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| Colonial Origins to AutonomyConstitution1. Statutes: Constitution
2. Common Law provisions: judicial interpretations which provide principles
3. Conventions/Customs/Practices – unwritten practices, not justiciable
4. Values/Goals – not binding but useful for interpretation, not justiciable

Federal system – (Federalism: In Preamble [7])1. Central Govt: some authority over entire geographic region and represents at international
2. Division of country into geographically identifiable regions or units (provinces, territories)
3. Legislative jurisdiction is divided btw central and regional govts
4. Division of legislative jurisdiction is governed by rigid (can’t be amended unilaterally by one or the other level) and written constitution
5. Rules to deal with conflicts between central and regional
6. Judicial review required (umpire – ex SCC)

1. Royal Proclamation of 1763* Based on prerogative pwrs – not statute

geographical regions defined and set * not a federal system – unitary states

creation of legislative councils and courts (judicial) – 2 branches – English Common law* sets up institutions of government
* “summon general assemblies, in such Manner and Form…(p7)” – used to refer to procedural
* “public peace, welfare, and good government” (p7) – present in constitution act 1867 – gives plenary legislative power, no other limitations on legislative powers, nothing is restricted or reserved – yet: later we need to cut it down to fit into a federal system

rights given to aboriginals – for benefit and protection2. Colonial Laws Validity Act 1865* Imperial Statute

Gives jurisdiction to draft an entrenched constitutionColonial statutes can modify English but not Imperial | 3. British North America Act 1867* Imperial Statute w/o amending procedures

Legislative division between Prov and FedGives s92(14) and s96 courts4. Report: Dominion-Provincial Relations 1867-1939Objective of Conf: political and economical5. Statute of Westminster 1931* Imperial Statute directed at multiple dominions
* Repeals Colonial Laws Validity Act

Colonial Statutes can modify Imperial Statutes with exception of BNAAParliament can Legislate extraterritorialy (Omission: Provinces)6. AG for Ontario v AG for Canada – 1947Judicial Independence: SCC is highest court of appeal* Prior: had Crim but not Civ
* Legal Reason: have extraterritoriality
* Principle of self-governance
* Principle of uniformity of Legal Decisions

7. Ref re Amendm’t of the Const of Canada, 1982 (Patriation Reference) Convention can never become legally enforceable in common lawBut constitutionalty (sm C) includes conventions: Federal Principle is in Preamble and is Justiciable* Facts: amend BNAA to include Charter, Amending Procedures, Extend Prov leg jurisd
* Issue: can fed can do this unilaterally?
* Held: no, unilateral **Δ** would be against federalism, changes require substantial agreement

8. Constitution of 1982Legislative Independence9. Ref Re Secession of Quebec 1998Reference Power: statute gives executive ability to ask legal questions if precise and provide enough info for court to answerPrinciples and Values Underlie Const - cannot trump each other, may be unwritten: Federalism, democracy, constitutionalism, rule of law, respect for minority rights (used all the time even if not as judicable) |
| Separation of Powers & Rule of Law* Inherited Judiciable Principles
1. Look at where they have been derived from
2. Look for some idea of how define and apply

**Rule of Law** – defn and application varies [13, 14]* Characteristics [14]:
1. law is supreme over government and individuals
2. requires the creation of positive laws that support normative order
* Source: Preamble

**Separation of Powers** [10, 11, 12,15]* Institutions of Gov
* Source: common law and preamble [15]

**Division of Powers** * Fed v Prov
* Source: federalism, 91 and 92

10. Question of Prohibitions 1607* Limits on King’s powers

Separation of the Executive from Judicial11. Question of Royal Proclamation 1610Prerogative: matters in which no authority or precedent (it is not CL, statute or custom)Executive cannot legislate12. AG Canada v AG Ontario 1937(Labour Conventions)* Facts: fed leg on labour following internat treaty
* Issue: Prob with separation or div of powers?

S 132 – gives Exec power to make treaties but Leg job to implement them – otherwise distroy federalismS 91 – ‘treaty implementation’ fails as a POGG matter of national concern13. Roncarelli v Duplessis 1959* Facts: Admin decision to revoke liquor licence due to religious connections to Jehovah witnesses

Arbitrary discretion is inconsistent with RoL (justiciable) – administration needs to be impartial and have integerty | 14. Re MN Language Rights Act 1985* Facts: MN bilingual in const, cannot unilaterally legislate to make Eng only
* Issue: Theory of Invalidity is retroactive, how preserve RoL when 2 parts are in conflict?
* Held: delay ruling to allow time to relegislate

RoL: Characteristics and Source; Theory of Invalidity15. Re Remuneration of Prov Court Judges 1997* Issue: decrease in salaries and court days result in violation to right to fair trial?
* Holding: creates new constitutionally entrenched level of gov: Compensation Committee

Judicial Independence source: preambleCore characteristics of independence of judiciary (it is unwritten principle) – 1) security of tenure, 2) financial security and 3) administrative independence.Validity* Judicial assessment of whether legislation within bounds of CA (Approach to Division of Powers Cases
1. Interpret subsection or head of power relied upon
* Can use: precedents, federalism, unwritten principles and policies
1. Characterize legislation and decide true matter
* Need to find legislative intent: pith and substance

16. Edwards v AG Canada 1930* Issue: women a ‘person’ for senate appointments? Yes.
* Statutory Interp: Historical, Internal Evid from Act – both inconclusive

General Approach: Constitution is a living tree, large liberal interpretation – relevant to all except tax which has not changed |

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| POGG* Historical Look: Not a Head of Pwr - was standard phrase in Imp docs but needs to be interp since in Const
* **National Concerns Branch** [23]:
1. **Separate and Distinct** from Emergency Branch (main diff: temp nature of emergency)
2. **New Matters** or Matters that have since become matters of national concern
3. Needs **singleness, distinctness and indivisibility** that clearly distinguishes it from matters of prov concern and a **scale of impact** on prov jurisd that is reconcilable with the fundamental distb of leg power under the constitution [detrimental effect of this new head of pwr on federalism?].
4. **Provincial inability test** – could provs deal effectively with it? [thinks about[17] in diff way]
* **Emergency Branch**
* Judicially Reviewable: existence [22] & continue [19]
* Parl need only prove a rational basis, low burden on state [22], heavy burden on challenger due to **deference to specialized knowledge of legislative** [19&22]
* Extrinsic Evidence admissible/required [20]
* Form [22 Dissent]:
1. Temporary (not conclusive)
2. Clearly indicate that it is an emergency
3. Not too many exemptions

17. Russell v the Queen 1887* Facts: Conditional Legislation - so no delegation
* Issue: Fed Canada Temperance Act iv? Yes.
* Held: IV - doesn’t fit under 92 heads so must be in POGG (may fit in s91 trade and commerce too)

Scope of POGG as an umbrella – high pointConcepts: geographical distribution, need for uniformity, national interest, public interest18. AG Ontario v AG Canada 1896 (Local Prohibition)* Issue: Prov legislation to give munic pwr over liquor licensing iv? Yes.
* Held: IV: beginning of narrowing of scope

National Distb not enough, need to argue the nature of the matter & Have to allocate to a specific head under 91 (not just examples of POGG) | 19. Fort Frances v Manitoba Free Press 1923* Issue: Fed War Measures act iv? Yes.
* Held: IV: Emergency branch includes war

POGG has emergency branch (War, Inflation, Intemperance ok so far) Judicial Review as to whether Emergency still ongoing20. AG Ontario v Canada Temperance Fed 1946* Issue: Fed Replacement Intemp Act iv? Yes.
* Longer statue in place, harder to overturn
* Denies Emergency Branch – not good law
* Held: IV, but as national concern, not emergency

POGG is broader then emergency branch and new topics alone – Into of National Concern Branch21. Johannessen v Muni of West St Paul 1952* Issue: Prov Leg re aerodomes iv? No.
* Justify aero in Fed: Treaty, Movement btw Provs, Essential in opening the north
* Held: Municipal act is iv; but pith and substance is location of aerodomes and this is uv.

Aeronautics is subject matter of POGG, but will be debate as to whether there is room for Prov22. Ref Re Anti-Inflation Act 1976* Issue: Fed Anti Inflation iv? (controls public and private sectors, voluntary prov public) Yes.

Analysis:1. Preamble: ‘serious’ taken to mean emergency but E thinks clearly aimed at nat conc
2. Exclusion of Pub sector?: irrelavant
3. Extrinsic Evidence must provide **Rational Basis** – not a heavy burden on the crown
4. **Reasonable** that goes beyond local concerns? (Quantum of proof most useful bit per E)
* Held: Inflation is a POGG emergency concern

Maj: Where crisis is unclear, evidence must only show Rational basis for the leg and Reasonable Quantum of Proof that goes beyond local concernsDissent: Does not fit Nat Concerns & Parliament may pre-empt emergency & Form of Emergency23. R v Crown Zellerbach 1988* Issue: Fed dumping law iv in BC waters? Yes.
* No causal connection between dumping and navigation or marine life: so not 91(10) or 91(12)
* Held: Subject matter: Marine Pollution is IV

Test for Scope of POGG National Concerns Branch |

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| Criminal s 91(27)* **Form for Criminal Law** [24] :
1. Prohibition and Penalty
2. Prohibition with view to public purpose: including but not restricted to: “peace, order, security, health, morality: ordinary but not exclusive ends served”
* **Pith and Substance Approach** [25, 29]:
1. Object and Purpose of Legislation (what aiming at)
* Leg history, ‘evil’ aimed at, form and content
1. Effect
* Legal – always looks here
* Practical – not always relevant
1. Actual Intent/Motive
* Relevant if Colourability
* **Federal: 91 (27) Scope**:
* extremely strong and reliable head for parliament
* covers 1) creation of offences and 2) criminal procedure
* Not frozen in time, can create new crimes [25]
* Elements to justify: 1) Prohibition with penalty (form) for a 2) public purpose (substance) [25]
* Weakens: more exceptions you create [25]
* Cases indicate that the SCC is prepped to be flexible in relation to the form (willing to find it when the form looks pretty regulatory) [26]
* Also permissible to add public purposes, so plenary [24, 26]

24. Ref Dairy Industry Act 1949Form of Criminal Law25. RJR-MacDonald v Canada 1995* Issue: Fed regulation of tobacco advert iv? Yes.
* Diss: is crim law in pith and sub: penal sanctions, purpose cl shows directed at evil, no hidden intent likely

Diss: Scope of Criminal Law, Maj did not discuss this26. R v Hydro Quebec 1997* Issue: Interm order controlling PCBs iv? Yes.
* Diss for M: adds ‘Protection of Environment’ purp, would be too broad for POGG (misappreh)
* Diss – should consider whole picture: is regulatory
* Maj-only considers parts of leg, emerging realities

Protection of Environment is valid purpose for 92(27) | * **Saving Provincial Legislation:** some heads look crim: 92 (6, 13, 14, 15, 16)
* Not always all available, the more the better
	1. Emphasize the property aspects of legislation [29]
	2. Emphasize local nature of the problem [27, 28]
	3. Emphasize use of regulatory techniques (licensing [28], permits [27])
	4. Deal with problem indirectly rather then directly ([28] – charge the owner rather then the performer)
	5. Emphasize the prevention, deterrence, pre-emptive strike of crime [27]
	6. Don’t copy Crim Code provisions [28 first time]
	7. Avoid harsh penalties (no case on this but court does say: not terribly heavy)
	8. Merely complementary (**never supplementary**)[27]
	9. If necessary, concede that the prov had some moral concerns but that it is not the primary purpose [28]
	10. Avoid discussing the real problem, don’t tell the media what you are really trying to do (no case)
	11. There may be certain crim offences that no matter how prov packages legislation, these will be very difficult to be upheld (no case – for example laws dealing with prostitution)

27. AG Canada v Dupond 1978* Issue: is mini-CC enacted by Montreal saved as a matter of local or private nature? Yes
* Would now be a charter issue

Arguments 2, 3, 5, and 8 were successful28. Rio hotel v Liquor Licencing Board 1987* Issue: can prov liquor licence include performer requirements? Yes.
* Initially a copy of CC – redrafted
* Cc would have charged performer

Arguments 2, 3, 4, 6, 9, licencing is key29. Chatterjee v Ontario 2009* Issue: forfeiture of property as a result of crim activities iv? Yes.
* Courts into cooperative federalism
* Pith and Substance before look to heads
* Reasoning flawed: broader, more likely not to be crim, but broader: more likely criminal procedure is import to protect innocents.

Argument 1 is keyLet stand whenever possible, Like Double Aspect Doctrine – attack merits on charter challenge later? |

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| Regulation of the Economy s 91(2)* Most difficult area to predict outcome – hard to divide a continuum
* **Fed s 91(2)**
1. Complete certainty that it has 2 branches [30]:
2. International or inter prov trade
3. General regulation of t&c in the dominion [35]
4. must be part of a general reg scheme
5. scheme must be monitored by the continuing oversight of a regulatory agency
6. the legislation must be concerned with trade as a whole rather than with a particular industry
7. legislation should be of a nature that the prov jointly or severally would be constitutionally incapable of enacting it
8. failure to include one or more prov would jeopardize the operation of scheme in other part of country
9. Fact that now has 2 branches, does not mean the leg jurisdiction has been subtracted from the provs
10. Parl cannot reach way back into the early stages of production [31] (no contracts [30], no businesses, industries [31], professions in the provinc.)
11. Cannot claim jurisdiction based on % of goods exported [31]
12. Cannot claim jurisdiction based on geographical distribution of the problem alone.[31]
13. Cannot regulate industry by industry [34]

30. Citizens Insurance v Parsons 1881* Issue: Prov Fire Insurance Act iv? Yes.
* If read 92(13) narrowly to exclude Ks, then fed could leg here and that would be too broad

Leading case for scope of 91(2): sets up two branches91(2) does not include regulation of contracts of particular business or trade, that is 92(13)31. R v Eastern Terminal Elevator 1925* Issue: Fed Grain Act regulates locally, interprov and internat iv? No.
* Cannot argue that high % is export, though relevant
* Since no prov can do it, can’t argue that fed must, cooperation is a charact of federalism (but [23]!?)

Parl cannot reach into early stages of production92(10) – engaged to declare works for Advantage of Canada (ownership not affected, physical item) | * **Prov 92(13) and 92(16)**
1. Prov leg controls the early stages of the process [31]
2. Can have significant effects on interprov trade but they are indirect and constitutional as long as the prov does not seem to be aiming at interprov trade. – merely incidental [32 but not 33]
* **General**
1. Validity of the legislation (for all heads), is always going to turn on how the court characterizes the subject matter of the legislation so P&S is a critical argument [32 as ex] [extrinsic 33]
2. Both can argue the ancillary doctrine no matter what head of leg jurisdiction it is relying on [35]
* **Ancillary Doctrine [35]**: approach when single provision
1. Consider in isolation – prima facie uv? If yes:
2. Assessment of validity of rest of statute. If valid:
3. Relationship and Encroachment (forUV)/Effect (forIV)
* Tiny effect: need functional relationship
* Large effect: need necessary relationship

32. Carnation v QU Agri Board 1968* Issue: Prov Marketing Board sets prices but mostly exported, iv? Yes
* E: Correctly decided but irreconcilable w nxt cases
* P&S to protect farmers: out of prov effect is merely incidental

Merely Incidental is not: trivial, it is :not controllingGoods moving out easier to control33. Burns Food v AG MN 1975* Issue: Prov Reg based on Marketing Act iv? No.
* Held: P&S aimed at interprov trade
* Dissent & E: Hard to distinguish from [32]

Key: Extrinsic Evid: press release aimed at SK HogsHarder to deal with products coming in 34. Labatt v AG Canada 1980* Issue: Fed Food and Drug Act Recipe for Light Beer iv? No.

Maj: cannot regulate industry by industryDiss: labeled it differently to fall under 91(2), so you can deacribe in diff way and argue35. GM Canada v City National Leasing 1989* Issue: Fed now Competition Act has a civil cause of action in normally crim act iv? Yes.
* Civil usually falls into 92(13)

Gives legal recipe for 2nd branch & Ancillary Doc |
| Taxation * **S 125** – no lands belonging to gov to be taxed
* **Federal 91(3)**
* plenary power, only a prov prob
* **Provincial 92 (2, 9, a4)**
	1. Is it the payment a tax (classification problem for court) [37]
* direct (income, sales, property, levied @estate[A])
* indirect (export, commodity, consumer)
* hybrid (need to look carefully to decide)
	1. If yes, is it a direct tax? [defn 36]
* **Direct tax** – one which is demanded from the very persons who it is intended or desired should pay. (rationale: clearer when taking $ and less need)
* **Indirect tax** – 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 customs.”
* Part of 92(9) Regulatory Scheme? [38]
	1. If 1 and 2 are true, is it a tax in the province?
	2. If the levy is a tax, was the legislation enacted consistently with s53 (method of enactment matters but should not happen again) [A]
	3. Is the tax payer entitled to immunity under s125 [B]
	4. If statute fails on any one of these questions, and is found to be invalid and struck down and tax payer has been paying taxes, they can recover those improperly charged taxes. [39]
 | 36. Bank of Toronto v Lambe 1887* Issue: QU tax on commercial ops iv 92(2)? Yes.

Meets defn of direct tax (trick is the application), mere physical presence within prov all needed, tax not limited to one type of business37. Canadian Ind Gas and Oil v Gov of SK 1978 * Issue: Prov Mineral Income Tax iv? No.
* Maj labels as export tax so indirect, mostly based on ministerial discretion cl (no evidence used)
* Now have 92a4 so will never occur again

Dissent: Process for Classification based on historicalNo matter what call(royalties), court decide true formPresumes Legs have acted constitutionally, so burden of persuasion on claiment38. Allard Contractors v Coquitlam 1993* Issue: Munic Bylaw for grovel extraction iv? Yes.
* Are indirect commodity tax, but can tax per 92(9), found roads in another section of MB

Scope of 92(9): 1. May be indirect
2. Must be related to Regulatory Scheme
3. Reasonable connection btw cost of scheme and tax

39. Kingstreet Investments v NB 2007* Issue: If pay liquor tax and it is uv, reimbursed? Yes. Gave leg time to sort out.
* Tax found to be indirect – but indirect passed on so no deprivation, court found const right anyway

Justification for repayment of even indirect taxes is RoL – Gov cannot profit from constitutional wrongdoing* Rejection not defense as taxpayers expected to pay

a. Re Eurig Estate* Issue: Prov Regulation for Probate fees iv? No.
* Fees were direct taxes, but improperly imposed
* s 53 applies to provs per s 90 (repealed in BC)

s 53 limitation: No taxation without representationb. West Bank First Nation v BC* Issue: WBFN tax crown corporation? No.

s 125 provides immunity only from taxes, can protect crown corporations  |
| Extraterritoriality* Prov matter only per s 92 – why?
* Watertight compartments: 1867
* Fed limit removed in Statute of Westminister
* **validity** of provincial legislation (is ultra vires if said to be dealing with matters outside of boundaries)
* Pith and Substance Test [40]
* If tangible: where it is? [42]
* If intangible (contract rights, cause of action): use meaningful connection test [42]
1. lkj
* **applicability** of provincial legislation (can be argued that prov statute is valid but inapplicable)
* Sufficient Connection Test [41]:
	1. Territorial limits on scope of prov leg authority prevent the application of the law of a prov 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. (important test!)
	3. The applicability of an otherwise competent prov leg to out-of-prov defendants is conditioned by the requirements of order and fairness that underlie our federal arrangements (federalism is order and fairness)
	4. The principles of order and fairness being purposive, are applied flexibly according to the subject matter of the legislation.
* **Principle of Sufficiency**
* **Principle of Order and Fairness**
 | c. Thomas Equipment* Issue: Failure in NS to comply with AB leg
* Holds: failure to buy back (omission) deemed to be located in AB.

40. Churchill Falls v AG Newfoundland 1984* Issue: Prov Reversion Act iv? No, colourable.
* Civil rights aimed at were not in prov
* Doesn’t give test for locating civil rights
* Colourable based on extrinsic evidence

Accepts Pith and Substance Approach for ValidityIncidental Extraterritorial effects are constitutionally irrelevant as long as they were not aimed atKey is derogation of extra provincial rights (no worries about shareholders as they were paid out)41. Unifund v Insurance Corp of BC 2003* Issue: 92(13), two valid insurance statutes, which one is applicable?
* E: overkill, could have used stat interp, lots of issues with this case
* Held: BC: but an uncertain test to find location of restitution action, difficulty is knowing exact nexus: maximal or minimal

Gives Test of Applicability (Sufficient Connection) – unclear if applies to validity too, should apply generally to cases with single statute42. BC v Imperial Tobacco* Prov Tobacco damages and health care recovery act iv? Yes.
* Aimed at intangible cause of action, decided sufficiently connected with BC: distinct cause of action for BC for costs expended in BC
* Does not look at location of other relationships

Churchill falls remains test for determinin validity where statute territorially challenged |

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| Inter Imm and Paramountcy* **3 Doctrines of Federalism**: (in order!)
1. **Validity (div of Powers and extrater)**
2. **Applicability (IJI)**
3. **Operability (Paramountcy)**
* **Interjurisdictional Immunity** :
* Concern with effect on fed entity not head of pwr
* Is theoretically reciprocal [47]
1. Is it a Fed Entity?
* Fed works and undertakings [43] [E]
* Fed entities (post office, banks [47]))
* Fed persons (Aboriginal)
* Fed incorporated companies [D]
* Fed Activities [F]
1. Is Fed Entity immune from application of Prov law?
2. **Impairment of vital and essential** part of the undertaking as an ongoing concern [44] [47] [48]
* Still do not know the extent of ‘impair’
1. Core of head of power impaired
* Need to identify the core of head of power
* **Paramountcy [48]**:
* Judge made solution not in constitution [45]
1. Valid Prov and Fed statute both apply?
2. Is there an operational conflict or frustration of purpose?
* **Operational Conflict: test is when a citizen cannot comply with both acts** [45]
* Frustration of Purpose: would applying the prov frustrate the purpose of the fed? [48]

d. John Deer v HortonIJI for Fed incorp Company justified on grounds of sterlizing fed head of power43. Winner v AG (ON) * Issue: Fed regulation of collecting bus passengers applic to fed entity undere 92(10)(a)? No.
* an undertaking is an arrangement (does not need to be underway yet)

Works and Undertakings are Disjunctive; not job of Court to Split Undertakings, looks at operation in fact | e. Westcoast Pipeline* Issue: Expansion of fed entity in prov iv fed? Yes.
* single operation depends on how actually run, physical connection/ownership not sufficient: must be functionally integrated and subject to common management and central control

Federal Undertaking: 1) Part of single operation? 2) necessarily incidental to the fed work & undertaking?44. Bell Telephone 66 * Issue: Minimum wage control of fed entity iv prov? No, falls into 92(10)(a) exception.
* wages is exclusive fed control

Scope of 92(10)(a-c) – all matters with are a vital part of the operation of an interprovincial undertaking as a going concern; IJI does not require Fed legis45. Multiple Access v McCutcheon * Issue: ON securities act opera on fed entity? Yes.
* overlap is price of federalism

Leading case on Paramountcy; conflict is narrow: if a cit cannot comply to both acts only46. Bell Canada 88* Issue: QU Workers Comp Appl on fed entity? Yes.
* classification of the statute as affecting an internal matter is key

OLD RULE: Sufficient that Prov Touches on vital or essential part of fed undertaking as a going concernf. Borden Stake v Grail* Issue: Accidents at sea a matter for Prov maritime law? No.
* moved IJI from entity to ‘core’ of head of power; maritime law demands uniformity

IJI applies to Activities47. Canadian Western Banks* Issue: Fed Entity claim IJI for insurance leg? No.
* insurance is not a v&e part of bank

IJI may be reciprocal; Focus back on entity; paramountcy first as it is simpler (inconsistant)New const princs: Don’t like Vacuums, SubsidiarityLimit to IJI: 1) Fed Entities 2)imp of vital & essential48. BC v LaFarge* Issue: Fed Entity (VPA) impaired by ? No.
* IJI: not an v&e part; both operational conflict and frustration of purpose

Defini of vital & essential; Current Paramountcy Test |

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| Aboriginal Peoples and Const* **Provincial laws** **& IJI** [50]:
1. Validity: relation to head under 92 or 91(27)
2. Applicable: s88 (Laws impairing status of Indians: incorporated by reference) and s35
3. Operable: cannot conflict with Indian act [55]
* **Insignificant**: small effect/burden/interference acceptable
* **Prima Facie infringement**: impairing/meaningful diminution of treaty right unacceptable
* **Fed Law:**
1. Validity: lots under 91(27)
2. Applicability: limited by s 35 only
* **Treaty**
1. Interpret the treaty
2. Prov and Fed analysis
* **Scope of 35** [51]: (still being worked out)
1. Identify the right (hunt, fish, self gov)
2. Outline scope (sustenance, ceremony, commercial)
* **Characterization** is key [52]: no too broad or specific
* **Van der Peet Test**: element of a practice, custom or tradition **integral to the distinct culture** [52]
* **Existing at contact**, & **not extinguished in 1982** can evolve, test of extinguishment requires explicit, regulated is not
1. Legislation have effect of interfering?
* reasonable, undue hardship, deny preferred means
1. Justification analysis
* Valid leg purpose, little infring as possible, compensation avalib, consultation
* Oakes + honour of the crown
* **Duty to consult [53]**:
* Crown duty (not private)
* Standard: nego in good faith, meaningful disc
* Source: **honour of crown**
* Whenever: crown knows of claim and is contemplating conduct which may have an adverse effect on the claim –prop to the strength of the claim and the severity of the poten harm
* No veto, no duty to accommodate, no duty to reach agreement
* **Fiduciary** **Duty** – from honour of the crown [49]
 | 49. Guerin v the Queen* Issue: lands surrendered without full disclosure
* Not a trust but a fid duty; unconscionability is test for breach

Crown owes Fiduciary duty based on relationship created by Indian act and honour of the crown; high standards expected when leasing lands50. Dick v the Queen* Issue: BC wildlife act inapplic to fed peoples?
* On CL – infringes on ‘indianness’ then inapplic
* Statutory interp removes IJI option

prov statute which impairs the status and capacity of a group of Indians is made applicable by s88.Fed may choose to waive IJI for one of its entities/peopg. R v Nil Tu’o (BC) & Native Child (ON)first nations organizations do not get IJI51. R v Sparrow* Issue: scope of 35(1) and fed fisheries act

S 35(1) does not guarantee absolute rights; but is a shield against both levels of govS35(1) interpreted in broad purposeful way to incorp fid relationship52. R v Pamajewan* Issue: high stakes gambling self governance?

Self governance protected by s35Characterization of issue and leading evidence re history of right is key53. Haida Nation v BC* Issue: lease to forestry companies

Honour of crown includes duty to consult54. Beckman v Camacks First NationCannot contract/treaty away duty to consult55. R v Morris* Issue: Treaty right to hunt trump wildlife act?

Interpretation Process: Should be placed in its historical, political and cultural context – want to find the subjective intentionS88 protects treaty rights (more then 35 but not absolutely) |
| Applicability: Charter* s 52: paramount over legislation which is inconsistent
* **Who** can take advantage – **wording of right**
* S2,7,9,10,11,24 – everyone
* S6 – every citizen and PR
* S15 – every indiv (not a corporation)
* **To whom** does it apply – **interpretation of s32**
1. Best is to have the entity defined as gov – then all functions covered [59] – **Control Test** [56]
2. If not, then performing a government function [56,57,I]
* Some concerns about colourability
1. If so, court may divide functions and only some may be subject [J]

h. Dolphin Delivery* Issue: Court injunction subject to charter?

Judiciary is gov but not subject to the charter56. McKinney v University of Guelph* Issue: charter apply to university?
* Yes lots of public $ and serving public purpose, but in this case academic freedom means they kept control
* Dissent: purposeful approach: Control, Government Function and Government Entity test

charter protection only from gov (hospitals and universities are not government for some purposes)57. Eldridge v BC* Issue: challenge to discretion under legislation
* Lots of discretion, performing a gov function

Even if entity itself (hospital) if not gov, the delivery of gov programs by the entity is subject to a charter challengei. Pridgen v UofCIndependent entity (university) subject to charter when delivering gov programs58. Vriend v Albertaomission can be challenged under charter59. Godbout v Lougueuil* Issue: internal city resolution subject to charter

municipalities are gov; all activities of gov entity subject to charter | 60. Grant and Torstar* Issue: new common law defamation defence?

can use charter values to argue for changes to the common law or for a particular statutory interpretation (even if strike out on s32)j. Sagen v Vanoc* Issue: VANOC gov entity or delivering program?
* No control of choice of sports, that was done years before by IOC

Not gov policy until gov says so v colourabilityIf performing gov function, may be broken downJustification* Usual Process:
1. Establish scope and infringement (challenger)
2. Justify under s1 (gov)
* **Oakes Test:**
1. Pressing and substantial (no shifting purpose [72]; not too broad [25])
2. Rational connection
3. Minimal impairment (ind v state**Δ**state v corp [71])
4. Proportionality

61. R v Nova Scotia Pharma* Issue: ‘unduly’ too vague? No.
* Tolerate a certain level; if too then not law

test for void for vagueness: judicially understandableVagueness as a Cause of Action under s7; s1 (purport); s1 (too vague to be ‘prescribed by law’) source is rule of law: fair notice, limitation of enforcement discretion62. R v Oakes* Issue: rvs onus in s8 of narco saved under s1? No
* Must be guided by values and princ of free demo

S1: guarantees & states justificatory criteria63. NFL (Treasury) v NAPE* Issue: inf to s15 saved under s1? Yes
* Overcame precedent for delayed wage equal

Evidence crucial to s1 – if not, Judicial NoticeFinancial measure ‘sometimes’ justifiable (overturnes limit from renumeration ref)Best if: short lived, exceptional crisis, context of financial emergencyMay cover prov too. |

|  |  |
| --- | --- |
| Remedies* Pre-1982
* Decl of 1) Invali 2) Inapplica 3) Inoperability
* If ambiguous: read up or read down
* Post-1982
1. S24
* Limited to Charter
* in cases of 1) gov action 2) which breaches
* Remedies: all private law, but **need to justify** [67]
1. S52
* Charter and Federalism
* Statute is unconstitutional
* Applies in almost all cases (usually w/o 24)
* Remedies: same as old common law [64]

64. Schacter v Canada (92)* Issue: unemploy limited to adoptive valid? Yes
* Gov conceded vio and this limited evidence

Common Theme: respect Leg and sep of pwrsApproach: 1) define extent of inconsistancy 2)evaluate sev and reading in: least impact on leg obj 3) temp suspension of declaration? [pg649]Remedies under s52 : 1) severance if does not change intent 2) reading in where intent clear 3) striking down65. Vriend v AB (98)* Issue: HR statute excludes sex orient valid? No.
* Not intent but

Reading in less intrusive then striking down but becomes a constitutional principle that overrides parl66. R v Ferguson (08)* Issue: Mand min warrant excep under s24? No.
* Indiv exceptions would make 52 redundant, frustrates purpose and produces uncertainty

No individual charter execeptions under s24 to otherwise valid law67. Vancouver v Ward (10)* Issue: award of damages under s24? Yes.
* Incremental opening

Remedy of Charter Damages under s24 1) Proof of Charter Breach 2) Functional Justification (compensation, deterrence, vindication) 3) Countervailing Factors 4) Quantum of DamagesCrim court not competent jurisd | 68. R v Conway (10)* Issue: is tribunal court of comp juris to award discharge? No.
* Reviews Mills, Slaight, Cuddy Chicks cases

Court of Competent Jurisdiction under s 35: 1) Grant charter remedies if can decide questions of law - Pwr to decide questions of law? (ex evaluate own enabling statute) 2) Statutory Mandate allow particular remedy? (legislative intent)Access to Justice* Charter is not last word, can use general justiciable princ like RoL

77. BCGEU v BC* Issue: strike in front of courthouse
* Commercial institutions are diff

Physical Access to justice is an aspect of the RoLNo evidence in this case – yet justified78. Minister of Justice v Christie* Issue: tax on legal services

Reframing argument as seeking a positive right makes your case easier to defeatAccess to justice is not being freely, expansively and purposefully expanded by the courtsConstitutional Questions Act* S6 Reference Opinion is a Judgment/can be appealed
* S8&9 AG should be notified

79. Minister of Justice v Boroski* Issue – how to get standing
* Progression: directory, regulatory, exculpatory
* **Public Interest Standing** (decl of invalidity) **test**:
	+ 1. Must be a **serious issue** as to its invalidity
		2. Affected by legislation directly **or** genuine interest as a citizen
		3. **No other reasonable or effective manner** of bringing the suit before the court
 |
| 2b – Freedom of Expression* Framework
1. Activity within scope
* Expresses meaning [71]
* Not violence [71]
* Location where one would expect protection [73]
1. Historical or actual function
2. Undermine 2b values
* Positive Duty [75] Justifies sig burden on gov[76]
1. Claim grounded in freedoms not access to particular stat regime
2. Exclusion from regime is substantial interference w/ freedom OR purpose was to interfere
3. State is substantially responsible for the violation
4. Purpose or effect an infringement? 2b values?
* 1) truth finding 2) democratic discourse 3) self fulfillment [71]
1. s1 justification
* core v periphery – diff min imp [72&74]

71. Irwin Toy* Issue: ban advertising to children – saved by s1
* Min imp diff when state v corp from state v indv

Protecting a venerable group is strong objectiveDissent: absolute ban is not min imp (good argu)72. R v Butler* Issue: selling obscene material protect?–no save

Vagueness argument – can be discussed in law so not Core: political, artistic; outside: commercial; periphery: obscene, violence; outside: violence – diff treatment in min imp/balanceTendency to protect: large lib interp73. Montreal v 2952-1366 Quebec* Issue: noise bylaw
* No infring of 2b

Location test: Expect protection on streets25. RJR MacDonaldprotection of heath too broad; prevent tobacco use better | 74. R v Bryan* Issue: election results
* Little evid, rely on commission

Right to receive at perephery; not at protectedEvidence: contextual factors, 1) nature of harm, ability to measure 2) vulnerability of group 3) subjective fear of harm 4) nature of activity = argue that court should be deferential/make room75. Baier v AB* Issue: teachers cannot be trustee- not violation
* Prevent conflict of interest=valid leg obj

Gov may have positive duty to give right to exp – test76. GVTA v CFS* Issue: political advts forbidden on bus- no save
* Applicability, 2b, s1

Bus and street ok locations - tho gov can justify changing use of locationNot under inclusive since group not excluded‘policy’ may be ‘law’: intelligible, outward looking, avail to public* Fails rat conn (rare) and min imp – no evid!
* S52 🡪decl of invalidity

2d – Freedom of Association* Prior: was indiv right with no positive obligation
* Scope – Derivative right to Collec Barg/strike [69]
1. Substantial interference (how broad)
2. Process not outcome
3. Meaningful, good faith bargaining (length)

69. Health Services* Issue: no consultation, act removed collec barg
* Times have changed, internat law

Charter values inform scope: human dignity, autonomy, enhancement of democracy70. ON v Fraser* Issue: Specific barg method leged
* Premature case: should try it first, but divided

69 only guarantees processResp to Diss: freedom=right; not unworkable; academic criticism; History ok; Charter values inform; too soon to overturn 69 |