(Federalism) CH 10 – Prov & Econ Regulation:

Focuses mostly on 92(13 – property & civil rights) and 91(2). Power to regulate intraprov trade: transactions in relation to goods & services that take place *within* the boundaries of the prov, and presumptively labour relationships (*Snyder*) – but power to regulate labour relations = /w pwr to regulate the industry. 91(2): T&C – *Natural Prods Marketing Ref* = revival of 91(2). \**Parsons* = *international trade* and *interprov, but may also cover general regulation of trade affecting the WHOLE dominion*.

Carnation Milk: - *How does court distinguish interprov vs intra trade – test for intraprov trade*

 -F: Que’s Act enacted /w purpose of helping Que agri producers market their prods. Act allows producers to come together, create producer plan, marketing board reviews. Little guys competing and selling prod to Carnation milk (Act tries to give them some bargaining pwr). Disagreement on fair price of milk with small group of local producers goes to review board. Carnation didn’t want to pay so much, according to board, so use federalism argument -> *most milk shipped outside of province* (interprov).. prov trying to regulate INTERprov trade. Transactions themselves took place *solely* within Que though.

 -Analysis: Rejection of *purely geo test* (if something takes place WITHIN the prov = INTRAprov), for a test about *AIM of legislation*: it will be intra prov if it is aimed or directed at trade within the province, and not at interprov trade (can have incidental effects).

 -Decision: leg is *not* aimed at interprov and impact is incidental (not the P&S of the legislation). Carnation’s argument rejected.

Manitoba Egg Reference: *Same test as Carnation but different result*: *MB’s mirror of Que scheme struck down b/c has AN interprov AIM – basically intentional, (inconsistency /w P&S doctrine*?)

 -F: Que had more tasty chickens for less than Ont, and Ont better eggs. Both weary about accepting other’s product but wanted access, and marketing schemes set up that were essentially protectionist, but not obviously so. MB good at producing BOTH, wanted access to both markets. ON & QUE’s schemes made it *difficult* for MB to get access. Couldn’t get ruling on constitutionality of *their* scheme, so MB enacted mirror scheme for eggs like QUE’s and referred constitutionality. SCC -> *strikes LEG DOWN* (implicit uncon for other two regimes).

 -Analysis: doctrine the same as in *Carnation* (testing the AIM of leg), but result: here, the leg really is aimed at interprov trade in eggs.

\*Note: Judge says **PART** of scheme directed at interprov trade, not whole (**A** direct object)… if that’s important, you don’t have to find that the entire prov leg is directed towards interprov, and somewhat **inconsistent** with P&S doctrine -> Flipside of *Eastern Terminal* (going into prov leg & looking at problematic parts).

**Wyler’s Critiques**:

1. Case shouldn’t be addressed on the *merits*, because “trumped-up” (not likely to get proper argument)
2. Lack of evidentiary foundation
3. Since no difference (in aim) between MB and Que leg, what justifies the court giving different results for them?
4. **Coming out of Wyler Critique:** The court is **mal-equipped** to deal with federalism judicial review (policing 91/92), and should stick to cases of paramountcy. \*The worry is that leg like MB’s (here) or like Que did in *Carnation* the spill-over impacts are on others who can’t vote in that province (raising costs), thus the courts should protect the **interests from outside**. General philosophy: *judicial restraint*, **except when** leg designed clearly to protect provinces own interest, then careful scrutiny.

Agricultural Products Marketing Act Reference: *Court deciding NOT to interfere with prov/fed cooperative scheme that was carefully drafted*

 -F: feds & prov agreed wrt many agri prods (incl eggs) that Canada should be divided into various regional components and each prov given a production quota (on how many they can make). Feds put quotas on the individual producers + global and, prov puts quotas on ALL OF THOSE SAME individual producers, on grounds of being in the prov. Challenge: prov individual quotas -> you’re regulating some products that might be interprov/international.

 -Reasons: judges have been telling govts to cooperate and sort out federalism issues together. If they were working on it for 40 years, judges deferential here to the scheme (won’t say it’s unconst).

CH 10 - Natural Resources

92A and others -> ownership of natural resources *specifically* granted (with exceptions) to prov.

Context: Canada producing a lot of own oil (Alta + Sask) during dramatic increase. Sask decided to make the manufacturers pay the *whole* of the *benefit* to the govt through leg saying -> “if govt suspects producer is selling at LESS THAN FAIR MARKET VALUE.. govt can replace the price with what they think it should be”.

**Canadian Industrial Gas and Oil Ltd. V Saskatchewan**: *Weakening prov powers, ended up affecting/being aimed at internat/interprov trade*

 -F: oil CO is arguing against const of kicker prov above, and is tantamount to prov trying regulate *interprov* and *interprovtrade* + *indirect taxation* (can only do direct). \*D tax = paid out of pocket by the entities against which the tax is levied, and I is paid by some *third party* who bears the burden of it, because party whom it is levied on just passes it on.

-**Analysis: Tax argument** -> being levied against producers, but being passed on to someone down the line (7-2 agreed it was indirect – unconst). **91(2) argument**: *leg is directly aimed at production of oil destined for export (Carnation test)* (regulating the export price) -> **Carnation distinguished** -> Sask’s argument = that prod produced here and regulation affects price in interest of protecting local producers, and some of it leaves, like *Carnation*. **Distinction**… ?! – detrimental effect on international or interprov trade.

 -> **Dixon in dissent**: uses the *US process* instead (**balancing**) rather than looking to *AIM* of leg. Weighing prov purpose against interprov/international trade.

**Central Canada Potash Co Ltd. V Saskatchewan**: *Prov Regulating “export prices”*, *thus aiming at interprov/internat trade 91(2)*

-F: Sask = major potash producer, almost ALL consumed OUTSIDE of prov. Responded to a problem with reg regime: **1) Quotas** for *individual* producers **2) *minimum price*** (preserving industry = critical, whatever burden on international trade). Certain producers challenged leg.

**-Analysis**: STRUCK DOWN on basis of same test -> an attempt by Saks to reg price of prod moving across prov + national boundaries (**directly aimed**) for export. **Production** (vs marketing) = *LOCAL undertaking* under 92(10), but not just regulation of establishing producer quotas here, but *regulating export prices* (and hence beyond prov juris).

CIGOL & POTASH:

 -Distinction from *Carnation* – here they say leg is *DIRECTLY* aimed at production of oil destined for export (regulating price, since producer is compelled to take price for prod). \**no processing* of the *raw material* within the province.

 -If case was about PRODUCTION (*Potash*), case would’ve been more likely to succeed.

-Amendments in 1981… Provisions -> 109 gives minerals, etc. 92A: (1) non-renewable natural resources + forestry in prov. Offers some reassurance to prov leg (although already implicit) – unhappiness with CIGOL (2) – loop around regulation of interprov trade in primary prod from things in (1) and (4) – deals with taxation. Wrt to these prods, allowing indirect taxes.

CH 10 – Federal Pwr & Econ Regulation

91(2) – Branch 1: *reg of international & interprov trade*; Branch 2: *reg of general trade over the WHOLE dominion* – (roots in *Parsons, JCPC*). SCC has allowed some extension via both branches.

Main premises:

- Intraprov reg (provisions over resources + local undertakings + property & civil irghts) test = *Q of AIM*

- Fed 91(2) branch = 2 parts.

-1st – courts willing to trench on intraprov reg with *Necessarily Incidental* recently (as long as *primary aim* = internat/interprov) – unless parallel scheme (*DS*).

-2nd – trot out 5 indicia and ask about QUALITATIVE diff

Queen v Klassen (Eastern Terminal era) – *FIRST BRANCH* – *Trenching on INTRAprov*

 -F: *Wheat Board Act* – comprehensive reg scheme for Canada’s grain industry. Some strict rules/regs on how much grain producers could deliver to the feed mills in their area. Mr. L delivered more grain (w/o recording) to Mr. K’s feed mill than allowed, and K prosecuted. Regime challenged on basis of attempt to regulate *intraprov trade* (very local – more than *Eastern Teriminal*).

 -Analysis: UNSUCCESSFUL CHALLENGE (leg upheld) - primary thrust of leg = reg of INT/INTERprov trade, and necessarily (?) incidental impact. Serious infringement justified, because otherwise *reg regime with 91(2) thurst would be compromised* (such a scheme has to treaty *all* producers equally and fairly). \*Allowing 91(2) to reg INTRAprov trade.

Caloil: *More trenching on Prov using NI doctrine*.

 -F: East Canada’s need for oil usually met by middle east, and to protect Alta + Sask’s oil market, line drawn right down Que, so Ont getting from west and most of Que from middle-east. Imported oil could not be sold west of the line. Division of powers challenge – CalOil challenges on ground of attempt to regulate INTRAprov trade in oil.

 -Analysis: UNSUCCESFUL challenge – leg UPHELD. Necessarily (? Or just incidental) incidental doctrine. Parliament regulating oil industry in national interest.. would be jeopardized if they couldn’t control it. (Anglin approach not Duff) -> use NI to *sustain* fed incursions on apparently exclusive prov leg juris.

Dominion Stores: *Destruction of Prov Juris taken a step back*

 -F: validity of fed leg in the agri prod sector (grades & names). Parliament helps agri industry by putting diff quality names, so when they move across provinces, you need to affix a label (to apples), or when you CHOOSE to – has to be right label.. DS sold bruised apples under “Canada extra fancy”. Ont leg effectively mirrors Fed (but directed to sale within Ont and *compulsory*).

 -Analysis: SUCCESSFUL challenge (5-4) – following *Klassen & Caloil* (ripe for NI). Majority -> *this is about regulating intraprov trad, since province already aggressively exercised jurisdiction* – prefer the prov route. Fed leg valid only for interprov/international movement, but otherwise not.

CH 10 - General Regulation of Trade 92(1)

General Motors v City National Leasing: *SECOND BRANCH REQS*

 -F: \*Other part was about ancillary doctrine & Fed anti-competition provision in legislation allowing company to sue GM in civil court. Argument that 92(1) upholds impugned provision. (Have to ensure the WHOLE the impugned leg is a part of = VALID).

 -Analysis: 91(2) test for Second Branch: 1. Impugned legislation must be part of a general regulatory scheme (not prohibitory); 2. The scheme must be monitored by continuing oversight of a regulatory agency; 3. Legislation must be concerned with trade as a whole rather than a particular industry; 4. Legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable (\*almost “politically”) of enacting (like Crown Zellerbach) 5. Failure to include one or more provinces or localities in a leg scheme would jeopardize the successful operation of the scheme in other parts of the country

 \*not supposed to be exhaustive: overriding consideration = whether *what is being addressed in a federal enactment is GENUINELY a national econ concern and not just collection of local ones*.

 -App: Satisfies the regulatory aspects (agency, etc.); Directed at anti-comp behavior at large; \*nothing really addressing #4.. but basically passes the criteria. Thus, Act supported by 91(2) – second branch.

Reference re Securities Act: *Fed Securities Leg looked like it was to pass 91(2)* – 2nd branch but failed horribly – *possibly an end to fed security scheme*. *2nd branch test not definitive* – just guide.

 -F: Just bill introduced (referred for const). Sec reg -> by each province so no uniform fed leg. Fed leg would only apply to provinces that opted in. 9-0 for provinces. Aspects that are national in character: “systemic risk & national databank”

 -Analysis: 1. Reg scheme -> yes 2. Reg agency -> yes. 3. Single trade or trade in general -> basically the regulation of a SINGLE TRADE (buying, selling, moving capital), despite some features that couldn’t be “direct” (SOME problems with “day-to-day” regulation that seems to belong to the PROVINCE). 4. *Seem to have changed criteria for this* -> not just constitutional capacity of provinces (GM) but also about “political will” to stay together on the matter. Q – is it beyond provinces capacity to act on their own (Argued that provinces are more than capble with passport system + the opt-in clause shows that not all are necessary) 5. Concern about province opting out -> *might be negative spill-over effects*…“efficaciousness is not a relevant consideration” in division of powers (consistency conflict).

 -Fails because of 3-5:

 ->>In sum, the proposed Act **overreaches genuine national concerns**. While the economic importance and pervasive character of the securities market may, in principle, support federal intervention that is qualitatively different from what the provinces can do, **they do not justify a wholesale takeover** of the regulation of the securities industry which is the ultimate consequence of the proposed federal legislation.

 \*Note: Dickson -> Fed leg has to be *qualitatively diff from anything the provinces could individually/jointly enact*.

Ch 11 – Criminal Law Power 91(27)

Ch 4 -> Haldane’s “fixed domain” suggested *narrow* role for 91(27). *PATA* -> no such thing as fixed domain. Formula: **Prohibition + Penalty**.

**Margarine Reference**: *Adding 3rd requirement to PATA test for 91(27)*

 -F: offence to sell & produce margarine (NWF + QUE). Marg cutting into butter market.

 -**Analysis**: import is fine (intl trade) but domestic production/sale = **invalid**. Expansion of 91(27) to: prohibition, penalty + ***(substantive req) typically criminal PURPOSE*** (crim character) – **e.g. personal security, public safety, public order**. The P&S of this leg is really ***protecting the diary industry***.

RJR: *Fed grounds here (charter FOE*), *prohibitions on advertising*

 -F: *Tabaco Products Control Act* 1988 at issue. Prohibited 1) Advt and promotion of T products 2) The *SALE* of T products in pkgs that did not have unattributed health warning. Challenge: industry falls within 92(13) – parliament trying to regulate the T industry.

 -Analysis: Act is VALID because prohibition + penalty + typically criminal public purpose -> health. \*Narrower argument e.g. against the fact that it’s not a true prohibition (foreign exemption). Apply basic test from *margarine* -> must pose a SIGNIFICANT, grave risk to one of those typical purposes (health, security, morality). Without prohibition, danger likely to take place (causation).

R v Hydro-Quebec: *Valid Crim Law on Toxic Substances*, *Regulatory character*

 -F: Environmental Protection Act – deals /w toxic substances released into environ. H&E ministers create lists (according to Act) of toxic substance and order them in priority that can be released in to environment. Pick potentially harmful ones -> scientists determine whether they qualify as TOXIC. (Not necessarily on health but environment). Ministers may *recommend* adding a substance to LIST of toxic substances. Fundamentally reg character. Que hydro targeted -> releasing “toxic” sub -> got interim order (short-cut in Act). Que Hydro challenge because of clearly REG character.

 -Analysis: 5-4 upholding -> regulating “safety/health” or *environment per se* (typically criminal purpose). “Probhition Aspect” -> said it was, DESPITE it being *clearly* regulatory.

 -> Dissent: Hogg -> “unless or until people DO something, no prohibition at all” -> executive determining what is/is not criminal. Exemption too (“equivalency provision”) -> if equiv regimes = regulatory, how can Fed leg by prohibitory crim leg. Further, how can crim law only apply “optionally”?

 \*Hesitation of law encroaching on prov right to legislate here.

 POGG -> *using this necessarily* rules out prov legislating in the area (hence prefer crim law power, which DOESN’T).

 -> justification of Majority: *unrealistic to approach enviro concerns with \*sledgehammer*.. (blanket prohibition) + Laforest = environmentalist.

Assisted Human Reproductive Act Reference: *Possible 4th Requirement* *for 91(27)*

 -F: (some controlled activities)

 -Analysis: Unclear whether it modifies the crim law power test.. different outcomes. L&D: try to make it stricter.. wrt typically criminal purpose (*RJR*) – the requirement of *a REAL EVIL and reasonable apprehension of harm* – CAUSATION. -> on the basis of this test some provisions would not have passed. These things *may be at stake*, but are not REAL evil/reasonable APP of harm. Makes it more substantive (battle for provinces not to be fought on PROHBITORY ground).

 ->Machlach’s understanding of MORALITY in “typically public purpose” -> central moral precepts and there is a consensus in society that engages fundamental moral importance.

 -> *Ancillary powers doctrine*: acknowledges she’s suppose to look at GM framework (impugned THEN whole), but does it the other way around.

Ch 11 –The Province - Moral & Public Order

Prov’s have signif authority in crim law in few respects: 1. Enforcement of Crim Law (Fed Crim) by policing – est priorities, handle prosecution. 2. Allowances in Fed criminal conduct -> prohibiting conduct in fed leg, but subject to *prov regulation (e.g. lotteries)*. 3. Enactment of their own prov leg in the area.

|  |  |
| --- | --- |
| **Valid** | **Invalid** |
| * + - * Part of regulatory/licensing scheme
			* Preventative (instead of punitive – *Dupont, and the Nova Scotia*).
			* Property *(Mcneal, Dawson*)
			* Civil Consequences (*Chattergy*)
 | * Severe penalty
* Targeting individuals, relying on CC language (*Morgentaller*)
* Free-standing offence
 |

*McNeal*: prov censor board… preventing the screening of obscene movies.

*Dupont*: Leg to stop protests -> seen as preventative? Harm = possible breach of peace.

* *Dawson*: Prov leg saying that if a particular piece of property was being used for prostitution it would be under sanctions. \*Freedom of expression (McNeal) + Assembly/speech this case -> *province must be careful* when trenching on fundamental freedom.
* *Chattergy*: prov forfeiture law upheld. Right to prevent crime (even if sometimes penal)…which would’ve affected mainly prov interests anyways.
* *WestenDrop:*

\*Provs should be careful about filling in “no-go zone” or void in federal regime (e.g. Abortion in *Morgentaller*).

Lesson: no guarantees in this area, just need to attach attractive “prov-looking”/valid looking criteria to pass through AG.

\*\*\*\* SUPPLAMENT

Ch 9 – POGG

Left off with Duff’s understanding in *Natural Products Marketing Ref* -> limited POGG to national emergency (read Watson’s national concern as just first step to building *emergency*). Next, *Inflation Act Ref* -> opened up to independence/importance of national concern branch (2nd) .. *Johanesen* -> all of Aeronautics falls under “national concern” branch. Then *Jones* case -> upheld Fed Statute of Languages Act on “gap/residual branch”.

Inflation Act Reference: *Court on use of national emergency branch*.
F: SCC decides to UPHOLD fed legislation dealing with effects of inflation, despite effect on provinces (e.g. wage controls, provinces if opted-in) on the basis of the emergency branch of POGG. Feds were uncertain, so pitched leg based on *“national concern”* (leg history/text shows).

 -Analysis: only 1 point of disagreement (#7)

 1. National emergency branch is separate from national concern and gap branch.

 2. For emergency branch, “emergencies” can arise in peace time

 3. *Serious economic problems* can qualify as national emergencies 4. National emergency branch allows parliament to PREVENT and deal *after the fact* with emergencies already arisen (*Eastern Terminal* )

 5. All that is required = RATIONAL BASIS for govt’s belief in a national emergency.

 6. Legislation has to exist for as long as the threat (temporary).

 \*\*7. Difference of opinion -> Betts: *legislation has to make clear unmistakable signal to judiciary it is using the nat emergency branch* – other 7 = satisfied /w any signal.

 -> B’s Strictness because emergency power = pro-tanto amendment of the constitution (invading prov juris at will).

Emergencies Act:

 -> *1988 Parliament imposed req on cabinet to issue a declaration that it was using the national emergency branch (Betts winning war*).

Inflation Act Reference: *NATIONAL CONCERN BRANCH – touching on property & civil rights, inflation act fails -> not a new matter, old aggregate + too destructive of prov power*

 -F: since Betts rejected emergency branch, turned to NC (nat concern). Also rejects national concern branch here.

 -\*\*Betts’ test for NATIONAL CONCERN:

1. Characterization process – identifying the matter or P&S - look in the ways it invades prov juris (e.g. profit margins, wages, etc. in private sector – property & civil rights).

2. Allocation of matter to right head of power: takes places with an *eye to 91/92* – context. \*Real danger in taking general concepts like inflation and using them to *characterize* legislation. Definition is skewed: *too large & amorphous* and unfair to prov autonomy.

 -Lesson: *characterization* process = crucial step in validity -> not mechanical and has to be informed by the balance of powers.

3. Doctrine of Nat Concern: *Has to be a NEW MATTER that is not an AGGREGATE, but a degree of UNITY that makes it indivisible, one which makes it distinct from PROVINCIAL matters*. Ultimately: need to decide whether this will be compatible with our sense of Canadian federalism (minimal invasion on prov juris).

 -> B’s conclusion: containment of inflation is actually an old subject matter with an aggregate of subjects/divisible + would render prov power USELESS.

Crown Zellerbach: *National Concern branch further defined (#4 added)* – *applied to a prov undertaking*

 -F: Forestry CO (CZ) regulated by BC, digging around in water. Prov owns sea bed. *FEDERAL* charges laid for not having permit under *Ocean Dumping Control Act*. Prevents the dumping of anything in salt water, not just internal (territorial) sea. Const challenge based on interfering with prov undertaking.

 -Analysis: UNSUCCESSFUL (valid on basis of national concern branch). LaDain adding 4th step: 4. Provincial Inability Test: *Q: what would be the effect on EXTRA-PROVINCIAL interests of a prov failure to deal effectively with the control/reg of the intraprovincial matter*. (“political inability”) -> a way to prove singlessness/indivisibility/distinctiveness.

 -Application: \*fresh & salt-water distinction.. Distinctiveness + indivisibility, but didn’t really apply the rest.

 -> Dissent – LaForest not a fan of “rules, tests and principles” -> handcuffing.

Charter of Rights & Freedoms:

General info:

**1. What kinds of rights & freedoms does the *Charter* protect**?: *Equality, fundamental freedoms, legal rights, democratic rights, rights not subject to override* (e.g. minority language rights, mobility rights, language) 🡪 **s33**: override.

 **2. Who can claim benefit to the rights & freedoms**?: Sometimes “everyone”, sometimes “EVERY CITIZEN”, sometimes actual people, not corporations.

**3. Against whom can those rights/freedoms be invoked**? The government & government officials. S32: applies vis a vis Parliament and Prov Leg. *Executive + Legislative*. Judiciary: *can take it into account* but won’t directly apply to CL (exception for crim + some procedural?)

**4. What limits on those rights and freedoms**? S1, 33, 25 (can’t take away rights of aboriginal rights or treaties – have can’t use charter to impinge on aborig treaty rights), s7 (qualifier ‘unless consistent /w POFJ), s8 (“*unreasonable*” S&S).

**5. What institutions are given authority to adjudicate claims under the *Charter*?** S24(1) “court of competent jurisdiction” -- *very generous* to include some tribunals, as long as they are authorized to decide Q’s of law under enabling statute.

**6. What remedies can be obtained of a violation of a right or freedom**? 52(1) – “no force or effect” clause to the extent of the inconsistency, if cannot be saved by s1 (reading down, reading-in .. e.g. *Vriend* (unusual). 24(2): authorizes trial courts to rule out/exclude evidence as inconsistent with the charter (disrepute); (1) more general -> **whatever remedy court considered just in the circumstances** (e.g. prohibitory injunctions, MONETARY comp).

**7.** **What guidance does the *Charter* provide for interpretation**? S25-31. E.g. 27 (*Keegstra)* -> “in manner consistent with *multicultural heritage*, equally guaranteed to male & female, etc.

# Charter Analysis FRAMEWORK

**Preliminary Issues**:

2. **Does the Charter even apply**?

 **A. ENTITIES THAT ARE CLEARLY GOVERNMENTAL 32(1): prov, fed legs, executive** **and admin branches.**

-> everything they do/don’t do is caught under charter.

**Vriend**: *Action or inaction*?

-Applies to government (prov and fed leg, or executive/admin) wrt to **a) functions they perform** and **b)** **inaction as well as action (*Vriend*)**. So some rights may *constrain* governments, but other can **impose obligations** on them to do something they weren’t going to do (e.g. include “sexual orientation” in HRleg – “**reading-in”**). \***Underinclusiveness**: at issue here, also in ***Dunnmore***. Note: **b)** should not be construed as *contingent* on the court’s willingness to construe whatever freedom there might as imposing positive obligs 🡪 separate what interests the right protects from the application to government.

**B. Three part approach** **for entities NOT OBVIOUSLY caught by 32(1)**:

-> Not everything these entities do is necessarily governmental.

1. **CONTROL:** *Any entity that the government can be said to* ***control*** *should be govt for purposes of charter* (**general df of control**) –e.g. appointing board of directors. Matter of **degree**.

 **McInney**: *Restricted df of control*

 -Test for control -> **ROUTINE & REGULAR**. University not government because not subject to routine & regular control (lot of independence). (**Stoffman v VGH** – Hospital, also same result as universities).

 **Douglas College**: *Same test, different result*

 -The community college *was* government because there was sufficiently regular/routine control exercised over the college, unlike in McInney.

 **Greater Vancouver Transport Authority**: *Different test for control*

 -Accepts **SUBSTANTIAL CONTROL** test. Looking at statute that creates body in Q.. is it direct or indirect? Any additional control apart from statutory authority? (GV – deemed **agent** of govt).

2. **GOVT FUNCTIONS:** An entity performing **quintessentially government functions**

 -**McInney**: e.g. power of taxation with municipality, election by people, COERCION, etc. (you can’t get them on basis of control, and not named in 32(1)), but if you find ***basically* govt function** = govt for purposes of charter.

 -**Gobou:** *decision on whether applies to* ***municipalities***

-Entities like the town (enacting a by-law preventing councilors from living outside of the city) are **by their nature** govt’l, because of ability to enforce law of general application, coercive laws, etc.

3. **STAT AUTHORITY:** When an entity acts **pursuant to statutory authority**. Many entities used to further public interest, and some need a lot of independence, but charter will only apply to them when they are acting in accordance with the statutory authority.

 -**Slaight** **Communications**:

-Can’t say arbitrator would be under “routine reg/substantial/direct ctrl” of govt, but **high degree of independence doesn’t immunize one from charter scrutiny**. All of arbitrator’s powers come from statute (decisions, orders), and engage in **statutory compulsion pursuant to statutory authority**.

**C. DOES NOT APPLY TO PRIVATE ACTORS**:

**Dolphin Delivery**: *private actors,* ***INDIRECT application to COURTS***

-Rooted in *Mcinney*: lots of policy reasons as to why it should never apply to private actors. Actors that neither fall under A) or B) by virtue of becoming govt, even if they serve “public purposes” (not enough) will still be “private actors”.

-**Doesn’t apply directly to courts**:

**-1. Textual Support**: you can see leg and exec branch in text of 32(1), but not judiciary

 -**2. Different roles**: applies to bodies that can *threaten individual rights & freedom* (not courts – “neutral arbiters”)

 -**3. Inconsistent**: it doesn’t apply to private actors. If it could be applied by parties against the CL, when being used in context of *private* dispute, the court will then be found applying the charter to PRIVATE ACTORS.

**-However, courts will take into account consistency of CL with “CHARTER VALUES”** -> framed as rights instead of values (***Hill v Scientology, Saloturo, Pepsi Cola***).

**Difference between consistency with “values” vs direct charter attack**:
-Implies that DIRECT application doesn’t matter *that* much (it may cause a bit of a difference though – “consistency with values” = significantly looser standard to hold court against).

-Charter values: *no shifting burden* (onto other party upon proving infringement).

-Far more relaxed inquiry: don’t have to go through *Oakes* steps.

 -> Possible that they won’t be more scrutinizing in one and not the other.

**BCGEU + Rahey**: *limited application to CL*

 -*Charter* will apply **directly** to the courts in **CRIMINAL/QUASI-CRIMINAL disputes and when presiding over PUBLIC FUNCTIONS**.

**Problems with charter not applying to private actors**:

 -a) Irony of Que (all civil law) – who didn’t want Charter is now prov with Charter applying to the most.

 -b) 52(1) – Constitution is SUPREME law.. and “**any law** that is inconsistent”.. does that not include CL?

 -c) Legal-rights in *Charter*: it’s the courts who oversee “fair trials”

 -d)US Bill of Rights: no problem making decision to apply to CL (and Euro Convention).

**D. PRIVATE ACTORS IMPLEMENTING PROGRAMS/POLICIES OF PROV/FEDS**:

**Eldridge**: *adding onto Stoffman v VGH*

-Case leaves *Stoffman* in tact (that hospital wasn’t governmental), but adds that if a **private actor implements a specific program on behalf of govt**, it can be considered government **only insofar as the service is being delivered**. (s15 claim based on underinclusion of patients needing interpreters).

**ABCA\* - UofC**: applied to university as well, insofar as they were implementing specific policy or program on behalf of govt -> “providing post-secondary to Albertans” (freedom of expression engaged).

1. **Does the claimant have standing**?

Either **DIRECTLY affected**.. **Or** **Public Interest** **Standing:**

**1.** is the claimant raising SERIOUS constitional Q (something with legs to it?) **2.** Does the party seeking PIS have a *genuine* interest in area in Q.. **or** is it org DIRECLTY affected (usually the genuine) **3.** Whether or not THIS proceeding is a *reasonable way for this kind of const challenge to be launched* (relaxed by recent case).

**Merits First Stage**:

\***Burden on Claimant** to satisfy infringement in s1.

1. **Is the claimant’s interest protected by the *Charter* right/freedom being invoked?**

 (IGNORE B/C WHOLE FIRST STAGE = *IRWIN TOY*)

2. **If so, has the right/freedom been infringed by the impugned governmental action**

**Big M Drug Mart**: *When has the charter right been infringed*?

 -**PURPOSE: -**Charter challenge can be invoked upon basis of infringement by **bad purpose** or **bad effects** (*Lord’s Day Act* -> purpose = forcing people to abide by Christian beliefs & practice – argued secular).

 -**Bad purpose**: *illegitimate, invalid, not consonant with guarantees in charter* (or *Bulter*: forcing society to adopt majoritarian views of sexuality). Some purposes are “sufficiently bad” to warrant infringement.

 -**Leg’s Purpose cannot be shifting**: (cannot be the secular one because original was religious) 🡪 i) practically difficult; ii) would upset parliamentary intention. **However**, *Bulter* allows for our **understanding** of the purpose to change (e.g. ‘harm’).

 **-EFFECTS**: -*RARELY* found that governments have relied on bad purpose (although they did in Big M + Butler) -> once they found this could happen, they eliminated infringements of this sort.

 -**Direct or indirect**: could be direct sanction as well as **deterring** someone from doing something, or limiting options.

 -**Harmful effects more than trivial**: can’t be insubstantial (**Edwards Books –** case based onEFFECTS, not purpose, like Big M, since better purpose)

**Freedom of Expression**

**\*\*\*FREEDOM OF EXPRESSION** – ***Irwin Toy* *Framework*** (**Restriction**)\*\*\*

\*Takes up MERITS I. for FOE question.

1. Is the claimant’s activity **protected** by s. 2(b)?
2. Does the claimant’s activity constitute an **attempt to convey meaning**?

🡪 American distinction between **speech vs conduct** (because no s1 – conduct not protected).**REJECTION OF THIS DISTINCTION** (**Ford + Dolphin**).

🡪 **Commercial expression** is protected (**Ford** ) – advertising serves important *economic* purpose (self-realization).

🡪 Canadian courts want to give 2(b) a very extended reach (we have s1). *Prima facie,* ***any non-violent expression*** *is protected* (**Dolphin Delivery**), and includes “conduct” (e.g. parking a car in no-park zone as protest).

1. If so, is it **non-violent** in form?

🡪 really about **manner** in which the activity has taken place.

2. If so, has the government **infringed** on that protected interest?

1. Is the restriction “**tied to content**” (in which case the infringement is said to be \***purpose-based**)?

🡪 The restriction attacks the **subject matter/message** being conveyed (rather than the time, manner, place – like American distinction (higher hurdle for CONTENT – compelling purpose, clear and present danger) which we have chosen to abandon likely because of S1 🡪 **Dolphin Delivery**).

🡪 Distinction is not in line with how you use **purpose-based** infringements are in *BIG M* (purpose of govt in Irwin Toy -> technically, to protect vulnerable kids from advertising, but here, if infringement attaches to conduct, it will be “purpose-based”.

🡪 Better if you are challenger for infringement to fall here, because it’s harder to prove you further one of three rationales in b)

1. If not, does the protected activity **further** **at least one of the three rationales** for protecting freedom of expression (in which case the infringement is said to be \***effects-based**)

🡪 Democracy, truth and knowledge, self-realization.

🡪 Example of an **effects-based** infringement: *anti-noise by-law*, or *prohibition against pamphlets in airports* (not about the content)?????

**Application**:

 -F: govt restricting advertising of products to children in Que up to 13. Reason -> inability of children to distinguish between fact & fiction, so easily misled (aim of leg). Evidence: decent amount, but nothing to make it obvious (stronger for younger children). Fed Challenge + FOE 2(b). Interest = *wanting to be able to advertise to kids*, Claiment = Irwin Toy.

 -**Framework**: 1. a) yes, basically saying “buy my toys” b.) not bringing about message in a violent manner. 2. a) **easily determined that restriction was based on “content”** and hence purpose-based (since CPA explicitly set out to target “advertising directed at children under 13”)

 \*-> problem in reasoning here (backwards contrapositive).

**\*\*\*COMPELLED EXPRESSION RJR & JTI** **\*\*\*** IN PLACE OF

**RJR**: *Unattributed health warnings, (failed) compelled expression by govt,*

-Courts accept that **new framework** needed for analyzing the violation of 2(b) by government requiring you to express something you didn’t want to say. Two different approaches:

**1. Laforest**: only compelled expression that meets critical test Q: *whether or not third parties would attribute the compelled expression to the person who is compelled against their wishes*. (Here: is “Peter Jackson’s saying this product may kill me?” or “Looks like govt forced them”)

**2. McLachlin**: Given what is possible for you to express in a certain context, the Q is: *whether the party being compelled will be able to COUNTERACT the compelled expression*. Are they still able to ***effectively*** express their own views?

**Note:** \*CORPORATE ENTITY factor.

\*Note: 3 types of advertising (brand, Lifestyle, information -> Brand + Information = okay, and govt failed at **minimal impairment).**

->**JTI**: attributed health warnings (much bigger, but govt came up with more nuanced, better supporting evidence, etc.)..  **Merits Second Stage**:

**1. Is the infringement “prescribed by law”?**

1. If the impugned governmental **action was taken by a government official** or other subordinate body, was there a **legal basis** for that action?

**Slaight Communications**: *Compelled expression – PbyL in civil cases, indirect vs direct authorization*

 -F: wrongful dismissal led arbitrator to **compel expression** (write certain content in ref letter). 2(b) argued by employer.

 -The arbitrator is acting pursuant to the statutory power “*create what remedies are necessary in the circumstances”* – this compelled expression = **implicit** from general power. Court agrees this non-specific authorization by law can still be PbyL, possibly because **CIVIL case**, whereas it ***Therens*** (crim), **not satisfied unless *specific authority*** (or language making it impossible to construe otherwise). Reason for PbyL (*Therens*) = **rule of law**.

**Or**

1. If the impugned governmental action is legislation, **is that legislation reasonably/sufficiently precise** in its wording?

**Irwin Toy**: *PbyL test for LEGISLATION* – easy

-Legislation cannot be **unduly vague**.. has to have *REASONALBE* amount of precision. ***Intelligible standard*** – allowing judiciary to do its work with their tools (very forgiving).

**\*Vagueness**: courts prefer to deal with it in actual *Oakes Test* **(min impairment stage** – ***Taylor* and *Osborne***).

-> **Reason for low standard**: government’s function has expanded drastically (involved in much more) and hence it has to legislation in relatively *GENERAL* terms – rethinking rule of law, thus, lots of sympathy for tolerant approach (***Osborne + NS Pharma***).

**2.** **If so, is the infringement reasonable/demonstrably justified? *(Oakes*)**

\* Second Stage, is to be undertaken with a high degree of sensitivity to the specific **legislative and factual context** out of which the case has arisen. How much, if any, **deference** to the other branches of government the court shows at that Second Stage will depend on its assessment of that context.

**Hunter v Southam**: *when looking at claimant’s charter right*, *the courts take a* ***purposive + generous & broad approach***  to interpreting the right (search & seizure). Text is your starting point (or Big M -> protecting freedom of religion). Courts must *construe* the right in a way that protects the interest behind it.

**a.** Before the actual analysis, need **CONTEXT**:

 **Edmonton Journal**:

 -F: about publication of matrimonial dispute in court, (freedom of press).

 -**Court is ultimately sensitive to context of the freedom/right** (unlike American direction) -> makes a difference to the result of balancing s1 analysis to analyze FOE as in the abstract, or FOE to talk about “salacious details of a marriage”.

 -> may also apply to the **objective of the government**

**b.** Also need to consider level of **DEFERENCE** required:

 **Edwards Books**:

 -Courts unlikely to strike down leg protecting ***VULNERABLE*** *Canadians* by infringing on *Charter* rights, especially where regulating *business activity*, and had given the matter a “great deal of thought”.

 **Irwin Toy***:*

 -Tried to force legislation into two categories: **a)** **state as mediator = HIGH deference** (govt striking balance between different interest groups/individauls, with incomplete social science, and possibly vulnerable groups) or **b) state as single antagonist = LOW deference**. But bi-furcated approach can break down, even in crim, where state can be characterized as mediating between different interests in society (**RJR**).

 **Thompson Newspaper**:

 -Since **RJR** -> **Dealing with deference as part of contextualized approach**: many contextual factors can go in to determining deference -> e.g. prot of vulnerable groups, immediate apprehension of harm of a group, ability to **produce scientific evidence,** and relative **importance** of right/interest at stake. \***Other**: action taken by executive vs leg? Foreign relations implicated? Does the judiciary know better than others in the area? Hasty action? Number of different groups whose interest being taken into account?

**c. (\*\* For FREEDOM OF EXPERSSION**) The purposes behind FOE:

 **Keegstra**: *three rationales behind FOE*

1. **Democratic Self-Government**: can’t have full democracy without it
	1. This is predominant. Political speech carries great weight. “Free flow of ideas” sounds wide, but **SCOPE IS LIMITED** here: only a *narrow* sector of FOE.
2. **Advancement of truth & knowledge:** marketplace of ideas to uncover truth
	1. History suggests marketplace **may not work** in fact, as we always hope
	2. There is a fair amount of expression that can’t meaningfully speak to truth & knowledge.
3. **Promotion of individual self-realization**: allows each individual to realize his/her full potential. Origins in other people as well as themselves participating.
	1. Loose & amorphous – hard to rule anything out
	2. Connection between FOE and self-realization?
	3. **Note:** fact of being a **CORPORATE** entity changes things -> self-realization would only be on part of consumer/audience, whereas with people (maybe groups too), both can have it affected.

 *Three rationales* relevant throughout s1 analysis (particularly min impair + costs & benefits).

**Other things to note during s1 analysis**:

-Profit-motivation will not adversely affect a charter claim (**RJR**) (not according to LaForest in dissent: advertising tabac has nothing to do with the three rationales)

 -Majority: if profit became a negative, it will have undesirable effects elsewhere (e.g. authors, movies, etc)

**A)** are the objectives of the impugned governmental action both

**i.)** valid, and

**ii.)** **sufficiently important** to warrant overriding the *Charter* right/freedom in question?

 **NAPE**:

 -Courts will avoid striking down leg at the “sufficiently important” stage. Even “saving money” to override rights (Newf govt + female emps) in certain circumstances. Almost anything “not bad” will pass.

**B)** is the impugned governmental action **proportional** **to the objectives** underlying it:

**i.)** **is that action rationally connected to those objectives?**

 **Keegstra, Butler, RJR**: *low threshold - Rational Connection Reqs*

-Courts looking for **logical, common sense connection** between impugned action and objective seeking to further. **Evidence** supporting connection not required, but “nice”. \*Usually conceded and likely to be satisfied.

 **RJR**: *FOE*

-“The expression of tabac advertising is harmful, because people will have their thinking affected and others will actually ACT and BUY” -> hard to produce convincing evidence for it. Science may not make the conclusion available to us -> thus only logic & common sense can be demanded.

**ii.) does that action minimally impair the right/freedom in question?**

 **RJR**: *lower than Oakes requirement*

-Only need to satisfy that the means chosen to impair the right fall within a **range of reasonable alternatives**, which is far less stringent than “*least impairing alternative*”.

-Further, **COMPLETE ban** -> much more difficult to satisfy than **PARTIAL** **ban**.

**-3 different** **Characterizations of advertising**: 1. Lifestyle; 2. Brand Preference; and 3. Informational (only #1 not okay -> but other two fine, and **government failed at minimal impairment**: did not consider reasonable, less impairing alts, since there is some value in these 2 forms of expression -> **net cast too broadly**).

 **Keegstra, Butler, RJR**: *2 kinds of arguments*

-Two arguments frequently posed: **a)** existence of **alternative means** and **b)** **overbreadth** (casting net too wide). Courts more sympathetic to (b).

 **Irwin Toy**: *freedom of speech*

-Argument of “**alternative means**” for Irwin Toy rejected (didn’t have to prevent advertisement, but couldn’t done something else to combat the “problem), because courts are not really *able* to pick and choose between different means. Courts prefer to ask whether “*net cast too broadly*”.

**iii.) do the benefits of that action outweigh the costs**

**Dagenais, Bryan**: *adding positive effects*

-Instead of just the objectives behind impugned governmental action, courts also consider the **positive effects** of that legislation, as well as the **costs**. Might be rolled into *minimal impairment*, but could be important independently especially where lack of hard evidence supporting govt’s claim. Courts preferred to look *less interventionist* by striking down at minimal impairment stage, but have become *more comfortable* with cost & benefits analysis.

**Remedies**..?