Constitutional Law WINTER 2017 Prof Edinger

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## Categorization of Federalism

1. **Validity - Statutes have to be valid –** Relationship of the statute that is challenged to Constitution Act 1867

* Did the govt have the authorization to enact that statute?
* Consider division of powers, some ET (Churchill falls)

1. **Applicability** - Statutes have to apply in the circumstances.

* Do they both apply?
* IJI & Extraterritoriality (Unifund) - judicially created doctrine

1. **Operability -** Is there a conflict? Is the statute operable?

* Paramountcy – judicially created doctrine

**#2 and 3 are GROWTH AREAS – always new cases**

## Issue #2: Applicability – does the statute apply to this defendant/claimant?

### Interjurisdictional Immunity (IJI)

**Certain federal entities have limited immunity from the application of certain parts of provincial laws**

* None federal entities can ever claim an ABSOLUTE immunity from the application of all provincial laws.
* The degree of immunity which a federal entity can claim has changed over the years. As has the test for IJI. It was very narrow, then broad, and now narrow again

**IJI can render a statute inapplicable, in operable, or invalid.**

* You can never assume validity, since you can never get to applicability or operability unless you have a valid statute
* Even a valid statute may not apply, and even if it does apply there may be an issue of operability
* Doctrine created in 1915 by Privy Council (John Deere Plow v Wharton - federally incorporated company).

**Parliament has legislative jurisdiction to incorporate companies (*John Deere Plow*).**

Parliament doesn’t have a head of power for federally incorporating companies. Possibly got it from POGG national concerns, or 91(2). Provinces and territories also have power in limited heads. Parliament has unlimited power. John Deere Plow wants to carry on business in BC. Registrar won’t register them here. Can’t operate in BC without registration. Privy Council held that John Deere Plow was exempt from BC statute requiring registration b/c … they weren’t clear. So Privy Council was creating an interjurisdictional immunity.

In certain circumstances, the powers of one level of government must be protected against intrusions, even incidental ones, by the other level. The courts have developed the doctrines of [interjurisdictional immunity](https://en.wikipedia.org/wiki/Interjurisdictional_immunity) and [federal paramountcy](https://en.wikipedia.org/wiki/Paramountcy_(Canada)).

**The level of the intrusion on the core of the power of the other level of government must be considered.** To trigger the application of the immunity, it is not enough for the provincial legislation simply to affect that which makes a federal subject or object of rights specifically of federal jurisdiction. The difference between “affects” and “impairs” is that the former does not imply any adverse consequence whereas the latter does. In the absence of impairment, interjurisdictional immunity does not apply. It is only if the adverse impact of a law adopted by one level of government increases in severity from affecting to impairing that the core competence of the other level of government or the vital or essential part of an undertaking it duly constitutes is placed in jeopardy.

#### Sequence –

#### It’s common to invoke both IJI (immunity to a statute) and paramountcy (inconsistent with federal law and federal law wins)

**#1 Are the 2 conflicting acts VALID?**

* Consider if they are ULTRA VIRES and therefore invalid?
* If invalid, then you don’t have to go to IJI!

**#2 Argue that a statute is not APPLICABLE because:**

* Not a constitutional issue – just a matter of statutory interpretation
* **Extraterritoriality** (*Unifund*)   
  Which statute applies? Argue the statue doesn’t apply as it would amount to an extraterritorial situation
* **IJI**If you can get immunity, then you don’t have to go to operability

**# 3 Argue that it IS NOT OPERABLE because**

* **Paramountcy -** There is a conflict – then you have to argue paramountcy.

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| Ontario (AG) v Winner (1954) \* Bus crosses provincial boundaries GRANTED IJI |
| **Facts**: D had bus business (Boston🡪New Brunswick), claiming IJI. P/R (SMT Eastern) had licenses granted per prov statute Motor Carrier Act of NB, operated busses. P wanted injunction-restraining debussing/embussing in NB (to get rid of Winner as competitor). Both licensed, one has limitations and one doesn’t.  **Issue**: **Should Winner’s bus company be granted IJI? Does IJI require a work AND an undertaking or work OR undertaking?**  **Provinces have jurisdictions over highways, can regulate them in every aspect (could grant/refuse licence at discretion)**  **Provincial statute cannot prevent or restrict inter-provincial traffic**  **Reasons**:   * **Work: physical thing; undertaking: an arrangement (ex. business plan, anything they have done to put it in motion) under which physical things are used (ex. busses)** * **Read disjunctively 🡪 work OR undertaking** * **If the *Motor Carrier Act* had applied to Winner it would have a significant negative effect on Winner’s federal work and undertaking consisting of a bus operation crossing boundaries** |

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| Tessier Ltee v Quebec (2012) \* Stevedore 14% does not cross prov boundaries NOT GRANTED IJI |
| **Facts:**   * Equipment (crane) rental company, involves intra-provincial road transportation and maintenance. **Operates exclusively within Quebec.** * 14% of operations involve stevedoring (*Stevedoring Reference*: SCC decided a firm engaged in stevedoring was a federal entity, closely connected with 91(10) Navigation and Shipping IF the work they did was integral to the federal shipping companies that they served). * Stevedoring not a distinct division as those employees also did other work in Tessier.   **Issue**: How to identify Tessier for purpose of occupational health and safety coverage (ie are they in prov program or federal)? **PROV - NOT a federal work/undertaking – not closely connected enough to navigation and shipping to be pulled into federal labour law jurisdiction**  **Ratio:**  **Labour/working conditions not exclusively federal or provincial (but presumptively provincial 🡪 engages property and civil rights)** **DOUBLE ASPECT**  **TEST Federal govt has jurisdiction pending a functional analysis: relationship between activity, particular employees, and the federal operation that benefits from the work of the employees.**  **Employment regulated under federal jurisdiction if:**  1. **Employment relates to a work, undertaking, or business within the legislative authority of Parliament (direct federal labour jurisdiction)**   * Services provided to the federal undertaking form the principal part of the related work’s undertaking * It is direct labour jurisdiction just that federal government can regulate employment for federal undertakings * Court assesses: whether the work, business or undertaking’s essential operation brings it within a federal head of power * For direct 🡪 is sufficient that only a minor part of the undertaking is interprovincial as long as its performed on a regular basis *(Winner*)   + - This case: do not form a discrete unit, functionally integrated   2. **Integral part or necessarily incidental to effective operations of a federally regulated undertaking (derivative jurisdiction)**   * It is provincial, but it does some things for inter-provincial operation * Court assesses: whether the essential operational nature renders the work integral to a federal undertaking (ex. federal undertaking is dependent to a significant degree on employees) * Dependent on the relationship between the activity of the stevedores and the undertaking, not the relationship between the stevedoring and the relevant head of power   **If the thing is entirely contained within the province:**  1. Look at the operation that is at the core of the federal undertaking  2. Look at the particular subsidiary operation engaged in by the employees in question   * + **Assessing whether the effective performance of the federal undertaking was VITAL to the services provided by the related operation**     - Contact can be important (whether function separately or together, something more than a physical connection, cannot be minor/casual     - **Providing regular/important services is not enough if only minor part of operations**     - **Even if it is vital, if it represents an insignificant part of employee’s time/minor aspect 🡪 not federal**     - **Only if its dominant character is integral to a federal undertaking will a local work or undertaking be federally regulated; otherwise, jurisdiction remains with the province**     - Must be functionally part of the interprovincial entity and lose its distinct character (normal day-to-day activities must be interprovincial in nature)       * If the essential/dominant character (view functionally) is distinct from interprovincial transportation/communication 🡪 remains in provincial jurisdiction   This case demonstrates that in certain circumstances a stevedoring company/business CAN be part of 91(10) because the vessels have to be loaded/unloaded   * + But in this case they didn’t make the grade because the way that the company was actually organized – there was no derivative jurisdiction |

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| Ordon Estate v Grail (1998) \*\* Using a core of a head of power for IJI |
| Two fatal boating accidents on lakes in Ontario. Estates of killed parties bring action in negligence against Grail (pleasure boat owner). \*\* First case where there is no entity upon which the laws are taking effect 🡪 the federal “entity” was not actually an entity it was a person 🡪 so Iacobucci relied on a HEAD OF POWER!  .  **First case which expressly states and then applies the version of the doctrine of IJI which says that there is a core to each head of federal power which other levels of govt can’t regulate towards**  Plaintiffs wanted to rely on provincial Family Law Act, Trustee Act, and Ontario Negligence Act. Precedent that provincial law could be used to supplement federal law. **However, recent jurisprudence made it clear Canadian Maritime Law leaves no room for application of provincial statutes.** Maritime negligence law has not benefited by the enactment of provincial negligence laws.   * Plaintiffs (depends of deceased) argue that they should apply to **fill gaps** that exist in federal maritime negligence law * Defendants submit that they can have no incidental application to any matter within exclusive federal jurisdiction   **Issue**: Do the provincial negligence statutes apply? NO  Can prov statutes supplement federal maritime law? NO – You would get different substantive law in different provinces.  **Reasons**:   * **Canadian maritime law must be uniform, shouldn’t be allowed to be supplemented by Prov Statutes** * **Canadian maritime law is an essential part of 91(10) Navigation and Shipping** * It is constitutionally permissible for a validly enacted provincial statute of general application to affect matters coming within the exclusive jurisdiction of parliament (this is an incidental effect; this is *Carnation*)   + **Question is whether it trenches in its entirety or in its application to specific factual contexts, upon an exclusive federal power**     - If it does, it must be read down so as to not apply to those situations     - This is IJI     - Reading down means that there is a declaration by the court that it is not applicable to this federal entity   + **Each head of federal legislative power has a basic, minimum and unassailable content which the provinces are not permitted to regulate indirectly through valid laws of general application** 🡪 **Immunity against incidental effects that affect the CORE of the head of power – even if the pith and substance is within the jurisdiction, if there are incidental effects it is inapplicable.**     - In this case, it would preclude the application of provincial statutes to those undertakings which have the effect of regulating an essential part of the management and operation of them     - **This case moved from giving federal entities (persons, works and things) immunity from the application of provincial laws that effect an essential part of the management of the undertaking, to heads of power and their essential cores (from even an indirect effect) claiming IJI**     - Things under exclusive federal jurisdiction are still subject to statutes that are general in their application, provided that they do NOT bear on the subjects which makes them specifically federal jurisdiction   + **Where the application of a provincial statute of general application would have the effect of regulating, indirectly, an issue of maritime negligence law, this is an intrusion upon the unassailable core of federal maritime law and as such is constitutionally impermissible**     - **Cannot supplement in a way that alters the rules within the exclusive competence of Parliament** |

### IJI vs. Pith + Substance

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

* First case which expressly states and then applies the version of the doctrine of IJI which says that there is a core to each head of federal power which other levels of govt can’t regulate towards

**The court creates a whole new version of inter-jurisdictional immunity;**

* Where a provincial statute trenches on an exclusively federal power, the statute must be read down so as not to apply to those situations; says this is known as inter-jurisdictional immunity
* Court finds that each federal head of power possesses a **basic minimum unassailable content** (the core) that cannot be trenched on by the province
  + Says the court in ***Bell 88*** said this (but ***Bell 88*** does not say this; the court in that case said the federal entity in question had core *workings*, not the *subject matter*)
* Edinger feels that IJI, as it has been expanded, is inconsistent with the pith and substance doctrine
  + Court determining what the matter of the statute is and slotting it under a head of power
  + Once a matter of the statute is found to fall under a legislating govt’s head of power, then incidental effects on other heads of power are constitutionally irrelevant
  + IJI interpreted with cores of heads of power, and measuring the “effects” of legislation on the core is inconsistent with the P+S doctrine – Edinger’s opinion on the matter

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| Bell Canada v Quebec (1988) \* IJI granted Core must be impaired |
| **Facts**: Deals with the reassignment of a pregnant worker (protective). Under provincial legislation Bell would have had to comply with the *Minimum Wage Act*. Labour relations and working conditions fall within the exclusive legislative jurisdiction of provinces (92(13)). Bell is a federal undertaking.  **Issue:** What are vital and essential parts of this undertaking? Wages and working conditions are vital.  **Bell Canada said that federal entities have IJI from the health and safety regulations part of the worker’s compensation legislation**   * Exclusive jurisdiction over labour relations and working conditions when that jurisdiction is an integral part of its primary and exclusive jurisdiction over another class of subjects * **The act as a whole is inapplicable to federal undertakings**   **Reasons**:   * **Not relevant whether the Act impairs the functioning of Bell Canada and Canadian national** * **The power to regulate wages and working conditions affects a vital part of the management and operation of the undertaking (managed provincially)🡪 therefore, inapplicable and ALSO ultra vires** * **Test of impairment is insufficient and not conclusive in cases where without going so far as to impair or paralyze federal undertakings, such application affects a vital part of those undertakings** * **Justice Beetz modifies the formula from sterilizing 🡪 impairs 🡪 affects the function**   + If a vital and essential part (which is essentially, internal management, workplace organisation etc.) of the provincial legislation affects that internal management then they will grant IJI because it is not fair to federal entities to wait until they have been impaired |

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| Canadian Western Bank v Alberta (2007) \* Application of IJI, must impair core |
| **Concerns 91(15) 🡪 “Banking, Incorporation of Bands, and the Issue of Paper Money”**   * Bank Act valid federal legislation * Alberta enacted *Insurance Act* for consumer protection to govern the promotion of credit-related insurance by banks, permitted under the federal Bank Act(*Citizens Insurance* 🡪 this is valid) * **Insurance Act made federally chartered banks subject to provincial insurance licensing scheme**   **Issue: Is banks’ promotion of insurance “banking” under 91(15) and does the Alberta Insurance Act and its regulations apply or operate on the bank?**  **Federal Paramountcy Does not Apply – No conflicting federal law re insurance**  **Insurance act valid exercise of prov powers under 92(13)**  **IJI fails because insurance not at the core of banking**  **Reasons**:   * **If the Feds don’t like applying provincial law, they can legislate the issue themselves.** * **Provinces can claim IJI AND Paramountcy for every head of power** 🡪 in theory, the doctrine is reciprocal: it applies both to protect provincial heads of power and provincially regulated undertakings from federal encroachment, and to protect federal heads of power and federally regulated undertakings from provincial encroachment.   + Broadens Ordon   + Inconsistent with federalism that the constitutional doctrines of pith and substance, double aspect and paramountcy are designed to promote     - These doctrines recognize that overlap is unavoidable   + Despite an absence of a law at one level of government, the laws enacted by the other cannot even have incidental effects on the “core” jurisdiction 🡪 because it increases risk of creating legal vacuums     - Not necessary for the government benefitting from IJI to actually regulate in that area     - Says this is an important argument to use 🡪 something won’t be regulated   + Excessive reliance: creates uncertainty (Criminal, T&C, matters of local/private 🡪 not precise)     - Could create rigid & centralized federalism (because would favour the feds) 🡪 @ odds with coordination required by the modern Canadian State     - Also would undermine the principle of subsidiary (decisions should be made closest to those affected)   + Superfluous 🡪 Parliament could regulate and exclude provincial jurisdiction (Edinger doesn’t think this is realistic, Parliament is not interested in doing this, just want to give an entity an immunity)   **Limitations to the broader application of IJI:**  **There has to be an impairment**   1. **IJI does not apply if the law does not impair the core of the head of power**    1. **The impairment must go to a vital and essential part of undertaking for IJI to apply** 2. **There has to be precedence.** IJI’s natural area of operation is in relation to those heads of legislative authority that confer on Parliament power over **enumerated federal things, people, works or undertakings**    * In most cases, a pith and substance analysis and the application of the doctrine of paramountcy have resolved difficulties in a satisfactory manner    * In the absence of impairment, IJI does not apply |

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| Canada v PHS Community Services Society (2011) \* Prov IJI claim, unsuccessful |
| **Facts**:  Since 2003 Insite was exempted from operation of criminal law in the Controlled Drug and Substance Act – ministerial exemption. In 2008 the Minister of Health refused to extend the exemption. Insite takes a pre-emptive strike and applies for declaration on one of two alternative grounds:   1. That as a provincial health facility they were entitled to IJI – nothing federal about it, provincial entity and 2. Declaration that on the grounds there would be breach of S 7 rights of all people who used Insite.   **BCCA:** one of 3 judges found that Insite was a “provincial entity” (hospital) and that Insite was entitled to IJI from application of criminal law and CDSA because without that exemption Insite would be impaired in a vital and going concern of the entity.  **SCC**:  Question: whether Insite is exempt from the federal criminal law either b/c it is a health facility within the jurisdiction of the Prov, or b/c it would violate S7 of the Charter.  **Holding**:   * **Did not get to use IJI, but did get exempted on the grounds of violation of S 7 of Charter.** * CDSA is applicable to Insite, and the scheme of the CDSA conforms to the Charter. However in refusing to extend Insite’s exemption under s 56 of the CDSA they are in violation of S 7 of the Charter and cannot be justified under s. 1. **Therefore the Minister was ordered to grant an extended exemption.** * Appeal dismissed. * Claim that it is under “healthcare” and therefore protected from federal intrusions (cite *Bell*)   + Basic, unassailable power in the heads of power in section 92 that must be protected from the other level of government   + **Claimants have failed to delineate a CORE of a provincial head of power**   + It is not even necessary for the government benefitting from the immunity to be exercising its exclusive authority (CWB) Also ask about this. Does this mean that when there is a double aspect the feds or provinces can claim IJI? Doesn’t this go against the whole idea of double aspect?   **Issue**:  Whether Insite can claim provincial IJI from federal criminal laws? Either because  (1) it is a health facility within exclusive jurisdiction of the Province **NO** or  (2) Because the application of the criminal law would violate S 7 Charter **YES**  **Reasons**:   * There is no precedent for the proposed core of the province’s over health (CWB) * Didn’t identify a core of exclusively provincial power - provincial health is too broad, amorphous, touches on a number of heads of power (not the restrain the courts call for)   + Parliament can legislate on matters that touch on health (ex. Criminal Law) * Can create legal vacuums   + Excluding federal criminal law power from a protected provincial core power would mean that Parliament could not legislate on controversial medical procedures (not legal vacuums, regulatory vacuums)   + Also affirm theory in CWB   Edinger thinks that if they had argued that it was a provincial entity (hospital)  Para 58 IJI premised on idea that there is a basic minimum unassailable CORE to every head of power |

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| Marine Services International Ltd v Ryan Estate (2013) \* Test for IJI |
| **Facts**:   * Two fisherman killed, estates sought compensation from the parties responsible. * Conflict between federal Marine Liability Act and provincial Workers Comp Act. * Provincial act disallowed claim in negligence, but federal would have allowed it.   + ***Marine Liability Act* (federal) which in 6(2) provides that negligence actions for survivors are possible** (where the deceased would have had an action for negligence) * **Provincial compensatory elements apply to federal undertakings operating within a province (but occupational health and safety elements do not**) – cite *Bell* and *Tessier* * Workers compensation schemes fall within provincial jurisdiction over property and civil rights   **Reasons**:   * ***Ordon*** 🡪 must consider IJI for 91(10); core: maritime negligence law * ***We have precedence in Ordon that you can claim IJI with respect to maritime negligence law*** * No federal entity. * ***Test* to determine if IJI is triggered:**   + 1. **Determine whether it trenches on the core of a head of power listed in 91 or 92**      - Meets this stage 🡪 Ordon set precedence for core     - Theoretically for a provincial statute to trench w/o impairing   + 2. **Determine whether the provincial law’s effect on the exercise of the protected federal power is sufficiently serious to invoke the doctrine of IJI**     - Must **impair (not affects)** CWB Would require a serious encroachment on maritime law     - Not met 🡪 Does not impair exercise of federal power over navigation and shipping 🡪 estate was getting payments through provincial WCB act (not at the same level, but still some payments) * **Doesn’t change any aspect of maritime negligence law, doesn’t supplement it, doesn’t impair the core of 91(10), no operational conflict so no need to utilize paramountcy**   + The federal statute is permissive, so neither frustrates nor has an operational conflict   + Does not frustrate the federal regime, just provides a different regime for compensation that is separate from tort |

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

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

### Paramountcy

* **Depends on the court finding a conflict between 2 VALID and APPLICABLE laws (1 prov, 1 fed).**
* **Is there a conflict between the two statutes?** 2 forms:
* operational conflict (feds say do this, prov says don’t do this – you can’t do and not do at the same time), and
* frustration of purpose (prov statute is interpreted as frustrating the purpose of the federal statute 🡪 fed statute wins, prov statute declared **inoperative** – only inoperative when there is a conflict, if the fed statute is repealed the prov statute will win).
* Judicially created 🡪 Therefore, subject to change (started broad, narrowed, then broadened again)
* Does not apply to an inconsistency between common law and legislation that is valid (*Ryan Estates*)

#### Test for Paramountcy Multiple Action v McCutcheon

**Express contradiction test:** Smith v The Queen (quoted in Multiple Access v McCutcheon)

Conflict in operation – one law says yes, one says no

* Must be a case in which a citizen is being told to comply with both; and if they comply with one, they cannot comply with the other
* Once the court has declared a conflict, it will apply to all subsequent litigants on the same conflict, but a citizen must bring it the first time b/c he/she is subject to an actual conflict

Multiple Access v McCutcheon

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

**Issue**: Does paramountcy apply?

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

Canadian Western Bank v Alberta

* There is more than one way to have a conflict. More than one kind of conflict. Duplication is not a conflict.
* If not IJI, make paramountcy argument 🡪 provincial law would frustrate Parliament’s purpose
* **When a federally regulated entity takes part in provincially regulated activities, will be jurisdictional overlap but paramountcy is not engaged (no conflict with a valid federal law🡪 provincial law applies)**
* **Provincial insurance laws complement, not frustrate, the federal purpose. Take into account true intent of govt**
* Application: Paramountcy does not apply.

Alberta v Maloney \* PURE PARAMOUNTCY CASE

**FACTS**: Uninsured driver responsible for car accident in 1989. Govt compensated injured party, obtained judgment against Maloney for payments. In 2008 Maloney declared bankruptcy, stopped paying his debt. Alberta said he had to still pay or they would forbid him from driving. He argues he doesn’t owe them anything anymore. Bankruptcy and Insolvency Act says free and clear, Alberta Traffic Safety Act says pay or no license.

**CONFLICT**: Federal act saying you’re discharged from debts – provincial act says you cant be discharged from.

**Operational conflict** – while you could possibly comply with both laws, you shouldn’t have to.

*Minority*: For operational conflict there must be express conflict – one must say yes and the other must say no – and they didn’t feel it existed in this case

**Frustration of purpose** – everyone agrees there is frustration, as the P has not been allowed a clean start after bankruptcy – we can’t have debts surviving bankruptcy unless the Bankruptcy Act says so

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

# Charter Procedure

**Historical Context**

* Division of powers was previously used when individual rights were challenged, they would just claim it was ultra vires the level of govt that enacted it.
* In 1950s, at time of [Justice] Rand court, implied bill of rights found between the lines of the 1867 act.
* That approach to protection of rights wasn’t continued, as in 1960 Bill of Rights, Diefenbaker.
* Two weaknesses of the Bill of Rights: 1) not entrenched - any inconsistent statute could overrule it – was weak re parliamentary supremacy. 2) didn’t apply to any provincial statutes.
* Human rights legislation was enacted in provinces
* 1982 Charter was introduced by Trudeau as part of the 1982 amendment of the constitution, was enacted as amendment to the 1867 act in the UK as the Canada Act. 1982 Amendments are called Schedule B.
* Charter is S 1-34 and S 52

Initial cases set out the framework for any Charter challenge.

## 1: Applicability

### When is the Charter available?

**Who benefits from the Charter? (Who can be a plaintiff?)**

* Identify the section that guarantees the right, read the section, see if the individual who claims that right is entitled to sue
* Every right is differently described
* “Natural persons”, everyone, citizens, permanent residents
* Animal? Fetus?

**Who bears the burden of complying with the Charter? (Who can be a defendant?)**

**S 32 of Charter determines application of Charter**

**(1) This Charter applies**

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

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

**You need to find a statute/regulation/act/provision that is infringing the right**

* **Option 1 - Federal and provincial governments**
  + No doubt that it applies to provinces, feds, and all their statutes.
  + The issue that occupies the courts is how much wider you can go in applying the Charter
  + Section 32 assists us in this.
  + Entities created and empowered by the legislative body (including both levels of government) MAY BE SUBJECT TO THE CHARTER
    - (Keep in mind the first option is govt legislation fed or prov, the following are just 2 other options if not govt legislation fed or prov).
    - Must focus on the entity. Is the entity a government entity?
* **Option 2** **- Private entity** 🡪 you must look to see whether this private entity is performing a government function. Find something that the entity is doing that is a government function. A private entity is limited to purpose. The grounds that you sue them on MUST BE THE GOVERNMENT FUNCTION – you can’t sue them because they have a government function but sue them on grounds other than the fulfillment of that government function.

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

McKinney

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

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

Eldridge v BC

**Two ways legislation can violate *Charter****:*

* + (1) Legislation is unconstitutional on its face because it violates a *Charter* right and isn’t saved by s 1
  + (2) *Charter* is infringed, not by the legislation itself but by the actions of a delegated decision-maker in applying it.

**Next question: does *Charter* apply to the decision maker?**

* + **If entity is found to be govt, *Charter* applies to ALL of its activities** 🡪 even ones that are generally “private”.
  + **Private entities may be subject to *Charter* if acting to further a govt program or policy** (they are government for that one function).
    - Merely serving a public function or being “public” is not enough 🡪 must be implementing specific govt policy.

**Test for a private entity (Eldridge): Is the entity performing governmental functions?**

* + Is there a direct and precisely defined connection between the nature of the activity in question and specific government program or policy? If yes, *Charter* is applicable.
  + **Note:** For an entity, the question is “degree of control”, but for a function, it is “nature of the activity”.
  + **Then the P can claim the entity is within s 32 and breached a Charter right.**

**Hierarchy for challenging something:** Legislation > government entity > government function

* IF an entity’s act is truly government in nature, that entity will be under *Charter* scrutiny only with respect to that act, and not all of their private activities.

#### What about government omissions?

Vriend

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

#### Issue of colourability

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

#### Charter and Private Litigation

*Grant v Torstar*

* Can you find that s 32 applies to the D? If not, such as in private litigation (and it can’t be evoked to strike down a common law rule merely for being against the Charter)
* What you can do is use Charter values
* You can invoke Charter values to SUPPORT arguments to modify common law, but you can’t use ONLY the Charter

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

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

Grant v Torstar PRIVATE LITIGATION – Tort / Common Law / Defamation

**Facts**: Grant sues Toronto Star in defamation, based on article published where reporter tried to verify facts, but didn’t. Action of defamation brought against writer. Wanted a new defense “RCMPI”. Toronto Star argued that the (1) changes in the common law and (2) common law should develop consistently with Charter values (including freedom of expression).

**ISSUE**: Should the Court modify the common law rules for defamation? YES

**Ratio**:

* Freedom of expression is not absolute (competing rights)
* **“Constitutional status of freedom of expression under the Charter means that all Cdn laws must conform to it”.**
* CHARTER VALUES ARGUMENT 🡪 in private litigation
* **The common law is not directly subject to Charter scrutiny where disputes btwn private parties are concerned, may be modified to bring it into harmony with the Charter.**
* **EDINGER**: Use Charter values to modify common law – Use Charter values as fundamental policy statements. You can always invoke the Charter but you aren’t going to get a charter analysis if the law in question is a common law.
* **The guarantee of free expression in s 2(B) of the Charter has three core rationales, or purposes 1) democratic discourse 2) truth-finding and 3) self-fulfillment. These purposes inform the content of s 2(b) and assist in determining what limits on free expression can be justified under s. 1**

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| RWDSU v Dolphin Delivery 1986 SCC \* Court orders not subject to Charter challenge |
| **ISSUE**: Are trade union members protected against injunction against secondary picketing which infringes on their Charter right of freedom of expression under s 2(b)?  **RATIO**:   * **Court orders are not subject to challenge under the Charter.**    + Judicial orders can’t be challenged per se.   + Judiciary is not part of govt as they don’t fall within S 32   + Orders come from application of prov or fed laws – so you can challenge the common law or the statutes from which the judicial orders came. * **Not intended to be applied in private litigation absent government action**   + S 32 shows that the Charter refers to the legislative, executive and administrative branches of govt, whether or not their action is invoked in public or private litigation. * **Does apply to common law** 🡪 Per s 52 Constitution is the supreme law of Canada and any law that is inconsistent with the provision of the Constitution is, to the extent of the inconsistency, of no force or effect. * **An order of a court cannot be equated with an element of governmental action, the courts cannot be contending parties involved in a dispute.** |

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| McKinney v University of Guelph (1990) \* University not govt under s 32 🡪 Charter not applicable |
| **Facts**: Deals with mandatory retirements in universities, appellants applied for declarations that the policies of the universities violate s.15 of the Charter  **Issue**: **Does the Charter apply to universities? NO it is not govt under s 32 so the Charter is not applicable….** Universities negotiate contracts and collective agreements with their employees and include within them provisions for mandatory retirement. These actions are not taken under statutory compulsion, so a Charter attack cannot be sustained on that ground. Para 35  **Reasons**:  **Majority and dissent difference of opinion on s 32**   * **🡪Majority La Forest** narrower application of Charter than dissent, yet is still broadening s 32 somewhat to include govt entities. Framers of Charter didn’t intend for it to apply in an open ended way, it was intended to be limited to govt as it was intended to control govt to protect citizens. Considers funding source, public service entity, but degree of independence of university 🡪 board of governors partly govt but don’t control the university. **Does not give a test but focuses on autonomy and independence as key factors in whether university is considered govt entity.**   **🡪 Dissent Wilson 🡪** court could apply Charter broadly by authorizing application of Charter to entities   * **Opens up the possibility that subordinate bodies could be governed by the Charter (doctrine of evasion).** * **Recognizes that Dolphin Delivery left open the possibility that subordinate bodies created and supported by Parliament or the legislatures could be governed by the Charter.** * **If the entity is govt within s 32 then everything that entity does is subject to Charter scrutiny** * NOT sufficient that it:   + **Is created by statute** (Private corporations are all created by statute)   + Has a public purpose (Too broad) * **CONTROL TEST**   A. **Nature and Extent of Government Control**   * Does government exercise such significant control over the operation of the institution that the activities of the latter may properly be seen as activities of the former? * Input into its policy formulation process, approval of the by-laws/rules that determine how that entity carries out its mandate, allocation of funding used to implement its objectives, or through the appointment of the personnel that run the entity   B**. Specific questions about entity’s activities**   * Is there a clear nexus between government and the **particular impugned activity**?   + Cannot be arms-length * No evidence that they were following dictates of government, generally autonomous, traditional purpose supports autonomy, contract of employment is not government policy * Would have to be shown than that they engaged in activities or the provision of services that are subject to the legislative jurisdiction of either the federal or provincial governments   **Dissent**:   * Problem with Control Test: body should not automatically be deemed to be non-governmental simply because one cannot point to a specific nexus * **Test 2: Government Function Test**   + Even although there is minimal government control over that body, the entity must nonetheless be viewed as part of government because it performs a function that has traditionally been performed by government * **Test 3: Government “Entity” Test (Edge likes this)**   + Whether an entity performs a task pursuant to statutory authority and whether it performs that task on behalf of government in furtherance of a government purpose   + Assist one to identify those bodies that are neither subject to extensive government control and that cannot be said to be carrying out a traditional government function, but that may nonetheless be the product of government's decision to take on a new role * **Factors to consider (indicators)**  1. Does the legislative, executive or administrative branch of government exercise general control over the entity in question?    1. This is the same as the majority 2. Does the entity perform a traditional government function or a function which in more modern times is recognized as a responsibility of the state?    1. Edinger thinks this is open ended 3. Is the entity one that acts pursuant to statutory authority specifically granted to it to enable it to further an objective that government seeks to promote in the broader public interest? |

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| Eldridge v BC \* sign language – is hospital govt? |
| **Facts**: In neither of the two primary statutes for medical care is sign language interpretation paid for. Alleges a violation of s.15. Not mentioned anywhere in the statutes/regulations (inclusion or exclusion)   * If it had expressly excluded 🡪 could challenge (wouldn’t have to worry about s.32) * Medical services commission is a panel that determines the services that are not benefits under the Act   **Issues**:   * Does not providing sign language interpretation for the deaf violate s.15 of the *Charter?* * If so, does it arise from the legislation itself or from the actions of the entities exercising decision making authority pursuant to the legislation?   **Decisions**:   * **Performing a government function 🡪 subject to Charter for those activities**   **Reasons**:   * **Acts do not exclude sign language**; it is the decision of the authority which decides what is “medically required” that is constitutionally suspect (legislation does not mandate the result)   + When it is alleged that an action of one of these bodies (not the legislation that regulates them) violates the Charter, it must be established that the entity, in performing that particular action, is part of "government" within the meaning of s. 32 of the Charter   + When it is considered “government” the Charter will apply to all its activities, including those that might in other circumstances be thought of as "private"   **Application**:   * **Hospitals are not government for the purpose of s.32** * Purpose of the statutes is to provide services to the public, government is responsible for defining the content of the service and those entitled to receive it * **Hospital is carrying out a specific government function (provides for the delivery of a comprehensive social program) – act as agents for the government**. * "Direct and . . . precisely-defined connection" between a specific government policy and the hospital's impugned conduct * Not simply internal hospital management   **Expansion of s.32 🡪 If the breach is found to be the responsibility of a decision maker (not a statute) then the Court is free to issue a remedy under s.24(1) of the Charter (third type of argument)** |

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| Godbout v Longueuil (City) (1997) \* once designated govt, always govt |
| **Facts**: Appellant city adopted a resolution requiring all new permanent employees to reside within its boundaries; Respondent signed a declaration promising she would establish her principal resident in the city, and would remain there as long as she was a city employee. She moved, was dismissed.   * City argues that they are not subject to the Charter for “private” acts (ex. employment conditions) * P argues S 7 rights and freedoms and Quebec Charter of Human Rights   **Issue**: **Does the Charter apply to municipalities within s 32 of Charter?**  **Decision**: Majority applies Quebec Charter. Applies to municipalities  **Reasons**:   * **City resolution that all new permanent employees must reside within the city limits.** * **Once an entity is designated govt it is govt for all matters.** * Democratically elected; accountable in a way analogous to legislative branch; possess general taxing power (indistinguishable from leg branch); empowered to make laws/administer/enforce them; derive existence and law making authority from provinces 🡪 They exercise **powers conferred on them by provincial legislatures, powers and functions which they would otherwise have to perform themselves.**   + Provincial gov could take power away from municipalities (level of control) * **Vs. *McKinney* employment decisions 🡪 in this case they are government so ALL activities are under Charter scrutiny** |

## 2: Justification of limiting a Charter right under s 1

**Pre-requisites**

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

#### Steps to Charter Challenge - Justification

1. **Ensure entity applies under s. 32 and has not opted out per s. 33**
2. **Give notice per Const Questions Act**
3. **Find the breach of right pursuant to your claim**

* Characterization process: interpret the right and your alleged violation
* This is a relatively easy stage b/c Courts are very liberal at this level as the limitations kick in at s.1

1. **Rights are subject to reasonable limits prescribed by law as can be demonstrably justified in a free & democratic society**

(a) “prescribed by law”: there must be legislation

(i) If no legislation 🡪 no s.1 analysis – *Charter* challenge fails

(ii) If there is legislation 🡪 Is the provision too vague? (***Nova Scotia Pharmaceuticals***)

* + - Note: Provisions of “discretion” often difficult/impossible to define, found as too vague
    - Yes 🡪 no s.1 analysis – *Charter* challenge fail
    - No 🡪 s.1 analysis occurs

(b) “demonstrably justified in a free & demo society” 🡪 ***Oakes* test**

* Justification is essentially a statutory interpretation exercise.
* For *Charter*, courts must take (1) a **living tree** approach, and (2) a **purposive** approach.
* **Notwithstanding clause**: s. 33 of *Charter* 🡪 can NOT be used against s. 2, ss.7-15. *Charter* rights aren’t absolute!
* Financial emergencies can be sufficient objectives **pressing and substantial in the Oakes test** (*Newfoundland v NAPE)*
  + - Money can’t be invoked as a justification during normal times. However this was not a normal time as Nfld was facing severe financial crisis.
    - Severe financial emergencies are accepted as a pressing and substantial matter.

#### Free and Democratic Values

**These underlying values and principles of a free and democratic society are the genesis of rights and freedoms guaranteed by Charter. Established in Oakes at para 64**

* **ARGUE**: Use these values and try to persuade the court, helping your infringement claim.
* **Respect for the inherent dignity of the human person**
* **Commitment to social justice and equality**
* **Accommodation of a wide variety of beliefs**
* **Respect for cultural and group identity**
* **Faith in social and political institutions which enhance participation of individuals and groups**
* **“The rights and freedoms guaranteed by the Charter are not however absolute” Oakes para 65**

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

* Test for justification of a *Charter* rights infringement.
* **The burden of proof of a rights violation / infringement is on the challenger (standard of proof is BoP civil standard).**
* **The burden of proof of justification is on the govt (standard of proof is BoP civil standard).**
* **Oakes test:**

(1) Is the objective of sufficient importance to warrant overriding a constitutionally protected right or freedom? Is it pressing and substantial?

(2) Are the means chosen reasonably and demonstrably justified? (This involves a proportionality test):

(A) Are the measures adopted **rationally connected** to the objective?

(B) Do the means **minimally impair** the right?

Doesn’t have to be an absolute minimum, just needs to be justifiable.

(C) Is there **proportionality** between the effects of the measures and the objective? (***Cost/benefit analysis)***

More serious infringements require higher level of justification from the Crown – proportionality

#### Vagueness

R v Nova Scotia Pharmaceuticals

**There are 3 times when you can argue vagueness as a defence: NS Pharmaceuticals**

1. Invoke s 7 of the *Charter* 🡪 if a law is too vague, it would go against fundamental values of justice. (Can only argue if arguing Section 7 rights were infringed.)

**Section 1 challenge:**

1. Argue overbreadth/vagueness in s 1 analysis 🡪 too vague to be within “a limit prescribed by law”
2. More specifically, the minimal impairment stage of s 1 analysis – most likely successful

**Vagueness** = so unclear that we don’t know when it will apply – ambiguous. If law is intelligible to lawyers or judges, and capable of giving rise to legal debate, then it is not too vague.

**Overbreadth** = drafted so broadly that although we know what it applies to, it will be applicable to people whom the legislature did not intend for the legislation to be subject to.

* Void for vagueness requires some sort of law – maybe even a regulation/policy. There has to be something understood to be “the rule”.

Butler

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

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| R v Oakes (1986) \* Justifying infringement of right under s 1 |
| **Facts**:   * Constitutionality of s.8 of the *Narcotic Control Act:* if accused in possession of a narcotic, assumed to be in possession for the purpose of trafficking. * Accused must prove the contrary on a BOP, if cannot 🡪 convicted * Crown argued violation of 11(d) was a reasonable limit under s.1   **Decisions:** Not justified 🡪 invalid.  **Reasons:**   * Failed rational connection – s.8 over-inclusive * Rights guaranteed by the Charter are not absolute   + But the onus in proving that a limit on a right/freedom is reasonable and justified rests on the party seeking to uphold the limitation   **Charter values:**   * The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, faith in social and political institutions which enhance participation of individuals and groups (this last one?) |

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| R v Nova Scotia Pharmaceutical Society (1992) \* Vagueness |
| **Facts**: Charged with conspiracy to prevent/lessen competition **unduly** for sale of Rx drugs and dispensing services contrary to s 32 of *Combines Investigation Act*. Appellant challenges validity of the CIA  **Decision**: No violation of s.7 on grounds of vagueness – unduly means seriousness  **Reasons**:   * **Deals with vagueness under s.7 of the Charter**   + Factors to be considered in determining whether a law is too vague include:   + (a) the need for flexibility and the interpretative role of the courts,   + (b) the impossibility of achieving absolute certainty, a standard of intelligibility being more appropriate and   + (c) the possibility that many varying judicial interpretations of a given disposition may exist and perhaps coexist * **Doctrine of overbreadth doesn’t exist 🡪 just an analytical tool under minimal impairment** * **Doctrine of vagueness:**   + **Rationale to reduce vagueness as a rule of law**:  **(1) Fair notice to citizens  (2) Limitation of enforcement discretion (conviction cannot automatically flow from decision to prosecute)**   + Must enunciate some boundaries; create guidance; delineate an area of risk; give sufficient indications that could fuel legal debate   + Must be intelligible to the courts/judges   + Some subject matters do not lend themselves to precision   + **Should have a consistent meaning in Canadian law** * General terms giving broad discretion are fine, but terms failing to give direction on HOW to exercise discretion is problematic (deprive judiciary of controlling exercise of discretion) * Once the minimal general standard has been met, any further arguments as to the precision of the enactments should be considered at the "minimal impairment" stage of s. 1 analysis |

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| Newfoundland (Treasury Board) v NAPE (2004) \* Used Oakes test |
| **Facts**: Province signed a Pay Equity Agreement for female employees in the healthcare sector. 3 years later, before any money was provided, the government introduced new legislation Public Sector Restraint Act to defer the start of the increase for 3 more years along with a wide range of other cuts. Government was going through a major financial crisis. **Union challenges validity of the Public Sector Restraint Act. Argue violates s 15(1).**  **Decision**: Yes there was a breach of S 15 however, infringement justified under s.1  **Oakes Test:**   1. Pressing/substantial objective? YES    * Budgetary considerations cannot normally be invoked as a free-standing pressing and substantial objective for the purposes of s. 1 of the Charter    * Financial emergency is not a "normal" time in the finances of the provincial government 2. Rational connection? YES 🡪 Made up a significant portion of budget cuts 3. Minimal Impairment? YES 🡪 Deference to government, but yes, tailored to minimally impair rights - was temporary    1. Balancing 🡪 violation’s harm did not outweigh objective |

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| Dore v Barreau du Quebec \* Judicial review of administrative decision framework |
| **Facts**: Lawyer engaged in angry letter writing to a judge. Lawyer (Dore) complained to Canadian Judicial Council. Also judge complained to bar association. Disciplinary committee found he breached code of ethics. Dore appealed, based on limitation of his s 2(b) Charter rights.  **Issue: What framework should be applied to determine if Oakes analysis or administrative law analysis should be applied for a Charter challenge? ADMINISTRATIVE 🡪 STANDARD OF REASONABLENESS (Proportionality portion of Oakes???)**  **Principles**:   * **When challenge is to a law that is alleged to breach charter rights, the Oakes analysis is used.** * **When there is not a challenge to the law - the court is supervising an administrative decision; the challenge is not to the law, but the decision itself or to the application of the valid law to the individual.** * **For judicial review of an administrative decision (labour board, workers comp tribunal, regulatory decisions) the Oakes test doesn’t work well (she outlines reasons but we don’t go through them in detail) – so how do they accommodate the Charter values?**   + Administrators have to comply with the Charter in their exercise of statutory discretion   + They should balance the charter values with the statutory objectives.   + Judicial review for reasonableness must be aligned with the one in the Oakes test context.   + ***“If in exercising its statutory discretion, the decision-maker has properly balanced the relevant Charter value with the statutory objectives, the decision will be found to be reasonable.” Para 58***   + **Reasonableness is the standard of review.**   **Application**:   * We are, in other words, **balancing** the fundamental importance of open, and even forceful, criticism of our public institutions with the need to ensure civility in the profession. **Disciplinary bodies must therefore demonstrate that they have given due regard to the importance of the expressive rights at issue, both in light of an individual lawyer's right to expression and the public's interest in open discussion.** As with all disciplinary decisions, this balancing is a fact-dependent and discretionary exercise. |

## 3: Remedies

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

* Always think about: what is the result I want? What remedy do I want? Never just go in talking about the law without considering this
* Know where to find the arguments and the general guidelines used for each type of remedy

### Remedial Options (Checklist)

1. **Pre-Charter (pre 1982):** 
   * No statutory source for remedies
   * Everything decided under 1867 Act, everything flowed from the logic of the interpretation of the statute/statutory interpretation; and from the jurisdiction
   * Could be held

(1) Inapplicable (IJI, taxation, etc; valid statute but doesnt apply to specific defendant),

(2) Inoperable (Paramountcy) or

(3) Invalid (Void in whole or in part) (declarations made without statutory authority – retroactive to the time of enactment

* + Variations:
    - Statute **read down** (restrictive interpretation to ensure statute stays valid)
    - NEVER AN OPTION: READING IN OR SUSPENSIONS OF DECLARATIONS (always immediate and retroactive)

1. **Post-Charter:**
   * Statutory sources for remedies **S 24(1) and S 52(1)**

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| **Charter Challenges only: Must be: 1 - Govt is D, 2 - Valid law, 3 - breach of Charter rights**  **SECTION 24(1)**Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court **considers appropriate and just in the circumstances**   * **Unconstitutional acts of government agents** **operating under lawful schemes**) (*Ferguson*) * More judicial discretion – use a remedy that is appropriate and just in the circumstances (*Ferguson*)   + Examples: injunction, damages, restitutionary order, anything consistent w/separation of powers, rule of law, and ordinary remedy considerations * Only available from a court of competent jurisdiction (*Ward, Conway*)   + Provincial criminal courts   + Tribunals can generally grant remedies (but still have to look at 2nd stage)   + Administrative tribunal CANNOT strike down entire laws (NEW REF??? *MLQ*) * Govt given opportunity to introduce countervailing considerations * Only VERY RARELY available with s.52(1) or during period of suspension (for suspension, this would allow declaration of invalidity retroactive effect) (*Schachter*) * Cannot undermine the purpose of the law – would undermine separation of powers (*Ferguson*)   + NEVER available for unconstitutional mandatory minimums (*Ferguson*) * An **appropriate and just remed**y will:   (1) meaningfully vindicate the rights and freedoms of the claimants;  (2) employ means that are legitimate within the framework of our constitutional democracy;  (3) be a judicial remedy which vindicates the right while invoking the function and powers of a court; and  (4) be fair to the party against whom the order is made   * Contrast to S 52(1) where a LAW is challenged as invalid for breaching the constitution (including the Charter), s 24 (1) is invoked when the CLAIMANTS RIGHTS are violated. |

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| **Laws that are inconsistent with the Charter**  **SECTION 52(1)** The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. |
| **Guidelines for applying S 52 remedies *Schachter***  (1) Use Oakes test to **Identify extent of inconsistency** – “the manner in which the law violates the Charter and the manner in which it fails to be justified under s. 1 are critical” – in *Schachter* unable to determine this as it was not brought on appeal   * + Purpose test – Define inconsistent portion **broadly** where legislation fails first branch of Oakes – purpose is not sufficiently pressing or substantial to warrant overriding Charter right, or if purpose is unconstitutional leg should be struck down as a whole   + Rational connection test – Define inconsistent portion **narrowly** if purpose is pressing and substantial, but the means used to achieve are NOT rationally connected to it, whole portion of leg that is not rationally connected is struck down   + Minimal impairment test – Define inconsistent portion **flexibly** where impairment is disproportionate to the purpose   (2) Determine whether inconsistency should be **struck down/severed/read in** - and which parts  (3) Determine whether the declaration of invalidity of that portion should be **temporarily suspended**. |

#### Five Steps to Sue for Damages Ward

1. **P must prove the Charter breach**
2. **P must justify damages as a remedy** – functional justification – must fulfill one or more of:
   1. Compensation
      * Tangible or intangible (physical or psychological)
      * Most prominent (but not necessary)
   2. Vindication of the right
      * Focus is on the harm caused to society (public confidence, faith in constitutional protection)
   3. Deterrence of future breaches
      * Influencing government behavior, ensure state compliance

\*most cases, all three present

1. **Government has burden of bringing up countervailing factors** - why damages are inappropriate
   1. Existence of alternative remedies
   2. Concerns for good governance
      * Chilling effect (but usually compliance w/ charter = good governance)
      * State may establish that damages should not be awarded without a minimum threshold of gravity (different thresholds in different situations)
2. **Assess quantum of damages**
   1. How serious is the breach?
   2. How was the claimant impacted?
   3. Must be fair to claimant and state
   4. Can be punitive (vindication, deterrence)
3. **Must be done in a court of competent jurisdiction**

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

**Vriend, Ward**

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

#### Court of Competent Jurisdiction

**Conway**

(1) Is the administrative tribunal a court of competent jurisdiction?

* + Yes, if it is both “authorized to decide questions of law” and has not been excluded from *Charter* jurisdiction by statute.

(2) Does the administrative tribunal have the statutory authority to grant the particular remedy at issue?

* + Yes, if “the scope and nature of the Board’s statutory mandate and functions” provide the authority to grant a particular remedy.
  + This step involves a determination of legislative intent including delineating the authority provided under the relevant statutory framework (mandate, structure, and function).

**Power to grant Charter remedies generally is based on whether they can adjudicate on questions of law**

* + Degree of expertise in that particular field. For example, labour tribunal deciding labour issue/remedies.
  + This is of course restricted if the statutory provision creating the powers of the administrative tribunal prevents specific remedies

**Administrative tribunals are courts of competent jurisdiction for granting Charter remedies, subject to exceptions such as statutory restrictions**

#### Severability

**Schachter**

* **Severability:** Consider a provision in comparison to rest of statute 🡪 can it be severed? (Generally must request this remedy).
* Schachter para 29 Severability to realize legislative purpose: “Where the offending portion of a statute can be defined in a limited manner it is consistent with legal principles to declare inoperative only that limited portion.”
  + Guiding question is whether or not the legislature would still have enacted the statute if they’d known this provision would be severed.
    - If yes, you can sever. If no, you can’t.
  + Usually happens with overinclusive or underinclusive cases
    - Overinclusive identify the inconsistent portion and make sure the remainder is in keeping with the legislative purpose/objective
      * Can cut a bit out
    - Underinclusive, severe out the portion that limits others (but not the whole statute)
      * Would the legislature have enacted the statute without that provision? If not, then you can’t severe.
  + Depends on finding of invalidity (lack of jurisdiction or breach of Charter provision)
* Reading in and severing can only be used in the CLEAREST OF CASES where:

1. Legislative objective is obvious, or revealed through evidence offered in s.1 argument
2. Choice of means used by the legislature to further that objective is not so unequivocal that severance would constitute an unacceptable intrusion into the legislative domain
3. Would not involve an intrusion into legislative budgetary decisions so substantial as to change the nature of the legislative scheme in question

* Severance/reading in would not involve intrusion into legislative budgetary decisions so substantial that would change nature of legislative scheme
* ASSESS SIGNIFIGANCE OF REMAINING PORTION – Ensure reading in or severance must not illegitimately intrude into the legislative sphere to substantially change the remaining statute when the offending part is excised!

**Vriend**

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

#### Reading in

**Schachter**

* **Reading in:** omissions/underinclusivity. Must consider budgetary limitations and compare sizes of omitted/included groups.
* **ONLY IN CLEAREST OF CASES (SEE SEVERANCE)**
* “As with severance, the purpose of reading in is to be as faithful as possible within the requirements of the Constitution to the scheme enacted by the Legislature.” Para 37 Schachter “Courts should only go as far as required to protect rights, but no further”
  + **Only do this if consistent with legislative intent:** would they have done it or been happy with it? Is this the only way to fix it?
  + **The legislation had a missing part which must be read in in order to further the purpose of the statute and to correct an inconsistency**
  + Not used in Schachter because group being read in was WAY larger than the group already getting benefits. Focus is on the benefits.
* **Purposes of Reading-In:** (when determining if it is appropriate) ( *Schachter*, *Vriend*)

1. Respect for role of the legislature
   * + Avoid undue intrusion into legislative sphere
     + Edinger argues that it exceeds its proper role as delineated by an unwritten, but justiciable constitutional principle, the separation of powers, it brings the administration of justice into disrepute
2. Respect for purposes of Charter – if not available, would have to strike down (remove benefits for all)

**Vriend**

* Problem of reading in something that the legislature deliberately excluded 🡪 separation of powers
  + Intrusion into sphere of legislative branch
  + However, Court decides it is justified for the protection of minorities – it is not undemocratic
* You can only read in for under-inclusive legislation if it respects the role of legislature and purpose of *Charter*
* EDINGER: READING IN AMOUNTS TO JUDICIAL LEGISLATION AND INFRINGES THE SEPARATION OF POWERS
  + However in Vriend, “there is no conflict between judicial remedy and democracy if judges intervene when there are indications that a decision was not reached in accordance with democratic principles. Parliamentary sovereignty is a means to this end, not an end in itself” para 174
* REMEDIAL – used to ensure legislative intent is met
  + Use where legislative objective is obvious and reading in/severance would further that objective
* A GOOD CHOICE IF Reading in/severance = lesser interference than striking down
* Choice of means to further objective = not unequivocal

#### Suspension of Declaration

**Schachter**

* **Suspension of declaration:** can’t do this too often/too long because *Charter* breaches continue during it. Warranted if suspension would cause DANGER TO THE PUBLIC, THREATEN THE RULE OF LAW, or is invalid because of UNDERINCLUSIVENESS.
* Temporary suspension allows Parliament or prov legislature an opportunity to bring it into line with its constitutional obligations where:
  + - 1. striking down the legislation without enacting something in its place would pose a danger to the public;
      2. striking down the legislation without enacting something in its place would threaten the rule of law, or
      3. the legislation was deemed unconstitutional because of **under-inclusiveness** rather than overbreadth, and therefore striking down the legislation would result in the deprivation of benefits from deserving persons without thereby benefitting the individual whose rights have been violated

#### Policy

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

See **Vriend**and reading in

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| Schachter v Canada (1992) \* Charter Remedies overview |
| **Facts**: P and wife had child, father applied for EI benefits under section for adoptive parent (*Unemployment Insurance Act*), denied benefits, brought action under s.15 claiming equality rights  Trial: judge accepted claim of violation of equality rights and gave declaratory relief under s 24(1) extending benefits to biological parents.   * Govt argues that the remedy (declaratory relief extending benefits) should be overturned   **Decision**: **Declared invalid**, with suspension   * Legislature amended 🡪 not what reading in would have imposed (changed both adoptive and biological parents benefits)   **Reasons**:   * **Court has flexibility in determining what course of action to take following a Charter violation that is not saved by s. 1 scrutiny.** * Section 52 mandates striking down a law inconsistent with the constitution, to the extent of the inconsistency. So can strike down, temporarly suspend, or read down / read in. * In addition, s. 24 of the Charter extends to any court of competent jurisdiction the power to grant an "appropriate and just" remedy to "[a]nyone whose [Charter] rights and freedoms ... have been infringed or denied". In choosing how to apply s. 52 or s. 24 a court will determine its course of action with reference to the nature of the violation and the context of the specific legislation under consideration. * **Severance:** For instance if a single section of a statute violates the Constitution, normally that section may be severed from the rest of the statute so that the whole statute need not be struck down. To refuse to sever the offending part, and therefore declare inoperative parts of a legislative enactment which do not themselves violate the Constitution, is surely more difficult to justify * This case: violated a positive right 🡪 more likely to fall into reading down/reading in or striking down & suspending than immediate striking down   + Under-inclusive   + Striking down 🡪would deprive others of benefit, not providing relief to P     - Requires suspension   + Should the court Read-in? Must look at legislation:     - * No clear legislative objective       * Budgetary considerations       * Substantial intrusion into legislative domain         + Would change the nature of the scheme as a whole |

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| Vriend v Alberta (1998) \*\* Applies Schachter, clarifies reading in for legislative intent |
| **Facts**: Vriend was dismissed from employment with private school when they found out he was gay. Filed a human rights complaint, it was dismissed. Brought action claiming that the failure of the act to protect against discrimination. SCC found violation, not saved under s.1. Appellant argues for reading in.  **Decision:** Read in provisions to make the statute in line with the Charter  **Reasons:** Dealt with omission 🡪 reading down isn’t available   * Considerable number of sections that play an important role in the scheme 🡪 severance would not be possible * **Must consider two principles when determining if reading in is appropriate: (1) Respect for role of legislature (2) Respect for purposes of Charter**   + **Interference with scheme enacted by the legislature by striking down would deprive all of human rights protection, against the purpose of the Charter** * Had expressly chosen to exclude sexual orientation   + But if reading in is not available when government is explicit, it suggests government should just violate Charter rights in deliberate ways   + Government deferred the decision to the judiciary (intention to defer to courts) |

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| R v Ferguson (2008) \* S 52 remedy, mandatory minimum sentences |
| **Facts**: Constable Ferguson was charged with manslaughter with a firearm, subject to 4 year mandatory minimum sentence. Challenged the validity under s 12 of the Charter. Issue was remedy. Wanted a constitutional exemption, but also for the law to remain valid.   * Argues: s 52 is blunt, preserves law to maximum extent possible (fits well with severance, reading in, reading down)   **Decision**: **s 52 would apply if the violation was found. Decision is limited to mandatory minimums.**  **Reasons**:   * NOT striking down legislation that violates the Charter would leave offensive legislation on the books 🡪 Generates uncertainty, law & practice would diverge, removes notice to citizens, uneven/unequal application of the law, does not give clear guidance to government * Allowing Judges to grant an exemption would import discretion where the legislature wanted none (the whole point of mandatory minimums)   + Directly contradicts parliament’s intent |

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| Vancouver v Ward (2010) \*\* CREATES FRAMEWORK FOR AWARD OF DAMAGES UNDER S 24(1) |
| **Facts**: Charter rights violated by officials who detained, strip-searched and seized his car w/o cause.  **Issue**: When can damages be awarded under s.24(1)?  **Decision:** $5000 for strip search, $5000 wrongful imprisonment; Appeal allowed  **How to assess damages under s.24(1):**   1. Proof of a charter breach 2. Functional justification of damages (compensation vindication and deterrence) 3. Countervailing factors (alt remedies ie tort remedy, concerns for good governance) 4. Determining quantum of damages – must be rational and proportional |

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| R v Conway (2010) \* Test for determining if a tribunal can order s 24 remedies |
| **Facts**: Physically and sexually abused as a child, twice convicted of assault, raped aunt 🡪 not guilty, insanity. Argued Charter rights violated by mental health facility 🡪 argues for absolute discharge under 24(1).  **Issues**: **Is the Ontario Review Board a court of competent jurisdiction? YES**  **Can they grant a Constitutional Rememdy? YES**  **Can they grant an absolute discharge? YES 🡪 but not of dangerous NCR patients**  **Test for determining if a Tribunal is a Court under s 24(1) that can grant Charter remedies:**   1. **Does it have jurisdiction to decide questions of Law?**     1. If so, unless the tribunal was specifically aimed to include the Charter then it can grant Charter remedies    * Most tribunals do have jurisdiction to decide questions of law because it is usually applying a particular statute so the tribunal has to determine the meaning of the provisions in the statute).    * A provincial criminal court has been held NOT to be a court of competent jurisdiction, because in its criminal law capacity it doesn’t award damages, just deals with criminal offences.    * Must act consistently with the Charter and its values when exercising statutory functions 2. **Can the Tribunal grant the particular remedy sought, given the relevant statutory scheme?**  * Must determine legislative intent of statute for interpretation * Statutes will determine remedies that can be granted * Tribunal exercises delegated authority * Look to: scope and nature of tribunal’s statutory mandate, structure and function   **Application**:   1. Yes 🡪 Quasi-judicial body with significant authority over vulnerable population, authorized to decide questions of law (parties can appeal to tribunal, language of mandate, ongoing supervisory jurisdiction over NCRMD) 2. Board’s mandate to protect public safety 🡪 Parliament did not intend NCR patients to be given absolute discharges as a remedy 🡪 NO absolute discharge |

# Charter Rights

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association.

## 1: Freedom of Expression

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

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

**Questions:**

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

🡪 Are there any limitations? Qualifications?

**2)** How do you make a case for an infringement?

🡪 *Oakes* test is flexible.

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

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

We had Bill of Rights before Charter, s 1 freedoms d) freedom of speech and ?? freedom of the press

### Sequence

1. **Do you have a Defendant?** Has to be govt – s 32 analysis
2. **The burden is on the claimant to establish that the activity/form of expression falls within s 2(b)** – pretty easy to do since most activities have meaning (even silence in some scenarios) – an exception is violence and some particular locations may not be available for FOE
   1. Violence is NOT covered by 2(b) *Irwin*
   2. Can be oral, written, artistic, anything with content regardless of form *Irwin*
   3. Broadly interpreted, includes any expressive activity *Bryan*
   4. There is no requirement that the activity be purely or predominately expression to qualify for 2(b) 🡪 can be incidental. *Baier*
   5. Purely physical activity can be expression if has intent to express *Butler*
   6. Location: private property NOT covered by 2(b)
   7. To answer whether a location is one where an individual would expect protection for expression, the following factors should be considered **(in light of 3 purposes of 2(b)**): *Montreal* 
      1. (a) Place’s historical or actual function? (historical use for public discourse indicates consistent 2/ 2(b) purposes).
      2. (b) Whether other aspects of the place suggest that expression within it would undermine the values underlying free expression (i.e., is the current function incompatible with 2(b) purposes?).
         1. Is it essentially private despite being gov’t owned?
         2. Does the current function require privacy or limited access?
         3. Is it compatible with open public expression?
3. **Characterize the form of expression - locate within 2(b) (either core, periphery, or somewhere between) which defines the extent of judicial expression** *Irwin*
   1. Right to receive info is at the periphery of 2(b). *Bryan*
   2. Political expression is usually considered at the core of s 2(b). *Bryan*
   3. For instance, commercial expression is protected but is not at the core of 2(b). *Irwin*
   4. Core forms of expression get more protection than periphery/fringe forms of expression
   5. Characterize the form of expression as core if possible if you want to get protected – *Butler* tried to state porn encouraged political discourse at its core
   6. **Consideration:** if the activity is for profit it will be afforded less protection. *Butler*
4. **The claimant has a burden to establish that the FOE guaranteed by the charter has been infringed (his or her FOE has been infringed)**
   1. **Analyze purpose vs. effect:** Assuming there is a law, you can check whether the purpose/intention is to permit the expression or whether it is just an effect of the law
      1. **Purpose =** aimed at infringing/preventing the expression
      2. **Effect =** incidentally infringes
   2. **Shifting purposes doctrine** *Butler*
      1. **There are other statutes and provisions in existence in Canada which have been in existence for decades. The shifting purposes doctrine says that you can’t now today invent a new purpose. You can’t shift the purpose to a purpose that we now find acceptable.**
   3. If it is an effect of the law, then the claimant has to relate the infringement to the values *Irwin*:
      1. (1) Seeking and attaining the truth
      2. (2) Participation in social and political decision making
      3. (3) Individual self-fulfillment and human flourishing
5. **At this point, it may be suggested by the defendant that the claimant is making a positive claim to a statutory regime**
   1. **Positive vs. negative rights:** negative is telling the govt to get lost, positive is asking them to do something *Baier*
   2. If this argument is made out, then the claimant has to work his or her way through the **Dunmore/Baier factors**
      1. (1) Is the activity in question a form of expression?
      2. (2) Does P want a positive entitlement to govt action or the right to be free from govt interference? If positive, go to 3
      3. (3) Consider the 3 *Dunsmore* factors – all 3 must be satisfied for an infringement to be made out
         1. (i) Claim grounded in fundamental freedom of expression rather than in access to a particular statutory regime
         2. (ii) Claimant has demonstrated that exclusion from a statutory regime has the effect of a substantial interference with s 2(b) or has the purpose of infringing 2(b).
         3. (iii) The govt is responsible for the inability to exercise fundamental freedom
      4. (4) If all 3 satisfied, move to s 1 analysis.
6. **Assuming the claimant makes out the infringement, the burden shifts to the govt under s 1**
   1. Even to get to the Oakes test, you need to find that there is a law, and of course you can argue that it is so vague that it isn’t a law (*Butler*?)
      1. If you manage to persuade the court that the law is so vague that it is unintelligible, there is no law and the government defence falls down
   2. Otherwise, *Oakes* test
   3. For political expression cases: *Bryan*
      1. Factors for whether evidence is required and what degree of deference to govt (when infringing political expression and justifying it): Look at these factors in the context of the provision – can use them to dispense with evidence and defer to government – you must work through these for evidence in political expression cases, likely in other cases too!
         1. The nature of the harm and the inability to measure it 🡪 absent determinative social science evidence, logic and common sense can be used
         2. The vulnerability of the group protected 🡪 certain degree of maturity and intelligence is presumed. Not vulnerable = no need for protection
         3. Subjective fears and apprehension of harm
         4. The nature of the infringed activity
7. **The final stage is to go to the remedy and then you have a choice between s 52 and 24 depending on the situation**
   1. Is it a law/policy justifiable as law or not?

* If there is no law, and it is a case in which there is apparently a statute but it is just unintelligible, then there can’t be any justification, and the challenger should win because there is nothing for the government to defend – you can’t go into the Oakes test because there is nothing to evaluate
  1. This works extremely well if there is some kind of statutory provision which is the equivalent to a statute or regulation – something that is intelligible and can be evaluated in terms of proportionality
* What happens if it is a ministerial decision (gives discretion to government actors), and there is no law?
  1. The law is unimpeachable – it is neutral
  2. There is no law to challenge since discretion was given
  3. Of course they do evaluate the discretion and no one automatically wins or loses at that point
  4. Now what you do as a challenger:
     1. Do you use the Charter values, or assess the validity/merits of the decision on the grounds of administrative reasonableness?
     2. Courts differ into which to use.

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| Irwin Toy v Quebec (AG) (1989) \* Definition of Expression \* Violated 2B but justified |
| **Facts**: Irwin sought declaration that provisions ss 248 and 249 of Quebec Consumer Protection Act prohibiting commercial advertising directed at <13 y/o were *ultra vires* Quebec and infringed Quebec Charter. Section 248 prohibits, subject to regulation, attempts to communicate a commercial message to persons under thirteen years of age. Section 249 identifies factors to be considered in deciding whether the commercial message in fact has that prohibited content.  Argued IJI federalism – *ultra vires* provincial legislation – should be under telecommunications of federal or criminal for purpose and penalties.  **Issue**:  Does advertising aimed at children fall within the scope of freedom of expression? YES  Are provisions prohibiting advertising to youth limiting FOE contrary to Charter and Quebec Charter? NO  **Decision**: Violated 2(b), but justified under s.1. Law upheld as justifiable infringement of FOE.  **Reasons**:   1. Within 2(b)? YES    * **Not all activity is protected by FOE – only an issue if the govt action restricts a protected right**    * **Expression has a content and form. Expressive activity conveys meaning which is its content and therefore is included in expression. Para 41-43 However not all activity is protected – it must have an expressive content**    * **FOE is entrenched to ensure everyone can manifest their thoughts opinions beliefs and all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream.**    * **Broad and inclusive** - “FOE is fundamental in a free pluralistic and democratic society because we prize a diversity of ideas and opinions for their inherent value both to the community and the individual”    * **If it conveys or attempts to convey meaning 🡪 expressive content 🡪 *prima facie* within 2(b)**    * **P must show it conveys meaning – can be through written or spoken word, arts, physical gestures or acts. Includes commercial expression.**    * **Violence, threats of violence not protected. Must be non-violent expression**. 2. Was purpose of Govt Action Infringement of FOE? **YES BUT SAVED UNDER S 1**    * **Purpose – was it to infringe a right or was there another objective in mind? OR**      + If govt aims to control only physical consequences of activity, regardless of meaning, purpose does not trench on guarantee (ex. prohibiting littering)      + But if govt aimed to control attempts to convey a meaning by directly restricting the content or by restricting a form tied to content, its purpose trenches upon the guarantee (ex. prohibiting handing out pamphlets)      + Restricts both a particular range of content and certain forms of expression in the name of protecting children        - Restriction tied to content 🡪 restrict content directly as well as the manner in which the content must be expressed (cannot use superlatives, directly incite a child to buy)    * **Effect – if the purpose is not to infringe FOE, then is the effect to infringe it?**    * Burden on P to show govt action had effect of restricting P’s FOE    * If purpose is neutral but effect infringes, must show that the activity promotes one of the principles underlying the freedom: para 53      + (1) Seeking and attaining the truth      + (2) Participation in community, social and political decision-making      + (3) Individual self-fulfillment and human flourishing    * Claimant: identify the meaning being conveyed and how it relates to one of these principles    * Govt: argue that the activity does nothing to promote these principles   **Oakes test to Justify Infringement** –  **Onus lies on Govt to justify the limitation of a right or freedom**  **Pressing and Substantial objective**: **YES**   * + **Objective is protecting particularly vulnerable group**, inequality imbalance between producers and consumers; does not ONLY have to protect the vulnerable group, can exercise reasonable judgement in specifying the group (can extend beyond dangerous range).   **Proportionality**:   * + **Rational Connection: YES** – obvious connection between banning advertising to children and the objective of protecting children from advertising   + **Minimal Impairment / Balancing objectives**:     - Question is whether govt had a reasonable basis for thinking it impaired as little as possible given the objective.     - Social science evidence shows that it is reasonable to ban advertising to children was a minimal impairment of free expression.     - While there were less intrusive options available that would meet the objectives of govt, evidence showed it was necessary to ban advertising so the ban was a minimal impairment. |

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| R v Butler (1992) \* Porn shop, obscenity protected to a level of community acceptance |
| **Facts**: Appellant has shop in Winnipeg MB that sells/rents “hard-core” videotapes and magazines, sexual paraphernalia. Convicted on 8 counts for 8 films based on obscenity provisions of the Criminal Code s 163. Historically obscenity was assessed by “community standards of tolerance” test and “degradation and dehumanization test” and “artistic defense test”. Appellant argues violation of FOE and when it comes to S1 analysis argues vagueness.  **Trial:** Acquitted on 242 other charges.  **CA:** Crown appealed 242 other charges 🡪 CA allowed appeal and entered convictions for all.  **Issue:** Are the obscenity provisions of the CC constitutional? Specifically s 163(8) (obscenity definition) although the whole s 163 in question in appeal. YES  *Note: Court noted s 163 also raised issues of reverse onus and absolute liability but those left to another proceeding directed at those issues.*  **Decision**: Violates 2(b), justified under s.1 The effect of the law’s infringement of a protected right is balanced with legislative objective. New trial ordered.  **Reasons**:   * **Infringes 2(b)? YES – seeks to prohibit certain types of expressive activity**   + Review of historic tests fail to show relationships of tests to each other – so we don’t know specifically how/why material is actually obscene   + **Porn divided in 3 categories:**     - Explicit sex w/ violence – explicitly mentioned in 163(8)     - Sex w/o violence but subjects people to degrading treatment – may be in 163     - Explicit sex w/o violence that is neither degrading or dehumanizing – not in 163   + **Test – what the community would tolerate others being exposed to on the basis of the degree of harm (may predispose persons to act in anti-social manner) that may flow from such exposure. The stronger the inference of a risk of harm the lesser the likelihood of tolerance.**   + Yes, within 2(b) 🡪 **films etc. that are not inherently violent – provincially regulated**   **Is infringement justified by S 1? Oakes YES**   * **Is s 163 a limit prescribed by law (clear and intelligible)?** **YES**   + Appellant argues provision is too vague to apply   + Clarifies the law regarding the provision 🡪 Provides an intelligible standard therefore not too vague   **Objective**:   * + - **Historically purpose of anti**-obscenity law was to protect morality from anything inherently undesirable, independent of any harm to society     - **However to impose a standard of morality is rife with conflict**.     - **Goal is avoidance of harm resulting from antisocial attitudinal changes from exposure to obscene material, public interest in maintaining a decent society**     - This is a legitimate objective.     - Objective is pressing and substantial because the harm caused by the proliferation of materials that offend the values of society is a substantial concern which justifies the restriction of FOE. Growing concern about victimization of women and children.   **Proportionality**   * + - Keep in mind the nature of expression that is infringed     - Different kinds of FOE get different degrees of protection (core or periphery?)   **Rational Connection**: Sufficiently rational connection between criminal sanction that demonstrates societies disapproval of materials that victimize women. “Parliament was entitled to have a ‘reasoned apprehension of harm’ resulting from the desensitization of individuals exposed to materials which depict violence, cruelty, and dehumanization in sexual relations”.  **Minimal Impairment**: excludes materials with artistic, scientific or literary merit;, or that without violence or risk of harm to society. Parliament has tried and this is as good as its going to get. Court does not agree that there are “less intrustive measures to take” as simply restricting ACCESS to the materials does not achieve the same objectives.  **Balancing**: Upheld. The effect of the law’s infringement of a protected right is balanced with legislative objective. |

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| City of Montreal (2005) \* location test – infringement justified as on public street |
| **Facts**: Respondent operates club with a loudspeaker at the main entrance. Charged with producing noise that could be heard outside using sound equipment in violation of a Montreal bylaw “By-law concerning noise”.  **Issue:** Does bylaw against amplified noise outside infringe s 2(b)? YES but justified under s 1 analysis  **Reasons:**   * Within scope of 2(b)? YES *prima facie* within 2(b), emitted expressive content * But METHOD (ie violence) or LOCATION of expression might remove it from 2(b) protection * **Location**?   + **2(b) does not extend to all places** 🡪 private property not included   + Sound issued onto street, public property (govt owned) therefore protected space for FOE   + **Test for public property, location exclusion –**      - Does expression in that place conflict with the purposes which s 2(b) is intended to serve, namely democratic discourse, truth finding and self-fulfillment?     - Test: assess 1) the historical or actual function of the place and 2) whether other aspects of the place suggest that expression within it would undermine the values underlying free expression   + Falls within public place, passes location test 🡪 nothing to suggest that allowing FOE on streets would subvert values of FOE;   + Primary purpose: provide means of passing * **Infringe 2(b)?** YES   + Purpose: benign   + Effect: Restricts expression 🡪 Engaging in lawful leisure activities promotes such values as individual self-fulfillment and human flourishing * **Justified infringement using Oakes**? YES   + Onus on city to show the limit is directed at a pressing and substantial objective and that the limit is proportionate- rationally connected and minimally impaired   + **Objective**: combatting noise pollution – serious concern in urban centers, cities must act to reduce it   + **Proportionality**     - 1. RC: Yes     - 2. MI: YES       * Not an absolute ban (grant exemptions), prohibited noise above certain loudness and particular noises. Court will not interfere because it can think of a less intrusive way to manage the problem     - 3: Balance: Infringement does not outweigh objective |

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| R v Bryan (2007) \* How much evidence is needed to show infringement? |
| **Facts**: During fed election, appellant transmitted the election results on from Atlantic Canada while polling stations were open in West by posting on a website, despite being told in advance that per s.329 *Canada Elections Act* which states no results can be broadcasted until all polls are closed in all of Canada. Challenging constitutional validity of several provisions.  **Decision:** Violates 2(b), justified under s.1  **RATIO THAT EDINGER CARES ABOUT:**   * You don’t need evidence for s 1 but if you don’t then you better have contextual factors to use it. * Right to receive information protected under freedom of expression   **Reasons:**   * Election laws should 1) be given deference to govt, 2) look at factors indicating less evidence may be sufficient:   1. Nature of the harm and inability to measure it   * + Some harms are "difficult, if not impossible, to measure scientifically"   + Resort to logic and common sense (no evidence available)   + In some cases the objective asserted by the government will be largely a matter of the "values and principles essential to a free and democratic society". In such cases it may not be appropriate to require proof according to the usual civil requirements   2. Vulnerability of the group protected – Cdn voters are presumed to be mature and intelligent  3. Subjective fears and apprehension of harm  4. Nature of the Infringed Activity: Political Expression   * **Oakes**: valid 🡪 Contributes to information equality, to fairness and reputation of electoral system which is a pillar of Canadian democracy. Magnitude of the ban is small. Outweighs. Minimal impairment test, doesn’t   **Dissent**: **DOESN’T PASS 3rd TEST OF PROPORTIONALITY (COST/BENEFIT ANALYSIS)**   * Evidence is highly theoretical, highly speculative and far from sufficient to justify infringing on the core right at issue * Harm caused is considerable, limited duration is not determinative 🡪 demonstrable * Overly broad * There is a right to receive information as well as disseminate it. |

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| Baier v Alberta (2007) \* Positive claim rights |
| **Facts**: Alberta *Act* that governs the proceedings for election to school boards – changed qualifications required to run for trustee. School employees used to be ineligible in the jurisdiction in which they were employed. Amended so that employees weren’t able to run for *any* school board in *any* district unless they were on leave of absence or their running would be deemed a resignation from their employment.  **Decision**: Does not infringe 2(b)  **Reasons**:   * **To argue for a right to a statutory platform for expression,:**  1. **Is it a form of expression?**    1. If so do they have an entitlement to govt action (ie govt must legislate or otherwise act to support or enable an expressive activity) or simply the right to be free from govt interference (negative right)? 2. **If positive rights claim then must satisfy ALL Dunmore factors**  * It must be grounded in fundamental Charter freedoms rather than in access to a particular statutory regime – court needs to consider whether the activity for which the claimant seeks s 2(b) protection * The claimant must meet an evidentiary burden of demonstrating that exclusion from a statutory regime permits a SUBSTANTIAL interference with activity protected under s. 2, OR that the purpose of the exclusion was to infringe such activity * The state must be accountable for the inability to exercise the fundamental freedom   + Does the government substantially orchestrate, encourage or sustain the violation of fundamental freedoms?   🡪 Infringement  **Application**:   * 1. Within 2(b)? NO * In Dunmore, the SCC found an exception to the rule that S 2 does not require positive govt action   + Court held the appellants had a positive claim 🡪 had previously been included in the statutory scheme but the amendments had excluded them   + Dunmore factors     - Claim is to a particular statutory regime of school trusteeship     - Does not meet 1st factor 🡪 claims of underinclusion (precludes P from using a statutory platform) should be grounded in freedom not statutory regime 🡪 in this case it was grounded in trusteeship – not a protected freedom🡪 Fails #1     - Would also fail 2nd       * Does not substantially interfere (remain free to express themselves in relation in many other ways)       * No evidence that the purpose was to restrain their expression |

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| Greater Vancouver Transit Authority \*\* EXCELLENT CASE FOR REVIEW |
| **Facts**: Canada Federation of Students and BC Teacher’s Federation attempted to purchase advertising space on buses that would be used in relation to upcoming provincial elections. Students were going to advertise about tuition costs, etc, BCTF concerned with education budget cuts and effects on schools/students. GVTA refused to post the respondents' advertisements on the basis that such advertisements were not permitted by their advertising policies. **Not a statute. Relevant provisions: 2) ads should be limited to those that are goods, services, PSAs and public events. Excludes: 7) any likely to cause offence to any person or group of person or create controversy. AND 9) anything political - any that conveys information about a political information gathering or event, a political party**  The respondents restricted their claim for relief to a declaration, "pursuant to s. 52 of the Constitution Act, 1982, that [articles] 2, 7 and 9 of the advertising policies are unconstitutional and of no force and effect".  **Decision: GVTA** Articles 2 7 and 9 prohibit political advertising which are unjustified limit on the respondents right under s 2(b)  **Reasons**:  **IS IT A GOVT ENTITY – OR IS ACTIVITY ENGAGED IN CONDUCTED FOR GOVT? YES GOVT**   * GVTA is govt entity (see **Applicability**) 🡪 **Charter applicable to all activities of the GVTA**   WHAT PROVISIONS ARE IMPUGNED AND WHAT CHARTER RIGHTS ARE VIOLATED (USE AS MANY AS YOU WANT, LEAD WITH STRONGEST)  **ARE P’S EXCLUDED FROM 2B BASED ON FORM OF EXPRESSION? NO**   * Govt argues that the claimants are invoking the Charter to place these government entities under a **positive obligation** to make buses available for their expression 🡪 Use DUNMORE Principles   + To demonstrate this 🡪 would have to show that the claimants themselves were excluded from the particular means of expression   + NO 🡪 just the content, not requesting the government support or enable their expressive activity by providing them with a means of expression from which they are excluded   **ARE BUSES EXCLUDED FROM 2B BASED ON LOCATION? NO**   * *City of Montreal:* Buses excluded from 2(b) because of form or location?   + Historical or actual use     - History of use as a place for public expression     - Also actual use – public streets are obvious place for freedom of expression     - Does not impede the primary function of the bus as a vehicle for public transportation or undermines the values underlying 2(b)   + Other aspects indicate values undermined     - Translink: private publicly owned property       * General public has access to advertising space       * By nature: public place   **SO THE P’S HAVE A RIGHT TO FREEDOME OF EXPRESSION.**  **DOES THE EXCLUSION OF POLITICAL ADVERTISING INFRINGE ON P’S 2B RIGHTS? YES**  **IS THE INFRINGEMENT JUSTIFIED UNDER s. 1? NO**   * Is the policy a law? YES because it is not meant for internal admin purposes   + Where a legislature has empowered a government entity to make rules, it seems only logical, absent evidence to the contrary, that it also intended those rules to be binding * Oakes test?   + **Purported objective**: safe, welcoming transit system   + **Fails rational connection** 🡪 Difficulty seeing how an advertisement on the side of a bus that constitutes political speech might create a safety risk or an unwelcoming environment for transit users   + **Fails minimal impairment** 🡪 prohibiting things that “create controversy” is overly broad   **REMEDY**   * + Neither P asked for a S 24 remedy   + They asked for a Declaration   + Not challenging government actions, challenging the law itself   + It is more appropriate to deal with rules made by government entities under s.52(1)     - Not left on the books     - Rules of general application have broad effects (= broader remedy more appropriate) |

## 2: Freedom of Conscience and Religion

**R v Big M Drug Mart – What is freedom?**

**Syndicat Northwest v Amselem – What is religion?**

**Multani v Commission Scolaire Margeurite Bourgeoys – What**

**Alberta v Hutterian Brethren of Wilson Colony – What**

**MLQ v Quebec 2015 SCC – CONSCIENCE and religion – atheists are protected too!**

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

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

**Freedom** (Big M)

(1) right to entertain such religious beliefs as a person chooses (Big M)

(2) the right to declare religious beliefs openly and without fear of hindrance or reprisal (Big M)

(3) right to manifest religious belief by worship and practice or by teaching and dissemination (Big M)

(4) characterized by the absence of coercion or constraint (Big M*)*

* Individuals are free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided inter alia only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own (limitation) (Big M)
* Equally protected: expressions/manifestations of non-belief (Big M)

**Religion** (Syndicat)

* Freely and deeply held personal convictions or beliefs connected to an individuals spiritual faith and linked to one’s self-definition and spiritual development, allowing to foster connection with divine or with object of spiritual faith.
* Individual must show a sincere belief in the undertaking to connect (good faith, not capricious or fictitious)

**To get into 2(a) you just need a sincere belief in something (relgion or lack of)**

**Does not have to be what anyone else believes, you just have to persuade court you are sincere.**

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

Big M Drug Mart

* Freedom of religion is about being free from state coercion and **at least** includes freedom of religious speech, including “the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination”.
* Speaks on purpose of s 2(a):
  + Any individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates so long as they do not injure others or their parallel rights to hold and manifest beliefs/opinions of their own
  + Equally protected are expressions and manifestations of religious non-belief and refusals to participate in religious practice
* Government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose.

Syndicat

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

Multani:

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

#### Who can claim freedom of religion?

Big M

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

#### What degree of infringement is permitted?

Big M Drug Mart + Syndicat + Hutterian

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

Hutterian

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

#### Justification

Hutterian

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

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| Big M Drug Mart (1985) \*\* LEADING CASE ON FREEDOM OF CONSCIENCE AND RELIGION |
| **Facts**: Charged with criminal offence of unlawfully carrying on sale of goods on Sunday contrary to *Lords Day Act* which prevented commercial activity on Sundays.   * *Lords Day Act* had previously been challenged under division of powers ss 91 and 92 as not criminal law. * Was found to be under criminal law as it was about promoting morals. * Attorney General gave “fiat” (allowed prosecution) for a violation against the Act by Big M.   **Issues**:   * Can a corporation invoke Charter? YES You can always argue the Charter whether it seems to include you or not. * Does the *Lords Day Act* infringe s 2(a) freedom of religion rights? YES   🡪 LORDS DAY ACT STRUCK DOWN  **Ratio**:   * A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms … Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. * **The essence of the concept of freedom of religion is 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.** * But the concept means more than that. * **Freedom is characterized by the absence of coercion or constraint – coercion includes direct and indirect forms of control which determine or limit alternative courses of conduct available to others.** * **No one is to be forced to act in a way contrary to his beliefs or his conscience.** * **Protecting one religion and not others imports disparate impact destructive of the religious freedom of the collectivity**   **Application**:   * *Act* works as a form of coercion inimical to the spirit of the Charter and the dignity of all non-Christians. * Government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose. * The guarantee of freedom of conscience and religion prevents the government from compelling individuals to perform or abstain from performing otherwise harmless acts because of the religious significance of those acts to others. |

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| Syndicat Northwest v Amselem (2004) \* Cannot waive right, subjective belief, significant infringement |
| **Facts**: Appellants are Orthodox Jews, own strata condo units. By-laws prohibit exterior decorations on balcony etc. Appellants want to set up succah on balcony for a Jewish religious festival where they dwell during Succot, also forbidden from using electricity, carrying things etc. Case brought under *Quebec Charter of Rights and Freedoms. (Couldn’t be under Charter as Syndicat is NOT govt!) – But everything he says aobut the Quebec Charter can be applied to the Canadian Charter!*   * Appellants signed a declaration of ownership prohibiting anything on patio, but said didn’t read it. * Syndicat proposed they could set up a communal succah in garden, Appellant refused. * Syndicat filed application for permanent injunction – granted.   **Issue:**  Whether the clauses in the by-laws of the declaration of co-ownership, which contained a general prohibition against decorations or constructions on one’s balcony, infringe the appellants’ freedom of religion protected under the Quebec Charter;  If so, whether the refusal by the respondent to permit the setting up of a succah is justified by its reliance on the co-owners’ rights to enjoy property under s. 6 of the Quebec Charter and their rights to personal security under s. 1 thereof; and  Whether the appellants waived their rights to freedom of religion by signing the declaration of co-ownership.  **Decision:** For appellants, allowed to have succahs on their patio.  **Ratio:**   * **Religion is about freely and deeply held personal convictions or beliefs connected to an individual’s spiritual faith and integrally linked to one’s self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith** * **Subjective belief –** emphasis of personal choice – not based in expert opinion, do not need to prove your beliefs objectively, and nor would such an inquiry be appropriate for the Court to make 🡪 must show sincerity of belief. Can be sudden, doesn’t have to be long held belief. * **As long as the person sincerely believes that a certain practice or belief is experientially religious in nature in that it is either objectively required by the religion, or that he or she subjectively believes that it is required by the religion, or that he or she sincerely believes that the practice engenders a personal, subjective connection to the divine or to the subject or object of his or her spiritual faith, and as long as that practice has a nexus with religion 🡪 triggers protection** * **Plaintiff has to show more than a mere infringement 🡪** The second step is to then demonstrate that the impugned conduct of a third party interferes with the individual’s ability to act in accordance with that practice or belief in a manner that is non-trivial.   **You cannot waive your right to freedom unless freely and voluntary (and even then might not be ok)**   * Assuming that that an individual can theoretically waive his or her right to freedom of religion 🡪 would have to be explicit, voluntary, freely expressed and with a clear understanding of the consequences of doing so * Majority: Rights had not been waived * Dissent: Rights had been waived based on law of contract |

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| Alberta v Hutterian Brethren of Wilson Colony (2009) \* Religion prohibited photos \* no DL renewal \* justification of infringement |
| **Facts**: Province made drivers license photo requirement universal to reduce the risk of IDs being used for ID theft. Use software (one-to-one and one-to-many) 🡪 comprehensive photo requirement is essential to ensure efficacy. Claimants argue it would violate religion to get photos taken, and if they can’t get driver’s licenses cannot maintain their religious lifestyle  **Decision:** Justified under s.1  **Reasons**: Divides on last stage of Oakes   * **Steps of establishing infringement of 2(a)** Amselem   + Claimant sincerely believes in a belief or practice that has a nexus with religion   + The impugned measure interferes with the claimant’s ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial   + Trivial or insubstantial interference “does not threaten actual religious beliefs or conduct” * **Salutary effects: Benefits of legislative goal**   (1) Enhancing the security of the driver’s licensing scheme  (2) Assisting in roadside safety and identification  (3) Eventually harmonizing Alberta’s licensing scheme with those in other jurisdictions   * **Deleterious effects – limit on the Colony members’ exercise of the 2(a) right:**    + Consider the impact in terms of Charter values (liberty, human dignity, equality, autonomy, and the enhancement of democracy)   + Driving is not a right, it is a privilege   + While not trivial 🡪 fall on less serious end of the scale * **Concludes that Justification of infringement is met under s 1 of the Charter**   + **Pressing and substantial**: Goal of minimizing risk of fraud justified.   + **Rational connection**: limit if linked to goal – impairs the right as little as reasonably possible in order to achieve this goal, the only alternative proposed would significantly compromise the goal of minimizing the risk.   + **Proportionality**: positive effects associated with the limit are significant, while the negative impact on claimants, while not trivial, does not deprive them of the ability to follow their religious convictions.   **Dissent**:   * **Benefit**: speculative (hundreds of thousands of AB don’t have driver’s licences)   + No evidence of benefit of forcing photos, so no evidence of proportionality – therefore doesn’t meet Oakes test, not justified. * **Harm**: substantial & ascertainable |

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| MLQ v Quebec (2015) \*\* Duty of Neutrality (Municipal Council - prayers) |
| **Facts**: City want to continue reciting a prayer at the start of city council meetings. Appellants asking them to cease this practice. Adopted a by-law, to regulate the recitation of prayer (“non-denominational” which is then followed by 2 minute silence).  **Decision:** Right is impaired – adhering to certain religious beliefs to the exclusion of others. Breaching state’s duty of neutrality.  **Reasons:**   * **Sponsorship of one religious tradition by the state in breach of its duty of neutrality amounts to discrimination against all other such traditions** * **State neutrality**:   + **Requires that the state neither favour nor hinder any particular belief, and the same holds true for non-belief**   + Denies others’ equal worth, required in free and democratic societies   + **By expressing no preference, the state ensures that it preserves a neutral public space that is free of discrimination and in which true freedom to believe or not to believe is enjoyed by everyone equally, given that everyone is valued equally**   + Must abstain from taking a position * **Infringement is more than trivial or insubstantial**   + Attempt to accommodate exacerbated the discrimination * **Non** **denominational nature of the prayer**   + Still religious, even if non-denominational – so effect on non-religious is more than trivial * **Prayer in House of Commons**   + No evidence on purpose of prayer in House   + Circumstances are different, and its possible that House’s prayer is subject to parliamentary privilege |