**PART 3- CANADIAN CHARTER OF RIGHTS AND FREEDOMS**

**Rights before the Charter: Federalism**

* 3 main mechanisms protecting rights before charter
	+ 1- Common law constitution
		- UK has a common law constitution unlike here. The UK judges had protected rights for centuries (right to political life, individual, etc). The courts have an important role in developing and maintaining it.
	+ 2- Federalism
	+ 3- Statutory Bills

Albert V Dicey

* Pre-Charter society always valued the central power of the government and the rule of law.
* All subjects are equal before the courts. The judges will weed out the injustices.
* These ideals are still present today.

Sharpe and Roch

* The BNA Act contained 2 major features
	+ **Parliamentary Supremacy**
		- Central to the British common law constitution.
		- Elected officials/Parliament have the most power
		- Parliaments that follow can change what those before them have done
		- Parliament has more power to change the law or make it invalid than judges do. Judges job is to interpret law not invalidate or make it.
		- Parliamentary supremacy lead to the protection of rights and freedoms largely
		- Issues:
			* If judges have to participate in charter rights and there administration, it conflicts with the idea that Parliament is to have full control over them. Arguably one is not fully supreme because they need to find a balance.
	+ **Federalism**
		- The division for power between parliament and the 10 provinces
		- It was done to support diversity
		- Federalism is a mechanism that can resolve rights disputes.
		- In 1867 Francophones were concerned about being taken over by the English. Quebec and Ontario were separated to individual provinces which allowed Quebec’s civil law to flourish the French language to be protected.
		- The division of powers itself protects rights
			* 92(13) property and civil rights in the province
			* 92(16) Generally all matters of a merely local or private nature in the province
			* 93 in and for each province the legislature may exclusively make laws in relation to education (with some exceptions)
		- Issue
			* Strengthening provincial and local rights does not necessarily protect minority rights
* Before the Charter was created the citizens demand a certain level or rights for all citizens such as:
	+ habeas corpus, trial by jury and innocence until proven guilty
	+ judicial review of administrate actions
* Pre-Charter
	+ It was hard to protect against discrimination against minorities
	+ In the fight against dispotic rulers, Anglo Saxons wanted to protect their
		- Political rights
		- Civil rights
			* Rule of law

Union Colliery Co v Bryden (1899) (federal jurisdiction)

* **F:** BC with the Coal Mining Regulation Act wanted to stop Chinese boys below 10 and all Chinese females from working in a coal mine (s.4). This was effecting the economics of the mine.
* **R:** The federal government gets to govern aliens and naturalized but if the naturalized has a child born in Canada, that child is not in the federal government’s jurisdiction.
* **C:** The Pith of this section was to prevent Chinese from being able to work in BC. It is ultra vires BC because s. 91(25) aliens and naturalized fall into Parliaments jurisdiction.
* Naturalized – they have become citizens to the country (like a permanent resident today)
* Alien- not permanent (like a visitor’s visa today)

Cunningham v Tomey Homma (provincial jurisdiction)

* **F:** BC Provincial Elections Act did not allow Japanese people to vote. Tomey applied and was denied. He argued that the province doesn’t have the authority to legislate on naturalization and aliens.
* **R/A:** the act in pith and substance was dealing with the result/status of naturalization not the process of it. Federal government can protect the daily rights of the naturalized but cannot provide further rights such as voting. When your naturalized u get a right of protection from the federal government. As a naturalized you have a right to the state. But privileges are an independent of nationality and are different than rights.
* **C:** Intra vires BC
	+ Today we could potentially argue paramountcy

Quong Wing v The King (provincial jurisdiction)

* **F:** Saskatchewan in the Female Employment Act states that chinamen, Japanese and oriental men cannot hire white women. Quong, a naturalized citizen, hires 2 white women and was charged.
* **R/A:** Naturalization does not matter. The Act was made to prevent local evils s 92(16). They needed to protect vulnerable white women from chinamen. Duff says it applies to a person’s race, not a nationality so it is not federal jurisdiction. They distinguished it from Union Colliery. Naturalized persons don’t get to be exempt from the laws of the province.
* **C:** The SCC ruled that it is intra vires the province.
* **Dissent:** This legislation has the same character of previous racist statutes. This act should only apply to non-naturalized citizens because they actually pose a threat

**Rights Before the Charter: Implied Bill of Rights, Statutory Bills of Rights**

Sharpe & Roach, The Charter of Rights and Freedoms

* Courts developed right protections through judicial review
* Cons 1867 protects minority language and religious rights, an independent judiciary, democratic rights through setting a time limit for parliament sessions, right to criticize government. These rights found by judges were not the norm. Most stuck to their traditional views
* Human rights
	+ After the racism and discrimination of WW2 and it’s after math there was more concern for human rights. The UN declarations and the US switch to activism starting with banning segregated schools (Brown) directly affected the con 1982.
* Human rights code
	+ Emerged in the post war era
	+ Prevented racial and religious discrimination and were first enacted at the provincial level. Age and gender alter followed
	+ Preventing discrimination is mainly achieved through an administrative process rather than through judges/courts
* Bill of Rights 1960 (otherwise known as common law constitution)
	+ Protected grounds
		- Race, national origin, color, religion or sex
	+ Property rights
		- Life liberty, security of the person and enjoyment of property
	+ Formal equality
		- Equality **before the law** and the **protection of the law**
	+ It was an act of parliament that lists rights to be followed. It is similar to principals of the United Kingdom
	+ The charter supersedes the bill of rights but there are some important rights that aren’t in the charter that should be recognized
		- The right of property s 1(a)
		- S 2 (e) guarantees everyone the right to a fair hearing in accordance with the principles of fundamental justice or the determination of his rights and obligations.
	+ Issues
		- The Bill only applied to federal laws. This made the provinces immune from the bill
		- The Bill wasn’t part of the constitution so the mandate it conferred on the courts was suspect. Judges were reluctant to apply it because it is not superior to other legislation. It runs counter to parliamentary supremacy
* Drafting of the Charter
	+ There was a lot of apprehension and concern about the Charter from the provinces
	+ They thought it wouldn’t be followed closely just like the Bill wasn’t. they were also concerned that not all provinces had consented to it (Quebec)
	+ The Parliament accepted the criticisms and made some fundamental changes to strengthen the charter
		- Section1 was broad and allowed parliament to disregard rights. So they changed it so that any reasonable limit on charter rights be prescribed by law and be demonstrably justified in a free and democratic society
		- Sec 8, 9, 10, 11, 24
	+ It was also criticized for its lack of remedies in 1980 so they added section 24(1)

Ref re Alberta Statutes (federal jurisdiction- Implied Bill of Rights)

* **F:** Alberta social credit party was in charge and tried implementing a new economic plan. It was not getting the support it wanted so the government multiple provisions that controlled all discussion in the newspaper about the government’s economic plan.
* **R/A:** there is a freedom of discussion because it furthers the democratic purpose. This freedom and political right is based on their Canadian citizenship, not provincial membership.
* **C:** It is ultra vires Alberta to limit Albertans political right. Only Canada can do that (when warranted).

 Switzman v Elbling (federal jurisdiction- Implied Bill of Rights)

* **F:** Quebec creates the Padlock Act s. 3 to prevent communism. It didn’t allow communism materials.
* **R/A:** the implied bill of rights states that its generally not acceptable to criminalize political speech. The right to freedom of discussion/debate is protected by the implied bill of rights. The freedom you have to disseminate your views is protected. Parliament requires the ability to express ourselves in an open society. Stopping discussion of communism in the home is counter to this.
* **C:** This is ultra vires Quebec because it limits citizens right and it is parliaments jurisdiction (criminal)
* **Dissent:** they weren’t criminalizing speech. They were preventing criminal actions that would follow from communism.

Dupond v City of Montreal (provincial jurisdiction- Implied Bill of Rights)

* **F:** the city of Montreal bylaw created a 30 day prohibition on protests and public gatherings
* **R/A:** freedom of expression, religion, press and assembly/association are protected by the bill of rights. But because this bylaw was passed to prevent violence and crime, it is within the provinces power to protect the local public safety.
* **C:** Intra vires Montreal

Drybones (violates equality- Bill of Rights)

* **F:** The Indian Act made it an offense for an Indian to be intoxicated off a reserve. The NWT had a law that there’s no public intoxication for Indians
* **R/A:** The bill of rights is quasi-constitutional. This enactment conferred upon the judiciary the authority to invalidate duly enacted laws. The SCC struck it down because it violated the Bills provision of equality right before the law and the protection of the law. One should not be treated harsher than another.
* **C:** provision is violates the equality right.

Lavell (doesn’t violate equality- Bill of Rights)

* Drybones precedence was not followed moving forward. The court refused to apply Drybones to this case
* **F:** An aboriginal women married a non-aboriginal man and lost her status due to the Indian Act. But when an aboriginal man married a non-aboriginal women he got to keep his status.
* **R/A:** Rule of law is the equal application of law. Though the law was sexist, the SCC said that it was applied equally to all aboriginal women so it was constitutional. This was a narrower and restrictive interpretation of the bill of rights
* **C:** provision is within federal jurisdiction

Bliss

* Women who are treated differently because there pregnant was because they were pregnant, not because they are women. It is justifiable under the bill of rights

**Judicial Review and Dialogue**

* Charter History
	+ 1980 – first draft of Charter circulated;
	+ 1980-81 – Joint Committee of Parliament;
		- Wide array of comments from advocacy groups.
	+ 1981: new draft of Charter.
* Sharpe & Roach
	+ Key changes to the Charter:
		- Section 1 – removed indication of “parliamentary supremacy” – rewritten so limits on rights would have to be prescribed by law and any limit on right would have to be demonstrably justified in a free and democratic society.
			* Understood to be a much higher standard on federal/provincial gov’t if they wanted to curtail rights – couldn’t just rely on parliamentary supremacy/elected officials.
		- Legal Rights – strengthened between 81/82;
		- Remedies – no remedies section initially included – added this section - anyone may apply to a court… to obtain such a remedy as the court deems appropriate and just in the circumstances;
			* Courts have broad remedial power if a right has been infringed;
		- Section 15 – equality rights provision
			* Didn’t initially include substantive equality – similar outcomes for everyone;
			* Women’s rights’ activists noted deficiency in the wording – changed to read that every individual is equal before AND UNDER the law – AND EQUAL BENEFIT OF the law
			* Shouldn’t have disproportioned effects on different groups of people;
	+ Charter Pros vs Cons (Bogart and Peter):

|  |  |
| --- | --- |
| **Pro Charter** | **Con Charter** |
| * Minority Protection; (B)
* Reasonable Limits; (B)
* Democracy/Open Government; (B)
* Nation Building. (B)
 | * Access to Justice; (P)
* Rights vs. Entitlements; (P)
* Competing Expertise – how do we achieve social change and which bodies are best to do that? (P)
 |

* 2 Main Responses in Canadian Constitutional Law to whether or not the courts and legislatures relate:
	+ **Constitutional Supremacy: (more court centered)**
		- The Charter effected a revolutionary transformation of the Canadian policy from legislative supremacy to constitutional supremacy. The transformation changed the role of every public institution. The Supreme Court became the major agent of this transformation, mandated to bring the entire legal system into conformity with a complex new structure of rights protection. (Weinrib – CB @ 750)
	+ **Dialogue between Courts and Legislature: (goes back and forth)**
		- Where a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the Court and the competent legislative body as a dialogue… the judicial decision causes a public debate in which Charter values play a more prominent role than they would if there had been no judicial decision. The legislative body is in a position to devise a response that is properly respectful of the Charter values that have been identified by the Court, but which accomplishes the… objective that the judicial decision has impeded (Hogg, CB @ 757)

Vriend v Alberta (constitutional supremacy)

* **F:** The Alberta Individual Rights Protection Act provided protection against discrimination. Vriend was fired from Kings College for being gay. He brought a claim through the act but it didn’t including freedom from discrimination for gays/lesbians. He then claimed the Act was not constitutional.
* **R:** the Alberta Individual Rights Protection Act violated s. 15 of the charter because it failed to extend protection against discrimination to gays and lesbians.
* **A:** Rights and freedoms are not always guaranteed. S. 1 can intervene. While the legislature agreed to the charter, they are bound to the charter unless they can be saved by s.1. The court gets to decide what happens in contentious cases. They do what is in the best interest of the public which is their job. This perspective looks like **constitutional supremacy** mainly because the courts get the final say and Intervene when Parliament over steps. There is however also **dialogue** when the courts issue there reasons and remedial action choices. This dialogue may bring about accountability and democratic values. Alberta looked at the notwithstanding clause s.33. S. 33 is part of the dialogue because the legislature get the ability to decide whether or not to apply it. This allows for some minority rights to be violated. Ultimately Alberta chose not to use it.
* **C:** It is unconstitutional and protection of sexual preference needs to be read in.

**Interpreting the Charter of Rights and Freedoms, Limits on Charter Application**

* 4 step process for the adjudication of rights claims
	+ 1) Does the Charter apply to these facts?
		- S. 32
	+ 2) Whether a charter right has been breached by a state act?
		- Burden of proof lies with the party claiming a breach of rights.
		- The court goes to step 2 ONLY if it finds that the charter right has been breached
	+ 3) Is the breach justifiable under s. 1?
		- Section1 of the charter states that protected rights may be limited provided they meet the **TEST** that they are: prescribed by law, reasonable AND demonstrably justified.
		- Burden of proof lies with the party seeking to uphold the limitation (usually the state)
	+ 4) If the breach is NOT justifiable, what is the appropriate remedy?
		- S. 24(1) and s. 52(1)
* The Purposive Approach (Hunter)
	+ It is used to interpret Charter Rights
	+ Ask; Is the court more generous for some rights than others?
	+ A judgment about the scope or value of a particular right can be made only after the court has specified the purpose underlying the right or delineated the nature of the interest it is meant to protect.
	+ Interpret rights broadly but don’t overshoot the purpose of the right. This leaves lots of room for argument.
	+ A super broad approach. Look at
		- **Interests** right is meant to protect
		- **Character** and **objects** of Charter
		- **Language** in the rights provision
		- **Historic origins** of the right
		- **Meaning** and **purpose** of related rights
* The Override Power (Ford)
	+ The notwithstanding clause s.33 is a compromise for legislatures that were concerned about their provincial powers and laws. The provincial government is elected and wanted to ensure their voices were heard.
	+ It is said that it was included for the wests concern. But it is also said that it was included for Quebec’s concern.
	+ You cannot use the clause to correct the violations that may have happened in the past. You can only use for future clauses.
	+ Section 33 Key Features:
		- **Federal** and **provincial** legislature
		- Must **expressly declare** in an **Act**
		- Only some rights (s **2, 7-15** Charter)
		- **Sunset clause** (5 year limit)
		- **Sunrise clause** (it can be reapplied if they desire it for another 5 years)
	+ Why it’s used according to Janet Hiebert:
		- 1) A form of political protest
		- 2) An exercise of risk aversion in the face of constitutional uncertainty about how protected rights would be interpreted
		- 3) An exercise in risk aversion as a result of uncertainty about how s. 1 arguments would be interpreted
		- 4) An expression of political disagreement with Supreme Court jurisprudence.

Hunter v Southam (Purposive Approach)

* **F:** Hunter (an administrative team under the Investigations Act), investigated Southam’s newspaper offices. The search was quite broadly worded. It was issued before s.8/charter was made. But the search was done after the charter was made. S. 8 is the right to be free of unreasonable searches
* **I:** What is the meaning of unreasonable?
* **R:** The charter is a purposive document. Purposive means our interpretation of the purpose of the document. The charter has a purpose and the individual right has a purpose and these purposes need to be looked at in a charter case. Ask what is the nature of the interest the right is meant to protect?
* **A:** The definition must be capable of growth and development to accommodate new social, political and historical realties. The dictionary does not help. The charters purpose is to guarantee and protect within the limits of reason the enjoyment of rights and freedoms it enshrines. It is a purposive document. It needs to be interpreted broadly because its purpose protects rights but also allows infringement. Its purpose in general is to constrain state action not authorize it. The purpose of s.8 is to protect an individual’s reasonable expectation of privacy.

Ford v Quebec (Override Power)

* **F:** the provision of the Quebec Charter of the French Language Act that required French-only public signs, posters and commercial advertising. This was an omnibus, retroactive use of s. 33 by Quebec.
* **I:** How specific does s.33 need to be? Not very. Is omnibus use acceptable? It is possible but the court didn’t say a direct yes or no. Can it have retrospective effect? No
* **R:** S. 7 cannot give retrospective effect to the override provision.
* **A:** The wording of the charter indicated that in order to be valid, a declaration pursuant to s.33 must specify the particular provision within a section of the charter which the government intends to override. Quebec cannot apply s. 33 to the past. If you want you can do in on new provisions but not old.
* **C:** The provision is unconstitutional in this case
1. DOES THE CHARTER APPLY TO THESE FACTS?

**Charter Application: Governmental Acts, Inaction, Common Law**

* **2 Part Test to determine whether the Charter applies to an entity’s activities: Section 32**
	+ By enquiring into the nature of its activities.
		- If the entity is found to be “government”, either because of its very nature or because the government exercises substantial control over it, all activities will be subject to the charter OR
		- If an entity is not itself a government entity but nevertheless performs governmental activities, only those activities which can be said to be governmental in nature will be subject to the charter
* **Governmental Action (Eldridge)**
	+ 2 ways governmental action may be subject to the Charter:
		- **1) Nature of the “entity”**
			* Is it Government by nature? (legislation is governmental)
			* Is the entity substantially controlled by government?
			* If the entity is government or substantially controlled by the government, then the charter will apply
				+ If it is government, the charter applies more broadly
				+ If the entity is controlled substantially by the government (hard test), then all of its activities will be governed by the charter also
		- **2) If NOT “government” under the first test, examine the entity activities**
			* Is the entity is implementing government program or policy (or is it just an in house matter)? (public funding can be a factor but is not determinative)
			* Is the entity a creature of statute/statutory powers of compulsion?
				+ If yes to either, the charter applies to the activities which have been determined governmental.
	+ Take Away
		- When “action” of an entity is at issue, ask:
			* Is the entity government? (by nature? By control?)
				+ If yes, charter applies to all actions
			* If not, are some of the entity’s actions government? (Implementing gov policy? Statutory powers?)
				+ Charter may apply to some actions

Monahan, Shaw & Ryan, Constitutional Law

* 34 sections in the Charter and is a constitutional document
* Charter is separate and distinct from the guarantees of indigenous rights in section 35
* S. 32 the Charter
	+ Applies to parliament, legislatures and government (government includes the entire executive branch (ministers, civil servants and regulatory agencies appointed by government))

Eldridge v British Columbia (Governmental Action)

* **F:** hospitals delivering medical services in accordance with provincial statutory scheme failed to provide sign language interpretation for deaf person. The medical services commission decides which services get funded or not. The hospital implemented the commission’s wishes. The commission had the money for sign language but chose not to cover it. BC argues the commission/hospital shouldn’t be subject to the charter.
* **R/A:** The government cannot use companies to do unconstitutional acts.Hospitals operate within the context of a comprehensive social program. There is a direct and precisely-defined connection between the failure to provide sign language and the medical service delivery system instituted by the legislation. It is not just an internal business decision, it’s an expression of governmental policy. The action is governmental but the hospital itself is not governmental. SO If an action is truly governmental in nature, the entity performing it will be subject to review under the Charter only in respect of that act, and not its other private activities. The commission is a governmental entity because it implements government policy. The commission is subject as a whole to the Charter.
* **C:** funding for sign language must be provided.

Vriend v Alberta (Governmental Inaction)

* **F:** Sexual orientation was not protected by the AB Individuals Rights Protection Act. Vriend was fired from Kings College for being gay. S.321b applies to the legislature and gov of each province in respect of all matters within the authority of the legislature. S.91(15) includes civil rights so s.32 applies
* **R/A:** AB considered sexual orientation but decided not to include it. This could be argued that it is an action or an inaction. The wording of the provision was intentionally left broad so that the government not only has positive duties but also negative duties. This robust approach is to ensure that government power is kept in check. If the s. 32 was viewed more narrowly, the provinces could just make super broad legislation to avoid s 32.

Hill v Church of Scientology (Common Law)

* **F:** Hill, a crown prosecutor, sued the church/their lawyer for defamation after they said Hill breached multiple rules of the court and brought an action against him for contempt of court (which failed). Hill was acting on his own behalf.
* **I:** Can the common law of defamation be subject to Charter scrutiny?
* **R/A:** The common law must be interpreted in a manner consistent with the Charter. The common law has always evolved to match societal norms. When there are 2 private individuals the charter does not apply. **Charter values** can apply even if the charter itself does not apply. The private individual bringing the charter values claim against another private individual must prove the common law is inconsistent with the charter AND that it is not justifiable. Then the court balances these values with other values in a flexible approach.

Grant v Torstar (Common Law)

* The defamation law gave insufficient protection to freedom of speech. Communication on matters of public interest, even if defamatory, are essential to proper functioning of democratic society and the search for truth. This form of defamation is essential for public debate so the SCC expanded the potential defenses to defamation.
1. IS THE BREACH NONTHELESS JUSTIFIABLE UNDER S 1?

**Limits on Charter Rights: section 1**

* **S.1 Analysis (Oakes)** (burden of proof on party seeking to uphold the charter limitation)
	+ 1- Was the breach “**prescribed by law**”? (usually met) (Greater Vancouver)
		- Law- Is it a policy/document that people are bound by?
		- Prescribed- Is it accessible and precise? (this is not a high bar, the law just can’t be obscure to the point that it is not able to be understood)
	+ Justification:
	+ 2- Does the offending law pursue a **pressing and substantial objective**? (usually met) (Oakes)
		- Is the goal of sufficient importance to allow a rights violation?
		- Trivial reasons will not suffice as it is a high standard.
	+ 3- Is the law **Proportional**? (if you fail on any, s.1 will not save it)
		- A) Is the law **Rationally Connected** to the pressing and substantial objective? **AND** (2nd most likely to fail)
			* Requires the state measures to be minimally capable of achieving that valid objective isolated in the end part of analysis. It looks at the relationship between the means and the end
			* Social science evidence can be used
		- B) Does the offending law **minimally impair** the right in question? **AND** (most likely to fail)
			* The state should impair the infringed right as little as possible. Alternatives that are less intrusive and would get the same results must be assessed.
		- C) Do the **salutary** (good) benefits of the law outweigh its **deleterious** (bad) effects? (least likely to fail)
			* The effects of the measure on the rights/freedoms must also, overall be proportional to the objective sought and potential benefits. It balances overall positive (are there actually positives in practice) and negative moral aspects of state action. This is controversial and not often relied upon solely by the courts

Panaccio, Justifications of Rights Violations

* It is a framework of moral reasoning which is a type of practical reasoning(how one ought to act)
	+ Whether its morally permissible for the state to infringe on the charter right

Greater Vancouver Transportation Authority (“Law” “prescribed”)

* **F:** BC transit and Trans-Link have a rule that they will not advertise political ads. 2 parties tried to have their political ads posted. They failed and sued for a charter breach.
* **R:** The law must be accessible and clear/precise.
* **A:** The court has a flexible approach to prescribe by law. Because the companies policies effect everyone who wants to use their services they can be considered laws. They are accessible and precise so they are prescribed.
* **C:** S.1 is applicable.

Oakes (Pressing and substantial)

* **F:** Oakes had 8 vials of hash oil. There was a reverse onus on people who possess drugs to prove they do not traffic. It violates 11(d).
* **R:** Proportionality Test:
	+ 1- They must be rational connected to the objective.
	+ 2- It must impair as little as possible.
	+ 3- There must be proportionally between the effect and the objective.
* **A:** In this case there is no rational connection between the objective and the effect to be saved by s. 1

*Contextual approach*

Edmonton Journal v Alberta (contextual approach)

* **F:** The AB Judiciary Act doesn’t allow the publication of matrimonial disputes. journal says it’s a violation of their freedom of expression.
* **R:** **Must balance rights in context of the case, not in abstract.** Must look at underlying intention and what the rights/rules mean to people. Some rights have different weight/value depending on context. A flexible approach should be used.

Irwin Toy v Quebec

* **F:** There was a restriction on directing advertisement at children under the age of 12. Irwin Toy states it is a violation of their rights
* **R/A:** Sometimes **context leads to deference** to the legislature. Deference could be used where the court must balance competing rights, to protect a socially vulnerable group, to balance the interests of various social groups competing for scarce resources, and to address conflicting social science evidence as to the cause of the social problem. They must not undermine legislative decisions easily.
* **C:** The restriction is constitutional
1. IF THE BREACH IS NOT JUSTIFIABLE, WHAT IS THE APPROPRIATE REMEDY?

**Charter Remedies**

* **Section 52(1)** the constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provision of the Constitution is to the extent of its inconsistency, of no force or effect.
	+ Section 52 provides remedies for unconstitutional law/legislation/regulation
	+ Third party can bring the action (usually no individual remedies, but there potentially could be)
	+ **Government Laws: 52**
		- Section **52** is almost always used. Section 24 may potentially be used but isn’t
		- The government action vs the effect of the law must be distinguished
	+ **Types of Remedies**:
		- Declaration of invalidity (declarative remedy)
			* The court say the law in part (1 provision) or whole is invalid
			* They may suspend/delay it
				+ Issue: it allows an unconstitutional law to continue to operate for some time
			* As soon as the declaration is made, there law is of no effect
			* Can declare one provision or the whole act as invalid (this is broader than severance)
		- Reading in (interpretive remedy)
			* Imputing meaning or words into a statute that are not there before
			* The text of the law remains the same but from that point on the Court pretends that these word were added. It changes how the document will be interpreted.
			* This provides immediate relief
			* It is used often for under inclusive cases
			* Issues: it allows legislatures to be lazy and not update their laws.
		- Severance/Reading Down (interpretive remedy)
			* Removing unconstitutional specific words or provisions from legislation (this is more narrow than declaration of invalidity)
			* Can also pull out words to make the new wording make sense
			* Possibly can be used for under inclusive legislation.
			* Most often used for positive violations of rights
				+ Ex) criminal law, pornography, child cases, etc.…
	+ ***TEST: How a court should make an appropriate remedy*** (Schachter)
		- **1) Extent of Charter violation**
			* We should look at the Oakes Test and determine how big of a violation it is
				+ There are more flexible remedial options when the provision fails the second and third step of the Oakes proportionality test.
		- **2) Which remedy “cures” the violation?**
			* The **2 guiding principles** are respect for the legislature and the purposes of the charter.
			* Is the purpose of the legislature being undermined by the remedy?
				+ The remedy should be precise, it should respect legislations intent, and should consider the remaining legislation.
		- **3) Temporary suspension required?** *(only applies for declaration of invalidity)*
			* A suspension is needed if there is a concern of no law in an area or where a specification of who gets benefits and others do not (because then all benefits would be taken away from everyone).
			* Allows Parliament time to address the issues (it’s a dialogue relationship).
* Declaration vs Interpretation (s.52)
	+ Interpretation- court leave some leeway for to interpret it certain ways. Takes affect right away (immediately)
		- They are tricky because they are infringing on legislative roles and they don’t display the changes
	+ Declaration- less room for interpretation. Much bigger issue. More powerful remedy.
* **Section 24(1)** anyone whose rights or freedoms, as guaranteed by this charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
	+ Section 24 provides remedies for unconstitutional acts by public officials.
	+ It has to be an individual claim. Third parties cannot bring the action
	+ **Government Actions: 24**
		- Must use section 24 because anyone’s whose rights were violated can bring an action.
		- Monetary damages may be requested. This might not prevent the same thing from being done in the future.
	+ **Types of Remedies**
		- General Declaration
			* Will the jurisdiction/branch respond to the general declaration?
			* Issues: its vague
		- Mandatory Order
			* Mandatory order that directs the government to do certain things
			* Sometime used to make the government report back
			* Use it went your dealing with a government body that wouldn’t follow your general declaration (You can know by looking at the body’s past actions)
* Remedies are always balanced with the different respective roles the courts, executives and legislators.
* Standing
	+ Standing means you have a right to bring a claim in front of a court and have it adjudicated
	+ It’s determined by the wording and how different rights have been interpreted to apply.
	+ People with standing
		- Someone with a **direct, personal** interest in the action (may not need new litigation to accomplish change)
		- Corporations may have standing.
			* Depends on if they have a **clear right** (You need to look at the nature of the corporation and the right violated. They do for expression, and REP. Not sure for freedom of religion or s. 7)
			* Standing depends on the wording of s. 24 and 52.
* Which Bodies have Jurisdiction?
	+ Superior Courts
	+ Administrative tribunals- do have jurisdiction based on Conroy.

*Section 52(1)*

Schachter v Canada (declaration of invalidity)

* The Unemployment Insurance Act allowed 15 weeks of paid leave for new born children and adopted children, for birth mothers and adoptive parents. A birth father applied for parental leave when his child was born and they denied him. It was a violation of s. 15.
* The SCC is determining if the trial judge has the authority to make a remedial change.
* **R:** *How a court should make an appropriate remedy*
	+ **1) Extent of Charter violation**
		- We should look at the Oakes Test and determine how big of a violation it is
			* There are more flexible remedial options when the provision fails the second and third step of the Oakes proportionality test.
	+ **2) Which remedy “cures” the violation?**
		- The **2 guiding principles** are respect for the legislature and the purposes of the charter.
		- Is the purpose of the legislature being undermined by the remedy?
			* The remedy should be precise, it should respect legislations intent, and should consider the remaining legislation.
	+ **3) Temporary suspension required?** *(only applies for declaration of invalidity)*
		- A suspension is needed if there is a concern of no law in an area or where a specification of who gets benefits and others do not (because then all benefits would be taken away from everyone).
* **A:** A declaration is the best option in this case as there are large budgetary concerns. Reading in does not work as money is a large factor. Reading down does not work as the legislature could not possibly want to take away all benefits from all birth mothers, or fathers in general.
* **C:** The provision is declared invalid and 6 months is given for the legislature to correct the violation.

Vriend v Alberta (Reading In)

* **R/A:** Fails on the Oakes test for a *pressing and substantial* objective **to omit** this expression (rare)**.** Gays and lesbians are a smaller population than what the act originally protects so reading in won’t change it fundamentally. It also won’t have a large budgetary effect. Just because they left sexual orientation out of the act on purpose does not mean that the court can’t read it in. Or else every government would intentionally violate rights to avoid a reading in by the court. Changing legislation should be done only after review. But even if the governor doesn’t like it they can make defenses for it or use the notwithstanding clause. *Ultimately,* the legislators left it up to the court by not making constitutional legislation so the court has the discretion to read in.

M v H (Reading down/Partial declaration of invalidity)

* **F:** SCC rules that the Ontario Family Law Act’s definition of “spouse” needed to include same sex relationships for spousal support.
* **R/A:** They read down the under inclusive s.29 provision and ordered a partial declaration of invalidity for a 6 month delay. The definition failed on all of the Oakes test components. Reading in is a bad option because the definition of spouse was used throughout the entire act. This would create a huge effect and the court cannot predict all of the outcomes of this, it is legislator’s job. Following this case many laws had to be changed.
* **C:** Unfortunately the party in this case does not personally get a remedy.

 *Section 24(1)*

Little Sisters (General declaration)

* **F:** This gay and lesbian book store was having its packages held up for being obscene. The law was not discriminatory but the policy handbook was. The handbook is not law so it can’t have a charter claim against it. The actions by the custom officials is however is.
* **R/A:** The court is unwilling to make a mandatory order because in the 6 years it took the case to get to the court, it looks like the government conduct had changed over time. If there was still an issue that continued, then the party could bring it back to the courts. A general declaration is best even though this party put their trust in the court to resolve their issue.
* **C:** It does not help the direct party.
1. HAS A CHARTER RIGHT BEEN BREACHED?

Burden of proof on the rights claimant

**Freedom of Religion: Anti-Coercion, Accommodation**

* Section 2(a): Fundamental Freedoms
	+ Everyone has the following fundamental freedoms: (a) freedom of conscience and religion
	+ Protect right to religion but much more broad with conscience.
	+ Person alleging the violation has the burden of proof
	+ This requires that states don’t coerce individuals into participating in certain practices and accommodation to enable people to engage in certain practices.
	+ It’s not just a communal right but an individual right
* Anti-Coercion
	+ State cannot coerce individuals to engage in practice for sectarian (religious) purposes
	+ Boundaries of anti-coercion: it must be substantial interference, trivial interference won’t find a violation of s. 2(a)
	+ **Analysis Test (Big M)**
		- Purpose AND
		- Effect of the legislation.
* Accommodation
	+ **Test (Syndicat/Amselem) for violation of Section 2(a): (claimant must prove)**
		- 1) Sincere belief, “nexus” to religion (only need a subjective belief in the faith/religion) AND
			* Subjective test (individual)
			* The belief is in good faith
			* Past conduct doesn’t matter
			* Court does not question their individuals beliefs in their religion/worship
			* You need to only subjectively believe in the faith and have a non-trivial interference for your freedom of religion to be violated.
			* Religion is: personal, the courts don’t normally assess it in depth and are rarely to question it is a religion.
		- 2) State interferes in a non-trivial (more than not trival) way with ability to act on religious belief
			* Interference doesn’t have to be substantial
			* Objective standard

R v Big M Drug Mart (anti-coercion)

* **F:** Big M did open his business on a Sunday in Calgary contrary to Federal Lords Day Act. This Act was justified under the criminal law power which regulates public order and moral.
* **R:** Must look at the **purpose** AND (if the purpose is constitution, then you look at) the **effect** of the legislation.
* **A:** The purpose of this legislation was to preserve the importance of Sunday. Freedom of religion protects positive and negatively. In this case it is a negative right it is protecting. It is also meant to protect minorities. They weren’t forced to attend church but the effect is forcing non-Christians to follow Christian beliefs of the sanctity of Sundays, which is a form of coercion. This Acts create discrimination against on Christians who don’t follow Christian beliefs of a workless Sunday. The objective of just a day of rest is not sufficient to be saved by s.1.
* **C:** Act is unconstitutional

Edwards Books and Art (anti-coercion)

* **F:** Edwards store was open on a holiday contrary to Ontario’s Retail Business Holiday Act and was charged.
* **R:** Section 2(a) is meant to stop interference with profoundly held beliefs not insignificant ones. The court must assess the substantial vs trivialness of the effect. A laws effects might not be substantial enough to overrule the law if it is not associated with a religion.
* **A:** This Act was so that people/employees could get to have a day off and practice their religion. There were exceptions that involved the number of employees (not more than 8 employees working) and square footage (not over 5,000ft). This act’s purpose is primarily secular. The effect is that it interferes with Saturday mass business owner’s freedom. It also effects shoppers who don’t do commercial shopping on Saturdays and then have limited options on Sunday. It is also discriminative of large companies (there’s no rational connection between this argument and the scheme of the act). But it is upheld by s.1 and the legislature made efforts to alleviate the interference.
* **C:** The Act is constitutional so the charge stands

Syndicat Northcrest v Amselem (accommodation)

* **F:** An orthodox Jewish man wanted to put up a religious succah for nine days. Syndicat refused due to the condominium coownership agreement. The man set it up anyways on his balcony and the Syndicat requested an injunction.
* **R:** You need to only subjectively believe in the faith and have a non-trivial interference for your freedom of religion to be violated.
* **A:** The man had both so an injunction would be a violation.
* **C:** The injunction is denied

Ktunaxa Nation v British Columbia (communal aspect)

* **F:** The people believe in the spirit of the grizzly bear. A ski resort was proposed over 20 years of consultation and approved.
* **R:** Purpose: freedom of religion protects your right to hold and manifest you belief in something but not to protect that something/focal point/object of the religion. Communal aspects: 2(a) has a communal aspect
* **A:** It’s not a violation of freedom of religion because their right to believe in the grizzly bear still exists.
* **C:** No violation of s.2(a)
* **Dissent:** this protects spiritual nonphysical religion. It provides no protection for land/object based religion

Law Society of British Columbia v Trinity Western University (communal aspect)

* **F:** TWU wanted to open a law school that only allowed the ideals of heterosexual marriage/relations and made the students follow the covenants.
* **R:** Purpose: freedom of religion is a personal choice. Communal Aspect: practicing religion together may strengthen convictions
* **A:** A law school must admit people of all religions, races, sexes and religious preferences. S.2a protects against coercion into a religion and that’s what would occur here.
* **C:** No 2a violation.

**Section 7: Life, Liberty and Security of the Person: Foundations**

* **Section 7**: Everyone has the **right to life, liberty and security of the person** and the **right not to be deprived thereof except** in accordance with the **principles of fundamental justice**
* It is hard to justify a section 7 violation (Carter)
	+ - Fundamental justice
			* Used to be due process. This is very American. It also included property in it, which would have disrupted Canadian social programs.
			* It cannot be interpreted to narrowly. It must be broader than s. 8-14 because they come from s.7
		- Life
			* Engaged by threat to that individual
			* It doesn’t mean life needs to be preserved at all costs (Parker)
			* It protects against immediate threat of death
			* Autonomy is not considered in this life component
		- Liberty
			* Protects individuals, when they are being physically restrained by the state (ex, prison) (narrow normally)
			* It also protects individuals right to make decision without intrusion
			* Liberty is self-actualization and freedom of choice. Its self-ownership (Morgentaler).
			* Purely economic interests are not considered liberty
		- Security of Person
			* Most expansive of the 3 stated rights
			* It protects against interference with your physical person or your psychological welfare (ex, stress).
		- Principles of Fundamental Justice
			* If the state violates the right, it must be in accordance with fundamental justice principles.
* **Test for violation of a fundamental justice s. 7: (Carter)**
	+ 1) Is life, liberty or security of the person in effect in this case? If no then stop. If yes continue
	+ 2) Is the violation justifiable under principals of fundamental justice? ( s. 1 )
		- Object of the law in very narrow terms (if broad it gives the government too much leeway)
		- Assessing 3 principles (it cannot be arbitrary, overbroad, grossly disproportionate)
			* **arbitrary** (is the law not capable of meeting its objectives)**,**
			* **overbroad** (encompasses too many individuals) **or**
			* **grossly disproportionate** (if there’s a huge imbalance between the result and the objective)**.** It is overbroad because not everyone is vulnerable and can’t decide on their own that they want to die.

Re BC Motor Vehicle Act

* **F:** BCs Motor Vehicle Act states that there’s a fine and mandatory 7 day imprisonment with absolute liability for driving with a suspended license.
* **R**: **2 Stage test to find a s.7 violation:**
	+ 1) Has one of the rights (life, liberty, security of person) been violated?
	+ 2) If yes, is the infringement in accordance with the fundamental principles of justice?
* In short, for a rule or principle to constitute a principle of fundamental justice for the purposes of s 7, it must be a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of person.
* **A:** Fundamental justice is not a synonym for nature justice. You cannot interpret s.7 more narrowly than s.8-14 as they originate from s.7. Many principles of fundamental justice are procedural. One Fundamental Justice is that innocent people should not be punished.
* **C:** This was a violation of s. 7

Morgentaler

* **F:** S. 251(1) illegal to cause abortion. S. 251(2) illegal to obtain abortion. S. 251(4) exception for committee-approved hospital abortion.
* **R/A:** Dickson: the purpose of the CC provisions are to force women with criminal punishment to carry a fetus to term. This interferes with women’s security of the person. Security of the person means to be free from state interference causing bodily harm and psychological harm. The standard for granting an exception is not consistent due to no definition of health and the inaccessibility of the hospitals that have a committee violates Fundamental Justice. Beetz/Esty: the purpose of the provisions is to protect the fetus. Security of person: it prevents women from getting medical treatment they need. It makes women chose between seeking illegal treatment or being forced to have potential medical and mental complications. There was no violation of fundamental justice principals because the medical opinion better protects the fetus. Wilson: this issue is also fundamentally about women’s rights. Liberty means the protection of the individual and their right to make choices. The purpose of this legislation is to control women’s bodies (making women’s bodies be incubators). Liberty is tied to human dignity (reference s. 15). Making women get permission to do something with their body takes away their choice. A committee deciding what best for the women is a violation of her security of person. If you can force a women to have a child, then fundamental justice principals seem ineffective.
* **C:** These provisions violate s. 7
* **Remedy:** Declaration of invalidity immediately.

Carter v Canada (fundamental justice)

* **F:** S 241(b) Aiding and abetting a person to commit suicide an offence. This was a blanket provision and had no exceptions. Carter has ALS and wanted to end her life.
* **R: Test for violation of a fundamental justice:**
	+ 1) Is life, liberty or security of the person in effect in this case? If no then stop. If yes continue
	+ 2) Is the violation justifiable under principals of fundamental justice? ( s. 1 )
		- Object of the law
		- Assessing 3 principles (arbitrary, overbroad, grossly disproportionate)
* The prohibition on physician assisted dying is void insofar as it deprives a competent adult of such assistance where
	+ 1) the person affected clearly consents to the termination of life; AND
	+ 2) the person has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his/her condition.
* Don’t need to follow previous binding precedent (stare decisis) when:
	+ There is a new legal issue OR
	+ There is a change in circumstances that fundamentally shift the debate
* **A:** Fundamental justices have changed in the last 20 years. They don’t need to follow the previous case. Life: is only engaged where there is a law or action of the state that threatens death (equality is not used in life). Liberty and security of person: they are distinct but both founded in dignity. It is engaged here. To determine if the provision violates s.7 it **cannot be (state must prove)**
	+ **arbitrary** (is the law not capable of meeting its objectives)**,**
	+ **overbroad** (encompasses too many individuals) **or**
	+ **grossly disproportionate** (if there’s a huge imbalance between the result and the objective)**.**
* It is overbroad because not everyone is vulnerable and can’t decide on their own that they want to die. It is not saved by s. 1. **A section 7 violation is hard to justify under s. 1.** The object of law should not be interpreted too broad (or else it will be too easy to meet the other requirements of s. 1). The purpose is to protect vulnerable individuals.
* **C:** Violation of s 7

Gosselin v Quebec (social rights)

* **F:** Quebec Social Aid Regulation only gave individuals under 30 1/3 of the amount of social assistance as those over 30, unless they participated in programs. The programs weren’t easily accessible and only 10% could. The $170 that they received couldn’t even cover the lowest rent in Montreal. 5,000 young people living on the street.
* **R:** There is not security of person right to receive social aid that will cover the basic needs of individuals.
* **A:** S.7 is not a positive right that makes the state ensure your social rights. It also doesn’t have a connection to economic rights.
* **C:** No s. 7 violation
* **Dissent:** Everyone has the right to life, liberty and security of person (positive right) AND the right not to be deprived thereof (negative right). This follows with long term statutory interpretation rules. S.7 has never been restricted to only negative laws.

**Section 15 Equality: Foundations**

* **Section 15(1)** Every individual is equal before **and under** the law and has the right to equal protection **and equal benefit of** the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
	+ No LGBTQ – but reading in could allow them to be protected by this right
* Section 15(2) subsection does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origins, colour, religion, sex, age or mental or physical disability.
* History
	+ Section 15 was debated often. It’s the only section not brought into force until after almost all other charter rights.
	+ The federal and provincial thought it would make a huge difference to their laws.
	+ Section 15 wording used to mirror the bill of rights
	+ Equal before the law was to provide protection for formal
* Equality
	+ **Equality** does not mean everyone must be treated the same. It is not just formal but substantive (Andrews)
	+ Substantive equality is what section 15 is protecting because equal application of the law (formal) can create disadvantages. So different people need to be treated differently (Kapp).
* Discrimination
	+ The focus is if there is distinctions not if there is a history of discriminatory intent. Discrimination= 1) Is it perpetuating disadvantage or prejudice? OR 2) Stereotyping can perpetuate discrimination. (Andrews this changes with Qubec v A, Taypotat)
	+ Discrimination can be proven on prejudice or stereotyping but it could also be proven through a connection to historic disadvantage that they aren’t experiencing today (Quebec v A).
	+ Arbitrary distinctions describes discrimination and is not a requirement. It also includes the definition in Quebec v A (Taypotat).
* Framework (Andrews, Taypotat) USE IF CLEAR DISCRIMINATION AND CLEAR GROUP
	+ **An individual claiming a violation of their s 15 rights must show:**
		- (1) That a law or government action makes a **distinction** on one of the **enumerated or analogous grounds** AND
		- (2) That this distinction tends to discriminate (perpetuate prejudice, stereotyping OR historic disadvantage) (May also ask if distinction is arbitrary). If they succeed, we then move to a section 1 analysis to determine whether the s 15 violation is justifiable.

OR

* **Framework Test:** USE THIS TEST IF NOT A CLEAR S.15 GROUP OR A CLEAR DISCRIMINATION (Andrews, Taypotat)
	+ 1) Is there a **distinction** on an **enumerated or analogous ground**? AND
		- **Direct** distinction OR **adverse** effects?
			* (A) Differential treatment (Eldridge)
				+ How does it treat people differently? How does the provision catch this type of individual?
		- If basis of distinction not listed in s.15 (race, national or ethnic origin, colour, religion, sex, age or mental or physical disability), is it **analogous**?
			* (B) Enumerated and analogous grounds (Corbiere)
				+ Enumerated Grounds: race, national or ethnic origin, colour, religion, sex, age or mental or physical disability (if not then assess analogous)
				+ Analogous grounds: citizenship, sexual orientation, marital status, aboriginality/residence
				+ If the ground for the appeal is difficult to change (immutable) is indicative of an analogous ground. If it’s immutable the government shouldn’t expect you to change it
	+ 2) Does the distinction “**discriminate**”?
		- What is its impact relative to **comparator groups**?
			* C) Comparator groups (Withler)
				+ Claimant used to meet the high standard of finding an appropriate comparator group.
				+ Now you don’t have to be as precise with the comparison, just look at general context and characteristics.
				+ We should look at the entire act/laws effects on others more broadly then the complainant

Ex, visible minorities attending inner city schools, compared to those not living in the inner city (they likely have fewer minorities and higher education levels).

* + - **Context** (prejudice, perpetuating stereotype, historical disadvantage)?
			* (D) Disadvantage (H v M)
				+ Look at contextual factors to see if its relying on prejudice, stereotype (miss match between assumptions people hold and what they can actually do), or historic disadvantage (even if they are not still disadvantage in present day society)

Andrews v Law Society of British Columbia

* **F:** The Canadian citizenship requirement to join the BC law society violated s.15.
* **R:** Three part test requires: (1) differential treatment (2) on the basis of an expressly prohibited ground or one analogous thereto (3) that is discriminatory because it imposes a burden or denies a benefit. “In particular” indicates that the list of prohibited grounds of discrimination is not exhaustive (additional personal characteristics can be recognized).
* **A:** Citizenship was the ground argued which is analogous (a discrete and insular minority). Citizenship is immutable because it is not easy to change as it takes time, money, exams and more. Section 15 doesn’t just look at the wording but also its application to human being who are all deserving of right protection. ***Equality*** *does not mean everyone must be treated the same. It is not just formal but subjective.* Burdens and benefits must be assessed. There is no connection between citizenship and understanding of the law and it has a large burden on Andrews. The focus is if there is distinctions not if there is a history of discriminatory intent. **Discrimination=** 1) Is it perpetuating disadvantage or prejudice? OR 2) Stereotyping can perpetuate discrimination.
* **C:** This was a violation

Law

* It required the complainant to show that their human dignity was interfered with. This placed a large burden of proof on the complainant. There should not be a limit on people being able to bring rights violations. This got changed in Kapp.

R v Kapp

* **F:** Commercial fisher claim there s.15 right were violated when 3 Indigenous groups were exclusively allowed to fish in the mouth of Fraser River for 24 hours. They argue the 24 hour period should be abolished for everyone.
* **R:** If 15(2) is proven then 15(1) does not need to be assessed.
* **A:** Substantive equality is what section 15 is protecting because equal application of the law (formal) can create disadvantages. So different people need to be treated differently.
* **C:** There is no violation.

Quebec v A

* **F:** A and B lived together for 7 years and had 3 children. They separated and A wanted custody among many other things. She said that it is a violation of s.15 to only protect married couples and not provide protections to long terms couples.
* **R/A:** While attitudes towards married vs non-married has changed, s.15 should protect groups (non-married) that were HISTORICALLY disadvantaged. Discrimination can be proven on prejudice or stereotyping but it could also be proven through a connection to historic disadvantage that they aren’t experiencing today. This law does violate her s.15 right but it is justified by s.1.
* **C:** It’s justifiable under section 1.

Kahkewistahaw First Nation v Taypotat **(Use this case for framework for s.15)**

* **F:** The election code established under federal jurisdiction made it a requirement to have at least a grade 12 education to be chief. He was 76 and had been the chief for the last 30 years. He claims it is a violation of 15(1) under age and race.
* **R: To establish a prima facie violation of s. 15(1),** the claimant must therefore demonstrate that
	+ (1) the law at issue has a disproportionate effect on the claimant based on his or her membership in an enumerated or analogous group AND
	+ (2) the specific evidence required will vary depending on the context of the claim, but “evidence that goes to establishing a claimants historical position of disadvantage” will be relevant
* **A:** There is no prima facie evidence that the age and residence on reserve effects the 15 right. There is no sufficient evidence supporting that older individuals are less educated. Education is not an analogous ground as potentially you should be expected to have a certain standard. Arbitrary describes discrimination and is not a requirement.
* **C:** No violation.

Eldridge v British Columbia (Differential Treatment)

* **F:** 3 deaf individuals claim not deeming sign language medically necessary is a violation of section 15.
* **R:** There doesn’t need to be an intent to discriminate, just a result (discrimination is not always intentional)
* **A:** S.15 should be generously and purposively interpreted. The deaf has always been disadvantaged. The effect of the law is treating everyone as if they can hear. The deaf were not given the ability to get the healthcare level of others so it is a violation. *The failure to ensure benefit available to deaf person is a “distinction.”*
* **C:** S.15 is violated

Corbiere v Canada (Enumerated and analogous ground)

* **F:** Non reserve residents weren’t allowed to vote in band elections.
* **R:** TO find an analogous ground you must ask: Is it immutable? This could include, race, religion, disability, etc.
* **A:** This was a direct distinction based on indigenous residence. Aboriginality and residence is hard to change. It is a violation of s.15. It’s not saved by s.1 because it didn’t infringe in the right as little as possible. McLachlan (5 total): analogous grounds may change over time. Embedded analogous grounds may be necessary to permit meaningful consideration of intra group discrimination. Dube (4 total): must consider the history of the group. Has a more concrete take on the analogous grounds.
* **C:** It is a violation of s.15. It’s not saved by s.1

Withler v Canada (Comparator groups)

* **F:** Public Service/Canadian Forces Superannuation Act, supplementary death benefits reduced by 10% a year past the age of 65 (PSSA or 60 (CFSA).Widows argue that getting less benefits due to the older age of their husband at passing was a violation of s.15.
* **R:** Avoid the mirror comparator groups because it makes I look for sameness instead of disadvantage. You don’t need to match an exact group, just some characteristics and general context.
* **A:** There was no discrimination.
* **C:** The death reduction does not violate s.15

M v H

* **F**: Two women were in a 10 years relationship and lived together. Upon separation M was unemployed and sued for support under the Family Law Act. M says that spouse should include same sex couples.
* **R**: Disadvantage is relying on stereotype, historical disadvantage and arbitrariness
* **A**: There was a direct distinction based on an analogous ground. The court looked at the importance of the benefits provided by the act. It allows individuals to feel safe and secure financially upon the ending of a relationship. This discrimination suggests that same sex partnerships are incapable of meeting the same level of interconnectedness. The distinction is based on the stereotype that same sex relationship are different and less stable that hetero couples. Ask: What would a reasonable person in similar cases be experiencing if the same law was extended to them? The laws ameliorative (trying to make it better) purpose does not have a role in an s.15 analysis (but can in s.1). Historical disadvantage will be assessed.
* **C**: s.15 is violated and not saved by s.1

Centrale des syndicats du Quebec v Quebec (CSQ)

* **F:** Quebec made the Pay Equity Act to fix the wage gap between men and women. S 38 delayed payment to workers in jobs with no male comparators until regulation passed. For women in this case it took 6 years to get payment.
* **R:** Must establish
	+ 1) does the challenged law, on its face or in its impact, draw a distinction based on an enumerated or analogous ground and if so,
	+ 2) Does it impose burdens or deny a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating disadvantage, including historical disadvantage?
* **A:** Distinction is based on the enumerated ground of sex. Women are disproportionately getting disadvantaged because they are women. There is discrimination because the pay equity scheme denies remedies for highly feminized occupations. This perpetuates disadvantage. It is a violation of s.15 but it is justifiable under s.1 because it needed time to implement the methodology. In remedial programs it just needs to be asked if what they did was reasonable. It was in this case for its ameliorative purpose.
* **C:** S. 15 violation but saved by s.1
	+ Taypotat emphasizes how a distinction does or does not meet the individual’s needs. CSQ does not.
	+ Taypotat describes distinction as arbitrary (hard for right claimants to prove). CSQ does not mention it.

**PART 4– INDIGENOUS PEOPLES AND CANADA’S CONSTITUTION**

**Aboriginal Practice based Rights: Sources**

* History
	+ Before 1982, the crown and indigenous peoples did have relations
	+ There were treaties and also the Indian act
	+ Until the 1960’s Indigenous individuals weren’t allowed to vote until, and they couldn’t get legal counsel which explains the absence of assertion of rights
	+ How did the crown acquire soverignity?
		- Terra Nullius- no man’s land/barren of people. The Crown would assess how productive the land use was/ if it wasn’t a best use of land, the Crown could take it over. If there wasn’t sufficient control/law it wasn’t occupied.
			* Terra Nullius cannot be used to explain how the Crown got soverignity. The Court has recognized that the land wasn’t barren (Marshall). The British had to negotiate, make treaties, and more the take over land.
			* Sadly these ideas still remain today (Napoleon/Friedland)
		- Doctrine of Discovery- Has a religious basis. The Roman Catholic Church, by way of the Pope, allowed catholic explorers to forcefully remove people from their land in order to make it catholic.
			* It wasn’t just ok but imperative to do so
			* This has been denounced by the legal community and the Catholic Church. It is no longer good law. Sadly is still arises in the courts sometimes (it’s mentioned in Guerin SCC).
	+ Soverignity (RCAP) - soverignity is the right to know who and what you are. Soverignity is the natural right of all human beings to define, sustain and perpetuate their identities as individuals, communities and nations.
		- From this perspective, soverignity is seen as an inherent attribute, flowing from sources within a people or nation rather than from external sources such as international law, common law of the Constitution.
* Constituting Just Relations between the Crown and Indigenous Peoples
	+ Which constitutional laws govern Crown-Indigenous relations?
		- Section 91(24) Constitution Act 1867 – Federal government have jurisdiction over Indians
		- Royal Proclamation – obligations of the crown to indigenous peoples
		- Treaties
		- Unwritten constitutional principles – fiduciary obligations/Honour of the Crown
		- Section 35 CA 1982
		- Indigenous Legal Traditions
* Section 35 and Aboriginal Rights”
	+ CA 1982 Section 35 (it’s in Part 2 so it’s not a charter right)
		- (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed
		- (2) In this Act “aboriginal people of Canada” includes the Indian, Inuit and Metis peoples of Canada

Napoleon and Friedland, Indigenous Legal Traditions

1. Logical starting point – talk about roots of indigenous traditions
2. Repression and Resilience – long dark era of the almost totalizing repression of indigenous laws and there perseverance
3. Recovery and Revitalization – opportunities and distortions within limited spaces of certain legal aspects into the larger common law system
4. Renaissance and Resurgence – recent movement towards indigenous legal traditions being recognized at serious laws instead of traditions/values

Sparrow (Test for Aboriginal Rights)

**F:** Sparrow, Musqueam Band member, had fishing license under band, charged by Fisheries Act for fishing with longer net

**I:** Does Sparrow have an aboriginal right to fish under the Constitution? Is parliament’s ability to regulate fishing limited by Constitution?

**Sparrow test –** **Aboriginal Right**

* Is there an aboriginal right? (Onus on claimant)
	+ Define the scope and content of the right
* Has the aboriginal right been extinguished prior to 1982? (Onus on Crown)
	+ Clear and plain intent is required to extinguish (is there a treaty, was there a war, was the land purchased, was there an exercise of complete dominion?)
	+ Rights are not frozen (they evolve over time, technology)(dependent on circumstance)
	+ Extinguished rights are not revived (dependent on circumstance)
* Has the aboriginal right been Prima facie infringed upon? (Onus on claimant)
	+ Prima facie infringement, by showing that the regulation is:
	+ Unreasonable OR
	+ Causes undue hardship OR
	+ Denies the preferred mean of exercising the right
* Can the infringement be justified? (Onus on crown) **Justification test:**
	+ A valid legislative objective AND
	+ The Honour of the Crown (fiduciary duty) is upheld (things to look for)
		- As little infringement as possible
		- Priority to the aboriginal groups (such as with scarce resources)
		- Compensation (only monetary)
		- Consultation (not Duty to Consult, it’s to merely one of four components)

**A:** Section 35 is for reconciliation between powers of the Federal government and their duty to respect s 35 rights. The courts place a high standard on the government is they wanted to violate these rights. Sparrow had an existing aboriginal right to fish for food, it was not extinguished clear and plain, it was infringed by the Fisheries Act, the infringement was not justified even though they said it was for conservation (Indigenous know better)

Van der Peet (Further specifies what an aboriginal right is in Sparrow)

**F:** Van der Peet, carrier of Indian food fish license, charged for selling 10 salmon as it violates s. 27(5) of the British Columbia Fishery Regulations which prohibits the sale or barter of fish caught under the license

**I:** Did Van Der Peet have an aboriginal right to sell fish? Does s. 27(5) infringe on the right?

**R: Integral to a distinctive culture test:** In order to be an aboriginal right an activity must be an element of a practice, custom, or tradition:

* Central and integral to the distinctive culture; and
	+ Is it a practice that makes the culture what it?
* Continuity; and
* Existed pre-contact

**A:** The Indigenous people had a distinctive culture of living off the land long before settlers arrived and that needs to be acknowledged.

**C:** Prior-contact exchange of fish was incidental/no trading syst., No Ab R to sell fish

**Aboriginal Rights: Commerce, Resource Harvesting, Self-Government**

* Framework (Sparrow)
	+ Is there a **prima facie infringement** on an Aboriginal right?
		- Is the practice an Aboriginal right?
			* Is it central and integral to the distinctive culture? (Van der Peet)
				+ The practice must be defined narrowly
				+ It must be central to distinctive culture (is it a practice that makes this particular culture what it is?)
				+ Existed at the moment of “contact” (this is an originalist approach)
		- Was the right previously extinguished?
		- Is the right infringed?
	+ If yes, is the regulation of the right **justified**?
* Limits built into AB right
	+ Justification
	+ Originalism
* Negotiation is an alternative to Litigation

Borrows, (Ab) Originalism

S 35 is to be interpreted broadly and in benefit of indigenous peoples. This correlates with the courts originalism. They base their analysis on an original past moment instead of a contemporary one. The doctrine of discovery lies at the heart of the originalist point of view the courts take. It’s what they deemed to be there preexisting traditions after they were diminished by the crowns assertion of sovereignty. It benefits the crown. They say right aren’t frozen but they are extremely limited.

Macklem, Form and Substance of Aboriginal Title

S 35 is for reconciliation. 2 issues are: 1) it produces constitutional protection only for those practices that amount to “define and central attributes of the indigenous society in question.” 2) it forecloses conception of AB rights as general and universal; their scope and content must be determined on a case by case basis. The fact that the gov can limit fishing, for commercial purposes, allows the government to interfere with constitutionally protect ab rights in our to protect non-indigenous interest

Campbell v British Columbia (Self Government)

**F:** BC MMP’s seek a declaration that party of the Nisga’a treaty “Nisga’a Final Agreement” was inconsistent in part with the constitution.

**R/A:** The right to self-government in s 35 was not extinguished. Negotiation, instead of litigation, should be primarily used. They argued exhaustiveness (CA s 91 and 92 had taken up all government positions/powers). They can hold their own elections but ultimately if there is a conflict, federal and provincial laws will take precedent.

Gladstone (Commercial Rights – is it central to the distinctive culture? Evidence of pre-contact practice?)

**F:** He was selling kelp without a proper license contrary to the federal Fisheries Act.

**R:** Reconciliation means the reconciling AB communities with the broader political society which they are a part of.

**A:** In sparrow the rule that ab get priority in a commercial setting gives them exclusivity which is wrong. Also in sparrow it says some circumstances beyond conservation are compelling and substantial but do not elaborate. The fact that the gov can limit fishing, for commercial purposes, allows the government to interfere with constitutionally protect ab rights in order to protect non-indigenous interest. Sovereign incompatibility is not addressed in Gladstone

Sappier and Gray (Resource Harvesting)

**F:** Were harvesting timber logs to build a house. He was charged with unlawful possession of or cutting of Crown timber from Crown lands.

**I:** Is there an AB right?

**R/A:** There is a right for indigenous individuals to harvest wood for domestic uses as a member of the aboriginal community.

**Aboriginal Title: Introduction**

* Aboriginal rights and titles
	+ They are site specific
	+ You don’t need to find a right before you can find title
	+ Title rights are restricted to beneficial use (they get benefit but don’t have the underlying title)
	+ The land must be used in a way that is preserved for future generations
	+ AB Title does allow you to have self-government over the land and potentially people
* Sources of Aboriginal Title
	+ Nisga’a recognized that not all title was extinguished
	+ CA 1987
	+ Indigenous on going practices
* Sources of Crown title (Macklem)
	+ Medieval soverignity- 11th century/1086, a concurred took over multiple countries. To ensure that the lords would pay their taxes he used a legal fiction (all ownership rights are the result of Crown grants). So the lords had to come sign up their land for it to make their land officially theirs (he made it up)
	+ Canada
		- Legal fiction was transported to Canada but only partially because the crown didn’t recognize the rights of the indigenous (like they recognized the lords in Europe)

Tsilhqot’in [2014] SCC 44 (1st case of proven Aboriginal Title)

**F:** Tsilhiqot’in Nation has always owned the land and have no treaty. BC let Carrier Lumber Ltd. cut down trees on crown land. Federal doesn’t regulate forestry. They want Aboriginal Title

**I:** Do they have Aboriginal Title for this small part of their traditional territory?

**R:** The test for Aboriginal Title is: *occupation* prior to assertion of European soverignity (Claimant must prove)

* **sufficient** (so that nomadic groups are included-clarified this from Delgamuukw where it was prior occupation)
* **continuous**, AND
* **exclusive** (at moment of crown assertion and continued till today, if not exclusive then it would be a right not title)
* Ab Title is the right to use/control/enjoy its benefits, and others need consent
* Infringement is a “meaningful diminution of a Right” (If it is straight forward. If not use sparrow step 2)
* Justification- a goal of s.35(1) is reconciliation of Aboriginals & society (need to reconcile Aboriginal interests with the broader interests of society as a whole)
	+ Onus on Crown to fulfill Duty to Consult and Accommodate;
	+ Gov’t action should be compelling and substantial (valid) objective (from both perspectives); AND
	+ Gov’t action must be consistent with the Fiduciary Duty of the Crown: (future generations need to be considered AND there must be a proportionality exercise)
		- Must be necessary to achieve the government’s goal;
		- Minimal – don’t go further than necessary to get goal; AND
		- The benefits expected to flow from the Crown goal are not outweighed by adverse effects on the Aboriginal interest
	+ Provinces may justifiably infringe. Provincial laws of general application may apply to lands held under Aboriginal Title.
* Aboriginal Title is not limited to village sites, but may include: regular use of territories for hunting, fishing, trapping, and foraging. Not every “nomadic passage” is sufficient use to ground Aboriginal Title

Crown must get consent to use the land, unless they can justify the infringement

**A:** Tsilhiqot’in Nation has Aboriginal Title

**Aboriginal Title: Provincial Laws, Inter-delegation**

* At the time of assertion of European sovereignty**, the Crown acquired radical or underlying title to all the land in the province**. … The **doctrine of terra nullius** (that no one owned the land prior to European assertion of sovereignty) **never applied in Canada**, as confirmed by the Royal Proclamation of 1763
* Do provincial laws apply to Tsilqot’in territory?
	+ Pre-Tsilhqot’in Nation:
		- Interjurisdictional immunity used
			* Provincial laws of “general application” could apply
		- Provincial laws that went to the “core of Indianness” (ie. The core of fed jurisdiction in s 91(24)) could not apply.
			* Delgamuukw – included s 35 protected rights
	+ Provincial laws may apply. Sparrow justified infringement test determines whether they apply
* Does the BC Forest Act apply to lands where Tsilhqot’in have established Aboriginal Title?
	+ The court says the forest act can apply but the application is subject to limits imposed by section 35 and the justified infringement test from Sparrow
	+ Interjurisdictional immunity (IJI):
		- The court tells us there are two reasons: consistency and concern with creating a legislative vacuum where there’s no federal forestry regulations and provincial laws don’t apply there.
		- They don’t want no provincial forestry laws to apply to the land and also no federal law (legal vacuum)
* General regulatory schemes that might not infringe aboriginal title:
	+ Pest invasions including mountain pine beetle control as a general regulatory scheme that would not infringe Aboriginal title at all. Because it would not impose unreasonable limitations, undue hardship, or deny the rights holders their preferred means of exercising their rights.
* Take-Away Points: Provincial laws may apply. Sparrow’s justified infringement test determines whether they apply.

Napoleon, Aboriginal Title from a Tsilhqot’in Legal Perspective

* Interjurisdictional immunity should not be used to resolve disputes like this. We should be looking at the sparrow justified infringement test. What should be asked is whether the application of laws infringes that title and whether the infringement is justified.
* Tsihlqot’in society has five authoritative decision-making groups: individuals, family members, chiefs/leaders, elders/medicine people and community.
* Principles that most directly relate to the question of consultation and consent are: 1) protecting both individual and community safety. 2) Proportionality. 3) Acknowledging and taking responsibility.

**Treaties and Treaty Interpretation**

* Treaties as constitutional documents (Grammond)
	+ S 35(3) for greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired
	+ They are long term between nations co-existing in one state
	+ Renewed regularly
	+ Originalist or evolutionary approach?
	+ Interpretive principals are used to understand treaties
	+ Categorizing types of treaties:
		- 1) Peace and Friendship Treaties
			* early 1600’s to middle 1800’s
			* European settlers entered into agreements that would secure peace and friendship (trading regimes). They weren’t for securing land but more for keeping the violence to a minimal and creating commercial relations.
			* Two row wampum
			* Founded on consent and continuity
			* Looks more like federalism than rights claims
		- 2) Land Treaties
			* It was centered on sharing of land so that agriculture could be extended in the west.
			* Robinson Huron and Robinson Superior treaties. Numbered treaty 6 and 3 in Grassy Narrows
		- 3) Modern Treaties
			* AB title could be established present day (Calder) which spurred modern treaties
			* Self-government agreements (Nisga’a Final Agreement in Campbell)
			* Co-management agreements (James Bay & Northern Qc Agreement)
* What is a “treaty”? (Badger)
	+ A treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred
	+ Treaties are analogous to contracts, albeit of a very solemn and special, public nature. They create enforceable obligations based on the mutual consent of the parties.
		- It follows that the scope of treaty right will be determined by their **wording**, which must be interpreted in accordance with the principles enunciated by this Court.
* Summing up Principles
	+ Liberal & generous, ambiguities resolved in Indigenous peoples favour
		- Badger
	+ Assume Crown intended to fulfil promises (honour of the crown)
		- Badger, Marshall
	+ Meaning as understood by indigenous signatories at time treaty concluded (text, oral evidence, history)
		- Marshall
	+ Choose interpretation that best “reconciles” interest
		- Sioui, Marshall
* Extinguishment?
	+ Pre-1982? Requires clear and plain intention by government
		- Badger
		- Ex, Natural Resource Transfer Agreements in prairies (including Alberta)
	+ Post 1982 Extinguishment impossible (s 35 CA 1982)
		- Marshall
* Justified Infringement?
	+ 1982 forward, treaty rights can only be infringed if infringement is justified (Sparrow/Badger test)
		- Duty to consult and accommodate
		- Compelling and substantial legislative objective
		- Restriction compatible with fiduciary duty/honour of the crown
* What alternative interpretive principles might exist:
	+ Borrow – nation to nation relationship would provide framework to guide relationships (what interpretation would the indigenous nation want today)
	+ Grammond – forward looking instead of the past
* **Take away points**
	+ Interpretive principles evolve from Sioui to Marshall (and disappear in Grassy Narrows)
	+ Extinguishment? Justified infringement (sparrow analysis adopted (including duty to consult)
	+ Originalism in treaty interpretation – can other interpretive principals prevail?

Sioui

**F:** Huron nation member went into a provincial park, cut down trees, camped and made a camp fire. The province charged them under the Quebec Parks Act for violating regulations prohibited cutting down trees, camping and fires in non-designated areas. Peace Treaty ensure “the free exercise of Huron-Wendat religion and their customs.”

**R:** The court must look to the common intention of the parties to reconcile at the time, as long as it was not incompatible with the crowns use of the land.

Badger (How to interpret treaties/NRTA/Treaty 8)

**F:** 3 men were hunting on private property “surrender lands.” They were charged under the Alberta Wildlife Act because s 26 & 27 hunters require license, must hunt in provincially designated season. Treaty 8 right of signatories to pursue their usual vocations of hunting, trapping and fishing.

**R:**

* Treaty is an exchange of solemn promises
* Honor of the crown is always at stake and they always are presumed to follow their word
* Ambiguities must be resolved in favour of indigenous people AND
* To extinguish the right there must be clear and plain intention.

**A:** NRTA/treaty rights are not absolute constitutional rights. Government regulations can apply to these rights and they were aware of this.

Marshall (guidance how to read and interpret it)

**F:** Marshall was fishing as per treaty rights. He was charged by the Federal Fisheries Act as regulations required license for fishing, etc. Treaty 1760-61 was a written document and it prohibited the Mi’kmaq from exchanging goods with anyone but Truck house managers. Oral evidence said they could sell their stuff at the Truck house.

**R:** Extrinsic evidence should be looked to in order to interpret treaty. We need to choose the interpretation that best reflect is the intentions of both the indigenous peoples and the crown at the time of the treaty. Don’t look at treaties as if they are contracts or entire agreements. It is implied that there must be a right to fish if there is a right to bring it to the Truck house. Treaty rights don’t need to be unique/central to Mi’kmaq but they must have been practiced in the 1700’s (Marshall 2).

1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation;
2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the Aboriginal signatories;
3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the on which best reconciles the interests of both parties at the time the treaty was signed;
4. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed;
5. In determining the signatories’ respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties;
6. The words of the treaty must be given the sense which they would have naturally held for the parties at the time;
7. A technical or contractual interpretation of treaty wording should be avoided;
8. While construing the language generously, courts cannot alter the terms of the treaty by exceeding what “is possible on the language” or realistic; and
9. Treaty rights of Aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context.

Grassy Narrows First Nation v Ontario

**F:** The Ontario government gave a lumber license as per the Provincial Forestry Act to a company. There was a history of clear cut logging in the area. Treaty 3 states harvesting rights preserved except on tracks of land as may be required or taken up for settlement, mining, lumbering or other purposes by her said government of the dominion of Canada.

**I:** Can the province take up the land protected by treaty 3 without federal consent?

**R:** Province doesn’t need federal authorization. Treaty interpretation was not used in this case.

**Metis Rights (s 35) and Federalism (s 91(24))**

* The Metis in Canada
	+ Distinct indigenous peoples in Canada in the Constitution. They had distinct cultural traditions
	+ Louis Riel pressed the dominion of Canada to be engaged with the Metis in their attempt to expand West
	+ When the dominion of Canada bought Rupert’s land from the HBC they did not respect the existing indigenous community’s rights. It lead to an uprising in the red river area and ultimately resulted in the Manitoba Act which promised land would be given to the Metis communities (this was never fulfilled). The act is not considered to be a treaty.
	+ After 1870, the script program was created to provide metis people with access to lands.
		- There were lots of issue as they allowed non-metis people to take the script.
		- It was intended to extinguish land claims, sometimes in return for nothing
	+ AB was the most proactive in address Metis rights
* Metis Rights (s.35 CA)
	+ Rights and Jurisdiction are different but intimately connected
	+ Metis can have practice based rights (Powley)
	+ Title is very hard to get as if its treaty land, then the Metis do not have exclusivity over the land. Script also potentially extinguished rights but this is shady. Title is not impossible though
	+ Treaty could be entered into in the future. Metis Settlements Act is AB provincial legislation, not federal, so it is not treaty.
* Legislative authority and the Metis (s 91(24) CA 1982)
	+ S.91 (24) federal jurisdiction for Indians, and lands reserved for Indians.
		- Indians= First Nations (status and non-status Indians), Inuit, and Metis (Daniels)

Vowel, Summary of Daniels

* The Daniels decision is a hard test to meet because it is not easy to trace your history to a small location from the 1600’s

Revisit Valverde, Jurisdiction and Scale from Part II

* Re Inuit 1930’s was about whether Inuit were considered to be Indians.
* This was mainly about who’s responsibility the Inuit people would be, provincial or federal?

Powley (Modifies Sparrow and Van der Peet tests for Metis People)

**F:** Powley and son shot/killed a moose w out a tag, a hunting license or a valid outdoor card. Got charged under Game and Fish Act c. G.1

**I:** Do the members of the Métis community in and around Sault Ste. Marie enjoy a constitutionally protected right to hunt for food under s. 35 of the *Constitution Act*, 1982?

**R:** Pre-contact is now pre-soverignity for Metis. The *Van der Peet* test- for if there is a Metis Right

1. Characterization of the Right: Contextual(ex, fishing); AND Site specific (red deer)
2. Identification of the Historic Rights-Bearing Community must show: demographic evidence; AND proof of shared customs; AND proof of shared traditions; AND a collective identity
3. Identification of the Contemporary Rights-Bearing Community
4. Verification of the Claimant’s Membership in the Relevant Contemporary Community:
	* Courts faced with Métis claims will have to ascertain Métis identity on a case-by-case basis. Must take into account both:
		1. the value of community self-definition; AND
		2. the need for the process of identification to be objectively verifiable
	* the criteria for Métis identity under s. 35 must reflect the purpose of this constitutional guarantee:
		1. to recognize and affirm the rights of the Métis held by virtue of their direct relationship to this country's original inhabitants and by virtue of the continuity between their customs and traditions and those of their Métis predecessors
	* Non-exhaustive criteria endorsed by the Court: (claimant must prove)
		1. **Self-identification as a member of a Métis community** (can’t be of a recent vintage)**;**
		2. **Must show evidence of an Ancestral Connection to a historic Métis community** (no blood quantum)**; and**
		3. **Must demonstrate that she/he is accepted by the modern community whose continuity with the historic community provides the legal foundation for the Aboriginal Right being claimed**
5. Identification of the Relevant Time Frame:
	* **Post contact but pre-European control test** must identify the period after a particular Métis community arose and before it came under the effective control of European laws and customs
6. Determination of Whether the Practice is Integral to the Claimants’ Distinctive Culture:
7. Establishment of Continuity Between the Historic Practice and the Contemporary Right Asserted:
8. Determination of Whether or Not the Right was Extinguished: (Applies equally to Métis and First Nation claims)(Sparrow)
9. If there is an Aboriginal Right, Determination of Whether There is an **prima facie** Infringement: (Sparrow)
10. Determination of Whether the Infringement is Justified (Sparrow)

**A:** Members of the Métis community in and around Sault Ste. Marie have an Aboriginal Right to hunt for food (broader then specifying for a certain type of animal and could potentially be for more than substance) under s. 35(1). Court says “the difficulty of identifying members of the Métis community must not be exaggerated as a basis for defeating their rights under the Constitution of Canada.” Conservation is a priority giving priority to Metis individuals will help the government meet both of these duties.

Daniels (Metis are included in Indians of the Constitutional which is federal jurisdiction)

**F:** Daniels brought litigation because for many years, metis and non-status were trying to figure out who they go to for answers. Both said that they were not their responsibility.

**I:** Whether or not Metis and non-status Indians are “Indians” under s. 91(24) of the Constitution Act 1867? Fiduciary Duty (already answered)? Consultation (already answered)?

**R:**

* Metis and non-status Indians are Indians under s. 91(24)
* The party seeking relief of a judgment must establish:
	+ That the court has jurisdiction
	+ The question is real and not theoretical
	+ Party raising the issue has a genuine interest in its resolution

A declaration can only be granted if it will have practical utility, that is, if it will settle a “live controversy” between parties

**A:** Canada couldn’t have expanded without the metis being controlled like all other Indians. Metis are Indians

**Duty to Consult**

* Constitutional Sources
	+ It comes from the honour of the crown which is an unwritten principal that existed pre s.35
	+ Its framed crown policy since the Royal Proclamation 1763
	+ Underlies Treaty obligations
	+ Recognized in s.35 CA 1982 by protecting aboriginal rights
		- Essentially the Honour of the Crown is a Duty to Consult
* When does it arise?
	+ There is **always** a duty of consultation. The nature and scope of the duty of consultation will vary with the circumstances. (Delgamuukw)
	+ Not a question of when but “what does it require”?
* What it requires: **Basic Components**
	+ Crown: good faith (meaningful consideration of indigenous needs, responsive to indigenous ideals, and before decision)
	+ Indigenous people: good faith (not frustrate crowns purpose, and have a reasonable position)
	+ Spectrum Obligations: from weak/limited to strong/deep
* Take Away Points
	+ Constitutional source
		- Unwritten principal – honour of the crown
	+ There is virtually always a duty of consultation
		- Question what is its nature and scope
		- Spectrum of consultation (and accommodation)
		- Fact based inquiry

*What it requires*

Haida Nation (Higher Duty to consult Test)

**F:** BC had issued Tree Farm Licenses since 1961 allowing the harvesting of trees on Haida. In 1999 the minister transferred the license. Current land claims were in negotiation but it is not settled if they had Title but there was a strong prima facie test. Haida challenged the issuance of new TFL’s.

**R:** The honour of the crown is always at issue. The crown may owe a duty of consultation and accommodation even before a right is proven

* **1)** The source of the Duty to Consult and Accommodate:
	+ The Duty to Consult and Accommodate is grounded in the Honour of the Crown;
	+ The Crown must act honourably in all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and implementation of treaties;
	+ The Honour of the Crown gives rise to different duties in different circumstances:
		- For example, where the Crown has assumed discretionary control over specific Aboriginal interests, the Honour of the Crown gives rise to a Fiduciary Duty
* **2)** When the Duty to Consult and Accommodate arises:
	+ The Duty to Consult arises when:
		- the Crown has knowledge, real or constructive, of the potential existence of an Aboriginal Right OR Title; AND
		- the Crown is contemplating conduct that might adversely affect that Aboriginal interest
* **3)** Scope and Content of the Duty to Consult (weaker) and Accommodate (heavier): **Spectrum (Mikisew)**
1. The scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, AND to the seriousness of the potentially adverse effect upon the right or title claimed (extent of the breach)
	1. Where the claim to title is weak prima facie, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice
	2. Where a strong prima facie case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required.
		1. While precise requirements will vary with the circumstances, the consultation required at this stage may entail **the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case**
2. What is required to uphold the Honour of the Crown?
* **4)** The controlling question in all situations is what is required to uphold the Honour of the Crown and what will bring about **reconciliation**
* **5)** The Crown is bound by its honour to **balance societal and Aboriginal interests**. Balance and compromise is therefore necessary
* **6)** When the balance of interest suggests that the Crown amend its plan or policy, then it is accommodating those interests
* **7)**Aboriginal claimants do not have veto power
* **8)** The ultimate legal responsibility for the Duty to Consult and Accommodate rests with the Crown. The Honour of the Crown cannot be delegated to third parties:
	+ The Duty to Consult and Accommodate flows from the Crown’s assumption of sovereignty over lands and resources formerly held by the Aboriginal group;
	+ There is no support for an obligation on third parties to consult or accommodate;
	+ While the Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development, **the Crown alone remains legally responsible for the consequences of its actions**
	+ *Where consultation is meaningful, there is no ultimate duty to reach agreement (Taku)*

**A:** The Crown owes a duty of consultation (and if appropriate, accommodation) which was not fulfilled Duty to consult is grounded in the Honour of the Crown

Taku River (Low Duty to Consult)

**F:** A mining company sought permission from BC to re-open an old mine since 1994. Taku participated in the environmental assessment process. Taku objected to the company’s plan to build a road through a portion of their traditional territory. BC granted project approval in 1998. Taku brought a petition to quash this decision based on administrative law and on its Aboriginal Rights and Title

**I:** What are the limits of the Crown’s Duty to Consult and Accommodate Aboriginal peoples when making decisions that may adversely affect as yet **unproven Aboriginal Rights** and Aboriginal Title claims?

**R:**

* 1) Where consultation is meaningful, there is no ultimate duty to reach agreement
* 2) Accommodation requires that Aboriginal concerns be balanced reasonably with the potential impact of the particular decisions on those concerns and with competing societal concerns

**A:** BC was aware of Taku’s claims through its involvement in the treaty negotiation process. BC knew that its decision to reopen the mine had the potential to adversely affect the substance Taku’s claim. The Honour of the Crown placed BC under a Duty to Consult with Taku, based on *Haida.* The environmental assessment process engaged by BC fulfilled the requirements of its Duty to Consult. The First Nation participated fully in this process and presented its views. The final project approval contained measures designed to address both Taku’s immediate and long-term concerns. The First Nation was disappointed when the review was concluded at the direction of the Environmental Assessment Office. There is no obligation to reach an agreement with a FN. Compromise in inherent to the reconciliation process (OBITER). s.35 recognizes and affirms existing Aboriginal Rights and Tile where one of its purpose is to negotiate just settlements. Taku was heavily involved in the process. Therefore BC fulfilled its Duty to Consult

Grassy Narrows (obiter provides a heavier duty to consult)

**F:** The Ontario government gave a lumber license as per the Provincial Forestry Act to a company. There was a history of clear cut logging in the area. Treaty 3 sates harvesting rights preserved except on tracts of land as may be required or taken up for settlement, mining, lumbering or other purposes by her said government of the dominion of Canada.

**R:** OBITER- duty to consult applies equally to both levels of government. The government must inform itself of the impact they will have on the treaty protected rights. THEN, they must communicated these findings to the indigenous community and engage in a good faith discussion to try and substantially address their concerns.

Beckman v Little Salmon/Carmacks First Nation (low end of spectrum)
**F:** They had a 435 paged precise treaty, First Nation Final Agreement, to use crown land in the Yukon for hunting and fishing for subsistence. Yukon gave 65 acres to non-native man for agriculture without telling the group.

**R/A:** Even though the government has this right, they owe a duty to the group to consult about the effects. There is always a duty to consult, written out or not. Here the effect was low on the spectrum and the Yukon does need to take into account to impact. *The crown cannot contract out of its duty to consult.* Reconciliation is long term relationship.

Mikisew Cree 2005 (Low Duty to Consult)

**F:** The government planned a road right through the reserve, then changed it to the barrier of it without consultation

**I:** Did the Crown have a Duty to Consult when their planned actions will infringe the claimants’ Treaty Right? If so, can that decision be justified under the Sparrow test?

**R:** Duty to Consult and accommodation of interests is grounded in the Honour of the Crown

• The duty arises when the Crown had knowledge, real or constructive, of the potential existence of the aboriginal right or title and contemplate conduct that might adversely affect it

 **Scope and Content of the Duty to Consult and Accommodate:**

1.The scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right/title claimed (extent of the breach)

2. The content of the duty to consult and accommodate varies with the circumstances.

* Weak- limitation/infringement minor. Crown may give notice, disclose information, and discuss any issues raised in response to the notice
* Strong- prima facie, the potential infringement is of high significance to Aboriginals, AND the risk of non-compensable damage is high. Crown may use deep consultation, aimed at finding a satisfactory interim solution.
* *In most cases, it will be significantly deeper than mere consultation*

**A:** There was a lower spectrum Duty to Consul because it has a minor impact. Crown potentially could have given **the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. The Crown did not do its Duty**

*Legislative drafting*

Mikisew Cree 2018 (no duty to consult)

**F:** The Federal government made 2 omnibus (one act that does multiple different things, hundreds of pages long) bill. They directly affected their hunting and fishing rights.

**R/A:** There is not a duty to consult. There are many important unwritten principles that guide decisions. Separation of powers, parliamentary soverignity and democracy are at odds with honour of the crown. The honour of the crown does not apply to executives/legislators. When developing legislation the duty to consult should interrupt. Afterwards the constitutionality of it can be assessed.

**Dissent:** the honour of the crown cannot be overridden by parliamentary soverignity. They should work together. There are modern treaty’s that prove that this can be done.