**CONSTITUTIONAL – EDINGER – FALL 2010**

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**CONSTITUTIONAL – SPRING 2011**

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**PART I - INTRODUCTION**

**What is a constitution?**

A charter of government deriving its whole authority from the governed. The organic and fundamental law of a nation or state, which may be written or unwritten, establishing the character and conception of its government, laying the basic principles to which its internal life is to be conformed, organising the government, and regulating, distributing, and limiting the functions of its different departments, and prescribing the extent and manner of the exercise of sovereign powers.

**Justiciable**: capable of being decided by a court. If not justiciable, can only seek a political remedy.

**6 necessary characteristics of a federal government:**

1. Central govt has authority over entire geographic region, represents state at international level.
2. The country is divided into geographically identifiable units or regions.
3. Legislative jurisdiction is divided between the central and regional governments.
4. The division or distribution of legislative jurisdiction is governed by a written constitution.
5. The constitution has rules to deal with conflicts between central and regional laws.
6. There is an umpire to deal with these conflicts – judicial branch.

Compare to a **unitary** government, where power is delegated and can be revoked by the central government.

**Sources of the Constitution:**

1. Constitution Acts 1867 and 1982, Imperial Statutes
2. Common law
3. Custom, convention and usage
4. Values

The first 2 are justiciable. The last 2 are only justiciable if the government legislates on them.

**Chapter 1 – Colonial Origins to Autonomy**

***The Royal Proclamation, 1763* (still valid in BC)**

**Imports common law to North America**.

A bestowal of legislative jurisdiction – divides North America and creates a constitution for the colonies.

Delegated power – the colonies were not autonomous.

Set forth a basis for Aboriginal rights.

***Colonial Laws Validity Act, 1865***

**Paramount Imperial statutes – ordinary law of England no longer applicable to colonies.**

A facilitative act meant to make life easier for colonies and give colonies a little more room to legislate.

Created *paramount Imperial statutes* – made it so if the London Parliament enacted a law and that law either expressly or by necessary implication was applicable outside of England and to the colonies then no colonial statute could overturn, repeal or amend it.

*Section 5*: gives power to colonies to amend Constitutions, creates the entrenchment principle.

***Statute of Westminster, 1931* (Imperial Statute)**

**Established legislative independence for dominions.**

England could only legislate for dominions if they were requested to (exception: Imperial statutes).

Did not give legislative power for BNA 1867 (this did not come until 1982).

**NOTE:** Executive independence was achieved during WWI – made our own declaration of war.

***Attorney-General for Ontario v Attorney-General for Canada,* [1947] AC 127 (PC)**

**Achieved full judicial independence for Canada.**

Facts: Government introduced “An Act to Amend the Supreme Court of Canada” which gave SCC ultimate civil and criminal appellate jurisdiction through Supreme Court Act S. 54, removing ability to appeal to Privy Council. The provinces argued against this because it would give a federal court final say over provincial civil matters.

Issue: Did the federal government have the ability to legislate S. 54 into the Supreme Court Act?

Analysis: You must look at effect of legislation as a whole, as well as its practical consequences. To make this ultra vires would cause a lack of uniformity. Therefore must allow this extra-territorial legislation.

Ratio: S. 54 is valid and Canada is no longer bound by Privy Council or House of Lords.

***Reference re Amendment of the Constitution of Canada*, [1981] 1 SCR 753 – Patriation Reference**

**Federal principle and convention stops federal government from altering powers of provinces.**

Facts: Provinces were unable to agree with federal government on an amending procedure for the Constitution. Trudeau was going to push forth *Charter* and other amendments anyways so provinces started legal action to determine if federal government could legally do it alone.

Issue: 1) Would provincial-federal relations be affected?

2) Does convention require that the federal government seek provincial approval?

3) Does the law require that the federal government seek and obtain provincial approval?

Analysis: 1) Practice was to consult provinces if legislation affected them. While the proposed amendments gave provinces more jurisdiction and had never been attempted before, it still affected provinces.

2) Convention shows there should be some form of agreement of provinces.

*Requirements for establishing a* ***convention***: precedents and usage are necessary but do not suffice. They must be normative. Three questions: (1) What are the precedents? (2) Did the actors in the precedents believe they were bound by a rule? (3) Is there a reason for the rule?

***Federal principle*** requires that feds cannot unilaterally modify provincial legislative powers. It is established as a justiciable principle in this case.

3) This convention has not become law, not justiciable, so no legal obligation to get provinces’ consent.

Ratio: It is legal for federal government to amend Constitution alone but would violate convention.

***Reference re Secession of Quebec*, [1998] 2 SCR 217**

**Unwritten principles – origin and application of federalism, democracy, constitutional supremacy and rule of law, respect for minorities.**

Facts: Narrowly defeated separation referendum. No clear amendment procedure for secession.

Issue: Can Quebec unilaterally secede from Canada under either Canadian or international law (self-determination)? In the case of a conflict between these laws, which takes precedence?

Analysis: Justiciability: can’t be too theoretical or speculative, political in nature, or unripe for judicial consideration. To decide this issue you must look at unwritten principles of **federalism, democracy, constitutional supremacy and the rule of law, and respect for minorities**. These principles are found between the lines of Constitution and constitute substantive limitations upon government action. None are absolute or can trump the others. *Enhanced democracy* requires more than simple majority rule.

Ratio: It would be illegal in Canadian law, not valid under international law. However, a *clear majority answering a clear question* would give obligation to federal government and other provinces to negotiate.

**Chapter 2 – The Fundamental Principles: Separation of Powers and the Rule of Law**

***Question of Prohibitions* (1607)**

**Separation of branches of government, judicial independence – rule of law, separation of powers**

Struggle between executive and judicial branches. King said he should be a judge. Coke said no because separation is necessary for impartiality. The King is under the law like everyone else (rule of law).

***Question of Royal Proclamation* (1610)**

**Separation of branches of government – rule of law, separation of powers**

Can the king make laws, create offences, and punish crimes? No, only the legislature can.

***Attorney General Canada v Attorney General Ontario*, [1937] AC 326 (PC) (Labour Conventions Case)**

**Constitutional interpretation, watertight compartments of federalism must be maintained**

Facts: Federal government legislated in accordance with an international treaty about labour. Federals claimed s. 91 (POGG) or s.132 (obligation as part of the Empire) as jurisdiction. Provinces argued that labour was their area and that s. 132 doesn’t apply because it wasn’t a treaty made by the Empire.

Issue: Could the federal government legislate this? Can Constitution be interpreted to allow it?

Analysis: Constitution can be interpreted broadly but you must also consider original intent. Intent can’t be that Canada can pass treaties by itself because writers of Constitution wouldn’t have known it would be a sovereign state. Interpretation of Constitution must be done in scope of the fundamental principles – here, federalism requires that the federal government can’t infringe on provincial powers. POGG had low scope at this time. Only the executive branch can enter into treaties, not legislative branch. Legislative branch can only implement treaties. Provinces cannot enter treaties with our countries but can enter ‘agreements.’

Ratio: Legislation struck down as being ultra vires.

***Roncarelli v Duplessis*, [1959] SCR 121**

**Rule of law limits actions of state officials – cannot be arbitrary**

Facts: D told liquor commissioner to revoke R’s liquor license because R was helping out JWs.

Issue: Was D legally able to revoke R’s license?

Analysis: D violated the **rule of law** by using his power arbitrarily. “Absolute discretion” violates the rule of law – officials can’t arbitrarily use state power. Discretion is implicitly limited and is only to be used to forward the objective of the statute, not for improper purposes. Rule of law is used to interpret a statute – doesn’t necessarily mean it is justiciable alone. Equality under the law is also an aspect of rule of law.

Ratio: D acted wrongly, did not have authority to revoke R’s license.

***Reference re Manitoba Language Rights Act, 1870,* [1985] 1 SCR 721**

**Rule of law requires creation and maintenance of an actual order of positive laws**

Facts: French and English were official languages of Manitoba as per the Constitution and they were required to put out statutes in both language but had not been doing so. Court found that all English-only statutes (i.e. all statutes since 1890) were therefore invalid.

Issue: Can the rule of law be used to uphold invalid laws?

Analysis: **Rule of law** has two areas: (1) precludes arbitrary power and (2) requires the creation and maintenance of an actual order of positive laws which preserve and embody the more general principle of normative order. This doctrine can therefore be used to uphold laws if necessary – temporary measure until Manitoba has time to redraft laws in French. This is a positive use of the rule of law. This cases gives definition/discussion of rule of law.

Ratio: Rule of law can uphold invalid law (temporarily).

***Reference re Remuneration of Provincial Court Judges,* [1997] 3 SCR 3**

**Definition and components of judicial independence**

Facts: Canada was having economic problems and so provincial (s. 92(14)) judges’ wages were cut.

Issue: Does judicial independence require certain things when it comes to judges’ compensation?

Analysis: **Judicial independence** (impartiality) is found in the preamble and required by s. 11(d) of *Charter*. Section 96 federal judges also have a constitutional provision to protect their independence. An independent and impartial judiciary requires security of tenure, financial security and administrative independence. Also requires individual independence and institutional independence. Only then can the public have faith in the judicial system. There can’t be rule of law without judicial independence. Independent committees should determine wages for provincial judges – SCC effectively created a constitutionally required institution through this.

Ratio: The legislation is inconsistent with judicial independence. Committees should establish wages.

\*Edinger’s criticism: this creates a constitutionally-entrenched institution– SCC amended the Constitution and were active in a legislative capacity here (vs Manitoba Language, where the created solution was temporary)

**PART II – FEDERALISM: DIVISION OF POWERS**

**Chapter 3 – Validity**

Questions to ask:

1. Does the subject matter of the statute fit in one of the subject matters given to the legislature that enacted it (i.e. federal or provincial)? (i.e. is it s. 91 or s. 92?)
2. If the statute is valid, does it apply to the defendant?
3. Is there a paramountcy issue if both a federal and provincial statuteare valid?

- federal law will always be **paramount** in an irresolvable conflict

When challenging validity, you must prove it does not fit into the other group’s box and then that it does fit into your box. Problem: boxes change in size and scope throughout time, boxes are vague.

3 components to general interpretation of validity:

1. Precedents - common law – how have they been interpreted before?

However, this is rarely binding and it is always possible to modify the scope.

1. Ordinary rules of statutory interpretation
2. Theories of federalism - values and principles, policies

3 general propositions for federalism:

* 1. Sovereignty in Canada is exhaustibly distributed .
	2. Courts do not evaluate the "wisdom and policy of the legislation." All they are doing is determining whether there is legislative jurisdiction for that statute.
	3. There are special principles of interpretation for the Const Act 1867. Constitutions need to be interpreted in a flexible way.

**3.1 – General Approach to Interpretation**

**Considerations in interpreting the Constitution Acts:**

Precedence (previous interpretations)

Ordinary rules of statutory interpretation

Theories of federalism

**Considerations in interpreting the actual statute**:

External evidence

Internal evidence

Pith and substance (object and purpose; legal and maybe practical effect [see *Morgentaler*]

Actual motive of government (colourability issue)

***Edwards v Attorney General Canada*, [1930] AC 124 (PC)**

**Constitutional interpretation must be flexible – *living tree approach***

Facts: SCC denied women ability to be in Senate, saying they were not persons as under s. 24 of BNA.

Issue: Are women “persons” as meant by s. 24 of the BNA?

Analysis: Court divides considerations into internal (rest of the statute) and external (common law, tradition, historical) evidence – a classic interpretation approach. External evidence can show the **corporate** intent. However, history/reflection of the times the statute was enacted should not be binding. Facts that weren’t known to legislature then should now be taken into account. **Living tree** metaphor – “capable of growth and expansion within its natural limits.” You can interpret words of a statute to fit the current times. Internally, other statutes specified “male persons” so if persons were only male, that would be redundant.

Ratio: Women are persons and can run for the Senate.

**3.2 – Peace, Order and Good Government**

***Russell v The Queen,* (1887), 7 App. Cas. 829 (PC)**

**POGG’s highest point: wide scope – anything not under a provincial head of power is a POGG matter.**

**If the problem exists across Canada, it is a POGG problem.**

Facts: Russell was a liquor salesman charged under the Canada Temperance Act, which was a local option legislation enacted by Parliament. Russell argued it was ultra vires because it raised revenue, involved tangible property, and was local in nature.

Issue: Is the Canada Temperance Act ultra vires?

Analysis: PC finds it isn’t a provincial matter. *If it is not in a provincial box, it is a federal matter*. POGG is a catch-all residual umbrella provision for things that don’t fit elsewhere – makes the other boxes of s. 91 irrelevant. If the problem exists across Canada, it must be a POGG issue. Any federal matter is a POGG matter. Federal legislation doesn’t have to cover Canada uniformly. The Act is about public safety across Canada.

Ratio: The Act is valid.

***Attorney General Ontario v Attorney General Canada*, [1896] AC 348 (PC) (Local Prohibition Case)**

**Places limits on POGG power**

**Origin of national concern doctrine**

Facts: Ontario enacted local option temperance legislation virtually identical to the Temperance Act.

Issue: Is the provincial legislation valid?

Analysis: The judge puts this into the provincial box of 92(16) – local and private nature. Provinces can legislate too, if there is no conflict (early example of **double aspect**) – in which case paramountcy would cause federal legislation to prevail. POGG can only be for things unquestionably of Canadian interest and importance and ought not to trench upon province’s s. 92 powers. POGG is for **matters which are unquestionably of Canadian interest and importance and ought not to trench upon provincial legislation under s. 92**. Just geographical application (as in *Russell*) is not enough. POGG is a head of power, not an umbrella.

Ratio: The legislation is valid as a matter of a local and private nature.

***Fort Frances Pulp & Paper v Manitoba Free Press,* [1923] AC 695 (PC)**

**Development of national emergency branch of POGG power.**

Facts: Regulation of newsprint prices, enacted by federal government in WWI as part of *War Measures Act*, was still ongoing in 1923 after the war had ended. Feds argued it is valid if war effects still exist.

Issue: Is this part of the *War Measures Act* a valid federal statute?

Analysis: POGG authorizes legislation to deal with **emergencies**. It is justiciable to determine when there is an emergency but a *very heavy burden of proof is required to show that the emergency is over*. There must be deference to the legislature since they have more information about the matter.

Ratio: The Act is valid and upheld as a POGG matter.

***Re Regulation and Control of Aeronautics in Canada*, [1932] AC 54 (PC)**

**New matters not covered by the BNA likely fall within POGG power.**

Facts: Parliament enacted *Aeronautics Act*; provinces challenged their jurisdiction to do so.

Issue: Was the Act valid federal legislation?

Analysis: Parliament enacted this as part of Empire treaty, which is in their jurisdiction.

Dicta: Aeronautics is a new matter. If things aren’t in the BNA Act, they likely fall within POGG power.

Ratio: The Act is valid.

***Re Regulation and Control of Radio Communication in Canada*, [1932] AC 304 (PC)**

**If it concerns nation as a whole and crosses provincial boundaries, it is likely under POGG.**

Facts: Canada entered an international agreement then enacted legislation for radio communication.

Issue: Is the legislation valid under federal power?

Analysis: S. 132 does not cover it because it was not anticipated. May be POGG - it concerns the nation as a whole.

Ratio: It is valid federal legislation.

***Attorney General Ontario v Canada Temperance Federation,* [1946] AC 193 (PC)**

**Reinforced POGG national concern aspect – it is bigger than just emergencies.**

Facts: The Temperance Act was revised then challenged again as a ‘different’ statute.

Issue: Is the Temperance Act valid federal legislation?

Analysis: The Act is basically and fundamentally the same as it was before. However, there is no evidence that alcoholism is of national concern. “The true test must be found in the real subject matter.” It must go beyond local or provincial concern and be inherently a concern of the Dominion as a whole – national concern.

Ratio: Act is upheld again.

***Reference re Anti-Inflation Act*, [1976] 2 SCR 373**

**Emergency branch POGG requirements**

Facts: Federal government legislated the Act. Inflation was high so they enacted wage and price controls, which are normally provincial issues as a civil matter. Feds claimed national concern and emergency under POGG.

Issue: Is the Act valid or ultra vires Parliament?

Analysis: Laskin: Existence of an emergency is judicially reviewable. To establish an emergency, all Parliament needs to do is lay a rational basis – a very low standard, doesn’t require you to objectively establish an emergency.

Beetz (Dissent): discusses **national concern branch**. The matter must be *distinct* and *indivisible*. For the **emergency branch**, it must be expressed *explicitly* and *unambiguously* that they are enacting emergency legislation. It must also be *temporary* and *mandatory* legislation.

Note: This is the first time the emergency branch upheld a non-war statute – crises now included in the branch.

This case also states that once a matter has been allocated to POGG, it is permanently a POGG issue.

Ratio: The Act is upheld (with a strong dissent).

***R v Crown Zellerbach*, [1988] 1 SCR 401**

**National concern branch requirements**

Facts: *Ocean Dumping Control Act* enacted by federal government. CZ dumped illegally and was charged. They argued that it should be under provincial control because it was in the internal waters of BC.

Issue: Was the federal statute ultra vires?

Analysis: **National concern branch** (separate and distinct from emergency branch): subject matter must have a *singleness, distinctiveness and indivisibility* (similar to Beetz’s thinking in *Anti-Inflation*). It can’t be an aggregate of things or eliminate balance of power of federalism. It can also be a **new subject matter (gap branch)** that was once of a local or private nature but has become a national concern. Establishes the **provincial inability test** – can the provinces enact legislation by themselves? Failure of some provinces to legislate effectively could undercut interests of the other provinces. “It is relevant to consider what would be the effect on extra-provincial interests of a province’s failure to deal effectively with the control of regulation of the intra-provincial aspects of the matter.”

Ratio: Legislation upheld as being a matter of national concern.

**3.3 – Criminal Law**

**91(27)** gives federal government legislation over criminal matters.

**92(15)** gives provinces power to impose fine, penalty or imprisonment to punish those who violates the laws under its areas.

**PITH AND SUBSTANCE APPROACH (Morgentaler):**

* 3 elements:
	1. Object and purpose of the statute
		+ Court attempts to divine corporate intent, intent of the legislature
			- Look at legislative history of the statute
			- Does the statute have earlier versions? Is it replacing something? Is it an amendment?
			- What is the evil aimed at?
			- Court can look at the form of the legislation, as well as the content
	2. The effect of the statute
		+ The legal effect of the statute is always relevant
			- What's it going to do?
		+ Practical effect
		+ A statute enacted doesn't always accomplish what the legislature thought it would accomplish
	3. Ulterior motive - actual intent of government in enacting the statute
		+ Actual intent - what was the Cabinet/exec trying to do with the statute?
		+ Always relevant when there is an allegation of colorability
			- Colorability: like fraud, you're pretending to do A when you really mean to do B

**Ways to make Provincial Legislation be upheld:**

1. Emphasize property and civil aspect
2. Emphasize local nature
3. Focus on form: employ regulatory techniques, avoid prohibition + penalty form
4. Deal with the problem indirectly
5. Emphasize prevention of crime and pre-emptive strikes
6. Avoid duplicating Criminal Code provisions
7. Avoid draconian penalties
8. Argue complementary, not supplementary
9. Concede provincial legislature's concern is with morality but argue it is not the main concern, it is just peripheral
10. Avoid discussing main problem (i.e. hide colorability)
11. May have to concede that they may be some traditional criminal activities they can't touch, no matter what aspect of it they're dealing with

***Reference re Validity of Section 5(a) of the Dairy Industry Act,* [1949] SCR 1 (Margarine Reference)**

**Criminal legislation must be a prohibition, have a penalty, and be for a public purpose**

Facts: Government bans sale of butter substitutes.

Issue: Is the Act valid as criminal legislation?

Analysis: Criminal legislation requires a **prohibition, penalty and to be for a public purpose** (peace, order, security, health, morality – not an exhaustive list).

Ratio: No, not valid as criminal law. However, it was upheld as being trade and commerce.

***RJR-MacDonald Inc v Canada*, [1995] 3 SCR 199**

**Expanded scope of Criminal Law, Pith and Substance analysis**

Facts: Federal legislation that prohibited promotion/sale of tobacco items without warnings on label. Attacked on grounds of division of powers and freedom of expression. Federal government argues POGG and criminal law.

Issue: Is this valid legislation?

Analysis: Form of the legislation is important. You draft it differently for POGG than criminal**. Plenary nature of criminal law**: criminal law power may validly be used to safeguard the public from any “injurious or undesirable effect” – it should be read broadly and the court must not freeze the definition of criminal law. Criminal law can include health and product safety. There is a *preventative* branch of criminal law – can prevent health problems by legislating against sale of dangerous products. **Pith and substance** analysis: goal is to determine Parliament’s underlying purpose, not to see if Parliament chose that purpose wisely or could have better achieved it in another way. The definition of criminal law is wide and new crimes can be created – does not have to be typical criminal-related matters. You can criminalize ancillary activities without criminalizing the evil itself – if the pith and substance is right, you can do it, even if you’re doing it in a roundabout way. Criminal law can contain valid exemptions for certain conduct. However, there is a limit in that criminal law must be checked for **colorability**. Scrutiny on form of criminal law should be loosened.

Ratio: Upheld as criminal law (but then shot down as violation of freedom of expression)

***R v Hydro Quebec,* [1997] 3 SCR 213**

**Expands scope of criminal law; test for colourability**

Facts: Legislation makes it so Minister can declare substances to be toxic in interim until it can be determined if they should be added to Toxic Substance List. HQ wanted PCPs and argued that s. 34 and 35 that allow the interim order are ultra vires. Federal government said it is good under POGG national concern and under criminal law.

Issue: Are ss. 34 and 35 of the *Canada Environmental Protection Act* ultra vires Parliament?

Analysis: RJR MacDonald says that matters that don’t look criminal at first glance and do not have traditional form can still be upheld under criminal law. It is more likely to be criminal than POGG because it is broad. Putting it in criminal allows *double aspect doctrine* where both province and feds can legislate. As criminal law power is so broad, parliament can criminalize everything it pleases as long as there is prohibition and penalty (subject to Charter) and it is not colourable. The test for "**colourability**" is whether the law has a "legitimate public purpose" that underlies the prohibition. Protection of the environment constituted such a legitimate purpose. It is a subject that has international implications yet it does not preclude provinces from regulating along with federal government. Criminal law is also specific, versus POGG which is broad and would give Parliament more power.

**Dissent**: this is more like a regulatory scheme than a criminal law. Criminal law should be public so that people can known about it and be deterred. Therefore executive branch should not be creating it (i.e. Minister shouldn’t be able to declare things criminal like in this statute). Interim orders should not be criminal.

Ratio: Upheld as criminal law

**The following cases are provincial 92(15) statutes challenged as being ultra vires because they are actually federal criminal laws under 91(27):**

***Attorney General Canada and Dupond v the City of Montreal*, [1978] 2 SCR 770**

**Provinces can pass laws that are complementary, local, temporary and preventative.**

Facts: Montreal created by-laws banning certain public gatherings for one month. Dupond made a complaint and was allowed to do so as a taxpayer of the city challenging a municipal law.

Issue: Were these by-laws ultra vires the City?

Analysis: The by-law was intended as a **preventative** measure against disorderly conduct. Provinces can enact preventative legislation to complement punishment legislation made by the federal government. **Complementary** (vs supplementary) legislation is ok. It is also **local** and **temporary**. It just can’t clash with actual criminal law.

Ratio: Valid municipal law.

***Rio Hotel v Liquor Licensing Board*, [1987] 2 SCR 59**

**Regulatory schemes of province can complement the criminal law**

Facts: Laws regulating entertainment activities of businesses – licenses with attached conditions. These laws were re-worded duplicated provisions of the *Criminal Code*.

Issue: Were these laws ultra vires the province?

Analysis: These laws are a licensing technique, which is **regulatory and not prohibitory** (and are therefore good for provinces to use). In the end, it is the business being regulated, not the actual entertainers. It is the business who is punished through loss of license. This **indirectly** helps control what the *CC* already covers. **Double aspect doctrine**: there is only a conflict where federal legislation is paramount *if* there is a direct conflict that cannot be avoided. Otherwise, both can legislate. A licensing scheme can be complementary and is regulatory. Also, losing your license is not a penal punishment.

Note: Do **not** copy provisions of the CC directly if you wish to have your provincial legislation upheld!

Ratio: Laws are valid because they are complementary to Criminal Code.

***R v Morgentaler*, [1993] 3 SCR 463**

**Ways to attack provincial legislation; colourability**

Facts: Province enacted law making it so that certain medical procedures, including abortion, could not be performed in private clinics. Morgentaler alleges this is colourable legislation to ban private abortion clinics. The punishment for violating this is a large fine. Morgentaler alleges this should be under the scope of criminal law.

Issue: Is the legislation valid provincial law?

Analysis: This is **colourability.** Sopinka discusses **factors on which provincial legislation** **can be attacked**: *duplication of CC provisions, legislative history (actual purpose), severity of the penalty, and traditional offences.* The government, in defending the legislation, must always have an object and purpose. Look to see if the evidence is different from what they say the object/purpose is. In this case, it is – the other medical procedures seem to be thrown in as a distraction/cover for abortion. The chronology is also suspicious (i.e. timing/speed of laws and timeline of Morgentaler announcing his clinic). The penalties were severe. Abortion is traditionally a criminal offence. There is a difference between legal and practical effect and it is the court’s discretion whether to consider the practical effect. Legal effect is always considered when looking at pith and substance.

**Note**: To be upheld, these should be consistent: (1) object/purpose, (2) effect (legal/actual), (3) motive

Ratio: Legislation struck down because it should be under criminal law.

***Chatterjee v Ontario*, [2009] SCC 19**

**Double aspect doctrine**

Facts: Legislation ordering that profits of unlawful activity forfeit to province. A cop stopped Chatterjee for having no license plate, finds a bunch of cash and drug stuff in car. The money is taken even though charges aren’t laid.

Issue: Is the legislation ultra vires the province?

Analysis: Court rules that **double aspect** doctrine allows this – it is complementary. Courts should uphold statutes as long as they aren’t conflicting – i.e. avoid striking down legislation on division of powers when possible. This case reduces ability to knock down legislation on that point.

Ratio: The legislation is valid.

**3.4 – Regulation of the Economy**

91(2) powers have faded with POGG – an emptying of the box.

S. 121 has also emptied and generally only means you cannot have customs charges between provinces.

There is no one head of power for economy – it is not distinct or indivisible – it is an aggregate.

All economy matters begin locally – question is *when does the provincial power end?*

**From General Motors:**

Hallmarks of validity for legislation under the second branch of the trade and commerce power:

1. Legislation must be part of a general regulatory scheme
2. Scheme must be monitored by the continuing oversight of a regulatory agency
3. Legislation must be concerned with trade as a whole rather than with a particular industry
4. Legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting themselves
5. The failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country.

However, these indicia do not represent an exhaustive list of traits nor is the presence or absence of any of these five criteria necessarily determinative.

**From General Motors**:

Test for drafting legislation where a provision may not be in your power:

1) Look at whether provision itself is ultra vires

- If not, stop there

2) Look at whether legislation as a whole is ultra vires

- If not, look at how integral it is to regulatory scheme as a whole

3) Ancillary doctrine

- Can be used to uphold section in a statute that doesn’t seem to be justified by itself

**Ancillary Doctrine:**

The Court must consider the degree the valid legislative scheme intrudes upon the other government's jurisdiction. If it is a minor intrusion, then the provision need only be "rationally connected." Otherwise for serious encroachments the provisions must be "truly necessary" or "essential" to the functioning of the law.

***Citizens Insurance v Parsons* (1881), 7 AC 96 (PC)**

**Definition and scope of 91(2), two branches of trade/commerce**

Facts: Regulation of insurance. Parsons’ store burnt down, Citizens wouldn’t pay. P sued because C didn’t comply with provincial law but C argued that the laws were ultra vires the province.

Issue: Who has jurisdiction over insurance?

Analysis: 91(2) is very broad so it must have some limits placed on it or else it will overwhelm everything else and control everything. It needs to leave room for 92(13) Therefore 91(2) should be read narrowly while 92(13) should be read expansively. Therefore it was **two branches: (1) international and interprovincial trade, and (2) general regulation of trade affecting the whole Dominion**.

Ratio: Insurance is a type of contract so it is provincial under 92(13) (i.e. *contracts are a civil matter*).

***R v Eastern Terminal Elevator Co*, [1925] SCR 434**

**Parliament cannot ‘reach back’ – possibility of 92(10)(c)**

Facts: Most grain is exported so Parliament passes *Grain Act* so they can use licensing scheme to regulate individual trades involved in grain elevators. It says funds from surplus grain should go to government.

Issue: Is the *Grain Act* ultra vires Parliament?

Analysis: Grain elevators are local and 91(2) does not give Parliament the power to regulate local trade. Percentage cannot be used to determine legislative jurisdiction – it is an inappropriate ‘reaching back’ by Parliament. This would better fit under 92(13) as local business. Duff also says Parliament’s claim of provincial inability fails because it doesn’t matter that provinces can’t effectively do it themselves -  *this has been shot down now!*

**Note:** Duff J says it is possible to regulate this – you must just frame it right. 92(10) gives jurisdiction to some undertakings to federal government. **92(10)(c)** – things for general advantage of Canada. This gives central power and is a unitary feature. It can be for physical things, not actions. You could claim grain elevators are such a thing and it would basically be immune from judicial review.

Ratio: The Act is ultra vires.

**\*\*\*** *Good for provinces*

***Carnation v Quebec Agricultural Board*, [1968] SCR 238**

**If pith and substance is provincial, indirect effects on federal issues do not affect validity**

Facts: Creation of Marketing Board by Quebec that gave power to create joint marketing plans and to settle disputes. Dairy farmers created the plans, which Board then approved. The plan fixed prices. Carnation bought from the Board. The entire transaction occurred in Quebec. Carnation then exported the milk .Carnation was not happy with the price set so they challenged the Board’s orders on grounds that the laws interfered with interprovincial trade and should fall under 91(2).

Issue: Is the legislation ultra vires the province because it belongs under 91(2)?

Analysis: While interprovincial trade may be affected, the statute’s purpose is not to control it – it is **incidental**. Quebec’s purpose was to protect dairy farmers (a local objective), not control interprovincial trade, therefore it is ok. This is a classic **pith and substance** approach where object and purpose are determined. To be ultra vires, the statute would have had to have been made *in relation to* trade and commerce. Therefore, if it is **necessarily incidental** then it does not invalidate the legislation.

**Note**: This case tells you that provinces have enormous power to have indirect effects (especially at production levels) of interprovincial and international trade. **Marketing boards** are a very useful technique for provinces in this way – province controls everything before it gets out of the province. **Key to making it provincial**: have the entire transaction occur within the province.

Ratio: Orders are valid, provincial statute is upheld.

*\*\*\*Edinger dislikes Burns*

***Burns Foods v Attorney General Manitoba*, [1975] 1 SCR 494**

**Provinces can’t affect interprovincial trade**

Facts: Regulations on slaughtering pigs bought in Manitoba extended to pigs purchased outside of the province. A Marketing Board required that pigs be bought through the Board so Burns had been buying pigs out of province because it was cheaper.

Issue: Are the regulations imposed by Manitoba valid or ultra vires?

Analysis: Pigeon says that the legislation is ultra vires Manitoba because Manitoba is attempting to regulate contracts which have been made outside of the province (i.e. interprovincial trade) and they do not have legislative authority to do so.

Note: Edinger disagrees with this because she wonders how Pigeon could know that the contracts were made outside of Manitoba. She thinks since it is Burns in Manitoba who is being regulated that it is ok legislation and should have survived. Other legislations have survived by ignoring this case so you should not assume that provinces can never regulate goods coming in from other places. You could, for example, make possession of goods not purchased through the Board illegal. Edinger thinks that instead of thinking about the contract, Pigeon should have looked at the object/purpose, which was to create a fair price for Manitoba farmers.

Ratio: Legislation is struck down because it aimed at interprovincial trade.

***Labatt Breweries Ltd v Attorney General Canada*, [1980] 1 SCR 914**

**91(2) cannot be used to control what is local or to control a single industry**

Facts: Part of *Food and Drug Act* being challenged. Labatt was making a ‘lite’ beer that is non-compliant with definition of light beer in the Act. Labatts argues that the Act is ultra vires. Federal government tries to use 2nd branch of 91(2) for the first time.

Issue: Is that part of the Act ultra vires Parliament?

Analysis: The beer was brewed and sold locally, so Parliament could not rely on interprovincial branch of 91(2). They attempted to use 2nd branch. However, since the Act only controlled a particular industry and was local, it could not be considered ‘general’ regulation of trade and commerce, so it did not fit in the second branch either.

Ratio: Legislation struck down as being ultra vires Parliament

***General Motors of Canada v City National Leasing,* [1989] 1 SCR 641**

**Second branch of trade/commerce, ancillary doctrine**

Facts: CNL sued GM saying there GM was giving preferential treatment to its competitors. CNL relied on 31(1) of Combines Investigation Act, which gave a civil cause of action if Act was violated. If you were harmed by a breach of the Act, you could sue for damages.

Issue: Was the provision which allowed Parliament to create a civil cause of action ultra vires?

Analysis: **Test for validity:** When a single provision of a statute is challenged, you must first look at that provision in isolation. Here, it looks prima facie 92(13). Then consider the provision in relation to the rest of the statute and decide if the entire statute is valid. If the statute is valid overall, you must then look at how integral the provision is to the legislation as a whole. You can then use ancillary doctrine to try to save provision from being struck down.

**Ancillary Doctrine**: Allows for validation of individual provisions in the statute (which, if taken in isolation would be invalid) to be valid, if they are necessarily incidental to the statute. Allows for an expansion of legislative jurisdiction. The necessity of the provision must be proportional to the degree of incursion into other government’s territory. Small incursion just needs a rational connection while it must be absolutely critical for large incursions.

There are **5 criteria** **to determine if the statute is part of** **the** **general regulation branch of 91(2)**:

(1) Is the legislation part of a regulatory scheme? (2) Does this scheme need to be overseen by an agency? (3) Is it general, instead of dealing with single industries? (4) Legislation must be of nature that provinces jointly or independently would be incapable of doing on their own. (5) Failure for one or more of the provinces or localities to implement this scheme would jeopardize the scheme in other parts of the country. These 5 criteria are not exhaustive or determinative, not all 5 are required.

Ratio: Legislation upheld under 2nd branch of 91(2)

**3.5 – Taxation**

Also known as Fiscal Federalism.

**91(3)**: The raising of Money by any Mode or System of Taxation.

 - nearly unlimited, can only be challenged for bad intention or colourability

**92(2)**: Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

**92A(4)**: In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of

(a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and

(b) sites and facilities in the province for the generation of electrical energy and production therefrom,

whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

**92(9)**: Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.

**125:** No Lands or Property belonging to Canada or any Province shall be liable to Taxation.

**Checklist of issues in provincial tax cases:**

1) Is the levy a tax? (*Allard v. Coquitlam)*

2) If yes, is it a direct tax? (*Bank of Toronto v. Lambe, CIGOL)*

3) Is the tax imposed within the province? (*Bank of Toronto v. Lambe)*

4) If it’s a tax, was the legislation properly enacted?

5) Is there any immunity from the tax (s. 125)?

6) Is an ultra vires tax recoverable? (*Kingstreet Investments)*

**Using 92(9) to create indirect taxation as a province** (from *Allard*)**:**

1. The licensing fee must be attached to a valid regulatory/licensing scheme as a fee.
2. The fee must be tailored and used to defray the costs of the regulatory scheme.

Arguing for province: say they are fees under 92(9), and argue in the alternative that they are taxes, and indirect, but are ancillary to a valid scheme.

Federal: can be direct or indirect, must have revenue raising as primary purpose, can’t be colourable towards s92, can raise revenue for federal or provincial use, can spend the revenue any way it likes.

**John Stuart Mill’s Definition of Direct/Indirect Tax (Bank of Toronto v Lambe):**

“A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another, such are the excise or customers.

The producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price.”

For provincial taxes, anyone found within the province can be taxed, regardless of residence (**Bank**).

Direct: income, sales, property

Indirect: commodity tax, customs, export/import

***Bank of Toronto v Lambe* (1887), 12 App. Cas. 575 (PC)**

**Definition of indirect/direct tax, deciding whether someone is taxable in the province or not**

Facts: Quebec passed a statute that imposed. Banks were subject to a tax that varied with the capital and an additional sum for each office. Bank argued this was an indirect tax, and thus ultra vires of the province.

Issue: Was the tax ultra vires of the province?

Analysis: The **definition of indirect/direct tax** is John Stuart Mill’s (see above). There is an assumption that the tax category is ascertained by the general tendencies of the tax and common understanding of men as to those tendencies. The question is not whether the taxpayer has ingeniously passed off the tax, it is whether government *intended* the tax to be passed off to another. S. .92(2) allows province to tax any person/entity within the province if taxed directly, to raise revenue for provincial purposes. The tax is for reasonable purposes of getting contributions for provincial purposes from those who are making profits by provincial business. It is meant to be direct because it is a lump sum and would be difficult to recoup from customers. As for being in the province, the bank carries on business there so it fills that requirement. **Anyone found in the province can be taxed**.

Ratio: It is a valid provincial tax because it is direct.

**\*\*\*Note**: CIGOL’s outcome overruled by statute through 92(a)(4) – but discussion is still valid

***Canadian Industrial Gas and Oil v Government of Sask.*, [1978] 2 SCR 545 (CIGOL)**

**Direct/indirect taxation , hybrid taxes, difficulty of Mills definition from *Bank***

Facts: Legislation lets Minister set a fair price on barrels of oil. If producers sell the oil over that price, they must pay the excess money to the province. CIGOL claims it is an indirect tax and therefore ultra vires the province.

Issue: Is the tax direct?

Analysis: It is important to look at the general tendency of the tax and try to fit it into a category. If it doesn’t, it is a **hybrid tax**. The majority here decided it was an export tax, and therefore indirect (because the tax affected the price) – based on legal effect. Dickson (dissent) said it is a hybrid so you must inspect the practical effect of the tax to decide. He thinks the practical effect makes it a direct tax because the producers can’t profit and tax is designed to be taken after the product is sold. This case demonstrates how difficult it is to use *Bank*’s test for directness.

This case gives the categories of taxes listed above in general taxation notes.

**Note**: 92(a)(4) is designed to constitutionally overrule this case – allows provinces to tax natural resources any way they like, directly or indirectly.

Ratio: Tax is indirect and therefore ultra vires the province.

***Allard Contractors v Coquitlam*, [1993] 4 SCR 371**

**Whether a levy is a tax, indirect taxation through 92(9) levies**

Facts: Municipal legislation was created that allowed Coquitlam to impose variable volumetric fees for gravel removal. It appeared to be an indirect commodity tax because it was per unit. Coquitlam argued it is allowed under s. 92(9).

Issue: Is the municipal legislation valid?

Analysis: Provinces are allowed to have flat licensing fees without problem. Court here decides that some forms of indirect taxation are allowed through variable licensing fees under **92(9).** **These fees must be attached to a valid regulatory scheme** and must raise revenue to be used towards the cost of the scheme and **defray the costs of regulation**. The volumetric fee can be supported as ancillary to the valid regulatory scheme. There must be some connection between what the revenue is spent on and the regulatory scheme, though it doesn’t have to be a super close match (e.g. here it is gravel removal fees paying for road maintenance). This limitation is so that 92(9) doesn’t undercut 92(2). Therefore provinces can levy payments indirectly if the levy can be fit into 92(9). You can raise more revenue than required to fund the scheme without problem (but it is easier to argue for the validity of it if the extra revenue isn’t excessive).

Ratio: The legislation is upheld as license fees under 92(9).

***Kingstreet Investments Ltd v New Brunswick*, [2007] 1 SCR 3**

**You can recover taxes which the government has collected improperly (rule of law)**

Facts: Kingstreet was seeking reimbursement for invalidly levied taxes – user fees on alcohol. They wanted reimbursement back to 1998 plus compound interest.

Issue: Could Kingstreet get reimbursed for an improperly levied tax?

Analysis: The period you can be reimbursed for may be limited by statute – 6 years in this case. Crown cannot be permitted to keep improperly gathered taxes. To do so would violate unwritten constitutional principles (likely the **rule of law**). Therefore**, citizens have a right to restitution –** a constitutional right, not a private law matter of unjust enrichment. However, concerning interest – why does Kingstreet require interest compensation? The tax was invalidated on basis of being indirect, so if they passed on the tax, what did they lose? This is unimportant because rule of law was violated – that it was passed on is no defence. However, there are **limitations:** (1) provincial limitation act should apply to any cause of action based on the constitutional right, and (2) tax payer is not entitled to compound interest if there is no gross wrongdoing on the part of the province – just entitled to simple interest. Province can request the judgment be suspended if paying would cause financial chaos/deficit for government – they could then retroactively legislate a valid tax so they do not have to pay it back.

Ratio: If a tax is invalidly collected, the taxpayer can recover what they paid within statutory limitations.

**PART II – FEDERALISM: DIVISION OF POWERS**

**Chapter 4 and 5 – Interjurisdictional Immunity and Paramountcy**

If the statute is valid, 2nd question is: Does it apply?

🡪 **Interjurisdictional immunity**: some federal entities are immune from certain provincial laws.

 🡪 Usually arises in s. 92(10) cases (federal works and undertakings)

🡪 **Paramountcy**: If both prov + fed laws apply, fed law wins if there is an irresolvable conflict.

 🡪 Makes laws inoperable (not invalid)

**INTERJURISDICTIONAL IMMUNITY:**

1. **Validity**: Is the provincial law valid?
2. **Eligibility:** Is it claiming immunity from application of a provincial law? Is the defendant a federal entity?
	1. Use the tests – *Winner* and/or *CWB*
	2. Look to 92(10)(a) – Federal Works and Undertakings
		1. Cannot be colorable – pretending to be federal (*Winner*)
3. **Application:** Is the entity immune from THIS provincial law? (It is not a blanket immunity)
	1. Use the tests – *CWB* and *Bell 1966*
4. **Effect**: Inoperable for that entity; NOT invalid.
5. **Cases:**
	1. *Winner*: TEST for 92(10)(a) eligibility
	2. *Bell 1966*: TEST for immunity from prov law: impairment + vital and essential part
	3. *Bell 1988*: TEST for immunity from prov law changed: effect, vital & essential part
	4. *Canadian Western Bank*:
		1. TEST for eligibility limited: federal entities which are persons, works or things that are supported by precedent
		2. TEST for immunity from provincial law reverts: impairment & vital/essential part

IJI: 3 possible definitions, depending on which case you argue and how you argue it:

1. Broadest definition: IJI available to fed and prov and available to every head of power (the “cores”).
2. Medium: Available to fed and prov entities (i.e. no heads of power).
3. Narrowest: Available to fed entities only.

**PARAMOUNTCY**:

1. Is the federal law valid? Is the provincial law valid?
2. Does the federal law apply? Does the provincial law apply?
3. Is there a conflict between the two statutes within the legal definition of conflict?

***Ontario (Attorney General) v Winner*, [1954] JCJ No 1 🡪 IJI**

**Definition of works/undertakings under 92(10). Use of roads. Colorability of entities. Sterilization.**

**Facts:** Bus runs out of US, through NB, back into US. NB says they can pass through but not pick up/drop off ppl.

**Issue:** Is Winner subject to NB’s legislation?

**Analysis:** 92(10): **Work**=physical thing; **Undertaking**=arrangement under which physical things are used. Read disjunctively.

How is the business actually operated? If operated as a single entity, treat it as one. But if it is operated as 2 businesses under 1 umbrella, it is **divisible**. Doesn’t matter if you can strip away parts; question is rather *what is the undertaking which is in fact being carried* on? When does the undertaking **come into existence**? When promoter has done everything necessary on his part to put it in motion and has made all essential arrangements.

Provinces can control roads but not undertakings that use roads. Legislation denying use of roads or **sterilizing** an undertaking is not allowed. **Colorability** also applies to undertakings; can’t fake being fed to escape prov laws.

**Ruling**: No. Winner is a federal undertaking (s. 92(10)) and is immune from NB’s licensing laws.

***Quebec (Commission de Salaire Minimum) v Bell Telephone Co*, [1966] SCR 767 🡪 IJI**

**Federal entities are immune if prov legislation impairs a vital and essential part of the undertaking.**

**Facts:** Bell says they aren’t subject to provincial minimum wage level because they are federal under 92(10)(a)+(c).

**Issue:** Is Bell immune to the province’s minimum wage legislation?

**Analysis:** To qualify for immunity, provincial legislation must **impair a vital and essential part** of the undertaking.

Here, wages would affect **internal management** – this is vital and essential. There can’t be patchwork wages.

It is ok if there is a federal **legislative vacuum** as long as it is in Parliament’s jurisdiction.

**Ruling**: Bell is immune. The prov legislation would affect a vital part of their undertaking.

***Construction Montcalm v Minimum Wage Commission*, [1979] 1 SCR 754 🡪 IJI**

**Discussion of classification of undertaking.**

**Analysis:** Aeronautics is federal but does not cover provincial companies constructing airports. Federal works and undertakings must **extend across borders**. Radio communication includes towers, stations, regulation of industry.

**\*\*\*** This is THE paramountcy case – still good law.

***Multiple Access v McCutcheon*, [1982] 2 SCR 161 🡪 Paramountcy**

**Definition of a conflict – frustrated purpose and express contradiction tests. Duplication is not a conflict.**

**Facts:** Feds and ON have similar anti-insider trading legislation. Df argues immunity to ON law as a federal entity.

**Issue:** Is mere duplication a “conflict” in eyes of the law so that the prov statute will be inoperative?

**Analysis:** First step is to assess validity of both statutes. Here, fed’s is POGG and prov’s is contracts.

**Duplication is NOT a conflict** for paramountcy purposes. Why? Legislative intent of Parliament will be fulfilled.

There is only a conflict if prov law **frustrates the purpose** of the fed law, or if there is an **operational conflict** in that complying with one statute will mean defying the other (**express contradiction test**). Both apply but double liability can be avoided through cooperation.

**Ruling**: Df must comply with ON legislation because duplication is not a conflict.

**\*\*\*** Even though Bell was rejected, Edinger thought it was good. Can use it to support your argument.

***Bell Canada v Quebec (1988)*, [1988] 1 SCR 749 🡪 IJI – REJECTED IN LAFARGE!**

**Changes immunity test to affects a vital or essential part of the undertaking. IJI can be preventative.**

**Facts:** Bell claims immunity against provincial health and safety regulations.

**Issue:** Is Bell immune from this provincial legislation?

**Analysis:** Beetz says old *Bell* test of impairment is insufficient 🡪 test should be if it has an **effect** on the entity.

It is sufficient if it **affects a vital or essential part** of the federal undertaking – it does NOT have to impair/paralyze.

Reasoning: relates to time of court case – shouldn’t have to wait for it to impair/paralyze before claiming immunity.

**Ruling**: Bell is immune again because prov law has an effect on it.

**\*\*\*** Edinger thinks this case is inconsistent with pith/substance doctrine. If it is prov in pith/substance, incidental effects on s.92 heads should be irrelevant. This says there’s immunity against incidental effects. It also removes relevancy of whether a federal entity is involved – shifts focus to heads of power instead. Before, IJI was limited to entities on a case-by-case basis, but extending it to heads of power opens it up.

***Ordon Estate v Grail*, [1988] 3 SCR 437**

**Heads of power have essential cores to which the other govt can’t regulate towards.**

**Facts:** Negligence action from boats on a lake (navigable waters). Pf wants prov law. Df says it should be fed law because navigable waters are under a federal head of power – didn’t argue that he himself was a fed entity.

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

**Analysis:** Maritime law demands uniformity because of its international character 🡪 can’t apply prov laws.

Each head of power has an **essential core** to which provinces are unable to legislate towards. **But are there cores?**

**Ruling**: Must use federal law.

**\*\*\*** CWB released at same time as LaFarge. SCC was trying to close box of IJI but Edinger thinks they just gave fuel to people to litigate in this area. Manipulate what they say to your client’s benefit.

Edinger also says that saying IJI is available to prov entities is a bold, unsupported theoretical statement.

***Canadian Western Bank v Alberta*, [2007] SCC 22 🡪 IJI and Paramountcy**

**IJI for provs? IJI should be limited to what has been done in the past. Reverses LaFarge – the prov law must impair a vital and essential part of the federal entity (not just have effect).**

**Paramountcy: *McCutcheon* is fine. Prov law can’t conflict w/fed law 🡪 easy if fed law is permissive.**

**New unwritten principle of subsidiarity.**

**Facts:** Bank had permission to sell insurance. Claimed to be immune to AB insurance legislation because banks are federal entities and the insurance was essential to their business. Claimed IJI and, in the alternative, paramountcy.

**Issue:** (1) Is CWB immune from the AB law or (2) is the AB law inoperable for CWB?

**Analysis:** “In *theory*, **IJI is reciprocal**: it applies both to **protect prov** heads of power and prov undertakings from fed encroachment, and to protect fed heads of power and fed undertakings from prov encroachment.”

 🡪 BUT in reality, it is asymmetrical – encroach fed laws just get read down w/o doctrinal discussion.

**Categories** of IJI: Fed transportation, airplanes, communication, maritime, Aboriginal, fed corporations and institutions.

Binnie: With IJI, courts should **stick to precedent** – limit scope and application of IJI to what’s already been done.

 🡪 Federal things, people, works and undertakings 🡪 creatures, distinct from heads of power.

Idea of “cores” and broad application of IJI are inconsistent with federalism 🡪 should use incremental approach.

**SUBSIDIARITY**: decisions are best made at level of govt that is closest to the citizens affected.

 🡪 Asymmetrical effect of IJI can undermine this – justification to limit IJI.

Excessive reliance on IJI undesirable: would create uncertainty (cores are undefined) 🡪 creates **legislative vacuums** by making incidental effects impossible even if there’s no fed laws to fill that area, has asymmetrical effects.

SO: must be ***federal* entity and a provincial statute that IMPAIRS a *vital and essential part* of the undertaking*.***

 🡪 Binnie may *say* it’s open to provs, but also says to stick to precedent. Do as SCC does, not as they say!\

 🡪 There must be an **impairment**– FACTUAL – look at actual entity, NOT head of power

 🡪 Try to pin it on “internal management”(*Bell*) – easy argument for feds to make.

Binnie says *McCutcheon* paramountcy rules are still fine 🡪 this case just adds a new application.

IJI is difficult so you can **argue paramountcy first**. BUT may need IJI first 🡪 can’t have conflict w/o a valid law.

AB required licensing for insurance, feds didn’t 🡪 AB is just regulating what banks were allowed to do. No direct conflict, so no reason why banks shouldn’t have to comply 🡪 **didn’t affect fed Act’s purpose or operation**.

 🡪 Fed law was PERMISSIVE 🡪 hard to find a conflict w/permissive law. Solution? Feds should legislate!

**Ruling**: No IJI immunity (insurance not a core service) and no conflict for paramountcy to apply. CWB loses.

***British Columbia v LaFarge Canada Ltd*, [2007] SCC 23 🡪 IJI and Paramountcy**

**Definition of “frustration of purpose” for paramountcy. IJI doesn’t apply to double aspect matters.**

**Facts:** LaFarge wants to build factory on federally-owned property but their plans violate municipal by-laws (prov).

**Issue:** Should LaFarge get IJI because it’s building on federally-owned land?

**Analysis:** IJI should not be used if the matter is double aspect or if it would create a regulatory vacuum.

 🡪 Paramountcy may be preferable because it does not create a regulatory vacuum.

IJI rejected here: it’s a double aspect matter & not essential to the core (i.e. not vital/essential). Scope of IJI is NOT discussed.

Paramountcy accepted: there is a conflict – feds want to give discretion, city wants to limit – frustrates purpose.

 **🡪 Frustration of purpose: If the federal statute was enacted for a specific purpose + complying with**

 **the provincial statute will frustrate the federal purpose** 🡪 must persuade court of fed law’s purpose.

🡪There is also **operational conflict**: when one statute says YES you can do X and another says NO.

🡪 Here, there is operational conflict – LaFarge could only comply w/both if municipal authority waived their law.

NOTE: Even though paramountcy is easier, court goes to IJI first 🡪 goes against what CWB said.

 🡪 Can’t ignore IJI unless judge wants you to. Court could have bypassed IJI but chose not to.

**Ruling**: LaFarge wins, doesn’t have to comply with the municipal by-laws. IJI rejected. Paramountcy accepted.

**Chapter 6 – Extraterritoriality**

Not an issue for Parliament 🡪 *Statute of Westminster*, 1931.

Involves **validity** and **applicability**:

 🡪 Validity: invalid because of extraterritorial pith and substance (most common use).

 - **Churchill Falls**

 🡪 Applicability: Statute is valid but inapplicable in *that* application (fallback option).

 - **Unifund**

Concerned not with *creating* rights outside prov but with *detracting* from activities/rights outside prov.

 🡪 i.e. generally not an issue to create benefits for those outside the province.

Avoid issues by pointing out how it does apply within prov; don’t directly regulate things outside prov.

Note: Only applies to provs. Parliament has power to legislate extraterritorially (*Statute of Westminster*).

Before these cases, there had been 2 lines of cases from the PC:

1. *RBC v the King*, 1930: There can’t be ANY ET effects at all.
2. *Ledore v Bennett*, 1939: Pith and substance approach, incidental ET effects are unimportant.

**CURRENT METHOD OF ASSESSING EXTRATERRITORIALITY – FROM *IMPERIAL TOBACCO:***

1) When legislation is challenged as ET, first look to **pith and substance** (*Churchill*) 🡪 check **validity**.

 🡪 If valid through *Churchill*, continue on. If not, stop analysis 🡪 invalid.

2) You must determine if the P&S of the legislation respects the territorial limitations on that head of power.

 a) If pith and substance is **tangible**, **location** is critical (valid if in prov, invalid if not).

 🡪 But what if the tangible item moves? No answer yet.

 b) If **intangible**, apply *Unifund* test to determine **applicability** 🡪 **meaningful connection** (real & substantial).

 🡪 Use the four considerations given in *Unifund*.

 🡪 In exam, use “meaningful” as much as possible, rather than real/substantial.

**Note**: If it all comes back as valid, incidental ET effects are irrelevant.

BUT if you accept that the legislation is valid, you can just argue inapplicability 🡪 *Unifund* only.

And if you just want to argue validity, not applicability 🡪 *Churchill* only if tangible, if intangible use *Imperial Tobacco*.

**\*\*\*** Affirms *Ledore v Bennett*.

***Churchill Falls (Labrador) Inc v AG Newfoundland*, [1984] 1 SCR 297 (Validity)**

**If pith and substance of a law is within the province, extraterritorial effects are unimportant.**

**Facts:** NFLD leased water and rights to CF, with a certain amount of hydroelectric power reserved for NFLD. QB bought the rest of the power. NFLD wanted more power, passed Reversion Act that gave them the property rights back. It was valid on face for affecting property within the province.

**Issue:** Was the Reversion Act invalid due to extraterritoriality?

**Analysis:** This is an example of SCC looking at prov’s motive, instead of just the legislation’s object/purpose/effect.

SCC finds that **incidental effects are unimportant** 🡪 *Ledore* line of reasoning.

**TEST: Court looks to pith and substance of the Act 🡪 civil rights. But *where* are these civil rights located**?

 🡪 If they’re **located within the province, ET effects are unimportant. If outside prov, the Act is invalid**.

 🡪 Performance of contract is in Quebec – colourability, effecting QB’s rights but pretending it’s NFLD.

 🡪 No principle or test given to determine where the civil rights are located.

 🡪 SO: when arguing location of civil rights, no guidance but try to claim it’s where you need it.

Note: This case is a good example of **colorability** – SCC looked at govt motive and it was aimed outside a border.

**Ruling**: Act is invalid, but NOT because of ET 🡪 because the contract was in Quebec.

**\*\*\*** Edinger doesn’t like Unifund. She thinks judge picked and chose which aspects of the relationship to look at and failed to look at the relationship to Ontario.

Invoke Unifund when there are overlapping CONFLICTING provincial laws that appear to apply out of province OR if there aren’t conflicting laws but P tries to apply law from their own jurisdiction to someone who appears outside of that jurisdiction.

***Unifund Assurance Co v Insurance Corp of BC*, [2003] 2 SCR 63 (Application)**

**Real and substantial connection test for ET if there is overlapping legislation between two jurisdictions or when PF wants to sue in their jurisdiction someone who is outside the jurisdiction.**

**Facts:** ON couple is in BC, gets in accident with BC driver. ON couple gets insurance payments from their ON company and ICBC pays out insurance to them as well. Unifund tries to recover from ICBC as per ON legislation but ICBC claims it doesn’t affect them as non-ON company. This is a statutory cause of action.

**Issue:** Is ICBC subject to the ON insurance legislation? Or no, because that would be an ET application?

**Analysis:** Conflict of laws cases: 1) Where do you bring the action? Whose laws should court apply?

Overall question: Which province’s statute has the closest connection to the set of facts for the case?

**Real and substantial connection test.** Four considerations:

1. The territorial limits on the scope of provincial legislative authority prevent the application of the law of a province to matters **not sufficiently connected** to it.
2. What constitutes a “sufficient” connection **depends on the *relationship*** **among the *enacting jurisdiction*, the *subject matter* of the legislation and the *individual or entity sought to be regulated*** by it.
3. The **applicability** of an otherwise competent provincial legislation to out-of-province defendants is conditioned by the **requirements of order and fairness** that underlie our federal arrangements (from *Morguard*).

 a. **Order** in the federation would be ***undermined*** *if competing exercises of regulatory regimes are permitted*

 b. **Fairness** to the *out-of province defendant*

 🡪 However, these points weren’t clarified well – ambiguous meanings.

1. Principles of order and fairness, being purposive, are **applied flexibly** according to subject matter of legislation.

Binnie: There must be a **constitutional principle** for overlapping prov legislation 🡪 provincial paramountcy rule.

**Ruling**: Unifund can’t recover because accident lacks a sufficient connection to ON – can’t use ON legislation. ICBC does not carry on business in ON, nor is it authorized to. The accident took place in BC. ON law does not apply to ICBC.

**\*\*\*** Edinger likes Imperial Tobacco. It uses Unifund (which she hates) but does so in an acceptable way.

***British Columbia v Imperial Tobacco*, [2005] SCC 49**

**Reconciles *Churchill* and *Unifund* to give current approach to ET analysis.**

**Facts:** BC passes Act so they can sue tobacco companies for breach of duty to customers and recover costs for health care for smoking diseases. Tobacco companies claim the Act is invalid for ET (among other reasons).

**Issue:** Is the Act invalid because of extraterritoriality? Did Unifund override Churchill?

**Analysis:** Analysis must center on **pith and substance** 🡪 *Churchill*. The P&S must be within provincial legislative competence and ancillary/incidental effects don’t matter.

**First step:** Find the Pith and Substance and ID the head of power from s. 92 (*Churchill*).

 🡪 If P&S is **tangible**: Where is it located?

 🡪 If P&S is **intangible**: look for a **meaningful connection** to find location 🡪 *Unifund*.

 🡪 **Real and substantial connection test** 🡪 look for degree of connection Apply *Unifund* test.

 🡪 But try to use wording of “meaningful” and not real/substantial when in exam.

 🡪 Relationship between enacting territory, subject matter and persons/entities subject to it

**Note: If law is valid, incidental extraterritorial effects are irrelevant**.

This case reconciles *Unifund* and *Churchill Falls*.

**So**: When legislation is challenged as ET, first look to **pith and substance** (*Churchill*) 🡪 check **validity**. Then, if pith and substance is **tangible**, **location** is critical (valid if in prov, invalid if not). If it is **intangible**, apply the *Unifund* test to determine **applicability** 🡪 **meaningful connection** (i.e. real and substantial).

 🡪 See intro section of ET for full test.

Application to this case: The P&S is 92(13) Property and Civil rights 🡪 valid prov power. The subject matter is intangible 🡪 go to meaningful connection analysis. Court finds a meaningful connection: it is to recover money spent by BC on BC residents for diseases caused by tobacco companies’ products given to BC residents.

**Ruling**: The Act is valid.

**PART III – ABORIGINAL PEOPLES AND THE CONSTITUTION**

**Chapter 7 – Aboriginal Peoples and the Constitution**

1867: *Constitution*, s. 91(24) – *Indians and land reserved for Indians* – FEDERAL.

1876: *Indian Act*.

1973. *Calder* case shows that Aboriginal title is a justiciable issue.

1982: *Charter*, s. 35(1) (2) [recognizes existing Aboriginal/treaty rights; Indian, Inuit, Metis] 🡪 ***Sparrow***

**If there is a provincial law and an Aboriginal person claims it should not apply to them:**

Application of ***Dick*** to a case:

 1) Is statute valid? 🡪 Is it aimed at AP or in **relation to 91(24)?** Is it in relation to a provincial power?

 2) Does the statute affect Indians and their Indianness? Look at expert evidence. Is it essential to culture?

 🡪 If yes, it is incorporated into the *Indian* Act via s. 88. go to step 3.

 🡪 If no, it is of general use, doesn’t need s. 88, it is directly valid and applicable on its own force.

 🡪 You can still go to general paramountcy if there is a conflict.

 3) Does the statute concern an area that is already covered by the *Indian Act* or another federal law?

 🡪 If yes, the existing federal law rules and the incorporated provincial law is inapplicable.

 🡪 If no, it is valid law and Aboriginal people are subject to it.

**STEPS TO TEST PROTECTION UNDER AN ABORIGINAL RIGHT - S.35(1) – *Pamajewan, Sparrow***

1) **Characterize** the right claimed: narrow it down

1.5) Attach a label to the activity you want protected

2) Determine whether it is a **protected Aboriginal right**:

(a) Terms of a **Treaty**; OR

(b) **Van der Peet Test** (see ***Pamajewan***): Adduce evidence to support the right is an element of “practice, custom or tradition integral” to the culture of Aboriginal group – Band specific; AND

 (c) **Sparrow Principles**: Determine whether right existed at 1982

4) Sparrow **Infringement-Justification Test**:

 (a) Prima Facie **Infringement**

 (i) Relationship;

 (ii) Adverse restriction

 (b) **Justification**

(i) Valid legislative Objective;

 (ii) Balance of priorities

(iii) Other considerations that may ameliorate/accommodate restriction

**TREATY INTERPRETATION** (***Morris***):

Look at the **common intentions of the parties** at the time treaty was signed:

🡪 Context incl: historical, political, economical, and social

🡪 If common intention is general and broad, courts can read down the treaty (e.g. remove absurd things)

**TO CLAIM PROTECTION UNDER TREATY RIGHT:**

1) **Treaty interpretation** (above) 🡪 persuade court that treaty means whatever you want it to mean.

2) Demonstrate that the **right covers the actual act** of the claimant:

(a) Methods of activity **may evolve** with modernity; must be **flexible and liberal** to determining this issue

3) **Treaty rights exclude application of s.88** (***Dick***)

(a) Does the statutory provision **impair Indianness** in the claimant

4) **Meaningful Diminution OR Insignificant Interference**:

🡪 Against the law 🡪 argue “Meaningful Diminution”; For the law 🡪 argue “Insignificant Interference

**Summary**: **(1)** Validity: If provincial, is it in relation to 91(24)?

 **(2)** Applicability: In effect because of s. 88 of *IA*? Does it affect/impair an AR? (s. 35)

 **(3)** Operability: Conflict with fed law? (Definition depends if incorporated or on its own). ***Dick***.

 **(4)** Honour of the Crown? Fiduciary obligation? ***Guerin***.

 **(5)** S. 35 🡪 Is there an AR that can be protected? ***Sparrow, Pamajewan***.

 **(6)** Treaty rights? Interpret it how you want. Protected by s. 88 if *IA* and s. 35 of *Charter*. ***Morris***.

***Guerin v the Queen*, [1984] 2 SCR 335 - Fiduciary Duty**

**The Crown owes a fiduciary obligation to Aboriginal people (quasi-constitutional).**

**Facts:** Musqueam FN misled in negotiations to lease their land that was held in trust for them by the Crown. They were led to believe the terms of the lease were better than they were. Crown withheld this info for several years. Musqueam people then sued the Crown for breach of fiduciary duty.

**Issue:** Did the Crown owe a fiduciary duty to the Musqueam? If so, was this duty breached?

**Analysis:** ***Royal Proclamation*** – doesn’t matter if it applies in BC or not 🡪 the principles are present either way.

 🡪 this case does NOT make a ruling on whether or not in applies in BC – says it’s irrelevant here.

Crown owes a **quasi-constitutional fiduciary duty** to AP 🡪 should be looking out for their best interests.

 🡪 **Honour of the Crown 🡪 equitable obligation.**

 **🡪** This duty exists outside of the trust relationship and can be judicially enforced.

 🡪 Arises because AP must surrender land to the Crown (*Royal Proclamation*).

 🡪 This is not technically a Constitutional case, but it DOES set out Constitutional principles (e.g. honour).

**Definition of a fiduciary relationship**: “where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.”

**Ruling**: Crown breached its fiduciary duty to the Musqueam; Musqueam people get award of damages.

***Dick v the Queen*, [1984] 2 SCR 335 – Division of Powers**

**Interpretation of s. 88 of *Indian Act*. Removes IJI for Aboriginal people.**

**Facts:** Dick kills deer out of season, charged with BC *Wildlife Act* offence. He argues the Act is inapplicable to him because he is Aboriginal and under federal jurisdiction. He argued that the application of the Act impaired his status and capacity because his band hunts to live. This is an IJI argument.

**Issue:** Does Dick have IJI immunity against the Wildlife Act as a federal person?

**Analysis:** **First: statute’s validity**🡪 pith and substance. Is it aimed at Aboriginal people (invalid)? Or general (valid) and within provincial power?

**Second:** Must consider **s. 88 of the *Indian Act***:

 🡪 88. *Subject to the terms of any treaty and any other Act of Parliament,* ***all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province****, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.*

Beetz decides that Parliament must have intended more than to restate doctrine of IJI by inserting this provision.

So, **purpose of s. 88**: **incorporates by reference,** for the benefit or detriment of Indian people, **provincial laws which impair them in their Indianness**.

 🡪 This is contrary to typical IJI – **wipes out possible IJI arguments for AP**.

 🡪 So s. 88 only affects provincial statutes which would have otherwise been inapplicable due to IJI.

 🡪 **Incorporates the prov statutes as fed law, but if fed law already exists for that, it dominates and rules**.

 🡪 This is a sort of **paramountcy** rule w/conflict definition of “if the field is already covered.”

 🡪 It gives the feds the ability to apply paramountcy within their own conflicting laws.

If there is a **general provincial statute that affects everyone equally**, Aboriginal people are NOT immune.

 🡪 S. 88 is NOT needed for this – they apply *a proprio vigour* – by their own force.

 **SEE SUMMARY OF APPLICATION IN INTRO SECTION!**

NOTE: **Aboriginal LANDS can still possibly claim IJI.**

Determining Indianness: Look at evidence of cultural practices and how that activity fits in.

**Ruling**: Dick loses. Hunting is part of his Indianness but s.88 of *Indian Act* removes IJI immunity for AP.

***Haida Nation v British Columbia*, [2004] SCC 73**

**There may be a requirement for government to consult with Aboriginal peoples.**

***R v Sparrow*, [1990] 1 SCR 1075 🡪 Section 35 of *Charter***

**Interpretation of s. 35 of *Charter*. Test to justify infringements of the right.**

**Facts:** Sparrow charged with fishing with illegal net, contrary to fed *Fisheries Act*. Claims Aboriginal right to fish.

**Issue:** Did the *Fisheries Act* extinguish the right to fish? Interpretation of s. 35 of *Charter*.

**Analysis:** Section 35 creates a **bias against extinguishment** of Aboriginal rights 🡪 regulation can’t do it!

 🡪 Intention to extinguish must be **clear and plain**.

Approach to **infringements of s. 35** right is based on *Oakes*:

 1) Is there an Aboriginal right? 🡪 Burden is on group claiming the right. What is the right? Scope?

 2) Has this right been infringed or affected negatively? 🡪 Burden on AP to show infringement.

 🡪 Is the limitation unreasonable? Does it cause undue hardship? Denial to holder of rights of

 their preferred means of exercising that right? 🡪 These create prima facie infringement of s. 35.

 3) Can the infringement be justified? 🡪 Burden is on government.

 🡪 Valid legis objective? Balance of priorities? Fiduciary? Min. infringement? Compensation? Consultation?

S. 35 must be **interpreted in broad and purposive way** – interpret “rights” **flexibly** to **permit evolution** over time.

“Recognized and affirmed” 🡪 govt must exercise restraint in infringing, but they CAN encroach reasonably if it is for a sufficient reason 🡪 the rights are not absolute. NOTE: If right was extinguished pre-1982, it can’t be revived.

Recognizes right to fish for *food, social, ceremonial purposes* –right to commercial fishing not recognized or denied.

Right is **sui generis** 🡪 can’t infringe on vague thing like “public interest” 🡪 be more specific (e.g. conservation).

**Ruling**: Case sent back to trial to consider justification of the net restriction.

***R v Pamajewan*, [1996] 2 SCR 821 – s. 35 of *Charter***

**Test to find an Aboriginal right.**

**Facts:** Pf had high stakes gambling house. They had refused a provincial license on the grounds of being self-governed and then were charged under the *Criminal Code*. Pf argued that gambling was an essential part of culture.

**Issue:** Is regulation of high stakes gambling an “existing right” under s. 35 of the *Charter*?

**Analysis:** There is room for **band by-laws** under the *Indian Act* but they must be approved – this wasn’t.

**TEST TO FIND ABORIGINAL RIGHT:** In order to be an Aboriginal right, an activity must be an **element of a practice, custom or tradition integral to the distinctive culture** of the group claiming the right (*Van der Peet*).

 1) Identify exact nature of the activity claimed to be a right. Characterization/label – go narrow to get it recognized.

 2) Determine, based on evidence, if activity was a defining feature of culture in question pre-contact (*Van der Peet*).

 🡪 Factors: consider natures of the activity, govt regulation/statute, and practice/custom/tradition relied on.

 🡪 You must look at Aboriginal rights in light of the specific circumstances (specific history/culture) of each case.

 🡪 Must be **band and site specific**.

 🡪 NOTE: Then go to *Sparrow* for infringement/justification test (see summary at start of section).

**Characterization of claim is important**: you can go broad (self-government) or narrow (use and management of lands) 🡪 you will have more success if you go narrow.

**Ruling**: The claim fails; court finds that gambling wasn’t an integral part of the distinctive culture.

***R v Morris*, [2006] SCC 59 – Treaty Rights (see summary at start of section)**

**How to get protection for treaty rights.**

**Facts:** Morris caught “pit-lamping” in violation of *Wildlife Act*. Claims treaty right protection (liberty to hunt).

**Issue:** What is the scope of the treaty right?

**Analysis:** In **treaty interpretation**, you must find that interpretation that bests suits the **intentions of both parties.**

Here, it is concluded there is no right to hunt dangerously – Douglas couldn’t have meant this – can read down absurdities.

However, Douglas wanted them to hunt “as before” 🡪 traditional hunting methods, sustain themselves.

 🡪 Look at **historical/political/social/economic context** – Douglas didn’t want them getting hungry, attacking whites.

**Look at evidence** 🡪 is hunting at night a traditional method?

 🡪 Historical evidence, anthropologists, testimony of elders.

 🡪 Here, court says it is – df established this by balance of probabilities.

Court determines **methods of enjoying a right can evolve** 🡪 not frozen but must have evolved from original right.

Treaty rights **are not absolute** but there are **limits on infringement.**

 🡪 Section 88 of *Indian Act* protects treaty rights. You can’t incorporate a law that infringes a treaty.

 🡪 **Infringement can only be insignificant or a modest burden**.

 🡪 For infringement, turn to ***Sparrow***. Limitation reasonable? Undue hardship? Denies preferred means?

Treaties are not part of the *Constitution* but are protected by it through s. 35 of the *Charter*.

**Ruling**: Morris wins – hunting at night with illumination is covered under the treaty right.

**PART IV – THE CHARTER**

**Chapter 8 – Applicability**

**Section 32**:

(1) This Charter applies

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

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

🡪 If pf, apply this to something you’re subjected to. If df, say that it doesn’t apply.

Who can get the **benefit** of the *Charter*? Pay attention to the wording 🡪 not the same for every provision.

TWO QUESTIONS IN APPLICABILITY

* **Who can claim the benefit of the Charter?**
	+ Some rights apply to “everyone” or “anyone”, “individuals” or those charged with an offence
* **To whom does the Charter Apply?**

Private litigation: *Dolphin Delivery*.

Challenging the common law in private litigation: *Hill*.
Delegated govt entities are subject to Charter: *Slaight*.

Determining if a non-govt entity is govt (Control Test): *McKinney*.

Determining if an activity of a private entity is subject to Charter: *Eldridge*.

Underinclusiveness: *Vriend*.

All actions of a govt entity are subject to Charter: *Godbout.*

***RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573**

***Charter* cannot be invoked in private litigation with no government intersection.**

**Facts:** Anti-Purolator picketers were outside Dolphin so Dolphin applied for a common law injunction against them. Union argued that picketing is protected under s. 2 of *Charter*.

**Issue:** Does the *Charter* apply in this case?

**Analysis:** Judgment here was centered around the interpretation of **s. 32 of the *Charter*** 🡪 What is the meaning of “govt”?

MacIntyre says that **s. 32 cannot be invoked in private litigation** – the entity must be government.

The *Charter* **always applies to statutes**.

When you have 2 private parties who are not govt and there is no statute, *Charter* does not apply directly.

 🡪 *Charter* may **apply** **indirectly** – can modify the common law to make it consistent with *Charter* values (**see *Hill***)

If there are only private parts, there must be some sort of **government intersection** (e.g. D relies on a statute).

*Charter* **applies to executive/legislative, does not apply to judges/judicial branch** (judicial independence).

**Ruling**: *Charter* can’t be invoked in this case so the injunction stands.

***Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038**

**Delegated governmental entities are subject to *Charter* scrutiny.**

**Facts:** Guy gets fired wrongly. Arbitrator demands that his ex-employer write him a reference letter and basically dictates it. The ex-employer claims freedom of speech protection.

**Issue:** Does the *Charter* apply to the arbitrator’s order?

**Analysis:** **Government cannot escape *Charter* scrutiny through delegation**.

Analogous to colourability 🡪 **govt can’t mask itself in another form** and evade the *Charter*.

The arbitrator is a delegated government entity so can be scrutinized by *Charter*.

 🡪 Versus judges: arbitrators can be scrutinized directly, judges scrutinized in the laws they apply.

**Chain of statutory authority:** everything flowing down (regulations, by-laws, etc) from legislation is subject to scrutiny.

If legislation gives some discretion, that discretion must be exercised in a *Charter*-appropriate way.

Arbitrator’s power was derived from statute and is therefore subject to review.

**Ruling**: Yes, it applies. The arbitrator counts as government. However, the order was saved under s. 1 analysis.

***McKinney v University of Guelph*, [1990] 3 SCR 229**

**Non-government entities can be government for a particular purpose 🡪 Control test.**

**Facts:** Employee challenges university policy that mandates retirement at 65 under s. 15 (equality).

**Issue:** Are universities “government” under s. 32?

**Analysis:** Universities are created by statute but you must look at **how they operate** to determine if they are government.

**CONTROL TEST:**

 🡪 Look at **degree of control** and the **relationship** in determining if it is govt.

🡪 Look at **activities, self-government/operations** of the university

 🡪 Does the govt exercise control over the entity? Is it a traditional govt function? Is it furthering a govt objective?

 **NOTE**: These questions come from the dissent. They are still useful though.

 🡪 Questions: (1) **Are they government?** If no, (2) **Are they government for *this* purpose?**

Not all entities created by government are government themselves.

 🡪 Here, the university is too independent to be considered government for ALL purposes.

 🡪 Look at the **purpose**: Here, it is employer/employee relations – nothing to do with government.

**Dissent** (Wilson): LaForest too traditional. Cdns aren’t scared of govt, so no reason to find reasons to limit definition of govt.

**Ruling**: Universities are not government under s. 32.

***Douglas/Kwantlen Faculty Association v Douglas College* [1990] 3 SCR 570**:

- Community college found to be “simply a delegate through which the government operates...”

 🡪 Question is **how much control does the government exercise over the entity?** (Q of fact)

- Board was appointed/removable at pleasure by govt; govt could direct its operations by law at all times.

***Stoffman v Vancouver General Hospital* [1990] 3 SCR 483**:

- Hospital is found to not be government.

- Just because it wasn’t fully autonomous in deciding where money given to it by govt goes, it was still autonomous overall and not controlled by govt. Also decided that the Board was not a means for exercise of govt control.

***Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130**

**How to challenge the common law in private litigation.**

**Facts:** Df made defamatory comments against pf. Df said common law of defamation violated s.2(b) of *Charter* and that the defence of qualified privilege must be widened to conform with the *Charter*.

**Issue:** Does the Court have to alter the common law to make it conform to the *Charter*?

**Analysis:** To **challenge common law**, you must persuade Court it is **inconsistent** with the *Charter* and that they should change it to reflect *Charter* values 🡪 ***Dolphin Delivery*** is the origin of this idea.

🡪 Distinction b/w values and rights – Private litigation can’t be founded on a *Charter* right but can argue values once in court.

**Party claiming the *Charter* inconsistency** must:

 1) **Bear onus** of proving that the **common law fails to comply** with *Charter* values and **how** it does so; and

 2) When values are balanced, **show that the common law can and must be modified** (i.e. CL can’t be justified).

 🡪 Try to show how it could be fixed.

 🡪 Weigh the *Charter* value against the underlying principle of the common law.

No full *Charter* analysis is necessary (unless it is an extremely significant common law idea, such as same sex marriage).

**Ruling**: Court finds that CL of defamation is fine as is.

***Grant v Torstar*, [2009] SCC 61**

Court looks at defamation again and decides that *Charter* values require that a defence of responsible communication is required. This was done through *Charter* analysis.

***Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624**

**How to determine if the activity of a private entity is subject to the *Charter*.**

**Facts:** Deaf people claim hospital legislation violates *Charter* because it doesn’t provide for sign language translation services. The legislation did not explicitly list which services should be provided. This was the responsibility of a decision-maker.

**Issue:** Is the hospital violating the *Charter* by not providing sign language services?

**Analysis:** There are **two ways that legislation can violate the *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.

First way: Court finds that the legislation was not unconstitutional on face 🡪 didn’t explicitly rule things out, gave discretion.

Second way: It was the actions of a delegated decision-marker, who had the discretion to choose the benefits, so use this way.

**Next question**: Does the *Charter* apply to the Medical Services Commission and the hospitals?

 🡪 It is possible for govt to give authority to a body that is not subject to the *Charter*.

If **entity is found to be govt, *Charter* applies to ALL of its activities** 🡪 even ones that are generally “private.”

 🡪 Govt can’t evade scrutiny by implementing policy through secondary bodies.

**Private entities may be subject** to *Charter* **if acting to further a govt program or policy** 🡪 govt for *that* function.

 🡪 Merely serving a “public function” or being “public” not enough 🡪 must be implementing specific govt policy.

Court finds that the **hospital is carrying out a specific govt objective** 🡪 delivery of a comprehensive social program.

 🡪 Merely vehicle used by legis to implement a program (providing medical services is NOT internal management)

**TEST FOR PRIVATE ENTITY:** is there a “**direct and... precisely defined connection**” **b/w the nature of the activity in question and specific govt program or policy**? If yes, *Charter* is applicable!

🡪 NOTE: **For an entity, question is “degree of control.” For a function, it is “nature of the activity.”**

 🡪 Here, it resembles a govt service more than an insurance scheme 🡪 govt policy, acting as govt agent.

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

**Ruling**: Hospital not govt but serving govt function. Order to BC govt to fix the Act (note: no order to do something specific).

***Vriend v Alberta*, [1998] 1 SCR 493**

**Application of the *Charter* is not restricted to situations in which govt actively encroaches on rights.**

**Facts:** Man challenges AB’s human rights legislation because it left out sexual orientation as a protected ground.

**Issue:** Can a government omission by challenged under the *Charter*?

**Analysis:** “Matters within the authority” does not specify whether it applies to acts, omissions, or both.

Mere fact that challenged aspect of Act is its **underinclusiveness should not necessarily render the Charter inapplicable**.

**Ruling**: Yes, you can challenge govt omissions. SCC reads in sexual orientation to the AB legislation.

***Godbout v Longueuil*, [1997] 3 SCR 844**

***Every* action of a government entity is subject to *Charter* scrutiny.**

**Facts:** City of Longueuil has a resolution requiring that its employees live within city limits. Godbout signs this but eventually moves into a neighbouring community and is fired. City says employer/employee relations are private, not subject to *Charter.*

**Issue:** Is every single function of a government entity subject to *Charter* scrutiny?

**Analysis:** Yes, **actions of government entities are ALL subject to *Charter* scrutiny.**

Issue of **colourability**: govt can’t evade *Charter* by incorporating things into private contracts.

**Municipalities are government**, so everything they do is subject to the *Charter*, even if it’s a “private” thing.

This case reinforces the idea that a government can’t shirk *Charter* obligations by delegating to other entities.

**Ruling**: Everything government does is subject to *Charter* so the resolution is struck down.

**Chapter 9 – Justification**

Justification is essentially a statutory interpretation exercise.

Interpretation provisions: ss. 27 (multicultural) and 28 (gender).

***Hunter*** (1984): 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!

**Justification of infringements**: **s. 1 🡪 *Oakes* Test**.

1. 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

2. Rights are subject to reasonable limits prescribed by law as can be demonstrably justified in a free/demo. 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**

**FREE & DEMOCRATIC VALUES**

* These underlying values and principles of a free and democratic society are the genesis of rights and freedoms guaranteed by Charter.
	+ 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*

***R v Nova Scotia Pharmaceuticals*, [1992] 2 SCR 606**

**How to argue against a law by using vagueness.**

**Facts:** Guys charged with a Combines Investigation Act offence but say that the provision is too vague.

**Issue:** When can you argue that a law is not actually a law because it is too vague?

**Analysis:** There are three times when you can argue vagueness as a defence:

 1) Invoke **s. 7 of *Charter* 🡪** if law is too vague, it would go against fundamental values of justice.

 2) Argue overbreadth/vagueness in **s. 1 analysis 🡪** Too vague to be “prescribed by law”.

 3) More specifically, in the **minimal impairment stage of s. 1 analysis**.

 🡪 Remedy under s. 1 could possibly be under s. 24 (you can’t strike down a law that doesn’t exist)

 🡪 So s. 7 = law violates fundamental justice, and s. 1 says there is no law because it’s too vague.

Laws cannot have a standardless sweep 🡪 must be able to **control prosecutorial discretion** (as in *Roncarelli*).

 🡪 People need to be able to know when to control their activities – require **fair notice**.

 🡪 Vagueness is inconsistent with the **rule of law** – people need to know what prohibitions exist to be able to comply.

 🡪 Must be able to give rise to legal debate 🡪 judges and lawyers need to be able to make sense of it.

**Ruling**: Find that it isn’t too vague and doesn’t violate s. 7 of the *Charter*.

***R v Oakes*, [1986] 1 SCR 103**

**Test for justification of a *Charter* rights infringement.**

**Facts:** Challenge that a reverse presumption provision of the *Narcotic Control Act* violates the s. 11(d) right to be presumed innocent until guilty. If found in possession of drugs, presumed to be for dealing unless accused establishes otherwise.

**Issue:** Does the provision violate s. 11(d)?

**Analysis:** The **burden of proof of a rights violation is on the challenger** (standard of proof: BoP civil)

The **burden of proof of justification is on the government.**

**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.

 i. Are the measures adopted **rationally connected** to the objective?

 ii. Do the means **minimally impair** the right?

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

Note: “Minimally impair” doesn’t have be the absolute minimum 🡪 just needs to be justifiable.

Infringements that are more serious will require a higher level of justification from the Crown 🡪 proportionality.

**Ruling**: The provision was found to be unproportional and therefore invalid.

***Newfoundland (Treasury Board) v NAPE*, [2004] SCC 66**

**Financial emergencies can be sufficient objectives.**

**Facts:** NFLD promised to increase women hospital workers’ wages but then NFLD ceased to get transfer payments and became poor. They put out a wide freeze on wages and promised to increase the women’s wages in a few years.

**Issue:** Was the failure to increase the wages a justifiable violation of s. 15 (quality) of the *Charter*?

**Analysis:** Court held that there was a violation of equality rights – this is not at issue here.

Issue: Is there a pressing and substantial objective here?

 🡪 Lamer said in another case that **money is never a justification for a rights infringement.**

 **🡪** However, shouldn’t say *never* – an NS court said **that finances can’t be invoked in *normal* times**.

 🡪 Here, this wasn’t a normal time. NFLD was facing a severe financial crisis.

 🡪 So here, **severe financial emergencies are accepted as a pressing and substantial matter**.

 🡪 It helped that it was **temporary** and made up a significant portion of the budget cuts 🡪 significant impact.

 🡪 Significant portion = rational connection. Temporary = minimal impairment. Also proportional.

**Judicial notice**: Here, court takes surprise notice of legislative discussions. Try to ask judge to take notice of things so that you aren’t surprised when he does 🡪 focus them on what you want. Courts can take notice of things that are **public knowledge.**

 🡪 Evidence is required during the justification process.

Courts should keep **deference to legislature** in mind 🡪 try not to be overly critical of their policy decisions.

**Ruling**: Legislation was upheld as valid – the rights infringement was justified.

***Alberta v Hutterian Brethren of Wilson Colony*, [2009] SCC 37**

**Cost/benefit analysis part of the *Oakes* test.**

**Facts:** Hutterites are mad that AB wants to take their picture (to stop ID theft) because cameras steal their souls or something.

Hutterites: need licenses to maintain way of life, this forces us to choose b/w religious integrity and compliance with the law.

AB: We need to curb ID theft and this can best be achieved by requiring photos on driver’s licenses for a database.

**Issue:** Is the requirement of photo licenses a justifiable violation of the s. 2 right to freedom of expression (religion)?

**Analysis:** An infringement of s. 2 is found – that isn’t at issue here. 4th branch of the *Oakes* test is at issue here.

**First 3 branches of *Oakes* test are concerned with effect and substance of the law**.

**4th branch takes into account the negative effects of the law on the affected group 🡪** costs to individual or group.

McLachlin: Pictures needed to maintain the integrity of the database system. Hutterites can hire a driver or suck it up. The Majority claims that there is no evidence suggesting that they can’t continue their ways with this requirement.

**Dissent**: Saying a database will help ID theft is pure speculation. 700K people don’t have licenses, so why is it so important that these 250 Hutterites have pictures on their licenses. Telling them to hire a driver violates their independent way of life.

**Ruling**: Court finds that it is justifiable.

**Chapter 10 – Remedies**

You should always have a remedy in mind before you start a *Charter* argument 🡪 tell court what you want!

Two remedy provisions:

1. **s. 24 (1)** – For govt action or when pf’s *Charter* right was infringed and the situation calls for a

remedy specific for that individual 🡪 a remedy that is *just and appropriate*.

🡪 Examples: injunction, damages, restitutionary order, anything consistent w/separation of powers, rule of law, and ordinary remedy considerations.

1. **s. 52** – For laws that are inconsistent with *Charter*.

🡪 ***Schachter*** gives the guidelines for applying these remedies.

🡪 Suspension of declaration of invalidity, reading in (***Vriend***) or out, severance.

Note: A combination of s. 52 and s. 24 has not yet happened or is extremely rare, but SCC has not prohibited it.

Note: Declarations of inapplicability (e.g. IJI) and inoperability (e.g. paramountcy) are also remedies.

***Schachter v Canada*, [1992] 2 SCR 679**

**Guidelines for application of ss. 24 (*government* *acts*) and 52 (*laws*).**

**Facts:** Father sues under s.15 because adoptive parents can get better benefits than him. Govt conceded infringement.

**Issue:** Does s. 52 require than the law be struck down or can judge extend benefits to natural parents through s. 24(1)?

**Analysis:** **Uses of s. 52**: strike down, read in, read out, and suspend declaration of invalidity to give govt time to fix it.

**Uses of s. 24:** provides an individual remedy for actions taken under a law that violate an individual’s *Charter* rights.

Use **s. 52 when you are challenging a *law*** - use **s. 24 when you are challenging a governmental *action.***

LaMer has concern with reading in 🡪 must try to be careful to not let judicial branch become legislators.

 🡪 Negative remedies are easily accepted – traditional and standard.

**Severability**: consider a provision in comparison to rest of statute 🡪 can it be severed? (Generally must request this remedy)

 🡪 Question: would legislature still have enacted the statute if they’d known this provision would be severed?

 🡪 If yes, you can sever. If no, you can’t (govt will just repeal the entire statute b/c provision was critical).

**Reading in**: omissions/underinclusivity. Must consider **budgetary limitations** and compare sizes of omitted/included groups.

 🡪 Only do this if **consistent with legislative intent**. Would they have done it/be happy with it? Only way to fix it?

 🡪 Reading in and severing can only used in the clearest of cases.

**Suspension of declaration**: Can’t do this too often/too long because *Charter* breaches continue during it.

 🡪 Warranted if suspension would cause danger to public, threaten rule of law or is invalid b/c of underinclusiveness.

Court must always consider **separation of powers** 🡪 can’t overstep their boundaries and interfere with legislative branch.

Three Steps to Find Remedy:

1. 1. Id extent of inconsistency
2. 2. Determine whether inconsistency should be struck down/severed/read in and which parts
3. 3. Determine whether the declaration if invalidity of that portion should be temporarily suspended

**Ruling**: Yes, s. 52 requires it be struck down if unconstitutional. No, s. 24(1) can’t do that.

***Vriend v Alberta*, [1998] 1 SCR 493**

**Reading in for underinclusiveness and issue of severability.**

**Facts:** Man challenges AB’s human rights legislation because it left out sexual orientation as a protected ground.

**Issue:** What is the remedy for a deliberate government omission/underinclusiveness?

**Analysis:** 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 underinclusive legislation if it **respects role of legislature and the purpose of the *Charter*.**

**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?

**Ruling**: Here, reading in homosexuality is least intrusive remedy. Striking down HR laws is worse than reading in GAY.

***Doucet-Boudreau v Nova Scotia (Minister of Education)*, [2003] 3 SCR 3**

**Guidelines for what a “just and appropriate” remedy under s. 24 requires.**

**Facts:** Parents wanted schools to provide French-language classes, as required by s. 23 of the *Constitution*. This is said to be a *Charter* violation. Trial judge gave remedy of ordering province to use “best efforts” to provide facilities and programs by particular dates and retained jurisdiction to hear status reports. Province argues that “best efforts” is too vague and that the judge can’t give himself jurisdiction to keep overseeing the case because it interferes with the executive branch.

**Issue:** What is the appropriate remedy for government inaction?

**Analysis:** Remedies require a **purposive approach**. A remedy must be **responsive** (purpose of the right must be promoted) and **effective** (purpose of the remedies provision must be promoted).

There are broad considerations for determining whether a s. 24 remedy is **just and appropriate**:

 1) The order must meaningfully vindicate the plaintiff’s rights.

 2) It must employ legitimate means within constitutional democracy and the court must not depart unnecessarily or

 unduly from their judicial role (i.e. respect separation of powers).

 3) The remedy must be a judicial one.

 4) It must be fair to the defendant. (No substantial hardship)

 5) The remedies of s. 24 can’t be tied down 🡪 s. 24 must be allowed to evolve as cases arise.

 🡪 Must be **flexible and responsive to the needs of the case** (allows a certain creativity).

**Criticism**: This order interfered with executive branch by encroaching on public administration. Orders should be final and not modifiable once made. Order was unclear. Questioning the province’s performance = political scrutiny by a judge. Other alternatives were available (i.e. contempt of court if they didn’t comply).

**Ruling**: SCC upholds the trial judge’s order.

***R v Ferguson*, [2008] SCC 6**

**Constitutional exemptions under s. 24.**

**Facts:** Man claims that a 4 year minimum sentence for manslaughter with a firearm is cruel and unusual punishment.

**Issue:** Does the minimum sentence violate the *Charter* in general? Does it violate it in the case of this complainant?

**Analysis:** Court finds that the law itself is not cruel/unusual 🡪 s. 52 cannot be used as a remedy.

Court also rejected the **constitutional exemption under s. 24** that Ferguson sought.

 🡪 Note: Court did not say that they are never available – just not in this case.

**Parliament’s intention** was that there would be a minimum for everyone – an exemption would be in direct conflict to this.

 🡪 **S. 24 remedies cannot undermine the purpose of the law**. (so it is NEVER available for minimum sentences)

 🡪 To do so would violate separation of powers and encroach on legislative powers.

Other considerations: **jurisprudence** (not binding but important), **remedial scheme of *Charter,* impact on rule of law** in granting exemptions in such cases.

**Ruling**: Court rejects this and says the 4 year minimum is fine for as a law and as a punishment in this case.

***R v Khadr*, [2010] SCC 3**

**Courts can’t order executive government to do things using royal prerogative power.**

**Facts:** Guy stuck in Gitmo for years applies to SCC to ask for review of govt’s decision not to ask for his repatriation (s. 7).

The Federal C.A. ordered govt to request repatriation under s. 24 of the *Charter*. Govt claims separation of powers violation.

**Issue:** What is the remedy for a challenge to the validity of a government omission?

**Analysis:** SCC says that **courts can’t order govt to do things using their royal prerogative power**.

 🡪 Only willing to make orders regarding normal executive power.

**Ruling**: Appeal allowed. There was a s. 7 violation but this wasn’t normal exec power – it was royal prerogative power.

***Vancouver v Ward*, [2010] SCC 27**

**An award of pecuniary damages is possible as a s. 24 remedy.**

**Facts:** Guy is suspected of smashing pie into Chretien’s face so cops search his car and arrest him while he is being filmed.

**Issue:** Can you sue for monetary damages under s. 24 as a remedy for a breach of *Charter* rights?

**Analysis:** There are **5 steps to sue for damages**: (1) Pf must prove the *Charter* breach. (2) Pf must justify damages as a remedy – functional justification (e.g. compensation [including intangible interests like embarrassment], deterrence, vindication of *Charter* rights). (3) Government has burden of bringing up counter-factors of why damages are inappropriate. (4) Quantum assessment. (5) This must be done in a court of competent jurisdiction.

NOTE: These aren’t private law damages or a tort. Proper approach to awarding damages should be incremental as cases arise.

**Ruling**: Plaintiff wins $5000 for getting strip searched.

**Chapter 11 – 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 FOE (see ***Irwin***)?

 🡪 Are there are limitations? Qualifications? What are they?.

 **2)** How do you make a case for an infringement? *Oakes* test is flexible.

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

***Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 - Broad interpretation (see extra handout)**

**How to find an infringement of 2(b) using a direct/purpose approach.**

**Facts:** Irwin opposes a law that restricts advertising to kids.

**Issue:** Is commercial advertising included within s. 2(b)?

**Analysis:** **First step**: plaintiffs must **bring themselves within the right.**

 **🡪** Pf is a corporation here but are included – “everyone” includes corporations.

**Second step**: Pf must prove an infringement of that right.

 **1) Pf must show that the activity being regulated is promoting a principle of freedom of expression**.

 1) **Seeking and attaining the truth**

 2) **Participation in social and political decision-making**

 3) **Individual self-fulfillment and human flourishing**

 2) Does the law **explicitly infringe**? Or do the **implications/consequences** of the law have an infringing effect?

 🡪 For explicit **purpose** approach, the legislation must aim at regulating content

 🡪 Irwin takes the direct **purpose** route 🡪 **must show that legislation is aimed at content or meaning**

After the infringement has been proven (here, infringes **commercial expression**), the court moves to the **s. 1 *Oakes* analysis**.

 🡪 Here, pressing/substantial objective is to protect **vulnerable persons** (kids).

 🡪 Protecting a vulnerable persons group is always pressing and substantial.

 🡪 For FOE, pressing/substantial objective can be found using social science evidence.

 🡪 Minimal impairment stage: court will just look for **reasonable impairment**, not absolute minimum.

**Commercial expression** is protected by the *Charter* but **is not at the core of 2(b)**.

Interpretation of **scope of 2(b) can be broad** because we have s. 1 to cut it down.

Note: Court says that **violence is not covered by 2(b)**.

**Ruling**: There is a violation but it is justified through s. 1.

***R v Keegstra*, [1990] 3 SCR 697**

**“Heart” of 2(b). Hate speech. Approach to s. 1 analysis for 2(b) violations (minimal impairment).**

**Facts:** Lunatic teaches his students that the Holocaust wasn’t bad and Jews suck. Charged with promoting hatred under CC.

**Issue:** Is hate speech protected under s. 2(b)?

**Analysis:** Court determines that **hate speech is not violence**.

Hate speech is clearly full of (stupid) content (i.e. it is within s. 2) and CC was clearly aimed at it, so there is an infringement.

 🡪 Hate speech NOT defined – Court says it doesn’t include private conversation.

 🡪 However, hate speech is on the fringes of 2(b) – far from the core.

 🡪 **The closer an activity is the heart of 2(b), the harder it will be to justify and infringement**.

**Approach to s.1:** s.1 about free & democratic values: court must be sensitive to them to avoid rigid and formulistic approach.

 🡪 Court must also show **deference to Parliament** – prohibition can be relatively speculative.

**Pressing and substantial objective?** Yes, stopping idiots from spreading hatred and stupidity through the world.

**Minimal impairment:** Parliament doesn’t have to use the least intrusive method as long as:

 1) The measures aren’t redundant; and

 2) The measures further the objective in ways alternative responses couldn’t; and

 3) The measures are proportionate to a valid s. 1 aim (principles of a free and democratic society from *Oakes*)

 🡪 You don’t want overly broad laws because they have a **chilling effect** on legitimate speech.

**Dissent**: Prosecuting hate speech is dumb because it gives them a platform and doesn’t reduce hatred (i.e. no rational connection 🡪 Parliament’s intent is good but you must look at actual effects of the law – Can’t be speculative and give deference to Parliament). They are second guessing Parliament’s methods.

 🡪 Also thinks hate speech is political and therefore at the core of 2(b).

**Ruling**: There is an infringement of 2(b) but it’s justified under s. 1.

***R v Butler*, [1992] 1 SCR 452**

**Pressing/substantial objective – “the norm.” Vagueness. Obscenity. Physical expression and 2(b).**

**Facts:** Guy is charged with selling obscene material at his porn shop. He claims the CC laws violate 2(b).

**Issue:** Can Parliament criminalize obscenity or is it protected by 2(b)?

**Analysis:** The Court determines that **obscenity is expression within 2(b)** but at the **fringe** of 2(b).

 🡪 Consideration: If the activity is for profit, it will be afforded less protection.

 🡪 Infringement here is one of **purpose** – direct regulation of content.

Expression is self-fulfullment of the most basic kind. Example of something at the “heart” of 2(b): **artistic expression.**

**How to determine “norm” (obscenity)**: “What community would tolerate others being exposed to on basis of the degree of harm that may flow from such exposure. Harm in this context means that it predisposes persons to act in an anti-social manner. Anti-social conduct for this purpose is conduct which society formally recognizes as incompatible with its proper functioning.”

**Pressing/substantial objective**: Butler argues the law targets morality (original purpose from long ago – you **can’t shift a law’s purpose** [*Edwards*]) but Sopinka says it targets harm and always has.

 🡪 Society’s standards evolve – you must **reformulate so that it is consistent with Parliament’s original intent.**

 🡪 If you persuade court that the purpose is to prevent harm to individuals/society, you’re good to go.

 🡪 If you think original intent is no longer good, get creative and make up something that *could* have been intended.

**Rational connection:** There is conflicting evidence so a rational connection is all that is needed.

Issue of **vagueness**: Argue it in 2 spots – (1) Pre-*Oakes* (“prescribed by law” or s.7) and (2) Minimal impairment (***NS Pharms***)

**Ruling**: Infringement is justified. Hardcore porn is harmful to society, particularly women, which justifies encroachment.

***Ramsden v Peterborough*, [1993] 2 SCR 1084**

**Public space limitation on 2(b). Indirect effect approach to infringement of 2(b).**

**Facts:** Guy posters telephone poles in violation of an absolute ban by-law. Claims 2(b) violation.

**Issue:** Is there a right under 2(b) to expression in public places?

**Analysis** (by Iacobucci)**:** Postering is a protected activity 🡪 promotes political/cultural/artistic/social communication.

Three judges put forth tests for public property/expression in the past – Iacobucci says they’re all good to go.

**Criteria for determining when public property will be considered a “public arena” fit for expression (from LHD):**

 1) The traditional openness of such property for expressive activity.

 2) Whether the public is ordinarily admitted to the property as of right.

 3) The compatibility of the property’s purpose with such expressive activities.

 🡪 Is postering on public property (in particular poles) furthering one of the purposes of 2(b)?

 🡪 i.e. Test should be based on 2(b) values, not on characteristics of types of property (McLachlin)

 🡪 Is attaching posters to public poles compatible with the poles’ use of carrying power lines?

 🡪 i.e. Expression takes a form that contravenes/is inconsistent w/function of the place (Lamer)

 4) The impact of the availability of such property for expressive activity.

 5) The availability of other public arenas in the vicinity for expressive activities.

Court finds that postering on some public property, including poles, is protected under 2(b).

Effect of the by-law was to limit expression – absolute prohibition on postering prevents discourse.

 🡪 This case uses the **indirect effect approach** (not direct purpose).

 🡪 Govt was aiming to stop littering, not to control expression 🡪 But law’s effect was to control content.

The objective (preventing littering) is pressing and substantial.

Minimal impairment: It is **more difficult to justify a complete ban** than a ban of a form of expression (e.g. time/place).

 🡪 There are ways this ban could have been minimized and still have promoted the objective.

 🡪 **Try to argue total ban** if you want the law to be struck down.

**Ruling**: By-law is overly broad and infringes 2(b) so it is struck down.

***Montreal (City) v. 2952-1366 Québec Inc,* [2005] 3 SCR 141 (note in class, also given in *GV Transit v CFS*)**

**Public property and 2(b).**

**Facts**: Noise pollution by-law, music coming from a club into the street.

**Issue:** Is the by-law a violation of 2(b)? Is the public place where one would expect protection for expression?

**Analysis**: To answer this, following factors should be considered (in light of 3 purposes of 2(b):

(a) Place’s **historical or actual function**? (Historical use for public discourse indicates consistent w/2(b) purposes);

(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?)**.** Is it essentially private despite being

govt-owned? Does the current function require privacy or limited access? Compatible with open public expression?

**Ruling**: There is an infringement as a public street is compatible w/2(b). However, it is justified by s. 1.

***RJR-MacDonald v Canada*, [1995] 3 SCR 199**

**Approaches to characterization of the objective in *Oakes*. Use of evidence in justification of infringement.**

**Facts:** Tobacco companies challenge ban on advertising cigarettes on other products + putting health labels on packaging.

**Issue:** Are these bans violations of s. 2(b)?

**Analysis:** It has already been shown that s. 2(b) includes commercial expression in ***Irwin Toy***.

Freedom of expression includes the **ability NOT to say certain things**.

Two approaches to characterisation of pressing and substantial objective are put forth:

**Majority Approach (McLachlin):**

 🡪 **Narrow approach**: If objective stated too broadly, importance may be exaggerated and analysis compromised.

 🡪 Only look at the objective of the impugned provisions – This is what is infringing. Here, to prevent advertising.

 🡪 **Standard of proof for govt is balance of probabilities** at all stages of proportionality analysis.

 🡪 Can use common sense, scientific demonstration unnecessary.

 🡪 Full prohibitions are only acceptable if govt proves that only that can achieve their objective.

 🡪 There is **no link between claimant’s motive and degree of protection** (e.g. profit motivation is irrelevant).

**Dissent Approach (LaForest):**

 🡪 **Broad approach**: Overall objective is to protect public health and reduce tobacco consumption.

 🡪 *Oakes* test is not a substitute for s. 1 🡪 makes more room for s. 1, be flexible with *Oakes*.

 🡪 **Profit motive** is far from the core of 2(b) 🡪 low degree of protection.

 🡪 Definitive evidence not necessary – this would be an impossible burden. **Use common sense, social science**.

 🡪 Consider **context** when determining appropriate standard of justification and in weighing the relevant evidence.

 🡪 Govt must only show they had **reasonable basis** for believing a connection existed – low standard.

**Point**: You can **use either approach**. This case tells you that you can play around with characterization of the objective.

 🡪 If you want law to be upheld, go for a broad approach.

 🡪 If you want it to get torn down, give a narrow objective that is less pressing and substantial.

 🡪 Evidence not necessary but try to lead evidence (e.g. social science) if possible – don’t have to prove, just lead.

 🡪 In particular, **bans require evidence**! Partial you can get away without it, but must justify a full ban.

**Ruling**: The laws don’t minimally impair so they fail the s. 1 analysis.

***R v Bryan*, [2007] SCC 12**

**Right to receive information. Factors for whether evidence or deference is required. Total bans.**

**Facts:** Man in BC announces Atlantic Canada election results before BC polls have closed. Charged w/*Elections Act* offence.

Federal govt says it is aimed at informational equality and to promote public confidence in the electoral system.

**Issue:** Is the *Elections Act* infringing on the 2(b) right?

**Analysis (Bastarache):**

There is **a right to receive information** 🡪 it is at the **periphery** of 2(b).

 🡪 **Significance**: Don’t have to wait for person whose positive right was violated to complain. EVERYONE can.

 🡪 E.g. in RJR, customers could complain about the advertising restrictions.

Infringement because dispersal of info limited. Pressing/substantial objective because it is elections and democracy.

**Factors for whether evidence is required and what degree of deference to govt** (from *Thomson Newspapers* and *Harper*)**:**

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

 🡪 Look at these in the **context** of the provision – can use them to dispense with evidence and defer to govt!

 🡪 You MUST work through these for evidence in political expression cases, likely in other cases too.

Here, hard evidence not required as it doesn’t exist – just policy analysis & speculation. OK bc of egalitarian model in Canada.

**Dissent (Abella):**

There are other alternatives to these provisions – staggered voting hours, etc. A total ban is not required.

 🡪 It is **difficult to conclude that a total ban ever minimally impairs**. There is a **lack of proportionality**.

 🡪 So, if you want it struck down, argue total ban! Even time-limited ban is a total ban for that time.

**Evidence here is too speculative**, inconclusive, largely unsubstantiated – doesn’t meet requisite “**reasoned demonstration**.”

 🡪 However, harm of suppressing political speech is profound 🡪 deleterious effects > benefits of the ban.

You must also look at **practical concerns** – e.g. effect of ban on the media, people in Atlantic can’t get their own results, etc.

**Ruling**: Bryan loses. Provisions are upheld.

***Baier v Alberta*, [2007] SCC 31**

**Positive rights claims. Activity doesn’t have to be purely or predominately for expression.**

**Facts:** Law against school employees being school trustees.

**Issue:** Is running for the school board a form of expression? If so, has 2(b) been unjustifiably violated?

**Analysis:**

There is **no requirement that the activity be purely or predominately expression to qualify** for 2(b) 🡪 can be incidental.

**Positive versus negative rights**: Negative is telling the govt to get lost, positive is asking them to do something.

Issue here: teachers are complaining about being unable to access a statutory platform.

**How to deal with a positive rights claim** (*Dunsmore*):

 1) Is the activity in question a form of expression?

 2) Does pf want a positive entitlement to govt action or the right to be free from govt interference? If positive, go to 3.

 3) Consider the 3 ***Dunsmore* factors** 🡪 all 3 must be satisfied for an infringement to be made out:

 i. Claim grounded in fundamental freedom of expression rather than in access to particular statutory regime.

 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).

 iii. The government is responsible for the inability to exercise the fundamental freedom.

 4) If all 3 satisfied, move to s. 1 analysis.

Here, 1 and 2 not met. Teachers want access to a regime and interference is not substantial (not total ban, other vehicles exist).

Must persuade court of a **substantial interference** with 2(b) right to get them to mandate access.

 🡪 Only in exceptional circumstances will a claim for a positive right work so legislators are forced to do something.

**Ruling**: Teachers lose, law is upheld. No right to access statutory platform to express views.

***Greater Vancouver Transit Authority v Canadian Federation of Students*, [2009] SCC 31**

**General overview of FOE cases. Issues with advertising limitations and limiting forms of expression.**

**Facts:** BC Teacher’s Federation tried to buy ad space on sides of buses b/c CFS wanted to encourage young people to vote. Transit denied the ads on the basis that they were not permitted by Transit’s advertising policies which banned political ads.

**Issue:** Can govt entities, in managing their property, disregard the right of individuals to political expression in public places?

**Analysis:** Translink is govt within s. 32 🡪 Govt basically controls them 🡪 **routine and regular control**.

 🡪 Therefore the *Charter* applies to ALL of their activities.

Does claim fall in 2(b)? It involves **political expression but it is a form being excluded**, not group (e.g. teachers not banned).

 🡪 This is not a claim of underinclusion. It is a limit on content. Distinguished from *Baier*.

 🡪 Use ***Montreal***’s 2 factors (listed 2 pages above) instead to determine if there has been an infringement:

 🡪 Do ads include expressive content for 2(b)?

 🡪 Is 2(b) protection removed by method or location of the expression?

 🡪 If it is protected by 2(b), does the transit authorities’ policy deny that protection?

Is side of a bus a **public space**? Yes. It is **not *inconsistent* with buses’ use to have political expression on their sides**.

 🡪 Govt argued CFS seeking a **positive right** but court characterizes it as a limitation on 2(b) for public space.

 🡪 Ask: How long have buses been used for expression? Are they used for expression? Bus’s primary function?

Is the **policy of BC Transit a law**? It is company policy, not a statute (see *Eldridge*, *Slaight*).

 🡪 Was govt entity authorized to enact the impugned policies? Are the policies binding rules of general application?

 🡪 If yes, they are law.

 🡪 Where the policies sufficiently precise and accessible? If yes, they were “prescribed” by law for s. 1.

 🡪 Yes, court includes it is law within s. 1 (use s. 52). If it was state action, use s. 24.

 🡪 Internal, informal policies more likely to escape scrutiny than external ones (i.e. less likely to be found as “law”).

This fails rational connection - Not all political expression offends bus riders as to damage “safe/welcoming environment.”

 🡪 Citizens are expected to put up with some controversy in a free and democratic society.

 🡪 Also fails minimal impairment: it is a total ban, can’t be upheld.

BUT doesn’t mean you can’t limit advertising: can consider presence of kids, audience’s ability to choose to be in that place.

 🡪 **Limits on advertising are contextual**.

**Remember to address remedy** – especially if s. 24 is involved. Don’t leave it to the court to figure out themselves.

**Point**: This case basically combines everything we’ve covered. 2(b) claim, govt control, public places, finding things as “law”, positive rights, s. 1 analysis, rational connection, total ban, minimal impairment.

**Ruling**: Yes, there is an infringement. CFS wins.

**Chapter 12 – Access to Justice**

***BCGEU v British Columbia (Attorney General)*, [1988] 2 SCR 214**

**Rule of law and *Charter*. Physical access to justice against *Charter* rights. *Charter* applies to judicial orders.**

**Facts:** Union picketing at entrances to all BC courthouses. Judge issued an injunction that they couldn’t picket there.

**Issue:** Could the judge do this? Did it violate ss. 2(b)(c), 7, 11(a)(c) and (d) of the *Charter*? If so, is it justified?

**Analysis:** The **rule of law is the very foundation of the *Charter***.

Judicial proceedings have no value at all unless they exist 🡪 Need them for *Charter* values to be enforced.

**There cannot be a rule of law without access to justice**.

 **🡪 Affirmative statement that timely, physical access to justice through the courts is an aspect of rule of law.**

**However, there is no specific *Charter* right for access to justice 🡪 *Charter* values are applied instead.**

The picket line impeded access to justice in both effect and intent and had inevitable affects on the administration of justice.

🡪 Denial of entry of witnesses, litigants, lawyers, and public at large.

**Justice delayed is justice denied**.

Requirement that entrants get picketers’ permission is a massive interference with legal/constitution rights of BC citizens.

**Contempt of court** = conduct designed to interfere with proper administration of justice. It is “criminal” in that it transcends the limits of any dispute between particular litigants and constitutes an affront to the administration of justice as a whole.

Picketing of the courthouses constituted a criminal contempt.

Is the judge’s order subject to *Charter* scrutiny?

The *Charter* applies to common law (*Dolphin*) and picketing for labour disputes is protected by s.2(b) (*Dolphin*).

S. 1 analysis: must consider individual values/interests and balance them with public/societal values and greater public interest.

Assuring unimpeded **access to courts is plainly an objective of sufficient importance**/is pressing and substantial.

There is a rational connection between the injunction and the objective.

The injunction impaired the 2(b) rights minimally – it left them other ways and places to express themselves.

Injunction was proportional – it was not intended to vindicate the dignity of courts/judges but rather to maintain access to the institution in our society directly charged with responsibility of ensuring respect for the *Charter*.

🡪 Therefore, a significant element of the objective of the injunction was to protect *Charter* rights.

**Ruling**: The order of an injunction was justified.

***British Columbia (Attorney General) v Christie*, [2007] SCC 21**

**There is no positive right to access to justice in that there is no general constitutional right to counsel.**

**Facts:** *Social Service Tax Amendment Act* imposed a 7% tax on legal services for the purpose of funding legal aid in the province. However, the tax went into general revenue (impossible to know where it actually went). Christie claimed his clients could not pay their legal bills and the *Act* required him to pay the tax even if he had not been paid. He claimed the net effect of the tax was to make it impossible for some of his clients to retain him to pursue their claims. He won at BCSC and BCCA.

**Issue:** Is there a general fundamental constitutional right to access to justice? To access to a lawyer?

**Analysis:** First argument: a general fundamental constitutional right to access to justice by access to lawyers:

The right claimed here is broad– respondent must show Constitution mandates this particular form of access.

Logical result of Christie’s claim is a constitutionally mandated legal aid scheme for virtually all legal proceedings.

The Court is not in a position to assess the cost to the public that the right would entail 🡪 **fiscal implications** can’t be denied.

It would also lead people to bring claims before courts who would not otherwise do so.

**S. 92(14) gives provs power to pass laws in relation to administration of justice**.

🡪**Implies that provs have power to impose at least some conditions** on how/when people can access the courts.

Second argument: Right to have a lawyer is constitutionally protected as part of rule of law or a precondition to it.

Rule of law has at least 3 principles: (1) The law is supreme over the govt and individuals; (2) Creation and maintenance of an actual order of positive laws; (3) The relationship between the state and the individual must be regulated by law.

While access to justice is therefore not a currently recognized aspect, the rule of law may include additional principles.

The right to counsel is recognized as having constitutional status in certain situations.

However, a **general right to access to a lawyer is NOT a general aspect of rule of law**.

🡪 If it was a general right, the 10(b) right to counsel would be redundant.

🡪 Right to counsel is historically understood to be a limited right that extended only, if at all, to a criminal context.

🡪 Constitution, jurisprudence and historical understanding of rule of law do not foreclose the possibility that a right

to counsel may be recognized in specific and varied situations. But they also do not support a general constitutional

right to counsel.

Here, there is not an adequate evidentiary base to say that the tax will adversely affect access to justice, so can’t kill the tax.

**Ruling**: Christie loses.

**Chapter 13 – Constitutional Litigation**

***Constitutional Question Act*, RSBC 1996, c 68**

**Rules on how to bring a Reference to a court.**

**1**. If Lieutenant Governor in Council refers something to CA or SCC, that court must hear it.

**2.** An opinion, with reasons, must be given. Dissenting justices can also give reasons.

**3.** If the matter involves the constitutional validity of an Act, the Attorney-General of Canada must be given notice.

**4.** BC (and other provinces, if they have an agreement w/the fed govt) must also be notified.

**5**. CA or SCC can order that people or groups who would be interested in the reference be notified and heard.

**6**. You can appeal the outcomes of references like a normal case.

**7.** The reasons of the court must be published in the Gazette.

**8**. (1) Definition of “constitutional remedy” (🡪 s. 24(1)) and “law” (enactment w/in meaning of Interpretation Act)

(2)(3) Law can’t be declared invalid and no remedy can be given until AG of BC and Canada are notified.

(4)(5) Notice must be in accordance with this section and there must be at least 14 days notice.

(6)(7) If AG of BC or Canada is involved in proceedings, AG is a party and has the same rights as any other party.

**9.** (1) SCC can hear an action from AG of BC or Canada to determine validity of an Act, even if no further relief is sought. (2) It is sufficiently constituted if both AGs are parties and (3) it can be appealed like a normal case.

***Finlay v Canada (Minister of National Revenue)*, [1986] 2 SCR 607**

**Public and Private Interest Standing**

**Facts:** For 46 months, 5% of P’s social allowance was deducted monthly in payment of a debt he owed to the Crown for overpayment of allowance. P claims that s. 20(3) of the Social Allowances Act, which allows this to happen, is contrary to the provincial undertaking from the Canada Assistance Plan to provide assistance to people in need because the deduction makes it so he gets less than needed for basic requirements. He also says that s. 444 of the Municipal Act, which makes the cost of municipal assistance to a person in need a debt owing to the municipality, is in breach of the provincial undertaking as well.

Counter: P does not have requisite standing in law to maintain the action.

**Issue:** Does a private individual have standing to sue for a declaration that certain payments out of the Consolidated Revenue Fund of Canada are illegal on the ground that they are not made in accordance with the applicable statutory authority?

**Analysis:** **Level of hearing required** to determine standing depends on nature of issues raised and whether the court has sufficient materials before it (allegations of fact, considerations of law) and argument for a proper understanding to be possible at a lower level (such as a preliminary hearing).

Only the Attorney General has traditionally been regarded as having standing to assert a purely public right or interest.

**AG’s exercise of discretion of whether to give consent is not reviewable by courts**.

🡪 Here, a **private individual cannot sue for declaratory or injunctive relief without AG’s consent unless he shows a sufficient private or personal interest in the subject matter of the proceedings**. **Two cases where P can sue w/o AG**:

 **1)** Where the interference with the public right is such that some private right of his is at the same time interfered with

 **2)** Where no private right is interfered with, but P, in respect of his public right, suffers special damage peculiar to

himself from the interference with the public right 🡪 Must be exceptionally prejudiced by the wrongful act

“Private right” = a right, invasion of which gives rise to actionable wrong w/in categories of private law (CL or statutory right)

“Special damage” = doesn’t just have to be to P alone, not limited to pecuniary loss, “has special interest in the subject matter”

**Private interest standing (1):** General rule requires a “**direct, personal interest**.”

🡪Here, there is no doubt that the P has a direct, personal interest in the alleged provincial non-compliance.

🡪However, the relationship between the prejudice allegedly caused to the P by the provincial non-compliance is too

indirect, remote or speculative to be sufficient causative relationship for standing for private right under general rule.

**Public interest standing (2):** Must show “**genuine interest as a citizen”** (*Borowski*)

 🡪 There must also be no other reasonable and effective manner in which the issue may be brought before the court.

Concerns about expanding public interest standing (and what resolves that issue): Concern about allocation of scarce judicial resources and need to screen out mere busybodies (requirement of genuine interest of the citizen); concern that in the determination of issues the courts should have the benefit of the contending points of view of those most directly affected by them (requirement that there be no other reasonable and effective manner in which the issue may be brought before court); Concern about the proper role of the courts and their constitutional relationship to the other branches of government (standing is a question of law and therefore clearly justiciable and fits within judicial duty).

**If respondent recognized as having standing to seek declaratory relief, no reason why he shouldn’t be recognized as also having standing to seek the ancillary injunctive relief** 🡪 Granting these reliefs is a matter of judicial discretion

**Ruling**: Yes, Finlay has standing and can seek injunctive relief. His statement of claim has a reasonable cause of action.