MINI- CONSTITUTIONAL CAN

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# General Constitutional Issues

## Unwritten Constitutional Principles

* Rule of Law (*Quebec Secession Reference*, *Imperial Tobacco*)
* Judicial Independence (*Judges Enumeration Reference*)
* Subsidiarity (*Canadian Western Bank*)
  + Decisions affecting individuals should, as far as reasonably possible, be made at the level of government closest to the individuals affected
* Federalism – not precisely defined judicially. Very open for debate
* Constitutional Supremacy

## Remedy Being Sought by the Client

* Always remember to discuss what remedies the client is looking for. Remedy will determine how we may approach the case

## Constitutional Arguments

* Classic Canadian defense
* Should not be the first defense and only a last resort if the case cannot be argued on the merits
* Matter of statutory interpretation to characterize the subject matter and the effects of the statute
  + Wide/narrow can lead to different effects and possible colourability (as seen in *Reference Re Assisted Human Reproduction Act*)
* Courts do not evaluate wisdom and policy of the legislation in federalism cases
* Broad purposive approach – living tree doctrine

# Federalism

## Validity – Is the statute valid under a head of power?

If specific statutory provisions are challenged, apply ANCILLARY DOCTRINE (Page 7, *City National Leasing*)

* 1. **Characterize the statute in question** 
     1. Object and purpose of the statute (*Siemens*)
        + What did legislature intend overall?
        + Evidence: legislative history, preamble of statute, form and content of statute, stated intent is of little relevance (*RJR MacDonald*), extrinsic evidence is admissible (*Reference Re Assisted Human Reproduction Act*) – but judges can give different weight to it
        + Look for the dominant feature vs merely incidental
          - Matter must be sufficiently specific
     2. Examine the effect of the legislation (*Morgentaler*)
        + **Legal Effect:** always relevant – what the statute is supposed to do?
          - **Look beyond the statute and consider the facts**
        + **Practical Effect:** sometimes relevant (*Morgentaler*), what is the statute actually doing?
          - **Consider extrinsic evidence**
          - **How is the statute administered?**
     3. Look for actual intent of the legislature & ulterior motives to show colorability
        + Speed, press releases, timing of events, extrinsic evidence
     + Keep in mind the double aspect doctrine and one matter can fall under both
  2. **Consider the following general principles**
     + Keep in mind the following principles
       - Exclusiveness: a particular matter will come within a class of subjects in one list only, unless it is a double aspect matter
       - Concurrency: there are some concurrent heads of power. Conflicts to be resolved under paramountcy.
       - Exhaustiveness: constitution is meant to be exhaustive. Provincial 92(16) or POGG
       - Progressive Interpretation: living tree approach
  3. **Put the pith and substance into a head of provincial or federal power**
     + POGG – residual power (*Local Prohibition Case*)
       - National Concern (**page 10**)
       - Emergency (**page 11)**
         * **Form is important**
     + Criminal Law (**Page 12-16**)
       - Prohibition
       - Penalty
       - Purpose
     + Trade & Commerce
       - International and Interprovincial Trade (**page 17)**
       - General Regulation of Trade Affecting the Whole Dominion **(page 18)**
     + Taxation test (**Page 19)**
       - Federal (direct or indirect)
       - Provincial (direct only)
         * Is the “tax” a regulatory charge? (**Page 20**)
         * License fees are allows (**Page 22**)

## Applicability – Interjurisdictional Immunity

* Test for IJI (*Canadian Western Bank*)
  + 2 step test

## Operability – Paramountcy

* Test for Paramountcy (*La Farge*)
  + Frustration of purpose?
  + Operational conflict? (yes vs no)

## Extra-territoriality

**Test for Extra-Territoriality**

* 1. **Validity: Identify the pith and substance/dominant feature of the statute being attacked, and identify a provincial power under which it might fall**
* Churchill Falls: If pith and substance is outside province, fails here.
  1. **Applicability: Determine if the pith and substance reflects the territorial limitations on the head of power** (*Imperial Tobacco*)
* **2(a):** If tangible, locate the physical place. If it is in province, there no problem. If it is outside province, try to apply *Unifund* (but use stat interpretation first).
* **2(b):** If intangible, find the location of the intangible subject matter
  + Must be *sufficiently connected* to the province
    - Look at relationships among enacting jurisdiction, subject matter of legislation, and individual or entity subjected to it. (*Unifund*) 🡪 legislation must respect the dual purposes (order and fairness) of the territorial limitations in s.92
    - **For exam:** look for real and substantial connection, but overriding concerns are “order and fairness”. Also, Major J in Imperial Tobacco used “meaningful” connection instead of “real and substantial”. Unclear what this means, but SCC has held that this requires a closer nexus than R&C connection, which is minimal. We can use either on exam depending on case we are using (CF v. IT)
    - **For exam**: any prov legislation purporting to regulate contracts or transactions will be hardest statute subject to deal with b/c contract might not have sufficient connection to B.C.
  + Applicability of an otherwise competent provincial legislation to out-of-province Ds is conditioned by requirements of *order and fairness* that underlie our federal arrangements (*Unifund*)
    - Principles are purposive and applied flexibly (*Unifund*)
      * Does not want to allow for conflicting rules between provinces
      * A relationship inadequate for app of regulatory legislation may be sufficient to permit courts to take jurisdiction over a dispute

# Aboriginal Rights

* Provincial Statute Challenged
  1. Is the statute a valid provincial statute? (ie. not in pith and substance in relation to 91(24))
  2. Does the statute apply to this defendant?
     + Apply on its own force
       - statutes that impair “indianess” cannot apply on its own force
     + Apply by virtue of Section 88 (*Dick v the Queen*)
       - Section 88 of the Indian Act incorporates provincial laws, even if they impair “indianess”
       - Exceptions:
         * Conflict with a treaty right
         * Conflict with an act of Parliament
         * Inconsistent with Indian Act
         * If it touches on matter already dealt with under the Indian Act
         * Provincial laws cannot *affect* treaty rights (*Morris)*
  3. Is there paramountcy? (*Dick v the Queen*)
     + Apply on its own force 🡪 apply the traditional paramountcy doctrine
     + Apply by virtue of Section 88 🡪 but keep in mind Section 88’s “paramountcy rule” seems broader than the traditional paramountcy. It does not require a conflict to be inoperable
* Federal Statute Challenged
  1. Pith and Substance under a federal head of power?
     + 91(24) allows all matters in relation to Indians *and* their lands
* Aboriginal Rights being “affected” – laws cannot extinguish aboriginal rights post 1982
  1. Is there an existing aboriginal right? (Van der Peet, Pamajewan)
     + Key is characterizing the right broadly or narrowly (*Pamajewan*)
  2. Has the right been extinguished? (*Sparrow*)
  3. Is the right infringed? (onus on party establishing the right)
     + - Undue hardship?
       - Unreasonable limitation?
       - Deny the right-holder the preferred means of exercising the right?
  4. Justification (onus on the Crown) - *Sparrow*
     + Compelling and Substantial Objective
       - Conservation
       - safety
     + Consistency with the Crown’s fiduciary obligation
* Treaty Rights being “affected” (*Morris)*
  1. Provincial laws?
     + Interpret the treaty right
       - Insignificant infringement 🡪 no problem
       - Infringement
         * Cannot use section 35 to justify (*Morris*)
         * Issue is one of applicability

impair indianness 🡪 cannot apply in its own force

also cannot apply by virtue of Section 88 because it excludes treaties

* 1. Federal laws?
     + Interpret the treaty right
       - Insignificant infringement 🡪 no problem
       - Infringement
         * Justify under Section 35 (*Badger)*
* **General notes about aboriginals**
  + Duty to consult (*Haida Nation*)
  + Honor of the crown (*Guerin*)
  + Treaty/aboriginal rights cannot be “extinguished” but can be regulated and justified under section 35

# Charter of Rights and Freedoms

## Charter Applicability

* 1. **Is the defendant eligible to claim the Charter right?**
     + Consider the wording of the right being claimed, “everyone” “every person” “every citizen”
  2. **Is the other party subject to the Charter? – Section 32**
     + Legislature
       1. All federal legislation (*Slaight Communication)*
       2. All provincial legislation (*Slaight Communication)*
       3. All delegated legislation (use *GVTA* to see if it indeed is considered legislation or internal policy) (*Slaight Communication)*
          1. Includes discretion/rights/authority exercised under a statutory grant
       4. Common law (*RWDSU, Hill*)
          - Charter does not apply directly to the common law but the Charter values are influential
          - Charter applies directly to common law in *Hyde*
     + Government (courts excluded)
       1. Entity (created by statute or otherwise controlled by government)
          - Control test (*McKinney*) or Implements government policy (*McKinney)*

Highly fact dependant (see *Douglas College)*

Inquire into the very nature of the entity and virtue of the degree of governmental control exercised to see if it can be characterized as government (*GVTA*)

* + - * + All activities are covered (*Godbout)*
      1. Function (*Eldridge*)
         * Carrying out of government function by an otherwise private entity?
         * Only these functions are subject to Charter, not everything (*Godbout*)

## Charter Justification

* 1. **Find out if there is a right infringed (characterization is important)+ charter applies**
  2. **Onus on the Crown to justify infringement under Section 1**
     + Evidence is very important
     + Balance of probabilities (*Oakes, but not entirely clear)*
     + “prescribed by law” (ie. there must be a law, and not too vague)
       1. “law” (*GTVA,* internal policy vs law)
       2. “vague” (*Nova Scotia Pharma)*
          - Can be addressed under:

Section 7

Section 1 in limine (too vague to be “prescribed by law” – see GVTA)

Minimal impairment under Oakes

Overbroad effects cannot be minimal impairment

* + - * + Reasons for no vagueness

Fair notice to the citizens

Limitation of enforcement discretion

Provide adequate basis for legal debate

* + - Free & Democratic values to measure against
      * 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/political institutions which enhance participation of individuals and groups
    - “demonstrably justified in a free and democratic society” (*Oakes test)*
      1. **Pressing and Substantial Objective**
         1. Financial reasons cannot be pressing and substantial, but financial *crisis* is? (*Newfoundland Treasury)*
      2. **Proportionality Analysis**
         1. Rational Connection
         2. Minimal Impairment

Financial reasons (*Newfoundland Treasury)*

* + - * 1. Balance the effects of the measure and the objective which was identified (*Hutterrian)*

Inquire into the salutary effects associated with the legislative goal

Security concerns

Government need not show the benefits actually happened – just reasonably beneficial

Consider deleterious effects

Seriousness of the limit varies case-to-case

Consider impact on Charter values

Take into account perspective of the claimant in a multicultural society

Absence of meaningful choice is SERIOUS

## Freedom of Expression

* 1. **Does the activity fall under 2(b)? (aka does it convey meaning?) (*Irwin Toy*)**
     1. Does the activity constitute expression?
     + Remember that 2(b) is very broad and covers a range of activities – some (such as political expression) being at the core
       - Farther away from the core may change the amount of deference and weight in Section 1 analysis.
       - Limitations/balancing of interests should be considered under Section 1 (*Keegstra)*
       - **Key is characterizing activity as being close to the core (***Butler)*
       - **Right to receive information is covered at the periphery** (*Bryan*)
* Commercial expression is included
  + Economic motivation \*may\* make activity less worthy of protection and justifiable under S1 (*Butler*)
* Child pornography and hate speech also included (but at the periphery)
  + Hate speech not at the core of “free and democratic society” (*Keegstra)*
* Violence is excluded
* **Activity must convey meaning** **in order to be protected**
* **Must not exclude from 2(b) on the basis of the content or meaning being conveyed** (*Keegstra)*
* **Activity need not be purely/predominantly expression to count under 2b (***Baier*)
* **Generally a negative obligation to be left alone, not a positive obligation** *(Haig – see part b below)*
  + - * Unless it is underinclusive (then argue section 15)
      * Government under no constitutional obligation to extend platforms or megaphones to anyone
      * Situation may arise where government must take positive action to make the fundamental freedom meaningful (but courts don’t like this, it is like forcing through legislation)
* Physical activity can be a form of expression if there was some deliberate choice by creator to convey some meaning *(Butler)*
  + Purely physical activity is different from “physical activity that conveys some meaning”
    1. Is the claiming a positive right?
       - *GVTA*
         * When content is restricted, it cannot be characterized as underinclusion
         * Underinclusion involves exclusion from the means
         * cannot interpret so broadly that any “support” from government invokes positive rights analysis
       - Negative 🡪 not an issue
         * BUT an issue does not become a negative claim only because there was access to a previous regulatory scheme (and now the scheme is gone)
       - Positive 🡪 satisfy the 3 Dunmore factors
       1. Claim is grounded in a fundamental charter freedom rather than in access to a particular statutory regime
       2. Claimant demonstrates exclusion from a statutory scheme has the effect of a substantial interference with his 2b rights or has the purpose of infringing rights under 2b
          1. Exercise of freedom need not be impossible but claimant must consider other alternatives to exercise those rights
          2. Statutes with purpose of infringing = NONO
       3. Government is responsible for the inability to exercise the fundamental freedom
    2. Is this activity on public property protected by 2(b)? (*Montreal City)*
       - **Key:** Whether the place is a public place where one would expect constitutional protection for free expression on the basis that expression in that place does NOT conflict with purposes which 2(b) is intended to serve?
       - Consider:
         1. Historical or actual function of the place

Historical use 🡪 protected

Actual function

Space essentially private, despite being owned publicly?

Function of the place compatible with open public expression?

* + - * 1. Any other aspects of the place suggesting that expression within in would undermine the values underlying free expression.

Changes in society/technology can affect the spaces in question

* + - * **When government allows its property to be used for certain expressive activities, it does not commit itself to that use indefinitely**, but if a change affects a charter right, any constitutional requirement which attach to the new function must be met *(GVTA)*
  1. **Is there an infringement? (ie. the government legislation/action has a purpose or effect of restricting 2b)**
     1. Purpose
        + Singling out an activity or type of expression
        + Restricting the form of expression to effectively control the expression
        + **Not** an infringement if the purpose is to control only physical consequences of certain human activity – regardless of meaning conveyed
        + If government’s purpose is to control harmful consequences of activities then avoid aiming at:
          1. Harms to certain individuals which consists of their coming to have false beliefs as a result of those acts of expression
          2. Harmful consequences of acts performed as a result of the expression, where the connection between the acts of expression and the harmful acts consists merely in the fact that the act of expression led the agents to believe these acts to be worth performing
        + **Key question to determine if aiming at harmful physical consequences**: Does the mischief consist in the meaning of the activity or the purported influence that meaning has on the behavior of others? Or does it consists of the direct physical result of that activity?
     2. Effect
        + Case-by-case
        + Must show the effect of government limited freedom of expression that promotes one of the following values:
          1. Truth-seeking
          2. Participation in social/political decision making
          3. Self-fulfillment and human flourishing
  2. **Justification under Section 1**
     + **Keep in mind deference to Parliament and Canada’s international HR obligations, section 15, section 27 in interpreting the Charter** (*Keegstra*)
     + **Contextual factors (***RJR-Macdonald***)**
       - **Minority**
         * Section 1 is a normative inquiry requiring the courts to take into account both the nature of the infringed right and the specific values/principles upon which the state seeks to justify infringement (focusing on principles of S1 makes justification easier)

Show flexibility with regard to factual/social context of the case

* + - * + Scope/nature of problem relevant in determining standard of evidence/deference
      1. **Majority**
         * Government must provide evidence and DEMONSTRATE
         * Deference is allowed but must have a bottom line if the problem is not completely understood
    - **Nature of Deference to Parliament (*Bryan*** *–* but not limited to political expression only)
      1. Nature of harm and ability to measure it
         * Use common sense and logic if there is no determinative social science evidence
         * Balance of probabilities not needed when objectives are matter of “principles and values in a free and democratic society”
      2. Vulnerability of the group protected
      3. Subjective fears and apprehension of harm
      4. Nature of the infringed activity
    1. Is there a law in question? (*GVTA)*
       - Distinguish between policies legislative in nature and administrative in nature
       - Administrative: relates to implementation of laws. Internal and informal. Mostly interpretive aids in application of statute/regulation. No statutory authority required.
       - Legislative: policy establishing a norm of general application enacted pursuant to a rule-making authority. As long as the rules are binding and establish rights/obligation and sufficiently accessible and precise
    2. Is it too vague?
       - Vagueness under Section 1 (*Butler)*
         * Too vague to be “prescribed by law”?
         * Too obscure to be incapable of interpretation with any degree of precision using ordinary tools?
         * Vague NOT equal to flexible
         * KEY IS WHETHER COURTS CAN GIVE IT SENSIBLE MEANING

Judicial interpretation yields intelligible standard 🡪 met the threshold for S1

* + 1. Justification under Oakes test
       - **Pressing and Substantial Objective**
         * *Irwin Toy*

Protecting a vulnerable group is always pressing and substantial

Legislature can exercise judgment to find the vulnerable group

Courts give legislature a margin of appreciation and not 2nd guess

* + - * + *Butler*
        + Avoiding harm to society will be easier than just saying morality
        + **Not limited to the objective intended at the time, these can evolve based on changing circumstances (as long as still consistent with original intent)**

Note the shift purpose doctrine

* + - * + *RJR-MacDonald*

One of the keys is characterizing the objective

Broad = easier to justify

Narrow = harder to justify

* + - * **Proportionality**
        1. Rational Connection

*Keegstra MINORITY*

Consider not only Parliament’s intention but actual effect of the legislation

*Butler*

Reasonable basis in light of conflicting evidence and such

*Ramsden*

Types of restriction (assuming it is partial prohibition) need to be rationally connected

*RJR-MacDonald*

Reasonable basis (minority) vs asking if it would be surprising to find otherwise when we use reason and logic? (majority)

* + - * 1. Minimal Impairment

*Irwin Toy*

Courts give legislature a margin of appreciation and not 2nd guess

Reasonable evidence to support the means taken

Social science evidence acceptable

*Keegstra*

Legislation cannot be overbroad

Parliament need not find the least intrusive approach, they can make choices

*Butler*

Need not be perfect legislative scheme but must be appropriately tailored in the context of the infringed right

Total ban = no good (*Ramsden)*

Exceptions = easier to pass

Legislature not limited to restricting activities, they can prohibit

*RJR-MacDonald*

Full prohibitions require government to show that full prohibition is necessary to enable its objectives

Balancing of the rights happen at next stage

* + - * 1. Cost-Benefits Analysis

Economic motivation (*Butler*) will have less weight

## Access to Justice

* BCGEU
  + There cannot be a rule of law without access to the courts
  + Assuring unimpeded access to the courts is plainly an objective of sufficient importance to warrant overriding the constitutionally protected right of freedom and is pressing/substantial
* Christie
  + Right of access is not absolute. Legislature can pass laws in relation to administration of justice in a province. There is power to impose some conditions on how and when people access the courts
  + Right to access legal services is only protected under 10(b) and 7
  + No general right to legal assistance (constitutionalizing this is crazy high cost)
  + Right to counsel may be recognized in some specific cases

# Remedies

## Federalism Remedies

* Declaration of Invalidity (section 52)
* Inapplicability (IJI)
  + **Defendant specific**
* Inoperability (Paramountcy)
  + **Defendant specific**
* Reading Down
  1. Take meaning most consistent with Constitution
  2. Interpret statute narrowly to comply

## Charter Remedies

* Section 52
  + Apply to the law as a whole, not specific for the defendant
  + Usually applies to **laws**
  + Includes: (*Schacter) – detailed formula in Schacter*
    1. **declaration of invalidity**
       - whole statute when there is no pressing and substantial objective
       - inconsistent portions when there is no rational connection
       - when it fails 1st branch of Oakes
       - *may* be appropriate when 2nd/3rd branch of proportionality test is not met
    2. **reading down (***Vriend)*
       - declare inoperative the inconsistent part and such part of the remainder of which cannot be safely assumed that the legislature would have enacted without the inconsistent portion
    3. **reading in (***Vriend)*
       - requires some precision on the basis of the requirements.
       - Edinger doesn’t like this so must explain why it is appropriate
    4. **suspending declaration of invalidity**
       - separate question from the above
* Steps to find remedy under 52
  1. Define extent of inconsistency
     + Not pressing & substantial objective -> strike the whole thing down
     + No rational connection 🡪 strike down parts of the legislation
     + Minimal impairment/Cost-benefits failure 🡪 case by case
  2. Decide whether reading in/down is appropriate
     1. Legislative objective is obvious and doing so would further that objective and lesser interference than striking it all down
     2. Choice of means to further objective is unambiguous, acceptable intrusion
     3. Reading in/down would not intrude into legislative budgetary decisions substantially that it changes the scheme
  3. Decide whether to suspend declaration of invalidity
     1. Potential danger to public?
     2. Offends rule of law?
     3. Cases of underinclusiveness as oposed to overbreadth
* Section 24 (*Schacter*)
  + Specific remedy for the defendant
  + Usually applies to **actions**
  + Definition of “appropriate and just in the circumstances” (*Doucet)*
    1. Remedy should meaningfully vindicate the rights and freedoms of claimant
    2. Remedy should employ means that are legitimate within the constitutional democracy
    3. Remedy should invoke powers/functions of the court and not step over the line
       - No administrative supervising
    4. Remedy should be fair to the party against whom the order is made (no substantial hardship)
    5. Remedies should be flexible and responsive to the needs of a given case. Section 24 must be permitted to evolve
  + **Constitutional Exemptions** (*Ferguson*)
    - Not available for Section 12 (minimal sentence violations)
    - Rare remedy- factors to consider
      1. Intrusion on role of legislatures (exemptions would change legislative intention)
      2. Exemptions are akin to reading in a discretion into statutes
      3. Rule of law – raises uncertainty if done case-by-case. Might as well strike it down
      4. S24(1) + s52(1) remedy is unusual and only where additional relief is necessary to provide claimant with effective remedy
      5. S24(1) cannot have broad application or else 52 is useless
    - Mostly an ancillary remedy to relieve claimant’s burden during the period of suspension
  + Does not give right to courts to reach into prerogative powers, in those cases only can issue a declaration (*Omar*)
  + Monetary damages are available (*Ward*)

# Constitutional Litigation

* Lis inter partes: in actual litigation
* Declaration: requires public interest standing (Finlay). Courts will only issue a declaration and not strike anything down
* Reference by the provincial or federal government
* **Section 8 of Constitutional Questions Act requires notice to be given to AGs**
  + **Notice not explicitly required to determine paramountcy, but better be safe than sorry**
* *Finlay*
  + Can challenge regulatory (*McNeil*) and directory (*Thorson*) legislation
  + Key: if there is a serious issue as to its invalidity, a person need to show that he is affected by it directly or that there is a genuine interest in the validity as a citizen AND that there is no other reasonable and effective manner in which the issue may be brought to court