**CONSTITUTIONAL LAW**

**Professor Eisen**

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# Foundations of Canadian Constitutionalism

## What is a Constitution?

* Establishes a structure of government
  + Identifies constituencies and assigns them powers
* Precommitments and change
* Rules about rules
* Expression of fundamental values
* Function of political compromises

## Fundamentals of Canadian Constitutionalism

### Secession Reference

* Federalism as a product of political compromise
  + Canada East and Maritimes would not have agreed without bicameral rights
  + Division of powers
    - Both within federal govt (bicameral) and btw fed/prov
  + Confederation considered web like quality
    - Ex. British colonial office telling them NB cannot back out because NS relies on them in confederation
* **Shift from parliamentary supremacy to constitutional supremacy**
  + Limitation on sphere of legislative power
  + Advent of the Charter 1982
* Four Principles
  + Federalism defines democratic majorities
    - Which majorities matter to which questions
  + Democratic majorities are made operable and stable by the rule of law
  + The rule of law protects the rights of minorities
    - Including through the definition of federal arrangements

## Democracy

* s 3 Charter; Every citizen of Canada has the right to vote in an election of the members of the House of Commons or of a legislative assembly and to be qualified for membership therein.
* s 1 Charter; The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society

### Sauve v Canada

Ratio: This is an infringement on section 3 and is not reasonably justified is therefore a **violation of the Charter**

Facts: Serving two or more years in correctional facility appealing for right to vote

Result:

Reason: Common sense can be relied on by the court. The court notes s.1 objectives cannot be trivial and cannot be in discordant with principles of free and democratic society. Charter rights are not matter of privilege or merit but a function of membership to Canada polity. Govt fails to establish proportionality for want of a rational connection between denying the vote to penitentiary inmates and its stated goals of encouraging respect for law and added punishment.

Issue: Does Canada Elections Act (s. 51(e) – inmates cannot vote no matter sentence time) infringe upon section 3 of the Charter and is this infringement justified under section 1 of the Charter. Further, whether this denial to vote is accepted under Section 1 of the Charter as a “reasonable limit” demonstrably justified by a free and democratic society.

Notes: Oakes Test

### Reference re Provincial Electoral Boundaries (Sask)

Ratio: Province is sufficient to justify existing electoral boundaries to meet effective representation – does not infringe, don’t have to move forward with s.1 analysis

Facts: Fixed number of votes to rural and urban regardless of population and argued to dilute votes

Result: Violation of s.3 has not been established; appeal disposed

Reason: Looked at history and philosophy – the framers of the constitution and democracy’s aim wasn’t one person one vote – they sought effective representation.

Issue: Not a question of achieving voter parity but rather effective representation (the true goal of section 3) – do these boundaries align with effective representation

Notes: Sopinka agreed with ultimate decision of McLachlin however noted different interpretation of s.3. Cory and two others dissent; does not agree that infringement is so minor that it should not be considered - right to vote fundamental to democracy… therefore each persons vote should be as near as possible to equal to the vote of any other voter residing in any other constituency - concerned with not only results of the appeal but the process and should look at s.1 (where he believes cannot be justified under s.1)

## Bicameral Legislation and Amendment

### Reference re Senate Reform

Ratio:

Facts: Govt asks SC – can parliament unilaterally implement a framework for consultative elections for appointments to Senate? Can parliament unilaterally set fixed terms for Senators? What degree of provincial consent is required to abolish the Senate?

Result: Parliament cannot unilaterally achieve proposed changes – which req at least 7 provinces representing in aggregate half the population of all provinces. Abolition would fundamentally change constitutional structure and can only be done with unanimous federal-provincial consensus

Reason:

* + Proposed consultative elections would constitute an amendment to the constitution and req substantial provincial consent – they would fundamentally alter the architecture of constitution and weaken purpose as sober second thought (general amendment procedure would be req; method of selecting Senate reps s 42)
  + Security of tenure allow senators to function with independence – change would thus affect Senate’s fundamental nature and role (to be, then, achieved under general amendment s.38); does the change to tenure engage provincial consideration because the nature of the way it changes the nature of the Senate… yes it does
  + Abolition would fundamentally alter constitutional architecture and deleting the Senate would be an amendment to Part 5 (how we make amendments) – would therefore require unanimous consent s.41

Issue: Amending procedures; whether changes amend the constitution and if so, which amendment procedures are applicable.

s.38 amendment procedure (7/50) – compromise between demands of legitimacy and flexibility; S.42 identify certain categories of amendments which 7/50 procedure should be followed

s.41 unanimous

ss. 44 and 45 unilateral

Notes:

### The Persons Case (Edwards)

* Are women persons
* Recognized women as representatives of state
* Famous for the way it treated tradition – the appeal to history
  + They say its from a more barbarous time – the appeal to history is not conclusive in this case for that reading
    - Canadian constitution as a living tree
      * Large and liberal interpretation

## Rule of Law

1. Officials and individuals are bound
2. Obligation to maintain and uphold written laws that express underlying principles
3. Public power grounded in legal rules

### Roncarelli v Duplessis

Ratio: Discretion of the commission does not go unchecked – in this case it was an abuse of legal power expressly with alienated intent and purpose.

Facts: By-laws passed by towns and municipalities made it an offence to distribute literature without a licence. The intention was to eradicate the distribution of Jehovah's Witnesses' pamphlets. This led to an exponential amount of arrests of Jehovah's Witnesses who Roncarelli arranged bail for. As a response, Duplessis, the Premier of Quebec, contacted the Quebec Liquor Commission to revoke Roncarelli's present licence and to disqualify him from obtaining future licences. Action for damages sought by Roncarelli against Duplessis for wrongful revocation of a licence to sell liquor (which led to the closing of Roncarelli's restaurant business). Statute says they could cancel “at its discretion”.

Result: In favour of Roncarelli

Reason: Vitally important that a public administration refuse to allow a person to enter/continue a calling, which in the absence of regulation would be free and legit, should be conducted with complete impartiality and integrity (unquestionably such). “Discretion” necessarily ***implies good faith*** in discharging and any clear departure from its lines or objects is just as objectionable. The act of the respondent through the instrumentality of the Commission brought about a breach of an implied public statutory duty toward the appellant; it was a gross abuse of legal power expressly intended to punish him an act wholly irrelevant to the statute, a punishment which inflicted on him, as it was intended to do, the destruction of his economic life as a restaurant keeper. Good faith means ***carrying out statute for its intended purpose – acting with rational appreciation for purpose NOT with improper intent and alien purpose***.

Issue: Was the use of executive power against Roncarelli valid? Was this discretion considered with complete impartiality and integrity? Was the cancellation within the discretion given by the statute?

Notes: Principle of Constitutional Supremacy; what is the source of law in Canada and by what law is every state actor bound? Answer within constitutional supremacy – constitution is the source of powers to make the law and all laws so made must be consistent with terms set out by constitution. SCC confirmed shift from parliamentary supremacy to constitutional supremacy with Quebec Secession Reference – completed with charter.

### **Trial Lawyers Association of BC v BC (AG)**

Ratio: Hearing fees that deny people access to the courts infringe the core jurisdiction of the superior courts. s.92(14) read in the context of the constitution as a whole, does not give the provinces the power to administer justice in a way that denies the right of Canadians to access courts of superior jurisdiction, any attempt to do so runs contrary to the constitutional protection for superior courts found in s.96

Facts: First began as family action; child custody and property. Ms. V went to could to have issues resolved – she had to undertake in advance to pay court a hearing fee to get a court date. Province argues that hearing fee scheme is valid exercise of prov power over administration of justice under s.92(14) of the constitution.

Result: Held that legislation imposing the fees was unconstitutional - falls outside prov jurisdiction under s92(14) to administer justice

Reason: No question of province power to impose fees – that is conceded, but that it is not unlimited. Measures that prevent people from coming to courts are at odds with the basic judicial function of resolving disputes – this is their very book of business. To prevent this business being done **strikes at the core of the jurisdiction of the superior courts protected by s.96**. “Requirements that flow by necessary implication from the express terms of the constitution”; that Canadians have rights to access superior courts flows by necessary implication of the express terms of s 96. Further supported by rule of law*;***there cannot be RoL without access otherwise the rule of law is replaced by rule of men and women who decide who shall/shall not have access to justice**. The right of the province to impose fees is limited by constitutional restraints and defining those constraints is not exclusive to the legislature.

Issue: Whether court hearing fees imposed by BC that deny some people access to the courts are constitutional. What are the limits of the scope of provincial authority over the administration of justice? The authority must be exercised harmoniously with core jurisdiction of provincial superior courts protected by s.96 – so is s.96 infringed upon (does is infringe on the core jurisdiction of the superior courts)?

Notes: Notes precedent in Christie does not undermine reasoning; held that not every limit on access is automatically unconstitutional – the present case has potential to bar litigants with legit claims which is the impact Christie lacked.

Rothstein dissent; hearing fee scheme does not offend any constitutional right – as only an overly broad reading of s 96 with support form the unwritten constitutional principle of the rule of law. Here there are no gaps for the unwritten law to fill in text of s 92(14). There is no express constitutional right to access the civil courts without hearing fees. This court, in Reference re Secession of Quebec, reiterated its earlier insistence on the primacy of the written consti­tutional text, stating that unwritten principles "could not be taken as an invitation to dispense with the written text of the Constitution". As long as courts maintain their character as judicial bodies and exercise the core function of courts, the demand of the Constitution are satisfied (s96). This court has clearly cautioned against using the rule of law to strike down legislation (Imperial Tobacco). Unwritten principle of democracy upholding legislation passed by democratically elected representatives.

# Federalism

## Introduction

Review of Federalism as We’ve Learned

* Secession Reference
  + Federalism = political mechanism to reconcile diversity with unity
  + Autonomy of prov govt within sphere of jurisd
  + Facilitates democratic participation by assigning power to most suitable level of govt
* Fed Leg authority
  + S 96 judicial appointments
* Prov Leg authority
  + Education
  + Property/civil rights
  + Administration of courts (Trial Lawyers)
* Role of Courts
  + Ensure public power exercised within bounds of authority conferred by the con

Types of Federalism Problems

* Advocates
  + Who can fix this problem and how
* Legislators
  + What can my level of govt do about this problem
* Business and regulators
  + What laws (fed/prov) apply to business or activity
* Restrained parties
  + How can I get rid of this law

Interpretative Approaches (see below too)

* Cooperative federalism (modern)
  + Watertight compartments (historic)
* Mutual modification
  + Parson’s case
    - Stands for fed govt being able to reg trade and commerce and prov being able to reg property and civil matters
      * Heads of power mutually modify each other
* Living tree
  + Same sex marriage

## Validity and “Characterization”

### Key Doctrines in Canadian Legal Federalism (Brouillet/Ryder)

* Preamble to constitution; ‘desire to be federally united into one Dominion’
  + Create a federal government in which they all (provinces) should be represented, entrusted with exclusive powers in which they had common interest and each province retaining its independence and autonomy
  + \*\*Secession reference
    - Federalism = central organizational theme of our constitution
      * = fundamental principles underling the written constitution – the federal principle can be used to guide the courts in the interpretation and application of the provisions of the text and to fill any gaps
      * Concede unity with diversity
* Constitution contains a number of provisions allocating law making powers to both federal and provincial legislatures
  + ss 91 & 92
  + The courts have the responsibility of interpreting these provisions and thus determining the boundaries of the law making powers of Canadian legislative bodies
    - Courts rulings in federal matters have the same force and normative value as the constitutional text (binding)
    - Up to the courts to adapt the constitutional texts to new societal conditions
      * The need to adapt the constitutional text to meet changing conditions in society cannot be questioned – the very preservation of the con’al order depends on this ability (principle of progressive interpretation)
    - **Courts see its role as interpreting the con in a manner that facilitates cooperation, maintaining federal balance and provides equal protection for the autonomy of each order of govt** 
      * As opposed to “watertight compartments”
* Principles Used in the Interpretation of Legislative Powers
  + Mutual Modification
    - Citizens Insurance v Parsons
      * “property and civil rights” or “trade and commerce”??
    - Idea that the broad language in which a power is described in the texts needs to be modified/limited to minimize conflict with other legislative powers
      * Both sections and other parts of the act need to be looked at to ascertain whether language of general nature must not by necessary implication or reasonable intendment be modified/limited (Sir Montague Smith in ^)
    - Helped shape the division of legislative jurisdiction in many contexts
      * Ex. penitentiaries v prisons, limiting federal legislative responsibility to more serious offenders
  + Progressive interpretation
    - Courts have rejected the idea that the meaning of the con is frozen in time by the framer’s original intent
    - Principle allows the meaning of con’al language to evolve over time
      * Living tree – most powerful and enduring metaphor in modern Canadian con’al jurisprudence
      * Edwards Persons case\*\*
        + “Con Act planted in Canada a living tree capable of growth and expansion within its natural limits”

Need to balance original political intent and court-based adaptation

* + - * Living tree cited when concluding the word marriage in s91(26) should now encompass same-sex marriage

### The Doctrine of Pith and Substance (Characterization)

* Any challenge to the distribution of powers begins with an examination of the validity of the contested laws or legislative problems
  + A law is valid when it falls within the powers (intra vires) of the legislative body that enacted it
    - Turns on whether it qualifies under the powers conferred respectively on the fed Parl and the prov legislatures
* Seeking the pith and substance of contested legislation involves examination of true nature (essential character) – “characterization”
  + Courts are guided by the object of the law and the effects it produces (objective targeted by legislative measure and its practical or legal consequences)
  + What it targets directly, not what it could affect incidentally – secondary effects do not influence its validity
* Characterization Test
  + Purpose
    - Colourability: the courts don’t just take the stated purpose for the govt’s word
  + Effects
    - Legal and practical

#### R v Mortgentaler

Ratio: P&S is outside the provincial competencies because of its criminal nature

Facts: Act and regulation make it an offence to perform an abortion outside a hospital. Respondent performed 14 abortions and charged with 14 counts of violating the Medical Services act. Trial judge and NS court of appeal held this was ultra vires NS.

Medical Services Act

* + Purpose to prohibit the privatization of certain medical services to maintain a single health care delivery system
  + No person shall perform or assist in the performance of a designated medical service other than in an approved hospital (Hospital Act)
  + Every person who contravenes this act is guilty of an offence and liable upon summary conviction for 10,000-50,000

Result: Appeal dismissed

Reason: Pith and Substance Test:

* + 1. Intrinsically (Sound) + Extrinsically
    - Extrinsic Evidence: Hansard (debate transcripts); timing of when act was brought up; looks like attempt to replace s 251 of CC; focus not preservation of single-tier system
  + 2. Effects:
    - Legal effects: Opposes heavy fines on people who open up abortion clinics
    - Practical effects: reduces access to abortion procedures in the province
  + Conclusion: in P&S: law dominant purpose is **criminal**, to **prohibit certain activity on grounds of public morality**

Issue: Whether the acts in question are *ultra vires* (invalid) the province of NS on the ground that they are in pith and substance criminal law – prov legislation over hospitals/health/medical profession/practice of medicine controlling the quality of health care system or criminal law (federal) punishing acts they want to prohibit as they are socially undesirable

Notes:

### The Double Aspect Doctrine

* Allows for the *concurrent application* of both federal and prov legislation but it does not create *concurrent jurisdiction* over a matter
  + Ex. nude dancing; fed = criminal, prov = reg of entertainment in association with liquor permits
* Once a law’s pith and substance is determined – comes or does not under the jurisdiction of the level of government that passed it
* Unbridled application of the doctrine would undermine the principle exclusiveness that forms the foundation of the distribution powers in Canada\*\*
  + SC claim for application whenever the contrast between the relative importance of the federal and prov characteristics of a particular subject matter is not sharp
    - Targets legislative rules responding to different normative standpoints and whose pith and substance can be seen as coming under the legislative jurisdiction of either level of govt

### Incidental Effects Doctrine

* Complex nature of society necessarily involves overlap of exercise of leg powers btw diff levels of govt in a federation
  + Why courts have recognized that the fed and prov legislatures can **incidentally affect** the powers of the other when legislating in their own areas of jurisdiction
    - P&S matter within the enacting legislatures jurisdiction – courts not take into account the incidental effects
* Incidental effects show overlap but do not disrupt – they do not change the P&S of the law
* *Morgentaler* showed the incidental effects on healthcare but the true purpose is criminal

#### Hodge v R

Facts:

Issue: Is a comprehensive licensing regime enacted by the ON leg to reg retail trade in liquor valid?

Notes: Double aspect doctrine applied served limited purpose – simply eliminated from the viable bases on which the validity of the prov leg at issue could be challenged on a DoP grounds the argument that, because fed leg directed at liq trade had been upheld as valid, that area was completely off limits in prov leg.

Would progress to show that not only is it possible in some circumstances for both levels of govt to legislate in the same area, it is also inevitable and sometimes a good thing

Important caveat; in spite of judiciary’s growing favour for the doctrine over time – there are a few areas in which it has never been applied 🡪 courts have decided that the exclusivity of leg’ve jurisd as btw parliament and prov leg as provided by the terms of ss 91 & 92 should be preserved

#### Multiple Access Ltd v McCutcheon

Ratio:

Facts: ON Securities Act 1970 prohibited insider trading in shares trading on the TO stock exchange. Canada Corporations Act (1970) had almost identical provisions, applicable to corporations incorporated under fed law. MA shareholders alleged that insiders took opportunity to buy shares in the company, relying on knowledge of upcoming license grant. Shareholders initiated proceedings under OSAct. D’s argued that the ON stat could not be validly applied to their case because the reg of trading in shares of federally incorporated companies falls within exclusive fed jurisd – relied on doctrine of paramountcy and the case should be taken up on CCAct (advantageous bc limitation period for initiating an action under the federal stat had already elapsed.

Result: Relevant provisions of both acts were valid and that both applied to trading in ON in the shares of a fed incorporated company.

Reason: A number of provs are without insider trading leg and striking down the fed leg would leave fed companies without the double protection – declaration of invalidity of fed act “would create a potential gap in the present reg schemes that might be exploited by the unprincipled.” The CCAct’s P&S is company law where “Parliament is in the discharge of its company law power”. Because of the language in ss 91 & 92 and of the various heads which they contain obviously cannot be constructed as having been intended to embody the exact disjunctions of a perfect logical scheme – con’al difficulty arises when a statute may be characterized as coming within a fed as well as prov head of power. **The impugned provisions have both securities and companies law aspect**. Dickson cites Prof Lederman *Classification of Laws and the British NAAct* where the double aspect doctrine is applicable when the contrast btw relative importance of the two features is not sharp 🡪 corporate-security fed and prov characteristics of the insider trading leg are roughly equal in importance. Holds that neither paramountcy or immunity doctrine applied to the prov provisions.

Issue: The validity of both provisions in of each act.

Notes:

### The Ancillary Powers Doctrine

* An otherwise invalid provision becomes valid because of its relation with a valid leg scheme
* Distinct from laws that contain provisions that substantially affect matters under jurisdiction of the other
  + Typical ex; provision whose P&S exceeds the jurisdiction level of govt that passed it but whose constitutionality is preserved because of the link btw the provision and the valid legislative whole of which it forms a part
    - Gives rise to the **ancillary powers doctrine**
      * Applied primarily for the benefit of fed parliament
      * *Criterion of necessity*; fed govt req’d to demonstrate that Parliament’s legislative intervention in a given matter under prov jurisd was necessary/indispensable to the effective exercise of one of its own powers
      * More flexible test\*\* *encroachment/fundamental connection test*; depends on context of case and degree of encroachment
        + Req’d degree of integration increases in proportion to seriousness of encroachment

Where leg encroaches only slightly – rational and functional connection is req’d

As deg of intrusion grows – req’d deg of integration tends toward a test of necessity

* + - * + Preferred by SC

Tends to broaden the domain of fed powers to an inordinate deg

* BIG PICTURE: deg of intrusion and fxnal connection
  + If marginal then functionally related
    - Cant just supplement has to actively further
  + If highly then stricter
    - Necessarily incidental

#### GM of Canada Ltd v City National Leasing

Ratio: The relationship between the section and the act meets the fundamental connection test so the section should be upheld

Facts: CNL brought civil action suit alleging that it suffered losses as a result of discriminatory pricing policy that constituted a kind of anti-competitive behaviour prohibited by the Combines Investigation Act. GM argued that s 33.1 was beyond the jurisd of parliament because of the creation of civil causes of action falls within prov jurisd in relation to property and civil rights.

Result: Appeal dismissed c

Reason: **First step**; concluded that the act prima facie intrudes prov powers to some extent.

**Second step**; only a remedial provision and typically less intrusive of prov powers, fed encroachment in this manner is not unprecedented and is limited by the restrictions of the act.

**Third step**; The act itself is validly enacted by parliament pursuant to its authority over laws in relation to trade and commerce.

**Final step**; overlap of legislation is expected and should be accommodated in a federal state therefore the courts should exercise restraining in proposing strict tests which will result in striking down such legislation. Mere inclusion in a valid legislature does not ipso facto confer con’al validity upon a particular provision – provision must be sufficiently related to that scheme for it to be con’ally jstfd. Strict test not appropriate but should also not be just tacked on.

**Test:** ask whether the provision is “**functionally related**” to the general objective of the legislation and to the structure and the content of the scheme.

* + - Necessary link between s 31.1 and the act exists
      * Integral, well conceived component of the economic regulation strategy found in the act
    - Even with a “necessarily incidental” test it would still pass

Issue: **First step**; consider whether and to what extent the impugned provision can be characterized as intruding into provincial powers (is its P&S federal? Need not go further if so as the legislation is “constitutionally unimpeachable”). **Second step**; to what extent? **Third step**; ascertain the existence of valid legislation. **Final step**; whether the provision can be con’ally justified by reason of its connection with valid legislation – answering this q req’s deciding what test of fit is appropriate for such a determination (how well the provision is integrated into the scheme of the legislation and how important it is for the efficacy of the legislation)

Notes: Notable decision CIAct now Competition Act is a valid exercise of the federal power over the “general regulation of trade” – also notable for setting out general approach to the necessarily incidental doctrine; when the con’al challenge is focused on a single provision or a larger legislative scheme, how is the con’al validity of the challenged provision tbd?

### Quebec (AG) v Lacombe

Ratio: No 260 is not rationally and fxnally connected to leg scheme of 210 or general purpose of zoning legislation and is therefore constitutionally invalid

Facts: Bylaw no 260 added by way of amendment to the municipality’s general zoning bylaw enacted after a vigorous lobbying campaign by the owners of summer homes and other users of a recreational lake who objected the operation of a private aerodrome a company that provided float plane sightseeing. The bylaw explicitly prohibited the construction and use of aerodromes within a particular municipality which included the lake.

Result: Held that the bylaw amounted to an unconstitutional trenching on federal jurisd over aeronautics.

Reason: **Under the rational function test affirmed multiple times in jurisp, ancillary powers will only save a provision that is rationally and functionally connected to the purpose of the legislative scheme that it purportedly furthers** (not enough to supplement, must actively further it). No 260 is not rationally and fxnally connected to leg scheme of 210 – 260 does not further the objectives of zoning law generally or 210 in particular. Lack of correlation btw the nature of the area affected and the ban on aerodromes evidences lack of rational connection. It does not fxn as zoning legislation but rather is stand alone prohibition. **There is no evidence that 260 is an integrated feature of the zoning scheme, viewed as a whole.**

Issue: Whether the impugned bylaw can be upheld because of its relationship with the general zoning bylaw (ancillary powers doctrine) – whether the amendments brought by the bylaw, which in P&S lie outside the prov power, are nevertheless valid because they are ancillary… specifically is bylaw 260 rationally and functionally connected to bylaw no 210, such that it should be sustained as a fxnal part of the whole.

Notes: Deschamps dissent; basis that a municipality has the power under s 92(13) to regulate land use in best interests of its residents, even when such reg is directed at the establishment of private aerodromes – relied on the double aspect doctrine. Lebel dissent; agreed in holding, by aligned with majority because the fact that the owner of the sightseeing business had been given permit under fed Aeronautics Act 0 meant that the doctrine of the federal paramountcy applied the municipality’s bylaw had to be held inoperative.

## Applicability

### The Principle of Subsidiarity

* Defn subsidiarity (by court); proposition that law-making and implementation are often best achieved at a level of govt that is not only effective but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness and to population diversity
* Principle aims to ensure that smaller entities in a federation have all the rights and powers the need to reg their own affairs freely and effectively while limiting the responsibilities of the larger entities to matters that the smaller entities cannot address alone
* NOT a part of the formal con’al structure
  + Split favour in the court – *Reference Re Assisted Human Reproduction*
    - Underlying principle that supports preservation of the prov sphere of autonomy in field of assisted human reproduction (fed provisions invalid) **VS.** subsidiarity does not override the division of powers in the Con and cannot prevent a level of govt from legislating in areas of competence \*\*subject to federal paramountcy
* The role of this principle is not yet clear

### The Interjurisdictional Immunity Doctrine

* Exclusivity has textual basis in the constitution
* There are cores of enumerated powers that are exclusive to each power of govt
* Result of liberal invocation of ^ doctrines = a DoP jurisprudence aimed at max’ing the democratic space open to the federal parliament and the prov leg when exercising the powers to pass laws within their respective spheres of jurisd
* Fxn to limit the application and operation of prov leg respectively (and paramountcy doctrine)
* Holds that prov laws that are (in P&S) in relation to matters within exclusive prov jurisd (valid) must be restricted in their app to the extent necessary to prvent them from impairing matters at the core of federal heads of power
  + Invoking the doctrine results in general terms of a prov stat are “read down” so as not to impair the matters at the core of fed jurisd
    - Prov law otherwise remains valid and app
* Origins in rulings that limited the app of valid prov laws to prevent them from impairing the status or essential operations of federally incorporated companies.
* Rooted in idea of exclusive jurisd – ss 91 & 92 confer exclusive leg powers on the fed parliament and prov leg
  + Doctrine premised on a strong interpretation of the meaning of exclusivity – one that renders the subject matter falling within the exclusive jurisdiction of one level of govt immune from impairment by valid laws passed by the other
* ***Bell Canada* watermarked doctrine**
  + ss 91 &92 req each head of power be assured “**basic, minimum and unassailable content**” immune from app of leg enacted by the other level of govt – J Beetz
    - Observed that **labour relations is** “**an integral and vital part of Parliament’s primary legislative authority over fed undertakings**. If the power is exclusive, it is because the Constitution, which could have been different but its not, expressly specifies this to be the case; and it is because this power is exclusive that it pre-empts that of the leg both as to their legislation of gen and specific app, in so gar as such laws affect a vital part of a fed undertaking.”
      * By upholding immunity of fed-reg business from the application of a valid Quebec law on occupational health and safety
* Doctrine is directed to ensuring that the two levels of govt are able to operate without interference in their core areas of exclusive jurisd
  + Should be reciprocal, applying equally to protect core elements of fed and prov powers from impairment
* \*\*Court has resisted attempts to invoke the doctrine
  + Only been app’d to fed heads of power – unprincipled result is a jurisp that treats fed heads of power as “more exclusive” than prov
* Understanding of exclusivity as requiring immunity from even incidental encroachment is more consistent with the “watertight compartments” conception of federalism than it does with the modern, flex federalism now favoured by courts.
  + Recognized in *Canadian Western Bank*
    - J’s Binnie and LeBel put forward remarkably thorough critique of the doctrine
      * Immunity doctrine is unpredictable in operation, at odds with the flexible federalism promoted by the P&S/double aspect doctrines, risks legal vacuums, creates a centralizing tendency in con interpretation and is unnecessary because the paramountcy doctrine can be used to protect the primacy of fed leg
      * Should be applied with restraint – reserved for situations already covered by precedent

### Canadian Western Bank v Alberta

Ratio:

Facts: Fed Bank Act allowed the bank to promote insurance, AB has insurance policy. Bank says that banking is federal and promoting this insurance is at the core of banking – if that’s true then the prov cannot tell us what to do because its at the core are federal territory and should be immune

Result: Court declined to apply the doctrine of interjurisdictional immunity

Reason: App of the prov leg at issue was held not to encroach on a core area of fed leg jurisd – promoting ‘peace of mind’ insurance was held not to fall within the core of parliaments jurisd and therefore the fed law is not immune

Issue:

Notes: Court’s analysis of the doctrine of interjurisd immunity

* Interjurisdictional immunity is a doctrine of limited application, but its existence is supported both textually and by the principles of federalism.
* Leading formulation of the doctrine is *Bell Canada*
  + Classes of subject in ss 91 & 92 must be assured “**basic, minimum and unassailable content**” immune from the application of leg enacted by the other level of govt
    - Immunity of such intrusion in the context of federal undertaking
      * “an integral and vital part of Parliament’s primary legislative authority over fed undertakings. If the power is exclusive, it is because the Constitution, which could have been different but its not, expressly specifies this to be the case; and it is because this power is exclusive that it pre-empts that of the leg both as to their legislation of gen and specific app, in so far as such laws affect a vital part of a fed undertaking”
  + Notion of exclusivity gave rise to Atkins famous watertight compartment metaphor
* In theory the doctrine is reciprocal, however jurisprudential app of the doctrine has produce asymmetrical results
  + Favours federal immunity at the expense of prov leg
* Broad app of this doctrine inconsistent with flexible federalism doctrines of P&S, double aspect and paramountcy which have proved to be the most consistent with contemporary views of Canadian federalism
* Immunity also means that despite the absence of law enacted at one level of govt, the laws enacted by the other level cannot have even incidental effects on the “core” of jurisd. This increases the risk of creating ‘legal vacuums’
  + Also runs the risk of creating unintentional centralizing tendency in con’al interpretation (asymmetrical app)
    - Undesirable and unnecessary
    - Undermining principles of subsidiarity – that decisions are best made at a level of govt that is not only effective, but also closes to the citizens affected
* Even when doctrine is properly avail, must consider the level of intrusion on the “core” of the power of the other level of govt which would trigger its application
  + *Bell Canada* Beetz “in order for the inapplicability of prov leg rule to be given effect, it is sufficient that the prov statute which purports to apply the fed undertaking affects a *vital or essential part of that undertaking, without necessarily going as far as impairing or paralyzing it*.”
  + Law as it stood prior to Bell better reflected fed scheme
    - Not enough for the prov leg simply to “affect” that which makes a federal subject or object of rights specifically of fed jurisd
      * Difference btw “affects” and “impairs”
        + Impairs = core competence of the other level of govt (vital/essential part) is placed in jeopardy
* “Basic, minimum and unassailable content” = core of the leg power in question
  + Min = min content necessary to make the power effective for the purpose for which it was conferred
* Too wise a scope of what are essential and vital elements of a fed undertaking
  + Vital and essential; words not randomly chosen
  + What is vital and essential, is not (by defn) co-extensive with every element of an undertaking incorporated fed or subject to red reg
    - Promotion of peace of mind insurance can hardly be considered “absolutely indispensable or necessary” to banking activities
* \*\*Prior to this case, it was understood that the doctrine of interjurisdictional immunity should always be applied first
  + “If a case can be resolved by the app of a P&S analysis, and fed paramountcy where necessary, it would be preferable to take that approach”
* **When IJI applies**

1. Head of powers deal with things, persons or undertakings
   1. Less likely to apply to activities or amorphous areas of jurisd
2. In the past, its application has been considered necessary to enable parliament or prov leg to achieve purpose for which jurisd was conferred (precedent)
   1. Examples
      1. Fed corporations immune from prov laws on raising corporate capital
      2. Telecommunication undertakings immune from prov laws on siting tele poles
      3. Federal election signs
      4. Prov law prohibiting to children does apply to advertising
      5. Prov mark up liquor bought by airlines is okay – not a core of aeronautics

### Quebec (AG) v Canadian Owners and Pilots Association

Ratio: The doctrine of IJI is applicable in this case. The location of aerodromes lies at the core of the federal competence

over aeronautics. S 26 of the Act impinges on this core in a way that impairs this federal power.

Facts: Two Quebec residents constructed an airstrip on a lot they owned in QC. Under the *Aeronautics Act*, the construction and operation of an airfield for private purposes is not subject to a requirement of prior permission. The two men registered their airstrip. The land that their airstrip was on was within an area designated as an agricultural region under a provincial Act and s 26 of the act prohibits use of the land for anything other than agricultural purposes unless permission was granted. The men did not get permission but argue that the Act is *ultra vires* or at least inapplicable where it affects aerodromes (by virtue of IJI).

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

Reason: s 26 is a valid prov leg under ss 92(13), (16) and s 95. Prov law survives under P&S. Still a limited/narrow application of IJI. The test is whether the subject comes within the essential jurisdiction (“basic, minimum and unassailable content”) of the legislative power in question. The core of the federal power is the authority that is absolutely necessary to enable Parliament to achieve the purpose for which exclusive legislative jurisdiction was conferred.

**First step**; The operation and regulation of aerodromes was core to the federal power over aeronautics.

**Second step**; The impugned provision impaired the federal exercise of that power.

Overall; If s 26 applied, it would force the federal Parliament to choose between accepting that the province can forbid the placement of aerodromes on the one hand, or specifically legislating to override the provincial law on the other. This would seriously impair the federal power over aviation.

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

**First step**; determine whether s 26 trenches on the protected “core” of a federal competence

**Second step**; determine whether the provincial law’s effect on the exercise of the protected federal power is

*sufficiently serious* to invoke the doctrine of IJI.

Notes: Core = necessary to achieve purpose for which exclusive leg jurisd is conferred

### Canada (AG) v PHS

Ratio:

Facts: Since 2003, the Insite safe injection facility has provided medical services to intravenous drug users in the Downtown Eastside of Vancouver (“DTES”). In 2008, the federal government failed to extend Insite’s exemption from the operation of criminal laws in the *Controlled Drugs and Substances Act*,S.C. 1996, c. 19 (“*CDSA*”). Faced with the threat that Insite would have to stop offering services, the claimants brought an action for declarations that the *CDSA* is inapplicable to Insite and that its application to Insite resulted in a violation of the claimants’ s. 7 rights under the *Canadian Charter of Rights and Freedoms*.

Result: CDSA is applicable to Insite

Reason: **(1/2)** Argued (Que) that prohibiting these drugs in a medical context is *ultra vires* the federal government – no; In pith and substance, the impugned provisions of the *CDSA* are valid exercises of the federal criminal law power - The fact that the law at issue in this case has the incidental effect of regulating provincial health institutions does not mean that it is constitutionally invalid. *Canadian Western Bank* evidences that a valid federal law may have incidental impacts on provincial matters. The protection of public health and safety from the effects of addictive drugs is a valid criminal law purpose.

**(3) IJI**

* This argument offers that decisions about what treatment may be offered in provincial health facilities lie at the core of the provincial jurisdiction in the area of health care, and are therefore protected from federal intrusions by the doctrine of interjurisdictional immunity
* Recent jurisprudence has tended to confine the doctrine of interjurisdictional immunity. In *Canadian Western Bank*, the majority stated that “although the doctrine of interjurisdictional immunity has a proper part to play in appropriate circumstances, we intend now to make it clear that the Court does not favour an intensive reliance on the doctrine, nor should we accept the invitation of the appellants to turn it into a doctrine of first recourse in a division of powers dispute”
  + 3 concerns
    - IJI is in tension with a model of federalism recognizes that in practice there is significant overlap between the federal and provincial areas of jurisdiction, and provides that both governments should be permitted to legislate for their own valid purposes in these areas of overlap
    - IJI is in tension with the emergent practice of cooperative federalism
    - IJI may overshoot the federal or provincial power in which it is grounded and create legislative “no go” zones where neither level of government regulates
* **The question in this case is whether the delivery of health care services constitutes a protected core of the provincial power over health care in s. 92(7), (13) and (16) - NO**
  + **Proposed core of prov power over health care has never been recognized in the jurisp**
    - Courts are reluctant to identify new areas where IJI applies
  + Failed to identify a delineated core of an exclusively prov power
    - Health care is too broad
    - Overlapping federal jurisdiction and the sheer size and diversity of provincial health power render daunting the task of drawing a bright line around a protected provincial core of health where federal legislation may not tread
  + App of IJI has potential to create legal vacuums (*Canadian Western Bank*)
    - Excluding the federal criminal law power from a protected provincial core power would mean that Parliament could noan t legislate on controversial medical procedures, such as human cloning or euthanasia. The provinces might choose not to legislate in these areas, and indeed might not have the power to do so. The result might be a legislative vacuum, inimical to the very concept of the division of powers.

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

\*\* argued that **(1)** the doctrine of interjurisdictional immunity should apply to shield provincial decisions about medical treatments from interference by the federal government(AG BC and PHS) **(2)** and that impugned CDSA provisions are ultra vires because the fed crim law power cannot interfere with reg of prov health facilities (AG Que); **(3)** CDSA should be read as avoiding interfering with the province’s jurisd over health policy (AG BC)

Notes:

## Operability

### The Paramountcy Doctrine

* P&S, double aspect and ancillary powers doctrines uphold laws even though they may have significant impacts on matters within the other level of govt’s jurisd
  + Result = creation of large areas of de facto concurrency
    - In these areas, the fed state needs a rule to deal with conflicts btw validity enacted laws that apply to the same factual situations
* Con is silent on what rule should be used for resolving a conflict in areas of de facto concurrency
* Courts adopted federal paramountcy
  + When a valid fed law and a valid prov law apply to the same facts, and the req of the two laws conflict, the fed law is paramount
    - Prov law is rendered inoperative
* The modern fed paradigm – when coupled with paramountcy – results in an obvious threat to the autonomy of provs
  + Concern is reflected in the large body of case law grappling with the Q of how to define what counts as conflict and therefore giving rise to paramountcy
  + Court has sought to define conflict narrowly\*\*
    - In *Multiple Access* Justice Dickson
      * Held that “in principle there would seem to me no good reason to speak of paramountcy and reclusion except where there is actual conflict in operation where one enactment says yes and the other says no… compliance with one is defiance of the other”
    - **Impossibility of dual compliance test**
      * Narrowest test compatible with the rule of law
        + Justified on grounds that the resulting “untidiness” and “diseconomy” that results from overlapping fed and prov laws “has to be subordinated to prov autonomy”
      * Limits the threat imposed by fed paramountcy to the operation of valid prov statutes
    - **Frustration of federal leg purpose by prov law**
      * Poses more serious threat to prov autonomy
      * Makes difficult to predict when the paramountcy doctrine will be invoked
      * SCC has stated that paramountcy should be applied with restraint
        + Party alleging the existence of a conflict has a high burden of proof
        + The principle of cooperative federalism req that “the purpose of federal leg should not be artificially broadened beyond its intended scope”
        + Essential component of SCC’s commitment to a modern vision of federalism

Without it the principles of modern federalism may produce a hierarchical relationship btw dominant parliament and subordinate prov leg

#### Ross v Registrar of Motor Vehicles

Ratio:

Facts: Ross was criminally convicted of driving impaired – judge also restricted Ross’ driving hours to particular time limits for 6mo and that his license should not be suspended. ON nonetheless suspended his license in accordance with s 21 of ON Highway Traffic Act. Ross instituted action claiming a declaration that s 21 was inoperative because of its conflict with s 238 of the CCC.

Result: Appeal dismissed

Reason: **(1/2)** both laws are valid. Prov leg deals with licensing for the purpose of reg highway traffic was not encroaching on criminal offences and no basis for claim that fed leg invaded prov jurisd either.

**(3)** Reference made to s 5(1) of CCC

“When an enactment creates an offence and authorizes a punishment to be imposed in respect thereof,

(b) a person who is convicted of that offence is not liable to any punishment in respect thereof other than the punishment prescribed by this Act or by the enactment that creates the offence”

Taken that the civil consequences of a criminal act are not to be considered punishment so as to bring the matter within the exclusive jurisd of the parliament. Both are valid and prov legislation remains operable.

Ross can easily comply with both – just obey the stricter law – there is no conflict here – judgement does not give him an affirmative right nor show a fed intent to oust prov power to restrict licensing (reject the idea that fed intent was to cover the field).

Issue: **(1)** prov leg s 21 of Highway Traffic act valid?

**(2)** fed lef s 238(1) of CCC valid?

**(3)** if both are valid, was there a conflict btw both provisions req the app of federal paramountcy

Notes: Judson in part dissent; the CCC as applied and s21 as applied are in direct conflict and the fed leg must prevail – the power of the prov to impose an automatic suspension must give way to an order for punishment validly made under the CCC and to that extent the prov suspension is inoperative

Spense in part dissent; concur with Judson

Narrower approach to paramountcy that emerged in the highway traffic cases were confirmed by the SCC in Multiple Access

#### Multiple Access Ltd v McCutcheon

Ratio: Mere duplication without actual conflict or contradiction is not sufficient to invoke the doctrine of paramountcy and render otherwise valid prov leg inoperative.

Facts: ON Securities Act 1970 prohibited insider trading in shares trading on the TO stock exchange. Canada Corporations Act (1970) had almost identical provisions, applicable to corporations incorporated under fed law. MA shareholders alleged that insiders took opportunity to buy shares in the company, relying on knowledge of upcoming license grant. Shareholders initiated proceedings under OSAct. D’s argued that the ON stat could not be validly applied to their case because the reg of trading in shares of federally incorporated companies falls within exclusive fed jurisd – relied on doctrine of paramountcy and the case should be taken up on CCAct (advantageous bc limitation period for initiating an action under the federal stat had already elapsed.

Result: Relevant provisions of both acts were valid and that both applied to trading in ON in the shares of a fed incorporated company.

Reason: There is no true repugnancy in the case of merely duplicative provisions since it does not matter which statue is applied; the leg purpose of Parliament will be fulfilled regardless of which statute is invoked by a remedy-seeker; app of prov law does not displace the leg purpose of the parliament. “**There would seem to me no good reason to speak of paramountcy and reclusion except where there is actual conflict in operation where one enactment says yes and the other says no… compliance with one is defiance of the other**”. The resulting ‘untidiness’ or ‘diseconomy’ of duplication is the price we pay for a fed system in which economy often has to be subordinated to prov autonomy. Mere duplication without actual conflict or contradiction is not sufficient to invoke the doctrine of paramountcy and render otherwise valid prov leg inoperative.

Issue: Does the mere duplication constitute conflict req by the paramountcy doctrine in order to render a prov statutory provision inoperative?

#### Bank of Montreal v Hall

Ratio: There is an actual conflict in operation between the two valid and applicable statutes, dual compliance is not possible therefore it is appropriate to apply the doctrine of paramountcy and hold the prov leg inoperable.

Facts: Hill contracted loans from a bank and in return granted the bank a security interest on a piece farm machinery pursuant to what was then s178 of the fed Bank Act. Hall defaulted on his loan and the bank (pursuant of the act) seized the piece of machinery and brought an action to enforce its real prop mortgage loan agreement. Bank did not act in accordance with the Limitation of Civil Rights Act (failure to give requisite notice of intention to seize resulted in the termination of the security interest and the release of the debtor from further obligations). Asked QB of Saskatchewan whether the bank was req to comply with the Limitation act when enforcing a security interest under the Bank act, determined no then reversed by the court of appeal.

Result: Appeal allowed – does not have to comply with Limitation (inoperative) because fed Bank Act is paramount

Reason: Court finds both legislations intra vires of their respective jurisd. ss 21-35 of Limitation ensures that a judge determine the terms and conditions under which a creditor may repossess and seize articles. Contrasted by ss 178 and 179 of Bank assigns bank an immediate right to seize subject to only the conditions set out in the Bank. On comparison it can be seen that there is an “actual conflict in operation”. Clear instance where compliance with the fed statute necessarily entails defiance of its prov counterpart. Dual compliance is impossible **when application of the prov statute can fairly be said to frustrate Parliaments leg purpose.**

Issue: Con’al validity of the relevant provisions of both the fed and prov acts – whether the security interest created under the bank act could be subjected to the procedures for enforcement of security interests prescribed in the prov leg.

“Do ss 178 and 179 of the Bank Act conflict with ss 19-36 of the Limitation of Civil Rights Act so as to render inoperative ss 19-36 in respect to security taken pursuant to s 178 by a chartered bank?”

Using reasoning in Multiple Access can reduce the question to

“Whether there is an ‘actual conflict in operation’ btw the Bank Act and the Limitation of Civil rights Act in the sense that the legislative purpose of Parliament stands to be displaced in the event that the appellant bank is req to defer to the prov leg in order to realize its security”

Notes: (6) This “incompatibility of leg purposes” approach to paramountcy was applied in

#### Law Society of BC v Mangat

* Case involved conflict between a provision of the BC Legal Professional Act that prohibited non-lawyers from appearing as counsel for a fee and provisions of the fed Immigration Act that permitted non-lawyers to appear as counsel before the immigration and refugee board. Court found that both laws were valid (the reg of legal representation in immigration proceedings had a double aspect).
* Court concluded that where there is an enabling fed law, the prov law cannot be contrary to Parliament’s purpose
* **Prov law frustrates fed purpose of creating “informal, accessible (in financial, cultural and linguistic terms), and expeditious process”**
  + You can obviously comply with both – but the frustration of the fed purpose is independent ground

#### Rothmans, Benson & Hedges Inc v Saskatchewan

Ratio: There is no inconsistency (dual compliance is possible and s 6 does not frustrate the leg purpose of the Tobacco Act) btw s 6 of the Tobacco Control Act and s 30 of the Tobacco Act that would render the former inoperative pursuant to the doctrine of fed paramountcy – **both laws have the same purpose**

Facts: s 30(1) of Tobacco provides that “subject to regulations, any person may display, at retail, a tobacco product or an accessory that displays a tobacco product/accessory that displays a tobacco product related brand element” and s 30(2) further provides that retailers may post signs indicating the availability and price of tobacco products. s 6 of the Control in Sask bans all advertising, display and promotion of tobacco or tobacco related products in any premises in which persons under 18y of age are permitted. RBH sued Sask seeking two forms of relief:

* + 1. S 6 of Control is inoperative in light of s 30
    2. ss 6 & 7 of Control are of no force and effect in light of s2(b) of the Charter

Result: Not sufficiently inconsistent and allowed the appeal

Reason: Overarching principle of the jurisp that a provincial enactment must not frustrate the purpose of a fed enactment, whether by making it impossible to comply with the latter or by some other means. In this way, **impossibility of dual compliance is sufficient but not the only test for inconsistency**.

An interpretation of s 30 as granting retailers an entitlement to display tobacco products in unsupported by, and perhaps even contrary to, the stated purposes of the Tobacco Act in its criminal nature under fed jurisd.

It is plain that dual compliance is possible in this case – Control simply prohibits what parliament has opted not to prohibit in its own legislation and regulations. Furthermore, the Control appears to further at least two of the stated purposes of the Tobacco Act; to protect young persons and others from inducements to use tobacco products and to protect the health of young persons by restricting access to tobacco products. The two statutes were enacted for the same health related purposes and there is no inconsistency.

Also important to notice that the court finds it compelling that the AG says they find the prov law should operate still.

**The fed law in P&S is criminal – the court is not likely to construe that it creates a free standing, affirmative right to do what is not prohibited by the statute**.

Issue: Whether Saskatchewan legislation, in particular s6 of the Tobacco Control Act is sufficiently inconsistent with s 30 on the fed Tobacco Act, so as to be rendered inoperative pursuant to the doctrine of fed paramountcy.

Notes:

#### Alberta (AG) v Moloney

Ratio:

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

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

Reason: Situations in which overlap will not lead to a conflict: duplicative federal and provincial provisions will generally not conflict, nor will a conflict arise where a provincial law is more restrictive than a federal law. The application of a more restrictive provincial law may however frustrate the federal purpose if the federal law, instead of being merely permissive, provides for a positive entitlement. Doctrine of paramountcy is applied with restraint; presumed that Parliament intends for its laws to co-exist with provincial laws. Conflict must be defined narrowly so that each level of government may act as freely as possible within its respective sphere of authority. The focus of the paramountcy analysis is on the effect of the provincial law, rather than its purpose. Look at the substance of the law rather than the form. In this case, we cannot disregard the fact that whether the debtor pays or not, the province, as a creditor, is still compelling payment of a provable claim that has been released, which is in direct contradiction with the *BIA.* The laws at issue give inconsistent answers to the question whether there is an enforceable obligation: **one says yes and the other says no**. Both laws cannot operate concurrently. **The *BIA* is a complete code that sets out which debts are released on discharge and which debts survive bankruptcy**. The provincial law is allowing something that the federal law prohibits.

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

Notes: Dissent; the **appeal should have been decided on the basis of the frustration of a federal purpose**, an issue in respect of which the applicable standard is higher and that requires an in-depth analysis of Parliaments intent. Therefore, the party must first establish the purpose of the relevant federal statute and then prove that the provincial law is incompatible with or frustrates this purpose

1. Duplicative laws don’t conflict (Multiple Access)
2. Impossibility of dual compliance (Multiple Access)
3. Even if possible to comply with both laws, frustration of fed purpose might provoke paramountcy (BMO)
4. No conflict when prov law is stricter than fed law unless fed purpose is frustrated (Rothmans; Magnat)
5. Fed submissions that prov law aligns with fed purpose are evidence – not determinative – that purposes align (Rothmans)
6. Criminal law rarely creates free standing rights (RBH)
7. High burden of proof on party alleging conflict; presumption that federal government intends provincial laws to operate (Moloney)
8. Operational conflict OR frustration of federal purpose   
   (Moloney)

# Heads of Power

## Peace, Order and Good Government (POGG)

### Scope of POGG Power

* Textual basis
  + Parliament is authorized to enact laws “**for the Peace, Order and Good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to Legislatures of the Provinces**”
    - Potentially a wide ambit
    - The provincial power of property and civil rights in the province s 92(13) attenuates this as property and civil rights is a very large exclusion
  + S 91 goes on to provide that the enumerated subjects in s 91 are merely illustrative of POGG power and should not “restrict the generality of POGG”
* However the privy council adopted a narrow interpretation of POGG power, construing it strictly as a residual power that came into operation only with respect to matters not falling within the enumerated subjects
  + Since matters within s 91 were automatically subtracted from the purely residual POGG power – POGG was rarely invoked as a basis for upholding fed laws
  + By the 20’s POGG had been reduced to essentially an emergency power avail only in cases of war/national crises
* SCC has broadened the scope of the POGG power
  + Now recognized that there are three distinct branches of POGG power (which can be relied on to support fed leg)
    - Emergency power
    - Gap/residual branch of POGG
      * Power to leg in relation to matters not included within any of the enumerated classes of subjects in ss 91 or 92
    - National concern branch
      * Power to leg in relation to distinct matters of inherent national concern
    - \*\**arguable 4th branch;* permits parliament to leg in relation to matters of inter-provincial concern or significance
      * Arguably implicit in decisions however not yet identified as a separate source of authority under POGG

### POGG as a Purely Residual Power

* Residual branch comes into play in relation to matters that fall outside the enumerated classes in s 92 and yet cannot be characterized into falling within any of the enumerated in s. 91
  + By defn they fall within the opening words of s 91
    - All the leg powers in s 92 are limited to matters within the province
      * Means that prov do not have any authority to directly regulate matters on lands or waters that fall within Canadian territory and yet are not within the boundaries of a particular prov
    - Then according to residual theory – leg dealing with these matters must be within parliament’s competence on the basis of POGG
* This was the precise analysis of the SCC in Reference Re Seabed and Subsoil of Continental Shelf Offshore Newfoundland
  + Whether the seabed off the coast of NFL fell within the prov
    - Determined that it was outside the prov, the court then disposed of the remaining issue in the case – noting that the leg jurisd fell within the parliaments POGG power “in its residual capacity”
* Similar analysis in Jones v NB (AG)
  + Court upheld the *Official Languages Act*
    - Dealt with the status of the English and the French languages in parliament and in exec institutions
      * The reg of the use and statues within fed institutions could not fall within prov jurisd, since the prov cannot regulate the manner in which parliament or the fed exec conducts its affairs
        + However, there was nothing in the enumerated subjects in s 91 that expressly conferred such leg’ve authority on parliament
      * Court therefore concluded that the power to enact leg est official languages within fed institutions must be allocated to parliament through the operation of POGG
* Residual branch may also be engaged in cases concerning matters addressed in an incomplete fashion in either the fed or prov enumerated powers

In general, the residuary branch has rarely been relied upon as the exclusive basis for upholding fed statutes

### The Emergency Branch

1. Explicit declaration of the emergency
2. Does the govt have a rational basis for concluding there is an emergency
3. Cautiousness in evaluating the means (Anti-Inflation) – defer to the wisdom of the legislature
   1. In practice this is sometimes reflected in determining the rational basis

* History (most prior to Charter introduction)
  + War Measures Act
    - Response to WWI
    - Could be invoked be declaration of the Cabinet
      * All they had to do was to was say that war was apprehended or real
    - Allowed Cabinet to make law in almost any subject (‘as it deems necessary or advisable’)
    - In WWI – 250 publications were banned, internment camps (enemy aliens of war), forced into work, marshal law introduced to supress riots of drafting
    - In WWII – more newspapers banned, rent controls, internment camps, even after the war of deportment of Japanese nationals and investigate anyone who was ethnically Japanese, took FN land anyways for temporary military base but continued to hold land until the 90s
    - October Crisis 1970
      * FLQ kidnapped a British diplomat and cabinet minister and demands made
      * Fed govt issued a statement of apprehended insurrection
    - Associated with egregious intrusions of human and civil rights
* Leading case on the scope of the emergency branch of POGG is the Reference Re Anti-Inflation Act
  + **BIG PICTURE:** Effectively held that in the context of an emergency, the DoP set out in ss 91 and 92 are effectively suspended for the duration of the emergency
    - Once the emergency branch of POGG comes into play, parliament can enact leg on any of the subjects enumerated in those sections, as long as it is reasonably necessary to deal with the circumstances of the emergency
  + Arose out of the decision by the federal govt to impose a comprehensive program of controls on wages, prices and profits
  + Program applied to the fed public sector, to prov govt employees where the prov had opted into the scheme and to large private sector firms

All of their activities were subject to the limits est by the leg

* + - * Reg of such intra-provincial activities or transactions had always been regarded by the courts as falling within exclusive prov jurisd – pursuant to the prop and civil rights power
  + Fed govt’s main con’al argument was that inflation was a problem of inherent national concern and the leg could be justified under the national dimensions branch of the POGG power
    - Majority of the court rejected this idea HOWEVER held that the leg could be supported on the basis of the emergency branch of the POGG power
  + **Laskin** CJ; assumption that the burden was on the parties challenging the leg to est that inflation did not constitute a national emergency. Indicated that, in order to overturn the leg, **it would be necessary to find that parliament did not have a “rational basis” for regarding inflation as a national emergency** and the court does not want to determine if there is an emergency – look to extrinsic evidence and judicial notice.
    - Judicial notice; things that to judges look obvious
    - Held that the fact that inflation had exceeded 10% in 74 and 75 supported the conclusion that parliament had a rational basis for deciding there was a national emergency. Also noted the leg was temporary – automatically ceased after 3 y unless extended by a Cabinet order approved by the Senate and the HoC. This limitation supported the validity of the act as an emergency measure.
    - Controversial because parliament did not appear to rely on the emergency power in enacting the leg
    - Laskin however pointed to the preamble to the act which stated “the containment and reduction of inflation has become a matter of *serious* national concern” and that “to accomplish such containment and reduction of inflation it is *necessary* to retrain profit margins, prices, dividends and compensation”
      * It was not necessary for parliament to use the word emergency.
      * Sufficiently indicative that parliament introducing a far-reaching program prompted by what in its view was a serious national concern
  + **Beetz dissent**; held that parliament could not rely on the emergency power unless it clearly declared the existence of an emergency
    - Argued that the effect of Laskin’s reasonings is to permit parliament to invoke emergency power at will
      * But these concerns are arguably overstated; court indicated that it would adopt a deferential attitude in assessing whether a national emergency exists
        + Such deference is appropriate given the limited ability of the court to determine the existence of an emergency situation req leg intervention

Also relevant that since then – there has been no instance in which parliaments finding of an emergency has been contested before the courts

Ratio:

Facts: The Anti-Inflation Act established a system of price, profit, and income controls – applied to private sector firms with more than 500 employees, members of designated professions, construction firms with more than 20 employees, and other private sector firms – also to public sector if agreement was made with province - “zap, you’re frozen” – Trudeau attempts to freeze prices and wages as an inflation measure

Result: The act is supported under POGG as an emergency leg

Reason: Laskin; The *Anti-Inflation Act* is supported by the AG of Canada under the opening words of the **preamble** of the *BNA Act* as being a law for POGG (“serious national concern” is mentioned in the preamble). Opt-in mechanism does not concede that it is not a real emergency and it actually allows for cooperative federalism (8/10 provinces opted in)

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

* The fact that there had been rising inflation at the time the federal action was taken, **that inflation is regarded as a monetary phenomenon and that monetary policy is within exclusive federal jurisdiction persuades the Court that Parliament was entitled to act as it did** (foothold/anchor in something already enumerated within the federal powers)

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

Notes: Beetz dissent; If we interpret POGG broadly, and characterize certain social phenomenon as unprecedented, it will upset provincial jurisdiction and constitutional order. The Anti-Inflation Act is ultra vires the Parliament of Canada. It directly interferes with matters within the exclusive jurisdiction of the Provinces, 92(13). This interference is not incidental or ancillary; it is interference on a large scale. Is inflation an issue of national concern? If parliament had power to control inflation, it is difficult to see what would be beyond the reach of Parliament. Inflation is an aggregate of many subject matters, some falling within provincial jurisdiction. It is so pervasive that its primary effects of the Act are related to property and civil rights. If we consider that Inflation should be parliament power, then everything else should be as well because inflation touches many fields (salaries, budgets, wages, rent controls, etc). Inflation is too general a concept and it would obliterate provincial powers, property and civil rights. Is the current legislation an emergency measure? The Act does not clearly use the language of express emergency. Provinces should not have choice to opt in or out. He warns that emergency should be kept separate so that courts cannot re-appropriate the decision to validate federal laws of “national concern” in the future.

#### Emergencies Act 1988

* Replaced the War Measures Act
* Defn a national emergency as urgent and critical situation of a temporary nature that
  + Seriously endangers the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority of a prov to deal with it, or
  + Seriously threatens the ability of the govt of Canada to preserve the sovereignty, security and territorial integrity of Canada
* Est four categories in which in each case (public welfare, public order, international and war), in order to exercise any powers provided for under the act, the **govt must first declare the existence of an emergency**
  + Made where the **govt believes “on reasonable grounds” that an emergency exists**
  + Procedure: the declaration must be laid before parliament for debate and confirmation. The declaration must also be preceded by prior consultation with the provinces concerned and, where the direct effects of the emergency are confined to a single prov, the prov cabinet must agree that it is unable to deal with the situation
    - Powers and time limits
* **Amounts to an acceptance of Beetz dissent in the Reference Re Anti Inflation Act**
* Defn of emergency in the Act would be relevant in future con’al litigation involving the use of the emergency branch
  + The defn’s in the act would serve as a check on the unbounded or indiscriminate reliance on the emergency branch of POGG (Relevant though not conclusive)

#### Clarity Act 2000

* Quebec Secession Reference – substantive ruling
  + Con’al amendment for the province to leave
  + In a circumstance where a clear majority of the province clearly states something – necessitates a good faith negotiation
* Pre-amble: any proposal relating to the breakup of a democratic state is a matter of the utmost gravity and is of fundamental importance
* HoC empowered to vote on whether a referendum question is “clear” and whether a “clear” majority had expressed itself after a referendum
* This is structured where it is permanent in nature – but structured to deal with discretely with a problem that will always be time limited (secession referendum)
  + Preventative and very tailored

### The National Concern Branch

**Steps of the Test**

1. Is this newly national?
2. Is this distinctive, singular and indivisible?
   1. Provincial inability
   2. Degree of the disruption of the DoP

* National concern = new concern that is singular, distinctive and indivisible – provincial inability to deal with the matter
  + Requires assessment of the assignment of this power is reconcilable with the fundamental DoP
  + **Beetz dissent** (*Anti-Inflation*); **distinction between the emergency power and national concern power is authoritative**
    - Emergency is a temporary suspension of DoP where national concern power is not
    - Can’t need to just accept what the subject matter of what the govt is claiming it is – need to look at the reality (operation, effects)
      * Inflation was reason but does not mean that that is the P&S of the legislation
    - National concern = a new matter is not an aggregate but has a degree of unity that makes it indivisible and distinct from provincial matters
      * Importance consistence that it retains the bounds of form (makes sense as a whole)
      * How much does this trench on provincial matters?
        + Because it is permanently adding to the list
      * Inflation is not new – and the framers of the con specifically meant to not give
        + Totally lacking in specificity – it is an aggregate of subjects
        + So pervasive and knows no bounds

Unbalance the federal system

* History starts with Russell v the Queen
  + Statute In issue was the Canada Temperance Act (fed) est a local-option temperance scheme
    - PC upheld the statute on the basis that it did not fall within any of the prov heads of leg power
  + Later explained for PC in *Local Prohibition* case as resting on the POGG power, and in the course of explanation enunciated for the first time a “national dimensions” of POGG
    - However this case is not easily reconciled with Russel
* Core = idea that some matters of legislation, in their origin local and prov, could acquire “national concern” and thereby come within the fed parliament’s POGG power
* Viscount Haldane’s view that POGG was only an emergency power persisted until after WWII
  + Its inconsistency with the national dimensions view of POGG was not directly until…

#### AG Ont v Canada Temperance Federation

* Frontal attack mounted against Russell
* Canada Temperance Act challenged a second time
* Either Russell was wrongly decided because it was not based on an emergency or if it was, the alleged emergency of drunkenness had now passed away
* PC Viscount Simon – refused to overrule Russell
  + The fact that it had stood for over 60 years show it “must be regarded as firmly embedded in the con’al law of Canada”
  + Also held that Russell had not been decided on the basis of emergency – POGG power was not confined to emergencies
* **Therefore, repudiated the line of cases that asserted that only an emergency could serve as the basis for an exercise of POGG power** 
  + Established that there was a national concern branch of POGG
* NEW TEST\*\*
  + If it is such that the leg goes beyond local or prov concern or interests and must from its inherent nature be the concern of the Dominion as a whole
    - Then it will fall within the competence of Parliament as a matter affecting the POGG of Canada (although it may in another aspect touch on matters specially reserved to the prov leg)

#### Johannesson v West St. Paul

* Court held that **aeronautics satisfied the national concern test**
  + Not mentioned but it should be, so we will judicially add it to the list
* 4/5 judgements cited the Canada Temperance dictum
  + Only Locke attempted to defn the characteristics of aeronautics that he thought were relevant
    - Rapid growth of passenger and freight traffic by air
    - The use of aircraft for the carriage of mails especially to the more remote norther parts of the country
      * There is a foot hold in some sort of federal power
    - The necessity for the development of air services to be controlled by a national govt responsive to the needs of the nation as a whole
      * Rather than the patchwork response of the provinces

#### Munro v National Capital Commission

* Court held that the **national capital region satisfied the national concern test**
* Cartwright (unanimous) referred to the unsuccessful efforts to zone the national capital region through the cooperative action of the two prov of ON and Q
  + “Difficult to suggest a subject matter of leg which more clearly goes beyond local or prov interests and is the concern of Canada as a whole than the development, conservation and improvement of the National Capital Region in accordance with a coherent plan in order that **the nature and character of the seat of the govt of Canada may be in accordance with its national significance**.”
    - The nature and character of the seat of the govt is a singular matter that should be added to the list of fed powers
  + The act deals with a single matter of national concern

#### R v Crown Zellerbach

Ratio: Marine water pollution is sufficiently singular, indivisible and distinct to be defined a national concern under the POGG power

Facts: s 4(1) of the *Ocean Dumping Control Act* prohibits the dumping of any substance at sea except in accordance with the terms and conditions of a permit, the sea being defined for the purposes of the Act as including the internal waters of Canada other than fresh waters. The general purpose is to regulate the dumping of substances at sea in order to prevent various kinds of harm to the marine environment. CZC carries on logging operations on Vancouver Island in connection with its forest products business in BC and maintains a log dump on a water lot leased from the provincial Crown. The Company was charged under s 13 with violated s 4 of the Act for dumping actions it took in the water.

Trial judge found s 4(1) to be *ultra vires* and dismissed the charges. CZC concedes that Parliament has jurisdiction to regulate dumping in waters lying outside the territorial limits of any province and that they can regulate dumping within provinces that causes pollution. CZC challenges federal jurisdiction to control the dumping in provincial waters of substances that are not shown to have a pollutant effect in extra-provincial waters.

AG of Canada submits that the controlled dumping in provincial marine waters was part of a single matter of national concern or dimension which fell under POGG. **National concern: prevention of ocean pollution**

Result: Marine pollution satisfies the national concern test and the Ocean Dumping control act is therefore con’ally valid

Reason: P&S?

* Purpose of this law is to regulate dumping at sea to prevent harm to the marine environment.
* Four corners of the act – the definitions within the act give credit to this purpose
* Practical effect – the fact that this would amount to pollution is the kind of matter that the Minister should be deciding not the one who is polluting.

Head of Power?

* Enumerated federal power? No

#### National Concern Doctrine of POGG

1. The national concern doctrine is separate and distinct from the national emergency doctrine, which is distinguishable due to the fact that it is temporary in nature
2. The doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern
3. For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguished it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power (Beetz retaining the bounds of form) under the Constitution
   1. Laws that are multitudinous threaten the DoP and “renders provincial powers nugatory” (Beetz)
4. In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility (TEST) that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter
   1. **Prov inability test** and is noted as the most satisfactory rational of the cases in which the national concern doctrine of POGG has been applied as a basis of federal jurisdiction. Involves a limited or qualified application of federal jurisdiction. Only justified to the extent that the federal legislation only fills the gaps in the provincial legislations

National Concern applies because

1. Interprovincial regulation: fed jurisd to leg for pollution of provincial waters applies because it reduces the risk that citizens of one province would be harmed by non-cooperation of another province.
2. Scientifically difficult to draw clear line btw prov and fed waters
3. Indivisible: This problem involves federal competence. The matter is indivisible due to movement of pollution through water
   1. Specific set of solutions that can be specific to salt water pollution
   2. Ascertainable and reasonable limits

Issue: Whether *Ocean Dumping Act* was con’ally valid

Notes: La Forest dissent; Marine pollution is not singular, indivisible and distinct – salt water and fresh water have blurred lines. Only a local matter, not an emergency requiring grave proportions that displace ordinary divisions of power. No evidence of any extra provincial effects. Prohibition not linked to purpose: because prohibits ANY dumping. Result: environmental issues will have fed aspect. Can apply to federal waters, but to apply to provincial waters = ultra vires. Provision prevents province from dealing with property w/o fed consent. (due to dumping of ANY substance). Agree with prov inability consideration but fall to different answers.

Differing in P&S analysis!! Majority says P&S = marine water pollution. Dissent says no P&S = matter purely local and private (internal marine waters) “what you can do with a rock without leaving the province”.

#### Friends of the Oldman River Society v Canada

Ratio:

Facts: Environmental Assessment and Review Process guidelines issued under the fed *Department of the Environment Act* req all fed departments and agencies that have a decision making authority for any proposed activity that may have an environmental effect on and are of fed responsibility to screen the proposal to determine whether it may give rise to any potentially adverse environmental effects – if there was there must be public review by an environmental assessment panel. AB govt proposed to construct a damn on the Oldman river – approval for the project was obtained from the fed minister of transport under the *Navigable Waters Protection Act* but the minister did not subject the project to assessment.

Result: Appeal dismissed

Reason: P&S: to facilitate in subject matters where the feds already have enumerated powers and wants to tack on environment to federal decision making.

Makes clear of the bounds of what the court in CZ added to the federal list. The court considered this outside of the singular and distinct power to legislate over marine pollution given to the feds by the court.

The Con has not assigned the matter of “environment” to either the prov or Parliament. Environmental control does not have the requisite distinctiveness to meet the test under the “national concern” doctrine as articulated by Beetz in *Reference Re Anti-inflation Act.*

“One may legislate in regard to prov aspects, the other fed aspects. Although local projects will generally fall within prov responsibility, fed participation will be required if the project impinges on an area of fed jurisd as is the case here”

Issue:

Notes: Accepting dissent from *CZ* that environment in general/pollution is too big – too disrupt the balance of fed/prov authority

#### Ontario Hydro v ON

* The SCC upheld the fed Atomic Energy Control Act
  + Fed jurisd over atomic energy was derived from both the declaratory power of s 92(10)(c) and the national concern branch of POGG
    - “the production, use and app of atomic energy constitute a matter of national concern” because “it is predominantly extra-provincial and international in character implications”
    - “strategic and security aspects of nuclear power in relation to national defence” and its potential for environmental catastrophes
  + Won’t fundamentally disrupt DoP
  + Labour relations is important to safety – being able to manage the workers is important to this power too
* Dissent (Iaccobuci, Sopinka, Cory); while parliament has jurisd over atomic energy under the national concern branch of the POGG power, that jurisd does not extend to the labour relations btw ON Hydro and those of its employees employed in the nuclear electrical generating stations

#### R v Hydro Quebec

* Challenge to Part II of the *Canadian Environmental Protection Act* which provided for comprehensive life cycle regulation of toxic substances
* Court upheld the act as a valid exercise of the fed crim law power, holding it “unnecessary to deal with the national concern doctrine, which inevitably raises profound issues respecting the fed structure of our Con which do not arise with anything like the same intensity in relation to the crim law power”
* Dissent (Lamer and Iacobucci); held the act also failed the test of ‘singleness, distinctiveness and individuality’ req by *Crown Zellerbach* bc it was not confined to a narrow range of toxic chemical substances, but potentially covered a broader range of harmful substances whose effects may be temporary and more local in nature and is not criminal

## Federal Criminal Law Power

Brief History

* Reference Re Board of Commerce (1922)
  + Limited interpretation of crim power – only for obvious classic crimes
* Proprietary ATA (1931)
  + Just has to take form of prohibition and penalty

VS. POGG National Concern

* POGG national concern power is used to recognize powers very narrow in scope (singular, distinct and indivisible)
* Criminal law power is plenary
  + Environment can be valid crim law purpose (Hydro Q) but CZ shows not a national concern
* Crim power is less interested in national scope and more interested in a criminal public purpose
* Once a POGG power has been recognized Parliament has power to regulate
  + Not bound by prohibition and penalty

### The Margarine Reference

Ratio: **Criminal law = prohibition + penalty + public purpose**

Provision ultra vires because it could not be upheld under either criminal law power or the trade and commerce power

Facts: 5(a) No person shall; manufacture, import into Canada or offer, sell or have in his possession for sale, any oleomargarine, butterine, or other substitute for butter, manufactured wholly or in part from any other fat than that of milk or cream.

Result: Prohibition was ultra vires (question answer in the affirmative “yes it is ultra vires”)

Reason: Public peace, order, security, health, morality: these are common ends served by criminal law – BUT they do not appear to be the object of the parliamentary action here. The object is found as economic and the leg purpose is to give trade protection to the dairy industry in the production and sale of butter. To forbid manufacture and sale for such an end is prima facie to deal directly with civil rights (prov power). **There is nothing of a general or injurious nature to be abolished or removed, it is a matter of preferring certain local trade to others**.

Issue: Is section 5(a) of the *Dairy Industry Act,* RSC 1927, ch 45, ultra vires of the Parliament of Canada either in whole or in part and if so in what particular or particulars and to what extent?

Notes:

### RJR-MacDonald Inc v Canada (AG)

Ratio: Protection of health is a valid public purpose and there is no reason to believe this is a colourable attempt to regulate another industry. Classic criminal law form is not undermined by exemptions.

Facts: *Tobacco Products Control Act* purpose as in s 3:

The purpose of this Act is to provide a leg response to a national public health problem of substantial and pressing concern and, in particular,

* + 1. To protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating fatal diseases,
    2. To prove young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them, and
    3. To enhance public awareness of the hazards of tobacco use by enduring the effective communication of pertinent information to consumers of tobacco products

The Act prohibited all advertising and promo of tobacco products, and req the display of unattributed health warnings on all tobacco products and precluded manufacturers from putting other information on. Quebec Court of Appeal ruled it ultra vires but was a valid exercise of POGG power as a matter of national concern.

Result: Appeal allowed – valid criminal law power

Reason: Pith and substance: parliament’s purpose was to prohibit three categories of acts: advertisement of tobacco products, promotion of tobacco products, and sale of tobacco products w/o health warnings. All prohibitions are accompanied by penal sanctions (this is a *prima facie* indication that the act is criminal). Health is not an enumerated ground in the *Constitution* – parliament and provincial legislatures can both validly legislate on this topic (DOUBLE ASPECT). **Protection of health is one of the ordinary ends served by criminal law power (*Margarine Reference).***Scope of federal power to create criminal legislation with respect to health matters is broad, circumscribed only by the requirements that the legislation must contain a prohibition accompanied by a penal sanction and **must be a legitimate public health evil** – **court is impressed that tobacco is a serious health concern**. This Act is not a ‘colourable’ intrusion upon provincial jurisdiction. Cannot find another other reason parliament would enact this Act except to target tobacco. They are not trying to regulate the tobacco industry – it would be impossible to outright prohibit tobacco consumption (increase smuggling). Parliament is allowed to get creative path to accomplish its goals as long as the goals are constitutionally valid. **Criminal law may validly contain exemptions for certain conduct without losing its status as criminal law – doesn’t mean that this isn’t in classic criminal law form of prohibition and penalty** (i.e. in Morgentaler abortion was outlawed except when a woman had a miscarriage) – court was impressed that there would good reasons for the exemption.

Criminal law power is not frozen time – living tree – so even though tobacco has always been legal, parliament is open to changing prohibitions where valid.

Issue: Is the Act ultra vires Parliament as an intrusion into prov jurisd over advertising grounded in ss92(13) or (16)?

Does the act infringe on s 2b of Charter (freedom of expression)?

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

### R v Hydro-Quebec

Ratio: The prohibition is enforced by penal sanctions and is undergirded by a valid criminal objective, and so is valid criminal law.

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

Result: No, this is a valid source of criminal law power

Reason: [**broad approach to criminal law power – can be circuitous version of prohibition and penalty**] Preamble speaks to the fact that toxic substances are a matter of national concern and provincial inability – criminal law power cannot permit Parliament, simply by legislating in the proper form, to colourably invade areas of exclusive provincial legislative competence 🡪 To determine if this attempt is being made, the court must look into the purpose of the legislation… The Act zeros in on dangerous substances – which demonstrates this is not just a colourable attempt to regulate industries. The definition is on toxic substances, not just anything. There is a limited prohibition applicable to a restricted number of substances. Extrinsic evidence bolsters Parliament’s concern with this and their wish to stop this injurious action.

**The environment is a public purpose sufficient to support criminal prohibition (shared jurisdiction similar to health – *Tobacco Control Act*). Pollution is an evil and injurious effects that Parliament can seek to supress through the criminal law power – additionally recognize environmental protection** (addition to Margarine Reference list). The purpose of criminal law is to underlie and protect our fundamental values and the stewardship of the environment is a fundamental value of our society Parliament may use criminal law power to underlie that value. In criminal law, reference to such a broad policy objective is simply a means of ensuring that the prohibition is legitimately aimed at some public evil Parliament wishes to suppress and so is not a colorable attempt to deal with a matter falling exclusively within an area of provincial legislative jurisdiction. The legitimate use of criminal law does not encroach on provincial legislative power, though it may affect matters falling within the latter’s ambit.

Telling the industries how to function is an incidental effect – does not change the P&S of the law.

Ex. Food and Drug law is classic criminal law purpose – complex regulatory scheme to stop certain actors causing harm

Issue: Is s 34 and 35 of the *EPA ultra vires* Parliament?

Notes: La Mer, Iacobucci, Sopinka and Major dissent; [narrow approach to crim power] their main issue: “Toxic” is not defined. “Toxic” = any substance that poses harm to human life/health/environment. Then Acts says it may be made subject of comprehensive fed regulation. In pith and substance: aimed at protecting environment/human health. Can this be justified under crim law power? **Must contain prohibitions backed by penalties: more an attempt to regulate environmental pollution than to prohibit or proscribe it = not justified**. The more regulatory a scheme looks, the less it seems like a federal law power if it is not anchored in an existing fed law power.

Must be directed at legitimate public purpose: cannot be supported at human health because toxic defined broadly. But protection of environment = legitimate criminal public purpose – but they are not intended to prohibit environmental pollution simply regulate it (Minister has discretion, lists when, what and quantities). How to tell if its prohibitive or regulatory?

1. It is allowed to contain exemptions which effectively make regulatory schemes – consider nature and extent of regulation it creates + context w/ in it purports to apply.
   1. The more elaborate the scheme – more likely it is regulatory
2. Must have general prohibition (not something that is not an offence until admin agency intervenes i.e. Adding to list of substances) (in contrast to Macdonald, which has a general prohibition)

**This framework is regulatory – Not criminal**. This is the type of framework that a province could use, but not the fed. Power. Fed must be more specific.

Rules

1. Prohibition, penalty, public purpose (margarine
2. Prohibitons may include exceptions (RJR)
3. Valid crim law pirposes nuclide but not limited to public [eace, order, security, helaht an dmorality (margarine
4. Health (RJR) and environment (hydroQ) are valid crim law purposes
5. List of purposes not frozen (RJR/hydroQ)
6. Evonomic reg not directed at evel or injury is NOGT a valid purpse (Margarine, RJR, hydro Q)
7. Criminal power plenary but cant be employed “colourably” (hydroQ)

## Provincial Punishment, Morality and Public Order Powers

### Provincial Regulatory “Crimes”

Morgentaler

* Regulation of the place of delivery of a medical service with a view to controlling the quality and nature of its health care OR punishing what it perceives to be the socially undesirable conduct

### Magnet

* Jurisp invites intense scrutiny of provincial regulatory prohibitions that entail penal consequences
* **Prov prohibitions cannot stand on their own (in sense of criminalizing conduct) without some further regulatory objective**
  + Must be anchored in the catalogue of prov leg powers and they must serve valid prov regulatory purposes powers

*Schneider*

* Estey J (concurring) “Without the existence of the prereq prov authority independent of the offence creating provisions, prov leg would be invalid as trenching upon the exclusive fed jurisd in criminal law”

*Edwards Books v R*

* Court recognized task of defining the boundary between prohibitions in pursuit of provincial reg objectives and criminal law is difficult
  + True principle which delineates this boundary is
    - **Where prov prohibitory legislation exhibits a sufficient nexus or connection to prov regulatory powers, such leg will not offend exclusive fed jurisd in relation to the criminal law**
    - **Where the nexus btw the prohibition and prov reg power is tenuous/absent, prov prohibitions are ultra vires**

Factors Which Indicate a Sufficient Nexus (Favours Prov Law)

* Whether the prohibition enforces standards created as a part of a comprehensive prov regulatory scheme (*Rio Hotel*)
  + Standards should be reasonably related to prov reg purposes (business ethics) rather than moral objectives
* Whether the prov leg, in P&S, relates to prov leg powers (ex. highway control, zoning)
* Whether the prohibition is an enforcement mechanism in aid of a scheme that aims at reg control of property
  + Rather than prohibition of offensive conduct which may happen to occur in prov property
* Whether the reg scheme is occasioned by some compelling temporary local circumstance or emergency, which req stern control at the local level
  + Either in anticipation of crisis, or to deal effectively with the crisis
  + In these circumstances – concurrent jurisd to prohibit temporarily will be recognized in the prove, where necessary to maintain order in the face of exigent circumstances

Factors Which Indicate the Absence of Sufficient Nexus

* The prohibition is an end in itself – purpose which is to enforce compliance with the leg’s view of morality or sanctity (*Westendorp*)
* The prohibition is directed to standards of public order or safety through the criminalizing of activity perceived as a public wrong
  + The prohibition in object and purpose aims at maintenance of public order
    - Rather than protecting the safety or rights of individuals from the consequences of harmful conduct (*Chatterjee*)
* Prov prohibitions become suspect when they intrude into areas traditionally associated with fed criminal jurisd
  + *Rio Hotel*
    - Estey “the longer the penalty and the closer the terminology comes to describing conduct traditionally criminal, the more doubtful the validity of the prov enactment. Prov leg that unduly interferes with fundamental freedoms of religion, speech, expression, assembly or association requires extraordinary justification in local circumstance in order to be upheld as a concurrent exercise of prov reg power”
* Prohibition unduly interferes with fundamental freedoms of religion, speech, expression, assembly or association (*Switzerman*)

Cooperative Federalism

* Chatterjee, mcneil, rio – allowing code to do one thing and prov leg to do something similar if not duplicative

Mutual Modification

* Morgentaler – criminal purpose weighed against the validity of the law
* Rio, NS board – evidence that there was regulatory purpose favoured prov validity
* Evidence of regulatory scheme weighed against federal validity
* \*\*see test for each shaping the test for the other

Double aspect doctrine

* Court will allow for cooperative fed by broad interpretation of the mutual mod of both fears
* Chatterjee; expressly saying deterrence has double aspect

### Nova Scotia Board of Sensors v McNeil

Ratio:

Facts: NS *Theatres and Amusements Act* established a system for regulating the showing of films. Board had to review the films before showing and breach of this process was a monetary penalty and revocation of a theatre’s licence.

Result: Within prov powers – reg business decision

Reason: The Act, read as a whole, is **directed at the regulation, supervision and control of the film business**. The provisions are enacted for the purpose of reinforcing the authority vested in a provincially appointed board to regulate. The legislation is concerned with property (film) and takes place wholly within the province. **Pith and substance: property and civil rights.** The legislation constitutes nothing more than the exercise of provincial authority to regulate the exhibition and distribution of films within its own boundaries which are considered unsuitable for local viewing by a local board on grounds of morality. The act is not concerned with created a criminal offence or providing punishment. Even if it were criminal, the province has the power to prevent crimes**. Morality is not the same is criminality.** These are two different regimes.

Issue:

Notes: Dissent; **unqualified power to determine the fitness of films for public viewing on considerations that may extend beyond the moral** and may include the political, the social and the religious. The board has the power to decide what is decent or indecent and morally fit for public viewing. This determination is within Parliament’s criminal law power. **This is about censorship: at its heart is a moral component and how it impedes free speech**. Also worried about free speech: doesn’t want provinces limiting free speech Not a case where civil consequences are attached to conduct defined and punished as criminal under federal legislation, but rather a case where a provincially authorized tribunal itself defines and determines legality, what is permissible and what is not. Direct intrusion into criminal law.

### Dupond v Montreal

* Municipal ordinance regulating public demonstrations in order to prevent “conditions conducive to breaches of the peace and detrimental to the admin of justice”
* Banning all public protest for 30 days
* Court concludes that “it is now well established that suppression of conditions likely to favour the commission of crimes falls within provincial competence”
  + Ordinance had a pre-amble that set out that this was an emergency and temporary legislation
* **Temporary provincial response to local emergency**

### Westendorp v R

Ratio: This was a colourable intrusion of the crim law power that was designed to punish prostitution.

Facts: Westendorp charged with being on the street for the purpose of prostitution in contravention of a Calgary bylaw. Provision added to by law prohibiting and penalizing being in the street for purposes of prostitution or approaching another purpose for the purpose of prostitution. Recital for prostitution amendment said persons engaged in prostitution “often collect in groups on streets and attract crowd – source of annoyance and embarrassment to members of public and interfere with the right and ability to move freely in the streets”.

Result: Provision is ultra vires Calgary

Reason: The provision is not functionally attached to the whole bylaw – stands and falls on own strength (validity).

If the purpose were about controlling the streets, it would have dealt with the congregation of persons regardless of their reason for congregating. Instead, the provision is only activated by what is said by a person, referable to the offer of sexual services. This is not a property issue or an attempt to deal with a public nuisance. Allowing this provision may create a slippery slope towards allowing a huge part of criminal law to be regulated by provinces (i.e. anything that happens on the street). This was a **colourable** intrusion. Obvious that this is designed to punish prostitution and have the 3Ps. This would allow for concurrency of power beyond any double aspect.

Issue:

Notes: Questionable provision apart of larger valid scheme – ancillary powers doctrine

### Rio Hotel Ltd v New Brunswick (Liquor Licensing Board)

* Conforms to dominant pattern of concurrency
* SCC upheld provisions of *NB Liquor Control Act* which gave the LLB the power to attach conditions to liquor licenses reg and restricting the nature and conduct of live entertainment in licensed premises
* SCC confirmed prov’s ability to prohibit nude entertainment as a part of a liquor licensing scheme notwithstanding the related provisions in the Code
* Main judgment (Dickson) **emphasized the integration of the prov prohibition in a comprehensive scheme of regulation and licensing in distinguishing the case from Westendorp**
  + Ancillary powers

### Chatterjee v ON (AG)

Ratio:

Facts: ONs *Civil Remedies Act* authorized the forfeiture of proceeds of unlawful activity without allegation or proof that any particular person committed any particular crime – just on balance of probabilities. Property can be forfeited under the CRA if, on a BOP, it is demonstrated that the property constituted the proceeds of crime in general. Chatterjee was arrested and police found $29k in small bills that smelled of weed. Wasn’t charged with any drug trafficking offence, but rather under the CRA and the money was seized as proceeds of unlawful activity.

Result: CRA is valid leg of ON

Reason: **A court should favour, where possible, the ordinary operation of statues enacted by *both* levels of government (*Canadian Western Bank*)** – seeing the court bringing in values not bringing in IJI but applying to validity analysis. **The CRA was enacted to deter crime and to compensate its victims** – con’ally valid so long as you are doing it within an assigned head of power and it does not interfere with the Code. Court notes deterrence of crime as something that has a double aspect because the province also has a legitimate interest in this.

Court is also impressed by the fact that it does not look like a criminal law – lacking 3Ps and that it seems to be a shortcut around the slow path of civil procedure. Civil litigation = province (also seen in *GM v CNL*).

**Pith and substance**: to make crime unprofitable – authority to seize money and other things shown on a balance of probabilities to be tainted by crime and thereafter to allocate the proceeds to compensating victims of and remedying the societal effects of criminality. May incidentally affect criminal law without doing violence to the heads of power.

**General purpose: to make crime unprofitable**, to capture resources tainted by crime, and to compensate individuals and public institutions for cost of crime. = Valid criminal object. Not colourable.

Issue:

Notes: If there was a conflict of operation with provisions of the Code then paramountcy would apply but since none we won’t look at it – but they don’t think this will come up and that cooperative federalism will triumph.

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

## Commercial and Economic Regulation

|  |  |
| --- | --- |
| Provincial | Federal Trade and Commerce |
| 92(13), 92(16), 92(10)  Economic matters *NOT* falling within federal Trade & Commerce power (per “exhaustiveness”)  i.e. matters NOT governing:  1) flow of goods/services across borders  2) “general” trade regulation  Particular trades  *Parsons*: fire insurance  *Labatt*: beer and alcohol industry  *Carnation*: dairy industry | Parsons branch 1: flow of commerce across borders  *Margarine Reference*: margarine exports was upheld  *CIGOL*: oil exports  *Central Can Potash*: potash exports  **But s 92A** – province may regulate interprov exports of specified natural resources  Parsons branch 2: general trade and commerce powers affecting the whole dominion  *GM v CNL*: competition law (indicia)  *Re Pan*-*Canadian*: control of systemic risk in securities market |

### Hogg on Trade and Commerce

Relationship to Property and Civil Rights

* S 91(2) confers upon the federal parliament the power to make laws in relation to “the regulation of trade and commerce”
* Broad language ≠ unlimited power (actually much more limited than US even though they have stricter language)
  + Result of judicial interpretation where Can has narrowed the scope of the clause
* Lies in the accommodation of this fed power with the prov power over prop and civil rights (**mutual modification**)
  + Seem to overlap
  + Trade and commerce is carried on by means of contracts which give rise to civil rights over property
    - Courts have narrowed the two classes of subjects so as to eliminate the overlap by mutual modification so as to make each power exclusive
* Leading case is *Parsons*
  + Since then it has been accepted that intra-prov trade and commerce is a matter within prov power under prop and civ rights
    - Fed trade and commerce power is confined to
      * Inter-prov or international trade and commerce
      * “General” trade and commerce

#### Citizens Insurance Co v Parsons

* Classic instance of mutual modification
* Issue was the validity of a prov statues which stipulated that certain conditions were to be included in all fire insurance policies entered into the prov
* PC held statute valid law in relation to prop and civ rights
  + Roots the assumption that regulation of insurance is within prov jurisdiction 92(1)
    - *Canadian Western Bank*
  + It did not come within fed power over trade and commerce
    - Because that power should be read as not including “the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province”
    - Should be read as **including** “political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of inter-prov concern, and it may be that they would include general regulation of trade affecting the whole dominion.”
      * Parson’s branch 1: Interprovincial or international trade and commerce
      * Parson’s branch 2: “General” trade and commerce affecting the whole dominion
* S 94, Quebec Act = s92(13) should be interpreted broadly

### Monahon on Property and Civil Rights

Defining Prop and Civ Rights

* Prov authority over prop and civ rights because a de facto residuary clause during the PC era
  + Held that any laws regulating or dealing with legal rights in a prov fell within the subject
    - Practically encompassed all manner of laws apart from the criminal law
    - The specific enumerated powers in s 91 were treated as exceptions to the power of the provs
      * Banking, bills of exchange and promissory notes, interest, bankruptcy and insolvency, patents, and copyright – upheld despite incidental impact on prop and civil rights because they were specifically assigned to the exclusive authority of Parliament
      * However, non-criminal enactments that fell outside enumerations were generally regarded by PC as falling within prov jurisd > POGG
        + Regulation of contractual rights, labour relations, business activity generally in prov, insurance, unemployment relief, securities regulation, agricultural products, price regulation etc were held to be subject to exclusive prov jurisd
  + Prop and civil rights also interpreted so as to authorize prov regulation over any transaction or activity that occurred within the prov
    - Prov enactments that affected matters outside the prov were upheld even if they had a sig impact

#### Shannon v BC

Not talked about in class

* + - PC upheld statute providing for the creation of a BC marketing board with powers to control the marketing of natural products in the prov
      * Whether locally produced or imported
    - Upheld on basis that it applied on ly to transactions that would be completed within the prov

#### Carnation Co v QB (SCC)

* + - Statute granted a prov appointed board the power to fix the price paid by Carnation for raw milk purchased from local dairy farmers including processors who exported most of their finished goods
    - When negotiations failed, board set prices of milk through arbitration
    - Court held the ultimate destination could not affect the validity because it was directed at a transaction taking place in prov
      * Not directed at interprovincial trade – **incidental effect**
    - P&S = regulation of a local transaction
      * Purpose was to protect the local industry
    - Labour costs also effect cost of doing business in prov
      * Wage control always known to be prov jurisd
* Potential difficulty
  + Makes it possible for prov to enact laws that restrict the free flow of goods or services btw provinces even though it is directed at matters within a particular province
* Prov have political incentive to est discriminatory schemes because local producers have significant lobbying power
* **One of the significant underlying objectives of the confederation bargain was to create a properly functioning economic union in which the entire country would operate as a single market**
  + Intention reflected in granting Parliament exclusive power over matters that are central to the achievement and maintenance of the economic union
  + Also req that there be some limits on prov powers, so that the provs are not permitted to impede the free flow of goods, services, labour and capital across prov borders

#### Manitoba Egg Reference

* QB est an egg marketing board with power to restrict egg imports in order to protect QB producers
* ON created a similar board with similar powers with respect to chickens sold in the prov
* Both were drafted to colour the discrimination as neutral marketing schemes
* Chicken and egg farmers in other provinces found themselves being shut out of the two largest Canadian markets for their products
* SCC
  + Law is ultra vires
  + The leg held to be operated by and for the benefit of egg producers of Manitoba, to be carried out by a board armed with the power to control the sale of eggs in Manitoba, brought in from outside, by means of…
  + The leg not only affects inter-prov trade **but was aimed at the regulation of such trade and was therefore unconstitutional**
    - Designed to restrict or limited the free flow of trade between the provinces
* Corrected for the prov power over prop and civ rights being used to erect protectionist and discriminatory barriers against goods produced in other provs
  + Which has the potential of carving up the Canadian economic union into 10 separate prov economies
* Signalled a willingness to depart from the PC’s decisions assigning exclusive jurisd to prov over transactions or persons physically located in the prov
* *Reference Re Agricultural Products Marketing* 
  + Fed and provs agreed to est the **Canadian Egg Marketing Agency**(CEMA)
    - And to assign each prov a share of the national egg market
    - Implemented through dovetailing fed and prov leg, with federal statute implementing the inter-prov elements of the plan and prov statutes implementing the intra-prov elements
    - SCC upheld this fed-prov scheme (valid)
      * “**Principle of exhaustiveness**” – all of the power of state is divided btw fed and provs, there is no such thing as a law that neither of them are allowed to make
        + Mutual modification – between the two of them they can do anything

### Prov Jurisdiction Over Natural Resources

* *Manitoba Egg* suggests that where the underlying purpose of provincial regulation is to impede the free flow of goods be- tween provinces, the regulation will be struck down even if it extends only to persons or things physically within the province and appears on its face to be neutral.
* s 92 (A) of the 1982 Constitution
  + Designed to confirm and extend prov powers in relation to natural resources (response to outcry by provs that SCC was biased in favour of fed)
    - CIGOL and Potash
  + Section 92A(1) states that the provinces have exclusive authority to enact laws in relation to the following matters:
    - (a) exploration for non-renewable natural resources in the province;
    - (b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and
    - (c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy
  + The section explicitly grants provinces the power to enact laws in relation to the primary production of natural resources found within the province
  + **No impact on international trade and commerce in natural resources**
    - *Potash* precedent undisturbed
    - **But provincial power to regulate trade and commerce in natural resources within Canada conferred**
      * CIGOL would no longer hold respecting specified natural resources
    - **Provincial power respecting trade and commerce other than respecting specified natural resources not affected**
  + Section 92A(3) provides that nothing in subsection (2) derogates from federal legislative authority and that, in the event of a conflict between federal and provincial legislation, the federal law prevails.
  + *ON Hydro v ON (Labour Relations Board)*
    - Majority SCC decision suggesting that s 92A(1) may derogate the fed govt’s exclusive jurisd over federal local works and undertakings
    - Issue was whether labour relations fell within fed jurisd
      * Whether s92A(1)(c) had affected the scope of fed power over local works and undertakings declared by Parliament to be for the general advantage of two or more provs
      * Court concluded it did not narrow that declaratory power
      * However suggested that it may affect the scope of fed jurisd over inter-prov works and undertakings under 92(10)(a)
    - Court suggested that one purpose of section 92A was to remove the danger that this approach to section 92(10)(a) might be used to extend federal jurisdiction over the entire electricity industry.
  + The jurisp of inter-prov works and undertakings has suggested that fed jurisd extends to facilities situated within a single prov, if those facilities are integrated with or part of a work or undertaking that extends beyond the prov
  + *West Coast Energy*
    - SCC narrowed decision in *ON Hydro*
      * Found that fed jurisd over a natural gas pipeline extended to facilities where the gas was processed, on the basis that the facilities were operated as a single integrated transportation undertaking
    - Found that section 92A does not derogate from Parliament’s jurisdiction over works and undertakings under section 92(10)(a)

#### Canadian Industrial Gas and Oil Ltd v SK

* Prov leg designed to capture the increased economic rent accruing to producers
  + Imposed a royalty surcharge on oil produced in the prov = to the difference the actual well-head price received and the basic well-head price
  + Also provided that where the minister thought that oil was being disposed of at less than its fair market value, he could determine what the well-head price should have been and calculate the tax payable on the basis of his determination
* CIGOL argued that because the surcharge would affect the price of its product in the extra-provincial market, the legislation amounted to an unwarranted provincial intrusion into the field of trade and commerce
* Similar to *Carnation*
  + In both cases, the province regulated the sale within the province of a good destined for export; in Carnation, the province was setting the price for the local sale of the product, while in CIGOL, the province was taxing the producer.
  + But ultimately opposite conclusion
* SCC**: judgement focused on the provisions permitting the minister to fix the well-head price for purposes of calculating tax** 
  + Argued that the effect of this was to compel the producer to sell the product at the price fixed – since they would otherwise be unable to recoup the full amount of the tax paid
  + PURPOSE: set a floor price for SK oil purchased for export
    - Or to ensure that the incremental value is not appropriated by persons outside of the prov
  + Distinguished from *Carnation*
* Dickson dissent; NOT DISCUSSED IN CLASS
  + Emphasis on the power of the minister was misplaced
    - Purely and anti-avoidance provision to prevent oil from being disposed of at less than a fair-market value merely in order to avoid tax liability
  + Entire scheme driven and structured around international market events, without reference to any needs or interests found within the prov
    - Arguably distinguishable from *Carnation*
* Reinforced the decision in *Manitoba Egg*
  + Clearly no longer open to a prov to assume that leg that fastened on a transaction occurring within the prov was automatically valid

#### Central Canada Potash

* Attempts by SK to stabilize the NA market for potash
  + Plan to limit production and increase market prices
  + Scheme fixed production quotas for potash producers and est a floor price for potash free on board the mine as a condition for obtaining license
* Prov sought to uphold upon challenge on the basis that it est production quotas rather than market quotas
  + Argued that the prov power of prop and civ rights included the power to impose controls om production of natural resources within the province
* SCC: P&S determined by considering the “circumstances under which it came into being, and the market to which they were applied and in which they had their substantial operation”
  + Concluded the statute **amounted to an attempt to regulate the export market** therefore ultra vires
    - Colourable into quotas on production was irrelevant

### Labatt Breweries (1980)

S 6 and regs of fed FDA set min and max alcohol content for “light beer”

Special lite beer exceeded alcohol max

Labbatt challenged act and regs as ultra vires

Feds argued intra vires T&C, Crim or POGG

Court held ultra vires under either Parsons branch – cannot just regulate a single industry

### GM v CNL

Civil remedy provision upheld (ancillary powers)

Why was the court so sure this scheme was valid? Valid under second Parsons branch (general trade and commerce)

**General T&C Power Indicia**

1. Does the act contain a regulatory scheme?
   1. Prohibited conduct, investigatory mechanism, remedies
2. Scheme under oversight of an agency?
3. Concerned with trade in general, NOT specific industry?
   1. Competition meets this element
4. Provinces constitutionally unable to legislate?
   1. Cannot have vacuums of legislative power
5. Interprovincial failure to cooperate would jeopardize scheme?

### Re Pan-Canadian Securities Reg (2018)

Held that creation of a national securities regulator was not within the T&C power

Characterization = controls systemic risk

Classification = T&C

## Labour, trade and Treaties

Section 132 of the Constitution Act, 1867

“The Parliament and government of Canada shall have **all powers necessary** or proper for **performing the obligations of Canada** or of any province thereof, **as part of the British Empire, towards foreign countries**, arising under treaties between the Empire and such foreign countries.”

*Balfour* *Declaration*, 1926

Each dominion government empowered to make treaties on own behalf

*Letters* *Patent*, 1947

Removal of formal vestiges of British power over treaty-making

### Labour Conventions Case

* **S 132 could be interpreted as conferring power to implement Canadian treaties**
* International Labour Organization adopted three conventions under which the members (incl Canada) agreed to enact laws limiting the working hours of employees and requiring a weekly rest and a minimum wage.
* Reference about the validity of the following acts as enacted by Parliament:
  + *Limitation of Hours Work Act,* which stipulated 8 hours a day and 48 hours a week as maximum hours of work
  + *Weekly Rest in Industrial Undertakings Act*, which required a rest period of at least 24 hours for industrial workers
  + *Minimum Wages Act*, which gave the governor in council power to establish minimum wages
  + 1919 – Canada signed the Treaty of Peace as a member of the British Empire to secure human conditions; in 1930 the International Labor Organization and the League of Nations adopted conventions about hours of work, minimum wages, and days of rest
  + March + April 1935 the federal government ratified those conventions and enacted the three statutes to explicitly implement treaty obligations
* Parliament relied on s 132 (treaty powers) to enact these acts, but the Provinces say they fall within s 92
* All three acts ultra vires
  + **The federal government cannot, just by making promises with foreign countries, clothe itself with legislative authority inconsistent with the Constitution**
  + S. 132 is not about the power of Canada to enter treaties, but about treaties to do with the British Empire à Parliament has right to engage in treaty, NOT right to legislate it into s 92
    - S 132. The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.
    - Essentially, Canada is required to adopt treaties that Britain enters into
    - S 132 doesn’t allow implementation of treaties, these have to be legislated, which turn to s 91/92
* PC Analysis
  + Decided it does not fall under s 132, turn to look at ss 91 and 92
  + Radio – doesn’t apply to s 91/92
  + **Section 132 does not authorize performance of treaties binding Canada “by virtue of her new status as an international person”**
    - **“There is no such thing as treaty legislation as such. The distribution is based on classes of subjects.”**
    - Classification is s 92(13)
  + Labour relations are a civil and local matter
  + Both wages and hours of work fall under contractual obligations, which is under s 92(13) and therefore cannot be federally regulated
  + The distribution of power is based on classes of subjects; if the treaty deals with that class/subject, it falls under that legislation
  + Division of power must remain in watertight compartments
  + POGG – this was not an emergency, POGG is only available when there is a national emergency peril to the life of Canada
* **Federal Treaty Options**
  + Treaties in relation to fed matters
    - Treaties can support finding of POGG national concern (*CZ*)
    - Treaties can support finding of “international” trade P&S (Hogg)
  + Cooperation with implementing provs

### Interprovincial Trade

Section 121 of the Constitution

“All Articles of Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other provinces.”

#### R v Comeau

Ratio: A party alleging that a law violates s. 121 must establish that the law in essence and purpose restricts trade across a provincial border. If the law does not in essence restrict the trade of goods across a provincial border, the inquiry is over and s. 121 is not engaged.

For s 121 to be violated the following is req; the law must impact the interprovincial movement of goods like a tariff, which, in the extreme, could be an outright prohibition. And, restriction of cross-border trade must be the primary purpose of the law, thereby excluding laws enacted for other purposes, such as laws that form rational parts of broader legislative schemes with purposes unrelated to impeding interprovincial trade.

Facts: NB law prohibited stocking large quantities of alcohol not purchased from NB Liquor Corporation. He drives to QB to and stocks up on liquor. Comeau, contends that s. 121 is essentially a free trade provision — in his view, no barriers can be erected to impede the passage of goods across provincial boundaries. His view represents that federalism principle demands economic union. The Crown argues that s. 121 was only intended to dismantle the power to impose tariffs or tariff-like charges at provincial boundaries. The Crown’s view represents that federalism principle demands high level of local control over local matters.

Result: s 121 prohibits laws that in essence and purpose restrict trade across prov boundaries. Laws that only have the incidental effect of restricting trade across prov boundaries because they are part of broader schemes not aimed at impeding trade do not offend s 12

Reason: Proper Interpretation of s 121?

* Deals with how revenues, debts, property, and fiscal authority were to be transferred between existing legislatures and the new federal government upon Confederation
* The scheme specifically provides for the power to levy border tariffs to be transferred from the former colonies to the new Dominion
* Comeau contends the purpose of 121 was to foster the full unimpeded economic integration of the new federation
* Courts reject Comeau’s broad interpretation
  + Text; “admitted free” remains ambiguous, and falls to be interpreted on the basis of the historical, legislative and constitutional contexts
  + Historical context; at a minimum, s. 121 prohibits the imposition of charges on goods crossing provincial boundaries - at best, provides only limited support for the view that “admitted free” in s. 121 was meant as an absolute guarantee of trade free of *all* barriers
  + Legislative context; indicates that it was part of a scheme that enabled the shifting of customs, excise, and similar levies from the former colonies to the Dominion; that it should be interpreted as applying to measures that increase the price of goods when they cross a provincial border; and that it should not be read so expansively that it would impinge on legislative powers under ss. 91 and 92
  + Foundational principles; The foundational principle that forms part of the architecture of constitutional texts as *Reference re Secession of Quebec* is federalism (reject crowns narrow interpretation)
    - That principle does not mandate any specific prescription for how governments within a federation should exercise their constitutional authority
* Case law
  + Purpose is to prohibit laws that in essence and purpose restrict or limit the free flow of goods across the country
  + Laws that pose only incidental effects on trade as part of broader regulatory schemes not aimed at impeding trade do not have the purpose of restricting interprovincial trade and hence do not violate s 1121
* **Conclude that a purposive approach to s. 121 leads to the following conclusion: s. 121 prohibits laws that in essence and purpose restrict trade across provincial boundaries**
  + Laws that only have the incidental effect of restricting trade across provincial boundaries because they are part of broader schemes not aimed at impeding trade do not offend s. 121
* **The primary purpose of s. 134(*b*) is to prohibit holding excessive quantities of liquor from supplies not managed by the province**
  + NB’s ability to exercise oversight over liquor supplies in the province would be undermined if non-Corporation liquor could flow freely across borders
  + **While one effect of s. 134(*b*) is to impede interprovincial trade, this effect is only incidental in light of the objective of the provincial scheme in general**

Issue: Whether s. 134(*b*) of the *Liquor Control Act*, R.S.N.B. 1973, c. L-10, infringes s. 121

S 134. Except as provided by this Act or the regulations, no person, within the Province, by himself, his clerk, employee, servant or agent shall (b) have or keep liquor, not purchased from the Corporation

1. **Is the essence of the law to restrict trade?**
2. **If yes, is the primary purpose to restrict trade?**

Notes:

# Themes and Limits of federalism

## “Indians and Land Reserved for Indians”

**s 91(24)** it is hereby declared that . . . **the exclusive Legislative Authority of the Parliament of Canada** extends to all Matters coming within the Classes of Subjects next hereinafter enumerated… **(24) Indians, and Lands reserved for the Indians**.

**Royal Proclamation, 1763**

If this land is not given over by treaty, then we the Crown are going to leave those people alone.

It was for this reason that it was going to be assigned to the federal govt so they could make treaties to get land and allocate land reserved for the “Indians”.

**Indian Act, 1876**

The leg HoP was created because the framers of the Constitution knew that this would help them acquire land – IA was one of the ways that the fed govt tried to do this.

Forced assimilation and violation of rights.

This assigned things (wills and estates etc.) that would be prov but for they pertained to Indians and Lands reserved for the Indians.

### Re Eskimos

Ratio:

Facts: Fed and QB govt each refused jurisd over Inuit within Quebec. Federal govt refused to reimburse Quebec for rising costs of relief monies directed at Inuit. QB initiated litigation arguing that “Eskimos” were “Indians” under s. 91(24)

Result: Question answered in the affirmative

Reason: In the *BNA Act* specific provision was made in section 146 for the acquisition of Rupert’s Land as well as the NWT and a statute of the Imperial Parliament conferred upon the Queen the necessary powers as respects Rupert’s Land.

The Eskimo were recognized as an Indian tribe by the officials of the Hudson’s Bay Company which, in 1867, as already observed, exercised powers of government and administration over this great tract; and that, moreover, this employment of the term “Indians” is evidenced in a most unequivocal way

“It is clear that here the Eskimo are classified under the generic term Indian. They are called “Savages,” it is true, but so are the Montagnais and so also the Hurons settled at Jeune Lorette. It is useful to note that he speaks in the first paragraph of the Esquimaux as “the wildest and most untameable of any” and mentions that they are “emphatically styled by the other Nations, Savages.””

Issue: Whether the Eskimo inhabitants of that province are “Indians” within the contemplation of head no. 24 of section 91 of the *British North America Act* which is in these words, “Indians and Lands Reserved for Indians”; and under the reference we are to pronounce upon that question.

The Eskimo population of Quebec inhabits a territory that formed part of Rupert’s Land – question we have to determine is whether these Eskimo, whose ancestors were aborigines of Rupert’s Land in 1867 and at the time of its annexation to Canada, are Indians in the sense mentioned.

Notes: Kerwin concurring; when the Imperial Parliament enacted that there should be confided to the Dominion Parliament power to deal with “Indians and lands reserved for the Indians,” the intention was to allocate to it authority over all the aborigines within the territory to be included in the confederation. The fact that there were no Eskimos within the boundaries of the provinces that first constituted the Dominion is beside the point as provision was made by the *British North America Act* to include the greater part, if not all, of the territory belonging to the Hudson’s Bay Company.

Court does not consider what the Eskimo’s consider themselves to be – consider HBC, dictionary etc.

**Diubaldo**:

* 1939 SCC declared that Eskimos (Inuit) were Indians and thereby the responsibility of the Canadian government
* 1924 an amendment to the Indian Act made the Indian Affairs Branch their overseers, but the govt refused to act directly on their behalf, fearing the cost implications and worried about repeating follies of the Indian Act
  + Health, ed and relief let to the trading companies and missionaries
  + Inuit within QB were the responsibility of the prov
* QB took to SCC arguing that Eskimos were Indians under the BNA Act and thus wards of Canada. Court ruled in QBs favour, Canada all but ignored the 39 decision and would ultimately take the position that Inuit were ordinary Canadians requiring special attention

### Daniels v Canada

Ratio:  
Facts: Three declarations were sought by the plaintiffs when this litigation was launched in 1999:

* That Métis and non-status Indians are “Indians” under s. 91(24);
* That the federal Crown owes a fiduciary duty to Métis and non-status Indians and;
* That Métis and non-status Indians have the right to be consulted and negotiated with, in good faith, by the federal government on a collective basis through representatives of their choice, respecting all their rights, interests and needs as Aboriginal peoples.

Facts as held by the trial judge

* The federal government considered Métis to be “Indians” in various treaties and pre-Confederation statutes, and considered Métis to be “Indians” under s. 91(24) in various statutes and policy initiatives spanning from Confederation to modern day
* The purpose of s. 91(24) was closely related to the expansionist goals of Confederation
  + Historical and legislative evidence shows that expanding the country across the West was one of the primary goals of Confederation – building a national railway was a key component of this plan
  + Purposes of s. 91(24) were accordingly “to control Native people and communities where necessary to facilitate development of the Dominion; to honour the obligations to Natives that the Dominion inherited from Britain . . . [and] eventually to civilize and assimilate Native people”
* His conclusion was that in its historical, philosophical, and linguistic contexts, “Indians” under s. 91(24) is a broad term referring to all Indigenous peoples in Canada, including non-status Indians and Métis
  + Declined to grant other declarations on the grounds that they were vague and redundant.

Result: Metis and non-status Indians are “Indians” under s 91(24)

Reason: Why was this power assigned to the federal government? The drafters wanted the fed govt to have the power to expand their land mass- historical and legislative evidence shows that expanding the country across the West was one of the primary goals of Confederation. And if that was the point then it had to include Metis and non-status Indians.

Court also considers group and self-identity – acceptance by the community cannot be a part of this determination, unjust to use this because the history was so divisive of community.

Applicable test for when a declaration should be granted (*PM v Khadr*); the party seeking relief must est that the court has jurisd to hear the issue, the question is real and not theoretical and that the party raising the issue has a genuine interest in its resolution – a declaration can only be granted if it will have practical utility – if it will settle a “live controversy”.

Practical Utility for 1st declaration

* No doubt that granting the first declaration meets this threshold – delineating and assigning constitutional authority between the fed and prov govts will have enormous practical utility for these two groups
* Métis and non-status Indians have asked the federal government to assume legislative authority over them, it tended to respond that it was precluded from doing so by s. 91(24) – and when Métis and non-status Indians turned to provincial governments, they were often refused on the basis that the issue was a federal one
* Non-status Indians, on the other hand, can refer to Indians who no longer have status under the *Indian Act*, or to members of mixed communities who have never been recognized as Indians by the federal government
  + Definitional ambiguities do not preclude a determination into whether the two groups, however they are defined, are within the scope of s. 91(24)
* The term “Indian” or “Indians” in the constitutional context, therefore, has two meanings: a broad meaning, as used in s. 91(24), that includes both Métis and Inuit and can be equated with the term “aboriginal peoples of Canada” used in s. 35, and a narrower meaning that distinguishes Indian bands from other Aboriginal peoples
* “Indians” has long been used as a general term referring to all Indigenous peoples, including mixed-ancestry communities like the Métis
  + Métis were considered “Indians” for pre-Confederation treaties such as the Robinson Treaties of 1850. Many post-Confederation statutes considered Métis to be “Indians”, including the 1868statute
  + Many Métis were also sent to Indian Residential Schools, another exercise of federal authority over “Indians”
  + Not only has the federal government legislated over Métis as “Indians”, but it appears to have done so in the belief it was acting within its constitutional authority

Neither the second nor third declaration should be granted because both restate settled law

Issue: The appellants sought to restore the first declaration as granted by the trial judge, not as restricted by the Federal Court of Appeal. In addition, they asked that the second and third declarations be granted. The Crown cross-appealed, arguing that none of the declarations should be granted.

Notes:

### Nadine Scott: Case Study Kaschewan First Nation Water Crisis

* Indigenous communities in Canada face major challenges in accessing clean and safe drinking water
  + FN homes are 90x more likely to be without running water
  + Boil water advisories often last years/generations
* Conditions raise serious physical and psychological health risks, and present an obvious example of enduring environment injustice
* Generally accepted that **provincial and territorial govts are responsible for ensuring access to safe and clean drinking water as a fxn of their authority to regulate public health**
  + Accomplished mostly through delegation of responsibility for water treatment/distribution to local municipality legislation
  + Critical exception: federal lands and institutions, including FN reserves, over which leg authority rests with the fed govt under s 92(24)
    - Thus the provision of sage drinking water on reserves is said to be a shared responsibility between FN band councils and several fed departments including Indian and Northern Affairs Canada which provides funding for the construction and maintenance of water services
* Oct 14, 2005 – nearly 1000 people from the **Kaschewan FN** were evacuated by ON because their community’s drinking water was contaminated by E coli
  + Alert was sounded by Health Canada
  + Crisis caught the attention of the mainstream media and photos showing children covered in rashes and scabs provoked shock and anger across country
* General public was being urged to understand the issue as one of mismanagement that stemmed from confusion over jurisd btw the fed and prov govts
  + Many traced the E coli contamination to the fed govt’s refusal a decade earlier to heed the community’s concerns with respect to the location of the water treatment plant, built downstream of the sewage lagoon in a place where seasonal flooding is expected
  + ON govt pointed finger at Ottawa
    - But they fired back noting that drinking water safety and public health were under prov jurisd
  + ON Minister of Aboriginal Affairs call Ottawa “missing in action”, ordered the community’s emergency evacuation
* Institute on Governance has said the problem presents a “governance problem of major complexity” and allocates at least some of the blame to the lack of an “effective legislative base”.
  + In making the argument that the lack of access to safe drinking water on many FN’s reserves is a violation of the right to equality under s15(1)
  + **Nathalie Chalifour** states that the main challenge is the “fact that there is no single law which categorically excludes FN reserve communities from protection. Instead, there is a national network of laws which provides clean drinking water to all Canadians… with one glaring exception: Aboriginal peoples living on reserves.”

## Federalism and Race

S 91(25): “The exclusive Legislative Authority of the Parliament of Canada extends to … Naturalization and Aliens”

S 92(13): provincial power over property and civil rights

### Union Colliery Co v Bryden

Ratio: The P&S of the legislation is to establish statutory prohibition which affects aliens or naturalized subjects, and therefore trenches upon the exclusive authority of Parliament.

Facts: Proposals were made in BC leg to exclude Chinese workers from mines. In 1890, the *Coal Mines Regulation Act*, s4 was amended in response to this pressure, by adding the words “and no chinaman” in the prohibition. The prohibition was difficult to enforce; its constitutionality was questioned and proposals were made throughout to repeal it. Late in the decade, a shareholder of Union Colliery brought an action for a declaration that the mine was violating the prohibition. The company appealed to the PC from the BCCA.

Result: Appeal allowed

Reason: s 91(25) extends to the exclusive legislative authority of Parliament to “naturalization and aliens”.

“Every alien when naturalized in Canada becomes, ipso facto, a Canadian subject of the Queen; and his children are not aliens, requiring to be naturalized, but are natural born Canadians.” Section might possibly be construed as conferring the power to legislate over the case of naturalized aliens after naturalization. **The words “no chinaman” were probably meant to denote every adult chinaman who has not been naturalized** – statutory construction to impute targeting alienage. The effect on how the mines are regulated are incidental.

P&S: establish a prohibition of naturalized and alien subjects. They may be regarded as merely establishing a regulation applicable to the working of the underground mines; and if that were an exhaustive description, it would be difficult to dispute that they were within the competency of 92(10) or (13).

Issue: Determine what are the limits of the jurisdiction committed to each level of government – not to inquire if the jurisd has been exercised wisely or not

Notes:

### Cunningham v Tomey Homma

Ratio:

Facts: A naturalized Japanese claims to be placed upon the register of voters for the electoral district of Vancouver City, the objection to the claim is that by the electoral law of the province it is enacted that no Japanese, whether naturalized or not, shall have his name placed on the register of voters or shall be entitled to vote.

Result: The JCPC upheld the *Provincial Elections Act*, and declared that the *BNA Act*granted the provinces exclusive jurisdiction over civil rights, including the right to vote

Reason: It is maintained that s 92(25), enacts that the whole subject of naturalization is reserved to the exclusive jurisdiction of the Dominion, while the Naturalization Act of Canada enacts that a naturalized alien shall within Canada be entitled to all political and other rights, powers and privileges to which a natural born British subject is entitled in Canada.

“**It is obvious that the decision in Bryden can have no relation to the question whether any naturalized person has an inherent right to the suffrage within the province in which he resides**.”

Issue:

Notes: There is some kind of assumption going on within the court between race and voting that lends to this reasoning.

### Quong Wing v the King

Ratio:

Facts: QW owned a restaurant and employed two white women as waitresses contrary to the *Female Employment Act*, when charged he argued that the prohibition was ultra vires. He was convicted and appealed to the SCC.

Result: Appeal dismissed

Reason: This affects the civil rights of Chinamen. The legislation does not trespass upon the exclusive power of the Dominion legislature. It **deals with the subject-matter of “property and civil rights” and cannot be declared ultra vires** – however harshly it may bear upon Chinamen, naturalized or not.

P&S: the protection of white women and girls in employment settings and drawing lines based on race = provincial authority.

“Once I find its subject matter is not within the powers of the Dominion Parliament and is within that of the provincial legislature, I cannot inquire into its policy or justice or into the motives which prompted its passage.

Issue:

Notes: Duff dissent; not about nationality but about “persons of a certain origin or persons having certain common characteristics and habits” – saying s.91(25) pertains here under the decision of Union Colliery.

Idlington dissent; Federal Naturalization Act – gives naturalized aliens rights and obligations the same as natural-born British subjects. Suggests that Parliament’s power over naturalization and aliens includes “power to guarantee to all naturalized subjects that equality of freedom and opportunity. Connection between immigration and colonization of “waste lands”. Reading btw the lines – this fed law should be paramount, because the spirit of that law is being offended by the prov legislation.

### Re Persons of Japanese Race

* National Emergency Transitional Powers Act (continuing emergency powers of War Measures Act) deployed to deport Japanese Canadian Citizens
* Property and civil rights are prov – “but the parliament of the dominion in a sufficiently great emergency such as that arising out of war has power to deal adequately… from slides
* Deference to parliament respecting 1) whether there is an emergency and 2) what must be done to address it

## Implied and Statutory Rights Under Federalism

### Implied Bill of Rights

**Preserving the structure of democracy and freedom, not protecting anyone’s individual rights particularly.**

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

#### Reference re Alberta Statutes

Ratio:

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

Result: Power is ultra vires – all three bills are ultra vires

Reason: The bill aims to control any statement relating to any policy or activity of the govt of the prov and declares this object to be a matter of public interest – it does not regulate the relations of the newspapers’ owners with private individual members of the public but deals exclusively with expressions of opinion by the newspapers concerning govt policies and activities. P&S of this bills is to regulate the press of Alberta from the viewpoint of public policy by preventing the public from being misled or deceived as to any policy or activity of the Social Credit Govt and by reducing any opposition to silence or bring upon it ridicule and public contempt. AB leg by this retrograde bill is attempting to revive the old theory of the crime of seditious libel by enacting penalties (confiscation of space in newspapers) and prohibition for actions.

Under the British system – no party can erect a prohibitory barrier to prevent the electors from getting info concerning the policy of the govt, freedom of discussion is essential to enlighten public opinion in a democratic state; it cannot be curtailed without affecting the right of the people to be informed through sources independent of the govt concerning matters of public interest. There must be an untrammelled publication of the news and political opinions of the political parties contending for ascendancy.

The province may deal with his property and civil rights of a local and private nature within the proc; but the prov cannot interfere with his status as a Canadian citizen and his fundamental right to express freely his untrammelled opinion about govt policies and discuss matters of public concern.

The mandatory and prohibitory provisions of this bill is ultra vires of the prov leg.

Issue: What is the extent of Alberta’s power to enact these bills?

Notes: Duff concurring; The practice of the right of free public discussion of public affairs is the breath of life for parliamentary institutions. Parliament possess authority to legislate for the protection of this right.

#### Saumur v City of Quebec

Ratio:

Facts: Ongoing struggle between the Quebec government and Jehovah’s witness. Prosecution under bylaws regulating the distribution of pamphlets in the streets was one of the principal ways in which the government sought to silent he Witnesses. Saumur was charged and convicted under a bylaw of this kind, and brought an action for a declaration that it was *ultra vires.*

Result: The bylaw was ultra vires

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

Issue: Whether the bylaw issued by QB was ultra vires

Notes: Rinfret dissent; a bylaw may be valid even if the aim of the municipal council is bad. The bylaw says nothing of the fact that it targets JWs – no need to search behind the text which it adopted to see what its aim could have been in making it. Would go even further to say that the use of streets in a municipality is unquestionably a local matter. Cannot see how this does not fall entirely under s 92.

#### Switzman v Ebling and AG of QB

Ratio:

Facts: Essentially a challenge to the *Padlock Act* to control communism. Switzman’s landlord brought an action to evict him because he had used the leaved premises for purposes prohibited by this section.

Result: Yes ultra vires

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

Issue: Whether this section is ultra vires

Notes: Abbott concurring; the impugned statue does not deal with matters of s 92(13) or 92(16). Parliament itself could also not abrogate the right of discussion and debate – the power to limit it is restricted to powers as may be exercisable with respect to criminal law and to make laws under POGG. Maybe neither level should be able to enact these laws.

Taschereau dissent; If the provincial legislature has no power to create criminal offences, it has the power to prevent crimes, disorders as treason, sedition, illegal public meetings 🡪 it therefore, may validly legislate as to the possession and use of property. As this is exclusively within the domain of civil law + by s. 92(13) is within provincial competence - Appeal should be dismissed.

#### Dupond v City of Montreal

Ratio:  
Facts: By law prohibiting parades or gatherings (requires license and bans parades for 30 days). The bylaw is challenged on two grounds:

(1) as an invasion of criminal law power and

(2) as an infringement of the fundamental freedoms of speech, assembly, and association, the press and religion.

Result: Bylaw held intra vires

Reason: On the second submission:

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

Issue:

Notes:

#### Ontario v OPSEU

* ON law prevented public servants from participating in some political activities
* Basic structure of constitution contemplates existence of freely elected legislatures
* It remains true that apart from Charter considerations, the legislative bodies in this country must conform to these basic structural imperatives and can in no way override them
* In this case, law does not go so far to as infringe upon th essential structure of free parliamentary institutions

### Canadian Bill of Rights

* Influences
  + UN Declaration of Human Rights
  + Developments in US rights jurisprudence
  + Expansion of the regulatory state – should have some explicit limitations on the govt
  + Reaction against WW2 treatment of Japanese Canadians
* Not “entrenched”
* Applied only to federal government

#### R v Drybones

* Indian Act – held that an Indian intoxicated off reserve was guilty of an offence
* Liquor Ordinance of NWT – creates an offence to be intoxicated in public
* Drybones was charged under the Indian Act and challenged the section saying it violated his rights to equality under s 1(b) of the Bill
* SCC dismissed an appeal by the Crown from an acquittal
* Rejected the approach that the Bill was simply a guide to interpretation and said it could have an impact as it is quasi-constitutional
* Courts must allow for previous law to be inoperative if it conflicts with the Bill of Rights
* Where conflict arises between Bill of Rights and an earlier statute, the statute would be inoperative
* Ritchie – no individuals are to be treated more harshly than another under the law and an individual is denied equality under the law if it is an offence for him to do something which his fellow Canadians are free to do without having committed an offence

#### Canada (AG) v Lavell 1974

* Indian woman who married non-Indian man and lost her registration, challenged the Indian Act because there was no similar provision for man
* Rejected by SCC – the impugned section could still be enforced without denying equality of treatment in the administration of the law. As long as treatment was the same for all status Indian women

#### Bliss v Canada (AG)

* Unemployment Insurance Act established a program of benefits for women whose employment was interrupted because of pregnancy but imposed a longer qualifying period for women claiming these benefits than for individuals claiming regular benefits
* It also excluded interruption of employment because of pregnancy from categories of entitlements for regular benefits
* SCC held that this did not discriminate against her on the specified ground of sex – any inequality between sexes in this area is not created by legislation, but by nature
  + Also, discrimination could not be grounded in the more general term ‘equality before the law’ o SCC said equality meant treating all pregnant women the same

# Introduction to the Charter

### Hogg and Bushell: Charter Dialogue

* Notion that judicial review is a part of a dialogue between judges and legislatures
  + **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**
* Where a judicial striking down a law on Charter grounds can be reversed/mod/avoided by a new law, any concern about the legitimacy of judicial review is greatly diminished
  + The legislative body would be forced to give greater consideration to the Charter values identified by the Court in devising the means of carrying out objectives, or the legislative body might have been forced to modify its objectives to some extent to accommodate the courts concerns
    - These are constraints on the democratic process, but the final decision is the democratic one
* Dialogue can only take place if the judicial decision to strike down a law can be rev/mod/avoided by legislative process
  + There is usually an alternative law that is available to the legislative body that still enables the leg purpose to be carried out
  + Court often offers a suggestion
* Sometimes an invalid law is more restrictive of individual liberty than it needs to be to accomplish its purpose, and what is required is a narrower law
* Or sometimes a broader law is needed because an invalid law confers a benefit, but excludes some people who have constitutional equality right to be included
* **The Charter can act as a catalyst for a two-way exchange between judiciary and legislature on the topic of human rights and freedoms, but it rarely raises an absolute barrier to the wishes of the democratic institutions**
* Dialogue may occur even when laws are upheld

The Four Features that Facilitate a Dialogue

1. **Section 33**, which is the power of legislative override
   * Parliament or a legislature need only insert an express notwithstanding clause into a statute and this will liberate the statute from the provisions of section 2 and sections 7-15 of the Charter
   * Most obvious and direct way of overcoming a judicial decision striking down a law for an infringement of Charter rights
   * Allows the competent legislative body to re-enact the original law without interference from the courts
   * Puts a democratic spotlight on those legislative choices = dialogue
2. **Section 1**, which allows for demonstrably justified reasonable limits
   * Balancing process by the court
   * Reviewing courts will often explain the less restrictive alternative law that would have satisfied the section 1 standard
   * Judgement says the law is violation but justified
     + But creates foothold by a statement that rights are violated
3. The “qualified rights” in sections 7,8,9 and 12 – which allow for action that satisfies the standards of fairness and reasonableness
4. The guarantee of equality rights under section 15(1), which can be satisfied through a variety of remedial measures

### The Drafting of the Charter: Robert Sharpe

* Initial opposition by most provinces to the very idea of the Charter; challenges by the provinces to the constitutionality of asking the British Parliament to amend the constitution without unanimous provincial consent
* Number of changes made between 1980 and 1981 (eventual agreement)
  + Domestic amending formula to govern future changes to the constitution
* Joint committee of Parliament heard from many witnesses representing civil liberties and women’s groups, defence lawyers and prosecutors, the police and others
  + Many of these groups were critical of the October 198o version of the Charter
    - That draft had been weakened in an unsuccessful attempt to win provincial consent
    - The critics feared that the draft would produce weak protection of rights and freedoms like the CBoR
      * Led fed govt to introduce some fundamental changes to strengthen the Charter
* Section 1
  + In Oct 1980 version: provided that the rights and freedoms would be “subject only to such reasonable limits as are generally acceptable in a free and democratic society with a parliamentary system of government
    - “Mack Truck clause” – traditions of parliamentary supremacy would allow governments to drive a truck through guaranteed rights and freedoms
  + Changed to provide new requirements that any reasonable limit on the Charter rights be “prescribed by law” and be “demonstrably justified in a free and democratic society”
* Section 8
  + More substantive guarantee now of “the right to be secure against unreasonable search or seizure”
    - Rather than – the right not to be “subjected to search or seizure except on grounds, and in accordance with procedures, established by law”
* Section 9
  + Similarly changed from the right “not to be detained or imprisoned except on grounds, and in accordance with procedures, established by law” to the present right “not to be arbitrarily detained or imprisoned,”
* Section 11(e)
  + Now provides a right “not to be denied reasonable bail without just cause,” as opposed to the more limited right not to be denied reasonable bail “except on grounds and in accordance with procedures, established by law.”
* Section 10(b)
  + Changed to provide not only the right to retain and instruct counsel without delay, but also the right to be informed of that right. Legal rights were also strengthened by replacing a provision of the October 1980 draft, which preserved legislative supremacy over the laws of evidence, with section 24(2) of the Charter, which requires the exclusion of unconstitutionally obtained evidence “if it is established that, having regard to all the circumstances, the admission of it would bring the administration of justice into disrepute.”
* The effects of these changes were to limit parliamentary supremacy in defining the rules to govern search and seizure and detention
* CBoR criticized for its lack of effective remedies and October 1980 draft provided no specific provision for remedies
  + **The general remedial provision in what is now section 24(1) was added at the suggestion of civil liberties groups**
    - It allows anyone whose rights and freedoms have been infringed to apply to a court of competent jurisdiction “to obtain such a remedy as the court considers appropriate and just in the circumstances”
* In addition to some strengthening of voting rights in section 3 and minority language rights in section 23, equality rights also were strengthened in part to avoid the restrictive interpretation that equality rights had received under the CBoR
* October 1980 draft “everyone has the right to equality before the law and to the equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex.”
  + Changed to the more open-ended and expansive provision contained now in section 15(1) of the Charter: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.”
* Section 28 was subsequently added to underline importance of gender equality
  + By providing “Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.”
* Section 27 was also added provided that the Charter “shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canada.”
* Not all changes made in the drafting of the Charter expanded rights and freedoms
  + Section 29 provides that nothing in the Charter takes away from denominational school rights
  + Section 33 was added as a result of the agreement between the federal government and all provinces except QB in November 1981
    - Allowing the prov and fed legislatures to enact legislation notwithstanding the fundamental freedoms, legal rights, or equality rights for renewable five-year periods

### Special Joint Committee on the Constitution: Selected Briefs

* Canadian Advisory Council on the Status of Women
  + In favour of entrenching protection of rights into constitution
  + Present BoR unable to stop discrimination
* Afro-Asian Foundation
  + Recommendations:
    - That an article of the Constitution protect Afro-Asian minorities from all forms of aggression and violence to which they are presently exposed by groups whose stated objective is to promote hatred and racism directed toward non-White groups…
    - That an affirmative action program be instituted that would ensure the representation of non-White minorities in decision making positions on all levels in both public and governmental bodies (e.g. police forces, armed forces, boards of education, the media)
* Alliance for Life
  + “This is the mark of true charity that must be a hallmark of the Constitution of Canada. If the document we are creating is to shine as the highest hope, the most noble aspiration of the people who inhabit these shores, it must enshrine the most basic right - the right to life - and must protect the most vulnerable of lives, those of its children not yet born. After all, the preamble to the Canadian Bill of Rights - AN ACT FOR THE RECOGNITION AND PROTECTION OF HUMAN RIGHTS AND FUNDAIEHTAL FREEDOMS - reminds us of the dignity and worth of the human person under the Supremacy of God.”
* Anishinabek
  + “There are two things that we require in the constitution of Canada. These will provide for our place in this country and will be the basis for the relations we will establish with Canada in the future.”
    - First, our rights must be recognized.
    - Second, those rights must be protected against arbitrary or unilateral change.
* Alberta Chamber of Commerce
  + Canadian parliamentary and legislative traditions have long provided Canadians with a system whereby elected representatives are responsible to the people for the ways in which their rights and freedoms are protected. "Entrenchment" of these rights and freedoms in the Constitution would give this power to the courts and could very possibly make the protection of rights and freedoms more rigid and less responsive to the changing needs of Canadians.
* Canadian Co-ordinating Council on Deafness
  + Canadians, among whom the deaf and hard of hearing are a sizeable minority, expect Parliament to guarantee them their fundamental rights on the basis of social justice and not on the basis of economic cost or political popularity
  + Section 1 of the proposed Canada Act places the entire Charter of Rights in jeopardy because of its extremely broad wording. It should either be deleted in its entirety on the grounds that limitations on human rights are unacceptable for any reason or be worded very narrowly to prevent its indiscriminate application.

## Application of the Charter

### Application of the Charter

* Section 32 of the Charter provides that it applies to that “Parliament and government of Canada” and to the “legislatures and governments of the provinces”
  + Applies to the laws enacted and also the executive or admin branches
  + It does NOT apply to purely private activity
    - Charter claims cannot be brought against private persons, unconnected with the govt
    - ***Dolphin Delivery***
      * McIntyre J: “The rights guaranteed by the Charter take effect only as restrictions on the power of government over the persons entitled to the rights. The Charter regulates the relations between government and private persons, but it does not regulate the relations between private persons and private persons. Private action is therefore excluded from the application of the Charter. Such actions as an employer restricting an employee’s freedom of speech or assembly, a parent restricting the mobility of a child, or a landlord discriminating on the basis of race in his selection of tenants, cannot be breaches of the Charter, because in no case is there any action by the Parliament or government of Canada or by the Legislature or government of a province. In cases where private action results in a restriction of a civil liberty, there may be a remedy for the aggrieved person under a human rights code, under labour law, family law, tort law contract law or property law, or under some other branch of the law governing relations between private persons; but there will be no breach of the Charter.”
      * Consistent with the underlying purpose of s32 which was designed to limit the impact of the Charter to the relationship between the state and individuals
* The application of the Charter to private activity would vastly increase the role and power of the judiciary and significantly constrain the jurisdiction of legislatures
* **BUT** what is enough govt involvement to trigger Charter scrutiny?
* For the purposes of s32 it includes the entire exec branch (including ministers, civil servants and regulatory agencies appointed by the govt) and all matters within authority therefore extending the Charter to entities which are constituted through statute and exercise governmental power.
* **The SCC has developed two distinct tests under s 32** for determining whether the Charter applies to an entity
  + If the entity is found to be “government”, either because of its very nature or because the

government exercises substantial control over it, all its activities will be subject to the Charter.

* + 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
  + Control test examples:
    - Community colleges
    - Vancouver transit authority
    - But universities and hospitals were held to not constitute government for the purposes of section 32
  + Governmental activities test
    - *Eldridge*
      * If an act is truly governmental in danger, the entity performing it will be subject to review under the Charter only in respect of that act
        + The implementation of a specific statutory scheme or a government program
      * Hospitals delivering medical services in accordance with a provincial statutory scheme failed to provide sign language interpretation for deaf persons
        + Relevant statutes were silent
      * Prov govt argued that the decision not to fund sign language interpretation was a decision of the hospitals rather than the government, and that the Charter did not apply
        + This was rejected by a unanimous court
      * La Forest concluded that hospitals operated within the context of a “comprehensive social program” for the delivery of medically necessary services, with hospitals being the “vehicles the legislature has chosen to deliver this program.”97 There was, therefore, a “direct and . . . precisely-defined connection” between the failure to provide sign language interpretation and the medical service delivery system instituted by the legislation.
      * Distinguished from *Stoffman*
        + The SCC held that the imposition of a mandatory retirement scheme was made by a hospital board and was not a reflection of government policy
      * The conclusion in Eldridge was based on the fact that the delivery of medically necessary services was part of a comprehensive program that is generally defined and controlled by government. Therefore, decisions as to the specific services to be provided were necessarily subject to Charter review, even in cases Where a particular decision might have been made by a non-government body, such as hospitals.

### Governmental Acts

#### Eldridge v BC (AG) (Non-governmental Entities Implementing Government Programs)

Ratio:

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

Result: Charter applies to actions through the *HIA*

Reason: The source of the violation of s15 was not the legislation but the actions of the commission and the hospitals the entities exercising statutory decision making authority pursuant to that legislation but it remains whether the Charter applies. It is possible for a legislature to give authority to a body that is not subject to the Charter. **When it is alleged that an action of one of these bodies, and not the legislation that regulates them, violates the Charter it must be established that the entity in performing that particular action, is part of “government” within the meaning of s32 of the Charter.**

Legislatures have created many other statutory entities that are not as clearly autonomous from government. There are a myriad of public or quasi-public institutions that may be independent from government in some respects, but in other respects may exercise delegated governmental powers or be otherwise responsible for the implementation of government policy. A private entity may be subject to the Charter in respect of certain inherently governmental actions insofar as they act in furtherance of a specific governmental program or policy. The mere fact that an entity performs what may loosely be termed a “public function”, or the fact that a particular activity may be described as “public” in nature, will not be sufficient to bring it within the purview of “government” for the purposes of s 32.

In order for the Charter to apply to a private entity, it must be found to be implementing a specific governmental policy or program. The charter may be found to apply to an entity on one of two bases: the entity itself is “government” or the particular activity can be prescribed to the government.

Government in nature 🡪 involves an inquiry into whether the entity whose actions have given rise to the Charter breach can, either by its very nature or in virtue of the degree of governmental control exercised over it, properly characterized as “government” within the meaning of s 32.

Government in action 🡪 this demands an investigation not into the nature of the entity whose activity is impugned but rather into the nature of the activity itself.

Hospitals in BC are non-governmental entities whose private activities are not subject to the charter BUT it remains open to be seen whether hospitals effectively implement government policy in providing medical services under the HIA. The purpose of the HIA it to provide particular services to the public. Although the services are delivered through private institutions, it is the government that is responsible for defining both the content of the service to be delivered and the persons entitled to receive it. The structure of the HIA reveals that in providing medically necessary services, hospitals carry out a government function. It provides for the delivery of a comprehensive social program. Hospitals are merely the vehicles the legislature has chosen to deliver this program. There is a direct and defined connection between a specific government policy and the hospitals impugned conduct.

Issue: Does protection under s. 15(1) apply to mandatory sign language interpretation under the Hospital Insurance Act in hospitals? Does the Charter apply to the Commission?

Notes:

#### Entities Exercising Statutory Powers of Compulsion

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

### Governmental Inaction

#### Vriend v AB

Ratio:

Facts:Case involved a challenge to the omission of sexual orientation from Alberta’s *Individual’s Rights Protection Act.* The general scheme of the IRPA was to prohibit discrimination in public life and to establish a commission for enforcement; It prohibited discrimination from public notices, public services, rentals, and employment or union membership on the basis of race, religious beliefs, colour, sex, marital status, age and ancestry. Legislative history shows that omitting sexual orientation was deliberate. Vriend was an employee of King’s College where his employer asked him about his sexual orientation and dismissed him after he affirmed he was gay. He was rejected a complaint under the act.

Held: The omission violated Vriend’s equality rights and the words “sexual orientation” should be read into the Act

Reason:There is nothing in the wording of s 32 to suggest that a positive act encroaching on rights is required; rather the subsection speaks only of matters within the authority of the legislature. S 32 is worded broadly enough to cover positive obligations on a legislature such that the Charter will still be engaged even if the legislature refuses to exercise its authority. The application of the Charter is not restricted to situations where the government actively encroaches on rights.

Issues:Does s 32 of the Charter prohibit considerations of s 15 violation when that issue arises from a legislative omission?

Notes:

### Application of the Charter to Courts, the Common law and the Exercise of Administrative Discretion

**Reliance by Government or Common Law**

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

**Reliance on Common Law in Private Litigation**

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

#### Hill v Church of Scientology of Toronto

Ratio:

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

Result:

Reason: The common law must be interpreted in a manner consistent with the Charter. When determining how the Charter applies to the common law, it is important to distinguish between those cases in which the constitutionality of government action is challenged, and those in which there is no government action involved. It’s important not to import into private litigation the analysis which applies in cases involving government action. Private parties owe each other no constitutional duties and cannot found their case on a Charter right. Charter rights do not exist in the absence of state action. The most that parties can do is argue that the common law is inconsistent with Charter values – must draw a distinction between charter values and charter rights. The Charter will “apply” to the common law only to the extent that the common law is found to be inconsistent with Charter values

* + S 1 analysis is not appropriate in the case of conflicting charter values and the common law
  + The balance must be more flexible than the traditional s 1 analysis undertaken in cases involving governmental action cases
  + Charter values should be weighted against the principles which underlie the common law page71image47978848-  The division of onus which normally operates a Charter challenge to government action should not be applicable in private litigation
  + The party who alleging that the common law is inconsistent with the Charter should bear the onus of proving that the common law fails to comply with Charter values and that, when balanced, the common law should be modified

Issue:Whether the common law of defamation can be subject to Charter scrutiny

Notes:

#### Grant v Torstar Corp

* Interaction of Charter and defamation
* Undertook an extended critical evaluation of the common law of defamation and found that it gave insufficient protection to freedom of expression
* The court found that communications on matters of public interest, even if defamatory, are essential to proper functioning of democratic society and the search for truth
* To better align the common law with the con’al value of free expression, the court fashioned a new common law defence of responsible communication on matters of public interest

# SECTION 1

### Prescribed by Law

Rationales:

1. Prevent arbitrary and discriminatory action
2. Give notice to citizens that the right is going to be infringed

**TEST** (*Greater Vancouver Transportation*):

1. **Authorized by law?** Did the entity have the authority to enact policies? Are the policies binding rules of general application?
2. Are the policies **sufficiently precise and accessible**?

#### Greater Vancouver Transportation Authority v Canadian Federation of Students

Ratio:

Facts:BC Transit and TransLink refused to carry the political advertisements of a student organization and a public sector union on the sides of their buses. In doing so, they relied on their advertising policies, enacted pursuant to statutory authority that permit commercial but not political advertisements. Students allege this is a breach of their s 2(b) rights. TJ dismissed the action; CA reversed, saying it was a breach and could not be upheld under s 1

Result: Yes – fit in “prescribed by law”

Reason:**It must be asked whether the government entity was authorized to enact the impugned policies and whether the policies are binding rules of general application**. If so, they are “law”.

The Court doesn’t require that the limit be prescribed by a “law” in the narrow sense of the term; it may be prescribed by a regulation or by the common law. It is sufficient that the limit simply results by necessary implication from either the terms or the operating requirements by “law”.

The court has chosen to take a liberal approach to the precision requirement as regards both the form and the articulation of a limit on a Charter right. There is a need to distinguish between limits which arise by law and limits which result from arbitrary state action; those resulting from arbitrary state action continue to fail the “prescribed by law requirement”.

This inclusive approach is based on recognition that a narrow interpretation would lead to excessive rigidity in a parliamentary and legislative system that relies heavily on framework legislation and delegations of broad discretionary powers. As a binding rule adopted pursuant to a government entity’s statutory powers, a policy may have a legal effect similar to that of a municipal bylaw or a law society’s rules, both which fall within the meaning of law for the purpose of s 1.

Rules or policies that act as interpretive aids in the application of a statute or regulation cannot themselves be viewed as law that prescribes a limit on the charter. Where a policy is not administrative in nature, it may be “law” provided that it meets certain requirements.

The policy must establish a norm or standard of general application that has been enacted by a government entity pursuant to a rule-making authority. A rule-making authority will exist if Parliament or a provincial legislature has delegated power to the government entity for the specific purpose of enacting binding rules of general application which establish the rights and obligations of the individuals to whom they apply.

For the purpose of s 1, these rules need not take the form of statutory instruments. **So long as the enabling legislation allows the entity to adopt binding rules, and so long as the rules establish rights and obligations of general rather than specific application and are sufficiently accessible and precise, they will qualify as “law” which prescribes a limit on a Charter right**. Thus, where a government policy is authorized by statute and sets out a general norm or standard that is meant to be binding and is sufficiently accessible and precise, the policy is legislative in nature and constitutes a limit that is “prescribed by law”.

A review of the enabling legislations suggests that the transit authorities’ policies were adopted pursuant to statutory powers conferred on BC Transit and TransLink. They this confer broad discretionary powers on each entity’s board of directors to adopt rules regulating the conduct of its affairs, including the generation of revenue for the public transportation system.

The policies are not administrative in nature, they act as rules that establish the rights of the individuals to whom they apply. They fall within the meaning of “law” for the purpose of s 1 and will satisfy the “prescribed by law” requirement provided that they are sufficiently accessible and precise.

Issue:Whether the advertising policies adopted by two transit authorities were “law” and hence capable of satisfying the requirement of prescribed by law

Notes:

#### Little Sisters (2000)

* Statute prohibited obscene materials
* Gay and lesbian materials disproportionately targeted for import restriction
* Targeting followed internal policy memorandum relied upon by custom officials to interpret what is obscene
* Found to violate s15
* It’s the policy that was the source – not the law; is this internal memo “prescribed by law” that can support a limitations analysis
  + Found no – it was not law but an internal administrative aid
  + Not publicly available and not meant to be binding, rules were not accessible
  + “House rules”
  + **Ends the analysis**

### Demonstrably Justified

#### OAKES TEST!

1. Does the law pursue a **pressing and substantial objective**?
   * Wide discretion to legislatures
   * Exception where the objective of the law itself runs contrary to the Charter (*Big M Drugmart*)
2. Proportionality analysis
   * Even if the importance of the objective itself (when viewed in the abstract) outweighs the deleterious effects on protected rights, it is still possible that the actual salutary effects of the legislation will not be sufficient to justify these negative effects.
   * 1) **Rational connection**
     + Does the law have anything to do with the purported objective?
     + *Oakes*; protecting society from trafficking is a P&S objective BUT means not rationally connected to objective because possession is not rationally connected to trafficking
   * 2) **Minimal impairment**
     + Does the law impair the protected right/freedom as little as possible to achieve that objective?
     + Based on the presumption that if you could achieve objective without impairing rights this much then it is NOT justifiable
     + Problem: always easy to argue that less intrusive measures don’t fulfill purpose as effectively (*Hutterian Brethren*)
   * 3) Are the law’s **“deleterious effects” proportional to their “salutary effects”**? (*Dagenais*)
     + Is the harm done proportionate to the good that’s done?
     + *Oakes* implied abstract balancing of objective against the Charter right
       - Language changed with *Dagenais*
     + In practice, cases usually decided on minimal impairment or rational connection
       - Because it often sounds like a policy judgement

#### R v Oakes (THE OAKES TEST)

Facts:S 8 of the *Narcotics Control Act* created a “rebuttable presumption” that once the fact of possession of a narcotic had been proven, an intention to traffic would be inferred unless the accused established the absence of such intention. The accused challenged this reverse onus provision, arguing that it violated s 11(d) of the Charter

Result: Failed the proportionality test, cannot be upheld

Reason:Section 1 has two functions:

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

Any s 1 inquiry must be premised on an understanding that the impugned limit violates constitutional rights and freedoms

A “free and democratic society” 🡪 inclusion of these words as the final standard for justification for limits on rights and freedoms refers the Court to the very purpose for which the Charter was originally entrenched in the Constitution: Canadian society to be free and democratic.

The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown to be reasonable and demonstrably justified. The rights and freedoms are not absolute. The onus of proving that a limit is justified under s 1 is on the party seeking to uphold the limitation.

To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied:

* + First, **the objective, which measures responsible for a limit on a Charter right or freedom are designed to serve, must be “of sufficient importance to warrant overriding constitutionally protected right or freedom”**
    - The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s 1 protection
    - Referred to as being a pressing and substantial objective
  + Second, once a sufficiently significant objective is recognized, then the party invoking s 1 must **show that means chosen are reasonable and demonstrably justified** 
    - This involves a form of **proportionality test** with three components:
      * The measures adopted must be **carefully designed to achieve the objective** in question (rational connection)
        + They must not be arbitrary, unfair or based on irrational circumstances
        + Protecting society from trafficking is a P&S objective BUT means not rationally connected to objective because possession is not rationally connected to trafficking
      * The means, even if rationally connected to the objective, should impair **“as little as possible”** the right or freedom in question
      * There **must be a proportionality between the effects of the measure which are responsible for limiting the Charter** right or freedom
  + The nature of the proportionality test will vary depending on the circumstances

Issue:

Notes:

### Interpretive Trends

* Contextual approach
  + *Edmonton Journal* per Wilson J
    - Abstract approach: compare values of expression and privacy when assessing proportionality
      * If you need to go here, you don’t have a hope of understanding the law and section 1
      * Need to get closer to the ground
    - **Compare the interests as the arise on the facts before the court**
      * Seems to inform the shift in *Dagenais*
        + Actual impact of harm and good done
* Deference to legislature
  + *Irwin Toy* list to favour deference
    - Balance competing rights
    - Protecting vulnerable groups
    - Balancing interests in competitions for scarce resources
    - Conflicting social science evidence
  + There are at least 3 different ways the courts can ‘defer’ to legislative judgement or lower the standard of justification:
    - **Judicial deference to relevant findings of fact by the** legislature (or a lowering by the court of the standard of proof that the legislature must meet when establishing the factual basis for its justification argument)  
      E.g. *Irwin Toy* 🡪 social science the legislature used to determine whether advertisements manipulated children was not clear cut; however, the Court deferred to the governments reading of the evidence – likely because it recognized it had limited competence in such matters, or not greater competence than the ledge
    - **Deference to the legislatures accommodation of competing values or interests** – if the legislature has made an apparently reasonable judgement that concerns about a certain interest justify a limited restriction on expression then the courts may be reluctant to substitute their own judgement for that of the legislature. This reluctance may be greater when it recognizes the legislature is making a reasonable attempt to protect the interests of a vulnerable group or to accommodate competing “private” interests
    - **Lowering a standard of justification under s 1** – the courts have held that a less substantial or significant competing interest may support the restriction of a less valuable form of expression – such as commercial advertising or hate promotion (different forms of expression under s 2(b) may have greater or lesser value under s 1)

#### Edmonton Journal v AB

Ratio: Always take a contextual approach to s 1

Facts: A newspaper challenged s 30(1) of the Alberta *Judicature Act*, which limited the publication of information arising out of the court proceedings in matrimonial disputes, claiming that the provision was contrary to s 2(b) of the *Charter.* The Court found that the section violated freedom of expression, but they were split on the justification issue.

Result: Minimal impairment test failed

Reason:Two approaches to the Charter’s application: abstract approach and contextual approach. Under each approach, it is important to ascertain the underlying value which the right alleged to be violated was designed to protect. Also important to ascertain the legislative objective sought to be advanced by the impugned legislation. When both the underlying value and the legislative objective have been identified, and it becomes clear that the legislative objective cannot be achieved without some infringement of the right, it must then be determined whether the impugned legislation constitutes a reasonable limit on the right which can be demonstrably justified in a free and democratic society.

In this particular case, freedom of expression and privacy in matrimonial disputes cannot both be fully respected. **One should not balance one value at large and the conflicting value in its context – to do so could well be to pre-judge the issue by placing more weight on the value developed at large than is appropriate in the context of the** **case**.

In this case, the public interest in protecting the privacy of litigants generally in matrimonial cases against the public interest in an open court process.

One virtue of the contextual approach is that is recognizes that a particular right or freedom may have a different value depending on the context. The contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it.

Issue:Can s 30(1) be justified as a reasonable limit under s 1?

Notes:

#### Irwin Toy v QB (high watermark of deference)

Ratio:

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

Result: Context is the better way to deal with this issue

Reason:**Deference to legislative choice is appropriate – where the government**… has sought **to balance competing rights; to protect a socially vulnerable group; to balance interests of various social groups competing for scarce resources; or to address conflicting social science evidence as to the cause of a social problem**

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

Issue: Did the govt have a reasonable basis for concluding ban was minimally impairing?

Notes:

# Freedom of Religion

* Fed structure gave provinces authority over matters relating to culture, family
  + In part to protect rights of the French minority
* *Indian Act*, valid under 91(24) with a focus cultural assimilation
  + Large effort, sustained over many years
    - Banning of specific religious practices
    - Residential schools
* Implied BoR cases found provincial laws targeting practices to be ultra vires
  + *Saumur*: Jehovah’s Witness leaf-letting laws targeted towards ideas of religion based on morals

Section 2 of the Charter: Fundamental Freedoms

1. **Freedom of conscience and religion**

Section 27: Multicultural Heritage

## Anti-Coercion

### R v Big M Drug Mart Ltd.

Ratio: Legislation has a religious purpose. Either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. Purpose is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable. Purposive interpretation approach (*Hunter*) prevents \*at minimum\* the government from compelling individuals to perform or abstain from performing otherwise harmless acts because of the religious significance of those acts to others 🡪 LDA is compelling observation of the

Facts: Big M was charged with unlawfully carrying on the sale of goods, on Sunday, contrary to the *Lord’s Day Act.* Big M has challenged the constitutionality of the *Lord’s Day Act*, both in terms of division of power and the Charter. Freedom of religion has been seen to be a matter falling within federal legislative competence. “Lord’s Day” = Saturday midnight to Sunday midnight.

S 4 of the Act makes it unlawful for any person to carry out business on Sunday.

S 24 may restrict Big M’s “individual remedy” under religious freedoms, because Big M has no religion.

Result: Declaration that LDA is of no force or effect (section 52)

Reason: **Purpose and Effect**

* + There are two ways to characterize the purpose of the Lord’s Day act
    - The religious one, namely securing public observance of the Christian institution of the Sabbath
    - The secular one, namely providing a uniform day of rest from labour
  + **Cannot be said to have a secular purpose; it is a religious purpose** 
    - Based on English Sunday observance law
    - History of upholding law under criminal power as morality legislation
  + Consideration of the object of legislation is vital if rights are to be fully protected
  + **“Either an unconstitutional purpose or an unconstitutional effect can invalidate legislation”**
    - Certain objects lay beyond leg power
    - Saves litigant from needing to prove violative effect where violative purpose is evident
  + **The Court shuts down the “shifting purpose” argument** (that the purpose may shift or transform over time)
    - Practical difficulties – uncertainty in laws and encourage re-litigation of the same issues (end stare decisis)
    - Stands contrary to ‘Parliamentary intention’ – purpose is a function of intent of those who drafted and enacted the legislation at the time, and not of any shifting variable
  + **Purpose is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable**

**Freedom of Religion**

* + A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes, and customs
  + **Essence**: right to entertain beliefs, declare them openly without fear, and manifest beliefs through worship
    - Freedom can be characterized by the absence of coercion or constraint
  + Is a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free
  + **Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, it also includes indirect forms of control which determine or limit alternative courses of conduct available to others**
  + Freedom means that, subject to limitations that are necessary to protect public safety, order, health or morals, or the fundamental rights of others, no one is to be forced to act in a way contrary to his beliefs or his conscience
  + The Charter safeguards religious minorities from the threat of the “tyranny of the majority”

**The *LDA* works as a form of coercion**

* + The act binds all to a sectarian Christian ideal
  + The Act takes Christian views and using the force of the state translates them into a positive law binding on believers and non-believers alike
  + Creates climate hostile to non-Christian Canadians and gives appearance of discrimination
    - Reminder of difference that has an alienating effect
  + Non-Christians are prohibited for religious reasons from carrying out activities which are otherwise lawful, moral and normal
  + **Inconsistent with s 27 re multicultural heritage**
    - \*\* Adoption of claimant’s perspective
    - Shift in emphasis

**The Purpose of Protecting Freedom of Conscience and Religion**

* + *Hunter* 🡪 **the proper approach to interpretation of the Charter is a purposive one – the meaning of a right or freedom is to be ascertained by an analysis of the purpose of such guarantee** – it is to be understood **in the light of the interest it was meant to protect**. The interpretation is meant to be generous but not overshoot the actual purpose of the right in question. It **must be placed in its proper linguistic, philosophic and historical contexts**.
  + The overall purpose (as per *Hunter*) is the “unremitting protection of individual rights and liberties”
  + Purpose of freedom of conscience and religion relations to democracy/expression 🡪 Every individual be free to hold and to manifest whatever beliefs and opinions his/her conscience dictates provided that such manifestations do not injure his/her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own
    - This **prevents \*at minimum\* the government from compelling individuals to perform or abstain from performing otherwise harmless acts because of the religious significance of those acts to others**
  + It is for each Canadian to work out for him/herself what his/her religious obligations are and not for the state to dictate otherwise
  + The purpose of the *Lord’s Day Act* is to compel observance of the Christian Sabbath
    - Not direct compulsion but compelling non-action
    - This infringes 2(a)

***Section 1***

* + Once a sufficient government interest is recognized, the Court must decide if the means chosen to achieve the interest are reasonable – proportionality
  + Two arguments that justify the *LDA*:
    - Sunday is the most practical day to be chosen for one of rest
      * Fundamentally repugnant – justifies the law upon the very basis upon which it is challenged
      * Reason cannot be “well this is the majority faith” – reproduces the problem in the first place
    - Everyone accepts and needs a universal day of rest from work, business and labour
      * Problem: asserts objective that this Court has never found to be the motivation for this law
      * If the purpose were uniform day of rest = federalism problem
        + Province has the power over labour
        + The only reason this was valid to fed was because of the morally motivated public purpose that validated it as a criminal law
  + Legislation cannot be saved because it achieves a goal that the legislators did not primarily intend
  + **There is no pressing and substantial purpose because the purpose itself is unconstitutional**

Issue: Is the LDA infringing s2(a)? Is it violating the Charter?

Notes:

### R v Edwards Books and Art Ltd

Ratio:

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

Result: Infringes s 2(a), upheld under s 1. Legislation with a secular inspiration does not abridge the freedom from conformity to religious dogma merely because its statutory provisions coincide with the tenants of a religion

Reason:**Legislation**

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

**Freedom of Conscience and Religion Under s 2(a)**

* + The act has a secular purpose which is not offensive to the Charter guarantee of freedom of conscience and religion
  + ***Big M* 🡪 both the purpose and the effects of legislation are relevant to determining its constitutionality**
  + Even if the law has a valid purpose, it is still open to a litigant to argue that it interferes by its effects with a right or freedom guaranteed by the Charter
  + Must still consider the impact of the Act
  + **“It matters not, I believe, whether a coercive burden is direct or indirect, intentional or unintentional, foreseeable or unforeseeable. All coercive burdens on the exercise of religious beliefs are potentially within the ambit of s2(a)**
    - **But trivial or insubstantial burdens are permissible**
  + 2 coercion arguments:
    - The RBHA makes it more expensive for retailers and consumers who observe a weekly day of rest other than Sunday to practise their religious tenets
      * The act indirectly coerces these persons to forego the practice of a religious belief
      * The purpose of s 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one’s perception of oneself, humankind, nature and in some cases, a higher or different order of being – the Constitution only shelters those to the extent that religious beliefs or conduct might reasonably or actually be threatened
      * For a state imposed cost/burden to be proscribed by s 2(a) it must be capable of interfering with religious beliefs or practice – if action increases the cost or practicing/manifesting religious beliefs is trivial/insubstantial then it is not prohibited
    - The Act has the direct effect of compelling non-believers to conform to a majoritarian religious dogma, by requiring retailers to close their doors on Sunday
      * One is not being compelled to engage in religious practices merely because a statutory obligation coincides with the dictates of a particular religion
      * A legislative prohibition such as theft or murder is not a state-enforced compulsion to conform to religious practices, merely because some religions enjoin their members not to steal or kill
  + There is an **internal limit** to s 2(a) – there has to be an actual state act that threatens religious practice
    - Real impact is on Saturday observers – can’t shop Saturday, and now can’t shop Sunday either
    - Forcing to compromise religious beliefs – actual burden, not trivial

**The Burden of the Act**

* + The act has a different impact on person depending on religious beliefs:
    - Non-Observers
      * The effects are generally secular in nature and do not impair or abridge their freedom of conscience or religion
      * It does not interfere with their religion
      * Without the law they would have a competitive advantage – desire to stay open by business not religious
    - Sunday Observers
      * The is act is favorable to Sunday observers – the cost of for religious observance has been decreased
    - Saturday Observers
      * It is argued that there is no nexus between the law and the freedom of Saturday observers to exercise their religious beliefs
      * **This Act leaves the Saturday observers at the same natural disadvantage relative to non-observers and adds a new purely statutory disadvantage of being closed an extra day relative to the Sunday observer – the competitive pressure to abandon Saturday observance is not insubstantial or trivial** 
        + Government action chose that they would have to be closed on Sunday – but they are also closed on Saturday (indirect coercion) would be easier if they gave up that religious tenant of faith and used Sunday as a day of rest
      * It can also affect Saturday observing consumers – can’t shop on Sunday
      * It is an infringement of their religious freedoms
    - Other Day Observers

**Section 1**

* + No prescribed by law issue
  + **The Act is aimed at a pressing and substantial concern – protect workers, families and communities by providing common day of rest**
  + There is a rational connection
    - Is the focus on the retail sector rationally connected? Yes – vulnerability of retail workers – and it is within the purview of the legislature to recognize this vulnerability
    - Are the exemptions are rationally connected? Mostly yes – yes attend to constituencies
  + Minimal impairment 🡪 No – option for retailers with less than 8 employees to stay open so it can be justified for large retailers but not small; this is where deference should be afforded to the legislature (balancing competing groups)
    - Minimal impairment analysis has to be about those who are not covered by the exemptions
    - Could alternative schemes have met objective in less impairing fashion?
      * Suggestion that the law could’ve focused on employees, granting the right to refuse Sunday work
        + Inattentive to employer vulnerability
        + “In interpreting and applying the Charter I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons”
      * Suggestion that they could replace s3(4) with similar exemption for any retailer with sincerely religious beliefs
        + Indignity of state-sponsored inquiry into sincerity of belief
    - Both alternative schemes might be permissible but involve trade offs
      * Therefore, ON has made a reasonable choice = **deference to the legislature**
        + The courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line
    - A serious attempt was made to accommodate – law is minimally impairing
  + Final balance 🡪 deleterious effects are not disproportionate

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

Does the law in this case create a burden that is more than trivial or insubstantial?

Notes: Beetz concurring; No discrimination from act itself – discrimination is from beliefs – act doesn’t make you close on Saturday; religion makes you close on Saturday.

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

## Accomodation

1. Does the claimant have a sincerely held belief having a nexus with religious belief? (*Amselem*)
   * Connect with divine, or as a function of spiritual faith
   * No need to prove belief is supported by official dogma
   * Cannot be fictitious (q of fact)
   * But it is inappropriate to rigorously study past practices given vacillating nature of religious belief
2. Has there been a non-trivial or non-insubstantial interreference with religious belief/practice?

#### “Duty to Accommodate”

* Concept developed in statutory human rights (ie. Discrimination) jurisp
* Employers, landlords etc are obliged to make “reasonable accommodation” for individuals harmed by facially neutral rules
* Duty to accommodate ends at a point of “undue hardship” to employer, landlord

**What is the relationship between duty to accommodate up to a point of undue hardship and minimal impairment analysis?**

### Syndicat Northcrest v Amselem (Head Note)

* Facts
  + The appellants, all Orthodox Jews, are divided co-owners of residential units in Montreal
  + Amselem set up a “succah” on his balcony for the purposes of fulfilling a biblically mandated obligation during the Jewish festival of Succah
  + Succah: small, enclosed hut opened to the heavens in which Jews are commanded to dwell temporarily during the festival
  + After Amselem put up his succah, the syndicate of co-ownership, Syndicat Northwest, requested its removal, claiming the succah was in violation of the buildings by-laws as stated in the declaration of co-ownership which prohibited decorations and alterations to the balcony
  + Despite the refusal, the appellants set up the succahs and the respondents filed an application for a permanent injunction prohibiting the appellants from setting them up
* McLachlin
  + Although a court is not qualified to judicially interpret and determine the content of a subjective understanding of a religious requirement, it is qualified to inquire into the sincerity of a claimant’s belief, where sincerity is in fact at issue
    - Assessment of sincerity is a question of fact that can be based on criteria including the credibility of a claimant’s testimony, as well as an analysis of whether the alleged belief is consistent with his or her other current religious practices
  + Freedom of religion is **triggered when a claimant demonstrates that he or she sincerely believes in a practice or belief that has a nexus with religion**
    - Once religious freedom is triggered, a court must then ascertain whether there has been **non-trivial or non‑insubstantial interference with the exercise of the implicated right so as to constitute an infringement of freedom of religion** under the Charter (*Edwards*)
  + On the issue of sincerity, the trial judge correctly concluded that the appellant A sincerely believed that he was obliged to set up a succah on his own property
  + The alleged intrusions or deleterious effects on the co‑owners’ rights to peaceful enjoyment of their property and to personal security guaranteed by ss. 6 and 1 respectively of the Quebec *Charter*are, under the circumstances, at best minimal and thus cannot be reasonably considered as imposing valid limits on the exercise of the appellants’ religious freedom

### Multani v Commission Scolaire Marguerite-Bourgeoys

* Link between minimal impairment analysis and the concept of reasonable accommodation was made explicit in this case by the court
  + Charron J
    - **Courts have held that there is a duty to make reasonable accommodation for individuals who are adversely affected by a policy or rule that is neutral on its face** 
      * **And that this duty extends only to the point at which it causes undue hardship to the party who must perform it**
    - This analogy with the duty of reasonable accommodation seems to me to be helpful to explain the burden resulting from the minimal impairment test with respect to a particular individual, as in the case at bar
* Involved an orthodox Sikh student who was forbidden by the school board in QB from wearing his kirpan to school pursuant to a rule forbidding all weapons in the school
  + The school did not dispute that the student had a sincere belief in the spiritual significance of the kirpan and that he considered himself to be bound to wear it at all times
* SCC held a breach of s 2(a) that could not be justified under section 1
  + Objective was to ensure “reasonable safety”
    - The school’s policy was to ensure safety, but it was unrealistic that the school could ban all safety risks
      * Pens, scissors and bats were all permitted
    - Accepted that this is rationally connected this
  + Minimal impairment
    - Not satisfied – some accommodation is required
    - Rejected the school’s argument that kirpans were inherently dangerous
      * No instances of one being drawn by a student at school
    - School distinguished from airplane or courthouse because it has ongoing relationships with students and can monitor and assess the risk of violent behaviour
    - Allowing the kirpan to be sewn into his clothes = reasonable accommodation

### AB v Hutterian Brethren of Wilson Colony

Ratio:

Facts: Alberta regulations require that all persons who drive motor vehicles hold a driver’s licence. Since 1974, each licence has borne a photograph of the licence hold, subject to exemption for people who objected to having their photographs taken on religious grounds. At the registrar’s discretion, religious objectors were granted a non-photo licence (Condition Code G licence).

2003 🡪 the province adopted a new regulation in which the photo requirement became universal.

56% of the Code G licences were held by Hutterites who sincerely believe that the second commandment prohibits them from having their photograph taken. The photo requirement was aimed at reducing the risk of fraud.

Result: S2(a) was infringed but justified under s 1

Reason: The Nature of the Limit on s2(a)

* + Given their beliefs, the effect of universal photo requirement is to place Colony members who wish to obtain licenses either in the position of violating their religious commitments or foregoing licences
  + Argued that the regulation forces members to choose between obeying the second commandment and adhering to their rural communal lifestyle – thereby limiting religious freedom guaranteed by s1(a)
  + Broader impact of the photo requirement is relevant at the proportionality stage
  + **Infringement of s2(a) of the Charter will be found where**
    - The claimant sincerely believes in a belief or practice that has a nexus with religion and;
      * Conceded by the province
    - The impugned measure interferes with the claimants’ ability to act in accordance with their religious beliefs more than trivial or insubstantial
      * Courts below have proceeded on the assumption that this requirement was met

Section 1 Analysis

* + Pressing and substantial?
    - Objective: ensure integrity of the system for licensing drivers in order to prevent ID theft and harmonize jurisdictions
    - Prevent identity theft or fraud and the various forms of mischief which identity theft may facilitate, and the harmonization of international and interprov standards for photo ID
      * Part of a larger goal of ensuring the integrity of the system for licensing drivers
    - Maintaining the integrity of the system in a way that minimizes the risk of identity theft is clearing a goal of pressing and substantial importance, capable of justifying limits on rights
  + Rational connection
    - Govt argues that universal photo system will be more effective in preventing identity theft than a system that grants exemptions
    - Concluded that the province has established that the universal photo requirement is rationally related to its goal of protecting the integrity of the system
  + Minimal impairment
    - Whether there are less harmful means of achieving the legislative goal
    - **Internal limitation**
      * Arises from the fact that the minimum impairment test requires only that the govt choose the least drastic means of achieving its objective
      * The court need not be satisfied that the alternative would satisfy the objective to exactly the same extent or degree as the impugned measure
        + The **court should not accept an unrealistically exacting or precise formulation of the govts objective which would effectively immunize the law from scrutiny at the minimal impairment stage**
        + But less drastic means that do not substantially fulfill the govt’s objective are irrelevant at this stage
        + **Question is whether there is an alternative, less drastic means of achieving the objective in a real and substantial matter**

Here lack of photos would significantly compromise the objective

* + - While the govt is entitled to deference in formulating its objective, that deference is not blind or absolute
    - Whether the means chosen to further its purpose (universal photo req) is reasonably tailored to address the problem of identity theft associated with driver’s licenses
    - The province proposes alternatives which maintain the universal photo req but minimize its impact on Colony members by eliminating or alleviating the need for them to carry photos
      * Rejected – only alternative is a drivers license issued without a photo, stamped with the words not to be used for ID purposes
        + Does not work
    - Freedom of religion cases may often present this “all or nothing” dilemma
      * Govts may find it difficult to tailor laws to the myriad ways in which they may trench on different people’s religious people’s beliefs and practices
    - A distinction must be maintained btw the reasonable accommodation analysis undertaken when applying human right laws and the s1 justification analysis that applies to a claim that a law infringes the Charter
      * Where the validity of a law is in question, the appropriate approach is the s1 Oakes analysis – if not justified the law is null and void per s52
      * Where a government action or administrative practice is alleged to violate the claimants Charter rights (where an infringement is found) the courts remedial jurisd in s24(1) of the Charter
      * “Undue hardship” and “reasonable accommodation” are not appropriate standards for review of legislation
      * Relevant relationships are societal not individual
      * Legislature has mot latitude to pursue preventative or precautionary objectives
      * Individual HR cases, unlike assessment of legislation, consider reasonable accommodation and undue hardship with reference to monetary costs and viability of enterprise
      * Even though Multani has told us that these concepts can be helpful but legislation is a societal relationship the court cautions the application of these concepts
  + Deleterious effects test
    - **Only element of proportionality analysis NOT anchored in law’s purpose** 
      * Only branch that takes full account of severity of impact of law on groups and individuals
    - Salutary Effects (Benefits)
      * Enhancing the security of the licensing scheme
        + Any exemption would undermine the system
        + Hard to assess amount of risk but clear that it would be compromised
      * Assisting in road side safety and identification
      * Harmonizing Alberta’s licencing scheme with those of other jurisdictions
      * Making sure no one holds more than one licence and requiring *all* licences to have a photo will accomplish the objective more effectively than allowing restrictions – internal integrity would be compromised
      * These effects are sufficient to support some restriction on the rights
      * Reason and the evidence suggest that the law will be beneficial
    - Deleterious Effects
      * Seriousness of infringement judged on case-by-case basis (in light of jurisprudence)
      * When assessing indirect burdens on religious practice, consider whether cost is so high as to effectively preclude choice
        + Harder cases are where the limit on the religious freedom are due to incidental and unintended effects of the law
        + This does not preclude the choice of religious belief but it makes it more costly
      * Cost – not being able to drive on the highway, **but this does not deprive the Colony of a meaningful choice as to their religious practice**
        + Distinguished from *Edwards* or *Multani*
      * Could hire people to drive them – driving is not a right, but rather a privilege
    - Final balance = important public balance in … fill in from slides

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

Notes: Abella dissent; The real objective is the interest in reducing identity theft, this is a valid pressing and substantial objective. The universal requirement is rationally connected to the objective. Complete ban really needs a demonstration that this is necessary to achieve the goal.

Disagrees in the minimal impairment analysis – the law must be carefully tailored so that the rights are impaired no more than necessary (RJR) – not minimally impairing because all alternatives involve taking a photo and this completely extinguishes the right. Proportionality – cannot say the salutary effects are more than speculation 🡪 the effects are slight and largely hypothetical. Choice not to drive is not a “meaningful choice” especially in rural AB. Treating driving as a privilege inconsistent with *Eldrigde, Roncarelli*. So many people not in the database (700,000) therefore adding 250 individuals from the Colony would be a marginal benefit. Believes the government has not discharged its burden for justification under s.1. No evidence that Condition Code G licenses imperiled scheme. Would dismiss appeal but suspend declaration of invalidity for one year.

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

## Communal aspects

### Ktunaxa v BC

Ratio:

Facts: The Ktunaxa’s traditional territories are said to consist of land that straddles the international boundary between Canada and the United States. The Ktunaxa asserted that Qat’muk was a place of spiritual significance for them. Notably, it is home to an important population of grizzly bears and to Grizzly Bear Spirit.

Result: We conclude that the claim does not engage the right to freedom of conscience and religion under s. 2 (*a*) of the *Charter .*Section 2 (*a*) protects the freedom of individuals and groups to hold and manifest religious beliefs. The Ktunaxa’s claim does not fall within the scope of s. 2 (*a*) because neither the Ktunaxa’s freedom to hold their beliefs nor their freedom to manifest those beliefs is infringed by the Minister’s decision to approve the project.

Reason: The Scope of Freedom of Religion

* + s. 2 (*a*) has two aspects — the freedom to hold religious beliefs and the freedom to manifest those beliefs
  + It is undisputed that the Ktunaxa sincerely believe in the existence and importance of Grizzly Bear Spirit
    - They also believe that permanent development in Qat’muk will drive this spirit from that place.
    - **Even though this is recently adopted, *Amselem* ensures that recent adoption of belief is irrelevant to sincerity**
  + The Ktunaxa must show that the Minister’s decision to approve the development interferes either with their freedom to believe in Grizzly Bear Spirit or their freedom to manifest that belief. But the Minister’s decision does neither of those things.
    - The state’s duty under s. 2(*a*) is not to protect the object of beliefs, such as Grizzly Bear Spirit. Rather, the state’s duty is to protect everyone’s freedom to hold such beliefs and to manifest them in worship and practice or by teaching and dissemination.
    - The Charter protects freedom to worship, but does not protect the spiritual focus of worship
    - Court recognizes that religion not purely individual but communal

Issue: Whether the British Columbia Minister of Forests, Lands and Natural Resource Operations erred in approving a ski resort development, despite claims by the Ktunaxa that the development would breach their constitutional right to freedom of religion

Notes: Moldaver concurring; Where the spiritual significance of beliefs or practices has been taken away by state action, this interferes with an individual’s ability to act in accordance with his or her religious beliefs or practices — **whether by professing a belief, engaging in a ritual, or passing traditions on to future generations**. In many Indigenous religions, land is not only the site of spiritual practices in the sense that a church, mosque or holy site might be; land may *itself* be sacred, in the sense that it is where the divine manifests itself 🡪 the spiritual realm in the indigenous context is inextricably linked to the physical world. Majority decision risks excluding Indigenous religious freedoms claims involving land from the scope of s2a’s protection. Basically, suggesting that the court is crafting freedom of religion law to explicitly exclude indigenous spiritual realities.

In my view, the approach adopted by my colleagues does not take into account that **if a belief or practice becomes devoid of spiritual significance, it is highly unlikely that a person would continue to hold those beliefs or engage in those practices**.

**Interference with ability to act in accordance with religious beliefs more than trivial or insubstantial and therefore infringes s2a**.

### Law Society of BC v TWU

Ratio:

Facts: Trinity Western University (TWU), an evangelical Christian postsecondary institution, seeks to open a law school that requires its students and faculty to adhere to a religiously based code of conduct prohibiting “sexual intimacy that violates the sacredness of marriage between a man and a woman”

Result: The LSBC’s decision not to recognize TWU’s proposed law school represents a proportionate balance between the limitation on the *Charter*right at issue and the statutory objectives governing the LSBC. The LSBC’s decision was therefore reasonable.

Reason: Is freedom of religion engaged?

* + TWU is a private religious institution created to support the collective religious practices of its members. For the reasons set out below, we find that the religious freedom of members of the TWU community is limited by the LSBC’s decision.
  + This Court has adopted a broad and purposive approach to interpreting freedom of religion under the [*Charter*](https://qweri.lexum.com/calegis/schedule-b-to-the-canada-act-1982-uk-1982-c-11-en). This encompasses “the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination” (*Big M*)
  + There is **no doubt evangelical Christians believe that studying in a religious environment can help them grow spiritually**.
  + It is clear from the record that evangelical members of TWU’s community sincerely believe that studying in a community defined by religious beliefs in which members follow particular religious rules of conduct contributes to their spiritual development. In our view, this is the religious belief or practice implicated by the LSBC’s decision.
  + The effect is a limitation on the right of TWU’s community members to enhance their spiritual development through studying law in an environment defined by their religious beliefs in which members follow certain religious rules of conduct. Accordingly, their religious rights were engaged by the decision.

Issue:

Notes: Rowe concurring; Rather than accepting the infringement as alleged at face value and proceeding to the balancing analysis, a review of the jurisprudence leads me to the conclusion that s. 2 (*a*) is not infringed in this case. I also conclude that no other *Charter*infringements have been made out on the record in this appeal. We can draw two conclusions with respect to the nature of religious freedom under s. 2 (*a*) from this foundational jurisprudence. The first is that religious freedom is based on the exercise of free will. This is because religion, at its core, involves a profoundly personal commitment to a set of beliefs and to various practices seen as following from those beliefs. The second conclusion is a corollary of the first: religious freedom is also defined by the absence of constraint. From this perspective, religious freedom aims to protect individuals from interference with their religious beliefs and practices. Its character is noncoercive; its antithesis is coerced conformity. This understanding of religious freedom is rooted in the philosophical tradition that conceives of freedom in terms of the absence of interference with individual choice.

Does it suffice for the purposes of s. 2(*a*) that the claimants sincerely believe that studying in a community defined by religious beliefs *contributes* to their spiritual development? Concern: *Multani* “an individual must do is show that he or she sincerely believes that a certain belief or practice is required by his or her religion”.

Where the protection of s. 2(*a*) is sought for a belief or practice that constrains the conduct of nonbelievers — in other words, those who have freely chosen *not* to believe — the claim falls outside the scope of the freedom. In other words, interference with such a belief or practice is not an infringement of s. 2(*a*) because the coercion of nonbelievers is not protected by the *Charter*.

It does not protect measures by which an individual or a faith community seeks to impose adherence to their religious beliefs or practices on others who do not share their underlying faith. I therefore conclude that what the claimants seek in this appeal falls outside the scope of freedom of religion as guaranteed by the *Charter*.

# Freedom of Expression

## Foundations and Commercial

Keegstra McLachlin dissent: The Purposes of Freedom of Expression

1. Free flow of ideas is essential to democracy
2. Essential to precondition of search for the truth
3. Intrinsic value to self-realization of speaker and listener

### Irwin Toy Ltd v Quebec (AG)

Ratio:

Facts: Challenge to the provisions of Quebec’s *Consumer Protection Act* and the relevant regulations governing children’s advertising. S 248 provided that no person may make use of commercial advertising directed at persons under 13 years of age. The regulations set out certain exemptions from the prohibition on children’s advertising. Irwin Toy broadcast messages that the *Office* claimed were in contravention of the act. Irwin instituted an action for a declaration that the sections were ultra vires the province or inconsistent with the guarantee of freedom of expression found in s 3 of the Charter

Result: Yes – infringe s 2(b) but are upheld under s 1

Reason: *Step 1 – Was the plaintiff’s activity within the sphere of conduct protected by freedom of expression*

* + Purposive interpretation: ensure that everyone can manifest their thoughts, opinions, beliefs indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream”
  + **Activity is expressive if it conveys a meaning; the meaning is its content** 
    - Extremely broad
  + We cannot exclude human activity from the scope of guaranteed free expression on the basis of the content or meaning being conveyed
  + **If the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of a guarantee**
    - Distinguishes “purelyphysical” from expressive conduct
      * Parking a car example
    - **“Attempts to convey” indicates the subjective nature of the intention**
  + Violence as a form of expression does not receive protection
    - To allow someone to create expression through violence, it cheapens and devalues the protection of expression
    - BUT 🡪 threats of violence may be protected, this court would address it under s 1
  + The message at issue 🡪 clearly conveys a meaning and cannot be excluded as having no expressive content

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

**Purpose**

* + When applying the purpose test to the guarantee of free expression, one must beware of drifting to either of two extremes:
    - On one hand, the greatest part of human activity has an expressive element and so one might find, on an objective test, that an aspect of the government’s purpose is virtually always to restrict expression
    - On the other hand, the government can almost always claim that its subjective purpose was to address some real or purported social need, not to restrict expression
  + If the **government’s purpose is to restrict the content of expression in order to control particular meanings** that are not conveyed, it necessarily limits the guarantee of free expression
  + If the government’s purpose is to control ONLY physical consequences of activity, regardless of expressive content, not impermissible purpose under 2(b)
    - Rule prohibiting leafletting vs. rule prohibiting litter
  + If the government’s purpose is to restrict a form of expression in order to control access by others to the meaning being conveyed or to control the ability of the one conveying the meaning to do so, it also limits the guarantee
  + In determining whether the government’s purpose aims simply at harmful physical consequences, the question becomes: does the mischief consist in the meaning of the activity or the purported influence that meaning has on the behaviour of others, or does it consist, rather, only in direct physical results of the activity
  + If the purpose is permissible – claimant may still prove 2(b) is infringing
    - Must show infringement linked to purposes of expression
  + HERE the case is prohibition of content 🡪 s2(b) is infringed

**Effects**

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

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

**Prescribed by Law**

* + Contended that it is too vague so there is not enough notice – not prescribed by law
  + Law permits some discretion in applying factors
    - Not confusing or contradictory
    - Discretion is acceptable, provided intelligible standards for interpretation

**Pressing and Substantial Objective**

* + The **concern that prompted the enactment of the legislation is pressing and substantial and that the purpose of the legislation is of great importance**
  + The **concern is for the protection of a group which is particularly vulnerable to the techniques of seduction and manipulation abundant in advertising** – established by the evidence
  + The concerns are the susceptibility of young children to media manipulation and their inability to differentiate between reality and fiction to grasp the persuasive intention behind the message – used the Trade Commission report on young children saying 2-6 cannot distinguish fact from fiction – reasonable to expand this older children and advertising in other media
    - Rational connection easily satisfied

**Minimal Impairment**

* + Don’t let the Charter “become an instrument of better situated individuals to roll back legislation” aimed to help vulnerable people (*Edward Books*)
  + Here – what legislation mediates between competing claims of different groups it will have to draw a line marking where one set of claims begins and the other fades away
  + **The question is whether government has reasonable basis, on evidence, for concluding ban on all advertising directed at children was minimally impairing?**
    - Evidence exists that other less intrusive options reflecting more modest objectives were available – there is evidence establishing the necessity of a ban to meet the objectives the govt as reasonably set
    - Courts are not called upon to substitute judicial opinions for legislative ones (*Edward Books*)
    - If legislature makes an assessment on where to draw the line, especially if done by weighing the scientific evidence and allocating scare resources, it is not for the court to second guess
    - Substitute one for another
  + Onus is discharged under this section
  + When striking a balance between claims of competing groups the choice of means will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources
  + The evidence sustains that the reasonableness of the legislature’s conclusion that a ban on commercial advertising directed at children was the minimal impairment of free expression consistent with the goal of protecting children against manipulation through such advertising

**Deleterious effects**

* + No suggestion that the effects are so serious to outweigh the pressing and substantial objective – advertisers will have to develop new marketing strategies for children’s products
  + The deleterious effect is profit margin on the companies

Issue:Do these sections limit freedom of expression? If so, are they justified?

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

### RJR MacDonald Inc v Canada (AG)

Ratio:

Facts:The *Tobacco Products Control Act* prohibited the advertising and promotion of tobacco products offered for sale in Canada and required manufacturers to add packages an unattributed warning about the dangers of smoking. The Act stated it was enacted to protect the health of Canadians in light of evidence of the harmful effects of tobacco use. Tobacco manufacturers challenged the Act on federalism grounds and Charter grounds. Said it violated free speech: inability to advertise (*Irwin Toy*), and forced them to add warning labels (forcing expression upon them)

Result: Yes – cannot be justified under s 1

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

* + Freedom of expression includes right to say nothing or right to not say certain things
  + Here obligatory health warning coupled with prohibition on any other content on packages really amounts to an infringement

**Justified Under s 1?**

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

**Pressing and Substantial Objective**

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

**Rational Connection**

* + Okay to use reason or logic rather than direct proof – deference to Parliament
    - Here, there is sufficient evidence to establish link most measures to their objectives on the basis on reason and logic
    - Exception: prohibition on use of logos on non-tobacco products
  + TJ found that the items of ‘direct or scientific’ evidence were not persuasive; taken together with the scientific evidence is sufficient to establish a link between certain forms of advertising and tobacco consumption

**Minimal Impairment**

* + Fails at this stage – final balance not necessary
  + **A full prohibition will only be constitutional under the minimal impairment stage where the government can show that only a full prohibition will enable it to achieve its objective**
  + Other options that would have been less intrusive include:
    - A partial ban
    - Ban on lifestyle advertising only
    - Excluded “brand preference” ads
    - More tailored scheme like in *Irwin Toy*
    - Measures to prohibit advertising at children
    - Labelling requirements
    - Attributed health messages
  + Also govt failed to prove unattributed warnings were necessary
  + Even with difficult social issues where the stakes are high, Parliament does not have the right to determine unilaterally the limits of intrusion on the rights and freedoms guaranteed by the Charter
    - The Constitution, as interpreted by the courts, determines this
  + **COMMERCIAL SPEECH should not be lightly dismissed** 
    - Motivation to profit is irrelevant to determination of whether the government has established that the law is reasonable or justified as an infringement on freedom of expression
    - Information on price, quality, health risks can be valuable
  + For the unattributed label, it was for the government to show why this is required to achieve the objective and it failed to do so
  + Danger of core v periphery 🡪 you now have judge deciding what is important and what is not
    - It is very subjective, shouldn’t be left to judges

**Institutional Competence**

* + Courts have to insist that there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement
  + It is the task of the courts to maintain this bottom line if the rights conferred by our constitution are to have force and meaning

Issue:Does the Act infringe on the freedom of expression? This was conceded by the govt. Can it be saved under s 1?

Does warning label requirement infringe s2(b)?

Notes: La Forest dissent;

* + In drawing a distinction between legislation aimed at “mediating between different groups” where a lower standard of s 1 justification may be appropriate, and legislation where the state acts at the “singular antagonist of the individual” where a higher standard of justification is necessary – draw a distinction between courts and legislatures
  + In according more deference to social legislation (policy decisions) than to criminal justice context, the Court has recognized these important institutional differences between legislatures and the judiciary
  + Tobacco is highly addictive, bad for health, dangerous
    - But it is unrealistic for parliament to prohibit the manufacturing, sale, or use 🡪 so made a compromise: prohibiting advertising and promotion of the products
  + *Keegstra* 🡪 fundamental core value served by freedom of expression; search for political, artistic and scientific truth; the protection of individual self-development and autonomy; and the promotion of public on in the democratic process
  + When the form of expression falls father from the ‘center core of the spirit’ the SCC has ruled restrictions on such expressions less difficult to justify – here, the harm engendered by tobacco place this form of expression far from the ‘core’ of freedom of expression values + therefore entitle it to a very low degree of protection under s 1
  + The core v periphery of expression:
    - This is a controversial idea in free speech – not all speech is created equally o Some speech lies at the core and some lies at the periphery
    - Do not look at rights in abstract – look at them in actuality
    - What is it actually an infringement of – in context
      * Right to advertisement of cigarettes
    - For the dissent – this falls away from the core of free speech protections
    - CORE 🡪 political speech; Periphery = commercial purpose – making money
    - If periphery should be easier to infringe that speech in s. 1
    - Who ranks and who has the power to rank this?
      * This is subjective
    - This idea of core/periphery starts to break down
    - But context (given the Edmonton Journal contextual) helps to shape this
  + **COMMERCIAL SPEECH** 🡪 Harms of smoking and profit motive place this form of expression “as from from the core or freedom of expression values as prostitution, hate mongering, or pornography, and thus entitle it to a very low degree of protection under s1”
  + Sole purpose for tobacco advertising 🡪 informs consumers about and promote the use of a product that is harmful and often fatal to the consumers who use it – the main (if not sole) motivation is profit
  + Rational connection 🡪 the common-sense observation is enough to establish a rational connection here – banning advertising to reduce tobacco consumption
    - However, there was enough evidence to bear out the rational connection between advertising and consumption
  + Minimal impairment 🡪 in choosing to prohibit only advertisement of tobacco products, it is clear that Parliament adopted a relatively un-intrusive legislative approach to the control of tobacco products
  + Proportionality 🡪 the deleterious effects of this limitation (the restriction on the rights of tobacco companies to advertise products for profit) do not outweigh the legislative objective of reducing the number of direct inducements for Canadians to
  + **“Institutional competence”**
    - Courts are not specialists in the realm of policy making nor should they be
    - Role is properly assigned to elected representatives of the people who have the necessary institutional resources to enable them to compile and assess social science evidence

#### JTI Macdonald 2007

* Federal *Tobacco Control Act*, prohibited tobacco advertising with exceptions for “informational advertising” and “brand preference” advertising
* Act included a warning attributed to government
* Govt presented “copious evidence” to justify limits
* This scheme represents “a genuine attempt by Parliament to craft controls on advertising and promotion that would meet its objectives” and protect s2(b) interests
* **Charter dialogue!!**

## Hate Speech

### R v Keegstra

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

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

Reason: ***Section 2 (b) of the Charter: Freedom of Expression***

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

***Section 1 Analysis of s 319(2)***

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

*Pressing and Substantial Objective*

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

*Proportionality*

* + The interpretation of s 2(b) in *Irwin Toy* gives protection to a very wide range of expression
  + However, a s 1 analysis of a limit upon s 2(b) cannot ignore the nature of the expressive activity in which the state seeks to restrict
  + We must guard carefully against judging expression according to its popularity, but it is equally destructive of free expression values to treat all expression as equally crucial to those principles in the core of s 2(b)
  + Dickson J 🡪 makes it clear that, in his opinion, the expression prohibited by s 319(2) is not closely linked to the rationale underlying s 2(b)
  + At the core of freedom of expression lies the need to ensure that truth and the common good are attained
    - There is very little chance that statements intended to promote hatred against an identifiable group are true, or that their vision of society will lead to a better world
    - **The greater the likelihood that it’s not true, the less valuable it is for truth seeking**
    - Don’t want to overplay that rationality will overcome falsehoods
      * People can be swayed – hate speech aims to inflame not people’s reason but other parts of their brain
  + Another central component of s 2(b) 🡪 the vital role of free expression as a means of ensuring individuals the ability to gain self-fulfilment by developing and articulating thought and ideas as they see fit
    - Cede that this limits self-fulfilment **BUT hate speech harms self-fulfilment of target groups**
    - Importance of community in identity and self esteem
  + Central component 🡪 political process
    - Hate propaganda definitely political, **BUT undermines democratic values**
  + The message put forward by individuals who fall within the ambit of s 319(2) represents a most extreme opposition to the idea that members of identifiable groups should enjoy this aspect of s 2(b) benefits
  + The extent to which the unhindered promotion of this message furthers free expression values must therefore be tempered insofar as I advocate with inordinate vitriol an intolerance and prejudice which views as execrable the process of individual self-development and human flourishing among all members of society
  + The degree of limit is no substantial
  + The suppression of hate propaganda reduces the harm such expression does to individuals who belong to an identifiable group and to relations between various cultural and religious groups in Canada

*Rational Connection*

* + There are 3 ways where the effect of the legislation might be seen as an irrational means of carrying out the Parliamentary purpose:
    - The provision might actually promote the cause of hatemongers by earning them extensive media attention
      * Argument – sends out a message that hate propaganda is harmful and threatening + to demonstrate the severe reprobation the society holds against these messages
    - The public might view the suppression of expression by the gov’t with suspicion – making it seem as though the expression is true
      * This is so the values beneficial to a free and democratic society can be publicized
    - Germany in 1920s/30s used these same types of laws and they did not to stop the racist philosophy under the Nazis
      * Does not say it could have stopped – but this is one way to prevent the spread of racism
    - This branch of the test has been met

*Minimal Impairment*

* + Argument that the law is overbroad – capturing communications that are merely unpopular or unconventional
  + Statements made in private are excluded from s 319(2), even if they are made in public forums, indicating Parliament’s intent to not intrude into the privacy of individuals
  + Will it chill free speech? – People self-censor? Statements made in private conversation are excluded
    - “wilful” means that the accused has the subjective desire to promote hatred
    - Goes to the *mens rea* of hate speech
  + Proof of actual hatred is not required in order to justify a limit under s. 1
  + Defences are also available to narrow this
  + “Hatred” must be defined according to the context in which it is found – emotion of an intense and extreme nature that is clearly associated with vilification and detestation and hatred is predicated on destruction
  + S. 319(2) provides definitional limits which act as safeguards to ensure it will only capture the expressive activity which is openly hostile to Parliament’s objective

*Other Modes That Could Further The Objective*

* + Using human rights statutes instead of criminal law
  + It may be that a number of courses of action are available in the furtherance of a pressing and substantial objective, each imposing a varying degree of restriction upon a right or freedom – the government may legitimately employ a more restrictive measure to further the objective in ways that alternative responses could not

The Final Balance:

* + Few concerns can be as central to the concept of a free and democratic society as the dissipation of racism and the especially strong value which Canadian society attaches to this goal must never be forgotten in assessing the effects of an impugned legislative measure
  + The effects of s 319(2) are not of such a deleterious nature as to outweigh any advantage gleaned from the limitation of s 2(b)
    - There are real concerns created by hate speech and those are addressed in a reasonable way through the criminal sanction

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

Notes: **McLachlin dissent**;

Rational Connection

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

Minimal Impairment:

* + The definition may catch many expressions which should be protected o “Hatred” is broad and capable of catching a wide variety of emotion
    - Use it every day to express even things like dislike
  + It is also subjective and is proved by inference – usually by judge or jury

The danger is that the legislation may have a ***chilling effect*** on legitimate activities important to our society by subjecting innocent persons to constraints born out of fear of the criminal process. Balancing harm to expression – people afraid to express out of fear; benefit – are worthy but the claims of gains to be achieved are tenuous. The Human Rights Code would have been better to deal with this. Any questionable benefit is outweighed by the significant infringement on the constitutional guarantee of free expression.

Lays out three main rationales for freedom of expression:

* 1. Political process/democracy
  2. Search for truth/marketplace of ideas
  3. Inherent value/self-actualization

#### Khawaja 2012

* *Keegstra* majority stated that threats of violence were protected under 2(b)
  + This was corrected in this case
* “Threats of violence, like violence, undermine the rule of law”

### R v Zundel

Ratio:

Facts: The accused was charged with spreading false news contrary to s 181 which provides that "every one who wilfully publishes a statement, tale or news that he knows is false and causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment” – for pamphlet *Did Six Million Really Die?* The pamphlet, part of a genre of literature known as "revisionist history", suggests, inter alia, that it has not been established that six million Jews were killed before and during World War II and that the Holocaust was a myth perpetrated by a worldwide Jewish conspiracy.

Result: Appeal allowed, s181 of the Criminal Code is unconstitutional

Reason: *Section 2b Analysis*

* + S2b protects the right of a minority to express its view, however unpopular it may be
  + All communications which convey meaning are protected by s2b – unless the physical form by which the communication is made excludes protection (ex. violent act)
  + Content of communication is irrelevant
    - Deliberate publication of statements known by speaker to be false is protected under s2(b)
  + PURPOSE 🡪 permit free expression to the end of promoting trust, political or social participation and self-fulfilment
    - Extends to the protection of minority beliefs which the majority reads as wrong or false
  + Subjecting someone to imprisonment because of words published has the **undeniable effect of restricting freedom of expression**
  + Given the broad, purposive interpretation of the freedom of expression guaranteed by s. 2 (*b*), those who deliberately publish falsehoods are not, for that reason alone, precluded from claiming the benefit of the constitutional guarantees of free speech.

*Section 1 Analysis*

* + Pressing and Substantial
    - Court found the objective was to “protect the mighty and the powerful from discord or slander” which is not pressing and substantial
    - In determining objective, the court must look at the intention of Parliament when the section was enacted – it cannot assign objectives or invent new ones according to the perceived current utility of the impugned provision
    - While s181 may be capable of serving legitimate purposes, Parliament has identified no real social problem or even one of pressing concern
    - The provision originally focused on the prevention of deliberate slanderous statements against the nobles of the realm to preserve political harmony in the state
      * To suggest now that it is meant to combat hate propaganda or racism is to go beyond its history and its wording and to **adopt the “shifting the purpose” analysis**
      * The lack of any ostensible purpose justifying led the LRC to recommend repeal of the section, labelling it as “anachronistic”
      * Even if the law was accepted to promote tolerance it is still OVERBROAD and could be used to prosecute unpopular ideas
  + Even if the Court were to attribute to s181 the objective of promoting racial and social tolerance and to conclude that such objective was so pressing and substantial as to be capable of overriding a fundamental freedom, it would **still fail to meet the proportionality test** (*Keegstra*)
    - The range of expression potentially caught by the vague and broad wording of s. 181  extends to virtually all controversial statements of apparent fact which might be argued to be false and likely to do some mischief to some public interest
    - It is particularly invasive because it chooses the most draconian of sanctions to effect its ends ‑‑ prosecution for an indictable offence under the criminal law

Issue: Whether s. 181 of the *Code* infringes the guarantee of freedom of expression in s2b, and if yes is it justified by section 1.

Notes: Gonthier dissent; concedes that this falls within the scope of s 2b, the sphere of expression protected by the section has been very broadly defined to encompass all content of expression irrespective or the particular meaning sought to be conveyed unless the expression is communicated in a physically violent form. Concedes that the right is infringed.

*Dissent on Section 1 Analysis*

* + Parliament’s objective of preventing harm caused by the wilful publication of injurious lies is sufficiently pressing and substantial to justify a limited restriction of freedom of expression
  + The objective of s181 is evident from the clear wording of the provision which prohibits the publication of a statement that the accused knows is false and “that causes or is likely to cause injury”
  + This specific objective in turn promotes the public interest in furthering racial, religious and social tolerance
  + S 181 provides protection, by criminal sanction, to all vulnerable minority groups and individuals against the harms caused by deliberate and injurious lies, still plays a useful and important role in encouraging racial and social tolerance, which is so essential to the successful functioning of a democratic and multicultural society
  + It is only where the deliberate publication of false facts is likely to seriously injure a public interest that the impugned section is invoked.  Any uncertainty as to the nature of the speech inures to the benefit of the accused.  The infrequent use of s. 181 can be attributed to the extremely onerous burden on the Crown to prove each element of the offence
    - Not overly broad
  + Third, the prohibition of the wilful publication of what are known to be deliberate lies is proportional to the importance of protecting the public interest in preventing the harms caused by false speech and thereby promoting racial and social tolerance in a multicultural democracy

### SK (Human Rights Comission) v Whatcott

Ratio:

Facts:Concerns a challenge to a prohibition on hateful publication in the *Saskatchewan Human Rights Code* - **S 14(1)** – No person shall publish or display or cause or permit to be published/displayed on any lands or premises or in a newspaper, through a TV or radio or any other broadcasting devise, or in any printed matter – including any notice, sign, symbol, emblem, article, statement, or other representation

* + (a) tending or likely to tend to deprive, abridge or otherwise restrict the enjoyment by any person or class of persons, on the basis of a prohibited ground, of any right to which that person or class of persons is entitled under law; or
  + (b) that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground.

Mr. Whatcott distributed flyers on behalf of Christian Truth Activists – two of the flyers were entitled ‘Keep Homosexuality out of Saskatoon’s Public Schools!’ (D) and ‘Sodomites in our Public Schools’ (E). 4 individuals filed complaints alleging these materials promoted hatred against individuals because of their sexual orientation. The flyers included many offensive statements – linking homosexuality to HIV/Aids and pedophilia. SKCA reversed trial findings finding that they failed to take the moral context of the flyers properly into account and that these flyers were a polemic on public policy issues and not hate speech.

Result:Yes, but can be upheld under s. 1, if severely ‘ridicules, belittles, otherwise affronts’ and keep ‘hatred’.

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

Reason: *Big M* 🡪 You’re allowed to manifest your beliefs

*Taylor* 🡪 defined hatred as ‘involving unusually strong and deep-felt emotions of detestation, calumny and vilification

Rothstein tweaked this by removing ‘calumny’ (speech amounting to false misrepresentations). This definition excludes merely offensive or hurtful expression and the question the courts must ask is whether a reasonable person, aware of the context and circumstances surrounding the expression, would view it as exposing the protected group to hatred.

Violent expression and expression that threatens violence does not fall within the protected sphere of s 2(b). Apart from that, not all expression will be treated equally in determining an appropriate balance of competing values in a s 1

Analysis. Certain types of expression will be relatively closer to or further from the core values behind the freedom, depending on the nature of the expression. This will affect its value relative to other Charter rights.

**Section 2(b) engagement is conceded.**

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

To the extent that Whatcott’s choice of expression is caught by the hatred definition in s 14(1)(b), the prohibition will substantially interfere with Whatcott’s ability to disseminate his belief by display or publication of those representations. This section infringes freedom of conscience and religion as guaranteed by s 2(a) of the Charter. **It is justified under s 1**.

**But the Court found that the words “ridicules, belittles or otherwise affronts the dignity of” in s. 14(1)(b) were not “rationally connected to reducing systemic discrimination against vulnerable groups”. The expression captured by those words was found not to rise to the level of “ardent and extreme feelings”** essential to the constitutionality of the limitation on expression in Taylor, **so the Court ordered those words struck out** – reads down the legislation to not include those words.

Hallmarks of Hatred (helped refine the scope of hate)

* + Vilifies and blames group members for social problems (powerful menace)
  + Secret conspiracies
  + Suggests group members illegal or unlawful (pure evil)
  + Equation with reviled groups like child abusers
  + Describing as “animals” or “subhuman” (dehumanization)

The term ‘hatred’ is “intended to capture expression which, by inspiring hatred, has the potential to cause the type of harm that the legislation is trying to prevent”.

If despite the context of the entire publication, even one phrase or sentence is found to bring the publication in contravention of the Code, this precludes publication of the flyer in its current form. The message that a reasonable person would take from the flyers is that homosexuals by virtue of their sexual orientation are inferior, untrustworthy, and seek to proselytize and convert our children.

Flyers D and E would objectively be seen as exposing homosexuals to detestation and vilification. But flyers F and G (identical) – but have a reprint of a gay magazine and saying ads with men who want to get sodomized shouldn’t be legal in Saskatchewan; and a bible passage saying if you cause one of these little ones to stumble it would be better that a millstone was tied around your neck and you were cast into the sea’ – this would not be found as exposing persons of same-sex orientation to detestation and vilification – reproduction of ads and statements of how ads could be interpreted as ‘men’ seeking boys’ do not demonstrate hatred required by the prohibition. The biblical passage stated on these flyers cannot be taken as inspiring detestation and vilification of homosexuals.

Only unusual circumstances and context could make a publication of a religion’s holy text into hate speech – trying to bake in religious freedom.

Issue:Is Whatcott’s freedom of expression justifiably infringed by preventing him from handing out his flyers? Does s 14(1)(b) infringe s 2(a)? Do the flyers contravene s 14(1)(b)?

Notes:

# Section 7: Life Liberty and Security of the Person

**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**.

What engages life?

* + Death penalty
  + Preventing access to medical care (*Chaoulli*)

What engages liberty?

* + Possibility of imprisonment
  + “Basis choices going to core of what it means to enjoy individual dignity and independence” (*Malmo-Levine*)

What engages security of the person?

* + Use of force against the body
    - Bodily samples, state-imposed medical treatment, use of force carrying arrest
  + Severe psychological stress
    - Removal of kids

***Internal limitation within the text of the provision…*** ‘Principles of fundamental justice’(justification like analysis already invited within the section)

Section 7 Antecedents

* “Natural justice” or “procedural due justice”
  + Existing body of law where the curt has to determine what’s fair in terms of process/procedure
    - When do you get to have a hearing, notice, what’s being alleged against you…
* US “Substantive Due Process”
  + State is not to deprive someone of life liberty or property without due process of law
  + Some interests protected regardless of procedures
    - The context in which this was decided was during the Great Depression
    - Govt tried to enact legislation to improve labour conditions
      * Among them was a law to limit the hours that bakers could work
    - This is where the court recognized that even with proper process there should be this protection
    - *Lochner* and freedom of K

### Principles of Fundamental Justice

* *Malmo-Levine* definition
  + “It must be a legal principle about which there is sufficient societal consensus that it is fundamental to the way in which the legal system should fairly 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 the person”
* Examples: with reference to law’s objective, law cannot be:
  + **Arbitrary**
  + **Overbroad**
  + **Grossly disproportionate**

### BC Motor Vehicles

* MVA imposed fine or imprisonment for driving with suspended license, even if unaware of suspension (ie. “absolute liability”)
* Is this a deprivation that fails to accord with the PFJ?
* Rejects relevance of US debates over substantive due process, given structural differences between constitutions
* “Rights” are “life, liberty and security of the person” as qualified by “principles of fundamental justice”
  + The scope of which the rights are guaranteed by s7 are limited by the PFJ
* PFJ are not limited to procedural protections
  + This would strip rights of meaningful content
* Section 7 embraces, but is not limited by ss8-14
* Analysis
  + Applicant must prove LLSoP impacted by law
  + Applicant must show that impact violates one or more PFJs
  + THEN, if the above is present, burden of justification falls to government under s1
* In this case
  + The possibility of imprisonment = LLSoP engaged
    - This is always true
  + PFJ violated = mentally innocent should not be punished
    - Cannot have a crime sending people to prison the has no MR element
  + Section 1
    - Government failed to demonstrate why defence of due diligence could not have been included

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

Ratio:

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

Result: There is an interference with liberty… Absolute liability offends the principles of fundamental justice – from the basic principle that the innocent should not be punished – and cannot be justified under s 1

Reason: The Principles of Fundamental Justice

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

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

Notes:

### R v Morgentaler (1988)

Ratio: Dickson and La Mer “assuming Parliament can restrict access to abortion, it must do so procedurally possible” – but expressly leaves open the expressly leaves open the possibility that section 7 “also contains a **substantive content** leading to the conclusion that, in some circumstances at least, the deprivation of a pregnant woman’s right to security of the person can never comport with fundamental justice”.

Facts: s 251(1) [now 287(1)] of the Code provided that anyone who took steps to cause an abortion was guilty of an offence and liable to imprisonment for life; (2) female who sought to cause own abortion liable to 2 years; (4) exception for those in approved hospital if pregnancy likely to endanger life/health. Morgentaler and two colleagues established and operated an abortion clinic in TO. Every abortion performed in their clinic violated s 251(1) because their clinic was not an approved or accredited hospital and therefore had not therapeutic abortion committee to issue certificates. They were charged and argued that the provision violated s 7 of the Charter.

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

Reason: Dickson and La Mer

*Security of the Person*

* + The law has long recognized that the human body ought to be protected from interference by others
    - The state it not to interfere
  + **State interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal context, constitutes a breach of security of the person**
  + Removal of decision and inflicting committee exposure may pose physical risk
    - Indecision of not knowing how committee will decide inflicts emotional stress
  + S 251 is a violation of the security of the person of thousands of Canadian women who have made the difficult decision not to continue with their pregnancy
    - It clearly infringes with a woman’s bodily integrity in both a physical and emotional sense
  + Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman’s body and thus a violation of security of a person
  + S 251 also creates an unnecessary delay for women who meet the criteria
    - The measurement requirements impose up to a 6 week delay
  + This creates a clear risk of damage to the physical well-being of a woman and is sufficient to warrant an inquiry into whether s 251 comports with principles of fundamental justice
  + S 251 forces women to carry a fetus to term contrary to their own priorities and aspirations and imposes serious delays causing increased physical and psychological trauma to those women who meet its criteria

*The Principles of Fundamental Justice*

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

*Section 1*

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

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

Notes: Beetz concurring

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

**Wilson concurring**

* + “At the heart of this appeal is the question whether a pregnant woman can, as a constitutional matter, be compelled by law to carry foetus to term”
  + **Must view the legislative scheme not only in the procedural sense but in the substantive sense as well** 
    - Focus on the primary issue so that the legislature does not waste time and energy curing procedural defects of a law that will be unconstitutional anyways
  + **Must ask what is meant by the right to liberty in the context of the abortion issue** – does it give pregnant woman control over decisions affecting her own body?
    - Believes that it is a liberty right to make fundamental personal choices without interference from the state
  + **Liberty** in a free and democratic society does not require the state to approve the personal decisions made by its citizens, but it does require the state to respect them
    - This guarantees every individual a degree of personal autonomy over important decisions affecting their private lives
    - This no doubt gives a woman a choice to decide whether or not to terminate her pregnancy
  + “**It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma**”
    - “**women’s needs and aspirations are only now being translated into protected rights. The right to reproduce or not to reproduce…is one such right**”
  + Liberty is a fence 🡪 fundamental personal decisions belong inside a fence, free from state entrance
  + S 251 clearly violates this right since it takes the decision away from the woman and gives it to a committee
  + This is also an interference with the right to personal autonomy in decision-making – a direct interference with her physical person as well
  + Section 1 not met 🡪 removes decision at all stages of pregnancy, and is not tailored to achieve objective
  + NOTE from class: liberty certainly includes liberty from prison, but this judgment expands it to include these fundamental personal choices

McIntyre dissent

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

#### After Morgentaler?

* Appeal pending to Manitoba CoA decision that same law unconstitutional because of threat to the foetus
  + CoA held foetus not a part of “everyone” per s.7 or “every individual” per s. 15
* After *Morgentaler*, SCC dismissed appeal as moot
* Created a legislative void
* 1990 bill designed to address procedural flaws never passed into law
* NS law seeking to restrict abortion in absence of federal law struck as ultra vires
  + The Morgentaler from sem 1

## Bodily Integrity

### Canada v Bedford

Ratio:

Facts: **Section 210** makes it an offence to be an inmate of a bawdy-house, to be found in a bawdy-house without lawful excuse, or to be an owner, landlord, lessor, tenant, or occupier of a place who knowingly permits it to be used as a bawdy-house. **Section 212(1)(*j*)** makes it an offence to live on the avails of another's prostitution.

**Section 213(1)(*c*)** makes it an offence to either stop or attempt to stop, or communicate or attempt to communicate with, someone in a public place for the purpose of engaging in prostitution or hiring a prostitute.

Result: Section 210, as it relates to prostitution, and ss. 212(1)(*j*) and 213(1)(*c*) are declared to be inconsistent with the *Canadian Charter of Rights and Freedoms* and hence are void. The word "prostitution" is struck from the definition of "common bawdy-house" in s. 197(1) of the *Criminal Code* as it applies to s. 210 only.

Reason: **Role of Precedent**

* + The issue of when, if ever, such precedents may be departed from takes two forms:
    - Vertical 🡪 When, if ever, may a lower court may depart from a precedent established by a higher court
      * If new legal issues are raised as a consequence of significant development in the law, or there is a change in circumstances or evidence that fundamentally shifts the parameters of debate
    - Horizontal 🡪 When can the SCC depart from its own precedent?
  + TJ **not bound if**:
    - New legal issues not raised in prior case
      * Met because here, this was grounded in security
    - Significant developments in the law
      * Developments re defn of arbitrariness, overbreadth and GD 🡪 effectively a new legal standard that was not available to the court with the reference
    - Change in circumstances or evidence that “fundamentally shifts the parameters of the debate”
  + **Deference** to TJ?
    - TJ determines “facts”
      * Adjudicative facts: what happened in particular case
      * Legislative or social facts: relevant facts about society at large (ex. social science evidence)
      * **Appellate courts should defer to trial court findings equally with respect to both categories of facts**
        + Costs and delay
        + Difficult to untangle these types of facts
  + The *Prostitution Reference* was an SCC decision that upheld the constitutionality of the prohibitions on bawdy houses and communicating – two of the provisions challenged here
    - Only considered the liberty portion of s7
    - Used older ideas of vagueness and PFJs

**Is security of the person engaged?**

* + Held that the impugned prohibitions impose “dangerous conditions” on prostitution, engaging security of the person
  + The focus is on the security of a person and not liberty for 3 reasons:
    - The *Prostitution Reference* decided that the communicating and bawdy-house provisions engage liberty, and it is binding on this point
      * Security is a novel issue and why the court can stray from the reference
    - It is not clear that any of the applicant’s personal liberties are engaged by living on the avails of prostitution
    - Breaking the law doesn’t engage person liberty, but rather, compliance with the law infringes the applicant’s security
  + The prohibitions at issue do not merely impose conditions on how prostitutes operate
    - They go a critical step further by imposing *dangerous* conditions on prostitution; they prevent people engaged in a risky but legal activity from taking steps to protect themselves from that risk
      * Bawdy house provision restricts prostitution to street prostitution or “out-calls”
        + App judge holds that street prostitution most dangerous, then out-calls, then from fixed location
        + Safe houses like “Grandma’s House” outlawed
      * Avails provision prevents hiring bodyguards, drivers etc.
      * Communication provisions precludes face to face communication
        + TJ found such communication to be “essential tool” enhancing safety of street prostitution
  + Sections 197 and 210 prevent prostitutes from working in the safest place (their own residence) and it interferes with provisions of health checks and preventative health measures
  + S 212 prevents prostitutes from hiring drivers or security guards, which would lessen their risk
  + S 213 prevents face to face communication which is an essential tool in enhancing prostitutes safety
  + The impugned laws negatively impact and thus engage security of a person’s rights of prostitution
  + **Causation** and LLSOP
    - There is a sufficient causal connection between the law and the effect on s 7 interests
    - Argument that “it is the choice of the applicants to engage in prostitution, rather than the law, that is the causal source of the harms they face”
      * But the court finds that many prostitutes lack “meaningful choice”
      * Laws make a lawful activity more dangerous (like law preventing cyclist from wearing a helmet”
      * “The violence of a john does not diminish the role of the state in making a prostitute more vulnerable to that violence”
        + **This more attenuated causal connection can still engage SOP**
  + It is not necessarily a choice for prostitutes to partake in this line of work and even if it is, sex for money is not illegal

**Principles of Fundamental Justice**

* + We are concerned with the basic values against arbitrariness, overbreadth and gross disproportionality
    - These constitute failures of instrumental rationality
    - The situation where the law is inadequately connected to its objective or in some sense goes too far in seeking to attain it
  + The first evil is addressed by the norms against arbitrariness and overbreadth which target the absence of connection between the law’s purpose and s 7 deprivation
  + The second evil lies in depriving a person’s life, liberty or security of the person in a manner that is grossly disproportionate to the law’s objective
    - The law’s impact on the s 7 interest is connected to the purpose but the impact is so severe that it violates our fundamental norm
  + **Arbitrariness** 🡪 law imposes limits on s7 interests in a way that bears no connection to laws objective – asks whether there is a direct connection between the purpose of the law and the impugned effect on the individual, in the sense that the effect on the individual bears some relation to the law’s purpose
    - There must be a rational connection between the object of the measure that causes the s 7 deprivation and the limits it imposes on life, liberty and security of the person
  + **Overbreadth** 🡪 no rational connection between purpose of law and some, but not all, of its impacts – deals with a law that is so broad in scope that it includes some conduct that bears no relation to its purpose
    - In a sense, the law is arbitrary *in part*
    - At its core, overbreadth addresses the situation where there is no rational connection between the purpose of the law and *some*, but not all of its impacts
  + **Gross Disproportionality** 🡪 extreme cases where the seriousness of s7 deprivation is “totally out of sync with the objective of the measure” – targets the second fundamental evil: the effects on life, liberty or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported
  + This portion does not consider the beneficial effects of the law for society
    - It balances the negative effect on the individual against the purpose of the law, not against the societal benefits o A grossly disproportionate effect on one person is sufficient to violate the norm
  + All three do not look at how well the law achieves its object or how much it benefits the public

**Do the Impugned Laws Respect PFJ?**

* + S 210: The Bawdy-House Prohibition
    - Purpose – to combat neighbourhood disruption or disorder and safeguard public health and safety NOT to deter prostitution
    - The harmful impacts are **grossly disproportionate** to its purpose
      * High homicide rates
      * Low incidence of complaints arising from indoor prostitution
    - A law that prevents street prostitutes from restoring to a safe house while a suspected serial killer prowls the streets is a law that has lost sight of its purpose
  + S 212: Living on the Avails of Prostitution
    - Purpose – to target pimps and the parasitic, exploitative conduct in which they engage
      * Reject govts statement of purpose: to target the commercialization of prostitution, and to promote the values of dignity and equality
    - **Overbroad**
      * Fails to distinguish between abusive pimps and those who enhance safety or those not likely to exploit
      * If law was purposefully overbroad to correct for enforcement practicality, this should be argued in s1 justification
    - The law punishes everyone who lives on the avails of prostitution without distinguishing between those who exploit prostitutes and those who could increase the safety and security for prostitutes
  + S 213: Communicating in Public for the Purposes of Prostitution
    - Purpose – to take prostitution “off the streets and out of public view” in order to prevent the nuisance that street prostitution can cause
    - The harm caused is **grossly disproportionate** to the provision’s objective
      * Urgent concern with bodily integrity and trying to keep street nuisance low
    - Prostitutes need the ability to screen clients face to face
      * Evidence that public communication essential to screening out violent clients

**Section 1**

* + Appellant did not argue a s 1 justification – but did try to justify the living on the avails provision in that it must be drafted broadly to catch all exploitative relationships (enforcement practicality)
    - However, is not minimally impairing since it catches clearly non-exploitative ones
      * Law catches “clearly non-exploitative relationships, such as receptionists and accountants” and is not minimally impairing
  + At the final stage 1 inquiry 🡪 effect of taking away measures that protect safety and possibly safe lives are not outweighed by effect of protecting them from exploitative relationships
    - Laws interference with…
  + On exam 🡪 broaden gaze more slightly to talk about the societal benefits and effects

Issue:

Notes: **Afterward**…

*Protection of Communities and Exploited Persons Act*

* + Preamble clarifying purpose as relating to “exploitation that is inherent in prostitution,” “objectification of the human body” and “disproportionate impact” of prostitution on women and children
  + Repeals avails provision
    - But makes it an offence to obtain sexual services for pay, or to communicate or advertise, except on the part of persons selling their own sexual service

WORK THROUGH THIS AS SAMPLE Q

### Carter v Canada

Ratio: The prohibition on physician-assisted dying is void insofar as it deprives a competent adult of such assistance where:

* + The person affect clearly consents to the termination of life
  + The person has a grievous and irremediable medical condition that causes enduring suffering that is intolerable to the individual in the circumstances of his/her condition

Facts: It is a crime in Canada to assist another person in ending her own life (s 241 *CC*). People who are grievously and irremediably ill cannot seek a physician’s assistance in dying. The person has to choose between taking their own life or waiting for the illness to kill them. The court says this is a cruel choice. It’s a balance between the autonomy and dignity of an adult and the sanctity of life and the need to protect the vulnerable.

Result: Violates s 7, not justifiable under s 1.

Reason: *Was the TJ bound by Rodriguez?*

* + *Stare decisis* is not a strait jacket that condemns the law to stasis
  + Trial courts may reconsider settled rulings of higher courts in two situations:
    - Where a new legal issue is raised
    - Where there is a change in the circumstances or evidence that “fundamentally shifts the parameters of debate”
  + Both conditions were met in this case
    - Developments in legal standards of over breadth and GD
    - Changes in legislative/social facts, especially re. workability of “halfway measure”
  + The legal framework for s 7 has changed and the evidence on controlling the risk of abuse associated with assisted suicide has also changed

*Does the Law Infringe the Right to Life, Liberty, Security of the Person?*

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

*The PFJ*

* + S 7 does not promise that the state will never interfere with a person's life, liberty or security of the person, but rather that the state will not do so in a way that violates the principles of fundamental justice
  + S 7 encompasses laws that impugn on life, liberty or security of the person that are arbitrary, overbroad or have consequences that are grossly disproportionate to their object
  + **Rejects Canada’s submission that object is “preservation of life”**
  + When looking at these, the first step is to identify the object of the prohibition on assisted dying
    - PURPOSE 🡪 to protect vulnerable persons from being induced to commit suicide at a time of weakness
    - Canada argues it should be – the preservation of life
      * NO
        + 1) Rodriguez did not adopt this as the object – remarks to it are best understood as a reference to an animating social value rather than a description of the specific object;
        + 2) if object is stated broadly it becomes difficult to say that the means used to further it are overbroad or grossly disproportionate;
        + 3) object needs to be defined precisely for purposes of s 7 – the direct target of the measure is the narrow goal of preventing vulnerable persons from being induced to commit suicide at a time of weakness
      * Object should not extend far beyond the ambit of the provision

*Arbitrariness*

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

*Overbreadth*

* + Inquiry asks whether a law that takes away rights in a way the generally supports the object of the law goes too far by denying the rights of some individuals in a way that bears no relation to the object
  + The question is not whether Parliament has chosen the least restrictive means, but whether the chosen means infringe life, liberty or security of the person in a way that has no connection with the mischief contemplated by the legislature
  + The prohibition is overbroad
    - The law catches people outside of the object
    - Here, evidence that some affected persons are not “vulnerable” but are rather informed and free from coercion
  + Again, if law purposefully overbroad for enforcement purposes, address under s1
  + Court didn’t decide on gross disproportionality because the law was overbroad

*Section 1*

* + “It is difficult to justify a s7 violation”
    - BUT s1 more likely to be relevant where public good justifies deprivation, or where competing Charter interests are at stake
  + Here it is prescribed by law and has a pressing and substantial objective (conceded)
  + Parliament did face a difficult task in balancing the perspectives of those at risk vs. those who seek the assistance of dying – deference needed
    - But here, since it was an absolute prohibition cannot describe it as a ‘complex regulatory response’ therefore, the degree of deference (while high) is reduced
  + Rational connection 🡪 yes - where a certain activity poses risks, prohibition of that activity is a rational method of curtailing risks; it is clearly rational to conclude that a law that bars all persons from accessing assistance in suicide will protect the vulnerable from being induced to commit suicide at a time of weakness
  + **Minimal impairment** 🡪 no - TJ concluded (after reviewing the evidence) that a permissive regime with properly designed and administrative safeguards was capable of protecting vulnerable people from abuse and error
    - * Per *Hutterian Brethren* – burden on govt to show “absence of less drastic measures of achieving the objective ‘in a real and substantial manner’
        + The burden of establishing minimal impairment is on the government and they did not discharge this burden – the evidence did not support the contention that a blanket ban was necessary to substantially meet the gov’ts objectives, as there is international evidence showing no abuse; a theoretical/speculative fear cannot justify an absolute prohibition
    - Could the risks to vulnerable patients not have been addressed through safeguards?
      * Can apply the informed consent standard to those wishing to seek assistance in dying
      * YES. TJ found that “a permissive regime with properly designed and administered safeguards was capable of protecting vulnerable people from abuse and error”
      * Experienced physicians can reliably assess patient competence
      * no evidence that “unconscious bias” in permissive jurisdictions results in “heightened risk” of assisted suicided for people with disabilities
  + Not necessary to look at final stage and balance benefits/effects

Issue: Whether the criminal prohibition that puts a person to this choice violates his/her ss 7 and 15 Charter rights

Notes: **Afterward**…

2016 Legislation introduced to create a procedure for exempting medical professionals from providing medical assistance in dying.

Available for patients

SAMPLE Q

## Social Rights

### Gosselin v QB (AG)

Ratio:

Facts: In 1984 the Quebec government created a new social assistance scheme. Section 29(*a*) of the *Regulation respecting social aid*, made under the 1984 *Social Aid Act*, set the base amount of welfare payable to persons under the age of 30 at roughly one third of the base amount payable to those 30 and over. The appellant, a welfare recipient, brought a class action challenging the 1984 social assistance scheme on behalf of all welfare recipients under 30 subject to the differential regime from 1985 to 1989. Evidence that food banks, private charities, unreliable resources and that many people on social assistance resorted to theft, prostitution, or dumpster diving etc. The appellant argued that the 1984 social assistance regime violated ss. 7 and 15(1) of the *Canadian Charter of Rights and Freedoms* and s. 45 of the Quebec *Charter*.

Result: Appeal dismissed – provision constitutional

Reason: The factual record is insufficient to support the appellant’s claim that the state deprived her of her s. 7 right to security of the person by providing her with a lower base amount of welfare benefits, in a way that violated the principles of fundamental justice. Thus far, the jurisprudence does not suggest that s. 7 places positive obligations on the state. Rather, s. 7 has been **interpreted as restricting the state’s ability to deprive people of their right to life, liberty and security of the person** = negative right. Such a deprivation does not exist here and the circumstances of this case do not warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards – the state is not taking things away.

“One day s 7 may be interpreted to include positive obligations”… (living tree principle) but in this case, the evidence of actual hardship is wanting making it a frail platform unable to support the weight of a positive state obligation of citizen support.

Issue:

Notes: Bastarache concurring

* + Section 29(*a*) of the Regulation did not infringe s. 7 of the *Charter*.
  + The threat to the appellant’s security of the person was not related to the administration of justice, nor was it caused by any state action, nor did the under inclusive nature of the legislation substantially prevent or inhibit the appellant from protecting her own security.
  + The right to security of the person is protected by s. 7 only insofar as the claimant is deprived of this right by the state, in a manner contrary to the principles of fundamental justice.
  + The strong relationship between s. 7 and the role of the judiciary leads to the conclusion that some relationship to the judicial system or its administration must be engaged before s. 7 may be applied.
  + In this case, there is no link between the harm to the appellant’s security of the person and the judicial system or its administration.

Lebel concurring

* + The appellant failed to establish a violation of s. 7 of the *Charter* in this case, for the reasons stated by the majority, it is not appropriate, at this point, to rule out the possibility that s. 7 might be invoked in circumstances unrelated to the justice system.

**Arbour** dissent

* + Section 29(*a*) of the Regulation infringed s. 7 of the *Charter* by depriving those to whom it applied of their right to security of the person. Section 7 imposes a positive obligation on the state to offer basic protection for the life, liberty and security of its citizens.
  + The barriers that are traditionally said to preclude a positive claim against the state under s. 7 are unconvincing
    - The fact that a right may have some economic value is an insufficient reason to exclude it from the ambit of s. 7.
    - Economic rights that are fundamental to human life or survival are not of the same ilk as corporate‑commercial economic rights.
    - The right to a minimum level of social assistance is intimately intertwined with considerations related to one's basic health and, at the limit, even one’s survival.
    - These rights can be readily accommodated under the s. 7 rights to life, liberty and security of the person
  + **A textual, purposive or contextual approach to the interpretation of s. 7 mandates the conclusion that the s. 7 rights of life, liberty and security of the person include a positive dimension**.
    - A purposive interpretation of s. 7 as a whole requires that all the rights embodied in it be given meaning.
    - Reducing s. 7 only to the second clause leaves no useful meaning to the right to life.
      * Such an interpretation of s. 7 threatens not only the coherence, but also the purpose of the *Charter* as a whole
    - “**and the right** not to be deprived thereof”
  + Charter expressly includes positive obligation (right to vote)
  + Life and SOP are engaged
    - Minimum level of welfare is so closely connected to one’s basic health (or SOP)…
  + Sets out a test for positive rights claim
    - 1) Claim is grounded in basic interest in SOP (not exclusion from particular statutory scheme)
      * This is met in this case – their actual life and SOP are engaged by level of poverty
    - 2) Some evidence that exclusion from the scheme substantially interfered with SOP
      * Govt intervention was “necessary in order to render their s7 rights meaningful”
      * Evidence of physical and psychological harms of poverty
    - 3) Existence of legislative scheme aimed at supporting a Charter interest provides necessary “state action”
      * “Here, as in all claims asserting the infringement of a positive right, the focus is on whether the state is under an obligation of performance to alleviate the claimants’ condition, and not whether it can be held causally responsible for that condition in the first place.”
      * Removes the hurdle like in *Bedford* where a causal connection of the state action and increased danger is required to be found

### New Brunswick v GJ

* Child welfare proceedings in which state sought custody of a parent’s child
* No legal aid provided
* Section 7 = violated
* Removal of child constitutes a psychological harm engaging SOP
* Lack of legal representation violated PFJs, in light of the complexity of legal matter and seriousness of individual interest at stake

### Chaioulli v QB (AG)

* Quebec law that prohibits private health insurance for health care services available in the public system
  + Aim was to try and strengthen the public system on the theory that if people of means can buy private insurance that people will lose interest in making the public system strong leading do deterioration
* Evidence of very long wait times in the public system
* McLachlin, Major and Bastarache
  + Agreed with Deschamps that prohibition on private insurance violated the Quebec Charter
    - Deschamps declined to consider s7
  + These three found **s7 violated** as well
    - “the appellants do not seek an order that the government spend more money on health care, nor do they seek an order that waiting times for treatment under the public health care scheme be reduced. They only seek a ruling that because delays in the public system place their health and security at risk, they should be allowed to take out insurance to permit them to access private services”
    - No “freestanding constitutional right to health care”, but if government creates a scheme it must comply with the *Charter*
    - INSTITUTIONAL COMPETENCE 🡪 “The fact that the matter is complex, contentious or laden with social values does not mean that the courts can abdicate the responsibility vested in them by our constitution to review legislation for *Charter* compliance when citizens challenge it”
    - Here, public “monopoly” results in treatment delays that interfere with citizens’ security of the person
    - Evidence of physical and psychological consequences of wait times (SoP), including some patients who die while waiting (life)
    - Like *Morgentaler*, legislative scheme made health services available only through public scheme, with scheme involving harmful delays
      * This was a good, creative use of precedent – basic bones of the deprivation are the same
    - “We conclude, based on the evidence, that prohibiting health insurance that would permit ordinary Canadians to access health care, **in circumstances where the government is failing to deliver health care in a reasonable manner**, thereby increasing the risk of complications and death, interferes with life and security of the person as protected by s. 7 of the Charter.”
  + **LLSOP**
    - Infringement on LLSOP is arbitrary (and so violates PFJ)
      * Very non-deferential take here
    - **Arbitrariness**: “In order not to be arbitrary, the limit…requires not only a theoretical connection…but a real connection on the facts”
    - Government’s argument is that insuring private care will divert resources from public system, and so reduce quality of public care
    - “a theoretically defensible limitation may be arbitrary if in fact the limit lacks a connection to the goal”
    - Accepts appellant’s evidence that other jurisdictions have insurance without harming public scheme
    - Government reports all conclude there should be no private insurance, but “the conclusions of other bodies on other material cannot be determinative of this litigation”
  + **Section 1** – not easy to uphold with s7 especially when held arbitrary
    - Rational Connection
      * Law is arbitrary, so also fails at ‘rational connection’ stage of s. 1
      * “Indeed, we question whether an arbitrary provision…will ever meet the rational connection test under *Oakes*”
    - Minimal impairment
      * Prohibition goes further than needed by denying access to medical care, and so is not minimally impairing
    - Final balance
      * Harms not outweighed by benefits (esp. since no demonstrated benefits)
* Binne, LeBel and Fish dissent
  + Accepts that some Quebeckers’ lives and SOP are engaged
  + BUT, legislation does not violate principles of fundamental justice:
    - Unchallenged objective is to “provide high quality health care, at a reasonable cost, for as many people as
    - possible in a manner that is consistent with principles of efficiency, equity and fiscal responsibility”
    - TJ concluded that expansion of private health care would have negative impact on public health system
      * Finding of fact
    - Public reports recommend retention of “single-tier” system
  + Court may doubt conclusions in report, but reliance on them in designing system is not “arbitrary”

# Section 15: Equality rights

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

Section 15(2). Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

**CURRENT TEST**

When assessing a claim under s. 15(1), this Court’s jurisprudence establishes a two-step approach:

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,
   1. Grounds based distinction
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?
   1. This is where the work is had in the courts
   2. Is the distinction discriminatory?

## foundations and restatements

### Section 15 Antecedents

* Restrictions on province’sauthority to create distinctions based on alienage (*Bryden*; but see *Quong Wing*, *Tomey Homma*)
  + This was ad hoc – extremely inconsistent or reliably used by the courts
* “Implied Bill of Rights” cases restricted (mostly) province’s authority to restrict speech and religion, sometimes in ways that protected minority groups (*Saumur*)
* “Rule of Law” restricted arbitrary authority in ways that sometimes protected minority groups (*Roncarelli*)
  + You have to work in good faith, in accordance with the purposes for which discretion was conferred
    - Protects minorities that are particularly vulnerable to arbitrary state action
* Bill of Rights (*Drybones*, *Lavell* – frozen rights/rule of law, *Bliss*)
  + Frozen rights approach – frozen at the time when the rights were enacted because its just a statute (not subject to living tree)
* Human Rights Statutes 🡪 dealing with discrimination in things like workplaces

|  |  |
| --- | --- |
| BOR | Charter |
| **s. 1(b)**: “It is hereby recognized and declared that in Canada there have existed and **shall continue to exist** without discrimination by reason of race, national origin, colour, religion or sex…the right of the individual to equality before the law and the protection of the law”. | Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination **and, in particular**, without discrimination based on race, national or ethnic origin, colour, religion, sex, **age** or mental or physical **disability**.  \*Note!   1. Plural listing of equality *rights* 2. Expanded list of “enumerated” grounds, and open list    1. “And in particular” opens it up to analogous grounds 3. “Shall continue to exist” vs. remedial (s. 32(2): 3 year delay)    1. Everyone knew that this was going to require a lot of changes to come into compliance with s15 – contemplated at the outset that it was recognizing something new (not something that already existed as implied by the BOR) |

### Andrews v the Law Society of BC (substantive equality)

Ratio:

Facts: The respondent Andrews, a British subject permanently resident in Canada met all the requirements for admission to the British Columbia bar except that of Canadian citizenship.  His action for a declaration that that requirement violated s. 15 dismissed at trial but allowed on appeal. Kinersly, an American citizen who was at the time a permanent resident of Canada articling in the Province of British Columbia, was added as a co-respondent by order of this Court.

Result: Section 15 was infringed and not justified by section 1

Reason: Majority

*Section 15 Analysis (McIntyre)*

* + S 15 provides for every individual a guarantee of equality before and under the law, as well as the equal protection and equal benefit of the law without discrimination.
    - This is not a general guarantee of equality; its focus is on the application of the law.
    - No problem regarding the scope of the word "law" arose in this case because legislation was under attack.
  + Rejects Aristotelian principle of **“formal equality”** (i.e. “things that are alike should be treated alike”)
    - “Applied literally, it could be used to justify the Nuremberg laws”
    - Not all distinctions result in inequality, and sometimes identical treatment can produce *inequality* (see *Big M)*
      * Sunday closure has different impact on different groups
    - Alternative approach: “**substantive equality**”
      * Consider law’s content, purpose and impact
  + S15 has a “large remedial component”, aimed at the evil of discrimination
    - **“Discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society.”**
      * Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.
      * May be intentional or intentional 🡪 It is not about the malicious heart of the legislature but about the existence of a law that results in differential treatment
      * May be either facial or disparate/adverse impact or effects
  + 1) Grounds Approach
    - Claimant must prove differential treatment/impact based on a ***listed*** ground, or ground(s) ***analogous*** to those listed
      * Grounds define “discrete and insular minorities,” vulnerable to being overlooked in political processes (McIntyre; Wilson)
      * Grounds are difficult or impossible to consciously change (La Forest)
      * Grounds are “generally irrelevant” to legit state objectives (La Forest)
    - Grounds of discrimination enumerated in s15 are not exhaustive
      * The words “without discrimination” require more than a mere finding of distinction between the treatment of groups or individuals
        + Form of qualifier built into s15 itself and limit those distinctions which are forbidden by the section to whose which involve prejudice or disadvantage
    - Here, the legislation draws a facial distinction on the basis of citizenship
      * Non-citizens are the kind of “discrete and insular minority” that the enumerated grounds are to protect
  + 2) Is the distinction discriminatory?
    - The effect of the impugned distinction or classification on the complainant must be considered
      * A complainant must show not only that they are not receiving equal treatment before and under the law or that the law has a differential impact on them in the protection or benefit of the law but must show in addition that the law is discriminatory
        + Claimant must show that the legislative impact is discriminatory
    - If then, we move to s1 analysis
    - **A rule which bars an entire class of persons from certain forms of employment, solely on the grounds of a lack of citizenship status and without consideration of educational and professional qualifications or the other attributes or merits of individuals in the group, infringes s. 15 equality rights**.  Section 42 of the*Barristers and Solicitors Act* is such a rule.

*Section 1 Analysis*

* + The objective of the legislation failed to be sufficiently pressing and substantial to warrant overcoming the rights protected by s15
    - Given that s. 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society, the burden resting on government to justify the type of discrimination against such groups is appropriately an onerous one.
  + Proportionality test not met
    - The requirement of citizenship is not carefully tailored to achieve the objective that lawyers be familiar with Canadian institutions and customs and may not even be rationally connected to it
      * Citizenship not positively correlated to being deeply committed to the country

Issue:

Notes: La Forest concurring

* + Legislation fails to meet the test of proportionality but agrees with dissent about how the legislation must be approached under s1
  + Citizenship neither ensures the objectives of familiarity with Canadian institutions and customs or of commitment to Canadian society.
    - Restriction of access to the profession to citizens is over-inclusive.  Less drastic methods for achieving the desired objectives are available
  + While certain state activities may, for both symbolic and practical reasons, be confined to those who are full members of our political society, such restriction should not apply to the legal profession as a whole.  The practice of law is primarily a private profession.

McIntyre & La Mer dissent on s1

* + The citizenship requirement is reasonable and sustainable under s1 given the importance of the legal progression in the govt of the country
  + Measure not disproportionate to the object to be attained
  + Non-citizens are encouraged to become citizens and the maximum delay imposed upon the non-citizen from the date of acquisition of permanent resident status is three years.
  + It is reasonable to expect that the newcomer who seeks to gain the privileges and status within the land and the right to exercise the great powers that admission to the practice of law will give should accept citizenship and its obligations as well as its advantages and benefits.

#### Andrews (1989) to Law (1999)

* Serious splits in approach within the Court, often agreeing in result without agreeing on test
* *Law* (1999) set out preventing violations of “human dignity” as the purpose of s. 15
* **Whether a law is “discriminatory”** in the sense of “demeaning a claimant’s dignity”, may be assessed on the basis of “contextual factors”:
  + Pre-existing group disadvantage, stereotyping, prejudice
  + Correspondence between ground and actual needs/capacities
    - Its not an affront to their dignity, its not discriminatory
  + Ameliorative purpose or effects of law on disadvantaged groups
  + Nature and scope of interest affected
    - How egregious is the distinction?

#### Law to Kapp (2008)

* Scholars and commentators harshly critical of *Law* test and its application:
  + Vague/malleable
  + Importing questions of s. 1 justification into s. 15 analysis
    - Particularly the correspondence factor
  + Placed too high a burden on equality claimants
* E.g. *Gosselin* (2002):
  + Welfare recipients under age 30 received lower benefits
  + Majority found the distinction did not impair the dignity of young people
  + By encouraging young people to join the labour force, the law met their needs (i.e. “correspondence”)
* Academic criticism cited in *Kapp* (2008)

### R v Kapp

* Court acknowledged *Law* test to be confusing, burdensome for claimants, and associated with “formalism”
* Re-stated 2-part test:
  + 1) Is the distinction based on ground?
  + 2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?
* This restatement reiterates *Andrews* and much of what is said in *Law*
  + “Prejudice”relates to *Law* factors of pre-existing disadvantage and nature of interest affected
  + “Stereotyping”relates to *Law* factor of correspondence
* In *Andrews* – discriminatory impact viewed through 2 concepts:
  + 1) Perpetuation of prejudice or disadvantage to members of a group on the basis of personal characteristics identified in the enumerated and analogous grounds, and
  + 2) Stereotyping on the basis of these grounds that results in a decision that does not correspond to a claimant’s or group’s actual circumstances and characteristics
* In *Law* – the SCC suggested that discrimination should be defined in terms of the impact of the law or program on the ‘human dignity’ of members of the claimant group having regard to 4 contextual factors:
  + 1) Pre-existing disadvantage, if any, of the group;
  + 2) Degree of correspondence between differential treatment and claimant group’s reality;
  + 3) Whether the law/program has an ameliorating purpose or effects
  + 4) The nature of the interest affected
* Factors 1 and 4 go to go to the perpetuation of disadvantage + prejudice; factor 2 deals with stereotyping; and 3 goes to whether the purpose is remedial within the meaning of s 15(2)
* These factors affirm the approach to substantive equality in *Andrews* – to combat discrimination defined in terms of perpetuating disadvantage and stereotyping

### Quebec v A

Ratio: **Prejudice and stereotyping are *indicia***, not requirements, for a finding of discrimination. Perpetuation of historic disadvantage may violate s. 15 even without proof of prejudice or stereotyping 🡪 the focus should be on “impact” of the law not “attitude” of the legislature.

Facts: A and B met in A’s home country. She came to Canada. They broke up soon after. Then they saw each other sporadically, where A became pregnant with their first child. She had 2 other children with B. They spoke about marriage on at least 2 occasions. By the time they had stopped living under the same roof, the couple had lived together for seven years. A began proceedings seeking custody of the children, spousal support, a lump sum support payment, and use of the family home. They are living de facto as spouses but now has no access to protections because they never got married. She challenged constitutionality of the Quebec Civil Code, claiming access to the same protections as married spouses.

Result: No violation

LeBel, Fish, Rothstein & Moldaver: No section 15 violation

Abella, Deschamps, Cromwell, Karakatsanis and McLachlin: Section 15 violated

McLachlin: Violation justified under s. 1

SO… majority upholds the legislation

BUT Abella J’s reasons on s. 15 represent majority on s. 15

Reason: Justice Abella's, while dissenting in the result, expressed the view of the majority on s 15(1) analysis

* + **Prejudice and stereotyping are *indicia***, not requirements, for a finding of discrimination
    - Perpetuation of historic disadvantage may violate s. 15 even without proof of prejudice or stereotyping
    - Focus on “impact” of the law not “attitude” of the legislature
  + The most notable aspect of her opinion is that she dropped the requirement that the claimant demonstrate that the challenged law operate through the perpetuation of prejudice or stereotyping
    - Large shift from the *Kapp* test
  + But the court on a different majority decided that her s 15 rights had not been violated, and if they were, they were saved under s 1
  + Whether the focus on discrimination should focus on the purpose behind the legislation (behind excluding common law couples) or if it should focus on the effect (disadvantage suffered)
  + Abella: When you look at this in a contextual way, given the story of this claim, recognize that one party to this relationship is clearly vulnerable, the economic interdependencies that arise of a co-habitant relationship are not necessarily a choice, but they arise. And excluding common law couples from these statutory schemes, you are disadvantaging those
  + Primary reason for the exclusion is autonomy for people. People should be able to choose whether they want to have their relationship recognized by the law. This is not discriminatory
  + Abella: look at the effect, not the purpose. What is the effect? It is likely to make a class of individuals that are already vulnerable, who are in an unequal power relationship, who lack the ability to protect their own interests in these types of relationships. Effect is to impose a serious disadvantage on persons like A, that we have relieved for people in marital relationships
  + Any exploration for the purpose of the legislation should happen under s 1, not under s 15
  + Where court really struggles is that they can understand why people in common law relationships are vulnerable to the same type of economic dependency as those who had been formerly married, but they also want to respect people’s choice not to become married
    - Is s 15 flexible enough to allow the national assembly to exclude common law relationships from the provisions of spousal support, or whether that offends s 15
  + In Quebec, you have to be married or have registered your relationship in order to gain the rights under the legislation. The two hadn’t gotten married or registered their relationship

***Grounds Based Distinction?***

* + Facial distinction on basis of marital status
  + Marital status found “analogous” in *Miron v Trudel* (1995)

***Is the distinction discriminatory?***

* + “The National Assembly enacted economic safeguards for spouses in formal unions based on the need to protect them from the economic consequences of their assumed roles. Since many spouses in de facto couples exhibit the **same functional characteristics** as those in formal unions, with the **same potential for one partner to be left economically vulnerable or disadvantaged** when the relationship ends, their **exclusion from similar protections perpetuates historic disadvantage against them based on their marital status**.”
    - Historically = its always been dangerous to be an economically dependent partner in a relationship where they’re not married
  + “The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. If the **state conduct widens the gap between the historically disadvantaged group and the rest of society** rather than narrowing it, then it is discriminatory”
    - Need not prove prejudice, stereotype, or intent
    - Court notes “functional” similarity between *de facto* and included spouses
    - Heterogeneity within claimant group does not defeat claim
      * Just because not everyone in de facto relationships who separate are economically vulnerable does not mean they haven’t been historically disadvantaged as a group

***Section 1 Analysis (Abella)***

* + P&S objective is preserving freedom of choice
  + Exclusion rationally connected to objective
  + BUT not minimally impairing, because an opt-out scheme (as used in other provinces) could equally preserve choice while increasing protection of vulnerable spouses

Issue: Whether provisions in Quebec’s Civil Code that exclude common law couples from the property and support rights granted to married spouses violated the right to equality under s 15, and if so whether the provisions could be upheld under s 1 of the Charter.

Notes: ***McLachlin Section 1 Analysis***

* + Scheme falls within range of reasonable alternative
  + Minimal impairment should be informed by federalism values
    - QB should be able to do something if they want to
  + Other schemes maximize choice less…
    - Question is whether goal can be achieved in less impairing way, not whether goal should change

### Kahkewistahaw First Nation v Taypotat

Ratio: The focus of s 15 is on laws that draw *discriminatory* distinctions – that is, distinctions that have the effect of perpetuating arbitrary disadvantages based on an individual’s membership in an enumerated or analogous group.

Facts: In response to the *Report of the Royal Commission on Aboriginal Peoples,* which emphasized education as a priority for Canadian AB communities, the K FN in Sask formulated an election code requiring a Grade 12 education for those wishing to be chief or band councillor.

Taypotat, who had been chief for the previous 30 years, contested the constitutionality of the requirement; he was 76 and had a Grade 10 education.  His challenge was based on the argument that the new educational prereq infringed s 15(1) of the Charter, and that educational attainment was analogous to prohibited grounds of discrimination based on race and age for the purpose of s 15(1). SCC held that it was not discriminatory. Abella’s approach to s 15(1) drew on her opinion in *Quebec v A.* The unanimous decision in *Taypotat* signals that the court is now united around Abella’s approach 🡪 Her opinion rejected the position, expressed in the *Kapp* test, that a finding of discrimination requires proof of the operation

of prejudice and stereotyping, Discrimination is now characterized as “arbitrary disadvantage”.

Note: it is too early to say whether this amounts to a systematic reformulation of the s 15(1) test or only a minor seismic shift.

Result: No s15 violation (unanimous court)

Reason: *Quebec v A* clarifies that s 15(1) requires a “flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant *because of his/her membership in an enumerated or analogous group*”.

 S 15 protects substantive equality… It is an approach which recognizes that persistent systematic disadvantages have operated to limit the opportunities available to members of certain groups in society and seeks to prevent conduct that perpetuates those disadvantages. Such an approach rests on the idea that not every difference in treatment will necessarily result in inequality and that identical treatment may frequently produce serious inequality.

* + Substantive equality “is an approach which recognizes that persistent systemic disadvantages have operated to limit the opportunities available to members of certain groups…and…to prevent conduct that perpetuates those disadvantages”
  + Not all distinctions are discriminatory: context, effects
  + Focus of discrimination analysis is on whether law imposes “arbitrary—or discriminatory—disadvantage, that is, whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage”

#### Reformulated s 15(1) Test:

* + Whether, on its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground
  + Whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage
    - At the second stage of the analysis, the specific evidence required will vary depending on the context of the claim., but “evidence that goes to establishing a claimant’s historical position of a disadvantage” will be relevant

*Application to This Case*

* + Here, not clear that there is a distinction on the basis of an enumerated or analogous ground
    - Educational requirements *may* have discriminatory impact (e.g. US *Griggs* case)
    - Here, “there is virtually no evidence about the relationship between age, residency on a reserve, and educational levels” in the KFN
    - Don’t necessarily need statistical evidence to prove “disparate impact” discrimination, but a “web of instinct” will not suffice
  + The education requirement for employment, could, in certain circumstances, be shown to have a discriminatory impact in violation of s 15
  + In this case, there is no evidence about the relationship between age, residency on a reserve, and education levels in the Nation to demonstrate an employment requirement that is unrelated to measuring job capabilities
  + The education requirement does not have the effect of imposing arbitrary disadvantage on community members based on their residence on the reserve

Issue:

Notes:

## Differential Treatment, Grounds & Comparators

### Step 1: Differential Treatment

#### Adverse Effects as Discrimination

\*It is established that distinction or differential treatment includes "facial" distinctions or "adverse effects" (*Andrews*; *Taypotat*)\*

*Eldridge*: failure to insure sign language interpretation

* Even though no specific distinction was drawn

*Vriend*: failure to provide protection against “sexual orientation” discrimination in human rights legislation

*Taypotat*: education requirement alleged to have adverse impact on grounds of age and residency-on-reserve (insufficient evidence)

* The relationship of facial discrimination lacked a sufficient nexus to adverse effects on the grounds of age

#### Eldridge v BC

Ratio:

Facts: 3 individuals born deaf and whose preferred means of communication was sign language sought a declaration that the failure to provide public funding for sign language interpreters for the deaf when they received medical services violated s 15. According to the Medical and Health Care Services Act, the power to decide whether a service is medically required and hence a ‘benefit’ is delegated to the Medical Services Commission – the Commission and the hospitals did not make sign language interpretation available as an insured service.

Result: No – the failure of the Commission/hospitals to provide sign language interpretation where it is necessary for effective communication constitutes a prima facie violation of the s 15(1) rights of deaf persons. Appeal allowed

Reason: *Purposive Interpretation*

* + “First, [Section 15] expresses a commitment—deeply ingrained in our social, political and legal culture—to the **equal worth and human dignity** of all persons… Secondly, it instantiates a desire to **rectify and prevent discrimination** against particular groups “suffering social, political and legal disadvantage in our society””
    - Particular attention to historical circumstances and the remedial focus (*Andrews*)

*Enumerated or Analogous Ground?*

* + No question – definitely an enumerated ground
  + Deafness is a physical disability
    - Long history of discrimination and exclusion
    - As deaf persons, the appellants belong to an enumerated ground under s 15 – being physically disabled – persons with disabilities have been excluded from labor force, denied opportunities for social interaction, subjected to stereotyping – have not been afforded the equal concern, respect, and consideration that s 15 demands
  + Court observes that many deaf people “resist the notion that deafness is an impairment and identify themselves as members of a distinct community with its own language and culture,” but “this does not justify their compelled exclusion from the opportunities and services designed for and otherwise available to the hearing population”
  + Exclusion exacerbates disadvantages associated with efforts to communicate with hearing persons

**BUT does the law draw a distinction based on this ground**?

* + Law **“**does not make an explicit ‘distinction’ based on disability by singling out deaf persons for different treatment. Both deaf and hearing persons are entitled to receive certain medical services free of charge”
    - Doesn’t single them out in a facial or explicit way
  + Draws on analysis from human rights law
    - *Simpson-Sears* (1985):**“direct discrimination”** (i.e. “No Catholics or no women or no blacks employed here”) and “**adverse effect**” (standard “on its face neutral” but imposes burden)
      * Idea that was referenced in *Andrews*
    - *Eaton* (1997): **S. 15 not JUST about “attribution of untrue characteristics based on stereotypical attitudes”**
    - “Whether it is the impossibility of success at a written test from a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual….Rather, it is the failure…to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them”
  + It is sufficient that the effect of the legislation is to deny someone the equal protection or benefit of the law
  + Here, the adverse effects result from a failure to ensure that deaf persons benefit equally from a service offered to everyone
  + Trial/CA decision 🡪 sign language interpretation services are not medically required; **they are ancillary services which are not publicly funded therefore, the appellants were not denied a benefit available to the hearing population** 
    - COA said there was no distinction
    - **This approach is rejected by the SCC** – “seriously mischaracterizes the practical reality of health care delivery” as effective communication is “integral”
      * Evidence that miscommunication can lead to misdiagnosis, failure to get adequate treatment
      * Especially high risk in emergencies (e.g. appellant at hospital for premature birth of twins)
    - **Argument that s. 15(1) should not apply here because it does not impose positive obligations represents a “thin and impoverished vision of s. 15”**
  + Under the adverse effects of discrimination, the government may be required to take special measures that disadvantaged groups are able to benefit equally from government services.
  + The principle of discrimination can accrue from the failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public
  + There is no question that the distinction here is based on a personal characteristic that is irrelevant to the functional values underlying the health care system – the values are promotion of health, prevention/treatment of disease, and the realization of those values through the vehicle of publicly funded health care system
  + Where it is necessary for effective communication, interpretation cannot be considered an ancillary service
  + The SCC has repeatedly held that once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner – this can have the effect of requiring the gov’t to take positive action [ex. by expanding the scope of the benefit to previously excluded persons]
  + Here, the failure to provide interpretation denies deaf people equal benefit of the law and discriminates against them in comparison with hearing persons
    - **Once a benefit is being provided, it has to be provided in a way that is not discriminatory**

Section 1

* + Objective: limiting health care expenditures
  + Not minimally impairing 🡪 no evidence that total denial of interpretation services to achieve objective
    - Particularly in light of the severity of impact (i.e. deleterious consequences) not outweighed by contribution to objective (i.e. salutary effect)

Issue:Does the failure to provide funding for sign language interpretation violate s. 15? Have the appellants been afforded equal benefit of the law without discrimination?

Notes:

Vriend v AB

* This is another successful claim of ‘adverse effects’ discrimination
* Fired when employer discovered he was gay – attempted to file complaint to AB Human Rights Commission alleging discrimination on basis of sexual orientation but did not allow as was not a prohibited ground of discrimination
* AB government argued the exclusion of sexual orientation was not differential treatment but a ‘neutral silence’
* SCC – the exclusion amounted to differential treatment directly and in terms of its adverse effects – by reason of under-inclusiveness
* Distinction between homosexuals and other protected disadvantage groups but also between homosexuals and heterosexuals
  + Equal benefit of the law

### Step 1: Enumerated and Analogous Grounds

**Governing Test** 🡪 Immutable or constructively immutable personal characteristics (*Corbiere*)

“Other factors identified in the cases as associated with the enumerated and analogous grounds, like the fact that the decision **adversely impacts on a discrete and insular minority** or a group that has been **historically discriminated against**, may be seen to flow from the central concept of immutable or constructively immutable personal characteristics, which too often have served as **illegitimate and demeaning proxies** for merit-based decision-making”

#### Cobiere v Canada

Ratio:

Facts: Members of a native band that do not live on a reserve are prohibited from voting in band elections pursuant to s.77(1) of the Indian Act. The respondents are native band members who do not live on a reserve, and they claim that this prohibition is contrary to s 15 of the Charter. They were successful at the lower courts, which the government appealed.

Result: Yes - appeal dismissed

Reason: ***Does the impugned law make a distinction that denies equal benefit or imposes an unequal burden?*** – Yes, the exclusion of off-reserve band members from voting privileges satisfies this requirement (this is obvious).

***BUT, is it an enumerated or analogous ground? (Step 1 is met)***

* + “The enumerated grounds function as legislative markers of suspect grounds associated with stereotypical, discriminatory decision making”
    - Screening function (avoid trivial claims)
      * Avoid distinctions that would be a misuse of s15
    - Government has a history of making discriminatory laws when legislation legislates on these grounds
    - The general purpose of s 15(1) 🡪 to prevent the violation of human dignity through the imposition of disadvantage based on stereotyping and social prejudice, and to promote a society where all persons are considered worthy of respect and consideration – believe Aboriginality- residence constitutes a ground of discrimination analogous to the enumerated grounds
  + “The thrust of identification of analogous grounds…is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law. To put it another way, s. 15 targets the denial of equal treatment on grounds that are **actually immutable**, like race, or **constructively immutable**, like religion.”
    - “Other factors identified in the cases as associated with the enumerated and analogous grounds, like the fact that the decision adversely impacts on a discrete and insular minority or a group that has been historically discriminated against, may be seen **to flow from the central concept of immutable or constructively immutable personal characteristics**, which too often have served as illegitimate and demeaning proxies for merit-based decision-making”
      * **EISEN** – this doesn’t make sense
        + Immutability does not mean the same as this
  + Majority 🡪 It is clear that non-reserve aboriginal status qualifies as an analogous ground, but distinctions based on analogous grounds do not always constitute discrimination.
    - **Aboriginality-residence is** “**a personal characteristic essential to a band-member’s personal identity**, which is no less constructively immutable than religion or citizenship. Off-reserve Aboriginal band members can change their status to on-reserve band members only at great cost, if at all.”
      * This is not about residence generally
    - Analogous grounds serve as the basis for stereotypical decisions made not on the basis of merit but a personal characteristic that is either unchangeable, or changeable only at an unacceptable cost to personal identity
  + Criteria for determining whether a ground is analogous
    - Enumerated grounds (sex, race, national/ethnic origin, color, religion, age, mental/physical disability) all have in common the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of personal characteristic that is immutable or changeable only at unacceptable cost to personal identity
    - Must reveal grounds based on characteristics that we cannot change or that gov’t has no interest in expecting us to change to receive equal treatment under the law
    - Other factors – the decision adversely impacts a discrete and insular minority or a group historically discriminated against
    - Actually immutable – race; constructively immutable – religion
    - Sexuality, marital status
  + **Once a personal characteristic is recognized or rejected as an analogous ground it will hold across all legal contexts**
    - Reject a case by case basis analysis

***Is the distinction amounts (in purpose or effect) to discrimination on the facts of the case? (Step 2)***

* + Distinction perpetuates historical disadvantage and does not correspond with actual characteristics
  + Based on stereotype that band members living off reserve are not interested in maintaining meaningful participation in the band or preserving cultural identity
  + Affected interests are fundamental, relating to preservation of cultural identity and matters of practical concern (e.g. surrender and allocation of lands, expenditures, etc.)
    - *Law* – nature and scope of the interest affected

*Section 1*

* + Not minimally impairing since total ban not necessary to achieve objective of giving electoral voice to those most directly affected by decisions.

Issue: Is prohibiting band members living off reserve from voting in band elections contrary to s 15 of the Charter?

Notes: L’HD concurring

* + Aboriginality-Residence
    - Important to identity, personhood, community, land
    - History of discrimination
    - Lack of housing opportunities on reserve
    - Leaving reserve often compelled by restrictions in *Indian Act*, not chosen
  + Classifies analogous grounds and states that they are things that, considered by a reasonable person in the position of the claimant, would be deemed important to their identity, personhood and belonging
    - There are several things that help to determine this: being immutable, or very difficult to change in terms of personal identity; lacking in political power; disadvantaged or vulnerable; and inclusion in human rights codes are all factors
    - Why this distinction is discrimination a 🡪 the interest here is very important, and that it is completely prohibited, showing a serious violation
    - It reinforces the view that aboriginals who do not live on reserves are "less aboriginal" than those who do, which harms the dignity of the group.

NOTE: The following characteristics do not qualify as analogous grounds: employment status or occupation, with respect to the RCMP, with respect to health care workers, province of residence, persons charged with war crimes/crimes against  
humanity outside of Canada, bringing a claim against the Crown, marijuana users

#### Other Analogous Grounds

* Citizenship (*Andrews*)
  + “Discrete and insular minority”, irrelevance, immutability
* Marital Status (*Miron v Trudel*)
  + Historical disadvantage, constructive immutability, deeply personal choice
  + *QB v A*
* Sexual Orientation (*Egan*)
  + Some judges focused on immutability, others on historical disadvantage
* Rejected Grounds:
  + Occupation/Employment Status (*Re Worker’s Comp; Delisle*; *Baier*)
  + Province or Municipality of Residence (*Turpin*; *Haig*; *Siemens*)
  + Marijuana Use (*Malmo-Levine*)
* Open Questions
  + Poverty
  + Social condition
  + Homelessness

### Step 2: Discrimination and Comparators

#### Withler v Canada

Ratio:

Facts: Plaintiffs (widows) whose federal supplementary death benefits were reduced because of the age of their husbands at the time of death [Public Service Superannuation Act and the Canadian Forces Superannuation Act] – provide federal civil servants and members of the Canadian Forces, and their families with a suite of work-related benefits both during employment and after retirement – both include a supplementary death benefit – akin to life insurance – provides a lump sum payment to be made to a plan member’s beneficiary at member’s death. For younger plan members, purpose is to insure against unexpected death at a time when the deceased’s member surviving spouse would be unprotected by a pension/entitled to limited pension funds + for older member’s, purpose is to assist surviving spouses with the costs of the plan members last illness and death – not intended to be a long-term income stream for spouses of older plan members. The amount (twice the plan member’s salary at time of death) reduces by 10% for every year the plan member exceeds 65 or 60 (depending on the Act). This is only one part of the package of survivor benefits – includes pension, health care, dental care, children’s allowance, student’s allowance. Argue the legislation discriminates on the basis of age violating s 15(1).

Result: No appeal dismissed – the reduction provisions do not violate s15(1), unnecessary to consider s1

Reason: ***Step 1)*** Clear, facial distinction on the basis of the enumerated ground of age…

* + Do the pension schemes at issue deny a benefit to the claimants that others receive?
    - Yes – the Reduction Provisions reduce the death benefit payable to surviving spouses of plan members over 60 of 65 years

***Step 2) Is the distinction discriminatory?***

* + Establish this by showing that the law perpetuates prejudice and disadvantage to members of a group on the basis of personal characteristics within s. 15(1) – perpetuation typically occurs when law treats a historically disadvantaged group in a way that exacerbates the situation of the group
  + Can also show that the disadvantage is based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant/group
  + If can show that the law imposes a disadvantage by stereotyping members, s. 15 may be found to be violated even in absence of proof of historic disadvantage

Do the Reduction Provisions violate s. 15(1)’s protection of substantive equality? Does the impugned law perpetuate disadvantage or prejudice, or stereotypes of the claimant group?

* + Look at purpose of provision in the context of broader scheme 🡪 it is in the nature of a pension scheme that it is designed to benefit a number of groups in different circumstances w/ different interests – but are these lines drawn appropriate given the circumstances of the group impacted and the objects of the scheme? [perfect correspondence not required]
    - “**Analysis is contextual, not formalistic, grounded in the actual situation of the group and the potential of the impugned law to worsen their situation**”
    - In assessing benefits scheme, contextual inquiry will often focus on the *purpose of the impugned provision* in the context of the *scheme as a whole*
    - “Whom did the legislature intend to benefit and why?”
      * Are lines drawn appropriate in this light?
    - “Perfect correspondence between a benefit program and the actual needs and circumstances of the claimant group is not required”
  + Where the impugned law is a broad-reaching benefits scheme, comparison with multiple other groups will be necessary
  + **Here, scheme is designed to address needs of various groups over the course of their lives**
    - Evidence that cost of last illness and death increases with age, with health care benefits accordingly increasing
      * For younger employees, SDB acts as life insurance, compensating for unexpected death in absence of pension
      * For older employees, SDB aids with cost of last illness and death, alongside pension and health care benefits
    - The package will target the same people through different stages of lives/careers – attempts to meet specific needs at particular moments in their lives
    - It treats beneficiaries differently depending where they find themselves – but it is discriminatory neither in purpose nor effect – have Pension benefits to assist them at this time, which (some) younger persons do not, and have other benefit packages as well
  + Court rules that “overall…effective in meeting the actual needs of claimants”
    - Not relying on invidious stereotypes regarding age
    - Not discriminatory in purpose or effect
  + The reality is such schemes of necessity must make distinctions on general criteria, including age 🡪 look at the death benefit in relation to other benefits that form the comprehensive benefit scheme to determine whether the claimants had been denied an equal benefit of the law – evidence showed the surviving spouses were better equipped than most Canadians to meet their expenses

***Comparison Under S 15***

* + **Court REJECTED “mirror comparators” as tools in equality analysis**
    - *Hodge:* Each case has a “correct” comparator group to guide discrimination analysis. The “appropriate comparator group is the one which mirrors the characteristics of the claimant (or claimant group) relevant to the benefit or advantage sought except that the statutory definition includes a personal characteristic”
    - In *Withler*, dissenting judge at COA conducted analysis through comparison of claimants with “mirror comparator”
      * i.e. those with retired spouses under age 60 or 65 (who received both pension and full SDB)
    - **SCC**: “What is required is not formal comparison with a selected mirror comparator group, but an approach that looks at the full context, including the situation of the claimant group and whether the impact of the impugned law is to perpetuate disadvantage or negative stereotypes about that group”
  + Formal comparison based on the logic of treating likes alike is not the goal of s. 15(1) – need substantive, not formal equality. Comparison is an essential facet of s. 15 but usually not by a formalistic comparison between groups, but by relevant contextual factors
  + Mirror comparator group approach – look at group claimed to be protected and whether there is a distinction established by the comparison
    - The Court in the final analysis must ask whether, having regard to all relevant contextual factors, including the nature and purpose of the impugned legislation in relation to the claimant’s situation, the impugned distinction discriminates by perpetuating the group’s disadvantage or by stereotyping the group
    - Concern of mirror comparator groups 🡪 can mean the definition of the comparator group determines the analysis and outcome; this may become a search for sameness as opposed to a search for disadvantage; can place an unfair burden on the claimants to find the ‘right’ comparator group (can be no group to use for the purposes of comparison and it may be difficult to decide which characteristics must be mirrored)
  + The mirror comparator analysis may fail to capture substantive inequality, may become a search for sameness, may shortcut the second stage of substantive equality analysis, and may be difficult to apply

Issue: Does the legislation’s Reduction Provisions discriminate on the basis of age violating s 15(1)?

Notes:

### M v H (decided under *Law*)

Ratio:

Facts: Two women, M and H, cohabited in a same-sex relationship for 10 years. H was financially stronger than M and they lived in a house owned by H and started own advertising business where H’s contributions were greater than those of M (devoted more time to domestic tasks). When the business failed, H was able to find other employment but M was not. After they broke up, M filed a claim against H for support pursuant to the Family Law Act – here, the definition of ‘spouse’ extended governing support applications beyond married persons to include a man and woman who were not married and had cohabited for a period of not less than 3 years. M said this definition was unconstitutional by virtue of its exclusion of same-sex couples and that the appropriate remedy was an extension of the definition to include same-sex couples.

Court concedes that exclusion from “protective aspect” of law is a benefit, denied to M because her partner was a woman. Sexual orientation recognized analogous group in *Egan*.

Result: The definition of spouse violates s 15(1). It is of no force and effect – 6 months delayed declaration of invalidity (instead of replacing with words ‘two persons’)

Reason: *Discrimination*

* + The determination of whether differential treatment imposed by legislation on an enumerated or analogous ground is discriminatory must be undertaken in a purposive and contextual manner
  + Need to inquire whether the differential treatment imposes a burden upon or withholds a benefit from the claimant in a manner that reflects the stereotypical application of presumed group or personal characteristics, or which otherwise had the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society equally deserving of concern, respect, and consideration
  + There are various contextual factors that can be used to determine whether legislation demeans a person’s dignity – the list is not closed and there is no specific formula that must be considered

*Application*

* + Denial of benefit “contributes to the general vulnerability experienced by individuals in same-sex relationships”
  + Law does not correspond with claimant’s “actual situation”: same-sex relationships equally permanent and conjugal
    - Not based on actual needs of the claimants
  + Interest affected is “fundamental, namely the ability to meet basic financial needs following the breakdown of a relationship characterized by intimacy and economic dependence”
    - The spousal support provisions are there to protect economic interests of individuals in intimate relationships so when a relationship breaks down it ensures that a member of a couple who has contributed to the couple’s welfare in intangible ways will not find himself or herself utterly abandoned
  + Benefit also has “societal significance” as exclusion denies worthiness of respect, protection
    - Contributes to “erasure of their existence”
    - The claimants are being told that their life experiences don’t matter by the exclusion in the legislation
  + Law implies same-sex couples less capable of intimate, interdependent relationships
    - Stereotype is being relied upon
  + \*\*Note the overlap of the *Law* factors
    - The factors allo have a lot in common
    - Why the court would maybe want to step away from these rigid factors

*Section 1*

* + Exclusion not justifiable under s. 1
  + Objective: equitable resolution of economic disputes arising from relationship breakup and alleviate “the burden on the public purse”
  + Exclusion not rationally connected and even “undermined” objectives
    - Creates a class of people who are more likely to burden the public purse and not likely to experience equitable division following a break up
  + Remedy: Definition of “spouse” of no force or effect
    - Suspended declaration of invalidity: 6 months

Issue: Does the definition of ‘spouse’ by not including same-sex couples' violation s 15?

Notes: Dissent (not discussed in class)

* + The primary purpose of the Act was to ameliorate the position of women who had become dependent on their partners in both married and conjugal opposite-sex relationships
  + Agreed that the legislation imposed differential treatment and that this treatment resulted in the withholding of a benefit
  + The unique social role of opposite-sex couples has 2-related features – women bear a disproportionate share of the child care burden in Canada and that one partner tends to be economically dependent on the other (usually the woman) – the legislation has sought to address this dynamic of dependence and there is no evidence that same-sex couples exhibit this type of dependency
  + The evidence is to the contrary – show lesbian relationships as having a more equal distribution of labor and a lower degree of financial interdependence than is prevalent in opposite-sex couples; there is economic disparity in opposite-sex – not present in same-sex relationships
  + The legislation takes into account the claimant’s actual need, capacity, and circumstances as compared with individuals in opposite-sex couples and by doing so it does not violate human dignity
  + The distinction drawn does not discriminate because it does not involve the stereotypical application of presumed group or personal characteristics and does not otherwise have the effect of perpetuating or promoting the view that individuals in same-sex relationships are less deserving of concern, respect, and consideration
  + Where a legislative distinction is drawn on the basis off an accurate picture of capacity and circumstance there is no stereotype and discrimination is unlikely

## ameliorative programs

**15(2).** Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

* Not all distinctions result in inequality (*Andrews*)
* Ameliorative purpose as a factor suggesting a distinction is not discriminatory (*Law*; *M v. H*)
* ***Lovelace*** (2000) affirmed *Law*’s use of ameliorative purpose as a “factor” in analysis of s. 15(1)
* Rejected treating s. 15(2) as an “exemption” to s. 15(1)
* Left door open to “independent” role for s. 15(2)

### R v Kapp

Ratio: When a claimant makes a s 15(1) discrimination claim they must first prove that a distinction has been drawn on an enumerated or analogous ground. After they have proven this, the government has the opportunity to prove that the program in question falls under s 15(2). In order to do this the government must prove:

* + The program has an ameliorative or remedial purpose; and
  + The program targets a disadvantaged group identified by the enumerated or analogous grounds.

To fall under s 15(2), the program must only have a sincere ameliorative purpose; the effects are not to be strictly considered (the burden is on the government to prove that the purpose is sincerely to promote the amelioration of the disadvantaged group; they must prove that there is a correlation between the program and the disadvantage of the group).

Although the ameliorative purpose does not need to be the sole purpose of the program, the more important the ameliorative purpose is, the more likely it is that the program will fall under s 15(2).

The fact that not all members of the group being helped by the program suffer disadvantage is not important so long as there is a group disadvantage suffered by the group targeted by the program.

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

Result: No – no breach of s 15 has been established. The program is protected by s 15(2) as a program that has, as its object, the amelioration of conditions of disadvantaged individuals or groups.

Reason: Federal government has pursued policies to increase Aboriginal involvement in the commercial fishery – as a response to Sparrow to respect rights recognized; provided them with a larger role in fisheries management and increased economic benefits; and minimizing disruption of non-Ab commercial fisheries.

*Purpose of s15*

* + Ss 15(1) and (2) work together to promote the vision of substantive equality:
    - (1) Is prevented at preventing discriminatory distinctions that impact adversely on members of groups identified by the grounds enumerated in s 15 and analogous grounds;
    - (2) The Charter preserves the right of the government to implement programs aimed at helping the disadvantaged to improve their situation
  + Central purpose of combatting discrimination
    - 15(1) = to prevent gov’ts from making distinctions based on the enumerated or analogous grounds that have the effect of perpetuating group disadvantage and prejudice; or impose disadvantage on the basis of stereotyping;
    - 15(2) = focus on enabling governments to proactively combat discrimination through affirmative measures

*Section 15(2)*

* + “If the government can demonstrate that an impugned program meets the criteria of s. 15(2), it may be unnecessary to conduct a s. 15(1) analysis at all”
  + **Approach to s. 15:**
    - Claimant seeks to prove that law draw a distinction (on its face or in effect) on basis of a prohibited ground
    - IF SO, government may seek to prove law is an ameliorative program, and if so, no s. 15 violation
    - IF NOT, clamant seeks to prove that distinction is “discriminatory” (burden shifts back)
  + The government must demonstrate

1. Program has an ameliorative or remedial purpose
2. Program targets a disadvantaged group identified by an enumerated or analogous ground
   * Here, the appellants were treated differently based on race – need to determine if the program that targeted the aboriginals falls under s 15(2) in the sense that it is a ‘law, program, or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups’
   * It was issued pursuant to an enabling statute + regulations – which qualifies as a law, program, or activity
   * S 15(2) approaches – as an interpretive aid to s. 15(1); as an exception or exemption from s. 15(1); or (added here) if gov’t can demonstrate that an impugned program meets the criteria of s. 15(2) it may be unnecessary to conduct a s. 15(1) analysis at all
   * It tells us that s 15(1) cannot be read in a way that finds an ameliorative program aimed at combatting disadvantage to be discriminatory and in breach of s 15
   * Once complainant establishes a distinction made on an enumerated or analogous ground, it is open for the gov’t to show that the impugned law is ameliorative + thus constitutional, if the gov’t fails to do so, then at this point the program must receive full scrutiny under s. 15(1) to determine whether it’s impact is discriminatory

*Ameliorative or Remedial Purpose*

* + Goal, not effect, is the paramount consideration
    - BUT, “the fact that a law has no plausible or predictable ameliorative effect may render suspect the state’s ameliorative purpose”
      * Suggestion that the government’s stated purpose is not actually the real purpose
    - Language suggests the main consideration is the legislative goal (purpose) rather than actual effect in determining whether a program qualifies for protection (subjective approach) – Courts can examine the legislation to ensure the declared purpose is actually genuine
    - To determine the purpose – can look at statements made by drafters and also whether the legislature chose means rationally related to that ameliorative purpose
    - The ameliorating purpose does not need to be the sole object of a program
  + No need to “slavishly accept” government statement of purpose
    - Consider whether law “rationally related” to ameliorative purpose
    - Consider whether law aims at disadvantage suffered by target group
  + Ok if ameliorative purpose is one of several objectives
    - BUT, 15(2) only protects distinctions that serve and are necessary to ameliorative purpose
  + Laws that restrict or punish target groups not “ameliorative”
    - “Its for your own good” will not count

*“Disadvantaged”*

* + Connotes vulnerability, prejudice, and negative social characterization
  + Does *not* cover “broad societal legislation, such as social assistance programs”
    - S. 15(2) is to protect gov’t programs targeting the conditions of a specific and identifiable disadvantaged group – not all members need to be disadvantaged as long as the group as a whole has experienced discrimination
  + Not all members of group need be disadvantaged as long as “group as a whole” has experienced discrimination

*Application*

* + Appellants have demonstrated a distinction imposed on the basis of race (an enumerated ground) as the gov’t conferred the fishing license to particular aboriginal bands only
    - 1) Ameliorative or remedial purpose? 🡪 provided economic opportunities to bands, to negotiate solutions to fishing rights claims, support progress towards self-sufficiency – means chosen to achieve the purpose are rationally related to serving the purpose
      * Objectives include negotiating solutions to Aboriginal fishing rights claims; providing economic opportunities for bands; and supporting progress toward self-sufficiency
        + These include redressing social, economic disadvantage of bands
      * Means chosen are rationally related to purposes
    - 2) Program targets disadvantaged group 🡪 the disadvantage of Ab people is indisputable – face high rates of unemployment, poverty, face disadvantages in housing, education, health – the license, by addressing long-term goals of self-sufficiency and providing sources of income/employment relates to the social + economic disadvantages suffered by the bands
      * Program aims correlate to actual economic and social disadvantage of Aboriginal peoples
      * Evidence of discrimination and economic disadvantage facing Aboriginal bands in general, and targeted bands in particular
      * Irrelevant that some band members advantaged

Issue: Have the appellants s. 15 equality rights been breached? No

Notes:

### R v Cunningham

Ratio:

Facts: Métis long struggled for recognition as distinct community, and for a “land base” to support self-government. Constitution Act, 1982 recognized Métis as one of three distinct “Aboriginal groups” (alongside First Nations and Inuit) in s. 35. Following Constitution Act, 1982 and Commissions exploring status of Métis, and negotiations between Alberta government and Métis, *Métis Settlement Act (MSA)* established self-governing settlements for Métis. *MSA* excluded “status Indians” from formal membership in any Métis settlement. Status Indians challenged *MSA* exclusion under s. 15.

Result:

Reason: **Refining Kapp test:**

1. Is the program genuinely ameliorative?
   * + Program targets a group (based on a ground) in need of ameliorative assistance to achieve substantive equality
     + Correlation between program and disadvantage suffered by group
     + Declared ameliorative purpose must be “genuine”
     + *Kapp*:means “rationally related” to goal; ok if amelioration is one of several objects; punitive measures not “ameliorative”
2. Does the distinction serve or advance the object of the ameliorative program?
   * + Distinctions that “serve and are necessary to” ameliorative goals (*Kapp*) does not require “proof that the exclusion is essential”
       - Just must “in a general sense serve or advance the object”
       - Cannot be “irrational means” of pursuing goal

*Ameliorative?*

* + First define object, then ask whether correlates with actual disadvantage
    - Look to language, history, and context of program
  + Here, object of program is enhancement of Métis identify, culture and self-government through establishment of a Métis land base
    - NOT “broad” goal of benefiting all Métis (though defining object too narrowly will skew analysis)
    - Object is not conferral of material benefits, but strengthening group identity and self government/culture
      * Element of identity is Metis distinction from other Indigenous cultures
    - Rectify history of denial through negotiated settlement
  + Correlation between program and disadvantage (*Kapp*)
  + Ameliorative purpose is genuine

*Advance the object?*

* + Do not need “positive proof” that distinction will have “particular impact”, but rather that it was “rational for the state to conclude” it “would contribute to” ameliorative purpose
    - A lot of deference in the way that 15(2) is being framed
  + HERE the distinction is supported by historic distinction between culture of Métis and of status Indians
    - AND without distinction/exclusion, program’s objective of fostering Métis culture, etc., would be harder to achieve
      * Some Status Indians may have different political priorities, especially respecting Métis access to benefits conferred by status
    - AND, Métis role in defining settlement membership should be respected (see s. 35 jurisprudence: *Powley*)
  + SO exclusion falls within s. 15(2)
    - Means we do not consider step 2 of 15(1) analysis or section 1 (no finding of rights violation)

Issue: Is the program genuinely ameliorative? Does the distinction serve or advance the object of the ameliorative program?

Notes:

# Aboriginal Rights

**Report of the Royal Commission on Aboriginal Peoples (1996)**

Stage 1: Separate Worlds

* Notion that prior to Europeans coming, there were separate legal and social orders developing in isolation from each other

Stage 2: Contact and Co-operation

* There is an initial moment when Europeans arrived in North America and there were alliances built – Indigenous peoples often necessary for survival
* Shift to stage 3

Stage 3: Displacement and Assimilation

* TRC report excerpt (read)
  + Banning spiritual practices
  + Spiritual leaders being incarcerated
  + Residential schools with express purpose of assimilation
  + Illegal to raise money for litigation of Aboriginal rights claims
  + Political organizing within Indigenous peoples outright criminalized

Stage 4: Negotiation and Renewal

* This stage is also referenced in the TRC excerpt
* Huge amount of skepticism
  + Concern is that the courts (historically exclusion and justification of harmful processes) are turned to to protect Aboriginal rights

**Constitution Act, 1867, s. 91(24)**

Federal government assigned power over “Indians, and Lands reserved for the Indians”

**Constitution Act, 1982**

PART I: CHARTER*,* **25**: “The guarantee in this Charter of certain rights and freedoms shall not be construed as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada…” (interpretive provision)

PART II: RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA (this is NOT the Charter)

**35(1)** The ***existing*** aboriginal and treaty rights of the aboriginal peoples of Canada are hereby ***recognized*** and ***affirmed***.

**(2)** In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

**(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 (envisions an ongoing process).

**(4)** Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.”

**35.1** No amendments to s. 91(24) of Constitution Act, 1867, or s. 25 of *Charter* or Part II of Constitution Act, 1982without “constitutional conference” with all premiers and PM and with invitation to representatives of “the aboriginal peoples of Canada” to “participate in the discussions”

#### Grand Cree Council Factum Interveners

* Two approaches to looking at history
  + Court primarily seeing it as a source of values that we want to maintain
  + Grand Council saw history as injustices that should be corrected moving forward
* These are mirrored a lot in the Charter jurisp
* Two different approaches in thinking about Indigenous peoples within the constitutional order
  + Court describing them as a minority group protected through rights
  + GCC says that they should be seen in the constitutional order through the lens as federalism
    - Think of communities as having governments that should be respected by the constitutional order – not as individuals needing rights protection
  + Think about when the court is looking through a rights protection or federalism lens

### Key Doctrines of Colonialism

International law doctrines from the colonial period that essentially held that the people who were governing themselves here were not the kinds of governments that needed to be respected and this land was literally nobody’s land.

* Now widely believed to be factually false and racist
* These ideas are predicated on the notion that because the people who were living here forming governments were racially, spiritually and religiously different – therefore European law would not recognize them
* Still seem to form a part of Canadian law despite this
  + Think through how these ideas are formally rejected, then what is the basis for Crown sovereignty??

#### Doctrine of Discovery

* Designed to govern the relationship between colonizing powers
* First to take the land – colonizing powers found to have discovered this ‘empty land’

#### Terra Nullius

* Once a land was found to be discovered, part of the rights accrued to the discovering power was the exclusive right to purchase land and make deals with the Indigenous people who lived on that land

#### Themes and Puzzles

* Basis of “Crown Sovereignty”
* “Rights” versus “Federalism” or “Nation-to-Nation”
* When/how do Courts Recognize Indigenous Legal Traditions as Sources of Canadian Constitutional Law?
  + In “rhetoric”?
  + In substance?
* Limits and Balancing
  + How similar/different relative to *Charter* analysis?
    - Section 1 does not apply

### Aboriginal Rights Before and Beyond s35

* Early recognition of Indigenous law as authoritative
  + (*Connolly v Woolrich* (1867)
    - Court applied Cree law and recognized a marriage
    - This was not the norm
* Royal Proclamation 1763
  + Indigenous peoples “should not be molested or disturbed in the Possession of” un-ceded and unsold territories
  + Because “great Frauds and Abuses” committed in purchase of lands to the “Prejudice of Our Interests, and to the great Dissatisfaction of the said Indians” only the Crown my purchase such lands
  + Treated as “source” of aboriginal rights (*St. Catherine’s Milling* (1888))
* *Calder* (1973) 🡪 turning point
  + First instance of recognition that aboriginal rights to land arose from prior occupation, NOT from royal proclamation or other colonial or Canadian law
    - Arises from the mere fact that they were here first

## Common Law Foundations and Constitutional Recognition of Aboriginal Rights

### Guerin v the Queen – common law principles, NOT s35

Ratio: The nature of Indian title comprises two key aspects: (1) a general inalienability of land except to the Crown, and (2) the Crown’s fiduciary obligation to deal with Indians’ land in their best interests

Facts: Section 18(1) of Indian Act holds that reserve lands are held by HMQ for benefit of bands. Land may be sold, alienated, leased or disposed of only if/when surrendered (in whole or in part) to HMQ.

An Indian Band surrendered reserve land to the Crown for the purpose of leasing the land and did so pursuant to the Indian Act. surrender document contained the approved terms of the lease, but the Crown did not follow these terms when leasing o Instead created terms much less favorable to the Band.  Initially, Crown found in breach of Trust. Crown appealed to FCA and won. Band now appealing to SCC.

Result: Yes, appeal allowed – set aside judgment in the Court of Appeal and reinstate the trial judge’s award

Reason: Through the Indian Act – the Crown asserted sovereignty and title on what was once Aboriginal land and say they will control reserve lands and deal with them on Indian’s behalf -- Due to the Crown’s power must exercise it according to the principles of a fiduciary.

*Aboriginal Title*

* + S. 109 of Constitution Act 1867 – The Indian’s interest was an ‘interest other than that of the Province’
  + “Indians” have *sui generis* “legal right to occupy and possess certain lands, the ultimate title to which is in the Crown”
    - *Suie generis* = of its own kind
  + Source of rights is NOT *Royal Proclamation*, but historic occupation
    - Building on *Calder*
    - Rights **pre-date and survive** claims of European sovereignty
    - Rights **exist even in absence of “treaty”** (as in this case, where reserve created by unilateral action of colony of BC)
  + “Doctrine of Discovery” gave title to “discovering” nations, but pre-existing rights of occupancy and possession remain unaffected
    - Basis of the right that is recognized here
  + Previously described as (in Privy Council) ‘personal or usufructuary rights
    - Concept of usufructuary right – a mere qualification of or burden on the radical or final title of the Sovereign
  + This is **inalienable** except upon surrender to Crown (per *Royal Proclamation* and *Indian Act*) to avoid exploitation
    - Indian title is an independent legal right which, although recognized by the Royal Proclamation of 1763 none the less predates it – it emerged when the Crown claimed sovereignty of the land (but Aboriginal’s retained title)
  + When there is a surrender to the Crown, it gives rise to Crown duty = fiduciary duty

*Fiduciary Relationship*

* + There is a fiduciary duty between the Crown and the Indians [Honor of the Crown] and if it is breached then liable to the Indians in the same way as if such a trust were in effect.
    - The Crown should always act honorable in dealing with Aboriginal people
  + Crown has fiduciary duty relating to surrendered lands, arising from unique status of “aboriginal title”
    - Aboriginal title non-transferable; extinguished when land surrendered, BUT gives rise to obligation of Crown to deal with land for benefit of “surrendering Indians”
  + General inalienability and fiduciary duty “go together” as arising from concern to avoid exploitation
    - Depends on the proposition that the Indian interest in the land is inalienable except on surrender to the Crown
  + Through the Indian Act, “Parliament has conferred upon the Crown a discretion to decide for itself where the Indians’ best interests really lie”
    - BUT courts may regulate this fiduciary relationship – this discretion is not absolute
      * There is an “equitable obligation” arising in relation to the Indian Act scheme
      * Not a “trust”, but gives rise to similar liability

*Fiduciary Breach*

* + TJ found Crown agents in fact promised to lease on certain terms, then obtained lease on less favourable terms
  + Crown NOT entitled to ignore terms just because not incorporated into surrender document
  + Oral representations are “backdrop” in assessing Crown’s conduct in discharging its fiduciary obligation
  + Crown should have returned to Musqueam Band to explain unable to secure original terms, and sought counsel
  + Crown must “make good the loss suffered in consequence” of breach

*Inalienability*

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

\*\* The principle of “fiduciary duty” later became integral in the interpretation of section 35 of the Constitution. Which provides protection for Aboriginal rights.

Issue: Whether the appellants are entitled to recover damages from the Federal Crown for leasing to a golf club land on the Musqueam Indian Reserve?

Notes:

### R v Sparrow – first construction of s35

Ratio:

Facts: Musqueam Indian Band member licensed to fish for food under Fisheries Act. License included restrictions as to length of drift net. Charged under Fisheries Act for fishing with too-long net. S. 35(1) of *Constitution Act, 1982*: *“*The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed”. Sparrow argued he was exercising an “existing aboriginal right” to fish, and that net length restriction inconsistent with s. 35.

Result: Confirm CA decision to set aside the conviction

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

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

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

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

*‘Existing Rights’*

* + Embraces rights “existing” as of 1982
    - BUT “existing” rights not narrowly defined by particular regulatory regime in effect in 1982 (“frozen rights”)
      * Means that the rights to which s 35(1) applies are those that were in existence when the *Constitution Act* came into effect
      * Means an existing right that cannot be read to incorporate the specific manner in which it was regulated before 1982
    - “Extinguished” rights not revived by the Constitution
      * There are some rights that the courts will find were extinguished by 1982 and are not revived by s35
      * The fact that the government has detailed regulation of a practice (fishing)does not extinguish a right
  + To extinguish a right
    - “the Sovereign’s intention must be clear and plain if it is to extinguish an aboriginal right”
    - Here, ongoing issuance of food fishing licenses to band shows intent to regulate not extinguish right

*‘Extinguishment’*

* + For the test of extinguishment to be adopted the Sovereign intention must be clear and plain to extinguish an Aboriginal right AND there is nothing in the *Fisheries Act* or its regulations that demonstrates a clear + plain intention to extinguish Indian Aboriginal rights to fish (must have occurred prior to section 35 being enacted)
  + Regulation is not extinguishing rights and cannot define a right by incorporating the ways in which it has been regulated in the past
  + Government regulations cannot be determinative of the content + scope of an existing Aboriginal right, however can regulate the exercise of that right within s 35(1)
  + AFTER 1982 – can extinguish rights within modern treaties
    - Could extinguish existing aboriginal rights and create a *new* set of aboriginal (now treaty) rights
    - Outside of areas with treaties, you are back to arguing about unextinguished aboriginal rights
  + Rights that have constitutional status cannot be extinguished with clear and plain language

*Scope of Right*

* + “the Indians have an existing aboriginal right to fish in the area where Mr. Sparrow was fishing at the time of the charge”
    - TJ found this was “ancient tribal territory where his ancestors had fished from time immemorial”, though not on reserve
  + Continuity of practice: evidence between 1867-1961 “scanty” but not disputed
    - Anthropological evidence fishery was “**integral part**” of “**distinctive culture**”
      * Right may be exercised in a contemporary manner
  + Here, no need to address right to fish for reasons other than for food

*‘Recognized and Affirmed’*

* + Court holds that s35 is NOT simply codifying or entrenching existing law
    - “Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game” (Prof. Noel Lyon)
    - S. 35 should be interpreted purposively: generous and liberal interpretation in keeping with the “honour of the Crown”
      * The nature of section 35(1) suggests it should be construed in a purposive way – when the purposes of the affirmation of aboriginal rights are considered it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded
  + **Guiding Principle**: “the Government has the responsibility to act in a *fiduciary capacity* with respect to aboriginal peoples. The relationship between the Government and aboriginals is *trust-like*, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be *defined in light of this historic relationship*.”
  + Recognition and affirmation **incorporate *limits* on rights**
    - “There is *no explicit language* in the provision that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights.”
      * “Yet, we find that the words “recognition and affirmation” incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. *Rights that are recognized and affirmed are not absolute*.”
      * “Federal power” under s. 91(24) “must be reconciled with federal duty and the *best way to achieve that reconciliation is to demand the justification of any government regulation that infringes* upon or denies aboriginal rights.”
    - Seen as a compromise between freezing “patchwork” of existing regulation as part of the definition of rights vs. characterizing rights in a manner unrestricted by regulation (“extreme positions”)
    - S. 35(1) is not subject to s. 1 of the Charter, however it does not mean that any law or regulation affecting aboriginal rights will automatically be of no force or effect by the operation of s. 52. Legislation affecting exercising aboriginal rights can still be valid as long as it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1).
  + Section 35(1) provides a solid constitutional base upon which subsequent negotiations can take place – it also
  + affords constitutional protection against provincial legislative power

Issue: Whether Parliament’s power to regulate fishing is now limited by s 35(1) of the Constitution Act, 1982 🡪 specifically: Whether the net length restriction in the licence is inconsistent with that provision.

Notes:

### Sparrow Justification Test

1. **Does the legislation in question have the effect of interfering with an existing aboriginal right?** Whether the legislation in question has the effect of interfering with an existing aboriginal right – if so, it represents a prima facie infringement of s. 35(1). The onus of proving an infringement lies on the individual or group challenging the legislation.
   1. Is the limitation unreasonable/unnecessary?
   2. Does the regulation impose undue hardship?
   3. Does the regulation deny to the holders of the right their preferred means of exercising that right?
   * If yes, *prima facie* infringement
   * Consider “aboriginal perspective” on meaning of right
   * Don’t make artificial distinction between right and manner in which exercised
2. **Is the interference justified?** [onus is on gov’t to prove it is a valid legislative object]
   1. Is there a valid legislative objective? What was the objective of the department setting out the legislation? [Can be valid if necessary, for the proper management and conservation of the resource]
      1. Conservation of resources is a valid objective
      2. Preventing harm to general populace or aboriginal peoples themselves is a valid objective
      3. Shifting resources to user groups without aboriginal rights is unconstitutional objective
   2. Assess the justification in light of the honour of the crown and special trust relationship 🡪 the fiduciary duty must be considered when determining whether the legislation can be justified
      1. Aboriginal food fishing requirements top priority after conservation
      2. May call for assignment of entire allocation (after conservation needs met) to aboriginal rights-holders

## Defining and Limiting Aboriginal Rights (PTC)

### R v Van der Peet (Infringement)

Ratio:

Facts: VdP is charged under s 61(1) of the *Fisheries Act* with the offence of selling fish caught under the authority of an Indian food fish licence. The charges arose out of the sale of 10 salmon. VdP defends her right to sell the fish as an exercise of existing aboriginal rights to sell fish. Also states that the regulations infringe on her aboriginal rights and are therefore invalid under s 35(1). Claimed her sale of fish was an “existing Aboriginal right” under s. 35, so regulations to the contrary violate s. 35. She objected in particular to COA’s focus on “pre-contact activities” as turning “Right into a Relic”

Result: No - the appellant failed to demonstrate that the exchange of fish for money or other goods was an integral part of the distinctive Stolo culture that existed prior to contact – appeal dismissed

Reason: ***Pre-Contact Focus***

* + Purposive interpretation of s. 35 requires focus on pre-contact activities
    - NOT like *Charter* rights that are “held by all people” on basis of “dignity”
  + S. 35 must be defined “in a way that captures *both* the Aboriginal and the rights in Aboriginal rights”
    - Purpose of s. 35 is “reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown”
    - Purpose of reconciliation requires test for defining Aboriginal rights that is “**directed at identifying the crucial elements of those pre-existing distinctive societies**. It must, in other words, aim at **identifying the practices, traditions and customs central to the Aboriginal societies that existed in North America prior to contact** with the Europeans.”
      * Court doubling down on this interpretation
  + Consistent with *Sparrow* focus on practice as “integral” to “distinctive culture” of Musqueam pre-contact

*Defining Rights*

* + Take “Aboriginal perspective” on meaning of right into account (*Sparrow*)
    - S 35 recognizes and affirms existing aboriginal rights, but it must not be forgotten that the rights it recognizes and affirms are *aboriginal*
    - Although equal in importance and significance to the *Charter*, aboriginal rights must be viewed differently from *Charter* rights because they are rights held only by aboriginal members of Canadian society
    - **BUT** must also “be framed in terms cognizable to the Canadian legal and constitutional structure”
      * “True reconciliation will, equally, place weight on each”
  + When defining the right, consider nature of action claiming to be done pursuant to a right, nature of governmental regulation, and the PTC relied upon to establish right
    - Consider actions at “general” rather than “specific” level as activity may be a modern exercise of a pre-contact PTC
    - Case-by-case, grounded in specific history of group claiming right
  + There are no pan-aboriginal rights 🡪 It is on a nation by nation basis
  + Fiduciary duty 🡪 When there are doubts/ambiguities between the Crown and aboriginals these must be resolved in favor of aboriginal peoples AND because of the duty the constitutional provisions protecting aboriginal interests must be given a generous and liberal interpretation
  + The test for identifying the aboriginal rights recognized and affirmed by s 35 must be directed at identifying the crucial elements of those pre-existing distinctive societies
    - It must aim at identifying the practices, traditions, and customs central to the aboriginal societies that existed in NA prior to contact with the Europeans
    - Keep reconciliation in mind 🡪 use a large and liberal interpretation

**Integral to a Distinctive Culture Test**

* + In order to be “integral”, PTC must be “of central significance” to society
    - Must have been “one of the things that truly *made the society what it was*”
    - Can’t be merely “incidental or occasional”
    - Without PTC, would culture be “fundamentally altered or other than what it is”?
      * Is the PTC “defining feature” of the culture?
    - PTC of “independent significance”, rather than “incident to another” PTC
  + Distinctive Culture
    - PTC can’t be so general it is part of every human society (e.g. eating to survive)
      * “Distinctive” does not mean “distinct” in the sense of “unique”
        + “Distinctive” means PTC “makes the culture *what it is*”, not that it is different from the PTCs of another culture
    - Evidence that contact with Europeans transformed practice (i.e. “adaptation”) does not undermine claim
      * BUT where PTC “arose solely as a response to European influences” it will “not meet the standard for recognition of an Aboriginal right”
    - Take into account “Relationship of Aboriginal Peoples to the Land” and the “Distinctive Societies and Cultures of Aboriginal Peoples”

*Continuity*

* + Rights protected by s. 35 have “continuity” with practices that existed prior to contact
    - “The time period that a court should consider in identifying whether the right claimed meets the standard of being integral to the Aboriginal community claiming the right is the **period prior to contact** between Aboriginal and European societies”
      * But evidence from post-contact may still be relied upon, but aim is to prove pre-contact origins
  + S. 35 claim made out where PTC “integral to its distinctive culture today” AND has “continuity” with PTCs of “pre-contact times”
    - “Chain of continuity” need not be “unbroken” – some interruption ok

*Evidence of Pre-Contact*

* + Courts must approach rules of evidence in light of “evidentiary difficulties” inherent in adjudicating claims of this kind
    - Evidence necessarily relates to a time with no written records
    - “Courts must not undervalue the evidence presented by Aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case”
  + In keeping with generous and liberal interpretation arising from fiduciary duty (per *Sparrow*), doubt or ambiguity must be resolved in favour of claimants

***Application of the Test***

* + Here, “most accurate” characterization of the right claimed is “an Aboriginal right to exchange fish for money or for other goods”
    - Nature of the claim 🡪 Here, she is claiming an aboriginal right to exchange fish for money or for other goods – she is claiming that the P, C, T of the Stolo include as an integral part the exchange of fish for money or other goods sold 10 salmon = exchange of fish for money and not commercial or market-based sale
      * Court draws a distinction between simple exchange and commercial exchange of the goods
    - Claim that the PTC of Stolo “include as an integral part the exchange of fish for money or other goods”
      * Specific acts charged: 10 salmon sold for $50
      * No evidence claimant sold salmon on other occasions, so can’t be characterized as “commercial”
  + Prior to contact exchanges of fish were only incidental to fishing for good purposes; there was no regularized trading system prior to contact; the trade engaged in between Stolo and Hudson’s Bay was different from that typical of Stolo culture prior to contact; the exploitation of the fishery was not specialized and that suggested the exchange was not central to the culture
    - TJ found that exchanges of fish were only “incidental” to food fishing prior to contact
    - Trading only became significant part of Stolo culture when Hudson’s Bay Company arrived (i.e. not pre-contact)
  + **No Aboriginal right found in this case**

Issue: Was there an existing aboriginal right to sell fish such that s 27(5) is invalid?

Notes: L’HD dissent;

* + Claimants should only have to prove PTC has existed for “substantial continuous period of time” rather than “arbitrary” focus on pre-contact
  + Would have found existence of right to trade for subsistence purposes as integral part of PTC of distinctive culture, and sent back to trial for evidence on extinguishment, infringement and justification

McLachlin dissent;

* + Would have applied empirical, historical approach to find that Stolo have a right to continue to use the resource (including through sale), but only to meet traditional sustenance needs in their modern form
  + Crown failed to justify regulation
  + s. 35 violated

### R v Gladstone (Justification)

Ratio:

Facts: The appellants were charged under the *Fisheries Act* with the offence of offering to sell herring spawn on kelp caught under authority of an Indian fishing license. The license permitted the sale of 500lb; the appellants were caught selling 4,200lb. The appellants did not argue the facts but claimed that they had an aboriginal right to commercially exploit the herring and that the regulation is contrary to 35(1).

Result: SCC majority agreed that he had an unextinguished right

* + Commercial sale of herring spawn on kelp was central, significant and defining feature of Heiltsuk culture prior to contact
  + No evidence of clear intention to extinguish right
  + Regulation constituted *prima facie* infringement

Evidence and testimony presented insufficient for the court to decide whether the government’s regulatory scheme is justified – appeal allowed, new trial ordered.

Reason: Majority (La Mer)

**Right Differs from *Sparrow* – No Inherent Limitation**

* + The right at issue in *Sparrow* has an inherent limitation which the right is recognized and affirmed – this appeal lacks that component
    - The food, social and ceremonial needs for fish of any given band of aboriginal people are internally limited – at a certain point the band will have sufficient fish to meet these needs
    - The commercial sale of the herring spawn on kelp for commercial sale are the external constraints of the demand of the market and the availability of the resource
  + Relates to the position taken in *Sparrow*, that subject to the limits of conservation, aboriginal rights holders must be given priority in the fishery
    - In so much as a right is internally limited – the notion of priority as articulated in *Sparrow* makes sense
  + Where the right has no internal limitation
    - What is described in *Sparrow* as an exceptional circumstance becomes an ordinary
    - The notion of priority in this case would mean that where an aboriginal right is recognized and affirmed that right would become an exclusive one

***Doctrine of Priority***

* + In this case, no evidentiary basis for limiting right, e.g., to “moderate livelihood”
  + Where there is no internal limitation, the doctrine does not require that the government allocate the fishery so those holding an aboriginal right to exploit that fishery on a commercial basis are given exclusive right to do so
    - Rather requires that the government demonstrate that, in allocating the resource, it has taken account of the existence of aboriginal rights and allocated the resource
    - In a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users
    - The right is at once both procedural and substantive
      * At the stage of justification the government must demonstrate both that the process by which allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest of aboriginal right holders in the fishery
  + \*\*Under *Sparrow’s* priority doctrine, where the aboriginal right to be given has no internal limitation, **courts should assess the government’s actions not to see whether the government has given exclusivity to that right but rather determine whether the government has taken into account the existence and importance of such rights**
    - Notion of “priority” (*Sparrow*) still “valid and important”, but must be refined where right has no internal limit
    - Here, “the doctrine of priority requires that the government demonstrate that, in allocating the resource, it has taken account of the existence of Aboriginal rights and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users.”
  + There being no blanket requirement imposed under the doctrine does not mean that the government’s actions will not be subject to scrutiny

***Objective***

* + Here, overall cap of 20% is based on valid objective of conservation (and is justified on the facts)
    - Almost no evidence of objectives behind allocation within the 20% overall cap (bc *Sparrow* not yet decided at time of trial)
  + New trial needed on question of justification for allocation
    - Guidance:
      * Reconciliation requires limits on rights (including for conservation)
      * With respect to distribution after conservation needs met, “compelling and substantial” objectives may include
        + “the pursuit of economic and regional fairness”
        + “the recognition of the historical reliance upon, and participation in, the fishery by non-Aboriginal groups”
        + (McLachlin J disagreed on both)

*Compelling and Substantial Objectives*

* + In *Sparrow*, the court recognized that there could be other compelling and substantial objectives pursuant to which the government could act in accordance with the first branch of the justification test (beyond conservation)
  + Aboriginal rights are recognized and affirmed by s35 in order to reconcile the existence of distinctive aboriginal societies prior to the arrival of Europeans with the assertion of Crown sovereignty
    - They are the means by which critical an integral aspect of those societies are maintained
    - HOWEVER, distinctive aboriginal societies exist within and are a part of a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole, some limitation of those rights will be justifiable
  + **In the right circumstances, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment.**

***Justifying Factors*** - *Was Crown justified in light of fiduciary relationship?*

* + Consultation
  + Compensation
  + Accommodation (reduced licence fees, etc.)
  + Relative extent of Aboriginal rights-holders participation in fishery
  + How government has accommodated particular fishing interests (food, commercial, etc.)
  + Importance of fishery to economic well-being of band in question
  + Criteria considered by government in allocating commercial licences
  + And other factors…

Issue: Do the appellants have an aboriginal right to fish? If so, does the right extend to commercial exploitation? If so, is the Crown justified in restricting the right using regulation?

Notes: McLachlin concurring; allow the appeal to the extent of confirming the existence of an aboriginal right of the Heilstuk to sell herring spawn on kelp for sustenance purposes and would have ordered a new trial to decide whether that right had been infringed and if so, whether such an infringement had been justified.

### R v Sappier; R v Gray

* *Sappier* (Class Notes)
  + Members of Maliseet and Mi’kmaq bands claimed right to harvest timber on Crown land for personal use
  + Court emphasized importance of PTC *in context* of culture or “way of life”
    - Narrowed claim to “a right to harvest wood for domestic uses as a member of the Aboriginal community” (i.e. shelter, transport, tools, fuel)
  + Here, gathering of birch bark integral to canoe-building and basket-weaving, but “it would be a mistake to reduce the entire pre-contact distinctive Maliseet culture to canoe-building and basket-making” as this reduces culture to “specific anthropological curiosities and, potentially, racialized Aboriginal stereotypes”
    - The link to survival is sufficient to prove “integral” to way of life
  + Right, as narrowed, recognized
  + Right infringed; infringement not justified
* At issue was whether the Maliseet and Mi’kmaq peoples in NB possessed an Aboriginal right to harvest timber on Crown lands for personal use
* Bastarache J noted that “an aboriginal right cannot be characterised as a right to a particular resource because to do so would be to treat it as akin to a common law property right”
  + Attention must instead be paid to the significance of the resource to the community in question
* In order to grasp the importance of a resource, the court seeks to understand how that resource was harvested, extracted and utilized
* The relevant practice [for purposes of the Van der Peet test] is harvesting wood – however, they are not claiming a right to
* harvest wood for all purposes – here, they claim a right to harvest timber for personal uses [also too general]
* The way of life for Maliseet and Mi’kmaq during the pre-contact period is that of migratory people who lived from fishing

and hunting and who used the rivers and lakes of Eastern Canada for transportation – therefore, the practice should be characterized as the harvesting of wood for certain uses that are directly associated with that particular way of life

* Here, the wood was used to fulfill the community’s domestic needs for things such as shelter, transportation, tools, and fuel – would characterize the claim as a right to harvest wood for domestic uses as a member of the aboriginal community
* ‘Distinctive culture’ 🡪 the focus of the court should be on the nature of aboriginal people’s prior occupation-
  + What is meant by ‘culture’ is really an inquiry into the pre-contact way of life of a particular aboriginal community, including their means of survival, their socialization methods, their legal systems, and potentially their trading habits
  + ‘Distinctive’ is meant to incorporate an element of aboriginal specificity – however it does not mean distinct and the notion of aboriginality must not be reduced to racialized stereotypes of Aboriginal people
* Must first inquire into the way of life of the group pre-contact [seek to understand how the particular pre-contact practice relied upon relates to that way of life]
* Here, harvesting wood for domestic uses [shelter, transportation, fuel, tools] directly relates to the pre-contact way of life of the Maliseet and Mi’kmaq cultures [using rivers/lakes for transportation and living from hunting and fishing]
* Does not need to go to the core of the culture – the fact that harvesting wood for domestic uses was undertaken for survival purposes was enough to meet the integral to a distinctive culture threshold

### Lax Kw’alaams v Canada; Ahousaht Indian Band and nation v Canada (AG)

* In Lax Kw’alaams the SCC (unanimous) placed further limits on the interpretation of rights that could be claimed to flow from the period just before European contact
  + Lax Kw’alaams Band claimed right to commercial harvesting of all species of fish within their traditional waters
  + Court found that record established *fishing for many species*, but only *trade in eulachon grease* was integral to distinctive culture
  + Court upheld existence of narrowed right to harvest and consume large variety of fish resources, including surplus for winter, **but ONLY** right to *commercial* harvesting of eulachon
    - Both “subject matter” and “method of exercise” of rights are subject to evolution
      * They don’t have to be catching the eulachon and using it the exact same way – but there is a difference between evolution and rupture
      * BUT, limits: both *qualitative* and *quantitative*
        + E.g. right to gather berries based on pre-contact PTCs does not “evolve” into right to “gather” natural gas; right to gather surface copper does not extend to deep shaft diamond mining
    - **Qualitative Limits**
      * IF record had shown significant trade in all available fish, right would not “freeze” to cover only species in those waters at time of contact
      * Here, recognition of general commercial fishery would be “qualitatively different” from pre-contact activity, out of proportion to original importance to pre-contact economy
    - **Quantitative Limits**
      * Short eulachon fishing season and laborious extraction method supports inference that quantities were small relative to overall pre-contact fishing activities
  + At issue was whether the Lax Kw’alaams had an aboriginal right to commercial harvesting and sale of “all species of fish” within their traditional waters
  + They argued that sporadic trade in fish products was part of their ancestral ‘way of life’ and, on that account they should be allowed to continue to engage in trade in fish generally under the protection of s35
    - The court rejected this argument for being framed too broadly
      * “The reference in *Sappier* to pre-contact way of life should not be read as departing from the ‘distinctive culture’ test set out in *Van der Peet*”
  + The court developed the necessity for framing Aboriginal rights in narrow ways
    - “Commission of inquiry” model
      * Inconsistent with the jurisprudence that calls for ‘characterization of the claim’ as a first step
      * This model is not suitable in civil litigation – even such conducted under rules generously interpreted in Aboriginal cases to facilitate the resolution in the public interest of the underlying controversies
    - Reject appellants approach
      * Illogical
      * Contrary to authority
        + *Van der Peet* – emphasized that the first task of the court is to characterize the claim
      * Defies the relevant rules of civil procedure
  + **A court dealing with a s35(1) claim would appropriately proceed as follows**
    - 1. Characterization stage 🡪 identify the precise nature of the FN’s claim to an Aboriginal right based on the pleadings. If necessary, refine the characterization of the right claimed on terms that are fair to all parties in light of the evidence
      2. Determine whether the FN has proved, based on the evidence adduced at trial
         1. The existence of the pre-contact practice, tradition or custom advanced in the pleadings as supporting the claimed right; and
         2. That this practice was integral to the distinctive pre-contact Aboriginal society
      3. Determine whether the claimed modern right has a reasonable degree of continuity with the ‘integral’ pre-contact practice. (Demonstrably connected)
         1. The court should take a generous but realistic approach to matching pre-contact practices claimed as a modern right
         2. The pre-contact practices must engage the essential elements of the modern right though of course the two need not be exactly the same
      4. In the event that an Aboriginal right to trade commercially is found to exist, the court should have regard to what was said by La Mer in *Gladstone*
         1. “In the right circumstances, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment”
  + Court held that significant trade in one species of fish could not be generalized to other species of fish
* CONTRAST; in **Ahousaht**, the NCN people were found to have a broad right to “fish and sell fish” based on evidence that “at the time of contact, groups comprising ancestors of the NCN fished extensively and quantities of fisheries resources with other groups for economic purposes”
  + - Ahousaht Band and Nuu-chah-nulth (NCN) Nations were found to possess a broad right to fish and sell fish
      * Evidence that at time of contact, NCN fished extensively for both food and trade
        + This trade was substantial and for economic purposes

BUT broad right recognized excluded geoduck

Commercial geoduck fishery is high tech and recent

No viable suggestion of pre-contact harvest and trade

## Metis Rights

Test for Metis Rights (*Powley*)

* 1. Characterization of the Right
  2. Identification of “Historic Rights-Bearing Community”
  + Want the claimant to show what community they are claiming to ground their right in
  1. Identification of “Contemporary Rights-Bearing Community”
  + Emphasis on community rights – not individual rights as a Charter right is
  1. Verification of claimant’s membership in contemporary community
  + First time the court is asking for this verification
  1. Identification of “Relevant Time Frame”
  2. Determination of whether PCT was “Integral” to “Distinctive Culture”
  3. Establishment of “Continuity” between “Historic Practice” and “Contemporary Right”
  4. Determination of whether right extinguished
  5. **THEN, if right found, inquire into infringement and justification**

### R v Powley

Ratio: For Métis rights, replace “pre-contact” focus with focus on PCTs “that were historically important features of Métis communities prior to the time of effective European control, and that persist in the present day”

Facts: Steve Powley and his son were charged with unlawfully hunting moose and knowingly possessing game hunted in contravention of the Game and Fish Act. They admitted to killing the moose without a hunting licence, but claimed that as Metis, they had an AB right to hunt for food in the Sault Ste. Marie arear and that this right could not be infringed on without justification.

Result: Yes – appeal dismissed

Reason: *Van der Peet Test*

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

**Purpose of Metis Rights**

* + “The constitutionally significant feature of the Métis is their special status as peoples that emerged between first contact and the effective imposition of European control”
  + “The inclusion of the Métis in s. 35 represents Canada’s commitment to recognize and value the distinctive Métis cultures, which grew up in areas not yet open to colonization, and which the framers…recognized can only survive if the Métis are protected along with other aboriginal communities”
  + For Métis rights, replace “pre-contact” focus with focus on PCTs “that were historically important features of Métis communities prior to the time of effective European control, and that persist in the present day”

***1) Characterization of the Right***

* + First step is to characterize the right being claimed (which are contextual and site specific)
    - AB hunting rights are contextual and site-specific
  + “The right to hunt for food in the environs of Sault Ste. Marie” is being claimed
    - Periodic scarcity of moose does not undermine claim to broader right to “hunt for food”
  + The respondents shot a moose within the traditional hunting grounds of their Metis community
    - Also made a point of documenting that the moose was for food for the winter
      * The right being claimed is therefore a right to hunt for food in the environs of Sault Ste Marie

***2) Identification of the Historic Rights-Bearing Community***

* + History shows that the settlement in Sault Ste Marie was one of the oldest and most important Metis settlements in the upper lakes are
  + Community of Métis established around Sault Ste. Marie post in mid-17th century, and “peaked” around 1850

***3) Identification of the Contemporary Rights-Bearing Community***

* + AB rights are communal rights
    - They must be grounded in the existence of a historic and present community and they may only be exercised by virtue of an individual’s *ancestrally based membership* in the present community
  + The TJ found (based on evidence) that a Metis community has persisted in and around Sault Ste Marie despite its “decrease in visibility” after a treaty signing in 1850
    - Robinson-Huron Treaty led to displacement of many
    - Underreporting and “disinclination” to self-identify as public opinion turned against Métis
    - SCC does not take this “invisible entity” to mean that the community ceased to exist or disappeared entirely
      * European control interfered but did not eliminate this community
  + There was never a lapse; the Metis community went underground, so to speak, but it continued
    - The “continuity” requirement puts the focus on the continuing practices of members of the community, rather than more generally on the community itself

***4) Verification of the Claimants Membership in the Relevant Contemporary Community***

* + May be harder to determine membership in a Metis community, but Metis people are full-fledged rights bearers
  + Courts currently must ascertain Metis identity on a case-by-case basis
    - This inquiry takes into account both the value of community self-definition, and the need for the process of identification to objectively verifiable
    - The criteria for Metis identity under s 35 must reflect the purpose of this constitutional guarantee: to recognize and affirm the rights of the Metis held by virtue of the continuity between their customs and tradition and those of their Metis predecessors
  + As Métis communities become more formally organized to assert rights, “it is imperative that membership requirements become more standardized so that legitimate rights-holders can be identified”
    - Court is suggesting broadly that its worth thinking about giving them some guidance
  + Until a formal way of recognizing Metis membership is formed, the Court looks at **3 broad factors as assisting indicia** of Metis identity for the purpose of claiming Metis right under s 35

1. Self-identification
   1. Claimant must self-identify as a member of a Metis community
   2. “Should not be of recent vintage”
2. Ancestral connection
   1. No ‘minimum ‘blood quantum’, but some proof that ancestors party of historic Metis community by birth, adoption or other means
      1. Evidence must be presented
   2. The objective requirement ensures that beneficiaries of s35 rights have a real link to the historic community whose practices ground the right being claimed
3. Accepted by the community
   1. Evidence may include evidence in Metis political organizations, participation in community activities, testimony from other members…
   2. The core community acceptance is past and ongoing participation in a shared culture, in the customs and traditions that constitute a Metis community’s identity and distinguish it from other groups

***5) Identification of the Relevant Time Frame***

* + The unique status of the Metis as AB people with post-contact origins requires an adaptation of the pre-contact approach to meet the distinctive historical circumstances surrounding the evolution of Metis communities
  + The test for Metis practices should focus on identifying those practices, customs and traditions that are integral to the Metis community’s distinctive existence and relationship to the land
    - Rejects focus on “pre-contact practices of Métis’ aboriginal ancestors”
    - Focus is on “the period after a particular Métis community arose and before it came under the effective control of European law and customs”
      * “**Post-contact but pre-control test**” best capture’s “Métis community’s distinctive existence and relationship to the land”
        + The unique history can most appropriately be accommodated by a post-contact but pre-control test that identifies the time when Europeans effectively establish political and legal control of a particular area
  + In this case, historical record demonstrates that “effective control” passed from Ojibway and Métis to Europeans between 1815-1850
    - Court identifies that the period “just prior to 1850” is “appropriate date for finding effective control in this geographic area”

***6) Determination of Whether the Practice is Integral to the Claimants’ Distinctive Culture***

* + The practice of subsistence hunting and fishing was a constant in the Metis community, even though the availability of particular species might have waxed and waned
  + Subsistence hunting was an important aspect of Metis life and a defining feature of their special relationship with the land
  + TJ found Sault Ste. Marie included traditional hunting areas in the period just prior to 1850

***7) Establishment of Continuity Between the Historic Practice and the Contemporary Right Asserted***

* + S 35 reflects a new promise: a constitutional commitment to protecting practices that were historically important features of particular aboriginal communities
  + A certain margin of flexibility might be required to ensure that AB practices can evolve and develop over time
  + Hunting for food was an important feature of the Sault Ste Marie community and the practice has been continuous to the present

***8) Determination of Whether or Not the Right was Extinguished***

* + The doctrine of extinguishment applies equally to the Metis and to the FNs
  + There is no evidence of extinguishment here
    - Crown argued it was extinguished via treaty, but the treaty explicitly excluded Metis

*If There is a Right, Determination of Whether There is an Infringement*

* + ON currently does not recognize any Metis right to hunt for food or any “special access to natural resources”
  + This lack of recognition, and the consequent application of the challenged provisions to the Powelys, infringed their AB right to hunt for food
  + Application of the infringing game law to claimants in this case infringes the right

***Determination of Whether the Infringement is Justified***

* + Main justification from the Crown was conservation
    - Valid objective, but TJ found that record did not support it in this case
      * No evidence moose were under threat
  + Even if the moose population in this area were under threat, the Metis would still be entitled to a priority allocation to satisfy their subsistence needs in accordance with the criteria in *Sparrow*
  + ON’s blanket denial of any metis right to hunt for food cannot be justified

Issue: Do the Powley’s, as Metis, have an AB right to hunt for food?

Notes:

### R v Blais

Ratio:

Facts: The appellant, a Manitoba Métis, was convicted of hunting deer out of season.  He had been hunting for food on unoccupied Crown land.  His appeals to the Manitoba Court of Queen’s Bench and the Manitoba Court of Appeal were based solely on the defence that, as a Métis, he was immune from conviction under the *Wildlife Act*regulations in so far as they infringed on his right to hunt for food under para. 13 of the Manitoba *Natural Resources Transfer Agreement*(*NRTA*).  This provision stipulates that the provincial laws respecting game apply to the Indians subject to the continuing right of the Indians to hunt, trap and fish for food on unoccupied Crown lands.  Both appeals were unsuccessful.  The issue in this appeal was whether the Métis are “Indians” under the hunting rights provision of the *NRTA*.

Result: Appeal dismissed

Reason: The *NRTA* is a constitutional document which must be read generously within its contextual and historical confines.

Here, the appellant is not entitled to benefit from the protection accorded to “Indians” in the *NRTA.*

1. *NRTA*’s historical contextsuggested that the term “Indians” did not include the Métis.
2. The common usage of the term “Indian” in 1930 did not encompass the Métis
   1. The terms “Indian” and “half‑breed” had been used to refer to separate and distinguishable groups of people in Manitoba from the mid‑19th century through the period in which the *NRTA*was negotiated and enacted
3. The purpose of para. 13 of the *NRTA*was to ensure respect for the Crown’s obligations to “Indians” with respect to hunting rights, who were viewed as requiring special protection and assistance.
   1. This view did not extend to the Métis, who were considered more independent and less in need of Crown protection

*Continuity of Language*

* + A requirement for “continuity of language” should not be imposed on the Constitution as a whole and, in any event, such an interpretation would not support the contention that the term “Indians” should include the Métis
  + The principle that ambiguities should be resolved in favour of Aboriginal peoples is inapplicable as the historical documentation was sufficient to support the view that the term “Indians” in para. 13 of the *NRTA*was not meant to encompass the Métis
    - The “living tree” doctrine does NOT expand the historical purpose of para. 13
    - While constitutional provisions are intended to provide “a continuing framework for the legitimate exercise of governmental power”, the Court is not free to invent new obligations foreign to the original purpose of the provision at issue
      * Rather must anchor the analysis in the historical context of the provision

***Approach to Interpretation***

* + NRTA incorporated as a constitutional document in 1930
  + Court found Métis NOT “Indians”, and so not entitled to NRTA hunting rights
    - Based reasoning on historical evidence relating to perception of “Indians” and “Métis” at time of enactment
    - Court saw this approach as supported by similar reasoning in *Re Eskimo*, 1939
  + Purposive interpretation should be generous and “fulfill the broad purpose of the guarantee”
    - BUT purposive interpretation should not “overshoot” the purpose or “invent new obligations” not in original text
  + Court REJECTED argument that “living tree” approach should be applied to read the term “Indian” and associated rights in light of contemporary recognition of fiduciary duty of Crown and general principles of restitutive justice”
    - “‘Generous’ rules of interpretation should not be confused with a vague sense of after-the-fact largesse” (*Marshall*)
  + Borrows, Ab(Originalism) and Canada’s Constitution (2012)
    - Originalism is alive and well in the context of Aboriginal rights interpretation
    - Court’s approach to Aboriginal rights overemphasizes the past and risks perpetuating historic discrimination

Issue: **Are** **Métis “Indians” for purposes of hunting rights provisions in Manitoba *Natural Resources Transfer Agreement* (NRTA)?**

Notes:

### Manitoba Metis Federation v Canada (AG)

Ratio:

Facts:

Result: The MMF should be granted standing.  The action advanced is a collective claim for declaratory relief for the purposes of reconciling the descendants of the Métis people of the Red River Valley and Canada.  It merits allowing the body representing the collective Métis interest to come before the court.

Reason: Majority (McLachlin)

*Constitutional Obligations/Fiduciary Duty*

* + Obligations enshrined in ss. 31 and 32 of the Manitoba Act did not impose a fiduciary duty on the government
  + Fiduciary duty may rise in 2 ways (Aboriginal Context)
    - (1) a specific or cognizable Aboriginal interest, and
    - (2) a Crown undertaking of discretionary control over that interest.  The interest must be a communal Aboriginal interest in land that is integral to the nature of the Métis distinctive community and their relationship to the land.
  + Must be predicated on historic use and occupation, and cannot be established by treaty or by legislation
  + FD arising (generally)
    - (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary;
    - (2)  a defined person or class of persons vulnerable to a fiduciary’s control; and
    - (3) a legal or substantial practical interest of the beneficiary that stands to be adversely affected by the alleged fiduciary’s exercise of discretion or control.

Issue: Appellants seek a declaration that (1) in implementing the *Manitoba Act*,the federal Crown breached fiduciary obligations owed to the Métis; (2) the federal Crown failed to implement the *Manitoba Act*in a manner consistent with the honour of the Crown; and (3) certain legislation passed by Manitoba affecting the implementation of the *Manitoba Act*was *ultra vires*

Notes: Dissent (Rosthein; Moldaver); The appeal should be allowed in part.  The federal Crown failed to implement the land grant provision set out in s. 31 of the *Manitoba Act, 1870*in accordance with the honour of the Crown.

**Slide Notes**

* Following confederation, Canada sought to expand west
  + Land that became Manitoba was 85% Métis, who resisted Canada’s westward expansion
* Canada and Métis-led government negotiated an agreement, embodied in *Manitoba Act*, 1870, which made Manitoba a Canadian province
  + *Manitoba Act*, 1870 is part of Canada’s constitution (s. 52)
    - Section 31 provided that parcels of land be allotted to “the children of the half-breed heads of families residing in the Province at the time of the said transfer to Canada”
    - Canada’s implementation of this promise was delayed, inefficient and inequitable (e.g. random allotment of parcels rather than in family units)
* MMF sought declaration that Canada breached its obligations under the *Manitoba Act, 1870*
  + Court found that Canada had failed to implement the *Manitoba Act* in a manner consistent with the honour of the Crown
    - Honour of the crown is “engaged by constitutional obligations to Aboriginal groups”
  + Here, s. 31 made commitments to individuals, but was overall “a promise made to the Métis people collectively” in a constitutional document
    - Gives rise to “**duty of diligent, purposive fulfillment**”
      * Purpose of provision was “to reconcile the Métis community with the sovereignty of the Crown” and permit creation of province of Manitoba
        + Land transfer to children of Métis was concrete measure to this end
        + Aimed to give Métis a “head start in the race for land” in new province

Aim of “head start” can only be satisfied if “the grants were made while a head start was still possible,” which was not done

* + Central issue not one of “bad faith” or even “negligence”
    - Rather “whether the government’s implementation of s. 31 comported with the duty of the Crown to diligently pursue implementation of the provision in a way that would achieve its objectives”
    - Delay in distribution of lands does not meet this standard
  + “Repeated mistakes and inaction that persisted for more than a decade” not consistent with “government sincerely intent on fulfilling the duty that its honour demanded”
  + Declaration that Canada failed to act in accordance with honour of the Crown granted

## Aboriginal Title (Rights to land)

***Guerin* (1984)**

* “Indians” have *sui generis* “legal right to occupy and possess certain lands, the ultimate title to which is in the Crown”
* Source of rights is NOT *Royal Proclamation*, but historic occupation (*Calder*)
* Rights exist even in absence of “treaty” (as in this case, where reserve created by unilateral action of colony of BC)
* Inalienable except upon surrender to Crown (per *Royal Proclamation* and *Indian Act*) to avoid exploitation
* Surrender gives rise to Crown duty
* Surrender in this case secured on basis of promises respecting disposition of land; broken promises and failure to consult breached Crown duty

**Aboriginal Title Test** (*Delgamuukw* test)

1. The land must have been occupied prior to assertion of Crown sovereignty
   1. Aboriginal title is burden on Crown’s underlying title, so does not “crystalize” until Crown sovereignty
   2. Occupancy determined as matter of physical reality (cultivation, construction) and existing Indigenous law (land use laws, etc.)
   3. Factors:
      1. Indigenous laws in relation to an area of land
      2. Physical occupation
2. If present occupation relied on as a proof of pre-sovereignty occupation, there must be a continuity between pre-sovereignty and modern times (but not an unbroken chain)
3. At the time of sovereignty, the occupancy must have been exclusive (but it could not have been jointly exclusive by more than one party or tribe)
   1. Necessary to mirror content of the right
   2. Can be demonstrated even if land shared with other Indigenous groups, as long as sharing by ‘permission’ or met with “intention and capacity to retain exclusive control” (e.g. trespass laws, treaties)

If all of these are established, then AB title exists

* + - If it partly fails, it is possible to establish a claim less than title

#### BC Context

* When BC joined Confederation (1871), Indigenous peoples outnumbered non-Indigenous peoples 2:1
* Provincial legislature immediately disenfranchised Indigenous peoples and established system of reserves
  + Strong objections by numerous Indigenous nations
  + Commissions established to receive complaints ineffective
* In 1927, Allied Tribes of British Columbia were close to bringing a case asserting their rights before the Privy Council
* *Indian Act* was amended to make it illegal to raise funds or hire lawyers for Indigenous land claims, with claimed purpose of protecting Indigenous peoples from lawyers and “agitators”
* Unable to raise funds, Allied Tribes of British Columbia dissolved

### Delgamuukw v British Columbia

Ratio:

Facts: Gitksan and Wet’suwet’en hereditary chiefs claimed separate portions of 58,000 square kilometers of BC. Archeological evidence of 3,500 to 6,000 years of human habitation. TJ accepted time of contact was 1820. TJ rejected or refused to give independent weight to oral histories and traditional forms submitted by Gitksan and Wet’suwet’en. Found insufficient evidence of occupation to ground title claim.

Result: Failure to accord weight to this type of evidence on basis of hearsay rules or overly strict rules of relevance was reviewable error. They were sent back for new trial.

Reason: Aboriginal title was a distinct species of aboriginal right that was recognized and affirmed by s 35(1). AB title is a right in land, and as such, is more than the right to engage in specific activities which may be themselves AB rights – it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs, and traditions which are integral to the distinctive cultures of aboriginal societies.

*Ab Title and Other Rights*

* + Title is “one manifestation” of the “Aboriginal rights” recognized in s. 35
  + Arises where connection to a particular piece of land is of central significance to distinctive culture
  + Section 35 rights fall on a “spectrum” according to their “degree of connection with the land”
    - Low end of connection: PTCs may be protected absent evidence of “occupation and use of the land”
    - Middle: site-specific rights to engage in particular activity
      * Ex. *Powley* – particular place where a PTC is practices is of some significance
    - High: title (right to land itself)

***Nature of Aboriginal Title***

* + **Inalienability** – land held pursuant to AB title cannot be transferred, sold or surrendered to anyone other than the Crown
    - Thus, inalienable to third parties
  + **Source** – although title was recognized in the Proclamation, it arises from the prior occupation of Canada by AB peoples
    - Grounded in physical fact and “relationship between common law and pre-existing systems of aboriginal law”
    - This makes is *sui generis* because it arises from possession before the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterwards
  + **Communal** – Ab title cannot be held by individuals, but rather held communally
    - Collective right to land held by all members of an AB nation
  + Encompasses rights of use *beyond* PCT’s integral to distinct cultures
    - BUT “protected uses must not be irreconcilable with the nature of the group’s attachment to that land”
      * “Inherent limit” implied by protection of patterns of relationship to land over time)
      * E.g. cannot turn lands claimed on basis of ceremonial significance into a parking lot
      * This is NOT a “legal straightjacket” because rights-holding groups can always surrender lands to achieve such purposes

***Test for Aboriginal Title***

1. The land must have been occupied prior to assertion of Crown sovereignty
   1. Aboriginal title is burden on Crown’s underlying title, so does not “crystalize” until Crown sovereignty
   2. Occupancy determined as matter of physical reality (cultivation, construction) and existing Indigenous law (land use laws, etc.)
2. If the present occupation is relied upon as a proof of pre-sovereignty occupation, there must be a continuity between pre-sovereignty and modern times (but not an unbroken chain)
3. At the time of sovereignty, the occupancy must have been exclusive
   1. Necessary to mirror content of the right
      1. The right is to exclusive use of the land, it can’t be the case that multiple groups can assert title to land
   2. Can be demonstrated even if land shared with other Indigenous groups, as long as sharing by ‘permission’ or met with “intention and capacity to retain exclusive control” (e.g. trespass laws, treaties)

If all of these are established, then AB title exists

* + - If it partly fails, it is possible to establish a claim less than title

*1) Infringement on AB Title*

* + AB title is not an absolutely protected title
  + It can be infringed upon if the infringement passes a two-part test:
  1. The infringement must be in the furtherance of a legislative objective that is compelling and substantial
  2. The infringement must be consistent with the special relationship between ABs and the Crown
  + This relationship is special b/c both the ideas of the common law and the AB traditions must be taken into consideration when making the decisions, as ABs are a unique case and must be given respect in terms of their traditions and laws

***2) Justification***

* + As with other Aboriginal rights (per *Sparrow*), Aboriginal title may be infringed with justification
  + Accepts *Gladstone*’s broad list of possible sources of justification grounded in “reconciliation”
    - Adds: “the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims” are consistent with reconciliation and can justify infringements of title
      * This is a big leeway for the Crown to establish justification to infringe Ab title claim
  + Fiduciary duty in context of justification assessed with reference to, *inter alia*, accommodation of participation in development, consultation, and compensation

Issue:

Notes: New trial BUT??

* + Orders new trial on basis of failure to assess evidence appropriately
    - BUT, “By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts”
  + Court’s ruling should provide constitutional basis on which to structure subsequent negotiations
    - “Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by judgments of this Court, that we will achieve…reconciliation”
  + “Let us face it, we are all here to stay”

### Tslhqot’in Nation v British Columbia, 2014 SCC

Ratio:

Facts: 1792, Captain George Vancouver claimed all of the land that would become BC on behalf of British Crown.

Minimal contact between Tsilhqot’in of central BC and European traders and explorers until 50 years later when British attempted to survey lands.

1864, Tsilhqot’in blocked construction of a road, killed 19 settlers and expelled all Europeans from territory.

Four Tsilhqot’in chiefs were hanged.

For next 100+ years, Tsilhqot’in lived in territory with minimal settler disruption.

1983, B.C. government granted Carrier lumber a licence to cut trees in Tsilhqot’in territory.

Following years of protest and blockades, title claim filed.

In 1998, T filed an Aboriginal title claim the court – the trial judgment was according in their favour and used a broad declaration of title. This decision was overturned at the Court of Appeal and a narrower test was applied. Only specific, intensively occupied areas can support Aboriginal title.

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

Reason: **Test for Aboriginal Title** (*Delgamuukw* test)

(1) The land must have been occupied prior to sovereignty

(2) If present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation (easily proven)

(3) At sovereignty, that occupation must have been exclusive (easily proven)

***Sufficiency of Occupation***

* + REJECTED COA standard of intensive use, under which only to sites of villages and harvesting areas
  + Context-specific inquiry
    - Context-specific and “culturally sensitive approach” inquiry, including consideration of group size, manner of life, material resources and technologies, and character of lands claimed
    - Court reiterates that the standard is required is determined by reference to both the CL and aboriginal perspective
    - The inquiry is affected by indigenous law and custom, the size of the group, its manner of life, the character of the land
  + Here, small group of 400 semi-nomadic people living on vast but ‘harsh’ lands
    - Notion of occupation must also reflect the way of life of the Aboriginal people, including those who were nomadic or semi-nomadic
  + Regular use of territories for hunting, foraging, etc., is sufficient in context to “evince an intention…to possess the land in a manner comparable to what would be required to establish title at common law”
    - An Aboriginal group must show that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes
  + Must be evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group

***The Incidents of AB Title – What Title Provides***

* + Subject to “inherent limit” that use cannot be irreconcilable with ability of succeeding generations to benefit from land (TBD in future cases)
    - BUT “the title-holding group has the right to choose the uses to which the land is put and to enjoy its economic fruits”
    - Cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the group from using and enjoying it
    - Cannot be developed or misused in some way that would substantially deprive future gens of the benefit
  + Crown must exercise its “radical or underlying title” in accordance with fiduciary duty
  + Crown has “the right to encroach on aboriginal title if the government can justify this in the broader public interest under s. 35”
  + AB title confers ownership rights similar to those associated with fee simple, including:
    - The right to decide how the land will be used
    - The right of enjoyment and occupancy of the land
    - The right to possess the land
    - The right to the economic benefits of the land
    - The right to pro-actively use and manage the land
  + Restrictions 🡪 AB title is a collective title held for both the present and future generation

***Justification on Infringement***

* + Justification test for infringing title (modified *Sparrow* test)
    - That it discharged its procedural duty to consult and accommodate
      * Here, there was no consultation and no accommodation = no justification
      * “I add this. Governments and individuals proposing to use or exploit land…can avoid a charge of infringement…by obtaining the consent of the interested Aboriginal groups”
    - That its actions were backed by a compelling and substantial objective
      * Must be considered from both AB and public perspectives
      * To constitute a compelling and substantial objective, the broader public goal asserted by the government must further the goal of reconciliation, having regard for all interests
    - That the governmental action is consistent with the Crown’s fiduciary obligation to the group
      * Unjustifiable if substantially deprives future generations of rights-holders
      * Fiduciary duty “infuses an obligation of proportionality” in justification process, including rational connection, minimal impairment and proportional impact
        + Implicit is the requirement that the incursion is necessary to achieve the government’s goal (rational connection); that the government can go no further than necessary to achieve it (minimal impairment); and that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the AB interest (proportionality of impact)
      * The beneficial interest in the land held by the AB group vests communally in the title-holding group
        + Incursions on AB title cannot be justified if they would substantially deprive future generation of the benefit of the land

Issue:

Notes: **Terra Nullius?**

* + “**At the time of assertion of European sovereignty, the Crown acquired radical or underlying title** to all the land in the province.  This Crown title, however, was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival. **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.  The Aboriginal interest in land that burdens the Crown’s underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown.”
  + How is it possible for them to unilaterally assert sovereignty without terra nullius??
  + Created a black hole??
    - What is the alternate explanation that the assertion of sovereignty was possible?

## Aboriginal Treaty Rights

### Sources and Foundations of S35 Rights

**PTCs and Title:** Reconciliation of prior occupation (legal and physical) of land prior to European contact/control

**Treaty:** Binding agreements entered into at any point in time, including:

* Pre-Confederation (1764-1867: 375 treaties)
* Post-Confederation (1867-1923: 150 treaties)
* Modern Treaties (1973-present: 24+ treaties)
  + SCC notes “increased detail and sophistication”of modern treaties
  + “Intended to create some precision” and place relationships “in the mainstream legal system” for continuity, transparency and predictability (*Beckman v Little Salmon*)

### Badger (1996) – Canons of Treaty Interpretation (General Principles)

* Recognition that Treaty represents solemn promises, sacred agreement
* Must consider that the Honour of the Crown at stake
  + There should be a presumption that Crown intends to keep promises; no sharp dealing sanctioned
  + Not open to the Court to assume that the Crown successfully used tricky terms to get away with something and the terms should be construed with this in mind
* Ambiguities resolved in favour of Indigenous claimants
* Limitations restricting rights of Indigenous peoples under treaties should be construed narrowly
* Heavy burden of proving extinguishment of treaty rights falls to the Crown

### Sioui (1990)

* Members of Huron nation convicted of cutting trees, camping and making fires in provincial park contrary to Quebec law
  + They claimed actions were ancestral customs protected by 1760 Crown-Huron treaty providing for “Exercise of [the Huron] religion [and] their Customs”
* Treaty is silent as to *where* religion/customs could be practiced, and Quebec argued entitled to exclude activities from provincial park
* Court held implication of expansive territorial terms necessary to give right “real value and meaning”
* When interpreting treaties, focus on “**intention of the parties…at the time it was concluded**” and choose “from among the various possible interpretations of the common intention **the one which best reconciles the Hurons’ interests and those of the conquerer**”

### R v Marshall (No 1) –how we should approach treaty rights

Ratio:

Facts: Marshall, a Mi’kmaq citizen, was charged with selling 463 pounds of eels for $787 without a licence, contrary to federal regulations made pursuant to the *Fisheries Act.* Marshall argues he was entitled to sell the eels by virtue of a treaty right agreed to by the BC Crown. The issue at trial was whether Marshall had an existing treaty right that exempted him from compliance with the federal legislation. In 1760, Aboriginal leaders in the Maritimes asked for truck houses [trading posts] ‘furnishing them with necessaries, in ‘Exchange for their Peltry’ – however, the written document recording the treaty contained only the promise by the Mi’kmaq not to traffic, barter, or exchange any commodities except with such persons [not with non-government individuals]. The issue was whether this ‘trade clause’ framed in negative terms as a restraint on trade reflected the positive right to M people to bring the products of their hunting, fishing, and gathering to a truck-house to trade – the trial judge held there was no positive right and rejected Marshall’s defense that he had a treaty right to catch + sell fish

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

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

*Extrinsic Evidentiary Sources*

* + The Court of Appeal took a strict approach to interpreting the meaning of the treaties in 1760/61.
    - This approach should be rejected because even in a modern commercial context, extrinsic evidence is available to show that a written document does not include all terms of an agreement.
    - COA held that “While treaties must be interpreted in their historical context, extrinsic evidence cannot be used as an aid to interpretation, in the absence of ambiguity”
      * SCC rejects this approach
  + Per *Badger*, courts should not be technical or apply rigid modern rules of construction to historic treaties
    - Historic treaties do not reflect entire agreement: drafted only in English with parties whose diplomatic and trade practices were largely oral
      * Only respecting the written words, you are only respecting the party with the pen
      * There were two languages involved in this treaty and one is a written culture and one is an oral culture. This wouldn’t be fair to the M peoples
    - Seek “common intention” that “best reconciles” interests of both sides
  + The Court’s obligation is to choose from among the various possible interpretations of the *common (*implied as used in class) intention at the time the treaty was made.

*Historical Evidence*

* + Pre 1760
    - The NS judgements erred in concluding that the only enforceable treaty obligations were those set out in the written document of March 10, 1760
    - It is to both the common intention and the terms of the treaty that effect must be given
      * The trade clause would not have advanced British objectives or M objectives unless the M were assured of continuing access to wildlife and trade
  + Rights of Other Habitants
    - The treaty rights-holder not only has the right or liberty ‘enjoyed by other British subjects’ but may enjoy special treaty protection against interference with its exercise
    - The fact that the content of M rights under the treaty to hunt and fish were no greater than those enjoyed by other inhabitants does not [unless those rights were extinguished prior to April 17, 1982] detract from the higher protection they presently offer to the M people
  + Historical evidence shows truck houses part of “imperial peace strategy” to restrain “unscrupulous traders”
    - Objectives of both sides (peace and necessaries) would only be achieved if Mi’kmaq were also assured “continuing access, implicitly or explicitly, to wildlife to trade”
      * “Officious bystander” would have asked, when looking at truck house provisions, if it included “the right to hunt and fish to catch something to trade at the truck houses”, and “having regard to the honour of the Crown” the answer would have to have been “of course”
  + *Sioui* supports “implied rights” to “support meaningful exercise of express rights” in treaty contexts EVEN IF “no such implication might necessarily have been made” outside this *sui generis* context
  + **Honour of the Crown** requires interpreting treaty to include rights to hunt, etc., as limited to “necessaries” (i.e. “moderate livelihood”)
    - Principle: The honour of the Crown is always at stake in its dealings with AB peoples
    - An interpretation of events that turns a positive M trade demand into a negative M covenant is inconsistent with the honor and integrity of the Crown
    - Also, inconsistent to conclude that the LG, seeking in good faith to address trade demands of the M people, accepted the M suggestion of a trading facility while denying any treaty protection to M access to the things that were to be traded, even though these things were identified and priced in the treaty negotiations
    - The trade arrangement must be interpreted in a manner which gives meaning and substance to the promises made by the Crown

*The Limited Scope of the Treaty Right*

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

*Application to the Facts*

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

***Infringement***

* + Regulations requiring licences conferred complete discretion to Minister with no direction to as to how to exercise discretion in manner respectful of treaty rights
  + Unstructured discretion that risks infringement of aboriginal rights in a substantial number of applications infringes s. 35
  + Any limitation on method, timing and extent of Indian hunting under treaty infringes rights
  + Here, appellant caught and sold eel to support his family
  + Treaty right infringed by licensure and net regulations
  + (No justification offered)

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

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

#### Marshall No 2

* Significant political backlash to *Marshall (No. 1)* in NS and NB from commercial fishers
  + West Nova Fishermen’s Coalition applied for rehearing, including on matters of justification
    - All parties opposed motion, including because it seemed to be based on misstatements of Court’s holdings in *Marshall (No. 1)*
    - These were not “exceptional circumstances” warranting rehearing, so application denied
* Nonetheless, Court restated findings in *Marshall (No. 1)* in ways that emphasized limited scope of judgment and availability of justification
  + Noted that *Gladstone* remarks re broad sources of justification for infringement “applies with particular force to a treaty right” since not founded on assumption pre-contact exclusivity of use
    - Eisen 🡪 this is the court basically noting that there is an assumption of “sharing of resources” is baked into the Treaty right because it assumes post contact sharing in a way that pre-contact PTC’s do not

### Grassy Narrows First Nations v Ontario (Natural Resource)

Ratio: Court is going to favour a unified interpretation of the crown

Facts:Treaty 3 🡪 The Ojibway FN yielded ownership of their territory (except for certain reserve lands), receiving in return the right to harvest the non-reserve lands surrender by them until such time as the land was “taken up”. Taken up could mean settlement, mining and lumbering by the Dominion of Canada. Appellants are descendants of the Ojibway and are challenging a forestry licence issued by Ontario that authorized forestry operations in areas under Treaty 3. Trial judge found that the “taking up” clause imposed a two-step process (involving provincial authorization and then federal approval) before any lands covered by the treaty could be taken up. Court of Appeal reversed this finding

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

Reason: *Constitutional Structure*

* + Treaty 3 promises made by “the Crown”
    - “Both levels of government are responsible for fulfilling these promises” according to division of powers
  + S 109 established conclusively that ON holds the beneficial interest in the Keewatin lands and the resources on or under those lands
    - s. 109, assigning lands, mines, minerals and royalties to Ontario
  + S 92(5) gives the Province the exclusive power over the “management and sale of the public lands belonging to the Province and of the timber and wood thereon”
  + S 92A gives the Province exclusive power to make laws in relation to non-renewable natural resources, forestry resources and electrical energy.
    - s. 92A, assigning provinces authority over development of forestry resources
  + All together, these provisions give ON the power to take up lands in the Keewatin area under Treaty 3 for provincially
    - Regulated purposes, such as forestry
    - The view that only Canada can take up, or authorize the take up of, lands under
  + Canons of interpretation not referenced
    - Finding based on constitutional provisions “confirmed” by treaty text
    - 3 paras on interpretation of treaty focus on text, fact that Ojibway could have demanded clear language to keep federal involvement, and intentions of Canadian commissioners
      * What is more clear than ‘Dominion of Canada’…
  + Treaty 3 rests on a misconception of the legal role of the Crown in the treaty context:
    - It’s true that treaty 3 was negotiated with the Crown in the right of Canada but that doesn’t mean that the Crown in right of ON is not bound by and empowered to act in respect to that treaty - The promises made in Treaty 3 were promises of the Crown, not those of Canada
    - Both levels of government are responsible for fulfilling these promises when acting within the division of powers under the *Constitution*

*Limits on the Province*

* + Provincial power to “take up” land “not unconditional”
    - Bound by honour of the Crown and subject to “fiduciary duties that lie on the Crown in dealing with Aboriginal interests”
    - Duty to consult and, if applicable, accommodate per *Mikisew* (2005) (see next class)
    - It must exercise its powers in conformity with the honour of the Crown and is subject to the fiduciary duties that lie on the Crown in dealing with AB interests
    - When a *government* exercises Crown power, the exercise of that power is the burden by the Crown obligations toward the AB people in question. Where a province intends to take up lands for the purposes of a project within its jurisdiction, the Crown must inform itself of the impact the project will have on the exercise by the Ojibway and their rights to hunt, fish, and trap 🡪 Must deal with the O in good faith.
  + IF taking up amounts to infringement of treaty right, *Sparrow* analysis will determine whether infringement is justified
  + When the lands covered by the treaty were determined to belong to the Province of ON, the Province became responsible for their governance with respect to matters falling under its jurisdiction by virtue of ss 109, 92A and 92(5).
  + S 91(24) allows the federal government to enact legislation dealing with Indians and lands reserved for Indians, but this only has an incidental effect on provincial land.
    - The applicability of provincial legislation that affects treat rights through the taking up of land is determined by *Mikisew* and s 35. ON’s power under treaty 3 is not unconditional.
  + The province is bound by the duty’s attendant on the Crown

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

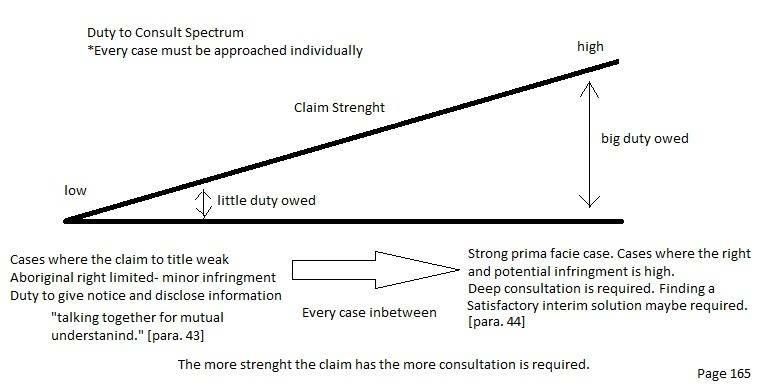
Notes: **Criticism** –John Borrows (2016)

* + The ambiguities were not read in favour of Ojibway
    - There was no large, liberal and generous interpretation
  + Notes historical intention to insulate First Nations from local governments who stand to directly gain from their dispossession “abandoned” in the Grassy Narrows case
    - Fails to honour “nation-to-nation” relationship and instead allows provinces to “justifiably infringe” treaty rights

## Duty to Consult

Duty to Accommodate so far…

* One of several factors in justification analysis (*Gladstone*, *Delgamuukw*)
* *Delgamuukw***:**
  + Content of duty varies with circumstances
    - RARE “less serious or relatively minor” breach, duty “will be no more than a duty to discuss important decisions”
    - MOST cases will require duty “significantly deeper than mere consultation”
    - SOME cases “may even require the full consent of an aboriginal nation”, especially in cases of hunting and fishing regulations on aboriginal lands
      * To the extent that we are taking about a governing function – this is a clear example of a participation in governance where the government needs affirmative consent from rights holding nations
  + Regardless of severity of breach, “consultation must be in good faith and with the intention of substantially addressing the concerns of the aboriginal peoples” whose rights are in issue



### Haida Nation v BC (Minister of Forests)

Ratio:

Facts: For over 100 years, Haida people had claimed title to all lands of Haida Gwaii and surrounding waters. Title was in a ‘claims process’ and had not been legally recognized. Haida use red cedar to make canoes, clothing, utensils and totem poles, such that “cedar forest remains central to their life and their conception of themselves”, but no PCT right recognized yet in court. BC made substantial changes to tree-farming licenses (TFLs), including transfer of a TFL to Weyerhaeuser to allow logging on Haida Gwaii. Haida Nation had publicly voiced objections to these changes for years.

Result: The Crown’s appeal is dismissed, and Weyerhaeuser’s appeal is allowed. The BCCA’s order is varied so that the Crown’s obligation does not extend to Weyerhaeuser.

Duty to consult applied, and in this case might require significant accommodations to preserve the interest of the Haida Nation pending resolution of their claims.

Reason: ***The Duty to Consult***

* + Honour of the Crown “is always at stake in its dealings with Aboriginal peoples”
  + Honour of the Crown gives rise to context-dependent duties, including BEFORE determination of claims
    - “**Put simply, Canada’s Aboriginal peoples were here when Europeans came, and were never conquered.** Many bands… negotiated treaties. Others, notably in British Columbia, have yet to do so. **The potential rights embedded in these claims are protected by s. 35 of the Constitution Act, 1982**. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. **While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests**.”
  + The DTC is active even when there is an active question of whether a right exists

***When the Duty Arises***

* + Duty arises when Crown has knowledge, real or constructive (knows or should have known), of potential existence of any Aboriginal PTC right, title right, or treaty right, AND contemplates conduct that might adversely affect it
  + ***Unproven******Interests***
    - The Crown, acting honourably, cannot cavalierly run roughshod over AB interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof
      * It must respect this potential, but yet unproven, interests
    - Crown not “rendered impotent” and may continue to manage resources BUT may have to consult and accommodate Aboriginal interests pending claims resolution
      * Unilateral exploitation of resources while claim pending may “deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable”
        + To unilaterally exploit a claimed resource during the process of proving and resolving the AB claim to that resource, may be to deprive the AB claimants or some or all of the benefit of the resource
  + ***Reconciliation***
    - Reconciliation is not a final legal remedy
      * Rather, it is a process flowing from rights guaranteed by s 35(1)
      * This proves flows from the Crown’s duty of honourable dealing toward AB people and *de facto* control of land and resources that were formerly in the control of that people
    - To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the “meaningful content” mandated by the “solemn commitment” made by the Crown in recognizing and affirming AB rights and title
      * When the distant goal of proof is finally reached, the AB peoples may find their land and resources changed and denuded and this isn’t reconciliation
    - The foundation of duty in the Crown’s honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the AB right or title and contemplates conduct that might adversely affect it
    - Consultation and accommodation before final claims resolution, while challenging, is not impossible, and indeed is an essential corollary to the honorable process of reconciliation that s 35 demands

*The Scope and Content of the Duty – Accommodation*

* + The scope of the duty varies with the circumstances
    - The **scope 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
    - Cites *Delgamuukw* summary of sliding scale of duty, and need for “good faith” in all cases
  + “There is no duty to agree; rather, the commitment is to a meaningful process of consultation”
    - Mere hard bargaining will not offend an AB people’s right to be consulted - A concept of spectrum is helpful to determine what duty arises in different situations
    - One end lies cases where the claim to title is weak, the AB right limited, or the potential for infringement minor
      * In these cases, the only duty on the Crown may be to give notice, disclose information and discuss any issues raised in response to the notice
    - At the other end lies cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the AB peoples and the risk of non-compensable damage is high
      * In these cases, deep consultation, aimed at finding a satisfactory interim solution may be required
    - Between these two situations will lie other situations 🡪 every case must be approached individually - When the consolation process suggests amendment of Crown policy, we arrive at the stage of accommodation
    - The effect of good faith consultation may be to reveal a duty to accommodate
      * “May require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim”
    - Honourable negotiations imply a duty to consult with AB claimants and conclude an honourable agreement reflecting the claimant’s inherent rights
  + ***Aboriginal Duty?***
    - Good faith is required by both sides
    - “As for Aboriginal claimants, they must not frustrate the Crown’s reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached”
      * What is this doing here? Where does this fit in doctrinily?
    - This process does not give AB groups a veto over when can be done with land pending the final proof of the claim
  + In all cases, the honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances
    - In discharging this duty, regard may be had to the procedural safeguards of natural justice mandated by administrative law
  + Neither the authorities nor practical considerations support the view that a duty to consult and, if appropriate, accommodate, arises only upon final determination of the scope and content of that right
  + The jurisprudence supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution

*Application*

* + Haida had relatively strong claim to title in land
  + Haida had relatively strong claim to Aboriginal right to harvest red cedar
  + Province knew about claims, and knew that decision would have serious impact on claimed rights
  + Duty to consult applied, and in this case might require significant accommodations to preserve the interest of the Haida Nation pending resolution of their claims.

Issue: What if any legal recourse is there for provincial actions respecting title or PCT rights that are not yet recognized?

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

Notes:

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

* Decided at the same time as *Haida*
* In this case, which arose in the context of ongoing treaty negotiations, the court determined that the provincial government’s duty to consult with the Taku River Tlingit First Nations (TRTFN) was engaged because the proposed action – the construction of a 160km long road through the group’s traditional territory to reopen an old mine – could significantly and negatively affect the TRTFN
  + Crown knew that there were strong title and rights claims that would be affected by the road
  + The court went on to hold that the provincial government had consulted and fulfilled its duty to accommodate before approving the reopening of the mine
    - This was accomplished through the environmental assessment that was conducted, which included consultation with interested Aboriginal groups, including the TRTFN
    - TRTFN argued insufficient provision of information and that, while some accommodations were made, they were not sufficient
      * Not all of the TRTFN were addressed when the final construction plan was approved
      * However, court was satisfied that the assessment committee had given sufficient attention to the specific issues raised by the TRTFN both in the initial assessment process when the group brought forward additional concerns after the assessment’s report
* **Crown Duty**
  + Duty to consult is engaged: Crown knew of claims sufficiently strong that they were included in treaty negotiation process
    - More than a minimal level of consultation, and likely some accommodation, required
    - BUT no need for ADDITIONAL consultation beyond that undertaken under the Environmental Assessment Act, which set out specific scheme for consultation with Aboriginal groups
      * The consultation can be a part of a big regulated scheme – this is sufficient for meeting the duty
    - Even though TRTFN did not approve of final plan, duty was satisfied
      * Example of the fact that it is not a duty to agree
  + “The Province was not under a duty to reach agreement with the TRTFN, and its failure to do so did not breach the obligations of good faith that it owed the TRTFN”

#### Mikisew Cree First Nation v Canada (Minister of Canadian Heritage) 2005

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

### Beckman v Little Salmon/Carmacks First Nation (modern treaty)

Ratio: Modern treaties are still subject to the honour of the Crown

Facts: Little Salmon/Carmacks First Nation (LSCFN) completed land claims agreement with Canada and Yukon Territory in 1997, Traditional LSCFN lands surrendered to be Crown land, with continued access by LSCFN for hunting and fishing. 2004, Yukon government transferred 65 hectares of this land to Paulsen for agricultural use.

Yukon claimed modern treaty constituted a “complete code” and consultation not called for in treaty is not required.

SCC disagreed: Crown duty to consult exists outside of treaty as part of Crown’s ongoing constitutional duty EVEN THOUGH treaty allowed government to transfer Crown lands, the effect on LSCFN members’ treaty rights gives rise to duty to consult.

Result: There was a duty to consult (on the low end of the spectrum)

Reason: *Role and Fxn of LSCFN Treaty*

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

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

* + Modern treaties should still be interpreted to uphold honour of the Crown, but also intended to create some precision around obligations
    - Modern treaties seek to further reconciliation by BOTH addressing grievances AND creating legal basis for positive long-term relations
    - Modern treaties more comprehensive and more procedurally fair (all parties adequately resourced and professionally represented)
  + Treaties will not accomplish these purposes if “interpreted by territorial officials in an ungenerous manner or as if it were an everyday commercial contract”
    - It is a doctrine that applies independently of the expressed or implied intention of the parties
  + Yukon “complete code” approach “misconceived”
    - Cannot call the LSCFN a ‘complete code’
  + Here, territorial governments were not entitled to act unilaterally
    - The duty to consult is treated in the jurisprudence as a means of upholding the honour of the Crown
    - “The Crown cannot contract out of its duty of honourable dealing with Aboriginal people”
  + LSCFN had treaty interest in hunting on lands
    - “It was no less a treaty interest because it was defeasible”
    - BUT given existence of surrender provision and consultation processes in the treaty, duty in this case is at the lower end of the spectrum
    - Consultation in this case (i.e. notice and opportunity for LSCFN to state its concerns) was adequate
  + Yukon entitled to conclude low impact 🡪 **No duty to accommodate**

Issue: What is the Crown’s obligation to the First Nation when Crown land is transferred to individual, non-native use?

Notes: **EISEN** 🡪 Unforeseen consequence of this jurisprudence is the impact of Aboriginal communities in the context of commercial agreements. There is nothing to stop corporations to entering into impact benefit agreements with Aboriginal communities.

### Mikisew Cree First Nation v Canada, 2018 SCC 40 (law making process)

Ratio: The law-making process does NOT trigger the duty to consult and accommodate.

**Key reason** 🡪 parliamentary sovereignty, parliament has a special role in our constitutional system that makes its actions different than the rest of what government does.

BUT when legislation (already enacted) is found to *infringe* s. 35 rights, quality of consultation will be relevant to *Sparrow* justification analysis.

AND when decisions made pursuant to legislative authority affect potential claims, remedies available under *Haida Nation.*

Facts: Mikisew Cree argued that Crown had duty to consult on the development of environmental legislation that would potentially adversely affect treaty rights to hunt, trap and fish.

Result: Appeal dismissed – No

Reason: Majority 🡪 “While the adoption of the [*Charter*]transformed the Canadian system of government “to a significant extent from a system of **Parliamentary supremacy** to one of **constitutional supremacy**” (*Reference re Secession of Quebec*…), democracy remains one of the unwritten principles of the Constitution…. Recognizing that the elected legislature has specific consultation obligations may constrain it in pursuing its mandate and therefore undermine its **ability to act as the voice of the electorate**”

*The Honour of the Crown/Duty to Consult*

* + The honour of the Crown is a foundational principle of Aboriginal law and governs the relationship between the Crown and Aboriginal peoples
  + It arises from “the Crown’s assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people” and goes back to the *Royal Proclamation*
  + The underlying purpose of the honour of the Crown is to facilitate the reconciliation of these interests
    - Ex. by promoting negotiation and the just settlement of Aboriginal claims as an alternative to litigation and judicially imposed outcomes
  + Court stated in *Haida Nation*,the honour of the Crown “is not a mere incantation, but rather a core precept that finds its application in concrete practices” and “gives rise to different duties in different circumstances”
  + In instances where the Crown contemplates executive action that may adversely affect s. 35 rights, the honour of the Crown has been found to give rise to a justiciable duty to consult
  + The duty to consult ensures that the Crown acts honourably by preventing it from acting unilaterally in ways that undermine s. 35 rights
    - This promotes reconciliation between the Crown and Aboriginal peoples first, by providing procedural protections to s. 35 rights, and second, by encouraging negotiation and just settlements as an alternative to the cost, delay and acrimony of litigating s. 35 infringement claims
  + This Court has repeatedly found that the honour of the Crown governs treaty making and implementation, and requires the Crown to act in a way that accomplishes the intended purposes of treaties and solemn promises it makes to Aboriginal peoples

*Duty to Consult during the Law-Making Process*

* + Mikisew submit that the development of policy by ministers leading to the formulation and introduction of a bill that may affect s. 35 rights triggers the duty to consult
  + The respondents submit that the development of legislation by ministers is legislative action that does not trigger the duty to consult, as this would be inconsistent with parliamentary sovereignty and the separation of powers.
  + **Law making process does not trigger the duty to consult. The separation of powers and parliamentary sovereignty dictate that courts should forebear from intervening in the law-making process. Therefore, the duty to consult doctrine is ill-suited for legislative action.**
  + Longstanding constitutional principles underlie reluctance to supervise the law-making process
    - The separation of powers is “an essential feature of our constitution”
    - Recognizing that a duty to consult applies during the law-making process may require courts to improperly trespass onto the legislature’s domain
  + Parliamentary sovereigntymandates that the legislature can make or unmake any law it wishes, within the confines of its constitutional authority
  + Applying the duty to consult doctrine during the law-making process would lead to significant judicial incursion into the workings of the legislature, even if such a duty were only enforced post-enactment
    - The duty to consult jurisprudence has developed a spectrum of consultation requirements that fit in the context of administrative decision-making processes
  + The Mikisew argue that if the duty to consult does not apply to the legislative process, Aboriginal or treaty rights will be subject to inconsistent protection

Issue: Does the duty to consult apply to the law-making process?

Notes: Brown concurring

* + “[T]he entire law-making process — from initial policy development to and including royal assent — is an exercise **of legislative power which is immune from judicial interference**”

Rowe (with Moldaver and Côté) concurring

* + “Section 35 rights are not absolute…. [S]. 35 is both supported and confined by **broader constitutional principles**”

Abella concurring

* + Appeal dismissed on procedural grounds
  + The enactment of legislation with the potential to adversely affect rights protected by s. 35 of the *Constitution Act, 1982* does give rise to a duty to consult, and legislation enacted in breach of that duty may be challenged directly for relief
  + “While the judiciary must respect the separate roles of each institution in our constitutional order**, its own role is to maintain the rule of law and protect the rights guaranteed by the Constitution**…. Like all constitutional principles, parliamentary sovereignty must be balanced against other aspects of our constitutional order, including the duty to consult.”

## Distribution of Legislative Authority

**So far…**

**s. 91(24)**: “the exclusive Legislative Authority of the Parliament of Canada extends to… Indians, and Lands reserved for the Indians”

* *Re Eskimos* (“Eskimos” are “Indians” under 91(24))
* *Daniels* (Métis are “Indians” under 91(24))
* Noted relation to jurisdictional uncertainty (Scott re KFN)
  + Something vacuum like when neither level of government was willing to take responsibility

**How does section 35 relate to the division of powers?**

### Pre 1982 Cases

#### Sutherland 1980 “No Singling Out”

* S. 49 of Manitoba *Wildlife Act* specified that in provincial recreation areas, wildlife management areas, etc., “Indians do not have a right of access for purposes of exercising” hunting rights
  + First held to be ***ultra vires***the province, as it is “in relation” to “Indians”
    - This is prima facie outside the provincial competence
* “Section 49 has effect only against Indians and its sole purpose is to limit or obliterate a right Indians would otherwise enjoy. Indians are singled out for special treatment”
  + Provincial laws of general application may apply to Indians but only if they **don’t single out** (*Four B*)

#### Four B (1980): Laws of General Application

* Four B shoe factory, owned by four members of the Mohawks of the Bay of Quinte, located on Tyendinaga Indian Reserve No. 38, primarily employing Band members
  + United Garment Workers of America certified as bargaining agent for employees of Four B, under Ontario Labour Relations Act
  + Four B argued Ontario law should not apply as the factory was a “federal undertaking”
* SCC: Provincial law is applicable
  + Law does not seek to “single out Indians nor purport to regulate them *qua* Indians”
  + Provincial laws of “general application” can apply to Indians

### Daniels v Canada

Ratio:  
Facts: Three declarations were sought by the plaintiffs when this litigation was launched in 1999:

* + That Métis and non-status Indians are “Indians” under s. 91(24);
  + That the federal Crown owes a fiduciary duty to Métis and non-status Indians and;
  + That Métis and non-status Indians have the right to be consulted and negotiated with, in good faith, by the federal government on a collective basis through representatives of their choice, respecting all their rights, interests and needs as Aboriginal peoples.

Facts as held by the trial judge

* + The federal government considered Métis to be “Indians” in various treaties and pre-Confederation statutes, and considered Métis to be “Indians” under s. 91(24) in various statutes and policy initiatives spanning from Confederation to modern day
  + The purpose of s. 91(24) was closely related to the expansionist goals of Confederation
    - Historical and legislative evidence shows that expanding the country across the West was one of the primary goals of Confederation – building a national railway was a key component of this plan
      * Purposes of s. 91(24) were accordingly “to control Native people and communities where necessary to facilitate development of the Dominion; to honour the obligations to Natives that the Dominion inherited from Britain . . . [and] eventually to civilize and assimilate Native people”
  + His conclusion was that in its historical, philosophical, and linguistic contexts, “Indians” under s. 91(24) is a broad term referring to all Indigenous peoples in Canada, including non-status Indians and Métis
    - Declined to grant other declarations on the grounds that they were vague and redundant.

Result: Metis and non-status Indians are “Indians” under s 91(24)

Reason: Why was this power assigned to the federal government? The drafters wanted the fed govt to have the power to expand their land mass- historical and legislative evidence shows that expanding the country across the West was one of the primary goals of Confederation. And if that was the point then it had to include Metis and non-status Indians.

Court also considers group and self-identity – acceptance by the community cannot be a part of this determination, unjust to use this because the history was so divisive of community.

Applicable test for when a declaration should be granted (*PM v Khadr*); the party seeking relief must est that the court has jurisd to hear the issue, the question is real and not theoretical and that the party raising the issue has a genuine interest in its resolution – a declaration can only be granted if it will have practical utility – if it will settle a “live controversy”.

Practical Utility for 1st declaration

* + No doubt that granting the first declaration meets this threshold – delineating and assigning constitutional authority between the fed and prov govts will have enormous practical utility for these two groups
  + Métis and non-status Indians have asked the federal government to assume legislative authority over them, it tended to respond that it was precluded from doing so by s. 91(24) – and when Métis and non-status Indians turned to provincial governments, they were often refused on the basis that the issue was a federal one
  + Non-status Indians, on the other hand, can refer to Indians who no longer have status under the *Indian Act*, or to members of mixed communities who have never been recognized as Indians by the federal government
    - Definitional ambiguities do not preclude a determination into whether the two groups, however they are defined, are within the scope of s. 91(24)
  + The term “Indian” or “Indians” in the constitutional context, therefore, has two meanings: a broad meaning, as used in s. 91(24), that includes both Métis and Inuit and can be equated with the term “aboriginal peoples of Canada” used in s. 35, and a narrower meaning that distinguishes Indian bands from other Aboriginal peoples
  + “Indians” has long been used as a general term referring to all Indigenous peoples, including mixed-ancestry communities like the Métis
    - Métis were considered “Indians” for pre-Confederation treaties such as the Robinson Treaties of 1850. Many post-Confederation statutes considered Métis to be “Indians”, including the 1868statute
    - Many Métis were also sent to Indian Residential Schools, another exercise of federal authority over “Indians”
    - Not only has the federal government legislated over Métis as “Indians”, but it appears to have done so in the belief it was acting within its constitutional authority

Neither the second nor third declaration should be granted because both restate settled law

Issue: The appellants sought to restore the first declaration as granted by the trial judge, not as restricted by the Federal Court of Appeal. In addition, they asked that the second and third declarations be granted. The Crown cross-appealed, arguing that none of the declarations should be granted.

Notes:

### Provincial Legislative Competence

* Federal legislative competence to pass laws affecting Aboriginal peoples is clearly established in s91(24)
* Provincial authority to pass laws affecting Aboriginal peoples is a more complicated issue
  + Province not entitled to “single out” Aboriginal people, it may in some circumstances regulate Aboriginal peoples by “laws of general application”
    - Governed by the federalism doctrine of interjurisdictional immunity which operates to preclude the application of provincial laws that intrude on the core of the federal power

#### Delgamuukw v BC

Ratio: Prior to 1982, as a result, Aboriginal rights could not be extinguished by provincial laws of general application” – the province was never able to extinguish title or rights. There is NO role “left” for IJI defining Aboriginal rights as core to s. 91(24).

Facts:

Result:

Reason: *Primary Jurisdiction*

* + Since 1871, the exclusive power to legislate in relation to “Indians, and Lands reserved for the Indians” has been vested with the federal government by virtue of s91(24)
  + The head of jurisdiction encompasses within it the exclusive power to extinguish aboriginal rights, including aboriginal title
  + SCC has held that s91(24) protects a core of Indianness from provincial intrusion through the doctrine of IJI
    - This core falls within the scope of federal jurisdiction over Indians
      * Encompasses aboriginal rights, including the rights that are recognized and affirmed by s35(1)
  + Laws which purport to extinguish those rights therefore touch the core of Indianness which lies at the heart of s91(24) and are beyond the legislative competence of the provinces to enact

*Provincial Laws of General Application*

* + The vesting of exclusive jurisdiction with the federal government over Indians and Indian lands under s91(24), operates to preclude provincial laws in relation to those matters
    - Provincial laws which single out Indians for special treatment are *ultra vires*
      * Because they are in relation to Indians and therefore invade federal jurisdiction
  + Notwithstanding s91(24), provincial laws of general application apply *proprio vigore* to Indians and Indian lands
  + **Does the same principle allow provincial laws of general application to extinguish Aboriginal rights? NO**
    - A law of general application, by definition, meet the standard which has been set by this court for the extinguishment of aboriginal rights without being *ultra vires* the province
      * Standard laid down in *Sparrow*
        + Drew a distinction between laws which extinguished aboriginal rights, they could not extinguish those rights
        + While requirement of clear and plain intent does not require that the Crown “use language which refers expressly to its extinguishment of aboriginal rights” *Gladstone*

***Interjurisdictional Immunity***

* + “Core” of 91(24) “encompasses aboriginal rights, including the rights that are recognized and affirmed by s. 35(1)”
    - S91(24) protects a core of federal jurisdiction even from provincial laws of general application, through the operation of the doctrine of IJI
      * The core of Indianness has been defined in both negative and positive terms
        + Negatively 🡪 it has been held to not include labour relations and the driving of motor vehicles
        + Positively 🡪 *Dick*; provincial hunting law did not apply *proprio vigore* to the members of an Indian band to hunt and because those activities were “at the centre of what they do and what they are”
  + “Laws which purport to **extinguish** those rights therefore touch the core of Indianness which lies at the heart of s. 91(24), and **are beyond the legislative competence of the provinces** to enact”
    - Any law with level of clear and plain intent required to extinguish in terms of the *Sparrow* test would be, in P&S, re s91(24) Indians
    - Any law extinguishing an Aboriginal right would (given *Van der Peet* ‘integral to distinct culture’ test) fall at the core of Indianness

Issue: Whether the province of BC had the power to extinguish Aboriginal title before 1982. The province had argued that, even if Aboriginal title had existed, it was extinguished by provincial grants of fee simple.

Notes:

#### Tsilhqot’in Nation v BC

Ratio: S. 35 limits both provincial and federal authority to limit rights 🡪 Provincial laws of general application apply to land held under Aboriginal title, subject to the constitutional limitations imposed by s35

Facts:

Result:

Reason: *Provincial Laws of General Application and Aboriginal Title*

* + **Generally, provincial governments have the power to regulate land use within the province**
    - Applies to all lands, whether held by the Crown, by private owners, or by the holders of Aboriginal title
    - The foundation for this power lies in **s92(13)**
  + Provincial power to regulate land held under Aboriginal title is constitutionally limited in two ways
    - Limited by s35 🡪 requires any abridgement of the rights flowing from Aboriginal title to be backed by a compelling and substantial governmental objective and to be consistent with the Crown’s fiduciary relationship with title holders
    - Province’s power to regulate lands under Aboriginal title may in some situations also be limited by the federal power over “Indians, and Lands reserved for Indians” under s91(24)
  + *Sparrow* 🡪 following factors to be relevant in determining whether a law of general application results in a meaningful diminution of an Aboriginal right, giving rise to breach:
    - 1) Whether the limitation imposed is unreasonable
    - 2)Whether the legislation imposes undue hardship
    - 3) Whether the legislation denies the holders of the right their preferred means of exercising the right
    - All three factors must be considered even if laws of general application are found to be reasonable or not to cause undue hardship, this does not mean that there can be no infringement of Aboriginal title

***Doctrine of IJI***

* + Court held in obiter that the doctrine of IJI should not be used to limit provincial power to legislate with respect to Aboriginal rights, but instead that s35 should be the primary constitutional constraint on both federal and provincial legislative power to infringe Aboriginal rights
  + Where valid federal law interferes with an aboriginal or treaty right, the s35 *Sparrow* framework governs the law’s applicability
    - But where valid provincial law interferes with an Aboriginal or treaty right
  + The jurisprudence leaves the following questions unanswered; **does IJI prevent provincial governments from ever limiting Aboriginal rights even if a particular infringement would be justified under the *Sparrow* framework?**
    - Implied by *Delgamuukw* re Aboriginal rights as part of 91(24) “core”
    - S. 35 limits both provincial and federal authority to limit rights
    - NO role “left” for IJI defining Aboriginal rights as core to s. 91(24)
      * Modern cooperative federalism (*CWB*)
      * Provincial laws apply to exercises of Aboriginal rights, subject to s. 35
  + IJI designed to deal with conflicts between provincial powers and federal powers
    - Does so by carving out areas of exclusive jurisdiction for each level of government
    - Application of IJI would create serious practical difficulties
      * 1) application of IJI would result in two different tests for assessing the constitutionality of provincial legislation affecting Aboriginal rights
      * 2) In this case, applying the doctrine of IJI to exclude provincial regulation of forests on Aboriginal title lands would produce uneven, undesirable results and may lead to legislative vacuums

Issue: 1) Do provincial laws of general application apply to land held under Aboriginal title and if so, how?

2) Does the BC *Forest Act* on its face apply to land held under Aboriginal title?

3) If yes, is its application ousted by the operation of the Constitution?

Notes: Criticism; **John Borrows, “The Durability of Terra Nullius”**

* + Canadian law located authority to deal with “Indians” at federal level in acknowledgment that local governments have greatest interest in infringing Aboriginal land rights
    - It was meant to be protective to exclude provinces from extinguishing Aboriginal rights
  + “The exclusion of the provinces for dealing with First Nations was one of the few checks and balances Indigenous peoples enjoyed under Canadian law throughout history”
  + See similar issues in construing treaty to allow both provincial and federal “taking up” in *Grassy Narrows*

**EISEN**: What do we know?

* There is no open pathway to argue that provincial intrusion on s35 rights is invalid or inapplicable as a matter of DOP
  + Whatever the court has said in the past that maybe the provinces cannot intrude on s35 rights, it is definitely the case that the province has the authority has to infringe s35 rights and make a case for justification
  + Section 35 changed the meaning of s91(24) in terms of DOP
  + Supposed to think of pre-post 1982 differently in terms of s91(24)
* Big open question 🡪 whether prior to 1982 the provinces were in theory authorized by the constitution to extinguish rights?

## Aboriginal Rights of Self Government

### PCT Rights to Self-Government

#### R v Pamajewon

Ratio: The first step of the VDP test is to narrowly identify the exact nature of the activity claimed to be a right; generally, this involves identifying the specific manner in which the "right" has been manifested. This is not the case where a PTC could give rise to a right to self-government BUT the door is not closed.

Facts: Accused were members of the Shawanaga First Nation and Eagle Lake Band. Convicted of keeping a common gaming house. Gaming activities were conducted on reserves. Claimed that s. 35 includes the right to self-government, including right to regulate gambling activities on reserve. Evidence advanced that “Ojibwa people…had a long tradition of public games and sporting events” pre-contact.

Result: Appeal dismissed - Lamer, writing for the majority, states that the right of self-government is no different than any other aboriginal right and thus must be measured by the same standard (VDP test).

Reason: The appellant argued that s35 grants a right of self-government to aboriginals, and that the right to regulate gaming activities on a reservation is inherent in this right. Resolution of the appellants’ claim rests on the application of the VDP test. Assuming s35 encompasses claims to aboriginal self-government, such claims must be considered in light of the purposes underlying that provision and must, therefore, be considered against the test derived from consideration of those purposes.

*Characterization of the Claimed Right*

* + “Assuming without deciding that s. 35(1) includes self-government claims, the applicable legal standard is nonetheless that laid out in Van der Peet ”
  + At step 1 (characterizing the claim, in light of nature of action, regulation and historic PTC), Court narrowed he broad asserted claim to self-government
  + “The **correct characterization of the appellants’ claim is that they are claiming the right to participate in, and to regulate, high stakes gambling activities on the reservation**”
    - The most accurate description of the claim is that they are asserting that s35 recognizes and affirms the rights of Shawanaga and Eagle Lake FN to participate in, and to regulate, gambling activities on their respective reserve lands
  + The claimant’s characterization was “at a level of excessive generality”

*Assessment*

* + Court found gambling was not integral to distinctive culture of Ojibwa
    - Evidence presented does not demonstrate gambling, or that the regulation of gambling, was an integral part of the distinctive cultures
  + No evidence of “large-scale” gambling, subject to community regulation, pre-contact
  + Commercial lotteries are “twentieth century phenomena”

Issue: Is the right to regulate gambling on reserve inherent in the aboriginal right to self-government?

Are s. 201, s. 206 or s. 207 of the*Criminal Code*, separately or in combination, of no force or effect with respect to the appellants, by virtue of s. 52 of the *Constitution Act, 1982* in the circumstances of these proceedings, by reason of the aboriginal or treaty rights within the meaning of s. 35 of the *Constitution Act* invoked by the appellants?

Notes:

#### Casimel v Insurance Corporation of BC

* Son was killed in motor vehicle accident and his customary adoptive parents were dependent on him
  + Insurance company claimed that the P’s were not Ernest’s parents because the adoption had not followed the procedures set out in provincial adoption legislation and were therefore not eligible to claim the benefit
* Court held that customary Aboriginal adoption should be treated as a legal adoption
  + First determined that there was in fact a custom of adoption among the Stellaquo Band and that this custom had been fulfilled by the Casimel family
  + Court recognized adoption and found that “Such a customary adoption was an integral part of the distinctive culture” of the Band and so was protected under s. 35
* Also held that nothing in statutory or common law had extinguished or limited the Band’s right to establish family connections
  + Including those created by adoption, according to custom; *this right remained protected by s35*

### Self-Government as Incident to Aboriginal Title

#### Tsilhqot’in

* The court stated “the right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders”
* Elders testified about the continuity of their ways of life in their own language, using their legal traditions
* **Indigenous law was key to establishing a sufficiency of Indigenous social organization, which was necessary to prove title**
* Indigenous Self Government as “Source” of Law
  + Indigenous law relied upon to prove historic and contemporary use of land sufficient, continuous and exclusive
  + *Delgamuukw* 🡪 sufficiency of occupation and exclusivity test as matter of physical and legal control)
* Title as Right to Govern
  + “The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders”
    - Caveat – there is a step for justification
  + Something like authority over the land is conferred by title
    - Unlike individual land ownership because these are communal rights
    - **Arguable that a jurisdictional authority is being conferred**
      * **Of course, within the justification caveat from the *Sparrow* analysis**
* Val Napoleon
  + International Indigenous Trickster Court Appeal
    - What are standards for consent and consultation under Tsilhqot’in law?
      * Decision-making groups, procedures, substantive rules
      * As a matter of decision-making power, both litigation and blockades are “legal responses to the unauthorized encroachment”, authorized by Tsilhqot’in National Government and legitimated by broad community support
    - Substantive principles include obligation to learn, respect and communicate law
    - Asymmetry in Tsilhqot’in “acknowledgment and respect for Canadian law” versus BC and Canadian failure “to learn Tsilhqot’in law”, even when entering territory

### Self-Government and Treaty Rights

#### Campbell (2000 BCSC)

* Nisga’a Final Agreement (2000) is comprehensive modern treaty
  + Included assigning Nisga’a government jurisdiction over language, land use, marriage, etc.
  + In some cases, Nisga’a law prevails over conflicting federal or provincial law (something like ***PARAMOUNT***)
    - Albeit often provided that comparable standards
      * Ex. Best interests of the child in adoption law, are met
* Challenge to constitutionality of agreement on basis that it interfered with exhaustive division of powers in s. 91 & 92
  + Court holds that the *Constitution Act, 1867* did NOT distribute ALL legislative powers (not exhaustive) because Aboriginal rights continued
* In any case, Nisga’a agreement limited by its own terms, and by acknowledged *Sparrow* justification framework
  + Nisga’a gov’t “does not have absolute or sovereign power”
    - Court ruled that Canada and the provinces can delegate elements of their constitutional powers to a FN through a treaty as long as the governments oversee how these powers are used
* Thus, this case does not address the central question of whether treaties incorporate inherent rights to self-government

### Self-Government as Inherent (A Directly Enforceable Right)

#### Mitchell v MNR

Ratio: **“Aboriginal interests and customary *laws*…were absorbed into the common law as *rights*”** (unless extinguished, etc.)

Geographical restrictions are relevant to aboriginal rights claims dealing with rights in a particular area – such as hunting, fishing, or trading in a specific area - however they are not relevant for general rights claims – such as a right to trade generally.

Canadian Crown sovereignty can potentially act to overrule legitimate aboriginal rights that are incompatible with Crown sovereignty; aboriginals must abide by the Constitution, and sovereignty is an underlying principle of the Constitution.

Facts: Grand Chief Mitchell, Mohawk of Akwesasne, claimed an Aboriginal right to cross the border between Canada and the US without paying customs

Sovereignty unless surrendered under treaty or extinguished (or possibly, if incompatible with Crown’s assertion of sovereignty – left open).

Result: Majority (per McLachlin CJ): insufficient evidence of pre-contact PCT

Majority affirmed “doctrine of continuity”, under which Indigenous practices and laws were presumed to survive assertion of Crown

Reason: **McLachlin**

* + Will not recognize an inherent jurisdiction and that they should be narrow enough to be considered a right as per the VDP test
  + She states that in the VDP test there are three things that you look for to help define the specific aboriginal right being claimed in a case:

1. Nature of the action that the appellant is claiming was done pursuant to the right;
2. Nature of the governmental legislation or regulation alleged to infringe the right; and
3. Ancestral traditions and practices relied upon to establish the right.
   * In this case, the aboriginal right claimed is the right to bring goods north across the St. Lawrence River (not Canada/United States border, as this did not exist when the right is claimed to have existed) for purposes of trade.
   * Flexible application of the rules of evidence must be used in aboriginal cases
     + This includes admitting evidence of post-contact activities to prove continuity with pre-contact practices, and meaningful consideration of oral histories.
     + However, this does not mandate blanket acceptance of such evidence if it potentially prejudicial, irrelevant, or unreliable.
     + Oral histories may be admitted for two reasons:
4. They may offer evidence of ancestral practices that would not otherwise be available, and;
5. They may provide the aboriginal perspective on the right claimed.
   * The evidence does not support the existence of the alleged aboriginal right.
     + Therefore, the claim fails on that basis – but goes on to make clear that geographic restrictions are necessary in rights linked to specific tracts of land, like hunting and fishing cases, but they are not overly important in cases that only deal with general rights (to trade, etc.)
     + The geographic restriction is important in this case as it deals with the right to trade in a particular area – the border along the St. Lawrence River
     + Thus, if the aboriginal right were found to exist, then the Court would have to ask if the right to trade across the St. Lawrence was integral to the Mohawk.

Issue:  
Notes: **Binnie** (w Major J, concurring): Indigenous rights could NOT survive assertion of Crown sovereignty if they were “incompatible” with sovereignty

* + Doctrine of “sovereign incompatibility” applies
  + Acknowledged “care must be taken” when applying British colonial law to s. 35, and that doctrine of “sovereign incompatibility” was given “excessive scope” in the past
    - Ex. “Important as they may have been to the Mohawk identity as a people, it could not be said, in my view, that pre-contact warrior activities gave rise under successor regimes to a legal right under s. 35(1) to engage in military adventures on Canadian territory”
  + “Control of mobility of persons and goods” fundamental attribute of sovereignty
    - **BUT leaves open possibility for inherent right to internal self-government** (as in US)