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# Edinger’s Tips

* When answering exam questions, make sure you acknowledge that some parts of arguments may be flawed. Don’t set out all your arguments AND ALL THE OTHER ARGUMENTS. Instead, just address the other parties’ arguments inasmuch as it addresses your own weaknesses and enhances your argument. Don’t go through every counterargument possible. Don’t make arguments FOR the other party.
* Say the argument you would make, and then evaluate the argument
* Know how you’d have to argue a statute or provision to be PROVINCIAL, or to be FEDERAL – make checklists – both sides for each head of power.
* Give names for cases – just a recognizable name (e.g. General Motors, or Securities Act Reference, etc…)
* Don’t waste time copying into the answer the facts given in the problem… it is better to put your analysis. The professor sets the facts so knows them. What you ought to be doing is working with the relevant facts.
  + Only incorporate the facts into your application of the principles.
* Don’t just lay out all of the law.
  + Actually apply it/say how you would apply it 🡪 so when you get a case where you draft a memo to help create legislation say how to frame it and an actual solid way how to (make this local by saying X)
* Every case will have multiple issues. State the relevant principles and apply the law to the facts.
* Deal with it issue by issue. Don’t list the issues, then address the issues. List the first issue, address it. Then the second issue, and address it. Etc…
* Depends in large part on how the legislation is drafted – In all cases in the course you must look at how the legislation is framed, not just what the provinces are doing. This makes it key that you understand the meaning of the legislation in the case…
* Pre-amble is not authoritative, only aids in statutory interpretation

# Roadmap

* Need to find a plaintiff and defendant
* Need to know what the remedy you seek is (*Charter* remedy or applicability/validity/operability)
* Justify your argument
* Consider counterarguments
* Go through all of the processes (i.e., for *Charter* must go through justification, for Federalism must begin by looking at validity then the rest)…

# Background Information (Quick Summary)

## What is a constitution?

A constitution creates the institutes of government AND regulates relationships between institutions of the government, the government itself, and citizens.

A constitution can be either unitary or federal – a unitary constitution involves all jurisdiction resting in the central government while federal constitutions involve a division of legislative jurisdiction between the federal government and the provinces, in which some matters belong to the federal government, and some to the provincial government.

## What is a federal constitution?

Federal constitutions involve a division of legislative jurisdiction between the federal government and the provinces, in which some matters belong to the federal government, and some to the provincial government.

**(1)** A central government with some authority over the entire geographic region

**(2)** The entire geographic area of the country is divided into geographically identifiable units or regions such as provinces,

**(3)** Legislative jurisdiction [or prescriptive jurisdiction] is divided between the central government and the provincial/unit governments,

**(4)** The distribution or division of legislative jurisdiction is governed by a written or rigid constitution**,**

**(5)** The constitution has rules to deal with conflicts between the central and regional laws,

**(6)** There has got to be some form of judicial review that decides whether people are complying with or breaching the constitutional law.

Compare this to a unitary government, where power is delegated and can be revoked by the central government

## What are the sources of our constitution?

1. Constitution Acts 1867 and 1982, Imperial Statutes,
2. Common law,
3. Custom, convention, and usage,
4. Values

The first 2 are justiciable, #3 and 4 are only justiciable if the government legislates on them

## Justiciability

Capability of being decided by a court. If not justiciable, can only seek a political remedy.

## Colonial Origins to Autonomy

#### The Royal Proclamation, 1763:

Establishes colonial govts, sets up govt and geography of the colonies… (1) Royal protection for anyone inhabiting or resorting in the said colonies. (2) Enjoyment of the benefit of the laws of England. (3) Governors of colonies have power to erect and constitute courts of judicature and public justice for the hearing and determining all causes as near as may be agreeable to the laws of England. (4) Appeals can be made to privy council.

#### Colonial Laws Validity Act, 1865:

This Act removed any inconsistency between local/colonial and British/imperial legislation. It confirmed that colonial legislation passed in the proper manner had full effect within the colony, limited only to the extent that it was not in contradiction with any Act of Parliament that contained powers which extended beyond the boundaries of the UK to include that colony.

#### Statute of Westminster, 1931:

**Established legislative independence for dominions. Recognized status of some colonies as nation states (Canada), gave treaty making powers,** *s. 2:* **Canada is free from all British statures except the BNA Act b/c it is protected by the colonial validity act. The British will not pass any statutes over Canada unless asked to.** *S. 3:* **Canada can pass laws extraterritorially (i.e. can make j-walking in Paris illegal).**

* Enabled by Imperial Parliament
* England could only legislate for dominions if they were requested to (exception: Imperial statutes)
* Did not give legislative power for BNA 1867 (this did not come until 1982)
* Repeals Colonial Laws Validity Act
* Colonial Statutes can modify Imperial Statues with exception of *BNA Act*

### What is the relationship between Colonial Laws Validity Act and Constitution Act 1867?

***Colonial Laws Validity Act:*** When the Parliament in London is operating in its Imperial capacity and enacting statutes, if there is a conflict between the Imperial statute and the colonial statute, the Imperial statute wins

* What is an Imperial statute? A statute passed by Imperial parliament, intended to extend to the colonies

***Constitution Act 1867:*** The BNA Act is a paramount Imperial statute

* If the Imperial statute is the constitution of a dominion and the proper procedures are followed in the proper circumstances, then one can reform or amend the constitution
* But there are no amending procedures included in the Constitution Act 1867
* Thus, this Act cannot be amended in Canada, and in order to do so one must petition the Queen

### Independence

**We didn’t become completely independent until 1982,** when we finally got amending procedures in the constitution

* We are autonomous, not autochthonous (grown from the soil, did it themselves – the USA is autochthonous)

## Statutory Interpretation

#### Edwards v Attorney General Canada, 1929, [1930] AC 124 (PC):

**Living tree approach to interpretation: Interpretation must be flexible. The original intent of the statute is capable of growth and expansion within its natural limits. You can interpret words of a statute to fit with current times.**

#### Reference re Secession of Quebec, [1998] 2 SCR 217:

**Principles are for filling in of the gaps of the text. Must consider unwritten principles of constitution, which are found between lines of Constitution and constitute substantive limitations upon government action. None are absolute or can trump the others. Democracy means more than simple majority rule – exists in the larger context of other constitutional values. Now you can make arguments to courts based on these principles.**

# Constitutional Procedure

**Mechanics of Constitutional litigation:** logic of federalism says that there must be umpire which says whether Constitution is being followed or not. How do you start the litigation or get it to the SCC? Two general methods: ***ordinary litigation*** and ***references.***

## Ordinary Litigation

***Ordinary litigation*** involves two subcategories: ***lis inter partes*** and ***declaratory action.***

* ***Lis inter partes:*** Dispute between two parties in which a statute is relevant to outcome of the action.
* ***Declaratory action:*** Apply for standing to seek a declaration in order to call into question (as *ultra vires*) a statute or provision of a statute. Whether or not you are granted standing is subject to the discretion of the Court *(Borowski).*

### Declaratory Action Standing

#### Minister of Justice v Borowski, [1981] 2 SCR 575:

**Public Interest Standing Test (declaration of invalidity):** To establish status as a plaintiff in a suit seeking a declaration that legislation is invalid (1) must be a serious issue as to its invalidity, (2) must be affected by legislation directly OR have genuine interest as a citizen, AND (3) no other reasonable or effective manner of bringing the suit before the court.

## References

***Reference Power:*** Created in Canada, for Canada***.*** Allows the federal executive (Governor General in Council) to ask the SCC any question that it felt like. The Court HAD to answer the question.

* There were severe and serious defects in the Reference Power as initially constituted: (1) No one would challenge/argue the questions put forth, (2) No reasons were required for decisions, (3) The provinces hated it
* The provision was not struck down – instead it became the case that the Lieutenant Governor could do the same and pose questions to the provincial or provincial supreme court
* There have been times where the SCC has altered the questions being asked so that they are more favourable to answer
  + However, the Courts are attempting to do their best in terms of making a reference more like ordinary litigation
* **It does not become a precedent when decided – it does not bind subsequent courts – key point about references**
* Another difficulty is that the Governor General in council can put a tough situation in the hands of the SCC since the GG doesn’t want to make the decision
  + Also, does not have the benefit of seeing the arguments at lower courts, or the decisions of lower judges

### How to bring a reference to a court

#### Constitutional Question Act, RSBC 1996, c 68:

**Rules on how to bring a Reference to a Court.**

**Of supreme importance is notice provision: You have to notify the provincial AG and AG of Canada so that they can intervene before you can bring about a question of validity or invalidity.**

**Court cannot decide any constitutional issues if notice has not been given. This is a federal requirement and a requirement in all provinces.**

* **1**. If Lieutenant Governor in Council refers something to CA or SCC, that court must hear it.
* **2.** An opinion, with reasons, must be given. Dissenting justices can also give reasons.
* **3.** If the matter involves the constitutional validity of an Act, the Attorney-General of Canada must be given notice.
* **4.** BC (and other provinces, if they have an agreement w/the fed govt) must also be notified.
* **5**. CA or SCC can order that people or groups who would be interested in the reference be notified and heard.
* **6**. You can appeal the outcomes of references like a normal case.
* **7.** The reasons of the court must be published in the Gazette.
* **8**. “The Notice Provision” (1) Definition of “constitutional remedy” (🡪 s. 24(1)) and “law” (enactment w/in meaning of Interpretation Act)
* (2)(3) Law can’t be declared invalid and no remedy can be given until AG of BC and Canada are notified.
* (4)(5) Notice must be in accordance with this section and there must be at least 14 days notice.
* (6)(7) If AG of BC or Canada is involved in proceedings, AG is a party and has the same rights as any other party.
* **9.** (1) SCC can hear an action from AG of BC or Canada to determine validity of an Act, even if no further relief is sought. (2) It is sufficiently constituted if both AGs are parties and (3) it can be appealed like a normal case.

## What are interveners?

***Interveners:*** people other than P or D who want to be part of the action and want to make a representation or argument to the court. Cannot be intervener when you add extra issues but can be if you offer different/expansive perspective on same issues.

# Pith and Substance Analysis – used often

**Pith and substance analysis (***RJR***):** which label is the proper constitutional characterization. Which enumerated head is proper?

* **1:** Object and purpose.
  + Based on legislative history
  + Evil aimed at
  + Form and content of legislation
* **2:** Effect of the statute
  + Legal effect – determined by looking at the statute, always looked at
  + Actual effect – optional… sometimes the actual effect varies from the legal effect
* **3:** Motive (actual intent of the government)
  + If motive differs from proposed effect, the action is called **colourable** – this is a pejorative term which means that the legislature is trying to fool the judiciary about the intention of a bill they are passing
  + The **doctrine of colourability** is the idea that when the legislature wants to do something that it cannot do within the constraints of the constitution, it colours the law with a substitute purpose which will still allow it to accomplish its original goal.

# Federalism

**Federalism:** You have a statute, which someone can challenge the validity of**.** We have s.91 (1-29), and s.92 (1-16)**.** The question for the Court is whether the statute being challenged is in relation to a s.91 or s.92 matter.

Courts will evaluate the object and purpose of the statute, the effect of the statute (legal effect and actual effect), and occasionally the motive of the statute

* **Effect:** In terms of effect, the court will always consider the legal effect. Actual effect is with regards to how the statute is actually operating – is it doing what the legislature actually intended for it to do?
* **Motive:** it has to do with when the statute looks like it is doing something but is actually meant to do something else. **Colourability** – when there is an argument raised by counsel attacking a statute, colourable means that we know the motive is unconstitutional.

**3 general propositions for federalism:**

* 1. Sovereignty in Canada is exhaustibly distributed .
  2. Courts do not evaluate the "wisdom and policy of the legislation." All they are doing is determining whether there is legislative jurisdiction for that statute.
  3. There are special principles of interpretation for the Const Act 1867. Constitutions need to be interpreted in a flexible way.

## Issue #1: Validity – is the statute valid?

When challenging validity, you must prove it does not fit into the other group’s box and then that it does fit into your box. Problem: boxes change in size and scope throughout time, boxes are vague.

**3 components to general interpretation of validity:**

1. Precedents - common law – how have they been interpreted before? However, this is rarely binding and it is always possible to modify the scope.
2. Ordinary rules of statutory interpretation
3. Theories of federalism - values and principles, policies

**Considerations in interpreting the actual statute**:

1. External evidence
2. Internal evidence
3. Pith and substance (object and purpose; legal and maybe practical effect)
4. Actual motive of government (colourability issue)

### POGG

**POGG:** Introductory clause to s.91 treated as a head of power in itself.

**Present scope of POGG (present day):** there are two branches to POGG – (1) emergency power, (2) national concerns doctrine

**Gap branch:** Gap between feds and provincials counts as POGG *Russell*. Too wide/broad. High point of POGG. Now invalid.

*The Local Prohibition case*placed limits on the POGG power: one can only rely on POGG for matters of national dimensions, and cannot use POGG where the province has power to legislate. iPOGG is a residual clause – it can’t be both a s 91 or a s 92 issue, it needs to be ONE OR THE OTHER.

#### #1 Emergency Power

The emergency power originates in the *Fort Frances* case. Pre-conditions to the use of the emergency branch are established in *Anti-Inflation and Crown Zellerbach,* in which it is noted that (1) legislation should be **temporary**, and (2) somehow as a precondition to getting the court to consider it, **Parliament should indicate clearly that it is acting with a sense of urgency/emergency**.

The standard of judicial review is minimal, and a great deal of deferene is given to the government, as Parliament need only have a **RATIONAL BASIS/Reasonable quantum of proof** for BELIEVING that an emergency exists (*Anti Inflation)*.

If the emergency is over, there must be clear evidence provided that the emergency has ceased to exist (*Fort Frances*).

One key is **justiciability limits on Emergency Power** 🡪 Parliament determines whether an emergency exists with regards to an Act. Thus, burden to overturn is relatively difficult for a court to overturn an emergency, but a court can ESTABLISH the initial emergency.

#### #2 National Concerns

The national concerns doctrineoriginates in *Local Prohibition + Canada Temperance + Johanesson* but is referred to more thoroughly in other cases, namely *Crown Zellerbach*

There are a few things to note about the national concerns doctrine: **(1)** Any subject can be a matter of national concern, and it is very open ended. **(2)** If that subject is found by the court to be a matter of national concern, it is **permanently federal** … it is as if you are adding enumerated heads to s.91 (*Anti-Inflation)*.

The doctrine applies to matters that did not exist at Confederation as well as to matters that were once matters of a local or private nature but have since become matters of national concern.

**In order to qualify as a national concern, the following criteria must be considered** *Crown Zellerbach***:**

* **(1)** A matter **must** have a SINGLENESS, DISTINCTIVENESS, and INDIVISIBILITY (*Crown Zellerbach + Anti Inflation dissent)* that clearly distinguishes it from matters of provincial concern, as well as a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution [based on the Federal Principle], **and**
* **(2)** In determining whether a matter has sufficient singleness, distinctiveness, and indivisibility, it is relevant to **consider** the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of intra-provincial aspects of the matter **[Provincial inability test]**

🡪 What Single, Distinct, and Indivisible (*Crown Zellerbach, Anti-Inflation dissent Beetz*) means is that you can’t break down the subject matter – you must give the legislation a label not so broad that it can be broken down into sub-categories. You don’t want multiple sub-categories made possible by the breadth of the subject matter

**Provincial argument:** the province may make a policy argument that it will be unfavourable to have this issue considered permanently as a federal issue. If it is only desirable to temporarily have it as a federal issue then the national concern doctrine may be undesirable.

### Criminal

**91(27)** gives federal government legislation over criminal matters.

The provinces have a number of similar looking heads of power, but they get challenged on the basis that they are invalid legislation since they should actually fall under s. 91(27). These include:

* **S.92(13)** property and civil rights
* **92(14)** administration of justice in the province
  + In combination with 91(27), give to the central government the power to make criminal law and create criminal law and gives to the province the ability to enforce that law
* **92(15)** imposition of punishment by fine, penalty, or imprisonment
* **92(16)** matters of a merely local and private nature

#### Federal 91(27)

**In order to qualify under s 91(27), the criminal provision must have the following qualities:** (1) the law must be a prohibition, (2) the law must carry with it a penalty (penal sanction), and (3) the law must be for a public purpose (generally in relation to public peace, order, security, health, and morality, and also environment) *Margarine reference.* The public purposes can be expanded, the prohibition is flexible, but it is ALMOST ALWAYS necessary to have a penalty.

**The statute must also pass a test for colourability:** since the law must have a legitimate public purpose underlying the prohibition. *Hydro Quebec*

* The definition of criminal law is wide and new crimes can be created – does not have to be typical criminal-related matters. You can criminalize ancillary activities without criminalizing the evil itself – if the pith and substance is right, you can do it, even if you’re doing it in a roundabout way. Criminal law can contain valid exemptions for certain conduct. However, there is a limit in that criminal law must be checked for **colorability**. Scrutiny on form of criminal law should be loosened. *RJR*

The criminal head of power is preferred over POGG *Hydro Quebec*

#### Provincial 92(13, 14, 15, 16)

**Ways to make Provincial Legislation be upheld without entrenching on 91(27) (defence against attacks from Fed Leg): When you use these, make sure you explain how they would be applied**

1. Emphasize property and civil aspect (in drafting and in argument) *Chatterjee*
2. Emphasize local nature of the problem addressed *Dupond*
3. Emphasize the temporary nature of the legislation *Dupond*
4. Focus on form: employ regulatory techniques, avoid prohibition + penalty form *Rio*
   1. Can connect to regulatory scheme, perhaps under 92(9)
5. Deal with the problem indirectly (i.e., *Rio Hotel, Dupond*)
   1. Licencing (*Rio Hotel*) 🡪 license required to operate businesses that supply the prohibited good, and license may be removed if licensee selling prohibited good contrary to the prohibition
   2. Instead of punishing the individual, punish the supplier or regulator 🡪 *Rio* they punish the hotel instead of the individual for a more preventive stance
6. Emphasize prevention of crime and pre-emptive strikes (deterrence) *Dupond*
7. Avoid duplicating Criminal Code provisions when framing legislation *Rio*
8. Go wide (make it broad, and get everything) *Chatterjee, Dupond*
9. Avoid draconian penalties *Chatterjee?*
10. Argue complementary, not supplementary (use of wording is important) 🡪 don’t add to *CC* provisions and fill in gaps but complement something that *CC* covers without infringing *Rio, Chatterjee*
    1. When double aspect doctrine occurs and the law could be both federal or provincial purpose, the provincial law is intra vires if it is complementary to the criminal law. Uphold statutes as long as they aren’t conflicting.
11. Concede provincial legislature's concern is with morality but argue it is not the main concern, it is just ONLY peripheral
12. Avoid discussing main problem (i.e. hide colorability)
13. May have to concede that there may be some traditional criminal activities they can't touch, no matter what aspect of it they're dealing with (e.g., prostitution and abortion)

### Regulation of the Economy

REGULATION OF THE ECONOMY IS CLEARLY A DOUBLE ASPECT MATTER. Legislative jurisdiction over the economy has been divided federally vs. provincially.

#### Federal

* **The central/federal government** gets to control things once they enter the flow of trade – once things get into a stream of trade, then the federal government gets legislative jurisdiction.
* 91(2) is the main head of power for the federal government, and most frequently used head of power with regard to the economy. **The leading case on s. 91(2)** is *Parsons* (has not been broadened or narrowed).
* *Parsons* sets up two branches …
  + (1) **International and interprovincial trade –** Occurs when agricultural products or natural resources have moved from PRODUCTION into the FLOW OF TRADE
    - This occurs in the flow of trade across borders…
    - If regulation of the flow in extra-provincial channels of trade is the object, then the federal statute will be valid.
  + (2) **General regulation of trade and commerce affecting the WHOLE dominion**. Defined in *GM*
    - **5 criteria (indicators) to determine whether ENTIRE statute is part of the general regulation branch of s. 91(2) aka** *GM***:** 
      * **(1)** Is the legislation part of a general regulatory scheme?
      * **(2)** Does this scheme need to be overseen by a regulatory agency?
      * **(3)** Is it general (trade as a whole), instead of dealing with single industries?
      * **(4)** Legislation must be of nature that provinces jointly or independently would be incapable of doing on their own.
      * **(5)** Failure for one or more of the provinces or localities to implement this scheme would jeopardize the scheme in other parts of the country.
      * These 5 criteria are not exhaustive or determinative, not all 5 are required.
        + The overriding consideration is whether what is being addressed in a federal enactment is genuinely a national economic concern and not just a collection of local ones
    - NOTE THAT GM ONLY APPLIES TO THE GENERAL BRANCH OF 91(2) and NOT 91(2) IN GENERAL
* **Parliament CANNOT do the following:**
  + (1) Cannot directly regulate the local stations of matters of a trade in a province *Parsons*
  + (2) Parliament cannot reach back into the production of the goods *Terminal Elevator*
  + (3) Cannot claim jurisdiction based on percentages of export *Terminal Elevator*
  + (4) Parliament cannot rely on sheer volume of trade or geographic distribution across Canada of trade
  + (5) Cannot regulate PARTICULAR industries if they are substantially local in nature (single industires or businesses) *Labatt, Securities 🡪 Labatt seems stronger*
    - Regulation of a single trade/industry is not of great national concern, and national ownership of a trade/undertaking or national advertising of products is not sufficient to authorize the imposition of federal trade and commerce legislation.
* *Reference Re Securities Act, 2011 SCC 66:* **The Court never says that you can’t use the evolution argument for 91(2) – that the issue evolved from provincial to national concern – But if you want to make this argument, you must bring in hard evidence to persuade them**

#### Provincial

* **Provinces** can control practically all activities and people within the province (not absolute, but pretty good control).
* **Provinces:** There is more than one enumerated head in s.92 – the two main ones for the purposes of the economy would be **92(13)** property and civil rights, **92(16)** matters of a merely local and private nature
* Provinces CAN do the following:
  + **(1)** Control the EARLY STAGES of the manufacturing/marketing process *Terminal Elevator*
  + **(2)** Have legislative jurisdiction over CONTRACTS (*Burns*) and THE PROFESSIONS (businesses, trades, professions)
    - If contractual rights within the province are the object of the proposed regulation, then the province has authority.
  + **(3) INTENTIONAL VS INCIDENTAL:** The effect on interprovincial/international trade is constitutionally irrelevant and are said to be MERELY INCIDENTAL unless the court decides that it is the effects on interprovincial trade that the province is AIMING at (**PITH AND SUBSTANCE)**. (*Carnation)*,
  + **(4) Can’t take as precedent setting, but simple theme is that** it is much easier for provinces to regulate/control goods *going out* (*Carnation*) than those *coming in (Burns)*. This is because harder to control them in the same INDIRECT WAY as when going out.
  + **(5)** Localize it – the activity/transaction/thing regulated is LOCAL, and that is what the province is AIMING TO REGULATE
* **Again, What can Parliament NOT do?** 
  + (1) Cannot directly regulate the local stations of matters of a trade in a province *Parsons*
  + (2) Parliament cannot reach back into the production of the goods *Terminal Elevator*
  + (3) Cannot claim jurisdiction based on percentages of export *Terminal Elevator*
  + (4) Parliament cannot rely on sheer volume of trade or geographic distribution across Canada of trade
  + (5) Cannot regulate PARTICULAR industries if they are substantially local in nature (single industires or businesses) *Labatt, Securities 🡪 Labatt seems stronger*
    - Regulation of a single trade/industry is not of great national concern, and national ownership of a trade/undertaking or national advertising of products is not sufficient to authorize the imposition of federal trade and commerce legislation.

### Taxation (Fiscal Federalism)

* **Direct Tax:** “A direct tax is one which is demanded from the very persons who it is intended or desired should pay it.”
  + **Examples:** income, sales, property, flat rate license fee
* **Indirect Tax:** Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another, such are the excise or customers. The producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price.”
  + **Examples:** commodity tax, customs, export/import

#### Federal

* Taxation generally challenged when provincial, not Federal
* **91(3):** The raising of money by any mode or system of taxation
  + Nearly unlimited, can only be challenged for bad intention or colourability
* *Federal legislative jurisdiction:*
  + You should never assume that the only legitimate constitutionally valid reason for imposing a tax is to raise revenue. Taxation can be used to regulate and control or promote certain things. Thus, raising revenue is not necessarily the ONLY objective.
  + The federal government can raise taxes by any mode or system of taxation. They can therefore raise more money than any province can raise, and they can spend that money any way they please.
  + Can be direct or indirect,
  + Usually must have revenue raising as primary purpose,
  + Can’t be colourable towards s92,
  + Can raise revenue for federal or provincial use,
  + Can spend the revenue any way it likes.

#### Provincial

* **92(2):** Direct taxation within the Province in order to the raising of a revenue for provincial purposes
* **92a(4):** In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of:
  + (a) Non-renewable natural resources and forestry resources in the province and the primary production therefrom, and
  + (b) Sites and facilities in the province for the generation of electrical energy and production therefrom, whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.
* **92(9)**: Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
* **125:** No Lands or Property belonging to Canada or any Province shall be liable to Taxation.

**Checklist of issues in provincial tax cases:**

* 1) Is the levy/payment a tax? (*Allard v. Coquitlam)*
  + No 🡪 prov under 92(9) maybe
  + Yes 🡪 next question
* 2) If yes, is it a direct tax? (*Bank of Toronto v. Lambe)*
  + Yes 🡪 good for prov if used to raise revenue for provincial purposes
  + No 🡪 go to *Allard* argument or *CIGOL* argument
* 3) Is the tax imposed within the province? (*Bank of Toronto v. Lambe)*
* 4) If it’s a tax, was the legislation properly enacted? (*Eurig estate)*
  + You can’t delegate power to tax. Must be elected legislatures that impose the tax.
    - In order to delegate power to tax, you need to make it clear that legislature is imposing the tax, and you are just letting someone else fix the rates
* 5) Is there any immunity from the tax (s. 125)? – we did not have a case on this
* 6) Is an ultra vires tax recoverable (can they get the taxes back)? (*Kingstreet Investments)*
  + You can recover taxes which the government has collected improperly (rule of law)
  + Tax payer is not entitled to compound interest if there is no gross wrongdoing on the part of the province – just entitled to simple interest. Province can request the judgment be suspended if paying would cause financial chaos/deficit for government – they could then retroactively legislate a valid tax so they do not have to pay it back.

***Allard Argument* Option 1 for indirect -- Using 92(9) to create indirect taxation as a province** (from *Allard*)**:**

1. The variable licensing fee must be attached to a valid regulatory/licensing scheme as a fee.
   1. Flat rate licensing fees usually seen as indirect
2. The fee must be tailored and used to defray the costs of the regulatory scheme.
3. Doesn’t have to be a scientific correlation or exactness between money collected and that spent on regulatory scheme, just has to be a reasonable, uncoloured nexus.

***CIGOL Argument* Option 2 for indirect --** *CIGOL***:** Look at tax in its entire context to see whether it is an indirect or hybrid direct tax 🡪 if hybrid then may be passable (*CIGOL Dickson dissent*).

### The Ancillary Doctrine – any time you see a single provision analysis

**ANY TIME YOU SEE SINGLE PROVISION ANALYSIS – Ancillary doctrine *(GM)*:**

A law that is found to be invalid under the pith and substance analysis may still be saved by using the doctrine of **necessarily incidental or ancillary effects**. In such cases, the intruding provisions of the law will only be upheld if they satisfy the "rational connection" test. **Ancillary** – providing necessary support to the primary activities or operation of the statute.

* **Ancillary doctrine vs. Pith and Substance:** … **Ancillary doctrine** has to do with the connection between a provision and the statute – can be used on provincial or federal statute. … **Pith and substance**, on the other hand, has to do with the connection of the statute to the head of power (e.g., 91(2)). Don’t confuse the ancillary doctrine with the pith and substance doctrine from *Carnation*
* **This test can only be applied when the proposed statute considered as a whole is valid…**
* **Test for validity of individual provision:**
  + **First step:** Look at provision in isolation. However, you don’t make a final decision after looking at the provision in isolation. Find out whether it is prima facie valid in relation to the statute.
  + **Second step:** Determine whether entire statute is valid
    - If the whole of the statute is valid and the single provision is of the same pith and substance of the statute, then the provision is valid.
    - If the whole of the statute is valid, but the single provision is not really of the same pith and substance of the statute, then you move to the **third step** which is the ANCILLARY DOCTRINE
  + **Third step – Ancillary doctrine (or necessarily incidental doctrine):** is provision necessarily incidental or sufficiently integrated into the statute as a whole? Is the relationship sufficiently close in the circumstances such that we can say the provision is valid?
    - If there is an encroachment into a different head of power, how significant is the encroachment? More significant encroachment, greater connection required. Necessarily incidental is the largest connection needed if it is a massive encroachment. Only a rational/functional connection required for a weaker encroachment.
      * The necessity of the provision must be proportional to the degree of incursion into other government’s territory.

## Issue #2: Applicability – does the statute apply to D?

### Interjurisdictional Immunity (IJI)

* IJI amounts to saying a federal entity is not subject to a certain part of a provincial law
  + None of these federal entities can ever claim an ABSOLUTE immunity from the application of all provincial laws. The immunity is more narrow.
  + The degree of immunity which a federal entity can claim has changed over the years. As has the test for IJI. It was very narrow, then broad, and now narrow again
* Also applies to invalidity. Can render a statute inapplicable or invalid.
* You can never assume validity, since you can never get to applicability or operability unless you have a valid statute
  + Even a valid statute may not apply, and even if it does apply there may be an issue of operability

#### Sequence – What you should do if you get a problem

1. **IF YOU CAN FIND A FEDERAL ENTITY:** Try to use the traditional version of IJI (*Winner/Bell…* Pre-*Canadian Western Bank*) –
   1. This requires you to find/identify a federal entity (see below heading for how to do so)
   2. Then ask and answer what the essential status and capacity/vital part of the operation is as a going concern.
   3. Then the third step is to persuade the court that the application of the provincial statute **impairs** an essential or vital part of the federal entity *Canadian Western Bank*
      * Example: Legislation can’t STERILIZE an undertaking *Winner*
        + The province can regulate roads so long as they don’t do so in a way that impairs or sterilizes federal power (relates to IJI)
        + Can control roads but not undertakings that use roads.
      * *Bell, CWB:* the test of impairment is insufficient and inconclusive in cases where, without going so far as to impair or paralyze federal undertakings, an application AFFECTS a vital part of those undertakings.
   4. All federal entities carrying on business are going to be subject to the vast majority of provincial laws – it is only certain parts of certain provincial statutes that infringe – this is only area of immunity
2. **IF YOU CANNOT FIND A FEDERAL ENTITY, USE A HEAD OF POWER:** Second choice is when you can’t find a federal entity (*Canadian Western Bank, Marine Services v Ryan)*…
   1. *Marine Services International Ltd v Ryan Estate:* **Sets out very clearly how to approach IJI when there is no federal entity anywhere to be found:** When you don’t have an entity, you have to claim a head of power if you want to use IJI
      * SCC said there is a two-step test to trigger IJI, once the previously mentioned steps are succeeded on
        + (1) First step – does provincial law trench on a core of the head of power (precedent is preferred)
        + (2) Second step – is this sufficiently serious to invoke IJI (cannot just affect the core but must IMPAIR it)
          1. **“Impair” lies on a spectrum from effect to sterilization (effect is too little, sterilization is as bad as it gets)**

**“Seriously or significantly trammels the federal power… it need not paralyze it, but it must be serious” – it is a judgment call**

* 1. So you identify a federal head of power relevant to your claim for IJI [91(10) navigation and shipping is a great one] *Canadian Western Bank*
  2. Then work on finding the core of the head of power – there will be no precedent’s, you will have to invent it *Canadian Western Bank*
     + Try and find a precedent
     + **When can you rely on IJI**
       - **Can rely when there is precedent:** IJI should be limited to what has been done in the past (precedent). An attempt to limit the scope and application of IJI to what’s already been done
       - You have to determine what is at the core, and use IJI when the provision touches on the vital/core component of power
       - Can protect provincial jurisdiction, but should be restrained to only protect areas where there is precedent.
  3. The last step is to persuade the court that the application of the provincial law **impairs** the core of the head of power – a SERIOUS/SIGNFICANT negative effect on the core
     + There must be an **impairment (as opposed to affect)** – factual – look at the ACTUAL ENTITY, not the head of power.
     + **Whenever IJI available:** Must consider the level of intrusion on the “core” of the power on the other level of gov which would trigger the application of IJI.
     + It must be more than a mere effect – it is when the adverse impact of a law adopted by one level of gov increases in severity from affecting to impairing (without NECESSARILY sterilizing or paralyzing) such that the “core” competence of the other level of gov is placed in jeopardy.

1. You can do the same for provincial heads of power (go with traditional first, and then the second option) – with the traditional version, must find a provincial entity
   1. *Canada v PHS Community Services Society, 2011 SCC 44*

* **This case expressly continues the POSSIBILITY of a province or provincial entity claiming IJI from the application of federal law – the only case to reach the CC in which the application of IJI to a provincial entity or head of power has been claimed**
  1. If you can’t find a provincial entity, it will be hard to find a precedent for IJI at a core of a provincial head of power
  2. Thus, finding an entity first helps you avoid having to find the core of a head of power – you only find the core when you don’t have an entity!

#### Finding/Identifying a Federal Entity

* The most common federal entity consists of federal works and undertakings. And that is 92(10)(a).
  + 92(10)(a) gives federal jurisdiction to all forms of transportation and communication, which crossed provincial boundaries or extended beyond the limits of a province. Includes steamships, railways, canals, telegraphs, and OTHER WORKS – the residual clause OTHER WORKS allows them to slot in more modern forms of transportation and communication.
  + *Winner:* 92(10). **Work** = physical thing. **Undertaking** = arrangement under which physical things are used. Read it disjunctively.
* What else included as federal entity outside of 92(10)a?
  + Aeronautics
  + Police force, RCMP
  + Banks
  + Post office
  + Indians and land reserves for Indians
* *Winner:* 
  + Must ask: how is the business actually operated?
    - If operated as a single entity, treat it as one.
    - But if it is operated as 2 businesses under 1 umbrella, it is divisible.
    - It doesn’t matter if you can strip away parts; question is rather *what is the undertaking which is in fact being carried on?*
  + If ONE PART of an undertaking is said to be federal (inter-provincial) then it is all federal (inter-provincial)
    - Courts cannot carve up jurisdiction – it is an all-or-nothing game
  + Something doesn’t have to be BOTH a work AND undertaking to fall under s 92(10)(a).
* *Winner:* Colourability also applies to undertakings; can’t fake being fed to escape provincial laws.
  + The PC warned against colourability – you can’t just tack a minor federal aspect to a significantly provincial undertaking just to escape provincial legislation
* *Tessier* is a much more recent case that expands federal works and undertakings and federal entities through what is called **Derivative Jurisdiction…**
  + **The principle is that you don’t have to be a federal work and undertaking on your own in order to fall under the federal umbrella, but you must have a sufficiently close relationship to a federal work and undertaking** *Tessier*
    - **Sufficiently close relationship involves being integral or necessarily incidental to the effective operation of the federal undertaking. In other words, federal undertaking relies on/is dependent to a significant degree on the services and employees of a provincial company.**
    - **The question becomes HOW THE COMPANY ACTUALLY FUNCTIONS. Did the company have a unit that did nothing but stevedoring? No.**
      * **Has to have a sufficient FUNCTIONAL relationship. Must be so tight that you fall within the protection and immunity of a federal entity.**
  + **Derivative jurisdiction**
    - Basically looking at the functional relationship between the business claiming federal immunity and the federal entity
    - Has to have a sufficient FUNCTIONAL relationship. Must be so tight that you fall within the protection and immunity of a federal entity.

#### IJI vs. Pith + Substance

*Ordon Estate and Grail – pre-decessor to CWB in terms of cores of heads of powers*

* First case which expressly states and then applies the version of the doctrine of IJI which says that there is a core to each head of federal power which other levels of govt can’t regulate towards
* **The court creates a whole new version of inter-jurisdictional immunity;**
  + Where a provincial statute trenches on an exclusively federal power, the statute must be read down so as not to apply to those situations; says this is known as inter-jurisdictional immunity
    - This is a **confusion between validity and immunity**
  + Court finds that each federal head of power possesses a **basic minimum unassailable content** (the core) that cannot be trenched on by the province
    - Says the court in ***Bell 88*** said this (but ***Bell 88*** does not say this; the court in that case said the federal entity in question had core *workings*, not the *subject matter*)
  + **Problem:** This is completely inconsistent with the **pith and substance approach** which *allows for incidental effects on the jurisdiction of another level of government* as long as its pith and substance is within its jurisdiction
* Edinger feels that IJI, as it has been expanded, is inconsistent with the pith and substance doctrine
  + Court determining what the matter of the statute is and slotting it under a head of power
  + Once a matter of the statute is found to fall under a legislating govt’s head of power, then incidental effects on other heads of power are constitutionally irrelevant
  + IJI interpreted with cores of heads of power, and measuring the “effects” of legislation on the core is inconsistent with the P+S doctrine – Edinger’s opinion on the matter

### Extraterritoriality

* Built right into the Constitution Act 1867 – there WAS no Federal jurisdiction to legislate extraterritorially until the Statute of Westminster 1931
* Provinces cannot legislate extraterritorially
* Again, this can apply to both **validity** and **applicability:**
  + 🡪 Validity: invalid because of extraterritorial pith and substance (most common use). - ***Churchill Falls***
  + 🡪 Applicability: Statute is valid but inapplicable in *that* application (fallback option). – ***Unifund***
* **Provinces are not so much restricted from *creating* rights outside prov but with *detracting/derogating* from activities/rights outside prov. 🡪 i.e. generally not an issue to create benefits for those outside the province.**
* Avoid issues by pointing out how it does apply within prov; don’t directly regulate things outside prov.
* ***Churchill Falls*: Where pith and substance of the enactment is in relation to matters which fall within the field of provincial legislative competence, incidental or consequential effects on extra-provincial rights will not render the enactment ultra vires.**
  + **However, where the pith and substance is the derogation from or elimination of extra-provincial rights, then even if it is cloaked in the proper constitutional form (e.g. by making it look like its aimed at local matters) it will be ultra vires.**

#### Two Initial Lines of Cases

* Before these cases, there had been 2 lines of cases from the PC:
  + *RBC v the King*, 1930: There can’t be ANY ET effects at all. All regulation must be contained within the province.
  + *Ledore v Bennett*, 1939: Pith and substance approach, incidental ET effects are unimportant.
    - We focus on *Ledore* because of *Churchill*

#### Current Process of Assessing Extraterritoriality

*From BC v Imperial Tobacco:* Reconciles *Churchill* and *Unifund* to give current approach to ET analysis.

1. **First look to the pith and substance** *Churchill:* **When validity of legislation is challenged on basis of extraterritoriality, the analysis centres on the pith and substance of the legislation**
   1. If it is in relation to matters falling within the field of provincial competence, the legislation may be valid..
   2. **However, where the pith and substance is the derogation from or elimination of extra-provincial rights, then even if it is cloaked in the proper constitutional form (e.g. colourability – by making it look like its aimed at local matters) it will be ultra vires.**
   3. In determining pith and substance, court identifies its essential character or dominant feature; this may be done through reference to both the purpose and effect of the legislation;
2. **Now identify the head of power from s 92.** 
   1. **For Tangible Matters:** Where the pith and substance relates to a head of power based on a tangible matter, one need only look for the location of the matter to see if its valid; where it relates to an intangible matter, then its more complicated;
      1. E.g. “no person shall”; this means a person in BC
   2. **For Intangible Matters (civil rights, contract rights, etc…): REAL AND SUBSTANTIAL CONNECTION TEST…** Where the pith and substance relates to a head of power based on an intangible matter, you have to locate the matter by looking at (***Unifund***):
      1. **You want a meaningful relationship between** the
         1. (1) Enacting territory,
         2. (2) The subject matter of the legislation and
         3. (3) The persons made subject to it, in order to determine whether the legislation would respect the dual purpose of territorial limitations (meaning connection to the enacting province and pays respect to legislative sovereignty of other territories)
      2. **Real and substantial connection test has four considerations** *Unifund***:**
         1. **(1)** The territorial limits on the scope of provincial legislative authority prevent the application of the law of a province to matters NOT sufficiently connected to it
         2. **(2)** What constitutes a sufficient connection depends on the relationship among the enacting jurisdiction, the subject matter of the legislation, and the individual or entity sought to be regulated by it
         3. **(3)** The applicability of an otherwise competent provincial legislation to out-of-province defendants is conditioned by the requirements of order and fairness (order in the federation would be undermined if competing exercises of regulatory regimes are permitted, and there must be fairness to the out of province defendant)
         4. **(4)** Principles of order and fairness, being purposive, are applied FLEXIBLY according to the subject matter of the legislation.
      3. This is identifying relationships and asking whether there is a ***meaningful relationship***
         1. ***Preferable to use term ‘meaningful’ on exam instead of ‘real/substantial’***
      4. There is no scientific approach to the connection analysis
      5. There will always be different weights of the connections, so the weight of the connection can vary case-by-case. So it is very difficult to predict what the outcome will be.
3. **If this all comes back as valid, then incidental extraterritorial affects are irrelevant!!!**

## Issue #3: Operability – if it applies in two jurisdictions, which is paramount?

### Paramountcy

Is there a conflict between the two statutes within the legal definition of conflict? The conflicting statute must be valid and applicable.

* You can never assume validity, since you can never get to applicability or operability unless you have a valid statute
  + Even a valid statute may not apply, and even if it does apply there may be an issue of operability

#### The Test for Paramountcy

* *Cite Multiple Action v McCutcheon:*
  + Mere duplication without actual conflict or contradiction is not sufficient to invoke the doctrine of paramountcy and render otherwise valid provincial legislation inoperative. That being said, only one statute can apply (i.e., no double prosecution)
  + **Express contradiction test: For paramountcy to be invoked, there needs to be conflict in operation, as where one enactment says yes, and one says no**
    - **Must be a case in which a citizen is being told to comply with both; and if they comply with one, they cannot comply with the other**
    - **Once the court has declared a conflict, it will apply to all subsequent litigants on the same conflict, but a citizen must bring it the first time b/c he/she is subject to an actual conflict**
* *Canadian Western Bank***:** There is more than one way to have a conflict. More than one kind of conflict. Duplication is not a conflict.
  + There is one other way in which a court can find a conflict occurring: if provincial frustrates the federal purpose, the province loses

# Charter Procedure

## 1: Applicability

### When is the Charter available?

**Section 32**:

(1) This Charter applies

(a) to Parliament and govt of Canada in respect of all matters within the authority of Parliament ...; and

(b) to legislature and govt of each province in respect of all matters within authority of legis of each prov.

* **You need a plaintiff and a defendant**
  + You need to find an eligible plaintiff – plaintiff eligible pursuant to a charter provision in order to challenge
  + It all depends on what right is being evoked
  + Some rights say “every person”, some rights say “everyone”, and some rights say “every citizen”
    - Pay attention to the wording – since the rights are not the same for every provision
* **However, when it comes to finding D for *Charter*, it is different** 
  + No doubt that it applies to provinces, feds, and all their statutes.
  + The issue that occupies the courts is how much wider you can go in applying the Charter
  + Section 32 assists us in this.
  + Entities created and empowered by the legislative body (including both levels of government) MAY BE SUBJECT TO THE CHARTER
    - (Keep in mind the first option is govt legislation fed or prov, the following are just 2 other options if not govt legislation fed or prov).
    - Must focus on the entity. Is the entity a government entity? This is **option 1.**
    - **Option 2** involves a private entity 🡪 you must look to see whether this private entity is performing a government function. Find something that the entity is doing that is a government function. A private entity is limited to purpose. The grounds that you sue them on MUST BE THE GOVERNMENT FUNCTION – you can’t sue them because they have a government function but sue them on a grounds other than the fulfillment of that government function.

#### When do we know if something is government?

*McKinney*

* Questions: (1) Are they government? If no, (2) are they government for *this* purpose? Not all entities created by government are government themselves.
* Non-government entities can be government for a particular purpose 🡪 Control Test. To be deemed government, government must exercise control.
* Control Test: *McKinney*
  + Look at **degree of government control** and the **relationship** in determining if it is government.
  + Look at **activities, self-government/operations** of the university
  + Does the **government exercise control** over the entity? Is it a traditional **government function**? Is it furthering a **government objective**?
* Universities/hospitals are not generally subject to the *Charter*, as government has no legal control over them.
  + An entity performing a public function is not enough in itself to warrant Charter scrutiny; government must “exert control” over operations.

#### What about delegated decision makers or private entities?

*Eldridge v BC*

* **Two ways legislation can violate *Charter:***
  + **(1) Legislation is unconstitutional on its face because it violates a *Charter* right and isn’t saved by s 1**
  + **(2) *Charter* is infringed, not by the legislation itself but by the actions of a delegated decision-maker in applying it.**
* **Next question: does *Charter* apply to the decision maker?**
  + **If entity is found to be govt, *Charter* applies to ALL of its activities 🡪 even ones that are generally “private”.**
  + **Private entities may be subject to *Charter* if acting to further a govt program or policy (they are government for that one function).**
    - **Merely serving a public function or being “public” is not enough 🡪 must be implementing specific govt policy.**
* **Test for a private entity:** is there a direct and precisely defined connection between the nature of the activity in question and specific government program or policy? If yes, *Charter* is applicable.
  + **Note:** For an entity, the question is “degree of control”, but for a function, it is “nature of the activity”.
* **Hierarchy for challenging something:** Legislation > government entity > government function
* **IF an entity’s act is truly government in nature, that entity will be under *Charter* scrutiny only with respect to that act, and not all of their private activities.**

#### What about government omissions?

*Vriend*

* **The *Charter* applies to government omissions as well as positive acts; if a legislature chooses not to include something in their legislation that should be protected by the *Charter*, then the courts can step in and insist that this right or freedom be granted**
* **Establishing comparator groups is an essential element in determining that a distinction is being created (for instance, comparing homosexuals to other discriminated groups shows that they deserve protection).**

#### Issue of colourability

* **Issue of colourability:** Government CANNOT evade *Charter* by incorporating things into private contracts.
* **Municipalities are government:** so everything they do is subject to the *Charter*, even if it is a “private” thing.
* **This case reinforces the idea that a govt can’t shirk *Charter* obligations by delegating to other entities.**

#### Charter and Private Litigation

*Grant v Torstar*

* **While the *Charter* does not apply directly in private litigation (and it can’t be evoked to strike down a common law rule merely for being against the Charter)**
* **What you can do, though, is use Charter values**
* **You can invoke Charter values to SUPPORT arguments to modify common law, but you can’t use ONLY the Charter**

## 2: Justification

**Pre-requisites**

* Obviously by this point it is necessary for a plaintiff + defendant, and lack of a s. 33 override, and a s.4 proper notice given pursuant to *Constitutional Questions Act*… so justification will not be at issue until these things are done
* Section 33: (Override clause) 🡪 has a limited application. Can’t be used against s. 2, 7-15.
  + You can override certain provisions in the *Charter* under s 33. The only province that has actually used s 33 is Quebec.
  + You can legislate this in with a pre-emptive strike.
  + You basically announce that you are breaching the *Charter*.

**Justification**

* 1. Find the breach of right pursuant to your claim
  + Characterization process: interpret the right and your alleged violation
  + This is a relatively easy stage b/c Courts are very liberal at this level as the limitations kick in at s.1
* 2. Rights are subject to reasonable limits prescribed by law as can be demonstrably justified in a free/demo. society
  + (a) “prescribed by law”: there must be legislation
    - (i) If no legislation 🡪 no s.1 analysis – *Charter* challenge fails
    - (ii) If there is legislation 🡪 Is the provision too vague? (***Nova Scotia Pharmaceuticals***)
      * Note: Provisions of “discretion” often difficult/impossible to define, found as too vague
      * Yes 🡪 no s.1 analysis – *Charter* challenge fail
      * No 🡪 s.1 analysis occurs
  + (b) “demonstrably justified in a free & demo society 🡪 ***Oakes* test**
* Justification is essentially a statutory interpretation exercise.
* For *Charter*, courts must take (1) a **living tree** approach, and (2) a **purposive** approach.
* **Notwithstanding clause**: s. 33 of *Charter* 🡪 can NOT be used against s. 2, ss.7-15. *Charter* rights aren’t absolute!
* Financial emergencies can be sufficient objectives **pressing and substantial in the Oakes test** (*Newfoundland v NAPE)*
  + Money can’t be invoked as a justification during normal times. However this was not a normal time as Nfld was facing severe financial crisis.
  + Severe financial emergencies are accepted as a pressing and substantial matter.

#### Free and Democratic Values

* These underlying values and principles of a free and democratic society are the genesis of rights and freedoms guaranteed by Charter.
  + ARGUE: Use these values and try to persuade the court, helping your infringement claim.
  + *Respect for the inherent dignity of the human person*
  + *Commitment to social justice and equality*
  + *Accommodation of a wide variety of beliefs*
  + *Respect for cultural and group identity*
  + *Faith in social and political institutions which enhance participation of individuals and groups*

#### Oakes Test – whether something is demonstrably justified

* Test for justification of a *Charter* rights infringement.
* The burden of proof of a rights violation is on the challenger (standard of proof is BoP civil standard).
* The burden of proof of justification is on the govt.
* **Oakes test:**
  + (1) Is the objective of sufficient importance to warrant overriding a constitutionally protected right or freedom? Is it pressing and substantial?
  + (2) Are the means chosen reasonably and demonstrably justified? (This involves a proportionality test):
    - (A) Are the measures adopted **rationally connected** to the objective?
    - (B) Do the means **minimally impair** the right?
      * Doesn’t have to be an absolute minimum, just needs to be justifiable.
    - (C) Is there **proportionality** between the effects of the measures and the objective? (***Cost/benefit analysis)***
      * More serious infringements require higher level of justification from the Crown – proportionality

#### Vagueness

*R v Nova Scotia Pharmaceuticals*

* There are 3 times when you can argue vagueness as a defence:
  + (1) Invoke s 7 of the *Charter* 🡪 if a law is too vague, it would go against fundamental values of justice.
  + (2) Argue overbreadth/vagueness in s 1 analysis 🡪 too vague to be “prescribed by law”
  + (3) More specifically, the minimal impairment stage of s 1 analysis
* If law is intelligible to lawyers or judges, and capable of giving rise to legal debate, then it is not too vague.
* **Vagueness** = so unclear that we don’t know when it will apply – ambiguous
* **Overbreadth** = drafted so broadly that although we know what it applies to, it will be applicable to people whom the legislature did not intend for the legislation to be subject to.
* **Void for vagueness requires some sort of law – maybe even a regulation/policy. There has to be something understood to be “the rule”.**

*Butler*

* **Vagueness:** argue it in 2 spots – (1) Pre-*Oakes* (“prescribed by law” or s. 7) and (2) Minimal impairment (*NS Pharmaceuticals)*

## 3: Remedies

**You should always have a remedy in mind before you start a *Charter* argument 🡪 tell court what you want!**

* Always think about: what is the result I want? What remedy do I want? never just go in talking about the law without considering this
* Have to know where you want to end up; have to ask for a specific remedy and then have to justify asking for that remedy

### Remedial Options (Checklist) -- always have to ask this/think about this when going into a case

1. **Pre charter (pre 1982):** 
   * No statutory source for remedies
   * Everything decided under 1867 Act, everything flowed from the logic of the interpretation of the statute/statutory interpretation; and from the jurisdiction
   * Could be held
     + (1) Inapplicable (IJI, taxation, etc; valid statute but doesnt apply to specific defendant),
     + (2) Inoperable (Paramountcy) or
     + (3) Invalid (in whole or in part) (declarations made without statutory authority)
   * Variations:
     + Statute **read down** (restrictive interpretation to ensure statute stays valid)
     + **NEVER AN OPTION: READING IN** OR **SUSPENSIONS OF DECLARATIONS** (always immediate and retroactive)

1. **Post Charter:**
   * Now the world changed: 2 statutory sources
   * Statutory sources for remedies
     + S 24 (CA 1982) and s 52(1)

1. **s. 24 (1)** – For **govt action** or when **plaintiff's** *Charter* right was infringed and the situation calls for a **remedy specific for that individual**

* **Limited to Charter breaches**
* **A remedy that is *appropriate and just in the circumstances*.**
  + - * **S 24 remedies cannot undermine the purpose of the law** *Ferguson*
        + (So it is NEVER available for minimum sentences)
        + To do so would violate the separation of powers and encroach on legislative powers.
* Examples: injunction, damages, restitutionary order, anything consistent w/separation of powers, rule of law, and ordinary remedy considerations

1. **s. 52(1)** – For **laws** that are inconsistent with *Charter*.
   * **Basically laws inconsistent with Charter are given no force or effect**
   * **General**, applies to both federalism and charter cases
   * ***Schachter*** gives the guidelines for applying these remedies.
   * Suspension of declaration of invalidity, reading in (***Vriend***) or out, severance.

**S 52 is always applicable when a statute is challenged with regards to validity. So Federalism cases would qualify here. Also qualifies for reading in OR stay of execution.**

**Applies to both Federalism AND Charter – general provision dealing with validity of a law.**

**S 24 limited to Charter breaches. Can’t be invoked in a federalism case. Always available when the law is valid but there has been a breach by a government actor.**

**Under s 24(1), the range of options is not limited. Anything you want to ask for as a judicial remedy can be asked for so long as it is justified by the plaintiff. And must be done in a court of competent jurisdiction.**

**The ordinary rule is that you use either s 52 or s 24(1). You don’t USUALLY use both of them together. It is USUALLY an either-or.**

**Note:** Declarations of inapplicability (e.g. IJI) and inoperability (e.g. paramountcy) are also remedies.

Frame your argument with wanted remedy in mind and have to *justify* your request for the remedy you want

* So if you want a particular remedy, go see the justifications for using that remedy in these leading cases
* Know where to find the arguments and the general guidelines used for each type of remedy

#### Three Steps to Find a S 52 Remedy

*Schachter*

* (1) Identify extent of inconsistency
  + Should be defined **broadly** where legislation fails first branch of Oakes or if purpose is unconstitutional
  + **Narrowly** where purpose sufficiently pressing and substantial but fails first part of proportionality test (no rational connection)
  + **Flexibly** where fails 2nd/3rd element of proportionality test
* (2) Determine whether inconsistency should be struck down/severed/read in and which parts
  + Only warranted in clearest of cases
  + Legislative objective is obvious and reading in/severance would further that objective
  + Reading in/severance = lesser interference than striking down
  + Choice of means to further objective = not unequivocal
  + Severance/reading in would not involve intrusion into legislative budgetary decisions so substantial that would change nature of legislative scheme
* (3) Determine whether the declaration of invalidity of that portion should be temporarily suspended.
  + Should be done if striking down legislation without enacting something in its place = danger to public
  + Would threaten rule of law
  + Would result in deprivation of benefits for person whose rights infringed (underinclusiveness)

#### Five Steps to Sue for Damages

*Ward*

* **5 steps to sue for damages:**
  + **(1) P must prove the Charter breach**
  + **(2) P must justify damages as a remedy** – functional justification (e.g., compensation [including intangible interests like embarrassment], deterrence, vindication of *Charter* rights).
  + **(3) Government has burden of bringing up counter-factors of why damages are inappropriate**
  + **(4) Quantum assessment**
  + **(5) Must be done in a court of competent jurisdiction**

#### Five Considerations for “appropriate and just remedy”

*Vriend, Ward*

* Five considerations for “appropriate remedy” (echoed in *Ward*):
  + *Meaningfully vindicates claimants rights*
  + ***Legitimate means within constitutional democracy* (“cannot depart unduly or unnecessarily from the judicial role”) [Edinger really likes this]**
  + *Must be a judicial remedy* (of kind; “fair”)
  + *Fair to the defendant*
  + *s. 24(1) can evolve in common law*

#### Court of Competent Jurisdiction

* **Conway test:**
  + **(1) Is the administrative tribunal a court of competent jurisdiction?** 
    - **Yes, if it is both “authorized to decide questions of law” and has not been excluded from *Charter* jurisdiction by statute.**
  + **(2) Does the administrative tribunal have the statutory authority to grant the particular remedy at issue?** 
    - **Yes, if “the scope and nature of the Board’s statutory mandate and functions” provide the authority to grant a particular remedy.**
    - **This step involves a determination of legislative intent including delineating the authority provided under the relevant statutory framework (mandate, structure, and function).**
* Power to grant Charter remedies generally is based on whether they can adjudicate on questions of law
  + Degree of expertise in that particular field. For example, labour tribunal deciding labour issue/remedies.
  + This is of course restricted if the statutory provision creating the powers of the administrative tribunal prevents specific remedies
* Administrative tribunals are courts of competent jurisdiction for granting Charter remedies, subject to exceptions such as statutory restrictions

#### Severability

*Schachter*

* **Severability:** Consider a provision in comparison to rest of statute 🡪 can it be severed? (Generally must request this remedy).
  + **Guiding question is whether or not the legislature would still have enacted the statute if they’d known this provision would be severed.**
  + If yes, you can sever. If no, you can’t.
  + Usually happens with overinclusive or underinclusive cases
    - Overinclusive identify the inconsistent portion and make sure the remainder is in keeping with the legislative purpose/objective
      * Can cut a bit out
    - Underinclusive, severe out the portion that limits others (but not the whole statute)
      * Would the legislature have enacted the statute without that provision? If not, then you can’t severe.
  + Depends on finding of invalidity (lack of jurisdiction or breach of Charter provision)
* **Reading in and severing can only be used in the CLEAREST OF CASES**

*Vriend*

* **Rules of severance:**
  + (1) Would legislature have passed that statute without that provision?
  + (2) Do the other provisions rely on the provision?
  + (3) Is that provision integral to the statute?

#### Reading in

*Schachter*

* **Reading in:** omissions/underinclusivity. Must consider budgetary limitations and compare sizes of omitted/included groups.
  + **Only do this if consistent with legislative intent:** would they have done it or been happy with it? Is this the only way to fix it?
  + Not used in this case because group being read in was WAY larger than the group already getting benefits. Focus is on the benefits.
* **Reading in and severing can only be used in the CLEAREST OF CASES**

*Vriend*

* Problem of reading in something that the legislature deliberately excluded 🡪 separation of powers
  + Intrusion into sphere of legislative branch
  + However, Court decides it is justified for the protection of minorities – it is not undemocratic
* You can only read in for underinclusive legislation **if it respects the role of legislature and the purpose of the *Charter***

#### Suspension of Declaration

*Schachter*

* **Suspension of declaration:** can’t do this too often/too long because *Charter* breaches continue during it. Warranted if suspension would cause DANGER TO THE PUBLIC, THREATEN THE RULE OF LAW, or is invalid because of UNDERINCLUSIVENESS.

#### Policy

* **Court must always consider the separation of powers –** can’t overstep their boundaries and interfere with the legislative branch (particularly when reading in).
* **See *Vriend* and reading in**

# Charter Rights

## 1: Freedom of Expression

**s. 2**. Everyone has the following fundamental freedoms:

(b) freedom of thought, belief, opinion & expression, including freedom of press & other media of communication

Key word – EVERYONE – not just every person. EVERYONE.

**Questions:**

**1)** What is the scope of FOE (see ***Irwin***)?

🡪 Are there any limitations? Qualifications? What are they?.

**2)** How do you make a case for an infringement? *Oakes* test is flexible.

🡪 If Crown, argue for either violence (***Irwin***) or public place exceptions.

*Irwin Toy* is the leading case and the rest of the cases mostly build on it

### Sequence

On an exam if you are a challenger you need t go through all steps – do I have a defendant? Characterize the defendant. Characterize it as core aside from periphery. Argument or purpose or effect? Etc…

1. **Start with a D – s 32 analysis – has to be government defendant**
2. **The burden is on the claimant to establish that the activity/form of expression falls within s 2(b)** – pretty easy to do since most activities have meaning (even silence in some scenarios) – an exception is violence and some particular locations may not be available for FOE
   1. **Violence is NOT covered by 2(b)** *Irwin*
   2. **There is no requirement that the activity be purely or predominately expression to qualify for 2(b) 🡪 can be incidental.** *Baier*
      1. **Doesn’t have to be purely expression – just SOME expression in there.**
   3. *Montreal v Numbers case* To answer whether a location is one where an individual would expect protection for expression, the following factors should be considered **(in light of 3 purposes of 2(b)**):
      1. (a) Place’s historical or actual function? (historical use for public discourse indicates consistent 2/ 2(b) purposes).
      2. (b) Whether other aspects of the place suggest that expression within it would undermine the values underlying free expression (i.e., is the current function incompatible with 2(b) purposes?).
         1. Is it essentially private despite being gov’t owned?
         2. Does the current function require privacy or limited access?
         3. Is it compatible with open public expression?
3. **The form of expression has to be characterized and located within 2(b) (either core, periphery, or somewhere between) which defines the extent of judicial expression** *Irwin*
   1. Success depends largely on how you characterize the form of expression
   2. **Right to receive info is at the periphery of 2(b).** *Bryan*
   3. **Political expression is usually considered at the core of s 2(b).** *Bryan*
   4. **For instance, commercial expression is protected but is not at the core of 2(b).** *Irwin*
   5. **Core forms of expression get more protection than periphery/fringe forms of expression**
   6. **Characterize the form of expression as core if possible if you want to get protected**
   7. **Consideration:** if the activity is for profit it will be afforded less protection. *Butler*
   8. *Whatcott* **Para 112 – not all expression will be treated equally under s 1 – it does make a difference based on how the form of expression is characterized**
      1. **The further it is from the core, the harder it is to justify**
      2. **Expression can be defined in multiple ways i.e., hate and political**
4. **The claimant has a burden to establish that the FOE guaranteed by the charter has been infringed (his or her FOE has been infringed)**
   1. **Analyze purpose vs. effect:** Assuming there is a law, you can check whether the purpose/intention is to permit the expression or whether it is just an effect of the law
      1. **Purpose =** aimed at infringing/preventing the expression
      2. **Effect =** incidentally infringes
   2. **Shifting purposes doctrine** *Butler*
      1. **There are other statutes and provisions in existence in Canada which have been in existence for decades. The shifting purposes doctrine says that you can’t now today invent a new purpose. You can’t shift the purpose to a purpose that we now find acceptable.**
   3. If it is an effect of the law, then the claimant has to relate the infringement to the values *Irwin*:
      1. **(1) Seeking and attaining the truth**
      2. **(2) Participation in social and political decision making**
      3. **(3) Individual self-fulfillment and human flourishing**
5. **At this point, it may be suggested by the defendant that the claimant is making a positive claim to a statutory regime**
   1. **Positive vs. negative rights:** negative is telling the govt to get lost, positive is asking them to do something *Baier*
   2. If this argument is made out, then the claimant has to work his or her way through the Dunmore/Baier factors
      1. (1) Is the activity in question a form of expression?
      2. (2) Does P want a positive entitlement to govt action or the right to be free from govt interference? If positive, go to 3
      3. (3) Consider the 3 *Dunsmore* factors – all 3 must be satisfied for an infringement to be made out
         1. (i) Claim grounded in fundamental freedom of expression rather than in access to a particular statutory regime
         2. (ii) Claimant has demonstrated that exclusion from a statutory regime has the effect of a substantial interference with s 2(b) or has the purpose of infringing 2(b).
         3. (iii) The govt is responsible for the inability to exercise fundamental freedom
      4. (4) If all 3 satisfied, move to s 1 analysis.
6. **Assuming the claimant makes out the infringement, the burden shifts to the govt under s 1**
   1. This is where certainty departs
   2. **Even to get to the Oakes test, you need to find that there is a law, and of course you can argue that it is so vague that it isn’t a law (***Butler***?)**
      1. If you manage to persuade the court that the law is so vague that it is unintelligible, there is no law and the government defence falls down
   3. Otherwise, *Oakes* test
   4. *Bryan* For political expression cases:
      1. **Factors for whether evidence is required and what degree of deference to govt (when infringing political expression and justifying it): Look at these factors in the context of the provision – can use them to dispense with evidence and defer to government – you must work through these for evidence in political expression cases, likely in other cases too!**
         1. (1) The nature of the harm and the inability to measure it 🡪 absent determinative social science evidence, logic and common sense can be used
         2. (2) The vulnerability of the group protected 🡪 certain degree of maturity and intelligence is presumed. Not vulnerable = no need for protection
         3. (3) Subjective fears and apprehension of harm
         4. (4) The nature of the infringed activity
7. **The final stage is to go to the remedy and then you have a choice between s 52 and 24 depending on the situation**
   1. Is it a law/policy justifiable as law or not?
8. **If there is no law, and it is a case in which there is apparently a statute but it is just unintelligible, then there can’t be any justification, and the challenger should win because there is nothing for the government to defend – you can’t go into the Oakes test because there is nothing to evaluate**
   1. This works extremely well if there is some kind of statutory provision which is the equivalent to a statute or regulation – something that is intelligible and can be evaluated in terms of proportionality
9. **What happens if it is a ministerial decision (gives discretion to government actors), and there is no law?**
   1. The law is unimpeachable – it is neutral
   2. There is no law to challenge since discretion was given
   3. Of course they do evaluate the discretion and no one automatically wins or loses at that point
   4. Now what you do as a challenger:
      1. Do you use the Charter values, or assess the validity/merits of the decision on the grounds of administrative reasonableness?
      2. Courts differ into which to use.

## 2: Freedom of Religion

**Freedom of conscience and religion. S (2)(a)**

* S 2(a) creates individual and collective rights
* Freedom of religion is often claimed for a community or organization, and sometimes even for a corporation
* SCC is very reluctant to delve into religious beliefs
* Prevents government to force compelling or abstaining from religion
* **Freedom of religion can be limited when causes harm to others** *Multani*

**Religion:**

* Not precise
* Sincere belief – not rigorously scrutinized
* *Syndicat* **Religion:** freely and deeply held personal convictions or beliefs connected to an individuals spiritual faith and linked to one’s self-definition and spiritual development, allowing to foster connection with divine or with object of spiritual faith.
  + **Individual must show a sincere belief in the undertaking to connect (good faith, not capricious or fictitious)**

#### What is freedom of religion? What does claim require?

*Big M Drug Mart*

* Freedom of religion is about being free from state coercion and **at least** includes freedom of religious speech, including “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”.
* Speaks on purpose of s 2(a):
  + Any individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates so long as they do not injure others or their parallel rights to hold and manifest beliefs/opinions of their own
  + Equally protected are expressions and manifestations of religious non-belief and refusals to participate in religious practice
* Government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose.

*Syndicat*

* **Freedom of religion claim requires:**
  + **(1) A practice or belief, having nexus with religion, personal connection with divine or subject of spiritual faith irrespective of whether particular practice or belief is required.**
    - **Either objectively required OR subjectively believes that it is required by religion OR that they sincerely believe the practice engenders a connection to spiritual faith as long as practice has nexus w/ religion**
  + **(2) Sincere in belief**
    - **Religious fulfillment is subjective and personal**
    - **Just has to be LIKE religion, does not have to be one**
    - **Does not matter if religion changed over time**
* **Waiving freedom of religion must be voluntary, freely expressed, and with a clear understanding of the true consequences and effects of so doing if it is to be effective.**
* **Claimant need not show an objective religious obligation to invoke freedom of religion!!!**

*Multani:*

* Claimant of freedom of religion infringement must prove:
  + (1) They SINCERELY belief in practice or belief that has a nexus with religion (not objective)
  + (2) Impugned conduct of third party interferes in a manner that is NON-TRIVIAL or NOT INSUBSTANTIAL with their ability to act in accordance with that practice/belief

#### Who can claim freedom of religion?

*Big M*

* Freedom of religion is a personal freedom and a corporation cannot have a conscience or a religious belief.
  + Only people can apply under s 24(1) for *Charter* remedy.
  + People and corporations can apply for s 52(1) remedy for no force or effect.

*Loyola High School*

* **The question is whether or not the high school could have been able to claim religious freedom**
  + **Majority says that she is not going to decide on whether or not corporations or organizations in general have F.O.R.**
  + **What she is going to say is that religious institutions can claim the benefit of freedom of religion**
  + **McLachlin – “religious organizations can claim the protection of s 2(a)”**

#### What degree of infringement is permitted?

*Big M Drug Mart + Syndict*

* For an infringement, must be more than insubstantial/trivial.

*Alberta v Hutterian Brethren*

* Legislatures can only be asked to impose measures that reason and evidence suggest will be beneficial.
* No barometer to measure seriousness of particular limit on a religious practice.

#### Justification

*Alberta v Hutterian Brethren*

* The only real issue in the court is whether or not the Alberta law could be justified. Here we have a s. 1 analysis
  + The real controversy here is at the last stage of the Oakes analysis (the cost/benefit analysis)
  + This is rare because infringement cases usually resolved @ minimal impairment
* The analysis is different when you get to cost/benefit
  + In the earlier stages of the Oakes’ test, what you are measuring is purposes and objectives. In the cost/benefit analysis, you are looking at EFFECTS – the EFFECTS of the law.
  + When you are taking account of the EFFECTS of the law, you are measuring the impact of the law on Charter values
  + One of the EFFECTs here is that liberty of the Hutterites is being impacted
  + The majority, speaking through McLachlin, says that the question here is whether the Hutterites still have a meaningful choice as to their religious practice

*Whatcott*

* **The Court applied the same justification analysis to the infringement of freedom of religion. The Court held that it does not matter whether the expression at issue is religiously motivated or not; if, viewed objectively, it exposes or is likely to expose the vulnerable group to detestation and vilification, then the religious expression is captured by the hate speech prohibition.**

## 3: Access to Justice

#### BCGEU v British Columbia (Attorney General), *1988 2 SCR 214*

* This case posits physical access to justice vs. individuals’ *Charter* rights.
* The rule of law is the very foundation of the *Charter* – unwritten principle
* The rule of law cannot exist without **access to justice:** a timely, physical access to justice through the courts is an aspect of the rule of law.
* However, there is no specific *Charter* right for access to justice 🡪 *Charter* values are applied instead.
* **Justice delayed is justice denied.**
* **Contempt of court –** conduct designed to interfere with proper administration of justice. It is “criminal” in that it transcends the limits of any dispute between particular litigants and constitutes an affront to the administration of justice as a whole.

#### British Columbia (AG) v Christie, *2007 SCC 21*

* **There is no positive right to access to justice in that there is no general constitutional right to counsel.**
* **The rule of law does not extend to a right to be legally represented in court.**

#### Trial Lawyers Association of BC v BC, *2014*

* **TRIAL Judgment:** hearing fees are invalid. Independence of judiciary requires that there be access to the courts. Courts are only place where government and citizens are equal.
  + Criticized government – treating litigants instead of consumers, which is not the case.
* **SCC:** any hearing fees that deny people access to the courts infringe the core jurisdiction of s 96 (provincial) courts.
* **Thus, access to justice is not limited to PHYSICAL access to the courthouse like in BCGEU.**