**EXTRATERRITORIALITY – Validity**

**🡪 STRIKES DOWN LEGISLATION ENTIRELY**

**TEST:** (Churchill, modified by Imperial)

1. Find ***PITH + SUBSTANCE*** and ***s. 92 head*** (Churchill Falls, as modified by Imperial)

* P+S:
  + Is it made to destruct a contract?
  + 🡪 COLORABLE!! (not valid)
* S. 92 Head
  + EX: Cause of action? 🡪 92(13)
  + EX: In relation to property? 🡪 92(13)

1. Determine whether P+S respects territorial limits on that head of power:
   1. **TANGIBLE P+S** 🡪 **Find physical location**
   * *Activities in the province, things in the province, touch/see/feel*
   * *INSIDE PROVINCE = valid*
   1. **INTANGIBLE P+S** 🡪 **Meaningful connection test** (Unifund)
   * *Civil rights, contract rights*
   * Look at relationship between:
     1. Enacting territory
     2. Subject matter
     3. Person/entity
        + List ALL possible connections
   * MEANINGFUL CONNECTION = VALID

\*\*If valid, incidental ET effects irrelevant

**To Rebut Validity**

🡪 disprove meaningful connection test (no connection between the enacting province, establish connect with different province

**EXTRATERRITORIALITY – Applicability**

**🡪LEGISLATION NOT APPLICABLE TO ENTIRY**

**TEST: – REAL + SUBSTANTIAL CONNECTION TEST** (Unifund)

Territorial limits on the scope of provincial legislative authority prevent the **application** of provincial law to matters not sufficiently connected to it

1. **Sufficient connection between the provincial law and the cause of action**
   1. Relationship among the enacting jurisdiction
   2. Subject matter of the law
   3. Person/entity sought to be regulated by it
2. **Requires Order and Fairness**

Order + Fairness 🡪 are purposive and applied flexibly according to the subject matter of the legislation

* 1. ORDER:
     1. Order in the federation would be undermined if competing excerises of regulatory regimes are permitted
     2. EX: If accident was a tour bus full of vistors from around the country
  2. FAIRNESS:
     1. To the out of province defendant

**To argue INAPPLICABILITY**

🡪 disprove meaningful connection test (no connection between the enacting province, establish connect with different province)

**INTERJURISDICTONAL IMMUNITY**

**🡪 ARGUING FOR INAPPLICABILITY**

**QUESTION 1: IS THE DEFENDANT A FEDERAL ENTITY?** (Winner)

Either/or…(read disjunctively)

1. **FEDERAL WORKS**

Physical thing that crosses boarders (EX: railway)

1. **FEDERAL UNDERTAKINGS**

Arrangement that crosses borders

* Winner’s bus line crossing provincial/international boarders = federal undertaking

1. **LISTED IN S. 91**

Banks, Indians, Post office, RCMP

1. **DERIVATIVE IMMUNITY** (Tessier)

* Activity sufficiently close to a federal undertaking?
  + Can claim IJI
  + Must be functionally connected to a federal undertaking

EXAM STRATEGY: Argue **federal work/undertaking**, then alternate argument of **derivative immunity**

**STEP 2 – TEST FOR IMMUNITY** (CWB)

1. **LEGISLATION SUBJECT MATTER**

* Legislation must touch on the VITAL & ESSENTIAL party of the entity
* Absolutely indispensible or necessary element (EX: internal management and operations)

OR:

* Touch on the CORE of the head of power

1. **IMPAIRMENT**

There must be an:

* ***IMPAIRMENT*** to the ***vital and essential part of the entity***

OR:

* ***IMPAIRMENT*** to the ***core of the head of power***

**Arguing core?**

Will have to address concerns from PHS:

1. No precedence
2. Difficulty of defining core

(especially w/double aspect matters)

1. Danger of legal vacuum

EXAM STRATEGY: Advance **impairment to the entity**, then alternate argument **impairment of head of power**

**PARAMOUNCY:**

**🡪 ARGUING FOR INOPERABILITY OF PROVINCIAL STATUTE**

***2 Types of Conflict****:* (Multiple Access)

1. **Operational Conflict**

* One law says yes, one law says no

1. **Frustration of Purpose Conflict**

* Federal statute enacted for a particular purpose, and that purpose is frustrated by the operation of the provincial statute

**\*\*Duplication is NOT conflict**

**FREEDOM OF EXPRESSION**

*SETUP/INTRODUCTION:*

1. **IDENTIFY PLAINTIFF**

* Any person
* Any person/corp/entity CHARGED under a law (EX: Big M – charged under Lord’s Day Act)
* Religious institutions can claim rights (Liolya)

CROWN: can argue a corporation is trying to claim a right, and is unprecedented

1. **FIND s. 32 DEFENDANT**

**Government Entity** (McKinney)

**“Control Test”**

*🡪Is the body controlled by the government?*

* MAJ: looks @ factors in isolation
* MIN” inclusive approach

\*\*all functions subject to government scrutiny

**Private Entity, Exercising Gov. Function** (Eldridge)Show:

***DIRECT + PRECISELY DEFINED CONNECTION*** between ***government policy*** and ***actors activity***

\*\*only gov. functions subject to charter scrutiny

PLAINTIFF: Make 2-step argument: government entity, and if not 🡪 then private entity exercising gov. function.

CROWN: Make 2-step argument: Dispute control test 🡪 and dispute direct + precisely defined connection

1. **PLAINTIFF? 🡪 STATE REMEDY YOU WANT (Justify @ end)**

**S. 52 – Unconstitutional Law**

***Must be a law: (don’t argue here – just for guidance)***

1. Policy binding rule of general application
2. Not for internal, administrative use only
3. Government entity must be authorized to enact impugned polices

***Remedies:***

* Strike Down
* Severance
* Reading in
* Reading down
* Strike down w/temp suspension

**S. 24(1) – Unconstitutional Government Act**

***Law must be Constitutional***

* Statute provides discretion & Gov. actor uses discretion unconstitutionally
* Gov. actor acts in contravention to a Constitutional statute

***Remedies***

* Constitutional exemption
* Damages (Ward)
* Declaration of violation

*VIOLATION OF RIGHT*

*If arguing for Crown 🡪 STATE: If you find the entity to*

1. **MUST CONVEY MEANING (Irwin Toy)**

* Includes pure physical activity (Butler)
* Includes right to disseminate & receive expression (Butler)

PLAINTIFF: Say WHY activity conveys meaning

CROWN: Say why there IS NO meaning (pure profit making activity?)

* BUT: this is a low threshold, not much room for argument
* **MIGHT WANT TO CONCEDE HERE**

1. **LOCATE IN 2(b) SPHERE**

***CORE***

PLAINTIFF: Argue this!

* Political (Bryan)
* Religion

***MIDDLE:*** Commercial (Irwin Toy)

***PERIPHEREAL***

CROWN: Argue this!

* Sexual/obscene (Butler)
* Hate expression (Whattcott)
* Receiving expression (Bryan)

1. **VIOLENCE: Remove 2(b) Protection**

PLAINTIFF: No violence

* Violence OK if in non-violent form (video)

CROWN: Argue Violence

* Removes 2(b) protection
* Words generally NOT violent…

1. **LOCATION: Remove 2(b) Protection**

Consider:

* 1. **Historical Function**
  2. **Actual Function**
  3. **Does location undermine 2(b) values:**
     1. Truth finding
     2. Democratic discourse
     3. Self-fulfillment

PLAINTIFF: Point historical/actual functions to ones inclusive of FOC

& Argue it does NOT undermine values

\*Streets OK (City of Montreal) \*Busses OK (GVTA)

CROWN: Point historical/actual functions to ones NOT inclusive of FOC

& Argue it DOES undermine values

1. **ESTABLISH INFRINGEMENT**

**Negative Right (You can’t do “X”)**

***Purpose:***

Claimant must show the purpose of the law is to restrict freedom of expression (Irwin Toy)

🡪 INFRINGEMENT established 🡪 go to s. 1

***Effect:***

If the effect of the law infringes FOE, must show the effect of the law restricts one of:

1. ***Pursuit of truth***
2. ***Participation in the community, or***
3. ***Individual self-fulfillment and human flourishing***

**Positive Right (Under-inclusive statute)**

🡪 Good for Crown (very onerous for P)

CROWN: Argue that P does NOT satisfy

PLAINTIFF: Argue DUNMORE FACTORS satisfied

1. **Claim is grounded in fundamental freedom, not access to a statutory regime**
2. **Exclusion from statutory regime:**
   1. *SUBSTANTIALLY* interferes with freedom of expression
   2. *PURPOSE* is infringing freedom of expression
3. **Government is responsible for claimant inability to exercise fundamental freedom**
4. **JUSTIFICATION**

**DOCTRINE OF VAGUENESS**:

Law must be intelligible to public and those who apply it.

PLAINTIFF: Can argue term is too vague (unintelligible)

**IS IT PROSCRIBED BY LAW?**

CROWN: Lead arguments on it being a law

PLAINTIFF: Can argue NOT a law (then law gone! Yay!)

Test for determining if a govt policy qualifies as “law” for purposes of s. 1:

**(a) policy must be binding rule of general application;**

**(b) policy must not be for internal, administrative use only;**

**(c) policy must be sufficiently precise and accessible to those to whom it applies.**

🡪 In *GVTA*, transit authorities’ advertising policies found to be “law” w/in meaning of s. 1.

**S. 1 OAKES TEST**

***Pressing and substantial objective***

CROWN: Make purpose protecting a vulnerable group

* Prohibiting advertising directed at children 13 and under (Irwin Toy)
* Protect society from harm – especially woman and children (Butler)
* Combatting noise pollution (City of Montreal)
* Informational equality (Bryan)
* Safe, welcoming transit system (GVTA)

\*\*No shifting purpose (but can redefine, and link to historic purpose) (Butler) \*\*Morality cannot be ***sole*** purpose (Butler)

***Rational Connection***

* Purpose protecting vulnerable groups? 🡪 DEFERRENCE TO LEGISLATURE (Butler)
* No need for direct causal link – reasonable apprehension of harm is suffient (Butler)
* Logic and reason + available evidence is sufficient (Bryan)

***Minimal Impairment***

* Purpose protecting vulnerable groups? 🡪 DEFERRENCE TO LEGISLATURE (Irwin, Butler)
* Competing interests to groups? 🡪 DEFERRENCE TO LEGISLATURE (Irwin, Montreal)

***Proportionality b/w deleterious and salutary effects***

* The harm caused by the infringement VS. the benefits the law provides to society

1. **REMEDY – PLAINTIFF: justify the remedy you want CROWN: Argue for a less-intrusive remedy if not saved by s. 1.**

**FREEDOM OF RELIGION**

*SETUP/INTRODUCTION:*

1. **IDENTIFY PLAINTIFF**

* Any person
* Any person/corp/entity CHARGED under a law (EX: Big M – charged under Lord’s Day Act)
* Religious institutions can claim rights (Liolya)
* CROWN: can argue a corporation is trying to claim a right, and is unprecedented

1. **FIND s. 32 DEFENDANT**

**Government Entity** (McKinney)

**“Control Test”**

*🡪Is the body controlled by the government?*

* MAJ: looks @ factors in isolation
* MIN” inclusive approach

\*\*all functions subject to government scrutiny

**Private Entity, Exercising Gov. Function** (Eldridge)Show:

***DIRECT + PRECISELY DEFINED CONNECTION*** between ***government policy*** and ***actors activity***

\*\*only gov. functions subject to charter scrutiny

PLAINTIFF: Make 2-step argument: government entity, and if not 🡪 then private entity exercising gov. function.

CROWN: Make 2-step argument: Dispute control test 🡪 and dispute direct + precisely defined connection

1. **PLAINTIFF? 🡪 STATE REMEDY YOU WANT (Justify @ end)**

**S. 52 – Unconstitutional Law**

***Must be a law: (don’t argue here – just for guidance)***

1. Policy binding rule of general application
2. Not for internal, administrative use only
3. Government entity must be authorized to enact impugned polices

***Remedies:***

* Strike Down
* Severance
* Reading in
* Reading down
* Strike down w/temp suspension

**S. 24(1) – Unconstitutional Government Act**

***Law must be Constitutional***

* Statute provides discretion & Gov. actor uses discretion unconstitutionally
* Gov. actor acts in contravention to a Constitutional statute

***Remedies***

* Constitutional exemption
* Damages (Ward)
* Declaration of violation

1. **INFRINGEMENT**

***SCOPE OF 2(a) - establishing a right*** (Big M, Amselem)

*(just as broad as 2(b) – Whatcott)*

1. **Practice or belief, having nexus with religion, which calls for a particular line of conduct (either by being objectively or subjectively obligatory or customary), engendering a personal connection with the divine or with the subject of claimant’s spiritual, faith irrespective of whether a particular practice or belief is required by official religious dogma (or is in conformity with the position of religious officials)**
2. Individual must have a ***SINCERE BELIEF***
   * Subjective
   * Past beliefs not relevant, can change over time
   * Determined on credibility of witness
   * Consistency with other religious practices (but not detrimental)

***INFRINGEMENT*:**

* Impugned conduct of third party **interferes** in a manner that is **NON-TRIVIAL** or **NOT INSUBSTANTIAL** with the claimant’s ability to act in accordance with that practice/belief (Multani)

1. **JUSTIFICATION:**

***OAKES:***

1. **Pressing and substantial objective**

* Protection of public safety, order, health, or morals or the fundamental rights and freedoms of others (but these are only examples and limitations can be a lot more broad) (**Big M)**

1. **Rational connection**
2. **Minimal impairment**

* Reasonable accommodation is less impairing than complete ban (**Multani)**
* Prohibition of any representation “that exposes or tends to expose to hatred” any person or class of persons on the basis of a prohibited ground is a reasonable limit (**Whatcott)**

1. **Proportionality** (Hutterian)

* **Salutary effects - benefits of legislation**
* Must not be merely speculative
* But a G enacting social legislation is not required to show that the law will in fact produce the forecast benefits.
* Don’t need to wait for proof of positive benefits before enacting social legislation
* **Deleterious effects – impact on freedom**
* Consider impact in terms of Charter values, such as liberty, human dignity, equality, autonomy, and the enhancement of democracy
* Imposing cost is OK
* BUT not OK to deprive of meaningful choice to follow religious beliefs/practices

*Majority:*

* + Driving automobile is not a right, it is a privilege
  + Imposing financial cost does not rise to level seriously affecting claimants rights
  + Photos does not deprive members of their ability to live in accordance w/beliefs

*Dissent:*

* + Because it would not do much to prevent identity theft, the harm outweighed the benefits due to significant impairment on way of life

**Administrative Law Route**

***🡪 EXAM: Just acknowledge that you can use this is an available option***

Pros (dissent in Multani):

* + - Purpose of C justification is to assess a norm of general application, such as a statute or regulation
    - Basing the decision on principles of administrative law averts the problems that result from blurring the distinction between the principles of C justification and the principles of administrative law

1. **JUSTIFY REMEDY**

*🡪 remedy sheet*