CHARTER

BEFORE/WITHOUT

- *Secession Ref*: moved from system of parliamentary sovereignty → **judicial review** – where there are now substantive limits on what government can do and courts determine whether legislature has gone too far intruding on rights

Implied Bill of Rights: line of cases where court limited scope of provincial authority when laws were made that infringed upon rights (usually freedom of speech/religion/press/assembly)

- *Alberta Press Case* (1938) – social credit gov tries to deal with widespread economic problems by essentially just printing more money
    - Press was very critical of this policy and AB gov proposed *Accurate News and Information Act* – created a board that could require newspapers to print corrections when it described gov policy unfavourably/misleading → found ultra vires provincial gov – provinces may regulate newspaper industries but not in ways that interfere with democracy

→ **LIMITS: (1)** acted only to restrain local governments **(2)** these rights not anywhere in Constitution – means it is a less certain form of protection

- *Dupond* – implied bill of rights cases brought before court; court held these rights were not constitutionalized; if legislature wants to impede on them they can

Statutory Rights

- *Canadian Bill of Rights* (1960) – recognized rights to equality, free speech, religion, etc.
    - Passed at a time during heavy rights-consciousness (post WWII); came together with political activism across many groups

→ **LIMITS: (1)** ordinary legislation (not entrenched; next gov could repeal) **(2)** applied only to federal government **(3)** court adopts "frozen rights" approach – law meant to reflect way law was at time of passage; not meant to change anything [*Lavell* – claim that it was discriminatory that under *Indian Act* status woman would lose status if marrying non-status man but not vice versa – not found to be discriminatory bc all women treated same and all men treated same]

ROAD TO *CHARTER*

- Bill of Rights – seen to not actually change anything; massive protests; climate of 1960s
- Failed efforts [since 1920s] to "patriate" (bring home) Constitution – making it Canadian instead of British law
- Failed QC *Secession Ref* (1980) – fed promised things would be different if they stayed; promised to create new Constitution
    - Draft constitution in 1980
    - 1981 joint committee of Parliament – televised, open meetings where people could share opinions on draft
        - Text was revised to reflect input (ex. Equality provision made more robust)
- "Night of Long Knives" – final version approved w/o QC representatives present; British Parliament ultimately finds sufficient consensus and approves *Constitution Act* 1982 into law

CONSTITUTION ACT, 1982

- Patriates Constitution (British → Canadian law)
- Includes amending formula – different changes require different cooperation (QC also bound)
- Distinct section to protect Aboriginal Rights
- *Charter* (section 1, individual rights, interpretive provisions, remedies, override – notwithstanding clause)
- Parliamentary sovereignty → judicial rights review

CHARTER - Overview

SECTION 1 – rights are guaranteed but subject to reasonable limits as can be justified in free/democratic society

- *Sauve/Frank* – 2 stage analysis: (1) right infringed? (2) infringement justified?
- Prescribed by law (*Irwin Toy* → intelligible standard)
- Reasonable limits (*Oakes*)

RIGHTS

- ***2(a)*** – freedom of conscience and religion
- ***2(b)*** - freedom of thought, belief, opinion, expression
- ***3*** – right to vote
- ***7*** – life/liberty/security of person and not deprived except in accordance with PFJ
- ***15(1)*** – every individual equal before/under law; has right to equal protection and benefit without discrimination
    - Race, national/ethnic origin, colour, religion, sex, age, mental/physical disability
- ***15(2)*** – the promise of equality does not stop gov from trying to ameliorate conditions of disadvantaged groups
    - Providing help to those who are worse off is not an equality violation for not also helping those better off

INTERPRETIVE PROVISIONS

- ***25*** – Cannot use Charter to take away rights specifically guaranteed to Indigenous people in another area of Charter
- ***27*** – Charter intended to preserve/enhance multiculturalism and should be interpreted as such
- ***28*** – equal rights for male/female

REMEDIES – what happens when protections have been violated

- ***52(1)*** – any law inconsistent with Constitution is of no force/effect (to extent of the inconsistency)
- ***24(1)*** – court may provide any remedy they want to fix a *Charter* violation (awarding damages, suspended declarations of invalidity, supervision of legislatures, etc.)

NOTWITHSTANDING/OVERRIDE CLAUSE

- ***33(1)*** – government may expressly declare that an Act/provision will operate notwithstanding a provision in section 2 or 7-15 of *Charter*
    - Democratic provisions (right to vote, periodic elections) not included → cannot be overridden
    - Rationale: explicitly asking not to have a provision subject to Charter review puts on a "democratic spotlight" and causes people to pay attention
- ***"Sunset" provision*** – clauses may only last 5 years; must be enacted again and explicitly removed from Charter review if want to keep law
    - Ex: QC Bill 21: prohibited religious symbols/clothing in public sector

CHARTER – APPLICATION

SECTION 32 – *Charter* applies to **government** (Parliament, provincial, executive and administrative branches)

Dolphin Delivery (1986)

→ Charter regulates relations between government and private persons → does not govern purely private actions

- Charter does NOT cover:
    - Private **employment** relationships (ex. Restricting employee's free speech – not charter violation)
    - **Parenting** (ex. Parent unfairly restricts child's liberty – not charter violation)
    - Private **housing** (ex. Landlord discriminates – not charter violation)

→ does not mean it is legal for these things to take place; but any remedies will come from ordinary law (human rights, labour, etc.)

TEST to determine what counts as "government" under section 32 [contextual analysis]

Governmental Entity

- If governmental by very nature or "controlled" by government → Charter will apply
  - Ex: Transit authorities (*Greater Vancouver*); municipalities (*Godbout*) – functions are so governmental in nature that Charter applies
  - Ex: hospital (*Stoffman*) – entities doing some work of gov but largely independent – Charter does not apply
    - Have more institutional independence

Governmental Activities

- Activities that implement a statute or government program
- When an entity not part of government is carrying out gov activity – only those activities will be covered by charter
- Ex: if hospital is carrying out government mandate as per gov program – that activity must be in accordance with Charter (*Eldridge*) → so the delivery of medical services under gov program is subject to charter; however daily operations (non-governmental activity) are not

COMMON LAW OF PRIVATE DISPUTES [torts, contract law, etc.]

- Charter does not apply directly to common law → **a CL rule cannot be said to violate Charter** (*Dolphin Delivery*)
- But doesn't mean Charter is irrelevant to CL → Charter values must be considered by courts in developing CL (*Grant*)

Grant v Torstar (2009)

- What it means for court to consider Charter values when developing CL
- Court revises common law in response to this case
  - At the time, only defence available was to *prove* truth of statements
- CL found to not adequately protect these values when considering truth seeking function of democracy under Charter
- New trial ordered

→ court revises common law (of libel) to balance competing interests of protecting reputation/privacy [CL] vs. free expression [Charter] → creates new defence of *responsible communication on matters of public interest*

CHARTER – ANALYSIS

Executive Action: governmental entities acting pursuant to statutory mandate

- **"Administrative Decisions"** – decisions must at least be *reasonable* interpretations of statute
  - Decision will only be reasonable if it adequately weighs Charter values

Dore/Loyola Framework:

1. Is a *Charter* right engaged?
2. If yes – was the decision reasonable in light of *Charter* values
   a. Balance statutory objectives w/ Charter interests

Doré (2012)

- Law Society provision *Code of Ethics of Advocates*, Art. 2.03 – "conduct of advocate must bear stamp of objectivity, moderation and dignity"
- Dore [lawyer] writes letter to judge not following such conduct - Is punished by Law Society in violation of provision
- Dore challenges punishment under s. 2(b) *Charter* (freedom of expression)

- Not challenging the provision itself; just that the decision made under the rule was not reasonable
- Framework: (1) yes, engages s. 2(b) *Charter* (2) Court finds decision was reasonable in light of Charter values
  - Discipline to assure civility in legal profession [statute interest] vs. lawyer's free expression [Charter interest]

→ here, Disciplinary Council appropriately considered and balanced interests (reasonable under *Charter* values)

STATUTUES AND REGULATIONS

- Rules of general application – framework comes from Section 1
- **Section 1:** rights guaranteed + limitations sets
  - Administrative review balances priorities (same as when developing CL)
  - Whether right has been infringed = onus on claimant; justification = onus on government

OAKES Test (framework for assessing laws of general application under Charter)

"Prescribed by law"

- Intelligible standard (*Irwin*)
  - Intelligibility may be supplemented by judicial reasons (*Butler*)
- Not confusing/contradictory (*Irwin*)
- Discretion can be acceptable (*Irwin*)

1) **Pressing/Substantial Objective**: gov bears burden of showing the intrusion was for a good reason
   a. Cannot be contrary to *Charter* values (*Big M; Butler; Zundel*)
   b. No shifting purpose (*Big M*) but shifting emphasis ok [where a law may seem to have 2 diff purposes] (*Butler*)
   c. Attend to level of generality (*RJR*) → has implications for rest of analysis
2) **Proportionality:** gov pursued objective in a way that was proportionate
   a. Rational connection – between good reason and government action
      i. "logic" and "reason" (*RJR*) or 'reasonable to presume link' (*Butler*)
      ii. May be irrational if defeats own objective (*Keegstra*)
   b. Minimal impairment – is there any other option that is less intrusive on rights
      i. Evidence gov has considered alternative means? (*Edwards Books; Keegstra*)
      ii. Court prefers deference to 'reasonable' choice of legislature when drawing precise lines (*Edwards*)
      iii. Evidence of narrow tailoring? Exceptions/defences? (*Keegstra; Butler*)
         1. Judicial interpretation may further narrow (*Keegstra; Butler*)
      iv. Don't "read down" gov objective – is about whether objective achieved NOT whether could have aimed lower (*Hutterian Brethren*)
      v. Gov has reasonable basis, on the evidence, for concluding means was minimally impairing (*Irwin*)
      vi. Total bans impacting rights → court is skeptical (*RJR; Corbiere*)
   c. Proportionate effects – good done to pursue objective > harm done through intrusion on rights
      i. In 2(b) cases – consider FoE values (truth, democracy, self-realization) [speaks to harm done]
      ii. Commercial interests: loss of profits not serious harm (*Irwin*) BUT "commercial" interest =/= "low value" speech (*RJR*)
      iii. Exclusion from driving less serious because it is a 'privilege' (*Hutterian Brethren*)

Oakes (1989)

- *Narcotics Control Act* – included rebuttable presumption that possession signaled intent to traffic

1) Infringement? → Yes, presumption of innocence intruded by reverse onus applied
2) Justified?
   1. **Pressing substantial objective** → yes, protecting society from drug trafficking
   2. **Proportionality**
      a. No rational connection b/w stated objective and reverse onus (possession of small quantities not rationally connected to trafficking)

CHARTER – DIALOGUE

- Relationship b/w court and legislative body is regarded as **dialogue: where a decision is open to legislative reversal/modification/avoidance**

4 features of the *Charter* that facilitate dialogue:

1) **Section 33** - power of legislative override
    a. Allows legislature to re-enact original law without interference from courts
2) **Section 1** – allowing for "reasonable limits" on Charter rights
    a. *Oakes; Franks/Sauve*
3) **Qualified rights** – in sections 7, 8, 9, 12 – allowing actions that satisfy standards of fairness/reasonableness
4) **Equality rights** under s. 15 – which can be satisfied through remedial measures

→ these features offer the legislative body room to advance objectives while respecting requirements of Charter as described by courts

Section 33 – Notwithstanding Clause

- Legislative body can expressly declare that an Act/provision will operate notwithstanding some parts of Charter
    - Shielding a law from Charter review
- Does not include democratic provisions [sections 3-5 *Charter*] (bc logic is "democratic spotlighting")
- Any declaration expires after 5 years (Sunset provision)
    - May renew clause → but must be done actively under section 1 – Sunset comes into effect with each renewal

Examples of Notwithstanding clause and relationship to democratic processes:

Ford v Quebec (1988)

- After enactment of *Charter* (night of long knives) QC is upset and doesn't think should be subject to a Charter they did not agree to → QC passes omnibus legislation which essentially applies s. 33 to every single law
    - One of the laws was restriction of commercial signage not in French
- **SCC**: holds that this is allowed; s. 33 requires "form only" – need to be express in declaration; don't need any reason
    - Requiring justification would depart from aim of s. 33
- **Aftermath**: public controversy, legislative change and continued use of notwithstanding clause
    - **1993**: language law revised to lessen impact on expression. (allowed some non-French signage) and dropped notwithstanding clause

→ use of notwithstanding clause becomes more selective (in QC and elsewhere)

Quebec Bill 21

- Law **prohibiting public sector workers from wearing religious symbols to work**
- One group is specifically impacted – Muslim women wearing hijab
- *Hak c. Procurer* – public school teacher unable to practice
    - Use s. 33 → therefore no review of law in terms of impact on religion/equality rights
    - Law mostly continues to operate – with a carve out for some school boards
    - Further appeals pending (is a law with independent force; therefore law should be allowed despite s.33)
    - Sunset provision → enacted in 2019

→Democratic spotlight placed on law bc s. 33 invocation was controversial – so far legislature has left law on the books and don't want courts to review for impact on religion/equality rights

Ontario Bill 28 (2022)

- ON gov passes law imposing contract on unionized education workers which prohibits them from striking [Nov. 3]
    - Intrusion on s. 2(d) freedom of association

- Section 33 invoked – more important to get students back in schools and prevent strikes
- Massive protests, news coverage, public opinion expresses against use of s. 33

→ Democratic attention brought to law and government responds – repealed on Nov. 14 when gov sees public outrage

FREEDOM OF RELIGION: Anti-Coercion

SECTION 2(A): freedom of conscience and religion

- Situations where state is trying to coerce people to observe a certain faith
- **Coercive** – making someone observe religion in a way they may not want to
  - Freedom to not have someone else's religion imposed on yourself ("freedom from" religion)

RELIGIOUS FREEDOM SO FAR:

- **Rule of Law**: *Roncarelli* – persecuting someone for support of religious community is not a good faith exercise of statutory authority to grant liquor licenses
- **Federalism**: Implied Bill of Rights
  - *Saumur* (1953) – QC city bylaw requiring permission to distribute leaflets in street. Aim was targeting Jehovah's Witness. P/S found to be regulation of religious speech (not city streets as stated)
    - Not a law targeting local issue – has implications throughout entire country (dimensions of interest of freedom of religion are nationwide)
    - This is morality legislation – perhaps federal could enact under criminal power but ultra vires prov
  - *Indian Act* – continuous egregious intrusions on religious freedoms
    - Valid under 91(24) – and included explicit attempts to assimilate religious/spiritual practices
      - Banned religious practices (ex. Potlatch), residential schools
    - No federalism basis to complain under Constitution → *Charter* shifts paradigm to allow for constitutional arguments about the impact a law has had on individual/community (rather than only on matters of division of power)

Federalism & Lord's Day Legislation

[PRIOR TO CHARTER]

- Prior to *Lords Day Act* there was *Ontario Act to Prevent Profanation of the Lord's Day*: forbade labour/business/work on Sundays → found ultra vires prov; intrusion on criminal law power – outlawing something for moral purposes
- Federal *Lords Day Act* (1906) – under Implied Bill of Rights – when one level of gov cannot take action, under federalism, other level can step in
  - Forbade/punished work on Sundays – exceptions for necessity, mercy
  - Found intra vires Parliament under criminal law
    - Aim was making "positive law enforcing moral and divine law"
    - Religious purpose essential to finding of validity of law
  - Challenged repeatedly and always upheld as valid federal criminal law

ENTER CHARTER (1982)

- Freedom of religion in section 2(a)
- Interpretive provision (s. 27) – must interpret 2(a) in a manner consistent with preservation/enhancement of Canadian multicultural heritage
  → These provisions place new limit on what government can do

Big M Drug Mart (1985)

- Challenge to *Lords Day Act* – Big M claims this law is unconstitutional now with the enactment of Charter

1) **Right Infringed?**
    - Yes – gov cannot compel individuals to perform/abstain from performing otherwise harmless acts [going to work] because of those acts religious significance to others → section 2(a) cannot allow this
2) **Justification?** [s. 1; *Oakes*]
    - (1) pressing/substantial objective: objective = compel religious observance → not pressing/substantial
        - Forcing someone to obey religious practice that has no meaning to them =/= justified
    - Religious objective was already found essential to establishing the validity → therefore gov cannot try to characterize as something else; ends up being fatal to justification analysis

→ Remedy: law declared invalid; of no force/effect

This is the first time Court is declaring law invalid under this section of *Charter* → give more information to guide practice:

- Different ways a law may infringe *Charter*:
    - Infringing purpose (*Big M*)
    - Infringing effect – even if *aim* is not infringing (*Edwards*)
- No "shifting purpose" – gov cannot argue that the purpose of a law shifts over time; is not the living tree Constitution
    - Ordinary statute means can only look to purpose at time of enactment (even if effect shifts over time)
- Must adopt claimant's perspective when analysing the law → this is a massive shift in Constitutionality jurisprudence introduced by *Charter*'s protection of individual interests
    - Who is getting hurt? Who is impacted?
    - Same law may be viewed different ways by different people – court must consider this
    - Dickson J imagines self as a minority [Jew/Muslin] → law as a subtle/constant reminder of difference

Edwards Books (1986)

- Ontario *Retail Business Holidays Act* 1980: defines "holiday" to include Sundays (and other days like Xmas/Easter)
    - Makes offence to carry out business on "holidays"
    - Exemption for small businesses (less than 7 employees + less than 5k sq ft + closed previous Sunday)
        - Ie. If observe Saturday off for religion – could stay open Sundays

1) Infringement?

- Two ways a law may infringe (*Big M*)

(1) Purpose

- Evidence
    - Act itself
    - Ontario Law Reform Commission Report re: Sunday Closing Laws – emphasizes retail workers as vulnerable group that benefit from a uniform holiday scheme (to have days off with family)

→ purpose is to provide uniform day of rest, not forcing observance/inscribing divine law into statute (like *Big M*) → Not the same *Charter* infringing purpose as *Lords Day Act*

(2) Effect – *even though aim is creating uniform day of rest – does it have effect of violating 2(a)?*

- *Coercive burdens on the exercise of religious belief* = what counts as an infringing <u>effect</u>
    - Gov making you do something that makes it harder to practice your faith
    - Counts even if it was done unintentionally/indirectly/unforeseeable → emphasis on claimant's perspective
- Court places limits: → trivial/insubstantial burdens will not violate 2(a)
    - Ex: sales tax – may be burdensome when buying items for religious practice → does not violate 2(a)
- → if a law happens to coincide with religious law it will not violate 2(a)
    - Ex: fact that majority faith outlaws murder doesn't mean it is coercive state imposition of religion
- Gov is not obliged to *remove* burdens of faith (ie. Taking a Saturday Sabbath = losing business)
    - However – here, the religious disadvantage (Saturday closure) remains AND a statutory disadvantage is added (Sunday closure)
    - Context of competitive retail sector important to analysis – forcing a business to be closed all weekend = huge los of business

→ Here – the aim is valid, but a substantial burden is placed on practice of religion → 2(a) infringed

2) **Justification?** [s. 1; *Oakes*]

(1) Pressing/substantial objective: yes - protecting retail workers with common day off

(2) Rational connection: yes

(3) Minimal impairment: was there any other way which would have harmed rights less? Alternative means:

- Could have created a right to refuse work on Sunday
  - This doesn't achieve objective as good bc doesn't attend to vulnerability of workers (aim of law)
    - Ie – still requires vulnerable workers to have that uncomfortable conversation asking for day
  - This may result in well-off people using *Charter* to roll back legislation aimed at helping others
- Could have created broader exemption (ex. Retailers with <u>sincere</u> Saturday Sabbath beliefs)
  - Court doesn't want to get in business of interrogating people's sincerity of belief
- → law found to represent a *reasonable* choice
  - 7 employees/500 sq ft is reasonable threshold
  - Was a serious effort made to accommodate Saturday observers

→ minimal impairment test met (better thought of as reasonable alternative test)

(4) Proportionate effects: benefits > harms?

- Yes

FREEDOM OF RELIGION: Accommodation

- Situations where accommodations are made for religious minorities/practices
  - Laws of general application that burden religious practice
- Test applied is same regardless of what religious right is being dealt with
- **Accommodation**: law that prevents someone from practicing religion
  - "freedom to" religion

Amselem (2004) [leading precedent for all accommodation cases even though not *Charter* case]

- Condo building had prohibition on decorations/alterations/construction on balconies
  - Many residents observed Jewish holiday Succot – required building hut (succah) that they live in for holiday
- Neighbours (non-observers) sought injunction to take down the huts and build 1 communal succah instead
  - Brought expert evidence – Judaism experts who testified communal hut would be ok → Injunction granted
- While a burden on freedom of religion is not a Charter problem because gov is not involved (private matter)
  - Instead falls as a problem under QC *Charter of Human Rights and Freedoms* – which provides freedom of religion protection for individuals → court holds the precedent set here will still apply for *Charter* issues
- Court finds that the claimants really believed individual succahs were necessary
  - Conflict b/w individual Jew's subjective beliefs vs. expert evidence brought forth
- Court holds that the question of freedom of religion cases is that of **sincere belief, not official doctrine**
  - If a claimant can show a sincere belief + that has been burdened → infringement can be established
- Here – sincere belief + significant burden established
  - Neighbours 'eye sore' complaint is only a minor inconvenience

2(a) Test:

Does law's purpose infringe 2(a)?

- *Big M* = benchmark; inscribing divine law into statutory law
  - Ask: does it look like government is actively trying to force people to obey religion other than their own?

OR Do the law's effects infringe 2(a)?

1) Does claimant have sincerely held belief having nexus with religious belief? (*Amselem*)
   - Some kind of connection with divine or spiritual belief
     - Looking for a sincere belief that is not fictitious, capricious or artifice
   - Official dogma/doctrine is not ruling
   - Is a question of fact – but threshold is low; will not engage in rigorous study of claimant's past practices
2) Has there been non-trivial or non-insubstantial interference with the religious belief/practice? (*Edwards)*
   - Anything beyond triviality will move analysis into s. 1 justification

Multani (2006)

- Administrative decision making – came at a time where *Oakes* still used for this
  - If came before court today, *Doré* framework would be used

2(a) Infringement?

- QC schoolboard had rule forbidding weapons – prevented Sikh student from wearing kirpan (ceremonial dagger)
  - Student sincerely believed religion required he wear it at all times
  - Prohibition substantially burdened sincere belief
- Aim not questioned – no weapons in school is valid – claim comes against decision to classify kirpan as a weapon

Justification?

- Statutory objective: assure reasonable safety (NOT absolute safety - many potential dangers in a school)
  - Was this prohibition a reasonable decision?
- Held: Not reasonable
  - No evidence of kirpans being used as weapon, many other dangers in schools
  - Other less intrusive measures could have bene taken to outright ban (family offered to sew kirpan to clothes)

Alberta v Hutterian Brethren (2009) [leading case on s. 1 test]

- AB gov required photo driver's license to drive
  - "Condition Code G" exemption – allowed some people to get a license without photo
    - 2003 – exemption removed and photo database implemented
- HB's religion refused to be photographed – violation of Bible's second commandment

All members of court agree:

- 2(a) is infringed under the effect of the law
  - Sincere belief with nexus to religion + burden that is not trivial/insubstantial
- Action will be under s. 1 analysis
  - Objective: valid; ensures integrity of system to prevent theft and harmonize with other jurisdictions
  - Rational connection b/w objective and measure taken
    - Universal scheme is almost always more effective than scheme w/ exemptions (*almost always true)

→ *Case becomes important in understanding* ***minimal impairment & proportionality***

Minimal Impairment – could there have been another way? → not to reach real objective

- Important not to "read down" government's objective – court will not dilute objective itself in this analysis
  - Wont define objective too precisely – this presents danger of immunizing from review
  - Any alternative means must **substantially fulfil** objective
    - Court will not replace/"read in" a different objective

→ here, found that lacking photos would significantly compromise objective of *maximum efficiency*

- **Degree of objective** becomes important – ex. *Multani* = reasonable safety; *HB* = max efficiency

Proportionate Effects – balancing harms/benefits → found proportionate

- Salutary effects/benefits:
  - Assures license corresponds w/ individual and no one has more than one license
  - Supports aim of maximally efficient and secure system to combat fraud
- Deleterious consequences/harms:
  - Not as bad as *Multani; Amselem*
  - Claimants still have effective choices – there are other means (driving is a privilege; can bus/taxi, etc.)
- This is a law of general application (unlike *Multani; Amselem)*→ gov granted leeway in this kind of rule making

DISSENT (Abella J)

- Minimal impairment: no evidence this exemption would truly interfere w/ objective
- Proportionate effects:
  - Benefits – offer nothing more than "web of speculation"; facial recognition tech not foolproof
    - No evidence of problems with Condition Code G licenses; Small number of observers affected
  - Harms – not driving is a substantial consequence (esp. in rural AB)
    - Describing driving as a "privilege" doesn't line up with case law – *Roncarelli* required liquor licenses to be administered fairly

FREEDOM OF RELIGION: Land & Community

- These relate to special problems re: land/community
- These are **Administrative Decisions** – not laws of general application
  - Statues are subject to *Oakes*
  - These decisions are assessed under *Dore*
  - These are novel claims – contexts are different and court must maneuver under precedent – do the decisions seem reconcilable?

Ktunaxa (2017)

- Proposal to develop ski resort in region (Qat'muk) which was held to be of particular spiritual significance
  - Area home to Grizzly Bears and thought to house their spirit – which was key to their faith
- Glacier Resorts apply for permits to build on this mountain, enter very long negotiations with gov
  - Late in this process an elder in community (Luke) advises of a revelation he had a few years earlier that these negotiations could never produce agreement for his community because any permanent structures would drive out Grizzly Bear Spirit
  - Project is approved regardless by minister
- Litigation brought forth on multiple claims : (1) violated s. 35 rights and (2) violated freedom of religion
- **SCC majority**: freedom of religion NOT engaged
  - There is sincere belief BUT don't believe state is placing burden on a practice/belief

        - Charter designed to ensure everyone can believe what they want and manifest those beliefs as such; but this does not create burden/duty to "protect object of beliefs"
- **Concurring** (Moldaver J): rights ARE engaged; but concurs in result (believes decision was still reasonable)
    - Indigenous spirituality is different from spiritual practices presented in previous caselaw (anchored in Judaeo-Christian perception of religion that does not adequately capture what Indigenous religion requires)
        - Divine has been treated as something supernatural → this =/= most Indigenous beliefs/practices – where divine is inextricably linked to physical world
    - → to have meaningful Charter protection of religion – it must accept different religions & their needs
    - Religious significance should be protected – not up to gov to render an object devoid of religious significance
- Statutory objectives → statutes not challenged; whether decisions made under statutes reasonable w/ Charter values
    - Administration of Crown lands
    - Dispose of lands in public interest
    - Decision bound by encouraging outdoor recreation

→ decision infringed rights as little as possible in light of objectives; Ktunaxa lose in court

    - There were accommodations made throughout negotiations (ie. some land left undisturbed)
    - Once Luke Elder came forward – not possible to reconcile w/ objectives required by statute

Context & Aftermath

- Laws court applied in this decision operate alongside Indigenous Legal orders – which requires Ktunaxa to protect/care for land (Qat'muk Declaration)
- Significant social movement activism
- Region ends up being converted into Indigenous protected area

Law Society v Trinity Western University (TWU) [2018]

- Evangelical university – sought to open law school
    - Students required to sign mandatory covenant – incl. agreement to abstain from sex outside hetero marriage
- LSBC refused to recognized law school
    - Statutory mandate requires diversity and equal access to legal profession – Covenant is exclusionary to LGBT
- TWU claims this is a 2(a) violation

1) Sincere religious belief?

    - Yes – sincere belief that studying in community following covenant contributes to spiritual development

2) Interference?

    - Yes – LSBC interfered with ability to maintain approved law school in line with beliefs → 2(a) infringed
- BUT infringement reasonable
    - Not a religious requirement to go to a school alongside others who have signed this covenant
    - Approval of the law school would harm statutory objectives of equality/diversity in profession
- **Concurring** (Rowe J)
    - No mandatory sincere religious belief – preference for being in a community with certain people
    - Even if ^ is sincere; there is no interference – no one is being prevented from doing anything
        - Choosing to sign a Covenant is welcome; just cannot require others in community to do so
    - While there is communal aspect, religion is an individual right → cannot mandate anyone else's practice

IN ALL 4 DECISIONS OF THE 2 CASES: [majorities + concurring]

- Government actors made a choice they were allowed to make
    - Question was just if it was making reasonable intrusion on violated charter right *or* if they did something that didn't engage Charter protections at all

FREEDOM OF EXPRESSION

SECTION 2(B): freedom of thought, belief, opinion and expression – including freedom of the press and other media communication

SO FAR: **Implied Bill of Rights**

- *Ref re Alberta Statutes* – gov required newspapers to disclose sources/authors and publish statements to "correct" public misapprehension of economic policy (ultra vires prov bc national matter)
- *Saumur* – religious; but local law targeting pamphletting struck down (bc religion is not local matter)
- *Dupond* – illustrates limits; local law prohibiting protest upheld bc nothing in Constitution saying FoE is protected

Charter - specifically protects individuals from state intrusions into free expression

- *Grant* - Framework for charter values being read into CL
- *Doré* – administrative law framework

Commercial Contexts

Irwin Toy (1989) [landmark case on FoE]

- QC *Consumer Protection Act* – prohibition on all advertising to kids under 13. Includes factors to decide if violating:
  - Nature/purpose of goods (ex. Froot loops vs. pacemaker)
  - Manner of presentation (ex. Cartoons vs. complicated text)
  - Time/place shown (ex. 9am Sunday vs 2am Monday)
- Regulator is making decisions – but challenge is not any specific decision (this would be *Dore* framework) but to entire law being intrusion to FoE
- Some exemptions (ex. Kids magazines – advertising was allowed)
- Irwin Toy found to violate Act and they claim the law is an infringement on 2(b)

FEDERALISM ISSUES

- Found intra vires province bc consumer protection; NOT inapplicable (under IJI) as impairing federal telecommunications bc IJI protects infrastructure not content of advertisement

CHARTER ISSUES

SCOPE OF 2(B): Any activity that conveys/attempts to convey meaning

- Purely physical vs. expressive conduct
  - Can be difficult because something that looks purely physical may have expressive conduct in certain circumstances (ex. *Parking a car* – somewhere specific in an act of protest → attempting to convey meaning)
- Violence is OUTSIDE of scope – even though lots is associated with conveying meaning

ANALYSIS FOR INFRINGEMENT

1) **Infringing purpose?**
   - If *purpose* is to restrict content → 2(b) infringed
     - Any law aiming at words/content
       - Ex: warning labels required on products, any law around advertising, hate speech
     - Broad definition; more open to laws infringing 2(b) than 2(a)
   - Laws relating only to physical consequences → will not have infringing purpose
     - Ex: prohibiting leafletting (restricting expression) vs. prohibiting littering (may prohibit leafletting but purpose not directed at expression)
2) **Infringing effect?** → ex: prohibiting littering may still have infringing effect

- Determined by looking at impact of rule on purpose of guaranteeing FoE – why is this right protected?:
    - *Marketplace of ideas rationale* – society pursues truth by allowing free expression and competition in 'marketplace of ideas'
    - *Democratic rationale* – participation in political community requires free speech
    - *Human flourishing/self-fulfillment* – as humans we need expression to be fulfilled

APPLICATION: QC *CPA* found to prohibit some speech → 2(b) infringement → move to section 1 analysis

SECTION 1 – this is the case where court sets out what it means by a limit for right to be **prescribed by law**

→ if government is going to interfere with these important interests – must do so clearly with a law that can be understood

- In this case – no bright line rule limiting expression – discretion is given to regulator
    - In comparison with *Edwards* – where there was clearly defined rules/requirements for law to apply
- Prescribed by law? - If cannot tell what conduct is prohibited by looking at rule → s. 1 inquiry would end; limit not founded in legal rule
    - A law will pass this point in the analysis as long as there are intelligible standards for interpretation
        - Its ok for there to be some discretion; just can't be confusing/contradictory

  APPLICATION: QC *CPA* meets requirement for prescribed by law → move to justification [*Oakes*]
- Pressing/substantial objective: protection of children from advertising → accepted by court
    - Evidence children aged 2-6 are vulnerable to manipulation by ads – "completely credulous"
    - Evidence less clear for children aged 7-13
        - Court holds that if gov has made appropriate assessment based on this it is not for court to second guess
- Rational connection: satisfied; something dangerous is banned → danger is suppressed
    - [Most often engaged where evidence that law has no relationship to stated purpose]
- Minimal impairment: flexible standard is used – "whether reasonable basis, on evidence, for concluding the measure taken was minimally impairing given government objective" → found minimally impairing
    - Court will not require legislature to choose least ambitious means to protect vulnerable groups → *Charter* not a tool to "roll back legislation" aimed at helping vulnerable people [*Edwards*]
- Proportionate effects: harms are not severe and not of great concern – advertisers are free to direct messages at result. "real concern" [of *Irwin*] is profit

  → **law justified under section 1** – real harm to children that the law protects; objective > 'harms' [profit]

RJR-MacDonald (1995)

- Federal *Tobacco Products Control Act* – required warnings on packaging and prohibited advertising tobacco
- Challenged on federalism basis for being ultra vires federal → upheld as intra vires under criminal power
    - Circuitous approach to this
- ISSUE: whether warning labels/advertising prohibitions infringed 2(b)
- INFRINGEMENT: advertising prohibitions – aimed at words/expressions → 2(b) infringement conceded
    - Warning labels – compelled speech (by forcing to convey message don't wish to) → 2(b) infringement
        - There was also a prohibition bc couldn't add anything to label to diminish warning

  → **INFRINGING PURPOSE on both counts**

PROPORTIONALITY

- Pressing and substantial objective: must define at level of measure taken (not at high degree of generality)
    - Cannot define objective of broad measure (such as "reduce smoking)
    - Advertising ban = prevent people from being persuaded to smoke
    - Package warning = discourage people who see package from smoking
    - → both found to be pressing and substantial objectives
- Rational connection: ok to use "reason/logic" rather than direct proof (rational not proven connection)

    - → Logic found to support rational connection
- Minimal impairment: complete prohibitions only acceptable where proven that a partial ban would be less effective
    - Blanket ban with no exceptions → means gov must show there was no other possible way
    - Gov provides no evidence for why didn't use less intrusive restrictions
        - Ex: could have allowed informational advertising; not persuasive (targeting at already smokers)
    - Contrasts with *Irwin* – where evidence was provided and scheme was more tailored
    - Gov also fails to prove that unattributed warnings were needed (ex. US "surgeon general's" warning)
- Proportionate effects: not necessary bc fails at minimal impairment

MAJORITY: Wishes not to undervalue commercial speech – even if profit is the motive, there can be important things companies need to convey (pricing, quality, etc.)

DISSENT: this is not important speech/expression (like hate, etc.) that should attract the protection of 2(b) [view of *Irwin* majority]

→ tension of deference/institutional competence b/w court/legislature exhibited in conflicting views here

JTI-MacDonald (2007)

→ gov tries to capitalize on using crim law power (which was upheld) in a way to not upset court w/ a 2(b) violation

- Come up with Federal *Tobacco Control Act* – prohibits tobacco advertising; exceptions for informational and brand preference advertising; warning label attributed to government
- Law upheld under 2(b) → sufficiently tailored this time
    - Gov provides lots of evidence to justify limits
    - Strong national/international attention to smoking suppression
    - Scheme represents genuine attempt to control advertising and meet objective while protecting 2(b) interests

2(B) CLAIM REVIEW

1) Does the activity convey/attempt to convey meaning?

→ Ruling out any kind of purely physical activity or violence (regardless if meaning is conveyed)

2) Infringement: purpose or effect of law restricts expression?

→ Any law at all that aims at expression/content

Section 1 in 2(b) cases so far:

"Prescribed by law": *government is going to intrude on people's rights; must at a minimum be sure that they were clear about what they were doing. Cannot justify rights infringement w/ law that creates no intelligible standard to convey what law does/does not cover → cannot justify intrusion w/ confusing/contradictory law (Irwin Toy) . Any infringement at a minimum must be clear enough to pass this threshold*

Irwin Toy - Standard that required discretion in application; was enough to meet the prescribed by law standard

Pressing and Substantial Objective: *need a good reason*

RJR – be cautious about level of generality of which defining objective. Reducing smoking is too broad; when get to minimal impairment, there can be too many different ways; "short-circuiting" s. 1 analysis. Must define objective w/reasonable fealty to what government was trying to do.

Rational Connection: *Once level of generality is appropriately set, want to assure that the measure taken to achieve the objective is also rationally connected*

RJR – not necessarily a rigorous test; can rely on logic and reason to show they acted appropriately to achieve objective

Minimal Impairment*: Reasonable basis, on the evidence, for concluding minimally impairing. The way they acted limited rights as little as possible. NOT did they actually limit rights as minimally as possible, but did the government have a reasonable basis for acting as they did.*

Total bans (RJR) – heightened requirement to show they ruled out alternatives for good reason when there's a total ban

Proportionate Effects: *was action taken reasonably considered least rights impairing way of getting things done. And did the benefits outweigh the harms (salutary and deleterious effects)*

Irwin Toy – harm caused by restriction on advertising boils down to lost profits. This is not substantial – benefit of protecting children outweighs this "harm"

BUT

RJR – fact that speech in question is commercial doesn't always mean it is necessarily "low value". Some commercial speech might serve purposes of democracy, marketplace of ideas, etc. wont assume that just bc speech is commercial doent mean profit motive is the only significant harm – ie. Book sellers want to make money; banning books is huge infringement and harm

Harmful/Offensive Speech

Keegstra (1990)

- AB school teacher convicted for wilfully promoting hatred against jews → *Code* provision creates offence of "wilfully promoting hatred against any identifiable group through statements"
  - Includes exceptions – ie. Cant be convicted if statements occur in course of private conversations
  - Includes defenses
    - Prove truth of statements
    - Your own sincere religious opinion
    - You *believed* statements were true and of benefit to the public
    - Pointing out someone else's speech for purpose of removal (ie. *"I cant believe what they just said*)

1) law aimed at conveying meaning? → yes; doesn't matter they are "obnoxious and invidious"
2) infringing purpose → yes; law is aimed at words

Connection b/w speech and 2(b) values – *must assess at some point in 2(b) analysis* (at outset or proportionality)

- What is the connection that helps to understand if gov was justified?
- Truth seeking: hate speech often factually inaccurate → shouldn't let ppl say untrue things under 2(b) protection [this does not advance the real values underpinning 2(b)
- Self-fulfillment: is intruded upon; even when speech is hateful (hateful speaker is still saying what they want)
    - BUT hate speech harms self-fulfillment of target groups
- Political process: this is definitely political; would count as high value on this metric alone
    - BUT this speech undermines democratic *values*

→ This speech has a low connection b/w expression and 2(b) values – hurts the values more than helps; not core to ***why*** FoE is protected

SECTION 1

- Pressing/substantial objective: broader social benefit to be served by reducing hate speech
    - Evidence to prove that hate speech was a problem at the time – causing tension/discord in communities
        - Unconscious effects on listeners – negative biases internalized
    - Not idiosyncratic – international attention
    - Constitutional values of equality and multiculturalism *Charter* protected (s. 15 and 27)
- Rational connection:
    - **Dissent** (MacLachlin) argues there is **no rational connection** – if a law banning hate speech has the effect of promoting the cause of "hate mongers" → it is not rational
        - Can result in heroism to people expressing hate – ie. Being prosecuted makes Keegstra look like a victim of an overreaching state law
    - **Majority**: test is whether rational connection b/w banning speech and harms caused by the speech
        - Suppression does not always dignify speech – media attention shows public condemnation
        - Despite insinuation that law may have different effect than intended → rational connection is established
- Minimal impairment: argument that law is **overbroad and vague** (covers too much conduct and not clear exactly what)

  → captures some speech that is unconventional/unpopular but doesn't cause harm
    - No required proof that the speaker caused "actual hatred" (ie. All Keegstra's students may have thought he was nuts and not believed him; but he could still be prosecuted)
    - Evidence of narrow tailoring:
        - Private conversations excluded
        - Wilfulness requirement – must prove *intent* to promote hatred
        - Defences available
    - The court also layers on an interpretation of "hatred" to make subsequent statutes even more narrow/tailored
        - ***"hatred"*** = emotion of intense and extreme nature; clearly associated with vilification and detestation; predicated on destruction (of group in question)

      → this further narrows the speech applicable under the provision
    - Prior cases that used overbroad application does not invalidate law – just examples of misinterpretation
    - Alternatives? – human rights law

  → found that gov considered/pursued range of approaches and reserved most extreme speech for criminal sanctions
- Proportionate effects: FoE values not deeply at stake (est. at outset) and benefits are substantial (importance of objective)

→ law justified under section 1

Zundel (1992) [*Keegtra* postscript]

- Holocaust survivor swore information against denier (Z) – alleging wilful publication of fake news under s. 181 *Code*
- SCC: counts as 2(b) protected speech → section 1: **Purpose is to protect mighty/powerful (not P&SO)** and even if purpose found valid, is not minimally impairing bc overbroad and could be used to prosecute unpopular ideas

  → *not justified under s. 1*

Khawaja (2012): holds that **threats of violence are not protected under 2(b)** [although *Keegstra* held they were]
- Undermine values necessary to free expression
- No articulation of what counts as threats of violence; just overrules doctrine in *Keegstra*

Butler (1992)

- *Code* provision making an offence to possess/publish/distribute any ***"obscene thing"*** – defined as any publication where the dominant characteristic is the undue exploitation of sex or sex alongside crime/horror/cruelty/violence
- **INFRINGEMENT** → yes; is re: expressive conduct, not purely physical and clearly speech infringing purpose because prohibits expression

SECTION 1

- Prescribed by law: does "undue" provide an intelligible standard? (*Irwin*)
  - Finds that yes – as long as supplemented by following "intelligible standards" (further narrowing "undue")
    - Community *tolerance* – not just taste
    - Exploitation of sex is undue where it is degrading/dehumanizing
    - Likely to cause harm
    - No artistic value
- Pressing and substantial objective: avoiding harm from exposure to obscene material (NOT making the state a "moral custodian" in sexual matters) → harm objective is P&SO
  - Preventing "dirt for dirt's sake" would not be defensible in *Charter* era – BUT here the moral conception overlaps with harm → represents a shift in "emphasis" within purpose (counter to *Big M*) – didn't overrule
- Rational connection: b/w preventing harm and prohibiting materials with undue exploitation of sex
  - Competing social science evidence; but question is whether there's reasonable basis on reason/logic
  - Found reasonable to presume link b/w exposure and harm
- Minimal impairment: scheme need not be perfect, just appropriately tailored
  - Narrowly defined (with help of "undue" tailoring done here)
  - Focus only on public distribution (private not covered)
  - Not a viable alternative – education insufficient
- Proportionate effects: not "core" speech – not political [deleterious] and objective is of fundamental importance [salu] → law justified under s. 1

SECTION 7: LIFE, LIBERTY, SECURITY OF PERSON

- Right with significant internal limit → "except in accordance with PFJ"
  - These rights are limited before even reaching a section 1 analysis
- For a violation: **(1)** protected interest at stake and **(2)** failure to accord with PFJ
  - Once both these are established → burden to government for justification
- **Liberty** – engaged any time there is possibility of incarceration (*Re BC)* and deeply personal choices (*Malmo/Morgen*)
  - PFJ must be applied whenever imprisonment is on the line
- **Security of the person** - physical and psychological integrity (*Morgentaler; Carter; Bedford*)
- **PFJ**: must be a legal principle about which there's sufficient societal consensus that it's fundamental and must be identified with sufficient precision (*Malmo*) → each principle is defined w/ reference to law's objective/purpose
  - Ex: No imprisonment without fault (Re BC)
  - Defences cannot be "illusory" (*Morgentaler*)
  - NOT harm principle (*Malmo*)

[*Bedford*]:
- Arbitrariness → *no connection* to law's objective (*Chaoulli*)
- Overbreadth → *no connection* between law's objective and *some but not all* of it's impacts (*Carter; Bedford* avails)
- Gross disproportionality → deprivation is *totally out of sync* with law's objective (*Bedford* bawdy house/commun)

Re BC Motor Vehicle Act (1985) [fundamental s. 7 approach]

- Reference re: constitutionality of BC *Motor Vehicle Act* – could be guilty of driving w/ suspended license even if you were unaware of such suspension (absolute liability – no need to prove knowledge)

> 2 step framework to guide all future s. 7 inquiries:
>
> 1) Are interests engaged re: life/liberty/security of person?
> *2)* Are any PFJs violated?

→ offence carrying the potential for incarceration requires a mental element be proven

- **Application**: 1) yes → bc incarceration – therefore liberty and 2) yes → is a PFJ that morally innocent should not be punished
- **Section 1**: no P&SO for refusing to include defence of due diligence → gov did not have good reason for contravening right in the interest of PFJ → not justified
- Sections 8-14 (re: criminal procedure & about fairness) are examples of what PFJ's require but not the only things
    - Section 7 is not limited to the rights in these sections

Malmo-Levine (2003)

- *Narcotic Control Act* – prohibited possession of marijuana, claimants convicted
  1) Interest? → No liberty interest in smoking BUT possibility of imprisonment engages s. 7
  2) PFJ violation? → claimants put forth *harm principle* as a PFJ – wrong to incarcerate for doing something that doesn't hurt anyone
    - **PFJ definition**: a legal principle where there is societal consensus that it is fundamental and identified with sufficient precision → harm principle not found to qualify; it is a diffuse moral standard and hard to apply

Morgentaler (1988)

- Precedes NS Federalism decision → where law found ultra vires bc 'filling gap' in criminal law
- This is the decision striking down the federal law to criminalize abortions → struck down on Charter grounds
    - NS then tries to fill that gap with their own prohibition → struck down on Federalism grounds

Charter evaluation on the federal criminal prohibition:

- *Code* s. 251: offence to seek an abortion – up to 2 years imprisonment
    - Exception for life or health of pregnant woman – BUT serious procedural and administrative obstacles
        - Needed approval from 3-doctor committee – which hospitals lacked staffing for
        - Inconsistent application of "health" risks – some considered psych and some did not
- Morgentaler (doctor) opens clinic in open defiance of law – performs abortions w/o committee approval

1) S. 7 interest? → yes, security of person; state interference w/ bodily integrity

- Evidence: physical risks (of not getting treatment), also state-imposed psychological stress from uncertainty of not knowing if could get one, and lengthy delays threaten "psychological integrity"

2) PFJ violated? → yes, scheme including criminal punishment. Has a defence, but it is "illusory" → defences to criminal offences should not be illusory

3) Section 1? → illusory defence violates min. impairment & PFJ - having defence actually available would be minimally impairing

- Deleterious effects also out of proportion to supposed objectives

→ "assuming" Parliament has authority to restrict access to abortion (don't find they outright do) must do "properly" → leave open possibility that in some circumstances, abortion restrictions may violate s. 7 – here the majority only deals with illusory defence

- **Wilson J** (concurring): [only female on the bench] re-frames issue as question of can a pregnant woman be compelled by law to carry a fetus to term? → liberty interest of free choice re: human dignity
    - In her view s. 7 is infringed even if procedural issues are resolved
    - Not tailored to achieve objectives → cannot be saved under s. 1
- **Dissent**: no s. 7 interest engaged at all → the right to have an abortion is not protected/implied under Charter

Afterward: *Borowski v Canada* (MBCA 1987) – challenged same law – but under premise it threatened s.7 interests of fetus → CA holds fetus is not included under "everyone" in s. 7; appealed to SCC but rendered moot when *Morgentaler* struck down s. 251

Today: legal status of abortion → various bills have attempted to re-criminalize some abortions but none have been passed (so we don't know if they would pass constitutional muster)

- Local governments have been effectively precluded from outright restricting abortion for "moral" reasons on face
- Federal has jurisdiction under criminal law power but ambiguity whether they have access under Charter
    - Presently no laws restricting access; but there is unequal access across the country

Allocation of burden in s. 7 claims:

- Violation of rights → claimant
    - S. 7 interests engaged AND in contravention of PFJ
    - Significant overlap with PFJ and elements of section 1
        - Arbitrariness & rational connection
        - GD & proportionate effects
        - Overbreadth & minimal impairment

      → however here it is all contained within s. 7 and burden remains on claimant
- Justification → government
    - Is very difficult to justify a s. 7 violation due to the overlap (mentioned above)
    - However independent role of s. 1
        - Overbreadth required for enforcement (*Bedford*)
        - "public good/competing social interest" not captured by P&SO (*Carter*)
        - There are other PFJs that may show violation (ex. Self incrimination s. 13; innocent until proven guilty s. 11(d))

SECTION 7: *BODILY INTEGRITY*

Bedford (2013)

- Number of *Code* provisions challenged on the premise they violate s. 7 by making sex work more dangerous
    - S. 210 – offence to own, lease, etc. "bawdy house"
    - S. 212(1)(j) – offence to live off avails of prostitution
    - S. 213(1)(c) – offence to communicate in public for purpose of prostitution
- *Note:* court in *Prostitution Reference* (1990) held bawdy house & communication provisions did not violate PFJ vagueness
- ***Role of precedent***: court may change mind in certain cases; TJ authorized to disregard SCC precedent if:
    - 1) New legal issues raised → only liberty interest raised in *PR*; security is being raised here
    - 2) Significant developments in the law → interpretation of s.7 has evolved here to est. key principles of PFJ
    - 3) Change in circumstances or evidence that "fundamentally shifts parameters of debate" (*Carter*)

RIGHTS ENGAGED:

1) Bawdy house – increases street/out-calls → the most dangerous form of sex work
- Provisions made it illegal to provide safe houses/places for refuge
    - "Grandmas House" safehouse facility outlawed – at the same time Pickton was operating in the area

2) Avails – prevented ability to hire bodyguard/driver/etc.

3) Communication – face to face deemed essential in enhancing safety (screening clients)

- Do these provisions *cause* the risks?
    - AG states those affected by the provisions *choose* to be engaged in such activity
    - SCC holds there is a lack of meaningful choice
- → these provisions make lawful activity more dangerous → liberty AND security interests are engaged

PFJ? → *define objective of provision and then reference PFJ to that*

- **1) Bawdy house –** objective = combat neighbourhood disruption – valid objective but → GD in achieving
  - Social science evidence – high homicide rates, fewer complaints re indoor sex work & Gmas house/Pickton
- **2) Avails** – objective = target pimps and exploitative conduct (narrowed from AGs "target commercialization promote dignity/equality) → overbroad for failing to distinguish b/w abusive pimps & bodyguard
- **3) Communication** – objective = prevent public nuisance; taking off streets and out of public view → GD
  - Public communication essential to safety; concern about "look/feel" of neighbourhood is "totally out of sync" with risk posed to the workers

SECTION 1

- Mostly overlaps with PFJ analysis; only argument is avails provision being overbroad allows effective enforcement
  - → even if found P&SO it is not minimally impairing – no effort to exempt non-exploitative relationships
  - Deleterious effects of interference with safety outweighed any positive effect protecting ^"
  - → *both echo the overbreadth and GD analyses* (again hard to imagine law that reconciles these PFJs w/ min impair/proportionality)

Subsequently, Parliament enacts *Protection of Communities and Exploited Persons Act* (2014) – purpose relates to:

- "exploitation inherent in prostitution"; "objectification of human body"; "disproportionate impact" on women/children
- → repeals avails and bawdy house provisions, leaves communication but adds new offence of "obtaining sexual services for consideration" – making it illegal to purchase sex but not sell it

Carter (2015)

- *Code* s. 241(b) criminalizing aiding/abetting suicide
- *Note:* court in *Rodriguez* (1993) 5:4 majority held the same provision did not violate s. 7
  - SCC in *Carter* holds that TJ is not bound by *Rodriguez*
    - No new legal issues BUT developments in law of overbreadth/GD and changes in factual record re: medically assisted dying

RIGHTS ENGAGED

- Court will not expand "life" interest to include death "with dignity" or "duty to live" (would require banning suicide)
- Liberty interest engaged bc someone's choice to die in face of serious illness is "fundamental"
- Security of person engaged bc physical/mental suffering

OBJECTIVE

- Gov says is "preserving life" – this is very broad – court narrows "protect vulnerable persons from being induced to commit suicide at a time of weakness"

PFJ

- Not arbitrary – a total ban clearly advances objective
- Overbroad – evidence suggests some people captured by law are not the "vulnerable" seeking to protect
  - Some people (like Carter) were informed, free from coercion. Bringing case up to SCC unlikely by "vulnerable" person

SECTION 1

- Law is not minimally impairing – risk to vulnerable (objective) could have been addressed through safeguards
  → which TJ found workable:
  - Physicians can reliable assess patient competence (if they really want this)
    - Concern there is unconscious bias towards mentally ill – which would be carried forth by physicians
    - Court found no evidence this unconscious bias was leading to heightened risk of terminating lives
  - Concern ableism + provision may lead to pressure to commit suicide
    - No evidence prohibition would result in "slippery slope" to condoned murder

  → echoes what was found in overbreadth analysis

SECTION 7: *SOCIAL RIGHTS*

- *"the right not to be deprived thereof"* (s. 7) → does this create a separate right? Or does every s. 7 intrusion require active deprivation on part of state?

Gosselin (2002)

- Challenge to QC *Social Aid Act* – provision that you would get 1/3 of social assistance if you were under 30 years old
  - Could top up through work/education program – however difficult and 88% under 30 unable to do so
  - Evidence that level of poverty of under 30 recipients associated with disease, depression, suicide
- ISSUE: do lower benefits for persons under 30 violate s. 7?
- Section 7 so far has been limited to clear deprivation *by the state* – state is somehow preventing access
  - → there is no deprivation in this case; state is not taking anything away
  - Evidence does not show actual hardship → frail platform unable to support weight of positive state obligation
- Court leaves the door open to allow possible interpretation of s.7 in future to include positive obligations
  - "living tree" (*Edwards*)
- **DISSENT**: section 7 includes positive dimension – where government can be required to do something *for* you/give something to you [not just unable to take things away] (ex. Voting rights under s. 3 Charter)
  - State's obligation not contingent on proof the state is "causally responsible"
    - *Social Aid Act* sufficient to trigger *Charter* application
  - Evidence re: health risks of poverty - included:
    - Expert testimony from physicians/professionals
    - Homelessness; malnourishment; vulnerability to disease/miscarriage
    - Resorting to theft/prostitution
    - Stress, suicide, drug addiction
  - → this evidence was not enough to render s. 7 rights meaningful to majority [keep in mind for issue spotter]

Chaoulli (2005)

- Prohibition on private insurance for health care services available in public system
  - Evidence of long wait times in public system
- Court differentiates from *Gosselin* because it does not seek gov spending – just seeks removal of prohibition
  - Not asking for a free-standing constitutional right to health care
- BUT – once a health care scheme is created, it must be Charter compliant

RIGHTS ENGAGED

- Security of person – physical/psychological harm from wait times
- Life – evidence some died in waiting period
- Analogy to *Morgentaler* – services available through scheme involving harmful delays
- Since public system is not operating well → refusing to allow people to obtain private insurance = s. 7 violation

PFJ

- Objective = maintain quality of public system by preventing diversion of resources
  - Evidence that creating private system results in support for public dwindling
- Arbitrary → ban has no connection to objective
  - To be arbitrary – connection must be more than "theoretical"
  - Court accepts claimant's evidence re: other jurisdictions
  - Court rejects gov evidence of reports urging ban
    - "Conclusion of other bodies cannot be determinative"

SECTION 1 → fails on every level

- Rational connection → cannot be because it is arbitrary
- Minimal impairment → prohibition goes further than needs by denying access to care
- Proportionality → substantial harms and no demonstrated benefits

SECTION 15: EQUALITY

Anti-Discrimination so far:

Federalism

- Provincial laws struck down on making distinctions on national origin "alienage" (*Bryden*)
- "Implied Bill of Rights" – protecting people from being treated differently than others under federalism
    - *Saumur* – provincial laws cannot make distinctions on basis of religion
    - *Roncarelli* – RoL to prevent administrator from punishing on basis of faith

Statutory anti-discrimination laws

- Gov can commit selves through ordinary legislation (even where Charter doesn't require) to treat equally
- Bill of Rights (*Lavell*) – human rights statute committing to anti-discrimination in private and public relationships
    - Every provincial and federal government has human rights statute of some kind

CANADIAN BILL OF RIGHTS

- Includes promise not to discriminate under s. 1(b)
- Federal law applying only to fed – provinces not bound
- Subject to restrained judicial interpretation – frozen rights approach; not meant to change anything
    - *Lavell* – was ok to treat all women and all men the same under *Indian Act* despite discrimination against women

→ this + other cases lead to huge amounts of protest – culminating in *Charter* s. 15 protection

SECTION 15(1): Every individual equal before and under law and has right to equal protection and benefit of law w/o discrimination – in particular based on race, national/ethnic origin, colour, religion, sex, age, mental/physical disability

- Open list of enumerated grounds – meant to leave room for expansion
- Remedial – meant to intervene and remedy injustices
    - Under ***s. 32(2)*** – all other *Charter* rights come into effect immediately but s. 15 has 3 year delay to allow gov time to "clean up" all the discriminatory legislation on the books

SECTION 15(2): promise not to discriminate does not preclude any law/program/activity that has objective of ameliorating conditions of disadvantaged groups → meant to be clear that anti-discrimination is not for purpose of taking down affirmative action; and avoid litigation where members of advantaged groups challenge affirmative action programs

Section 15 Doctrine – THE TEST: [*Andrews* Framework]

1) ***Claimant must prove distinction has been made on basis of protected ground***
    - Distinction – can include direct (*Andrews*) or indirect impact (*Vriend; Eldridge; Fraser*)
        - Intentional or unintentional
        - Burden on claimant to show (esp. where disparate impact) [*Sharma*]
    - Protected grounds – include enumerated grounds AND ***analogous grounds*** – *like* those listed
2) ***That distinction is discriminatory***
    - Burden remains on claimant
    - S. 15 protection is substantive (not formal) equality – intervening to have remedial impact
    - Law reinforces, perpetuates, exacerbates disadvantage (*Fraser; Sharma*)

Andrews (1989) – foundational statement of s. 15 doctrine

- BC *Barristers and Solicitors Act* s.42 – required that lawyers in BC be Canadian citizens
    - Challenged by BC permanent resident (ironic that a white Brit is the "flagship" equality plaintiff)
- Rejects formal equality – idea that things that are alike are treated alike (*Lavell* reasoning)

    - This allows for gross inequality (*Big M* – identical treatment can *produce inequality*)
- Accepts **substantive equality** – consider law's content, purpose and impact
    - Remedial nature of s. 15 – *fixing* evil of discrimination
- **Defining discrimination**: a distinction (intentional or not) based on grounds relating to personal characteristics that has effect of imposing burdens/obligations/disadvantages not imposed on others or which withholds/limits access to opportunities/benefits/advantages available to other members of society → forms 15(1) test
- **Distinctions** direct (in language of law) or disparate impact (looks natural on face but has impact)
- **Analogous grounds** - & enumerated are common in that they define "discrete and insular minorities"
    - Some constituencies are especially vulnerable to being overlooked in political process
        - Consistently in minority
        - Characteristics that are difficult/impossible to consciously change
        - Usually irrelevant to legit state objectives

APPLICATION TO CASE

- 1) Grounds based **distinction**? – present explicitly in words
    - Citizenship is an analogous ground → non-citizens are discrete/insular; they cannot vote
- 2) **Discriminatory**? – yes
    - Barring entire class solely on citizenship status and w/o consideration of merits infringes s. 15
    - Not individual considerations of qualifications

Distinctions

- **Direct** or facial – law literally says treating differently because of characteristic
    - *Andrews* – non- citizens explicitly treated differently
    - *Gosselin* – explicitly treated diff based on age
- **Indirect** – appears neutral on face but has discriminatory impact; adverse effects/disparate impact
    - *Eldridge* – sign language interpretation unavailable for hospital service → discriminates against disabled
        - Law the looked completely neutral on face had impact of burdening certain people
    - *Vriend* – AB employee fired due to sexual orientation – human rights statute failed to protect
        - Distinction created that resulted in adverse impact on group due to preclusion of SO from list

Fraser (2020) [claim of disparate impact]

- RCMP Pension Plan (RCMPP) - FT workers accrue full pension benefits and members on leave could 'buy back' time
    - PT workers could not accrue full benefits (no buy back option)
    - "job sharing" program allowing those wanting to remain FT status but unable to commit hours
        - 100% participants women (most w/ small children)
        - FT pension unavailable for buy back under the program
- **Claim**: pension scheme discriminates against women (with small children esp. – family status part of it)

DISTINCTION?

- No "direct" on basis of protected ground
- Example of ***adverse effects discrimination*** – seemingly neutral law which indirectly places members of protected group at disadvantage; "built-in headwinds" and absence of accommodations
- Evidence which may help claimants prove law has this kind of impact:
    - Situation of claimant group – ex. Testimony/evidence
    - Impact of law – ex. statistics to show disproportionate impact
        - However don't always need – courts should be able to infer relationship
- NO NEED TO PROVE:
    - Discriminatory intent
    - Causal mechanism behind disparities → background disparity that women have disproportionate burden of childcare; not necessary to prove *why*
    - That the law is actually responsible for creating background conditions which produce disparate impact
    - All members of protected group similarly affected (ex. Many women not caring for small children)

APPLICATION

- 1) Distinction on basis of protected ground?
  - Yes – unavailability of buy-back disproportionately affects women (statistical evidence)
  - Women's "choice" to participate in scheme doesn't undermine claim → "choice" is constrained here
  - Dissent: distinction is based on caregiver status (not sex) → not a protected ground and no evidence to make analogous ground
- 2) Distinction discriminatory?
  - Yes – exacerbates disadvantage → evidence women are disadvantaged by pension schemes generally
  - Dissent: agree distinction based on sex, but not discriminatory; distinction was not arbitrary

Sharma (2022) [claim of disparate impact]

- Ojibwa woman convicted importing cocaine – boyfriend just tells her to take suitcase on trip and gives money
  - 20 y/o, single mother, facing homelessness, no prior criminal record
- **Conditional sentence** provision was clawed back in 2012 → no longer available for offences w/ max sentence 14+yrs
- Claim: revocation of CS has disproportionate impact on Indigenous women
- Majority: law does not make distinction on basis of a ground → claim fails at first step
- Dissent: s. 15 violation that is not justified under s. 1 → complete case of discrimination found

DISPROPORTIONATE IMPACT

- Need evidence about claimant group and impact of law (*Fraser*)
- Court recognizes the burden/difficulty on individual claimants without resources → asymmetry of knowledge
  - Evidentiary burden should still be fulfilled, but should not be undue

APPLICATION

- No statistical information that the legislation caused a distinction
- Expert testified it was "unknown" if limits on CS had special impact on Indigenous peoples
- What is missing is expert evidence/statistical data showing Indigenous imprisonment disproportionately increases for specific offences targeted by CS relative to non-Indigenous offenders → this could have met burden

DISSENT

- Upset that former dissenters (*Fraser*) are articulating formulation of test they believe to be wrong
- The amendments did more acutely affect Indigenous offenders
- Evidence of disparate impact:
  - Acute over-incarceration of Indigenous women
  - Revocation amendment "impairs" remedial impact of CS regime – one of the aims is to address overincarcer.
  - Sharma's case represented constellation of classic *Gladue* factors → judge would have imposed CS if available

Grounds

Enumerated	Analogous

- **Race**
- **National/ethnic origin**
- **Colour**
- **Religion**
- **Sex**
- **Age**
- **Mental/physical disability**
	- **Citizenship** (*Andrews)*
	  - Identifies discrete/insular minorities
	  - Difficult to change personal characteristics
	  - Irrelevant to gov decision making
	- **Sexual orientation** (*Egan*)
	  - Deeply personal and difficult to change
	  - History of discrimination and prejudice
	- **Marital status** (*Miron v Trudel)*
	  - Choice of mate = dignity and freedom
	  - Beyond exclusive control of individual (need at least 1 other
	  - Associated with patterns of disadvantage
	- **Aboriginality-residence** (*Corbiere*)

Rejected analogous grounds

- Occupation/employment status
- Province or municipality of residence
- Marijuana use
- Family/parental status (unresolved)

→ common in that both describe "discrete and insular minorities" vulnerable to being overlooked in political process

→ once a ground is recognized analogous it is forever in the list

→ touchstone of analogous grounds is **immutability** – from which the basis of other grounds flow

Corbiere (1999)

- *Indian Act* s. 77 required band members be "ordinarily resident" on reserve to vote in band elections
    - Drew facial distinction on basis of reserve residency
      → is this a distinction based on an analogous ground?

DISTINCTION

- For a ground to be considered analogous, must be immutable – having at least 2 aspects:
  1) characteristics that are ***actually immutable*** – cannot be changed
    - Ex: race;

  2) ***constructive immutable*** characteristics – grounds that are very difficult to change and can only be done at great personal cost – or gov has no legitimate interest in asking people to change about themselves
    - Ex: religion
- **Aboriginality-residence** → held to be constructively immutable ground attracting s. 15 protection
    - No less constructively immutable than religion/citizenship
    - Impacts identity/personhood/community
    - History of discrimination
    - Leaving reserve is often compelled – not chosen

DISCRIMINATORY? [*Law* factors drive this analysis]

- Yes – perpetuates historical disadvantage
- No correspondence between measure and needs
    - Many not living on reserve maintained connection → restricting voting did not correspond w/ realities of lives of those on reserve
- Based on stereotype that indigenous peoples living off reserve are not really connected/truly Indigenous
- Interests affected are voting → fundamental to democracy

SECTION 1

- Not minimally impairing
    - Total ban not shown to be necessary (like *RJR*) – to show electorate be connected to community

Discrimination

- What makes a distinction discriminatory? – complicated jurisprudence
- *Law* (1999) – 4 contextual factors to assess whether law impacts "human dignity"
    1) Pre-existing disadvantage
    2) Correspondence b/w differential treatment and claimant's reality
    3) Whether law/program has "ameliorative" purpose/effect
        - Does it aim to improve circumstances for disadvantaged groups (if yes may be found less discrim)
    4) Nature of interest effect – is it impacting an important interest?
- *Kapp* (2008) – contextual factors and concept of human dignity have proven confusing/difficult to apply
    - Returns to Andrews – focus on perpetuation of disadvantage/stereotyping as primary indicators
    - *Law* era cases still good law – but moving forward there's a new focus
- *Fraser* (2020) – clarifies that disadvantage/stereotyping are not separate requirements
    - Re-states *Kapp/Andrews* test: discriminatory when reinforce/perpetuate/exacerbate disadvantage

→ while the principles of analysis have changed, they are still somewhat carried through

LAW-ERA CASES:

M v H (1999)

- ON *Family Law Act* s. 29 – spousal support limited to married and opposite sex couples
  1) Distinction – yes, on basis of analogous ground (sexual orientation)
  2) Discriminatory? - yes, exacerbates pre-existing disadvantage/vulnerability
    - Based on stereotypes – assumes hetero relationships have more longevity
    - Interests affected are fundamental
- Dissent: the law is appropriate because it's aim is to respond to the inequality of resources b/w female and male partners

Gosselin (2002)

- QC *Social Aid Act* – lower assistance to those under 30
- No s. 15 violation
- **1) Distinction** – facially based on enumerated characteristic (age)
- **2) Discriminatory** – no; young people do not suffer pre-existing disadvantage
    - No impairment of dignity or treating less worthy of respect
    - Treating young people as capable and adaptable – designed to incentivize young people to work
    - Problem was individual in the case – in which young person was left in dire situation
    - "correspondence" (#2 *Law* factor) need not be perfect – the fact some individuals fall through the cracks doesn't mean law is based on incorrect stereotype
- Dissent: law did offend claimant's dignity

Canadian Foundation for Children, Youth and the Law (2004)

- *Code* s. 43 – exception to criminal assault; permits parents and teachers to use reasonable force to correct children
- No s. 15 violation
  1) Distinction – facially based on age
  2) Discriminatory – no; based on correspondence factor
    - Correspondence with fact that children need greater intervention
    - Not about children being less important/less dignified but impact of criminalization on families
- Dissent: treats children as second class citizens; compounds children's disadvantage/vulnerability

NON-LAW-ERA CASES → factors not explicitly used but still have influence

Fraser (2020)

- RCMPP buy back not available for job sharing → women disadvantaged
- S. 15 violation found
  1) Distinction – disparate impact on enumerated ground (sex)
  2) Discriminatory – perpetuates longstanding source of disadvantage to women – gender biases w/ pension plans
- Dissent: law does not contribute to women's disadvantage
    - Law corresponds to circumstances – those working less hours should have less pensions
    - Scheme created in interest of claimants to help keep jobs – gov shouldn't be held liable for insufficient remedy
    - Substantive equality becoming unbounded rhetoric

Sharma (2022)

- CS regime clawed back for certain offences – alleged disparate impact on race/Indigeneity
- No s. 15 violation – Distinction/disparate impact – not found on protected ground
- Gov should be able to address inequality incrementally and there's no positive obligation
- Dissent: *Law* correspondence – fails to account for distinct needs of Indig offenders → law perpetuates disadvantage

ABORIGINAL RIGHTS

Relevant Constitutional Provisions

- ***Constitution Act 1867, s. 91(24)*** – federal government assigned power over FN
  - Allows gov to acquire land and pursue policies of assimilation (incl. through enactment of *Indian Act*)
- ***Constitution Act 1982*** – different posture expressed
  - ***Charter s. 25*** – whatever is set out in charter shouldn't be construed to abrogate from FN freedoms
  - ***Part II: Rights of Aboriginal Peoples*** (not part of *Charter)* ***s. 35***
    (1) Existing Aboriginal and treaty rights recognized/affirmed
    (2) Interpretive section that affirms who – Indian, Inuit and Métis
    (3) Future-looking provision; new rights will have protection of s. 35
    (4) Equal guarantee to male and female
  - ***S. 35.1*** – agreement that there is no amendment to s. 25 or 35 without constitutional conference including representatives of FN → further layer to amending formula
  - ***Section 35***: protects 2 kinds of Aboriginal Rights: (1) Practices/traditions/customs (2) Land/Title

Aboriginal law: Canadian state/colonial law re: FN (s. 35) **Indigenous law**: within Indigenous legal orders (ex. Cree law)

Key Doctrines of Colonialization

- **Doctrine of Discovery**: provided that European powers firs to discover "new territories" would have legal and jurisdictional claim over them
- **Terra Nullius**: lands governed by FN were "nobody's land" → they were viewed as not real legal systems/not occupied by "real people" – Euro powers could view land as empty and make claims under DoD

COMMON LAW FOUNDATIONS

Aboriginal rights before/beyond s. 35

- ***Royal Proclamation*** **1763** – recognizes there have been abuses in acquisition of land by private parties [colonizers] – which have prejudiced Crown's interest – try to "fix" this situation in "favour" of FN
  - FN should not be disturbed in possession of un-ceded/unsold territories
  - Only Crown can purchase FN land – to protect from unscrupulous colonists
  - "source" of Aboriginal rights (*St. Catherine's Milling* 1888)
- *Connolly v Woolrich* (1867) – early recognition of Indigenous law as authoritative [recognized Cree law]
- ***Indian Act*** – restricts rights on land claim litigation (1927 – 1951) – legal system precluding FN rights from the courts
- *Calder* (1973) – first case where SCC holds that AR don't arises from RP/Crown but from the fact they were here first

Guerin (1984)

- *Indian Act* s. 18(1) – reserve lands are held by HMQ for benefit of bands – land can be sold/alienated (FN get paid) but ONLY if surrendered land to HMQ to deal on their behalf
- Musqueam Indian Band surrenders land based on understanding they would receive financial benefits
  - Oral terms of this understanding not included in surrender document
- Crown goes on to lease land to golf club, terms much less favourable than represented to band, Crown didn't keep band in the *loop* → *happening at a time where there is little/no judicial recognition of rights to FN land/practices*
- Court here recognizes CL right to Aboriginal title for the first time
  - ***Sui generis*** – legal right to occupy and possess certain lands; ultimate title lies with Crown but FN at CL retain pre-existing rights of occupancy and possession [pre-dating Euro sovereignty and exist even w/o treaty]
- Arrangement under which land is inalienable except to crown (RP) creates **fiduciary relationship** – Crown has obligation/duty to deal with surrendered lands for benefit of "surrendering Indians" → courts may regulate to ensure gov actually fulfilling in this duty (equitable obligation existing under *Indian Act* scheme)

→ court finds fiduciary breach – Crown NOT entitled to ignore oral terms; must "make good loss suffered" and pay band

- First time Crown is held accountable for broken promises to FN; occurring right after Constitution amended to recognize/affirm FN rights
- Case signals court's willingness to fundamentally reconsider Aboriginal rights
    - Title to land; Fiduciary obligation; Legal remedies available where rights breached; Duty to include FN in decision making → all foundational to s. 35

CONSTITUTIONALIZATION OF ABORIGINAL RIGHTS

Sparrow (1990) [first SCC adjudication of s. 35 claim]

- Musqueam band member licensed to fish for food; *Fisheries Act* subjected license to net length restrictions; Sparrow charged with having net that was too long
- **Claim**: Sparrow had "existing aboriginal right" to fish (under s. 35) and net length provision is inconsistent w/ s. 35
- court charged with interpreting what it means for right to be existing; what rights covered; what does it mean for constitution to recognize/affirm these rights under 35(1)
- **Existing**: 1982 is benchmark for assessing if rights exist – *existing* means some rights may have been fully extinguished prior to 1982 which will not be brought back to life by s. 35
    - Regulation =/= extinguish; Crown must use clear/plain language to express **intention to extinguish** (prior 1982) → here – ongoing licensing = regulation → fishing rights not extinguished
- **Scope of Right**: s. 35 rights not limited to reserve lands (here charge was laid on area not on reserve)
    - TJ found it was ancient tribal territory where ancestors fished → historical relationship to land
        - Evidence: Continuity of practice, integral part of distinctive culture
        - Once a right is recognized – may be exercised in contemporary manner
- **Recognized and Affirmed**: s. 35 is not codifying existing law → is remedial in nature (*Andrews*) and meant to change "old rules of the game"
    - S. 35 should be interpreted in keeping with the honour of the crown → guiding principle describing fiduciary, trust-like relationship
- **Rights and Limits**: recognition/affirmation incorporates limits on rights → only Charter is subject to s. 1; no explicit limitations on s. 35
    - Courts will demand justification of any gov regulation infringing upon Aboriginal rights

Basic s. 35 framework: → setting framework for negotiations; cooperative federalism

1) ***Prima facie infringement of Aboriginal right?*** [burden on *claimant*]
    - Whether law in question has effect of interfering with existing right
        - Must consider Aboriginal perspective on what that right is
        - Contemporary of historic practices will be covered
2) ***If so, is the infringement justified?*** [burden on *government*]
    - Whether gov is pursuing valid legislative objective (similar to pressing/substantial under Oakes)
        - Conservation of resources and preventing harm always valid objective
        - Shifting resources to user groups w/o aboriginal rights is unconstitutional
    - Whether government action is justified in light of honour of crown
        - Fulfilling s.35 protected rights to access the resource are top priority after conservation

        → may mean assignment of entire allocation of resource (to s. 35 rights holders) after conservation needs met
        - Must consult or at least inform FN of changes impacting their rights
        - Since crown cannot aim to move resources away from rights holders, might mean that entire allocation of fish (after conservation needs are met) have to go to aboriginal rights holders
            - Very high priority that court is articulating

→ no finding in case – retrial ordered – new evidence needed in light of newly est. tests

Federal Aboriginal Fisheries Strategy (1992) – included substantive rights protection and consultation

DEFINING AND LIMITING ABORIGINAL RIGHTS

CURRENT "TEST" FOR EXISTENCE OF RIGHT (*Lax Kw'alaams*)

1. ***Characterize***/identify precise nature of right
    - Consider – historic practice, contemporary action, impugned regulation [*VDP*]
2. Identify whether the right connects to ***pre-contact practice***/tradition/custom that was integral to pre-contact society [*Sappier*]
3. Whether there is ***continuity*** between claimed modern right and pre-contact practice
4. (*if commercial right*) – delineate/narrow right w/ regard to objectives that might justify infringements (*Gladstone*)
    - When dealing w/ some kind of economic/trade relationship
    - Objectives such as allocating resources, economic/regional fairness may be justified

Van der Peet (1996) [gives specificity to *Sparrow* framework]

- *Fisheries Act* – prohibited selling fish caught with food fishing license
- VDP (member of Sto:lo Band) sold 10 salmon caught w/ license and charged with unlawful sale
- **Claim**: sale of fish was exercises of existing Aboriginal right → *Fisheries Act* violates s. 35
- **CA:** rejects claim – focus on pre-contact period important to understanding s. 35
    - VDP argues looking to ancient practices to understand contemporary scope of rights is wrong approach
- **SCC**: retains CA's focus on pre-contact – purposive interpretation of s. 35 = reconciling pre-existence of FN societies w/ sovereignty of Crown
    - Not like Charter rights (held by all people on basis of human dignity) – more of political compromise

DEFINING RIGHTS

- Case-by-case assessment to determine if integral/distinctive to pre-contact society
    - Not incidental/occasional – but something that *made the society what it was*
    - Need not be unique (can be important to other societies) but cant be universal (ie. Eating to survive)
    - Cannot be practice arising post-contact (if it didn't start until after contact → not protected under s. 35)
- Consider nature of:
    - Contemporary action claimed pursuant to right
    - Governmental regulation
    - Historic practice thought to ground the modern right

→ look to all elements together and define in terms that are sufficiently general and allow for some adaptation over time

CONTINUITY

- Between pre-contact and contemporary practice – relevant time period = pre-contact
    - Evidence from post0contact may be used but only to make inferences about what happened pre-contact
- "chain" of continuity need not be unbroken – scanty evidence or fall off/resurgence of practice is ok

EVIDENCE

- Court recognizes the evidentiary difficulties inherent in these claims –pre-contact necessarily has no written records
    - Therefore evidentiary standards used in other cases (ie. Private tort claim) not used
    - Claimant's evidence will not be "undervalued"
    - Doubt/ambiguity must be resolved in favour of claimants (comes from fiduciary relationship *Sparrow*)

APPLICATION

- 1) Characterization: aboriginal right to trade fish; not commercial, small quantity "simple exchange"
- 2) Connection to pre-contact society practices: no → exchange of fish not integral to pre-contact society
    - Evidence shows exchange of fish only "incidental" to food fishing pre-contact
    - Trading only became significant part of Sto:lo culture when HBC arrived

→ No Aboriginal right found

- Dissent: test should be "substantial and continuous period of time"
    - Focus on pre-contact is "arbitrary"
    - Can keep the test but rights should be defined more broadly

Gladstone (1996) [refining *Sparrow* – commercial aspect]

- *Fisheries Act* regulation – overall cap for herring spawn – 20% allotment allocated through licenses among various groups in the area
- Gladstone (Heiltsuk Band) charged with selling herring spawn on kelp [material used] without required license
- **Claim:** pre-existing right to commercial access to this resource
- → pre-existing unextinguished right to commercial fishing established – integral to pre-contact culture → regulation constitutes prima facie s. 35 infringement →Question becomes justification

JUSTIFICATION

- Objective of law (20% cap) = conservation → valid objective (*Sparrow*)
    - BUT almost no evidence of why gov allocated within the 20% the way that they did
    - NOTE: *Sparrow not yet decided at this time – framework not available*

  → order a new trial to get evidence on question of justification (why gov allocated this way)
- Court states dealing with nature of commercial rights requires guidance on legal framework:

PRIORITY

- Commercial fishing differs from subsistence, ceremonial fishing as it has no internal limit – need for resource is potentially infinite as long as there's buyers
    - No evidentiary basis for limiting right (eg. To "moderate livelihood" in this case)
- *Sparrow* "priority" framework revised – Sparrow states entire allocation may be given to s. 35 rights-holders after conservation accounted for
    - *Revised:* In commercial cases – gov must show it has (1) taken account of existence of Aboriginal rights and (2) allocated resources in a manner respectful of that fact those rights have priority
    - → procedural and substantive dimensions – respectful allocation on both counts of procedure/substance

OBJECTIVE

- Even after conservation needs are met, infringing distributions may be justified if objectives are compelling:
    - Economic and regional fairness
    - Recognition of historical reliance on/participation in fishery by nonaboriginal groups
        - *Sparrow* says infringement never justified to shift resources away from s. 35 holders → court says opposite here

JUSTIFYING FACTORS

- Was crown justified in light of fiduciary relationship? Assess following to consider whether gov met the burden:
    - Consultation – w. s. 35 rights holders
    - Compensation – to nation for intruding on their rifhts
    - Accommodation – any efforts made? (ex. Reducing license fee)
    - Relative extent of aboriginal rights-holders participation in fishery
    - How government has accommodated particular fishing interests (food, commercial, etc.)
        - *Explore. solution allowing band members to engage in fisheries in a way relevant to their community?*
    - Importance of commercial fishery to economic well-being of band in question
    - What criteria did gov consider in allocating commercial licenses (*allocating within 20%*)
    - And other factors…

Sappier; Gray (2006) [how to define right in question] → ex of "narrowing" right

- Prohibition on possession/harvesting timber on Crown land → Maliseet and Mi'kmaq bands claim right to harvest for personal use → birch essential to canoe building and basket weaving
- **Delineation of Right**: narrowed to "a right to harvest wood for domestic uses as a member of Aboriginal community
    - Practices with specific relationship to traditions; occurring in context of "way of life" →fact that harvesting was integral to survival supports claim it was integral to pre-contact way of life
- → found right infringed without justification
- Criticism: possible to end up objectifying community's practices and relying on "aboriginal" stereotypes when defining right according to concepts of what's integral to traditional way of using resource → court cautions lower courts to avoid this when applying test [*Pamajewon* (1996) runs counter to this caution]

Lax Kw'alaams (2011) [sets governing framework building on prior cases]

- **Claim:** LK Band claims right to commercial harvesting of all species of fish in their traditional waters
- **Historic practice**: yes; fishing for many species in water
    - Evidence showed there was commercial exploitation of fish but only one species (eulachon grease) was integral to distinctive culture
- **Rights delineated**: fishing (incl. some surplus for winter) large variety of fish; but *commercial fishing* only possible for eulachon grease

EVOLVING RIGHTS

- Nature of practices may change and contemporary rights holders entitled to be able to keep up with times
- Method/exercising rights (ie. How to catch/sell eulachon) and subject matter may change
- BUT – subject to limits – evolution cannot be infinite (ex. Pre-contact gathering berries =/=→ gathering natural gas)
- ***Qualitative limits:*** IF record showed significant trade in all fish – right would not "freeze" to cover only the species in waters at time of contact
    - BUT general commercial fishery would be "qualitatively different" from pre-contact activity → would be out of proportion to original importance in pre-contact economy
- ***Quantitative limits***: eulachon season short and extraction method time consuming (pre-contact)
    - Quantities small relative to overall pre-contact

→ in light of record – only rights at stake are general right to access fishery and fish variety; commercial limited to eulachon

Ahousaht (2011 BCCA) [narrowing commercial right]

- **Claim:** broad right to fish and sell fish of Ahousaht Band and NCN Nations
- Evidence at time of contact there was substantial multi-species fish trade for economic purposes in these communities
- BUT broad right narrowed to exclude geoduck
    - Commercial fishery in geoduck is high tech and recent
    - Very hard to catch – no viable suggestion there was pre-contact harvest/trade

→ even where court finds exploitation of fisheries for commercial – still narrow the commercial right

METIS RIGHTS

TEST FOR METIS RIGHTS [*Powley*] (Lax Kw'alaams + specific points for Metis)

1. Characterization of right (*VDP*)
2. Identification of "historic rights-bearing community"
    → *Metis specifically; not Indigenous ancestors*
3. Identification of "contemporary rights-bearing community"
    → *who, as a result of Metis ancestry, holds rights*
4. Verify claimant's membership in contemporary community
5. Identification of "relevant time frame"
    → *after Metis community exists but before Crown Sovereignty*
6. Integral to distinctive culture (*VDP*)
    - *Of Metis people, with lineage linking to contemporary community (which claimant is member) in moment immediately prior to imposition of European control*
7. Continuity (*VDP*) → b/w rights asserted and relevant time period
8. Whether right is existing (not extinguished) (*Sparrow; VDP*)
9. Infringement?
10. → if yes: Justification (*Sparrow)*

Powley (2003) [Metis framework for rights under s. 35]

- ON *Game and Fish Act* – required hunting license; Powley and son (Metis) charged with hunting/possessing moose without license
- **Claim**: Existing Aboriginal right to hunt for food in this area (Act violates s. 35)
- **Issue**: how to interpret rights claim under *VDP* framework which focuses on pre-contact society
    - Purpose of s. 35 is reconciling prior occupation w/ Crown sovereignty – but Metis do not arise until post-contact, necessarily
- **SCC**: rejects focus on pre-contact practices of Metis' Aboriginal ancestors → Metis have constitutionally significant "special status" of people emerging between first contact and European control
- "Pre contact" focus will be replaced with:
    - Historically important features of Metis communities
    - Prior to effective European control
    - w/ regard to practices persisting to present day

APPLICATION OF NEW FRAMEWORK

1. Characterization: contextual and site/specific → right to hunt for food in area
    - Periodic scarcity of moose does not undermine claim
2. Identification of historic rights bearing community → Metis est. in this area mid 17th c – peaked around 1850
3. Contemporary rights bearing community → Metis community persisted in area despite decreased visibility (essentially went underground and would identify as white if possible due to increasing tension)
4. Verify claimant's membership – court urges "standardized" membership requirements; factors to assist:
    1) Self-identification – should not be of recent vintage
    2) Ancestral connection – no "minimum blood quantum" but proof ancestors part of Metis community (birth/adoption/otherwise)
    3) Accepted by community – by other Metis members. Evidence may include:
        - Membership in Metis political organizations
        - Participation in community activities
        - Testimony from other members
5. Relevant time frame → effective control passed to Euro just prior 1850
    - Factual inquiry; post-contact but pre-control [Euros being unnamed marker)
6. Practice integral to distinctive culture → hunting/fishing constant and defining feature of Metis community
    - Particular species may have changed but that's ok
7. Continuity → hunting moose in both; easily proven
8. Extinguishment → no evidence here
9. Infringement → yes; licensing regime preventing Metis from hunting violated s. 35
10. Justification? → NO – conservation valid objective (*Sparrow*) BUT no evidence there were actual conservation needs that needed protection or that any priority was given to s. 35 rights holders

Manitoba Métis Federation (2013) [CONTEXT - inquiry into history of Metis and relationship w/Cad state]

- *Manitoba Act* (1870) – made MN province of Canada; part of Constitution s. 52
    - At time of Confederation MN territory is 85% Metis (Metis resisted Canada's westward expansion)
    - Canada and Metis governments negotiate the act in time of armed rebellions against expansion
- Provision at issue: section 31 – states Crown must be express in intention to extinguish any rights existing at CL or Indigenous traditions (here is Indian Title to land)
    - Chunks of land set aside to be "divided among children of Metis heads of family
- **Issue**: actual allotments were careless (random instead of family units), scrip provided instead of land (land inaccessible or scrip lost value) and long delays in land promised
- **Claim**: Canada breached obligations under s. 31 → land distribution delayed, inefficient and inequitable
- **SCC**: Canada did breach s. 31 – distribution failed to act in accordance with honour of crown - fiduciary duty (*Guerin*)
    - Purpose of s. 31: reconcile Metis community w/ sovereignty of Crown by giving Metis a "head start" in race for land that would inevitable ensue when MN joined Canada

- → breached obligation bc aim is no longer achievable (due to poor distribution efforts to fulfil goal)
- Court **remedy: purely declaratory** → hope that this will structure future negotiations to place burden on gov to act honourably and empower Metis in bargaining

→ *widely celebrated by Metis – recognition state had failed and secure their place in political system moving forward*

Blais (2003)

- *National Resources Transfer Agreement* (NRTA) 1930 – constitutional document → transferred control of crown lands/resources from federal gov → province of MN
  - All hunting/trapping/fishing rights owed to "Indians" would be reserved despite the transfer
- Blais (Metis) charged with hunting deer out of season contrary to MN *Wildlife Act*
- **Issue:** whether Metis can be considered as among "Indians" whose rights are preserved under NRTA
- → court finds NO – Metis are not considered Indians – evidenced on Euro perception of "Indians" vs "Metis" at time of enactment (similar to *Re Eskimo* reasoning)

APPROACH TO INTERPRETATION – this is the fight here

- NRTA constitutional document → should use "living tree" approach
- SCC rejects living tree argument – purposive interpretation should not "invent new obligations"
- **Critique**: overemphasis on past risks perpetuating historic discrimination [*Persons*]

ABORIGINAL TITLE

- Communal rights in land – second kind of right protected under s. 35
- AT comes from **Historic occupation and governance**
  - RP acknowledges rights arise from this → land inalienable except to Crown
  - *Calder* – arise from historic occupation
  - *Geurin* – title doesn't require treat; *sui generis* right to occupy/possess land; surrender leads to crown duty

BC Context:

- 1871 – BC joins Canada; FN outnumber non-FN 2:1 → gov immediately removes voting/citizenship rights from all FN in territory and establishes reserve system → strong objections by many FN
- 1927 – allied tribes prepare to claim rights before PC
  - *Indian Act* made illegal to fundraise/effect litigation re: Indigenous land claims (claimed to protect FN from "agitators" – lawyers going to "stir up trouble" over disenfranchisement that wouldn't otherwise be there)
- 1953: *Indian Act* litigation restrictions lifted → *Calder* (1973) puts forth claims

TEST FOR ABORIGINAL TITLE (*Delgamuukw*)

1. Was ***land occupied*** by group in question ***prior to assertion of Crown Sovereignty***?
   - CS period used for AT claims – test of occupation is assertion of CS
   - AT is burden on Crown's underlying title → "crystallizes" into Cad legal order at CS
   - Occupancy determined by:
     - Physical reality (cultivation, construction)
     - Indigenous law (land use laws internal to orders)
2. If present occupation relied on as proof of pre-sovereignty occupation → must be ***continuity***
   - Continuity b/w present and pre-CS occupation
3. Occupation must be ***exclusive*** at time of Crown Sovereignty
   - Authority over land requires exclusivity (cant have more than one in power)
   - Sharing with other FN groups possible IF:
     - Group sharing had permission (group making claim was in charge and gave permission)
     - Intention and capacity to retain exclusive control (ex. Trespass laws, treaty)
4. Intrusions must be justified (*Sparrow* framework)

Delgamuukw (1997) [outlines test for AT]

- **Claim**: Gitksan and Wet'suwet'en hereditary chiefs claim AT to respective territories
- TJ est. time of contact as 1820 (pretty far before any contact)
    - TJ found insufficient evidence of occupation to ground title claim
- **SCC**: TJ made reviewable error – did not give weight to traditional sources of evidence (ceremonial songs/etc) bc applied hearsay rules strictly
    - New trial ordered – treatment of evidence from these sources needs to be treated differently
    - Note: *SCC encourages negotiation to achieve reconciliation via cooperative federalism*

WHAT TITLE INVOLVES

- Is one manifestation of s. 35 Aboriginal rights – connection to particular land is integral to distinctive culture
- Arises from **prior occupation** – physical fact but also relationship b/w CL and pre-existing Aboriginal law
    - Whether legal jurisdiction was being exercised in the territory
- Rights are ***sui generis*** – inalienable except to crown and communal/collective
- Encompasses use **rights beyond specific practices** – more like authority over what happens to land
- Subject to **inherent limits** – use rights cannot be irreconcilable with understanding of group's attachment to land
    - *Can* be if surrendered to crown first (ex. Turning ceremonial lands into parking lot)

Tsilhqot'in (2014)

- **Background**: TQ territory claimed in 1792 on behalf of Crown – minimal contact b/w TQ and Euro traders
    - 50 years later Crown sends surveyors and TQ revolts – blocks construction, kills some settlers and expels all Euro from territory. 4 TQ chiefs were hanged; next 100+ years very little settler disruption
    - 1983 – BC gov gives license to lumbar company to cut trees in area – years of protests/blockades → title claim finally filed

DELGAMUUKW TEST

1. Sufficiency of occupation prior to CS – small group of semi-nomads living on vast, mountainous territory

- CA finds occupation only sufficient where "intensive" use (ie. Village)
- SCC rejects – must maintain context-specific and culturally sensitive approach (consider group size, manner of life, material resources/technologies and character of lands)
- → requisite occupation established

2. Continuity – need not be "unbroken" (*VDP*)

3. Exclusivity → established; based on intention/capacity to control land

- Evidence that permission to access land was granted/refused
- Treaties with other groups
- Lack of challenges to occupancy

→ title is established for the first time by SCC – what does this involve?

Incidents of title:

- Right to choose uses of land
- Enjoyment/occupancy of land
- Possessing land
- Economic benefits
- Right to proactively use and manage land
- Anyone who wishes to use (gov or otherwise) need consent (otherwise is rights intrusion and needs justification)

Restrictions on title:

- Can only be alienated to crown
- Cannot be put to use that is irreconcilable with ability of succeeding generations to benefit from land

JUSTIFICATION?

- No consultation or accommodation – forestry licenses issued without any second thought → not justified

Terra Nullius? Confusing treatment – court holds that doctrine never applied in Canada (as per RP) → aboriginal interest in land burdening Crown's title is independent legal interest giving rise to fiduciary duty

TREATY RIGHTS

- **Sources**: binding legal agreements between particular FN and Crown
- **Interpretation of treaties**: defining treaty rights, resolving ambiguities
- **Treaties and constitutional analysis**: relationship to federalism

PHASES

- ***Pre-Confederation*** (1764 – 1867: 375 treaties)
    - Before Canada emerged as a state
    - Relative equality of bargaining power between FN and Euro
- ***Post-Confederation*** (1867 – 1923: 150 treaties)
    - Included "numbered treaties" - Larger groups and pieces of land at stake
    - Relatively stronger role of Crown in setting terms of agreements

  → no new treaties from 1923 – 1973: time of assimilation/displacement on behalf of State; less interest in negotiating
- ***Modern Treaties*** (1973 – present: 24+ treaties)
    - 1950 *Indian Act* reversal and 1973 *Calder* leads to resurgence – "renewal" of political relationship
    - Expansion of FN bargaining power
    - More longer and detailed; increased sophistication, precision and detail
    - Aim at creating continuity, transparency, predictability
    - Explicit constitutional status from 1982 onward (meaning can supersede ordinary legislation)

Sioui (1990)

- QC *Parks Act* Regulation – prohibits anyone from cutting trees, camping and starting fires in parks
- Huron band members convicted for engaging in customary religious practices involving cutting trees/fires
- **Claim**: Act violates 1760 Crown-Huron Treaty which protected exercise of Huron religion and customs
    - Treaty didn't specify *where* could practice – QC gov holds not stopping practice, just location
- **Issue:** was QC entitled to ban these practices in parks?

  → *when approaching treaty claims, follow this process to define what rights treaty protect:*

  1) Identify intention of parties at time treaty was concluded
    - Crowns + FN signatories intentions → why was treaty being established in first place?

  2) Choose interpretation that "best reconciles" parties' interests
- **Application**: right to protect religion covers territory frequented by Hurons at the time so long as practices are not incompatible with particular use made by the Crown
    - Crown wants to use land in range of ways; Huron wants to protect practicing religion in entire territory

  → Huron allowed to practice religion (silent on territorial scope) as long as not interfering with Crown

Badger (1996)

"Cannons" of Treaty Interpretation

- No firm rules that yield answer to interpretative problem; but series of principles to resolve ambiguities:

  1. Treaties represent ***solemn promises, sacred agreement***
  2. ***Honour of crown is always at stake*** → must assume Crown intends to keep promises; cannot interpret treaties as being result of "sharp dealing" by Crown intended to deceive FN
  3. ***Ambiguities resolved in favour of Indigenou***s parties
  4. Any ***limitations*** on rights granted to Indigenous should be ***narrowly construed***
  5. ***Heavy burden of proof*** any time gov is asserting it has extinguished treaty right

Marshall (No. 1) (1999)

- Federal *Fisheries Act* – prohibits sale of fish without license; Marshall (Mi'kmaq) charged with selling eel
- 1760 Mi'kmaq-Crown treaty included promise for "truck houses" (trading stations) throughout NS for MM to trade w/ Euro for "necessaries of life" and MM could ONLY sell to truck houses
    - No explicit guarantee truck houses would be provided
    - No ex[licit rights to hunt/fish/gather
- **Claim**: truck house provision implies right to trade/hunt/fish/gather in support of trade
- **CA**: only examined extrinsic evidence where text is ambiguous (however this text is not ambiguous)
- **SCC**: rejects CA – historic treaties DO NOT reflect entire agreement → must consider extrinsic evidence
    - Written documents only drafted in English; FN diplomatic/trade practices largely oral
        - Written text as whole agreement is foreign way of doing business for FN
    - Follows *Badger/Sioui* – identify intentions to reconcile while following cannons of interpretation

INTERPRETATION

- Crown intent: truck houses part of imperial peace strategy; required restraint to protect against unscrupulous traders
- Mi'kmaq intent: maintain access to "necessaries" of life; needed truck houses to participate in economies
- "officious bystander"" – test used by court to interpret words of text; imagine how a bystander would respond
    - Would ask if MM could still hunt and fish? Only honourable answer from crown would be YES
- Implied rights may support express provisions (*Sioui*)
- Treaty includes right to hunt/fish/sell – BUT limited to provide "necessaries of life"/"moderate livelihood"
    - Not to become commercial industry

→ reconciling intentions of both sides

INFRINGEMENT

- Limits on method/timing/extent of "moderate livelihood" infringes treaty rights
    - Marshall was catching to support family (moderate livelihood) → license regime infringed this treaty right
- **Unstructured discretion**: was given to minister through the regulation; no statutory direction re: treaty
    - → This kind of discretion itself counts as a s. 35 infringement
- No justifications offered by government

Marshall (No. 2) (1999)

- Outrage following Marshall 1 in NS – non-FN fishers concerned about implications for livelihood/commercial interests
- West Nova Fishermen's Coalition applies for rehearing of Marshall 1 (all parties to Marshall litigation opposed)
- Application denied – no exceptional circumstances to warrant re-hearing BUT court will still comment to emphasize **limits of Marshall 1:**
    - Rights are limited to moderate livelihood (commercial fishers need not worry)
    - Infringements may be justified under *Sparrow/Gladstone* → applies w/ particular force to treaty right
        - Treaty not founded on pre-contact exclusive use; founded on sharing/cooperation of resources

MARSHALL 1 & 2 AFTERMATH:

- Gov continues to regulate fishery – but not "moderate livelihood" fisheries
- FN begin establishing moderate livelihood fisheries in 202
    - Create own definitions of "moderate livelihood"
    - Regulate themselves w/o any government authorization
- Violent resistance from non-FN fishers
- Gov continues to seize community-approved "moderate livelihood" traps BUT also negotiation's that had previously been stalled begin to see movement → Gov approves 4 Mi'kmaw community-led plans

Grassy Narrows (2014) [relationship b/w treaty rights & federalism]

- Treaty 3 (1873): Ojibway yields ownership of land to Crown but retains hunting/fishing right
    - The rights are subject to "taking up clause" – preserved as long as Canada doesn't want to use land for something else
- ON gov issues license for clear-cutting in territory → had effect of limiting protected Ojibway use rights
- **Issue:** can ON take up land in a way that intrudes upon treaty rights which give FEDERAL gov take up power

INTERPRETATION

- **SCC**: treaty 3 promise made by "Crown" – includes both levels of gov → both levels required to uphold promise
    - Obligations flowing from treaty should accord with division of powers – ON has power here over land/resources (s. 109; 92(5); 92A) → ON had authority under treaty; party of entity "gov of Canada"
- *Badger* cannons not referenced – finding based solely on constitutional provisions which are confirmed by treaty text
    - Focused on intentions of Canadian commissioners
    - SCC: Ojibway could have demanded clearer language to keep federal involvement ("Gov of Canada" used… this is pretty clear….)
- Provincial power to "take up" land is "not unconditional" – ON gov still bound by of honour of Crown and D2C
- Note: *IF was taking land in a way that infringed treaty right, Sparrow analysis determines justification*

Criticism (Borrows 2016)

- Ambiguities were not read in favour of Ojibway
- No large/liberal/generous interpretation (called for in other treaty cases)
- Historical intention to insulate FN from local governments "abandoned" in this interpretation
    - Provinces stand to directly gain from dispossession of treaty lands
- Fails to honour "nation to nation" relationship
- Allows provinces (rather than fed) to "justifiably infringe" treaty rights

→ court does not use *Badger; Sioui* interpretation here; but should generally keep this framework

DUTY TO CONSULT (D2C)

- Binds crown when *any* rights are at stake – even if yet to be considered/intruded - Distinct set of constitutional obligations
- ***Delgamuukw***: consultation must always be:
    - In good faith
    - With intention (of Crown) to substantially address concerns raised by FN rights holders
    - Content of duty varies with circumstances
        - "less serious" intrusion → duty to only discuss (rare)
        - Most cases → requires more than mere consultation – some kind of accommodation
        - Serious cases (ex. Hunting rights on Title land) → may require full consent
- Court may not analyze until justification phase, but government should be considering at the outset

Haida Nation (2004) [D2C Framework]

- **Background**: island territory Haida had claimed title for 100+ years – title was in 'claims process' following introduction of judicial acknowledgement of title → claim recognized in Haida law – also Canadian?
    - Also a practice right to harvest cedar (not yet adjudicated by court)
    - Evidence that Haida heavily relied on cedar historically (canoes/clothing/utensils/totem poles)
- BC gov grants farming license to log in territory (despite ongoing title claim negotiation)
    - Haida had publicly objected to logging for years; was a "strong" title claim but would take years to prove
- **Issue:** what, if any, legal recourse does Haida have?
    - Do they need to wait until logging actually occurs? (forests take generations to mature)
    - Civil process of **interlocutory injunction** – court can place injunction (until matter is adjudicated) where one party will be irredeemably harmed by state of affairs w/o judgement → this is found inadequate to manage claim

→ court develops Duty to Consult – enforceable even without a completed rights infringement [freestanding right]

- **Duty to Consult**: Aboriginal peoples were here when Europeans came, and were never conquered. The potential rights embedded in these claims are protected by s. 35. Honour of Crown requires these rights be determined, recognized, respected. While the claim process continues, honour of Crown may require to consult and (where indicated) accommodate Aboriginal interests.
- **Unproven interests**: must be respected; not honourable for Crown to change lands while litigation unfolds
    - Otherwise Crown could effectively run over asserted rights
    - BUT crown not "rendered impotent" – still able to manage resources BUT may need to consult/accommodate
- **Reconciliation**: not a "final legal remedy", but a process flowing from recognition of rights under s. 35(1)
    - Don't want a distant, legalistic goal where court would need to adjudicate every claim
    - Want situation where parties know rights asserted and can bargain amongst selves
- **Consultation**: duty arises when:
    - Crown (1) knows/ought to know of s. 35 interest at stake and (2) is contemplating action that may affect interest
    - What is required of gov will vary (*Delgamuukw*) according to:
        - Preliminary assessment of strength of s. 35 case
        - Seriousness of any potential adverse effects in s. 35 interest
    - Varying strength of duty – but in the end is duty to ***consult not agree***
        - Nonetheless requires meaningful, good-faith consultation
- **Accommodation**: may arise in most serious of cases – something like a duty to agree
    - Pending resolution of claim, may include:
        - Avoiding irreparable harm (even while claim still outstanding)
        - Minimizing effects of infringement (of conduct if do go ahead)
- **Aboriginal Duty?** – claimants must not frustrate Crown's reasonable good faith attempts
    - Cannot take unreasonable positions to thwart gov decisions or act in cases where agreement not reached (despite meaningful consultation)
    - → something like court's sentiment of encouraging negotiation amongst selves

APPLICATION

- ***Duty →exists***
    - Strong title/practice claims; province knew of claims and serious impact of license
- ***Content*** of duty → at high end; likely ***accommodation***
    - Strong evidence for title/practice claims
    - Difficult/lengthy forest regeneration
- ***Duty met? →no*** – no consultation on granting licenses
    - Some general consultation on forestry → this is insufficient

Taku River Tlingit [TRTFN] (2004) [duty to consult not agree]

- **Background**: Crown and TRTFN mid-treaty negotiations – BC gov wants to build mining road through treaty territory
    - Environmental assessment included consultation – some (not all) TRTFN concerns addressed in final plan
- **Claim**: consultation/accommodation offered insufficient
- ***Duty? →yes***, gov knew about treaty negotiation
- ***Content →*** ongoing treaty process = serious → significant consultation and likely ***accommodation***
- ***Duty met? →yes***; consultation part of broader regulatory process (Environmental Assessment Act) + was good faith
    - Doesn't matter TRTFN didn't approve – duty to consult not agree

<u>Consultation by Executive Institutions</u>

- Acknowledgement that agencies, etc. can do their own consultations which will fulfill crowns D2C
    - Ex: National Energy Board (NEB) – in charge of pipelines

Chippewas of the Thames FN v Enbridge (2017)

- **NEB met duty**

- Notice given, hearing, funded participation
- Changes to plans to accommodate following hearings
- Written reasons provided to explain decisions

Clyde River v Petroleum Geo-Services (2017)

- **NEB did not meet duty**
  - Did host meetings but proponents unable to answer basic questions
  - No oral hearings or funding, inadequate document translation
  - No accommodations and did not mention s. 35 rights at all in written reasons

  → statutory bodies *capable* of fulfilling D2C – but must *actually fulfill* for it to be effective

Mikisew Cree (2005) [failure to meet duty at low end of spectrum]

- Crown taking lands surrendered under Treaty 8 to build winter road → reduces treaty-protected hunting/fishing land
- ***Duty? → yes***; Crown knew would impact treaty rights
- ***Content → low end*** of spectrum
  - Minor road; treaty contains "taking up" clause (doesn't extinguish duty; HoC always exists)
- ***Duty met? → NO*** – no effort to consult/accommodate
  - **Unilateral government action**
  - Must still inform selves of treaty rights and inform Mikisew of findings

Beckman (2010) [modern treaties still have duty to act honourably]

- Modern treaty in 1997 b/w Little Salmon/Carmacks and Canada/Yukon
  - LSCFN surrendered traditional lands to crown in exchange for continued hunting/fishing rights
  - Treaty says nothing about consultation process
- 2004: Yukon unilaterally transfers LSCFN land to farmer → land subject to treaty and underlying Title claims
  - Yukon claims modern treaty → no consultation required; exceeded requirement by advising LSCFN of plans and providing opportunity to comment
- ***Modern treaties still subject to HoC*** → seek to further reconciliation by:
  - Addressing grievances
  - Creating legal basis for positive long term relationships

  → collective purpose not accomplished if interpreted ungenerously as though everyday commercial contract
- ***Duty? → yes;*** ongoing constitutional duty outside of treaty
  - Crown cannot 'contract out' of duty under HoC and Crown knew treaty interest was present
- ***Content → low end*** – surrender provisions = less serious and treaty drafters chose to exclude consultation process
- ***Duty met? → yes*** – notice and comment sufficient in circumstances; no duty to accommodate

Doctrinal Takeaways

- Modern treaties not "complete code" – consultation required where rights affected even if not called for in treaty
- "low end" consultation - parties can rely on treaties to regularize relationships LT

Mikisew Cree (2018)

- Fed gov considering adopting new environmental laws → potential adverse effect on M treaty rights to hunt/fish/trap
- **Issue:** does D2C apply to law-making process?
  - **SCC:** NO – law making process does not trigger D2C
  - However consultation is still incentivized by legal regime (gov knows may have to explain selves down road)
    - *Sparrow* justification examines quality of consultation if enacted law infringes rights
    - *Haida* framework still applies where statutes enable decisions
- Legislative process different from executive because of unwritten constitutional principles (Democracy)
  - Parliament limited by rights that will be adjudicated – due to *Charter*/s.35 imposition
  - Law-making process is separate and democratic – can only be held accountable after the fact

- **Dissent**: parliamentary sovereignty unwritten principle, but needs to be balanced against other unwritten principles (like D2C and HoC)

INDIGENOUS CONSTITUTIONAL PRINCIPLES

Chippewa of Thames "Wiindamaagewin Consultation Protocol" (2016)

- Prompted to create document explaining how their approach to consultation is informed by Indigenous legal orders
- "we are all related" – consultation focuses on how proposed projects foster relatedness
- "independence/self-determination' – requires FN live independently available to ally with but not assimilate
    - Any gov proposal must respect alliance of equals
    - Points to assimilation policies/residential schools and treaty histories emphasizing equality/partnership
- This principles are not new – but are being written down now to **shape consultation, accommodation and consent** moving forward → principles are given life through negotiations arising from *Haida* framework

INDIGENOUS SELF-GOVERNMENT

ABORIGINAL RIGHTS OF SELF-GOVERNMENT

- **PCT** rights to self-government (*Pamajewon; Casimel)*
- Self-government as **incident to title** (*Tsilqhot'in*)
    - Indigeneous Legal Orders *source* of title – Cad law looks here & self-gov *incident* to title
- Self-government as **treaty rights** (*Nisga'a Treaty*)
    - Aboriginal laws prevail over federal laws under Nisga'a treaty (but not absolute power)
- Self-government as **inherent** (*Mitchell*)

Self-Government Through Consultation

- Very serious issues/potential infringements → consultation that may require full consent of Aboriginal nation
    - *Haida*; drawing on *Delgamuukw*
- **Collective right to consent** – not to individuals but entire nation (jurisdictional)
- Chippewa of Thames "Consultation Protocol" – underlines jurisdictional quality of consultation by textualizing own Indigenous legal protocols as part of consultation process

Self-Government as Practice Rights

- Somewhat narrower; to do with how court has defined practice rights (*Sparrow; VDP)*
- Claim generality has implications for analysis
    - Think about what version of claim is most favourable to claimants vs. opps → analyze cases law to determine where court might land

Pamajewon (1996) [self-gov **rejected** as practice right]

- *Code* provision prohibiting keeping common gaming house – band members convicted for gambling on reserve
- **Claim**: s. 35 includes right to self-government – including regulation of gambling
    - Runs against *Sappier* caution re: stereotyping Indigenous culture
    - Evidence of pre-contact self-gov and small scale, informal gambling
    - Gambling always part of communities + self-gov pre-contact way of life → regulating gambling has pre-contact grounding and triggers s. 35 right
- Court rejects broad claim says it is excessively general; narrows claim under *VDP*
  1) Characterization: court narrows self-government → right to participate in/regulate high stakes gambling activities on reserve →*level of claim generality has massive implications for rest of analysis*
  2) Integral to Distinctive Pre-Contact Society? → no
    - No evidence large scale gambling subject to community regulation pre-contact

- Accept TJ finding that commercial lotteries are "20th c phenomenon"

Casimel (1993) [self-gov **recognized** as practice right]

- Adoption process of Stellaquo Band of Carrier People
- Casimels adopted grandson who died in accident – sued insurer for benefit owed to dependent parents
  - Insurer claims Casimels not dependent parents bc adoption didn't follow Canadian adoption law
- **BCCA: customary adoption law is protected under s. 35**
  - Evidence that specific regulation of adoption was integral part of pre-contact society
  - → insurer obliged to recognize adoption despite not being part of Canadian law

Self-Government as Incident to Title

- Clear version of jurisdiction being recognized under Canadian law

Tsilhqot'in (2014)

- Self-government as "source" of title
  - Indigenous law relied upon to prove sufficiency and exclusivity of occupation in Canadian law making title claim → look to Indigenous Legal Orders to see where title rights exist
- Self-government as "incident" of title
  - What you get when you succeed with title claim – community **right to control** land
  - Those using land need **consent** of title holders
  - Tsilhqot'in establishes national government that operates in territory
    - Canadian courts recognize as part of legal order

Self-Government as Treaty Rights

Campbell (2000 BCSC)

- Nisga'a Final Agreement – comprehensive modern treaty; provide Nisga'a gov w/ authority over:
  - Language rights, land use, marriage → in conflict; Nisga'a law will prevail over Canadian law to contrary
- **Issue**: agreement disrupts division of powers in s. 91/92
- **BCSC**: Constitution Act did not distribute ALL legislative powers
  - Aboriginal rights to self government continued – operating behind 91/92 dividing powers
  - However court warns ALL rights are subject to *Sparrow* framework – gov can always violate any protected rights with justification
  - Nisga'a do not have absolute/sovereign power

Self-Government as Inherent

Mitchell (2001)

- Grand Chief Mitchell claims s. 35 right to cross Canada-US border w/o paying customs
- This group (Mohawk of Akwesasne) asserts sovereign authority – they traverse border often and arguably have special interest in establishing own jurisdiction
- **Majority**: insufficient evidence of pre-contact practice trading across border
  - Claim is narrowed from controlling goods across territory → trading North/South
    - Most trade found East/West → this *specific type* of trade not significant to pre-contact
- Court affirms **doctrine of continuity** – Indigenous practices and laws continue in effect after assertion of CS – EXCEPT IF: **(1)** rights surrendered under treaty (**2**) rights extinguished by clear intention [prior 1982] **(3)** rights incompatible with CS
- Under this framework - Legal orders absorb into common law as rights
  - CS is non-negotiable; however legal orders re-emerge as rights
- **Concurring**: doctrine of sovereign incompatibility – indigenous rights incompatible with CS cannot survive

- Has potential to threaten s. 35 rights if drawn broadly; but maintains as valid
- Controlling mobility across borders is fundamental attribute of sovereignty
- BUT some internal aspects of self-government may possibly be protected