**Class 1**

Criminal law Jurisdiction

* federal govn’t has jurisdiction over criminal law, including the procedure in criminal matters
* Very difficult to distinguish legitimate piece of criminal jurisdiction and legitimate piece of provincial legislation to do with local conditions.
* Formal considerations are key in determining when federal legislation has gone into provincial jurisdiction.

Fire Arms Reference

* Criminal law tends to be laws of prohibition. Laws that come out of s.92 (13) and s.92(16) are more often about prevention.
* Also, federal laws tend to be penal, while provincial laws tend to be regulatory. It’s about setting up a penal punishment versus setting up a regulatory scheme.
* Criminal law is also often about public considerations, while provincial is about private considerations.
* If there’s a significant punishment (like Morgentaler) it will look more like criminal punishment than if it’s something more like just a license being denied, which looks more regulatory

Margarine Reference

* Form: must be a law that sets out a prohibition that is backed up by a penalty.
* It must have a criminal purpose
* Often, a court will allow some regulatory elements if there’s a very strong criminal purpose
* Court says that a criminal law is a prohibition with a sanction attached directed against some sort of criminal purpose, which they describe as evil, injurious, or undesirable effect on society.
* Criminal purposes: public peace, order, security, health, and morality. Court says this is not an exhaustive list, not the exclusive ends of a criminal purpose. Possibilities for expansion.
* Court says this is not a criminal purpose, it’s not meant to protect public in general from evils of margarine, but rather protects a particular interest group, dairy farmers. This is a private interest, not the kind of public interest that qualifies as a criminal purpose.
* This case shows us the three requirements of “criminal purpose, prohibition, and backed by penalty” which are the purpose and form requirements for criminal law jurisdiction.
* It also gives info about what is a criminal purpose: to do with large, public matters and that significant private focus may disqualify it from being criminal purpose.

RJR

* confirms there is a broad scope for the criminal law power.
* Supreme Court says the criminal law jurisdiction is plenary (full, whole, complete), but that it is constrained by the requirement that use of that jurisdiction not be colourably done.
* Real distinction between law that is colourable, manipulating prohibition and penalty, is that it will not have a valid criminal purpose, its purpose is such that federal govn’t can’t do it.
* Tobacco Controls Act. Statute prohibits all advertisement by broadcast or publication of tobacco products offered for sale in Canada, or sponsorships. Tobacco said this law went into provincial jurisdiction, not federal law to prohibit advertising, also claimed it violated charter.
* Is it really the advertising that the govn’t cares about? No, it’s the tobacco-smoking. The advertising in itself is not the evil. But tobacco is legal.
* Also, the exemptions included are a problem: if it’s really criminal, shouldn’t nobody be able to do it? Makes it look regulatory in nature instead of strictly prohibitory.
* So, no valid criminal purpose (fails purpose) and problems with form (has regulatory nature due to exemptions)
* Says the matter of the law is that it’s directed at the detrimental health effects caused by tobacco consumption, a concern of public health, and this kind of matter is a valid criminal purpose; it’s being injurious to health makes it valid criminal law.
* has a prohibition backed by penalty so ultimately has the requisite form to fit in federal criminal
* you don’t need to have an affinity or be similar to a traditional criminal law concern. It is not “frozen in time,” the govn’t can create new crimes, not stuck with the jurisdiction that only allows it do what it has always done. Non-traditional is ok
* you can criminalize an activity that is ancillary to the evil. You can go circuitously.

**Class 2**

Colourability

* shaped and drafted to look like something that is in enacting govn’t’s jurisdiction, but has a hidden purpose that is in the other government’s jurisdiction.
* Colourability is a key consideration due to the broad scope of the criminal law jurisdiction.
* The check on the broad jurisdiction is that it must have a criminal law purpose. If a law has a strongly obvious criminal purpose however, it will be allowed to have a lot of irregularities in its form, can look more regulatory, for instance

RJR

* there were exemptions in the act, so more regulatory than criminal? Court rejects this argument by saying that it’s been a long established principle that criminal law can have exemptions for certain conduct. The creation of a broad, status-based exemption does not detract from the criminal nature of the legislation. Legislators use exemptions to delineate the logical and practical limits of a crime in the criminal jurisdiction.
* Dissenting opinion of Major J.: He says a criminal purpose is an illusive concept but must target that is sufficiently grave or serious, conduct that interferes with the proper functioning of society or that undermines safety and security of society. Identification of what legitimately counts as a crime is not frozen in time, but there must in this new area be an affinity with traditional things that fit within the idea of criminal purpose.
* He also says form is problematic, the fact there are exemptions indicates that it’s not about something that is sufficiently serious.

More Indications that Something isn’t Criminal Power

* Regulatory law: powers of licensing, preventative measures, inspections, these are things that will lead to something being declared not criminal jurisdiction.
* Where there is a clear criminal purpose, they’re allowed some regulatory provisions, some slack in formal requirements, not just prohibition backed by penal sanctions. Like in RJR where (for majority) the exemptions didn’t make the legislation invalid.
* Civil remedies in a federal statute will raise some issues about whether or not this is adequately of the right form, but again, the addition of civil law remedies has nonetheless been upheld

Hydroelectric

* three requirements: criminal purpose, prohibition, backed by penalty
* Environmental protection is criminal purpose, but this legislation is more regulation than prohibition. They say this is about protection of environment, not health, though this can still be a valid criminal purpose.
* Distinction between prohibition and regulation is more art than science. Criminal law can mix into its criminal law form a fair amount of regulatory details, some regulatory elements like exemptions

Hydroelectric (how to determine if a mixed form is okay?)

1. It must not be fundamentally regulatory.
2. The more elaborate the regulatory scheme, the more likely it is that it’s regulatory and not criminal.
3. The exemption relates to the prohibitions
4. Criminal law typically contains a prohibition that is self-applied, not one that needs to make a discretionary opinion about it, doesn’t require an agency to intervene prior to the prohibition. Offence right away, not when an agency intervenes and deems there has been one.
5. If there are equivalency provisions, that raises the presumption that it is improperly regulatory, equivalency provisions is when exempts people from coverage of the law due to equivalent provisional statute in play.
6. Looks more like control than prohibition of a substance
7. If it’s a really broad coverage, then it looks really like it’s an impingement on provincial jurisdiction.
* Pollution prevention is a fundamental value and that purpose lies legitimately in both federal and provincial jurisdiction but that here you have the requisite form as well to the legislation, so it doesn’t encroach on provincial jurisdictionProvisions of toxic substances: has to deal with that the legislation is just way too broad.
* n. While it may be broad, it also has very precise target: specific number of toxic substances and precise targeting of those substances. It’s enforced by penal sanctions, has valid criminal substance, and precisely enough targeted prohibition.
* it gives an assertion of national values, the Canadian nation. This is a common argument in favour of federal regulation
* Beatty is on the other side, worried about prov will be squeezed out of the field

Firearms Reference

* Can have terrible legislation that is still valid, as long as it’s enacted in the correct jurisdiction.
* Deemed to be about public safety, the regulatory aspects of the legislation are merely secondary. it has valid criminal law purpose (public safety), it’s a prohibition (possession without registration) backed up by penalty. It has the three criteria.
* Doesn’t matter if it’s complex legislation, that doesn’t speak against it’s being in crim jurisdiction
* No administrative body here in finding the offences, as there was in Hydro.
* Any discretion that is assigned to officials is restricted.
* Court said the purpose underlining this law is different than the purposes of other registration schemes, here it’s in relation to something of a dangerous nature
* , it’s about whether intrusion into prov is incidental or disruptive.

**Class 3**

Assisted Reproduction case

* Determining the purpose is part of the “characterization,” determining the matter, the first part of a pith and substance analysis. Characterization of the legislation is determining its dominant character. Here it’s purpose is not dominantly criminal.
* form is problematic, it’s regulatory in nature, not just prohibition and penalty. This is still a consideration of characterization, determining the matter.
* Concern that criminal law jurisdiction can be used as a Trojan horse into the provincial jurisdiction, idea that it’s this covert occupation of provincial jurisdiction by stealth.
* Failed because it wasn’t so much about prohibiting activity but rather about imposing standards.
* While exceptions are tolerable, this legislation isn’t about exceptions, but about setting up a framework for defining what are permitted activities

**Class 4**

Provincial Jurisdiction Over Morality and Public Order

* Counterpoint to federal jurisdiction over criminal law. Ends up with a lot of overlap. Provincial jurisdiction also involves penalties.
* Subsidiarity, some law making is better done closer to the conditions to which those laws pertain. The standard moral concerns, for instance, can be more in touch.
* provinces have jurisdiction over administration of justice and fed has delegated to province considerable power over prosecution of offences so while fed defines the offences in the Code the province defines when prosecutions to place and administrating judgments.
* Case law has allowed for judicially created concurrency. Areas formally and textually granted to both levels of government. Considerable concurrency in matters of morality and public order;
* constitution also gives provincial governments power to enact penalties to support laws passed in relation to other areas of its jurisdiction. Sets up an “ancillary power.” An ancillary power means that any time the prov govn’t is acting under a substantive head of power in s. 92, it’s doing something in relation to those, legitimate, it can pass penalties to enforce legislation under other heads of power.
* It’s a jurisdiction to attach penalties to things that you have jurisdiction for
* Problem is when the penalty is punishing because an activity is injurious to the public. This is part of how we define the fed jurisdiction of criminal law.
* These activities are also oftenregulated in the Canadian criminal code, so you have immediate suspicion that they’re trenching on federal Criminal jurisdiction as provincially enacted laws.

McNeil

* Public interest standing – McNeil is just member of the public wants to see the movie.
* SCC notes that this law does stuff that is quite similar to regulation of obscenity in the Criminal Code. Suspicion is raised
* prior case law made it clear that federal criminal law covers matters of criminal morality but the regulation of local business and trades lies in provincial jurisdiction. These are the heads of power in competition. Majority of court finds it lies in provincial jurisdiction
* Reasons: It was for the regulation of a business, to do with private theatre premises, not to do with the punishment of some public crime.
* It was also the prevention of an activity, not the attachment of a penalization of all instances of the activity. It is prevention and NOT prohibition, it’s not penalty attached after the fact
* Finally, it was a private business being regulated and not public morality.
* If the Criminal Code that makes it an offence to show obscene films is valid and if the provincial law that lets its board ban films for obscenity is valid, then this could be an area of double aspect. Provincial aspect is regulated as prior restraint with respect to business and private property. Federal aspect is instance of public morality concern through criminal law.
* Provincial laws punishing on activities related to moral activities, that to have preventative and private premises aspects can keep it valid provincial law.

Dupont

* Court finds what’s critical to this legislation that allows it to be upheld is its preventative nature. The fact that it extends to public property the streets, didn’t matter.
* Provincial laws can work to prevent the situations that could aid or lead to the commission of crimes, prevent actions that will be of a criminal nature.
* In dissent, Laskin says this is like a mini-Criminal Code, but it’s a departure from Code principle that police are meant to enforce law against violaters, not against innocents.
* Majority also finds that the fact that this legislation is temporary makes it more likely to be provincial. Also the fact that it covers all gatherings, not just those that are rowdy or whatever
* Majority thinks the fact that the city is acting proactively to stop, as opposed to go in after the parade happened and ticketing, makes it provincial/preventative

Westendorp

* Federal criminal law provisions require that solicitation be pressing and persistent to count as an offence under the Code. In their frustration,the cities passed their own by-laws, saying they were regulating the activity not for criminal purpose of moral regulation, but rather for the prov purpose of preserving the order of their streets.
* SCC finds the by-law to be invalid. Says the sections that set out this offence of solicitation for the purposes of prostitution doesn’t fit with the rest of the statute and can be severed
* You don’t offend the provision if you just stand around on the street, but you do if you do so to sell sex. So it’s not really about use or occupation of the street.
* The matter is about control and punishment of prostitution, that is its dominant characteristic, and that lies in the scope of the federal jurisdiction of criminal law.
* Provincial laws tend to be about property, particularly private property, but the matter here has nothing to do with property.
* Criminal law can’t be completely consumed as just an area of double aspect.
* Laskin reads down the Dupont decision; he says the cases cannot be compared. Dupont is read down to only apply to temporary assemblies, not disruptive behaviour on the streets generally
* the provisions dealing with solicitation are severable. In fact, that’s one of the reasons they were found ultra vires: they were so unlike the rest of the provisions in the statute.

**Class 5**

Rio Hotel

* Dickson accepts the liquor license condition of no nude dancing was related to the sale and marketing of liquor in the province and not the matter of public morality. it’s dominant characteristic is about the sale and marketing of liquor. These are forms of entertainment used as marketing tools to boost sales of alcohol.
* Also, there’s a regulatory scheme in place, the penalty is suspension or cancelation of license, no penal consequences: character of the punishment does not look criminal but regulatory
* Historically, liquor regulation has been done provincially, so historical pattern to allow some regulation of alcohol sale for the province.
* Double aspect: Laws which regulate the matter from one aspect can co-exist with law that regulates from another aspect. Prov is about regulation of sale and conditions of sales of liquor while federal law is about public morality. It’s possible to comply with both simply by not having nude dancing. No paramountcy.

Chatterjee

* Binney - valid exercises of the federl criminal law will adversely affect numerous provincial interests; basically saying there can be incidental effects by valid criminal law.
* Commissions of Inquiry: provinces get broad powers of investigation, with intent that they get broad inquiry into not a specific crime but broad, ongoing issues.Were it to focus on a specific instance/individual, it may lie outside provincial jurisdiction (Starr)
* Important piece of federal criminal law is its being a source of protection for individual rights. Public inquiries, broadly shaped by province, don’t impair individual rights, but when they start focusing on individual offences and persons, then they start to interfere with the substantive crimes set down by federal government and therefore bypassing the protections the individual gets under Criminal Code, therefore ultra vires the province
* dealing with a legitimate provincial purpose, not just preservation of public order and morality.

General Theory of Pogg

* the POGG words, that grant of power in pre-amble in s.91 is the entire grant to the fed. Anything not specifically granted to the provinces, is by virtue of that pre-amble, granted to the federal government. The enumerated powers of s.91 are just illustrations or elaborations of the kinds of powers that fall within federal power.

Russell (1882)

* challenge to federal temperance legislation. Hard for fed to justify, long considered prov that can regulate sale and consumption of alcohol
* fed goes to s.92 and saying that if it isn’t listed here, it must be in the general grant of POGG. Court accepts this without saying why
* fact that it couldn’t find it in s.92 was enough to say that it was in fed jurisdiction.
* Russell has never been overruled and is used to justify general theory. However, other approaches to s.91 have overtaken Russell. General theory is now discredited and residual theory has taken its place.

Residual Theory

* idea that POGG is a separate and additional head of power in s.91 that covers those things that can be found neither in s.92 nor in the rest of s. 91. Anything left out of all the other enumerated heads as a residual that’s unaccounted for accrues to fed’s jurisdiction by virtue of these s.91 opening words.
* Things that would otherwise be found as property and civil rights are actually retained by fed. s.92 the grant over property and civil rights is potentially very broad. Concern is that this category not become too large and matters the framers distinctively wanted to be federal were specifically enumerated in s.91 so would not fall in this head of power. Having enumerated heads serves purpose to ensure things don’t get folded into prov jurisdiction.
* S.91 pre-amble ensures that nothing that doesn’t fall into either list will fall within some level of government.

Gap branch of POGG

* Drafting oversights, things that the drafters had not thought to put in the enumerated lists, but clearly had they thought of it, they would have wanted to have it covered.
* Principle of exhaustiveness: cannot be a possible area of legislation in neither jurisdiction.
* Gap branch just says that if there’s something that was a drafting oversight by the drafters, it’s going to go into the gap branch of POGG and thus fall into the federal jurisdiction.
* It’s a completion tool for what the drafters logically wanted to do, uncontroversially.
* It cannot be used for things that are historically new (things like aviation or TV broadcasts)

**Class 6**

Labour Conventions case

* example of extensive economic social legislation struck down as ultra vires the fed.
* Fed can’t extend its domestic law making jurisdiction via signing on to an international treaty.
* The dominion cannot, merely by making promises to foreign countries, clothe itself with legislative authority inconsistent with the constitution that gave its birth.
* Fed tried to argue legislation involved matters of such great national and general importance dimensions as to affect the body politic. A matter of *national concern*. First enunciation of the national concerns branch
* Fed also tries to use emergency argument, saying that it is responding to economic emergency. JCPC says emergencies must be abnormal circumstances, exceptional conditions, extraordinary peril to the nation of Canada.
* Emergency is a temporary gain in jurisdiction while national concern doctrine is a permanent
* On text of constitution, clear drafters intended a strong federal national govn’t, where national govn’t could deal effectively with range of national issues history threw at it and JCPC’s interpretation of opening words of s.91 were legally wrong on a textual reading
* After WWII you see a slight shift here, you don’t see the idea of what constitutes an emergency being lightened up , but you do see there starts to be articulation of a national concerns branch

Canadian Temperance Federation

* Challengers here argued that Russell is wrong, there’s no emergency. And even if it could be justified by emergency of alcoholism, that emergency is over, no need for that emergency intervention.
* Recognition in this case that POGG includes power not only to legislate in case of emergency, but nascent idea of some concern that affects the nation as a whole.

Anti-Inflation

* surprise when court comes down that the legislation is justified under emergency. You get in this reference case the first clear articulation of the equal importance, but separateness, of the emergency branch and the national concerns branch under POGG
* Scope of the act: very extensive, but temporary, set to expire in 4 years, its purpose was stated to be to “control runaway inflation.”
* This case was also a landmark use of extrinsic evidence, which was not standard practice then
* This legislation deals with a lot of matters that normally lie in prov jurisdiction. It’s suspicious
* it’s going to let gov do something that, but for POGG, would only be able to be done by prov.

**Class 7**

 Anti-Inflation

* Laskin decides in favour of govn’t for emergency branch; he says he’s following the standard dictates of constitutional adjudication, in which you decide on the narrower ground rather than the broader. Emergency branch narrower than the national concerns branch because the power granted by the emergency branch is temporary
* It touches on matters already in fed jurisdiction in s.91, but it extends the embrace to include other matters that would not otherwise be within fed jurisdiction and would therefore otherwise be in prov jurisdiction.

Anti-Inflation (what does and doesn’t define Emergency)

* Delayed response does not disentitle from being considered emergency legislation.
* Provincial arguments can opt in or opt out (would think it’d be imperative, not optional, if it’s an emergency) doesn’t matter. Won’t disentitle it from being emergency legislation
* Doesn’t matter if it looks like the legislation doesn’t effectively deal with the problem.
* Was it a rational response on part of parliament. Reasonable politician standard. Rational basis for legislative decision (this matters in determining if it’s emergency). It must be a reasonable decision by legislators to be able to fall under emergency branch
* You don’t have to actually signal in the bill that your dealing with an emergency. Serious national concern is enough.
* It must be temporary
* It’s okay if the legislation only covers part of what the emergency is about
* It’s got to be something with an emergency/crisis nature. Laskin does not say in his judgment that there has to be a particular kind of crisis. Calmer sense of emergency – ok that it’s crisis legislation, not the previous serious emergencies considered like war, famine, pestilence. He also says that an economic crisis is sufficient.

Beetz’s dissent

* dissenting against majority to so easily, such a low threshold, to find that the requirements for emergency power are met
* national concerns branch is separate, distinct, with different criteria from emergency
* Think of emergency branch’s impact on division of powers and potentially unlimited excursion into prov, but it’s temporary. But it’s a takeover of prov jurisdiction.
* National concern is a permanent realignment, no requirement that it be temporary. It’s a structured, delineated takeover, not unlimited power grab like Emergency
* Would’ve been hard to justify anti-inflation under national concern, as it wasn’t limited enough, stepped into too many provincial areas for it to be permanent.
* arguest that the court cannot find an emergency when the govn’t doesn’t bother itself to declare one. Comes down to the language the legislature uses , must use something to capture it as an emergency, not just a concern.
* All of the things Laskin disregards, Beetz thinks are damning

Richie’s concurring opinion

* He agrees with Laskin that an economic crisis is okay
* the standard that must be met: instead of demanding that the govn’t show rational proof that there’s an emergency, Richie says that to defeat the legislation, its opponents must show that there is no emergency. Reverses onus onto the opponents

Emergencies Act (passed after Anti-Inflation Reference)

* defines a national emergency as an “urgent and critical situation of a temporary nature that endangers life, health, and safety and cannot be effectively dealt with under any other law.”
* Says federal cabinet can declare emergency under this statute, but that declaration must concisely describe the emergency and that must be confirmed by parliament and pre-figured by consultation with prov govn’ts, there must be agreement that it’s not something the provs can deal with and also that the legislation is of a temporary nature.
* The requirement is that any declaration of an emergency specifically state and justify in it that there is an emergency, with consultation with provinces due to the incursion i
* this is a legislative response, doesn’t change judicial interpretation of the scope of the emergency branch. Parliament doesn’t get to reinterpret SCC interpretation of its constitutional jurisdiction. You can’t change what SCC said by passing a statute in fed parliament.

National Concern Branch (Anti-Inflation)

* For it to be national concern branch, Beetz says the matter must be NEW, like aeronautics
* matters that fall within national concerns branch have a degree of unity that make them distinct from other provincial matters, and they are indivisible. Identity that make it distinct from prov and sufficient consistency to retain the bounds of form.
* the new matter must not swallow up all provincial jurisdiction, not embrace and smother prov powers and destroy the equilibrium of the constitution.

**Class 8**

Crown v Zellerbeck (National Concern Branch)

* Case was an attempt to put environmental legislation under fed through POGG.
* signing on to international obligations does NOT expand federal jurisdiction. Even if they say statute was to keep with international law obligations, they must still show International obligations are not at force domestically unless a constitutionally valid domestic law is passed.
* National concerns doctrine is separate and distinct from the emergency doctrine.
* National concern branch applies to new matter. Matter can be new if it is historically new (didn’t exist at confederation). Matter can also be considered new if at the time of confederation, it was only local or private, but has since newly become a matter of national concern. Changed in its social or cultural manifestation
* Must have a singleness, distinctness, and indivisibility that clearly distinguishes it from matters of provincial concern. This is because it’s permanent, has to be single and indivisible because you can’t give a FUZZY permanent grant, it has to be a clear grant that can’t later grow and get bigger and infringe more of the prov jurisdiction.
* Scale of impact must be reconcilable with the division of powers. Do you still have division of powers after this grant of power under national concern? Check in on effect it’s having on the division of powers.
* Provincial inability test of singleness, distinctness, and inability. In determining whether a matter attains the distinctness, indivisibility required to be national concern branch, you have to look to the question of provincial inability. See if the matter that you are going to grant jurisdiction on is something the provinces themselves can’t deal with. It’s conceptual across the board, if all the provinces overall are succeeding in dealing with it, not how many of the provinces are succeeding or failing.

**Class 9**

Provincial inability test

* Issues you want to regulate where if provinces don’t cooperate or don’t have relevant jurisdictions, they can’t regulate it. Test is both formal and functional. On the face of it, is it something the provinces can deal with, and functionally, is it something that the provinces won’t or will choose not to do anything or if one province doesn’t do it, the others can’t do it.

Indivisibility

* means it coheres as a single thing, can’t see it as five different heads of power thrown together under the name of inflation.
* Distinctiveness speaks to the fact that it’s distinct from provincial jurisdiction. You don’t want to give a matter to federal government that has blurred edges and thus pulls in more of prov jurisdiction. Concern is that you’re not permanently giving the fed this open-ended entry into provincial jurisdiction.
* Zellerbach argues that marine pollution is an aggregate of existing fed and prov powers, an aggregate of powers fed already has. Not a distinctive or new matter, just an aggregate of fed and provg powers, mostly fed powers, stuff they can already do.
* For the majority though, the fact you can’t draw a line between provincial and federal waters is what gives it its indivisibility. But this same consideration makes the dissent want to strike the legislation down for not being distinctive enough.
* Suggestions following this case that it’s reasoning could be relied on to create a much larger fed jurisdiction over the environment, which was appealing to activists. The environment writ large doesn’t respect provincial boundaries and would meet this criteria. This was rejected by judgment in Old Man River Case.

**Class 10**

s.35

* not part of the Charter, which means it’s not subject to the not withstanding clause and not subject to s.1 of the charter. Doesn’t have those limitations.
* Includes Indians, Inuit, Metis, and non-status Indians
* Constitutional commitment to the principle of consultation and discussion through constitutional convention with aboriginals should any constitutional changes or amendments relevant to them be made/attempted.

**Class 11**

Sparrow

* makes it clear that you cannot get an idea of how a s.35 abo rights analysis is to be conducted by only looking at the text of s.35, must read the extensive jurisprudence interpreting that section.
* Challenge is a validity question: whether the govn’t has done something consistent with the charter, whether consistent with s.35. if it goes against s.35, it goes against constitution/supreme law, so by s.52, is invalid.
* S.35 is not in the charter, meaning it’s not subject to s.33, the override provision, nor to s.1 which allows for govn’t to justify limitations.
* s.35 is to be given a generous, large, and liberal interpretation and ambiguities about whether a s.35 right has been established or similar doubts should be resolved in favour of aboriginals
* Aboriginal rights are sui generis – unique, of a singular type

Van der Peet

* aboriginal rights are not the same of liberal enlightenment rights (the inherent dignity of an individual), abo rights are specially attached to aboriginal peoples, not to everyone simply by virtue of being a person, they reflect the unique situation of aboriginal people in Canada.
* the doctrine of abo rights exists and is recognized and affirmed by s.35 because of simple fact that Europeans arrived in NA with abos already here. This is what separates abo from all other minority groups in Canada and maintains their special legal status.
* S. 35’s aim is reconciliation of fact that abo lived here before Euro arrived and that we now have sovereignty of the Canadian crown.

Sparrow: 3-step s.35 analysis.

1. Is there an existing aboriginal right?
2. Has there been prima facie interference with that right? Has govn’t done something that has limited or imposed some type of burden, something that has infringed or limited the existing abo right established in the first stage?
3. If successful with #2, can the govn’t justify that infringement?

Sparrow test for Finding a Violation of s.35

* Onus of step 1 lies on the person who wants to claim and benefit from that right. The appellant must show he/she is acting in accordance with existing abo right. First, you must show that it is indeed an abo right. Secondly, that that abo right has been unextinguished up until 1982.
* Extinguishment had to be something that was clear on the face of the Crown’s actions, , can’t be read by implication, had to be a clear and unequivocal expression of an intent to extinguish.
* Scope of right will not be determined by the scope and extent of its regulation
* Onus is then on the plaintiff to show that there has been a prima facie interference with the right that came out of the first stage. The court will ask whether the limitation is unreasonable, does the regulation bring undue hardship, does it prevent the holders from their preferred means of exercising that right?
* After you’ve proven infringement, the onus is then on the Crown to argue that such an infringement is nonetheless justified.

Sparrow third stage: justifying the infringement

* there are two stages to this analysis: that there is a valid objective underlying its infringing activity or legislation and that must be a compelling or substantial government purpose or objective.
* Sparrow tries to dictate a very narrow range as what will count as a compelling and substantial purpose in this context. Conservation would, as it applies to everyone. Absent conservation concerns, priority must be given to abo rights.
* This discussion must be carried out in light of honor of the Crown. Crown has a fiduciary obligation to abo people and must act honourably and in light of that caretaking responsibility
* list it mentions of valid objectives is not exhaustive. The expansion of this list must be done in keeping with a sensibility to and keeping with and respect to aboriginal peoples’ interest.
* Factors that will be considered in deciding whether govn’t can justify infringement is whether or not it is a minimal infringement, has there been compensation where there has been a taking of resources, were they consulted in advance

More on Sparrow

* regulation, limited exercise, is not the same as extinguishment. Regulation doesn’t tell against the scope of the right.
* Scope of right is important, not enough to give it a general characterization
* Court also said that the abo right would not be frozen in the form that it was exercised in traditionally, it could be evolved, as long as there is some continuity or link between tradition and modern practice.

Van Der Peet (test for finding out whether something is an abo right)

* Do this inquiry from the perspective of abo peoples in a manner that makes sense under Canadian common law and constitutional laws (reconciliation).
* The activities may be exercised in modern form of practice, tradition or custom that existed prior to contact. There has to be continuity from now to pre-contact times/people to establish that you’re dealing with an abo right.
* It has to be something that makes the society distinctive, a defining attribute of that society, where if it wasn’t present, the society would be fundamentally altered.
* That practice must be established as being integral to that society in pre-contact times
* Rules of evidence: approach the rules of evidence and interpret it with a consciousness to the special nature of abo claims: originates in times when there were no written record.
* Specific rather than general: right in question is to be articulated in light of the specific abo group claiming that right in this case.
* The practice or custom must be of independent significance to the abo culture in which it exists. It can’t be incident to some other practice or tradition, piggy-backed
* European culture influence only relevant if practice exists only because of influence of the Euro culture, which would disqualify the activity. Fact that euro settlers engaged in same activity is irrelevant unless you can show that abo practice of that activity came about only because of the existence of euros and so didn’t exist prior to contact.
* Court must take into account abo peoples’ relationship to the land. Court cautions against considering as abo rights only those things that have to do with a relationship to land. Abo rights can also protect customs, traditions, etc that have independent existence that aren’t focused solely on relationship to land
* distinctive tradition is not a relative claim, different from other cultures, but rather claim that tradition makes the culture what it is. Doesn’t have to be unique from all other cultures

**Class 12**

Van der Peet Test (basics)

* Step one: Identify the precise nature of the claim.
* Step two: look at whether the claim identified is a practice, custom, or tradition is integral to the distinctive culture of the abo peoples claiming that right in this instance. Here court finds that trade of fish pre-contact was only incidental to the practice of fishing for food and real trade was post-contact and couldn’t be linked to a pre contact practice. Trading salmon was only central to that culture primarily as a result of contact with European influence

Delgamuukw

* claim on land must be shown to have existed when crown sovereignty vests.
* in order to be an abo right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the abo group claiming the right
* Test of extinguishment is that sovereign’s intention is clear and plain that is to extinguish

Gladstone

* Court finds right to fish for commercial purposes is different from right to fish for food that’s identified in Sparrow. Food is a right with internal limitation, as soon as you have enough food, you’ve exhausted that right. However, commercial is only externally limited (market demand and may have no limit at all)
* If there’s no objective other than conservation that can infringe this right, you’re not giving abo people priority, but exclusivity, as because this right has no internal limitation, can fish forever.
* In terms of the test and future cases, court says that a right with only external limitation (fishing for commercial puprposes alone), Sparrow’s doctrine of priority, second only to conservation, is not going to be required.
* the govn’t must show that both the procedural and actual allocation of the resource is a respectful of the abo rights-holders’ interest and the govn’t shows this by showing they have engaged in things like consultation, compensation for resources taken, accommodation (modifications of limitation to account for the abo right), consideration (paid attention to the interests at stake)
* in process of establishing limitation, govn’t must show that there’s been an attempt to respect abo rights as much as possible.
* Case allows the court to say that it will broaden the list of what will count as a compelling and substantive objective that justifies infringement of abo rights. Will include Crown’s pursuit of economic and regional fairness. This can balance against abo rightsholders interests in cases where those no internal limit on the right.

Establishing the nature of the Claim (Sappier)

* Need to be more specific than just saying “right to wood”. You have to look at how the use of that resource is playing out in practice, where is it done, how is it done, and what is it used for. Court is not willing to say there is generally a right to harvest wood, must specify the purposes. Must relate to how that resource relates to pre-contact culture, identifying a practice around use of that resource, otherwise lack the necessary specificity. It’s specific, not general right.
* This is an inquiry into the pre-contact way of life of a particular abo community. Court warns against reducing this evaluation to stereotypes, too much anthropology
* Sappier: looking at integral/distinctive involves looking into the way of life and distinctiveness of that abo community and then establishing whether that claimed right is delineated in accordance with that abo community’s way of life. It doesn’t have to go to the core of that community or be the one thing on which that community survives, , as long as it’s one thing that is necessary for that survival, one factor, then it is sufficient to meet the requirement
* After deciding that it is integral, ensure that it’s unextinguished. Then you have to look at whether there’s a prima facie interference. Then whether there’s a justification

Jurisdiction

* Jurisdiction over Indians and lands reserved for Indians is exclusively federal.
* Titles to land in a province vest in that province, subject to other interests, meaning that prov ownership of land is subject to jurisdiction fed has over Indians and their lands.
* Once abo title has been alienated to the federal govn’t, the title spills back to prov, but the jurisdiction for abo title to be surrended is to the fed.

Abo title

* adaptations to Van Der Peet test for abo titles over abo rights. Replace requirement of integral and distinctive culture requirement with requirement of occupancy on the land in question.
* Also time period, when you have to be occupying land in question, it’s not contact but the point of the instantiation of crown sovereignty.
* Court has to find it to be continuous occupation, doesn’t have to be an unbroken chain of continuity, just continuous.
* the occupancy must be exclusive. Fact other people were on the land doesn’t mean you didn’t have exclusive occupancy (could be trespassers, or you could’ve invited or given permission for others to come onto the land), and you can have shared exclusive occupancy

**Class 13**

Implied Bill of Rights

* Division of powers cases often served similar purposes
* pre-amble of our constitution imports a system of govn’t similar to UK has been held by some judges to mean that there is an implied bill of basic political rights, those sorts of freedom essential to the kind of parliamentary democracy the UK is accorded
* the idea of human rights is not novel to our constitutional culture, but explicit limitations of government and explicit rights in constitutional text is novel. Turns us from parliamentary supremacy to constitutional democracy.

Trudeau article

* his location for this call for entrenched bill of rights is in traditional liberal theory: natural rights, social contract, protecting individual from excesses of state power, idea of limited government hedged in by these rights, protection of civil liberties

Alan Kearns article

* what happens to parliamentary supremacy when you put in bill of rights, how the charter was facilitated by changes in 20th century (influence of US, nation-buliding, language of rights becoming more dominant)

Russell article

* unifying effects of the charter, a hedge against that move for Quebec independence, that people would start identifying themselves based on their Charter interests, not regional interests. That we’d have Charter Canadians.

**Class 14**

Grounds for judicial review (Charter expands/gives more grounds for review):

* Federalism: whether a particular level of government can enact a particular law or not. If not, the other level can do so.
* Charter: whether a particular government action is allowed or not, if not, no government can

Legitimacy of judicial review

* decided by non-elected judges. They are generally not representative (largely white men). They are unelected and yet they have superior law making power over elected legislature. They tend not to be representative of Canadian Society. Elite disproportionate.
* They are unaccountable, you can’t remove them from office unless they do something seriously wrong or reach 75 years of age.
* However, they’re not being representative allows them to do law and not politics (easier for them to protect minority interests).
* They’re not experts in so many things, like social policy
* They also have limited resources, don’t have same kind of policy staff that can initiate research as politicians can do. They have a limited educational background (legal).

Morton and knopff

* right wing argument that the courts have been taken over by left-wing special interest groups. These groups couldn’t get through in the legislature, so they took the back door and manage to influence the court instead to get power through courts. (illegitimate power)

Hutchison

* propertied, wealthy classes have generally been much more successful in asserting their rights than others have been.

Middle-ground View (Weinrib)

* the Charter makes our society interest richer and gets minority interests attention and that there are overwhelming values that find expression through the Charter, values that unite us.
* Weinrib: higher sense of ourselves and shared aspirations that the Charter allows to be reflected in our political and legal life together.

Dialogue theory

* Best way to understand judicial review, that it’s not judiciary>legislature, as it leads to a back and forth....legislature creates legislation, judiciary rejects it, legislature goes back and modifies and submits it again.
* ways legislature can respond to Charter challenges: s.33 (they can just override for a limited period of time most of or at least some of the rights in the Charter), s.1 allows the judgment to justify infringements based on larger public interest reason, rights are also qualified so s.7 if it is infringed in interests of fundamental justice, it’s ok) or other rights are qualified as well, like s.9 says *arbitrary* detention (govn’t can change the punishment to be another kind of detention
* Even though dialogue, court still has more power as they determine the restraints on how the legislature can come back, can’t just come back and ask for the same thing again (Petter)

Vriend (court argues legitimacy of review)

* they read in sexual orientation into discrimination legislation. This is the court in its most activist frame, putting language into law, essentially creating new law by putting in text.
* They say the Charter is a democratic choice, deliberate choice of legislatures to give this role to the courts and thus the choice of the people through their elected representatives to ask the courts to do this and redefine our democracy (it’s a new social contract)
* courts as reasoned, principled, and restrained by the constitution
* they are independent from the executive and legislature and make reasoned, principled decision based on law, not the same as what govn’t does (politics).
* :court also says judicial review doesn’t substantially affect parliamentiary supremacy as they can still overrule the court’s decision by s.33 and there is always ability of legislative response. S.33 and s.1 – dialogue theory, the court doesn’t have the final word.
* it enhances democracy, which is more than majority rule. It fosters dialogue between different levels of government about minority interests, enhances accountability to all the interests in Canadian society, enhances dialogue between the institutions of government, gives some voice to other perspectives and voices than those of majority.

Charter analysis threshold issues

* legitimate standing?
* Does Charter apply?
* Can court rule in this issue?
* Start out with rights analysis, then section 1 Oakes test, then remedy. Have to first get standing
* Rights analysis: does the activity that the plaintiff wants to be protected fall within the scope of a right? Consider the purpose,what that section is trying to protect. It’s often a generous interpretation.
* Remedy: if you find an unjustified infringement on a protected right, what response do you get from the court.

Purposive approach to interpretation

* words in Charter tend to be very general.
* In understanding of what the rights mean, largely what the scope of those rights are, it’s going to give an interpretation that is purposive (an eye to the purposes behind the entrenchment of that particular right and the larger purposes of the charter as a whole).
* Thus, court tends to discuss the right at issue quite a bit and the purpose behind its protection.
* It purports to proceed into its interpretation of what rights mean and protect(scope) to be informed by the reasons why that right was protected in the first place.

Principle of large and broad and generous interpretation

* Living tree: a broad interpretation that will evolve to continue to make the Charter relevant
* Limits to how you interpret rights is the purposive approach: you can’t be so large and generous in interpretation of Charter rights that it goes beyond the purposes behind those rights.
* different from interpreting statute, different philosophy of interpretation, larger political and moral ideals, more philosophic when interpreting charter than in other areas of the law.

Section 1

* Requirement that the limitation on the right must be prescribed by law and that the limitation must be reasonable and demonstrably justified in a free and democratic society.
* Purposive approach to s.1: it functions to guarantee rights, that rights under the Charter are guaranteed except in those circumstances to allow for some demonstrably justifiable reason to limit those rights. S.1 is not just about allowing limitation, it also thus has this component that guarantees rights in that it limits rights ONLY by demonstrable justification.
* Govn’t in s. 1 is justifying the infringement of a right, doing it in a legally prescribed way according to the rule of law, not an arbitrary exercise of state power. There should be clear standards, articulation of a clear risk area, should know when you’re running up against a law that infringes on your rights.

Sunday Times case (requirements of s.1 justification)

* when your rights are infringed on by that law and are going to be justified, you have to have requisite elements of rule of law agency.
* Two formal requirements: first, that the limitation has to be “accessible.” Second, there’s a precision requirement.
* Accessibility: that you know what it is that the state is doing, that you’re put on formal notice about this rights infringement, that there be a rule articulated somewhere in official pronouncements of the state, that they’re legally authorized. No problem of accessibility if you can trace the law to a statute or a common law utterance.
* Precision: requirement that there be an intelligible standard that the law establishes. If you’re going to limit that right, you do it in a way that makes sense in that its boundaries are sufficiently precise.
* Problem is that legislation by necessity has to be general, it captures a broad range of scenarios, often unpredicted. So there’s a balance between doing this and having an intelligible standards.
* Courts will tend to take some level of imprecision if the limitation is expressed in a statute or in their own utterances in common law. But if it comes out of an administrative tribunal, this would be more scrutinized under precision.
* Issue of vagueness: issue rule of law has is impreciseness, vagueness in terms of what the limitation is. You want it to be clear because you want the government to be accountable and because people should know what the limitations are and it is that will be justified

Nova Scotia Pharmaceutical

* It can infringe a right because it’s too vague or its not a right because it’s too vague.
* Vagueness: a concern in principles of fundamental justice (s7), prescribed by law requirement of s1, and the minimal impairment stage of Oakes test.
* Concerns about vagueness forecloses the impossibility of justifying a rights infringement. People should be given fair, knowable notice of what their rights limitations are. Discretion has some limits when state exercises it.
* There is some flexibility in allowing laws be pragmatic, but not vague.
* Court notes that in minimal impairment, vagueness can overlap with overbreadth (that it affects more than it needs to or captures more activity than it needs to to accomplish its objective).
* s1 context, the court will have fairly high tolerance for vagueness because of idea of requisite flexibility in legislative drafting, but court will prefer to look at vagueness in minimal impairment stage of Oakes test.

Oakes test

* First stage: there must be an objective that is pressing and substantial underlying the infringement of the right. Seldom does legislation fail at this stage, not hard to pass. There can be much debate though about WHAT the objective is.
* Objectives will always be found not to be pressing or substantial where the very objective was to be found to breach the right (Big ), like an objective to restrict religion
* Purposes can’t shift. Court won’t let you argue a new purpose in the pressing and substantial stage. You can’t pass it for one purpose, and then a hundred years later, say it was passed for an entirely different purpose. You’re generally stuck with the objective you’ve passed the legislation with, though the government has often been clever about arguing that it’s not a shift in objective, just a shift in emphasis.

**Class 15**

Oakes Test Stage 2 (Proportionality)

* Rational connection: the means the govn’t has chosen fit the objectives that the govn’t has shown to be pressing and substantial. Are the means chosen advancing the purpose of the objective that the govn’t has just identified?
* Minimal impairment: questions of overbreadth, vagueness, arbitrariness, ideas of govn’t harming the right more than it has to in order to achieve the objective it has identified as pressing and substantial. Could the government achieve the same objective with substantially less infringement of rights? In some cases, they’re going to read it less toughly and simply say whether it is a reasonable choice among the various choices available to the govn’t to infringe as little as possible.
* Balancing the deleterious effects against the objective: is the evil that the law does outweighed by the good the law does? Affront to individual rights vs the public good.

Dagenais

* adds another element to this stage of Oakes.
* Daganer says that sometimes you have legislation that has a very noble objective but will in fact do very little of that objective.
* Dagenais adds consideration of the salutary effects of the legislation, which is what it actually achieves that is good. It may have noble objective, but what are its actual, salutary effects? THIS is what you balance against the deleterious effects.
* Technically, this is in addition to the Oakes stage.. you should ask both deleterious vs. Salutary AND deleterious vs objective, but typically, courts only go through the Dagenais

Deference and Context

* Court has in certain contexts and circumstances been willing to accept either what seems common sensical or reasonable in satisfaction of these different questions.
* Context has come to matter in how the court is going to read and put the govn’t to test and also, in some particular circumstances, they’re going to exercise more deference to govn’t decisions.
* Deference is with an eye to the institutional appropriateness of the court second guessing the govn’t and substituting its decisions for the govn’t’s.

Edmonton Journal Case

* Wilson talks about the fact that in approaching questions under s.1 you can take either an abstract or contextual approach .
* Wilson argues that the best approach is to look at the values at stake both in terms of the right that’s being infringed and the particular interests in that right and the specific, contextualized value of the infringing govn’t action.
* Wilson says take a contextual account of the values you’re putting in the balance: what’s being harmed and what’s achieved, be specific to the context of that right and that legislation. Don’t frame only one side, the harm or the value, as abstract and the other as contextual, as you will skew the balance. Best approach is to take both values in their context.
* Wilson says do it contextually, concretely, not in the abstract.
* We’re not balancing rights, we’re looking at a right and seeing what that infringement of a right is causing as a harm and balancing that against the value of the legislation.

Irwin Toy

* the high watermark of judicial deference to the govn’t under s.1.
* When there’s a polycentric social problem that the govn’t is resolving through legislation, court should more deferent under s.1. Polycentric social problem = lots of different groups with interest in the problem that the govn’t has to mediate between. The govn’t is in the best position to make the necessary political trade-offs and compromises. Competing groups.
* Also more deferent when there’s indeterminate social science evidence, which is almost always, as social science never gives clear cut causal. Where there’s a difficulty in social science, and an absence of it, the benefit of the doubt goes to govn’t’s assessment of it
* If the govn’t is protecting a vulnerable group, the court is going to be more deferent
* This is related to courts must be cautious to ensure that the charter does not just became an instrument for better situated individuals to roll back legislation that has as its object the improvement of the situation of the less-advantaged or vulnerable.
* These factors can co-occur
* Government as singular antagonist. Court has since backed away from this notion after Irwin Toy. Here means that occasions where state acts in its most powerful way against the sole, defenceless individual, this is when gov should have the hardest time in arguing s. 1. When the state is acting in its capacity as singular antagonist against lonely, powerless individual.

Thompson newspaper

* every situation is basically polycentric, the state is balancing interests. Court thus moves away from this being such a factor yielding to deference, though there is still reference to it.
* Oakes standard of proof is the civil standard

After Irwin

* deferential to govn’ts factual findings
* deferential to the way government manages competing interests (courts reluctant to substitute its own judgment for what the govn’t should do in that particular circumstance, particularly where thre’s a vulnerable group involved).
* Moon also says when the freedom of expression is the right at issue and the value of the speech at issue is high, the govn’t will be put to a tougher test at s.1. The less value the court grants to the speech at issue, the easier time the gov will have under s.1

RJR

* McLachlin: s.1 still must mean something and be tough for the court, deference can’t be taken too far, not to the point of reliving govn’t of burden under s.1.
* courts have the role to determine if parliament has acted within framework of constitution and cannot abdicate this responsibility, so don’t carry judicial deference to the point of accepting Parliiament’s view simply on the basis that the problem is serious and the solution difficult.

**Class 16**

Application

* court is trying to articulate a coherent boundary between the public and the private.
* Line is drawn by governmental and what’s non governmental.
* horizontal application: within the society rights apply as between individual entities, for example that anytime you interact with another individual in society you can claim that right or impose that duty on him or her, across levels of society.
* Vertical application: just against the state or the apex of government/power. Lets you hold rights and duties against people/entites that are higher than you in social hierarchy

Dolphin Delivery

* If it were in provincial jurisdiction, no problem, as secondary picketing is illegal, but it was in federal, which was silent on the issue
* the Charter applies to government, parliament of Canada and legislatures of provinces.
* he’s going to exclude from the term govn’t the judiciary branch; Charter applies to legislative and executive branch, regardless of what those branches do, whether doing something in reliance on statutory law or in reliance on common law.
* McIntyre states nonetheless that judiciary “ought to apply to apply and develop the principles of common law in a manner consistent with the fundamental values enshrined in the charter”
* the Charter does not apply between private individuals. Private actors do not have duties to each other, does not apply to purely private actions and disputes between private actors, there must be, somewhere on the scene, the government, either a government action or actor
* The Charter to legislatures and to parliament, who pass statutes, so it applies to statutes and written law.
* It applies to the government in terms of the actors and actions related to the executive and legislative branch.
* It applies to the common law of judges only in those instances where the government is a party attempting to rely on the common law
* excludes from coverage of common law are those instances of common law being used between purely private, non-governmental actions.

McKinney:

* notion that comes out of case about “government control.”
* something counts as governmental both in terms of the character of the actor and the character of what’s being done (the action) to determine charter application.
* They have to argue that the charter applies to universities directly, who set the rules, and also applied to human rights codes. Application issue to human rights codes is straightforward: they’re statutes and thus actions of legislatures.
* find that universities lie on the outside of that more formalistic notion of state power against which the Charter protects. Reason is a floodgates justification: to open up all areas of public and private action to judicial review of Charter will strangle the operation of society
* is there “government control”? It has to be a kind of direct control, indirect won’t count
* Second piece: question of whether the actor is performing or the activity itself is a quintessential govn’t function. If it’s a quintessential govn’t function, that will count as government actor or activity for the purposes of charter application
* It was argued that universities were statutory bodies and hence emanations of the state. Rejects based on floodgates argument – all corporations owe their existence to statutes,
* it is not sufficient to argue that an entity is performing a public function to have the Charter apply to it. Government function is more than that.
* Uni has its own governing body and on those bodies, majority of members are not appointed by gov and not subject to government’s direction, which is indicative to the fact that gov has no legal ability to control universities. They are subject to gov regulation and get funds, but they control their own affairs.
* LaForest says uni are traditionally autonomous, academically independent institutions, he has notions of academic freedom which demand that they be autonomous
* University’s are not subject to rights but may be rights holders. If there is a right that applies to non-human entities like freedom of expression, they can use it against the govn’t but can’t have them used against them, as they are not govn’t actors.

**Class 17**

Application

* Government: action, inaction, and actor
* look at whether the entity is under government control and a quintessential government function (though that’s never been elaborated upon) (McKinney)
* You want to look at the composition of the governing board to determine whether govn’t controlled. Distinction between control and autonomy. If corporation is under the control of govn’t then it is a govn’t actor, but not if it initiates or defines its own tasks and governs itself

McKinney (Wilson’s Dissent: three tests – she finds the Charter does apply to the university)

* Control test: ask if there’s if general control over the entity exercised by the executive or legislative branch of the govn’t
* Government function test: asks that the entity is performing a traditional govn’t function or if the function, in modern times, has emerged as something govn’t conventionally does
* Statutory authority/public interest test: whether the university is acting pursuant to statutory authority that is specifically granted to it to further an objective the govnerment has to further a greater public interest. That the govn’t assigned something through statute that is connected to the govn’ts broader purpose.

McKinney – opposite viewpoints on application

* LaForest is basically narrowing the Charter, making it applicable in fewer circumstances, leaving more up to the sole, utter decision-making power of the appropriate legislative institution.
* Counter to this is the idea that maybe the Charter should be more actively used in re-engineering society and its diffuse power, that may want the Charter more relvant in broader circumstances. More concerned about the power that will go unreviewed otherwise. (Wilson)
* SCC did however determine that human rights DO apply to universities. Provincial human rights code gives statutory right to non-discrimination, even though the Charter doesn’t apply.

Stoffman

* court again shuts a case down on basis of not enough govn’t control.
* VGH was set up by the government though, it was set up as public healthcare delivery program by BC govn’t, it is significantly publically funded and publically regulated.
* A majority of the Court concluded that the hospital was not part of govn’t nor was the regulation in issue an act of the govn’t
* When approaching an application issue, decide what you want Charter to apply to. Can attach Charter directly to the government action, or indirectly to the actor and hence it’s action is subject to the Charter.
* look at the make-up of the board of directors and if it is mostly made up of govn’t actors, it is govn’t controlled. Here, 14 out of 16 board members are appointed by the govn’t and everything they approvehas to be approved by e minister but they also look at what these 14 of 16 members do: are they accountable to the govn’t and thus just voiceboxes for the govn’t, or do they have autonomy despite being appointed?
* Coming out of this is a notion of control that requires it to be routine and daily to count it as being government control sufficient to find the charter to be applicable. Here, ministerial approval was just a rubber stamp, not routine, daily.
* Majority says it’s about routine, daily, or regular control, not about some public nexus or public function test. The public function test goes NOWHERE in any of these cases

Douglas College

* Court here says the board here is appointed by the provincial government and the minister has power to establish and direct particular by-laws and approve all by-laws board passes, there is a large administrative structure in the statute for community colleges
* charter applies to community colleges as they are subject to routine and regular control. Board of governors is appointed and REMOVABLE at the pleasure of the govn’t, who can also step in at any time to direct the actions and operation of the college.

Godbout vs Longueil:

* Municipalities are subject to the Charter. It’s not that they’re serving a public role, it is that they are performing govn’t role.
* Provincial government delegating their power to another body can’t dodge Charter responsibility. Since the cities are exercising authority that the provincial government would otherwise execute itself, it is deemed to be the same thing.
* Rejects public function test, it’s not enough that you’re performing a public function, it must be a govn’t function
* Once a government actor, all your actions are government functions, even ones that normally wouldn’t be construed as such in themselves.

Eldridge

* What is the source of the violation? The act, each of these statutes potentially violating these equality rights, or is it some other entity?
* They find that these statutes do not themselves breach in the alleged way, the decision not to provide sign language translation doesn’t happen at the statutory level. Statutory assigns that decision and leaves it open to the entity that delivers the healthcare services.
* The application is not about statute but to the hospital and commission that are given the authority under the statute.
* We know private entities are immune to the Charter and we know hospitals are immune to the charter, but this case says that some private entities, otherwise not subject to the Charter, can be entrusted to implement a specific govn’t policy.
* Govn’t sets up a public healthcare scheme under these statutes and delegates the details of carrying it out to the hospital and the commission, simply by putting in place that subordinate decision making structure can’t leave the govn’t off the hook from the Charter guarantees.

**Class 18**

Eldridge cont’d

* Eldridge holds that in some circumstances, non-governmental entities will be subject to the Charter in accordance with certain of their actions. That even though it’s a private actor who performs the functions at issue here, the hospital, the govn’t is still retaining responsibility for those actions so that when a private entity performs them, it’s subject to Charter scrutiny.
* This is not a public policy test.. That an entity performs a public purpose is not enough.
* a private entity performing a specific government policy and program. THAT’S what’s looked for here, specific government policy or program.
* looking at the characteristics of the action to see if it’s the fulfilling of a government policy or program. You are not looking at the characteristics of the entity, which you were when you were trying to characterize the entity as a government actor.

Slate

* statutory powers of compulsion.
* Order was subject to the Charter, this was a non-government actor, but was found to using coercive statutory, and hence government powers. So not implementing government program, but was using government power. Using coercive power granted by a statute.

Blanco

* even though human rights commission could not be considered a government actor nonetheless, because they implement specific govn’t policy of human rights protection and because they have statutory powers of compulsion (can compel evidence, etc) through the Human Rights Code, the Charter applies to their actions.

Vriend

* discussion of negative versus positive rights.
* Classical rights discourse is much more comfortable with negative rights only: hands off government. Social liberalism = state is not only a threat to us in terms of what it does but also a facilitator of freedom and equality because of what it can do by collective authority – leads to positive obligations
* so attacked the Humans Right Act from omitting sexuality as one of the protected classes of discrimination. Court and applies the Charter to read in sexuality.
* there’s development in doctrine of application that stops proper full review under the constitution than that’s a concern, as pieces of govn’t behaviour that should be subject to Charter scrutiny would escape it if you’re not careful to plug holes in how you understand application of the Charter.
* Cory: this is a challenge about the individual rights protection act, which is a statute that has been proclaimed, this is challenge to characteristics of an actual statute.
* That the challenge involves application to an underinclusion in the statute does not alter the fact that it’s still a statute, an action of government that the court is scrutinizing.
* the language of s.32 doesn’t limit the application of the Charter to positive actions only, it’s worded broadly enough to cover positive obligations therefore the application to the Charter will not necessarily be restricted where the govn’t has actively, through a positive action, encroached on rights.
* if you didn’t apply the Charter to omissions, than the govn’t could just manipulate the wording of statutes to turn charter scrutiny on and off.
* Under some sections of the Charter in substantive rights analysis, where some benefit is specifically withdrawn from legislation, in those instances, court is willing to say Charter applies
* Often made easier where there’s a clear disadvantaged group, but this isn’t required.
* Statutory context matters. context, a clear government action.
* Criticism: if you apply the Charter to statutory omissions, you’re essentially applying it to common law. this is whittling away to the ruling in Dolphin Delivery that the Charter doesn’t directly apply to the common law.

BC Government Employees Case

* Absoluteness of DD’s “no Charter on common law” is questioned.
* Court holds Charter applies, this case is “public” it has a “public cast” to it and not a private cast, that public context, as it’s about access to the courthouses, sufficiently transforms this into an instance where the Charter would apply.
* If there’s a case with a public significance to the issue, you’d argue based on BCGEU that the Dolphin Delivery ban would not hold the day.

Swain

* Criminal case without clear govn’t actor . In these cases, it will apply the Charter to the common law. . Here the charter is applied to rewrite the common law rules at stake.
* Fact that it’s a Crown prosecution, the presence of the Crown obviously governmental, means there is a sufficient public aspect to turn those common law rules into charter fodder. Something that’s relying on the common law is sufficiently governmental or public

**Class 19**

Hill

* Did not find Hill to be acting in his capacity as a govnerment actor.
* Court also reiterated the principle from Dolphin Delivery that in a purely private dispute, which this is ruled to be as the court found that Hill is acting in a private capacity here, the Charter does not apply to common law principles resolving that dispute.
* Court reiterates that common law must nonetheless be developed in a manner consistent with Charter principles and it understands this rule to be a reflection simply of the inherent jurisdiction of the court to develop common law rules in keeping with dominant values of a society, of which the Charter is an expression.
* In purely private disputes, best that can be argued is that the common law principles resolving that dispute be developed in line with Charter values.
* Distinction is thus drawn between Charter values and Charter rights. If the charter applies by s.32, you’re applying Charter right. If the Charter doesn’t apply, you’re just holding it consistent to Charter values.
* s.1 framework is not appropriate, need a more flexible balance, just weigh charter values in very general terms against the principle of the common law rule at stake here.
* Onus of showing imbalance is on the party making the claim, to both show there’s a charter value implicated in the common law rule and that it’s not being balanced appropriately
* Have to show that the charter value is being violated and that it isn’t being appropriately balanced.
* Problem: can you with confidence distinguish an argument about rights and one of values, aside from one having more formality to it?

Bell Express Vu (2002)

* claimants forgot to raise the Charter argument and didn’t raise it in timely enough manner, so they argued that the section they were challenging, that they were being prosecuted under, they argued that it should be read in accordance with the values of the Charter.
* Court rejects this argument. This is not what presumption constitutionality is: that presumption is that where you have two equally plausible interpretations, one of which is constitutional and the other isn’t, you pick the constitutional one. But the presumption requires that they be EQUALLY plausible.
* Presumption of constitutionality does not mean that you’re going to give a statute, despite legislator’s intention, a constitutional meaning in accordance with principles of the Charter
* It’s a matter of parliamentary supremacy, have to give the government chance to pass laws that infringe on Charter rights and have to be justified under s.1....can’t read everything government does as being consistent with the law, as they’d never have justify anything under s.1
* can’t just reshape everything to comply with Charter and remove the ability of legislators to infringe a Charter right with justification under s1. Can’t remove this dialogic aspect
* Cannot do to statutes what you do to the common law in Hill

Keegstra

* Before getting into details of this case, have to identify purposes of freedom of expression, so we know what purposes underlie it and from those purposes state what the scope and test for freedom of expression is.

Purposes of freedom of speech (Keegstra)

* It’s linked to democracy, it’s essential to free flow of ideas that is required in democratic institutions. Linchpin freedom on which other freedoms depend.
* It is a pre-condition of the search for truth. Idea of marketplace of ideas, the free flow of ideas and speech whether good or bad true or false is best guarantee that in this hurly-burly, what is true will emerge.
* Critique is that imbalance of resources mean louder voices are more heard
* As a good in itself. Freedom of expression is about how we self-fulfill and self-realize, our potential as human beings are realized through speech, has its own intrinsic value.

Dolphin Delivery

* In US, there is acceptance by judiciary of distinction between speech and conduct. In this case, McIntyre rejects this: we protect not just speech, but also expression.
* Picketing still can be protected as a form of expression even if it’s conduct
* even expression purely motivated by economic factors are protected. Protects expression that has a goal or purpose that seems far from purposes outlined (democracy, self-fulfillment, etc)

Irwin Toy (Freedom of Expression process) (1st stage – scope)

* Character of the speech involved goes to kind of deferential approach the court will take to s.1
* commercial expression is protected but also tells us how wide the scope will be: the expression rights are interpreted very broadly. Very quick nod to rights infringement and bulk of the case will be about the s.1 argument
* Threshold analysis (standing and application), then rights analysis to see if there’s an infringement, and if there is, go to s.1 justification
* Rights analysis for freedom of expression: does activity that the claimant is doing fall under the scope of freedom of expression?
* Protected expression: it’s activity that conveys or attempts to convey a meaning. Doesn’t matter what the content is, it can be vile, untrue, hateful, threatening, ridiculous. Content neutral. However, some FORMS of activity or what would otherwise be expression are excluded if they take a violent form.
* If your action has no meaning, it is not protected.
* Violent in form can be destruction, like cutting down a tree or burning a building. Trespass is not necessarily violence and can be challenged under freedom of expression.

Irwin Toy (2nd stage – infringement)

* Two ways the govn’t can infringe: infringe it purposely (on the face of what it’s doing, it intentionally intends to stop you) or it can do it in terms of the effect (the law doesn’t say it’ll infringe, but the carrying through of the law, in its effects, will put a burden on or somehow limit what is protected).
* First see if there’s been a purposeful infringement; if not, may be an infringement in effect
* Court draws distinction between direct regulation of expression and direct regulation of the consequences of expression.
* For instance: you could show that the effect of regulating littering in this way infringes on pamphlets’ expression
* Onus is on the claimant but gives broader range of infringement, not just what govn’t intends but what effect its actions actually have.
* If you’re unable to show that there’s an intention that legislation has purpose of infringing and want to make effects based argument, there’s another condition – you have to show that the activity that has this effect has the effect of infringing the protected expression in such a way that it touches on one of the three reasons why expression is protected in the first place (democracy, truth, and self-fulfillment).

Irwin Toy (3rd stage – s.1 justification)

* once you get to s.1 the character and content of the speech becomes hugely important, one of the factors that will strongly determine the strictness of the court’s application of s.1.
* court will ask how valuable this speech is and how closely it lies to the core of expression that we protect – that is, expression that is clearly about truth, democracy, and self-fulfillment. Types far removed from these will be easier to justify infringing under s1.
* court will ask whether the speech is protecting a vulnerable group, which will make it more valuable. Is there a different policy choice? Competing values? Also relevant.

**Class 20**

Showing Infringement of Freedom of Expression

* Requirement to show that the infringement impacted those three core values
* content is irrelevant, only relevant in s.1 justification

s.1 justification (Irwin Toy)

* Must show a pressing and substantial objective.
* Irwin Toy: Court says doesn’t matter that the data wasn’t available at the time, it’s still okay to bring it in after the fact to show that the objective was pressing and substantial. This isn’t a shifting purpose test . The purpose hasn’t changed, you just have more evidence to show that the objective is pressing and substantial.
* legislature had a reasonable basis for drawing the line where it did, mediating complex interests and allocating scarce resources – thus they will not hold the govn’t to a strict standard under s.1.

Rocket

* court recognizes that some value to this kind of commercial speech, albeit that commercial speech may be more easily infringed/justified under s.1 than other forms of speech, but ability of consumers to make informed choices is furthered by having access to the info that dentists’ advertising contains. Can be useful the public, so there is value there.

Prostitution Reference

* court said selling sex for money doesn’t go to core of freedom of expression. Speech associated with those providing those services is forbidden, public purpose is found in dental advertising (consumer info), but not of selling sex for money.
* Shows judicial attitude in assigning value to speech. Set of values at play.

RJR

* Targetting of three forms of commercial activity: advertising, promoting, and labelling (all will be found as unjustified infringement). The unattributed warnings also raise issue of forcing expression, as opposed to limiting.
* Purpose of the act is taken as response to national public health problem, which is a substantial and pressing concern.
* Govn’t conceded infringement on everything save for the warnings on the packages.
* Machlachlin’s: constitutional rights, if they are to have force and meaning, s.1 test cannot be too easily discharged. State must demonstrate that the means it attempts to meet its objectives are proportional and reasonable given the infringement of rights that are involved.
* LaForest sets up for less onerous application of Oakes test by saying that it’s the written rules of s.1 that is the law, not Oakes, which should only be taken as guidelines.
* LaForest in RJR spells out the factors that mean there should be a more deferential standard under s.,1: that the legislation is dealing with a social concern on which definitive social science evidence is impossible to attain, a complex issue (complex social legislation- gov has better resources to assess evidence, to protect vulnerable groups, and mediate competing interests)
* LaForest says commercial expression is simply about the profit motive, is entitled to less protection. It’s farther from the core values that underline protection of expression. Low value
* Maclachlin challenges this idea, that this speech is of minimal value.
* Court says that trial judge is in a better place to assess adjudicative facts but appellate courts are in just as good a position as trial judges about social facts. McLachlin disagrees.
* Objective you’re looking at is the objective of the impugned measures, not of the whole statute

Oakes Test in RJR

* Rational connection; means chosen by govn’t are rationally connected to the objectives that are pressing and substantial. LaForest: all that’s required is a rational basis for believing that this connection exists. Here, he says companies wouldn’t spend so much money on advertising if it didn’t work, common sense inference – rational basis. Connection is not scientifically measured
* Minimal Impairment: court is concerned about whether or not the particular bans and the character as the drawn minimally impair the freedom of expression and the associated values.

Types of Ads (RJR) and Minimal Impairment

* 3 types: lifestyle ads, information ads, and brand preference ads
* LaForest finds, because of the difficulty articulating distinctions between those ads and the way companies have manipulated attempts to make those distinctions, it’s a minimal impairment to do what the govn’t does here. Govn’t doesn’t have to use the least minimal impairment, only have to show that in light of the objects, the measures taken were reasonable, and were reasonably less intrusive in light of the expressions that are impaired.
* McLachlin say that partial bans are easier to justify, total bans are tough to justify, only acceptable when govn’t can show that in order to meet its objective, it has to have a total ban, that a partial ban would be less effective.
* For her, the distinction between the three types of ads is important; you could have allowed info and brand advertising but simply restricted lifestyle advertising and still met your objectives. Banning the other two stops consumers from getting information that will help them regarding access of what is a legal product.

Forced Expression (RJR)

* this forced expression is a version of protected expression, just as silence is protected
* LaForest won’t find that the message on tobacco packages is infringed expression. It’s whether there’s been an infringement of protected activity, that hasn’t happened here, as no one sensibly thinks that the unattributed message on the box is actually coming out of the mouths of the tobacco companies. It’s not attributable to the tobacco companies, so there’s no infringement of protected expression, no forced speech
* Even if there was an infringement here, LaForest says it’d easily be justified under s.1: it’s a dangerous product, it’s about expression for the sake of profit, and the forced speech is informational and not political/social/religious, so easily justified.
* McLachlin (majority) disagrees: finds it is protected expression and is infringement, is forcing tobacco companies to speak, so it’s infringement, and govn’t hasn’t met its burden under minimal impairment to show that it can be unattributed, why can’t be attributed
* Idea is that we don’t want to force someone to say something because it’s an indignity.

JTI Macdonald: companies challenge this new act (dialogue theory, new act in response to RJR)

* The ban on false promotion was found to be an infringement of freedom of expression, likely to create an erroneous impression. Objective was pressing and substantial
* Restriction on ads that would target young persons. Given the complexity and subtlety of tobacco ad practices that this kind of regulation is going to be a minimal impairment. Also, the speech is of low value and the beneficial effects of protecting this vulnerable group is high
* Minimal impairment is met because the other two types of ads are permitted, not a total ban, only partial, only on lifestyle ads
* Lavigne argument – that no one would reasonably attribute this speech to tobacco companies.

**Class 21**

Guignard

* there’s an informational need of the listeners that is important in freedom of expression.
* Importance of resources to the availability to express oneself.
* Consumer backspeech isn’t for people without resources easily done, so this kind of sign put up criticizing insurance company on side of a building is actually the only kind of resources available to communicate that information
* it has value for the informational needs of the listeners who might be considering that insurance provider.
* This isn’t mere commercial speech but consumer counter-advertising with considerable social value and has an informational need attached to it, it’s not just about money.
* Court also, in s.1, talks about how this might be the only available means of expression for these speakers to communicate these expressions. As such, the by-law is not minimally impairing (other methods – leaflets or pamphlets – are much harder and take more resources)