Constitutional Law Final Outline

DIVISION OF POWERS

A division of powers analysis involves an assessment of the validity, operability and applicability of the piece/s of legislation in question.

VALIDITY

Swinton outlines the test for validity, which are analytically helpful but are rarely applied in a systematic fashion, as courts tend to combine them together:

As ***Lederman*** points out, our community life has many aspects, social, economic, political and cultural, that make it very complex and thus it does not fit neatly into any scheme of categories without considerable **overlap and ambiguity** occurring. So any analysis of the validity of a piece of legislation has to be prepared to deal with the fact that issues will overlap and laws will have multiple features that will complicate the question of whether it should be classified as falling under federal or provincial jurisdiction.

As ***Simeon*** notes, this analysis is a matter of **art, not science**. ***Simeon*** also sets out **three key values** (community, functionalism, and democracy) that should inform this analysis. A division of powers analysis can be assessed from the point of view of political, ethnic, or linguistic communities; the division of powers criterion of the allocation of powers for the purpose of improving participation and responsiveness; and the effect of the allocation on liberty and equality in the democratic process.

Ryder notes that there are two contrasting attitudes towards division of powers. The **classical paradigm** relied on an insistence of strong exclusivity, and did not tolerate overlap between the heads of power. This paradigm relies on mutual modification to limit the generality of the classes of laws in ss. 91 and 92 and avoid overlapping. The heads of power were seen as "watertight compartments" and spillover was not tolerated. So legislation would either have to be declared ultra vires or be read down. *Ryder* emphasizes the weakness of this approach since social problems do not fit neatly into jurisdictional boxes, and the possibility that legislative vacuums might result from this approach.

The **modern paradigm** on the other hand focuses on the dominant characteristic of the legislation, and tolerates overlapping and some spillovers between the heads of power as long as the pith and substance of the the legislation is within the jurisdiction of the enacting legislature. These paradigms define different judicial approaches to defining the authorities of each level of government, and post WWII, the general trend has been that the modern approach has replaced the classical approach. Thus, in this case, it is most likely that the court would keep with the modern paradigm and would be more tolerant of overlaps.

PITH AND SUBSTANCE ANALYSIS

Test for validity as outlined in Swinton:

1. DOMINANT CHARACTERISTIC

The pith and substance doctrine, results in a law being upheld if its dominant characteristic falls within the classes of subject matter allocated to the jurisdiction of the enacting government. At this first stage, we look at the **dominant characteristic** (matter, pith and substance) of the piece/s of legislation.

In establishing the matter of the legislation, we can consider **legislative intent** or **purpose of the legislation** (***CWB***). In determining this, we can look at **intrinsic materials**, such as the preamble to the legislation and the text of the legislation itself. We can also consider **extrinsic evidence**, such as legislative debates (***Anti Inflation***, ***Morgentaler***). We can also look to the **legal effects** (looking only at the statute) and the **practical effects** (real world) of the legislation (***Morgentaler***).

Do this for Act 1 and Act 2*: In this case, the preamble of Act 1 states that the purpose of the legislation is X. The nature of the provisions support this purpose as they target whatever it is that they target. It may also be helpful to look at debates or speeches made in regards to the legislation to help in determining what the legislative intent. However, we only have access to the Act itself, and based on the wording of the provisions, it seems that the primary purpose of the legislation is to do something.*

Based on the provisions of the Act, the legal effect of the legislation is that it would require this to happen. However, the practical effect of this is that something else would actually happen, which is not consistent with the stated purpose of the Act (Morgentaler: legal = jain, practical = abortion issue).

COLOURABILITY
If the legislation's true purpose is different from what it claims to be its purpose, it may be held to be ***colourable*** (***Morgentaler***). Look at the legislation itself – is it really about what it says it is about?

In this case, the purpose of the Act is stated as being X, but upon considering the practical effects of the legislation, along with other factors, including the fact that a, b, and c, it is clear that the true purpose of the legislation is to do Y. The true purpose of the legislation is different from what it claims its primary purpose is. The Act is thus colourable, its true purpose being to do Y.

Conclusion: Based on this analysis, I conclude that the dominant characteristic of the legislation is to do X.

2. SCOPE OF THE HEADS OF POWER
The second stage of the validity test considers the requirements of the relevant heads of power
- Scope of Criminal Law power: purpose // form // penalty *see Criminal Law (p. 6/7)*
- Scope of POGG power: gap // emergency // national concern *see Peace, Order and Good Government (p. 8/9)*

3. FIT
Given the dominant characteristic of the legislation (from step 1), and given the scope of the heads of power (from step 2), which head of power does this legislation fit into?

See factual analysis of heads of power: Criminal Law (p. 6/7) // Peace, Order and Good Government (p. 10)

Conclusion: In this case, the dominant characteristic of the legislation is to address the problem of X (from step 1), which fits within the scope of Y outlined in step 2. [Apply requirements of step 2 to the facts of the case] — after "other considerations" the legislation(s) in question are thus valid.

OTHER CONSIDERATIONS
In determining the validity of the legislation, other factors may be considered.

INCIDENTAL EFFECTS

The **incidental effects doctrine** applies when a provision, in pith and substance, lies within the competence of the enacting body but touches on a subject assigned to the other level of government. It holds that such a provision will not be invalid merely because it has an incidental effect on a legislative competence that falls beyond the jurisdiction of its enacting body." (***Lacombe***)

It is almost inevitable that legislation today will have some incidental effects or "spillover" (***CWB***, ***Employment Insurance***) which ***Ryder*** notes is a characteristic of the **modern paradigm**, as opposed to classical paradigm which emphasized mutual exclusivity, mutual modification & "watertight compartments" without tolerance for even minor incidental intrusions (***Parsons***)

In this case, the dominant characteristic of Act 1 is X and this fits within the scope of Q, which is within the jurisdiction of the enacting government. The part of the legislation dealing with Y is a minor intrusion into the powers of the other government, and are merely incidental effects of the legislation. In keeping with the modern paradigm, these will be tolerated.

DOUBLE ASPECT
Some matters are by their very nature impossible to categorize under a single head of power: they may have both provincial and federal aspects. Thus the fact that a matter may for one purpose and in one aspect fall within federal jurisdiction does not mean that it cannot, for another purpose and in another aspect, fall within provincial competence (***CWB***) A field (the specific activity being regulated) has a **double aspect characteristic** where it can be regulated at both the federal and provincial levels by valid legislation for different, though equally important purposes (***Lederman***, ***Multiple Access***).

The court is hesitant to find double aspect areas because it would be render the division of powers meaningless (***Multiple Aspect***). *In this case, the regulation of this type of activity falls into category A (which would fall under federal jurisdiction) and category B (which would fall under provincial jurisdiction). Overlap is so extensive that it cannot be considered to be incidental effects. Thus the field of whatever is in question is a double aspect matter.*

Current areas include: insolvency, highways, temperance (drinking), trading stance, observance of Sunday as a holiday, obscenity in films (***McNeil***), nude/semi-nude dancing *(**Rio Hotel***), environment (***Hydro-Quebec***).

NECESSARILY INCIDENTAL (ANCILLARY) DOCTRINE

The **necessarily incidental doctrine** applies where the pith and substance of a legislation is within the enacting body's jurisdiction but a particular provision of the act intrudes, possibly quite substantially, into the jurisdiction of the other level of government. The doctrine allows this intruding provision to stand if there is a sufficient degree of connection/integration between the impugned provision and the rest of the otherwise-valid legislation. The analysis has three stages (***GM of Canada,*** *civil cause of action is minimal intrusion*)

1. ***Validity of the impugned provision & the degree of intrusion***
   - Does the impugned provision intrude into other government's jurisdiction? – involves a pith and substance analysis of the provision on its own
   - **If so, to what extent?** – how much does it intrude into the other government's jurisdiction? (a) minimally intrusive (b) moderately intrusive (c) highly intrusive

   [pith and substance analysis: (1) matter, (2) scope, (3) fit] In this case, the impugned provision creates a civil cause of action, therefore it prima facie intrudes into the other government's jurisdiction since creation of civil causes of action is a matter of provincial jurisdiction. Given (this is a remedial provision – purpose is to help enforce substantive aspects of the act, vis-a-vis less intrusive (GM), impugned clause is limited in scope as opposed to a general cause of action (GM), the fed government is not constitutionally precluded from creating civil rights of action where they are warranted (GM)), this intrusion is (minimally intrusive).

2. ***Validity of the legislation overall***
   - Establish whether the act as a whole is valid – involves a pith and substance analysis of the legislation as a whole (without the impugned provision)

   [pith and substance analysis: (1) matter, (2) scope, (3) fit] In this case, the legislation as a whole is intra vires and thus valid.

3. ***Nature of attachment***
   - Determine whether the provision is sufficiently integrated into the rest of the statute – as the seriousness of the encroachment on provincial powers varies, so does the test required to ensure that an appropriate constitutional balance is maintained
     - How well is the provision integrated into the scheme of the legislation?
     - How important is it for the efficacy of the legislation?

   - The kind of fit required will depend on the **degree of intrusion:**
     (a) **Minimally intrusive:** functional standard
       - A functional or sensible connection is required
     (b) **Moderately intrusive:** "necessarily incidental" standard
     (c) **Highly intrusive:** "truly necessary" standard
       - The legislation must not be able to function without it
       - The provision is saved because the legislation cannot exist without it

   Since the provision in this case was found to be minimally intrusive (step 1), then the provision must meet the standard of there being a functional or sensible connection to the legislation. In this case, the provision is a well-conceived component of the regulation strategy found in the Act. Thus, under test of "functionally related" this section is sufficiently integrated into the legislation to justify its minimal intrusion into the other government's jurisdiction. The provision is thus saved by the ancillary doctrine.

   [In this case, the purpose of the legislation is to do X. It would be impossible to meet this objective without doing Y. Without this provision, the purpose of the legislation could not be met. Thus, I would argue that the provision is truly necessary for the Act to be effective, which is a higher standard than necessary for a minimal intrusion.]

PRESUMPTION OF CONSTITUTIONALITY

If there are **2 plausible interpretations**, the court goes with the one that renders the law valid. Where validity depends on the **finding of a fact,** the court will accept it as true if the government had a rational basis for relying on the fact. Where a **broad interpretation** would render the law invalid, the court where possible will read the law down to keep it valid.

OPERABILITY

Once the legislation(s) in question is found to be valid, the next step is consider the the doctrine of paramountcy (which affects operability of the legislation) and the doctrine of inter-jurisdictional immunity (which affects applicability of the legislation). Traditionally, the courts would first analyze IJI, then paramountcy, but in ***CWB***, the court stated that in practice, this is not necessary.

In ***Mangat*****,** the court showed a preference for the more "supple" doctrine of paramountcy over an analysis based on the doctrine of inter-jurisdictional immunity, noting the risk of creating a legal vacuum. The IJI doctrine would exclude provincial legislation, even if Parliament did not legislate in the area, whereas, the paramountcy doctrine would only suspend the operation of the provincial legislation if, and only insofar as, it conflicts with existing federal legislation.

Given the court's reasoning in ***CWB*** *and* ***Mangat*** *(above), I will proceed first with the doctrine of paramountcy*

Where there is a conflict between a valid provincially-enacted legislation and a valid federally-enacted legislation, the **doctrine of paramountcy** may be applied to hold the federal law as supreme (note: applies to conflict between laws, not conflict between jurisdictional heads of power). This would render the provincial legislation temporarily inoperable insofar as it conflicts with the federal legislation, and only as long as the federal legislation continues to be in place. If the federal legislation is repealed, the provincial law regains full force. Note: the presumption of constitutionality applies – if the federal statute can be interpreted so as to avoid conflict with the provincial statute, the court will attempt to interpret it that way (***CWB***)

Conflict is the key issue in determining whether the doctrine of paramountcy should be applied. ***Rothman's*** reconciles a line of cases that were not always compatible with regards to what constitutes "conflict" ("express contradiction" in ***Multiple Access*****,** "frustration of federal intent" in ***BMO*****,** ***Mangat*****,** ***Spraytech*****,** "occupation of the field" from ***Privy Council***): The overarching principle to consider is federal intent (***Rothman's***). A provincial enactment must not frustrate the purpose/intent of a federal enactment, whether by:

1. ***Impossibility of dual compliance:***
   - ***Rothman's*** clarifies that the test of dual compliance is simply an instance of federal intent, thus if dual compliance is possible, you still have to consider frustration of Parliamentary intent
   - In order to satisfy dual compliance test, it is sufficient to show that its impossible for a court to give effect to both – (***M&D Farms***)
   - *In this case, is it possible to comply with both?*

2. ***Frustration of Parliamentary intent*** (***Hall, Husky Oil***)
   - The provincial law does not frustrate Parliament's intent if the federal law is permissive instead of mandatory (***Spraytech***)
   - *Even if it is possible to comply with both – is there a reason that federal government has passed this law, and does the provincial law frustrate this reason?*

Note: If Parliament wants to **"occupy the field",** there has to be clear statutory language because this is a broad conceptualization of paramountcy (***Rothman's***). If there is no clear statutory language, the narrow conceptualization set out in ***Rothman's*** should be followed.

In this case, it is impossible to comply with both legislations,. In the alternative, the provincial legislation frustrates Parliamentary intent [explain why]. Therefore, there is a conflict between the provincial enactment and the federal enactment to which the doctrine of Paramountcy must apply. The provincial enactment is thus rendered inoperable insofar as it conflicts with the federal enactment and as long as the federal enactment continues to exist.

In the alternative, if the paramountcy doctrine is found to not apply, the IJI doctrine may apply in this case.

APPLICABILITY

Interjurisdictional Immunity occurs where the federal level has a "basic unassailable minimal content" in a given field which cannot be touched by the provinces, whether or not there exists federal legislation relating to that field (***Bell #2***). Where a valid provincially-enacted legislation impairs an immunized core of the federal level, the **doctrine of interjurisdictional immunity** could be used to read down the provincial legislation and render it permanently inapplicable so as to not conflict with that federal immunized core (***Irwin Toy***)

Although IJI has traditionally been used to protect federal government, it is theoretically available to protect both federal and provincial jurisdiction (***CWB***), however it is uncertain whether it could be used to protect provinces practically speaking since the doctrine has been used in a **limited manner** – limited to areas it has been applied to in the past (***CWB***): Aboriginal title, possession rights, and reserve property, or matters at the heart of Aboriginal identity, RCMP, Fed incorporated companies, Fed regulated undertakings, aeronautics

It is a controversial doctrine and courts are generally reluctant to apply it. First, it inconsistent with modern paradigm used today because it creates sharp clean lines and does not tolerate overlap. Second, it has been argued that the federal government address overlaps by passing legislation and relying on the doctrine of paramountcy. Third, IJI is permanent (whereas paramountcy only applies as long as there is conflict with a federal statute) and can cause a legislative vacuum where no federal legislation exists (***CWB***). Fourth, IJI runs the risk of unintentional centralization by granting immunity to the federal government in areas where the legislation passed by the province was found to be valid (validity stage above). Paramountcy is generally preferred over IJI because it allows for greater flexibility (***Mangat***).

The test for IJI in ***CWB*** (refined former tests from ***Bell 1 and 2*** and ***Irwin Toy***)

1. ***Is there a core federal area?***
   - Are there any "core" federal areas involved that need to be protected?
   - Does the area regard federal "works, persons or undertakings? (note: you don't have to be a FIC to be federally regulated and just because you are a FIC doesn't mean that you can't be provincially regulated (***Parsons***)
2. ***Character of infringement***
   - If so, does the provincial legislation directly or indirectly ***impair*** the vital/essential part of the operation of the FRU?
   - Court in ***CWB*** replaces "affects" (from ***Bell 1***) with "impairs" – increases severity of impact required, making it more difficult to use IJI

In this case, the provincial legislation concerns X, which is/not a federal work, person or undertaking, nor does it fall within a "core" federal area that needs to be protected [explain why]. In the alternative, if the legislation does deal with an area regarded as a federal core, the legislation cannot be said to impair the vital/essential part of the operation of the federally protected core. It may have an affect on the area, but CWB increases the standard used from "affects" to "impairs" and in this case, this higher standard is not met. Therefore, the doctrine of IJI does not apply in this case.

HEADS OF POWER

CRIMINAL LAW

Federal jurisdiction	Provincial jurisdiction
Prohibition	Prevention
Penal/punitive	Regulatory
–> Punishment	–> Licensing
Public Property	Private Property

The ***Margarine Reference*** set out the scope of the criminal law head of power (granted to federal government under s. 91(27) of the *Constitution Act 1867*) stating that it has a **form** and **content** requirement. In order to be a criminal law, the law must include a **prohibition** with **penal sanctions** (form) directed at some undesirable effect on the **public** (content)(***Margarine Reference***). For example, some criminal purposes include peace, order, security, protection of property, and morality. It is important to note that the criminal law is not frozen in time and should be defined broadly (***RJR MacDonald***, ***Firearms Reference***).

PROVINCIAL LEGISLATION

Although **s. 91(27)** of the *Constitution Act, 1867* assigns responsibility over procedural and substantive criminal law matters to the federal Parliament, provinces do have some power to regulate morality and public order. For example, much of the federal Criminal Code is provincially enforced. **s. 92(14)** gives the provinces jurisdiction over the administration of justice in the province (including provincial policing).

Furthermore, **s. 92(15)** gives provincial governments the jurisdiction to impose punishment by way of fine, penalty or imprisonment to any law that it enacts in relation to s. 92. This is known as an ancillary power and must be anchored in another section, such as s. 92(13) on property and civil rights or s.92(16) regarding all matters of local or private nature.

Problems arise when the P&S of the provincial legislation appears to deal with public injury, which falls under the federal government's exclusive power over criminal law.

The scope of the criminal law head of power was outlined in the ***Margarine Reference*** as noted above. If a piece of legislation is **preventative** (as opposed to prohibitive) and focuses on a **regulatory** scheme (as opposed to punitive) with respect to **private** property (as opposed to public), it will be considered regulatory and thus not within the criminal law head of power. The Court has held that moral undertones to legislation are acceptable, so long as the legislation is regulatory (***Rio Hotel***).

Factual analysis would go under stage 3 (Fit) in the validity analysis.

If arguing for provincial legislation to be upheld, argue Dupond, McNeil, Rio Hotel – within s. 92(15) to regulate and set punishment or s. 92(13) property and civil rights

- *In this case, the legislation is preventative, not prohibitive (**Dupond, Rio Hotel**)*
- *More regulatory than punitive (**McNeil, Rio Hotel**)*
- *Legislation is temporary (**Dupond**)*
- *Dealing w/ an industry*
- *Denying licences rather than jail*
- *Private property interests/geographic (**Rio Hotel, Dupond**)*

If arguing for provincial legislation to be struck down, argue Westendorp – it 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**)*

FEDERAL LEGISLATION

In order to be a criminal law, the law must include a **prohibition** with **penal sanctions** (form) directed at some undesirable effect on the **public** (content)(***Margarine Reference***). The court will allow a circuitous route in attempting to address the evil, however the legislation cannot be colourable whereby Parliament has some ulterior motive attempting to unjustifiably intrude into provincial jurisdiction. (***RJR MacDonald***).

Factual analysis would go under stage 3 (Fit) in the validity analysis.

If arguing for federal legislation to be upheld, argue within s. 91(27)

- *To fall within scope of s. 91(27), the legislation must have a criminal purpose, prohibition and penalty (**Margarine Reference**, **Hydro-Quebec**, **Firearms Reference**)*
- *Feds are allowed to take circuitous route (**RJR MacDonald**). The court agreed that the health risk of tobacco use did not require complete ban of cigarettes. Similarly, in this case, the objective of X can be achieved circuitously by doing Y.*
- *The legislation must also be directed at protecting the public in general, as opposed to a particular group (**Margarine Reference**) which is the case here, since the legislation does X.*
- *The legislation does not allow for opt-ins or exemptions, which supports the argument that the purpose is criminal, not regulatory (**RJR MacDonald**)*
- *Note: regulatory aspects can be found secondary to federal legislation where there is a legitimate criminal law purpose (**Firearms Reference**)*

If arguing for federal legislation to be struck down, argue not within s. 91(27)

- *The regulation is regulatory (**Hydro Quebec**)*
- *Factors to consider in determining whether scheme is regulatory vs. prohibitive (**Hydro Quebec,** dissent)*
  1. *Is it fundamentally regulatory*
  2. *How elaborate is the regulatory scheme*
  3. *Does the regulatory aspect relate to the prohibition?*
  4. *Criminal law typically contains a provision that is self-applied*
  5. *Is there an equivalent legislation in the province?*
  6. *Does it look like its controlling substances rather than a general prohibition*
  7. *If it covers a broad field of things (ex. the environment), its 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)*

PEACE ORDER AND GOOD GOVERNMENT

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:

1. ***The General Theory*** is a centralist interpretation of POGG, emphasizing federal jurisdiction. It is attributed to Laskin K, who is a strong centralist, and early Privy Council decisions. The theory is 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. *Example*: in ***Russel v. The Queen***, federal laws that imposed restrictions on alcoholic beverages were challenged as being outside federal jurisdiction. Since there was nothing in s. 92 relating to the matter of this legislation, it was held that it fell within federal jurisdiction. Although the ***Russel*** case has never been overturned, the general theory of POGG has been discredited.

2. ***The Residual Theory*** has replaced the General Theory. Under this theory, POGG is a separate, additional head of power and not a "mere grammatical prudence" (***Lederman***). Under this theory, anything not found in s. 91 **or** s. 92 will fall within POGG power, the emphasis being that POGG power will take up the powers not otherwise taken up. Courts have come to structure three branches of POGG power:

   a) 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 government has to be able to do every area of legislation imaginable (you can't have an area where no level of government can legislate). The Gap Branch does not cover new matters.

   - ***Labour Conventions Reference*** – federal government passed employment standard laws in accordance with international treaties and argued it should have jurisdiction over those treaty obligations, even though the matters otherwise fell within provincial jurisdiction. **PC held that federal government could not claim jurisdiction by way of signing international treaties.** "While the ship of state now sails on larger ventures and into foreign waters, she still retains the watertight compartments which are an essential part of her original structure".

   b) Emergency Branch: provides a basis for a temporary alteration of the division of powers between Parliament and the provinces to address an emergency situation. There are **two criteria for emergency legislation:** (from ***Anti-Inflation Reference,*** *articulated that the national concerns branch and emergency branch were distinct branches*)

   (1) Parliament must have a **rational basis for concluding that there is an emergency** and that its the right kind of emergency), using a standard of a "rational politician". The courts will consider extrinsic evidence (***Laskin in Anti-Inflation Reference***).
   - The onus is on the complainant to provide very clear evidence that an emergency has not arisen or that the emergency no longer exists to justify the judiciary overruling Parliament that exceptional measures are required (***Co-operative Committee on Japanese Canadians***).
   - The judiciary will take a **deferential stance** toward the government. It is not for judiciary to consider the wisdom or propriety of policy in emergency legislation – this is exclusively a matter for Parliament (***Co-operative Committee on Japanese Canadians***)
   - The judiciary is not concerned with whether legislation will be effective (***AIR***)

   (2) The legislation must be **temporary:** Counterbalances the fact that emergency power allows federal government to grab from matters that would otherwise be under provincial 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 these*) or might be considered to have ineffective measures.
   - **Emergency circumstances must be extraordinary or extreme.** To do something that is otherwise within provincial jurisdiction, federal government has the onus to prove there is an "emergency" (there must be a crisis – economic crisis is sufficient (***Laskin***)), as an issue that is "national concern" is inadequate to qualify under the EM branch (***Anti-Inflation Reference***).

- ***Employment and Social Insurance Act***: The Privy Council held that because the Act, dealing with unemployment insurance in Canada, was permanent and did not deal with a special emergency, but rather, general worldwide conditions, the legislation did not meet the conditions to be classified as emergency legislation
- ***Co-operative Committee on Japanese Canadians*** – The War Measures Act gave the federal government significant powers that would have otherwise been provincial, and provided that these measures would remain in place even after the war. The Privy Council upheld the orders in council under POGG and in doing so, revived the notion of the federal emergency power. **To show measures taken in the time of emergency fell within the emergency branch of POGG, three factors were noted: (1) onus is on complainant (2) judicial deference (3) judiciary not concerned with effectiveness** (outlined above)

c) National Concern Branch: is separate and distinct from emergency branch (***AIR, Crown Zellerbach***). 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 concerns branch of POGG it results in a **permanent grant of jurisdiction to the federal government** (***Beetz dissent in AIR,*** *which forms majority judgment on national concern – obiter but widely accepted*)**.** The Court's concern has been whether a grant of federal jurisdiction would infringe significantly upon various areas of provincial competence and disturb the federal/provincial DoP to an unacceptable degree.

Test for legislation to be considered to fall within the national concerns branch: (***Beetz in AIR***)

1. **Subject matter (P&S) of legislation has to be new:** New matters which did not exist at Confederation (***Beetz in AIR***) **or** matters which, although originally matters of a local or private nature in a province have become matters of national concern (***Crown Zellerbach***)
2. **Singleness, distinctiveness and indivisibility:**
   - **First part:** (***Beetz in AIR***) 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. Legislation must be clearly distinguishable from matters of provincial concern
     - 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 over which the law purports to claim jurisdiction. It must hang together so its clear what you're giving the federal government and that you're not giving the federal government everything – constraining the POGG power
     - *The Anti-Inflation Act does not meet this criteria – it doesn't have unity and indivisibility in what it deals with*
   - **Second part:** (***Crown Zellerbach***) Is the **scale of the impact** of this grant of power under national concerns branch reconcilable with the constitutional division of power? You don't want to end up changing the division of powers.
   - In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern, it is relevant to consider the **provincial inability test** (***Crown Zellerbach***).
     - Is this a matter that the provinces really can't deal with on their own? Effect of one province's failure to deal with the control or regulation of an interprovincial aspect of a matter on other provinces? (ties into principle of exhaustiveness). Extra provincial costs from one province's inability to deal with the matter. ***Le Dain*** *says that the provincial inability test helps in the determination of requisite singleness or indivisibly and it does this from a functional as well as a conceptual point of view.*
     - ***Choudhry****: consider 1) negative extra-provincial externalities (when costs of the decision are borne by someone other than the decision-maker). 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 a free-rider problem.*
3. **The new matter must not effectively swallow up provincial jurisdiction**
   - *In Anti-Inflation Reference case, very little would be left to provincial jurisdiction if inflation were recognized as a national concern*

- *Factual analysis would go under stage 3 (Fit) in the validity analysis:*
- *Matter to Canada as a whole. It is **single, distinctive and indivisible**: Marine pollution is scientifically distinct from pollution generally and pollution in freshwater – there is a sharp distinction between salt and freshwater. "Marine" pollution gives boundaries – outer boundary = where salt meets fresh. What makes it indivisible – no line between the water that is under fed jur and water that is in prov jur. This makes it single and indivisible as jurisdictional matter. Its single as a matter because there is no cutting it up into parts – you can't tell where inland waters and territorial waters start and end. Its distinctive because you **can** distinguish between salt and fresh water. The matter of marine pollution includes water in beaver cove (inland waters) and territorial waters. Provincial inability test – if provinces don't deal with beaver cove adequately, then you can't effectively regulate the territorial waters*

- ***Canadian Temperance Federation:*** Watershed case. A challenger sought to overturn Russell, which dealt with the same federal temperance legislation. The JCPC refused to overrule Russell and stated that POGG power was not confined to emergencies. If subject matter of legislation goes beyond local or provincial concern or interests, it is a national concern, and will fall under federal POGG power. Court also expanded scope of POGG power by recognizing power to legislate for prevention of an emergency under NC branch.
- ***Anti-Inflation Reference:*** Key case on current standing and application of POGG. The temporary act, which aimed to control runaway inflation, was federal and clearly legislated matters within provincial jurisdiction. It did not mention EM but did mention NC about inflation. Surprisingly, the court found the legislation was justified under as a "national emergency" under the emergency branch of POGG.
  - ***Laskin (majority):*** avoided the national concerns branch and based his decision solely on the emergency branch of POGG. According to Laskin, to invoke the emergency branch of POGG, Parliament must have a rational basis for concluding there is an emergency, and this can be established by looking at extrinsic evidence. This is deferential to Parliament; the burden is on the challenger of the legislation to show it has no rational basis. The legislation must be temporal and indicate a "serious concern", though it need not mention "emergency" explicitly. The legislation does not have to address the emergency in its entirely or respond promptly or effectively address the problem.
  - ***Beetz (dissent):*** agreed with Laskin that both the NC and EM branch are part of POGG—each is a separate branch with an essential role. However, he argued that the NC branch works as if certain heads of power were permanently added to s. 91 and it is a permanent extension of federal jurisdiction. Because it is permanent, it should have some boundaries. In contrast, the EM branch is only a temporary extension of jurisdiction and only requires the matter be an emergency. Beetz took a narrower view of the EM branch and would not have held the Anti-Inflation to be an emergency. The EM power is extraordinary, and an emergency should not be found unless the federal govt explicitly declares it to be one. Merely declaring a matter a "serious national" concern is not enough. The legislation in this case was not fulsome and thus could not address an emergency; in contrast to Laskin who allowed the legislation to partially cover the emergency, Beetz thought the legislation should have full coverage of the emergency to be considered EM legislation.
  - ***Swinton*** points out that their differing views can be attributed to their differing conceptions of federalism—Laskin favours a centralist perspective, while Beetz favours a provincialist perspective.
- ***Crown Zellerbach:*** applies the test for NC branch of POGG from the Anti-Inflation Reference. CZ was charged under a federal act for dumping waste into a body of water within provincial jurisdiction. Signing international treaties does not give the federal govt jurisdiction to encroach on provincial powers, but the federal govt argued that this legislation fell under the NC branch because it dealt with the regulating of dumping to prevent marine pollution. The majority held that the P&S of the act was marine pollution and accepted the federal govt's argument, placing the legislation under the NC branch of POGG. [Emphasizes points from above]. Inevitable conflicts between valid provincial legislation (i.e. internal waters) and valid federal legislation (i.e. pollution) can be dealt with by finding IJI or creating an overlap through D/A or paramountcy. The dissent (LaF and Beetz) would have struck down the legislation. The environment is a broad, diffuse, and aggregate matter and threatens to upset the constitutional BoP.
- ***Oldman River Dam:*** The prov govt wanted to build a dam but needed approval from the federal govt. The issue was whether guidelines for the assessment were within federal jurisdiction. The Court read down Crown Z as dealing with only marine pollution, not with pollution and the environment generally, and decided it was a matter of national concern. The legislation was upheld because it related only to projects within or linked to something within federal jurisdiction.
- ***Ontario Hydro*** – the production, use and application of atomic energy is of national concern

***Swinton*: The Supreme Court and Canadian Federalism (Laskin vs. Beetz)**

Justice Bora Laskin
- Favours strong central government
- Pogg clause constitutes the "general power" – enumerated powers in s. 91 are illustrative
- Federal government is the logical institution to deal with important problems
- Problems once local in nature could take on a federal aspect, as they became more complex or spilled over provincial borders

Justice Beetz
- BNA was a document designed in certain areas to protect the French-speaking minority of Quebec from majority domination in certain areas important to the preservation of the Francophone culture – specifically religion, language, laws and education
- The Constitution should be interpreted in a manner sympathetic to provincial competence
- The need for a liberal interpretation to allow the document to evolve with changing circumstances

- In Quebec, there has been a preference for analytical jurisprudence, with concentration on the development of concepts, rather than a functional or relativist approach
  - Thus, there is a distrust of the "national dimensions" approach to the pogg clause of section 91 because the doctrine would allow matters traditionally within provincial jurisdiction to take on a national importance warranting federal action
  - Quebecois would prefer the emergency interpretation of the pogg power because it leads only to a temporary suspension of the constitution, rather than a permanent transfer of power to the federal government based on the importance of the problem to be addressed

Summary of Contrast between Laskin and Beetz

Laskin:
- View of federalism that favours the existence of a strong central government
- Called for flexibility in the interpretation of the constitution
- Functional approach to interpretation

Beetz:
- (Searched for principles and rules to confine the exercise of judicial discretion)
- More protective of provincial rights
- Cautious about departing from precedents which provided safeguards for provincial autonomy
- Guided by provincial autonomy but had classical vision of the federal system – which demanded respect for the autonomy of the federal, as well as the provincial governments in the areas of jurisdiction
- Conceptual approach to interpretation of the constitution which would preserve exclusive areas of jurisdiction for both levels of government

THE CHARTER OF RIGHTS AND FREEDOMS

A *Charter* analysis involves four stages:

1. **Threshold Issues**
   - At this stage, the burden of proof (on POP) is on the applicant rights holder to show that:
     a) The applicant has standing (as per ***ss. 24, 52, Trilogy (Orsen, McNeil, Borrowski), CCC***)
     b) The *Charter* applies – i.e. a government actor or state action is involved (as per ***s. 32***)
2. **Rights Analysis**
   - At this stage, the burden of proof (on POP) is on the applicant rights holder to show that:
     a) The applicant's claim comes within the scope of the right
     b) The applicant's right has been violated by the government action
3. **Section 1 Limits Analysis**
   - At this stage, the burden of proof (on POP) is on the respondent government actor to show that:
     a) The limitation of the right is prescribed by law
     b) The limitation is imposed because of a government objective that is pressing and substantial in a free and democratic society
     c) The means chosen to accomplish government objective are proportional to that objective (***Oakes***)
        (i) There is a rational connection to the objective
        (ii) There is minimal impairment of the right
        (iii) Balance between deleterious effects and salutary effects
4. **Remedial Discussion:** These stages are followed by a remedy, if applicable (law struck down, declaration of invalidity, words inserted/removed, damages, constitutional exemption) as per ***ss. 24*** and ***52***

1. THRESHOLD ISSUES

a) STANDING

- Assume applicant has standing

b) APPLICATION

There are two theories on who the Charter would apply against: (1) horizontal application would mean that the Charter would apply between private actors (2) vertical application would mean that the Charter would only apply to the government.

S. 32 of 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 (thus it does not apply to purely private disputes) – specifically to the Administrative, Executive and Legislative branches of the government, but not the judiciary (***Dolphin Delivery***). This means that the Charter doesn't apply to common law as articulated by the judiciary if no government actor is involved, however, the SCC held that the Court should apply and develop the principles of common law in a manner that is consistent with the fundamental values that are entrenched int he Charter.

To determine if the Charter applies, we must first consider the source of the alleged Charter infringement – is it coming from legislation or an entity? If you are dealing with a statute and an entity implementing the statute, you can either go after the legislation or the entity (or both). The statute is clearly an action of legislative assembly and caught by s. 32, and will thus be subject to the Charter. If the statute isn't directly causing the alleged infringement, but rather gives discretion to an entity that in turn causes the alleged infringement, then you have a better chance if you target the entity, not the statute.

In this case, the entity in question is a private entity, thus it does not fall within "government" as outline in s. 32. But we can apply the tests developed from case law following Dolphin Delivery to determine whether the entity could be considered to be a government actor or doing a governmental act.

I. Government Actors: If the entity is sufficiently controlled by the government or if they are implementing a government function so as to constitute a governmental actor, all of the entity's activities will be subject to the Charter (***Lavigne***)

1. **Entities controlled by the government**
   - If the government has **direct** (***McKinney***) or **routine and regular control** (***Stoffman***) over the entity, it may be viewed as a government actor.
     - ***Stoffman:*** Hospital was not viewed as a government actor even though 14/16 board members were appointed by the government, because the routine and day-to-day control was in the hands of the hospital's board of trustees. Minister had the right to review all policies, but didn't actually do this ≠ routine control
     - ***Douglas:*** College was a government actor because its daily affairs were managed by a provincial government appointed board and a government minister established and issued directions and approved all board bylaws.
   - **Public funding** or **serving a public purpose** is not a determinative factor, but courts will look to whether the entity is an autonomous body.
     - ***McKinney:*** university is autonomous because of its role in society
     - ***Douglas:*** college not autonomous
   - *In this case, consider:*
     - *How many members are appointed by the government?*
     - *What are their terms of appointment? (removable at government's pleasure = more influence by government vs. fixed term = not readily influenced)*
     - *Is there a government influence over the board?*
   - *Therefore, government has direct/routine control over entity and is thus sufficiently controlled by the government to be considered a government actor (go on to next stage – in the alternative)*

2. **Entities exercising governmental functions** (***Godbout***)
   - Even if the entity is not controlled by government, it may be viewed as a government actor if it is serves a **government function.** Policy consideration: this prevents the government from circumventing its Charter obligations by delegating its powers to other entities (***Godbout***). Note: it must be a government function, not merely a "public" function. Courts will look at the nature and quality of functions the entity performs (***Godbout***).
     - ***Godbout:*** Municipalities are governmental entities subject to Charter because they, like Parliament or provincial legislatures, are democratically elected, have general taxing power, and can make, administer, and enforce laws within a defined territorial jurisdiction
   - *In this case… (go on to next stage – in the alternative)*

II. Governmental Acts (by non-government 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.

1. **Entities implementing government program** (***Eldridge***)
   - If the private entity is implementing a specific government program or policy, it will be subject to the Charter insofar as it is acting in furtherance of a specific governmental program or policy
   - There must be a **"direct and precisely defined connection"** between the government policy and the entity's conduct. Public function is not sufficient!
     - ***Eldridge:*** health care is a government program. Government defines content of service – hospitals are mere vehicles to carry out specific government objectives
     - ***Stoffman*** says a hospital as an entity is not subject to Charter. ***Eldrige*** doesn't overrule this, it confirms that a hospital is a non-governmental actor but says it is carrying out a government program and is thus subject to Charter – but only in carrying out that program
   - *In this case… (go on to next stage – in the alternative)*

2. **Entities exercising statutory powers of compulsion**
   - The Charter also applies to non-government actors exercising coercive statutory powers (e.g. adjudicators: ***Slaight***, ***Blencoe***)
   - The government cant give powers that include discretion to breach the Charter because the government doesn't have that power to give
   - *This does not apply to this case since the entity is not given a statutory power of compulsion*

Government Inaction
Section 32 applies to "all matter" and has been interpreted in certain circumstances to include the government 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 ***Vreind*** 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 obligations to protect the freedom of vulnerable groups

In this case, we do not need to consider the application of the Charter to government inaction since this is not a case that deals with failure of government to act or under-inclusive legislation.

Charter Application to Courts and 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 with the fundamental values that are entrenched int he 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/purpose

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***)

- Significant changes to the CL should be addressed by the Legislature (***Hill***,)
- Courts should modify/extend CL to comply with prevailing social values (***Hill***)
- The consistency of CL principles w/ Charter is a guiding principle (***Hill***)
- This insertion of the Charter into private issues has been criticized because it departs from the vertical application principle of the Charter delineated in Dolphin. (***Hill***)

2. RIGHTS ANALYSIS [SECTION 2(b)]

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 purposive approach is adopted (***Hunter v. Sutherland***) so that the right is understood in light of its underlying purpose and how it fits with the overarching purpose of the Charter.

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. **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. **Precondition for truth:** based on the notion of a marketplace of ideas – that through competition of speech, the truth emerges. In this sense, freedom of expression is instrumental to another end – truth (although there is no guarantee that the truth will actually emerge)
3. **Achievement of self-fulfillment and self-realization:** through expression, we come to realize our character as human beings (applies for both speakers and listeners). In this sense, freedom of expression has an intrinsic value and is an end in itself.

Thus, the **core** of freedom of expression is speech related to truth, democracy, self-fulfillment, while speech that doesn't have to do with these 3 values lies somewhere in the **periphery.**

a) SCOPE

The court has cast a wide scope for protected expression and in most cases, courts will quickly establish (or the government may concede) an infringement and proceed to a section 1 analysis.

The template for a s. 2(b) analysis comes from *Irwin Toy*:

1. **Content Requirement:** any activity that conveys or attempts to convey **meaning** is expression. This will always depend on intention. This inquiry is content-neutral. Thus, whether the meaning is unpopular, contrary to norm, a physical gesture, an act or a verbal comment is irrelevant.
2. **Form Requirement:** the expression cannot take the form of violent activity. Note: threats don't count as violence – if it is violent in content, that's fine, as long as its not violent in form.

In this case, X activity is attempting to convey meaning by … it is not a simple statement/gesture, but rather the intention is to communicate "something" to "someone". The form of expression is not violent, even if the content is violent – that's okay. The activity thus falls within the scope outlined above.

b) INFRINGEMENT

Two ways government can infringe freedom of expression:

1. **Purposefully:** if the legislation singles out specific kind of expression
   - Note: there are some **forms** of expression that are so tightly linked to certain **content** that restricting that form of expression will be a purposeful restriction of that content

2. **In effect:** the legislation does not intend to infringe expression, but the effect of the legislation has been to limit expressive activity unintentionally
   - Policy consideration: this prevents government evade Charter obligations by passing colourable legislation (*its not that we don't trust you. We just… don't trust you*)
   - But to show there is "in effect" infringement, you have to link that interference to an impingement of one of the three purposes. This is because of the 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, the government can control purposeful infringement, but does not always foresee in effect infringements.

In this case …

3. SECTION 1 LIMITS ANALYSIS

Section 1 of the Charter serves two functions: (1) it guarantees the rights and freedoms set out in the Charter (2) it sets out the criteria for a justified infringement of those rights (reasonable limits as prescribed by law as can be demonstrably justified in a free and 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, justification analysis must be guided by these underlying principles and values (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***).

The context of a case becomes relevant because how you characterize what is being balanced will affect which way the scale will tip. An abstract approach will likely result in a weightier argument, where as a contextual approach will result in a less weighty argument. The best approach is to use the same approach for values associated with each side – either both contextually or both abstractly to avoid a skewed result (***Wilson J.***).

On the issue of deference, ***McLaghlin J.*** has expressed concerns about excessive deference, grounded in a desire not to relieve the government of its burden to justify a rights infringement (*dissent in* ***RJR***).

Factors to consider for deference: (***Irwin Toy***)

- **Protecting vulnerable group** – more deferent
- Dealing with a **polycentric issue** (mitigation between different groups) – more deferent
- Government acting as a **single antagonist** (ex. criminal prosecution) – less deferent
- **Conflicting social science evidence** – more deferent
  - ***Choudhry*** raises a valid point regarding the factual uncertainty in many government decisions. Who should bear the risk of empirical uncertainty that inevitably surrounds government action, especially in matters relating to the social sciences, where empirical evidence will almost never be 100% certain. ***Choudhry*** suggests that the more the judiciary is deferent to the government, the more the claimants will bear the risk of empirical uncertainty

In this case, protected expression is at core/periphery … Also, the court will be less/more deference because…

a) 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 better be done by law, not by arbitrary exercise of power. ***Nova Scotia Pharmaceutical*** outlines the rule of law principle that any infringement of a right must be legally authorized (not an arbitrary act of state power). For a law to be "prescribed by law", it must have **2 features:**

1. **It must be accessible.** This means formal notice is given, it can be accessed (i.e. people can know about it). For every law there is an official announcement (for example, in the Canada Gazzette). As long as a law is legally authorized and published, it is deemed to be accessible. *Note: policy guidelines are unlikely to meet this criteria even if they are accessible because they are not legally authorized.*
2. **It must have precision.** There is a tension in this sense, because laws must be general and flexible to some degree in order to be useful but there must also be a degree of precision to allow for certainty. The standard to be used is an **intelligible standard**.

- ***Nova Scotia Pharmaceutical*** emphasizes that the requirement of precision, i.e. that a law not be **vague** comes from rule of law, which is a fundamental principle of our Constitution. There are different factors involved in a finding of vagueness: there needs to be some tolerance of vagueness in a legal system because you need the laws to be flexible. Language in general does not lend itself to absolute precision. So if a law requires the court to interpret it, that's okay. The law simply needs to be **intelligible.**

- Courts are reluctant to disqualify laws at this stage of the test because they don't want to throw a case out at the threshold level. If there is a vagueness issue, the preferred way of dealing with it is under the minimal impairment test (discussed later)

b) PRESSING AND SUBSTANTIAL GOVERNMENT OBJECTIVE

The next stage of the s. 1 analysis is the ***Oakes Test***, the first step of which requires that the limit imposed be because of a government objective which is "pressing and substantial".

A claim rarely fails at this stage (exception: ***Big M***, *where the objective that was attached to the provision of having a day of rest was found not to be pressing and substantial because it was directly in contradiction with 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 Court will not allow a shift in objectives – the original purpose underlying the enactment cannot be changed, so the government has to defend the original objective for passing the legislation (***Big M***). However, a shift in emphasis is permitted (***Butler***, *moral harm became harm against women*)

In this case, the government's objective of doing X is/not pressing and substantial because…

c) PROPORTIONALITY

(i) 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***).

In this case, it is reasonable to think that by doing X, Y will result…

(ii) 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 just isn't another reasonable way of achieving the objective that would infringe less on the right (***Big M***).

The govt/actor may fail at this stage if less intrusive alternatives 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 govt/actor may fail at this stage if the legislation is vague. At this stage, vagueness has to do with 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.

In this case, its true that the government could infringe less on the right, but by doing so, it would not be able to achieve its stated objective.

(iii) BALANCE BETWEEN DELETERIOUS AND 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 deleterious effects. Note: it is not the purpose vs. deleterious effects, but the deleterious vs. salutary effects that are important.

In this case, the salutary effects of the legislation are that… while the deleterious effects are that …

REMEDY

Section 24(1) states that anyone whose *Charter* rights have been infringed or denied may obtain a remedy that a court deems appropriate and just. This may include having the law struck down, a declaration of invalidity, words inserted/removed from the legislation, damages, or a constitutional exemption (e.g. ***Insite***)

HATE SPEECH

Hate speech is treated differently in the US and Canada. In the US, courts are reluctant to restrict the fundamental right to free speech and impose censorship unless there is an imminent danger of serious harm. "Counter speech" is treated as appropriate response to hate speech. In Canada, the SCC has given greater weight to equality values.

Pro restriction of s. 2(b): denies humanity to group/class of people, serious attack on psychological and emotional health *(**Mahoney**)*

Anti restriction of s. 2(b): impossible to target hate speech without prohibiting other speech. "Chilling effect" and self-censorship (***Borovoy***)

- ***Keegstra***: conviction for unlawfully promoting hatred (CC s. 319) upheld. Not at core of protected speech. McLachlin dissented
- ***Taylor***: cease and desist order upheld. McLachlin dissented
- ***Ross***: order removing teacher upheld. LaF emphasized importance of educational context, young children

SEXUALLY EXPLICIT EXPRESSION

The debate over sexually explicit expression has shifted from concerns about its immorality/offensive character to its harmful effects and promotion of violence/degradation (*MacKinnon*, *West*).

R. v. Butler: Butler was charged with a criminal offence relating to the possession of obscene materials for the purpose of sale. The criminal offence infringed s. 2(b) but was justified under s. 1 analysis

- Dominant characteristic must be **undue exploitation** of sex (violence, degrading/dehumanizing treatment, use of children)
  - Measured against **"community standards"**
  - Defence: **"internal necessities/artistic defence"**
- Pressing and substantial purpose: YES, shift in emphasis, not purpose
- Rational connection: YES, no causal relationship in social science evidence, but reasonable to presume one. *Irwin Toy*: Parliament needs only to have a rational basis; ***Keegstra***: absence of proof of causative link discounted as determinative factor
- Minimal impairment: YES, from ***Irwin Toy***, need not be "perfect scheme", only appropriately tailored
- Proportionality: YES

Little Sisters: customs legislation prohibiting the importation of obscene material was justified under s. 1; however , the manner of implementing legislation could not be justified under s. 1

Sharpe: upheld prohibitions on production, sale, distribution, and possession of child pornography, but read in two exceptions (which didn't meet "balancing" stage. Too remote/improbable to prevent risk to children): written and visual representations created and held by accused exclusively for personal use, AND visual recordings created by or depicting accused, held exclusively for personal use

LEGITIMACY OF JUDICIAL REVIEW

JUDICIAL REVIEW

Judicial review describes a specific judicial function

- In Constitutional Law, this means the power of courts to determine, when they are properly asked to do so, whether a government body/actor/act is in accordance with Constitution
- Furthermore, power of courts to declare legislation unconstitutional – of no legal force or effect
- Courts can only pronounce when asked to do so; cannot take independent action
  - Can make speeches and express concerns, but cannot directly and explicitly incite the public to act, for example
  - Idea that there is a separation between law and politics
    - Complicated notion … is there actually a distinction between 2?
    - Is it possible that law can be apolitical?

What makes judicial review legitimate? (Think about how much power JJ have!)

- Concerns about JJ power
  - Undemocratic – JJ are not elected, they are appointed by politicians
  - Unaccountable – serve to age 75, no responsibility to electorate
  - Elite group in society given background, education, employment, etc.
  - Unrepresentative – class, race, citizenship status, sexuality, gender, age, not member of aboriginal group
  - Perhaps out of touch with popular sentiments
- On the flipside
  - J are not accountable – have no political masters, do not need to curry favour of electorate for re-election
  - Independent, removed and detached from politics … JJ not supposed to do what politicians do
  - Experts in law as a result of education
  - Being out of touch with popular sentiments might better represent minority concerns
- JJ overturn democratic actions, yet can be seen as strengthening democracy
- Can check unbridled democratic, political processes but with same values of democracy

Judicial review under federalism, division of powers

- When SCC declares legislation is ULTRA VIRES of one level of govt, that means it is outside jurisdiction of that level … but that law can still be passed by other jurisdiction
- Still allows legislation to be passed

Judicial review under Charter

- If legislation is contrary to *Charter*, cannot be passed by any level of government

ADVENT OF THE CHARTER

The 1982 amendments, which included the adoption of the Canadian Charter of Rights and Freedoms, stand as the first major reconstruction of Canada's written constitution since 1867. The enactment of Charter has been significant not only because it is based on the notion of natural rights and the idea that rights are inalienable (***Trudeau***), but because it also plays a role in contributing to national unity (***Russell***).

Pierre Elliot Trudeau, "The Political Purpose of the Canadian Charter"

- Classic liberalism defence of rights: idea that human dignity is linked to our most civilized moments and respect for human dignity is what distinguishes us
- Natural rights are rights that can't be violated simply because of our human nature, because of our compassion morality etc we also have a series of rights that are attached to us. Natural law has served for a long time as a justification for the granting of human rights. Out of this idea of natural rights more modern notions of freedoms and equality have evolved.
- The capacity of a moral and rational nature is what grants us this right to dignity
- Social contract movement explains why we give state some much power over us as they state will give us a guarantee against exercise of arbitrary state power…idea of governments limited by rights (look to abuses and excesses of WWII)
- Charter seen as a move toward US system of gov, abolish of appeal to JCP, growth from colony to dominion, immigration, to be accountable to ppl of Canada and not British Parliament
- Therefore we need an entrenched bill of rights…tough to argue as prior we had parliamentary supremacy. Once strong, this had diminished due to challenges of tight affinity to Britain. Immigration patterns were changing and many new citizens wanted to move away from Westminster parliamentary supremacy

Why was Trudeau in favour of an entrenched bill of rights?

- Gave a new dimension to Canadian politics (tension between Quebec and rest)
- Discussion before was mostly about creating a domestic amending formula
- T comes to see idea of charter as a unifying counter to provincial division
- Imposes national standards on provinces
- Create a nation composed of people not with regional identities but national idea of Charter Canadian
- Unifying pride in Charter, national shared values

Cairns, "Charter v Federalism: Dilemmas of Constitutional Reform"

- What charter represents, how it modified parliamentary supremacy
- By 1980s this idea had diminished and there was a challenge to it
- People became aware of how attenuated individual rights were without legislation
- Charter was facilitated by distancing from British, moving toward American, abolition of appeals to privy council, immigration
- Moment that we achieved was special moment in growth of nation

- Talks about the profound change in society since WWII, many immigrants from different countries wary of the state
- Increase in ethnic and racialized minorities becoming of more concern…need to protect rights
- International Human rights dimension –UN passing human rights laws
- Diminishment in the need to be tied to the British system of government. No longer seemed necessary to Cdn identity
- Other countries (inc. US) getting new constitutions around this time were all including bills of rights

Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms"

- Explores idea purpose of charter to contribute to national unity
- Quebec's concerns for constitutional change were coming to dominate the debate. Trudeau and other federalists felt this would weaken the federal government or anger other provinces. So Trudeau had a notion that the bill of rights would unite the nation, by providing Canadians with a set of basic rights that are applicable to all.
- There are now Canadians that gain their identity from what part of s.15 they fall into. People now unify under these categories and regional differences come less important. *Charter* creates a nation full of ppl not just of regional identities, but those with identities based on rights

Weinrib, "Canada's Charter of rights: Paradigm Lost?

- Charts stages in Charter making
- Charter represents a reduction in government in some way
- Distinctive institutional features (s 1 s 33)
- Our section 1 is a common feature of international bills of rights

- Unlike other states who entrenched rights, Canada did not create a special constitutional court—instead, it allowed for judicial review function in existing courts and a constitutional role for the established legislatures
- The charter limits parliamentary supremacy and gives power to the Judges in the courts over the parliament.
- Questions raised about legitimacy of judicial review. This reflected in
- One of the compromises that our Charter includes is the limitation clause (s1). S23 the notwithstanding clause is a compromise made by the prov/fed governments (gives legislatures the last word). This is a way of moderating between the judiciary and the legislature; political bargains that were made

Gold, "Politics and Rhetoric in the SCC"

- Federal initiative initially attracted support of only a few of the provinces. SCC ruled that there needed to be a substantial level of prov consent. Quebec liked this as they didn't feel they were opposing fed gov alone
- But other provs gathered together to accept plan of fed gov, but Quebec was excluded from the final deal making. This exclusion of Quebec has had ramifications in terms of the politics that ensued (only Quebec could trust Quebec)

MERITS OF ENTRENCHMENT

Tremendous power that the judiciary has to overturn legislation passed by democratically represented electives

Politics	Law
Interest, Subjective, Irrational, Willful, Ruled by Passions, Majority	Predictability, Principled, Rational, Impartial, Objective, Logic
Because of these features, use elections to legitimate the power that governments have	Judges are not elected, not responsible to people, not accountable, politically appointed, then how do we legitimate their power?
	Liberal legalism – classical liberalism defence of role of law, power government has over you is ok because you choose them, they govern according to law "rule of law" *The judiciary must be doing law and NOT politics… when they start doing politics, we have problems with the legitimacy of judicial review. …Judges are appointed, unrepresentative, unaccountable…so how is their exercise of enormous power legitimate? Makes judicial review problematic in a democratic system…* Indeterminacy…multiple plausible outcomes 'no right answer'

PRO-CHARTER RESPONSES

W. Bogart, "Courts and Country"

- Says that two very diff models of democracy are at issue
- On the one hand, their enshrinement of rights is democratically valid as it give a space and a particular minority interest to be recognized in n open and public process. But problem with this is that the majority rules and the minority is ignored (the minority doesn't elect gov, majority does). The disadvantaged don't get her w respect to the political agenda. *Charter* forces gov to take interests of minority into account by requiring them to provide for key fundamental values and rights (think Insite decision and the resulting Charter challenge…if it wasn't for the Charter, these ppl wouldn't be heard…but so what?)

- Allows individuals, particularly those with minority interests, to seek vindication in an open, public, and responsive process as opposed to legislators who may unresponsive/are more attentive to majority concerns
- Signals the full maturity of Canadian legal system
- Ability to unite Canadians
- Provides a justification for judicial review due to the existence of **s. 33** (notwithstanding clause)

Weinrib, "Limitations on Rights in a Constitutional Democracy"

- Enshrinement of rights democratically valid because it give articulation to minority interest to be vindicated in open and public process (problem with Politics is that minority is ignored)
    - Enriches democratic process by increasing participation of all, forces government to take account of interests they can ignore politically

- Rights protection operates as a higher level of law – as supreme law
- Independence of judiciary offers politicians relief from final responsibility and lends legitimacy to a variety of legal operations

ANTI-CHARTER RESPONSES

(*Bogart*)

- Born as a device to combat separatism rather than respond to widespread abuse
- Role of judges subverts any possibility of true democracy
- Elected members of government and their agencies have been more effective for improving lives of Canadians in most circumstances (substantive outcomes)
- Best chance for a vigorous, responsive, and respected democracy comes from elected representatives
- Costs of access to courts privilege the powerful/organized and thus allow disproportionate use of judicial review

Petter, "Immaculate Deception: the Charter's Hidden Agenda" – anti charter

- Charter more likely to undermine than advance interests of socially disadvantaged Canadians. Reasons lay in the nature of the rights themselves and in the judicial system charged w interpretation & enforcement
- Negative nature of *Charter* rights (aimed at protecting ppl from state power…have private sector interests in mind). Remove from Charter scrutiny the major source of inequality in our society—unequal distribution of property entitlements amongst parties and what a bout jobs and food? The disadvantaged need the state to interfere to provide these
- Decisions made by the courts under the charter are ones that should be made by democratically elected officials not the judiciary. That the judiciary can trump the legislative is unconstitutional, illegitimate and undemocratic
- Petter's argument is about the whole institution of judicial review; that it takes important questions that should be deicide in a democratic regime and puts them in front of 9 unelected unrepresentative judges.
- Dialogue theory ignores the way that Charter rights can shape public debate and policy independent of any dialogue. 2 aspects of judiciary that make it inappropriate for advancing interests of disadvantaged:
  1) *Cost of gaining access* to the system: denies access to courts and shapes rights themselves. Says that those who can afford Charter litigation will end up shaping the rights
  2) *Composition of the judiciary itself:* judges all come from an elite, affluent background.

- Charter is a regressive instrument more likely to undermine than to advance the interests of socially and economically disadvantaged Canadians
- Rights in Charter founded upon belief than main enemy of freedom is the state rather than disparities in wealth or concentrations of private power
- "Systemic bias" in favour of the interests of the upper middle-class/corporations
- Victories that have been won on part of marginalized groups have been achieved, for the most part, in the democratic arena
- Weakens impetus for further legislative reform by diverting resources from political to judicial arena
- Cost of gaining access to judicial system an issue
- Composition of judiciary itself does not reflect all segments of Canadian society (recruited from small class of successful, middle-aged lawyers)
- Deep in judicial ethos, there exists special concern and reverence for property rights which guides/ constrains judicial decision-making in Charter cases

(*Morton and Knopff*)

- See the Charter as anti-democratic because of the "Court Party" = cluster of interest groups who have used the Charter to advance their interests in the Courts to constitutionalize policy preferences that could not easily be achieve through legislative process
- Primary objection is that "Charter Revolution" is fundamentally undemocratic because it erodes habits/ temperament of representative democracy
- Real effect of the Court Party is not to protect rights in any fundamental sense but to encourage rights claiming
- Disagree with "dialogue" theory (SEE BELOW) because although true in abstract, not so in practice (legislatures would not want to challenge new judicially-created policy status quo)

DIALOGUE THEORY

The "dialogue theory" is an idea raised by Hogg and Bushell based on the notion that judicial review is part of a dialogue between the judiciary and the legislature. A judicial decision is open to reversal, modification or avoidance; this leads to dialogue between the judiciary and the legislature.

- It is rare that a constitutional conflict can't be fixed by the legislature, and still accomplish the overall purpose of their legislation. Sometimes an invalid law is more restrictive of individual liberty than it needs to be to accomplish its purpose.
- There are four relevant features of the Charter that allow the legislature to advance its objectives while respecting the requirements of the Charter as articulated by the Courts
    1) Section 33 – the power of the legislature to override
        The legislature need only insert and express not withstanding clause into a statute and it will not be subject to s2 or s7-15 of the Charter.
    2) Section 1 – allows for 'reasonable limits' on guaranteed Charter rights
        All breaches of rights can be limited by a law that meets the Oakes test
    3) the "qualified rights" in Sections 7,8,9, and 12 which allow for action that satisfies the standards of fairness and reasonableness
        S 7 = in accordance with the principles of fundamental justice
        S8 = 'unreasonable' search and seizure
        S9 = 'aribtrary' detained or imprisoned
        S12 = 'cruel or unusual' punishment
    4) the guarantees of equality rights under section 15(1)

The decisions of the court almost always leave room for a legislative response. In the end the legislative objective will still be accomplished. Judicial review is not a veto.
Dialogue theory dominates mainstream ideas about what judges do.

Petter's response to dialogue theory:
Dialogue Theory – legitimizes judicial review because legislature can revise laws

For:

- You told us not to let you have bacon and eggs, that is what we are doing
- s. 1, s. 33 (override), s. 7, 8 (internal limitations that allow values that the legislature asserts to be put in), s. 15 – charter is built to allow governments to keep coming back, government should therefore be more activist
- Response to Petter – is any better conversation going on in parliament…? No

Against:

- Pedder: classical picture of rights sees state as enemy
- In modern state we need to state to actively distribute wealth
- Charter no positive obligation on states to provide certain benefits,
- Gives judges a justification for making aggressive judicial pronouncements
- This should not be a justification because legislatures get last word, if judicial review was not a problem then wouldn't need this, legislature doesn't have a lot of opportunity, not a normative defence
- Not really true that legislatures have the last say, they do but only on the courts terms
- Critical theories of democracy, need better democracy

Vriend v. Alberta

- Good too look at because:
    - Activist insertion of a phrase (goes against stated wish of legislators)
    - Federalism issue
    - Legislation at issue is not positive government action, but government omission (even more of an activist court)
- ***McLung:*** constitutional experts did not anticipate judges could dictate legislation while scrutinizing
- ***Morton & Knopft:*** inappropriateness of judges …, federal judges dictating provincial legislation (concern about provincial autonomy)
    - Sexual orientation not meant to be part of protected rights

LEGITIMACY OF JUDICIAL REVIEW

1. Charter is product of democratic choice (para 132, 134, 135)
    - Elected reps wrote the charter and gave judges the task of interpreting
2. Courts are reasoned, principled and constrained by the constitution (law not politics)
    - Values invoked by law
3. Judicial review does not substantively affect legislative supremacy (dialogue theory)
    - Can use s 1 or s 33
4. Democracy is more than majority review, judicial review increases dialogue and enhances democratic process

Note: Read Charter (we will look at ss 1, 32, 2(b), 15(1))

- Constitutional documents, difficult to interpret
- Specific rules for interpretation given its special place
- SCC mapped out a particular approach
- Courts used to interpret constitutional narrowly and legalistically (except for persons Case)
    - Eg parsons

- SCC marked out different approach for Charter, not appropriate for constitutional document, they are not susceptible for easy change, tend to be written in broad terms
- General interpretive principles
- Purposive approach began from ***Hunter v Sutherland***, Charter functions to restrain government action

1. <u>Purposive approach</u> to Charter interpretation
- Not look to dictionary
- Look first to purpose underlying particular right in light of larger purposes of the Charter
- Look at document in light of its character and purpose
- Eg freedom of expression – self-fulfillment and democracy
- Less concerned about framers intend than with how the right functions in society
- Judges continually looking at charter with eye to future and to current society
- Places boundaries on interpreting open ended phrases
- Purposive approach constrains judicial interpretation and allows judges to have some concern for the context

2. General, broad, generous and Liberal approach
- Presence of s 1 encourages this (gov gets other chance to legitimate)

- These two work together
    - Purposive anchors to purpose, constraint on interpretation of the right, need to have eye to underlying purpose
    - Generous reading is broad, but it is constrained by purposive
    - Often used as if they are the same interpretative approach, but they are separate
    - Approaches are important because they constrain what is a reasonable inquiry

ABORIGINAL PEOPLES

S. 91(24) grants federal jurisdiction to regulate "Indians and lands reserved for Indians." This section protects a "core" of Indianness from provincial intrusion through the doctrine of IJI. This core encompasses the whole range of rights protected by **s. 35(1)** of the Charter, including rights in relation to land and practices/customs/traditions which are not tied to the land (*Delgamuukw*).

Provincial authority to pass laws affecting Aboriginal peoples is more complicated. Provinces are not entitled to "single out" Aboriginal people and where they do, these laws are found to be ultra vires and therefore unconstitutional. This occurs if the focus or P&S of the provincial legislation is exclusive or differential treatment of an aboriginal group or person.

However, provinces may, in some circumstances, regulate Aboriginal peoples by "laws of general application." Provincial laws of general application that have their P&S within provincial jurisdiction will apply as long as the incidental effects don't touch on the core of the federal power regarding "Indianness."

Prior to the enactment of **s.88 of the Indian Act**, laws of general application that had incidental effects on the core of federal jurisdiction would be rendered inapplicable due to IJI and permanently read down.

In *Dick*, the Court ruled that **s.88** is NOT merely declaratory, but in fact is an example of **anticipatory referential incorporation** whereby parliament has referentially incorporated provincial law into federal law. Hogg has criticized the distinction stating that this is merely legislative inter-delegation by pre-emptively incorporating laws from another jurisdiction. The Court in *Dick* also noted that from that point onwards, as new provincial laws passed, they would be anticipatorily referentially incorporated into federal jurisdiction so as to avoid legal vacuums.

Because of s.88, provincial laws of general application will now be referentially incorporated, except for the 4 exceptions outlined in the provision:

- Terms of any treaty
- Any other act of Parliament
- Inconsistent with the *Indian Act*/any rule made under the *Indian Act* (paramountcy)
- for any matter for which provision is made by or under the *Indian Act* (creates a kind of "super paramountcy")

Mary Ellen Turpel, "Home/Land" (Suppl.) – legal system itself as colonial hegemony

- Law as a way to maintain colonial hegemony
- Theoretical and moral foundations of legal order, history of its ideas and institutions influence wider social order and system of class rule
- Even having to go to court is implicit way of legitimating of Crown sovereignty
- Guardianship, paternalism justify elite or class rule
- *Sparrow, Sioui, Delgamuukw*
- Applying formalist mode, technical reasoning to aboriginal claims

Thomas King, "A Coyote Columbus Story" (Suppl.)

- History is what you read in a book?
- The ones who change the rules are the ones who have power
- Explorers look to land and people as commodities

White and Jacobs, Report of the Aboriginal Committee (Suppl.)

- European ideas about civilized/"state of nature"
- Failure to recognize and understand aboriginal society; imposed structure of power and authority to "save our people from ourselves"
- Cultural assumptions about family, relationships, land use and ownership, nature
- Cultural genocide, residential schools, limited opportunities for education and employment
- Assimilation, identity crises, loss of legal recognition of Indian status

DISTRIBUTION OF LEGISLATIVE AUTHORITY

- Before 1982, Parliament and provincial legislatures were viewed as free to pass laws that interfered w/ the exercise of CL Aboriginal rights, as long as each level of govt acted within its sphere of legislative authority
- Federal govt: s. 91(24)
  - Jurisdiction to legislation in regards to "Indians, and Lands reserved for Indians"
  - Also creates core of "Indianness" that is protected from provincial intrusion through IJI
- Provincial govt:
  - Cannot "single out" Aboriginal people
  - But may regulate them by "laws of general application" (s. 88 of *Indian Act*)

Delgamuukw v. British Columbia (1997 SCC) – land rights; "core of Indianness" under IJI

- Issue: Does the province have the power to extinguish aboriginal rights either under its own jurisdiction or through the operation of s. 88 of the *Indian Act*?
- s. 91(24) confers jurisdiction to legislate with respect to aboriginal title
  - Based on *St. Catherine's Milling (1888 JCPC)* – reserve lands, aboriginal title, extinction of title
  - Only federal govt has jurisdiction to accept surrenders or extinguish title, although province takes title to land after this occurs
- s. 91(24) also protects a "core" of "Indianness" from provincial intrusion through IJI
  - This encompasses aboriginal rights in relation to land, practices, customs, and traditions

- Provincial laws which single out Indians for special treatment are *ultra vires*
- Provincial laws of general application are valid, but should consider IJI. Does it touch on core of Indianness?
- Prov laws of general application that touch on core of Indianness in incidental effects are valid but inapplicable to extent it touches on core
- However, this does not allow provincial laws of general application to extinguish aboriginal rights

s. 88 of *Indian Act* incorporates by reference provincial laws of general application

- Does not "invigorate" provincial laws which are invalid b/c they are in relation to Indians/Indian land
- e.g. provincial law which regulates hunting might touch on core of Indianness
  - However, it can apply through s. 88 of the Indian Act b/c it is law of general application
  - Enacted to conserve game and safety

Dick v. The Queen (1985 SCC) – application of s. 88

- Dick convicted of killing deer out of season (but for food) contrary to provincial *Wildlife Act*
- Conviction upheld b/c s. 88 states that even though the provincial law touches on the core of his band, it is still applicable
- Issues:
  - Is the provincial *Wildlife Act* inapplicable as invading federal jurisdiction under s. 91(24)? YES, should be read down
  - Is it saved by s. 88? YES
- Consider effect and intent – does *Wildlife Act* single out Indians or is it a law of general application?
- Would not be open to Parliament to make *Indian Act* paramount over provincial laws simply because *Indian Act* occupied the field; would need operational conflict
- Parliament can validly provide for paramountcy of *Indian Act* over other provisions

Lambert J's dissent is interesting

- Accepts extrinsic evidence that shows hunting is central practice to accused's band (able to get around precedents; relevant to land claims)
- Says "Indianness" should be culturally and historically specific, and will vary b/t diff bands
- Shifts gaze/focus of Constitution law from one on govt to First Nations
- Reinterprets s. 88's use of phrase "law of general application"

Exceptions of s. 88

- Treaty
- Any other act of Parliament
- Inconsistent with *Indian Act*
- Any matter for which a provision is made by or under the *Indian Act* ("super paramountcy")