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Essayish Materials

Constitution

-Constitution lays out 3 key relationships: 1) Feds and the provinces
2) State and the people
3) State and aboriginals

-Constitution is entrenched, makes it difficult to evolve and respond to society

Bobbit's 6 Forms of Argumentation

1) Historical- argument that marshals the intent of the draftsmen of the constitution
*Seen to have little persuasive force, but can occasionally play a role in the resolution of disputes about the roper meaning given to a provision of the constitution
2) Textual - argument drawn from a consideration of the present sense of the words of the provision in question
3) Doctrinal- argument from previously decided cases
*predominant form of argument in Canada
4) Prudential - argument about costs and benefits
5) Ethical - argument whose force relies on a characterization of Canadian institutions and the role within them of the Canadian people
6) Structural- inferences from the existence of constitutional structures and the relationship which the constitution ordains among these structures
*largely faceless and depend on deceptively simple logical moves

Standing

*Private standing - seek a remedy under s.24 or s. 52 if you feel personally wronged
*Criminal/ Other Trial- if you run into a constitutional problem
*Public interest standing- You raise an issue in regards of public interests in terms of constitutionality
-3 criteria for public interest standing: -expertise in the subject
-must be an interest in the decision/subject
-no other way that this would be brought forth

Evolution of Con Law

Colonial Laws Validity Act (1865)

*says that any Colonial law that is inconsistent with an imperial act is void and inoperative
*maintains/clarifies British law superiority and dominance over the colonies
*Corollary, colonial law is acceptable as long as it doesn't contradict imperial law
*Also expressly says that if British parliament dictates a law is meant to apply to a colony, then it shall

Statute of Westminster, 1931

-states that any law made by the UK, will not apply in the dominions unless otherwise expressly with the consent of the Dominion
-Strikes down the Colonial Laws Validity Act

-S.7 speaks to Canada, says Statute of Westminster doesn't apply to the BNA Act
*this is important because we would have lost our constitutional structure
*only measure of amendment must be by Westminster Parliament

Canada Act, 1982
-Enacts the Constitution Act, 1982 in schedule B of the Act
-No act of parliament of UK, after 1982, shall extend to Canada as part of law
(Schedule B): First part is Charter of Rights and Freedoms, 2nd= Aboriginal rights, 5= Amending Formula, 7 = General
-s.7 (52) (1) - Enshrines that the Canadian Constitution is the Supreme Law of Canada, and anything repugnant to it is in no effect
(2)- Constitution of Canada includes: Canada Act, 1982 , Acts and orders referred to in the schedule, any Amendments to the documents in the schedule
*Open ended clause, not limiting to S.7
(3)- Anything in constitution can only be amended by Amending formula
*Schedule mentioned earlier is foundation of constitution (approx 30 Acts)

Important Cases

Person's Case aka Edwards v Canada (1928)
Does the phrase "qualified persons" in section 24 include female persons? Should women be able to stand for senate appointment?
-Point of 1867 Act was to provide a framework through which Canada could grow
* therefore, in interpreting the act, they should give it liberal interpretation
*review act and find that some clauses expressly use "male", while others use "person" in clearly a male and female sense
-Therefore, term Person is ambiguous…can include females in this case
Constitution as a living tree- must look at both roots and current society to determine how it should be interpreted, should be interpreted liberally

Values Informing Interpretation of the Division of Powers

General Notes
-Distribution of legislative authority is sufficient, but not necessary for a federal state
*Other factor, is that neither government is subordinate to another and that they have supreme jurisdiction in their own sphere
*However, where sphere's collide the federal government trumps the provincial government
-Centralist model- idea that having a strong central government is best for the Canadian government
*in 1867 Act, this sentiment is present
-federal disallowance power= refusal of assent by the provincial Lieutenant Governor who are appointed by the feds allows the federal government to refuse or disallow provincial laws
-Compact theory- that the constitution because it was the result of a compact or contract between provinces whereby powers were delegated to a central body

*idea that Canada came about in 1867 out of agreement between provinces to delegate some powers to an overarching federal government
-Dualist theory (two nation theory): that two nations French and English inform the structure of federalism
-Co-ordinate concept: each government, whether federal or provincial is supreme in its right in relations of equality with each other, not hierarchy
-Symmetrical v asymmetrical federalism
*Canada is an asymmetric federalism, Quebec gets more than other provinces (difference)
-Subsidiarity-deals with the idea that if you can do it locally, do it locally
*federal government acts when provinces can't do it themselves

Simeon, "Criteria for Choice in Federal Systems"
-Provides us with an illustration of the kinds of values that are at stake with constitutional decisions
*different conceptions of arrangements and values that should be taken account for
3 sets of values are present in Canadian division of powers cases:
1) Community-one set of values, pan-Canadian community v provincial community v 2 national communities
*many belong to multiple communities that have conflicting interests
*most focus placed on provincial v federal community (because of government presence)
2) Functional Effectiveness- costs v benefits analysis
* How does the division of powers help/frustrate the decision making process, economic system, environmental issues
* Difficulties figuring out whose values should be optimized
* Founders of the "watertight compartments within the ship of Canadian Federalism" approach
3) Democracy-Liberty, equality, representation
*how does federalism allow for checks and balances of political power?
*does it lead to more responsive and responsible government?
-Argues that one or more factors are present in Canadian cases
*Different sets of values that contain different principals, that often oppose one another in an individual decision

Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism"
-Article discusses movement between classical federalism (division of powers that allowed little overlap) and modern federalism (more flexible conception of federalism) in canadian jurisprudence
-Classical paradigm is premised on a strong understanding of exclusivity
*there shall be no overlap or interplay between federal and provincial heads of power
*if there is overlap, heads should be modified mutually to avoid future overlap
*weakness= in a complex world most social problems don't fit neatly into a single jurisdictional box, can create legislative vacuums by granting partial jurisdiction of one are to both levels of government

*promotes judicial activism, as the judiciary is left to separate the powers along lines it sees as proper
-Modern paradigm: premised on a weaker understanding of exclusivity
*prohibits each level of government from enacting laws whose dominant characteristics is the regulation of a subject matter within the other level of government's jurisdiction
*laws should be in the "pith and substance" of the enacting governments jurisdiction
*this promotes judicial restraint
*weakness is that it quashes some provincial power, as when federal and provincial overlaps occur, federal paramountcy ensures federal laws prevail

Validity: Characterization of Laws

-3 tests of laws constitutionality:
1) Validity
2)Applicability
3)Operability
-Each has it's own tests and own challenges
-Validity is always considered first
*is the law in the jurisdiction of government making the law
*if a law is not valid- it is of no force and effect, as it runs contrary to s. 52 (1) go 1982
-So then if the law is valid, we ask whether it is applicable
*this deals with Interjurisdictional Immunity
-Finally, we must look at operability
*this deals with paramountcy

Swinton Article

-3 steps: 1)identification of the "matter" of the statute
*looks at statutes , purpose of legislation for aids in determining the content of the statute
2) Delineation of the scope of the competing classes
*judges have discretion, as many areas of s.91/92 overlap, law may fit within one or more heads of power,
*double aspect doctrine- court acknowledge that some laws may have both federal and provincial purposes
*water-tight compartments doctrine is accepted not to work, as both federal and provincial powers have good reasons for making laws that are validated by s91/92
3) a determination of the class into which the challenged statute falls
*suggests that the final decision is made on the basis of where the power fits best, and where the balance is best struck between federal and provincial power sources

Lederman Article

-PRINCIPLE: A rule of law for purposes of the distribution of legislative powers is to be classified by that feature of its meaning which is judged the most important one in that respect
*constitution is for the betterment of the citizens ->best for the people that the law falls in the category that benefits the most people

Citizens Insurance Company v Parsons
Whether the Ontario fire insurance legislation was ultra vires s 36 (1)?
-How to characterize the law?
*Privy council suggests that the first step is do discern whether the act falls within the s. 92 headings
-they say this does in the head of property and civil rights (92-13) (broad reading)
-Appellants wish to have the term civil rights be construed as those rights flowing from the law, so that this instance would not be covered by them (narrow reading)
*court looks at other parts of the constitution, determine that provinces must have been given the power of contracts as Quebec has a separate civil code
-Court then looks at whether the act of insuring falls within the federal head of "trade and commerce" s.91-2
*if you use the words in their widest sense this could refer to anything
*looks at the internal provisions of the act, and looks to similar provisions in other british statutes to determine that the word trade refers to political trade arrangements
*regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade (such as fire insurance)
-Find the act in question valid
Good Example of Mutual Modification

R v Morgentaler
Is the Nova Scotia Medical Service Act ultra vires the province of nova scotia on the ground that it is, in pith and substance, criminal law?
-Crown argues that the act is under the province's jurisdiction as it argues that the Medical Services act falls under heads 7, 13 and 16 of s. 92
*these acts give the province exclusive authority over hospitals
-To determine background context and purpose of the legislation, court uses previous legislation, external documents, evidence of the "mischief at which the legislation is directed
*court says that Hansard stuff is ok as long as the context of the excerpts are noted and they excerpts are not used as a crutch for the greater argument
*catalyst for the act was the announcement of Morgentalers intention to open his clinic (concede by the crown)
*this is the "mischief" which the act attempts to override
-Legislative purpose: 1) To ensure the quality of healthcare (abortions)
*not rational because quality is comparable to hospitals and do not compromise the health and safety of the woman
2) To avoid a two-tier health platform in the province
*not supported by Hansard, and if this is true it is supplementary to the main intent to punish the activity of abortion
*judges find no link between the services listed under the act, if intent was truly to prohibit private procedure, wouldn't it ban all procedures
3) To increase the cost-effectiveness of health care
*no evidence that private clinics are less cost effective or quality

-S. 91(27) gives the federal gov the exclusive jurisdiction over criminal law in the widest sense
*Abortion has always been treated as a criminal matter historically in British and Canadian Common law
-this was changed in Canada with the erasure of s. 251 which allowed for non-criminal abortion
-Finds that NS had the right to pass law preventing the privatization of health care services, but the clauses that specifically criminalize the performance of abortions is of questionable validity
*Court suggests that as s.251 is now defunct, the criminal provisions in the NS act overlap the old s.251 provisions, and thus an inference could be drawn that they intrude on federal jurisdiction
-Judge says that there is nothing to suggest that the true pith and substance of the legislation is to do with healthcare, and thus it is ultra vires of the province
Lays out rules for what can be used as proof for pith and substance test
distinguishes between intention and effects of legislation

AG Canada v AG Ontario (Employment and Social Insurance Act)
Was this act to provide unemployment insurance in pith and substance Federal or Provincial?
-SCC held that the act was invalid as it dealt with insurance (provincial) and contracts and employment (provincial)
*was not justified by emergency POGG powers
*went to the privy council
-Privy council agrees, suggests that categorizing it as a tax under s.91 (3) would invade the provinces rights over its heads of power
In this case we see a good example of the classical paradigm

Reference Re Unemployment Insurance Act
Did the maternity unemployment insurance provisions rightly fall within the powers of the federal government?
-Quebec government alleged that these provisions were directed at supporting families with children, and therefore fell within property and civil rights 92 (13) or 92 (16) (Matters of local or private nature in the province)
-Federal government suggested that they fell within unemployment insurance head 91
-SCC details the fact that when the constitution was amended (1982 Act) it was specified that unemployment insurance would fall in Federal hands
-Court concludes that while the results of this insurance are to help families (provincial argument), the pith and substance of the legislation is to entitle pregnant women to receive benefits when they sustain an interrupt of earnings
*this is different from maternity leave or job security (provided for by the provinces)
*it is more consistent with unemployment insurance
*incidental effects doctrine

AG Canada v AG Ontario (Labour Conventions)
Did the government have the ability to pass legislation around minimum work weeks, wages, and hours/day?, or was it Ultra Vires
-The AG primarily sought to justify the government's entrance into this under s. 132 which outlines federal treaty powers
*PC suggests that this doesn't work, as s.132 deals with obligations imposed upon Canada by British treaties imputed to Canada, and this is certainly not the case here
-Province's argument is clearly that it would fall in the province's jurisdiction under property and civil rights
*the PC upholds this, and suggests further that it would be a miscarriage of the underlying constitutional principles to allow the federal government to step on parliamentary powers in the name of foreign obligations
*upholds the notion of water-tight compartments
Treaty obligations do not provide ability for the feds to encroach upon the provinces

Double Aspect Doctrine

Lederman "Classification of Laws and the British North America Act"
-Suggests the court has 4 options when there is overlap between jurisdictions on a piece of legislation:
1) Invalid-too much overlap
2) Valid- but there are incidental effects (pith/substance + incidental effects)
3) Necessarily incidental/ ancillary- in order for a legislation to work, there must be some overlap and as long as it can be defined, then it should be tolerated
4) Double Aspect region
*there are some areas where legislation can be defined federally or provincially legitimately overlap, and both do the same thing, then there is a double aspect
    -hard to pick federal jurisdiction so allow both to continue to operate

Multiple Access Ltd v McCutcheon
Does the trading of shares on the TSX fall under Ontario Securities Act? Or is it a matter of share trading by federally incorporated companies under Canada Corporations Act?
-Court determined that the ability to legislate with reference to the incorporation of companies other than provincial objects belonged to the feds through POGG powers
*Extending this down the legislation the *Canada Corporations Act* attempts to legislate companies, and thus the provision legislating insider trading in these companies fits well within the Act
-Also falls into the power of the Provincial governments in their ability to legislate over local matters, as well as property and civil rights
-Dickson then judges the competing legislations are of roughly equal value
*finds that neither the doctrine of inter-jurisdictional immunity or federal paramountcy apply in this case

Good demonstration of double aspect doctrine, and the test for it. 1) Must be valid both provincially and federally 2) Implications of federal and provincial legislation must be of roughly equal importance*
* Double aspect is not a test for validity, its a conclusion you reach after testing for validity using pith and substance*

Necessarily Incidental (Ancillary Powers)

General Motors of Canada Ltd v City National Leasing

When challenged provision is part of a greater legislative scheme, how is the constitutional validity of the challenged provision to be determined?
-Procedure:
1) Court must determine whether the provision intrudes upon the other sphere, and if so to what extent
2)Court must establish whether the Act is valid?
3) Is the impugned provision sufficiently integrated in the scheme that it can be upheld by virtue of this relationship
-In this case:
1) Yes, as the provision creates a civil right of action (impugned 92.13)
*this is a significant power that is not lightly encroached upon
*However, 31.1 is remedial (not substantive), it is of limited scope, and feds are not constitutionally precluded from creating rights of civil action where it can be shown it is warranted (POGG)
2) Act is valid under trade and commerce heading of charter
3) Strict test for inclusion in the act is not necessary, as intrusion is somewhat minor
*if intrusion of statute upon other jurisdiction is moderate, it must be necessarily incidental
*if it intrudes a little, the provision must only be rational and functionally connected
*if intrusion is high, the provision must be truly necessary
-Under this, the provision is deemed valid as it is an important part of a well-conceived economic regulation

Lacombe v Quebec

Issue
-Whether the amendments brought by the by-law preventing aeronautics in the zoning restrictions, which in pith and substance lie outside the provincial power, are nevertheless valid because they are ancillary to valid provisions
*in other words, whether the amendments are rationally and functionally connected to valid provincial zoning objectives
Ratio
-Judge established that the municipal by-law 260 was outside provincial powers, and that the infringement was minor
-Ancillary powers doctrine requires that the impugned provision, both rationally and in its function, further the purposes of the valid legislative scheme of which it is said to be part
-Conducts first step to see whether by-law No. 210 is valid?

*finds that it is valid in relation to land use planning
-Purpose of the legislation is treat similar areas similarly in terms of zoning
-Finds that the by-law No. 260 does not functionally or rationally work with by-law 210, as it does not ban aerodromes where it is rational to ban them, but bans them everywhere within the given municipality
* no evidence that by-law 260 really has a place within 210
-Therefore, the by-law does not have the kind of connection required to validate invalid legislation
When preforming necessarily incidental test it is important to examine the scope of the overall legislation, and see whether the impugned provision fits within that scope/purpose of the overall legislation

Inter jurisdictional immunity

McKay v The Queen

Whether the by-law preventing election signage is applicable?
-Main point- If a statute can have multiple interpretations, the court should adopt the interpretation that renders the statute constitutional, as opposed to unconstitutional
*presumption of constitutionality
-Uses this to challenge the reading of the lower courts that the by-law can be construed to explicitly ban the display of political signs
*says that the by-law cannot be read this way as this would clearly trench upon the powers of the federal government to ensure political rights of federal political candidates
-does not fall within the provinces ability to control property and civil rights
-Thus, the by-law is not meant to read that way, which means that the charge upon of the appellant cannot be valid
Federal Election law is in the jurisdiction of the Federal government, and thus cannot be trenched upon by provincial legislation i.e. interjurisdictional immunity
This case uses interpretation of the municipal statute to rule it out of the federal jurisdiction, to enforce interjurisdictional immunity
Example of covering the field method

Bell Canada #1

Issue
-Deals with the Quebec Minimum Wage Act
*says that regulations apply to all companies within Quebec boundaries
-Bell says it is not subject to this legislation, it is a federal undertaking
-Quebec responds by saying that they have jurisdiction over civil laws
*says that infringement on Bell is an incidental effect
Ratio
-Court doesn't accept this
*finds that effect on Bell touches on a core piece of federal jurisdiction which is employment standards
*even though this legislation had not sterilized or froze Bell's operations

-Then, court read down Quebec Statute to not include federally undertakings
Suggests that if provincial legislation touches on a vital or essential part of federal undertakings, they must be read down so that they do not effect the federal undertakings

Bell Canada #2
Does the province have the ability to legislate in the area of employment rights, or is it within the untouchable jurisdiction of the feds?
-Judge suggests that telephone matters fall within a category, the classes of which are deemed to be exclusively federal (such as railways)
*thinks that this power should be read broadly, as if it is read narrowly it gives the few power only over certain segments of the industry, which creates an ineffective jurisdiction
-If jurisdiction is labeled as a core of jurisdiction, that means that there is a basic, unassailable minimum that cannot be vitally or essentially effected by provincial statutes
-Finds that Quebec legislation impairs the federal power over labour relations and working conditions in federal undertakings, this this law is not applicable
Outlines federal areas of exclusive jurisdiction, and the test that says that provincial legislation can enter these areas as long as it does not impair or paralyze federal power
Upholds Bell#1's proposition that Federally Regulated Undertakings be tested for IJI based on vital essential part test…whereas for Federally Incorporated Companies are still tested by sterilization

Irwin Toy
Issue
-Quebec passes a legislation that says advertisement for children's toys couldn't be played at certain times of the day, to prevent manipulation
*Irwin toy says that the Quebec government could not do this as it was infringing upon a core federal jurisdiction
Ratio
-However, as Irwin Toy is a Federally Incorporated Company, they had to meet the sterilization test
*So Irwin Toy argues that this legislation is effecting broadcasting, which is a Federally Regulated Undertaking
-Court does not allow this, says that if a statute indirectly effects a Federally Regulated Company, must meet sterilization test

Canadian Western Bank v The Queen
Is the use of the IJI doctrine in the case of the Alberta Requirements for banks selling insurance?
-91(5) gives Feds exclusive jurisdiction over Banking, Incorporation of Banks, and the Issue of paper Money
-92(13)-Property and Civil Rights…92(16) Exclusivity over local or private matters
-Court suggests that the better test for IJI would be an impairment test (does the provincial application of power impair the federal application of power)
-Introduce two changes to the doctrine: 1) Substitute impairs for effects

-Reads down Bell #1, finds a midway point between affecting and sterilizing…which is impairing
2) Reserve for situations already covered in precedent, largely reserved for those heads of power that deal with federal things, persons, or undertaking, or where in past application considered indispensable or necessary
-keep the understanding of the core that emerged from Beetz's judgement in Bell #2 "basic, minimum and unassailable content"
*we can understand that if it effects the minimum content that allows the power to be what it is meant to be, and if this is diminished, then it is not being exercised in the way it is meant to be
-On another stream, they say that Pith and Substance tests should always be applied before IJI, so as hopefully to resolve it before it gets to IJI
*suggest that IJI should only be applied in circumstances where it has already been classified

Quebec (AG) v COPA
Does IJI apply to Aeronautics?
-Finds the provincial legislation valid
*however impairs the protected core of the federal jurisdiction over aeronautics and is inapplicable to the extent that it prohibits aerodromes in agricultural zones
Step 1)- Pith and substance legislation pertains to ensuring agricultural production, and looks to prohibit non-agricultural uses in lots designated to be agricultural regions
2)Does it fall within a provincial head of power? Yes, 92(13) property and civil rights, 92(16) matters of local or private nature, or s. 95 (agriculture)
3) IJI? 1) Does the provincial law trench on the protected core of a federal competence
*Federal power over aeronautics is well established, ands extends to power over airports
*Is this a protected core of federal power? does the subject come within the basic minimum and unassailable content of the legislative power?

> -jurisprudence suggests that location of airports is an essential component of aeronautics and aerial navigation

-thus falls within the core of the jurisdiction
2)Does S 26 unacceptably interfere with federal competency?
-Does it impair federal power?
*yes, prohibits building or airdromes in designated agricultural regions without permission of committee

> -such a substantial limitation on parliament's freedom constitutes an impairment of federal power
> -would otherwise force federal parliament to legislate specifically to build airports overlapping federal and provincial legislation

Canada (AG) v PHS Community Services Society
<u>Issue</u>
1. Are s. 4(1)+5(1) of the CDSA constitutionally inapplicable to Insite because it is under provincial control therefor not needing a s. 56 exemption
2. Are s. 4(1)+5(1) of CDSA constitutional? Reasonable limits under s.1?

3. Was ministers refusal to give exemption unconstitutional? reasonable limits under s.1?
Ratio
-S.4 (1) prohibits possession of drugs s.5(1) prohibits trafficking of drugs
-S. 56 - Allows the health minister to allow an exemption where it is in public interest or necessary for medical or scientific needs
-BCSC conclusions on addiction:
1) Addiction is an illness
2) Injection substances do not cause Hep c or AIDS, but unsanitary equipment, techniques, and conditions do
3) Risk of morbidity and mortality associated with injection drugs is ameliorated by presence of health care professionals
-SCC- Respondents argue that:
1) Federalism- Interjurisdictional immunity?
2)s. 7 constitutionality argument
-#1 - Doctrine of interjurisdictional immunity is premised on the idea that there are basic, unassailable powers that must be protected from impairment by the other levels of government
*court concludes that health care does not constitute a core provincial power because:
-provincial healthcare is too large and amorphous to deserve the protection of interjurisdictional immunity
-Carving out healthcare would create too large a silo
-Afraid of making a zone where the feds cannot legislate, and the province is not inclined to legislate, so that there would be somewhat of a deadzone
-Court then ponders whether this is a charter violation?
*Judge -The court finds that there is an infringement against the right to life of the vulnerable drug users
*However, finds that this accords with fundamental justice, as section 56 acts as a safety valve so that if s. 56 infringes upon s.7 rights, the minister can grant an exemption finds that the act itself doesn't violate s. 7 as the minister may exempt parties based on his best discretion, therefore not unconstitutional
-However, as the minister didn't grant this exemption, and the decision was made in an arbitrary manner that contradicts the act
*Ministers decision is not in accordance with principles of fundamental justice
*Court orders Minister to grant exemption under Insite

Paramountcy

Ross v Registrar of Motor Vehicles

Issue
1) Was the provincial legislation valid
2)Was the federal legislation valid?
3)If both pieces of legislation were valid, was there a conflict between the two provisions requiring the application of the rule of federal paramountcy, with the result that the provincial legislation would be inoperative
Ratio

-Finds that both the provincial legislation and the federal legislation are valid
-However, says that the intention of the federal legislation was not override the provincial legislation, but was instead made to augment the legislation
-Thus the judge says that the conflict should be mediated by obeying the provincial statute, which is more onerous, and then the federal statute (as it was of a longer time frame then the provincial ban)
In situations where prov/fed legislation are both valid and seem to conflict, look at intention of feds…if intention was to override prov legislation, or deal with an area of legislation that the province was dealing with, then paramountcy will rule..if not then they can both continue to exist
Marked departure from covering the field

Multiple Aspect v McCutcheon
-For paramountcy:
*rejects the covering the field doctrine
-Instead, Dickson develops new test for conflict
*impossibility of dual compliance- not possible to comply with both statutes at the same time
-more tolerable of overlap: if it is possible for citizenry to comply with both acts, they will not be found in conflict

BMO v Hall
Was BMO required to comply with the provincial legislation?
-First, consider whether the laws are valid:
1) Provincial legislation was intra vires as it fell within the property and civil rights head go power
2) Federal legislation was intra vires under the power of the federal government over Banks
-Then considers paramountcy: asks whether the legislative purpose of Parliament would be displaced in the event that the appellant must comply with the provincial legislation
*suggests that the provincial legislation is enacted to standardize the situations in which property may be seized from a debtor
    -if it is not followed the debtor is alleviated of his debt
*in contrast, bank act allows banks to immediately seize assets when a debtor defaults
-Finds that there is a conflict in the McCutcheon sense, as the bank is prohibited from doing something federal statute says that it can
*court says that this frustrates the intent of parliament, to allow the bank act to operate as the scheme designed by parliament
-Finds the impugned sections of the provincial legislation to be inoperative when it comes to federal bank repossession
Introduces Frustration of Federal Intent test

Rothmans, Benson & Hedges Inc v Saskatchewan
Whether the Tobacco Control Act is sufficiently inconsistent with the Federal Tobacco Act, so as to be rendered inoperative?

-Judge says that the test of conflict is whether the provincial enactment frustrates the federal enactment, making it impossible to comply with the latter
-In this case:1) Can a person simultaneously comply with The Tobacco Control Act and the Tobacco Act
2) Does the Tobacco Control Act frustrate Parliament's purpose in enacting the Tobacco Act

1)Yes because a vendor can comply with provincial Act by ensuring that everyone in the store is 18+, and still comply with the federal act
2)No because the general purposes of the Tobacco Act are being fulfilled by the Tobacco Control Act, mainly the protection of youth from the inducements of tobacco products
-Thus, paramountcy doesn't apply here
*Introduces 2 part test

Other Cases
-*Mangat* reaffirms BMO
*case is all about federal law that says immigration tribunals can be conducted by a lawyer or a paralegal
*provincial legislation requires a lawyer
*court finds that this conflicts with federal intent
-In *Spray Tech*
*makes the distinction between where federal intent is permissive v mandatory
*if permissive, then there can be cases where local legislation doesn't really frustrate federal intent, because the feds are not explicitly disbarring something, but are permitting activity in some area, which may or may not be complied with locally

Criminal Law

General Stuff
- Federal = prohibition, penal, public property
- Province = prevention, regulatory, licensing, private property
-Hutchinson and Schneiderman suggest that the scope of the federal power can be potentially limitless and can subvert the division of powers between the federal and provincial legislatures

Margarine Reference
Is Section 5(a) of the Dairy Industry Act valid use of the Criminal Law Power
- Step #1: Judge finds that purpose is primarily toward the economic protection of the dairy industry
- Step #2: Scope of criminal law - not directed toward injurious harm (public peace, order, security, health, or morality)

*finds that this deals directly with the civil rights of individuals in relation to particular trade within the provinces (as the dairy regulations choose manufacturers over consumers who would otherwise benefit from lack of regulations)

-Finds that it is unsatisfactory to allow parliament to use criminal law power to choose one segment of the economy over another, and significantly shut down trade in that sector = not good use of criminal law power
** it is important to look at the evil at which the act is directed**

RJR MacDonald Inc. v Canada (Attorney General)
Is tobacco control a valid exercise of the federal criminal law power?
Ratio
-Problematic because: deals with health, does not prohibit the harmful aspect of the activity, not a complete prohibition on advertising, has some regulatory facets
1) the evil it is directed at is legitimate public health concern- detrimental health effects of tobacco consumption
2)the laws are accompanied by penal sanctions
3)it is colorably provincial, but is in it's nature federal - says if they really wanted to intrude on prov would have done so more broadly/ attacked manufacturing of cigarettes
*the federal government is not trying to regulate an industry for economic purposes, it is trying to use prohibitions on advertising to address a social issue that poses risks to persons health
-As there is no enumerated power over health, the court has deemed that the criminal law may protect citizens against injurious or undesirable effects
*federal power to legislate to protect health through criminal power is broad and is only limited in situations where the legislation is colorably federal but actually presents a serious infringement upon the provincial powers
-Once it is established that parliament may validly legislate the manufacture and sale of a given product, it is a logical extension that they may legislate to prohibit advertisement or sale of product without health warnings
** parliament may have exemptions in an act without effecting the act's criminality, this can be seen as defining the scope of the criminality of an activity**
*** This case showed that the courts are willing to recognize a wide variety of laws under the criminal law power - ie can take a circuitous route to criminalize evil***
****Court says that it is not necessary for their to be an affinity between the legislation and a traditional criminal matter - criminal power not frozen in time****
Dissent
-Says that this is not a valid area of the criminal law power deals does not deal with proper functioning society, grave concerns
-While criminal law is not frozen in time, should have affinity with traditional criminal law concerns
*if this is a true criminal law power, then why are there exceptions

R v Hydro Quebec
Can the Environmental Protection Act be justified under the criminal law power?
-Scheme of act is for the government to compile a list of substances that are dangerous to the environment, and categorize these substances in terms of their danger to the environment

*allows the government to regulate advertising, manufacture, use, quantity, handling, recording of chemicals listed as toxic substance
*allows for the making of interim orders regulating substances that are not on the Toxic chemicals list, or that are in the process of being added, without following normal procedure
*act prescribes number of civil and criminal penalties
-Protection of the environment seems to be an area in which the federal government could exercise its criminal law power - relates to health and is of national concern
-Both levels of government can work together in this area to regulate, as it is broad in scope - seems to suggest that this reduces the colorability of the legislation as provincial because it allows prov to act in a capacity and does not preclude them
-Court answers allegations that power is too broad by saying broadness is necessary and that the purpose of the act is narrow enough in regards to chemicals that it does not interfere with manufacturing/marketing of all chemicals
*does not infringe upon the provinces regulatory power because it attempts to address an evil through penal sanctions, and is very particular about how this evil is addressed
Says that you must be clear that if you want legislation to be POGG, you must make arguments to that extent
this case shows that the courts are willing to entertain expansions of the criminal law power
Dissent
-Basically says the act fails in form, as it is regulatory and does not have a prohibition
*says that the assertion that it is protecting public health is unconvincing
*agrees that the law could be understood to be about environmental protection as a criminal purpose
-7 points which discern whether it is regulatory or prohibitory:
1) Balance between exception and regulation
2)More elaborate regulatory regime, the more regulatory
3) It is ok to have exemptions if they relate to the prohibition
4) Criminal law, the prohibitions typically does not have an intervening agent or agency
5) Equivalency provisions - provinces can be exempt if they have equivalent laws in place...if it valid criminal law, then there could not be an equivalent provincial law that is valid
6)Looks like it is control of substances not prohibition of particular behaviours or activities
7)RJR only dealt with one specific form of advertising, did not deal with a broad topic

Reference Re Firearms Act
What is the limit of the federal criminal power when it comes to regulatory schemes?
-Court finds that in p+s the law is directed to enhancing public safety by controlling access to firearms - regulatory aspects are second to this
-Criminal purpose behind law is clearly public safety, and thus regulation of guns is validly criminal
-Provincial suggestion that the acts complex nature and the discretion of the chief firearms officer makes it regulatory is overcome by the court

*says that complexity does not detract from criminal nature, also that no administrative body oversees/implements the prohibition, as it is cut and dry that unregistered/licensed gun owners will be punished
-Court then looked at federal-provincial power balance:
*says that it does not intrude upon provincial ability to regulate property as regulation of firearms is different than provincial car/land registry because guns registry is designed to address public safety, which places it validly in criminal law power
*said that effects on property were incidental , act did not hinder ability of province to regulate the property and civil rights aspect of guns, nor did law enter feds into a new field
Case provides a nice summary of how the court treats these cases (broadly), and process: 1)P +S = what area does law lie in 2)Evil that it addresses? 3)Form? regulatory or criminal 4)Power balance
***Argument that federal legislation bars provinces from not having a registration scheme for the guns is answered by saying it is a double aspect area, and where these areas conflict then the federal government has paramountcy
****Case shows that regulatory features of laws are not necessarily determinative of the criminality of the law, willing to see these regulations as being incidental effects****

Reference Re Assisted Human Reproduction Act
Is Assisted Reproduction Act a valid application of the federal government's power over criminal law? specifically is the legislative scheme as a whole valid? are the controlled activities prohibitions valid? validity of the administrative provisions under the ancillary powers doctrine?
-Breaks sections up and analyzes them individually
*ss 5-9 are absolute prohibitions; things like cloning, use of embryos for scientific studies other than human
*ss 10-13 are controlled activities, prohibits these activities unless they are carried out in accordance with relations made under the Act, under licence, and in licensed premises
-Act also creates an Agency to administer licensing and monitoring of the Act
Validity of the Legislative Scheme as a whole
-Does the act attempt to curtail practices that may contravene morality, create public health evils or put the security of individuals at risk? or does it promote positive medical practices associated with assisted reproduction
*Court says that the dominant thrust of the Act is prohibitory, and that the provisions that concern provision of health services do not rise to the level of pith and substance
-Accomplishes purpose by prohibiting conduct that is reprehensible by imposing sanctions
*ss 8-13 still prohibit reprehensible conduct and distinguish it from promotion of beneficial conduct
-Finds that the act in Pith and substance is for the prohibition of unwanted health services and that the regulatory underpinnings are designed to help ensure that purpose (incidentally effect the provinces jurisdiction over health - *Firearms Reference*)
-Then consider if the matter meets the three requirements of valid criminal law
*Act imposes prohibitions backed by penalties

-says that the regulatory scheme under the criminal law act does not bar the creation of regulatory schemes, provided they further the law's criminal law purpose

-Court then finds that moral concerns of the federal government can be a legitimate criminal purpose

-Also defines that health concerns that involve human conduct that can have an injurious or undesirable effect on health members of the public is a legitimate reason for criminal law power exercise - health concern must be of significant enough concern to warrant sanction and prohibition

-Finally court identifies that personal security is a valid reason for enacting criminal law jurisdiction

Do the prohibitions in sections 8-13 constitute valid criminal law

-Finds that these provisions are addressing concerns that are severe enough and threaten morality, health safety, and security that they necessarily could require criminal provisions to address them

Are the Administrative provisions of the Act Ancillary to the Prohibition Regime in Seciont 5-13

-McLachlin refines the severity of extra jurisdictional incursion test to 3 steps:

1) Scope of power: narrow power being intruded upon makes severity of intrusion greater as the power being intruded upon could be swamped

2) Nature of impugning provision: meant to co-exist with other power, remedial, supplemental to the other power, exclusive of other legislation

3) History of legislation on this matter: has this kind of intrusion been condoned before

-In this case: 1) scope of provincial head of power are broad, rendering the intrusion less serious

2) None of provisions create a substantive right, simply assist in enforcing the Act

*effect a small area of the provincial jurisdiction over health, does not prevent provinces from regulating in the field

3) Parliament has long sought to address issues of morality, health, and security

-Concludes that they pose a minor infringement upon provincial health jurisdiction, and must be tested through rational and functional connection test

-Finds that these provisions are rationally and functionally connected to the act, as they help the act function effectively and efficiently

Dissent

-Finds that the prohibitions in ss 10-13 do not have the same purpose as those in 5-8

*says that activities prohibited and those not prohibited are very different in nature

*also have a direct impact on provincial power over the field, and existing laws in Québec

-Characterize the pith and substance as the regulation of assisted human reproduction as a health service

-Agrees with majority that it has prohibitions and backs them up with sanctions, but suggests that it is not a valid criminal purpose as morality cannot be a valid justification for criminal laws - extending this would vastly extend criminal law power

-Because of massive overlap into the power of provinces over health services, in order to qualify under the ancillary powers doctrine, the impugned provisions would have to be necessary to the statutes - says connection is artificial, and thus is not justified under ancillary powers doctrine

**Purpose: 1)Morality- should be a moral concern of fundamental purpose 2)Health - must be true evil to warrant prohibition, can be a shared jurisdiction for provinces and feds 3)Security - threatens security of the person - Clearly must be to prevent harm or evil, not to encourage something beneficial
-Form - Regulatory body and licensing procedure is certainly not a traditional form, regulatory, but says that if there is a valid criminal law purpose, there will be tolerance for regulatory aspects to be part of the form**

Provincial Power to Regulate Morality and Public Order

Re Nova Scotia Board of Censors v McNeil

Is the act regulating movies intra vires, or is this part of the federal criminal law
-Says that act as a whole in pith and substance is directed to the supervision and control of the film business in NS
*Legislation is nothing more than the exercise of provincial authority over transactions taking place within the Province
-They find that this is so because the industry that is being regulated is private (instead of public), that it is not a complete ban on the industry but a specific ban, and that it bans it preemptively and does not punish act afterward
-Says that it is justified under both property and civil rights, as well as local and private matters
-This is a double aspect then
*federal aspect is ban on movie because it punishes criminal morality breaches
*provincial government sanction deals with business industry regulations
Minority
-Says that the legislation gives the board unfettered power to uphold the morals and social standards of NS
-This is direct intrusion into criminal law, as the board is attempting to determine legality
-Says that while there is no penalty or punishment making an order to prohibit the exhibition of a film, but this is just a formulaic distinction, as, substantially, those who show films that have been banned are subject to license removals
Important thing about McNeil is that provincial law is <u>regulating</u> a <u>private trade</u> on <u>private property</u>
also the fact that it is preventative instead of punitive (gets attacked by the minority as tenuous)

Westendorp v The Queen

Is bylaw placing restrictions on prostitution a criminal law sanction, or is it provincial control over morality and local matters?
-Says that, really, the bylaw only prevents solicitation, and does not prevent prostitutes standing on the street and talking to people about other things
*if purpose was really to control gathering on the street, it would have dealt with congregations of people on the streets or with obstruction, unrelated to what the congregation is doing - not really dealing with congregation, but with sexual related activity
-Only way that this law could be held to be provincial is if there was a double aspect here

*SCC says that really this goes beyond double aspect, and leaves it open to a province or to a municipality to authorize usurpation of federal power
*says that nuisance argument could be used for trafficking and sale of drugs, assaults, etc.
-Thus say that it has effected federal power over criminal law, and is ultra vires
*In this case, the court goes against *Dupond,* as the bylaw is permanent in nature as opposed to temporary*

Other Cases
Dupond
-Issue - Did the bylaw restricting public demonstrations for 30 days fall within provincial power over morality?
Majority
-Uphold it as local, because it is a) preventative not punitive b) regulatory not prohibitory c) limited in geography
Dissent (Laskin)
-Says that the "preventative" nature of the statute is specious as there are tremendous civil liberty concerns at stake
*Difference between *Dupond* and *Westendorp*
*Both are local, prohibitory, and regulatory
*What's different in *Westendorp* is that it is permanent legislation whereas *Dupond* is temporary
-*Dupond* can be read widely that bylaws regulating the streets are within provincial jurisdiction
-*Westendorp* reads *Dupond* to mean that temporary bylaws concerning parades and assemblies are in relation to a control of public property and are municipal or provincial in nature

Rio Hotel Case
-Issue - Did law restricting granting liquor licenses where there was nude dancing fall within provincial power over morality
-Court says that nude and semi-nude dancing is a marketing tool to boost alcohol sales
*legislation had no punishment attached to it, just cancellation of the liquor license
*fact that the subject matter has moral overtones can be overlooked as long as form of the regulations are regulatory and not penal
*private property, prohibitory license
-Upholds provincial legislation
This is a double aspect case, court is holding that there is a double aspect area here as the federal government may legislate this from a morality standpoint, and the province may regulate it from the conditions of the sale of the alcohol

Chattergy
-Looks at Ontario legislation that allows seizure of property if their is belief on the BOP goods are stolen
-Court says that double aspect area exists
*purpose here is to deter crime and compensate victims
-deterrence can be done through federal criminal law, or through property and civil rights

-no punishment, purpose is to make crime unprofitable and compensate private individuals

NOTE ON PROVINCIAL INQUIRIES
-Concerns arise about provincial intrusion on the federal criminal power where the laws potentially undermine the procedural protections offered to an accused under the criminal law
*ex Provincial commission on matter of criminal investigation or charges
-criminal investigation or charges cannot force an accused to testify against himself, whereas a commission can
-Response has been to find this as a double aspect area
*grants inquiries power to investigate broadly, as long as subject area of investigation is not whether a specific crime was committed
*however, in *Starr* the SCC found that a commission with a very narrow focus, and a close relationship to the criminal code provisions was ultra vires

Peace Order and Good Government

General Notes
-National Concern doctrine was given its modern formulation in *AG Ontario v Canada Temperance Federation*
*Legislation that goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole will fall within POGG
-this even applies it touches upon matters specially reserved to the provincial legislatures - ex. War, Disease, Alcohol, Drugs, Firearms
*Says that Parliament can act to prevent national issues, as well as in reaction to an epidemic (emergency power)
-In *Johannesson*, the court allowed the federal government exclusive jurisdiction of the Aeronautics industry
*Importance of the Airline industry to growth of Canada, inter-provincial and international nature of the industry also cited
-In *Munro*, the National Capital Act was upheld which seized the plaintiffs property under act
*Court found that the national capital region was a matter of national concern, enabled feds to intrude on provincial powers over property

-2 theories of POGG: 1) General theory of POGG
*everything but what is given in section 92 belongs to the federal government
-if its in 92 then it can't fall in POGG
2) Residual theory of POGG (dominant theory)
-Holds POGG constitute its own head of power
*therefore the POGG power doesn't include powers that fall anywhere else, in s. 91 or 92
-Principle of exhaustiveness
*there's nothing that at least one level of government can't legislate on
*constitution allots all types of powers to various levels of government

-Court has now articulated that there are 3 branches under POGG
1) Gap - things not mentioned by framers that would have fallen in a certain area
2) National Concern - aeronautics
3) Emergency

Beetz v Laskin
-**Laskin** favoured a strong central government
*believed POGG power gave feds general power, while those enumerated powers were just examples
-Was highly critical of the PC's primacy toward enumerated powers, and their adoption of dividing federal and provincial powers through the covering the field doctrine
*believed that the pith and substance should determine where the legislation should be allocated
-Believed the necessary incidental doctrine was garbage, and that once a legislation was classified in one class, it's incidental effects didn't matter
-Also believed that federal legislation was the most effective in most circumstances
-**Beetz** was more protective of the provincial jurisdiction
*saw federal-provincial divide in classical terms (strictly divided allowing each law making powers in their own areas)
-Believed that BNA was supposed to be interpreted as granting Quebec Language, Educational, and autonomy rights
-Agreed with privy council's interpretation of the BNA Act which gave primacy to the enumerated portions of the text
*looked upon POGG skeptically as it would be a way for the Federal government to infringe upon the power of the provinces and erode the division of powers

Reference Re Anti-Inflation Act
Can the Anti-Inflation Act be justified under Emergency power? National dimension test? Ultra-vires?
-Pre- general motors, the federal trade and commerce power is very limited at this time
-Laskin supports the conclusion to uphold the legislation under the emergency branch
Beetz Majority against National Dimension Test
-Says the legislation intrudes upon the jurisdiction of the province's power over local trade and commodity pricing, thus in order to be valid it must fall under federal emergency powers
-Says that if they found that parliament could use POGG to justify the intrusion upon various areas of legislative competence, the future power for them to use this over and over against to intrude in different areas would be dangerous
*this power would not be temporary, it would be out of provincial reach
-Further, says ultimately that the legislation is not about "anti-inflation", but is about controlling provincial matters such as profit margins, prices, and dividends
-Not like the other POGG areas, aggregates several subjects and lacks specificity
*also that it was around during the drafting of constitution, wasn't unconceivable to drafters
-Then turns to emergency power, inflation may constitute an emergency, and parliament may exercise emergency power preemptively

*emergency doctrine is different than the national concern doctrine because emergency doctrine is temporary in nature
-Reads emergency power in its narrowest sense, only in the truest of national emergencies
-Temporariness of the power does not just allow parliament to declare anything they want as an emergency
*courts must look very closely at the evidence of parliamentary intent, and see whether the feds really see it as an emergency
-In this case finds it unconvincing that the act addresses a pressing inflation emergency
Laskin Minority in favour of National Dimension Test
-First decides that extrinsic evidence should be admitted as it is important to the context of the court proceedings - helps ground the act's relevance to the POGG of Canada
-Considers first whether it is legitimate under crisis legislation
*4 main issues: 1) Did act itself contradict the federal contention of emergency because of the form of the Act
*exclusion of the provincial public sector did not indicate that the Gov of Canada was not seized with urgency in responding to inflation
2) Is the federal contention assisted by the preamble to the statute
*failure to use emergency in the preamble is not determinative, as urgent language is used in it's place
3) Does the extrinsic evidence put before the court show that there was a rational basis for the Act as a crisis measure?
*extrinsic material need go only so far as to persuade the court that there is a rational basis for the legislation

-As extrinsic evidence is reliable and shows quite alarming rates of inflation, even if not to crisis level, the government had a rational reason for implementing the policy

4) Is it a tenable argument that this rises to the level of national concern
*says the federal jurisdiction over monetary policy, trade, commerce provided a springboard in which the federal government could justify legislation
-Thus, concludes that the federal government had a power base with which they could validly put in place legislation to fight inflation
Basically Laskin says that its ok if only addresses small part of problem, doesn't mention emergency, doesn't act immediately, not effective - says it must be temporary
***Beetz is important because he lays out 3 features for national concern: 1) New matter that framers would not have interpreted 2) Degree of unity, distinct and indivisible
*provincial power that might have to be tramped on a bit must be unified and indivisible in nature (distinct borders) 3) You do not want to swallow up provincial jurisdiction, as this is a permanent re-allocation of jurisdiction
*this relates to the second point***
****This case opened up admissibility of external evidence - says that Royal commission and White Paper reports should be admitted as an aid to determine the mischief at which the Act was directed, the background against which the legislation was enacted and institutional framework in which the Act is to operate****

Emergency Legislation after Anti-Inflation (Example of Dialogue Theory)
-Emergency Legislation after the Anti-Inflation reference
*legislation is temporary in nature
*has to concisely describe state of affairs = emergency and must be confirmed by Parliament
*prior consultation with affected provincial governments and agreement
-This emergencies act was motivated by Beetz's dissent
*does not undue Laskins's dissent however
-This is government's legislative interpretation of when they will use the emergency power, does not change court's test
*cannot change part of the constitution with legislation, legislation does not overrule court, is political in nature

R v Crown Zellerbach Canada Ltd.
How do environmental issues fit under POGG
-Majority then accepts Beetz's dissent, but clarifies;
1) Separate and different from emergency doctrine
2) National concern doctrine applies to both new matters, and matters that were initially categorized in one head of power, but have since become a national concern
3)Scope: a) is the matter single, distinctive, individual
b) scale of impact
4)Provincial inabilities test
*quite unclear, in what way can provinces not do certain things? practically, economically, politically, etc.
*if province is able to deal with it, feds are allowed to legislate only as far as may fill the gap the provincial government cannot legislate in
-Majority application of the test:
2)marine pollution has application of national concern and it is a new matter
3) Says that inland and external marine waters are indistinguishable, and thus they should be one single indivisible issue
4) Won't have too much of an effect on fresh water, which is in provincial concern, because you can divide salt and fresh water quite easily
Dissent
-Risk that the federal government will use this power to regulate incidental effects of marine pollution
-Also says that marine pollution is not a single distinct matter, too broad and diffuse to grant to one of the branches of POGG
*says that the federal government has lots of power to do what they want in regard to marine pollution through other powers (fish, criminal)
-This is a provincial matter, undertaken on provincial lands, only local matters involved
-Notes that the combination of POGG power and criminal law power allow the federal government tremendous breadth if they are allowed to apply these powers in a general way - breadth could undermine the sharing of power between provincial and federal governments

-Legislation over the environment is too amorphous to allow federal control over under the POGG power

Friends of the Oldman River Society v Canada (Minister of Transport)
Is the Environment Act ultra vires the federal government?
-Court notes that environmental concern does not have the necessary singleness required to fall under the national concern doctrine
**Crown Zellerbach* decided that marine pollution as a singular issue was inside fed control, not environmental pollution as an entire issue
*legislation dealing with the environment must be linked to an appropriate head of power
    -says that certain heads of legislation (such as fisheries) will provide more power for the feds to legislate over the environment by their nature
-In this case says that the federal government has the ability to impose itself upon provincial projects, because there is no provincial IJI over public works
*says there is almost double aspect, in that the province may regulate on provincial aspects of the issue, and the feds may legislate on federal aspects of the issue

Other Cases
-*Hauser*- held that national concern doctrine authorized the Narcotics act, as drug abuse was a new problem that had not been conceived by the drafters
-*Schneider*- Dickson held that treatment of Heroin addiction was largely a local and private matter
*says that it fails the provincial inability test, as it is not a matter that provincial governments cannot address (very little national dimension)
*failure by one province to provide treatment will not effect the situation of other provinces
R v Hydro Quebec- Canadian Environmental Protection Act was found valid under the federal governments criminal law power
*court was hesitant to discuss whether it was justified under POGG
*minority said that it would fail singleness, distinctiveness and indivisibility requirement because it was not confined to a narrow range of toxic substances, but dealt with a broader category of substances whose effects on the environment may be temporary and considered local in nature
Ontario Hydro v Ontario (Labour Relations Board)
-Question was whether the federal government had ability regulate nuclear energy under POGG
*found that they could as nuclear energy is a matter of national concern
*says that characteristics of nuclear power are distinct and specific enough that it requires it's own power
*national characteristic of nuclear catastrophe make it a national concern
-Dissent suggested that while nuclear energy falls under POGG, this jurisdiction does not include ability to regulate employee relations between Ontario Hydro and it's employees
R v Malmo Levine
-Revisited whether drug control was a national concern
*found that laws prohibiting possession valid fell under criminal power, and thus the POGG aspect was not important

Charter

General Notes

-4 steps in charter adjudication: 1) Threshold issues - arise before you get to start talking about the content of the Charter

*Must have standing

-public or private

*Must show that charter applies to the thing that you are trying to complain about

*Onus to establish these threshold issues is on the claimant

2) Discussion of Rights Analysis- onus on claimant to show rights have actually been infringed

(i) Is the potential infringement within the scope of the right?

(ii) government action has actually infringed the activity

3) If this is proven, then proceed to s 1 test

(i) is the limit prescribed by law

(ii) Is objective pressing and substantial in a free and democratic society

(iii) proportionality

a) rational connection

b) minimal impairment

c) proportionality balance (connection between infringement and the objective must be proportionate)

*salutary (positive effects) vs deleterious effects

4) If you show that it is not justifiable, then there is a charter breach. Proceed to remedial stage

*damages, change law (court read words in, be left alone to remake laws, court impose laws)

-Two main structural components of s.1: 1) Requirement that all limits on rights be prescribed by law

**R v Therens* - notion that limit must be prescribed by law is concerned with the distinction between a limit imposed by law and one that is arbitrary

*limit will be prescribed by law if it is expressly provided for by statute or regulation or results by necessary implication from the terms of a statute or regulation or from its operating requirements

-However, courts have been reluctant to establish an overly high standard for the prescribed by law requirement, as this may unduly restrict legislatures in accomplishing objectives

*question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work

Two specific conditions: 1) Accessibility: includes formal notice – the public know what the law is. There has to be some announcement about this specific rule.

*For prov laws & fed laws because they are statutes, this stage easily met since they're be printed in the gazette, etc and the public can look online to find them

2) Precision: laws must accord to some standard of precision – ties in with intelligibility

*Cannot be written in a way where a person wouldn't even understand them after reading them. Although it is inevitable that many laws will be somewhat general, they have to meet an minimum intelligibility threshold

-This is not a stage where charter challenges fail often

2) requirement that limits be reasonable and demonstrably justified in a free and democratic society

*2 important developments in the SCC s. 1 analysis have occurred since the *Oakes* test

1) Emergence of the contextual approach to the assessment of limits under s. 1

*court assess value or significance of the right and its restriction in their context rather than in the abstract

2) Courts willingness to defer in certain circumstances to the legislatures judgement about the need for and effectiveness of a particular limit on a charter right

*Significant amount of disagreement in the SCC about when and to what degree courts should defer to legislative judgements

*3 ways a court can defer to legislative judgement or lower the standard of justification (R. Moon)

1) Judicial deference to findings of fact by the legislature (*Irwin Toy* -legislature relied on social science evidence to justify that children were unable to assess advertisements critically, court deferred to this finding of fact)

2) Legislatures accommodation of competing values or interests

3) Lowering the standard of justification under s. 1 - recognizing broad scope of a right and allowing variance of scope in circumstances to allow legislature room to legislate

-After Oakes test there is a shifting purpose test which is implemented

*Can't use a changed purpose, as a result of time/society, to justify a law under s.1. . . must be purpose enacted in legislation

-Courts have adopted a purposive approach to the interpretation of Charter rights

*Difficulty in the purposive approach is how does a judge go about determining the purpose of a particular Charter right?

Commentary

<u>*Courts and Country* - W Bogart</u>

-In Charter Canada: *curbs power of the ballot with independent judges who ensure that legislatures do not overstep their boundaries

*allows individuals, especially minorities, to seek vindication in an open, public, and responsive process

*unites minorities in sex and race, rejects regionalist approaches

*says the Charter does not provide a formula for judging legislation right or wrong, but provides a better forum for collective debate

-this is then backed by s 33 which allows judicial decisions to be overridden by the legislative body

-Non-Charter Canada: *political power is everything, while courts are reserved to very limited judicial intervention

*says that in this system social reform is subverted to conservative political policies

-Critics of the charter: *say that Charter was not brought in to fix abuses of power, but was implemented to ensure Quebec had a larger stake in Canadian federalism and that it did not separate

*charter subverts true democracy by taking hands out of the power of elected officials, and thus, the people

-elected officials are better situated to respond to democratic needs, courts are expensive to access

-assert that elected officials have been better at responding to the needs of those not traditionally taken care of in society, while the courts are hostile to these claims (in striking down legislation)

Social Rights in Canada - Patrick Macklem

-International law has become a prominent and significant feature of judicial interpretation by the SCC

*Dickson in *Reference re Public Service Employee*, says that the Charter should be interpreted to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified

*However, court has also looked to international treaties that have not been ratified by Canada as indicative of international laws and customs in interpreting similar rights in Canada

So what is the Real Legacy of Oakes? Two Decades of Proportionality Analysis Under the Canadian Charter's Section 1 - Sujit Choudhry

-In the decade following Oakes, the court backed away from Oakes, searching for criteria of deference to reliably and predictably categorize cases where deference was warranted and those where it was not

*however, these categories have been unpredictably administered and have been questioned

-Says the courts confusion demonstrates dilemma of demand for definitive proof to support each stage of the section 1 analysis, and the reality of policy making under conditions of factual uncertainty

-McLachlin noted in RJR MacDonald that the Oakes test necessarily relies upon fact specific scenarios, as rights can only be restricted in response to precise and real problems or harms

-However, difficulty lies in the fact that the Oakes test asks broad policy questions, of which it is difficult to imagine evidence that could be adduced to meet these evidentiary demands

*question becomes who should bear the risk of empirical uncertainty with respect to government activity that infringes Charter rights

-obvious answer may be government, but this may be too high of a burden as it may be impossible to prove that the means are scientifically the best way to combat problem

*could impair the operation of government

-could ask courts to read out need for government to meet high standards, but this would necessarily read out that limits on rights of citizens be reasonably justified

*response to this question has been to require from governments something less than proof

-However, the court has been split on the threshold allowed of government to infringe upon rights

*specifically the types of inferences government is allowed to make

-ex. can government assume that tobacco advertising leads to increased consumption without concrete evidence (RJR Macdonald)

*also what circumstances in which it is appropriate to apply logic or common sense

-basically restrain common sense inferences to situations in which the court could use common sense without the aid of other empirical proof or aids

-There is never going to be social science evidence that ultimately proves policy decisions
*this must be balanced against need for a solid test to justify s.1 infringement

Vriend v Alberta

Can Charter apply to government inaction (failure to include Gays in Individual Rights Protection Act violating s 15)?

Cory on Main issue

-Says that it is important that the court show deference to legislative decision not to act, but that this consideration is most properly made in the s. 1 analysis
-Nothing in the test of s 32 or in the jurisprudence which requires a narrow view of the charters application which suggests that government must make some action to activate charter review - no words that it must be a positive encroachment of rights
-Approach that requires action would put form over substance which would be illogical and unfair - Thus, IRPA is subject to charter review

Iacabucci on the proper relationship between the courts and the legislature

-suggests that it was a conscious choice by the governments involved in introducing charter to include s 52(1) to allow court to declare legislation invalid
-Courts were entrusted with inalienable rights, and as an arbiter to decide upon the extent of these rights and the place of these rights
*this necessarily requires scrutiny of the legislature
*however, within the charter there are built in provisions that require respect of the legislature by the judiciary (s 7, 1, 33)
-Iacobucci suggests that charter has made the 2 branches of government accountable to one another
*dialogue of accountability does not detract from the democratic process, but instead enhances it
-Embodiment of democracy is greater than simply majority rule, there are principles underlying this democracy which the court is upholding

Hunter v Southam

How should s.8 guarantee of freedom from unreasonable search and seizure be interpreted

-No political, historical, or philosophic context capable of providing an obvious gloss on the meaning of the guarantee
-Interpretation must be especially liberal in terms of bills of rights and constitutions, as the court would not want to infringe upon constitutional rights unduly and these documents must be able to grow and flourish
-Thus, an inquiry will first define the purpose of s. 8 to determine the interests it is designed protect, and then to ask its reasonability or unreasonability of the impact on these interests (effects of a search and seizure will determine its reasonability)
-Concluded that s. 8 protects an individuals reasonable expectation of privacy

*found that Combines Investigation Act sections that authorized issuance of search warrants by officials whose functions were investigative, without any requirement for reasonable and probable grounds was invalid
Purposive approach: delineates the nature of the interest that the right is meant to protect
***Broad purposive approach**: large and liberal interpretation (Persons). Interprets specific provision in light of that provision's larger objects/interests

-Look at purpose underlying the specific right**,** but also really the specific right in terms of the whole Charter in generally***

R v Nova Scotia Pharmaceutical Society
How should legislative vagueness be considered in constitutional challenges
-Vagueness can be raised under s. 7, since it is a PFJ that a law may not be too vague. It can also be raised under s. 1 of the Charter on the basis that an enactment is so vague as not to satisfy the requirements that a limitation on the Charter rights be "prescribed by law." Vagueness is also relevant to the "minimal impairment" stage of the Oakes test.
-In determining vagueness of law, 3 factors must be considered: 1) need for flexibility and the interpretive role of the courts
2) the impossibility of achieving absolute certainty, a standard of intelligibility being more appropriate
3) possibility that many varying judicial interpretations of a given disposition may exist and perhaps coexist
-When it considers vagueness in s.7 or prescribed area of the charter, consideration is the same
*however, when raised in second stage of Oakes, it is more a test for overbreadth
-Vagueness principle is to guard against unintelligible provisions that give insufficient guidance for legal debate, making this legislation unconstitutionally vague
*Says that in a modern context, however, the state must be allowed a certain amount of vagueness so that laws can be flexible
-Says that in this case, the minimum general standard had been met in regards to the vagueness standard

R v Oakes
Whether reverse onus assumption in Narcotic Control Act is unconstitutional under s. 11 (d)? Is it a reasonable limit?
-Oakes test: 1) Legislation found unconstitutional has pressing and substantial objective
2) Does the legislation have rational connection to the objective
3) Does the legislation contain minimal impairment
4)Does there exist proportionality between the effects and objectives
5)*Dagonais* test added proportionality between deleterious and salutary aspects of the tests

Edmonton Journal v Alberta (Attorney General)
How is the contextual approach to s.1 analysis taken?

-Says in this case a contextual approach is better suited to mitigate the conflict between free speech and privacy in matrimonial matters
*must not balance one value at large and another value in its context, both must be placed in its context
-Contextual approach, freedom of speech may have greater value in political context then it does in the context of disclosure of details of a matrimonial dispute
-Says in this case the provision was not a reasonable limit under s. 1 as matrimonial privacy in this case should trump infringement upon freedom of expression

Irwin Toy (Deference Issue)
When is deference to legislative judgement appropriate?
-Says that where the legislature has drawn a line between two competing factions of society, and has made a reasonable assessment as to where the line is most properly drawn, it is not for the court to second guess
*Courts must be mindful of the legislatures representative element in this type of legislation
-However, when the legislature is passing legislation that relates to maintaining the authority and impartiality of the judicial system, the courts can assess with some certainty whether the least drastic means for achieving the purpose have been chosen
-Court holds that greater deference to legislative choice is appropriate in circumstances where: gov is seeking to balance competing rights, to protect a socially vulnerable group, balance the interests of various social groups competing for scare resources, or to address conflicting social science evidence as to the cause of a social problem
High Watermark of judicial deference
Where there is conflicting social science evidence, court is not well equipped to decide which evidence is best acted upon
-They also suggest that courts should take into account whether it is the government against an individual, or the government against a more powerful actor

Ford v Quebec
How should the notwithstanding clause be understood
-Act's may override more than one freedom, and that in order for the override power to be meaningful Parliament's should not be bound to have to specify the specific provisions the act overrides
*say that is just have to refer to the subsection of the charter which contains the provision or provisions to be overridden
commercial speech is to be protected under the charter because it has value

Other Cases
-*Reference Re s94(2) of the MVA* - discussed relevance of the committee and parliamentary debates to the interpretation of the entrenched rights
*text of parliamentary debates will be given a variety of weight depending upon the type of speech it is

-says that statements of one parliamentary employee cannot be determinative of the entire purpose or interpretation of the charter

-*R v Therens*- decided that judicial decisions regarding the Bill of Rights had little bearing on the Charter

*this is because Bill of Rights provide only an uncertain mandate for judicial intervention

-*Big M***:** you don't stray outside the test, however there is a need to maintain a balance through the interpretive approach

*Lurking in the BG is always this talk about judicial review legitimacy

-*Lucas* represents a pushback

*McLachlin says that Oakes test needs to be stringent enough to prove that infringement is important enough to justify infringement

*S.1 has to mean something

-deference should only feature in the last stage- deleterious v salutary

What is Government in s32(1)?

General Stuff

-Charter applied to only government, government can be delineated in 2 ways

1) if the actor itself is governmental, then its actions are subject to the Charter

*governmental actors include components and members of the legislative branches of government and other entities that are controlled by government or that are exercising governmental functions

2) Non-governmental actors may be subject to the Charter if they are engaged in governmental acts, such as implementing a governmental program or exercising a power of compulsion conferred by statute

-In addition to government actors and non-governmental actors implementing specific government programs, charter applies to non-governmental actors exercising coercive statutory powers

*in *Slaight Communications Inc v Davidson* Charter was held to apply to the order of an adjudicator acting pursuant to the Canadian Labour Code, because the adjudicator was exercising powers conferred by legislation

-has resulted in adjudicative bodies, such as administrative tribunals and labour adjudicators are bound by the charter

Retail, Wholesale and Department Store Union, Local 580 v Dolphin Delivery Ltd.

To what government actors does the charter apply?

-Begins by asking whether the Charter applied to the common law

*says yes, s 52 provides that any law that is inconsistent with the charter is to the extent of the inconsistency of no force or effect - reasons that this includes the common law

-Then focuses on whether charter applied to litigation between private parties

*s. 32 is very clear that applies to government branches listed in charter (legislature and parliament, executive and administrative) - says that generally it does not

-this applies whether or not government is brought up in public or private litigation

*applies to common law but only insofar as is the basis of some governmental action which infringes on a guaranteed right or freedom
-Appellants argument is that the common law is subject to the charter, and the common law was used as the basis for the injunction, and thus that the Charter should apply to the rights of the picketers against the injunction
-McIntyre finds that the court should not be seen as a participant, as this would widen the scope of application for the Charter to almost all private litigation
-Says that as a general principle the charter will not apply in private suits where no government is involved
*however, said the judiciary should take measures to develop the common law in a way that accords well with the Charter
-No government in this case, so the claim fails
Very clearly establishes that our charter is vertical in nature, not horizontal

McKinney v University of Guelph
Is charter applicable to universities (can they be said to be government actors under the definition of s 32 of the Charter)
-Court says that just because an entity is a creature of statute and has been given the legal attributes of a person does not mean its actions are subject to the charter
*says that the charter was not meant to cover activities by non governmental entities created by government for legally facilitating private individuals to do things of their own choosing without engaging governmental responsibility
-Specifically for universities, have the competency to negotiate contracts with their employees and include within them provisions for mandatory retirement
*university was not following the dictates of government when it did this
-Appellants contend that broader relationship between government and university must be looked at
*universities are created by government statute dictating powers, objects, structures
*historical development is part of a public system of education
*survival relies upon public funding
*government controls many of the activities
-Court says that while it is true that universities are regulated by government, and have a history as part of the public system (public purpose), it does not follow that Universities are therefore organs of government
*government has no legal power to control universities even if they wished to do so
*Laforet is emphatic about not using a public purpose test, public purpose must be shown through coercive law making power or very important public purpose
government control must exist in a very specific extent
Dissent
-Talks about 3 possible tests: 1) control test - general control by government
2) government test - does the entity provide a government role
3) statutory and public control test
-Finds that under these tests the university should be subject to the charter

Godbout v Longueuil (City)
Can the city of Longueuil be considered government such that they can be considered under the Charter?
-Distinguishes from McKinney on the facts
*if the Charter only applied to entities that are institutionally part of government, and not those that are governmental in nature, provincial and national governments would be able to shirk responsibility by setting up extra-governmental entities not regulated by charter
*however this governmental nature test must not be a public purpose test, must truly be undertaking governmental functions
-Under this the Charter should apply to municipalities as they are governmental institutions
1) municipal councils are popularly elected and accountable 2) possess general taxing power, just like parliament 3) in power to make laws, administer laws, and enforce them within a territory 4) Municipalities get existence and lawmaking authorities from proven ail government
-Not applying to charter would allow provinces to shirk responsibilities by creating municipalities and shifting responsibilities to them
-Municipalities are empowered by statute, act within this statute, gain powers from these statutes, charter applies to statutes, therefore charter should apply to municipalities
Establishes that even if your not subject to routine and regular ministerial control, you can be considered government if you exercise a certain government function
Dissent
Wilson was open to public function test

Eldridge v BC (Attorney General)
Can hospitals be considered governing institution for the purposes of s.15(1) of the Charter of Rights?
-When an entity is considered to be part of government, both private and public actions will be subject to charter actions
*alternatively, charter can apply to non-governmental entities in cases where entity is exercising activity that can be attributed to government
    -however, for charter to apply to a private entity, it must be found to be implementing a specify governmental policy or program
-Thus charter can apply to 1) Government within meaning of s. 32(1)
*requires an inquiry into whether the activity engaged in by an entity could be performed by a non-governmental agent
2)Entity acting with regard to a particular activity that can be ascribed to government
*requires investigation into the nature of the activity, not the entity who is engaging in the activity
-Interesting thing in this case is that there are 2 statutes
*charter applies to statutes unequivocally, however, here statute delegates provision of services to the hospital
-Jurisprudence makes it clear that hospitals are non-government entities whose private activities are not subject to the Charter

*However, Purpose of Hospital Insurance Act is to provide particular services to the public
-hospital government is responsible for defining both the content of the service to be delivered and the persons entitled to receive it, then benefits of service are delivered and administered by hospitals
-Thus hospitals are carrying out a specific government objective
*direct and precisely defined connection between a specific government policy and the hospitals impugned conduct
*private institution acting in a government role
-government cannot avoid it's s 15 obligations under the Charter by delegating it to a hospital
-Thus, hospitals decision is reviewable by the charter
thing to take out of this is that one of the first things you have to do as a claimant under the charter is find from where the harm is coming
If something has not been classified before, you need to look at the entity to see if it is government; then, if not, look at the activity (or if something has been characterized as a private entity) and see if it was government

Hill v Church of Scientology of Toronto
Considers common law in light of the charter
-Charter is statement of the fundamental values which guide and shape our democratic society and our legal system
*it is appropriate thus that the court make revisions to the common law as may be necessary to have it comply with the values in the Charter
-However, Charter cannot be brought into private litigation as charter rights do not exist in the absence of state action
-Says that these considerations should be undertaken as a weighing of the principles of the common law against those of the charter
*should not be done through s.1 analysis
-Traditional onus rules should not apply, party alleging common law fails to comply with Charter values should bear the onus of proving both that the common law fails to comply with Charter values and that, when these value are balanced, the common law should be modified
-Concluded in this case that the common law of defamation reflected an appropriate balance between competing interests, consistent with the underlying values of the Charter, no need to alter it

Bell Express Vu
-Looks at the idea that vetting the common law to make sure it is consistent with the Charter could be applied to statute
*court says that you cannot extend the idea applying to the common law to statute law
-Must go through complete charter analysis
*by allowing the judges to shape statute, they would be filling a legislative role which is not allowed under s 1 of the charter

-s 1 allows the charter to be broken when it is reasonable, and if judges overrule that then they fill legislative ability to do that

Other Cases

Stoffman- mandatory retirement age case, in hospital context
*hospitals are publicly funded, started by government, bear many marks of state control
*court said no, not sufficient control of the institution by the government
-defines notion of control as: routine and regular control
*court looked at the board of governors, noted that 14/16 were appointed by the government, governing statute said that everything board did needed gov oversight/approval
-however said that BOG was independent enough, gov oversight/approval was pro forma enough, that there was sufficient autonomy from routine and regular control of government that the charter did not apply
-*Dissent*
*Hospital had enough control
Factual scenarios in this are important, look to factual similarities to Stoffman/McKinney
Douglas case- looks to community college mandatory retirement
*BOG is completely staffed by government, Minister directly approves all initiative out of the board
-Say that as a result of this the charter did apply to the community college
-Laforet is willing to say colleges are a different entity then hospitals (he wrote Stoffmans)
*says that Colleges are much more tied to government than universities as well
-*Lavigne*- that it doesn't matter who is the ultimate actor, as long as they are considered government, they will be subject to the charter
-*Translink* - busses said to student organizations that you cannot advertise political issues on our busses
*students said that this infringed their freedom of expression
-Court says that BC Transit was subject to everyday control of BC government, all members of the board were appointed by gov
*translink same thing, board of governors were appointed by municipal government, government generated plan which bound them very tightly = routinely and regularly controlled by government
-*Swain/BCGEU* - say that there must be some public aspect of purely private cases in order to make the charter apply to these cases/common law

Freedom of Expression

Principles of Freedom of Expression

1) Political purpose - important to the free political nation
2) truth - important to discovery of truth in society because through free flow of ideas one is able to understand truth
3) self fulfillment - free speech is necessary to reach our potential is a human being

Irwin Toy - Free Speech

What is meant by freedom of expression in context of commercial speech?

-Expression has both content and form- two are inextricably connected

1st stage of test- Does the thing that is happening fall within freedom of expression?

-2 criteria: 1) does it attempt or actually convey meaning

2) Is it non-violent? Threats are protected expression

-Thus, concludes that as advertising aims to convey a meaning, it has expressive content and falls within protection

*This means that you cannot use content to excuse something from section 2(b) - content comes in at section 1

2nd Stage - Was the purpose or effect of the government action to restrict freedom of expression (thus can infringe it in purpose [2 types] or effect)

-If govs purpose is to restrict the content of expression by singling out particular meanings that are not to be conveyed, it necessarily limits the guarantee of free expression

*if governments purpose is to restrict a form of expression in order to control access by others to the meaning being converted or to control the ability of the one conveying the meaning to do so, it also limits the guarantee

-On the other hand, where the government aims to control only the physical consequences of certain human activity, its purpose is not to control expression

-Ex, prohibition on handing out pamphlets, even if justification to prevent litter = contravention of freedom of expression because it necessarily entails curtailing expression

*on the other hand prohibition on litter as a manner of expression = no contravention because it need not lead inexorably to restricting a content

-However, even if the governments intention was not to control or restrict attempts to convey a meaning, court must decide whether the effect of the action was to restrict the plaintiffs free expression - burden is on the plaintiff to show this

*must show that effect of government legislation was to limit seeking or attaining the truth, participating in social and political decision-making, or the diversity of forms of individual self-fulfillment or human flourishing - to be determined on a case-by-case basis

now must see whether it is justified under s. 1

1) Pressing and substantial objective

*Court finds that the AG Quebec has demonstrated that the concern which prompted the enactment is pressing and substantial, and the legislation is of great importance

-important for protecting impressionable young children from advertising (lead evidence that targeted age group is especially vulnerable to advertisements)

*high water mark of deference

2)Rational connection test - Easily met

3)Minimal Impairment - says that this part of the test will generally involve the weighing of social science evidence, and the court must generally be deferential to the democratic function of the legislature

*says in this case that the social science points reasonably enough to the governments system being a minimally impairing

4) Deleterious effects- no suggestion that the effects of the ban are so severe as to outweigh the government's pressing and substantial objective
*advertisers can direct ads toward parents or other adults
-Thus is upheld as a reasonable limit on the s. 2(b) rights
This case shows us what happens when commercial expression is at issue, shows model for freedom of expression cases
Dissent
-Says that they cannot be justified under s.1
*basically says that while Children cannot distinguish content, that this is not a pressing or substantial objective, as they are not harmed
-Criticizes the paternalism of the court, looks are right in non-contextual, abstract way
**It is interesting because the court allowed the government to use a report released after the legislation - Irwin Toy says this would allow a shifting purpose test, which the court has suggested shouldn't be allowed
-Court says that the purpose has not changed, but the government can use this new purpose as fresh evidence toward their original purpose**
***Note 4 - tells us the kinds of factors that are at play in taking into consideration whether the limit is justified
*vulnerability of the group, apprehension of harm, nature of the activity
-Irwin toy is an example of restriction of commercial speech
*also gives us the form that these types of actions will take***

R v Keegstra
What is guaranteed by the charter for freedom of expression?
-Free Speech is to promote the freedom of exchange of ideas
*must be constitutionally protected because of its political value
*helps to promote truth, or at least a marketplace of ideas in which enlightenment may be sought
-2(b) is broadly worded to capture the many facets of freedom of expression
-However says that this freedom is limited
*McLachlin notes that in the past governments have censored freedom of expression for political/bad reasons
*concerns about over censorship must be counterbalanced by the need to limit freedom of expression at some point
-Court upholds content neutrality of section 2(b) test for infringement
*then says that this right is infringed by the purposive government legislation
-Section 1 application of the Oakes test is quite deferential toward the government and flexible
1) says it has a pressing and substantial objective - to prevent pain experienced by racial members from attacks
* McLachlin notes that the prohibition on hate speech can actually undermine parliament's intention in 3 ways: 1) provides publicity to haters 2) Makes people suspicious of government censorship 3) there was hate speech laws in nazi Germany
2)core values of free speech are not found within hate speech, and actually undermined it: undermines truth, self fulfillment and democracy

*publicity of hate speech spreads non-truths
*Dickson says that it is rationally connected to the goal of suppressing hate speech, says that repression of hate speech promotes free speech
3) Minimal impairment - Keegstra says over breadth and vagueness are problems
*private conversations are exempted, promotion of hatred has to be willful, risk of harm from hate speech is strong enough that there is no need for proof of harm, definition of hatred court gives, allows court to say that it is not over broad or vague, also there are many defences to the hate speech
-Says that section 1 doesn't demand that the government pick a single best mode of infringement, and thus as long as it is reasonable then it should stand
*thus, this is minimally impairing
-Says that there is proportionality between infringement and the objective at hand
*also finds a lot more salutary effects versus deleterious effects
Minority
-Finds that the act infringes freedom of expression
-Oakes: 1) Easily finds that the provisions are of a substantial and pressing nature
2)-Says that while there is not a strong connection, the connection is substantial enough to justify the imposition of the laws to meet the objective
3)-Says that the provisions is too broad: 1) Definition of hatred is wide ranging and covers many different activities
2) Hatred is a subjective evaluation - can be used to justify penalization of speech that is unpopular
3) Says that wilful requirement is not strong enough to limit use of charge to infringe upon free speech
4) Says that the history of the section is to prohibit or punish free speech that is unpopular or socially progressive
-Thus says that this legislation is not minimally impairing
4) Said that the harms outweigh the benefits, as the legislation severely restricts free speech, while conferring only questionable practical benefits in the form of reducing hate speech

RJR MacDonald Inc (Freedom of Speech)
Is the anti-smoking advertising legislation a contravention of the right to freedom of expression?
-Majority
-Says that the prohibition on advertising and promotion of tobacco products constitutes a violation of the right to free expression
-Notes that Oakes should be flexible, but then says that the test should still be applied relatively rigorously
*context is important, but cannot be carried to the extreme of treating the challenged law as a unique socioeconomic phenomenon of which parliament is deemed to be the best judge, as this would undercut need for parliament to demonstrate and justify limitation on rights
-distinction between state as a singular antagonist and polycentric problems is difficult to draw
-Says that the government needs to prove the Oakes test on the civil standard
Oakes: 1) -Says that objective must be the infringing measure, can't be cast too broadly

*courts have the ability to manipulate objective through the way that they cast it
-in turn this can change the minimal impairment test, huge objective = much harder to justify minimal impairment because objective is so wide
*in this case the objective is to prevent Canadians from being persuaded by advertising and promotion to use tobacco products
*also, the mandatory label is to discourage people who see the package from tobacco use

-Finds these objectives are pressing and substantial
2) Court is prepared to find Rational connection test, in the absence of scientific evidence, from reason and logic
*says that the evidence put forth by the gov is sufficient to prove there is a rational connection
3) Minimal impairment - Says that a full prohibition will be justified when the government can show that it is necessary to achieve it's objective
*no evidence was adduced to show a partial ban would be less effective than a total ban
-government didn't even adduce evidence or provide testimony on this point
-Motivation for profit is irrelevant to the determination of whether the government has established that the law is reasonable or justifies as an infringement of freedom of expression
-On the unattributed ban, say that the government has failed to prove that the unattributed ban is required to achieve their objective of reducing consumption among those who might read the warning
*didn't do this so they failed
McLachlin gives advice to legislators how to change the legislation to make it constitution - can be used to demonstrate dialogue theory
*can be used to demonstrate dialogue theory

Dissent

-Strict application of proportionality analysis would put tremendous burden on Parliament, would require adducing of evidence on exact nature of tobacco addiction which is complicated to say the least
-Parliament faced a tough policy decision, ban tobacco products totally (unrealistic) or continue to live with the terrible health effects of tobacco products
*ban on advertising is an attempt to find happy medium between these concerns

-Says that as tobacco promotion does not go to the "core" of freedom of expression, it should be afforded relatively low amounts of s. 1 protection (main function is profit)
-Oakes- 1)Already acknowledged that it passes this
2) Proportionality - Says that social science facts mean that court should be deferent to legislature, says that there is proportionality
3) Rational Connection- says that it is enough that the government believed rational connection to exist, does not have to be rigorously demonstrated through fact as would be required by a strict test
*common sense observation (advertising = more smokers for longer) is good enough to pass this test
*court also finds evidence that the companies themselves had the goal of enlarging their markets with advertising

4) Minimal impairment- in prohibiting advertising of the only legal lethal product in Canada, parliament chose a relatively non-intrusive method as it could have easily used criminal law power to prohibit it entirely
*furthermore, parliament had adduced evidence that less intrusive bans were not effective in meeting the object of the act
5)Deleterious effects-deleterious effects do not outweigh legislative objective of reducing the number of direct inducements for Canadians to consume cigarettes
-Then turns to the unattributed health message requirement
*says that this would only be a violation of section 2(b) if it amounted to putting words in the manufacturers mouth
    -as it is unattributed warnings, the tobacco company doesn't have to endorse the warnings, and thus doesn't violate their right of silence
-Says even if they were an infringement, would be saved under s.1

AG Canada v JTI-Macdonald Corp.
Can new Tobacco Act be justified under s 1 of the Charter?
-Purpose of Tobacco Act is to provide a legislative response to a national public health problem of substantial and pressing concern and to promote the halt of Canadians in light of conclusive evidence implication tobacco use in incidence of numerous debilitation and fatal diseases
-Then goes on to find that the ban on false, misleading or deceptive promotion infringes the guarantee of freedom of expression
-s.1 analysis must be conducted in the context of the very effective advertising used by tobacco producers to market their products:
1) says that the combating of the promotion of tobacco advertising based on half truths is a pressing and substantial objective
2) prohibiting such forms of promotion is rationally connected to this objective
3) impugned phrase does not impair the right of free expression more than is necessary to achieve the objective
4) meets proportionality requirement: objective is of life or death importance, evidence shows that banning this type of advertising may help reduce smoking, while the expression at stake is of low value
-Considers the increase in size of the mandatory health labels
*says this violates 2(b) because of the broad breadth that the court is willing to recognize as an expression under 2(b), placing a label could be seen as a limit on the ability of the tobacco companies ability yo express themselves
-However said that it is justified under the oakes test as the bigger labels can have a greater effect, and Parliament is not required to implement less effective alternatives

R v Guignard
Is counter advertising free speech?
-Court says this type of expression is important because it serves as a balance to commercial speech, has important effects on social and economic life of a society

-Says that the bylaw severely infringes Guignard's freedom to express himself, and forces him to use advertising (presupposes that he has enough financial resources to do this)
-Says by-law is invalid, but delays 6 months to allow governments to alter their laws

Other Cases
Ford v Quebec (AG) - SCC held that commercial expression fell within the scope of 2(b)
*critics of this say that regulation on advertising is simply economic regulation which falls within the scope and ability of the legislature
*In response to this the courts have said the commercial expression falls within the scope of 2(b), it can more easily be justified under s.1
Rocket v Royal College of Dental Surgeons - challenge to regulation enacted under the Ontario Health Disciplines Act which imposed stringent restrictions on advertising by dentists
*SCC concluded that the regulation violated the Charter's guarantee of freedom of expression
-however, noted under the s. 1 analysis that this type of expression would be easier to justify because it was in pursuit of economic profit and not of political participation/expression etc.
*also noted ability of advertising to help patients make informed choices about their dentists
*said restriction could not be justified under s. 1
-failed proportionality test because it precluded the advertising of information such as hours of operation and language spoken (informative and not misleading or undermining to professionalism)
-*Prostitution Reference*- says that soliciting prostitution is of little value to free speech
*easy for government to justify total ban on free speech
-says that even though the same arguments are available, the government can infringe on free speech in this area
-Seems as though there is some moral value judgement going on here in regards to prostitution