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CONSTITUTIONAL PROCEDURE

1. REFERENCE POWER

* Privilege of the government
* (+) speed, economic, efficient
* Very persuasive to the government
* Cannot be appealed if referred directly to SCC

2. ORDINARY LITIGATION

A. DECLARATORY ACTION/TEST CARE

* 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 (Burowski).

Public Interest Standing:

Canada v Downtown Eastside Workers (2012)

F: Constitutional challenge to the prostitution references of the *Criminal Code*

I: Whether they should be granted standing?

R: Requirements: (1) Serious Justiciable Issue; (2) Plaintiff’s genuine interest OR directly effected; (3) No other reasonable/effective means

**Granted standing.**

Not a strict test, not rigid rules. Weighed cumulatively and in light of their purpose.

B. LIS INTER PARTES

* Dispute between parties to the dispute
* Defendants can always challenge the constitutionality of a provision (*Big M Drug Mart*)
  + **Any accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid**

GENERAL APPROACH TO INTERPRETATION

Edwards v Attorney General (Canada) 1930

Question: Does “qualified persons” of s.24 of BNA Act 1967 include women? Can women be summoned/become members of the Senate? 🡪 YES

Reasons:

* Reference from member of the public
* External Evidence – legal systems (women in public office) 🡪 No
* Internal Evidence
  + Original meaning: both sexes
  + Some sections used “persons” and “males” indicating they are distinct, s.11 requires persons to include women

Ratio: **Living Tree Metaphor🡪 constitution to Canada is subject to development; do not want to cut down the provisions through a strict, narrow construction: want a broad liberal reading; Can grow within its natural limits and adjust according to current needs**

* **This is how you approach all interpretation of the Constitution Acts**

***Reference re: Secession of Quebec***

* Un-justiciability 🡪 When breaches role in separation of powers (beyond proper role), imprecise question or parties don’t provide sufficient information
* **Unwritten principles (federalism, democracy, rule of law, respect for minorities) can be used to fill gaps. They are not exhaustive. Can be used in any division of powers or *Charter* case (supplement the constitution)**
* **Use in ANY Constitutional case! 🡪 as support**

**ISSUE #1: VALIDITY: Is the statute valid?**

PEACE ORDER AND GOOD GOVERNMENT

EMERGENCY BRANCH:

**UPHOLDING** FEDERAL LEGISLATION:

* First recognized in *Fort Frances*
* Federalism can be placed aside in times of emergency – CAN usurp provincial jurisdiction and the s.92 heads of power (*Fort Frances* – property and civil rights 92(13))
  + Can be extended after emergency if no proclamation of peace (Fort Frances)
* Must be **explicit** when using the power (Beetz dissent Anti-Inflation)
  + In both Hansard and legislation itself
* Must be **temporary** (Beetz dissent Anti-Inflation, affirmed in Crown Zellerbach)
* Only need **some rational basis for believing** its an emergency, with extrinsic evidence (Anti-Inflation Case)
  + *Anti-Inflation*: high inflation & unemployment 🡪 reason for policy
* Framing legislation:
  + Wide scope & no preamble suggests emergency legislation (Anti-Inflation Case)
* Examples upheld: Anti-inflation legislation

**CHALLENGING** FEDERAL LEGISATION:

* Commencement:
  + **Argue no rational basis** for determining emergency (*Anti-Inflation*)
  + Parliament was not **clear and explicit** (dissent *Anti-Inflation*)
  + MUST be **temporary legislation** (dissent *Anti-Inflation*)
    - Even if it IS temporary, may not be emergency legislation *(*dissent *Anti-Inflation*)
  + The scope of the legislation does not indicate Parliament acting out of crisis (*Anti-Inflation*🡪 public sector not bound, private sector bound)
* Continuation:
  + Burden on challenger🡪 must have **very clear evidence** (*Fort Frances)*
    - Not expertise of judiciary, therefore deference to the government
* Use extrinsic evidence (admissible and necessary)

**NATIONAL CONCERNS BRANCH:**

**UPHOLDING** FEDERAL LEGISLATION:

* Subject matter + geographic distribution (Local Prohibition) – affirmed in Canada Temperance case
  + Must be a **national concern** (Local Prohibition Case) – but can be any subject
    - Must go beyond a local concern, inherently concerned with dominion as a whole (Canada Temperance case)
    - Must respect the provincial powers and their autonomy (federalism) (Local Prohibition Case)
      * Can touch on s.92 heads (Canada Temprance)
      * But can overlap with provincial jurisdiction (may be room for provincial aspects – **double aspect doctrine**) (Canada Temperance)
        + Ex. Aeronautics case
    - POGG as residual (Local Prohibition Case)
    - **Can become a matter of national concern (evolution argument)** (Local Prohibition Case, Crown Zellerbach)
      * Characterize the subject matter, select a label that is not too broad, not too narrow and then make arguments about provincial inability to deal with the matter on their own (singleness, distinctiveness and indivisibility)
  + **Once a subject matter is but in national concerns branch under POGG it belongs permanently** ~~and exclusively~~ **to the federal government (provinces cannot legislate)** (Aeronautics case)
    - **Double Aspect**: Even once a subject matter is allocated to POGG, there is still room for argument that certain aspects are not federal (it is plenary jurisdiction, not exclusive) (Edinger)
      * Can be potentially subdivided into provincial aspects (Edinger)
      * Marine pollution is in POGG 🡪 but if there is another kind of pollution, so pollution as a subject is divisible and there can be a provincial aspect
      * The double aspect is not eradicated because a subject matter is in POGG, even though its permanently in POGG.
      * Something connected w/ aeronautics can still be provincial
      * It is still possible to characterize subsets of a larger subject matter and say they are provincial
  + **Must be single, distinctive and indivisible** (Beetz dissent in Anti-Inflation)
    - Cannot be broken down into subsets
    - Must be clearly distinguished from matters of a provincial concern (Crown Zellerbach)
    - The impact on provincial jurisdiction must be reconcilable with the distribution of power under federalism in the Constitution (Crown Zellerbach)
    - Must have a degree of unity that makes it specific and indivisible (Anti-Inflation dissent)
    - When selecting label: not too broad, not too narrow (ex. environment v marine pollution in *Zellerbach*)
    - NOT SINGLE/DISTINCT/INDIVISIBLE: Inflation (Anti-Inflation), Environment (Crown Zellerbach)
    - Can use **provincial inability** to determine this **BUT NOT ESSENTIAL** – used in Aeronautics case, Crown Zellerbach
      * Ex. Marine pollution was a special kind of pollution (distinct), difficult in determining the boundaries of internal/external water (indivisibility), distinguishable from fresh water (singleness, indivisibility)
        + Make pragmatic arguments
* Examples upheld: Temperance 🡪 **public order and safety** (In Russell, Canada Temperance Case) **Aeronautics**, **marine pollution** ~~environment~~(Crown Zellerbach),
  + NOT: Internet, Cloning (provincial jurisdiction: health; divisible: human cloning? Vegetable cloning? Cells?; **if it’s bad for society 🡪 criminal law is better**)

**CHALLENGING** FEDERAL LEGISLATION

* Argue that it doesn’t have the geographic distribution or subject matter:
  + Not a matter of national concern (Local Prohibition Case) – **must respect federalism & autonomy of the provinces**
    - Argue concern/matter/problem does not go beyond a local concern (Canada Temperance case)
      * NOT inherently concerned with the dominion as a whole
    - Argue provinces could deal with it within their legislative authority effectively
  + Argue that it would not be favourable to have the matter permanently under federal jurisdiction (once POGG NCB exclusively federal – Aeronautics case)
    - Ex. Would be better dealt with locally (more effective, efficient),
    - **Argue that the province could legislate within its jurisdiction even if there was an effect on a s.91 head**
* **Argue it doesn’t demonstrate singleness, distinctiveness and indivisibility (**Anti-Inflation, Zellerbach)
  + Can it be divided?
  + Is it too broad? (ex. Environment v Marine pollution)
  + Doesn’t exhibit a degree of unity that makes it specific and indivisible? (Anti-Inflation dissent)

GENERAL POGG

Russell v The Queen (1882) FEDERAL STATUTE

Facts: *Canada Temperance Act* allowed local municipalities to vote on whether they wanted to ban liquor by referendum. P charged with selling liquor.

Argues: Ultra vires the federal government

* Argues it falls under:
  + ~~92(9) licenses to raise revenue for provincial/local/municipal purposes~~ not a fiscal law
  + ~~92(13) property and civil rights~~ no 🡪 dealing with public order/safety
  + ~~92(16) all matters of a merely local/private nature in province~~ no 🡪 objective for uniform national legislation to promote temperance

**Valid 🡪 intra vires the federal government under**

**POGG as an umbrella 🡪the broadest POGG ever got. If it doesn’t fall in provincial jurisdiction, then automatically falls in federal jurisdiction.**

* This would mean that if a clause didn’t fall under 92, do not need to enumerate the 91 head a statute would fall under (could be anything)
* Requires: ONLY **geographic distribution** (minimal)

Local Prohibition Case (1896) - AG Ontario v AG Canada ~~PROVINCIAL STATUTE~~

Facts: Ontario legislature enacted s.18 Ontario Act (An Act to improve the Liquor License Act), essentially the same as the Canada Temperance Act

POGG cannot be used to justify legislation that are of local/provincial interest just because of their geographic distribution (would destroy autonomy of provinces – must respect **federalism**)

Provinces should retain jurisdiction over matters provincial/local interest

geographic distribution **+ subject matter (national concern)**

Was valid (**double aspect doctrine)**, but subject to **paramountcy** 🡪 that federal government wins.

**Narrows POGG, must persuade court that subject matter is of national concern (national concerns branch)**

**POGG is a residual clause, not an umbrella.**

**Local matters can become matters of national concern. 🡪 evolution argument, used later in the *Securities* case**

EMERGENCY BRANCH

Fort Frances Pulp & Paper v Manitoba Free Press (1923) FEDERAL STATUTE

D – manufacturers P – publishers

Facts: P wanted to recover sums they paid for paper which were over controlled prices regulated by law in the *Paper Control Tribunal.* Held intra vires in lower courts.

* 1917 GG made Order in Council authorizing fix quantity/price newspaper, tended to 1918. Then set up *Paper Control Tribunal*
* *War* *Measures Act* –exists from proclamation of war – proclamation of peace
  + GG has power to do/authorize acts necessary for security/defense/peace/order/well-being of Canada
* Proclamation of peace hadn’t been issued (unsure) – War had ended

**Creates emergency branch 🡪 gives great power to the federal government during times of war or extreme emergency, can infringe on provincial jurisdiction (and can be extended afterwards if no proclamation of peace)**

* In this case, issues of 92(13) **property and civil rights 🡪 POGG**
* **Federalism** can be placed aside in times of war

**When is emergency legislation reviewable?**

🡪 When emergency is over, but regulation is continuing. Heavy burden on challenger🡪deference to Federal government. **Clear evidence required for court to overrule Parliamentary decision re: emergency**

* + Information of whether an emergency continues is not expertise of judiciary

i. Reference: Anti-Inflation Case (1976) FEDERAL STATUTE

Facts: Federal government passed the *Anti-Inflation Act* which set wage and price controls. Reference was to determine its validity, and whether it was binding on the Ontario public sector.

Reasons: (7:2 valid)

* Serious national concern (inflation contrary to interests of all Canadians)
* Some issues cannot be dealt with by depending on provincial collective action (*Fort Frances*)
* Emergency:
  + Scope indicates crisis
  + No preamble 🡪 suggests crisis
* **Only needs to persuade the Court that there is SOME rational basis for believing there is an emergency the legislation** 
  + **🡪 use when an emergency has arisen to create legislation**
  + By extrinsic evidence
  + Deference for government (**very low standard**)

Beetz, Dissent: \***LEADING JUDGEMENT ON EMERGENCY BRANCH\***

* Reduction of inflation aggregates several heads 🡪 to recognize it would render most provincial powers meaningless
* EMERGENCY BRANCH:
  + Must be **explicit** when using this power
    - *Anti-Inflation* does not pass this test
  + Must be **temporary**
    - Emergency legislation has to be temporary, but **temporary legislation does not mean that its emergency legislation**

NATIONAL CONCERNS BRANCH

Ontario (AG) v Canada Temperance Federation (1946) FEDERAL STATUTE

Facts: Action against Federal Government 🡪 questioning validity of *Canada Temperance Act* (decision in *Russell)*

Argued: (1) Either *Russell* was decided wrong (not emergency); or (2) if *Russell* was based on emergency, it was no longer an emergency

🡪UPHELD

Reasons: *CTA* was upheld not because of an emergency (permanent not temporary legislation)

* True test is subject matter
* If gov can legislate in 1878, also have power to re-enact provisions with objective of preventing a repeat of the same state of affairs
* Can legislate for prevention (emergency not necessary)
* Can take away power from the provinces

**Opened up POGG again. Not confined to emergency branch. Upholds *Local Prohibition Case* –** meets subject matter standard.

**National concerns branch 🡪 subject matter that goes beyond a local concern, inherently concerned with dominion as a whole (may touch on other matters within provincial jurisdiction – matters may overlap, there may be room for provincial aspects (double aspect doctrine))**

Johannesson v Municipality of West St. Paul (1952) ~~PROVINCIAL STATUTE~~

Facts: Appellant purchased land for float planes, then municipality enacted by-law (s.192 *Municipal Act* allowed them to do this) prohibiting aerodromes in that area. TJ: *intra vires*, CA: affirmed.

Reasons:

* Previous case PC decided that aeronautics was in federal jurisdiction, matter of national interest (subject matter) 🡪 affects body politic
* **Once decided a subject is of national importance, provinces cease to have any legislative jurisdiction. Federal jurisdiction is exclusive.**
* Pith and substance: property and civil rights BUT closely connected w/ aerial navigation 🡪 federal
* **Provincial inability**🡪 if some provinces refused to cooperate/accept uniform procedures for use of air space and ground facilities

Ratio:

* Affirms **subject matter** is sufficient to be put in **National Concerns Branch** (*Local Prohibition)*
* Airports is a subject matter that demonstrates **double aspect doctrine** – provincial legislation is invalid insomuch as it relates to aeronautics but other aspects (ex. building standards) may not be exclusively federal.

**Once subject matter under POGG, belongs exclusively to Federal government, provinces cannot legislate permanently.**

ii. Reference: Anti-Inflation Case (1976) FEDERAL STATUTE

Beetz: Dissent: 🡪 *ultra vires* as a whole (upheld under emergency branch)

* NATIONAL CONCERNS BRANCH:
  + Any subject matter that gets permanently allocated to POGG national concerns must have a **singleness, distinctiveness and indivisibility** (cannot be broken into subsets)
    - **In order to qualify under national concern branch, had to be distinct in identity from provincial matters with** a degree of **unity** that makes it **specific and indivisible**
    - Inflation lacks specificity
    - 🡪 carried into *Zellerbach*

R v Crown Zellerbach Canada (1988) FEDERAL STATUTE

Facts: Federal government enacted *Ocean Dumping Control Act*. Zellerbach was dumping in internal provincial waters, permit wasn’t in vicinity of dumping site. Argues s.4(1) of *ODCA* is *ultra vires*. AG argued that it was within POGG for the prevention of marine pollution.

Reasons:

* Marine pollution cannot fit into s.91 heads of power
* 1. Affirms Beetz in *Anti-Inflation Case* 🡪 national concern doctrine is distinct from emergency, which must be **temporary**
  + 🡪 Rejects *Canada Temperance Case*
* 2. **Can apply to new matters, and matters which were once local which become national concern**
* 3. Affirms**: singleness, distinctiveness & indivisibility** (*Anti-Inflation)*
  + Which clearly distinguishes it from matters of a provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power
  + Relevant to consider **provincial inability test** 
    - Other provinces unable to deal with it individually?
* Application: Marine pollution was shown to be a special kind of pollution, pragmatism: difficulty in determining boundaries of internal/external water (indivisibility), distinguishable from fresh water (singleness, indivisibility)

\*strange they accepted marine pollution as a distinct, indivisible matter of national concern

* + - Could have justified it under shipping or sea-coast fisheries

CRIMINAL LAW

|  |
| --- |
| 91(27) enables the Federal government to legislate for the *Criminal Code* and beyond the CC  92(15): Allows provinces to impose punishment by fine, penalty or imprisonment 🡪 not stand-alone: relies on a statute being enacted under another 92 head (usually 92(13) property and civil rights or 92(16) matters of merely local & private nature)   * **Claimant argues that the statute is really 91(27) and therefore provincial law does not apply b/c ultra vires**   92(14): Provincial power in relation to the courts |

1. **Definition** (*Margarine*)

* i. **Prohibition backed by penalty**
  + Regulatory or prohibitory?
    - Not JUST prohibition and penalty… (dissent Hydro Quebec)
    - Nature and extent of regulation, the context and subject matter (dissent *Hydro Quebec*)
* ii**. Valid public purpose**
  + Use evidence

2. **Pith and substance of legislation**

3. Look at provision (if contested) is it aimed at promoting the dominant purpose of the statute? If the scheme is valid 🡪 provision valid) (Hydro Quebec)

**DEFENDING A FEDERAL CRIMINAL LAW**

Subject matters: (set out in Margarine Reference)

* Is it a matter traditionally within criminal law competence?
  + When enacting the long-gun registry, found it to be valid criminal law🡪 guns (merely incidental effects on legislative jurisdiction there are still provincial aspects leftover related to guns (sales etc.)) (*Quebec v Canada*)
* **Does not have to deal with a traditional criminal law concern** 🡪 Can create new laws (RJR)
* **Morality** (*Russell v The Queen, Margarine Reference, Assisted Human Reproduction*)
* **Health** 🡪 but legitimate public health evil (*RJR MacDonald, Assisted Human Reproduction)*
  + List of 3 features of statutes that are normally upheld in Assisted Human Reproduction
* **Security** (*Human Reproduction*)
* **Public peace and order** (*Margarine Reference*)
* **Colourability is the only limit (RJR & Hydro Quebec)**
  + Doesn’t matter if the govt has a bad motive 🡪 *Quebec v Canada*
* Do not need a threshold for harm (*Malmo-Levine, Assisted Human Reproduction* majority)
* CAN:
  + Have flexible form: can embed a prohibition backed with a penalty for a valid public purpose **within a more extensive regulatory scheme** (*RJR MacDonald)* 🡪 but need **public purpose and for its pith and substance be in relation to criminal law legislation**
    - *RJR*: Prohibits tobacco advertising and promotion, regulates aspects of both also (labels, toxic components etc.)
    - **Form is not controlling**
    - Back it up with extrinsic evidence
      * *RJR:* harm of tobacco, idea that prohibition leads to black markets)
  + Legislate non-traditional criminal law concerns (*RJR MacDonald)*
    - Cannot confine criminal law to precise categories (*Assisted Human Reproduction*)
    - Can legislate in the “widest sense” (RJR)
  + If pith and substance relate to criminal law:
    - **Can indirectly control “evil” as long as aimed at the evil** *(RJR MacDonald*)
    - Can have large “carve-outs” or exemptions where Parliament does not want to prohibit
      * “Carve outs” mean that province can enact stricter legislation with no conflict in paramountcy (can comply with both)
        + *RJR*: exceptions for publications and broadcasts originating outside Canada
    - Can have incidental effects on provincial heads of power if its pith and substance relate to criminal law (*Quebec v Canada*)
  + \*Also has preventative power (Dupond)
* If the government wants to repeal legislation:
  + Given deference: if can enact it, can repeal it (look at original legislation when looking at repealing legislation, more flexibility in characterizing the issue) (*Quebec v Canada*)
    - When repealing, even if its not a prohibition backed by a penalty for a public purpose it can be characterized as criminal law - criminal law provision must logically be wide enough to give Parliament jurisdiction to destroy the data collected for the purpose of a criminal law provision

**CHALLENGING FEDERAL CRIMINAL STATUTE**

* Argue its NOT a valid public purpose
* **Colourable** 🡪 use extrinsic evidence (*RJR MacDonald,* also *Hydro-Quebec*)
  + What is the government ACTUALLY aiming at?
  + Effects of the legislation directly impinge on some other subject matter as to reflect some alternative or ulterior purpose
  + If you argue colourability 🡪 POINT to what it is actually aiming for (ex. regulate advertising, regulate a specific industry etc.) (*RJR*)
* Cannot be limitless 🡪 would make federalism hollow and make criminal law power have no limits (dissent *Assisted Human Reproduction*)
  + **Must address a real, objective evil & demonstrate** **a reasonable apprehension of harm** (dissent, Human Reproduction)
    - 🡪 ARGUE: there IS a threshold (dissent Human Reproduction)
    - Just because its new doesn’t justify it (dissent Human Reproduction)
    - Evil or threat must be real and must describe the risk of harm precisely enough that a connection can be established between the apprehended harm and the evil in question
    - Argue Malmo Levine and Majority in Assisted Human Reproduction were badly decided
    - Argue this would jeopardize the division of powers
* **Argue its real purpose is regulatory**
  + *Assisted Human Reproduction* 🡪 set up a national scheme to regulate human reproduction (mandatory national standards) 🡪 regulation of a health service
  + Dissent of Hydro Quebec (which Edinger Agrees): Subject matter determines if its regulatory or prohibitory, prohibition & penalty does not mean its criminal in nature
    - Nature and extent of regulation, the context and subject matter all determine whether its regulatory or prohibitory (dissent *Hydro Quebec*)
      * *Hydro Quebec*: Is there broad sweeping discretion for Ministers? Are there equivalency exceptions given to provinces?

**CHALLENGING PROVINCIAL LEGISLATION AS INVADING CRIMINAL LAW:**

* Does it use language directly from Criminal Code? (*Rio Hotel* – original statute)
* Despite regulatory form, trying to enforce code provisions (Rio Hotel)
  + Offences in “regulatory” program are not necessary for its purpose (Rio Hotel)
* Argue that the only thing local is its territorial ambit and the subject is relating to criminal law
* The heavier the penalty and the closer the terminology comes to describing conduct traditionally criminal🡪 criminal law (*Rio Hotel*)
* Argue supplementary not complementary
  + Trying to enforce Code provisions through regulation (*Rio Hotel*)
* Is the legislation **colourable**?
  + \*\*Edinger thinks that *Chaterjee* was 🡪 avoiding criminal procedure and protections that it offers (everything in the *Charter*)
* MUST be within a valid scheme of regulatory legislation (dissent Dupond)
  + Provincial prohibitions cannot be sustained by themselves to forbid conduct or behavior (dissent *Dupond*)
    - Dissent *Dupond* 🡪 there are no regulations that the sanction supports

\*Look at defending provincial legislation section, argue the opposite

**DEFENDING PROVINCIAL STATUTE AS NOT CRIMINAL**

92(15): Allows provinces to impose punishment by fine, penalty or imprisonment 🡪 not stand-alone: relies on a statute being enacted under another 92 head

1. **Emphasize property aspects (92(13))** 🡪 in the drafting or ex post factum (*Chaterjee)*

* There is no general bar to provinces enacting civil consequences to criminal acts in relation to provincial heads of power (property and civil rights) (Chaterjee)
  + *Chaterjee* 🡪 compensating victims (provincial jurisdiction 🡪 property based authority)
    - **Pith and substance: property rights**

2. Emphasize the local aspects of the problem, limited scope of the problem (**92(16)**) (*Dupond)*

* *Dupond* 🡪 only dealing with local public gatherings
* Emphasize **temporary** nature (Dupond)
* If its **transaction oriented** or a business and local 🡪 province has plenary jurisdiction (Rio Hotel)
* *Chaterjee* 🡪 Crime costs lots of money to province, should deter crime to suppress costs

3**. Employ regulatory techniques** – licencing, permitting, zoning

* Must be associated with a valid scheme of regulation (prohibitions cannot be sustained by themselves) (*Dupond,* dissent Laskin)
  + Otherwise, destructive to the principle of exclusiveness
* Does not become a matter of criminal law because it has a prohibition and makes it an offence to observe the prohibition (*Dupond*) 🡪 but what is a criminal law then?
* Prohibitions not sustainable by themselves (Dupond, dissent)

4. **Deal with the problem indirectly** (*Rio Hotel, Chaterjee)*

* *Rio Hotel* 🡪 use a licencing system to take away licence instead of obscene performance
* Instead of punishing individual, **punish supplier/regulator** (*Rio Hotel* – punish hotel instead of individual 🡪 more preventative)
* **Create a licensing scheme** (regulatory) that has a corresponding head of provincial power and attach regulations/conditions instead of prohibitions (*Rio Hotel, Chaterjee*)
  + Licencing scheme, fees, conditions to licence holders
  + **Make sure penalties are not too harsh** (avoid imprisonment)
    - BUT imprisonment is not fatal 🡪 *Dupond* by-Law: Penalties set up are fines and imprisonment and if fines are not paid, imprisonment
    - Don’t use language directly from Criminal Code (replaced with conditions) (*Rio Hotel)*

5. Emphasize the pre-emptive strike, prevention of crime (**preventative not punitive**) (Dupond)

* **Must identify its dominant feature (pith and substance) – can have incidental effects into s.91 heads**
* Suppress conditions likely to favour the commission of crimes (*Dupond, Chaterjee*)\*Feds also have this power
* Provinces have legislative jurisdiction over preventative power (local, temporary)
  + *Dupond* 🡪 preventing conditions conducive to breaches of the peace and detrimental to the administration of justice
* *Dupond* - Provinces can control vice & crime
  + Dupond 🡪 dealing with assemblies before the begin (preventative) versus the Criminal Code which prohibits them after they have formed (punitive)
* *Chaterjee –* can suppress crime through in rem action
  + Civil consequences for criminal offences **provided they province does so for its own purposes in relation to provincial heads of legislative power** (*Chaterjee*)
    - Can have punitive effects 🡪 as long as its dominant purpose is preventative (Chaterjee)
      * **Not colourable** \*\*Edinger thinks that *Chaterjee* was colourable

6. Don’t copy code provisions into the legislation (give away!)

* Form: do not use prohibition + penality, use regulations and conditions, do not use CC (*Rio Hotel)*

7. Go really broad (prohibit and regulate everything, don’t restrict to behaviour you really want to prohibit)

* Go wide, make it broad and get everything
  + In *Chaterjee*🡪 both federal and provincial offences, doesn’t single out offences (only concerned with the effects of crime)
  + In *Dupond* 🡪 broad prohibitions (all gatherings)

8. Provincial legislation is complementary NOT supplementary (*Chaterjee*)

9. If necessary, concede that legislation was concerned with morality, but it wasn’t the MAIN concern only a minor one (*Rio*)

10. Evidentiary point 🡪 avoid discussing the real problem that the legislature deals with (hide **colourability**)

11. Extrinsic evidence to support the pith and substance (*Dupond* – internal documents supported the bylaw as preventing crime)

Margarine Reference (1949) ~~FEDERAL STATUTE~~ (in part)

Facts: prohibited manufacturing/selling etc. margarine or butter substitutes (theory: margarine bad for heath)

Decision: Severance ordered (part of statute is bad but the rest is good and can stand alone) of*Dairy Industry Act*

Reasons:

* Scientific evidence🡪no risk to health. Just protection of an industry (not valid criminal law)

**Sets out scope for 91(27): Must be a prohibition coupled with a penalty enacted with a valid public purpose** (public peace, order, security, health, morality etc.)

RJR MacDonald Inc v Canada (AG) (1995) FEDERAL STATUTE

Facts:*Tobacco Products Control Act* prohibits, with exceptions, all advertising and promotion of tobacco products, adds health warnings, lists toxic components and produced in combustion

Reasons:

* Purpose: national public health
  + Includes extrinsic evidence that it is harmful
* Broad scope
* Health is not an enumerated head, can validly employ criminal law power
* Actual Intent: If their underlying intent was to encroach on provincial power to regulate advertising, would have regulated in more than 1 industry, if wanted to regulate tobacco industry would have relating to quality, pricing labour.
  + Regulated instead of prohibited because prohibition leads to black market
* **Does not have to deal with traditional criminal law concerns (Feds have power to create new laws), can legislate in the widest sense**
* **Can indirectly control elements (can criminalize an ancillary to an “evil”) as long as aimed at evil**
* **Form is flexible: can be largely regulatory and can contain exemptions** (which normally indicate regulations)
  + Exemptions as “clarifiers”
  + Ex. contains exemptions for publications and broadcasts originating outside Canada)
* **Colourability is the only limit on 91(27) other than definition (plenary power)**
  + To prove colourability 🡪 use extrinsic evidence

R v Hydro Quebec (1997) FEDERAL STATUTE

Facts: Minister of Environment made an interim order restricting PCBs to 1 gram per day. Hydro Quebec broke the order. Challenged 2 sections in statute and the interim order.

Reasons:

* Must be looked at in the whole scheme (provision aimed at promoting dominant purpose of statute & scheme is valid 🡪 provision is as well)
* La Forest 🡪 **Legislating under criminal is preferable over POGG**
  + POGG allows legislation in broad policy areas
  + Criminal must be more specific and still allows room for provinces to legislate on same subject matter (**double aspect**)
* **Does not preclude provinces from legislating to complement**

Dissent: \*Edinger agrees with this decision

* Probation & penalty does not mean its criminal in nature
* Subject matter determines if its regulatory or prohibitory
* Gives broad, sweeping discretion for Ministers of Health & Environment (criminal would likely not do this)
* Can except provinces that have equivalent legislation (unusual for criminal)
* Distinguish from *RJR MacDonald* 🡪 this contains no general prohibition, also a broad area of concern
  + Environment is more broad than human health

🡪 Regulatory (failed first requirement)

Reference re Assisted Human Reproduction Act (2010) FEDERAL STATUTE 4:4:1

Facts: *AHRA* regulated aspects of in vitro, prohibited cloning, determining sex for non-medical reasons, altering genome, removal of sperm/ova from someone <18y/o etc.

Reasons:

* Parliament can create regulatory schemes under 91(27) (Affirms *RJR* & *Hydro Quebec*)
* Pith and substance: upholding morality, some provisions: prohibiting public health evils & promoting security
  + Morality is a proper basis for 91(27) (*Russell v The Queen, Margarine Reference*)
  + Health – shared by feds and provinces
    - Must address legitimate public health evil (*RJR Macdonald*)
    - **Three constant features:**

**1. Human conduct**

**2. Injurious or undesirable effect**

**3. Health of members of the public**

* **No threshold for harm where Parliament can regulate** (*Malmo-Levine*)
* **Uses ancillary doctrine in an unprecedented way** (upholds the bulk of the statute instead of a single provision

Dissent:

* Finding regulatory provisions intra-vires would effectively oust provincial power over health due to **paramountcy**
* Should not be able to promote beneficial medical practices
* Pith and substance: regulation of assisted human reproduction as a health service
* Just because its “new” doesn’t justify it
* Must be an objective evil
  + Threshold: **reasoned apprehension of harm**
  + **It must be possible to describe the risk of harm precisely enough that a connection can be established between the apprehended harm and the evil in question**
  + Otherwise🡪 criminal law power would have no limits (colourable)

Cromwell:

* Disagreed with CJ in upholding the whole statute, but found more provisions valid than other 4.

Dupond Case - Attorney General Canada v Montreal (City) (1978) PROVINCIAL STATUTE

Facts:

* Appellant attacked validity of a by-law which set up fines and imprisonment in relation to public gatherings, assemblies or anything that endangers “tranquility, safety, peace, or public order in public places, parks” etc., prohibited assemblies for 30 days
* Frames as a way to safe guard civil liberties, prevent riots, safeguard public domain
* Dupond argues they are criminal law

Majority:

* Preventative, not punitive 🡪 prohibit all gatherings (even innocent ones)
  + Temporary, indicative of preventative nature
  + Only deals with it locally
* **Provinces have legislative jurisdiction over preventative power (local, temporary**)

\*NOTE: federal government also has preventative power

* + Code: forbids assemblies once they have been committed
  + Ordinance: aims at preventing them in the first place
  + **Complementary not supplementary**
* Provincial enactment does not become criminal law because it has a prohibition

Dissent: (Laskin)

* Mini-Criminal Code
  + Local nature is not a test of constitutional validity
  + Focus (on breach of peace and maintenance of public order) is clearly within criminal law
  + MUST be within a valid scheme of regulation (prohibitions are not sustainable by themselves)
  + Supplementary not complementary

Rio Hotel Ltd v New Brunswick (Liquor Licensing Board) (1987) PROVINCIAL STATUTE

Facts: NB enacted comprehensive statute creating a licensing system, 2 kinds: (1) liquor (2) entertainment, with conditions.

Reasons:

* Offences in regulatory program must be reasonably necessary for its purpose
* Harsher the penalty & closer terminology to criminal🡪 more doubtful legislation
* Constitutionally valid 🡪 licensing scheme with **regulations and conditions** related to the provision of the license (a long as not clearly criminal)
  + Related to **local operations**
  + **Transaction oriented**, business 🡪 provinces have plenary jurisdiction

**More likely upheld when provincial statutes are in the form of a regulatory scheme (dealing with a head of provincial power) with licensing scheme, fees, conditions for the license, use regulations and conditions instead of prohibitions because this looks civilnot criminal.**

Chaterjee v Ontario (2009) PROVINCIAL STATUTE

Facts: Appellant was driving outside of where was allowed by his bail. Police found money and items used in grow op, smelled like marijuana. Never charged with offence, but money and items seized. Challenged validity of *Civil Remedies Act* which authorizes in rem forfeiture.

Reasons:

* Pith and substance: deter crime and compensate victims
  + **No general bar to province enacting civil consequences to criminal acts in relation to provincial head of power** (🡪 property and civil rights)
  + Creates property based authority to seize money etc.
  + Provinces and federal gov can legislate to prevent crime (broad enough)
  + Compensating victims 🡪 only provincial jurisdiction
* Forfeiture has de facto punitive effects, dominant purpose: to make crime unprofitable **(not colourable)**
  + **Complements not supplements** federal forfeiture provisions
    - Difference: does not require conviction of offence (just BOP that related criminal activity)
* Doesn’t single out offences 🡪 only concerned with effects of crime (**broad purpose less likely characterized as criminal)**

EDINGER doesn’t like this case 🡪 circumventing protections of the *Charter,* supplementing *Criminal Code*

* **Colourable**🡪subverts/avoids protections of criminal procedure and *Charter*
* **Succeeds because of the framing of the legislation**

Quebec v Canada (2015) FEDERAL STATUTE

Facts: Quebec wanted to create its own provincial gun control scheme, wanted Canada to give them the data on long guns in Quebec. Feds refused. Quebec challenged federal *ELRA*.

Reasons:

* Cooperative federalism (as a new unwritten principle) does not limit the scope of legislative powers defined by Constitution
* Quebec’s argument that they have a right because of expectation of continuing access regardless in changes in federal legislation🡪would mean that the Firearms Act was binding, which Parliament couldn’t undo (would inhibit future legislative action)
* 91(27) cannot be limited
* **If its pith and substance relates to a federal head and has incidental effects on provincial heads of power it is still intra vires**
* Not a prohibition, coupled with a penalty for a public purpose
  + **Court classifies it as a derivative of the scheme it is undoing (public safety under criminal law)**
  + **Guns are traditionally under criminal law**
  + **If they can pass it they can repeal it**
* **If Quebec had argued they owned the records instead of cooperative federalism it would have given the courts a legal basis to give them the records**
* **Bad motive cannot limit legislative jurisdiction**

REGULATION OF THE ECONOMY

|  |
| --- |
| 91(2)🡪 1. International and Inter-Provincial Trade  2. General Regulation of Trade and Commerce  92(13) 🡪 Property and Civil Rights  92(16) 🡪Matters of a merely local or private nature |

**DEFENDING FEDERAL STATUTE**

* **Is there a physical work?**
  + Could declare that all of a specific work are for the general advantage of Canada 🡪 they can regulate it under 91(10)(c) (*Eastern Terminal Elevator*) [hasn’t been used since the 60s]
    - Must be a physical work (*Eastern Terminal Elevator*)
    - Federal government has declaratory power
* 91(2) Trade and Commerce given two branches:
  + (1) **International interprovincial trade**
  + (2) **General regulation of trade and commerce** (Citizens Insurance)

GENERAL TRADE AND COMMERCE

* Federal legislation should not upset the balance between fed/prov
* Examples:
  + If it were to deal only with the fostering of a fair, efficient and competitive national market, contributing to integrity and stability of the financial system would be under general trade and commerce (*Securities*)
    - Would have to support this with factual matrix that it is no longer an industry-specific matter (*Securities* – but evolution argument is from *Local Prohibition Case*)
* When arguing it has **evolved** into a national matter (*Securities* like *Local Prohibition Case*)
  + Must show that provinces acting individually or together could not effectively achieve (if federal government did not legislate, would be a constitutional gap) (*Securities*).
  + Must show that the act as a whole belongs in the jurisdiction of the federal government (vs. in *Securities* where the court found that **only some aspects dealt with larger national goals** – this did not justify a complete takeover of provincial regulation).
  + **Must present a factual matrix that supports this**
    - *Securities*🡪 would have to show that regulating every aspect of securities trading is no longer an industry specific matter

General Validity (but not **determinative, case-by-case analysis**) (GM)

* 1. Part of a general regulatory scheme (GM)
  + i. Explanation of prohibited conduct
  + ii. Creation of an investigatory procedure
  + iii. Establishment of a remedial mechanism
  + GM 🡪 Yes part of a well-integrated regulatory scheme
* 2. Scheme must be monitored by the continuing oversight of a regulatory agency, ex. tribunals (GM)
  + GM 🡪 Yes
* 3. The legislation must be concerned with **trade as a whole**, rather than a particular industry (GM, unlike Labatt)
  + GM 🡪 Regulating trtade, competition is a concern for the whole economy
  + Securities 🡪 Look at purpose and effects
    - Aimed at day-to-day conduct, detailed regulation of all aspects of trading (GOES TOO FAR)
    - Argued that it has transcended its local nature and is now a national concern (but would have to present a factual matrix that shows it is no longer a local matter)
* 4. Legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting (GM)
  + GM 🡪 must be done federally
  + Securities 🡪 federal scheme aimed at such matters might well be qualitatively different from what the provinces, acting alone or in concert, could achieve BUT IT GOES TOO FAR (regulates all aspects)
* 5. Failure to include 1 or more provinces or localities in the scheme would jeopardize the operation of the scheme in other parts of the country (GM)
  + GM 🡪 must cover intraprovincial trade if it is to be effective,

\*Not an exhaustive list, absence of criteria is not determinative, case by case analysis(*Labbat’s*)

**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**

* 6. whether the Act, viewed in its entirety, addresses a matter of genuine national importance and scope going to trade as a whole in a way that is distinct and different from provincial concerns **(double aspect)** (added in *Securities*)
  + **Need to find a DISTINCTIVE aspect for the federal government to regulate**

To determine constitutionality of a provision: (GM)

1. **Look at the provision alone, is it valid? To what extent does it intrude on provincial powers?** 
   * If pith and substance federal + entire act valid/provision severable and valid 🡪 no intrusion, inquiry ends
   * When assessing seriousness of encroachment, consider 3 factors:
     + 1. Only remedial provision (help enforce substantive aspects of the Act, not in itself substantive (remedial typically less intrusive)
     + 2. Limited scope of the act
     + 3. Federal government is not precluded from creating rights of civil action where measures are warranted
   * *GM 🡪* encroaches to some extent on 92(13) (civil matters are generally under this head)
2. **Entire statute valid? Use 5 points above.**
   * Not valid 🡪 end of inquiry (ex. *Terminal Elevators* struck down here)
     + The rest of the statute has to be valid (can’t just rely on the ancillary doctrine to make the whole statute valid (*Securities*)
   * If yes 🡪 Move onto #3
   * GM 🡪 valid as a whole
3. **Can provision be justified through connection with valid legislation?** (**ANCILLARY DOCTRINE)**
   * Invalid provision inside a valid statute does not make it valid
   * Must consider how much it intrudes on provincial powers
     + Marginally 🡪 “functional” relationship sufficient to justify
     + Highly intrusive 🡪 stricter test

\*Can have incidental/ancillary effects on other power

* + GM 🡪 the provision is an integral part of the Combines Investigation Act scheme regulating anti-competitive conduct

**Ancillary doctrine: allows infringement on another jurisdiction’s head of power if the pith and substance of the entire act is “in relation to” an intra vires matter and the infringement is incidental (ancillary) to the pith and substance of the act**

If passes 🡪 Intra vires

If it doesn’t 🡪cannot be sustained under general trade and commerce

INTERPROVINCIAL/INTERNATIONAL

* End of production process is federal (everything in between is up for grabs)
* Merely incidental effects (or significant effects) on local business are okay (Labatt) as long as its aimed at international/interprovincial trade (?)
  + But cannot regulate local trade because its more efficient to regulate it with interprovincial (Burns)

**CHALLENGING FEDERAL STATUTE**

Inter-provincial Trade:

* Cannot reach back into provincial jurisdiction to regulate local businesses (*Eastern Terminal Elevators, Securities*)
  + Provincial inability test alone cannot be used to grant jurisdiction to the Feds (Eastern Terminal Elevators)
  + Cannot claim jurisdiction based on percentages of export (*Terminal Elevators*)
    - *Terminal Elevators* 🡪 80% is international trade
  + **Cannot regulate locally in order to give effect to export policy** (*Terminal Elevators*)
  + Cannot rely on sheer volume of the problem (*Securities*) or sheer national distribution of the problem (not enough for jurisdiction)
  + Argue that there are MORE than merely incidental effects (Labatt)
* **Is it production?**
  + *Prima facie* province is qualified to legislate with reference to production (*Labatt*)
* **Argue 92(13)** property and civil rights 🡪 this head of power should be interpreted broadly (Citizens Insurance)
  + Argue Feds directly regulating trades, contracts in a province (*Citizens Insurance*)
  + When they talk about regulating local businesses, are they generally considered within 92(13) or 92(16)
* **Argue 92(16)** 🡪 Matters of a merely local or private nature
* **Cannot regulate particular industries** *(Eastern Terminal Elevators, Labatt*)
  + Cannot regulate localized products even if they cover substantial portions Canadian economic activity (*Labatt*)
  + *Labatt*🡪not controlling the regulation of the distribution of products or their movement through channels of trade; main purpose 🡪 regulate brewing process

General Trade and Commerce:

* General trade and commerce cannot be used so that it **denies the provinces the power to regulate local matters/industries within their boundaries** (*Securities*)
* OPT-IN: The fact that the province can opt in with equivalent legislation undercuts the argument that the federal government has legislative jurisdiction (*Securities*)
* Argue that there are more than incidental effects on the other sphere (*Securities*)
  + Pith and substance is not 91(2)
* Must be directly aimed at international/interprovincial trade or general recognition of trade generally (genuine national concern) (*Securities, GM*)
* Argue **its pith and substance is local;** it falls in:
  + **Property and Civil Rights 92(13): contracts**
    - Citizens Insurance
    - Eastern Terminal Elevators
    - Carnation (related to contractual rights)
  + **Merely Local or Private Nature 92(16)**

**DEFENDING PROVINCIAL STATUTE**

* Provinces have significant power, can use ancillary doctrine
* **Find a provincial head of power:**
  + **Pith and substance must relate to a provincial head** – incidental effects are okay
    - *Carnation* – local business with incidental effect on trade and commerce
    - If products are produced locally before being exported, province can likely regulate the industry or production if the focus is on the local transactions (*Carnation, Labatt*
  + 92(13) Property and Civil Rights
    - Property and Civil rights interpreted broadly (*Citizens Insurance*)
      * *Citizens Insurance* 🡪 **contracts and the rights arising out of them** are included in 92(13)
* Despite effects on interprovincial trade it is AIMING at local businesses
  + *Carnation* 🡪 Quebec aimed at improving the bargaining position of producers (local businesses)
  + There can be **SIGNIFICANT effects** on interprovincial and international trade (*Carnation*)– it is permissible UNLESS🡪 the province was aiming at those effects (to produce them) as its main objective (**colourability)**
* Early stages of manufacturing/production (*Terminal Elevators*, *Carnation*) – but things in between are up for grabs
  + *Prima facie*, production is provincial *(Labatt*) \*this is in the notes of the Carnation Case
  + Regardless of the destination of the goods
* Easier to regulate what is produced there (*Carnation*), than what is coming into the province (*Burns*)
  + Prima facie able to legislate with reference to production (*Labatt*)
* Make sure what you are regulating is local
  + Have jurisdiction over Local businesses & professions

**CHALLENGING PROVINCIAL STATUTE**

* Argue that the **aim** is to regulate one of the two branches:
* Within 91(2) 🡪 General Trade and Commerce
  + *Securities*🡪 take argument from this case (although they were trying to uphold Federal) – but that it changed so much that regulation of all aspects fall within the general branch??
* **Argue it is within 91(2) Inter-provincial Trade**
  + Province cannot regulate inter-provincial trade because it is beneficial for the effective control of intra-provincial trade (*Burns*)
    - **Argue that the interference/effects are significant to interprovincial trade (MORE THAN INCIDENTAL)**
      * Burns it was not insignificant 🡪 it effectively dictated conditions under which hogs can be brought in from outside Manitoba; effectively subjects price of imports to same regulations as local sales
    - Argue the statute essentially regulates buying of products from other provinces (*Burns*)
  + Even if the law in form doesn’t appear to be regulating inter-provincial trade, is it colourable?
    - Cannot AIM to produce effects on interprovincial and international trade (*Carnation*)
* The provinces cannot use their power to deny the federal government powers under 91(2) to regulate on matters of national importance & scope (*Securities*)

Citizens Insurance Co of Canada v Parsons (1881) PROVINCIAL STATUTE

Facts: Insurance Co didn’t want to honour the prescriptions required under Ontario’s *Fire Insurance Policy Act* 🡪 argued it was 92(13) and therefore ultra vires Ontario.

Reasons:

* Insuring against fire is not a trade
* **91(2) Trade and Commerce: given a narrower meaning. Sets out branches:**
  + **1. International, interprovincial trade (movement of goods)**
  + **2. General regulation of trade and commerce**
  + **does NOT include: Contracts** unless they specifically relate to another head of power (especially not those that are related to a specific trade or business, in the bounds of a province)
  + **Property and civil rights should be interpreted broadly**

Canada v Eastern Terminal Elevator Co (1925) ~~FEDERAL STATUTE~~

Facts: Federal statute *Canada Grain Act* passed under 91(2). Eastern Terminal Elevator didn’t want to pay a levy required by the Act, said it was ultra-vires.

Reasons:

* **91(2) does not give the Federal government legislative jurisdiction to reach into the provinces to regulate local businesses even if majority of product is external**
* **Provincial inability test alone cannot be used to grant Parliament jurisdiction to regulate the economy.**
* **Even when a high percentage of goods are crossing borders, it does not give the federal government legislative jurisdiction to reach into the provinces to regulate local businesses** 
  + Difficult to use 91(2)

Carnation Co v Quebec (Agricultural Marketing Board) (1968) PROVINCIAL STATUTE

Facts: Marketing Board created a plan which bound all producers of milk shipping their products to appellant’s plant in Quebec, determined price to be paid by appellant, ended up paying more than others in area. Originally applied only to him, then amended. Argues that the majority of product will be exported🡪therefore regulation of trade and commerce

Reasons:

* Pith and substance: improving bargaining position of farmers (local businesses)
  + Effect of doing business in Quebec
  + **Incidental effects on trade and commerce does not mean that they constitute a regulation of trade and commerce.**

Manitoba (AG) v Burns Foods (1975) ~~PROVINCIAL STATUTE~~

Facts: Hog Producers’ Marketing Board changed regulations once found out Burns was buying Saskatchewan hogs (by-passes teletype auctions).

Reasons:

* If Parliament cannot regulate local trade b/c more efficient to regulate it inter-provincial trade, provincial legislature cannot regulate inter-provincial just because its desirable for the control of intra-provincial trade
* **Direct interference with interprovincial trade (not insignificant) 🡪 effectively dictates conditions under which hogs can be brought in from outside Manitoba** 
  + Subjects imports to same regulations as local sales

**Province cannot, as an incident of its authority over local matters, regulate buying of products from other provinces**

Labatt Brewing Co v Canada (1980) ~~FEDERAL STATUTE~~

Facts: Labatt challenges validity of a section of the *FDA*. Beer was entirely local at this point.

Reasons:

* Merely incidental effects are okay
  + **Merely Incidental** effect on legislative sphere of other jurisdiction will no longer necessarily doom statute to failure
* Regulating in relation to the production of a single industry 🡪 not to control the distribution of the products, their movement through trade
  + Main purpose: regulate brewing industry

**Even if it covered a substantial portion of Canadian economic activity, Federal government cannot regulate a single industry that’s mainly local**

Negative statement: What general branch of trade and commerce is NOT: regulation of a certain industry

GM v City National Leasing Ltd (1989) FEDERAL STATUTE

Facts: CNL alleges that GM, directly or indirectly, had been paying preferential interest rate support to competitors of CNL in addition to the ones available to CNL (price discrimination), argues it gives them a civil action under federal *Combines Investigation Act*. GM argues it is ultra vires.

Reasons:

* Validity for general trade and commerce:
  + 1. Part of a general regulatory scheme (**3 components:** explanation of prohibited conduct, creation of an investigatory procedure, establishment of a remedial mechanism
  + 2. Scheme must be monitored by the continuing oversight of a regulatory agency
  + 3. The legislation must be concerned with trade as a whole, rather than a particular industry
  + 4. Legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting
  + 5. Failure to include 1 or more provinces or localities in the scheme would jeopardize the operation of the scheme in other parts of the country
  + Federal legislation should not upset the balance between fed/prov
  + **\*Not an exhaustive list, absence of criteria is not determinative, case by case analysis**
* To determine constitutionality of a provision:

**1. Look at the provision alone, is it valid? To what extent does it intrude on provincial powers?**

* + - If pith and substance federal + entire act valid/provision severable and valid 🡪 inquiry ends
    - When assessing seriousness of encroachment, consider 3 factors:
      * 1. Only remedial provision (help enforce substantive aspects of the Act, not in itself substantive (remedial typically less intrusive)
      * 2. Limited scope of the act
      * 3. Federal government is not precluded from creating rights of civil action where measures are warranted

**2. Entire statute valid?**

* **Use 5 points above for general trade and commerce** 
  + - Not valid 🡪 end of inquiry (ex. *Terminal Elevators* struck down here)

**3. Can provision be justified through connection with valid legislation?** (**ANCILLARY DOCTRINE)**

* + - Invalid provision inside a valid statute does not make it valid
    - Must consider how much it intrudes on provincial powers
      * Marginally 🡪 “functional” relationship sufficient to justify
      * Highly intrusive 🡪 stricter test
      * \*Can have incidental/ancillary effects on other powers

**Ancillary doctrine: allows infringement on another jurisdiction’s head of power if the pith and substance of the entire act is “in relation to” an intra vires matter and the infringement is incidental (ancillary) to the pith and substance of the act**

If passes 🡪 Intra vires

If it doesn’t 🡪cannot be sustained under general trade and commerce

Found the CIA to be a minor intrusion into provincial jurisdiction but it was a provision that was **essential** to the functioning of the Act.

Reference re Securities Act (2011) ~~FEDERAL STATUTE~~

Facts: If validly adopted, would create a single scheme governing trade of securities throughout Canada. Gov says its under general trade and commerce even though some aspects fall in provincial authority (property and civil rights); **say it evolved from a provincial to a national matter (evolution argument)**

Reasons:

* Federal government has not shown that securities has changed so regulation of all aspects falls under the general branch
  + Must show that there is a constitutional gap if the federal government doesn’t legislate (provinces individually or in concert couldn’t effectively achieve)
* Demonstrates **double aspect doctrine**
  + Federal legislation will be constitutional even if the matter also falls in the provincial head of power
  + **6. Whether the Act, viewed in its entirety, addresses a matter of genuine national importance and scope going to trade as a whole in a way that is distinct and different from provincial concerns.** (add’s 6th factor to GM)
    - **Need to find a DISTINCTIVE aspect for the federal government to regulate**
* General trade and commerce cannot be used so that it denies the provinces the power to regulate local matters/industries within their boundaries
* Focus on legislative competence only
* Used test from general trade and commerce, met first two.
  + 3. Trade as a whole (vs particular industry)?
    - Descends into detailed regulation of all aspects of trading in securities (this is provincial)
      * If it were to deal only with the fostering of a fair, efficient and competitive national market, contributing to integrity and stability of the financial system would be under general trade and commerce
        + Would have to support this with factual matrix that it is no longer an industry-specific matter
  + 4. Provincial inability (alone or in concert)?
    - Provinces could withdraw from a scheme, no assurance they could effectively address issue of national systemic risk, competitive national markets
    - Essentially saying there is a federal aspect, BUT it goes too far 🡪 it would regulate all aspects
  + 5. Failure to include 1 or more provinces frustrate scheme?
    - B/c main thrust is dealing with day-to-day regulation, proposed Act would not flounder if a province didn’t participate

**Pith and substance = local concerns. Like Eastern Terminal they reached too far into provincial jurisdiction. Not incidental effect.**

Could not invoke ancillary doctrine 🡪 to invoke that the act as a whole must be valid

**…if valid (\*never assume validity first: can’t get to issue 2 & 3 without a valid statute)**

ISSUE #2: APPLICABILITY: Does the statute apply to this defendant/claimant?

Interjurisdictional Immunity

* Certain federal entities have limited immunity from the application of provincial laws
* Federal entity:
  + Federal businesses or organisation over which there is legislative jurisdiction
    - Federally incorporated company (not really though – would have immunity from provincial corporate law, that’s it)
    - **Thinks of heads of power 🡪 banks and banking etc.**
  + 92(10)(a)(b)(c) – Federal works OR undertakings (outlined in s.92) (*Winner*)
    - (a) A local work or undertaking that crosses provincial boundaries are prima facie in the jurisdiction of the federal government
      * **Residual power catches a whole lot of entities that did not exist in 1867 (“other works”)**
      * Internet, telephone wires, etc.
      * All forms of transportation and communication that cross borders
    - (b) steam ships etc.
    - (c): Works, although wholly situate within the Province, declared by the Parliament of Canada to be for **the general advantage of Canada or at least 2 of the provinces** (ex. *Terminal Elevator Case*)
    - **Easy to identify because they are forms of transportation and communication**
  + Aeronautics (*Johanneson v West St Paul* 🡪 POGG)
  + RCMP
  + Post Office
  + Banks and banking (s.91 *Canada Western Bank*)
  + 91(24) Aboriginals and their lands

**PROCESS:**

**Federal Entities:**

* 1. Can identify entity 🡪 use traditional version
  + A. **Identify** a federal entity/undertaking \*see above
    - *Churchill Falls* 🡪 Unlikely to succeed with federally incorporated companies (because not claiming IJI for a particular activity, but for the entire company)
      * Vs. *Bell*, Bell was not arguing that the COMPANY claimed IJI, but that the activity did.
      * As long as legislation leaves the corporate structure in tact (that basically means that it is subject to BC company law) there is no IJI
      * But if the company wherever incorporated is involved in an activity that is a federal work and undertaking, if the provincial legislation impairs the management, health and safety regulations etc that activity the federal undertaking can be given immunity
    - **Is it divisible?** (Functional analysis 🡪 how does it actual operate? If single/indivisible: can claim IJI, if not: separated) (*Winner*)
      * Will not divided unless the business is actually divided – have a bias against dividing
    - **Is it colourable?** If it’s actually intra-provincial, **can’t manufacture federal immunity by starting minor inter-provincial operations** (*Winner*) \*
    - *Tessier* 🡪 Expands W&U through **derivative jurisdiction**: 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 (functional analysis) – THIS IS TRUE FOR LABOUR RELATIONS COULD BE TRUE FOR OTHER WORKS OR UNDERTAKINGS (ex. Railway)** 
      * 1. Look at the operation that is at the core of the federal undertaking
      * 2. Look at the particular subsidiary operation engaged in by the employees in question
      * Assessing whether the effective performance of the federal undertaking was dependent on the services provided by the related operation, and how important those services were to the related work itself (must be vital)
      * *Northern Telecom* 🡪 80% of work done by installers was vital, also completely integration between workers and operating of the network
      * *United Transportation Union* 🡪 must be something more than a physical connection and mutually beneficial commercial relationship w/ a federal undertaking
      * *West coast Energy* 🡪 facilities located completely w/i province, but in federal jurisdiction because was transported to an interprovincial pipeline (direct jurisdiction)
      * Has applied in 2 situations:
        + A. when the services provided to the federal undertaking form the **principal part of the related work’s undertaking**
        + B. **when the services provided to the federal undertaking are performed by employees who form a functionally discrete unit that can be constitutionally characterized separately from the rest of the related operation**
      * **Contact** can be important (whether function separately or together, something more than a physical connection, cannot be minor/casual
      * **Providing regular/important services is not enough if only minor part of operations** (vs. direct jurisdiction – which can be minor)
      * Even if it is vital, if it represents an insignificant part of employee’s time/minor aspect 🡪 not federal
      * **Only if its dominant character is integral to a federal undertaking will a local work or undertaking be federally regulated; otherwise, jurisdiction remains with the province**
      * Must be functionally part of the interprovincial entity and **lose its distinct character (normal day-to-day activities** must be interprovincial in nature**)**
        + If the essential/dominant character (view functionally) is distinct from interprovincial transportation/communication 🡪 remains in provincial jurisdiction
  + B. **Identify a core**, its vital and essential element of a going concern (precedents) (*PHS* failed to do this)
    - Anything to do with internal management of an entity is essential:
      * Labour relations
      * Employer/employee relations
      * Safety and health
      * Provincial health power is TOO broad and extensive (*PHS)*
      * *CWB*: went through all the case law by category (federal works and undertaking, post-office, banks, etc.)
      * If you can’t find a precedent for head of power or entity🡪 you are not prevented, you can argue it; but it will be more difficult. (CWB does not prohibit unprecedented applications of IJI)
  + C. **Apply:** persuade the court that the application of the provincial statute (that particular provision) to the federal entity will somehow impair its internal management, or vital or essential part of it (**effect**) (*CWB*)
    - Can argue that it will impair prospectively
    - Cannot sterilize: *Winner* 🡪 prevent him from operating inter-provincial undertaking
    - *Winner*🡪 Fed entity cannot be impaired by the province’s general right to control the roads (Prov authority is limited, does not entitle it to interfere with connecting undertakings)

🡪 If you succeed the court will find them inapplicable to that federal entity

* + - Not invalid for everything
* 2. NO entity 🡪 use new version
  + A. Identify a federal head of power (NAME IT)
  + B. Identify the core of that head of power for the court (NAME IT)
    - *Ordon Estate* 🡪 maritime negligence law is the core of 91(10)
    - *Canadian Western Bank* 🡪 promoting insurance is NOT the core of banking (91(15))
    - *PHS* 🡪 didn’t identify core
  + Impairment step 🡪 show the court how the application of that provincial law (or the part of it) will impair the core of that head of power (*CWB)*
    - **What is the scope of the immunity that the federal entity can claim? What effect is the provincial statute, if applied, going to have?**

**Provincial Entities:**

* In theory, provincial entities and heads of power are also entitled (*Canadian Western Bank, PHS*)
  + *PHS 🡪* **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 SCC in which the application of IJI to a provincial entity or head of power has been claimed**
  + 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
  + 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!

Ontario (AG) v Winner (1954) \*crosses provincial boundaries GRANTED IJI

Facts: D had bus business (Boston🡪New Brunswick), claiming IJI. P/R (SMT Eastern) had licenses granted by Motor Carrier Board of NB, operated busses. P wanted injunction restraining debussing/embussing in NB. **Provinces have jurisdictions over highways, can regulate them in every aspect (could grant/refuse licence at discretion)**

Reasons:

* Argued 92(10)(a) as a federal entity
* Work: physical thing; undertaking: an arrangement (ex. business plan, anything they have done to put it in motion) under which physical things are used (ex. busses)
* **Read disjunctively 🡪 work OR undertaking**
  + Undertaking: anything that was necessary to put the work in motion

Court said that

* Identified a business as a federal entity (work OR undertaking)
* **Cannot prevent or restrict inter-provincial traffic**

Identifies a federal entity

Defines 92(10)(a)🡪 work OR undertaking

Tessier Ltee v Quebec (2012) \*does not cross provincial boundaries NOT GRANTED IJI

F: Equipment rental company, involves intra-provincial road transportation and maintenance. **Operates exclusively within Quebec.** Some operations involve stevedoring (*Stevedoring Reference*: SCC decided a firm engaged in stevedoring was a federal entity, closely connected with 91(10) Navigation and Shipping.

* 2 separate rates of assessment for health & safety statutes, Tessier seeks declaration that they are not subject to general rates of CSST (only particular 🡪 therefore not subject to Quebec labour law)

Issue: **How to identify Tessier? NOT a federal work/undertaking; is it closely connected enough to navigation and shipping to be pulled into federal labour law jurisdiction?**

Reasons:

* Labour/working conditions not exclusively federal or provincial (but presumptively provincial 🡪 engages property and civil rights) **DOUBLE ASPECT**
  + Parliament is entitled to regulate labour relations when jurisdiction over the undertakings were an integral part of Parliament’s competence under a federal head of power

Federal govt has jurisdiction to regulate **employment** in 2 circumstances:

* **Both require the court to look at its essential operational nature (how it actually functions), and its ongoing character**
* **1. Employment relates to a work, undertaking, or business within the legislative authority of Parliament (direct federal labour jurisdiction)** 
  + **It is direct labour jurisdiction just that federal government can regulate employment for federal undertakings**
  + Court assesses: whether the work, business or undertaking’s essential operation brings it within a federal head of power
  + **For direct 🡪 is sufficient that only a minor part of the undertaking is interprovincial as long as its performed on a regular basis** *(Winner*)
* **2. Integral part or necessarily incidental to effective operations of a federally regulated undertaking (derivative jurisdiction)** 
  + **it itself is provincial, but it does some things for inter-provincial operation**
  + Court assesses: whether the essential operational nature renders the work integral to a federal undertaking (ex. federal undertaking is dependent to a significant degree on employees)
    - Dependent on the relationship between the activity of the stevedores and the undertaking, not the relationship between the stevedoring and the relevant head of power
* If the thing is entirely contained within the province 🡪
  + Test:
    - **1. Look at the operation that is at the core of the federal undertaking**
    - **2. Look at the particular subsidiary operation engaged in by the employees in question**
    - **Assessing whether the effective performance of the federal undertaking was dependent on the services provided by the related operation, and how important those services were to the related work itself (must be vital)**
      * Contact can be important (whether function separately or together, something more than a physical connection, cannot be minor/casual
      * Providing regular/important services is not enough if only minor part of operations
      * Even if it is vital, if it represents an insignificant part of employee’s time/minor aspect 🡪 not federal
      * **Only if its dominant character is integral to a federal undertaking will a local work or undertaking be federally regulated; otherwise, jurisdiction remains with the province**
      * **Must be functionally part of the interprovincial entity and lose its distinct character (normal day-to-day activities must be interprovincial in nature)**
        + If the essential/dominant character (view functionally) is distinct from interprovincial transportation/communication 🡪 remains in provincial jurisdiction
  + Applied in 2 circumstances: (1) services provided to the federal undertaking form the **principal part of the related work’s undertaking** (2) **when the services provided to the federal undertaking are performed by employees who form a functionally discrete unit that can be constitutionally characterized separately from the rest of the related operation**
    - This case: do not form a discrete unit, functionally integrated
* In either case: determine which level of government has labour relations authority by assessing the work’s essential operational nature (how it actually functions)
  + Considers its ongoing character
  + Small incursions do not change the essential character
* THIS CASE:
  + Tessier argued direct jurisdiction 🡪 No. Provinces allowed to regulate transportation within boundaries.
  + If Tessier itself was an inter-provincial transportation undertaking, it would be justified in assuming that the percentage of its activities devote to local vs. extra-provincial transportation would not be relevant (like in *Winner*) – but can only qualify for derivative jurisdiction
  + Majority of Tessier’s activities are non-shipping, stevedoring only 14% of revenue. Employees were fully integrated and worked across different sectors, non-discrete unit, indivisible workforce, interchangeable tasks
    - Essential aspect: local

92(10)(a) turns on the territorial scope of the shipping activities (and if federal, can regulate the labour relations of those employed on work/undertaking (stevedoring is not itself transportation across borders) 🡪 not direct jurisdiction.

* This case demonstrates that in certain circumstances a stevedoring company/business CAN be part of 91(10) because the vessels have to be loaded/unloaded
  + But in this case they didn’t make the grade because the way that the company was actually organized – there was no derivative jurisdiction

Ordon Estate v Grail (1998)

Boating accidents. Recent jurisprudence made it clear Canadian Maritime Law leaves no room for application of provincial statutes.

* Plaintiffs (depends of diseased) argue that they should apply to fill gaps that exist in federal maritime negligence law
* Defendants submit that they can have no incidental application to any matter within exclusive federal jurisdiction

Issue: Can prov statutes apply to a cause of action otherwise governed by (federal) maritime law?

Reasons:

* **CML must be uniform**
* **Canadian maritime law is an essential part of 91(10) Navigation and Shipping**
* **It is constitutionally permissible for a validly enacted provincial statute of general application to affect matters coming within the exclusive jurisdiction of parliament** (this is an incidental effect; this is *Carnation*)
  + Question is **whether it trenches in its entirety or in its application to specific factual contexts, upon an exclusive federal power**
    - **If if does, it must be read down so as to not apply to those situations**
    - This is IJI
    - Reading down means that there is a declaration by the court that it is not applicable to this federal entity
  + **Each head of federal legislative power has a basic, minimum and unassailable content which the provinces are not permitted to regulate indirectly through valid laws of general application 🡪 This is saying there is an immunity against incidental effects that affect the CORE of the head of power – even if the pith and substance is within the jurisdiction, if there are incidental effects it is inapplicable.** 
    - In this case, it would **preclude the application of provincial statutes to those undertakings which have the effect of regulating an essential part of the management and operation of them**
    - **Moved from giving federal entities (persons, works and things) immunity from the application of provincial laws that effect an essential part of the management of the undertaking, to heads of power and their essential cores (from even an indirect effect) claiming IJI**
    - Things under exclusive federal jurisdiction are still subject to statutes that are general in their application, provided that they do NOT bear on the subjects which makes them specifically federal jurisdiction
  + Where the application of a provincial statute of general application would have the effect of regulating, indirectly, an issue of maritime negligence law, this is an intrusion upon the unassailable core of federal maritime law and as such is constitutionally impermissible
    - Cannot supplement in a way that alters the rules within the exclusive competence of Parliament
* 91(10) has a core of jurisdiction which is immune from the application from any valid provincial law of general application (moved from the entity to the head of power)
  + Has defined the core of navigation and shipping as maritime negligence law
  + This does not mean that no provincial law of general application will every be applicable in any maritime context (even involving maritime negligence law (ex. setting out rules of court, provincial taxation is possible) – but will be rare to NOT regulate a core.

**Means that IJI is available for federal heads of legislative jurisdiction** 🡪 Now do **not** need to identify a federal entity

Can say that the application of the valid provincial statute will trench, indirectly, on the core of this federal head of power

Bell Canada v Quebec (1988)

Facts: Deals with the reassignment of a pregnant worker (protective). Under provincial legislation Bell would have had to comply. Labour relations and working conditions fall within the exclusive legislative jurisdiction of provinces (92(13)). Bell is a federal undertaking.

Reasons:

* **Not relevant whether the Act impairs** the functioning of Bell Canada and Canadian national
  + **It suffices that the application of the act bears upon the undertaking, in what makes it specifically of federal jurisdiction**
* The power to regulate wages and working conditions affects a vital part of the management and operation of the undertaking
* 🡪 therefore, inapplicable and ALSO ultra vires
* **Test of impairment is insufficient and not conclusive in cases where without going so far as to impair or paralyze federal undertakings, such application affects a vital part of those undertakings**
  + If a vital and essential part (which is essentially, internal management, workplace organisation etc.) if the provincial legislation affects that internal management then they will grant IJI because it is not fair to federal entities to wait until they have been impaired

Bell Canada said that federal entities have IJI from the health and safety regulations part of the worker’s compensation legislation

* Exclusive jurisdiction over labour relations and working conditions when that jurisdiction is an integral part of its primary and exclusive jurisdiction over another class of subjects
  + Will still be subject to provincial statutes general in application, as long as it does not bear upon the subjects what make them specifically federal jurisdiction
* Essentially divided the statute (insurance from health and safety)
* The act as a whole is inapplicable to federal undertakings

Canadian Western Bank v Alberta (2007)

Concerns 91(15) 🡪 “Banking, Incorporation of Bands, and the Issue of Paper Money”

* Banks – Federal regulation
* Trust companies, insurance companies and securities dealers – Provincial regulation

Alberta enacted *Insurance Act* for consumer protection to govern the promotion of credit-related insurance by banks, permitted under the federal *Bank Act* (*Citizens Insurance* 🡪 this is valid)

* Made federally chartered banks subject to provincial insurance licensing scheme
* Banks sought a declaration that their promotion of insurance is “banking” under 91(15) and the *Insurance Act* and its regulations are inapplicable and/or inoperative
  + Core of banking: enhancing the security of loan portfolios

Reasons:

* **Provinces can claim IJI for every head of power** 🡪 in theory, the doctrine is reciprocal: it applies both to protect provincial heads of power and provincially regulated undertakings from federal encroachment, and to protect federal heads of power and federally regulated undertakings from provincial encroachment.
  + **Broadens Ordon**
* The argument exposes the dangers of allowing the doctrine of interjurisdictional immunity to exceed its proper (and very restricted) limit and to frustrate the application of the pith and substance analysis and of the double aspect doctrine (which can resolve most problems relating to validity)
  + Inconsistent with federalism that the constitutional doctrines of pith and substance, double aspect and paramountcy are designed to promote
    - These doctrines recognize that overlap is unavoidable
  + **Despite an absence of a law at one level of government, the laws enacted by the other cannot even have incidental effects on the “core” jurisdiction** 🡪 **because it increases risk of creating legal vacuums** 
    - **Not necessary for the government benefitting from IJI to actually regulate in that area**
    - **Says this is an important argument to use 🡪 something won’t be regulated**
  + Excessive reliance: creates uncertainty (Criminal, T&C, matters of local/private 🡪 not precise)
    - Could create rigid & centralized federalism (because would favour the feds) 🡪 @ odds with coordination required by the modern Canadian State
    - Also would undermine the principle of subsidiary (decisions should be made closest to those affected)
  + Superfluous 🡪 Parliament could regulate and exclude provincial jurisdiction (Edinger doesn’t think this is realistic, Parliament is not interested in doing this, just want to give an entity an immunity)
* In *Bell*, court said it doesn’t have to go as far as impairing/paralyzing 🡪 affect just vital or essential.
  + **In the absence of impairment, IJI does not apply**
* **IJI does not apply if the law does not impair the core of the head of power (have a serious negative effect on) or impair (if it is a person, work or thing) a vital and essential part of the undertaking for IJI to apply**
* IJI’s natural area of operation is in relation to those heads of legislative authority that confer on Parliament power over **enumerated federal things, people, works or undertakings**. (stick to precedence)
  + **In most cases, a pith and substance analysis and the application of the doctrine of paramountcy have resolved difficulties in a satisfactory manner**

Examples:

* Transportation undertakings
  + A provincial law that purported to regulate the access of its residents to banks would meet the same constitutional objections as in *Greater Toronto Airports*
  + There is no vital or essential federal interest that would justify holding transportation undertakings immune from the rules of the road or legislation dealing with safety in the transportation industry
  + Not vital or essential to the federal interest to regulate the wages and working conditions of employees of an independent contractor (not itself a federal undertaking) constructing an airport building
* Examples of Communication undertakings
  + *Bell* – unimpeded access to conduits and poles was vital to fulfill its federal mandate
  + This case 🡪 does not DENY banks access to insurance as collateral. Just because banks require collateral does not mean they have an essential role as an insurance agent or provider (can let borrower find own insurance)
* Rely on *Ordon* and the concern for uniformity
  + In this case 🡪 would favour provincial law (all promotors of insurance are subject to uniform standards in the province)
* Aboriginal Cases
  + In their federal aspect (“Indianness”) governed by federal law exclusively, but in activities of citizens of a province they remain subject to provincial laws of general application
    - Ex. Non-aboriginal business (partly owned by aboriginals) on a reserve subject to provincial laws

Canada v PHS Community Services Society (2011) \*First case where provincial entity claimed IJI

Facts: 2008 the fed govt did not extend the exception from the operation of criminal laws in the Controlled Drug and Substance Act

* Claim that it is under “healthcare” and therefore protected from federal intrusions (cite *Bell*)
  + Basic, unassailable power in the heads of power in section 92 that must be protected from the other level of government
  + It is not even necessary for the government benefitting from the immunity to be exercising its exclusive authority (CWB) Also ask about this. Does this mean that when there is a double aspect the feds or provinces can claim IJI? Doesn’t this go against the whole idea of double aspect?

Issue: Whether Insite can claim provincial IJI from federal criminal laws? Either because (1) it is a health facility within exclusive jurisdiction of the Province or, because the application of the criminal law would violate the Charter

Reasons:

* There is no precedent for the proposed core of the province’s over health (CWB)
* Didn’t identify a core of exclusively provincial power - provincial health is too broad, amorphous, touches on a number of heads of power (not the restrain the courts call for)
  + Parliament can legislate on matters that touch on health (ex. Criminal Law)
* Can create legal vacuums
  + **Excluding federal criminal law power from a protected provincial core power would mean that Parliament could not legislate on controversial medical procedures (not legal vacuums, regulatory vacuums)**
  + Also affirm theory in CWB

Edinger thinks that if they had argued that it was a provincial entity (hospital)

Marine Services International Ltd v Ryan Estate (2013)

Facts: Two fisherman killed, estates sought compensation from the parties responsible.

* Newfoundland workers’ compensation legislation bars actions for negligence
* *Marine Liability Act* (federal) which in 6(2) provides that negligence actions for survivors are possible (where the deceased would have had an action for negligence)
* Provincial compensatory elements apply to federal undertakings operating within a province (but occupational health and safety elements do not) – cite *Bell* and *Tessier*
* Workers compensation schemes fall within provincial jurisdiction over property and civil rights

Reasons:

* *Ordon* 🡪 must consider IJI for 91(10); core: maritime negligence law
* No federal entity.
* *Copa*, set out test to determine if IJI is triggered:
  + 1. Determine whether it trenches on the core of a head of power listed in 91 or 92
    - Meets this stage 🡪 Ordon set out core
    - Theoretically for a provincial statute to trench w/o impairing
  + 2. Determine whether the provincial law’s effect on the exercise of the protected federal power is sufficiently serious to invoke the doctrine of IJI
    - Must impair (CWB)
      * Not met 🡪 Does not impair exercise of federal power over navigation and shipping
    - Would require a serious intrusion
* **Doesn’t change any aspect of maritime negligence law, doesn’t supplement it, doesn’t impair the core of 91(10)**

Extraterritoriality

* All provincial legislation is limited territorially (express terms of Constitution)
* Federal legislation is not limited, but presumption that they did not intend to legislate extraterritorially
* Challenges may be to **validity** or **applicability**
  + Validity: *Churchill* & *Imperial Tobacco*
    - ARGUING INVALID VIA ET:
      * **1. Find a provincial head of power** 
        + Argue pith and substance provincial (locate head)

Argue it is aimed outside province…

**\*incidental effects irrelevant UNLESS colourable**

* + - * + (Can argue pith and substance federal 🡪 ultra vires, locate head of power)
      * **2. Locate it** (*Imperial*)
        + **A. Tangible?**

ex. Aimed at people (people are tangible)

If aimed outside 🡪 ET applies 🡪 ultra vires

If aimed inside 🡪 ET does not apply 🡪 intra vires

* + - * + **B. Intangible?**

Use *Unifund* principles

Ex. Contracts, civil rights, etc.

**Is there a ~~meaningful~~ connection** (real and substantial) **to the enacting province and pays respect to the legislative sovereignty of other territories?**

If yes 🡪 ET does not apply 🡪 intra vires

If no 🡪 ET does apply 🡪 ultra vires

* + - ARGUING ET DOES NOT APPLY:
      * 1. Find a provincial head of power
        + Argue pith and substance provincial
        + Argue located inside province
  + Applicability: *Unifund*
    - To find a **Real and Substantial Connection**: \*If there are two valid provincial statutes where one says yes, the other says no 🡪 apply these criteria
      * 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. 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**
        + What is being regulated? An activity? (not limited to an entity, because there may not be an entity in the case)
        + Divorce 🡪 mere residence isn’t enough to constitute a “relationship” (actual domicile is required)
        + Going over airspace is insufficient
        + Products liability case, the presence of the defendant manufacturer in the jurisdiction is unnecessary. The relationship created by the knowing dispatch of goods into the enacting jurisdiction in the reasonable expectation that they will be used there is regarded as sufficient

But when promoted in the jurisdiction 🡪 sufficient

* + - * + Legislation that reduced the rate of interest on out-of-province bondholders was upheld (purchasers created a relationship between themselves and Ontario)
        + Subjective
        + **Different degrees may be needed depending on subject matter**
        + **the subject matter of the legislation to determine if the relation was "sufficient" to support the validity or applicability of the legislation in question**
      * 3. The applicability of an otherwise competent provincial legislation to out-of-province defendants is conditioned by the requirements of **order and fairness** that underlie our federal arrangements
        + **Flexible approach**
        + Fairness to out of province defendant is important 🡪 if Unifund is right, ICBC would be obligated to respond to insurance regimes in each province or state claiming a financial fall out from the BC accident arising out of whatever obligations those other province’s legislatures have imposed on their own insurance companies
        + *Thomas Equipment* 🡪 sell and promote machinery was bound by Alberta statute (more than just a vender)
      * 4. The principles of order and fairness, being purposive, are **applied flexibly** according to the subject matter of the legislation
        + Strength of relationship caries with type of jurisdiction being asserted (court jurisdiction, but law of other province v. law of a province)

Reference re: Upper Churchill Water Rights Reversion Act 1980 (Newfoundland) (1984) ~~PROVINCIAL~~

Facts:

* Company required option to develop Labrador’s water resources; authorized LGC to deliver a lease o CFLCo that gave full right to use of certain waters and its watershed to generate hydro electric power.
* Needed finances, found Hydro Quebec who was necessary for the project and agreed to purchase virtually all power produced for 40 years, Newfoundland & CFLco could retain a certain amount.
* Each party was responsible for the construction of transmission lines
* Contract said that governed and interpreted in accordance with the laws of Quebec and that only the courts of Quebec would have jurisdiction to adjudicate disputes
* Passed the Reversion Act which provided for the reversion to the province of unencumbered ownership and control in relation to certain water within the province
* Challenged constitutional validity:
  + 3. In relation to the regulation of interprovincial trade and commerce
  + 4. In relation to an interprovincial work or undertaking (hydro electric transmission lines

Issue: Is the Reversion Act constitutionally valid?

Decision: Ultra-vires

Reasons:

* 1. Does it interferes with the status and capacity of a federally incorporated company (IJI)
  + No 🡪 business structure left in tact with capability to raise new capital and issue shares 🡪 not interference with essential status and powers of a federally incorporated company
* 2. Is legislation in relation to property and civil rights outside the province of Newfoundland
  + **Ultra vires, effect would destroy lawfully acquired civil rights outside the province**
  + **Pith and substance 🡪 aimed at derogation of extra-provincial contract rights, which are situated outside Newfoundland (beyond legislative competence of province)**
    - Not just incidental effects outside of the province
    - **Incidental effects are irrelevant to validity**
    - Colourability 🡪 true intent is an **attempt to interfere with the Power Contract and thus to derogate from the rights of Hydro Quebec**

**Resolved 2 cases that had been operating parallel to each other. Does not show how to locate civil rights (🡪 *Imperial*)**

**Federal government could have intervened on grounds that it was a federal work and undertaking, or declared it for the general advantage of Canada**

BC v Imperial Tobacco (2005) PROVINCIAL

Facts: The *Tobacco Damages and Health Care Costs Recovery* Act authorizes an action by the government of British Columbia against a manufacturer of tobacco products for the recovery of health care expenditures incurred by the government in treating individuals exposed to those products

* Gave BC the right to collect from tobacco companies, reverse the burden of proof, had to prove on a BOP, and they would be jointly and severally liable, operates retroactively

Decisions: Valid

Reasons:

* Pith and Substance
  + 1. Identify essential character or dominant feature (*Firearms Act*), identify a provincial head of power under which it might fall
    - Tangible (intrinsic and observable physical presence) 🡪 is it within territorial limits?
      * Look at location of the matter
        + Inside province 🡪 intra vires
        + Outside province 🡪 ultra vires
    - Intangible 🡪 use *Unifund* principles to determine the location of the intangibles
      * Ex. Contracts, civil rights, etc
      * **Uses meaningful connection** (not substantial) **to the enacting province and pays respect to the legislative sovereignty of other territories**

**🡪 If so, pith and substance is regarded as situated in the province, and its valid**

**Validity is looked at between the *kinds* of parties, then when you are looking at applicability its between the particular plaintiff (Unifund criteria)**

**In imperial tobacco, they lost on validity (it was valid). They went back and then they argued that it didn’t apply (they also lost).**

**The law might be valid (because you satisfied imperial tobacco factors)**

**And then that it doesn’t apply to a party specifically (applicability) 🡪 those connections might be different**

Application:

* Pith and substance 🡪 civil cause of action (92(13) Property and Civil Rights)
* Can capture incidental effects (that’s all it does)
* But no territory could possibly assert a stronger relationship to that cause of action than British Columbia

Unifund Assurance Co v ICBC (2003) SCC ~~PROVINCIAL~~

Facts:

* Unifund (Newfoundland company) seeks to recover from ICBC for $750 000 under an Ontario Statute
* Dispute stems from a car accident in BC (P from Ontario, D from BC)
* Injured P returned to Ontario to collect benefits from Unifund
  + Unifund wants to subject ICBC to the Ontario Scheme of loss transfer provisions (statutory mechanism that transfers losses between Ontario insurance companies)
* ICBC owes 2.5$ million to victims but under BC law (*Insurance (MV) Act*) is allowed to deduct no-fault payments (even though they didn’t pay any part of the amount)
  + Can deduce wherever issued
  + Deducts $750 000 from 2.5 million award
* Essentially, ICBC is taking a $750 000 deduction created at Unifund’s expense (because ICBC contributed nothing to the payment of no fault benefits)

Reasons:

* 4 Principles to find a **Real and Substantial Connection**: \*If there are two valid provincial statutes where one says yes, the other says no 🡪 apply these criteria
  + 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. 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**
    - \*\* Find examples here (divorce etc.)
    - Subjective
    - **Different degrees may be needed depending on subject matter**
    - **the subject matter of the legislation to determine if the relation was "sufficient" to support the validity or applicability of the legislation in question**
      * Imperial tobacco 🡪 NO, its just applicability
  + 3. The applicability of an otherwise competent provincial legislation to out-of-province defendants is conditioned by the requirements of **order and fairness** that underlie our federal arrangements
    - **Flexible approach**
    - Fairness to out of province defendant is important 🡪 if Unifund is right, ICBC would be obligated to respond to insurance regimes in each province or state claiming a financial fall out from the BC accident arising out of whatever obligations those other province’s legislatures have imposed on their own insurance companies
    - *Thomas Equipment* 🡪 sell and promote machinery was bound by Alberta statute (more than just a vender)
  + 4. The principles of order and fairness, being purposive, are **applied flexibly** according to the subject matter of the legislation
    - Strength of relationship caries with type of jurisdiction being asserted (court jurisdiction, but law of other province v. law of a province)

Because the accident occurred in BC, the Court saw this as a huge factor.

* But it has nothing to do with where the accident occurred.
* This is a bad decision because if it had occurred in Saskatchewan would they have applied Sask law?
* Didn’t even ask if Ontario had a connection

1. If two valid provincial statutes w/ an operational conflict 🡪 apply 4 principles to see which statute applies
2. Even if there is no 2 overlapping valid provincial laws that are inconsistent 🡪 if its one statute whose applicability is at issue, use principles to argue the provincial legislation inapplicable.

ISSUE #3: OPERABILITY: Is there a conflict?

Paramountcy

* Judicially created 🡪 Therefore, subject to change (started broad, narrowed, then broadened again)
* Law is inoperable NOT invalid (must have 2 valid laws for paramountcy)
* Does not apply to an inconsistency between common law and legislation that is valid (*Ryan Estates*)
* SCC has said that it is reading down the federal statute (as if the federal government should not want to create a conflict)
  + They interpret federal legislation restrictively

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| * (1) Are there two pieces of valid legislation? * (2) Is there an **express contradiction** (*Multiple Access*)   + Dual compliance must be impossible   + If provincial bolsters federal, no contradiction * Alternatively, (3) Does the provincial statute **frustrate the purpose** of the federal statute?   + Does the provincial purpose undermine the federal purpose?   + *CWB*: does not try to fully regulate banks, exclude provincial aspects * **Argue that the language of the federal legislation is permissive (“may”) 🡪 therefore provincial does not frustrate or have an operational conflict** *(Ryan)*   + Argue that striking down a provincial statute that is otherwise valid is wasteful, confusing – could create a gap in a provincial scheme of regulation |

Multiple Access v McCutcheon

Facts: A charged in provincial securities legislation (but could have been charged under federal) for insider trading. Both intra-vires, essentially identical. Only difference: location of proceeding

I: Does paramountcy apply?

* **Uses express contradiction test from Smith v The Queen: conflict = compliance with one means a breach of the other (can’t operate concurrently) – one says “yes” the other says “no” 🡪 OPERATIONAL CONFLICT**
* Double liability can be avoided by cooperation
* Striking down provincial legislation could result in gap in provincial scheme of regulation which would have to be filled by federal law – wasteful, confusing
* **Duplication is not contradiction**

Canadian Western Bank v Alberta

* In alternative, make paramountcy argument 🡪 provincial law would frustrate Parliament’s purpose
* When a federally regulated entity takes part in provincially regulated activities, will be jurisdictional overlap but paramountcy is not engaged (no conflict with a valid federal law🡪 provincial law applies)
  + No operational conflict
* Provincial insurance laws complement, not frustrate, the federal purpose
* Paramountcy can apply when provinces are using ancillary power, or when Parliament is using ancillary and provinces primary

**There are cases where imposing obligation to comply with provincial laws frustrate the purpose of the federal law (even though there is no operation conflict)**

* Take into account intent of Parliament
* Looking for the TRUE purpose
* Incompatible federal legislative intent must be established by the party relying on it

Application:

* Paramountcy does not apply.

OI 🡪 can comply with both, does not prohibit what federal law permits

Frustration 🡪 does not try to fully regulate banks, exclude provincial aspects

Marine Services International Ltd v Ryan Estate (2013)

* The federal statute is permissive, so neither frustrates nor has an operational conflict
  + Language is permissive (dependent “may” bring a tort action)
* WHSCA and MLA are also distinct in purpose and nature
* Does not frustrate the federal regime, just provides a different regime for compensation that is separate from tort

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| **PROVINCIAL – SECTION 92** | **FEDERAL – SECTION 91** |
| (2) Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes  (3) The borrowing of Money on the sole Credit of the Province  (4) The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers  (5) The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon  (6) The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.  (7) The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals  (8) Municipal Institutions in the Province  (9) Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes  **(10) Local Works and Undertakings (other than 🡪)**  (11) The Incorporation of Companies with Provincial Objects  (12) The Solemnization of Marriage in the Province  **(13) Property and Civil Rights in the Province**  (14) The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts  **(15) The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.**  **(16) Generally all Matters of a merely local or private Nature in the Province.** | (1A) Public Debt and Property  **(2) Regulation of Trade and Commerce**  (2A) Unemployment Insurance  (3) Raising of Money by any Mode or System of Taxation  (4) The borrowing of Money on the Public Credit  (5) Postal Service  (6) The Census and Statistics  (7) Militia, Military and Naval Service, and Defence  (8) The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.  (9) Beacons, Buoys, Lighthouses, and Sable Island.  **(10) Navigation and Shipping.**  92(10) exceptions:   1. Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province   \*Must be transportation or communication across boundaries  Aeronautics is NOT this, its POGG   1. Lines of Steam Ships between the Province and any British or Foreign Country: 2. Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.   (11) Quarantine and the Establishment and Maintenance of Marine Hospitals  (12) Sea Coast and Inland Fisheries  (13) Ferries between a Province and any British or Foreign Country or between Two Provinces  (14) Currency and Coinage  (15) Banking, Incorporation of Banks, and the Issue of Paper Money  (16) Savings Banks  (17) Weights and Measures  (18) Bills of Exchange and Promissory Notes  (19) Interest  (20) Legal Tender  (21) Bankruptcy and Insolvency  (22) Patents of Invention and Discovery  (23) Copyrights  (24) Indian, and Lands reserved for the Indians  (25) Naturalization and Aliens  (26) Marriage and Divorce  **(27) Criminal Law**  (28) The Establishment, Maintenance, and Management of Penitentiaries.  (29) Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces  And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces |

**CHARTER**

**1. APPLICABILITY**

**When is the Charter available?**

32. (1) This Charter applies

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

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

**\*Charter values are everywhere, can invoke them for common law, to support an interpretation** *(Grant v Torstar*)

* For any common law/tort problem, you can argue that the common law needs to be developed because it is out of step or anachronistic with modern social and economic conditions
  + Party A does not owe a constitutional duty to Party B
* Cite the Charter (if you find a relevant provision) and talk about Charter values
* Common law should be developed consistently with Charter values (*Dolphin Delivery*)
* Use precedent 🡪 cases from other countries, jurisdictions (more persuasive) (*Grant v Torstar*)
* The deleterious effects of a limit on freedom of religion requires us to consider the impact in terms of Charter values, such as liberty, human dignity, equality, autonomy, and the enhancement of democracy (*Hutterian*)

PROCESS:

1. Identify right/benefit
2. Does that right qualify you as a plaintiff?
3. Who is the defendant?
   * **Government of Canada/BC?**  (an entity falling directly into the terms of s.32)
     + Is there a statute, part of a statute, a regulation, or an order in counsel?
     + *Dolphin Delivery* 🡪 applies whether or not action is invoked in public or private litigation (will apply to common law)
   * **Other entity** (DOCTRINE OF EVASION):
     + Introduced the possibility that subordinate bodies could be subject to the Charter in *McKinney*
     + **Is there a decision maker?** (*Eldridge* – medical services commission*)* 🡪 If charter violation comes from decision 🡪 must be established that it is “government” within s.32
     + **1. Is is actually a GOVERNMENT ENTITY**? \*ALL ACTIVITIES under Charter scrutiny (*McKinney*, *Eldridge)*
       - A. Derives its power from a statute?
         * Ex. *Vancouver Transit*
       - B. Controlled by government?
       - Nature of the entity or in virtue of the degree of governmental control (*Eldridge*)
       - **Control Test:** 
         * If the relationship/proximity is such that the government is controlling the entity 🡪 government
         * Funded? Directors appointed by govt? involved in policy formulation? Approve rules in how it carries out mandate? (*McKinney*)
         * Control over day-to-day activities? Power consistent with that of government (creation of regulations/bylaws)? No independent agenda? Board members mostly government actors? (*Vancouver Transit*)

*Vancouver Transit* 🡪 GVRD appointed 12/15 directors to the board, must ratify the bylaws

* + - * Rationale: While private actor implements, government has responsibility for it, can’t evade constitutional responsibilities
      * Ex. *Godbout* 🡪 municipality’s policy was under Charter scrutiny (no by-law)
      * Ex. *Douglas College,* performed government function, Crown agency to implement government policy, wholly controlled by government 🡪 Charter applies
    - **2. PRIVATE ENTITY that performs a traditional function of government?** (\*more difficult to establish)
      * Nature of the activity itself is government (*Eldridge*)
        + Quality of the act, not the actor
      * ONLY the discharge of that particular (government) function is subject to the *Charter* (*Eldridge*)
    - NOT SUFFICIENT:
      * Created by statute (*McKinney*)
      * Has a public purpose (*McKinney*, *Eldridge*) 🡪 Must be found to be implementing specific government policy/program, P can challenge specific policy decisions (*Eldridge*)
  + DOES NOT APPLY TO: Judicial branch (*Dolphin Delivery*)

RWDSU v Dolphin Delivery

Facts: Appellants argue that the injunction against secondary picketing by members of a trade union infringes on their Charter right of freedom of expression under s.2(b)

Reasons:

* **Charter set up to regulate relationship between individual and government (restrain government action, protect individual)**
  + Not intended to be applied in private litigation absent government action
  + But applies to common law 🡪 Can make an argument on Charter values though.

**An order of a court cannot be equated with an element of governmental action, the courts cannot be contending parties involved in a dispute**.

McKinney v University of Guelph (1990)

Facts: Deals with mandatory retirements in universities, appellants applied for declarations that the policies of the universities violate s.15 of the Charter

Issue: Does the Charter apply to universities?

Reasons:

* **Opens up the possibility that subordinate bodies could be governed by the Charter (doctrine of evasion)**
* **NOT sufficient that it:**
  + **Is created by statute** (Private corporations are all created by statute)
  + **Has a public purpose** (Too broad)
* **CONTROL TEST** \*if its not government
  + A. Nature and Extent of Government Control
    - Does government exercise such significant control over the operation of the institution that the activities of the latter may properly be seen as activities of the former?
    - **Input into its policy formulation process, approval of the by-laws/rules that determine how that entity carries out its mandate, allocation of funding used to implement its objectives, or through the appointment of the personnel that run the entity**
  + B. Specific questions about entity’s activities
    - Is there a clear nexus between government and the **particular impugned activity**?
    - Cannot be arms-length
* No evidence that they were following dictates of government, generally autonomous, traditional purpose supports autonomy, contract of employment is not government policy
  + Would have to be shown than that they engaged in activities or the provision of services that are subject to the legislative jurisdiction of either the federal or provincial governments

🡪 Do not form part of the government apparatus, so their actions, as such, do not fall within the ambit of the Charter

Dissent:

* Problem with Control Test: body should not automatically be deemed to be non-governmental simply because one cannot point to a specific nexus
* **Test 2: Government Function Test**
  + Even although there is minimal government control over that body, the entity must nonetheless be viewed as part of government because it performs a function that has traditionally been performed by government
* **Test 3: Government “Entity” Test** (Edge likes this)
  + Whether an entity performs a task pursuant to statutory authority and whether it performs that task on behalf of government in furtherance of a government purpose
  + Assist one to identify those bodies that are neither subject to extensive government control and that cannot be said to be carrying out a traditional government function, but that may nonetheless be the product of government's decision to take on a new role
* Factors to consider (indicators)
  + **1. Does the legislative, executive or administrative branch of government exercise general control over the entity in question?** 
    - **This is the same as the majority**
  + 2. Does the entity perform a traditional government function or a function which in more modern times is recognized as a responsibility of the state?
    - Edinger thinks this is open ended
  + 3. Is the entity one that acts pursuant to statutory authority specifically granted to it to enable it to further an objective that government seeks to promote in the broader public interest?
  + **Each of these questions is meant to identify aspects of government in its contemporary context. An affirmative answer to one or more of these questions would, to my mind, be a strong indicator that one is dealing with an entity that forms part of government**

**If the entity is found by the court to be government then any activity or decision of that entity is subject to Charter scrutiny**

Grant v Torstar PRIVATE LITIGATION

Facts: Grant sues Toronto Star in defamation, based on article punished where reported tried to verify, didn’t. **Toronto Star argued that the (1) changes in the common law and (2) common law should develop consistently with Charter values (including freedom of expression)**

* **Freedom of expression is not absolute (competing rights)**
* **CHARTER VALUES ARGUMENT 🡪 in private litigation**

Eldridge v BC

Facts: In neither of the two primary mechanisms (statutes) for medical care Is sign language interpretation paid for. Alleges a violation of s.15. Not mentioned anywhere in the statutes/regulations (inclusion or exclusion)

* If it had expressly excluded 🡪 could challenge (wouldn’t have to worry about s.32)
* Medical services commission is a panel that determines the services that are not benefits under the Act

Issues: Does not providing sign language interpretation for the deaf violate s.15 of the *Charter?*

* **If so, does it arise from the legislation itself or from the actions of the entities exercising decision making authority pursuant to the legislation?**

Decisions:

* Performing a government function 🡪 subject to Charter for those activities

Reasons:

* Acts do not exclude sign language; it is the decision of the authority which decides what is   
  “medically required” that is constitutionally suspect (legislation does not mandate the result)
  + 🡪 **When it is alleged that an action of one of these bodies (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 s. 32 of the Charter**
  + When it is considered “government” the Charter will apply to all its activities, including those that might in other circumstances be thought of as "private"

Application:

* Hospitals are not government for the purpose of s.32
* Purpose of the statutes is to provide services to the public, government is responsible for defining the content of the service and those entitled to receive it
* **Hospital is carrying out a specific government function** (provides for the delivery of a comprehensive social program) – act as agents for the government.
* "Direct and . . . precisely-defined connection" between a specific government policy and the hospital's impugned conduct
* Not simply internal hospital management

**Expansion of s.32 🡪 If the breach is found to be the responsibility of a decision maker (not a statute) then the Court is free to issue a remedy under s.24(1) of the Charter (third type of argument)**

Godbout v Longueuil (City) (1997)

Facts: Appellant city adopted a resolution requiring all new permanent employees to reside within its boundaries; Respondent signed a declaration promising she would establish her principal resident in the city, and would remain there as long as she was a city employee. She moved, was dismissed.

* City argues that they are not subject to the Charter for “private” acts (ex. employment conditions)

Issue: Does the Charter apply to municipalities?

Decision: Applies to municipalities

Reasons:

* Democratically elected; accountable in a way analogous to legislative branch; possess general taxing power (indistinguishable from leg branch); empowered to make laws/administer/enforce them; derive existence and law making authority from provinces 🡪 They exercise **powers conferred on them by provincial legislatures, powers and functions which they would otherwise have to perform themselves.**
  + Provincial gov could take power away from municipalities (level of control)
* Vs. *McKinney* employment decisions 🡪 in this case they are government so ALL activities are under Charter scrutiny

**2. JUSTIFICATION**

**After you have a P & D, P must identify an infringed right & prove the breach.**

**Then the government must justify the infringement**

* Charter makes judges evaluate the merits of a particular statute 🡪 these cases provide the framework
* Not bound by the what was intended in 1982 🡪 large, liberal, purposive interpretation

**s.1 The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society**

Standard of proof: **Balance of probabilities** (*Oakes*)

**1. VAGUENESS:** (*Nova Scotia Pharm)*

* ARGUE THIS BEFORE GOING INTO OAKES – IS THERE EVEN A LAW?

3 ways to argue:

* 1. Violation of s.7 of the Charter 🡪 go against fundamental justice
* 2. Raised under **s.1 in limine** 🡪 not “prescribed by law”

\*but courts are reluctant to find it not to qualify as law 🡪 generally consider under minimal impairment (*Nova Scotia Pharm*)

Is it just departmental policy? (*Vancouver Transit*)

* + - If it’s a policy, is it sufficiently precise and definitive to count as a law under s.1?
      * Do they come within the meaning of law?
        + Adoption must be authorized by statute and binding rules of general application
        + Does a rule-making authority exist? Does the statute creating the entity allow it to adopt binding rules?
      * Are the sufficiently precise and accessible?
        + Sufficiently accessible to the public and precise so individuals can regulate their conduct
        + Must have an intelligible standard
    - Argue that they are administrative: not known to pubic, informal and internal administrative aids, specific application, interpretive aids in the application of a statute or regulation. ARE NOT LAW.
    - *Vancouver Transit* 🡪 legislature has empowered the government entity to make rules – logical to infer (absent evidence to the contrary) that intended those rules to be binding, not meant for internal use or administration

If not (1) or (2), go into Oakes....

If its not law 🡪 go into Dune balancing (is it reasonable?) – administrative law

* **3. Can raise specifically under minimal impairment stage of Oakes Test**

**2. OAKES TEST**

* 1. Pressing and substantial objective in a free and democratic society
  + Vulnerable group? Deference to govt (*Irwin* – children)
    - Does not ONLY have to protect the vulnerable group, can exercise reasonable judgement in specifying the group (can extend beyond dangerous range) (*Irwin*)
  + **CANNOT**: impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community– but govt **CAN** legislate on morality to safeguard values of free and democratic society (Criminal law) (*Butler*)
  + **CANNOT SHIFT PURPOSE:** must look to the purpose at the time of the enactment (*Butler*)
    - *Butler* 🡪 had always been concerned about harm to society, anti-social conduct
    - **Argue that it was always the purpose, just subordinate 🡪 now primary**
  + Examples: avoidance of harm *(Butler*), safe, welcoming transit system (*Vancouver Transit*)
* **2. Proportionality**
  + \*keep in mind nature of right being infringed (FOE) (*Butler*)
  + **A. Rational Connection**
    - Measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations
    - Must be internally rational
  + **B. Minimal Impairment\*\***
    - Should impair "as little as possible" the right or freedom in question
      * Reasonable basis for thinking it infringed as little as possible (*Irwin* – but that was 2 groups in society)
    - Not actual minimum, just justified
    - Overly broad?
    - Point to past legislative attempts
      * *Butler* 🡪 past abortive attempt to replace definition of “undue exploitation”
      * *Bryan* 🡪 considered alternative approaches from Lortie, determined this one to be most effective/least intrusive
    - Point to exemptions, the way the law was tailored to exclude non-problematic forms
      * *Montreal* 🡪 not absolute ban on noise, granted licenses as exemptions
      * *Butler* 🡪 excluded material with scientific/artistic/literary merit
  + **C. Proportionality: harm/benefit**
    - Balancing
    - More serious infringement 🡪 more serious justification
    - *Hutterian*
* Gives the courts flexibility
* EMPHASIZES NEED FOR EVIDENCE
  + No evidence available? Use contextual factors in *Bryan* case (FOE) 🡪 **can use logic and common sense**
    - **Natural deference for government when dealing with election laws in terms of sufficiency of evidence**
    - **(1) The nature of the harm and the inability to measure it**
      * In some cases the objective asserted by the government will be largely a matter of the "values and principles essential to a free and democratic society". In such cases it may not be appropriate to require proof according to the usual civil requirements
        + Public policy
      * **Can resort to logic and common sense**
    - **(2) The vulnerability of the group protected**
    - **(3) Subjective fears and apprehension of harm**
      * Where the harm that the law is seeking to address is is about these subjective views – must be taken as doubly important (*Bryan* – importance of information equality)
    - **(4) Nature of the infringed activity**
      * Political expression🡪 Dissent: if it is at the **core** for FOE, you cannot rely on speculative or theoretical evidence when the harm can be demonstrated.
  + In *Irwin* only social science evidence presented, but this is balancing between different groups in society (not state v individual) – more deference to government

R v Oakes (1986)

Facts: Constitutionality of s.8 of the *Narcotic Control Act:* if accused in possession of a narcotic, assumed to be in possession for the purpose of trafficking. Accused must prove the contrary on a BOP, if cannot 🡪 convicted.

* Crown argued violation of 11(d) was a reasonable limit under s.1

Decisions: Not justified 🡪 invalid.

Reasons:

* **Failed rational connection – s.8 over-inclusive**
* Rights guaranteed by the Charter are not absolute
  + But the onus in proving that a limit on a right/freedom is reasonable and justified rests on the party seeking to uphold the limitation

**Charter values:**

* The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, 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 (this last one?)

R v Nova Scotia Pharmaceutical Society (1992)

Facts: Charged with conspiracy to prevent/lessen competition **unduly** (*Combines Investigation Act*)

Decision: No violate s.7 on grounds of vagueness.

Reasons:

* **Deals with vagueness under s.7 of the Charter**
* **Factors to be considered in determining whether a law is too vague include:**
  + **(a) the need for flexibility and the interpretative role of the courts,**
  + **(b) the impossibility of achieving absolute certainty, a standard of intelligibility being more appropriate and**
  + **(c) the possibility that many varying judicial interpretations of a given disposition may exist and perhaps coexist**
* Doctrine of overbreadth doesn’t exist 🡪 just an analytical tool under minimal impairment
* Doctrine of vagueness:
  + Rationales: (1) Fair notice to citizens (2) Limitation of enforcement discretion (conviction cannot automatically flow from decision to prosecute)
  + Must enunciate *some* boundaries; create guidance; delineate an area of risk; give sufficient indications that could fuel legal debate
  + Must be intelligible to the courts/judges
  + Some subject matters do not lend themselves to precision
  + General terms giving broad discretion are fine, but terms failing to give direction on HOW to exercise discretion is problematic (deprive judiciary of controlling exercise of discretion)
  + **Once the minimal general standard has been met, any further arguments as to the precision of the enactments should be considered at the "minimal impairment" stage of s. 1 analysis**

Newfoundland (Treasury Board) v NAPE (2004)

Facts: Province signed a Pay Equity Agreement for female employees in the healthcare sector. 3 years later, before any money was provided, the government introduced legislation to defer the start of the increase for 3 more years along with a wide range of other cuts. Government was going through a financial crisis (unprecedented). Argue violates s.15(1).

Decision: Saved under s.1

**Oakes Test:**

* 1. Pressing/substantial objective?
  + **Budgetary considerations cannot normally be invoked as a free-standing pressing and substantial objective for the purposes of s. 1 of the Charter**
  + **But was not a "normal" time in the finances of the provincial government 🡪 EMERGENCY**
* 2. Proportionality
  + A. Rational Connection 🡪 yes
    - Made up a significant portion of budget cuts
  + B. Minimal Impairment 🡪 deference to government, but yes, tailored to minimally impair rights
    - Was temporary
  + C. Balancing 🡪 violation’s harm did not outweigh objective

3. REMEDIES

**Think about the remedy you want 🡪 prepare to argue for that remedy.**

Pre-Charter Remedies:

* 1. Declaration that it was void was retroactive to the time of enactment

🡪 this was the first and most common remedy that a challenger to a statute could obtain

* 2. Statute was inapplicable
* 3. The statute (limited to provincial) was inoperative (paramountcy)
* 4. Reading down
  + Interpretation
  + It might be that a part of the statute, a clause for example, had to be invalidated so that it you could sever a statute as well
* DID NOT: read-in, and suspend execution of a judgment
* No statutory source, all decided under 1867 Act

Post-Charter Remedies: \*normally use one or the other, but may be exceptional circumstances

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| **SECTION 24(1)**  **24(1)**Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court **considers appropriate and just in the circumstances**   * **Limited to Charter challenges** * **Always available when government/government agent is defendant & there is a valid law** * Available when law is valid 🡪 but breach by government actor (**unconstitutional acts of government agents** **operating under lawful schemes**) (*Ferguson*) * More judicial discretion (*Ferguson*) * Only available from a court of competent jurisdiction (*Ward, Conway*)   + ~~Provincial criminal courts~~   + Tribunals can generally grant remedies (but still have to look at 2nd stage)   + Administrative tribunal CANNOT strike down entire laws (*MLQ*)   + Could declare it to be inoperable against him. However, it could not declare it to be “inoperative and invalid” without further clarification, as that would amount to a general declaration of invalidity(*MLQ*)   + \*see Conway * Individual remedy (case-by-case) – must be someone who had their Charter rights violated * Govt given opportunity to introduce countervailing considerations * Only VERY RARELY available with s.52(1) or during period of suspension (for suspension, this would allow declaration of invalidity retroactive effect) (*Schachter*) * **Cannot undermine the purpose of the law** (*Ferguson*)   + NEVER available for unconstitutional mandatory minimums (*Ferguson*)   **HOW TO ASSESS DAMAGES UNDER 24(1):** (*Ward*)   * **1. Establish Charter right breached** * **2. Functional justification of damages, fulfill one or more of:**    + **(a) Compensation**      - Tangible or intangible (physical or psychological)     - Most prominent (but not necessary)   + **(b) Vindication of the right**      - Focus is on the harm caused to society (public confidence, faith in constitutional protection)   + **(c) Deterrence of future breaches**      - Influencing government behavior, ensure state compliance   **\*most cases, all three present**   * **3. Countervailing factors \*onus on govt**   + A. Existence of alternative remedies   + B. Concerns for good governance     - Chilling effect (but usually compliance w/ charter = good governance)     - State may establish that damages should not be awarded without a minimum threshold of gravity (different thresholds in different situations) * **4. Assessing quantum of damages**   + How serious is the breach?   + How was the claimant impacted?   + Must be fair to claimant and state   + Can be punitive (vindication, deterrence) * An appropriate and just remedy will: (1) meaningfully vindicate the rights and freedoms of the claimants; (2) employ means that are legitimate within the framework of our constitutional democracy; (3) be a judicial remedy which vindicates the right while invoking the function and powers of a court; and (4) be fair to the party against whom the order is made |

**SECTION 52(1)**

**52(1)** The Constitution of Canada is the supreme law of Canada, and any **law** that is **inconsistent** with the provisions of the Constitution is, **to the extent of the inconsistency, of no force or effect**.

* **Always available when you are challenging a law** 
  + Applies to entire constitution (federalism and Charter)
  + Can be invoked by individuals whose rights were violated AND third parties (*Big M*)
* Traditional range of remedies:
  + May **strike down** (entire statute or severed portion), **strike down and** **temporarily suspend** the declaration of invalidity, or it may resort to the techniques of **reading down** (interpreting down a provision that could have an unconstitutional interpretation) or **reading in** (*Schachter*)
* Applies to invalid policies of government entities when considered “law” (*Vancouver Transit*)
  + Not left on the books
  + Rules of general application have broad effects (= broader remedy more appropriate)

**Types of s.52 remedies:** (*Schachter*)

**1. Define extend of the inconsistency**

* s.1 justification is critical:
  + Fails part 1 (objective) 🡪 defining inconsistency **broadly**
  + Fails rational connection 🡪 entire portion that fails this element (**more narrowly**)
  + Fails minimal impairment or balancing 🡪 defined more **flexibly**
    - Striking down, severing or reading in may be appropriate

**2. Decide remedy: strike down/severe/read-in**

* **Read in ONLY when the intent of Parliament is clear and would further the objective of the statute in line with the Charter** \*Edinger thinks this is overstepping judicial role
  + vs. *Vriend* 🡪 where expressly did not include sexual orientation (but STILL read in)
* Remedial Precision:
  + Severance: can define inconsistent section and strike it down
  + Reading in: question of how it ought to be extended may not have the same precision on constitutional analysis 🡪 in this case it is legislature’s role to fill gaps, not court’s
* Legislative Objective:
  + May be obvious from the text of the provision
  + May only be illuminated through evidence from s.1 analysis
  + May be manifest in the means chosen to pursue that objective
  + A remedy which entails an intrusion into this sphere so substantial as to change the nature of the legislative scheme in question is clearly inappropriate
* Change in Significance of Remaining Portion:
  + Is remaining portion substantially changed when inconsistent part removed?
  + May have to strike down other portions that are necessarily connected to offending provision
  + Group added smaller than group originally benefitting? 🡪 Indication that would have enacted benefit
    - Budgetary reasons, marked change in thrust of program
* Significance of Remaining Portion
  + If very significant 🡪 indication Parliament would have enacted statute w/o offensive portion

**3. Temporarily suspend the declaration of validity?**

* Gives the legislature time to fill the void
* Appropriate where:
  + A. striking down the legislation without enacting something in its place would pose a danger to the public;
  + B. striking down the legislation without enacting something in its place would threaten the rule of law, or
  + C. the legislation was deemed unconstitutional because of **under-inclusiveness** rather than overbreadth, and therefore striking down the legislation would result in the deprivation of benefits from deserving persons without thereby benefitting the individual whose rights have been violated
  + Decided AFTER decision about which remedy to impose

**Striking down:**

* Less appropriate when it’s a positive right *(Schachter*) 🡪 would deprive everyone of the benefit (more likely: reading down/reading in or striking down & suspending)

**Reading down:**

* Unavailable for omissions

**Severance:**

* Consider a provision in comparison to rest of statute 🡪 can it be severed?
  + Would the legislature have passed the constitutionally valid part without the severed part? (*Schachter)*
* ONLY appropriate in the clearest of cases, where each of these criteria is met: (*Schachter)*
  + 1. Legislative objective is obvious, or revealed through evidence offered in s.1 argument
  + 2. Choice of means used by the legislature to further that objective is not so unequivocal that severance would constitute an unacceptable intrusion into the legislative domain
  + 3. Would not involve an intrusion into legislative budgetary decisions so substantial as to change the nature of the legislative scheme in question
* **Define** extent of inconsistency between statute and Constitution (*Schachter)*
  + For severance🡪 something improperly included

**Reading-In:**

* **ONLY appropriate in the clearest of cases, where each of these criteria is met: (***Schachter)*
  + 1. Legislative objective is obvious, or revealed through evidence offered in s.1 argument
  + 2. Choice of means used by the legislature to further that objective is not so unequivocal that reading in would constitute an unacceptable intrusion into the legislative domain
  + 3. Would not involve an intrusion into legislative budgetary decisions so substantial as to change the nature of the legislative scheme in question
    - *Schachter* 🡪 group added is larger than original beneficiaries 🡪 budgetary concerns
* Defining extent of inconsistency:
  + For reading in 🡪 something is improperly excluded
* **Purposes of Reading-In:** (when determining if it is appropriate) ( *Schachter*, *Vriend*)

1. Respect for role of the legislature
   * + Avoid undue intrusion into legislative sphere
     + Edinger argues that it exceeds its proper role as delineated by an unwritten, but justiciable constitutional principle, the separation of powers, it brings the administration of justice into disrepute
2. Respect for purposes of the Charter
   * + If reading in wasn’t available, would have to strike down (remove benefits for all)
   * *Vriend* 🡪 even when legislative intent was explicit, found protection of minorities, respect for role of legislature and purpose of Charter outweighed (plus legislature deferred to court)

Schachter v Canada (1992)

Facts: P and wife had child, applied for benefits under section for adoptive parent (*Unemployment Insurance Act*), denied benefits, brought action under s.15

* Govt argues that the remedy (declaratory relief extending benefits) should be overturned

Decision:

* **Declared invalid, with suspension**
  + Legislature amended 🡪 not what reading in would have imposed (changed both adoptive and biological parents benefits)

Reasons:

* This case: violated a positive right 🡪 more likely to fall into reading down/reading in or striking down & suspending than immediate striking down
  + Under-inclusive
  + Striking down 🡪would deprive others of benefit, not providing relief to P
    - Requires suspension
  + **Should the court Read-in?**
    - Must look at legislation:
      * No clear legislative objective
      * Budgetary considerations
      * Substantial intrusion into legislative domain
        + Would change the nature of the scheme as a whole

Vriend v Alberta (1998)

Facts: Vriend was dismissed from employment with private school when they found out he was homosexual. Filed a human rights complaint, it was dismissed. Brought action claiming that the failure of the act to protect against discrimination. SCC found violation, not saved under s.1. Appellant argues for reading in.

Decision: Read in provisions

Reasons:

* **Dealt with omission 🡪 reading down isn’t available**
* **Considerable number of sections that play an important role in the scheme 🡪 severance would not be possible**
* Must consider two principles when determining if reading in is appropriate: (1) Respect for role of legislature (2) Respect for purposes of Charter
  + Interference with scheme enacted by the legislature by striking down would deprive all of human rights protection, against the **purpose of the Charter**
* Had expressly chosen to exclude sexual orientation
  + But if reading in is not available when government is explicit, it suggests government should just violate Charter rights in deliberate ways
  + Government deferred the decision to the judiciary (intention to defer to courts)
  + 🡪 Therefore should **read in** to make the statute in line with the Charter

R v Ferguson (2008)

Facts: Constable Ferguson was charged with manslaughter with a firearm, subject to mandatory minimum sentence. Challenged the validity under s.12 of the Charter. Issue was remedy. Wanted a constitutional exemption, but for the the law to remain valid.

* Argues: s.52 is blunt, preserves law to maximum extent possible (fits well with severance, reading in, reading down)

Decision: s.52 would apply if the violation would have been found.

Reasons:

* Judge disagrees based on four considerations: (1) the jurisprudence; (2) the need to avoid intruding on the role of Parliament; (3) the remedial scheme of the Charter; and (4) the impact of granting constitutional exemptions in mandatory sentence cases on the values underlying the rule of law
* **NOT striking down legislation that violates the Charter would leave offensive legislation on the books**
  + 🡪 Generates uncertainty, law & practice would diverge, removes notice to citizens, uneven/unequal application of the law, does not give clear guidance to government
* **Allowing Judges to grant an exemption would import discretion where the legislature wanted none (the whole point of mandatory minimums)**
  + Directly contradicts parliament’s intent
* CE could remove all recourse to s.52 (contrary to intent of Charter’s framers)
* CEs are only granted as remedial measures alongside suspended declarations (ancillary, not stand-alone)

Vancouver v Ward (2010)

Facts: Charter rights violated by Vancouver officials who detained, strip-searched and seized his car w/o cause.

Issue: When can damages be awarded under s.24(1)?

Decision: $5000 for strip search, $5000 wrongful imprisonment; Appeal allowed

Reasons:

* This case: compensation large (serious injury, violated in an egregious fashion), inherently humiliating, degrading regardless of how it is carried out, significant harm to intangible interests; no countervailing factors (tort claims were dismissed)
  + Damages: not on the high end of the spectrum (no psychological damage, never touched) 🡪 moderate damages

**How to assess damages under s.24(1):**

* + **Constitutional damages (vs. tort) can be a remedy**

R v Conway (2010)

Facts: Physically and sexually abused as a child, twice convicted of assault, raped aunt 🡪 not guilty, insanity. Argued Charter rights violated by mental health facility 🡪 argues entitled to absolute discharge under 24(1)

Decision: Absolute discharge is not available 🡪 danger to public. Ontario Review Board is a court of competent jurisdiction.

Reasons:

**Test for determining of a Court can grant Charter remedies under s.24(1):**

* **1. Can it grant Charter remedies generally?**
  + **Can it decide questions of law & not excluded by statute?**
    - 🡪 Ability to grant Charter remedies
    - Must act consistently with the Charter and its values when exercising statutory functions
    - **Most tribunals would pass this test**
* **2. Can it grant the particular remedy sought, given the relevant statutory scheme?** 
  + Must determine legislative intent
  + Look to: scope and nature of tribunal’s statutory mandate, structure and function

Application:

* 1. Yes 🡪 Quasi-judicial body with significant authority over vulnerable population, authorized to decide questions of law (parties can appeal to tribunal, language of mandate, ongoing supervisory jurisdiction over NCRMD)
* 2. Board’s mandate to protect public safety 🡪 Parliament did not intend NCR patients to be given absolute discharges as a remedy
* 🡪 NO absolute discharge

FREEDOM OF EXPRESSION

s.2. Everyone has the following fundamental freedoms: (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

After finding a plaintiff and defendant (s.32 applicability analysis):

1. **Get yourself into 2(b)**
   * Burden is on the claimant
   * 2(b) is broadly interpreted and **includes any expressive activity** and (probably) to **receive** expressive activity(this is closer to the edge of 2(b)) (*Bryan*)
     + Does NOT have to be primarily expressive (*Baier*)
     + P must show it conveys/attempts to convey meaning (*Irwin*)
       - Don’t have to say what the meaning is as long as its not excluded form/content
       - Message does not need to be redeeming (*Butler*)
     + Purely physical activity can be expression if captured w/ intent to express (*Butler*)
       - Find some meaning of the act to bring it under 2(b)
       - Purely physical 🡪 void of meaning, feeling, opinion, ideas
     + Cannot exclude b/c of meaning or content (*Irwin*, *Butler*)
       - Butler: pornograph, obscenity
   * **Exceptions**:
     + A. Form – ex. violence (*Irwin*)
     + B. Locations (*Montreal*)
       - ~~Private property~~
       - Some public property 🡪 some government spaces are essentially private, it cannot have been the intention of government to confer a right to FOE to places that have always been off limits to the public
       - **Test for public property: \*onus on claimant** (*Montreal*)
         * Whether one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s. 2(b) is intended to serve (democratic discourse, truth finding, self-fulfilment), Factors:

a. Historic or actual use

Historic use: indicates that it is consistent with purposes

Actual use: is it essentially private? Would it undermine democracy and efficient governance to extend FOE there?

b. whether other aspects of the place suggest that expression within it would undermine the values underlying free expression

Ultimate question (normally (a) is definitive)

Provides flexibility

Does the public have access? (*Vancouver Transit*)

* + **Characterize the variety of expression, different kinds get different protection** (*Butler*)
    - Is it at the **core?** (political (*Irwin*))
      * *Butler* tried to get there (porn encouraging political discourse – govt would be given less deference)
    - Or is it at the **periphery?**
    - **Claimant: use the characterization to persuade the court that it is closer to the core (deserves more protection)**
    - **Government:** 
      * (1) Argue it is **not within 2(b)** 
        + Does not convey or attempt to convey meaning
        + Is the form violent?
      * (2) or if it is within 2(b)**, near the periphery** 
        + Motivated by economic profit (Butler, Irwin)

1. Claimant: show that there has been an infringement of FOE

**Negative Claim:** (seek freedom from legislation or action suppressing an activity in which people would be otherwise free to engage – w/o need for government support or enablement (*Baier*))

* 1. Purpose of the law is to shut down that form of expression
     + Has the govt aimed to directly restrict content?
     + Has the govt restricted a form of expression tied to content?
     + Only controls physical consequences
  2. Effect of the law is to shut down that form of expression
* *Montreal* 🡪 restricts expression that engages activities that promote such values as individual self-fulfillment and human flourishing (leisure activities)

\*Does not have to be substantial 🡪 ANY INFRINGEMENT COUNTS, but the more it infringes, the more it just be justified

**Govt can argue🡪 it is not a negative claim, it is a positive claim asking for access to a statutory platform** *(Baier*)

* + **Positive claim**: claim for the govt to legislate to enable expressive activity, positive entitlement (if previously extended, subsequently withdrawn 🡪seek inclusion (*Baier*))
    - Would have to show that the claimants themselves were excluded from the particular means of expression (*Vancouver Transit*) [failed in that case, it was just the content]

Court decides whether it is a positive or negative claim.

If the Court finds that it is a positive claim: work through the Dunmore Factors (*Baier*):

* + - **1. Grounded in fundamental Charter freedoms rather than in access to a particular statutory regime**
      * *Baier* 🡪 trusteeship is not a protected freedom, just access to the regime
      * Argue just gaining access to particular statutory regime
    - **2. The claimant must meet an evidentiary burden of demonstrating that exclusion from a statutory regime permits a:**

**SUBSTANTIAL interference with activity protected under s. 2**

* + - * + *Baier* 🡪 remained free to express in many other ways

**OR**

**That the purpose of the exclusion was to infringe such activity**

* + - * + Adduce evidence 🡪 *Baier* did not
    - **3. The state must be accountable for the inability to exercise the fundamental freedom**
      * **Does the government substantially orchestrate, encourage or sustain the violation of fundamental freedoms?**

🡪 Infringement

MUST SATISFY THEM ALL.

\*Must be seeking a freedom of expression that can only be achieved through the platform, not seeking the platform itself

1. BURDEN SHIFTS: ***Oakes* Test under s.1**
   * (1) Is there a law? (Go to Vagueness section in Justification)
   * (2) Oakes Test
     + Adduce evidence – needs to produce less now
     + No evidence? Work through contextual factors (*Bryan*)
2. Fails to discharge burden? 🡪 **Remedies**

Irwin Toy v Quebec (AG) (1989)

Facts: Irwin sough declaration that provisions prohibiting commercial advertising directed at <13 y/o were ultra vires Quebec and infringed Quebec Charter.

Decision: Violated 2(b), justified under s.1.

Reasons:

1. Within 2(b)?
   * Cannot exclude based on content or meaning
   * If it conveys or attempts to convey meaning 🡪 expressive content 🡪 *prima facie* within 2(b)
   * P must show it conveys meaning
   * ~~Violence~~, ~~threats of violence~~
2. Infringement?
   * Purpose
     + If govt aims to control only physical consequences of activity, regardless of meaning, purpose does not trench on guarantee (ex. prohibiting littering)
     + But if govt aimed to control attempts to convey a meaning by directly restricting the content or by restricting a form tied to content, its purpose trenches upon the guarantee (ex. prohibiting handing out pamphlets)
     + Restricts both a particular range of content and certain forms of expression in the name of protecting children
       - Restriction tied to content 🡪 restrict content directly as well as the manner in which the content must be expressed (cannot use superlatives, directly incite a child to buy)
   * Effect
     + If purpose is neutral but effect infringes, must show that the activity promotes one of the principles underlying the freedom:
       - (1) Seeking and attaining the truth
       - (2) Participation in community, social and political decision-making
       - (3) Individual self-fulfillment and human flourishing
     + **Claimant: identify the meaning being conveyed and how it relates to one of these principles**
     + **Govt: argue that the activity does nothing to promote these principles**

* Oakes
  + 1. Objective is protecting particularly vulnerable group, inequality imbalance between producers and consumers; does not ONLY have to protect the vulnerable group, can exercise reasonable judgement in specifying the group (can extend beyond dangerous range)
  + Rational Connection: yes
  + Minimal Impairment: Question is whether govt had a reasonable basis for thinking it impaired as little as possible given the objective.
  + Balancing: Yes

R v Butler (1992)

Facts: Appellant has shop that sells/rents “hard-core” videotapes and magazines, sexual paraphernalia. Convicted on 8 counts for 8 films based on obscenity provisions of the CC.

Decision: Violates 2(b), justified under s.1.

Reasons:

* In 2(b)?
  + Portrayal of sex must be viewed in context to determine dominant theme (is exploitation the main object or there is a larger artistic, literary or other purpose?)
  + Yes, within 2(b) 🡪 films etc. nothing inherently violent
* Too vague?
  + Clarifies the law regarding the provision🡪 therefore not too vague
  + **Provides an intelligible standard**
* Oakes
  + Objective: avoidance of harm resulting from antisocial attitudinal changes from exposure to obscene material, public interest in maintaining a decent society
  + Proportionality
    - **Keep in mind the nature of expression that is infringed**
    - **Different kinds of FOE get different degrees of protection (core or periphery?)**
    - (1) RC: Sufficiently rational, some connection
    - (2) MI: excludes materials with artistic, scientific or literary merit; Parliament has tried and this is as good as its going to get
    - (3) Balancing: Upheld.

City of Montreal (2005)

Facts: Respondent operates club with a loudspeaker at the main entrance. Charged with producing noise that could be heard outside using sound equipment in violation of a Montreal bylaw. Contests the bylaws validity.

Decision: Violates 2(b), justified under s.1

Reasons:

* Within 2(b)? *prima facie* within 2(b), emitted expressive content
  + Not excluded due to form
  + **Location?**
    - **Location: sound issued onto street, public property**
    - **2(b) does not extend to all places**
    - **Test for public property, location exclusion**
    - Falls within public place, passes location test 🡪 nothing to suggest that allowing FOE on streets would subvert values of FOE; primary purpose: provide means of passing
* Infringe 2(b)?
  + Purpose: benign
  + Effect: Restricts expression 🡪 Engaging in lawful leisure activities promotes such values as individual self-fulfillment and human flourishing
* Oakes
  + Objective: combatting noise pollution
  + Proportionality
    - 1. RC: Yes
    - 2. MI:
      * Not an absolute ban (grant exemptions), prohibited noise above certain loudness and particular noises.
      * Court will not interfere because it can think of a less intrusive way to manage the problem
      * Just must be tailored to limit in a reasonable way
      * Yes.
    - 3: Infringement does not outweigh objective

R v Bryan (2007)

Facts: During fed election, appellant transmitted the election results on from Atlantic Canada while polling stations were open in West by posting on a website. Challenging constitutional validity of s.329 *Canada Elections Act*

Decision: Violates 2(b), justified under s.1

Reasons:

* AG asserts two objectives: (1) informational equality among voters (2) public confidence in electoral system
* Very little evidence (b/c has been done this way forever) 🡪 election laws should be given deference to govt, look at factors indicating less evidence may be sufficient:
  + **1. Nature of the harm and inability to measure it**
    - Some harms are "difficult, if not impossible, to measure scientifically"
    - Resort to logic and common sense (no evidence available)
    - In some cases the objective asserted by the government will be largely a matter of the "values and principles essential to a free and democratic society". In such cases it may not be appropriate to require proof according to the usual civil requirements
  + **2. Vulnerability of the group protected**
  + **3. Subjective fears and apprehension of harm**
  + **4. Nature of the Infringed Activity: Political Expression**
* Oakes: valid 🡪 Contributes to information equality, to fairness and reputation of electoral system which is a pillar of Canadian democracy. Magnitude of the ban is small. Outweighs.

Dissent:

* Evidence is highly theoretical, highly speculative and far from sufficient to justify infringing on the core right at issue
* Harm caused is considerable, limited duration is not determinative 🡪 demonstrable
* Overly broad

**There is a right to receive information as well as disseminate it.**

Baier v Alberta (2007)

Facts: Alberta *Act* that governs the proceedings for election to school boards – changed qualifications required to run for trustee. School employees used to be ineligible in the jurisdiction in which they were employed. Amended so that employees weren’t able to run for any school board in any district unless they were on leave of absence.

Decision: Does not infringe 2(b)

Reasons:

* To argue for a right to a statutory platform for expression, must satisfy **ALL** Dunmore factors:
  + 1. Grounded in fundamental Charter freedoms rather than in access to a particular statutory regime
  + 2. The claimant must meet an evidentiary burden of demonstrating that exclusion from a statutory regime permits a SUBSTANTIAL interference with activity protected under s. 2, OR that the purpose of the exclusion was to infringe such activity
  + 3. The state must be accountable for the inability to exercise the fundamental freedom
    - **Does the government substantially orchestrate, encourage or sustain the violation of fundamental freedoms?**

🡪 Infringement

Application:

* 1. Within 2(b)?
  + Positive claim 🡪 Dunmore factors
    - Claim is to a particular statutory regime of school trusteeship
    - Does not meet 1st factor 🡪 not grounded in freedom (trusteeship is not a protected freedom)
    - Would also fail 2nd
      * Does not substantially interfere (remain free to express themselves in relation in many other ways)
      * No evidence that the purpose was to restrain their expression

Greater Vancouver Transit Authority

Facts: Canada Federation of Students and BC Teacher’s Federation attempted to purchase advertising space. Refused to post the respondents' advertisements on the basis that such advertisements were not permitted by their advertising policies. **Not a statute.**

Decisions:

Reasons:

* Is a government entity (see Applicability) 🡪 Charter applicable to all activities
* Govt argues that the claimants are invoking the Charter to place these government entities under a positive obligation to make buses available for their expression 🡪 DUNMORE
  + To demonstrate this 🡪 would have to show that the claimants themselves were excluded from the particular means of expression
  + NO 🡪 just the content, not requesting the government support or enable their expressive activity by providing them with a means of expression from which they are excluded
* *Montreal:* exclusion b/c of form or location?
  + Location
    - Historical or actual use
      * History of use as a place for public expression
      * Also actual use
      * Does not impede the primary function of the bus as a vehicle for public transportation or undermines the values underlying 2(b)
    - Other aspects indicate values undermined
      * Translink: private publicly owned property
        + General public has access to advertising soace
        + By nature: public place
* Infringes? Yes
* Prescribed by law?
  + Not narrow term, can be prescribed by common law or regulation, municipal by-laws, provisions of a collective agreement involving a government entity, rules of a regulatory body
  + **Adoption is authorized by statute, they are binding rules of general application, and they are sufficiently accessible and precise to those to whom they apply**
  + This case: enabling legislation confers broad discretionary power on the board to adopt rules regulating itself
  + Where a legislature has empowered a government entity to make rules, it seems only logical, absent evidence to the contrary, that it also intended those rules to be binding
  + Not meant for internal use/administration🡪 Law
* Justified?
  + Purported objective: safe, welcoming transit system
  + **Fails rational connection** 🡪 Difficulty seeing how an advertisement on the side of a bus that constitutes political speech might create a safety risk or an unwelcoming environment for transit users
  + **Fails minimal impairment** 🡪 prohibiting things that “create controversy” is overly broad
* Remedy
  + Not challenging government actions, challenging the law itself
  + It is more appropriate to deal with rules made by government entities under s.52(1)
    - Not left on the books
    - Rules of general application have broad effects (= broader remedy more appropriate)

FREEDOM OF RELIGION

**Freedom** (*Big M*)

* **(1) right to entertain such religious beliefs as a person chooses** (*Big M*)
* **(2) the right to declare religious beliefs openly and without fear of hindrance or reprisal** (*Big M*)
* **(3) right to manifest religious belief by worship and practice or by teaching and dissemination** (*Big M*)
* **(4) characterized by the absence of coercion or constraint** (*Big M)*
* Means that individuals are free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided inter alia only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own (limitation) (*Big M*)
* Equally protected: expressions/manifestations of non-belief (*Big M*)

**Religion** (*Amselem*)

* Religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual’s spiritual faith and integrally linked to one’s self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith
  + Subjective

After finding P & D (s.32 analysis)

1. Get into 2(a), claimant must show:
   * (1) He or she has a practice or belief, that has a **nexus with religion** (*Amselem*)
   * (2) He or she has a **sincere belief**
     + Court looks at credibility
       - Does NOT need to be supported by any mandatory doctrine of faith (*Amselem)*
       - DO NOT: look at past-practices, beliefs (*Amselem*)
         * Only on the person’s belief at the time of the alleged interference
     + Religion: in supernatural (*Amselem*)
     + Can be an organization (*Loyola*)
       - Communal character of religion means that protecting the religious freedom of individuals requires protecting the religious freedom of religious organizations, including religious educational bodies such as Loyola
       - **Instead of sincere belief 🡪 an organizational claimant must show that the claimed belief or practice is consistent with both the purpose and operation of the organization** (*Loyola*)
         * Credibility of officials and representatives (objective indicators), asses in light of other practices/policies/governing documents, may be expected to be more static (less fluid) than those of an individual (*Loyola*)
   * Or be **free of state religious coercion or constraint** (*Big M*, *MLQ*)
     + Doctrine of state neutrality (*MLQ*)
2. Demonstrate a substantial infringement
   * *Amselem* 🡪 non-trivial interference
     + Trivial or insubstantial” interference does not threaten actual religious beliefs or conduct (*Hutterian*)
     + **Argue that it is merely trivial interference, still have a choice (therefore, less justification required)**
     + Deprivation of a meaningful choice: serious violation (*Hutterian*) (**if the law compelled a violation)**
       - The incidental effects of a law passed for the general good may be less serious (*Hutterian*)
       - **Argue that even its not a direct infringement or doesn’t create an absence of choice between obeying the law and following religion its not meaningful**
         * *Hutterian* 🡪 still have a meaningful choice (alternative transport for additional cost) 🡪 less serious end of the scale
3. Is it law or an administrative decision?
   * Law 🡪 s.1 justification (*Hutterian*)
   * Administrative decision 🡪 reasonable in all circumstances of the case? (*Loyala)*

Big M Drug Mart (1985)

Facts: Charged with unlawfully carrying on sale of goods on Sunday contrary to *Lords Day Act* which prevented commercial activity on Sunday

Application:

* *Act* works as a form of coercion inimical to the spirit of the Charter and the dignity of all non-Christians
* **Government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose**

Syndicat Northwest v Amselem (2004)

Facts: A are Orthodox Jews, co-owners of residential units. By-laws prohibit exterior decorations on balcony etc. Appellants want to set up succuh on balcony for a Jewish religious festival where they dwell during Succot, also forbidden from using electricity, carrying things etc.

* Syndicat proposed they could set up a communal succuh in garden, A refused.
* Syndicat filed application for permanent injunction – granted.

I: What is religion?

D: For appellants.

R: As long as the person sincerely believes that a certain practice or belief is experientially religious in nature in that it is either objectively required by the religion, or that he or she subjectively believes that it is required by the religion, or that he or she sincerely believes that the practice engenders a personal, subjective connection to the divine or to the subject or object of his or her spiritual faith, and as long as that practice has a nexus with religion 🡪 triggers protection

* Assuming that that an individual can theoretically waive his or her right to freedom of religion 🡪 would have to be explicit, voluntary, freely expressed and with a clear understanding of the consequences of doing so
  + Also still open whether it is EVER permissible to waive Charter rights

Alberta v Hutterian Brethren of Wilson Colony (2009)

Facts: Province made drivers licence photo requirement universal to reduce the risk of IDs being used for ID theft. Use software (one-to-one and one-to-many) 🡪 comprehensive photo requirement is essential to ensure efficacy.

* Claimants argue it would violate religion to get photos taken, and if they can’t get driver’s licenses cannot maintain their religious lifestyle

D: Justified under s.1

Reasons: Divides on last stage of Oakes:

* Salutary effects: (1) Enhancing the security of the driver’s licensing scheme (2) Assisting in roadside safety and identification (3) Eventually harmonizing Alberta’s licensing scheme with those in other jurisdictions
* Deleterious effects:
  + Consider the impact in terms of Charter values (liberty, human dignity, equality, autonomy, and the enhancement of democracy)
  + Driving is not a right, it is a privilege
  + While not trivial 🡪 fall on less serious end of the scale

Dissent:

* No evidence (govt did not discharge its evidentiary burden) – speculation only
* Harm: substantial & ascertainable
* Benefit: speculative (hundreds of thousands of AB don’t have driver’s licences)

Loyola High School v Quebec (2015) SCC

Facts: Quebec required a Program on Ethics and Religious Culture (ERC), which teaches about the beliefs and ethics of different world religions from a neutral and objective perspective; Minister may grant private schools an exemption from the ERC Program if they offer an alternative program that the Minister deems to be equivalent. Appeal from an exemption denial for Loyola, a private Catholic school.

Decision: Seriously infringes FOR, no benefit for the program’s objectives 🡪 disproport

If anadministrative decision(exercise of discretion) that causes an infringement, don’t go to s.1 **🡪** just ask: **was the decision reasonable?**

Dore Analysis:

1. Engage Charter? 🡪 Yes, serious infringement
2. Whether, in assessing the impact of the relevant Charter protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a **proportionate balancing of the Charter protections at play?**
   * + Must be reasonable in terms of infringement and accommodation
     + Looks like final 2 stages of Oakes: minimal impairment and balancing
     + Highly contextual

* Serious infringement (tells it how to explain its faith undermines the liberty of the members)
  + 🡪 remedy under 24(1); sent back to Minister for reconsideration
    - Concurring: order Minister to grant an exemption

MLQ v Quebec (2015)

Facts: City want to continue reciting a prayer at the start of city council meetings. Appellants asking them to cease this practice. Adopted a by-law, to regulate the recitation of prayer (“non-denominational” which is then followed by 2 minute silence).

Decision: Right is impaired – adhering to certain religious beliefs to the exclusion of others. Breaching state’s duty of neutrality.

Reasons:

* **Sponsorship of one religious tradition by the state in breach of its duty of neutrality amounts to discrimination against all other such traditions**
* State neutrality:
  + Requires that the state neither favour nor hinder any particular belief, and the same holds true for non-belief
  + Denies others’ equal worth, required in free and democratic societies
  + By expressing no preference, the state ensures that it preserves a neutral public space that is free of discrimination and in which true freedom to believe or not to believe is enjoyed by everyone equally, given that everyone is valued equally
  + Must abstain from taking a position
* Infringement is more than trivial or insubstantial
  + Attempt to accommodate exacerbated the discrimination

**HEALTH**

* Provision of hospitals and health care is generally a provincial responsibility. However, the federal government plays a leading role in health care
  + Contributes funding to provincial health insurance programs, provided they conform to certain requirements including “comprehensiveness”

Assisted Human Reproduction:

* Health is a jurisdiction shared by both the provinces and the federal government.
* In order to preserve the balance of powers, Parliament’s ability to pass criminal laws on the basis of health must be circumscribed
  + Must address a “legitimate public health evil” (*RJR Macdonald)*
    - food and drug products, tobacco, gun control, environmental degradation
  + three constant features:
    - 1. Human conduct
    - 2. Injurious or undesirable effect
    - 3. Health of members of the public