**Pith and Substance**

* Object and Purpose
	+ Legislative history
	+ The evil aimed at
	+ Its form and content
* Effect
	+ Legal
	+ Actual
* Motive
	+ Intent of legislators; there must be no colourability

**Ancillary doctrine**

This determines whether the impugned provision is ancillary to the scheme of the legislation and therefore can be upheld by virtue of that relationship.

The requisite degree of relationship between the provision and the statute is dependent on the seriousness of the encroachment into provincial powers.

Varying scale from “necessary” or “integral” to “functional”.

**Double Aspect Doctrine:** a subject matter can be treated validly by province (because of provincial aspect); but the same subject matter can also be treated by Federal (because of national aspect)

**PEACE ORDER AND GOOD GOVERNMENT**

**Emergency Branch**

* Allows for a greater encroachment on the provincial heads of power
* Must be temporary *(Anti-Inflation Reference)*
* The form and manner of emergency legislation must make it very clear that the government thinks it is an emergency *(Anti-Inflation Reference)*
* The existence of an emergency is judicially reviewable but great deference is given to parliament; they need only be persuaded of a “rational basis” for believing in its existence (*Anti-Inflation Reference*)
* The continuance of an emergency is judicially reviewable; the Court requires clear evidenceof this fact; the burden of proof is on the person bringing the argument (*Fort Frances*)

**National Concern Branch**

* If it is found to be subject matter of national concern, it holds this status permanently(*Anti-Inflation Reference)*
* The true test is found in the subject matter of the legislation (*Canada Temperance Foundation*; *Johannesson*)
	+ The geographic spread of a subject matter is not sufficient to make it a national concern (*Canada Temperance Foundation*)
* The subject matter must be have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern*(Crown Zellerbach)*
	+ Characterization is very important here
* The subject matter must have a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution (*Crown Zellerbach*)
* It is always relevant to consider the Provincial Inability Test (*Crown Zellerbach)*
	+ What would be the effect on extra‑provincial interests of a provincial failure to deal effectively with the control or regulation of the intra‑provincial aspects of the matter?

**CRIMINAL LAW**

**Federal legislation**

* + - * + 91(27) - The Criminal Law
* Requires a prohibition, penalty and public purpose (*Margarine Reference*)
* Prohibition:
	+ May have regulatory aspects (*Hydro-Quebec*)
	+ May contain exemptions; these help define the crime (*RJR Macdonald*)
* Purpose
	+ “Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law” (*Margarine Reference*)
	+ This list is amorphous; plenary; non-fixed; not static (*RJR*)
	+ Ambiguity between a reasonable apprehension of harm or a reasonable basis for concern (*AHRA*)
	+ Protection of the environment is a valid purpose (*Hydro-Quebec*)
* It must not take away all jurisdiction from the provinces; this infringes the principle of federalism (*AHRA*)
	+ It can have incidental effects on provincial jurisdiction (*RJR MacDonald*)

**Provincial Legislation**

92(13) – Property and Civil Rights 92(14) – The Administration of Justice; 92(15) – Imposition of Punishment 92(16) – Matters of a merely local or private Nature

* Emphasize the property (‘in rem’) and civil rights aspects of legislation (*Chatterjee*)
* Focus on the local and peculiar nature of a problem; or a temporary local emergency (*Dupond*)
* Permits and licenses are powerful tools; i.e. for local businesses (*Rio Hotel*)
* Legislation that is pre-emptory or preventative can be valid (*Dupond*)
	+ Form and language is important: don’t copy the criminal code; principle of exclusiveness (*Rio Hotel*)
* A wide breadth and scope is better than narrow (*Chatterjee*)
	+ Avoid draconian penalties; avoid fine and imprisonment; the harsher the penalty the more it looks like criminal law
	+ Never use the word supplementary, use complementary (*Dupond*)
	+ Don’t let moral concerns be (or seem to be) the primary reason for provincial legislation
	+ Some criminal activities will never have a provincial aspect (e.g. abortion, prostitution)
	+ Avoid discussing the problem in the legislature
* Offenses should be reasonably necessary for the purpose of the legislation and an important and integral part of the scheme (*Dupond*)

**REGULATION OF THE ECONOMY**

Provincial Legislation

* 92(13) and 92(16) are the heads of power most often used
* Have jurisdiction over
	+ Contracts and professions (*Citizens Insurance*)
	+ Primary stages of production (everything before the border – can’t reach back) – local works and undertakings 92(10) (*Eastern Terminal Elevator*)
* Effects of legislation on extraprovincial trade are irrelevant (“merely incidental”) unless the Court finds that these effects are what the province is aiming at (*Carnation*)
	+ Identify the stage of production
	+ Localize whatever it is the province wants to regulate
	+ Marketing boards are very useful in this regard
	+ Note the distinction between goods coming in (*Burns*) and going out (*Carnation*).

Federal Legislation

* See 3-step test from *General Motors* (P&S – *prima facie* intrusion on provincial head of power; which head of power it falls under; ancillary doctrine)
* 91(2) is not the only head of power but the one used most often
	+ It has two branches (*Citizens Insurance*)
* First branch: interprovincial and international trade (the “flow of trade”)
* Second branch: general regulation of trade affecting the whole dominion
	+ Work through 5 criteria
	+ And then ask the 6th question
* It doesn’t give Parliament the right to regulate:
	+ Early parts of production (cannot “reach back” – *Eastern Terminal Elevator*)
	+ The geographical distribution
	+ Particular industries
	+ Contracts
* It does not subtract anything from provincial jurisdiction
	+ Double aspect doctrine
* Form and characterization of the legislation is very important

Second branch of 91(2):

* 1. The impugned section must be part of a general regulatory scheme
	2. The 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 with a particular industry
	4. The legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting
	5. Failure to include one or more provinces in the legislative scheme would jeopardize successful operation of the scheme in other parts of the country.
	6. *Re Securities Act*: Does the Act viewed in its entirety address 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?
		+ Provincial inability test: do they have the ability to enact this legislation?
		+ It must address a constitutional gap: something the provinces can’t do.

**TAXATION**

1. Characterization – is this a tax? Or is it some other kind of levy (i.e. a license fee under 92(9))?
	* *Allard Contractors*: Indirect taxes can be valid under 92(9) as long as its object is to defray the expenses of the regulatory scheme, and there is reasonable correlation between the tax and the costs.
	* Taxes are generally: compulsory; levied by a public body; for a public purpose; with no nexus between the costs and the quantum.
2. If this levy is a tax, is it direct?
	* *Bank of Toronto:* “A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another.”
	* *CIGOL: There is “basic wellhead price” based on the 1973 price, and a “wellhead price” based on the world price (which is much higher). The difference between wellhead price and basic wellhead price is a tax. The producer is prevented from circumventing the tax (selling at less than market price) because the Minister can set a floor price.*
	* Majority:
* It is a commodity tax, therefore it is indirect.
* The legal effect of the price fixing is aimed at extraprovincial trade.
* Dissent:
* Categorizing taxes isn’t always as simple as commodity tax = indirect; you must look at how the tax operates
* It must be determined what the actual effects of the tax are:
	+ There is no evidence that the ‘floor price clause’ has been used.
	+ Even if it is used, it is done after the fact (*ex post facto*) and therefore is not passed on
		- Does not ‘add to price’ but ‘takes from owner’
		- The tax does not set the price, the price sets the tax
1. If it is direct, it is in the province?
	* *Bank of Toronto:* Don’t need to be domiciled or a resident, justpresent (the bank had a branch in Quebec)
2. Was the legislation properly enacted?
	* *Eurig Estate:* the taxing legislation came from the executive, not the legislative.
3. Does the taxpayer have immunity (s. 125 – Crown immunity from provincial taxes)?
	* *Johnny Walker: 92(5)*
4. If the legislation is held to be invalid, can the taxpayer get the money back?
* *Kingstreet Investments:* if there is a constitutionally invalid taxing statute, then there is a constitutional right to claim repayment of that tax with some limitations: (1) limitation period; (2) no compound interest (because no morally wrongdoing of province).
* Provinces can legislate retroactively to prevent fiscal chaos.

Federal government:

S. 91(3) - The raising of Money by any Mode or System of Taxation

As much as they like, any way they like

* Colourability is the major limitation:
	+ Cannot regulate something they shouldn’t be regulating
	+ Never assume that the only legitimate reason is to raise revenue
* There is virtually no limitation on Federal taxing power
	+ They can impose charges under other heads of power
	+ The tax does not need to be for a federal purpose (*Winter Haven Stable*)

Provincial government

* S. 92(2) – direct taxation within the province for the raising of revenue for provincial purposes
* S. 92(9) – shop, saloon, tavern, auctioneer, and other licenses in order to raise revenue for provincial, local, or municipal purposes
* S. 92A(4) – in each province, the legislature may make laws in relation to raising by money by any mode or system of taxation in respect of
1. Non-renewable resources and forestry resources, and BUT: such laws cannot differentiate between production exported to other provinces or not exported.
2. Sites for generation of electric energy, whether such production is exported in whole or in part from the province

BUT: such laws cannot differentiate between production exported to other provinces or not exported.

* S. 121: cannot impose tariffs between provinces
* S. 125: No lands or property belonging to Canada or province shall be liable to taxation
	+ Crown lands have immunity from taxation by other levels of government.

**INTERJURISDICTIONAL IMMUNITY**

A party may rely on the doctrine of interjurisdictional immunity to show that a statute is not **applicable**.

\*Note - the doctrine is reciprocal: it can be used to protect to protect provincial heads of power and provincially regulated undertakings from federal encroachment (*CWB*)\*

1. Identify a federal entity.
	* Federally incorporated companies.
	* Examples include the RCMP, Canada Post, Banks and Indians.
	* 92(10)(a) gives federal legislative jurisdiction over all forms of transportation and communication which extend beyond a province’s borders.
	* Generally this includes all modern forms of transportation and communication.
	* It does not need to be both a work and an undertaking (*Winner*).
	* Look at how the business is actually being operated.
	* *Winner:* the undertaking was one and indivisible.
	* The entity must avoid the appearance of colourability: attempting to avoid provincial jurisdiction by starting activities over the border or having an occasional interprovincial service (*Winner*).
* An entity may be a “derivative undertaking” that is associated or connected with a federal entity.
* There must be a sufficiently close relationship between the two entities (*Tessier*).
* *Tessier:* Stevedoring would fall under this category; however:
* It was not the exclusive activity of the company.
* There was no ‘discrete’ stevedoring unit - the employees and equipment were not exclusive to stevedoring and moved between activities.
* The relative number of employees doing stevedoring was low.
1. Identify the vital or essential part of the entity.
	* Some words from *CWB*:
	* Essential to the existence of something
	* Absolutely indispensable or necessary
	* More than just a benefit
* ‘Peace of mind insurance’ does not fall into this category for banks
* This typically includes internal operations such as labour relations, management, wages, and health and safety (*Bell* *’88*).
1. Persuade the court that the application of the provincial statute impairs a vital or essential part of the entity.
	* In order for a federal entity to be immune from provincial legislation, the provincial statute must impair a vital or essential part of that entity (*CWB*).
	* ‘Impair’ means more than ‘affects’ but not necessarily ‘sterilizes’ or ‘paralyzes’.
	* Look to the pith and substance of the legislation
	* *Winner* dealt with a license to operate.
	* Only certain parts of certain provincial statues impair federal entities.

The doctrine also applied to federal heads of power (*CWB*). (*Note - This is much harder, especially for provinces*).

* 1. Identify a head of power
	2. Try and find the precedent for using IJI with that head of power
	+ You likely won’t have this in an exam
	+ There are no precedents for provincial heads of power.
	+ Maritime negligence law is at the core of 91(10) - Navigation and Shipping (*Ordon*)
	+ *PHS*: the court has never recognized a core of provincial power over health care; and the claimants failed to delineate one.
	1. Identify the core of the head of power
	+ This can be challenging
	+ “Basic, minimum and unassailable content” (*Bell ’88*)
	+ “The minimum content necessary to make the power effective for the purpose for which it was conferred” (*CWB*)
	+ The court is reluctant to identify new areas where IJI applies (*PHS*).
	+ The court has never applied it to a ‘broad and amorphous’ area of jurisdiction (*PHS*).
	+ *PHS*: recognizing a new protected core here would create ‘legal vacuums’
	1. Persuade the court that application of the statute impairs the head of power
		+ Does it trench on the protected core of federal/provincial competence?
		+ Does it seriously or significantly trammel the federal/provincial power?
	+ i.e. more than ‘affect’ but not necessarily ‘sterilize’

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Reasons to limit IJI? Or redefine ‘impairs’ See Jan 16 and para 43-46, 67 of *CWB,* para 62-64 PHS (also inconsistent w/ pith and substance doctrine – once it fals under a head of power, incidental effects are ok see Jan 20; vaccums are ok? See MT notes)

* Uncertainty – goes against incremental approach to Canadian constitutional law
* Risk of legal vacuums – if you say IJI is that even incidental effects are not allowed
	+ Edinger doesn’t see much problem with this though, what’s wrong with not being regulated?
* Risk of unintentional centralizing tendency – undermine “subsidiarity” – level closer to the issue should govern the issue 🡪 this is becoming an implied constitutional principle that’s justiciable (not quite affirmed, but she’s of the view it’s coming to be constitutionalized!)
* If feds don’t want provincial legislation in a certain area, then fed should extend legislation, and not leave it up to an IJI claim
* Note broad readings of heads of power and double aspect doctrine leading to IJI

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**EXTRATERRITORIALITY**

**Validity**

1. *Churchill Falls:* Where the pith and substance of the legislation is:
	* + In relation to matters which fall within the field of provincial legislative competence, incidental effects on extra-provincial rights will not render the enactment *ultra vires*.
		+ The derogation from extra-provincial rights then, even if it is cloaked in the proper constitutional form, it will be *ultra vires*.
		+ *Churchill Falls:* the legislation was colourable – it pretended to be in relation to property in the province but there was plenty of evidence that it was aimed at the contract (i.e. derogation of extra-provincial rights). The evidence included: requests for more power than was provided for in the contact; a subsequent demand by Order in Council; a pamphlet calling for fairness and equity; etc.
2. *Imperial Tobacco:* Where the pith and substance of the legislation relates to a tangible matter, one need only look to the location of the matter. If it is in the province the legislation is valid. If it is outside the province the legislation is invalid.
3. *Imperial Tobacco:* Where the pith and substance of the legislation relates to an intangible matter, there should be a meaningful connection between:
	* (List all the connections)
	* The enacting territory;
	* The subject matter of the legislation; and
	* The persons made subject to it.
	* *Imperial Tobacco:* strong relationships between the enacting territory (BC), the subject matter (compensation for the BC government’s tobacco-related health care costs) and the persons made responsible (the tobacco manufacturers).
	* *Imperial Tobacco:* The breach of duty need not occur in BC because the legislation is not aimed at the mischief, it is aimed at compensation; and the breach is strongly tied to BC citizens and the BC government’s costs.

**Applicability**

For a statute to **apply** extraterritorially, there must be a real and substantial connection between the law and the enacting province. To determine if there is a real and substantial connection, the Court looks at four propositions set out in *Unifund*:

1. 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.
	* (List all the connections)
	* *Unifund:* ICBC is not authorized to sell insurance in Ontario; its vehicle had not ventured into Ontario; the accident occurred in BC; and ICBC benefited from BC’s law, not Ontario’s.
	* Some examples in *Unifund:*
	* *Ladore*: province could reduce interest on bonds because out-of-province purchasers had created a sufficient relationship with the province.
	* *Broken Hill:* actual domicile is required for tax.
	* *Moran*: presence in the jurisdiction is not required for manufacturers in a product liability case.
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.
	* Consider the collective interest of the federation as a whole.
	* *Unifund:* this would be undermined if every injured party and its insurer imposed their varying insurance arrangements of their home jurisdiction.
	* Example from *Unifund*:
	* Hunt*:* a Quebec statute prohibiting removal of business records excused compliance with documentary production in a BC court, and this offended the principles of order and fairness.
4. The principles of order and fairness, being purposive, are applied flexibly according to the subject matter of the legislation.
	* A relationship that is inadequate to support the application of regulatory legislation may nevertheless provide a sufficient connection to permit the courts of the forum to take jurisdiction over a dispute. The court may then apply the law of the other province and use rules of conflict resolution governing choice of law issues.

**PARAMOUNTCY**

A part may rely on the doctrine of paramountcy to show that a statute is not **operable**. Where provincial legislation is incompatible with federal legislation, the federal legislation must prevail and the provincial legislation is rendered inoperative to the extent of the incompatibility.

Paramountcy applies where there is an actual conflict in operation between two statutes i.e. one says ‘yes’ and the other says ‘no’ (*Multiple Access*).

* + *Multiple Access:* it was a double-aspect matter because it was possible for the validity of legislation by both jurisdictions; duplication does not create defiance of one by the other.

Paramountcy can also apply when the provincial law frustrates the purpose of the federal law (*CWB*).

* + In *Mangat,* the federal statute allowed for non-lawyers represent an individual at an immigration tribunal, however provincial laws required a person to be a member of the bar association before they could represent or advise for a fee.
	+ i.e. it is possible to comply with both, but the provincial law is stricter.
	+ As a matter of constitutional interpretation, preference is giving to an interpretation that does not create conflict between the statutes (*CWB*).

**APPLICABILITY**

Per s 32, the *Charter* applies to Parliament and the government of Canada, as well as the legislature and government of each province.

1. Legislation is a product of the legislature and is always subject to the *Charter.*
* Omissions in legislation may be challenged (*Vriend*).
1. If an entity is government for the purpose of s 32, then everything it does is subject to the *Charter.*
* *Godbout*: Any act performed by a government entity is necessarily “governmental” in nature and cannot be considered “private”.
* *Dolphin Delivery:* section 32 does not refer to “…government in its generic sense - meaning the whole of the government apparatus of the state…” but does include the legislative, executive and administrative branches (not the judicial).
* *McKinney:* The fact an entity is a creature of statute, receiving public funding, performing a public service and subject to regulation is not sufficient to make it government for the purpose of s 32.
* *McKinney:* In determining whether an entity is government, the key factor is the level of control the government has over that entity.
* In other words, what is the level of autonomy that entity has? Who makes the decisions?
* The university was sufficiently autonomous: the board of governors was appointed independently of government; it managed its own affairs such as negotiating contracts and allocating funds; and a high level of government control would breach academic freedom.
	+ *Douglas College:* the government at all times directed the school’s operation.
	+ *Stoffman:* the hospital was not government; each member of the board represented an organization and the Minister’s power of appointment was not a means for the exercise of control over day-to-day operations of the hospital.
	+ *Godbout:* municipalities are government; they are democratic, can tax, create laws, and exercise powers which the province would otherwise have to exercise itself.
1. If a private entity is found to be implementing a specific governmental policy or program, the *Charter* applies to the entity with regard to that activity (*Eldridge*).
	* Policy: the government cannot delegate its duties to avoid *Charter* scrutiny (doctrine of evasion).
	* This depends on the nature of the activity itself (*Eldridge*).
	* Is the entity a “vehicle” for the delivery of that program?
	* *Stoffman:* a mandatory retirement program was approved by the Minister of Health; but was a regulation for internal management of the hospital and it was developed, written and adopted by the authorities entrusted with the ongoing management of the hospital’s internal affairs; there was considerable variety between hospital by-laws dealing with retirement.
	* *Eldridge:* in providing medically necessary services, hospitals are carrying out a specific government objective. The *Hospital Insurance Act* provides for a comprehensive social program, and the hospitals are merely the vehicles the legislature chose to deliver this program.
	* *Douglas College:* the school is a delegate through which the government operates a system of post-secondary operation, as its constituent act makes clear.

You can also invoke “*Charter* values” to support your arguments that the common law should be changed to be more consistent with the *Charter* (*Grant*).

* + You cannot directly challenge judicial decisions and the common law.
	+ You can use it for statutory interpretation.
	+ This is how the *Charter* can be invoked in private litigation.

**2(B) - FREEDOM OF EXPRESSION**

*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*

1. The claimant must establish that the action falls within the scope of 2(b)
	* If an activity conveys or attempts to convey meaning, it has expressive content and falls under 2(b) (*Irwin Toy*)
	* Note: expression has content and form.
	* Some activity is purely physical and does not convey meaning, such as parking a car.
	* Violence as a form of expression receives no protection under 2(b) (*Irwin Toy*)
* Commercial advertising falls under 2(b) (*Irwin Toy; City of Montreal*)
* The purpose need not be to convey meaning - you just need to find some meaning and it need not be ‘redeeming’
* How you characterize the right at this stage is important in the justification analysis.
* *Butler:* pornographic materials have some meaning for their individual who created them; but this only engages individual self-fulfilment at its more base aspect and is at the periphery, rather than the core, of freedom of expression. For example, the BCCLA argued that pornography “validates women’s will to pleasure…celebrates female nature”.
* Try and connect the meaning to the core of freedom of expression (political expression). An economic aspect of expression may push it somewhere in between the core and the periphery.
	+ 2(b) protection is subject to the location of the expression (*City of Montreal*).
	+ Private property is outside the scope of 2(b) absent state-imposed limits on expression.
	+ Public property is subject to 2(b)depending on whether it is a place where one would expect protection of free expression on the basis that expression in that place does not conflict with the three purposes underlying 2(b). Factors to consider include:
	+ The historical or actual function of the place (important - most cases are decided here).
	+ Is it a place where free expression has traditionally occurred?
	+ Is it essentially private?
	+ Is the activity at that location compatible with free expression?
	+ Does the activity at that location require privacy and limited access?
	+ Is free expression consistent with that activity or would it hamper it?
	+ Other aspects of the place that may be relevant.
	+ Changes in society in technology
	+ There is a right to receive expression (*Bryan – political information*).
	+ But it is on the periphery of 2(b)
1. The claimant must establish an infringement of the right.
* If the purpose of the law is to control attempts to convey meaning by directly restricting the content (or by restricting a form of expression tied to content) its purpose trenches on the guarantee (*Irwin Toy*).
* The question is whether the mischief aimed at is within the meaning or influence of the activity or merely the direct physical result.
* *Butler:* the purpose of the law was anti-obscenity.
* If the government’s purpose was not to restrict expression, the plaintiff can still argue that the effect of the government’s action was to restrict her expression (*Irwin Toy*). In this case, the plaintiff must identify the meaning being conveyed and how it relates to the principles underlying free expression:
* The pursuit of truth
* Participation in the community (democratic discourse)
* Individual self-fulfilment and human flourishing
* *Butler; City of Montreal* – “lawful leisure activity”
* Is the plaintiff is making a positive rights claim?
* The question is whether the appellants claim the government must legislate or otherwise act to support or enable an expressive activity (*Baier*).
* Inclusion in an underinclusive statutory scheme is the hallmark of a positive rights claim.
* A negative claim seeks freedom from government legislation or action suppressing an expressive activity in which people would otherwise be free to engage, without any need government support or enablement.
* If it is a positive rights claim, the three *Dunmore* factors must be considered.
1. Is the claim grounded in a fundamental freedom of expression rather than in access to a particular statutory regime?
* *Baier*: the claim was grounded in access to the particular statutory regime of school trusteeship
1. Has the claimant demonstrated that exclusion from a statutory regime has the effect of substantial interference with 2(b) or has the purpose of infringing 2(b)?
* *Baier*: exclusion from school trusteeship does not substantially interfere with their ability to express themselves on matters relating to the education system; it was merely a “particular channel of expression”
* *Baier*: the purpose of excluding school employees from school trusteeship was to avoid a conflict of interest.
* *Dunmore*: labour legislation excluded agricultural workers from access to a protective regime; without access to the statutory regime there was no way for the claimant to associate or organize in any way.
1. Is the government responsible for the inability to exercise the fundamental freedom?

**2(A) FREEDOM OF RELIGION**

*2. Everyone has the following fundamental freedoms:*

*(a) Freedom of conscience and religion;*

1. The scope of 2(a)
* The claimant must demonstrate that he or she sincerely believes in a practice or belief that has a nexus with religion (*Amselem*).
* This is subjective; it is “irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials.
* Expert opinion can be used to demonstrate that practices or beliefs are consistent with those of other adherents but this is not necessary.
* The court can assess the credibility of the claimant’s testimony; however it is inappropriate for the court to focus on past practices and beliefs; the focus should be on the person’s belief at the time of the alleged interference; a individual’s beliefs can change.
* Religion may involve a “…personal connection with the divine or with the subject or object of an individual’s spiritual belief…it is the religious or spiritual essence of an action that attracts protection.”
* …particular/comprehensive system of faith and worship; involve belief of divine/superhuman/controlling power; freely/deeply held personal convictions/beliefs connected to one’s spiritual faith and integrally linked to self-definition/spiritual fulfillment…
* Purpose and limitations: “The values that underlie our political and philosophic traditions demand that every individual be free to hold whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours on their parallel rights to hold and manifest beliefs and opinions of their own.” (*Irwin Toy*).
	+ Standing: any accused, whether corporate or individual, may defend a criminal charge by arguing that a law is invalid (*Irwin Toy*).
	+ “Whether a corporation can enjoy or exercise freedom of religion is therefore irrelevant [in this case].”
	+ “Section 24(1) sets out a remedy for individuals (whether real persons or artificial ones such as corporations) whose rights under the *Charter* have been infringed.”
* Waiver of a fundamental right must be voluntary, explicit, and stated in express, specific and clear term (*Amselem*).
* A group claimed this right in *Hutterian Brethren.*
1. Infringement
	* The claimant must show a non-trivial or not insubstantial interference with their ability to act in accordance with that practice or belief (*Amselem*).
	* “Freedom can primarily be characterized by the absence of coercion or constraint….coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others.” (*Irwin Toy*)
	* “…2(a) prevents the government from compelling individuals to perform or abstain from performing otherwise harmless acts because of the religious significance of those acts to others.” (*Irwin Toy*)
	* The *Lord’s Day Act* infringes 2(a) because it “…binds all to a sectarian Christian ideal…” Non-Christians are prohibited for religious reasons from carrying out activities which are otherwise lawful, moral and normal.

**JUSTIFICATION**

**Vagueness**

*Nova Scotia Pharmaceutical Society*:

Vagueness can be invoked in three ways:

1. Section 7: as a principle of fundamental justice.
2. Section 1 *in limine*: so vague that it is not “prescribed by law”.
	* The court is reluctant to find this and would rather consider it in the minimal impairment test.
3. Section 1 in the minimal impairment test.
	* This is overbreadth and vagueness rolled into one.
	* Vagueness = the law is so ambiguous that we don’t know it applies
	* Overbreadth = the law is so broad that it applies to people the legislature did not intend for it to apply to.

The doctrine of vagueness is founded on the rule of law, particularly on the principles of:

* + Fair notice to citizens.
	+ Formal aspect
	+ This is assumed; ignorance of the law is no excuse
	+ Substantive aspect
	+ A subjective understanding that some conduct comes under the law
	+ Limitation of enforcement discretion.
	+ A law must not be so devoid of precision in its content that a conviction will automatically flow from the decision to prosecute.

Factors in determining whether a law is too vague include:

* + The need for flexibility and the interpretative role of the courts;
	+ The impossibility of achieving absolute certainty, a standard of intelligibility being more appropriate; and
	+ An unintelligible provision gives insufficient guidance for legal debate and is therefore unconstitutionally vague.
	+ All language can do is enunciate some boundaries which create an area of risk.
	+ The possibility that many varying interpretations of a given disposition may exist and perhaps coexist.

**The Oakes Test**

\*Note from *Multani*: in an administrative context where a valid statute is applied in a way that breaches the *Charter*, the Court has split on whether to use the administrative proportionality test of “reasonable accommodation” or the *Oakes* proportionality test. \*

Limitations on *Charter* rights may be justified under s 1. The onus of proving this justification rests upon the party seeking to uphold the limitation, based on a balance of probability. To establish that the limit is justified under s 1, two central criteria must be satisfied:

1. There must be a pressing and substantial objective.
* *Irwin Toy:* the government identified a particularly vulnerable group and adduced evidence to this effect.
* *Butler:* the purpose cannot shift over time (shifting purposes doctrine); moralism is not a valid objective; but moralism and harm to society are not distinct (a ‘dual-purpose’); there is evidence of the harmful effects of obscene materials; community standards can shift over time as more evidence becomes available.
* *City of Montreal*: noise pollution
* *Bryan*: at this stage the government must simply “assert” an objective; it is not an “evidentiary contest” (note: don’t get sucked into this – do more than assert).
* *Nape*: fiscal concerns (see below)
1. The means must be reasonable and demonstrably justified. There are three components to this:
	* 1. The measure must be rationally connected to the objective.
	* *Oakes:* It was irrational to infer a person had an intent to traffic on the basis of possession of a very small quantity of narcotics.
		1. The measure should minimally impair the right in question.
* *Irwin Toy:* the court will show more deference to the legislature when they are mediating claims between competing groups (rather than an issue between the state and an individual).
* Policy: difficulty in striking a balance; court must avoid becoming a tool of better situated groups.
	+ *City of Montreal:* it was unclear if other methods would be effective; the court accorded the legislature a measure of latitude.
		1. There must be proportionality between the objective of the measure and its effects on the right or freedom.

Values and principles essential to a free and democratic society include: 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; and faith in social and political institutions which enhance the participation of individuals and groups in society.

Dickson in *Oakes:* The standard of proof should be applied rigorously. Since s 1 is invoked to justify an infringement of constitutionally protected rights and freedoms, a very high degree of probability is commensurate. Evidence should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing a limit.

[Compare this with]

Bastarache in *Bryan:* in analysing justification under s 1, the nature and sufficiency of evidence required depends on contextual factors which are determined after stating the objective of the provision:

* The nature of the harm and the inability to measure it
* Public confidence and informational equality are difficult to measure
* Use “logic and reason”
* The vulnerability of the group protected
* Subjective fears and apprehensions of harm
* The nature of the infringed activity

Abella’s dissent:

* + The harm is “…speculative, inconclusive, unsubstantiated…”
	+ “…highly theoretical and far from sufficiently persuasive to justify infringing the core right at issue in this case…”
	+ The right to receive is at the core – this is supressing political speech

McLachlin took the contextual approach in *Hutterian Brethren*: the police had no evidence that photo-less driver’s licenses were leading to fraud.

*NAPE:* fiscal concerns do not normally constitute a pressing and substantial objective because the government would always be able to justify an infringement of rights. There are always pressing budgetary constraints and pressing priorities. However, these were exceptional circumstances. The circumstances were not normal and the fiscal crisis was severe, an “exceptional financial crisis”.

* + It was caused by a reduction in transfer payments.
	+ The infringement was minimally impairing due to several factors: the magnitude of the monetary amount; the continued (postponed) commitment to pay equity; the fact that there had been consultation; and the government was mediating between stakeholders.
	+ There was proportionality based on the balancing of pay equity with essential services, as well as the provincial debt and credit rating.

**REMEDIES**

The twin guiding principles are respect for the role of the legislature and the purposes of the *Charter.*

**Section 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.*

Section52(1) is engaged when a law is itself held to be unconstitutional, as opposed to simply a particular action taken under it (*Schachter*).

*Schachter*: Once s 52 is engaged, three questions must be asked:

1. What is the extent of the inconsistency? It should be defined:
* Broadly when it fails the “pressing and substantial objective” test;
* Narrowly when it fails the “rational connection” test; or
* Flexibly when it fails either the “minimal impairment” or “proportionality” test.
1. Can that inconsistency be dealt with alone, by way of severance or reading in, or are other parts of the legislation inextricably linked with it? Severance and reading in will be warranted only in the clearest of cases, where each of the following criteria is met:
* The legislative objective is obvious and severance or reading in would further that objective or constitute a lesser interference with that objective than would striking down;
* Key: had Parliament been aware of the provision’s constitutional defect, would it have enacted it with the alterations being made by the court by means of severance or reading in?
* *Reading in:* this should be consistent with legislative intent.
* Remedial precision: the court should not read in in cases where there is no manner of extension which flows with sufficient precision from the requirements of the Constitution.
* *Ferguson:* creating an exemption to a mandatory minimum sentence directly contradicts Parliament’s intent; it confers discretion on judges whereas the intent is to remove this discretion.
* The choice of means used by the legislature to further that objective is not so unequivocal [clear and unambiguous] that severance or reading in would constitute an unacceptable intrusion into the legislative domain; and
* *Vriend:* the means chosen by the legislature (excluding sexual orientation from their *IRPA*) were not integral to the scheme of that act; the choice was not “of such centrality to the aims of the legislature that it would prefer to sacrifice the entire IRPA rather than include sexual orientation as a prohibited ground of discrimination”.
* Severance or reading in would not involve an intrusion into legislative budgetary decisions so substantial as to change the nature of the legislative scheme in question.
* This was the case in *Schachter:* reading in a large group into a benefits scheme would’ve had such an impact as to change the nature of the scheme as a whole; the unemployment insurance benefits were only available to adoptive parents and not biological parents.
1. Should the declaration of validity be temporarily suspended? Giving Parliament or the legislature an opportunity to bring the impugned legislation or provision into line with its constitutional obligations will be warranted if:
* Striking down the legislation without enacting something in its place would pose a danger to the public;
* Striking down the legislation without enacting something in its place would threaten the rule of law; or
* The legislation was deemed unconstitutional because of underinclusiveness 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.
* This was the case in *Schachter.*
* “Equal vineyards and equal graveyards” or “equality with a vengeance”.

**Section 24(1)**

*Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.*

*Schacter:* s 24(1) is engaged where the statute or provision in question is not of itself unconstitutional, but some action taken under it infringes a person’s *Charter* rights.

Ordinarily, where a provision is declared unconstitutional and struck down pursuant to s 52(1) that is the end of the matter. A remedy under s 24(1) is rarely used in conjunction with action under s 52(1).

*“Appropriate and just”*

*Doucet-Boudreau:* s 24(1) should be given a broad and purposive interpretation to allow the remedy to be responsive to an infringement of the right, and to be effective. An appropriate and just remedy is one that meaningfully vindicates the rights and freedoms of the claimants and employs legitimate means within the framework of our constitutional democracy. It is judicial remedy which vindicates the right while invoking the function and powers of a court.  It should be fair to the party against whom the order is made.  The approach to remedies must remain flexible and responsive to the needs of a given case.

* + The dissent didn’t like the clarity of the judge’s remedy which required “best efforts”.
	+ Therefore if your client wants something out of the ordinary, it must be clear, certain and something everyone understands. You are free to ask for remedies that are “out of the norm”, but you should justify it, show it is clear and certain, and show that it does not encroach into the other branches of government.

*Ward* provides a framework for damages as a remedy for a *Charter* breach:

1. Prove a *Charter* breach
2. Show why damages serve a useful function or purpose: a remedy should further the objects of the *Charter* such as:
* Compensation: for personal loss (physical, psychological or pecuniary) as well as intangibles (distress, humiliation, anxiety, etc.)
* Vindication: this focuses on the harm an infringement causes society, such as impairing public confidence and diminishing public faith in the efficacy of constitutional protection.
* Deterrence: this focuses on influencing government behaviour in order to secure state compliance with the *Charter.*
1. Consider countervailing factors which render the remedy inappropriate or unjust, such as:
* Alternate remedies
* Private law remedies (avoid double compensation)
* Declarations (where there is no personal damage, and no need to deter public officials from behaving in a similar way in the future)
* Legislation permitting proceedings against the Crown
* Concern for effective governance
* An award of damages make have a chilling effect on governance.
* A minimum threshold, such as clear disregard for an individual’s *Charter* rights, may be appropriate.
* *Mackin:* if state conduct is clearly wrong, in bad faith, or an abuse of power.
* The threshold varies with the situation.
1. Quantify the damages.
* Restore claimant to the position she would have been in had the breach not been committed.
* Tort law is useful here, for example with non-pecuniary damages.
* The objectives of vindication and deterrence call for proportionality with the level of egregiousness and seriousness of the repercussions on the claimant.
* This remedy should be fair and consider factors such as: the public perspective in diverting funds from public programs into private interests; and deterring government from undertaking certain policies and programs.

*“Court of competent jurisdiction”*

*Conway:*

1. The court must have jurisdiction, explicit or implied, to decide questions of law.
	* Superior courts (s 96) have this inherent jurisdiction
	* Provincial courts (s 92(14)) and administrative tribunals only have the jurisdiction bestowed on them by statute
2. It must be able to grant the particular remedy sought given the relevant statutory scheme.
* This was the issue in *Conway:* it barred the absolute discharge of a person who was dangerous to the public.

**ACCESS TO JUSTICE**

* Has its basis in the rule of law (*BCGEU*)
* Access to courts is necessary to enforce *Charter* rights (*BCGEU*)
* “Justice delayed is justice denied”
* This case only involved physical access to the court (people were picketing outside)
	+ There is no “general right to lawyer representation in court/tribunal proceedings affecting one’s rights; this is not an aspect or precondition of the rule of law (*Christie*)
	+ This case involved a tax on legal services; said to fund legal aid but legal aid was subsequently cut.
	+ Hearing fees are unconstitutional; they infringe the core of s 96 (*Trial Lawyers Assoc.*)

**STANDING**

*Minister of Justice v. Borowski (1981) SCC*

To establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, a person need only to show that he is **affected by it directly** or that he has **genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the court.**

* The legislation provides exemption from criminal liability; therefore it would be difficult to find a class of person directly affected who would have cause to attack the legislation.
* Borowski had exhausted all other means in which the issue may be brought before the court.
* *Thorson (Languages Act*): no one was directly impacted - if Thorson couldn’t be granted standing then no one could.
* *McNeill (movie censorship)*: members of the public had a direct interest but no means of accessing the court – only theatre operators could be party to an adversarial action.

Any accused, whether corporate or individual, may defend a criminal charge by arguing that a law is invalid (*Irwin Toy*).

**INTERVENERS**

This involves an estimation of whether the applicant will add a new or different perspective on the issue to that of the parties, but without widening the lease (i.e. can’t add new issues).