CONSTITUTIONAL LAW SEMESTER II

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# CHAPTER IX – PEACE, ORDER AND GOOD GOVERNMENT

## The Historical Development of the P.O.G.G. Power

In the 20th century a major issue in Canadian Constitutional jurisprudence was over the scope of the Federal jurisdiction over Peace, Order and Good Government. Peace Order and Good Government arises out of the opening words of *Section 91* of the *Constitution Act, 1867*, is distinct from the other enumerated heads of Federal power in that Section.

Its broad language suggests a comprehensive grant of residual jurisdiction to the Federal government.

The early theory of this Head of Power was that P.O.G.G. was a **general power** to legislate over all Canadian matters, except for the heads of power expressly given to the Provinces in *Section 92*. This conception of P.O.G.G. was most notably advocated by Chief Justice Laskin in *Reference Re Anti-Inflation Act* *(1976)*.

This theory is in contrast with the more modern “**residual power**” theory, which conceptualizes P.O.G.G. as a residual power, different from both the Federal heads of power in *Section 91* and the Provincial heads of power in *Section 92*.

Under the residual theory P.O.G.G. has three branches:

1. The gap branch: for undisputedly Federal matters that were overlooked by the drafters of the Constitution, but which they nonetheless could contemplate at the time.
2. The emergency branch
3. National concerns branch

## K. Swinton, The Supreme Court and Canadian Federalism: The Laskin-Dickson Years

Laskin was a strong centralist in his academic writing and judicial decisions. He thought that the federal government should be able to regulate all important legislative matters. He espoused a “general power” theory of P.O.G.G., which was shut down by the Privy Council.

He was critical of the Privy Council’s “field” theory of the heads of power enumerated in *Section 91* and *92*, as well as the “necessary incidental” doctrine or the “trenching” doctrine. The Privy Council treated the Heads of Power as concrete subjects, and when taken together as drawing a boundary around the respective government’s exclusive jurisdiction.

Laskin promoted, instead, the “aspect” theory, which treated the Heads of Power as aspects of various legislative subjects (for instance, wheat trade) so that one subject can have potentially both a federal and a provincial aspect.

His centralist beliefs were likely caused by his upbringing in Northern Ontario during the Depression, where Provinces did not have the resources to adequately provide social and economical benefits and progressive thinkers promoted the need for a strong federal government.

Laskin believed that constitutional adjudication allowed the courts to play an instrumental role in the promotion of social good, and come up with creative solutions to social problems. He therefore called for flexibility, and a functional approach, in the interpretation of the constitution.

Jean Beetz, the Supreme Court Justice from Quebec, held views that contrast heavily with Laskin. He believed that Constitutional law should be grounded in conceptual and fixed applications of principles and rules, and eschewed the functional/sociological approach of Laskin. He tried to constrain excessive use of judicial discretion.

He was wary of a centralist interpretation of the P.O.G.G. power and defended the Privy Council conception primarily because it protected the interests and identity of Quebec. He espoused a classical approach to federalism, which demanded respect for the autonomy of both the provincial, and federal governments.

He thought the Constitution was a “paradoxical document” because it was very hard to amend and therefore mandated a liberal and purposive interpretational approach, yet lacked any statements of general principles and was worded restrictively.

He was not fond of the “national concerns” branch of P.O.G.G. because it allowed Courts to upset the balance of the division of powers permanently in the favour of the Federal government, while the “emergency” interpretation only provided temporary power.

He found it hard to reconcile the demands of “exclusivity” between each government’s jurisdiction with the notion of concurrency of laws (Aspect theory), since concurrency favoured the Federal government through the doctrine of paramountcy.

The philosophical leanings and styles of both judges are on display in *Reference re Anti-Inflation Act* [1976].

## Reference re Anti-Inflation Act [1976]: Establishes requirements for Emergency branch (rational basis, crisis, temporary) and National Concern (new, indivisible, impact)

**FACTS:**

Federal government enacted the *Anti-Inflation Act*, which established a system of price, profit, and income controls. The Act applied to private sector firms with more than 500 employees, members of designated professions, construction firms with more than 20 employees, and other private sector firms. The Act was also binding on the federal public sector, but applicable to the public sector of each province only if an agreement was made between the governments.

The Governor in Council directed a reference to the Supreme Court to see if the Act was *ultra vires* and whether the Ontario agreement, purporting to bind the Ontario public sector to the Act’s stipulations was valid.

Seven judges (written by Laskin) held that the Act was supportable under the P.O.G.G. power as emergency or “crisis” legislation, while two held it was not (written by Beetz).

The Federal Attorney General argued that it is *intra vires* the Federal government pursuant to its P.O.G.G. power under the national concern branch, or in the alternative, under the emergency branch.

The Act itself had language suggesting Parliament was purporting to use its national concern power, and there was no mention of an Emergency in the Preamble.

**ANALYSIS:**

Laskin C.J.:

Holds that the Act is valid under the emergency branch, but does not address the National Concerns branch, which he thinks is separate and distinct.

He gives a list of factors required for valid Emergency legislation:

1. Parliament has a **rational basis** for regarding the legislation as a temporary necessity to meet a situation of crisis imperiling the well-being of Canada as a whole and requiring Parliament’s stern intervention.
	1. The Court need not, and cannot, determine the existence of an actual crisis as a matter of fact, and must only weigh external evidence to determine the minimum requisite **rational basis**. The correct standard is that of a **rational politician**.
	2. The Court in this case looked at a study done by Statistics Canada which showed that both unemployment and cost of living had gone up, which was enough to meet the standard of rational basis.
2. The Act must be appropriately characterizable as **“crisis legislation”**, although explicit use of words like “emergency” is not required.
	1. The Preamble of the Act mentioned “inflation has become a matter of *serious* national concern” which was held by the Court to be enough.
	2. The range of possible emergencies requiring Federal action is diverse and expansive.
3. The Act’s effect must be **temporary**.
	1. It must be framed as temporary measure but can be subject to extension of its operation.

The majority also identifies a second list of factors that are **not required** for valid Emergency legislation:

1. The Act does not have to have immediate effect
2. The Act does not have to be actually effective
	1. Whether the Act will accomplish its purposes is irrelevant
3. The Act does have to be comprehensive or have full-coverage
	1. The *Anti-Inflation Act* allowed for provincial opt-out in regards to public sector jobs
	2. The Act does not have to address the whole crisis

Beetz J. [forceful dissent]:

Beetz does not think the Act meets the requirements of valid legislation under the Emergency branch of P.O.G.G.

1. He requires that the Federal government make it very clear that it is exercising the Emergency branch. The federal legislation has to give an “**unmistakable signal**” that it is being enacted under the Emergency branch. Ritualistic words like “emergency” are not required. Not even the slightest sense of ambiguity should be contendedable.
2. The legislation should be effective, or at least requires something more than just a rational basis.

Beetz also provides a substantive analysis on the National Concerns branch. He agrees with Laskin that it is distinct from the Emergency branch, and expounds the requirements of the National Concern legislation:

1. The Act must legislate over a **new subject matter**
	1. “containment and reduction of inflation” is not new, but an aggregate of several subjects, some of which form a substantial part of provincial jurisdiction.
2. The subject matter must be **unique**, and not enumerated or subsumable under the heads of power in Section 91 or 92, and **limited by its identity**.
3. The court must pay attention to the **impact on Provincial jurisdiction**, and the Federal government should attempt to minimize it.

The subject matter of the Act was too amorphous and ambiguous to constitute a valid exercise of the National Concern branch of P.O.G.G.

Ritchie J, with Martland and Pigeon JJ concurred with Beetz on National concern, but found that the Federal government validly enacted the Act under Emergency.

**RATIO:**

Emergency branch requirements [Laskin]: rational basis, crisis legislation, temporary.

National Concern branch requirements [Beetz]: new, distinctive unity/indivisibility, impact on provincial government.

Hogg: *Anti-Inflation* constitutes a clear precedent for the admission of social-science briefs in constitutional cases where legislative facts are in issue.

## Emergency Legislation After the *Anti-Inflation Reference*:

In 1988, the Federal Government enacted the *Emergencies Act* giving it power to declare a national emergency over a range of different hypothetical circumstances, including public-welfare emergencies.

Under this Act, the Governor in Council can declare an emergency but must concisely describe the state of affairs constituting the emergency and it must be confirmed by Parliament. The declaration cannot be made without prior consultation with affecting provincial governments and an agreement by the provincial Cabinet that the province is unable to deal with the situation. This recalls the “signal” requirement of Beetz.

## The National Concern Doctrine after *Anti-Inflation*

The doctrine emerges again in two cases: *R v Hauser* (1979) and *Schneider v The Queen* (1982) which play a role in the formulation of the federal P.O.G.G. power expounded in *R v Crown Zellerbach*.

In *Hauser*, the majority of the Court found that the constitutional validity of the *Narcotics Control Act* rested in the federal P.O.G.G. National concerns branch, not the criminal power, since narcotics were not a problem at the time of Confederation and they did not come within matters of a merely local or private nature. It fell within the “general residual power” in the same manner as aeronautics or radio.

In *Schneider*, Dickson J upheld the constitutionality of the *Heroin Treatment Act* of BC and made reference to the national concerns doctrine. He talked about what has come to be known the “provincial inability” test, in relation to that doctrine. He reasoned that heroin dependency, as opposed to drug traffic, was not beyond the capacity of the province to legislate effectively.

## R v. Crown Zellerbach Canada Ltd (1988)- four factors in considering national branch (distinct from emergency, new/newly national, single/distinct/indivisible, provincial inability)

**FACTS:**

The question raised by this appeal is whether the federal jurisdiction to regulate the dumping of substances at sea, as a measure for the protection of marine pollution, extends to the regulation of dumping in provincial marine waters.

At issue was the validity of s. 4(1) of the *Ocean Dumping Control Act*, which prohibits the dumping of any substance at sea except with a permit. The sea was defined for the urposes of the Act as including the internal waters of Canada other than fresh waters.

Crown Zellerbach dumped wood-waste into provincial waters, and was charged according to the Federal Act. It argues successfully at trial that the provision was *ultra vires* the Federal government. On appeal the trial decision was upheld.

Canada’s Attorney General argued that the provision prohibiting dumping in provincial waters was valid because it was part of a single matter of national concern or dimension which fell within the federal POGG power. He characterized the matter as the prevention of ocean or marine pollution.

**ANALYSIS:**

Federal legislative jurisdiction with respect to seacoast and inland fisheries is not sufficient by itself to support the validity of the provision.

Le Dain J gives the following summary of the national concern doctrine, which he thinks is firmly established:

1. The national concern doctrine is separate and distinct from the national emergency doctrine, because the latter is reserved for necessary legislation of a temporary nature
2. The National concerns doctrine applies to both **new matter** which did not exist at Confederation and to matter which, although originally matters of a local or private nature have **since become matters of national concern**.
	1. Marine pollution is a matter of national concern.
3. National concern requires a matter of **singleness, distinctiveness and indivisibility** that clearly distinguishes it from matters of provincial concern and a scale of impact that is **reconcilable with the fundamental division of powers**.
	1. It is very hard to tell when Federal water starts and Provincial matter ends, leading to great uncertainty and constituting the essential indivisibility of the matter of marine pollution by the dumping of substances.
	2. The limit of applicability to only salt water, and not fresh water, meets the requirement of **ascertainable and reasonable limits**.
	3. La Dain J says that a matter must be both functionally and conceptually indivisible but himself relies more on the functional requirement.
4. In determining whether the matter has the singleness, distinctiveness and indivisibility required, the Court must consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter (**Provincial inability test**)

Conclusions 3 and 4 come together so that the existence of a national dimension justifies **no more** federal legislation than is necessary to fill the gap in provincial matters.

In this sense, the “provincial inability” test is one of the indicia for determining whether a matter has that character of singleness or indivisibility required to bring it within the national concern doctrine.

Appeal allowed.

LaForest J (and Beetz, Lamer) write a dissent criticizing the legislation for being overtly broad and marine pollution not being a newly national concern but a subject matter that is an aggregate of different heads of power, some of which already provincial. The federal government can effectively legislate against marine pollution by putting together its heads of power over fisheries and the sea with the criminal law power. Dissent also argues that fresh and salt water boundaries cannot be demarcated clearly due to the existence of rivers. In effect, the majority’s argument of uncertainty arising out of the difficulty of demarcating between territorial and inner waters applies equally to fresh/salt water.

 The dissent note that adding subject matter to the national concern branch is like a constitutional amendment because it recognizes a new class of subject under federal jurisdiction.

**RATIO:**

New 4 part test for National Concern branch.

Marine pollution is national concern POGG.

## Jean Leclair “The Elusive Quest for the Quintessential ‘National Interest’”

Jean Leclair writes that giving the federal government jurisdiction over marine pollution is a *carte blanche* to regulate every conceivable activity known to humankind, be they inter- or intra- provincial in nature.

Functional indivisibility is problematic because it would be like a finding that the entire subject of tobacco use is a matter of national concern because the provinces are incapable of efficiently controlling advertising originating outside the province. Furthermore, is the provincial inability stemming from political incapacity, political unwillingness or legal inability? The most troubling aspect is that it gives the impression that Canada’s federal system was designed to achieve functional efficiency to the exclusion of other normative concerns (recall Simeon).

The conceptual indivisibility of a particular matter should hinge upon whether the totality of legislative means necessary for its overall regulation amounts to an important invasion of provincial spheres of power.

## Sujit Choudry, “Recasting Social Canada: A Reconsideration of Federal Jurisdiction Over Social Policy”

The “provincial inability” test is based on a conceptual of federalism founded on mutual advantage.

Choudry distinguishes 3 types of “provincial inability” from the *Crown Zellerbach* and *General Motors* cases:

1. Negative Extra-Provincial Externalities
	1. When an extra-provincial interest bears some or all of the costs of a inter-provincial decision. E.g. Saskatchewan and Ontario plants polluting water which flow into Manitoba. Manitoba is incapable of legislation across its borders to close the factories.
	2. Choudry points out that in this case, *inability* is a misnomer since Ontario and Saskatchewan can regulate their pollution causing factories. At most, it is a provincial *unwillingness*
	3. Nevertheless this is exactly the kind of inability contemplated in *Crown Zellerbach*. Therefore, federal jurisdiction under national concerns was premised on the risk of inter-provincial non-cooperation.
2. Collective Action Problems
	1. Inter-provincial collective action problem where for a legal scheme to be effective it requires total provincial support but provinces, although constitutionally able to, will not cooperate for some reason. This gives rise to a kind of prisoner’s dilemna where if one province does not want to abide by the same standard, the other provinces will choose to enact easier/more relaxed regulations in turn. Conversely, with public goods, provinces might free ride.
	2. Again, this is unwillingness, not inability, although it is truly closer.
3. True provincial inability
	1. Where the provinces are actually incapable of validly legislation over a subjet matter. I.e., the Yukon or Northwest Territories and Nunavut.
	2. In this case all that subject matter goes under the “gap” branch of POGG.

## Friends of the Oldman River Society v Canada (Minister of Transport) (1992) – Federal government does not have full control over the environment under POGG, the environment is likely a double aspect area.

**FACTS:**

Under the *Department of the Environment Act*, any federal decision-maker with authority over a project that may have an environmental effect on an area of federal responsibility must screen the proposal and if it has the potential of adverse affect there must be a public review by an environmental assessment panel.

The Alberta government proposed to construct a damn on the Oldman River to create a storage reservoir. It was approved by the Federal Minister of Transport, but he did not subject the project to an environmental assessment.

The Society brought an action to have the Minister’s decision set aside and to compel that Minister and the Minister of Fisheries and Oceans to comply with the Guidelines. They lost at trial, succeeded on appeal and then the appeal from the Government was dismissed by the Supreme Court.

**ANALYSIS/RATIO**

La Forest J speaking for the whole court:

The Court rules out the interpretation of *Crown Zellerbach* wherein the federal government was given jurisdiction through the national concern doctrine over the environment.

The Court writes that environmental control, as a subject matter, does not have the requisite distinctiveness to meet the test under “the national concern” doctrine as articulated by Beetz J in *Reference re Anti-Inflation*.

Environmental control is likely a double aspect area with legitimate provincial and federal aspects.

Local projects will generally fall within provincial responsibility, federal participation will be required if the project impinges on an area of federal jurisdiction as is the case here…

Note: Federal jurisdiction over the emission of toxic substances has been dealt with in *R v Hydro-Quebec* with the majority of the Court finding that relevant legislation prohibiting toxic emissions was *intra vires* the Federal government’s criminal law power, not POGG.

Nuclear power is POGG national branch (*Ontario Hydro v Ontario (Labour Relations Board)*)

Marijuana control is criminal law, but also may be POGG. (*R v Malmo-Levine R v Caine*)

# CHAPTER XI CRIMINAL LAW POWER:

## I. Federal Powers over Criminal Law

Section 91(27) assigns responsibility over criminal law to the federal Parliament.

This gives rise to two issues:

1. the scope of the federal power
2. the extent to which the existence of this federal power has constrained provincial attempts to control local conditions of publicorder and morality

Justice Estey noted in *Scowby v Glendinning* that “criminal law is easier to recognize than to define.”

The modern starting point for any discussion of the federal criminal law power is the judgment of Rand J in the *Margarine Reference*.

## Reference re Validity of Section 5(a) of the Dairy Industry Act (Margarine Reference) [1949] – criminal law must have a criminal purpose and a criminal form (prohibition + penalty)

**FACTS:**

Governor in Council has referred to the Supreme Court the question of the validity of Section 5(a) of the *Dairy Industry Act* which prohibited the import, sale or possession of any oleomargarine, margarine, butterine, or other substitute for butter, manufactured wholly or in part from any fat other than that of milk or cream.

**ANALYSIS:**

The court lays out some requirements for the federal criminal power:

A crime is an act which the law, with appropriate penal sanctions, forbids targeted at some **evil or injurious or undesirable effect upon the public against which the law is directed**.

The purpose of criminal law is public peace, order, security, health, or morality (although not exhaustive)

The Court does a pith and substance analysis to identify the matter of the legislation. The court employs the concept of severability. They reason that they can pull out from that provision two different parts. The first part is the extent to which that provision prohibits the manufacture, possession and sale of butter substitutes. The second is the part that prohibits import.

This Act has a economic and trade protection purpose and to benefit one group of persons as against competitors in business. Therefore, *prima facie* it deals directly with the civil rights of individuals in relation to particular trade within provinces.

Rand considers this the most insidious form of encroachment on provincial jurisdiction.

The part of the act dealing with import is properly under Federal jurisdiction over foreign trade, but not criminal law.

**RATIO:**

For a law to be enacted under the federal criminal law power it must have:

1. Criminal purpose (some public purpose)
2. Criminal form (prohibition accompanied by penalty)

**NOTE:**

Apart from the *Margarine Reference* itself, there have been relatively few occasions where federal laws that meet the formal requirements of criminal law – that is, prohibition and penalty – have been found invalid because of the absence of a criminal law purpose.

## RJR Macdonald Inc v Canada (AG) [1995] – confirms a fairly broad scope for the federal criminal law power (plenary, not frozen in time, allows exemptions, can attack ancillary activity).

**FACTS:**

The *Tobacco Products Control Act* prohibited all advertising and promotion of tobacco products offered for sale in Canada, with the exemption for advertising of foreign tobacco products in imported publications. As well, the legislation required the display of unattributed health warnings on all tobacco products and precluded manufacturers from putting other information on tobacco products.

Violations of the provisions of the Act constituted an offence punishable by way of summary conviction or indictment, with penalties ranging in seriousness from a fine not exceeding $2000 or six months’ imprisonment to a fine not exceeding $300 000 or two years’ imprisonment.

Two tobacco companies challenged the constitutionality of the legislation, seeking declarations that it was *ultra vires* the Federal government as an intrusion into provincial jurisdiction over advertising grounded in Section 92(13) or (16) and that it infringed freedom of expression guaranteed by s. 2(b) of the Charter.

A majority of the Supreme Court of Canada found the legislation valid under the criminal law power, but then went on to declare its central provisions were contrary to the Charter and not justified.

At trial, the Quebec Court of Appeal concluded that the legislation was intra vires, though it found that it was valid not under criminal law but under the national concern branch of POGG.

**ANALYSIS:**

La Forest J:

The fact that it prohibited three categories of acts: advertisement of tobacco products, promotion of tobacco products, and sale of tobacco products without printed health warnings coupled with the fact that it dished out penal sanctions created at least a *prima facie* indication that the Act is criminal law.

The evil the Act was targeted towards was the detrimental health effects caused by tobacco consumption. They read this from the Act’s “purpose” clause (s. 3). The criminal purpose was therefore the protection of public health. This is a valid concern.

The criminal law power is **plenary in nature**. The scope of the federal power to create criminal legislation with respect to health matters is **broad**, and is circumscribed only by the **requirements** that the legislation must contain a **prohibition accompanied by a penal sanction** and must be directed at a legitimate public health evil.

The legislation is not colourable, but it would be if the true purpose of the act was the regulation of the tobacco industry. There is no evidence that Parliament had an ulterior motive in enacting the legislation.

The argument raised by the tobacco companies that if the Parliament wanted to make tobacco criminal, then it should prohibit its use not only its advertising was countered by La Forest J by the assertion that the prohibition upon the sale or consumption of tobacco is **not a practical policy option at this time**. Parliament can attack an activity that is ancillary to the criminal evil of smoking.

The criminal law **is not “frozen as of some particular time”**. Parliament can **create new crimes**.

In response to the argument that true criminal law applies equally to everyone, and so an Act prohibiting only domestic tobacco publications but allowing foreign advertisement cannot be criminal law is answered by the assertion that criminal law may validly contain **exemptions**.

Major J dissenting

Criminal law should have an affinity with a traditional criminal law concern, although it is not frozen in time. Advertising and trademark usage restrictions do not constitute criminal conduct. Tobacco advertising is not serious, grave or dangerous enough to public health because in the end, although undesirable, it just encourages people to consume a legal but harmful product.

Since Parliament did not criminalize tobacco use, it is difficult to understand how tobacco advertising can somehow take on the character of criminal activity. The underlying “evil” of tobacco use which the Act is designed to combat remains perfectly legal.

Although exemptions do not necessarily take legislation out of the criminal law power, broad exemptions are a factor, which may lead a court to conclude that the proscribed conduct is not truly criminal. It does not make sense that the Federal government claims that only a total ban of advertising can accomplish its purpose, but then allows a major exemption from foreign sources.

Therefore, the Act, except for the sections relating to mandatory health warnings, cannot be upheld as valid criminal legislation. The Act is a regulatory measure aimed at decreasing tobacco consumption, which while desirable cannot be valid legislated under criminal law.

**RATIO:**

Criminal law is a plenary power.

Criminal law is allowed to have exemptions.

Criminal law is not frozen in time.

Parliament can attack an activity ancillary to a criminal evil, or can attack a criminal evil indirectly.

## The Requirement of Criminal Form – if a clear criminal purpose is identified, the court is more lenient on criminal form.

The presence of regulatory features in a federal law may make the law incapable of being upheld as an exercise of the criminal power. However, in cases where a clear criminal purpose is identified, the Court is more lenient in allowing deviation from the strict formal requirements of prohibition and penalty.

In *R v Cosman’s Furniture*, detailed regulations setting out standards for the manufacture of babies’ cribs and cradles, made pursuant to a Federal Act were found to be a valid exercise of the criminal law power.

In *R v Zelensky*, a provision of the Criminal Code allowing the court to order an accused found guilty of an indictable offence to pay compensation to the victim was upheld.

In *R v Swain*, the old criminal insanity provisions for the detention in a provincial mental institute of an accused acquitted by reason of insanity was *intra vires* the federal government’s criminal law power, even though it was not designed to be punitive in measure.

## R v Hydro-Quebec [1997]- a regulatory scheme with a large measure of administrative discretion can satisfy the formal requirements of criminal law.

FACTS

The Federal government enacted the *Environmental Protections Act*, which was a complex legal scheme involving regulation of toxic substances, civil and criminal sanctions, and substantial discretionary power to some Federal Ministries.

Hydro-Quebec was charged with violation of an interim order made by the federal Minister of the Environment restricting its emissions of PCBs.

Hydro-Quebec challenged the legislation as *ultra vires* the Federal Government’s criminal law power because of two sections 34 and 35.

Section 34 provides for the regulation of substances on the List of Toxic Substances. The Governor in Council is given extensive powers to prescribe regulations dealing with every conceivable aspect of the listed substances.

Section 35 allows for the making of “interim orders” by the Ministers without going through the usual procedure set out in the act.

At trial and at the Quebec Court of Appeal, the legislation was found *ultra* vires. A narrow majority of the Supreme Court upheld the validity of the legislation.

ANALYSIS

La Forest J:

Criminal law is plenary and full/broad in nature. The only thing that restrains criminal power is colourability. Parliament cannot, simply by legislating in the proper form, to colourably invade areas of exclusively provincial legislative competence.

Criminal law is not frozen in time.

The majority “entertains no doubt” that the protection of a clean environment is a **public purpose** within Rand J’s formulation in *Margarine Reference*, sufficient to support a criminal prohibition. In other words, pollution is an **“evil”** which Parliament can legitimately target.

The court notes that a legitimate use of the criminal law **in no way constitutes an encroachment on provincial legislative power**, thought it may affect matters falling within the latter’s ambit (equivalency). Following *Oldman River*, the environment is possibly a double aspect area of law.

In Contrast to the national concern power, which assigns full power to regulate an area to Parliament, **criminal law seeks by discrete prohibitions to prevent evils falling within a broad purpose**, such as the protection of health.

The purpose of Criminal law is to **underline and protect** our **fundamental values**.

The court then goes through Sections 34, and 35, which are impugned to be so broad as to encroach upon provincial legislative jurisdiction.

Broad wording is unavoidable in environmental protection legislation because of the breadth and complexity of the subject, and has to be kept in mind in interpreting the relevant legislation.

Nevertheless, only “dangerous” substances are targeted, the whole scheme is enforced by a penal sanction and all of the sections are consistent with the terms of the statute, its purpose and indeed common sense.

The discretionary power in Section 35 is justified, and speaks even more to the criminal law purpose, because it is ancillary to Section 34 and it allows the Ministers to target a pressing issue where ”immediate action is required to deal with a significant danger to the environment or to human life or health”.

Lamer CJC and Iacobucci J dissent

They think that the pith and substance of Part II (where the impugned provisions are found) is the “wholesale **regulation** by federal agents of any and all substances which may harm any aspect of the environment or which may present a danger to human life or health”.

The purpose is criminal, but the form is regulatory and cannot be upheld under the criminal law power.

Exemptions, according to them, are only allowed when they are ancillary to a prohibition in the legislation from which that exemption is derived. In *RJR Macdonald* there were broad prohibitions against advertising and promotion of tobacco products.

In this legislation, no such prohibitions appear. In this case, there is no offence until an administrative agency “intervenes”. Sections 34 and 35 do not define an offence at all. It would be an odd crime whose definition was mad entirely dependent on the discretion of the Executive.

Granting Parliament the authority to regulate so completely the release of substances into the environment by determining whether or not they are “toxic” would not only inescapably preclude the possibility of shared jurisdiction, it would also infringe severely on other heads of power assigned to the provinces.

This legislation has an equivalency provision. If you have an equivalency provision (if Province makes legislation that is similar, it is exempt) then it has to be within provincial jurisdiction.

**RATIO**

A regulatory scheme with large measures of administrative discretion can meet the requirement of criminal form so long as it is consistent and promotes a valid criminal purpose.

## Two Academic responses following *R* v *Hydro-Quebec*: David Beatty and Jean Leclair

David Beatty, in “Polluting the Law to Protect the Environment” is extremely critical of the Court’s ruling in *Hydro-Quebec* arguing that it unjustifiably expands the federal government’s criminal law power by removing the constraining of prohibition and penalty, and undermines the federal-provincial equilibrium that previous decision of the court had established in the environmental area.

In effect, he argues this case gives the Federal government sweeping jurisdiction over the environment under the criminal law power, combined with the federal paramountcy rule allows the Federal government to dictate Provincial environmental policy.

Beatty argues that a more principled (and preferable) approach would have been to uphold the legislation under the p.o.g.g. power by demonstrating the provincial inability to effectively control the spread of toxic substances.

Jean Leclair, in “The Supreme Court, the Environment, and the Construction of National Identity: R v Hydro-Quebec” argue a contrary opinion.

This is a win for the environment since provinces lack interest in its protection. He finds no problem with the Court’s treatment of the criminal law power because based on precedent it need not be confined to traditional modes of sanctions so long as the law is aimed at the regulation of “public evils”.

He expressed pessimism about the practical effect of the judgment on the environment because the federal government may be unwilling to seriously assume its reponsibilities to protect the environment. Nevertheless, the decision is an important one from the perspective of nation building and national identity because in placing a contentious issue within the national frame it enables us to transcend the issues which divide us (language, ethnic origin, etc.) Environmental protection and health operate as symbols of what being Canadian really means. By placing protection of the environment (and health, in *RJR*0 within criminal purpose the Court identifies it as a “fundamental value of our society” and actively participates in the construction of “Canadian identity”.

## Reference Re Firearms Act (CAN.) [2000]– The effectiveness of the law is not the subject of Constitutional review. Further expanded criminal law power. Balance of jurisdictions is a new element of the analysis. For Maclachlin, the pith and substance is the prohibition of public evil, for the dissent it is the regulation of public good.

**FACTS:**

In 1995, the Liberal federal government passed new gun control legislation. In addition to banning or restricting the use of certain types of firearms, the *Firearms Act*, which amended the existing *Criminal Code* provision related to firearms, established a comprehensive licensing system for the possession and use of firearms and a national registration system for all firearms.

Failure to comply with the licensing and registration requirements for the use of certain firearms had for many years been found in the *Criminal Code*, the new scheme extended the reach of the regulation to all firearms (including “ordinary firearms”, such as rifles and shotguns).

In 1996, the Alberta government challenged the federal governement’s power to enact new gun control law by reference to the Alberta Court of Appeal. The legal scheme was impugned to be regulatory rather than criminal legislation because of the complexity of the legislation and the discretion given to the chief firearms officer.

The Alberta Court of Appeal upheld the legislation by a 3 to 2 majority, which was unanimously confirmed on appeal by the Supreme Court of Canada in 2000.

**ANALYSIS:**

The law is in “pith and substance” directed to enhancing public safety by controlling access to firearms through prohibitions and penalties.

Gun control has traditionally been considered valid criminal law because guns are dangerous and pose a risk to public safety.

When considering the tougher issue of criminal form, it focused on the *Criminal Code* prohibition of the possession of firearms without a license and registration certificate. It did not have to talk about the necessary incidental doctrine.

It was prohibitory and backed by penal sanctions.

The complex, regulatory nature of the legislation was found not to preclude a finding of criminal prohibition. Gun control was distinguished from provincial regulatory schemes for the registration of motor vehicles and land titles (which Alberta based its argument on) because of the inherently dangerous nature of firearms.

The court **explicitly addressed and dismissed the concern that the new law would upset the balance of powers**. Its effects on property rights were incidental and it did not hinder the Provinces’ ability to govern the property and civil rights aspects of guns.

**RATIO:**

In considering the fit of a piece of legislation under the criminal law power, the Court should consider the legislations effect on the federal/provincial equilibrium. Federalism is a background concern that comes forward or recedes in doctrinal issues.

## Reference re Assisted Human Reproduction Act [2010]– the court will apply the necessary incidental test more generously for plenary heads of power like criminal law, look to whether there has been a history of intrustion/overlap.

**FACTS:**

In 2004 Parliament enacted the *Assisted Human Reproduction Act,* criminalizing a series of technologies and activities relating to assisted reproduction. Section 5 prohibit human cloning, the creation of an *in vitro* embryo for any purpose other than creating a human being, and the creation of hybrids or chimeras for purpose of transplanting them into a human being or a non-human life form.

Section 6 and 7 reiterate the principle of non-commercialization of the human body by prohibiting and form of payment to surrogate mothers as well as the purchase or sale of ova, sperm, embryos and human cells or genes.

Section 8 prohibits the use or removal of human reproductive material for the purpose of creating an embryo.

Section 9 prohibits the removal or use of ova or sperm of a person under 18 years of age.

The Act goes on to prohibit a second series of activities relating to assisted reproduction except in accordance with the regulations and the authorization of the relevant Federal Agency (Section 10 to 11).

It also establishes a mechanism to collect personal information about people who use assisted reproductive technology and specifies the circumstances in which such information may be disclosed, and establishes a registry to contain this information (Sections 14 to 19).

The Quebec government sent a reference questioning the Act’s validity under the criminal law power to the Quebec Court of Appeal which held in favour of the province.

It said that the Act did not contain a valid criminal law purpose (except for section 5-9) because it did not target an “evil”, instead establishes its intent to control the clinical and research aspects of a medical activity in order to create national uniformity it finds desirable.

The Court also found that the scheme was regulatory in nature and therefore did not meet the requirements of criminal form.

Goes to SCC.

**ANALYSIS:**

The court breaks down the act provision by provision and has the following split on their validity:

PURPOSE:

The majority finds that the Act as a whole has the purpose of prohibiting negative aspects of assisted reproductions.

McLachlin says the Act is essentially a series of prohibition followed by a set of subsidiary provision for their administration. While the Act may have beneficial effects and while some of its effects may impact provincial matters, neither its **dominant purpose** nor its **dominant effects** set up a regime of regulation and promotion of the benefits of artificial reproductions.

The valid criminal purpose is to prohibit practices that would undercut moral values, produce public health evils, and threaten the security of donors, donees and persons conceived by artifical reproduction.

Lebel/Deschamps

The Impugned provisions represent an overflow into provincial exclusive jurisdiction over hospitals, property and civil rights, and matters of a merely local nature.

The impugned provisions deal with the regulation of the management of hospitals, and several of the impugned provisions deal with subjects already governed by the Civil Code of Quebec, demonstrating that they are properly characterized as provincial matters.

Cromwell

The impugned provisions as a whole are regulatory and best classified as relating to the establishment, maintenance and management of hospitals, property and civil rights in the province and matters of a merely local nature.

However, ss 8,9 and 12 in purpose and effect prohibit negative practices associated with assisted reproduction and fall within the traditional ambit of the federal criminal law power. Similarly ss 40(1), (6) and (7), 41 to 43, and 44(1) and (4) set up mechanisms to impliment s. 12 and are therefore **saved through necessary incidental doctrine**.

Each decision considers the constitutional balance of powers between federal and provincial governments.

The provisions saved through the necessary incidental doctrine only required a rational/functional connection.

**RATIO:**

Broad, plenary heads of power (like criminal law) might have a lot of overlap into provincial jurisdictions. Narrow heads of power are unlikely to have intrusion and any overlap will be harder to save through necessary incidental doctrine.

Also one should consider whether there has been a history of intrusion. If intrusion is accepted, it means it hasn’t been constitutionally precluded, and is more likely to support legitimacy.

The Court collapses the pith & substance test here.

## II. Provincial Power to Regulate Morality and Public Order.

In our federal system, Parliament’s power over criminal law is in tension with the need to respond to local conditions of public order and morality that may vary regionally. Various mechanisms exist to give recognition to provincial interests in criminal law matters.

Section 92(14) gives the provincial legislatures jurisdiction over the administration of justice in the province (including provincial policing), combined with federal delegation to the provinces of the power to prosecute *Criminal Code* offences.

Section 92(15) allows the provinces to enact penal sanctions to enforce provincial regulatory schemes that are validly anchored elsewhere in the Section 92 list of provincial powers.

A lot of concurrency is tolerated. However, sometimes, as in *Morgantaller* and *Westendorp*, the courts have found provincial laws to have exceeded their jurisdiction.

Some basic distinctions between Federal and Provincial laws are outlined in the jurisprudence:

Provincial laws are **regulatory**, **private** and **preventative**.

Federal laws are **penal**, **public** and **punative**.

This is, of course, an oversimplification.

## Re Nova Scotia Board of Censors v McNeil [1978] – morality and criminality are not co-extensive, but preventative/regulatory Acts may have moral dimensions and still be *intra vires* the Province. The criminal law is also a break on provincial legislation.

**FACTS:**

Last Tango in Paris was banned in Nova Scotia, under the *Theatres and Amusements Act*, for a gratuitous scene. It was shown all across Canada but not in Nova Scotia. McNeal, the appellant, a member of the movie-going public challenged the legislation.

The Federal government intervened on behalf of McNeil and argued that the Nova Scotia Act was primarily moral legislation. The Province said that the purpose of the Act was to regulate local business and trade and that it was private and civil in scope.

Sanction for breach of regulations was a monetary penalty and the revocation of a theatre owner’s license.

The Supreme Court upheld the legislation.

**ANALYSIS:**

Ritchie J (majority):

The pith and substance of the Act is the regulation, supervision and control of the film business within the Province of Nova Scotia.

The legislation is concerned with dealings in and the use of property (films) which take place wholly within the Province.

It is not concerned with creating a criminal offence or providing for its punishment, but only in the regulation of the theatre business. It is preventative, not penal.

**Morality and criminality are far from co-extensive**.

It is valid both under “civil and property rights” (92.13) and “local and private nature in the Province” (92.16)

Although he finds that the purpose was not targeted at criminality, he said even if it was it would be saved because of its form (preventative, regulatory)

Laskin J (dissent)

The Act is a direct intrusion into the field of criminal law since it allows a Censorship board to decide what is legal and illegal, what is moral and immoral and what is permissible and impermissible.

The court will not allow form to mask substance.

Provincial government has jurisdiction over objects where moral matters are concerned but those objects must in themselves be anchored in the provincial catalogue of powers.

**The criminal law has been held to be as much a brake on provincial legislation as a source of federal legislation**.

The Act is invalid.

**RATIO:**

Morality and criminality are not co-extensive. If an Act has moral dimensions it may nonetheless be *intra vires* the provincial government if it is preventative, and regulatory (as opposed to punative and prohibitory).

## Dupond v City of Montreal [1978]– Beetz focuses on local aspect and prevenative form while Laskin focuses on civil liberties:

The Court’s sympathy to provincial interest in regulating local conditions of morality was followed in *Dupond v City of Montreal* 1978. There, Montreal passed bylaws in form of ordinance that prohibits the holding of any assembly, parade or gathering in the public domain of the city for 30 days. This was Pre-Charter. The bylaw included penal sanctions.

Beetz, writing for the majority focused on the **local aspect** of the bylaw and the preventative character of the bylaw.

Laskin, in strong dissent, wrote that the bylaw was a mini-criminal code, dealing with apprehended breach of peace, apprehended violence and the maintenance of public order. His dissents in both McNeil and Dupond were informed by concerns for the protection of civil liberties by means of the federal criminal power. This was an important antecedent to the Charter but may have missed the strong provincial claims to an anchor in s. 92.

## Westendorp v The Queen [1983] – Reverses the trend established in *McNeil* and *Dupond* of tolerance for moral provincial legislation. In contrast to *Dupond* it was a permanent bylaw.

**FACTS:**

Westendorp had been charged with being on a street for the purpose of prostitution in contravention of a section of bylaw of the City of Calgary. The bylaw dealt generally with controlling the use of city streets and controlling soliciting or carrying on businesses, trades or occupations on any street.

The sanctions for breach were fines and imprisonment (up to 10, 30, 45, or 60 days) according to the gravity of the infraction. The city council amended the bylaw later to include the specific provision, “No person shall approach another person on a street for the purposes of prostitution” and “no person shall be or remain on a street for the purposes of prostitution.””

The recitals that introduced the amendment and explained its necessity referred to the fact that prostitutes were a **source of annoyance and embarrassment to members** of the public and interfere with their right and ability to move freely and peacefully upon the city streets.

Westendorp was successful at challenging the validity of the provision at trial but was overturned by the Alberta Court of Appeal.

**ANALYSIS:**

Majority (Laskin, Ritchie, Beetz and the unanimous Court0

The provision of the bylaw is so unlike the overall spirit, form and purpose of the bylaw as a whole that it should be treated as its own bylaw.

It is an intrusion into the Federal criminal law power.

It is patently an attempt to control or punish prostitution and has nothing to do with property or civil rights or even with the interference with the enjoyment of public property, let alone private property.

Sanctions are triggered by offer of sexual services or a solicitation, which does not have to obstruct or annoy anyone.

This bylaw establishes a concurrency of legislative power that goes beyond any double aspect principle and leaves it open to a Province to usurp exclusive federal criminal law power. It’s not about “preventing public nuisance” as reasoned by the Court of Appeal.

As opposed to Dupont the bylaw had permanent effect.

**RATIO:**

Provincial laws that have moral dimensions and are permanent are less likely to be seen as valid.

## Rio Hotel v New Brunswick (Liquor Licensing Board) [1987] – despite similarities in effect to a Federal Criminal law, a provincial law may be held to be *intra vires* if its purpose is anchored in a head of power under Section 92 and it is preventative, regulatory and private in nature.

Subsequent cases at the Supreme Court of Canada level continue the general pattern of upholding provincial laws dealing with public order and morality through generous use of the doctrine of double aspect rather than finding them to be an intrusion on the federal criminal law power. Every so often, however, no valid provincial purpose is found and, instead, the provincial law is found to constitute an invalid attempt to duplicate, stiffen or undermine the operation of the criminal law.

**FACTS:**

In *Rio Hotel* the Court upheld provision of the New Brunswick *Liquor Control Act* which gave the Liquor Licensing Board the power to attach conditions to liquor licenses regulating and restricting the nature and conduct of live entertainment in licensed premises.

A license was issued to a hotel owner with a condition precluding nude performances. The owner challenged its validity, the Supreme Court upheld it not withstanding numerous provision in the *criminal Code* relating directly or indirectly to public nudity.

Dickson CJC writes the majority which emphasizes the integration of the provincial prohibition in a comprehensive scheme of regulation and licensing.

**ANALYSIS**:

The court reasons that the law is related in pith and substance to the sale and marketing of liquor within the province. Rio Hotel is a business within the province. The Provincial legislature seems to regulate forms of entertainment that can be seen as marketing tools to boost alcohol sales.

The absence of penal sanctions and prison time is informative of their decisions

The dominant characteristic is regulatory and not punative, and relates to private businesses not public spaces.

It involves prior restraint, not punishment after the fact.

**RATIO:**

Despite similarities in effect with Criminal Code provisions, a provincial law may be *intra vires* if its purpose falls within the heads of subjects listen in 92 and it is preventative/regulatory/private.

# CHAPTER XVI – The Advent of the *Charter*

## I. Introduction - The Adoption of the Charter

The Charter project formally began at a federal-provincial first ministers’ conference, spearheaded by Justice Minister Pierre Trudeau.

In “A Canadian Charter of Rights” Trudeau sketches the historical development of the concept of human rights from the philosophical underpinnings of natural law, social contract theory, as the motivation behind the American and French Revolutions and the need for an entrenched Charter of Rights in Canada.

## The Merits of Entrenchment and the Legitimacy of Judicial Review

## W. Bogart – Courts and Country: neutral canvassing of both sides of the argument, two different models of democracy are at stake.

Two different models of democracy are at stake. First recognizes power of the ballot that is curbed by independent judges. Second model places its confidence in those who can claim the power of the ballot.

In the first model, independent judges curb the tyranny of the majority and protect vulnerable parties through rationality and principle. They ensure rationally and principle are paramount over impetuous legislatures, rigid bureaucracies and a duller citizenry.

The second model, while realistic about democracy’s shortcomings, is even more reserved about using judicial intervention to solve them. In this model, judges’ independent and tenure make them unaccountable, elitist and always unrepresentative. Far from promoting democracy, judges will sap it with regressive decisions, progressive decisions that nonetheless blunt popular responses to societal problems, and cause barriers of access due to the costs of litigation.

## A. Petter, “Immaculate Deception: The Charter’s Hidden Agenda” [1987]: Anti-Charter, Anti-dialogue theory. Charter litigations costs too much and judges are unrepresentative. The Charter and the judiciary are biased towards property owners and rights.

Petter argues that the *Charter* is a regressive instrument more likely to undermine than to advance the interests of socially and economically disadvantaged Canadians. The reasons for this lie partially in the rights themselves and partially in the nature of the judicial system, which is charged with their interpretation and enforcement.

The Charter is, at its root, a “19th century liberal document set loose on a 20th century welfare state.”

It obscures the issue and places human rights in opposition to the State, and not the disparities in wealth distribution and large private powers.

The Charter is catered to upper-middle class professionals who are opposed to the redistribution of wealth and are who the judiciary and legal professions are composed of.

This is a “systemic bias”. The real threat to human rights is the distribution of wealth which is assumed to be the product of private initiative as opposed to state action, and for the purposes of the Charter serves as the very foundation against which State action is judged.

He argues that most if not all of the victories for human rights in labour relations, woman rights, racial equality have been won through democratic action, in the form of legislative reform. Although we’re not there yet, the Charter threatens to slow or even reverse this process. The Charter is likely to “chisel away at certain aspects of the regime, and to erect barriers to future innovation.”

Petter predicts that there will be few “progressive” Charter decisions, and most will just uphold legislation – in other words, doing nothing. Furthermore, the money, time and energy devoted by interest groups to the Charter are money, time and energy that will be taken away from lobbying and other forms of political action.

The nature of the judicial system also amplifies the regressive impact of the Charter because of the cost of gaining access to the system and the composition of the judiciary itself.

Because litigation costs more money, litigation concerning rights is thus more likely to be brought by economically powerful interests in society (*RJR*) for whom the costs are small in relation to the potential economic gains. If litigation disproportionally represents the interest of businesses, the jurisprudence surrounding freedom of expression will come to reflect business concerns.

Furthermore, since the judiciary is unrepresentative (elite members) of all of Canada, they cannot promote effectively disadvantaged rights since they do not know their problems and cannot empathize. At a more fundamental level, the attitudes of lawyers and judges tend to reflect the value of the legal system in which they were schooled and to which they owe their livelihood. In other words they are allied with the common law, which is fundamentally favourable and based on the supremacy of property rights (he says “concern and reverence”). It treats property rights as “natural”, which also reaffirms the dichotomy of private action (“natural”) and state action “unnatural”.

Private/natural/liberty vs state/unnatural/interference

Hence, narrow Charter interpretations are “bad” while expansive interpretations are “good” since they maximize liberty.

“what is conveniently forgotten in all of this is that the liberty of many Canadian is better protected by the regulatory and redistributive policies of the state than by the market (assuming “liberty” includes the liberty to be clothed, housed and fed, and the liberty not to be preyed upon by those who command social and economic power).”

## L. Weinrib, “Limitations on Rights’ in a Constitutional Democracy” (1996): describes two models of understanding the Charter and the role of the courts: “majoritarian” and “supremacy of rights” models. Charter as a supplement and guide to the exercise of legislative authority.

Founded on a commitment to certain irreducible substantive values to which all other lawmaking, whether legislative or judicial, must conform. This model welcomes judicial protection of individual rights and their value structure as a correction for the perceived inadequacies of majoritarian politics.

“The supreme law model is thus not antagonistic to the majoritarian apparatus that creates the positive law of the modern state. It merely recognizes that majority politics may lapse in its commitment to the initial human premises of the collective enterprise–the very premises that undergird democracy itself”

Legislative policy is may not be the proper arena for some human rights questions because it is future-oriented and cannot necessarily anticipate potential effects on minority groups.

Also, legislative programs are “forged in a chaotic mélange of give and take, favour and obligation, dissimulation and frankness, long term objectives and crisis management, as government struggles to sustain and enlarge its base of support.”

“The model values independent, highly trained and educated judges as a means of tapping a deeper, long-term political voice.”

Although rights are not absolute and frozen in time, the Charter guarantees to every citizen that they live in a society where human rights are fundamental. On occasion, a state action must infringe a right but must nonetheless prevail in the interest of fidelity to the general guarantee.

## P.W. Hogg and A.A. Bushell, “The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All) [1997]– The relationship between the courts and the legislature is an ongoing dialogue. 4 factors that facilitate dialogue: override provision, section 1, qualified rights and wide range of remedial measures to correct infringements of equality.

In the early days of the Charter, the main criticisms of entrenchment and judicial review came from the political left (Petter) raising concerns that the Supreme Court of Canada would use the Charter to restrain socially desirable regulation and redistribution.

More recently, criticism about illegitimate “judicial activism” has come from the political right, who argue that the Court is acting undemocratically by forcing unwilling majorities to accept the rights of unpopular minorities (Morton and Knopff). Hogg and Bushell write in response to this new wave of criticism.

“Where a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the Court and the competent legislative body as dialogue.”

Because judicial decisions striking down a law on *Charter* grounds can be reversed (section 33 override provision), modified or avoided by a new law, any concern about the legitimacy of judicial review is “greatly diminished”.

In 44/65 cases where the Court struck down a provision on Charter grounds the law was later amended, usually through minor changes that made it Charter-compliable and that maintained the objective of the original legislation.

It is rare that a constitutional defect cannot be remedied.

Hogg and Bushell identify 4 features of the *Charter* that facilitate dialogue:

1) section 33 (override provision) which allows legislature to re-enact the original law without interference of the courts (for sections 2, 7-15 rights)

2) section 1, which allows for “Reasonable limits” on guaranteed *Charter* rights. The court will explain why section 1 was not met, which will involve explaining the less restrictive alternative law that would have satisfied the section 1 standard (*Bedford*).

3) The “qualified rights” (s 7, 8, 9, 12) which allow for action that satisfied the standard of fairness and reasonableness.

4) the guarantee of equality rights under section 15(1) that can be satisfied through a variety of remedial measures.

Hogg and Bushell note “barriers” to dialogue theory such as when the objective is struck down on Charter grounds and where political pressures stop the legislature from fashioning a response (*R v Morgantaler*)

In conclusion, although the judiciary is unrepresentative and unelected it nevertheless always allows the legislature to respond so there is no problem of legitimacy.

In Professor Roach’s view, the Charter has created “a fertile and democratic middle ground between the extremes of legislative and judicial supremacy.”

In *Vriend*, the Supreme Court directly addressed the issue of legitimacy of judicial review drawing in part on the concept of dialogue as presented by Hogg and Bushell.

Morton et al reply to dialogue theory saying that liberal groups subvert Charter hearings, that judicial review underestimates political pushback and that the few balancing provisions aren’t envoked often (Section 33) and don’t get rid of undemocratic issues.

## Andrew Petter “Twenty years of Charter justification: From Liberal Legalism to Dubious Dialogue” [2003]: notes a shift in the justification of judicial review, which undermines its legitimacy even as it purports to promote it.

Petter notes the Court’s shift of justification of judicial review from assumptions based on liberal legalism to assertions of dialogue theory.

Early in the Charter days, courts viewed themselves as independent arbiters constraining State action to protect private interests.

“According to this view, the role of courts under the *Charter* is simply to police the boundary between these spheres [State and private] so as to constrain the state from unduly interfering with individual freedoms.”

In *Dolphin Delivery* the Court viewed judges as “neutral arbiters” whose conduct was non-governmental (except when linked to legislative or executive actions) and beyond *Charter* scrutiny.

This limited their remedial discretion to striking down legislation but not reparing or extending it.

“Sadly for the Court, however, these positions contained within them the seeds of their own destruction”

Nobody bought into the objectivism required to believe in liberal legalism, and the philosophy, founded on 19th century assumptions, was out of touch with twentieth century social norms and realities.

The Courts then started to understand their roles as largely discretionary and also expand available *Charter* remedies, and admit that the *Charter* may require as well as constrain governmental action.

In comes Dialogue theory.

“In other respects, I believe that dialogue theory is seriously deficient. While held out as a justification for judicial review under the *Charter*, dialogue theory mitigates more than it legitimates. By acknowledging the subjective nature of *Charter* decision-making, dialogue theory undercuts the legitimacy of judicial review as it seeks to explain why legislatures should be allowed to trump judicial decisions. And, in arguing that court decisions under the *Charter* are ultimately less influential than is sometimes supposed, dialogue theory calls into question why courts should be allowed to make such decisions in the first place.”

Dialogue theory also discounts the extent to which judicial decision-making under the *Charter* drives public policy-making in Canada:

1. Not all legislative responses are evidence of genuine dialogue and many are better characterized as reflections of, rather than responses to, judicial norms
2. Dialogue theory plays down the privileged position that courts occupy in *Charter* dialogues. There is an inbalance of power since Courts speak in the “rhetoric of rights” leaving legislatures to “mouth the language of limits”. They are the ones that interpret the scope of the rights and whether a given limit is justified.
3. *Charter* rights shape public debate and influence public policy independently of any dialogue taking place, that is independently of any decisions.

“For this reason, the rise of dialogue theory carries with it a disturbing message about the declining value of democracy in Canada. Say what you will about liberal legalism, its acceptance of judicial interference with democratic decisions is based on its assumption that judicial review yields "right answers."”

The rise of dialogue theory marks a decline in the value of democracy for Canadians.

## *Vriend v Alberta* [1998]: Court uses dialogue theory and the fact that the Charter was entrenched by democratic will to underpin the legitimacy of judicial review.

**FACTS:**

Vriend was fired because he was gay. The Alberta Human Right’s Code offered him no protection. He challenged its constitutionality because the Code went against his section 15 equality rights. He could not challenge his dismissal because the *Charter* does not apply to private actors.

The Supreme Court used the *Charter* to read in protection of sexual orientation into the Alberta Human Rights Code, which was considered by their legislature but consciously excluded.

**ANALYSIS:**

They essentially offer the dialogue theory. The mainstream hold that Hogg and Bushell article has had. They justify the particular features of the Charter that support a dialogue theory. Taking on these rights was not something the Judiciary asked for, the elected officials put them in charge of it.

The judiciary and the legislature are accountable to each other, which promotes democracy.

The concept of democracy is broader than the notion of majority rule, but democracy “free and democratic society” (Section 1) underlies the *Charter*. The Court must explain its decisions by appealing to a democratic and free society.

# Chapter XVII – The Framework of the Charter

## Interpreting Rights: The Purposive Approach

The courts have adopted a “purposive approach” to the interpretation of *Charter* rights.

A judgment about the scope or value of the right can only be made after the court has “specified the purpose underlying” the right or “delineate[d] the nature of the interests it is meant to protect”

## Hunter v Southam [1984]: The court must adopts a purposive and broad approach to defining Charter rights with an eye to specified underlying purpose of the right or an analysis of the interests the right is meant to protect. Rights must be given a large and liberal interpretation. Productive tension.

**FACTS:**

A search of newspaper offices was carried out by the Combines Investigation Branch. The statutory basis for the search did not require prior judicial authorization. The *Charter* guarantees freedom from unreasonable search and seizure under Section 8.

The issue before the Court was what constitutes “unreasonable”.

**ANALYSIS:**

The court finds that defining terms in the *Charter* cannot be a simple dictionary approach, nor an approach of statutory construction because the Constitution’s functon is to provide a continuing framework for the legitimate exercise of governmental power.

Court calls for **purposive analysis**. Narrow and technical approach not appropriate.

Charter is a **purposive document**.

Section 8: serves as a limitation on whatever powers of search and seizure the government already and otherwise possesses. An assessment of te constitutionality of a search and seizure must focus on its “reasonable” or “unreasonable” impact on the subject, and not simply on its rationality in furthering some valid government objective.

**Purposive** – gets to interests protected and reasons for recognizing rights. Limits judicial interpretation by being bound by historical contextual circumstances.

**Broad** – look at whole Charter, history, context, language.

**Generous and liberal**: **large and liberal approach**. Expansive, because it is a rights -protecting document. Not legalistic, narrow interpretation. Rights enhancing. Supposed to be evolving. Fact that section 1 is in the Charter should be taken by the courts to encourage them to read the rights largely.

The purpose of Section 8 is found to be the protection of an individual’s reasonable expectation of privacy.

**RATIO:**

Charter interpretation should be both purposive and broad and large and liberal. These two requirements are not necessarily consistent. The purpose of the drafters of the Charter and the history, context and language of it might go against an overtly liberal and large interpretation.

“**Productive tension**” between these two requirements.

NOTES:

R v Big M Drug Mart [1985] – In interpreting a right the court needs to refer to the character and larger objects of the Charter itself, the language chosen, to the historical origins of the concepts enshrined, and to the meaning and purpose of the other rights with which it is associated. Reiterates Courts commitment to broad and purposive interpretation

R v Therens [1985] – there is no need to read in “internal” limits into the definition of a particular right to narrow their understanding of interests protected, since those limits are considered in section 1.

## II. Justifying an Infringement: Section 1

## A. Prescribed by Law – Before a section 1 analysis, the Government must prove that the limitation was prescribed by law (fair notice and limitation of enforcement discretion).

## R v Nova Scotia Pharmaceutical Society [1992] - Extensive discussion on vagueness: fair notice, limit of discretion and rule of law.

**FACTS:**

The accused were charged under the *Combines Investigation Act* with conspiring to lessen competition unduly in the sale of prescription drugs. They moved to quash the indictment, arguing that the provisions under which they were charged violated s. 7 on grounds of vagueness. The Supreme Court rejected their argument and dismissed the appeal.

**ANALYSIS/RATIO:**

Doctrine of vagueness is a single concept whether invoked as a principle of fundamental justice under section 7 of the Charter or as part of the section 1 “prescribed by law” requirement (*in limine* – at the start/threshold issue)

The doctrine is founded on the principles of fair notice and limits of law enforcement discretion

The substantive aspect of fair notice is a subjective understanding that the law touches upon some conduct, based on the substratum of values underlying the legal enactment and on the role that the legal enactment plays in the life of the society (i.e., murder).

The limit of discretion principle is that a law must not be so devoid of precision in its content that a conviction will automatically flow from the decision to prosecute.

The citizen is entitled to have the state abide by constitutional standards of precision whenever it enacts legal dispositions. The law must be precise enough to serve as ground for debate, i.e., it must intelligibly outline the boundaries of permissible and impermissible behaviour.

## B. Justification: the second stage of section 1

## R v Oakes [1986]: Proportionality test: i) pressing and substantial objective, ii) rational connection, minimal impairment and balancing/proportionality of effects

**FACTS:**

Section 8 of the *Narcotic* *Control Act*, created a “rebuttable presumption” that once the fact of possession of a narcotic was proven, an intention to traffic would be inferred unless the accused established the absence of such an intention.

The accused challenged this “reverse onus” provision, arguing that it violated s. 11(d) of the Charter. After finiding that s. 8 did violate s. 11(d) of the Charter, the Court then went on to discuss whether the limit could nonetheless be upheld under s. 1.

**ANALYSIS/RATIO**:

The onus of proof that a limit on a right or freedom is reasonable and demonstrably justified in a free society is on the party seeking to uphold the limitation.

The standard of proof under s. 1 is the civil standard: balance of probabilities.

To establish that a limit is justified under section 1 two central criteria must be satisfied:

1. The objective of the limiting measures should be at minimum **“pressing and substantial”** to be held “sufficiently important” to justify infringement.
2. The means chosen are reasonable and justified (a form of **proportionality** test)
	1. Provisions must have a **rational connection** to the objective
	2. The limit should impair “as little as possible” the right or freedom in question [**minimal impairment**]
	3. There must be **proportionality** between the effects of the measures which are responsible for limiting the Charter right or freedom and the pressing and substantial objective. The more deleterious the effects of the measure the more important the objective must be.

The “reverse onus” in *Oakes* passed all of the requirements up to rational connection where the court held there was no rational connection between possession of a small quantity of narcotics and an intent to traffic.

**NOTES:**

The courts seem to regard almost any purpose as “pressing and substantial”.

Rational connection concerns the effectiveness of the infringing measures and minimal impairment concerns their scope. Usually when Courts strike down provisions it is because of minimal impairment, and rarely rational connection.

The fact that judgments about rational connection and minimal impairment almost invariably involve a balancing or trade-off between competing interests may explain why the final “balancing” step of the test seldom plays more than a formal role in the s 1 analysis.

## Dagenais v Canadian Broadcasting Corp [1994]: refines *Oakes* “deleterious effects” test to balance the deleterious effects not only with the importance of the objective but with its salutary effects.

“Even if the importance of the objective itself (when viewed in the abstract) outweighs the deleterious effects on protected rights, it is still possible that the actual *salutary effects* of the legislation will not be sufficient to justify these negative effects”

May be relevant in cases where the challenged law may not be completely successful in achieving the objectives for which it was enacted.

Dagenais itself involved a publication ban for the purpose of guaranteeing a fiar trial but which was found to have only limited effect given the difficulty of effectively enforcing such bans in light of technological advances.

## The Subsequent Development of the Oakes Test: Context and Deference

When doing a section 1 analysis the Court should assess the value and significance of the right and the restriction in their actual context. The court should not balance the value of a law’s purpose against the value of the right in the abstract, but in practice (e.g. if a law will actually reduce hate speech vs. its actual costs to freedom of expression. Thus, the court may divide the right, as with freedom of expression, into more or less valuable expressions of the right. The Supreme Court held that hate speech is a less valuable form of expression (go against the purposes of the right.

The second trend is that Courts have been willing to defer in certain circumstances to the legislature’s judgment about the need for, and effectiveness of, a particular limit on A charter right. This is related to context since deference varies by context.

## Edmonton Journal v Alberta (Attorney General) [1989]: rights and limits must be interpreted in their context to properly balance them under section 1

**FACTS:**

Newspaper challenged Alberta legislation which banned publication of court proceedings in matrimonial disputes claiming that the provision was contrary to s. 2(b) of the Charter, freedom of expression. All members of SCC found it violated s. 2(b) they were split on justification issue. Four members ruled that the provision was not a reasonable limit. Cory J wrote on decision supporting this result, with which Dickson and Lamer concurred [abstract approach]. Wilson wrote a separate concurring Judgment. La Fores J wrote a dissent, with which Heureux-Dube and Sopinka concurred finding a justified limit. Wilson J described a context- sensitive approach to s. 1 that was later adopted by the entire Court.

**ANALYSIS/RATIO:**

Wilson J

The right at stake is not freedom of expression in the abstract but the right to the public to an open court process. It must be balanced against the right of litigants to the protection of their privacy in matrimonial disputes.

We should not balance one value at large and the other in context.

One Virtue of the contextual approach is that it recognizes that a particular right or freedom may have a different value depending on the context. It is more sensitive to the reality of the dilemma.

The right or freedom must then, in accordance with the dictates of this court, be given a generous interpretation aimed at fulfilling that purpose and securing for the individual the full benefit of the guarantee.

## Irwin Toy Ltd v Quebec (Attorney General) [1989]: Represents the high water mark of judicial deference to legislative judgment. When there are many interests at stake (polycentric), and where the legislature has to weigh conflicting scientific evidence, or protect a socially vulnerable group more deference should be given. Less deference when the government is a singular antagonist.

**FACTS:**

Restrictions on advertising directed at Children.

**ANALYSIS:**

If the legislature has made a reasonable assessment as to where the line is most properly drawn, especially if that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the court to second guess.

More deference should be given when the government attempts to protect a socially vulnerable group.

Where the government is a singular antagonist of the individual whose right has been infringed, as in criminal law, less deference should be given.

**NOTES:**

There are different forms of deference that the Court does not always distinguish:

R. Moon recognizes 3 types of deference.

1) judicial deference to relevant findings of fact by the legislature (or lowering the standard of proof that the legislature must meet when establishing the factual basis for its justification argument) [important when there is conflicting social science evidence]

2) deference to accommodation of competing values or interests (when polycentric issue)

3) lowering the standard of justification (when the value or interest in context is less substantial or significant) – in this case the standard should only be lowered in the final balancing stage of Oakes according to McLachlin, but other judges such as Cory and La Forest think that a lesser value should lower the standards of minimal impairment and rational connection

The Oakes test remains flexible and vague (context, deference) since not all rights are the same in the Charter and demand the flexibility of a test that can accommodate them.

## Sujit Choudry, “So What is the Real Legacy of Oakes? Two Decades of Proportionality Analysis Under the Canadian Charter’s Section I” (2006) – the central issue of Section 1 jurisprudence is how the court should allocate the risk of factual uncertainty when governments legislate under conditions of imperfect information. The Court settled on a compromise of “reasonable basis” and will allow appeals to common sense, logic or reason to bridge an absence of evidence, but has not made the doctrine clear or consistent.

The Oakes test created an “enormous institutional dilemna” because it creates a conflict between the demand for definitive proof for each step of the test and the reality of policy making under factual uncertainty.

The central question of section 1 is how the Court should allocate the risk of factual uncertainty when governments legislate under conditions of imperfect information.

The Court has failed to recognize this issue and has failed to adopt a consistent approach to deference.

How can the government prove things like minimal impairment, rational connection and proportionality on a factual basis, when public policy is often based on approximations and extrapolations from the available evidence, inferences from comparative data and even educated guesses? To maintain a strict requirement of factual proof could, as La Forest J wrote in his dissent in *RJR-Macdonald* could have the effect of “virtually paralyzing the operation of government”

Yet to remove the requirement of the government providing factual evidence in justification would run counter to the requirement that reasonable limits be “demonstrably justifiable”.

The Court has struck a **compromise between these two extremes**. In cases in which there is conflicting or inconclusive social science evidence, the question is whether the government has a **“reasonable basis”** for concluding that an actual problem exists, that the means chosen would address it and that the means chosen infringes the right as little as possible.

There is a significant disagreement in accepting the reasonable basis doctrine (notably in RJR when La Forest was willing to infer that tobacco advertising sustained consumption and McLachlin was not).

Another issue, Choudry notes exemplified in *Thomson Newspapers*, is when the court is willing to allow appeals to common sense and popular opinion overcome the gaps left by insufficient evidence. **When the possibility of harm is within the everyday knowledge and experience of Canadians, or where factual determination and value judgments overlap then the Court will infer the existence of harm without factual evidence** (pornography, hate speech). In *Thomson* the majority refused to infer from the fact that opinion polls influence voter choice in election campaigns that inaccurate polls mislead large numbers of voters and have a significant impact on the outcome of an election.

But then in *Harper* v *Canada (AG)*, a divided Court disregarded this self-imposed limitation and upheld restrictions on third party expenditures during election campaigns on the eve of the last federal vote. The majority openly acknowledged that both the alleged harm and the efficacy of the legislation were “difficult, if not impossible, to measure scientifically” but were willing to reason both that the harm existed and the cure was effective. McLachlin, in furious dissent, argued that in the absence of evidence the dangers posited are entirely hypothetical, unproven and speculative, and that the legislation was an overreaction to a non-existent problem. Dissent was completely unwilling to listen to a common sense argument.

The Court has yet to work out under what circumstances it will use common sense, reason or logic to bridge an absence of evidence, and to delineate when it will allow inferences to be drawn from inconclusive social science evidence.

# CHAPTER XVIII – Application

## The Debate About Application To Private Action: Section 32(1) of the Charter.

Before considering whether a Charter right or freedom exists has been infringed by an impugned course of action or inaction, we need to deal first with a threshold question: does the Charter even apply?

Section 32(1) of the Charter provides:

This Charter applies

1. to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories
2. to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

The Charter does not apply to private actors after *Dolphin Delivery*

## Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd [1986]: The Charter will apply to the legislature, executive and administrative actions, but not to private parties and not Court orders or the common law. The common law should be developed in a manner consistent with *Charter* values.

**FACTS:**

There were picketers protesting Dolphin Delivery’s association with Puralator. Relying on the common law tort of inducing breach of contract, a BC court issued an injunction to restrain the picketing. On appeal, the union sought to have the injunction overturned on the ground that it violated its members’ freedm of expression. The BCCA dismissed the appeal and the union appealed to the Supreme Court of Canada

McIntyre J held that peaceful picketing enjoyed protection under 2(b) but the injunction was a reasonable limit on expressive freedoms that could be justified pursuant to s. 1 because Dolphin Delivery was not related to Purolator.

He went on to discuss whether the Charter even applied to the dispute in the first place:

**ANALYSIS**

The Charter applies to the common law because of Section 52 (repugnancy clause). The French text adds strong support to this conclusion in its employment of the words “*de tout autre règle de droit*”

He then asked whether the Charter applied to litigation between private parties. After quoting a number of commentators and relying on the text of s 32, he concluded that it did not.

They read “government” in s 32 in the sense of executive government of Canada and the provinces. It also applies to the legislative and administrative branches of government.

It will apply to those branches whether or not their action is invoked in public or private litigation**.**

It will apply to the **common law** only insofar as it is the **basis of some governmental action** which, it is alleged, infringes a guaranteed right of freedom.

It will apply to all statutes regardless of whether it is the basis of governmental action.

The Court, and its orders, is not considered a governmental actor and so it is not subject to the Charter, but the Court should develop the common law in “a manner consistent with the fundamental values enshrined in the Constitution” (i.e., **Charter Values**) This is justified because the Court are “neutral arbiters” not as “contending parties” (Petter criticizes this), and if Charter did apply to court orders it would apply *a fortiori* to all private litigation (because of enforcement orders).

RATIO:

Where a private party “A” sues private party “B” relying on the common law and where no act of government is relied upon to support the action, the Charter will not apply.

The Charter applies to legislature, executive and administrative branches of the government.

NOTES:

Petter and other left wing commentators heavily criticize this case because of its dubious distinction between governmental and private actors (Court is not State action), because it doesn’t protect disadvantaged parties’ rights against large private parties, which are more likely to infringe them than the government. They criticize the distinction because it is unprincipled to subject statutes to the Charter but not the common law since both govern private relationships. This has the negative implication of unequal Charter application for provinces based on whether they have codified common law, or for Quebec where there is no common law.

Hogg says it is correct to hold that purely private action should be unconstrained by the Charter, it drew the line in the wrong place and should have subjected the common law to the Charter to the extent that the common law has “crystallized” into a rule that can be enforced by the courts.

## Governmental Actors: not all entities that have powers conferred on them by statute, that are controlled to some degree by government, or that receive public funding will qualify as “government” for the purposes of s. 32

If an entity is part of the government, then the Charter will ordinarily apply to all of its actions (legislature, executive/administrative). The Charter not only applies to all legislative actions, it also applies to actions taken by the legislative assembly so long as those actions are not shielded from Charter scrutiny by constitutionally protected parliamentary privileges.

In *Dolphin Delivery*, the Court found that the term “government” does not extend to the judiciary although this has been since called into question.

“Government” in section 32 includes cabinet, ministers, officials employed in government departments, police officers, and other public agencies or agents that are subject to ministerial control or charged with the performance of government responsibilities.

The case law makes it clear that not all entities that have powers conferred on them by statute, that are controlled to some degree by government, or that receive public funding will qualify as “government” for the purposes of s. 32.

## McKinney v University of Guelph [1990]: being a creature of statute is insufficient to attract Charter applicability, public purpose is insufficient, public funding/governmental regulation is insufficient, the test seems to be governmental control

**FACTS:**

Eight faculty members and a librarian challenged the mandatory retirement policies of four Ontario universities. They argued that the universities’ policies violated the equality guarantees found in s. 15 of the Charter by discriminating on the basis of age.

The main issue at the Supreme Court was whether universities could be said to be government actors under section 32 of the Charter.

On the issue of the application of the Charter to universities, a majority of the court concluded that universities’ mandatory retirement policies did not come within the concept of government action.

**ANALYSIS:**

La Forest J:

He talks about the reasons why private actors were chosen not to be subject to Charter scrutiny. One justification is that Government is the body that can enact and enforce rules and authoritatively impinge on individual freedom.

“**Only government requires to be constitutionally shackled to preserve the rights of the individual. Others, it is true, may offend against the right of individuals.”**

To open all of private and public action to judicial review would be to “strangle the operation of society”, and “diminish the area of freedom within which individuals can act”

Appellants argued that universities are creatures of statute, which exercise powers pursuant to statute and carry out a public function pursuant to statutory authority. Therefore, they should be subject to the Charter since they are part of the government.

Being a creature of statute, i.e., a corporation, is not sufficient to count as a governmental actor since it is still a vehicle of private interests and since it would raise all the same problems as blanket application of Charter to private actors.

The Charter covers municipalities because they “**perform quintessentially governmental function**”: they enact coercive laws binding on the public generally, for which offenders may be punished. This may be sufficient to attract Charter scrutiny but it is not necessary.

Appellants also argued that universities should constitute part of the government because they have a special relationship to the provincial government: depend on public funding, government structures largely coordinate and regulate their activities, are subject to tuition fee control and new program approval.

Public funding and regulation is not sufficient/relevant since many private actors are subject to these things, and government appointment of members is insufficient.

The real test seems to be whether **the government has legal power to control the entity**.

Any attempt by the government to influence university decisions would be met with resistance and seen as a violation of academic freedom.

Wilson dissent;

She criticizes the “minimal state” conception of Government which she saw La Forest J’s decision to be based on.

She says that the government should be given a broader view “sensitive to the wide variety of roles that government has come to play in our society and the need to ensure that in all those roles it abides by the Charter”

She lays out the three tests to help identify the kinds of bodies that ought to be constrained by the Charter

1. the **control test**, which asks whether any branch of government exercises general control over the entity in question
2. the **government function test**, which asks whether the entity performs a traditional government function or a function that in more modern times is recognized as the responsibility of government
3. the **statutory authority and public interest** test, which asks whether the entity is one that acts pursuant to statutory authority specifically granted to it to enable it to further an objective that government seeks to promote in the broader public interest.

**RATIO**:

Universities are not subject to Charter scrutiny.

Public purpose, public funding, statutory incorporation, governmental regulation and governmental appointment of some members is no sufficient to treat a body as a government actor.

The test seems to be whether the government can legally control the actions of the entity or whether they are autonomous.

Wilson rejects the “minimal state” conception that LaForest seems to be basing his decision on and sets out a tripartite test for governmental actors (control test, governmental function, statutory authority and public interest)

This decision was followed in *Harrison v UBC* [1990].

## Stoffman v Vancouver General Hospital [1990]: Public hospitals are not government actors, reaffirms governmental control test

FACTS:

Stoffman involved a challenge by doctors at the Vancouver General Hospital to a hospital board regulation that established a policy of mandatory retirement at 65.

Fourteen of the sixteen members of the board were appointed by government.

The government statue required all regulation be approved by the Minister of Health Services

ANALYSIS/RATIO:

Nonetheless, the majority of the court ruled that the hospital was not part of government nor was the regulation in issue an act of government.

The majority emphasized that routine control of the hospital was in the hands of the hospital’s board of trustees rather than in the hands of the provincial government.

 If routine or regular control of hospital policies was in the control of the government, then Charter would apply.

If the mandatory retirement policy had been dictated by government, the Charter would have applied.

Wilson, Heureux-Dube and Cory were in dissent concluding that the hospital was activing as government. Dubé distinguished McKinney where the government involvement there was a matter of mostly funding.

RATIO:

Governmental control is the test for governmental actors.

## Douglas/Kwantlen Faculty Association v Douglas College [1990]: colleges are subject to Charter scrutiny because they are subject to routine and regular control, and because their Board members served at pleasure of the Minister.

**FACTS:**

Challenge to mandatory retirement policy in a collective agreement between a college and a union. The affairs of the college were managed by a board appointed by the provincial government (like in *Stoffman*).

The minister **was allowed to establish and issue directions and approved all bylaws of the board**.

**ANALYSIS:**

The Court was unanimous in concluding that the Charter applied to the actions of the college in the negotiation and administration of the collective agreement between itself and the association representing the teacher and librarians at the college.

They distinguish *McKinney* and *Harrison* by noting that the board served *at pleasure* of the Minister, and that the Minister could at any time lawfully direct the college’s operation.

In *McKinney* and *Harrison*, the university is autonomous.

**RATIO:**

Colleges attract Charter scrutiny because they are subject to routine and regular governmental control.

In *Greater Vancouver Transport Authority v Canadian Federation of Students* [2009] the VTA was found to be a governmental actor because it was an “agent of the government”, and because it had a board all appointed at pleasure of the Lieutenant Governor and the LG has the power to exercise substantial control over its day-to-day activities.

## Entities Exercising Governmental Functions: non-governmental entities exercising governmental functions are subject to *Charter* scrutiny.

Even if an entity is not part of the apparatus of government, because it is not subject to routine or regular ministerial control, it may nevertheless qualify as government for the purposes of s. 32 if it is **exercising governmental functions**.

## Godbout v Longueuil (City) [1997]: municipalities are subject to the Charter

**FACTS**:

The city of Longeuil adopted a resolution requiring all new permanent employees to reside within its boundaries. An employee was fired for moving after signing an agreement she would not.

The Supreme court held unanimously that the city’s residence requirement violated the Quebec Charter of Human Rights and Freedoms. Six justices found it unnecessary to consider Charter arguments but La Forest J also found it violated Section 7 of the Charter (life, liberty and security of person).

**ANALYSIS:**

LaForest J:

Municipalities are subject to Charter Review.

Entities may be subject to *Charter* scrutiny in respect of certain governmental *activities* they perform, even if they cannot be described as governmental *per se*

He justifies this principle because Charter includes “matters within the authority” of the particular legislative body that created them. Otherwise, the government could easily “*shirk*” their Charter obligations by conferring certain of their powers on other entities and having those entities carry out what are, in reality, governmental activities or policies.

This is still not a “public function” test. It has to be acting in **“governmental capacity”.**

Municipalities are “governmental entities” however:

1. Democratically elected by general public
2. Possess a general taxing power indistinguishable, for the purpose of Application analysis, from the taxing powers of Parliament or the Provinces
3. Municipalities **exist because of and exercise powers conferred on them by provincial legislation**.

If it is a governmental actor, then all of its actions are Charter reviewable, even if the same action when performed by a “

**RATIO:**

Municipalities are governmental entities that exercise governmental powers.

## Eldridge v. British Columbia (Attorney General) [1997]: for a private actor to be subject to Charter scrutiny its act can be governmental (i.e, in furtherance of a specific governmental program or policy, direct and precisely-defined connection between policy and act)

**FACTS:**

Three individuals who were born def and whose preferred means of communication was sign language sought a declaration that the failure to provide public funding for sign language interpreters for the deaf when they received medical services violated s. 15 of the Charter. According to the *Medical Services Act*, the power to decide whether a service was “medically required” and hence a “benefit” under the Act is delegated to the Medical Services Commission.

In the case of the *Hospital Insurance Act*, hospitals were given discretion to determine which services should be provided free of charge. The Commission and the hospitals did not make sign language interpretation available as an insured service.

Does the Charter apply?

**ANALYSIS:**

La Forest J:

When it is alleged that an action of one of a statutory entity, and not the legislation that regulates them, violates the Charter, it must be established that the entity, in performing that particular action, is part of “government” within the meaning of section 32 of the Charter.

A private entity may be subject to the Charter in respect of certain inherently government actions. There is not an *a priori* test for when an act is “governmental”.

It is sufficient to attract Charter scrutiny, however, when private **entities act in furtherance of a specific governmental program or policy**:

The private entity “**must be found to be implementing a specific governmental policy or program**.” This is still not the “public function” test.

Two important considerations:

1. If the entity is found to be governmental then all of its actions are subject to Charter scrutiny (*Godbout*)
2. If the entity is non-governmental but attract Charter scrutiny with respect to a particular activity that can be ascribed to the government [Governmental Act] then **only that act is subject to Charter review**, and not the other private acts of that entity. **The investigation is of the nature of quality of the activity itself**.

Hospitals are not governmental entities (Stoffman)

LaForest clarifies his statement in Stoffman that providing health services is just a public function and not enough to make the entity governmental. He meant “public function” generally.

In Stoffman, the mandatory retirement policy was a **“matter of internal hospital management”**.

The Hospital Insurance Act is designed to provide particular services to the public. Although the benefits of that service are delivered and administered through private institutions–hospitals– “it is the government, and not hospitals, that is responsible for defining both the content of the service to be delivered and the persons entitled to receive it**”**

He thinks that in providing medically necessary services, hospitals carry out a specific government objective. The Act provides for a delivery of a “comprehensive social program”.

Unlike *Stoffman*, there is a “**direct and precisely-defined connection”** between the specific government policy (medical services) and the hospital’s impugned conduct. The provision of these services is not simply a matter of internal hospital management; **it is an expression of government policy**.

RATIO:

For a private actor to be subject to Charter scrutiny its act can be governmental (i.e, in furtherance of a specific governmental program or policy, direct and precisely-defined connection between policy and act)

## Note: *Slaight, Blencoe* – Charter applies to non-governmental actors (tribunals, adjudicators) exercising coercive statutory powers

The Charter also applies to non-governmental actors exercising coercive statutory powers (i.e., administrative tribunals, labour adjudicators).

In *Slaight* it was an order of a labour adjudicator, in *Blencoe* it was the BC Human Rights Commission

Such a power cannot be used to infringe the Charter, unless the legislation expressly confers or necessarily implies this use.

It’s unclear how it applies to citizen’s arrest.

## Governmental Inaction: Government inaction may be the subject of Charter scrutiny in a variety of contexts since most Charter rights impose both positive and negative obligations

## Vriend v Alberta [1998]: Legislative omission is subject to Charter scrutiny and the Court can read in provision to remedy underinclusiveness.

**FACTS:**

Alberta’s Individual’s Rights Protection Act didn’t include “sexual orientation” in its protection from discrimination and Vriend, following termination on that ground from his employment, challenged its constitutionality.

The omission was deliberate.

The supreme court found an unjustifiable limit and read “sexual orientation” into the legislation

**ANALYSIS/RATIO:**

Cory J:

Deference to legislative choices must only be taken into account in section 1 and again in determining the appropriate remedy

Nothing in “all matters within the authority of the legislature of each province” to suggest a positive act is required to trigger Review.

Underinclusiveness is a valid ground for Charter review

Alternatively, deliberate decision to exclude can be read as an “act”.

It was deemed unnecessary to consider whether failure to act at all (as opposed to underinclusiveness) can be subject to Charter scrutiny. For some rights, like minority language rights, the government has to take positive actions to ensure those rights are respected.

## NOTES: Traditionally section 2 rights are negative and do not confer positive obligations on the Government. Freedom of association is an exceptions in *Dunmore v Ontario* (underinclusiveness only)

The court have typically characterized the fundamental freedoms in section 2 of the Charter as being purely negative in character, imposing no positive obligations on the state. A tradition view of freedom of expression is that it “**prohibits gags, but does not compel the distribution of megaphones**.” (*Haig v Canada*)

On this traditional view, a governmental inaction that is alleged to infringe civil liberties will not attract Charter scrutiny.

In *Dunmore v Ontario* the Court suggested that governments may have positive obligations to protect the freedom of association of vulnerable groups. At issue was labour legislation that excluded agricultural workers from the right to form a trade union and bargain collectively with their employers. The court found exclusion violated freedom of association.

## Application of the Charter to Court and the Common Law: Developments since Dolphin Delivery

In Dolphin Delivery, the Court stated that the courts were not part of government for the purposes of s. 32(1) of the Charter. This proposition makes little sense and has since been generally ignored. The Charter has several substantive rights directly related to procedural law (right to a fair trial within reasonable time).

Dolphin delivery also stands for the proposition that the Charter does not apply to the common law when relied upon by private litigants, nor to court orders issued at the conclusion of litigation between parties resolved on the basis of the common law. These aspects of the decision have been followed. Their significance appears to be dwindling as the courts become more comfortable with the notion, also emanating from *Dolphin* that the common law needs to be applied and developed in a manner consistent with Charter values.

## BCGEU v British Columbia (AG) [1988/ R *v* Swain [1991]: The Charter will apply to the common law when it is relied on in litigation involving a government party or in proceedings initiated for a public purpose. Where a common law is relied upon by the Crown in criminal proceedings, the Charter applies as state prosecution provides the requisite element of governmental action.

FACTS:

The Chief Justice of the Supreme Court of BC, on his own motion, issued a temporary injunction restraining government employees on lawful strike from picketing a courthouse, on the ground that this interference with access to the courts constituted a contempt of court.

The union challenged the injunction as a violation of their Charter rights of freedom of expression. Dickson CJ writing for a majority of the Court concluded that the Charter applied to the Chief Justice’s order:

ANALYSIS:

Dickson CJ:

He distinguished Dolphin where the court said the Charter will not apply to the common law when it is invoked with reference to a purely private dispute. Here, there is a public element. The Court is action on its own motion and not at the instance of any private party.

Ratio:

The Charter will apply to the common law where the common law is relied upon to fulfill a public purpose.

## Hill v Church of Scientology of Toronto [1995]: the Charter will apply to the common law in civil contexts only to the extent which the common law is inconsisten with Charter values. Section 1 is not appropriate, but Charter values framed in general terms should guide the modification of the common law.

**FACTS:**

The case arose as a libel action brought by Crown Attorney Casey Hill against the Church of Scientology and its lawyer, Morris Manning. The action was brought in response to a press conference held by the Church representatives and Manning to publicize criminal contempt proceedings, which they planned to commence against Hill. Their allegation was that Hill misled a judge of the Supreme Court of Ontario and breached orders sealing documents belonging to the Church of Scientology. These allegations were found to be untrue in the subsequent contempt proceedings.

They were held liable at trial and on appeal for libel and appealed to the Supreme Court where one of the issues was whether the common law of defamation was inconsistent with the Charter guarantee of freedom of expression. The Supreme Court upheld the libel finding.

**ANALYSIS/RATIO:**

Cory J:

Reaffirms that the common law must be interpreted in a manner which is consistent with Charter principles, but also that the common law when relied upon in a purely private matter is not subject to Charter scrutiny the same was a governmental action is.

The most that the private litigant can do is argue that the common law is inconsisten with Charter *values*.

He notes however, that the Charter will “apply” to the common law in the context of civil litigation only to the extent that the common law is found to be inconsistent with **Charter values**.

Courts must not make far-reaching changes to the common law since that should be left to the legislature.

When the common law is inconsistent with Charter values a traditional section 1 framework is not appropriate. Instead, Charter values, framed in general terms, should be weighed against the principles which underlie the common law. The Charter will then provide the guidelines for any modification to the common law which the court feels is necessary.

The onus to justify modifying the common law due to inconsistency with Charter values, after a balance of values (separation of powers vs supremacy of rights), is on the party alleging the inconsistency.

He found that there was no need to amend the common law.

**NOTES:**

In *R v Salituro* the Court considered the common law rule that prevents the spouse of an accused from testifying against him or her in criminal proceedings and found that it was inconsistent with the dignity of the witness and therefore had to be abrogated when spouses are irreconcilably separated to better reflect Charter values.

In *RWDSU v Pepsi-Cola* the Court applied the methodology set out in *Hill* to boldly revise the common law rules regarding secondary picketing. They changed the rules to treat secondary picketing as lawful unless it invokes harmful conduct that amounts to a tort or a crime. They distinguished *Dolphin Delivery* because in that case McIntyre J assumed that the proposed picketing would be tortuous, whereas in *Pepsi-Cola* the court refused to make any such presumption. Charter values required evidence of tortuous or criminal conduct before secondary picketing could be restrained. This decision takes a much more robust approach to protecting freedom of expression.

## CHAPTER XX – Freedom of Expression

## R v Keegstra [1990]: The purposes of freedom of expression are necessity to democracy, precondition of the search of truth, self-fulfillment

**FACTS:**

Hate speech case. Alberta teacher was fired for promoting anti-Semitic speech following Hate Speech Legislation and challenged the decision on the basis that it infringed his section 2(b) rights of freedom of expression.

McLachlin (dissent on other grounds) wrote on the purposes of freedom of expression

**ANALYSIS/RATIO:**

McLachlin J:

McLachin promotes freedom of expression as a means to valuable ends, but also partially as an end in itself for the purposes of self-realization.

One major rationale is that the freedom is “**instrumental in promoting the free flow of ideas essential to political democracy and the functioning of democratic institutions**”

McLachlin thinks this is a valid purpose but it is too narrow since it only applies to political speech.

Freedom of speech is also upheld as an **essential precondition of the search of truth**. Freedom of expression is seen as means of promoting a “marketplace of ideas” in which competing ideas vie for supremacy to the end of attaining truth.

This is also valid but too narrow because certain important opinions are incapable of being proven either true or false.

Freedom of expression is also an end in itself necessary for self-realization and so as an intrinsic value. This conception is too broad and amorphous to support a constitutional principle and doesn’t tell us why it later is should be upheld to be supreme law but is nonetheless useful to supplement the other means.

No need to adopt one justification of the freedom because of the broad language of 2(b). Different justifications might assume varying degrees of importance in different contexts.

RATIO:

The underlying purposes of freedom of expression are

1. political process rationale (democracy)
2. market place of ideas (pre-condition of truth)
3. self-fulfillment and self-realization (intrinsic good)

Margot thinks the **core** of freedom of expression is related to these three values and speech that has no connection to these three values is at the **periphery**

This is why freedom of expression is content-neutral

## The Scope and Limits of Freedom of Expression: content-neutral, non-violent form

In most Freedom of expression cases, the Court finds, with little difficulty, that the restricted “Expression” is protected under 2(b) and quickly moves to s. 1 where the real debate seems to take place.

*Dolphin Delivery* was the first significant freedom of expression case to come before the Supreme Court but was decided on application grounds. McIntyre J went on to consider the substantive Charter issues.

McIntyre says that there is always some element of expression in picketing. He rejects the conduct/speech distinction from America, which said picketing is not speech. She reaffirms that the bar is low and that picketing would only not be protected where it involved threats of violence or acts of violence or destruction of property. However he says that the injunction was justified as a reasonable limit in a free and democratic society because Dolphin Delivery were a third-party.

The Court in *UFCW Local 1518 v Kmart Canda Ltd [1999]* held that a tribunal order to stop leafleting as a form of secondary picketing was struct down as not a reasonable limit because leafleting is more valuable than picketing. It is less coercive and more discursive.

*Pepsi Cola* overturned Dolphin Delivery and said secondary picketing is generally lawful unless it involves tortuous or criminal conduct.

In *Ford* v Quebec the Court held that freedom of expression includes the freedom to express oneself in the language of one’s choice, and overturned Quebec legislation prohibiting English advertising on signs. Language is not just a medium of expression but colours its content and is an expression of cultural identity. In *Ford*, it also says that freedom of expression extends to commercial speech.

## Irwin Toy v Quebec (AG) [1989]: 2(b) protects any non-violent activity that conveys or attempts to convey a meaning (content+form), lays out three stage analytical framework for Section 2(b) claims 1) whether activity falls within the sphere of protection 2) whether the Act in purpose or effect (then tie to values) infringes a right, 3) Section 1 analysis [majority is very deferential]

**FACTS:**

This case involved a challenge to the provision of Quebec’s *Consumer Protection Act*, and the relevant regulations governing children’s advertising. It was a ban on advertising targeted at children under 13. Section 248 – banning the advertising, and Section 249 ­– identifying the factors to be considered in determining whether an advertisement is directed to children under 13.

It had some exceptions such as advertising in children’s magazines and announcements of children’s programs or shows.

Irwin Toy was charged for violation of the Statue for its broadcasts and then instituted an action for a declaration that the sections were *ultra vires* the province or inconsistent with the guarantee of freedom of expression of the Charter which had come into effect between intiation of action (originally under the Quebec human rights code) and the appeal. The Court of Appeal found that the act violated Irwin Toy’s section 2(b) rights and could not be saved under section 1. It was appealed to the Supreme Court.

**ANALYSIS**:

Dickson CJC, Lamer and Wilson JJ:

They lay out the general framework of a Section 2(b) claim

1. **Was the plaintiff’s activity within the Sphere of Conduct Protected by Freedom of Expression?**

Expression has both a content and a form:

**Content: activity is expressive if it attempts to convey meaning**. The meaning is its content. This is a broad definition as it is content-neutral, there is no restrictions on meanings that are protected and those that are not. If the conduct expresses meaning it has an expressive content and *prima facie* falls within the scope of the guarantee.

Certain day-to-day tasks, like parking a car, might not have expressive content. To bring such an activity within the protected sphere, the plaintiff would have to show that it was performed to convey a meaning.

**Form**: the content of expression can be conveyed through an infinite variety of forms of expression. **The only thing not protected is violence as a form of expression**.

Advertising conveys a meaning and is non violent. Therefore the court must move on to step two.

1. Was the Purpose or Effect of the Government Action to Restrict Freedom of Expression?

Purpose

The government’s **purpose** must be assessed from the **standpoint of the guarantee** in question…

If the government’s **purpose is to restrict the content** of expression by singling out particular meanings that are not to be conveyed (hate speech legislation) it necessarily limits the guarantee of free expression.

If the government’s **purpose is to restrict** **a form** of expression in order to control access by others to the meaning being conveyed or to control the ability of one conveying the meaning to do so, it also limits the guarantee.

On the other hand, if the government’s purpose is to restrict the **physical consequences of certain human activity**, **regardless of the meaning** being conveyed, its **purpose is not to control expression**.

Ex: rule prohibiting handing out pamplets is a restriction on a manner of expression and is “tied to content” even if that restriction purports to control litter, but a rule against litter is not a restriction on a manner of expression in purpose.

In determining whether the government’s purpose aims simply at harmful physical consequences, the question becomes: **does the mischief consist in the meaning of the activity or the purported influence that meaning has on the behaviour of other, or does it consist only in the direct physical result of the activity.**

Effect

If the government’s purpose was not to control or restrict attempts to convey a meaning, the Court must still decide whether the effect of the government action was to restrict the plaintiff’s free expression.

The burden is on the plaintiff to demonstrate that such an effect occurred and in order to demonstrate, a plaintiff must state her claim with reference to the principles and values underlying the freedom: the attainment of truth, participation in social and political decision-making, self-fulfillment and human flourishing.

She must show her activity promotes at least one of these principles. The plaintiff must at least identify the meaning being conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing.

The Act’s purpose was to restrict the expression of some content in the name of protecting children.

1. Whether the Limit on the Freedom of Expression Imposed by the Provisions is Justified Under Section 1 of the Canadian Charter

There is a *in limine* issue of “prescribed by law” which the Act is clearly not vague enough to maek an issue.

This involves the government first establishes the existence of a “sufficiently important” objective. Here, the government must prove that children under 13 are unable to make choices and distinctions respecting products advertised and whether this in turn justifies the restriction on advertising put into place. **The government isn’t allowed to plead a different objective than the one that motivated it to enact the legislation but it can plead new evidence that was not available at the time to prove that the objective remains pressing and substantial.** Here, factual evidence must be adduced.

A. Pressing and Substantial Objective

The Attorney General successfully proved that there is a pressing and substantial objective (the protection of a group which is particularly vulnerable to the techniques of seduction and manipulation abundant in advertising)

The court looked at some studies. The report provided a “sound basis” [reasonable basis] on which to conclude that television advertising directed at young children is per se manipulative.

There was some evidence to suggest that children younger than 7 are more vulnerable, and this lead the Court of Appeal to say that the legislation was not sufficiently tailored to the objective, but the Supreme Court gave **deference to the legislation** and reasoned that “the legislature is not obliged to confine itself solely to protecting the most clearly vulnerable group”, it only had to exercise a “reasonable judgment” in specifying the vulnerable group.

**The Court should not draw the line for the legislature**.

The Court reaffirms its stance on deference to the legislature when there is competing social science evidence, and where the issue is polycentric (balancing of many interests). The standard is only a balance of probabilities and so a reasonable basis is needed.

The Attorney General of Quebec has successfully pleaded the existence of a pressing and substantial objective.

* 1. Means proportional to the Ends (rational connection, minimal impairment, deleterious effects)

Rational connection test is easily found to have been satisfied. The nalaysis then moves to the issue of minimal impairment.

The majority decision gives the government deference for the same reasons above, and because of the fact of empirical uncertainty in where it drew the line for the purpose of minimal impairment. Where the government is a singular antagonist there should be less deference.

The standard is again “Reasonable basis” for concluding that it impaired freedom of expression as little as possible given the government’s pressing and substantial objective.

They look at the Report again and ruled content based restrictions would not be effective and a blanket ban on all advertisement was required.

Deleterious effects

There is no suggestion that the effects of the bans are so severe as to outweigh the government’s pressing and substantial objective. Irwin Toy can advertise to adults and can develop new marketing strategies.

McIntyre J and Beetz in dissent:

They agree that the Act infringes but disagree that it can be justified.

They think there is no reasonable basis on the evidence to infer the existence of a pressing and substantial problem/objective. No conclusive evidence that advertisement hurts kids.

They also say that the total prohibition of advertising aimed at children below an arbitrarily fixed age makes no attempt at the achievement of proportionality.

They in effect give way less deference to the government’s factual findings and place way more value in the freedom of expression rights.

**You can see the importance of contextualization in the dissent. Majority contextualizes activity as manipulative speech aimed at vulnerable group, dissent talks about expression as the lynchpin of democracy, Margot thinks this shows that dissent did not contextualize the activity**.

## Commercial Expression: Rocket v Royal College of Dental Surgeons [1990] and Prostitution Reference [1990]

In *Ford* the Supreme Court of Canada held that commercial expression fell within the scope of s. 2(b)

It attracted a lot of criticism from the left and qualified its statement by saying in subsequent judgments that the restriction of commercial speech might be more easily justified under section 1 than the restriction of other forms of expression because it is less directly connected to the values underlying our commitment to freedom of expression.

This was a distinction between core and marginal expression and plays a significant role in the Supreme Court’s approach to a variety of freedom of expression issues, including commercial advertising, hate speech and pornography. When the Court decided a certain form of expression is marginal it applies some or all of the section 1 steps more flexibly and less rigorously.

In Rocket, there was a challenge to a regulation enacted under the Ontario *Health Disciplines Act* imposing stringent restriction on advertising by dentists. Some dentists challenged the regulation on the ground that it infringed their freedom of expression rights, which the court agreed with but when it came to a section 1 justification they said that the fact that the speech was commercial, and not motivated by political discourse, truth or self-fulfillment, and only economic profit it might be easier to justify its restriction. Nevertheless she noted that there is a public interest served by such expression in enhancing consumer awareness. The Court held that the regulation could not be justified under s. 1. It was overbroad in banning all advertisement including non-harmful informational advertising.

In *Prostitution Reference* the majority of the Court held that Criminal Code provisions banning any communication in a public place for the purpose of engaging in prostitution could be upheld under s 1 as a proportionate response to the nuisance created by street solicitation. Iacobucci implied that because such communication was only economically motivated it lied at the periphery of freedom of expression. All female justices dissented reasoning that the legislation was overbroad, did not minimally impair and therefore should be tailored

## RJR Macodnald Inc. v Canada (Attorney General) [1995] – commercial speech is not less valuable. Deference and context under section 1 should not alleviate the government’s burden. The government has the burden of proving that it strived for minimum impairment. The Court has to consider the objective of the limitation not the act as a whole. Minimal impairment does not require perfection but only placement within a range of reasonable alternatives. In the event of empirical uncertainty arguments from reason or logic may be heard.

**FACTS:**

The *Tobacco Products Control Act* prohibited the advertising and promotion of tobacco products offered for sale in Canada and required manufacturers to add to packages an unattributed warning about the dangers of smoking. The Act stated that it was enacted to protect the health of Canadians in light of evidence of the harmful effects of tobacco use. Two tobacco companies challenged the Act on both federalism and Charter grounds.

During the litigation, the federal government refused to disclose policy documents revealing alternatives to a total ban on advertising that had been considered prior to the enactment of the legislation.

The majority of the Supreme Court of Canada struck down a general ban on tobacco advertising.

**ANALYSIS**

La Forest J dissent:

The government conceded that the prohibition on advertising constituted an infringement of freedom of expression under s. 2(b) of the Charter, although it did not include in this concession the requirement of the unattributed warning.

The Oakes test demands a rigorous standard of proof for a section 1 analysis, which the Court of Appeal judge adhered to but which the dissent said should be relaxed. **Oakes test is only a tool and is not a substitute for section 1**.

The evidentiary requirements will vary depending on context of both legislation and right.

The nature and scope of the health problems raised by tobacco consumption are highly relevant to the section 1 analysis. There is empirical uncertainty about the root causes of tobacco consumption and the effects of tobacco consumption so requiring the government to prove the existence of a pressing and substantial objective (or the rest of section 1) on a rigid standard would be unfair and place an impossible onus on Parliament. It would **virtually paralyze the government in the socio-economic sphere**. All the government has to establish is a “reasonable basis” for inferring the objective.

This is a polycentric issue so more deference should be given to the government. The harm of tobacco use and the profit motive underlying its promotion makes tobacco advertising as far from the core of freedom of expression values as prostitution, hate mongering and pornography. Where the form of expression falls further from the “centre core of the spirit” the Court will lessen the burden of proof on the government.

The pressing and substantial objective was conceded by the Tobacco companies.

The dissent would reverse the Appeal finding on proportionality. La Forest concludes that while a trial judge is in a privileged position with respect to adjudicative fact finding, it is owed **less deference for legislative or social fact finding**. This is because social or legislative facts are complex.

The causal connection between advertising and consumption is a hallmark example of legislative or social facts.

The dissent says only rational basis for believing in a rational connection between infringing provisions and the objective (much less than a civil standard) is required. La Forest relies on **a “common sense”** observation based on how much the tobacco companies spend on advertising that it works. The tobacco companies argue that their advertisement only serves to promote brand loyalty among already existing smokers and not expand the market. La Forest counters that sustaining consumption is enough to justify rational connection.

He also says he doesn’t have to rely on common sense because there was sufficient evidence adduced at trial to maintain a reasonable basis for a rational connection between advertising and consumption. He looks to internal tobacco marketing documents, expert reports, and international materials. In particular, the internal marketing documents introduced at trial strongly suggest that the tobacco companies perceive advertising to be a corner stone of their market strategy in both expansion and sustainment.

On minimal impairment the dissent also wants to reverse the Court of Appeal decision because of the context. The Court should not draw the line in balancing effectiveness of a provision with intrusion on rights in cases where there is empirical uncertainty and where many interests are at stake.

They also find that the deleterious effects do no outweigh the salutary benefits or the legislative objective.

About the unattributed health warnings, they say its no different from warnings on other hazardous products and so are not infringements because they cannot be seen as coming from the Tobacco companies. Even if they were they would be saved under Section 1.

McLachlin J majority

She says both the general band on advertising and the unattributed warnings are infringements.

Unattributed warnings are infringments, following *Slaight*, because 2(b) necessary entails the right to remain silent or the right to not say certain things.

She goes on to section 1 and says

1. context should not lower the evidentiary burden on the government. Context cannot “be carried to the extreme of treating a challenged law as a unique socioeconomic phenomenon”
2. deference should also not be used as an excuse to lower the evidentiary burden below a civil standard for a section 1 analysis

She notes importantly that the objective defended under the first step of section 1 analysis is the **objective of the infringing measure**, and should not be **overstated** because its importance may be exaggerated and the analysis compromised

The objective of the advertising ban must be to prevent people in Canada from being persuaded by advertising and promotion to use tobacco products.

The unattributed warning objective must be to discourage people who see the package from tobacco use.

She still finds that these narrower objectives meet the substantial and pressing standard.

Rational connection

Rational connection between infringement of rights and the benefit sought may be proved by scientific evidence but where legislation is targeted at changing human behaviour, the causal relationship may not be scientifically measurable.

Then, the Court can admit arguments based on reason, common sense or logic without insisting on a direct proof.

She defers to the trial judge’s findings that the “Direct or scientific” evidence was not persuasive.

She considers LaForest’s arguments from reason and common sense and finds that there is a rational connection between the objective/benefit and the infringement.

Minimal impairment

McLachlin says the legislature should be given some deference and does not have to prove that its chosen means was the least infringing alternative, just that it fell under a range of reasonable alternatives.

The impairment must be “minimal”, or infringe as little as reasonably possible to achieve the legislative objective.

McLachlin thinks the ban is overbroad and includes advertising which arguably produces benefits to the consumer like purely informational advertising, reminders of package appearance and of tar contents. She reasons that smoking is a legal activity but consumers would be deprived of an important means of learning about product availability to suit their preferences with an aim to reduce their risk to health.

The government gave no evidence that a partial ban would be less effective than a total ban. Total prohibitions will only be constitutionally acceptable under the minimal impairment stage of analysis where the government can show that only a full prohibition will enable it to achieve its objective.

She relies on a distinction between lifestyle advertising designed to increase consumption and informational or brand preference advertising.

Parliament does not have the right to determine unilaterally the limits of its intrusion on the rights and freedoms guaranteed by the Charter.

McLachlin infers negatively from the federal government refusing to provide evidence about alternatives it considered.

She also addresses La Forest J’s arguments that profit-driven expression is less valuable and says that motivation to profit is irrelevant to the determination of whether the government has established that the law is reasonable or justified.

The government also did not show that an unattributed warning would be more effective than an attributed warning.

Iacobucci wrote a concurring judgment saying context should inform a section 1 analysis and that the lynch-pin of the Act’s unconstitutionality was that the amount legislative tailoring required to sustain minimal impairment was not very significant but the government did not even try.

**RATIO:**

Commercial speech is not less valuable

Deference to the legislature should be given (LaForest thinks this means that the Oakes test should be applied more flexibly and that the standard of proof of section 1 should be lowered) but not to the extent of removing the burden of section 1 (McLachlin).

There is an **important relationship between** objective (pressing and substantial) and proportionality, the broader the objective the more options that come up as “reasonable alternatives” in minimal impairment and “rational connection” stage.

## Canada (Attorney General v JTI-Macdonald Corp [2007]: separate section 1 test for each limit, Parliament should be given deference for rational connection and minimal impairment for complex issues but still has to prove each element of section 1 to a civil standard, parliament does not have to implement less effective alternatives but must show it is not overbroad or vague.

**FACTS:**

In 1997, the federal government passed new legislation regulating tobacco advertising and labeling. The new act prohibits most tobacco advertising but creates an exception for “information advertising” and “brand-preference advertising” contained in publications (primarily magazine) directed at an adult readership. All “lifestyle advertising” is banned. The legislations also requires the placement of attributed health warnings. The Supreme Court unanimously upheld the legislation.

**ANALYSIS:**

McLachlin for a unanimous court:

The new legislation represents a “genuine attempt” by Parliament to craft controls on advertising and promotion that would meet its objectives as well as the concerns expressed by the majority in *RJR*.

They talk about the international context has changed because governments are enacting heavier bans. Furthermore, there was more supporting evidence about the harms of tobacco advertising

None of these developments remove the burden on the Crown to show that limitations on free expression imposed are justified and same legal template in *Oakes* and *RJR* remains applicable.

They go provision by provision to determine the scope of the act.

The court engages in an overview of section 1 emphasizing **the appropriateness of a certain measure of deference at both the rational connection and minimal impairment stages when the Parliament is tackling a complex social problem, citing Edward Books and Irwin Toy**.

The court also notes the minimal impairment analysis must take into consideration the possibility of overbreadth being resolved by statutory interpretation.

It also follows McLachlin’s suggestion and determines the objective of each part of the Act and each limit, as opposed to the act as a whole.

It analyzes each limit under a separate section 1 analysis. A separate objective is identified for false advertising, advertising targeted at youth and lifestyle advertising, and attributed warnings.

Under attributed warnings it finds that the Court takes a broad view of “expressive activity” (includes silence in certain circumstances) and so attributed warnings (compelled speech) is enough to constitute impairment.

The test is whether the law deprives one of the ability to speak one’s mind or associates someone with a message they don’t agree with (*Lavigne*)

However, it is justified under section 1, particularly minimal impairment since there is evidence that bigger warnings may have a greater effect. Parliament is not required to implement less effective alternatives.

**Overbreadth and vagueness is discussed under minimal impairment. Margot thinks this is important. Essentially the government has to show that its legislation does not catch more than it needs to and that it is sufficiently clear as to not be vauge. Factors: defences, definitions, distinctions. You have to target precisely the prohibited activity. How tailored is it? How fitted?**

## R v Guignard [2002]: counter-advertising is protected and important

**FACTS:**

In many of its commercial speech cases, the SCC has identified the informational interests of listeners as one of the reasons for protecting such expression. In this case, the Court struck down a bylaw banning “counteradvertising” by consumers.

Guignard was charged for violating a bylaw against advertisement by erecting a sign expressing his dissatisfaction with the delay of an insurance claim for a loss from his insurance provider.

**ANALYSIS**

LeBel J

Counter-advertising is valuable because it is derived from political opinion not commercial speech.

Most people can’t access media publication so they have to distribute leaflets, or post on the internet to express their discontent.

The bylaw infringes the rights of a vulnerable group.

## R v Keegstra [1990]: Hate speech is protected but less valuable and limited justifiably. The Court will consider the conflict of a form of expression with other Charter values under section 1.

FACTS:

Mr. James Keegstra was a high school teacher in Eckville Alberta who was charged with an offence under the Criminal Code for unlawfully promoting hatred against an identifiable group by communicating anti-Semitic statements to his students.

He challenged it on Charter grounds for unjustifiably limiting his freedom of expression. He was successful at the Court of Appeal in Alberta and it was appealed to the SCC

ANALYSIS:

Dickson CJC

The court traces the history of propaganda crimes in Canada and a report from the Special Committee on Hate Propaganda.

The dominant theme is the need to prevent the dissemination of hate propaganda without unduly infringing the freedom of expression.

Following the Irwin Toy test Dickson finds expression of meaning in hate speech and infringement (purpose based legislation) so hate speech falls under section 2(b)

Hate speech is not a form of violence that would fall within the *Irwin Toy* exception, which he interprets to exempt only forms of physical violence. Threats of violence do not fall within the exemption.

The consideration of other Charter values should fall under section 1

Section 1 analysis

Dickson distinguishes Canadian constitution from American because ours has an express limiting provision, so the first amendment jurisprudence is of diminished relevance

In stage one of the Oakes test: the objective stage

He infers from the evidence presented two forms of harm relating from hate speech

1. there is harm done to members of a target group
2. influence upon society at large, active dissemination can attract individuals to its cause

Dickson considers international human rights legislation for adding basis to the objective

Most importantly, Canada’s Charter rights of equality and multiculturalism underlie the great importance of Parliament’s objective which he describes as the need to prevent harm in the form of hate against identifiable groups

Under Stage two Dickson says that the value of the particular expression should be analyzed in context

Hate speech is not closely linked to the rationale underlying 2b (3 values)

Hate speech does not add to the market place of ideas leading to truth because there is a very little chance that statements intended to promote hatred are true or that their vision of society will lead to a better world.

Intolerance and prejudice go against self-fulfillment and human flourishing

While prohibition of hate speech takes certain individuals out of democratic discourse, hate speech itself is not consistent with democracy (equality) and so the society it promotes is inherently undemocratic

Rational connection is met because there is a rational basis to conclude it stops the spread of racism.

McLachlin’s arguments that it may be unreasonable since it earns racists media attention, the public might view censorship as suspicious and the fact that Nazis had hate propoganda laws which were obviously not effective were found as not convincing

Media attention gives notice of severe reprobation of engaging in hate speech

But defamation and pornography laws do not glorify defamation or pornography

Hate propaganda laws should be seen as the democratic will to purge society of racism, conditions in pre-WW2 Germany and modern Canada are obviously different

Under minimal impairment Dickson addresses the main argument that the legislation has a real possibility of punishing expression other than hate speech and might be overbroad. That is, merely unpopular or unconventional communications might be prohibited.

He argues that the provisions are tailored because they do not apply to private speech, and that the mens rea requirement that the promotion of hatred be “willful” excludes merely unpopular and unconventional speech.

He points to defences to further narrow the scope.

It may be that a number of courses of action are available in the furtherance of a pressing and substantial objective, each imposing a varying degree of restriction upon a right or freedom. In such circumstances, a government may legitimately employ a more restrictive measure, either alone or as part of a larger programme of action, if that measure is not redundant, and furthers the objective in way the alternative responses could not, and is in all other respects proportionate to a valid s. 1 aim.

Dissent led by McLachlin finds the legislation infrining and unjustified because of no rational connection, because it does not minimally impair and because no obvious rational connection then the deleterious effects of criminalizing people outweigh the objective/salutary effects. She notes the chilling effects of an overtly broad prohibition on speech causing people to not say anything out of fear of criminal reprehension.

## Access to Public Property: 2(b) includes the right to communicate on state-owned property

The courts have accepted that freedom of expression must included the right to communicate on state-owned property–that in the absence of any right to communicate on state-owned property, many individuals would be significantly limited in their ability to communicate with others.

But this doesn’t seem to fit with the two-step model of freedom of expression adjudication.

 State-owned property described a variety of locations though. A governmental office might be less critical to freedom of expression than a public park.

## Montreal (City) v 2952-1366 Quebec Inc (2005): not all places are protected under 2(b), the ultimate question is whether free expression in that place (or manner) would undermine the values underlying the guarantee, two important factors are historical/actual function of the place and whether aspects of the place suggest that expression within it would undermine the values underlying free expression, some imprecision is inevitable.

**FACTS:**

This appeal concerns the power of the city of Montreal to prohibit noise produced in the street by a loudspeaker located in the entrance of an establishment. Two arguments are raised, one based on limits on the power to regulate and the other on the Charter Section 2(b) grounds.

The bylaw limiting noise is validly enacted and although it limits the freedom of expression guaranteed by s. 2(b) the limit is reasonable and can be demonstrably justified within the meaning of Section 1

The respondent operates a strip club and put a loudspeaker at its entrance projected into the street to amplify the noise inside and attract customers in violation of the city bylaw.

**ANALYSIS**

McLachlin CJC:

Does the noise have an expressive content? The answer is yes. The loudspeaker sent a message into the street about the show going on inside the club. Section 2(b) is content-neutral.

Expressive activity may fall outside the scope of section 2(b) **protection because of how or where it is delivered.** The method or location of the expression may not be protected. For instance, violent expression is not protected.

Expression on private property will fall outside the scope of protection unless it is infringed by a government act

Public property, however, by definition implicates the state. Two countervailing argument, both powerful, are pitted against each other where the issue is expression on public property.

One argument says the crucial distinction is between who owns the property, and since the government owns the public property any action restricting rights on it will be governmental action and attract Charter scrutiny.

The other argument, is that the crucial distinction is between public use of property and private use of property. Regardless of whether the government owns the property and controls it, some government property is essentially private in use (like governmental offices). It cannot be the intention of the framers of the Charter to allow freedom of expression in these essentially private places and leave it to the government to justify infringement.

In *Committee for the Commonwealth of Canada* six of the seven judges endorsed the second general approach although they differed on what the test in determining the nature of a particular government property is. This second approach was followed in *Ramsden v Peterborough* but it was held that emission of noise onto a public street was protected.

This method of expression is not **repugnant to the primary function of the public street** on the test Lamer CJ proposes in *Committee*.

McLachlin’s test was whether the method and location of the expression also arguably serve the values that underlie the guarantee of free expression.

Finally Hureux-Dube thinks the public/private use distinction is better addressed under section 1 sticking to the broad requirement of expressive content.

The Court endorses McLachlin’s test: Expressive activity should be excluded from the scope of 2(b) only if its method or location clearly undermines the values that underlie the guarantee.

It proposes the following test for determining whether 2(b) applies to a particular public-property [onus on claimant[:

The **basic question with respect to expression on government-owned property is whether the place is a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s. 2(b) is intended to serve, namely 1) democratic discourse, 2) truth finding and 3) self-fulfillment.**

The following questions should be considered:

1. historical or actual function of the place
2. whether other aspects of the place suggest that expression within it would undermine the values underlying free expression

Historical function of a place for public discourse is an indicator that expression in that place is consistent with the purposes of s. 2(b)

Actual function as a private or public place is also important.

Other factors may be relevant

Some imprecision is inevitable.

They find the existence of a pressing and substantial objective (preventing noise pollution) and that the means was proportionate to it.