**LAW100: Constitutional**

**Full CAN (2013-2014)**

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Federalism

THEORETICAL INTERPRETATIONS

**Simeon Article:**

Federalism can be evaluated from 3 perspectives:

* **Community:** what implications do diff. forms of federalism have for diff. images of ideal/preferred community w/which people identify/feel loyal towards?
	+ Federalism largely assessed in terms of ability to defend & maintain **balance between regional & national**
	+ Tension threatens fed system when residents of diff. parts of the country hold fundamentally clashing conceptions of the balance between country-building, province-building & Quebec
* **Democratic Theory:** does federalism promote democracy?
	+ What are consequences of alternative fed arrangements for diff. conceptions of democracy – for participation, responsiveness, liberty and equality?
* **Functional Effectiveness:** does it enhance or frustrate capacity of gov’t institutions to generate effective policy & respond to citizen needs?
	+ Constitutional problem is to allocate powers & erect machinery that maximizes capacity of gov’ts collectively to satisfy citizen needs

**Ryder Article:**

2 ways of understanding diff. approaches to division of powers:

* **Classical Paradigm**
* **Modern Paradigm**

**Classical Paradigm:** characterized by **strong notion of exclusivity**; clear line between Fed power (s. 91) & Prov. power (s. 92) [***Citizens Insurance Company v Parsons*** – *scope of power analysis-fed regulate interprov. insurance schemes-can’t interfere w/insurance w/in prov. itself* → **mutual modification** – restrict fed power]

* “**Watertight compartments**” → notion of **mutual modification** (if something’s on fed list can’t also be on prov. list)
* Judicial restraint more active b/c classical doesn’t tolerate overlap of legislation
* **Weakness:** laws don’t operate in vacuums → impossible to limit overlap, would lead to mass deregulation if applied strictly

**Modern Paradigm:** division that overlaps, has lots of leakage/spillage; **dominant characteristic in 1 jurisdiction,** but **tolerant of incidental effects** in another

* Judicial restraint – is court going to be active in striking down legislation? Not in modern paradigm, more liberal in accepting legislation
* **Weakness:** can compromise prov. autonomy; by allowing spillover effects creates areas of social life subject to overlapping/concurrent powers → fed power rules in overlap, so can limit prov. powers

Interpretation Doctrines

Validity

PITH & SUBSTANCE DOCTRINE

***Is law intra or ultra vires the jurisdiction of the enacting gov’t?***

Test outlined by ***Swinton*** → 3 steps (not always clear, often muddled in judges reasoning):

1. Identification of the **“matter”** of the statute
2. Delineation of the **scope** of the competing heads of power (**s. 91 = fed; s. 92 = prov**)
3. Determination of the **class** into which challenged statute falls (**fit**)

**1)** Law’s **DOMINANT CHARACTERISTIC/ MATTER**

***Effects & purpose (Morgentaler***):

**Effects of enforcement:**

* ***Legal effects*** (4 corners of legislation): how legal rights and abilities are affected
* ***Practical effects****:* social and economic effects

**Purpose (**problem which the legislature is trying to address)

* ***Intrinsic materials***(statute itself, preamble)
* ***Extrinsic materials***(Hansard related legislation, legislative history, background/surrounding circumstances)

As long as dominant characteristic is w/in enacting gov’s jurisdiction, **incidental effects** may be tolerated **(**in accordance w **modern paradigm) (*Lacombe*)**

Say here if it has any **incidental effects → law can affect other gov’t jurisdiction & be *intra vires* as long as DOMINANT CHARACTERISTIC stays w/in assigned jurisdiction**

**2) DELINEATION OF SCOPE OF COMPETING CLASSES**

* Circumscribes scope of heads of power
* History, precedent may play a role (*framers intent)*
* But heads can expand & evolve w society in accordance w **Living Tree** doctrine (***Edwards)***.
* This is seen in ***Employment Act***
* **S. 91 = federal**
* **S. 92 = provincial**

**3) CLASS INTO WHICH IT FALLS**

* Again, not logical, based on policy & judicial discretion (***Lederman***)
* **Incidental effects** may be tolerated **(*Lacombe*)**
* If colourable, not tolerated

**Conclude if intra vires, consider if necessarily incidental or double aspect doctrine**

|  |
| --- |
| * **Presumption of constitutionality** → aspect of **judicial restraint.** Court will assume legislation is constitutional – **burden of proof lies w/challenger**
* Process is not a tight formalistic one; not mechanistic but discretionary (***Swinton)***
* **Heads of power are classes of laws, not classes of facts.** Where legislation falls is not logical, but **determined by judicial interpretation/discretion & policy** ***(Lederman***) → must look at totality of legislation
* **3 theories** that inform judge’s choices about division of powers: **community, democratic theory, functional effectiveness** (***Simeon)***

Judges may interpret division of powers according to:* ***Ryder:* Classical paradigm** (***Parsons***): no overlap: mutual modification, reading down, watertight compartments & exclusivity
* ***Ryder:* Modern paradigm** (***Morgentaler; Employment Insurance***): SCC era, more overlap/ interplay, allows for principle of exhaustiveness
 |

**MATTER**: ***R v Morgentaler, 1993***

**F:** M performs abortions in private clinic, NS gov’t passes *Medical Services Act* that makes it mandatory to perform abortions inside hospitals, M carries on anyway.

**I:** is the *Medical Services Act* ultra vires the NS gov’t?

**H:** Yes – pith & substance of the legislation = criminal (fed power)

**R:** extrinsic evidence suggests ***MSA* punishes rather than regulates; therefore encroaching on fed crim power**

* Court focuses on **matter** part of P&S analysis – central purpose, **dominant characteristic** of *MSA*
	+ Uses extrinsic evidence to infer that language of *MSA* very similar to language of defunct provision of *Criminal Code* re: abortions
	+ **Colourability** → prov. gov’t knew it couldn’t outlaw abortion so tried to circumvent w/this act (Judge weirdly says not relevant to his analysis)
* Abortion = healthcare matter; court finds *MSA* to be in P&S attacking abortion for being **socially undesirable**
	+ No evidence that clinic abortions are dangerous, no arguments re: privatization of health care, no studies about cost of clinic abortions & why they should have to happen in hospitals
	+ Evidence suggests that none of the “issues” raised by NS actually addressed by legislation; solely aimed at preventing M from performing abortions in his clinic (suspicious timing)

INCIDENTAL EFFECTS

**Incidental Effects:** less dominant characteristics of otherwise valid piece of legislation that encroach on other gov’t jurisdiction

**SCOPE**: ***Ref re Employment Insurance Act, 2005***

**F**: at issue = validity of maternity & paternity benefits. Prov. says directed at supporting families/children so falls w/in prop & civil rights and/or matters of local nature. Fed says directed at providing replacement income so falls w/in unemployment insurance (added to list in 1940)

**I:** What is scope of Fed power over unemployment insurance?

**H**: Ruled effect of supporting families incidental effects

**R**: Progressive approach to interpretation (Living Tree Doctrine); decision to offer women possibility of receiving income replacement benefits when off work = social decision not incompatible w/the concept of risk in realm of insurance

* QC relied on Parsons to say insurance = prov. so EI should also be prov. jurisdiction → court rejects this, says EI = social policy measure, not insurance
* Question not initial exercise of power, but scope of power → must examine in current context
* Assisting families = incidental effect, but insurance = MATTER
	+ Complex piece of legislation does a lot, but everything is simply incidental to main purpose of insurance

DOUBLE ASPECT DOCTRINE

“Subjects which in one aspect & for one purpose fall w/in s. 92, may in another aspect & for another purpose fall w/in s. 91” – Hogg

* Legislation has both fed & prov. matter equally

“The contrast between the relative importance of the 2 features is not so sharp” (Lederman) → affirmed in (Multiple Access)

***Multiple Access v McCutcheon, 1982***

F: Inside trading addressed in both prov. & fed legislation, basically the same except for statute of limitations → D charged under prov. legislation b/c limitation already expired on fed – tries to argue it’s ultra vires the prov.; alternatively argued for paramountcy (so that fed would prevail & wouldn’t be able to be charged b/c limitation expired)

* P&S analysis on both (fed first, then prov.)
	+ If both valid & equally important, go to double aspect
* Prov. power = regulating trade in securities (prop & civil rights in prov.) s. 92(13)
* Fed power = characterization of fed false prospectus offence as “criminal law” (s. 91(27)) & fed insider trading remedy = corporate law (s. 91 opening words)
* Course of judicial restraint → court finds both above characteristics of roughly equal importance so law can be enacted in either jurisdiction

ANCILLARY DOCTRINE (necessarily incidental test)

ONLY USE IF PROVISION IS CHALLENGED & CONNECTED TO LARGER LEGISLATIVE SCHEME

Doctrine allows gov’t to intrude substantially on other level of gov’ts jurisdiction, as long as most important features of laws remain w/in their jurisdiction

***General Motors of Canada Ltd v City National Leasing, 1989***

**F:** CNL brings civil action against GM alleging it suffered losses as result of discriminatory pricing policy = anti-competitive behaviour prohibited by ***Combines Investigation Act*, s. 33.1.** GM argued s. 33.1 was beyond jurisdiction of fed b/c creation of civil causes of action falls w/in prov. jurisdiction (prop & civil rights).

**I:** whether particular provision is sufficiently integrated into the Act to sustain its constitutionality?

* Dickson finds law valid, saves impugned provision w/3 stage **ancillary test** → makes it possible to find provision valid even if it seems invalid
* Question is **to what extent does provision entrench on other gov’ts jurisdiction**? → Purpose is to ascertain degree to which provision could be said to intrude on prov. powers so that intrusion can be weighed in light of possible justification for the section
	+ **Encroaches marginally → “functional” relationship may be sufficient to justify provision**
	+ **Highly intrusive → stricter test is appropriate**
* Adopts **modern approach to interpretation –** Dickson examines 3 things in assessing seriousness of encroachment by **s. 33.1**:
1. Remedial provision → enforces substantive aspects of Act, but not itself substantive part
2. Limited scope of action, doesn’t create general cause of action
3. Well-established that fed gov’t not constitutionally precluded from creating rights of civil action where measures can be shown to be warranted

**Ancillary Doctrine/Necessarily Incidental Test** (reflects notion of impossibility of watertight compartments – modern paradigm **Ryder**)

1. Does impugned provision encroach on other gov’ts jurisdiction (is it *ultra vires*)? → P&S test of provision:
	1. Matter, Scope, Fit
2. If it’s *ultra vires*, to what extent is the encroachment?
	1. Marginal encroachment
	2. Middling
	3. Highly intrusive
3. P&S test of overall statute w/o offending provision → if invalid, PBGH. If valid move on to next step:
4. Can impugned provision be saved by its relationship w/valid legislative scheme?
	1. Required degree of integration increases in proportion to seriousness of encroachment (for provision to be saved)
	2. **Serious** intrusions require a **necessity** test (must be there for statute to function)
	3. **Lesser** intrusions simply require **rational connection** test (can’t just be add on, must actually be connected to/further the purpose of the rest of valid legislative scheme)

***Quebec (AG) v Lacombe, 2010***

F: Municipal by-law in QC prohibited use of lakes as aerodromes. Land use zoning = prov. power (prop & civil)

* Impugned portion is ultra vires jurisdiction of the prov. → don’t need to look at IJI or paramountcy
* 2 aspects to characterization of P&S:
	+ Purpose of legislation (intrinsic & extrinsic)
	+ Effect (legal & practical)
* Court decides P&S = aeronautics (fed) → provisions can still be found valid if “ancillary” to exercise of prov. power
* To determine the connection test looks at whether provision further the purpose of the overall statute → that determines how integrated the provision is w/the overall statutory scheme
* Amendments brought by by-law No. 260 don’t meet rational/functional connection test in General Motors → lack of correlation between nature of areas affected (zoning) & ban on aerodromes

Applicability

INTERJURISDICTIONAL IMMUNITY

Law is valid, but **should be interpreted so as not to apply** to matter that is outside jurisdiction of enacting body. Doctrine emphasizes **exclusivity** of jurisdiction (classical paradigm). **Protects certain matters that fall w/in fed jurisdiction from impact/interference of otherwise valid prov. laws**.

* If found inapplicable, courts will **read down** prov. (or fed) statutes to protect core of fed (or prov.) powers from encroachment
	+ Saves statute from constitutional challenge: words interpreted to apply only to matters w/in enacting body’s jurisdiction

**Rule: if the prov. law would affect the “basic, minimum & unassailable” core of the fed subject, then the IJI doctrine stipulated that the prov. law must be restricted in its application (read down) to exclude the fed subject.**

Assumption is that IJI must apply equally to prov. jurisdiction, but prov. IJI argument has never succeeded

***McKay v The Queen, 1965***

**F:** municipality by-law prohibiting displaying of sign on residential lawns – M displayed fed election sign, convicted under the by-law.

**I:** Is prov. legislation applicable to regulation of signs in fed election?

**H:** By-law upheld but “read down” to prohibit all signs “but fed election signs”

**R:** When prov. doesn’t have jurisdiction for legislation in Q, court may “read down” legislation

* Can’t (by using general words) effect a result which would be beyond its powers if brought about by precise words
* **Presumption of Constitutionality**: if words in statute are susceptible to 2 interpretations (*intra* or *ultra* *vires*) interpret to be *intra vires*
* Even though no specific fed legislation in the area, prov. legislation can’t affect anything to do w/fed elections (**protected core**)

***Bell Canada #1, 1966*** (**affects vital part test**)

**F:** Bell operates in QC, doesn’t want its workforce controlled by prov. commission re: *Minimum Wage Act*. Bell argues not applicable b/c it’s a federally regulated undertaking (FRU)

**R: Valid prov. law can’t apply to FRUS if it affects a vital part of their operation or management** (broad test)

* Court held that issues related to employment Ks (pay & hours) qualified as vital parts of management & operation of FRU → Abandons language of **sterilization** from previous rulings - broadens test for IJI
* QC law couldn’t apply even though no competing fed law existed at the time

**Criticism of *Bell #1*:** inconsistent w/ basic P&S doctrine that law “in relation to” a prov. matter may validly “affect” a fed matter; immunity of FRUs seems unnecessary b/c fed gov’t can enact its own law that would overrule the prov. law (paramountcy)

***Bell Canada #2, 1988*** (affirms ***Bell #1* – affects vital/essential part test**)

**F:** Part of trilogy of cases that dealt w/application of prov. health/safety laws to FRUS → argue not applicable

**R:** Sufficient that the prov. statute which purports to apply to the FRU affects a **vital or essential part** of that FRU **w/o necessarily going as far as impairing or paralyzing it**

* Fed gov’t vested w/exclusive legislative jurisdiction over labour relations & working conditions when that jurisdiction is an **integral part** of its **primary & exclusive** jurisdiction over another class of subjects
* Rejects possibility of **double aspect** b/c doesn’t want to create concurrent fields of jurisdiction → says can only be invoked when it gives effect to rule of exclusive fields of jurisdiction (in this case legislators have legislated for the same purpose & in same aspect)
* S. 91(29) & exceptions in s. 92(10) create exclusive classes of subject (FRUs) to which a **basic, minimum and unassailable content** has to be assigned to make up the matters falling w/in these classes

***Irwin Toy v Quebec, 1989*** (**directly affects vital part test**)

**F:** Irwin Toy argued QC law that prohibited advertisers from directing ads at kids under 13 was *ultra vires* to the extent that it applied to television advertising → affected vital part of management of broadcasting FRUs

**R:** Limits scope of ***Bell #2***test → vital part test only applicable to prov. laws that purport to apply **directly** to FRUs

* Where prov. law only has **indirect effect**, the narrower **sterilization/impairment test** should be applied
	+ In this case found that law only had indirect effect on advertising, & didn’t sterilize or impair the FRU, thus not rendered inapplicable

**Criticism of *Irwin Toy*:** this ruling doesn’t make much sense, speculated that Court was concerned that ***Bell #2*** test too tightly restricted prov. power over FRUs, saw this refinement (directly/indirectly) as way of loosening the constraints w/o overruling ***Bell #2*** completely

***Canadian Western Bank v Alberta, 2007*** (**impairment of vital part test**)

**F:** Alberta’s *Insurance Act* required “deposit-taking institution” to obtain license from prov. & comply w/ prov. consumer-protection laws in order to promote insurance to its customers → is it applicable to banks (FRUs)?

**R:** Vital part of FRU should be limited to functions that were **essential/indispensable/necessary to fed character** of the FRU (promo of insurance too far removed) → should be **minimum content necessary to make power effective for purpose for which it was conferred**

* Unsympathetic to IJI → “court should favour, where possible, the ordinary operation of statutes enacted by *both* levels of gov’t”
* Argued that IJI was superfluous b/c paramountcy could serve same purpose of limiting prov. intrusion
* IJI “an undertow in the dominant tide of modern paradigm”
* Bastarache J says IJI should always come before paramountcy in analysis (DOESN’T SAY WHY)
* **Impairment Requirement**: “significantly trammels”; “jeopardizes”; “impairs” the essential/vital part of the FRU

***British Columbia v Lafarge Canada, 2007*** (same as ***Canadian Western Bank***)

**F:** Dispute over who had authority over land use regulation at port of Vancouver – Lafarge wanted to build cement-batching plant on the land, Feds okayed it, prov. said no.

**R:** Court held that regulation of development wasn’t in core head of Fed’s power; therefore IJI doesn’t apply b/c prov. legislation merely affected part of the FRU

* Court didn’t seem swayed by own argument though, b/c went on to hold prov. law inoperative (paramountcy)
* Argues IJI shouldn’t be used in instances of double aspect

***Quebec v Canadian Owners & Pilots Association (COPA), 2010*** (current **impairment of essential part test**)

**F:** Owners of land selected site for airstrip w/o prior approval from fed b/c no approval required by fed *Aeronautics Act* to establish/operate a private aerodrome. Prov. law designated areas of prov. as agricultural zones from which all non-agricultural uses were prohibited → is it applicable to prohibit the operation of this airstrip on private land w/in agricultural zone?

**R:** Prov. law was valid, but inapplicable to extent that it prohibits aerodromes in agricultural zones b/c deemed location of aerodromes **essential** to fed power over aeronautics (w/in core of power) – non-severable

* Effect of prov. law serious enough to = **impairment** (midpoint between sterilization & merely affecting)
* Must have **precedent** → reluctant to create new immunized cores of fed power
* To apply IJI, **not necessary to show that there’s a conflict** between the laws adopted by 2 levels of gov’t

**Interjurisdictional Immunity Test**

1. Does the prov. (or fed) law **trench on the protected “core” (basic, minimum & unassailable content) of a fed** (or prov.) **power?**
	1. No → it’s fine, test over.
	2. Yes → move to step #2.
2. Is prov. (or fed) law’s effect on the exercise of the protected fed power **sufficiently serious** to invoke the doctrine of IJI? → Must **impair** federal exercise of core competence (***Canadian Western Bank***)

***Insite***

**F:**

* Doctrine premised on basic, minimum, unassailable context that is protected from impairment
* Law remains valid, but can’t apply to protected core
* Claim fails on first stage of ***COPA*** test → no protected cores of prov. power (in theory IJI should apply both ways, but no jurisprudence on prov. cores)

Operability

PARAMOUNTCY

In case of conflict between fed & prov. laws, fed law = **paramount** and prov. law is **inoperative to extent of the conflict →** if fed legislation is repealed, conflict disappears & prov. law once again operable

* Fed trumps prov.
* Temporary – prov. operable once conflict disappears
* Doctrine has moved from **occupying the field test** to **requirement of a conflict**

**Precursor to below cases: “covering the field” test**

* Fed enacted law on particular topic that precludes prov. from enacting diff. law on same topic (Courts reject this approach in all the cases below – no acceptance of “**negative implication**” by fed legislation)

***Ross v Registrar of Motor Vehicles, 1975*** (**incompatibility of intent test**)

**F:** Ross convicted of driving while impaired, Registrar suspended his license in accordance with *Highway Traffic Act*. Ross argued this conflicted with s.238 of *Criminal Code* b/c that section allowed judge to order suspension & he hadn’t in this case.

**R:** Shifts away from blanket paramountcy/**operating the field** test

* **If both laws are valid & serve same intent, they can co-exist** → occupying the field no longer the standard

***Multiple Access, 1982*** (**narrow application of paramountcy – dual compliance**)

* Mere duplication **without actual conflict/contradiction** not sufficient to invoke paramountcy
* If dual compliance is possible, then it’s fine → both laws are basically identical, person just has to obey the stricter law – duplication = “ultimate in harmony”
	+ No policy conflict between fed & prov. schemes

***M & D Farm v Manitoba Agricultural Credit, 1999*** (**impossibility of dual compliance**)

**F:** Under fed *Farm Debt Review Act* P got a stay of proceedings to recover mortgage $$→ during stay, Credit got court order under prov. *Family Farm Protection Act* granting permission to foreclose. Farm argues court order void b/c fed law should be held above prov. law

**R:** Since the stay ordered under the fed law directly prohibited court order made under prov. law, paramountcy kicks in for fed law to prevail

* No possibility of dual compliance → can’t follow both laws
* **Express contradiction**

***Bank of Montreal v Hall, 1990*** (**incompatibility of intent; expanded impossibility of dual compliance**)

**F:** Hall defaulted on loan, Bank seized machinery that they secured the interest on w/o notice (*Bank Act*) but there was a prov. law that said creditor had to serve last notice before seizure (*Limitation of Civil Rights Act*)

**R:** Bank complies w/fed law, but prov. law conflicts → Court finds **no possibility of dual compliance**

* Paramountcy renders prov. law inoperative to extent that **it requires something diff.** from fed law
* **If prov. law frustrates fed intent, paramountcy is triggered**

***Husky Oil Operations Ltd v MNR, 1995*** (conflates IJI & paramountcy – interprets ***BMO*** as IJI)

**F:** Involved operation of prov. legislation in bankruptcy situations

**R:** Valid prov. legislation can’t apply to bankruptcies if it would have the effect of subverting the order of priorities for creditors’ claims set out in fed *Bankruptcy Act*

* Creates a lot of confusion b/c Gonthier J. conflates arguments of applicability & operability

***Law Society of BC v Mangat, 2001*** (**frustrates fed intent – *BMO* test**)

**F:** Fed *Immigration Act* said non-lawyer could represent party before Immigration & Refugee Board; BC’s *Legal Profession Act* said non-lawyers prohibited from practicing law.

**R:** Technically dual compliance is possible if party follows the stricter prov. law, but that would **frustrate federal intent** to establish informal, accessible & speedy process. Compliance w/ strict prov. law **contrary to fed purpose**

***114957 Canada Ltée (Spraytech, Société d’arrosage) v Hudson (Town), 2001*** (precursor to ***Rothmans*)**

**F:** municipal bylaw restricted use of pesticides to specified locations & purposes; Fed law *Pest Control Products Act* regulates which pesticides can be registered for manufacture or use in Canada

**R:** L’Heureux-Dubé J. characterized fed law as permissive legislation that does not purport to exhaustively regulate pesticides → no conflict that gives rise to paramountcy

* No impossibility of dual compliance
* Bylaw doesn’t displace or frustrate purpose of fed legislation

***Rothmans, Benson & Hedges Inc v Saskatchewan, 2005*** (**impossibility of dual compliance +frustration intent**)

**F:** Fed *Tobacco Act* prohibited promo of tobacco products, except as authorized elsewhere in the Act → went on to provide that “ a person may display, at retail, a tobacco product”. Saskatchewan *Tobacco Control Act* banned the display of tobacco products in any premises in which people 18 or under permitted.

**R:** Fed permission to display intended to circumscribe prohibition on promotion, not to create positive “entitlement” to display

* **No impossibility of dual compliance:** Retailer could comply w/ both laws – refuse to admit people under 18 or don’t display tobacco products (***Multiple Access***) → for this to occur fed law would have to require retailers what prov. law prohibits
* **No frustration of federal intent:** permission to display tobacco products didn’t indicate fed purpose to allow retailers to display tobacco products. Purpose was to circumscribe the general prohibition on promotion, which the prov. law was deemed not to frustrate (***BMO***)
	+ Enacted for same health-related purposes & no inconsistency between 2 provisions at issue

Heads of Power

CRIMINAL LAW

|  |  |
| --- | --- |
| **Federal Jurisdiction** | **Provincial Jurisdiction** |
| Prohibition | Prevention |
| Penal/punitive | Regulatory |
| → Punishment | → Licensing |
| Public Property | Private Property |

Federal Jurisdiction

**S. 91(27)** asserts that jurisdiction over the criminal law rests with the federal government. The ***Margarine Reference*** set out the scope of the criminal law head of power as involving a **form** and **content** requirement. In order to fall under the ambit of criminal law, the law must include a **prohibition** with **penal sanctions** (form) directed at a **criminal law purpose**, such as the prevention of undesirable effect on the **public** (content) (***Margarine Reference***). It is important to note that the criminal law is not frozen in time and should be defined broadly (***RJR; Firearms Reference***).

Potential Criminal Law Purposes:

* Public peace
* Order
* Security
* Health
* Morality

In cases where a clear criminal law purpose has been found, courts have allowed some deviation from the strict form of prohibition and penalty. In ***RJR*** the court found that the presence of exemptions did not preclude a finding that the legislation was criminal law. Further, the court held that a circuitous route to the stated purpose is often permissible; however, the legislation cannot be colourable whereby Parliament has some ulterior motive attempting to unjustifiably intrude into provincial jurisdiction (***RJR***). In ***Hydro Quebec*** the court went further in finding that a regulatory scheme with a large measure of administrative discretion satisfied the formal requirements of criminal law.

**Uphold – Arguments for Inclusion w/in s. 91(27)***:*

* To fall w/in scope of s. 91(27), the legislation must have a criminal purpose, prohibition and penalty (***Margarine Reference; Hydro Quebec; Firearms Reference***)
* Circuitous route to purpose fulfillment allowed (***RJR***) – court agreed that health risk of tobacco use did not require complete ban of cigarettes.
* The legislation must also be directed at protecting the public in general, as opposed to a particular group (***Margarine Reference***)
* Distinguish regulatory nature from exemptions, which do not call into question the ‘criminal’ nature of the legislation (***RJR***).
* Complexity, a regulatory approach, or institutional discretion does not necessarily preclude a finding of criminal prohibition (***Firearms***).

**Strike Down – Arguments for Exclusion from s. 91(27):**

* Factors to consider in determining whether scheme is regulatory vs. prohibitive (***Hydro Quebec, dissent***)
	+ Is it fundamentally regulatory
	+ How elaborate is the regulatory scheme
	+ Does the regulatory aspect relate to the prohibition
	+ Criminal law typically contains a provision that is self-applied (***Hogg*** – “self-applied” means there is not normally any intervention by an administrative agency or official prior to the application of the law. The law is “administered” by law enforcement officials and courts of criminal jurisdiction only in the sense that they can bring to bear the machinery of punishment after the prohibited conduct has occurred)
	+ Is there an equivalent legislation in the province
	+ Does it look like its controlling substances rather than a general prohibition
	+ If it covers a broad field of things (ex. the environment), it’s unlikely that the court will want to locate it solely under federal criminal law jurisdiction
* Does an agency/administrative body determine when an offence has occurred? (***Hydro Quebec, dissent***)

Provincial Jurisdiction

Provinces have some power to regulate morality and public order. For example, must of the federal Criminal Code is provincially enforced. Section (2(14) gives the provinces jurisdiction over the administration of justice in the province. S. 92(15) allows provincial governments to impose punishment by way of fine, penalty or imprisonment to laws pursuant to s. 92. This is known as an **ancillary power**, which requires legislation validly enacted under another provincial head of power, such as property & civil rights (s. 92(13)). Valid provincial legislation is regulatory and preventive rather than prohibitive and punitive, and is concerned with private rather than public issues.

**Uphold – Arguments for Inclusion w/in s. 91(15) to regulate & set punishment or s. 92(13) prop/civil rights***:*

* Legislation is preventive, not prohibitive (***Dupond***)
* More regulatory than punitive (***McNeil***)
* Legislation is temporary (***Dupond***)
* Dealing w/an industry
* Denying licenses rather than jail
* Private property interests/geographic (***Dupond***)

**Strike Down – Arguments for Exclusion – intrudes into s. 91(27):**

* Deals w/matter injurious to public, safety, etc. (***Westendorp*** – “so patently an attempt to control or punish prostitution as to be beyond question” = seemed to be about controlling morality)
* Legislation is too similar to federal law (***Westendorp***)

POGG

The preamble to s. 91 of the Constitution Act, 1867 states that the federal government has the power to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces – this is what is referred to as POGG power. There are two dominant theories on the interpretation of POGG, influenced by the perspective on federalism the proponents hold:

**The General Theory:** **Laskin** is a centralist, thus he believes that POGG constituted the general power of the federal government, while the enumerated powers in s. 91 were illustrative only. The general theory believes that every power not explicitly granted to the provincial government automatically falls within federal jurisdiction. Thus, if the subject matter was not listed in s. 92, it would be added to the federal jurisdiction by virtue of POGG.

**The Residual Theory:** has replaced the General Theory. Under this theory, POGG is a separate, additional head of power, not just “superfluous grammatical prudence” (***Hogg***). Thus, anything not found in s. 91 **or** 92 will fall within POGG power; the emphasis being that POGG power will take up the powers not otherwise taken up. Beetz favours this approach as he is much more protective of provincial rights and autonomy between the federal and provincial governments. Courts have come to structure three branches of POGG power:

(1) Gap Branch

**Gap Branch:** covers matters that were inadvertently left out of s. 91 through a drafting oversight, but are uncontroversially federal. It is an example of the principle of exhaustiveness at play – the principle that some level of gov’t has to be able to do every area of legislation imaginable (you cannot have an area where no level of gov’t can legislate) [ex. incorporating fed companies – head of power for prov. incorporation but not fed – logically would fall under fed through POGG]. The Gap branch **does not cover new matters**.

* 1. ***Labour Conventions Reference, 1937*** – fed gov’t passed employment standard laws in accordance w/international treaties & argued it should have jurisdiction over those treaty obligations, even though the matters otherwise fell within prov. jurisdiction. **PC held that federal gov’t could not claim jurisdiction by way of signing international treaties**. Legislative powers remain distributed, and if treaties incur obligations they must, when they deal w/prov. heads of power, be dealt with by the totality of powers (cooperation between fed & prov.).

(2) Emergency Branch

**Emergency Branch:** provides a basis for a temporary alteration of the division of powers between Federal Parliament and the provinces to address an emergency situation. Laskin established 3 criteria for **emergency legislation** in ***Anti-Inflation Reference*** (also articulated that national concern & emergency branch were **distinct**):

* 1. Parliament must have a **rational basis for concluding there is an emergency** (not a Q of whether Parliament was correct, only needs rational basis. **Standard** = “**rational politician**” [oxymoron])
	2. **“Crisis legislation” – reduced sense**
		1. Laskin reads down idea that legislation needs to be explicitly about emergency, holds “crisis” is sufficient
		2. Beetz takes Laskin up on this point – can’t understand how he can find legislation as emergency when it never mentions emergency
	3. **Must be temporary**
		1. Emergencies not the norm; temporary/acute (FLAG: what counts as temporary?)
		2. Counterbalances the fact that emergency power allows federal gov’t to grab from matters that would otherwise be under prov. jurisdiction.

**It does not matter if** the legislation is incomplete in coverage, provides for optional coverage, is considered a delayed response, has no explicit declaration of an emergency (*Beetz dissents to this, requires explicitness in order to constitute emergency*) or might be considered to have ineffective measures.

**Emergency circumstances must be extraordinary or extreme.** To do something that is otherwise within prov. jurisdiction, federal government has the onus to prove there is an “emergency” (must be a crisis – economic crisis is sufficient [**Laskin**]), as an issue that is “national concern” is inadequate to qualify under EM branch.

(3) National Concern Branch

**National Concern Branch:** is separate and distinct from the emergency branch (***AIR; Crown Zellerbach***). This branch applies when a particular issue requires a single unified law that cannot realistically be satisfied by cooperative prov. action (***Hogg***). Once a subject matter is qualified as a national concern, Parliament has an exclusive jurisdiction of a plenary nature to legislate in relation to that matter, including its intra-provincial aspects (***Crown Zellerbach***). If legislation falls under the national concern branch of POGG it results in a **permanent grant of jurisdiction to the federal gov’t**, although it is limited by the identity of the subject newly recognized to be of national dimensions (***Beetz, AIR dissent***; forms majority judgment on NC – obiter, but widely accepted). The Court’s concern has been whether a grant of fed jurisdiction would infringe significantly upon various areas of provincial competence and disturb the federal/provincial DoP to an unacceptable degree.

**Test for National Concern Branch:**

* 1. **Subject matter (P&S) of legislation must be new:** New matters which did not exist at Confederation (***Beetz, AIR***) **or** matters which, although originally matters of a local or private nature in a province have since, in the absence of national emergency, become matters of national concern (***Crown Zellerbach***).
	2. **Singleness, distinctiveness, and indivisibility**:
		1. **First part**: The matter (P/S) of the legislation must have a degree of unity that makes it distinct from provincial matters and it must be indivisible. Legalisation must be clearly distinguishable from matters of provincial concern (***Beetz, AIR***).
			1. Because of the high potential risk to the Constitution’s division of powers presented by the broad notion of “national concern”, it is crucial that the legislation specify precisely what it is that the law purports to claim jurisdiction over. Requirement of precision is a way of constraining the POGG power.
		2. **Second part:** the legislation must have a **scale of impact** on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution (***Crown Zellerbach***). → don’t want to alter division of powers, needs to be reconciled.
		3. In determining whether a matter has attained the required degree of **singleness, distinctiveness and indivisibility** that clearly distinguishes it from matters of prov. concern **it is relevant to consider what would be the effect on extra-provincial interests of a prov. failure to deal effectively w/ the control or regulation of the intra-provincial aspects of the matter – provincial inability test** (***Crown Zellerbach***)
			1. Is this a matter that the provinces really cannot deal with because it involves federal competence or that of another province?
			2. ***Hogg*** – prov. inability test adopted simply as a reason for finding that a particular matter is one of national concern falling w/in POGG: that prov. failure to deal effectively w/intra-prov. aspects of the matter could have an adverse effect on extra-prov. interests.
			3. **Prov. inability test = indicia** for determining whether a matter has character of singleness or indivisibility required to bring it w/in NC
			4. ***Choudry*** – consider (1) negative extra-provincial externalities (when costs of the decision are borne by someone other than the decision-maker) [ex. no incentive for Alberta to do something about dumping that affects Manitoba. (2) collective action problem (economic theory). Public goods – can’t exclude others from the benefits, so no incentive for anyone to supply it (national security, clean air). Leads to free-rider problem.
	3. **The new matter must not effectively swallow up provincial jurisdiction**

THRESHOLD ISSUES

There are two threshold issues that must be addressed in examining a Charter challenge. The first is whether the challenger has standing to bring a claim. In this case it is assumed the applicant has standing to bring a challenge. The next issue to address is application. **Section 32 of the Charter** states that the Charter applies to Parliament and government of Canada, and the legislature and government of the provinces. This has been interpreted to mean that the Charter applies vertically, specifically applying to the administrative, executive and legislative branches of the government, but not the judiciary (***Dolphin Delivery***).

Standing

* **Assume applicant has standing**

Application of the Charter

**Section 32(1) says Charter applies:**

1. **To the Parliament and gov’t of Canada in respect of all matters w/in Parliament’s authority; AND**
2. **To the legislature and gov’t of each province in respect of all matters w/in their authority**

Was this section meant to be exhaustive or merely illustrative, that is, w/o restricting the application of the Charter?

TO WHOM DOES THE CHARTER APPLY?

**Vertical Application:** (Charter only applies to gov’t in order to protect everyone below gov’t)

* Benefits: in the classical liberal mindset the state is the real problem maker – limits state power
* Drawbacks: Charter effects permeate too little in our lives, lets a lot of powerful actors (i.e. corporations) off the hook for their Charter obligations

**Horizontal Application:** (Applies to private actors & the state in order to protect individuals → rights in a Constitution should apply to everyone vis a vis everyone else)

* Benefits: get at sources of power that limit freedom; some of the most oppressive actors in people’s lives are non-state actors (ex. corporations, banks, etc.) This would give Charter real expression & force
* Drawbacks: would result in plethora of litigation, might end up with a lot of rights conflicts b/c rights bearers can bring challenges about rights against each other (at the moment gov’t doesn’t hold rights, so it is always a rights holder against a non-rights holder); would infringe individual freedom and choice extensively

***RWDSU v Dolphin Delivery, 1986*** (*RWDSU tried to picket outside DD’s office, DD applied for & was granted an injunction based on fact that CL doesn’t permit secondary picketing – BC legislation prohibiting it but no fed legislation. RWDSU challenged decision saying injunction infringed s. 2(b)*)

**Issue:** Does the Charter apply to CL? Does it apply in private litigation?

* **Held:** McIntyre J. confirmed **vertical application theory** → **Charter only applied to protect individuals from gov’t action,** not individuals from other individuals
	+ **Charter applies to CL**, but only insofar as CL is basis of some gov’t action that allegedly infringes on Charter → relies on **s. 52(1) of Charter** (any law that is inconsistent w/Constitution is of no force or effect)
		- **BUT** principles of CL should be developed **in accordance w/ “Charter values”**
* **Charter Applies To: Government (legislature/Parliament/executive/administrative – all branches of prov. & fed gov’t)**
	+ Charter will apply to these branches of gov’t whether they are involved in public or private litigation & whether it’s legislation or CL that is in Q
	+ Pulls regulatory actions, tribunals, appointees of gov’t etc. under Charter
* **Charter Doesn’t Apply To: purely private litigation or judiciary**
	+ Court must abide by Charter and apply CL in manner consistent w/it, but its orders can’t be challenged on basis of Charter in case between 2 private parties

**Criticism of *Dolphin Delivery***:

* Reflects **conservative reading of gov’t**, underpinned by classically liberal notions of the state
* Critical of how distinction between gov’t & non-gov’t action drawn
	+ Anomalies created by decision’s ruling that CL rules, when relied on by private litigants, are not subject to Charter, but stat rules governing private relationships are
* HOGG: criticized SCC, said CL should fall under gov’t action b/c it has “crystallized” into a rule that can be enforced by the courts (US approach)

**\*\*Since *Dolphin Delivery* court has attempted to define division between gov’t vs. non-gov’t action, often unconvincingly\*\***

* Shows division between public & private is unclear & even, perhaps, unprincipled

GOVERNMENTAL ACTION

Gov’t Actors: Entities Controlled by Gov’t

**Government Actors:** If the entity is sufficiently controlled by the gov’t or if they are implementing a gov’t function so as to constitute a governmental actor, all of the entity’s activities will be subject to the Charter (***Lavigne***)

|  |
| --- |
| **TEST for Entities Controlled by Gov’t:**(1) **DIRECT CONTROL BY GOVT** (2) Performing a **“quintessentially governmental function”(**not really used since then**) (*Mckinney)*****LOOK TO: EXTENT and TYPE of government control** (***Douglas College)*** * **To be government, the entity needs to be under the “ROUTINE and REGULAR control” of gov’t (active gov’t involvement, gov’t power to intervene in institution) *Stoffman***
* Consider the composition of board, who the board serves, amount of control gov’tover it (how many members, mandate? Condition of terms**? can they be removed at pleasure (gov’t control) OR is it fixed terms (not gov’t control)?**

**Once you are deemed a gov’t actor, EVERYTHING YOU DO IS CONSIDERED GOVERNMENTAL and subject to Charter (*Lavigne)*****It’s important that gov’t not be able to rid itself of its duties under the Charter by delegating its duties to another entities *(GTA)*****A private agreement** can be subject to Charter **if employer is a gov’t actor *(Lavigne)*** |

***McKinney v University of Guelph, 1990*** (*appellants challenge provision forcing retirement @ age 65; claimed violation of s. 15 of Charter & argued universities are “gov’t” so Charter applies*)

**Issue:** What constitutes a gov’t actor pursuant to s. 32 of Charter?

* **Held:** La Forest J. held that university was an institution w/ **“legal autonomy”** and was **not** **an “organ of gov’t”**
	+ Mere fact that entity is creature of statute & has been given legal attributes of a natural person not sufficient to make its actions subject to the Charter (if this was enough, then all corps would fall under Charter = floodgates argument)
	+ Has its own **autonomous governing body** – rendered it less susceptible to direct gov’t control
		- Looked at **composition of board of directors** as well as **traditional position of university in society**
	+ Argued that universities serve a **public purpose** – La Forest says this test will NOT bring something under gov’t actor b/c not a test mandated by s. 32, uncertain, etc.

**TEST:**

1. **Directly controlled by gov’t**
2. Performing a **“quintessentially gov’t function”**

**What is NOT a factor in making a determination as to whether the actor is sufficiently governmental**?

1. **Just because something is a statutory body doesn’t mean it is governmental** (corporations are statutory bodies in a sense, through incorporation)
2. **Public function test insufficient**: look to direct control and whether it performs a “quintessential government function
3. **Relationship** **between government and institution** **may create a nexus of government action, but still NOT sufficient**.

**Dissent of *McKinney***:

* Willson J. sets out 3 tests to identify whether something is gov’t actor:
	+ **Control Test:** Does the legislative, executive or administrative branch of gov’t exercise general control over the entity in question?
	+ **Gov’t Function Test:** Does the entity perform a traditional gov’t function, or a function that in more modern times is recognized as a responsibility of the state?
	+ **Stat Authority & Public Interest:** Is the entity one that acts pursuant to stat authority specifically granted to it to enable it to further an objective that gov’t seeks to promote in the broader public interest?

***Stoffman v VGH, 1990*** (*challenge by doctors to hospital board regulation that established a policy of mandatory retirement at 65 [14 of 16 board members appointed by gov’t & governing statute required all regulations be approved by Minster of Health Services & Hospital Insurance])*

**Rule: To be gov’t entity needs to be under the “routine & regular control” of gov’t**  (active gov’t involvement, gov’t power to intervene in institution)

* Court focused on fact that **routine control [day-to-day operations]** of hospital was in hands of hospital’s board rather than gov’t
* Mandatory retirement provision originated w/ board, not gov’t
* Also ruled that provision of a public service, even health care, didn’t qualify as gov’t function

***Douglas College, 1990*** (*challenge to mandatory retirement provision in collective agreement between college & a union*)

**Rule: Look to EXTENT and TYPE of gov’t control**

* Affairs of college managed by board **wholly appointed by prov. gov’t** – minister allowed to establish & issue directions; approved bylaws of the board → “part of the apparatus of gov’t both in **form & fact**”
* Consider the composition of board, who the board serves, amount of control gov’t has over it (how many members, mandate, condition of terms?)
	+ **Can they be removed at pleasure (gov’t control) OR is it fixed terms (not gov’t control)?**

***Lavigne v Ontario Public Service Employees Union, 1991*** (*challenged union’s expenditure of dues on political causes that L didn’t support* – *union had entered agreement w/Council of Regents requiring mandatory payment of dues from all employees whether or not they belonged to the union*)

* **Held:** Charter didn’t apply to union but did apply to Council of Regents as council was subject to routine & regular control of Minster of Education, including collective bargaining w/college employees
	+ **Private agreement can be subject to Charter if employer is gov’t actor**
	+ **Once deemed a gov’t actor, everything you do is considered governmental & subject to Charter** (can’t distinguish between regulatory activities & commercial/contractual activities)

***Greater Vancouver Transportation Authority v Canadian Federation of Students – BC, 2009*** (*GVTA wouldn’t allow political posters to be put on bus, students said this violated s. 2(b))*

* **Held:** Charter applies, found violation of s. 2(b)
	+ Both GVTA & Translink bound by Charter b/c they are **statutory bodies designated by legislation as an “agent of the gov’t”** w/ a board of directors whose members all appointed by prov. gov’t → LG managed affairs & subject to day-to-day control of gov’t
* **Important that gov’t not be able to rid itself of its duties under the Charter by delegating to another “autonomous” entity to circumscribe Charter**

Gov’t Actors: Entities Exercising Government Functions

Even if the entity is not controlled by gov’t, it may still be subject to the Charter pursuant to s. 32 and viewed as a gov’t actor if it serves a **government function (*Godbout*)**

* Policy Consideration: this prevents the gov’t from circumventing its Charter obligations by delegating its powers to other entities **(*Godbout*)**
* **Must be gov’t function, not merely a “public” function** → courts will look to **nature & quality** of functions entity performs **(*Godbout*)**

***Godbout v Longueuil, 1997*** (*private K between municipality & employee that required her to live in city as condition of employment & that if she moved she could be terminated w/o notice*)

**Issue:** are municipalities subject to the Charter?

* **Held:** La Forest says municipalities are subject to the Charter because they:
	1. **Are elected**
	2. **Possess general powers of taxation**
	3. **Are empowered to make & enforce laws in territorially defined jurisdictions**
	4. **Derive existence & lawmaking authority from provinces (MOST IMPORTANT)**
* When an entity can be described as “**governmental in nature”** (see above factors) it’s subject in its activities to Charter review
	+ Practical to interpret s. 32 this way b/c prevents gov’t from circumventing Charter scrutiny
* Once an entity is assumed to be subject to the Charter, ever act it does is subject to Charter → **gov’t entity** **can’t perform private act**

\*\*La Forest’s minority judgment only one to address application of Charter to municipalities so SCC hasn’t explicitly answered this question\*\*

GOVERNMENTAL ACT

**Governmental acts** (by non-governmental actors): Even if the entity is not considered a governmental actor, it may be subject to the Charter because it performs governmental acts or is exercising the statutory power of compulsion.

Gov’t Acts: Entities Implementing Gov’t Programs

If the private entity is **implementing a specific gov’t program or policy,** it will be subject to Charter insofar as it is acting in furtherance of a specific governmental program/policy (***Eldridge***)

***Eldridge v BC, 1997*** (*re: hospital – deaf woman sought declaration that failure to provide public funding for sign language interpreters of the deaf when they received medical services violated s. 15 of the Charter*)

**Held: an otherwise private entity may be subject to Charter IF THEY ARE IMPLEMENTING A SPECIFIC GOVERNMENTAL PROGRAM**.

* Gov’t maintains responsibility for the program, even though it’s being carried out by a private actor
	+ Can’t escape Charter scrutiny by entering into commercial Ks or other “private” arrangements so shouldn’t be allowed to evade constitutional responsibilities by delegating implementation of their policies to private entities
* Demands investigation into **nature of the activity itself** (**quality of the act**, rather than the actor)
* There must be a “**direct and precisely defined connection**” between the gov’t policy & entity’s conduct. Public function is not sufficient!
	+ ***Eldridge***: health care is a gov’t program. Gov’t defines content of service – hospitals mere vehicles to carry out specific gov’t objectives
	+ ***Stoffman***: says a hospital as an entity is not subject to Charter. ***Eldridge*** doesn’t overrule this, it confirms that a hospital is a non-governmental actor but says it is carrying out a gov’t program and is thus subject to Charter – but only in carrying out that program

Gov’t Acts: Entities Exercising Statutory Powers of Compulsion

The Charter also applies to non-governmental actors exercising coercive statutory powers (ex. adjudicators: ***Slaight; Blencoe***)

***Slaight v Davidson, 1989*** (*Adjudicator gets power from statute, has ability to compel activity. Orders someone to write a letter. Person claims infringement on s. 2(b))*

* **Held:** Charter applies b/c **adjudicator = statutory creature, derives all powers from statute**
	+ **Impossible to interpret legislation conferring discretion as conferring a power to infringe the Charter** b/c gov’t doesn’t have that power to give, unless that power is expressly conferred or necessarily implied
* **Result:** some adjudicative bodies (admin tribunals, labour adjudicators) bound by Charter, while courts are not -

***Blencoe v BC (HRC), 2000*** (*B accused of sexual harassment, many delays in his hearing, said delays impair his rights under s. 7***)**

* **Held:** Charter apples to HRC even though it’s not a gov’t actor. Can do so for 2 reasons:
1. **Implementing a specific gov’t program (human rights regime)**
2. **B/c it’s exercising statutory powers of compulsion** [likely that it’s hiring & retirement policies etc. wouldn’t be caught by Charter] → *Human Rights Code* granted various powers to Commission to both investigate complaints & decided how to deal w/them

GOVERNMENTAL INACTION

***Section 32*** applies to “all matter” and has been interpreted in certain circumstances to include the gov’t failing to act (***Vriend***). If the Charter requires the fulfillment of a positive objective, its failure can constitute an infringement (***Vriend***). It has been questioned whether the ***Vriend*** decision applies to complete government inaction or if there must be under-inclusive legislation in place. The court has suggested that governments may have a positive obligation to protect the freedom of vulnerable groups (***Dunmore***).

***Vriend v Alberta, 1998*** (*V was fired for teaching b/c he was gay; couldn’t sue school as gays not protected under IRPA. Wanted legislature to modify IRPA to include sexual orientation so brought a Charter challenge*)

* **Held: Charter should apply to gov’t inaction**
* Policy Consideration: If gov’t inaction didn’t come under Charter control legislature could avoid Charter scrutiny by enacting under-inclusive legislation → this would be illogical & unfair
* Four points:
	+ Dealing w/statute that’s been proclaimed (not just an absence)
	+ Underinclusivity of the act doesn’t alter the fact that it’s a legislative act under scrutiny
	+ **S. 32** allows positive and negative manipulations
	+ If you allow gov’t to escape Charter scrutiny by not doing something, you allow it to manipulate its actions
* Apply Charter to the failure, find it as an infringement and read the word sexual orientation in

\*\*Courts typically characterized the fundamental freedoms in s. 2 of the Charter as being purely negative in character, imposing no positive obligations on the state – FOE traditional view = that it “prohibits gags, but does not compel the distribution of megaphones” (***Haig***) → on this traditional view Charter won’t apply to gov’t inaction that is alleged to infringe civil liberties\*\*

APPLICATION OF THE CHARTER TO COURTS & THE COMMON LAW

In ***Dolphin Delivery,*** the court held the *Charter* does not apply to the common law when relied upon by private parties, but the court should attempt to develop the common law in a manner that is consistent w/the fundamental values that are entrenched in the Charter. This was refined in ***BCGEU***, where it was stated that the Charter will apply if the user of the common law is motivated by **public interest or purpose**.

**However: *Dolphin Delivery*** statement that the courts were not part of gov’t for the purposes of s. 32(1) of the Charter has since been generally ignored.

Reliance by Gov’t on Common Law

***BCGEU v BC, 1988*** (*judge issued injunction against picketing courthouse, challenged as violation of FOE*)

* **Held:** injunction subject to Charter scrutiny b/c **court was** **acting on its own motion** not at the instance of any private party
	+ Motivation for court’s action = **public** in nature (not private)

***R v Swain, 1991 & Dagenais v CBC, 1994*** → where a CL rule is relied upon by the Crown in criminal proceedings, Charter applies as state prosecution provides requisite element of governmental action

* “If it is possible to reformulate a common law rule so that it will not conflict with the principles of fundamental justice, such a reformulation should be undertaken”

Reliance on Common Law in Private Litigation

In private litigation resolved on the basis of the common law, the Charter does not apply directly, but it is still relevant, as the court held in ***Dolphin Delivery*** that common law principles should be developed in a manner consistent with Charter values.

Assuming the Charter does not apply to the CL in a given situation, it must be determined whether the CL rule is **inconsistent with Charter values, not whether it infringed a Charter right** (***Hill***). The burden of showing that the CL rule should be modified lies with the party claiming that it’s intolerable in relation to Charter values. This involves weighing the Charter value against the purpose for the CL rule.

***Hill v Church of Scientology, 1995*** (*lawyer alleged that tort of defamation was inconsistent w/Charter’s protection of FOE)* - **Private parties owe each other no constitutional duties and cannot found their cause of action upon a Charter right, most they can argue is that CL is inconsistent w/Charter values**

* Significant changes to the CL should be addressed by the legislature
* Court should modify/extend CL to comply w/prevailing social values
* Charter values provide guidelines for any modification to CL which court feels is necessary

Framework of the Charter

INTERPRETING RIGHTS

The courts have adopted a **general and purposive approach** to the interpretation of Charter rights. ***Hunter v Southam*** held that the scope or value of a particular right could only be judged after the court has **specified the underlying purpose of the right in light of the larger purposes** of the Charter.

**Purposive Approach:**

* Makes constitution reflective
* Places limits on judicial review → committing to purposive approach limits judges’ ability to interpret constitution to mean whatever they want

**Generous & Liberal Approach:**

* Court will read the rights broadly & generously
* **S. 1** encourages this b/c it allows collective interest to come back into the calculation (***Therens***)

***R v Big M Drug Mart, 1985*** → SCC reiterated commitment to purposive approach

* Purpose of right/freedom in Q is to be sought by reference to:
	+ The character & larger objects of the Charter itself
	+ The language chosen to articulate the specific right/freedom
	+ The historical origins of the concepts enshrined
	+ Meaning & purpose of other specific rights w/which it’s associated (if applicable)

Rights Analysis (s. 2(b) – Freedom of Expression)

This stage of the analysis is to determine whether the activity that is being limited falls within the scope of the Charter right, and if it does, whether that right has been infringed. In this inquiry, a generous, liberal and purposive approach is adopted (***Hunter***) so that the right is understood in light of its underlying purpose and how it fits with the overarching purpose of the Charter. The “living tree” doctrine dictates that the Charter is not frozen in time, and thus the courts should allow for a liberal interpretation of rights.

In a purposive approach to s. 2(b), courts have articulated 3 underlying purposes that inform why freedom of expression is protected in the Charter and why the court has such high regard for this right (*dissent in* ***Keegstra****, but has been followed by subsequent cases)*:

1. **Democracy (political process rationale):** free speech is essential to promoting free flow of ideas which is necessary for political democracy and functioning of democratic institutions. It is thus a lynch pin freedom – other freedoms hinge on it.
2. **Truth (precondition for it):** based on the notion of a marketplace of ideas – that through competition of speech, the truth emerges (no guarantee that it will actually emerge though)
3. **Achievement of self-fulfillment & self-realization:** through expression, we come to realize our character as human beings (applies for both speakers & listeners)
	1. FOE has intrinsic value & is an end in itself

Thus, the **core** of FOE is speech related to **truth, democracy, self-fulfillment,** while speech that doesn’t have to do with these three values lies somewhere in the **periphery**.

* \*\*ONUS ON CLAIMANT TO SHOW EVERYTHING UNDER S. 2(B)\*\*

WHAT IS SCOPE OF RIGHT? (content & form)

The court has cast a wide scope for protected expression and in most cases courts will quickly establish (or the gov’t may concede) an infringement and proceed to a section 1 analysis.

**Test for s. 2(b) analysis (template from *Irwin Toy*):**

1. **Content Requirement:** any activity that conveys or attempts to convey **meaning** is expression. This will always depend on intention. Inquiry is **content-neutral**. Thus, whether meaning is unpopular, contrary to norm, a physical gesture, an act or a verbal comment is irrelevant.
	1. Doesn’t have to be verbal, can just be an action that conveys message (***Dolphin Delivery***)
	2. It can be **commercial speech** (***RJR/Irwin Toy/Rocket/Prostitution Reference***)
	3. **Language** is protected b/c it’s so fundamentally connected to expression (***Ford***)
	4. Hate speech will be protected, but easily infringed b/c of s. 1 justification (***Keegstra***)
2. **Form Requirement:** the expression cannot take the form of violent activity.
	1. **Note**: threats don’t count as violence – if it is violent in content, that’s fine, as long as its not violent in form.

\*\***Low threshold, not hard to pass this stage**\*\*

Exception to Protection or w/in Scope?

Government has control of public property so Charter applies, but some things according to history & tradition that we don’t want in s. 1 defence

**Public Property Test:** (***Montreal v 2952 Quebec, 2005*** – *strip club playing loud music outside the entrance to club*)

* Is the place a public place where one would expect constitutional protection of FOE on basis that expression doesn’t conflict w/purposes underlying s. 2(b)?
	+ To answer this Q look at:
		- Historical & actual function of the place; and
		- Are there other aspects that suggest the kind of expression w/in it would undermine the values underlying free expression

HAS THE RIGHT BEEN INFRINGED? (purposeful/effects based)

Two ways gov’t can infringe FOE: (***Irwin Toy***)

1. **Purposefully:** if the legislation singles out specific kind of expression (ex. no negative statements in Olympics)
	1. **Note:** there are some **forms** of expression that are so tightly linked to certain **content** that restricting the form of expression will be a purposeful restriction of that content (ex. rule against handing out pamphlets vs. restriction on littering)
2. **In effect:** the legislation does not intend to infringe expression, but the **effect** of the legislation has been to **limit expressive activity unintentionally** (ex. no posters on building b/c making city ugly – could argue this has an effect on expression)
	1. Policy Consideration: this prevents gov’t evading Charter obligations by passing colourable legislation
	2. **Burden on plaintiff to demonstrate that effect has restricted plaintiff’s free expression**
	3. **To show there is “in effect” infringement, must link that interference to an impingement of 1 of the 3 purposes** (truth, self-fulfillment, democracy) → b/c of broader scope available under this branch – anything can be construed as limiting expression based on this, so you have to limit it in some way. Also, gov’t can control purposeful infringement, but doesn’t always foresee in effect infringements.

Forced Expression

***RJR*** held that forced expression, such as the prescribed health warnings required on tobacco packages, will not constitute an infringement of s. 2(b) when the forced expression is unattributed.

* No requirement of endorsing the messages, nor that the consumers will perceive they endorse the messages
* Common knowledge that such statements emanate from the gov’t, not tobacco manufacturers
* **Context important in determining whether a requirement infringes s. 2(b)**
* Important distinction between messages directly attributed to tobacco manufacturers (creates impression that message emanates from them, violates right to silence) and unattributed messages in this case (emanate from gov’t, create no impression)
* Similar to the unattributed labelling requirements under *Hazardous Products Act*, which requires labels of “danger” or “poison” on hazardous materials
* Unattributed warnings proportional to objective of informing consumers re: risks of tobacco use
	+ Rationally connected b/c they increase visual impact of the warning

Section 1 Limits Analysis

**Section 1 of Charter** serves 2 functions:

1. It guarantees the rights & freedoms set out in the Charter
2. It sets out the criteria for a justified infringement of those rights:
	1. **All limits on rights must be “prescribed by law”**
	2. **Limits must be reasonable** and **demonstrably justified in a free & democratic society**

Charter justification analysis involves balancing the protection of individual rights alongside the collective societal good derived from infringement of certain rights. The Charter was entrenched to maintain a “free and democratic society”, thus these underlying principles and values must guide the justification analysis (such as respect for inherent dignity of humans; social justice/equality/ accommodation of wide range of beliefs; respect for cultural/group identity; faith in social/political institutions) (***Oakes***).

The onus is on the party attempting to justify the infringement on a balance of probabilities, typically the government actor (***Oakes***). ***Oakes*** suggested a strict standard because of the seriousness of an infringement of a guaranteed right. This strict standard has since been relaxed to account for context (***Edmonton Journal***) and deference to legislature (***Irwin Toy***).

**Contextual Approach:** requires that courts assess the value/significance of the right and its restriction in their **context** rather than in abstract. (***Edmonton Journal***)

* Balance value of speech & value of legislation **in context**
* How you characterize & frame either side will affect the outcome
* Recognizes that particular right or freedom may have a different value depending on the context

**Deference:** McLachlin J. has expressed concerns about excessive deference, grounded in a desire not to relieve the gov’t of its burden to justify a rights infringement (*dissent in* ***RJR***)

**Factors to Consider for Deference:** (***Irwin Toy***)

* **Protecting vulnerable group** – more deferent
* Dealing w/a **polycentric issue** (mitigation between different groups) – more deferent
* Gov’t acting as a **single antagonist** (ex. criminal prosecution) – less deferent
* **Conflicting social science evidence** – more deferent
	+ ***Choudry*** raises a valid point regarding the factual uncertainty in many gov’t decisions. Who should bear the risk of empirical uncertainty that inevitably surrounds gov’t action, especially in matters relating to the social sciences, where empirical evidence will almost never be 100% certain. ***Choudry*** suggests that the more the judiciary is deferent to the gov’t, the more the claimants will bear the risk of empirical uncertainty.

PRESCRIBED BY LAW

This stage serves a gatekeeper function for a s. 1 justification and concerns the rule of law. An infringement of a right is a serious matter, and if a right is limited, it should be done by law, not an arbitrary exercise of power [**rule of law**] (***Nova Scotia Pharmaceutical***)

For a law to be “prescribed by law”, it must have **2 features**:

1. **It must be accessible** – citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable in a given case.
	1. **Formal notice given**, it can be accessed (i.e. people know about it)
	2. For every law there is an **official announcement** (ex. Canada Gazette)
	3. As long as law is legally authorized & published = accessible (policy guidelines unlikely to meet this criteria even if they’re accessible b/c not legally authorized)
2. **It must have precision** – tension b/c laws must be general & flexible but must also be degree of **precision** to allow for **certainty** → standard = **intelligible standard** (***Nova Scotia Pharmaceutical***)
	1. If a law requires interpretation, that’s okay, can still be prescribed by law
	2. If conviction is inevitable based on the wording of the legislation, can be termed too vague
	3. Law’s wording must be precise, in not granting limitless discretion to officials

\*\*Courts reluctant to disqualify laws at this stage of test b/c they don’t want to throw a case out at threshold level. If there’s vagueness issue, preferred way of dealing w/it is under the minimal impairment test (discussed later)\*\*

APPLICATION OF OAKES TEST

**Standard of Proof =** BOP

**Onus** = on party seeking to uphold limitation

Pressing & Substantial Gov’t Objective

The next stage of the s. 1 analysis is the ***Oakes Test***, the first step of which requires that the limit imposed be b/c of a gov’t objective that is “**pressing and substantial**”.

A claim rarely fails at this stage (exception: ***Big M*** – *where objective that was attached to provision of having a day of rest was found not to be pressing & substantial b/c it was directly in contradiction w/freedom of religion*)

If the objective is framed generally, it can easily satisfy this stage – although it may become problematic at the proportionality stage (***Edmonton Journal***). The government must defend the **original objective** for passing the legislation (***Big M***) [NO SHIFTING OBJECTIVE]. However, a shift in **emphasis** is permitted (***Butler,*** pornography - moral harm became harm against women).

***Keegstra* –** limitation must respond to an actual harm (*indicia, not a requirement*)

Proportionality – Rational Connection

At this stage, the government must show that the means chosen are rationally connected to achieving the pressing and substantial purpose or objective. This is a fairly low threshold, involving a value-neutral inquiry. The government is seldom unsuccessful at this stage. They must simply show that there is some **reasonableness** about doing X in order to get Y (***Big M***)

* **Rationally connected to objective – not arbitrary or unfair**
* Presented as **value neutral** (not whether law is good just if it’s rationally connected on common sense basis)
* **From *Irwin Toy* and elaborated by La Forest dissent in *RJR***
	+ Deference when gov’t balancing competing public interests
	+ Court less deferential when gov’t singular antagonist
	+ When no statistical info available, common sense enough
* Effectiveness threshold = law reasonably advances the pressing & substantial purpose for which it was enacted

\*\*Proportionality – Minimal Impairment\*\*

At this stage, the government must show that the **effects of the legislation impair the right as minimally possible, given the stated objective.** They must show that there is not another reasonable way of achieving the objective that would infringe less on the right (***Big M***).

The government may fail at this stage if less intrusive options are available. The court does not require that the government adopt a method with the lowest intrusion possible, but that the intrusion be minimal having regard to the stated objective (***Irwin Toy***).

The government may fail at this stage if the legislation is **vague**. At this stage, vagueness has to do w/over-breadth, which means that the legislation catches more than it needs to in order to fulfill the particular objective (***Nova Scotia Pharmaceutical***). Laws cannot be minimally impairing if they are infringing more of the right than is necessary to satisfy the given objective. Court could read down the law to be termed as minimally impairing.

\*\***Most leg fail at this point**\*\*

Proportionality – Balance Between Deleterious & Salutary Effects

At this stage, the government must show that the interests of the objective outweigh the effects of limiting the right. This is refined in ***Dagenais*** to ask **whether the salutary effects outweigh the deleterious effects**.

* **Note:** it is not purpose vs. deleterious effects, but deleterious vs. salutary that’s important

Actual value/benefit vs. actual costs (ex. what is the value of expression being infringed? [***Rocket*** (*dentist advertising*) & ***Prostitution Reference***]