Interjurisdictional Immunity; Paramountcy

Three Federalism issues:
- **Validity** (First term)
- **Applicability** (IJI)
- **Operability** (overlapping F and P) — if there is a conflict, the Feds win. What is the definition of a conflict? It is fairly narrow.

- Most common federal entity is (**s.92(10)**) Federal Works and Undertakings.
  - One type is all types of communication and transportation that cross boundaries.
    - Not ownership, but legislative jurisdiction to regulate.
  - Federal entities also include aeronautics (POGG), RCMP, post office, banks and banking, Indians and lands reserved for Indians.

Paramountcy
Two types of conflict may engage the doctrine of paramountcy:
(1) "Operational conflict" in the sense that it is impossible for a citizen to simultaneously comply with valid provincial and federal laws.
(2) The application of the provincial law may frustrate the purpose of a federal enactment.

Ontario (Attorney General) v Winner, 1954 (JCPC)

- P claimed an injunction against D restraining him from embussing and debussing passengers within the province of New Brunswick, and a declaration that he had no right to do so.

- Does Winner's business come within the exception of **s.92(10)(a)**?
- A straight **s.92(10)(a)** case and how you apply it.

- Doesn't have to be both a work **and** an undertaking to fall under **s.92(10)(a**).
  - Undertaking is arrangement under which physical things are used.
  - Have a plan and everything to put it into action (except a license) and it can be considered an undertaking.
- Provinces can regulate roads so long as they don't do so in a way that impairs or sterilizes Federal power (i.e. blocking federal works from using then).
- There is a bias against divisibility and if one part is Federal, it is all Federal (if severable).
  - If there are actually two operations and one is entirely within the province, the province can control that part. The intra-Provincial nature of the business is not severable.
- Whether an operation is inter-provincial is a factual question.
  - Is there an internal activity that is prolonged over the border (artificial) or is actually in pith and substance inter-provincial?
  - Colourability to avoid provincial jurisdiction is not acceptable.
- The proper test is whether the application of the legislation sterilizes the function of the company or impair its status and capacities.
- To be considered inter-Provincial and within Federal jurisdiction, the work must be *regular* and *continuous????*

Tessier Ltee v Quebec, 2012 SCC

- A company that performed many functions such as renting cranes, inter-provincial transportation, stevedoring, etc.
- Many employees worked in various areas of the company, doing work that would traditionally fall under provincial jurisdiction and work that would fall under federal jurisdiction.
- Stevedoring accounted for 14% of the work and 20% of the revenue and is considered a federal undertaking.

- Is it a federal entity or sufficiently connected to be considered a federal entity?
- Expands s.92(10)(a) — how to approach and make such a claim of expansion.

- If there is an indivisible, integral operation, it should not be artificially divided for purposes of constitutional classification.
- 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.

- Is there an activity that is closely related that you can pull under the federal work and undertaking umbrella.
- Tessier did not get to come under the umbrella.
- You need to have a sufficiently close and relevant(?) relationship to get under the umbrella.
- Tessier could not make out a sufficiently close relationship.
- There is nothing set in stone (i.e. a set percentage) — you won't know when derivative immunity can be claimed — You need to be able to make the argument.
  - Based on the way the business actually operates has a sufficiently functionally close relationship (connection) that it falls within IJI.

Multiple Access Ltd. v McCutcheon, 1982 SCC

- The Ontario Securities Act prohibited insider trading.
- The federal government had nearly identical legislation.
- The defendants were charged under the Ontario legislation, but argued they were a federal company.

- Are sections of the Ontario Act inoperative because they are the same as those in the Canada Act.
- Can duplicate legislation operate at both the federal and provincial levels?

- It is impossible to comply with the federal and provincial laws simultaneously in this case.
  - There is no reason to speak of paramountcy and preclusion except where there is actual conflict in operation.
- Duplicacy is not a conflict in the paramountcy doctrine — must be a conflict in operation.

****Canadian Western Bank v Alberta, 2007****

- Parliament allowed banks (a Federally regulated industry) to enter into the insurance industry (a Provincially regulated industry)
- Alberta enacted legislation that made banks susceptible to the provincial licensing scheme.

- Do banks (or to what extent) as federally regulated institutions have to comply with provincial laws regulating the promotion and sale of insurance?

- Provincial laws apply to Federal works or undertakings so long as they don't impair (as opposed to merely affect) the core functions (vital and essential parts) of the work or undertaking. (banks lose).
  - The terms "vital and essential" are critical; the activity in question must be "absolutely indispensable or necessary" to the federal entity in order for it to be immune.
- Banks fall under the Alberta statute and there is no IJI issue.
- IJI is reciprocal — P and F companies can use it to avoid P and F legislation — opening up.
  - Every head of power in **ss.91-92** could be the basis of argument of IJI.
- What is the effect on the entity (applicability)? vs. What is the effect on the head of power (if you assume that each head has an immune core)(validity)?
  - The undertaking is a going concern (could have been something the federal government could have enacted)?
  - Pre-CWB - what is the effect on the entity?
- How did CWB case pull it back?
  - Stick with the precedents.
  - Let's go back to impairs — a serious negative effect.

- All constitutional legal challenges should follow the same approach:
  - (1) Pith and substance analysis, determine validity and overlap (stick with precedents?).
  - (2) Applicability of provincial law must be resolved with reference to inter-jurisdictional immunity.
  - (3) If both F and P are good law and P law is applicable to the federal matter with sufficient overlap and a corresponding conflict, then paramountcy should be triggered.
- Flaws were identified with IJI and it subsequently has quite a narrow scope.
  - (1) It has a centralizing tendency which is said to be inconsistent with the "dominant tide" of constitutional interpretation.
  - (2) The inherent uncertainty associated with attempts to identify "core" or "unassailable" aspects of heads of legislative power.
  - (3) The possibility that the doctrine will give rise to regulatory vacuums in which there is no legislation that applies to the entity sought to be exempt.
- Inter-jurisdictional Immunity often overlaps with paramountcy and should only be invoked after paramountcy has been applied.
- Makes it clear there is more than one kind of conflict. — when you can't do both (conflict in operation) and frustration of purpose (when the P legislation frustrates the federal purpose — P loses) (see Mangat).
- Paramountcy — applicable and operable.

Bell Case — sterilize to impair to affects — vital and essential of the undertaking as a going concern.
… An affect is ok…

Bell Canada v Quebec, 1988
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- Impairs requires too much and is too hard for the entities and therefore we should move to affects.
- If the p statute has an effect on a vital essential part of the entity as a going concern then it is unapplicable.
- Any of the internal organization (a vital and essential part of the undertaking) — labour relations, management, minimum wage, health and safety.
- You have a choice between this and WestCB — which is the best way of containing IJI.
- Could you make an argument for a reversion to affects from impairs — can an effect be argued to impair?

- Worker's comp avoids litigation.
- After the insurance plan was put in place, they realized there wouldn't be as many payments if they put safety regulations in place.

Ordon Estate v Grale 1998
- Four different boating accidents on lakes in Ontario.
- Negligence actions.
- Feds and IJI come in because all the lakes are navigable waters (**s.91(10)** navigation and shipping) — Canada Shipping Act.
  - This dealt with causes of action and has various other provisions.
- The plaintiffs wanted provincial statutes applied
- Courts applied maritime negligence — then it was decided that uniform maritime negligence law should be applied across Canada.
- Each head of federal power possesses an essential core that provinces can't legislate on.
- First case which expressly states and then applies the version of IJI that says there is a core to each head of federal power.

Canada (Attorney General) v PHS Community Services Society, 2011 SCC

- Insite is a safe injection site in Vancouver's DES.
- It has operated under an exemption from the Controlled Drugs and Substances Act.
- In 2008 the Minister of Health failed to extend this exemption.

- Are the CDSA (Federal) prohibitions inapplicable to provincial health activities?

- The federal CDSA provisions do apply to provincial health activities.

- IJI is inconsistent with the pith and substance doctrine — overlapping of the cores(?)
- IJI remains available to the provinces (although this case puts limitations on it).
- IJI has been narrowed in recent years and the courts prefer concepts such as the double aspect doctrine and cooperative federalism.
- There are three major reasons:
  - **(1)** The immunity of the provincial health power has never been recognized in the jurisprudence — it is not simply one head of power, but many (broad and amorphous = no IJI).
  - **(2)** The claimants failed to identify a delineated "core" of the provincial health power, which is large and overlaps substantially with federal jurisdiction.
  - **(3)** Granting inter-jurisdictional immunity on the facts might result in a "legal vacuum" where neither government is able to legislate.
- Expressly continues the possibility of a province or provincial entity claiming IJI from federal law (only provincial side SCC case on IJI).

Marine Services International Ltd. v Ryan Estate, 2013 SCC

- A Newfoundland shipping vessel capsized and the Ryan brothers died.
- The widows and dependants received compensation under provincial *Workplace Health, Safety and Compensation Act*.
- Under the federal *Marine Liability Act* the Ryan estates commenced an action against the company and person who designed and built the boat.
- They also brought an action against the AG of Canada in negligence.

- Basically, the P Act limited their ability to access the F Act — They wanted IJI for the F Act so they could collect more money — can they do this?

How to approach IJI when there is no federal entity to be found:
- When you do not have an entity, you need to go to the head of power (as in this case).
- The court should consider IJI only if there is prior case law (stare decisus) favouring its application to the subject matter at hand (**s.91(10)**) — Should be reserved for situations already covered by precedent — Ordon Estate v Grale.
- If it makes it this far, then there is a **two-pronged** test:
  - **(1)** Whether the provincial law trenches on the protected "core" of a federal competence.
  - **(2)** If it does, whether the provincial law's effect on the exercise of the protected federal power is sufficiently serious to invoke the doctrine (impaired) — Impairment should be used instead of affects — it is a judgment call.
- The doctrine of paramountcy applies where the F and P law are **(1)** each valid and **(2)** inconsistent.

Summary
- **(a) Old Version**: Try and use traditional version of IJI first (Pre-WCB):
  - **(1)** Find and identify a federal entity.
  - **(2)** Ask and answer what is the essential or vital part of the entity as a going concern.
  - **(3)** Persuade the court that the application of the provincial statute impairs an essential or vital part of the federal entity.
    - There is no immunity from all provincial laws — only certain parts of certain laws.
- **(b) New Version**: The second choice — when you can't find a federal entity:
  - **(1)** Identify a relevant federal head of power.
  - **(2)** Try and find a precedent — if you can — very few.
  - **(3)** Work on identifying the core — invent it!
    - (PHS) Persuade the SCC or whatever court, that the application of provincial law impairs the core of the federal power.
- You <u>can still raise IJI for provincial entities</u> and for provincial heads of power:
  - Follow all the same steps.
  - Try keep them focused on that you have an entity
  - Impairment is easier to prove with an entity.
    - If you cannot find a provincial entity, you're screwed because there are no precedents! (it's worth arguing).

- BC Ferries is provincial because it never leaves BC's jurisdiction — the waters between the mainland and the island are BC waters.
- **Enbridge — We can do things to them as long as it doesn't seriously impair the federal entity? High cost permits, etc., so long as they didn't go too far. We don't know if the Province can change the route.

- We know a lot about the tests, but we don't know what exactly "impair" can be defined as.

Extraterritoriality

- The impairment of extra-provincial rights (or other extra-provincial consequences) may be validly accomplished by a provincial Legislature as an incidental effect of a statute that is in relation to a matter territorially within the province and within a head of provincial legislative power.
- **Section 92** says "within the province" — i.e. extraterritoriality is built into the constitution.
- 1931 Statute of Westminster = granting ET to Canada.
- Provinces can't destroy civil rights outside provincial boundaries.
- It is due to a desire to create water tight compartments. No overlapping legislation.
- Two common issues (Property and Civil Rights):
  - **(1) Property** — is physical and is therefore easy to locate.
  - **(2) Contracts** — are not physical and therefore need to be located.

- **Churchill** solved a lot of problems — **two** approaches — **(2)** is the correct one.
- **(1) RBC case** — JCPC — provincial legislation will be ultra vires unless all the elements that are regulated are within the province.
- **(2) Ladore v Bennett** — Pith and substance is provincial and the extra-provincial effects are merely incidental.

Re Upper Churchill Water Rights, SCC 1984

- A Nwfld statute expropriated all the assets and water rights of a company generating hydro-electricity at Churchill Falls in Nwfld — the company did not receive compensation.
  - It repealed the Act granting all the rights in the first place.
- The company was therefore not able to perform its duties to Hydro-Quebec — contract rights outside of Nwfld.
- The contract was governed by Quebec.

- Where the pith and substance of the provincial enactment is in relation to matters which fall within the field of provincial legislative competence, incidental or consequential effects on extra-provincial rights will not render the enactment ultra vires. (Ladore v Bennet).
- The contract was situated in Quebec and therefore outside of Nwfld.
- No subsidiary rule for locating civil rights (intangibles).
- The statute was held as invalid because it was an attempt to impair a civil rights outside the province (it was "colourable").
- A validity case.

Morguard Investments v De Savoye 1990 — Had nothing to do with constitutional law.

- Unanimous SCC judgment.
- Should BC recognize and allow enforcement of an Alberta judgment.
- Anything outside of BC was originally seen as foreign (English enforcement rules). — Final and conclusive, jurisdiction in the international sense — if satisfied, BC will recognize.
- Jurisdiction in the international sense — Yes, if action started and if the De Savoyes had been served there. If not the case, if they had somehow submitted to the court.
- By the time the action was commenced, the De Savoyes had moved to BC! Not served in Alberta. The BC Court should never have recognized it. Somehow makes it to the SCC.

- The SCC opened things up! **(1)** Do not recognize English laws for enforcement.— Why recognize judgments? Comity. Federalism = Order and fairness — due process and full faith in credit. Should do so when there is a "real and substantial" connection between the cause of action and the province.

Hunt 1993 — Established the doctrine of constitutional applicability in the context of the territorial limitations on provincial powers.
- The constitutional applicability of a provincial statute turned on the concept of "**Real and substantial**" connection (the term became associated with extraterritoriality).

Unifund Assurance Co v Insurance Corp of BC, SCC 2003

- A husband and wife, residents of Ontario, suffered a car accident in BC.
- Ontario law entitled them to no-fault accident benefits paid by their Ontario insurer (Unifund).
- They also sued (and won damages) the BC resident whose insurance was ICBC.
- ICBC deducted from its payment the amount already paid by the Ontario insurer.
- Unifund sued ICBC for the money under Ontario's *Insurance Act*.
  - Ontario's *Insurance Act* required the at fault insurer to reimburse the other insurer.
  - BC's *Insurance Act* did not contain this provision.
- Overlapping, valid, provincial statutes.

- Was ICBC as a BC company bound to pay back Unifund under Ontario legislation? (no)

- Which provincial statute applies to the facts? (what the hell does this mean!)
- Constitutional applicability was said to be "organized around" four propositions:
  - **(1)** The territorial limits on the scope of provincial authority prevent the application of the law of a province to matters not sufficiently connected to it (**Sufficient connection**).
  - **(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 (**Real and substantial connection**).
  - **(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 (**Order and fairness**)
  - **(4)** The principles of order and fairness, being purposive, are applied flexibly according to the subject matter of the legislation (**Order and fairness is applied flexibly**).
- Is it all a question of a real and substantial connection between the facts and the statute? — the party and the province?
- Usually applied when someone claims extraterritoriality. Rarely used in terms of overlapping statutes.
- Caused big problems because it applied to validity **or** applicability (not just applicability!)!

- (Majority) — Ontario legislation would be imposing a legal obligation on a person (ICBC) outside of Ontario. - It would also offend "**order and fairness**" because it could lead to the application of conflicting rules to the same set of events. - ICBC did not sell insurance in Ontario or even try to enter that market. - (Dissent) — ICBC covered the risk of harm to extraprovincial parties which made ICBC "at least notionally, an insurer in Ontario."

British Columbia v Imperial Tobacco Canada Ltd, 2005 SCC

- 1997 and the tobacco healthcare costs recovery act.
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- A confirmation that the **pith and substance doctrine** remains the governing approach to determining the constitutional *validity* of a provincial enactment having extraterritorial effect.
- Proposes a framework for **determining the validity of a provincial law dealing with intangible matters** that focuses on contacts and connections among the subject-matter of the legislation, the persons regulated, and the enacting province.
- Does Unifund govern everything? — No… **validity** is *Churchill Falls* **and** *Ladore v Bennett.*
- Is the subject matter of the statute tangible or intangible.
  - If it is intagible then you have to have a rule to locate… Bring in Unifund. Sufficiently real and substantial connection.
- It remains unclear whether and to what extent the doctrine of applicability discussed in Unifund applies in cases concerning provincial legislation sought to be justified under the heading of "Property and Civil Rights in the Province" in section 92(13).

- The **pith and substance** of the legislation was the creation of a civil cause of action, an intangible matter.
- The Act respected the legislative sovereignty of other jurisdictions.
- Imperial Tobacco said they didn't do anything in the province and therefore should not be held liable… they lost.
- court to consider.
- They are always going to have different weights. The weight of the connections can vary from case to case.

Summary

Two areas to consider, *applicability* and *validity*:
- There are tangible and intangible subject matter.
- **(1) Validity:** Pith and substance is provincial and the extra-provincial effects are merely incidental.
- **(2) Applicability:**
  - **(1)** The territorial limits on the scope of provincial authority prevent the application of the law of a province to matters not sufficiently connected to it (**Sufficient connection?**).
  - **(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 (**Real and substantial connection?**).
  - **(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 (**Order and fairness**)
  - **(4)** The principles of order and fairness, being purposive, are applied flexibly according to the subject matter of the legislation (**Order and fairness is applied flexibly**).

The Charter

Applicability

- When is the Charter available?
- Who can claim Charter rights? Natural persons, foetus?, corporations?, citizens? — It depends. What right is being invoked? 2, 7, 9, 10 = everyone. 6 = every citizen and permanent resident. And so on and so forth.

- *In 1982 a baby chimpanzee was smuggled out of Sierra Leone destined for animal testing in Toronto. He was seized at customs and sent to a sanctuary in BC. The sanctuary went bankrupt and now the property is being liquidated. The chimp is going to be sold to the original lab in Toronto. Should the Chimp be recognized under the Charter because he is so close to being human? Outline an argument about s 7 “everyone” might include the chimp.

Where you start when think about if you have a plaintiff — **s. 32** of the Constitution Act — This Charter applies to:.. The provinces and Parliament, statutes, regulations (any statutory material). This is not the limit of the application of the Charter… An extended application — How far can s.32 be used.

- When looking for a defendant — **s. 32** —How to identify a defendant?

McKinney v University of Guelph, 1990 SCC
- Mandatory retirement age…
- Is a University government within the definition of **s. 32**.

- **Section 32** should not be restricted to statutes and regulations — It should be read reasonably broadly.
  - Wilson wants really broad.
  - La Forest (majority) says not so broad — <u>The *Charter* is essentially an instrument for checking the powers of government over the individual.</u> — **It is to protect fundamental rights from the unreasonable actions of politicians and public officials.**
- For mandatory retirement, the University is not government within the meaning of s. 32.

- The SCC can completely change its mind.

Grant v Torstar
- Toronto Star published an article about Grant and his application to build a golf course. - The article had interviews from people, casting Grant in a negative light. - The Toronto Star tried to get an interview/rebuttal from Grant, but he refused. - Grant sued in defamation.
- Is the law of defamation inconsistent with **s. 2(b)** of the *Charter*? — Can you use the *Charter* for private litigation and the common law?

- Follows on *Dolphin Delivery* — a labour dispute about secondary picketing of a federal undertaking — Court provides an injunction — are the courts bound by the *Charter*? No, they take notice, but it doesn't apply to them directly.

- We should adopt a defence that would allow publishers to escape liability if the can establish that they acted responsibly in attempting to verify the information on a matter of public interest.
- The *Charter* does not apply directly in private litigation, instead *Charter* values can be taken into account and argued — argue that the common law rule should be changed or modified to be more in line with the *Charter*.
- Argue for a particular interpretation of the statute — not *ultra vires* — ambiguous in some way, etc.

Eldridge v British Columbia (AG), 1997

- Hospitals did not provide sign language translators for deaf patients.
- This impaired the ability of deaf patients to communicate with doctors and therefore they received less adequate care.

- Was this in contravention of **s. 15** of the *Charter*?

- The hospital's failure to provide an interpreter was contrary to **s. 15** of the *Charter*.
- *Charter* **breaches are directly through (1)** the government (i.e. legislation) **or (2)** through delegated authority.
- Although a hospital is not a "government" for *Charter* purposes, its decisions regarding the provision of medically necessary services carried out the specific government objectives of the provincial *Hospital Insurance Act*.
- The government **cannot shield decisions** from *Charter* scrutiny by delegating a discretionary power to a private entity. — **Doctrine of Evasion**.

- The **test for determining whether entities** such as hospitals, public broadcasters, or the post office **are "government"** for purposes of the *Charter* turns on the degree to which there is significant control by government ministers or their officials in their day-to-day operations and on the extent to which the entity acts on the government's behalf **or** furthers some specific governmental policy or program.
- Hospitals are government for the purposes of delivery of health services.

Note on Vriend v Alberta, 1998

- Is the *Charter* limited to positive acts (i.e. it does not include omissions)?

- The *Charter* includes positive acts and omissions.
- To exclude omissions would be to open a large loophole where one could simply omit things instead of excluding them, thereby bypassing the *Charter*.

Godbout v Longueuil (City), 1997

- Godbout was a dispatcher for a police department.
- When she was hired she signed a contract that required her to live in the municipality.
- Godbout moved outside of the municipality and was fired.

- Does the *Charter* apply to municipal governments and their private dealings?

- In order for the *Charter* to apply to institutions other than Parliament, the provincial legislatures and the federal and provincial governments, then an entity must truly be acting in what can accurately be described as "governmental" — as opposed to a merely "public" — capacity.
- If you succeed as the plaintiff that the entity in question is government, everything the entity does is subject to *Charter* scrutiny.

- Municipal governments are "governmental entities" for the following reasons:
  - **(1)** They are democratically elected (like other levels of government).
  - **(2)** They have a taxing power (indistinguishable from other levels).
  - **(3)** They are empowered to make and enforce laws.
  - **(4)** They derive their existence and law-making authority from the provinces (they perform acts the province would otherwise have to do itself).

Review
- (A) The legislature and all their products are defendants. Anything statutory.
- (B) Concern about the Doctrine of Evasion — you cannot get away by giving away decision making powers. — Entities created and empowered by the legislative body may be subject to the Charter.
  - (1) Is it a government entity? — everything they do is subject to the Charter.
  - (2) Is it a private entity? — Is it performing a government function? (the jurisprudence does not identify these) — count and weigh. Limited purpose?

Hypotheticals

BC Ferries now provides internet access. It censored the internet. Can you say they are in breach of s. 2(b) of the Charter? — You would need to capture it under (B)(1) so that you say everything. Under (2), it is unlikely that the internet is a government function. — If you establish a plaintiff and defendant and s. 2(b), then what is the situation under s. 1?

University of Calgary — identical twin brothers — Postings on a Facebook page about a professor. The professor complains. The twins were disciplined for non-academic conduct. They argued s. 2(b). Is the U of C subject to the Charter? — Provision of education is a government activity under (B)(2) and therefore government for this purpose. Describe it so that it encompasses

Women ski jumpers against VANOC — Can they successfully sue? Is VANOC government for this purpose? All levels of government are in there because they think it is good for Canada — VANOC was not government for purposes of being sued under s. 15 of the Charter. They didn't choose the sport and the government put the money in but were not in control.

Justification

- By this time, you must have have accomplished certain assumptions
  - Plaintiff, defendant (**s. 32**), no override (**s. 33**), notice given.
    - **Section 33** — Notwithstanding clause (**ss. 2, 7-15** are not subject to it). Five year sunset clause (**s. 33(3)**). — Only Quebec has used it.
    - You have to declare in public.
- Must be a breach — the government must then persuade that it was justified.
- The courts evaluate the virtue of statutes with regards to the *Charter*.
- When onus on government, head to **s. 1**. — allows for the balancing after the right.
- There are **four steps** to the **section 1** analysis:
  - **(1)** The objective of the measure must be important enough to warrant overriding a Charter right.
  - **(2)** There must be a rational connection between the limit on the Charter right and the legislative objective.
  - **(3)** The limit should impair the Charter right as little as possible.
  - **(4)** There should be an overall balance or proportionality between the benefits of the limit and its deleterious effects.

R v Nova Scotia Pharmaceutical Society, 1992
- A number of pharmacies were charged with conspiracy "to prevent or lessen competition" under **section 32(1)(c)** of the Combines Investigation Act for the sale of prescription drugs and dispensing services prior to June 1986. - They challenged the provision on the basis that it violated **section 7** of the *Charter* on account of its vagueness.
- Whether **section 32(1)(c)** of the Act infringed **s. 7** of the *Charter* because of vagueness arising from the use of the word "unduly"; and - Whether **section 32(1)(c)** infringed **section 7** by reason of the mens rea required by the offence.
- “Proscribed by law” — - We don’t like vagueness — notice and control of discretion. - We know the standard that has to be reached to be sufficiently certain — - If you want to argue vagueness — (1) Invoking s. 7. (2) “Proscribed by law”, s. 1, it is so vague that it is not a law (void for vagueness). (3) Relevant to Oakes test and minimal impairment test (vagueness and overbreadth are rolled into one?). - Vagueness is too ambiguous. Overbreadth means it is drafted so broadly that it is going to be applicable to people not intended to be subject to it. — - On the facts, the impugned provision of the Act was found not to be vague.
- “Proscribed by law”, s. 1, it is so vague that it is not a law (void for vagueness) — Requires some kind of law (statute, regulation, policy, etc.).

R v Oakes, 1986

- There are three rights inherent in **s.11(d)** of the Charter:
  - **(1)** You must be proven guilty beyond a reasonable doubt;
  - **(2)** The Crown must bear the burden of proof; and
  - **(3)** Criminal prosecutions must be carried out in accordance with lawful and procedural fairness.
- Federally enacted statutes are still subject to the Charter, even though they are enacted by Parliament.
- To test if a section is saved under **s.1**:
  - **(1)** The section must fulfill an objective related to concerns which are pressing and substantial in a free and democratic society; and
  - **(2)** The means chosen must be reasonable and demonstrably justified (more than 51%, but not BOD).
    - **(1)** Rational connection
    - **(2)** Minimal impairment
    - **(3)** Proportionality

- The Supreme Court has held, contrary to Oakes (R v MacDougall?), that there need not be internal rationality between the proven and the presumed facts. In other words, <u>all that has to be established is that there is a rational connection between the limitation and the legislative objective of facilitating the detection and conviction of crime</u>.

Newfoundland (Treasury Board) v (NAPE), 2004

- The Newfoundland government recognized that women were being paid less then men in many areas of employment in their province.
- To correct this situation they implemented a pay equity program that was to begin in 1988 and lead to equal wages for men and women.
- However, the province experienced severe financial difficulties and was forced to pass a bill stating that this pay equity program would not start until 1991.
- The appellant union argues that this was a violation of the **s.15** rights of female workers, and that they should be reimbursed for the lost wages from 1988 to 1991.

- **(1)** Does the delay of the implementation of the pay equity program violate the women's rights under **s.15** of the Charter?
- **(2)** If so, can the violation be saved under **s.1**?
- **(3)** Are financial concerns enough to satisfy the **s.1** test?

- Budgetary matters should not normally save a provision under the *Charter*, but in extreme cases, such as this one, they can.
- Despite Lamar saying financial issues (costs to the government) will NEVER work — Financial issues can play a role in determining if something that is deemed to be discriminatory can be saved under **s.1**; in times of severe financial crisis money must be allocated accordingly.
- There should be greater deference to the law when it is made by the legislature — The division of powers (judicial deference to the legislatures) is given sufficient consideration in the Oakes test.
- How narrow can the circumstances be drawn? Financial emergency? Limited circumstances.
- Sometimes the court will take judicial notice — Newfoundland lucked out? Could have said “no evidence.”

There is no hierarchy of Rights and Freedoms

Remedies

- Any constitutional case can be analyzed by:
  - **(1)** How does it fit with precedents and guidelines the court has set itself? Narrowing, broadening, etc.
  - **(2)** Merits — is it consistent with the constitution? Should the court have gone the other way? Is this the proper interpretation?
  - **(3)** In relation to the separation of powers — has the judicial branch in issuing this remedy kept to the judicial function or has it exceeded the judicial function into the legislative? Relationship between the judicial and legislative branches.
- Dissents on the scope of a right are very important.
- Section 24 of the Constitution and s. 52 are remedies.

Questions you must ask for federalism and Charter cases:

- **(1)** What are the remedial options available?
- Remedial options can be divided by pre-82 and post-82.
- Pre-82: No statutory source for remedies.
  - Logic flowed from statutory interpretation and jurisdiction.
  - Could get various declarations — invalidity, inapplicability, inoperability (paramountcy), read down (narrowing) — reading in never happened! No suspensions of declarations (it was immediate)!
- Post-82: Two statutory sources for remedies: **(1) s. 52** *1982 Act*, **(2) s. 24(1)** of the *Charter* — limited to *Charter* breaches.
- **(2)** What changes, if any, have these two sections made to remedies? What is the relationship between these two sections?

- You need to identify and justify your remedies.
- **If you want a particular remedy, look at what these leading cases say about it and how to get it.**
  - Know where to find them and the general arguments for them.

Schacter v Canada, 1992 (leading case)
- Schacter applied for benefits to care for his child. - The section only provided benefits for adoptive parents and he was subsequently denied. - He brought an action under **s. 15** — equality rights — he won. - The Crown contested the remedy at the SCC (**s. 24(1)**). - By the time the judgment came down, Canada had amended the breach. — this case is strictly about the remedy.

- Lamer speaks at length about:
- **(1) Severance** — a consequence of a finding of invalidity (breach of charter provision or legislative invalidity). Would the rest of the statute been enacted without the rest of the provision? If yes, you only severe off that piece and call it invalid.
- **(2) Reading in** — Should probably think about the relative group sizes — when those excluded are bigger than those included, courts should probably look to avoid reading them in. It should be consistent with legislative intent (interfere as little as possible). — Is "reading in" a judicial overstep — by not reading in they are being less intrusive?
  - Reading in is only appropriate in the clearest of cases:
  - **(1)** the addition of the excluded class was consistent with the legislative objective;
  - **(2)** there seemed to be little choice as to how to cure the constitutional defect;
  - **(3)** the reading in would not involve a substantial change in the cost or nature of the legislative scheme;
  - **(4)** the alternative of striking down the under-inclusive remedy would be an inferior remedy.

- In selecting a remedial course under **s. 52**:
- **(1)** Define the extent of the Charter inconsistency which must be struck down.
- **(2)** Determine which remedy is appropriate.
  - **(a)** Striking down the legislation.
  - **(b)** Severance of the offending sections.
  - **(c)** Striking down or severance with a temporary suspension of the declaration of invalidity.
  - **(d)** Reading down.
  - **(e)** Reading provisions into the legislation (consider the role of the legislature and respect for the purposes of the Charter).
- **(3)** Interference with the legislative objective.

Vriend v Alberta, 1998

- Vriend was fired when the private school he worked at found out he was a homosexual.
- He filed a complaint under an Albertan human rights statute, but his claim was dismissed as sexual orientation was not included.
- He then said this violated his s. 15 rights, which the courts agreed with.

- The addition of language that included sexual orientation would be:
- **(1)** consistent with the objective of the Act,
- **(2)** could be accomplished with precision,
- **(3)** would not greatly add to the cost of administering the Act, and
- **(4)** would be a less intrusive remedy than striking down the entire Act.

There are a range of remedies that you have — must identify the remedy — then you must justify it. Separation of powers and its breach or not breach can be an issue.

Doucet-Boudreau v Nova Scotia
- **Section 23** (language rights) issue — Francophone parents wanted their own school.
- **Section 24(1)** remedy:
  - Use its best efforts to construct schools and programs by more or less specific deadlines — the (TJ) judge maintained jurisdiction to receive progress reports.
- Appealed to the SCC (5-4) on validity of remedy.

- Recognize the separation of powers issue — **s. 24(1)** must be interpreted in a purposive way so as to provide an **responsive** and **affective** and full remedy for Charter breaches.
- BUT the courts must also be sensitive to their judicial roles and not to interfere with other branches (no test though!).
- Broad considerations as always relevant to determine whether a particular remedy is appropriate and just:
- **(1)** Meaningfully vindicates rights.
- **(2)** Must employ legitimate means — must not department unduly or unnecessarily from their judicial role.
- **(3)** Must be a judicial remedy.
- **(4)** Fair to the defendant.
- **(5)** Allow **s. 24** to evolve.
- **Dissent** — Two things — First is technical, must be a better drafted order ("best efforts", progress reports, etc. — should be clear and certain and everyone should understand). Next, separation of powers and the appropriate role of the judiciary.
- You can ask for remedies out of the norm. Must justify — one basis is the separation of powers — the court is not encroaching (too far). Must be clear and certain.

R v Ferguson
- A police officer (Ferguson) shot a guy (Varley) in custody. - Manslaughter with a firearm requires a four year minimum.

- **Sections 52(1)** and **24(1)** serve different remedial purposes.
  - **Section 52(1)** provides a remedy for laws that violate Charter rights either in purpose or in effect.
  - **Section 24(1)**, by contrast, provides a remedy for government acts that violate Charter rights.
- If the law = **s 52(1)**, If a government action = **s 24(1)**.
- The only remedy for an unconstitutional mandatory minimum sentence enacted by Parliament is to strike down the law in its entirety under **section 52(1)** — No exemptions!
  - Uncertainty would be caused by crafting case-by-case exemptions from the law.
- At the same time, however, it would be a mistake to assume that striking down a law in its entirety is the only available remedy under **section 52(1)** to deal with a law that is an unjustified violation of the *Charter*.

Vancouver v Ward
- Thought Mr. Ward was going to pie Jean Chretien. - Defendant was illegally detained and stip searched. - His car was also seized, without a warrant.

- A remedy for a *Charter* breach **can be damages** (not the same as private law damages and therefore are computed differently).
- **Four steps** to achieve getting damages (a framework):
  - **(1)** Prove a breach.
  - **(2)** Justify an award of damages as a remedy (better than something else).
  - **(3)** Burden shifts to the government to argue against the awarding of compensation (countervailing factors).
  - **(4)** Figure out the quantum — how much?
- *Charter* damages (**s. 24(1)**) should serve one of the following three purposes:
- **(1)** compensation for the pecuniary and non-pecuniary harms caused by the violation.
- **(2)** vindication of the *Charter* right.
- **(3)** deterrence of future violations of the *Charter*.
- Even after a Charter applicant has established that damages are necessary to **compensate**, **vindicate**, or **deter**, the government could try to establish that damages would not be an appropriate and just remedy because of an open-ended list of "countervailing factors."
- Proportionality is also a major factor in any remedial decision (see Oakes style analysis?).
- ******There is no finite list for **s. 24(1)** — If you want something, ask for it and justify it!!******

- Authority to decide a *Charter* issue turns on the pre-1982 court structure.
- An administrative body must generally have the power to decide questions of law.
- The provincial superior courts have constant concurrent jurisdiction to award constitutional remedies under both **section 24(1)** of the *Charter* and declarations of invalidity under **section 52(1)** of the *Constitution Act, 1982*.
- The jurisdiction of other courts and tribunals to award constitutional remedies depends on their statutory jurisdiction.
- In order to award a remedy under **section 24(1)** of the *Charter*, a court or tribunal must have jurisdiction, independent of **section 24(1)** (and the *Charter*), over the parties, subject matter, and remedy requested.
- A tribunal that has jurisdiction to decide questions of law will be presumed to have jurisdiction to apply the *Charter* as the supreme law and to award *Charter* remedies unless the legislature has clearly removed that power from the tribunal.

R v Conway, 2010 SCC

- In 1983, Mr. Paul Conway was charged with sexual assault with a weapon for repeatedly raping his aunt at knifepoint.
- He was found not guilty by reason of insanity at trial and has since spent his years in various mental health facilities throughout the province of Ontario.
- Each year his case has been reviewed before the Ontario Review Board.
- In 2006, Mr. Conway claimed breaches of his *Charter* rights, including **ss. 2(b), 2(d), 7, 8, 9, 12** and **15(1)**, and that he was entitled to an absolute discharge under **s. 24(1)**.
- In part, he claimed that his *Charter* rights were violated as a result of poor living conditions, improper treatment, environmental pollution, and "threats of the use of chemical and mechanical restraints."
- The Ontario Review Board ruled that it did not have the jurisdiction to consider the *Charter* claims

- Who can decide remedial provisions of the *Charter*?
  - Can administrative tribunals decide remedial provisions of the *Charter*?

- The presumption that tribunals have *Charter* jurisdiction **can** be **rebutted** by clear legislation.
- If a specialized tribunal has the power to decide questions of law, the tribunal will also have jurisdiction to decide *Charter* issues and to grant *Charter* remedies arising in the course of carrying out its statutory mandate unless *Charter* jurisdiction is excluded by statute.
- The authority of an administrative tribunal to make a binding declaration of invalidity will be limited by the scope of the tribunal's authority to decide questions of law.
- Administrative tribunals are not exempt from the *Charter*.

- **Conway Test:**
- **(1)** Is the administrative tribunal a court of competent jurisdiction?
  - **Yes**, if it is **both (a)** "authorized to decide questions of law" and **(b)** has not been excluded from *Charter* jurisdiction by statute.
- **(2)** Does the administrative tribunal have the statutory authority to grant the particular remedy at issue?
  - **Yes**, "if the scope and nature of the Board's statutory mandate and functions" provide the authority to grant a particular remedy.
  - This step involves a determination of legislative intent including delineating the authority provided under the relevant statutory framework (mandate, structure and function).
- Essentially — jurisdiction of the person, subject, and the remedy? Remedy was changed here — To grant *Charter* remedies generally. Some specific remedies may not be able to be granted by a given tribunal.
- Administrative tribunals generally only can decide questions related to their expertise (i.e. not general law).
- Now, (most) Administrative Tribunals have to be able to decide questions of law and particularly constitutional law.

- Pursuant to **s. 24(1)** the ORB is a "court of competent jurisdiction" but that an absolute discharge was not a remedy that could be granted by the ORB under the particular circumstances.

- If a civil remedy under **s. 24(1)** is desired, then a criminal court cannot decide this (Provincial Court sitting as a criminal court). A small claims court could though.

Summary
- **Section 52** is always applicable when a law is challenged in terms of validity.
- The range of options is all seen in federalism cases, reading in, a stay of execution.
- Is available to any and all forms of constitutional challenges to the **law**.
- **Section 24(1)** is limited to *Charter* breaches (i.e. not federalism cases).
- Always available when the law is valid, but a government official breaches a *Charter* right.
- The range of options is not limited — anything you want (provided it is a judicial remedy) — but you have to justify it.
- The ordinary rule is that use either **s. 52** or **s. 24(1)** — usually not together.

Freedom of Expression

- Charter — Fundamental freedoms
  - 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;
- Bill of Rights, American Constitution, USSR Constitution, Russian Constitution, Chinese Constitution.
- All these constitutions have similar rights, but the difference is how they are applied!
- *How has the interpretation of **s. 2(b)** changed?*
- *How is the court using **s. 1**?*
- How do you make the arguments to get it into **s. 2(b)**, how to make room in **s.1** for a government infringement? — what arguments is the court most susceptible to?

Irwin Toy Ltd v Quebec (Attorney General), 1989 SCCEXAM Q ASPECTS****
- Quebec passed legislation that prohibited "commercial advertising directed at persons under thirteen years of age."
- Does the Quebec legislation violate **s. 2(b)** of *Charter*?

- Stages for violation of **s. 2(b)**:
- **(1)** Does the claimant get itself within the scope of **s. 2(b)**? — Yes — commercial expression.
  - What is the scope of **s. 2(b)**? Statutory interpretation — Expression is any activity that "attempts to convey meaning." — content **or** form — very little is excluded.
  - This excludes violent activities or violent expressions — for expressions, argue it!
- **(2) Prove an infringement**. Two ways to prove it: **(a) purpose** of law is aimed at the content of the expression **or** the **(b) effects** of the law negatively infringe the content (**not an auto infringement**).
  - Must show one or more values are being purported and the law is having a negative **effect** on one:
  - **(1)** Seeking and attaining the truth is an inherently good activity.
  - **(2)** Participation in social and political decision-making is to be fostered and encouraged.
  - **(3)** The diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated.
- **(3)** Onus moves to the government — Justify — Freedom of expression can be curtailed if **s. 1** is met. — Is it a vulnerable group? Oakes style analysis.
  - To test if a section is saved under **s.1**:
  - **(1)** The section must fulfill an objective related to concerns which are **pressing and substantial** in a free and democratic society; and
  - **(2)** The means chosen must be reasonable and demonstrably justified (more than 51%, but not BOD).
  - **(1)** Rational connection
  - **(2)** Minimal impairment
  - **(3)** Proportionality
- Para 74 — Different approaches the court will take in the Oakes test.
  - Mediating claims between different community groups — advertisers and parents of children.
- **Dissent** — Application of Oakes test — a total ban can never be a minimal impairment.

- Seminal case on interpretation scope of **s. 2(b)** — leading case. General framework of analysis.

Irwin Toy — Federalism aspects — Doctrine of colourability — Legislation was aimed at all advertising. Trying to control radio-communication? IJI argument — affects a vital and essential

part of television as a going concern — Advertising to children under 13 was too small. Operability — inconsistency with the broadcasting act.

R v Butler, 1992 SCC
- Does **s. 163** of the *Criminal Code* violate freedom of expression?

- If you can find some meaning with the activity, then you can bring it under **s. 2(b)**. — Doesn't have to be a good message.
- Falls within **s. 2(b)**, even though films. Not violence. Location of the form of **s. 2(b)** is important.
  - Porn is periphery (little protection), political is core.
  - Core or periphery will affect the ease or difficulty with which the government can justify the interference.
  - <u>You can make arguments about how a type of expression should be categorized</u>.
- Obscenity provisions are aimed at the content — Infringement is **purpose** — If content is obscene, **s. 163** will get you.
- Vagueness — too vague to be a law. Needs to reach an intelligible standard.
- ***Justification** — Identify a pressing and substantial objective — The issue here is the length of time obscenity provisions have existed.
  - Back in the day it was preservation of morality and prevention of anti-social conduct — now it has changed.
  - Objective has shifted over the years — **Doctrine of shifting purposes <u>is not allowed</u>.**
  - Pressing and substantial purpose has to be something explicit or at least implicit at the time the statute was first enacted.

Dorvalle Airport Case — Nothing can be handed out in the airport except poppies — i.e. no pamphlets. Does this infringe **s. 2(b)**? The Court **split three ways** — Freedom of expression on public property.

Peterborough v Ramsden —By-law prohibits postering on public property. What approach to take? Still don't know after this.

City of Montreal v 2952-1366 Quebec Inc, 2005 (Location of Expression)
- The owner of a Montreal strip club was charged for violating a Montreal by-law which prohibited "noise produced by sound equipment."
- Did the municipal by-law violate his freedom of expression under **s. 2(b)** of the Charter?

- The by-law violated freedom of expression, but could be saved under **s. 1**.
- The bylaw was not after any type of expression, just sound produced by sound equipment.
- The Court held that the question to be asked is:
  - "whether the place is a public place where 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" — **(1)** democratic discourse; **(2)** truth finding; **(3)** self-fulfillment.
  - **(1)** The historical or actual function of the public place in question, and whether its function or the activities taking place within it are compatible with free expression.
  - **(2)** Whether other aspects of the space indicate that allowing free expression within it would serve to undermine the values underlying the freedom of expression.

- Can't just say public property — you must apply the test above! It is not always clear.

- Think about the Occupy Movement — parks are not Charter free zones. How did they end up kicking people out? Municipal governments said that other people are entitled to use the park, there are health and safety concerns.
- What about the law courts? A shopping centre?

R v Bryan, 2007 (Political Expression)

- Bryan posted polling results before the polls were closed.
- He was charged with contravening **s. 329** of the Canada Elections Act, which bans the transmission of election results from one electoral district to another before the closing of all polling stations in the second district.

- Is **s. 329** of the Canada Elections Act unconstitutional as it infringes **s. 2(b)** of the Charter?

- The right to receive political information also falls within **s. 2(b)**, but it is at the periphery?
- You can challenge whatever is preventing you from receiving information.
- The SCC found it did violate **s. 2(b)** but was saved under **s. 1**.
- Crown asserts?
- New approach — Contextual factors:
  - **(1)** Nature of the harm and the inability to measure it.
  - **(2)** Vulnerability of the group protected.
  - **(3)** Subjective fears and apprehension of harm.
  - **(4)** the nature of the infringed activity.
- Make more room for the court — go to the evidence needed to do the proportionality analysis — even without the benefit of hard evidence or social science evidence.
- The contextual factors favour a deferential approach to parliament. — this is especially so with election law.
- Want to promote Informational equality and confidence in the system. — this also heavily regulates other things such as spending.

- Dissent (Abella) —

- Arguments about proportionality will probably be stronger than ones about where in the circle it falls?

Baier v Alberta, 2007

- In Baier, members of Alberta Teacher's Association challenged the constitutionality of amendments made to the *Local Authorities Election Act*.
- Before the enactment of these amendments, school employees were only prevented from running for school trustee positions in jurisdictions where they worked.
- Afterwards, the restrictions extended to preclude candidacy for any school board position across the province unless the employee chose to resign from his or her position.
- Because remuneration for a school trustee position is quite low, the claimants claimed that this effectively nullified their ability to run for a school trustee position, and as such, infringed upon their freedom to express themselves in that manner.

- The Court found that the employees' freedom of expression was not violated as their claim was grounded in access to a particular statutory regime rather than in the fundamental freedom of expression.
- Precedent set in **Haig v. Canada, [1993]**, where it was found that the government has no positive obligation to provide a statutorily-enabled platform of expression.
- From that premise, the court reasoned that since the ability to run for a school trustee position is enabled through the *School Act*, the action of the government in changing who is able to run for this position was just a removal of a platform that these individuals once had, and not an infringement of an inherent constitutional right.
- To make out a positive rights claim under **s. 2(b)**, the claimant must:
  - **(1)** show that expressive activity is in issue; and
  - ****(2)** satisfy the three criteria derived from **Dunmore v. Ontario, [2001]**:
    - **(a)** the claim is grounded in a fundamental freedom of expression rather than in access to a particular statutory regime;
    - **(b)** the statutory regime substantially interferes with the claimant's freedom of expression, or has interference with freedom of expression as its purpose; and
    - **(c)** the government is responsible for the claimant's inability to exercise his or her fundamental freedom of expression, in the sense that it substantially orchestrates, encourages or sustains the violation of freedom of expression.
- Must make it through all **three Dunmore** factors. The government can then justify under **s. 1**.
- ****Doesn't have to be 100% pure expression, just needs some.

- When do you know when the claimant is making a claim to a statutory regime? What is a statutory regime?
  - In this case it is the School Trusteeship. A creation of a level of government (sort of).
  - Baeir and Dunmore are distinguished based on the fact that teachers can associate and organize outside of the school board.
  - Must show how under-inclusion of individuals deprives or substantially interferes with their *Charter* rights.
- It (**Dunmore**) is restricted to **s. 2** of the *Charter*? The fundamental freedoms.
  - Don't worry about these factors for any other *Charter* provisions.

Dunmore v Ontario — In Dunmore the statutory regime was the labour relations regime (code, act, etc) in Ontario. It is legislation that varies certain contract rights. Agricultural workers had been excluded (and therefore not allowed to unionize). Ont. NDP changed the law and then the PCs repealed it later. The agricultural workers then challenged it under s. 15. The SCC decided it on s. 2(d) and struck the exception of agricultural workers down. Without access to a statutory regime or platform, there was absolutely no way in which Agricultural workers could organize or associate in any way. They needed access to the platform. Execution of the judgment was suspended for 18 months.

Greater Vancouver Transportation Authority v CFS — BC, 2009

- The CFS were being refused the ability to advertise on the sides of buses.
- Translink said its policies do not allow political advertising.

- Can government entities, in managing their property, disregard the right of individuals to political expression in public place?

- When the government exercises “substantial control” over an entity, that entity may come under Charter scrutiny.
- Statutory bodies designed by legislation as an “agent” of the government, with a board all appointed by the Lieutenant Governor and the LG having authority to manage affairs through regulations — there is no autonomous operation here.
- The government should not be able to shirk its *Charter* responsibilities by conferring powers onto another entity.

- Apply the **Montreal City test:**
  - There was both a history and an actual use of the sides of buses as a space for public expression and that as “the space allows for expression by a broad range of speakers to a large public audience” and that allowing expression “could actually further the values underlying **section 2(b)**,” the side of a bus “was a location where expressive activity is protected by **section 2(b)** of the *Charter* .”
- There was no statutory platform here. It was just a physical location created by the legislature. The defendant is using the Dunmore factors in a defensive way.

Summary of main points:
- Proper defendant under s. 32? (Yes) (Find a defendant before anything).
- Falls within s. 2(b)? (Political expression) (Classification of type of expression).
- How the defendants can use the Dunmore factors as a defence. (Normally challenge is brought by a negative law, but here plaintiffs had a positive claim) Makes it harder for a plaintiff to participate in statutory regime.
- Are the buses a Charter free location (means or location can disqualify)?
- Government uses of property can change — things can become Charter-free locations.
- On to s.1 and whether there was a law in question? (Technically no. A policy can be a law if it meets its definition for purposes of s.1)
- Remedy — s.24 or s.52? s.24 is an administrative act and s.52 is a law. Policy = law therefore s.52. Policy for purposes of s.1, therefore policy for purposes of s.52.

Saskatchewan v Whatcott

- Whatcott distributed anti-homosexual fliers to schools.
-

- Provision that prohibited publications that “expose or tend to expose a person to hatred, ridicule or otherwise prohibits the dignity of any person or class of persons on the basis of a prohibited ground of discrimination” violated freedom of expression (and religion), but that it was a reasonable limit under **section 1**.
  - Part of it is severed
- Political speech can include hate speech, but political speech is at the core and hate speech is at the periphery. At the periphery does not take too much to justify an infringement. Not all expression is treated equally under **s. 1**.
-

Summary
(1) Start with a defendant (s.32) (has to be government).
(2) Burden is on the claimant to establish the activity the form of expression or whatever falls within s. 2(b) (virtually any activity, except when means of expression is violence and some particular locations)

(3) Form of expression has to be characterized and located within the core - periphery or somewhere in between.
(4) Establish that your right has been infringed. Purpose and Effects. If effects of law then claimant has to relate those to…
(5) Dunmore/Baier factors…
(6) Burden shifts to the government under s.1. Is there a law?
This is where certainty departs. A total reduction in the high burden originally set. It is uncertain how the Court will actually apply the Oakes test in a given case.
(7) Even to get to Oakes, you need to find that there is a law. If you manage to persuade Court that it is so vague that it is unintelligible then there is no law and the gov't defence falls down. When there is no law, there can't be any justification and therefore nothing to defend. Works like a dream. What happens if its a ministerial decision? (bestows discretion on a government actor). Do you use the Charter or assess it on the administrative grounds of reasonableness? The decision should be the same, but what is the preferred method of analysis? (Multani). If it's a law, do the Oakes test. If no law (a decision) still do some kind of proportionality analysis.
(8) Go to the remedy — s.52 or s.24. Law or policy you can call a law.

Freedom of Religion (31:00)

- Section 2(a) and its scope — what is included?
- To obtain some idea as to what infringements might be justified, considered, found by the courts to be justified.
- Conscience and religion is an individual and collective right.
- The Supreme Court is very reluctant to dive into religious beliefs.

R v Big M Drug Mart, 1985 The leading case on s. 2(a)****
- Leading case for its explication of freedom of religion (?) - The *Lords Day Act* made it an offence for anyone to engage in or carry on business on a Sunday.
- Does the *Lords Day Act* violate **s. 2(a)** of the *Charter*? - Does Big M have any right to claim under s. 2(a)? (How can a corporation have a conscience or religion?) - What is freedom of religion and what is an infringement of it?
- Set the generals outlines of **s. 2(a)**. - Clearly the enforcement of Christian morals. - Freedom of religion is about being free from state coercion. This freedom at least includes freedom of religious speech, including "the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. - Freedom means that subject to such situations safety, order, health, morals, or the fundamental rights and freedoms of others. - Purpose of **s. 2(a)** — values that underly that people can hold their own beliefs provided that such manifestations do not harm others.
- Applied to the Lord's Day Act — you are coerced to follow it.

Syndicat Northwest v Amselem
- Condo association refused to permit huts on their balconies for a Jewish religious holiday. - The Orthodox Jews built the huts — the interpretation of their faith plays a role here. - Actually brought under the Quebec Charter. You don't need a government defendant.
- Does the refusal to allow
- There is now difference between the Quebec Charter and the Charter on religious freedom. - The Court is avoiding having to decide any religious questions. - Did not say that a corporation can never have a religion. - Is it permissible to waive your Charter rights? Voluntary, informed, explicit — must be very clear and expressly.

- In order to establish that his or her freedom of religion has been infringed — must demonstrate:
  - **(1)** he or she **sincerely** <u>believes in a practice or belief</u> that has a nexus with religion. — doesn't have to be consistent with the rest of the religion, etc. — The court does not want to decide on religious beliefs but will assess credibility of witnesses.
  - **(2)** that the impugned conduct of a third party interferes, in a manner that is not trivial or not insubstantial, with his or her ability to act in accordance with that practice or belief.

Multani v Commission Scolaire Marguerite Bourgeoys

- Multani wanted to wear a kirpan to his public school.
- The school and Multani agreed to a solution where he could wear it so long as it was under his clothing.
- The school board disagreed with this and said he could not wear it at all. — it went against the code of conduct — a regulation — a neutral law.
- The problem was the absolute enforcement of the law with no consideration of a less onerous way to enforce it.

- By not allowing Multani to wear a kirpan to school an infringement of his religious freedom?

- The fact that the kirpan is a bladed weapon that could be used to seriously injure another person was relevant to the **section 1** inquiry but irrelevant for the purposes of determining whether the student's religious freedoms had been breached.
- The fact that other Sikhs had been willing to accept compromises, such as substituting the metal kirpan with a plastic or wooden one, was not relevant to the **section 2(a)** analysis.
  - Instead, concerns such as the dangerousness of the kirpan and possible compromises to the dispute were left for the **section 1** analysis.
- In the **section 1** analysis, the prohibition on the kirpan could not be justified, as it failed to minimally impair the rights of the student. — although the judges disagreed on how it was applied.
  - The minimal impairment prong of the **Oakes test** was analogous to the concept of **reasonable accommodation**.
  - If there was a reasonable accommodation that the school board could make so as to allow the student to safely bring the kirpan to school, the prohibition could not be minimally impairing.
    - The student in question had never exhibited any behavioural problems at school, there had not been a single incident in Canada of kirpan-related violence in school, the original compromise reached between the student and the school board, in which the kirpan would be sewn into its sheath and kept under the his clothes, was such a reasonable accommodation.
- Accordingly, the prohibition was deemed unconstitutional.
- **There is nothing proscribed by law — we have a breach — you can go administrative or Charter when you do the proportionality analysis — know that this is an option.**

- **Dissent** — The decision is inconsistent with the Charter. This kind of case should be resolved on administrative law grounds — not suitable for Charter grounds.
- Minimal impairment is about the same as reasonable accommodation in administrative law.
- Basically — don't use a Constitutional sledgehammer when there are other ways to deal with it!

Alberta v Hutterian Brethren of Wilson Colony

- Alberta passed a law that required everyone to have a picture on their driver's licence, thereby ending exemptions previously allowed.— for identity theft issues.
- A Hutterite colony challenged this law because they believe that to take a picture of them is to violate the second commandment.
- The Hutterites need people to drive ascertain basic services.

- Are the Hutterites' **s. 2(a)** rights unjustifiably infringed?

- Everyone acknowledged there was an infringement.
- Analysis surrounded the final aspect of the ***Oakes Test*** (unusual) — the cost benefit level.
  - There must be a proportionality between the effects of the limiting measure and the objective -- the more severe the deleterious effects of a measure, the more important the objective must be.
  - The Court accepted that the purpose of the photo requirement — to protect the integrity of the licensing scheme and to guard against identity theft — was an objective of sufficient importance to warrant overriding a Charter right.
- The analysis is different when you get to the cost benefit. In early stages are purposes and objectives. In the last stage salutary benefits v deleterious effects, we are looking at the effects of the law (probably should have evidence). You are measuring the impact of the law and its effects on *Charter* values such as liberty, human dignity, etc. — what is the evidence and its impact?
  - The salutary effect of the law would be undermined by granting exemptions.
  - The Hutterities were not compelled in any way and had other means of achieving their goals.

- Abella (Dissent) — There was no proportionality…

- If no mention of evidence and you want to persuade the Court in the **s. 1** analysis, you should argue context (take contextual factors). For the other side, goes the evidence route to eliminate free-run of the Court.

- High School Case — Can a high school claim religious freedom? It is not charged with anything, so can't go Big M route. Majority — Religious institutions can claim the benefits. Dissent(ish) — Religious organizations can claim the protection of **s. 2(a)**.

Access to Justice; Procedure
Access to Justice; Constitutional Procedure

- What the hell is access to justice?
- Cost, delay, problems with procedural rules, problems with the law, BC Civil Rules,

BCGEU v BC (AG)
- BCGEU goes on strike and sets up pickets at the entrances to all the courts in BC. - They were willing to hand out passes to people to cross the picket line. - Asked CJ McEachren…. to close the courts, he declines. - He orders an injunction ex parte to stop picketing — Makes it to the SCC.
- Physical access to justice!
- Access to justice is in conflict with Charter values. - CJ Dickson upheld the injunction on grounds of the Rule of Law — found in the pre-amble to the Charter. - Access to the courts is a necessary condition to enforce Charter rights. - Picket lines block access to justice and to fundamental rights. - Any picketing would be criminal contempt. However picketing is freedom of expression. Proportionality analysis ensures the injunction upheld.

BCGEU applied in the Occupy Movement when they moved to the law courts.

BC (AG) v Christie
- BC imposes a 7% tax on legal services to supposedly fund legal aid. - No other professional services were taxed. - The tax went in the general revenue fund and legal aid got cut. - Christie's low income clients could not afford to pay it and he could no longer practice.
- Is access to justice a fundamental constitutional right?
- At the lower levels he managed to get an exemption tied to income of the clients. - The Court kind of shifts the argument to access to lawyers for everyone (not just low income). - Denied because of the huge cost associated with it. - The Rule of Law does not extend to the right to be legally represented in court.

Trial Lawyers of BC v BC — Involved a challenge to hearing fees (Litigants pay these on per diem basis to use the courts). Stems from a typical family litigation where there self-representing people. The trial went 10 days ($3600) and relief was asked for from the fees.

- Relying on **s. 96**, it was found that they were unconstitutional.
- Access to the courts is a part of the Rule of Law and the underpinnings of the constitution(?).
- SCC **s. 96** protects the core jurisdiction of **s. 96** courts — which is deciding private disputes.
- Christie was distinguished and hearing fees were found unconstitutional (Rule of Law considered as well). — Courts are free to develop new aspects to the Rule of Law.
  - Section 96 is not subject to a proportionality analysis (s. 1 or s. 33). How do you get rid of unwritten constitutional principle?
- Impediments to access to the courts have been declared invalid.

IJI Checklist — No Entity (Weak Version)

( )**(1)** Identify a relevant federal head of power (Ryan).

( )**(2a)** See if a precedent has been set:
    Precedents have been set in: s. 91(10) Shipping and Navigation (Ordon/Ryan).
( )**(2b)** If no precedent set, make an argument for one (PHS).

( )**(3)** Determine whether the impugned provision entrenches on the protected "core" of the head of power (Ryan).
    ( ) If you have to, invent it the core! (PHS)

( )**(4)** Does it entrench enough on the head of power that it is sufficiently serious to invoke the doctrine of IJI.
    ( ) Argue **impairs**. — Impairs the core functions (vital and essential parts) of the power (CWB/Ryan Estate).
    ( ) Argue **affects**. — Impairs requires too much effort and is too hard to prove (Bell).

        ( ) The activity must be "**absolutely indispensable or necessary**" to the federal entity in order for it to be immune (CWB).
        ( ) Each head of federal power possesses an **essential core** that provinces can't legislate on (Ordon).

( )**(5)** Final considerations: courts prefer double aspect doctrine or cooperative federalism (PHS). Also, it cannot create a legal vacuum of a "no go" zone.

Remember
- First part of CWB says they are inviting us to make new IJI arguments.
- Ordon says maritime law is at the core s.91(10)
- Discover a new core — a different part of a core?
- You don't have to say what the core definitively is, only that this is touching the core.
- If a provision says nothing or no one or absolute like that, it must sterilize!
- Strange undercutting — if it touches on the core, shouldn't pith and substance kill it?

IJI Checklist — Federal Entity (Strong Version)

— Remember: There is no immunity from all provincial laws — only certain parts of certain laws.

( )**(1)** Find and identify a federal entity.
    ( ) It can be a work OR an undertaking (Winner).
        Undertaking: an arrangement under which physical things are used.

( ) If there is an indivisible, integral operation, it should not be artificially divided for purposes of constitutional classification (Tessier).
    ( ) Whether an operation is extra-provincial is a factual question (Winner).
        ( ) Is there an internal activity that is prolonged over the border (artificially) or is it actually in pith and substance extra-provincial?
            ( ) Colourability to avoid provincial jurisdiction is not acceptable.
    ( ) Only if its dominant characteristic is integral to a federal undertaking will a local work or undertaking be federally regulated (otherwise is provincial) (Tessier).
    ( ) You can pull things under a federal work and undertaking umbrella (Tessier).
        ( ) Is it a sufficiently close and functional relationship (connection)?
        ( ) There is not set percentage or threshold.

( )**(2)** Ask and answer — what is the essential or vital part of the entity as a going concern?
    ( ) There is a bias against divisibility — if one part is federal, it is all federal (Winner).
    ( ) Severability may be possible — If there are actually two operations (Winner).
    ( ) If there is an indivisible, integral operation, it should not be artificially divided for purposes of constitutional classification (Tessier).

( )**(3)** Persuade the court that the application of the provincial statute impairs an essential or vital part of the federal entity (Winner).
    ( ) Includes (Bell):
        (i) Labour relations
        (ii) Management
        (iii) Minimum wage
        (iv) Health and safety
    ( ) Alternatively — Argue affects — Impairs requires too much effort and is too hard to prove (Bell).

Paramountcy Checklist

( ) Is there an actual reason to speak of paramountcy and preclusion (McClutcheon)?

( ) Duplicacy is not a conflict (McClutcheon).

( ) “Operational conflict” is when it is impossible for a citizen to simultaneously comply with valid provincial and federal laws.

( ) Does the application of the provincial law frustrate the purpose of a federal enactment?

Extra-territoriality Checklist

( ) Is the matter **tangible**? (i.e. property)
    ( ) If it is located in the province, move to the next step.

( ) Is the matter **intangible**? (i.e. a cause of action, contracts) (Imperial)
    ( ) First interpret the legislation to see if it was meant to apply.
    ( ) You now need to consider the “real and substantial” connection:
        ( ) Is there a relationship among:
            (i) The enacting territory.
            (ii) The subject matter of the law.
            (iii) The person(s) sought to be subjected to it.

( )**(1)** Is there a validity issue? (territorial limits on provincial powers) (Imperial)
    ( ) Do the pith and substance of the provincial enactment fall within the field of provincial legislative competence?
        ( ) Are the effects merely incidental or consequential on extra-provincial rights (Imperial)?

( )**(2)** If it is valid — is there an applicability issue? — You need to hit one before you move onto the next (Unifund).

( )**(a)** It needs to be sufficiently connected to the province enacting the law (**sufficient connection**).

( )**(b)** What constitutes a "sufficient" connection depends on the relationship among (**real and substantial connection**):
    (i) the enacting jurisdiction
    (ii) the subject matter of the legislation
    (iii) the individual or entity sought to be regulated by it.

( )**(c)** The applicability to out-of-province defendants is conditioned by the requirements of order and fairness that underlie our federal arrangements (**order and fairness**).
    (i) Comity — Mutual respect amongst provinces.
    (ii) Federalism — We are all working together.
    (iii) Due process — The legal rights owed.
    (iv) Full faith and credit — respect the public acts, records, and judicial proceedings of other states.
    — Concepts to consider: Does it lead to conflicting rules for the same events? Overly harsh punishment?

( )**(d)** The principles of order and fairness, being purposive, are applied flexibly according to the subject matter of the legislation (**order and fairness is applied flexibly**).