *politically difficult* to reverse a decision of the SCC. But is that not as it should be? Reversal is possible where there is a sufficiently strong popular revulsion of the Court's ruling
        - Reversal has occurred too – see QC in the *Ford Decision*
        - Lack of reversal for *Vriend* was likely due to the lack of popular support. But it was still legally possible and was seriously examined by the AB govt.

The Supreme Court on Trial – Kent Roach

- The American debate about judicial activism has been inappropriately imported into Canada, without a recognition of the fundamental structural differences between the Charter and other modern bill of rights and the American Bill of Rights
    - 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
- The independent judiciary can be robust and fearless in its protection of rights and freedoms, knowing that it need not have the last word
- The greatest danger in the dialogue between courts and legislatures is not excessive judicial activism
    - Because the legislatures can and will correct judicial overreaching on behalf of minorities and the unpopular
    - But if the Court is too weak in protecting the rights of minorities and the unpopular, it is less likely that elected governments will do more
        - This would lead to a complacent and majoritarian monologue that is less truly democratic
- The greatest danger in judicial activism debate is that it may produce excessive judicial deference
    - As a result, we would ignore the potential under modern bills of rights with parliamentary forms of government to have the benefits and responsibility of both judicial activism and legislative activism
- The answer to unacceptable judicial activism under a modern bill of rights is legislative activism and the assertion of democratic responsibility for limiting or overriding the Court's decisions

Jeremy Waldron, "The Core Case Against Judicial Review" (NZ philosopher)

- judicial review "distracts [us] with side-issues about precedent, texts, and interpretation. And it is politically illegitimate, so far as democratic values are concerned: By privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights."

CHARTER FRAMEWORK + INTERPRETATION (767-771)

CONSTITUTIONAL AMENDMENTS

Failed Moments of Constitutional Change

- Meech Lake Accord 1987

- Charter rights should be interpreted according to QC's role as distinct society
- NFLD and MB held out – this amending formula hadn't taken into account of indigenous peoples (if QC gets, so do aboriginal); undermines equality of constitution
- Elijah Harper says that if Quebec is a distinct society then how come indigenous peoples who are even more distinct not granted distinct status in the Constitution?
- Nfld Clyde says it goes against the equal notion of provinces in Canada
- This had been called executive federalism – all male, all white, all premiers, came up with their amendment – where is the rest of us having a say in constitutional amendment
- Mulroney said that we will add an interpretive clause to the Charter that says that the Charter has to be interpreted in keeping with Quebec's distinct society

- Charlottetown Accord 1992
  - QC is distinct, so are aboriginal, etc. we vote for it in national referendum
  - Failure last time as it was premiers
  - Let's open it up to a national referendum where Canadians now have a say in their constitutional amendments
  - Referendum result: no
  - Include indigenous peoples and include rights to self government
  - QB: goes too far
  - Western Canada and the reform party said it goes to far in undermining provincial equality
- Two failures leads to 1995 referendum where QC almost leaves Canada
  - As a result, nobody wants to reopen amending the constitutional – bad for unity
  - But what about Indigenous peoples? QC? Environment issues? AB also have made a formal request to change it

Part V: Amending Formula

- Different formulas for different scenarios
- S. 38: General Amending Formula (70/50 formula)
  - Mostly the default provision
  - Need 7 provinces, and those provinces must represent at least 50% of the population:
    - denied Quebec's historic veto as a minority
    - ON gave up their veto, begrudgingly
- S. 41: Unanimous amending formula
  - Some kinds of elements of constitution that need to be protected from change and thus need unanimous support
  - Powers of the governor general, the Queen, use of French/English, composition of the Supreme Court (only reference to the SC in constitution)
- S. 43: bilateral amending formula
  - If matter deals with only a single province then it and the federal government can join together to make a change
- S. 44: some leeway for exclusive federal matters
- S. 45: provinces can change exclusively provincial matters

→ Overall, VERY difficult to change

Relevant Legislation

- *Referendum Act,* S.C. 1992 c. 30.
  - Law that gave power to ask a constitutional referendum (Charlottetown Accord)
- Constitutional Amendments, S.C. 1996, c. 1.
  - States federal government will never agree UNLESS certain provinces agree
  - So, 70/50 formula really becomes a unanimous formula

    - Ramifications: no formal amendments happening any time soon
- Constitutional Referendum Act, R.S.A. 2000, c. c-25
    - 1. The Lieutenant Governor in Council may order that a referendum be held on any question relating to the Constitution of Canada or relating to any possible change to the Constitution of Canada.
    - 2(1). The Lieutenant Governor in Council shall order the holding of a referendum before a resolution authorizing an amendment to the Constitution of Canada is voted on by the Legislative Assembly.
    - AB government cannot vote to change the constitution without a referendum in AB
        - So, UCP's proposal to amend the equalization formula if Alberta has a referendum will trigger the amendment to the Constitution but that's unlikely because of the obstacles in place for amending the Constitution
- Reference re Secession of Quebec and the duty to negotiate
    - Use the four guiding factors to guide constitutional questions
    - Although the question was about how to amend the constitution, the SCC did not provide clear answer
    - [88] If one province legitimately attempts to seek an amendment to the Constitution duty to negotiate if there is a clear majority to a clear question on secession
        - Exact words: "The corollary of a legitimate attempt by one participant in Confederation to seek an amendment to the Constitution is an obligation on all parties to come to the negotiating table." [88]
        - AB argument to open discussions on equalization payments draws upon this argument to state it applies to any constitutional referendum
        - But if reading it in context, you can see the SCC is referring to secession
    - Likely need a unanimous decision for any secession

CHARTER FRAMEWORK

- The Charter establishes a 2-step process for the adjudication of rights claims
- First, has a state act breached a *Charter* right?
    - Court must define protected activity and determine if it has been interfered with
    - Burden of proof lies with rights claimant on a BoP
- Second step - if there is a breach, is this breach justified?
    - S 1 – rights may be limited provides limits are "prescribed by law", "reasonable" and "demonstrably justified"
    - Burden of proof lies with party seeking to uphold limitation (usually the state)

Interpreting Rights: Purposive Approach

- Courts have adopted a "purposive" approach to the interpretation of *Charter* rights
- a judgement about the scope or value of a particular right can be made only after the court has specified the purpose underlying the right or delineated the nature of the interests it is meant to protect" (*Hunter)*
-

Hunter v Southam 1984 SCC

Ratio	•
Facts	• Involved s. 8 guarantee of freedom from unreasonable search and seizure • A search of a newspaper office was carried out by the Combines Investigation Branch. • The statutory basis for the search did not require prior judicial authorization.
Issue	•
Result	•

Reason	• The task of expounding a Constitution is crucially different from that of construing a statute (p 768)
	  ○ Why? (class)
	  ▪ Statutes can be amended, changed, govern everyday life
	  ▪ Constitution is about the fundamental rules of society, drafted with an eye to the future (living tree), it is meant to endure, it is the supreme law
	  ▪ Charter uses more general language. It entrenches abstract moral + political ideas
	  ○ "Living tree" encourages us to take a broad interpretation
	• Therefore, must approach the language less technically and more with a "**broad purposive analysis** which interprets specific provisions… in the light of its larger objects"
	• What is the purpose of the document?
	  ○ The Canadian Charter of Rights and Freedoms is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights
	  ○ That purpose then should ground an analysis

R v Big M Drug Mart Ltd 1985 SCC

- Interpretation should be "generous rather than a legalistic one, aimed at fulfilling the purpose
- BUT "it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore be placed in its proper linguistic, philosophic, and historical contexts."
- Harmony between text, context, and language
- The framework of a purposive analysis is designed to ascertain the purpose of the guarantee and the "interests it was meant to protect

CHARTER APPLICATION (811-830)

- Before considering whether a right has been infringed, must deal with threshold question:
  - Does the Charter even apply? → look to section 32(1)

Section 32

(1) This Charter applies

(a) To the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) To the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

- Why the delay of three years?
  - S 15 was considered the most potentially revolutionary. Governments needed time to bring their legislation in accordance with its provisions.
- "To Parliament AND government" / "legislature AND government"
  - There is a distinction between Parliament (the legislative arm of government) and government
  - Doesn't mean government in the generic sense then. Referring to something more specific.
    - The "government" specifically refers to the EXECUTIVE branch of government (*Dolphin Delivery*)

        - PM, premiers, cabinets, ministers, officials employed in gov't departments, police officers
        - They hold the executive powers (power to act) – when they act they are bound by the Charter
        - Other public agencies or agents that are subject to ministerial control
    - All statutes and laws passed by Parliament/Legislature (and their products) are subject to the Charter
    - So, the wording makes it clear that the **Charter refers to ALL legislation and all government ACTION**

Does the Charter Apply to the common law? Generally, no unless it is the basis of govt action

- *Dolphin Delivery* – the **Charter does not apply to the common law when relied upon by private litigants** nor to a court order issued at the conclusion of litigation between private parties resolved on the basis of the common law
- 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 with Charter values
    - **Charter will apply to the common law where it is relied on in litigation involving a government party or in proceedings initiated for a public purpose**
    - Otherwise, a private **litigant may only argue the common law is inconsistent with charter *values*** (*Hill v Church of Scientology of Toronto* 1995)

- *BCGEU v British Columbia* (Attorney General) 1988 SCC – Dolphin Delivery
    - Temporary injunction restraining government employees on lawful strike from picketing a courthouse issued on the ground that this interference with access to the courts constituted a contempt of court
    - At issue is the validity of the common law breach of criminal law and ultimately the authority of the court to punish for breaches of that law
        - Motivation of the Court action is entirely public in nature rather than private
        - The court is acting on its own motion and not at the instance of any private party
    - The branch of criminal law like any other must comply with the fundamental standard established by the Charter
    - Injunction did not violate the Charter
    - **Where a common law rule is relied on by the crown in criminal proceedings, the charter applies because state prosecution provides the requisite element of governmental actions**

Local 580 v Dolphin Delivery 1986 SCC

Ratio	• Charter applies to government action • Charter applies to the common law when it is the basis of governmental action which is alleged to have infringed a guaranteed right of freedom • Charter does NOT apply between private parties UNLESS there is a connection with a govt action
Facts	• Strike between Union and Purolator. • A court order restrained the appellant union from picketing the premise of the respondent company, Dolphin Delivery. • No statute governed "secondary picketing" at this time.

Issue	• What does "government" mean?
	  ○ Not dealing with an Act, the BC legislature, or the GoC
	  ○ Dealing with an injunction stemming from the common law
	  ○ So, does the *Charter* apply to the common law?

Result	•

Reason	• The Charter applies to the common law.
	  ○ BUT it only applies when **the common law is the basis of governmental action** which is alleged to have infringed a guaranteed right or freedom (Crown prerogatives, police powers etc.) whether in private or public litigation
	  ▪ Most govt action is dependent on statutory authority though
	• The Charter does not apply to private litigation completely divorced from any connection with government.
	  ○ A more direct and a more precisely-defined connection between the element of government action and the claim advanced must be present before the Charter applies.
	  ○ Ex:
	• Court orders cannot be subject to the Charter
	  ○ If they were it would unduly widen the scope of applications to virtually all litigation [36]
	• Charter applies to many forms of delegated legislation, regulations, orders in council, possibly municipal by-laws, and by-laws and regulations of other creatures of Parliament and the Legislatures. It is not suggested that this list is exhaustive.
	  ○ Where such exercise of, or reliance upon, governmental action is present and where one private party invokes or relies upon it to produce an infringement of the Charter rights of another, the Charter will be applicable.
	  ○ Where, however, private party "A" sues private party "B" relying on the common law and where no act of government is relied upon to support the action, the Charter will not apply.
	• Role of constitutional values/principles
	  ○ despite the above, the judiciary should apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution

Class	• So, QC which has a civil law (codifying their law) means that the Charter applies their more than it does in others like AB. Ironic considering QC did not sign on to the Charter.

Charter Application - 1. Governmental Actors

- There are two ways to determine whether the Charter applies to an entities' activities (*Greater Vancouver Transportation Authority,* 2009 SCC)
  - By enquiring into the nature of the *entity*
  - OR By enquiring into the nature of the *activities*
- If an entity is found to be government then the Charter applies to all of its actions (*Greater Van)*
  - If entity is not itself a govt entity but nevertheless performs governmental activities, only those activities which can be said to be governmental in nature will be subject to the Charter

- Two ways for entity to be considered part of government
  - 1) govt exercises significant control over it or
  - 2) it is "governmental in nature" – it exercises govt functions

McKinney v University of Guelph 1990 SCC

Ratio	• The mere fact that an entity is a creature of statute and has been given the legal attributes of a natural person is not sufficient to make its actions subject to the Charter ○ The *Charter* does apply to the statute that created the entity but not automatically the entity itself. • **Universities are not controlled by the government** and therefore there are many things they do that will not be subject to the Charter.

	○ But this does not close the door that it may apply to SPECIFIC activities (see *Stoffman* and *Eldridge*) • Government does not mean those with a **public purpose**. ○ Govt is narrower. Not entities that are autonomous from government even if those entities are created by government and/or statute. • **Becomes a question of the control test → does the government control that entity?** ○ Even if a private entity, if govt controls it, then everything it does is subject to the Charter
Facts	• University of Guelph has a mandatory retirement age. • McKinney says this policy discriminates on the basis of age, and retirement policy is of no force or effect because it interferes with the Charter. • McKinney argument: universities get government funding, regulated in a manner, carrying out public purpose, governance structure (boards – many appointed by govt); set tuition policy thus hey are a govt entity
Issue	• Can universities be said to be government actors under s. 32 of the Charter?
Result	• No – universities are not government, they are autonomous entities, therefore their actions are not subject to the Charter
Reason	• Rejects public purpose test – insufficient ○ Would extend the Charter beyond its application ○ Many things do good things (theatres, ballet, daycares) and yet those are not subject to the Charter ○ Who determines a public purpose? ○ Charter intended to deal with government! • Universities are meant to be **autonomous** ○ Independence and autonomy of government is important so that the school and professors can criticize government and that makes for a richer educational experience ○ While a universities' fate is largely in the hands of the govt + subjected to limitations it does not auto follow that they are "organs of govt" ○ Many other entities receive govt funding to accomplish policy objectives govt seek to promote • **BUT there may be situations in respect of *specific activities* where it can be said that the decision is that of the govt OR that the govt sufficiently partakes in the decision as to make it an act of govt** • **Test** to determine whether an entity should be subject to the charter = **degree of government control** ○ Whether the legislative, executive, or administrative branch exercises general control over the entity in question? ○ Cannot create a loophole where gov't can create a corporation and delegate government responsibilities without being bound by Charter ○ Leaves doors open for private companies to fall under Charter when they are exercising a government policy ▪ Government control = all actions subject to Charter ▪ Government activity = action alone subject to Charter • Overall, not enough regulation here in the decision making to make it controlled by the government for the purposes of the Charter

Applying the Control Test

Harrison v UBC 1990 SCC

- **Facts**: Mandatory retirement. UBNC Board of Governments were mostly appointed by the BC govt. Govt also closely monitored the expenditures.
- **Held**:
  - The fact that the government had "ultimate or extraordinary control" over the university such as the capacity to withdraw statutory powers or public funds was not enough
  - To be part of the government and therefore bound by the Charter, the university had to be subject to **"routine and regular control"** by the government
  - Why? >because the university enjoyed a high degree of internal autonomy

Stoffman v Vancouver General Hospital 1990 SCC – Are hospitals subject to the Charter?

- **Routine and regular control required**
  - Hospitals are funded and regulated by governments. Often created by governments yet governments still do not control. Still a level of autonomy.
- **Facts**:
  - Doctors at the hospital – mandatory retirement at 65.
  - Almost all board members (14/16) were appointed by gov't and the governing statute required all regulations to be approved by the Minister of Health.
- **Held**:
  - The hospital was found not to be a part of gov't, nor was the regulation in issue an act of the gov't
  - Routine control of the hospital was in the hands of the hospital's board of trustees rather than in the hands of the provincial gov't, and these independent/autonomous decisions of the Board were not sufficient to make it subject to the Charter.
  - Need routine or regular control of hospital policies in the hands of the government or the mandatory retirement policy had to be dictated by government for the Charter to apply

Douglas/Kwantlen Faculty v Douglas College 1990 SCC – Are community colleges subject to the Charter?

- **Community colleges, when in full control by the government, are subject to the Charter**
- **Facts**:
  - Challenge to a mandatory retirement provision in a collective agreement between a college and union.
  - The affairs of the college were managed by a board appointed by the prov gov't.
  - Minister allowed to establish and issue directions and approve all bylaws of the board
- **Held**
  - Community colleges are subject to the Charter as the affairs of the college were managed by a board appointed by the prov govt. Minister was allowed to establish and issue directions and approved all bylaws of the board.
    - There was much greater involvement by the provincial government pertaining to the college decisions. Operational involvement.
  - So, charter applied to the actions of the college in negotiation and administration of the collective agreement
  - SCC distinguished McKinney that although "extensively regulated and funded [were] essentially autonomous bodies"

Lavigne v Ontario Public Service Employees Union 1991 SCC – does Charter apply to union? Fabric of government

- **"full control over" activities → Charter applies**
- **Facts:**

- Charter challenge by faculty member at a community college to the union's expenditure of dues on political causes that he did not support
- 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

- **Held**:
  - Charter does not apply to the union, but it did apply to the Council of Regents because it was subject to '**full control over** all the Council's activities' by the Minister of Education
    - Council is then simply "part of the fabric of government"
  - **Once an entity is found to be controlled, then everything it does is subject to the Charter. All decisions, all activities.**
    - So, all of the terms of the collective agreement were subject to the Charter
    - Commercial + contractual activities of the government are not exempt from the Charter
  - BUT in this case, limitation on appellant's freedom of association is justified under s 1

Greater Van Transportation v Canada Federation of Students **2009 SCC – is public transport subject to the Charter?**

- Van transit found to be controlled by government because there was "**substantial control over its day-to-day activities"**
- **Facts**:
  - 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
- **Held**
  - 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).
  - Cannot be found to be operating autonomously because gov't has substantial control over day-to-day activities
  - TransLink were required to prepare all its capital and service plans and policies and carry out all its activities and services in a manner that was consistent with its strategic transportation plan
  - And if found to be controlled by the government, then all policy/actions/regulations are subject to the Charter (even those private in nature)

❖ Note:
- unclear whether schools or school boards are "controlled by govt" for the purposes of s32 (yet to be addressed and in some cases the Crown just conceded that it was)
- also unsettled whether Crown corporations (CBC or Canada Post, for example) are subject to the Charter
  - recall that in *Lavigne* the SCC disapproved of the attempt to distinguish b/w the public + commercial/private transactions of govt

Charter application – 2. Entities Exercising Govt Functions

- If an entity is not part of the apparatus of either the fed or prov government, because it is not subject to routine, full, or regular ministerial control, it may nevertheless qualify as government for the purpose of s 32 of the Charter if it is exercising governmental functions
- At this point after previous cases, it was unclear if municipalities would get over the control test hurdle. Why?
  - Created by government/statute but with very broad oversight → autonomous
  - Technically, provinces could exercise control over cities, but they do not on a day-to-day basis. Municipalities then look like universities (which are not subject to the Charter)

- Until *Godbout…*

Godbout v Longueuil 1997 SCC

Ratio	• Municipalities are "governmental entities" for the purpose of s 32 • Interpreting s 32 to include governmental in nature is sensible ○ If not, governments could shirk their Charter obligations by conferring certain of their powers on other entities
Facts	• City of L adopted a resolution requiring all new permanent employees to reside within its boundaries. • As a condition of her employment, G signed a resolution promising she would establish her principal residence in the city, and she would continue to live there for as long as she remained in the city's employ. • If she moved out of the city for any reason, she could be terminated without notice. • When she moved she was terminated
Issue	• Are municipal governments and their bylaws subject to the Charter? • Are they "governmental entities" for the purposes of s 32?
Result	• Yes

Reason	• Duck test – does it look like a duck, quack like a duck….
	• So, is this governmental in nature? Does it look governmental? Does it act governmental?
	  ○ Yes, municipalities are governmental in nature and are therefore subject to the Charter.
	  ▪ They enact bylaws, enforce laws, tax, have elected officials, have s 92 powers etc. [51]
	  ▪ "most significantly they derive their existence and law-making authority from the provinces; that is, they exercise powers conferred on them by provincial legislatures, powers and functions"
	  ○ To hold otherwise, Provinces could confer power to municipalities to avoid following *Charter*
	• **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 shirk their Charter obligations by conferring certain powers** on other entities and having those entities carry out what are essentially government activities
	  ○ Governments cannot simply create bodies distinct from themselves, vest those bodies with the power 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
	• Should interpret s 32 in a purposive manner – *Hunter*
	  ○ Purpose to protect rights of the people against state action → therefore, makes sense to include municipalities
	• The mere fact an entity performs a "public function" it not in itself enough (*following McKinney)*
	• An entity must truly be acting in what can be described as a "governmental" as opposed to a merely "public" capacity
	• Applied to this case:

	○ It is considered an entity exercising government functions. City's residence requirement violates the right to respect for private life set out in s 5 of Quebec's Charter of Human Rights and Freedoms •

Charter Application – 3. Non-Govt Entities Implementing Govt Programs

CB: 832-848, 853-857:

Eldridge v British Columbia 1997 SCC

Ratio	• May have **private entitles not controlled by govt**, or governmental in nature **but exercise a govt** program and therefore **subject to the Charter** ○ There needs to be a **direct and precisely defined connection** b/w a specific govt policy and the conduct • Similar policy reasons above: do not want to incentivize governments to evade their Charter responsibilities. That would not be in keeping with the purpose of s 32
Facts	• 3 individuals (born deaf) 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 • BC argument ○ *Stoffman* – charter does not apply to hospitals – lacks control by government • Eldridge argument ○ Category 3 in list below – hospital is implementing a government program
Issue	• Does the Charter apply to the hospital? If so, in what way? • Whether there was an obligation for hospitals to provide sign language interpreters
Result	• Yes, when there is a precise connection b/w policy and conduct
Reason	• Justice La Forest concluded the source of the violation of s 15 was the actions of the Medical Services Commissions and the hospitals not the legislation itself ○ Having concluded that, "it remains to be considered whether the Charter actually applies to them" ○ Legislatures may not enact laws that infringe the Charter not can they authorize or empower another to do so ○ It is possible for a legislature to give authority to a body that is not subject to the Charter though ▪ Ex: private corporations exist via the power of incorporation, and they have no power or authority that does not derive from the statute. But the Charter does not apply to them • when an entity is determined to be part of the "**fabric of government", the Charter will apply** to all its activities, including those that might in other circumstances be thought of as "private" (*McKinney*) ○ Again, mere fact that an entity performs a public function or it is public in nature is insufficient [43] • Charter may be held to apply to a private entity when: ○ 1. The entity itself is government for the purpose of s 32 by its **very nature <u>or</u>** in virtue of the degree of **governmental control** exercised over it ▪ In this case all of the activities of the entity will be subject to the Charter regardless of whether the activity in which it is engaged could correctly be described as private

	○ 2. An entity engages in a **particular activity that can be ascribed to government** due to the **nature of the activity** itself ▪ This demands an investigation into the nature of the activity itself (not the entity!) [44] ▪ If the act is truly "governmental" in nature -- for example, the implementation of a specific statutory scheme or a government program -- the entity performing it will be subject to review under the Charter only in respect of that act, and not its other, private activities. Application to the case: • Hospital thought since they were not "controlled" by gov't and following *Stoffman* the charter did not apply • *Stoffman* made it clear that, as presently constituted, hospitals in BC are non-governmental entities whose private activities are not subject to the Charter. [46] BUT did not answer whether hospitals implementing govt policy was covered ○ In *Stoffman,* the policy was developed written and adopted by hospital officials ○ Here the purpose of the *Hospital Insurance Act* is to provide particular services to the public • Unlike in Stoffman, there is a **direct and precisely defined connection** between a specific government policy and the hospital's impugned conduct [51] ○ Alleged discrimination is intimately connected to the medical service delivery system instituted by the legislation ○ Not a matter of internal hospital management but an expression of government policy ○ The hospital was merely the vehicle
Exam	• In exam – handing a case about a provision of a service → define that service, what is the govt objective? • Because that gives the connection b/w the entity + the government but it also defines the scope of what the Charter applies to

UAlberta Pro-Life v U of A 2020 ABCA

Ratio	• Charter applies to the freedom of expression policy of the university because there is a direct and precisely defined connection b/w govt policy and uni activity
Facts	• Students criticized a professor on Facebook. • Uni disciplined the students
Issue	• Does the Charter apply to universities in Alberta? • Is "the University's regulation of freedom of expression by students on University grounds … a form of governmental action?"
Result	• Yes
Reason	• *McKinney* states universities not subject to the *Charter* as the govt lacks control • BUT the university is not exempt when there is a direct and precisely defined connection b/w a govt policy and the university's activity (*Eldridge*) • ABCA found a direct connection for 5 reasons: ○ "core purpose of the University" is "free expression" ○ "education of students is the acknowledged core purpose of the University" ○ Physical design of University to encourage "students to learn and to debate and to share ideas"

	○ Rule of Law and "core values of human rights and freedoms, democracy, federalism, Constitutionalism, equality and respect for minority interests" enhanced by Charter protection ○ Application of Charter to freedom of expression by students "does not threaten the ability of the University to maintain its independence"

Entity Exercising Statutory Power of Compulsion

- In addition to government actors, and non-govt actors implement specific govt programs, the Charter applies to non-**govt actors exercising coercive statutory powers**
- Where a govt has set up usually an administrative entity (HR commission, milk board, etc.) – not controlled by government, not governmental in nature but it is exercising some power over individuals either to compel them to provide testimony or control them in an arbitration process
    - Not talking about courts – just administrative entities.
- That power of compulsion is subject to the Charter
    - "There is no question, of course, that the Charter applies to provincial legislation (RWDSU v. Dolphin Delivery Ltd., [1986]). There are two ways, however, in which it can do so.
    - First, legislation may be found to be unconstitutional on its face because it violates a Charter right and is not saved by s. 1. In such cases, the legislation will be invalid and the Court compelled to declare it of no force or effect pursuant to s. 52(1) of the Constitution Act, 1982.
    - Secondly, the Charter **may be infringed, not by the legislation itself, but by the actions of a delegated decision-maker in applying it.** In such cases, the legislation remains valid, but a remedy for the unconstitutional action may be sought pursuant to s. 24(1) of the Charter." [para 20 *Eldridge*]
- Adjudicator is a statutory creature, appointed pursuant to a legislative provision and derives all his powers from the statute. Therefore, must comply with the Charter (*Slaight Communications v Davidson,* 1989)

Does s 32 apply to legislative omissions? Yes

Vriend v Alberta

Ratio	• The Charter is not restricted to situations where the government actively encroaches on rights → Legislative omissions are subject to the Charter.
Facts	• Vriend fired from his job at a religious college • V challenges omission of sexual orientation from AB's *Individual Rights Protection Act*
Issue	• Does the omission of sexual orientation violate equality rights under s. 15? • Does s 32 apply to legislative omissions?
Result	• Yes, yes.
Reason	• The court is worried for what this might mean for the argument about the *Charter* being a sword or a shield ○ Could this decision compel government action? Worried about it because of policy decisions, cost restraints, courts forcing gov'ts into new legislation fields. Politicizing the judiciary • Difference b/w legislative omission vs legislative silence. ○ The *Charter* does not apply to all legislative silences (para 63)

	▪ Silence: where there is no legislation – will not be forcing the govt to act no charter application ▪ Omission: where the gov't undertakes to pass legislation, it then has to do so in line with Charter. Underinclusive scheme charter will apply • There is nothing in s 32 that requires such a narrow view of the Charter's application focusing only on active encroaches on the Charter ○ 32(1)(b) states that the Charter applies to the legislature and government of each province in respect of all matters within the authority of the legislature of each province ▪ Nothing in the wording suggest that a positive act encroaching on the rights is required ○ Matters within legislative authority could include an omission • Since we take a broad and purposive interpretation (*Hunter*) to the Constitution, then a broad and generous reading would catch more government action, and inaction is more protective of individual rights

Extra-Territorial Application 853-857

- Section 32 states the Charter applies … in respect of all matters within the authority of Parliament
- Charter has been invoked for operations outside of Canada's border, in particular Afghanistan during the war
  - Evidence of torture of prisoners that Canada had transferred to an Afghan jail which led to Canada stopping the transfers.
- Question was: Does the Charter follow the Canadian states outside the border?
  - If so, did the prisoners have section 7 rights? And if so, was the Canadian military infringing on those rights?

R v Hape 2007 SCC

- **Facts:** Detective of Turks and Caicos Police Force agreed to allow the RCMP to continue the investigation on the Turks and Caicos territory but warned the officers that he would be in charge and that the RCMP would be working under his authority
- **Issue**: Were RCMP officers subject to the Charter when conducting a search and seizure in the Turks and Caicos Islands in the course of an investigation of suspected money laundering activities of a Canadian businessman?
- **Analysis:**
  - **Approach to s 32(1) requires consideration of two issues**
    - 1. Is the conduct at issue that of a Canadian state actor?
    - 2. If so, is there an exception to the principle of sovereignty that would justify applying the Charter?
  - Because CAD govt has no authority in foreign jurisdiction, the Charter will general not apply to actions outside of Canada with two exceptions:
    - 1. There is a violation of international human rights OR
    - 2. There is consent of the foreign state to the application of the Charter

Canada v. Khadr, [2008] 2 S.C.R. 125

- **Facts**:
  - Khadr is Canadian citizen, being held in Guantanamo Bay, and he is tortured while being interrogated.
  - Khadr tried to rely on the Charter to obtain disclosure, for the purposes of his defence, of all relevant documents in the possession of the Canadian Crown
  - Canadian Crown argued that Charter disclosure obligations did not apply extraterritorially
- **Issue**:

- If what happened in Guantanamo Bay process was in conformity with Canada's internal obligations, then the Charter has no application.
- However, if Canada was participating in a process that violates Canada's binding obligations under international law, the Charter applies to the extent of that participation.

- **Held**
  - The SCC held that the Charter applied to the actions of Canadian officials operating at Guantanamo Bay.
- **Analysis**:
  - The conditions Khadr was being held under were illegal under both US and international law – therefore, no deference to foreign law arises.
    - "**comity cannot be used to justify Canadian participating in activities of a foreign state… that are contrary to Canada's international obligation**s"
  - "The Charter bound Canada to the extent that the conduct of Canadian officials involved it in a process that violated Canada's international obligations." – i.e. "a clear violation of fundamental human rights protected by international law." (see paras. 24-26)

Amnesty International Canada v. Canada, [2008] F.C.J. No. 1700 (C.A.).

- **Facts**:
  - Application for judicial review with respect to Afghan detainees being held by Canadian forces and the transfer of these individuals to Afghan authorities
  - Argued that the formal arrangements between Canada and Afghanistan did not adequately safeguard against a substantial risk of torture
- **Analysis**
  - Differs from Khadr (a Canadian citizen), therefore had no attachment to Canada or its laws
  - Charter **does not apply to Afghan detainees**
  - "This does not mean that the Charter then applies as a consequence of these violations …. all the circumstances in a given situation must be examined before it can be said that the Charter applies" (para. 20)
    - i.e., Is there "effective control" over territory? Has there been acquiescence to the extension of Canadian law?
      - Canadian govt did not effectively control. Afghan government did not acquiesce.
  - How to reconcile this with Khadr?
    - There was no effective control over Guantanamo bay. Some tension here.

Canada v Khadr 2010 SCC

- 14 **As a general rule, Canadians abroad are bound by the law of the country in which they find themselves and cannot avail themselves of their rights under the Charter.** International customary law and the principle of comity of nations **generally prevent the Charter from applying** to the actions of Canadian officials **operating outside of Canada** …The jurisprudence leaves the door open to an exception in the case of Canadian participation in activities of a foreign state or its agents that are contrary to Canada's international obligations or fundamental human rights norms…
- 15 The question before us, then, is whether the rule against the extraterritorial application of the Charter prevents the Charter from applying to the actions of Canadian officials at Guantanamo Bay.
- 16 This question was addressed in Khadr 2008, in which this Court held that the Charter applied to the actions of Canadian officials operating at Guantanamo Bay who handed the fruits of their interviews over to U.S. authorities. This Court held … that "the principles of international law and comity that might otherwise preclude application of the Charter to Canadian officials acting abroad do not apply to the assistance they gave to U.S. authorities at Guantanamo Bay", given holdings of the Supreme Court of the United States that the military

commission regime then in place constituted a clear violation of fundamental human rights protected by international law…The principles of fundamental justice thus required the Canadian officials who had interrogated Mr. Khadr to disclose to him the contents of the statements he had given them. The Canadian government complied with this Court's order.

- 18 Though the process to which Mr. Khadr is subject has changed, his claim is based upon the same underlying series of events at Guantanamo Bay (the interviews and evidence-sharing of 2003 and 2004) that we considered in Khadr 2008. We are satisfied that the rationale in Khadr 2008 for applying the Charter to the actions of Canadian officials at Guantanamo Bay governs this case as well.
- 39 Our first concern is **that the remedy ordered below gives too little weight to the constitutional responsibility of the executive** to make decisions on matters of foreign affairs in the context of complex and ever-changing circumstances, taking into account Canada's broader national interests. For the following reasons, we conclude that **the appropriate remedy is to declare that, on the record before the Court, Canada infringed Mr. Khadr's s. 7 rights, and to <u>leave it to the government to decide how best to respond</u>** to this judgment in light of current information, its responsibility for foreign affairs, and in conformity with the Charter.
- Class Notes:
    - If the charter applies to him in Guantanamo Bay, there should also be a remedy.
        - His s. 7 rights had been infringed by Canadian state action (torture). Requested remedy was his release
    - Satisfied that what was held in 2008 (Charter applies) continues to be the case today
    - Ordered that the government request his release - government appealed this
    - The federal court of appeal said that Khadr plead guilty to murdering a soldier, so he is no longer being detained for a human rights violation and the question need not be answered
    - Court **justified declaration as opposed to a mandatory order because it would not be appropriate for the Court to give direction as to the diplomatic steps necessary** to address the breaches of Mr. Khadr's Charter rights
        - Also, mandatory order gives too little weight to the constitutional responsibility of the executive to make decisions on matters of foreign affairs in the context of complex and ever-changing circumstances, considering Canada's broader national interests

Exercise

- Ten individual female ski jumpers from a variety of countries have launched a constitutional challenge in the British Columbia Supreme Court seeking a declaration that the failure to include women's ski jumping at the 2010 Winter Olympic Games violates the Canadian Charter of Rights and Freedoms. Specifically, the rights claimants have named the Vancouver Olympic Organizing Committee (VANOC) as the defendant. VANOC is a not-for-profit organization, *incorporated under the Canada Corporations Act. Financially supported* in part by the Government of Canada and the Government of British Columbia, VANOC is responsible for the *planning, organizing, financing, and staging of the Games.* VANOC is guided by a 20-member board of directors nominated by the Government of Canada (three members), the Province of British Columbia (three members), the City of Vancouver (two members), the Resort Municipality of Whistler (two members), the Canadian Olympic Committee (seven members), the Canadian Paralympic Committees (one member) and local First Nations (one member).
- VANOC has approached you for an assessment of the ski-jumpers' case. What constitutional issues will arise during the case? What arguments can VANOC use to defend itself against the claim? What is the likely outcome of the case?

<u>How to approach this question</u>

- Is VANOC government for the purpose of s 32

- Controlled by government?
  - Funding is insufficient (*McKinney; Stoffman)*
  - 10 (half) of the board is government appoint BUT not controlled by any single level of government
  - Is there any evidence of routine or direct control?
    - Lacks indication the government appointees are involved in the day-to-day activities.
    - Planning, organizing, financing is unlikely to be sufficient
- Governmental in nature?
  - Not government in nature
  - No democratic function, no laws passed, no control over citizens
- Is there a government program being implemented?
  - Has the government directed VANOC to exempt women?
  - Direct and tightly defined connection?
    - Missing the precise and defined connection

- *Sagen v. VANOC*, [2009] B.C.J. No. 2293 (C.A.).
  - 49 [I]n determining the scope of the application of the Charter to an entity such as VANOC, it is **necessary to look not only to the activities or function of the entity itself but also to the nature or function of the specific act or decision of the entity that is** said to infringe a Charter right. Regardless of whether VANOC's hosting of the Games can properly be considered to be a governmental activity because of the substantial commitments made by the several levels of government to secure and hold the Games in Vancouver, it is clear on the facts that neither government nor VANOC had any authority either to make or to alter the decision of the IOC not to include a women's ski jumping event in the 2010 Games. The decision of the IOC not to add women's ski jumping as an event in the 2010 Games is not a "policy" choice that could be or was made by any Canadian government and the staging by VANOC of only those events authorized by the IOC cannot reasonably be viewed as furthering any Canadian government policy or program.

- Remember if in exam, if Adams gives a law by the government of Canada
  - then we know it applies by looking right to s 362. Will result in a one sentence answer. "Under s 32 it is clear that the *Charter* applies to the enactment of the Parliament of Canada."
  - When more complicated: Does the *Charter* apply?
    - Ask, is it controlled by govt, governmental in nature, govt program implemented?
    - If not, still state "in theory if it does.. here's the rest of my analysis"

Charter Application Overview

Entity can be subject to Charter if:

- 1) **controlled by government** –
  - Includes certain community colleges ex: nait (*Douglas/Kwantlen, Lavigne*) and public transport (*Greater Van)* but not autonomous university (*McKinney*) or hospitals (*Stoffman*)
  - all of its activities will be subject to Charter
  - not a public purpose test (*McKinney)*
  - funding is not enough if the entity operates autonomously (*McKinney)*
  - looking for routine and regular control (*Harrison v UBC; Stoffman; Lavigne)*
    - is the entity simply "part of the fabric of govt"? (*Lavigne)*
    - "substantial control over its day-to-day-activities (*Greater Van)*

- Unclear whether schools or school boards are controlled by govt for purposes of s 32. Similarly, unclear whether Crown corporations (CBC, Canada Post etc.) are subject). Recall that in *Lavigne*, the SCC disapproved of the attempt to distinguish b/w the public _ commercial/private transactions of govt.

- 2) **sufficiently governmental in nature**
  - Includes municipalities (*Godbout v. Longueuil*)
  - all of its activities will be subject to Charter
  - Look at the activities the entity is performing (duck test)
    - Not a public function test
    - Do they perform a democratic function?
    - Do they make laws?
    - Do they control citizens that fall within their jurisdiction?
    - Do they derive their powers from the provincial legislature?
  - Interpret s 32 in a purposive manner (*Hunter*)
- 3) entity is **implementing a government program** (*Eldridge*)
  - If there is a direct and precisely defined connection between a specific government policy and the entity's conduct
  - Look at the nature of the activity itself (not the entity administering it)
  - Only activities which are considered governmental in nature will be subject to the Charter
    - So, applies to a university's application of freedom of expression policy bc there is a connection b/w govt policy and uni activity but not the entire school (*AB Pro-life v UofA*)
  - Why does it extend to programs? Do not want to incentivize govt's to evade Charter responsibilities.
- 4) Exercising a **Statutory Power of Compulsion**
  - Where a govt has set up usually an administrative entity (HR commission, milk board, etc.) – not controlled by government, not governmental in nature but it is exercising some power over individuals either to compel them to provide testimony or control them in an arbitration process
  - Not talking about courts – just administrative entities.
  - That power of compulsion is subject to the Charter *(Eldridge*; *Slaight Communications v Davidson)*
- Charter also applies to legislative omissions (*Vriend*) *E*xtra-territorial application
  - Consider whether conduct at issue is that of a CAD state actor and if so, is there an exception to the principle of sovereignty that would justify applying the Charter. Exceptions: violation of international human rights OR there is consent of the foreign state (*Hape*)
  - Comity cannot be used to justify Canadian participation in activities of a foreign state that are contrary to Canada's international obligations (*Khadr* 2008)
  - Charter does not apply to foreign detainees (*Amnesty*)

SECTION 1: REASONABLE LIMITS

- 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.
  - 1) That the Charter guarantees rights and freedoms;
  - 2) Subject only to such reasonable limits;
  - 3) **Prescribed by law;**
  - 4) Demonstrably **justified** in a free and democratic society.

History of section 1

- Victoria Charter, 1971: Nothing in this Part shall be construed as preventing such limitations on the exercise of the fundamental freedoms as are reasonably justifiable in a democratic society in the interests of public safety, order, health or morals, of national security, or of the rights and freedoms of others, whether imposed by the

Parliament of Canada or the Legislature of a Province, within the limits of their respective legislative powers, or by the construction or application of any law.
    - Criticism → all about limits
    - What if something is omitted?
- 1980 Draft: The Canadian Charter of Rights and Freedoms recognizes the following rights and freedoms subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government.
    - Recognizing rights
    - Criticism → generally accepted is vague
    - Minority and you're against the general exception of majority that have no protection
        - Reimposing majoritarianism, oppressive
    - Just recognizes it and doesn't do anything to protect them
    - Limiting to parliamentary systems of government
        - Parliamentary system of governments abuse rights sometimes, isn't that the purpose of the Charter to stop that?
- Section 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
    - Guaranteeing rights
    - Demonstrably justified
    - Prescribed by law
        - Limit rights through law not through actions
    - Subject only
        - Limiting the limits, i.e., strengthening the rights
    - Stronger protection of rights by narrowing of the reasonable limits

Prescribed by Law

- 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
- Two related values advanced by this requirement: accessibility + intelligibility to the citizen
    - Also ensures accountability for any restriction on a constitutional right
    - To have otherwise, would allow arbitrary discretion (*Therens*)
- The prescribed by law requirement has been interpreted to entail a two-step analysis (*Greater Van*):
    - **Is the limit on the right authorized by "law"?**
        - Meets this if expressly provided for by statute or regulation or results by necessary implication from the terms of the statute or regulation (*Therens*)
        - Also extends to municipal by-laws, rules of a regulatory body…because they are binding rules of general application and authorized by statute (*Greater Van*)
    - **Does the law have the required degree of precision and accessibility required?**
        - "absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work" (*Irwin Toy*)
- Must not take 'prescribed by law' too far
    - If a high degree of precision is demanded, Courts are effectively restricting legislatures from achieving anything
    - There must be some discretion to use words that have a range of meanings and not run afoul of precision of law
    - Courts have tended to lean on flexibility rather than precision

Ratio	• 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" • Flexible approach to prescribed by law
Facts	• Translink and BC Transit had advertisement policies that prohibited political, but not commercial, advertising on buses. • The Canadian Federation of Students (CFS) were prohibited from advertising on B.C. buses to raise awareness about an upcoming provincial election. • CFS challenged the policies – violated the freedom of expression protection in s 2(b) •
Issue	• Are transit corporations operating public transportation systems actors under the Charter? •
Result	• yes, bound by the Charter. Policy violates s 2b

Reason	To satisfy the prescribed by law
	• 1) Must first determine whether the policies come within the meaning of the word "law" in s1 of the Charter
	  ○ To do so, ask as the government entity authorized to enact the impugned policies and are the policies binding rules of general application? If so, policies law for the purposes of s 1
	• 2) Must determine whether the policies are sufficiently precise and accessible
	
	• Prescribed by law requirement safeguards the public against arbitrary state limits on Charter rights (*Therens*)
	  ○ Courts take a liberal approach to the precision requirement
	  ○ Narrow interpretation to prescribed by law would lead to excessive rigidity in a parliamentary and legislative system that relies heavily on a framework legislation and delegations of broad discretionary powers
	• [58] Often times even though government policies emanate from a government entity rather than from Parliament or legislature, they are similar in both form and substance to statutes, regulations and other delegated legislation
	  ○ The question that arises is does a given policy or rule emanating from a government entity satisfy the "prescribed by law" requirement?
	  ▪ Distinguish between rules that are legislative in nature and rules that are administrative in nature (which does not fall within the definition because it is not intended to be a legal basis for govt action)
	  ▪ To be legislative in nature, policy must establish a norm or standard of general application that has been enacted by a government entity pursuant to a rule-making authority
	  ○ **[65] 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".**
	
	Application to the case:
	• The rule you cannot have political ads is prescribed by law as it was intended to be a general policy applied to all equally. There is some discretion to decide what is political, but it is not so unknowable as a policy to be beyond prescribed by law.

R v Lucas 1998 SCC

- Sections may not be perfectly drafted and cannot always be measured with precision
- Imprecision may exist, but inherent vagueness can be considered under the "minimal impairment" test.
    - 36 While the sections in question may not be perfectly drafted it must be remembered that words and **phrases cannot always be measured with scientific precision**. This concept was ably captured by Gonthier J. in Nova Scotia Pharmaceutical Society, supra, at p. 639:
    - 37 It follows that merely because ss. 298 to 300 may **be subjected to various shading of interpretation does not mean they are unacceptably vague.**
    - 38 In considering this issue, the trial judge found that the definition of defamatory libel in s. 298 is set out in words of common usage capable of interpretation. In his view the section provides "an intelligible standard according to which the judiciary must do its work", pursuant to the test laid out in Irwin Toy, supra. He found that it defines defamatory libel in a manner that provides an intelligible standard of conduct. In my view, the trial judge applied the proper tests and arrived at the correct result.

Justification (*Oakes)*

- Factors relevant to determining whether a violative law is reasonable and demonstrably justified (*RJR MacDonald)*:
    - Oakes' test must be applied flexibly having regard to the factual + social context of each case → contextual approach)
    - Important to extend dereference to governments in the rights kinds of cases when there are competing claims or there is an inexact science when drawing the line
        - But neither context nor deference alleviates the burdens of governments to justify the rights infringement under s1
    - Standard of proof required is on a balance of probabilities
- **1) Pressing and Substantial Objective**
    - Is the limit advancing a pressing and substantial objective?
        - The LIMIT itself must do so; Cannot ride on the coat tails of the entire Act. Although sometimes courts look to the entire Act
    - Look to Hansard, preambles, studies, polls, research, read the provision in context etc.
    - Low threshold
        - See *Big M Drug Mart*, [1985] 1 S.C.R. 295
            - Imposing a religious standard on all. Purpose was rights infringing in itself
    - But in almost all other cases, the govt has able to get over this hurdle
- **2) Rational Connection**
    - One sentence will do
    - Rational connection between the infringement and the purpose to be achieved
        - Does not have to be a perfect connection. Just "rational".
    - Most laws and infringing provisions pass this stage.
    - See *Benner v. Canada*, [1997] 1 S.C.R. 358
        - Did not meet threshold
        - Irrational government restriction. Rule in citizenship – rules were different depending on whether grandmother or grandfather were a Canadian citizen.
        - Court says security concerns are important, but it is irrational to treat different types of people differently when no connection b/w security concerns of the two groups.
- **3) Minimal Impairment**
    - From "as little as possible" (*Oakes)* to "as little as reasonably possible" (*Edward Books)* to one granting the government a "margin of appreciation" to decide how to meet their objective (*Irwin Toy)*

        - "the means, even if rationally connected to the objective in this first sense, should impair "as **little as possible**" the right or freedom in question" [*Oakes,* para 70]
            - That language did not always work → see: *Irwin* and ban of advertising targeting 13-year-olds. We could easily imagine a less restrictive measure just bump down the age by a day, a year, or six months.
    - Judicial deference (*Irwin*)
        - Deference to legislative choice is appropriate in cases of government balancing interests of competing groups rather than singular antagonist (in the latter case, a more stringent application of s1 is warranted)
        - Greater deference to legislative choice is appropriate in a variety of circumstances: where the govt has sought to balance competing rights, to protect a socially vulnerable group, to balance the interests of various social groups competing for scarce resources, or to address conflicting social science evidence as to the cause of a social problem.
            - ex: pandemic, limiting people's rights to gather, what to wear on their face, way they worship in the way they might like – but have the govt done so in a way that protects other important objectives?
    - Requires considering alternatives – what other measures could have taken place to achieve the objectives but would have been less infringing?
        - Is there evidence possible to support the govt' restriction? Have they based this on some kind of evidence or expertise?
        - So long as the expertise gave them a range of responsibilities and they keep within that range, often the court will say that is compliant with the gov't obligation under section 1 because exact science and line drawing is not possible
            - Ex: why do we make drivers licence 16? Not 15 and 360 days or 16 and 200 days? Consider a teen who drove up driving farm equipment, very much likely better equipped than some adults
        - S 1 judicial review is not about substituting judicial preferences. The point is court's reviewing where the govt has interfered with rights they have done so in a reasonable and justifiable manner.
    - Sometimes governments get it wrong, and decisions are considered "overbroad" – capturing rights more than necessary to achieve their objectives
        - Most often, things fail here.
- **4) Proportionate Effects**
    - Weigh the actual good that flows from the statutory objectives against the harm to the individuals whose rights are being infringed
        - The more severe the negative effects of a measure, the more important the objective must be.
        - The actual harm weighed against the actual benefit – must be specific, not abstract
    - See *Dagenais*: "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…"
        - Compare the actual impact of the law on the affected right, and the actual contribution the law makes to its pressing and substantial purpose (*Edmonton Journal v Alberta*) → this informed the *Deagenais* modification to the test

R v Oakes 1986 SCC

Ratio	• Limits on the Charter are exceptions • "Demonstrably justified" by the party who seeks to limit rights (predominantly the Crown)

	• Outlines four steps: pressing and substantial objective, rational connection, minimal impairment, proportionate effects
Facts	• Section 8 of the Narcotic Control Act created a rebuttable presumption that intent to traffic would be presumed once possession was established unless accused established the absence of such an intention • Violated s 11(d)
Issue	• Was s8 justified under s 1?
Result	• Yes

Reason	• S1 has two functions
	  ○ It constitutionally guarantees the rights and freedoms set out in the provisions which follow
	  ○ It states explicitly the exclusive justificatory criteria against which limitations on those rights and freedoms must be measured
	• Rights and freedoms guaranteed by the Charter are not absolute
	  ○ It may become necessary to limit rights and freedoms where their exercise would undermine the realization of collective goals of fundamental importance.
	  ○ so s1 provides limits on the rights + freedoms
	• Onus of providing that a limit on a right guaranteed by the charter is reasonable and demonstrably justified in a free + democratic society rests upon the party seeking to uphold the limitation
	• Limits on the Charter are exceptions unless party invoking s1 can bring itself within the exceptional criteria to justify their being limited
	• Standard of proof is balance of probabilities
	• Two central criteria to show justified limit:
	  ○ 1. Objective which the measures responsible for a limit on the Charter must be of "sufficient importance to warrant overriding a constitutionally protected right or freedom" (*R v Big M Drug Mart*)
	  ▪ The standard is high – only those objectives important enough to limit a right and freedom
	  ○ 2. Proportionality Test – party invoking s 1 must show that the means chosen are reasonable and demonstrably justified (balance interests of society with those of individuals or groups) m- 3 components to this
	  ▪ 2.a. Rational Connection – the limitation has to be rationally connected to the P&S objective
	  ○ Not a perfect correspondence, but rational
	  ▪ 2.b. Minimal Impairment – the measure should impair as "little as possible"
	  ▪ 2.c. Proportionate Effects – must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom and the objective which has been identified as of "sufficient importance"
	  ○ The more severe the negative effects of a measure, the more important the objective must be.
	  ○ The actual harm weighed against the actual benefit – must be specific, not abstract
	  ○ Even if an objective is of sufficient important and the first two elements of the proportionality test are satisfied, it is still possible that the measure will not be justified by the purposes it is intended to serve because of the severity of the deleterious effects of a measure on individuals or groups

	○ The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society

After Oakes - Context + deference

- Two developments after Oakes
  - First is the emergence of the contextual approach to the assessment of limits under s 1
    - Courts have to assess the value or significance of the right and its restriction in their context rather than in the abstract
    - Courts have to balance the value of what the restriction achieves in practice against its actual cost to the freedom of expression values
      - SCC has held that certain forms of expression such as hate promotion are less valuable
  - Second tend is the court's willingness to defer in certain circumstances to the legislature's judgement about the need for, and effectiveness of, a particular limit on a Charter right
    - Deference is more appropriate in some contexts than in others

Edmonton Journal v Alberta 1989 SCC

Ratio	• The Charter should be applied to individual cases using a contextual rather than an abstract approach. ○ Right of freedom must be assessed in context rather than in the abstract and that its purpose must be ascertained in context ○ Once done, the right or freedom must then be given a generous interpretation aimed at fulfilling that purpose + securing for the individual the full benefit of the guarantee • Under the 4th step of the *Oakes* test, Courts now compare the actual impact of the law on the affected right (for example, on the freedom of expression interests) with the actual contribution the law makes to its pressing & substantial purpose
Facts	• Journal challenged s. 30(1) of the *Alberta Judicature Act*, which limited the publication court proceedings in matrimonial disputes, claiming that the provision was contrary to s. 2(b) of the Charter.
Issue	• Can s. 30(1) be justified as a reasonable limit under s.1? How to approach justification issue?
Result	• 4 justices said the provision was not a reasonable limit. Wilson wrote a concurring opinion, but her approach was later adopted by the entire court.
Reason	There are two possible approaches to the Charter's application – abstract or contextual • Necessary under both approach to ascertain underlying value which the right alleged to be violated was designed to protect ○ This is achieved through a purposive interpretation of Charter rights ○ Also necessary to ascertain the legislative objective sought to be advanced by the impugned legislation ○ This is done by ascertaining the intention of the legislator in enacting the particular piece of legislation ○ When the underlying value and legislative objective have been identified and the legislative objective cannot be achieved without some infringement of the right, then we have to determine if the impugned legislation constitutes a reasonable limit on the right which can be demonstrably justified in a free and democratic society

	• A **contextual approach recognizes that a particular right or freedom may have a different value depending on the context** and brings 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.
	  ○ Freedom of speech is a category but within that category there is an immense awry of behaviours (political speech – possibly state it stands at the core of freedom of expression, whereas the right to ridicule a child – expression but not as important)
	  ○ This approach is more sensitive to the reality of the dilemma posed by the particular facts of a case and is more conducive to finding a fair and just compromise between two competing values under s. 1.
	• The importance of a Charter's right or freedom, therefore, must be assessed in context rather than in the abstract and its purpose must also be ascertained in context.
	• Abstract vs contextual:
	  ○ Abstract analysis is broad and makes it unreasonable to understand how it could or should be limited
	  ○ Contextual analysis is grounded in the facts and analyzes how each party's rights in that circumstance are infringed
	• Limitations:
	  ○ Difficult to establish precedence
	  ○ The more contextual the analysis, the more important the framing of the argument becomes
	• May lead to prioritization of rights leads away from Dickson CJ's vision of broad rights protection
	•

- After Edmonton Journal, some courts viewed the contextual approach as requiring greater flexibility in the application of each of the *Oakes* steps and greater deference to legislative judgment
  - The result has been a more deferential reasonableness-based approach to the various standard in the s1 analysis in certain contexts

Irwin Toy v Quebec

Ratio	• High-water mark of judicial deference • Deference to legislative choice is appropriate in cases of government balancing interests of competing groups rather than singular antagonist (in the latter case, a more stringent application of s1 is warranted) ○ Greater deference to legislative choice is appropriate in a variety of circumstances: where the govt has sought to balance competing rights, to protect a socially vulnerable group, to balance the interests of various social groups competing for scarce resources, or to address conflicting social science evidence as to the cause of a social problem.
Facts	• This case involved a challenge to Quebec laws regulating children's advertising on the basis of s 2(b). 'no person may make use of commercial advertising directed at persons under 13 years of age'
Issue	• Can QC prohibit advertising targeting viewers under 13 years? Infringes s 2b (expression)
Result	• Yes, limited, but justified under s 1
Reason	• If the legislature has made a reasonable assessment as to where the line is most properly drawn between two competing claims of different groups in the community, **it is not for the court to second guess** that assessment. ▪ If the court intervened it would be merely placing one estimate for another

	• Legislature mediating between the claim of competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how that balance is best struck
	  ○ When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources
	• In other cases, however, **rather than mediating between different groups, the government is best characterized as the <u>singular antagonist</u> of the individual** whose right has been infringed.
	• So,
	  ○ When mediating b/w competing groups the courts must balance competing claims
	  ○ When there is a singular antagonist (the govt), the courts can assess w/ some certainty whether the least drastic means for achieving the purpose has been chosen

Dollars v Rights Debate

- Could money justify the limitation on rights? (5 cases were not assigned)
- In response to this excuse, the Court has moved from 'never', to "only during remedies" to 'maybe', to "sometimes, it depends on the context"

Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177:

- **Issues**: Could money justify the limitation on rights? Whether or not a full hearing had to be supplied to individuals seeking refugee status?
- **Arguments**:
  - Govt said it would be too expensive to attach full administrative immigration hearings to all potential applicants. Too many want to come into Canada.
  - Against using money as s1 justification:
    - Floodgate argument: If dollars can limit rights in this context, can't they be used in all contexts? Right to vote is a great expense (polling stations)
    - When we have an interpretative problem – turn to broader principles of the Charter
      - Those principles are to approach the constitution generously and purposefully (*hunter v Southam*). What are those purposes? To protect the rights of individuals against government interference.
      - SO, if use money – it would amount to a less protected charter.
- Held: – s. 1 argument cannot be based on budgetary interests
  - "Certainly, the guarantees of the Charter would be illusory if they could be ignored because it was administratively convenient to do so. No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice…" (Wilson, J.)

Schacter v. Canada, [1992] 2 S.C.R. 679:

- budgetary interests are relevant when deciding appropriate remedy
- "This Court has held, and rightly so, that budgetary considerations cannot be used to justify a violation under s. 1. <u>However, such considerations are clearly relevant once a violation which does not survive section 1 has been established</u>, s. 52 is determined to have been engaged and the Court turns its attention to what action should be taken thereunder." (Lamer, C.J.)
  - Budgetary considerations cannot be used to justify a violation of s1
  - But budget might be a factor in deciding what the right remedy is
    - Courts will be mindful of the financial consequences of some kinds of remedies

Ref re Remuneration of Judges of the Provincial Court of PEI, [1997] 3 S.C.R. 3:

- if the sole purpose of the measure is financial, it cannot be justified
- "a measure whose

- sole purpose is financial, and which infringes Charter rights, can never be justified under s. 1." (Lamer, C.J.)
    - **Provides a bit of wiggle room**. Can add financial purpose to another purpose (money is never their sole purpose – always have another objective)

***Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504:**

- money cannot normally be invoked as an objective for s 1
- "Budgetary considerations in and of themselves cannot normally be invoked as a free-standing and substantial objective for the purposes of s. 1 of the Charter." (Gonthier, J.)
    - Suggests there could be abnormal situations where s1 could be justified based on budgetary expenses

***Figueroa v. Canada (Attorney General)*, [2003] 1 S.C.R. 912**

- Dollars and cents considerations can justify limitation of s. 1
- "I do not wish to rule out the possibility that there might be instances in which the potential impact upon the public purse is of sufficient magnitude to justify limiting the rights of individual citizens." (Iacobucci, J.)

TWEN: *Newfoundland v NAPE* 2004 SCC

Ratio	• Courts will continue to examine with skepticism legislators' attempts to justify infringements of Charter rights on the basis of budgetary constraints.
	• BUT sometimes budgetary concerns will be enough to justify an infringement
	  ○ A financial emergency inherently involves balancing claims and priorities (hospital v school v policing etc.)
	  ○ Built into the *Oakes* test is a healthy respect for legislative choice in areas of economic and social policy [deference]

Facts	• The provincial gov't in NF signed a pay equity agreement in 1988 that would have resulted in pay increases for female healthcare workers who had been earning less than their male counterparts. • Before implementation, the NF gov't postponed for 3 years for budgetary reasons (saving gov't $24 million).

Class	Arguments
	• First, does the Charter apply to that legislation?
	  ○ Yes, s 32 it is legislation
	• That Charter violation occurred:
	  ○ S 15 violation. Decision to delay the payment of a pay equity agreement of money to two women
	• Argument against
	  ○ Justified – budgetary crisis
	  ○ Step 1: pressing + substantial objective
	  ▪ In the middle of a fiscal crisis – using the money to keep healthcare system running, children in schools, etc.
	  ▪ Objective met
	  ○ Step 2: is it rationally connected?
	  ▪ Means: delaying implementation of the policy for 3 years. Objective: functioning govt.
	  ▪ Rational: objective is to save money and means delay expense.
	  ▪ Definitely meet this standard
	  ○ Step 3: is it of minimal impairment?
	  ▪ "little as possible" does not work here. A less restrictive infringement here would be to pay some or lessen the delay (say to 2 years).

	▪ Instead, are we balancing competing objectives? ○ Govt would say yes – spending it on other important social objectives (school + hospitals etc.) ○ Margin of appreciation in which the govt is allowed to operate in minimally impairing rights. SCC says yes, they've delayed the payment to achieve other priorities. ○ Step 4: Ultimate proportionality ▪ Weighing pros against cons. ▪ Did not delay forever. Chose the shortest amount of time reasonable. •
Issue	•
Result	• The SCC found the legislation violated s. 15 of the Charter – women are being asked to deal with the consequences of government deficit in a way that is different from men.
Reason	• It is true … "[**b]udgetary considerations <u>in and of themselves cannot normally be invoked</u> as a free-standing pressing and substantial objective for the purposes of s. 1 of the Charter"….** The spring of 1991 was not a "normal" time in the finances of the provincial government. At some point, a financial crisis can attain a dimension that elected governments must be accorded significant scope to take remedial measures, even if the measures taken have an adverse effect on a Charter right, subject, of course, to the measures being proportional both to the fiscal crisis and to their impact on the affected Charter interests. [64] • [C]ourts **will continue to look with strong scepticism at attempts to justify infringements of Charter rights on the basis of budgetary constraints**. To do otherwise would devalue the Charter because there are always budgetary constraints and there are always other pressing government priorities. **Nevertheless, 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…. The weighing exercise has as much to do with social values as it has to do with dollars. • 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. The budget is simply a forum for juggling spending priorities of all types. 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.**

SECTION 33

CB: 802-810:

- (1) **Parliament or the legislature of a province may expressly declare** in an Act of Parliament or of the legislature, as the case may be, **that the Act or a provision thereof shall operate notwithstanding** a provision included in section 2 or sections 7 to 15 of this Charter.
    - Expressly declared: cannot hide they want to operate outside the bounds of the Charter protections
    - Does not apply to whole Charter. Cannot override s 3 – 6 then (voting, maximum term length – 5 years), annual sitting of legislative bodies, and the ability of citizens to enter, remain, and leave Canada.
    - Also does not apply to 16-22 (official languages rights) and 23 (minority language educational rights)

- (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
- (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
    - "sunset clause" – deliberate attempt to inject the democratic process. give the legislatures and citizens chance to see if they want to continue with this infringement.
        - Time period is deliberate – if govt invokes s 33 before they get to re-enact it an election must take place (as per the constitution). Kept the issue at the forefront of an election.
- (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).
- (5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Using the override power

Ford v Quebec 1988 SCC

Ratio	• Only case in which the SCC has reviewed the override power • 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(s) to be overridden – but they don't have to • s. 33 does not allow for a retroactive use, so laws can only go forwards • Courts only role is to assess adherence to the form of s 33 (meeting formal requirements) – no substantive analysis
Facts	• In protest against a significant constitutional amendment to which QC had not agreed, QC attached a "Standard override clause" in an omnibus amendment act. This insulated all existing provincial legislation from the Charter. • One Act concerned the provision of the QC Charter of French Language, which required public signs to only be in French. This was challenged under the Charter (freedom of expression) but… Quebec again attached the notwithstanding clause. • Essential contention against the validity of the "override clause" was that it did not sufficiently specify the guaranteed rights or freedoms it intended to override (was just a blanket clause)
Issue	• Is QC's omnibus use of the override valid? Is a "standard override provision" constitutional?
Result	• Valid

Reason	• Valid except for retroactivity part
	  ○ Valid as s 33 is a formal requirement
	  ▪ They were specific enough because they said the exact words of s 33. They met the formal requirement.
	  ○ But to apply retroactively when it interferes with other constitutional principles (e.g., presumption of innocence)

Class	Arguments again QC doing this:
	• Not valid because the provision does not sufficiently specify the guaranteed rights or freedoms which the legislation intended to override
	  ○ Failed to "expressly declare" by using boiler plate
	  ▪ Rationale for including specifics: draws attention of public to allow them to understand the seriousness of what is proposed
	• Not healthy part of the constitutional democratic architecture with a blanket approach
	  ○ Contrary to the spirit of s 33
	  ○ Possibly contrary to *Hunter* by allowing this widespread limitation on rights by govt that can eradicate huge section of the Charter from the law of QC

Janet Hiebert: The Notwithstanding clause – Why Non-use Does Not Necessarily Equate with Abiding by Judicial Norms (807-810)

- 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
    - Political Protest of the 1982 Constitutional Changes
    - Quebec National Assembly's invocation of the notwithstanding clause, within 3 months of the enactment of the Charter, in a retroactive as well as omnibus fashion to repeal and re-enact all legislation passed before the Charter was enacted, as an act of political protest
- 2. An exercise of risk aversion in the face of constitutional uncertainty about how protected rights would be interpreted
    - Pre-emptive uses of notwithstanding clause
    - In early days of Charter, legislative decision making had to anticipate how the Supreme Court would interpret equality and to predict when a distinction with respect to social policy benefits constitutes constitutionally invalid discrimination under s15
    - Quebec invoked notwithstanding clause 5 times in a pre-emptive manner with respect to pension eligibility
    - Saskatchewan invoked the notwithstanding clause in 1986 with respect to back-to-work legislation for the public sector after a series of rotating strikes
- 3. An exercise in risk aversion as a result of uncertainty about how s.1 arguments would be interpreted
    - Notwithstanding clause used as a form of insurance given uncertainty of the Court's interpretation of the government's s1 arguments to justify restrictions on rights
    - Over time, the popularity of the Charter and broad public disdain for the notwithstanding clause have discouraged reliance on the notwithstanding clause as a means for dealing with potential consequences of Charter litigation
    - Invoked 6 times in Quebec with respect to education policy that offered Catholic or Protestant moral and religious instruction in public schools
    - Quebec insulated legislation from the kinds of challenges that occurred in other provinces as to whether the denominational character of Canadian public education violates Charter guarantees of religious freedom or equality in a manner that not justified under s1
- 4. Expression of political disagreement with Supreme Court jurisprudence
    - In AB the legislature passed the Marriage Amendment Act which invoked the notwithstanding clause to signal that the Alberta legislature did not approve of altering the definition of marriage to comply with equality
    - Symbolic gesture since Alberta lacks jurisdiction over marriage
- Potential use of the notwithstanding clause:
    - Allow parliament to revise legislation following a suspended judicial declaration of invalidity
        - 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

        - When unable to legislate within the timeframe, governments have gone to the Court to request additional time to pass the revised legislation

- Court may be unwilling to grant extensions to remedy Charter invalidities
    - 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.

Other Perspectives on S 33

- Section 33 … was included in the Charter to ensure that the state could, for economic or social reasons, or because other rights were found in the circumstances to be more important, choose to override a Charter-protected right….[T]he rights enumerated in the Charter are not more important than other human rights….[W]here the likely violation of a human right stems from the operation of the economic and social systems, then the best instruments for enforcing these rights are the legislative, executive, and administrative arms of government. (Hon. Allen E. Blakeny)
    - How can s 33 protect rights?
        - Ex: say the court states public health care infringes on the security of the person who are prevented from private care or should get faster care.
    - Blakeny says governments can use s 33 if court ever said something was contrary to the Charter → allows courts to correct decisions
- Section 33 is "that major fatal flaw of 1981, which reduces your individual rights and mine." Any constitution "that does not protect the inalienable and imprescriptible individual rights of individual Canadians is not worth the paper it is written on." (Prime Minister Brian Mulroney, House of Commons Debates, 6 April 1989)
    - Takes classic position - not a fan of notwithstanding clause
    - Fatal flaw. Reduces your rights. Not worth the paper it's printed on
- Section 33 provides "the unique structure and genius of the Charter in promoting democratic dialogue about the treatment of rights and freedoms…. The override provides a complex and wise structure for dialogue between courts and legislatures which, unfortunately, is not well enough understood by politicians or the public." (Kent Roach, The Supreme Court on Trial: Judicial Activism or Democratic Dialogue (Toronto: Irwin, 2001) at 8, 193.)
    - In the US, all the power is vested in a single court. Nobody can overturn decision. At other extreme, in the UK the legislature may get it wrong (often does) and there is no court protection (there is but more limited)
    - Notwithstanding clause is part of that dialogue that puts legislators and courts in Canada in a conversation about rights protection
    - Balances judicial supremacy and parliamentary supremacy by subjecting them to each other's power
- Critics:
    - If s 33 is so great, why has it not been used more?
        - Political cost (never used at federal level)
    - But culture seems to have shifted
        - In QC – state neutrality v religious domination
- Unlike most Canadians, Mr. Harper has said the Charter of Rights has serious flaws. His justice critic has said we should use the notwithstanding clause to take away the rights of Canadians. They criticize our courts for enforcing Charter rights. I think that's wrong … I think the Charter defines Canada… the first act of a new Liberal government is going to be to strengthen the Charter, and we're going to do that by removing by Constitutional means the possibility for the federal government to use the notwithstanding clause, because quite simply, I

think governance says that the courts shouldn't be overturned by politicians. (Prime Minister Paul Martin, Leader's Debate, January 9, 2006)
    - Harper did not go through with the proposal

Future Questions

- Pre-emptive use
    - There was a theory that govt should only use clause AFTER courts have made a judgment → would be a response to a decision
    - But if they pre-emptively use it then it is not a dialogue
        - Still allowed by the courts as the text does not restrict it (*Ford*)
- Relationship with s. 28
    - "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons".
        - Unlike section 15, the equality rights section of the Charter, the gender equality requirement only protects rights guaranteed in the Charter, not equality rights generally.
        - Women were worried about s 33 overriding s 15 they were also concerned after the Bill of Rights decisions (pregnancy case – discrimination based on "nature")
    - Does this clause trump s 33 or vice versa?
        - How will this play out with Bill 21 case?
            - QC law disproportionately impacts women wearing hijabs
- Individual remedy and s. 24
    - Argument about Bill 21 that maybe s 33 can maintain the operation of an unconstitutional law but it has to work in conjunction with s 24. S 24 continues to allow an individual to pursue an individual rights claimed against the govt for unconstitutional laws, maybe damages maybe an individual remedy
        - Court would not be able to declare the law of no force or effect (bc s 33 is invoked) but s 33 may have to work with s 24
- Can judges still determine constitutionality of legislation invoking s. 33?
    - Two theories
        - 1. When govt uses s 33 it is a total protection. The court should not and cannot evaluate its constitutionality for any of the provisions listed in s33
        - 2. Still allows court to determine the constitutionality of the legislation – declare whether it infringes but s 33 just removes the remedy declaring the law of no force and effect.
            - They should: Courts hear a different story than legislatures, which is valuable to the democratic dialogue. Useful also when sunset clause appears – good for the public to know what the courts say and whether it interferes then make up their minds at the ballot box.
- Using to expand time of suspended declaration

CHARTER REMEDIES

- Anytime it is asked what the court will do, it raises the question about the relationship b/w the courts, legislators, and the power between the two branches. Remedies captures this.

- Where there is a right, there must be a remedy (ubi jus, ibi remedium)

- Section 24 of the *Charter*. (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.
    - Broadly flexible remedial provision

- The government has *acted* in an way that violates the Charter
- Refers to an individual complaining about unconstitutional behaviour by the state. That individual may seek an injunction or damages.
  - So unlike s 52 can only be invoked by a party alleging a violation of *that* party's own constitutional rights

- Section 52 of the *Constitution*. (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.
  - Dominant remedial provision
  - Enables courts to strike down a *law* (declare it unconstitutional as contrary to the charter)

Kent Roach Constitutional Remedies In Canada (1392-1393)

- The legitimate purposes of constitutional remedies include compensation and correction of the harms that constitutional violations have caused to individuals, the vindication of the values of the Constitution and ensuring compliance with the constitution in the future for the benefit of society
- Main constraints on constitutional remedies are
  - The need to respect the respective roles of the courts, executive and the legislature when providing remedies
  - The need to be fair to all affected parties
  - The need to recognize an open-ended category of compelling social interest that would be harmed by a particular remedy or an immediate or fully retroactive remedy
  - Principles of proportionality are also relevant to remedial decision-making
- Remedial decision making is inevitably contextual
- Judges are only justified and competent to order remedies to the extent that they repair harms caused by a government's violation
- Sometimes judges fashion remedies to achieve compliance with the Constitution in the future

Types of Remedy

- Know from federalism term:
  - Inapplicability – IJI
    - Building a castle wall around a federal undertaking (airport)
  - Declaration of invalidity – striking down
    - *Ultra vires*
  - Severance – strike down the offending provision only
    - Take the unconstitutional chunk and remove it
  - Paramountcy
    - Inoperable
    - The law exists but just not operating while there is a conflict
- **Reading in**
  - add text to legislation (e.g., *Vriend* read in sexual orientation to AB Bill of Rights)
    - Courts are careful not to overstep into judicial legislation
- **Reading dow**n
  - Interpretive mechanism to read the meaning of a word narrowly to ensure the statute remains constitutional
- Declaration of **Invalidity** (s 52)
  - Section 52(1) provides that laws inconsistent with the Constitution are of no force or effect to the extent of the inconsistency (*Ontario v G)*

        - That a law is "of no force or effect" only "to the extent of the inconsistency" with the Constitution means that a court faced with a constitutional challenge to a law must determine to what extent it is unconstitutional and declare it to be so.
    - Although it states the legal result where there is conflict between a law and the Constitution, s. 52(1) does not explicitly provide courts with a grant of remedial jurisdiction.
- **Suspensions** of Declarations of Invalidity
    - It is not unconstitutional in a certain period but is later

- Section 24(1) tailored remedies
    - **Damages**
        - No law to strike down as it is constitutional but actions under the law were unconstitutional, therefore can sue for damages
    - **Injunction**
        - Court should stop the unconstitutional behaviour

Schacter v Canada 1992 SCC

Ratio	• Remedy test

Facts	• There was a benefit scheme for parental leave
	  ○ Parents who adopted children granted 15 weeks for parental leave
	  ○ Natural birth father not authorized to split maternity leave with mother
	• Discrimination based on gender s. 15
	• Not saved by s. 1

Issue	• What is the appropriate remedy?

Reason	1) Define the extent of the inconsistency
	• Needs to be specific
	• Where is the constitutional problem? Where in the statute? What is the thing the statute does that interferes with the Charter and is not saved by section 1?
	• The extent of the inconsistency should be defined:
	  ○ A. broadly where the legislation in question fails the first branch of the Oakes test in that its purpose is held not to be sufficiently pressing or substantial to justify infringing a Charter right or, indeed, if the purpose is itself held to be unconstitutional -- perhaps the legislation in its entirety;
	  ○ B. more narrowly where the purpose is held to be sufficiently pressing and substantial, but the legislation fails the first element of the proportionality branch of the Oakes test in that the means used to achieve that purpose are held not to be rationally connected to it -- generally limited to the particular portion which fails the rational connection test; or,
	  ○ C. flexibly where the legislation fails the second or third element of the proportionality branch of the Oakes test
	
	2) Determine the appropriate remedy:
	• severance? Reading in? Read down? Struck down in its entirety? Temporarily suspend?
	• Consider:
	  ○ Remedial precision
	  ▪ Take a cautious and conservative approach (limit interference – likely means no reading in (exam – Adam said students often make this mistake)
	  ▪ Do not do more than you should and be careful of what you do

- Why? Because invading domain of the legislature when making a remedy
  - Must only change unconstitutional elements of the legislation, not other elements of the Act
  - Do not make a remedy unless confident the legislature would prefer that fix as opposed to no legislation at all
    - This means do not add groups to a benefit scheme just because you think it should have it (see below)
- Budgetary implications
  - What is that going to cost the gov't if we choose one remedy over the other?
    - Schachter: Statistically higher rates of birth fathers = greater number weeks paid EI
- Relative Size of the added groups
  - Implications weigh against the remedy
  - Schachter: Adding natural birth parents to adoptive parents group adding is much larger than group there
    - Changes the legislative objective
    - Where the size is much larger, it is reasonable to infer that
      - the legislature did not intend to include them
      - the legislature would rather cancel the program
- Effect of remedy on the remaining portion
  - Make sure there is no deleterious impact (if there is, strike down whole act)
  - If a benefits conferring scheme, striking the whole act down will harm people benefited
- Extent of Interference with Legislative Objective
  - Would gov't prefer no policy at all, or amended group?
  - Schachter: not clear whether the law intended to target adoptive parents for a particular purpose

- While respect for the role of the legislature and the purposes of the Charter are **the twin guiding principles**, these principles can only be fulfilled with respect to the variety of considerations set out above which require careful attention in each case.

- 3) Should the remedy be temporarily suspended?
  - danger to the public? – e.g., certain criminal code provisions
    - E.g. striking down manslaughter is different from striking down law preventing smoking advertising RJR)
  - rule of law threatened? - *Ref re Manitoba Language Rights*
    - Laws were to be published in both languages. Stopped doing that in 1878ish. Striking down all laws would be crazy.
    - Remedy: gave 12 months to pass laws in French.
  - Nature of the benefit – required or discretionary? vs.
    - Don't want to away benefits from people who need them if scheme struck down
    - Why not just read in birth dad's?
      - Budgetary implications, relative size. So here the court suspending the declaration
    - But if there's no obligation in the first place for government to provide the benefits, it may be inappropriate to go ahead and extend them
  - Perpetuation of an unconstitutional state of affairs

	▪ State of unconstitutionality continues during the suspension

Remedy: Reading In

- Add text to the invalid legislation

Vriend v Alberta 1998 SCC

Ratio	• If the court is able to fix the unconstitutional provision in a precise way that is keeping with the overall purpose of legislation itself, then reading in is the correct remedy.
Facts	• Vriend fired from his job at a religious college • V challenges omission of sexual orientation from AB's *Individual Rights Protection Act* • Found to violate s 15 of the Charter - Equality
Issue	• What is the appropriate remedy?
Result	• Read in sexual orientation

Reason	Followed *Schachter v Canada*
	• Step 1: define the extent of the Charter inconsistency
	  ○ Failure to include sexual orientation in *IRPA* legislation
	• Step 2: Appropriate remedy
	  ○ Strike down would remove rights across AB
	  ○ Issue is under inclusiveness in a particular part in a particular section
	  ○ Options:
	  ▪ Read down
	  ○ Impossible here because dealing with a legislative omission
	  ▪ Strike down
	  ○ Again, it is an omission
	  ▪ Read-in sexual orientation:
	  ○ Precision: subsequent-order effects occur, majority says the implication is minimal
	  ○ "sexual orientation" has a settled legal meaning
	  ○ Considerations when choosing
	  ▪ Budgetary implications:
	  ○ Damages to those discriminated against
	  ○ Floodgates in bringing LGBT claims to the AB HR Commission: majority says that, relatively speaking, the impact is small percentage of an overall scheme
	  ▪ Relative size of added group:
	  ○ LGBT relatively small compared against remaining protected people
	  ○ "where the group to be added 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" (quoting *Schachter)*
	  ▪ Impact on remaining protected people:
	  ○ Negligible
	  ▪ Extent of interference with legislative objectives
	  ○ AB intended to exclude LGBT

	○ Majority says the question is not whether they deliberately chose to exclude LGBT, but whether they intended to remove all HR ○ There will be interference regardless of the remedy the courts choose ○ Court also believed AB legislature deferring to the courts as an "express invitation for the courts to read sexual orientation" into the Act [171] •
Dissent	• Only judge from AB on court • It was not clear that AB would choose to strike down entire HR Act if it required the inclusion of LGBT • LGBT was "read in" until Redford gov't

M v H 1999 SCC

Ratio	• Severing can be an appropriate remedy for under-inclusive legislation, if the remedy of reading-in does not also assure the validity of the rest of the legislation
Facts	• Family law act – "Spouse" definition excluded same-sex couples • Thus, same sex couples not protected by the regime that lets you sue each other for spousal support when relationships break down
Issue	• Was the Act an unjustified infringement? What is the remedy?
Result	• Yes. Sever out the definition subject to a six-month delayed declaration of invalidity.
Reason	Issue of remedy under s 52 • 1. Determine the extent of the inconsistency between the legislation and the Charter (*Schachter*) ○ Inconsistency stems from the exclusion of same sex-partners from the definition of spouse in *FLA*. ○ This exclusion violates the equality rights guaranteed under s 15 of the Charter ▪ Cannot survive s 1 review • 2. What is the appropriate remedy to deal with that inconsistency? (*Schachter*) ○ Schachter provides various options: ▪ By severance (holding that one portion is of no force or effect and the rest of the Act remains in force), ▪ reading in/down (to replace the offending words w/ language that will include the wrongly excluded group) ▪ or strike down entirely? (entire Act is of no force or effect) ○ To determine whether reading in / down is appropriate **consider**: ▪ how precisely the remedy can be stated, **budgetary implicat**ions, the effect the remedy would have on the remaining portion of the legislation, the significance or long-standing nature of the remaining portion and the extent to which a remedy would interfere w/ legislative objectives ▪ **Reading in: Only available where the Court can direct with a sufficient degree of precision that what is to be read in comply with the Constitution** • Here: "spouse" means "man and woman" ▪ Possible to read in the words "two persons" instead ▪ However, reading this in would call into question the overall validity of the legislation ▪ Same sex couples would not be able to opt out of this regime because the rest of the act (parts that do that) doesn't recognize same-sex couples

	▪ Where reading into one part of a statute will have significant repercussions for a separate and distinct scheme under that Act, it is not safe to assume that the legislature would have enacted the statute in its altered form ▪ Striking down the whole of the FLA would be excessive as only the definition of spouse has been found to violate the Charter ○ So, sever the provision (definition of spouses) • 3. Should the declaration of invalidity be temporarily suspended? ○ Yes – suspension. ○ Some latitude ought to be given to Parliament to address the issue ○ Could also impact other statutes that use a similar definition of "spouse"`
After the case	• Ontario Premier, Mike Harris, did not like the decision so created an act called "Amendments because of the SCC in decision of M&H act"

Remedy: Severance and Reading down

- Severance:
  - Partial invalidation of the law
- Reading down
  - Interpretative technique to avoid declaring an act invalid
  - Narrows a statutory interpretation to exclude the unconstitutional applications so it is constitutionally compliant
  - Functions as a technique of interpretation to avoid invalidity
  - Rooted in notions of legislative intent
    - Narrowing interpretation is placed on the law because of a presumption that the legislature intended to act within the bounds of the Constitution

R v Sharpe 2001 SCC

Ratio	• Example of the court (typically reluctant to read in) using the remedy to save a potentially overbroad legislation prohibiting the possession of child pornography • Twin guiding principles (*Schachter)* used to inform the appropriate remedy
Facts	• Sharpe charged with possession of child pornography • Argues that he can't be convicted because it's overbroad and can encapsulate harmless behaviour ○ Child pornography is protected by freedom of expression and if the exercise of that expression has no harmful impacts on children then can the law against child pornography be unconstitutional • Unharmful aspects: teenagers videoing themselves; what about drawings or self-creations since it involved no children
Issue	• Did that infringe s 15? • If so, what is the remedy?
Result	• Yes, certain aspects were overbroad. Read in to save the legislation
Reason	• To strike down the entire law would be to allow the evil that is targeted to continue ○ "why one might well ask, should a law that is substantially constitutional be struck down simply because the accused can point to a hypothetical application that is far removed from his own case which might not be constitutional?" [111] • **Appropriate remedy is to read into law an exclusion** of the problematic application of s 163.1

	○ Court, following *Schachter* and suggestions for addressing unconstitutional provisions or applications of law, must decide on the basis of the "twin guiding principles": ▪ Respect for the role of Parliament ▪ Respect for the purposes of the Charter ○ Read as incorporating an exception for the possession of ▪ Self-created expressive material ▪ Private recordings of lawful sexual activity • Reading in appropriate where (*Schachter*): ○ 1. The **legislative objective is obvious and reading in would further that objective or constitute a lesser interference** with that objective than would striking down the legislation ▪ Here: protect children from exploitation + abuse ▪ Will reading in further that objective? Yes. The applications of the law that pose constitutional problems are exactly those whose relation to the objective of the legislation is most remote ▪ Whereas striking down would undermine the objective ○ 2. The **choice of means used by the legislature to further the legislation's objective is not so unequivocal that reading in would constitute an unacceptable intrusi**on into the legislative domain ▪ Question is (*Vriend*)*:* what would the legislature have done if it had known that its chosen measure would be found unconstitutional? ▪ If it is not clear the legislature would have enacted the legislation w/o the problematic provisions then reading in a term may not be appropriate ○ 3. Reading in would not require **an intrusion into legislative budgetary decisions** so substantial as to change the nature of the particular legislative enterprise ○ But this remedy is close to legislating
Class Notes	• Alternative to this remedy is to strike down or suspend ○ Why did they not strike down? ▪ Optics: "SCC STRIKES DOWN CHILD PORNOGRAPHY LAW" • Reading in would not require an intrusion into legislative budgetary decisions so substantial as to change the nature of the particular legislative enterprise • Remedy is also problematic with principle that people should know what the law is • What can they possess? Not in the criminal code anymore. They would have to look at para 115 of Sharpe.

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 2008 SCC

Ratio	•
Facts	• RCMP charged with manslaughter. • Officer argued that the mandatory minimum 4 year sentence provided for the offence constituted on the facts of his case, cruel and unusual punishment contrary to s 12 of the Charter
Issue	• Was the mandatory minimum contrary to s 12? IF so, what was the remedy?
Result	• No.

Reason	• SCC did not find a violation BUT discussed if there was one, whether a constitutional exemption under s 24(1) would have been appropriate remedy or if only s 52 would have applied
	• Argument in favour of constitutional exemptions:
	  ○ better to grant a constitutional exemption than to strike down the law as a whole when a mandatory minimum sentence is constitutional in most of its applications but generates an unconstitutional result in a small number of cases
	• Nevertheless, SCC concluded the counter-considerations outweighed the arguments in favour
	  ○ Highly discretionary language in s 24(1) is appropriate for control of unconstitutional acts
	  ○ By contrast s 52(1) targets the unconstitutionality of laws in a direct non-discretionary way
	  ▪ Laws are of no force or effect to the extent that they are unconstitutional
	  ○ Central consideration was the concern that it would intrude on the role of Parliament
	  ▪ Allowing this would be reading in a discretion to a provision where Parliament clearly intended to exclude discretion

Temporary Suspensions of Declarations of Invalidity

- Immediate nullification of a law creates a void → in some cases it may be appropriate to suspend the effect in order to allow Parliament to fill the void
- But to be used sparingly, as it allows a state of affairs that violates the Charter to persist (*Schachter*)
- Criteria to temporarily suspend it:
  - potential danger to the public,
  - threat to the constitutional order,
  - under inclusive law where striking down would deprive deserving persons of benefits
- *Manitoba Language Reference* introduced this remedy into Canadian constitutional law
  - SCC found that Manitoba's failure to meet the requirements for bilingual enactment and publication of its statutes constituted a violation of s23 of the provincial construction
  - Court declared the invalid legislation temporarily valid for the minimum period of time required for translation and re-enactment of the laws in both French an English because to invalid it immediately would create legal chaos and undermine the fundamental constitutional principle of rule of law
- 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
- Should have an immediate remedy unless the government can prove otherwise (Ontario v G)

TWEN: *Ontario v G*, 2020 SCC 38

Ratio	• suspensions of declarations of invalidity should be rare
	• Onus on government to demonstrate why a suspended declaration is necessary
	  ○ granted only when an identifiable public interest is endangered by an immediate declaration to such an extent that it outweighs the harmful impacts of delaying the declaration's effect
	  ○ When declarations *are* suspended, individual exemptions pursuant to s 24(1) will often balance the interests of the litigant, broader public, and legislature in a manner that is "appropriate and just"

Facts	• If registered as a sex offender individuals must report to the police forever. Changes of address, periodic check-ins etc. • There was a way to apply to remove yourself from that obligation if found guilty. • But if you were found NCR of a sexual crime – not criminally responsible – could not have yourself removed from the list. • G argues this is unconstitutional via s 15 – equality rights pertaining to mental disability

Issue	•
Result	• Unconstitutional. Discriminatory. Is it saved by s 1? No.
Reason	• Law draws discriminatory distinctions between people found guilty and people found NCRMD of sexual offences on the basis of mental disability, contrary to s. 15(1) of the Charter. When legislation violates the Charter, courts have been guided by the following <u>fundamental remedial principles</u>, grounded in the Constitution, in determining the appropriate remedy, applying them at every stage: ○ Safeguarding *Charter* rights through ***effective*** **remedies** ○ Public has an interest in the constitutional compliance of legislation ▪ Talking about suspended declarations. When they are handed out it creates odd holes in the law. Not good. Public should be able to rely on the law being constitutional compliant. ▪ Principle of the rule of law means that the impact of laws, even unconstitutional laws, extend beyond those whose rights are violated → bad for all of society for it to remain in place ○ Public is entitled to the benefit of legislation ▪ BUT the public is also entitled to the benefit of legislation which individuals rely upon to organize their lives and protect them from harm (*Manitoba Language Rights*) ▪ So, if there is an unconstitutional law but it provided benefits to people, public have an interest in maintaining those benefits ○ Respect for institutional roles of courts and legislatures ▪ Parliamentary sovereignty is an expression of democracy ▪ Courts by providing remedies are by definition interfering with the legislature so accept that and be aware they should not be legislating constitutional solutions to these problems. This goes beyond the court's democratic mandate. ▪ Yet, courts are also "guardians of the Constitution and of individuals" (*Hunter*) ○ "[d]eference ends . . . where the constitutional rights that the courts are charged with protecting begin" Following *Schachter* • Remedies are flexible; *Schachter* endorsed remedies tailored to the breadth of rights violations ○ Case recognized the twin guiding principles: respect for role of legislature & for the purposes of the *Charter* • "a measure of discretion is inevitable in determining how to respond to an inconsistency between legislation and the Constitution" (pg 7) • Types of constitutional deficiencies are sufficiently varieties and the context in which they arise are sufficiently diverse that the Court will always be faced with these discretionary choices on how to fix it → so courts cannot always give certainty depends on the case Process: • First step in crafting an appropriate s 52(1) remedy: determine the extent of the legislation's inconsistency w/ the Constitution ○ S 52(A) states law is of no force or effect to the FULL extent of its inconsistency ○ BUT the public is entitled to the benefit of laws passed by the legislature. ▪ Tailored remedies that address the precise constitutional flaw can permit a court to both safeguard the constitutional rights of all those affected and preserve the constitutional aspects of the law.

- The second step is determining the form that a declaration should take
  - To ensure the public has the benefit of enacted legislation, reading down, reading in, and severance should be employed where possible to ensure the constitutional aspects of legislation are preserved
  - Tailored remedies
    - **Reading down** – when a court **limits the reach of legislation by declaring it to be of no force and effect to a precisely defined extent**
      - Reading down is an appropriate remedy when "the offending portion of a statute can be defined in a limited manner" (Schachter, at p. 697).
    - R**eading in** – when a court **broadens the grasp of legislation by declaring an implied limitation on** its scope to be without force or effect.
      - Reading in is an appropriate remedy when the inconsistency with the Constitution can be defined as "what the statute wrongly excludes rather than what it wrongly includes" (Schachter, at p. 698)
    - **Severance** – when a court declares **certain words to be of no force or effect**, thereby achieving the same effects as reading down or reading in, depending on whether the severed portion serves to limit or broaden the legislation's reach.
      - Severance is appropriate where the offending portion is set out explicitly in the words of the legislation.
  - However, if granted in the wrong circumstances, tailored remedies can intrude on the legislative sphere.
    - Schachter cautioned that tailored remedies should only be granted where it can be fairly assumed that "the legislature would have passed the constitutionally sound part of the scheme without the unsound part" and where it is possible to precisely define the unconstitutional aspect of the law
    - significance of the remaining portion of the statute must be considered, and tailored remedies should not be granted when they would interfere with the legislative objective of the law as a whole
      - in *Vriend*, "sexual orientation" was sufficiently precise and advanced the objective of the law so it was read in

Suspending Declarations of Invalidity

- Suspended declarations **should be "rare".**
  - But there are times when an immediately effective declaration of invalidity would endanger an interest of such great importance that, on balance, the benefits of delaying the effect of that declaration outweigh the cost of preserving an unconstitutional law that violates Charter rights.
- *Schachter* recognized three categories of cases where suspensions could arise:
  - Threat to the rule of law (*Manitoba Language Rights)*
  - Threats to public safety
  - Underinclusive legislation
  - BUT These compelling interests cannot be reduced to a closed list of categories but will be related to a remedial principle grounded in the Constitution — typically, the principle that the public is entitled to the benefit or legislation or that courts/legislatures play different institutional roles.
- **Govt bears the onus of demonstrating that a compelling public interest supports the suspension**,
  - Rationale from govt must be to avoid harmful and undesirable consequences of immediate declaration (pg 22)

- The **benefit achieved (or harm avoided) must then be weighed against countervailing fundamental remedial principles** (namely the principles that Charter rights should be safeguarded through effective remedies and that the public has an interest in constitutionally compliant legislation.)
  - Consider factors such as:
    - Significant of the rights infringement (ex: infringement is heavy when criminal jeopardy is at stake)
    - whether the public is benefiting from other aspects of the Act
      - Court does not want to strike down and eliminate all those benefits.
    - The uncertainty and instability of leaving the law in place temporarily

Individual remedies under s. 24(1) when suspending the declaration of invalidity

- To be "appropriate and just", a s. 24(1) remedy should:
  - meaningfully vindicate the right of the claimant,
  - conform to the separation of powers,
  - invoke the powers and function of a court,
  - be fair to the party against whom the remedy is ordered,
  - and allow s. 24(1) to evolve to meet the challenges of each case
- an effective remedy that meaningfully vindicates the rights and freedoms of the claimant will take into account the nature of the rights violation and the situation of the claimant
- The importance of safeguarding constitutional rights weighs heavily in favour of an individual remedy
- Exempting only the claimant from a suspension may appear unfair at first glance
  - But the claimant is not in the same position as others subject to the impugned law in a key respect: the claimant who brings a successful constitutional challenge has done the public interest a service by ensuring that an unconstitutional law is taken off the books
  - While it is in the public interest for laws to apply to everyone uniformly, immediate remedies for claimants are also in the public interest.
    - The practical realities of bringing a constitutional challenge may reduce the incentive for rights claimants to bring cases that carry substantial societal benefits…
- there must be a compelling reason to deny the claimant an immediately effective remedy.

  - Say a person wins a case that a law is invalid, but the court suspends invalidity. What happens to the individual who brought the case if say they were charged with a crime? Or a fine? Do they still have to pay the penalty because it is suspended despite winning? Court says that is unfair.
    - Solution is 24(1) → give individual remedy to the person that litigates where they temporarily suspend the invalidity.
  - What about the person who is charged the next day after a declaration of invalidity, but it is suspended?
    - They will be treated differently. The person that brought the case used resources (money, time, will) to litigate. They deserve differential treatment.
  - What about someone charged/convicted a day before? A year before? 10 years?
    - Oh well. Chaos if they found everyone impacted by an invalid law prior to the invalidity declaration.

Remedies under Section 24(1)

- Case where the law is fine, but the application may have an unconstitutional effect from the actions of the state.
- Possible s. 24(1) remedies:
    - **Damages** - when the others will not suffice (*Ward*)
    - **Declaration** - forcing the government to do something (positive right) (Doucet-Boudreau) (Insite)
    - **Injunction** - forcing the government to stop doing something (*Little Sisters*)
    - **Individualized** remedy when suspending declaration of invalidity (*Ontario v G*)

Little Sisters Book v Canada 2000 SCC

Ratio	• Remedy for unconstitutional action is s 24(1) which can allow them to declare the government to stop doing the unconstitutional thing
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 • Customs was targeting material destined for gay and lesbian bookstores on the basis that the federal Customs legislation prohibited the importation of obscene publications and empowered Customs officials to make the necessary determination of obscenity. • The rights of the appellants under s 2(b) and 15(1) of the Charter have been infringed in many ways • Little Sisters argued that the procedure for determining obscenity was so cumbersome and procedurally defective that it could not be administered in a way that respected Charter rights
Issue	•
Result	• S 2(b) and 15(1) infringed
Reason	• Targeted as importers of obscene materials despite the absence of any evidence to suggests gay & lesbian erotica is more likely to be obscene than heterosexual erotica • Not practical to fashion s24(1) remedy. ○ 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 • A more structured s 24(1) remedy might be helpful but it would serve the interests of none of the parties for the Court to issue a formal declaratory order based on 6 year old evidence supplemented by conflicting oral submissions and speculation on the current state of affairs
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

Practice Problem (Mar 15 video)

- Edmonton Transit Service (ETS) is a corporation that operates a public transportation system in Edmonton, Alberta. ETS is governed the ETS Board of Directors as established by **Alberta's City Transportation** Act.
- This past summer, Voices for Animals (VA), a vegan advocacy group that promotes the ethical treatment of animals and the non-consumption of animal products, **attempted to purchase advertising space** on the sides of ETS buses. VA's advertisement, "Meat is Murder," depicted graphic pictures of abused farm animals (pigs, chickens, and cows) from large-scale factory farms.

- ETS refused to accept the VA's advertisement on the basis that it violated the ETS advertising by-law, which provides as follows:

  1 Advertisements, to be accepted, **shall be limited to those which communicate information concerning goods, services, public service** announcements and public events.
  2. advertisement will be accepted which is **likely to cause offence to any person** or to create controversy.
- VA has retained your law firm for advice on the constitutionality of the ETS by-law. Restricting your answer to an assessment of the Canadian Charter of Rights and Freedoms (Charter), **draft a memo providing full analysis with specific references to course materials discussing and assessing whether the Charter applies**, and whether the by-law is constitutional. Conclude your answer with an assessment of potential remedies.

<u>Division of Powers</u>

- 92(13) – this is classic provincial jurisdiction (property, contracts, advertising).

<u>Contrary to Charter?</u> ****THIS IS THE FORMAT

- First step: **Application** – does the Charter apply to ETS?
  - In most cases will just say "yes, as per section 32 the *Charter* applies to legislation".
  - (1) Does the gov't control ETS?
    - If yes, subject to *Charter* in everything they do.
    - is the entity simply "part of the fabric of govt"? (*Lavigne*)
    - City Transportation Act – Charter applies to the legislation but not automatically the entity itself or its policies (*McKinney*)
    - Composition of board established by the *City Transportation Act* – is the govt controlling that board? Requires routine and regular control (*Stoffman*). Day-to-day operational control over activity? (*Greater Van*)
      - Do not have this information on the facts but *Greater Van* is similar so likely it would be applied to ETS.
    - Funding relevant but not enough (*McKinney*)
    - What is the relationship between the Minister responsible for ETS and ETS's day-to-day operation? Does he establish and issue directions and approve bylaws? (*McKinney*)
  - (2) Sufficiently governmental in nature?
    - Does it act like a government?
    - Do they perform a democratic function?
    - Do they make laws?
    - Do they control citizens that fall within their jurisdiction?
    - Do they derive their powers from the provincial legislature?
    - Not applicable. No real power just a service.
  - (3) Implementing a government policy?
    - Does the Charter apply to the advertising policy?
      - is this advertising policy a government policy being implemented? (*Eldridge*)
      - Only if there is a <u>direct and precisely defined connection</u> between a specific government policy and the entity's conduct
    - Did the government instruct ETS to implement and have this policy? Did ETS mandate this policy? Did the gov't and the Minister say, you're going to have an advertising policy, and this is what its going to say?
      - Do not have information here
    - Even if government have directed certain policies that does not automatically mean the Charter applies to things the government did not direct (*Stoffman* – where government funds and

regulates hospitals but retirement policy was not dictated by the govt and thus the Charter did not apply*)*
    - Whereas in *Eldridge* – it concerned the implementation of a govt policy – provision of emergency services and the discrimination was connected to that service.
- (4) Is ETS exercising a statutory power of compulsion?
    - No. ETS is not compelling anyone to take the bus.

- Second step: Assuming the Charter applies
    - Has the **Charter been infringed**?
        - Freedom of expression (2(b))
        - → will be large portion when we've gone over the 2B test

- Third step: **Prescribed by law**?
    - Is the limit on the right **authorized by "law**"?
        - Meets this if expressly provided for by statute or regulation or results by necessary implication from the terms of the statute or regulation (*Therens*)
    - Does the law have the required **degree of precision and accessibility required**?
        - On the one hand, "phrases cannot always be measured with scientific precision" (*Lucas)* and "absolute precision in the law exists rarely, if at all" (*Irwin Toy)*
        - However, what does the term "controversy" mean in s 2 mean? Controversial to who in particular? It is not a legal term. It is very subjective. Does this then give ETS too much discretion and not give the public a clear understanding of whether their advertisement would be accepted or not?
        - Unlikely to be sufficiently specific to restrict fundamental freedoms. Nevertheless, we know the courts have a low threshold for prescribed by law and do not like to eliminate restrictions at this stage of the analysis.

- Fourth step: the **infringement justified** via section 1? (*Oakes test)*
    - 1. **Pressing and substantial objective** of the infringing measure (of the bylaw restriction)
        - what will ETS' state the P&S objective?
            - Our job is to transport, and we want a safe and respectful environment, so people will use it. Want to avoid having anything that would make the public feel uncomfortable riding with them.
            - Their mandate will be limited if people do not feel comfortable and reduces ridership.
        - Low threshold (*Big M Drug Mart)* and governments tend to get over this hurdle so ETS is likely to meet this step.
    - 2. **Rational connection** between the infringement and the purpose to be achieved
        - One sentence will do
        - ETS will likely argue their objective was to provide uncontroversial and upsetting transportation. The bylaw limits controversial material and expressions. This does not have to be a perfect connection, just rational. Therefore, this will likely meet the threshold required (*Benner)*.
    - 3. **Minimally impairing**? –
        - The way they've drafted the bylaw is to capture more conduct that is necessary. "cause offence" and "create controversy" is vague and broad.
        - Do we really need to eliminate all controversy to make ETS safe and inclusive?
            - What if you are against the sugar industry and offended if you see pop ads.
            - Perhaps that is going further than necessary to achieve the goal: people are not overly prohibited from accessing transportation services.

        - Can we imagine less invasive measure?
            - Could narrowly define the advertisement policy by striking "controversy" or being more specific to "hate speech"
    - 4. **Proportionality**
        - Weigh the actual good that flows from the statutory objectives against the harm to the individuals whose rights are being infringed
            - Here: right to free speech (commercial expression via ads on buses) versus people's rights to feel safe and included on buses
            - Contextualism approach (*Edmonton Journal*)

Assume section does not pass the infringement analysis

- Final step: **Remedies**
    - S 52(1) – because the problem is with the way the law is written, not with the way ETS is applying the law (s 24)
        - We want to target the extent of the inconsistency – 2nd clause – make it less vague
            - Reading in? – unlikely to be used – would be quite intrusive to the legislature to make the bylaw clearer. How would they define what controversy is? Would they remove it?
            - Reading down? Unlikely to be used too. Unnecessary and is not on the same level as the *Sharpe* case. It is merely an overbroad ETS bylaw.
            - Likely to just strike down
                - Temporarily suspending? Not likely. There is no danger to the public, benefit to all those entitled to, or threat to the rule of law (*Ontario v G*)

FUNDAMENTAL FREEDOMS

SECTION 2 A FREEDOM OF RELIGION

CB: 859-882:

2. Everyone has the following fundamental freedoms:
- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion, and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

Background to Freedom of Religion

- Under the *Constitution Act* 1867, provincial governments were given jurisdiction over matters related to culture, family, charitable organizations, and civil obligations. Federal government given the power to establish and maintain a general economic infrastructure and ensure public order and security.
- Religious tolerance initially based on pragmatic considerations and conceved as a political strategy to ensure social peace or stability

- Now freedom of conscience and religion is understood as a principled right
- Justification for Religious freedom
    - Writers, such as John Locke, argued that religious tolerance was the better route to social peace but that it was also morally required
    - The state should not concern itself with individuals' spiritual welfare because it had not been given authority in this matter. Moreover, the power of government, that was exercised through coercion according to Locke, would be ineffective. Cannot compel citizens to embrace a certain spiritual truth.
- Religious freedom under the Charter
    - Two dimensions of religious freedom
        - Freedom *to* religion – freedom to practice religion without state inference
        - Freedom *from* religion – freedom from state compulsion to follow a religious practice.
    - Also, a shift to requiring the state to treat religious belief systems or communities in an equal manner
- Freedom of conscience
    - Viewed as an alternative to religious freedom
    - It extends protection to fundamental beliefs that are not part of a religious belief system → to secular morality
    - *Maurice v Canada* (Attorney General) 2002 – one of the only reported cases where 2A freedom of conscience breached
        - Refusal by federal prison authorities to provide an inmate with vegetarian meals
        - Prison could accommodate the inmate's vegetarianism without difficulty since it was already providing vegetarian meals to inmates on religious grounds
- Sunday Observance and the scope of s. 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 1985 SCC

Ratio	• Cannot shift purpose • Cannot coerce people into following a religion / religious practice ○ Coercion can be direct or indirect (either one would violate s 2A) • "[n]o one should be subjected to an unconstitutional law" (even corporations)
Facts	• Big M was charged with unlawfully carrying on the sale of goods contrary to the Lord's Day Act (federal act) • Big M has challenged the constitutionality of the Act both in terms of division of powers and of s 2(a) of the Charter • Freedom of religion falls within federal legislative competence • Lord's Day: time that begins at midnight on Saturday night and ends at midnight the following night
Issue	• Does the Act infringe s 2(a) of the Charter?
Result	• Yes – this Act is of no force or effect under s 52 of the Constitution Act

Reason	Federalism argument
	• This is a federal *Lords Day Act* yet concerns property and civil rights 92(13)
	  ○ businesses are making contracts via sales
	  ○ also, this is governing employment when forcing to be closed on Sundays (Parsons).
	• Provincial argument doesn't win –morality falls under federal jurisdiction

- Moreover, feds have criminal law power too: prohibition (close on Sunday), penalty (fine), public purpose (enforcement of morality)
- To win the federalism argument, would have to prove it is about the enforcement of religious morality otherwise it is invalid under s 92(13)
  - But if the federal govt won on that argument they cannot later say this is a secular Act and not a Charter violation (this is what happened)
- So, need a religious purpose, otherwise it is *ultra vires*

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
- Both purpose and effect are relevant to determining the constitutionality.
  - 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 purpose 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 absence of coercion or constraint
  - If a person is compelled by the state to a course of action/inaction he would not otherwise have chosen, he is not acting of his own volition and cannot 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, but it also includes **indirect forms of control** which determine or limit alternative courses of conduct available to others
  - **Freedom embraces the absence of coercion and constraint and the right to manifest believes and practices**
  - 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 Act 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 (aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection)
  - 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*) of the Charter 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 their 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 test) • Two arguments proposed 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 Remedy • S 52 – An unconstitutional law is of no force or effect – applies to Big M even though don't have religious freedoms
Class	• Originally argued by AG of AB that Big M did not have standing to challenge the law on freedom of religion because it is a corporation and could not hold religious beliefs • Dickson: ○ Any accused, whether corp or individual, may defend a criminal a charge by arguing that the law under which the charge is brought is constitutionally invalid ○ Big M is arguing that the law is inconsistent w / s2a ○ Whether a corp can enjoy or exercise freedom of religion is therefore irrelevant. They are arguing the law is constitutionally invalid. If the law impairs freedom of religion it does not matter whether the company can possess religious belief. ○ **It is the nature of the law, not the status of the accused, that is in issue** • Adams: Would not have been able to advance a s24(1) argument – which shows it is still relevant what the entity is that brings the claim

Edwards Books and Art v The Queen

Ratio	• Just because an Act's obligations coincide with a religious belief does not make it unconstitutional

	• 2A does not require legislatures to eliminate every trivial state-imposed cost associated with the practice of religion

Facts	• Ontario's *Retail Business Holidays Act* was challenged
	  ○ Act that established a common day of rest for retail workers.
	  ○ Also included other holidays which are of specifical significance to Christian denominations (Xmas, Boxing, Good Friday etc.)
	• The Act contained some exemptions to the Sunday closing requirement (small businesses could remain open etc.)
	  ○ Controversial exemption: those with 7 or fewer employees and use less than 5,0000 sq feet were exempt if they were closed on the previous Saturday
	• 4 stores charged w/ failing to ensure no goods were sold or offered for sale on a holiday.

Issue	• Did the Act breach s 2a?
Result	• Yes but justfied. • Intent to provide uniform holidays to retail workers. No surreptitious attempt to encourage religious worship.

Reason	• Act has a secular purpose which is not offensive to the Charter
	• Following *Big M,* even if a law has a valid purpose, it is still open to a litigant to argue that it interferes by its effects w/ a right or freedom guaranteed by the Charter
	
	• 2 alleged coercion arguments:
	  ○ the Act 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 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
	• **2A does NOT require legislatures to eliminate every miniscule state-imposed cost associated with practice of religion**
	  ○ Otherwise Charter would have to protect from taxation extending to the bible, or churches would not have to clear snow, meet bylaws etc.
	  ○ 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 prohibited by s 2(a) it must be capable of interfering with religious beliefs or practice
	  ▪ → state **action which increases the cost of practicing/manifesting religious beliefs is not prohibited if the burden is trivial/insubstantial**
	• No **one is 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
	
	The Impact of the Act
	• different impact on persons depending on religious beliefs
	  ○ 1) Non-Observers – effects are generally secular, do not impair their freedom of conscience or religion. Would benefit if did not have to observe Sunday law.

	○ 2) Sunday Observers – Act is favorable for Sunday observers (cost for religious observance has been decreased) ○ 3) 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 (<u>indirect coercion</u>) 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 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, enjoy the day with other family members, go to the zoo, etc. ○ Vulnerable group – low wage earners – protecting this group is a public good • There is a rational connection ○ Day off to protect vulnerable makes sense – rational ○ Is the focus on retail justified? Are the exemptions within he Act justifiable? ▪ Yes. Open to legislature to restrict its legislative reforms to sectors in which there appears to be particularly urgent concerns or to constituencies that seem especially needy. Law Reform commission viewed the retail industry as having a particularly pressing problem – industry stated they had competitive pressures forcing operators to extend hours largely against their wishes. • Minimal impairment? ○ Employees in small businesses are weaker and do not have the options that larger retailers would have ○ Maintains general objective of the legislation to benefit retail employees by providing them a weekly holiday coinciding with the community (not wanting big retail outlets to choose what day they're open, so retail workers will be forced to be working on Sundays) ○ option for retailers with fewer than 8 employees to stay open so it can be justified for large retailers but not small; ○ there is no magic in the number7 as distinct from 5, 9, or 15. ○ Deference to legislature (balancing competing groups – *Irwin Toy)* ○ religious people and their freedoms are important, but so are retail workers. • Proportionate? ○ Yes ○ Serious effort made to accommodate the freedom of religion of Saturday observers
Dissent (Wilson)	• Agrees there is a s2 violation • Disagrees on application of s 1 ○ Once it is accepted that the Act infringes the freedom of religion of those who close on Saturdays for religious reasons, the question is whether the infringement is justified under s 1 Chief Justice believes it can be justified in the case of large retailers but not in the case of small

	○ There is no rational connection ▪ 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 ▪ The *effect* is that the religious freedom of some is respected by the legislation and the religious freedom of others is not ○ Not demonstrably justifying ▪ no evidence to show that the division between big and little businesses is a reasonable way to do this ○ This is not 'as little as possible' – there are less infringing measures ▪ Why not give Saturday observers an exemption? To allow them to stay open on Sundays. No evidence this would cause a substantial disruption of the common pause day.

CB: 906-918; 923-941:

Restriction and Accommodation of Religious Practice

- Above, we looked at freedom *from* religion. Now looking at the second focus of 2A: freedom *to* religion – the freedom to engage in religious practice w/o restriction by the state.
- S 2(a) is breached any time the state restricts a religious practice in a non-trivial way

Infringement test (*Amselem*)

- 1) does the claimant sincerely believe in a custom, practice or belief having a nexus with religion?;
  - Two separate questions/elements here
    - 1. Must have a sincere belief
    - 2. Belief must relate to religion
- 2) has the custom, practice or belief been interfered with in a manner that is more than trivial or insubstantial? (*Edward Brooks*)
  - i.e., substantially interfered with or actually threatened
  - Consider context of harm and rights of others [internal limit!]
    - Some religious practices not protected at all – those that call harm to others or interfere with their rights
    - "Harm to others" quite broadly in this case. But Adam thinks it will be narrowed to actual and tangible harm.
- If yes TURN to section 1 and ask is it justified under Oakes

Syndicat Northcrest v Amselem 2004 SCC

Ratio	Religious Freedom Analysis • 1) Has an individual's freedom of religion been infringed? Does the claimant sincerely believe in a custom, practice or belief having a nexus with religion? • 2) Has the custom, practice or belief been interfered with in a manner that is more than trivial or insubstantial? ○ i.e., substantially interfered with or actually threatened

	○ Consider context of harm and rights of others
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
Issue	• 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 under the QUEBEC CHARTER?
Result	• The appellants' religious freedom under the Quebec Charter has been infringed by the declaration of co-ownership – must be allowed to set up the succahs provided they remain for the limited time necessary
Reason	• Respect for minorities = important feature of constitutional democracy ○ BUT must also coexist alongside societal values central to the makeup and functioning of a free and democratic society 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 • This understanding is consistent with a personal or subjective conception of freedom of religion ○ 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 ○ Why the emphasis on "sincerity"?

- Focus on sincerity of belief as opposed to objective criteria – subjective conception
  - Sincerity provides accountability. Do not want religions of convenience.
  - So, there is still some scrutiny involved but only on the question of sincerity of belief. Not whether that aligns with some religious principle of not.

- Practice may or may not be mandatory. Court does not concern itself with that. Not their job to decide what is right within a religion. It would violate 2A to determine winners/losers within religious traditions. Also, what do courts even know about that topic?
  - An inquiry into the mandatory nature of an alleged religious practice is not only inappropriate, but also plagued with difficulties
  - BUT 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
    - Claimant may adduce evidence that their alleged belief is consistent with the religious practices
      - Relevant to sincerity but not necessary
      - Focus of the inquiry is not on what others view as religious *obligations* but what the claimant views as an obligation
      - Religious belief is intensely personal and varies b/w individuals [54]
  - He/she is sincere in his/her belief
    - Question of fact based on several criteria including credibility of claimant's testimony and analysis of current religious practices
    - However, it would be inappropriate for courts to rigorously study and focus on the past practices to determining whether current beliefs are sincerely held
      - People's beliefs are fluid

Infringement of Religious Freedom

- Once it is shown that their religious freedom is triggered, court must ascertain whether there has been enough of an interference w/ the exercise of the right to constitute an infringement
  - The interference has to be more than trivial or insubstantial (*Edward Books*)
    - "The Constitution shelters individuals and groups only to the extent that religious beliefs or conduct might reasonably or actually be threatened" (*Books*)
- No right is absolute; we live in a society where we must consider the rights of others

Application to the Facts

- 1. Does Amelsem have a sincere belief having a nexus with religion?

	○ Amselem sincerely believed he is obligated by the Jewish religion to set up and dwell in his own succah ▪ The trial judge's methodology was faulty in that he chose between two competing rabbinical authorities on a question of Jewish law ▪ Also, he seems to have based his findings with respect to freedom of religion solely on what he perceived to be the objective obligatory requirements of Judaism ▪ Failed to recognize that freedom of religion under the Quebec (and the Canadian) Charter does not require a person to prove that their religious practices are supported by any mandatory doctrine of faith ▪ Also, irrelevant whether someone changes how they practice (celebrating a religious holiday differently does not have a bearing on how it is celebrated now) • 2. Has this belief been interfered with in more than a trivial manner? ○ His right is infringed, and it is more than trivial, because it is a prohibition ○ Harms of others? (property value decreased). ▪ Balancing – intrusion on belief is more than the intrusion on the rights of the others ▪ A lowering property value does not touch religious rights ○ Other's rights would be minimally harmed by allowing the set up of succah's – 9 days only ▪ Not enough evidence that the value of the unit or property will decrease ○ Security concerns if soundly established would require appropriate recognition in ascertaining any limit on the exercise of the appellants' religious freedom ▪ But the appellants wrote in a letter to the respondent that they will set up their succahs in such a way that they would not block the doors, would not obstruct fire lanes and would pose no threat to safety or security in any way

Alberta v Hutterian Brethren of Wilson Colony 2009 SCC

Ratio	• More deference in s. 1 analysis to government for regulatory response than penal statutes directly threatening the liberty of the accused. • Ultimate proportionality revived
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 – could not be used for identification) ○ 56% of the Code G licences were held by Hutteriates who sincerely believe that the second commandment prohibits them from having their photograph taken • 2003 - the province adopted a new regulation in which the photo requirement became universal ○ The photo requirement was aimed at reducing the risk of fraud ○ [comes after 9/11 although no mentioned in the case] • The colony challenges the requirement's constitutionality
Issue	• Whether the universal photo requirement infringes s 2(a)
Result	• Yes but justified
Reason	• Claimants asserted that if members could not obtain driver's licences, the viability of their communal lifestyle would be threatened • Infringement made out where: (*Amselem*) ○ The claimant sincerely believes in a belief or practice that has a nexus with religion

- Impugned measure interferes with the claimant's ability or act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial

- Govt conceded on the first point. Second, unclear but lower courts believed it was met so Chief Justice McLachlin moved onto considering if it was justified under s 1

Section 1 analysis

- More deference in s. 1 analysis to government when implementing a complex regulatory response to a social problem versus when the impugned measures is a penal statute directly threatening the liberty of the accused
  - Giving effect to each of the religious claims impacted by the broad scope of the Charter guarantee could seriously undermine the universality of many regulatory programs

1) Is the purpose for which the limit is imposed **pressing and substantial** [41+] -- YES

- Objective: to prevent identity theft, fraud, and other mischief; larger goal of ensuring the integrity of the universal drivers licensing system
- Minimize identify theft– to ensure no individual has more than one license
- Other provinces and nations are moving towards this harmonization as well
- Even though other provinces have not yet moved to this requirement, the governments are entitled to act in the present with a view to future developments

2) Is the limit **rationally connected** to the purpose? [49] YES

- This is more effective than a system that grants some people exceptions

3) Does the limit **minimally impair** the right?

- Must ask is there a less harmful way of achieving the legislative goal?
- 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**
  - However, this deference is not blind or absolute
  - Test is whether there is an alternative, less drastic means of achieving the objective in a real and substantial manner [55]
- So, were the means chosen (photo requirement) to further the objective – maintain integrity of drive licensing system by minimizing the risk of theft etc. – reasonably tailored to address the problem?
  - Yes. Province proposed alternatives which maintain the universal photo requirement but minimizes its impact on Colony members by eliminating or alleviating the need for them to carry photos
  - But claimant rejected it and for them the only acceptable measure is one that entirely removes the limit on their s 2a rights
- Can we get an exemption?
  - No – because everyone has to be in the system.
  - If they granted the exemption, it would not prevent a person from assuming the identity of the licence holder and producing a fake document, which could not be checked in absence of a photo in the data bank
  - Alternative proposed by the claimant would *significantly compromise* the government's objective and is therefore not appropriate for consideration at the minimal impairment stage

- The dissent argues the risk posed by a few religious dissenters is minimal. Pointed to the fact that over 700k Albertans did not hold a DL. BUT majority say this looks at the goal of the govt too broadly.
    - The goal is to maintain the integrity of the driver's licensing system so as to minimize identity theft associated with THAT system
    - It's not the broad goal of eliminating all identity theft

4) Is the law **proportionate in its effect**? [75]]– the revival of ultimate proportionality

- Must balance the harm done to claimant's religious freedom and benefits associated with universal photo requirement for licenses
    - given the purpose, is it worth it, given the harms to the rights holding group?
- This step has been called "redundant". How, some ask, could a law fail at this final step after meeting the pressing goal, rational connection, and minimal impairment?
    - **First three stages are anchored in an assessment of the law's PURPOSE. Only the fourth branch takes into account the severity of the deleterious effects of a measure on individuals or groups.**
- 1) **First inquiry is into the salutary effects (benefits)** associated with the legislative goal
    - Benefits:
        - Enhancing security of licensing scheme (most important)
        - Assisting in roadside safety and identification;
        - Harmonizing AB's licensing scheme with those of other jurisdictions
    - Any exemptions would undermine the certainty the government is able to say that a given licence corresponds to an identified individual and that no individual holds more than one licence
    - Benefits to the requirement are sufficient, subject to final weighing against the negative impact on the right
        - Governments do not need to show that the law will in fact produce the forecast benefits
- 2) Now consider the d**eleterious effects of the limit on the group/individual's exercise of their rights**
    - No magic barometer to measure the seriousness of a particular limit on a religious practice
    - Perspective of the claimant is important; however, must be considered in the context of a multicultural, multi-religious society where the duty of state authorities to legislate for the general good inevitably produces conflicts with individual beliefs
    - State cannot by law directly compel religious practice or belief *(Big M)*
    - Harder to measure seriousness where the limit is as a result of an incidental and unintended effect of the law
        - Incidental effects that preclude choice as to religious belief or practice is treated as serious
        - But limits that impose costs on the religious practitioner in terms of money, tradition or inconvenience but may still leave the adherent with a meaningful choice concerning the religious practice at issue
    - Here: 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 drivers – driving is not a right but a privilege
        - No evidence that this would be cost prohibitive
        - Evidence does not support the conclusion that arranging alternative means of highway transport would end the Colony's rural way of life

	• Finally, must **weigh the salutary and deleterious effects**
	  ○ Law has important goal with benefits. Limit imposes does not deprive members of their ability to live in accordance with their beliefs. The effects, while not trivial, fall at the less serious end of the sacle.
	  ○ → The impact of the limit on religious practice associated with photo requirement is proportionate

Dissent (Abella)	• 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 could 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)	• 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

Class notes	• McLachlin's comments on minimal impairment greatly shifts the burden to the final stage because it essentially narrows the ability of any alternatives being accepted. IF any alternative would go against minimizing fraud – then what alternative would ever meet this?
	• Step 4: proportionality and costs
	  ○ Emergencies – how do they get a cab or driver very quickly?
	  ○ What about survival? Selling items
	• In exam – be aware of the flexibility or lack thereof re: minimal impairment
	  ○ As little as possible → gone
	  ○ "as reasonably possible" or "margin of appreciation" (*NFLD v Nate?)*

TWEN: *Ktunaxa Nation v British Columbia*

Ratio	• 2a protects the freedom to hold and manifest religious beliefs but not to protect the object of that belief

Facts	• Glacier Resorts negotiated with the BC government and stakeholders, including the Ktunaxa, on the terms and conditions of the development of a year-round ski-resort in Qat'muk
	  ○ Ktunaxa informed Glacier Resorts of the spiritual significance of Qat'muk, as well as the presence of the Bear Spirit
	  ○ As a result, Glacier made significant changes to the planned development
	  ○ Ktunaxa were unsatisfied
	• Ktunaxa issued the "Qat'muk Declaration", which, among other things, mapped an area in which the Ktunaxa would not permit development.
	  ○ The mapped area included land vital to the resort's construction and operation.

	• Minister signed a Master Development Agreement with Glacier Resorts Ltd., allowing development to proceed despite the Ktunaxa's claim
Issue	• Did the Minister's decision violate the Ktunaxa's freedom of religion and conscience?
Result	• No.

Reason	Does this fall under the scope of s2(1)?
	• Freedom to hold religious belief AND
	• Freedom to manifest those beliefs (*Big M Drug Mart*)
	
	To establish infringement of right of freedom of religion, the claimant must demonstrate (*Ameselem*)
	• 1) a sincere belief in a practice or belief having nexus with religion
	  ○ Ktunaxa sincerely believed in the existence of Grizzly Bear Spirit
	  ○ Believed permanent development would drive away the spirit
	• 2) State conduct interferes in a non-trivial, or not insubstantial manner, with the claimant's ability to act in accordance with the practice or belief
	  ○ Objective analysis.
	  ○ Not met here. The Minister's decision doesn't interfere with their freedom to believe in Grizzly Bear Spirit or to manifest that belief
	  ○ **State's duty is not to protect the object of the belief (**such as the Grizzly Bear Spirit)
	  ▪ Instead, state's duty is to protect everyone's freedom to hold such beliefs and manifest them in worship and practice or by teaching and dissemination
	  ○ If we protect the object of the belief, it would put deeply held personal beliefs under judicial scrutiny which would be inconsistent with the principles underlying freedom of religion
	  ○ Here: the appellants are not seeking protection for the freedom to believe in Grizzly Bear Spirit or to pursue practices related to it. Rather, they seek to protect Grizzly Bear Spirit itself and the subjective spiritual meaning they derive from it. That claim is beyond the scope of s. 2(a).

Dissent (Moldaver)	• S2(A) breached but reasonable in the circumstances • where a person's religious belief no longer provides spiritual fulfillment, or where the person's religious practice no longer allows him or her to foster a connection with the divine, that person cannot act in accordance with his or her religious beliefs or practices, as they have lost all religious significance. • there is an **inextricable link between spirituality and land in Indigenous religious traditions**. In this context, state action that impacts land can sever the spiritual connection to the divine, rendering Indigenous beliefs and practices devoid of their spiritual significance. • Chief Justice and Rowe J. frame the Ktunaxa's religious freedom claim as one that seeks to protect the "spiritual focal point of worship" — that is, Grizzly Bear Spirit (para. 71). ○ This is wrong. The Ktunaxa are seeking protection of their ability to act in accordance with their religious beliefs and practices [133] • 2A is about ability to MANIFEST/Practice belief – does this not also encapsulate honouring a spirit?

FREEDOM OF EXPRESSION (COMMERCIAL)

1000-1008; 1013-1026:

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;

- "everyone"
- Not just freedom of speech – belief, opinion, thought → broad
- "including" → could be expanded / open category
- "other media of communication" → looked to the future (no internet then)

- Freedom of expression has a number of underlying values and interests that it promotes. Helpful to think about the instrumental democratic rationale for freedom of speech that is democratically enhancing. Also, the rationale that connects to the individuals and the individuals place within the broader community.

R v Keegstra: Dissent but focus on freedom of expression (not the source of the disagreement)

- Three main rationales for why free speech is important
    - 1. political process/democracy
        - freedom is instrumental in promoting the free flow of ideas **essential to political democracy** and the functioning of democratic institutions
        - 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
    - 2. search for truth/marketplace of ideas
        - Knowledge and truth
        - Its only through the widest array of opinions and views that society is able to find truth (marketplace of ideas)
        - 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
            - Nevertheless, it assists in promoting the truth
        - 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
        -
    - 3. inherent value/self-actualization
        - The natural law/human dignity/relational argument
        - free speech is inherent in human condition – we need to express ourselves, and our law to reflect that need
        - relational aspect – contributes to the building of community and humanity
        - Free expression is an end in itself

        - 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
    - Different justification for freedom of expression may assume varying degrees of importance in different fact situations

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

- Protects the individual's freedom to communicate with others
- All arguments for protection of freedom of expression seem to focus on a combination of three values: 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 shaped from the demands of collective welfare
    - 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
- Some also categories freedom expression theories as either "listenr" or "speaker"
    - Listener theories = listener can hear and judge the expression for herself
        - Protected as a matter of respect for her autonomy as a rational agent or for its contribution to social goals such as the development of truth or the advancement of democratic government
    - Speaker theories = value self-expression
        - Part of a basic human autonomy or is critical to her ability to direct the development of her own personality
- **Focus on these accounts on speaker and listener "misses the central dynamic of the freedom, the communicative relationship, in which the interests of the speaker & listener are tied"**

Why should we limit free speech?

- Speech can be so harmful as to undermine the values it protects – democracy, truth, human dignity
- Free speech advantages the loudest speakers
    - to promote everyone's ability to speak, some speech may have to be limited
- Not all speech is created equal
    - cigarette advertising is not the same as political speech
- Marketplace of ideas is a bit naïve- premised on equality
    - sometimes that place gets torqued in a way that pollutes the whole thing
    - Holocaust and Rwanda – let untrue speech acts form the foundation of violence
    - In the short run, millions of people have died in violence that had its origins in hateful speech
- Issues around disinformation & misinformation
- Libel / defamation
- Practical problems: Who determines what is harmful? Is it objective? Consistent?

Positives of free speech (*Keegstra* mostly)

- Good for society/conducive to learning
    - Chilling effect to limit

    - Marketplace of ideas
- Democratic principles
    - "breath of life of parliamentary institutions"
    - Need a mix of perspectives
- Government should not have a censorship role (social credit case)
    - Governments have an interest in not being criticized/having public dissenters

Freedom of Expression: Commercial Context

Irwin Toy v Quebec 1989 SCC - Freedom of Expression TEST

- **1) Does the plaintiff's activity (that the legislation targets) fall within the sphere of conduct protected by freedom of expression?**
    - Not all activity is protected by freedom of expression
    - What is expression? (p 1001)
        - **ANY action that *attempts* to convey meaning.**
            - Expression is not just about things you say. It is also about the things you DO that have expressive meaning or attempts to convey meaning.
        - BUT some expression is purely physical that falls outside expression as it is not meant to convey meaning:
            - Sitting, chewing gum, walking, eat.
            - Some physical acts are expressive at their core:
                - Holding signs at protest, dancing etc.
            - the right to park?
                - Do not have a right to park wherever you want. But you *may* have a right when attempting to convey meaning – if intention is to protest.
                - Another example: unmarried person parks in a zone reserved for spouses of govt employees to express outrage. **If demonstrate there is an expressive content → it would fall within the sphere**
        - **Internal limit: violence is outside of 2(b).**
            - Not going to *prima facie* protect abhorrent activity – don't deal with violent acts in s 1
            - Threats of violence are speech not protected either since 2012 case (*Khawaja*)
- **2) Purpose Test: Was the purpose or effect of the govt action to restrict freedom of expression?**
    - Restricting content and form vs. physical consequences
        - Path 1: A law will limit 2(b) if the purpose of a law is to restrict content of expression → go directly to section 1 – restricting content.
            - By singling out particular meanings. Then it necessary limits free speech.
            - Uttering threats; libel; examples of law that directly singles out activities you cannot do. Then the content is specifically addressed, and freedom of speech has been infringed so move on to section 1.
        - Path 2: A law will not limit 2(b) if the purpose of a law is to control only physical consequences of certain harmful activity
            - Regardless of the meaning being conveyed, its purpose is not to control expression
            - Some laws do not target content of speech, but they may prohibit it indirectly.
            - Ex: Noise bylaw – not passed to stop a political rally. More focused on typical nuisances like leaf blowers. But it does restrict a political rally.
    - To determine which path

- Does the mischief consist in the meaning of the activity or the purported influence that meaning has on the behaviour of others?
- Does it consist only in the direct physical result of the activity?

- **3) Restricting Effects: Were the effects of the government action to restrict the freedom of expression?**
  - Even if purpose was not to control or restrict attempts to convey a meaning, the Court must still decide whether the effect of the action was to restrict free expression
    - Claimant must demonstrate that the expressive activity promotes at least one of the underlying values of free speech: self-fulfillment, promoting democracy through participation in the community, or pursuit of truth
      - 1) seeking and attaining the truth is an inherently good activity;
      - 2) participation in social and political decision making is to be fostered and encouraged;
      - 3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant and welcoming environment for those conveying the meaning and those who the meaning is conveyed to

      → if claimant cannot prove, then no infringement of 2B and no s1 analysis

Ratio	Freedom of expression test
	• Step 1 – Was the activity within the sphere of conduct protected by freedom of expression?
	  ○ The meaning of expression: content and limits
	• Step 2 – Was the purpose of the government action to restrict the freedom of expression?
	  ○ Restricting content and form vs physical consequences
	• Step 3 – Were the effects of the government action to restrict the freedom of expression?
	  ○ Demonstrating value
	• Section 1 Analysis – Is it justified limitation?

Facts	• Facts: This case involved a challenge to Quebec laws regulating children's advertising on the basis of s 2(b). 'no person may make use of commercial advertising directed at persons under 13 years of age'. • (already covered this case under section 1)

Reason	TEST AS OUTLINED ABOVE
	• Irwin attempting to convey meaning: **advertising aims to convey a meaning**
	• Was the restriction targeting the content or simply is it an indirect impact on the effects of that expression?
	  ○ Govt purpose was to prohibit particular content of expression – advertising – in the name of protecting children
	  ○ Therefore, Irwin does not need to show promotes values of free speech
	
	Section 1 Analysis
	• Courts want to give deference in line drawing in cases where there were conflicting interests.
	  ○ Courts should not replace one line with another where legislature has a basis for where they placed line
	  ○ Especially if done by weighing scientific evidence and allocating scarce resources
	• <u>Prescribed by law</u>: nothing inherently confusing or contradictory. Legislature has provided an intelligible standard
	• <u>Pressing and substantial</u>: concerns are the susceptibility of young children to media manipulation and their inability to differentiate between reality and fiction

	○ Used the Trade Commission report on young children saying 2-6 cannot distinguish fact from fiction ○ Television advertisement directed at young children is per se manipulative ○ If the legislature has made a reasonable assessment as to where the line is most properly drawn, especially if that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the court to second guess • Means proportional to the ends: the choice of means will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources ○ There is evidence establishing the necessity of a ban to meet the objectives the government had reasonable set and the court will not take restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups as long as there is a sound evidentiary basis for the government's conclusions ○ *Edwards Book*→ court should be cautious not to become an instrument of better situated individuals to roll back legislation which has its object the improvement of conditions of less advantaged persons when interpreting and applying the Charter ○ Did the government have reasonable basis on the evidence tendered for concluding that the ban on all advertising directed at children impaired freedom of expression as little as possible given the government's pressing and substantial objective? ▪ Yes, strongest evidence from FTC report ○ Legislative action to protect vulnerable groups does not necessarily have to be restricted to the least common denominator of actions taken elsewhere ○ The evidence shows the legislature's conclusion was reasonable ○ A ban on commercial advertising directed at children was the minimal impairment of free expression consistent with goal of protecting children against manipulation via such advertising • Deleterious effects: no suggestion that the effects of the law are so serious to outweigh the pressing and substantial objective ○ Advertisers will have to develop new marketing strategies for children's products •

RJR MacDonald v Canada 1995 SCC

Ratio	• Core v periphery of expression • Core = political speech – "breath of life" of democratic institutions. Periphery: advertising, porn, hate speech – low intrinsic value
Facts	• The Tobacco Products Control Act prohibited the advertising and promotion of tobacco products offered for sale in Canada and required manufacturers to add to 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 manufactures challenged the Act on federalism grounds and Charter grounds • There's both limitation on expression and compelled speech here
Issue	• Does this Act infringe the freedom of expression? Can it be saved under s.1?
Result	• Yes – and cannot be justified under s. 1. • The prohibitions against advertising and requirement of unattributed warning are of no force and effect – appeal allowed

Reason	Division of Powers issue: ○ Is this a valid criminal law – it seems like 92(13) (civil rights and property) ▪ However, regulatory laws can be criminal laws (*Hydro Quebec*) ▪ Is this regulatory, or a prohibition? 3 P's? Ancillary doctrine? ○ This is valid criminal law <u>Charter challenge: freedom of expression</u> • TLDR: The prohibition on advertising and promotion of tobacco products violated the right to free expression. Since freedom of expression necessarily entails the right to say nothing or the right not to say certain things, the requirement that tobacco manufacturers place an unattributed health warning on tobacco packages combined with the prohibition against displaying any writing on their packaging other than the name, brand name, trademark, and other information required by legislation too infringed this right. • Section 7, which prohibits the free distribution of any tobacco product in any form, is closely connected to the law's objective and should stand. • RJR Macdonald is attempting to convey meaning: advertising (we know this from *Irwin*) Deference v. rigour under section 1 • Page 1021: Rigor need to justify free speech ○ *Oakes's* test should be applied flexibility, having regard to the factual and social context of each case ○ The contextual approach doesn't reduce the obligation on the state to meet the burden demonstrating that the limitation on rights imposed by law is reasonable and justified ▪ Onus is still on the govt. ○ Degree of deference to Parliament and legislation may vary with the social context in which the limitation on rights is imposed ▪ **Difficulty of devising legislative solutions to social problems can also be given greater deference to Parliament** (for example, when there are competing rights b/w different sectors of society but not when it is the individual v the state) ○ But deference must not be carried to the point of relieving the government of the burden which the Charter places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable [136] ▪ Here the govt did not show evidence (trust us, smoking is bad, why not use a less impairing law?) – criticized by the government ○ Total prohibitions are harder to justify • Civil standard of proof of balance of probability is appropriate at all stages of the proportionality analysis • **Objective**: to prevent people in Canada from being persuaded by advertising to use tobacco products • **Rational connection**: there is sufficient evidence to establish a link based on reason or logic. There would be no causal connection between objective of decreasing tobacco consumption and absolute prohibition on the use of tobacco trademark on articles other than tobacco products. So s8 of the Act fails the rational connection test • **minimal impairment** (1023) ○ **"law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator**

	▪ IF the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement ○ Simple fact we can find alternatives is insufficient to state cannot be justified under s 1 ○ BUT it will still be the case to justify a complete ban on a form of expression [163] ▪ A full prohibition will only be constitutionally acceptable where the government can show that only a full prohibition will enable it to achieve its objective ▪ Here the government have failed to show that a partial ban would be less effective ▪ Ban is **more intrusive of the freedom than is necessary to accomplish its goals** • "Care must be taken not to undervalue the expression at issue. Commercial speech, while arguably less important than some forms of speech, nevertheless should not be lightly dismissed" [170] ○ As a result, held not justified under s 1 ○ **Motivation for profit is irrelevant to the determination of whether the government has established that the law is reasonable or justified as an infringement of freedom of expression** • The government failed to show that the unattributed warning was required to achieve its objective of reducing tobacco consumption among those who read the warnings and they failed to show why permitting tobacco companies to place additional information on tobacco packaging would defeat the government's objective
dissent	• The infringement was justifiable under s. 1. Protecting Canadians from the health risks associated with tobacco use, and informing them about these risks, is a pressing and substantial objective. It meets the two broad criteria set forth in Oakes. First, its objective is of sufficient importance to override a guaranteed right. Second, it meets the proportionality requirements established in Oakes. These requirements are not synonymous with nor have they been superseded by those set forth in s. 1 of the Charter. The appropriate "test" is that found in s. 1 itself. The courts are to determine whether an infringement is reasonable and can be demonstrably justified in a "free and democratic society" and must strike a delicate balance between individual rights and community needs. This balance cannot be achieved in the abstract, with reference solely to a formalistic "test" uniformly applicable in all circumstances. The section 1 inquiry is an unavoidably normative inquiry, requiring the courts to take into account both the nature of the infringed right and the specific values and principles upon which the state seeks to justify the infringement. An important "synergetic relation" exists between Charter rights and the context in which they are claimed. The Oakes requirements therefore must be applied flexibly, having regard to the specific factual and social context of each case. A rigid or formalistic approach should be avoided in order to overcome the risk of losing sight of this relation. • Section 1: The Oakes test – must be applied flexibly, having regard to the factual and social context of each case • A contextual approach does not give the government an exemption – deference may vary with the social context in which the limitation on rights is imposed – but should not extend this too far • Rational connection: at trial, evidence established a link between certain forms of advertising and tobacco use ○ Also internal marketing documents prepared by tobacco manufacturers themselves show their advertising strategy is to reassure current smokers and expand the market by attracting new smokers, primarily among the young

	• Minimal impairment: Parliament adopted a relatively unintrusive legislative approach to the control of tobacco products
	  ○ Degree of required fit between means and ends vary depending on both the nature of the right and the nature of the legislation
	• A strict application of the proportionality analysis in cases of this nature would place an impossible onus on Parliament by requiring it to produce definitive all scientific evidence respecting the root cause of a pressing area of social concern every time it wishes to address its effects
	• Other options that would have been less intrusive – a partial ban, a ban on lifestyle advertising only, measures to prohibit advertising at children, labeling requirements, attributed health message
	  ○ Core vs periphery of free speech (not all speech is created equally)
	  ▪ cigarette advertising is not the same as political speech, should therefore not be so stringently protected
	  ○ Rebuttal – but then judges are deciding what is core/periphery – its very subjective.
	  ○ Also, means that gov't won't have to demonstrably justify their infringement if we start judging which is more important. Forgetting Hutterian Betheren
	• Just because tobacco manufacturers are required to place unattributed warnings on their products does not mean that they must endorse these messages or that they are perceived by consumers to endorse them
	  ○ The health message is no different from requiring manufacturers of hazardous products to place unattributed warnings such as Danger or Poison

Class Notes	Restricting content or incidental?
	• Two issues here. First the prohibition of advertising. Second, the requirement of warning labels. Separate analysis for each.
	  ○ Prohibition of advertising – content → path 1 → move to section 1 analysis
	  ○ Warning labels – does this infringe free speech by compelling speech?
	  ▪ Compelled speech is a violation of 2(b) – putting words in the mouth of the speaker
	  ▪ An attributed warning label is still compelled speech – hurts ability to sell these things
	  ▪ Move to section 1 analysis
	
	The core v. periphery of expression
	• This core v periphery distinction matters in section 1 (recall contextualism)
	  ○ Not all speech is created equally
	  ▪ Cigarette advertising is not the same as political speech and should not be so stringently protected
	  ○ Core: political speech – breath of life of democratic institutions (*Alberta Statutes)*
	  ○ Periphery: advertising products for profit hate speech, pornography etc. → activities of low intrinsic value
	  ○ Critique: judges decide what is core / periphery. Subjective.
	• Commercial purposes viewed as periphery. What about authors, artists, - need protection and need to eat so profit activities = periphery does not work very well

- Legislative Sequels:
  - → DIALOGUE THEORY IN PRACTICE – striking down, then fixing
  - The *Tobacco Act,* S.C. 1997, c. 13
    - Now – attributed government of Canada to the warning labels; ALSO – warning labels are much larger

- Did not ban all advertising
- *Canada (Attorney General) v. JTI-Macdonald Corp.,* [2007] 2 S.C.R. 610
  - First legislative sequel case (When a law gets struck down; then legislature responds with new law to try again)
  - Gov't listened and demonstrated evidence of why the rights are being infringed
  - More deference may be appropriate where the problem parliament is tackling is a social policy problem
    - on complex social issues, the minimal impairment test has been met when parliament has chosen one of the reasonable alternatives (Irwin Toy; Edwards Books)
    - but they don't get more deference just because legislation is responding to decision that previous law was unconstitutional (legislative sequel)
  - **spectrum of speech exists (McLachlin) but let's not get carried away with it and do not dismiss commercial speech**.
  - Govt won at section 1

FREEDOM OF EXPRESSION (HATE SPEECH)

CB: 1033-1051, 1057-1062:

- 319. (2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of
  (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
  (b) an offence punishable on summary conviction.
- Defences
  - (3) No person shall be convicted of an offence under subsection (2)
  - (a) if he establishes that the statements communicated were true;
  - (b) if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text;
  - (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
  - (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.

- Violence and Threats of Violence now Excluded from s. 2(b) (see R v Khawaja, 2012 SCC 69)

R v Keegstra

Ratio	• Hate speech and threats of violence are not a form of violence that falls within the Irwin Toy exception (LATER THEY WERE – *KHAWAJA*)
Facts	• K (high school teacher) was charged under s. 319(2) of the Criminal Code for unlawfully promoting hatred against an identifiable group by communicating anti-Semitic statements to his students. He expected his students to reproduce his teaching in class and on exams. If they failed to do so, their marks suffered • Argument: He claimed s. 319(2) unjustifiably infringed his freedom of expression as guaranteed by s. 2(b) of the Charter – trial convicted him; CA accepted his argument •

Issue	• Does s. 319(2) unjustifiably infringe K's right to freedom of expression by preventing him from hateful speech against Jews?
Result	• S. 319(2) does infringe the right to freedom of expression, but can be upheld under s. 1 • Conviction stands
Reason	2B ANALYSIS • Is it an attempt to convey meaning? o Yes o "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. Because Irwin Toy stresses that the type of meaning conveyed is irrelevant to the question of whether s. 2(b) is infringed, that the expression covered by s. 319(2) is invidious and obnoxious is beside the point." • Is the purpose of s 319 to restrict content of speech? o Yes. Directly targets the content (hatred) → singling out a specific thing you cannot do o "the prohibition in s. 319(2) aims directly at words -- Mr. Keegstra's teachings -- that have as their content and objective the promotion of racial or religious hatred. The purpose of s. 319(2) can consequently be formulated as follows: **to restrict the content of expression by singling out particular meanings that are not to be conveyed.** Section 319(2) therefore overtly seeks to prevent the communication of expression, and hence meets the second requirement of the Irwin Toy test. • Move onto section 1: K does not have to show the underlying values **Section 1 analysis** • Pressing and substantial objective o Hate speech can lead to harms: genocide has historically started with hate speech o Two types of harm caused by hate propaganda: ▪ 1) Harm done to members of the target group (impact sense of self-worth and acceptance) and o target of the hate speech become less able to participate ▪ 2) Influence upon society at large o Individuals can be persuaded to believe almost anything if information or ideas are communicated using the right technique and in the proper circumstances o Downstream harms created by the hate speech – spread of racism • Regarding the three justifications for protection of free speech o "expression can be used to the detriment of our search for truth; the state should not be the sole arbiter of truth, but neither should **we overplay the view** that rationality will overcome all falsehoods in the **unregulated marketplace of ideas**." (pg 1040) o vital role of free expression as a means of ensuring individuals the ability to gain self-fulfillment by developing and articulating thoughts and ideas as they see fit… [BUT] The extent to which the unhindered promotion of this message furthers free expression values must therefore be tempered insofar as it a**dvocates with inordinate vitriol an intolerance and prejudice** which view as execrable the process of individual self-development and human flourishing among all members of society. o expression can work to undermine our commitment to democracy where employed to propagate ideas anathemic to democratic values. Hate propaganda works in just such a way, arguing as it does for a society in which the democratic process is subverted and individuals are denied respect and dignity simply because of racial or religious

	characteristics. This brand of expressive activity is thus wholly inimical to the democratic aspirations of the free expression guarantee.
	• Is it rationally connected?
	  ○ 3 ways effects of leg might be seen as irrational means of carrying out Parliamentary purpose (put forward in Dissent by MacLachlin and rebutted here by Dickson):
	  ▪ 1) Law might actually promote the cause of hatemongers by earning them extensive media attention. Person accused of intentionally promoting hatred often see themselves as martyrs engaged in battle against the immense powers of state
	  ○ Rebuttal: the law demonstrates the severe condemnation society holds for these messages
	  ▪ 2) The public might view the suppression of expression with suspicion
	  ○ Might contain an element of truth
	  ○ Rebuttal: government suppression of hate propaganda will not make the expression attractive and hence increase acceptance of its content
	  ○ Governmental disapproval of hate propaganda does not invariably result in dignifying the suppressed ideology
	  ○ Porn is not dignified by its suppression
	  ▪ 3) Germany in 1920s/30s used these same type of laws; did not to stop the racist philosophy under Nazis
	  ○ Does not say it could have stopped – but this is one way to prevent the spread of racism
	  ○ It's a bid of a free and democratic society to prevent the spread of racism
	  ○ Their rational connection to this objective must be seen in such a context
	  ○ This branch has been met
	
	• Minimal impairment
	  ○ This is a tailored provision. Not overbroad.
	  ▪ The defences narrow the scope (defence of truth)
	  ▪ "other than in private conversation" → specific to public promotion of hatred
	  ▪ "wilful" = must subjectively desire/intend the promotion of hatred or have foreseen such a consequence as certain to result from the communication
	  ○ (this is why prosecutions under 319 are rare)
	  ▪ "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 <u>detestation</u> and hatred is predicated on destruction
	  ○ **READING DOWN** → narrowing scope of provision to give it a constitutional interpretation
	  ○ **Issue with this** – people have to go to Keegstra to understand the scope (possible conflict with rule of law and thus chill speech)
	  ○ **Alternatives**: severing is more dramatic. Striking down leaves a gap (unless suspended which has other issues). If hatred is too broad – how to define it? We use broad words in law all the time.
	  ○ **Therefore,** narrow hatred and make it constitutional.
	• Proportionality
	  ○ Not discussed in class + not in casebook

Dissent	• Rational connection:

	○ Not clear it has a way of curbing hate speech → could it have the opposite effect? Streisand effect. ○ Criminal process confer on the accused publicity for his dubious causes, it may even bring him sympathy • Minimal impairment ○ Definition of offending speech captures many expressions which should be protected ○ How do we define "promoting hatred"? vague ▪ Broad spectrum of meaning of hatred. Use it every day to express things of dislike. ○ Overbroad shown by its track record – provoked many questionable actions by the authorities ○ Criminalization is itself an excessive response to the problem of hate propagation

Saskatchewan (Human Rights Commission) v Whatcott

Facts	• 14. - (1) No person shall publish or display, or cause or permit to be published or displayed, on any lands or premises or in a newspaper, through a television or radio broadcasting station or any other broadcasting device, or in any printed matter or publication or by means of any other medium that the person owns, controls, distributes or sells, any representation, including any notice, sign, symbol, emblem, article, statement or other representation: ○ (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. • (2) Nothing in subsection (1) restricts the right to freedom of expression under the law upon any subject. ○ [this is a weird inclusion. It obviously does restrict] • 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). • Whatcott Argues: ○ 2A (freedom of conscience) – things he was distributing were merely a manifestation of religious beliefs ○ 2B (expression)
Issue	• Is Whatcott's freedom of expression justifiably infringed by preventing him from handing out his flyers?
Result	• Yes, infringes s 2(b) but can be upheld under s. 1, IF the words 'ridicules, belittles, otherwise affronts' are severed
Reason	• Attempt to convey meaning? yes • Path 1: direct interference – direct prohibition Section 1 • Prescribed by law • Pressing and subjective ○ Prevent the negative effects of hate speech ▪ goes too far with "ridicules, belittles or otherwise affronts dignity" ○ These are overbroad – capturing the low end of speech, and having a chilling effect on speech

- The expression captured by those words does not rise to the level of "ardent and extreme feelings" essential to the constitutionality of the limitation on expression, so the Court ordered those words struck out – severing that portion of the provision, the remaining prohibition is not overbroad

- Rational connection
  - Same issue with the words
  - But hatred provides a reasonable connection to protect the public
- Proportionality
  - Not all expression will be treated equally when balancing of competing values under a s. 1 analysis.
  - Different 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, in turn, affect its value relative to other Charter rights, the exercise or protection of which may infringe freedom of expression

Section 2a

- **Would a reasonable person, aware of the context and circumstances surrounding the expression, view it as exposing the protected group to hatred**? (*Taylo)*
- Does the flyer contravene the Code?
  - General comments on sexual activity are not likely to fall in the purview of a prohibition against hate
  - If W chooses to direct his expression at sexual behaviour by those of a certain sexual orientation, his expression must be assessed against the hatred definition in the same manner as if his expression was targeted at those of a certain race or religion
  - Flyers D & E: 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 → objectively viewed as exposing homosexuals to detestation
  - Flyers F and G were offensive but did not amount to inciting hatred and did not contravene the Code

- Why sever not strike down with suspension
  - The rest of the statute is not overly broad
  - The other sections are not necessary to fulfil the purpose. Still makes sense without them so unnecessary to fully strike down.
    - Like M v H where removing "spouse" was appropriate because could not read in definition and the rest served a purpose

SECTION 7: RIGHT TO LIFE LIBERTY AND SECURITY

CB: 1181-1188, 1194-1209:

- 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.

- Issues with section 7 from the outset:
  - Language similar to US bill of rights
  - Difference: exclusion of property rights. Why?
    - Public policy. No inalienable right to property.

        - Expropriation
        - Taxation
        - Power of regulation / zoning
        - All these acts deal with interference with property. Did not want to justify each one.
    - Section has a powerful internal limit: "except in accordance with"
        - State CAN deprive you of life, liberty, and security as long as it accords with principles of fundamental justice
            - Courts then interpret internal limits
        - What does PFJ mean?
    - How to define liberty?
        - Liberty from confinement (prison) or liberty as in choice
    - How to define security of the person?
        - Physical? Psychological? Bodily integrity? What is the threshold?
        - Interferes all the time for example requiring a seatbelt
    - "AND"
        - S 7 protects two distinct categories of rights
        - Arbour in Dissent
            - Positive rights: right to liberty, life, and security
            - Negative right: right not to be deprived of those positive rights
        - Majority does not agree with this. Still just an idea. Courts shy away from positive rights – how to determine when a govt should give MORE security.
            - Instead, should be interpreted in a purpose way. It is a shield to protect rights. Not a sword to demand more life, liberty, and security.
            - Does not make sense because then would have a broad set of rights and then a narrow set of rights to follow them (PFJ)

SECTION 7 TEST

Section 7 Claim Test

- **Step 1) is there a *prima facie* violation of life, liberty, OR security of the person by the government?** *(Motor Vehicle Act)*
    - Identify **which right is engaged:**
        - The interest in **life** is engaged by govt action that:
            - Imposes death or increases the risk of death (*Carter)*
            - creates a serious threat to an applicant's life by preventing the person from obtaining access to medical care (*Chaoulli)*
            - Extradition to face offences punishable by death
        - An interest in l**iberty** is engaged with the state interferes with someone's right to make fundamental personal choices or there is a possibility of incarceration (*Morgentaler*)
            - Protects human dignity *and* physical liberty
            - This right is engaged at every stage of the criminal process (*Motor Vehicle)*
        - Interest in **security of person** is engaged by state interference with bodily integrity and severe state-imposed psychological stress (*Morgentaler; Bedford*) and making a dangerous activity mor dangerous (*Bedford; Insite)*
            - Generally, whenever states use force against a person's body s 7 will be engaged
    - Must be a '**sufficient causal connection'** between state action and the effect/deprivation on applicant's life, liberty, or security (*Bedford*)
- **Step 2) Is the state deprivation in accordance with the Principles of Fundamental Justice**

- Onus is on claimant to prove that governments action is contrary to at least one PFJ
- **First step – what is the objective/ purpose of the law**
  - Court must be careful to not state law's objective too broadly (*Carter*)
  - Looked at with a purposive analysis of s 7 preferring interpretations that are more rights protecting (*Hunter*)
- **Second step is to identify the relationship between the state interest and the impugned law**
  - At this step the focus is not on the impact of the measure on society of the public, but on its impact on the rights of the claimant (*Carter)*
    - **Arbitrary**: a law which is inconsistent with or bears no relation to its purpose (*Insite; Bedford)*
    - **Overbroad**: does the deprive s.7 rights more than is necessary? (*Bedford; Carter)*
    - **Gross disproportionality**: is the deprivation so extreme as to be disproportionate to any government interest (*Insite)*

- Infringement? → go to section 1 analysis
  - Difficult to justify infringement of s7 rights because it is fundamental and not easily overridden by competing social interests (*Carter)*
- Focus on rights claimant at s 7 (*Carter; Bedford)*

Ref re s. 94(2) of the Motor Vehicle Act

Ratio	• PFJ is going to be interpreted broadly ○ They are the underlying principles in our laws that the courts will be spotting and protecting • It is not just about procedural - it is substantive due process [content itself must be fair and just]
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 (no *mens rea* requirement) • Absolute liability offence
Issue	• Does s. 94(2) unreasonably infringe s. 7 of the Charter? What do the 'principles of fundamental justice' mean?
Result	• Absolute liability offends principles of fundamental justice and cannot be justified under s. 1

Reason	• Government thought 'fundamental justice' would cover the same thing as 'due process' - 'does not cover the concept of what is called substantive due process'
	  ○ Procedurally fairness = fair process, give notice, listen
	  ○ Engaged in the transparent democratic process
	  ○ If its just procedural fairness = the provision wouldn't have any backbone, it would be easy for the government to interfere with right
	  ○ Procedural v substantive due process [content itself must be fair and just]
	• PFJ are <u>not a protected interest</u> but a qualifier of the right not to be deprived of life, liberty, and security of the person
	  ○ Establishes the parameters of the interests but it cannot be interpreted so narrowly as to frustrate or stultify them
	  ○ Meaning of PFJ (given insight through s 8 to 14) are essential elements of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and on the rule of law

	○ Purposive analysis → interpret broadly (*Big M)* • The principles of fundamental justice are to be found in the basic tenants of our legal system – they do 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 Section 7 Claim Test • Step 1) is there an interference with life, liberty, OR security by the government? ○ Yes – this obviously interfered with liberty criteria because people are being imprisoned • Step 2) The Principles of Fundamental Justice ○ Onus is on claimant to prove that governments action is contrary to PFJ ○ Must be looked at with a Purposive analysis of s. 7 (*Hunter* – prefer interpretations that are more rights protecting (broad interpretation)): ▪ Section 7 is meant to protect the life, liberty, and security of the person ▪ PFJ are to be found in the basic tenants of our legal system (inherent principles of justice) ○ One of these: innocent people should not be convicted – insisting on mens rea ○ Held that "principles of fundamental justice" had two prongs: ▪ 1. Is the law substantively fair? (Should we have a law at all?) and ○ Substantive due process – is content of this law in accordance with larger principles of justice? ▪ 2. Is the procedure fair? ○ Procedural due process – the law needs to be clear, procedurally correct. ○ If PFJ are only procedural, it's easier for the government to interfere with rights of LLSP. ○ If PSJ are broader and more substantive, court will be able to evaluate the content of those laws. ○ Ss. 8-14 address specific deprivations of the right to LLSP in breach of the PFJ and as such, are violations of s. 7 ▪ Incongruous to interpret s. 7 more narrowly (more important) than the rights in ss. 8-14 (less important) ▪ These sections are examples in which the 'right' to LLSP is violated not in accordance w/ the PFJ • Justify under section 1 ○ Problem here: the court has just found that the law is contrary to PFJ – how do we justify it then? ○ Government has not demonstrated that the risk of imprisoning innocent persons was reasonable limit when weighed against the alternative of a statute that allowed for a defence of due diligence

R. v. Morgentaler

Ratio	• Security of the person is defined by 1) bodily integrity and 2) psychological wellbeing ○ Serious state imposed psychological stress – not every state act imposes stress • Liberty includes 1) incarceration and 2) fundamental personal choices (at a reasonably high threshold)

Facts	• S 251 of the Code: anyone who took steps to cause an abortion was guilty of an indictable 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 established an abortion clinic clearly violating s. 251(1) because it was not approved/did not obtain certificate
	• Charged, argued provision violated s. 7 of the Charter

Issue	• Does s. 251 of the Code violate s. 7 of the Charter?
Result	• The deprivation of security of the person caused by s. 251 violates s. 7 • It cannot be justified under s. 1 (its procedural delays impair s. 7 rights far more than is necessary)

Reason	<u>Step 1. Does the law engage one of the rights under s 7?</u>
	• Yes – security of the person at least (Also maybe liberty – because there is the possibility of jail)
	• Security of the Person – What does this mean?
	  ○ There are 2 types of actions by the state can engage your security of the person interest.
	  ○ **1) State interference with bodily integrity, and**
	  ▪ Forming committee took time, unnecessary delays, forcing her to carry it longer than she would want to
	  • interfering with control over her own body
	  ○ **2) Serious state imposed psychological stress**
	  ▪ Imposition of the stress/anxiety/uncertainty about not knowing what would happen
	  ○ 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 – infringes s 7
	FINDING AN INFRINGEMENT IS NOT THE END → GOVERNMENTS MAY CHOOSE TO INFRINGE IF IT DID SO IN A MANNER THAN COMPLIES WITH PFJS
	• <u>Step 2: Complying with Principles of Fundamental Justice?</u>
	  ○ Only 20% of hospitals in Canada are able to perform abortions
	  ▪ The requirements for approval were so strict (and provinces were able to impose more restrictive reqs)
	  • Need to have at least 3 doctors to form a committee and none of them could perform the abortion so they needed a fourth doctor
	  ○ A therapeutic abortion is granted only when in the interest of the 'life or health' of the pregnant women
	  ▪ 'health' is not defined, and committees are applying different definitions
	  ▪ The absence of a clear legal standard is a serious procedural flaw (no predictability)
	  ▪ No adequate standard for therapeutic abortion committee when therapeutic abortion as a matter of law should be granted
	  ○ s. 251 does not comply with the principles of fundamental justice
	  ▪ The delays are unconnected to the objective of the law (for women to protect their health)
	  • The max delay was 1 week for government sponsored clinics in Quebec
	  • The delay for therapeutic abortion is 6 week or more and caused by the requirements of s 251 itself
	  ▪ Requiring women to travel would create a financial burden and some hospitals imposed geographic limitations
	  ▪ They are arbitrary, or certainly grossly disproportionate
	  ▪ This is manifestly unfair, contrary to PFJ.

- *Section 1*
  - Not justified – it impairs s. 7 rights far more than is necessary
    - Women who wish to avoid criminal liability will nevertheless be forced by the practical unavailability of the supposed defence to risk liability or to suffer other harm such as traumatic late abortion caused by delay inherent in the s 251 system
  - The effects of the limitation upon s. 7 rights are out of proportion to the objective sought to be achieved
    - Objective (to protect life, health of women) may be defeated because the process is so cumbersome that women whose health is endangered may not be able to gain an abortion

Concurrence (Beetz)

- 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 an act of Parliament forces a person to choose between committing a crime to obtain effective and timely medical treatment or receive in adequate or no treatment at all then the right to security of the person has been violated
- 3 delays which can be traced to s 251 requirements
  - Absence of hospitals with therapeutic abortion committees in many parts of Canada
  - The quote which some hospitals with committees impose on the number of therapeutic abortions which they perform
  - The committee requirement itself each create delays for pregnant women who seek timely and effective medical treatment
- Any delay does not result in s7 being invoked, it's delays that because of the CC result in an additional danger to the pregnant woman's health and the state intervened and this intervention constituted a violation of that woman's security of the person
  - By creating additional risk, it prevents access to effective and timely medical treatment for the continued pregnancy which would or would be likely to endanger her life or health
  - Delay caused by s251 results in
    - Risk of post-operative complications increases with delay
    - Risk that the pregnant woman requires a more dangerous means of procuring a miscarriage because of the delay
    - Since pregnant woman knows her life or health is in danger, the delay created by s 251(4) procedures may result in an additional **psychological trauma**
- Why does it require an in-hospital committee of 3 physicians from which is excluded the practicing physician?
  - Not rationally connected, violates PFJ
- Only so far the administrative structures that create delays which are unnecessary that the structure can be considered to violate the principles of fundamental justice

Concurrence (Wilson)

- The first question is not 'is the system constitutional', but 'do women have a constitutional right to abortions?'
  - If the answer is yes, then whatever system that limits that right will be unconstitutional
- Do women have a right to abortion? Yes. It is a liberty right to make a decision about this.
  - Liberty is also about fundamental personal decisions, in which the state cannot interfere
    - Charter is a fence around these types of fundamental personal decisions

	• It's about respecting human dignity ▪ The right to liberty contained s7 guarantees to every individual a degree of autonomy in making decisions of fundamental personal importance. • Right to make fundamental personal decisions without interference from the state • Liberty in a free and democratic society does not require the state to approve the person decisions made by its citizens, it does require the state to respect them ▪ Does the right of women to terminate her pregnancy fall within this class of protection? • It has profound psychological, economic, and social consequences for the pregnant woman • It's not just a medical decision, it's a profound ethical and social one o The purpose of s 251 is to take the decision away from the woman and give it to a committee ▪ Committee bases its decision on criteria entirely unrelated to pregnant woman's priorities and aspirations ▪ The fact that the decision whether a woman will be allowed to terminate her pregnancy is in the hands of a committee is just a great violation of the woman's right to personal autonomy in decisions whether a woman should be allowed to continue her pregnancy o Right to security of the person protects both physical and psychological integrity of individual ▪ It also asserts that the woman's capacity to reproduce is not to be subject to her own control rather to be subject to the control of the state ▪ It is a direct interference with her physical person as well o Not saved by s1 because it took the decision away from the woman at all stages of her pregnancy and was not sufficiently tailored to its objective
Disssent (McIntyre)	• All laws have a potential to interfere with individual priorities and aspirations • When legislation go beyond interfering with priorities and aspirations and abridges rights, that court must intervene • Can't read new rights into the Charter – abortion is not in the Charter o Always been clear recognition of a public interest in the protection of the unborn o No evidence or indication of any general acceptance of the concept of abortion at will in our society • To invade s7 right of security of the person, there would have to be more than state-imposed stress or strain

Chaoulli v Quebec [2005] 1 SCR 791 at para. 209 – How many MRIs does a constitution require

- Facts: QC prohibiting the purchase of private health insurance

- How would you argue that the legislative prohibition on the purchase of private health insurance violates s. 7?
  - Security of person
    - Delay (*Morgentaler*) in medical treatment/medication
    - Increased psychological stress, decreased in quality of life
    - Exposed to pain and suffering through delay
  - Liberty
    - Health insurance is a fundamental personal choice to care and how you take care of your body
    - State is requiring public over private
- How to determine the PFJ?
  - must be a **legal principle**
  - reasonable people must regard it as **vital to our societal notion of justice** (social consensus);

- capable of being identified with **precision** and applied in a manner that yields predictable results (i.e. not unduly vague)

- Yet, since this case, Court have instead focused on applying 3 PFJs rather than finding new ones
  - **Arbitrary**:
    - Prohibition on insurance decreases health care [purpose is to provide public health care]
  - **Overbroad**
    - Capturing more people than just the wealthy - Insurance removes demand and leaves open to those that cannot afford private
  - **Gross Disproportionate**
    - Public objective to provide health care, but prohibition on private insurance can leave individual suffering for years
  - → similar to section 1 analysis
- Struck down under *Quebec Human Right's Act* not under s 7. QC made some changes.

Canada v PHS 2011 SCC - Insite

Ratio	• What infringes PFJ:
	  ○ 1. Arbitrariness
	  ▪ Identify the law's objective
	  ▪ Identify relationship b/w state interest and impugned law
	  ○ 2. Overbreadth
	  ○ 3. Grossly disproportionate
	• Confirmed that section 1 applies to section 7. Not automatic that s 7 cannot be justified.

Facts	• Insite safe injection site. Exemption from Controlled Drugs and Substances Act provided. • Harper's govt rejected application for exemption renewal. • Insite make section 7 claim
Issue	• Does the government have a constitutional obligation to exempt safe injection sites from operation of the criminal law prohibitions on possession and use of narcotics? What is s7 argument?
Result	• Arbitrariness and gross proportionality so violates s7

Reason	• 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
	• Arbitrariness
	  ○ First step in determining whether a law's application is arbitrary → Identify the law's objective
	  ▪ Protection of health and public safety

	○ Second step is to identify the relationship between the state interest and the impugned law (or impugned decision of the Minister in this case) ▪ Statement of collective disapproval by society of drugs ▪ Rationally connected to a reasonable apprehension of harm ▪ Burden on claimant to show that it's not in accordance with PFJ ○ Traditional criminal prohibitions have done little to reduce drug use ○ Risk of injection drug users of death and disease is reduced when they inject under the supervision of a health professional ○ Presence of insite did not contribute to increased crime rates, increased incidents of public injection or relapse rates in injection drug users • Gross disproportionality ○ state actions or legislative responses to a problem that are so extreme as to be disproportionate to any legitimate government interest ○ Insite saves lives ○ Effect of denying service to population is grossly disproportionate to any benefit that Canada might derive from presenting a uniform stance on the possession of narcotics • Overbreadth ○ Not necessary to consider where arbitrariness and gross disproportionality are met • S1 ○ Minister's decision to refuse the exemption bears no relation to the objectives of the CDSA and cannot justify the infringement of the complainant's ○ Minister argued that granting s 56 exemption would undermine the rule of law and denying an exemption is justified ▪ But it's not a license for drug users to use and possess drugs wherever and whenever they wish ▪ It's not an invitation for anyone who so chooses to open a facility for drug use under the banner of safe injection facility

Canada v Bedford 2013 SCC

Ratio	• Example of grossly disproportionate and overbroad law • Focus on rights claimant at s 7 • Focus on society at s 1 • Govt cannot say legal to ride a bike and then say it is illegal to wear a helmet
Facts	• It is not a crime to sell sex for money in Canada, but it is to keep a bawdy-house, to live on the avails of prostitution, or to communicate in public with respect to a proposed act of prostitution • 3 applicants brought an application seeking declarations that 3 provisions of the Criminal Code are unconstitutional • 210.(1) Every one who keeps a common bawdy-house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years. • Every one who is found, without lawful excuse, in a common bawdy-house is guilty of an offence punishable on summary conviction. • 212. (1) Every one who … lives wholly or in part on the avails of prostitution of another person, is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years

	• 213.(1) Every person who in a public place or in any place open to public view … (c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction.
Issue	• Do these criminal code provisions infringe s. 7 of the Charter (security of the person)? ○ If so, are they justified under s.1?
Result	• Yes, infringe s 7. Not justified.

Reason	• P 1223: Precedents – does the 1990 *Prostitution Reference* bind?
	  ○ Reference was a SCC decision that upheld the constitutionality of the prohibitions on bawdy houses and communicating – two of the provisions challenged here
	  ○ A number of different interests in play with precedents:
	  ▪ Stability – to have a rule of law means to have a system of law that is binding and predictable
	  ▪ Flexibility – what if that earlier case was wrongly decided?
	  ○ Trial judges are allowed to reconsider rulings of higher courts if
	  ▪ 1) New legal issues arise as result of developments in law, or
	  ▪ 2) There is a change in circumstances/evidence that fundamentally shifts parameters of debate
	  ○ The Reference did not discuss the interests here – security of the person of the sex workers
	  ▪ The Prostitution Reference was on s7 physical liberty interest alone
	  ▪ PFJ considered in the Prostitution Reference was vagueness and permissibility of indirect criminalization
	  ▪ Here the concept of arbitrariness, overbreadth and gross proportionality is being questioned
	<u>SECTION 7 ANALYSIS (p 1225)</u>
	• Is Security of the Person Engaged?
	  ○ 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
	  ○ Yes – the prohibitions heighten the risks faced in prostitution
	  ▪ Safest place to work is from a fixed location independently.
	  ▪ Interferes with provision of health checks and preventative health measures
	  ▪ Hiring a bodyguard or a driver or receptionist is safest plan
	  ▪ Talking with potential clients in public is safest way
	  ○ Sex work is a legal activity, and the law is making it more dangerous (removing the safest way to do that activity)
	  ○ This state action (the creation of extra risk) constitutes the *prima facie* violation of the security of the person
	
	• Causal Connection?
	  ○ 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
- The causal question is whether the impugned laws make this lawful activity more dangerous

- Principles of Fundamental Justice
  - First, identify the purpose of the law in a reasonably precise way
  - Next, measure that purpose against the impact of the law on the individual rights claimant
    - I.e., consider arbitrariness, overbreadth, gross disproportionality – i.e., the PFJ
  - **Arbitrariness – is there a direct connection between the purpose and the impugned effect on the individual?**
    - There must be a rational connection between the purpose of the law and the limits it imposes on LLSP
  - **Overbreadth – a law that is so broad in scope that it captures <u>SOME</u> conduct that bears no relation to its purpose**
    - Where a law is rational in some cases, but overreaches in its effect in others.
    - Rational connection between the purpose and some (not all) of its impact
    - Distinct PFJ but related to arbitrariness. Both ask whether there is *no* connection b/w effects of a law and its objective. However, Overbreadth then allows the court to recognize the lack of connection arises in a law that goes too far by sweeping conduct into its ambit that bears to relation to its objective
  - **Gross disproportionality – the seriousness of the limitation is totally out of sync with any government interest**
    - Only applies in extreme cases: a law with the purpose of keeping the streets clean imposes a sentence of life imprisonment for spitting on the sidewalk.
    - Weighing the objective of a law against the harms it causes to the rights claimants NOT against any societal benefit possibly gained from the law
- Keeping a Common Bawdy-House
  - Purpose: prevent the public nuisance of a brothel in neighborhoods and to safeguard public health and safety
  - Practical effect: confine prostitution to street and out-calls
  - This negatively impacts security of the person and engages s. 7
    - Out-calls are not as safe as in-calls
  - PFJ – the negative impact on security of person is *grossly disproportionate* to its objective
    - harms (high homicide rate) are grossly disproportionate to the deterrence of community disruption
    - Preventing a nuisance is not worth the lives of women when we know they are dying on the street
  - Not arbitrary. Connect to the objective.
  - Overbroad – why need a total prohibition to address nuisances? Tailor it.
  - Legislature can still regulate bawdy houses, but also provide somewhere for safe conduct of legal activity
- Living on the Avails
  - Purpose: preventing exploitation of sex workers
  - Effect = prevents hiring of bodyguards, drivers, receptionists
    - This prevents prostitutes from taking steps to reduce risks they face and negatively impact security of the person
  - PFJ – this is overbroad – captures a number of non-exploitative relationships not connected to the law's purpose

	▪ Punishes everyone living on the avails of prostitution without distinguishing who exploit them ○ Tailor the law - Legislature could define 'exploitation' – captures those we want to keep out, and allows those who are helping ▪ Court reading in exploitation circumstance would create evidentiary difficulties which lead to exploiters escaping liability ○ Exploitation often involve intimidation and manipulation of the kind that make it difficult for prostitute to testify • Communicating in Public ○ Purpose: to take prostitution off the streets and out of public view; preventing nuisances, providing public orders ○ Face-to-face communication enhances safety removing this tool increases risks – engages security of the person ○ PFJ – grossly disproportionate – ability to screen clients was an essential tool to avoid violent/drunk clients ▪ Whatever minimal gain arises from the fact that this conversation is being prohibited is being outweighed by the danger that people face when they are no longer able to do a face-to-face screening in public <u>Section 1 Analysis</u> • Here is where to discuss more general public benefits and purposes of the law ○ Focusing on the individual when assessing PFJS. When turning to section 1 consider the broader implication whether or not this should be enforced or not or whether the public benefit outweigh the harm to this individual's rights ○ Government argue for total prohibition (i.e., impossibility of a more tailored distinction) ▪ We have to outlaw all relationships because we can't distinguish exploitative vs non. ▪ Enforcement practicality is one way the government may justify an overbroad law under s1 of the Charter ○ The intellectual exercise of balancing harms and benefits under s 7 becomes more practical under s 1 ▪ How many people is it actually benefitting? ○ The law's positive effect of protecting prostitutes from exploitative relationship does not outweigh preventing prostitutes from taking measures that would increase their safety and possibly save their lives • Remedy ○ Under s 52, the laws are invalid (of no force or effect) with a waiting period of 1 year.

Carter v Canada 2015 SCC

Ratio	• Prohibition is void as it is overbroad (deprives a competent adult of assistance where the person clearly consents to termination and the person has a grievous and irremediable medical condition) • The right to life is engaged where the law or state action imposes death or an increased risk of death on a person
Facts	• It is a crime in Canada to assist another person to end her own life – a person facing this prospect (who is ill and cannot seek a physician's assistance in dying, therefore may be condemned to suffering) has two options: can suffer until she dies or can take own life prematurely (before the

	disease progresses so as to prevent the ability of taking own life, but before they would choose to die if assisted suicide was an option) • 241. Every one who (a) counsels a person to commit suicide, or (b) aids or abets a person to commit suicide,
Issue	• Does the criminal prohibition on assisted suicide violate Charter rights to life, liberty, and security of the person?
Result	• Yes – violates s. 7, declaration of invalidity is suspended for 12 months
Reason	• <u>*Precedent:*</u> *Rodriguez* (1998) held the prohibition did not violate s. 7 (balances a respect for life that does not violate PFJ) ○ The trial judge not bound by *Rodriguez* – new legal issues raised (analysis regarding PFJ, overbreadth & gross disproportionality, has changed); and ○ Because a change in circumstances/evidence (a bunch of other jurisdictions have changed this – no slippery slope) ○ Revisiting precedent if the law has changed, or the world around it has changed Does the law infringe s 7 (Life)? ○ Yes, it engages s 7 right to life because it forces some individuals to take their own lives prematurely (bc suicide is legal) ▪ fear they would be incapable of doing so when reached the point where suffering was intolerable ○ The right to life is engaged where the law or state action imposes death or an increased risk of death on a person ○ Doesn't have to be an absolute prohibition on assistance in dying or that individuals cannot waive their right to life ○ Sanctity of life is no longer seen to require that all human life be preserved at all costs ▪ In certain circumstances, an individual's choice about the end of her life is entitled to respect • Liberty and Security (*Morgentaler*) ○ Liberty protects the right to **make fundamental personal choices**, free from state interference ○ Security of the person encompasses a notion of personal autonomy involving: ▪ Bodily integrity, or psychological integrity ▪ Being forced into a life that you know is going to be unbearable ○ Psychological stress too created • *PFJ* (arbitrariness, overbreadth, and gross disproportionality) ○ <u>First step: determine the object of the impugned law</u> ▪ Gov't said the purpose of this act is to preserve the sanctity of life – court rejected this (too broad) ○ If the goal is preserving life, then s 7 could never be infringed ○ This law prohibits only some kinds of suicide, so legal regime is not about preserving life ▪ **Objective: to protect vulnerable persons from being induced to commit suicide at a time of weakness** ○ <u>Arbitrariness</u>: a total ban on assisted suicide clearly helps achieve the protection of vulnerable persons from ending their life in times of weakness. It is not arbitrary.

- Overbreadth: not every person who wishes to commit suicide is vulnerable – therefore, this limitation is at least in some cases not connected to the objective of protecting vulnerable persons. It is overbroad.
  - A law that is interested in protecting the vulnerable, but it captures more people than just the vulnerable
  - It encapsulates people who are fully within their capacity to make this decision for themselves
  - TAILOR the harm. Do not blanket the harm.
- Gross Disproportionality – unnecessary since it is overbroad

Section 1 – the difficulty of justifying a s 7 violation is that the law is inherently flawed via PFJ analysis

- Difficult to justify infringement of s7 rights because it is fundamental and not easily overridden by competing social interests
- Competing societal interests may justify a s 7 infringement under Oakes
- Prescribed by law and has a pressing and substantial objective
  - Parliament did face a difficult task in balancing the needs of those at risk and the needs of those who seek the assistance of dying.
  - Proportionality does not require perfect
  - Courts must accord the legislature a measure of deference at this stage and social problems requiring a "complex regulatory response" will garner a high degree of deference (*Hutterian*)
  - ON the other hand, was an absolute prohibition results in the degree of deference being reduced [98]
- Rational connection – yes. 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:
  - At this stage of the analysis, the question is whether the limit on the right is reasonably tailored to the objective. The inquiry into minimal impairment asks "whether there are less harmful means of achieving the legislative goal" (*Hutterian*). The burden is on the government to show the absence of less drastic means of achieving the objective "in a real and substantial manner" (*Hutterian*) (ibid., at para. 55). The analysis at this stage is meant to ensure that the deprivation of Charter rights is confined to what is reasonably necessary to achieve the state's object (*Carter*).
  - Trial judge 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 – it fails here
    - Feasible for properly qualified and experienced physicians to reliably assess patient competence and voluntariness and that coercion, undue influence and ambivalence could all be reliably assessed as part of that process
  - If evidence showed that physicians are unable to consistently assess vulnerability, a total prohibition would be allowed – but it was easily and clearly able to be assessed, so more than minimally impairing
  - TJ concluded that a regulatory regime would not initiate a descent down a slippery slope into homicide
  - 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** ○ Proportionality – Not necessary to look at final stage and balance benefits/effects • Government responds with legislation – new assisted suicide provisions.
Class	• Arguments from Govt to keep law ○ Exploitation of vulnerable people ○ Fundamental value of maintaining life • "natural death has become reasonably foreseeable" removed from legislation ○ Claimants not at very end of life may still be extremely suffering ○ Same rights engaged

SECTION 15 – EQUALITY

CB: 1279-1286; 1305-1309:

- 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

- Internal limit of s 15
  - Only DISCRIMINATORY treatments that run afoul of section 15
    - What is Discrimination?
    - Who are "disadvantaged" under subsection 2
- Subsection 2 is about protecting affirmative action programs
- Equal before and under the law and equal protection and equal benefit
  - Why did they include all four?
    - To have a more comprehensive scheme of equality

SECTION 15 TEST

1. **Is there a distinction? Has a distinction been made on enumerated or analogous grounds?**
   a. Distinction
      i. Direct discrimination: clear distinction between grounds (*Andrews* – citizens vs non-citizens)
      ii. Adverse effects discrimination: 'facially neutral' law has a differential impact on the basis of a prohibited ground of discrimination (*Eldridge* – hearing and non-hearing)
   b. Enumerated/analogous grounds (*Corbiere*)
      i. Recognized: citizenship, sexual orientation, marital status
      ii. Rejected: profession, place of residence, economic situation
      iii. **Proxy:** Ground is a proxy for an enumerated ground (i.e. pregnancy and sex)
      iv. Immutable: a characteristic that cannot be changed
      v. **Constructively immutable** – it is changeable, but it would be significant to do so – religious grounds
2. **Is this distinction saved as an ameliorative program? (15(2)) (*Kapp,*)**

a. Government must establish:
    i. the program has an ameliorative or remedial purpose; and
        1. Look at the purpose, and if the means chosen can rationally achieve that purpose
    it targets a disadvantaged group identified by enumerated or analogous grounds
b. Court has rejected general application laws (do not target anyone, rather about improving conditions generally)

3. Is this distinction discriminatory? (*Quebec v A,*)

a. How is this distinction representative of a lack of concern or respect for inherent dignity of this person, or assumes they are less worthy of concern and respect than the rest of us

b. The distinction is discriminatory because it creates an arbitrary disadvantage

i. The distinction is discriminatory because it perpetuates historical disadvantage
ii. The distinction is discriminatory because it perpetuates prejudice or stereotype

SECTION 15 CASES

Andrews v Law Society of British Columbia 1989 SCC

Ratio	• Equality cannot be reduced to sameness of treatment (formal equality). Equality sometimes requires that differences be taken into account • Rejection of the notion of formal equality to guide s 15 because "consideration must be given to the context of the law, its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from application" → instead **identifies substantive equality** as the philosophical premise of s 15 (confirmed in *Fraser* 2020) • Actual effects of a challenged law or practice should be the focus of the analysis. Unnecessary to establish intentional or purposeful discrimination. • For something to be "discrimination" under s 15 the claimant must establish there was **differential treatment amounting to discrimination** on the basis of a personal characteristic (either listed as a prohibited ground of discrimination OR analogous to the listed ground) ○ A personal characteristic will be accepted as an analogous ground if it shares the essential features of the personal characteristics listed in section 15
Facts	• Andrews (British subject but permanent resident of Canada) brought an action for declaration that the Canadian citizenship requirement for admission to the Law Society of BC violated s. 15 of the Charter
Issue	• Does the citizenship requirement violate s. 15?
Result	• Yes • 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 • All except McIntyre agree violation is not justified under s 1
Reason	• **S. 15 is not a general guarantee of equality** – it does not provide for equality between individuals or groups nor does it impose an obligation for individuals to accord equal treatment to others ○ Why not? Because we are only concerned about legal inequality – the Charter only applies to government action. ▪ It's not about forcing people to treat each other equally, it's about forcing the law not to discriminate

	○ How are we going to then define the purpose of s 15? Got to determine what the overall purpose of the Charter is, and how s 15 can function in that purpose • **Purpose of s 15: substantive, not formal, equality.** ○ Treating people differently may promote equality, and treating people the same may promote inequality. ▪ S15(2) is there to recognize that identical treatment may frequently produce serious inequality ○ The accommodation of differences is the essence of true equality ○ The key to understanding s 15 is the notion of discrimination – its discriminatory distinctions that infringe s 15 • **Discrimination =** a distinction based on grounds relating to personal characteristics of the individual/group which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others or which withholds or limits access to opportunities, benefits, advantages available to other members of society ○ Worst oppression will result from discriminatory measures having the force of law ○ ***Decisions based on irrelevant personal characteristics* – discriminate when we make assumptions about people's capacities needs or interests that are unconnected to their actual needs' capacities or interests. We assign them group characteristics, and those characteristics have the impact of withholding an benefit or imposing a burden.** ○ Citizenship is not related to the ability to be a good lawyer • S 15 is limited to prohibiting differences in treatment on the basis of prohibited grounds ○ Effect of the distinction has to also be considered • **Complainant has to show that they are not receiving equal treatment before and under the law or that the law has differential impact on them in the protection or benefit accorded by law AND that the legislative impact of the law is discriminatory** ○ Here citizenship makes a distinction between non-citizen and citizen and denies admission to the practice of law to non-citizens ▪ it takes 3 years to qualify for citizenship if you're a permanent resident • **Rights in s 15 apply to all whether citizens or not** • La Forest noted that in addition to lack of political power, citizenship is immutable or beyond the control of the individual ○ It's also generally irrelevant to the legitimate work of government and to the assessment of an individual's ability to perform or contribute to society

R v Kapp

Ratio	• Substantive equality recognizes that all "human beings equally deserving of concern, respect and consideration." • A 15(1) claimant must establish the law creates a distinction based on a enumerated or analogous ground AND this distinction created a disadvantaged by perpetuating prejudice or stereotyping • The role of s. 15(2): "enabling governments to pro-actively combat discrimination" • S.15(2) test: Gov't then must establish that ○ 1) A program has an ameliorative or remedial purpose; and ○ 2) Targets a disadvantaged group identified by enumerated or analogous grounds.

Facts	• Appellants are commercial fishers (mainly non-Aboriginal) who assert their equality rights under s. 15 were violated by a communal fishing license granting members of 3 aboriginal bands the exclusive right to fish for salmon for a period of 24 hours in Fraser River.
	• Fed. gov't 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 & increased economic benefits; and minimizing disruption of non-Aboriginal commercial fisheries
	• License allowed Aboriginal fishers to fish for food, social & ceremonial purposes, and for sale
	  ○ Some were licensed fishers allowed to fish at other openings for commercial fishers.
	• Appellants were commercial fishers excluded from the fishery for 24 hours & were charged w/ fishing at a prohibited time
	  ○ Some themselves faced racial discrimination; some were from lower working class struggling

Issue	• Have the appellants s. 15 equality rights been breached?
Result	• No – breach of s. 15 equality guarantee has not been established – appeal dismissed • 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

Reason	• Purpose of S. 15
	  ○ Central purpose of combatting discrimination
	  ▪ **15(1)→** to *prevent* govt's from making distinctions based on enumerated/analogous grounds that result in perpetuating group disadvantage/prejudice; or impose disadvantage on the basis of stereotyping;
	  ▪ **15(2)→** focus on *enabling* govt's to proactively combat discrimination through affirmative measures
	• 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*, 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
	  ○ 1. Pre-existing disadvantage, if any, of the claimant group
	  ○ 2. Degree of correspondence between differential treatment and the claimant group's reality
	  ○ 3. Whether the law or program has an ameliorative purpose or effect
	  ○ 4. Nature of the interest affected
	• *Law* didn't create a new and distinctive test for discrimination, it was affirming the approach to substantive equality under s 15 set out in *Andrews*
	  ○ The 4 factors are a way of focussing on the central concern of s15 identified in Andrew
	  ▪ Combatting discrimination, defined in terms of perpetuating disadvantage and stereotyping
	  ○ But human dignity element of the decisions has been criticized as the term is abstract and subjective
	  ○ Factors 1 and 4 of Laws 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)
	• As noted, central purpose of combatting discrimination underlies both s 15(1) and (2)–

	○ 15(1) = the focus is on PREVENTING 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
Note pg 1309	• In *QC v A* SCC said claimant can establish s 15(1) violation by either showing that the challenged differential treatment on a prohibited ground operates on the basis of prejudice or stereotype OR that it exacerbates the disadvantage of a historically disadvantaged group

TWEN: Fraser v Canada, 2020 SCC 28

Ratio	• Substantive equality is the "animating norm" of the section 15 framework which requires attention to the "Full context of the claimant group's situation, to the actual impact of the law on that situation, and to the persistent systemic disadvantages that have opened to limit the opportunities available to that group's members • Charter protects from direct or intentional discrimination AND adverse impact discrimination. The latter still violates substantive equality.
Facts	• The claimants are three retired members of the RCMP who took maternity leave in the early-to-mid 1990s. Upon returning to full-time service, they experienced difficulties combining their work obligations with their childcare responsibilities. ○ At the time, the RCMP did not permit regular members to work part-time. • In December 1997, the RCMP introduced a job-sharing program in which members could split the duties and responsibilities of one full-time position. ○ The three claimants enrolled in the job-sharing program; they and most of the other RCMP members who job-shared were women with children. • Pursuant to the Royal Canadian Mounted Police Superannuation Act, and the associated Royal Canadian Mounted Police Superannuation Regulations ("pension plan"), RCMP members can treat certain gaps in full-time service, such as leave without pay, as fully pensionable. • The claimants expected that job-sharing would be eligible for full pension credits. However, they were later informed that they would not be able to purchase full-time pension credit for their job-sharing service. • Argue: discriminatory impact on women contrary to s. 15(1) of the Charter.
Issue	• Does the lack of pension benefits violate s 15?
Result	• Yes
Reason	• The job-sharing arrangement has a disproportionate impact on women and perpetuates their historical disadvantage. It is a clear violation of their right to equality under s. 15(1) of the Charter • To prove a prima facie violation of s. 15(1), a claimant must demonstrate that the impugned law or state action, ○ on its face or in its impact, creates a distinction based on enumerated or analogous grounds, and ○ the law imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage. ▪ The claimants contend that the negative pension consequences of job-sharing infringe s. 15(1) because they have an adverse impact on women. Resolving their claim requires considering how adverse impact discrimination is applied. • Adverse impact discrimination occurs when a seemingly neutral law has a disproportionate impact on members of groups protected on the basis of an enumerated or analogous ground.

- **Not only is such discrimination "much more prevalent than the cruder brand of openly direct discrimination", but it also often poses a greater threat to the equality aspirations of disadvantaged groups**
- **adverse impact discrimination violates the norm of substantive equality** which underpins the Court's equality jurisprudence.
- Substantive equality requires attention to the full context of the claimant group's situation, to the actual impact of the law on that situation, and to the persistent systemic disadvantages that have operated to limit the opportunities available to that group's members. [42]
- At the heart of substantive equality is the recognition that identical or facially neutral treatment may frequently produce serious inequality. This is precisely what happens when seemingly neutral laws ignore the true characteristics of a group which act as headwinds to the enjoyment of society's benefits. [47]

- How to approach the first step of the test when the law concerns adverse effects discrimination since the law will not include any distinctions on its face?
  - in order for a law to create a distinction based on prohibited grounds through its effects, it must have a disproportionate impact on members of a protected group. If so, the first stage of the s. 15 test will be met.
  - In practice, instead of asking whether a law explicitly targets a protected group for differential treatment, a c**ourt must explore whether it does so indirectly through its impact on members of that group** ***(****Eldridge****)***
  - Two types of evidence will be especially helpful in proving that a law has a disproportionate impact on members of a protected group.
    - 1. The first is **evidence about the situation of the claimant group.**
      - Courts will benefit from evidence about the physical, social, cultural or other barriers which provide the full context of the claimant group's situation.
      - The goal of such evidence is to show that membership in the claimant group is associated with certain characteristics that have disadvantaged members of the group.
      - These links may reveal that seemingly neutral policies are designed well for some and not for others.
    - 2. The second is **evidence about the results of the law [**58]
      - Courts will also benefit from evidence about the outcomes that the impugned law or policy has produced in practice.
      - This evidence may provide concrete proof that members of protected groups are being disproportionately impacted.
- Other observations [68]
  - Whether the legislature intended the disparate impact is irrelevant
  - Once claimants demonstrate the law has a disproportionate impact on members of a protected group, they do not need to prove the protected characteristic "caused" the disproportionate impact
  - Unnecessary to inquire into whether the law itself was responsible for creating the social or physical barriers which made a particular rule, requirement, or criterion disadvantageous for the claimant group
  - Do not need to show the law impacts all members of the group in the same way

- The second step – — whether the law has the effect of reinforcing, perpetuating, or exacerbating disadvantage — will usually proceed similarly in cases of direct and indirect discrimination.

	○ The goal is to examine the impact of the harm caused to the affected group – psychological, physical, exclusionary, economic disadvantage - which must be viewed in light of any systemic or historical disadvantages faced by the claimant group. ▪ The presence of social prejudices or stereotyping are not necessary factors in the s. 15(1) inquiry → careful not to view *Kapp* as requiring that a distinction perpetuates prejudicial or stereotypical attitudes. The focus is on the discriminatory IMPACT not on whether a discriminatory ATTITUDE exists. [78] ○ The perpetuation of disadvantage does not become less serious under s. 15(1) simply because it was *relevant* to a legitimate state objective. ○ The test for a prima facie breach of s. 15(1) is concerned with the discriminatory impact of legislation on disadvantaged groups, not with whether the distinction is justified, an inquiry properly left to s. 1. Similarly, there is no burden on a claimant to prove that the distinction is arbitrary to prove a prima facie breach of s. 15(1). It is for the government to demonstrate that the law is not arbitrary in its justificatory submissions under s. 1. APPLICATION • The use of an RCMP member's temporary reduction in working hours as a basis to impose less favourable pension consequences plainly has a disproportionate impact on women. ○ The relevant evidence showed that RCMP members who worked reduced hours in the job-sharing program were predominantly women with young children. ○ These statistics were bolstered by compelling evidence about the disadvantages women face as a group in balancing professional and domestic work. ○ This evidence shows the clear association between gender and fewer or less stable working hours and demonstrates that the RCMP's use of a temporary reduction in working hours as a basis for imposing less favourable pension consequences has an adverse impact on women. • Section 1 allows the state to justify a limit on a Charter right as demonstrably justified in a free and democratic society. ○ To start, the state must identify a pressing and substantial objective for limiting the Charter right. ▪ The Attorney General has identified no pressing and substantial policy concern, purpose or principle that explains why job-sharers should not be granted full-time pension credit for their service. ▪ On the contrary, this limitation is entirely detached from the purposes of both the job-sharing scheme and the buy-back provisions. Job-sharing was clearly intended as a substitute for leave without pay for those members who could not take such leave due to personal or family circumstances. ○ It is unclear, then, what purpose is served by treating the two forms of work reduction differently when extending pension buy-back rights. The government has not offered a compelling objective for this differential treatment. • Appeal allowed. They should also have retroactive effect in order to give the claimants in this case and others in their position a meaningful remedy

CB: 1326-1331; 1337-1342, 1360-67

Eldridge v British Columbia;

Ratio	•
Facts	• 3 individual born deaf and preferred means of communication was sign language • Failure to provide public funding for sign language interpreters for 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 was medically required and hence a benefit under the Act was delegated to the Medical Services Commission • Under Hospital Insurance Act, hospitals were given discretion to determine which services should be provided free of charge • Commission and hospitals did not make sign language interpretation available as an insured service
Issue	• Have the appellants been afforded equal benefit of the law without discrimination?
Result	• No – the failure 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.

Reason	• 15(1) serves 2 distinct purposes
	  ○ Expresses a commitment to the equal worth and human dignity of all persons which are deeply ingrained in our social, political, and legal culture
	  ○ Instantiates a desire to rectify and prevent discrimination against particular groups suffering social, political, and legal disadvantage in our society
	• **The question here is whether the appellants have been afforded equal benefit of the law without discrimination within the s15(1) meaning [60]**
	  ○ The BC medicare system does not make an explicit distinction based on disability by singling out deaf persons for different treatment
	  ○ Appellants contend that the lack of funding for sign language interpreters renders them unable to benefit from legislation to the same extent as hearing persons
	• **Adverse effects discrimination** – facially neutral laws which may be discriminatory, not because they target different groups, but because they are unequal in their application to people
	  ○ It is in its effect that the distinction operates. Sometimes treating everyone the same creates inequalities
	  ▪ Promise of equal benefit of the law – not just equal application,
	  ○ Sufficient if the effect of the legislation is to deny the equal protection or benefit of the law
	  ▪ Doesn't need to be motivated by a desire to disadvantage an individual or group to violate s 15(1)
	• **Distinction:** hearing people get a doctor and the ability to communicate with their doctor; deaf people only get a doctor – the policy assumes an ability to communicate
	• **Discrimination –** show that the distinction perpetuates an arbitrary disadvantage
	  ○ By not providing ASL interpreters to deaf people, it promotes social isolation, exacerbating an inability to access services that are generally available to the public
	  ○ Stereotyping and prejudice – they've got to bear the cost of their own care – if you're disabled, you are different than the rest of us, or less worthy of crucial medical care
	  ▪ Overlooking them – the lack of concern and attention to the needs of others
	  ▪ Not even thinking about them is the way you **exacerbate** a condition of being overlooked.
	  ○ There is no categorical difference between state-imposed burdens and benefits and that the government is not obliged to ameliorate disadvantage that it has not helped to create or exacerbate
	  ○ Lower courts said that sign language is an ancillary service not a medically required one
	  ○ BUT effective communication is an integral part of provision of medical services

	○ Miscommunication can lead to misdiagnosis or a failure to follow a recommend treatment ▪ Risk particularly acute in emergency situations ○ Where it is necessary for effective communication, sign language interpretation should not be viewed as an ancillary service ▪ This would mean that the failure to ensure that deaf person communicate effectively with their health care providers is not discriminatory

Corbière v Canada 1999 SCC

Ratio	• Common feature of the enumerates grounds is immutability ○ Something one cannot change ○ This is a broader inquiry than before
Facts	• This case concerned s. 77(1) of the Indian Act requiring band members to be ordinarily resident on their reserve in order to be eligible to vote in band elections • Non-resident band members brought a challenge under s. 15 alleging that residence was an irrelevant personal characteristic on which to deprive them of a voice in decisions that could deeply affect them
Issue	• Does the provision requiring band members to be ordinarily resident on their reserve to be eligible to vote violate s. 15?
Result	• Yes – s. 77(1) violates s. 15 and cannot be justified under s. 1 [Not minimally impairing under s. 1] • The words 'and is ordinarily resident' struck from statute but delayed for 18 months
Reason	• 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? – ▪ Consider 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** – ○ Here: Court believes 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 [8] ○ 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 ▪ E.g., sex will always be a recognized ground, but sex-based law distinctions may not always be 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[10] ▪ 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 [13] ▪ 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
Concurring L'Heureux	• Analogous and grounds inquiry bust be done in a purposive and contextual manner (*Laws)* • 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 [60] ○ 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 that may lead to its recognition as analogous ground *(Andrews; Vriend)* • Second stage should be flexible enough to adapt to stereotyping, prejudice or denials of human dignity and worth that might occur in specific ways for specific groups of people, to

	recognize that personal characteristics may overlap or intersect and reflect changing social phenomena or new or different forms of stereotyping or prejudice • 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.
Disagreement	• Majority disagree with L'Heureux on whether the recognition of a personal characteristic as an analogous ground will be context-specific • Majority view it as once a ground is determined – it holds across all legal contexts

R v Kapp [same as above but different section of judgment]

Ratio	•
Facts	• BC gov't allows certain designated Indigenous communities exclusive fishing rights for a 24-hr period, excluding commercial fishers. • Some non-Indigenous, but still vulnerable people, claimed that the law was discriminatory in that they could not access the 24-hr fishing period
Issue	•
Result	•
Reason	s. 15(1) • Is there a distinction: Yes • Enumerated or analogous ground: Yes – race (not perfect because it did not apply to all Indigenous people, only certain groups) • *About preventing discrimination* S. 15(2) • Is the state action saved as an ameliorative program under s. 15(2)? o *About enabling government to create programs which protect vulnerable groups* o Requires a broad and generous interpretation: the program is not required to actually ameliorate circumstances, its purpose must intend to ameliorate (is there a rational basis?) • Test: o A program that has an ameliorative or remedial purpose; and ▪ Program's purpose must intend to ameliorate ▪ Rational basis ▪ Not required to be the sole purpose, simply one purpose ▪ General benefits programs covering a large swathe of the community, must be a targeted program specific to the group o Targets a disadvantaged group identified by enumerated or analogous grounds

EXAM

FEDERALISM + SECTION 35 + CHARTER
ONE PROBLEM WILL COMBINE 2 / 3 OF THOSE
TALK ABOUT REMEDIES AT THE VERY END

Long fact pattern
Medium fact pattern
Essay
Haiku
Maybe a shortish question